JORDAN v. WILKINS.

Case No. 7,526.
{2 Wash. C. C. 482}[1]

Circuit Court, D. Pennsylvania. Jan., 1811.

ALLEGATA AND PROBATA—VARIANCE—PRODUCTION OF PAPERS AT TRIAL.

1. This court directed a nonsuit to be entered, because the evidence varied from the case stated in the declaration; the latter stating the goods as belonging to the plaintiff, of which the defendant, as bailiff, was to make profit for him; and charging the defendant as receiver, by the hands of A, B, C, being the money of the plaintiff; and the evidence proved that the money received was that of himself and his partners, and was received on joint account.

{Cited in Early v. Friend, 16 Grat. 30.}

2. If one party gives notice to another to produce certain papers at the trial, he has no right to inspect them, unless he will consent that they shall be used in evidence.

{Cited in Edison Electric Light Co. v. United States Electric Lighting Co., 45 Fed. 59.}

This was an action of account, brought by the plaintiff; and the declaration stated, that the defendant was bailiff of the plaintiff, and had the care and management of divers goods of the plaintiff, viz. flour, &c. of the value of 20,000 dollars, to merchandise and make profit of for the plaintiff, and to render a reasonable account thereof to the said plaintiff, when he should be required; and that the defendant was also receiver of the money of the plaintiff, from such a time to such a time (stating it); and received of the money of the plaintiff, by the hands of certain persons (whose names are stated), other 20,000 dollars, to render an account thereof when required: yet, though often required, the defendant had not rendered an account to the plaintiff, but had refused, &c. The case upon the evidence was, that the plaintiff, together with the defendant, Charles Wilkins, and John A. Sayles, entered into a mercantile partnership in 1803, which was dissolved in September, 1804, upon the death of Sayles. And the subject of this dispute was, a number of shipments of cotton, made to England, on joint account, the proceeds of which, it was contended, had been received by the defendant. But no evidence was given of any sum having been received by the defendant, by the hands of any one of the persons mentioned in the declaration.

The defendant moved for a nonsuit, upon the following grounds: 1st. That the evidence should prove the receipt of money by the hands of the persons mentioned in the declaration; and the declaration should state the names of the persons from whom each sum was received, and none other can be recovered but such as are stated and proved. 2d. That though one joint merchant may bring this action against another, yet the declaration must state that the money was received on joint account, in which case he would be liable only for the balance. But a receiver is not, and a bailiff is chargeable for the profits made, or which might have been made. Cases cited for defendant, 1 Vin. Abr, 140, 143,

146; Co. Litt 172; 1 Mod. Ent. 47, 48, 49; [James v. Browne] 1 Dall. [1 U. S.] 339; Plead. Assist. 35, 36.

For the plaintiff, it was answered, that St. 4 & 5 Anne, c. 27, which is in force in this state, allows one joint tenant, or tenant in common, to sue the other as bailiff; and therefore, it is not necessary to state that the receipt was on joint account, but that it was received as bailiff. 7 Co. Inst. 199.

Ingersoll, Chauncey & Dallas, for plaintiff.

Hare, Hopkinson & Tilghman, for defendant.

WASHINGTON, Circuit Justice. The objection to the recovery is, that the declaration charges the defendant as bailiff of certain goods belonging to the plaintiff, to make profit of for the plaintiff; and as receiver of certain sums, by the hands of A, B and C, being the money of the plaintiff, to whom he was to render an account; and has given in evidence sums of money received by the hands, not of the persons mentioned in the declaration, but of a person not named there; and these sums, so received, not the money of the plaintiff, but the money of the partners, and received on joint account. The allegata and probata, therefore, are totally at variance with each other; and the defendant's only remedy is by moving for a nonsuit. The declaration states a case at common law; and a case of one tenant in common suing another is proved. If the plaintiff meant to proceed upon the statute, he should have stated his case truly, and that the money was received on joint account, by the hands of the person who really received it. This appears by the case from [James v. Browne] 1 Dall. [1 U. S.] 339, where it was decided, that if the proof established the receipt from one of the persons named in the declaration it would be sufficient. But in this case, no proof has been given going even so far as that, and in that case the receipt was stated to be on joint account. Besides, the court, in that case, gave the most liberal construction to the statute, in consequence of the want of chancery jurisdiction in the state. This court has chancery jurisdiction. The plaintiff, therefore, must be called. Nonsuit.

The defendant produced certain papers, which the plaintiff had given notice would be required at the trial; but prayed the opinion of the court, if he was obliged to show them to the plaintiff, until he declared his intention to read them in evidence.

BY THE COURT. The plaintiff has no right to see the contents of these papers, but on this condition.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]