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Steln Vs. Bowman

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Decided On : 1839

Appeal No. : 38 U.S. 209

Appellant : Stein

Respondent : Bowman

Judgement :

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Stein v. Bowman

38 U.S. (13 Pet.) 209

ERROR TO THE DISTRICT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF LOUISIANA

SYLLABUS

Certain German documents were offered in evidence by the plaintiff in the District Court of Louisiana for the purpose of using such parts of them as contained depositions which related to the pedigree of the plaintiff, which were overruled by

the district court on the ground that they were not duly authenticated. By the court: in the case of *Church v. Hubbart,* 2 Cranch 187, this Court held that the certificate of a consul, under his consular seal, is not a sufficient authentication of a foreign law to make it evidence, it not being one of his consular functions to grant such certificates. And also that the proceedings of a foreign court, under the seal of a person who styles himself the Secretary of Foreign Affairs in Portugal, is not evidence. On the principles of this case, the circuit court very properly rejected the depositions offered. The certificate and seal of the minister resident for Great Britain from Hanover is not a proper authentication of the proceedings of a foreign court or of the proceedings of an officer authorized to take depositions. It is not connected in any way with the functions of the minister. His certificate and seal could only authenticate those acts which are appropriate to his office. The only mode in which depositions can be taken in a foreign country is under a commission.

No rule is better established than that a party cannot be a witness in his own case.

The objection to the competency of a party to a suit as a witness does not arise so much from the small pecuniary liability to the payment of the costs as from that strong bias which every party to a suit must naturally feel, and this influence is not the less dangerous if the party be unconscious of its existence. Every individual who prosecutes or defends a suit is, in the nature of things, disposed to view most favorably his own side of the controversy, and with no small prejudice the side of his adversary. To admit a party on the record under any circumstances to be sworn as a witness in chief would be attended with great danger. It would lead to perjuries and the most injurious consequences in the administration of justice.

From necessity, in cases of pedigree, hearsay evidence is admissible. But this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in the different branches. The declaration of these individuals, they being dead, may be given in evidence to prove pedigree. And so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another; evidence. As evidence of this description must vary with the circumstances of each case, it is difficult if not

impracticable to deduce from the books any precise and definite rule on the subject.

It is not every statement or tradition in a family that can be admitted as evidence. The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, they are speaking the truth and that they could not be mistaken.

The declarations offered as evidence were made subsequent to the commencement of the controversy, and in fact after the suit was commenced. It would be extremely dangerous to receive hearsay declarations in evidence respecting any matter after the controversy has commenced. This would enable a party by ingenious contrivances to manufacture evidence to sustain his cause. It is therefore essential, when declarations are offered as evidence, that they should have been made before the controversy originated and at a time and under circumstances when the person making them could have no motive to misrepresent the facts.

It is a general rule that neither husband nor wife can be a witness for or against each other. This rule is subject to some exceptions, as when the husband commits an offense against the person of his wife.

The husband and wife may be called as witnesses in the same case, and if in their statement of facts they should contradict each other, that would not destroy the competency of either. It would not follow from such contradiction that either was guilty of perjury. And in some cases the wife may be a witness under peculiar circumstances where the husband may be interested in the question and to some extent in the event of the cause.

The wife cannot be a witness to criminate her husband or to state that which she has learned from him in their confidential intercourse. The rule which protects the domestic relations from exposure rests upon considerations connected with the

peace of families, and it is considered that this principle does not afford protection to the husband and wife, while they are at liberty to invoke it or not, at their discretion, when the question is propounded; but it renders them incompetent to disclose facts in evidence in violation of the rule. The husband's being dead does not weaken the principle. It would seem rather to increase than lessen the force of the rule.

To sustain a claim to the admission of the deposition of a witness in evidence, the affidavit of a person who represented himself to be the agent of the plaintiff stated that the witness had left Louisiana before the commencement of the suit and ascended the Mississippi with the intention of going to Ohio, and that since then, the person who made the affidavit had not heard from him, although he had made inquiries. By the Court: this does not amount to that degree of diligence which the law requires to introduce secondary evidence.

