Lessee of Ewing Vs. Burnet

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Appeal No. : 36 U.S. 41

Appellant : Lessee of Ewing

Respondent : Burnet

Judgement :

Lessee of Ewing v. Burnet - 36 U.S. 41 (1837)
U.S. Supreme Court Lessee of Ewing v. Burnet, 36 U.S. 11 Pet. 41 41 (1837)

Lessee of Ewing v. Burnet

36 U.S. (11 Pet.) 41

ERROR TO THE CIRCUIT COURT

OF THE DISTRICT OF OHIO

SYLLABUS

Ejectment. Ohio. It is the exclusive province of the jury to decide what facts are proved by competent evidence. It is its province to judge of the weight of testimony as tending, in a greater or less degree, to prove the facts relied upon.

An elder legal title to a lot of ground gives a right of possession, as well as the legal seizure and possession thereof, coextensive with the right, which continues until there shall be an ouster by actual adverse possession or the right of possession becomes in some other way barred.

An entry by one on the land of another is or is not an ouster of the legal possession arising from the title according to the intention with which it is done. If made under claim or color of right, it is an ouster; otherwise it is a mere trespass. In legal language, the intention guides the entry, and fixes its character.

It is well settled that to constitute an adverse possession, there need not be a fence, a building, or other improvement made; it suffices for this purpose that visible notorious acts are exercised over the premises in controversy for twenty-one years after an entry under a claim and color of title.

Where acts of ownership have been done upon land which from their nature indicate a notorious claim of property in it, and are continued for twenty-one years with the knowledge of an adverse claimant without interruption or an adverse entry by him for twenty-one years, such acts are evidence of an ouster of the former owner and of an actual adverse possession against him if the jury shall think that the property was not susceptible of a more strict and definite possession than had been so taken and held. Neither actual occupation or cultivation is necessary to constitute actual possession when the property is so situated as not to admit of any permanent useful improvement and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and could not exercise over property which he did not claim.

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail, but the court will first take the instrument by its four corners in order to ascertain its true meaning. If that is apparent on judicially inspecting it, the punctuation will not be suffered to change it.

An adverse possession far twenty-one years under claim or color of title merely void is a bar to a recovery under an elder title by deed, although the adverse holder may have had notice of the deed.

The plaintiff in error instituted an action of ejectment in the Circuit Court of Ohio at December term, 1834, against the defendant to recover a lot of ground in the City of Cincinnati. Both the plaintiff and the defendant claimed title under deeds from John Cleves

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Symmes, the original grantee of the United States, for all the land on which the City of Cincinnati is erected. The deed from Symmes, under which the plaintiff asserted his title, was executed June 11, 1798, to Samuel Forman; the deed from Symmes to the defendant for the same lot was dated May 21, 1803. An adverse possession for twenty-one years and upwards was relied on as constituting a sufficient legal title under the statute of limitations of Ohio. The case and the evidence are fully stated in the opinion of the Court.

The cause was tried at July term 1835, and a verdict, under the instructions of the court, was found for the defendant, on which a judgment was rendered. The plaintiff tendered a bill of exceptions.

The charge of the court was as follows:

"The plaintiff having shown a deed for the premises in controversy older in date than that which was given in evidence by the defendant, on the prayer of the defendant, the court instructed the jury that his actual possession of the lot, to protect his title, under the statute of limitations, must have been twenty-one years before the commencement of this suit. That suing for trespass on the lot, paying the taxes, and speaking publicly of his claim were not sufficient to constitute an adverse possession. That any possession short of an exclusive appropriation of the property by an actual occupancy of it so as to give notice to the public and all concerned that he not only claimed the lot, but enjoyed the profits arising out of it, was such an adverse possession as the statute requires. That to constitute an

adverse possession, it is not essential that the property should be enclosed by a fence, or have a dwelling house upon it. If it were so situated as to admit of cultivation as a garden or for any other purpose without an enclosure, and it was so cultivated by the defendant during the above period, it would be sufficient, or if the lot contained a coal mine or marble or stone quarry and it was worked the above period by the defendant, he having entered under a deed for the whole lot, such an occupancy would be an adverse possession, though the lot had no dwelling house upon it and was not enclosed by a fence. And also if the lot contained a valuable sand bank which was exclusively possessed and used by the defendant for his own benefit by using the sand himself and selling it to others, and his occupancy of the lot in this manner was notorious to the public and all concerned, and if the defendant paid the taxes for the same, ejected and prosecuted trespasses on the lot, it being

