

Mumford Vs. Wardwell

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Appeal No. : 73 U.S. 423

Appellant : Mumford

Respondent : Wardwell

Judgement :

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Mumford v. Wardwell

73 U.S. (6 Wall.) 423

ERROR TO THE CIRCUIT COURT FOR

THE NORTHERN DISTRICT OF CALIFORNIA

SYLLABUS

1. Where a paper in the form of a special verdict -- except that after stating the facts, it did not refer the decision on them to the court in the conditional and alternative way usual in such verdicts, but found "a general verdict for the plaintiff

subject to the opinion of the court upon the foregoing recited facts" -- was "*agreed to as a special verdict*" by counsel in the cause, filed of record and passed on as an agreed case by the court below, this Court -- remarking that as a special verdict the paper was defective because not ending with the usual conclusion -- in view of the facts just mentioned considered it as a special verdict or agreed case, and on error to a judgment given on it below adjudged the case presented by it.

2. Where a statute gave to a city named certain lands of the state, excepting such as had been sold or granted by a certain body or certain officers in accordance with terms specified, or had been sold or granted by a certain officer and confirmed by a certain body, but declared also that the deed by which any of the excepted lands were conveyed by such body or officer should be "*prima facie* evidence of *title* and possession, to enable the plaintiff to recover possession of the land so granted," *held* that the deed made under the statute being in evidence, a compliance with the terms upon which sales were to be made (such as sufficient notice) was, under its terms, primarily to be presumed, and that it was cast upon anyone alleging *non* compliance to prove it.

3. Where a statute of California, passed in 1851, granted certain lands, excepting from the grant such as had been granted by a particular officer,

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and "registered or recorded on or before April 3, 1850, in some book of record now in the office &c., of the recorder of the county," *held* that the term "book" was satisfied, within the meaning of the act, by copies of the deeds on sheets not bound or fastened together in any manner, but folded, the name of the purchaser and number and designation of the class of the lot sold being endorsed thereon, each distinct class being kept in a separate bundle, and the sheets not being bound up in the form of books, until 1856, when they were so bound, each class forming a separate volume.

Mumford -- plaintiff both below and in error here -- brought ejectment against Wardwell for a "one *hundred* -vara lot," No. 186 on the official map of San

Francisco. Plea, possession as owner under a good title. The record showed that the case was set down on that issue for trial August 26, 1863, when the jury found a verdict in these words:

" *J. E. Mumford v. C. Otis Wardwell, United States Circuit Court* "

" *Northern District of California* "

"We, the jury, find a verdict for the plaintiff, subject to the opinion of the court."

"GEORGE AMERAGE, Foreman"

"SAN FRANCISCO, August 26, 1863."

The finding set forth no case, nor had any been previously stated. This verdict was entered of record, but no notice apparently taken afterwards of it. Subsequently, on the 29th August, *by consent of counsel*, it was ordered that the further hearing of the cause should be set down for September 5. The record went on:

"And afterwards, to-wit, on the 5th day of September A.D. 1863, the following special verdict, by stipulation of counsel, was duly entered of record in said cause, to-wit:"

" *SPECIAL VERDICT*"

"In the Circuit Court of the United States for the Northern District of California. "

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" *JAMES E. MUMFORD, Plaintiff v. CHAS. O. WARDWELL, Defendant*"

" *AT COMMON LAW*"

"And now, on this 26th day of August, A.D. 1863, come the parties aforesaid by their respective attorneys, and thereupon come a jury, to-wit: [the names of the jurors were here given], twelve good and lawful men, who, being duly elected, tried, and sworn, the issues herein joined between said parties well and truly to try,

and a true verdict to render according to the evidence, after hearing the evidence of said parties respectively, the jurors aforesaid upon their oaths aforesaid to say . . ."

Following this was set forth the titles of the respective parties to the lot in controversy. The document ended thus, the signatures of the respective counsel being appended at the end:

"And the jurors aforesaid, upon their oaths aforesaid, do further say that they find *a general verdict for the plaintiff, subject to the opinion of the court upon the foregoing recited facts.* "

"The above is *agreed to as a special verdict in this cause.* "

It will be observed that in what was here agreed to "as a special verdict" there was no such conclusion as is technically usual in special verdict actually found by a jury -- that is to say the finding did not, after presenting the case, refer the decision of it to the court, with the conditional and alternative conclusion that if the court should be of the opinion, in view of the facts, that the plaintiff was entitled to recover, then they found for the plaintiff, but if otherwise, they found for the defendant.

