857

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Supreme Court of Appeals of Virginia

AT RICHMOND

JUNE TERM, 1931

NICK J. BROWN

v.

SADIE M. BOWDEN, ET ALS.

REPLY BRIEF OF COUNSEL FOR APPELLANT, NICK J. BROWN

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BRIEF SUMMARIZING STATEMENT

The question before the Court in this case is whether the conveyance from the commissioner of the Court to the appellant is to be set aside. The appellees' petition and cross-bill was filed more than one year after the sale to the appellant was confirmed. Section 6306 of the Code is as follows:

> "If a sale of property be made under a decree or order of a court, and such sale be confirmed, the title of the purchaser at such sale shall not be disturbed unless within twelve months from such confirmation, the sale be set aside by the trial court or an appeal be allowed by

> the Supreme Court of Appeals, and an order or decree be therein afterwards entered requiring such sale to be set aside, but there may be restitution of the proceeds of sale to those entitled."

We may concede that the above has no application to a decree of sale where the Court is without jurisdiction. Brenham v. Smith, 120 Va. 30. The decree in such cases is void, and life cannot be infused into it by the lapse of time.

But, if the Circuit Court did have jurisdiction, it was manifest error to set aside the sale. The appellees, if they had proved they were entitled to any relief, would have been confined to restitution of the amount they proved they were entitled to.

The record shows the case was heard on bill and answer, the latter denying the course of descent. Nowhere in the record is there any proof that Catherine Sidney Abingdon married Richard Zigler or that she was the mother of Mary Zigler or of the other children of Richard Zigler. The appellees contend that appellant's counsel, R. E. Woolwine, admitted to the judge of the Circuit Court that this relationship existed, and that the Court was misled thereby. It is not even contended, however, that opposing counsel were so misled, and Mr. Woolwine has an entirely different recollection of the conversation between him and the judge. Therefore, as the appellants have failed to prove any rights in the matter whatsoever, their petition and cross-bill should be dismissed.

FIRST ASSIGNMENT OF ERROR

The Circuit Court had jurisdiction to sell the land.

The entire argument of counsel for appellees is based upon the assumption that the order of publication

in this case was not sufficient to give the Court jurisdiction to sell the land here involved. If their contention were sound, it would absolutely destroy the efficacy of judicial sales in cases which frequently arise where there are a large number of unknown heirs.

The appellees claim Mary Zigler was the last surviving child of Richard Zigler and that she died intestate and without issue; they claim that Mary Zigler inherited the land by virtue of being the daughter of said Richard Zigler. They admit that the order of publication was properly directed to all the unknown heirs of said Richard Zigler. They do not dispute that the land books for many years taxed the property as belonging to Christopher Zigler. He was Richard's father. They do not deny that, so far as the records of deeds and wills show, Mary Zigler never owned the property; she, it is claimed, acquired it by inheritance without any record evidence thereof. It is not denied that the order of publication was properly directed against all the unknown heirs of the last record owners of the property. Nor is it disputed that the trial court solemnly decreed that this order of publication was sufficient as against all unknown parties in interest, as disclosed by the bill. The appellees claim as collateral kindred of Richard Zigler through his alleged daughter and wife.

We have cited in our petition authority for the proposition that "The term 'unknown heirs' means all kind of heirs of such defendants, including heirs of heirs of such defendants, as well as legatees of heirs' ". Mary Zigler, if she was the legitimate daughter of Richard Zigler, was certainly an heir of those whose names were set out in the order of publication. This is not disputed. If the rule above quoted is sound, then all her heirs are necessarily embraced therein, and appellees claim as her heirs, that is, as heirs of the heir of Richard, Leonard and Christopher Zigler, all

of whose heirs were expressly included in the order of publication.

