Anderson v. Clark.

THIS cause came on, &c.: On consideration whereof, it is the opinion of this court, that the judgment of the said circuit court in this cause is erroneous, because the verdict is imperfect. It is, therefore, considered and adjudged by this court, that the said judgment be and the same is hereby reversed and annulled. And it is further ordered, that this cause be remanded to the said circuit court with directions to award a *venire facias de novo*.

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*618] *JAMES JACKSON, *ex dem.* LACY ANDERSON, *v.* JOHN CLARK and ROBERT ELLISON.

Land-law of Ohio.

Construction of the act of congress, passed March 2d, 1807, entitled, "an act to extend the time for locating Virginia military-warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands for the use of schools, in the Virginia military reservation, in lieu of those heretofore appropriated."[1] p. 634.

The reservation made by the law of Virginia of 1783, ceding to congress the territory northwest of the river Ohio, is not a reservation of the whole tract of country between the river Scioto and Little Miami; it is a reservation of only so much of it, as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio; the residue of the lands are ceded to the United States, as a common fund for those states, who were or might become members of the Union, to be disposed of for that purpose. p. 635.

Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied, as still to keep in view the interests of the Union, which were also a vital object of the trust; this was only to be effected, by prescribing the time in which the lands to be appropriated by these claimants should be separated from the general mass, so as to enable the government to apply the residue to the general purposes of the trust. p. 635.

If the right existed in congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension, follows, as a necessary consequence. p. 635.

If it be conceded, that the proviso in the act of 2d March 1807, was not intended for the protection of surveys which were in themselves absolutely void; it must be admitted, that it was intended, to protect those which were defective, and which might be avoided for irregularity; if this effect be denied to the proviso, it becomes itself a nullity. p. 635.

Lands surveyed are, under the law, as completely withdrawn from the common mass, as lands patented; it cannot be said, that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys; they did not require legislative aid. The clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times. p. 638.

ERROR to the Circuit Court of the United States for the district of Ohio. The plaintiff brought an action of ejectment, in the circuit court of Ohio, to recover a tract of land, situate in Adams county, in the Virginia military district, and state of Ohio.

On the trial of the cause, a bill of exceptions was tendered by the plaintiff, to the opinion of the court upon the admissibility of certain testimony which was offered by the plaintiff, and which was rejected by the court.

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[1] See Lindsey *v.* Miller, 6 Pet. 666; Galloway *v.* Finley, 7 Id. 264; McArthur *v.* Dun, 7 How 262.

The facts of the case, with the matters which were the *subject of the plaintiff's exceptions, appear in the opinion of the court.

The case was argued by *Leonard* and *Hammond*, for the plaintiff in error; and by *Creighton* and *Ewing*, for the defendants.

The argument of the counsel of the plaintiff in error, was principally upon these points:—1. Congress could not rightfully limit the time within which military warrants should be located and surveyed. 2. The act of congress, prohibiting locations on lands already surveyed, and declaring any patent which should be issued on such survey void, does not comprehend the survey in this case.

Leonard and *Hammond*, insisted, the proviso of the act of 2d March 1807, was simply designed to protect voidable surveys, not those absolutely void. Before the statute, surveys made in defective locations, or not executed in conformity, were voidable, but might be carried into grant; and the grants issued thereon, were, without the aid of the act, appropriations of the land. These were the principal evils in the country, demanding legislative interference, and led to the enactment of the statute. And this places all voidable surveys, which might be patented, on the same footing as if they were patented, so far as to prevent subsequent appropriation, but does not cover with its protection, surveys on which grants can never issue. The authority of the surveyor to make a survey, is derived solely from the warrant; and surveys executed without warrants, are void. This is apparent from all the laws of Virginia relative to the subject, and from the common practice and universal understanding of those laws, and the decisions of the courts. By the act of 9th June 1794, now in force, no patent can issue on the defendant's survey.

On the construction of defendants, the proviso will operate as a virtual repeal of that act, and give such validity to these surveys, as to remove the necessity of obtaining grants; or otherwise, by preventing subsequent locations, vest the land in the United States. The latter construction would be an infringement of the compact between Virginia and the United States, and a refusal to execute it in good faith. If congress can limit the time within which locations may be made, they are bound to execute the power with the utmost honor, and not apply a limitation to one part of the district, without extending it to all. Much less are they authorized, under color of limiting the time, to appropriate the land to their own use. None will presume such ill faith in congress. The Virginia troops acquired a right, and
*630] at the price of blood, to *compensation in land, by the express stipulation of that state. Virginia did not cede the north-west territory to the Union, till the United States engaged to make good the compensation, out of the reservation. The faith of two sovereigns has pledged the military district to these troops.

