

STUART et al. v. CITY OF ST. PAUL et al.

(Circuit Court, D. Minnesota, Third Division. January 27, 1894.)

1. EQUITY PRACTICE—VACATING PRO CONFESSO DECREE.

A final decree against defendant upon a bill taken pro confesso charging infringement of a patent will not be vacated and defendant permitted to answer, though defendant's neglect is sufficiently excused, where the patent has been sustained in other circuits, and the answer submitted does not refer to or plead any patent claimed to anticipate that in suit, nor specify any time or place where, or any party by whom, the invention described was ever used before application made for the patent.

2. SAME.

A final decree on a bill taken pro confesso cannot be vacated at a subsequent term where no application was made at the term at which it was rendered.

In Equity. This was a motion by the city of St. Paul to vacate a final decree rendered against it upon a bill by Peter Stuart and others, charging infringement of a patent, and to permit the defendant to answer.

Paul & Merwin, for complainants.

Leon T. Chamberlain, for defendant the city of St. Paul.

SANBORN, Circuit Judge. This is a motion to vacate a final decree rendered June 5, 1893, during the January, 1893, term of this court, against the defendant the city of St. Paul upon a bill charging the infringement of a patent, and to permit the defendant to answer. The motion is denied for the following reasons:

First. The patent on which the bill is based has been sustained after a contest in the circuit court for the eastern district of Pennsylvania in *Vulcanite Co. v. American Co.*, 34 Fed. 320, and in the circuit court for the district of Maryland in *Stuart v. Thorman*, 37 Fed. 90. Conceding, for the purposes of this decision, that the neglect of the corporation attorney is sufficiently excused by the affidavits filed, it must be presumed that the proposed answer of the city states every substantial defense it could interpose in this action. The answer has been carefully examined, and it does not refer to or plead any patent which is claimed to anticipate that in suit, nor does it specify any time or place where, or any party by whom, the invention described in the patent was ever used before application was made for the patent. Under this answer the only substantial defense is that the invention was not patentable. That question is so far foreclosed by the decision of the circuit courts already rendered that this court ought not to come to a different conclusion until all controversy is put at rest by a decree of the supreme court of the United States. *Manufacturing Co. v. Bancroft*, 32 Fed. 590; *Manufacturing Co. v. Spalding*, 35 Fed. 67; *Reed v. Railway Co.*, 21 Fed. 284; *Celluloid Manuf'g Co. v. Zylonite Brush & Comb Co.*, 27 Fed. 295. As it does not appear that the city of St. Paul ever had any substantial defense to this suit, there is no reason why the decree should be vacated.

Second. It is not in the power of this court to vacate this final decree in any event. It was rendered at the January term, 1893. No application to vacate or modify it was made at that term. The nineteenth equity rule provides that:

"When the bill is taken pro confesso the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill pro confesso and such decree rendered shall be deemed absolute unless the court shall at the same term set aside the same or enlarge the time for filing the answer upon cause shown upon motion and affidavit of the defendant."

The bill in this case was taken pro confesso, and the final decree entered in strict accordance with the rules and practice of this court. No rule of practice is better settled than that the United States circuit courts have no jurisdiction to vacate or modify final decrees in equity subsequent to the term at which they are rendered, except to correct formal or clerical errors. *Bronson v. Schulter*, 104 U. S. 415; *Allen v. Wilson*, 21 Fed. 881, and cases cited.

YORE et al. v. YORE.

(Circuit Court, E. D. Missouri, E. D. July 14, 1894.)

1. DEED—CONSTRUCTION.

Where land is conveyed to a trustee for the sole and separate use of a married woman, giving her full power to sell and convey the property, and it is provided that, in case she dies without disposing of the property by deed or will, the trust shall cease and determine, and the property shall revert to and vest in her husband, *held* that, on the death of the wife, the property being undisposed of, an equitable fee-simple title to the land vested in the husband.

2. SAME—STATUTE OF LIMITATIONS.

Where land is conveyed to trustee for the sole and separate use of a married woman, in trust to pay over to her the rents during her natural life, and no longer, with power on her part to dispose of the property, and it is provided therein that, in case of her death without disposing of the property, then that the same shall be held by the trustee for the use and benefit of her children, *held* that, upon her death, the title to the property vested in the children; and the husband having entered into possession of the premises, claiming them as his own, and having held them continuously for a period of more than 10 years after the death of the wife, the right of entry of the children as remaindermen was barred.