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situated adjoining to the lots on which the defendant actually resided, except the intervention of a street which had not been graduated and opened so as to be used by she public, and said lot preserved the view of the defendant from his residence unobstructed, and such possession was continued the time required by the statute, it would constitute an adverse possession for the whole lot, the defendant having entered under a deed as aforesaid. The court also said to the jury the law had been settled in Kentucky that if a person residing on a tract of land should purchase by deed another tract adjoining to it, his possession would be extended over the tract thus purchased, and that this seemed to be reasonable and was sustained by the doctrine of possession as generally recognized. That had the lot in controversy adjoined the premises on which the defendant resided, the case would come within the rule, but that a street intervened between the residence of the defendant and the lot in controversy, which would prevent an application of the rule. "

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MR. JUSTICE BALDWIN delivered the opinion of the Court.

In the court below, this was an action of ejectment brought in November 1834, by the lessor of the plaintiff to recover possession of lot No. 209 in the City of Cincinnati, the legal title to which is admitted to have been in John Cleves Symmes, under whom both parties claimed, the plaintiff by a deed dated 11 June 1798, to Samuel Foreman, who on the next day conveyed to Samuel Williams, whose right after his death became vested in the plaintiff; the defendant claimed by a deed to himself dated 21 May, 1803, and an adverse possession of twenty-one years before the bringing of the suit.

It was in evidence that the lot in controversy is situated on the corner of Third and Vine Streets, fronting on the former 198, on the latter 98, feet; the part on Third Street is level for a short distance, but descends towards the south along a steep bank from forty to fifty feet to its south line; the side of it was washed in gullies over and around which the people of the place passed and repassed at pleasure. The bed of the lot was principally sand and gravel, with but little loam or soil; the lot was not fenced, nor had any building or improvement been erected or made upon it until within a few years before suit brought; a fence could have been kept up on the level ground on the top of the hill on Third Street, but not on its declivity, on account of the deep gullies washed in the bank, and its principal use and value was in the convenience of digging sand and gravel for the inhabitants. Third Street separated this lot from the one on which the defendant resided from 1804, for many years, his mansion fronting on that street; he paid the taxes upon this lot from 1810 until 1834, inclusive, and from the date of the deed from Symmes until the trial claimed it as his own. During this time he also claimed the exclusive right of digging and removing sand and gravel from the lot, giving permission to some, refusing it to others; he brought actions of trespass against those who had done it, and at different times made leases to different persons for the purpose of taking sand and gravel therefrom, besides taking it for his own use as he pleased. This had been done by others without his permission, but there was no evidence of his acquiescence in the claim of any person to take or remove the sand or gravel or that he had ever intermitted his claim to the exclusive right of doing so; on the contrary, several witnesses testified to his continued assertion of right to the lot, their knowledge of his exclusive claim, and their ignorance of any adverse claim

for more than twenty-one years

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before the present suit was brought. They further stated as their conclusion from these facts that the defendant had, from 1806, or 1807, in the words of one witness, "had possession of the lot;" of another that since 1804, "he was as perfectly and exclusively in possession as any person could possibly be of a lot not built on or enclosed;" and of a third "that since 1811, he had always been in the most rigid possession of the lot in dispute; a similar possession to other possessions on the hill lot." It was further in evidence that Samuel Williams, under whom the plaintiff claimed, lived in Cincinnati from 1803, until his death in 1824; was informed of defendant's having obtained a deed from Symmes in 1803, soon after it was obtained, and knew of his claim to the lot; but there was no evidence that he ever made an entry upon it, demanded possession, or exercised or assumed any exercise of ownership over it, though he declared to one witness, produced by plaintiff, that the lot was his and he intended to claim and improve it when he was able. This declaration was repeated often from 1803 till the time of his death, and on his death bed, and it appeared that he was during all this time very poor; it also appeared in evidence by the plaintiff's witness that the defendant was informed that Williams owned the lot before the deed from Symmes in 1803 and after he had made the purchase.

