

Findlay Vs. Hinde

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Court : US Supreme Court

Decided On : 1828

Appeal No. : 26 U.S. 241

Appellant : Findlay

Respondent : Hinde

Judgement :

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Findlay v. Hinde

26 U.S. (1 Pet.) 241

APPEAL FROM THE CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF OHIO

SYLLABUS

If, in case where the loss of a deed or other instrument is made the ground for coming into a court of equity for discovery and relief, an affidavit of its loss must be made and annexed to the bill, and the absence of such affidavit is good cause of

demurrer to the bill, yet if the party charged by the bill failed to demur for that cause but answered over to the bill or permitted it to be taken for confessed by default against him, it seems that the absence of the affidavit is not a sufficient cause for the reversal of the decree.

If a deed has not been proved, acknowledged, and recorded, and would therefore be insufficient against subsequent purchases without notice, parties who claim under such deed have a right to come into a court of equity for a discovery upon the ground of notice, and if notice should be brought home to subsequent purchasers, the complainants have a right to relief, by a decree quieting the title.

Where, in a bill filed for discovery and relief, the party relied upon a deed said to have been lost, but which had never been formally executed to convey the real estate, and upon a receipt of the purchase money binding the party to convey the estate, the person alleged to have executed the lost deed, and who gave the receipt should have been made a party to the proceeding, although he had subsequently, by a legal and formal conveyance, duly

executed, conveyed the estate to others, and thus, so far as he could, divested himself of all title in the same.

The decree of the circuit court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same, and awarded costs generally against all the defendants. All the defendants appealed together to this Court, some of whom held the legal title to the lot, and all the defendants had an interest in defending this title, standing as they did in the relation of vendors and warrantees

and vendees. Although the defendants, against whom there is a decree for costs only, could not appeal from this decree for costs, yet the reversal of the decree of the circuit court was made general as to all of the appellants, and the whole case opened.

The appellees filed their bill in the Circuit Court of the United States for the District of Ohio, praying a discovery and that the defendants may convey to the

complainants such a title as they have acquired to a lot of ground in the Town of Cincinnati and deliver up the possession acquired by them, and also that they account for the profits, and for general relief.

The title set up by the complainants, was alleged to be derived from a receipt given by Abraham Garrison, in whom the title to the lot was then vested, which receipt in the following terms:

"Received, Cincinnati, 10 September, 1799, of Wm. and

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Michael Jones, fifty pounds thirteen shillings and three pence, in part of a lot opposite Mr. Conn's, in Cincinnati, for two hundred and fifty dollars, which I will make them a warrantee deed for the same, on or before the twentieth day this instant."

"Test, Jacob Awl Signed, ABRAHAM GARRISON"

And from a deed, executed on the following day, by which Abraham Garrison, for the consideration of \$250, conveyed the lot to William and Michael Jones, which deed was said to have been lost by time and accident. The lot was, by subsequent conveyances, claimed to be vested in the complainants. No affidavit is attached to the bill showing that the deed was not in the complainants' possession or setting forth that it had been so lost or destroyed.

To this bill the defendants, James Findlay, Charles Vattier, William Lytle, and Robert Ritchie, answered separately, and a decree was entered against the other defendants for costs, the bill having been taken *pro confesso* against them, they not having answered.

After hearing, this Court gave a decree against the defendants who had answered, and all the defendants appealed to this Court.

The bill, answer, exhibits, and depositions showed a case containing many controverted facts and allegations, and the questions of law arising upon the same

were elaborately argued by Mr. Webster and Mr. Caswell, for the appellants; and by Mr. Dodridge and Mr. Jones, for the appellees.

The decision of this Court, by which the decree of the Circuit Court of Ohio was reversed and the cause remanded for further proceedings, was upon two questions of chancery practice which were raised by the counsel for the appellants.

1. The court have decreed relief to the complainants on the bare suggestion that the deeds once existed, which are lost, when no affidavit is attached to the bill, showing that the deeds were not in complainant's possession, and without such an affidavit a court of chancery has no jurisdiction of the cause. The appellants cited the following cases to show the error of this proceeding. Mitford's Pl. 52, 112; 2 Pere Williams 540-541; 3 Atk. 17, 132; 4 John.Ch. 297.

2. The complainants not having shown a deed from Garrison to the Jones', must rely upon the receipt from Garrison to the Jones' as an equitable title; and if they claim that equitable right, they of course must make Garrison, the elder, and the Jones', parties to the suit. Upon this point the counsel for the appellants cited [Simms v. Guthrie](#), 9 Cranch 25.

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MR. JUSTICE TRIMBLE delivered the opinion of the Court.

