Pollard and Pickett Vs. Dwight

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Court : US Supreme Court

Decided On : 1808

Appeal No. : 8 U.S. 421

Appellant : Pollard and Pickett

Respondent : Dwight

Judgement :

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Pollard & Pickett v. Dwight

8 U.S. (4 Cranch) 421

ERROR TO THE CIRCUIT COURT

FOR THE DISTRICT OF CONNECTICUT

SYLLABUS

The appearance of the defendants to a foreign attachment in a circuit court of the United States waives all objection to the nonservice of a process.

The district judge may alone hold a circuit court, although there be no judge of the Supreme Court allotted to that circuit.

An action may be supported on a covenant of seizin, although the plaintiff has never been evicted, and the declaration need not aver an eviction.

Under the foreign attachment law of Connecticut, an absent person who is liable for damages for breach of his covenant is an absent debtor.

The official certificate of survey returned by a legal sworn surveyor in Virginia cannot be invalidated by a particular fact tending to show an impossibility that the survey could have been made in the time intervening between the date of the entry and the date of the certificate of survey.

On the trial of an action in Connecticut for breach of a covenant of seizin of lands in Virginia, the question whether a patent from the State of Virginia for the lands be voidable is not examinable. Parol testimony is not admissible in an action on the covenant of seizin to prove prior claims upon the land.

Dwight and others brought a foreign attachment against Pollard and Pickett in the County Court of Hartford, and declared in an action of covenant upon a deed of bargain and sale in fee simple of certain lands in the County of Wythe and Commonwealth of Virginia by which the defendants below covenanted that they were

"lawfully seized of the lands and premises, with their appurtenances, and had good right and lawful authority to sell and convey the same in manner and form aforesaid,"

and the breach assigned was

"that they were not nor were any or either of them lawfully seized and possessed of any estate whatever in the said land and premises nor in any part thereof, nor had the said Pollard and Pickett, or either of them, good right and lawful authority to sell and convey the said land and premises as aforesaid."

The defendants appeared and removed the cause to the Circuit Court of the United States for the District of Connecticut, and there pleaded to the jurisdiction of the court, and prayed

"judgment whether the honorable Pierpont Edwards, District Judge of the District of Connecticut holding said court, there being no justice of the Supreme Court of the United States present in court, will have cognizance of the said cause, because they say that, by the law of the United States, the Circuit Court of the Second Circuit in the District of Connecticut shall consist of the Justice of the Supreme Court residing in the third circuit and the District Judge of the District of Connecticut, and that when the said law was enacted, *viz.,* on 3 March, 1803, the Honorable William Paterson was the only Justice of the Supreme Court residing in the said Third Circuit, and that he died on or about 10 September last past,

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and that there is not now, nor hath there been, since the death of the said Paterson, any Justice of the Supreme Court residing in the said third circuit; and there hath not been by the Supreme Court of the United States, or by the President of the United States, any allotment of a Chief Justice or an Associate Justice of the Supreme Court of the United States to the said second circuit, and this they are ready to verify,"

&c.;, which plea, upon general demurrer, was overruled and a *respondeas ouster* awarded, whereupon the defendants pleaded that they were, at the date of the deed,

"well seized and possessed of the said land, and had good right to bargain and sell the same in manner as is alleged in the said deed, and so they have kept and performed their said covenants, and of this put themselves on the country . . . and the plaintiffs likewise."

The verdict was for the plaintiffs, and damages assessed to $27,497. The defendants moved in arrest of judgment because it appears by the declaration that the said deed was executed, and the lands lie in the State of Virginia, and because

the declaration is insufficient and will not support any judgment; but the motion was overruled and judgment rendered on the verdict.

