Parker *v.* Rule's Lessee. (*a*)

Direct tax.

Under the act of congress to lay and collect a direct tax (July 14th, 1798), before the collector could sell the land of an unknown proprietor, for non-payment of the tax, it was necessary that he should advertise the copy of the lists of lands, &c., and the statement of the amount due for the tax, and the notification to pay, for sixty days, in four gazettes of the state, if there were so many.[1]

Error to the Circuit Court of the district of West Tennessee, in an action of ejectment. *The facts of the case were thus stated by the Chief Justice in delivering the opinion of the court : [*65

This was an ejectment, brought by the defendant in error, in the circuit court of the United States for the district of West Tennessee. The plaintiff below claimed under a patent regularly issued by the proper authority. The defendant made title under a deed from the collector of the district, reciting a sale of the said land, as being forfeited by the non-payment of taxes, and conveying the same to the purchaser. On the validity of this conveyance, the whole case depends. At the trial, the defendant produced his deed, and also a general list of lands owned, possessed and occupied, on the first day of October 1798, in assessment district No. 12, in the state of Tennessee, corresponding with the collection district No. 8, returned to the office of the late supervisor of the revenue for the district of Tennessee, by Edward Douglass, surveyor of the revenue for said assessment district, among which is the following :

"Grant, John, reputed owner, in Sumner county, on the middle fork of Bledsoe's creek, 640 acres of land, subject to and included in the valuation, valued at $2560, no possessor or occupant."

He also produced the tax-list furnished by said surveyor to Thomas Martin, collector of the collection district No. 8, in which list, said land is described in the same manner as in the said general list, excepting that the said John Grant is described as possessor or occupant of said 640 acres of land, and said land is included in the list of lands belonging to residents. He also produced the advertisements of the sale of the said lands, mentioned in the said deed to have been made in the Tennessee Gazette, in which said John Grant is mentioned only as reputed owner of said land, and proved, by a witness present at the sale, that the said Henry Bradford, for himself and Daniel Smith, became the purchaser of the said land ; and that the said Daniel and Henry, before the execution of the said last-mentioned deed, assigned their interest in the said land to the defendant, Richard Parker. But it did not appear, that the said collector had, at any time, caused a copy of the said list, with a statement of the amount of the tax, and a notification to pay the same, to be published for sixty days, in four gazettes of the state, if there were so *many, pursuant to the last clause of the 11th section of the act of congress, entitled "an act to lay and collect a direct tax within the United States." (1 U. S. Stat. 597.) And thereupon, [*66

(*a*) February 11th, 1815. Absent, Johnson and Todd, Justices.

[1] The marshal's deed is not even *primâ facie* evidence, that the pre-requisites of the law have been complied with. Williams *v.* Peyton, 4 Wheat. 77. And see Early *v.* Homans, 16 How. 610.

the judge instructed the jury, that the said sale made by said collector was unauthorized and void, because the said collector had not previously made said last-mentioned publication, and because it appeared, that the collector proceeded to collect the taxes due on the said land, in the manner prescribed by law for collecting taxes due upon lands, where the owner resides thereon, and not in the manner prescribed when the owners are non-residents, and because there is a variance between the surveyor's books and the collector's list. The defendant below excepted to this opinion of the judge, and a verdict and judgment being rendered against him, he has brought the same, by writ of error, into this court.

Jones, for the plaintiff in error.—There is only one question in this cause, viz., whether the collector, in making sale of the land under the 13th section of the act (1 U. S. Stat. 601) was bound to publish for sixty days, in four gazettes of the state, the copies of the lists of the lands taxable, &c., with a statement of the amount of the taxes due thereon, and a notification to pay the same in thirty days, as required by the 11th section of the same act?

We contend, that this clause of the section applies only to unoccupied lands of unknown proprietors, and not merely to lands of non-residents. Grant, although a non-resident, was a known proprietor. Such publication is only necessary, in case of distress and sale of goods and chattels, which is the only remedy given by the 11th section. If the collector intended to levy the distress, then it was incumbent on him to make the publication. But when the legislature, by the 13th section, give the remedy by sale of the land itself, they make a different provision, and require different notice of the sale, and do not refer to the provisions of the 11th section; all of which provisions relate only to the case of distress.

*67] *C. *Lee*, contrà.—The deed from the collector must always recite all the facts necessary to make the title good. In this respect, the deed is very defective.

