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Chirac Vs. Reinicker

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Court : US Supreme Court

Decided On : 1826

Appeal No. : 24 U.S. 280

Appellant : Chirac

Respondent : Reinicker

Judgement :

Chirac v. Reinicker - 24 U.S. 280 (1826)
U.S. Supreme Court Chirac v. Reinicker, 24 U.S. 11 Wheat. 280 280 (1826)

Chirac v. Reinicker

24 U.S. (11 Wheat.) 280

ERROR TO THE CIRCUIT

COURT OF MARYLAND

SYLLABUS

A counsel or attorney is not a competent witness to testify as to facts communicated to either by his client in the course of the relation subsisting between them, but may be examined as to the mere fact of the existence of that

relation.

Confidential communications between client and attorney are not to be revealed at any time. The privilege is not that of the attorney, but of the client, and it is indispensable for the purposes of private justice.

Whatever facts, therefore, are communicated by a client to a counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose, and their testimony is incompetent.

A counsel may, however, be asked, and in answering the question his testimony is competent whether he had been retained by the party as counsel or attorney, but he cannot be asked in what capacity he was so retained or what claim or title he was employed to maintain.

The action for mesne profits may be maintained against him who was the landlord in fact who received the rents and profits and resisted the recovery in the ejectment suit, although he was not a party to that suit and did not take upon himself the defense thereof upon the record, but another did as landlord.

A recovery in ejectment is conclusive evidence in an action for mesne profits against the tenant in possession, but not in relation to third persons. But where the action is brought against the landlord in fact, the record in the ejectment suit is admissible to show the possession of the plaintiff connected with his title, although it is not conclusive upon the defendant in the same manner as if he had been a party on the record.

Amendments to the pleadings are matters in the discretion of the court below. Error will not lie to this Court on the allowance or refusal of such amendments.

Variances between the writ and declaration cannot be taken advantage of in the court below after plea pleaded.

Quaere whether by the modern practice such variances can be taken advantage of at all?

This was an action of trespass for mesne profits brought by the plaintiffs in error, Chirac and others, against the defendant in error, Reinicker, in the court below. The plaintiffs had recovered judgment and possession of the premises in an ejectment in which one C. J. F. Chirac prayed

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leave of the court, as landlord of the premises, to be made defendant in the place of the casual ejector, and was admitted accordingly under the common consent rule. At the trial of the present suit, the record of the proceedings in the ejectment were offered by the plaintiffs as evidence to maintain this action, and they then offered to prove, by the testimony of R. G. Harper, and N. Dorsey, Esqs., that the defendant had retained and paid them to conduct the defense of the ejectment for his benefit, and also propounded to these witnesses the following question: "Were you retained, at any time, as attorney or counsel, to conduct the ejectment suit above mentioned, on the part of the defendant, for his benefit, as landlord of those premises?" This question was objected to by the defendant's counsel, as seeking an improper disclosure of professional confidence, and was rejected by the court. Whereupon the plaintiffs excepted.

The plaintiffs then gave in evidence certain deeds and patents by which and the admissions of counsel on both sides the title to the premises in question was vested in John B. Chirac, deceased, and also read in evidence certain depositions to prove who were the heirs of J. B. Chirac, and also offered the record in the ejectment to prove Maria Bonfils to be one of the heirs, and then offered to prove by parol evidence that the defendant was in fact landlord of the premises at the commencement and during the progress of the ejectment, and had notice of the

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same and retained counsel to defend the same and received the rents and profits thereof during its progress, which last-mentioned evidence the court refused to admit, and the plaintiffs excepted to the refusal.

The plaintiffs then offered to prove the same facts (not saying by parol evidence), with the additional fact that counsel did defend the same action for the benefit of the defendant. This evidence was also rejected by the court, and constituted the third exception of the plaintiffs.

