Zane's Devisees v. Zane, 6 Munf. 406 (1819); 20 Va. 406

6 Munf. 406
Supreme Court of Appeals of Virginia
Zane's Devisees v. Zane
Decided Oct. 25, 1819.

Opinion:

****1 *406** 1. In the year 1775, *J. Z.* made a settlement on the upper part of an island in the Ohio River, containing in all 285 acres. In 1777, his brother *E. Z.* made a settlement on the lower part. A *parol* agreement between them, in or before the year 1784, that *E. Z.* should exhibit his settlement right, to the Land Commissioners, obtain their certificate, and get a Patent to himself for the whole island; and afterwards convey to *J. Z.* in fee simple his part thereof, situate above certain line trees, was enforced in Equity, upon a Bill filed, in 1815, by *J. Z.*, *whose possession of the land had continued without interruption from the time of his first settlement.*

2. The considerations of *compromising doubtful rights,* and *settling boundaries,* are not only good, but favoured in law.

3. Although the rule is, that the *allegata* and *probata* ought to correspond, yet the Court of Equity should always incline to get over *form,* in favour of *substance,* where the case *in proof* is clearly such as would, if properly set forth in the Bill, entitle the plaintiff to a decree; especially, if the defendants do not pretend to disprove the agreement alledged, or to prove one different but say in their answer that they are willing to yield to the proof of any agreement which the plaintiff can establish.

IN a suit brought by *Jonathan Zane* in the year 1815, against the heirs at law of *Ebenezer Zane* deceased, in the Superior Court of Chancery for the Clarksburg District, Chancellor CARR pronounced the following Opinion and Decree.

“The Bill states that, in the first settlement of the Western Country, the plaintiff took up, in conjunction with his brother Ebenezer, the island in the Ohio River, called Wheeling Island: that they took possession of their respective parts, and occupied them 'till the death of his said brother, and the plaintiff has continued to occupy his part ever since: that, in 1784, they employed the Surveyor of Ohio County, (in which the land lies,) to survey the island for them: that he did this, distinctly establishing, in the presence of himself and brother, and by their direction, an Elm Tree on the East side, and a Walnut on the West, as Corner Trees; from the one to the other of which, a strait line was to constitute their division line; the upper part to belong to the plaintiff, the lower to his brother: that the plaintiff's part was calculated separately by the Surveyor, and found to contain 75 acres 138 perches: that it was then mentioned by his brother, that he had a settlement right, which would cover the whole island; that a patent might issue in his name for the whole, and he would convey to the plaintiff his part; which was assented to by the plaintiff; that, after the land was patented, he suggested to his brother the propriety of making a deed for his part, which he promised to do; but the confidence and regard they felt ***407** for each other rendered them careless on the subject, and it was delayed from year to year, 'till his brother died without executing the deed: that his brother often declared, before witnesses, that the upper part of the island was the plaintiff's, and, if he died before executing a deed, his children were directed to do so: that, so far from carrying into execution this intention of their father, the children, or some of them, are prosecuting an action at law to turn the

plaintiff out of possession. All the children by name are made parties; and the prayer of the Bill is that they may be compelled to convey his part of the island to the plaintiff. The Bill was subsequently dismissed as to all the children, but *Noah* and *Daniel.--Noah* filed his Answer; and, in this state, the papers were put into my hands before the last term. I returned them, saying I could not decide without the answer of *Daniel*, to whom, with *Noah,* it appeared from *Noah's* answer that the Island had been devised by *Ebenezer.* I mentioned at the same time, that I should like to see the Patent to *Ebenezer,* and his Will. At the last term it was agreed by Counsel, and entered of record, that the Answer of Noah should be taken as the answer of *Daniel* also; that all the depositions in the cause should be read as to *Daniel,* and that the cause should be considered as set for hearing. Accordingly, the papers were again put into my hands; but the Patent, or the Will of *Ebenezer,* have not been furnished. I do not know that they are absolutely necessary to a decision, as their existence and contents, so far as concerns this cause, seem to be admitted on all hands. The answer states, that the defendants *Noah* and *Daniel* are devisees, under their father's will, of the island; that they know nothing of the contract stated in the Bill, but have heard their father say that he had promised the plaintiff that he should during his *life* hold that part of the island, which lay opposite to his land on the main. The answer then refers to several copies of original entries and surveys; states that *Ebenezer* was invested with the legal title, and died seised; admits the plaintiff entitled to a life estate; alledges that, until their *father's* death, the whole island was taxed to ***408** him, that the defendants are prosecuting at law a writ of Right to recover the part of the island in the plaintiff's possession, and hope to succeed, unless the plaintiff can shew the equitable claim he pretends to, and of which the defendants are ignorant: that the defendant *Noah,* upon hearing his uncle claimed the land, wrote to him, enquiring by what right he claimed, and stating that, if there existed any arrangement or agreement, by which his father was morally bound, he would execute it; to which he received no answer: that *Ebenezer's* certificate of settlement, covering the whole Island, would give him a title to the whole, unless the plaintiff could derive a title to part from some *contract; and the defendants are perfectly and entirely willing to yield to the proof of such contract, if any such there be.* This is an abstract of the answer. It will be observed, that it does not contradict the Bill, but, merely professing ignorance of the subject, puts the plaintiff on the proof of his case; to which proof, if any can be produced, they are entirely willing to yield.

