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Lands between Ludlow and Roberts' lines, Ohio

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LANDS BETWEEN LUDLOW AND ROBERTS' LINES, OHIO.

FEBRUARY 18, 1829.

Mr. BUCKNER, from the Committee on Private Land Claims, to which the subject had been referred, made the following

REPORT:

The Committee on Private Land Claims, to which was referred the resolution of the 6th instant, directing an inquiry into the expediency of carrying into effect the provisions of the act, entitled "An act to authorize the President of the United States to enter into certain negotiations relative to lands located under Virginia military land warrants, lying between Ludlow and Roberts' lines, in the State of Ohio," have had the same under consideration, and beg leave to report:

That, on looking into the subject of the reference, they find that three several bills have heretofore passed the House of Representatives to quiet the title to certain persons, who purchased lands of the Government between Ludlow and Roberts' lines, which lands are claimed by persons holding under Virginia military land warrants. Those bills, in each instance, did not pass through the House till the session was too far advanced to give to the Senate time to act upon them.

The committee concur in the report heretofore made on this subject, and beg leave to adopt it as a part of their present report. They would remark, in addition to the facts stated in that report, that the Supreme Court of the United States, during its present term, has made a decision in a cause between a military claimant and a purchaser of the United States, whose title was defended by the Government, which completely and finally establishes the validity of military titles acquired between Ludlow and Roberts' lines previous to the year 1812. It now only remains for the United States to quiet the title of those who have purchased of the Government, and made valuable improvements on these lands, by purchasing in the title of the Virginia military claimants; or, on the other hand, to leave them to be evicted, and thus subject the Government to the much larger, and more important, claims of the present occupants. The committee have not hesitated to adopt the former course, and, in so doing, have imitated the example of the committees which have heretofore examined this subject, and whose recommendations have successively received the sanction of the House. They therefore report a bill.

MARCH 28, 1825.

The Committee on the Public Lands, to which was referred certain papers relative to the claims of certain purchasers under the United States, and holders of Virginia military warrants, between Ludlow and Roberts' lines, in the State of Ohio, have had the same under consideration, and submit the following report:

That, from evidence adduced before the committee, it appears that the United States have sold and conveyed to various purchasers the greater part of the lands lying south of the Greenville treaty line, and between what are known by the names of Roberts and Ludlow's lines, both of which were run to ascertain the western boundary line of the Virginia Military Reservation in the State of Ohio. In the year A. D. 1810, about 14,000 acres of the land so sold by the United States were located upon holders of Virginia military land warrants, as land within that reservation. Upon a part of these locations patents have issued, and the entries upon the residue have never been withdrawn. In this way, the claims of the purchasers under the United States, and the Virginia military locations, are brought in direct conflict. In this controversy, the United States is interested as the original vendor, and, as such, in duty bound to protect, and, in case of loss of title, to indemnify the Government purchaser. From an attentive examination of the facts in this case, and previous legislation upon the subject, the committee are of opinion that Congress ought to quiet the title of the Government purchasers, by paying to the Virginia military claimants the value of the land claimed by them. To put the House in possession of the reasons upon which this opinion is founded, it will be necessary to give some account of the origin of the title to the lands in controversy, and of the legislative and judicial proceedings that have been had concerning them.

This reservation had its origin in the cession of the country northwest of the river Ohio, by the Commonwealth of Virginia, to the United States. In the deed of cession, there is a stipulation, that, in case the quantity of good land on the southeast side of the Ohio, in the now State of Kentucky, which had been reserved by law for the Virginia troops upon the Continental establishment, should prove insufficient for their legal bounties, the deficiency should be made up to said troops in good land, to be laid off between the rivers Scioto and Little Miami, on the northwest side of the river Ohio, in such proportions as had been engaged to them by the laws of Virginia. Not many years afterwards, a deficiency of good land was found to exist in Kentucky, and locations were permitted in Ohio. In the year A. D. 1802, Israel Ludlow was directed by the then Surveyor General of the United States to run the western boundary line of the military reservations from the source of the Little Miami to the Scioto river; and he accordingly, after exploring the head waters of the former river, run a line from its source towards what he supposed to be the head water of the Scioto, as far as the Greenville treaty line, where he was prevented by the Indians from the further prosecution of his survey. From that line to the head of the Scioto, the country was then Indian territory, and the committee can find no evidence that he made an actual exploration of the head waters of the Scioto, and presume none was made at that time. In

1804, Congress passed an act declaring that Ludlow's line extended to the Scioto should be the western boundary line of the reservation, in case Virginia should, within two years, assent to it. Virginia omitted to give her assent, and, accordingly, the act of Congress never took effect. From this time until the year 1812, no effort was made to establish the boundary. In the mean time, the locations abovementioned were made by the holders of military warrants. In the year 1812, the President was authorized, by act of Congress, to appoint three Commissioners, to meet Commissioners to be appointed by Virginia, who were invested with full power and authority to ascertain, survey, and mark the western boundary line of the military reservation between the Scioto and Little Miami rivers, according to the true intent and meaning of the deed of cession, and providing that Ludlow's line should be the boundary until a line should be established. Commissioners accordingly met in the fall of that year; and after having explored the head waters of both these rivers, directed Charles Roberts, their Surveyor, to run a line from the point ascertained by them to be the source of the Little Miami to that of the Scioto, which was done by him, the line so run being known by the name of Roberts' line. After these explorations had been made, and it having been ascertained that the head waters of the Scioto were west of those of the Little Miami, the Commissioners on the part of the Commonwealth of Virginia set up a claim to run from the source of the Scioto to the mouth of the Little Miami, at its confluence with the Ohio, thus embracing a large extent of country west of the Little Miami, upon which the negotiation between the Commissioners was broken off.

