HACKETT *et al. v.* MARMET CO.

(*Circuit Court of Appeals, Fourth Circuit.* October 11, 1892.)

No. 11.

1. EJECTMENT—TITLE TO SUPPORT—ADVERSE POSSESSION AND PAYMENT OF TAXES.
In ejectment, in West Virginia, it is immaterial whether the paper title of the plaintiff is good or not, when he has proved adverse possession and payment of taxes for 10 years, for this gives a perfect title under the state statute of limitation.

2. LANDLORD AND TENANT—ESTOPPEL—DENIAL OF LANDLORD'S TITLE.
Where a person admits that he stands in the relation of a tenant to another, he is estopped to deny the validity of his landlord's title.

3. SAME—LEASE—NOTICE TO QUIT.
Where a lease provides that the tenant shall deliver possession on voluntarily ceasing to work for the lessor or on receipt of notice to quit, the lessor can maintain an action of ejectment when the lessee voluntarily ceases to work for him, whether valid notice to quit is given or not.

4. SAME—MISNOMER—EJECTMENT.
The Marmet Company was incorporated under the laws of Ohio, and permitted to do business in West Virginia under that name, according to the laws of the state. It customarily used in West Virginia the name of the Marmet Mining Company, and executed a lease under this misnomer. Its identity, however, appeared both by proof and admissions. *Held*, that the Marmet Company could maintain an action of ejectment under the lease.

In Error to the Circuit Court of the United States for the District of West Virginia.

At Law. Action of ejectment by the Marmet Company against P. J. Hackett and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Statement by HUGHES, District Judge:

This was an action in ejectment, instituted and conducted under the practice in such cases observed in West Virginia. The action was brought for the recovery of lots of ground and houses upon them, contained in a tract of land in Putnam county, in that state, embracing 4,500 acres, described in the declaration. At the trial of the cause, the defendants below elected to sever, and pleaded not guilty, severally. It was afterwards agreed upon the record that the case against P. J. Hackett should be tried singly, and that the final judgment in that action should be entered in each of the other cases,—about 120 in all. The defendants below had been miners in the employment of the plaintiff company, as such occupying houses on its property, under leases the same as that under which Hackett held. That lease contained the following stipulations:

"This lease shall terminate and close whenever the said lessee, from any cause, ceases to work for said company. The said company may terminate this lease at any time by giving the said lessee ten days' notice in writing that the same shall end and terminate upon some day named in such notice, and upon the day so named in said notice this lease shall terminate and end, and the said lessor may re-enter and take possession of said leased premises without further notice or proceeding. The said lessee hereby agrees and promises to pay to the said Marmet Mining Company the rent, as aforesaid, monthly, and also agrees that such rent may be withheld by said company

out of any wages accruing to him from said company; and he also agrees to deliver possession to said company of said tenement building and appurtenances upon the termination of this lease, whether the same is terminated by notice or by his ceasing to work for said company, as hereinbefore provided, or in any other manner whatever; and under no circumstances and in no event shall this lease be construed to be a renting from year to year. It being the purpose of this lease to secure the said company the use of said tenement building and appurtenances for the persons in its employ, the said P. J. Hackett enters into this lease with a full understanding of this purpose, and admits its justice and propriety, and also recognizes and admits the right and power of the said company to terminate this lease in the manner hereinbefore provided, at any time and for any purpose it may choose, and hereby agrees to all provisions of the foregoing lease."

The lease was dated June 22, 1886. It was made in the name of the Marmet Mining Company. Prior to the month of June, 1885, the Marmet Company, the plaintiff in this cause, leased of its subsequent vendors the premises mentioned and described in the declaration in this cause, and as such lessee, and under the name of the Marmet Mining Company, operated said property as a coal property, and continued said operations in said name until the deeds aforesaid were executed to it, and thereafter continued said business in said name, as owner of said property, and still does so.

