SPECK, ANN C. v RIGGIN, JOHN MARCH 1867 ST. LOUIS LAND COURT

584/3

FOLDER 2 OF 2

OLD AFFIRMED

661/6

INVOLVED:

- JUDGMENTS
- CONVEYANCES

In Supreme Court of Missouri,

MARCH TERM, 1867.

ANN C. SPECK, *Appellant*,

vs.

JOHN RIGGIN, *Respondent*.

BRIEF OF RESPONDENT,

BY R. M. FIELD AND C. GIBSON.

This was an ejectment commenced in the St. Louis Land Court, February 22, 1865, to recover lot 5 in block 14, of St. Louis commons, containing 3 57-100 acres. The suit was transferred to the Circuit Court by change of venue, and a trial had April 23d, 1866, which resulted in a judgment for the defendant. The plaintiff has brought the case here by appeal.

On the 18th March, 1835, the Legislature of this State passed an act authorizing the sale of St. Louis commons, (2 Terr. St. 501). This act directed a subdivision of the commons and a sale of the several lots by auction. The purchaser was to pay five per cent. interest on the purchase money annually for the period of fifty years, at the end of which time there was to be a valuation of the lot by the public assessor, and the purchaser was to pay five per cent. interest on this new valuation for the next fifty years, and so on forever. Provided, that the purchaser at any time after ten years from the sale might pay up the whole purchase money, and was then entitled to a deed in fee simple. The act contains various other provisions, not material to this case. On the 2d of May, 1842, a sale of lots was had by the city under the forementioned act, at which sale Diedrich W. Wohlien became the purchaser of the lot now in controversy, at the price of $910 35. An instrument in writing was executed in duplicate

between the city and Wohlien, referring to the said act of March 18, 1835, reciting the circumstances of the sale and setting forth the terms and stipulations of the sale conformably to the act. This instrument is styled by the parties an "indenture." It contains the usual clauses of a lease, "grant, devise, to farm let;" "to have and to hold to the party of the second part, his executors, administrators and assigns"—"the party of the second part paying as a yearly rent five per cent. on the amount bid at the sale." These clauses are relied upon by the plaintiff as constituting the instrument a lease, creating a term of years or mere chattel interest.

D. W. Wohlien went into possession of the lot and made some improvements. He died in August of the same year, 1842, leaving surviving his widow, Ann Wohlien, and an only child, L. R. Wohlien, an infant aged twelve years. Ann Wohlien and John Wolff administered on his estate. They instituted proceedings in the Probate Court for the sale of the real estate of the intestate. The lot now in controversy was appraised at $1,500 for the fee. It was bought at the administrator's sale on the second day of June, 1845, by Ann Wohlien, the administratrix, at the price of $410. On the sixth day of June, being at the same term when the sale was made, the Probate Court entered an approval of said sale, but no deed was made to Mrs. Wohlien. Soon afterwards Mrs. Wohlien procured an ordinance from the City Council authorizing a conveyance to her of the fee simple in the lot on her paying $120 per acre. The ordinance on its face requires, as a condition precedent, that Mrs. Wohlien should reconvey to the city the right previously conveyed by the city to D. W. Wohlien. The deed of the city to Mrs. Wohlien was made January 13, 1846; she on the same occasion making a release to the city on the back of the original lease of the city to D. W. Wohlien. On the 16th January, 1866, Mrs. Wohlien conveyed the lot to the plaintiff for the consideration of $1,000. This last conveyance describes the lot as "being the same tract of land which the said Ann Wohlien purchased of the city of St. Louis by deed dated 13th January, 1846, and also at an administrator's sale of real estate belonging to Diederich W. Wohlien, deceased, made under an order of the Probate Court of St. Louis county, on the 2d day of June, 1845, which will more fully and at large appear, by reference to the records of said Probate Court."

The plaintiff entered into possession of said lot, and occupied the same by her tenant, John Focken, until she was dispossessed by the heir, L. R. Wohlien. Young Wohlien came of age in 1851. On the 2d day of June, 1852, he commenced his action against the present plaintiff and her tenant, Focken, to recover the said lot. The petition is an equitable ejectment, setting forth the facts as hereinbefore stated, and asking that an account be taken

of rents and profits, that said Speck, on being reimbursed, the sum paid to the city for the fee simple, convey the lot to said Wohlien, and that the latter recover the premises. This petition, on the subject of notice, states that, at the time when Mrs. Speck made her purchase from Mrs. Wohlien, "she had full notice of the manner and circumstances under which said "Ann Wohlien acquired her title to said lot, and which have been herein before set forth." The answer was a general denial. It admits that D. W. Wohlien went into possession of the premises, & made improvements thereon

On the trial, and under the instructions given by the Court, the plaintiff Wohlien, became nonsuited and took the case to the Supreme Court, where the judgment below was reversed; the Supreme Court holding that without a deed the title of the heir was not divested, that by the original lease, a fee was created, which, upon Wohlien's death, descended to his heir, and that the subsequent conveyance by the city to Mrs. Wohlien was void. This case is reported 18 Mo. 561.

On the return of the case to the Court below, the parties entered into an agreed statement of facts, which was submitted to the Court, and judgment rendered for plaintiff, January 2, 1855; execution issued, and Riggin, the present defendant, who had purchased under Wohlien, was put in possession.

In the meanwhile, Mrs. Speck, commenced a suit in equity in the Land Court against Wohlien, the heir, and Wolff, surviving administrator (Mrs. Wohlien having died some years before), to have the administration sale perfected by divesting the title of the heir under the decree. The Land Court refused the relief, and on appeal to the Supreme Court, the decision was affirmed. This case is reported 22 Mo. 310, and it was tried in both Courts on agreed case aforesaid, which has been given in evidence in this case.

