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Duvall Vs. Craig

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Court : US Supreme Court

Decided On : 1817

Appeal No. : 15 U.S. 45

Appellant : Duvall

Respondent : Craig

Judgement :

Duvall v. Craig - 15 U.S. 45 (1817)
U.S. Supreme Court Duvall v. Craig, 15 U.S. 2 Wheat. 45 45 (1817)

Duvall v. Craig

15 U.S. (2 Wheat.) 45

ERROR TO THE CIRCUIT COURT FOR

THE DISTRICT OF KENTUCKY

SYLLABUS

Variances between the writ and declaration are matters pleadable in abatement only, and cannot be taken advantage of upon general demurrer to the declaration.

A trustee is in general suable only in equity, but if he chooses to bind himself by a personal covenant, he is liable at law for a breach thereof, although he describe himself as covenanting as trustee.

Where the parties to a deed covenanted severally against their own acts and encumbrances, and also to warrant and defend against their own acts, and those of all other persons, with an indemnity in lands of an equivalent value in case of eviction; it was held that these covenants were independent, and that it was unnecessary to allege in the declaration any eviction, or any demand or refusal to indemnify with other lands, but that it was sufficient to allege a prior encumbrance by the acts of the grantors, &c.;, and that the action might be maintained on the first covenant in order to recover pecuniary damages.

Where the grantors covenant generally against encumbrances made by them, it may be construed as extending to several, as well as joint encumbrances. No profert of a deed is necessary where it is stated only as inducement, and where the plaintiff is neither a party nor privy to it.

An averment of an eviction under an elder title is not always necessary to sustain an action on a covenant against encumbrances, if the grantee be unable to obtain possession in consequence of an existing possession or seizin by a person claiming and holding under an elder title, it is equivalent to an eviction, and a breach of the covenant.

The *capias ad respondendum* issued in this case was as follows:

"The United States of America to the Marshal of the Kentucky District, Greeting. You are hereby commanded to take John Craig, Robert Johnson and Elijah Craig, if they be found within your bailiwick, and them safely keep so that you have their bodies before the judge of our district court at the capitol in Frankfort on the first Monday in March next to answer William Duvall, a citizen of the State of Virginia, of an action of covenant; damages $50,000, and have then and there this writ. In

testimony whereof, Harry Innes, Esq. judge of our said court, hath caused the

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seal thereof to be hereunto affixed this 22 January, 1804, and of our independence the 28th. Thomas Turnstall, C.D.C."

Whereupon the plaintiff declared against John Craig, Robert Johnson, and Elijah Craig, in covenant,

"for that whereas, on 28 February, 1795, &c.;, the said John, and the said Robert and Elijah, as trustees to the said John, by their certain indenture of bargain and sale, &c.;, did grant, bargain, sell, alien, and confirm unto the said plaintiff, by the name of William Duvall, of the City of Richmond and State of Virginia, his heirs and assigns forever, a certain tract of land lying and being in the State of Kentucky, &c.;, together with the improvements, watercourses, profits, and appurtenances whatsoever belonging or in any wise appertaining, and the reversion and remainder, and remainders and profits, thereof; and all the estate, right, title, property, and demand of them, the said John Craig, and Robert Johnson and Elijah Craig, trustees for the said John Craig, of, in, and to the same, to have and to hold the lands thereby conveyed with all and singular the premises, and every part and parcel thereof to the said William Duvall, his heirs and assigns forever, to the only proper use and behoof of him, the said William, his heirs and assigns forever, and the said John Craig, and Robert Johnson and Elijah Craig, trustees to the said John Craig, for themselves, their heirs, executors, and administrators, did covenant, promise, and agree, to and with the said William Duvall, his heirs and assigns, that the premises before mentioned,

