IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

E. S. BLANTON
APPELLANT

vs.

R. L. ROBERTS, GEORGE L. KNIGHT, E. L. BOWLING, NAPLES GULF FRONT COMPANY, HUGH KENEIPP AND FRANCES A. KENEIPP
APPELLEES

Record No. 855

ARGUMENT IN BEHALF OF APPELLEES, HUGH KENEIPP AND FRANCES A. KENEIPP.

Appeals Press, Inc., Richmond, Va.

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Pursuant to Rule XV of this Honorable Court, appellees, Hugh Keneipp and Frances A. Keneipp file this printed argument in lieu of oral argument in their behalf.

In the brief heretofore filed in behalf of appellees, a statement of the facts in so far as deemed material, and a statement of the case, in so far as is deemed material, has been made, including pages 1 to page 12, of said brief.

In this argument, no re-statement of the facts and of the case will be made except as deemed material in the discussion of the reply brief of appellant.

The discussion of the assignments of error made by appellant in behalf of said appellees begins on page 12, and continues through page 38 of that brief.

Restating the arguments in behalf of appellees so made, the jurisdiction of a Court of equity in this cause is challenged upon the following grounds:

1. That complainant does not come into Court with clean hands.

2. That complainant has no standing in a Court of equity because the alleged cause of action set up by him has been split.

3. That the alleged purchase by complainant of the note upon which he predicates this cause of action is champertous.

4. That independently of whether complainant's alleged transactions are champertous, he does not come into Court with clean hands and under the facts disclosed by the record, he cannot invoke the jurisdiction of a Court of equity on the purely equitable remedy of subrogation.

In the reply brief of appellant, page 1, in discussing the argument as to whether complainant comes into Court with clean hands, counsel for appellant stated:

"We do not catch the drift of this contention.

> Nowhere in the bill is there any allegation of any fact that in anyway shows appellant has not clean hands, and in the absence of such a showing in the bill, this question cannot be raised on demurrer."

In response to this suggestion of appellant's counsel, attention is directed to the fact that the foreclosure proceedings in the Florida Court is made "Exhibit I," with the bill of complaint in the 9th paragraph thereof and the invitation is now extended appellant's counsel to point out to this Honorable Court a single material statement of fact in appellees' brief heretofore filed which is not supported by the bill of complaint and said exhibit filed therewith. Certainly appellant's counsel cannot seek to divorce from the record in this cause said "Exhibit I" which supports, it is sincerely thought, every statement and argument advanced in said brief of appellees, reflecting upon complainant's course of conduct.

Counsel for appellants then direct attention to page 13 of appellees' brief, discussing the first ground of demurrer, that the bill "sets up no equitable cause of action against demurrants," and seeks to avoid the force of the argument on pages 13, 14 and 15 of appellees' brief by saying that such argument constitutes a collateral attack upon the decree of the Florida Court. It is doubtless unnecessary to state that no such attack is being made. Appellees naturally and justly contend that this Honorable Court in determining their rights must necessarily look to complainant's bill and said "Exhibit I" therewith as affecting the right of complainant to invoke the jurisdiction of a Court of equity. Appellees contend that consideration of the said exhibit in connection with the allegations of paragraph 7th and paragraph 10th of appellant's bill of com-

plaint (R. 10-13) affirmatively shows that appellant does not come into Court with clean hands and is not entitled to invoke the jurisdiction of a Court of equity. At no time have appellees contended that the decree of the Florida Court is invalid. All they have done is to refer to the proceedings therein as affecting appellant's alleged rights.

On page 2 of said reply brief counsel for appellant seek to dispose of appellees' contention that complainant has no standing in a Court of equity on the ground that his bill of complaint shows the effort on his part to recover on part of a cause of action by stating that the rule that a cause of action cannot be split does not obtain on the ground that several promissory notes give rise to several rights of action. In response to this suggestion, attention is directed to the fact that appellees are not parties to the notes in question. That any pretended cause of action against them grows out of one remedy and right, to-wit, the right of subrogation in a Court of equity. Appellees contend that this right to pure equitable relief where it exists (which is denied in the instant cause) cannot be split into several causes of action and several causes of action instituted for recovery, the authority in support of such contention being set forth on pages 14 and 15 of appellees' brief.

