47TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { MIS. DOC. No. 10.

VIRGINIA MILITARY DISTRICT IN OHIO.

PAPERS DESIGNED TO ILLUSTRATE THE NECESSITY FOR THE PASSAGE OF BILL H. R. 7015.

[To accompany bill H. R. 7015.]

DECEMBER 16, 1882.—Referred to the Committee on the Judiciary and ordered to be printed.

Mr. Robinson, of Ohio, introduced a bill (H. R. 7015) supplementary to "An act in relation to land patents in the Virginia military district of Ohio," approved August 7, 1882; which was read a first and second time, referred to the Committee on the Judiciary, and ordered to be printed.

The bill is as follows:

[Forty-seventh Congress, second session.]

H. R. 7015.

IN THE HOUSE OF REPRESENTATIVES, DECEMBER 11, 1882.

Read twice, referred to the Committee on the Judiciary, and ordered to be printed.

Mr. JAMES S. ROBINSON introduced the following bill:

A BILL supplementary to an act entitled "An act in relation to land patents in the Virginia military district of Ohio," approved August seventh, eighteen hundred and eighty-two.

Whereas an act entitled "An act to cede to the State of Ohio the unsold lands in the Virginia military district in said State," approved February eighteenth, eighteen hundred and seventy-one (Statutes at Large, volume sixteen, page four hundred and sixteen), ceded "the lands remaining unsurveyed and unsold" in said district, but did not include any lands previously entered; and

Whereas under said grant it was claimed, contrary to the provisions of said act, that if said survey contained more land than called for in the land warrants under which they were respectively made, the excess passed to the State of Ohio, and such claim, if sustained contrary to prior decisions of the courts of the State, would have taken from bona fide purchasers and occupants, long in possession, under titles which they believed valid, their lands; and

Whereas Congress by an act approved May twenty-seventh, eighteen hundred and eighty (Statutes at Large, volume twenty-one, pages one hundred and forty-two and one hundred and forty-three), "to construe and define" said act, declared valid all legal surveys returned with the proper land warrants to the General Land Office "on or before March third, eighteen hundred and fifty-seven, on entries made on or before January first, eighteen hundred and fifty-two, in pursuance of the act approved March third, eighteen hundred and fifty-five (Statutes at Large, volume ten, page seven hundred and one), prescribing said period of March third, eighteen hundred and fifty-seven, on such entries for such return, and for the procuring of patents, whether the amount of land included in any survey conformed to that called for in the warrant or not; and

Whereas an act entitled "An act in relation to land patents in the Virginia mili-

tary district of Ohio," approved August seventh, eighteen hundred and eighty-two (Statutes at Large, volume twenty-two, page three hundred and forty-eight), declared "that any person in actual open possession of any tract of land in the Virginia military district of the State of Ohio, under claim and color of title made in good faith based upon or deducible from entry of any tract of land within said district founded upon military warrant upon Continental establishment, and a record of which entry was duly made in the office of the principal surveyor of the Virginia military district, either before or since its removal to Chillicothe, Ohio, prior to January first, eighteen hundred and fifty-two, such possession having continued for twenty years last past, under a claim of title on the part of said party either as entryman, or of his or her grantors, or of parties by or under whom such party claims, by purchase or inheritance, and they by title based upon or deducible from such entry by tax sale or otherwise, shall be deemed and held to be the legal owner of such land so included in said entry, to the extent and according to the purport of said entry or of his or her paper titles based thereon or deducible therefrom;" and

Whereas there are many persons in possession of other lands in said district, either entered or entered and surveyed, but which have never been patented, and in many cases in which said lands have reverted to the United States because the surveys and warrants were not returned to the General Land Office for patents prior to March third, eighteen hundred and fifty-seven, and in many cases said persons in possession of lands purchased them in good faith by contracts with persons claiming to be owners of the surveys or entries, but never received any deed of conveyance, and in other cases such deeds were lost or records destroyed, so that no title can be traced to an entry or survey: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has been, or may be, in the actual open possession of any tract of land in the Virginia military district of the State of Ohio, under claim and color of title made in good faith, which land has been entered or surveyed, and a record of which entry or survey was duly made in the office of the principal surveyor of the Virginia military district, either before or since its removal to Chillicothe, Ohio, such possession having continued for twenty years, under a claim of title on the part of said party either as entryman, or of his or her grantors, or of parties by or under whom such party claims by purchase or inheritance, by tax sale, or otherwise, shall be deemed and held to be the legal owner of such land so included in said entry or survey to the extent, and according to the purport of said entry, or of his or her paper titles; and patents may be issued as evidence of title, to persons entitled thereto under this act, or the act to which it is supplementary. And the Commissioner of the General Land Office is authorized to make all necessary surveys at the expense of the parties in interest, and ascertain the boundaries of lands to be patented under such regulations as he may prescribe.

Much information on the subject of the bill (H. R. 7015) above referred to will be found in the Miscellaneous Document entitled as follows: "House Mis. Doc. No. 42, Forty-seventh Congress, first session."

The judicial decisions, and other papers following, are designed to supplement the document above referred to in illustration of the necessity for passing the bill to which reference is made above.

JUDICIAL DECISIONS, ETC.

LAND WARRANT SURVEY—LANDS OF VIRGINIA MILITARY DISTRICT.

Supreme Court of Ohio, January Term, 1882.

JOHN A. COAN *vs.* WILLIAN J. FLAGG.

1. A survey, embracing sixteen hundred and eighty-two acres, on an entry of lands in the Virginia military district made on a warrant for five hundred acres, is, by reason of such excess, fraudulent as against the Government of the United States, and vests in the owner of the warrant no estate or interest in the land, which the Government of the United States, on principles of equity, is bound to protect by issuing a patent for the whole or any part of the survey.
2. Whether the act of Congress of February 18, 1871, granting to the State of Ohio lands in Virginia military district "remaining unsurveyed," passed title to lands covered by a previous survey voidable on account of excess in the quantity of land embraced, *quære?* But if it did not, the title to such land sold by the Ohio Agricultural and Mechanical College, grantee of the State of Ohio, to a purchaser for a valuable consideration, was ratified and confirmed to such purchaser by the fourth section of the act of May 27, 1880.

MAY 30, 1882.

Error to the district court of Scioto County.

The original action was brought by defendant in error against plaintiff in error to quiet his title to certain real estate within the Virginia military district, and known as survey 15882, containing 1,682 acres, and also known as lot No. 99, in the allotment of lands granted by the United States to the State of Ohio, by act of Congress passed April 18, 1871, and afterwards by the State of Ohio to the Ohio Agricultural and Mechanical College.

The plaintiff, Flagg, in his petition, claimed to be the owner of the legal title to, and to be in possession of, the whole of said tract.

The defendant, Coan, by his answer, disclaimed title or possession to that part of survey 15882 which is south of a line drawn from the northwest corner of survey 14304 to the easterly corner of survey 15771, and denying the plaintiff's title and possession to that portion of survey 15882 north of the line described, asserts title and possession in himself. The original suit was commenced in the court of common pleas of Scioto County, on the 19th of October, 1875. From the decree of the common pleas an appeal was taken to the district court, wherein a final decree was rendered in favor of the plaintiff, Flagg, at the December term, 1877. On a motion for a new trial by defendant, Coan, being overruled, a bill of exceptions, containing all the testimony, was made part of the record.

N. W. Evans, Duncan Livingstone, and James M. Dawson, for plaintiff in error.

STATEMENT OF FACTS.

This action involves the title and right of possession to the northern portion of survey 15,882, in the Virginia military district of Ohio, lying

north of the Ohio River, between the Scioto and Little Miami Rivers, and bounded on the north by a line drawn from the source of the Scioto River to the source of the Little Miami River, known as Ludlow's Line. The land in controversy is situate in Nile Township, Scioto County, Ohio. Aside from the question of title, and in case the finding of the court should be in favor of the plaintiff in error, there is a question as to the southeastern boundary, as claimed by the plaintiff in error.

A short review of the history of the general title to these lands may enable the court better to understand the questions in controversy.

SKETCH OF VIRGINIA MILITARY TITLES.

The lands in the Virginia military district of Ohio were granted by King James I, of Great Britain, to the colony of Virginia on the 23d of May, 1609, in the second charter granted to that colony by said monarch. This founded the only claim of the State of Virginia to these lands, and which has been recognized and admitted by the Congress of the United States.

An act of the legislature of Virginia of October, 1779, 10 vol. Henning's Statutes of Virginia, page 160, provides for bounties in lands to the officers and soldiers of Virginia in the Revolutionary War, both on Continental and State establishment, and prescribes the quantity each should receive, according to rank. Prior to the passage of this act, Virginia had promised land bounties to her soldiers on both State and Continental establishment, but the quantity was not definitely fixed till the passage of the act last referred to. This act does not prescribe from what particular lands the bounties shall be granted. According to its terms a subaltern officer of Virginia, in the Revolutionary War, under one of whom plaintiff in error claims, was entitled to 2,000 acres of land military bounty.

An act of Virginia in May, 1779, 10 vol. Henning's Statutes, p. 51, prescribed the manner in which officers and soldiers of Virginia, who served either upon State or Continental establishment, should procure their land warrants. The *modus operandi* may be briefly described as follows: In case of a commissioned officer (the case in point), he procured a certificate from his commanding officer that he had served the time prescribed by law, three years, stating his regiment and particular service. Armed with this certificate, the party applied to any court of record in Virginia, and by his own affidavit or otherwise satisfied the court of the truth of said certificate. Thereupon the clerk of the court applied to made a note of the proof on the original certificate and also in his order-book, and annually sent a list of such certificates approved to the office of the register of lands of the State.

With the endorsed certificate, the officer entitled to the bounty applied to the register of the land office of Virginia, who issued him a warrant, under his hand and seal of office, specifying the quantity of land and the rights upon which it was due, authorizing any surveyor qualified by law to lay off and survey the same, and requiring him to make a record thereof.

There was also a provision in the same act by virtue of which a party holding original warrants could lay them in one or more surveys, and where the survey or surveys were insufficient to fill the quantity named in the warrant, the party was authorized to exchange the original warrant or warrants for others calling for the quantity of land not already entered and divided into quantities, in separate warrants, to suit the

party holding the originals. In this way the name exchange warrant originated, and the one in question is an exchange warrant.

The same act also provided that all persons, including foreigners, should have the right to transfer warrants or certificates of survey of lands.

This statute provides also in regard to surplus in surveys, to the effects that no outside party should be permitted to claim the surplus except during the lifetime of the patentee or grantee, and not then in case any sale or conveyance of the land had been made from the patentee or original grantee. The party seeking to enter or take up the surplus must give one year's notice to the party in possession, who had that year to perfect his title to the surplus by covering it with a proper survey, on the same or another warrant, and in case the patentee could not defeat the claim for surplus by a resurvey or otherwise, he, and none other, could assign it in the tract held by him where he saw fit. The act also provided that a surplus of five per cent. should not be regarded.

An act of Virginia of October, 1783, 11 vol. Henning's Statutes, p. 353, prescribes the manner in which the warrants issued by virtue of the other acts referred to should be located, which is substantially the practice and manner used after the cession of these lands to the United States, and need not, at this point, be further referred to.

On the 1st of March, 1784 (1st vol. U. S. Laws, 472), Virginia ceded all lands owned or claimed by it northwest of the Ohio River to the United States. The cession was absolute, except as to so much of said lands as lay between the Little Miami and Scioto Rivers, which was reserved for bounties to Virginia troops upon Continental establishment, and as to these lands, since known as the Virginia Military District, the United States simply took the title in trust for the satisfaction of the bounties of the officers and soldiers of Virginia upon Continental establishment, whose bounties had not previously been satisfied by lands upon the Green and Cumberland Rivers.

To show how Congress regarded this trust, we quote from the ordinance of 1785 for ascertaining the mode of disposing of lands in the territory northwest of the Ohio River:

> Saving and reserving always to all officers and solders entitled to lands on the northwest side of the Ohio, and to all persons claiming under them, all rights to which they are so entitled, under the deed of cession executed by the delegates for the State of Virginia on the 1st day of March, 1784, and the act of Congress accepting the same; and to the end that the said rights may be fully and effectually secured, according to the true intent and meaning of the said deed of cession and act aforesaid, be it ordained, that no part of the land included between the rivers called Little Miami and Scioto, on the northwest side of the river Ohio, be sold, or in any manner alienated, until there shall first have been laid off and appropriated for the said officers and soldiers and persons claiming under them, the lands they are entitled to, agreeably to the said deed of cession and act of Congress accepting the same.—[Laws United States, volume 1, pages 563-69.

The mode of acquiring title to lands in the Virginia Military District, after the cession thereof to the United States Government, should be noticed.

The Virginia warrant holder would take his warrant to the office of the surveyor of the district and there make an entry of the lands he desired to take up with his warrant, not being already entered or surveyed, in the book of entry of the surveyor. Thereupon with this entry he would have a survey of the entered lands made by a deputy surveyor of the district, and returned to the office of the surveyor. Thereupon the surveyor would forward the survey to the General Land Office in Washington, upon which patent would issue to the owner of the survey making application therefor.

STATEMENT OF THE PLEADINGS.

The action began in the common pleas court of Scioto County, Ohio, was by William J. Flagg, plaintiff, *vs.* John A. Coan, defendant, a bill to quiet the alleged title and possession of defendant in error to survey 15,882, Virginia Military District, against the plaintiff in error. The suit was brought October 19, 1875. Defendant in error claimed the legal title to and that he was in possession of survey 15,882. He alleged that plaintiff in error had lately set up a claim to the northern portion of the survey, and was threatening to commit waste and trespass thereon, and praying that he be forever enjoined from asserting any claim to the premises. The plaintiff in error answered, setting up six defenses.

First, he disclaimed any title to that portion of survey 15,882 south of the black line running from the most westerly corner of survey 14,304 to the northeastern corner of survey 15,771. (See plat inserted in the printed record between pages 66 and 67.) He alleged that he was the owner of that portion of survey 15,882 north of the line described, and denied the title, ownership, and possession of defendant in error therein.

The second defense was adverse possession by plaintiff in error and those under whom he claimed, for more than twenty-one years, prior to the commencement of the suit.

The third defense, and most important of all, was the equitable title in plaintiff in error under and by virtue of a warrant, entry, and survey of the land claimed under the laws regulating the acquirement of titles in the Virginia Military District prior to 1871. He alleged that the warrant, entry, and survey were legal and valid, and had appropriated the land; that he was the owner of the entry and survey at the commencement of the suit, was entitled to a patent, and had applied for the same.

The fourth defense was that the only title of the defendant in error was a pretended deed from the Ohio Agricultural and Mechanical College, to him made, under the supposed authority of the act of the legislature of Ohio of April 3, 1873, accepting the cession of unsurveyed and unsold lands in the Virginia Military District of Ohio, and granting the same lands to the Ohio Agricultural and Mechanical College, and that at the time Congress passed said act of February 18, 1871, this particular land had been appropriated by a previous legal and valid entry and survey (being the same mentioned in the third defense), and that therefore defendant in error took no title by said deed.

The fifth defense was that defendant in error had procured his college deed by fraudulent and corrupt acts and practices upon the agents of the college, and that for these means the deed was void. The allegations of this defense furnish interesting reading matter, but need not be further quoted here.

The sixth defense was to the effect that the college, prior to making the deed to the defendant in error, had failed to comply with the act of April 3, 1873, requiring this land to be divided into lots of 500 acres each, to have plats and surveys thereof made and recorded in the office of the auditor of state, and to have the land appraised prior to sale, and that for the want of these prerequisites the deed was void.

The plaintiff in error prayed the court to adjudge his title by entry and survey valid, and that defendant in error be perpetually enjoined from disturbing his possession. He also alleged that the pretended deed of the defendant in error from the Ohio Agricultural and Mechanical College was a cloud upon his title, and asked that the court should declare

the same invalid and void as against the premises claimed by plantiff in error.

The defendant in error replied to the second, third, and fourth, and demurred to the fifth and sixth defenses.

His reply to the second defense denied the twenty-one years' adverse possession, and said that even if such were the case he denied that plaintiff in error could acquire any title thereby, because, as he said, that until February 18, 1871, the title to said premises was, and continued to be, in the Government of the United State s.

His reply to the third defense was to the effect that the entry and survey of the Gordons and Heaton were invalid, and had been so declared by the Commissioner of the General Land Office, on account of defects in the assignment of the warrant and surplus in the quantity of land included in the survey.

His reply to the fourth defense was to the effect that his college deed was good and valid, or that plaintiff in error's alleged entry and survey had never appropriated the lands.

STATEMENT OF THE TITLE OF JOHN A. COAN.

The facts connected with the title of plaintiff in error are as follows

1st. A Virginia Military warrant exchange, No. 494, for five hundred acres, issued to Joseph, Sarah Ann, and Margaret B. Gordon, children and heirs of Francis Gordon, a child and heir-at-law of John Gordon, the only heir of Thomas Gordon, a lieutenant of cavalry for three years in the Continental Line, Virginia Military Establishment, dated 16th June, 1840, found on page 50 of the Record.

2d. An entry upon this warrant of 500 acres of land, dated December 18, 1849, No. 15,882, and being part of the same land in controversy, page 51, Record.

3d. A survey, No. 15,882, following said entry including the land in controversy, dated April 10, 1851, made by D. F. Heaton, a deputy surveyor, and recorded December 23, 1851.

4th. An assignment by Sarah Ann Dawson *ne* Gordon, and one of the owners of the warrant, George H. Dawson, her husband, of one-fourth interest in the warrant to David F. Heaton, dated April 18, 1849.

5th. A like assignment by Joseph F. Gordon, Margaret R. Francis *ne* Gordon, and Henry P. Francis, her husband, of one-fourth interest in the warrant to David F. Heaton, dated 16th May, 1849. Record, pp. 55 and 56.

6th. An assignment by Margaret R. Francis and husband of their entire interest in the warrant, being one-third, dated January 14, 1858, to David F. Heaton.

7th. An assignment by Joseph F. Gordon to David F. Heaton of his entire interest in the warrant 494 and survey 15,882, being one-third, dated January 14, 1858.

8th. The evidence of Leonidas C. Heaton, executor of David F. Heaton and his son, to the effect that he had seen an assignment from George H. Dawson and Sarah Ann Dawson, his wife, one of the Gordon heirs named in the warrant, of their entire interest in the warrant to David F. Heaton, his father, in the latter's papers, but that the same had been lost and could not be found.

9th. The record of the will of David F. Heaton probated in Scioto County, Ohio, November 11, 1871. This will authorizes the executor, Leonidas C. Heaton, to sell and convey the real estate of which he died seized, and of which survey 15,882 was part.

10. A deed in fee-simple from Leonidas C. Heaton, executor of David F. Heaton, for the north part of survey 15,882 was made to David M. Elliott, being the same premises claimed by plaintiff in error. Deed dated March 13, 1874, and recorded September 13, 1874.

11th. A deed from David M. Elliott to John A. Coan, plaintiff in error, conveying the same premises herein by him claimed. Executed September 15, 1874, and recorded November 10, 1875.

STATEMENT OF THE TITLE OF WILLIAM J. FLAGG.

The evidence of the title of the defendant in error to the land in controversy was in substance as follows:

1st. A deed from the trustees of the Ohio Agricultural and Mechanical College to William J. Flagg, dated June 10, 1875, and recorded July 22, 1875.

Plaintiff in error objected to the introduction of this deed in evidence as incompetent, without previous proof that the grantor in the deed had, before the execution of the same, complied with the requirements of the legislature of Ohio, in an act passed April 3, 1873, accepting the cession of Virginia military lands from the United States, but his objection was promptly overruled, as were all others made by him, and the deed was admitted in evidence.

To further support his title the defendant in error, Flagg, introduced evidence of the title to that part of survey 15,882 south of the line marked on the plat between pages 66 and 67 of the Record, as Coan's line, and which had no connection with the land in controversy except so far as it reflected on the question of the correctness of the boundary line in dispute.

To this evidence plaintiff in error objected as incompetent, but his objection was overruled and the evidence admitted. The evidence in question was—

2. A title bond from David F. Heaton to John A. Coan for 100 acres of land in this survey 15882, but south of both the red and black lines in controversy across the survey. This title bond was dated February 1, 1854. Record, p. 26.

3d. On the same day John A. Coan sold and assigned one-half interest in this title bond to Joseph M. Smith.

4th. On May 10, 1854, Joseph M. Smith assigned his interest in this title bond to William J. Flagg, and

5th. On the same date John A. Coan assigned his interest in this title bond to William J. Flagg.

6th. On August 2, 1854, William J. Flagg assigned this title bond to Nicholas Longworth. Assignments endorsed on the bond.

7th. Then defendant in error introduced a deed for the southern half of this survey 15882, not in controversy in this action, from David F. Heaton and wife to Nicholas Longworth, dated January 18, 1858. Plaintiff in error objected to the introduction of this deed as incompetent, but his objection was overruled and the deed admitted.

8th. Defendant in error then offered in evidence item 12 of the will of Nicholas Longworth, deceased, with item 2 of the first codicil thereto probated in Hamilton County, Ohio, February 17, 1863. The substance of this evidence was as to the will that the south half of survey 15882 covered in said deed from David F. Heaton to Nicholas Longworth was devised to Joseph Longworth and Larz Anderson, in trust for his daughter, Eliza J. Flagg, wife of defendant in error, William J. Flagg, and by the codicil this land went to Eliza J. Flagg absolutely during

her life, with power in her to dispose of the same by last will and testament.

The foregoing embraced all the evidence offered by defendant in error directly in support of his title.

DANIEL M'CARTY'S DEPOSITION.

After plaintiff in error had completed the evidence of his title, defendant in error undertook to impeach the same by the deposition of Daniel McCarty, a clerk in the General Land Office in Washington, D. C., together with Exhibits A, B, C, D, E, F, and G thereto.

The substance of the deposition and exhibits were as follows:

Witness had had charge of Division H, relating to the Virginia Military District, since 1857. He said that all the *decisions* of the Commissioner of the General Land Office were contained in letters written by him to parties interested. He, McCarty, wrote the letters. Exhibit "A" was a letter from Willis Drummond, Commissioner, to James M. Trimble, of Hillsborough, O., dated December 23, 1872, acknowledging receipt of a caveat against the issue of a patent on survey 15882 on account of a surplus of 1,282 acres, and notifying him that patent would not issue till the excess was explained, or otherwise patent would not issue for over 400 acres.

Exhibit B was a letter dated June 18, 1873, from W. W. Curtis, Acting Commissioner of the General Land Office, to L. C. Heaton, notifying him that on April 26, 1852, his testator had filed in the office for patent survey 15882, on Virginia Military warrant 494. That the application had been suspended for discrepancies in the manner of the warrantees and assignees, want of proof of marriage, &c., also that James M. Trimble, of Hillsboro', Ohio, agent of the Ohio Agricultural and Mechanical College, had filed a caveat against the issuing of a patent on the ground of surplus, and had filed a sworn survey of the land made by Thomas Keyes, a civil surveyor, showing 1,682 acres in the survey, or a surplus of 1,282 acres; also notifying Heaton that the validity of the survey would not be recognized under the circumstances, and that unless he denied the facts patent would be refused.

Exhibit C was a letter dated July 11, 1873, from Willis Drummond, Commissioner, to L. C. Heaton, notifying him that ninety days would be allowed him to substantiate his claims to survey 15882.

Exhibit D was a letter dated October 10, 1873, to L. C. Heaton, from Willis Drummond, Commissioner, to the effect that his application for patent for survey, 15882 was rejected.

Exhibit E was a letter dated October 29, 1873, from Willis Drummond, Commissioner, to L. C. Heaton, notifying him that the department would take no further action in regard to survey 15882.

Exhibit F was a copy of the resurvey of Thomas Keyes.

Exhibit G was a letter from Willis Drummond, Commissioner of the General Land Office, to David F. Heaton, dated October 26, 1871, recognizing the validity of survey 15882, and urging him to complete the evidence so that patent could issue.

In addition to the foregoing there was attached to the deposition of McCarty, as an exhibit and marked Exhibit G in the record, but wrongly so, a letter from S. S. Burdett, Commissioner of the General Land Office, to William J. Flagg, dated October 2, 1875, in which he recognizes the validity of the survey 15882 for 500 acres.

These exhibits were attached at the instance of Flagg, with the exception of the two last, which were attached at the instance of Coan.

The plaintiff objected to the introduction of this deposition and the exhibits thereto as incompetent, but his exception was overruled and the evidence admitted.

The vital question of the whole case is,

IS THE ENTRY AND SURVEY MADE IN THE NAME OF THE HEIRS OF THOMAS GORDON VALID?

If this question be determined by this court affirmatively, then the judgment of the district court must be reversed, for it decided the entry and survey wholly invalid.

After Congress had accepted the cession of these lands from Virginia, it passed various resolutions and acts concerning the same. The act of August 10, 1790, 2 vol. U. S. Laws, p. 179, provided for locations, entries, surveys, and patents on these lands.

The act of March 23, 1804, 3 U. S. Laws, p. 592, required locations to be completed within three years, and parties to return their surveys within five years.

Another act was passed March 2, 1807, 4 U. S. Laws, page 92. This extended the time for making locations to three years from March 23, 1807, and five years to return surveys.

In this act, on account of great litigation which had arisen between conflicting entries and surveys, what has since been known as the proviso of 1807 was incorporated.

This proviso reads as follows:

Provided, That no locations as aforesaid, within the above mentioned tract, shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had previously been 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 time for making locations and returning surveys has been extended by Congress from time to time, as follows:

March 16, 1810, 5 and 7 years, 4 U. S. Laws, p. 281.
November 3, 1814, 3 and 5 years, 4 U. S. Laws, p. 714.
February 22, 1815, 2 years, 4 U. S. Laws, p. 805.
April 11, 1818, 3 years, 1 sess. 15 Cong., p. 37.
February 9, 1821, 2 years, 2 sess. 16 Cong., p. 10.
March 1, 1823, 2 and 4 years, 2 sess. 17 Cong., p. 73.
May 20, 1826, 3 and 5 years, vol. 1 G. S., 189.
April 23, 1830, 2 years, vol. 4 G. S., 396.
March 31 1832, 7 years, vol. 4 G. S., 500.
July 7, 1838, 2 years, vol. 5 G. S., 262.
August 19, 1841, 3 years, vol 5 G. S., 449.
July 29, 1846, 2 years, vol. 9 G. S., p. 41.
July 5, 1848, 2 years, vol. 9 G. S., 245.
February 20, 1850, 2 years, vol. 9 G. S., 421.
May 27, 1880, 3 years, 2 sess. 46 Cong., p. 143.

Each of these statutes, except the last, which is only one of construction, substantially re-enacted the proviso of 1807 before referred to.

The legality of the warrant is not questioned, nor that of the entry. That the survey was made within the time prescribed by Congress and properly returned is not questioned. That the survey was made by a deputy surveyor, and in due form and manner, is not questioned. That a computation of the calls of the survey, as recorded, will not show a surplus of over five per cent., is also proven by the evidence of John B. Gregory (see page 67 of the Record), at the close of his examination in chief.

In fact, the only objection to the validity of the survey is an account of the alleged surplus therein. The Commissioner of the General Land Office, the common pleas and district courts of Scioto County, all decided this survey invalid and void on account of the surplus, in face of the laws of Virginia and of Congress, and the decisions of the highest courts of Virginia, Kentucky, and Ohio, and the Supreme Court of the United States. The act of Virginia of May, 1779, 10 vol. Henning's Statutes, p. 51, and before referred to on pages 2, 3, and 4 of this brief, provides that surplus should vitiate no grant or location, and provides how the surplus might be ascertained and disposed of, giving the owner of the survey the right to perfect his title thereto. This law of Virginia is a rule of property affecting this land as fully in force to-day as any statute of the State or of the United States affecting the same. When the United States took title to these lands from Virginia on March 1, 1784, it was only the naked legal title in trust for the officers and soldiers of Virginia upon Continental establishment. The right of these Virginia soldiers to have their bounties satisfied out of these lands could not be defeated by any clerk sitting in an office in Washington and writing letters in the name of the Commissioner of the General Land Office.

But Virginia alone has not legislated on this question of surplus. Congress has also legislated on the question of surplus, a fact which was overlooked by the Commissioner of the General Land Office and the courts below. In the act of May 20, 1826, 4 vol. U. S. Laws, p. 189, section 2 reads as follows:

> That no patent shall be issued, by virtue of the preceding sections, for a greater quantity of land than the rank or term of service of the officer or soldier to whom, or to whose heirs or assigns, such warrant has been granted, would have entitled him to under the aforesaid laws of Virginia; and whenever it appears to the Secretary of War that the survey made by virtue of any of the aforesaid warrants is for a greater quantity of land than the soldier is entitled to for his services, the Secretary of War shall certify on each survey the amount of such surplus quantity, and the officer or soldier, his heirs or assigns, shall have leave to withdraw his survey from the office of the Secretary of War and resurvey his location, excluding such surplus quantity, in one body, from any part of his resurvey, and a patent shall issue upon such resurvey, as in other cases.

