

Hepburn Vs. Dubois

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SooperKanoon Citation : sooperkanoon.com/79623

Court : US Supreme Court

Decided On : 1838

Appeal No. : 37 U.S. 345

Appellant : Hepburn

Respondent : Dubois

Judgement :

Hepburn v. Dubois - 37 U.S. 345 (1838)

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Hepburn v. Dubois

37 U.S. (12 Pet.) 345

ERROR TO THE DISTRICT COURT OF THE UNITED

STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SYLLABUS

The deed of a *feme covert* conveying her interest in lands which she owns in fee does not pass her interest by the force of its execution and delivery, as in the common case of a deed by a person under no legal incapacity. In such cases, an

acknowledgment gives no additional effect between the parties to the deed. It operates only as to third persons, under the provisions of recording and kindred laws. The law presumes a *feme covert* to act under the coercion of her husband unless before a court of record a judge or some commissioner in England, by a separate acknowledgment out of the presence of her husband or, in these states, before some court or judicial officer authorized to take and certify such acknowledgment, the contrary appears.

Where the evidence in a cause conduces to prove a fact in issue before a jury, if it is competent in law, a jury may infer any fact from such evidence, which the law authorizes a court to infer on a demurrer to evidence. After a verdict in favor of either party on the evidence, he has a right to demand of a court of error that they look to the evidence only for one purpose, with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which made out the right of the party, on a part or the whole of his case. If, in its judgment, the appellate court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferable therefrom in the same manner and with the same legal results as if they had been definitely set out in a special verdict. So, on the other hand, the finding of a jury on the whole evidence in a cause must be taken as negating all the facts in which the party against whom their verdict is given has attempted to infer from or establish from the evidence.

The decision of the Court in the case of [Dubois' Lessee v. Hepburn](#), 10 Pet. 1, affirmed.

This was an action of ejectment instituted by the defendant in error for a tract of land situated in Lycoming County, Pennsylvania surveyed under a warrant to Joseph Fearon, and patented to him on 19 September, 1796. The case was before the court on a writ of error prosecuted by the plaintiff in the ejectment at January term, 1836, and is reported in [35 U. S. 10](#) Pet. 1.

Joseph Fearon died seized and possessed of this tract of land at Philadelphia, in April, 1810. His heirs and legal representatives were the children of his two

brothers, Abel Fearon and William Fearon, both Abel and William having died in the lifetime of Joseph

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Fearon. The children of Abel Fearon were Robert Fearon, of the City of Philadelphia, since deceased; Joseph Fearon, of Northumberland County, Pennsylvania; Sarah Fearon, since intermarried with Christopher Scarrow, residing at the time of the death of Joseph Fearon, in England; Elizabeth Fox, afterwards intermarried with Joseph Fox, then residing in England and afterwards in Philadelphia. The children of William Fearon were John Fearon, formerly residing in Center County, Pennsylvania, since deceased; William Fearon, also residing in Center County; James Fearon, residing in Philadelphia; Sarah Fearon, intermarried with Robert Quay, residing in Lycoming County, Pennsylvania; and Nancy Fearon, intermarried with Samuel Brown, residing in Center County, Pennsylvania. By deed of partition, dated 12 and 26 March, 1825, William Fearon's heirs made, on their part, partition of the real estate of Joseph Fearon, between the two branches of the family of Joseph Fearon, and by that deed the tract of land for which this ejectment was brought, No. 5615, was allotted, *inter alia*, to the heirs of Abel Fearon. The deed of partition from the heirs of Abel Fearon to the heirs of William Fearon was executed on 12 March, 1825, by Joseph Fearon, in person, and by Elizabeth Fearon and Christopher Scarrow and Sarah, his wife, by power of attorney to John Curwen, and John Wilson. The power of attorney was dated on 11 February, 1811. The privy examination of Mrs. Scarrow to the power of attorney, was not taken. On 13 November, 1827, a partition was made by the heirs of Abel Fearon, by which partition of the part of the estate of Joseph Fearon conveyed to them by the heirs of William Fearon was made. The deed of partition was executed by Joseph Fearon, Jacob Fox, and Elizabeth Fox, in person, and by Christopher Scarrow and Sarah Scarrow, by their attorney, Nathaniel Nunnelly. The power of attorney to Nathaniel Nunnelly was dated 25 June, 1828, without the privy examination of Mrs. Scarrow. This power of attorney was ratified and confirmed, with the privy examination of Sarah Scarrow, on 8 September, 1832, by Christopher and Sarah Scarrow. The premises for which the

ejectment was instituted were by these conveyances and confirmations vested in Joseph Fox and wife, who, by deed of 16 April, 1830, conveyed the same to Benjamin E. Valentine, from whom they afterwards came by regular conveyances to the lessor of the plaintiff in the ejectment.

