GARDNER v. COLLINS.

Case No. 5,223.
{3 Mason, 398.}[1]

Circuit Court, D. Rhode Island. June Term, 1824.

DEED—DELIVERY—STATUTE OF DESCENTS—HALF BLOOD.

1. A delivery of a deed may be inferred from circumstances, and need not be proved by positive testimony.

2. Under the statute of descents of Rhode Island of 1822, brothers and sisters of the half blood inherit equally with those of the whole blood.

{Cited in Clark v. Sprague, 5 Blackf. 415; Cliver v. Sanders 8 Ohio St. 506.}

{See note at end of case.}

3. A court is not bound to give an opinion upon a point of law, which the evidence does not raise.

Ejectment for lands in Rhode Island by the demandant {William C. Gardner}, described in the writ as a citizen of Virginia, against the tenant, described as a citizen of Rhode Island. Plea, not guilty. At the trial the plaintiff to support his case, gave in evidence a certain deed-poll made by the said John A. Collins to George Collins Gardner and Mary Collins Gardner, dated April 3d, 1810, and duly proved the execution of the same, which deed included the land in controversy. The plaintiff then stated, that the said George Collins Gardner had since deceased, whilst a minor, and without issue, and therefore his share of the demanded premises descended to and vested in the said Mary Collins Gardner, his sister and heir at law, their father and mother having both, previously, deceased. That afterwards said Mary C. Gardner deceased, to wit, in the month of December, 1822, a minor, and without issue. Which statements were admitted by the defendant to be correct and to be received as evidence. The plaintiff further stated, that the said Mary C. Gardner was his sister of the half blood, that Samuel P. Gardner was also brother to the said Mary C. Gardner of the half blood, that Mary Clarke and Eliza G. Phillips were sisters of the said Mary C. Gardner of the half blood, which statements were also admitted by the said defendant to be correct and to be received as evidence. The plaintiff further produced and offered in evidence a certain deed-poll made to him by Audley Clarke and his wife the said Mary Clarke, the said Samuel P. Gardner and the said Eliza G. Phillips, not having date of any particular day, but acknowledged the 16th day of May 1823, and recorded as of that date. And to prove said deed the plaintiff produced the subscribing witnesses thereto, namely, Benjamin B. Mumford and W. A. Clarke. That said Mumford testified, that he saw said Audley Clarke and Mary Clarke, said Samuel PI Gardner and Eliza G. Phillips sign and seal said deed, that the plaintiff was not present at the execution thereof, nor any one in his behalf to his the witness knowledge, that the deed when executed was delivered to the said Audley Clarke. The said W. A. Clarke testified to the same effect. The plaintiff also produced as a witness Charles Gyles, the town clerk of Newport and the register of deeds therein, who testified, that said deed was delivered into his office to be recorded by said Samuel Fowler Gardner. This witness further stated, that this deed remained in his office till the commencement of this action, when it was applied for by Richard K. Randolph, Esquire, (the counsel of the plaintiff,) to whom it was delivered. Upon being further interrogated upon whose behalf said Randolph applied for the deed, he answered, in Mr. Audley Clarke's, he supposed, but that said Randolph did not state in whose behalf he applied, and that he (the witness) delivered it without any order from any one, and on his own responsibility. The plaintiff also produced as a witness William Marchant, Esquire, who testified, that he had known the said Samuel F. Gardner to be the agent of his brother, the plaintiff, for a number of years last past, and as such agent to transact business of various kinds to a large amount for the plaintiff on his behalf. The plaintiff's counsel further produced and

offered in evidence a letter of attorney made by the plaintiff to the said Samuel F. Gardner, dated the ninth day of October, 1817, appointing him his general agent. On the part of the said defendants, and in defence against said action it was stated, that at the date of the execution of said deed of Audley Clarke and wife, and Samuel F. Gardner and Eliza G. Phillips to the plaintiff, he, the plaintiff, was settled at Alexandria, in the District of Columbia, as a merchant, doing business there, and that previous to the execution of said deed there existed a controversy, as to the demanded premises, and conflicting claims of ownership thereto between the said John A. Collins on the one part, and the said Audley Clarke and wife, Samuel F. Gardner, Eliza G. Phillips, and the plaintiff, on the other part; which statements were admitted by the plaintiff's counsel to be correct, and to be received as evidence.

Hunter and Robbins, for tenant, contended in defence against said action, 1st, that there had been no delivery of said deed of said Audley Clarke and wife, said Samuel P. Gardner and Eliza G. Phillips to the plaintiff. 2dly. That the deed was a deed in trust, made for the purpose of giving said court a colourable jurisdiction of said case, when it had no real jurisdiction, it being a controversy between citizens of Rhode Island, and not between parties who were citizens of different states. 2 Dall. 431. And 3dly. That the plaintiff and the said Mary Clarke and Samuel F. Gardner and Eliza Phillips were not the heirs at law to the said Mary Collins Gardner.

Searle & Hazard, for demandant, argued e contra.