These sections clearly establish that the validity of a survey is not the affected on account of surplusage, and only give the Commissioner of General Land Office the right to refuse to issue a patent until a resurvey, including only the correct quantity authorized by the warrant, is made.

Under the proviso of 1807, a survey once made, no matter how informal, appropriated the land located and withdrew it from subsequent location.

So far as the defendant in error, Flagg, is concerned, since the cession of February 18, 1871, he cannot be regarded in any better light than a subsequent locator. We refer the court to the following cases in which the proviso of 1807 has been construed:

McArthur's heirs *vs.* Dunn's heirs, 7 Howard, 262.
Jackson *vs.* Clark & Ellison, 1 Peters, 628.
Galloway *vs.* Finley, 12 Peters, 264.
Parker *vs.* Wallace, 3 Ohio, 490.
Stubblefield *vs.* Baggs, 2 Ohio State, 217.
Thomas *vs.* White, 2 Ohio State, 540.
Price *vs.* Johnston, 1 O. S., 394. In this case, in quoting Justice McLean's opinion in Lindsay *vs.* Miller, 6 Peters, 666, there is an error in the printer on page 394, which makes Justice McLean say the contrary to what he actually decided. The quotation reads in Price *vs.* Johnston,

"There can be no doubt that Congress did [not] intend to protect surveys which had been irregularly made, &c." The word *not*, in brackets, is not in Justice McLean's opinion.

McArthur's heirs *vs.* Gallaher, 8 O., 515.

Now as to the decisions of the Commissioner of the General Land Office, by which Flagg seeks to destroy the title of Coan.

The Commissioner, in his report for the year 1876, on pages 56, 57, and 58, speaking of unpatented lands in the Virginia Military District, of surplus therein, and of the claims of the Ohio Agricultural and Mechanical College thereto, says:

VIRGINIA MILITARY DISTRICT, OHIO.

This district, lying between the Little Miami and Scioto Rivers, northwest of the river Ohio, and estimated to contain some four million acres, was reserved by Virginia from the cession of 1783–'84 to the United States of what is known as the Northwestern Territory, for the purpose of satisfying the warrants issued or to be issued to the officers and soldiers of the Continental Line of said State, for services rendered during the war of the Revolution.

Three patents for 259⅜ acres of land in said district have been issued, and the number of claims therefor is 61, calling for 13,441⅜ acres, all which have been and continue suspended on account either of caveats filed against the satisfaction thereof, defects in the chain of title or heirship, or for the reason that the surveys contain a large excess of land over and above the quantity called for by the warrants in virtue of which the same purport to have been made.

On the 18th of February, 1871, Congress, by an act entitled "An act to cede to the State of Ohio the unsold lands in the Virginia Military District in said State," made provision that the lands remaining unsurveyed and unsold in said district be, and they are declared by said act to be thereby, ceded to the State of Ohio, upon certain specified conditions. These lands were soon thereafter ceded to the Ohio Agricultural and Mechanical College by act of the legislature of said State, official evidence of which is on file in this office.

It is estimated from such data as are attainable that between twenty thousand and thirty thousand acres of land in said district, apportioned among several hundred surveys, are still outstanding and unsatisfied, never having been returned to this office to be carried into patent; and efforts are now being made by parties acting as attorneys for claimants to have the same filed and patented.

The college above named contends that these unpatented surveys for the most part call for a large excess in the area of land actually included therein beyond the amount specified in the warrants upon which the same were made, and have produced satisfactory evidence in several cases showing by resurveys made upon the ground by competent civil engineers, and verified by their respective oaths, that such excess of land often amounts to from 50 to 500 per cent. over and above the area called for by the warrants in virtue of which such surveys purport to have been made.

It is further insisted by said college that all surveys should have been legally made, that is, for the precise amount called for by the warrants applied thereto; that by law no patent can be legally issued, where the fact is known, for any greater amount of land than is set forth in the warrant, and that therefore all such excess is really "unsurveyed" land, and, as such, the property of the college within the true intent and meaning of the said cession by Congress to the State of Ohio and that of the said State to the said institution, as above mentioned.

On the other hand it is claimed by the owners of such surveys that the act of issuing patents thereon is purely a ministerial duty; that the Commissioner of the Land Office must act from the face of the papers presented, and can exercise no judgment upon the subject, except as regards matters of form, and that patents are justly due for the lands called for by the surveys to the persons apparently entitled thereto.

The questions involved arose while Hon. Willis Drummond was Commissioner, who, upon full and careful examination of the subject-matter, decided that, while in the issue of the patents in question this office merely acted ministerially, and upon the face of the papers pronounced, and had no power or authority to determine the question of title to any excess of land in the said survey, yet it was the manifest duty thereof, upon general principles of right and justice, to withhold the issue of patents until the matters in controversy were settled either by a legislative interpretation of the said cession of 1871, or by proper and competent judicial decision. He accordingly declined to issue patents in the cases of surveys involving any considerable excess, first giving the parties in interest full opportunity to be heard before the office,

and after such declension was made, the usual sixty days in which to take an appeal to the department. No appeal was ever made.

My immediate predecessor, Hon. S. S. Burdett, concurred in these views, and I see no good or sufficient reasons to change the actions had in the matter.

If it shall be decided in either of the methods above indicated that the excess in any unpatented survey is legally the property of the said college, I would then recommend, in all cases where the fact of such excess is established to the satisfaction of this office, that authority be given by law to the surveyor of the said military district to make, at the expense of the parties in interest, a resurvey of the lands claimed, excluding the excess in one body from any such part of the original survey as may be denied by the present proprietors thereof; and that a patent shall issue upon such resurvey as in other cases. This will leave the residue of said lands as the property of the institution in question.

If, however, it is determined that the surveys made are to be held as legal and valid so far as the locators thereof are concerned, and that the cession of 1871 had no reference to lands which were included in any survey, and that the patents must follow the same so far as the description of land is concerned, then the difficulty in the case will be removed, and all other requirements being satisfactorily answered, said surveys can be duly carried into patent.

It is proper to add in this connection that the surveyor of said district had by law no power or authority to make any surveys therein after March 3, 1857.

I am duly advised that the colle e in question designs to make resurveys of all the unpatented lands embraced in outstanding surveys, and expects to complete and file the evidence thereof by the 1st of January next.

This will serve to show that the Commissioner regarded himself only as a ministerial officer, and not a judicial one. That he is to be considered only a ministerial officer and without any judicial functions, has been repeatedly decided by the courts.

How Congress regards these entries and surveys may be seen by the act of May 27, 1880.

As to the construction of the grant of February 18, 1871, by Congress to the State of Ohio, that remains for the courts; and the court of common pleas and district court of Scioto County, instead of depending on the *ex parte* statements contained in the letters of the Commissioner of the General Land Office, and deciding the case on the authority of these statements alone, as they did, ought to have decided it on the merits of the entry and survey and the evidence of the ownership thereof. Had these courts sought to have determined the validity of the entry and survey on their own merits, instead of on the declarations of the Commissioner of the General Land Office, they could have found mines of judicial learning to have guided them to a correct decision. Had they followed the grand beacons of judicial authority scattered all along the course of years from 1807 down to the present time, instead of the farthing rush light of Daniel McCarty, we would have had no cause of complaint in this court to-day.

Having referred to the act of February 18, 1871, ceding these lands to the State of Ohio, it should be quoted at this point:

THE ACT OF FEBRUARY 18, 1871.

AN ACT to cede to the State of Ohio the unsold lands in the Virginia military district.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That the lands remaining unsurveyed and unsold in the Virginia military district, in the State of Ohio, be, and the same are hereby, ceded to the State of Ohio, upon the conditions following, to wit: Any person who, at the time of the passage of this act, is a *bona fide* settler on any portion of said land, may hold not exceeding one hundred and sixty acres so by him occupied, by his pre-empting the same in such manner as the legislature of the State of Ohio may direct.

Approved February 18, 1871.

The word "unsold," as used in this act, was utterly inappropriate. Not a foot of ground in this district was ever sold in the first instance, but it was all given away in military bounties. Had the term "unap-

propriated" been used it would have been strictly correct. Doubtless the framer of the bill had in his mind other land districts in which Congress sold its lands. We think the court in passing upon this statute must necessarily construe the word "unsold" as though it read "unappropriated." Let it be given such construction, and under the construction given by the courts to the proviso of the act of March 2, 1807, all surveyed land, regardless as to the validity of the entry or survey, has been withdrawn from subsequent location, and as to all after claimants becomes the same as surveyed and sold land, and is not within the terms of the act of cession of February 18, 1871.

In construing the words "unsurveyed" and "unsold," the court will take into consideration the intention of Congress, the effect the act will have upon titles, and the object of the grant. Did it intend to convey to the State the surplus included in unpatented surveys, as well as the unsurveyed and unsold lands?"

The reasons stated for the passage of the act, as shown by the remarks made in the House and Senate upon the presentation of the bill, gathered from the Congressional Globe, were that the warrants for services in the Virginia Line upon Continental establishment had all been located and satisfied; that the tracts remaining unappropriated were composed of wild and barren hill lands, unfit for cultivation, and valuable only for the timber remaining thereon, and which was being rapidly destroyed by trespassers. The United States was unwilling to undertake to protect the value yet remaining in the unappropriated lands, and in order that they might be valuable to some one they were given to the State. The bill was presented in the House by the Hon. John T. Wilson, of the eleventh district, and its passage advocated by him and the Hon. Philadelph Van Trump, of the twelfth district. In the Senate the bill was presented and advocated by the Hon. Allen G. Thurman.

Can it be supposed that in the passage of the act Congress intended that the State, or its assigns, should have the right to file caveats against patents for all unpatented surveys containing surplus; that the Commissioner of the General Land Office, an appendage to the office of the Secretary of the Interior, should have the right and authority to decide all such surveys invalid, and by his own ministerial act change the title of this land to the college, subject only to the rights of squatters to pre-empt 160 acres? This is what the common pleas and district court of Scioto County decided.

There is a maxim that "the law favors quiet and repose;" but the two lower courts evidently overlooked it in rendering their decision, and considered that the title to every unpatented survey containing surplus should be held at the will of the Agricultural College and the Commissioner of the General Land Office.

There are over 270 unpatented surveys in the Virginia military district, nearly all of which contain surplus, and the greater part of which contain valuable farms. To say that Congress intended that the college should have the power to take up all the surplus in these surveys, seems absurd. It would have the effect to unsettle titles which have never been questioned in any court.

Consider the fact that by the passage of this act, Congress only intended to get rid of lands not required for the purposes of the trust for which it held them; to place them where they might become productive and tax-paying; that neither the State of Ohio or its college ever paid any consideration for the lands and had no equitable rights whatever in them; that the owners of these surveys had paid valuable considerations therefor either in services, blood, or money; and can it then

be said Congress intended to give the State, or its assignee, a right which the United States never claimed, and which it expressly protected in the acts of 1826 and 1838, and which would, if carried to its legitimate result, unsettle many titles?

It was claimed in the court below that the survey was void because it operated as a fraud upon the United States. In the court of common pleas plaintiff in error alleged in his answer that defendant in error, in procuring the title from the college, had practiced stupendous frauds upon the latter, and was ready with evidence and anxious to substantiate it; but the court said to him, it is none of your concern as to a fraud practiced by Flagg upon the college; you are not the party to complain; and sustained a demurrer to the fifth answer.

But here no fraud was practiced on the United States. It was advised of the surplus, and the Commissioner of Patents refused a patent until the matter of the surplus was disposed of. Had the Commissioner disposed of this surplus under the acts of May 20, 1836, July 7, 1838, or the Virginia act of May, 1779, sect. 4, there would have been no difficulty.

The surplus is not a fraud upon the college, for Congress reserved the surveyed and sold lands, and he has paid no consideration for the grant, valuable or otherwise, while the owner of this survey has.

The theory of the defendant in error was that the Commissioner of the General Land Office having refused to issue a patent, that was tantamount to a decision that the survey was fraudulent, and therefore the survey being invalid the land passed to the college. The district court adopted this theory and decided the case upon it. In so doing it utterly ignored the uniform decisions of the courts of the highest resort in Virginia, Kentucky, and Ohio, and the Supreme Court of the United States, construing the proviso of 1807. It overlooked the fact that the Commissioner of the General Land Office is a mere ministerial officer and clothed with no judicial functions. It further overlooked the fact that he stated in his letters that the survey was perfectly good for the number of acres named in the warrant, and it was only on account of the surplus that patent was refused. It further overlooked the fact that instead of following the *dicta* of the Commissioner as a guide, it ought to have decided the question for itself, independent of his action. Ever since the settlement of this country and the establishment of courts, it has been considered their function to determine between different entries and surveys, and the Commissioner of the General Land Office has been guided by these decisions uniformly. If the owner of an unpatented survey could get the smallest 6 by 8 court in the United States to decide in his favor against a conflicting survey, all he had to do was to send an exemplified copy of the decree to the Commissioner of the General Land Office and the Commissioner would issue a patent in accordance with the decree. In this case the Commissioner refused patent, leaving it to the parties to have their claims determined by the proper court, of Scioto County. That court, instead of determining the question by the flood of judicial light it might have had, simply followed the action of the Commissioner of the General Land Office, supposing it to be conclusive.

Another matter that may be looked at in the construction of the act of February 18, 1871, is this: is it to be presumed that Congress intended to place the owners of unpatented surveys having surplus at the mercy of the Land Office Commissioner, prompted by the greedy agents of the college, when that body undertook to protect the illegal interests of squatters and trespassers who had no shadow of title or equities in the

premises, no claim upon the government, and who were violating the laws? Yet as against the State of Ohio and its grantee, the college, is reserved the right of a *bona fide* settler at the passage of the act to pre-empt 160 acres in such manner as the State might prescribe. Does it not seem reasonable that if Congress were so tender of the *rights* (?) of squatters, who had no claim on it, that it intended to give the Commissioner of the General Land Office and the college, power to wrest from the owners of unpatented surveys containing a surplus, the lands for which they held equitable titles, for which they and their grantors had paid a valuable consideration, and place them in a worse condition than the squatters who had no rights, and still were allowed to pre-empt 160 acres?

A SURPLUS DOES NOT VITIATE A SURVEY.

The Supreme Court of the United States thoroughly considered and directly passed on the question in the case of Taylor *vs.* Brown, 5 Cranch, 249, 250, 251, and 253, and there following the doctrine and rules in Beckley *vs.* Bryan and Ransdale, Sneed's Kentucky Cases, 197, and Johnson *vs.* Buffington, 2 Washington, 116, held that surplusage did not vitiate or render a survey invalid. This case was decided at the February term, 1809. It is valuable as showing that at that time the old Virginia law of May, 1779, heretofore cited, respecting surplus, was held to be in force, and that its provisions governed cases of this character. This question arose before the court at a time when the attention of the public had been fully directed to this question of surplus, and the court says:

> No case exists, so far as the court is informed, in which, on a *caveat*, the quantity of land in the survey of the plaintiff or defendant has been considered as affecting the title, upon the single principle of surplus. Yet the fact must have often occurred.

The court goes on to show that these were the decisions of the courts of Kentucky and of Virginia both subsequent and prior to the Revolution, and cites precedents and cases. Those precedents have since been repeatedly followed by the same court, those of Kentucky and this State.

In Holmes *vs.* Trout, 7 Peters, page 208, a case going from Kentucky, the court says:

> It has long been a settled principle in Kentucky, that surplus land in a survey does not vitiate it; and such a survey was held to be made conformable to entry.

Laum *vs.* Latham, Wright's Reply, 309, decides that surplus in a survey is not subject to appropriation by a subsequent locator.

Gill *vs.* Towler, 3 Ohio, 209, was decided in 1827. There the court says:

> The error of a surveyor in placing his corners at a greater distance from each other than he intended, or in placing them somewhat out of the course he is calling for, so as to make an entry, by a survey of the ground, include too much land, has never been considered as affecting the location; if it did, by far the largest number of entries in the district would be void.
>
> * * * * * * *
>
> The defendant does not pretend that those surveys are injured by their surplus. But why not? It is because it appears of record that the owners preferred to take the quantity they were respectively entitled to, and no more; and because we are bound to attribute the variance, or excess, to the ordinary inaccuracy of measuring through a forest.

In this connection we desire to call the attention of the court to the fact that there was no authority of law for the resurvey of Thomas Keyes

ascertaining surplus; that it was made without any notice to the owners of the survey at the time made.

Moreover, in Gill *vs.* Towler (2 O., 210), the court says that—

> The legality of the entry must be determined by the courses and distances as found on record, and not by the remeasurement of the ground.
>
> * * * * * * *
>
> We do not distinguish between a call for course and distance, ascertained by the locator who makes the call, and a call for the recorded course and distance of an existing survey as ascertained by a former locator. In either case, the validity of the location, as far as quantity affects it, must be ascertained by the calls, and not by remeasurement.

The obvious justice of this rule will be apparent in this case, for the reason that the lines and corners of this survey 15,882 were, except upon the north, lines and corners of older surveys. (See testimony of Captain Barton, p. 42 of Record.)

The plaintiff in error objected to the testimony of Joseph M. Smith, a surveyor, in testifying that he made a remeasurement of the survey and found a surplus of 1,302 acres (Record, page 38), but the district court, disregarding the authority of Gill *vs.* Towler, 2 O., 210, before recited, overruled the objection and admitted the evidence.

In making this survey the deputy surveyor of the United States for the district was governed by the corners, courses, and distances of surrounding surveys. If these were erroneous, is our survey for that reason invalid? If so, then this question might be investigated from one adjoining survey to another, until the surplus of every survey in the district, patented or otherwise, should be ascertained.

The most that the authorities representing the college have ever claimed is that under the cession of February 18, 1871, it is entitled to the surplus in existing unpatented surveys; but in this case the district court, utterly disregarding the rights of the owner of the survey, has given the whole of it to the college's grantee on account of surplus. On the contrary, the Commissioner of the General Land Office, in his alleged *decisions*, has uniformly recognized the validity of the survey to the extent of the 500 acres covered by the warrant. See his statement in Exhibit A to Daniel McCarty's deposition, Record, p. 83. See also his letter of date October 2, 1875, to William J. Flagg, on page 93 of the Record, in which he states that the survey was irregular only beyond 500 acres, the amount called for in the warrant, thus clearly admitting its regularity for 500 acres, the number called for in the location.

In the same letter he promises to notify Flagg of further application for patent, evidently considering that the owner of the survey had a right to apply for patent for the number of acres he could properly locate.

We claim that under the construction given by the courts to the proviso of 1807 all lands in the district covered by irregular and defective surveys were as much withdrawn from subsequent location as if covered by regular and valid surveys duly carried into patent. That the term "unsurveyed and unsold lands," as used in the act of February 18, 1871, in view of the construction given by the courts to the proviso of 1807, must exclude any and all surveys and appropriations under Virginia military warrants, and that to give the State of Ohio or its assigns any right or title in the irregular surveys would require a subsequent act of Congress expressly conveying title to this class of surveys, or to the surplus therein, and there being no such subsequent grant, defendant in error has not, never had, and cannot have any title to the lands conveyed by this survey. If this position is correct, there is an end of the case, and the judgment of the district court must be reversed.

But for the sake of the argument, let us for a moment admit that the act of February 18, 1871, must be construed so as to give the surplus in unpatented surveys to the college, what, then, should the district court have done? It should either have permitted the owner of the survey to have resurveyed his location under the old statute of Virginia of May, 1779, prior to the cession to the United States, and gotten his quantity, excluding the surplus. Or it should have held his location valid for the number of acres in his warrant, and allowed him time to have made a resurvey, gotten his exact quantity, and excluded the surplus under the acts of May 20, 1826, vol. 4 U. S. Laws, p. 188, or under the act of July 7, 1838, vol. 5, 9 U. S., page 262.

It failed to do this, and for this reason, if none other, the judgment of the district court should be reversed.

ASSIGNMENTS OF THE WARRANT AND SURVEY.

It may, however, be argued against the plaintiff in error that though his survey was valid as to the 400 acres, yet he did not fully substantiate his title to it in that he did not fully indemnify Margaret B. Francis and Sarah Ann Dawson, as Margaret B. and Sarah Ann Gordon, original warrantees, and that the assignments by the warrantees are informal, and no assignment of the one-third interest of Sarah Ann Dawson to David Heaton appear.

No particular form of assignment is necessary. No written assignment is required. Lapse of time, coupled with payment and possession, is sufficient. After lapse of time and long possession an assignment will be presumed. (McArthur's heirs *vs.* Gallaher, 8 O., 512; Bouldin and wife *vs.* Massie heirs, 7 Wheaton, 122; Lewis *vs.* Baird, 111 McLean, 56; Duke *vs.* Thompson, 16 O., 34.)

But in this case the Commissioner did not refuse the patent on account of any irregularities or defects in the assignments of the warrant, but only on account of surplus in the survey.

THE DECISION OF THE COMMISSIONER OF THE GENERAL LAND OFFICE FURTHER CONSIDERED.

If the theory of the defendant in error be correct that this land passed to the State of Ohio by the cession of February 18, 1871, then the decision of the Commissioner of the General Land Office was void, as the United States had no interest in the land to be the subject-matter of a decision by the Commissioner.

The only remaining proposition to which the defendant in error is driven is that the title to the land was in the United States at the time of the decision of the Commissioner, and that by his decision he changed the title from the United States to the State of Ohio. This proposition is absurd upon its face, as the Commissioner possessed no power or functions which, by his own act, would enable him to transfer title. Either the title passed under the cession of February 18, 1871, or it is still in the United States, in trust for the owner of the survey.

In view of the Virginia act of May, 1779, the proviso of 1807 and the decisions of the courts thereunder, forming rules of property and muniments of title, the acts of May 20, 1826, and of July 7, 1838, we think this cannot successfully be maintained.

If, for the sake of the argument, it be admitted that the cession of February, 1871, conveyed this land to the State of Ohio, and with the decision of the Commissioner was equivalent to a patent, which we think

the court cannot find in any event, yet the equities of the owner of the survey can be asserted and protected.

Marquez *vs.* Frisbie, 11 Otto, 473.
Johnson *vs.* Towsley, 13 Wallace, 73.
Bird *vs.* Ward, 1 Missouri, 398.
Shepley *vs.* Cowan, 91 U. S., 330.
Danforth *vs.* Monical, 84 Ill., 456.

These cases are to the effect that notwithstanding the proper officers of the United States have acted, and patents to lands have issued, yet the equity of any third party may be protected and the holder of the land title by patent may be decreed to hold in trust for one having equities prior to the issuing of the patent. While we do not think there is any call for the administration of this principle in this case, yet out of extreme caution we have referred to the doctrine. The case last above referred to goes to the extent that the decisions of the register and receiver of the United States Land Office are not conclusive on the rights of individuals.

Upon this subject we also refer to the statutes of the United States, sections 2,447 to 2,455, Revised Statutes. Section 2,450 provides in what manner the Commissioner of the General Land Office shall decide upon unpatented entries and adjudge in what cases he shall issue patents. Section 2,451 provides that every such adjudication shall be approved by the Secretary of the Interior and Attorney General, acting as a board, and shall operate only to divest the United States of the title of the lands embraced thereby, without prejudice to the rights of conflicting claimants.

The latter clause was inserted in the statutes to conform to the decisions of the Supreme Court and courts of the last resort in the several States, of the tenor before referred to. (Brush *vs.* Ware, 15 Peters, 107.)

So in case the defendant in error relies upon the decision of the Commissioner as equivalent to a grant by the United States to him, in what better condition is he against the prior equity of the owner of the survey than he was before?

It may be claimed that the owner of the survey is not prejudiced by the action of the Commissioner and the lower courts; that he could surrender his entry, procure land scrip of the United States and locate land elsewhere. (Act of 31st of August, 1852, 10 Statutes, p. 143.)

This statute does not apply, for the reason that at the passage of that act the warrant in this case was not an "unsatisfied outstanding warrant," for which relief was provided in the statute, but had been satisfied by being located.

Should the owner of the survey undertake to procure the scrip referred to in this act he would be met by this objection by the Commissioner of the General Land Office. This act has a proviso to the effect that it should be taken as a full and final adjustment of all bounty land claims to the officers and soldiers, seamen and marines, of the State of Virginia, for services in the war of the Revolution, on condition that the State of Virginia should, by proper act of the legislature thereof, relinquish all claims to the lands in the Virginia Military Land District of the State of Ohio. This clearly shows that Congress, at that time, still recognized the trust in favor of the Virginia officers and soldiers.

There is another answer to this question still more forcible.

Section 3 of the act of May 20, 1836 (4 Statutes U. S., p. 189), provides "that no holder of any warrant which has been or may be located, shall be permitted to withdraw or remove the same and locate it in any

other land, except in cases of eviction, in consequence of a legal judgment first obtained, from the whole or part of the located land, or unless it be found to interfere with a location or survey."

Hence the locator is bound to hold to his location.

A sufficient answer to this objection, however, is that the locator is not bound to give up his location, and his assignee does not desire to do so.

THE SUSTAINING OF THE DEMURRER TO THE SIXTH DEFENSE.

Being in possession and claiming title to the land, it seems to us that Coan should have been permitted to show that Flagg's college deed was void, in order to remove a cloud from his, Coan's, title. Or even if the college had title, under the sixth defense Coan should have been permitted to show that for want of compliance with the act of the legislature of Ohio of April 3, 1873, respecting sales of college lands, the deed was void and conveyed no title.

Without the legal title Flagg could not have maintained a bill of peace, and his action must have failed whether he lacked that title on account of the college never having had any under the act of February 18, 1871, or having the title, failed to convey the same by want of compliance with the sections 4 and 5 of the act of April 3, 1873. (Thomas *vs.* White, 2 O. S., 540.)

THE DISPUTED SOUTHERN BOUNDARY.

A reference to the plat bound in with the record between pages 66 and 67 will show the difference between the parties as to boundary. The black line running from the three black oaks, northwest corner of survey 14,304, to the hickory and hornbeam, northeast corner of survey 15,771, is the one claimed by Coan. The red line running directly west from the three black oaks to the west side of the survey is the one claimed by Flagg. The call for this line in the deed of David F. Heaton and wife to Nicholas Longworth is "from the northwesterly corner of McCall's survey 14,304, west 330 poles to a hickory and hornbeam on side of a hill, most easterly corner to William McCall's survey 15,771." (Record, page 27.)

The call in the deed of Leonidas C. Heaton to David M. Elliott for this line is "from three black oaks on top of ridge northwest corner to survey 14,304, south 73 degrees 25 minutes west 316 poles, crossing several branches and ridges to a stone on the west bank of ravine, 10 poles north of a branch of Dog Hollow, in place of hickory and hornbeam east corner of survey 15,771."

The evidence shows that the true course of the line is as given in Leonidas C. Heaton's deed to David M. Elliott. The point of the controversy is that valuable stone quarries lie between the disputed lines. The Coan line, from the three black oaks to the hickory and hornbeam, is from monument to monument; that from the three black oaks 330 poles west is according to course alone, and finds no monument at its western limit.

The law in case of a conflict of this character is too plain to admit of an argument. Course and distance must yield to natural and artificial monuments.

Hence, if the court find the title of the northern portion of the survey to be in Coan, it must find the southern line as claimed by him. (Nash *vs.* Atherton, 10 Ohio, 167; Calhoun *vs.* Price, 17 Ohio State, 100.)

April 6, 1881.

MOORE & NEWMAN and W. A. HUTCHINS for defendant in error:

The objection to the relief sought by the defendant in error, relied upon mainly, if not entirely, is, that he did not have the legal title to the land in controversy. As the case was finally submitted, the entire scope of this objection was the alleged want of title in the Ohio Agricultural and Mechanical College, by which the lands were conveyed to Flagg, and upon which he mainly relied as the source of his title. Coming directly to the point, the contention of the plaintiff in error was that the premises in controversy are not embraced in the act of cession by Congress to the State of Ohio.

We do not understand that any question is made, or can be, as to the right of the United States to grant to the State of Ohio any of the lands in the Virginia military district remaining undisposed of, or not appropriated before that time in the manner provided by law.

From 1784, when the cession was made by Virginia to the United States, of the lands (among others) situated in what has since been known as the Virginia military district, the time was extended by acts of Congress from time to time until August 31st, 1852, within which the Virginia troops, upon continental establishment, could obtain warrants for their bounties and satisfy the same by the location and appropriation of lands in the district referred to. Under these provisions most of the persons entitled to bounties obtained their warrants and had the same satisfied out of the lands so set apart; and in 1855, by act of Congress, the holders of entries made before January 1st, 1852, were allowed until March 3d, 1857, to make and return their surveys and warrants. (See U. S. Statutes at Large, vol. 10, p. 701.)

August 31st, 1852, Congress provided, by act, that warrants issued or allowed before March 1st, 1852, were allowed to be surrendered for land scrip, *and the act was required to be taken as a full and final adjustment of all bounty land claims on the Virginia military district.* (See U. S. Statutes at Large, vol. 10, p. 143.)

In Jackson *vs.* Clark (1 Peters, 628), the U. S. Supreme Court recognized the validity of the limitation acts referred to.

And in Taylor's Lessee *vs.* Myers (7 Wheaton, 23), the court held that an individual could *abandon* his survey by not returning it to the land office within the time specified by law, &c.

