Henderson Vs. Tennessee

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Appeal No. : 51 U.S. 311

Appellant : Henderson

Respondent : Tennessee

Judgement :

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Henderson v. Tennessee

51 U.S. (10 How.) 311

ERROR TO THE SUPREME

COURT OF TENNESSEE

SYLLABUS

If the defendant in an ejectment suit claims a right to the possession of land derived under a title which springs from a reservation in a treaty between the United States and an Indian tribe, and a state court decides against the validity of

such title, this Court has jurisdiction, under the twenty-fifth section of the Judiciary Act, to review that decision.

But if such defendant merely sets up the title of the reserved as an outstanding title, and thus prevents a recovery by the plaintiff, without showing in himself a connection with the title of the reserved, and then a state court decides against the defendant in the ejectment, this Court has no jurisdiction to review that decision.

In order to give jurisdiction to this Court, the party must claim the right for himself, and not for a third person, in whose title he has no interest.

An action of ejectment was brought in the Circuit Court for

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Monroe County by the lessee of the State of Tennessee, against Richard Fen, for a tract of land at Toqua, with notice to R. Stapp, W. F. Brown, John Beatty, and Solomon Aikin, as tenants in possession, endorsed, "Den, Lessee of the state, v. Fen &c.;, to Henderson and Calloway, issued 27 January, 1841." The declaration and notice being returned by the sheriff as served on the tenants in possession, Stapp, Brown, Beatty, Aikin, they appeared, and on the application of Thomas Henderson and Thomas H. Calloway, they were, "by leave of the court, admitted to defend in the room and stead of the tenants sued," entered into the common rule, and pleaded not guilty.

The material facts of the case are, that the land in controversy was a school section, and that the school commissioners had taken possession of and held it until a law was passed by the Legislature of Tennessee directing the school lands to be sold. About that time, one John Lowry, professedly as attorney and agent of Toqua Will, obtained possession of the land, and retained it until about 1836, when the school commissioners regained the possession, and retained the same until 1837 or 1838. Then Thomas Henderson, one of the plaintiffs in error, got possession of the tract for the heirs of one Andrew Miller, under which title it has since been held.

Andrew Miller, at the date of the Cherokee treaty of 1817, was the head of an Indian family, and resided in the Cherokee nation, east of the Mississippi; about 1 March, 1818, he settled and made improvements on the land in dispute; and on 24 May, 1818, registered his name in the office of the Cherokee agent for a reservation in right of his wife, and designated, on the books of said agent, this land as the location by him selected for reservation. From that time until he was killed August, 1818, he, with his wife and part of his family, resided on the land, claiming it as a reservation, on which he said he intended to live and die. A few days after his death, his widow sent for John Black and requested him to take possession of the land and hold it for her and her children. Black offered her $1,000 for her claim, which was refused. Black was placed in possession in the fall of 1818 by Mrs. Miller and George Hicks and James Chisolen, two Cherokees who had taken charge of Miller's estate. Two of Miller's children lived with Black were sent to school, and the expense paid out of the profits of the land. Black held possession for the children of Miller, who remained with him till put off by the school commissioners in the spring of 1822. Afterwards, Thomas Henderson got possession for the children of Andrew Miller. The land was included in the cession made to the United States by the Cherokee treaty of 1819.

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The court instructed the jury, that

"although the ancestor, Andrew Miller, registered his name for the place in dispute, and took possession thereof in the spring of 1818, and died upon the place in July or August of that year, and before the treaty of 1819, no title vested in him, and consequently none could vest or descend to his heirs."

Verdict for plaintiffs. On appeal to the Supreme Court of Tennessee, the judgment of the Circuit Court of Monroe was affirmed. Thereupon the case is brought before this Court by writ of error, under the twenty-fifth section of the Act of September 24, 1789.

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

The first question to be decided in this case is whether the Court has jurisdiction.

The case is brought before us by a writ of error to the Supreme Court of the State of Tennessee. It appears by the record, that the decision turned upon the title of Andrew Miller to the lands in question, under the treaties of 1817 and 1819, with the Cherokee nation. Andrew Miller was the head of an Indian family when the first treaty was made, and it was insisted at the trial that the title to this land was in his heirs, by virtue of the reservations contained in these treaties. The decision was against the validity of this title, and the question is whether the plaintiffs in error claimed under it. If they did not, this Court has no power to revise the judgment of the state court.

