FRENCH v. EDWARDS et al.

Case No. 5,097.
{4 Sawy. 125.}[1]

Circuit Court, D. California. Nov. 27, 1876.

CONVEYANCE PENDENTE LITE—JUDGMENT—ESTOPPEL—SUPPLEMENTAL ANSWERS—CALIFORNIA CODE CIVIL PROCEDURE.

1. Where in an action to recover land, the plaintiff conveys to a stranger the premises in controversy, pendente lite, under the Code of Procedure of the state of California, the action may be prosecuted to judgment in the name of the original party; and such conveyance cannot be set up by way of supplemental answer to defeat a recovery of the possession.

{Cited in Elliot v. Teal, Case No. 4,389.}

2. F. sued E. to recover land, and there was a trial and judgment for defendant. Afterward F. conveyed the same land to V., who sued E. to recover the same. E. set up as a defense by way of estoppel the prior judgment against F. and the subsequent conveyance to V., and the court found the matter of estoppel, and gave judgment for defendant on that ground. Afterward the said first judgment in F. v. E. was reversed on writ of error, and the case remanded for a new trial. V. in the meantime conveyed to R. When the case of F. v. E. was again called for trial, E. moved for leave to file a supplemental answer, setting up the conveyance to V. and his subsequent conveyance to R.; that the action was then prosecuted for the sole benefit of R., and by way of estoppel against any recovery for the benefit of R., the said judgment in V. v. E. *Held,* That the vacation of the judgment in F. v. E. after the judgment in V. v. E., which was based upon the first judgment, removed the matter of estoppel, and that the judgment in V. v. E., constituted no defense to the action.

3. Supplemental answers are in the nature of pleas puis darrein continuance under the former practice, and like such pleas, should be interposed at the first opportunity after coming to the knowledge of the parties.

4. Where pending an action matter has arisen constituting a good technical, though an inequitable defense, which, the defendant having notice, has for several years neglected to plead, one trial having intervened, the court after such delay, in the exercise of its discretion, will, on the ground of laches, refuse leave to file a supplemental answer setting up such matter as a defense.

5. Code Civ. Proc. Cal. § 367, construed.

Action to recover land. The complaint in the action was filed November 8, 1866. A trial by jury having been had, and a verdict found for defendants {Thomas Edwards and others}, judgment on said verdict was entered April 26, 1867. Afterward on September 26, 1867, the plaintiff, {Ira G.} French, conveyed the premises in controversy to one Robert H. Vance, who soon after, on November 4, 1867, commenced in his own name, an action in the state court of the Sixth judicial district, against the defendants in this action and other parties, to recover possession of the premises. The defendants herein, in their answer to Vance's complaint, set up as a defense the said former adjudication in their favor in this action of April 26, 1867; the said subsequent conveyance to Vance; that said conveyance was Vance's only title, and that said matters ought not to be again litigated. The case was tried, and the issue on this defense was found by the court for

the defendants. As a conclusion of law, the court found that the "plaintiff is estopped from maintaining this action by the verdict and judgment entered in said circuit court in said action of French v. Edwards [unreported], and that said verdict and judgment are a bar to said action herein." Judgment for defendants was accordingly entered upon said finding April 18, 1868. Vance, however, established his title, and recovered as to those defendants who were not parties to this action, or did not plead the matter of estoppel. Afterward on April 12, 1870, French, by writ of error, removed said judgment of April 26, 1867, to the supreme court for review, and thereupon said court, at the October term, 1871, reversed said judgment and remanded the cause for a new trial (13 Wall. [80 U. S.] 516), the judgment reversed being the same set up and established as a bar to said action in said case of Vance v. Edwards [unreported]. Upon the return of the case to this court the defendants, on August 20, 1872, by leave of the court, filed a supplemental answer, setting up a conveyance of the title to them, by deed executed since the last trial, upon a sheriff's sale, in pursuance of a judgment rendered for taxes levied on said premises. At the September term of this court, 1872, the case was again tried, and some of the issues found upon which judgment was again rendered for defendants, on October 30, 1872. This judgment was also reversed on writ of error at the October term, 1874, and the case again remanded with directions to proceed in conformity with the opinion of the court (21 Wall. [88 U. S.] 150), which was afterward construed as requiring the court to proceed and try the other issues, and in other respects to proceed in such manner as according to its judgment justice may require. [Ex parte French, 91 U. S. 425, 426.] The case having been returned to this court and subsequently set for trial, when the case was called on February 8, 1876, the defendants, in pursuance of notice previously given to plaintiff's counsel, on January 26, 1876, moved the court for leave to file supplemental answers: (1) That since the commencement of this action, to wit: on September 27, 1867, plaintiff conveyed the premises in controversy to R. H. Vance, hereinbefore mentioned, and that his estate has consequently terminated, and he has now no right to a judgment for the possession; (2) that since the commencement of this action the plaintiff conveyed the premises in controversy to said Vance, as aforesaid; that Vance afterward brought his action against these defendants, the action hereinbefore set out, and the matters between said Vance and defendants