There being, however, no claim that after giving to the persons entitled to bounties a reasonable time, as was done, within which to obtain their warrants and have them satisfied with lands, and after providing also for the satisfaction by land scrip of the warrants not already satisfied, it was not within the power of Congress to cede to Ohio the residue of the lands; and this having been done, the real question is, are the premises in controversy embraced in the terms of the act of cession?

I.

We agree with counsel for the plaintiff in error, that the language used in the act may not be very well chosen, or appropriate, to designate clearly the lands ceded to the State. Both of the terms used as descriptive, in view of the true situation of the lands, is, to say the least, somewhat indefinite. The term "unsold lands" would seem to imply that some had been sold, and yet, strictly speaking, none of the lands embraced in the Virginia military district, up to that time, had been "sold." The term was used, we suppose, to exclude from the grant all of the lands the legal title to which, under the provisions of the law, had

passed out of the government, and had become vested in another, as by patent issued. The courts had held that while provision was made for the appropriation of the lands by entry, survey and patent, and that this was the usual way for disposing of lands, still, if there had been no entry or survey, or if the entry and survey, or either of them, were defective, or were void, but the government had issued its patent granting the land, the title would pass, and the land could be treated in the broad sense as "sold" land. (Hoofnagle *vs.* Anderson, 7 Wheaton, 27; Stubblefield *vs.* Boggs, 2 O. St., 206. Thomas *vs.* White et al., 2 O St., 540.)

The term "sold," as contra-distinguished from "unsold lands," covered by the cession to the State, we submit, had reference to and embraced the lands for which the government had issued its patent, and thereby parted entirely with its title.

In 1871, when the act of cession was passed, most of the lands in the military district, at least the valuable portion of the same, had been fully appropriated to satisfy the warrants allowed for bounties, and patents had been issued by the government therefor; so that nothing remained in it in respect thereto that could be the subject of grant. And of course that class of lands would necessarily be excluded by the terms of the cession.

At the same time there was another class of lands in the district, the legal title to which still remained in the government; but with a view to their application to the satisfaction of warrants granted for bounties, everything had been done that would entitle the holders of the warrants to their patents, and nothing was left but to issue the same therefor; still, even in the broad sense, they could not be treated as "sold lands." And while this class ought not to have been the subject of cession to the State, strictly, they were neither sold or unsold lands, and, therefore, their exemption in the act of cession under the description of "unsold lands," was indefinite, and might lead to confusion. Hence, we suppose, the other term in the act, "unsurveyed lands," was used so as to embrace, in connection with the class first named, "unsold lands," all of the lands in the district intended to be ceded to the State.

The law authorizing the holders of warrants to locate the same ceased to operate January 1st, 1852, and since that time there has been no law which would authorize an "entry," and the most that could be done, if an entry had been made prior thereto, was to make and return their surveys. And on March 3d, 1857, even this right was terminated.

Prior to January, 1852, the district was open to locations and entries to satisfy military warrants, and by acts of Congress well-known rules were prescribed to regulate the conduct of the holders of warrants in making their entries and surveys, so as to avoid conflict or interference in respect thereto. The most notable of these was the *proviso* attached to the act of Congress passed March 2d, 1807, and continued in force as long as there was any law authorizing entries to be made. The proviso itself was suggested, doubtless, by the constant conflict that was occurring between the holders of warrants in locating the same, and in making their entries and surveys. It was to operate upon them, and was to obviate, so far as possible, the conflict so constantly occurring in respect to the entries and surveys then being made.

In the language of Chief Justice Marshall, in Jackson *vs.* Clark *et al.* (1 Peters, 638), "it was most truly an enactment of repose." It was intended as a prohibition upon subsequent locators from any interference, or even inquiry in respect to lands already entered and surveyed. As to the subsequent locator, the land was withheld from location. In

regulating the satisfaction of warrants by the appropriation of lands set apart for that purpose, Congress had power "to withhold from location any portion of the military land;" and having by the proviso referred to witheld from location all lands previously *patented* or *surveyed*, it would follow, necessarily, than any attempt to enter lands so expressly withheld from location would be null and void.

It is enough to know that such subsequent locations by the holders of warrants were a nullity, because Congress had so declared, and it had the power so to declare. (Stubblefield *vs.* Boggs, 2 O. St., 219; Jackson *vs.* Clark *et al.*, 1 Peters, 638–9.)

It is apparent, therefore, that the proviso of 1807 was intended as a rule for the control of the holders of warrants in locating and appropriating lands in the Military District in satisfaction of the same, and nothing else. It is a part and parcel of the law authorizing such locations, and prescribing how and when it may be done. And its only purpose was to withdraw certain lands from location, and prohibit the holder of a warrant from subsequently entering or surveying the same. Its entire scope was to operate upon and restrain the parties holding warrants in locating the same. It in no way, by its terms, affects the title of the government to the land, or its right to dispose of it, as it may see proper, or the right of any one acquired under the government to the land in any other way than by an entry and survey in satisfaction of a military warrant.

The conclusion, therefore, is irresistible that when, as in 1852, the right to enter and appropriate lands to satisfy military warrants ceased, or, at all events, in March, 1857, when the right to make and return surveys of lands previously entered terminated, the proviso of March, 1807, so far as it could operate upon subsequent transactions, was at an end. It had served its purpose, and had become *functus officio*. In 1852 Congress provided for the satisfaction of all the military warrants not already satisfied by the appropriation of lands, with land script, and thereby withdrew the military lands from appropriation for that purpose, and assumed control of it for some other purpose. And in so doing, all the rules prescribed for its appropriation, while subject to entry, survey and patent, to satisfy military warrants, ceased to operate, and it was for Congress to prescribe the mode by which the remaining lands could be appropriated. Whatever conflict there was, or could be among those who had attempted to locate and appropriate the lands to satisfy military warrants, while there was a law authorizing it, would have to be controlled by the acts of Congress in existence when such attempt was made, including, we may concede, the proviso of March, 1807; but as to the government, or those claiming under it by virtue of some appropriation, other than by entry and survey to satisfy a military warrant, such acts of Congress would in no way control.

II.

We do not understand that it is claimed in behalf of the plaintiff in error that the *proviso* of March, 1807, is to be applied in a controversy between the government and the owner of the warrant who has made an entry and survey at a time when he was authorized by law to do so, as it has been, or should be, between two conflicting entries made by the holders of warrants at different periods. Should it be, however, it is only necessary to examine the cases in which the very stringent rulings have been made by the courts, so much relied upon by counsel for

Coan, to satisfy any one that both upon principle and authority the rule can have no such application.

The proviso itself, it must be remembered, is merely a rule prescribed to regulate and control *the holders of warrants in entering and appropriating lands to satisfy the same.* Its chief, if not only purpose, was repose and the prevention of conflicting claims, so likely to occur in the attempts of parties to appropriate the same piece of land. Its manifest effect was, and so intended to be, to withdraw from subsequent entry and survey, land previously surveyed and patented, and almost in every respect to prevent inquiry on the part of the subsequent locater as to the validity of the previous survey or patent. The subsequent entry and survey is declared null and void, because Congress saw proper, having the power to do so, to so declare; *second*, because land already surveyed and patented is no longer land *subject* to entry and survey, and *third*, because the subsequent entry and survey of land already surveyed or patented is expressly prohibited. (Jackson *vs.* Clark *et al.*, 1 Peters, 638; Price *vs.* Johnson, 1 O. St., 394; Stubblefield *vs.* Boggs *et al.*, 2 O. St., 218.)

Based upon the reasons of the rule given, the courts, in controversies between the parties claiming under surveys and patents covering the same land, but made at different periods, have gone to great extremes in sustaining the previous survey, and in holding the subsequent survey or patent null and void. The cases already referred to, the more recent case in Ohio of Saunders *et al. vs.* Niswanger *et al.* (11 O. St., 302), and the various cases referred to by the court in delivering the opinions in the cases mentioned, will illustrate how far the courts have gone to sustain the prior and exclude the subsequent survey.

But it will be seen that all through the series of decisions referred to the ruling is limited to the rights of the owners of the conflicting surveys, and the effect of the proviso of 1807 upon them; and great care is observed to maintain the distinction that there is in a controversy between such parties, and one between the government and an individual who asserts title under or against it. There may be a good reason for not permitting a party who has a conflicting claim to property to interpose as an objection some defect of title, or fraud, as between his adversary and the government under which he claims, while as between the government and the latter no such reason would exist. But whether there is a reason for it or not under the proviso of 1807, as interpreted by the courts, the holder of the subsequent entry and survey is hardly permitted to raise any objection to the validity of the prior survey. And when the reason given, to wit, that the land, *as to him*, when his survey is made is not subject to entry, and he is expressly prohibited from making it, is considered, it is clear that, by implication at least, the right is reserved to the government to make the objection referred to, if any such exists.

In Jackson *vs.* Clark *et al.* (1 Peters, 638), Chief Justice Marshall, referring to the distinction mentioned, says:

> It may be that the defendants (the owners of the senior survey) may never be able to perfect their title. The land may be yet subject to the disposition of Congress. It is enough for the present case to say, that as we understand the act of Congress, it was not liable to location when the plaintiff's entry was made.

The same doctrine is held in Price *vs.* Johnston (1 O. St., 394), and the language of C. J. Marshall is quoted and approved. (See also Stubblefield *et al. vs.* Boggs *et al.*, 2 O. St., 218; Thomas *vs.* White *et al.*, 2 O. St., 540.)

III.

It is apparent that in 1871, when the act of cession to the State of Ohio was passed, the purpose of the United States was, by that act, to dispose of and transfer to the State all of the lands in the district not before that time actually appropriated, as provided by law, to satisfy military warrants.

As long ago as 1852 the authority for entering these lands ceased to operate, and after 1857 there was no law by which entries made prior to 1852 could be surveyed and patented. In 1852 provision was made for satisfying with land scrip the unsatisfied warrants, and in 1857 the land office was closed. From that time until 1871 there was no provision of law by which a single acre of these lands could be obtained from the government. They had been withdrawn from location to satisfy military bounties, and there was no law authorizing their sale. They were wholly useless to the United States, and there was every reason why some definite disposition should be made of them, so that the government should be relieved of all burden in respect to every parcel in the district remaining under its control. And this, we submit, is just what was done by the act of cession. There was no reason why any portion of the land which really remained under the control, or was undisposed of by the government, should be excepted from the grant. And none was excepted. The grant is sweeping in its terms, and embraced every acre not already appropriated as against the government under the provisions of the law authorizing such appropriation. Whatever title or estate remained in the United States was granted to the State. The only limitation therefore there is upon the title so acquired by the State is the limitation that was upon the title of the United States at the time of the act of cession.

IV.

As against the government, was the land in controversy *appropriated* by the survey made in the name of the Gordon heirs?

We have seen that the proviso of 1807 was simply a rule to regulate the conduct of the holders of warrants in making their entries and surveys under the same, and had no application to the government in determining its rights in respect to the land sought to be appropriated; that its effect was merely to *withdraw* from subsequent entry and survey by the holder of a warrant lands already surveyed or patented, and to *prohibit* such holder from making a subsequent entry and survey thereon. But as to the government, the question remained open as to whether or not the *previous* survey appropriated the land. We have seen, also, that the manifest purpose of the act of cession was to transfer to the State of Ohio all the land remaining in the district not already appropriated, either by patent granted, or by a survey, *valid and legal*, not only as to subsequent locators under military warrants, but as to the government itself. And the important inquiry in the case is, was the land in question *appropriated* by a survey subsisting at the time of the act of cession *valid and legal as against the government?*

There is no controversy in this case between conflicting surveys based upon military warrants, and therefore nothing to be affected by the proviso of 1807.

It is a question simple and pure between the United States and the holders of the survey under whom defendant below claims. If it was a legal, valid, subsisting survey, such as would appropriate the land as against the government at the time the act of cession was passed, no

title would pass to the State, and none would pass o the college, or from it to plaintiff below. On the contrary, if the survey was not at that time a legal, valid, subsisting one, such as would *against the government* appropriate the land, whatever its effect would have been under the operation of the proviso of 1807 in a controversy between locators, the land was subject to grant by the United States, and the title would pass under the act of cession.

It will be remembered that long prior to the act of cession, to wit, as early as March 3d, 1857, all laws providing for the completion and return of surveys in the district ceased to operate, and there was no provision of law in force that would authorize any act on the part of the owner of a survey, or any government official, in the way of correcting a survey, or in curing defects, or in relinquishing a portion of the land covered thereby, so as to render the same legal and valid to the extent of appropriating the land, when otherwise it would not be appropriated.

On pages 2, 3, and 4 of the brief of the plaintiff in error reference is made to certain acts of the Virginia legislature on the subject of the satisfaction of bounty warrants by the appropriation of certain lands set apart for that purpose, in which it is provided that no outside party should be permitted to claim any surplus contained in a survey, except during the lifetime of the patentee, or original grantee, &c.; and providing, also, that a surplus of five per cent. should not be regarded. Whatever effect the acts referred to had upon the lands entered under them, it is enough to know that they never had any effect upon the appropriation of lands in the Virginia military district to satisfy military warrants. Such appropriation was provided for and regulated exclusively by Congressional legislation. On page 17 of the same brief there is a reference also to an act of Congress passed May 20th, 1826, by which provision is made for the case in which a greater quantity of land than the rank or term of service of the officer or soldier to whom, &c., such warrant has been granted, would have entitled him to under the laws of Virginia; and it is argued that said act will control the government in respect to any surplus that there may be in the Gordon survey.

From a careful reading of this act, however, it will be perceived that the case provided for is the one in which, by a mistake, the warrant has been granted for more land than the rank or term of service of the officer or soldier entitled him to, and not the case of an attempted appropriation of a greater quantity of land than was called for by the warrant itself. And, besides, the clause referred to is, by its very terms, limited to patents issued by virtue of *section* 1 of the same act, and *that section* ceased to operate entirely June, 1829, so far as it authorized officers and soldiers to obtain warrants; and in June, 1832, for the completion of the location of the warrants; and in June, 1833, for the return of the surveys and warrants. (See vol. 4, U. S. Statutes at Large, p. 189.) And no subsequent act of Congress made the section quoted by the plaintiff in error in his brief applicable to any other than patents issued by virtue of sec. 1 of the said act, approved May 20th, 1826.

And so also in regard to the act of Congress approved May 27th, 1880 (long since the determination of this action in the courts below). In none of its provisions does that act apply to the lands in controversy in this case. On the contrary, by the very terms of sec. 4, the tract in question is exempted from its provisions.

We repeat, therefore, that since 1857 there has been no provision of law that could in any way enable the Gordon heirs to perfect their survey, cure any defect or irregularity that existed in respect to it, or

change it in any way so as to make it a valid, legal, subsisting survey *as against the government*, such as would *appropriate* the whole, or any portion of the land covered by it, when it otherwise would not, nor could, have had that effect.

The survey must be adjudged as it stood after March 3d, 1857, when the law for the completion and return of surveys in the district expired by its own terms. If sufficient then, or on the 18th of February, 1871, when the act of cession was approved, to *appropriate* the land in controversy as to and against the United States, it never was or could be, and as a result the title would pass by the grant to the State of Ohio.

The term "surveyed land," in the Virginia military district, may be said to have had two significations depending upon the parties to be affected. A "survey," as it was to be understood, by one who would seek by virtue of a military warrant to enter and survey the land covered by it, was "a *bona fide* attempt to locate lands under a warrant by entry and survey." Because the "effect was to *withdraw* such lands from subsequent location upon another warrant, whether such entry and survey was valid or void." (Price *vs.* Johnston, 1 O. St., 397.)

But as to the government, by the term "survey" was meant not simply a *bona fide* attempt to locate lands under a warrant by entry and survey, but a *legal, valid survey*, such as would appropriate the land as to and against the United States. If void, no title or interest, either legal or equitable, would pass out of the government, but the whole would remain in it, as it did before the attempt was made. "It has the effect, and this only, to exclude every person except the legal holder of the warrant from encroaching upon the land thus attempted to be appropriated by subsequent locations." (See also Jackson *vs.* Clarke, 1 Pet. R., 628.)

The counterpart of the term "unsurveyed lands" used in the act of cessions, to wit, "surveyed lands," must be understood either in the sense given to it in respect to the holder of a warrant who would seek, by a subsequent entry and survey, to appropriate the land covered by a prior survey, or in the sense that attaches to it where the rights of the government are to be affected by the act done.

The contention of the plaintiff in error is, that the term, as it is used in the grant to the State, must be understood as contradistinguished from its counterpart, "surveyed lands," as that term is understood in respect to the rights of a subsequent locator of a warrant upon the same land. And it is absolutely essential to him that he should maintain such a claim. If he can succeed in so doing, he may, or may not, obtain the reversal of the judgment; but if he fail, he cannot possibly succeed in the reversal.

The reference by his counsel in his brief to the cases in which the courts have given to the term mentioned the signification claimed for it, is quite full, and while it may be difficult to harmonize them all, the rule may be considered as well enough established, that the courts have gone almost to the verge of absurdity in applying the proviso of 1807 to sustain the senior survey. And while they have not done so in every case, in view of the reasons given by the courts, we need not care to complain of their rulings. (See Saunders *et al. vs.* Niswanger *et al.*, 11 O. St., 298, and the review of all the cases cited in the opinion of Justice Gholson.)

But in every one of the cases referred to, in which the meaning claimed by the plaintiff in error for the term "surveyed lands," was given, the controversy was between conflicting entries and surveys, and the rights of the respective locators of warrants were involved. In no

one case that we are aware of, certainly in no case cited by counsel for Coan, or found by us, where the controversy has been between the holder of the survey and the government, or where the rights of the government in respect to the land were involved, or the question was as to the appropriation of the land as against the government, has any court given to the term the signification which is claimed for it by the plaintiff in error. In no case has it ever been held that, by virtue of the proviso of 1807, the government is *prohibited* from interfering with land sought to be appropriated by an entry and survey, or from enquiring into the regularity, validity, or legality of the survey. And least of all, is land covered by a survey without reference to its regularity, its validity or legality, *withheld* from the control or subsequent appropriation by the government. On the contrary, such an enquiry, control, and right in behalf of the United States is fairly deducible from the decisions, and recognized by the courts in the very cases relied upon by the counsel for Coan.

The enquiry still remains, did the survey of the Gordon heirs appropriate the land in controversy as against the government, or so affect either the legal or equitable title to it, that it is no longer the subject of grant?

As to the government, the entry and survey are but the *preliminary* steps towards the appropriation of the land; but whether the proceedings are to be consummated by which the appropriation is to become complete, is certainly a matter beyond the mere entry and survey. Until the patent has issued, the land, to some extent at least, if not fully, is under the control of the government. Indeed, it has been said that "if the patent has been issued irregularly, the government may provide means for repealing it." (Miller *vs.* Kerr, 7 Wheat, 1; Thomas *vs.* White *et al.*, 2 O. St., 549.)

And if, therefore, until the patent has issued, the land is still under the control of the government, there must abide in it the power to examine into the regularity and validity of the preliminary steps, and especially in respect to the entry and survey. The right to examine and inquire must imply the right to determine, and to accept or reject the entry and survey as valid and regular or otherwise. And upon the result will depend the issuing of, or refulal to issues the patent. This right to accept or reject as regular and valid, the entry and survey, may not be an unlimited one, or a right to be exercised arbitrarily. And while as against the government the courts may be powerless to compel the issuing of a patent, we may concede that cases may arise in which the determination of the government may be the subject of review by the courts. It is not necessary, certainly, in this case, that we should claim that the courts possess no such power.

We may grant, for the sake of the argument, that to constitute in its broadest sense an appropriation of the land in question, so as to leave nothing in the government to pass by the act of cession to the State, it was not necessary that the patent should have issued; but, certainly, it was necessary that the entry and survey should have been a valid, legal, subsisting one, as to and against the government itself, and so complete as to create in favor of the Gordon heirs a perfect, equitable title, one upon which, if it were not for the want of power in respect to the party to be affected, the courts would have predicated a decree for the legal title. But we may say, that in so liberal concession, we do not admit that the proviso of 1807 is to figure in the slightest. On the contrary, the rights of the parties are to be determined precisely as if there had never been any such proviso.

Was there then a valid, legal, subsisting entry and survey as to and against the government, the effect of which was to give to the Gordon heirs a perfect, equitable title to the land embraced in their survey?

First. The government itself has answered this in the negative. It was the right of the government to examine into the matter and determine whether or not the entry and survey were made in accordance with the law; and it has done so, and we have the result in the record which it has kept.

It is true that various objections are made by the counsel for Coan to this action of the government. (1.) It is objected that the mode of proof as to the determination of the government is incompetent. The deposition of Daniel McCarty, who had been a clerk in the General Land Office since 1852, and, ever since 1857, has had exclusive charge under the various Commissioners of all matters pertaining to the Virginia military district of Ohio, was taken, and he testifies that the only record kept of the action of the General Land Office touching the matters involved is the correspondence between the clerk having charge of the business, approved by the signature of the Commissioner, and recorded in full on the letter-books of the office, and the parties to be affected by the action. These letters, so recorded and preserved, contain the evidence of the action taken and the determination arrived at; and copies of the same, taken from the record and sworn to by the clerk, is the evidence objected to. We submit that it is in every respect competent in that way to establish the action of the proper department of the government on the subject. (2.) Objection is made also as to the time when the action of the government took place. The matter considered was something that had occurred prior to 1857. And the inquiry was not as to matters transpiring after the act of cession, but long prior thereto; and the effect was simply to ascertain the status of the claimants in respect to the land in question at and prior to 1871. If their entry and survey had been adjudged valid and legal, so as to give them a complete, equitable title, the patent would have issued, and the title would then have related back to the time of the return of the survey; and in that event, there was nothing in the government, except the naked legal title, that could have passed to the State of Ohio.

The objection is based upon the idea that the determination of the Commissioner of the General Land Office had something to do with the *creation* of the title; but nothing of the kind is claimed as the result of that action. It neither weakened nor strengthened the title of the State or college. Our claim is, that if by the entry and survey the land in suit was *appropriated*, even by a complete, equitable title as against the government, when in 1871 the act of cession was approved, there was nothing, except the naked legal title in the government, and nothing would pass by the grant. And all that was done by the Commissioner was simply to pass upon and determine, when the application for a patent was made, whether or not the entry and survey created such an equity as would entitle the holder to a patent for the land. And this was what was done, and no more. No one has claimed that the decision of the Commissioner was equivalent to a patent to the State of Ohio. Its title came by the act of cession, and the effect of the decision of the Commissioner was simply the rejection, as illegal and invalid, of the survey of the Gordon heirs.

(3.) It is objected also that the Commissioner of the General Land Office *alone* could not decide upon the legality of the entry and survey, and that sections 2447, 2455, 2450, and 2451, U. S. R. S., required that he should act in conjunction with the Secretary of the Interior and the

Attorney-General. We submit, that none of these sections sustain the objection made. They have reference to another class of cases, especially sections 2450 and 2451, which are the only ones that bear upon the subject.

The letters of the Commissioner will show that an appeal could have been taken to the Secretary of the Interior, and 60 days were given to Heaton within which to take his appeal; but none was taken. We maintain, therefore, that the usual and ordinary course was taken to obtain the determination of the government, acting through the proper department, in respect to the legality or validity of the survey, and that the decision was adverse.

Second. But even if the Commissioner had no power to act, or if his action was informal and irregular, or if it is true that his decision is not final, the same conclusion must be reached by any court having jurisdiction to determine the question. The legal title to the property involved remained in the government, and the most that can be claimed is, that it held it subject to the equities that existed in favor of the Gordon heirs. These were equities, if any existed, *against the government*, and in favor of the parties who were attempting by an entry and survey to appropriate a portion of the lands belonging to it.

The warrant under which it was sought to make the appropriation called for 500 acres of land, and no more. To that extent it was authority for the appropriation of the lands in the Virginia military district, and beyond that it conferred upon the holder no authority whatever. Without such a warrant no entry or survey could be made at all; and with such a warrent, the authority to make the entry and survey was limited to the number of acres called for by the warrant. An entry and survey of more land than was called for by the warrant was just as unauthorized as to the excess as an entry and survey without any warrant whatever. And this was the argument that was used in Clarke *vs.* Jackson *et al.* (1 Peters R., 635), the weight of which, as Chief Justice Marshall said in deciding the case, "the court felt," and had "bestowed upon it the most deliberate consideration." But the controversy in that case was between parties claiming under entries and surveys made at different periods upon the same land; and in view of the proviso of 1807, notwithstanding the senior survey was based upon a warrant *already satisfied*, the subsequent survey was held void; because, as was said, *as to him*, at the time he made his survey the land was *withheld* from entry, and he was *prohibited* from making his survey. While so holding, however, the court recognized the difference between that class of cases and those where the question was between the holder of a survey based upon a warrant already satisfied and the government. (See the language of the court, on pages 638–9.)

The government refused to carry the survey into grant, and to issue to the Gordon heirs a patent for the land covered by it, because, with a warrant calling for 500 acres, two entries and surveys were made, one for 400 acres, so called, covering the land in controversy, but embracing, in fact, as ascertained by actual survey, 1,682 acres of land; the other for 100 acres, so-called, but embracing, by actual survey, 517 46-100 acres. In the 400-acre survey, so-called, for the attempted appropriation of the 1,282 acres in excess of said 400 acres, there was no authority or warrant whatever. The owners of the warrant were in no way entitled to any part of said excess, and there was certainly no reason why the government should be deprived of it. As to the 1,282 acres, no equity existed or could exist in favor of the holders of the survey, and none could grow up against the government. Upon what, then, could

Gordon's heirs predicate any claim to it? But the claim of Coan seems to be that, inasmuch as the warrant was authority for appropriating 400 acres covered by the survey, the surplus must go along with it; or, if that is not his claim, it is, that with an authority to appropriate 400 acres of land, you may appropriate 1,682 acres, and still, even as to the government, that is to be immediately affected by it, the survey is in no way vitiated. The mere statement of either proposition shows its absurdity. It must be borne in mind that the most that can be claimed is, that there had been an *equitable* appropriation of the land in question as to the government, and therefore, at the time of the grant to the State, the government had nothing except the naked legal title, that it could grant. An *equitable* appropriation must arise out of or be based upon equitable principles; and what equity is there in compelling the government to give up 1,682 acres to a party who has a claim upon it for 400 acres? Or in awarding to a claimant 1,682 acres, because he has a warrant that entitles him to 400?

The brief for Coan contains a reference to quite a number of cases, in which it is said a surplus in a survey does not vitiate it. And that there can be no entry or survey of the surplus so as to deprive the holder of the survey containing the surplus in it. We have no doubt that decisions to that effect can be found. But as to whom does such doctrine apply? Not the government, certainly, that is to be affected by it, where no patent has issued; but to third parties, who are mere volunteers in behalf of the government, or are seeking to interfere and appropriate land that they are *prohibited* from interfering with, as they were by the proviso so often referred to. But besides, the cases in which the doctrine has been recognized, are those in which but a small quantity of surplus land was embraced, such as might naturally, by mistake or error in making the survey, be included. But no case has been, or can be found, we apprehend, where the surplus is more than *three times* as much as the quantity authorized to be appropriated, and the rights of the government are directly involved, to sustain so startling a proposition.

But it is argued that the survey, if vitiated at all, is only vitiated to the extent of the surplus; 400 of the 1,682 acres covered by the survey, it is claimed, is in equity appropriated to satisfy so much of the warrant. But the trouble is, which 400 of 1,682 acres is so appropriated? Possibly, while there was a law in force which authorized entries and surveys to be made, and lands to be appropriated in that way, to satisfy military warrants, if the government had refused on account of the surplus to carry the survey into grant, the warrant might have been withdrawn, and a survey, embracing the proper quantity, made. But there is no law in force, and has not been, at least so far as these lands are concerned, since 1857, to warrant any such action. And the result is, that since the law ceased to operate, and expired by its own limitation, the only relief that a party can have, if he has failed within the time limited to have his warrant satisfied by valid survey with the land in the district, is to have it satisfied with land scrip. The provision referred to is ample and complete to cover any such case as the one involved. And if it were otherwise, the party who has embraced so much surplus land in his entry and survey as to justify the government in refusing to carry it into grant, is the one, if anybody, that should suffer.

But we plant the right of the government to reject the survey entirely upon a much higher principle, and could go far to justify it even in a case where the government alone was not concerned, but where the rights of a subsequent locator were involved, although it is by no means required that we should maintain the latter branch of the claim.

Judge Ranney, in delivering the opinion of the court in Price *vs.* Johnston, (1 O. St., 397), in referring to the conflicting decisions as to the import of the proviso of 1807, and in endeavoring to reconcile them, says it can be done by "holding that every *bona fide* attempt to locate lands under a warrant by entry and survey, has the effect to *withdraw* such lands from subsequent location upon another warrant, whether such entry and survey is valid or void." And the *bona fides* of the senior entry and survey should have much to do, certainly, in withholding the land from subsequent survey. But if, as between conflicting surveys, the *bona fides* of the entry and survey should be an important element, how much more should its effect be in a controversy between the locator and the government, in which it is sought, upon *equitable considerations*, to appropriate a portion of its lands?

