

**Dirst Vs. Morris**

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**Court :** US Supreme Court

**Decided On :** 1871

**Appeal No. :** 81 U.S. 484

**Appellant :** Dirst

**Respondent :** Morris

**Judgement :**

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**Dirst v. Morris**

**81 U.S. (14 Wall.) 484**

*ERROR TO THE CIRCUIT COURT FOR*

*THE NORTHERN DISTRICT OF ILLINOIS*

## **SYLLABUS**

1. A plaintiff in ejectment, claiming under a deed made on a sale in a foreclosure of a mortgage, may properly put in evidence the record of the proceedings in foreclosure even though the defendant claim by a deed absolute made by the

mortgagor, prior to giving the mortgage under which the foreclosure took place. Showing title from a party previously seized, the plaintiff has a right to exhibit it subject to such decision with regard to its effect as might become necessary after all the evidence is in.

2. Even more obviously has he a right to introduce it as evidence in chief, and when the prior deed absolute under which the defendant claims has not yet been offered in evidence, for in such a stage of the proceeding, the proceedings in foreclosure give apparently a valid title.

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3. Under the Act of Congress of March 3, 1865, authorizing the trial of facts by the circuit courts and enacting that the findings of the court upon them shall have the same effect as the verdict of a jury, this Court, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of evidence. If the court chooses to find generally for one side or the other instead of making a special finding of the facts, the losing party has no redress on error except for the wrongful admission or rejection of evidence.

Russell, being the owner of a large number of lots of land in different counties in Illinois, conveyed one in May, 1837, to Josiah Breese. This deed was not recorded until the year 1864.

In December, 1837, Russell, being a debtor to the United States, mortgaged the same lot with all the several others that he owned to the then Solicitor of the Treasury to secure this debt, and the mortgage was promptly put on record. There was no evidence that the existence of the deed to Breese was known to the agents of the government *at the time when this mortgage was taken by it.*

On the 1st of September, 1841, the United States filed a bill to foreclose the mortgage. The bill was in ordinary form against Russell, but it contained a clause alleging that Francis Peyton, Gordon Hubbard, Josiah Breese, H. S. Fuller, Augustus Garrett, Frederick Fraylor, and several others named, "commissioners of

school lands, have or pretend to have some interest or claim upon the above described premises as judgment creditors or otherwise," and process was accordingly prayed against them.

A summons with subpoena issued accordingly, the record saying:

"Which said subpoena went into the hands of the marshal to be executed, and was returned by him into the said clerk's office, *executed upon all of the defendants by delivering to each of them true copies thereof.* "

The marshal's return, however, on the summons itself, which it was shown by the fee bill on file in the case, was

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the only summons issued, while making return that certain of the defendants named had been served, stated that Breese and the rest had not been found in his district.

An order taking the bill *pro confesso* against the defendants was subsequently entered, reciting "that the said defendants have been duly served with process and have failed to appear."

Final decree having been entered and sale made, the lands were bought in by the United States, whose title by means of a deed from the Solicitor of the Treasury, in whose name the title had been made, became subsequently vested in W. W. Corcoran, who conveyed to W. B. Morris.

The title in Breese under the deed of 1837 of Russell to him became, on the other hand, vested in one Dirst, and he in 1864 having taken possession of the land, which till then had been unoccupied, Morris brought ejectment against him.

The case was tried by the court, under the act of Congress of March 2, 1865, authorizing the circuit courts on written stipulation of the parties to try issues of fact without the intervention of a jury, and enacting that "*the findings of the court upon the facts shall have the same effect as the verdict of a jury.* "

On this trial before the court, the plaintiff, having first put in the mortgage to the government, offered in evidence the record of the foreclosure suit, to which the defendant objected, on the ground (amongst others) that Breese had not been served with process in the cause. To prove this, he referred to the record itself, and also proved by parol that Breese was not in Chicago in 1841, but was in New York, and further produced the original subpoenas and files in the cause. As already stated, the papers showed that Breese had been made a party to the bill, and that his name had been included in the subpoena; and the record recited that the subpoena was returned by the marshal into the clerk's office executed upon all the defendants; but the return of the subpoena did not show any service on Breese. Nevertheless

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the court admitted the record in evidence, and the defendant excepted.

The plaintiff also offered in evidence the deed from the Solicitor of the Treasury (representing the government) to Corcoran, the plaintiff's grantor. The defendant objected to it on the ground that it did not appear thus far in the proceedings, that the United States had any title to the premises in controversy, except as mortgagee, and that as the deed did not purport to assign or convey to the grantee any part of the mortgage debt, and, as the defendant maintained that it did not appear that the mortgage had been foreclosed as against Breese, the owner of the equity of redemption -- therefore, that the said deed did not pass to the grantee any legal title or estate to the premises. The court, however, received the deed, and the defendant excepted.

The defendant, on his part, produced Breese's deed and mesne conveyances to himself and evidence to show that under this title, in 1864, he had taken possession of the property, which till then was unoccupied. He now insisted that his right was paramount to that of the plaintiff. But the court decided that the plaintiff was entitled to recover notwithstanding the possession taken by the defendant, and found the issues generally in the plaintiff's favor. This ruling of the court at the close of the trial was alleged by the defendant as an additional error.

MR. JUSTICE BRADLEY delivered the opinion of the Court.

We think that there was no error in admitting in evidence the record of the foreclosure suit, whether Breese was served with the subpoena or not. If he was not served and could show that fact, he was not bound by the decree. But the decree and sale formed a link in the plaintiff's chain of title from Russell, and at this stage of the cause, the deed from Russell to Breese had not been given in evidence. So far as yet appeared, the evidence was not only admissible, but effective to transfer the title. But it was admissible in any view, for it tended to show title from a party formerly seized, and the plaintiff had a right to exhibit it, subject to such decision with regard to its effect as might become necessary after all the evidence was in.

The same remarks apply to the admission of the deed from the Solicitor of the Treasury to the plaintiff's grantor.

The only other alleged error necessary to be noticed is the ruling of the court at the close of the trial.

The particular reason why, or ground on which the court decided that the plaintiff was entitled to recover, notwithstanding the possession taken by the defendant, and found the issues generally in the plaintiff's favor, is not specified. The court was exercising the functions of both court and jury, and whether, as matter of fact, it regarded the proof sufficient to show that Breese had been served with process in the foreclosure suit, or whether, as matter of law, it regarded that fact as not material, or what other view of the case it may have taken, does not appear, and therefore no error can be asserted in the decision. This Court, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of the evidence; and there

was no special finding of the facts. Had there been a jury, the defendant might have called upon the court for instructions, and thus raised the questions of law which he deemed material. Or, had the law, which authorizes the waiver of a jury, allowed the parties to require a special finding of the facts, then the legal questions could have been raised and presented here upon such findings as upon a special verdict. But, as the law stands, if a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.

However, as there was no proof that the government agents, when the mortgage was given, had any notice of Breese's unrecorded deed, and as the mortgage in such case would have the superior efficacy, and would entitle the mortgagee or his assigns to possession of the land on nonpayment of the money at maturity, we do not see on what possible ground the defendant could have claimed to succeed.

No error appearing on the record, the judgment of the court below is

*Affirmed.*

\* 12 Stat. at Large 501.