*Pollard and Pickett *v.* Dwight *et al.*

Foreign attachment.—Circuit court.—Covenant of seisin.—Land law of Virginia.—Parol evidence.

The appearance of the defendants to a foreign attachment, in a circuit court of the United States, waives all objection to the non-service of process.[1]

The district judge may alone hold a circuit court, although there be no judge of the supreme court allotted to that circuit.[2]

An action may be supported on a covenant of seisin, although the plaintiff has never been evicted; and the declaration need not aver an eviction.[3]

Under the foreign attachment law of Connecticut, an absent person, who is liable in damages for breach of his covenant, is an absent debtor.

The official certificate of survey, returned by a legal sworn surveyor, in Virginia, cannot be invalidated by a particular fact, tending to show an impossibility that the survey could have been made in the time intervening between the date of the entry and the date of the certificate of survey.

On the trial of an action, in Connecticut, for breach of a covenant of seisin of lands in Virginia, the question whether a patent from the state of Virginia for the lands, be voidable, is not examinable.

Parol testimony is not admissible, in an action on the covenant of seisin, to prove prior claims upon the land.

Error to the Circuit Court for the district of Connecticut.

Dwight and others brought a foreign attachment against Pollard and Pickett, in the county court of Hartford, and declared in an action of covenant upon a deed of bargain and sale, in fee-simple, of certain lands in the county of Wythe, and commonwealth of Virginia, by which the defendants below covenanted that they were "lawfully seised of the lands and premises, with their appurtenances, and had good right and lawful authority to sell and convey the same, in manner and form aforesaid;" and the breach assigned was, "that they were not, nor were any or either of them, lawfully seised and possessed of any estate whatever in the said land and premises, nor in any part thereof, nor had the said Pollard and Pickett, or either of them, good right and lawful authority to sell and convey the said land and premises as aforesaid."

The defendants appeared, and removed the cause to the circuit court of the United States for the district of Connecticut, and there pleaded to the jurisdiction of the court, and prayed "judgment whether the honorable Pierpont Edwards, district judge of the district of Connecticut, holding said court, there being no justice of the supreme court of the United States present in court, will have cognisance of the said cause, because, they say, that by the law of the United States, the circuit court of the second circuit in the district of Connecticut, shall consist of the justice of the supreme court residing in the third circuit, and the district judge of the district of Connecticut; and that when the said law was enacted, viz., on the 3d of March 1803, the honorable William Paterson was the only justice of the supreme court residing in the said third circuit, and that he died on or about the 10th of September last past, *and that there is not now, nor hath there been, since the death of the said Paterson, any justice of the supreme court [*422

[1] s. p. Toland *v.* Sprague, 12 Pet. 300; Irvine *v.* Lowry, 14 Id. 293; Atkins *v.* Disintegrating Co., 18 Wall. 298.

[2] In re Kaine, 10 N. Y. Leg. Obs. 257. And see Hussey *v.* Whitely, 2 Fish. 120.

[3] Le Roy *v.* Beard, 8 How. 451. And see Rickert *v.* Snyder, 9 Wend. 415.

residing in the said third circuit; and there hath not been, by the supreme court of the United States, or by the President of the United States, any allotment of a chief justice, or an associate justice of the supreme court of the United States, to the said second circuit, and this they are ready to verify," &c.; which plea, upon general demurrer, was overruled, and a *respondeas ouster* awarded: whereupon, the defendants pleaded, that they were, at the date of the deed, "well seised and possessed of the said land, and had good right to bargain and sell the same, in manner as is alleged in the said deed, and so they have kept and performed their said covenants, and of this put themselves on the country; and the plaintiffs likewise."

The verdict was for the plaintiffs, and damages assessed to $27,497. The defendants moved in arrest of judgment, because it appeared, by the declaration, that the said deed was executed, and the lands lay in the state of Virginia; and because the declaration was insufficient, and would not support any judgment; but the motion was overruled, and judgment rendered on the verdict.

