KIRBY v. McDONALD et al.

(Circuit Court of Appeals, Eighth Circuit. October 1, 1895.)

No. 613.

PARTNERSHIP—FIRM DEBTS.

One G., upon forming a partnership with M., borrowed from K. the amount of his contribution to the firm capital, giving therefor his note, with his wife and a third party as sureties. After such note had been several times renewed in the same form, K. sued the firm for the amount due, and induced G. to give him a note of the firm for such amount, and to secure it by a chattel mortgage on the firm property. *Held*, that such acts of G. could not, without the consent of his partner, change his individual debt to K. into a firm debt, and that M. was entitled to have the mortgage set aside.

Appeal from the Circuit Court of the United States for the District of Kansas.

This was a suit by D. McDonald against M. D. Good and Thomas Kirby for the dissolution of a partnership, and to secure the cancellation of a chattel mortgage. The circuit court rendered a decree for the complainant. Defendant Kirby appeals. Affirmed.

On the 1st day of June, 1892, M. D. Good and D. McDonald formed a copartnership to conduct a retail dry-goods business at Abilene, Kan., under the firm name of M. D. Good & Co. The original capital of the partnership was $4,000, of which each partner contributed one-half, which was invested in the purchase of a stock of goods. On December 31, 1892, $2,000 was added to the capital of the firm, of which each partner contributed $1,000. Each partner paid his share of the capital to the firm in cash. McDonald resided at St. Joseph, Mo., and Good at Abilene, Kan., but he was a commercial traveler, and much of the time away from home. The firm employed one C. G. Hawk to conduct the business. Good, without the knowledge of his partner, borrowed from the appellant, Thomas Kirby, the money to make up his share in the capital of the firm, giving his individual note therefor, signed by his wife, Annie Good, as surety, and indorsed by C. G. Hawk. This note was renewed three or four times. When the capital was increased to $6,000 Good borrowed from the appellant his share of the increase, namely, $1,000; and that sum was added to the $2,000 previously borrowed, and a note given for $3,000, signed as the first note and the several renewals thereof had been. On November 7, 1893, the appellant, Thomas Kirby, brought suit by attachment against M. D. Good, Annie Good, and C. G. Hawk on the last renewal of the $3,000 note. On the 8th of November, 1893, the appellant, Kirby, brought suit by attachment against D. McDonald, the appellee, to recover the $3,000 loaned to Good, alleging that the $3,000 was loaned to M. D. Good & Co., and was a debt of the partnership, and on the 9th of November, 1893, the appellant induced M. D. Good to give him a note for the $3,000 of borrowed money, signed in the firm name of M. D. Good & Co., and on the same day Good, without the knowledge or consent of his partner, executed, in the firm name, a chattel mortgage on the stock of goods belonging to the firm, to secure the note last above mentioned. As soon as the appellee heard of these transactions, he filed this bill, on the 13th of November, 1893, making M. D. Good and the appellant, Kirby, defendants, and praying for a dissolution of the partnership between himself and M. D. Good, and a winding up of the partnership affairs, and that the chattel mortgage executed by Good in the firm name on the partnership stock of goods to secure the note given by him to the appellant, Kirby, on the 9th of November, 1893, be declared void, and that the $3,000, borrowed by Good from the appellant, Kirby, be decreed to be the personal debt of Good, and not a liability of the firm of M. D. Good & Co. Good did not answer the bill. The appellant, Kirby, answered alleging the $3,000 was

loaned to Good for partnership purposes. The lower court rendered the decree substantially as prayed for in the bill, and the appellant, Kirby, brought the case here by appeal.

John H. Mahan filed brief for appellant.

Vinton Pike, Stambaugh & Hurd, and Joseph Morton filed brief for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The money was not borrowed by or for the firm or on its credit, and was not used to pay any debt or liability of the firm. It was borrowed by Good to make up his share of the capital in the firm, and was used for that purpose, and he got credit for it accordingly. The appellee had no knowledge that Good had borrowed the money to make up his share in the capital of the firm; and, as soon as the appellee learned that the appellant claimed that the firm was liable for the money so borrowed by Good, he disputed the claim. Good could not make the firm liable for money borrowed for his own use without the knowledge or consent of his copartner. The money borrowed to pay the amount Good was to contribute to the capital of the firm was borrowed for his own use, and was his individual transaction, as fully and completely as if he had borrowed it to pay an individual debt due to a third person. He had bound himself to contribute $3,000 capital to the partnership. If he could bind the partnership for the money borrowed for this purpose without the knowledge or consent of his copartner, then he in fact contributed nothing to the capital of the firm; for, when the borrowed money was repaid, his share of the capital would be exhausted.