The whole course of the legislation of congress evinces, that it was not their design to authorize locations or surveys, without military warrants, or for more land than is embraced in them. It cannot be supposed, that it was the design of the proviso to protect surveys wholly unauthorized, on which grants can never issue; but to protect surveys that are irregular, defective,

voidable, and which might be patented. The act of Virginia, protecting old military surveys, is as strongly expressed as the proviso, but has always been held to apply only to those founded upon warrants.

A sale of land, by title bond, and location afterwards made, does not vest the purchaser with title in the warrant or entry. The purchaser reposes confidence in the vendor, and if this confidence is misplaced, the purchaser, and not the government, must sustain the loss. The purchaser can look to his bond for indemnity. Massie was then the proprietor, and had the right to elect either of these locations, and by recording a survey of the earlier, he bound himself, and abandoned the latter. The taking out the warrant, and the plats of survey, as on a satisfied warrant, is a solemn act of abandonment. The recorded survey, and not the survey executed on the ground, is protected by the proviso. The recording a survey, after the satisfied warrant with the plats of survey are taken from the office, is a void act. A new entry cannot be held a withdrawal of one prior; or, if so, it cannot be held a withdrawal of a survey recorded when the plat is taken from the office, and especially, when not returned, and thus a survey of 553 acres, made on only 403 acres of located warrant, the residue of the 553 acres being surveyed, recorded, the plats taken out of the office, and not returned, is not shielded by the proviso.

They cited, among other cases, *Taylor's Lessee* v. *Myers*, 7 Wheat. 23; *Kerr* v. *Watts*, 6 Ibid. 550; *Matthie* v. *Potts*, 3 Bos. & Pul. 23; *Taylor and another* v. *Brown*, 5 Cranch 234; *Wilson* v. *Mason*, 1 Ibid. 45; *Hickman* v. *Boffman*, Hardin 356; and *Estill's Heirs* v. *Hart's Heirs*, Ibid. 577; Sneed 81, 82; *Johnson* v. *Buffington*, 2 Wash. 116; *Holt's Heirs* v. *Hemphill's Heirs*, 3 Ohio 232, and referred to Swan's Collection of Ohio Land Laws, under the head of Virginia military lands.

Creighton and *Ewing*, for the defendants in error, contended:—In the case presented by the record and bill of exceptions, *the counsel for the defendants insist, that they are protected by the proviso of the [*631 act of congress of the 2d March 1807, entitled an act to extend the time for locating Virginia military warrants, for returning surveys, &c.; and subsequent acts of congress on the same subject, containing the same proviso; and that the patent obtained by the plaintiff is "null and void."

The United States, under the deed of cession of 1784, from Virginia, held the Virginia military district in trust for the Virginia claimants. The surplus, subject to sale, as other lands belonging to the United States. In the execution of these trusts, the congress of the United States, on the 23d of March 1804, passed an act limiting locations in the Virginia military district to three years, and five years to execute and return surveys. The holders of warrants asked an extension of the time. When the act of the 2d March 1807 was passed, extending the period for making locations and returning surveys, the proviso on which the defendants rely, was introduced, and has been retained in all the subsequent acts of congress on that subject. The power of congress to limit the period for making locations and surveys in the district (exercised since the year 1804), heretofore, has never been questioned. In the exercise of an undoubted power, the object and policy of the national legislature in the introduction of the proviso cannot be mistaken, in excluding from location "land for which patents had previously

been issued, or which had been previously surveyed." The survey claimed by the defendants, is a subsisting survey, which has never been abandoned or withdrawn, and comes expressly within the doctrine laid down by the court in the case of *Taylor's Lessee* v. *Myers*, 7 Wheat. 23. "The proviso in the act of March 2d, 1807, which annuls all locations made on lands previously surveyed, applies to subsisting surveys—to those in which an interest is claimed." The act places surveys on the same footing with patents, for all the purposes of defence in trials at law. A patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation. *Hoofnagle and others* v. *Anderson*, 7 Wheat. 212. In the action of ejectment, in Ohio, the parties are never permitted to go behind the patent. The same rule applies, under this act, to surveys. The class of cases referred to, and relied on by the plaintiff's counsel, are cases in chancery, where it is the appropriate duty of the court to go behind the patent or survey.