This was an action of ejectment by the plaintiffs, as the sole heirs of their father, William A. Yore, for the recovery of a one-sixth interest in the premises in controversy.

William A. Yore, plaintiffs' father, was one of six children born of the marriage of Patrick Yore and Barbara Ann Yore. Barbara Ann Yore died intestate, April 21, 1876, leaving the property undisposed of. William A. Yore was born in 1847, and died November 9, 1886, so that, at the time of his mother's death, he was 29 years old. Patrick Yore died July 14, 1889, and by his will left nothing to the children of William A. Yore. Patrick Yore married defendant, May 24, 1879. By marriage settlement dated May 22, 1879, he conveyed the premises in controversy to defendant for life. On the death of Barbara Ann Yore, Patrick Yore entered into the possession of the premises, claiming them as his own, and so continuously held possession

to the time of his death. The property is on the southwest corner of Eighth and St. Charles streets in the city of St. Louis, and has a front of 70 feet on the west line of Eighth street. Plaintiffs claimed title under two deeds: (1) Deed from Michael Kelly to John E. Yore, trustee of Barbara Ann Yore, dated January 12, 1857. This deed conveyed 37 feet to the trustee, beginning at the corner, to the use of Barbara Ann Yore, in trust—First, to receive and pay the rents to Barbara Ann Yore, as her separate property; second, to sell and convey the property in fee simple in such manner as said Barbara Ann Yore might designate. Said deed provided that, if said Barbara Ann Yore should die without having disposed of the property by deed or last will, the property should revert absolutely to Patrick Yore, his heirs and assigns. As to this deed the plaintiffs contended that the absolute fee vested in Barbara Ann Yore, and that the remainder to Patrick Yore was of no force and effect, and relied principally on the case of *Green v. Sutton*, 50 Mo. 186. As to the remainder of the lot, plaintiffs relied upon a deed from Thomas O'Flaherty to James Meegan, trustee of Barbara Ann Yore, which conveyed the property in trust for the sole and separate use of Barbara Ann Yore during her life, and no longer, to receive the rents, with power to sell, mortgage, etc. In case of her death without having disposed of the property, then said property was to be held by the testator for the sole use and benefit of the children of Patrick and Barbara Ann Yore.

C. P. Johnson, J. D. Johnson, D. P. Dyer, and M. F. Hunley, for plaintiffs.

H. D. Wood and A. J. P. Gareshee, for defendant.

Upon the proposition that the construction of deeds must be upon the entire instrument, with a view to give effect to the whole instrument, and that, by the first deed above referred to, an equitable fee-simple title vested in Patrick Yore on the death of Barbara Ann Yore, counsel cited *Long v. Timms*, 107 Mo. 519, 17 S. W. 898; *Bean v. Kenmuir*, 86 Mo. 666; *Pollard v. Bank*, 4 Mo. App. 408; *Carr v. Dings*, 58 Mo. 400; *Harbison v. James*, 90 Mo. 411, 2 S. W. 292; *Munro v. Collins*, 95 Mo. 33, 7 S. W. 461; *Straat v. Uhrig*, 56 Mo. 482; *Jecko v. Taussig*, 45 Mo. 167; *Smith v. Bell*, 6 Pet. 68; *Greffet v. Willman*, 114 Mo. 107, 21 S. W. 459; *Lewis v. Pitman*, 101 Mo. 281, 14 S. W. 52; *Gaven v. Allen*, 100 Mo. 298, 13 S. W. 501; *Wood v. Kice*, 103 Mo. 329, 15 S. W. 623; *Bassett v. Budlong (Mich.)* 43 N. W. 984; *Prior v. Quackenbush*, 29 Ind. 475; *Baxter v. Bowyer*, 19 Ohio St. 490; *Chew v. Keller*, 100 Mo. 368, 13 S. W. 395; and other cases; and upon the proposition that, by the statute of uses, a fee may be mounted upon a fee, counsel cited *Bean v. Kenmuir*, 86 Mo. 666; *Straat v. Uhrig*, 56 Mo. 482; *Wood v. Kice*, 103 Mo. 329, 15 S. W. 623; *Chew v. Keller*, 100 Mo. 368, 13 S. W. 395; 2 Washb. Real Prop. (2d Ed.) *251, *252; *Dunwoodie v. Reed*, 3 Serg. & R. 452; *Saund. Uses & Trusts*, *149, *150; *Carver v. Jackson*, 4 Pet. 1. As to the second deed, upon the proposition that Barbara Ann Yore took a life estate, and that upon her death the trustee held the property in trust for the children of Barbara Ann and Patrick Yore, counsel cited *Rubey v. Barnett*, 12 Mo. 3; *Reinders v. Kopplemann*, 68 Mo. 482. That the statute of uses did not execute the use in Barbara Ann, see *Pugh v. Hayes*, 113 Mo. 432, 21 S. W. 23. That Patrick Yore had no right to the possession as tenant by the curtesy, see *Spencer v. O'Neill*, 100 Mo. 49, 12 S. W. 1054. That the adverse possession of Patrick Yore barred the right of entry of the children as remainder men, see *Jackson v. Harsen*, 7 Cow. 323; *Jones v. Johnson*, 81 Ga. 293, 6 S. E. 181; *King v. Rhew*, 108 N. C. 696, 13 S. E. 174; *Pattison v. Dryer (Mich.)* 57 N. W. 814; *Busw. Lim. par. 401*; *Probst v. Trustees*, 129 U. S. 182, 9 Sup. Ct. 263; *Houx v. Batteen*, 68 Mo. 84; *Bank v. Evans*, 51 Mo. 335; *Farris v. Coleman*, 103 Mo. 353, 15 S. W. 767; *Ewing v. Shanahan*, 113 Mo. 188, 20 S. W. 1065.