On the trial, a bill of exceptions was taken, which stated that the defendants claimed to be seised under a patent to them from the Governor of Virginia, dated March 20th, 1795, and grounded on a survey in favor of David Patterson, by virtue of an entry, dated September 1st, 1794, on sundry treasury warrants, to the amount of 150,000 acres, and completed on the 8th day of September 1794, which survey had been assigned to the defendant, Pollard; whereupon, the plaintiffs offered to read in evidence copies of two surveys made for one Wilson Carey Nicholas, by virtue of two entries made on the same 1st of September 1794, in the office of the same surveyor, one to the amount of 500,000 acres, and the other to the amount of 480,000 acres, the greater part of which laid in the county of Wythe, and bounding on the land surveyed for Patterson; and that the said survey for 500,000 acres purported to be completed on the 9th of September 1794, *423] *and that for 480,000 on the 10th of the same month, and that the extent of all the lines of the said surveys was more than 320 miles; and offered to prove by Erastus Granger, that the nearest part of the said lands to the office of the surveyor of Wythe county, was distant therefrom two days' journey; and that a surveyor could not, in that county, survey a line longer than seven miles in a day; and that he (Erastus Granger) had surveyed the land surveyed for Patterson, and found marked trees only for about three or four miles from the starting point of the survey, and two or three only of the first corners mentioned in the survey, and that the streams ran in opposite directions to those laid down in the plot; which testimony of the said Granger was offered, to prove that Patterson's survey was fraudulent, and not made conformable to the laws of Virginia; and the plaintiffs further offered to prove, by the testimony of the said Granger, that there were prior claims upon the land in question to the amount of upwards of 90,000 acres. It was admitted, that Granger was not a sworn surveyor. The defendants objected to the above evidence, but the court overruled the objection, and suffered it to go to the jury.

The defendants sued out their writ of error to this court, and the errors assigned were: 1. That the plea to the jurisdiction ought to have been allowed. 2. That the evidence stated in the bill of exceptions ought not to have been admitted. 3. That the declaration was insufficient. 4. That the

title of the land could not be tried in Connecticut. 5. That the circuit court had not jurisdiction, the plaintiffs being citizens of Massachusetts and Connecticut, and the defendants citizens of Virginia, not found in the district of Connecticut. *6. That the judgment ought to have been [*424 rendered for the defendants.

C. Lee, for the plaintiffs in error.—This is a prosecution against an absentee, for breach of covenant. The act of Connecticut only authorizes such process against a debtor, not against a man who may be liable for unliquidated damages on a breach of covenant. The words of the Connecticut law, fol. 35, are, "absent or absconding debtors," and the defendants are so called in the declaration. It could never be the intention of the legislature of Connecticut, to try the title to land in Virginia, by the process of foreign attachment in Connecticut.

Two questions arise in this cause. 1. Whether the circuit court had jurisdiction? and 2. Whether the evidence stated in the bill of exceptions was admissible?

1. The law is the same in this case on the point of jurisdiction, as if the suit had been originally commenced in the circuit court (1 U. S. Stat. 79, § 12); and by the 11th section of the same act, the circuit court has no jurisdiction but over inhabitants of the state, or over persons found therein and served with process. (Ibid. 78.) Process by attachment on effects of persons not inhabitants, cannot be maintained in the circuit courts of the United States. *Hollingsworth* v. *Adams*, 2 Dall. 396.

A plaintiff may assign for error the want of jurisdiction in that court to which he has chosen to resort. *Capron* v. *Van Noorden*, 2 Cr. 126; *Beecher's Case*, 8 Co. 59; *Bernard* v. *Bernard*, 1 Lev. 289. And in the case of *Diggs and Keith* v. *Wolcott*, in this court, at last term (*ante*, p. 179), the appellants had removed the cause from the state court to the circuit court, who decreed against them, and on their appeal to this court *the decree was reversed for want of jurisdiction in the circuit court. [*425

Where the court has a limited jurisdiction, the facts which bring the case within that jurisdiction must appear on the record. 9 Mod. 95; *Bingham* v. *Cabot*, 3 Dall. 382; *Wood* v. *Wagnon*, 2 Cr. 9.

Upon the demurrer to the plea to the jurisdiction, the whole record is open to examination; and the defendant may avail himself of every substantial objection to the declaration, or to the writ, as it is made a part of the record. The declaration itself shows that the lands which are the subject of the covenant are in the state of Virginia; that the deed was there executed; and that the title of those lands is drawn in question. It appears, then, upon the face of the declaration, that the action is local, and can be tried only in Virginia. The declaration also states Pollard and Pickett to be "of the county of Henrico, and state of Virginia," and that they are "absent and absconding debtors;" and therefore, the circuit court was excluded from the cognisance of the case, by the 11th section of the judiciary act of 1789. (1 U. S. Stat. 78.)

The declaration is also defective, in not averring an eviction, or a better title out of the plaintiffs in error. *Emerson* v. *Proprietors of Minot*, 1 Mass. 464; 4 T. R. 620.