In 1857, Mrs. Speck, and Wolf the administrator, united in a petition to the Probate Court to approve the administrator's sale, making Wohlien and the purchasers under him, defendants to the petition. The petition sets out the lease to D. W. Wohlien, and the sale in administration, and adds:—"Your petitioners further represent, that on the 16th day of January, 1846, "Ann Wohlien, in consideration of one thousand dollars to her paid by "your petitioner, Ann C. Speck, conveyed to her the said premises by deed "of general warranty duly executed and delivered, that your petitioner, Ann "C. Speck, purchased said premises and paid a full consideration therefor "in good faith, believing that she was acquiring a full and complete title to "the same, by virtue of said deed and the proceedings for the sale of the "real estate of said deceased." The petition was duly sworn to.

This petition was heard, and the prayer of it granted by the Probate Court. On appeal, a full trial was had in the Circuit Court, where a judgment was rendered that the proceedings in the sale in administration, were "fraudulently brought about and conducted by the administrator and administratrix, and were disapproved" and set aside and held for naught. This case was carried to the Supreme Court, and it was there held that no appeal lay from such judgment of the Circuit Court. The case is reported 32 Mo. 124.

In 1862, Mrs. Speck commenced ejectment suits for the property in the Circuit Court of the United States, but the suits were dismissed without being brought to trial.

In 1865, the present suit was brought. The answer of the defendant denies the title of the plaintiff, and sets up an adjudication of the title in former suits as a bar to the plaintiff's recovery. On the trial, the plaintiff put in evidence the deed of the city to Mrs. Wohlien, and of Mrs. Wohlien to herself claiming to be an innocent purchaser without any notice of the previous lease to D. W. Wohlien, or of the proceedings in administration. The defendant gave in evidence the lease of the city to D. W. Wohlien. The ordinances of the city authorizing a conveyance to Mrs. Wohlien, Mrs. Wohlien's release, the record of the suit Wohlien vs. Speck and Focken the record of the suit, Mrs. Speck vs. Wohlien and Wolff, the proceedings in the Probate Court, and on appeal in the Circuit Court, and various deeds by which the property had been transferred from Wohlien to the defendant in 1853, and subsequently to other parties.

As will be seen the testimony was not materially different from that given in the former suit of Wohlien vs. Speck and Focken. The Court gave the following instruction, on motion of the defendant:

"If the records, documents and instruments of writing offered in evidence are genuine, the plaintiff cannot recover."

The plaintiff relied on two principal points as the ground of her right to recover in the action:

1. That the original lease from the city to D. W. Wohlien created only a term of years or a chattel interest, that passed to the administrators, and that they, or either of them, might transfer or surrender this interest, and that this was in effect done by Anna Wohlien in both forms, by her surrender to the city and by her conveyance to the plaintiff.

2. That the plaintiff purchased of Anna Wohlien the property in dispute on the faith of the city's deed to Anna Wohlien, without any notice of the prior lease to D. W. Wohlien, or of the proceedings in the Probate Court for the sale of said land by the administrators, and, therefore, being a *bona fide* purchaser, without any notice of the unrecorded lease, she is entitled to recover the land.

Both these points were involved in the decisions herefore made in the progress of the litigation between the parties, as will be seen by the proceedings in prior suits contained in the record. But it is proposed to examine the grounds of the former decisions with some particularity.

1. Mrs. Speck, as plaintiff in this case, claims under precisely the same title that she set up as defendant in that case; and Riggin claims the same title under which L. R. Wohlien prosecuted that case. After the decision in that case, Mrs. Speck made several attempts to perfect her title, but the validity of the decision was not called in question for more than ten years after it was delivered.

In the case of Wohlien vs. Speck and Focken, the plaintiff (Wohlien) set forth his claim in the petition fully and minutely, and he made no pretence or claim to the land other than such as was conveyed to D. W. Wohlien by the city in 1842, *and such as descended to him as heir of said D. W. Wohlien.*

Therefore, if the estate in the land which was conveyed to D. W. Wohlien by the city, either passed to his administrators or did not descend to his heir; or if it had been lawfully surrendered by Ann Wohlien to the city, or if it had been forfeited, or it had been lawfully sold and conveyed by the proceedings in administration in 1845; in either of these cases he would have been without the pretence of a claim to the land, and this Court would have been bound to have approved the judgment against him below, and this was represented by Mrs. Speck's counsel to the Court at the time. (See Polk's brief, VI, filed herewith.)

The Court held that the city conveyed the land in dispute to D. W. Wohlien "forever," subject to a semi-annual rent; that "this sale divested the city of all title;" that "when Wohlien, the ancestor, died, his title descended to his heir; that, as no deed was made, no title passed by the sale in administration; and that "she (Ann Wohlien), not having the first title conveyed by the city, had no authority to effect it in any wise," and that Wohlien "held the land under the original deed from the city."

This decission is reiterated in Speck vs Wohlien 22 Mo

Wohlien having thus made out a *prima facie* case, it became necessary to examine into the defendant's claim of title.

Her claim of title was twofold:

First. She claimed that the proceedings of sale in administration were valid under the confirmation of the Probate Court. Wohlien claimed that they were fraudulent in fact and void in law for want of a deed, and the Court held that "no title passed by the sale," on the ground that no deed was made, and so ended Speck's first claim of title.

Second. She claimed that "the deed from the city of St. Louis to Anna Wohlien vested a full title in said Anna," (see Mr. Polk's brief, IV) and that "there being a reference in the deed under which this respondent (Mrs. Speck) claims, to *two* sources of title, to-wit: the city of St. Louis and D. W. Wohlien, deceased, the respondent (Mrs. Speck) was at liberty to rely upon either of them, and if either of them, as for instance, the City of St. Louis, was good, he was authorized to have recourse to that and intrench himself in it as paramount to all other claims or pretensions." [Ib. V.]

To this the appellant [now defendant] replied, that

"Speck cannot be considered as an innocent purchaser without notice." And the brief of Field and Gibson then proceeds to give reasons in support of this proposition substantially the same as stated herein below. [See their brief III].

The court held that "the title then remaining in the heir, the city had no authority to convey the land to any one else. The deed from the city to Mrs. Wohlien was purely void and passed nothing."

