Prentice Vs. Zane's Administrator

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Decided On : 1850

Appeal No. : 49 U.S. 470

Appellant : Prentice

Respondent : Zane's Administrator

Judgement :

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Prentice v. Zane's Administrator

49 U.S. (8 How.) 470

ERROR TO THE DISTRICT COURT OF THE UNITED

STATES FOR THE WESTERN DISTRICT OF VIRGINIA

SYLLABUS

Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, this Court will not render a

judgment, but remand the cause to the court below for a *venire facias de novo.*

Therefore, where a suit was brought by an endorsee upon a promissory note, and the special verdict found that the original consideration of the note was fraudulent on the part of the payee, but omitted to find whether the holder had given a valuable consideration for it or received it in the regular course of business, and the court below gave judgment for the defendant, this Court could not decide whether that judgment was erroneous or not, and would have been compelled to remand the case.

But the parties below agreed to submit the cause to the court, both on the facts and the law. This Court must presume that the court below founded its judgment upon proof of the fact as to the manner in which the holder received it, and must therefore affirm the judgment of the court below.

In 1836, Platoff Zane, a citizen of Virginia, being in Pennsylvania, executed the following promissory note:

"$5,437 50/100. Philadelphia, November 28, 1836. Five years after date, I promise to pay to the order of James H. Johnson five thousand four hundred and thirty-seven 50/100 dollars, without defalcation, for value received."

"PLATOFF ZANE"

On some day afterwards (the record did not show when), this note was endorsed in blank by Johnson the payee, and delivered to John Stivers, who handed it over to Prentice & Weissinger without putting his own name upon it.

On 8 May, 1840, Prentice & Weissinger filed a bill before the Honorable George M. Bibb, Judge of the Louisville Chancery Court in Kentucky, against the above-named John Stivers and one John Thomas. The bill stated that the complainants and Thomas were sureties for Stivers as principal in a debt which Stivers owed to the Bank of Louisville, that the complainants had paid the debt, and now required Thomas to contribute one-half.

On 16 June, 1840, Thomas answered and also filed a cross-bill. He alleged that Stivers had placed in the hands of Prentice & Weissinger a large amount of securities, and required an exhibition thereof. Weissinger answered the cross-bill and gave in a list of these securities, amongst which was Zane's note, to which was attached the remark that they had received notice that the note would be defended on the ground of no consideration. The answer also offered to transfer all the securities to Thomas for eighty percent of their amount, averring a belief of their insufficiency to pay the debt.

Here these proceedings in chancery stopped.

On 7 November, 1845, Prentice & Weissinger, citizens of Louisville, Kentucky, brought an action of debt against Zane in the District Court of the United States for the Western District of Virginia upon the above-mentioned promissory note.

The defendant pleaded *nil debet,* and the case went to a jury, who found a special verdict. Before reciting this, it may be mentioned that the deposition of Jacob Anthony, therein referred to, proved that the note in question was passed by Stivers to Prentice & Weissinger, to indemnify them for money paid by them, as his endorsers, in bank.

"The jury said that it found that the note in these words:"

"$5,437 50/100. Philadelphia, November 28, 1836. Five years after date, I promise to pay to the order of James H. Johnson five thousand four hundred and thirty-seven 50/100 dollars, without defalcation, for value received."

"Platoff Zane"

"was made by the defendant and delivered to the payee at the date thereof at Philadelphia, in the State of Pennsylvania, and that said note was endorsed by the payee and delivered by him, so endorsed, to one John Stivers, at the City of Louisville, in the State of Kentucky, before the maturity thereof; that there has not been any evidence submitted to us that said Stivers paid value therefor, or that there was any consideration for such endorsement, unless the same ought to be

inferred from the matters herein stated, but should the court be of opinion that, from the facts and evidence herein found, the jury ought to presume that said endorsement to said Stivers was made for a valuable consideration, then we find that the same was made for full value received by the payee from said Stivers therefor; otherwise we find that the same was made without any consideration or value therefor. And we further find that said Stivers afterwards, but before the said note became payable, delivered the same (endorsed in blank by the payee as aforesaid, but not endorsed by the said Stivers) to the plaintiffs, at the City of Louisville aforesaid, for the purposes and upon the

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consideration shown in the deposition of Jacob Anthony, and the record of a bill, answer, and cross-bill and answers; which deposition and record are in the words and figures following, to-wit:"

"[The deposition and record were then set forth *in extenso,* and the special verdict proceeded thus:]"

"We further find that the consideration of said note was fraudulent on the part of the payee, and such that the payee could not recover against the maker upon said note."

