AULD v. HEPBURN ET AL.

Case No. 650.

{1 Cranch, C. C. 122.}[1]

Circuit Court, District of Columbia. June Term, 1803.

PLEADINGS—TENDER—RIGHT TO OPEN AND CLOSE—PAROL EVIDENCE TO VARY WRITTEN AGREEMENT—ADMISSIONS BY DEMURRER IN ANOTHER SUIT.

1. On a plea of tender, &c, the defendant holds the affirmative, and has a right to open and close the cause.

2. Parol evidence will not be received to explain a written agreement, until it is first shown that the expressions of the agreement are equivocal.

3. A demurrer in one cause between the same parties, whereby a particular fact is considered in law as admitted, is not evidence of that fact in another cause between the same parties.

{See Auld v. Hepburn, Case No. 651.}

At law. Debt {by Auld, as agent for Dunlop & Co., against Hepburn & Davis} for the penalty of an agreement, $45,000. The defendants pleaded a tender of a deed of assignment.

THE COURT was of opinion, nem. con. that the defendants held the affirmative of the issue, and had the right to open and close the cause.

Mr. Keith's evidence was objected to, because parol evidence cannot be given to alter the written agreement

Mr. E. J. Lee cited Meres v. Ansell, 3 Wils. 275.

THE COURT was of opinion, nem. con. that in order to let in parol evidence to explain the agreement, the party must first show that there are equivocal expressions in the contract, and that the evidence is to explain those equivocal expressions.

Mr. C. Lee, for the plaintiff, offered the record of the case of Hepburn v. Auld, {Case No. 6,389,} decided in this court, and in the supreme court, {1 Cranch, (5 U. S.) 321; 5 Cranch, (9 U. S.) 262,} upon a writ of error,

to show that by the demurrer in that case, the fact is admitted that the tender was not unconditional.

THE COURT refused to permit the record to be read for that purpose, or to prove any other fact admitted by that demurrer.

The jury could not agree after being out three days.

[1] {Reported by Hon. William Cranch, Chief Judge.}