

Brown's Lessee Vs. Clements

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Court : US Supreme Court

Decided On : 1845

Appeal No. : 44 U.S. 650

Appellant : Brown's Lessee

Respondent : Clements

Judgement :

Brown's Lessee v. Clements - 44 U.S. 650 (1845)

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Brown's Lessee v. Clements

44 U.S. (3 How.) 650

ERROR TO THE SUPREME COURT

OF THE STATE OF ALABAMA

SYLLABUS

Under the acts of Congress providing for the subdivision of the public lands and the instructions of the Secretary of the Treasury, made under the Act of 24 April, 1820, entitled "An act, making further provision for the sale of the public lands," it

is the duty of the Surveyor General to lay out a fractional section in such a manner that an entire quarter-section may be had if the fraction will admit of it.

The Surveyor General has no right to divide a fractional section by arbitrary lines so as to prevent a regular quarter-section from being taken up.

This was an ejectment brought by the plaintiffs in error to recover 2 $\frac{40}{100}$ acres of land in the possession of Clements as the tenant of Hunt. The plaintiff claimed title through a patent to James Etheridge, and the defendants through a patent to W. D. Stone. Both Etheridge and Stone claimed as preemptioners under the Act of Congress passed on 29 May, 1830.

The question depended upon the manner in which the fractional section twenty-two, in township four south of range one west in the district of lands subject to sale at St. Stephens, Alabama, should be laid out.

A reference to the annexed diagrams will make it more intelligible.

image:a

Nos. 1, 2, 3, 4 represent the whole section, but in consequence of prior claims or grants, only that part of it included within 1, 5, 6, 7, 8, 9, 10 was subject to entry, containing the entire southwest quarter-section and some additional land upon the east and north. The surveyor divided the whole of this into two parts by a line running from 11 to 12, one of which parts (marked A) contained 92.67 acres, and the other (marked B) contained 110.50. The

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plaintiff claimed to extend the part A over the whole square which constituted the quarter-section, as represented by dotted lines.

On 28 January, 1831, Etheridge presented the following application and affidavit:

"To the Register and Receiver of the land office at St. Stephens: "

"You will please to take notice that I, James Etheridge, of Mobile County, Alabama, claim the right of preemption, under the Act of Congress of 29 May, 1830, to the southwest quarter-section 22, t. 4, r. 1 west."

" *Affidavit.* -- James Etheridge, being sworn, maketh oath that the above described tract of land was planted and cultivated by him in the year 1829, and remained in his possession from the year 1829 until after 29 May, 1830. That the said land was occupied and cultivated by him in his own right, and not as the tenant of any other person. That the said land was enclosed with his own fence, and that there was no person concerned with him in the occupation and cultivation of the said land, and that the present claim does not interfere with the right of any other person, and that he believes he is entitled to the same under the Act of Congress of 29 May, 1830, and that the said tract is within the corporate limits of the City of Mobile."

"J. ETHERIDGE"

The affidavit was sustained by the oaths of Daniel Robertson and John Carr.

On 25 March, 1831, Stone presented the following application and affidavit:

"To the Register and Receiver of the land office at St. Stephens, Alabama: "

"You will please to take notice that I, William D. Stone, of Mobile County, Alabama, claim the right of preemption, under the Act of Congress of 29 May, 1830, to the fraction situated in the west part of the southeast quarter of section 22 in township 4, range 1, west of 13."

"WILLIAM D. STONE"

" *Affidavit.* -- William D. Stone, being sworn, maketh oath that the above described tract of land was planted and cultivated by him in the year 1829 and remained in his possession from the year 1829 until 29 May, 1830, and that the said land was occupied and cultivated by him in his own right, and not as the tenant of any other person. That the said tract of land was enclosed with his own fence, and that there was no person concerned or connected with him in the

cultivation of the said land, and that this present claim does not interfere with the rights of any other person, and further that the tract described is within the present corporate limits of the City of Mobile."

"WILLIAM D. STONE"

The affidavit was supported by the oaths of Samuel H. Garrow and James Dowell.

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On 20 June, 1831, the register and receiver issued the following certificate:

image:b

The account of sales was entered in the book at some period which the record does not show, and was as follows:

Extract from account of land sold by register and receiver.

image:c

On 30 April, 1832, the register gave to Etheridge the following certificate:

" *G. -- Certificate*"

" *Preemption No. 4,539, Act 29 May, 1830*"

" *Land Office, St. Stephens, Ala., April 30, 1832* "

"It is hereby certified that in pursuance of law, James Etheridge, of Mobile County, Alabama, on this day purchased of the register of this office the lot or southwest quarter of section number twenty-two, of township No. 4 south, in range number one west, containing ninety-two $\frac{67}{100}$ acres, at the rate of one dollar and twenty-five cents per acre, amounting to one hundred and fifteen $\frac{83}{100}$ dollars,

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for which the said James Etheridge has made payment in full, as required by law."

"Now therefore be it known that on presentation of this certificate to the Commissioner of the General Land Office, the said James Etheridge shall be entitled to receive a patent for the lot above described."