"But we further find, that the plaintiffs had no notice of the fraudulent consideration of said note at or before the time the same was delivered to them as aforesaid."

"And we find that the defendant, since the institution of this suit, has duly served the plaintiffs with a notice in the following words, to-wit:"

"An action of debt in the District Court of the United States for the Western District of Virginia between PRENTICE & WEISSINGER, Plaintiffs, and PLATOFF ZANE, Defendant."

" The defendant in this suit will offer evidence to show and will insist at the trial that the note described in the declaration was obtained from him, said defendant, by the payee thereof, by means of misrepresentation and fraud, and without any

value having been received therefor by said defendant, and will require the plaintiffs to prove at the trial the consideration, if any, paid by them, or the previous holder or holders thereof, for the same, and the time and manner in which they became possessed of said note. Very respectfully &c.;,"

"PLATOFF ZANE"

" *By JACOB & LAMB, his Attorneys* "

" TO MESSRS. PRENTICE & WEISSINGER"

" Due service of above admitted."

"M. C. GOOD, *Attorney for Plaintiffs* "

"We further find the statute of Pennsylvania in force within that state at the time of the execution of said note, and the endorsement thereof and delivery of the same to the plaintiffs as aforesaid, in these words:"

" *Act of 27 February, 1797 -- 4 Dall. 102; 3 Smith 278"*

" *An act to devise a particular Form of Promissory Notes not liable to"*

" *any Plea of Defalcation or Set-off"*

" 6. SEC. 1. All notes in writing, commonly called promissory notes, bearing date in the City or County of Philadelphia

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whereby any person or persons, bodies politic or corporate, or co-partnership in trade, shall promise to pay, or cause to be paid, to any other person or persons, bodies politic or corporate, or co-partnership in trade, and to the order of the payee for value in account, or for value received, and in the body of which the words 'without defalcation' or 'without set-off' shall be inserted shall be held by the endorsees discharged from any claim of defalcation or set-off by the drawers or endorsers thereof, and the endorsees shall be entitled to recover against the

drawer and endorsers such sums as, on the face of the said notes or by endorsements thereon shall appear to be due, provided always that in every action brought by the holder of any such note, whether against the drawer or endorsers, the defendant may set off and defalk so far as the plaintiffs shall be justly indebted to him in account by bonds, specially, or otherwise."

" (See 8 Serg. & R. 481, and posted notes.)"

" A copy from a copy filed in my office."

" Teste: ALEXANDER T. LAIDLEY, *Clerk* "

" And if the law be for the plaintiffs, then we find for them the sum of $5437.50, the debt in the declaration mentioned, with interest thereon at the rate of six percent per annum from 1 December, 1841, till paid. But if the law be for the defendant then we find for the defendant."

"T. W. HARRISON"

"And because the court will consider of what judgment should be rendered upon the verdict aforesaid, time is taken until tomorrow."

" *Memorandum.* Upon the trial of this cause, the parties, by their attorneys, filed a written agreement in the words following, to-wit:"

" And the parties agree that the court, in deciding upon the foregoing verdict, shall look to and regard the decisions of the courts of the State of Pennsylvania, as found in the several printed volumes of the reports thereof, to avail as much as if the same were found by said verdict, and to have such weight as in the judgment of the court they ought to have, and the parties further agree to waive all objections to said verdict on account of its finding in part evidence, and not fact. And that the court, in deciding thereupon, may make all just inferences and conclusions of fact and law from the evidence and facts therein stated, and the decisions aforesaid, which, in the opinion of the court, a jury ought to draw therefrom, if the same were submitted to them upon the trial of this cause, and that

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this agreement is to be made part of the record in this suit."

