

CHANDLER v. TOWN OF ATTICA.

(Circuit Court, N. D. New York. January 7, 1885.)

1. REMOVAL OF CAUSE—COLLUSIVE TRANSFER—REMANDING CASE—ACT OF MARCH 3, 1875, § 5.

A plaintiff who has been introduced into a controversy by an assignment or transfer merely that he may acquire a standing and relation to the controversy, to enable him to prosecute it for the beneficial interests of the original party, is collusively made a party to the suit, and when the fact appears it is the duty of the court to remand the suit, under section 5 of the act of congress of March 3, 1875.

2. SAME—CREDIBILITY OF WITNESS—DISCRETION OF COURT.

Where an extraordinary transaction is disclosed, no satisfactory explanation of which is vouchsafed, and the evidence of the transaction, which it was in the power of the parties to produce, has been withheld, the court may disregard the testimony of the parties so far as it is improbable, and interpret the transaction in a way consistent with the ordinary conduct and motives of business men.

3. SAME—CAUSE REMANDED.

On further examination of the evidence and circumstances of the case the former order remanding the cause is affirmed, and a new trial refused.

Motion for New Trial.

Redfield & Hill, for plaintiff.

Cogswell, Bentley & Cogswell, for defendant.

WALLACE, J. The question raised upon this motion for a new trial is whether the court erred upon the trial in ordering the action to be remanded to the state court, upon the ground that the plaintiff was collusively made a party to the suit, for the purpose of creating a case removable to this court. It appeared in evidence that prior to February 9, 1884, the plaintiff was the owner of 12 unpaid and overdue coupons, for interest on bonds issued by the defendant, the coupons being for the sum of \$25 each. The plaintiff was a citizen of the state of Connecticut. He had owned similar coupons previously, upon which he had brought suit in this court and recovered judgment. The defendant contested the coupons in that suit upon the ground that the bonds were issued without its authority.

On the ninth day of February, 1884, he purchased 79 other coupons, of the same issue of bonds, being also for \$25 each, of Sistaire & Sons, bankers, of New York city. He paid for these coupons \$79, or one dollar for each coupon of \$25. Sistaire immediately delivered these coupons to the plaintiff's attorneys, who brought a suit upon them and the 12 previously belonging to the plaintiff. The suit was brought in the state court, and was immediately removed by the plaintiff to this court, and, as was conceded by his counsel, the suit was intended to be so removed at the time it was commenced. The negotiations between plaintiff and Sistaire & Sons for the purchase took place by correspondence. None of the letters were produced upon the trial, and it was not shown that they were lost, but both the plaintiff and Mr. Sistaire were permitted to testify, without objection, that there

was no arrangement or understanding between them in reference to the object of the purchase, or qualifying in any way the absolute transfer of the coupons from Sistaire & Sons to the plaintiff. Sistaire refused to produce his books showing the account between his firm and the plaintiff. Neither plaintiff nor Sistaire were asked or attempted to explain how plaintiff knew the coupons were for sale, how he came to purchase them, or why Sistaire & Sons sold \$1,975 of coupons for \$79. Sistaire was a witness on the trial of the former action brought in this court by the plaintiff against the defendant, and sold plaintiff the coupons on which that suit was brought at their par value. Upon the present trial he testified that he was unable to state whether his firm were the owners of the 79 coupons sold to plaintiff, or whether the coupons belonged to other persons.

If the court was authorized to find upon this evidence that the coupons were sold by Sistaire & Sons to the plaintiff to invest him with the legal title, and enable him to maintain an action thereon in this court without intending to transfer to him the beneficial interest therein, the case was properly remanded. *Fountain v. Town of Angelica*, 12 Fed. Rep. 8. As was held in that case, a plaintiff who has been introduced into a controversy by an assignment or transfer merely, that he may acquire a standing and relation to the controversy, to enable him to prosecute it for the beneficial interests of the original party, is collusively made a party to the suit, and when the fact appears it is the duty of the court to dismiss or remand the suit, under section 5 of the act of congress of March 3, 1875.