The rule quoted is sound beyond question. Nor could any case afford a better illustration for the necessity of the rule than the one now before this Court. The order of publication published on appellees' cross-bill, (Record, pp. 84-86, incl.), sets out the names of fifty-eight persons whose whereabouts are unknown, and also the unknown heirs of twenty-five other designated deceased persons, whose names and whereabouts are unknown. Now it would be almost a miracle, if some of these innumerable supposed persons or their heirs have not already died intestate and without issue, leaving maternal kindred as heirs. And yet, if opposing counsel are correct in their contention, a second sale of this land could be again set aside, at least in part, by some such persons filing petitions and claiming the second order of publication was not broad enough to embrace them.

Substantially every state in the Union has found it necessary to enact legislation permitting proceedings of this nature by publication against unknown heirs. It is an obvious necessity to prevent the lands of the state becoming overburdened with clouds on titles which could never be otherwise removed than through judicial sales. Unless the purchasers at such sales could feel assurance that "heirs of heirs" are embraced in the process, no one could be found who would pay a fair price for the property; for he would be forever in danger of having his title upset by such "heirs of heirs". The rule is a rule of reason as well as of necessity.

But opposing counsel, while conceding the rule as to "lineal descendants", assert that it does not apply to collateral kindred, and say that an examination of our authorities "will so show". This we deny. Ruling Case Law says even "legatees" of unknown heirs come within such publications. There is no distinction, either in reason or authority, between lineal and col-

lateral heirs. The same rule which makes necessary proceedings of this nature by publication of process against lineal heirs requires that it apply to all persons, so that stability of land titles may be effected. Opposing counsel have been able to find no authority in support of their alleged distinction between lineal and collateral heirs, nor does it have any foundation in reason or principle. See the case of Goins v. Garber, 131 Va., 59.

The opposing brief seeks to split up the land into divisions, as though separate and distinct types of claim were applicable as between maternal and paternal heirs. While Section 6254 of the Code defines the measure of the interest which the various kindred take, yet they all take as common heirs of the decedent, though in varying proportions. If Mary Zigler was the last surviving sole owner of the land, all of her unknown heirs are before the Court, or else none of them are. The particular type, kind or degree of relationship, whether paternal or maternal, cannot affect the question. All of them, being heirs of the heir of Richard Zigler, are clearly included in the order of publication and were before the Court when the appellant bought the land.

On page 5 of the opposing brief, the contention is made that, although the object of the suit as set out in the order of publication describes the tracts of land to be sold and the magisterial district in which located, yet because the purpose is said to be to sell the lands Christopher Zigler died seized of, this is not sufficient. This contention is highly technical. The order of publication, (Record, pp. 71-72), says "an affidavit having been made and filed in the clerk's office that the defendants x x x the other heirs at law of Leonard Zigler, dec'd, whose names, ages and residences unknown, x x x , the other heirs at law of Christopher Zigler, dec'd, whose names, ages and residences unknown, the heirs of Richard Zigler, whose names, ages and residences unknown, x x x, it is ordered that they do appear here x x x

and do what may be necessary to protect their interest in this suit." And the publication says further, "The object of this suit is to sell all the real estate Christopher Zigler owned at the time of his death and distribute the net proceeds of the sale among the heirs according to law". Thus the heirs of these various persons are designated as the heirs whose interests are affected. Taken as a whole the order of publication further shows that the heirs of Christopher Zigler are also the heirs of Richard Zigler and Leonard Zigler and that all of them are co-owners whose rights are involved. Now the appellees all claim to be "heirs of the heir" of Richard Zigler and Leonard Zigler. The bill alleges the land stands on the land books in the name of Christopher Zigler, and this is not denied, and is record evidence of the general reputation of the ownership thereof for purposes of identification and description. The bill further states the land is owned by the heirs of Christopher Zigler, Leonard Zigler and Richard Zigler, and further that upon the death of Christopher Zigler, Richard and Leonard inherited same.

