

No. 13263

Supreme Court of Illinois

chickering

vs.

Faile

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 287

1867
Chester
R. G.
Faulkner

1867

STATE OF ILLINOIS—THIRD DIVISION.

SUPREME COURT.

April Term, 1861.

JOHN CHICKERING and
JAMES LUDDINGTON,—Appellants. }
vs. } In Chancery.
THOMAS H. FAILE, et al,—Appellees. }

The Defendants in this cause seem to consider that they are entitled to the closing argument, and not content with some fifty odd closely printed pages, before submitted, have prepared another book of thirty pages in reply to the argument submitted on the part of the appellants.

There must be an end of discussion at some time, and although we are entitled to the closing argument in the case, we should be disposed to let the matter rest as it is, were it not that the argument last submitted by them, questions certain statements of the *facts* of the case, made by us, and we deem it necessary therefore to make a brief reply upon these matters.

The second argument of the Defendants, on page 2, undertakes to question the correctness of the statement made by us, "That Brown as agent of Lee, directed the foreclosure proceedings, and they were paid for by Lee."

We propose therefore, to recite, verbatim, from the testimony of Brown, all which he says on this subject, that it may appear whether the statements made by us in argument, are or not borne out by the evidence.

Brown swears as follows :—

That as Executor of E. K. Hubbard, who died in May, 1839, witness learned from his books that David Lee had furnished

Hubbard with money to invest in lands and lots, in and about Chicago, and that with said money of Lee, Hubbard purchased the lands (in question), of *all of which Lee* was advised and understood.

- 18 That witness never knew of Lee's having any other agent, or depending on anybody else except witness, and he had therefore no doubt that said Lee understood that witness was his agent, upon whom he depended to do this business as well as his other business in Chicago. Witness don't know when Lee became acquainted
19 with the matters between himself and Hubbard, but he became acquainted with them he thinks as early as 1840 or 1841. Hubbard died in May, 1839. That witness has no distinct recollection for whose benefit the foreclosure by sci. fa. was conducted, but supposed it must have been for the benefit of David Lee.

He has no distinct recollection who paid the costs, though he presumes Lee did.

- 20 That he has no recollection who paid the costs of foreclosure in 1846 and 1847, but presumes Lee did. He finds Lee charged in his books, Dec. 1842, \$96 paid Scammon & Judd for legal services ; also, finds Lee charged \$25, Dec. 14, 1847, cash paid Cowles, which he supposed to be for legal services, he knew of nothing else it could be for. That the reason why he presumes and supposes David Lee made the several payments, last referred to, is that there were large interests in real estate purchased by E. K. Hubbard, in his life time, for divers persons, and when those interests were fully ascertained, his estate being insolvent, the parties *were left to themselves to assert their rights, at their own expense, and Mr. Lee among the rest.* That witness had no recollection as to Lee, or any agent, of his ordering the suits referred to, but presumes that Lee or some agent of his directed the proceedings ; that witness supposed that *he* must have directed them as Lee's agent.

That witness has no doubt that Hubbard's estate never paid any of the costs or expenses of the sci. fa. or foreclosure suits. That witness has no recollection about any correspondence with David Lee, in his life time, with regard to his interest in these lands, and the various legal proceedings that had been conducted with regard thereto, *but has no doubt that all that was done by witness, as Lee's agent, in regard to the lands, was done by his (Lee's) direction.*

Here is a witness who, from 1840 to 1854, was the sole agent

of David Lee in Chicago, for the property in question, who commenced about that time paying taxes on this property; who attended to all Lee's business here from that time until he relinquished the agency in 1854. This man paid the attorneys, Seammon & Judd, who conducted the sci. fa. proceedings; he was the law partner with Cowles, the solicitor, who prepared the foreclosure bills. He paid Cowles money, which he presumes was on account of those proceedings—knowing of nothing else it could be for. The proceedings were conducted in his own law office. He was executor of Hubbard's estate, and swears that Hubbard's estate did not, to his knowledge, pay any of the expenses of the proceedings; and expresses his belief that all was ordered by himself, and says that all he ordered was by Lee's direction. Under such a state of facts as this, and with not a particle of proof to the contrary, we leave it to the Court to decide whether or not we were justified in the statement made in our previous argument, that "these foreclosures were in the name of Brown & Hubbard, executors, but the *real plaintiff* in both suits was David Lee."