**2 In support of his claim, the plaintiff produces, first, his long and uninterrupted possession, without the payment of rent, or any other evidence that he held it as the land of another: 2dly, the deposition of *Mills,* who says, that in 1775 he saw an improvement on that part of the Island claimed by the plaintiff, consisting of trees deadened and brush heaps made, which he understood were made by the plaintiff, who then lived where he now does, on the main, opposite the island:--3dly, the deposition of Mrs. *Clarke,* who says that, about the time of *Broadhead's* campaign, her husband moved on the island; that he applied to *Ebenezer* to lease him some land, who said he had leased all the land he had to spare; but referred him to the plaintiff; that the plaintiff gave her husband a lease of the upper part of the island, where she has ever since resided; that *Ebenezer* never mentioned to her his claim to that part of the island, or claimed rent, or ordered her off the premises; that her husband has been dead about twenty years; since which time, she has lived on the land,

without paying any certain rent, but has cooked ***409** for the plaintiff's hands, and taken care of his stock and farm, as a compensation for living on the land:--4thly, the deposition of *John Caldwell,* who says, that, in 1779, he was agent for his father *James Caldwell,* in land business, in the western parts of Virginia; that his father claimed land immediately below Wheeling Creek on the Eastern shore of the Ohio; *Ebenezer* directly above him; and the plaintiff next above *Ebenezer;* all of which lands lay opposite to different parts of Wheeling Island:--that, after a time, a dispute arose between *Ebenezer* and the Deponent, in respect to their claims on the Island; which was amicably adjusted, by agreeing that each should retain so much of the Island as lay opposite to his land; that, some time in the Spring of 1782, the deponent was in company with *Ebenezer,* at the sitting of the board of Commissioners in Monongalia County, when *Ebenezer* proposed to the deponent to agree that he should include the whole Island in his certificate of settlement and take a patent for the same, and that he could make a deed to *James Caldwell* for his part: that, at the same time, *Ebenezer mentioned to the deponent, that he had made such a proposal to Jonathan, who had agreed to it;* and that each of the owners could pay an equal share of the expense, which would save costs: that the deponent would not make such agreement; and, sometime after, *Ebenezer* bought *James Caldwell's* part of the Island, which lay opposite his land below Wheeling Creek:--5thly, the plaintiff produces the deposition of the surveyor *Woods,* who says that, in 1784, he surveyed a tract of land on Wheeling Island, by virtue of a certificate from the land Commissioners, in the name of *Ebenezer;* that, while surveying the same, *Ebenezer* and *Jonathan,* (both present,) pointed out an Elm tree on the east side of the Island, and a Walnut on the West side, which they told the deponent to mark, for corner trees, to divide the said Island between them; which trees were marked for corner trees, and the deponent took an account of them in his field notes; the said Ebenezer saying that, as soon as a patent was obtained on the survey, he would convey that part above the said corners to *Jonathan;* that he has ***410** the original field notes in his possession yet; (a Copy of which is filed among the papers, and admitted by the Counsel;) and, upon examination, finds that the Elm on the East side of the Island is described as standing 182 poles from the upper end, and the Walnut on the West side as standing 174 poles from the upper end:--the course across the upper end of the Island, is 17 poles at the Elm on the East side. The deponent recollects that *Ebenezer* said that his settlement right was enough to cover the whole Island, and that taking the whole up together would save *Jonathan* the costs of a warrant and separate survey. Lastly, the plaintiff produces the evidence of *Moses Given,* who says that he was with *Ebenezer* in his last illness, when he was on his death-bed; and, in a conversation he held with him, *Ebenezer said that he intended the upper part of the Island for Jonathan.* The deponent asked him why he did not see to it in his own day? he said, he had children he could rely on. The reason of the deponent's enquiry was, that he had previously understood, from common report, that the whole Island belonged to *Ebenezer.*

