Lane, William Carr v. Ewing, William C. 1860 St. Louis 438/2

604/7
58/060
31 Mo 75

Demurrer to a pet

Lane (plaintiffs) app

Mary E Lane

land sold under execution

plaintiffs argue ~~court ruled~~ that she's entitled to said tract

court sustained demurrer

say he never had equitable right or interest to the tract of land

he just had barren legal title

he hadn't paid for tract but took it out of the trust of Mrs Lane

Napton rev & rem

Ewing

resp

brother

he bought land

he owes a one Dr. Lane as security for Madame Berthold

he ~~to~~ mortgages his land for some of that payment

he leaves on journey

written execution of remaining land to his sister Mary

all but 32 arpens

Page 1

State of Missouri }
County of St Louis } S.S.

Be it Remembered that on the Thirty first day of January in the year of our Lord One thousand eight hundred and fifty seven there was filed in the Office of the Clerk of the St Louis Land Court a Petition which petition is in the words and figures following, to wit:

Petition

William Carr Lane & his wife Mary E. Lane, Plaintiffs } St Louis County to wit:
v.
William L. Ewing, Defendant } In the St Louis Land Court.

March Term. 1857.

The plaintiffs, who sue in this behalf in the right and for the interests of the plaintiff Mary E. Lane wife of the said William Carr Lane, complain and state that they have resided for many years in the City of St Louis.

That the said W. C. Lane for a series of years next before the year 1838, had become the owner of a large amount of real estate, in the City of St Louis & in the County around & near the said City.

That the defendant William L. Ewing is the younger b(r)other of the plaintiff Mary E. Lane, and as such was nurtured and brought up chiefly in the family & under the protection of the plaintiffs.

Stricken out by Court, March 17th. 1857. C. A. Mantz, Ch.

That for several years next before the year 1842, the said William Carr Lane became embarrassed in his affairs, and unable promptly to pay his debts. That in order to secure his creditors against loss, & to gain time for a better settlement of his affairs, he gave liens & incumbrances upon various portions of his real estate; and among the rest the tract of land herein after described as containing thirty two arpens lying within the survey of the Commons of the City of St Louis.

That suits were brought against the said William Carr Lane by certain of his creditors, and judgments obtained against him, and executions issued on said judgments; in virtue of which executions the Sheriff of the County of St. Louis, advertised for sale a large quantity of the real estate of the said William Carr Lane, to be sold on the 21st day

of November 1842. and among the rest "a tract or parcel land in the County of St Louis, situate in the Commons of the City of St Louis, in Blocks Nos. 59, 60 & 68. of DeWards survey, containing 32 arpens - being the same tract of land which was conveyed by the Mayor, Aldermen & citizens of the City of St. Louis to William Carr Lane by deed dated May 27, 1836, recorded in Book X, page 5 & following" which said tract of thirty two arpens of land is sometimes called Vasquez tract, (because it was formerly claimed by a person of that name,) and is marked down & known by that name upon the map of the Commons of St Louis.

That on the said 21st day of November 1842, the said Sheriff did in fact offer at public sale to the highest bidder, a large amount & quantity of the real estate of the said William Carr Lane, consisting of the tract of 32 arpens of land, above described, and many other tracts & lots of land of the said W. C. Lane, situate in the County of St Louis. And at that Sheriff's sale the defendant became the purchaser of the* tract above described, of thirty two arpens, which is sometimes called the Vasquez tract, upon his last and highest bid, and for the price and sum of ten dollars, which was a price very far below the actual market value of the land. And the other lands purchased at that sale by the defendant, were also purchased by him at prices very far below their market value, the amount bid for the whole of said lands being only $131.50.

* said real estate, he being the highest and last bidder therefor, when the said tracts & lots of land were respectively offered for sale by the Sheriff. And especially the defendant then and there became the purchaser of the

And the reason why the defendant was enabled to purchase the said lands at those diminished prices, was, (as these plaintiffs are credibly informed and believe) that few or no persons bid against him, because those who would otherwise have bid for the lands and have run them up to much higher prices, declined to compete with the defendant in the purchase, induced thereto by the belief that the defendant was trying to purchase the said lands for the purpose of saving if possible, something from the wreck of said W. C. Lane's Estate, & of making a provision out of the lands for his sister, the plaintiff Mary E. Lane.

Stricken out by Court March 17th 1857. C. A. Mantz, Clk.

At the said sale he did purchase the said lands at very low prices, and afterwards, on or about the thirty first day of January 1843, the Sheriff of the County of St Louis did make to him a deed of of conveyance of the said lands (which is recorded in the Recorders office of St Louis County in Book G, No 3, page 64,) a copy of which will be

3 produced to the Court.

These plaintiffs do not charge that the defendant purchased the said Lands, as aforesaid, under any Specific Contract that he would hold them, in trust, either for the payments of the debts of the said Wm Carr Lane, or for the use of the said Mary E Lane, But they do charge, that, in point of fact, he did purchase them with that intent; that after the purchase he did frequently declare both to these plaintiffs and to other persons, that he held the said lands under the Sheriffs deed, only for the purposes of refunding to himself the money paid by him for the said lands and whatever advances he had made for the said Lane, and of paying the debts of the said Lane, for which he, the defendant, was in any way liable, and these objects being accomplished, for the use of the said Mary E. Lane his Sister,

And they do charge that after the making of the said Sheriffs deed, and for a number of years next following that time, he treated the said lands, not as his own estate, but as a trust fund in his hands, for the uses and purposes above expressed — by offering to sell portions of the said lands for the payment of the debts of the said Lane, and by exhibiting to the plaintiffs accounts of taxes, and other expenses, incident to the possession and management of said lands, as expenses chargable upon the trust fund in his hands,

And in this connexion, they allege, that on or about the 29th day of November 1847, the defendant being about to start from St Louis on a long journey, and in order to secure the rights of the said Mary E. Lane in case of his death, voluntarily made a memorandum and note in writing, signed by him with his name, in the presence of witnesses, which is recorded in the Recorders Office of St Louis County, and is herewith Exhibited, marked B, 2, and is of the substance & effect following, —

all the real estate (now remaining unsold) which was bought by me, as the property of Wm Carr Lane and conveyed to me by Sheriff Milburn by deed dated January 31, 1843, and recorded in the Recorders office of St Louis County, Missouri, on the 16th day of January 1844, Book G, & p 3 page 64, & following, to be conveyed by deed to Ann E. Lane, or any other trustee in trust for the following purposes — 1st to refund to me the entire purchase money which was paid for said lands, including the sums paid in purchasing liens on the same taxes &c,

4

2d to secure me and my heirs from all accountabilities on account of my security-ship for said Wm Carr Lane & my sister Mary E Lane wife of said Wm Carr Lane. —

3d All the remaining portions to be held in trust for the sole & seperate use of Mary E. Lane and to be disposed of and applied according to the written order of said Mary.

