

Day Vs. Chism

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Court : US Supreme Court

Decided On : 1825

Appeal No. : 23 U.S. 449

Appellant : Day

Respondent : Chism

Judgement :

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Day v. Chism

23 U.S. (10 Wheat.) 449

ERROR TO THE CIRCUIT

COURT OF TENNESSEE

SYLLABUS

In a declaration upon a covenant of warranty, it is necessary to allege substantially an eviction by title paramount, but no formal terms are prescribed in which the averment is to be made.

Where it was averred in such a declaration

"that the said O. had not a good and sufficient title to the said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law,"

it was held sufficient as a substantial averment of an eviction by title paramount.

Where the plaintiffs declared in covenant both as heirs and devisees, without showing in particular how they were heirs and without setting out the will, it was held not to be fatal on general demurrer.

Such a defect may be amended under the thirty-second section of the Judiciary Act of 1789, ch. 20.

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This is an action of covenant brought by the heirs and devisees of Nathaniel Day in the Court for the Seventh Circuit for the District of Tennessee on a covenant contained in a deed from the defendant to the said Nathaniel Day purporting to convey a tract of land therein mentioned. The declaration, which contains six counts, states the covenant in the fourth in the following words:

"That the said Obadiah Chism, the defendant, then and there, by the said indenture, covenanted and agreed with the said Nathaniel Day his heirs and assigns, to warrant and defend the title to the said premises against the claim of all and every other person whatsoever, as his own proper right in fee simple."

In the fifth count, the covenant alleged is, "to warrant and defend the land against all and every person whatever."

In some of the counts, the only breach assigned is want of title in the defendant. The fourth and fifth counts charge that

"The said Obadiah, the defendant, hath not kept and performed his covenant so made with the said Nathaniel aforesaid with the said Nathaniel in his lifetime, nor with the plaintiffs since his death, but hath broken it in this, that he hath not warranted and defended the title to said premises, described in said covenant,

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against all and every person whatsoever to said Nathaniel Day his heirs and assigns, and also in this, that the said Obadiah had no title to said tract of land, but it was vested in the State of Tennessee, and the said plaintiffs aver that by reason of said want of title in said Obadiah, the said Nathaniel, in his lifetime, and the plaintiffs since his death, were unable to obtain possession thereof or to derive any benefit therefrom, and also in this, that the said Obadiah had not a good and sufficient title to the said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law, and also in this, that the said Obadiah had no title to the said premises, but the same was in the State of North Carolina, by reason whereof the said Nathaniel, in his lifetime, and the plaintiffs since his death, were and are unable to obtain possession of the said premises."

The defendant demurred to the declaration and assigned for cause of demurrer that

"1st, it does not appear in and by the said declaration, any averment or allegation therein, that the said plaintiffs have been evicted by a title paramount to the title of the defendant, and 2d, the said declaration is in other respects defective, uncertain, and informal."

The covenant stated in the declaration is, we think, a covenant of warranty, and not a covenant of seizin or that the vendor has title. In an action on such a covenant, it is undoubtedly necessary to allege substantially an eviction by title paramount, but we do not think that any

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formal words are prescribed in which this allegation is to be made. It is not necessary to say in terms that the plaintiff has been evicted by a title paramount to that of the defendants. In this case, we think such an eviction is averred substantially. The plaintiffs aver

"that the said Obadiah had not a good and sufficient title to the said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law."

This averment, we think, contains all the facts which constitute an eviction by title paramount. The person who, from want of title, is dispossessed and ousted by due course by law, must, we think, be evicted by title paramount.

We think, then, that the special cause assigned for the demurrer will not sustain it.

There are other defects in the declaration which are supposed by the counsel for the defendants in error to be sufficient to support the judgment. The plaintiffs claim both as heirs and devisees, and do not show in particular how they are heirs, nor do they set out the will.

It is undoubtedly true that their title cannot be in both characters, and that the will, if it passes the estate differently from what it would pass at law, defeats their title as heirs. But a man may devise lands to his heirs, and the statement that they are his heirs as well as his devisees, though not a strictly artificial mode of declaring, is an error of form, and not of substance. Of the same character is, we think, the omission to state how the plaintiffs are heirs or to set out the will.

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Although in the case of *Denham v. Stephenson*, 1 Salk. 355, 6 Mod. 241, the court says "that where H. sues as heir, he must show his pedigree, and *coment heres*, for it lies in his proper knowledge," the court does not say that the omission to do this would be fatal on a general demurrer or that it is an error in substance. The plaintiff must show how he is heir on the trial, and the 32d section of the Judiciary Act of 1789, c. 20, applies, we think, to omissions of this description. The

judgment may be given "according to the right of the cause and matter in law," although the declaration may not show whether the plaintiff is the son or brother of his ancestor or may not set out the will at large. An averment that he is the heir or the devisee avers substantially a valid title, which it is incumbent on him to prove at the trial.

The declaration presents another objection respecting which the Court has felt considerable difficulty. In the same count, breaches are assigned which are directly repugnant to each other. The plaintiffs allege that from the defect of title in the vendor, they have not been able to obtain possession of the premises and also that they have been dispossessed of those premises by due course of law. These averments are in opposition to each other. But the allegation that possession has never been obtained is immaterial because not a breach of the covenant, and the majority of the Court is disposed to think may be disregarded on a general demurrer.

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It is the opinion of the Court that the fourth and fifth counts, however informal, have substance enough in them to be maintained against a general demurrer, and that the judgment must be reversed and the cause remanded for further proceedings. It will be in the power of the circuit court to allow the parties to amend their pleadings.

Judgment reversed accordingly.