In other words, though there is a difference of opinion expressed in the bill from that in the appellees' petition as to the means by which Richard and Leonard derived title, whether by inheritance or by deed, there is no disagreement as to the fact that when they died they held the title to these lands. The report of the Commissioner shows that the said tracts were charged to Christopher Zigler for taxation. See record, Page 28. The report was confirmed by a decree of the Circuit Court, at the June Term, 1928, (record, page 29.)

Code Section 2451 makes it mandatory on the "owner of real estate to cause it to be entered on the land books." Section 2273 makes it mandatory on the "Commissioner to show the land books to the owner or agent and swear him as to the correctness of the entry of his land, to verify entries and make proper correction." The fact that the 18 3/4 acres and the 282 acres of land

were charged in the name of Christopher Zigler for taxation at the time of the institution of the suit in chancery of Eliza Plasters et als v. Lent Zigler et als, and for more than forty years prior thereto, is forceful evidence that Christopher Zigler was the owner.

The order of publication, being against the heirs of all three last record owners of the land clearly indicates their heirs, (or "heirs of heirs" by legal interpretation), as those whose lands are being sold. It is apparent from the allegations of the original bill that the complainants therein were not aware who was the last living owner of the land. Nor does the bill allege that Richard Zigler ever married. So far as was apparently known to the complainants therein, his children may have been illegitimate, or if legitimate, may have died in infancy, in which case appellees, claiming as maternal heirs would have no interest in the property. Nor is there any proof in the record now to show they were adults at the time of their death. The name of the mother was apparently unknown to them.

Opposing counsel do not dispute that Christopher Zigler owned the 18¾ acre tract at the time of his death, or that he owned, at the very least, an undivided one-third interest in the 282 acre tract, and that as to this part of the land sold the object of the suit, as expressed in the order of publication, is unquestionably correct. Their claim is as to the other two-thirds interest in the 282 acre tract; that, although same appears on the land books in the name of Christopher Zigler, the deed books do not disclose that he acquired it from his sons. This is a highly technical objection. The tract of land in question is clearly described and identified. Christopher Zigler owned either a part of all of it,—the land books indicating all, the deed books a part. The order of publication shows the entire tract is to be sold. The rights of the parties are identical, whether Christopher Zigler once owned it all or not, as the same persons inherit in either case. Mary Zigler, if she was the last

surviving legitimate child of Richard, inherited same, whether Christopher owned it all or an undivided interest therein. Clearly all the appellees were charged with notice by the order of publication that their lands were to be sold. A technical objection as to the ancient ownership or chain of title, not affecting the ultimate rights of anyone, cannot affect the jurisdiction of the court, as all these parties were undoubtedly embraced in the order of publication.

All that is required to constitute due process is that the statute be substantially complied with and that an interested person, reading the entire notice as published would be informed that his interests would be affected by the suit. Grannis v. Ordean, 234 U. S. 385, 34 Sup. Ct. Rep. 779.

In the case at bar the heirs of Richard Zigler and the heirs of Mary Zigler, (if she were his legitimate child), are identical, as the entire rights passed through Richard. Any such person reading the notice and cognizant of the facts concerning his family relationship and the laws of inheritance applicable thereto, would necessarily know he had an interest in the lands to be sold, and that his rights were being litigated in the suit.

But even, if this Court should be of opinion that, as an original proposition, the order of publication is defective, the record shows that the Circuit Court's decree, entered before appellant purchased the land, declared that the order of publication was properly executed against all resident as well as non-resident defendants. The memorandum of the suit, as well as the original bill, set out the heirs of Mary Zigler as parties defendant having an interest in the property. This decree of the Court was therefore a judicial determination that Mary Zigler's heirs were included in the "heirs" of Richard, Christopher and Leonard Zigler, under the rule that "heirs of heirs" are included.