No effort on the part of either Government has since been made to establish this boundary. In the case of *Doddridge, lessee, vs. Thompson and Wright*, lately decided in the Supreme Court of the United States, the plaintiff derived title from a location made between Ludlow's and Roberts' line, south of the Greenville treaty line, in the year 1810; this location having been made the same year, and under precisely the same circumstances with all the other locations between those lines. The defendant, Thompson, derived his title from the United States as a purchaser under the Government. In that case it was agreed that Roberts' was the true line; and under this agreement, the question to be decided by the court was, "whether a location made, prior to the act of 1812, west of Ludlow's line, and between it and Roberts' line, was valid and ought to prevail over the title made by the Government to the defendant, Thompson. The Court decided this question in the affirmative, and a recovery was had for the plaintiff. This decision seems firmly to establish the title of the Virginia claimants, and they must prevail against the purchaser under the United States, unless the admission of Roberts' being the true line from the sources of those rivers was erroneously made. The committee are satisfied that the admission was correctly made, and that Roberts', and not Ludlow's, is the true line between the heads of those rivers. 1st. From the fact that Ludlow did not run his line to the Scioto, having been arrested in his progress at the Greenville treaty line, about three-fourths of the way to the Scioto, the source of which river the committee are not informed was ever examined by him; but the head waters of that river were examined by the joint Commissioners, who directed Roberts' line to be run, both parties, the United States and the State of Virginia, being represented at the time: while, on the other hand, the examination of it by Ludlow,

if ever made, was *ex parte*, Virginia having no agency in the matter. The head water of the Scioto must, therefore, be presumed to be at the point of the termination of Roberts' survey. Both Ludlow and Roberts' lines commence at, or very near, the same point, on the same branch of the Little Miami. The Indian title to this part of the country having been extinguished before Ludlow's survey, the sources of the river, from which he began to run, were, without doubt, examined by him, and were afterwards examined by the Commissioners, as above stated. Nor do the committee see any thing in the documents to them referred to change their opinion as to the correctness of the line established by the said Commissioners. There is, therefore, no just ground of dispute about the source of this river. But, if the correctness of Roberts' line were even doubtful, a question would still arise, whether Congress has not gone too far, by its legislation in giving a sanction to that line, now to recede. Congress, by a law passed in 1818, declared that Ludlow's line, until otherwise directed, as far as the Greenville treaty line, and from the Greenville treaty line to the source of the Scioto, Roberts' line, should be unconditionally the western boundary of the Virginia reservation. Since the passing of that act, it is quite certain Congress could not affect entries made between Ludlow's and Roberts' line, above the Greenville treaty line, and so much of Roberts' line is, at least, binding upon the United States. A direct acquiescence in the correctness of Roberts' line is, in the opinion of the committee, to be found in the act of the 26th of May, 1824, passed immediately after the abovementioned decision of the Supreme Court, in the case of *Doddridge, lessee, vs. Thompson and Wright*. That act "directs the President of the United States to ascertain the number of acres, and, by appraisal or otherwise, the value thereof, exclusive of improvements, of all such lands lying between Ludlow's and Roberts' lines, in the State of Ohio, as may, agreeably to the principles of a decision of the Supreme Court of the United States in the case of *Doddridge, lessee, vs. Thompson and Wright*, be held by persons under Virginia military warrants, and on what terms the holders will relinquish the same to the United States, and that he report the facts to the next session of Congress." As was remarked above, all the locations made between these lines mentioned in this act, rest upon the same principle, and were made under the same circumstances, as that decided upon by the court. The committee regard this act as admitting the validity of all such claims, and as further indicating the intention of Congress to quiet the purchasers under the United States, by obtaining a relinquishment of title from the Virginia military claimants. The lands so claimed were valued at \$ 62,515 25, and application was made to the claimants to ascertain on what terms they would relinquish their titles. A relinquishment, in all cases, by paying the appraised value of the land, was offered, except in the case of the tract of about 700 acres, recovered by *Doddridge*, which he proposed to relinquish on paying to him the sum received by the United States from the sale of it, and interest from that date.

The committee, from a view of all the facts in the case, think it an act of justice to the purchasers under the United States, against some of whom suits are now pending, to quiet them in their titles to their lands, upon most of which, it is understood, they have made great and very valuable improvements; and, in pursuance of what they deem to be the intention of the act of 1824, have reported a bill for their relief.

No. 2.

We, the undersigned, appointed by the President of the United States, pursuant to an act of Congress, passed the 26th day of May, 1824, to appraise and ascertain the value of the lands, exclusive of the improvements thereon, lying between Ludlow's and Roberts' lines, in the State of Ohio, which have been sold by the United States, and which are claimed by persons under Virginia military warrants, have attended to the duties assigned us by said act, and your instructions bearing date the 18th day of June, 1824; and they now submit for the consideration of the President the following report:

We, the undersigned, met on the business of our appointment in the town of Springfield, Clark county, Ohio, on the 24th of August, last past, and thence proceeded to make an actual examination of the land above referred to; that is to say: the land contained in survey No. 6912, entered in the name of Duncan M'Arthur, we estimated at four dollars and fifty cents per acre; the land contained in survey No. 6913, entered in the name of John and Matthew Hobson, we estimated at two dollars and twenty-five cents per acre; in survey No. 6614, entered in the name of John and Matthew Hobson, we estimated at four dollars per acre; in survey No. 6915, entered in the name of John and Matthew Hobson, we estimated at two dollars and fifty cents per acre; in survey No. 6919, entered in the name of Duncan M'Arthur, we estimated at four dollars and fifty cents per acre; in survey No. 6927, entered in the name of Abraham Bowman, we estimated at five dollars per acre; in survey No. 6922, entered in the name of John and Matthew Hobson, we estimated at six dollars per acre; in survey Nos. 6923 and 6926, entered in the name of John and Matthew Hobson, we estimated at two dollars per acre; in survey No. 6928, entered in the name of Abraham Bowman, we estimated at two dollars and twenty-five cents per acre; in survey No. 6929, entered in the name of Abraham Bowman, we estimated at three dollars and fifty cents per acre.

And also, upon examination and actual survey, we find that survey No. 6928 does not interfere with section 36, township 5, and range 13; and we further ascertained that the southeast corner of section 36, township 5, range 13, lies thirty poles north of the north boundary of survey No. 6923.

