Ness Vs. Fisher

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Appeal No. : 223 U.S. 683

Appellant : Ness

Respondent : Fisher

Judgement :

Ness v. Fisher - 223 U.S. 683 (1912)
U.S. Supreme Court Ness v. Fisher, 223 U.S. 683 (1912)

Ness v. Fisher

No. 66

Argued November 15, 1911

Decided March 11, 1912

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ERROR TO THE COURT OF APPEALS

OF THE DISTRICT OF COLUMBIA

SYLLABUS

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with *quasi* -judicial functions, to which is confided the execution of the laws regulating the disposal of the public lands.

A decision of an executive officer, made in the discharge of a duty imposed by such a law and involving the exercise of judgment and discretion, may not be reviewed by mandamus, nor can he be compelled by that means to retract his decision so made and to give effect to another not his own and having his approval.

The Secretary of the Interior made a decision that, under 2 of the Timber and Stone Act of June 3, 1878, 20 Stat., 89, c. 151, the statement that the land is unfit for cultivation, valuable chiefly for its timber, uninhabited, and contains no mining or other improvements must be made upon the personal knowledge of the applicant, and not upon information and belief, and the court of appeals held that this decision was right, and on that ground refused mandamus to review it; this Court affirms the judgment, but without examining the merits of the question and solely on the ground that the decision of the Secretary is one involving the exercise of judgment and discretion of an executive officer which cannot be reviewed by mandamus.

That no writ of error or appeal lies in such a case by which the decision of the Secretary of the Interior can be reviewed furnishes no ground for awarding mandamus.

33 App.D.C. 302 affirmed.

The facts, which involve a claim under the Timber and Stone Act of 1878, and the power of the court to control the decision of the Secretary of the Interior in regard thereto by mandamus, are stated in the opinion.

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MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was a petition, in the Supreme Court of the District

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of Columbia, for a writ of mandamus to compel the Secretary of the Interior to accept, as conforming to the Timber and Stone Act of June 3, 1878, 20 Stat. 89, c. 151, an application to purchase under that act 160 acres of public land in the Roseberg, Oregon, land district. The respondent answered, but the answer was held insufficient upon demurrer and judgment was entered awarding the writ as prayed. An appeal to the Court of Appeals resulted in a reversal of the judgment, with a direction that the petition be dismissed (33 App.D.C. 302), and that ruling is now here for review. Briefly stated, the material facts are these: being desirous of purchasing the land under the Timber and Stone Act, the relator, Mary S. Ness, filed in the proper local land office a written application which fully conformed to the statutory requirements, unless it was objectionable in that it disclosed that she had not personally examined the land and that her statement that it was unfit for cultivation, valuable chiefly for its timber, uninhabited, and contained no mining or other improvements was made upon information and belief, and not upon personal knowledge. The register and receiver ruled that the application was objectionable in that regard, and therefore rejected it, subject to her right to appeal. Successive appeals by her to the Commissioner of the General Land Office and the Secretary of the Interior resulted in an affirmance of the ruling of the local officers, the decision of the Secretary being adhered to upon a motion for review. Soon after the act was passed, it was construed by the Land Department as requiring that, in applications thereunder, the statement respecting the character and condition of the land be made upon the personal knowledge of the applicant, save in the particulars which the act declares may be stated upon belief, and its was because of this construction, disclosed in repeated decisions of the Secretary of the Interior and in the regulations issued under the act (*see* 6 L.D. 114; 11 L.D.

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599; 32 L.D. 631) that this application was rejected. After its final rejection -- that is, after the decision of the Secretary on the motion for review, one William A. Taylor made application at the local land office to purchase the land under the same act, and his application, which appeared to be in conformity with the statutory requirements, was accepted by the local officers and was being carried to final entry when this petition and the answer were filed.

The answer concluded by alleging, in substance, that the respondent was the head of the Land Department, to which the law committed the administration of the Timber and Stone Act and other public land laws; that the duty of determining whether the relator's application conformed to the statutory requirements was not merely ministerial, but involved the exercise of judgment and discretion; that to compel him to accept that application would be to control his judgment and discretion, and to require him to disregard his own decision in a matter falling within his lawful authority, and that a writ of mandamus could not be used to that end.