The appellant here is an innocent third party and the solemn adjudication in the decree of the Court that

process against Mary Zigler's heirs had been duly executed, is conclusive to protect his title, and cannot be contradicted by bringing in a copy of the order of publication. In Wilcher v. Robertson, 78 Va. 616, involving the validity of a judicial sale based on process by publication against a defendant, who was dead at the time, this Court said:

> "On the other hand, if it be a judgment or decree of a court of general jurisdiction, and the record declares that notice has been given, such declaration cannot be contradicted by extraneous proof. In such cases the judgment or decree is sustained, not because a judgment rendered without notice is good, but because the law does not permit the introduction of evidence to overthrow that which, for reasons of public policy, it treats as absolute verity. The record is, conclusively, presumed to speak the truth, and can be tried only by inspection. This results from the power of the court to pass upon every question which arises in the cause, including the facts necessary to the exercise of its jurisdiction, and as to which, therefore, its judgment, unless obtained by fraud or collusion, is binding, until reversed, on every other court. And especially is this so, in respect to decrees under which sales are made to bona fide purchasers. If it were otherwise—if purchasers could be held responsible for the errors of the court, or could be required to look beyond the proceedings in the cause to find authority for the court to act, then such sales, as has well been said, would be but snares for honest men."

In Morrow v. Brinkley, 85 Va., 60, after quoting

the foregoing with approval, the court continued:

> "The appellees are innocent third parties not concerned in the litigation before the court, and who became purchasers by the invitation of the court; and the evidence of the appearance of the heirs of Parker West is the recital in the court's decree of the fact solemnly alleged thereby, that these heirs, the appellants, were before the court."

The attention of the Court is again invited to the authorities to the same effect cited in the petition for appeal, (Record, p. 6). The sufficiency of the process against all defendants to the original bill, which included Mary Zigler's heirs, cannot now be questioned as against the appellant.

It is claimed on page 7 of the opposing brief that "even if the maternal kindred of Mary Zigler were parties to the suit under this order of publication x x x they had a perfect right to appear x x x and have any injustice in the proceedings corrected." This is true to a limited extent. Under the provisions of Section 6306 of the Code they could have a decree for restitution against any person who may have received money to which they were entitled, but as twelve months had elapsed since the sale, the court was without power to disturb it.

It is respectfully submitted, therefore, that the order of publication was amply sufficient to give the Court jurisdiction of the land sold and conveyed by its commissioners to the appellant, and as no complaint, other than want of jurisdiction, has been or can be made to the decrees authorizing and confirming the conveyance to the appellant, it was error for the Circuit Court to set aside said conveyance. The petition and cross-bill attacking appellant's deed were not filed until more than twelve months after the sale to appellant was confirmed, and said sale cannot now be disturbed.

OTHER ASSIGNMENTS OF ERROR

While it is believed that it will not be necessary for the Court to consider any of the remaining assignments, except the sixth, we will nevertheless discuss them briefly.

SECOND ASSIGNMENT OF ERROR

This assignment is to the effect that even, if the Circuit Court had been correct in its holding that all parties in interest were not included in the order of publication executed on the original bill, yet it was clearly erroneous to decree a resale of these lands on the second order of publication which was had on the appellees' petition and cross-bill. The reason we assigned is that such publication was had and completed before leave of court was granted to file such petition and cross-bill, and that as the process against these innumerable unknown parties was, for this reason void, such process could not be afterwards validated by the *nunc pro tunc* provision contained in the final decree granting such leave of court. No application had been made to the Court for leave to file the petition and cross-bill, and the Court had no power to grant the leave *nunc pro tunc.* In Duncan v. Carson, 1927 Va., 311, the Court said "The object of a nunc pro tunc order is to make the record show something which actually took place at a former day of Court. It is not to permit something to be done which was omitted by oversight or otherwise."

Opposing counsel reply that the appellant has appeared and answered and thus waived the objection. But appellant first moved the Court to dismiss the petition on this ground. And even, if waived as to appellant, it was certainly not waived by the unknown parties. If they were not properly in Court, the resale would be void as to them. The land was ordered

to be sold as a whole. The appellees admit appellant owned at least a one-fourth interest therein. Even if he had no other interest than this, he might desire to purchase to protect same, and would be clearly prejudiced by any irregularity which would affect the validity of the resale.