were adjudicated in said action between said Vance and these defendants; that Vance afterward conveyed to one Reynolds, with knowledge of said prior adjudication, who is now the party in interest for whose benefit this action is being prosecuted, and that he is estopped by said judgment in Vance v. Edwards [supra], from further litigating the matter. The plaintiff opposed the motion for leave to file said supplemental answers on the grounds: (1) That the matters sought to be set up came to the knowledge of defendants so long ago, at least, as April 18, 1868, when said judgment in their favor, now sought to be set up, was rendered in the said case of Vance v. Edwards, and during all the intervening time of some eight years they have neglected to set up these defenses, although there has since been one trial and appeal to the supreme court; (2) that the matters alleged in said several proposed supplemental answers do not in either case, constitute a defense to said action, and are, therefore, irrelevant and immaterial.

John H. McKune and J. W. Armstrong, for the motion.

Houghton & Reynolds, contra.

SAWYER, Circuit Judge. As to the matter set up in the first supplemental answer—the conveyance to Vance since the commencement of this action—it is settled by the decisions of the supreme court of California that this is no defense to the action under the statutes of California. Section 34 of the act concerning conveyances authorizes the owner of land in the adverse possession of another to convey it "with the same effect as if he was in the actual possession thereof." And section 16 of the practice act, in force at the time of the conveyance to Vance, provided that "an action shall not abate by the death or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death or other disability of a party, the court, on motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." Under these provisions of the statute, the supreme court of California has settled the construction that in an action to recover the possession of land, the action may proceed in the name of the original party, after a conveyance to a stranger pendente lite, and that such conveyance is no defense against a recovery of possession. Moss v. Shear, 30 Cal. 474, 475. The change in the common law, by which a party out of possession is authorized to convey his lands, rendered this change in the practice necessary, otherwise it would often happen, as was the case in Moss v. Shear, and, as is the case in this action, the statute of limitations would bar an action by the grantee before he could have an opportunity to bring his action, or even before the conveyance to him. If the pending action could not be continued in the name of the original party, or the grantee be substituted, the title might be cut off by the statute even while the litigation is going on. Without such a provision in the Code of Procedure, the owner of lands in the possession of another,

would lose much of the advantage of the provision of the statute allowing him to convey while out of possession.

This is a very important consideration in this state, where the statutory period is extremely short According to my judicial experience and observation, the only cases in which attempts' have been made to set up a conveyance to strangers to the suit pendente lite, to defeat a recovery, have been cases where the defendants have been in a position to avail themselves of the statute of limitations, in case they could defeat the pending action in the name of the grantor, and compel the grantee to bring a new action. Be this as it may, the questions now under consideration depend upon the provisions of the state statute referred to, and that construction is settled by the highest court of the state, and is controlling in this court Tioga R. Co. v. Blossburg & C. B. Co., 20 Wall. [87 U. S.] 137.

The change of the language in section 4 of the old practice act, when carried into the new Code, does not in my judgment affect the question. The case is governed by the other provisions cited. But if it did, the change cannot be construed to apply to cases already pending, wherein a party would be liable to lose his right of action altogether under the statute of limitations if his right to recover in the pending action be cut off, and he be compelled to bring a new suit Besides, section 4 doubtless refers to the commencement of a suit, not to its continuance after it has been properly commenced.

As to the said judgment in the case of Vance v. Lincoln [38 Cal. 586], sought to be set up as an estoppel in the second proposed supplemental answer. It will not be necessary, under the view I take, to consider how far that judgment could under any circumstances affect this action. It is enough to say that the first judgment in this present action, which was adjudged in that case to estop Vance from relitigating the title, has since the entry of that judgment been itself vacated on appeal, and if it ever could be an obstacle, it no longer stands in the way of an inquiry into the merits of his title. The judgment in Vance v. Lincoln [supra], cannot stand in the way, for it is only evidence that at the time of its entry there was a judgment in existence which estopped the parties from further litigation. It does not touch or affect subsequent changes in the condition of things. Since that time there has been a change, and the judgment upon which the

judgment in Vance v. Lincoln proceeded has been vacated. The reversal of that judgment is not merely a destruction of the evidence upon which the case of Vance v. Lincoln was tried, but a change in the state of the facts themselves. The record in Vance v. Lincoln shows that the judgment proceeded alone on the estoppel of the prior judgment in this case, which has since been set aside, and we are now proceeding to try the case again in pursuance of the mandate of the supreme court