The Marmet Company derived title through Henry J. Raymond and Elisha Riggs, and through the Averill Coal & Oil Company. Henry J. Raymond and Elisha Riggs, at the date of their deed to the Averill Coal & Oil Company of October 20, 1866, had good title to the premises therein described. Said premises are of value greater than $2,000. The plaintiff, and those under whom it claims under the deeds aforesaid, are and have been, by its agents and tenants, in the actual possession of said premises ever since the date of said deed of October 22, 1866, and have paid all the taxes charged or chargeable thereon since that date, to wit, the taxes for the year 1866 and each year since. They have had possession and paid taxes for more than 10 years preceding the institution of this suit. Since the date of the deed of December 22, 1866, the plaintiff, under the name of the Marmet Mining Company, has been largely engaged in mining and shipping coal from said premises, and has had on said premises, for the use of its miners and employes, many houses, one of which houses, to wit, house 52, is now, and was at the commencement of this suit, occupied by the defendant P. J. Hackett. The plaintiff, under the name of the Marmet Mining Company, using said name to distinguish its transactions and business in West Virginia from its transactions and business elsewhere, leased to its miners these houses, and, among them, leased to the defendant P. J. Hackett, as one of its miners, the house 52 and premises set out in the written lease aforesaid, dated June 22, 1886. Hackett signed said lease at its date, and delivered the same to the plaintiff, and has ever since occupied said house, and paid to the plaintiff, under the name of the Marmet Mining Company, under said lease, the rents therein provided for up to the 1st

day of January, 1891. About the 1st day of January, 1891, the miners, including the defendant Hackett, struck, and ceased to work for the plaintiff, doing business as aforesaid, because of the plaintiff's refusal to increase its prices of and for mining coal from 2 cents per bushel to 2½ cents per bushel, whereupon the plaintiff, by the name of the Marmet Mining Company, gave to the defendant Hackett more than 10 days' notice to terminate the lease and tenancy, and to quit the premises, which notice was in writing, but the said defendant refused to vacate said house and premises, and still occupies the same. Said notice was given in January, 1891, and no rent has been paid by said defendant for said premises since January, 1891. The plaintiff has complied with all the requirements of the laws of West Virginia authorizing foreign corporations to hold property and do business and prosecute suits in that state.

On the part of the defendant below it was proved affirmatively that he had entered into the possession of the house and premises in question in this suit in June, 1885, as the tenant of the plaintiff, the Marmet Company, and that he held and occupied the same as such tenant, and paid the rent thereof to the said company as such tenant prior to the date of said lease given in evidence in this case by the plaintiff, during all of which time he was mining coal for the plaintiff; that after the date of the lease he continued to mine coal for the Marmet Company, and paid his rent for the house and premises to that company up to the time he quit work for said company; that the plaintiff's agent informed him at the time he executed the lease that he should not work for the plaintiff unless he executed the same, and thereupon he did execute said lease, and thereafter paid the rent thereof to the plaintiff, as aforesaid, up to January 1, 1891; that he did not, in terms, refuse to work for the plaintiff, but did voluntarily cease to so work about January 1, 1891, because the plaintiff refused to increase its miners' wages for mining coal from 2 cents per bushel to 2½ cents per bushel, and that he never received any notice to quit and surrender the premises in question from any one, except the notice in writing given in evidence in this cause by the plaintiff; that the plaintiff paid him for all the coal mined by him up to January 1, 1891, and that he had not worked for the plaintiff in any way since that date. And, the plaintiff not objecting to the evidence and proof so offered, the same was given to the jury in the words and figures stated in said offer. The defendant further proved that in a suit in the circuit court of Putnam county, W. Va., brought by R. N. Lilly against the Marmet Mining Company, the plaintiff here, the Marmet Mining Company, filed a plea in bar of said suit, duly verified, that there was no such corporation as the Marmet Mining Company, and that said suit was thereupon dismissed without trial. In the descent of the property embracing the leased premises one Elisha Riggs was a holder of some of the bonds secured by mortgage upon it at one stage of the descent. Riggs died. The mortgage was foreclosed. Riggs' executors were among those who purchased at the sale in foreclosure. Deed was made to them, as executors, among other grantees; and these executors, as

such, united with other grantors, afterwards, in conveying the property to the Marmet Company. It is objected on behalf of Hackett that no power by will to sell real estate is shown by the Marmet Company to have been given the executors of Riggs, and therefore that no title passed to that company as to the undivided portion of the property which represented the bonds belonging to the estate of Riggs.