Whether a patent can be obtained by the defendants, on their survey, will be a question between them and the government, *whenever the government shall make provision to inquire into the claim. It can never be a question between the plaintiff and defendants. It is sufficient for the defendants in this controversy, that they have a subsisting survey, claimed by them, and that the patent obtained by the plaintiff has been procured in contravention of the positive provisions of the act, and is "null and void." If it were admissible to go into the inquiry desired by the plaintiff, it will be seen, that when Nathaniel Massie sold the land in question to the defendants, and at the time he made the entry and survey, he owned 403 acres, part of Leven Powell's warrant, and 150 acres, part of Thomas Goodwin's warrant, making 553 acres, the precise quantity in the entry and survey. If the objection to the defendants' title exists, as suggested by the plaintiff's counsel, the facts disclosed in the evidence offered by him, present a case where a court of equity would give to the defendants ample relief.

*632]

Marshall, Ch. J., delivered the opinion of the court:—This is an ejectment brought by the plaintiff in error, in the court of the United States for the seventh circuit and district of Ohio, to recover a tract of land lying in the military district. The plaintiff offered, as his title, a patent from the government of the United States, bearing date the 10th of November 1824.

The defendants then introduced a certified copy of an entry and survey of the lands in controversy, sworn to by Richard G. Anderson, the principal surveyor of the Virginia military district; the survey purporting to have been made on the 10th of October 1796, and recorded on the 15th of April 1812, founded on an entry, bearing date the 19th day of July 1796, for 553 acres of land, in the name of Nathaniel Massie, assignee, numbered 2744, and founded upon Leven Powell's warrant, for 2000 acres, No. 3398, and Thomas Goodwin's warrant for 200 acres, No. 1930. It was admitted, that the defendants were purchasers from Massie, prior to the year 1796; entered into possession of the premises under the said purchases, and received a conveyance from him, before the year 1812. It was also admitted, that the plaintiff's entry was made on the 10th of June 1824, and his survey on the 20th of the same month. The defendant relied on this survey, and on the pro-

viso of the act passed the 2d of March 1807, entitled "an act to extend the time for locating Virginia military warrants, &c." This act annexes the following proviso to the provision it *grants to obtain warrants for military service, and to make locations within the military district: [*633 "Provided, that no locations as aforesaid, within the aforesaid 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 been previously surveyed, and any patents which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void."

To show that the survey set up by the defendants was not protected by the proviso in the act of congress, the plaintiff offered to prove, that the warrants on which it was founded were satisfied before that entry was made. For this purpose, he offered in evidence two entries amounting to 1597 acres, on Powell's warrant, made in Powell's name, the 30th of December 1791, surveyed by Massie on the 3d of January 1792, the survey recorded on the 10th of the same month; plats and certificates taken from the office by Massie, the 11th of July 1795, and a patent issued to him on the 19th September 1799; also an entry for 403 acres, the residue of Powell's warrant, made in the name of Nathaniel Massie, on the 27th of January 1795, surveyed on the 27th December 1796, the survey recorded on the 9th of June 1797; the plat and certificate, together with the warrant supposed to be satisfied, taken out of the office by Massie, on the 14th of June 1797, and a patent issued to his heirs, on the 3d of December 1814. He also offered in evidence, an entry for fifty acres made on Thomas Goodwin's, warrant, in the name of John Walker, assignee, the 17th of September 1795, surveyed the 30th of March 1820, and patented on the 19th of November 1825; also an entry for 150 acres, the residue of the said warrant, made on the 16th of June 1795, in the name of the said Massie, surveyed on the 1st of July in the same year; survey recorded the 10th of the same month, and a patent issued to Massie, on the 15th of February 1800. The plaintiff also offered the deposition of Richard C. Anderson, the principal surveyor, who deposed, that the survey of 553 acres, which was given in evidence by the defendants, was illegally made, and admitted by him ignorantly and improperly, to record; and that he had marked the same on the record of his office, "error;" but he does not state the time when this mark was made. He adds, that he had refused to grant a plat and certificate of survey, being of opinion, that the whole of the warrants had been previously satisfied.