The *nunc pro tunc* decree could not validate a void process, and a decree of sale based on such process as to the unknown parties who did not appear is clearly erroneous.

THIRD ASSIGNMENT OF ERROR

The only answer to this assignment which opposing counsel have made, which calls for a reply, is that appellant's counsel, R. E. Woolwine, admitted the correctness of the alleged "course of descent." We will discuss this later in connection with another assignment.

FOURTH ASSIGNMENT OF ERROR

This assignment is that the Court erred in not referring the case to a commissioner in chancery. It is a well established principle in judicial sales in Virginia that the respective interests involved in land to be sold be fixed and determined prior to sale, so that the parties may, by intelligent bidding, protect their interests. While this is largely a matter for the discretion of the Court, where the interests are involved and complicated as in this case, it was clearly an abuse of discretion not to do so. Thompson v. Davidson, 76 Va., 338.

Furthermore, the appellant is conceded to be the owner of at least an undivided one-fourth interest in the land, and it should have been determined whether his interest could be set aside to him by partition in kind. Appellant was not consenting to the sale, and it was error to sell his conceded interest, if it was susceptible of partition in kind. Roberts v. Hagan, 121 Va., 573.

FIFTH ASSIGNMENT OF ERROR

The decree appealed from gave the appellant the privilege of retaining title to the land, if he so desired, upon repayment of three-fourths of the purchase money. This money the decree directs be paid in its entirety to the attorneys for the appellees, although they do not purport to represent the innumerable unknown defendants, who, appellees claim, have an interest in the property. Appellant's contention is that, if the sale was to be reconfirmed to appellant, and, if he were to be required to make restitution to anyone, certainly he should be required to pay only those persons who come into the suit and prove their right thereto; and that, so far as possible, if appellant should be compelled to lose through having paid the court's officer, his loss, upon principles of equity, should be reduced as far as possible, by giving him the benefit of unclaimed shares. This, it is submitted, is a sound principle of equity, and if the Court had been right in other respects, should have been applied.

As to the contention of opposing counsel that appellant has no claim to the fund and it is immaterial to him where it goes, it may be replied that their clients could have no claim to more than their respective shares and it is immaterial to them where the balance goes, and if appellant had been protected, so far as possible, in his transactions with the Court, they would not have been hurt.

SIXTH ASSIGNMENT OF ERROR

This assignment is to the failure of the Court to enter a final decree for the defendants to the petition and cross-bill, because of the failure of appellees to produce any evidence in support of their allegations of relationship to the decedents who owned the land in question, such relationship having been denied in the

answers. Opposing counsel practically concede the correctness of our position on this assignment, and in an effort to extricate themselves have filed an affidavit of the judge of the Circuit Court that Mr. Woolwine, who represented appellant, stated to him privately in his office that there was "no denial of the kinship of the parties as set forth in the petition and cross-bill." It is quite embarrassing to have to question the justification of the judge below in reaching this conclusion. Mr. Woolwine has, however, given his affifavit that he did not so understand the conversation. He understood the judge's inquiry was directed to the question of whether he desired to introduce evidence on the subject, as he had suggested he might desire to do on the evening before. It is, at most, clearly a case of misunderstanding, and its occurrence is to be much regretted.

But, however, that may be, there is no intimation that counsel for appellee were misled, or that they ever heard of any such statement, or that same was made to them or in their presence. After all, the judge has no personal interest in this case, and it is no reflection upon his ability that opposing counsel did not or could not prove their case before having a final decree entered.

