

Spring Vs. Executors of Gray

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Decided On : 1832

Appeal No. : 31 U.S. 151

Appellant : Spring

Respondent : Executors of Gray

Judgement :

Spring v. Executors of Gray - 31 U.S. 151 (1832)

U.S. Supreme Court Spring v. Executors of Gray, 31 U.S. 6 Pet. 151 151 (1832)

Spring v. Executors of Gray

31 U.S. (6 Pet.) 151

ERROR TO THE CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF MAINE

SYLLABUS

The master of a ship, who with the other members of a mercantile house were owners of the vessel which he commanded, with the approbation of the firm, signed a bill of lading to deliver certain articles of merchandise, the property of the

shipper, at the port of destination of the vessel, "freight to be paid for the goods as per agreement endorsed." The agreement endorsed was that the owners of the ship should have, as the freight of the ship, one-half of the net profits on the proceeds of the goods, which were to be invested in a return cargo to be consigned to and sold by the shipper. The proceeds of the outward cargo were received by the shipper, part in goods and part in money, a portion of the cargo having been left unsold by the vessel where they were delivered. The transaction was made the subject of an account current by the owners of the vessel with the shipper of the goods, and a large balance was claimed to be due to them on the said account. The shipment was made in May, 1810, and in May, 1829, a suit was instituted for the recovery of the balance stated to be due on an account current. The defendants, the executors of the shipper, pleaded the statute of limitations of the State of Maine. The defendants replied that the accounts and promises arose "from such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants." The plaintiffs admitted they had no other cause of action than such as arose from the bill of lading, and the contract endorsed thereon. *Held* that the bill of lading and the contract were not sufficient to maintain the issue joined on the part of the plaintiffs in respect to the replication of merchants' accounts.

The statute of limitations of Maine is copied from the 21st of James I, and its words are

"All actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants &c.;, shall be commenced."

It would seem to be the necessary construction of these words that the action on the case to which the exception applies must be founded on an account. The language of the act conveys the same meaning as if it had been "all actions of account, and all actions on the case other than such as are founded on such accounts as concern the trade of merchandise," &c.; The foundation of the action must be an account, not a contract.

From the association of actions on the case, a remedy given by the law for almost every claim for money, and for the redress of every breach of contract not under seal, with actions of account, which lie only in a few special cases, it may reasonably be conceived that the legislature had in contemplation to except those articles only for which account would lie. The words certainly imply that the action should be founded on an account. The account must be one which concerns the trade of merchandise.

The case presented by the exception is not every transaction between merchant and merchant; not every account which might exist between them; but it must concern the trade of merchandise. It is not an exemption from the act attached to the merchant merely as a personal privilege, but an exemption which is conferred on the business as well as on the persons between whom that business is carried on. The accounts must concern the trade of merchandise,

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and the trade must be not an ordinary traffic between a merchant and any ordinary customer, but between merchant and merchant.

The trade of merchandise which can present an account protected by the exception must be not only between merchant and merchant, but between the plaintiff and defendant. The account -- the business of merchandise which produces it -- must be between them.

A charter party, a contract by which the owner lets his vessel to another for freight, does not change its character because the parties happen to be merchants. It is still a special contract whereby a compensation is stipulated for a service to be performed, and not an "account concerning the trade of merchandise." It is no more "an account," and no more connected with "the trade of merchandise" than a bill of exchange or contract for the rent of a house or hire of a carriage or other single transaction which might take place between individuals who happen to be merchants. An entry of it in the books of either could not change its nature and convert it from an insulated transaction between individuals into an account

concerning the trade of merchandise between merchant and merchant. They must depend on the nature and character of the transaction, not on the books in which either party may choose to enter a memorandum or statement of it.

The English cases certainly do not oppose the construction given by the court to the words of the statute; the American cases, as far as they go, are in favor of it.

On a commercial question especially, or one deeply interesting to merchants and to merchants only, the settled law of New York is entitled to great respect.

This action was originally instituted in March, 1829, by the plaintiffs in error, who survived Andrew M. Spring, their co-partner, in the Court of Common Pleas of the County of York, in the State of Maine, by process of attachment, and was removed to the circuit court of the United States upon the petition of the defendants.

The action was assumpsit, and in the declaration the first count was for the balance of an account current, which account was annexed to the writ. The second count was for money had and received.

The defendants pleaded the general issue, which was joined, and also the statute of limitations. The plaintiffs, to their pleas of the statute, replied that "the accounts and promises arose from such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants," and issue was taken on the replication.