This was a full and perfect answer by the court to the legal propositions made by counsel, for it necessarily disposed of the whole case.

This opinion is supported by at least five several reasons, either one of which is sufficient:

1. The deed of the city to Ann Wohlien was not made under, or in conformity with, the provisions of the act of 1835, and it was therefore void.

2. The ordinances, 1,527 and 1,603, under which it was made, impart actual notice to all the world claiming by deed under them, of the existence of D. W. Wohlien's title, for they recite that there was a "conveyance made by the city of the same [the land] to one D. W. Wohlien, late husband of the said Anna Wohlien," and therefore it was void as against the title of said D. W. Wohlien.

3. The ordinances required as a condition precedent to the execution of the deed by the city officers that the city should be reinvested with the title previously conveyed by special warranty to D. W. Wohlien, and therefore the deed was void,

A. Whether this instrument be considered as a lease or a sale and conveyance, it contained in law a covenant of quiet enjoyment on the part of the city to D. W. Wohlien and his representatives.

B. The city covenants in this deed that upon payment of the sum bid, $910, it will convey the fee simple absolute with special warranty against itself. This covenant would be broken by the act of the city if the deed to Ann Wohlien be valid.

C. It would have been immoral for the city to convey the land to one person and subsequently convey the same land to another, so as to cut out its first vendee, whatever may have been the nature of the first vendee's title. Such transactions are now made criminal by statute.

These considerations prove the propriety of the provisions of the ordinances, which require that D. W. Wohlien's title should be reconveyed to the city before the making of the deed to Ann Wohlien.

4. The deed was made under these ordinances. [See agreement of counsel in Speck vs. Wohlien, record, p. 36; and also Haren's testimony.] The Mayor and Register, who alone executed the deed, have no power, without ordinance, to convey away the real estate of the city. Now both the ordinances authorize and direct the "*Comptroller*" to make the deed. The Comptroller does not even join in it, and, therefore, it was void; for the power to make it was confided by the ordinances to the *Comptroller*, and not in the Mayor and Register.

5. The recitals in the deed of Ann Wohlien to Ann C. Speck convey actual notice to Speck of the title of D. W. Wohlien, and, therefore, the deed was void against said title.

These are reasons which occur to us. Other reasons may have occurred to the Court. It is sufficient to know that the Court, for reasons satisfactory to it, unanimously came to the conclusion and expressed in due form the "opinion" that the deed "was purely void and passed nothing." The Court was bound by law to give its "opinion," but it was not bound to give the reasons on which its opinion was based. This left Wohlien with a *prima facie* case and Mrs. Speck without a shadow of a title.

We will now compare the points presented by Mr. Hill with the decision in 18 Mo., 560.

1. Mr. Hill avers that the conveyance to D. W. Wohlien was for a term of years only, and that the title so conveyed passed upon his death to the administrators, and not to the heir.

The Court decided that it was a conveyance "forever," and that "this sale divested the city of *all title*," and that young Wohlien "held the land under the original deed from the city."

Now, a conveyance "forever," subject to semi-annual payments, is a fee farm, or what may be called a defeasible fee, and does not pass to the personal representatives, and if the sale divested the city of "*all title*" it invested D. W. Wohlien with "all title" to the land, and if young Wohlien held the land under the original deed, no one could hold it adversely to him under the same deed.

Mr. Hill claims, as a corollary from his premises, that the estate conveyed passed to the administrator. The Court held, as a corollary from its premises, that "when Wohlien, the ancestor, died, his title descended to his heir."

2. Mr. Hill avers that the release of Ann Wohlien conveyed or surrendered to the city the estate previously conveyed to D. W. Wohlien. This release was given in evidence in that case as well as in this (Record p. —) So that the facts are the same in both cases.

This release was void for any one of the following reasons:

1. It does not purport to convey D. W. Wohlien's title, but only the individual interest of Ann Wohlien, who then claimed the land under the void sale in administration, and John Wolff the other administrator, was a subscribing witness to this deed, but did not join in it as a party, thus proving conclusively that Ann Wohlien was not attempting to act in her capacity as one of the administrators when she made the deed.

2. The order of the Probate Court, obtained upon petition of Ann Wohlien, requires the administrators jointly to sell the land at public auction, make report of sale, &c.

3. Ann Wohlien was only one of the administrators, and the power, if any, was lodged in both jointly.

4. The title was vested in L. R. Wohlien, and not in either or both of the administrators and, therefore, "she had no authority to effect it in any wise."

5. Mrs. Speck being now plaintiff, must show title in herself, and if the deed of the city to Ann Wohlien, which is the only deed under which she now claims "was purely void and passed nothing," it is immaterial here whether or not the title of D. W. Wohlien was conveyed, surrendered or forfeited to the city, for that would only prove an outstanding title in the city, which cannot avail one who is plaintiff.

Mr. Hill introduced this release in evidence below as a new feature in the case; thereupon the defendant gave in evidence the record from this Court in Wohlien vs. Speck, which settled that point conclusively against him.

The brief of Wohlien's counsel, distinctly averred that the deed of the city to Ann Wohlien was void, because the Comptroller was not authorized to make it until she reconveyed D. W. Wohlien's title to the city, which was not done, (see Brief III), and the Court held that "she not having the first title conveyed by the city, had no authority to effect it in any wise."

3. Mr. Hill avers that the deed from the city to Ann Wohlien was perfectly valid, and passed the fee simple absolute. The court held that the deed "was purely void and passed nothing." Stronger terms than these are not to be found in the English language. Still the court repeats that the "conveyance between her and the city being *void* the plaintiff, [Wohlien], holds the land under the original deed from the city."

Now whether the court held that the deed "was purely void and passed nothing" because neither the city nor its officers could, under the act of 1835, dispose of the city commons in that manner, or because the Mayor and Register had no power under the ordinances, 1,527 and 1,603, to make the deed; or because those ordinances conveyed, as well to Ann Wohlien as to her vendee, actual notice of D. W. Wohlien's title, or whether it chose to frame the opinion so as to rest upon any one or all of these reasons or other reasons occurring to the court for its justification, can be no grounds for

disregarding or overhauling the decision, for the court was bound by law to give only its "opinion," and not the reasons upon which the opinion was founded.

