Brush Vs. Ware

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Appeal No. : 40 U.S. 93

Appellant : Brush

Respondent : Ware

Judgement :

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Brush v. Ware

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APPEAL FROM THE CIRCUIT

COURT OF OHIO

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The appellees, John H. Ware and others, heirs of John Hockaday, an officer in the Virginia line on the continental establishment, filed their bill in the Circuit Court of

Ohio against the appellant, Henry Brush and against others for the recovery of certain lands in the State of Ohio in the military reservation. John Hockaday was entitled, under the acts and resolutions of Congress, to 4,000 acres, in the Virginia military reserve. Afterwards, on the motion of the complainants, the bill was dismissed as to all the defendants except Henry Brush, and a decree having been entered in the circuit court in favor of the complainants, Henry Brush prosecuted this appeal.

As the heirs of John Hockaday, the complainants claimed title to the land in question. John Hockaday made his will, disposing of his personal property only, and Ware, one of the executors, proved the will. As executor Hockaday, he made a fraudulent sale of the military right of the testator to one Joseph Ladd, and having obtained from the executive council of Virginia a certificate of the right of John Hockaday for the land to which he was entitled, he assigned the same to John Ladd. On this certificate, Ladd obtained, as the assignee of Ware, executor of John Hockaday, four warrants, each for 1,000 acres. Part of the land under one of these warrants, through assignments to George Hoffman and others, became the property of Henry Brush, who, under an entry made by George Hoffman, obtained a patent for the land held by him from the United States on 23 January, 1818.

The bill of the appellees asserted that Henry Brush was a purchaser with notice of the superior title of the heirs of John Hockaday,

and prayed that he might by a decree of the court be directed to convey the land to them, they having the prior equity.

In the answer of Brush, he said the land in controversy was granted to him by patents dated January 23, 1818; that he had no recollection or belief that he ever saw the warrant, entry or survey, or copies of either; that he was an innocent purchaser for a valuable consideration. He denied all notice of complainant's claim at or before the emanation of the patents and all knowledge of any fraud; he said

he believed that the purchase by Ladd was fair, and for a valuable consideration, that he had no knowledge what the will of Hockaday contained; he said he has been in possession, under claim of title, since 1808, and had made lasting and valuable improvements, and insisted that complainants ought to be barred by the statute of limitations, and that at any rate he ought to be paid for all improvements. And by his amended answer, he claimed compensation for taxes paid and for an allowance for a locator's share, for expenses in perfecting the title, and claimed all the surplus land in the survey.

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Mc LEAN, JUSTICE, delivered the opinion of the Court.

This is an appeal from the decree of the Circuit Court of Ohio. In their bill, the complainants represent that they are the only heirs and legal representatives of John Hockaday, late of the County of New Kent in the Commonwealth of Virginia. That Hockaday, in the revolution, was a captain in the Virginia line on continental establishment, which, under the acts and resolutions of Congress, entitled him to 4,000 acres of land in the Virginia Reservation within the State of Ohio. That in 1799, Hockaday died, leaving as his only child and heir, Hannah C. Ware, who had intermarried with Robert S. Ware, and who was the mother of a part of the complainants and the grandmother of the others. That Hockaday left a will in which he disposed of his personal estate only, and appointed Ware, with two other persons, his executors. Ware proved the will, the others declining to act, and that he wholly neglected his duties as executor, and never settled the estate. That their mother died in 1805, and Robert S. Ware, their father, also died some years afterwards. That in the year 1808, one Joseph Ladd, who has since died insolvent and without heirs, fraudulently made a contract with the executor for the sale of the above military right, and having obtained the certificate of such right from the Executive Council of Virginia, the same was assigned to Ladd for the consideration of forty dollars and a pair of boots. That on this certificate and assignment, Ladd obtained four warrants of 1,000 acres each, as the assignee of Ware, the executor of Hockaday. One of these warrants was assigned to George

Ladd, and through certain other assignments, to Brush. By a part of this warrant, the two tracts of land in controversy were entered, and for which Brush obtained patents from the United States, dated 23 January, 1818. And the complainants allege that Brush was a purchaser with notice of their equity, and they pray that he may be decreed to convey to them the title, &c.;

In his answer the defendant states that he was a *bona fide* purchaser for a valuable consideration and without notice of the complainants' equity. And he insists, if the court shall decree for the complainants, that he is entitled to the part usually given to the locator for making the entry and obtaining the title for the land. And also that he is entitled to moneys paid for taxes, &c.;, on the land. This cause has been ably argued on the part of Brush, the appellant.