It might be that the owner of a warrant, acting in entire *good faith*, could embrace a small quantity of surplus land in his survey, and no doubt it has been frequently done; but when a warrant callling for 500 acres is used as the foundation of two surveys—one for 400 acres and the other for 100—and by actual measurement the former is made to cover 1,682 and the latter 517 46-100 acres, the presumption of *good faith* or *innocent mistake* is overcome, and the very reverse must be the presumption. In fact, the attempted appropriation of the amount of land embraced in the two surveys, to satisfy a military warrant calling for five hundred acres, and no more, upon its very face is a most arrant fraud upon the government; a fraud so palpable and glaring that out of such a transaction, in the language of Judge Reed, "no equity can ever blossom."

The government having ignored the survey, and refused *absolutely* to carry it into grant, and there being no equity in the claim, and the survey itself being so strongly tainted with fraud, the conclusion is irresistible that at the time of the act of cession to Ohio the land in question was in no way appropriated, either legally or equitably, to satisfy the warrant of the Gordon heirs; and it was therefore the subject of grant by the government, and would pass by the cession to the State.

V.

The question raised by the ruling of the court upon the demurrers to the defenses of the plaintiff in error need not require much space for discussion. Coan in no way connected himself with the Ohio Agricultural and Mechanical College in respect to the land, or its title thereto, and yet in his *fifth* and *sixth* defenses he attacks the title of Flagg acquired from the college. In his fifth defense he alleges that the title from the college was acquired by *fraudulent and corrupt acts* practiced by Flagg, and in his sixth defense he alleges that there was a *fraudulent combination and conspiracy* between Flagg and the trustees of the college, by which the title was obtained. And suppose either or both of them were true, how did it affect Coan? At best, the matters stated could only be the cause for setting the deed aside at the instance of the proper parties; but the deed itself was not void. Coan had no right to raise any question in respect to the mode by which Flagg acquired his title from the college, and for that reason his defenses were not sufficient.

Several objections were made during the progress of the trial by Coan in respect to the introduction of evidence, and when the objections were overruled, *exceptions were noted*, as shown by the bill of exceptions, but no exception was, in fact, *taken* to such rulings in this bill of exceptions. The only exceptions saved by bill of exceptions was as to the ruling of

the court in overruling the motion of a new trial. But if we were mistaken in this, and the questions are before this court for review in respect to the rulings of the district court in the admission of evidence objected to, it is sufficient for our purpose to say that all of the evidence introduced upon the trial is embraced in the bill of exceptions, and if any evidence was introduced that was not strictly competent, a matter that we do not at all concede, the evidence so admitted was unimportant, and could in no way have contributed to bring about the result. It was as to collateral and immaterial matters, and in no way pertinent to the material questions involved. The evidence objected to could as well have been omitted, and the finding would have been the same; and this is apparent from all the evidence introduced. Should it, therefore, even be found that some of the evidence objected to and admitted ought to have been excluded, the plaintiff in error has not been prejudiced by such admissions.

McILVAINE, J.:

Each party traces his title to the cession of territory northwest of the Ohio River by the State of Virginia to the United States, in 1784 (1 vol. U. S. Laws, 472), whereby lands situate in this State, between the Scioto and Little Miami Rivers, were devoted to the satisfaction of warrants, as bounties, issued by the State of Virginia to troops for services in the Revolutionary War, on the continental establishment.

Flagg, plaintiff below, claims title under the act of Congress of April 18, 1871 (16 vol. of Statutes at Large, 416), which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That the lands remaining unsurveyed and unsold in the Virginia Military District in the State of Ohio be, and the same are, ceded to the State of Ohio upon the conditions following, to wit: Any person who at the time of the passage of this act is a bona-fide settler on any portion of said lands may hold not exceeding one hundred and sixty acres so by him occupied, by his pre-empting the same, in such manner as the legislature of the State of Ohio may direct.

To complete his chain of title, the plaintiff below claims further under a grant from the State of Ohio to the Ohio Agricultural and Mechanical College, and from the college to himself.

Coan, the defendant below, claims title under an exchange military warrant No. 494, issued by the State of Virginia on the 16th day of June, 1840, to the children and heirs of Francis Gordon, a child and heir of John Gordon, the only heir of Thomas Gordon, who was a lieutenant of cavalry in the continental line of Virginia troops in the Revolutionary War, for five hundred acres of land, to be laid off in one or more surveys.

An entry, No. 15882, purporting to cover five hundred acres of land under the foregoing warrant, No. 494, made on the 18th of December, 1849, by the said heirs of Francis Gordon and one David F. Heaton, an assignee of part of said warrant.

A survey under said entry, No. 15882, purporting to contain four hundred acres—375 acres for the heirs of Francis Gordon and 25 acres for said Heaton—made by said D. F. Heaton, a deputy surveyor of the district, on the 10th day of April, 1851, giving the metes and bounds of the lands surveyed, which was duly recorded on the 23d of December, 1851, and mesne conveyances from the heirs of said Francis Gordon and said Heaton to himself. It appears, however, that this survey, No. 15882, embraces, in fact, one thousand six hundred and eighty-two acres.

No patent has ever been issued on this entry and survey, for the

reason, among others, that the quantity of land embraced is grossly in excess of the quantity named in the warrant No. 494.

Upon these facts the main questions in the case arise:

1st. Did the entry and survey invest the owners of the warrant or their assignee with an equitable interest in the lands conveyed? If, as against the United States, an equitable estate had passed to the defendant below, it may be admitted that the subsequent grant by the United States to the State of Ohio did not divest such estate. Upon general principles, it cannot be doubted that a fraud so palpable as is shown to have been attempted against the laws of the United States by this entry and survey would have avoided the survey entirely. The excess is so great that no reasonable supposition can arise that it occurred through an honest mistake. True, the United States, against whom it was intended, might waive the fraud and relieve the party from its consequences, in whole or in part; and it is claimed that such was the effect of the act of Congress of July 7, 1838 (vol. 5, Statutes at Large, 262), the second section of which provides "that no patent shall be issued, *by virtue of the preceding action*, for a greater quantity of land than the rank or term of service of the officer or soldier to whom, or to whose heirs or assigns, such warrant has been granted, would have entitled him to under the laws of Virginia and of the United States regulating the issuing of such warrants; and whenever it appears to the Secretary of War that the survey made by any of the aforesaid warrants is for a greater quantity of land than the officer or soldier is entitled to for his services, the Secretary of War shall certify on each survey the amount of such surplus quantity, and the officer or soldier, his heirs or assigns, shall have leave to withdraw his survey from the office of the Secretary of War and resurvey his location, excluding such surplus quantity, in one body, from any part of his resurvey, and a patent shall issue upon such resurvey as in other cases," &c. Clearly this section forbids the issuing of a patent for a greater quantity of land than the officer or soldier was entitled to under the laws regulating the subject; and by fair construction it would seem that the relief provided was only in cases where the quantity named in the warranty was in excess of the quantity to which the warrantee was entitled, and not to cases where the survey was in excess of the warrant. But however that may be, the operation of the section is expressly limited to cases arising under the preceding section of the act, and the operation of that section expired by its own limitation on the 10th of August, 1840. If it be claimed that the operation of section two of this act was extended by reason of the extension and revival of the first section by the act of August 19, 1841 (vol. 5, U. S. L., 449), it is, at most, sufficient for this case to say, *that the "preceding section" thus revived and continued in force for a limited time, contained the sole authority for making and returning entries and surveys under these Virginia warrants, and since March 3rd, 1857, there has been no authority for making or returning surveys under any circumstances whatsoever.* So that, at all events, the right to relief against excessive surveys granted by the 2d section of the act of 1838, whatever it may have been, has not existed since 1857, even if it be conceded that it was continued at all after 1840. See Statute Mar. 3, 1855 (10 vol. Stat. at Large, 701). Again, it is claimed that Congress has recognized the validity of surveys within the district, notwithstanding the quantity embraced in the survey was excessive, by the *proviso* in the act of March 23, 1807 (4 U. S. L., 92), which reads as follows: "Provided, 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."

It has undoubtedly been settled by repeated decisions that under this proviso that excess in the quantity of land embraced in a survey does not vitiate the survey so as to authorize a subsequent location or entry under another warrant. But it has not been settled, nor was it the intention of Congress, by this proviso, to require a patent to be issued on an excessive survey.

As between locators, lands actually surveyed, whether the survey was fraudulent or not, were withdrawn from subsequent entry and survey until the previous survey should be withdrawn or set aside. This legislation was in the interest of peace, as between locators of warrants, and was a wise provision. But to hold that Congress intended, as against the Government of the United States, to declare that excessive surveys, whether by mistake or design, should be binding, so as to establish an equitable estate in the holder of the warrant and entitle him to a patent for the whole or any part of the survey, would do violence to the language of the *proviso*, and would show a disregard for the faithful execution of the trust imposed by the cession of these lands by Virginia to the United States, amounting to wickedness.

As far as we are advised, we know of no rule or practice, based either upon Congressional enactment or principles of justice, by which the United States Government could be justified in recognizing in the defendant below an equitable estate in the whole or any part of the lands in dispute, arising upon an entry and survey so palpably fraudulent as those upon which he relies, and, therefore, it was within the power of Congress, on the 18th of April, 1871, to grant to the State of Ohio the lands in dispute, free from any claim of right or interest therein of the defendant below.

It is claimed, however, that these lands were not conveyed, or intended to be conveyed, by the act of April 18, 1871. The following is the description of the lands intended to be conveyed by that act, to wit: "The lands remaining unsurveyed and unsold in the Virginia military district in the State of Ohio."

On the part of the plaintiff in error, it is contended that the word "unsurveyed" is used in this statute as the counterpart of the word "surveyed," as used in the proviso in the act of 1807, which has been construed to mean "surveyed in fact," whether the survey was valid or voidable in point of law. On the other side it is contended that the intention of Congress was to grant to the State all the lands remaining in the district of which the United States had the power of disposition, so that the word "unsurveyed" included land covered by an invalid or void survey. *This construction is supported strongly by the facts that subsequent to the year* 1852 *no entries under warrants for military services in Virginia were authorized, and subsequent to* 1857 *the right to make surveys on account of such warrants ceased*—provision having been made by Congress for the satisfaction of outstanding warrants by other means—and that prior to the act of 1871, Congress had provided no other means for the dispositions of lands remaining subject to its power of disposition.

But inasmuch as Congress, by the act of May 27, 1880 (2nd session 46th Congress, Statutes, page 142), has declared the true intent and meaning of the act of 1871, to be, that the word "unsurveyed" excluded lands which had been included "in any survey," whether valid or invalid; and

as we do not deem it necessary to the decision of this case to declare the effect of the act of 1871, we leave it undecided. The decision of this question becomes unnecessary, from the fact that Congress, in the 4th section of the act of 1880, provides, "This act shall not in any way affect or interfere with the title to any lands sold for a valuable consideration by the Ohio Agricultural and Mechanical College granted under the act of February 18th, 1871." This section we construe to be a ratification on the part of Congress of the title of Flagg, plaintiff below, who was a purchaser from the college for a valuable consideration. True, the language of the section was not happily selected to express such ratification, but we think such was the intention of the section. Construed literally, the section can have no effect whatever. Of course, the declaratory act of 1880, could not "affect or interfere" with any right acquired under the act of 1871. Congress knew that the Ohio Agricultural and Mechanical College had assumed to convey title to portions of these lands for a valuable consideration under the belief and claim that it had a right to do so under the act of 1871. The title which the act was not to "affect or interfere with" was not one which in the view of Congress was valid and indefeasible, but one which, under the construction placed upon the act of 1871, by the act of 1880, the college had no power to convey for want of title in itself. A title which the college intended to sell for a valuable consideration, but by reason of the construction claimed for the act of 1871, it could not convey, was the subject of this section, and the purpose undoubtedly was to confirm the sale so made and give it effect according to the intention of the parties.

The title of Flagg thus ratified took effect as of the date of the conveyance, no other rights having intervened.

Several other questions have been raised and considered, which need not be reported.

Judgment affirmed.

[This case will appear in 38 O. S.]

The following is the argument submitted to the Secretary of the Interior on an appeal taken to him from the decision, dated May 9, 1882, of the Commissioner of the General Land Office, denying a patent on a survey of land in the Virginia military district of Ohio, which decision will be found in House Miscellaneous Document No. 42, first session Forty-seventh Congress, June 23, 1882:

Argument of Jeremiah Hall for the appellants.

CIRCLEVILLE, OHIO, *June* 12, 1882.

Hon. N. C. MCFARLAND, Esq.,
Commissioner of the General Land Office, Washington, D. C.:

DEAR SIR: You will take notice that we appeal to the honorable the Secretary of the Interior from your decision on our application for the issue of a patent on survey No. 12096 for 150 acres of land in the Virginia military district of Ohio, founded on part of military warrant No. 584, for 200 acres issued in the name of Aquilla Norvill Sergeant, in the Virginia line on continental establishments, holding that there is no authority of law under which a patent can issue in this case.

Very respectfully, yours, &c.,

JEREMIAH HALL,
Attorney for Samuel H. Ruggles and others.

Specification of errors filed with the foregoing appeal, as follows, to wit:

I. The Commissioner erred in deciding that there was no authority of law under which a patent could issue in this case, when he should have held that the case was within the act of Congress of May 27, 1880 (United States Land Laws, local and temporary, vol. 1, page 95, No. 190, and the other acts of Congress to enable the officers and soldiers of the Virginia line on continental establishments to obtain titles to certain lands lying northwest of the river Ohio, between the Little Miami and Scioto, beginning with the act of August 10, 1790, page 1, No. 1 of said Land Laws, &c.).

II. The Commissioner erred in construing the words "land office" in section 2 of said act of May 27, 1880, to mean the "General Land Office," when he should have held that Congress by said words intended the land office of the Virginia military district of Ohio, otherwise designated as the office of the principal survey of said district.

III. The Commissioner erred in deciding that the survey in this case was not within the said act of May 27, 1880, in so far as it had not been returned to the "General Land Office" on or before March 3, 1857, when he should have held that it was within the act because it had been legally surveyed and returned to the land office previous to March 3, 1857, on an entry made previous to January 1, 1852, and was founded on part of an unsatisfied Virginia military continental warrant, and was a complete location and appropriation of the land designated therein, and by the provisions of the second section of the act of March 1, 1823 (said Land Laws, page 63, No. 98), reserved from locations to be made thereafter, and by the provisions of the first section of the act of July 7, 1838 (said Land Laws, page 80, No. 146), and the second section of said act of May 27, 1880, declared valid.

IV. The Commissioner erred in holding the act of March 23, 1804, alluded to by him on page 3 of his said decision (said Land Laws, page 32, No. 35), and the provisions of the second and third sections thereof in force and operated a release of the lands designated in said survey from the satisfaction of said military bounty, so that they became and were now a part of the public domain of the United States, discharged from the trust imposed by the deed of Virginia of March 1, 1784 (1st vol. Laws of the United States, page 472), ceding to the United States the territory, or that tract of country within the limits of her charter, situate, lying, and being to the northwest of the river Ohio, to and for the uses and purposes, and on the conditions of the act recited therein, among which is the reservation of the land designated in said survey in satisfaction of the said military warrant, when he should have held the provisions of said act of 1804 not in force, or if ever in force to release the lands designated in said survey from the satisfaction of said military warrant, then that Congress by her act of February 18, 1871 (said Land Laws, page 94, No. 187), and her said act of May 27, 1880, had waived that release and recognized the said survey as a valid and complete appropriation of the lands designated in said survey and entitled to be carried into patent.

JEREMIAH HALL,
Attorney for Samuel H. Ruggles and others.

Argument filed on the foregoing appeal and specification of errors, &c.

I. There is but one principal question in this case, and that is whether

or not the law authorizes a patent to issue on said survey No. 12096; all other questions involved in the case are merely incidental to this.

II. At the time the location was completed in this case by the record of the survey in the office of the principal surveyor of said district on the 27th day of January, 1823, the time limited by the act of February 9, 1821 (said Land Laws, page 61, No. 93), under which the location and survey had been made had expired; but however that may have been, the survey was returned to said office and recorded, and by the act of March 1, 1823, reserved from location, and by said act of July 7, 1838, declared valid.

III. Counsel concede that the act of 1804 was suspended by the act of March 2 1807 (said Land Laws, page 39, No. 45), and subsequent acts, and all locations previously surveyed reserved from location, and we do not disagree as to what would have been the effect of the act of 1804, if Congress had the constitutional authority to pass it, had it not been suspended; but I may say the act of 1804 was not discovered until 1881, and then it was found by a blind man, and Justice Matthews, of the Supreme Court of the United States, not remembering, perhaps, the parable, "Can the blind lead the blind? Shall they not both fall into the ditch?" and never having heard of the act before, and believing it to be in force, adopted it from the brief of the blind man into his decisions of the cases of Fussell *vs.* Hughes *et al.*, and same *vs.* Gregg *et al.*, decided by him at the June term of the circuit court of the United States for the northern district of Ohio, and published in the Federal Reporter, vol. 8, No. 6, pages 384–387, inclusive, September 20, 1881, in which decision the justice held that all the lands in the Virginia military district of Ohio, standing on entry and survey merely, forfeited to and had become a part of the public lands of the United States, and at its disposal at pleasure, and with this decision he held in the case of Chamberlain *vs.* Marshall, decided at the same term of court and published at the same time, pages 398–410, inclusive, fell all titles of those lands resting on sales for taxes, executors and administrators, guardians, &c., whensoever made, thus discrediting the titles to a great district of very important lands; but I forbear to pursue the discussion of the act of 1804 any further at present.

IV. But whether the act of 1804 ever at any time went into effect, we insist it was competent for Congress to suspend it or waive its effect to release the land designated in said survey from the claim for military lands, and that they did so by their act of February 18, 1871, to cede to the State of Ohio the unsold and unsurveyed land in the Virginia Military District in said State. Under this act the "Ohio Agricultural and Mechanical College, the grantee of the State, claimed the lands standing upon entry and survey in said district, thereupon Congress not having intended to cede to the State of Ohio any of the lands in said district standing upon such entries and surveys and which she intended by her said act to reserve to the said officers and soldiers, their heirs or assigns, for whom they had been originally reserved by Virginia, passed her act of May 27, 1880, construing and defining her said act of 1871, by which she very clearly stated that she did not intend to cede to the State of Ohio any land in said district appropriated by entry or survey upon military warrants on continental establishments.

V. She then declared in the second section of her last named act, that all legal surveys returned to the "land office" on or before March 3, 1857, on entries made on or before January 1, 1852, and founded on unsatisfied Virginia military continental warrants valid, as she had before by her said act of July 7, 1838, declared the survey in this case valid.

VI. She then by the third section of her said act of 1880 extended to said officers and soldiers, their heirs or assigns, entitled to bounty lands which had been entered on or before January 1, 1852, within the tract reserved by Virginia, between the Little Miami and Scioto Rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishments, three years to make and return their surveys for record to the office of the principal surveyor of said district, and provided by the last clause of this section that "and may file their plats and certificate, warrants or certified copies of warrants at the General Land Office and receive patents for the same."

VII. Now we insist this last act is so plain that no right-minded, intelligent man can fail to understand it.

VIII. Congress thus, by the first section of her act of 1880, clearly recognized the estate of the officers and soldiers, their heirs or assigns, to the lands designated in said entries and surveys. She calls them appropriations of the lands.

IX. By the second section they describe a legal survey returned to the "land office" on or before March 3, 1857, on an entry made on or before January 1, 1852, founded on an unsatisfied Virginia military continental warrant, valid, or a complete location. This is what Congress had in their minds. They had no allusion to a return of a plat certificate, warrant, or certified copy of a warrant to the "General Land Office" for patent. They meant what they said, "a legal survey returned to the "land office," the local office of the Virginia Military District of Ohio, otherwise designated as office of the principal surveyor of said district; the office where the military warrants were legally kept; in which the record of the entries of lands were made and recorded in a particular book, called the "Book of Entries" and to which office the surveys were returned and in which they were recorded in the record of surveys and from which the plats, certificates and other papers in the location were delivered to the locator, to be filed by him in the "General Land Office" for patent.

X. The office of the principal surveyor in the military district of Ohio is defined a land office by Webster's Unabridged Dictionary.

XI. The author defines the term "land office" "An office in which the sales of new lands are registered and warrants issued for the location of lands and other business respecting the public lands is transacted."

XII. As in this case in a district of country reserved specially for the satisfaction of a particular class of military land warrant, in which an office is established and an officer appointed to take charge of the military warrants, to keep the records of locations, make and record the entries and surveys of lands, etc.

XIII. Congress did not then by the words "land office" as used in said second section of said act of 1880, intend the "General Land Office." In no act of theirs did they ever speak of the "General Land Office" as a "land office" merely. The General Land Office is always designated by Congress by the name given it by the act creating it. Congress always speaks of this office by the designation of "General Land Office," the office of all and every class of public lands, and to construe the words "land office" to mean "General Land Office" would be illogical in making the minor proposition include the major; or it would be enacting the farce in the fable of the frog blowing herself up to the size of the ox.

XIV. Nor is any allusion had in this second sections to a return of the survey or plat, certificate or warrant to the "land-office" for patent.

That is left to the last clause of the third section of the act, in which Congress says, "said officers and soldiers, their heirs and assigns," may file their plats, certificates, warrants, or certified copies of warrants at the General Land Office and receive patents for the same.

XV. But I understand counsel will insist that this last clause does not apply to a legal survey declared valid by the second section of the act, or that it does not apply to a legal survey made and returned to the land office on or before March 3, 1857.

XVI. It is conceded that the act of 1804 was suspended by the act of March 2, 1807, and the other acts for the extension of the time to make and complete locations, &c., and reserving from location tracts previously surveyed, all of which are in *pari materia* and must be construed together and in the same uniform way, each and every new act extending the time reserved, the surveys previously made from location and in no other way referred to them. Yet not one of them when returned to the Secretary of War or the General Land Office was ever denied a patent on the ground that the new act did not apply to a survey previously made. The language in such acts of extension was to obtain warrants and complete their locations, and return their surveys, warrants, &c. (Sedgwick on the rules which govern the interpretation of Statutes, &c., page 247, &c.)

XVII. Sometimes one period was limited for obtaining warrants and completing surveys, and another and different period was limited for returning plats, &c. And so it was under the act of March 3, 1855, to extend the time for surveying entries made before January 1, 1852. No survey previously made was denied a return and patent under the act of 1855, and it must not be done under this act of 1880. A survey previously made stands upon the same equity, the same law, the same right in every respect as a survey of an entry, to be made under this act, and such has been the previous construction and practice under it, and Congress so intended. (See engrossment and passage of the bill in this act in the Senate, the discussion and the letter of J. A. Williamson, then Commissioner of the General Land Office, vol. 10, part 4, Congressional Record, pages 3453–3454, inclusive, May 18, 1880.)

XVIII. That my position in this case may be defined, and what I claim to be the questions discussed, and how I understand them may be manifest, I will recapitulate.

1st. I concede then that the act of March 23, 1804 (waiving the right of Congress to pass it), discharged the unappropriated lands in the said district from the claim for bounty land, on the expiration of each and every period limited for making locations, &c., and that if a location was made between acts, such location was void, unless validated by some such provision as that of the first section of the act of July 7, 1838, or that of the second section of the act of May, 27, 1880. These acts are in *pari materia* and must be construed in the same way.

2d. But that the provisions of each of those acts, beginning with the act of March 2, 1807, reserving from location tracts of land which had been previously surveyed, withdrew from forfeiture under the third section of said act of 1804, the tracts surveyed forever as perfectly as if they had been patented.

3d. Each and every act then to extend the time to make locations, etc., was a new grant at the pleasure of Congress to locate lands which had not been previously surveyed under the former act, but there were no forfeitures of the tracts previously surveyed nor was there any extension to locate them *de novo*, but they were reserved from location and never denied a patent under the new act, nor was an entry denied

a survey under the new act. These acts to extend the time to locate, survey, and return the surveys for patent to the General Land Office are also in *pari materia.* No location surveyed previous to the act of March 3, 1855, was ever denied a return to the General Land Office for patent under that act, and it is certainly the narrowest act of any of the acts of extension in respect to tracts previously surveyed, while the act of 1880 is as favorable, admitting the return for patents of tracts previously surveyed, as any former act since the extension of time to locate these lands.

4th. The language and purpose of these several acts are plain, unambiguous, and nothing is left for construction or interpretation. (Sedgwick, page 231.)

In conclusion, unless your honor has been convinced that the principles of logic have been changed, and that the minor proposition now contains the major, and that the frog is "biger" than the ox, and that Congress when they said "land office" meant "General Land Office," and did not know the difference between the offices, or if they did, we must presume they made a mistake, or if you please, it was a typographical error, then you will sustain our application for the issue of the patent in this case.

Respectfully submitted,

JEREMIAH HALL,
Attorney for Samuel H. Ruggles and others.

Legal proposition supposed to be involved in the foregoing application for patent, and the decision of the Commissioner and appeal from the same to the honorable the Secretary of the Interior, and which propositions it is desired his honor the Secretary would submit to the honorable the Attorney-General of the United States for his opinion thereon, viz:

I. Did the act of Congress of March 23, 1804, referred to in said decision, page 3 (United States Land Laws, Local and Temporary, vol. i, 1880, page 32, No. 35), take effect the 1st day of January 1852 (or at any other time), to release those tracts of land within the tract reserved by Virginia, the surveys whereof had not been returned to the "General Land Office," from the satisfaction of the military warrants upon which the locations had been legally founded?

II. Did the act of Congress of February 18, 1871 (said Land Laws, vol. i, page 94, No. 187), as construed and defined by the 1st section of the act of Congress of May 27, 1880 (said Land Laws, vol. i, page 95, No. 190), recognize the surveys described in the first proposition as subsisting appropriations of said tracts of land?

III. Did Congress by the words "land office" in the 2d section of the last-named act describe the local "land office" of the Virginia Military District of Ohio, otherwise designated as the office of the principal surveyor of said military district?

IV. May legal surveys, such as those described in the said second section of said last-named act be carried into patent under the last clause of section three of said act of 1880, on plat certificate, warrant, or certified copy of warrant in such locations being filed in the "General Land Office"?

Respectfully submitted.

JEREMIAH HALL,
Attorney for Samuel H. Ruggles and others.

A sufficient argument in answer to the foregoing is found in the House Mis. Doc. No. 42, first session Forty-seventh Congress, and in the following case, which shows also the necessity for legislation on the subject:

Court of Common Pleas of Hardin County, Ohio, October term, 1882.

SUSAN RHODES AND OTHERS *vs.* JOHN R. GUNN.

Civil action in the nature of ejectment, to recover Virginia Military survey No. 12097. Before Hon. John A. Price, judge.

1. It is well settled that a patent issued without authority of law is void.

2. The act of Congress of March 23, 1804, provides that officers and soldiers in the Virginia military line on continental establishment shall have three years to complete locations of Virginia military bounty land warrants and five years to make returns of surveys to the Secretary of the Department of War, and that lands not thus subjected to a right of locators to procure patents should be released from any claim for bounty lands. By subsequent legislation the return was to be made to the General Land Office. Various acts of Congress were from time to time passed extending the time for making entries and surveys, or for making return of warrants and surveys, and procuring patents down to the act of March 3, 1855, which gave two years to make and return surveys on entries made prior to January 1, 1852.

Virginia military warrant No. 4641, issued to Cornelius Beazley, September 1, 1794, was entered by him December 24, 1822, and survey made thereon December 28, 1822, recorded in the office of the principal surveyor of the Virginia Military District in Ohio, January 28, 1823; the warrant and survey were filed in the General Land Office in January, 1859, and patent issued thereon October 29, 1861.

Held:

(1.) The patent issued without authority of law, and is void, because the warrant and survey were not returned to the General Land Office within the time required and limited by law.

(2.) It was competent for Congress to make such limitation.

(3.) The third section of the act of May 27, 1880, extends the time two years for making and returning surveys and for receiving patents for lands entered on or before January 1, 1852, but does not declare valid returns that were made during the interim from March 3, 1857, to May 27, 1880, and they therefore remain void, and all patents issued thereon are void.

4. The fact that Congress, by the act of May 27, 1880, gave authority to do certain acts does not give validity to similar acts previously done without authority. This construction is rendered all the more certain by reference to the act of 1838, in which Congress made express provision for the validation of acts previously done without authority.

5. The act of May 27, 1880, does not, in terms, or by any reasonable implication or construction, give validity to returns of warrants and surveys made to the General Land Office after the time fixed by law had expired for making such returns, nor does it render valid the void patent issued on such returns.

6. The act of May 27, 1880, does not authorize any new entry to be made.

7. It does not authorize a new patent to be issued on any land previously entered and surveyed by authority of law.

8. The expression "the land office," mentioned in section 2 of the act of May 27, 1880, means the General Land Office at Washington City.

9. But if this expression means the office of the principal surveyor of the Virginia military district in Ohio, it cannot aid a patent previously issued in violation of law on a warrant and survey returned to the General Land Office after the time limited by statute. This section does not validate such patents, nor authorize any new patent to issue. Its purpose was to protect occupants under surveys containing land in excess of the amount specified in the respective bounty-land warrants under which said surveys were made, and it applies to such surveys returned to the General Land Office within the time prescribed by previous statutes.