**3 Upon this evidence, the plaintiff rests to establish his claim; and I must confess, that, to my mind, it is extremely strong to prove that he had, by settlement or improvement, a right to the upper part of the Island; that, *under this right, he was in possession;* that *Ebenezer* and himself did make an agreement, (the proposition coming from *Ebenezer,*) that he (*Ebenezer*) should obtain from the

Commissioners a settlement right, which would cover *Jonathan's* part of the Island, and should convey to *Jonathan* when he obtained the patent: that, in consequence of this agreement, *Jonathan* made no claim before the Land Commissioners:--that the conversation, which passed before the Surveyor *Woods,* was an explicit recognition of this agreement; and that the evidence of *Given* shews that, on his death bed, *Ebenezer* still acknowledged it.

To countervail this evidence, what have the defendants produced? 1st, the declarations of *Ebenezer* and his wife that *Jonathan* was to have a life-estate only; or, at most, ***411** for himself and wife. These declarations I hold to be utterly inadmissible in favour of the party making them. No man is permitted by his own evidence to make out his own case. 2d, The general understanding of the neighbourhood, that *Jonathan* had a life estate, and *Ebenezer* the fee simple. This sort of evidence upon the subject of *title,* is of little more worth than the last; probably produced by it, and by the farther circumstance of *Ebenezer's* having the *patent,* of which every one might know, though few would hear perhaps of the *parol agreement.* 3d, The payment of taxes by *Ebenezer;* of taxes for the whole Island tract. This probably resulted, too, from the legal title being in him. The Commissioners for the County, finding that to be the fact, listed the land to him; and the tax on *Jonathan's* part, being but a trifle, excited no attention. This, at least, is probable:--but, whether true or not, the circumstance can by no means avail to prove, in the face of *Jonathan's possession,* that he had abandoned his claim.

Thus, if the case depended merely upon the evidence for and against the agreement, I should feel little hesitation in the decision to be given: but, in the arguments which have been submitted by the Counsel for the defendants, several objections have been taken to the plaintiff's case, which I will proceed to consider. 1st, The Statute of frauds. 2d, That the agreement was without consideration. 3d, That the length of time which has elapsed should prevent the Court from interfering. 4th, That the case made out in the evidence is materially variant from that stated in the Bill; and, however good in itself, will not justify a recovery, as the plaintiff must make out the case stated and put in issue.

With respect to the *Statute of Frauds,* it is perhaps hardly worth while to say any thing; as one of the Counsel abandoned that ground, and the other I am sure would have done so, if he had adverted to dates; the Act having passed in 1785, and the contract here having been made long before that time. I will merely quote Judge ROANE'S remark in *Vance v. Walker,* on the subject. That, like this, was a contract for land. He says, "If it be said ***412** that a reliance on the parol proofs in this case is dangerous; I answer, that the Act of frauds does not apply to the two points of time embraced by them, and that it was not for Courts, but the Legislature, to adopt the rules of that Statute: independent of it, we must decide this case, as others, by the general doctrines of evidence."

****4** 2dly, That the agreement was *without consideration.* This objection is founded on the idea, that the agreement was, for the first time, proposed and made while the survey was going on, and when *Ebenezer,* being in possession of the certificate of settlement, had a right under it to cover the whole Island: but it is most evident to me, both from the deposition of *Woods* and of *Caldwell,* that what passed at the survey was merely the recognition and recapitulation of an agreement formerly made. *Caldwell* states, that, when about to go before the Commissioners, *Ebenezer* proposed to him, "to agree that he should include the whole Island

in his certificate of settlement, and take a patent for the same, and that he could make a Deed to *James Caldwell* for his part;" saying, at the same time, "that he had made the same proposal to *Jonathan,* who had agreed to it." Here, then, is the agreement explicitly stated by the party himself. And was there not a good consideration for it? We have seen that Jonathan had made an improvement on the upper end of the Island in 1775: Ebenezer's certificate states his settlement to have been in 1777: the Island contains but 285 acres: consequently, one Settlement Right would cover the whole. Who should obtain this? If there was a contest, might not the Commissioners award it to *Jonathan?* To prevent this contest then, and yet secure to the parties what each claimed, Ebenezer made the agreement. Here were two considerations, not only good, but favoured in law; *to compromise doubtful rights, and to settle boundaries.*