This Court is clearly confined to the record before it, and cannot look to affidavits to prove that the decree was a consent one. The decree appealed from shows on its face that it was suspended to allow time for an appeal, negativing the idea that anything was consented to. If opposing counsel considered the decree based on an admission, a provision to this effect should have been incorporated in the decree. Mr. Woolwine would then have had opportunity to make his objection thereto.

Furthermore, the record shows (p. 14) that a copy of the petition for appeal was delivered to each of opposing counsel on the 9th day of July, 1930, fourteen

days before the same was presented to one of the judges of this Court. Under Rule II (a) of this Court opposing counsel had ten days within which to file a reply thereto in writing. If they desired to raise this question, it should have been raised and the affidavit filed before allowance of the appeal. No such thought seems to have occurred to them at that time, however, and they evidently had never heard of the conversation between Mr. Woolwine and the judge.

The Court can look only to the record to determine the nature of a decree. Its character cannot be changed by depositions. Morris v. Green 29 W. Va. 201, 11 S. E. 954. In Bank of Gauley v. Osenton 114 S. E. 437 this was said: "It is argued that the affidavits show that the order was entered by consent. They cannot be received for that purpose."

And in the case of Denny v. Searles 150 Va. 730, where the decree stated on its face that the parties assented thereto, this was said to be conclusive, and the attorney for one of the parties, who had not endorsed the decree, was not permitted to question it.

See also to the same effect Shinn v. Shinn 142 S. E. 64.

In Paris v. Brown 143 Va. 897, it is said:

> "Statements *de hors* the record have been filed by counsel for both parties, purporting to detail certain incidents in connection with the trial of the case and the perfecting of the record prior to the application for a writ of error. The recollections of counsel appear to be at variance in several particulars, as is to be expected when opposing counsel attempt to give

> their versions of the happenings in connection with the litigation. We think the wisdom of disallowing all such attempts to add to, or take from, the record is well illustrated in this case."

While the misunderstanding in the case at bar arose between the trial judge and one of the counsel, it involves not so much what was said between them, as the interpretation thereof. Mr. Woolwine is clear that he did not intend to admit any facts denied in the answer. If such an admission had been placed in the decree, he would have had an opportunity to correct it. It is exceedingly embarrassing to an attorney to be placed in a position of this kind, and the rule above quoted, as to the verity of the record, repeatedly announced by this Court, and the courts of the states generally, is the only wise and safe practice to follow. Ruling Case Law, Vol. 2, p. 153 states the general rule as follows:

> "It is a well settled rule of appellate procedure that all questions must be tried and determined by the record as certified to the appellate court. The record imports absolute verity and resort cannot be had to anything *de hors* the record for the purpose of contradicting it. Thus evidence outside the transcript is inadmissible to show that a motion stated therein to have been made by one of the parties was in fact made by the other."

As before stated, there is no suggestion, either in the record or the affidavit, that any admission was made to or in the presence of opposing counsel, or that they had any knowledge of it. If they had relied on an oral admission, their motion to file the affidavit would

have been made promptly before the appeal was allowed. Clearly they had not heard of any such thing. They elected to go to trial on bill and answer, and must abide the result. They themselves are seeking to take advantage of a technical omission of the clerk in not including Mary Zigler's heirs, by name, in the order of publication, and are in no position to complain, if the case goes against them for failure to produce the necessary proof of their case. Fortunately, the clerk's omission was immaterial, as the heirs of her father were included, but they themselves were relying on a technicality to disturb the sale made by the Court to an innocent purchaser who had paid his money in good faith.

CONCLUSION

It is respectfully submitted, in conclusion,

(a) That the original order of publication was adequate to confer upon the Court jurisdiction to sell the land:

(b) That more than twelve months having elapsed since the sale was confirmed, the Circuit Court was without power to disturb the conveyance to the appellant; and

(c) That, the appellees, having submitted their case on their petition and cross-bill and the various answers thereto, without proof of relationship to the deceased owners of the land, their said petition and cross-bill should be dismissed.

Respectfully submitted,

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Of Counsel for Appellant.