The plaintiffs further state that before the said sale by the Sheriff to the defendant, on or about the seventh day of August 1841. the said Wm. Carr Lane for the purpose of raising funds to pay off certain debts which were pressing him, borrowed from Madame Pelagie Berthold the sum of fifteen thousand dollars, and gave his note for the same, executed by himself and by the defendant William L. Ewing who kindly agreed to be his security for that large sum. At or about the same time and in order to secure the payment of the said note, these plaintiffs Wm Carr Lane & wife executed a deed of trust whereby they conveyed to John B. Sarpy and Peter A Berthold, as trustees for the security of the said debt, a large amount of real estate which is particularly described in said deed, but may be briefly stated here, thus. —

The North half of Block № 2 in the City of St Louis —

a lot in Block № 1 in said City, fronting fifty feet on Front Street —

Ninety six lots in suburbs St George, now within the City —

a lot of eleven acres and twenty three hundredths on Chouteau Avenue, now within the City. —

And the said tract of land of thirty two arpens in the City Commons, called the Vasquez tract.

This large debt to Madame Berthold remained unpaid for a number of years, and until the year 1848.

On or about the 30th day of July of that year, it was ascertained that there remained due upon the said note for principal and interest Twenty thousand dollars.

And it was thought desirable by the parties immediately interested that the trustees John B. Sarpy & Peter A. Berthold, should be relieved from the trouble of managing and selling the land for the payment of the debt, and that the defendant (who was previously liable for the debt as having executed the note along with Wm C. Lane) should have a larger control over the security fund,

and power to sell the lands, from time to time, as occasion might offer, to releive himself from liability, by paying the debt, in whole or in part. Thereupon the said trustees John B. Sarpy & Peter A. Berthold, by their deed bearing date the 30th of July 1848, conveyed to the said William L. Ewing all the real estate mentioned and described in the said deed of trust. This was done at the request of the said Pelagie Berthold, the creditor of Wm Carr Lane, the principal debtor and they executed the deed along with the trustees. But the said Mary E. Lane was not a party to the transaction.

Stricken out by leave of Court, March 17th 1857. Cecil Mantz, Clk.

After the making of this last mentioned deed, the said W. C. Lane was anxious to be relieved from the pressure of his debts, and with the hope of accomplishing that end, offered repeatedly, as far as he had power over the subject, to allow Madame Berthold to take the whole of the said real estate in absolute property in full payment of his indebtedness to her, and in like manner offered to let the defendant (who was nearly related to Madame Berthold as having married her daughter) take the whole of the said lands in said deed mentioned, which are the same lands mentioned in the aforesaid deed from the Sheriff to the defendant, in full satisfaction and discharge of said Lane's indebtedness to Madame Berthold. But both the said offers were declined.

Sometime after the making of the said deed of trust, with a view to the speedy payment of the debt & discharge of said W. C. Lane, a valuation of the lands was made by disinterested persons. (Messeurs Charless & Lebeaume). This valuation was in some particulars unsatisfactory to the said W. C. Lane.
He believed that some of the property was estimated quite too low, and he objected to making a partial sale of the land, at those low rates, but, for the sake of being fully discharged from the debt, he was willing and offered to the said Ewing that he, Ewing, should take the whole of the lands, and, at once, discharge said Lane from the debt. But said Ewing declined the offer.

Then the said Ewing, having the legal title vested in him, by the deed last aforesaid, and by the said Sheriff's deed: and being personally interested as being jointly bound with the said W. C. Lane in the said note to Madame Berthold, proceeded to execute the

trust first reposed in John B. Sarpy & Peter A. Berthold, by selling portions of the said lands, from time to time, as opportunity offered, and applying the proceeds towards the payment of the said debts.

And in doing this he frequently employed the agency and assistance of the said W. G. Lane, to negotiate sales of said lands, and settle the terms of conveyance, and then the said Ewing made the deeds of conveyance to the purchasers, & and received the proceeds & applied them to the purposes of his trust.

In this way the business went on until some time in the year 1849, when the said debt to Madame Berthold, principal & interest, was fully paid & extinguished by the said Ewing, out of the proceeds of the lands thus sold by him, as such trustee.

And the plaintiffs further state that by the same means, that is, the sale of the lands so held in trust by the said Ewing, all debts of these plaintiffs, or either of them, for which the Defendant was security or in any manner liable, to pay the same, were fully paid and satisfied; and all advances & outlays of money made by the defendant, either for the purchase of the said trust lands or any of them, or for the purchase or extinguishment of any encumbrance thereon, or for taxes, or other charges incident to the possession & management of the said lands, have also, by the same means, been fully paid & satisfied, the defendant having the money in his own hands & being his own paymaster.

The defendant being thus relieved from all liability on account of his securityship for these plaintiffs or either of them, and being fully paid & reimbursed all sums of money advanced by him on account of the said lands, in the year 1849, proceeded to execute the trust on which he held the said lands, as conveyed to him by the aforesaid deed from the Sheriff, and as the said trust is declared in the written memorandum of the defendant, of the 29th of November 1845, as above set forth. The demand for real estate being greatly increased and the market value thereof having advanced, it was not necessary, to raise the required amount of money, to sell off all the trust lands. Lands, considerable both in number and value remained unsold, in the hands of the defendant, and he in the year 1849, by divers deeds, conveyed to trustees for the sole & seperate use of the plaintiff Eleanor E. Lane, all of the said lands remaining unsold, except only the aforementioned tract of thirty two arpens of land, situate in the Common

7 of St Louis, & called the Vasquez tract.
That tract has never been sold by the defendant for any trust purposes; but these plaintiffs now understand that he claims the same, as his own property, free from the trust, in favor of the plaintiff Mary E. Lane.

As to that tract, the plaintiffs say that it stands precisely in the condition of the other unsold tracts & lots which were conveyed by the defendant to the trustees of the plaintiff Mary E. Lane in the year 1849. And not otherwise.

Stricken out by Court, March 17th 1857. C. A. Mentz Ch.

Before the full payment of Mrs Bertholds debt, and while the defendant held the said tract both in trust for Mrs Berthold's debt and in residuary trust for the use of the Plaintiff Mary E. Lane, the defendant more than once expressed a wish to own the same, as his private property, & to improve it & reside there, and the plaintiff W. C. Lane gave his free consent, that he, the defendant, should take it, at a moderate even a low price. For a short time the said W. C. Lane believed that the defendant had determined to take the said tract & pay a low price for it, and believed that he had actually done so, by paying off a debt of the said Lane for about Twenty five hundred or three thousand Dollars, and that nothing remained to be done to perfect the arrangement, but to make the necessary deed to convey to him the interest of the said Mary E. Lane. But that was a mistake of the said W. C. Lane.

He soon ascertained that the said Ewing had not paid any thing for the purchase of the said tract of land so as to take it out of the trust in favor of the plaintiff Mary E. Lane, as certainly he had not made any specific contract with these plaintiffs or either of them, for the purchase thereof, down to the time when he conveyed the other unsold lands to the trustees of the said Mary E Lane in the year 1849.