Other objections to the right of the plaintiff company to recover in this suit, based on other facts in the case, are stated as follows in behalf of the plaintiff in error:

"The court erred in overruling the objection of the plaintiff in error to the reading in evidence to the jury of the lease dated June 22, 1886, executed by the Marmet Mining Company, by W. W. Adams, cashier, to the plaintiff in error, by the defendant in error, and in permitting said lease to be so read in evidence to the jury, notwithstanding said objections. This lease was not the lease of the defendant in error, the Marmet Company, the plaintiff below, but it was the lease of an entirely different company. The plaintiff in error was not, therefore, the tenant of the defendant in error, but of the Marmet Mining Company. And the oral evidence improperly permitted by the court to be given in connection with said lease against the objections of the plaintiff in error did not make the said lease proper evidence in this cause. The defendant in error, the plaintiff below, is an Ohio corporation, which, but for the statutes of the state of West Virginia granting the privilege to nonresident corporations, could not do business in that state. The corporate name of the defendant in error, as shown by its articles of incorporation, was and is the The Marmet Company. The several papers and certificates filed by it for the purpose of acquiring the right under the provisions of said statute to transact its corporate business in West Virginia all show its corporate name to be the Marmet Company. And conceding, for the purpose of argument only, that the misnomer of a resident corporation in pleading might not be fatal to the pleader, it does not follow that a foreign corporation can obtain authority to transact its corporate business in the state of West Virginia in its proper corporate name, and then, instead of doing so, as matter of convenience, assume another and different name, and transact its corporate business in that name, which the defendant in error in this case, by its own showing, did.

"The court erred also in overruling the objections of the plaintiff in error to the reading in evidence to the jury by the defendant in error of the notice to the plaintiff in error to quit and surrender the possession of the premises occupied by him, signed, 'Marmet Mining Company. By Geo. W. Guysi, Superintendent,' and of the return of the service thereof, and in permitting said notice and the return of the service thereof to be read in evidence to the jury, notwithstanding the objections. If the theory of the defendant in error in this case is correct, the notice to quit should have been in the name of the Marmet Company, and not in the name of the Marmet Mining Company. And the service of this notice did not entitle the defendant in error to a verdict for the recovery of the possession of the leased premises. And the return of the service of the notice was not sufficient in law, (1) because it did not show that the notice was served on the plaintiff in error in the county of Putnam; (2) it did not show that Goff, whose name is signed to said return, was either sheriff, deputy sheriff, or constable of Putnam county; (3) and said return is not verified by affidavit."

C. C. Watts, for plaintiff in error.

Malcolm Jackson, for defendant in error.

Before BOND, Circuit Judge, and HUGHES and SIMONTON, District Judges.

HUGHES, District Judge, (*after stating the facts.*) It thus appears that the plaintiff in error excepts to the judgment of the court below on three grounds, viz.: *First*, a failure of the defendant in error to prove power to convey real estate in the executors who united with other grantors in conveying the land embracing house and lot 52 to the Marmet Company; *second*, irregularities in the notice to quit given to the defendant below; and, *third*, and chiefly, the variance in name between the Marmet Company, the nominal plaintiff below, and the Marmet Mining Company, of whom the defendant below was an employe and tenant, and the tenant in possession of house and lot No. 52. Doubtless the first two objections are based really and chiefly upon the variance between the name of the plaintiff company shown by the record and that of the company which made the lease, and of whom Hackett held as lessee after June, 1886. The two objections would not probably have been made if this misnomer had not been used. But they will be dealt with as if no such variance appeared.

1. The first exception cannot be sustained. It is immaterial to this case whether the executors of Elisha Riggs had or had not power to unite in a conveyance of real estate; for, independently of the paper title, the Marmet Company proved a title by possession, and the payment of taxes for more than 10 years next preceding the institution of this suit, a tenure which constitutes a perfect title under the laws of limitation in force in West Virginia. "Uninterrupted, honest, and adverse possession for the period prescribed by the statute not only gives a right of possession (in Virginia and West Virginia) which cannot be divested by entry, but also gives a right of entry and of action, if the party is plaintiff, which will enable him to recover, even against the strongest proof of a title, which, independently of such continued adversary possession, would be a better title." 2 Minor, Inst.; *Middleton* v. *Johns*, 4 Grat. 129. This exception cannot be entertained, moreover, for another reason. The defendant below is in this case estopped from bringing in question the title of the plaintiff company to the premises which he holds from it. The relation of landlord and tenant between the plaintiff and the defendant below having been not only established by the plaintiff, but unqualifiedly admitted and affirmatively proved by the defendant below, objection from this tenant to this landlord's title cannot be entertained by the court. In such a case "the title of the lessee is, in fact, the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. It is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to contradict the title of his lessor without dis-

paraging his own, and he cannot set up the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing and in full operation." *Blight* v. *Rochester*, 7 Wheat. 547.