"JOHN B. HAZARD, Register"

On the same day, a certificate was issued to Stone, as appears from the following extract from the record of certificates issued for lands sold.

image:d

On 17 December, 1832, a patent was issued to Stone. It granted the land described in the following preamble:

" *Preemption certificate, No. 4,549 -- The United States of America,*"

" *to all to whom these present shall come, greeting:*"

"Whereas William D. Stone, of Mobile, has deposited in the General Land Office of the United States a certificate of the register of the land office at St. Stephens whereby it appears that full payment has been made by the said William D. Stone, according to the Act of Congress of 24 April, 1820, entitled 'An act making further provision for the sale of the public lands,' for the southeast subdivision of fractional section twenty-two, in township four, south of range one west, in the district of lands subject to sale at St. Stephens, Alabama, containing one hundred and ten acres and fifty one-hundredths of an acre, according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said William D. Stone."

"Now know ye,"

&c.;

On 30 May, 1833, a patent was issued to Etheridge for the land described in the preamble.

" *Preemption certificate, number 4,539*"

" *The United States of America, to all to whom these presents*"

" *shall come, greeting:*"

"Whereas James Etheridge, of Mobile County, Alabama, has deposited in the General Land Office of the United States a certificate of the register of the land office at St. Stephens whereby it appears that payment has been made by the said James Etheridge,

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according to the provisions of the Act of Congress of 24 April, 1820, entitled 'An act making further provisions for the sale of the public lands,' for the southwest quarter of section twenty-two, in township four, south of range one west, in the district of lands subject to sale at St. Stephens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said James Etheridge."

"Now know ye,"

&c.;

In April, 1838, Brown and wife, claiming under the title of Etheridge, brought an ejectment against Clements for the east half of the southwest quarter of fractional section twenty-two. The case came on for trial at the April term, 1841, in the Circuit Court of the State of Alabama for the County of Mobile, in the course of which the following bill of exceptions and agreement were filed.

" *Bill of Exceptions* "

"Be it remembered that upon the trial of this cause, the plaintiffs gave in evidence the paper hereto annexed, marked A, being a duly certified copy of a patent from the United States government to James Etheridge, and thereupon it was admitted

by the defendants that the plaintiffs had, at the date of the demise and time of trial, all the rights of said patentee Etheridge in the land described in the declaration. Plaintiffs also gave in evidence paper marked B, hereto annexed, being a plat of a survey made and returned, under an order of this Court, by the Surveyor for the County of Mobile, and proved by said surveyor that said survey was truly made according to said order and that the plat returned shows correctly the external lines and corners of said fractional section twenty-two. That he found the southwest corner of said fractional section as shown by the plat returned, and also found, on the section lines of said fractional section, the half-mile posts, each post being a half mile from the southwest corner of said fractional section. That these posts bore evidence of being those put down by the United States surveyor on running the section lines. That an entire southwest quarter exists in said fractional section, without interference with any private land claim and leaving a residuum both on the north and on the east of said quarter-section, as shown by the plat returned by him, and also that said fractional section contains two hundred and ten acres. The defendants admitted that they were in possession, at the time of service of the declaration, of sixteen acres of the land described in the declaration. The defendants gave in evidence, by consent of plaintiffs, a certified copy of a patent from the United States government to William D. Stone, hereto annexed, marked No. 1, and thereupon it was admitted by the plaintiffs that the defendants have all the rights of the said patentee, Stone, in

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the land admitted to have been in their possession at the time of the service of the declaration."

"The defendants offered in evidence duly certified copies of the official township plats of 1832 and 1835 of the township in which the land sued for is situated, extracts from which are hereunto annexed, marked No. 2, to show the boundaries and contents of the land described in said patents to said Etheridge and to said Stone, without having offered or professing to have any other evidence than the plats themselves afford to prove that the subdivision, corners, and lines dividing said fractional section, as exhibited in the said plats, had been run and marked on

the ground. To the admission of which evidence the plaintiffs objected, and their objection was overruled and said plats allowed to go to the jury. The plaintiffs admitted that if the line, as marked on said extract from plats (No. 2) dividing lots A and B, is a legal line, lot B, as exhibited, will cover the land sued for."

"The plaintiffs further gave in evidence that the said line and corners, as exhibited on the extract (No. 2), had never been run or marked on the ground, and also gave in evidence papers marked C, D, E, F, G, H, being duly certified transcripts of records from the land office at St. Stephens, Alabama."

"The defendants gave in evidence paper marked No. 3, being a duly certified copy of the instructions of the Secretary of the Treasury bearing date 10 of June, 1820, also 20 January, 1826."

"The plaintiffs gave in evidence paper marked I, being a duly certified copy of the circular of the Secretary of the Treasury of date 8 May, 1832."

"Upon the foregoing evidence the court instructed the jury that if they believed the same, they must find for the defendants. The court further instructed the jury that if said fractional section (No. 22) was capable of being subdivided into an entire southwest quarter-section and two half quarter-sections, leaving a residuum as shown by the said map and evidence of the county surveyor, still the Surveyor General was not required, under the acts of Congress providing for the subdivision of the public land and the instructions of the Secretary of the Treasury made under the Act of 24 April, 1820, entitled 'An act making further provision for the sale of the public lands,' to make, in his subdivision of the same, either such quarter-section or half quarter-sections, but might lawfully subdivide the same into two lots (A and B), as indicated by said plat of 1832, and that under said evidence, Etheridge's title would not hold the whole southwest quarter of said fractional section, but only lot A, and that Stone's title would hold lot B, being the balance of said fractional section."

"To which instructions and each and every of them the plaintiffs,

by their counsel, except, and pray the court to sign and seal this their bill of exceptions."