In the District Court of the Eastern District of Louisiana on the eighth day of April, 1836, Johann Frederick Stein, an alien and a subject of the King of Hanover, presented a petition stating that he was the sole and lawful heir of Nicholas Stein, or sometimes called Nicholas Stone, who had died some time before in the Parish of St. Tammany in the State of Louisiana. The petition prayed that William Bowman, who had been appointed curator of the estate of the deceased Stein by the proper tribunal, should be decreed to account for the estate and effects received by him, and to deliver to the petitioner the property of the succession which had not been sold, and to pay to him the amount in his hands.

The answer of William Bowman, the curator, denied that the petitioner, Johann Frederick Stein, was the heir or related to the deceased Nicholas Stein, or Stone, and averred that the claim was interposed to vex and harass the respondent and the true heirs of Nicholas Stein.

Afterwards, Andreas Stein, residing in the Kingdom of Hanover, presented a petition to the district court stating that in April, 1834, he had applied to the Court of Probate of New Orleans, claiming the succession to Nicholas Stein, as the heir of the deceased, and that by the unjust interference of Johann Frederick Stein, he

had been prevented recovering the same.

Subsequently Johann Stein, Anna Sophia Stein, wife of Mathias Ahreus, and Luer Stein, a minor, assisted by his curator or trustee, and by his guardian, all of the Kingdom of Hanover, filed their petition in the circuit court stating that they are the only heirs of Nicholas Stein and that in 1835 they had instituted a suit against William Bowman, which suit is still pending. They aver that the claim of Johann Frederick Stein is fraudulent and that he is not the heir of Nicholas Stein, as he alleges. They pray leave to introduce in the suit, and state that William Bowman is a mere stakeholder. William Bowman afterwards filed a petition in the district court setting forth that individuals belonging to three different families, the petitioners, pretend to be the nearest relations of the late Nicholas

Stein, and to be entitled to his estate, and he asks, as he is only a stakeholder, that the parties contesting the claims of each other may be called in to take cognizance of this suit and defend him against it.

The petitioner, Johann Frederick Stein, put in a general replication to each of the petitions of intervention.

The case was, on the application of William Bowman, referred to a jury, and on 3 March, 1837, it came on for trial, and the jury found a verdict for the defendant.

On the trial of the cause, bills of exceptions were signed by the court to the decisions of the court on points arising during the trial of the cause.

The affidavit of John Rist was laid before the court stating that he had made diligent inquiry for Francis Stuffle, whose deposition was taken in the cause in the parish court between the plaintiff and Bowman; "that he was unable to find him, and had been informed, and truly believed he was dead; this information had been derived from those who knew him."

The deposition also stated, that Nicholas Mouzat, whose testimony was taken in the same cause, left Louisiana before the commencement of this suit and

ascended the Mississippi with the intention of going to the State of Ohio; that he had not since heard from him, although he had made inquiries for him.

The deposition of Francis Stuffle was then offered in evidence by the plaintiff and was admitted by the court, to which the defendant excepted.

The defendant called the wife of Francis Stuffle, he being dead, to prove that her husband had been bribed by John Rist to give evidence in the case and also to prove he had frequently told her he knew nothing of the plaintiff or of Nicholas Stein. The plaintiff objected to the admission of the witness, but the court allowed her to be sworn, and she gave her testimony. The plaintiff excepted.

The plaintiff then offered in evidence certain German documents to prove the pedigree of the petitioner, which were rejected by the court as not being sufficiently authenticated, and to this rejection the plaintiff excepted.

The depositions which were taken, and which were in the German language, were not signed by the deponents, and at the end of each deposition it is stated that each of the witnesses assented to the same. A magistrate of the place certifies to this fact, and this is attested under his seal by the "Royal British Hanoverian Landrostey," and his signature is attested under his seal, by the "Royal British Hanoverian Minister Residentis."

The defendant, William Bowman, was during the trial admitted as a witness by the court to testify as to the merits of the controversy. The plaintiff excepted to his admission.

The court refused to admit Stultz as a witness for the plaintiff

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to prove that he had been in Hanover the preceding summer and there heard from many old persons of whom he inquired that the plaintiff was the brother of Nicholas Stein. The witness stated that he had gone to Germany for the purpose of taking a deposition. The court was of opinion that the depositions of those persons should have been taken.

The plaintiff prosecuted this writ of error.

