

Atkinson's Lessee Vs. Cummins

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Court : US Supreme Court

Decided On : 1850

Appeal No. : 50 U.S. 479

Appellant : Atkinson's Lessee

Respondent : Cummins

Judgement :

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Atkinson's Lessee v. Cummins

50 U.S. (9 How.) 479

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SYLLABUS

The rule of evidence, as stated by Tindal, Chief Justice, in the case of *Miller v. Travers*, 8 Bingh. 244, sanctioned by this Court, viz.:

"In all cases where a difficulty arises in applying the words of a will or deed to the subject matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject matter really intended to be granted or devise."

Therefore, where the sheriff sold a tract of land under a *feri facias*, and made a deed of it to the purchaser, and it appeared afterwards that the debtor had two tracts near to, but separated from each other, and the sheriff's deed described one tract accurately except that it called to bound upon two parcels of land which were actually contiguous to the other tract, and the purchaser took possession of that to which the description was mainly applicable, and retained possession for nearly twenty years, parol evidence was admissible to show that the levy and sale applied to one tract only, and not both.

This was an action of ejectment brought in the circuit court by Isaac Atkinson, a citizen of Ohio, to recover a tract of land in Derry Township, Westmoreland County and State of Pennsylvania.

The whole case was stated in the bill of exceptions, which it is only necessary to recite.

" *Copy of Bill of Exceptions* "

" I n the circuit court of the United States, Western District of Pennsylvania"

"RICHARD SMITH, Lessee of ISAAC ATKINSON, a Citizen of the State of Ohio v. WILLIAM STILES, with Notice to JOHN CUMMINS, a Citizen of the State of Pennsylvania."

" *November Term A.D. 1846. Action of Ejectment.*"

"Be it remembered that at the November term, A.D. 1846, of the said court, before the Honorable R. C. Grier, an Associate Justice of the Supreme Court of the United States, and the

Honorable Thomas Irwin, judge of the said district court, judges holding said court, at Pittsburgh, in said district, the parties in this cause were at issue upon a plea of not guilty in manner and form as the said plaintiff hath thereof in his declaration complained, by said John Cummins, who had entered into and filed in said cause the common consent rule, confessing lease, entry, and ouster &c.;, as appears of record in the same; and therefore a jury was called, and regularly and legally empanelled and sworn to try said issue; and on the trial thereof, the plaintiff, to prove the same on his part, gave in evidence the record of a judgment in the Court of Common Pleas of Westmoreland County, Commonwealth of Pennsylvania, in favor of Thomas Pumroy, for the use of John Sloan, Jr., against George Pumroy, on 5 September, 1820, for the sum of four hundred dollars debt and costs; also a writ of *fieri facias* , issued on said judgment from said court, dated December 2, 1820, directed to the Sheriff of said Westmoreland County, a levy by John Klingensmith, sheriff of said county, of said writ, on all the right, title, and claim of George Pumroy, of, in, and to a certain tract of land, situate in Derry Township, adjoining land of James Henry, Nathaniel Doty, William Reed, William Bell, Robert Thompson, James Wilson, and others, containing 400 acres, more or less, about sixty acres cleared, thirty acres of which is in meadow, having thereon erected a grist mill, shingle-roofed log dwelling house, shingle roofed log barn, with an apple orchard thereon growing, and also of such further proceedings in the premises as showed a legal and valid sale by said sheriff of the premises so levied upon, as aforesaid, on 18 February, A.D. 1822, to one John Rhey, for the sum of fourteen hundred and one dollars; also a deed from said sheriff to said Rhey for said premises so levied upon and sold as aforesaid, duly acknowledged in said court on 9 April, 1822, and also evidence that, at the time of said levy and sale, said George Pumroy was the owner of said premises described in the plaintiff's declaration, and sought to be recorded in this action; also a conveyance in fee of said premises by said John Rhey on 16 June, A.D. 1841, to said Isaac Atkinson."