But the plea in abatement ought to have been allowed. The act of con-

gress of March 3d, 1803 (2 U. S. Stat. 244) enacts, "that the circuit court of the second circuit shall consist of the justice of the supreme court residing within the third circuit, and the district judge of the district where such court shall be holden;" and by the act of 29th of April 1802 (Ibid. 156), it is "provided, that when only one of the judges, hereby directed to hold the circuit courts, shall attend, such court may be held by the judge so attending." The 5th section of the same act provides for the allotment of the judges among the circuits, in case of a new appointment of a judge; but makes no provision in case of a vacancy.

*426] *There can be no circuit court in the second circuit, unless there be a justice of the supreme court allotted to that circuit. If the circuit court is to consist of a particular justice of the supreme court, and a district judge, it cannot exist without such a justice of the supreme court. A whole consists of all its parts: if any part be wanting it is not a whole. A session of the court may be holden by one judge, but the court must be in existence. Whenever there are not two judges of the court in existence, its functions are suspended.

2. As to the bill of exceptions. The papers said to be copies of surveys for Nicholas, ought not to have been admitted in evidence. Nicholas was no party to this suit, and even if there had been evidence that such surveys were ever made, and that these were true copies, they could not be evidence in this cause.

The testimony of Erastus Granger was inadmissible. He was allowed to testify that he had surveyed the land, and that there were prior claims upon it to the amount of 90,000 acres. If he ever made such survey, it was *ex parte*, and as the agent of the appellees. *Ex parte* surveys are inadmissible evidence as to boundaries. *Bridgemore* v. *Jennings*, 2 Ld. Raym. 734. Illegal or improper evidence, however unimportant or irrelevant, should not be confided to a jury, because it may mislead them. *Lee* v. *Tapscott*, 2 Wash. 281.

Parol testimony is incompetent to invalidate a title to lands in Virginia, which is to be decided according to the laws of that state. Unless the prior claims were founded upon deeds or writings, they could not be set up against a patent from the state; and if they were founded upon deeds or writings, they ought to be produced. No lands in Virginia can pass, or be conveyed, but by deed in writing, acknowledged or proved, and recorded.

*427] **Martin*, on the same side, in support of the objection that the declaration did not aver an eviction, cited 1 Mod. 292; 1 Saund. 58; 3 Went. Plead. 440; 2 Mod. Intrandi 206, 207; 1 Harris's Entries 526, 531.

Harper, contrà.—According to the decisions of the courts in Connecticut, a foreign attachment will lie for damages on a breach of covenant. The distinction is only taken between debts and torts. What is not a tort is a debt, within the meaning of their act of assembly. 2 Swift 177.

According to the mode of surveying lands in Virginia, by the 23d section of their land-law, it is impossible to execute the surveys in the time which intervened between the dates of the entry and of the survey. The evidence offered was to show that the survey was fraudulent. It was to show that surveys, said to be made in eight days, could not have been made in eight weeks.

The bill of exceptions states the papers to be copies of the surveys, and *ex vi termini*, a copy means a true copy ; for if it be not a true copy, it is no copy. The objection was not, that they were not copies, but that copies of such papers were not admissible evidence.

The testimony of Granger was to show that the land was included in prior surveys. It was a necessary link in the chain of proof, to show title out of the plaintiffs in error.

It was not necessary to aver or to prove an eviction. The case in 1 Mass. 464, is upon a covenant to warrant ; which is, in effect, a covenant for quiet enjoyment. So was the case in 1 Mod. 292. In the case from Saunders, the covenant was that he was seised. It is true, that proof of eviction is one mode of showing a want of title, but it is not the only mode. In *Horsford* v. *Wright*, Kirby 3, it is decided, that eviction is not necessary to recover on a covenant of seisin. If the plaintiff can show that the defendant had a defective *title, it is sufficient. What use would there be in a covenant of seisin, in addition to the covenant of warranty, if the former requires the same evidence as the latter? [*428

Martin, in reply.—If the papers offered were copies, it does not appear that the originals could not be had.

After Pollard and Pickett had produced a grant under the state of Virginia, the plaintiffs below must have shown a better title in some other person (*Salmon* v. *Bagshaw*, Cro. Jac. 304), but they only attempted to prove irregularity in the survey.

The patent gave a good title, even if there had been no survey. The surveyor himself could not have been permitted to contradict his certificate. It does not appear how long the surveyor was employed in making the survey. It could only bear date on one day, and whether that was the day on which he began or finished it, does not appear. It is no evidence of fraud.