On the trial, a bill of exceptions was taken which stated that the defendants claimed to be seized under a patent to them from the Governor of Virginia dated March 20, 1795, and grounded on a survey in favor of David Patterson by virtue of an entry, dated September 1, 1794, on sundry Treasury warrants to the amount of 150,000 acres, and completed on 8 September, 1794, which survey had been assigned to the defendant, Pollard; whereupon the plaintiffs offered to read in evidence copies of two surveys made for one Wilson Carey Nicholas, by virtue of two entries made on the same 1 September, 1794, in the office of the same surveyor, one to the amount of 500,000 acres and the other to the amount of 480,000 acres, the greater part of which laid in the County of Wythe, and bounding on the land surveyed for Patterson, and that the said survey for 500,000 acres purported to be completed on 9 September, 1794,

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and that for 480,000 on the 10th of the same month, and that the extent of all the lines of the said surveys was more than 320 miles, and offered to prove by Erastus Granger that the nearest part of the said lands to the office of the surveyor of Wythe County was distant therefrom two days' journey and that a surveyor could not, in that county, survey a line longer than seven miles in a day, and that he (Erastus Granger) had surveyed the land surveyed for Patterson and found marked trees only for about three or four miles from the starting point of the survey, and two or three only of the first corners mentioned in the survey, and that the streams ran in opposite directions to those laid down in the plot, which testimony of the said Granger was offered to prove that Patterson's survey was fraudulent, and not made conformably to the laws of Virginia, and the plaintiffs further offered to prove by the testimony of the said Granger that there were prior claims upon the land in question to the amount of upwards of 90,000 acres. It was admitted that Granger was not a sworn surveyor. The defendants objected to the above evidence, but the court overruled the objection and suffered it to go to the jury.

The defendants sued out their writ of error to this Court, and the errors assigned were,

1. That the plea to the jurisdiction ought to have been allowed.

2. That the evidence stated in the bill of exceptions ought not to have been admitted.

3. That the declaration is insufficient.

4. That the title of the land could not be tried in Connecticut.

5. That the circuit court had not jurisdiction, the plaintiffs being citizens of Massachusetts and Connecticut and the defendants citizens of Virginia, not found in the District of Connecticut.

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6. That the judgment ought to have been rendered for the defendants.

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court as follows:

In this case, objections have been made to the jurisdiction of the circuit court and to the proceedings in that court.

The point of jurisdiction made by the plaintiffs in error is considered as free from all doubt. By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which

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they would have stood had process been served upon them, and consequently waived all objections to the nonservice of process. Were it otherwise, the duty of the circuit court would have been to remand the cause to the state court in which it

was instituted, and this Court would be bound now to direct that proceeding. As little foundation is there for the exception taken to the manner in which the circuit court was constituted. That court consists of two judges, any one of whom is capable of performing judicial duties. So this Court consists of seven judges, any four of whom may act. It has never been supposed that the death of three of the judges would disqualify the remaining four from discharging their official duties until the vacant seats of their departed brethren should be filled. There is nothing in the peculiar phraseology of that part of the Judicial Act which establishes the circuit courts that requires a different construction of the words authorizing a single judge to hold those courts, from what is usually given in other cases, to clauses authorizing a specified number of justices to constitute a court.

The exceptions taken to the proceedings of the circuit court are more serious. These are,

1. To the pleadings.

2. To the opinions of that court, admitting certain testimony in support of the action.

The objections to the pleadings are

That the different parts of the declaration are repugnant to each other, and that the declaration is itself insufficient as the foundation of a judgment.

In deciding on so much of this objection as depends on the laws of Connecticut, this Court would certainly be guided by the construction given by that state to its own statute, and if it was indispensably necessary now to decide that question, the evidence in favor of the construction maintained by the defendants in error would seem to preponderate.

Another objection taken to the declaration is that it ought to have alleged a disseizin of the plaintiffs below in order to enable them to maintain their action.

On this part of the case, the Court can only consider whether the declaration in itself, unconnected with the testimony which was adduced to support it, is so radically defective that a judgment cannot be rendered on it. This leads to the inquiry whether the covenant of the vendors can be broken, as stated in the declaration, although no eviction has taken place, and the Court is of opinion that it may be so broken. 9 Co. 60.

