Southard v. Russell, 57 U.S. 547 (1853)

Syllabus **Case**

U.S. Supreme Court

Southard v. Russell, 57 U.S. 16 How. 547 547 (1853)

Southard v. Russell

57 U.S. (16 How.) 547

APPEAL FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF KENTUCKY

Syllabus

A bill of review, in a chancery case, cannot be maintained where the newly discovered evidence, upon which the bill purports to be founded, goes to impeach the character of witnesses examined in the original suit.

Nor can it be maintained where the newly discovered evidence is merely cumulative, and relates to a collateral fact in the issue, not of itself, if admitted, by any means decisive or controlling: such as the question of adequacy of price, when the main question was, whether a deed was a deed of sale or a mortgage.

Where a case is decided by an appellate court, and a mandate is sent down to the court below to carry out the decree, a bill of review will not lie in the court below to correct errors of law alleged on the face of the decree. Resort must be had to the appellate court.

Nor will a bill of review lie founded on newly discovered evidence, after the publication or decree below, where a decision has taken place on an appeal, unless the right is reserved in

decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose.

Being a continuation of the case of *Russell v. Southard* and others, reported in 53 U. S. 12 How. 139, it is proper to take it up from the point where that report left it.

In 53 U. S. 12 How. 159 it is said,

"After the opinion of the court was pronounced, a motion was made on behalf of the appellees for a rehearing and to remand the cause to the circuit court for further preparation and proof, upon the ground that new and material evidence had been discovered since the case was heard and decided in that court. Sundry affidavits were filed, showing the nature of the evidence which was said to have been discovered."

The reporter abstained from stating the substance of these affidavits in consequence of the following order, which was endorsed upon them in the handwriting of MR. CHIEF JUSTICE TANEY.

"The Court directs me to say that these affidavits are not to be inserted in the report, as they implicate the character of individuals

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who can have no opportunity of offering testimony in their defense. The reporter will merely state, in general terms, that affidavits were filed to support the motion."

As the present case turned chiefly upon the contents of these affidavits which were made the groundwork for the bill of review, it becomes necessary to state them now. They were affidavits to sustain the two following points:

1. That Dr. Wood, a witness for Russell was bribed either by him or his attorney, Stewart; that Wood had in his possession a note given to him by Stewart for about three hundred dollars, then past due; that Wood had applied to a person named Addison to collect it for him, and left the note in his possession for that purpose; and that Wood had confessed to James J. Dozier, Esq., that the note had been given to him for his testimony in the case.

2. The following affidavit of George Hancock.

"I, George Hancock, state that some short time previous to the sale by Col. Gilbert C. Russell of his farm near Louisville, to James Southard, he offered to sell it to me for five thousand dollars, and he made the same offer to my sister, Mrs. Preston. I thought it a

speculation, and would have bought it but for the reputation the place bore for being extremely sickly. He also explained to me the reason why he had given so large a price for the place, which it is not deemed necessary here to state, and which satisfied me that he knew he was giving much more than its value, at the time he made the purchase."

"GEORGE HANCOCK"

Upon these affidavits, the motion for a rehearing was made and overruled, the opinion of the Court overruling the motion being recorded in 53 U. S. 12 How. 158.

The mandate went down to the circuit court, and was there filed at May term, 1852. The circuit court decreed that the conveyance from Russell to Southard was a mortgage, and that Russell was entitled to redeem; and in further pursuance of the opinion of the Supreme Court that the case was not then in a condition for a final decree in respect to the other defendants, it was remanded to the rules.

At the same term, namely in June, 1852, Southard and the other appellants moved the court for leave to file a bill of review of the decree rendered at the present term, and in support of the motion presented their bill, and read the following documents, namely:

The affidavits of James Guthrie, Willett Clarke, Daniel S. Rapelge, U. E. Ewing, Thomas G. Addison, George Hancock, Charles M. Truston, John P. Oldham, J. C. Johnston, D. F. Clark, and of R. F. Baird, and a paper purporting to be an extract

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from a letter from Russell to J. W. Wing, and a copy of the deed from G. C. Russell to Joseph B. Stewart. And the said Russell by his counsel, opposed the motion, and objected that the grounds made out were insufficient, and read in his behalf the documents which follow: the affidavits of Elias R. Deering, Elijah C. Clark, Robert F. Baird, J. B. Stewart, Philip Richardson and of Robert F. Baird, a copy of the record of Burks against Southard, and a copy of the opinion of the Supreme Court of the United States upon a new hearing, with the affidavits attached thereto.

After argument, the court gave leave to the complainants to file their bill of review; whereupon the defendant, Russell moved the court to strike from the bill all that portion relating to champerty and all that portion relating to the explanation of the evidence of J. C. Johnston, by the introduction of his affidavits, and all other parts of said bill which is designed to explain the evidence already in the original record. The court overruled the motion, but reserved all the questions of the competency and effect of the matters the

defendant moved to have stricken from the bill, to be decided when they may be made in the progress of the cause, or on the final hearing thereof.