We further state, that Aaron L. Hunt, whose account is herewith enclosed, was by us employed to perform the necessary surveying required in examining the aforesaid lands; which is respectfully submitted.

JONAH BALDWIN,
DAVID HUSTON, } *Commissioners.*
WILLIAM WARD,

Pursuant to instructions from the General Land Office, bearing date August 31st, 1824, we beg leave to submit the following report:

That, upon actual view and examination of the lands covered by entry No. 7619, mentioned in said instructions, we estimated the value of the same at three dollars per acre; which is respectfully submitted.

JONAH BALDWIN,
DAVID HUSTON, } *Commissioners.*
WILLIAM WARD,

October 20th, 1824.

To GEORGE GRAHAM.

Commissioner of the General Land Office of the United States.

No. of surveys.	Acres in survey.	In whose name entered.	To whom Patented.	Date of Patents.	Price per acre, at the valu- ation.	Amount of the valuation.	Quantity sold at \$4.	Quantity sold at \$2.	Quantity re- maining un- sold.	Amount of moneys paid on land in- terfered with.	Am't of pur- chase mon- ey, of quan- tity sold.	Valuation of quantity un- sold.
					Dls. cts.	Dols. cts.	Ac. Hds.	Ac. Hds.	Ac. Hds.	Dols. Cts.	Dls. Cts.	
6912	235	Duncan M'Arthur -	D. M'Arthur	Apr. 20, 1812	4 50	1,057 50	- -	228 71	6 29	457	457 42	28 30½
6913	255	J. and Matthew Hobson	- -	- -	2 25	573 75	- -	228 00	27 00	484	456 00	60 75
6914	312	J. and Matthew Hobson	- -	- -	4 00	1,248 00	- -	312 00	- -	649	624 00	
6915	270	J. and Matthew Hobson	- -	- -	2 50	675 00	- -	174 00	96 00	354	348 00	240 00
6919	1,240	Duncan M'Arthur -	D. M'Arthur	Oct. 12, 1812	4 50	5,580 00	57 75	1,182 25	- -	2,181	2,595 50	
6927	1,300	Abraham Bowman -	D. M'Arthur	Oct. 16, 1812	5 00	6,500 00	546 72	753 28	- -	3,857	3,693 44	
6922	6,220	J. and Matthew Hobson	- -	- -	6 00	37,320 00	330 91	5,788 98	100 11	12,661	12,901 60	600 66
6923 & 6926	2,943	J. and Matthew Hobson	- -	- -	2 00	5,886 00	316 00	2,258 40	368 60	4,600	5,780 80	737 29
6928	700	Abraham Bowman -	D. M'Arthur	Dec. 4, 1812	2 25	1,575 00	262 91	437 09	- -	1,530	1,925 82	
6929	600	Abraham Bowman -	D. M'Arthur	Dec. 4, 1812	3 50	2,100 00	348 39	251 61	- -	1,903	1,896 78	
Am't 7619	14,075 250	S. Johnson & John Moore			3 00	62,515 25 750 00	1,862 68	11,614 32	598 00	28,676	30,679 36	1,666 91½
	14,325				Amount.	63,265 25						

No. 4.

GENERAL LAND OFFICE, December 8, 1824.

SIR: I enclose you a copy of the report made by the Commissioners appointed, in pursuance of an act of the last session of Congress, to value those lands lying between Ludlow and Roberts' lines, which were claimed under titles derived from Virginia military warrants, and which had been sold by the United States.

I also enclosed a statement, showing the valuation of the lands contained in each military survey, as reported by the Commissioners, and the prices at which these lands, respectively, have been sold, so far as the quantities could be calculated from the plats in this office. From this statement it will appear, that, of the 14,075 acres of land, valued by the Commissioners to be worth \$ 62,515 35, at present, 1,864.68 acres sold at \$ 4 per acres, 11,614.32 sold at \$ 2 per acre, and 598 acres remain unsold: the unsold lands have been valued by the Commissioners to be worth \$ 1,666 91; and the purchase money of the lands sold amounts to \$ 30,679 36; of which sum it is estimated that \$ 28,676 have been paid. These lands were sold in small quantities, at different periods, from the year 1804 to 1817, and no satisfactory calculation can be made of the interest which would accrue on the different payments, without an accurate resurvey, showing the precise interference of the public surveys with each of the military surveys.

From a general view of the subject, I should presume that the gross amount of interest which would be demandable by the individual purchasers, in the event of the loss of their lands, might be estimated to be equal to twelve years' interest on the amount of the purchase money. Assuming this data, the following results will be exhibited:

The amount of purchase money,	-	-	\$ 30,679 36
Twelve years' interest on that amount,	-	-	22,089 14
598 acres unsold, valued at	-	-	1,666 91
Total,	-	-	<u>\$ 54,435 41</u>
14,075 acres valued by the Commissioners at	-	-	<u>62,515 25</u>
Difference,	-	-	\$ 8,079 84

To enable the President to make to Congress the report required by the act of the last session, I have to request that you will, as soon as practicable, inform me what portion of the lands valued by the Commissioners you claim, and upon what terms you will relinquish to the United States such claim.

I am, &c.

GEORGE GRAHAM.

P. S. Mr. Doddridge has proposed to relinquish his claim for the original purchase money with interest.

The Hon. DUNCAN M'ARTHUR,
House of Representatives.

No. 5.

WELLSBURG, BROOK COURT HOUSE, VA.

November 15, 1824.

