2FED.CAS.—35

Case No. 808.

BALFOUR'S LESSEE v. MEADE.

[1 Wash. C. C. 18;[1] 4 Dall. 363.]

Circuit Court, D. Pennsylvania. April Term, 1803.

PUBLIC LANDS—TITLE DERIVED FROM PENNSYLVANIA—ACTUAL SETTLEMENT—WARRANTS OF ACCEPTANCE.

1. To constitute a settlement upon lands in "the new purchase." under the provisions of the ninth section of the act of the legislature of Pennsylvania, passed April 3d, 1792; there must be an occupancy, accompanied by a bona fide intention immediately to reside upon the land, either personally or by a tenant; and without this, the mere improvement of the land, is of no importance; except as evidence of an intention to settle.

2. The proviso of the 9th section of the act, applies only to those who had an incipient title at some time by actual settlement, preceding the necessity which obliged them to require the benefit of the proviso; or by warrant; and such settlement, if so made, would be sufficient, although it were prevented, by the existence of hostilities, from being such a one as this section requires, by the occasion mentioned in the proviso.

3. Who is an actual settler to whom a warrant may issue, under the law. Actual settlement under the 9th section, consists in clearing, fencing, and cultivating two acres of land, at least, on each 100 acres; erecting a house thereon, fit for the habitation of man, and a residence continued for five years, &c.

4. The survey made for the plaintiff in this case, gave no title, because—1. it was not a returnable survey; 2. it was not authorized by a warrant; 3. it was not made for an actual settler; 4. it was not made by an authorized surveyor.

5. A warrant of acceptance gives no title under the law, it not having been founded on a settlement

6. The dismissal of the caveat filed by the defendant, did not settle the question of title, but left the same to be decided by an ejectment if brought within six months.

At law. This was an ejectment for four tracts of land, lying north and west of the Ohio and Alleghany rivers and Conewango creek in Pennsylvania. The plaintiff's title rested upon settlement rights, surveys, and warrants. In 1793, the plaintiff was a surgeon in the army, in garrison at Fort Franklin. He took some of the soldiers, went out, cut down a few trees, and built up five pens or cabins, about ten feet square; and without putting covers on them, returned back to the fort in about six or seven days. In April 1795, he had these five tracts surveyed in the name of himself, Elizabeth Balfour, and four others, each four hundred acres. The deputy surveyor had, upon application of the plaintiff, directed one Wilson to make the survey, but something preventing him from doing it, the plaintiff employed one Steel to do so, and upon returning the surveys to Stokely, he prevailed upon him to write an authority to

Steel to make the survey, which Stokely says he did, and antedated it, in order to make It appear to precede the survey. In May 1795, he obtained warrants of acceptance for two of the surveys of two of the tracts, having paid the consideration money for the whole.

In autumn 1794, Meade the defendant, finding no person settled upon these lands, built cabins upon the four tracts in controversy, covered them, or some of them, and then went off, not returning again until November 1795, when he came with his family to reside in one of the cabins, and fixed settlers upon the other tracts. In July 1795, the plaintiff gave notice to the defendant that he claimed the lands in question, that he intended to settle them, and forewarned him to proceed farther with his improvements thereon. In January 1796, the defendant caveated the plaintiff in form; and the same being tried before the board of property in March 1800, the caveats were dismissed, and warrants were ordered to issue; but they never did Issue, in consequence of doubts afterwards existing respecting the plaintiff's title. In April 1796, the plaintiff made engagements with some persons to settle these lands for him; but after they had seen and approved the lands, they declined going on them, upon hearing of the defendant's claim. It was in proof by many witnesses, that the war with the Indians rendered it dangerous to settle in that country during the years 1793, 1794, and 1795, and that but few settlements were attempted before the spring or summer of 1796.

Mr. Dallas and Mr. Edward Tilghman contended, that the plaintiff had acquired a good right by settlement, survey, and warrant, to the lands in question, under the laws of Pennsylvania, and particularly the act of the 3d of April 1792, 3 vol. 209; and that the settlement of Meade in 1795, was in violation of the plaintiff's prior right, and of course void. That the plaintiff had been prevented by the Indian hostilities from settling or fixing settlers until the peace of Fort Grenville, made in August 1795, was ratified; in December 1795; and that he had attempted it in a reasonable time after that event. They cited {Fothergill v. Stover,} 1 Dall. {1 U. S.} 6; {McCurdy v. Potts,} 2 Dall. {2 U. S.} 98; {Sims v. Irvine,} 3 Dall. {3. U. S.} 457; Add. 216, 218, 354.