The declaration described the plaintiffs as co-partners on 1 July, 1821, "transacting business as merchants in the name of Seth Spring and Company." The defendants' intestate was described as "William Gray late of Boston, deceased."

The account annexed to the writ was as follows:

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image a:

This account grew out of a special contract between the parties, and the evidence and instructions of the court to the jury were set forth in a bill of exceptions which stated that the plaintiffs, to maintain the issues on their part, offered in evidence and read to the jury:

A bill of lading of the outward cargo of the *Morning Star*, signed by Andrew M. Spring, with the amount of contract on the back of it, signed by William Gray and Seth Spring and Sons. The bill of lading was in the usual form, and stipulated that the cargo should be delivered at Algiers, to Andrew M. Spring, the freight to be paid as per agreement endorsed on the same. The agreement was as follows:

"The proceeds of the within cargo, amounting to \$35,202.83, as per invoice, costs and charges, is to be invested in Algiers or some other port (after deducting all charges, consignee's commission included, except freight and premium of insurance within, of which two last mentioned charges are to be made on the goods), and returned in the said barque *Morning Star* to Boston, when Seth Spring and Sons (owners of said barque) are to recover one-half of the net profits thereon in lieu of freight and primage, the voyage round. The consignee's commissions to be two and a half percent on the sales of the within cargo, and no commissions to be charged in Boston except what is paid an auctioneer."

"SETH SPRING AND SONS"

"WILLIAM GRAY"

"\$35,202.83"

Also letters of instructions addressed by William Gray to Andrew M. Spring relative to the voyage of the *Morning Star*, and also the correspondence on the accounts of Andrew M. Spring, and of the consignees and others relative to the transaction. The plaintiffs' counsel having closed their evidence, they were inquired of by the court whether they had any other cause of action than such as arose from the bill of lading of the outward cargo of the barque *Morning Star*, and the contract

endorsed thereon, answered that they had not.

And thereupon the defendants' counsel moved the court to instruct the jury that inasmuch as the plaintiffs had admitted that their whole cause of action arose from said bill of lading

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and contract endorsed thereon, the said bill of lading and contract, with the other papers, documents, and testimony aforesaid, were not sufficient evidence in point of law to maintain the issue joined on the part of the plaintiffs in respect to their replication of merchants' accounts.

The plaintiffs' counsel objected to such instructions and prayed the court to instruct the jury that the evidence introduced was sufficient to prove and did prove the issue last aforesaid on the part of the plaintiffs.

But the court instructed the jury that inasmuch as the plaintiffs had admitted that their whole cause of action arose from said last mentioned bill of lading, and contract endorsed thereon, the said bill of lading and contract, with the other papers, documents, and testimony aforesaid, were not sufficient evidence in point of law to maintain the issue last aforesaid on the part of the plaintiffs.

And thereupon the jury returned their verdict for the defendants on this issue, and upon the general issue they found no verdict.

The court gave a judgment for the defendants, and the plaintiffs prosecuted this writ of error.

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This cause depends entirely on the question whether the plaintiffs are within the exception of the statute of limitations made in favor of "such accounts as concern the trade of merchandise between merchant and merchant."

The plaintiffs in error brought an action on the case against the defendants in the proper court of the state of Maine,

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which was removed by the defendants into the Circuit Court of the United States for the District of Maine.

The first count was for balance of accounts annexed to the writ; the second was for money had and received. The defendants pleaded nonassumpsit and the statute of limitations. Issue was joined on the first plea. To the second the plaintiffs replied that the accounts and promises mentioned in the declaration are and arose from such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, and issue was jointed on this replication.

At the trial, the plaintiffs produced the bill of lading of the outward cargo of the barque *Morning Star*, signed by Andrew M. Spring, the master of said barque, with the contract on the back of it, signed by William Gray the testator of the defendants, and by Seth Spring and Sons, the plaintiffs and owners of the barque *Morning Star*, which bill of lading and contract are in these words:

"Shipped in good order and well conditioned by William Gray of Boston, a native citizen of the United States of America, for his sole account and risk, in and upon the barque called the *Morning Star*, whereof is master for this present voyage, Andrew M. Spring, now in the harbor of Boston, and bound for Algiers, to say: [The merchandize is here described by marks, numbers and quantities], being marked and numbered as in the margin, and are to be delivered in like good order and well conditioned at the aforesaid port of Algiers (the dangers of the seas only excepted) unto Andrew M. Spring or to his assigns, he or they paying freight for the said goods as per agreement endorsed hereon, without primage or average. In witness whereof, the said master of the said barque hath affirmed to four bills of lading of this tenor and date, one of which being accomplished, the other three then to stand void. Dated in Boston, May 26, 1810."