It is insisted for the plaintiff that this conclusion cannot be indulged, in the face of the testimony of the plaintiff and Sistaire to the contrary, both of whom are uncontradicted and unimpeached witnesses. It may very well be that there was no express arrangement or understanding between them to this effect, and that the testimony of each of them was literally true in this behalf; but there may have been some equivalent arrangement for the ultimate protection of Sistaire. If such an arrangement can be fairly inferred from the circumstances, the suit was properly dismissed. The plaintiff owned coupons which were not of sufficient amount to enable him to sue in this court by an original suit, or to remove a suit into this court from a state court, and which were not valid obligations of the defendant according to the decisions of the state courts. The plaintiff and Sistaire both knew the coupons were collectible by a suit in this court. Obviously, the plaintiff bought the coupons intending to sue upon them, and to invoke the jurisdiction of this court, because they were immediately delivered to his lawyer for that purpose. That Sistaire, knowing the coupons to be thus collectible, would be willing to sell them for one twenty-fifth of their face value, without attempting to get more for them, is utterly incredible. That he did not know whether they belonged to him or some one else, is also incredible, and it is quite fair to assume that they belonged to him. If Sistaire had

been insolvent at the time, and the question were whether the sale could stand as against his creditors, the gross inadequacy of the price paid would stamp the transaction as a colorable sale, unless it were shown that he had tried to get a better price. In such a controversy no prudent lawyer would permit his client to rest on the bare assertion of a purchase without the production of the correspondence by which the transaction was effected. If that correspondence was within his reach, and was not produced, its non-production would start a persuasive inference that it was unsafe to produce it. If, in such a controversy, the sale would be deemed a colorable one, why should it not be here? If the sale was collusive, what was the nature of the real arrangement between the parties to it?

The court could not ignore the fact that an extraordinary transaction was disclosed; that no reasonable explanation of it was vouchsafed; and that the evidence of the transaction, which it was in the power of the parties to produce, was withheld. The court was therefore at liberty to disregard the testimony of the parties, so far as it was incredible, and interpret the transaction in a way consistent with the ordinary conduct and motives of business men. A sufficient motive appeared for just such a transaction as the statute, under which this suit was remanded, was enacted to meet, and the circumstances were consistent with that motive and inconsistent with the theory of an unconditional sale of the coupons. If the court was at liberty to disregard the testimony of the two witnesses, it was also justified in accepting it as true in part and untrue in part, in believing what was probable and in disbelieving what was incredible.

The case, then, resolves itself into the inquiry whether the court was foreclosed by the statements of the parties to the effect that the sale was *bona fide*. It is stated in *Newton v. Pope*, 1 Cow. 109; that it is difficult to establish a rule which shall regulate and limit the discretion of a court or jury in the degree of credit to be given to the testimony of a witness, but where he is unimpeached, the facts sworn to by him uncontradicted, and there is no intrinsic improbability in the relation given by him, his testimony cannot be disregarded. A witness may be contradicted by circumstances as effectually as by the statements of other witnesses. Conjecture is not to be substituted for probative *indicia*; but where these exist, a judge or a juror is not bound to surrender his convictions and blindly accept the statement of a witness, because no other witness has contradicted it, and the character of the witness is not impeached. The authorities are numerous that a judge or jury, in the exercise of judicial discretion, is at liberty to reject the statements of witnesses in the situation of the witnesses here, and under the circumstances of this case. *Harding v. Brooks*, 5 Pick. 245; *Elwood v. W. U. Tel. Co.* 45 N. Y. 549; *Kavanagh v. Wilson*, 70 N. Y. 177; *Gildersleeve v. Landon*, 73 N. Y. 609; *Koehler v. Adler*, 78 N. Y. 287.

The motion for a new trial is denied.

ALBRIGHT and others v. OYSTER and others.¹

(Circuit Court, E. D. Missouri. December, 1884.)

TRUSTS—ADMINISTRATORS—JUDGMENTS—EVIDENCE.

