No. 11922

Supreme Court of Illinois

Bissett
~~Tiffany~~, et al

---

vs.

McKay

71641

Supreme Court of Illinois

James McKay
vs.
Bissell et al

Appeal from Lake.

The appellant James McKay by Morris his Solicitor most respectfully Petitions this Honorable Court for a rehearing of this cause upon the grounds hereinafter stated. It becomes necessary that he should show some reason why this motion was not made at the last term of this Court. to do so it is only necessary to call the attention of the court to the fact that in consequence of ill health at the last term the Counsel of McKay who could not be present the was compelled to submit this cause to a hearing on the part of McKay by written brief & was not present to reply to the very ingenious Argument made by the Defts Counsel in Court, seems to have had effect upon the minds of the Court and he presumes it caused the Court to stop at the general rule of law without looking into the exceptions to the rule laid down in such cases as that under consideration. and it will be seen that in four days after the Opinion of the Court was given in this cause and before it was possible for McKays counsel to have prepared a petition for a rehearing the Court adjourned till the present term. The Opinion was delivered on the 29 June last. the Court adjourned the 3d July.

Presuming then, in such a case, the Court will exercise its discretion in favour of Justice, he will proceed to state the reasons or grounds upon which he relies for a rehearing of this cause.

The rule as laid down by the Court in this case that the proof must correspond and support the allegations of bill or, no recovery or relief can

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or that the allegata and probata must agree be had need not be denied or controverted. The fact is admitted. The case though made to turn upon that point upon the supposition that the facts in the case warrant such a conclusion, when upon a careful examination of the law of the case upon the facts presented by the pleadings, we have no doubt the court will upon a rehearing of this cause reverse the decree of the court below as well as their own in affirming it. There seems to be either a misapprehension of the application of the law & not facts in the case made by the pleadings in this respect. to wit. The court say "The question of notice is decisive of this case." & you then proceed to state a part of it correctly thus. "The complainant alleges in "his bill that the Defd. W. C. Tiffany, in whom the legal "estate in the lot, is vested had actual notice of the "mistake in the discription of the lot in the conveyance "to Bissell. this is made the bases of his right to relief "as against this Defd. which notice the Defd denies "and there is no proof whatever to sustain the bill. To this last sentence we beg to say there is proof sufficient & he denies notice in so many words. which is in fact & amounts to no sufficient denial of notice. Now if it appears (as it does in this case) that the facts stated in the answer or omissions to state such facts as are material in a court of Equity is tantamount to admission of notice Every material fact from which the court may infer notice must be denied or the court is warranted in drawing from it, the fact, that he had notice. Upon the second Point. Now it is a well known rule in Equity. that he who sets up that he is a purchaser for a valuable consideration fully paid without notice, must prove the facts to be so & then make proof thereof not by his own oath but by other evidence that he had no notice of the Equity alleged at the time he paid his money & took his deed He must state & prove the time when paid, the amount paid

from this opinion we beg to differ respectfully with the court.

Secondly. there was no need of proof by McKay

and if the Deft. omits to make these averments
or if made, the pals to prove them, the court will
infer notice as alleged in the bill. For his
denial in his plea or answer of notice is no
evidence against the charge in the bill.
Such is the law and correct practice of a Court
of Equity in sifting the facts necessary to
ascertain the conscience of the Deft.

Now it is not necessary for the Complainant
to allege in his bill, in order to let in proof,
that the Deft. is not a bona fide purchaser for a valuable
consideration fully paid. It is new matter
set up by the Deft. in Bar or avoidance
and if he fails in this, the allegations of the bill
charging the Deft as holding the title subject to
his equity is taken as true and the decree
must be accordingly made.

see 3 J.C. 345.
see 7 J.C. 64.
10 Peters 210.

Now the Bill charges that a mistake was
made, and to show that fact he refers
to the deeds as evidence of a reservation
showing the notice to the defts heretofore under
those deeds &c. from which notice will be inferred
even if the answer met every material fact
necessary to be averred in such case.

Now the Deft. in setting up a matter in bar
or avoidance must prove his case made in
the plea or answer independent of his answer
or his own oath. He can not throw the
proof from off his own shoulders on to
that of the Complainant to disprove the
allegations of the answer. Such is the
law and such is the case referred to by
the Court in 10 Peters R. 210, at which the
court certainly did not carefully look or examine

10 Peters 210.
& authorities
there cited

or the opinion of the court would have been otherwise than that which was delivered.

Judge Baldwin in that case after showing a bona fida purchaser to be a favourite in a court equity proceeds to say "But this will "not be done on mere averments or allegations "(of Defts)"; the protection of such bona fida purch=aser, is temporary only when the plff. has a prior "equity; which can be barred or avoided only "by a union of the legal title with an equity, "arising from the payment of the money, and the "receiving of the conveyance without notice, "and a clear conscience. It is a setting up "of matter not in the bill." I wish the court marks this point as being in conflict with your opinion. Again he says "a new case is "made, not responsive to the bill, "but one founded on a right and title of party "if true at all, to bar or avoid the plff's equity, "which must otherwise prevail". 9 Vrs. 33. 34. all this is in conflict with your opinion as delivered in this case of McKay's. But again the court say "the answer setting it up is "no evidence against the plff. who is not bound "to contradict or rebut it". This again is in direct conflict with your decision see the cases cited in support of those principles by that court commencing with 14 Johns R. 63. 74. But again that court says "It must be established affirmatively by the Defts. "independently of his own oath" 6 J. R. 559 &c. &c. &c.

not so in 5 Gil.