"E. L. DARGAN [SEAL]"

"Agreement of the parties:"

"The parties to this cause, not wishing to encumber the record by copying from the book entitled"

"General Public acts of Congress respecting the sale and disposition of the public lands, with instructions issued from time to time by the Secretary of the Treasury and Commissioner of the General Land Office, and official opinions of the Attorney General on questions arising under the land laws,"

"and which instructions are contained in the 2d volume, part 2d, prepared and printed by order of the Senate, agree that said book may be used by either party, and anything therein contained read as illustration of the practice of the land office, and construction that the acts of Congress had received in that branch of the government. The same work can be referred to by either party in the Supreme Court for the purpose aforesaid. The parties further agree that for exhibit No. 2, being the official map of the survey of the township described in the patents of both plaintiffs and defendants, the map contained in the same book above described, between pages 134 and 135, shall be referred to as if the same was incorporated with, and formed a part of the record in this cause."

"SHERMAN & CHAMBERS"

"Attorneys for plaintiffs"

"GORDON, CAMPBELL & CHANDLER"

"Attorneys for defendants"

The jury having found for the defendants under the above instructions, the case was carried to the Supreme Court of the State of Alabama, where the opinion of

the court below was affirmed.

A writ of error brought it to this Court.

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MR. JUSTICE Mc KINLEY delivered the opinion of the Court.

The plaintiffs brought an action of ejectment against the defendants, in the Circuit Court for the County of Mobile, in said state, and upon the trial they read in evidence the following claim and entry:

"To the register and receiver of the land office at St. Stephens:"

"You will please take notice, that I, James Etheridge, of Mobile County, Alabama, claim the right of preemption under the Act of Congress of 29 May, 1830, to the southwest quarter-section 22, township 4, range 1 west,"

and that on 28 January, 1831, the said James Etheridge made the necessary proof that he had planted and cultivated said quarter-section in the year 1829, and remained in possession until after 29 May, 1830. The plaintiff also read in evidence a patent from the United States bearing date 30 May, 1833, reciting that

"Whereas James Etheridge, of Mobile County, Alabama, has deposited in the General Land Office of the United States a certificate of the register of the land office at St. Stephens whereby it appears that payment has been made by the said James Etheridge, according to the provisions of the Act of Congress of 24 April, 1820, entitled 'An act making further provision for the sale of the public lands,' for the southwest quarter of section 22, in township 4, south of range 1 west, in the district of lands subject to sale at St. Stephens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said James Etheridge."

"Now know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents do give and grant unto the said James Etheridge and to his heirs the said tract above described,"

&c.;

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In obedience to an order of the circuit court, the Surveyor of Mobile County went upon the land in controversy and made an actual survey, and returned a plat thereof into court showing that the section 22 was covered by private land claims except the whole of the southwest quarter, on which James Etheridge had made his entry and a small fraction in the southeast quarter, entered, under the preemption law, by William D. Stone and a fraction in the northeast and northwest quarters of said section, which plat was given in evidence to the jury. And the plaintiffs proved by the surveyor that he found the southwest corner of said fractional section as shown by the plat returned, and also found, on the section lines of said fractional section, the half-mile posts, each post being half a mile from the southwest corner of said fractional section; that these posts bore evidence of being those put down by the surveyor of the United States on running the section lines; that an entire southwest quarter-section exists in said fractional section, without interfering with any private land claim, leaving a residuum on the north and the east of said quarter-section.

The defendants gave in evidence to the jury the following claim and entry, made by the said William D. Stone:

"To the register and receiver of the land office at St. Stephens Alabama:"

"You will please take notice that I, William D. Stone, of Mobile County, Alabama, claim the right of preemption under the act of Congress of 29 May, 1830, to the fraction situated in the west part of the southeast quarter of section 22, in township 4, range 1 west of 13."

And on 25 March, 1831, he made the necessary affidavit and proof to show that he had planted and cultivated the above described tract of land, according to said act of 29 May, 1830. And they also gave in evidence the following patent:

"The United States of America to all to whom these presents shall come, greeting:"

"Whereas William D. Stone, of Mobile, has deposited in the General Land Office of the United States a certificate of the register of the land office at St. Stephens whereby it appears that full payment has been made by the said William D. Stone, according to the Act of Congress of 24 April, 1820, entitled 'An act making further provision for the sale of the public lands,' for the southeast subdivision of fractional section 22, in township 4 south, of range 1 west, in the district of lands subject to sale at St. Stephens, Alabama, containing one hundred and ten acres and fifty-one hundredths of an acre, according to the official plat of the surveyor of said land, returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said William D. Stone:"

"Now know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents do give and grant unto the said William D. Stone and his heirs the said tract above described, "

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&c.; And it was admitted by the plaintiffs that the defendants had all the rights of said Stone in the land admitted to have been in their possession at the time of the service of the declaration, and the defendants admitted that the plaintiffs had, at the date of the demise and time of trial, all the rights of said patentee Etheridge in the land described in the declaration.