Mr. Martin declined arguing the points respecting the jurisdiction, and the form of the declaration, as the court seemed strongly inclined against him ; but he thought it a fatal objection to the declaration, that it did not aver an eviction ; and that the action was local, and not transitory.

March 15th, 1808. Marshall, Ch. J., delivered the opinion of the court as follows, viz :—In this case, objections have been made to the jurisdiction of the circuit court, and to the proceedings in that court.

The point of jurisdiction made by the plaintiffs in error is considered as free from all doubt. By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which *they would have stood, had process been served upon them, and consequently, waived all objections to the non-service of process. Were it otherwise, the duty of the circuit court would have been to remand the cause to the state court in which it was instituted, and this court would be bound now to direct that proceeding. [*429

As little foundation is there for the exception taken to the manner in which the circuit court was constituted. That court consists of two judges, any one of whom is capable of performing judicial duties. So, this court consists of seven judges, any four of whom may act. It has never been supposed, that the death of three of the judges would disqualify the remaining four from discharging their official duties, until the vacant seats of their

departed brethren should be filled. There is nothing in the peculiar phraseology of that part of the judicial act which establishes the circuit courts, that requires a different construction of the words authorizing a single judge to hold those courts, from what is usually given in other cases, to clauses authorizing a specified number of justices to constitute a court.

The exceptions taken to the proceedings of the circuit court are more serious. These are, 1. To the pleadings. 2. To the opinions of that court, admitting certain testimony in support of the action.

The objections to the pleadings are, that the different parts of the declaration are repugnant to each other ; and that the declaration is itself insufficient, as the foundation of a judgment. In deciding on so much of this objection as depends on the laws of Connecticut, this court would certainly be guided by the construction given by that state to its own statute ; and, if it was indispensably necessary now to decide that question, the evidence in favor of the construction maintained by the defendants in error would seem to preponderate.

*430] *Another objection taken to the declaration is, that it ought to have alleged a disseisin of the plaintiffs below, in order to enable them to maintain their action. On this part of the case, the court can only consider whether the declaration, in itself, unconnected with the testimony which was adduced to support it, is so radically defective, that a judgment cannot be rendered on it. This leads to the inquiry, whether the covenant of the vendors can be broken, as stated in the declaration, although no eviction has taken place ; and the court is of opinion that it may be so broken. 9 Co. 60.

The covenant is, that the vendor is seised in fee of the premises which he sells and conveys. Suppose, the fact to be, that he had no title, nor pretence of title, to those premises ; that he had conveyed lands for which he had never received a patent or a title of any kind. Could it be said, that his covenant that he was seised in fee remained unbroken, until the real proprietor should think proper to eject the vendee ? This question, in the opinion of the court, must be answered in the negative. The testimony which would be sufficient to establish the breach assigned may be a subject for serious consideration, but on the sufficiency of the breach, as assigned to support a judgment, there is no doubt.

The exceptions to the testimony admitted in the circuit court consists of two parts. 1st. To the admission of certain copies of surveys made for Wilson Carey Nicholas, connected with the testimony of Erastus Granger, describing the face of the country on which the surveys purported to be made. 2d. To the admission of parol testimony to prove prior titles to the lands conveyed in the deed on which this suit was instituted.

1. The surveys of Wilson Carey Nicholas, and the explanatory testimony of Granger, were introduced for the purpose of showing that the patent for the lands sold by Pollard and Pickett was void, because it issued on a *431] *plat representing a survey which, in point of fact, could not have been made.

In examining this exception, it becomes proper to inquire, what was the real issue between the parties. The plaintiffs below averred in their declaration, that the defendants were not seised and possessed of any estate whatever in the land and premises, nor in any part thereof, nor had they, or

either of them, good right and lawful authority to sell and convey the same. The defendants, in their plea, do not set forth their title, but say, generally, that they were seised of the land sold and conveyed by them, and had good right to sell and convey the same, as is expressed by their deed. On this plea, an issue is tendered, which is joined by the plaintiffs.