At that time he had nothing but the barren legal title to the said tract of land, while the equitable right & interest therein belonged to the plaintiff Mary E. Lane.

Since that time, no contract has been made with him by these plaintiffs or either of them, for the sale or transfer of the right to him; and if since that time, he have paid any money on account of said tract of land, these plaintiffs are ready & willing to allow & pay to him whatever shall be found to be reasonable and just on that account.

8

These plaintiffs further state, that the said Wm Carr Lane, ever since the date of the said deed of the Sheriff to the defendant, has not claimed & does not claim now, any right or interest personal to himself, in any of the lands embraced in the said Sheriffs deed.

While his debts for which they were bound remained unpaid, he claimed that they should be applied to the payment thereof – no farther.

These plaintiffs state that the said Mary E. Lane is in equity & good conscience, entitled to have the use and enjoyment of the said tract of land, called the Vasquez tract; as the same is above described; that the defendant denies her right and refuses to allow her to have & enjoy the same; that he pretends that it is his own property, and applies it to his own use, and refuses to convey it, as he did the other unsold lands of his trust, to trustees for the use of the said Mary E. Lane.

All of which acts, doings & refusals of the defendant are unjust and wrong.

Wherefore they pray that the Court will be pleased, by such judgment & decree as it shall find proper, to ascertain, determine, & declare, that the plaintiff Mary E. Lane is entitled to the use profit & enjoyment of the said tract of land; and to cause the title to the said tract of land to pass & be vested in some suitable trustee or trustees, to be held for the seperate use of the said Mary E. Lane and her heirs and assigns, and a judgment for costs of suit.

by atty Edwd Bates

St Louis County, to wit

William Carr Lane being duly sworn says, that he is one of the plaintiffs named in the above petition, that he believes the matters therein stated are true,

Wm Carr Lane.

Sworn to & subscribed before me this 31st day of January 1857

C. A. McMantz, Clk

Upon the filing of the above petition the Clerk then issued to the Sheriff of St Louis County, a Summons, in the words and figures following to wit;

Summons

County of St. Louis, S.

The State of Missouri;

To the Sheriff of St Louis County. . . . Greeting;

9

We command you to summon William L. Ewing to appear before the Judge of our St Louis Land Court, on the first day of the next term thereof, to be held in the City of St Louis, within and for the County of St Louis, on the second Monday of March next, then and there to answer the complaint of William Carr Lane & his wife Mary E. Lane, as set forth in the annexed petition; and have you then and there this writ:

Witness, Charles A. Mantz, Clerk of our said Court with the seal thereof hereto affixed, at Office in the City of St Louis, this Thirty first day of January in the year of our Lord eighteen hundred and fifty seven.

Seal

C. A. Mantz, Clerk.

Upon which Summons the Sheriff made his return in words and figures as follows, to wit;

Sh'ffs Return

Executed this Writ in the County of Saint Louis February 2d 1857 by delivering a copy of the same with the petition as furnished by the Clerk to William L. Ewing the defendant.

James Castello. Sheriff

By Thos Chadbourne Deputy,

And afterwards the following proceedings were had in this cause, to wit:

March Term. 1857.

Wednesday March 11th 1857.

Mo to Strike out pts of Pet'n filed.

William Carr Lane & his wife Mary E. Lane

vs

William L. Ewing

} Motion of Defendant to strike out parts of the Plaintiffs petition

filed in this cause,

Which Motion is in the words and figures following, to wit;

Mo to Strike out parts of Pet'n

William Carr Lane & Mary E. Lane his wife,

Plaintiffs.

against

William L. Ewing,

Defendant

} In the Land Court St Louis County, Missouri,

The defts by Glover & Richardson their attys moves the Court to strike out of the plaintiffs petition, all that portion of the said petition

in the words & figures following. viz.
" That the defendant William L Ewing is the younger brother of the plaintiff Mary E. Lane and as such was nurtured & brought up cheifly in the family and under the protection of the plaintiffs "
because the same is redundant and irrelevant, is neither a cause of action nor an aid to any cause of action; is not pleading but evidence only if any thing.

And also to strike out of the said petition all that portion in the words & figures following viz —

" and the reason why the deft was enabled to purchase the said lands at these diminished prices was as the plaintiffs were credibly informed & believe that few or no persons bid against him because those who would otherwise have bid against him for the lands and have run them up to much higher prices declined to compete with deft in the purchase induced thereto by the belief that the defendant was trying to purchase the said lands for the purpose of saving if possible something from the wreck of said W. C. Lane's Estate & of making a provision out of the lands for his sister the plaintiff Mary E. Lane."
because the same is redundant and irrelevant is neither a cause of action nor an aid to a cause of action.

Also to strike out of said petition all that portion in the words & figures following viz. —

" after making the last mentioned deed Lane was anxious to be relieved from the pressure of his debts & with the hope of accomplishing that end offered repeatedly as far as he had power over the subject to allow Madam Berthold to take the whole of said real estate in absolute property in full payment of his indebtedness to her and in like manner offered to let the defendant who was nearly related to Madam Berthold as having married her daughter take the whole of said lands in said deed mentioned which are the same lands mentioned in the aforesaid deed of the Sheriff to the defendant in full satisfaction & in discharge of said Lanes indebtedness to Madam Berthold but both said offers were declined. Sometime after making of the said deed of trust and with a view to the speedy payment of the debt and discharge of the said W. C. Lane, a valuation of the lands was made by disinterested persons Mess Charless & Labaume. This valuation was in some parti-

11

culars unsatisfactory to the said, W. C. Lane. He believed that some of the property was estimated quite too low, and he objected to making a partial sale of the lands at those low rates; but for the sake of being fully discharged from the debt he was willing and offered to the said Ewing that he Ewing should take the whole of the lands and at once discharge said Lane from the debt. But said Ewing declined the offer."

Because the same is redundant and irrelevant, is neither a cause of action nor an aid to one.—

Also to strike out of said petition the portion thereof in words & figures following to wit—

"Before the full payment of Mrs Berthold's debt

"And while the defts held the said track both in trust for Mrs Berthold and in residuary trust for the use of the plaintiff Mary E. Lane, the defendant more than once expressed a wish to own the same as his private property and to improve it and reside there and the plaintiff W. C. Lane gave his full consent that he the defendant should take it at a moderate even & low price. For a short time the said W. C. Lane believed that the defts had determined to take the said track and pay a low price for it and believed that he had actually done so by paying off a debt of the said Lane for about Twenty five hundred or three thousand dollars and that nothing remained to perfect the arrangement but to make the necessary deed to convey to him the interest of the said Mary E. Lane. But that was a mistake of the said W. C. Lane. He soon ascertained that the said Ewing had not paid any thing for the purchase of the said land so as to take it out of the trust in favor of the plaintiff Mary E. Lane, as certainly he had not made any specific contract with these plaintiffs or either of them for the purchase thereof down to the time when he conveyed the other unsold lands to the trustees of the said Mary E. Lane in the year 1874. At that time he had nothing but the barren legal title to the said track of land while the equitable rights and interests therein belonged to the plaintiff Mary E. Lane. Since that time no contract has been made with him by these plffs or either of them for the sale or transfer of the rights to him"

because the same is redundant and irrelevant is neither a cause of action nor an aid to a cause.