This is the substance of the evidence given at the trial and returned with the record and a bill of exceptions, stating that it contains all the evidence offered in the cause; whereupon the plaintiff's counsel moved the court to instruct the jury that on this evidence the plaintiff was entitled to a verdict; also that the evidence offered by the plaintiff and defendant was not sufficient in law to establish an adverse possession by the defendant, which motions the court overruled. This forms the first ground of exception by the plaintiff to the overruling his motions: 1. the refusal of the court to instruct the jury that he was entitled to recover; 2. that the defendant had made out an adverse possession.

Before the court could have granted the first motion, it must have been satisfied that there was nothing in the evidence or any fact which the jury could lawfully infer therefrom which could in any way prevent the plaintiff's recovery; if there was any evidence which conduced to prove any fact that could produce such effect, the court must assume such fact to have been proved, for it is the exclusive province of the jury to decide what facts are proved by

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competent evidence. It was also its province to judge of the credibility of the witnesses and the weight of their testimony as tending, in a greater or less degree, to prove the facts relied on; as these were matters with which the court could not interfere, the plaintiff's right to the instruction asked must depend upon the opinion of the court, on a finding by the jury in favor of the defendant, on every matter which the evidence conducted to prove, giving full credence to the witnesses produced by him and discrediting the witness for the plaintiff.

Now as the jury might have refused credence to the only witness who testifies to the notice given to the defendant of Williams' ownership of the lot in 1803 and of his subsequent assertion of claim and intention to improve it, the testimony of this witness must be thrown out of the case in testing the correctness of the court in overruling this motion; otherwise we should hold the court below to have erred in not instructing the jury on a matter exclusively for its consideration -- the credibility of a witness or how far his evidence tended to prove a fact if it deemed him credible. This view of the case throws the plaintiff back to his deed as the only evidence of title, on the legal effect of which the court was bound to instruct the jury as a matter of law, which is the only question to be considered on this exception.

It is clear that the plaintiff had the elder legal title to the lot in dispute, and that it gave him a right of possession, as well as the legal seizin and possession thereof, coextensively with his right, which continued till he was ousted by an actual adverse possession, 31 U. S. 6 Pet. 743, or his right of possession had been in some other way barred. It cannot be doubted that from the evidence adduced by

the defendant it was competent for the jury to infer these facts -- that he had claimed this lot under color and claim of title from 1804 until 1834; had exercised acts of ownership on and over it during this whole period; that his claim was known to Williams and to the plaintiff; was visible, of public notoriety, for twenty years previous to the death of Williams. And if the jury did not credit the plaintiff's witness, they might also find that the defendant had no actual notice of Williams' claim; that it was unknown to the inhabitants of the place, while that of the defendants was known, and that Williams never did claim the lot, to assert a right to it from 1803 until his death in 1824. The jury might also draw the same conclusion from these facts as the witnesses did; that the

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defendant was during the whole time in possession of the lot as strictly, perfectly, and exclusively as any person could be of a lot not enclosed or built upon or as the situation of the lot would admit of. The plaintiff must therefore rely on a deed of which he had given no notice, and in opposition to all the evidence of the defendant, and every fact which a jury could find, that would show a right of possession in him, either by the presumption of a release or conveyance of the elder legal title or by an adverse possession. On the evidence in the cause, the jury might have presumed a release, a conveyance, or abandonment of the claim or right of Williams under a deed in virtue of which he had made no assertion of right from 1798 in favor of a possession, such as the defendant held from 1804, though it may not have been strictly such an adverse possession, as would have been a legal bar, under the act of limitations. There may be circumstances which would justify such a presumption in less than twenty-one years, 31 U. S. 6 Pet. 513, and we think that the evidence in this case was in law sufficient to authorize the jury to have made the presumption, to protect a possession, of the nature testified, for thirty years, and if the jury could so presume, there is no error in overruling the first motion of the plaintiff.