The 3d objection is, the *length of time* which has elapsed. It is correctly stated to be a general rule that Courts of Equity, after a great length of time, will not lend their aid to execute contracts. The Rules of Courts ***413** are generally founded in good reason; and Courts of *Equity,* especially, never tie themselves down so strictly to any rule as to apply it to cases not within the mischief it was intended to remedy. Let us enquire what are the reasons on which this rule is founded? 1st, It is considered, that, where a party has for a long time suffered a contract to sleep, without taking any step to execute it, the opposite party has a right to presume an abandonment, and, under this presumption, may have made arrangements and dispositions which would render a specific execution of the contract very injurious to him. Does this reasoning apply to the present case? Could *Ebenezer* ever have supposed that Jonathan had abandoned the contract? Let it be remembered that *Jonathan* did not claim the land under the contract, but by an *original right;* that, by a compromise of the claims of the brothers, *Ebenezer* was to receive the legal title to the whole Island, and, in consideration of the compromise, was to make a deed to *Jonathan* for his part; that, under the agreement, *Ebenezer* did obtain the settlement certificate, and the Patent. Here the consideration moving from *Jonathan* was complete: he had performed the whole of his part of the contract. After this, could it be supposed that he would abandon? Abandon what? The claim of the legal title from his brother, when this was all that remained to complete the contract? This would be, indeed, a strange abandonment! But *Jonathan* still held possession; uninterrupted possession. To what could this be referred, but to his claim? Will it be said that it might be referred to the estate for life which *Ebenezer* gave him? The answer is, that, of this estate for life, there is not a tittle of Evidence which can be received. The possession then which Jonathan held, can only be referred to his claim. Suppose a man were to buy an estate, to pay the consideration, to take possession and hold it uninterruptedly for many years, without having obtained a legal title. When, at length, he came to ask for the legal title, would it, under such circumstances, be said to him, "we can not aid you; you have abandoned your contract?"--Certainly not.

****5 *414** But it may be said that *Jonathan* did not *gain possession* under the *contract.* True; because he was already in possession under his *prior right.* But was not that possession *continued* under the sanction of the contract, after *Ebenezer* obtained the legal title?--And was not what passed at the survey equal to a delivery of possession? *Jonathan being then in possession, Ebenezer* directs the corners to be marked, and the line laid down, which designated and circumscribed that possession, and says, that so soon as he obtained a patent,

he would make *Jonathan* a deed for it. In my mind, this was equal to an actual delivery of possession.

Another reason, for which Courts of Equity have refused to execute contracts after a great lapse of time, is, that, in the interim, the circumstances may be forgotten, and the evidence lost which would present the subject fairly to the Court; and, as this has happened through the negligence of the party applying, he shall suffer by it. But, in the case before us, the injury from length of time could operate only to the prejudice of the *plaintiff;* for he had to make good his contract by *witnesses;* while *Ebenezer* stood firm on the ground of his *patent.* Every year that passed away, might bear with it some portion of the plaintiff's testimony; thereby weakening his case, and strengthening his opponent's. Suppose, in the lapse of years, *Caldwell* and *Woods* had died; (and they must both be very old men now;) in the loss of their testimony would have been involved the loss of his cause by the plaintiff. This is certainly a risk which the plaintiff ran by his delay, and which it was very imprudent in him to have incurred; but if, notwithstanding this lapse of years, and the advantage it gave his opponent over him, he succeeds in presenting to us a full and strong case, shall we reject it? And is not his case, considering the circumstances, wonderfully strong? To me it seems so. Will it be said that the lapse of time has destroyed the witnesses by whom the defendants could have countervailed this evidence? It would be strange indeed, if that lapse had operated more injury to him who stood fortified by the legal title, than to him who, in the teeth ***415** of such title, had to make out a case by parol evidence:--but the proof of the plaintiff is of such a kind, that I do not see how it could be countervailed, but by proving his witnesses guilty of perjury. If *Woods* and *Caldwell* speak the truth, he makes out a case, not on one side, but on both; and that case taken from the statement of *Ebenezer* himself.

