

No. 14196

Supreme Court of Illinois

Thomas

vs.

Bowman et al.

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In Supreme Court of the State of Illinois,
FIRST GRAND DIVISION, AT MT. VERNON.

NOVEMBER TERM, A. D. 1862.

WM. THOMAS
vs.
BOWMAN & HARROW. } Appeal from Lawrence.

On behalf of appellees we submit the following propositions and authorities in support of the decision of the court below.

1st. Judge Thomas, by selling the lot in question on an execution against the Dubois' heirs, admitted their interest in it.

2d. By receiving the redemption from Bowman without objection, he admitted Bowman's right to redeem.

3d. By causing the Lot to be sold as Dubois, or accepting the redemption money, he is estopped from claiming title to it adverse to that of Dubois or their assigns.

4th. The law will not allow a party to receive and hold the redemption money, and also retain the property redeemed. Such a doctrine would be so palpably unjust as not to require or even excuse an argument to refute it.

5th. Judge Thomas selling the Lot, or accepting the redemption, is analogous to a person standing by and seeing his own property sold as the property of another without objection. By such silence he is estopped from afterwards asserting his claim.

6th. The fact that Wise was a party to the judgment on which the Lot was first sold cannot affect the case; for Judge Thomas, by his bill in the chancery suit, (and for the cost of which the Lot was sold), charges that the Lot was claimed by the Dubois heirs, and nowhere avers that Wise pretended to have any claim whatever to it except as a tenant. The suit was to settle the Dubois claim, and not any claim of Wise.

7th. Judge Thomas, by the decree which he took in the chancery suit, and which is in evidence here, shows that the Dubois' heirs and not Wise, were the only ones claiming the Lot; and the decree so far as it relates to title is against them exclusively.

8th. A redemption in bank bills is legal if not objected to for the reason of its being in paper instead of coin. 2 Green. Ev. Sec. 522. *Phillips vs. Blake*, 1 Metcalf, 158. *Snow vs. Perry*, 9 Pickering, 539.

It is insisted by Judge Thomas, that the Dubois' heirs not having any title on which the execution could attach, therefore all the proceedings on the execution of Bowman are void; or, in other words, that Bowman, on a judgment against the Dubois' heirs, could take no greater or other interest than the heirs themselves could have claimed. In the case of *McLagan vs. Brown et al.* 11 Ills. 519, this court held that a judgment creditor could redeem, on a judgment obtained after the judgment debtor had parted with his equity of redemption, the land having been sold on a judgment in force while the Defendant was the owner. In that case the redeeming creditor clearly took what neither the judgment debtor nor his assignee could have taken.

We think we cannot be mistaken in the position we take—that Judge Thomas, by selling this property on an execution against the Dubois' heirs, admitted some kind of title in them; especially when he himself furnishes us the evidence, that they and not Wise, were the ones with whom he was contending. Or, if we are incorrect in this, that by his accepting the redemption money he is most clearly bound. If he was claiming the lot by prior title why did he receive the money from the Sheriff? Why not at the time tell us we were mistaken in supposing we had a right to redeem? If another instead of Judge Thomas had bought the lot, it would have been great injustice to allow him to stand by and see Bowman paying out his money on a claim which he, Thomas, knew to be void. In this case he not only stands by and sees such proceeding without objection, but he actually reaps the rewards of such violation of good faith by receiving the redemption money—receiving what at the time he knew he had no right to. And what excuse can be made for such a proceeding? He can't pretend he was misled by any one. He can't pretend that Bowman, or Bowman and Harrow said anything to mislead or deceive him. He can't say he did not know his rights, and his duty in the premises. But we can say truly that by the conduct of Judge Thomas we have been misled to our injury. He has received money that he now asserts he has no right to, and still keeps the money and proposes to keep the land also. We submit the case in entire confidence.

E. BEECHER,

For Defendants in Error.

37
William Thomas

vs.

Brown & Nassau

Brief of Appellees.

14196

Filed Nov. 12, 1862.

N. Johnston clerk

State of Illinois—ss.

SUPREME COURT--1ST GRAND DIVISION.

NOVEMBER TERM, 1862.

WILLIAM THOMAS, Appellant,
vs.
JOSEPH G. BOWMAN and WILLIAM HARROW, Appellees. } *Appeal from Lawrence.*

Action of Ejectment, to recover possession of Lot 21, in Lawrenceville.

