MEIGS *et al. v.* MCCLUNG'S LESSEE. (*a*)

Military reservation.

In the treaty of the 25th of October 1805, with the Cherokees, the reservation of three miles square, for a garrison, lies below, and not above, the mouth of the Highwassee, where the United States have placed the garrison.

ERROR to the Circuit Court for the district of East Tennessee, in an action of ejectment, brought by McClung's lessee against Meigs and others. *On the trial in the court below, a bill of exceptions was taken, which states the case, as follows : [*12

The plaintiff's lessor claims the land, under a grant from the state of North Carolina, to John Donelson, dated the 11th of July 1788, for 1500 acres, lying on the north side of Tennessee river, opposite to a high bluff of rocks of diverse colors. The defendants resided on the land, as officers, and under the authority of the United States, who had a garrison there, and had erected works at an expense of $30,000. The place where the defendants resided was two miles, at least, above the termination of the treaty line, opposite the mouth of the Highwassee. In 1805, the line between the United States and the Cherokee Indians was ran, according to the treaty, under the direction of the defendant, Meigs, who was an agent of the United States for that purpose ; and afterwards, the garrison reserve of three square miles was laid off, by the direction of the defendant, Meigs, opposite and above the mouth of the Highwassee river, making the treaty line from the three forks of Duck river, to the point on Tennessee river, opposite the mouth of Highwassee, the lower line of said reservation, and the Tennessee river the southern line, meandering the river and reducing it to a straight line of three miles in length.

The defendants read a copy of a letter written by D. Smith and the defendant, Meigs, who were commissioners on the part of the United States, at the treaty holden with the Cherokee Indians, on the 25th of October 1805, dated at Washington, January 10th, 1806, and addressed to the secretary at war ; in which they say : "By the treaty with the Indians, concluded at Tellico, on the 25th day of October 1805, there was reserved three square miles of land, for the particular disposal of the United States, on the north bank of the Tennessee, opposite to and below the mouth of Highwassee. This reservation is ostensibly predicated on the supposition, that the garrison at South-West Point, and the United States factory now at Tellico, would be placed on the reserve, during the pleasure of the United States. But it was stipulated with Doublehead, that whenever the United States should find this land unnecessary for the purposes mentioned, then it is to revert to Doublehead ; provided, as a condition, that he retain one of the square miles to his own use, *and that he is to relinquish his right and claim to the other two sections of one mile square each, in favor of John D. Chisholm and John Riley, son to Samuel Riley, one of the interpreters in the Cherokee nation, in equal shares. As it is proper that this be recognised, we have made this statement for your information, and have the honor to be, &c., [*13

DANIEL SMITH,
RETURN J. MEIGS."

(*a*) February 11th, 1815. Absent, JOHNSON and TODD, Justices.

When the defendant and the other officers of the United States went to look for the place to erect the garrison, in pursuance of the reserve, they went first below the mouth of Highwassee; but it was a low and marshy country, affording no good site for a garrison, and no water or spring was to be had there.

The plaintiff's counsel insisted, that the Indian title to the land was extinguished, and that he had a right to recover, and prayed the court so to instruct the jury; to which the defendant's counsel objected, and insisted, that the defendants were entitled to recover against the plaintiff, because the Indian title was not extinguished; and because the land was occupied by the United States' troops, and the defendants, as officers of the United States, for the benefit of the United States, and by their direction; and because the garrison was erected on the land really reserved for that purpose by the treaty, as they insisted it was, out of the land ceded that the reserve was made. That it must, by the letter of the treaty, be understood to be land reserved to the Indians, out of the part ceded, and not a reserve in favor of the United States, out of the land not ceded by the Indians; and that the term "reserve" in the treaty, controlled the other expressions, "opposite and below the mouth of Highwassee." That the United States had a right, by the constitution, to appropriate the property of individual citizens; and that the line run, was the true line of the reservation.

But the court overruled the objections of the defendants' counsel, and charged the jury, that the land reserved *for a garrison was opposite to and below the mouth of the Highwassee, and that the land opposite to and above was ceded to the United States by the Indians, by the treaty of Tellico, and that the United States had no right to appropriate the land mentioned in the plaintiff's declaration. And that the plaintiff was authorized by law to recover, if the land covered by his grant lay opposite to and above the mouth of the Highwassee. That if the treaty had expressly reserved the three miles square, for the disposal of the United States, opposite and above the mouth of Highwassee, the Indian title would be thereby extinguished, as that reserve would be north of the treaty line. That if the land thus reserved was, at the time, vacant land, the United States could appropriate it as they pleased; but if it was private property, the United States could not deprive the individual of it, without making him just compensation therefor. And further, that by the expressions used in the said treaty, the Indian title to all land north of the treaty line, from the point opposite the mouth of Highwassee to Fort Nash, except such tracts as were expressly reserved for the Indians, was extinguished; and that the three square miles, reserved for the United States, must, according to the treaty, be situate opposite and below the mouth of Highwassee. To this opinion, the counsel for the defendants excepted.

