No. 13414

Supreme Court of Illinois

Montag

vs.

Linn et al

71641

Supreme Court—Second Grand Division.

ABSTRACT.

January Term, 1861.

GEORGE ADAM MONTAG,
vs.
JAMES J. LINN, and others.

} APPEAL FROM ADAMS.

1. On the 21st day of April 1860, George Adam Montag filed his bill of complaint in the Adams Circuit Court on the Equity side thereof, against James J. Linn, Almeron Wheat, Isaac M. Grover, and James H. Hendrickson. The bill alleges that said Montag about 12th March 1853, in consideration of $600, purchased of Archibald Williams and Charles B. Lawrence, the S. E. 25, 2 S. 8 W. of 4th principal meridian; that he received from said Williams
2. and Lawrence a written contract for the conveyance of said land to him on payment of said purchase money, and on 8th of February 1856, having paid the purchase money, Williams and Lawrence for said consideration and in consummation of said contract, at Montag's request, conveyed said premises to complainant and to his wife Dorothea E., and to Henry and George Ch. Montag; said conveyance to complainant and his wife Dorothea for their joiut lives, and to the survivor during his or her life, and after death of survivor to Henry and George Ch. Montag as tenants in common in fee. The deed contained covenants on behalf of the grantors of seizin, right to convey and warranty. Complainant when he purchased received from said grantors, the original patent to John Silver, late a private in McIntosh's company of light artillery, for services in war of 1812 with Great Britain; also what purported to be the original deed from John Silver aforesaid to Joseph B. Cofield, dated 18th February 1850, and the original deed from said Cofield to Williams and Lawrence aforesaid, all for said premises. Said deed from Silver to Cofield was recorded in Adams County, Illinois, where said land lies, on 26th February 1850. In the spring of 1853, about 17th March,
3. after his purchase but before he received a deed from Williams and Lawrence, complainant relying on said claim of title and original title papers, took actual possession of said premises, together with his wife Dorothea and said Henry and George Ch. Montag, and with the assistance of said Henry and George Ch. Montag, commenced improving said land for a farm for a home, said Henry and George Ch. assisting him to pay for said land, and becoming interested therein. The land when purchased was broken and rough, and worth not more than the $600 which complainant paid for it. No large timber on it, all had been cut off, and nothing left thereon but heavy growth of brush and small trees and grubs, the second growth, of little value for fire wood or to make improvements with; there were no improvements on the land when complainant took possession, except that wood had been chopped off about one acre on which was a poor uninhabitable log cabin.

Between time of taking possession and 1st of April 1856, complainant with help of Henry and George Ch. Montag, grubbed and cleared fifty acres on said premises; put a substan-
4. tial fence around said fifty acres at cost of $5 per acre, put it in good cultivation, and made the cabin habitable, put two stables and a smoke house and corn crib on the premises.

The improvements made before 1st April 1856, cost complainant and said Henry and George Ch. Montag as follows:

Grubbing at $15 per acre,	$750 00
Expense of making house habitable,	250 00
Two stables,	80 00
Smoke house and corn crib,	20 00
Fencing upon 55 acres—11,720 rails and substantial garden fence,	376 00

Complainant also with assistance of Henry and George Ch. Muntag, planted out an orchard of fifty apple trees, fifteen peach and ten cherry trees. The lasting and valuable improvements made by complainant and said Henry and George Ch. Montag, up to the the 1st April 1856, were worth at least $1,656, for which they have received no compensation.

Since said 1st of April 1856, complainant and Henry and George Ch. Montag have made

upon said premises lasting and valuable improvements, as follows, to wit: A frame house worth at least $500, have cleared, fenced and grubbed, and broken up fifteen acres more land, and put it in cultivation. The breaking cost $3 per acre; grubbing and clearing $225, or
5. all improvements since that time amounting to $770, for which complainant with said Henry and George have received no compensation.

Complainant has paid all taxes assessed on said land from 1853 to 1859 inclusive, amounting to $72 93.

Bill alleges that on 1st of April 1856, said James J. Linn commenced an action of ejectment in said Adams Circuit Court against complainant for said premises, no notice being in said suit taken of the interest of said Dorothea, Henry and George Ch. Montag, although they were then and still are in possession of the land, claiming the same in their own rights respectively, according to the interests conveyed to each of them by said deed from Williams and Lawrence; that complainant alone appeared and filed a plea of not guilty. On trial of cause at October term 1859, in said Adams Circuit Court, complainant read in evidence under the instructions of the Court, his title papers to said land, as follows:

1st. The original Patent.