The language of the witness that he "presumes" as used in this connection, strengthens rather than weakens the force of the evidence. It means evidently, that while he does not recollect precisely as to the fact of the payment of the costs and the directing the suits, *he knows that it must have been so—that it could not have been otherwise.* Why? because he knew, and Lee knew, that the lands were Lee's; Hubbard's estate was insolvent, and had no interest in the matter; Lee was left to assert his rights at his own expense and in his own way. He (Brown) was Lee's agent, and he knew that as such agent he must, in the nature of things, have directed all that was done about this litigation, and that no one else could or would have done so; it was done under his own eye, in his own office. Lee was cognizant of all and approved all, and of course must have paid all the expenses. They were paid by somebody, and he knew that the plaintiffs did not pay. Of course Lee did. Somebody ordered the litigation, and he knew it could have been none other than himself as Lee's agent.

This is a matter of fact, forming the basis of much of the argument, and we desire that there shall be no mistake about it. If we said that it was *admitted* to be so in the court below, we

meant by that that nothing was asserted to the contrary; that it was not contended in argument that the fact was otherwise; that no point was made of the proof not being entirely sufficient to establish it, and in truth our recollection is that the learned counsel distinctly claimed in his argument that *Lee was the real plaintiff in the foreclosure suits*, and argued upon that hypothesis.

The only error in the statement made in our former argument on pages 6 and 21, "that the deed of Brown & Hubbard, made in pursuance of the decree, *referred to the decree of strict foreclosure* as the source of their title," consists in this: we should have said that the *bill filed by Lee*, upon which the decree was taken and deed made, expressly referred to the decree of strict foreclosure as the source of title.

The statement in that bill is in these words: That the said Brown and Hubbard, executors, "filed their bill in equity on the chancery side of the Cook County Court, and at the March term thereof obtained a decree against Josiah E. McLure, the mortgagee of said tract of land, and other defendants, that said lands should *belong to the said executors by strict foreclosure*; that the right and title in law and equity, by force of said mortgage *and said decree*, became vested in said defendants as trustees for the use and benefit of your orator" (Lee).

This reference in the bill connects the deed made in pursuance of the decree rendered upon it with the decree of strict foreclosure, just as effectually as a similar reference in the deed would have done, and the error, therefore, is wholly unimportant. The recital in the bill is notice equally with that in the deed, and the title of Lee is, therefore, referred back to the decree of strict foreclosure in the same manner as if it had been inserted in the deed; and since the deed purports to be made in pursuance of a decree which refers to the bill containing the recital above set forth as its basis, it may be said with truth that the deeds do refer to the decree of strict foreclosure as the source of the grantor's title. In legal language it is strictly accurate.

The learned counsel in his second argument has abandoned the Bible and King Solomon, and betaken himself to the Church of Rome in support of his cause. He seems very unwilling to trust his case to the law and the Courts, and is driven for analogies and arguments quite outside of the sources of reasoning and authority which are usually supposed to influence the decision of Courts of law.

In regard to his labored effort to bring his client's cause within

the doctrine of the apostolic succession, and save his client from the doctrine of "*imputed*" fault, we have only to say that we hold Mr. Lee, like the Popes to which the learned counsel refer, liable for his *own* errors and faults, and no other; but we apply to him as to them the well known maxim, "*Qui facit per alium, facit per se.*" The wicked Popes to whom the gentleman alludes did not perform their various acts of iniquity in proper person; they employed various agents and instruments; but history takes no note of the agents, but ascribes the evil deeds to them on whose responsibility and in whose behalf they were perpetrated.

Mr. Lee cannot employ agents to act for him and then shelter himself behind the plea of his own personal ignorance. Their knowledge is his knowledge, their actions are his actions, and the law regards him, and not them, as the actor and principal in all these proceedings.

The learned counsel complain that in stating the defendant's color of title we unite with the deeds of Brown & Hubbard to him the deed of McLure to Brown & Hubbard, and accuse us of unfairness in intimating that that deed of McLure to Brown & Hubbard is a part of their color of title, when this latter deed, they say, "was a deed which for aught that appears was obtained without the knowledge of Lee, which he never saw or knew to be in existence, and upon which no evidence was offered to show that he predicated his color of title." This sensitiveness about having the deed from McLure to Brown & Hubbard regarded as a part of their color of title strikes us as not a little singular.

We had always supposed that this was one of the instruments upon which they especially relied as color, and were not aware until now that they disclaimed this instrument as part of their color.

It is clear that they feel reluctant to meet the imputation on their good faith, which the taking of such a Deed under the circumstances would necessarily create.

But they cannot escape from this. The Deed from McLure was got by Lee's agent, W. H. Brown, and for his benefit, and in order to strengthen his title. It cannot be said with truth that it was obtained without Lee's knowledge, for the knowledge of Brown, Lee's agent, was Lee's knowledge, and notice to him was notice to Lee, to all intents and purposes.

