PINNEY v. NEVILLS et al.

(Circuit Court, D. Massachusetts. March 4, 1898.)

No. 658.

ATTACHMENT—STOCK IN FOREIGN CORPORATION.

In Massachusetts, there being no statute authorizing it, there can be no attachment of shares of stock in a foreign corporation owned by a nonresident defendant.

This was an action, commenced by attachment, by George M. Pinney against William A. Nevills and others. The case was heard on a motion to discharge the trustee.

Gaston & Snow, for plaintiff.
Charles M. Reed, for defendants.

COLT, Circuit Judge. This suit was originally brought in the state court, and removed to this court. The plaintiff is a citizen of Massachusetts, and the defendants are citizens of California. No personal service was made on any of the defendants. The only service which was made was by attachment of certain certificates of stock belonging to the defendants, in the hands of the National Bank of the Republic, located in Boston. These were certificates of stock of the Rawhide Gold-Mining Company, a corporation organized under the laws of West Virginia. The question presented on these motions is whether shares of stock in a foreign corporation owned by a nonresident defendant can be reached by process of attachment under Massachusetts law. The statutes of Massachusetts provide that shares of stock in a corporation organized under the laws of the state, or under the laws of the United States, where such corporation has a usual place of business in the state, may be attached. Pub. St. Mass. c. 161, § 71; Id. c. 171, § 45. There is no provision in the Massachusetts statutes that shares of stock in a foreign corporation can be reached by attachment, except in the case of a corporation organized under the laws of the United States. The general rule of law is that shares of stock in a foreign corporation owned by a nonresident defendant are not subject to attachment. Plympton v. Bigelow, 93 N. Y. 592; Ireland v. Reduction Co., 19 R. I. 180, 32 Atl. 921; Denton v. Livingston, 9 Johns. 96; Winslow v. Fletcher, 53 Conn. 390, 4 Atl. 250; Smith v. Downey (Ind. App.) 34 N. E. 823. Motions granted. Case dismissed for want of jurisdiction.

BUFORD v. KERR.

(Circuit Court, W. D. Missouri, W. D. March 17, 1898.)

1. COURTS—FOLLOWING STATE COURTS.

Where the supreme court of Missouri held that an estate passed by a will is a statutory estate, and that the effort of the testator to further control the estate was in contravention of the statutes of Missouri, the federal court will follow such decision.

2. ADVERSE POSSESSION—LIMITATION OF ACTIONS.

In Missouri, a defendant who has held open, notorious, exclusive, continuous, and adverse possession for more than 10 years after the plaintiff became of age is held to have acquired title by virtue of the statute of limitations.

O. A. Lucas and C. F. Moulton, for plaintiff.
Geo. W. Warder and Fyke, Yates & Fyke, for defendant.

ROGERS, District Judge. I have not the time, nor do I see that it would be profitable, to write an opinion in this case. It is admitted by counsel that the question raised in this case is the same as that raised in Brown v. Rogers, 125 Mo. 392, 28 S. W. 630. On argument it was insisted by the plaintiff that the supreme court of Missouri in that case erred in not holding that the will of Jacob Johnson created an executory devise; and it is further insisted that this court is not bound by the decision of the supreme court of Missouri in Brown v. Rogers, supra, but should disregard the same, and hold that the will created an executory devise. The question presented is not what was the intention of the testator, Jacob Johnson. The supreme court of Missouri, in Brown v. Rogers, supra, say:

"There can be no doubt that the testator, by the final paragraph of the will, intended, in case of a failure of issue to any of the devisees, to have the estate pass to the other devisees, and the heirs of their bodies; having in view the purpose of finally vesting the entire estate in the grandchildren. The intention of the testator is very clear."

In this statement I concur. There is therefore no difference of opinion as to what the testator, Jacob Johnson, intended by his will. The real question, therefore, presented before the supreme court of Missouri in Brown v. Rogers, supra, was, what effect did the statute of Missouri of 1845, quoted on pages 398, 399, 125 Mo., and page 631, 28 S. W. (of Brown v. Rogers, supra), have upon the will of Jacob Johnson; or, to state it in another form, in construing the will, how had the statute modified the common law? The court said:

"There can be no doubt that each separate paragraph of the will which makes devises to the daughters of the testator created, as it would have been under the English statutes of entails, an estate in fee tail."