A. died testate, leaving his property, some of which was situated in Missouri and some in Pennsylvania, to his children, B., C., D., and E. Letters of administration were taken out upon his estate in Missouri by B.; in Pennsylvania, by C. The devisees agreed to depart from the plan of division contained in their father's will, and B. put the real property situated in Missouri up at public sale, under an agreement with the other devisees that certain specified tracts, and such other tracts as it should be deemed advisable to bid in, should be bid in, and subsequently appraised and divided between said devisees. In the execution of this plan a certain tract fell to B.'s share, and was conveyed by him to D. in trust for B.'s children, by an absolute deed, but under an oral agreement that it should be held in trust. B. then took possession for his children, who were minors. He was then indebted to the estate. Later, D. conveyed said tract to C., who brought suit in ejectment against B., and recovered judgment. A judgment has been rendered against B. in favor of A.'s estate in a probate court of Missouri, which, upon appeal, was reduced, but which has been taken to the supreme court of Missouri by a writ of error, and is now pending there. Complainants claim that C. has been allowed an improper credit in a settlement made by him in an orphans' court of Pennsylvania. Because of the questions as to said judgments, it is uncertain whether the interest of B. in A.'s estate, after deducting the amount he owes the estate, is or is not equal to the value of the land conveyed in trust for his children. In a suit to restrain the issuing of an execution upon the judgment in said ejectment suit, and to obtain a decree ordering C. to convey said land to said children, *held*, (1) that this court cannot go behind or review said probate judgments; (2) that, neither the judgment of the probate court nor that of the circuit court against B. are admissible in evidence; (3) that said conveyance to D. was charged with trusts for the final settlement of A.'s estate, and that C. holds said land subject thereto; (4) that inasmuch as the amount of B.'s interest in A.'s estate cannot be ascertained under the evidence, no relief can be granted in this suit.

In Equity.²

The facts in this case, so far as they need be here stated, are substantially as follows: Abraham Oyster died testate in 1862, leaving four children, Margaret, Simon K., George, and David K., who were his only devisees. Letters of administration upon their father's estate were taken out in Missouri by David K. and in Pennsylvania by George. The provisions of Abraham Oyster's will created dissatisfaction, and a different plan of division from that contained in the will was agreed upon among the children. Among other things it was agreed that certain lands in Missouri should be put up at public sale, and that certain tracts, and such other tracts as it should be found advisable to keep, should be bid in and subsequently appraised and divided between the parties without any payment of the amounts bid. This was done, and the lands in question here fell to David K., who, with the oral consent, as claimed, of the other parties in interest,

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

² For a report of opinion on demurrers and plea to the bill and exceptions to the answer see 19 FED. REP. 849.

conveyed them, as administrator, to Simon K. Oyster by a deed absolute on its face, but under an oral agreement that the property should be held in trust for David K.'s children. David K. then went into possession of the property and has since held possession for his children, who were minors. Thereafter, the lands conveyed to Simon K. in trust were conveyed by him to George Oyster, who, ignoring the alleged rights of David K.'s children, brought suit in ejectment against David K. for possession, and recovered judgment. This suit is to obtain an injunction restraining the issuance of an execution upon said judgment, and for a decree requiring George Oyster to transfer his interest in said land to the children of David K. The defendants claim that said land was held by the original trustee subject to an accounting, and that David K.'s interest in his father's estate is not as great, after deducting what he owes the estate, as the appraised value of said land, and that for that reason he is not entitled to the relief sought. To substantiate the latter proposition the defendants offered in evidence a judgment of a probate court of Missouri against David K., and in favor of said estate, for about \$6,000. Complainants objected to its admission on the ground that the judgment had been reduced \$2,500 on appeal from the probate to the circuit court, and offered to prove this by a copy of the judgment. It appeared, however, that the matter had been taken to the supreme court by writ of error and is now pending there, and the court refused to go into the matter at all. Evidence was offered on the part of complainants tending to prove that the orphans' court of Pennsylvania had allowed George Oyster, the Pennsylvania administrator, an improper credit.

George H. Shields and *James Carr*, for complainants.

Dryden & Dryden, for defendants.

TREAT, J. This case has been fully heard on the merits. While the theory of the bill was quite narrow in its scope, the court intimated that under the general prayer, if adequate *data* were before it, the whole controversy, which has been protracted through years, might be finally determined. To that end a large amount of evidence was received and considered; but the respective parties, by technical and other objections, well founded under the rules of evidence, have prevented the court from reaching such a result. Nothing, therefore, remains but to determine, under the evidence, the questions presented by the pleadings. The property conveyed by David K. Oyster, administrator, with the will annexed, to Simon K. Oyster, and by the latter to George Oyster, stands, as among the respective legatees, subject to the final outcome of the decedent's estate. Many interesting questions were suggested by the respective counsel concerning the will of Abraham Oyster, dated in 1862, and a subsequent contract in 1868, between respective legatees, to which latter contract the children of David K. Oyster were not parties. As to that legal question the case of *Nichols v. Eaton*, 91 U. S. 716, is instructive. The parties, however, before the court were willing to waive that in-

quiry; yet it is doubtful whether such waiver would be permissible as against infant parties.