As the only title now claimed by Mrs. Speck is under the deed thus declared purely void, the judgment below must be affirmed or the decision of this court held for naught.

4. The circumstances under which Mr. Hill asks the court to disregard and annul this opinion are extraordinary.

1. The opinion was rendered at the October Term, 1853, more than thirteen years ago. The case then went below, and judgment was rendered in obedience to it in favor of Wohlien. Speck acquiesced in the decision as final by taking no appeal or writ of error. Wohlien was then put in possession.* Speck brought several cases afterwards in the vain endeavor to perfect her title in accordance with the opinion of the court, but no one of these cases called the opinion in question. She continued to regard it as final and conclusive for more than ten years.

In the meantime Mr. Flournoy and Mrs. Sibly purchased some of the property, relying upon the decision and believing all litigation at an end, as no suits were then pending, and erected improvements on the same, worth about twenty thousand dollars. [See Flournoy's testimony].

2 .If the citizens of the State cannot rely with confidence on the decisions of this court—which have remained unquestioned for more than ten years—when is it that men can buy and sell with safety? Is the first decision only interlocutory? If this court shall consider that the ejectment against Mrs. Speck is no bar, and that it is not bound by the decision rendered thirteen years ago, may not the defendant bring ejectment thirteen years hence and properly ask the court then to disregard any judgment or decision rendered now against them? If this court shall overhaul and disregard decisions heretofore rendered, simply because it thinks error has been committed, can it be supposed that any greater respect will be shown to its decisions by its successors?

3. It is plain that such propositions amount to the abolition of all law, and are not to be tolerated.

4. This decision has remained as the unquestioned law of Missouri ever since it was rendered. How much property has been disposed of under it, and how many interests depend upon it other than the claims of the immediate parties, it is impossible to tell.

Overall vs Ellis 38 Mo.

5. The history of this litigation is curious. In Wohlien vs. Speck et al,

*The briefs in that case, and which we file herewith, show that all the points made now were made then.

Wohlien charged that the administrator's sale was fraudulent. Mrs. Speck replied that the confirmation of the Probate Court was conclusive. Wohlien rejoined that there was no deed, and the Court held the sale void on that account.

In Speck vs. Wohlien, Speck again claimed that the confirmation of the Probate Court even in equity, was conclusive as to the proceedings of sale. Wohlien replied that the sale was fraudulent, and that a court of equity had no power to cure the want of a deed, and that the confirmation being at the same term, was null and void. This Court decided both these points in his favor.

In the last case, Wohlien's vendees, made no actual defence in the Probate Court, and took appeal to the Circuit Court, believing that in any event a trial de novo would be had there.

Mr. Hill moved that Court to dismiss their appeal, which motion was overruled.

The Court then, for the first time, examined the facts concerning the sale, and found that the sale "was fraudulently brought about and conducted by the administrator and administratrix" (Record p.—). Mr. Hill appealed from this judgment, and in this Court renewed his motion to dismiss the appeal from the Probate Court, whereupon the defendants moved to dismiss *his* appeal, which motion was sustained.

Thus, Mrs. Speck claimed in every case on a mere technicality, and was beaten except in the trial of the case from the Probate Court in the Circuit Court, where the whole case was examined and the sale in administration declared to have been fraudulently brought about and conducted by the administrators.

When the plaintiff's appeal to this Court from this last judgment was dismissed, and it was thus rendered forever final, the plaintiff, suddenly lost all knowledge or consciousness of D. W. Wohlien's title, and after having claimed under that title for more than ten years, and by a petition duly sworn to, averring that she had bought the land and paid her money on the faith of the sale of this title by the administrators, she now denies that she had any notice of that title.

The new code of practice introduced in 1849, required all petitions to be sworn to. This provision was made in order to prevent false and fictitious pleading.

If the object of the statute cannot be accomplished by purging the conscience of litigants, it will be attained under the doctrine of estoppel.

If the deed from the city to Ann Wohlien was a nullity, the question as to whether Speck had notice of D. W. Wohlien's title becomes perfectly immaterial, for Speck, having then, no title in herself, cannot recover.

When the defendant proved in himself a valid title from the city, he had the right to require the plaintiff to show the authority under which the Mayor and Register executed the deed to Ann Wohlien, therefore, if the plaintiff contends that this deed was not made under the ordinances given in evidence, it becomes void as against the defendant, because the authority to make it, was not shown: and if he admits that it was made und er those ordinances, they become a part of her title papers and convey actual notice to her of the defendant's title.

We will now examine these points as an original question:

I. As to the estate created by the deed of the city to D. W. Wohlien. The plaintiff contends that the deed conveyed only a term of years. But it is an essential requisite to every estate for years that it should have a certain commencement and end. 2 Bl. Comm., 143; 1 Shep. Tonch., 267. By the terms of the deed the interest conveyed by the city was to continue forever.

Under the rule of the English common law, requiring in all cases the word *heirs* to create a fee, it cannot be denied that the deed gave no more than a life estate to D. W. Wohlien. This rule was repealed in this State as early as 1835, and it was enacted that "every conveyance of real estate shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or necessarily implied in the terms of the grant."

The terms "grant, remise and to farm let" are not the usual or appropriate terms for a feoffment or bargain and sale, but they are sufficient. 4 Cruise, 46; Id., 98. The words of a deed were "demise, grant, set and to farm let." It was held the deed might operate as a bargain and sale. Fox's case, 8 Co., 185. So "demise and quit claim," or "covenant to stand seized," have been held sufficient in a bargain and sale. 4 Cruise, 98, in note.

The limitation to "executors and administrators" is repugnant to the nature of the estate and must be rejected. A lease for years to J. S. and his *heirs* goes to the executors and not to the heirs. 2 Shep. Tonch., 77; Bac. Abv., Tit. Lease, L.