And the parties,

"not wishing to encumber the record by copying from the book entitled"

"General acts of Congress respecting the sale and disposition of the public lands, with instructions issued, from time to time, by the Secretary of the Treasury, and

Commissioner of the General Land Office, and official opinions of the Attorney General on questions arising under the land laws,"

"and which instructions in the 2d vol., part the 2d, prepared and printed by the Senate, agree that said book may be used by either party and anything therein contained read as illustration of the practice of the land office, and construction that the acts of Congress had received in that branch of the government. The same work can be referred to by either party in the Supreme Court for the purpose aforesaid. The parties further agree that the exhibit, No. 2, being the official plat of the survey of the township described in the patents of both plaintiffs and defendants, between pages 134 and 135, shall be referred to as if the same was incorporated with and formed a part of the record in this cause."

This statement furnishes all the evidence deemed necessary and pertinent to the investigation of the questions involved in the principal instruction of the circuit court, to the jury, on the trial of the cause, which instruction is as follows:

"The court further instructed the jury that if said fractional section, No. 22, was capable of being subdivided into an entire southwest quarter-section, and two half quarter-sections, leaving a residuum, as shown by said map and evidence of the county surveyor, still the Surveyor General was not required, under the acts of Congress providing for the subdivisions of the public lands, and the instructions of the Secretary of the Treasury, made under the Act of 24 April, 1820, entitled 'An act, making further provision for the sale of the public lands,' to make in his subdivision of the same, either such quarter-section or half quarter-sections, but might lawfully subdivide the same into two lots, A and B, as indicated by said plat of 1832, and that under said evidence, Etheridge's title would not hold the whole southwest quarter of said fractional section, but only lot A, and that Stone's title would hold lot B, being the balance of said fractional section."

To this instruction the plaintiffs excepted.

Upon the construction here given to the act of Congress, and to the instructions of the Secretary of the Treasury thereon, referred to in the above instruction of the

court, depends the whole controversy between the parties to this suit. The 1st section of the act of Congress, above referred to, is in these words:

"That from and after

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the first day of July next, all the public lands of the United States, the sale of which is, or may be, authorized by law, shall, then offered at public sale to the highest bidder, be offered in half quarter-sections, and when offered at private sale, may be purchased, at the option of the purchaser, either in entire sections, half sections, quarter-sections, or half quarter-sections, and in every case of the division of a quarter-section, the line for the division thereof shall run north and south, and the corners and contents of half quarter-sections, which may hereafter be sold, shall be ascertained in the manner and on the principles directed and prescribed by the second section of an act, entitled"

"An act concerning the mode of surveying the public lands of the United States, passed the 11th day of February, 1805, and fractional sections, containing one hundred and sixty acres, or upwards, shall, in like manner, as nearly as practicable, be subdivided into half quarter-sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury."

3 Story Laws 1774.

The settled policy of Congress has been to survey the public lands in square figures, running the lines north and south and east and west, and to extend the subdivisions authorized by law as far as practicable in square figures to the lowest denomination.

The second section of the Act of 18 of May, 1796, chap. 29, directs that the public lands

"shall be divided by north and south lines, run according to the true meridian, and by others crossing them at right angles, so as to form townships six miles square, unless where the line of the late Indian purchase or of tracts of land heretofore

surveyed or patented or the course of navigable rivers may render it impracticable, and then this rule shall not be departed from further than such particular circumstances may require."

After directing how townships should be divided into sections, it directs that

"fractional townships shall be divided into sections in manner aforesaid, and the fractions of sections shall be annexed to, and sold with, the adjacent entire sections."

I Story Laws 422. The lowest denomination authorized by this act was sections, but the direction to the surveyor was to divide the fractional townships into as many sections as the particular circumstances would permit. And so by the 1st section of the Act of 25 April, 1820, the surveyor is directed to subdivide fractional sections, containing one hundred and sixty acres and upwards, into as many half quarter-sections as practicable by running the lines north and south. And this statute conferred no power on the Secretary of the Treasury to make any regulation by which a fractional section might be divided into any quarter or other subdivision than half quarter-sections. The only authority he acquired by the statute was to make such rules and regulations as would enable the surveyor to make the greatest number of half quarter-sections out of a fractional section by running the lines north and south, or east and west, and this

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power he executed, by his circular letter to the surveyors general of 10 June, 1820, 2d part, Public Land Laws 820.

Had the Surveyor General subdivided the fractional section 22 now in controversy according to law, there would have been two half quarter-sections in the southwest quarter, making that quarter complete, a fractional section in the southeast quarter, and a fractional section in the northeast and northwest quarters, making four tracts or subdivisions instead of two, as returned by him to the land office of the district. None of the lines, subdividing sections, is required by law to be made by actual survey and marked on the land, but they are to be delineated on the

township plats according to the 2d section of the Act of 11 May 1805, chap. 74, referred to in the Act of 24 April, 1820, 2 Story Laws 961. When the township and section lines are run and the corners marked according to law, the quarter-section lines are ascertained on the plat by protracting lines across the section north and south, and east and west, equidistant from the section lines, and so of other subdivisions. And a surveyor going on the land to ascertain the boundary of a quarter or half-quarter section would do it with as much ease and certainty as if it had been delineated on the plat by the Surveyor General. Extending the subdividing lines on the township plats is not, therefore, essentially necessary to enable the register to sell the land or to give title to the purchaser. The register is as much bound to know what is a legal subdivision of a section or fractional section as is the Surveyor General.