The material facts are as follows:

1. *September* 1, 1794, Virginia military bounty-land warrant 4641, for 100 acres, was issued at the proper office in Richmond, Va., to Cornelius Beazley, a soldier for three years to the United States in the Virginia line on Continental establishment.

2. *July* 4, 1819, on this warrant an entry was made of 100 acres in Hardin County, Ohio, in the name of Beazley.

3. *December* 28, 1822, Virginia military survey No. 12097, for and in the name of Cornelius Beazley, was made of that date on said 100 acres of land, which survey was recorded at Chillicothe, in the office of the principal surveyor of the Virginia military district in Ohio January 28, 1823.

4. *January*, 1859, the survey and land warrant were filed in the General Land Office in Washington City, and application made for the issue of a patent to the heirs of said Beazley, he being dead.

5. *October* 29, 1861, the patent issued to Cornelius Beazley on this application for said land.

6. *March* 14, 1854, the court of common pleas in Hardin County by partition decree on service by publication against Beazley's heirs set off to Gunn, as assignee of Wallace, one-third of said survey by metes and bounds for services in locating the survey.

7. The defendant has been in adverse possession, claiming the whole survey, since February 10, 1851, under a tax sale made to him in January, 1851, on which the auditor's deed of conveyance was made to him December 15, 1853.

8. *December* 12, 1831, the land was sold at forfeited tax sale to Ralph E. Runkle for taxes of 1823 to 1831, inclusive, with possession in him under it for several years, but no tax-sale deed made.

9. *August*, 1872, Susan Rhodes and others claiming to be heirs of Beazley commenced a suit in the court of common pleas of Hardin County, Ohio, to recover the land from John R. Gunn, defendant, in possession.

10. *October* 24, 1882, the case was tried to the court, Hon. JOHN A. PRICE, *Judge*, a jury being waived.

William Lawrence, for defendant.

The patent is void, because the statute did not authorize it to issue on a warrant and survey returned to the General Land Office after January 1, 1852. This is the limit fixed by the act of Congress of February 20, 1850 (9 Stat., 420). The act of March 3, 1855 (10 Stat., 701), ex-

tended the time for two years for making surveys on previous entries and for patents in such cases, but did not extend the time for return to the General Land Office of surveys previously made. The failure to return the warrant and survey within the limited time renders the patent void.

I. This has been decided:

1. By the Commissioner of the General Land Office.

(1) Kendrick's Case, April 3, 1880, Copp's Land Owner, August, 1880, House Mis. Doc. No. 42, 1st session 47th Congress, June 23, 1882.

(2) Norvill case, May 9, 1882, [Congress] House Mis. Doc. No. 42, aforesaid, 30, 34.

2. By the circuit court of the United States for the northern district of Ohio, August, 1881, held by Matthews, justice, Supreme Court United States, and Welker, district judge.

(1) In Marshall *vs.* Chamberlain, 8 Saint Paul, Minn., Federal Reporter, 398, Sept., 1881; 8 Copp's Land Owner, 145, No. 9, Dec., 1881; House Mis. Doc. No. 42, above mentioned, p. 3.

(2) In Fussell *vs.* Hughes, same Reporter, 384, 398; also in same Congressional Doc., p. 15.

3. It is expressly made so by the act of August 10, 1840, 5 Stats., 262.

4. The same decision in effect by the supreme court of Ohio, May 30, 1882, in Coan *vs.* Flagg (38 Ohio St. R.), 2 Ohio Law Journal [Columbus], No. 44, p. 555, June 15, 1882. In this case the acts of Congress relating to the Virginia military district in Ohio came under review, and the court, referring to the act of July 7, 1838 (5 Stat., 262), said:

> The second section * * * provides that no patent shall be issued by virtue of the preceding section for a greater quantity of land than the rank or term of service of the officer or soldier * * * entitled him to. * * * If it be claimed that the operation of section 2 of this act was extended by reason of the extension and revival of the first section, by the act of August 19, 1841 (5 Stats., 449), it is at most sufficient for this case to say that the "preceding section" thus revived and continued in force for a limited time contained the sole authority for making and returning entries and surveys under these Virginia warrants, and since March 3, 1857, there has been no authority for making or returning surveys under any circumstances whatever * * * Subsequent to the year 1852 no entries under warrants for military services in Virginia were authorized, and subsequent to 1857 the right to make surveys on account of such warrants ceased—provision having been made by Congress for the satisfaction of outstanding warrants by other means.

The act of August 31, 1852 (10 Stats., 143), made them convertible into land scrip.

It is unnecessary to repeat the reasoning of these cases; they are unanswerable.

II. State courts will, generally, follow the rulings of the courts of the United States, on acts of Congress especially, when, as in this case, the executive and judicial officers of the national government have ruled in the same way. (Wells' Res Adjudicata, § 630; Roser Inter-State Law, 36, 85.)

III. The act of Congress of May 27, 1880 (21 Stats., 142; House Mis. Doc. No. 42, p. 46), does not aid the plaintiffs.

1. This was considered and determined in all of the decisions above referred to since that of April 3, 1880; and,

2. If the act authorized a patent, as it does not in such case as this, the plaintiffs have none under it. The only provision authorizing a patent is section 3, which gives three years "to make and return surveys * * * and receive patents for the same" as to lands only "which have on or before January 1, 1852, been entered;" it does not apply to

lands which had been previously surveyed. Congress did not intend to permit patents to issue in cases where lands had been previously entered and surveyed, because, as shown by Justice Matthews, in cases referred to, the lands covered by surveys not returned to the General Land Office prior to 1857 had reverted to the United States; they were generally held by owners with an occupancy of from twenty to eighty years, or more, under deeds of conveyance, or contracts of purchase, sometimes lost or imperfect, from the parties in whose names the surveys had been made, and in many cases under tax sales, guardians' sales, executors' and administrators' sales, from fifty to eighty years old; the occupants were entitled to be protected, having purchased in good faith, without looking to see if patents had issued or if all was regular. If patents were issued in such cases they would be to the heirs of the parties in whose names the surveys were made, and speculators in old stale claims would buy them up, bring suits against the occupants who would not be protected by the statute of limitations, since the supreme court of Ohio has decided that the statute does not run until the patent issues, and thus a great wrong would be done. Congress intended to protect these occupants, and hence, in the act of February 18, 1871 (16 Stats., 416), ceding "the unsold" lands in the Virginia Military District, ceded only "the lands remaining unsurveyed and unsold." The word unsold must be construed as having some purpose other than unsurveyed, and it means unentered.* This purpose is shown by the history of the legislation on the subject. Congress has shown a purpose to fix an end to the time of making surveys. It is shown by the fact that from March 3, 1855, to May 27, 1880, Congress refused to authorize new surveys. Repeated efforts to secure extensions failed. [Congress] House Mis. Doc. No. 42, 1 sess., 47th Cong., 28; Globe, vol. 69, p. 349, January 22, 1866; Globe, vol. 72, p. 3511, June 30, 1866.

3. The second section of the act of May 27, 1880, does not aid the plaintiff.

(1) It does not authorize the issue of a patent, and the plaintiffs have none.

(2) It does not validate entries and surveys unless returned to the Land Office at Washington "on or before March 3, 1857," and the plaintiff's survey was returned after that date.

(3) The Land Office mentioned in the act of 1880 is the General Land Office, at Washington, for several reasons:

a. This subject was considered and decided by Justice Matthews in Fus-

*In [Congress] House Mis. Doc. No. 42, 1 sess., 47th Cong., June 23, 1882, page 28, in a letter from William Lawrence to the Commissioner of the General Land Office, it was intended to be said "it was not the purpose of Congress to include any land which had been surveyed or entered." By a typographical error the words "or entered" were dropped out. The act of Congress of August 7, 1882 (22 Stats., 348), evidently was based on the views presented above, and was designed to protect occupants in the condition above described. By it Congress gave to occupants land which, as Justice Matthews declared in Fussell *vs.* Hughes, had lapsed "into the general body of the public lands to be disposed of according to the laws." In Coan *vs.* Flagg (38 Ohio St.; s. c. 2 [Columbus] Ohio Law Journal, No. 44, June 15, 1882, p. 559) it is apparent the court regarded the act of February 18, 1871, as only granting the unentered lands. The able briefs filed in that case show this conclusively. In that case a majority of the court gave a construction to the fourth section of the act of May 27, 1880, which seems to be unsupported by its language or purpose, and which, if sustained, will be ruinous in its operation. (See letter of Samuel Kendrick to William Lawrence, March 11, 1879. House Mis. Doc. No. 42, p. 58.) It is understood the case will be taken to the Supreme Court of the United States. For reference to many of the acts relating to these lands, see 1 Stats., 182, note; vol. 2, p. 274, and Synoptical Index to Laws U. S., 1852.

sell *vs.* Hughes (House Mis. Doc. 42, p. 22), and by the Commissioner of the General Land Office in his decision of May 9, 1882 (House Mis. Doc. No. 42, p. 34). The reasoning of these cases is conclusive.

b. This is clear by reference to the statutes on the subject. The act of March 3, 1855 (10 Stats., 701), was the last of the original series extending time to make entries and surveys. It fixed the limit of two years—to March 3, 1857—"to make and return surveys * * * to the General Land Office" only on entries made "prior to January 1, 1852." The act of May 27, 1880, is a *counterpart* of the act of 1855, deals with the same subject (surveys and returns), takes the *same dates*, of March 3, 1857, for surveys, and January 1, 1852, for entries, as found in the act of 1855, and validates all surveys of this character returned to the General Land Office on the date previously fixed by the act of 1855. The coincidence in language between the two acts shows that both referred to returns to the same General Land Office. So far it only gave validity to what had been authorized by act of March 3, 1855.

So on entries made "prior to January 1, 1852."

There may have been surveys made under the act of December 19, 1854 (10 Stats., 598), and prior acts, not returned to the General Land Office within the two years limited by each, but still returned prior to March 3, 1857, but which, having been returned after the limited time, were not validated by the act of March 3, 1855 (10 Stats., 701). The second section of the act of May 27, 1880, merely validates them. Its whole purpose is to refer to entries prior to 1852, surveys and returns to the General Land Office prior to March 3, 1857, and to validate those.

It is unreasonable and absurd to suppose it referred to any other land office than that mentioned in prior acts, especially when its dates are taken from prior acts, relates to them, and has no words to indicate a purpose to refer to any other office. This construction is required by well-settled rules. Lord Mansfield said:

> All acts which relate to the same subject, notwithstanding some of them may be expired, or are not referred to, must be taken to be one system and construed consistently. (Rex *vs.* Loxdale, 1 Burroughs, 447; Sedgwick Stats., 212; State of Indiana *vs.* Springfield Township, 6 Indiana, 83.)

The adoption of a statute, as that of 1881, carries with it the construction placed upon prior statutes on the same subject. This rule is carried so far that "the adoption of a statute originally passed in another State carries with it the construction which obtained in the original jurisdiction at the time of such adoption." (Sedgwick Stats. (2d ed.), 367, citing Tyler *vs.* Tyler, 19 Ill., 151; Drennan *vs.* People, 10 Mich., 169; Scruggs *vs.* Blair, 44 Miss., 406; Galbraith *vs.* Galbraith, 5 Kans., 402.) Hence the "land office" mentioned in the act of 1881 is the same office mentioned in the act of 1855, and prior acts; even a change of phraseology will not change the result. (Burwell *vs.* Tullis, 12 Minn., 572; Sedgwick Stats. (2d ed.), 229, 365.)

c. The land office is an expression which in legal and popular usage, refers to the General Land Office at Washington.

d. The office at Chillicothe cannot be intended as the office mentioned in the act of 1880. This act has its own definition of terms or names. Section 3 requires owners of entries made prior to 1852 "to make and return their surveys for record to the *office* of the *principal surveyor of said Virginia military district.*" This is the *name* given by *this act* to the Chillicothe office. When it is thus *named in this act*, it cannot be held that the words "land office" in the same act mean the office of the "principal surveyor of the Virginia military district." The statute distinguishes between the "land office" and "the office of the principal

surveyor." The distinction must be presumed to have had a purpose—to refer to different offices. The use of the expressions interchangeably is to assign two meanings to each.

Lieber, in his Legal and Political Hermaneutics, 86–88, says: "To have two meanings in view is equivalent to having no meaning, and amounts to absurdity."

Bishop reaffirms this in his work on Written Laws, sections 94, 95, and says that generally—

> If a particular word occurs repeatedly in a statute, or in different statutes on the same subject, the meaning may, *prima facie*, be deemed identical in all the places. This doctrine is occasionally expressed in even stronger terms.

The Chief Justice of the King's Bench has said:

> We disclaim altogether the assumption of any right to assign different meanings to the same words in an act of Parliament, on the ground of a supposed general intention in the act. We are not to assume the unwarrantable liberty of varying the construction. (Reg. *vs.* Commr's Poor, 6 Ad. & El., 68; Sedgwick Stats., 222.)

e. The legal and popular name of the office at Chillicothe is that of the *principal surveyor of the Virginia military district.* The act of Congress of February 24, 1829 (4 Stats., 335) requires the appointment of "a surveyor for the Virginia military district," and he is authorized to appoint *deputies.* Prior to this, surveyors were appointed in Virginia, under the act of May, 1799 (10 Henning Va. Stats., 53), one called a "*principal surveyor*" and others *deputies.* The land warrants issued at Richmond since the establishment of the office are addressed "to the principal surveyor," &c. His certificates to copies of entries and surveys are always dated at the "office of the principal surveyor of the district," and they are signed officially by the surveyor as such officer. The act of August 7, 1882 (22 Stats., 348), recognizes this as the name of the office, as all prior legislation had done.

f. It is not competent to show by parol evidence the purpose of any interested person who wrote the bill, or of particular members of Congress in obtaining its passage. (United States *vs.* Union Pacific R. R. Co., 91 U. S., 72; Aldridge *vs.* Williams, 3 How., 9.)

IV. But if the expression "land office" in the act of May 27, 1880, applies to the office of the principal surveyor of the Virginia military district, it does not aid the plaintiffs. It does not authorize any patent to issue. The reasons which led Congress to refuse repeatedly to authorize patents in such cases have been stated. It does not validate any patent. It is shown, and will be more fully shown, that the act was intended to protect occupants of lands, whether on valid or invalid surveys, whether subsisting, or lapsed by failure to make the proper return to the General Land Office. This purpose is to be kept in view. No construction which will permit occupants to be disturbed is to be tolerated.

V. The real purpose of the second section of the act of May 27, 1880, was to validate surveys returned to the General Land Office prior to March 3, 1857, made on entries prior to January 1, 1852. These surveys generally included more land than the warrant called for. The Commissioner of the General Land Office refused to issue patents in such cases on surveys made and returned in due time. The act of February 18, 1871 (16 Stats., 416), ceded the "unsurveyed and unsold [unentered] lands" to the State of Ohio. The State granted its rights to the Ohio Agricultural and Mechanical College. The college claimed that the act of 1871 ceded lands both entered and surveyed, so far as there was any excess above the number of acres in any survey called for by the warrant. (Coan *vs.* Flagg, 38 Ohio St.) Congress intended to validate all

these surveys to defeat the claim made by the college. Congress intended to protect the occupants of the lands—not to validate patents illegally issued—not to authorize patents to lay a foundation to harass occupants with litigation. All this is fully shown in [Congress] House Mis. Doc. No. 42, first session forty-seventh Congress, June 23, 1882, pp. 10, 21, 22, 25–30, 31–34, 36, 37, 47–52. The history of the reasons which led to the act are there given. This is clear from the language of the act. Section 1 is declaratory of the meaning of the ceding act of February 18, 1871, and says it "had no reference to lands which were included in any survey or entry."

This settled two points:

(1) If lands previously entered and surveyed had reverted to the United States by a failure to return the warrant and survey to the General Land Office within the time limited by law, they did not pass to the State. Congress did not intend that occupants should be disturbed in their possession. In cases of failure to make such returns the lands reverted. (Jackson *vs.* Clark, 1 Peters, 628; Fussell *vs.* Hughes, above cited.)

(2) If entries and surveys included more land than authorized by land warrant, the excess did not pass to the State. Congress intended to protect occupants.

Then the second section carrying out this policy validated entries and surveys "returned to the land office on or before March 3, 1857." This was the last date fixed by the act of 1855 for such return. Congress intended to protect occupants on these surveys, even though (1) they had reverted to the United States, or (2) if not reverted, yet contained an excess of lands; the occupants having bought in good faith with no knowledge of the excess, were to be protected. Patents were not authorized, because they could only issue to the persons in whose names the surveys were made, or their heirs. (1) As to lands reverted by failure to return the warrant and survey prior to March 3, 1857, they were not entitled to patents. (2) As to lands included in surveys properly returned to the General Land Office with warrant, no new statute was necessary to issue patents. The prior acts authorized their issue.

There is great justice in protecting the occupants even of surveys containing an excess of land over the amount authorized by warrant. The surveys were made by officers of the United States. Those who purchased and occupied were not lawyers; they had no means of testing their accuracy, and might well assume them to be correct. Nearly all the surveys contained excess land. (House Mis. Doc. No. 42, 1st session Forty-seventh Congress, p. 58.) There are now 270 unpatented surveys in the district mostly with excess land generally covered with valuable farms. Hence the courts have held excess surveys valid. (Taylor *vs.* Brown, 5 Cranch, 249, 253; Holmes *vs.* Trout, 7 Peters, 208; Gill *vs.* Fowler, 3 Ohio, 209.) These recognize the Virginia act of May, 1779 (10 Henning's Statutes, 51), as in force, which protects the occupants of excess surveys.

VI. The partition proceeding does not estop the defendant from denying the validity of the patent. The claim of estoppel is an afterthought, utterly without any show of support.

1. This question was decided in principle in Chamberlin *vs.* Marshall and Fussell *vs.* Hughes. (House Mis. Doc. No. 42, pp. 9–23.)

2. This is the result of legal principles.

Neither the petition nor decree in partition declared that the plaintiffs had any title. They only asserted that Wallace was entitled to a locator's share of the land which he sold to Gunn, and which was accordingly set off

to him by metes and bounds. This was the only question which passed *in rem judicatam*. The decree did not attempt to make a title to the land even in Gunn, except as against defendants therein, much less to these same persons now plaintiffs in this action. They could not make a title in these plaintiffs when they lost any claim to the land or to a patent by the failure to return the survey to the General Land Office within the time required by law. The title was in the United States at the time of the decree, and a State court could not divest it. The United States could not be made a party to the proceeding, and is not bound by it. The decree could not give a title to the plaintiffs *which the law denied to them*. It could not deny the defendant's right to assert what the law says—that the patent is void. A partition decree cannot repeal a statute. A test of this would arise if the plaintiffs sought to recover on the *decree alone*. Clearly they could not, because the decree *gives them no title*. The defendant may now deny the plaintiff's title because that never passed *in rem judicatam*. Thus, it is said in Broom's Legal Maxims, p. 340:

> The rule against reagitating matter adjudicated is subject generally to this restriction, that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as *to its immediate and direct object*, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the *immediate subject* of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. (From Herman's Law of Estoppel, p. 64.)
>
> But where since the judgment new rights and titles have accrued, it is no bar to another action. (*Id.*, p. 71.)
>
> In order that a judgment in another action between the same parties shall constitute an estoppel, it should appear that the identical questions involved in the issue tried were passed upon by the court or jury at the former trial. It must, therefore, be clearly evident that a former judgment cannot operate as an estoppel to another action, unless the subsequent suit is not only founded upon the same contract of transaction as that litigated in the first, but that the subsequent action is brought for the wrong or redress which the party sought in the first action. So a judgment for a defendant in action brought to recover damages for an alleged deception in inducing the plaintiff to enter into a contract can be no defense to an action on the contract, or on a bond given for the fulfillment of the contract, because a judgment that a contract was not procured or void for fraud can be no reason why it should not be enforced. (*Id.*, 546.)
>
> If, however, it be doubtful whether the second action is brought *pro eadem causa*, it is a proper test to consider whether the same evidence would sustain both actions, and what was the particular point or matter determined in the former action, for a judgment in each species of action is final only for its own purpose and object, and *quoad* the subject-matter adjudicated upon, and no further; for instance, a judgment for the plaintiff in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed, but, in a subsequent ejectment between the same parties, would not be conclusive with respect to the general right of property in the *locus in quo*. Where, in an action for the stipulated price for a specific chattel, the defendant pleaded payment into court of a sum, which the plaintiffs took out in satisfaction of the cause of action, it was held that the defendant in that action was not thereby estopped from suing the plaintiffs for negligence in the construction of the chattel.

When the whole title is swept away, there can be no estoppel, and no recovery. In Chamberlain *vs.* Marshall a party in possession for over thirty years under a tax sale conveyance made of a survey unpatented at the time of the tax sale sought to quiet his title against those claiming under a patent void because issued on a survey returned too late, but the court said:

> The claims of the complainant, under his tax deed, and based on the presumption of a grant from the defendant of his equitable interest under the entry and survey, of course cannot survive the extinguishment of the defendant's interest, both in equity

and law. These claims of the complainant are derived from and through the previous title of the defendant, and being dependent upon it must fall with it. The proposition, therefore, which sweeps away all title from the defendant, precisely as if none ever existed, as this proposition which avoids the patent does, necessarily leaves nothing in the complainant but a naked possession, which, however good it may be as a defense against any stranger without title, does not confer even the color of right as against the true owner.

It is true that the bill claims that an equitable title vested in Robert Marshall by virtue of the entry and survey, that that equitable estate passed to and vested in the complainant by virtue of the tax deed, and the presumed grant thereof, and that only the patent is void. But a statement of the grounds on which it is claimed, and on which alone it can be claimed, that the patent is void, will show the impossibility of maintaining the existence of any such equitable estate, to vest in the complainant.

VII. The plaintiff can only recover on evidence of a legal title shown by a valid patent. This has been decided in Fussell *vs.* Hughes. (House Mis. Doc. No. 42, p. 23.) In that case the plaintiffs sought to recover land on an equitable title, and the court said:

> The complainant claims only an equitable estate, and yet prays for the recovery of possession of the lands against defendants in possession, as to whom she alleges they have no title either at law or in equity. She does not admit that the patents under which they claim have vested them with the legal title, but under such circumstances as to entitle her in equity to call for a conveyance and release. If she did, it would be an ordinary case for the exercise of jurisdiction by a court of chancery. But she asserts no equity against the defendants in possession except that they are in possession, without title, of land which in equity belongs to her, the legal title to which is in the United States. Under such circumstances her only remedy is, if she is entitled to do so, to clothe her equity with the legal title by an application under the law to the public officers of the United States charged with the duty of issuing patents to those entitled, and then proceed at law to recover possession. But she does not expect or ask for a decree of this court clothing her with the legal title, nor pray for a conveyance from the defendants of what they claim to have.

The plaintiffs have no legal title, because the patent is void. If they could claim (1) the estoppel they assert, or (2) that the act of 1881 validated their survey, these only operated on the equitable title created by the entry and survey, but by no means create or vest in the plaintiffs the legal title which is in the United States, and must so remain until a valid patent issues. (Simmons *vs.* Wagner, 101 U. S., 260; Polk's Lessee *vs.* Wendell, 9 Cranch, 99; s. c. 5 Wheaton, 303; Lindegray *vs.* Roland, 2 How., 590; United States *vs.* Stone, 2 Wall., 535.)

VIII. The patent is void because issued to a dead man.

The patent having been issued in the name of a dead man, without authority of law, and in violation of law, is void. (Lessee of Wallace *vs.* Sanderson, 7 Ohio, Part 1, p. 322; Price *vs.* Johnson, 1 Ohio St. R., 397; Wood *vs.* Ferguson, 7 Ohio St. R., 288; 4 Peters, 345; McDonald *vs.* Smalley, 6 *Id.*, 261.) The case of Hoffnagle *vs.* Anderson (7 Wheat, 212) is not in conflict with the cases cited, because in that case it was held that the patent was not void for want of power to issue it, but voidable only for irregularities in the exercise of the power. The act of May 2, 1836 (5 Stats.), to give effect to patents in the name of deceased persons, only reaches patents issued "in pursuance of any law," and this patent was not so issued.

IX. The defendant's tax title conveyance will, after the lapse of twenty-one years, in this case be deemed regular, especially as the records on which it issued were long since destroyed by accidental fire. The authorities which prove this are cited in Fitzpatrick's Heirs *vs.* Forsythe (7 American [Cincinnati] Law Record, 411, January, 1879) [and follows this case in this document]; 1 Greenleaf, Evidence, 21; Stockbridge *vs.* West Stockbridge (14 Mass., 257); Trustees Ep. Church *vs.* Trustees Newbern Academy (2 Hawks, 233).

X. The law will, after twenty-one years' adverse possession by the

defendant, presume a grant to him from the holders of the entry and survey under which the plaintiffs claim. This subject is fully discussed in Fitzpatrick's Heirs *vs.* Forsythe, above cited, and in [Congress] House Mis. Doc. No. 42, first session Forty-seventh Congress, June 23, 1882. It is shown in 1 Greenleaf's Evidence, 21; Stockbridge *vs.* West Stockbridge (14 Mass., 257); Trustees Ep. Church *vs.* Trustees of Newbern Academy (2 Hawks, 233). It is recognized by Justice Matthews in the extract above quoted from his opinion in Chamberlain *vs.* Marshall.

Whenever the statute of limitations does not protect a possession at its inception, the doctrine of *presumed grant* applies. This is not by *analogy* to the statute, and hence there is no exception for disabilities.

It may be supposed that Stark *vs.* Smith (5 Ohio, 456), and Smith *vs.* Stark (7 Ohio, 551, Part 2, p. 201), militate against the doctrine of presumption in this case. It holds that long enjoyment "*alone*" of an *easement* "*peremptorily*" raises a presumption of a grant *because* the statute of limitations did not then apply to easements.

It does say that "in respect to corporal rights this rule of presumption has not [at that date] been applied," and, as the case says, *because* "they are within the purview of the act of limitations." It does not say that it would not in a proper case be applied, and it has been since applied.

1. This case is an authority for saying, then, that when lands are occupied (as in this case) *before the patent emanates* so that *the statute of limitations does not protect the occupancy*, the doctrine of presumption *will* apply. It says "in all *cases in which the statute operates* the only bar arising from length of possession is that prescribed by its provisions." The *inference* is—and the *reason* of the rule is—that when the *statute* does not apply, the presumption will.

2. *Every* REASON *exists for applying the presumption to possession upon an equitable title to land as to easements.*

Equitable titles are sold by decree, and in probate court proceedings. Can the original owner whose equitable title is thus sold get in the legal title fifty years after and say he is neither barred by *presumption* nor by the *statute of limitation?* If the Ohio civil code applies its limitation to *equitable* titles, as it clearly does, still there are thousands of acres where equitable titles were sold prior to the code, and yet dependent on the law in force prior to it.

3. The question is *settled in Ohio* that a grant will be presumed from the holder of an *outstanding equitable title* (like that of the plaintiff in this case) to the occupant (as in this case).

Lessee of Blake *vs.* Davis (20 Ohio, 242) affirming the principle that "there is *no difference* in the doctrine [of presuming a grant] whether the grant relate to *corporeal* or *incorporeal* hereditaments," and on page 243 that in even less than twenty years deeds may be presumed "to clothe the *equitable rights* with perfect legal protection," and on page 241 the doctrine is approved that such "presumptions do not always proceed on a belief that the thing [grant] presumed has actually taken place * * but merely from a *principle of quieting the possession.*"

This doctrine is founded on the highest principles of morality. The Rev. Joseph Cook says the *right of property* "includes also the provision that a title, after a certain period, should be given by prescription.

"What if Selkirk here on his island had no right to a foothold when he first landed? He passes years in solitude, and makes the garden resemble Eden, and it is finally ascertained that the island belonged to some barbaric chief. Selkirk took possession without purchase; but the chief, after ascertaining what Selkirk had done, leaves him in pos-

session, and Selkirk goes on improving the island. Many years pass, and he obtains at last what our laws call a prescriptive right to the soil. *He has mingled so much of his labor with it that more injustice would be done in turning him out than in allowing him to stay.* Although defending several extreme views on this right of property, John Stuart Mill himself undertakes to maintain that the right of property includes the right of possession by prescription. Far away is the cool, clear Mill from the wildness of Herbert Spencer, who claims that a clean cut, universal principle must be run through all these cases of prescription, and the right to private property denied even when it has not been disturbed for centuries." (See Mill, Principles of Political Economy, vol. i, book ii, chap. 11, § 2. See also Roscher, Political Economy, vol. i, chap. v.)

XI. It is fully settled that a defendant in possession with an equitable title can defeat a party claiming under a patent. (Ohio Civil Code, section 93, 559; Bliss's Code Pleading, 349, 351; Pomeroy, Legal Remedies, 87; Burnley *vs.* Stevenson, 24 Ohio St., 479; Matthews *vs.* Rector, 24 Ohio St., 445; Crary *vs.* Goodman, 12 New York, 65; Simon *vs.* Schurck, 29 New York, 598; Wintermute *vs.* Montgomery, 11 Ohio St., 442; Jones *vs.* Devore, 8 Ohio St., 431; Niswanger *vs.* Gwynne, 20 Ohio, 556; Newman *vs.* Cincinnati, 18 Ohio, 326.)