In September, 1852, Russell filed his answer.

The substance of the bill and answer are stated in the opinion of the court.

In May, 1853, the circuit court dismissed the bill with costs, upon the ground that

"there is not sufficient cause for setting aside said decree of the Supreme Court of the United States, entered here, according to the mandate of said Supreme Court."

From this decree, the complainants appealed to this Court.

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MR. JUSTICE NELSON delivered the opinion of the Court.

The present defendant, Russell filed a bill in the court below in 1847, against the present complainant, Southard, and others, for the purpose of having the deed of a large and valuable farm or plantation, and a defeasance on refunding the purchase money executed at the same time, declared to be a mortgage; and that the complainant be permitted to redeem on such terms and conditions as the court might direct. The cause went to a hearing on the pleadings and proofs, and a decree was entered May term, 1849, dismissing the bill. Whereupon the complainant appealed to this Court, and, after argument, the decree of the court below was reversed, the court holding the deed and defeasance to be a mortgage, and that

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the complainant had a right to redeem, remanding the cause to the court below, with directions to enter a decree for the complainant, and for further proceedings in conformity to the opinion of the court. The case and opinion of this Court will be found in 53 U. S. 12 How. 139.

The main question litigated in the cause, both in the court below and in this, was whether or not the transaction, the decree and defeasance, was a conditional sale to become absolute on the failure to refund the purchase money within the time, or a security for the loan of money. The case was severely contested in the court below, some seventy witnesses having been examined, as appears from the original record, and was very fully argued by counsel, and considered by this Court, as may be seen by a reference to the report of the case.

case.

On the coming down of the mandate from this Court to the court below, and the entry of a decree in conformity thereto, the defendants filed a bill of review, which having been entertained by the court, the cause went to a hearing on the pleadings and proofs, and after argument the court dismissed the bill. The case is now before us on an appeal from that decree. Between forty and fifty witnesses have been examined upon the issues in this bill of review; but we do not deem it material to go into the evidence, except as it respects one or two particulars, which are mainly relied on as ground for interfering with the former decree. The learned counsel for the appellant, in a very able argument laid before us, frankly and properly admits that, so far as it regards the newly discovered evidence produced, the case rests mainly upon the alleged bribery of one of the material witnesses for the complainant in the original suit, Dr. Wood; and upon the evidence of Hancock, who had not before been a witness. It is claimed that this evidence is of such a nature and character, when taken in connection with the original case, as to be controlling and decisive of the original suit in favor of the defendants; and that it is competent and admissible as newly discovered facts bearing upon the main issue in that case, within the established doctrine concerning proceedings in bills of review.

It is important, therefore, to ascertain with some exactness the character and effect of this evidence when taken alone; and also when viewed in connection with the evidence in the former case.

The bill of review charges, upon information and belief, that Stewart who was one of the solicitors for the complainant in the original bill obtained by means of bribery the testimony of Dr. Wood, a material witness in the cause, and upon the faith of whose evidence this Court was induced to render its decision

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on the appeal; that said Stewart gave to the witness his note for the sum of two hundred and eighty dollars, and that this fact first came to the knowledge of the complainants since the decree.

The answer sets forth, that this note was given by Stewart under the following circumstances: the defendant, on his return to the State of Kentucky, in the fall of 1827, ascertained that his overseer, Wing, who was his agent in charge of the farm or plantation in question, had greatly involved him in debt, and among the list of creditors furnished by said overseer were Doctors Smith and Wood. That afterwards, when he brought his suit for the redemption of the mortgage, he left with the said Stewart a list of the names by whom

he believed he could prove the facts necessary to sustain his bill; and among others were the names of Doctors Wood and Smith. That he was subsequently informed by Stewart that each of these two witnesses claimed a debt against him; and that Wood had exhibited an account certified by said Wing, his overseer, for medical services and borrowed money; and knowing that any account signed by Wing was correct, the defendant authorized his solicitor to execute a note for the same as his agent; and to do the same thing in respect to Dr. Smith, after ascertaining what was really and truly due to him.

That he was afterwards informed by said Stewart, he had executed a note to Doctor Wood to the amount of two hundred and eighty dollars, which included his account together with the interest. That said Stewart also informed him he would have given a similar obligation to Doctor Smith; but on reference to a record of a suit of said Smith against the defendant in Louisville chancery court, it appeared doubtful if any further sum was due to him. Thus the facts stand upon the pleadings.

