Gordon *v.* Caldcleugh *et al.*

Error to a state court.

Th's court has not jurisdiction upon a writ of error to a state court, under the 25th section of the judiciary act of 1789, if the decision of the state court be in favor of the privilege claimed under an act of congress.[1]

This was a writ of error to the judges of the Court of Equity of the state of South Carolina, holden in and for the eastern district of the said state.

James Gordon, "of the city of Charleston, in the state aforesaid," filed a bill in equity, against Caldcleugh & Boyd, "of London, in the kingdom of Great Britain," William Muir, "of Hamburg," and John Gillespie, George McKay and Joseph Reid, whose residence was not mentioned in the bill. At the return of the *subpœna*, Caldcleugh, Boyd and Reid appeared, and filed a petition, stating themselves to be aliens, and subjects of the King of Great Britain, and that the complainant was a citizen of the state of South Carolina, and praying that the cause might be removed to the circuit court of the United States, according to the 12th section of the judiciary act of 1789. To which petition, Gordon, the complainant, answered, that the prayer thereof ought not to be granted, because Gillespie and McKay, two of the defendants, were citizens of the state of South Carolina. But the court, "after observing that the parties, defendants to the suit, residing in this state, were stakeholders, and not materially concerned in the determination of the cause, ordered that it be transferred to the federal court, agreeable to the prayer of the petition.

The complainant, immediately, in the same court, assigned errors, in the following form: "Whereupon, the said James Gordon comes and says, that *269] in the *giving of the final judgment, in the cause aforesaid, upon the construction of the 12th clause or section of the statute of the United States, entitled an act to establish the judicial courts of the United States, passed the 24th day of September 1789, and 2d section of the 3d article of the constitution of the United States, and the 12th article of the amendment of the constitution, there is manifest error in this, to wit, that the judgment aforesaid was given in form aforesaid, for the said Caldcleugh, Boyd and Reid, upon their petition, for the removal of the said cause for trial, into the circuit court of the United States, to be held for the district of South Carolina, whereas, judgment should have been given for the said James Gordon, against the removal aforesaid; and this he is ready to verify. Caldcleugh, Boyd and Reid joined in error; and thus the case came up.

The writ of error did not state that the Court of Equity of the state of South Carolina, to the judges of which it was directed, was "the highest court of equity of the state in which a decision in the suit could be had," so as to bring the case within the provisions of the 25th section of the judiciary act of 1789, nor did that fact in any other manner appear.

E. J. Lee, for the plaintiffs in error.

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[1] Strader *v.* Baldwin, 9 How. 261; Linton *v.* Stanton, 12 Id. 423; Reddall *v.* Bryan, 24 Id. 420; Roosevelt *v.* Meyer, 1 Wall. 512; Ryan *v.* Thomas, 4 Id. 603.

McFerran v. Taylor.

February 13th, 1806. MARSHALL, Ch. J., after stating the case, delivered the opinion of the court.

This court has no jurisdiction under the 25th section of the judiciary act of 1789, but in a case where a final judgment or decree has been rendered in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is *against* their validity, &c., or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission *held under, the United States, and the decision is *against* the title, right, privilege or exception, specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission. [*270

In the present case, such of the defendants as were aliens, filed a petition to remove the cause to the federal circuit court, under the 12th section of the same act. The state court granted the prayer of the petition, and ordered the cause to be removed; the decision, therefore, was not *against* the privilege claimed under the statute; and therefore, this court has no jurisdiction in the case. The writ of error must be dismissed.

MCFERRAN *v.* TAYLOR and MASSIE.

Implied warranty.— Verdict.

He who sells property on a description given by himself, is bound in equity to make good that description; and if it be untrue in a material point, although the variance be occasioned by mistake, he must still remain liable for that variance.[1]

Quære? If the mistake be of a matter deemed perfectly immaterial by both parties, at the time of the contract, and of a matter which would not have varied the bargain, if it had been known, and of which both parties were equally ignorant, whether a court of equity ought to interfere?

A finding by the jury, which contradicts a fact admitted by the pleadings, is to be disregarded.

ERROR to a decree of the District Court of the district of Kentucky, in chancery.

McFerran, in his bill, alleged, that on the 19th of March 1784, the defendant, Taylor, for a valuable consideration, executed his bond to the complainant, for the conveyance of 200 acres of land out of 1000 acres located by him on Hingston, or out of 5000 acres which Taylor then had for location. The condition of the bond was as follows: "that if the said Richard Taylor, his heirs, &c., shall well and truly make, or cause to be made, to the said Martin McFerran, his heirs or assigns, a good sufficient title in fee-simple to two hundred acres of land in the county of Kentucky, out of 1000 acre tract, located by the said Richard Taylor on Hingston's fork of Licking; or 200 acres out of 5000, which the said Taylor has now for location, provided he obtain the same, at such part or place thereof as the said McFerran shall choose, not to exceed more than twice the breadth in length thereof, so soon as the lands can, in any degree of safety, be surveyed; *then this obligation to be void, otherwise to remain in full force and virtue." [*271

[1] See Smith *v.* Richards, 13 Pet. 26.