But this matter was not the subject of remark either by counsel here or apparently by them in the court below, and the paper agreed to was treated everywhere as a case agreed on and stated for the opinion of the court.

The title of the respective parties as set forth in the case as settled was as follows, that of the defendant, for more clearness, being here stated first:

1. *Defendant's title.* The lot was what was called a water lot

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-- that is to say, formed part of certain flats, situated below the high water mark of San Francisco Bay. The conquest of Mexico in 1846 having put the whole region about San Francisco into the control of the military authorities of the United States,

General Kearney, then acting as Military Governor of California, by deed reciting that he was acting in virtue of authority vested in him by the President of the United States, conveyed these flats (with some unimportant reservations) to the Town of San Francisco, a proviso being attached to the grant that they should be divided into lots, and after three months' notice sold at auction to the highest bidder for the benefit of the town. On the *1st day of December, 1849*, the ayuntamiento or town council of San Francisco ordained:

"That two hundred *fifty* -vara town lots be sold at public auction on *Friday, the 10th instant*. "

On the same 10th of December, 1849, General J. W. Geary, then acting as alcalde of San Francisco (under which title the municipal authority of that city was exercised by officers, either appointed by the military commandant or elected by the people) -- by deed reciting that the ayuntamiento or town council of San Francisco, by resolution passed on the *1st day of December, 1849*, had ordered that certain town lots should be exposed to public sale and sold to the highest bidder, and that after *due public notice* &c.;, one of the said lots, No. 186, so ordered to be sold, was sold to D. O'Brien &c.; -- granted and conveyed the said lot, No. 186, to O'Brien aforesaid.

This deed, like every other deed made by Alcalde Geary during his term of office, consisted of a printed blank on one sheet, filled up at the time it was issued, and like them was not registered or recorded except in the following manner, that is to say copies of the deeds consisting of similar blanks, filled up in like manner by the clerk of Alcalde Geary, were retained in the office of the alcalde. These copies were *folded up*, the name of the purchaser and number

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of the lot and designation of the class to which it belonged -- that is to say, whether one hundred-vara, fifty-vara, or water lot -- being endorsed thereon, and those of each distinct class were kept in said alcalde's office in a separate *bundle*, but these several copies were not *bound or fastened together in any manner*. In that

state they passed into the office of the county recorder, on its organization in 1850, where they continued to remain until 1856, *when they were bound up in the form of books*, each class forming a separate volume. The grant to O'Brien was filled up in the manner above stated, and a copy of it also, made as above stated, was kept in like manner in the bundle composed of copies of grants of one-hundred-vara lots, and so continued until the time it with the other copies was bound up as above said, in 1856.

Whether General Kearney had authority to make a grant such as he did make to the Town of San Francisco, or whether the ayuntamiento or town council of San Francisco ever directed a sale of the lot in question -- which it will be remembered was a hundred-vara lot, not a fifty-vara one -- the case agreed on as a special verdict did not state.

Sometime after the sale, that is to say, on the 26th of March, 1851, the Legislature of California granted these flats, including this lot, to the City of San Francisco for ninety-nine years. But the statute contained (2) two exceptions. It excepted from its operation those portions of the flats which had been either,

" *First*, sold by authority of the ayuntamiento, or town or city council, or by any alcalde of the said town or city, at public auction, *in accordance with the terms of the grant known as Kearney's Grant to the City of San Francisco*, "

or

" *Second*, sold or granted by any alcalde of the said City of San Francisco, and *confirmed* by the ayuntamiento or town or city council thereof, and also *registered* or *recorded* on or before the 3d day of April, A.D. 1850, in some *book of record*, now [that is, on the 26th day of March, A.D. 1851] in the office, or custody, or control of the Recorder of the County of San Francisco. "

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It contained also (3) this enactment as to the effect, viewed as evidence, of any deed, by which any of the lands excepted were conveyed or granted by any

ayuntamiento, common council, or alcalde, declaring that it

"Shall be *prima facie* evidence of *title* and possession to enable the plaintiff to recover possession of the land so granted."

Such was the title of Wardwell, defendant below and here.

2. *The plaintiff's* was a sheriff's deed for the lot, on execution upon a judgment against the City of San Francisco, all confessedly regular, but all subsequent to the statute above quoted.

On this case, the court below entered judgment for the defendant Wardwell.

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MR. JUSTICE CLIFFORD delivered the opinion of the Court.