The question which lies at the foundation of this controversy and which, in its order, should be first considered, is whether the court can go behind the patent and examine the equity asserted in the bill. Whatever doubt might arise on this question on common law principles, there can be none when the peculiar system under which this title originated is considered. In Ohio and Kentucky, this question has been long settled judicially, and this Court, following the decisions of those states, has also decided it. *Bodley v. Taylor,* 5 Cranch 196. In the case of *Polk's Lessee v. Wendall,* 9 Ibid. 98, the Court said

"That every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself. It would therefore be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent. But there are some things so essential to the validity of the contract that the great principles of justice and of law would be violated did there not exist some tribunal to which an injured party might appeal and in which

the means by which an elder title was acquired might be examined."

And the Court, after showing

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that a court of equity was the proper tribunal to make this examination, remarked

"But there are cases in which a grant is absolutely void, as where the state has no title to the thing granted or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law."

The same case was again brought before the Court by a writ of error, and is reported in 18 U. S. 5 Wheat. 293, in which the Court held that the system under which land titles originated in Tennessee, being peculiar, constituted, with the adjudication of its courts, a rule of decision for this Court.

In the case of *Miller v. Kerr,* 7 Wheat. 1, it was held that an equity arising from an entry of land made on a warrant which had been issued by mistake could not be sustained against a patent issued on a junior entry. The Court said

"The great difficulty in this case consists in the admission of any testimony whatever which calls into question the validity of a warrant issued by the officer to whom that duty is assigned by law. In examining this question, the distinction between an act which is judicial and one which is merely ministerial must be regarded. The register of the land office is not at liberty to examine testimony and to exercise his own judgment respecting the right of an applicant for a military land warrant."

And in the case of *Hoofnagle v. Anderson,* 7 Wheat. 212, another question was raised on an entry made by virtue of the same warrant. The mistake in the warrant consisted in this. Thomas Powell having performed military services in the Virginia state line, a certificate by the executive counsel of Virginia was obtained by his heir which entitled him to a certain amount of land. On this certificate, the register of the land office at Richmond, Virginia, issued a warrant which, instead of reciting that the services were performed in the state line, stated that they were performed

in the state line on continental establishment. This mistake was important, as the tract of country in Ohio in which the warrant was located was reserved, in the cession by Virginia, for the satisfaction only of warrants issued for military services in the state line on continental establishment, and consequently was not subject to the right of Powell. And the Court remarked

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how far the patent ought to be affected by this error is the question on which the cause depends. It said there was no ground to suspect fraud; that the warrant was assignable, and carried with it no evidence of the mistake which had been committed in the office; that it had been assigned for a valuable consideration, and the purchaser had obtained a patent for the land, without actual notice of any defect in the origin of his title, and it held that the patent gave a good title as against any one whose entry was subsequent to its date.

A patent appropriates the land called for, and is conclusive against rights subsequently acquired. But where an equitable right which originated before the date of the patent, whether by the first entry or otherwise, is asserted, it may be examined. The patent, under the Virginia land law, as modified by usage and judicial construction in Kentucky and Ohio, conveys the legal title, but leaves all equities open. *Bouldin v. Massie's Heirs,* 7 Wheat. 149. The controversy in this case does not arise from adverse entries, but between claimants under the same warrant. And it is admitted that Ware, as executor, had no power to assign the military right, which, on the decease of Hockaday, descended to his heirs. It is too clear to admit of doubt that Ladd, by circumvention and fraud, obtained the assignment from the executor, which enabled him to procure the warrant from the register. As between Ladd and the complainants, can there be any doubt that this case would be examinable in equity? Could the issuing of the warrant by the register interpose any objection to such an investigation?