"And the plaintiff, on said trial, for the purpose of exhibiting and defining what he claimed as embraced in said levy, sale, and conveyance to said Atkinson, as

aforesaid, gave in evidence the plot or draft marked on the outside 'A, November 18, 1846,' hereto attached, and herewith incorporated as a part of this bill, and claimed before said court and jury that said levy, sale, and conveyance to said Rhey embraced and contained the said land represented in said

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plot or draft by the black lines, embracing 326 1/2 acres, and also 158 1/2 acres, and gave evidence that William Bell and William Reed, two of the persons named as adjoiners of the said 158 1/2 acres, as indicated on said plot or draft, are not adjoiners of any part of the 326 1/2 acres. The defendant, on the contrary thereof, insisted and claimed that said levy and sale did not embrace or contain any part of the land described in the plaintiff's declaration which is the same marked 158 1/2 acres on the plot, but, on the other hand, was limited and confined to that marked on the said plot 326 1/2 acres &c.; and thereupon, after giving evidence to show that the improvements on the said last-mentioned tract of 326 1/2 acres &c., corresponded with the description in the levy, that the tract in dispute contained upwards of one hundred acres of cleared land, with an apple orchard, a shingle-roofed log dwelling house and barn and stable thereon erected, and that the said two tracts were entirely distinct, separate, and disconnected from each other, in order further to prove that said levy and sale did not embrace or contain any part of the land described in plaintiff's declaration, but, on the other hand, was limited and confined to that marked on the plot 326 1/2 acres, called John Klingensmith, Esq., late Sheriff of Westmoreland County, by whom the levy and sale in the case were made, and proposed to prove by him as follows:"

"That he went to the land of George Pumroy in 1821 to make the said levy; that the said George Pumroy furnished him with the adjoiners of both tracts; that upon inquiring of said Pumroy whether the description furnished embraced more than one tract and learning from him that it covered both, he objected to making the levy in that way; that the said Pumroy acquiescing in his decision, he then struck off, as well as he could, the names given to him as adjoiners exclusively of the tract in dispute in this action, and supposed that he had stricken them all off; that on the inquisition held upon the levy, endorsed on the *fi. fa.*, the land in dispute

was not submitted to the jury, or acted upon by them, but only what was called the mill tract -- or in other words that upon which the purchaser entered after the sale; that at the sale, upon a representation made to him by some of the bystanders that there was an ambiguity in the description of the land which rendered it uncertain whether one or both tracts were included within it, he stated in the presence and hearing of John Rhey that he was selling only the mill tract, and that bidders must govern themselves accordingly; that he made the same representation to Paul Morrow, by whom the property was purchased, as the agent and for the use of said Rhey; that after the said sale he was directed to execute

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the deed to said Rhey, which was accordingly done; that at the time of the execution thereof, it was again represented, and perfectly understood by both parties that the property conveyed in said deed embraced only the mill tract, and not the land in dispute; and that at a subsequent period, not very remote from the time of the said sale, upon a representation to him by some of the neighbors that the said Rhey was asserting his claim to the property in dispute under said sale, he took occasion to inquire of him whether the fact was as represented, to which the said Rhey replied that he might have said so in a jocular manner, but that he never intended to claim both tracts, for that he knew that he never bought both tracts, and that he never paid for both tracts, and to claim them now then would be too much like putting his hand into another man's pocket and robbing him."

"To the admission of which testimony of said Klingensmith, proposed to be given by the defendant as aforesaid, the plaintiff objected and insisted that the same could not be legally admitted for the purpose aforesaid."

"Whereupon said court did overrule said objection and admitted said testimony of said Klingensmith so proposed to be given as aforesaid, and the said Plaintiff here in court, and during the trial of said cause, excepts to the judgment, opinion, and determination of said court in admitting said testimony; and as the facts aforesaid do not appear of record, the said plaintiff prays that this bill of exceptions may be certified, signed, and sealed by the judges of said court, that the same may

become part and parcel of the record in said case. By the court allowed and ordered to be lodged on file."

"R. C. GRIER [L.S.]"

"THOMAS IRWIN [L. S.]"

The jury found a verdict for the defendant.

Upon a writ of error sued out by the plaintiff, the case was brought up to this Court.

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MR. JUSTICE GRIER delivered the opinion of the Court.

The single question in this case arises on a bill of exceptions to the admission of certain testimony. In order to judge of its correctness, we must ascertain what was the matter in dispute before the jury at the time the testimony was offered and received.

The action was ejectment for a tract of land containing 158 1/2 acres. In 1822, George Pumroy was owner of this tract, and also of another of 326 1/2 acres lying near to it but not adjoining. A judgment had been obtained against Pumroy for the sum of \$400 and an execution issued on which the sheriff returned that he had levied on "a certain tract of land, situate in Derry Township, adjoining lands of James Henry" and a number of others, "containing 400 acres, more or less, of which 60 acres were cleared land, and 30 acres of meadow, and on which were erected a grist mill, dwelling-house," &c.; A sale was made by the sheriff under a writ of *venditioni exponas*, and a deed delivered by him to John Rhey, legally conveying to him the tract of land as described in the levy. Under this deed, Rhey took possession of the tract of 326 1/2 acres, on which the grist mill was erected, and has held it from the year 1822 till the present time. In 1841 he made a conveyance to Isaac Atkinson, the plaintiff's lessor, a citizen of Ohio, in whose name the present ejectment was instituted for the other tract, owned by Pumroy, of 158 1/2 acres, and now in the possession of the defendant Cummins.

