D'WOLF v. BABBETT et al.

Case No. 4,220.
{4 Mason, 289.}[1]

Circuit Court, D. Rhode Island. Nov. Term, 1826.

SALE—DELIVERY—INSOLVENCY OF PURCHASER—FRAUDULENT SUPPRESSION.

1. A purchase was made of 198 boxes of sugar, for which certain acceptances, drawn by the purchaser and indorsed and accepted for his accommodation, were to be given to secure payment. The sugars were to be shipped on board of a ship belonging to the purchaser, then lying in the same port, and bound on a foreign voyage. The acceptances were to be delivered upon the return of the purchaser from Boston, to which place he was then going. While at Boston he failed, and assigned his property. During his absence, a part of the sugars were put on board of the ship. After his return, he kept his own failure a secret, and also the failure of his indorsers and acceptor, and procured a delivery of the residue of the sugars, on the faith, that the acceptances were to be duly given. *Held,* that if the delivery of the sugars, under these circumstances, was not intended by the parties to be an absolute delivery, but a delivery on condition only, that the terms of the contract were complied with, then the vendor might reclaim the sugars, and his property in them was not gone.

2. If the delivery of the sugars, after the failure, was procured by a fraudulent suppression of that fact, the delivery, as to that portion, was altogether without any legal validity, whatever might be the case as to the other parcels.

Trover for 198 boxes of sugar. Plea, the general issue.

At the trial it appeared, that the sugars originally belonged to the defendant, Jacob Babbett, and were sold to one George D'Wolf, in the manner hereafter stated. As soon as the purchase was made, George D'Wolf ordered an invoice and bill of lading to be made out by his clerk, of the goods, as if already on board of the ship Magnet Capt Usher, master, in which they were to be sent to Marseilles. The ship was owned by George Coggeshall, and was not expected to sail for a number of days, not then being equipped for sea. The master signed the bill of lading of the goods, as on board, though in point of fact

they were, at the time, in the store of the defendant, Babbett. This bill of lading was indorsed by George D'Wolf, and immediately sent to the plaintiff at New York, who, upon the faith of it, accepted a draft drawn on him by George D'Wolf, to a large amount. The defendant, Babbett, was wholly ignorant of these transactions.

The testimony of George D'Wolf, introduced by the plaintiff in the cause, was as follows:

"That on the seventh day of December, 1825, he, D'Wolf, agreed to purchase of Messrs. Babbett & Browning one hundred and ninety-eight boxes of brown sugar, at eleven cents per pound. In payment he was to allow them the debenture certificates, and give them Isaac Clapp's acceptance, endorsed by John Smith and George Coggeshall, for $4983.88, at sixty days, and for the remainder his own note at ninety days. On the date of the agreement, the sugars were cleared for debenture, by him, and were to be shipped in the Magnet, Usher, master, for Marseilles. On the same day he went to Boston, and was to deliver Clapp's acceptance on his return. He returned from Boston, on Friday evening the 9th, on which day he made an assignment to John Richards, Isaac Clapp, and Charles D'Wolf, to secure them for their advances, acceptances, and endorsements; on the same day Mr. Clapp and John Smith stopped payment, and on the 10th George Coggeshall stopped payment. These facts were not known in Bristol until the evening of the 10th. In consequence of his stopping, and Clapp, Smith, and Coggeshall's stopping, he did not offer Mr. Babbett the paper. In the course of Saturday evening the 10th, Mr. Babbett called at R. Rogers, Jr.'s house, to see him, D'Wolf, and said he should keep the sugars; to which he, D'Wolf, made no reply. On Sunday morning the 11th, Capt. Usher and Mr. Babbett met him in the street, and Babbett demanded of Capt. Usher the sugars, which Usher refused to give up, because he had signed a bill of lading for them. Mr. Babbett inquired of D'Wolf where the bill of lading was. He replied to Babbett, that he had sent it to New York, previous to his going to Boston. At the time said bill of lading was signed, the whole of the sugars were in Mr. Babbett's store, and he did not know of the bill of lading being signed until Sunday morning. Babbett asked D'Wolf, in presence of Capt. Usher, whether the sugars had been settled for by him; D'Wolf replied, they had not. On the day D'Wolf purchased the sugars, he drew on Mr. James D'Wolf, Jr. for $6000, at sixty days, as an advance upon them, and forwarded to him the invoice and bill of lading, consigned to his order at Marseilles, which draft was negotiated and accepted.