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then were, and forever after should be, free of and from all former and other gifts, bargains, sales, dower, right and title of dower, judgments, executions, titles, troubles, charges, and encumbrances whatsoever done or suffered to be done by them, the said John Craig, and Sarah his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, as by the said indenture will more at large

appear. And the said William in fact saith that the premises before mentioned were not, then and there, free of and from all former gifts, grants, bargains, sales, titles, troubles, charges, and encumbrances whatsoever done and suffered to be done by the said John Craig, and Sarah his wife, and Robert Johnson and Elijah Craig, trustees to the said John Craig. But on the contrary, the said John Craig and Robert Johnson theretofore, to-wit, on 11 May, 1785, assigned the place and certificate of survey of said land to a certain John Hawkins Craig, by virtue of which said assignment, Patrick Henry, Governor of the Commonwealth of Virginia, granted the said land to said John Hawkins Craig, and his heirs forever, by letters patent dated 16 September, 1785, and now here shown to the court, the date whereof is the day and year aforesaid, which said patent to the said John Hawkins Craig, on the day and year first aforesaid at the district aforesaid was in full force and virtue, contrary to the covenant aforesaid, by reason of which said assignment, patent, and encumbrance, the said William hath been prevented from having and enjoying all or any part of the premises above mentioned.

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And thereupon the said William further saith that the defendants aforesaid, although often requested, have not kept and performed their covenant aforesaid, &c.; To which declaration there was a general demurrer, and joinder in demurrer, and a judgment thereupon in the circuit court for the defendants."

The indenture referred to in the plaintiff's declaration is in the following words:

"This indenture, made this 28 February, 1795, between John Craig, and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, all of the State of Kentucky, of the one part, and William Duvall of the City of Richmond, and State of Virginia, of the other part, witnesseth that the said John Craig, for and in consideration of the sum of two thousand pounds, current money of Kentucky, to him, the said John Craig, in hand paid, the receipt whereof they do hereby acknowledge and forever acquit and discharge the said William Duvall, his heirs, executors, and administrators, have granted, bargained and sold, aliened and confirmed, and by these presents do grant, bargain and sell, alien and confirm,

unto the said William Duvall, his heirs and assigns forever, a certain tract of land lying and being in the State of Kentucky, and now County of Scott, formerly Fayette, on the waters of the Ohio River below the Big Bone Lick Creek, it being the same lands that the said John Craig covenanted by a writing obligatory, sealed with his seal and dated the second day of December, 1788, to convey to Samuel McCraw, of the City of Richmond,

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and which said writing the said Samuel McCraw, on the back thereof, endorsed and transferred the same on 27 February, 1789, to William Reynolds, and which is bounded as follows, beginning at a poplar and small ash corner, to William Bledsoe, about thirty miles nearly a south course from the mouth of Licking; thence S. 15, E. 520 poles with the said Bledsoe's line, crossing four branches to an ash and beech; thence S. 75, W. 150 poles, to a hickory and beech; thence S. 15, E. 400 poles, crossing a branch to a sugar tree and beech, near a branch; thence S. 75, W. 87 poles, to three beeches, corner to Robert Sanders; thence with his line S. 15 E. 600 poles, crossing two branches to a poplar and sugar tree; thence S. 60 poles to a sugar tree and beech; thence west 2,174 poles, crossing five branches to a large black walnut; thence north 1,580 poles, crossing a large creek and four branches to a sugar tree and ash; thence E. 2,006 poles, crossing five branches to the beginning; containing 20,440 acres, together with the improvements, watercourses, profits, and appurtenances whatsoever to the same belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, and profits thereof, and all the estate, right, title, property, and demand, of them, the said John Craig, and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig of, in, and to the same, to have and to hold the land hereby conveyed, with all and singular the premises and every part and parcel thereof, to the said William Duvall, his heirs and

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assigns forever, to the only proper use and behoof of him, the said William Duvall, his heirs and assigns forever. "

brk:

