No. 8726

Supreme Court of Illinois

Wm. Schofield

vs.

John Brissenden

In the Supreme Court at Mt Vernon
Ohio. Term 1854

William Schofield
v
John Brissenden

Petition for Rehearing.

The Petition of William Schofield respectfully shows that this case was decided on the last day of the last term of this Court & he now respectfully asks a rehearing of the same for the following reasons—

The Court in its opinion treat the sale on an execution in favor of the Bank of Illinois v Pickering as a sale for money. This though true as to ordinary judicial sales, is not, as we conceive the fact in this case. The record distinctly shows that the sale was for Shawneetown Bank paper worth at the time sixty cents to the dollar—

The fact that such paper would be received in payment was publicly proclaimed at the sale—

The statute in reference to the payment of debts due the Bank expressly declares, Acts 1842'3, page 81,— that all debts due or which may become due the Bank whether after or before suit brought thereon, and whether the same be in the possession of the Bank or transferred to some other person, may be discharged in the bills of the Bank. This statute entered into and became part of the judgment against Pickering as completely as if copied into it, and by it a different rule was prescribed for the payment of debts due the Bank whether by judgment or otherwise, from that governing other cases.

The sale was not, therefore, as in ordinary cases, for <u>money</u>, but for <u>Bank bills</u>; and the

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general laws regulating Sheriffs' sales and redemptions is modified by this particular statute in all cases to which it applies.

The judgment against Pickering was in legal contemplation a judgment to pay so many dollars in bills of the Bank of Illinois, and he was only liable for the actual value of the indebtedness agreed to be paid. This point is decided in the case of Smith v Dunlap, 12 Ills. 189. The statute places a judgment on the same footing as a promissory note, and Pickering's right was as complete to discharge the one as the other with bank bills.

Had the Bank bid in the property at the Sheriff's sale Pickering's right to redeem in bank notes could not have been disputed; or if he failed to do so, the right of Schofield, a judgment creditor, would have been equally clear. Does the fact that a third person, who paid his bid in bank paper, was the purchaser, alter the rights of the judgment debtor and his other judgment creditors?

Suppose instead of bidding in the property on execution Brissenden had bought the judgment of the Bank, Pickering's right to discharge it in bank notes would have continued. This point is expressly decided by this court in the case of Wright v Taylor, 3 Gilm. 193. The court say in that case that the mortgage "having been once the absolute property of the Bank, and over due, the makers right to discharge it in bank indebtedness accompanied it into whose hands soever it might afterwards fall", and the court held that the complainant who was the mortgagee and payee of the note could only recover the value of the funds he paid the bank on their re transfer to him. In the present case Brissenden by his purchase succeeded to

the rights of the bank, and became entitled to the same redemption funds to which it as a purchaser would have been entitled and to nothing more.

A transfer of the Bank's right by a sheriff's sale and operation of law, differs in no respect so far as regards the right of redemption from a transfer by private arrangement.

If the court in its opinion has taken a mistaken view of the case, as we insist, it consists in this, that the opinion treats a judgment in favor of the Bank as a judgment for so much money. If this were so, then it could only be discharged in money, which we know is not the case. So the sale was not for so many dollars in money, any more than was the note in the Dunlap case, or the mortgage in Taylor v Wright.

The case of Watson v Hannum, 10 Smedes & Marshall, 521 is conceived to be in point. The syllabus of the case is as follows: "Where property has been sold under execution in favor of a bank, the notes of which are at a depreciation, and a judgment creditor of the defendant in execution has redeemed from the sheriff's vendee, by paying the agreed value in specie, of his bid, which was paid in the notes of the bank, the defendant in execution, or his vendee in electing to redeem, need only tender to the judgment creditor the amount in good money with the statutory interest which the judgment creditor paid the sheriff's vendee"

By giving the statute the construction for which we contend injustice is done to no one, a sacrifice of property is prevented, and the ends of justice are promoted by making the debtor's property pay the greatest amount of debts. The object of the statute is "to prevent the sacrifice of the debtor's

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property, and to make the land bring its utmost value by an auction among creditors. Miller v Lewis, 4 Comstock 560 - 11 Wheat. 449

The suggestions in the opinion of the Court that it would put the Sheriff in jeopardy if he were required to determine the value of the bank paper have no foundation in this case, because the pleadings admit its value to have been sixty cents to the dollar - If this were not so, it does not follow that the sheriff would not have been bound to accept the bills themselves at their face, & if he would, it was error to dismiss the bill on motion, for it might have been amended to state that fact. If there was any equity whatever in the bill, even though ever so defectively set forth, it was wrong to dismiss it, when it seemed the defect could have been cured by amendment.