And I do not understand that the conclusion of the court thus reached, based upon the separate paragraphs, as it is above stated, is combated by plaintiff's counsel. Continuing, the court say:

"If there had been no other provision of the will, the statute of this state concerning entails, in force at the death of the testator, would have immediately converted the estate into one for life only in the devisee, with remainder in fee to her children; and, in the event of such devisee dying without issue, the remainder would have passed to, and been vested in, the heirs of such devisee."

Further on, referring to the statute of 1845, they say:

"Under this statute, where the attempt is made to create an estate tail the estate is immediately converted to one created by the statute, under which the entire estate passes to the grantee or devisee for life, with remainder in fee simple to his or her heirs."

The character of estate, therefore, created by the separate paragraphs of the will, is that described in the foregoing paragraph. In short, it is a statutory estate to each devisee for life, with remainder in fee simple to her heirs, not to the heirs of her body, as designated in the will.

They then say:

"The attempt of the testator by the final paragraph of the will to follow up the estate tail, first created, with a succession of others limited upon cross re-

mainders, with a view that ultimately his entire estate should vest in his grandchildren, is in direct contravention of the clearly-expressed intention of the statute. The intention of the legislature must prevail over that of the testator."

We see, therefore, that the supreme court of Missouri have distinctly held that the estate passed by the separate paragraphs of the will is a statutory estate, and they describe its nature and character, and that the effort upon the part of the testator to further control the estate was in contravention of the statutes of Missouri, as construed by its court of last resort. This court is asked to place another and different construction upon that statute. To do so, we think, is in direct conflict with an unbroken line of authorities which control this court. Travellers' Ins. Co. v. Township of Oswego, 19 U. S. App. 321, 7 C. C. A. 669, and 59 Fed. 58; Madden v. Lancaster Co., 65 Fed. 188; Brown v. Furniture Co., 16 U. S. App. 221, 7 C. C. A. 225, and 58 Fed. 286; McElvaine v. Brush, 142 U. S. 155, 12 Sup. Ct. 156; Sanford v. Poe, 37 U. S. App. 378, 16 C. C. A. 305, and 69 Fed. 546; Association v. Smith, 1 U. S. App. 270, 4 C. C. A. 8, and 56 Fed. 141; Evansville v. Woodbury, 18 U. S. App. 515, 9 C. C. A. 244, and 60 Fed. 718; Marbury v. Tod, 22 U. S. App. 267, 10 C. C. A. 393, and 62 Fed. 335; Railway Co. v. Hogan, 27 U. S. App. 184, 11 C. C. A. 51, and 63 Fed. 102.

The supreme court of Missouri further say:

"The statute operating upon the will vested a life estate in the devisees, Clarinda and Mary Jane, to the land devised to them, respectively, with remainder in fee simple absolute in their respective heirs. Both dying without issue, the remainder in fee upon their death passed to, and vested absolutely in, their collateral heirs, as tenants in common. After the death of each devisee, the land devised to her for life was subject to partition, and to the application of the statute of limitation. As it is conceded that defendants and those under whom they claim had been in the adverse possession of the land in question under color of title, for more than ten years after the youngest of the plaintiffs became of age, the judgment is for the right party, and should be affirmed."

In so far as the above paragraph is applicable to the case at bar, I concur. In the agreed statement of facts it is admitted that the defendant, John A. Kerr, and those under whom he claims, have had open, notorious, exclusive, continuous, and adverse possession of the S. E. ¼ of the S. E. ¼ of section 33, township 50, range 32, since 1871, and that the defendant, John A. Kerr, and those under whom he claims, have had open, notorious, exclusive, continuous, and adverse possession of the S. W. ¼ of the S. E. ¼ of section 35, township 50, range 32, ever since June 30, 1860. The court therefore holds that the plaintiff is not the owner, nor entitled to the possession, of either or any part of said tracts of land; that the said John A. Kerr, and those under whom he holds, have acquired title thereto by virtue of the statute of limitations,—their possession being under color of title under deeds derived by virtue of sales in the partition proceedings, as stated in the agreed statement of facts. The court therefore finds the issues of fact for the defendant, and declares the law in his favor, as above indicated. Judgment for defendant.

