

Indiana Vs. Kentucky

Indiana Vs. Kentucky

SooperKanoon Citation : sooperkanoon.com/86439

Court : US Supreme Court

Decided On : May-19-1890

Appeal No. : 136 U.S. 479

Appellant : Indiana

Respondent : Kentucky

Judgement :

Indiana v. Kentucky - 136 U.S. 479 (1890)

U.S. Supreme Court Indiana v. Kentucky, 136 U.S. 479 (1890)

Indiana v. Kentucky

No. 2, Original

Argued April 9-10, 1890

Decided May 19, 1890

136 U.S. 479

ORIGINAL

SYLLABUS

The waters of the Ohio River, when Kentucky became a state, flowed in a channel north of the tract known as Green River Island, and the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained after the channel has been filled.

The dominion and jurisdiction of a state bounded by a river continue as they existed at the time when it was admitted into the union, unaffected by the action of the forces of nature upon the course of the river.

Long acquiescence by one state in the possession of territory by another state, and in the exercise of sovereignty and dominion over it, is conclusive of the title and rightful authority of the latter state.

In equity to settle and determine the boundary line between the States of Indiana and Kentucky.

On the 20th day of December, 1783, the Legislature of Virginia by statute authorized and empowered the delegates of the state in the Congress of the United States

"for and on behalf of this state, by proper deeds or instrument in writing, under their hands and seals, to convey, transfer, assign, and make over unto the United States, in Congress assembled, for the benefit of the said states, all right, title and claim, as well of soil as jurisdiction, which this commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being to the northwest of the River Ohio."

On the 1st of March, 1784, the delegates from that state in Congress executed and delivered to "the United States in Congress assembled" a deed of

"all right, title and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being to the northwest of the River Ohio."

This deed was on the same day accepted by Congress, and was spread at length upon its records.

Page 136 U. S. 480

On the 13th of July, 1787, Congress enacted an ordinance which was entitled "An ordinance for the government of the Territory of the United States northwest of the River Ohio." There were no words of description in this ordinance except those contained in its title.

In 1788, the Legislature of Virginia, by an act which recited the passage of this ordinance, enacted:

"That the afore-recited article of compact between the original states and the people and states in the territory northwest of Ohio River be, and the same is hereby, ratified and confirmed, anything to the contrary in the deed of cession of the said territory by this Commonwealth to the United States notwithstanding."

The first Congress assembled under the Constitution enacted, on the 7th August, 1789, " *An act to provide for the government of the territory northwest of the River Ohio.* " These words of description were repeated in the act, but there were no other words of description. 1 Stat. 50.

On the 18th December, 1789, the Legislature of Virginia passed an act consenting

"that the district of Kentucky, within the jurisdiction of said Commonwealth, and according to its actual boundaries at that time, should be formed into a new state."

By that act it was further provided that

"the use and navigation of the River Ohio, so far as the territory of the proposed state or the territory which shall remain within the limits of this commonwealth lies therein, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state, on the river aforesaid, shall be concurrent only with the states which shall possess the

opposite shores of the said river."

On the 26th May, 1790, Congress established a territorial government over "the territory of the United States south of the River Ohio," 1 Stat. 123, but on the 4th of February, 1791, 1 Stat. 189, it gave its consent to the admission of Kentucky into the union "according to its actual boundaries on the 18th day of December, 1789," the date of the passage of the act of the Legislature of Virginia.

On the 7th May, 1800, an act was passed "to divide the

Page 136 U. S. 481

territory of the United States northwest of the Ohio into two separate governments." 2 Stat. 58.

On the 30th April, 1803, the Enabling Act for the admission of Ohio was passed, the Ohio River being made the southern boundary. 2 Stat. 173. By this act, everything west of the present boundary of Ohio and east of the division line established by the act of 1800 was "made a part of the Indiana territory."

On the 3d February, 1809, the Territory of Illinois was separated from the Territory of Indiana, the Wabash River being the boundary. 2 Stat. 514. And on the 19th April, 1816, the enabling act for Indiana was passed, in which it was enacted that the state should be bounded "on the south by the River Ohio, from the mouth of the Great Miami River to the mouth of the River Wabash." 3 Stat. 259.

