

BOOTHE *et al.* v. BAILEY *et al.*

NASHVILLE, DECEMBER, 1842.

LIABILITY OF CLERK WHO PAYS MONEY WITHOUT ORDER, NOTWITHSTANDING A SUBSEQUENT ORDER DIRECTING SUCH PAYMENT. Although the clerk and special commissioner of the court may claim the protection of an erroneous order directing him to pay money, when he pays it accordingly, yet, if he pay the money without order, he ought not to be permitted to protect himself under a subsequent erroneous decree of the court, pursuant to which he did not act at all, and which, therefore, led him into no error.

CASE IN JUDGMENT. The lands of non-resident miners having been sold under a decree of the chancery court, the clerk and commissioner of sale was directed to collect the purchase money and pay it into court, instead of which he paid the money to the foreign guardian of the minors, taking a bond of indemnity from other defendants, and afterwards, for the purpose of protecting himself, procured an erroneous order in the cause, without the knowledge of the parties interested, to pay the money to the foreign guardian. Held, that a bill by the miners stating these facts would, if sustained by proof, entitle the complainants to relief, and that a demurrer by the clerk ought to have been overruled.

[595] This bill was filed in the chancery court at Clarksville, by Boothe and wife, and the heirs and distributees of Andrews, deceased, against C. Bailey and others. Bailey demurred to the bill, which was allowed, and complainant appealed.

Meigs & Garland, for the complainants.

Boyd, for the defendants.

Reese, J., delivered the opinion of the court.

The bill alleges the same proceedings in the circuit court of Montgomery county, relating to the sale of a tract of land in said county belonging to the widow and heirs of Andrews, deceased, and the several decrees and orders made therein, which are set forth in the preceding case of Boothe and wife, and the heirs of Baker Andrews, deceased, *ex parte*, in the matter of the estate of the said Baker Andrews, deceased.

In addition, it states that after the order or decree of January, 1837, and before that of May, 1839, the defendant Charles Bailey, the clerk and commissioner of said court, while the decree of 1837 was in full force, which directed him, expressly, to retain the bonds taken to secure the price of said tract of land, sold by the decree of said court,

in his possession, to collect the money when it should fall due, and to pay the same into court, did, contrary to his duty, pay the same over to Pegram, the Illinois guardian, taking a bond of indemnity from the other defendants, Sturdevant and the Masons, to secure him against responsibility for his violation of duty in that behalf, and that said Bailey obtained some pecuniary advantage for [596] such, his violation of the decree of the court. The bill also alleges that the decrees of 1839 and 1841 were procured at the instance, and by the action of, said Bailey and his confederates in the bond or indemnity, without the knowledge or co-operation of the widow or heirs of Baker Andrews; and even without the knowledge or co-operation of said Pegram, the guardian in Illinois, although his name was used, with a view to shield and protect the said Bailey and his confederates from the consequences of his illegal conduct. That the said Bailey never made any report or statement to the court showing the truth of the matter; that, at the very time when he procured the decrees of 1839 and 1841, setting forth the terms and conditions on which the payment over to the guardian should take place, he had already, not only without the knowledge or consent of the court, but against its express orders, paid the money over; and that these orders and decrees, thus procured, should not shield and protect Bailey and his confederates; that said last orders and decrees do not purport to be confirmations of anything which Bailey, the commissioner, had done; and that Bailey took no step whatever upon the ground of said orders, or by authority of them, or in consequence of them; and, indeed, that he took no step whatever in the premises, after said orders. We state the legal effect of what is alleged in the bill, rather than the precise terms as used. The bill further states that the Illinois guardian and his surety are insolvent, and prays a decree for the money against Bailey and the sureties to him in the bond of indemnity.

These sureties have answered. But Bailey demurred to the bill, and his demurrer was allowed by the chancellor. This, we presume, was done upon the ground that the decree of May, 1841, authorizing Bailey to pay over the money to the Illinois guardian, although erroneous, ought

to protect the commissioner. But the bill alleges that that decree was procured by Bailey; that it is delusive on its face, asking the court to do that which had already been done; that the money was not paid over in consequence of that decree, but had been paid over more than two years before; that no step was taken subsequent to said decree, or by reason of it; that the decree does [597] not purport to confirm what had been done. The court appears to have been ignorant of that. The reasons gravely given in what purports to have been the petition of the Illinois guardian, of trouble and inconvenience, rate of interest, etc., as they imply that the money was still in the hands of the commissioners, were suggestions of falsehood to the court, and the whole proceeding fraudulent.

This, then, is not a case where a court erroneously directs a person, in the situation of Bailey, to do an act, and he does it, and where he may claim protection therefor. Whatever he did as to paying the money over was against the direction of the court, and he did nothing therein because of the direction of the court. He ought not, therefore, to be permitted to protect himself under that erroneous decree of the court, pursuant to which he did not act at all, and which, therefore, led him into no error. If the material allegations of the bill be true, the complainants are entitled to the relief prayed. The decree of the chancellor must be reversed, the demurrer be disallowed, and the defendant Bailey must answer.

THE BANK OF TENNESSEE v. SAFFARRANS.

NASHVILLE, DECEMBER, 1842.

PARTNERS—ACCOMMODATION ENDORSEMENT BY ONE PARTNER. It is not within the purpose and business of a mercantile firm to endorse negotiable paper for its neighbors, and, therefore, a bank, which has discounted a note with knowledge of the fact that the endorsement of a firm thereon was made by one partner for the accommodation of a third person, can not hold the other partner liable, unless it proves his assent thereto, express or implied, before or after the transaction. (Acc. Scott v. Bandy, 2 Head, 190, and Bankhead v. Allaway, 6 Coldw., 96, both citing this case.)