The remainder of the reply brief, pages 3 to 15 is devoted to a discussion of appellant's right to invoke the purely equitable doctrine of subrogation. On page 3 of said reply brief counsel for appellant content themselves with stating the dry facts appearing from the allegations of the bill of complaint and a portion of the innocuous facts appearing in "Exhibit I", and adopt the position that in a Court of equity it is not incumbent upon a complainant,

invoking the jurisdiction of the Court upon a purely equitable ground, to-wit, subrogation, to set up any facts justifying and necessitating exercise by the Court of its discretionary jurisdiction. On page 3 of the reply brief the statement is made that any question of fraud or inequitable conduct on the part of complainant, independently of whether or not it appears from the pleadings, cannot be raised by demurrer but is only the subject of answer.

The general jurisdiction of Courts of equity in this Commonwealth, save only the statutory jurisdictional grounds, rests basicly upon the true functions of equity Courts, to-wit, to granting relief in equitable cases where the strict application of the rules applicable in the law Courts deny the right to recovery. In order to give Courts of equity jurisdiction where such jurisdiction is not conferred by statute, the duty rests upon complainant to show by appropriate allegations of fact that he is entitled to equitable relief and he cannot ask a Court of equity to *assume* that the right to the equitable relief prayed for exists. Reference to the bill of complaint (R. 11-13) shows that the only allegations attempted of any equitable grounds for relief in behalf of appellant are found in paragraph 7th and paragraph 10th of the bill. These allegations are insufficient to set up any right to invoke the jurisdiction of a Court of equity and when the allegations of paragraph 10th as to appellant's acquisition of the mortgage note are considered in the light of his prior connection therewith, as shown by "Exhibit I", discussed on pages 16 to 19 of appellees' brief, it is manifest, we submit, that appellant is not entitled to invoke the jurisdiction of an equity Court which is extended on purely the equitable right to subrogation.

On page 4 of the reply brief, the statement at the top of page 18, paragraph No. 4, of appellees' brief that appellant had been paid in full for the note and was not liable thereon, prior to the time he alleges he purchased the same, is challenged on the ground that the record does not show this to be the fact. The statement in appellees' brief is predicated upon "Exhibit G", and "Exhibit J", page 51, and certainly said exhibits which are not available at the time this paper is drafted (having been heretofore filed with this Honorable Court) support the contention of appellees. Said exhibits show as stated on page 17 of appellees' brief that on June 28, 1927, appellant sold and assigned for full value so far as the records show, the $38,700.00 note to the Naples Gulf Front Company, *without recourse.*

This contention of appellees, it is respectfully submitted, is supported by the record and is most material for the consideration of a Chancellor in determining the demurrers filed by appellees.

Appellant, after he received full value for the $38,700.00 note, sold and assigned by him without recourse to the Naples Gulf Front Company, after having been made a party defendant in the Florida proceedings, after appearing therein as *quasi* counsel for the complainant, after the sale of the mortgaged property, with result that the second mortgage was not reached, with knowledge that the $38,-700.00 note was then long past due and had been protested and dishonored, boldly comes into a Court of equity in this Commonwealth and alleges:

"That subsequent to the foreclosure of the property aforesaid, the said note for the sum of $38,-700.00, secured by the second mortgage deed filed

> herewith as 'Exhibit D' was sold and assigned to E. S. Blanton, complainant herein."

And asks a Court of equity to subrogate him to the pretended rights of his alleged assignor. And with this course of conduct and under the naked allegations of the bill, his counsel, on page 4 of the reply brief, contend he can rightfully invoke the jurisdiction of a Court of equity under the provisions of Section 5768 of the Virginia Code. This section has no application to negotiable instruments. *Davis* v. *Miller*, 14 Gratt., p. 1, and particularly p. 13.

If such Code Section gave appellant the vested right to sue appellees, the question immediately suggests itself as to why such proceedings were not instituted on the law side of the Court.