The controversy in this case related to the jurisdiction over the Green River Island, a formation in the river on the Indiana side opposite the mouth of the Green River, entering the Ohio from Kentucky, and the claims of Indiana in respect to it are fully stated in the brief and argument of its counsel. Some of the main issues were issues of fact, concerning which there was a large amount of proof. No good purpose can be served by further reference to it.

An act passed by the Legislature of Kentucky in 1873, and an Indiana statute following it in 1875, and the proceedings under the latter were relied upon by the State of Kentucky. These acts are printed in the margin. [*](#)

image:a

MR. JUSTICE FIELD delivered the opinion of the Court.

This is a controversy between the State of Indiana and the State of Kentucky, growing out of their respective claims to the possession of and jurisdiction over a tract of land nearly five miles in length and over half a mile in width, embracing about 2,000 acres, lying on what is now the north side of the Ohio River. Kentucky alleges that when she became a state on the 1st of June, 1792, this tract was an island in the Ohio River, and was thus within her boundaries, which had been prescribed by the act of Virginia creating the district of Kentucky. The territory assigned to her was bounded on the north by the territory ceded by Virginia to the United States. The tract in controversy was then, and has ever since been, called "Green River Island." Kentucky founds her claim to its possession, and to jurisdiction over it, upon the alleged ground that at that time the River Ohio ran north of it, and her boundaries extended to low water mark on the north side of the river, also upon her long undisturbed possession of the premises, and the recognition of her rights by the legislation of Indiana. Indiana rests her claim also upon the boundaries assigned to her when she was admitted into the union on the 11th of December, 1816, of which the southern line was designated "as the River Ohio from the mouth of the Great Miami River to the mouth of the Wabash." This boundary, as she alleges, embraces the island in question; she contending that the river then ran south of it, and that a mere bayou separated it from the mainland on the north.

The territory lying north and west of the Ohio, embracing the State of Indiana, as well as the territory lying south of that river, embracing the State of Kentucky, was, previous to 1776 and down to the cession of the same to the United States, held by the State of Virginia. Indeed, that commonwealth claimed that all the territory lying north of the Ohio River and west of the Alleghanies, and extending to the Mississippi, was within her chartered limits. As stated by Chief Justice Marshall in

374, [18 U. S. 376](#) , at an early period of the Revolutionary war,

"the question whether the immense tracts of unsettled country which lay within the charters of particular states ought to be considered as the property of those states or as an acquisition made by the arms of all for the benefit of all convulsed our confederacy and threatened its existence."

To remove this cause of disturbance, Congress, in September, 1780, passed a resolution recommending

"to the several states having claims to waste and unappropriated lands in the western country a liberal cession to the United States of a portion of their respective claims for the common benefit of the union."

The Commonwealth of Virginia yielded to this recommendation, and on the 20th of December, 1783, an act was passed by her legislature authorizing her delegates in Congress to convey to the United States all her right, title, and claim, as well of soil as of jurisdiction, "to the territory or tract of country within the limits of the Virginia charter situate, lying, and being to the northwest of the River Ohio," subject to certain conditions, among which was that the territory should be laid out and formed into states containing a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as the circumstances would admit, and that the states so formed should be distinct, republican states, and admitted members of the federal union, having the same rights, sovereignty, freedom, and independence as the other states. In pursuance of this act, the delegates in Congress, on the 1st of March, 1784, executed a formal deed ceding to the United States all the right, title, and claim, as well of soil as of jurisdiction, which the commonwealth had to the territory or tract of country within the limits of the Virginia charter, "situate, lying, and being to the northwest of the River Ohio," for the uses and purposes, and subject to the conditions, mentioned in the act of the commonwealth. By the Act of Congress of July 13,

1787, entitled, "An ordinance for the government of the territory of the United States northwest of the River Ohio," a modification was made of the terms of the cession of Virginia, to the effect that there should be formed in the ceded territory not less than three

Page 136 U. S. 505

nor more than five states, the fixed and established boundaries of which were designated, and of which the Ohio River was declared to be one.