"ANDREW M. SPRING"

"The proceeds of the within cargo, amounting to \$35,202.83, as per invoice, costs and charges, is to be invested in Algiers or some other port (after deducting all charges, consignee's commission included, except freight and premium of insurance within, of which two last mentioned charges are to be made

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on the goods) and returned in the said barque *Morning Star* to Boston, when Seth Spring and Sons (owners of said barque) are to recover one-half of the net profits thereon in lieu of freight and primage, the voyage round. The consignee's commissions to be two and a half percent on the sales of the within cargo, and no commissions to be charged in Boston except what is paid an auctioneer."

"SETH SPRING & SONS"

"WILLIAM GRAY"

"\$35,202 83"

The plaintiffs also produced several letters and papers from William Gray the master of the *Morning Star*, and others, respecting the outward voyage of the barque, together with the bills of lading and invoices of her inward cargo, which was delivered to the defendants. They also produced an account from the books of Seth Spring and Sons, as follows:

image:b

When the plaintiffs had closed their evidence, the court asked whether they had any other cause of action than such as arose from the bill of lading of the outward cargo of the barque

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Morning Star and the contract endorsed thereon, and they answered that they had not.

The counsel for the defendants then moved the court to instruct the jury that inasmuch as the plaintiffs had admitted that their whole cause of action arose from said bill of lading and contract endorsed thereon, the said bill of lading and contract, with the other papers, documents, and testimony aforesaid were not sufficient evidence in point of law to maintain the issue joined on the part of the plaintiffs in respect to their replication of merchants' accounts.

The plaintiffs' counsel objected to such instructions and prayed the court to instruct the jury that the evidence introduced was sufficient to prove and did prove the issue joined on the part of the plaintiffs.

The court instructed the jury that inasmuch as the plaintiffs had admitted that their whole cause of action arose from said last mentioned bill of lading and contract endorsed thereon, the said bill of lading and contract, with the other papers, documents, and testimony aforesaid were not sufficient evidence in point of law to maintain the issue last aforesaid on the part of the plaintiffs. To this instruction an exception was taken.

A verdict was found for the defendants, and this writ of error brings up the judgment which was rendered thereon.

The statute of Maine is copied from the 20th of James I, and its words are

"All actions of account and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, &c.;, shall be commenced,"

&c.;

It would seem to be the necessary construction of these words that the actions on the case to which the exception applies must be founded on an account. The language of the act conveys the same meaning as if it had been "all actions of account, and all actions on the case other than such as are founded on such account as concerns the trade of merchandise," &c.; The foundation of the action must be an account, not a contract.

From the association of actions on the case, a remedy given by the law for almost every claim for money, and for the redress of every breach of contract not under seal, with actions

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of account, which lie only in a few special cases; it may reasonably be conceived that the legislature had in contemplation to except those actions only for which account would lie. Be this as it may, the words certainly require that the action should be founded on an account. The account must be one "which concerns the trade of merchandise." The case protected by the exception is not every transaction between merchant and merchant, not every account which might exist between them, but it must concern the trade of merchandise. It is not an exemption from the act, attached to the merchant merely as a personal privilege, but an exemption which is conferred on the business as well as on the persons between whom that business is carried on. The account must concern the trade of merchandise, and this trade must be not an ordinary traffic between a merchant and any ordinary customers, but between merchant and merchant. This "trade of merchandise," which can furnish an account protected by the exception, must be not only between merchant and merchant, but between the plaintiff and defendant. The account -- the business of merchandise which produces it -- must be between them.

If these propositions be well founded, and we believe they are, let us apply them to the case.

The defendants were undoubtedly merchants. The plaintiffs, Seth Spring and Sons, were also merchants. But they were likewise ship owners. They were the proprietors of vessels which they hired to others for freight. A charter party, a contract by which the owner lets his vessel to another for freight, does not change its character because the parties happen to be merchants. It is still a special contract whereby a compensation is stipulated for a service to be performed, and not an account concerning the trade of merchandise. It is no more "an account," and no more connected with "the trade of merchandise," than a bill of exchange or

a contract for the rent of a house, or the hire of a carriage, or any other single transaction which might take place between individuals who happened to be merchants. An entry of it on the books of either could not change its nature, and convert it from an insulated transaction between individuals into an account concerning the trade of merchandise, between merchant and merchant. This must depend on the nature and character of the

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transaction not on the book in which either party may choose to enter a memorandum or statement of it.