Counsel for appellant, then, on pages 6, 7 and 8 of the reply brief, discuss the case of *Thacker* v. *Hubard*, 122 Va., page 379, and 132 Va., 33. On page 7 of said reply brief the statement as to the holding on page 49 of the opinion in 132 Va. it will be noted is not the decision of this Court, but of the New Jersey Court in a case cited. On page 6 of said reply brief, language quoted from page 25 of appellees' brief is set forth in support of the argument that appellees are misconstruing the two decisions in the *Thacker* v. *Hubard* case.

The quotation so set forth on page 6 of the reply brief is to be read in connection with the statement on page 26 of appellees' brief that:

> "No allegations of facts are made in the suit at bar sufficient to show a novation between complainant and these defendants, and it appears clear

> that unless complainant can claim under the purely equitable doctrine of subrogation he has no cause of action against these defendants."

In the lower Court appellant elected to contend and argue as he does in this Honorable Court (R. 7, bottom of second paragraph), that he had no right to file an action against appellees on the law side of the Court. The contention of appellees in both the lower Court and of this Honorable Court as shown from the said quotations from their brief is that merely because appellant contended a law Court was without jurisdiction, that such contention on his part could not confer jurisdiction upon a Court of equity because no alleged novation was made of any contract between him and appellees, and that in view of the facts appearing from the record in this cause and of the absence of any allegations of existing equities, appealing to the conscience of a Chancellor, made in the bill of complaint, he cannot invoke the jurisdiction of a Court of equity upon the purely equitable doctrine of subrogation.

The contention is made on page 7 of the reply brief that appellees in the discussion in their brief of the decisions of this Honorable Court in cases of subrogation are arguing in the face of the holding of this Honorable Court in the *Hubard* v. *Thacker case, supra.* Consideration of the argument advanced by appellees on the point, pages 26 to 38, of their brief, is deemed sufficient to answer this contention in behalf of appellant.

In conclusion of the discussion in behalf of appellant, pages 8 to 15, of the reply brief, the case of *Tatum* v. *Ballard,* 94 Va. 370, is cited as final authority justifying appellant's right to invoke the jurisdiction of a Court of

equity. The statement is made that this case, "Fits the instant case as a glove fits the hand."

It might be observed that the fit of the glove to the individual hand is dependent either upon chance—which element Courts of equity do not regard—or upon the acquisition of a particular glove with a view of fitting a particular hand.

Consideration of the *Tatum Case* so differentiates it in facts from the instant case as to show that it is not authority for appellant's contention—and that, adopting his counsels' line of simile, appellant's hand is entirely too small to fill the glove.

In the *Tatum Case,* the facts were that complainant paid in cash (page 374 of the opinion), $2,398.89, which seems to have been about the full amount of the debt due, and under the assignment complainant and his heirs and assigns were given full power and authority to recover the same. That the assignment sued upon was for the entire amount of debt and was absolute and unconditional *under the allegations of the bill.* The demurrer in the *Tatum Case* filed to the bill of complaint was on two grounds:

> 1. That a Court of equity is without jurisdiction to render a personal decree in favor of a mortgagee against a purchaser from the mortgagor who in his purchase has expressly or impliedly assumed payment of the mortgage debts *unless the mortgaged lands and the purchaser be in the same jurisdiction.* (Page 372).
>
> 2. That the proper parties were not before the Court. (Page 375 of the opinion).

The points raised by the demurrer in the instant cause

were not raised in the *Tatum Case,* were not passed upon in that case, hence the opinion therein in no wise reaches the points raised by the demurrers in the instant cause.

Not only is this true, but the facts in the *Tatum Case* are entirely different from the facts in the instant cause. In the *Tatum Case,* the bill of complaint shows that complainant paid full value, for the debt and secured an assignment in writing of the amount represented by a decree, with full right under the terms of full assignment to recover the same for himself, his heirs and assigns.

In the instant case, appellant, a mere volunteer, alleges that he purchased a $38,700.00 note which he knew was then dishonored, having been protested and being long past due, from the Naples Gulf Front Company, some time subsequent to the 16th day of July, 1928, and by affidavit filed in the cause, advises the Court that in the month of October, 1928, the short space of three month's time, the address of the party from whom he alleges he purchased the said note is unknown to him. Despite which the argument is advanced in the reply brief, page 4, that a Court of equity with no equitable allegations in the bill of complaint, is not interested and not entitled to inquire into the motives, purposes and intentions of appellant in purchasing the said note.