The defendants moved the court to reject the authenticated copies, and testimony aforesaid, as inadmissible evidence; which motion was granted by the court, upon the ground, that the act of congress confirmed the survey of the defendant, *and annulled the plaintiff's patent. An exception [*634 was taken to this opinion. A verdict and judgment having been given for the defendants, the plaintiff has brought the cause into this court by writ of error.

Two points have been made by the counsel for the plaintiff. They contend—1. That congress could not, rightfully, limit the time within which military warrants should be located and surveyed. 2. That the act of congress, prohibiting locations on lands already surveyed, and declaring any

patent which should be issued on such survey, void, does not comprehend the survey in this case.

The first point to be considered, is the objection to the limitation of time prescribed by congress, within which the military warrants granted by Virginia should be located. The plaintiff contends, that no limitation can be fixed. In the October session of 1783, the legislature of Virginia passed an act ceding to congress the territory claimed by that state, lying north-west of the river Ohio, under certain reservations and conditions in the act mentioned. One of these was, "that in case the quantity of good land on the south-east side of the Ohio, upon the waters of the Cumberland river, and between the Green river and Tennessee, which has been reserved by law for the Virginia troops, on the continental establishment, should, from the North Carolina line bearing in farther upon the Cumberland lands than was expected, prove insufficient for their legal bounties; the deficiency should be made up to the said troops, in good lands, to be laid off between the rivers Scioto and Little Miami, on the north-west side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia." This is not a reservation of the whole tract of country lying between the rivers Scioto and Little Miami. It is a reservation of only so much of it as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio. The reservation is made in terms which indicate some doubt respecting the existence of the deficiency, and an opinion, that it will not be very considerable. Subsequent resolutions of the Virginia legislature, have added very much to the amount of these bounties. The residue of the lands are ceded to the United States, for the benefit of the said states, "to be considered as a common fund for the use and benefit of such of the United States, as have become, or shall become, members of the confederation or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the
*635] general charge and *expenditure; and shall be faithfully, and *bonâ fide*, disposed of for that purpose, and for no other use or purpose whatever."

The government of the United States, then, received this territory in trust, not only for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the confederation; and this trust is to be executed "by a faithful and *bonâ fide*" disposition of the land, for that purpose. We cannot take a retrospective view of the then situation of the United States, without perceiving the importance which must have been attached to this part of the trust. A heavy foreign and domestic debt, part of the price paid for independence, pressed upon the government; and the vacant lands constituted the only certain fund for its discharge. Although, then, the military rights constituted the primary claim on the trust, that claim was, according to the intention of the parties, so to be satisfied, as still to keep in view that other object which was also of vital interest. This was to be effected only by the prescribing the time within which the lands to be appropriated by these claimants, should be separated from the general mass, so as to enable the government to apply the residue, which it was then supposed would be inconsiderable, to the other purposes of the trust. The time ought certainly to be liberal. But unless some time

might be prescribed, the other purposes of the trust would be totally defeated; and the surplus land remain a wilderness.

This reasonable, and, we think, necessary, construction, has met with general acquiescence. Congress has acted upon it, and has acted in such manner as not to excite complaints, either in the state of Virginia, or the holders of military warrants. If the right existed to prescribe a time within which military warrants should be located, the right to annex conditions to its extension follows, as a necessary consequence. The condition annexed by congress has been calculated for the sole purpose of preserving the peace and quiet of the inhabitants, by securing titles previously acquired. We are to inquire, whether the case of the defendants is within it.

2. It has been contended, that the prohibition in the act of the 2d of March 1807, to make locations on lands which had been previously surveyed, does not extend to the survey of the defendants, because that survey was made on warrants which had been previously satisfied. The word "survey," as used in the law, is not satisfied by the mere circumstance that a chain has followed a compass round a particular piece of ground; but requires that it should be made in virtue of a warrant, for the purpose of appropriating land, to which the holder of that warrant is entitled by law. The warrant can be an authority *for surveying and appropriating so much land only as it professes to grant; and this necessary limitation, could it require [*636
confirmation, is confirmed by the act of the 9th of June 1794, which regulates the manner of issuing patents on surveys for less than the whole quantity of land specified in the warrant. The act contains a proviso, "that no letters-patent shall be issued for a greater quantity of land than shall appear to remain due on such warrants." As patents had issued for the whole quantity of land specified in the warrants on which the survey of the defendants professes to be founded, previous to the entry of the plaintiff, no patent could, at that time, have been obtained by the defendants; and therefore, the saving in the statute could not have been intended for their survey.