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MR. JUSTICE Mc LEAN delivered the opinion of the Court.

This case was brought originally in the District Court of the United States for the Eastern District of Louisiana, and on the trial certain exceptions were taken to the ruling of the court by the

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plaintiff, and which he now brings before this Court on a writ of error.

The action was brought by petition in the form peculiar to the courts of Louisiana to compel the defendant to render an account as curator of the estate of Nicholas Stone, or Stein, deceased. The plaintiff represents himself as an alien and as the only heir at law of the deceased. Sometime after the defendant had answered the petition, Johann Stein and others filed their petition of intervention, denying the statements in the plaintiff's petition and representing themselves to be the true heirs of the deceased.

The cause was submitted to a jury, and on the trial, to sustain his case, the plaintiff offered in evidence certain German documents, for the purpose of using such parts of them as contained the depositions which related to the pedigree of the plaintiff, which were overruled by the court on the ground that they were not duly authenticated. And this constitutes the first exception.

Several depositions appear to have been taken, but none of them was signed by the deponents. At the close of them it is stated:

"After the preceding depositions were read to the deponents, they gave their assent to them and approbation."

"[Signed] R. V. D. Busseke"

"Seen, for attestation of the preceding signature, of the Royal Amtsvagtey Burgwedel."

"Luneburg."

"Royal British Hanoverian Landdrostey."

"[Seal] Ruemern"

To which is added: :

"The subjoined signature of the Royal Britannic Land Bailiwick at Luneburg is hereby attested."

"Hamburg, Sept. 19, 1834"

"Royal Britannic Hanoverian Minister Residentis"

"Im Ausftrage by authority. G. W. Kern"

"[Seal]"

In the case of *Church v. Hubbart,* 2 Cranch 187, this Court held that a certificate of a consul under his consular seal is not a sufficient authentication of a foreign law to go in evidence, it not being one of his consular functions to grant such certificates. And also that the proceedings of a foreign court, under the seal of a person who styles himself the Secretary of Foreign Affairs in Portugal is not evidence.

On the principle of this case it would seem that the court very properly rejected the depositions offered.

The certificate and seal of the minister resident from Great Britain in Hanover is not a proper authentication for the proceedings of a foreign court, or of the proceedings of an officer authorized to take

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depositions. It is not connected in any way with the functions of the minister. His certificate and seal could only authenticate those acts which are appropriate to his office.

The authority to take the depositions by the person before whom they were taken nowhere appears, and it is not shown that the Royal Britannic Hanoverian Land Bailiwick, Ruemern, was authorized to attest, as he has done, the signature of R. V. D. Busseke.

If the attestation of the signature and right of the person who administered the oaths were duly certified under the seal of a responsible officer, whose appropriate duty it was to give such certificate, it might be received, so far as the authentication goes, as *prima facie* evidence, though not under the great seal of the state. It may be proper, however, to remark (though the point was not raised in the court below) that if the authentication had been sufficient, the depositions would have been inadmissible, they not having been taken under a commission, which is the only mode by which depositions in a foreign country can be taken.

In the course of the trial, Bowman, the defendant, was admitted as a witness by the court, and, being sworn, gave evidence to the jury respecting the merits of the case. And to this decision of the court overruling the objection made the plaintiff also excepted.

No rule is better established, than that a party in an action at law cannot be a witness in his own case.

In the case of *Scott v. Lloyd,* 12 Pet. 149, this Court said

"The decision in 1 Pet.C.C. 301, where the court held a party named on the record might be released, so as to constitute him a competent witness, has been cited and relied on in the argument."

"Such a rule,' the court remarked, 'would hold out to parties a strong temptation to perjury; and we think it is not sustained either by principle or authority."

Bowman was a party on the record, was curator, as represented, and was *prima facie* liable for the costs of suit.

But if there could have been a release for the costs executed, or the money to cover the costs had been paid into court, his competency would not have been restored.

The objection to his competency does not arise so much from the small pecuniary liability to the payment of costs as from that strong bias which every party to a suit must naturally feel. And this influence is not the less dangerous if the party be unconscious of its existence. Every individual who prosecutes or defends a suit is, in the nature of things, disposed to view most favorably his own side of the controversy, and with no small degree of prejudice the side of his adversary. We think, therefor, to admit a party on the record under any circumstances to be sworn as a witness in chief would be attended with great danger. It would lead to perjuries and the most injurious consequences in the administration of justice. We think therefore the court erred in admitting Bowman as a witness.

