

Mciver Vs. Kyger

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Court : US Supreme Court

Decided On : 1818

Appeal No. : 16 U.S. 53

Appellant : Mciver

Respondent : Kyger

Judgement :

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Mciver v. Kyger

16 U.S. (3 Wheat.) 53

SYLLABUS

Bill for the specific performance of an agreement for the exchange of lands. The contract enforced.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

On 25 March, 1789, George Kyger and Josiah Watson entered into articles for the exchange of a lot in Alexandria, estimated at \$2,200, for certain lands in Kentucky,

the property of Watson. The lot was to be conveyed to Watson within eighteen months from the date of the contract, in consideration of which Watson stipulated to convey to Kyger such lands surveyed and patented for him on the waters of Elkhorn in Kentucky as the said Kyger should select to the extent of \$2,200 at one dollar per acre, as soon as Kyger should make his election, and furnish a plot and survey of the lands chosen.

On 23 December, 1790, a second agreement was entered into which, after reciting the terms of the first, states that George Kyger had represented to the said Josiah that the land on Elkhorn was not so valuable as Kyger had supposed, and had proposed to extend the time of surveying

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and choosing the lands in Kentucky, and to be allowed to take lands to the amount of \$2,200 on the waters of the Elkhorn or from other lands patented for the said Josiah in Kentucky at the intrinsic value which such land bore at any time between 25 March, 1789, and 25 September, 1790. On this representation it was agreed that the time for choosing, valuing, and conveying the lands in Kentucky should be extended eighteen months; that Kyger might take lands to the stipulated amount from other tracts, which were specified, at the intrinsic value between the periods before mentioned, taking not less than 700 acres out of anyone tract. To ascertain the value of these lands, Thomas Marshall, the elder, was chosen on the part of Watson, and Samuel Buler on behalf of Kyger, and it was agreed that if T. Marshall should die or refuse to act, the agent of Watson in Kentucky should nominate some other person in his stead. A similar provision was made for supplying the place of Buler. The selection and valuation being thus made, Josiah Watson was to convey the land selected and valued.

In the year 1806, Daniel Kyger and others, devisees of George Kyger, party to the said contracts, filed their bill in chancery in the Circuit Court for the County of Alexandria stating the contracts above mentioned, and stating further that the lot in Alexandria had been duly conveyed; that Thomas Marshall had refused to act as a valuer; that the agent of Watson had nominated John McWhattan in his place; that

in the year 1791 the said McWhattan and Buler proceeded to make a valuation by which the lands on

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Elkhorn were valued at \$1,200, and by which one tract of 1,800 acres on Ravin Creek, and one other tract of 1,200 acres on Forklick Creek, were taken to complete the amount in value to which Kyger was entitled under the contract.

The bill proceeds to state that this valuation was made known to Josiah Watson and the conveyances demanded, but from some unknown cause were not made until Josiah Watson became bankrupt. That in the year George Kyger departed this life, having first made his last will in writing, in which he devised all his real estate in Kentucky to the plaintiffs. In the year 1805, the plaintiffs presented to Josiah Watson an affidavit made by McWhattan and Buler stating the valuation they had made, and demanded a conveyance. He excused himself on account of the bankruptcy, but executed a release which recites the agreement and valuation, and that a deed for the lands had been executed by him, which was in the hands of John McIver, the defendant. This release is annexed to the bill. The bill prays that McIver, the defendant, who is the assignee of the bankrupt, may be decreed to convey the lands contained in the valuation of McWhattan and Buler.

The answer admits the contracts, but does not admit that Thomas Marshall declined acting as a valuer or that McWhattan was appointed in his place. It avers that the Elkhorn lands were worth the sum at which they were rated in the first contract, and that the second was obtained by the fraudulent representations of Kyger. That the valuation of McWhattan and Buler was not only unauthorized, but

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made under an imposition practiced on them by Kyger, who prevailed on them to consider the contract as obliging them to value the lands on Elkhorn and Eagle Creek at no more than one dollar per acre, although they might be worth more. That Josiah Watson never admitted that Kyger was entitled to more than the Elkhorn and Eagle Creek land, which was therefore not conveyed to his

assignees, though the other lands mentioned in the bill were so conveyed. The defendant consents that a conveyance be decreed for the Elkhorn and Eagle Creek lands, and insists that the bill as to the residue ought to be dismissed.

Several depositions were taken which generally estimate the Elkhorn and Eagle Creek land at a dollar or more per acre. One deposition estimates them at 83 cents. Parts of those lands were sold by Kyger at various prices, whether on credit, or on what credit, is not stated, averaging rather more than one dollar per acre.

The deposition of McWhattan was taken by the defendant, and states that the valuers acted under the first agreement, and, to the best of his recollection, thought themselves bound to estimate the first rate land at no more than one dollar per acre.

The court decreed a conveyance for all the lands contained in the valuation, from which decree the defendant appealed to this Court.

1. Admitting the lands on Elkhorn and Eagle Creek to have been worth intrinsically, one dollar per acre, a fact not entirely certain, the Court is of opinion that the second contract is not impeachable on that ground. It is not suggested, nor is it to be presumed, that Watson derived his sole knowledge of the value of his lands from the representations made by Kyger. The value fixed in the first contract was probably founded on his previous information, and there is no reason to doubt that when Kyger was dissatisfied with the stipulated price, Watson was perfectly willing to leave the value to arbitrators mutually chosen by the parties. The court perceives no reason for annulling the second contract.

2. On the second point, the establishment of the valuation made by McWhatten and Buler, there is a total want of testimony. The defendant, in his answer, denies the authority of McWhattan to act as a valuer, and there is no proof to support the allegation of the bill. The *ex parte* affidavit of McWhattan and Buler, did it even contain any evidence of their authority, is inadmissible, and the recitals of the deed of the release executed by Watson after he became a bankrupt are not evidence.

The decree therefore, so far as it establishes this valuation and orders conveyances to be made in conformity with it, must be reversed and that valuation set aside and a new one directed.

Decree accordingly.

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