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By the 2d article of the treaty of 25th October 1805 (7 U. S. Stat. 93), "the Cherokees quit-claim and cede to the United States, all the land which they have heretofore claimed, lying to the north of the following boundary line: beginning at the mouth of Duck river, running thence up the main stream of the same, to the junction of the fork, at the head of which Fort Nash stood, with the main south fork; thence a direct course to a point on the Tennessee river bank, opposite the mouth of Highwassee river," &c. After describing the other lines of the cession, the treaty proceeds thus:

"And whereas, from the present cession made by the Cherokees, and other circumstances, the site of the garrisons at South-West Point and Tellico are become not the most convenient and suitable places for the accommodation of the Indians, it may become *expedient to remove the said garrisons and factory to some more suitable place; three other square [*15 miles are reserved for the particular disposal of the United States, on the north bank of the Tennessee, opposite to and below the mouth of the Highwassee."

C. Lee, for the plaintiffs in error.—The points in dispute in this cause are stated in the bill of exceptions. The principal question is, whether the three miles reserved for the use of United States are to lie below or above the mouth of the Highwassee?

We say, that it was the intention of the parties that they should lie above. The expression "reserved" imports an exception to the cession. The reservation must have been out of the land ceded. The United States could not reserve what was not theirs before; but for the accommodation of the Indians, they reserve three miles square for the use of the United States. It was intended to prevent the extinguishment of the Indian title to so much, in order to prevent individuals from purchasing it. The letter of Smith and Meigs to the secretary of war shows that the land was to revert to Doublehead and two others, whenever the United States should cease to have a use for it. It was, therefore, clearly a reserve, or exception from the general operation of the grant. It would be inconsistent with the faith of the treaty, to suffer any individual to possess it.

Jones, contrà, relied upon the plain words of the treaty. The word "reserve" is the only thing that can justify a question; but it means "to appropriate" to "set apart" to hold it for the use of United States, for the purpose of a garrison, but not to make an absolute grant or cession of the land. The expression "three other square miles," shows that they meant other than the land ceded.

The letter is not evidence; it is no part of the treaty; it was never ratified by the senate; and is unimportant, if it was. It, however, shows that there was no mistake in the word "below" in the treaty.

**C. Lee*, in reply.—The word "reserve" was used to keep individuals from appropriating to themselves, the lands supposed most [*16 convenient for the mutual accommodation of the Indians and the United States. It means the same as the word "retain." The word "other" is put in opposition to the former site of the garrison and factory. It is straining the word "reserve" very far, to make it mean a new grant.

MARSHALL, Ch. J.—Does the question arise in this case, whether a grant is good, before extinguishment of the Indian title?

C. Lee.—That question does not come up in this case.

STORY, J.—That question has been decided in the case of *Fletcher* v. *Peck* (6 Cr. 87).

February 13th, 1815. (Absent, Johnson, J., and Todd, J.) MARSHALL, Ch. J., delivered the opinion of the court, as follows:—

The land for which this ejectment was brought, lies within the territory ceded to the United States by the state of North Carolina, and was claimed by a patent anterior to that cession. At the date of the grant, the Indian title had not been extinguished. On the 25th day of October 1805, a treaty was made between the United States and the Cherokee Indians, in which the Indians ceded to the United States "all the land lying to the north of the following boundary line: beginning at the mouth of Duck river, running thence, up the main stream of the same, to the junction of the fork, at the head of which Fort Nash stood, with the main south fork; thence a direct course to a point on the Tennessee river bank, opposite the mouth
*17] of the Highwassee river." *The question on which the cause has been placed is this: Is the land, claimed by the plaintiff in the court below, within the ceded territory?