The land appears to have belonged to a non-resident. If his residence was known, the law required that he should have personal notice: if not known, he must have presumptive notice, by publication, as the 11th section requires. It cannot be supposed, that the law would require less notice to authorize a sale of the land, than a distress sale of chattels. It cannot be supposed, that the legislature meant to comprise all the pre-requisites of a sale of the land in the 13th section; for that section applies as well to residents as to non-residents, and yet it requires no notice of the amount of the taxes, nor a demand of payment before sale. It is rather to be presumed, that the legislature meant that all the preceding requisites should be complied with.

Jones, in reply.—It is not necessary, that the deed should recite any of the facts preceding the sale; they may all be proved by parol.

February 18th, 1815. (Absent, Johnson, J., and Todd, J.) Marshall, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows:—It is admitted, that if the preliminary requisites of the law have not been complied with, the collector could have no authority to sell, and the conveyance can pass no title. On the part of the plaintiff in error, it is insisted, that these requisites have been performed, and that the instruc-

tion given by the judge is erroneous. The instruction is, that the sale was unauthorized and void.

It was proved in the cause, that the proprietors of the land in controversy were non-residents of the state of Tennessee, when the tax was assessed, and continued to be so, to the time of bringing the action, and that they had no known agents in that state. *The mode of proceeding with respect to non-residents is prescribed in the 11th and [*68 13th sections of the act imposing the direct tax. The object of the provisions of the 11th section is "lands, dwelling-houses and slaves, which shall not be owned by, or in the occupation, or under the care or superintendence of, some person within the collection district where the same shall be situated or found, at the time of the assessment aforesaid."

It is alleged, that the plaintiff below did not entitle himself to the provisions of this section, by bringing himself within its description. He was a non-resident and had no known agent, but has not shown that there was no occupant of the land. The testimony offered by both plaintiff and defendant is spread upon the record; and although the plaintiff has not shown that there was no occupant, yet that fact came out in the testimony of the defendant, before the opinion of the court was given. One of the tax-lists produced by him states the land to be without an occupant; and the other, which states John Grant to be the occupant, is so far disproved, because the case admits John Grant to have been, at the time, an inhabitant of Kentucky, without any agent in the state of Tennessee.

The requisites of the 13th section of the act, which prescribes the course to be pursued, where lands are to be sold, because the taxes are in arrear and unpaid for twelve months, have been observed. The requisites of the 11th section, which prescribes the duty of the collector, after the assessment of the tax, before he can proceed to distrain for it, have not been observed. The cause depends on this single point—was it the duty of the collector, previous to selling the lands of a non-resident, in the manner prescribed by the 13th section of the act, to make the publications prescribed in the 11th section?

This will require a consideration of the spirit and intent of the law. *The 9th section makes it the duty of the collector to advertise that [*69 the tax has become due and payable, and the times and places at which he will attend for its collection. It is then his duty to apply once at the respective dwellings of those who have failed to attend such places, and there demand the taxes respectively due from them. If the taxes shall not be then paid, or within twenty days thereafter, it is lawful for the collector to proceed to collect the same by distress and sale.

The 11th section prescribes the duty of the collector with respect to lands, &c., not owned, &c., by some person within the collection district wherein the same shall be situated. Upon receiving lists of such lands, &c., he is to transmit certified copies thereof to the surveyors of the revenue of the assessment districts, respectively, within which such persons respectively reside, whose duty it is, to give personal notice of the claim to those who are liable for it. If the tax shall not be paid within a specified time after this notice, it then becomes the duty of the collector to collect the same by distress. If the residence of the owner of such land be unknown, this section requires certain publications to be made, as a substitute for personal notice;

after which, it is the duty of the collector to proceed to collect the tax, by distress, in like manner as where a personal demand has been made.

The 13th section prescribes the duty of the collector, and the forms to be observed in the sale of land, the taxes on which remain unpaid for one year. This section contains no reference to those which preceded it, but marks out the course of the collector in the specific case. It is therefore, contended, and the argument has great weight, that if the requisites of this section be complied with, the sale is valid. This opinion is in conformity with the letter of the section; and it is conceded, that the intent must be very clear, which will justify a connection of that section with those which precede it, so as to ingraft upon it those acts which must be performed by the collector, before he can distrain for taxes. But in this case, when we
*70] take the whole statute *together, such intent is believed to be sufficiently apparent.