It is insisted that the register, of necessity, before he issues the warrant, must determine the right of the applicant, and that in doing so, he acts judicially; that presumptions not only arise in favor of such acts, but unless fraud be shown, they

are not open to examination. The Executive Council of Virginia, in determining the right of Hockaday's heirs, may be said to have acted judicially, but the register, in the language of the court in one of the cases above cited, acted ministerially. The court said he was not authorized to examine witnesses in the case, but was bound to act upon the face of the certificate. The parties interested were not

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before him, and he had no means of ascertaining their names, giving them notice, or taking evidence. And under such circumstances, would it not be a most extraordinary rule which should give a judicial character and effect to his proceeding? He acts, and must necessarily act from the face of the paper, both as regards the certificate of the executive council and the assignment of such certificate. His acts, in their nature, are strictly ministerial; they have neither the form nor effect of a judicial proceeding.

It may be admitted that presumptions arise in favor of the act of a ministerial officer, if apparently fair and legal, until they shall be impeached by evidence. But in this case there is no impeachment of the acts of the register. The evidence on which he acted is stated on the face of the warrant, which enables the proper tribunal, as between the parties interested, to determine the question of right, which the register had neither the means nor the power to do. The complainants do not deny the genuineness of the certificate, the assignment, or the warrant, but they say that the executor had no right to make the assignment, and that the issuing of the warrant by the register does not preclude them from raising that question.

Until the patents were obtained, this warrant, though assigned and entered in part on the land in controversy, conveyed only an equitable interest. Hoffman, to whom Ladd assigned it, and the other assignees took it subject to all equities. In their hands, unless affected by the statute of limitations or lapse of time, any equity arising from the face of the instrument could be asserted against them the same as against Ladd. Brush, being the last assignee, obtained the patents in his own name, as assignee, and these vested in him the legal estate. But this, on the

principles which have been long established in relation to these titles, does not bar a prior equity. The complainants are proved to be the heirs of Hockaday, and a part of them were minors at the commencement of this suit. All of them in age were of tender years when the warrant was assigned, and it appears that none of them came to a knowledge of their rights until a short time before the bill was filed. And this is an answer both to the statute of limitations and the lapse

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of time. The statute of Ohio does not run against nonresidents of the state, nor can lapse of time operate against infants under the circumstances of this case.

The great question in this controversy is whether Brush is chargeable with notice. The certificate of the Executive Council of Virginia stated that, "the representatives of John Hockaday were entitled to the proportion of land allowed a captain of the continental line, for three years' service." To this was appended a request to the register of the land office to issue a warrant in the name of Joseph Ladd, his heirs or assigns, signed by Ware, executor of Hockaday, he having received, as stated, full value for the same. Four military warrants of 1,000 acres each were issued by the register, "9 August, 1808, to Joseph Ladd, assignee of Robert S. Ware, executor of John Hockaday, deceased." By virtue of one of these warrants, 400 acres of the land in dispute were entered, 8 June, 1809, in the name of George Hoffman, assignee, and 200 acres, in the same name, 18 August, 1810. These entries were surveyed in May, 1810, and on 20 January, 1818, patents were issued to

"Brush, assignee of John Hoffman, who was assignee of Joseph Hoffman *et al.,* assignees of George Hoffman, who was assignee of Joseph Ladd, assignee of Robert S. Ware, executor of Hockaday,"

&c.;

It is insisted that the general doctrine of notice does not apply to titles of this description. And this position is true so far as regards the original entry. To make a valid entry, some object of notoriety must be called for, and unless this object be

proved to have been generally known in the neighborhood of the land, at the time of the entry, the holder of a warrant who enters the same land with full notice of the first entry will have the better title. And so, if an entry be not specific as to the land intended to be appropriated, or in any respect be defective, it conveys no notice to a subsequent locator, nor can it be made good by a subsequent purchaser without notice. *Kerr v. Watts,* 6 Wheat. 560. But with these exceptions, the doctrine of notice has been considered applicable to these military titles, as in other cases. And no reason is perceived why this rule should not prevail.