It was an action of ejectment. The plaintiffs in error were permitted by the court to appear as defendants. They were not the tenants in possession when the suit was brought. The process was served on other persons named in the proceedings, and the record does not show in what character, or upon what ground, the plaintiffs in error were permitted to appear and defend the suit.

Andrew Miller died in 1818, and the land in dispute was held for his children until 1822, when the state took possession of it, claiming title. The widow of Miller removed to the Cherokee nation, in their new settlement on the west of the Mississippi, soon after his death, and the children followed her when the state took possession of the land; and they have all remained there ever since. The right to this property appears to have been continually in dispute since the treaties above mentioned, and after the removal of Miller's children the possession changed hands several times before this suit was brought.

The bill of exceptions states that Henderson, one of the plaintiffs in error, got possession for the heirs of Andrew Miller in 1837 or 1838, under which title it was held down to the commencement of this suit. But it is not stated that he or Calloway had any authority from the heirs of Andrew Miller.

On the contrary, it is expressly stated that they set up no title in themselves, but relied for their defense on an outstanding title in the heirs of Andrew Miller.

Now in the language of ejectment law, an outstanding title means a title in a third person, under which the tenant in possession does not claim. And as no one has a right to enter upon the land and eject the tenant but the person holding the legal title, if the tenant can show that the title was in a third person it defeats the action, although the tenant sets up no title in himself. This was the defense in the case before the court. If they had been in possession under the heirs of Miller, as tenants holding under their authority, then the title of the heirs would have been the title of the tenants, and they could have defended their possession, by showing title in themselves derived from the heirs. For although the landlord may appear and defend on account of his own interest, yet his appearance is not necessary for the protection of the tenant. The tenant may show the title of the landlord, and his own right derived from him. And if the plaintiffs in error had made this defense, they would evidently have claimed a right to the possession under a treaty of the United States; and as the decision was against the right, this Court would have jurisdiction, and might reverse the judgment if they deemed it erroneous. But they claimed no right to the possession under this title. They set it up as a title in a third person, not to show a right in themselves, but that the lessor of the plaintiff had none, and therefore had no right to enter upon them. They might have been mere trespassers or intruders, without any authority from the legal owner, and yet this defense would have been a good one, if the outstanding title was superior to that produced by the lessor of the plaintiff.

The right to make this defense is not derived from the treaties, nor from any authority exercised under the general government. It is given by the laws of the state, which provide that the defendant in ejectment may set up title in a stranger in bar of the action. It is true, the title set up in this case was claimed under a treaty. But to give jurisdiction to this Court, the party must claim the right for himself, and not for a third person in whose title he has no interest. The case in 9 U. S. 5 Cranch 344, *Owings v. Norwood's Lessee,* is in point. And the same

doctrine was reaffirmed in *Montgomery v. Hernandez,* 12 Wheat. 129; *Fulton v. McAffee,* 16 Pet. 149; and *Udell v. Davidson,* 7 How. 769.

The heirs of Miller appear to have no interest in this suit, nor can their rights be affected by the decision. The judgment in this case is no obstacle to the assertion of their title in another

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suit, brought by themselves or any person claiming a legal title under them. And in such a suit this Court would have jurisdiction upon a writ of error, whether the judgment was in a circuit court of the United States or in a state court.

But this writ of error must be

Dismissed for want of jurisdiction.

MR. JUSTICE WOODBURY dissented from the opinion delivered by the Court.

My view of the present case is that this tribunal has jurisdiction over it, and, also that the judgment below ought to be reversed.

In order to enable us to exercise jurisdiction in this class of causes, it need only appear that in the state court some right or title set up under treaty with the United States was drawn in question and overruled. The title set up below by the defendants seems very clearly to have been one of this character. The record states that

"it was proved by sundry witnesses that Andrew Miller was the head of an Indian family; resided in the Cherokee nation east of the Mississippi at the date of the Treaty of 1817 between the United States and the Cherokee nation; that from the spring of 1818 till his death in July or August of the same year, he resided on the land in dispute, claiming the same as a reservation, where he said he intended to live and die, and that the land in dispute was not ceded by the treaty of 1817, but was by that of 1819."

Now on such facts it is averred and admitted that the court instructed the jury

"That although the ancestor, Andrew Miller, registered his name for the place in dispute, and took possession thereof in the spring of 1818 and died upon the place in July or August of the same year, and before the treaty of 1819, no title vested in him, Andrew Miller, and consequently none could vest or descend to his heirs."

