Niswanger Vs. Saunders

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Appeal No. : 68 U.S. 424

Appellant : Niswanger

Respondent : Saunders

Judgement :

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Niswanger v. Saunders

68 U.S. (1 Wall.) 424

ERROR TO THE SUPREME

COURT OF OHIO

SYLLABUS

1. The State of Virginia issued, in 1784, a warrant for a soldier of the Continental establishment, which was entered in her own borders south of the Ohio. The land having been surveyed, a patent issued; everything proceeding in ordinary form.

But a part of the tract surveyed having been previously granted away by the state, never came into the soldier's possession or control nor in any way benefited him.

Held, in a case where the new entry and survey were free from objection on their face, that the warrants, which called for no specific tracts anywhere, were not so far "satisfied" or "merged" as that a new and effective entry and survey might not be afterwards made in another district open to the soldier, to-wit, in the Virginia Military District in Ohio, and which would be protected against any subsequent location by the proviso of the Act of March 2, 1807, providing that no location should be made on any tracts of the district which had been previously surveyed.

2. Where a survey of land, under the military rights referred to, is void for circumstances not appearing of record on its face, and which must be proved by extrinsic evidence from different sources, a second enterer is met by the statute, and cannot obtrude on the existing survey by a second location. *Saunders v. Niswanger,* 11 Ohio St. 298, overruled.

Saunders filed a bill in chancery in the State District Court of Madison County, Ohio, to quiet the title to a tract of land in that commonwealth in what is called the Virginia Military District, a region north and west of the Ohio and which, by the act of cession of that territory to the United States and several acts of Congress, was reserved for the Virginia troops upon the Continental establishment of our Revolutionary war. The case was thus:

In 1784, in the Book of Entries, kept by the proper officer in the State of Virginia, an entry, No. 70, was made in the name of David Ross & Co., on several military warrants, of one thousand acres of land on the Ohio River, in that part of Virginia then called the Green River Country and now making Kentucky. The entry was surveyed, the survey returned and recorded; and on the 15th June, 1786, *a patent for one thousand acres of land was issued* by the Governor of Virginia to Ross accordingly, *the warrants themselves having apparently been returned into the land office in Virginia.* The warrants had described no specific tracts, but were addressed to the surveyor, authorizing him

"to survey and lay off, in one or more surveys," the quantity "set apart for officers and soldiers of the Commonwealth of Virginia."

It was afterwards ascertained that in laying off and surveying this one thousand acres, a portion of the land, to-wit, six hundred and forty acres of it, had been laid off within the bounds of a well known body of lands that had been previously granted to Richard Henderson & Co., and this being the older and better title, Ross *lost, or rather never acquired, so much of his promised land* -- that is to say, six hundred and forty acres. This fact being ascertained, a memorandum was subsequently made in the Book of Entries opposite to entry No. 70,

" *640 withdrawn, and entered in 197"*

In 1790, Congress passed an act by which the soldiers of the Virginia line on the Continental establishment were authorized to obtain titles, on warrants issued to them, in what is now the state of *Ohio* -- that is to say in that region northwest of the Ohio River between the rivers Little Miami and Scioto, and in 1810 an entry was made in the office of the principal surveyor of the Virginia Military District in *Ohio* of six hundred and forty acres (the exact amount of Ross' patent covered by Henderson's prior grant), upon the *same warrants* upon which the patent issued in Virginia. On this entry a survey was made in 1817, which was returned and recorded; the Surveyor General of the Virginia Military District within the state of Ohio certifying that the survey was founded on such and such warrants, which he specified by number and warrantee name, and adding,

"That said warrants were entered originally in a thousand acre entry, No. 70, in the State of Kentucky &c.;, and patented to said David Ross, by the State of Virginia, on the 15th of June, 1786; that said survey No. 70, *i.e.,* six hundred and forty acres of it, is *withdrawn* by reason of its having been lost by interference with Henderson's grant, and entered and surveyed as above; that *said warrants were never before satisfied,* and that said patent on which this survey is founded is in my possession not satisfied."

Thus things remained from 1816

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till 1837, when a certain Samuel Saunders, the complainant below, entered a portion, to-wit, four hundred and twenty-eight acres of this same land, which had been surveyed to Ross, the entry being surveyed on the day it was made. On the 20th November, 1838, a patent was issued by the United States to this *Saunders,* complainant as above stated, and on the same day another patent to Niswanger, defendant below, in whom had become vested the entry and survey of Ross. This patent to Niswanger, following the surveyor's certificate already mentioned, stated the number of each one of the warrants; "the same warrants" -- it went on to recite --

"having been formerly located in the District of Kentucky and patented by the Commonwealth of Virginia to the said David Ross, which has since been lost by interference with a prior claim, to-wit, Henderson's grant, and the said warrants *withdrawn* and *re* located in the Virginia Military District of Ohio, upon *which* the said survey is founded."

A principal defense relied on to the bill below was that even admitting some irregularity here, in the entry and survey of Ross of 1810 &c.;, yet as the case was one of great equity, and as an entry and survey had actually been made, the land thus entered and surveyed for Ross was protected from any subsequent entry and survey by others, in virtue of the proviso of an act of Congress passed March 2, 1807, that Saunders' entry was accordingly void. This proviso enacted,

"That no locations within the above-mentioned tract [the tract in Ohio] shall, after the passage of this act, be made on tracts of land for which patents had previously issued, *or which had been previously surveyed, and any patent which may nevertheless be obtained for land located, contrary to the provisions of this section, shall be considered as null and void.* "

The proviso originally for three years had been subsequently extended.