Plaintiff brought ejectment against the defendant to recover possession of a certain tract of land situated in the City of San Francisco, describing it by metes and bounds, and as the one hundred-vara lot numbered one hundred and eighty-six, as laid down and represented on the official map of the city. Defendant pleaded that he was in the possession of the lot as owner under a good title, which the plaintiff in his replication denied. Parties went to trial upon that issue, and the jury empanelled to try the issue returned the following verdict, as appears by the record: "We, the jury, find a verdict for the plaintiff, subject to the opinion of the court."

I. 1. Such a verdict is certainly irregular in form, and it does not appear that it was ever made the subject of any

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further action. Instead of affirming or amending it, or setting it aside, the parties and the court seem to have treated it as a nullity. No notice whatever was taken of it except that the cause was set for hearing at a subsequent day, but when the time for the hearing came, the parties, by stipulation, entered of record the paper

called the special verdict.

Statement of the introductory allegation of the paper is that a jury came and that they were duly empanelled and sworn and that, having heard the parties, they found the facts as therein recited, but it is not signed by the foreman, and the statement in the conclusion is that the jury return a general verdict for the plaintiff, subject to the opinion of the court upon the recited facts.

Irrespective of the agreement of the parties, it would be difficult to regard the document as the proper foundation of a judgment, because the alleged finding of the jury is not in the alternative, as it should be in a special verdict.

2. Correct practice in such cases is that the jury find the facts of the case and refer the decision of the cause upon those facts to the court, with a conditional conclusion that if the court should be of opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then they find for the plaintiff, but if otherwise, then they find for the defendant. By leave of the court, such a verdict may be prepared by the parties, subject to the correction of the court, and it may include agreed facts in addition to those found by the jury. When the facts are settled and the verdict is reduced to form, it is then entered of record, and the questions of law arising on the facts so found are then before the court for hearing as in case of a demurrer.

3. Verdicts should be general or special, as the jury, in the absence of directions from the court, have nothing to do in respect to a special case. Principal purpose of a special case is that the court may have time to hear the parties and give the questions of law arising at the trial a more deliberate consideration.

4. Such being the understanding between the court and the bar, the entry is made in the minutes that the verdict is

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subject to the opinion of the court, but the entry follows the verdict and is no part of the finding of the jury.

5. Where the verdict is general, the court may enter judgment on the verdict or may set it aside and grant a new trial, but the rulings of the court during the trial cannot be revised on writ of error save by a regular bill of exceptions. Judgment also may be rendered on the verdict in a special case, or a new trial may be granted because the verdict is general, and is for plaintiff or defendant.

6. Exceptions to the order of the court in granting a new trial do not lie in any case, and the losing party in case of judgment in a special case cannot except to the rulings of the court during the trial unless he seasonably reserved the right to turn the special case into a bill of exceptions, because the court has no power, unless otherwise agreed, to render any judgment except upon the verdict of the jury.

7. Special verdicts having a conditional or alternative finding are the proper foundation of a judgment for either party, as the law of the case on the facts found may require, and consequently the judgment of the subordinate court on such a verdict, whether for plaintiff or defendant, may be reexamined in the appellate tribunal without any bill of exceptions. [[Footnote 1](#)]

Viewed strictly as a special verdict, it is evident that the paper under consideration is defective because it does not contain the conditional or alternative finding of the jury, and in that respect it is irregular.

But the parties intended to agree, and did agree, that the facts as found were correct, and entered the paper of record at the time under the leave of the court as a correct statement of the facts in the case. They do not appear to have taken any distinction between a special verdict and a special case or an agreed statement of facts, and the record shows that the judgment of the court was rendered wholly irrespective of any such distinction. Both parties appear to have

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treated the paper as an agreed statement in the court below, and it has been treated in the same way in this Court. Undoubtedly the general verdict was superseded when the paper in question was entered of record, as that was done under the sanction of the court and by the consent of both parties, and it is certain

that the parties intended that the controversy should be finally decided upon the facts as therein agreed.

8. Doubt cannot be entertained upon that subject, and yet such a result cannot follow if the paper is held to be a special verdict unless the opinion of the court is in favor of the plaintiff, as there is no proper conclusion in it to warrant a judgment for the defendant. Regarded as an agreed statement, the paper is in due form, and inasmuch as no objections are made to the proceedings, the Court here adopts that view of the subject as the correct one in the case.

