THE STATE OF ALABAMA—JUDICIAL DEPARTMENT.

THE SUPREME COURT OF ALABAMA.

October Term 1919-20
~~November Term, 191-~~

To the Clerk of the Circuit Court of Baldwin County, Greeting:

Whereas, the Record and Proceedings of the Circuit Court of said county, in a certain cause lately pending in said Court between Jacob H. Reichert, Appellant, and Jerome F. Scheip, Inc., et al., Appellees, wherein by said court, at the --- --- --- Term, 191--, it was considered adversely to said appellant, were brought before our Supreme Court, by appeal taken, pursuant to law, on behalf of said appellant:

Now, it is HEREBY CERTIFIED, That it was thereupon considered by our Supreme Court, on the 12th day of February, 1920, that said judgment of said Circuit Court be reversed and annulled, and the cause remanded to said court for further proceedings therein; and that it was further considered that the appellees pay

the costs accruing on said appeal in this Court and in the Court below.

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, at the Capitol, this the 16th day of February, 1920.

Robert F. Ligon

Clerk of the Supreme Court of Alabama.

The Supreme Court of Alabama

October
~~November~~ Term, 1919-20

1 Div., No. 114,

Jacob H. Reichert,
Appellant,

v.

Jerome H. Scheip, Inc., et al.,

Appellee.

From Baldwin Circuit *Court*,
Law.

Certificate of Reversal

The State of Alabama,
Baldwin *County.* } *Filed*

this 17 *day of* Feb, 1920

P. W. Reinmon
Clerk.

Brown Printing Co., 17908.

1920

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1919-20.

1 Div. 114.

Jacob H. Reichert

v.

Jerome H. Sheip, Inc., et al.

Appeal from Baldwin Circuit Court.

Statement.

This appeal is from an order granting a non-suit which the appellant took in an action of ejectment against the appellees, on account of the adverse ruling of the Circuit Court of Baldwin County in sustaining appellees' objection to the introduction in evidence of a deed dated September 24,1918, from Max Collins to appellant, covering lands described in the complaint,—the grounds of said objection being: (1) it did not appear that the grantor had title to the lands at the time of its execution; (2) the said deed had no revenue stamps affixed thereto, and (3) said deed was void for champerty and maintenance.

Plaintiff's grantor, Max Collins, claimed title through a number of persons who, by the deposition of Anna Leland, have been shown to be the heirs and personal representatives of Louis Durette, deceased, to whom the land had been granted by the Spanish Government,—the patent to his heirs from the United States Government being offered in evidence.

GARDNER, J.

The objection to the introduction of the deed from Max Collins to the plaintiff, that it was obtained under a champertous contract, is a ground upon which great stress is laid in argument of counsel, and upon which, as we gather from the brief, the court below acted in excluding the same from the evidence. This deed recites a consideration of $1.00 and "other valuable consideration, and the further sum of $1,000 to be paid within one year from the date of said conveyance." It also provides that a vendor's lien is reserved to secure the balance of $1,000 as purchase money, as evidenced by promissory note due one year from date, and for a sale of the property upon failure to pay the note at maturity; and, further, that the grantor is to look to the land for the payment of the $1,000 note — the grantee not to be personally responsible or liable therefor.

This deed did not disclose upon its face a champertous agreement (6 Cyc. 874; Torrance v. Shedd, 112 Ill. 466; Moore v. Ringo, 82 Mo. 468; McSwain v. Davis, (S.C.) 80 S.E. 87), as was held to be the case in Johnson v. VanWyck, by the Court of Appeals of the District of Columbia, 41 L.R.A. 520, cited by counsel for appellees.

The possession of defendants, under section 3838 of the Code of 1907, does not now affect the question here considered.—Nichols v. Nichols, 179 Ala. 613.

The objection that the deed should be excluded on account of champerty must therefore be rested upon the testimony of Anna Leland, concerning a certain conversation had with the plaintiff. Whether this testimony suffices to establish a champertous agreement need not be here determined. The action is not brought directly upon any alleged champertous agreement, which, in any event, is here only collaterally involved. The defendants were strangers to any such agreement, if one existed, and are not in position to ~~xxii~~ avail themselves of its illegality.