When a litigant invokes the jurisdiction of a Court of equity on the purely equitable doctrine of subrogation, it is his duty, we submit, to set up sufficient allegations of fact in his pleadings when same are challenged by a demurrer, as was done in the instant cause, to enable the Court to determine whether or not it should take jurisdiction.

This was not done by appellant in the instant cause. On the contrary, from the allegations in his bill of complaint

and the facts shown in the sundry exhibits filed therewith, it is manifest, we submit, that there are no equities in behalf of appellant and that a Court of equity is without jurisdiction.

The argument in behalf of appellant that he acquired this particular note by purchase and that a Court of *equity* is not interested in the equities including the consideration paid therefor by him, but may *assume* the equities to be in his favor, is one that does not appeal either to the conscience or the discretion of a Chancellor.

In general where Courts of equity in cases of the character of the instant cause apply the doctrine of subrogation, the reasons assigned for such procedure necessarily are not always the same.

In some cases it is on the theory of the existence of a contract, express or implied, between the mortgagee and the vendee, as in the *Thacker Case,* sometimes on the theory of principal debtor and a surety *compelled* to make payment as in the *Keller* v. *Ashford case,* 133 U. S. 610, and sometimes on the theory that the contract of assumption between the vendor and vendee is an offer and contract for the direct benefit of the mortgagee which must be accepted.

Independent of the respective theories upon which equity takes jurisdiction, there must be some equity in the case which appeals to the Chancellor and calls for the exercise of equity jurisdiction.

In the instant cause, it appears from the record that appellant on the 28th day of June, 1927, assigned *without recourse* and received full payment from the Naples Gulf Front Company, of the $38,700.00 note for the collection of which this suit was filed. That appellees were not the makers of this note. That in the foreclosure proceedings

in Florida, appellant was made a party defendant and appeared as agent and *quasi* counsel for complainant. That after the termination of the foreclosure proceedings in Florida, the $38,700.00 note, no part of which had been paid in said proceedings, was withdrawn from the papers in said cause, that said note was then long past due and dishonored. That appellees had no knowledge of such foreclosure proceedings. That from the allegations of paragraph 10th of the bill of complaint, (R. 13), said note, "Was sold and assigned to E. S. Blanton, complainant herein." That said E. S. Blanton *was a pure volunteer* in so acquiring said note, being liable for the payment of no part thereof. That he had theretofore received the value of said note. That after so acquiring said note, appellant filed this suit and that in the month of October, 1928, the address of the Naples Gulf Front Company, the party from whom he alleges he purchased the said note, *was unknown to him.* Is not a Court of equity entitled to appropriate averments showing the motives actuating appellant and his equities at the time it is requested to take jurisdiction?

Certain it is from the record in this cause, appellant has set up no grounds for invoking the jurisdiction of a Court of equity on the purely equitable jurisdiction of subrogation.

Not only was he in any event a volunteer in his alleged purchase of said note, *for a consideration, real or pretended, but known to him and which for reasons best known to him, he declined to disclose to the Court,* but he knew at the time, if he did purchase it, he was buying a law suit. On the other hand, if he did not purchase it, but merely took it under some arrangement with the Naples Gulf Front

Company, whereby they were to each mutually profit, then his course of conduct is champertous.

Appellant has no standing in a Court of equity in this State except under the doctrine of equitable subrogation. The question of the jurisdiction of a Court of equity under the pleadings in this case, it is submitted, can be successfully raised by demurrer and does not have to await the filing of an answer and the consequent expense incident to the taking of evidence.

The subject of subrogation is fully treated in 5 *Pomeroy's Equity Jurisprudence* (2nd Ed.), page 5183, *et seq.*, cited with approval by this Honorable Court in the late case of *Morgan* v. *Gallehon*, 153 Va. 246.