"M. C. GOOD, *Attorney for Plaintiffs* "

"JACOB & LAMB, *Attorneys for Defendant* "

"Which agreement is ordered to be made a part of the record in this suit."

"On the 9th of September, 1846, the district court pronounced the following judgment, *viz.:* "

" The matters of law arising upon the special verdict in the cause being argued at a former term of this court and the court having maturely considered thereof, it seems that the law is for the defendant."

A writ of error brought the case up to this Court.

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MR. JUSTICE GRIER delivered the opinion of the Court.

The plaintiffs in error were plaintiffs below. They declared

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on a promissory note given by defendant to James H. Johnson or order for the sum of $5,437.59, payable five years after date. The note was endorsed by the payee and delivered to John Stivers, who delivered it to the plaintiffs. The defendant pleaded *nonassumpsit,* and a jury, being called, found a special verdict setting forth the note and finding that it was made by the defendant and delivered by him to the payee, but that "the consideration was fraudulent on the part of the payee," that the note was endorsed by the payee to John Stivers before its maturity,

"and that there has not been any evidence submitted to the jury that said Stivers paid value therefor, or that there was any consideration for such endorsement unless the same ought to be inferred from the matters herein stated,"

&c.; They also find that Stivers delivered the note to plaintiffs, but without saying whether for a valuable consideration or not, and they refer the court to be deposition of a witness and the record of a chancery suit appended to the verdict for the evidence on that point.

This special verdict is manifestly imperfect and uncertain, as it finds the evidence of facts, and not the facts themselves.

A verdict, says Coke (Co.Litt. 227 *a*), finding matter uncertainly and ambiguously is insufficient, and no judgment will be given thereon.

A verdict which finds but part of the issue and says nothing as to the rest is insufficient, because the jury have not tried the whole issue. So if several pleas are joined and the jury find some of them well, and as to others find a special verdict which is imperfect, a *venire facias de novo* will be granted for the whole. 2 Roll.Abr. 722, Pl. 19; *Auncelme v. Auncelme,* Cro.Jac. 31; *Woolmer v. Caston, id.,* 113; *Treswell v. Middleton, id.,* 653; *Rex v. Hayes,* 2 Ld.Raym. 1518.

In all special verdicts, the judges will not adjudge upon any matter of fact but that which the jury declare to be true by their own finding, and therefore the judges will not adjudge upon an inquisition or aliquid tale found at large in a special verdict, for their finding the inquisition does not affirm that all in it is true. *Street v. Roberts,* 2 Sid. 86.

In *Chesapeake Ins. Co. v. Stark,* 6 Cranch 268, and *Barnes v. Williams,* 11 Wheat. 415, this Court has decided that where in a special verdict the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the Court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below with directions to award a *venire de novo.*

The Court in this case would have been bound to pursue the same

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course if the judgment of the court below had been rendered on the imperfect special verdict which the record exhibits. But it appears that the court and counsel were aware of this imperfection in the verdict, and that it was not such as would warrant any judgment thereon by the Court. Nevertheless the parties, instead of asking for a *venire de novo* or amending the verdict, agree to waive the error and to submit the cause to the Court both on the facts and the law. Their agreement is as follows:

" *Memorandum.* Upon the trial of this cause the parties, by their attorneys, filed a written agreement in the words following, to-wit:"

" And the parties agree that the court, in deciding upon the foregoing verdict, shall look to and regard the decisions of the courts of the State of Pennsylvania, as found in the several printed volumes of the reports thereof, to avail as much as if the same were found by said verdict, and to have such weight as in the judgment of the court they ought to have; and the parties further agree to waive all objections to said verdict on account of its finding in part evidence, and not fact. And that the court, in deciding thereupon, may make all just inferences and conclusions of fact and law from the evidence and facts therein stated, and the decisions aforesaid, which, in the opinion of the court, a jury ought to draw therefrom if the same were submitted to them upon the trial of this cause; and that this agreement is to be made part of the record in this suit."