As thus seen, the territory ceded by the State of Virginia to the United States, out of which the State of Indiana was formed, lay northwest of the Ohio River. The first inquiry, therefore, is as to what line on the river must be deemed the southern boundary of the territory ceded -- or, in other words, how far did the jurisdiction of Kentucky extend on the other side of the river? Early in the history of the state, doubts were raised on this point, and to quiet them its legislature, on the 27th of January, 1810 passed the following act declaring the boundaries of certain counties in the commonwealth:

"Whereas, doubts are suggested whether the counties calling for the River Ohio as the boundary line extend to the state line on the northwest side of said river, or whether the margin of the southeast side is the limit of the counties, to explain which,"

" *Be it enacted by the General Assembly* that each county of this commonwealth calling for the River Ohio as the boundary line shall be considered as bounded in that particular by the state line on the northwest side of said river, and the bed of the river and the islands therefore shall be within the respective counties holding the mainland opposite thereto, within this state, and the several county tribunals shall hold jurisdiction accordingly."

1 Statute Law of Kentucky (1834), p. 268, Sess.Laws 1810, 100.

Upon this question of boundary, we also have, happily, a decision of this Court rendered so early as 1820. In [Handly's Lessee v. Anthony](#), 5 Wheat. 374,

ejectment was brought to recover land which the plaintiff claimed under a grant from the State of Kentucky, while the defendants held under a grant from the United States, and the title depended upon the question whether the land lay in the State of Kentucky or in the State of Indiana. It was separated from the mainland of Indiana by a bayou, a small channel, which made out of the Ohio and entered that river again a few miles below. This bayou was from four to five poles wide, and its bed was

Page 136 U. S. 506

dry during a portion of the year. The Court said that the question whether the land lay within the State of Kentucky or of Indiana depended chiefly upon the land law of Virginia, and on the cession of that state to the United States, and, in determining this question, it went into the consideration of the proper construction to be given to the deed of cession, and reached the conclusion that the boundary between the states was at low water mark on the northwest side of the river.

"In pursuing this inquiry," said the Court,

"we must recollect that it is not the bank of the river but the river itself at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying, and being to the northwest of the River Ohio,' and this territory, according to express stipulation, is to be laid off into independent states. These states, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country. When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly created state extends to the river only. The river, however, is its boundary. . . . If, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted that a country bounded by the river would extend to low water mark. This rule has

been established by the common consent of mankind. It is founded on common convenience. Even when a state retains its dominion over a river which constitutes the boundary between itself and another state, it would be extremely inconvenient to extend its dominion over the land on the other side which was left bare by the receding of the water, and this inconvenience is not less where the rising and falling is annual than where it is diurnal. Wherever the river is a boundary between states, it

Page 136 U. S. 507

is the main, the permanent river which constitutes that boundary, and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark. When the State of Virginia made the Ohio the boundary of states, she must have intended the great River Ohio, and not a narrow bayou into which its waters occasionally run. All the inconvenience which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the states on its southeastern side would result from attaching to Kentucky, the state on its southeastern border, a body of land lying northwest of the real river and divided from the mainland only by a narrow channel, through the whole of which the waters of the river do not pass until they rise ten feet above the low water mark."

This decision has been followed by the courts of Kentucky. See *Church v. Chambers*, 3 Dana 279; *McFarland v. McKnight*, 6 B.Mon. 510; *Fleming v. Kenny*, 4 J.J.Marsh. 158; *McFall v. Commonwealth*, 2 Met. 394. In this last case, the defendant, a justice of the peace for a Cincinnati Township, in the State of Ohio, solemnized a marriage on a ferry boat upon the Ohio River, midway between Newport, in Kentucky, and Cincinnati, in Ohio, and was indicted in the courts of Kentucky for unlawfully solemnizing a marriage, and was convicted of the offense, he not having been authorized to perform that ceremony by the county court of that state. The Court of Appeals of Kentucky, in affirming the conviction, referred to the authority of *Handly's Lessee v. Anthony*, and said:

"That the boundary and jurisdiction of the State of Kentucky rightfully extend to low water mark on the western or northwestern side of the River Ohio must now be considered as settled."

The same doctrine was maintained in *Commonwealth v. Garner*, 3 Gratt. 655, by the General Court of Virginia at its June term, 1846, after elaborate consideration, against the earnest contention of some of its judges that the jurisdiction of the state after the cession extended to the line of high water mark on the northwest side of the river.