THAYER, District Judge. It will be sufficient, to advise counsel of the grounds on which the decision in this case rests, to say that the court holds:

First. That it is a well-settled doctrine in Missouri that a deed should receive such construction as to give effect to the obvious intentions of the parties thereto. Technical rules of construction will be ignored, especially in deeds designed as family settlements, when they do violence to the evident intent of the grantor. *Bean v. Kenmuir*, 86 Mo. 666, 671; *Cook v. Couch*, 100 Mo. 29-34, 13 S. W. 80; *Lewis v. Pitman*, 101 Mo. 281-292, 14 S. W. 52; *Long v. Timms*, 107 Mo. 512, 519, 17 S. W. 898. There can be no doubt, in view of the proviso contained in the habendum clause of the deed from Michael Kelly to John E. Yore, trustee of Mrs. Barbara Ann Yore, of date January 12, 1857, that the grantor intended that the title to the lot therein described should vest in Patrick Yore in fee simple in the event that his wife, Barbara Ann, died without having disposed of the property either by deed or will. The deed must be construed as having vested in Barbara Ann a life estate, with power of disposal either by deed or will. Hence the plaintiffs cannot recover as to any of the property included in the Kelly deed.

Second. The court holds that the action is barred by the statute of limitations, as to the property included in the deed from O'Flaherty to Meegan, trustee of Ann Yore, of date April 26, 1852.

Judgment for defendant on these grounds.

WESTERN MORTG. & INV. CO., Limited, v. GANZER et al.

(Circuit Court of Appeals, Fifth Circuit. June 12, 1894.)

No. 231.

1. HOMESTEAD—ATTEMPT TO INCUMBER—SIMULATED SALE TO RAISE VENDOR'S LIEN—NOTICE—PRINCIPAL AND AGENT.

Knowledge by the agent of a loan company that an ostensible sale and conveyance of a homestead is merely colorable, and for the purpose of enabling the owners to raise money thereon by discounting the notes for the deferred payments with the loan company on the faith and security of the resulting vendor's lien, is not imputable to the company itself when the whole transaction is arranged by collusion between the agent and the owners for the purpose of perpetrating a fraud upon the company; and in such case the company is entitled to rely upon the vendor's lien. McCormick, Circuit Judge, dissenting, on the ground that in the particular case there was no fraudulent intent, at least upon the part of the wife; that it was doubtful on the evidence whether the supposed agent was not acting for himself alone, as principal; and that, under such circumstances, it was opposed to the historical and constitutional policy of the state of Texas (in which the homestead was situated) to deprive the debtors of their homestead, even if they had intended to incumber it.

2. SAME—VENDOR'S LIEN—SUBROGATION.

It is the settled rule in Texas that, where one advances money to pay off a vendor's lien upon a homestead, and the money is so applied, the creditor becomes subrogated to the vendor's lien. *Hicks v. Morris*, 57 Tex. 658, and *Pridgen v. Warn*, 15 S. W. 559, 79 Tex. 588, followed.

Appeal from the Circuit Court of the United States for the Northern District of Texas.