Mr. Ingersoll and Mr. M'Kean contended, that the plaintiff never had made a settlement within the meaning of the law, not having accompanied it with actual residence or intention to reside; that of course he never had an inceptive title to be protected, by the proviso in the 9th section of the act of 1792. They cited Add. 248, 335; the case of the Holland Co. v. Cox, in the supreme court of this state; and the decisions of the judges of that court, in a feigned issue tried at Sunbury.

The case was argued very much at length (beginning on Saturday and not ending before Tuesday at 2 o'clock, the court sitting until 9 o'clock at night on Saturday and Monday,) and with great abilities on both sides.

WASHINGTON, Circuit Justice, charged the jury. The importance of this cause led the court to wink at some irregularities in the argument of it at the bar, which has tended

to protract it to an unreasonable length. Depending upon the construction of the laws of this state, and particularly on that of the 3d of April, 1792, It had at first the appearance of a difficult and complicated case. It is not easy at the first reading of a long statute to discover the bearings of one section upon another, so as to obtain a distinct view of the meaning and intention of the legislature. But the opinion I now entertain was formed on Saturday before we parted, open however as it always is, to such alterations as ulterior reason and argument may produce.

The better to explain and to understand this subject, it will be necessary to take a general view of the different sections of the {Pennsylvania} act of the 3d of April, 1792, upon which this cause must turn. The first section reduces the price of all vacant lands, not previously settled or improved, within the limits of the Indian purchase made in 1768, and all precedent purchases, to fifty shillings for every hundred acres; that of the vacant lands within the Indian purchase made in 1784, lying east of Alleghany river and Conewango creek, to five pounds; to be granted to purchasers in the manner authorized by former laws.

The second section offers for sale all the other lands of the state, lying north and west of the Ohio, Alleghany, and Conewango, to persons who will cultivate, improve, and settle the same, or cause it to be done, at the price of seven pounds ten shillings per hundred acres; to be located, surveyed, and secured, as directed by this law. It is to be remarked, that all the above lands lie in different districts, and are offered at different prices. Title to any of them may be acquired by settlement, and to all except those lying north and west of the Ohio, Alleghany, and Conewango, by warrant without settlement.

The third section, referring to all the above lands, authorizes applications to the secretary of the land office, by any person having settled and improved, or who was desirous to settle and improve a plantation, to be particularly described, for a warrant for any quantity of land not exceeding four hundred acres; which warrant is to authorize and require the surveyor general to cause the same to be surveyed and to make return of it, the grantee paying the purchase money and fees of office. The eighth section, which I notice in this place because intimately connected with

the third section, directs the deputy surveyor to survey and mark the lines of the tract, upon the application of the settler. This survey, I conceive, has no other validity than to furnish the particular description which must accompany the application at the land office for a warrant.

The fourth section, amongst other regulations, protects the title of an actual settler against a warrant entered with the deputy surveyor posterior to such actual settlement.

The ninth section, referring exclusively to the lands north and west of the Ohio, Alleghany, and Conewango, declares, that "no warrant or survey of lands within that district shall give a title, unless the grantee has, prior to the date of the warrant, made or caused to be made, or shall within two years after the date of it make or cause to be made, an actual settlement, by clearing, fencing, and cultivating, two acres at least in each hundred acres, erecting thereon a house for the habitation of man, and residing or causing a family to reside thereon for five years next following his first settling the same, If he shall so long live; and in default of such actual settlement and residence, other actual settlers may acquire title thereto."