DEAR SIR : Although the persons appointed by the President to report the value of the lands recovered by me in the suit of Doddridge's lessee vs. Thompson and Wright, and other lands similarly situated, have, as I suppose, long since discharged that duty, I am ignorant how they have reported. The President is also directed to report on what terms we will release our claims. I am only interested in the 700 acres I recovered, which I am led to believe contains a considerable surplus quantity of acres. The officers of the United States entered on these lands many years since, and surveyed and sold them as public lands. I believe mine was all sold, part at four dollars and part at two dollars per acre. I know not the respective quantities sold at the above prices. I am not desirous to take benefit by the labor of others, and propose to relinquish my claim upon receiving from the Government what the purchasers paid to it, with interest from the payment to the Government until I am paid. This will place the purchasers in security, and will leave the Government where it would have been in relation to this business, if its officers had not fallen into the error they did fall into. The act of the Government's officers in surveying these lands and selling them as public property, together with the refusal of the former Commissioner to grant the other patents, on a regular application made by General M'Arthur, threw such doubts on the title as to place these lands completely out of the market, at a time when the *minimum* price of public lands, good and bad, was two dollars. The subsequent reduction ought not to affect us, because it was not our fault, but the act of Government, which prevented a sale, when the price of good land in that country was at least threefold what it now is.

If it be not improper, or too much trouble, would you inform me what my land has been valued at.

Be good enough to lay this before the President.

P. DODDRIDGE.

To the COMMISSIONER of the General Land Office.

 No. 6.

WASHINGTON CITY, Dec. 6th, 1824.

SIR : I have the honor to acknowledge the receipt of your favor of the 3d instant, with the copy of the report of the Commissioners appointed, in pursuance of an act of the last session of Congress, to value the lands lying between the lines of Ludlow and Roberts, claimed by virtue of locations made upon Virginia military land warrants, and sold by the United States; and your statement showing the valuation of each military survey, as reported by the said Commissioners.

In answer to that part of your letter which asks information as to the portion of these lands which I claim, and upon what terms I will relinquish them to the United States, I can state, that I claim the whole of the

land embraced in the first report of the Commissioners aforesaid, with the exception of survey No. 6927, of 700 acres, sold and conveyed by me to Philip Doddridge, which is 13,375 acres, valued at \$ 60,940 25 cents. My title papers will be exhibited at the General Land Office whenever required.

I am willing to transfer or relinquish these lands to the United States for the amount at which they were valued by the Commissioners.

DUNCAN M·ARTHUR.

GEORGE GRAHAM, Esq.

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No. 7.

REYNOLDS, Plaintiff in Error, }
vs. } *Opinion of Sup. Court.*
M·ARTHUR, Deft. in Error. }

This is a writ of error to a judgment rendered by the Supreme Court of Ohio for the county of Champaign, in an ejectment, in which the lessee of Duncan M·Arthur was plaintiff, and John Reynolds was defendant. The plaintiff claimed the land in controversy under a patent, issued on the 12th day of October, 1812, founded on an entry, made in the year 1810, on a military land warrant, granted by the State of Virginia, for services during the war of the Revolution, in the Virginia line on continental establishment.

The title of the defendant is thus stated: The land was sold by the United States at their land office in Cincinnati, in the year 1805, to Henry Vanmeter. It reverted to the United States in the year 1813, on account of the non-payment of the purchase money, and was again sold during the same year, at the same office, to Henry Vanmeter, to whom a certificate of sale was issued, which he afterwards transferred to the defendant, John Reynolds.

The verdict and judgment were in favor of the plaintiff in the State Court. At the trial, the counsel for the defendant moved the Court to instruct the jury on several points made in the cause, and excepted to the refusal of the Court to give these instructions. The judgment of the State Court, having been against a title set up under several acts of Congress, is brought before this Court by writ of error, that the construction put on those acts by that Court may be re-examined. The inquiry will be whether the Court ought to have given any one of the instructions which were required.

The several prayers for this purpose will be considered in the order in which they were made.

1st. The first instruction asked is, "That the lands west of Ludlow's line, east of Roberts' line, and south of the Indian boundary line, had been withdrawn from appropriation under and by virtue of military land warrants prior to the year 1810; and that, as the same had, pursuant to the acts of Congress in such case made and provided, been directed to be surveyed and sold, and had accordingly been surveyed and sold to the defendant prior to the year 1810, the plaintiff's patent is void, and their verdict ought to be for the defendant."

This motion does not question the bounds of the lands reserved by Virginia for military bounties; but, supposing the tract of country west of Ludlow's line, east of Roberts' line, and south of the Indian boundary line, to be within that reserve, asks the Court to say that Congress had, prior

to the year 1810, when Mr. M-Arthur's entry was made, withdrawn it from appropriation under and by virtue of military land warrants.

Before deciding on the propriety of refusing or granting this prayer, it will be necessary to review the legislation of Congress on this subject.

The act of the 9th of June, 1794,* taken in connexion with the reservation in favor of their officers and soldiers, contained in the deed of cession made by Virginia, unquestionably subjected the whole of the military reserve to the satisfaction of those warrants for which the reserve was made. Had Congress, previous to the year 1810, withdrawn that portion of this reserve which lies between the line run by Dudley Ludlow and that run by Roberts, from its liability to be so appropriated?

So early as the year 1785, Congress passed "an ordinance for ascertaining the mode of disposing of lands in the Western Territory," in which, for the purpose of securing to the officers and soldiers of the Virginia line on Continental establishments the bounties granted to them by that State, it is ordained "that no part of the land 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."

The scrupulous regard which this clause, in the ordinance of May, 1785, manifests to this condition made by Virginia in her deed of cession, is the more worthy of remark, because at that time no suspicion was entertained that the military warrants of Virginia would cover the whole Territory; and it was even doubted, as the legislation of Congress shows, whether any part of that Territory would be required for them. Even under these circumstances, Congress declared the determination not to sell or alienate any land between the Scioto and the Little Miami.

In May, 1796, Congress passed "an act providing for the sale of the lands of the United States in the Territory northwest of the river Ohio, and above the mouth of Kentucky river."† The 2d section enacts "that the part of the said lands which has not been already conveyed, &c. or which has not been heretofore, and during the present session of Congress may not be appropriated for satisfying military land bounties, and for other purposes, shall be divided," &c.