Had the freight contracted for been a sum in gross or a sum dependent on the space occupied by the cargo or on its weight or on any estimate of its value, it would have been perceived at once to be a claim founded on contract, and not on account.

Is the nature of the transaction varied by the fact that the freight to be paid by the charterer, instead of being a specific sum or a sum to be ascertained by some given rule, is dependent on the profits of the adventure? That the sales of the outward and inward cargo and all the expenses attendant on the enterprise must be examined in order to ascertain the amount of freight? This process must undoubtedly be gone through in an action on the contract, but does its necessity convert the action, which ought to be on the contract, into one founded on an account concerning the trade of merchandise between merchant and merchant? The account of the sales of the outward cargo is to be adjusted between the shipper and his consignee, not between the shipper and the ship owner in his adventitious character of a merchant. So the sales of the return cargo must be examined in order to ascertain whether any and how much profit has been made and whether the ship owner is entitled to any and how much freight. But this account is not founded on trade and merchandise between the owner and affreighter of the vessel. It is founded on the trade of the affreighter alone, to which reference must be made in order to ascertain the amount of freight. Mr. Gray could not be considered as the factor of Seth Spring and Sons, selling their goods. He

was selling his own, and the relation between them was not that of merchant and factor, but of charterer and charteree of a vessel by special contract.

If we were to decide this case on the words of the statute, we should not think that the plaintiffs had brought themselves within the exception. We should not consider the action as founded on "such an account as concerns the trade of merchandise between merchant and merchant."

This opinion is not changed by cases which are to be found in the books.

In *Webber v. Tivil*, 2 Saunders 121, the plaintiff's declaration contained two counts, one in *indebitatus assumpsit* for

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money had and received by the defendant for the plaintiff's use and for goods, wares, and merchandise sold and delivered and the other on an *insimul computasset*. To the plea of the act of limitations the plaintiff replied that the money in the several provisions mentioned became due and payable on trade between the plaintiff and defendant as merchants, and wholly concerned merchandise. The defendant demurred, and the whole court gave judgment in his favor.

Morton, Justice, was of opinion, that only actions of account were within the exception. The report does not contain the reasons assigned by the other judges otherwise than by stating that they were the reasons given by Mr. Jones in his argument. These were that the statute intends to except nothing concerning merchandise between merchants, but only accounts current between them, whereas the declaration in the second count was on an account stated and agreed. He also contended that the first count did not make a case to be brought within the exception, it being only a bargain for wares sold and for money lent, and although it concerned merchandise, and was between merchants, yet that was no reason why it should be excepted out of the statute, for if it should be excepted, by the same reason every contract made between merchants would also be excepted, which was not the intention of the statute, for in the statute accounts

between merchants only are excepted, and not contracts likewise. He also contended that actions of account only were within the exception. This point has been since overruled, though it seems to have been long considered as settled law.

This case having been decided, as the reporter informs us, for the reasons assigned by Jones, his argument must be taken as the opinion of the court. It decides that only accounts, not contracts, between merchants, even although they may concern the trade of merchandise, are within the exception, and that the accounts must be current.

In *Cotes v. Harris at Guildhall*, Dennison, Justice, held that the clause in the statute of limitations about merchants' accounts extended only to cases where there were mutual accounts, and reciprocal demands between two persons. This was only the decision of a single judge, but Mr. Justice Buller seems to have given it his sanction, also, by introducing it into his work.

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Bul.Ni.Pri. 150.

And Lord Kenyon quoted it with approbation in *Cranch v. Kirkman*, Peake's Ni.Pri. 121, adding that he had furnished his note of the case to Mr. Justice Buller.

The distinction between an account current and an account stated has been often taken, 1 Ves. 456; 4 Mod. 105; 2 Ves. 400; 1 Mod. 270, and is now admitted.

The English cases certainly do not oppose the opinion we have formed on the words of the statute.

The American cases, as far as they go, are in favor of it.