An obligation to pay money to J. S. and his heirs. The executor shall have the benefit of it and not the heir. 2 Shep. Tonch., 212.

There was a devise for life to one and his heirs. It was held that the

word *heir* was repugnant and had no effect. Campbell vs. Rawdon, 18 N. Y., 412.

The deed must be construed in reference to the act of 1835, under which it was made. It is plain that this act does not authorize the creation of estates for years or dependent on lives, but contemplates a disposition of the fee. Taking the whole instrument and construing all its provisions, it will be found to correspond in all respects with the act. As one principal motive of the act was to secure a revenue to the corporation out of the land, the draftsman has been led to adopt a phraseology appropriate to leases, but the intent as derived from the whole instrument is plainly manifested to pass the fee, and effect will be given to this intent in the law.

The case, then, is in all respects like the *fee farm*, of the common law, where a rent is reserved upon the grant of the fee. 1 Hill, Real, P. 239.

Such dispositions are lawful and are not uncommon.

In Pennsylvania they are known as ground rents. *Ingersoll v. Sargeant*, 1 Wharton, 337; *Kennege v. Elliot*, 9 Watt, 262.

In Massachusetts they are called perpetual leases. *Adams v. Bucklin*, 7 Peck, 121.

In New Jersey and Virginia they are termed rents charge. *Farley v. Craig*, 6 Halst., 262; *Marshall v. Conrad*, 5 Call, 364.

In civil law they are know under the name of *conductio perpetua*. Cod. Just. Lib., 11 tit., 70, C 5.

The conclusion is that the instrument made by the city to D. W. Wohlien gave to the latter the fee in the land, subject to an annual rent; and, from the nature of such estate, it passed, on the death of Wohlien, to his heir and not to his executors. The "fee simple," spoken of in the instrument to be conveyed on payment of the purchase money, can mean nothing more than the fee disencumbered of the rent.

See, also, cases cited, 11 Vin. Abridg. 144.

The decisions of the Courts of this State have been uniform that the present form of lease transferred a fee.

When this case first went to the Supreme Court, 18 Mo., 561, this point was the first to be disposed of. Judge Scott says: "The city of St. Louis, under the authority of an act of the Legislature, approved March 18, 1835, conveyed the land in dispute to the ancestor of the plaintiff forever, he paying therefor semi-annually a sum equal to one-half of five per cent. on the purchase money, which was $910 35. This sale divested the city of all title. So long as the terms of the sale were complied with, she could in no way affect the title thus conveyed. When Wohlien, the ancestor, died, his title descended to his heir, the plaintiff."

The same question came before the Court in Woodson v. Skinner, 22 Mo., 1, and an ingenious argument was made by Mr. Skinner to show that the city only conveyed successive terms of fifty years forever. Judge Scott says: "We do not deem it necessary to enter into any discussion as to the proper name of the instrument executed by the authorities of the city of St. Louis. The instrument was effectual to convey away all the interest the city had in the premises in dispute, and a compliance with its terms on the part of the lessee and his assigns would have effectually barred all right the city might have had in the lot." Afterwards the Judge adds: "This instrument is a substantial compliance with the act. It is in effect a perpetual lease, with a privilege to convert it into an estate in fee, by complying with the conditions in the instrument of lease."

II. As to notice to the plaintiff of the unrecorded lease to D. W. Wohlien, the plaintiff now contends that he was an innocent purchaser of the title of the city without any notice of the prior lease to Wohlien.

1. The question of notice was involved in the suit of Wohlien vs. Speck and Focken, and the determination in that case has disposed of the question between the parties.

When the case was ultimately tried in the Land Court upon a statement of facts agreed to by the parties, the same question was involved, and the judgments of the Court in that case concluded the parties forever as to their rights then existing in the property.

It is no answer to say that the Court mistook the law or the facts, or that the case was only partially tried. The judgment was binding and conclusive forever.

There has been much conflict of opinion on the question how far a former judgment is binding. Some Courts hold that a prior adjudication is conclusive only as to the precise subject matter to which the judgment applies. Others, and much the greater number of judges, hold that a particular question involved in one litigation and tried and decided, will bind in all suits between the same parties in respect to that question, though applied to a different subject matter. The cases on this subject are collected in 2 Smith's Lead. Ca. (6th Am. Edit.) p. 787 et seq. Our own Supreme Court, in *Edgell vs. Sigerson*, 26 Mo. 585, decided that a question presented to a Court and passed on in one case, estopped the parties in all cases that might involve the same question.

But, in the present case, the question is not only the same, but the subject matter is identical. And the singular spectacle is exhibited of a party, who has been adjudged to have no title, seeking to recover through the instrumentality of the Courts that gave the former judgment, the same

subject matter, from the same adversary party and upon the same evidence.

This is not the case of successive ejectments. From 1849 to 1855, there was, properly speaking, no action of ejectment known to our law. It was again restored by the revision of 1855, but the rights of the present parties had been determined before. Besides, it is manifest, from the inspection of the petition in Wohlien vs. Speck and Focken, that it was really a proceeding to settle the rights of the parties in the land.

In the case of *Caperton vs. Schmidt*, 26 Calif. 49, this question is discussed with great ability by Justice Sawyer, and the authorities cited and commented on. The code of practice in California is substantially like our practice act of 1849. Both were borrowed from New York. See also the recent case of *Miles vs. Caldwell*, 2 Wallace, 36.

The present case is plainly distinguishable from that of *Holmes vs. Carondelet*, 38 Mo. This last case was plainly an ejectment commenced in 1856, after the revision of 1855 had restored the action of ejectment, and the judgment was not in fact rendered till 1858, when the conclusive character of the judgment no longer existed.

2. Sufficient notice of the lease to D. W. Wohlien appears on the face of the plaintiff's title papers.

The deed of Mrs. Wohlien to the plaintiff describes the land as being the same which the grantor "purchased at an administrator's sale of real estate belonging to D. W. Wohlien, deceased, made under an order of the Probate Court of the county of St. Louis, on the second day of June, 1845, which will more fully and at large appear by reference to the records of said Probate Court."