This law, then, from which the whole power of the Surveyor General is derived, excludes from his general authority all lands previously appropriated for military land bounties, and for other purposes; and consequently excludes from it the lands between the Scioto and the Little Miami. In May, 1800,§ Congress passed an act to amend the act of 1796, which enacts, "that, for the disposal of the lands of the United States directed to be sold by the original act, there shall be four Land Offices established in the said Territory." The places at which these land offices shall be fixed are designated in the act, and the district of country attached to each is described. One of these is Cincinnati. The place at which the lands in controversy were sold, and the district attached to it, is that below the Little Miami. It is perfectly clear, from the language of this act, that it extends to those lands only which were comprehend-

* 2d. U. S. L. 440.

† 1st. U. S. L. 563. 569.

‡ 2d. U. S. L. 533.

§ 3d. U. S. L. 385.

ed in the act of May, 1796; and that no one of the districts established by it comprehends the land in controversy. Any general phrases which may be found in the law must, according to every rule of construction, be limited in their application to those lands which the original act authorized the Surveyor General to lay off for the purpose of being sold. If he surveyed any lands to which that act does not extend, he exceeded his authority, and the survey is not sanctioned by law. If land thus surveyed by mistake has been sold, the sale was not authorized by the law under color of which it was made.

The counsel for the plaintiff in error has pressed earnestly on the Court the grants made to John Cleves Symmes, and to the purchasers under him. We are not sure that the argument on this point has been clearly understood, and have therefore examined that transaction, in order to discover its influence, if it can have any, on the question now under consideration.

In 1787, John Cleves Symmes applied to Congress for a grant to himself and his associates, of the lands lying within the following limits, viz: "Beginning at the mouth of the Great Miami river; thence, running up the Ohio to the mouth of the Little Miami river; up the main stream of the Little Miami river, to the place where a due west line to be continued from the western termination of the northern boundary line of the grant to Messrs. Sargent, Cutler, & Co., shall intersect the said Little Miami river; thence due west, continuing the said western line, to the place where said line shall intersect the main branch or stream of the Great Miami; thence, down the Great Miami, to the place of beginning."

In consequence of this petition, a contract was entered into for the sale of one million of acres of land, to begin on the bank of the Ohio, twenty miles along its meanders, above the mouth of the Great Miami; thence to the mouth of the Great Miami; thence, up that river, to a place where a line drawn due east will intersect a line drawn from the place of beginning, parallel with the general course of the Great Miami, so as to include one million of acres within these lines and the said river; and from that place, upon the said Great Miami river, extending along such lines, to the place of beginning; containing, as aforesaid, one million of acres."

The language of this contract does not indicate any intention on the part of Congress to encroach on the military reserve which the ordinance of May, 1785, then in full force, had exempted from sale or alienation.

In 1792,* Congress, at the request of John Cleves Symmes, passed an act to alter this contract in such manner that the land sold should extend from the mouth of the Great Miami to the mouth of the Little Miami, and be bounded by the river Ohio on the south, by the Great Miami on the west, by the Little Miami on the east, and by a parallel of latitude on the north, extending from the Great Miami to the Little Miami, so as to comprehend the proposed quantity of one million of acres." The lands then which might be granted to John Cleves Symmes in pursuance of this act of Congress, lay between the Great and Little Miamis, and were to lie below the Little Miami: the Scioto is above that river; so that Congress could not have intended that this grant to Symmes should interfere with the military reserve.

On the 30th of September, in the year 1794, a deed was executed in pursuance of the act of 1792, conveying to John Cleves Symmes that

tract of land beginning at the mouth of the Great Miami river, and extending from thence along the river Ohio to the mouth of the Little Miami river, bounded on the south by the river Ohio, on the west by the Great Miami, on the east by the Little Miami, and on the north by a parallel of latitude to be run from the Great Miami to the Little Miami, so as to comprehend the quantity of 311,682 acres of land. It is obvious that this patent does not interfere with the military reserve. But John Cleves Symmes had sold to several persons, who purchased in the confidence that he would comply with his contract for one million of acres, and be enabled to convey the lands sold to them.

In March, 1799, Congress passed an act declaring that any person or persons, who, before the first day of April, in the year 1797, had made any contract, in writing, with J. C. Symmes, for the purchase of lands between the Great Miami and Little Miami rivers, which are not comprehended in his patent dated the 30th of September, 1794, shall be entitled to a preference in purchasing of the United States all the lands so contracted for, at the price of two dollars per acre.

In March, 1801, Congress passed an act extending this right of pre-emption to all persons who had, previous to the 1st day of January, 1800, made any contract in writing with the said J. C. Symmes, or with any of his associates, for the purchase of lands between the Miami rivers, within the limits of a survey made by Israel Ludlow, in conformity to an act of Congress of the 12th of April, 1792. The provisions of this act are supposed to contemplate the survey and sale of the lands which had been sold to J. C. Symmes, between the Miami rivers, in like manner as had been prescribed for other lands lying above the mouth of Kentucky, by the acts of 1796 and 1800. The right of pre-emption was limited to lands within Israel Ludlow's survey; but that survey contained less than 600,000 acres, and the contract of Symmes was for one million of acres. Congress, therefore, resumed the consideration of this subject, and in May, 1802, extended this right of pre-emption to all those who had purchased from J. C. Symmes lands lying between the Miami rivers, and without the limits of Ludlow's survey. It cannot be doubted that this right of pre-emption, allowed to the purchasers under J. C. Symmes, was limited to lands lying between the Miami rivers, and lying within his contract. Congress could never have intended that this contract should interfere with the military reserve. That reserve was of lands lying above the Little Miami. The sale to Symmes was of lands lying below that river. It was made while an ordinance was in full force, declaring the resolution of Congress not to alienate any part of that reserve. Their contract was made in subordination to that ordinance, and cannot have been intended to violate it. The terms of the contract do not purport to violate it. The land sold to Symmes, and the pre-emption rights allowed to the purchasers under him, are so described as to furnish no ground for the opinion that Congress could have suspected them to interfere with the military reserve. If the Scioto and the Great Miami, contrary to all probability, should take such a direction as to produce a possible interference between the lands sold to Symmes and the reserve which Congress had declared its resolution not to alienate, some difficulty might possibly arise in a case where one of the parties claimed under a military warrant, and the other under a pre-emption certificate. But that is not the case. The title of the plaintiff in error is under a purchase made at a sale of the lands of the United States at Cincinnati,

by Henry Vanmeter, who is not stated to have held a pre-emption certificate, or to have been a purchaser under Symmes. The instructions which the court was asked to give, is, that the land between the lines of Ludlow and Roberts had been withdrawn from appropriation under, and by virtue of, military land warrants, previous to the year 1810. This withdrawal is not in express terms, but is supposed to be implied from a direction to survey the lands between the Great and Little Miamis, which had been exempted from the operation of the acts of 1796 and 1800, under the idea that they were comprehended in the contract with Symmes. Congress could not suspect that the lands to be surveyed under this law could interfere with the lands lying between the Little Miami and the Scioto; and consequently, cannot have intended by this act to vary the boundary of the military reserve.