Also to strike out all that portion of said petition which is in the words & figures following viz.—

12 "But they do charge that in point of fact he did purchase them with that intent that after the purchase he did frequently declare both to these plaintiffs and to other persons that he held the said lands under Sheriffs deed only for the purpose of refunding to himself the money paid by him for the said lands and whatever advances he had made for said Lane and of paying the debts of said Lane for which he the Deft was in any way liable and these objects being accomplished for the use of the said Mary E. Lane his sister and they do charge that after the making of the said Sheriff's deed and for a number of years next following that time he treated the said lands not as his own estate but as a trust fund in his hands for the uses & purposes above expressed by offering to sell portions of said lands for the payment of the debts of the said Lane and by exhibiting to the plaintiffs accounts of taxes & other expenses incident to the possession and the management of said lands as expenses chargable upon the trust fund in his hands"

Because the same is redundant and irrelevant & if anything at all to the cause is evidence only.

Glover & Richardson for deft.

And afterwards the following further proceedings, were had in this cause, to wit:

Saturday March 14th 1857.

Mo. to strike out parts of Petn. submitted

William Carr Lane and Mary E. Lane, his wife
vs.
William L. Ewing

Now at this day come said parties by their respective attorneys. and submit to the Court, the motion of the Defendant, hereinbefore filed, to strike out parts of the plaintiff's petition, and the Court having heard, and not being fully advised of and concerning the premises takes time to consider thereon,

And afterwards the following further proceedings, were had in this cause, to wit;

Tuesday March 17th 1857

Mo. to strike out &c sustd.

William Carr Lane & his wife Mary E. Lane
vs
William L. Ewing

Now at this day the Court having heard and being fully advised of and concerning the motion hereinbefore submitted in this cause, to strike out parts of Plaintiff's petition,

13 doth order and adjudge that said motion be sustained,

And afterwards the following further proceedings, were had in this cause, to wit;

Saturday March 21st 1857.

Demurr. filed

William Carr Lane &
his wife Mary E. Lane
vs.
William L. Ewing

Demurrer to Plaintiffs Petition filed in this cause,

Which Demurrer is in the words and figures following, to wit;

Demurrer,

William Carr Lane &
Mary E. Lane, Plaintiffs
vs.
William L. Ewing, Defendant

In Land Court
St Louis County Mo.
March T. 1857.

And now at this day comes the defts by Glover & Richardson his attorneys and says that the Plaintiffs petition and the matters and things therein contained are not sufficient to maintain the action and said defendant sets down and assigns the following cause of demurrer, to wit.

1. The facts stated in said petition (is) insufficient to establish any trust or agreement which equity will enforce,

2. The facts stated do not establish any trust whatever; nor any covenant or promise to establish a trust which the Court will decree the execution of,

3. There is no valuable consideration shown for the alledged written promise or declaration to establish the alledged trust,

4. There is no meritorious consideration shown for the alledged written promise or declaration to establish the alledged trust,

5. There is no consideration valuable or meritorious, for the verbal promises or declarations of intention mentioned in said petition or any of them,

4 6. The scope of the bill is simply this, that of his own volun-
tary motion deft bought the property in the bill mentioned with
his own money, there being no agreement with plffs or either of them
+ to do so — that in his own breast there was no intention of deft
to secure the said property to the plffs or so much as might be left
after paying certain debts and refunding defts advances, —
that this intention was afterwards put into writing and often
expressed verbally by deft and that deft has performed and car-
ried out these promises & declarations in part, & refuses to carry
them out in relation to the property now in dispute,
And all this shows no cause of action.

7. The said petition does not state facts enough to make
a cause of action.

Glover & Richardson, for the defts

And afterwards the following further proceedings, were
had in this cause, to wit;

October Term 1857.
Tuesday December 22nd. 1857

Demurrer Submitted

William Carr Lane &
his wife Mary E. Lane,
vs.
William L. Ewing.

Now at this day come said parties by
their respective attorneys, and submit
to the Court, the Demurrer hereinbefore
filed in this cause, and the Court hav-
ing heard the argument of Counsel, and not being fully advised of
and concerning the premises, takes time to consider thereon.

And afterwards the following further proceedings were
had in this cause, to wit:

Tuesday December 29th 1857

Demurr. Sust'd. 10 days from Jan 4. 1858. given to Am'd Pet'n

William Carr Lane &
his wife Mary E. Lane
vs
William L. Ewing

Now at this day, the Court being fully
advised of and concerning the Demurrer
heretofore submitted in this cause, doth
order and adjudge that said Demurrer
be sustained, and that ten days time from January 4th 1858
be granted Plaintiffs to amend their petition

15

And afterwards the following further proceedings were had in this cause. to wit:

Monday January 11th 1858

Judgmt on Demur

William Carr Lane &
his wife Mary E. Lane
vs
William L. Ewing

Judgment

Now at this day, the Court having heretofore sustained the Demurrer to the plaintiffs petition, and the Plaintiffs herein not having filed herein an amended petition, and declining so to do. It is ordered and adjudged by the Court, that the Plaintiffs take nothing by their suit, but that the defendant go hence without day, and recover of said Plaintiffs his costs and charges herein expended, and have execution therefor.

And afterwards the following further proceedings were had in this cause. to wit:

Wednesday January 13th 1858.

Mot for Apl filed,

Apl granted

William Carr Lane &
his wife Mary E Lane
vs
William L. Ewing

Appeal to the Supreme Court.

Now at this day come said Plaintiffs by their attorney, and file herein their affidavit for an appeal, and on their motion an appeal is granted them to the Supreme Court of the State of Missouri, from the decision herein rendered.

Which Affidavit for Appeal is in words and figures as follows, to wit:

Mot for Appeal.

Wm Carr Lane & Mary E his wife
vs
William L. Ewing

In the St Louis Land Court.

And now at this day, the Plaintiffs make their appeal to the Supreme Court, from the judgment of this Court, sustaining the Demurrer of the defendant to the petition of the plaintiffs, and dismissing the said petition.

And Wm. Carr Lane, one of the said plaintiffs, makes oath & says that the appeal in this case is not made for vexation or delay, but because the affiant believes the appellants are aggrieved by the judgment of the Court.

Sworn to and subscribed before me this 13th day of January 1858.
C. A. Mauntz, Clk

Wm. Carr Lane.

State of Missouri
County of St Louis } SS.

