

No. 13362

Supreme Court of Illinois

Bailey

vs.

Doolittle

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 210.

Barley
73
Doolittle

1861

13362

Pekin April 18/61

James Roberts
you have the within and
watch the Law
there is a Bad Spirit
in this matter
Yours Truly
B. S. Doolittle

Samuel P. Bailey } Appeal from Saywell
 vs } In Supreme Court
 Martha Doolittle } Heard & decided
 Mary Doolittle } at April Term
 Isabella Simpson } A.D. 1860.

The Plaintiff Enters a motion for
 a rehearing in this case for the Reasons
 Stated and set forth in the Petition
 to be filed herein

J. H. Copley

Atty for Plffs

April 16th 1861

²¹⁰
Samuel P. Bailey
²⁴
Martha Coolidge
28th May -

Mo, for Rehearing

Filed Apr. 16. 1861
L.eland
Ch.

Samuel P. Bailey } Appeal from
 (or) } Taylors.
 Martha Doolittle } In Supreme Court
 Mary Doolittle }
 Isabelle Sampson }

To the defendants above
 named ~~and~~ or James Roberts Esq. their
 attorney

You are notified that on Monday
 the 22nd day of April Inst^{ant} or as soon
 thereafter as Council can be had
 application will be made to the
 Supreme Court of this State by Petition
 for a rehearing in this Cause for
 Reasons stated in said Petition

N H Purple

April 16. 1861

Pffs atty

Samuel P Bailey

or

Mary V. Marsh

Heortle

Copy notes

Fried April 20. 1881
L. Leland
Clark

Samuel P. Bailey } Appeals from Seizure
 vs } In the Supreme Court
 Martha Coolittle }
 Mary Coolittle }
 Abigail Sampson }

To the Defendants above named
 or Samuel Roberts Esq their atty.

You are notified that on Monday
 the 22nd day of April instant or
 as soon thereafter as Counsel can be
 heard, Application will be made to
 the Supreme Court of this State by
 Petition for a Rehearing in this Cause
 for Reasons stated in said Petition

April 16th 1861. *J. M. Chapple*
 Opp atty

Received a copy of this
 Notice Apr 19th 1861.
 James Roberts

State of Illinois }
Tazewell County } ss.

Christophe C. Glass, being duly sworn, ~~etc~~
according to law on oath states that he
did on the seventeenth day of April 1861

Saw on the within named defend-
ants in the within entitled cause that is
to say Martha and Mary Doolittle the
within notice by leaving a true copy
thereof with each of them respectively.

Sworn & Subscribed to this 18
April 1861.

C. C. Glass.

Geo H Harlow
Clerk

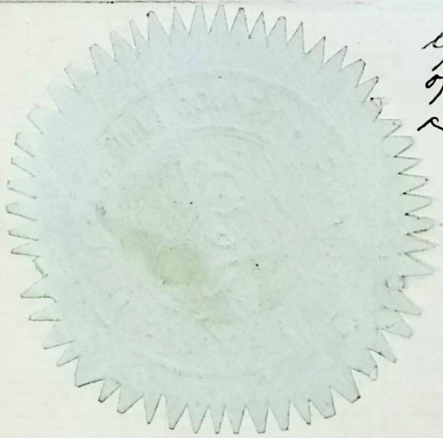
I George H Harlow Clerk of the Tazewell
Circuit Court in & for the County and
State aforesaid do hereby certify that
the above affidavit ~~made~~ ^{to} ~~Glass~~
was duly subscribed, & sworn, before me
on the 18th day April 1861;

Given under my hand &
Official Seal this 18 day of April
1861.

Geo H Harlow
Clerk

Bailey as Doolittle -

Notice



Samuel P. Bailey }
 vs } In Supreme Court.
 Martha Doolittle } Accord at April Term
 et al. - } A.D. 1861.