"In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly, that the vendor was seized in fee and in possession the consideration must be stated

"stated with a distinct averment that it
"was bona fide and truly paid, independently
2 — "of the recital in the deed. Notice must be
"denied previous to, and down to the time
"of paying the money and the delivery of
"the deed; and if notice is specially charged"
"(which need not be) "the denial must be of all
3 — "circumstances stated to, from which notice
"may be inferred; and the answer or plea
"show that the grantee acquired title.
"Sugden 766. 70" (Others) "Such is the case
"(necessary)" which must be stated to give
"a def. the benefit of an answer or plea
"of an innocent purchase without notice
3 "such as the privileges of innocent purchasers
"now we have only to apply the case to the
"answers of Chiles and Clay". (Bisset & Tiffany)
"together with the exhibits & proofs in the
"case, to ascertain whether Clay" (Bisset)"
"(Tiffany) files that character when he comes"
to The answers are as bare of the
"averments necessary to make a case
"of such a purchase as would be
"protected against the prior equity
"of the plaintiffs as the record is
"of proof of any fact to support it."

Here it can be seen that the cases reported in 10 Peters and the case of McKay vs. Bisset & Tiffany, are precisely similar in point of principle.

The Court lay down the rule such answers or pleas must make the proper averments by presenting a new case not made by the bill; with all the essential averments to show him to be

a bona fide purchaser for a valuable consideration fully paid before notice. by saying that he is a bona fide purchaser without notice without averring the facts of time when he bought & paid his money amounts to no bar or defence to the case made by the bill. There was an attempt to make a new case but none was made. N.C. Tiffany never paid the purchase money. he was the agent of R.T. attempting to cover up his fathers property & for his fathers use.

~~one of the case in Chatham~~

In 3 Johns. C.R. 345. Chancellor Kent says, that it is not necessary to charge notice of the Equity before purchase that the Deft must deny notice whether it be charged or not. for it is his business to state in his plea or answer all the essential facts to establish himself to be a bona fide purchaser &c. (X)

3 J.C. 345.

Wherefore for this & many other reasons that might be urged a rehearing is respectfully asked and that said decree of the Court below may be reversed &c.

by. B.J. Morris his Solr.

(X) Now if he fails to aver and prove payment of his money before notice, the law presumes him to be a guilty buyer and does not require any proof from the Complainant

In 8 Cowe. R. 374 the Judge use this language. "If a purchaser rest his claim on the fact of being an innocent bona fide purchaser he must deny notice, even though it be not charged, positively and not evasively. He must deny fully and in the most precise terms, every circumstance from which notice could may be inferred". and he cites Pre. in Chy. 226.; 2 P.W. 491. 1 Johns C. 302. 3 J.C. 240. He then further says. It was "not necessary for plff. to make proof of notice till defts. had explicitly denied all knowledge of notice."

Now the defts in the case in Cowens R. say by way of denial "they deny that at the several times they had actual notice notice of the proceedings and of the claims of the plff." The Bill charges

notice by the deed itself & then allege the
Dft had actual notice. The Dft does not
respond to the charge of notice through
deed. on that subject he is silent.

to establish the fact. It is a matter the Deft sets up in bar - he holds the affirmative of the question of whether the Deft be bona fide purchaser or not. It is new matter coming from the Defts and they must show other than by their deeds or their oaths. If the plea or answer fail to set forth the payment of the money & receiving of the conveyance before notice - the denial of notice amounts to nothing for it may be (as is the fact in this case) the purchase money was never in fact paid - for there is no averment in the answer of the payment of any or the time when paid - Hence the answer offers no valid objection to the relief sought by the bill. It is a mere shadow - without substance and as this court must act upon the ground of notice denied & not proved they will see the propriety of settling the true and correct doctrine on that subject - which is of vital importance in practice in settling this doctrine correctly in this State to begin with.

He who sets up such a defence must state & aver all the facts necessary to show he is such purchaser and then he must prove the facts as alleged by other testimony than his own oath. The pltff is not bound to respond to such answer or plea - it is setting new matter which the Deft must prove - or he fails in his defence. This is the true rule of practice in courts of Equity, if not at law. He must prove payment of his money

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before notice or he is not injured say the courts.
you will look in vain for any such allegation
or proof by the Defendants in this case.
neither W. C. Tiffany or his father R. Tiffany
has as yet paid up for the property tho.
because they dared not to make such averments
or offer such proof. do they have notice
fixed upon them by own showing, or rather
failure to aver and prove the facts necessary for
such defense.

7 J.C.64-7. "To support the plea of a bona fide purchase without notice, the Defd. must aver & prove not only that he had no notice, but also that he had actually paid his money before notice: otherwise his defense is not good for anything - see 7 John. Ch. R. 64-7.

