In the Superior Court of Los Angeles County, State of California.

Juan M. Luco)
)
vs.)
)
Robert S. Baker.)

Since the oral argument the defendant has submitted authorities to the Court mainly upon two points:

FIRST; That parole evidence is admissable to show the purposes and intentions of the parties at the time of the execution of the second deed.

SECOND; That the interest of the cestui que trust may be released or conveyed to the trustee.

The last proposition is not disputed and cuts no figure in the case, the question being, not whether the interest of the cestui que trust can be released or conveyed; but whether the second deed of June 14th, 1887, operated so to release or convey the interest of the cestui que trust.

Without attempting or presuming at this time, to reargue the case, let us consider briefly the situation of the parties at the time of the execution of the second deed. That Baker, the defendant, had received the deed from Pico of May 21st, and had executed back to him the declaration of trust and thereby established the relation of trustee and cestui que trust, and accepted the position of trustee with all the burdens, incidents, and consequences of that fiduciary relation is admitted.

What was the nature of the trust so established?

FIRST; It was an express trust created by an instrument in writing, and it was:-

(1) An expressed trust in real property under Sec. 857 Sub.1 C.C. to sell real property and dispose of the proceeds in accordance with the instrument creating the trust; or,

(2) A trust in personal property lawful and permissable under Sec. 2220 C.C.

In either event the statute of limitation would have no application as expressed trust are universally excluded from its operation, and this whether the trust be in realty or personalty.

On the 28th of June 1879 when the agreement of compromise and settlement was executed between defendant, Baker, and E. F. Beale on the one side, and F.B. Taylor and the California Star Oil Works Co., on the other side; Baker had no title, or right of property in the premises described in the mineral location, or the presmises described in plaintiff's Exhibit "1", or in any part thereof, except such as he had as one of the locators thereof, or such as he had derived by mesne conveyances from his co-locators. We make this statement with absolute confidence because there is no evidence, or pretense of evidence, before the Court tending to show, or establish, any mining interest in Baker at the time mentioned, other than that held or derived by him under the socalled Pico location of August 8th, 1865. In consideration of that settlement Baker received a large amount of stock in the corporation and has since received large dividends on that stock.

Our claim is that in making that settlement, he disposed of, not only the interest which he held as an original locator; but also of the interest he received from Pico by the deed of May 21st 1877, and that he should account to the plaintiff, as assignee of Pico, of so much of the proceeds of that compromise and settlement as he, Baker, received by virtue of the interest so conveyed to him

by Pico.

The defendant seeks to excuse himself from such accounting and liability as trustee of an expressed trust, upon the theory that all trust relations between him and Pico were terminated by the deed of June 14th 1877. To this we reply that the last mentioned deed does not, upon its face, purport to release or discharge the defendant, Baker, from his liability as trustee, and in no manner refers to his declaration of trust. That Pico might have released Baker from his liability as such trustee by an instrument in writing executed for that purpose and containing apt terms and words, we do not dispute. But even then, as we shall see, the chancellor will approach such a settlement and adjustment between the trustee and cestui que trust , especially where the trustee claims to have purchased the interest of the cestui que trust, with great suspicion, and with the most violent presumption against the validity of such purchase. Such is the unquestioned law. If there be the slightest doubt as to the purpose for which the second deed was executed, the issue in question must be resolved against Baker.

This is not an ordinary issue in a civil case where the mere preponderance of evidence is sufficient to sustain an affirmative allegation; on the contrary, it is more analogous to the issue in a criminal case where, under the universally excepted rules of evidence, it is necessary to prove the guilt of the accused beyond a reasonable doubt. In an ordinary civil action a mere preponderance in the weight of evidence is sufficient to maintain an issue ; but where a trustee seeks to justify dealings with the cestui que trust inconsistent with the purposes of the trust, and particularly where the trustee claims to have purchased from the cestui que

trust for a valuable consideration, the very subject matter of the trust; then Courts of equity, under well established and unvarying rules, will not only require the trustee, in order to maintain his claim, to establish it by a preponderance of evidence; but will regard the whole transaction with extreme suspicion, and will hold against the trustee if there-by the least shadow of suspicion as to the fairness of the transaction and the fullness and adequacy of the consideration. The rule of equity is so imparative in this respect that if the purchase made by the trustee from the cestui que trust has the appearance of fairness and honest dealing, nevertheless, if thereafter, and in the consumation of the transaction contemplated at the creation of the trust, the trustee receives advantages or considerations in excessof that paid to the cestui que trust he will still be held as the trustee of the surplus and the relation of trustee and cestui que trust considered as continuing.

