

BENNETT ET AL. vs. OWEN ET AL.

A sale of the real estate of a deceased person made under the order of the Probate Court, conveys the legal title, though the proceedings may have been irregular—such court having competent jurisdiction of the subject matter.

The purchaser of such real estate, having agreed with the creditor, before sale, that he will buy, if the creditor will take his note—to be assigned by the executor in payment of his claim against the estate—and give time; cannot come into equity for relief against the creditor, after the agreement has been carried into effect, on the ground of mistake, in that the deceased had no title to a part of the real estate sold: particularly where the creditor cannot be restored to the position he occupied before the agreement, and such agreement was induced at the instance of the purchaser.

Appeal from Pulaski Circuit Court in Chancery.

WATKINS & CURRAN, for the appellants. The proceedings of the Probate Court are not void, and though informal or irregular, cannot be impeached collaterally. *Borden v. State, use Robinson*, 6 Eng. 519. *Erwin v. Lowery*, 7 Howard (U. S.) 181.

The executors acting under the order of the Probate Court, did not warrant the title, and Owens purchased only such title as they could give: he executed his note for the purchase money, and took possession of the property from which he has never been evicted. The note was assigned to the appellants, under agreement with Owens, for extension of time, and the judgment of the appellants satisfied: they are not then in the attitude of assignees holding the note subject to equities between the maker and payee. (*Williamson v. Ramsey*, 1 Freem. Ch. 112.) If there was a mistake, it was the duty of the purchaser to have informed himself of the facts before the agreement with the appellants was carried out: and their remedy is now against the heirs of McDaniel for the correction of the mistake. 1 Edw. Ch. Rep. 477. 6 Paige 347. See the cases as to a rescission of the contract in

this cause of *Lambkin et al. v. Reese et al.*, 7 Ala. Rep. 170. *Bates v. Delavan*, 5 Paige 300. *Talmadge v. Willis*, 25 Wend. 114. *Bates v. Terrel*, 5 Ala. 134. 3 Ala. 237. 7 Ala. 76. *Pintard v. Martin*, 1 S. & Marsh Ch. 133. 7 ib. 268. 9 ib. 544. 1 ib. 388. 5 Howard 284. *Abbot v. Allen*, 2 John. Ch. 519. *Williamson v. Raney*, Freem. Ch. 112. 3 Watts & Serg. 444. 16 Serg. & Rawle 371.

S. H. HEMPSTEAD, contra. The complainants are entitled to relief because they cannot obtain a title to the lots named in the bill. (2 Eq. Dig. 529. 2 Sug. 110, 114. 3 Russ 320. 7 Paige 590. 22 Wend. 509. 25 Wend. 114. 5 Paige 300. 26 Wend. 246.) The will under which the vendors acted, was void, because it exceeded the value of \$500, and was never probated according to law. (*Hynds v. Imboden*, 5 Ark. 389.) McDaniel and Black were not legally executors, and empowered to sell the real estate; and although the title to real estate, when sold by executors, may not be warranted to the purchaser, yet the person representing himself as executor, must be legally such, and authorized to sell and convey all the title of the testator; or the purchaser may appeal to a court of chancery to rescind the contract, and relieve him from the payment of the purchase money. Dig., sec. 40, p. 118. *Crisman v. Beasley*, 1 S. & Mar. Ch. Rep. 561. *Lowry v. McDonald*, id. 620. 1 Hill Ch. Rep. 494. *Ives v. Pearson*, 1 Freem. Ch. Rep. 220. Ib. 53. *Bank of Columbia v. Hagner*, 1 Pet. 465. *Wolford v. Phelps*, 2 J. J. Marsh. 31.

The same defence may be made against the appellants, who are assignees, as against the assignor. *Smith v. Henry*, 2 Eng. 213. *Black v. Bruman*, 4 Eng. 505.

Mr. Justice WALKER delivered the opinion of the court.

The points of equity, presented by the record in this case, are, First: That the executors of the estate of McDaniel had no power to sell, and could convey no title to the lots sold to defendant, Owen, and therefore the consideration for which the note was executed, had failed. Second: That through mistake of all the

parties, the executors sold and delivered to defendant, Owen, real estate to which McDaniel's estate had no title, and therefore the consideration had failed.

In answer to the first objection, the defendants say that although the proceedings under which the sale took place, may not have been regular, yet, as the order was made, and the authority to sell conferred by a court of competent jurisdiction over the subject matter, they are not void, but are, in fact, sufficient to sustain a sale, and pass a title to the purchaser under it. And as to the second ground, that, admitting it to be true that the mistake did exist as stated, and that, in ordinary cases, the contract should, for this reason, be set aside; still, under the peculiar circumstances of this case, the rule does not apply.

So far as the first question is concerned, we think the facts bring it within the rule laid down by this court in the case of *Borden et al. v. State, use, &c.*, 6 Eng. 519; and upon the authority of which, we must hold the proceedings though informal, not absolutely void; and upon a mere question of authority to sell, that the sale should not be set aside.

The second ground is one of much difficulty, and must depend upon the peculiar circumstances of the case: which we will proceed to examine.