The covenant is that the vendor is seized in fee of the premises which he sells and conveys. Suppose the fact to be that he had no title nor pretense of title to those premises; that he had conveyed lands for which he had never received a patent or a title of any kind. Could it be said that his covenant that he was seized in fee remained unbroken until the real proprietor should think proper to eject the vendee? This question, in the opinion of the Court, must be answered in the negative. The testimony, which would be sufficient to establish the breach assigned, may be a subject for serious consideration, but on the sufficiency of the breach as assigned to support a judgment, there is no doubt.

The exceptions to the testimony admitted in the circuit court consists of two parts.

1st. To the admission of certain copies of surveys made for Wilson Carey Nicholas, connected with the testimony of Erastus Granger, describing the face of the country on which the surveys purported to be made.

2d. To the admission of parol testimony to prove prior titles to the lands conveyed in the deed on which this suit was instituted.

1. The surveys of Wilson Carey Nicholas, and the explanatory testimony of Granger, were introduced for the purpose of showing that the patent for the lands sold by Pollard and Pickett was void, because it issued on a

plat representing a survey which, in point of fact, could not have been made.

In examining this exception, it becomes proper to inquire what was the real issue between the parties.

The plaintiffs below averred in their declaration that the defendants were not seized and possessed of any estate whatever in the land and premises nor in any part thereof, nor had they or either of them good right and lawful authority to sell and convey the same. The defendants in their plea do not set forth their title, but say generally that they were seized of the land sold and conveyed by them and had good right to sell and convey the same as is expressed by their deed. On this plea an issue is tendered which is joined by the plaintiffs.

To prove that the survey on which the patent granting the lands to the defendants was issued could not have been made, the plaintiffs produced two other surveys made by the same person for Wilson Carey Nicholas, which were said to be completed only two days succeeding the completion of the survey of the defendants, which three several surveys could not possibly have been made in the time intervening between the entries in the surveyor's office and the day on which they are alleged to have been completed, whence the jury might conclude that the survey of Pollard and Pickett was not made.

The surveyor was a sworn officer, and his survey was returned upon oath. This is an attempt to invalidate the evidence derived from his official return by a particular fact which has no relation to the cause before the court and with which the parties to this controversy have no connection. Had it even appeared that the copies offered in evidence were authenticated, they would on this account have been inadmissible.

This whole testimony is inadmissible on other ground. Were it even true that this patent is voidable if the surveyor had not run round all the lines of the land, a

point not yet established, it cannot be deemed absolutely void -- it cannot be deemed a mere nullity. While it remains in force, it is a valid title and vests the fee simple estate in the patentee. In this action and on the trial of this issue, the question whether the patent be voidable by Virginia or not is not properly examinable. Testimony, therefore, tending to establish that point is irrelevant and

inadmissible.

2. But had the court entertained any doubt on this point, the second part of the exception would be clearly decisive with regard to this judgment.

Parol testimony is admitted to show prior claims to the land in controversy. The defendants in error attempt to defend the admission of this testimony by supposing it auxiliary to other testimony which had previously established the validity of those claims, and that this witness was only adduced to show that those claims covered this land. Had the fact supported the argument, a private *ex parte* survey would have been a very improper mode of establishing it; but the language of the exception excludes that construction of the opinion which the counsel for the defendants in error would put upon it. The proof offered and admitted is not that those particular titles which were exhibited and proved to the court covered the land conveyed by Pollard and Pickett, but "that there were prior claims upon it to the amount of upwards of ninety thousand acres." The prior claims rest upon the oath of the witness. If those claims were valid, their validity was established by his testimony, which cannot be tolerated on any legal principle; if they were mere claims, not good titles, they ought not to have been stated to the jury. They were irrelevant to the point in issue.

Upon the whole, the Court is unanimously of opinion that the circuit court erred in permitting the copies of surveys made for Wilson Carey Nicholas and the testimony of Erastus Granger to go to the jury for the purposes mentioned in the bill of exceptions, and

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that the judgment of the circuit court must on that account be reversed and the cause remanded for a new trial.

Judgment reversed.