Cases Omitted in the Reports.

SMITH *v.* ORTON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

No. 80. December Term, 1865. — Decided January 15, 1866.

The grantee in a deed of realty, to whom it is conveyed to protect him against an obligation of the grantor's for which he has become surety, becomes the holder of the legal title in trust for the grantor, when the latter has discharged the obligation and thus released him from the liability.

An assignee of a chose in action takes it subject to the equities of the original debtor or obligor, and is bound to inquire into their existence when the instrument itself puts him upon the track of inquiry.

To bring a defence in a case like this within the rule which affords protection to a *bonâ fide* purchaser without notice, it must be averred in the plea or answer, and proved, that the conveyance was by deed, and that the vendor was seized of the legal title; that all the purchase money was paid, and paid before notice; and there must be a distinct denial of notice, not only before purchase, but also before payment.

The case is stated in the opinion of the court.

Mr. Justice Nelson delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the District of the State of Wisconsin, held by the district judge.

The bill was filed to secure the title in lots Nos. 7 and 8, section No. 9, situate in the City of Milwaukee, to Smith, the complainant, against the defendant Orton. The equitable interest in these lots belonged originally to Otis Hubbard, the legal title being in Cyrus D. Davis. The equitable interest in lots Nos. 5 and 6, in block 43, in said city, also belonged to Hubbard, the legal title being in persons in the States of New York and Massachusetts.

These lots Nos. 5 and 6 were sold by Hubbard, with the assistance of his friend T. D. Butler, to Joseph Schram; but as the legal title was not in him, it was agreed that the purchase money should not be paid until the title was obtained and conveyed to Schram, or satisfactory security given that it would be procured within a given time. Security was accordingly given by David Knab, a responsible person, in which Butler joined, and the purchase money was paid. In order to indemnify Knab, Hubbard procured a conveyance of lots 7 and 8 by Davis to him. The security

to Schram is in the form of a bond under seal, and bears date 22d July, 1848, and is conditioned to procure for him a conveyance of the title to the premises free from incumbrances within three months.

On the same 22d July, Knab gave a bond to Butler, conditioned for the conveyance of lots 7 and 8, which had been conveyed to him by Davis as his indemnity on his (Butler's) fulfilling the conditions of his obligation to Schram.

The conditions of the bond given to Schram to secure a conveyance of the title to lots 5 and 6, were fulfilled by Hubbard. Schram, in his examination, states: "I did receive from Otis Hubbard a deed of the lots described in the bond from Tertullus D. Butler, and David Knab to me. The lots were: twenty-five feet in lot 5, and ten feet in lot 6, in block 43," etc. "The deed," he says, "was executed in part by Hubbard for himself, and in part by him as attorney for others." We may add, these deeds were all found on record, several of them from persons holding the outstanding legal title to Hubbard, and also the deed from Hubbard to Schram, the latter bearing date July 4, 1850.

At this stage of the case, and upon the facts as stated, it is apparent that Hubbard, having satisfied the condition of the bond given by Knab and Butler to Schram, the title to lots 7 and 8 held by Knab, simply as a security against this bond, belonged in equity to him. Knab had no longer any interest in it, and must be regarded as holding in trust for Hubbard.

There is, however, another branch of this case that must be examined, and which calls in question this relation of Hubbard to the title, and asserts the title to be in Orton, the defendant.

On the 22d July, 1851, something more than a year after Hubbard had satisfied the bond to Schram, Butler sold and transferred the bond to him from Knab for the title to these lots 7 and 8 to Orton, for a consideration of $2100, as is alleged, to be paid by the latter; and accompanying the sale and transfer, is a power to Orton to "pursue all legal means to recover the full enjoyment of the same."