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The plaintiff in error, the defendant in the district court, claimed the tract of land for which the ejectment was brought under a sale of the same for county and road taxes for the year 1825, made under the laws of Pennsylvania, amounting together to one dollar and ninety-five cents. The county tax was assessed prior to 1 February, 1825; the road tax was assessed on 29 April, 1825. On 12 June, 1826, the tract No. 5615 was sold to the defendant for the sum of five dollars and fifty-two cents, the amount of the taxes and the costs, and on 15 July, 1826, the same was conveyed by deed to the defendant, by Mr. Brown, treasurer of the county.

The plaintiff below, to overthrow the tax title of the defendant, gave in evidence an offer to redeem the property sold for taxes, which offer was made by Robert Quay, Jr., acting for and under the directions of his father, Robert Quay, Esq., within two years after the sale for taxes. The treasurer of the county refused to receive the amount of the taxes from Robert Quay, Jr., so representing his father, Robert Quay, Esq., alleging that Robert Quay was not the owner of the land, and that by the law of Pennsylvania no one but the owner or his authorized agent could receive land sold for taxes.

The cause was tried in October, 1836, and a verdict was given for the plaintiff under the charge of the court. The defendant excepted to the charge of the court and prosecuted this writ of error.

On the trial of the cause in the district court, the counsel for the plaintiff in the ejectment requested the court to charge the jury:

"1st. That the law authorizing the redemption of land sold for taxes (viz., the law of Pennsylvania passed 3 April, 1804, and its several supplements) ought to

receive a liberal and benign construction in favor of those whose estate will be otherwise divested."

"2d. That under the said law, any person has a right to redeem unseated lands sold for taxes by a payment of the tax, costs, and percentage within the time named in the said acts."

"3d. That any person having or believing himself to have an interest in the lands so sold has a right to redeem the same within the time named in the said acts."

"4th. That any person having the charge of such lands from the owner during his life, after his decease intestate and without a countermand of such charge, has a right to redeem such lands so sold. "

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"5th. That any person being a tenant in common of the land so sold has a right to redeem."

"6th. That the deed of partition, dated 26 March, 1825, in evidence in this cause did not take effect as a divestiture of the estate of Robert Quay and wife in the land claimed in this ejectment, tract No. 5615, until the same was consummated by its ratification by Christopher Scarrow and wife by their deed on 8 September, 1832; the said Robert Quay, in right of his wife, was a tenant in common of the said tract, No. 5615, and had a right, in May, 1825, to redeem the same from the sale for taxes."

"7th. That the refusal of the treasurer to receive the redemption money for lands so sold for taxes is equivalent to and dispenses with a tender of the same."

The court instructed the jury as requested in the plaintiff's first proposition. The instruction asked in the second proposition was refused. On the third proposition the court said any person having an interest in land so sold has a right to redeem the same within the period named in the act, but a mere opinion, without right or having an interest, confers no power to redeem.

The court refused the instruction asked in the fourth proposition, and in answer to the fifth proposition said a tenancy in common, or any other interest in the land, legal or equitable, confers a right to redeem. The court gave the instruction asked in the sixth and seventh propositions.

The counsel for the defendant requested the court to instruct the jury as follows:

"1st. That by the legal construction of the several letters of attorney, and the ratifications and confirmations thereof, and of the various deeds given in evidence in the trial of this cause, Robert Quay, at the period of the sale of this tract of land to A.D. Hepburn, and at the time the alleged offer to redeem was made, had neither in law nor in equity a right to the possession, enjoyment, or ownership, or a right of entry to the land in controversy, and could not make a legal offer to redeem which would avoid the title of the defendant unless he was the authorized agent of the owner."

"2d. That the partitions of 1825, being executed by the duly authorized attorneys in fact of Christopher Scarrow and wife and Elizabeth Fearon and Joseph Fearon, representatives of Abel Fearon, in conjunction with the heirs of William Fearon, and possession having

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been taken in accordance with the deeds, are binding on all the parties and valid."