There is, throughout the act, an obvious anxiety in the legislature to avoid coercive means of collection, unless such means should be necessary; and to give every owner of lands the most full information of the sum for which he was liable, and to afford him the most easy opportunity to pay it. Thus, the accruing of the tax is to be advertised, and the times and places at which the collector will attend to receive it. A personal demand at the dwelling-houses of those who have neglected to attend to this notice must then be made, a reasonable time before the collector can collect the tax by distress. Where lands are owned by non-residents, whose places of residence are known, this personal notice is still required; and where their residence is unknown, certain publications are substituted for and deemed equivalent to personal notice and demand. In each case, it is made the duty of the collector to proceed to collect the tax by distress and sale.

From this view of the law, it is inferred, not only that the legislature was anxious to avoid coercive means of collection, but has also manifested a solicitude to collect the tax, by distress and sale of personal property, rather than by a sale of the land itself. That all the means of collection prescribed in the act must have been tried, and must have failed, before a sale of the land can be made. The duty of the collector to make a personal demand from the resident owner of lands, and to make those publications which the law substitutes for a personal demand, where the residence of the owner is unknown, does not depend on the fact that personal property is or is not on the land from which the tax may be levied by distress. It is his duty to proceed in the manner prescribed in the 9th and 11th sections, in every case. After having so proceeded, it is his positive duty to levy the tax by distress, if property liable to distress can be found. If, notwithstanding the proceedings directed in the 9th and 11th sections, the tax shall remain one year unpaid, it is to be raised by a sale of the land. It appears to the court, that the 13th section pre-supposes everything enjoined in the 9th and 11th sections to have been performed, and that the validity
*71] of the *sale of land, owned by a non-resident, made by the collector for the non-payment of taxes, must depend not only on his having made the publications required in the 13th section, but on his having made those also which are required in the 11th section. Those publications not having been made in this case, it is the opinion of the majority of this court,

that the sale is void, and that the judge of the circuit court committed no error, in giving this instruction to the jury. The judgment is affirmed, with costs.

Judgment affirmed.

The Struggle. (*a*)

The Brig Struggle, Thomas Leigh, claimant, *v.* United States.

Penal statute.—Circumstantial evidence.

A party who offers an excuse for violating a penal statute, must make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence.
Circumstances will sometimes outweigh positive testimony.

Appeal from the sentence of the Circuit Court for the district of Massachusetts, which condemned the brig Struggle, for violation of the non-intercourse act of 28th of June 1809 (2 U. S. Stat. 550), by going, with a cargo, to a prohibited port.[1]

February 18th, 1815. (Absent, Johnson, J., and Todd, J.) Livingston, J., delivered the opinion of the court, as follows :—

This was an information, in the district court of Massachusetts, against the brigantine Struggle, for the violation of the act of congress of the 28th of June 1809, in departing from Portsmouth, in the United States, with a cargo of domestic growth and manufacture, bound to a foreign port with which commercial intercourse was not then permitted. The libel further states that the vessel arrived at said prohibited port, with her cargo, and that no bond had at any time been given to the United States, in the manner required by law, that she should not proceed to any interdicted *port, nor be engaged directly or indirectly, during such voyage, in any trade with such port or place. [*72

The claim denies the departure of the brigantine from Portsmouth, on a foreign voyage, to a port with which commercial intercourse was interdicted, or to any other foreign port or place ; but insists, that she was duly cleared, at the custom-house at Portsmouth, for Charleston, and that she departed and was sailing towards her place of destination, when by the violence of the winds and waves, she was driven out of her course, and became so much damaged, that she could not proceed on to Charleston ; but that it was necessary for the preservation of the vessel and cargo, and of the lives of those on board, to sail for the West Indies ; that she accordingly went to Martinico, and thence proceeded to St. Bartholomews.

The cause being at issue on this allegation of the claimant, and a number of witnesses having been examined, the district court condemned the vessel as forfeited to the United States. This decree was affirmed by the circuit court, from whose sentence this appeal is taken.

The master of the Struggle, who was produced as a witness, swears that after being regularly cleared, she sailed from Portsmouth to Charleston, the cargo being consigned to Joseph Waldron & Co., on whom he had

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(*a*) February 15th, 1815.

[1] See 1 Gallis. 476.