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The next exception of the plaintiff arises from the rejection of Stultz as a witness, who was introduced to prove that he had been in Hanover, in Germany, "last summer", and there heard from many old persons of whom he inquired that the plaintiff was the brother of Nicholas Stone, deceased.

And this Court have no doubt that this evidence was properly overruled by the district court.

From necessity, in cases of pedigree, hearsay evidence is admissible. But this rule is limited to the members of the family, who may be supposed to have known the relationships which existed in its different branches. The declarations of these individuals, they being dead, may be given in evidence to prove pedigree, and so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence. As evidence of this

description must vary by the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject.

"It is not every statement or tradition in the family that can be admitted in evidence." The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely from their domestic habits and connections that they are speaking the truth and that they could not be mistaken. 1 Phillips, 174. 2 U. S. 2 Dall. 116.

The declarations proposed to be proved by the witness do not appear to have been made by members of the family or by persons who had such connections with the deceased as to have a personal knowledge of the facts stated. And these persons, for aught that appears, are still living, and their depositions might be taken.

On both these grounds the evidence was inadmissible. But there is another ground on which the opinion of the district court can be sustained, and it is proper to state it.

The declarations offered as evidence were made subsequent to the commencement of this controversy, and in fact after the suit was commenced.

It would be extremely dangerous to receive hearsay declarations in evidence respecting any matter after the controversy has commenced. This would enable a party, by ingenious contrivances, to manufacture evidence to sustain his cause. By interrogatories propounded in a cautious manner to unsuspecting individuals, he might elicit the answers he most desired.

It is therefore essential, when declarations are offered as evidence, that they should have been made before the controversy originated and at a time and under circumstances when the person making them could have no motive to misrepresent the facts. 4 Camp. 409. *Case of the Berkley Peerage.*

The plaintiff having read the deposition of Francis Stuffle, deceased, in evidence, the defendant called the wife of the deceased to prove, as stated in the bill of exceptions, that her husband had been bribed by John Rist to give evidence in that case, and also to

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prove that he had frequently told her he knew nothing of the plaintiff, or of Nicholas Stone deceased. The plaintiff objected to the swearing of the witness, but the court overruled the objection and permitted the witness to give evidence. To this opinion the plaintiff excepted.

It is a general rule that neither a husband nor wife can be a witness for or against the other. Co.Lit. 6, b. Hawk, b. 2, ch. 46, s. 70. Gilb.Ev. 11. Bull.N.P. 286. *Fitch v. Hill,* 11 Mass. 286.

This rule is subject to some exceptions, as where the husband commits an offense against the person of his wife. 1 Hale P.C. 301. Hawk. b. 2, c. 46, s. 77. Bull.N.P. 287. 1 Bl.Com. 413. The wife may exhibit articles of the peace against her husband. Bull.N.P. 287.

The husband and wife may be called as witnesses in the same case, and if in their statement of facts they should contradict each other, that would not destroy the competency of either. It would not follow, from such contradiction, that either was guilty of perjury.

And in some cases the wife may be a witness, under peculiar circumstances, where the husband may be interested in the question, and, to some extent, in the event of the cause. 8 East 203. Gilb.Ev. 139.

In the case of *King v. Cliviger,* 2 Term 268, the court held that a wife should not be called in any case to give evidence even tending to criminate her husband. Mr. Justice Grose in that case observed,

"In all the books which treat of evidence there are certain technical rules laid down which are highly beneficial to the public and ought not to be departed from. Some

of these relate to husband and wife, and we find the general rule as to them to be founded not on ground of interest, but of policy, by which it is established that a wife shall not be called to give testimony in any degree to criminate her husband. And Lord Holt says that she shall not be called indirectly to criminate him. And the rule seems to have governed all the decisions from that time to the present."

In the case of *Executrixes of Stead v. Pritchett,* 6 Term 680, the court said,

"Ratcliff is one of the plaintiffs on the record; he has therefore an interest in the cause, and that cannot be prejudiced by any act or by the evidence of the wife."