"3d. That at all events, said partition was binding on Mrs. Scarrow during her coverture, and could only be avoided, if at all, by her or her heirs on the death of her husband, no other person having the right to object thereto, and she having ratified and confirmed it during coverture, the plaintiffs or Robert Quay cannot impeach the validity of the said partition as of the date of 12 March, 1825."

"4th. That it is not necessary for a *feme covert* to acknowledge an agreement, or power to make partition under the Act of the 24 February, 1770, of lands which descend to her in Pennsylvania, where the partition is equal at law; being compelled to make partition, she can do so amicably."

"5th. That Quay, and Fox and wife, and their alienees, are estopped from questioning the validity and consummation of the partitions in 1825 by their execution and delivery of the various deeds and letters of attorney given in evidence on the trial of this cause."

"6th. That the denial of the agency and ownership of Quay, by Fox, and his right to redeem, if the jury believes Harris' testimony, is conclusive, and precludes him or his alienees from subsequently claiming any right by or through the acts of Quay or his son."

"7th. That on the legal construction of the act of 1815, no person has a right to redeem land sold for taxes but the owner, his heirs or assigns, or legally authorized agent or representative. If the jury believes that Quay was not the owner or the agent of the owner, the alleged offer to redeem made by him or his son are of no validity; and the plaintiff cannot recover."

"8th. That if Quay did not make the alleged offer to redeem as owner or agent of the owner of the land, but in fraud of the owner's right and for the object of benefiting himself by taking the timber off and obtaining a right to the land, it would not divest the title of the defendant."

"9th. That the offer to redeem must be a legal tender, unconditional and unrestricted, and if the jury believe the testimony of Robert Quay, Jr., no such legal tender was made, nor was it such an offer and refusal as would bring this case within the saving clause of the 4th section of the Act of 13 March, 1815."

"10th. That from the testimony disclosed, the taxes for which the land was sold were assessed, and that the deed from the treasurer to

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the defendant, on the face of it, vests in him a complete title to the land in controversy."

"11th. That if the jury believed the testimony of Robert Quay, Jr., and of Joseph F. Quay, neither of them were the agents of Jacob Fox, under whom the plaintiff

claims, when Robert Quay, Jr., called on Harris to attempt to redeem the tract of land in dispute. Therefore the plaintiffs cannot recover."

The court refused to give the first instruction. As to the second proposition, the court said so far as it is necessary to the issue on trial, the legal effect of the partition of 25 March, 1825, is noticed in answer to the sixth instruction of the plaintiff's counsel. The deed of partition of 12 March, 1825, and the possession which it is alleged was taken in accordance with the deeds, cannot vary that instruction.

As to the third instruction, the court said the supreme court has in effect decided this point. Mrs. Scarrow's interest remained undivided until the deed of confirmation in 1832. The partition of March, 1825, was not binding on her until then, and although Robert Quay and wife cannot impeach its validity, they held until then an undivided interest in the land in question.

The court refused to give the fourth instruction on the authority of the decision in [35 U. S. 10](#) Pet. 22.

As to the fifth instruction asked, the court said Quay and wife, and Fox and wife and their alienees, were estopped from questioning the validity of the partitions of 1825 after they were legally accepted by all the parties to them, and the various deeds and letters of attorney derive their validity from that acceptance.

The six instruction was refused. As to the seventh and eighth instructions, the court said a redemption of land sold for taxes under the act of 1815 can only be made by the owner, his heirs or assigns, or legally authorized agent or representative, or by a person acting for the owner with his subsequent ratification. If Quay was not the owner or part owner or the agent of the owner, the alleged offer to redeem made by him or his son, not so ratified, has no validity, and the plaintiff in such case could not recover. But Quay's interest in the land was not divested at the time he caused an offer to be made to redeem, and that offer cannot therefore be legally regarded as in fraud of any person's rights.

Ninth: the offer to redeem must be of the nature here stated, but from the testimony of Robert Quay and other witnesses to the

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same point, the tender made was sufficient under the saving clause of the Act of March, 1815.

The tenth instruction was given, as was also the eleventh, except the concluding words "therefore, the plaintiff cannot recover."

The case was argued at large on all the points presented by the bill of exceptions, orally by Mr. S. Hepburn, and a printed argument by Mr. Potter for the plaintiff in error, and by Mr. Tilghman and Mr. Anthony on a printed argument, for the defendant. The opinion of the Court having been confined principally to one point, it has not been considered necessary to report the whole of the arguments of the counsel for the plaintiff or the defendant.