The court has felt the weight of this argument, and has bestowed upon it the most deliberate consideration. The act of the 23d of March 1804, is the first act which prescribes the time within which the holders of military warrants shall make their locations and surveys. That act requires that the locations shall be made within three years from its passage. On the 2d of March 1807, the first act was passed giving a farther time of three years for making locations, and of five years for returning surveys. This act contains the proviso of which the defendants claim the benefit. In every act which has been since passed, prolonging the time for making entries and returning surveys on military warrants, the same proviso has been introduced. It was enacted in March 1807, and has continued in force ever since. It constitutes a limitation to the right given by all subsequent laws, to locate and survey military warrants. If it be conceded, that this proviso was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted, that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity. We must, therefore, inquire, to which class the survey of the defendants belongs?

Nathaniel Massie was probably the proprietor of Leven Powell's whole warrant of 2000 acres, certainly, of 403 acres, part thereof, when he made

the entry under which the defendants claim. He was also the proprietor of 150 acres, part of Thomas Goodwin's warrant. We say he was at that time the proprietor of those warrants, because he made an entry for 403 acres, part of Powell's warrant, in his own name, on the 27th of January 1795, and an entry for 150 acres, part of Goodwin's warrant, in his own name, on the 16th of June 1795; both which entries were afterwards surveyed and patented for himself and his heirs. These two entries amount to
*637] 553 acres, the *quantity for which the entry sold to the defendants was made. Being thus the proprietor of both these entries, and of the warrants on which they wore founded, he makes an entry in his own name, on the 19th July 1796, for the same quantity of 553 acres. This last entry, the warrants being satisfied, if the previous entries remained in force, was inconsistent with the two preceding entries. It ought not to have been made by him, nor allowed by the principal surveyor, unless those preceding entries were withdrawn. According to the usage of the office, as stated in *Taylor's Lessee* v. *Myers*, 7 Wheat. 23, Massie had the power to withdraw them. Had he expressed to the surveyor-general his wish to withdraw them, and to re-enter the warrants, his wish would not have been opposed. But without expressing this wish, so far as the case shows, he made the entry in question. This act was lawful, if the two preceding entries were removed; unlawful, if they stood. The officers of the government did their duty, if this entry displaced the two which preceded it; but violated their duty, if it had not this effect. Unquestionably, in an office regularly kept, the withdrawal of an entry ought to appear upon the record; but had this office been regularly kept, the last entry could not have been allowed, unless accompanied by a withdrawal of those which were inconsistent with it.

Had Nathaniel Massie transferred his right to the two last preceding entries, previous to the time of making this for the defendants, so that the contest was between purchasers; the prior entries could not have been affected by his subsequent act. But he had not transferred his right to them; the contest, had one arisen, would not have been between purchasers, but between a purchaser and the wrongdoer himself. Can it be doubted, how such a controversy would have terminated? Nathaniel Massie, being the proprietor of 553 acres of military land-warrants, enters them on lands which they might lawfully appropriate; afterwards, possessing a perfect right to cancel this entry, and locate the warrants elsewhere, he does locate them elsewhere, and sells this location to a purchaser, for a valuable consideration, without notice. It cannot, we think, be doubted, that a court of equity would, at any time, while Massie remained the owner of the prior entries, relieve such purchaser, by annulling the entries which obstructed the title of the purchaser; or decreeing that Massie should withdraw them, or enjoining him from carrying them into grant. Had the plat and certificate of survey, with the accompanying vouchers required by law, been presented by the defendants, previous to the proceedings taken by Massie to obtain patents for himself, a grant would have issued to the defendants. Their survey, then, was not an absolute nullity. It might have been supported in
*638] a *court of equity; and had the defendants, instead of trusting, as they probably did, to Massie, for a title, been diligent in the pursuit

of it themselves, they might, perhaps, have obtained one from the United States.

This was not a fictitious, but an actual, survey, made as early as the year 1796, by a regular officer, for one owning the warrants on which the entry purports to be made, and having, at the time, full power to give complete validity both to the entry and survey. No circumstance attended them, which could enable a purchaser to detect the latent defect. The survey, having every appearance of fairness and validity given to it by the regular officers of the government, is sold, at least, as early as the year 1796, to persons who take possession of it, and have retained possession ever since. Why should not the proviso in the act of congress apply to the case? The words, taken literally, certainly apply to it. "No locations shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed." Had a patent been previously issued on this very survey, this contest could never have arisen. Does the language of the clause furnish any distinction between the patent and the survey? If it be a survey, there is none. Lands surveyed are as completely withdrawn, as lands patented, from subsequent location.