The fourth exception taken by the plaintiffs related to the proper parties to the action. The original plaintiffs in the suit were Anthony Taurin Chirac, Mathew Chapus, and Anna Maria, his wife, Mathew Thevenon and Maria, his wife, and Maria Bonfils, the same persons having been plaintiffs in the ejectment. Pending the suit, the plaintiffs obtained leave to amend their declaration, and amended it by introducing the name of John B. E. Bitarde Desportes as husband of the said Maria, called at the commencement of this suit Maria Bonfils. No objection was taken to this amendment, and the defendant pleaded the general issue to the declaration so amended. The evidence of title of John B. Chirac, deceased, having been introduced, and also evidence to prove that Anthony T. Chirac and the female plaintiffs were heirs at law of John B. Chirac, the defendant prayed the court to instruct the jury that it ought to find a verdict for the defendant unless it was satisfied that all the plaintiffs were the proper heirs at law

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of John B. Chirac, which direction the court accordingly gave.

The fifth exception related to the supposed variance between the writ and declaration by the amendment introducing the husband of Maria Bonfils as a party upon the record. The court held the variance fatal under the general issue.

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MR. JUSTICE STORY delivered the opinion of the Court.

This is an action of trespass for mesne profits brought by the plaintiffs in error against the defendant in error in the Circuit Court for the District of Maryland. The cause comes before this Court upon exceptions taken by the plaintiffs on the trial of the cause in the court below.

The plaintiffs had recovered judgment and possession of the premises in an ejectment in which J. C. F. Chirac prayed to be admitted as landlord to defend the premises, and was admitted accordingly under the common consent rule. The record of the proceedings in that action were offered by the plaintiffs as evidence in the present suit, and they then offered to prove by the testimony of R. G. Harper and W. Dorsey,

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Esqs., that the defendant had retained and paid them to conduct the defense of the ejectment for his benefit, and also propounded to these witnesses the following question:

"Were you retained at any time as attorney or counselor to conduct the ejectment suit above mentioned on the part of the defendant for the benefit of the said George Reinicker as landlord of those premises?"

This question was objected to as seeking an improper disclosure of professional confidence. The court sustained the objection, and this constitutes the first ground of exception.

The general rule is not disputed that confidential communications between client and attorney are not to be revealed at any time. The privilege indeed is not that of the attorney, but of the client, and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel solely on account of that relation such counsel are not at liberty, even if they wish, to disclose, and the law holds their testimony incompetent. The real dispute in this case is whether the question did involve the disclosure of professional confidence. If the question had stopped at the inquiry whether the witnesses were employed by Reinicker as counsel to conduct the ejectment suit, it would deserve consideration whether it could be universally affirmed that it involved any breach of professional confidence. The fact is preliminary in its own nature, and establishes only the existence of the relation of

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client and counsel, and therefore might not necessarily involve the disclosure of any communication arising from that relation after it was created. But the question goes further. It asks not only whether the witnesses were employed, but whether they were employed by Reinicker to conduct the ejectment for him as landlord of the premises. We are all of opinion that the question in this form does involve a disclosure of confidential communications. It seeks a disclosure of the title and claim set up by Reinicker to his counsel for the purpose of conducting the defense of the suit. It cannot be pretended that counsel could be asked what were the communications made by Reinicker as to the nature, extent, or grounds of his title, and yet in effect the question, in the form in which it is put, necessarily involves such a disclosure. The circuit court was therefore right in their decision on this point.

The plaintiffs then gave in evidence certain deeds and patents by which, and the admissions of counsel on both sides, the title to the premises in question was vested in John B. Chirac, deceased, and also gave in evidence certain depositions to prove who were the heirs of J. B. Chirac, and also offered the record in the ejectment to prove Maria Bonfils to be one of the heirs, and then offered to prove by parol evidence that the defendant was in fact landlord of the premises at the commencement and during the progress of the ejectment and had notice of the same and employed counsel to defend

the same and received the rents and profits thereof during the progress of the ejectment, which evidence the court refused to admit, and this constitutes the second exception of the plaintiffs. The plaintiffs then offered to prove the same facts (not saying by parol evidence) with the additional fact that counsel did defend the same action for the benefit of the defendant. This evidence was also rejected by the court, and constitutes the third exception of the plaintiffs.

The question of law involved in each of these exceptions is substantially the same. It is whether a person who was not a party to the ejectment and did not take upon himself upon the record the defense thereof, but another did as landlord, may yet

be liable in an action for the mesne profits upon its being proved that he was in fact the landlord, received the rents and profits, and resisted the recovery.