A conclusive answer to the contention of the appellant is found in the fact that the money was not loaned on the credit of the firm. In his answer, the appellant says that, when the money was borrowed, Good said:

"He did not like to take the responsibility of signing said firm name; * * * that he would prefer to execute a note in his own name; and that his wife, Annie Good, and C. G. Hawk, the said manager, would also sign said note as sureties therefor."

The appellant agreed to this, and the note was made accordingly, and several times renewed. When the appellant became apprehensive that he would lose his debt, he induced Good to execute a note therefor in the partnership name, but this did not make it a partnership debt. The fact remained that the money had been borrowed by Good for his own use, and upon his own credit and that of his sureties. No arrangement or agreement between Good and the appellant could convert this into a partnership debt without the consent of the appellee. The conclusion reached on this point makes it unnecessary to consider any of the other questions raised in the case. The decree of the circuit court is affirmed.

LITCHFIELD v. BROWNE et al.

(Circuit Court of Appeals, Eighth Circuit. October 1, 1895.)

No. 442.

LACHES—WHAT CONSTITUTES—FRAUD—RESCISSION OF CONVEYANCES.

The right to rescind conveyances, arising out of the collusion of the vendor's agent with the purchaser, and their concealment of the fact that the land was valuable for coal-mining purposes, as well as the right to recover damages from the purchaser, *held* to have been lost where, after obtaining knowledge of the facts, the vendor received the notes and mortgages for deferred payments, and thereafter neglected to disaffirm the sale for three years and three months, during which the lands were conveyed to other parties, who expended large sums in prospecting and developing them.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

The statement of this case by Mr. Lehmann, of counsel for the appellees, is accurate and concise; and, in substance, we adopt it.

The bill is filed to secure the rescission of certain conveyances of land which were made in January, 1882, by E. C. Litchfield, the original complainant, to L. F. Collins, Joseph Stanfield, and James Taylor; and, failing in that, it seeks to recover a judgment for damages against Hamilton Browne and James J. Hill, trustee. The ground of rescission stated in the bill is that Collins, Stanfield, and Taylor were only nominally interested, the real purchaser being the defendant Hamilton Browne; that Browne is a speculator in coal lands, and bought the lands in question believing them to be underlaid with coal; that this was known to Litchfield's agent, John Browne, who was the father of Hamilton Browne, but was not known to Litchfield; and that John Browne conspired with his son to keep the knowledge of this important fact from his principal, they both knowing that he would not sell the lands at their mere surface value if he knew Hamilton Browne to be the purchaser, or that they were probably underlaid with coal. These averments of the bill we find to be true, and Mr. Litchfield had an undoubted right to disaffirm the conveyances in a reasonable time after the facts of the fraud came to his knowledge. The suit for rescission was brought in May, 1885,—three years and four months after the conveyances were made. In the meantime the lands had been conveyed, in the latter part of 1882, to James J. Hill; and in 1883, by James J. Hill to James J. Hill as trustee; and in 1884 by James J. Hill, trustee, to the Clyde Coal Company. The suit was originally brought by Edwin C. Litchfield against Hamilton Browne and James J. Hill, trustee. The Clyde Coal Company was subsequently made a defendant. The sole reason set out in the bill for not sooner bringing it is that Litchfield did not become aware of the fraud which was practiced on him until after the conveyance to Hill, trustee. Litchfield died, and the suit was revived in the name of Edward H. Litchfield, as his executor. On January 20, 1882, John Browne, Litchfield's agent, died. Litchfield at once sent out L. S. Rhoads, his agent, to Des Moines, to look after the business of Browne's agency; and while he was there, on the 6th and 7th days of February, Hamilton Browne came to him with the money constituting one-fourth of the purchase price of the lands (the amount to be paid in cash), and notes for the deferred payments, executed by Collins, Stanfield, and Taylor, secured by mortgages upon the tracts of land conveyed to them, respectively. This money and the notes and mortgages were taken by Rhoads, and receipted for by him to Hamilton Browne, and shortly thereafter delivered to Litchfield. While there, Rhoads was informed that Browne was the real purchaser, that the lands were coal lands, and that Browne intended to sell them. He went to Browne, and asked him to return the receipts, in order that he might change them and make them subject to the approval of Mr. Litchfield. This was refused.