2. The exception of the plaintiff in error to the service and the return of the notice to quit given him by the mining company cannot avail to invalidate the judgment below, for, without regard to any notice in writing at all, the plaintiff below had full right to maintain its action. He admits in his defense that he voluntarily ceased to work for the company, and the lease provides in express terms that the lessee shall deliver possession, "whether the same is terminated by notice or by his ceasing to work for said company, as hereinbefore provided." In the face of an admission that he had voluntarily ceased to work for the company, thereby violating the express stipulation of the lease, it is immaterial whether any notice to quit was given at all, and whether its service and return were regular or not. This objection to the judgment of the court below must therefore be overruled.

3. We come now to the point which is the chief reliance of the plaintiff in error, to wit, that whereas the evidence produced at the trial went to establish title in the Marmet Company, the plaintiff of record in the court below, yet the lease on which the action is founded was made by the Marmet Mining Company, the defendant below being tenant of and holding from the Marmet Mining Company, "an entirely different company;" and therefore, that proofs of the title of the Marmet Company were improperly admitted in evidence at the trial of a suit for possession founded on a contract between the Marmet Mining Company and its lessee, the defendant below. The question presented by this exception is, therefore, whether a corporation is limited in its transactions strictly to the use of the name under which it was incorporated, and whether the use of such a variation in name as that of the Marmet Mining Company instead of the Marmet Company *ipso facto* vitiates its contract as to the company of the corporate name, and makes it in law necessarily a different and distinct corporation from the chartered one. A long line of authorities negatives such a contention, and establishes the proposition concurred in by courts and text writers, that a misnomer of the corporation does not invalidate a deed if it can be collected from the face of the deed, aided by extrinsic evidence, what corporation is intended; the real test being not identity of name, but identity of the corporation itself, or capability of identification. Mr. Dillon, in his work on Municipal Corporations, expresses the law of the subject as accepted by the courts:

"A misnomer or variation from the precise name of the corporation in a grant or obligation by or to it is not material if the identity of the corporation is unmistakable either from the face of the instrument or from the averment and proof."

Identity of name, therefore, being unnecessary, the only question in the case under consideration is as to the identity of the Marmet Mining

Company with the Marmet Company. This identity is established by the plaintiff in error himself. He proved affirmatively at the trial "that he had entered into the possession of the house and premises in question in this suit in June, 1885, as the tenant of the plaintiff, the Marmet Company, and that he held and occupied the same as such tenant, and paid the rent thereof to the said company as such tenant, prior to the date of the lease [June 22, 1886] given in evidence in this case by the plaintiff; * * * that after the date of said lease [which was from the Marmet Mining Company] he continued to mine coal for the said Marmet Company, and paid his rent for said house and premises to said company, [his lessor being now the Marmet Mining Company,] up to the time he quit work for said company, * * * January 1, 1891; * * * and that he never received any notice to quit and surrender the premises in question from any one except the notice in writing given in evidence in this cause by the plaintiff;" the notice, be it observed, having been given by the Marmet Mining Company, and the plaintiff of record of which he speaks being the Marmet Company. Throughout his evidence given in his defense he speaks of and treats the plaintiff Marmet Company as identical with his lessor and employer under the lease of June, 1886, the Marmet Mining Company, as one and the same corporation. It was both proven by the plaintiff company and admitted by the plaintiff in error that the company was in possession of the premises embracing house and lot 52, and extensively operated them as a coal property from as early a date as 1866; that the plaintiff in error was in its employment as well before the lease of June, 1886, as afterwards down to 1891, receiving wages from and paying rent to the Marmet Company before and the Marmet Mining Company after June, 1886, as one and the same corporation. Not only is this identity of the corporation recognized throughout by Hackett himself, but it is apparent also from the written evidence in the case. For instance, the first clause of Hackett's lease from the company of June 22, 1886, uses these words:

"The Marmet Mining company doth hereby lease to P. J. Hackett, now [that is to say, before the lease was entered into] in its employ, the tenement building marked and known as '52,' upon the premises and coal property of the Raymond City coal property, now in the possession and under the control of said Marmet Mining Company."