The record in the case of Vance v. Lincoln is conclusive evidence that, at the time of its entry, Vance was estopped from further litigating the title to the land in controversy, while the record in this case now in progress is also conclusive evidence that, since the judgment in that action, the estoppel therein adjudged has been annulled and removed, and that there is nothing to preclude an examination into the title of Vance and his grantees, and especially nothing to preclude such examination in this particular action.

But these matters now sought to be set up in supplemental answers necessarily came to the knowledge of the defendants some eight years before they offered to set them up, for the judgment in Vance v. Lincoln, in which they were determined in their favor, bears date April 18, 1868. More than four years after that time, this case was tried again, and has since been to the supreme court and returned for another trial; yet no effort was made to set up these defenses till the present motion, notice of which was given in the latter part of January, 1876. A supplemental answer is in the nature of a plea puis darrein continuance under the old practice, which it was necessary to plead at the first opportunity, and before the next continuance, and could only be pleaded at a later date by leave granted by the court in its discretion, upon showing a satisfactory excuse for the negligence. The ends of justice, I think, require the same rule to be applied in the case of supplemental answers, and this very case affords a striking illustration of the propriety, not to say the necessity, of such a rule. Both of the defenses sought to be set up, if they could, under any circumstances, be regarded as valid defenses, are purely technical and without substantial merit; and upon the hypothesis that the plaintiff or his grantee really has the title, it would work a transfer of the property of the plaintiff or his grantee to the trespasser upon his rights, and therefore be grossly inequitable if they should prevail. Upon the first defense, if this action should be defeated, the right of action of Vance, the grantee of French, and Reynolds, his grantee, is barred by the statute of limitations, and Vance, as shown by the said judgment in Vance v. Lincoln, never was in a position to maintain an action in his own name till his action was barred or might have been barred. If the second defense should prevail, then the plaintiff and his grantors will lose their land, no matter how good their title may be, without ever having had an opportunity to have their title in fact finally adjudicated. Thus, in either event, the defendants, by wrongfully taking possession of plaintiff's property and skillful and adroit management of pretended defenses, would, after putting the plaintiff to the trouble and expense of years of litigation, in

process of time not only defeat his action, but actually, by this iniquitous process, acquire the title to his property. That defenses which are liable to work such results are entitled to no favorable consideration at the hands of a court of justice, needs no argument to demonstrate, and such are the proposed defenses in this case. That plaintiff has some ground, at least, to prosecute this action, may, for the purposes of this motion, be inferred from the fact that Vance actually established his title and recovered, in said case of Vance v. Lincoln, against those defendants who were not in a position to avail themselves, or did not avail themselves, of the estoppel of the first judgment entered in this case, and, so far as the record shows, was only defeated as to the defendants in this action by being precluded by the said judgment in this action from any investigation of their title. In the first trial, which took place before I had the honor to preside in this court, the plaintiff was defeated by a tax deed which the supreme court held to be void. On the second trial he was defeated by a purely technical defense, which this court reluctantly sustained. The supreme court reversed the judgment upon a point which, doubtless, fairly arose on the record, but which did not occur to counsel in this court, was not suggested at the trial, and, consequently, was never passed upon or considered by this court, while the only point decided by this court and intended by the court and counsel who tried this case to be presented by the record to the supreme court, was not considered at all by the appellate court The same point, however, was decided in another case by the supreme court at the same term in the same way as by this court in this case. Schulenberg v. Harriman, 21 Wall. {88 U. S.} 63. I do not regret however, that the counsel on appeal and the supreme court found a point upon which the judgment could be reversed as to this technical defense, and the case remanded for retrial upon its real merits. I think, however, after so many years' neglect on the part of the defendants to set up their proposed technical and inequitable defenses, in view of all the circumstances of this case, that, even conceding them to be good defenses, if they had been set up in time, which I do not in fact admit, the court in the exercise of a sound discretion, is fully justified in denying leave to file these supplemental answers at this late date on the ground of laches.

The motion for leave is therefore denied, both on the ground of laches and the ground

that the matters sought to be set up do not constitute defenses to the action.

{NOTE. Subsequently, judgment was rendered for the plaintiff. Case No. 5,098.}

[1] {Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.}