It cannot be said, that the prohibition was intended only for valid and regular surveys. *They* did not require legislative aid. It was known, that the military district abounded with defective entries and surveys, which might be defeated by entries made in more quiet times, with better knowledge of the requisites of law. This clause was introduced for their protection. It was, most truly, an enactment of repose. A survey made by the proper officer, professing to be made on real warrants, bearing upon its face every mark of regularity and validity, presented a barrier to the approach of the location, which he was not permitted to pass; which he was not to liberty to examine. Had the survey been made on land not previously located, it would have been as destitute of validity, as it is now supposed to be. Yet, it is admitted, that though it should not cover one foot of the location, the land surveyed could not be appropriated by a subsequent locator. The illegality of the survey would not have been examinable by him. We cannot draw the distinction between such a case and this. Congress does not appear to have drawn it. They are both surveys made by the regular officers, on military warrants.

It may be, that the defendants 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. [*639

We have not noticed the testimony of the principal surveyor, because we do not think it affects the case. The word "error" was written on the face of the plat, we know not when; certainly, after it was recorded, and after the certificate exhibited by the defendant at the trial had been given. It manifests his opinion, that he acted improperly in admitting the survey to record, but that opinion cannot affect the case. The great original impropriety was in omitting to require that the previous entries made in the name of Massie, should be withdrawn expressly, when this entry was made.

This case is not, we think, like *Taylor's Lessee* v. *Myers*, reported in 7 Wheat. 23. In that case, the owner had openly abandoned his location and

survey, and had placed his warrant on other land. In such case, the land was universally considered as returning to the mass of vacant land, and becoming, like other vacant land, subject to appropriation. A person having no interest in the original survey, attempted to set it up against a subsequent locator, under the proviso in the act of congress which has been stated. The court said, "the proviso of that act, which annuls all locations made on lands previously surveyed, applies to subsisting surveys; to those in which an interest is claimed, not to those which have been abandoned, and in which no person has an interest." This survey has not been abandoned by any person having title to it, and the defendants still have an interest in it. We think, there is no error in the decree, and that it ought to be affirmed.

Decree affirmed.

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*640] *Robert Barry, Appellant, *v.* Griffith Coombe, Appellee.

Statute of frauds.

The statute of frauds, in Maryland, requires written evidence of the contract, or a court cannot decree performance; the words of the statute are, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." p. 650.

A note or memorandum in writing of the agreement between parties, is sufficient, under the statute of frauds of Maryland; and in order to obtain specific performance in equity, the note in writing must be sufficient to maintain an action at law. The form is not regarded, nor the place of signature, provided it be in the handwriting of the party, or his agent, and furnish evidence of a complete and practicable agreement. A court of equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c. p. 650.

An examination of the cases will show, that courts of equity are not particular, with regard to the direct and immediate purpose for which the written evidence of the contract was created; it is written evidence which the statute requires; and a note or letter, and even in one case, a letter, the object of which was to annul the contract, on a ground really not unreasonable, was held to bring a case within the provisions of the statute. p. 651.

Where, in an account stated by the parties, in the handwriting of the defendant, his name being written by him at the head of the account, a balance was acknowledged to be due by him to the complainant in the bill for a specific performance, there was the following credit, "by my purchase of your half, E. B. wharf and premises, this day agreed upon between us, $7578.63;" it was held to be a sufficient memorandum in writing, under the statute of frauds of Maryland, upon which the court could decree a specific performance of the sale of the estate referred to; other matters appearing in evidence, and by the admission of the defendant in his answer, to show the particular property designated by "your ½ E. B. wharf and premises."[1] p. 651.

Appeal from the Circuit Court of the District of Columbia. This was an appeal from a decree in equity of the circuit court for the county of Washington, against Robert Barry, the appellant, upon a bill filed by Griffith Coombe, for the specific execution of a contract for the sale of real estate in the city of Washington, and for the payment of the balance of an account, which it was alleged had been settled and agreed upon by the parties.

The material charges in the bill, and which were brought into the con-

[1] S. P. Clark *v.* Burnham, 2 Story 1; Williams *v.* Moore, 95 U. S. 456.