It is difficult to conceive how it is possible to say that a title under a treaty was not thus set up or drawn in question, and was not overruled by the state court, so as to give to this Court jurisdiction to revise any error committed. Such a title seems to have been the only one interposed against a recovery, and was the only one decided on below, and was there explicitly overruled.

The sole argument offered here to obviate this conclusion does not appear to have been there presented or relied on. It is that, though Miller's title was there set up and overruled, it was not set up as existing in the tenants, or as the title under which they entered or claimed.

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But the Judiciary Act, in order to give to this Court jurisdiction under the twenty-fifth section, does not in terms require that such title should have been entirely vested in the tenants. It seems sufficient if it was drawn in question, or was set up, and could legally be set up, in defense and was overruled. 1 Stat. 85

What is *drawn in question* in any case depends on the facts and the law applicable to that particular case. Here the title of Miller's heirs under the treaty, I have already shown, was certainly drawn in question, and as certainly was overruled by the judge.

But it is argued that the defendant must have had a right under the United States to make the defense, or we have no jurisdiction. That, however, is begging the question on the merits. It seems quite sufficient to have him set up such a right and to have it overruled.

Here too, the court below seemed to concede that Henderson possessed such a right under Miller's heirs, but decided against him on the ground that the right of Miller himself was defective.

Again, the question of right is not the guide, but the question of claim, and the claim's being overruled. Nor need the claim be to the whole estate or interest. I such an action as this, the persons in possession may have, in themselves, no title in fee, nor for life, nor even for years. It is sufficient if a mere tenancy at will, for or in behalf of those possessing a larger estate, is claimed.

So it may be only a naked possession, if the legal estate is shown to be in other persons than the plaintiff, the latter not being authorized to disturb the possession of the tenant, unless he has the legal estate. 4 Burr. 2484; 22 U. S. 9 Wheat. 515; *Greenleaf's Lessee v. Birth,* 6 Pet. 302.

Here, however, the defendants appear to have gone further and to have made a claim in privity with the heirs, or set up a right under Miller and the treaty, though not to the whole interest. In a just view of the record, therefore, they seem to have brought themselves within what is now required, even by the opinion of this Court. Because, though the original defendants claimed no title in themselves, unless it was a tenancy at will under Henderson and Calloway, and hence, probably, the latter were requested to defend, and did defend, yet it clearly appears on the record, that the latter set up rights for the heirs of Miller, and relied in defense on the title of those heirs, and the court did not overrule the propriety of such a mode of defense, but the title itself of Miller's heirs set up under the Cherokee treaties.

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The title under the treaty was not only thus set up and overruled, but it was set up by Henderson and Calloway, claiming rights under it in privity under the heirs of Miller.

The widow of Miller, as early as 1818, is proved to have put Black in actual possession of the land, "to hold it for her and the heirs of Andrew Miller." And he,

with two of the children, remained in possession and cultivated the land till 1822. No question can exist that if Black was the defendant here, he could rightfully protect himself under the Miller title. But it is said that Henderson and Calloway were never, like him, put into possession by the widow or the heirs, and never held it for them with any privity by lease or otherwise. We think differently. Another portion of the record says expressly, after Black had been expelled by the plaintiffs, and the plaintiffs by others, between 1822 and 1837 or 1838, that "Thomas Henderson got possession for the heirs of Andrew Miller, under which title it has since been held."

During the three or four years which ensued before this action was instituted, it would therefore appear not only that the present defendants were in possession, in person or by others, "for the heirs," which is the very expression used as to Black's possession, but would naturally mean in one case no less than the other, with the privity or request of the heirs and as agents for them. But to remove all doubt as to this in respect to Henderson, who entered for the heirs of Miller, the record adds that under the Miller "title it has since been held."

Giving a fair construction to all the words in the record and to all the other facts stated, it is difficult to misunderstand this language. The widow and heirs regarded the reservation as valuable. She refused to sell their rights in it for $1,000 offered by Black. It was not abandoned as unworthy of attention, but Black was first put into possession with privity as agent or tenant to them. And after he was expelled, Henderson, as another agent, seems not only to have regained the possession for the heirs, but to have held it by their title since, and probably as their agent or tenant, with like privity. The notice to Henderson, Likewise, to take on himself the defense in this case, and his admission by the court to defend, confirm this view. A third person, disconnected entirely with the title or right of possession, would not usually be admitted. 10 Johns. 69; 1 Caines 151; *Fairclaim v. Shamtitle,* 3 Burr. 1299, 1301. He was doubtless admitted, then, from his connection with Miller's title. Lord Holt says, Comb. 209, "No person is admitted to defend in ejectment unless he be tenant and is or hath been in possession or receives the rent." Bac.Abr. Ejectment, B. 2. Runnington on Eject. 192, 199, 201, 209.