We agree with the observations of the Court in *Handly's Lessee v. Anthony* that great inconvenience would have followed

Page 136 U. S. 508

if land on either side of the river, that was separated from the mainland only by a mere bayou, which did not appear to have ever been navigable and was dry a portion of the year, had been attached to the jurisdiction of the state on the opposite side of the river, and in the absence of proof that the waters of the river once flowed between the tract in controversy in this case and the mainland of Indiana, we should feel compelled to hold that it was properly within the jurisdiction of the latter state. But the question here is not, as if the point were raised today for the first time, to what state the tract, from its situation, would now be assigned, but whether it was at the time of the cession of the territory to the United States, or more properly when Kentucky became a state, separated from the mainland of Indiana by the waters of the Ohio River. Undoubtedly, in the present condition of the tract, it would be more convenient for the State of Indiana if the main river were held to be the proper boundary between the two states. That, however, is a matter for arrangement and settlement between the states themselves, with the consent of Congress. If, when Kentucky became a state on the 1st of June, 1792, the waters of the Ohio River ran between that tract known as "Green River Island" and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they

could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up, from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. [*Missouri v. Kentucky*](#), 11 Wall. 395, [78 U. S. 401](#) . Her dominion and jurisdiction continue as they existed at the time she was admitted into the union, unaffected by the action of the forces of nature upon the course of the river.

Page 136 U. S. 509

The question, then, becomes one of fact. Did the waters of the Ohio pass between Green River Island and the mainland of Indiana when Kentucky became a state, and her boundaries were established? There is much evidence introduced on the part of Indiana to show that since her admission into the union, the Ohio River has not passed between the island and the mainland except at intervals of high water, and that at low water the mainland has been accessible for portions at least, of the year, from the island, free from any water obstructions. Aside from the speculations of geologists, which are not of a very convincing character, the evidence consisted principally of the recollections of witnesses, which were more or less vague and imperfect. Apart from those speculative theories, she produced no evidence that at the time the cession was made by Virginia to the United States in 1784, or when Kentucky became a state, the tract was attached to, and formed a part of, the territory then ceded, out of which the State of Indiana was created, or that the waters of the Ohio did not run between it and the mainland of Indiana, so as to justify its designation as an island in the river. Much evidence has also been given on that subject by Kentucky, and a great number of transactions shown which proceeded upon the assumption that the tract was within the jurisdiction of that state. It is clear, we think, from the whole testimony that at an early day after Kentucky became a state, the channel between the island and the mainland of Indiana was often filled with water the whole year, and sometimes to the width of

two hundred yards, and that water passed through it, of more or less depth, the greater part of the year until down to a period subsequent to the admission of Indiana into the union.

But above all the evidence of former transactions, and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a state before this suit was commenced, and during all this period, she never asserted any claim by legal proceedings to

Page 136 U. S. 510

the tract in question. She states in her bill that all the time since her admission, Kentucky has claimed the Green River Island to be within her limits, and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a state, her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty, both as to soil and jurisdiction, over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two states now hinge, and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues.

This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome except by the clearest and most unquestioned proof. It is a principle of public law universally recognized that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it is conclusive of the nation's title and rightful authority. In the case of [*Rhode Island v.*](#)

Page 136 U. S. 511

Massachusetts, 4 How. 591, [*45 U. S. 639*](#) , this Court, speaking of the long possession of Massachusetts and the delays in alleging any mistake in the action of the commissioners of the colonies, said:

"Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change, and this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of state or individuals, long possession under a claim of title is protected, and there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Vattel, in his *Law of Nations*, speaking on the same subject, says:

"The tranquility of the people, the safety of states, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute, and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title."

Book II, c. 11, 149. And Wheaton, in his *International Law*, says:

"The writers on national law have questioned how far that peculiar species of presumption arising from the lapse of time, which is called 'prescription,' is justly applicable as between nation and nation; but the constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim

Page 136 U. S. 512

of every other person to the article of property in question."

Part II, c. IV, 164.