Let us now consider this case as if the law had stopped here. A title to the land in controversy lying north and west of the Ohio, Alleghany, and Conewango, could be acquired in no other manner but by actual settlement No sum of money could entitle a person to a warrant, unless the application was preceded by actual settlement on the land; or if not so preceded by actual settlement, the warrant would give no title unless it were followed by such settlement within two years thereafter. The question then is, what constitutes such an actual settler, within the meaning and intention of this law, as will vest in him an inceptive title, so as to authorize the granting to him a warrant? Not a pedis positio—not the erection of a cabin—the clearing, or even the cultivation of a field: these acts may deserve the name of improvements, but not of settlements. There must be an occupancy, accompanied with a bona fide intention to reside and live upon the land, either in person or by that of his tenant;—to make it the place of his habitation, not at some distant day, but at the time he is improving; for if this intention be only future, either as to his own personal residence, or that of a tenant; then the execution of that intention by such actual residence fixes the date of the commencement of the settlement, and the previous Improvements will stand for nothing in the calculation. The erection of a house, and the clearing and cultivating the ground, all or either of them, may afford evidence of the quo animo with which it was done—of the intention to settle; but neither, nor will all, constitute a settlement, if unaccompanied by residence. Suppose these improvements made, the person making them declaring at the time that they were Intended for purposes of temporary convenience, and not with a view to settle and reside. Could this be called an actual settlement, within the meaning and intention of the legislature? Surely not But though such acts, against the express declarations of the quo animo, will not make a set-

tlement, it does not follow that the converse of the proposition will; for a declaration of intention to settle, without actually carrying that intention into execution, will not constitute an actual settlement.

How do these principles apply to the case of the plaintiff? In 1793 he leaves the fort at which he was stationed, and in which he was an officer, with a few soldiers, cuts down some trees, erects four or five pens, (for not being covered, they do not deserve the name of cabins,) and in five, six or seven days, having accomplished the work, he returns to the fort to his former place of residence. Why did he retreat so precipitately? We hear of no danger existing at the time of completing those labours, which did not exist during the time he was engaged in them. What prevented him from proceeding to cover the cabins, and from inhabiting them? Except the state of general hostility which existed in that part of the country, there is no evidence of a particular necessity for flight, In the instance of this plaintiff. It is most obvious, that the object of his visit to this wilderness was to erect what he considered to be Improvements, but they were in fact not inhabitable by a human being, and consequently could not have been intended for a present settlement He was besides an officer in the army, and whilst in that service he could not settle and reside in his cabins, although the country had been in a state of perfect tranquillity. In short, his whole conduct, both at that time and afterwards—his own statements when asserting a title to the land—the recitals in his warrants of acceptance and certificates of survey,—all afford proof, which Is irresistible, that he did not mean in 1793 to settle. Mistaking the law, as It seems many others have done in this respect, he supposed that an improvement was equivalent to a settlement for vesting a right to those lands. It Is not pretended, even now, nor is it proved by a single witness—not even by Crouse, who assisted in making the improvements—that he contemplated a settlement. It has been asked, could the legislature have meant to require persons to set down, for a moment, on land encompassed by dangers from a savage enemy? I answer, no: at such a time, it was very Improbable that men would be found rash enough to make settlements. But yet no title could be acquired without such a settlement; and if men were found hardy enough to brave the dangers of a savage wilderness, they might be called imprudent men, but they would also deserve the promised reward, not for their boldness, but for their settlement The first evidence we have

of an intention in the plaintiff to make an actual settlement, was in the spring of 1796, long after the actual bona fide settlement of the defendant with his family; for I give no credit to the notice from the plaintiff to the defendant in July 1795, since so far from accompanying it with actual settlement, he speaks of a future settlement, which however was never carried into execution. Every thing which I have said, with respect to the four hundred acres surveyed in the name of George Balfour, will apply, a fortiori, against the three other surveys in the names of Elizabeth Balfour, and the other warrantees, who it is not pretended were ever privy even to the making of the cabins, or ever contemplated a settlement upon those lands.

If the law then had stopped at the proviso, it is clear that the plaintiff never made such a settlement as would entitle him to a warrant But he excuses himself from having made such a settlement as the law required, by urging the danger to which any person, attempting a residence in that country, would have been exposed. He relies on the proviso to the ninth section of the law, which declares, that "if any such actual settler, or any grantee in any such original or succeeding warrant, shall by force of arms of the enemies of the United suites, be prevented from making such actual settlement, or shall be driven therefrom, and shall persist in his endeavours to make such actual settlement as aforesaid; then, ha either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued." Evidence has been given of the hostile state of that country during the years 1793,1794, and 1795, and the danger to which settlers would have been exposed. We know that the treaty at Fort Grenville was signed in August 1795, and ratified in December of the same year. Although Meade settled with his family in November 1795, it is not conclusive proof that there was no danger even then; and at any rate it would require some little time and preparation, for those who had been driven off to return to their settlements; and if the cause turned upon the question whether the plaintiff had persevered in his exertions to return and make such settlement as the law requires, I should leave that question to the jury, upon the evidence which they have heard.