2d. The said deed from John Silver the patentee, to Joseph B. Cofield.

3d. The said deed from said Cofield to Archibald Williams and Charles B. Lawrence.

4th. The said deed from said Williams and Lawrence to complainant together with Dorothea E., Henry and George Ch. Montag. Said Linn also claimed title to said premises from
6. said Silver, the patentee, by deed dated January 11th 1855, and recorded January 24th 1856, from John Silver to Albert M. Noyes, and made long after complainant took possession of the premises, said Noyes having full notice of title of complainant, Dorothea E., Henry and George Ch. Montag. On 16th December 1859, said trial of said cause resulted in a judgment against complainant, that plaintiff recover possession in fee, and have a writ of possession for said premises. On same day complainant prayed for and perfected an appeal to Supreme Court, which he prosecuted in said Court at January term A. D. 1860. Said Court about 13th February 1860, just as they were adjourning for the term, rendered judgment, affirming judgment of Circuit Court, but neither filed nor delivered any opinion in said cause, and have not yet filed any, (when bill was filed.) On 26th March 1860, the first day of March term 1860, of said Adams Circuit Court, complainant served notice in writing upon said Linn's Attorneys of record, Wheat & Grover, that he would move the Court to appoint Commissioners to assess value of lasting and valuable improvements on said premises under statute of Illinois,
7. and for order to stay writ of possession on the ground amongst other things, that said Linn was a non-resident.

At said March term 1860, the said Court refused motion, would neither appoint commissioners nor stay writ of possession. Said motion was made at earliest moment possible after final determination of case by Supreme Court.

Complainant had no actual notice of said Linn's title until suit was commenced on 1st April 1856.

Said Linn is not a resident of Illinois, is selling out and removing his effects out of the State, and he and his Attorneys, Wheat and Grover, give out and threaten that he will dispossess complainant, who was defendant in said ejectment suit, and also said Dorothea E., Henry and George Ch. Montag, who were not defendants, by said writ of possession, and will not pay complainant nor said Henry and George Ch. Montag for their lasting and valuable improvements made by them, together with complainant, in good faith in said title, and which have enhanced the value of the land at least $2.500,00, all of which is in violation of the Statute allowing complainant pay for said improvements, and of his equitable right to pay therefor under said Statute, upon the basis thereof.

Owing to Linn's non-residence, if he gets possession, complainant and also said Henry
8. and George Ch. Montag will lose pay for such improvements, although the rights of said Henry and George Ch. and those of said Dorothea E. have not been litigated in said suit.

Bill makes Dorothea E., Henry, George Ch. Montag, James J. Linn, and because of his, Linn's non-residence, Almeron Wheat & Isaac M. Grover his Attorneys, who threaten to sue out and use a writ of possession to dispossess complainant (together with Dorothea E., Henry and George Ch. Montag,) also James H. Hendrickson, Sheriff of Adams County aforesaid, into whose hands said writ has or will come, defendants. Waives their answers being under oath, prays for process of subpœna, and also for an injunction against Linn, Wheat, Grover and Hendrickson, restraining them until further order of Court, from issuing &c., or using, or
9. executing &c. any writ of possession in favor of Linn for said premises, either against Dorothea E., Henry, George Ch. Montag, or complainant, &c.

That Linn be enjoined from conveying or encumbering the premises until further order, lest benefit of decree for improvements would be lost. That cause be referred to Master to

ascertain the value of said improvements, and a decree entered on the hearing, that Linn within some short time pay to complainant or to Dorothea E., or Henry or George Ch. Montag, or to such of them as shall be entitled to it, the value of all lasting and valuable improvements, adjusted on the basis and equitable provisions of the Statute of this State providing for pay for such improvements by the owner of the paramount title, and also the said taxes, or in default, that execution issue against Linn therefor. That Linn be enjoined from selling, conveying, encumbering &c. said premises until full payment of such decree, and that Linn pay the costs of this suit, and for general relief.

10. Bill sworn to by complainant.
Mandate of Master that injunction issue.
Affidavit that Hendrickson is Sheriff of Adams.
11. Injunction bond filed 21st April 1860.
12. Writ of injunction dated 21st April 1860, directed to Coroner.
13.
14. Served by Coroner on Hendrickson and Wheat & Grover.
15. Summons to Coroner on same day, and served on Hendrickson, Wheat, Grover and Linn.
On 12th June 1850, defendants Wheat, Grover, Hendrickson and Linn filed ther demur-
16. rer to said bill for want of equity, and 16th June 1860, at a term of said Adams Court then being held, the Court *Sibley* Judge, sustained said demurrer, and dismissed said bill as to said
17. Wheat, Grover, Hendrickson and Linn.