XII. The act of August 7, 1882 (22 Stats., 348), quiets the title of the defendant in possession. This is the effect of its language. It is competent for Congress to give a new defense or remedy. This power, says Cooley, "must reside in every State to enable it to secure its citizens from *unjust* and *harassing litigation*, and to *protect them in those pursuits which are necessary to the existence and well-being of every community.*" (Cooley, Const. Lim. (4th ed.), 352 [288]; Bronson *vs.* Kinzie, 1 How., 311.)

"Congress has sole power to declare the dignity and effect of titles emanating from the United States." (Bagnell *vs.* Broderick, 13 Pet., 436; Swayzie *vs.* Burke, 12 Pet., 11; Gilmer *vs.* Poindexter, 10 How., 257; Fenn *vs.* Holme, 21 How., 481; Hooper *vs.* Schermer, 23 How., 235.)

XIII. *The plaintiffs are barred by the Statute of Limitations of March* 22, 1849. (2 Curwen, 1494.)

They had the right of action in *equity* to recover the land in February, 1851, and the right *at law* when the patent issued, October 29, 1861.

The act of 1849 recognizes the right *at law and in equity* by saying that after a prescribed time "NO action of *ejectment* or *other action for the recovery* of lands or tenements shall be brought." There was then no action at law but ejectment.

The civil code follows it by *barring* both *legal* and equitable causes of action. And it is settled that when the statute begins to run it does not stop. (State Md. *vs.* Shipley, 7 Ohio, Pt. 1, p. 246; Granger *vs.* Granger, 6 Ohio, 35.)

But if the right of action did not accrue to the plaintiffs until the patent issued October 29, 1861, they were not then under disability, and their action is barred by either five or seven years' possession thereafter *if the statute of* 1849 *applies to this case.*

It does so apply. The civil code, section 6, continues in force the statute of 1849, as to all "cases where the right of action [at law or in *equity*] has already accrued, [when the code took effect, July 1, 1853,] but the statute now in force [the statute of 1849] shall be applicable to *such cases* [cases in the plural] according to the subject of the action, and *without regard to the form*," [at law or in equity.]

In Scott *vs.* Hickox, 7 Ohio St., 91–93, the statute of 1849 was held to bar a right asserted in *equity*.

The Limitation Act of 1831, (3 Chase, 1778,) by (1) its *title* and (2) all its *provisions*, applied only to *law* actions.

The act of 1849 by (1) its *title* "to give *additional* security to land titles," [at law and in equity,] and (2) by all its *provisions* covers both *legal* and *equitable* titles. It is, besides, to be liberally construed to effect its object. Angel Limitations, 24, 7 Ohio St., 94.

In every view the plaintiff must fail.

JEREMIAH HALL for the plaintiffs:

I. The patent is valid. Every extension of the period to locate land by the several acts of Congress down to the act of March 3, 1855, and to return surveys, revive the whole of section 2 of the act of March 23, 1804, and postpones the release of said act for the same period.

The acts of March 3, 1855, and of May 27, 1880, subtract from the second section of the act of March 23, 1804, the right to make new locations and revive every other provision of said section, and postpone the release of said surveys from the several periods prescribed in said last-named act. This is the effect of what Senator McDonald said at the time a bill on the subject passed Congress. (See Congressional Record, vol. 10, part 4, p. 3453, May 18, 1880.) The acts of 1855 and 1880 apply to surveys made prior to January 1, 1852. The construction of all the acts as one continuous act to obtain patents applies to the acts of 1855 and 1880. The patent in this case is valid from its date. (Thomas *vs.* White, 2 Ohio St., 540; Stubblefield *vs.* Boggs, 2 Ohio St., 216.)

II. One tenant in common cannot assail the common title. (Freeman on Co-tenancy, secs. 152, 158, 552, 530, 531, 553.)

III. The act of 1880 is a new grant founded on the original valid equity conveyed by the entry and survey, and relates back to the issuing of the patent, October 29, 1861.

IV. The act of May 20, 1836, declares patents valid when issued in the names of deceased persons. (Wood *vs.* Ferguson, 7 Ohio St., R.)

WILLIAM LAWRENCE for defendant in reply:

I. The act of 1880 does not aid the plaintiffs.

1. This has already been shown.

2. This was shown, also, by Justice Matthews in Fussall *vs.* Hughes. In that case the court considered the effect of the act of 1880, and, after deciding that a patent could not lawfully issue on surveys returned after the time prescribed in prior acts, said:

> This conclusion is strengthened by the language used in the act of July, 1838, confirming entries and surveys made in the interim between June 1, 1832, and the passage of that act, during which, as has been shown, the limitation which barred them had become complete. That language is that such entries and surveys "shall be held good and valid, any omission heretofore to extend the time for the making of such entries and surveys to the contrary notwithstanding." Such language would not have been thought necessary, except upon the theory that, without it, all such entries and surveys would have been void. So, too, it is manifest by the act of March 3, 1855, and of May 27, 1880, which extends the time for making and returning surveys until March 3, 1857, but on entries only that had been made prior to January 1, 1852, that since the last-mentioned date all entries and surveys made prior thereto are vacated, annulled, and made void, so that they cannot lawfully serve as the basis of patents; the land covered by them lapsing into the general body of public lands of the United States, to be disposed of according to the laws in respect thereto, and no longer constituting any portion of the Virginia military reservation of bounty lands.
>
> That conclusion, adopted and applied to the present case, is fatal to the complainant's claim.

II. The defendant is not affected by any rule as to one co-tenant assailing the common title.

1. Neither the defendant, nor Wallace, whose claim was assigned to him, was ever a co-tenant with plaintiffs. The defendant, certainly, is not now. If a co-tenancy ever could have been said to exist, it has long since been severed.

2. If the defendant had been a co-tenant he is not precluded from showing the invalidity of plaintiffs' title. This has been shown from the extract above quoted from the opinion in Chamberlain *vs.* Marshall, which, in effect, authorizes the defendant to deny the plaintiff's claim of title, since the evidence "sweeps away all title" and "avoids the patent." A tenant in common who is in possession may show that a co-tenant claiming to oust him never had title. (2 Greenleaf's Evidence, 305, 307.)

III. The act of 1880 makes no grant. It passes no legal title. It purposely omits to provide for the issue of any patent except in the class of cases mentioned in section three. *Expressio unius exclusio alterius.* The fact that provision is made for the issue of patents in section three shows that no other patents were to be issued. No language is employed to validate patents previously issued. Such validation by implication is not to be favored, and especially as Congress expressly provided for patents in one class of cases. It is not to be presumed that Congress intended by relation to validate void patents, and thus cut off the rights of occupants, or subject them to vexatious litigation.

JAMES KERNAN and JOHN STILLINGS also for defendant.

October 25, 1882, Hon. JOHN A. PRICE, judge, delivered an opinion, as follows:

This is an action to recover 100 acres of land situate in Hardin County, in military survey No. 12097, founded on military warrant No. 4641, for 100 acres of land issued to Cornelius Beazley for his services as a soldier of the United States in the Virginia line on continental establishment.

For the purpose of having determined a legal question arising in the case, the parties agree on the facts already stated.

The defendant insists:

I. That the patent under which the plaintiffs claim was issued without authority of law, and, hence, is void, for the reason that the warrant and survey were not returned to the General Land Office at Washington prior to March 3, 1857.

(*a*) If the claim of the defense be true, that the patent relied upon by plaintiffs was issued without authority of law, it follows, of course, that the patent is void, and the plaintiffs take nothing under it. That a patent issued without authority of law is void, is a mere truism that I do not understand is disputed in this case, or, in fact, by any one.

(*b*) The pertinent and vital question in this case is: Was the patent under which plaintiffs claim issued without authority of law? This is the question we will now briefly consider.

II. The determination of this question depends upon a construction of the act of Congress of March 23, 1804 (United States Land Laws of 1881, pp. 32 and 33), limiting the period for locating Virginia military lands, &c., and the various other acts of Congress, from time to time, extending time for making locations, and making and returning surveys, down to and including the act of May 27, 1880. (Land Laws, p. 95.)

1. The act of 1804 (Land Laws, pp. 32, 33), section 2, provides:

* * * That officers and soldiers shall have three years to complete locations, and five years to make return of surveys to the Secretary of the Department of War.

Section 3 provides, in substance, that lands not located within three years from that time and surveys returned to the Secretary of War within five years from that time should be released from any claim for bounty lands, &c. By subsequent legislation the return was to be made to the General Land Office.

The Supreme Court of the United States has decided that it was competent for Congress to limit the time when the lands to be appropriated by the claimants should be separated from the general mass of the public lands. (Jackson *vs.* Clark *et al.*, 1 Peters, 628.)

Various acts of Congress were passed extending the time for making locations, and for making and returning surveys, or doing some of those things, down to the act of March 3, 1855. (Land Laws, p. 92.)

2. This act of March 3, 1855, gives two years' further time to make and return surveys to the General Land Office on entries that had been made prior to January 1, 1852. That was the last act of Congress relative to the matter prior to the act of May 27, 1880. (Land Laws, p. 95.)

III. On the 3d of March, 1857, according to the limitation in the act of March 3, 1855, the time expired within which a person might return a survey to the General Land Office, and procure a patent thereon.

The survey in this case was returned to the General Land Office in January, 1859, nearly two years after the last limitation had expired; leaving out of view the act of May 27, 1880. The patent issued in 1861 upon warrant and survey that had been returned when there was no authority of law for making such return. There was an interim from March 3, 1857, to May 27, 1880, during which there was no law authorizing a return of the survey. The return of the survey in this case to the General Land Office and the issuing of the patent were both during such interim.

IV. When the patent issued it was without authority of law, because it issued upon a return not authorized by law to be made. It was competent for Congress to make the limitation. The limitation ran through all the various acts, including the act of March 3, 1855, and from and after March 3, 1857, the land was not subject to appropriation by patent by claimants of bounty lands. If the legislation had ceased with the act of March 3, 1855, with its limitation of two years, I think there could scarcely be a doubt that the patent relied upon is void, as having issued without authority of law. It is claimed, however, that it is in some way saved by the act of May 27, 1880, that said act gives validity to returns of surveys that were invalid and unauthorized when made, and to the patents issued upon a survey so returned.

There was an interim once before, from 1833 to 1838, and in the act of 1838 Congress deemed it necessary to give validity to entries and surveys made during the interim. The act of July 7, 1838 (Land Laws, p. 80), declares:

* * * And all entries and surveys, &c., * * * shall be held to be good and valid, any omission heretofore to extend the time for the making of such entries and surveys to the contrary notwithstanding. * * *

The act of May 27, 1880, third section (Land Laws, p. 95), extends the time two years *for making and returning surveys*, but does not declare valid returns that were made during the interim from 1857 to 1880, when there was no authority for such return. Because Congress gives certain time within which to do certain acts, it does not follow that it

thereby gives validity to similar acts previously done without authority. In the act of 1838 Congress deemed it necessary to make valid by legislation the acts done in the interim. In the act of 1880 it did not do so. In my judgment, the return of the survey being unauthorized in 1859, it is not cured by anything in the act of 1880, for that act does not purport to make any such return valid. In other words, the act of 1880 is not curative, only in so far as it purports to be. It does not purport to legalize a return of a survey made in 1859, nor to authorize or give validity to a patent issued upon a survey so returned.

The act of May 27, 1880, does not aid the plaintiff.

Section one is declaratory of the meaning of the act of February 18, 1871, ceding the "unsurveyed and unsold" lands to the State of Ohio. It declares that the act of 1871 did not cede any lands "which were included in any survey or entry." This excluded from the grant all lands covered by any entry or survey, whether (1) they included more land than authorized by land warrant or not, and (2) even if they had reverted to the United States by a failure to make return to the General Land Office prior to March 3, 1857, &c. Section 2 only gives validity to what had already been authorized by the act of March 3, 1855. Section 3 only authorizes parties having entries to "make and return their surveys" and receive patents in such cases. It does not authorize a new entry.

The act of 1880 does not, either in terms, or by construction, give validity to a patent issued on a survey returned in 1859. It follows, according to my construction of the law, that the patent under which plaintiffs' claim was issued without authority of law, and is therefore void.

The partition decree does not operate to estop the defendant from denying the validity of the patent. State courts are not necessarily bound to follow the decisions of the courts of the United States, but, as a general rule, they do so on questions relating to the construction of the acts of Congress.

Judgment for defendant.

District court of Logan County, Ohio.

FITZPATRICK'S HEIRS *vs.* JAMES FORSYTHE.

Civil action to recover land.

SYLLABUS.

1. On the trial of a civil action to recover real estate the jury may, in favor of a party defendant, who has had a possession adverse *in law* and *in fact* for twenty-one years, *presume a grant* from the plaintiffs whose title has been such that the statute of limitations does not run against it.
2. Where a party occupies adversely, for the period prescribed in the statute of limitations, an entry of land in the Virginia military district of Ohio, not patented at the inception of the adverse possession, the jury may, on trial of an action to recover such land brought by those claiming title under the patent, against the party in possession, presume a grant from the original holder of the entry to such party in possession, and thus defeat such action.
3. In favor of a party in adverse possession of real estate for a long period, but less than twenty years, under a delinquent tax sale, it may be presumed, when the records are destroyed, that all the proceedings have been regular to authorize a sale and to make a valid conveyance.
4. If the tax records are destroyed in such case, and secondary evidence of their contents cannot be produced, it will be presumed that all official acts have been rightfully performed, and a tax deed regular on its face will be *prima facie* evidence of valid title.
5. *Semble.*—That in such case, to support the deed, it is not necessary to resort to, or prove the loss of, secondary evidence.

COLE, MCKENZIE, AND PHELPS, JJ.

The material facts are these:

April 5, 1872, the plaintiffs brought a civil action in the court of common pleas of Logan County, to recover military survey 9953.

On the trial, April term, 1874, the plaintiffs gave in evidence, Virginia military entry 9953, date July 19, 1819, in name of James Fitzpatrick; a survey of same entry, January 14, recorded March 28, 1821, in surveyor's office, Chillicothe, patent date February 20, 1872, and to the plaintiffs described as heirs of James Fitzpatrick, and depositions proving heirship of plaintiffs.

WM. LAWRENCE, for defendant, moved to rule out the patent.

I. It is void, because issued after the time had expired within which patents could be lawfully issued in the Virginia military district of Ohio. (2 U. S. Stat. at Large, 274, sec. 2, p. 425; 3 Stat., 10 Stat., 143, 598–701; 1 Stat. 394, and other acts on the subject; 2 Greenl. Ev., sec. 541.)

II. The patent is not indorsed by the Secretary of War, as required, showing the land warrant unsatisfied. (1 Stat., 394; 10 Stat., 143.)

JEREMIAH HALL, for plaintiff.

By COURT. Motion overruled.

The defendant then offered in evidence: Entry 13314, in name of Duncan McArthur, date June 30, 1832, survey thereof October 15, 1832; patent to him July 1, 1837, proof that the surveys 9953 and 13314 covered the *same land;* record of delinquent tax sale of survey 9953 to Duncan McArthur December 12 1831, (on which no deed was ever made); McArthur's deed of conveyance, July 4, 1837, to Irwin, with warranty for survey 13314 and other conveyances to defendant; that Irwin and defendant had continued in adverse possession since July, 1837; about 35 years before suit was brought; that McArthur died 1838, that no claim was made by plaintiffs until after 1872; that the taxes had been regularly paid by McArthur, Irwin, and defendant, all of whom had made large and valuable improvements.

The court was asked to charge the jury on the law before the argument to the jury and on the law questions.

JEREMIAH HALL, for plaintiff, argued:

1. The patent to McArthur is void. (Act of Congress of March 2, 1807, *proviso*, 2 Stat., 425; McArthur's Heirs Lessee *vs.* Gallagher, 8 Ohio, 512; Galt *vs.* Galloway, 4 Pet., 331.)

2. There is no presumption of any grant in favor of defendant. (Hart's Heirs *vs.* Young, 3 and 4, JJ. Marsh, 408; Stark *vs.* Smith, 5 Ohio, 455; S. C., 7 Ohio Rep.; Wallace *vs.* Minor, 7 Ohio, 249.)

He cited on various questions, page Va. Mil. Titles, 126–131, 2 Ohio R., 415; Kerr *vs.* Watt, (6 Wheat., 550); Miller *vs.* Lee (6 and 7 B. Monroe, 91); Galt *vs.* Galloway (9 Curtis, 331); Taylor *vs.* Fletcher (7 B. Monroe, 82–90); 8 Ohio, 412.

WM. LAWRENCE, for defendant:

I. McArthur's patent is valid. The act of March 2, 1807, was changed by act December 19, 1854 (10 Stat., 598), and act March 3, 1855 (10 Stat., 701). The possession under it is a bar to the plaintiff's action) Miller *vs.* McIntyre, 6 Peters, 61). It is operative for all purposes of the statute of limitations. This is especially so in Ohio. The civil code protects even equitable titles.

II. But if McArthur's patent is void, then the defendant has a title independently of it, which is a defense.

Some preliminary considerations are necessary.

1. An *equitable* title in defendant is a defense. (24 Ohio Stat., 444–5–479; Civil Code, sec. 93; Wallace *vs.* Seymour, 7 Ohio, Pt. 1, p. 156; Duke *vs.* Thompson, 16 Ohio, 48; Holt *vs.* Hemphill, 3 Ohio, 236; Blake *vs.* Davis, 16 Ohio, 48; Ricard *vs.* Williams, 7 Wheat., 244; *Idem*, 109.)

2. The *land warrant* on which the entry of Fitzpatrick was made may be *verbally* sold so as to convey an equity. (Duke *vs.* Thompson, 16 Ohio, 41; Lessee of McArthur *vs.* Gallagher, 8 Ohio, 518–519.) The assignment may be presumed. (4 Wheat., 343; 7 B. Monroe, 279; 20 Ohio, 231; 7 Wheaton, 243.)

3. Possession long continued is evidence tending to prove a *purchase* by the defendant of the outstanding equity of plaintiffs before patent issue. (Bierce *vs.* Pierce, 15 Ohio, 529–540; Duke *vs.* Thompson, 16 Ohio, 41, 48, 54; McArthur *vs.* Gallagher, 8 Ohio, 518–519; Ward *vs.* McIntosh, 12 Ohio Stat., 238; Ludlow *vs.* Barr, 3 Ohio, 407; Ricard *vs.* Williams, 7 Wheat., 59 [237] Broom., Legal Max., 428; 3 Stark Ev., Part IV, 1203–1221; Courcier & Graham, 1 Ohio, 330; Arnold *vs.* Flattery, 5 Ohio, 272; 15 Ohio R., 548; 1 McLean, 93; 6 Cl. & Fin., 657; 2 W. Bl., 1228; Best on Presumptions, 87; 1 Greenl. Ev., § 21; 14 Mass., 145; *Id.*, 177; 10 Mass., 105; 2 Rob. La., 374; 1 N. H. R., 310.) The evidence is competent, and from which the jury may infer, *as a fact*, a conveyance. They are the judges of the *fact*, and by the rules of evidence, if the facts make it *probable* that there was a sale in some form, this is all that is required. In Angell on Limitations, sec. 3–4, it is said: "*Long* possession in the eye of the law is *an assurance of title*, because it is in *itself evidence of title, priora praesumuntur a posterioribus* * * * And in order to render the title of the possessor complete they [the courts] *will presume* * * * *execution* of deeds, &c., agreeable to the maxim, *ex diuturniate temporis omnia praesumuntur solemniter esse acta.*"

III. On the facts in evidence the jury as a question of *law must* presume a grant from Fitzpatrick to McArthur or his grantees, or as a question of *fact may* presume it.

I concede that to raise this presumption there must be a possession—adverse *in law* as well as *in fact*. There are cases where a possession adverse *in fact* is not so in law. I will mention three classes.

(1.) The possession of a lessee after the expiration of his lease is not *in law* adverse to the lessor, and cannot be until possession is surrendered to him.

(2.) The possession of a party under contract of purchase is *in law* not adverse to the vendor.

(3.) So the possession of a trustee is not in law adverse to the *cestui que trust;* but subject to these and similar exceptions the doctrine of presumed grant applies.

Subject to these exceptions and others similar in principle a grant will be presumed to a party long in possession from all adverse claimants.

1. *This is the doctrine of the elementary books.* (American Law Register, Feb., 1874, p. 69, old series, vol. 22, N. S. 13; Angell on Limitations, sec. 38–3–4–9–10; Starkie Ev., Part 4, p. 1222; 2 Greenl. Ev., sec. 539–541 n; 1 Greenl. Ev., 20–45 n; 2 Washburn Real Prop., 293 A [39]; 3 *Idem*, 51 [448]; Washburn on Easements and Servitudes, 2d Ed. [72], 109 [68] 103, &c.; Best on Presumptions of Law and Fact, 87; Wood Civil Law, 123; Phillip's Jurisprudence, sec. 147; Maine Anc. L., 284; Tudor Leading Cases, 114; Perry on Trusts, sec. 866; 2 Greenl.; Cruse Dig., Book 3, p. 423 n; Matthew's Presumptive Evidence, 1, 7, 271–277; 3 Dane's Abridgment, 55; Hoffman's Eccl. Law, 123, 126; Broom, Legal Max., 800–852; 3 Cruse Digest, 467; 1 Greenleaf Evidence, sec. 21 n.)

The books enumerate many reasons in support of the doctrine.

(1.) *Public interests* require an end of litigation; *interest reipublicæ, &c.*, is the maxim which Angell declares (sec. 9) antedates the Christian era, is venerable for its age as it is hallowed in its purposes of peace.

(2.) *Public interests* require that titles be settled so as to promote improvements and agriculture. (Angell, sec. 9.)

(3.) *Truth* requires courts to presume as probable that parties who long delay to make claims have abandoned or transferred them. (9 Opinions Attorneys-General, 204.)

(4.) *Justice* requires that parties in possession (who *cannot* preserve evidences of title, often in imperfect writings or by parol) shall not suffer by loss of evidence.

(5.) *Honesty* requires that *fraudulent claims* shall find no favor when the evidence to defeat them is lost.

These and other reasons are supported by authorities and legal maxims hereafter cited.

Angell says:

> The doctrine of prescription is founded on *public policy*. The spirit of the maxim, *interest reipublicæ ut sit finis litium*, may be traced to a more remote period than the Christian era. * * * With respect to land, there is one other *public consideration* in support of the doctrine of prescription * * * that during the litigation it must become waste and unproductive from want of improvement. * * * Lapse of time is a dereliction of all ground of objection—a protection against * * * claims the *injustice of which* (from lapse of time) it is extremely difficult to detect and expose. * * * *Vigilantibus non dormientibus inservit lex.* * * *

And see the authorities cited above from Angell.

2. *It is the doctrine of the courts.* (Lessee of Ludlow *vs.* Barr, 3 Ohio, 408; Courcier *vs.* Graham, 1 Ohio, 330; Blake *vs.* Davis, 20 Ohio, 242; Duke *vs.* Thompson, 16 Ohio, 48; Jarboe *vs.* McAtee, 7 B. Monroe, 279; Berthelemy *vs.* Johnson, 3 B. Monroe, 92; Edson *vs.* Munsell, 10 Allen, 568; McArthur *vs.* Gallagher, 8 Ohio, 512; Roods *vs.* Symes, 1 Ohio, 316; Valentine *vs.* Piper, 22 Pick., 93; Melvin *vs.* Lock, 17 Pick., 255; Hill *vs.* Crosby, 2 Pick., 466; Trustees Episcopal Church *vs.* Trustees of Newburn Academy, 2 Hawks, 233; 16 Pick., 241; Ewans *vs.* Trumbull, 2 Johns, 313; Eldridge *vs.* Knott, Cowp., 214; Oswald *vs.* Leigh, 1 Term R., 270; *Id*, 399; Coolidge *vs.* Leonard, 8 Pick, 504; Strickler *vs.* Todd, 10 S. & R., 63–69; Rust *vs.* Low, 6 Mass., 90; Mayor *vs.* Horner, 1 Cowper, 102; Campbell *vs.* Smith, 3 Halst., 141; Olney *vs.* Fenner, 2 R. I., 211; Tinkburn *vs.* Arnold, 3 Greenl., 120; Pillsbury *vs.* Moore, 44 Maine, 154; Farran *vs.* Merrill, 1 Greenl., 17; Croker *vs.* Pendleton, 10 Shepley, 339; Belknap *vs.* Trimble, 3 Paige, 577; Townsend *vs.* McDonald, 2 Kernan, 381; Hazard *vs.* Robinson, 3 Mason, 272; Wilson *vs.* Wilson, 4 Dev., 154; Gayette *vs.* Bethune, 14 Mass., 51–53; Tyler *vs.* Wilkinson, 4 Mason, 402; Parker *vs.* Foote, 19 Wend., 309–315; Schauber *vs.* Jackson, 2 Wend., 13; Corning *vs.* Gould, 16 Wend., 531; Hall *vs.* McLeod, 2 Metc., Ky. 98; Wallace *vs.* Fletcher, 10 Foster, 434; Winnipisceogee Co. *vs.* Young, 40 N. H., 420; Tracy *vs.* Atherton, 36 Vermont, 512; Townsend *vs.* Downee, 32 Vermont, 183; Ingraham *vs.* Hutchinson, 2 Conn., 584; Balstour *vs.* Benstead, 1 Campl., 465; Daniel *vs* North, 11 East., 371; Knight *vs.* Halsey, 3 Bos. and Pul., 172–206; Bealey *vs.* Shaw, 6 East., 215; Wright *vs.* Howard, 1 Sim. & Stu., 203; Wallace *vs.* Minor, 7 Ohio, Pt. 1, p. 249; 6 Ohio, 366; 5 Ohio, 456; 16 Ohio, 34; Miller's Heirs *vs.* McIntire, 6 Peters, 61; Harpending *vs.* Dutch Ch., 16 Peters, 455; Humbert *vs.* Trinity Church, 22 Wend., 485; Dutch Ch. *vs.* Mott, 7 Paige, 77; Stillman *vs.* Whitebrook M. Co. *vs.* 3 Woodb. & Minot, 538; Hussb. *vs.* McNeil, 1 Wash. C. C. R., 70; Ransdale *vs.* Grove, 4 McLean, 282; Baird *vs.* Wolfe, 4 McLean, 549; Sar-

geant *vs.* St. B. Ind., 12 How., 371; Hanson *vs.* Eustace, 2 How., 208; Boulden *vs.* Massie, 7 Wheat., 122; Hepburn *vs.* Auld, 5 Cranch, 262; Weatherhead *vs.* Barkiesville, 11 How., 329; Archer *vs.* Tanner, 2 Henning & Mun., 370; Billings *vs.* Hall, 7 Cal., 1; Ingraham *vs.* Hough, 1 Jones, N. C., 39; Callender *vs.* Sherman, 5 Ired. N. C., 711; Stimfler *vs.* Roberts, 18 Pa. St. (6 Harris), 299; Meanor *vs.* Hamilton, 27 Pa. St., 137; Johnson *vs.* Irwin, 3 S. & R., 291; Thomas *vs.* Hatch, 3 Sumner, 170; Young *vs.* Collins, 2 Brown, 28; Miller *vs.* Bates, 3 S. & R., 63; Kingston *vs.* Leslie, 10 S. & R., 391; Ewing *vs.* Barton, 2 Yeates, 318; Cannon *vs.* Philips, 2 Sneed, Tenn., 214; Lessee of Brock *vs.* Burchell, 2 Swan Tenn., 31; Martin *vs.* Stark, 10 Humph., 162.

Stockbridge *vs.* West Stockbridge, 14 Mass., 257.

Chamberlain *vs.* Marshall and others, [Saint Paul] Federal Reporter, September 20, 1881; S. C., House Mis. Doc. No. 42, first session Forty-seventh Congress, 9; Fussell *vs.* Hughes, same Federal Reporter, 1; S. C., same Mis. Doc., 19.

Process presumed. (Morgan *vs.* Burnet, 18 Ohio, 535; Curtis *vs.* Keesler, 14 Barb., 511; Tracy *vs.* Atherton, 36 Vermont, 503; Ricard *vs.* Williams, 7 Wheat., 244; Wendell *vs.* Jackson, 8 Wend., 183; People *vs.* Dennison, 17 Wend., 312; People *vs.* Trinity Church, N. Y. court of appeals, September, 1860; 3 P. F. Smith, 84; 1 Rawle, Penrose & Watts, Pa., 78; 4 W. & S., 336; Mather *vs.* Trinity Church, 3 S. & R., 509; Bedle *vs.* Beard, 12 Co., 5; Croker *vs.* Pendleton, 10 Shepley, 339; Jackson *vs.* McCall, 10 Johns, 377; Vandyck *vs.* Van Buren, 1 Caines, 84; Burges *vs.* Bennett, 1 Caines, C., 1; Grote *vs.* Grote, 10 Johns, 492; Jackson *vs.* Schoonmaker, 7 Johns, 12; Mather *vs.* Trinity Church, 3 S. & R., 509; Powell *vs.* Millbank, 12 G., 3 B. R.; 1 T. R., 339; Williams *vs.* Presby. Soct., 1 Ohio St., 492.)