But the plaintiff, to entitle himself to the benefit of the proviso, should have had an incipient title at some time or other; and this could only have been created by actual settlement, preceding the necessity which obliges him to seek the benefit of the proviso, or by warrant I do not mean to say, that he must have had such an actual settlement as this section requires to give a perfect title; for if he had built a cabin, and commenced his improvements in such manner as to afford evidence of a bona fide intention to reside, and had been forced off by the enemy at any stage of his labours; persevering at all proper times afterwards in endeavours to return when he might safely do so; he would have been saved by the proviso. But it is incumbent on the plaintiff, if he would excuse himself, from the performance of what has been correctly called a condition precedent, to

bring himself fully and fairly within the proviso which was made for his benefit. This he has not done.

Decisions in the supreme court, and in the common pleas of this state, have been cited at the bar; two of which I shah notice, for the purpose of pointing out the peculiar marks which distinguish them from the present, and to prevent any conclusions being drawn, from what has been said, either to countenance or to impeach those decisions. The cases I allude to are: the Holland Co. v. Cox; and the feigned issue tried at Sunbury.

The incipient title under which the plaintiffs claim in those causes, were warrants, authorized by the third section of this law: the incipient title in the present case is settlement The former was to be completed by settlement, survey, and patent, these to precede the warrant: and for the better explanation of this distinction, it will be important, to ascertain what acts will constitute an actual settler to whom a warrant may issue, and what constitute an actual settlement as the foundation of a title. I have before explained, who may be an actual settler to demand a warrant—namely, one who has gone upon and occupied land with a bona fide intention of an actual present residence; although he should have been compelled to abandon his settlement, by the public enemies, in the first stages of his settlement. But actual settlement intended by the ninth section, consists in clearing, fencing, and cultivating, two acres of ground, at least, on each hundred acres; erecting a house thereon for the habitation of man, and a residence of five continued years next following his first settling, if he shall so long live. This kind of settlement more properly deserves the name of improvements, as the different acts to be performed clearly import. This will satisfactorily explain what at first appeared to be an absurdity in that part of the proviso, which declares, that "If such actual settler shall be prevented from making such actual settlement." The plain meaning is, that if a person has once occupied land with an intention of residing, though he has neither cleared nor fenced any land, and is forced off by the enemies of the United States, before he could make the improvements, and continue thereon for five years, having once had an incipient title, he shall be excused by the necessity which prevented his doing what the law required, and in the manner required. Or if the warrant holder, who likewise has an incipient title, although he never put his foot upon the land, shall be prevented by the same cause from making those improvements,

&c.; he too shall he excused, if, as is required also of the settler, he has persevered in his endeavours to make those improvements, &c.

But what it becomes such a grantee to do, before he can claim a patent, or even a good title, Is quite another question, upon which I give no opinion.

As to the plaintiff's surveys and warrants, they cannot give him a title. Not the surveys; First, because they are a mere description of the land, which the surveyor is authorized by the eighth section to make, and the applicant for the warrant is directed by the third section to lodge in the land office at the time he applies for a warrant. It is merely a demarcation or special location of the land, intended to be appropriated; and gives notice of the bounds thereof, that others may be able to make adjoining locations without danger of interference. This is not such a returnable survey, so as to lay the foundation of a patent Second, It Is not authorized by a warrant Third, It was not done for an actual settler. Fourth, It was not made by an authorized surveyor, if you believe upon the evidence that the authority to Steel was antedated, and given after the survey was returned.

Not the warrant—First Because it was not a warrant of title, but of acceptance. Second. It is not founded on settlement, but Improvement; and if it had recited the consideration to be actual settlement, the recital would have been false In fact, and could have produced no legal or valid consequence.

As to the caveat; the effect of it was to close the doors of the land office against the further progress of the plaintiff in perfecting his title. The dismission of it again opened the door; but still the question as to title is open for examination In ejectment, if brought within six months, and the patent will issue to the successful party.

The plaintiff therefore having failed to show a title sufficient to enable him to recover in this action, it is unnecessary to say any thing about the defendant's title, and your verdict ought to be for the defendant

The jury found for the defendant Case No. 809.

[1] {Originally published from the manuscripts of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Esq.}

This volume of American Law was transcribed for use on the Internet

through a contribution from Google.