

Gupp v. Brown.

not paid, and the deed from Shultz's executors to Stump, in 1794, that it was then paid. The defendant, therefore, has not a legal title to authorize a verdict in his favor; but he has an equitable title, and may compel a grant upon paying or tendering what is due to the plaintiffs, with costs of this suit. And if the plaintiffs should then refuse, this court, sitting in equity, would compel them, at the expense of paying costs. In the state court, I understand, the jury may make a kind of special or conditional finding, in consequence of the having no court of equity; but this court having equitable jurisdiction, your verdict must be general.

Verdict for the plaintiffs. (a)

GUPP *et al.* v. BROWN.*Execution of commission.*

A commission, issued to four commissioners jointly, was executed by three only, two of whom were of the defendant's nomination; on objection by the defendant to the reading of the depositions, it was held, that the commission was not well executed: commissioners do not derive their authority, from the parties, but from the court.

A COMMISSION had issued to four commissioners, jointly, to take the depositions of witnesses in England. It was executed and returned by three of the commissioners only, two of whom, however, were of the defendant's nomination.

At the trial of the cause, the defendant's counsel objected to the reading of the depositions; and cited 1 Bac. Abr. 202; 2 Inst.

The plaintiffs' counsel observed, that the commission had not issued in the usual form; but insisted, that as the defendant's *commissioners had attended, the objection could not be maintained on his part. [*411]

BY THE COURT.—The objection is fatal. The commissioners do not derive their authority from the parties, but from the court; (b) and as it is a special authority, it must be strictly pursued. The power given to four, cannot be well executed by three commissioners. (c)

The evidence overruled.

Ingersoll and *Todd*, for the plaintiffs. *Franklin* and *Dallas*, for the defendant.

(a) As some of the persons interested in the ejectments brought for lands in Springetsbury manor, had purchased from the state; and as the state would be entitled to all arrears of purchase-money, if the proprietary title should not be established; the legislature had authorized the governor to employ counsel to assist the counsel of the defendants. After the decision of the above case, the legislature appointed James Ross and James Hopkins, Esqs., to take defence in the next ejectment, *Penn's Lessee v. Groff*, which was tried in April term 1806; and upon the same charge, the same verdict was given. The defendant's counsel having tendered a bill of exceptions to the charge of the court, arrangements were made to obtain a final decision in the supreme court, upon a *writ of error*. It appears, however, from the journals, that the legislature is not disposed to interfere any further.

(b) Those who execute a commission, are appointed by the court, and although they may be nominated by the parties, they are not their agents. *Gilpin v. Consequa*, Peters C. C. 88.

(c) If a commission, directed to five commissioners, of whom three are named by the plaintiff and two by the defendant, is executed by three only, or by any number less