As stated in Michoud v. Girod 4 How. U.S. page 556, it is possible for a trustee to buy the interest of the cestui que trust in the trust property.

" But it is diffcult to make out such a case, where the ex-
"ception is taken, expecially when there is any inadequacy of
"price, or any inequality in the bargain. Cloes V. Trecothick,
"9 Ves. 246; Fox v. Mackreth, 2 Bro. Ch. R. 400 Gibson v. Jeyes
"6 Ves. 277; Whichcote v. Lawrence, 3 Ves. 740; Campbell v.
"Walker, 5 Ves. 678; Ayliffe v. Murray, 2 Atk. 59. And therefore,
"if a trustee, though strictly honest, should buy for himself an
"estate from his cestui que trust, and then should sell it for more,
"according to the rules of a court of equity, from general policy,
"and not from any peculiar imputation of fraud, he would be held

"still to remain a trustee to all intents andm purposes, and not "be permitted to sell to or for himself. 1 Story's Com. on Equity "(2d ed.) 317; Fox v. Mackreth, 2 Bro. Ch. R. 400; S. C., 2 Cox, "320, 327."

This case of Michoud v. Girod, is often cited with approbation, indeed it is one of the great leading cases upon this subject.

See Federal Citations p. 462; also,

Leadings Cases on Trusts by Peter Zinn, where Michoud v. Girod re-reported and annotated.

In Abbott's Trial Evidence (p. 236) it is said ; "If a trust-"ee purchases of the cestui que trust, or accepts a benefit from "him, the burden is on the trustee to vindicate the transaction "from any shadow of suspicion , and to show that it was perfectly "fair and reasonable in every respect. If he alleges the consent "of the cestui que trust, the presumption is against the fairness "of the transaction, and the burden is on him to show it affirma-"tively, and to establish all the conditions necessary to its "validity."

See also ib. 735 n. 7, and ib. p. 817.

It is unnecessary to cite the numberous cases to the same effect. The decisions of the Courts of Equity are uniform on the subject.

Assuming for the moment (without admitting such to be the true doctrine) that the defendant might show by oral evidence, the purposes for which the second deed was executed, can this Court say that there is not "Any shadow of suspicion" as to the sufficiency and validity of the consideration of the second deed? We assert with absolute confidence that the weight of evidence as to

the purposes for which the second deed was executed, is in favor of the plaintiff and against the defendant. The consideration recited in each deed is the same viz., $20. It is in evidence and admitted that no money passed between the parties at the execution of either of the deeds. The first deed bears upon its face two palpable and apparent mistakes or deficiencies; the first being, "The party of the first part x x x x x xdoes by these presents "grant, bargain, sell and convey unto the said party of the first "part", instead of to the party of the second part: and the second being, an apparent limitation of the interest conveyed to the interest claimed by Pico under the laws of the State of California, as indicated by the words: "meaning to convey to the said party "of the second part all the interest, rights, and privileges of the "said party of the first part, of whatsoever nature there are or "may be in the said Oil claim and land, and to which he is entitled "under the laws of the State of California."

With these exceptions the two deeds are identical except as to date. They are both in the handwriting of Forbes, agent of Baker and we submit that the Court must conclude, his evidence to the contrary notwithstanding, that the language used in the second deed is literally copied from the first.

(Our evidence was left with the reporter to be bound and indexed and we have not yet received it; hence our references to the evidence can not be to page and line, but to the substance as we remember it.)