It is undoubtedly true that in general, a recovery in ejectment, like other judgments, binds only parties and privies. It is conclusive evidence in an action for mesne profits against the tenant in possession, when he has been duly served with a notice in ejectment, whether he appears and takes upon himself the defense or suffers judgment to go by default against the casual ejector. The reason is that in the first case he is the real party on the record; in the last, he is considered as substantially the defendant, and the judgment by default as a confession of the title set up in the ejectment. Such was the decision

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of the court in *Aislin v. Parkin,* in 1 Burr. 667. But in relation to third persons, the judgment in ejectment is not conclusive, and if they are sued in an action for mesne profits, which is substantially an action against them as trespassers, they may controvert the plaintiff's title at large. In such a suit, the record of the ejectment is not evidence to establish the plaintiff's title; but it seems admissible for another purpose -- that is to say to show the possession of the plaintiff. The plaintiff may certainly prove his possession connected with his title by any sufficient evidence *in pais,* and if his possession has been under a judgment of law, he is entitled to establish it by introducing the record of the recovery and an executed writ of possession under it.

The question then is generally whether it is competent for the plaintiff to maintain an action for mesne profits against any person who is in possession of the land by means of his tenants and who by his acts, commands, or cooperation aids in the expulsion of the plaintiff and in withholding possession from him. All persons who aid in or command or procure a trespass are themselves deemed in law to be trespassers, whether they are actually present or do the act through the instrumentality of their agents and servants. A recovery of the possession in an ejectment against one of such agents does not constitute a bar to an action for mesne profits against another agent, for the same reason that

the former suit is no bar to the latter against the defendant in ejectment, *viz.,* that the mesne profits were not a matter in controversy in the ejectment. If, then, it is competent to maintain the action for mesne profits against any trespasser, although not a defendant in ejectment, it is competent to prove that the defendant is in that predicament. The evidence offered in this case was strong to prove the fact that the defendant was a party to the trespass, supposing the plaintiffs to have established their title and possession. If he was landlord of the premises and the other parties were in possession under him, if he was in the perception of the rents and profits, if he resisted the plaintiff's title and possession and cooperated in the acts of the tenants for this purpose, the evidence was proper for the jury as proof of his being a co-trespasser.

This doctrine is supported by the case of *Hunter v. Britts,* 3 Campb.N.P. 455, which was cited at the bar. There, the judgment was against the casual ejector in the ejectment suit and the action for the mesne profits was brought against Britts as landlord, and he was proved to be in the receipt of the rents and profits from the time of the demise till the writ of possession was executed. The ejectment was served upon the tenant; there was no evidence that Britts had any notice of this till after judgment, but subsequently he promised to pay the rent and the costs to the plaintiff. It was objected that the judgment in ejectment was not, under these circumstances, evidence of

title against Britts, and Lord Ellenborough held that it was not, without notice of the ejectment. But he thought that his subsequent promise amounted to an admission that the plaintiff was entitled to the possession of the premises, and that he himself was a trespasser. The language of the learned judge seems indeed to import that if the landlord had had notice of the ejectment, he would have been concluded by the recovery in the ejectment. It might be so if the common notice had been formally given to him as tenant in possession and he had neglected to take upon himself the defense of the suit. If, however, the notice was *in pais* and conduced

merely to prove his actual knowledge of the suit without calling upon him to defend it, we are not prepared to admit that on general principles it ought to have such an effect. [Footnote 1] But the point actually decided was that a party might be charged in an action for mesne profits who was not in any sense, a party to the ejectment by establishing the title against him and showing his connection as landlord with the tenant in possession and his adoption of the acts of the latter.

But it is said that assuming the law to be so in general, yet in the present case the plaintiffs are estopped from setting up the fact that the defendant was the real landlord because, in the ejectment, one J. C. F. Chirac prayed leave of the court "as landlord of the premises to be made defendant" in the place of the casual ejector, which was, with the consent for the lessee of

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the plaintiffs, allowed by the court. It does not appear to us that any such estoppel arises from this allegation in the record. The record itself certainly does not constitute a technical estoppel, for it is *res inter alios acta.* The most that can be said is that it is proper evidence to prove who the plaintiffs at that time deemed to be landlord, and therefore admissible to rebut the presumption that the present defendant was the landlord. But, certainly the evidence was not conclusive upon either party. It was open to the plaintiffs to show that in point of fact the present defendant was the real landlord, that the admission in the record was founded in mistake of the facts, or that J. C. F. Chirac was a sub-landlord under Reinicker, or his superior landlord. What would have been the effect of such proof is not for this Court to determine. We think, then, that the evidence offered by the plaintiffs was admissible upon general principles, and we see no estoppel which excludes it in this particular case. The directions of the circuit court were on this point erroneous.