It has been very truly observed, that all the laws on this subject should be taken together. The condition inserted in the deed of cession of Virginia, which reserves the land lying between the Little Miami and the Scioto for the purpose of satisfying the warrants granted to the officers and soldiers of that State; the ordinance of May, 1785, declaring that no part of that reserve should be alienated; the contract with Symmes for the sale of lands lying between the two Miamis; the acts relative to pre-emption, and which direct the survey and sale of the lands lying between the Miamis, without any allusion to the military district, must be taken into view at the same time. It is, we think, impossible to believe that Congress supposed itself, when directing the survey and sale of lands between the Great and Little Miamis, to be abridging or altering the bounds of a district which Virginia had reserved in the deed of cession by which the country northwest of the Ohio had been conveyed to the United States.

When Congress designed to act on this subject, the purpose was expressed, and overtures were made to the other party of the compact, to obtain her co-operation. In executing the act of May, 1800, the Surveyor General had caused a line to be run from what he supposed to be the source of the Little Miami towards what he supposed to be the source of the Scioto, which is the line denominated Ludlow's, and surveyed the lands west of that line in the manner prescribed by the act of Congress.

In March, 1804,* Congress passed an act establishing that line as the western boundary of the reserve, provided the State of Virginia should, within two years after the passage of the act, accede to it. Virginia did not accede to it.

In 1812,† Congress made another effort to establish this line. The President was authorized to appoint commissioners to meet others which should be appointed by Virginia, who were to agree on the western line of the military reserve, and cause the same to be surveyed and marked out. These commissioners met, and, after ascertaining the sources of the two rivers, employed Mr. Charles Roberts to survey and mark a line from the source of the one to the source of the other. This line is called Roberts' line. The Virginia commissioners, however, refused to accede to this line. This act provided that until an agreement shall take place between the commissioners, the line designated in the act of 1804, which is Ludlow's, should be considered and held as the proper boundary line. This enactment is provisional and prospective.

* 3d U. S. L. 592.

† 4th U. S. L. 455.

In 1818,* Congress passed an act, declaring, that, from the source of the Little Miami to the Indian boundary line established by the treaty of Greenville, Ludlow's line should be considered as the western boundary of the military reserve, until otherwise directed by law : and that, from the said Indian boundary line to the source of the Scioto river, the line run by Charles Roberts shall be so considered. When we review the whole legislation of Congress on this subject, we think the conclusion inevitable, that, in the acts of 1801 and 1802, which have been cited, the Legislature did not consider itself as altering the boundary of the military district, or as withdrawing, before the year 1810, any part of the Territory lying between the Little Miami and the Scioto, from being appropriated by the military land warrants granted by the State of Virginia.

If those acts have this effect, it is one which was not intended. Before a court can be required to declare the law which would arise between conflicting statutes of this character, the fact that they do conflict ought to be clearly established. The counsel for the plaintiff in error has argued this part of the case, as if the fact was established ; as if a line drawn from the source of the Little Miami to the source of the Big Miami would include the land between Ludlow's line and that of Roberts ; and this court has thus far treated the question as it has been argued. But this fact is not established in this cause. It is not among the facts agreed by the parties. Nor was the State Court requested to instruct the jury, that, if they should find the land west of Ludlow's, and east of Roberts' line, to lie between the Little and Big Miamis, or within Symmes' Purchase, "that it had been withdrawn from appropriation, under and by virtue of said military land warrants, prior to the year 1810;" and that M. Arthur's patent was consequently void. The court was not required to state the law hypothetically, as being dependent on the fact, but to assume the fact, and to state the law positively upon that assumption. The record, we think, did not authorize the Court to consider this fact as established, and to withdraw it from the jury. There is no error in refusing this instruction.

2d. The counsel for the defendant then asked the Court to instruct the jury, that, as the second section of the act of Congress of the 11th of April, 1818, declares, "that, from the source of the Little Miami river to the Indian boundary line established by the treaty of Greenville in 1795, the line designated as the westerly boundary line of the Virginia tract by an act of Congress, passed on the 23d day of March, 1804, entitled 'An act to ascertain the boundary of the lands reserved by the State of Virginia, &c. &c. shall be considered and held as such until otherwise directed by law,'" and as the said boundary line was run by Ludlow, under the directions of the Surveyor General, pursuant to an act of Congress, entitled "An act to extend and continue in force the provisions of an act, entitled 'An act giving a right of preemption to certain persons who have contracted with John Cleves Symmes, or his associates, for lands lying between the Miami rivers, in the Territory northwest of the Ohio, and for other purposes,'" approved May 1, 1802, and offered for sale at public auction at the land office at Cincinnati, pursuant to the act, entitled "An act making provision for the disposal of the public lands in the Indiana Territory, and for other purposes," approved March 26th, 1804, must be construed as having relation back to the time the said recited act of 23d of March,

1804, was passed, and had its effect ; and as the defendant's patent is for lands west of Ludlow's line, and south of the Greenville treaty line, and is based on an entry made in 1810, on a Virginia continental land warrant, which land had been surveyed and sold to the defendant, pursuant to the acts of Congress, prior to the year 1810, the plaintiff's patent is void, and their verdict ought to be for the defendant."