The Appellant Respectfully Requests
 the Court to grant a Rehearing in this
 Case for the following Reasons, and upon
 the following grounds.

1st Because the Circuit Court Refused
 to permit the Appellant to claim under,
 and set up his Equitable title to the
 land.

It is Shown by the Record that Bailey
 by Assignment from Prettyman, purchaser
 at Marshall's Sale, became the owner
 of all the title and claim of title which was
 ever vested in Rowley Doolittle - Bailey,
 answers sets up; that in Dec. 1844 Rowley
 Doolittle purchased and paid for $\frac{2}{3}$ ds of
 the title to this land, from the heirs of the
 Patentee, that to avoid the payment of
 Webster's Judgment he had the convey-
 ance made to his "Heir". Not being dead
 and having no heir, the deed was void.
 Still he having paid the money, became
 in Equity the Owner of the land -

That Bailey became the owner of this Equity by purchase under Wakeston's & Co's Judgment. Now if that be true Bailey was clearly the Equitable owner in fee of $\frac{2}{3}$ rd of the land in controversy.

This Defence or Claim of his was Stricken out of his answer by the Court.

Your Petitioner respectfully Submits that he ought to have been permitted to make this defence.

The Petition in cases under the Statute is required to set forth "the Rights & Titles of of Parties interested in the Estate - " And of Every person who, upon any Contingency, may be or ~~may~~ become entitled to any Beneficial interest in the premises, " People's Stat. § 93 S. 2. See also Secs. 3. 5. 6. 7 -

The Court must also decide and determine upon the Rights titles and interests of all the parties and give Judgment accordingly. Idem Sec. 8.

The Evident intention of the Legislature was, to settle and adjust in this proceeding the Rights (Equitable as well as

~~And~~ legal), of all the parties —

The Judgment upon all the parties must be conclusive as to the rights adjudged. If Bailey had the equitable title which he sets up, he must be precluded by the decree of the Court in this case from asserting it hereafter.

There is a manifest distinction between this Statute of Partition of 1845 and the act of the 6th July 1827 under which the Case of Louville Et al vs Menard was 1 Gil. 39. was decided

The Statute of July 1827 only authorized an inquiry into the legal rights of the parties and the intentions since given in subsequent decisions, seem to have been based upon the decision of the Case of Louville v Menard, without sufficient attention to the language & clear intention of the act of 1845.

Such is the Case of Greenup v Sewell 18th Ills 54. The Case of Louville v Menard is quoted as authority in the same manner as though the two decisions had been made under the same act.

In the Case of Gregory vs Goss 19th Ill. 612. The Remark is made generally that

"On a Partition at Law a Court
Can only take Cognizance of legal
titles" — See Conclusion of Opinion.

These are the only cases adjudged by
this Court which seem to bear upon this
point, Except — Loomis v. Riley 24 Ill. 307.

The Expressions of the Court thus made
are dicta merely — The point was not
made in either case, and of course
was not well or fully considered.

The cases do not therefore decide the
point. It is still open for argument.

Petitioners therefore insist that the
Court under a Petition pursuant to the
act of 1845 has full and ample power
Right and authority; and is in duty bound
to settle & adjust every claim of Right or
title (legal or Equitable) presented by
the parties in as full and ample a
manner as could be done by Bill in
Chancery filed for the same purpose.

Such is the Spirit of the decision in
the case of Loomis v. Riley 24 Ill. 307
affirming that a Mortgagee is a necessary
party to a proceeding in Partition.

The Proceeding under our Statute of 1845 and by Bill is different only in Name. One is called a Petition the Other a Bill for Partition; the Necessary arguments and Pleadings in Each are in Substance the Same—The Statute being intended only to make the proceeding more Simple and Summary—and at the Same time to answer all the purposes and Objects of a technical Bill in Chancery.

I do not perceive from the Record that this point was made before the Court on the former hearing—

If it is well taken, the party ought not to be prejudiced by the Oversight.