ERRORS ASSIGNED.

18. 1st. In sustaining demurrer to said bill.

2d. In dismissing said bill as to said defendants in error, Wheat, Grover, Linn and Hendrickson.

WILLIAMS, GRIMSHAW & WILLIAMS,
Attorneys for Plaintiff's in Error.

43

Montag
vs
Linn

Abstract

43

13414

Files Jan 5/69
Wm A Carey
Clk

Supreme Court---Second Grand Division.

JANUARY TERM, 1861.

ABSTRACT.

GEORGE ADAM MONTAG,
vs.
JAMES J. LINN and others,
} Error to Adams.

Defendant's Points and Authorities.

By the common law the owner recovers his land by ejectment, without being subjected to the condition of paying for the improvements which may have been made on the land. The improvements are considered as annexed to the freehold and pass with the recovery.—See 2d Kent's Com., 334.

The only relief granted to the person evicted on account of improvements, in Chancery, is when the owner proceeds in that Court for an account of rents and profits, to obtain a deduction from the same on account of the lasting and valuable improvements made by him.—Ibid.

The case of Moss vs. Irving, cited by the plaintiff, is not an authority against this position. The only question in that case was as to the constitutionality of our occupying claimant law.

Waiving the mere dicta of Courts, we believe we are safe in saying that the case of Bright vs. Boyd, cited by the plaintiff, is the only one that can be found to sustain the plaintiff's position, and in that case Judge Story admits he was carrying the doctrine beyond what had been known in courts of equity before. Besides, there were circumstances in that case which seemed greatly to influence the Judge, that do not exist in this.

We are cited to no case, and we know of none, where the person evicted has been permitted to resort to chancery to get pay for improvements when there was a statutory remedy given him.

The plaintiff's right to pay for improvements was purely statutory, and he could enforce it only in the manner pointed out in the statute. If he has neglected thus to enforce it, it was his own fault, which a court of equity will not relieve him against—his remedy was complete at law. See Rev. Stat. of 1845, p. 211, §48.

Dorothea, Henry and George Ch. Montag were not parties to the ejectment suit, and if they had been, whatever their rights in the premises or that of the plaintiff, he is entitled to no relief on account of them. If they had any rights that could be enforced in equity, they should have been made complainants in the bill.

For these reasons, we insist that that the decree below should be sustained, and the injunction dissolved

WHEAT & GROVER,
Attorneys for Defendant.

Whatever may be the view of the court relative to the right of the Plaintiff to relief in equity the injunction obtained herein by his Hon Judge Walker ought to be dissolved, no sufficient and proper cause for an injunction being shown, and the same having been improperly allowed.
See Wiggins et al vs Armstrong et al 1st John Ch Rep 144.
Wheat & Grover Attys for Defts.

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Montag
v
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Defts brief

Filed June 18/61
L Leland
Clerk

Filed Jan 10/61
Wm A Turner
Clk

SUPREME COURT—JANUARY TERM, A. D. 1861.

GEORGE ADAM MONTAG,
vs.
JAMES I. LINN and others.

Brief of points for Plaintiff in error.

It will be seen by the record in this case that when judgment was rendered in the Adams Circuit Court in the ejectment suit, out of which this present suit arises, an appeal to this court was taken and perfected at once. That appeal was prosecuted in this court, but resulted in the judgment below being affirmed. At the first term of circuit court, next succeeding the judgment of affirmance. Montag moved the circuit court to appoint commissioners to assess the value of improvements, under the statute, the court refused to appoint commissioners.

We insist that until the case which was appealed, was finally determined by this court, it was not in a situation where the circuit court could act under the mere letter of the statute and appoint commissioners, if the court pending the appeal had made such appointment and the commissioners had assessed an amount for improvements, in favor of Linn, and against Montag, the circuit court must on the letter of the statute have rendered a judgment on the coming in of the report against Linn for the amount of such assessment. See Revised Code 1845, p. 211, §48.

If in the meantime this court had reversed the original judgment below, it might present a case where the plaintiff in ejectment, would be beaten in his ejectment suit and yet have a judgment rendered against him for another man's improvements, which judgment would not be erroneous, and yet would be highly inequitable.

Montag had just such a title as was intended to be protected by the occupying claimant law.