Because he is directed by law to offer the lands, when sold at public sale, in half quarter-sections. To enable him to perform this duty, he must know what a half quarter-section is. And before he can offer a fractional section for sale, he must see that it has been subdivided so as to enable him to offer as much of it in half quarter-sections as practicable. When Etheridge applied to purchase the southwest quarter of this fractional section at private sale, as he had a right to do under the act granting preemption rights, the register was bound to know whether such a subdivision could be obtained according to law. A bare inspection of the township plat must have satisfied him in this case that it was practicable to obtain an entire quarter-section in the southwest corner of the fractional section 22. The 1st section of the act of 24 April, 1820, directed that this fractional section should be divided into as many half quarter-sections as practicable by lines north and south, and the instructions given by the Secretary of the Treasury under this act directed that it should be divided into half quarter-sections by north and south or east and west lines, so as to preserve the most compact and convenient forms.

There is nothing in any of the acts of Congress nor in the instructions of the Secretary of the Treasury to authorized the division of

this fractional section made by the Surveyor General, and it being a violation of the law and contrary to the duties of his office, it must be regarded as a void act. [*Miller v. Kerr*](#), 7 Wheat. 1. So far as Stone's claim was concerned, this division of the fractional section has been treated by the register and the Commissioner of the General Land Office as a legal subdivision, and the register seems to have disregarded entirely the act granting preemption rights and Stone's claims and proofs under it, and to have transferred his claim to the western lot of the fractional section as divided by the Surveyor General. The certificate of the register recited in the patent of Etheridge takes no notice of this subdivision of the fractional section, but states that Etheridge had "purchased of the register the lot or southwest quarter of section, number 22," &c.; The patent is for the whole of the southwest quarter of section 22, by its proper designation, and if no quantity of land had been expressed in it, all the land contained in the quarter-section would have passed by the patent to Etheridge, because, by the 2d section of the act of 11 February, 1805, before referred to, it is provided that

"Half-sections and quarter-sections the contents of which have not been returned shall be held and considered as containing the one-half, or the one-fourth respectively, of the contents of the section of which they make part."

The surveyor failed to return the contents of the quarter-section in this case; it was liable, therefore, to be sold by the above rule. But it has been insisted that Etheridge and those claiming under him were bound and concluded by the number of acres expressed in the patent. It is evident the quarter-section was not referred to for the number of acres contained in it, but by express words reference was made to the plat returned by the Surveyor General showing the division of the fractional section into two parts, one of which contains the number of acres expressed in Etheridge's patent and the other the number of acres expressed in Stone's patent. It has been already shown that this plat was illegal and the subdivision of the fractional section void, and any reference, therefore, to this plat to show the number of acres granted to Etheridge is illegal and inconsistent with every previous step taken towards perfecting his title and utterly repugnant to the previous words of grant used in the patent.

Thus it appears that neither the claim of Etheridge, filed with the register, the certificate of purchase issued by him, nor the patent issued to Etheridge by the Commissioner of the General Land Office is founded on the division of the fractional section made by the Surveyor General, but the whole appears to be founded on the subdivision of the fractional section into one quarter-section and two fractional sections, made by actual survey on the land. It is true that in undertaking to state the quantity of land contained in the quarter-section, reference is made to what is there called the official plat of the lands returned to the General Land Office by the Surveyor

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General which is nothing more than a reference to this same subdivision of the fractional section so often mentioned. But this question necessarily arises how can the contents of either division of the fractional section, thus divided into two lots or subdivisions, show the contents or number of acres in the southwest quarter of the same section? The ninety-two acres and sixty-seven hundredths of an acre mentioned in the patent is the number of acres contained in the western subdivision of said fractional section, and consists of part of the southwest and part of the northwest quarters of the fractional section, as appears by the plat used on the trial. No part of the northwest quarter of this fractional section can by any reasonable construction be considered as being within and part of the land included in a patent for the southwest quarter of the section. This proves that the reference to this plat in Etheridge's patent is both delusive and illegal, and must therefore be rejected as void and inoperative.

The Act of 29 May, 1830, to grant preemption rights to settlers on the public lands, chap. 209, appropriated this quarter-section of land, on which Etheridge was then settled, to his claim under the act for one year, subject, however, to be defeated by his failure to comply with its provisions. During that time, this quarter-section was not liable to any other claim or to be sold to any other person except at public sale under the proclamation of the President of the United States, and that Etheridge had a right to prevent by paying for it as directed by the act. And as he has complied with all the requisitions of the act, as far as the mistakes and illegal acts

of the ministerial officers of the government would permit, he has acquired a good title by his patent against the United States for the whole of said southwest quarter-section. The remaining question is whether Etheridge's title is good against Stone's patent. Stone claimed

"the right of preemption under the Act of Congress of 29 May, 1830, to the fraction situated in the west part of the southeast quarter of section 22 in township 4, range 1 west."

This claim confined his preemption right to that specific fraction. And although the act gave to every settler on the public lands the right of preemption of one hundred and sixty acres, yet if a settler happened to be seated on a fractional section, containing less than that quantity, there is no provision in the act by which he could make up the deficiency, out of the adjacent lands, or any other lands. The only case provided for in the act by which the preemptor had the right to enter land outside of the quarter or fractional section on which he was settled at the passage of the act is the case provided for in the 2d section. When two or more persons were settled on the same quarter-section, it might be divided between the two first settlers, and each be entitled to a preemption of eighty acres of land elsewhere in the same land district. But in this case, Stone was not only permitted to take

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land outside of the fractional section on which he was settled, but he was permitted to take land on which Etheridge was settled and to which he had previously proved his right under the same act of Congress.