This author divides those entitled to subrogation into three classes, to-wit:

> (1) Those, who acting in the performance of a legal duty, arising either by express agreement or by operation of law, in discharge of this legal duty, pay their principal's debt, such as surety.

It is not contended that appellant falls within this class.

> (2) Those not legally bound to pay the debt, but who might suffer loss if the obligation is not discharged, and who act under *the necessity of self-protection.*

No averments are made that appellant falls within this class. On the contrary, the only averment made shows *he acted as a volunteer,* with no right to protect *and under no necessity of self-protection.*

> (3) Strangers who act neither under compulsion

> nor for self-protection, *but at the request of some person liable for the debt.*

No averment is made that appellant's alleged voluntary purchase of a dishonored note to which he was a stranger, and upon a consideration he elects not to disclose to the Court for reasons best known to himself, was at the *request* of any person liable for the payment thereof, and hence he does not fall within the scope of this final classification of those entitled to subrogation.

A mere volunteer is never entitled to invoke the doctrine.

In addition to the authorities on this point cited in appellees' brief, additional citations are as follows:

Barton's Chcy., Practice, (2nd Ed.) page 1145:

> "A gratuitous payment by an intermeddler does not entitle him to any relief in equity by way of subrogation. *Newell* v. *Hadley,* 29 L. R. A. (N. S.) 908, 206 Mass. 335, 92 N. E. 507.
>
> "The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own. *Campbell* v. *Foster Home Asso.,* 26 L. R. A. 117, 163 Pa. 609, 30 Atl., 222.
>
> "Voluntary payment of the debt of another, by one not under obligation therefor, creates no liability in favor of the volunteer, and creates *no right of subrogation* in his favor in relation to a lien held by the creditor to secure payment of the original

debt. *Ft. Jefferson Improv. Co.* v. *Dupoyster,* 2 L. R. A. (N. S.) 263, 112 Ky. 792, 66 S. W. 1048.

"Anyone, who is under no legal obligation to pay a debt, is a stranger, and, if he pays it, a mere volunteer. *Walters* v. *Charleston Mills,* 48 L. R. A. 503, 40 C. C. A. 108, 99 Fed. 825. L. R. A. Digest, Volume 8, page 9045."

As hereinbefore stated, in the lower court, appellant argued his right to file this cause, on the ground that a court of law was without jurisdiction, basing such argument on the holding in the case of *Hubard* v. *Thacker, supra.* This position, adopted by appellant in the lower court, is necessarily the one taken by him in this Honorable Court, and on page 7 of the record, after stating the acquisition of the note sued upon by him, his counsel say:

"How else could he sue save and except in a court of equity? This Honorable Court, in *Hubard* v. *Thacker, supra,* held in a case not as strong as the instant one, but very similar to it, that—Where the right of the creditor is derivative only, his remedy is in equity and not at law."

As stated in the reply brief and heretofore in this paper, appellees contend that for the reasons therein set forth, (which will not be reiterated), appellant cannot invoke the jurisdiction of a Court of equity under the pleadings and exhibits therewith filed in this cause.

If any additional citation of authority is required as to the correctness of the ruling of the lower court on the demurrer, attention is directed to the case of *Swain* v. *Virginia Bank,* 151 Va. 655, page 667. This was a suit in

equity, involving in some aspects questions similar to those in the instant cause. On the question as to the admitted lack of jurisdiction in an equity court, Crump, P., on page 667 of the opinion says:

> "The jurisdiction of the equity court was not questioned in the lower court by demurrer or otherwise, nor is that matter presented in this court by assignment of error or in argument. The parties manifestly desire, we take it, that the court should consider and determine their substantive rights upon this appeal."

Counsel for appellees frankly states to this Honorable Court that he did not have this case before him at the time of the preparation of the reply brief.

In conclusion, it is earnestly submitted that the record in this cause shows that appellant does not come into Court with clean hands, that no equities appear in his behalf either justifying or necessitating the exercise of equity jurisdiction, and that the decree of the lower court is plainly right and should be affirmed.

Respectfully submitted,

HUGH KENEIPP,
FRANCES A. KENEIPP.

By WILSON M. FARR,
Their Counsel.