Potential as are the considerations drawn from the long silence and acquiescence of Indiana in the claim and pretensions of Kentucky, her affirmative action is not the less persuasive in favor of Kentucky's claim. It appears that on March 26, 1804, Congress authorized a survey into townships six miles square of the public lands north of the Ohio River and east of the Mississippi River. 2 Stat. 277, c. 35. Under this act, a survey was made of the land in the vicinity of Green River Island in the month of December, 1805, and in April, 1806, and it did not include the island within the territory north of the Ohio, but treated the bank of the bayou or channel north of the island as the bank of that river. The notes of this survey were given in evidence, and show conclusively that the officers of the government at that time did not consider the tract in controversy as forming any part of the Territory of Indiana, but did consider that the waters of the Ohio River running north of it made the tract now in controversy an island of the river. This survey, from the time it was made, has been regarded as establishing the fact that the southern boundary of Indiana lies north of the island. It is now insisted that the lines of this survey were intended merely as meander lines run for the purpose of defining the sinuosity of the bank, and the means of ascertaining the quantity of land then subject to sale, and was not intended as a boundary line of the island. Conceding, for the purposes of this case, that this is true so far as related to the

fixing of the precise line of low water mark to which the territory of Indiana extended, it does not affect the force of the survey as evidence that the island was not included within that territory, according to the judgment at that time of the surveying officers of the United States. With knowledge of this survey, the legislature of that state, on the 27th of February, 1875, passed an act entitled

"An act to ascertain the location of the boundary line between the States of Indiana and Kentucky above and near Evansville, and making the same evidence in any dispute."

This act recited that difficulty and

Page 136 U. S. 513

dispute had arisen between the owners of land in Indiana and Kentucky in regard to the boundary line between the two states, and that such difficulty involved the title to large tracts of land above and near the line between Green River Island and the State of Indiana, and empowered and directed the governor to select a commissioner, who should be a resident of the state, and a practical surveyor, to act with a similar commissioner to be appointed by the Governor of Kentucky, and provided that the two commissioners so selected should make a survey of the line dividing the states, beginning at the head of Green River Island, near and opposite to the mouth of Green River, and running thence down the Ohio River to the lower end of the island. The second and third sections of this act are as follows:

"SEC. 2. In running said line, the said commissioners shall consult and be governed by the surveys originally made by the government of the United States, when such surveys are not inconsistent with each other, and they shall establish and mark proper monuments along said line, whereby the same may be plainly indicated and perpetuated."

"SEC. 3. Within ten days after making such survey, and establishing said line, said commissioners shall reduce the same to writing, giving a full and plain description of all the courses and distances, and of the marks and monuments made and established, and sign and acknowledge the same before some officer authorized

to take acknowledgments of deeds, which writing, so acknowledged, shall be recorded in the recorder's office in the Counties of Vanderburgh and Warrick, and the original filed in the office of the Secretary of State, and such writing, or the record thereof, shall be conclusive evidence in any of the courts of this State of the boundary line between the States of Indiana and Kentucky between the points on said Green River Island heretofore indicated."

An appropriation was also made for the survey.

An act of similar purport had been passed by the State of Kentucky on the 23d of April, 1873, authorizing the governor of that state to appoint a surveyor to act with the person selected by the Governor of Indiana, and make a survey of the

Page 136 U. S. 514

line. In pursuance of these acts, the states each appointed a commissioner to survey the line. The commissioners accordingly, in 1877, made a survey and ran a line on the north side of Green River Island, and also of the small tract known as "Buck Island." In doing this, they followed the lines of the United States survey of 1806. By this survey, both these islands were left within the State of Kentucky. Complaint being made of the action of the commissioners in running the line on the high bank, the Governor of Indiana directed the commissioner of that state to suspend any further action under the act, and subsequently visited Evansville, a city in Indiana northwest of the island, and near the survey made, and examined the line of the survey, and in a subsequent letter to the commissioners stated that the line thus run did not in any part conform to the low water mark of the river, but that the greater part was upon the bank, and the residue at a distance from it, leaving a tract of land between it and the river. Subsequently the Legislature of Indiana, upon the recommendation of the governor, repealed the law authorizing the survey, and on the 14th of March, 1877, passed an act authorizing the governor to enter into negotiations with the Governor of Kentucky for the acquisition from the latter State of all her rights of jurisdiction and soil over the Green River Island, and her claim for any ground on the Indiana side of the river at said island, or to establish the line between the states by surveys, to be made in

such manner as they might deem just, provided that the Governor of Kentucky should be authorized to enter into the agreement by the legislature of that state, and the consent of Congress should be obtained thereto. These efforts to adjust the boundary line failing, the governor was authorized to direct the prosecution in this Court of a suit for the purpose of determining and settling the boundary.