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From the nature of these titles and the force of circumstances, an artificial system has been created unlike any other, which has long formed the basis of title to real estate in a large and fertile district of country. The peculiarities of this system, having for half a century received judicial sanctions, must be preserved, but to extend them would be unwise and impolitic.

Brush, it is insisted, was a *bona fide* purchaser for a valuable consideration without notice. The answer under which this defense is set up is neither in substance nor in form free from objection. It does not state the amount of consideration paid, the time of payment, nor does it deny the circumstances from which notice can be inferred. *Boone v. Chiles,* 10 Pet. 211212. But passing over the considerations which arise out of the answer, we will inquire whether the defendant is not chargeable with notice from the facts which appear upon the face of his title. The entry on the books of the surveyor, kept at the time in the State of Kentucky, was the incipient step in the acquisition of the title. This entry could only be made by producing to the surveyor and filing in his office the original warrant or a certified copy of it. The survey was then made, and a plat of the land, by a deputy, who returned the same to the principal surveyor's office. This survey is called the plat and certificate, and is assignable by law, but without an entry founded upon a warrant, it is of no validity. On the transmission of this survey, under the hand and seal of the principal surveyor, accompanied by the original warrant, or a copy, to the General Land Office, a patent is issued to the person

apparently entitled to it. In issuing the patent, the commissioner of the land office performs a ministerial duty. He examines no witnesses, but acts from the face of the papers and exercises no judgment on the subject, except so far as regards matters of form. The patent therefore conveys the legal title only, leaving prior equities open to investigation.

This is the history of this title and of every other in the same district of country. And the question arises whether the respondent, under the circumstances, was a *bona fide* purchaser for a valuable consideration without notice. In his answer he says that he never saw the warrant, the

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entries, nor the surveys on which the patents were founded, and that he had no information as to the derivation of the title except that which the patents contain. The question is not whether the defendant in fact saw any of the muniments of title, but whether he was not bound to see them. It will not do for a purchaser to close his eyes to facts -- facts which were open to his investigation by the exercise of that diligence which the law imposes. Such purchasers are not protected.

It is insisted that the plats and certificates being assignable, the defendant might well purchase them, without a knowledge of the facts contained on the face of the warrant. But was he not bound to look to the warrant as the foundation of his title? The surveys were of no value without the warrant. No principle is better established than that a purchaser must look to every part of the title which is essential to its validity. The warrant was in the land office of the principal surveyor, and although this at the time was kept in Kentucky, the defendant was bound to examine it. In this office his entries were made, and to it his surveys were returned, and from this office was the evidence transmitted on which the patents were issued. Can it be contended that the defendant, who purchased an inchoate title, a mere equity, was not bound to look into the origin of that equity? As a prudent man, would he not examine whether that which he bought was of any value? The records of the land office, and the papers there on file showed the origin of the title and the steps which had been taken to perfect it. By the exercise

of ordinary prudence, he would have been led to make this examination, and in law he must be considered as having made it.

And here the question arises whether the statements of the warrant, which were afterwards copied into the patents, that the right originally belonged to Hockaday, descended to his heirs on his decease, and had been assigned to Ladd, by his executor, were not sufficient to put the defendant on inquiry? Now an executor has not ordinarily any power over the real estate; his powers are derived from the will, and he can do no valid act beyond his authority. Where a will contains no special provision on the subject, the land of the deceased descends to his

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heirs, and their rights cannot be divested or impaired by the unauthorized acts of the executor. The warrant, then, showed the purchaser that this right, which pertained to the realty, and which, on the death of Hockaday, descended to his heirs had been assigned by the executor. Was not this notice? Was it not a fact, essentially connected with the title purchased by the defendant, which should have put him upon inquiry? If it would do this, it was notice, for whatever shall put a prudent man on inquiry is sufficient. And this rule is founded on sound reason as well as law. How can an individual claim as an innocent purchaser under such a circumstance?