To prove that the survey on which the patent granting the lands to the defendants was issued, could not have been made, the plaintiffs produced two other surveys made by the same person for Wilson Carey Nicholas, which were said to be completed only two days succeeding the completion of the survey of the defendants, which three several surveys could not possibly have been made in the time intervening between the entries in the surveyor's office and the day on which they are alleged to have been completed, whence the jury might conclude that the survey of Pollard and Pickett was not made. The surveyor was a sworn officer, and his survey was returned upon oath. This is an attempt to invalidate the evidence derived from his official return, by a particular fact which has no relation to the cause before the court, and with which the parties to this controversy have no connection. Had it even appeared, that the copies offered in evidence were authenticated, they would, on this account, have been inadmissible.

This whole testimony is inadmissible on other ground. Were it even true, that this patent is voidable, if the surveyor had not run round all the lines of the land, a *point not yet established, it cannot be deemed absolutely void; it cannot be deemed a mere nullity. While it remains [*432 in force, it is a valid title, and vests the fee-simple estate in the patentee. In this action, and on the trial of this issue, the question whether the patent be voidable by Virginia or not, is not properly examinable. Testimony, therefore, tending to establish that point, is irrelevant and inadmissible.

2. But had the court entertained any doubt on this point, the second part of the exception would be clearly decisive with regard to this judgment. Parol testimony is admitted to show prior claims to the land in controversy. The defendants in error attempt to defend the admission of this testimony, by supposing it auxiliary to other testimony which had previously established the validity of those claims, and that this witness was only adduced to show that those claims covered this land. Had the fact supported the argument, a private *ex parte* survey would have been a very improper mode of establishing it; but the language of the exception excludes that construction of the opinion which the counsel for the defendants in error would put upon it. The proof offered and admitted is, not that those particular titles which were exhibited and proved to the court covered the land conveyed by Pollard and Pickett, but "that there were prior claims upon it to the amount of upwards of 90,000 acres." The prior claims rest upon the oath of the witness. If those claims were valid, their validity was established by his testimony, which cannot be tolerated on any legal principle; if they were mere claims, not good titles, they ought not to have been stated to the jury. They were irrelevant to the point in issue.

Upon the whole, the court is unanimously of opinion that the circuit court erred, in permitting the copies of surveys made for Wilson Carey Nicholas, and the testimony of Erastus Granger, to go to the jury [*433 for the purposes mentioned in the bill of exceptions, and *that the

judgment of the circuit court must, on that account, be reversed, and the cause remanded for a new trial.(a)

Judgment reversed.

Ex parte LEWIS and others.

Compensation of jurors.

The jurors in civil cases, attending the circuit of the United States, for the Pennsylvania district, are entitled to one dollar and twenty-five cents each, for each day's attendance.

IN the Circuit Court for the district of Pennsylvania, at November term, 1806, a motion was made by *Rawle*, in behalf of Lewis and others (the jurors in civil cases who had attended the court at that session), that the marshal be ordered to pay each of the jurors one dollar and twenty-five cents for each day's attendance;

But the judges of that court being divided in opinion upon the question, it was certified to this court.

THIS COURT ordered it to be certified, that the jurors were entitled to the fee of one dollar and twenty-five cents *per diem* for their attendance.

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*434] *CROUDSON and others *v.* LEONARD.

Sentence of foreign courts of admiralty.

The sentence of a foreign court of admiralty, condemning a vessel for breach of blockade, is conclusive evidence of that fact, in an action on the policy of insurance.

Croudson *v.* Leonard, 1 Cr. C. C. 291, reversed.

ERROR to the Circuit Court of the district of Columbia, in an action on a policy of insurance on the cargo of the brig Fame, on a voyage from Alexandria, to, at and from Barbadoes, and four other ports in the West Indies, and back to Alexandria, the vessel and cargo warranted American property. The vessel arrived at Barbadoes, and sailed from thence for Antigua, but on her voyage to that island, was captured by a British vessel, and carried into Barbadoes, and there condemned in the vice-admiralty court, for attempting to break the blockade of Martinique.

The jury found a special verdict, upon which the judgment below was in favor of the plaintiffs. The only question arising upon this special verdict was, whether the sentence of the court of vice-admiralty was conclusive evidence of an attempt to violate the blockade of Martinique.

This question having been several times argued (but not decided), in the case of *Fitzsimmons* v. *Newport Insurance Company*, at this term (*ante*, p. 185), the counsel submitted it to the court without further argument.

March 15th, 1808. JOHNSON, J.—The action below was instituted on a

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(a) After the opinion of the court was delivered, *Lee* prayed that the cause might be remanded, with leave for the defendants below to amend their pleadings.

THE COURT said, that the court below had the power to grant leave to amend, and this court could not doubt but it would do what was right in that respect.