LILIENTHAL et al. v. McCORMICK et al.

(Circuit Court, D. Oregon. March 1, 1898.)

No. 2,418.

1. CONTRACT OF SALE—ACTION FOR BREACH—PLEA OF PERFORMANCE.
An allegation of a tender of hops of an average of the best product of a crop produced upon certain premises, and that defendants exerted their utmost to produce a crop "of choice quality, in sound condition, of good color, and fully matured," does not show a compliance with a contract to deliver, absolutely, hops of that quality and condition, to be produced upon said premises.

2. SAME—DEMAND BEFORE SUIT.
A contract of sale subject to inspection provided for the repayment, on demand, of money advanced, if the goods, when delivered, were not accepted because not of the quality agreed upon. Goods were tendered, and on that ground refused, and the seller insisted that he had fully performed the contract. The purchaser sued for the alleged breach. *Held*, that an answer that no demand had been made for the repayment of the money advanced was insufficient.

3. SAME—PERFORMANCE OF CONTRACT—PLEA OF TENDER.
A plea of tender of the money advanced, with interest thereon at the agreed rate, is a sufficient answer to a complaint for failure to comply with a contract to repay money advanced in case goods sold subject to inspection were not accepted.

Wirt Minor, for complainants.
John H. Woodward, for defendants.

BELLINGER, District Judge. This is a suit by the complainants upon a hop contract, in which, among other things, it is prayed that the contract sued upon be decreed to be a lien upon certain hops grown upon one of the defendant's hop farms in Marion county, in favor of the complainants, to the extent of moneys advanced by them to the defendants, and of interest upon the same at the rate of 10 per cent. per annum from the dates upon which the same were advanced, and to the extent of all damages which have been sustained by the complainants by reason of the failure of the defendants to deliver hops according to their contract. The contract provides for a delivery not later than November 10, 1897, of 30,000 pounds of hops, in bales of about 185 pounds each, in new 24-ounce bale cloth; 7 pounds tare per bale being allowed. These hops are to be the product of the hop farm of Charles McCormick, defendant, consisting of about 70 acres. The contract further provides that said hops, when delivered, are to be not the product of a first year's planting, and not affected by spraying or mold, and are to be of choice quality, and in sound condition, good color, fully matured, cleanly picked, free from vermin, damage, etc. And it is further provided that when said hops are delivered they may be inspected by the parties of the second part (the complainants herein), or by an agent selected by said parties, at the time of the delivery of any lot thereof, and that should said hops, or any part thereof, not be delivered in the condition agreed upon, according to the judgment of said parties of the second part, or their said agent, the said parties of the first part shall, upon demand, repay to said parties of the second part such sums of money as they may have advanced on said crop,

with interest at the rate of 10 per cent. per annum from the date when advanced; and it is provided that such instrument shall be a chattel mortgage on the entire crop of hops raised on the above-described land, to secure the payment of said sums advanced, and interest, and the performance of all the provisions thereof. This court has heretofore held in this case that this mortgage could not be enforced as a lien to secure damages for the nonperformance of the contract, but that it is a security merely for the repayment of the sums of money advanced by the complainants herein upon the said hop crop, with interest as provided in the contract. The questions to be now decided arise upon exceptions to the answer of the defendants herein.