By reference to the proceedings in the Probate Court it is seen that the lease to Wohlien is accurately described by its date and terms, in the inventory, the advertisements and the administrator's report.

Here then was actual notice of the lease to Wohlien which, if followed up as common prudence dictated, must have resulted in actual knowledge.

To test this matter, let us suppose that at the time when Mrs. Speck was making the purchase, young Wohlien had served her with a written notice that the land she was about purchasing belonged to his deceased father's estate, and that the particulars appeared in the records of the Probate Court, could the plaintiff, after such service, assert that she had no notice of the title in the deceased?

In law the notice cannot depend at all upon whether the party heeded it or not.

The question here arising on the face of written documents was proper to be decided by the court; and it would have been improper to refer to the

jury a question purely of legal construction. [*Bellar vs. Lloyd*, 2 Watts 402].

The cases on notice are fully collected in 2 White & T. Lead. Ca. Eq. 152 et seq.

But the title of the plaintiff under the city ought to be considered in this connection. The power of the city to sell or dispose of its common must be exercised by ordinance. The Legislature has never conferred the authority to sell the common on particular officers. All the charters confer this authority on the Council, to be exercised by ordinance. The city seal may be *prima facie* evidence of an ordinance authorizing the deed, but the deed must always depend for its validity on the ordinance. Now ordinance No. 1,527, in its second section, requires that Mrs. Wohlien shall reconvey to the city the same title conveyed by the city to D. W. Wohlien. And here it will be seen that Mrs. Speck can not make out a title for the city without direct notice of the title of D. W. Wohlien.

3. The plaintiff is estopped by her own act from denying notice of the lease to D. W. Wohlien.

In 1857 the plaintiff filed in the Probate Court a petition for an approval of the administrator's sale of the land. This petition sets out the lease by the city to Wohlien, the proceedings in the Probate Court, the sale by the administrators, report and irregular approval. It then sets forth her purchase of Mrs. Wohlien, and adds "your petitioner, Ann C. Speck, purchased said premises and paid a full consideration therefor in good faith, believing that she was acquiring a full and complete title to the same by virtue of said deed and *the proceedings for the sale of the real estate of said deceased.*" This petition was sworn to by the agent of the plaintiff, and prosecuted successfully, the Probate granting the prayer of the petition, and in the most formal manner entering on its records an approval of the administrator's sale.

It will be observed that the statement of the petition quoted above lay at the foundation of the proceeding. Without it, the plaintiff would have had no standing in court. If it had been denied by the adversary parties, the plaintiff must have proved its truth or the proceeding would have been dismissed. But it was not denied, and the plaintiff has had the same benefit of this statement as if it had been proved on trial and established by the judgment of the court.

Under such circumstances it is insisted that the plaintiff is estopped from denying the truth of this statement. She is not at liberty to deny that she purchased the land on the faith of the proceedings in administration, and, *a fortiori*, that she had notice of what those proceedings were. She has had the privilege of harassing her adversaries with litigation running through six years, and through all the courts of the State, upon the representation of a

fact that lay peculiarly within her own knowledge. She cannot now assume exactly opposite ground.

The authorities on this ground of estoppel are ample.

Philadelphia Railroad Company vs. Howard, 13 How. 308. In a previous suit between the parties, the defendant's attorney produced on trial a written instrument which he insisted contained the true contract between tne parties. The plaintiff thereupon became non-suit, and commenced another action conforming to the written contract. The defendant denied that the contract had ever been executed, and the Supreme Court of the United States decided that he was estopped, by his action in the previous trial, from making any such denial. Judge Curtis, in giving the opinion of the Court, said: "We are clearly of opinion that the defendant cannot be heard to say that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit and the plaintiff the loss, and it is too late to correct it. It does not carry the estoppel beyond what is strictly equitable, to hold that the representation, which defeated one action upon a point of form, should sustain another on a like point."

Queen v. Sandwich, 10 Ad. and El. 563. A corporation had made return that it had levied an assessment to pay the salary of an officer. Held in a subsequent suit that the corporation was estopped from denying the title of the officer to the office.

Varick v. Edwards, 11 Paige, 289. Where a party recovers under a particular title, he is estopped from disputing that title.

Ogden v. Rowley, 15 Inda , 56. In one suit a party pleaded an award in bar. Held that in another suit he could not dispute the award.

Scaggs v. Railroad Co., 10 Md., 268. A party using a release in evidence, cannot in another suit deny its effect.

Hawley v. Middlebrook, 28 Conn., 527. A party, sued upon an attachment bond, denied the execution of the bond. It was proved that, when a witness in the attachment suit, he testified that he had given bond for the prosecution of the suit. The Court held that this testimony estopped him from denying the execution of the bond.

Martin v. Ives, 17 S. and R., 364. A party gave an award in evidence in one suit. Held in another suit that he was estopped from denying it.

Kelly v. Eichman, 3 Wharton, 419. A sued C and offered B as a witness. C objected that A and B were partners. The Court decided in favor of C, and dismissed the suit. Afterwards A and B sued C on the same contract. Held that C was estopped from denying the partnership.

Hays vs. Gudykunst, 11 Pa. State Rep. 220. A, defendant, was sued as a partner. He denied the partnership, and the issue was found for him. Afterwards, in a collateral action, the same question of partnership arose.

The Court held the defendant was estopped from asserting a partnership. The Court said: "The principle, which closes the defendant's mouth, is "founded in good faith and fair dealing. He cannot have the benefit of a "defence, when it serves his turn, and repudiate it afterwards, when it "makes against him. A person is not permitted to blow hot and cold."

Bailey vs. Bailey, 44 Pa. State Rep. 274. After divorce, the wife, as a feme sole, brought a suit against the husband and recovered. She then brought a writ of error to reverse the decree of divorce. The Court held that she was estopped from suing error.

