CARSON v. GORDEN.

Case No. 2,463.

{Brunner, Col. Cas. 208;[1] 1 Cooke, 149.}

Circuit Court, D. Tennessee. 1812.

LAND—APPROPRIATION OF—WHAT CONSTITUTES.

An actual settlement and survey is necessary to constitute an appropriation of land.

The plaintiff produced in evidence an entry made upon a military warrant, the 10th day of May, 1809; a survey of the entry made the 9th day of August, 1809, and a grant thereon, dated the 8th day of January, 1811, covering the land in controversy. The defendant's was an occupant-claim, under

the law of 1807; to support which, he produced a survey dated the 2d day of September, 1808; an entry made in pursuance of the survey, on the 1st day of December, 1810 [and a grant thereon, dated the 3d day of Dec, 1810].[2] It was admitted that the defendant lived within the bounds of both the claims; and that on the 12th day of September, 1807, he was seated on and in actual possession of the land in dispute.

Upon the trial, two questions were agitated—1. As the entry of the plaintiff was older than either the grant or entry of the defendant, whether the defendant's previous survey and right of occupancy had so appropriated the land that it could not be entered. 2. Whether the legislature of Tennessee had authority to pass the law of 1807, giving a preference to occcupants, as against claims founded upon military warrants.

The land lies within the military reservation.

Mr. Dickinson, for plaintiff.

Mr. Whiteside, for defendant.

M'NAIRY, District Judge (absent TODD, Circuit Justice). For the purpose of showing that the legislature of Tenneesee were unauthorized to pass the occupant law of 1807, the counsel for the lessors of the plaintiff have relied upon the cession act, which contains these words: "The lands laid off, or directed to be laid off, by any act or acts of the general assembly of this state, for the officers and soldiers thereof, their heirs and assigns respectively, shall be and enure to the use and benefit of said officers, their heirs and assigns respectively." Hayw. Rev. 165. It is contended that this clause in the cession act, connected with the compact between this state and North Carolina, prohibited this state from passing the act of 1807. The compact before alluded to authorizes the state of Tennessee to issue grants in such cases only as could have been done by North Carolina under the cession act. The compact also declares that in entering and obtaining titles to lands, no preference shall be given to the citizens of Tennessee over the citizens of any other state, claiming under North Carolina; "nor shall any occupancy or possession give preference in entering and obtaining titles, so as to injure or take away the right of any person claiming by entry, grant, or otherwise, under North Carolina."

The law of 1807 provides, that it shall be lawful for any person, who was seated on any vacant and ungranted land, on the 12th day of September, 1807, to have a preference for the term of two years to enter the same, provided such person caused it to be surveyed within nine months after the passing of the act, which was on the 2d day of December, in that year. I do not believe that the reservation of the land, in this section of country, can be considered alone as an appropriation. The lands still remain vacant, until the application of a warrant to some particular spot. The holder of a warrant has only a floating claim, and cannot be considered as having an appropriation, unless he goes on to designate by survey, etc., the locality of the particular tract he wishes to affix his warrant

to. Under this view of the case I cannot but believe that the state of Tennessee had a right to pass the law in question.

The next question which occurs is, whether the survey and right of preference of the defendant so appropriated the land as to render it not liable to be entered by the plaintiff's military warrant. The entry laws, under which the plaintiff's entry was made, only authorize the entering of vacant and unappropriated land. When an actual settlement has been made in pursuance of the act of 1807, and the enterer has gone on to make a survey, I do not consider the land as being vacant, within the true sense and meaning of the entry laws. I am therefore of opinion that although the plaintiff has produced an entry, older in date than the entry of the defendant, yet as the defendant's right of preference existed, and his survey was made when the plaintiff had only a warrant, not located anywhere, the land was from thence no longer vacant, and consequently not subject to be entered by the plaintiff. Whether the entry of the plaintiff, under those circumstances, can be declared void in a court of law is perhaps doubtful. I am inclined to think it cannot. But this is not made a question in the cause. It seems to be admitted that if in any court this would be the result, a verdict at law may pass against him.

Verdict for the defendant.

[1] {Reported by Albert Brunner, Esq., and here reprinted by permission.}

[2] {From 1 Cooke, 149.}