II. Reference will first be made to the title of the plaintiff as shown in the agreed statement. He claims title under a sheriff's deed of the lot, bearing date October 17, 1859, which is in due form, and was duly executed and recorded. Prior to that time judgment had been recovered against the City of San Francisco by one of her creditors in the sum of one thousand and seventy dollars and twenty-five cents, and the city failed to pay the amount. Execution was duly issued on the judgment and delivered to the sheriff of the county for legal service, and the sheriff, in obedience to the command of the process, sold the lot in question to the purchaser as the highest bidder.

Title of the plaintiff is deraigned through various mesne conveyances from the grantee of that deed, as fully explained in the agreed statement. Parties agree that the lot is below what was, prior to any improvements, the natural high water mark of the bay, and that prior to March 26, 1851, it was at all ordinary high tides wholly covered with the tidewaters.

III. 1. Source of the title of the defendant is a deed from the alcalde of the town dated December 10, 1849, to Daniel O'Brien, as set forth in the transcript, and as confirmed by the second section of the Water Lot Act. He holds that title,

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whatever it may be, as deraigned through a regular chain of mesne conveyances from the original grantee. Possession of the premises was in the defendant at the commencement of the suit, and it appears that he had been in the actual

possession of the same for the period of three years.

2. Mexican rule came to an end in that department on the 7th of July, 1846, when the government of the same passed into the control of our military authorities. [[Footnote 2](#)] Municipal authority also was exercised for a time by subordinate officers appointed by our military commanders. Such commander was called military governor, and for a time he claimed to exercise the same civil power as that previously vested in the Mexican governor of the department. By virtue of that supposed authority, General S. N. Kearney, March 10, 1847, as military governor of the territory, granted to the Town of San Francisco all the right, title and interest of the United States to the beach and water lots on the east front of the town, included between certain described points, excepting such lots as might be selected for government use.

Requirement of the grant was that the land granted should be divided into lots and that the lots should be sold after three months' notice at public auction for the benefit of the town. Pursuant to that requirement, numerous lots were surveyed and laid out, and public sales of the same took place at various times as recited in the agreed statement. Lot one hundred and eighty-six was subsequently sold at public auction by the alcalde of the town, and the same was conveyed by deed or grant in due form to the original grantee, under whom the defendant deraigned his title.

3. But the power to grant lands or confirm titles was never vested in our military governors, and it follows as a necessary consequence that the grant as originally made was void and of no effect. Nothing passed to the town by the grant, and of course the doings of the alcalde in selling the lot in question was a mere nullity.

4. California was admitted into the Union September 9,

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1850, and the act of Congress admitting her declares that she is so admitted on equal footing, in all respects, with the original states. [[Footnote 3](#)] Settled rule of law in this Court is, that the shores of navigable waters and the soils under the

same in the original states were not granted by the Constitution to the United States, but were reserved to the several states, and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders. [[Footnote 4](#)]

When the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them, subject only to the rights since surrendered by the Constitution. [[Footnote 5](#)]

5. Necessary conclusion is, that the ownership of the lot in question, when the state was admitted into the Union, became vested in the state as the absolute owner, subject only to the paramount right of navigation. Corporate powers were exercised by the City of San Francisco prior to the time when the state was admitted into the Union, but she was reincorporated April 15, 1851, and the agreed statement shows that the lot described in the complaint is within the corporate limits of the city.

6. Certain lots of land situated in the city and within certain described boundaries were designated in the first section of the Act of the 26th of March, 1851, as the beach and water-lots of the city. [[Footnote 6](#)] Second section of the act granted the use and occupation of all the land so described to the city for the term of ninety-nine years, with certain exceptions as therein provided. First, exception was made of all lands so described which had been previously sold by authority of the ayuntamiento, or town or city council, or by any alcalde of the town or city, at public auction, in accordance with the Kearney grant. Secondly, same exception

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was also made of all lands so described which had been granted or sold by any alcalde of the city, and confirmed by the ayuntamiento, or town or city council, and registered or recorded on or before April 3, 1850, in some book of record now in the office or custody or control of the recorder of the county, and the provision is that all such excepted lands shall be, and the same are hereby, granted and

confirmed to the purchasers or grantees or the persons holding under them, for the term of ninety-nine years. The lot in question is included within the boundaries described in the first section of that act, and it appears that it is not any part of the lands reserved for public use.