The judgment of the court below was rendered upon this submission, and not on the special verdict alone.

In cases at law, this Court can only review the errors of the court below in matters of law appearing on the record. If the facts upon which that court pronounced their judgment do not appear on the record, it is impossible for this Court to say that their judgment is erroneous in law. What "inferences or conclusions of fact" the court may have drawn from the evidence submitted to them we are not informed

by the record. The fact submitted to the judge formed the turning point of the case. So far as the record exhibits the facts, no error appears. The note being found to have been obtained from the defendant by fraud, the plaintiff's right to recover on it necessarily depended on the fact that he gave some consideration for it or received it in the usual course of trade. We must presume that the court found this fact against the plaintiff, and if so, their judgment was undoubtedly correct. Whether their "inferences or conclusions of fact" were correctly drawn from the evidence is not for this Court to decide.

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That such has been the uniform course of decision in this Court may be seen by reference to a few of the many cases in which the same difficulty has occurred. In *Hyde v. Booraem,* 16 Pet. 169, this Court said:

"We cannot upon a writ of error revise the evidence in the court below in order to ascertain whether the judge rightly interpreted the evidence, or drew right conclusions from it. That is the proper province of the jury or of the judge himself if the trial by jury is waived. The Court can only reexamine the law so far as he has pronounced it on a state of facts, and not merely on the evidence of facts found in the record in the making of a special verdict or an agreed case. If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before the supreme court, by an appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with supposed conclusions in matters of fact."

See also *Minor v. Tillotson,* 2 How. 394, and *United States v. King,* 7 How. 833.

The judgment of the court below is therefore

Affirmed.

MR. JUSTICE Mc LEAN, MR. JUSTICE WAYNE, and MR. JUSTICE WOODBURY dissented.

MR. JUSTICE WAYNE.

I do not concur with the Court in the course which it has taken in this case or in affirming the judgment. The record in my view is irregular. It is difficult to say whether it has been brought to this Court upon a special verdict or a case stated by agreement of the parties, and I think it difficult to determine whether the court below acted upon either. It may have given its judgment *pro forma* to get the case to this Court. I think a different direction ought to have been given to it by returning the case to the district court for amendment, so that the case might have been decided substantially upon its merits. This would have been according to what has been done by this Court in other cases similarly circumstanced as this case is.

MR. JUSTICE WOODBURY.

I feel obliged to dissent from the judgment in this case. It is conceded that the special verdict is defective in form. Instead of stating some of the matter as a fact, only the evidence of it is given. The most obvious and proper course under such circumstances would seem to be to send the case back and give an opportunity to the plaintiff to have that defect corrected, and afterwards, if the case comes up again,

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to render judgment on the merits upon all the facts, when thus formally set out. This could regularly be done by reversing the judgment below instead of affirming it as here. That judgment was rendered erroneously on this same defective verdict, instead of putting it first in proper shape and then deciding on it as corrected.

After the reversal here, we should, in my opinion, remand the case of the circuit court, not to have judgment entered there either way on this imperfect verdict, but to have a *venire de novo* ordered so as to correct it. Such I understand to be the well settled practice of this Court. As decisive proof that the course now pursued of refusing to send the case back for correction before final judgment is not in

accordance with what has been done by this Court in like cases, Chief Justice Marshall, in *Chesapeake Ins. Co. v. Stark,* 6 Cranch 268, observed

"In this case, the jury has found an abandonment, but has not found whether it was made in due time or otherwise. The fact is therefore found defectively, and for that reason a *venire facias de novo* must be awarded. . . . Judgment reversed and the cause remanded with directions to award a *venire facias de novo.* "

Such was deemed the proper course there, rather than at once to give absolute and final judgment, as here, against the plaintiff because the special verdict was defective. Another objection there was precisely as here, "because the jury have found the evidences of the authority and time, but not the fact of authority nor the reasonableness of the time." P. 271 [argument of counsel -- omitted].