Again Linn was a non-residant, and the bill shows that the ordinary proceeding by commissioners would not protect Montag's rights, Linn had the legal power to turn Montag off the land, and if he conveyed before judgment was rendered and became a lien on the land, he would deprive Montag of all compensation for the improvements. Again the right to receive a compensation for the improvements was in George Adam Montag and his wife, who were tenants for life and also in Henry and George Ch. Montag, who were the owners of the remainder in fee. A court of law under the ordinary action of the occupying claimant act could neither settle nor protect all these equities.

We therefore insist that the case presents a clear right to relief in equity, both on account of its minor details and on account of the general equity recognized by our statute. Of the occupying claimant law, this court has said in the case of Ross vs. Irving, 14 Ills. p. 174: "It will be observed that the statute is of an equitable character." * * * "There is something so manifestly right and just in such a statute, that it would be strange indeed if the people in their organic law should have inhibited the Legislature from passing it."

"It is nothing more than the assertion of a principle of almost daily application in courts of chancery, that he who asks equity must do equity."

"It is in his power to institute suit or give notice to the person entering on the land before improvements have been made, and then he will have none to pay for, but if he delays the assertion of his right to the land, or even to give notice of his title, till the industry and means of another supposing it to be his own, has placed upon it lastlng and valuable improvements, he has no right then to complain that he cannot have the benefit of toe improvements without paying for them."

In Gaines vs. Buford, 1 Dana 494, the court say of a similar law in Kentucky:

"Our occupant laws reduce this moral duty to a legal obligation. Independant of our statutes, the chancellor acting upon the basis of natural equity, would secure to the bona fide occupant the value of his ameliorations. The statutary remedy afforded relief for the same thing, according to a rule prescribed by legislative instead of judicial power."

In 2d Story's equity jurisprudence, sec. 799, a, it is said: "If a plaintiff in equity seeks the aid of the court, to enforce his title against an innocent person, who has made improvements on land, supposing himself to be the absolute owner, that aid will be given to him only upon the terms, that he shall make due compensation to such innocent person, to the extent of the benefits which shall be received from those improvements." This principle of the right of the occupant to pay for betterments or ameliorations is fully recognized in.

Bright vs. Bond, 1 Story's Reports 494, the court, Judge Story, there says:

"To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another, who is in no default. The argument, I am aware, is that the moment the house is built, it belongs to the owner of the land, by mere operation of law; and that he may certainly posses and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold, what in a just sense he never had the slightest title to, that is, the house. It is not answering the objection, but merely dryly stating, that the law so holds. But then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief. I have ventured to suggest that the claim of the bona-fide purchaser under such circumstances, is founded in the highest equity; I think it founded in the highest equity."

Montag had no adequate remedy at law in this case, he had a general equity recognized by the authorities above quoted, and he also had that general equity recognized by our statute, and a mode pointed out for enforcing his recognized right by statute, which did not adequately afford him relief, and which did not protect the rights of his wife, who was his co-tenant for life, nor notice the interest of the remainder men surely if any case could be made, when it was necessary to enforce a recognized right in equity, because the law did not furnish an adequate mode of enforcing such recognized right at law, this case is the one.

Again, in the case of the Bank of Hamilton vs. Dudleys 2, lessee Peters 524, the supreme court of the United States decided that the circuit court of the United States for the District of Ohio could not carry out the Ohio occupying claimant law, (which resembles ours,) by appointing commissioners to value improvements, because the valuation by commissioners would be a violation of the 7th amendment to Constitution of the United States. The court say however in that case: "But this inability of the courts of the United States to proceed in the mode prescribed by the statute, does not deprive the occupant of the benefit it intended him. The modes of proceeding which belong to the courts of chancery are adapted to the execution of the law, and to the equity side of the court he may apply for relief." "Sitting in chancery it can appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin the execution of the judgment at law until its decree shall be complied with."

Cases arise in the circuit courts of the United States, in both the Northern and Southern Districts where non-resident plaintiffs recover in ejectment. If this statute does not raise a recognized equity that a court of chancery can enforce, then the occupying claimant law of our State so far as the Federal courts are concerned, would be a nullity. On the contrary, those courts in proper case made act on the opinion above quoted from 2d Peters, and grant relief. Even in our own State courts the statute never affords adequate relief where a non-resident is plaintiff; he can turn the occupant out and not pay the judgment for improvements unless equity can interfere, and make him pay for improvements before he gets possession.

WILLIAMS, GRIMSHAW & WILLIAMS,
Attorneys for plaintiff in error.

43

Montag

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Brief

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L. Leland

Clerk

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Wm Lunn