The line mentioned in the treaty has been run, and the land in controversy lies on the north side of it, and consequently, within the limits ceded to the United States; but there was a further stipulation in the treaty, which the plaintiffs in error say, comprehends the lands for which this suit is brought. After describing the ceded territory, the treaty proceeds to say: "And whereas, from the present cession made by the Cherokees, and other circumstances, the sites of the garrisons at South-West Point, and Tellico, are become not the most convenient and suitable places for the accommodation of the said Indians, it may become expedient to remove the said garrisons and factory to some more suitable place,"—three other square miles are reserved for the particular disposal of the United States, on the north bank of the Tennessee, opposite to and below the mouth of Highwassee.

The ceded territory lies above the mouth of Highwassee, as does the land in controversy; yet the plaintiffs in error contend, that this land is within the stipulation for a reserve of three square miles to lie below the mouth of Highwassee. They attempt to sustain this proposition, by alleging that the word "below" was inserted in the treaty by mistake, when the word "above" was intended. This mistake ought certainly to be very clearly demonstrated, before the courts of the United States can found upon its existence a judgment which shall deprive a citizen of his property.

The argument, so far as it is drawn from the treaty itself, rests on the word "reserved." It is said, that the lands "reserved for the particular disposal of the United States," must necessarily be a part of the ceded territory, or the term would not aptly express the idea of the parties.
*18] *The court cannot accede to this reasoning. The treaty is the contract of both parties, each having lands. The words are the words of both parties, and the term might, without any strained construction, be applied to the lands of either. No great violence is done to the known import of the term, as used in the treaty, if it be considered as equivalent to the words "set apart." This construction is rendered necessary by the word "other." "Three other square miles," that is, other than those before ceded, are reserved for the particular disposal of the United States. The context, instead of proving that the word, "below" was used by mistake in the treaty, would rather induce the court to put that construction on an ambiguous term, had one been employed.

The counsel for the plaintiffs in error also rely on a letter written by the

commissioners who negotiated the treaty, to the secretary of war, on the 10th day of January 1806. But without inquiring into the weight to which such a letter is entitled, in such a case, it is to be observed, that the letter agrees with the terms of the treaty. It says, that the three square miles reserved for the particular disposal of the United States, were "opposite to and below the mouth of the Highwassee." It is unnecessary to make a further comment on this letter, than to say, that there is no expression in it which appears to the court to countenance, in the slightest degree, the idea, that the word "below" in the treaty was used by mistake instead of the word "above."

The facts, that the agents of the United States took possession of this land lying above the mouth of the Highwassee, erected expensive buildings thereon, and placed a garrison there, cannot be admitted to give an explanation to the treaty, which would contradict its plain words and obvious meaning. The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it, by violence, and without compensation. This court is unanimously and clearly of opinion, that the circuit court committed no error in instructing the jury, that the Indian title was extinguished to the land in controversy, and that the plaintiff below might sustain his action. The judgment is affirmed, with costs.

Judgment affirmed.

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*Simms *v.* Guthrie *et al.* (*a*) [*19

Land law of Virginia.—Pre-emption right.—Injunction bill.—Relief in equity.

The land law of Virginia, which gives a right of pre-emption to those who had marked and improved land, before the year 1778, refers that right to the time when the improvement was made, and to the time of the passage of the act, and not to the time when the claim for such pre-emption was made before the court of commissioners.

If an entry be made, by the assignee of a pre-emption right, it will be good, although the name of the assignor be not mentioned in the entry, if the entry refer to the warrant, and it mention an improvement; provided, the place be described with sufficient certainty, in other respects.

A bill in equity to enjoin a judgment at law, is not to be considered as an original bill, and therefore, it is not necessary, in a court of limited jurisdiction, to make other parties, if the introduction of those parties should create a doubt as to the jurisdiction of the court.[1]

A complainant in equity cannot obtain a decree for more than he has asked in his bill.

Error to the Circuit Court for the district of Kentucky, in a suit in chancery. The facts of the case, as stated by the Chief Justice, in delivering the opinion of the court, were as follows:

Charles Simms, the plaintiff in error, having obtained a judgment in ejectment, for certain lands lying in Kentucky, in possession of the defendants, for which the said Simms held a patent, prior to that under which the defendants claimed, a bill of injunction was filed by them, praying that he might be decreed to convey to them so much of the land in their possession, as was included within his patent.

(*a*) February 8th, 1815. Absent, Livingston, Story and Todd, Justices.

[1] Where a bill does not relate to some matter already litigated in the same court, by the same persons, and which is not either in addition to, or a continuance of, an original suit, it is an original bill, not an ancillary one. Christmas *v.* Russell, 14 Wall. 69.