Now while no agreement between the states would be of any validity under the Constitution without the consent of Congress, and the survey made pursuant to the joint action of the two states would not have been legally binding even had it not been withdrawn before the report of the commissioners was filed in the offices designated in the acts, still the

Page 136 U. S. 515

law of Indiana authorizing the line to be fixed in accordance with the survey of the United States -- and no other was made except the one in 1806, although the act speaks of surveys -- was a plain recognition on her part that the boundary of the state was north of the island, though it was uncertain where the line should be drawn on the land, inasmuch as the channel of the bayou had been filled up. It is an admission entitled to great weight in explaining the cause of the state's general acquiescence from the time it was admitted into the union, up to the passage of that act, in the claim and jurisdiction of Kentucky. Independently of the necessity of obtaining the consent of Congress to the execution of any agreement between the two states, it was competent for the State of Indiana to provide for a survey of a line already established, and to make such survey evidence in subsequent controversies upon the subject.

While on the part of Indiana there was a want of affirmative action in the assertion of her present claim, and a general acquiescence in the claim of Kentucky, there was affirmative action on the part of Kentucky in the assertion of her rights, as we have seen, by the law declaring the boundaries of her counties on the Ohio River, passed in January, 1810, and there was action taken in the courts of the United States and of the state by parties claiming under her or her grantor, and there was also action by her officers in the assertion of her authority over the land, all of

which tends to support the claim of rightful jurisdiction. It at least shows that her claim was never abandoned by her or her people. On the 10th of February, 1784, Virginia issued a military land warrant to one John Slaughter. In March, 1785, Slaughter had a tract of six hundred acres surveyed, upon which he located a part of that warrant, and the tract was conveyed to him by the Commonwealth of Virginia on the 10th of February, 1790, by patent, in which the land was described by metes and bounds as lying in the district set apart for the officers and soldiers of the Virginia Continental Line, on the first large island in the Ohio below the mouth of Green River. That island was Green River Island. In September, 1821, Slaughter's

Page 136 U. S. 516

heirs, who were residents of Virginia, brought a suit in ejectment in the Circuit Court of the United States for the District of Kentucky, to recover the land conveyed to their ancestor by this patent, against Garrett and others, who were in possession. The cause was not tried until 1834, when the plaintiffs, who relied entirely upon the validity of the patent to Slaughter, recovered judgment, and were awarded restitution of the premises. When the marshal went upon the land to execute the writ for its possession, he was accompanied by one Levi Jones, who claimed to have an equitable title under Slaughter's heirs, and was there to receive possession. Garrett, one of the defendants, concluded to purchase one hundred acres of the land upon which he was living from Jones, and for part of the purchase money executed to Jones his note. Jones assigned this note to James Rouse, who in turn assigned it to Jackson McLean. McLean brought an action at law upon the note in the Circuit Court of Henderson County, in Kentucky, in which he recovered judgment by default, and sued out a writ of execution, whereupon Garrett filed a bill in equity in the same court, making Jones and Rouse codefendants with McLean, to enjoin the enforcement of the judgment of law upon the following, among other, grounds: first, that the process in the common law action had been served upon him at his residence on Green River Island, which was not within the territorial limits of the State of Kentucky, but beyond the jurisdiction of the court, and that therefore the service of process, judgment, and

execution were null and void; second, that neither Jones nor Slaughter, under whom he claimed, had ever had a valid title to the land which Jones had sold him, because the military land warrant upon which Slaughter's patent had been issued could not be located upon land which lay northwest of the Ohio and north of the mouth of the Green River. As evidence that the tract of land in controversy lay in Indiana, and not in Kentucky, he filed a copy of the deed of cession from Virginia to the United States as part of his bill. The question of Kentucky's title and right of jurisdiction over Green River Island was thus put in issue, and its decision was necessary to the determination