In the case of [*Lindsay v. Miller*](#), 6 Pet. 674, the plaintiffs in ejectment claimed title under a patent, dated 1 December, 1824, founded on an entry and survey made in the same year. The defendants claimed title under an entry, made in January, 1783, upon a military warrant, for services rendered in the Virginia state line, and a survey made thereon in the same month and recorded on 7 April, of the same year and a patent issued by the State of Virginia in March, 1789. This land lay in what is

called the military district, between the Rivers Scioto and Little Miama in the State of Ohio. This district had been reserved, in the deed of cession, dated 1 March, 1784, made by Virginia to the United States, to satisfy the claims of the Virginia troops on continental establishment in the event of there not being sufficient good land for that purpose in a reservation previously made by Virginia on the southeast side of the Ohio River. Although the defendants proved possession under this title for upwards of thirty years, the entry, survey, and patent were adjudged by the court to be void on the ground that the land had been reserved for the satisfaction of military warrants, granted for services of the Virginia troops on continental establishment, and was not, therefore, subject to entry upon warrants for services rendered in the Virginia state line.

In the case before the Court, all the land in the southwest quarter of the fractional section had been appropriated by law to satisfy Etheridge's claim, and no other land could be substituted in lieu of that quarter-section for any part of it. Stone's claim arose under the same law, and by the same provisions was confined to the fraction in the west part of the southeast quarter of the same section, and gave no right to land elsewhere. So much of the patent to Stone as purports to grant land within the southwest quarter of the section is therefore not only an appropriation of land to his claim, not subject to it according to the act, but which, by the same act, had been appropriated to another claim arising under the same act, concurrent with and equal in all respects to Stone's claim. How then could his patent give him title to land that was not subject to his claim -- land that he never had legally claimed, and to land that by law had been appropriated to and claimed by another? It seems to us this case is clearly within the principles settled in the case above referred to, and that the patent granted to Stone is void for so much of the land included in it as lies within the said southwest quarter of the fractional section, and for which Etheridge holds a patent.

It has been insisted, however, that as Etheridge only paid for the quantity of land mentioned in his patent, that he can have no right

to land paid for by Stone and included in his patent. This is one of the results of the mistaken and illegal acts of the ministerial officers of the government, which, as already shown, can neither benefit one party, nor prejudice the rights of the other. The United States has received full payment for all the land contained in both patents. And if Stone has paid for land which belonged to Etheridge, that is a matter to be adjusted between themselves, amicably or by law, as they may choose.

Upon a full view of the whole case, it is the opinion of the Court that the judgment of the Supreme Court of Alabama be

Reversed.

MR. JUSTICE CATRON.

I feel myself bound to dissent from the foregoing opinion for the following reasons:

1. By the Act of 29 May, 1830, a preemption right settler then in possession was entitled to enter with the register of the land office in the district where the land lay, by legal subdivisions, not more than one hundred and sixty acres.

The controversy before us turns partly on what was the true "legal subdivision" of fractional section 22, containing two hundred and three acres. This must be ascertained from the laws on the subject existing in 1830. The lines of public surveys actually run and marked in the field are township extensions and section boundaries; the lines dividing sections into quarters, half-quarters (and quarter-quarters since 1832), being only indicated, or depicted upon the township plats returned and recorded in the office of the register.

The Act of 26 March, 1804, provides for the first time for the sale of the public lands in quarter-sections, and also directs (sec. 9) that fractional sections shall be sold entire, or by uniting two or more together. The act of February 11, 1805, directs with absolute precision, leaving no discretion on the subject, the manner in which full sections shall be divided into quarters, but makes no provision for the subdivision of fractional sections. It was not until the passing of the Act of April 24,

1820, that these were authorized to be subdivided, and then only when they contained more than one hundred and sixty acres. The act of 1820, in directing the manner in which full sections shall be subdivided into half-quarters, or eighty-acre lots, is as absolutely precise in its provisions as that of 1805, and, as in the former case, gives no discretionary power so far as these subdivisions are concerned -- but in authorizing the subdivision of fractional sections containing one hundred and sixty acres and upwards, it directs that they shall in like manner, "as nearly as practicable," be subdivided into half-quarter sections, or eighty acre lots -- "under such rules and regulations as may be prescribed by the Secretary of the Treasury." Under the discretionary power here given, rules and regulations were prescribed by Secretary Crawford on 10 June, 1820, 2 Land Laws and Opinions,

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p. 820, No. 796. A circular was addressed to the surveyors general of that date, for their government in this respect, by the Commissioner of the General Land Office. It orders that fractional sections containing more than one hundred and sixty acres shall be divided into half-quarter sections by north and south or east and west lines so as to preserve the most compact and convenient forms. "You will, therefore," says the commissioner,

"be pleased to divide the fractional sections in your district which remain unsold in the manner above directed, and report to this office, and to the registers of the land district in which those fractions respectively are situate, the subdivisions, together with the quantity in each. It is not intended to run the subdivisional lines and mark them, but merely to make them upon your surveys and calculate the quantity of land in each subdivision."

In January, 1826, 2 Land Laws, 583, No. 841, further instructions were given on this subject, to the Surveyor General at Washington, Mississippi. The commissioner says, among other things

"A fractional section is a tract of land not bounded by sectional lines on all sides, in consequence of the intervention of rivers &c., and containing a less quantity than

six hundred and forty acres."