I, Charles A. Mantz, Clerk of the St Louis Land Court, within and for said County, certify the foregoing Transcript to be a true and correct copy of the Record and proceedings had (as required) in the case of William Carr Lane & his wife Mary E. Lane, plaintiffs, and William L. Ewing, defendant, as fully as the same remains of Record in my office.

In Testimony, Whereof, I hereto set my hand and affix the seal of our said St Louis Land Court, at office in the city of St Louis, this Fifteenth day of January, A. D. 1858.

Charles A. Mantz, Clerk.

Index

Petition	Page.	1 to 8. inclusive.
Summons & Sheff's Return.	"	8 & 9.
Mo" to Strike out Parts of Petn filed.	"	9.
" " " " " " " "	"	9 to 12 in.
" " " " " " " submitted.	"	12.
" " " " " " " Sust'd.	"	12 & 13.
Demurrer filed. & Demurr.	"	13 & 14.
" Sub. Dem" Sust'd & 10 days &c given to Am. Petn.	"	14.
Judgm't on Demurr.	"	15.
Mot. for Appeal filed & Bd. granted.	"	15.
" " " .	"	15.

67

October T. 1859

William Carr Lane & wife. appls

vs.

William C. Ewing res.

Land Court.

Ed Bates for Peff.

S. T. Glover for Deft.

Filed 27th Feby 1858.
Wm S. Glanville,
Ck.

This Transcript $10 92½ Pd by Peff. 67

Assigt Mt. 58/ stol. & argument for res/ motion to adj. adjourned over/ submitted/ order for reorg./ continued for reorg/ submitted/

Received & remanded, 15 Dec. 1860, C. J. 105

William Carr Lane
& Mary E. his wife - Pltffs
vs
William F. Ewing deft

In the Supreme Court
March Term 1858.

On appeal from the St Louis Land Court,

And the said Wm Carr Lane & Mary E his wife come here into the Supreme Court, and say that in the record & proceedings aforesaid & in the rendition of the judgment aforesaid, the said St Louis Land Court has done manifest error, to the great damage of these plaintiffs. And for an assignment of errors, they set down & shew to the Court here the following:

1. The said Land Court gave judgment in the said action against these plaintiffs & in favor of the defendants, whereas, by law, judgment ought to have been given in favor these plaintiffs against the defendant.

2. The said Land Court, sustained the demurrer of the defendant to the petition of the plaintiffs & dismissed the petition, whereas, by law, the demurrer ought to have been overruled, & the petition sustained.

All which they are ready to verify, wherefore, for the errors aforesaid, & other errors apparent in the record, they pray that the said judgment of the Land Court be reversed &c And that they be restored &c

Edw. Bates

There is no error in the record
S T L A D Glover
for deft

67 D34

In the Supreme Court
March Term 1858

Wm Carr Lane Wife

v

William L. Ewing & a.

Assignment of Errors.

Filed 15 March 1858
Wm S Glenville
Clk.

Lane & wife Pltffs

vs

Ewing Deft

W Bates may take up this case at any time he pleases whether I am in court or not my brief is on file,

S T Glover

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Lane
v.
Ewing

Mr Glory Company

Agreement to take up
canoe at option of
Frage Bates.

Filed 26 March 1859.
Wm J Granville
Cl.

William Carr Lane & his wife Mary E. Lane
v.
William L. Ewing.

In Supreme Court
March Term 1859.

Appeal from the St Louis Land Court.

This is a suit in Equity, to enforce a trust in certain lands held by the defendant, in favor of the plaintiff Mary E. Lane, her husband, Wm Carr Lane being joined only as a formal party.

The substance of the petition is to this effect—

That Wm Carr Lane, the husband, was the owner of various & valuable real estate in the County of St. Louis:

That for several years next before 1842, the said Wm Carr Lane became embarraged in his circumstances, owing divers debts which he could not promptly pay:

That in order to secure his creditors, he gave liens & incumbrances upon various of his real estate, and among the rest, the tract of land in question, being 32 arpens, within the survey of the Commons of St. Louis:

That certain of W.C. Lane's creditors brought suits against him, got judgments and sued out executions, under which executions a large quantity of said real estate was sold by the sheriff, to the defendant and among which property so sold to defendant, was the said tract of 32 arpens

That the lands encumbered with heavy debts sold for very little – The tract in question being bid off for $10.- and the aggregate sum bid for all the lands being $131.50. The sheriff's sale was made on the 31st of November 1842 – the sheriff's deed on the 31st of January 1843.

That the Defendant purchased said lands at sheriff's sale without any specific contract that he would hold them in trust, but, in fact with the intent so to hold them; and that after the purchase, he often declared that he did hold them in trust; and that for a number of years following, he did treat the said lands, not as his own estate, but as a trust fund for the uses and purposes specified in the petition – and in this connexion

That on the 29th of November 1847, the defendant made and signed a written declaration of trust [which was duly proven & recorded] whereby he declared, as to all the said lands then remaining unsold, that he did hold them in trust – "for the following purposes 1st to refund to me the entire purchase money which was paid for said lands, including the sums paid in purchasing liens on the same, taxes &c – 2nd – to secure me & my heirs from all accountability on account of my securityship for said Wm Carr Lane, & my my sister Mary E. Lane, wife of said Wm Carr Lane – 3rd all the remaining portion to be held in trust for the sole & separate use of the said Mary E. Lane, & to be

disposed of and applied, according to the written orders of the said Marg."

That before the said Sheriff's sale to defendant, on or about the 7th of August 1841, Wm Carr Lane borrowed $15.000. from Madame Berthold to pay off certain Debts, and gave his note for the same, with the defendant as his security And, to secure the same, gave a deed of trust to John B. Sarpy & P. A Berthold for a large quantity of real estate, & among the rest, for the tract of land in question. That the debt remained unpaid for several years, and until, in July 1848, there was due, for principal & interest, $20.000. - And then it was thought best by the parties immediately interested, that, as the defendant was liable on the note, he ought to have a more direct control over the trust fund, in order the better to secure himself: and accordingly, on the 30th of July 1848, a deed of assignment was executed by J.B. Sarpy & P.A. Berthold, the trustees, & Pelagie Berthold, the creditor & Wm Carr Lane, the principal debtor, whereby was conveyed to the defendant, Wm L. Ewing, all the titles, powers, and duties in & in relation to the said Lands (including the tract in question) which had been vested in the said J.B. Sarpy & P.A. Berthold, by the said deed of trust to them.

That Ewing, acting as a trustee & treating the lands as a

as a trust fund, proceeding to execute the trust, sold portions of the land from time to time, & applied the proceeds to the payment of the debt, until, sometime in the year 1849, the debt to Madᵉ Berthold, principal and interest, was fully paid and extinguished.

That in the same manner, that is by the sale of lands so held in trust by the said Ewing, all debts of the plaintiffs or either of them, for which the defendant was security or in any manner liable, were fully paid and satisfied; and all advances & outlays of money, made by the defendant, either for the purchase of the said trust lands or any of them, or for the purchase or extinguishment of any liens or incumbrances thereon, or for taxes or other charges incident to the possession or management of the said lands, have also, by the same means, been fully paid and satisfied.

