

Cases Omitted in the Reports.

both in the court below and on appeal, without being held to have such control over both the preparation and argument of the cause, as to make the suit merely collusive in both courts. It can make no difference that the counsel fees were charged to the party apparently, though not really, liable to pay them, and payment from the other party procured through him. This, indeed, is a circumstance against the party who pays the fees, rather than in his favor.

The motion to vacate the decree of affirmance, heretofore made, and to dismiss the appeal must, therefore, be granted, and an order made to recall the mandate which has been issued to the Circuit Court. We take occasion, however, to say, that we see nothing in the conduct of the counsel who actually represented the company which merits blame, or which ought to affect in any degree the high esteem in which they have been held. Neither of them appears to have had any knowledge of any arrangements made by their client with the opposing party.

Motion granted.

Mr. J. S. Black for the motion. *Mr. Causten Browne* submitted an explanatory statement to the court.

WELCH *v.* BARNARD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 141. December Term, 1871. — Decided April 22, 1872.

The decree below rightfully denied to the parties their claim for rents and profits, and it is affirmed.

THE case is stated in the opinion.

MR. JUSTICE FIELD delivered the opinion of the court.

In 1837 one Thomas Barnard, a citizen of the State of Mississippi, filed a bill in the Circuit Court of the United States for the Eastern District of Arkansas, against Chester Ashley, Silas Craig and others, to obtain a decree for the cancellation of certain patents issued to them, and to quiet his title to certain real property in Arkansas, of which he claimed to be the owner and occupant.

In 1853, by a decree of the court rendered in that suit and in a cross-suit commenced by the defendants, the title to the property was adjudged to be in Silas Craig, and the heirs and executrix of Chester Ashley, he having died pending the suits; and the complainants were decreed to surrender possession of the premises, or

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such parts thereof as were occupied by them, and to pay the value of the rents and profits of such parts as were possessed and used by Barnwood or his heirs, he also having died pending the suits, after the conveyance of the property by the governor of the Territory to Craig and Ashley, until such parts were sold by them to other persons. And it was ordered that it be referred to a master in chancery, to take and state an account of such rents and profits, and to ascertain what portions, if any, of the property had been sold by Craig and Ashley to other persons; and the master was directed to exclude from the account the rents and profits of the portions thus sold, from the time of their sale.

This decree was affirmed by this court at the December Term, 1855, and the case was remanded for further proceedings to be had respecting the rents and profits.

Upon filing the mandate in the Circuit Court a reference was had to a master to examine and state an account of the rents and profits as directed by the decree. No report was made by him, or if made, was ever acted upon; and in consequence of the death of some of the parties, and proceedings taken to revive the suit, nothing appears to have been done with respect to the account ordered until 1869. The suits being then revived, a new master was appointed to take the account; and in 1868 he made his report, finding that the rents and profits of the property whilst possessed and enjoyed by the complainants, with interest, amounted on the 16th of April of that year to over eighteen thousand dollars.

He also reported that, as appeared by the answer and cross-bill of the defendants, Craig and Ashley, the lands, of which he had taken an account of the rents and profits, had been sold by them long anterior to the decree, and before any rent was proved to have accrued; and that no other evidence of sale was presented to him. As the decree only required an account to be taken of the rents and profits which had accrued previous to a sale by Craig and Ashley, the Circuit Court refused to confirm the report, and denied to the parties their claim for rents and profits; and in so ruling, in our judgment, ruled rightly.

Decree affirmed.

Mr. Watkins and Mr. U. M. Rose for appellants. *Mr. George Taylor* for appellees.