8FED.CAS.—10

Case No. 4,200.

DUSSERT v. ROE.

[1 Wall. Jr. 39.][1]

Circuit Court, Third Circuit. April Term, 1843.

EVIDENCE—PEDIGREE.

Where several persons, all of whom testify to considerable acquaintance with a family, swear that a particular person's pedigree was matter of common reputation, (notoriete publique,) it will be inferred, that reputation in the family is meant to be included; although not so in any way said: This, at least, in favour of depositions taken abroad; when the opposite party has not chosen to cross-examine, nor offered counter evidence; and when the depositions present general evidence of candour. The circumstances last mentioned are considerations which may properly weigh with the court, and induce the admission of testimony which, in opposite circumstances, might give pause.

[Cited in Hall's Deposition, Case No. 5,924.]

A question as to the plaintiff's pedigree, arising in this case, Mallery, for the defendant objected to certain depositions taken at L'Orient in France, in 1840, to shew descent. The plaintiff's family had resided for many years at L'Orient, where all the witnesses, of whom there were four, likewise lived. But her father, a merchant, had died at Le Puy, in 1786, and a brother, in this country.

One of the witnesses, a merchant, sixty years old, had personally known Madame Dussert for more than thirty years. He had also known her relatives and family, by various connexions (differents rapports) which he had had with her or her sister in commercial dealings (a raison d'affaires commerciales) for about twenty or thirty years. But in answer to a question as to the means of his knowledge of this pedigree, the witness answered, that it was derived from Madame Dussert deceased (the present plaintiff) and par la notoriete publique.[2] The testimony of two other witnesses, (one aged 39, and the other 45,) whose acquaintance with the family arose likewise through business relations, (in both cases, however, of much less standing than that of the first witness,) gave the same answers as to their source of knowledge. But a fourth witness, a retired officer of the navy, (in which Madame Dussert had had a brother,) had known her and her family for twenty-four years, by social and friendly intercourse (rapports de societe et d'amitie) with her and her sister; and he had derived his knowledge of her pedigree, from what he had learned from her mother, her brother, (the navy-officer,) and by this same "notoriete publique."

Except as inference from these dates, it did not appear when the knowledge derived from these last named persons as to Madame Dussert's pedigree had been communicated.

The sister, mentioned in the depositions of the first and the last witness, was the survivor of Madame Dussert's family, and at the time the depositions were taken, had become the sole beneficiary of the suit.

The present action, which was ejectment, and the defence to which was twenty-one years adverse possession,[3] was brought in the year 1832. And the evidence left it in doubt whether or not the statements of the mother and sister to the ex-officer had or had not been after a lis mota, and the descent had become a question. No one of the witnesses was related nor affined to the family of Madame Dussert; but each of them stated, in reply to the plaintiff's interrogatories, the dates and places of the several members' deaths, in a way to indicate entire acquaintance, through some means, with the family history in these particulars. What these means were did not appear; but as to some of the dates specified, it was impossible that the younger witnesses should have known them otherwise than by information from others.

The general complexion of the testimony, as respects the intelligence and education of the witnesses, was good.

The defendant had not joined in naming commissioners; and had not cross-examined.

Mr. Mallery, in support of his objection:

Evidence of common reputation may be received in matters of publick and general interest, a claim of highway, for example; because, all persons being interested in such matters, every one is presumed to have knowledge concerning them. But even in regard to such matters, proper means of information must be first shown; such as, in the case of a highway, being acquainted with the neighborhood, or frequently using the road. Otherwise, the evidence is not only worthless, but inadmissible. The principle on which such evidence is received, is the one already stated; viz. that the facts are publick facts, concerning the truth of which every person has an interest to inform himself. See the case of Crease v. Barrett, 1. Cromp. M. & R. 919, 929. But what interest can the publick have in the birth of a common child? or of what value is common rumour in regard to such a fact? a fact which as in this case, must have occurred more than half a century before the testimony was given.

Hence it is well settled, that common reputation is not evidence in regard to pedigree. Dr. Greenleaf, in his recent authoritative treatise on Evidence, after a careful collection of the cases, thus presents their result: "There are reported cases, in which the declarations of servants, and even of neighbours and friends, have been admitted. But it is now settled, that the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connexions of the family. The rule of admission is, therefore, restricted to the declarations of deceased persons, who were related by blood or marriage, to the person, and, therefore, interested in the succession in question." Greenl. Ev. pt 2, c. 5, § 103.

It is to be observed that not one of these four witnesses swears to general repute in the family: it is to a "notoriete publique," alone; that is common rumour; no base whereon to rest judicial decree.

