

Wallace v. Anderson.

right of action upon the covenant aforesaid, as authorizes him to sustain the action in the name of the said Welch's administrator, for the whole debt due by the said covenant, at the time of the said Welch's delivering the said account to the said Prior : " it is, therefore, adjudged and ordered, that the judgment of the said circuit court in this case be, and the same is hereby reversed and annulled : and it is further ordered, that the said cause be remanded to the said circuit court, with directions to issue a *venire facias de novo*.

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Quo warranto.

An information for a *quo warranto*, to try the title to an office, cannot be maintained, except at the instance of the government ; and the consent of parties will not give jurisdiction, in such a case.¹

ERROR to the Circuit Court of Ohio. This was an information for a *quo warranto*, brought to try the title of the defendant to the office of principal surveyor of the Virginia military bounty lands north of the river Ohio, and between the rivers Scioto and Little Miami.

The defendant had been appointed to the office by the state of Virginia, and continued to exercise its duties, until the year 1818, during all which time, his official acts were recognised by the United States. In that year, he was removed by the governor and council of Virginia, and the plaintiff appointed in his place. The writ was brought, by consent of parties, to try the title to the office, waiving all questions of form, and of jurisdiction. Judgment was given in the court below, for the defendant, and the cause was brought by writ of error to this court.

March 6th, 1820. The cause was argued by *Hardin*, for the plaintiff, and by the *Attorney-General* and *Scott*, for the defendant. But as the cause was dismissed for want of jurisdiction, it is deemed unnecessary to insert the argument.

*292] *March 8th. MARSHALL, Ch. J., delivered the opinion of the court, that a writ of *quo warranto* could not be maintained except at the instance of the government, and as this writ was issued by a private individual, without the authority of the government, it could not be sustained, whatever might be the right of the prosecutor, or of the person claiming to exercise the office in question. The information must, therefore, be dismissed.

Judgment reversed.

JUDGMENT.—This case came on to be heard, on the transcript of the record of the circuit court for the district of Ohio, and was argued by counsel : on consideration whereof, this court is of opinion, that no writ of *quo warranto* can be maintained, but at the instance of the government ; and as this is a writ issued by an individual, without the authority of government, it is the opinion of this court, that the same cannot be sustained, whatever may be the right of that individual, or of the person who claims to exercise

¹ Nebraska v. Lockwood, 3 Wall. 236 ; Commonwealth v. Burrell, 7 Penn. St. 34.

Polk v. Wendell.

the office, to try the title to which, the writ is brought: it is, therefore, the opinion of this court, that the judgment of the circuit court ought to be reversed, and the cause remanded to that court, with directions to dismiss the information, because it is not filed at the instance of the United States.

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Land law.

There are cases in which a grant is absolutely void; as, where the state has no title to the thing granted, or where the officer had no authority to issue the grant, &c. In such cases, the validity of the grant is necessarily examinable at law.

A grant raises a presumption that every pre-requisite to its issuing was complied with, and a warrant is evidence of the existence of an entry; but where the entry has never in fact been made, and the warrant is forged, no right accrues, under the act of North Carolina of 1777, and the grant is void.

Where a party, in order to prove that there were no entries to authorize the issuing of the warrants, offered to give in evidence certified copies of warrants from the same office, of the same dates and numbers, but to different persons, and for different quantities of lands: *Held*, that this was competent evidence to prove the positive fact of the existence of the entries specified in the copies; but that in order to have a negative effect, in disproving the entries alleged to be spurious, the whole abstract ought to be produced in court, or inspected under a commission, or the keeper of the document examined as a witness, from which the court might ascertain the fact of the non-existence of the contested entries.

In such a case, certificates from the secretary's office of North Carolina, introduced to prove that on the entries of the same dates with those alleged to be spurious, other warrants issued, and other grants were obtained, in the name of various individuals, but none to the party claiming under the alleged spurious entries, is competent circumstantial evidence to be left to the jury. In such a case, parol evidence, that the warrants and locations had been rejected by the entry-taker as spurious, is inadmissible.

It seems, that, whether a grant be absolute void, or voidable only, a junior grantee is not, by the law of Tennessee, permitted to avail himself of its nullity, as against an innocent purchaser, without notice.

Polk v. Windel, 2 Overt. 433, reversed.

ERROR to the Circuit Court of West Tennessee. This was an action of ejectment, for 5000 *acres of land, in the state of Tennessee, granted by the governor of North Carolina, to Polk, the lessor of the plaintiff, on the 6th of May 1800, on a warrant from John Armstrong's office, dated May 25th, 1784. [*294]

The defendants, who were proved to be in possession of part of this tract, claimed title under a grant from the governor of North Carolina to John Sevier, for 25,060 acres, bearing date on the 28th of August 1795. This grant appeared by the annexed certificate of survey, to be founded on 40 land-warrants of 640 acres each, numbered from 1634 to 1676, and surveyed in one entire tract. The land in dispute was proved to lie within the lines of Sevier's grant.

The plaintiff, having proved that John Carter was entry-taker of Washington county, until February 26th, 1780, and that Landon Carter was then appointed, offered in evidence an office-copy of an abstract (marked K, in the transcript) of the warrants, on which Sevier's survey and grant were founded; the original book of entries being destroyed. From this copy, it appeared, that all the warrants were issued from the Washington county office, in April or May 1780, to the surveyor of Sullivan county, and purported to be founded on entries which bore date on the 16th of September