Speaking of the regulations and the circular letter founded on them, the commissioner continues:

"The substance of the rule is that fractional sections of one hundred and sixty acres and upwards are to be subdivided by east and west, or north and south lines, at the discretion of the surveyor, so as to preserve the most compact and convenient forms. Each lot to be, as nearly as practicable, a half quarter-section, containing a quantity of eighty acres; sometimes rather more, sometimes less, as the locality demands."

According to these instructions, fraction No. 22 was divided: two precise eighty-acre tracts could not be made out of it; half-quarters, or eighty acres, was the least quantity that could be sold by the act of 1820, if in regular form and part of a full section; but if in irregular form, and the fraction of a section, containing upwards of one hundred and sixty acres, then it was left to the Secretary to cause it to be subdivided according to his own regulations, into two or more tracts, approaching "as nearly as practicable" to eighty acres each. He directed the subdivisions to be made in all cases so as to preserve the most compact and saleable forms, accommodating the tracts to the sides of rivers, or other legal intervening boundaries to subserve the best interests of the government. This practice has prevailed as the governing rule for nearly a quarter of a century, and is now in full operation -- large quantities of land have been sold thus subdivided, and great quantities yet remain to be sold. I speak on information derived from the Commissioner of the General Land Office. The idea of taking out of a fraction a quarter-section of one hundred and sixty acres, if found there, as if the section was entire, and leaving surrounding strips of a few acres each, unsalable

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and of little or no value, as will be the case here, never has been entertained at that office, as the true construction of the act of 1820, from the date of Mr. Crawford's instructions, (June 10, 1820) up to this time. On mature consideration, I

think the instructions given legitimately within the authority conferred on the Secretary. In this view of the law as applicable to the present case I am supported by the opinion of the Attorney General given on Etheridge's claim in 1837, 2 Land Laws and Opinions, 136, No. 85.

2. Suppose, however, it was doubtful whether they were or not authorized, is it admissible for the courts of justice, after such a lapse of time, to call in question the construction given to the act; to disturb so many titles taken under it and to break up existing subdivisions? The sole authority to which the act referred for its exposition, and the prescribing of rules and regulations to carry it into execution, was the Secretary of the Treasury. His jurisdiction was subject to no supervision; he was constituted the only judge, from whose decision there was no appeal on part of purchasers; they were compelled to buy in the form and quantity the lands were offered for sale, or not be permitted to purchase at all. The Secretary having adjudged and settled the construction of the act according to his views of its true meaning, and this coeval with its passage -- a strong circumstance, the government in its executive and political departments and the community at large concerned in purchasing from the government having acquiesced without complaint, recognizing the construction as the true one, through so great a lapse of years, it is now supposed by me, the duty of this Court, on the question being presented here, and that for the first time, to acquiesce also. That these subdivisions are for the best interests of the United States is manifest; all others have abided by them, and so should the plaintiff.

If one of our own judgments made in 1820, coeval with the statute, had produced similar consequences; if many thousands, of titles rested on it (as there surely do on Mr. Crawford's instructions), I should feel myself wholly unauthorized at this day to overthrow the decision, however doubtful I might think it to be. The conservative rule of *communis error facit jus* is universal in courts of justice in regard to their own judgments under such circumstances, and undoubted judicial propriety requires its adoption, as it seems to me, when dealing with the decision of the Secretary in the present instance. This course is peculiarly due to the repose of titles and the stable maintenance of an established system in a great department,

a system that cannot be changed in this respect without much expense, confusion, and delay in the administration of that department.

3. But suppose the Secretary was mistaken, and the subdivision of fractional section 22 is illegal; what then is the plaintiff's case? His title is a patent; on his legal title he must recover; therefore he

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cannot be heard to say his patent is void because founded on an illegal subdivision. The question then is reduced to this -- what does the patent cover? Etheridge had no peculiar rights by the act of 1830 save that he had a preference of entry; like others purchasing of the United States, he was compelled to buy in legal subdivisions; before 1820, not less than an entire fractional section could be sold; nor after the act of that year could one be sold in subdivisions until divided under regulations by the Secretary of the Treasury. Further than this, the act of 1805 remained unchanged as to fractions. Etheridge could not be permitted to treat a quarter-section in a fraction, although found there, as if it was found in an entire section. He did attempt it, in proving up his preference right, but when he applied to enter at the land office the register rejected his claim, and compelled him to take the land on which he resided in the form and quantity it had been laid off according to the instructions, and this he did take. The government is bound by its patent, is estopped to disavow the subdivision granted, and as estoppels are mutual, Etheridge is equally bound by the grant. It recites the patent certificate; this says it is for ninety-two acres and sixty-seven hundredths, bounded

"according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General -- which said tract, described in the plat returned, has been purchased by the said James Etheridge."

The plat is part of the patent certificate, is referred to in the patent, and is part of that also, just as much as if it was attached to the same paper. By the plats of public surveys, lands must be identified and the boundaries ascertained in all cases of the kind. The parties agree of record that exhibit No. 2 is the official map

described in the patent of Etheridge; according to this, he purchased lot A for ninety-two acres and sixty-seven hundredths; his eastern boundary being the red line made by the Surveyor General, pursuant to the instructions. This was undoubtedly the land the government intended to sell, and, as I think, as certainly the same Etheridge intended to buy, and did buy; of course he can recover no land east of that line, and therefore the judgment ought to be affirmed even if the instructions were illegal and void.