A third ground on which the rule we are considering rests, is, that, by the lapse of time, such a change is operated in the situation of the parties, and the subject matter of the contract, as would in many cases render it's execution unjust:--as, (for example,) if I agreed for the purchase of a tract of land in a young and growing country; for which I was to pay a particular price; I hold off for 6 or 8 years, in which time the land doubles in value; then I come forward, offer the purchase money, and, if the party refuses it, call on a Court of Equity for assistance:--the Court will not give it under such circumstances. A slight attention to the case before us will evince that this reason does not apply to it. The land in question never was, in equity, the land of *Ebenezer;* never in his *possession.* He was suffered, under contract, to get the legal title:--by that permission, the consideration of the contract on *Jonathan's* part was paid, and the obligation on *Ebenezer* to convey was complete. *Jonathan has been ever since in possession.* No change, therefore, in the situation of the parties, or the value of the land, can have so operated as to render it unjust to execute this contract. Thus have I considered the several grounds on which the general rule with respect to length of time is founded, and shewn (as I think) that none of them are applicable to our case.

****6** The last objection made by the defendant's Counsel is, that the plaintiff has made one case in his Bill, and another by his evidence; that the case in the *Bill* is not good, and, if good, not supported; that the case made by the *evidence,* if admitted to be good, can not support the Bill, because not in issue; and because the *allegata* and *probata* must agree. This, I acknowledge is the most formidable ***416** objection that has been made; for, while I consider that the

plaintiff has a clear and strong case, I must agree that it has not been set out to the best advantage in the Bill. If, however, I thought the Bill so defective that a decree could not be rendered upon it; it does not follow that I should dismiss it:--for, where the Court perceives that the plaintiff has a good case, it is sometimes permitted, even at this stage, to file a supplemental Bill; or, if that is not suffered, the Bill is dismissed without prejudice, which leaves the plaintiff at liberty to sue again. I incline to think though, that the case stated, and the case proved, are not so materially variant, as to prevent a decree in favor of the plaintiff. In this, perhaps, I am carried too far by that liberal spirit which always inclines Courts of Equity to get over *form,* in favor of *substance;* especially, in support of such a case as the plaintiff's appears to me to be. The Bill first states, that the plaintiff and *Ebenezer* took up the Island in conjunction, and each remained in possession of his respective part.

The words *"took up,"* as applied to land, are well understood in this quarter:--they are used to describe those acts which, under the law of 1779, give a claim to settlement or preemption rights. By the addition, in the Bill, that the parties held in possession their respective shares, the idea of a partnership, raised by the words *"in conjunction,"* is done away. Here, then, is a statement of the plaintiff's original claim to his part of the Island. In a subsequent part of the Bill, it is set forth that, by an agreement between the plaintiff and *Ebenezer,* he *(Ebenezer)* was permitted to obtain the legal title, upon his promise to convey to the plaintiff his share. To be sure, this agreement is so *stated,* that it might be supposed to have taken place on the survey; whereas, in fact, it was made *before* that time; but I do not think this ought to prevent a decree; especially, as the defendants do not pretend to disprove the agreement, or to prove one different; but expressly state in their Answer, *that they are entirely willing to yield to the proof of any agreement, which the plaintiff can establish.*

*417 Thus, upon every view of the case, which I have been able to take, I am of opinion that the plaintiff is entitled to the land he claims. It is therefore adjudged, ordered and decreed, that the defendants, who claim as devisees from their father *Ebenezer,* do, by deed, with warranty against themselves and all claiming under them, convey to the plaintiff the inheritance of the land claimed in the Bill; it being all that part of Wheeling Island lying above a strait line run from the Elm on the East side, (and which is stated in the Surveyor's field Notes and Deposition to be one hundred and eighty two poles from the upper end of the Island,) to the Walnut on the West, (which is stated to be one hundred and seventy four poles from the upper end.) As the defendants state in their answer, that they made efforts before suit to ascertain the nature of the plaintiff's claim, by letter to him offering to execute any contract he had made with their father; and that they have always been willing to yield to any contract he could establish; I do not think they ought to pay costs. It is therefore farther ordered and adjudged, that each party pay their own costs.

****7** From this decree the defendants appealed.

Attorneys and Law Firms

Wickham for the appellants.

Call for the appellees.

BY THE COURT, the decree was AFFIRMED.

All Citations

6 Munf. 406, 20 Va. 406, 1819 WL 890