The defendants proved the execution of said deed by McLure, and offered it in evidence; they proved by Brown, that he obtained

it for the purpose of perfecting Lee's chain of title to the property. It becomes a part of the title papers of defendants, and these must all be taken and considered together. The doubts and imputations which this McLure deed furnishes, as to the confidence of the party in their title, and as to its good faith, cannot be escaped by any attempt to rest their claim and color on the other deeds, and endeavoring to ignore the existence and effect of this conveyance.

We do not propose to discuss further the legal propositions of our former argument. After a careful review of the second printed argument of defendants, we see nothing either in the reasoning or authority which requires any further answer, or which is not fully met in the argument before submitted.

And we submit the whole with entire confidence to the judgment of the Court.

E. C. LARNED,

for Goodwin, Larned & Goodwin,

Solicitor for Complainants.

State of Illinois 3^d Div
Supreme Court
April Term 1861

John Chickering et al
vs

Thos W. Faile et al

Compt's reply to 2^d -
Argument of appellees

John W. Chickering
& James Sudington

Supreme Court
of Illinois

on
Thomas M. Fairle Sheriff
Executor of David Lee's Estate
& others the w^r & heirs of
said David Lee

On appeal from
Cook Circuit Court
In Chancery

LaSalle County in the

3^d Grand Division of Ill.

} S. S. Miran & J. Mather and
Levi P. Tapp of Chicago Cook County Ill.
being duly sworn severally depose & say, that
the above entitled cause was argued by them,
they being solicitors & counsel for respondents
and by Mr. Chickering pro se & by Mr.
Larned as counsel for complainants in
the month of January last; the argument
occupying the attention of the Court nearly
one week; that upon said argument no point
was made by the complainants touching the
payment of taxes on the part of respondents
as to whether paid by them for seven
years successively before the commencement
of this suit; but on the contrary thereof it was
arranged between counsel that the payment
of taxes for seven successive years as aforesaid
should be admitted & passed over as pretty
nearly proved by the depositions and in pursuance

thereof the complainant above named & counsel expressly stated that admission to the Court and made no point or discussion thereupon and the same was not argued or discussed by either Side:— and the whole argument, on the part of complainant, on that branch of the case, (tax payment under the Ninth Section of conveyance act) was aimed to show, that the color of title by which the defendants as tax payers held under their paper title was not in good faith & they consequently not entitled to be shielded by tax payment under the ninth Section aforesaid and these defendants & their counsel are now for the first time taken by surprise by the point started on the part of the complainants alleging in their points for argument, that the taxes paid by the executors of David Lee in this case are not available under the evidence to shield or protect the title descended on his death to his numerous heirs the other defendants in this Suit

These deponents further say that so far as matters of fact are concerned touching the subject of tax payment aforesaid they can make the

* Had from the decease of Mr. Lee to the present time still having & exercising the sole & exclusive care & oversight of said lands & other real estate in Chicago belonging to said estate for the sole benefit of said heirs of said Lee is a fiduciary capacity.

following statement derived by them incidentally in the progress of defending in this cause during the year past & over and of the exact & full truthfulness whereof they have no doubt whatever, that is to say, that on the decease of David Lee a resident & merchant of New York City in 1853 he left the widow & children who are named as defendants, then most of them minors, the youngest of which has but recently come of age; that Messrs. Faile & Walcott were the executors under his will and proceeded immediately for the protection of the estate of Mr. Lee to pay the taxes from the funds & moneys of the estate in order that the said estate should be safe & secure to said heirs they the said executors having no other interest except as executors and as deponents also suppose guardians for those of the children who were minors - said executors having ^{no} And further deponents say that if any such question or point as it is above complained is sprung upon them by surprise, in this Court, had been ever made in the Circuit Court in any stage of the cause before or upon argument in any stage of it, they

would have considered it their imperative duty, and they would immediately have set themselves to the diligent and faithful performance of it by an application to the Circuit Court (or other practicable way) to arrest the cause in whatever stage of progress and to give leave to defendants if necessary for the purpose to amend the answer & especially & above all to take further proof to show beyond a possibility of doubt (and deponents have no doubt whatever such was the truth ^{that} it was perfectly & easily susceptible of proof) that all the tax payments by the executors of David Lee in this case proved were made with the funds & money of the heirs aforesaid & for the sole purpose of protecting their ^{the said heirs} estate in the lands & premises in question in this District. But the minds of these deponents were taken from said subject & it was supposed to be wholly unnecessary in consequence of the admission by complainant's counsel on & prior to the argument aforesaid