Jack vs. Jack 2 *W. and S.* 101. It was held that a party, who sues execution on a judgment in his favor, is estopped from bringing error to reverse it.

Cassel vs. Fagin, 11 Mo. 207. The same point was decided by the Supreme Court of this State.

In many of the cases, much stress is laid by the Judges on the circumstance that the party, against whom the estoppel is applied, has derived some advantage, or the adverse party has suffered some loss, from the fact, out of which the estoppel is derived. In other cases the judges found the rule on the policy of discountenancing, in courts of justice, all pratices of falsehood and deceit, and of requiring from parties a strict adherence to truth, honesty and plain dealing.

All these reasons apply in the present case. The plaintiff has had the benefit of an approval in the Probate Court. She has subjected the defendant to the cost and vexation of a six years law suit. On the faith of her representation, the land has gone into the hands of innocent purchasers, who have expended large sums in improvements. And the plaintiff has given the strongest evidence of the earnestness of the representation contained in her petition, in the pertinacity with which she pressed her suit to the court of last resort.

The remarks of Judge Holmes in giving the opinion of this Court in the recent case of *Pacific R. R. Co. vs. McCombs*, 38 Mo. —, have a special application in favor of those parties who have purchased the land now in controversy, and expended their money in making costly improvements. Speaking of certain acts amounting to an admission on the part of the Company, the Judge says: "It is not important that this admission was not "made to the defendant in person. Being an open and public act, it is to "be considered as addressed to every one that had occasion to act upon it. "As against this party, neither the agent nor the party can now be heard "to deny the truth of the admission. Whether the fact were true or false, "they are concluded by their own act and acceptance, to say the truth. "And it may well be deemed to have amounted to an estoppel in pais."

Ann C. Speck
Pltff Appelt
v
John Riggin Deft
Res

IN SUPREME COURT,
Oct. TERM, 1866.
212.

AND now comes the said Appellant and says that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellant assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Appellant
2. That said Court rejected proper and legal testimony offered by Appellant
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Appellant
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Defendant when it should have been rendered for the Plaintiff
10. That said Court overruled the motion for a new trial, made by Plaintiff

B. A. Hill
for Appelt

And now come the Respondent and for joinder in error say, that there is no error in the record and proceedings of said court below in said cause, as assigned by said appellant

C. Gibson & R. M. Field
for appellants

Supreme Court

No 212 Oct 7. 1866

Speck appt
v
Riggin

Apt of error

B. A. Hill
for appt.

Filed Oct. 20. 1866
C. T. Fishback
Clk

In Supreme Court March Term 1867

Anna C. Speck
pltff: Appellant
vs
John Riggin.
Deft. Respdt.

The appellant, in addition to the brief of her counsel, B. A. Hill Esq, submits ~~the following~~ the following points, authorities, & arguments, in her behalf.

Point 1.

The legal title of this land was vested in the City of St. Louis, when the City executed to Diedrich W. Wohlien the ~~lease~~ deed dated May 22d. 1842, & this deed granted to Wohlien only a leasehold estate, with the privelege of purchasing the fee upon conditions therein stated. This privelege was only an incident - was not property, & went, & fell, with the lease.

Woodson vs Skinner 22 Mo: Rep. p 13 } Robertson vs Brant. 16 Mo: Rep. p 129 } ~~9 Mo: p 237~~

(See argument under the last Point of this Brief)

A. J.

-Point 2-

Upon the death of said Wohlien one half of said leasehold became vested absolutely in his widow, Anna Wohlien, under the dower laws, subject to the payment of his debts, & by the granting of letters of administration of his estate to her & John Wolf, the whole title thereof became vested in them, as one person, with the power, & duty in each, to sell the same, for the payment of debts, as in the case of other personal property.

Rev. Code of 1835 p 228 Sec. 2 -

1 Mo: Rep pp 370 & 371 - 10 Mo: Rep pp 370 & following
1 Lomax on Executors pp: 210 Sec. 6 - 213 Sec. 13 - 214 Sec. 15 - p 228. - Toller on Exr. p 139 -

1 Lomax p 333 - Toller on Executors p 242
Williams on Executors pp 268 & 269

1 Lomax pp 358 & 359 - 4 Hill N.Y. Rep. p 503

- Point 3

They could sell this leasehold ~~without~~, for the payment of debts, without an order of Court therefor, it being personalty, & not realty & their sale of it to the widow, Anna Wohlien, ~~was in~~ satisfied the requirements of the law, regulating a sale of personalty for the payment of debts, sufficiently to make the property hers, & as the legal title was already in her, one half for dower, & the whole, as administratrix, there was no need of a formal deed of assignment to her. The order of sale was of no legal effect.

as to her right to buy?
4 Porter Rep. p 283
2 Hill Chy. Rep. p 401
8 Alaba: Rep. p 680
2 Stew. Rep. p 47
1 Lomax p 351.
Adams Eject pp 44 & 45.

Rev: Code of 1835. p 48. Secs. 31-32-34
" " " 1845 pp: 78 & 79.
21 Mo: Rep: p 538 ~~427~~ James et al vs Dixon decides no order needed to sell a lease, nor does want of advertisement affect purchasers title.
21 Mo: Rep: p 427. Talbot vs Mearns decides as to effect of bills of sales of personalty.

- Argument -

For the sale of personalty for the payment of debts the ~~requirements~~ directions of the law were

as follows, to wit-

1st - Advertisement of time & place of sale for 3 weeks.

In this Case, the sale was advertised for 4 weeks. There was real estate with this leasehold.

2d - The sale to be a public sale.

This sale was a public sale.

3d - It shall have a Clerk, who shall keep a true account of the sale, setting forth the property sold, its price, & the name of the purchaser, to be sworn to by him, & this account the Administrator shall file in the office of the Clerk of the Probate Court within 30 days after the sale.

There was no Clerk of this sale, but an account of it was made by the Administrators, setting forth the price this leasehold sold for - the name of its purchaser, which was sworn to, & filed within 30 days after the sale.