If it had appeared upon the record that the evidence offered by the plaintiffs was solely to connect the defendant with the ejectment, so that the recovery would be conclusive upon him in the same manner as if he had been a party on the record, and as such admitted to defend and actually defending the suit, the case might have required a very different consideration. We have already intimated an opinion

that notice of an ejectment suit or defense of the suit by a

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person not tenant in possession or defendant on record does not make him a party to the suit in contemplation of law so as to conclude his rights.

In considering the fourth and fifth exceptions, it is necessary to advert to the fact that the plaintiffs in this action originally were Anthony Taurin Chirac, Mathew Chapus, and Anna Maria, his wife, Mathew Thevenon and Maria, his wife, and Maria Bonfils, the same persons having been plaintiffs in the ejectment. During the pendency of the suit, the plaintiffs obtained leave to amend their declaration, and did amend it, by introducing the name of John B. E. Bitarde Desportes as husband of the said Maria, called, at the commencement of this suit, Maria Bonfils. To this amendment no objection was taken, and the defendant pleaded to the declaration, so amended, the general issue. The evidence of title of John B. Chirac, deceased, being introduced, and also evidence to prove that Anthony T. Chirac and the female plaintiffs were heirs at law of John B. Chirac, the defendant then prayed the court to direct the jury

"that it ought to find a verdict for the defendant unless it is satisfied that all the plaintiffs are the proper heirs at law of the aforesaid John B. Chirac,"

which direction the court accordingly gave. The probable intention of the defendant was to pray an instruction to the jury that unless all those of the plaintiffs who claimed to be heirs of John B. Chirac should establish their title, the suit could not be maintained. In this view the opinion of

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the court would be correct, for it is a general rule that no recovery can be had unless all the plaintiffs are competent to maintain the suit. If, therefore, the title fails as to one, it is not maintainable in favor of the others. The proof does not under such circumstances meet the case set up in the declaration. But framed as this exception actually is, the direction given by the court is in its terms erroneous.

It was not necessary to prove that all the plaintiffs are the proper heirs at law of J. B. Chirac. The action was maintainable if the husbands were not the proper heirs of J. B. Chirac, for in right of their wives they were proper parties to the suit. The fourth exception is therefore well taken.

The fifth exception is founded on the supposed variance between the writ and declaration, by the amendment, introducing the husband of Maria Bonfils upon the record. The court held this variance fatal under the general issue. It is observable that this amendment was made under an order of the court, and was not objected to on the record by the defendant, and that the general issue was subsequently pleaded. It has been decided in this Court that the allowance or disallowance of amendments is not matter for which a writ of error lies here. Variances between the writ and declaration are in general matters proper for pleas in abatement, and if in any case a variance between the writ and declaration can be taken advantage of by the defendant in the court below, it seems to be an established rule that it cannot be done except

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upon oyer of the original writ granted in some proper stage of the cause. The existence of such variance forms no matter of controversy upon the general issue, by which the jury is to be governed in forming its verdict. In the present case, as no objection was taken to the amendment upon the record, it must be deemed to have been waived by the defendant, and therefore not proper to be insisted upon at the trial. [Footnote 2] It does not appear on the record whether Maria Bonfils was married before or pending the suit, and the fact might have a material bearing upon the propriety of granting the amendment, since at all events, if pending the suit, it would not of itself abate the suit, and the objection could only be made available by a plea in abatement. [Footnote 3]

Upon the whole it is the opinion of the Court that there is error in the directions of the circuit court in the four last exceptions and contained in the record, and for this cause the judgment must be

Reversed and a venire facias de novo awarded.

[Footnote 1]

Adams on Ejectment 336. 2d ed.

[Footnote 2]

See Com.Dig. Abatement G. 8; Com.Dig. Pleader, C. 13; 2 Wils. 85, 394, 395; 1 Chitt.Pl. 438, 439; Stephens on Plead. 68, 423; 1 Saund. 318; note 2 by Williams.

[Footnote 3]

Com.Dig. Abatement H. 42.

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