Page 136 U. S. 517

of the case. Several depositions were taken by each party upon the point, but, upon a full hearing of the case, Garrett's bill was dismissed, with costs and charges. Here were two adjudications, one by the United States circuit court, and the other by a circuit court of the state, that Green River Island was within the jurisdiction of Kentucky. And the record shows that between 1818 and 1877, numerous grants of parcels of land on the island were made by Kentucky, and that between these dates taxes were assessed by her officers upon the lands as being within her territory and jurisdiction.

We have spoken of the character of the testimony introduced on the part of Indiana, and of the fact that it does not touch upon the condition of the channel above the island previous to her admission as a state into the union. The testimony of the witnesses introduced by the State of Kentucky consisted to a great extent of recollections, which must of necessity have been more or less imperfect. They showed, as already stated, that in former times at some periods of the year, there was a large volume of water which passed north of Green River Island, and that sometimes this volume continued throughout the whole year, but they also showed that at a very early period, great changes had taken place in the channel north of the island, so that in some portions of the year it was easy to pass on foot from the island to the mainland. The facts as they existed at the time of the cession of Virginia to the United States, in 1784, and even at the time of the admission of Kentucky into the union, have long since passed beyond the memory

of man, and therefore cannot be established by oral testimony. As counsel says, the very grandchildren of men then living are now hoary with age. The facts can only be established as a matter of inference from general facts in regard to the condition of the country, and documentary evidence, which in many cases rises little above that of hearsay, such as notices by travelers, and maps given by them, indicating the position of the tract in question. Of the latter, it may be said that they all represent the tract as an island in the river.

Page 136 U. S. 518

Great changes in the bed of the river were to be expected from the immense volume and flow from its vast watersheds. These watersheds, according to the official report of the tenth census of the United States, cited by counsel, comprise over 200,000 square miles, and more than half of the water from them comes from east of Green River Island, and nearly all the great watercourses find their way to the Ohio River. That vast changes should be made in the channel of that river from the volume of water thus received and its impetuous flow at certain seasons, wearing away its banks, deepening some portions of the stream, and filling up others, was not surprising, and that where large vessels at one time could easily float should have become dry ground many years afterwards was but the natural effect of the tremendous forces thus brought into operation.

We have not deemed it important to take up the testimony of each of the numerous witnesses produced in the case by the States of Indiana and Kentucky. It would serve no useful purpose to attempt an analysis of the testimony of each and to show how little and how much weight should be attributed to it. All the testimony is to be taken with many allowances from imperfect recollection, from the confusion by many witnesses of what they saw with what they heard, or of what they knew of their own knowledge with what they learned from the narrative of others. The clear and admitted facts we have mentioned, corroborated as they are by nearly everything of record presented, leave on our minds a much more satisfactory conclusion than anything derived from the oral testimony before us. The long acquiescence of Indiana in the claim of Kentucky, the rights of property,

of private parties, which have grown up under grants from that state, the general understanding of the people of both states in the neighborhood, forbid at this day, after a lapse of nearly one hundred years since the admission of Kentucky into the union, any disturbance of that state in her possession of the island and jurisdiction over it.

Our conclusion is that the waters of the Ohio River, when Kentucky became a state, flowed in a channel north of the

Page 136 U. S. 519

tract known as "Green River Island," and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled.

Judgment in favor of the claim of Kentucky will be entered, in conformity with this opinion, and commissioners will be appointed to ascertain and run the boundary line as herein designated, and to report to this Court, upon which appointment counsel of the parties will be heard on notice. And it is so ordered.

*

"An Act to fix and determine the boundary line between the States of Indiana and Kentucky above and near Evansville."