The prayer for this instruction is founded on the assertion that Ludlow's line was run under the directions of the Surveyor General, pursuant to the act of Congress of May 1st, 1802, granting preemption rights to purchasers from John Cleves Symmes : and that the land in controversy was sold pursuant to the act of March 26, 1804, making provision for the disposal of public lands in Indiana Territory, and for other purposes. If, by the words "pursuant to an act of Congress," as used in this prayer, it is intended to say that the boundary line run by Ludlow was correctly run, as required by the act of May 1st, 1802, and that the sale of the land in controversy was authorized by the act of March 26th, 1804, then the Court is required to decide facts not admitted by the parties, which are proper for the consideration of the jury ; and then to declare the law arising upon those facts. If those words mean no more than that the line was actually run under the authority of the Surveyor General, and that the land in controversy was actually sold at the land office in Cincinnati by the officers of Government, the question fairly arises, What influence have these facts on the rights of the parties ? Do they, taken in connexion with the act of the 23d of March, 1804, and of the 11th of April, 1818, justify the inference which the Court is asked to draw, that the act of 1818 relates back to the act of 1804, and takes effect from its date, so as to avoid a patent issued in October, 1812, on an entry and survey made in 1810 ?

It has already been stated that the act of the 23d of March, 1804, establishes Ludlow's line, not absolutely, but on condition that Virginia shall assent to it ; and that Virginia never did assent to it. It has also been stated, that, in 1812, Congress authorized the President to appoint commissioners, who should proceed, in concert with such as might be appointed by Virginia, to run a line, which should constitute the western boundary of the Virginia military reserve. These commissioners did meet, and did cause a line to be run from the source of the Little Miami to the source of the Scioto. This is called Roberts' line. The commissioners of Virginia did not assent to this line ; consequently it is of no operation. The act of the 11th of April, 1818, declares that Ludlow's line shall be considered and held as the true western boundary of the Virginia military reserve, until otherwise directed by law. But from what time shall it be so considered and held ? The language of the law is entirely prospective. It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forwards, not backwards ; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable. No words are found in the act of 1818 which render this odious construction indispensable. The language is, that Ludlow's line *shall* be considered and held ; that is, shall in future be considered and held as the true western boundary of that reserve. That this was the understanding of the legislature, is rendered the more probable from the clause which relates to patents. It does not annul patents already issued, but declares that no patent shall be granted on any location and survey that has or may be made west of this line.

Patents which have been granted are not affected directly by the words of this law, and must depend on the preëxisting acts of Congress.

The argument is, that this act, declaring that Ludlow's line shall be considered and held as the western boundary line of the reserve, until otherwise directed by law, proves, that, according to the true construction of the deed of cession, this line is in reality the true boundary, and, therefore, that all titles previously acquired to lands lying west of this line are invalid.

We cannot admit the correctness of this argument. That, in the state of things which existed in 1812 and 1818, Congress might establish the western boundary of the military reserve, was to affect titles thereafter to be acquired, is not questioned. Congress might fix a reasonable time within which titles should be *asserted*, and might annex conditions to the extension of this term. But to look back to titles already acquired—to declare by a law what was the meaning of the compact under which those titles were acquired, is to construe that compact, and to adjudicate in the form of legislation: it would be the exercise of a judicial, not of a legislative power. This construction can never be admitted by the court, unless it be rendered indispensable by the language of the act. We do not think that the language of this act does require it. If the language of the statute does not require this construction, neither does the fact that Ludlow's line was run by order of the Surveyor General, and that the land in controversy was sold by the regular agents of Government. These facts cannot, we think, carry back the act of 1818 to 1804, and give it a retrospective operation.

We do not inquire into the power of Congress to pass such an act. There is undoubtedly much force in the argument suggested at the bar, that the general power of legislation which Congress could exercise over the Territory northwest of the Ohio passed to the new Government when the Territory was erected into a State, and that Congress retained only the power of a proprietor, with a capacity "to dispose of and make all needful rules and regulations respecting the property." But it is unnecessary to pursue this inquiry, because we are of opinion that this construction is inadmissible. The Court, therefore, did right in rejecting this prayer.

3d. The third instruction asked by the defendant is in these words: "That, according to the true intent and meaning of the act and deed of cession from Virginia to the United States, and the several acts of Congress relative to the sale of the public lands of the United States, the land lying between the rivers Scioto and Little Miami is bounded by a line extending from the source or point of land farthest removed from the mouths of these rivers, from which the rain, descending on the earth; runs down into their respective channels, along the top of the ridges dividing the waters of the Scioto from the waters of the Great Miami, which empty into the Ohio below the mouth of the Little Miami, as delineated on the diagram returned by the county surveyor for the defendant in this cause; and as the plaintiff's patent covers land west, or without the boundary of the district so bounded as aforesaid, as is based on an entry on a Virginia continental land warrant, which entry was made in the year 1810, and which said entry and patent cover land which had, pursuant to the acts of Congress, been surveyed and sold to the defendant, prior to the date of the plaintiff's said entry, the plaintiff's patent is void, and their verdict ought to be for the defendant."

In the case of *Doddridge vs. Thompson, et al.* this Court said that the ter-

ritory lying between two rivers, in the whole country from their sources to their mouths, and a straight line drawn from the source of one river to the source of the other, was considered in that case as furnishing the western boundary of the lands lying between them. One or both of the rivers may pursue such a course, that a straight line from the source of one to the source of the other may cross one or both of them. Such a case may form an exception to the universal application of the straight line, and may go far in showing that no general rule can be laid down which will fit every possible case. But this obvious and reasonable rule has been adopted by Congress, as well as by this Court. The act of 1804 adopts the straight line. The act of 1812 obviously contemplates a straight line; and the act of 1818, adopts Ludlow's line from the source of the Little Miami to the Indian boundary line, established at the treaty of Greenville, and the line run by Roberts, from the Indian boundary to the source of the Scioto.

