No. 13291

Supreme Court of Illinois

Harnett

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vs.

Ball

71641

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

JOHN M. HARTNETT *vs.* MARIA BALL.

Error to Lake County.

THIS was a bill filed in the Lake County Circuit Court by plaintiff, the grantee of Richard Shatswell, to redeem the premises in controversy, charging that the legal title held by defendant, was in equity a mere mortgage. For that the conveyance from Shatswell to defendant, although absolute on its face, was given to secure a loan of money. The law of the case is well settled by numerous cases decided by this Court, among which are,—

Davis et al. vs. *Hopkins*, 15 Ill., 519.
Smith et al. vs. *Sackett*, 15 Ill., 528.

The true intent of the parties may be enquired into in reference to a sale of land, to ascertain whether a loan of money only or a sale was intended.

Williams vs. *Bishop* et al., 15 Ill., 553.

Parole evidence may be introduced to show that a deed, absolute on its face, was intended as a mortgage.

Whitlock vs. *Kane*, 1 Paige C. R., 206.
Van Buren vs. *Olmsted*, 5 Paige C. R., 10.
Slrong vs. *Stevens*, 4 John. C. R., 167.
Hodg vs. *Tren. In. Co.*, 4 Selden, 416.

The bill waives answer under oath.

The answer denies the loan and claims that the transaction was a sale; the case therefore rests entirely upon the testimony, which discloses the following facts:

Richard Shatswell received of defendant $212 in money, to go to California. Samuel M. Dowst, a land agent and conveyancer, who stands entirely disinterested between the parties, testified that he drew the deed of conveyance from himself, Shatswell and wife, to defendant. At the time the deed was executed and delivered, Shatswell agreed to repay the money to defendant, and 12 per cent. interest, as soon as he could send or bring the money from California. One year was named as the time. Defendant hesitated and expressed fear that Shatswell would not pay, and *she should have to keep the land, which she said she did not want.*— The defendant would not let the money go until Dowst, the witness, agreed that if Shatswell did not redeem he would. Defendant then said she was satisfied. Dowst signed the deed with Shatswell and wife.— Dowst and Shatswell both think that he signed the deed to indicate that he was security.

Dowst also testified that he was, at the time of the conveyance, the recorder of deeds of Lake county, and did a considerable business in the way of conveyanceing, and that the usual mode of securing loans of money, at that time, was by making a deed of conveyance absolute on its face. See Dowst's testimony, commencing on page 9 of abstract.

Dowst's testimony is corroborated by the testimony of Richard Shatswell and William D. Shatswell, and to some extent by all of the witnesses in the case on both sides, except Edwin Ball, a brother of defendant. He testified that he was present and did not hear any agreement to redeem, sell back, or reconvey. His testimony is evasive, uncertain, and of a *negative* character. "It is a rule of law, in weighing contradictory evidence that, *other things being equal*, positive testimony preponderates over negative evidence."

Johnson vs. *Whidden*, 32 Maine 230.
Far.'s & Mech. Bank vs. *Champlain Trans. co.* 23 Vt. 186.
Johnson vs. *The State*, 14 Geo. 55.
C. & R. I. R. R. Co. vs. *Still*, 19 Ill. 499.
See Ball's Testimony, com. on p. 14 of Abstract.

To corroborate Dowst's testimony and rebut Edwin Ball's testimony, it is shown by numerous witnesses, that Richard Shatswell sent money from California to his wife, to pay Miss Ball, the defendant $212, and interest, and that, $250 was offered to her, through the only agents she had in this state, (she being herself in Massachusetts,) which she declined, alleging that it was not quite enough to pay the amount she invested, and 12 per cent. interest. There is some doubt under the evidence about the time the money was offered. William D. Shatswell testifies that he figured up the amount at the time, and it was $250.
See W. D. Shatswell's testimony, p. 5 of Abstract.

The testimony of most of the witnesses on both sides show that, immediately after offering the $250 to redeem the place, Mrs. Shatswell, who had resided for a time with her father, by consent of Goodenow, the agent, removed back on the premises, and remained on them until she died, and the family remained on the premises until the sale to Hartnett, the plaintiff, and Hartnett resided thereon, peaceably and quietly, paying the taxes, &c., until the filing of the bill—defendant still residing in Massachusetts.

Defendant introduced as evidence two letters of Richard Shatswell, marked B and C, (see p. 11 of Abstract,) in both of which letters Shatswell mentions the agreement to reconvey upon payment of money and interest.

The testimony shows that Shatswell was a mechinic and had a family, and desired the premises as a home, and that the defendant was a maiden lady, not situated to make any profitable use of the premises.

There was an attempt on the part of defendant to show that Shatswell never pretended that he had any right to redeem the premises in question until about the time of the sale to Hartnett, and for that purpose called Benjamin W. Backus (printed Barnes—see abstract p. 20.) To rebut which, plaintiff proved by R. M. Gray that, at about the year 1853, R. Shatswell stated to him (Gray) the agreement of the defendant as proved by Dowst, Richard and William D. Shatswell, and others.

At the time the conveyance was executed the land was worth $250 or $300; at the time of filing the bill was worth $1,000 to $1,500.
See Dowst's testimony, p. 9 & 10 of Abstract.

C. C. PARKS,
Att'y for Plaintiff in Error.

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In Supreme Court

John M Hartnett

vs

Maria Batt

Bill & Brief & Notice

Filed April 28, 1869

L Leland

Clerk

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