"In answer to certain questions put by the plaintiff's counsel, D'Wolf farther stated, that he did not take possession of the sugars by employing the coopers to work upon them: That he went immediately to Boston after the agreement. The sugars were to be delivered when called for, and to be paid for when he returned from Boston. When he returned from Boston on Saturday following, he saw the sugars going on board the ship: That he had not any idea of stopping payment when he left Bristol for Boston on the

7th: That he did ask Mr. Babbett, whether he would receive the paper after his return from Boston, at Mr. Robert Rogers's house, in the evening, at the time he read to him the assignment, which he declined: That on Saturday forenoon Mr. Babbett did call on him, D'Wolf, for the paper. He informed Babbett that he had not seen Mr. Coggeshall, and the paper was not ready. He never did obtain Coggeshall's endorsement, or Clapp's acceptance."

The clerks of D'Wolf stated, that the invoice and bill of lading of the sugars were made out, pursuant to G. D'Wolf's order, and sent to New York: That no debenture of the goods was ever obtained, or given by G. D'Wolf to Babbett; and no note was ever given for the amount of the sugars, all the parties having failed: That G. D'Wolf went to Boston on Wednesday (the 7th of December), and returned from Boston on Friday night (the 9th of December); but his failure was not known, but kept a secret until Saturday night. One of his clerks, by his order, applied on Thursday to Babbett for the delivery of the sugars. They were stored in an upper loft of the store of Babbett, and he objected to lowering them down at his own expense; but made no objection to the delivery. The sugars were lowered down at D'Wolf's expense, and coopered, and 12 boxes were put on board of the Magnet (which lay at a wharf opposite the store), on Thursday; 26 boxes were put on board on Friday; and 102 boxes on Saturday. The clerk of D'Wolf, who attended to this delivery, stated, he did not know of D'Wolf's failure until Sunday, the 11th.

On the part of the defendants, a witness swore, that he was present during the conversation and bargain for the sale, between the defendant, Babbett, and George D'Wolf. The defendant, Babbett, agreed to sell upon credit upon the terms stated; but said to G. D'Wolf, that the delivery would not be made, until the drafts were given, according to the terms of sale. D'Wolf then asked, if Babbett had any objection to his coopering the boxes of sugar in the mean time; to which Babbett replied he had not. He further testified, that on Sunday (the 11th of December), in the morning, the ship Magnet was in the stream, but not in a condition to go to sea for several days. Babbett came on the wharf with the witness. George D'Wolf was there. Babbett said, he was going to take the sugars out of the ship. D'Wolf said he had no objection. D'Wolf then told Capt Usher, that he might deliver the sugars to Babbett, adding, "It is Babbett's; I have not complied

with the terms of sale." Usher said he would deliver the sugars, if D'Wolf would give up the bill of lading. D'Wolf said it was out of his power; the bill of lading was at New York. Usher then asked the witness's advice, who advised him to protest against Babbett's taking the sugars. Babbett, however, did take them out of the ship.

It further appeared, by other testimony, that the clerks of G. D'Wolf were very busy on Saturday (the 10th) in hurrying the sugars on board the ship, from the store of Babbett. But Babbett had no notice of G. D'Wolf's failure until late on Saturday night or Sunday morning.