4. The case does not stop here. Stone's patent is elder than Etheridge's; the same plat is referred to in each; Stone's is for the one hundred and ten acres and fifty hundredths east of the red line. This is not disputed. To overcome it, Etheridge's patent must be supported by a legal entry for the same land, elder than Stone's patent. As already stated, until Etheridge paid his money, he could have no legal entry from which to date his title. There being no such subdivision existing in law as the southwest quarter of fractional section 22, when Etheridge presented his occupant claim, he could not be permitted to enter in that form, or for that quantity. Such was the express instruction of May 31, 1831, 2 Land Laws

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and Instructions, No. 497, and again in No. 521. The first subdivision was created afterwards by the act of the Surveyor General, and is indicated by the red line. That it is denominated the southwest quarter in the patent, amounts, in my judgment, to very little; thus the department saw proper to call such subdivisions; the denomination was arbitrary and not precise, but we cannot discard the substance for the sake of correcting terms of description open to verbal criticism. The land contained in plat referred to in Etheridge's patent is a technical quarter-section in the language of the General Land Office, and such subdivisions are known by no other name there, as will be seen by No. 483 and No. 486 in the volume of Instructions above referred to. Thus, in No. 483, dated July 28, 1830, the commissioner instructs the register at Mount Salus, that the preemption law of that year restricted the quantity to be located to one hundred and sixty acres, or a quarter-section, but that it did not intend that an excess over one hundred and sixty acres "in a tract of land technically known as a quarter-section" should be cut

off so as to restrict the quantity literally to one hundred and sixty acres.

"The law [says he] having taken it for granted that every quarter-section contains one hundred and sixty acres, which not being the fact, we must be guided by what we know to be the spirit and intention of the law."

He then instructs the register, in cases of fractional sections, to conform to the subdivisions as made by the Surveyor General, and to give the quantity as near as practicable.

No. 486 is a general circular dated September 14, 1830, on the same subject in part. Instruction 8 directs:

"Although a quarter-section may be found to contain rather more than the ordinary quantity of one hundred and sixty acres, the right of preemption is extended to the full quantity of such quarter-section."

In the language, therefore, of the General Land Office, the southwest quarter of fractional section 22, called for in Etheridge's patent, is as well known by its designation as if the section was entire. This the Instruction No. 497 above explains, where the subdivided quantity is less, to be a "technical" quarter also, as well as if the quantity had been more. But if there be uncertainty, here, as in former cases, we must refer to the plat and quantity to explain the uncertainty. This course was pursued in the case of [*Mclver v. Walker*](#), 9 Cranch 173, and again in [17 U. S. 4](#) Wheat. 444. There the plat was held to control the face of the patent, and fixed a different locality, because Crow Creek was laid down on the plat, nearly through its center; the location certificate copied in the patent, as in this case, called for a beginning, and for courses from that point, running off from the creek, which was not named as being crossed by the lines; yet this Court disregarded the calls, and held the land lay on both sides of the creek, as indicated in the naked plat. It was a much weaker case than the present. In patents of the United States, from their earliest date down to this day, nothing is referred to but numbers

on the public surveys. To hold that the surveys did not explain and control the patent as to identity, and side lines, would be an abandonment of both, as nothing else can establish either.

Much stress is laid on the fact that the half-mile post is found on the south boundary of section 22. The same line marks are uniformly made on all sectional lines, regardless of fractions; so it would have been done had the fraction 22 been for less than one hundred and sixty acres, and not subjected to subdivision. The section south may have been entire, and the corner post necessary for the purposes of that section.

Another difficulty stands in the way of the plaintiff's recovery. Stone's patent is the elder; it is admitted it covers the land in dispute -- the patent passed the perfect and consummate title; in an action of ejectment the patent is conclusive, as was held by this Court in *Wilcox v. Jackson* and *Bagnell v. Broderick*, [38 U. S. 13](#) Pet. 516, [38 U. S. 450](#) . You can only go behind it, and give it earlier date, from a precise legal entry for the same land made by the grantee, to overreach an elder patent; as this Court held in [Ross v. Barland](#), 1 Pet. 655. We have seen Etheridge did not enter the land in dispute when he paid his money, and took his patent certificate. To overthrow Stone's patent, we must rely on the preference right to enter. At best, it is a remote and doubtful equity; Stone paid for the land, and if the assumption be true, has an equity attached to it for his purchase money; presenting a case of conflicting equities, with which a court of law cannot deal. In the language of this Court in *Bagnell v. Broderick*,

"we are bound to presume for the purposes of this action that all previous legal steps had been taken by Stone to entitle himself to the patent, and that he had the superior right to obtain it, notwithstanding the claim set up by Etheridge, and having obtained the patent, Stone had the best title known to a court of law, to-wit, the fee."

There, a much more imposing equity than Etheridge can pretend to was set up. In no respect, therefore, is there any ground for reversing the decision of the Supreme Court of Alabama, as is supposed by me.

In the case of *Brown v. Hunt*, MR. JUSTICE DANIEL dissents from the opinion of the Court and concurs in opinion with MR. CHIEF JUSTICE and MR. JUSTICE CATRON.

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