The only evidence offered in support of the plaintiff's claim

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was that two of the adjoining tracts, called for as boundaries in his deed, did not adjoin the mill tract of 326 1/2 acres, but were contiguous to, and adjoined the tract of 158 1/2 acres. It was admitted that all the other parts of the description correctly applied to the larger tract, but it was contended that if this portion of the description applied only to the other, the levy and deed for this reason included both.

The defendant, on the contrary, insisted that the levy and sale did not embrace any part of the land in dispute, and gave evidence to prove that it was a distinct and separate tract of land, having a house, barn, orchard, and 100 acres of cleared land, not occupied or used in connection with the larger or mill tract. They contended also that the deed called for but one tract of land, which was well described, except in this one particular, which was evidently an ambiguity, caused by a mistake of the sheriff in making his levy.

The defendant might perhaps have safely rested his case on the evidence as it now stood, but in order to remove all possible doubt he offered to prove by the sheriff

"how the mistake in the description occurred, and that the purchaser and other bidders at the sale had remarked this ambiguity in the description, and were informed how it happened, and were perfectly aware that but one tract was levied on and offered for sale, called the mill tract. That Rhey, the purchaser, was fully aware of it, and accordingly claimed and took possession of the mill tract only; that the sheriff, having afterwards heard a report that Rhey was asserting a claim to the property in dispute, took occasion to inquire of him if it was true' and that Rhey replied"

"that if he had said so it was only in jest; that he had bought and paid for one tract only, and to claim them both would be too much like putting his hand in his neighbor's pocket and robbing him."

To the reception of this testimony the plaintiff's counsel objected, and the admission of it by the court forms the subject of the bill of exceptions now under consideration.

It is contended that this testimony ought not to have been received because

"the levy, *fieri facias*, *venditioni exponas*, sheriff's deed &c., are records, and parol evidence is not admissible to contradict, vary, or limit the description of the premises contained in them."

This proposition is undoubtedly true. But it assumes the very fact in dispute and on which the jury were about to pass on parol proof given by both parties. It is true that if a sheriff levies on a whole tract of land, and describes it accurately in his levy and deed, parol testimony cannot be received to show

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that he intended to sell less than his deed describes or that he excepted a part of the premises at the time of the sale.

But that is not the case before us. The testimony offered is not to contradict the levy and deed, but to explain and confirm them. The plaintiff's testimony had shown that there was a latent ambiguity on the face of his deed. It purported to convey a single tract of land; it described one tract completely, with a single exception which applied to another. It might be void for uncertainty if its description equally applied to two tracts, while it clearly purported to convey but one. It might convey one, and the part of the description which did not apply to that would be rejected as *falsa demonstratio*, or misdescription. Or it might possibly be intended to convey both; but in the present case the latter supposition had hardly a shade of probability to support it.

It would be of little profit to notice the infinite variety of cases on this subject, or to seek for one precisely in point with the present. The general rule is well stated by Tindal, Chief Justice, in the case of *Miller v. Travers*, 8 Bingh. 244, that

"in all cases where a difficulty arises in applying the words of a will or deed to the subject matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject matter really intended to be granted or devised."

The deed in this case called for but a single tract of land, the purchaser had himself taken possession and held up to certain boundaries for near twenty years, and had thus by his acts given his own construction of an ambiguity in his deed which he now showed by extrinsic evidence to exist. The evidence offered tended to confirm what appeared on the face of the deed; that but one tract was sold; that the practical location of his grant made by the purchaser was correct; that he had not acted under a mistake of his just rights, but had a due appreciation of the merits of the claim now set up to the land in question. This testimony may have been superfluous and unnecessary, but was not irrelevant or illegal. It did not contradict the record or deed under which the plaintiff claimed, but showed the gross injustice of the claim now attempted to be established under cover of an ambiguity in their terms.

The judgment of the circuit court is therefore affirmed.

ORDER

This cause came on to be heard on the transcript of the record

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from the Circuit Court of the United States for the Western District of Pennsylvania and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.