In the case of *Aveson v. Kinnaird,* 6 East 192, the counsel asserted in the argument that the declarations of the wife could not be permitted as evidence to show that her husband had been guilty of fraud or in any manner to criminate him. And he contended that the rule of law was general, and extended even to cases where the wife was afterwards divorced from her husband. Lord Ellenborough, assenting to the rule, observed, "that goes on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation."

And his Lordship observes in the same case, "It is sound doctrine

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that trust and confidence between man and wife shall not be betrayed."

In this case, however, the court permitted the declarations of the wife to be given in evidence, as to the bad state of her health about the time the policy of insurance on her life was executed, the action being founded on such policy.

The above case of *King v. Cliviger* has been somewhat considered in the Court of King's Bench, in the case of *King v. Inhabitants of All Saints,* in Worcester, and the court seemed to think that the rule laid down in that case was too large and general. But at the same time it observed that the rule in the case of *King v. Cliviger,* admitting it to its utmost extent, did not exclude the evidence in the case then under discussion. Philips Ev. 69.

It has been said that on the grounds of state policy, the wife is a competent witness against her husband in case of treason. Bull.N.P. 289. 1 Brownl. 47. Bac.Ab.Ev. A. 1. But it has since been settled that the wife is not bound to discover the treason of the husband. 1 Brownl. 47.

The law does not seem to be entirely settled how far in a collateral case a wife may be examined on matters in which her husband may be eventually interested. Nor whether in such a case she may not be asked questions as to facts that may in some measure tend to criminate her husband but which afford no foundation for a prosecution. The decisions which have been made on these points seem to have been influenced by the circumstances of each case, and they are somewhat contradictory. It is, however, admitted in all the cases that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband or to disclose that which she has learned from him in their confidential intercourse.

Some color is found in some of the elementary works for the suggestion that this rule, being founded on the confidential relations of the parties, will protect either from the necessity of a disclosure, but will not prohibit either from voluntarily making any disclosure of matters received in confidence, and the wife and the husband have been viewed in this respect as having a right to protection from a disclosure on the same principle as an attorney is protected from a disclosure of the facts communicated to him by his client.

The rule which protects an attorney in such a case is founded on public policy, and may be essential in the administration of justice. But this privilege is the privilege of the client, and not of the attorney. The rule which protects the domestic relations from exposure rests upon considerations connected with the peace of families. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion, when the question is propounded, but it renders them incompetent to disclose facts in evidence in violation

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of the rule. And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances it would afford no substantial protection to persons uninstructed in their rights and thrown off their guard and embarrassed by searching interrogatories.

In the present case, the witness was called to discredit her husband; to prove, in fact, that he had committed perjury; and the establishment of the fact depended on his own confessions. Confessions which, if ever made, were made under all the confidence that subsists between husband and wife. It is true the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule.

Can the wife under such circumstances either voluntarily be permitted or by force of authority be compelled to state facts in evidence which render infamous the character of her husband. We think most clearly that she cannot be. Public policy and established principles forbid it.

This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations that constitute the basis of civil society and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife would be to destroy the best solace of human existence.

We think that the court erred in overruling the objections to this witness.

The next exception by the plaintiff arises from the rejection of the deposition of Mouzat, which had been taken in the case of the parties in the parish court.

To lay the foundation for reading this deposition, John Rist, who represents himself to be the agent of the plaintiff, swore that the witness left Louisiana before the commencement of this suit and ascended the Mississippi with the intention of going to Ohio, and that since then he has not heard from him, although he has made inquiries.

This does not amount to that degree of diligence which the law requires to introduce secondary evidence, and such was the deposition offered.

The plaintiff might have taken out a subpoena, the return of which, not served, would have been better evidence that the witness was not within the judicial district. We think, therefore, that the court did not err in rejecting the deposition.

For the errors above specified, the judgment of the district court must be

Reversed and the cause sent down for further proceedings.

MR. JUSTICE BALDWIN dissented.

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This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana and was argued by counsel. On consideration whereof it is ordered and adjudged by this Court that the judgment of the said district court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said district court for further proceedings to be had therein in conformity to law and justice and the opinion of this Court.

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