But it is argued that it would impose on the defendant an unreasonable duty to hold that he was bound not only to examine the warrant in the land office in Kentucky, but to hunt up the will of Hockaday and see what powers it conferred on the executor. The law requires reasonable diligence in a purchaser to ascertain any defect of title. But when such defect is brought to his knowledge, no inconvenience will excuse him from the utmost scrutiny. He is a voluntary purchaser, and having notice of a fact which casts doubt upon the validity of his title, are the rights of innocent persons to be prejudiced through his negligence? The will of Hockaday was proved 11 July 1799, before the County Court of New Kent, in Virginia, and recorded in the proper records of that county. When the defendant purchased the title, he knew that it originated in Virginia, had been

sanctioned by the executive council of that state, and that the warrant had been issued by the register at Richmond. These are matters of public law, and are consequently known to all. But independently of this, every purchaser of a military title cannot but have a general knowledge of its history.

Why was not the defendant bound to search for the will? The answer given is the distance was too great, and the place where the will could be found was not stated on the warrant, nor on any of the other papers. That mere distance shall excuse inquiry in such a case would be a new principle in the law of notice. The certificate of the original right and the warrant were obtained

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in Richmond, Virginia. And in the office records and papers of the executive council, or in those of the register in Richmond, a copy of the will probably could have been found. And if such a search had been fruitless, it is certain that it could have been found on the public record of wills of New Kent County. A search short of this would not lay the foundation for parol evidence of the contents of a written instrument. And shall a purchaser make a bad title good by neglecting or refusing to use the same amount of vigilance?

In the case of *Reeder v. Barr,* 4 Ohio 458, the Supreme Court of Ohio held that where a patent was issued to Newell as assignee of the administrator of Henson Reeder, deceased, it was sufficient to charge a subsequent purchaser with notice of the equitable rights of the heirs of Reeder. It is difficult to draw a distinction in principle between that case and the one under consideration. An administrator in Ohio has no power unless authorized by the court of common pleas to sell or convey an interest in land, nor has an executor in Virginia any power over the realty unless it be given to him in the will. In this case, therefore, the purchaser was as much bound to look into the will for the authority of the executor as the Ohio purchaser was bound to look into the proceedings of the court for the authority of the administrator.

The case *Lessee of Burkart v. Bucher,* 2 Binn. 455, is also in point. The defendant derived his title from William Willis, to whom a patent had issued reciting that the title was derived under the will of Henry Willis. This will did not authorize the sale of the premises, and the court held, that this was notice to the defendant. So, in the cases of *Jackson ex dem. Livingston v. Neely,* 10 Johns. 374, where a deed recited a letter of attorney by virtue of which the conveyance was made, which was duly deposited with the clerk of Albany, according to the act of 8 January 1794, it was held to be sufficient notice of the power, by means of the recital, to a subsequent sequent purchaser, who was equally affected by it, as if the power itself had been deposited.

An agent receiving notes from an executor, payable to him as executor as security for advances by the principal to the executor

on his private account, and not as executor, affects his principal with notice that it is a dealing of an executor with the assets, for a purpose foreign to the trusts he was to discharge. 2 Ball & Beat. 491. When a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected with notice of that fact. *Mertins v. Jolliffe,* Ambl. 311. A. made a conveyance to B., with a power of revocation by will, and limited other uses. If A. dispose to a purchaser by will, a subsequent purchaser is intended to have notice of the will as well as of the power to revoke, and this is a notice in law. And so in all cases where a purchaser cannot make out a title, but by deed which leads to another fact, notice of which a purchaser shall be presumed cognizant, for it is *crassa negligentia* that he sought not after it. *Moore v. Bennett,* 2 Chan.Cas. 246. Notice of letters patent in which there was a trust for creditors is sufficient notice of the trust. *Dunch v. Kent,* 1 Vern. 319. That which shall be sufficient to put the party upon inquiry is notice. 13 Ves. 120. On a full consideration of this part of the case, we think that the defendant must be held to be a purchaser with notice.

The circuit court considered the defendant as vested with a right to such part of the land as is usually given to a locator, and directed onefourth of the two tracts to

be laid off to him so as to include his improvements, and they also decreed to the defendant threefourths of the taxes paid by him, with interest. This part of the decree is equitable, and as we coincide with the views of the circuit court on all the points of the case, the decree is affirmed.

Decree affirmed.