Now the Bill in the case of Boone vs Chiles (10 Peters 208.) charges the purchase to be fraudulent & with notice of pltfs equity - there is no charge, that the consideration has not been paid. To this Chiles answers & says he bot of Clay was an innocent purchaser for a valuable consideration without notice til his title complete. &c.
This caused the court to say when Chiles proved Clay to be an innocent purchaser: it did not correspond with his answer which did not aver payt before notice &c.

Morris for McKay

Jas McKay
vs.
Bissette &c
Petition for
rehearing.

Filed June 12. 1858.
Wakeland Clk.

1860.

William C. Tiffany
Rufus Tiffany
et. al.
ats.
James McKay

} Supreme Court of the State of Illinois
June Term 1850

The defts. Tiffany object to a rehearing of this Cause

1st. For the reason that the Motion should have been made at the term at which the Cause was decided in this Court — The Petition shows no such state of facts as would regain this Court to waive any of its general rules of Practice.

2d. The Notice of a Motion for rehearing has not been served on all the defendants — None are served except the Tiffanys.

3d. A rehearing will not be granted unless upon an Examination of the Record it appears that the final judgt. of this Court was correct although the opinion arriving at that judgt. may have been Erroneous. unless upon affdt. of newly discovered matter.

4th. The Authorities relied upon by the Appellant do not show any Error in the former opinion pronounced in this Case —

In this Case the Complainant ought to recover by Charging the

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Tiffany as purchaser with notice of his Equity And the Record is barren of proof to sustain that Charge — He now seeks to change the basis of his Claim for relief and to insist that Tiffany is not a bona fide purchaser for a valuable Consideration paid — An issue not made by the pleadings.

Had the bill contained no Allegations respecting the nature & extent of Tiffanys interest and no Charge of notice as to his Equity against them then the defence of bona fide purchase might be considered as new matter — Now however the ground for relief sought by the bill is notice to Tiffany —

3d The Case in 10th Johns cited to show Error in the former opinion in this Case was so Essentially different from this as to make the authority of little weight upon this motion — Then the defts. Claimed as bona fide assignees of a Contract to purchase Now the legal title as is shown by both Bill and Answer is in Tiffany And the legal presumption must be that the Consideration has been paid although the Contrary may be the case if he Claimed under a Contract of purchase not yet perfected

6th There is no testimony in the case showing any right in McKay to conveyance of the land in question or shows no consideration paid nor agreement either by deed or in writing for a conveyance.

7th There is no notice shown to either of the Tiffanys of Complts. Equity before purchase.

8th The proof in this case shows that five hundred dollars of the purchase money was paid at the time of the purchase by Rufus Tiffany and no notice is brought home to him of McKays claim save by Bissett Testimony and that is fully contradicted by Augustins testimony.

9th The proof by Bissett also shows that the securities taken by Bissett on the sale of the land had been transfered and in the absence of proof as to who holds them this Court will presume that they have been transfered to bona fide holders in which case it is the same as though the consideration had been fully paid. And further as there is no allegation or proof as to the value of the lot in question how can this Court assume that so far as the lot in question is concerned Tiffany had not fully paid for the same.

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10th The Counsel for Appellant assumes in his petition that the observations of the Court in the former opinion are ~~directed to the pur~~ respecting the confinement of the Compt. to the case made by his is directed entirely to the question of Notice to Tiffany while in fact that point applies with equal force to the fact that the bill contains no charge of interest in the deft. Hunt in the lot in question which would authorize a sale by him to McKay or create any equity in McKay so far as against a purchaser from Bissett who held the legal title.

H. W. Blodgett
Atty. for Tiffany

Tiffany et al.
ads
McKay

Appellees Reasons for Petition for re hearing

Blodgett for Appellees

11192

State of Illinois }
Lake County } ss

James H. Bradley of the town of Waukegan in said County being duly sworn deposes and says that on the 15th day of June A.D. 1850 he personally delivered at Waukegan in said County three copies of the above notice, one copy of said notice was delivered to Rufus Tiffany, one copy to William C. Tiffany, and one copy to H. M. Blodgett Esq. late of the firm of Doyt & Blodgett, and surviving Partner of E. M. Doyt deceased & Solicitor for said Tiffanys, And further this deponent saith not.

James H Bradley

Subscribed & sworn to before me
this 15th day of June AD 1850
Witness my hand and seal of Co Court of said County
Amos J Waterman and Clerk of Co Court

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James McKay

vs.

Bissett. et al

Notice of filing petition for Rehearing

58–1850

Filed June 17. 1850.

V. Leland Clk.

Mr. Rufus Tiffany &
Wm C. Tiffany
Messrs Hoyt & Blodgett
their Solrs &.

Ottawa June 12th. 1850.

Gentlemen

This is to inform you that I have filed with the clerk of the Supreme Court a Petition in the case of James McKay vs. Bissett, Tiffany & al. for a rehearing of this cause. And I shall move the court to take up said Petition on or before the 19th day of this instant (June) at which time & place you can be heard &.

Respectfully yours &.
B.S. Morris Solr
for McKay.

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