It does not follow that a bill should be dismissed because an injunction is dissolved, and this Court said in Beams v Denham, 2 Scam. 58: "Before a bill can be dismissed there must be an issue made up between the parties"

If it were ever allowable to dismiss a suit on motion, such a practice certainly ought not to be tolerated except in a very clear case.

~~It~~ The redemption law ought to receive a liberal construction Swazey v Chandler 11 Wheat. 449 and if the Court can without violence so construe it as to allow the redemption in this case it is its duty to do so & thereby prevent a sacrifice of property & promote the ends of justice

Underwood & Trumbull
for Appellant.

By the decision given in this case Brissenden, the purchaser at Sheriff's sale, became entitled in case of redemption not only to the amount of his

(over)

real bid and ten per cent interest, but he is also permitted to speculate at the rate of forty per cent to the dollar out of the deft. in execution or his bona fide creditors.

A decision establishing such a principle is, to say the least, at war with the whole spirit of the redemption act, and we are persuaded, will be most cheerfully revised by the court, if it can be done without a departure from what it conceives to be the positive requirements of rigid law.

No 57

William Schofield
v
John Brissenden

Petition for Rehearing

Re-hearing denied
Treat
Caton

Filed November 1854
F. D. Preston Clk
By [illegible] Deputy

Wm Scofield
vs.
John Brisenden

In Sup. Court
Nov. Term
1854.

Wm Pickering being duly sworn says that since the motion in this cause was entered for a re hearing Chas. H. Constable Esq. has arrived in this place and has been notified personally of this motion. Said Constable is the atty. of record of the said defts in error.

Subscribed & sworn to
this 23d day of Nov.
1854

William Pickering

Harvey D. Preston Clk
by N Johnston Deputy

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№ 57

Schofield
vs
Rossendale

Filed 23. Nov. 1854
Jimmy D Preston clk
By N Johnston Deputy

In Supreme Court. May Term 1852.

State of Illinois
Jefferson County

William Pickering being duly sworn states upon oath that he is agent for William Schofield who was plaintiff in a cause pending in this Court at its last term wherein John Brissenden was defendant; that said cause was decided on the last day of the last term of this court and it was & still is the intention of said Schofield to apply for a rehearing of said cause; that neither this affiant nor said Schofield as affiant believes was aware till the present term that it was necessary to notify said Brissenden or his atty. of said intention to apply for a rehearing; that said Brissenden resides in the County of Edwards some dozen or fifty miles distant and is engaged in business which calls him frequently from home, and it is altogether uncertain whether he would be found at home at this time; that C. H. Constable, Esqr. the atty. of said Brissenden has written that he would be present at this term of the Court, & has been daily expected for several days but has not yet arrived; that affiant fully expected he would have been present before this time so that notice of the intended application for a rehearing could have been given him; that a petition for a rehearing was prepared last month & has been ready to present to the Court, but there has been no opportunity to give notice, & even if it is too late in the term affiant fears the term may close before he can have time to notify said Bris-

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Petitioner or his attorney unless he should ~~still~~ appear before the Court adjourns, his residence being at least one hundred miles distant.

Whereupon under the peculiar circumstances of this case, this appearance was in behalf of his principal that his atty. be permitted to file said petition for a rehearing, & that the Court will enter pass upon the same, or suffer it to stand continued till the requisite notice can be given.

Sworn & subscribed before me the 22d day of June 1854

Finney & Preston Clk
By N Johnston D.C.

William Pickering.

Petition
for
Rehearing
by
Petitioner

No 51

William Schofield
by
John McSwain

Errors Edwards
Petition Rehearing

Denied

No 51

November 1874

William Schofield
vs.
John McSwain

Errors Edwards
Pet. for Rehearing

By the
Court

8726

Petition Denied