That the debts for the payment of which the said lands were held in trust being all paid, and the defendant being thus relieved from all liability on account of his securityship for the plaintiffs or either of them, and being fully paid and refunded all sums of money advanced by him, on account of said lands, he the defendant, in the year 1849, proceeded to execute the trust on which he held the said lands, as conveyed to him by the aforesaid

by the aforesaid deed from the sheriff, and as the said trust is declared in the written memorandum of the defendant, of the 29th of November 1847. In consequence of the rapid rise of prices, it was not necessary to sell all the trust lands in order to pay the debts, but lands considerable in number and value, remained unsold, in the hands of the said trustee, the land in question being one of the parcels so remaining. And the Defendant, as such trustee, by divers deeds, executed in the year 1849, conveyed to trustees, for the sole and separate use of the plaintiff Mary E. Lane, all of the lands so remaining unsold, except only the afore-mentioned tract of thirty two (32) arpens, situate in the Commons of St. Louis, & called the Vasquez tract. And that tract stands precisely upon the footing of the other tracts, and ought to have been conveyed in like manner.

That Mary E. Lane is, in equity & good conscience, Entitled to have the use & enjoyment of the said land:

That the Defendant denies her right, & refuses to allow here to have and enjoy the same: that he pretends that it is his own property, and applies it to his own use, and refuses to convey it, as he did the other unsold lands of his trust, to trustees for the use of the said Mary E. Lane.

(over.)

The Prayer is - to ascertain & determine that the plaintiff Mary E. Lane, is entitled to the use, profit and enjoyment of the said tract of land, and to cause the title to be vested in some suitable trustee, for her use.

To this petition there was a Demurrer, stating specific points, but substantially, for want of Equity.

The demurrer was sustained, and the Plaintiffs bring the case here by appeal.

Supreme Court. March T. 1859

no ~~19~~ 67

Wm Carr Lane & wife

&

Wm L. Ewing

Statement of the Case by Pltff.
E Bates atty.

Filed 15 Dec. 1859.
Wm S. Glanville
Ck.

Wm Carr Lane & wife
v
Wm L. Ewing

No 19. Supr Court
March Term 1859.

Gov. Bates for the Pltffs:

The defendant in his written brief on file, misconceives the nature & object of this suit, in several particulars —

1. He assumes that it is a suit for the specific performance of a contract, admitted or proven, instead of leaving the party to recover a compensation for the breach of the contract in some legal way.

This is an entire mistake, both as to the form & the effect of the cause of action set forth in the petition.

If it were merely a case for specific performance, then the defendant might invoke the Chancery doctrine, that it lies in the discretion of the court, whether to enforce specific performance of the contract, or leave the aggrieved party to recover a compensation in damages.

2. He assumes that it is an executory and not an executed trust, and so, needs a valuable consideration to support it.

This again is a mistake. A trust is completed or executed whenever no further act is needful to be done to make one party a trustee for the other. It is executory when the act out of which the trust is supposed to arise

is inchoate, so that no trust, in reality, exists, without some further act to be done. But the further act being done, it is no longer an executory trust, but executed & complete. But if the further act be not done, then there is, in reality, no trust — nothing to bind the conscience of the party — Then, and then only, comes the necessity for a valuable consideration, which does bind the conscience of the party, — and create a trust, on the same principle precisely, as when A. buys land with the money of B. a trust is created in favor of the owner of the money — and this is an executed not an executory trust, for it needs no further act to make it perfect, as a trust.

The trust is one thing; the property held in trust another; and the validity & binding force of the trust is independent of the nature of the property, & the quality of the title by which it is held, whether legal or equitable.

Hill on T.ees p120–1

A trust executed is always binding upon the trustee, and the Courts will enforce it: A trust Executory, ought not to be called a trust at all, for the Courts will not enforce it.

The Defendants Counsel (& I fear, the Court below) goes upon the erroneous idea that this suit is brought to get the Court, by implication, to raise an interest — or to create a trust in our favor, when no such interest was raised, nor such trust created by the terms of the transaction.

That is a mistake. We do not ask the court to make either an interest or a trust for us. We only ask to enforce

a trust expressly declared by the party; & under which he acted for years, receiving & paying out money according to the terms of his declaration of trust, & paying back to himself all his outlays on account of the trust estate.

And this estops him from denying the trust,

see 23. Mo R. 168. Yutzwiles v Lakenau

That this was the erroneous view of the court below seems very plain from the cases cited on that side — for instance, 1. J.C.R. 329 Burn vs Winthrop. — The chancellor quotes & adopts the language of Ld Eldon (in 6. Ves. 662. Ellison v Ellison)

"If you want the assistance of Chancery to raise an interest by way of trust, on a covenant or executory agreement, you must have a valuable or meritorious consideration; for the Court will not constitute you a cestui que trust when you are a mere volunteer, & the claim rests in covenant, as a covenant to transfer stock, &c"

This may suffice in reply to the ground taken by the Defendant, both in this court & the court below.

The plaintiffs, affirmatively, take the following Points.

First. The Demurrer admits all the facts of the petition, & those facts show clearly the relation of truster & cestui que trust between the Defendant & his sister, Mrs Lane, as to this land.

They shew it in several ways, and

1. Under the circumstances, it was a trust, from the date of his purchase at Sheriffs sale – Nov. 21. 1842 – Lane, the defendant in execution, was his brother in law; the land was encumbered by a previous deed of trust, made to secure a large debt due to his mother in law, Mrs Berthold, for which he himself was personal security; he bid off the land for only $10: he bid off the land without any specific contract to hold it in trust, but in fact with the intent so to hold it, & often afterwards declared that he did so hold it; he treated it for years, as trust property, charging to Lane the expenses of its management; he accepted an assignment of the previous deed of trust, in order to enable him the better to execute the trusts reposed in him; he did execute the trusts (employing W.C. Lane to help him) as to all the lands except only this one piece; & he did receive back every cent that he ever paid for the purchase of said lands and all other expenses incident to the management thereof.

With all these facts admitted by the demurrer, he now denies his trusteeship, & boldly claims the land as his own, without ever having paid a dollar for it!

Under these circumstances, it is not perceived upon what principles of justice & good faith he can now claim this land.

2. Having acquired W.C. Lane's equity of redemption in this land (& various other tracts) by the Sheriffs deeds of Jan. 31. 1843. he did on the 29th of November 1847, make a formal declaration of

trust, in writing, signed with his name in the presence of witnesses (which was afterwards only proved & recorded) whereby he declared all said lands then remaining unsold to be trust-property, for specified purposes — 1st to refund to him all he had paid as purchase money for said lands & buying in liens on the same, taxes &c — 2nd to secure him and his heirs against accountability as security for W.C. Lane & Mary E. Lane, his own sister — & 3rd "all the remaining portion to be held in trust for the sole & separate use of the said Mary E. Lane, to be disposed of & applied according to the written orders of the said Mary."