On the next motion the only question presented is on the legal sufficiency of the evidence to make out an ouster of the legal seizin and possession of Williams by the defendant, and a continued adverse possession for twenty-one years before

suit brought. An entry by one man on the land of another is an ouster of the legal possession arising from the title or not according to the intention with which it is done; if made under claim and color of right, it is an ouster, otherwise it is a mere trespass; in legal language, the intention guides the entry and fixes its character. That the evidence in this case justified the jury in finding an entry by the defendant on this lot as early as 1804 cannot be doubted, nor that he claimed the exclusive right to it under color of title from that time until suit brought. There was abundant evidence of the intention with which the first entry was made, as well as of the subsequent acts related by the witnesses, to justify a finding that they were in assertion of a right in himself, so that the only inquiry is as to the nature of the possession kept up.

It is well settled that to constitute an adverse possession, there need not be a fence, building, or other improvement made, 35 U. S. 10 Pet. 442; it suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in

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controversy for twenty-one years after an entry under claim and color of title. So much depends on the nature and situation of the property, the uses to which it can be applied or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases. But it may with safety be said that where acts of ownership have been done upon land which from their nature indicate a notorious claim of property in it and are continued for twenty-one years with the knowledge of an adverse claimant, without interruption, or an adverse entry by him for twenty-one years, such acts are evidence of an ouster of a former owner and an actual adverse possession against him if the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held. Neither actual occupation, cultivation, nor residence is necessary to constitute actual possession, 31 U. S. 6 Pet. 513, when the property is so situated as not to admit of any permanent useful improvement and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and

would not exercise over property which he did not claim. Whether this was the situation of the lot in question or such was the nature of the acts done was the peculiar province of the jury; the evidence, in our opinion, was legally sufficient to draw the inference that such were the facts of the case, and if found specially, would have entitled the defendant to the judgment of the court in his favor; it of course did not err in refusing to instruct the jury that the evidence was not sufficient to make out an adverse possession.

The remaining exceptions are to the charge of the court, in which we can receive no departure from established principles. The learned judge was very explicit in stating the requisites of an adverse possession; the plaintiff had no cause of complaint to a charge stating that exclusive appropriation, by an actual occupancy, notice to the public and all concerned of the claim, and enjoyment of profits by defendant were all necessary. No adjudication of this Court has established stricter rules than these, and if any doubts could arise as to their entire correctness, it would be on an exception by the defendant. In applying them in the subsequent part of the charge to the evidence, there seems to have been no relaxation of these rules. The case put by the court as one of adverse possession is of a valuable sand bank, exclusively possessed and used by the defendant for his

own benefit by using and selling the sand, and this occupancy, notorious to the public and all concerned, which fully meets all the requisites before stated to constitute adverse possession. If we take the residue of the charge literally, it would seem to superadd other requisites, as the payment of taxes, ejecting and prosecuting trespassers on the lot, its contiguity to the defendant's residence, &c.;, but such is not the fair construction of the charge nor the apparent meaning of the court. These circumstances would seem to have been alluded to to show the intention with which the acts previously referred to were done, in which view they were important, especially the uninterrupted payment of taxes on the lot for twenty-four successive years, which is powerful evidence of a claim of right to the whole lot. The plaintiff's counsel has considered these circumstances making a

distinct case, in the opinion of the court, for the operation of the statute, and has referred to the punctuation of the sentence in support of this view of the charge. Its obvious meaning is, however, to state these as matters additional or cumulative to the preceding facts, not as another distinct case, made out by the evidence, on which alone the jury could find an adverse possession. Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail, but the court will first take the instrument by its four corners in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it.

It has also been urged in argument that as the defendant had notice of the claim of Williams, his possession was not fair and honest, and so not protected by the statute. This admits of two answers: 1. the jury were authorized to negative any notice; 2. though there was such notice of a prior deed, as would make a subsequent one inoperative to pass any title, yet an adverse possession for twenty-one years, under claim and color of title, merely void, is a bar; the statutory protection being necessary only where the defendant has no other title but possession during the period prescribed. The judgment of the circuit court is therefore affirmed.

Judgment affirmed.