The defence in this branch of the case is placed on two grounds:

1. That Orton, the defendant, is a *bonâ fide* purchaser of the title in Knab without notice, and,

2. That Butler owned the title, having purchased it from Hubbard.

As to the first ground; the answer sets up this defence, as fol-

lows: the defendant avers that he purchased said bond so executed by Knab to Butler, for the sum of $2100, which he paid at or about the date of purchase, except a portion thereof which was expended in complying with the conditions of the bond to Schram; and that he caused said bond and assignment to be recorded; that at the time of the purchase, the title of record to said lots was in Knab; that this defendant did not know that said Hubbard had or claimed to have any right or interest therein; that after he purchased said bond, he satisfied some of the incumbrances upon said lots 5 and 6, and indemnified Schram against the remainder and procured from him an assignment of the bond of Butler and Knab, and tendered the same to Knab and demanded a conveyance, &c.

This averment in the answer, if admitted to be true, fails to bring the defence within the principle which affords protection to the title of a *bonâ fide* purchaser without notice; and this upon two grounds:

First. An assignee of a chose in action, to which class the bond in question belongs, takes it subject to all the equities of the original debtor or obligor. Now, Knab, who held a title to these lots at the time of this purchase of his bond by the defendant in trust for Hubbard, had a perfect defence against the claim of Butler, his obligee, for a conveyance. Butler had not complied with any one of the conditions of the bond. They were, in substance, that Butler should perform the conditions of the bond to Schram, and which were, as that instrument was drawn, that B. and K. should procure a conveyance of the title from the persons who held it, and who were named, residing in New York and Massachusetts, to themselves, and that they should convey it to Schram; whereas, no such conveyance had been procured nor any such title made to him. On the contrary, the title had been procured from these persons by Hubbard to himself, and he had made the title to Schram. Both these bonds were before Orton, the defendant, at the time he made the purchase of the one from Knab to Butler, for that refers in terms to the one given to Schram; and, being before him, it was not only his interest, but his duty, to inquire if the bond to Schram had been fulfilled, and to ascertain the truth of the transaction; and, in making that inquiry, he would have found that neither Knab nor Butler had performed the conditions, but Hubbard; and the records of the city would, if examined, have confirmed it. He would have learned, also, that the bond to Schram was given for the benefit of Hubbard, and that his trustee, Davis, had conveyed the title in question to

Knab, to indemnify him and Butler for entering into the obligation to Schram. All this he would have learned from Knab and Schram.

But, secondly, the rule which affords protection to a *bonâ fide* purchaser without notice, has no application to this case. To bring the defence within it, it must be averred in the plea or answer and proved, that the conveyance was by deed, and that the vendor was seised of the legal title: that all the purchase money was paid and paid before notice. There must not only be a distinct denial of notice before the purchase, but a denial of notice before payment. Even if the purchase money has been secured to be paid, yet if it be not, in fact, paid before notice, the plea of purchase for a valuable consideration will be overruled. *Jewett* v. *Palmer*, 7 Johns. Ch. 65; *Vattier* v. *Hinde*, 7 Pet. 252, 271; *Boone* v. *Chiles*, 10 Pet. 177, 211; Story, Eq. Pl. §§ 805, 806.

So utterly defective is the case on this branch of it on the part of the defendant, that it would be a waste of time to examine it.

The remaining question is, whether or not Butler had acquired the interest of Hubbard in these lots, so as to cut off his equitable claim to them.

Butler states, on his examination, that he made the purchase from Hubbard a short time before the conveyance of these lots from Davis to Knab; that it was a purchase by parol, no writing having passed between them; that he paid no money as a consideration for the land; that Hubbard owed him for money and merchandise previously received, to the amount of $800; that he had no vouchers from Hubbard of the advances, as they were generally made on his verbal order. He further states that part of his demand against Hubbard was for board of him at different times during the years from 1844 or 1845, to 1849 or 1850. He says he had regular account books where the items of charge against Hubbard during these years were entered, but that they are lost. He further states that he received a portion of the purchase money paid by Schram, some $200 or more, at the signing of the bond to him, which he held in trust for Hubbard, and afterwards paid it over to him as he wanted it.