The identity of the Marmet Company with the Marmet Mining Company being thus established beyond all doubt, the objection of the plaintiff in error to the judgment of the court below, founded upon this variation in the use of the name of the corporation, cannot be sustained.

The judgment of the court below must therefore be affirmed.

UNITED STATES v. NEWTON.

(*District Court, S. D. Iowa.* May 26, 1892.)

1. CONSPIRACY TO DEFRAUD UNITED STATES—FRAUDULENT INCREASE OF MAILS DURING WEIGHING PERIOD.
On separate trial of one defendant, on an indictment against two for conspiring to defraud the United States by mailing a large quantity of old newspapers for the purpose of fraudulently increasing the weight of mail matter, (transported over a railway post route during a period fixed by the postal authorities for weighing such mail matter, as a basis for ascertaining the additional compensation to be paid the railway company,) thereby offending against Rev. St. § 5440, which provides that if two or more persons conspire to commit any offense against, or to defraud, the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties thereto shall be liable, etc., before the jury can convict they must find the defendant guilty beyond any reasonable doubt; and this includes finding from the evidence (1) that the conspiracy charged existed, (2) that the overt act charged was committed in furtherance of the conspiracy, and (3) that defendant was one of the conspirators.

2. SAME—BENEFIT TO CONSPIRATORS.
To constitute such conspiracy it is not essential that defendant, or any other of the alleged conspirators, should have derived any pecuniary benefit therefrom; but any benefit so accruing therefrom may be considered by the jury as a circumstance in determining defendant's relation to the acts committed.

3. SAME—SUCCESS OF CONSPIRACY.
To constitute the statutory offense, it is not necessary that the alleged conspiracy should have been successful.

4. SAME—KNOWLEDGE OF ACTS OF OTHER CONSPIRATOR.
Mere suspicion or bare knowledge by an alleged co-conspirator that defendant was attempting to defraud the United States is not sufficient to make such person a party to the attempt to defraud, and to sustain the charge of conspiracy. To constitute a conspiracy the evidence must also show intentional participancy in the attempt to defraud; and if the evidence shows that such alleged co-conspirator had knowledge that defendant was mailing over said post route such newspapers with intent to defraud the United States, and such alleged co-conspirator, with a view to assist defendant therein, remailed such newspapers over said post route, a conspiracy to defraud the United States is thereby proven, and by such remailing such alleged co-conspirator becomes an active party to such conspiracy.

5. SAME—PLACE OF CONSPIRACY.
If the fraudulent mailing was committed within the judicial district charged in the indictment, it is immaterial where the alleged conspiracy was formed, or whether or not the parties thereto, or either of them, were ever within such district.

6. SAME—TIME OF CONSPIRACY.
It is not necessary, to justify a verdict of guilty, that the conspiracy should have been formed and in full existence prior to the weighing of such fraudulent mail matter. It is sufficient if the defendant and any other person at any time during the weighing formed a common design to defraud the government in connection with such weighing, and that then the defendant or such other person committed an overt act in connection therewith.

7. SAME—PREVIOUS ACTS OF CONSPIRATOR.
If, prior to the formation of such common design, defendant or any other person had been doing the very act which afterwards, by being committed to effect the conspiracy, ripened into the statutory offense, a verdict of guilty would be warranted.

8. SAME—ACTS OUT OF DISTRICT CHARGED IN INDICTMENT.
Evidence that the newspapers, the fraudulent mailing of which within the district constituted the overt act charged in the indictment, were rewrapped and remailed over the post route in question, from a place without the district, by an alleged co-conspirator, is not competent as proof of such overt act, but may be considered as showing the nature, extent, plan, and operations of the conspiracy, if one existed.

9. SAME—ACTS OF EMPLOYES OR AGENTS.
If such mailing was done by defendant's employes, servants, or agents, as such, and not as parties to, or members or abettors of, the common design, they will not be deemed co-conspirators, nor will such mailing amount to an overt act.