The counsel for the defendant in the State Court abandoned the rule adopted by Congress and by this court, by taking for his commencement "that point of land which is farthest removed from the mouth of the respective rivers, and from which the rain descending on the earth runs down into their respective channels," and to draw a line from that point along the tops of the ridges dividing the waters of Scioto from the waters of the Great Miami.

We feel some difficulty in comprehending the principle which was suggested and can sustain this rule. Why should a line drawn along the top of the ridges which divide the waters of the Scioto from those of the great Miami constitute the true boundary of the country lying between the Great and Little Miami? Would such a line certainly lead to the source of the Scioto, or to that of the Little Miami? We can give no satisfactory answer to these inquiries. It is some objection too to this instruction, that the jury would be much and unnecessarily perplexed in finding the point of land farthest removed from the mouth of each river, and from which the rain descending on the earth runs down into their respective channels. If any point exists which would fit all parts of the description, and could be found by the jury, it is by no means certain that such point would be in a line which would mark the boundary of the country between the two rivers.

The rule which the court was asked to lay down appears to us to be entirely arbitrary; and this prayer was properly rejected.

4th. The fourth instruction has been abandoned by the plaintiff in error.

5th. The proposition on which the fifth prayer depends is, that the sources of the two rivers must be "at that point in their respective channels, at which, from the union of several streams, sufficient water flows at an ordinary stage on which to navigate small vessels loaded." This rule for ascertaining the source of a river is entirely new in this country. A stream may acquire the name of a river which is not navigable in any part. A river which is navigable may retain that name above the highest navigable point. The meaning of words, as commonly used, must be changed before the source of a river can be confounded with its highest navigable point. The court did not err in rejecting this prayer.

6th. The proposition on which the sixth prayer depends is, "That the sources of the two rivers must be considered as commencing at that point

in their respective channels from which the water flows at all seasons of the year."

Is this proposition so invariably true as to become a principle of law? We think it is not. A stream may acquire the name of a river, in the channel of which, at some seasons of extreme drought, no water flows. For a great portion of the year, parts of a stream may flow in great abundance, in which, during a very dry season, we may find only standing pools. It would be against all usage to say that the general source of the river was at that point in its channel from which the water always flows. This prayer, we think, ought not to have been granted.

7th. The seventh prayer depends on the proposition that the sources of the two rivers must be fixed at that point in their respective channels farthest removed from their respective mouths, at which water is found at all seasons of the year."

If the terms of this proposition be taken according to their most obvious import, it would seem to vary from the sixth only in this—that the sixth fixes the source of a river at the point in the channel from which water flows at all seasons in the year, while the seventh fixes it at that point which is farthest removed from its mouth, at which water is found at all seasons. Understanding it in this sense, the proposition would not raise the question, which of several was the main branch, but at what point the source of that main branch was to be found. The remarks made on the sixth prayer would apply with equal propriety to this, and the Court would come to the same conclusion on both. But we understand from the argument, that the counsel for the plaintiff in error intended by this prayer to furnish a rule by which the main branch might be designated. That rule is, that the branch in whose channel water might be found farthest removed from the mouth of the river is its main branch.

Is this proposition universally true? That branch of a river which is entitled to the appellation given to the main river, is a conclusion of fact, to be drawn from the evidence in the cause. Consequently, no general rule can be laid down which will, in all cases, guide us to a correct conclusion. One of the forks may have retained the name of the main river, in exclusion of the others. The Scioto and Miami are both Indian names; and if any one branch of either had received from the natives, and retained exclusively, the name given to the main river, that would have been the stream referred to in the reserve contained in the deed of cession, although water might have been found in a dry season of the year in the channel of some other, at a greater distance from the mouth of the river; or the white men who explored the country before the deed of cession was executed, may have fixed the name on some one of the branches of the respective rivers.

When France ceded to Great Britain all her pretensions to the country lying east of the Mississippi, "from its source to the river Iberville," no man could have been so extravagant as to assert that the source of the Mississippi was to be looked for through all its branches, and fixed at that point in the channel of either in which water might be found farthest removed from the mouth of the river. The size of the rivers, and the notoriety of the names by which they were designated, place the unreasonableness of such a pretension in so strong a point of view, that we can scarcely bring ourselves to suppose that there is any resemblance between the case put by way of illustration, and that under consideration. And yet,

what is the real difference in principle? If one branch of a small river has, by consent, retained the name of the main river, in exclusion of the others, that branch must be considered, in the absence of other circumstances, as the true boundary intended by the parties in a deed which calls for the stream by its name. The fact may be less certain and less notorious, but, if it exists, it must be followed by the same consequences.

If neither branch had notoriously retained the name of the river, the main branch is entitled to it. But the main branch is not necessarily that in whose channel water might be found at all seasons of the year at the point farthest removed from its mouth. The largest volume of water is certainly one indication of the main stream; which does not necessarily accompany that which the counsel for the plaintiff in error has selected as the sole criterion by which it is to be determined. The length of the stream is another. It is obvious that two branches may pursue such a course that the source of the longest may be nearer the mouth of the river than that of the shortest.

We think the rule proposed in this prayer does not furnish a certain guide to conduct us to the source of the river; and therefore the instruction ought not to have been given.

8th. The eighth prayer requires the Court to instruct the jury that the source of each river is at that point farthest removed from its mouth, from which the rain runs down into its channel.

We cannot perceive in the rule which this instruction proposes any principle which will conduct us to the source of the main stream. Every objection to granting the seventh prayer applies with equal force to this. They need not be repeated. The Court did not err in rejecting it.

The instructions to the jury for which the plaintiff applied to the State Court are some of them mixed questions, involving fact with law, and requiring the Court to decide the fact, and then to declare the law upon that fact. Others propose a rule as of universal application, to ascertain the main branch of a river and the source of that main branch, which would, unquestionably, in many cases mislead us. They propose one single circumstance, in exclusion of all others, as being the infallible evidence of a complex fact depending on a number of varying circumstances. The Court very properly refused to give any of these instructions.

This Court is of opinion that there is no error in the judgment of the State Court, and that it ought to be affirmed with costs.