That is a direct declaration of trust, plain & simple, leaving nothing to inference or implication — It is a complete executed trust. It is not a gift nor a conveyance, nor a covenant, requiring the aid of Chancery "to raise an interest" or "imply a trust." All terms & conditions are specially set down, and the declarant himself is preferred above all; for, first of all, he is to be fully refunded all monies advanced, & fully protected against his securityship for his sister & her husband.

All that has been done; and yet, without a dollar out of pocket, he still denies his trusteeship, for no better reason that I can see, than that the land has greatly increased in value.

In support of the views above expressed I refer chiefly to Hill's Treatise

Treatise on Trustees, supposing that to be one of the best. —

Hill on Trustees p. 113

Volunteers. — "It has long been an established principle with courts of equity that they will not interpose to perfect the title of a party claiming merely as a volunteer. Therefore if the transaction on which the volunteer trust is attempted to be established, be still executory & incomplete, the court will decline to interpose"

And see the notes.

What is Executory & incomplete?

The text speaks of cases in which a trust is implied from a conveyance. And if the conveyance be incomplete, then there is no ground for the implication of a trust.

p. 115. Hill says "In all these cases, the court has considered the gift to be incomplete; & has refused to enforce it (the gift) as a trust, against the parties who made it.

Executed trust — what?

Hill p.p. 117 — 122. A formal declaration of trust, by deed or letter is an executed trust — that is, a trust actually created.

Hill cites numerous authorities, & dilates through several pages.

The case Ex Parte Pye, 18. Vez: 149 is a leading case, cited in all the later books.

Lewin p. 110 Lewin on trusts (12. L.L. p 56) is substantially the same as Hill.

L.P. Hanly Conv (2nd Ed) Vol 4. Sec: 61.

4. K. 6. 303. The trust is regarded as the lands, & the Declaration of trust as the disposition of the lands.

Trusts Executed & executory

Ib. 304-5- A letter acknowledging the trust will be sufficient to establish the existence of it.

Resulting trusts

H. 306- "The mere want of a valuable consideration will not of itself & without any auxiliary circumstances, create a resulting trust."

Substantial justice

Ib. p. 307. "Courts of equity will regard & enforce trusts in a variety of other cases, where substantial justice & the rights of third persons are concerned."

Covenant to stand Seized.

I premise that this covenant does not, in terms, create a trust, but only a legal obligation, the breach of which may be compensated in damages.

But the Courts, in furtherance of substantial justice, do, habitually, imply or infer a trust in such case, and that for the purpose of bringing the subject within the jurisdiction of Chancery & subjecting it to be treated according to the rules of Equity.

1. Co: Lit: 112. a.

And Coke informs us that the trust being thus established, the Statute of uses would execute the use; so that the covenant to stand seized &c would amount to a conveyance, & operate an estate in possession.

As to voluntary deeds.

See 2. Coup: R. 705. Watson v. Rutledge –

As to same & implied trusts –

See 3. Ld: Campbell's Lives of the Chancellors, in vit: Nottingham. p. 336.

Edw. Bates

S. C. March T. 1859.

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Wm Carr Lane & wife

v

Mrs L. Ewing.

Filed 15 Dec. 1859
W. S. Glanville Ck.

Pltff's Brief
by Edw. Bates

Mem. all the real estate now remaining unsold which was bought by me as the property of Wm Carr Lane & conveyed to me by Sheriff Milburn by deed dated Jany 31/43 & recorded in the recorders office of St Louis County Missouri on the 16th of January 1844 Book G no 3 p 64 of following to be conveyed by deed to Ann E Lane or any other trustee in trust for the following purposes, 1 To refund to me the entire purchase money which was paid for said lands including the sums paid in purchasing liens on the same taxes &c 2 To secure me & my heirs from all accountability on account of my securityships for said Wm Carr Lane & my sister Mary E Lane wife of said Wm Carr Lane 3 all the remaining portion to be held in trust for the sole & separate use of said Mary E Lane and to be disposed of & applied according to the written order, orders of said Mary Nov 29. 1847

Witness
H Singleton
William Wade
John Law

Wm L Ewing

The above is a literal copy of the document made by Wm L Ewing as mentioned in Pltf's petition
Dec 15/59

S J Glover
Ed W Bates

67

W L Ewings agreement to convey in trust

W. Bates will perhaps sign the within — W. Glanville please show it to him —

Filed 16 Dec. 1859.
Wm. Glanville Clk.

Lane & wife v. Ewing

This cause was determined upon a demurrer to it
the petition, after a considerable portion of ~~the petition~~
had been stricken out.

The defendant, Ewing, is a brother of the
plaintiff, Mrs. Lane. The plaintiff, William
Lane Lane, about the year 1841, was largely
indebted, & his real estate, consisting of several
detached pieces of land & lots lying in & about the
city of Mexico, was sold under execution, & the
defendant became the purchaser at a nominal
sum. The defendant ~~previous to this~~ had become liable as security
~~a creditor of Lane's~~
~~in a large amount, having become his security~~
for the payment of a debt, from Mrs. Lane to Mad. Berthold
(the defendants' mother in law) for $15000, ~~which~~
to protect which the plaintiffs had mortgaged
the same real property, afterwards sold by the
~~of~~ under the executions of other creditors & purchased
by defendant. a portion of The property thus purchased
at sheriff's sale was applied by the defendant
to the payment of Lane's debts. In 1847
the defendant, being about to leave Mexico, on
a long journey, & with a view to secure his
sister, Mrs. Lane, in the event of his death,
executed the following paper:

"all the real estate (save remaining
unsold) which was bought by me as the property

of W. Carr Lane, & conveyed to me by Sheriff Milburn's by deed dated Jany. 31. 1843, & recorded in the Recorder's office of Pleasant county, Mohouse, on the 16th day of Jany. 1844 Book E. No. 3. p. 64 & following, to be conveyed by deed to Anne E. Lane or any other trustee, in trust for the following purpose:

1. To refund to me the entire purchase money, which was paid for said land, including the money paid in purchasing liens on the same, taxes &c

2. To secure me & my heirs from all accountability on account of my security-ship for said W. C. Lane & my sister M E Lane, wife of said W. C. L.

3. All the remaining portions to be held in trust for the sole & separate use of Mary E. Lane, & to be disposed of & applied according to the written order of said Mary."