Bennett, Morrill & Co. obtained judgment against McDaniel for the sum of \$762.06, with interest and costs of suit, which, by the statute, was a lien on the real estate of McDaniel at the time of his death, who died leaving the judgment unsatisfied: that a transcript of this judgment was filed in the Probate Court, and allowed against said estate, and held priority over other debts. To satisfy this, and other debts, the Probate Court ordered the lands of said estate to be sold, and caused the same to be valued under the statute requiring real estate thus sold to bring two-thirds of its appraised value. Owen, the complainant, wished to purchase the property, provided he could have further time for payment than the executors were authorized to give: whereupon, and as a matter of accommodation to Owen, it was agreed between himself, Bennett, Morrill & Co., through their attorney,

Watkins, and the executors, that Owen should bid off the lots at two-thirds of their appraised value, and execute his note to the executors in accordance with the terms of the sale advertised by them; which note the executors agreed to assign over to Bennett, Morrill & Co., in payment of that amount on their judgment, and that Watkins should receipt to them, as such attorney, for that amount, as so much money paid on the judgment; and give to Owen a written assurance of further time for payment on said note than that expressed upon its face. And the purchase by Owen, the assignment by the executors, the receipt and assurance of further time by Watkins, were all duly made in conformity with said agreement, and Owen put into possession of the property.

It is moreover shown that, at the time Owen bought, there was a reservation made of part of one of the lots, but a mistake as to the locality of that part: and that part of one of the lots, which Owen supposed he was buying, was in fact held by a superior adverse claim to McDaniel's, at the time, and that another part, which he supposed did not belong to McDaniel, was embraced in his purchase, whereby the value of the property which he actually intended to buy, was materially affected.

Owen retained undisputed possession of the property he intended to purchase. Judgment at law in favor of Bennett, Morrill & Co., was rendered against him on the note so executed and assigned. And he has filed this bill to rescind the contract, and perpetually enjoin the collection of the judgment at law.

As between the executors and Owen, there is certainly strong ground for the equitable interposition of the chancellor. But even then a question might arise as to how far executors warrant the title of their testators to the property sold, or whether the rule *caveat emptor* does not apply. Be this as it may, the situation of the assignee ordinarily would be no better than that of the assignor. But Bennett, Morrill & Co., do not defend as ordinary assignees; they rest the equity of their defence upon the peculiar circumstances of the case.

It cannot be doubted that, ordinarily, in a case like the present,

where the deed has not yet been made, where the contract is executory, not executed, that the purchaser has a right to withhold the payment of the purchase money until doubts upon the title or the power to sell are removed: and we will not be understood as by any means controverting the correctness of the numerous authorities cited to this point. The cases of *Lowry & Puckett v. McDonald & Rogers* and *Crisman v. Beasley, ad.*, reported in 1 *Sm. & Mar. Ch. Rep.*, and particularly in the first named case, page 620, the court reviews the subject with much clearness, and whilst it holds that an administrator who has no power to sell, and acts without any authority to sell, may be restrained from collecting the purchase money for the property sold, it is expressly held that there is no warranty of the quality or quantity of the property sold. In that case, the administrators sold without any order of court whatever. In the case before us, the sale was made upon the petition, order, notice and valuation, substantially in compliance with the statute. The sale was not made under the authority of the will, nor can it be said that the authority to sell was dependent upon its validity, or the grant of letters to execute it. The will did not order the sale of the lots, or if it had, it cannot be successfully assumed that it was such a will as could confer such power. The order of sale was made upon petition to the court for that purpose, under the provisions of the statute from the 155th to the 162d *sec. Digest ch. 4*; and those provisions, if not technically, have been substantially, complied with.

In the case under consideration, then, the whole question turns upon the circumstances under which Bennett, Morrill & Co., acquired title to the note sued upon. Owen, in effect, said to them, if you will buy this note, and give me time on it, I will pay it to you; and they did buy the note, and gave up their lien on the property, credited their judgment by the amount of it, and gave the further time, whereby they have lost their recourse against the estate for that amount. But it is said that they can take their course still against these lands. Grant it; and from the state of facts (apart from any defect in title or power to sell,) it is evident that, perhaps by the abandonment of the property and the neg-

lect of Owen, the improvements which constituted its chief value, have been destroyed by fire and the property thereby rendered far less valuable than when it was sold, or would now be worth but for the waste occasioned by the abandonment of Owen. As between Owen and Bennett, Morrill & Co., the transaction stands fair. The purchase of the note was made at the instance of Owen, and under a contract that he would pay it if they would agree to prolong the time of payment. This they covenanted to do, and did. Shall this contract also be rescinded? If so, upon what ground? There is no pretence that Bennett, Morrill & Co. can be restored to the situation they occupied when they contracted with Owen; and unless they should be found in fault, it is rarely indeed, if ever, the case that the chancellor will rescind the contract. Owen, should have looked better into the responsibilities which he assumed in his purchase of the property, and in his subsequent contract with Bennett, Morrill & Co., before he entered into them. Under the state of case presented, he may be put to inconvenience and expense in getting a title to the property which he bought; and should it now be of less value, he has in all probability produced that result by his neglect. But be this as it is may, there is certainly no ground for withholding from Bennett, Morrill & Co. the benefit of their judgment at law.

Let the decree of the Circuit Court be reversed; the injunction dissolved, and the complainant's bill dismissed with costs.