So again, in *Livingston v. Mar. Ins. Co.,* 6 Cranch 280, the Court made a like order. And another of similar character in *Barnes v. Williams,* 11 Wheat. 415. We should thus obtain a verdict in due form, with all the facts found positively, and not the mere evidence of some of them submitted. And the judgment below could then be rendered understandingly, as it could also here, if the case was again brought here by either party.

It does not seem promotive of justice to affirm a judgment below on the ground that the imperfect verdict must at all events stand, and to decide technically on the hypothesis that a certain transaction is not in the case as a fact, and is not to be considered, nor allowed to be corrected and restated, though full evidence of it is submitted. And the more especially does it look wrong where, if it was corrected in conformity with what the evidence proves, the judgment ought, in my view, to be for the plaintiffs.

But it is objected that the counsel agreed below to waive

this exception to the special verdict, and consequently the court there rendered judgment on that agreement and waiver, as well as on the verdict, and that this

was a wrong course of proceeding.

Supposing it was wrong, there is no proof that the court acted on the agreement and waiver, but may have deemed it proper to disregard them and decide on the verdict alone. On the contrary, if that court decided on the whole, their decision for the defendant seems to me erroneous both on the merits and on the course of proceeding, and ought in either court to be reversed instead of affirmed, as it has been on this occasion by the majority of this Court. The original plaintiffs should, on the apparent merits, in my apprehension, recover, because no doubt exists first that in point of law the note in controversy must be construed by the laws of Pennsylvania, where it was made, and that by those laws it was negotiable. *See* Act of February 27, 1797, 4 Dallas Laws of Pennsylvania 102.

It is as little in doubt that no pretense exists but that the plaintiffs took this note from the second endorsees before it was due, and without any circumstances to excite suspicion or cast a shade over its goodness, and without any notice or knowledge of the badness of its original consideration.

Under such circumstances it is equally clear that such a *bona fide* holder of a note is presumed to have given a valid consideration for it, and on producing it is entitled to a recovery of its amount unless this presumption is repelled by counter evidence. Story on Prom. Notes 220.

Furthermore, in such case it is no obstacle to a recovery that a consideration is not shown between the first endorsee and his endorser. 1 Ad. & Ell. 498.

But it is found here that, for some reason not specified in the record, there was fraud in the original consideration. Hence it is contended that the holder must in such case prove a consideration given by him; but he is not otherwise affected by the original fraud when without notice of it. 4 Ad. & Ell. 470; Chit. on Bills 69.

Granting this for the argument, it appears that he proceeded to show a consideration, and proved that the second endorsee passed the note to him to secure and pay certain debts and liabilities assumed then in his behalf, as would seem to be inferable from the record. It would in that event be obtained in the

course of business for a new and original consideration, and thus the transfer stood unimpeached. But if the debts were preexisting ones, as is contended, they would still constitute a

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good consideration. However the decisions in different states on this may differ and may have changed at different periods, this Court seems deliberately to have held this doctrine in *Swift v. Tyson,* 16 Pet. 15, 41 U. S. 22 .

It will not answer to overturn all these established principles because some might fancy the equities of the maker, who was defrauded as to the consideration, greater than those of the present holder, who paid a full and valuable consideration for the note, relying, too, on the good faith of the maker, not to send negotiable paper into the market, and running for five years, so as to mislead innocent purchasers, and, for aught which appears, making no attempt to recall it when discovering he was defrauded, and giving no public and wide caution, as is usual, by advertisement or otherwise, against a purchase of it after such discovery.

Under such circumstances, if equities were to weigh, irrespective of the law, which cannot be correct, they seem rather to preponderate in favor of the holder, who has thus been misled and exposed to be wronged by the conduct of the maker. *United States v. Bank of the Metropolis,* 15 Pet. 398.

Finally, were we compelled to give a decision as to the merits on the special verdict, as it now stands somewhat defective in form, but with an agreement by counsel virtually to waive the defect of form, it would be most just to regard the jury as intending to find for a fact what they find as given in evidence and uncontradicted. This is clearly the substance of this verdict, and in such a view, as already shown, the same result would follow, that the plaintiffs appear in law entitled to recover.

ORDER

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said district court in this cause be and the same is hereby affirmed with costs.