In [Mandeville v. Wilson](#), 5 Cranch 15, this Court said that the exception extended to all accounts current which concerned the trade of merchandise between merchant and merchant. The only addition made in this part of the opinion to the words used in the statute is the introduction of the word "current." The statute

saves "accounts current." The opinion proceeds to say that an account closed by the cessation of dealing between the parties, is not an account stated, and that it is not necessary that any of the items should be within five years. This decision maintains the distinction between accounts current and accounts stated.

In *Ramchandu v. Hammond*, 2 Johns. 200, the court determined that the statute of New York, though slightly varying in its language from the English statute, was to be construed in the same manner, and "must be confined to actions on open or current accounts."

"It must be a direct concern of trade: liquidated demands, or bills and notes which are only traced up to the trade or merchandise, are too remote to come within this description."

In the case of *Coster v. Murray*, 5 Johns.Ch. 522, a purchase of goods was made by the agents of the parties at Copenhagen, and shipped to the defendants, merchants in New York, on joint account under an agreement made by the agents, that the goods should be sold by the defendants, free from commission, and one-third of the proceeds paid to the plaintiffs, who were insurers. The goods were received and sold by the defendants, who mingled the money with their own, and refused to pay any part of it to the plaintiffs, unless on terms to which the plaintiffs would not accede. To a bill filed by the plaintiffs, the defendants pleaded the act of limitations. The plaintiffs contended that the claim was within

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the exception of the statute in favor of accounts between merchants, and also that it related to the execution of a trust, and was therefore not within the statute.

On the first point, Chancellor Kent said

"To bring a case within the exception of the statute, there must be mutual accounts and reciprocal demands between two persons."

"In the present case there was no account current between the parties. There are no mutual and reciprocal demands."

"The defendants took charge of and agreed to be accountable for some goods or the proceeds thereof, in which the parties had a joint interest, and as concerns the parties, and as between them, this hardly seems to be a trade of merchandise between merchant and merchant."

The chancellor took a very elaborate review of all the English cases in which this exception had been discussed. Many of them went off on other points, many were indecisive, and some of them seem to be opposed to each other, though not on the precise question which has been argued in this case.

He concluded this review by observing:

"Assuming the case before me to be one that concerned the trade of merchandise between merchant and merchant, I should rather be inclined to think the statute was well pleaded and that the case did not fall within the exception."

A decree was made in favor of the plaintiff on the other point, from which the defendant appealed to the Court of Errors.

The cause was argued on several points, the first of which was "whether it came within the exception of the statute concerning the trade of merchandise between merchant and merchant, their factors or servants."

Mr. Chief Justice Spencer said the chancellor had examined the case very elaborately, and had come to the conclusion that the statute was well pleaded, and that the case does not fall within the exception. He added,

"Whether the statute is at all applicable to a case of mutual dealing and mutual credits between merchant and merchant is a question not now necessary to be decided, because the present is not a case of that kind. On the part of the respondents, this is no account at all. This is a case of an account merely on the part of the appellants; there is no selling or trading. It is a case of a joint purchase of

goods, where one of the purchasers takes the whole goods, and is to account for one-third of the proceeds. In such a case, where the items of an account are all on one side, in my judgment it is not within the reason or principle of the exception, which must have intended open and current accounts, where there was mutual dealing and mutual credits."

Judges Platt and Woodworth concurred. There was some division in the Court of Errors, but the decree of the chancellor was affirmed.

This case is stronger than that under consideration, and turns on principles which decide it.

No doubt is expressed in it on the necessity of accounts being mutual and being open and current to bring them within the exception of the statute.

On a commercial question, especially on a question deeply interesting to merchants, and to merchants only, the settled law of New York is entitled to great respect elsewhere.

We have found no conflicting decision in any of the states.

The account from the books of the plaintiffs contains one item not founded on the contract for the freight of the barque *Morning Star*, the loss on the sloop *Francis*, insured by said Gray. But this item itself is not within the exception, and was abandoned by the plaintiffs, who declared that their whole cause of action arose from the contract. The claim, to bring the case within the exception, rests entirely on the sale of the inward cargo. This single transaction has not equal (certainly not superior) pretensions to being an account current between merchant and merchant, a case of mutual accounts between them, with the sale made by the Murrays, in *Carter v. Murray*, of goods purchased on joint account, shipped to the defendants on joint account, and sold by the defendants on joint account.

We are of opinion that this action is not founded on an account concerning the trade of merchandise between merchant and merchant, their factors or servants, and is not within the exception of the statute of limitations. There is no error in the

instructions given by the circuit court, and the judgment is

Affirmed with costs.

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