And they therefore further say that should this court adopt the view now first stated as above stated and

disallow the defence of tax payment as
by dependants & their Counsel relied upon
in consequence of any want of clearness in
the evidence, ^{as to} on what account the executor
paid or caused to be paid Said Taxes
than in such case their Said clients the
hirs spouses will be exposed to the hazard
of possibly losing a great & valuable
estate after ^{expending} an imperfect trial of
the merits in respect to the point
stated, being a point as they believe
very easily supplied & made good and
which would richly & fully have
been sustained & made good in the Circuit
Court but for the admission made
by complainants in the Circuit Court
and on which account dependants
complain that it cannot & ought
not to be considered as now raised
in good faith in this Court.

These dependants further state to the
Court, that prior to argument on the
merits above referred to a full day
was spent in argument in the Circuit Court
by the same Counsel & party on both
sides upon the motion made by the
dependants to amend the answer in

the matter of distinct reference to the
9th Section of Conveyance act & that
the premises were vacant & unoccupied
and the objection was then started &
fully disowned on the part of the complainants
viz - the contrariety of such amended
allegation with other parts of the answer
particularly that wherein it is admitted that
defts. had been in possession five years
or more & they claimed to defend therefore
as actually holding & being in possession
under claim & color of title under the
Eighth Section of the Conveyance act
and thereupon their deponents fully &
expressly stated & declared to the opposing
Counsel & party & to the Court that now
having taken their proof they were ready
& willing and offered if it was desired
or moved to elect on the part of defendants
upon which Section of Conveyance act
(8th or 9th) they would rely and
claim under in arguing & defending so
as to remove all charge of contra-
dictory or contradiction ^{with each other or} in the allegations
or contrariety of one or both ^{with}
the proofs, but the said opposing
Counsel wholly neglected & refused
to express any wish to have such

election made or to move the court to that effect

The fact was the defendants & counsel relying upon the taking of their proofs aforesaid upon the Shield of the 9th Section aforesaid & that only, so far as this point was concerned; tho' when the answer was first drawn they were not sufficiently cognizant of the facts to be able to make any such discrimination; and they also suppose their reliance on the 9th Section aforesaid was equally well known to the complainant & his counsel

Deponents further state to the Court that only one of the heirs of Mr Lee above named (David P. Lee the youngest as they suppose) is present or at home in this their country but all the other children during this whole controversy have been & are still absent on foreign travel & whether the absentees have ever had specific information of this cause from any source they do not know. The fact being that the whole of their interests are in charge of the Executors aforesaid; the said David P. Lee is the only one with whom deponents have had any counsel

tation of said heirs; He was sent up from New York by Mr. Fails the surviving executor on the eve of the argument of this cause before the Circuit Court & being young & inexperienced lost on the way all his papers deeds documents & tax receipts sent up by request of counsel & he returned without finding them and deponents went on upon transcripts of deeds obtained from the record and duplicates of tax receipts kept by Mr. Keepaest, (Mr. Browns are originals)

These deponents further say that on looking to receipts they found some to run to Executors & some to the estate of David Lee deceased

The counsel for defendants therefore pray the Court in view of the facts above stated & thus appearing in the case or on argument that in case the Court should be of opinion that the objection or point by which they are here taken by Surpize is one that is sound or tenable in Law, and in case it should be found necessary by this Court to reverse the decree for that reason; that then the Court would

remands the Cause to the six o'clock Court
with leave to the defendants to amend
their answer and to take further proceedings
as they ~~see fit~~

These deponents further
say in corroboration of the fact above
stated by them as proveable, that the
tax payment referred to by the executors
of David Lee was made by them solely
for the benefit of & in order to protect the
estate descended to his heirs, the further
facts that it is well understood that the
estate of said David Lee is one of great
wealth, wholly out of debt and that
the property real of the said heirs in
Chicago alone is worth ^{near or above} ~~not less than~~
half a million of Dollars; ^{including that in this} ~~not less than~~ ^{controversial} that in
controversy in this Suit being variously
estimated at from two to four hun-
dred thousand Dollars requiring and
absorbing annually a tax payment
to City County & State of over
one Thousand Dollars

Subscribed & Sworn to
May 3^d — A.D. 1861
before me

L. Leland Clark
Jr. or his Deputy

A. F. Mather
J. B. Jeff

287-1704

Sup. Court Ill.

Chickering and
Ludington
vs

Faile Exr.
& Lees heirs
& widow

● Affidavit

●
Filed May 3^d 1881
L. Leland
clerk