It is charged in the bill that the property in question was bid off at the sale in 1869, by Simon K. Oyster, with full understanding among the parties, for the benefit of David K. Oyster's children. Under the agreement of 1868, a portion of the property conveyed to Simon K. Oyster was set apart to David K., and therefore exempt from further adjustments of the estate. Why was that portion included in the deed to Simon K.? The evidence with respect thereto is very unsatisfactory. It appears that David K. Oyster, as administrator, was in arrears, and therefore, in purchasing property at the sale of 1869, and in taking under the contract of 1868, necessarily took the same subject to a further accounting among the parties. Whatever property was bought at said sale, if bought for the children, was subject to an accounting for the purchase money therefor. They could not, by any contrivance such as is suggested in the bill, deplete the estate, for their own private benefit, regardless of the rights of other legatees. Hence they would stand in no better condition as to the purchase money than would David K., or any of the other legatees. It is sufficiently demonstrated by the evidence that the property conveyed to Simon K. by David K., whether for the benefit of David K. or his children, still remains subject to the demands of defendants for their portion of the purchase money.

As heretofore stated, the technical objections prevent a detailed and accurate adjustment of the accounts between all parties to these proceedings. It seems that after a long dispute among themselves—nothing unusual among beneficiaries of an estate—the effort is now made to charge the deed to Simon K., and his subsequent conveyance to George, with a trust for the benefit of David K.'s children, on the theory—*First*, that all of said property, with the consent of said David K. and the several legatees, was to be vested in said Simon K. for said children; *second*, that all of the consideration therefor had been fully paid by said David K., and therefore no sum by way of purchase money therefor was due to the other legatees. Said theory is not sustained by the evidence as to either one of said points. The deed from Simon K. to George is charged with trusts for the final settlement of the estate. Why, then, should he not proceed to execute the trust thus devolved upon him? The plaintiffs say that the property conveyed to him belongs to them, discharged of said trust, because the same had been fully paid for by David K. The evidence shows otherwise, viz., that David K. is in arrears to the estate in a large sum, not ascertainable under the evidence before the court. When George, under the administration of his trust, comes to a settlement thereof, if the parties are not satisfied therewith they can pursue him in some future proceeding.

As to the probate settlement of George, in Pennsylvania, and David K., in Missouri, this court cannot, in the case presented, go behind

the judgments of those tribunals; and yet the review of those judgments may, possibly, be needed for a just accounting between the parties. It is therefore ordered, adjudged, and decreed that the bill be dismissed, with costs, without prejudice to any rights that the parties may have in the final administration of the trust devolved on George Oyster by the deed from Simon K. Oyster, dated February 10, 1881, and the contract of March 3, 1868, executed by George Oyster, D. K. Oyster, M. Oyster, Charles Oyster, and Margaret Oyster.

BARRY v. MISSOURI, K. & T. Ry. Co.

(Circuit Court, S. D. New York. 1884.)

RAILROAD BONDS.

Bill dismissed, because of defect of parties; following *Morgan v. Kansas Pac. Ry. Co.* 21 Blatchf. 134; S. C. 15 FED. REP. 55.

In Equity.

Anderson & Man, for complainant.

Dillon & Swain, for defendant.

WALLACE, J. This case cannot be distinguished from that of *Morgan v. Kansas Pac. Ry. Co.* 21 Blatchf. 134, S. C. 15 FED. REP. 55, and the question whether the trustee for the bondholders, named in the mortgage, is a necessary party to a suit to compel the mortgagor to apply its net earnings to the payment of the bonds, is therefore not an open one in this court. The demurrer is sustained which alleges a defect of parties. There are no merits in the other grounds of demurrer.

Leave is granted to complainant to amend his bill within 30 days, upon payment of costs of the demurrer.

SANDWICH MANUF'G Co. v. WRIGHT and others.

(Circuit Court, N. D. Iowa, W. D. October Term, 1884.)

1. FRAUDULENT CONVEYANCE—RIGHT OF ASSIGNEE TO SET ASIDE—COMMON-LAW DOCTRINE.

At common law the right of a creditor to attack and set aside a conveyance made by his debtor, on the ground of fraud, did not pass to an assignee or trustee appointed by the debtor.

2. SAME—STATUTE OF IOWA.

This right is not conferred on the assignee by the Iowa statute regulating assignments for the benefit of creditors. *Rumsey v. Town*, 20 FED. REP. 558, followed.