Pico testifies that shortly after the execution of the first deed, Forbes came to him and told him there was some defect or mistake in that deed which ought to be corrected, and for that purpose requested him to execute the second deed, which he did. His evidence

of the transaction is consistent with the difference in the two deeds. According to Baker's own evidence, he procured the first deed from Pico to himself for an important and material purpose, to enable him to deal advantageously with the parties with whom he was then in ~~the negotiation~~ litigation concerning interests in this oil claim, and that his purpose was for him and Beale to control, as he expressed it, a majority of the stock. Well, they had between themselves 3/7 or 1500 feet each, Pico's interest was 1/7 and that would give themthe control desired. The first deed having the mistake in saying "party of the first part to the party of the first "part", and also apparently limiting the conveyance to Pico's interest under the laws of California, whereas the interest of all locators was under the laws of the United States and not of the State of California; what would be more natural than for Baker, or his agent Forbes, upon reflection, to seek another deed from Pico which would purport to grant from the part of the first part to the party of the second part, and also omitting the words contained in the first deed: "meaning to convey to the said party of "the second part all the interest, rights and priviliges of the said "party of the second part, of whatsoever nature they are or may be "in the said oil claim and land, and to which he is entitled under "the laws of the State of California."

Under the management of laymen the second deed might very naturally and properly have been executed for the puspose claimed by the plaintiff. But, upon the other hand, it appears very difficult, if not impossible to believe that Baker, acting upon legal advice (for he says he was adviced by Bronson or Eastman at the time) would receive such an instrument as the second deed for the express purpose of terminating the trust relation. it is true

that the second deed was written by Forbes, but if Baker had set out to terminate the trust relation upon the advice of counsel it is to be presumed he would have continued to act under such advice. The peculiar surroundings and circumstances under which the second deed was executed being such, we think the Court must conclude that it was executed for the purposes claimed by the plaintiff, and not for the purposes claimed by the defendant. Such we claim is the weight of evidence; but certainly the Court cannot accept Mr. Baker's theory of this transaction withouth doubt, and if it cannot, then under the law we have cited, the issue must be resolved against him. But let us go one step further. What was the consideration of the second deed according to the defendant's theory?

It was to cancel an indebtedness or obligation of some kind from Dom Andreas Pico to the defendant Baker. What was that indebtedness? Mr. Baker although a man of vast business affairs, and keeping books of account, does not pretend to have now or to have ever had in his books any charge against Andreas Pico. He says something about the sheep of Andreas Pico having been pastured upon his, Baker's ranch sometime prior, or during the dry years of 1864-1865. There is no pretense that any amount was fixed upon to be charged, or that Baker ever had in his mind an intention to make any charge of a ~~Pacific~~ specific sum or amount for such pasturage. Next he speaks of having given a lawyer in San Francisco on some occasion, a fee of $500. He says that Andreas Pico and his brother had some litigation about property and that he desired to help him; that he came to San Francisco, and gave the lawyer in some place in the Montgomery Block $500. It is not stated in terms that the lawyer was paid that sum by Baker for or on account of Anders Pico; and if Mr. Baker were indicted for testifying falsely that he had

paidthat sum of money for and on account of Pico, his defense would be the ~~six~~ simplest in the world --- he would simply say he never testified to anything of the kind, and the record would bear him out .

Moreover Andreas Pico died in February 1876, almost a year and ahalf before the second deed was executed. It is admitted that Baker never presented any claim against his estate. Now , we ask in all seriousness, how can this court upon such evidence , make a finding that there was a valid and existing indebtedness from Andreas Pico to Baker on the 14th day of June 1877, and state and fix the amount of that indebtedness; or that ~~any~~ in consideration ~~for~~ of such indebtedness; that amount being fixed , Pico executed and delivered to Baker the deed of that date?

How can the Court possibly find that Andreas Pico was indebted to Robert S. Baker in any particular amount? It cannot so find If it were possible for the Court to except such ~~exixxen~~ evidence as satisfactory that there was a valid consideration moving Pico to the execution of the second deed other than that claimed by the plaintiff, and that the purpose of the second deed was to sell out and relinguish all his equities under the declaration of trust, then we should have the precise amount of the consideration of that deed stated and found; for , as said in Michoud v. Girod "if a trustee, though strictly honest, should buy for himself an "estate from his cestui que trust, and then should sell it fo r "more, according to the rules of a court of equity, from general "policy, and not from any peculiar imputation of fraud, he would be "held to remain a trustee to all intents and purposes, and not be " permitted to sell to or for himself". Baker clearly admitts and states that the purpose for which he sought the original conveyance

