

Case No. 8,922. MCPHERSON V. GALLAGAN ET AL.
[1 Hayw. & H. 394.]¹

Circuit Court, District of Columbia.

Dec. 1, 1849.

CERTIORARI—MAGISTRATE'S COURT—ISSUES REGULARLY TRIED—AWARD BY JURY.

On a motion to dismiss a certiorari it was held that the writ would not lie to a magistrate's court where it appears on the record of said court that the issues below had been regularly tried on a traverse tendered by the petitioner, and the restitution awarded on an inquisition held by a jury.

Motion to dismiss certiorari and to award restitution.

The petition of Daniel McPherson respectfully showeth:

That in the month of March, 1846, General John P. Van Ness, late of the city of Washington, died seized of a large real estate situate in the said city, of which the north part of that lot of ground being on [Seventh] street, known and described on the ground plot of said city as lot numbered 1, in square 428, with the house thereon and appurtenances, formed a part That in the summer of the year 1846, Governor Van

Ness, a brother of the said John P., and one of his heirs at law, who had entire control of his real estate aforesaid, put your petitioner into the peaceful and lawful possession of the said part of said lot and house thereon, with the appurtenances, which your petitioner has had and held from the summer aforesaid hitherto, and still has and holds, as tenant of the said Governor Van Ness. That the heirs of General John P. Van Ness have not, nor has the said Governor Van Ness, nor any person claiming under him, notified your petitioner that he or they or any of them wished to have again and repossess the premises aforesaid, or any part thereof. That in the month of June, in the present year, a man calling himself Dant, and two other men, the said Dant professing to act as the agent of James and Thomas Gallagan, of the city of Washington, called at the premises aforesaid and there and then demanded of your petitioner immediate possession of the same, which your petitioner refused to give, whereupon the said Dant and his said comrades commenced to take the windows out of the said house aforesaid, and it was with great difficulty your petitioner prevented the said parties from taking forcible possession of the premises aforesaid. That the said Dant and his said companions have since been tried and committed in our criminal court of a riot for their breach of the peace and acts aforesaid. That the said James and Thomas Gallagan have caused your petitioner to be proceeded against before Johnh. L. Smith and Thomas C. Donn, esquires, justices of the peace for Washington county, for a forcible entry and detainer. That the only acts charged and relied on as constituting the forcible entry and detainer complained of are your petitioner's refusal to surrender up the premises aforesaid to the said Dant, and your petitioner's resisting the said Dant and his associates in their said attempt to take forcible possession of the same in the month of June aforesaid. And your petitioner further shows, that in pursuance of a warrant issued by the said justices a jury was summoned and appeared on the premises aforesaid on Friday the 11th inst., and then and there convicted your petitioner of a forcible entry and detainer. Your petitioner, advised by a counsel learned in the law, and verily declares, and therefore charges that the said proceedings are unlawful and oppressive, and a manifest violation of his rights as a citizen of the city of Washington, and as the legal tenant of the premises aforesaid. Your petitioner therefore prays your honors to grant him the United States writ of certiorari to be directed to the said John L. Smith and Thomas C. Donn, commanding them to return and certify to this honorable court the warrant aforesaid by them to the marshal of the District of Columbia, and all proceedings had thereon as fully as the same now remains before them, and your petitioner will pray.

Wm. P. Percell and G. L. Giberson, for the petitioner.

The United States of America, District of Columbia, to wit:

To John L. Smith and Thomas C. Donn, Esquires, Justices of the Peace in and for the County of Washington, in the District of Columbia, and Each of Them, Greeting:

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Whereas, a certain inquisition for a forcible entry and detainer was lately depending before you or one of you in the name of James and Thomas Gallagan against Daniel McPherson, late of said county, for a forcible, &c., which said inquisition, as it is said, is still depending before you or one of you, undetermined, and the circuit court here being willing, for certain reasons, to be certified of the said inquisition, therefore you and each of you are hereby commanded, that the inquisition aforesaid, together with all the proceedings thereon, as fully and entirely with all things touching the same, as it now remains before you or some of you, by whatsoever name the said James Gallagan and Thomas Gallagan, or either of them, may be called in the same, you or some of you certify to the said circuit court to be held at the city of Washington on the 3d Monday of October-next, together with this writ, so that the said circuit court may be able to proceed thereon and do what shall appear to them of right ought to be done. Hereof fail not at your peril, and have you then and there this writ.

Witness the Hon. W. W. Cranch, Chief Judge, the 14th day of August, 1848.

The following is a summary of the proceedings had before the justices of the peace:

Writ of Inquisition.

District of Columbia, County of Washington, to wit:

We, Thomas C. Donn and John L. Smith, Justices of the Peace of said County and District aforesaid, to the Marshal thereof, Greeting:

Whereas, complaints have been made before us that Daniel McPherson, of said district and county, did on the 22d day of June, 1848, with force and arms and with strong hands did unlawfully enter into and make forcible entry and detainer into the dwelling-house situate on 7th street, west side, between H and I streets, on the north quarter of lot numbered one (1) in square No. 428, whereof James Gallagan and Thomas Gallagan, trading under the firm name of J. Gallagan and Son, of said county, was then seized in his demesne as of fee, against the form of the statute in such case made and provided; therefore, in behalf of the United States, we do command you that you cause to come before us, on Friday, the 11th day of August, 1848, at 4 o'clock A. M., at the premises in said county, twenty-four sufficient and indifferent persons, dwelling near and about the

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said tenement so forcibly entered and detained as aforesaid, to enquire upon their oaths, for the United States, of and concerning the said forcible entry and detainer so made as aforesaid, and have you then and there this writ with the jury as aforesaid.

Given under our hands and seals this 12th day of August, 1848.

T. C. Donn, J. P. (Seal.)

J. L. Smith, J. P. (Seal.)

Plea of the Defendant.

United States vs. Daniel McPherson.

Forcible Entry and Detainer.

The defendant, by his counsel, Wm. P. Percell and G. L. Giberson, comes and denies and defends the alleged forcible entry and detainer or either, and upon this he puts himself upon his country.

Wm. P. Percell, Att'y.

G. L. Giberson, Att'y.

August 11th, 1848.

A jury was thereupon summoned and the inquisition was held and the jury found for the United States.

Upon which the defendant was required to appear before the justices, at the premises, on the 12th day of August, 1848, in the county, between the hours of three and four o'clock of the aforesaid day, to show cause, if any you can, why restitution of said tenement should be made to the said James and Thomas Gallagan.

The jury being summoned by the marshal to appear as aforesaid and being impanelled and sworn to speak the truth of and upon the premises before specified, do say upon their oaths that Daniel McPherson is guilty of the premises aforesaid in the inquisition above specified, as by the said inquisition is above found. Therefore it is considered by us, the justices aforesaid, that the said James and Thomas Gallagan have restitution of the premises aforesaid in as full and ample a manner as he had before the said disseizen by the said Daniel McPherson. And now here comes before us, the subscribers, &c., the writ of certiorari, &c.

Given under our hands and seals, this 14th day of August, 1848.

J. L. Smith, J. P. (Seal.)

T. C. Donn, J. P. (Seal.)

Carlisle & Ennis, for defendants.

BY THE COURT. This cause having been heard and considered by the court on a motion to dismiss the certiorari, and it appearing by the record that the matter of fact, to wit, the forcible entry and detainer had been regularly tried, upon a traverse tendered by the petitioner, before the service of the certiorari, and restitution awarded but not executed; it is now considered by the court that the certiorari be dismissed with costs, and the

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justices proceed in the premises as if the certiorari had not issued; and that the clerk of this court do certify the same to said justices.

¹ [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]