Is the case altered by what is said to have been derived from the family? As to what came from Madame Dussert the plaintiff, or from her sister, (for many years before these depositions were taken, the beneficiary of the suit,) it is clearly inadmissible. Then as for what was said by the mother. It is doubtful whether this was not said post litem motam. Now, first of all we must remember that the admission of hearsay testimony, at all, is in opposition to a maxim of the law, of more pervading influence than perhaps any other. The statements offered in evidence must appear to be the "natural effusions" of the mind of the party making them; and being, at best, received with jealousy, it is incumbent on whomsoever offers them, to clear away every suspicion that may rest upon them. It is not enough that the evidence may be true. It must present every credential of truth upon its face. This was the doctrine held by a great majority of the judges in the Berkeley Peerage Case [8 H. L. Cas. 21], a case to which the attention of the court is particularly directed,

and which, being in the house of lords, is of the highest authority. Then the defence in this case is, the statute of limitations, or an adverse possession for twenty-one years before suit brought: and strong evidence has been given to support this defence. Now, admit that what was said by Madame Dussert was before suit brought, yet is it certainly clear that it was ante litem motam? The line of distinction is, not the commencement of the suit, but the origin of the controversy. Being an ejectment, the case is not one for favourable presumptions. "The plaintiff" says one case "must remove every possibility of title in another person; before he can recover; no presumption being to be admitted against the person in possession." Richards v. Richards, 15 East, 293, note. The plaintiff was a foreigner, a female, a widow, in a distant country; and there was no pressing necessity to bring a suit until the twenty-one years were about to expire.

But, finally, this hearsay is admitted under the condition that it is the best evidence which the case allows. And with us, where, except the family Bible, a registry is scarcely known; where there is but little motive of any sort, to perpetuate a knowledge of genealogies or pedigree, such evidence is well received; for in the nature of the case there can rarely be better. And this remark, though in a less extent, applies in England likewise. But in France, where marriage is a sacrament of the church, and baptism is scarcely ever omitted; where wills, and births and deaths are al enregistres devant notaire, and every man has his acte de naissance surely if the descent be as is alleged, some better evidence of it than such as is produced here, must exist; better than that of persons who appear to have been nowise connected with the family but in the course of commercial dealings; or than that of a person who, by force of his vocation, must have passed the greater part of his life at sea. Are there no family letters? nor deeds? nor recitals? Where is the father's will? or where any evidence of a devolution of property? The evidence, then, it is clear, is not the best of which the case admits; and though it may be hard on this plaintiff to reject evidence which may cause a loss of the suit, yet the court will act upon the wise sentiment of Lord Eldon, in a kindred case: "Your lordships will look hardships in the face rather than break down the rules of law."

Mr. C. Ingersoll, in support of the evidence: The father of Madame Dussert died in

1786; more than half a century before the depositions were taken. Direct evidence of marriage and birth cannot be required after such a term of years; for it would be impossible to obtain it. We have enough; we have persons of various ages and professions, all acquainted with the family through a series of years, and all testifying that the pedigree of Madame Dussert was matter of publick notoriety. The court will infer from the acquaintance proved with the family, that this notoriety means to include notoriety or common reputation in the family; and that is enough. Doe v. Griffin, 15 East, 293.

The depositions are in a foreign tongue, and the precise requirements of our law were probably understood by neither commissioners nor witnesses. The defendant did not name commissioners: he did not cross-examine; and the testimony is unimpeached; for he has offered none in rebuttal. In such a case no court will scan with eagle eyes.

As respects the lis mota, the question, by concession, is but doubtful; and this should not be enough to exclude the evidence. The Berkeley Peerage Case settled no such principle of exclusion. The testimony there offered has been made, not only post litem motam, but propter litem motam. To be sure, the court will not make difficult presumptions to support any testimony; neither will it make impossible ones for an opposite purpose.

BALDWIN, Circuit Justice. The rules of evidence are not absolutely inflexible; and where testimony bears strong general marks of candour, and an opposing party has neither cross-examined the witness, nor attempted to impeach the testimony by adducing counter evidence, a court, generally speaking, is not extreme in its requirements; especially where, as in this case, the evidence comes through the channels of a foreign language and a foreign commission. In such cases, testimony will sometimes be received, in regard to which, in other circumstances, the court would be more strict. We think, that under the circumstances of this case, it may be intended that the witnesses, two of whom appear to have been considerably acquainted with the family of Madame Dussert, designed by the expression notoriete publique, to include general reputation in the family.

The point being thus rested, it is not so important that we express an opinion as to the statements of the mother and brother; which it is a matter of doubt whether they were made ante or post litem motam. The defendant's counsel has argued very well against the reception of such testimony; but we rather incline, on first impression, to think that it is admissible. You may read the testimony, but we will reserve the point of law for future consideration, should it be rendered necessary.

[1] {Reported by John William Wallace, Esq.}

[2] The plaintiff's interrogatory as filed in English, asked: "Are you conversant with her pedigree, by direct knowledge; by declarations of deceased members of her family, or from general reputation?" This last expression the commissioners translated "Notoriete publique," and the witness, responding affirmatively, used the same words.

[3] The verdict having been for the plaintiff, this defence, it must be taken, was not made out; but the defendant showed a possession of several years.