The case being taken from the court where it originated to the Supreme Court of Ohio, that court, in *Saunders v. Niswanger,* [Footnote 1] following the reasoning and argument is a case

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previously decided by it, *Nisewanger v. Wallace,* [Footnote 2] held that the warrants on which the entry of 1810, in Ohio, was made had been "merged and satisfied" in the previous patent for the 1000 acres in Virginia, and that this being so, they were nullities. The act of the surveyor, the court thought, did not improve the matter. It was a case of want of power in the officer. His authority was limited to a particular subject matter. He could dispose of lands only upon specified evidence, to-wit, a military warrant. Here he had done it on a "patent." The return or renewal of a warrant once surrendered was within the power of the Virginia Legislature alone. The surveyor had no power to return or to renew, however equitable a claim for such return or renewal might be. By whom or by what authority the memorandum in the Virginia Entry-book, "640 *withdrawn,* and entered in 197," was made did not appear. It was not certified as the official act of any officer in Virginia. If made by the surveyor in Ohio, the question of his power was to be settled. Had the entry of 1810 and the subsequent survey been a case of "irregularity" only, or even of "invalidity," the act of Congress of 1807 might cure it; but it was the case of a proceeding wholly void, a proceeding not based on a subsisting warrant at all, and therefore past the healing power of the statute. The court accordingly decreed that all that was done on Ross' warrants in 1810 and afterwards was a nullity, and that the land should go to Saunders or his heirs. On this part of the decision, which held the act of Congress of 1807 on protection, error was taken to this Court under the 25th section of the Judiciary Act of 1789, [Footnote 3] which provides that a final judgment or decree in any suit in the highest court of law or equity of a state where is drawn in question the construction of any clause of a *statute* of the United States and the decision is *against* the title, right &c.;, specially set up or claimed by either party under such statute, may be reexamined &c.;, in this Court.

The question in this Court was therefore -- as one question

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had been in the Supreme Court of Ohio -- whether the entry of 1810 and the survey on it was or was not, under the facts of this case and the operation of the proviso of the act of 1807, to be treated as a nullity.

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MR. JUSTICE CATRON delivered the opinion of the Court, and after stating facts, and referring to Ross' entry of 1810, proceeded thus:

This entry was surveyed and the survey recorded in 1817. The entry and survey are regular and free from objection on their face; they recite the warrants, and the boundaries of the survey are distinctly defined. It is not indicated on the records of the surveyor that the warrants had been merged in the first entry and the Virginia patents, nor that the warrants were absent when the entry and survey were made. In this condition Ross' title stood till 1837, when Samuel Saunders entered four hundred and twenty-eight acres of the land surveyed for Ross. Saunders' entry was surveyed on the same day it was made. On the 20th day of November, 1838, a patent was issued by the United States to Saunders, and on the same day a patent issued to Niswanger, the assignee of Ross' entry and survey. This patent recites the fact that a previous patent had been issued by the Commonwealth of Virginia, founded on warrants, in part, that were withdrawn because of the loss by the interference with Henderson's Grant in the Kentucky District.

A principal defense relied on by the respondents was that the act of Congress of 1807 withheld the land surveyed for Ross from location by Saunders, that his entry was void, and that the bill should be dismissed for this reason. But the Supreme Court of Ohio held that the act of 1807 was no protection to Ross' survey, and decreed that the land should be conveyed to Saunders' heirs; and on this part of the case

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an appeal was prosecuted to this Court under the twenty-fifth section of the Judiciary Act.

The record shows that the act of Congress was drawn in question and relied on as a defense, and that the defense was rejected by the state court.

The act of 1807, which we are called on to construe and apply to the facts coming within our cognizance, gives the further time of three years for making locations of lands in the Military District of Ohio, and five years for the return of surveys and warrants to the office of the War Department, and then provides

"That no locations, as aforesaid, within the above-mentioned tract shall, after the passage of this act, be made on tracts of land for which patents had previously issued or which had been previously surveyed, and any patent which may nevertheless be obtained for land located contrary to the provisions of this section shall be considered as null and void."

By subsequent acts of Congress further time was given to return surveys, so that Ross' survey is not open to objection for not having been made and recorded in time, nor was any objection made in the court below on this ground; but the decree proceeded on the assumption that the warrants on which the entry and survey of Ross purported to be founded, were merged in the previous patent of one thousand acres, and that there were no valid warrants to sustain the survey, which was made without authority and void, and therefore could claim no protection by virtue of the act of 1807.

Ross' entry and survey were made by the proper officer and in the proper office, purporting to be made on real warrants, and bearing on their face every mark of regularity.

When a survey is void for circumstances not appearing of record on its face, and which must be proved by extrinsic evidence from different sources, then a second enterer cannot be heard to adduce such proof, because he is met by the statute, and not allowed to obtrude on the existing survey by a second location. He can obtain no interest in the land to give him a standing in court. The government can

justly say to him "You are a stranger, and must stand aside; this

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land is withdrawn from location; you cannot be heard." If the grantee, Ross, lost part of his land by Henderson's grant, and his warrants were merged by this misfortune, equity required that Congress should declare his survey to be valid by a curative act. This is the principle governing the decisions in the cases of *Galloway v. Finley,* 12 Pet. 294, and *McArthur v. Dun,* 7 How. 264, where the entries, surveys, and patents had been made to dead men and were void, of course, for want of a grantee; yet this Court held that the act of 1807 applied, and that a second entry on the first survey was void. In the case of *Stubblefield v. Boggs,* 2 Ohio St. 216, the same doctrine is maintained.

We hold that the survey of Ross was protected, and that Saunders' entry, survey, and patent were void, and order that the judgment of the Supreme Court of Ohio be reversed and that the cause be remanded to that court, to be proceeded with in conformity to this opinion.

Remanded accordingly.

[Footnote 1]

11 Ohio St. 298.

[Footnote 2]

16 Ohio 557.

[Footnote 3]

1 Stat. at Large 85.