The rule is so strong, that in case of a possession adverse in law and in fact the presumption of a grant *cannot be repelled by evidence.* It is conclusive. (Strickler *vs.* Todd, 10 Serg. & R., 63–69; Rust *vs.* Lowe, 6 Mass., 90; Mayor *vs.* Horner, Cowp., 102; 2 Greenl. Ev., sec. 539; Wilson *vs.* Wilson, 4 Dev., 154; Ingraham *vs.* Hough, 1 Jones, N. C., 39, and cases collected; 22 [Philadelphia] American Register, 73.)

The doctrine was applied by courts of law to *easements*, because the statute of limitations did not apply to them. For the same reason courts must apply it in cases of lands to which the statute does not apply. The *reason* of the law is the life of the law.

3. *Courts of equity apply the doctrine.* (Ridley *vs.* Hettman, 10 Ohio, 524, commented on; 22 American Law Register, 69 [N. S., vol. 13]; Larrow *vs.* Beam, 10 Ohio, 502; Burnley *vs.* Stevenson, 24 Ohio St., 479; Matthews *vs.* Rector, 24 Ohio St., 444–5; Wallace *vs.* Fletcher, 10 Foster, 446; Miller *vs.* McIntyre, 6 Peters, 61–65; Rhodes *vs.* Symmes, 1 Ohio, 281. Fussell *vs.* Hughes alone cited per Matthews, Justice.) The doctrine originated with courts of equity in 1707, and was adopted by courts of law in 1761. (Wallace *vs.* Fletcher, 10 Foster, 446.)

4. *In tax sales* the courts *presume* the proceedings regular after a long possession, even less than twenty years. (Bierce *vs.* Pierce, 15 Ohio, 547–533–543; Wallace *vs.* Seymour, 7 Ohio, Pt. 1, p. 156; Matthews *vs.* Rector, 24 Ohio St., 445; Burnly *vs.* Stevenson, 24 Ohio St., 474; Ward *vs.* Barrows, 2 Ohio St., 241; Coombs *vs.* Lane, 4 Ohio St., 112; Ridley *vs.* Hettman, 10 Ohio, 524; Read *vs.* Goodyear, 17 S. & R., 350; Freeman *vs.* Thayer, 33 Maine, 76; Farrar *vs.* Eastman, 5 Greenl. Me., 345; Brown *vs.* Connelly, 5 Blackf'd, 391; Keane *vs.* Cannovan, 21 Cal., 300; Coleman *vs.* Anderson, 10 Mass., 105; Gray *vs.* Gardner, 3 Mass., 399;

Bank U. S. *vs.* Dandridge, 12 Wheat., 70; 2 Ohio St., 241–246; 4 Ohio St., 112–148.)

Blackwell, in his valuable work on tax titles, reviews the authorities, and says (4 Ed., 533), "that a long possession under a tax deed *short of the period fixed by the statute of limitation*, is a sufficient basis for a *presumption of regularity*," and he says this doctrine "is in unison with the established principles of law as applied in analogous cases." It is not even necessary to *prove* the loss of records; it will be conclusively presumed. It is not necessary to look for secondary evidence; at best it is, or may be, imperfect. The law supplies its *existence* as well as its *defects* by presumption.

This doctrine is especially important, since the *principle* affects all *judicial sales* under which it estimated lands equal to the entire area of Ohio are transferred once in every generation of thirty years. It will apply to sales by corporations, the authority of whose officers cannot be proved after a few years, &c. There is no one principle of law of such far-reaching consequences and so important in giving repose to land titles as this. By force of these authorities it must be held that the tax sale of December, 1831, was regular; that the officers did their duty, and this on grounds of public policy, even if the fact were not so. It must also be presumed that the tax deed was made and thus a perfect title passed to McArthur.

5. There is nothing in the objection that the statute of limitations does not run against the government, nor until a patent issues—*nullum tempus occurit regi*, as decided in Wallace *vs.* Minor (6 Ohio, 366, S. C.; 7 Ohio, Part 1, p. 249); Duke *vs.* Thompson (16 Ohio, 34); Clark *vs.* Southard (16 Ohio St., 408); Wood *vs.* Ferguson (7 Ohio St., 288).

This is so for several reasons, to be considered separately.

a. The cases show that the doctrine of the *presumption of a grant* exists independently of the statute of limitations. The statute of limitations made no *new principle*, it was only declaratory of the common law. (Angell on Limitations, *passim.*)

The maxim, *nullum tempus*, &c., was designed to protect the *rights of the government*, not private individuals who sleep on *their* rights. It is an ignorant perversion of the maxim to make it give protection to private citizens, and hence has been held not to apply in cases affecting private persons. (Beadle *vs.* Beard, 12 Co., 5; Jarbo *vs.* McAtee, 7 B. Monroe, 279; Starkie on Evidence, Part 4, p. 1222; 22 American Law Register, 69.)

b. A tax title operates upon an *entry* before patent, and carries to the purchaser a title which will defeat the subsequent patent. (Jones *vs.* Devore, 8 Ohio St., 431; Holt *vs.* Hemphill, 3 Ohio, 232; Wallace *vs.* Seymour, 7 Ohio, Pt. 1, p. 156; Douglas *vs.* Dangerfield, 14 Ohio, 522; Gwynne *vs.* Niswanger, 20 Ohio, 556; Lessee of McMillin *vs.* Robbins, 5 Ohio, 32.)

A tax title is an *original title.*

c. A grant has been presumed even against the government on grounds of public policy, and contrary to the known fact. (22 American Law Register, February, 1874, pp. 70–71, note 84, and authorities there cited; Beadle *vs.* Beard, 12 Co., 5; Jarbo *vs.* McAtee, 7 B. Monroe, 229; Goodtitle *vs.* Baldwin, 11 East., 488; Roe *vs.* Ireland, 11 East., 280; Read *vs.* Brookman, 3 Term R., 159; Rex *vs.* Carpenter, 2 Show., 48; Biddulph *vs.* Ather, 2 Wils., 23; Bullard *vs.* Barksdale, 11 Ired., 461.)

d. The courts have sustained the title of parties in possession upon the ground that an adverse claimant, by long neglect, had *abandoned* his claim—equivalent to the equitable doctrine of *stale equity.* (Strauch

vs. Shoemaker, 1 Watts and S. Pa., 173; Chambers *vs.* Mifflin, 1 Pa. (Raule, Penrose and Watts), 79; Read *vs.* Goodyear, 17 Serg. and Rawle, 350.)

This doctrine, in its *reason*, its *policy*, and its *purpose*, applies as well where an original claimant *has paid* for his land as in cases where he has not. A party who *abandons* a claim thereby consents that others may acquire rights, after which the original claimant is, on every principle of law, morals, and justice, *estopped* from asserting a title.

IV. *a.* The doctrine of presumed grant should be sustained on grounds of *public* policy. This is especially so in a new country like Ohio, where early records were sometimes not carefully made—where many have been lost.

b. There are now in the Virginia military district 130,000 acres of land covered by entries, never patented, held by occupants more than twenty-one years, who are liable to be harassed by unscrupulous parties, who hunt up fictitious heirs, get patents in their names, and bring suits. (See speech of Hon. H. L. Dickey, House of Representatives, June 8, 1878, Congressional Record, vol. 7, part 5, page 4342.)

c. Parties who persistently refuse to pay taxes and wait to speculate on the advance in value of lands produced by the labor of others, do not present a favorable claim for judicial aid. (Carlisle *vs.* Longworth, 5 Ohio, 371, and cases cited *ante* as to presumptions on tax sales; Read *vs.* Goodyear, 17 Serg. and Rawle, 350.)

d. History has shown that uncertainty of titles is the greatest impediment to the improvement of lands. This has been seen in the Virginia military district. Waddy Thompson has described it in his "Recollections of Mexico." Men flee from a region of doubtful titles as from pestilence. (Angell on Limitations, sec. 9; Hovenden *vs.* Lord Ausley, 2 Schf. and Lefr., R., 629; Lewis *vs.* Marshall, 5 Peters, 470; Hawkins *vs.* Barnett, 5 Peters, 547.)

e. I may illustrate the necessity for the doctrine of presumed grant by a case.

On the 24th of July, 1832—more than forty years ago—a paper was executed as follows:

> Received, July 12, 1832, of Henry H. McPherson, three hundred dollars, in full payment of the south half of the southeast quarter of section numbered seven, and township numbered two, and range fifteen, known as the place Michael Kearns now lives on.
>
> Witness my hand and seal.
>
> JAMES McPHERSON.

Nearly thirteen years passed by when James McPherson, having died, Henry H. McPherson, on May 2, 1845, filed a bill in chancery against the widow and heirs of James McPherson to obtain decree for title.

He soon after had his bill dismissed without prejudice, because he found himself involved with surety debts, which would have taken the land.

Henry H. McPherson paid the taxes from 1832 to 1872, forty years; but the land being wood land, he had no actual *pedis possessis* which would protect him under the statute of limitations. In 1872 he agreed in writing to convey the land to J. McPherson, and in a few weeks thereafter died, the only title of record being in the original James McPherson, the patentee.

In 1875 the last purchaser, J. McPherson, found himself in litigation as to this land, and liable to be ousted by action by the heirs of James McPherson.

There was but *one living man* who knew of the existence of the *receipt*

of July 12, 1832—the attorney who filed the bill of May 2, 1845—who, for a wonder, after thirty years, remembered and produced it, and thus saved the title of the last purchaser. But for this fact his title must have been lost, unless it could have been saved by the doctrine of *presumed grant*, and that, too, merely on proof of (1) payment of taxes, and (2) the absence of claim by the heirs of James McPherson.

There is a *necessity* for the doctrine, especially in cases like this, where *a party in possession*—as the Supreme Court of Ohio possibly may be supposed to have held—*cannot avail himself of the benefit of the statute of limitations under a void patent, and against the prima facie valid patent of plaintiffs.*

If the court will not require or permit the presumption, what follows? Then, if the holder of an entry and survey delays procuring his patent for forty years, and can still maintain an action to recover land under it, he may do so for sixty years, or a hundred, and if this be so, then an adverse possession will be of no avail for

> Ten thousand years bright shining as the sun,
> With no less days to sing Hall's praise than when we first begun.

In Whitney *vs.* Webb (10 Ohio, 522), the court say that the doctrine of "*cumulative disabilities*" would let a claim run to infinity, which "is a consequence *too monstrous* and absurd to be admitted."

Adverse possession must raise the presumption of a grant, or "*monstrous consequences*" will result. The evidence of titles is liable to perish. Fire, flood, accident, negligence, all contribute to destroy the evidences of title.

The evidence perishes even of the original adoption of our constitutions and of the enactment of laws.

Change is written on everything. All earthly things decay. God only is unchangeable.

The statute of limitations is founded on a policy *approved in morals* and entitled to *favorable* consideration by the courts, and so is the doctrine of presumed grant. (Angell on Limitations, sec. 65, ed. of 1854; also secs. 3, 4, 9, and 10.) I refer also to page 17, Minority Views to House Rep., 784, first session Forty-third Congress, and the opinion of Attorney-General Black on a post-office claim as to loss of evidence and statute of limitations (9 Opinions Attorney-General, 204; Co. Litt., 6, American Law Register, February, 1874, p. 71.)

V. If necessary, I would insist that a possession under the MacArthur patent is protected by the statute of limitations. For the *purpose of the statute of limitations*, the McArthur patent passed the *legal title.* The act of 1807 only *protects the prior title* as between conflicting claimants, if asserted in due time. (Holt *vs.* Hemphill, 3 Ohio, 233–237; Niswanger *vs.* Wallace, 16 Ohio, 558–561; Wallace *vs.* Minor, 6 Ohio, 366; 7 Ohio, 249; 22 Amerigan Law Register, 71; Ridley *vs.* Hettman, 10 Ohio, 524; Miller *vs.* McIntyre, 6 Peters, 61; Fussell *vs.* Hughes [St. Paul], Federal Reporter. September 20, 1881: House Mis. Doc. No. 42, first session Forty-seventh Congress, 24.)

P. B. COLE, judge, charged the jury, in substance, that the McArthur patent is void; that it cannot be presumed that Fitzpatrick made an assignment or grant to McArthur, or those claiming under him, because he did not *claim* under Fitzpatrick, but under an adverse entry, survey, and patent; that the plaintiffs did not lose their right by *abandonment;* that in the Pennsylvania cases cited the locator *had not paid* for the

land, but Fitzpatrick's warrant was payment. He ruled out the McArthur entry, survey, patent, and tax sale.

LAWRENCE, for defendant. I ask the court to charge the jury that the Fitzpatrick warrant might have been assigned by delivery without writing; that if the jury find as a *fact* that it was assigned to McArthur, or that Fitzpatrick sold the entry or survey to McArthur, or made him any written conveyance of the land, the plaintiffs cannot recover.

COLE, J. This is so; but there is no evidence of such written conveyance.

LAWRENCE, for defendant. I ask the court to charge the jury that they are the exclusive judges of all disputed facts.

COLE, J. This is the law.

LAWRENCE then argued to the jury:

There was a sale by Fitzpatrick to McArthur or his grantee of the warrant on which entry 9,953 was made, or a written assignment, in some form, of the entry, survey, or land. I cannot produce the writing; but I ask you to believe it *once existed.* It is *probable* it did, and this is all the law requires. (1 Stark. Ev., 451.)

This probability is shown:

1. By the long neglect of plaintiffs to make claim. (Angell on Limitations, sec. 10.)

2. By the fact that Fitzpatrick himself made no claim; *he* knew he had no right to do so.

3. The *possession* of defendant, without other evidence, makes it *probable* that he had purchased in the adverse claim. (12 Ohio Stats. Rep., 238; 3 Ohio, 407; 7 Wheat., 59 [237]; Mathews on Presumptive Ev., 2–8–260; Best on Presumptions, 87; Angell on Limitations, sec. 3–4–9.)

This is supported by four maxims quoted by Angell: (1) "*Interest Republicæ ut sit finis litium;*" (2) "*Priora præsumuntur a posterioribus;*" (3) "*Ex diuturnitate temporis omnia præsumuntur solemniter esse acta;*" (4) "*Vigilantibus non dormientibus inservit lex.*" Hence it is a rule in law and equity that "he who is silent when he *should* speak *shall* be silent when he *would* speak." These are illustrated in Broom's Legal Maxims.

4. The McPherson case cited, illustrates the probability of the existence of written sale.

5. The McArthur patent is evidence that the General Land Office was satisfied that Fitzpatrick had no claim.

6. The tax sale shows that Fitzpatrick had no claim.

JEREMIAH HALL, for plaintiffs, argued the case, cited 14 Ohio, 509, and other cases.

COLE, judge, charged the jury again, when the jury retired, and, after deliberation, returned a verdict for defendant.

The plaintiffs then took a second trial, then permitted, as of right, by the statute.

The case was again tried to a jury, April 5, 1875, on the same evidence, the defendant being permitted to offer to the jury, subject to the instructions of the court, all the evidence he previously offered.

On this trial the defendant had also some evidence, tending to prove that the plaintiffs were not the true heirs of James Fitzpatrick, the original owner of entry 9,953.

LAWRENCE, for defendant, insisted that the plaintiffs must prove the heirship. (Adams on Ejectment [282]; 2 Greenl. Ev., sec. 309; 1 Greenl. Evidence, sec. 104; Niswanger *vs.* Wallace, 16 Ohio, 561.)

The same questions were made and argued as on the former trial, and the same charge, in substance, given to the jury, who rendered a verdict for defendant.

The court overruled a motion for a new trial, and rendered judgment for defendant.

The whole case was put into a bill of exceptions by plaintiffs, who filed a petition in error in the district court of Logan County, which was heard at March term, 1876.

The court affirmed the judgment of the common pleas, and held that under the circumstances disclosed in the bill of exceptions the jury might properly have presumed a grant from James Fitzpatrick, or his heirs, to McArthur, or those claiming under him, and that upon the disputed facts the jury had not erred.

The plaintiffs subsequently applied to the supreme court of Ohio for leave to file a petition in error therein to reverse the action of the district court.

The following is the argument submitted to the Supreme Court in the foregoing case:

WILLIAM LAWRENCE, JOSEPH H. LAWRENCE, J. B. MCLAUGHLIN, DUNCAN DOW, AND J. D. MCLAUGHLIN for Forsythe:

Plaintiffs in error were plaintiffs in common pleas, seeking to recover 300 acres of land, called survey No. 9953.

Substantially two defenses were pleaded: First the general issue; and next an equitable defense, to wit: that in 1819, James Fitzpatrick, under whom plaintiffs' claim acquired an equitable title to the land which was assigned to Duncan McArthur, defendants' grantor.

The case was tried before court and a jury, at April term, 1874, and verdict for defendants, and allowance of second trial entered and perfected. At the April term, 1875, second trial resulted in verdict and judgment for defendants.

District court, upon petition in error, at March term, 1876, affirmed the judgment of the common pleas. Leave is now sought to file a petition in error to the district court, alleging such affirmance to be error.

On the second trial two patents were in evidence, each confessedly covering the tract of land in suit: The first made in 1837, on entry of 1832, and on survey No. 13314, of A. D. 1833, to Duncan McArthur, defendant's grantor. The second made in 1872, on entry of 1819, and survey No. 9953, of A. D. 1821, to the heirs of James Fitzpatrick, who made the first entry and survey.

The auditor's record book of forfeited land sales was also in evidence, showing a sale of the land to Duncan McArthur, on 12th Dec., 1831, for $79.50.

The adverse possession of defendants since 1837 was admitted.

The assignments of error may be condensed into three:

I. Permitting in evidence patent to McArthur, his conveyance to defendants, then occupancy of the land, &c.

II. Permitting in evidence, record of tax sale to McArthur (1831).

III. Overruling plaintiff's motion for new trial.

Now consider these assignments of error *seriatim:*

I. Did the court below err in admitting McArthur's patent, with the precedent entry and survey, and the grants and acts thereunder, to go to the jury?

Defendants alleged that James Fitzpatrick assigned his equitable interest in the land to McArthur before McArthur made his entry and survey.

And if so, McArthur's patent, not being in controvention of the "proviso of 1807," would be valid: and defendants entitled to the use of it, before the jury, and entitled to a verdict.

Again: under the general issue the heirship of plaintiffs is denied. The burden of proof on them.

Defendants insist that plaintiffs signally failed to establish their identity as heirs of James Fitzpatrick.

Now, if the jury should have found this issue in favor of the defendants, this again would sustain the validity of McArthurs's patent, for a stranger cannot be permitted to set up the *proviso* of 1807. (18 Ohio, 44; 7 Ohio, 160.)

Besides, plaintiffs could not have suffered by such evidence, for the entry of James Fitzpatrick was proven by certified copy; and court charged the jury that "the entry is proved by a certified copy thereof; and if any subsequent entry be made it is void; and survey, patent deeds, possession, &c., founded thereon, also void."

That McArthur made entry, survey, procured patent, conveyed to defendants; that they *occupied* and *improved* forty years without *notice* of adverse claim, and paid all *taxes;* and that he died thirty-three years ago, are all and each legitimate evidence, tending to prove an assignment of Fitzpatrick's equitable interest in the land to McArthur and his grantees.

We respectfully insist: the court was wrong in charging—as the record shows it did—"that no presumption of such assignment of such equitable title can be inferred from length of time the defendant's have been in adverse possession."

But such charge being actually given, no injury could have resulted to plaintiffs from the admission of evidence of the fact.

II. Defendants insist that the court did not err in admiting the *old record*—forty-four years old—showing that McArthur had purchased the land—survey No. 9953, of 300 acres, on December 12, 1831, for $79.50.

It will not be denied that this record tends to prove that the land had been sold to McArthur by the auditor, according to law; and if so, the equitable title passed away from Fitzpatrick and vested in McArthur; and if so, his patent is not void.

True the statute substantially says that a tax deed shall be *prima facie* evidence of the ownership of the purchaser. (S. & C., 1472, sec. 104.)

This does not exclude the possibility of other proof of ownership.

The deed is not the ownership, but only evidence thereof.

The record shows the lapse of time—more than fifty years—abandonment by Fitzpatrick, and more than forty years since McArthur bought the land for $79.50 from the auditor.

The lapse of time might induce the jury to find as a matter of fact that all was lawfully done that should have been done in the premises, including deed. (10 Mass., 105.)

III. A verdict will not be set aside unless *palpably—manifestly* against the evidence. (6 Ohio, 74 and 456; 1 Ohio S., 54; 4 Ohio S., 566.)

The verdict sought to be set aside must have been the result of a finding; that plaintiffs had failed to prove their heirship; or that defendants had succeeded in proving their acquisition of Fitzpatrick's equitable title to the land, or both.

Either one, or both, would justify the verdict.

Can it be said that plaintiffs are *palpably* and *manifestly* proven to be the heirs-at-law of the person who made the entry, No. 9953?

1. His name was Fitzpatrick; the name of the father of the plaintiffs was Fitspatrick.

2. Fitzpatrick was poor; he must have sold his land warrant, received for his own service, for he swears in his pension application, under date of 1820, that he only owned $39.25 worth of property, and he enumerates the articles, whilst Fitzpatrick was in 1819, and after, the owner of survey No. 9953. It was surveyed for him in 1820.

3. The father of the plaintiffs, Fitzpatrick, was himself a Revolutionary soldier, as shown by said application for pension. The ancestor of the owner of No. 9953, Solomon Fitzpatrick, was in the war of Independence.

James Fitzpatrick, the son of Solomon, must have been too young to serve in the war of Independence, for his father was a soldier in that war.

4. James Fitzpatrick, as shown by his warrant, was of the State of Maryland, not of Bourbon County, Kentucky.

The jury are not *manifestly* and *palpably* wrong in finding a failure of proof of heirship.

The fact of assignment was presumptively found on slight grounds in Duke *vs.*Thompson. (16 Ohio, 41.)

In that case, the assignment was presumed upon the ground of abandonment—thirty years lapse of time—and Basil Duke's letter suggesting that his nephew was willing to exchange the land for other lands.

In the case at bar we have 50 years abandonment; thirty-five years adverse possession by defendants, claiming title; McArthur's tax purchase; his entry and survey, and patent, and his death thirty-three years ago, involving the loss of his papers.

This makes as strong a case as Duke *vs.* Thompson, in which Judge Hitchcock asys:

> There is no sufficient apology for this delay. It can be accounted for upon no other presumption than the one assumed by the defendants, that the complainant had parted with his interest. (16 Ohio, 54.)

IV. And last, not least, defendants, as we insist, have a right, upon the acknowledged *abandonment* of the *land* for half a century by the original equitable owner, and the confessed adverse possession of defendants for a period of full nigh forty years, claiming title, to the *conclusive*, *legal* presumption that they are the assignees of such equitable title.

And if this proposition be tenable, it would be a vain and useless work to set aside this verdict and reverse this judgment, and require the inferior court conducting a future trial of the same case, to instruct a future jury to return the same verdict.

Indeed it has been well said, "When substantial justice has been done by a verdict, a court should not disturb it, although found upon slight evidence." (12 Ohio ,151.)

Upon principles of reason—and the law is said to be "the perfection of reason."

It is right to presume an assignment after fifty years abandonment by claimants, and forty years advance possession by occupants. If it be, as it is, right, to presume a grant on twenty-one years' adverse possession. The presumption is not against the government, for it had parted with the equitable title in 1819.

Since such presumption of grant is right, *a fortiori*, the presumption of assignment is right, for the former requires deed, written, signed,

sealed, attested, acknowledged, and recorded, whilst the latter needs only a memorandum in writing, signed by the assignor, or parol agreement with possession. (McArthur *vs.* Gallogher, 8 Ohio, 518; Bauldin *vs.* Massie's heirs, 7 Wheaton, 122.)

The evidence of the latter being least permanent, the presumption should the sooner accrue.

We think the right of the defendants in this case to such *conclusive, legal* presumption is fully vindicated by many high and pertinent authorities. (10 Johnston, 377; 7 B. Monroe, 279; 10 Mass., 105; 16 Ohio, 41; 8 Ohio, 518; Mathews on pros., 2 to 8; Starkes on Ev., p. 1, 1203, and 1221; 3 Ohio, 236; 7 Wheaton, 122.)

Leave to file petition in error herein should be refused.

Jeremiah Hall for plaintiffs cited Stark *vs.* Smith (5 Ohio, 455); 7 Ohio, 249.

The supreme court refused permission to file such petition, thereby, in effect, affirming the judgment of the district court.

Upon the whole, the decisions *necessarily* affirmed the first two points stated in the syllabus, and the remaining points result from the authorities cited.

The foregoing case involves principles of so much importance, affecting so many land titles, that it is deemed proper to notice and quote more fully some of the authorities which support them.

I.—As to tax sales.

It is a *general rule*, when not changed by statute, that a party claiming title under a tax sale must show affirmatively a substantial compliance with the law to authorize it. Those acts which are required by law to be of record must be proved by the record. A leading case on the subject is Williams *vs.* Peyton (4 Wheaton, 77), and numerous authorities are collected in 2 Cow. and Hill's Notes to Phillips on Evidence, p. 832 (note q), and Vol. I, p. 460; Carlise *vs.* Longworth (5 Ohio, 370).

But there are *three modes* by which this proof may be made:

1. By the proper records.
2. If lost by secondary evidence of their contents; and
3. After the lapse of twenty-one years or the period fixed by the statute of limitations:—

(1) The *law* will *presume* that officers have done their duty and a tax deed under which a right has been asserted in any form will be evidence of title; and

(2) In case of the loss of record evidence, even in a *less period*, upon slight proof it may be left to a jury to infer, as a fact, that the proceedings have been regular without supplying all by secondary evidence.

In the former case the *law* supplies the requisite evidence, dispenses with the primary evidence, and does not require secondary evidence. In the latter case the law permits such evidence as may be reasonably accessible, and when all this is produced it leaves the jury to determine the fact in view of all the circumstances.

These doctrines rest upon *maxims* and grounds of *public policy* and on *rules of evidence*. These furnish legal proof as much so as original record evidence. The statutes regulating tax sales do not generally prescribe rules of evidence or interfere with legal maxims resting on public policy.

(1) The authority of Blackwell on tax titles has been cited in the foregoing case, and need not be again quoted here.

Some of the authorities in support of the principles stated are given as follows:

COLEMAN *vs.* ANDERSON.

(10 Mass., 105. Decided 1813.)

Action to recover land in 1810. Defendant held under tax sale deed, February, 1780. Verdict for defendant who failed to prove regularity of sale.

SEWALL, J.:

The title [of defendant] is * * * denominated a *collector's title*, as expressing a case of doubt and difficulty. And collector's title must continue dubious and difficult in the proof and evidence required to support them so long as they remain unasserted by *any other limitation than that which applies in a writ of weight.* * * *

These deeds [tax sale] are to avail, if at all, upon the legal authorities of the constables [who made the sale]; and it was thought at the trial incumbent upon the tenant to *prove all the circumstances requisite in the due execution of those authorities;* and this notwithstanding the length of possession under these deeds, and the long acquiesence of the parties otherwise entitled to the premises thereby surveyed. * * * The court are clear in the opinion * * * that the judge * * * was right in submitting such evidence as there was, *although incomplete;* and if the jury were satisfied that the deficiencies in the evidence were not chargeable to the fault or negligence of the party, that nothing in the power of the party to produce was willfully withheld, the jury were very properly instructed to *consider everything as proved* which might be rationally and fairly presumed from the facts and circumstances proved. In short, at the distance of time which had intervened between the constable's sales and the trial it was unreasonable to require evidence of the particulars which the tenant * * * was put to prove, especially evidence from documents not intrusted with the party or transferred with his title. The case is within the principal of * * * Gray *vs.* Gardner (3 Mass., 309).

Verdict confirmed and judgment accordingly.

GRAY *vs.* GARDNER.

(3 Mass., 399. Decided 1807.)

Action to recover land.

The syllabus is:

After *twenty years'* acquiesence by the heirs of an intestate in the possession of the real estate of their ancestor, holden under a sale by the administrator, *the court will presume* that the administrator took the oath and posted the notifications according to law previous to the date; evidence being given of the license to sell and of the actual sale at auction.

The court say:

When it is * * * considered that * * * the transaction took place more than twenty years since, and that the probate records are now *incomplete;* the court are satisfied * * * that the jury made a fair and *legal presumption.* * * * *If presumptions under these circumstances are not to be allowed the title to many estates holden under sales by license will be shaken, if not defeated.* And these presumptions are not stronger than the common cases in the English books of procuring a grant after twenty years' undisturbed possession. (See Bergen *vs.* Bennet, 1 Caine's Cases 1, 2, 18.)

Confirmation of judicial sales presumed: Moore *vs.* Greene, 19 How., U. S. 69. Grayson *vs.* Weddle, 63 Mo., 523. Henderson *vs.* Herrod, 23 Miss., 434. Tiplon *vs.* Powell, 2 Coldw., 19. Watts *vs.* Scott, 3 Watts, 79. Gowan *vs.* Jones, 10 S. & M., 164.

READ *vs.* GOODYEAR.