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MR. JUSTICE BALDWIN delivered the opinion of the Court:

This case was before this Court on a writ of error taken by the plaintiff below, to the district court for the Western District of Pennsylvania, at the January term, 1836, and all the questions arising on the record, or made by counsel, were there fully considered. The Court, however, took further time for consideration, and at the term of 1836 delivered its unanimous opinion reversing the judgment of the district court on the merits of the case, as well on the questions of law as of fact, as will appear in the 10th vol. of Peters pages [35 U. S. 17](#) , [35 U. S. 33](#) . Pursuant to the judgment and mandate there rendered, the case was again tried, and now comes before us on a writ of error by the defendant below, after a verdict and judgment below against him, in the argument, of which every point of law and question of fact which came up and was decided before, has been noticed by counsel now.

As relates to the questions of law arising on the great mass of deeds in the former and present record, they are not varied by

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anything which is now brought up for the first time: the want of any operative act by Mrs. Scarrow, which could confirm the alleged partition of 1825, before the duly acknowledged deed of confirmation by her and her husband in 1832, is not supplied. The counsel of the plaintiff in error have indeed contended that her deed of 1832 operates retrospectively to validate all the previous acts of her attorneys in fact from 1811 to 1828. But the law is well settled to the contrary. The deed of a *feme covert* conveying her interest in land which she owns in fee does not pass her interest by the force of its execution and delivery, as in the common case of a deed by a person under no legal incapacity. In such cases, an acknowledgment gives no additional effect between the parties to the deed; it operates only as to third persons, under the provisions of recording and kindred laws. The law presumes a *feme covert* to act under the coercion of her husband unless before a court of record, a judge, or some commissioner in England, by a separate acknowledgment out of the presence of her husband, and in these states, before some court or judicial officer, authorized to take and certify such acknowledgment. We are bound, therefore, in accordance to what we deem in the former case to be the legal result of all the deeds and facts on the record, to declare that Mr. Quay had in him such legal right to the premises, on which we then held, and now deliberately hold, to be a scintilla of legal right, which is all that, by the laws of the state, is necessary to entitle the holder of such right to redeem lands sold for taxes.

In urging upon this Court a review of the parol evidence in the record, we think the counsel of the plaintiff in error have asked us to transcend the limits prescribed to our action on questions of fact, by an uniform course of decision from the first organization of this Court, which has been repeatedly defined during the present term, in our opinions, unanimous on the law, though sometimes differing in its application to particular cases. If our past course of adjudication has not sufficed to satisfy the bar as to what we have considered our most solemn duty, and if it is yet

an open question as to what is the line which the law has drawn between those questions of fact cognizable only by the jury below, and questions of law arising on the joint action of the court and jury in that court whose record we judicially inspect on error; it will be useless to attempt to close it by any opinion to be delivered in this case.

This Court is committed in language which it neither can nor desires to recall, because that power which we are bound to obey, has

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spoken to us, and all the courts in the United States, in terms most imperative.

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress, and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares that"

" In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact trial by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

[28 U. S. 3](#) Pet. 446.

If this Court can comprehend what these rules are or promulgate them in intelligible language, they are these:

That where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence, which the law authorizes a court to infer on a demurrer to the

evidence; after a verdict in favor of either party, on the evidence, he has a right to demand of a court of error that they look to the evidence only for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part or the whole of his case. If, in its judgment, the appellate court shall hold that the evidence was competent, then it must found its judgment on all such facts as were legally inferrable therefrom, in the same manner and with the same legal results as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of the jury on the whole evidence in a cause must be taken as negating all facts which the party against whom its verdict is given has attempted to infer from or establish by the evidence.

On the evidence in the former record, we held that it was competent in law to make out, and for the jury to find the fact of an offer to refund the taxes &c., so as to give a right of redemption; on the evidence and finding of the jury in the present record, we

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are bound to consider the fact of such offer as established and to hold the facts so found to bring the defendant in error within the provisions of the laws of Pennsylvania on which the case turns.

The judgment of the court below is therefore

Affirmed with costs.

This cause came on to be heard on the transcript of the record from the district Court of the United States for the Western District of Pennsylvania and was argued by counsel. On consideration whereof it is now here adjudged and ordered by this Court that the judgment of the said district court in this cause be and the same is hereby affirmed with costs.