And the said John Craig, and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees to the said John Craig, for themselves, their heirs, executors, and administrators, do covenant, promise, and agree to and with the said William Duvall, his heirs and assigns by these presents that the premises before mentioned now are and forever after shall be free of and from all former and other gifts, grants, bargains, sales, dower, right, and titles of dower, judgments, executions, title, troubles, charges, and encumbrances whatsoever done or suffered to be done by the said John Craig, and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig. And the said John Craig, and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, and their heirs, all and singular the premises hereby bargained and sold, with the appurtenances, unto the said William Duvall, his heirs and assigns, against him the said John Craig, and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, and their heirs, and all and every persons whatsoever, do and will warrant and forever defend with this warranty, and no other, to-wit, that if the said land or any part thereof shall at any time be taken by a prior legal claim or claims, that then and in such case they, the said John Craig, and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, and their heirs, shall make good to the said William Duvall

and his heirs, such part or parts so lost, by supplying to his the said William Duvall's use, other lands in fee of equal quantity and quality, to be adjudged of by two or more honest, judicious, impartial men, mutually chosen by the parties for ascertaining the same. In witness whereof the said John Craig, and Sarah, his wife, and Robert Johnson and Elijah Craig, trustees for the said John Craig, have hereunto set their hands and seals, the date first in this indenture written.

"JOHN CRAIG"

"SARAH CRAIG"

"ROBERT JOHNSON"

" *Trustee for John Craig* "

"ELIJAH CRAIG"

" *Trustee for John Craig* "

"Signed, sealed, and delivered in presence of"

"Charles W. Byrd"

"T. S. Threshly"

"Thomas Corneal"

"Christopher Greenup"

"Robert Saunders"

"James Taylor"

"Jos. Wiggleworth"

"George Christy "

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MR. JUSTICE STORY delivered the opinion of the Court.

Several points have been argued in this case upon which the opinion of the Court will be now pronounced. In the first place it is stated that a material variance exists between the writ and declaration of which (being shown upon oyer) the court, upon a general demurrer to the declaration, are bound to take notice, and if so, it is fatal to the action. The supposed variance consists in this that in the writ all the

defendants are sued by their Christian and surnames only, whereas, in the declaration, the deed on which the action is founded is averred to be made by the defendant John Craig, and by the other defendants Robert Johnson and Elijah Craig, "as trustees to the said John," and the covenant on which the breach is assigned is averred to be made by the said John Craig, and Robert Johnson, and Elijah Craig, "trustees to the said John." The argument is that the writ is founded upon a personal covenant, and the declaration upon a covenant in *auter droit,* upon which no action lies at law; or if any lies, the writ must conform in its language to the truth of the case. It is perfectly clear, however, that the exception, even if a good one, cannot be taken advantage of upon general demurrer to the declaration, for such a demurrer is in bar to the action, whereas variances between the writ and declaration are matters pleadable in abatement only.

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But there is nothing in the exception itself. A trustee, merely as such, is in general only suable in equity. But if he chooses to bind himself by a personal covenant, he is liable at law for a breach thereof in the same manner as any other person, although the describe himself as covenanting as trustee, for in such case the covenant binds him personally, and the addition of the words "as trustee" is but matter of description to show the character in which he acts for his own protection, and in no degree affects the rights or remedies of the other party. The authorities are very elaborate on this subject. An agent or executor who covenants in his own name, and yet describes himself as agent or executor, is personally liable, for the obvious reason that the one has no principal to bind, and the other substitutes himself for his principal.

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The reasoning upon this point disposes, also, of the second made at the argument, *viz.,* that the covenant being made by Robert Johnson and Elijah Craig, as trustees, no individual judgment can be rendered against them. It is plain that the judgment is right, and indeed there could have been no other judgment

rendered, for at law a judgment against a trustee in such special capacity is utterly unknown.