The facts of this case are stated in the Bill of Exceptions, commencing on page 7 of the Record.

W. Thomas claiming the lot in controversy in his right as Trustee of the Bank of Illinois, filed a bill in chancery in the Lawrence County Circuit Court against the heirs of Touissant Dubois, senior, deceased, and George W. Wise, tenant in possession, for the purpose of settling the question of title, and of securing partition between him and any of said heirs, whose title had not been divested.

The defendants, except Wise, appeared and demurred to the bill. The demurrer was sustained, and the case was taken to the Supreme Court and heard *ex parte* at December Term, 1856, the Decree of the Circuit Court reversed, and cause remanded. At the May Term, 1857, of the Circuit Court, defendants were ruled to answer. Subsequently the venue of the cause was changed to the county of Sangamon. At the Term, 18..., a Decree was entered by the Circuit Court of Sangamon county, in favor of said Thomas. It is declared by the Decree, that the title to the lot had passed to said Thomas, in his right as aforesaid, and defendants, except Wise, enjoined and prohibited from setting up or asserting title. Wise was required to surrender possession and account for rents.

On the 20th June, 1857, an execution was issued by the clerk of Supreme Court on the judgment, for costs, against the heirs of Dubois and Wise, the tenant; to satisfy which, the sheriff of Lawrence county, on the 25th July, 1857, sold the said lot, and W. Thomas, the Appellant, in his right as Trustee, was purchaser, said Wise still being in possession of the property.

At the October Term, 1858, of the Lawrence Circuit Court, Joseph G. Bowman obtained a judgment against the heirs of Dubois, defendants in said chancery suit, but not against Wise; upon which execution was issued on the 25th October, 1858, and claiming the right to redeem said lot from the sale to Thomas, (twelve months having expired, but not fifteen, from the sale,) paid the sheriff \$74 19 bank bills, and had the lot levied on and sold under his execution, and the Appellees, Bowman and Harrow, purchased and subsequently obtained the sheriff's deed. The redemption money paid to the sheriff as aforesaid, was, on the 20th December, 1858, received by said Thomas in his right as Trustee in kind, &c. The Appellees claim the property in fee by force of this redemption, purchase and deed.

The Circuit Court, upon hearing the cause, on the foregoing facts, decided that the Appellees were seized in fee of the lot, and gave judgment in their favor,—from which judgment said Thomas appealed to this Court, and *now* assigns for Error, First, The Court erred in deciding the case in favor of Appellees. Second, The Court erred in not giving judgment for defendants.

The Appellant contends—

1. That the Decree of the Sangamon Circuit Court proves that the title to the lot in question had passed from the heirs of Dubois, and had been

Declaration p 1.

Judgment p 5.

Bill of Exceptions 7.

Decree of Sangamon Circuit Court - 9.

vested in him as Trustee, &c., long before the date of either judgment, under which the parties claim.

2. That by the sale under the execution issued by the clerk of the Supreme Court, the Appellant, Thomas, acquired the possessory title of the defendant, Wise, which was liable to be sold, but as the heirs of Dubois had no title, nothing passed from them.

3. The title of Thomas, as Trustee, was not affected or changed by his purchase under the execution against the heirs of Dubois and Wise.

4. If the heirs of Dubois had redeemed from the sale to the Appellant, their position with reference to title would have been the same as that occupied by them before the sale, and their judgment creditor stands in no better condition.

5. All that Appellees can claim under their redemption and purchase, is, that they stand in the position of the heirs of Dubois. If said heirs had no title, then Appellees have none; with this difference, however, that here the right and title of Wise was sold, and the redemption under judgment against others, and not against him, could not operate upon the title acquired from him.

6. In this action, the Appellant, by showing title out of the heirs of Dubois, was entitled to judgment. The right to recover depended on the question of title in those heirs, and that right would be defeated by showing that the title had passed from them before the date of the judgment.

7. The case stands as if A purchased the land of B on a judgment against C, and subsequently E, by virtue of a judgment against C, redeemed the land, obtained sheriff's deed, and then commenced his action of ejectment against B, to recover possession—or, as the facts here show, the judgment is against C and F, the land of F is sold, a judgment creditor of C redeems from the sale, and then sues to recover the land. Can he recover without showing title in C, against whom he obtained the judgment?

WM. THOMAS.

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Brownian et al

Abstract

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N. Johnston City