STORY, Circuit Justice (summing up to the jury). The first question is, whether there has been any delivery of the deed of Clarke and others to the demandant, or for his use. It is certainly not necessary to prove a positive, formal delivery. It may be inferred from circumstances. The execution of the deed by the grantors is fully established. It was then delivered to Clarke, one of the grantors, by the consent of the other grantors; it was subsequently found in the possession of S. F. Gardner, the demandant's agent, and by him placed in the registry for record. It is now found in possession of the demandant's counsel; and its due execution and delivery are not contested by any person, who was a party to it; but the objection is taken by a mere stranger. Under such circumstances I have no doubt, that the evidence is competent

in point of law, from which the jury may presume a delivery to, or for the use of, the demandant; and I shall leave it as a question of fact to them accordingly.

As to the second objection, there is no pretence to say, that it presents any point as to the jurisdiction of the court The demandant is described in the writ as an inhabitant of Fairfax county, and "a citizen of the state of Virginia." The tenant is a citizen of Rhode Island, and so described also in the writ If the tenant meant to deny the allegation of the citizenship of the demandant he should have done it by a plea in abatement, and brought the matter directly in controversy before the court By pleading over to the merits, he admits the description in the writ to be true. It is not matter relevant or proper under the general issue. It has no tendency to prove the guilt or innocence of the tenant Nor have I heard any evidence which shows that the demandant is not a citizen of Virginia. He claims the whole land in controversy; but admitting the deed is void, if his title by heirship is maintained, he is certainly entitled to recover his moiety, or one fourth part, as one of the heirs of Mary O. Gardner. To this extent therefore, his writ is at all events good, since his citizenship has not been put in issue, and the controversy is between citizens of different states. The second point is therefore narrowed down to, the consideration of that portion of the premises claimed by the demandant under the deed of the other asserted co-heirs. Whether a deed executed for the sole purpose of giving jurisdiction to the court, and without which it could not be maintained, be void or not is a point upon which I do not feel myself called upon to deliver an opinion under the present state of the evidence. Not that I have any objection to stating my opinion, but I think it wrong to travel beyond the points which the evidence brings before the court I cannot perceive any sufficient evidence in this case to raise the question. The onus probandilies on the party taking the objection. Where is the evidence of any purpose of founding jurisdiction by this deed? Where is the evidence of witnesses or others, that the consideration in the deed was not paid, or that the purchase was not bona fide made by a party having perfect confidence in the title. Though controverted by the tenant, it does not follow, that it was matter of any legal doubt Until therefore some evidence is introduced to lay a foundation for the presumption of the deed's being collusive, I do not feel myself called upon to express an opinion.

The more important point is that which respects the heirship of the demandant and those, under whom he claims. It depends upon this, whether by the law of Rhode Island brothers and sisters of the half blood are entitled to inherit by descent in default of lineal descendants of the intestate. The statute of distributions of Rhode Island of 1798 (Dig. 1798, pp. 287, 288) declares, that where there are no children of the intestate, all the right, title, and interest in his real estate "shall vest in and be divided equally amongst the next of kin in equal degree, and those, who shall represent them, if any of them be dead, computing according to the degrees of the civil law." Upon this statute there would seem

to be no room for legal doubt. By the civil law, brothers and sisters of the half blood are equally next of kin with those of the whole blood. This construction was put upon the statute of distributions of 22 & 23 Car. H. c. 10, which is far more general in its language, more than a century ago in Crooke v. Watt, 2 Vern. 121, and has ever since been adhered to in England. The same construction, at least as far as my knowledge extends, has been generally adopted in America. Hillhouse v. Chester, 3 Day, 166; Preston v. Hoskins, 2 Yeates, 515; Sheffield v. Levering, 12 Mass. 490.

But the present case is not governed by the act of 1798. It has arisen since the general revision of the statutes in 1822, and is to be settled by an appeal to the text in that digest. The statute of distributions of 1822 contains a detailed enumeration of the succession of heirs, and in the fourth paragraph declares, that "if there be no father, then to the mother, brothers and sisters of such intestate, and their descendants, of such of them as there may be." The question then is, whether brothers and sisters of the half blood are not within the purview of this clause. No intention is shown on the face of this statute to alter the rule of the act of 179S, as to the half blood; and unless the court can say, that brothers and sisters of the half blood are not brothers and sisters in the general sense of law, it is impossible to doubt the title in this case. The statement of the proposition carries its own answer. Brothers and sisters of the half blood are recognized by law as of kin in the degree of brothers and sisters, and as the act contains no qualification as to whole or half blood, the words must be taken in their common and usual sense.

Verdict for the demandant for the whole of the premises. Judgment accordingly.

{NOTE. This cause was taken to the supreme court on certificate of division of opinion of the judges in the circuit court, and was heard on questions certified. The supreme court, Mr. Justice Story delivering the opinion, decided in favor of the plaintiff, holding that the words "of the blood" comprehend all persons of the blood, whether of the whole or half blood; and that the words "come by descent, gift, or devise from the parent or other kindred, etc.," mean immediate descent, gift, or devise, and make the immediate ancestor, donor, or devisor the sole stock of descent. The cause was certified back to the circuit court; the supreme court adjudging that the plaintiff and those under whom he claims the estate in controversy are heirs at law of Mary C. Gardner, intestate, and as such heirs are by the statutes of descent of Rhode Island, A. D. 1822, entitled to the same estate upon the facts agreed in the case, and that the judgment ought to be given for the plaintiff in this cause. 2 Pet. (27 U. S.) 58.}

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