It is urged further in objection that Miller's heirs are not parties here. Neither is the owner of the fee a party in ejectment in any case where a lessee or agent under him makes a sub-lease and is admitted to defend for his sub-lessee.

Looking to the whole record, then, these considerations seem to dispose of the question of jurisdiction in favor of the original defendants. But the plaintiffs below rely on some detached expressions in the record from which to infer a different result. Such as the judge speaking of "an outstanding title" in Miller's heirs. Probably, as already explained from the whole case, the judge meant by the words "outstanding title" one which did not exist in the plaintiffs, and one which, though represented by, had not been conveyed to the defendants by any formal deed. Under that aspect all is natural and our jurisdiction is unimpaired. Such a case would be entirely unlike that of *Owings v. Norwood's Lessee,* 5 Cranch 344. But if he meant by outstanding title one which existed elsewhere, but which the defendants did not set up, nor mean to avail themselves of as a defense by their connection with it, he departs in all essentials from the rest of the record, and all the proof in it, that Henderson entered for the heirs of Miller, held it two or three years under their title, and set it up as his defense.

My dissent rests on this view of the case, though it is by no means certain, that if a naked outstanding title were shown merely to defeat the plaintiff, and not held under nor relies on through any privity in defense, and it was examined by the court below, when set up to defeat the action, we should not exercise jurisdiction to revise the decision if a treaty connected with that title is there overruled, because the treaty is a part of the defense there as much as in other cases. It is relied on for exemption in the action as much as in other cases. The title under a treaty is called in question and decided against as fully as in other cases. The dangers from such a defense being overruled by a state court are as serious as in other cases.

So a judgment of a state court is reversible here at all only when in collision with defenses offered under authority from the United States. And here the state court not only overruled an authority so set up, but did it in favor of their own state and of their own citizens, and against the validity of a claim in behalf of an Indian widow and Indian orphans. On general principles, therefore, and with entire respect for the court of Tennessee, it would seem proper that if any case should be open to revision by another tribunal, it ought to be one of this character.

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As it would be of no use to sustain jurisdiction here unless in favor of the validity of the title overruled, I would add a few words as to the merits being with the Miller title. It must be conceded that the title of Miller's heirs ought to be upheld against the plaintiffs if it became perfected before his death, or if it was so perfected afterwards as to operate or relate back to a time before his death.

The judge below rested his ruling entirely on the position that Miller, dying before the treaty of 1819, though after that of 1817, had acquired no title to the land claimed. But he had fulfilled all the requisites of the treaty of 1817, not afterwards varied by that of 1819. He entered on the lands under the treaty of 1817, which extended to territory afterwards, as well as then, ceded. He improved them under it. He was the head of an Indian family. He registered them under it. *See* Treaty, art. 8, 7 Stat. 159. He resided on them under it. And the only remaining requisite, the census, which had been provided for by the first treaty, was dispensed with by the treaty of 1819, 7 Stat. 195. Though his death, then, had intervened, his rights had commenced under the treaty of 1817, and become perfected by it and by that of 1819, ceding the territory and dispensing with the census. All, then, should relate back to the period of his entry and registration. It is very familiar law to have proceedings operate back to their commencement, and references need not be extended beyond the common cases of amendments in writs, records, and returns, as well as titles to land confirmed or ratified where before partly completed. Com.Dig. Confirmation; Vin.Abr. Relation; 4 Kent.Com. 450, n.; *Clary's Heirs v. Marshall's Heirs,* 5 B.Mon. 266; *Landes v. Brant, post,* 51 U. S.

348 ; 12 Johns. 141; 3 Cow. 75; 12 Mo. 145.

As this Court, in the opinion just delivered, has not gone into the consideration of the validity of the title of Miller's heirs, I forbear further remarks upon it until brought before us in some other action and form more acceptable to a majority of the members of this tribunal.

JUSTICES Mc LEAN, WAYNE, and Mc KINLEY concurred with MR. JUSTICE WOODBURY.

ORDER

This cause came on to be heard the transcript of the record from the Supreme Court of the State of Tennessee and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that this cause be, and the same is hereby, dismissed for the want of jurisdiction.