(17 Sergeant & Rawle, 350. Decided July 3, 1828.)

In this case the plaintiff showed a paper title. The defendant gave evidence of a warrant to the sheriff, date July 5, 1803, to sell the land

for taxes; a sale by sheriff to Ross November 28, 1803; a deed by Ross to defendant, and proved his payment of taxes until suit brought.

Rogers, J., in deciding the case, says:

If the plaintiff can recover under such circumstances, it is obvious it would be a premium for non-payment of the county rates and levies. He would recover back his lands without having paid or offered to pay one cent of the county assessments, for the defendant will have sustained these burdens for his benefit. For thirty years he has abandoned all claim, and in all probability we should not have heard of this suit had it not been for the increased value arising from the settlement of the country. It should be an unbending principle of law which would sanction the recovery in favor of a person so negligent of his rights and the duty imposed upon him against the holder of the land who has regularly paid the burden assessed for public purposes. *If one, claiming by warrant and survey, omit to pay one part of his taxes for twenty-one years, and suffer one who has entered without title and settled on the land to pay the whole taxes during that whole period, the jury may presume he was ousted* and he will be bound by the act of limitations. (10 Serg. & Rawle, 306.) This, it is true, is not the point of the case, and, therefore, not cited as a binding authority; but it is referred to for the good sense in the dictum of the learned judge. * * *

Several bills of exception have been taken to detached parts of the evidence offered by the defendant and overruled on the ground that "*an exact and punctual adherence to the laws can alone divest the title of lands on a sale of non-payment of taxes.*" That a minute conformity to the laws in ordinary cases must be proved under the act of 1796 and 1804 is too well settled to be now shaken, but that the principle under the facts governs this case may well be doubted. It has not, so far as my researches have extended, yet had the benefit of a judicial decision, whether *lapse of time may* not *alter the rule* and throw the *onus* on the warrant holder. That there must be *some limit* when *courts of justice* should apply the maxim, *omnia præsumuntur rite acta*, will appear from the consideration that otherwise the longer the possession the weaker the title. *After the lapse of twenty-one years it is almost impossible to prove a literal compliance with the act*, and to exact a punctual adherence to the letter would be equivalent to saying that a sale for taxes should not be supported. It would only be necessary to lie by until the evidence of the regularity of the sale was lost, when a recovery would be the necessary consequence. Time would strengthen the title of the warrant holder in the same proportion that it weakened the title of the vendee of the land. * * *

The court then cite Toth., 54, S. C. Vern., 196; Pencose *vs.* Frelaurey (1 Vern., 196); S. C., 2 Ch. Cas., 150, and the court say:

The plaintiff sought to have a conveyance of his father's estate set aside, which was made twenty years since, when the father was eighty years old, and *non compos mentis;* the court declared that after twenty years and two purchases it was not proper for the court to examine a *non compos mentis*, and dismissed the bill.

1 Ch. Rep., 40; 1 Ch. R., 139, S. P., 2 Ch. R., 48, the court refused to reverse a decree sixteen years old. 2 Vern., 32. "For a number of similar instances in which equity regards length of time, I would refer to Francis' Maxims in Equity, Maxim 10, p. 38."

The court then cite in support of presumptions at law: Young *vs.* Collins (2 Browne, 98); Strickler *vs.* Todd (10 Serg. & R., 63); Miller *vs.* Beates (3 S. & R., 490); Kingston *vs.* Leslie (10 S. & R., 391); Lessee of Ewing *vs.* Barton (2 Yeates, 318).

The court conclude:

Here in consequence of lapse of time the evidence should have been received and the jury should have been left to presume an ouster, and whether under the circumstances there was not an abandonment of all right to the land by the warrant holder.

This case shows that it is by no means necessary to prove the loss of records in order to let in the presumption that all has been properly done.

FREEMAN *vs* THAYER.

(33 Maine, 76. Decided 1851.)

Trespass involving title of land.

In 1816 the land was sold for taxes, and defendant claimed under this.

The statute requires that to support a tax sale the party shall "prove that such collector complied with the requisition of the law."

The defendant proved "that the assessment * * * was lost * * * that some of the notifications required by law were duly posted * * * but he failed to prove * * * that the other requisite notifications were given."

In the court below the tax sale was sustained.

HOWARD, J.:

The defendant assumed that the statute furnished a rule of evidence for him in preventing a recovery and sustaining the title derived from the sale for taxes. * * *

If this question of title had arisen before the expiration of *twenty years* from its origin, evidence might, perhaps, have been introduced, which time and accident may have rendered inaccessible. Then the facts, unaided by presumptions of fact, might have constituted the evidence to sustain the title originating in the collector's sale.

It has been determined that after the lapse of thirty years from a collector's sale of land for taxes it may be presumed, from facts and circumstances proved, that the tax bills, valuation, warrants, notices, &c., were regular; that the assessors and collector were duly chosen at legal meetings; that the collector was sworn; that a valuation and copy of the assessments were returned by the assessors to the town clerk, and that everything which can be thus reasonably and fairly presumed may have the force and effect of proof. (Gray *vs.* Gardner, 3 Mass. 402; *Knoxs* vs. *Jenks*, 7 Mass., 492; Coleman *vs.* Anderson, 10 Mass., 105; Pepipscot Proprietors *vs.* Ransom, 14 Mass., 147; *Blossom* vs. *Cannon*, 14 Mass., 178; Battles *vs.* Holly, 6 Greenl., 145; *Soc. for Propagating the Gospel* vs. *Young*, 2 N. H., 310; Bergen *vs.* Bennett, 1 Cain. Cas. Err., 18; The case of Corporations, 4 Coke, 78; Rex *vs.* Long Buckby, 7 East., 45; Read *vs.* Goodyear, 17 Serg. & Rawle, 350; 3 Sugden *vs.* & P. 16—43, 6th Amer. from 10th Lond. edition; Pittsfield *vs.* Burnstead, 40 N. H., 494.)

Judgment on the verdict.

FARRAR *vs.* EASTMAN.

(5 Greenl., Maine, 345. Decided 1828.)

Tresspass involving title to land.

Defendant set up title under tax sale, deed April 5, 1780. In the court below, the court rejected the tax deed.

WESTON, J.:

It is an ancient transaction; and neither the note of the proprietary, nor the deed under it, are drawn with any attention to legal precision. It is well known that much of the business of these proprietors was loosely conducted; and after such a lapse of time, and for the purpose of upholding their proceedings and of titles derived from them after such long acquiesence, they are to be viewed with great indulgence. Whether in a recent case greater precision and a more clear and perfect deduction and pursuance of authority would not be required, it is not necessary now to decide. *It is not essential that all the facts necessary to sustain and justify the sale should be recited in the deed. They may be presumed* or proved aliunde. Such as do not appear in the records and among the papers of the propriety may, *and after such a length of time will be, presumed.*

The opinion of the court is that *the deed* of John Knox, which was rejected at the trial, was by law admissible in evidence. The verdict is, therefore, set aside, and a new trial granted.

BROWN *vs.* CONNELLY,

(5 Blackford, 391. Decided 1840.)

BLACKFORD, J.:

The rule that secondary evidence shall not be admitted where primary evidence is attainable, although a sound general rule, has been relaxed in some cases where general convenience has required the relaxation. The character of a public officer is one of those cases.

KEANE *vs.* CANNOVAN.

(21 California, 300. Decided 1833.)

There are many transactions of which it is impossible or extremely difficult, after the lapse of little time, to produce the proper evidence, and in favor of the regularity

of which presumptions are in consequence made by the law. (Bierce *vs.* Pierce, 15 Ohio, 533–543–547; Wallace *vs.* Seymour, 7 Ohio, part 1, p. 156; Ridley *vs.* Hetmar, 10 Ohio; Lessee of Winder *vs.* Starling, 7 Ohio, part 1, p. 190; Bank of U. S. *vs.* Dandridge, 12 Wheat., 70; 2 Ohio St., 241–246; 4 Ohio St., 112–148; Easton *vs.* Savery, recently decided in Iowa.)

In Calvert *vs.* Fitzgerald (Litt. Sel. Cas., 388–392) probate of a will was presumed on proof of sales by the executor, the records having been destroyed.

Many of the authorities hereafter cited are equally applicable under this head, and to them reference is made accordingly.

The statute of limitations, the presumption of regularity of official acts after twenty years, and the doctrine of a presumed grant hereafter noticed, all rest on the same maxims and principles of public policy, and as the statute is conclusive, so should the presumptions referred to be equally regarded as conclusive. Hence it is that the authorities noticed show that the legal presumptions in favor of the regularity of official proceedings is *per se* original evidence or the equivalent of original evidence after twenty years, and in such cases there is no necessity for a resort to secondary evidence or even to other original evidence.

And certainly when the primary evidence to support a tax sale or judicial sale is lost, the presumption in favor of regularity may well be made without reference to secondary evidence.

This must be so, because:

1. This is the logic and result of the authorities.

2. It must be so on *reason*. All secondary evidence is imperfect. If it be produced it will come with its imperfections, and thus a party may lose a title which the original evidence would have sustained. If the presumption be not made, lapse of time instead of being a muniment of title will impair titles, (1) by the loss of evidence and (2) by the facilities thereby afforded to advances, fictitious and fraudulent claims.

3. Any other doctrine practically defeats the whole purpose of the presumption and the maxims on which it rests. It is equivalent to saying that where the maxim *omnia acte rite*, &c., is *most needed*, it shall not apply. It is most needed to avoid (1) the uncertainties of secondary evidence, (2) the loss of original evidence by time, and (3) to defeat fraudulent claims.

4. It must be so on grounds of *public policy*.

The same rule which applies to tax sales is to apply to all judicial sales. Is a defect in or loss of judicial records never to be cured? If not, there is no safety in judicial sales. If the record of a judgment is burned, shall not a sheriff's deed of sale, especially if there be no adverse claim made for 20 years, be sufficient evidence of the existence and regularity of the official proceedings necessary to support it?

II.—Presumption of a grant.

1. Where a party has been in adverse possession of lands, tenements, or hereditaments, during a period equal to the statute of limitations, the law in cases to which the statute does not apply presumes a grant to him from the original holder of an outstanding legal or equitable title. This doctrine was first adopted by the court of chancery in 1707, and it was adopted by the courts of law in 1761. (Wallace *vs.* Fletcher, 10 Foster, 446.)

This doctrine has been much discussed in the elementary books and adjudicated cases. Reference will be made to some of these.

THE ELEMENTARY AUTHORITIES.

For civil law see Sanders' Justinean, Lib. 2, Title 6.
The standard American work on the subject says:

Long possession in the eye of the law is an assurance of title, because it is in itself evidence of title. *Priora præsumuntur a posterioribus.* * * * And in order to render the title of the possessor complete, they (the courts) will presume * * * execution of deeds, &c., agreeable to the maxim, *exdinturnitate temporis omnia præsumunter solemniter esse acta.* (Angell on Limitations, sec. 3–4.)

Again Angell says:

The doctrine of prescription is founded on *public policy.* The spirit of the maxim *Interest Reipublicae ut sit finis litium* may be traced to a more remote period than the Christian Era. (Angell, Lim., sec. 9, *Vigilantibus non dormientibus inservit lex.*)

With respect to land * * * there is one other public consideration in support of the doctrine of prescription * * * that during the litigation it must become waste and unproductive from want of improvement. (Angell, Lim., sec. 9; Hovender *vs.* Ld. Aunsley, 2 S. Ch. J. & Lifr. R., 629; Lewis *vs.* Marshall, 5 Pet., 470; Hawkins *vs.* Barney, 5 Pet., 457.) Lapse of time is * * * a dereliction of all ground of objection—a protection against * * * claims, the injustice of which (from lapse of time) it is extremely difficult to detect and expose. (Angell, sec. 10.)

American Law Register, April, 1879, vol. 18, N. S. No. 4; 2 Washburn Real Property Book 2, p. [40] 293.
The most philosophical of all our books on evidence, says:

Although no one can prescribe against the Crown, the maxim being *nullum tempus occurrit regi*, yet after long-continued enjoyment a grant from the Crown may be presumed. After long-continued exercise of a right of advowson by the prior of Stonely, it was held that a grant was to be presumed. For that all should be presumed to have been solemnly done, which could make the ancient appropriation good, although the original grant could not be found. (Stark. Ev., Part iv, 1222; 1 Phillips, Ev., 442–455; Cow. & Hill, Notes, Part 1, page 486, note 298 to Phil. Ev.)

Another elementary writer of high authority says:

The fiction of presuming a grant from 20 years' possession or use was invented by the English courts in the eighteenth century to avoid the absurdities of their rule of legal memory, and was derived by analogy from the limitation prescribed by the statute, 21 Jac. 1, c. 21, for actions of ejectment, *not upon a belief that a grant in any particular case has been made, but on general presumptions.* (Washburn on Easements, 103 [68].

Again he says (p. 102 [66]):

Now an enjoyment of an easement for the term of twenty years raises a legal presumption that the right was originally acquired by the title. And this, *though the jury should not* find as a fact that any deed had ever been made. *And although the user never began, in fact, as an act of trespass.*

Washburn, referring, p. 108 [72], to Townsend *vs.* Downer (32 Vt., 183), and Tracy *vs.* Atherton (36 Vt., 503), and in considering "whether the presumption * * * is one of law or fact," says:

If it is to raise the presumption of a grant without regard to the fact whether such a grant was really made or not, it may with the strictest propriety be said that the law presumes a grant, and it would be the duty of the court to direct a verdict.

Tudor, in his Leading Cases, 114, says:

It became usual for the purpose of supporting a right which had been long enjoyed, * * * and upon enjoyment being proved for twenty years, the judges held, or rather directed, juries to believe that a presumption arose that there had been a grant made of the easement * * * which had been subsequently lost.

In the work on "The Law of Religious Societies" by Lawrence it has been discussed at some length. (22 American Law Register (O. S., Feb., 1874; Vol. 13, N. S.), 72.)

THE JUDICIAL AUTHORITIES.

COURCIER *vs.* GRAHAM.

(1 Ohio, 330.)

This was an action of covenant for breach of contract to convey land, and the question was as to the sufficiency of the title. The court say:

"The first position of the court [below] was, that no continuance of possession for any time less than where the statute of limitations would operate to bar a recovery in ejectment was sufficient to warrant the presumption of a deed. The authorities show that continuance of possession for a less period of time, accompanied by other circumstances, might be sufficient to warrant this presumption." In Baily *vs.* Shaw and others (6 East., 215), Lord Ellenborough says: "I take it, that twenty years' exclusive enjoyment of water, in any particular manner, affords a *conclusive* presumption of right in the party so enjoying it, derived from grant or act of Parliament. But less than twenty years' enjoyment may or may not afford such presumption, according as it is attended with circumstances to support or rebut the right."

From this I infer that *possession* alone would not be sufficient to warrant the presumption *unless continued for twenty years*, and, if so, the court were correct. The possession under Dayton had continued for more than twenty years, and this possession was accompanied by circumstances which would justify the jury in presuming, and they probably did presume, a title in that individual.

LESSEE OF BLAKE VS. DAVIS.

(20 Ohio, 214.)

In this case a question of title arose under an imperfect partition.

Ranney, J., said:

Possession was taken about nineteen years before the commencement of the suit, and has been continued * * * Presumptions do not always proceed on a belief that the thing presumed has actually taken place. "Grants are frequently presumed," as Lord Mansfield says, "merely for the purpose and from a principle of quieting the possession. There is much occasion for presuming conveyances of legal estate, as otherwise titles must forever remain imperfect, and in many respects unavailable, when, from length of time, it has become impossible to discover in whom the legal estate (if outstanding) is actually vested." On appeal to the Lord Chancellor (Erskine) the decree was affirmed. He says: "The presumption in courts of law from length of time stands upon a clear principle, built upon reason, the nature and character of men, and the result of human experience. It resolves itself into this, that a man will naturally enjoy what belongs to him. That is the whole principle." Mr. Justice Story, in delivering the opinion of the Supreme Court of the United States in the case of Prevost *vs.* Gratz (6 Wheat., 481,) says: "The doctrine in Hilary *vs.* Walker on this subject meets our entire approbation," and it is also approved by Chancellor Kent in Ham *vs.* Schuyler (4 J. C. R. 7,) Dutch Church *vs.* Mott (8 Paige, 81). Again in Ricard *vs.* Williams (7 Wheaton, 109;) Mr. Justice Story says: "There is no difference *in the doctrine whether the grant relates to corporeal or incorporeal hereditaments. A grant of land may as well be presumed as a grant of fishery or of a common or of a way.* Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions;" "and where the other circumstances are cogent and full, there is no absolute bar against the presumption of a grant within a period short of the statute of limitations."

If further illustration from the books were needed upon this subject I know not where the general doctrine will be found more perspicuously stated than in Cowan & Hill's notes to Phil. Ev., vol. 2, page 368.

LESSEE OF M'ARTHUR VS. GALLAGHER.

(8 Ohio, 518.)

In this case the validity of a patent for land in the Virginia military

district was called in question because the land-warrant on which the entry was made had not been assigned to the locator. The court say:

It must be remembered that no particular mode of assigning military land-warrants was prescribed by law. It might be done by an indorsement upon the warrant itself, or on a separate paper. Nor was there *anything in the law requiring it to be done even in writing* That mode was adopted most convenient to the parties. (7 Wheat. R., 122.) Courts will, under circumstances sufficiently strong, *presume a grant or a deed*, and there is no impropriety in a proper case made in presuming the assignment, and such presumption was made in the case of Bouldin *vs.* Massie's Heirs (7 Wheat. R., 122), and in that case the subject is very fully and at large discussed.

Rex *vs.* Joliffe, 2 B. & C., 54, cited 1 Phil. Ev., 442, note, whe it is said "Lord Tenterden, C. J., speaks of modern uses as affording cogent evidence of prescription, and he observes that it is fit to recommend a jury to make the presumption. In that case the usage had existed only for twenty years." (Chambers *vs.* Mifflin, 1 Penn. R., 29; Rawle, Penrose & Watts.)

Although a warrant has been surveyed, yet, if not returned, the owner may change its lines, or change its place altogether, and lay it on any other vacant land anywhere near; until it is returned the State has no power to collect arrears of purchase money. *It never can be that a man can wait thirty or forty years, and all that time* be able to say, this is my land, if I please, and not mine unless I please. I will take this land and pay the State for it if the country improves and it rises in value, or if somebody will render it valuable by improvement, but I will not take it and pay the purchase money unless something occurs to render it more valuable.

Nor is it the law that a man can commence procuring a title from the State, and, from pure negligence, leave it in such situation for more than twenty years as that he is not bound to take it, and no one else can safely take it.

JARBOE VS. M'ATEE.

(7 B. Monroe, 279.)

Bill to rescind contract of sale because title defective, as no patent had issued to vendor or those under whom he claimed. The vendor * * * had been in possession fifty years.

The court say:

After long continued enjoyment a grant from the Crown may be presumed (3 Stark., 1221; 1 Greenl. Ev., 50). In regard to public grants, a longer continued peaceable enjoyment has generally been deemed necessary, in order to justify the presumption, than is deemed sufficient to authorize the like presumption in the case of a deed from private persons, 10 Johns., 377. It is the policy of the law, and necessary to the repose and security of society, that such a presumption should be indulged. * * * This presumption is peculiarly proper in this State, the history of its land titles showing that the lands were often covered by several conflicting grants. * * *

After the lapse of fifty years, which is the longest period allowed by our statutes for the institution of a suit for any description of real property, the presumption of a grant from the Commonwealth is authorized in favor of a possession * * * continued during the time.

See cases collected Cow. & Hill. Notes, Part 1, p. 485, Note 298 to Phil. Ev.

In Ricard *vs.* Williams, 7 Wheaton, 59, it is said:

Possession of land by a party claiming it as his own in fee is *prima facie* evidence of his ownership. * * *

Presumptions of a grant arising from the lapse of time are applied to corporeal as well as incorporeal hereditaments.

In general the presumptions of a grant are limited to periods analogous to those of the statute of limitations, in cases where the statute does not apply. * * *

But if the circumstances of the case are very cogent, and require it, a grant may be presumed within a period short of the statute, presumptions * * * are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions.

There is another feature of this doctrine of presuming a grant.

II. *Where the possession is adverse the presumption of a grant is one of law, not merely of fact, and the jury will be instructed to presume it if not rebutted. In some cases it is conclusive.*

The possession of a lessee is not in law adverse to his lessor; that of a vendee is not adverse to his vendor; that of a trustee generally not adverse to his *cestui que trust.* But a possession adverse in law and in fact is entitled to the benefit of a conclusive presumption of a grant to support it. (Cow. and Hill's Notes, Part I, p. 486; note 298 to Phil. Ev.)

This is so for several reasons.

1. *The authorities are so.* (Washburn on Easements, 105–70:)

It may, therefore, be stated as a general proposition of law that if there has been an uninterrupted user and enjoyment of an easement * * * for more than twenty-one or twenty, or such other period of years as answers to the local period of limitation, it affords conclusive presumption of right in the party who shall have enjoyed it.

He cites numerous authorities, and on page 109 [72] says: "This must now be considered as established law."

In Strickler *vs.* Todd (10 Serg. & R., 63–69), Duncan, J., said:

It is well settled that if there has been an uninterrupted exclusive enjoyment above twenty-one years (the Pa. Stat. Limitations) of water in any particular way, this affords a CONCLUSIVE prescription of right in the party so enjoying it, and that is equal to a right by prescription.

In Rust *vs.* Lou (6 Mass., 90), Parsons, J., says:

The country has been settled long enough to allow of the time necessary to prove a prescription.

In Mayor *vs.* Horner, Cowper, 102, it is said:

So in the case of prescription, if it be time out of mind, a jury is *bound* to conclude the right from that presumption if there could be a legal commencement of the right. (See Oswald *vs.* Leigh, 1 Term, R., 270.)

Parker *vs.* Foote, 19 Wend., 309:

Where there is no evidence to repeal the presumption arising from twenty year's uninterrupted adverse user of an incorporeal right, the judge may very properly instruct the jury that it is their duty to find in favor of the party who has had the enjoyment. (Coolidge *vs.* Leonard, 8 Peck, 504.)

Knight *vs.* Halsey (3 Bos. & P., 172–206; 3 Dane, Abr., 55), says of the doctrine that it is—

A novel invention of the judges for the furtherance of justice, and the sake of peace where there has been a long exercise of an adverse right.

Parker *vs.* Foote (19 Wend., 309):

The modern doctrine of presuming a right by grant * * * exerts a much wider influence in quieting possession than the old doctrine of title by prescription. (Curtis *vs.* Keesler, 14 Barb., 511.)

Tracy *vs.* Atherton, 36 Vermont, 503:

The presumption arising from such long-continued possession unrebutted is a presumption of law, and that it is *conclusive* evidence or sufficient evidence to warrant the Court in holding that it confers a right on the possessor.

Jackson *vs.* McCall (10 Johns., 377):

Where M. died in possession of land, and his son and heir at law succeeded to the possession, and continued in the undisturbed possession of it for above eighteen years, it was held that a purchase of the title by the ancestor might be presumed; and where there was an order of the council of the colony of *New York,* in 1764, for the survey of the lot, as allotted to J. P., and a survey thereof made, though no patent could be found on record, it was held that a patent to J. P. and a deed from him to the ancestor, might be presumed for the sake of quieting the possession.(a.)

In a foot note to the 3d edition of Johnson's Reports [Ed. 1839, p. 277] numerous authorities are collected. (Eldridge *vs.* Knott, Cowp.,

214; Bealey *vs.* Shaw, 6 East, 208–219; Tyler *vs.* Wilkinson, 4 Mason, 397–402; Sherwood *vs.* Burr, 4 Day, 244.) And see: Lessee of Ludlow *vs.* McBride, 3 Ohio, 254; Lessee of Armstrong *vs.* McCoy, 8 Ohio, 135; Starke *vs.* Smith, 5 Ohio, 455; Smith *vs.* Stark, 7 Ohio, Part 2, p. 551; Brown *vs.* Willer, 10 Ohio, 143; 4 Mason, 397; 10 Serg. & Rawle, 63; 4 Day, 244; 3 Greenl. R., 120; 2 Peck, 466; 4 Peck, 245.

III. *The presumption may be made of a grant from the holder of an* EQUITABLE TITLE, *as an entry and survey in the Virginia military district in Ohio, even as against a subsequent patent.*

1. The authorities so hold.

These have been stated.

In Ricard *vs.* Williams (7 Wheat., 59) it is said the presumption is proper "in cases where the statute [of limitations] does not apply."

1 Phil. Ev. [7 Ed.] 161: Cowen & Hill's Notes, Part 1, p. 486; note 298:

There is the greater necessity for it in such cases. They are within the reason of the rule.

In Ridley *vs.* Hettman (10 Ohio, 524), a court of equity refused to decree the legal title in favor of the prior entry where the junior entry carried into patent had been held for a period equal to the statute of limitations, though the statute did not bind the chancery court. This was evidently on the doctrine of "stale equity," or it should be more properly on a *presumed grant* from the party holding the original entry. Since the case of Ridley *vs.* Hettman was decided, the act of Congress of March 2, 1807, was passed, which declares void all patents issued on lands on which there was a prior survey. The holder of a prior survey could, therefore, procure a patent and would no longer seek his remedy in equity, but would do so at law. But if he delayed to procure his patent until the period had run out for presuming a grant from him in favor of the holder of a junior survey carried into patent with twenty-one years' possession under it, he would be without remedy. His equity under his survey would pass by presumption to the occupant under the junior survey. (Duke *vs.* Thompson, 16 Ohio, 48; Blake *vs.* Davis, 20 *id.*, 242; Ricard *vs.* Williams, 7 Wheat., 59.) This must be so, or a large class of cases will be without remedy.

The only effect of the act of 1807 was to change the remedy from equity to ejectment at law. What was before illegal in equity became illegal at law. Yet if equity would not, prior to the statute, aid a party after twenty-one years to recover on his prior survey against an occupant under a junior survey, it must, since the statute enjoin an ejectment, or rather defeat it by the presumed grant, or rights will be sacrificed to mere modes of redress. (Angell in Limitations, sec. 38; Johnson *vs.* Irwin, 3 S. & R., 291; Thomas *vs.* Hatch, 3 Sumner, 170; 22 American Law Register, (O. S. Feb., 1874), 72.)

2. These authorities rest upon a public policy especially applicable to the Virginia military district.

(*a.*) These principles as applied to government grants are of the utmost importance, and are absolutely essential to the repose of society. The statute of limitations does not run against the government, nor in favor of the occupant of land, until the patent issues. (Roads *vs.* Symms, 1 Ohio, 316; Duke *vs.* Thompson, 16 *id.*, 34.) A person who had complied with the pre-emption laws of Congress, and so entitled to a patent, might neglect to procure its issue, his estate travel down through generations, and when the evidence of his claim is lost a third person might enter the land, procure patent, and oust him but for this salutary doctrine. So a person might enter land, receive his certificate of entry,

and having paid in full, but neglected to procure patent, might need the same principle for his protection.

(*b.*) So in the Virginia military district in Ohio, in the Kentucky military district, and in others, entries on warrants never carried into patent might be lost without remedy but for this principle. Imperfect entries need the application of the rule. This should certainly be so where a party came into possession under "color of title," as in Bedle *vs.* Beard (12 Co., 5). In the Virginia military district the prior entry appropriates the land even as against a junior entry carried into patent.

(*c.*) In our judicial proceedings the cases are very numerous where lands are sold without any legal title of record in the party owning—in fact on the record a mere equity. Unless aided by the presumption of a grant a fatal blow is given to judicial sales.

(*d.*) Cumulative disabilities are not allowed even with the letter of the statute of limitations in their favor, because they would permit claims to travel down throughcenturies, "and be productive of incalculable mischief." (Ridley *vs.* Hettman, 10 Ohio, 526.)

The same evil will result if a grant may not be preserved in favor of a possession against the holder of an equitable title.

3. The maxim, *nullum tempus occurrit regi*, has no application to such a case.

(*a.*) The purpose of this maxim is *to protect the rights of the government*—not to enable private persons claiming under it to perpetuate a claim against other parties claiming from them. (Birch *vs.* Alexander, 1 Wash., R., 34; Cow. & Hill's Notes, part 1, p. 486, Note 298 to Phil. Ev., and Note 301, pl. 40, p. 539, where authorities are collected; 22 American Law Register (vol. 13, N. S.), 466; Gwynne *vs.* Niswanger, 20 Ohio, 556; McClain *vs.* Bovey, 34 Wisconsin.)

Additional authorities will be found cited in the preceding pages.

(*b.*) The cases, therefore, which hold that the statute of limitations does not run in favor of a party in possession before a patent has issued does not in the least affect the doctrine of the presumption of a grant. In those States, as in Ohio, where a party can at law defend his possession on proof of an equitable title with right of possession, this presumption is sufficient to defeat an action to recover possession supported by a patent issued even within twenty years before suit brought.

In view of the vast number of land titles affected by these principles, it is hoped this review may be found of some value to the profession, and of service to the cause of justice in protecting titles.

BELLEFONTAINE, OHIO, *January* 1, 1879.

WM. LAWRENCE.

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