"Whereas difficulty has arisen between the owners of land in Indiana and Kentucky in regard to the boundary line between said states, and [said] difficulty involves the title to large tracts of land at or near the line between Green River Island and the State of Indiana, therefore,"

" *Be it enacted by the General Assembly of the Commonwealth of Kentucky, "*

" 1. That the governor of the state be and is hereby empowered and directed to select a commissioner, who shall be a resident of Kentucky and a practical

surveyor, who shall act with a similar person selected by the Governor of the State of Indiana, and such persons so selected shall make a survey of the line dividing said states, beginning at the head of the island known as Green River Island opposite, or nearly so, from the mouth of Green River, running thence in a direction down the Ohio River to the lower end of said island, upon a line dividing said island and the State of Kentucky from the State of Indiana. Said commissioners shall consult the surveys originally made by the United States government, if there be more than one, and they be not inconsistent with each other, and said commissioners shall be governed in running said line by such survey or surveys made by the government of the United States. Within ten days after such survey, said commissioners shall reduce said survey to writing, causing the metes and bounds and landmarks to be particularly described, and sign the same, and acknowledge the same before any officer authorized to take acknowledgments of deeds, and duplicates of such written statements of survey, signed and acknowledged by the commissioners, shall be filed in the office of the Clerk of the Henderson County Court, and in the auditor's office of Vanderburgh and Warrick Counties, Indiana, and such written statement, or a copy duly certified by the clerk of the said Henderson County Court, shall be conclusive evidence of the said line dividing said island, so called, from said State of Indiana in any of the courts of this state."

" 2. The commissioners to be appointed under this act shall report to the Governor in writing the result of the survey, together with a plat of the same, and when said survey shall have been completed, the commissioner shall file his account with the Governor, and when the same shall be examined and approved by him, the Auditor of Public Accounts is hereby authorized to draw his warrant on the treasury for said amount in favor of the commissioner appointed, *provided, however,* said amount shall not exceed the sum of two hundred and fifty dollars."

" 3. This act shall take effect and be in force from its passage. Approved April 21, 1873."

1 Sess.Laws 1878, 51, c. 964.

The statute of the State of Indiana of February 27, 1875, referred to in the cross-bill was as follows:

"An act to ascertain the location of the boundary line between the State of Indiana and Kentucky, above and near Evansville, and making the same evidence in any dispute, and declaring an emergency. (Approved February 27, 1875.)"

"Whereas, difficulty and dispute have arisen between the owners of land in Indiana and Kentucky in regard to the boundary line between said states, and said difficulty involves the title to large tracts of land above, near the line between the Green River Island and the State of Indiana,"

"SEC 1. *Be it enacted by the General Assembly of the State of Indiana* that the Governor be and is hereby empowered and directed to select a commissioner, who shall be a resident of the State of Indiana and a practical surveyor, who shall act with a similar commissioner to be appointed by the Governor of the State of Kentucky, and the two commissioners so selected shall make a survey of the line dividing said states, beginning at the head of said Green River Island, near and opposite to the mouth of Green River, and running thence down the Ohio River to the lower end of said island."

"SEC. 2. In running said line, the said commissioners shall consult and be governed by the surveys originally made by the government of the United States, when such surveys are not inconsistent with each other, and they shall establish and mark proper monuments along said line, whereby the same may be plainly indicated and perpetuated."

"SEC. 3. Within ten days after making such survey and establishing said line, said commissioners shall reduce the same to writing, giving a full and plain description of all the courses and distances, and of the marks and monuments made and established, and sign and acknowledge the same before some officer authorized to take acknowledgments of deeds, which writing, so acknowledged, shall be recorded in the recorder's office in the Counties of Vanderburgh and Warrick, and the original filed in the office of the Secretary of State, and such writing, or the

record thereof, shall be conclusive evidence in any of the courts of this the boundary line between the State of Indiana and Kentucky between the points on said Green River Island heretofore indicated."

"SEC. 4. There is hereby appropriated out of the moneys of the state in the hands of the Treasurer a sum not exceeding two hundred and fifty dollars to pay for making said survey. After rendering the services provided for in this act, the commissioners shall make proof to the judge of the Circuit Court of Vanderburgh County of the value thereof, to which the said judge shall certify, and upon the presentation of such certificate, the Auditor of the state shall draw his warrant in favor of said commissioner for amount so certified, not exceeding the said sum of two hundred and fifty dollars."

"SEC. 5. *Whereas* an emergency exists for the immediate taking effect of this act, the same shall be in force from and after its passage."

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com