This is a contest for lot number 86 in the City of Cincinnati. The appellees, who were complainants in the court below, claim the lot in right of the complainant, Belinda, as halfsister and heir at law of Thomas Doyle, Jr., only son of Thomas Doyle, the elder.

In the year 1795, Abraham Garrison became the proprietor, and was seized in fee of the lot in controversy.

The bill charges that on 10 September, 1799, Abraham Garrison, being so seized, sold the lot to William and Michael Jones, brothers, and partners in trade, for the

price of \$250, part of which being paid, the said Abraham Garrison gave a receipt for the same, binding himself to convey, which receipt is annexed, and made part of the bill. That a few days after, the said Abraham Garrison made a deed of conveyance, attested by two witnesses, to the Jones' for the lot, which deed has been lost by time and accident. That on 26 March, 1800, William Jones, in behalf of the firm of William & Michael Jones, conveyed the lot to Thomas Doyle, Jr., and that although the intention of that conveyance was to pass the title of both partners and is in equity good for that purpose, yet, as it did not pass the legal title of Michael Jones, he has since, in the year 1819, for the purpose of confirming the title of the complainants, made a deed of confirmation to complainant, Thomas S. Hinde.

Various other matters are stated in the bill as strengthening and confirming the equitable right of the complainants in right of the said Belinda, as heir at law of Thomas Doyle, Jr.

The bill charges that the defendants have fraudulently, and with notice of the claim of Thomas Doyle, Jr., and of the complainants, subsequently, obtained conveyances of the legal title from and under Abraham Garrison, and seeks discovery and relief.

The defendants, James Findlay, William Lytle, Charles Vattier, and Robert Ritchie, answered, and the bill was taken as confessed against the other defendants for want of answer.

The answer put in issue generally the allegations of the bill and the title of the complainants, but it is not at present necessary to say whether they do or do not sufficiently deny notice.

It appears from the answers and title deeds filed in the cause that all the defendants, as well those who have not answered as those who have, are interested in defending the title

of the lot, they standing in relation to each other as vendors, warrantees, and vendees.

At the hearing of the cause in the circuit court, the defendants Vattier and Ritchie were decreed to convey to the complainants, and costs were decreed against all the defendants, and all of the defendants have joined in the appeal to this Court.

The appellants contend that the decree is erroneous upon several grounds, which have been very elaborately argued at the bar. Among these, two preliminary objections have been raised to the regularity of the proceedings and decree, and if either of them be sustained, it will be unnecessary to consider the more important objections made to the decree upon the merits of the conflicting claims of the parties.

The first preliminary objection is that no affidavit of the loss of the deed, from Garrison to the Jones' "by time and accident," as charged in the bill, was made and annexed to the bill.

In support of this objection, the counsel for the appellants have cited numerous authorities to prove that when the loss of a deed or other instrument is made the ground for coming into a court of equity for discovery and relief, an affidavit of its loss must be made and annexed to the bill, and that the absence of such affidavit is good cause of demurrer to the bill. But no case has been cited and none is recollected in which it has been decided that although the party charged failed to demur for that cause, but answered over to the bill or permitted it to be taken for confessed by default against him, yet the absence of the affidavit is sufficient cause for a reversal of the decree.

If such a decided case were shown, we should exceedingly doubt its reason and authority.

The objection appears to us to be of that character which ought to be made at the earliest practicable stage of the cause, and if not then made, should be considered as waived. Upon the face of the bill there is an apparent jurisdiction, and the use of the affidavit is only to show, *prima facie*, the truth of the matter.

It is not like the cases in which there is an apparent want of equity on the face of the bills, admitting all the facts stated to be true, nor like the case in which it is apparent on the face of the bill that a court of equity could have no jurisdiction of the matters charged. In such cases, although a demurrer will be to the bill, yet none is necessary, inasmuch as there is either an absolute want of equity or of jurisdiction.

We think the supposed former existence and loss of the deed from Garrison to the Jones' was not the only ground for

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appealing to a court of equity for relief. If the deed, as stated in the bill, were produced, it, in consequence of not being proved or acknowledged and recorded, would be insufficient as a legal title against subsequent purchasers without notice. The complainants had a right to a discovery, upon the ground of notice, against the defendants, and if notice should be brought home to them, the complainants had a right to relief by a decree quieting the title, &c.;

Again, if the complainants should fail, as we think they have failed, to prove by competent and satisfactory evidence the former existence, execution, and contents of a formal deed of conveyance sufficient to pass the legal title, we perceive no reason why they might not rely upon the executory contract contained in the receipt, and in this latter view of the case the jurisdiction of the court of equity is unquestionable, and a general demurrer to the whole bill for want of an affidavit would not be sustainable. At most, a demurrer to only so much of the bill as stated and relied on the deed could have been maintained for want of an affidavit of its loss.