from Pico. The settlement of June 28th 1879 was in fulfillment of that purpose and Baker was enabled to make a more favorable settlement than he otherwise could by reason of having then vested in him the interest previously ~~xxtex~~ vested in Pico. Having no other valid mining interests than those derived under the Pico location ~~that~~ the amount received by Baker in consideration of the Pico interest is easily established. We repeat that ~~the court repeat that~~ the court cannot, upon the evidence, predicate a finding that there was a valid consideration for the second deed, or state the amount of that consideration. But if it could then Baker having sold the trust property for an excess of that amount he still remains trustee for the excess and there is no escape from his liability under the settled principles of equity enunciated in the authorities cited. But, it is said, that the deed of June 14th, on its face will be presumed to have been intended to opporate as a release of Pico's rights under the declaration of trusts. On the contrary, the presumption must necessarity be the opposite.--- that it was not so intended. The presumption as we have seen is not only constant, but violent against the suposition on an intent on the part of the cestui que trust to sell or convey his equity to the trustee. The deed only purports to convey the land and makes no allusion to Pico's rights under the declaration.

In the case of Loughborough vs. Loughborough 14 B. Mon. (Ky.) 550,-- (The opinion of the court is at Pp. 554-555) -- The head note, which correctly states the decision is as follows.

"By deed property was conveyed to a trustee, to be sold upon "such terms and in such manner as to realize the best price, and "the proceeds to pay the debts of the grantor in a prescribed order "and the surplus of the funds produced by the property hereby con-

"veyed shall be held in trust"for the grantor. Held that from the date of the deed there was a conversion of the realty into personalty. This case is applicable and suggests a line of authorities much considered in works on equity, where there is a conveyance in trust to sell and account for proceeds, or a contract to sell and a personal obligation is taken for the purchase ~~merely~~ money, equity will treat the land as converted into personalty from the date of the deed or contract.

The declaration of Baker was to account for proceeds. It was an express trust to hold and account for proceeds as such.

There appears to have been an idea in the minds of Counsel for defendants Baker, that if the trust was in the proceeds and not in the land, then the obligation would be resolved into a mere promise, to pay money, and the statute would run from the moment the proceeds were realized. Nothing of the kind however is the case. The trust in the proceeds was as much an express and confidental and continuing trust as if it existed in the land. In neither case would the statute be put into motion until the cestui que trust had full information and the trustee had repudiated and his trust relation and given explicit notice of such repudiation. Until then the beneficiary could repose in safety In the case at Bar there is no pretense that Pico had until long after Baker's letter of March 17th 1885, any notice or knowledge as to what, if anything, Baker had received for the sale of Pico's interest.

Under Sec.863 C.C. he had "no estate or interest in the property" after the execution of the first deed, but his rights were in the enforcements of the performance of the trust, and the fact that if Baker had refused to carry out the purposes of the trust, Pico could have compelled a reconveyance, does not change this principle.

In Gallager v. Pine 55 Cal. 94, where the owners of the fee conveyed the title upon trust that the grantee would sell and deliver to the grantor the portion of the proceeds of sale the court held that after such conveyance the second deed would be inoperative even to divest the grantors equity under the trust.

"The conveyance subsequently made by Barselisa Bernal and her "then husband, G. W. Frazer, to the defendant, of a portion of the "land, did not transfer any title, for after her conveyance to "Hoppe and Marvin, no title, either legal or equitable, remained "in her." x x x x x xx x x x "a failure on the part of Hoppe and "Burnett would give a right of action to Barselisa Bernal, if she "is entitled to the benefits of the covenants; but her deed to "the defendant of a portion of the lands did not vest in the latter "any estate in the land, either legal or equitable."

This is the only case that we have been able to find precisely in point. It decides in so many words that where the owner of land conveys the same in trust to be sold the proceeds of the sale or a part thereof to be delivered to the grantor by the grantee acting as trustee, from time to time as sales may be made, that there is no title legal or equitible left in the grantor to be operated upon by the second deed. That being so, after the first deed by Pico to Baker no equitable title remained in him to pass by the second deed.

The only theory upon which it can be held that the second deed operated to release Baker from his obligation ~~on~~ under his declaration of trust, is that there was an equitable title in Pico which passed by the second deed.

Gallagher vs. Pine, is an authority expressly in point that after the first deed, there was no equitable title to be conveyed.

if not, then, how can it be said that deed without refering to the declaration of trust operated to release Baker's obligation under that instrument?

Upon any theory of the case thus far advanced, when applied to the principles of law to which we have called the attention of the court the judgment must be in favor of the plaintiff.

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and [illegible]

Attys for Plaintiff