The deed from Davis to Knab, the time when Butler claims to have acquired Hubbard's interest in these lots, bears date 20th July, 1848. Butler does not pretend any fixed price was agreed upon between the parties, or that any money was paid at the time or since, to Hubbard. The payment of this indefinite consideration

relied on, is the previous advance of moneys and merchandise resting in a running account and board, all within the years from 1844 or 1845 to 1849 or 1850. No items of money, merchandise, or board are given, for the reason as assigned, that the books are lost. This reason might be satisfactory for the want of fulness and detail in an account, but hardly sufficient for the entire absence of evidence of any of the items.

But the conclusive answer to the whole of this testimony is found in schedule "N" in the record, which embraces eight promissory notes given by Butler to Hubbard, extending from August, 1845, to May, 1850, and covering the period of time within which he claims that his account accrued against Hubbard. These notes amount, in the aggregate, to the sum of $1059. One of these notes for the sum of $300, payable one year from date, with ten per cent interest, was given the 22d July, 1848, the day Schram paid the purchase money for lots 5 and 6 to Hubbard, a part of which, as appears from the testimony of Butler, was received by him and paid to Hubbard soon afterwards, as he wanted it. The last note was given as late as May 11, 1850. These notes, unexplained, furnish conclusive evidence by necessary implication, that Hubbard was not indebted to Butler at the time they were given, and disprove the consideration set up by him for the purchase of Hubbard's interest.

Our conclusion, without further examination, is that Hubbard has not been divested of his equitable title to the premises which he held at the time of the conveyance from Davis to Knab.

This interest he conveyed to Joachim F. Gruenhagen on the 7th of June, 1851, from whom the complainant Smith derives his title. He stands in the place of Hubbard invested with his equitable interest.

It appears in the record that a bill was filed by Orton, the present defendant in the Circuit Court of the county of Milwaukee against Knab to compel him to convey the title held by him to these lots founded upon his bond, to Butler, which has been assigned to Orton; and such proceedings were had in the case, that a decree was rendered directing the conveyance. But as Smith, the present complainant, nor either of the persons from whom he derives title, were parties to that suit, these proceedings are of no importance.

It also appears that Hubbard filed a bill in the same court against Knab, Orton and Butler, to compel a conveyance from Knab, and

to quiet the title; but as this case was afterwards discontinued, it is not material further to refer to it.

Upon the whole, after the best consideration which we have been able to give the case, we are of opinion that the decree of the court below should be

Reversed and the cause remitted, with directions to enter a decree for the complainant Smith, and that Orton release all claim or interest to lots 7 and 8 in controversy, and be enjoined from setting up any right or title to the same.

Mr. James S. Brown for appellant. *Mr. H. S. Orton* and *Mr. E. Mariner* for appellee.

WASHINGTON COUNTY *v.* DURANT.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

No. 105. December Term, 1865. — Decided February 26, 1866.

An appeal allowed or a writ of error served is essential to the exercise of the appellate jurisdiction of this court.

The case is stated in the opinion.

Mr. Chief Justice Chase delivered the opinion of the court.

This cause was submitted on a printed argument for the defendant in error. Upon looking into the record, we find that it has been brought into this court by agreement of parties, and without the issuing or service of a writ of error. We think that an appeal allowed or a writ of error served, is essential to the exercise of the appellate jurisdiction of this court.

The appeal in this cause is therefore *Dismissed.*

Mr. Charles Mason for plaintiff in error. *Mr. James Grant* for defendant in error.

DAYTON, CLAIMANT OF THE SCHOONER MONTEREY AND CARGO *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 144. December Term, 1865. — Decided February 26, 1866.

A decree in admiralty for the condemnation of a vessel is not final if the libel claims the condemnation of the cargo as well, and the cargo has been delivered to the respondents at an appraised value, and the money deposited with the register.