The defendants answer, and allege the delivery of 30,000 pounds of the crop of hops raised by defendants on the 70 acres of land mentioned in the bill, and not of the first year's planting, in bales of about 185 pounds each, in new 24-ounce bale cloth, etc., "and that the said hops so delivered were an average of the best product of said crop so produced, picked, and cured on said premises of seventy acres; that said defendants did exert their utmost to produce and secure a crop of hops of choice quality, and in sound condition, and of good color, etc.; that said hops so by the defendants delivered at said warehouse as aforesaid were on or about the 10th and 11th days of October, 1897, tendered to the agent of the complainants, who inspected them in part, and upon such inspection did at the first accept and approve a portion thereof, and thereafter did reject and refuse to receive any portion thereof." This answer then sets out a letter written by defendants to complainants, notifying them that they had delivered 30,000 pounds of hops at the warehouse at Woodburn, Or., according to said contract, which said hops complainants, according to the statement in said letter, refused and neglected to take or pay for, and charging complainants with the failure to comply with their said contract. The letter declares that in consequence thereof the defendants elected to consider said contract to be abrogated and annulled, and of no force or effect, and it concludes with the tender of the sum of $1,063, as the money advanced and paid under said contract, including interest thereon. All of these portions of the answer are excepted to, and the exceptions are sustained. The allegation that the defendants tendered 30,000 pounds of hops, of an average of the best product of said crops so produced, etc., and that they exerted their utmost to procure and produce crops of choice quality, and in sound condition, of good color, fully matured, etc., does not show a compliance with the requirements of the contract. The latter part of this allegation merely shows an attempt to comply with the contract, by an utmost exertion to procure a crop of hops of the quality required. The allegation that the crops tendered were an average of the best product of said crops so produced does not answer the contract, by which the defendants bound themselves to deliver hops of choice quality, and in sound condition, of good color, fully matured, etc. The tender was of an average of the best product of the crop produced, while the obligation was to deliver, absolutely, hops of choice quality, and in sound condition, good color, fully matured, etc. The letter set forth in the answer is wholly immaterial. It makes no difference what the parties

say, in a letter written to the complainants, they have done towards the performance of the contract. The material thing is, what have they in fact done? The exception is also sustained as to the second paragraph on page 3 of the answer, which alleges that complainants have never made demand on defendants for repayment of the money alleged in the complaint to have been advanced by them to defendants, etc. As to the remainder of the answer, the exception is overruled. Part of this matter is immaterial, and might have been stricken out, but connected with it are allegations of a tender, which show a compliance with the condition of the contract by which the defendants agreed to refund the money advanced by the complainants, with interest, etc., if the complainants, according to their judgment, should conclude that the hops tendered were not of the quality required by the contract, and should for that reason refuse to accept them.

SLADDEN v. NEW YORK LIFE INS. CO.

(Circuit Court of Appeals, Seventh Circuit. April 5, 1898.)

No. 440.

1. LIFE INSURANCE—FALSE REPRESENTATIONS IN APPLICATION—EVIDENCE.
An abstract of the application and medical examination contained in the last sheets of the policy introduced by plaintiff will be presumed, in the absence of any evidence of mistake, to be correct, and they are competent evidence of the contents, execution, and genuineness of the originals; and if, in connection with the proofs of loss also introduced by plaintiff, they show a breach of the warranty in the application, there can be no recovery.

2. SAME—FALSE STATEMENTS IN APPLICATION.
In an application, the applicant stated that she had no physician, and had consulted none, when in fact she had been attended by a physician for more than two months prior to the application, and had had consumption for nearly a year. *Held*, that the failure to disclose the facts was a violation of the warranty that she had made a full, complete, and true statement, and no recovery could be had.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This action was brought by the plaintiff in error, S. C. Sladden, as executor, to recover the amount of a policy of insurance upon the life of his wife, Mary, to whose executors, administrators, or assigns the policy had been made payable. The declaration embodies a copy of the policy, which contains the usual clause making the written application, with its "agreements, statements, and warranties," a part of the contract. A number of pleas were interposed alleging breaches of warranty in that certain statements of the application were false. At the trial, the plaintiff, according to the bill of exceptions, "introduced in evidence the insurance policy, which is composed of four sheets. The first two pages are set forth in the plaintiff's declaration. The third and fourth pages are as follows." Then follows an "abstract (e. & o. e.) of the application for insurance in the New York Life Insurance Co.," consisting presumably of the usual questions and answers, followed by an agreement signed by the applicant, the first clause of which is as follows: "That the statements and representations contained in the foregoing application, together with those contained in the declaration made by me to the medical examiner, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete, and true, whether written by my own hand or not; this warranty being a condition precedent to, and in consideration