JOHNSON v. HARRIS.

Case No. 7,388.
{1 Cranch, C. C. 257.}[1]

Circuit Court, District of Columbia.

Nov. Term, 1805.[2]

JOINT BILL OF PARCELS—EVIDENCE OF JOINT SALE—ARGUING POINT OF LAW TO JURY—NEW TRIAL—WEIGHT OF EVIDENCE.

1. A joint bill of parcels, is not conclusive evidence of a joint sale. The court will not permit a point of law which the court has decided, to be argued to the jury.

{See note at end of case.}

2. A new trial will not be granted, because the verdict is against the weight of evidence, if substantial justice has been done.

Assumpsit for goods sold and delivered. Upon the trial of the general issue, the defendant offered in evidence a bill of parcels of the same goods rendered by and in the handwriting of the plaintiff, beginning with these words: "Mr. Theophilus Harris, bought of Dunlap and Johnston," and containing a particular account of rum and sugar; at the foot of which, was the following receipt, signed by the plaintiff: "Received Messrs. Clingman & Magaw's note for the above sum, payable to the order of John Towers and Theophilus Harris, payable the 2d of April, 1798; when paid, received in full." This note, with the blank indorsements of Towers and Harris and Johnston, was delivered by Johnston to Dunlap, who brought suit upon it in Virginia, against Harris, but failed to recover, because an indorsee cannot, in Virginia, recover at law against a remote indorser. Dunlap then brought suit against Towers, on the same note in this court, which suit was still pending. The defendant upon these facts, prayed the court to instruct the jury, that the plaintiff could not recover in this action for the goods sold; and that from the bill of parcels and receipt aforesaid, the

transaction must be considered as a joint contract. Which instruction, the court refused to give, as prayed, but directed the jury that the bill of parcels was evidence (but not conclusive) of a joint contract of sale; and that the plaintiff may explain the transaction by parol, or other evidence to prove that he was the sole owner of the sugar, and that Dunlap was the sole owner of the rum, and that the contract was made with the plaintiff in his own right for the sugar, and with him as agent of Dunlap for the rum. But if the plaintiff should produce no explanatory evidence, he could not maintain the present action. And the court further instructed the jury that if they should be satisfied, by the evidence, that the contract of sale was made with the plaintiff alone, and that part of the goods was the sole property of the plaintiff, and that the residue was the sole property of Dunlap, and that the plaintiff had authority from Dunlap to sell such residue; then the plaintiff had a right to recover judgment in this action against the defendant for the whole amount of the goods so sold and delivered, and that the other facts stated are not sufficient to bar the plaintiff.

Mr. Swann, for plaintiff, was then going on to argue to the jury from the face of the bill of parcels, that it did not purport a joint contract; but the court stopped him, and would not suffer him to argue the question of law to the jury after it had been decided by the court. Verdict for the plaintiff.

Mr. Jones and Mr. C. Lee, for defendant, moved for a new trial: (1) Because the verdict was against evidence. (2) Because the plaintiff's brother in law was on the jury. (3) Because the note was outstanding, and had been passed away by Johnston, who had received its value from Dunlap. Kearsla 8: 56 PM 4/19/2011 ke v. Morgan, 5 Term R. 513; Tapley v. Martens, 8 Term R. 453.

CRANCH, Circuit Judge. This was an action of assumpsit, for goods sold and delivered by the plaintiff to the defendant. The plaintiff proved the sale and delivery of the goods, and that defendant gave the note of Clingman & Magaw, indorsed by Towers and the defendant for the amount of the goods, payable in five months. Dunlap, to whom Johnston had indorsed the note, brought suit in Virginia against the present defendant as indorser, and failed to support his action on the note, upon the ground that an indorsee in Virginia has not a remedy upon the note against a remote indorser. The defendant then produced a bill of parcels, made out in the name of Dunlap and Johnston, with a receipt given by Johnston alone for the note of Clingman & Magaw, which, when paid, was to be in full satisfaction for the goods sold. The defendant contended that this was evidence of a joint sale, and that the promise was made to Dunlap and Johnston jointly, and therefore the form of the action had been mistaken. The court instructed the jury, that the bill of parcels was evidence, but not conclusive evidence of a joint sale, and that the plaintiff might produce parol or other evidence, to show that part of the goods sold was the separate property of Johnston, and that Johnston had authority from Dunlap to sell his part;

and that if the jury were satisfied by the evidence that this was the real transaction, the plaintiff had a right to recover the whole amount of the goods. The plaintiff produced evidence to show that no general partnership existed between Dunlap and Johnston. That Dunlap never claimed any ownership of the sugar, and that Johnston never claimed any ownership of the rum; and that Dunlap did not deny the right of Johnston to sell the ram. Upon this evidence and instruction of the court, the jury found a verdict for the plaintiff, for the whole claim, and the defendant has moved for a new trial, on the ground that the verdict is contrary to evidence. It is the office of the court to decide what is evidence. But it is the province of the jury to ascertain its weight Some evidence was offered to the jury, from which they had a right to infer a separate property in the goods, and an authority from Dunlap to Johnston to sell Dunlap's part. It was for the jury to judge of its effect, upon a consideration of all the circumstances which were proved. They have drawn the inference, and the court cannot say it has been drawn improperly.

On a motion for a new trial, grounded on a defect of evidence, the court will consider the justice and equity of the case, and if they find these to be in favor of the verdict, and if there was any evidence which could reasonably justify the inference which the jury has drawn, they will support the verdict. The objection which the defendant made, and which was grounded on the bill of parcels, did not go to the substantial merits of the case. It did not show that the defendant had discharged the debt; while it contained, in itself, the evidence that he had received the goods. The plaintiff has parted with his property; the defendant has received it, and has not paid for it. The note, unless it produced the money, was no payment. It has not produced the money, and no negligence is imputed to plaintiff. The justice and equity of the case, therefore, are on the side of the verdict; and the court thinks that the jury had reasonable ground to presume the facts necessary to support it. In refusing to grant the new trial, however, the court will annex a condition that the plaintiff shall produce and deliver to the defendant the note of Clingman & Magaw, mentioned in the receipt upon the bill of parcels, and that Mr. Dunlap shall give the defendant a release of all demands on account of the ram, for the price of which this action is brought. Upon these terms the court will refuse to grant a new trial.

{NOTE. The case was then taken by writ of error to the supreme court, where the judgment was reversed in an opinion by Mr. Chief Justice Marshall, who said that an action on an original contract for goods sold arid delivered cannot be maintained by a person who has received a note as a conditional payment, and has passed away that note. There was no error, however, in holding that the bill of parcels was not conclusive evidence of joint property in the goods sold and delivered. It was proper to allow explanatory evidence to go to the jury. 3 Cranch (7 U. S.) 311.}

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

[2] {Reversed in 3 Cranch (7 U. S.) 311.}