Upon this evidence, Whipple, for the plaintiff, contended, that the sale was complete on Wednesday; that the bargain was, that George D'Wolf should have a credit for the amount, until his return from Boston on Friday; that he was then to give the notes and drafts conformably to the agreement. The goods were to be delivered, as D'Wolf wished, in the intermediate period; and they were actually and absolutely delivered to D'Wolf, so that the defendant, Babbett, had no right to retake them, but the property passed to the plaintiff. He cited 13 Johns. 434; 6 East, 618; 2 H. Bl. 504; 4 Bos. & P.; 1 Taunt. 458; 5 East, 175; 1 Camp. 452.

Searle, for defendants, contended, that the delivery was merely conditional, and the defendant, Babbett, had a right to retake his own goods under the circumstances.

STORY, Circuit Judge, in summing up to the jury, said: If in this case there has been an absolute and unconditional delivery of the sugars to George D'Wolf, unaffected by fraud, the plaintiff is entitled to recover. So far as regards the 102 boxes of sugar delivered on Saturday, as that was after the terms of the personal credit had expired, which the counsel for the plaintiff supposes to exist, the delivery can be maintained as valid, only upon the supposition, that the whole transaction was bona fide, and the defendant, Babbett, waived a compliance with the terms. At that time D'Wolf had failed and assigned his property, and Clapp and Smith had also failed, and Coggeshall failed on Saturday morning. Thus, all the parties to the intended drafts in payment had failed, at the time of the delivery of the 102 boxes on Saturday. The facts were well known to George D'Wolf, and they were utterly unknown to the defendant, Babbett. What then was the conduct of G. D'Wolf to Babbett on Saturday morning? It was an evasive reply to an inquiry respecting the paper to be given for the sugars. Was it not evasive for the purpose of misleading Babbett? My opinion is, that under the circumstances of this case a delivery, procured by a fraud in misleading the vendor by a suppression of facts, and by an effective affirmation of an intention to comply with the terms of sale, which the party at the time knew was impracticable, was such a fraud, that it at all events avoids the delivery, so far as respects the 102 boxes; and the jury, if they believe the facts, ought to find a verdict for the defendants to this extent.

But the other part of the case turns upon a ground equally applicable to the whole of the sugars. The question is, whether this was a contract for an absolute delivery of the sugars upon a personal credit to G. D'Wolf, until his return from Boston, or whether, in the understanding of all parties, a bona fide compliance with the terms of sale, by giving the note, acceptances, &c. was a condition precedent to the absolute delivery of the sugars. The vendor is not divested of his right to retake the goods, if for the convenience of the vendee he has assented to a qualified delivery of the goods, with the understanding, that the property is not absolutely to pass, unless all the terms of sale are complied with. If indeed a personal credit is given to the vendee, and the delivery is absolute and complete under the sale, the vendor has no right to reclaim the property. If, on the other hand, the delivery is conditional, and so understood by the parties, then the vendor does not part with his property until the terms of the sale are complied with. In short, the sale then is merely a conditional sale. Here there is no pretence, that all the terms of the sale have been complied with. They were notoriously broken by the insolvency of the parties, when there had been a part delivery only. No debenture has been given, no note, no acceptance. The question is a question as to the real intentions and bargain between the parties. Did the vendor intend to part with the property absolutely, by giving a personal credit to G. D'Wolf, whether he complied with the terms of sale or not? Or did not both parties understand, that the title by sale was only to be complete by a strict compliance with all its terms, and that any delivery of the goods, in the mean time, was to be deemed conditional, and merely for the convenience of the vendee? As the jury find the fact, their verdict ought to be for the plaintiff or defendant, as to all the sugars, not affected by the fraud. If the delivery was conditional, then the verdict is to be for the defendants; if absolute, then for the plaintiff.

Verdict for defendants.

See Bloxam v. Sanders, 4 Barn. & C. 941; Harris v. Smith, 3 Serg. & R. 20; Hussey v. Thornton, 4 Mass. 405; Haggerty v. Palmer, 6 Johns. Ch. 437; Copland v. Bosquet {Case No. 3,212}.

[1] {Reported by William P. Mason, Esq.}