In 1848, the mortgagees in the deed made to secure Mad. Berthold, conveyed to Ewing all the land embraced in that deed, thus enabling him to dispose of

an unencumbered title. The object of this was to enable the defendant, more conveniently, to raise the money necessary to extinguish this & other debts of Lane. Accordingly, the defendant proceeded to make sales, as opportunity offered & apply the proceeds to the payment of the debts, & in 1849, Mad. Berthold's debt, then $20000, was extinguished. Ultimately, it is stated, all of Lane's debts, ~~were in this way paid~~, for which the Defendant Ewing was in any way liable, were extinguished, & all advances were reimbursed, & Ewing proceeded to convey portions of the lands still remaining to trustees for the benefit of Mrs. Lane. In this way, all the real estate purchased by the defendant was disposed of, except a tract of 32 arpens, situated in the Stone Common, known as the Vasquez tract, & this tract the defendant now claims as his own. The object of the petition is, to have the alleged trust enforced as to this tract. The suit was brought in 1857.

It will be seen, that the only question presented by the record is, whether the facts stated constituted the defendant a trustee.

There is no doubt, that where a trust

has been created & declared, in a mode not contravening the statute of frauds, it will be enforced, notwithstanding the consideration is voluntary. It is equally well settled, that an executory agreement, upon a voluntary consideration, will not be enforced.

The difficulty, in applying these general principles, in determining whether the agreement is executory or executed, or in other words, whether the relation of trustee & cestuy que trust is established. The distinctions which have been taken upon this point are exceedingly refined & somewhat obscure, & the decisions are hard to be reconciled. A reference to the cases in England, a review of which may be found in a note to White & Tudor's leading cases (p. 158) will show a considerable fluctuation of opinion as to the criterion by which the character of the transaction is to be determined

In ex parte Pye (18 Ves. 149) Lord Eldon said "A party may so constitute himself a trustee, that a court of equity will execute the trust in favor of a volunteer. It is clear, that this court will not assist a volunteer, yet, if the act is completed, though voluntary, the court will act upon it. It has been decided, that upon an agreement to transfer stock, this court will not interfere, but if the party

has declared himself to be the trustee of that stock, it becomes the property of the cestuy que trust, without more, & the Court will act upon it."

Lord Loughborough said in Jeffreys v. Jeffreys "my misapprehension is, that the principle of the Court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement." And this was a case, where a father in a settlement covenanted to convey to trustees in trust for his daughter certain freehold estates & who covenanted to convey in the same way certain copyhold estates. He conveyed the freehold property, according to the settlement, but conveyed the copyholds to trustees for his wife, & after his death, the copyholds were held to belong to the widow, notwithstanding the previous settlement.

Sir James Wigram, the Vice Chancellor, in McFadden v. Jenkyns (1 Hare 462) attempts to ~~point out the~~ reconcile the cases in England, & to point out the principle upon which the Court act. "There may be difficulty" he says "in reconciling with each other all the cases which have been cited. Perhaps they are to be reconciled & explained upon the principle, that a declaration of trust purports to be, & is in form & substance, a complete transaction, & the Court need not look beyond the declaration of trust

itself, & enquire into its origen, in order that it may be in a position to uphold & enforce it; whereas an agreement or attempt to agree is, in form & ~~substance~~ nature, incomplete, & the origin of the transaction must be enquired into by the Court; and where there is no consideration, the Court, upon its general principles, cannot complete what it finds imperfect." The same learned Judge said in Meek v. Kettlewell (1 Hare 470) that the old cases only went so far as to hold, that "where the legal interest in property is transferred or acquired in pursuance or in execution of an antecedent agreement or direction touching the uses or trusts of that property, or a part of the transaction creating the trust, the Court will execute the trust, though voluntary." But he afterwards adds that "there does not appear to be any reason why the doctrine of the Court should be so confined, provided the trust is actually created & the relation of trustee & cestuy que trust established between the parties." Therefore his conclusion is, that "in the case of a formal declaration of trust by the legal or even beneficial owner of property, declaring himself in terms the trustee of the property

for a volunteer, the Court might not be bound to look beyond the mere declaration. If the owner of property, having the legal interest in himself, were to execute an instrument by which he declared himself a trustee for another, & had disclosed that instrument to the cestuy que trust, & afterwards acted upon it. that might perhaps be sufficient."

The same Judge repeats the idea in Hughes v. Stubbs (1 Hare 477) "If a person intending to give property to another vests that property in trustees, & declares a trust upon it, in favor of the object of his bounty, there are cases which establish that, by such acts, the gift is perfected & the author of the trust loses all dominion over it. The principle has been extended to cases in which the author of the gift has had the legal dominion over the property remaining in him, but has completely declared himself to be a trustee of that property for the object indicated. But it is clear also, that a person not intending to give or part with the dominion over his property may retain such dominion, notwithstanding he may have vested the property in trustees & declared a trust upon it in favor of third persons." The result of the cases is, according to Vice Chancellor

from the plain language of the instrument, that something more was contemplated — that the property was "to be conveyed by deed to Anna E. Lane or a trustee." and all the cases agree that even in the case of a trust created or continued in the party from whom the bounty emanates, the transaction must show that the entire equitable interest is parted with.

On the other hand, the facts antecedent to the execution of the writing & recited in it, might lead to the inference that the declaration was designed as an acknowledgement of an existing trust; that the relation of trustee & cestuy que trust already existed, when the paper was signed & that its object was to place the right of the cestuy que trust beyond the reach of casualties.

The embarrassment attending a proper understanding of transactions of this character is very much increased, where they occur between family connexions. In such cases Courts of equity have always been cautious in affixing a technical trust to acts & declarations, which, in the absence of the ordinary motives operating in the domestic circle, ~~of domestic~~ might be regarded as quite unequivocal. It was observed by Chancellor Kent, in the case of Steere v. Steere, - a

case, in which a son had purchased his father's property under executions & had from time to time made conveyances of portions of it to his brothers & sisters & made various declarations, orally & in writing of his intention to distribute ~~it~~ whatever remained after his own reimbursement equitably & justly for the common benefit of the family, — that considerations arising from the ties of blood & the dictates of family affection would ordinarily lead such a purchaser to offer to restore the property, on being reimbursed his advances & indemnified for his trouble, or to engage that all the profits of the purchase should be applied to the benefit of the relation whose property has been thus purchased. But he adds that "intentions & intimations of that kind cannot well be considered as amounting to a clear & absolute trust, which a Court of equity will recognize & enforce, unless the declaration of it be quite positive & free from all ambiguity."

In the present condition of this case we do not feel warranted in hazarding a definite opinion. A considerable portion of the petition was stricken out, on the motion of the defendants. An opinion upon a partial view of the case would only tend to embarrass ~~the~~ the trial upon

~~upon~~ an amended petition & answer & a full disclosure of the facts, should the case be further proceeded with. We think the Court should ~~have permitted the petition to remain in the form it was presented~~ ~~not have stricken out~~ ~~its original~~ have permitted the plaintiffs to state their whole case in their own way; & that the case stated is of such a character as to require a further developement in order to arrive at a satisfactory conclusion upon its merits.

The judt. is reversed & the case remd.

The other Judges concur

W. B. Napton

Lane & wife
v
Emery
~~Opinion~~ of
the Court
Napton
Rev. [illegible]
Filed 15 Dec. 1860.
W. S. Glanville Ck.