Section 2 of the act reads as follows:

"That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district *a written statement* in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, *setting forth* that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, *as deponent verily believes,* any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation,

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but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly, or indirectly, made any agreement or contract, in any way or

manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified *by the oath of the applicant* before the register or the receiver of the land office within the district where the land is situated, and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void."

The Secretary's decision rejecting the relator's application was not arbitrary or capricious, but was based upon a construction of 2 which was at least a possible one, had long prevailed in the Land Department, had been approved in *United States v. Wood,* 70 F. 485, and *Hoover v. Salling,* 102 F. 716, and has since been sustained by the Court of Appeals in the present case. True, a different construction had been adopted in *Hoover v. Salling,* 110 F. 43, and has since been followed in *Robnett v. United States,* 169 F. 778, but this, instead of indicating that the Secretary's decision was arbitrary or capricious, illustrates that there was room for difference of opinion as to the true construction of the section, and that to determine whether the relator's application conformed thereto necessarily involved the exercise of judgment and discretion.

So, at the outset, we are confronted with the question not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law, and involving the

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exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this Court and uniformly answered in the negative. *Decatur v. Paulding,* 14 Pet. 497, 39 U. S. 515 ; *United States ex Rel. Tucker v. Seaman,* 17 How. 225, 58 U. S. 230 ; *Gaines v. Thompson,* 7 Wall. 347; *Litchfield v. Register,* 9 Wall. 575; *United*

States v. Schurz, 102 U. S. 378 ; *United States ex Rel. Dunlap v. Black,* 128 U. S. 40 , 128 U. S. 48 ; *Riverside Oil Co. v. Hitchcock,* 190 U. S. 316 , 190 U. S. 324 . Original discussion being foreclosed by these cases, we will merely quote from two of them to illustrate the reasoning upon which they proceed. In the *Decatur* case, it was held that mandamus could not be awarded to compel the head of one of the executive departments to allow a claim under one construction of a resolution of Congress which he had disallowed under another construction, the Court saying:

"The duty required by the resolution was to be performed by him as the head of one of the executive departments of the government in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. . . . If a suit should come before this Court which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his construction to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in

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which they have jurisdiction, and in which it is their duty to interpret the Act of Congress in order to ascertain the rights of the parties in the cause before them. The Court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. . . . The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief, and

we are quite satisfied that such a power was never intended to be given to them."

And in the *Riverside Oil Co.* case, where it was sought by mandamus to compel the Secretary of the Interior to depart from a decision of his to the effect that a forest reserve lieu-land selection must be accompanied by an affidavit that the selected land was nonmineral in character and unoccupied, it was held that his judgment and discretion could not be thus controlled, it being said:

"Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands. . . . Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty, to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The Court has no general supervisory power over the officers of the Land Department by which to control their decisions upon questions within their jurisdiction. If this writ were granted, we would require the Secretary of the Interior to

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repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this by which to review the judgment of the Secretary furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility, as well as the power, rests with the Secretary, uncontrolled by the courts."

The relator seems to believe that *Roberts v. United States,* 176 U. S. 221 , and *Garfield v. United States,* 211 U. S. 249 , in some way qualify the rule so stated, but this is a mistaken belief. Both cases expressly recognize that rule, and neither discloses any purpose to qualify it. In the former, the duty directed to be performed was declared to be "at once plain, imperative, and entirely ministerial." And in the latter, the writ was awarded to compel the respondent to erase and disregard a notation which he arbitrarily and unwarrantably had caused to be made upon a public record, and which beclouded the relator's right to an Indian allotment.

We conclude that the decision of the respondent in the present case was not arbitrary or merely ministerial, but made in the exercise of judgment and discretion conferred by law, and not controllable by mandamus, and therefore that the Court of Appeals rightly directed that the petition be dismissed.

Judgment affirmed.