The second preliminary objection to the proceedings and decree is the want of proper parties.

It has been argued for the appellants that Abraham Garrison was a necessary party, and that as the complainants claim through him by an executory contract, he ought to have been before the court before any decree could be made against the

defendants, who also claim through and under him by a subsequent conveyance of the legal title.

The counsel for the appellees endeavored to overcome this objection by arguing that the deed from Garrison to the Jones' conveyed the title from him to them; that the contract was therefore not executory, but executed between Garrison and the Jones', and further, if it were not so, that there was no necessity for bringing Garrison before the Court, he having conveyed away the legal title to the appellants, and that therefore no decree could be made against him.

We have already said the evidence in the cause does not establish a formally executed conveyance from Garrison to the Jones' sufficient to convey the legal title, and that the complainants are therefore driven to rest their case upon the executory contract contained in the receipt.

Under this aspect of the case, was it necessary to make Garrison a party, to enable the Court to pronounce a decree between the parties, really before the Court?

In the case of [Symmes vs. Guthrie](#), 9 Cranch 25, this Court declared the general rule to be that

"regularly, the claimants who have an equitable title ought to make those whose title they assert, as well as the person for whom they claim a

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conveyance, parties to the suit. . . . And that for omitting to do so, an original bill may be dismissed."

In the case of [Mallon v. Hinde](#), 12 Wheat. 193, [25 U. S. 196](#) , the complainants claimed a survey in the military district in Ohio by virtue of certain executory contracts with Elias Langham and the heirs of Sarah Beard, and sought by their bill against Hinde to obtain a conveyance from him of the legal title, which, it was alleged, he had fraudulently obtained with notice of the complainants' prior equity. Langham and the heirs of Sarah Beard were not made defendants, and for that

cause the decree was reversed. There is no distinction in principle between that case and this. In that case, this Court, in delivering its opinion, hold the following language:

"For the appellees, it is insisted the proper parties are not before the Court so as to enable the Court to decree upon the merits of conflicting claims. And we are all of that opinion. . . . The complainants can derive no claim in equity to the survey under or through Langham's executory contract with the Beards unless these contracts be such as ought to be decreed against them, specifically, by a court of equity. . . . How can a court of equity decide that these contracts ought to be specifically decreed without hearing the parties to them? Such a proceeding would be contrary to the rules which govern courts of equity and against the principles of natural justice."

This reasoning applies with equal force to the case at bar. Here, however perfect all the other links may be in the chain of the complainant Belinda's equitable title to the lot in contest, she can have no claim to it in equity but through and under the executory contract of Garrison with the Jones'. Garrison has a right to contest the equitable obligation of that contract. No decree can be made for the complainants without first deciding that the contract of Garrison ought to be specifically decreed. He might insist the purchase money had not been paid, or make various other defenses. It is not true that if he were made a party, no decree could be made against him. It might not be necessary to require him to do any act, but it would be indispensable to decide against him the invalidity of his obligation to convey, and overrule such defense as he might make, and if the purchase money had not been paid, to provide by the decree for its payment before any decree could be made against the defendants holding the legal title. We are all of opinion that upon this second preliminary objection, the decree of the circuit court must be

Reversed.

A question of some difficulty presents itself as to the extent of the reversal. The decree of the circuit court directs the defendants Ritchie and Vattier to convey certain portions of

the lot of ground and awards costs generally against all the defendants. There is no doubt the defendants, against whom there is only a decree for costs, could not appeal alone from the decree of costs. But the defendants below have all appealed together, and although some of them hold the legal title to the lot, yet they all have an interest in defending the title, standing as they do in the relation of vendors and warrantees and vendees. Under these circumstances, we think the reversal should be general as to all of the appellants, and the whole case opened. And we are the more inclined to adopt this course because so numerous and so great have been the irregularities in conducting the cause in the Court below from its commencement to its termination by decree that it seems impracticable that justice be done between the parties without sending the cause back as to all the parties with directions that the complainants have leave, if asked by them, to amend their bill and make the proper parties and to proceed *de novo* in the cause from filing such amended bill.

This cause came on, &c.; on consideration whereof it is the opinion of this Court that there is error in the proceedings and decree of said circuit court in this, that Abraham Garrison ought to have been made a party, but was not, before a decree was made between the parties in the cause. Whereupon it is adjudged, decreed, and ordered that the decree of said Circuit Court for the District of Ohio in this cause be and the same is hereby wholly reversed, annulled, and set aside. And it is further ordered that the cause be remanded to the court from whence it came with instructions to permit the complainants, upon application for that purpose, to amend their bill and to make proper parties and to proceed *de novo* in the cause from the filing of such amended bill as law and equity may require.