But the want of a clerk cannot affect the title of the purchaser.

These provisions relative to a sale of personalty, are directory to the administrator, for the purposes only of securing fair sales, & the evidences thereof in behalf of the estate against the administrator for his accountability. The administrator alone is accountable for any omission thereof, & damages therefrom. The statute declares the object of the "sale bills" to "be evidence in the same manner with like effect as inventories". They are not conclusive, as decided in said case of Talbot & Means. Provided the sale be a public one, no omissions, or negligences, of the administrator can affect the title of the purchaser, for, his title depends upon the acceptance of his bid, not upon the ~~fidelity of~~ approval of the Court, as in case of a sale of real estate, nor upon any accompanying, or subsequent, formalities. Even the want of due advertisement, (as important a

Rev. Code of 1845 p79 Sec. 42

detail as any) cannot affect the title of a purchaser, as decided in said case of James et al vs Dixon.

As to Mrs. Wohlien's right to buy at her own sale, it is insisted, that she had such a right. (Vide marginal authorities of this Point) She was not a naked Trustee. She was interested to the extent of one half in this property, & all the other personalty, but subject to the payment of debts, & therefore her interest was, in this, as well as in all other sales, to make the property bring the fairest, & highest price, for, thereby her chance in the surplus was ~~increased~~ improved. The sale was for the payment of debts, & needed therefor.

But, even in the cases of naked trustees, the sales to such, at their own sales, are not void. They can only be avoided in equity. It is known, that some judges have said, that they were void, but such, it is believed, is not the fair tenor of the books upon this question. Besides, these opinions are in cases in equity

But such a harsh, & uncharitable,

& impolitic, a doctrine, cannot have any application to such a case as this -

This action was at law - Mrs: Wohlien could certainly dispose of half the title in her own right - Mrs: Speck got & has this - And, if it should be decided, that the other half could not be held, as against Wohlien's heir & his ~~representatives~~ grantees, for any of the reasons asserted by them, yet, Mrs: Speck was entitled to recover one half, in this action, as the ~~assign~~ grantee of Mrs: W., for her absolute use, & the other half as having it, as the ~~assign~~ grantee, of Mrs: W. in Trust for W's heirs & assigns - For, the whole legal title was passed into Mrs: S. - And a Trustee, having the legal title, can eject his cestui que trust - Adams' Ejectment pp 44 & 45 -

We insist, that the inquiry, as to this equity, if any, in behalf of Wohlien's heir, shall be made in proper proceedings, in ~~which~~ Equity where Mrs: Speck can have the benefit of

its principles of justice, as against Wohlien's grantees.

- Point 4

By her dower right, & title, Anna Wohlien could relinquish to the City one half of the title of the leasehold, & by the sale to her, she already having the whole title in her, as administratrix, she could relinquish the whole title to the City. And, as she did do this, the City's conveyance to her vested in her the title in fee absolutely, & her deed to Mrs: Speck vested the like title in Mrs: Speck.

- Point - 5

The cases of Wohlien vs Speck 18 Mo: Rep: p 561 & of Speck vs Wohlien 22 Mo: Rep. p 310. are of no application, because they assume, that this property was real estate. The Counsel on both sides argued, & submitted the case upon this assumption & thus the true legal qualities, as well as just merits of this case, have been ignored to the present time.

22 Mo: Rep: pp 22 & 23 - Woodson vs Skinner
16 Mo: Rep. p 129 - Robertson vs Brant -

- Argument -

The Indenture of the City to Wohlien was a lease. It cannot be construed, or named, ~~into~~ by, any other instrument known to the law. It contains the apt words of "Demise, Grant & To farm Let" & the lessee takes to himself "his executors, administrators & assigns" & not to his heirs ——

Its consideration is an annual rent, by name, payable at fixed times. It provides for a forfeiture in case of non-payment of this rent. It provides for continual periodical changes

of this rent. For this reason this Court, in the case of Woodson vs Skinner 22 Mo: Rep: pp 22 & 23, decides it to be a perpetual lease. And it is clear, under the reasoning of that case, that Skinner would have had the legal rights & benefits of the requirements, necessary for a common law forfeiture, on which his ~~court~~ defence was based, but for the mode of forfeiture fixed by the statute displacing it. The law of 1835, under which the City disposed of its Commons, fixes the mode, in the nature of a sale, but makes the transaction take the shape of a lease, with the privilege to the bidder to have the fee after a certain time, upon certain specified conditions. The object of the form of selling was to ascertain a measure for the rent to be paid, as well as the sum ~~up~~ for which the bidder might have the fee, in future, if he wished it. The transaction, therefore, was closed by a lease in terms, & in fact, with a clause ~~of possibility~~

of right to the bidder of the fee upon the specified Conditions. Such was the City's practical Construction of the Act, & this Court, in said Case of Skinner vs Woodson, decides, that it was a ~~subst~~ "substantial Compliance" with it.

If the lessee did not pay the rent, as provided for, the City could forfeit his ~~lessee~~ lease, as provided for, & the fact is historical, with regard to her like leases of these Commons, that the City did forfeit almost all of them.

And as before stated, the privilege of buying the fee, was only an incident of the transaction, made to accompany the lease - subsist with it, & fall with it, like a covenant of the lessor for a renewal, or any other real Covenant following the lease. It did not bind the lessee to anything. It was a mere privilege, that he might avail himself of, or not, as he pleased. There was no mutuality in it, for both parties were not bound

by it. It was not property & the pre was of no proprietary value in the eye of the Law. This principle was fully settled in the case of Robertson & Brant 16 Mo: Rep. p 129.

In Conclusion, the appellant insists, & prays for, not only a reversal of the judgment below, but for a judgment in her behalf in this Court, such as the Court below should have rendered. The facts therefor are of record in this case without dispute.

A. Todd
Atty. for Appellant.

No: 91

Sup: Court

Speck
appellant

vs

Riggin
appellee

Points.
for appellant

A. Todd
for appellant