It is vitally important to the Appellant that it should at least be clearly settled either, that he has the Right to make this defence and set up this Equity in this partition proceeding; or that so far as said Equities are concerned he is not to be prejudiced by the decree of Partition—and the Judgment of the Court upon the Rights of the parties.

Ind.

The Only other point made by Petitioner is, that as against these parties, he had a good title under the Statute of Limitations, and he thinks that in this portion of its decision the Court erred.

Before the Contract made between Bailey & Scoolittle, to wit in 1845, the land had been sold for taxes of 1844. Bailey got a deed on this sale in May 1847, — His Contract with Scoolittle for the purchase & to pay taxes was in July 1847. — Now what had these parties to do with this trade. Suppose Bailey had gone on and paid the \$200. to Scoolittle taken his deed from him — paid all the taxes for seven subsequent, consecutive years, being all the time in possession — Would it then have been urged that he could not have set up his Color of title under his tax purchase as well as under the deed from Scoolittle. Because he procured a second Colorable title, is he obliged to abandon the first?

What Right have the Appellants to object that the Appellant shall not set up and insist upon his Color of title derived from the tax sale; Because he had failed to

perform his Contract with Doolittle— a Contract to which they are neither parties nor privies— And which Doolittle can still in spite of any objections on their part, and notwithstanding the decree of the Court herein— Still enforce against him?

Does it lie in their mouths to say, that Bailey shall not be permitted to avail himself of his color of title acquired under his tax sale & deed, because he has not acquired another title under his Contract with Doolittle?

Is he to be deprived of the privilege of using One such title because he failed to get two?

I ask again— And I do not see how it can be answered— What have these appellants to do, with the Contract between Bailey & Doolittle? They do not pretend to claim under, or in privity with either.

If Bailey by his Contract with Doolittle was bound to pay the taxes on the land, so was he also bound to pay the same under his tax title. He paid said taxes under both— He had a Right to claim the payment under both— as against every body but Doolittle. As against him he could not under his Contract so

acquire a title, and thus deprive him
Doolittle out of his title. But as against
all the world besides Doolittle, his right
thus to perfect his tax title is unquestionable.

It is also respectfully suggested that Bailey's
Contract is not to pay future taxes - but
only those then due and unpaid.

It could not mean future taxes. The
Payment for the land, by the terms of the
Contract was to be made presently, in
Notes on Responsible Men - and upon
the payment, deducting taxes Doolittle was
to make Bailey a deed. Bailey was to
pay \$200. less the taxes which were to be
taken out - The tax for 1846 was then
due and probably unpaid - This was
what was to be deducted from the pur-
chase money - Any Other Construction
of the Contract is wholly inadmissible.

It would be to suppose that Bailey
had the Right to pay all the purchase
Money by paying future taxes - and
that no time was fixed even in the
contemplation of the parties when the
\$200. was to be paid, except as taxes
accrued from year to year to reduce the

Amount until the whole was paid.
No interest is agreed to be paid on
the \$200. Is it to be supposed that the
parties understood that the Subsequently
accumulated taxes should pay the \$200.
Contracted to be paid by Bailey for the
land? — If not — how many years had
Bailey to pay the taxes and deduct
them from the purchase money; and
when was the purchase money to be
paid?

It can not be doubted that by
the Contract Bailey was to pay presently
that the taxes to be deducted from the
purchase money were such as were
then due and unpaid, and which by the
land Doolittle was bound to pay.

The Contract had no reference to fu-
ture taxes, and therefore Bailey had a
clear right to pursue the course he did
pursue and pay subsequent taxes under
his tax title acquired after the Contract
with Doolittle.

For these reasons a rehearing
is prayed in this cause

Samuel J. Bailey Appellant
vs
J. M. Purple
his counsel &c

(210)
Samuel P. Bailey
by
Martha Coolidge
and others

Petition for
Rehearing —

Filed April 22 1861
L. Leland
clerk