7. Based on these facts, the proposition of the defendant is, that his title is a good one, and that the judgment of the circuit court should be affirmed. First, because it appears that the lot being within the first exception, never passed to the city, as it had been previously sold to the original grantee, under whom he claims, at public auction, by an alcalde of the town, in accordance with the terms of the Kearney grant. Secondly, because the lot being within the first section of the Water Lot Act, and having been sold, confirmed, and registered or recorded as required in the third clause of the second section of that act, the title to the same under that sale was ratified to the purchaser by the succeeding clause of that section. Express admission of the parties is that the lot in question is included within the boundaries described in the first section of the Water Lot Act, and the third section of the same act provides that the original deed by which any of those lands were conveyed by any ayuntamiento, alcalde, or common council, shall be *prima facie* evidence of the title and possession. [[Footnote 7](#)]

8. Conveyance of the lot in question was previously made by an alcalde, and the deed of conveyance contains the recital that due public notice of the intended sale was given before it was exposed to sale, and sold to the original grantee. Order of sale was passed by the ayuntamiento only ten days

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before the sale, but there is nothing in the agreed statement to prove that the full notice as specified in the grant to the town had not been previously given as required. Clear inference from the recitals of the deed is that it had been previously given, and the burden of disproving the presumption is, by the express words of the third section of the act, cast upon the party alleging the contrary.

IV. 1. Suppose, however, it were otherwise, still the judgment of the circuit court is correct, because the agreed statement shows that the lot in question was sold by an alcalde, and confirmed by the ayuntamiento, and registered or recorded within the time required, in a book of record in the office, custody or control of the recorder of the county. Confirmation of the sale by the ayuntamiento is clearly shown, but it is insisted by the plaintiff that the deed was never registered or recorded within the meaning of that requirement. Like the military governor, Alcalde Geary claimed to exercise powers vested in the alcaldes under the Mexican rule, and following the usages of some of his predecessors in office, he made his grants in duplicates, and delivered the original to the grantee, and filed the duplicate copy in his office.

2. Duplicate copies retained in the office were labeled with the name of the purchaser, number of the lot, and the class to which the grant belonged. Such duplicates, although regularly classified and endorsed, were not bound in the form of a book, but each class was kept in a separate bundle, and in that state they were passed into the office of the recorder of the county at its organization. They remained there till 1856, when they were bound into the form of books, each class forming a separate volume.

3. Those books are the only registry ever made of the original titles to these beach and water lots. Unless it be held that the grant in this case was registered or recorded within the meaning of that act, then all the titles are defective, as none of them was registered in any other way. [[Footnote 8](#)]

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Evidently the legislature assumed that some of the lots were duly registered as required, because the act proceeds to grant and confirm all such land to purchasers or grantees and persons holding under them, for the same term as the other lands are granted to the city.

4. Jurisdiction under the Mexican rule had come to an end more than three years when the Water Lot Act was passed, and it is a reasonable presumption that the

legislature knew what the course of proceeding had been in making those grants, and in what condition the evidences of the title were, as they existed in the recorder's office. All the act required was that it should appear, if the land had been sold by an alcalde, that it had been confirmed by the ayuntamiento and that it had been registered or recorded in some book of record now in the office, custody or control of the recorder.

5. Most or all of the grants were made before the office of recorder of the county was created, and of course it cannot be held that the act required that the grants should have been recorded by that officer at the time they were issued. No such registry was in existence at the time, and the better opinion is that the grants of lands so sold and confirmed are duly registered or recorded within the meaning of the requirement in all cases where the duplicate copy of the grant was, at the date of the Water Lot Act, regularly deposited in the office of the county recorder. Although not bound at that date, they had been classified and have since been bound into volumes. Looking at the case in any point of view consistent with the agreed facts, our conclusion is that the plaintiff shows no title and that the decision of the circuit court was correct.

Judgment affirmed with costs.

[[Footnote 1](#)]

[Suydam v. Williamson](#), 20 How. 432; 3 Blackstone's Commentaries 378; *Seward v. Jackson*, 8 Cowen 406; *State v. Wallace*, 3 Iredell 195.

[[Footnote 2](#)]

[United States v. Castillero](#), 2 Black 149; [Romero v. United States](#), 1 Wall. 743.

[[Footnote 3](#)]

9 Stat at Large 452.

[[Footnote 4](#)]

[Pollard's Lessee v. Hagan](#), 3 How. 212.

[[Footnote 5](#)]

[Martin v. Waddell](#), 16 Pet. 410.

[[Footnote 6](#)]

Wood's Digest 519.

[[Footnote 7](#)]

Wood's Digest 520.

[[Footnote 8](#)]

[United States v. Osio](#), 23 How. 279.

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