The proofs in the case, as far as they go, sustain the answer. They consist altogether of admissions drawn from Wood by persons in the service of Southard, the complainant, employed with the express view of extorting them by the temptation of reward, and by the use of the most unscrupulous and unjustifiable means. A deliberate and corrupt conspiracy was formed, at the instance of Southard, for the purpose of obtaining from Wood an admission that this note was given as an inducement to a consideration for his testimony in the original suit; but in the several conversations detailed, and admissions thus insidiously procured, Wood persisted in the assertion that the note was given as a consideration principally for medical services rendered to the slaves of Russell on the plantation in question. If any doubt could exist as to the truth of the circumstances under which this note was given, as declared by Wood, his

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consistency in the numerous conversations into which he was decoyed, unconsciously, by the conspirators, should remove it. If not founded in fact, the consistency is strange and unaccountable, considering the character of the persons employed to entrap him, and the unscrupulous and unprincipled appliances used to accomplish a different result, namely, the obtaining an admission that the note was given as the wages of his former testimony. He was surrounded by professed friends for this purpose, and intoxicating liquors freely used, the more readily to entrap him. An attempt has been made to invalidate this explanation by the testimony of Doctor Smith, who states, that he was the general physician of the plantation, and that, in his opinion, services to the amount claimed by Wood could not have been rendered at the time without his knowledge; but this negative

testimony, whatever weight may properly be given to it, is not sufficient to overcome the answer, and, corroborating circumstances to which we have referred. It is matter of opinion and conjecture, and that too after the lapse of some twenty-five years. Wing, the overseer, who might have cleared up any doubt upon the question, is dead.

One line of proof and of argument, on the part of the complainant in the original suit, to show that the transaction was a mortgage and not a conditional sale, was the great inadequacy of price. A good deal of evidence was furnished on both sides upon this point. The item of newly discovered evidence, besides that already noticed, is the testimony of Hancock, who states that Russell in a conversation with him in the forepart of the year 1827, as near as he could recollect, offered to sell to him the plantation for the sum of $5,000. This is claimed to be material, from its bearing upon the question of adequacy of price, Southard having paid nearly this amount.

Without expressing any opinion as to the influence this fact, if produced on the original hearing, might have had, it is sufficient to say, that it does not come within any rule of chancery proceedings as laying a foundation for, much less as evidence in support of, a bill of review.

The rule, as laid down by Chancellor Kent 3 J.Ch. 124, is that newly discovered evidence, which goes to impeach the character of witnesses examined in the original suit, or the discovery of cumulative witnesses to a litigated fact, is not sufficient. It must be different, and of a very decided and controlling character. 3 J.J.Marsh. 492; 6 Madd. 127; Story's Eq.Pl. § 413.

The soundness of this rule is too apparent to require argument, for if otherwise, there would scarcely be an end to litigation in chancery cases, and a temptation would be held out to

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tamper with witnesses for the purpose of supplying defects of proof in the original cause.

A distinction has been taken where the newly discovered evidence is in writing, or matter of record. In such case, it is said, a review may be granted, notwithstanding the fact to which the evidence relates may have been in issue before; but otherwise, if the evidence rests in parol proof. 1 Dev. & Batt. 108, 110.

Applying these rules to the case before us, it is quite apparent that the decree below dismissing the bill was right and should be upheld. The utmost effect that can be claimed for the newly discovered evidence is: 1. the impeachment of the testimony of Doctor Wood

for the newly discovered evidence is: 1. the impeachment of the testimony of Doctor Wood in the original suit, and 2. a cumulative witness upon a collateral question in that suit, which was the inadequacy of the price paid; a fact, it is true, bearing upon the main issue in the former controversy, but somewhat remotely.

As it respects the first -- the impeachment of Wood -- the means disclosed in the record resorted to by the complainant, Southard, strongly exemplify the soundness of the rule that excludes this sort of evidence as a foundation for a bill of review, and the danger of relaxing it by any nice or refined exceptions. And as to the second -- the evidence of Hancock -- it is excluded on the ground, not only that it is merely cumulative evidence, but relates to a collateral fact in the issue, not of itself, if admitted, by any means decisive or controlling. If newly discovered evidence of this character could lay a foundation for a bill of review, it is manifest that one might be obtained in most of the important and severely litigated cases in courts of chancery.

There is another question involved in this case, not noticed on the argument but which we deem it proper not to overlook.

As already stated, the decree sought to be set aside by this bill of review in the court below was entered in pursuance of the mandate of this Court on an appeal in the original suit. It is therefore the decree of this Court, and not that primarily entered by the court below, that is sought to be interfered with.

The better opinion is that a bill of review will not lie at all for errors of law alleged on the face of the decree after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as matter of course, any error of the kind that might have occurred in entering the decree.

Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the

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decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits. 1 Vern. 416; 2 Paige 45; 1 McCord's Ch. 22, 29, 30; 3 J.J.Marsh. 492; 1 Hen. & Munf. 13; Mitford's Pl. 88; Cooper's Pl. 92; Story's Eq.Pl. § 408. Neither of these prerequisites to the filing of the bill before us have been observed.

prerequisites to the filing of the bill before us have been observed.

We think the decree of the court below, dismissing the bill of review, was right, and ought to be

Affirmed.

Order

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this Court, that the decree of the said circuit court in this cause be, and the same is hereby affirmed, with costs.