Having answered these minor objections, we may now advance to the real controversies between the

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parties. It is contended that the two covenants in the deed are so knit together that they are to be construed in connection, so that the clause as to an indemnity with other lands, in case of an eviction by a prior legal claim, is to be applied as a restriction to both covenants, and if so, then the action cannot be sustained, for the declaration does not allege any eviction or any demand or refusal to indemnify with other lands. There is certainly considerable weight in the argument. It is not unreasonable to suppose that then the parties had provided a specific indemnity for a prior claim, they might mean to apply the same indemnity to all the other cases enumerated in the first covenant. But something more than the mere reasonableness of such a supposition must exist to authorize a court to adopt such a construction. The covenants stand distinct in the deed, and there is no incongruity or repugnancy in considering them as independent of each other. The first covenant being only against the acts and encumbrances under the parties to the deed, which, they could not but know, they might be willing to become responsible to secure its performance by a pecuniary indemnity; the second including a warranty against the prior claims of strangers also, of which the parties might be ignorant, they might well stipulate for an indemnity only in lands of an equivalent value. The case ought to be a very strong one, which should authorize a court to create, by implication, a restriction which the order of the language does not necessarily import or justify. It ought to be one in which no judicial doubt could

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exist of the real intention of the parties to create such a restriction. It cannot be pronounced that such is the present case, and this objection to the declaration cannot, therefore, be sustained.

The remaining objections turn upon the sufficiency of the breach alleged in the declaration. It is contended that the covenant on which the breach is assigned is against the joint, and not the several acts and encumbrances of the parties to the deed, and that therefore the breach, which states an assignment by John Craig and Robert Johnson only, is wholly insufficient. It is certainly true that, in terms, the covenant is against the acts and encumbrances of all the parties, and the words "every of them" are not found in the deed. Some of the encumbrances, however, within the contemplation of the parties are not of a nature to be jointly created, as, for instance, the encumbrance of dower and title of dower. This very strongly shows that it was the intention of the parties to embrace in the covenant several, as well as joint acts and encumbrances. There is also a reference in the premises of the deed to a covenant for a conveyance previously made by John Craig to Samuel McCraw, against which it must have intended to secure the grantees, and if so it fortifies the construction already stated. If, therefore, the point were of a new impression, it would be difficult to sustain the reasoning, which would limit the covenant to the joint acts of all the grantors, and there is no authority to support it. On the contrary, *Meriton's Case,* though stated with some difference by the several reporters, seems to

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us completely to sustain the position that a covenant of this nature ought to be construed as including several, as well as joint encumbrances, and has certainly been so understood by very learned abridgers. *Meriton's Case,* Noy 86, S.C. Popham 200; S.C. Latch 161; Bac.Abr., Covenant 77; Com.Dig., Condition E. This objection, therefore, is overruled.

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Another exception is that there is no profert of the assignment described in the breach, nor is it shown to have been made for a valuable consideration. Various answers have been given at the bar to this exception, and without deciding on others, it is a sufficient answer that the plaintiff is neither a party nor privy to the

assignment, nor conusant of the consideration upon which it was made, and therefore is not bound to make a profert of it, or show the consideration upon which it was made.

The last exception is that the breach does not set forth any entry or eviction of the plaintiff under the assignment and patent to John Hawkins Craig. Assuming that an averment of an entry and eviction under an elder title be in general necessary to sustain an action on a covenant against encumbrances (on which we give no opinion), it is clear that it cannot be always necessary. If the grantee be unable to obtain possession in consequence of an existing possession or seizin by a person claiming and holding under an elder title, this would certainly be equivalent to

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an eviction and a breach of the covenant. In the case at bar, the breach is assigned in a very inartificial and lax manner, but it is expressly averred that the assignment and patent to John Hawkins Craig was a prior conveyance, which was still in full force and virtue,

"by reason of which said assignment, patent, and encumbrance, the said William (the plaintiff) hath been prevented from having and enjoying all or any part of the premises above mentioned."

We are all of opinion that upon general demurrer this must be taken as an averment that the possession of the premises was legally withheld from the plaintiff by the parties in possession under the prior title thus set up.

Judgment reversed.

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