As to when a defendant in litigation may take advantage of a champertous agreement, the authorities are divided as is disclosed by reference to 11 Corpus Juris 270, and 5 R.C.L. 284. The Supreme Court of Iowa, in a comparatively recent case—Kress v. Ivens, 145 N.W. 325,—reviews several decisions holding to the view expressed

above, and this is the rule recognized in this State. In Kress v. Irons, supra, the court points out that one of the practical reasons why the question of champerty should not be gone into when only collaterally involved, is that it usually presents a question of fact, and that to inject it into the trial would be to permit the defendant [to use the language of the opinion] to "deflect the course of a trial to settle an issue in which he had no real interest, and which could not affect his ultimate liability. To open such a door would be to add greatly to the burden and confusion of litigation."

We consider the case of Sibley v. Alba, 95 Ala. 191, decisive of the question here under review, and the same principle there announced was recognized in Broughton v. Mitchell, 64 Ala. 310; see, also, in this connection, Gilmer v. Jones, 87 Ala. 601. We find nothing to the contrary in the cases from this State cited by counsel for appellees. We are therefore of the opinion that the action of the court in excluding the deed cannot be rested upon this ground of objection.

Chief Justice Anderson and Justices McClellan and Thomas further entertain the view there was error in excluding the deed upon the additional ground that if champerty affected the transaction, the agreement giving rise thereto was fully executed, under the authority of Grail Bros. Co. v. McClain, 197 Ala. 136, and Sellers v. Knight, 185 Ala. 95. As to this additional ground, the other members express no opinion.

It is further insisted that the deed should be excluded for the reason that it bore no United States revenue stamps. There is no evidence offered indicating any intent to evade the internal revenue law, or to defraud the Government by failing to affix the requisite amount of stamps; and, in the absence of such proof, under the authorities of this Court, the deed should not be excluded upon that ground.--Webb & Faulkner v. Barnes, 57 Ala. 509; Knox v. Whitaker, 130 Ala. 324; Berryman v. Greenville, 51 Ala. 507.

In the testimony of Anna Boland, enumerating the heirs of Louis Durette, the name is spelled Durette, while in the patent to his heirs it appears "Duret." It is argued by appellees' counsel that it is therefore not made to appear that plaintiff's grantor acquired any title from Louis Duret. Whether, under some of our decisions (Rooks v. State, 53 Ala. 79), the court might be justified in holding these names idem sonans, is unnecessary to determine for the reason that, in any event, this difference in spelling would not justify the exclusion of the deed, for the utmost the defendants could claim would be a submission of the question for the consideration of the jury.—Underwood v. State, 72 Ala. 500; 29 Cyc. 272, 277; 6 Encyc. of Ev. 917.

It is also argued that the deed was properly excluded for the reason that it did not appear from the evidence exactly what interest in the property passed to the plaintiff by virtue of the deed from Max Collins,— citing Hudson v. Vaughn, 49 South. 757, reported as a memorandum decision in 147 Ala. 690. The report of that case does not disclose whether the defendant was a stranger to the deed or a tenant in common with the plaintiffs. If a tenant in common, the holding there would be justified. If, however, the defendant was a stranger to the deed, then we think this authority would be opposed to the rule established by this Court in Hooper v. Parkhead, 171 Ala. 631, and authorities there cited, to the effect that a tenant in common is entitled as against a stranger in possession to the whole property and may recover, from such stranger, the whole in ejectment.

It appears that Louis Durette died in the year 1795, and there was evidence tending to show his marriage in a territory of this country, which was then under Spanish control. There was no evidence offered attacking the marriage as invalid under the foreign law then existing or to counteract the presumption that the children of the marriage were the lawful heirs of said Durette.—Franklin v. Lee, 62 N.H. 60. And, indeed, this question does not seem to be insisted upon by counsel for appellees.

We have here briefly treated the questions presented by argument of counsel on this appeal, and have reached the conclusion that the court committed reversible error in excluding the deed of Max Collins to the plaintiff.

The judgment of the court below will therefore be reversed and the cause remanded.

Reversed and remanded.

Anderson, C.J., McClellan, Somerville, Thomas, and Brown, JJ. concur. Sayre, J., concurs in conclusion.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1 Div., No. 114,

Jacob H. Reichert, Appellant,

vs.

Jerome H. Sheip, Inc. et al, Appellees.

From Baldwin Circuit Court.

The State of Alabama,
City and County of Montgomery.

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to five *inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.*

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, at the Capitol, this the 16th *day of* July, 1926.

Robt F Ligon

Clerk of the Supreme Court of Alabama.

The Supreme Court of Alabama

October Term, 1919-20

1 Div., No. 114,

Jacob H. Reichert
Appellant,

vs.

Jerome H. Sheip,
&c., et al
Appellees.

From Baldwin Cct. Court.

COPY OF OPINION.

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Filed Feb 17/920
T. H. Keenum
Clerk.