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Court : US Supreme Court

Decided On : 1853

Appeal No. : 57 U.S. 14

Appellant : Turner

Respondent : Yates

Judgement :

Turner v. Yates - 57 U.S. 14 (1853)
U.S. Supreme Court Turner v. Yates, 57 U.S. 16 How. 14 14 (1853)

Turner v. Yates

57 U.S. (16 How.) 14

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF MARYLAND

SYLLABUS

A bond, with sureties, was executed for the purpose of securing the repayment of certain money advanced for putting up and shipping bacon. William Turner was to have the management of the affair, and Harvy Turner was to be his agent.

After the money was advanced, Harvy made a consignment of meat, and drew upon it. Whether or not this draft was drawn specially against this consignment was a point which was properly decided by the court from an interpretation of the written papers in the case.

It was also correct to instruct the jury that if they believed, from the evidence, that Harvy was acting in this instance either upon his own account, or as the agent of William, then the special draft drawn upon the consignment was first to be met out of the proceeds of sale, and the sureties upon the bond to be credited only with their proportion of the residue.

The consignor had a right to draw upon the consignment with the consent of the consignee, unless restrained by some contract with the sureties, of which there was no evidence. On the contrary, there was evidence that Harvy was the agent of William, to draw upon this consignment as well as for other purposes.

It was not improper for the court to instruct the jury that they might find Harvy to have been either a principal or an agent of William.

An agreement by the respective counsel to produce upon notice at the trial table any papers which may be in his possession, did not include the invoice of the consignment, because the presumption was that it had been sent to London, to those to whom the boxes had been sent by their agent in this country.

A correspondence between the plaintiff and Harvy, offered to show that Harvy was acting in this matter as principal, was properly allowed to go to the jury.

The testimony of an attorney was admissible, reciting conversations between himself and the attorney of the other parties in their presence, which declarations of the attorney were binding on the last mentioned parties.

Evidence was admissible to show that a charge of one percent upon the advance made upon the consignment, was a proper charge according to the usage and custom of the place.

It is not necessary that the bill of exceptions should be formally drawn and signed before the trial is at an end. But the exception must be noted then, and must purport on its face so to have been, although signed afterwards *nunc pro tunc.*

The facts of the case are set forth in the opinion of the Court, to which the reader is referred.

Page 57 U. S. 21

MR. JUSTICE CURTIS delivered the opinion of the Court.

This is a writ of error to the Circuit Court of the United States for the District of Maryland. The action was debt on the bond of the plaintiffs in error, the condition of which was as follows:

"Whereas the said Joseph C. Yates is about to lend and advance to William H. F. Turner the sum of twelve thousand dollars in such sums and at such times as the said William may designate and appoint, which designation and appointment

Page 57 U. S. 22

and advances it is hereby agreed shall be evidenced by notes drawn by the said William in favor of the said Harry F. Turner, agent, and by the latter endorsed, or by drafts drawn by the said William H. F. Turner in favor of the said Harry F. Turner, agent, on and accepted or paid by the said Yates, endorsed by said Harry F."

"And whereas the said Harry F. Turner, Sterling Thomas, and James F. Purvis, have agreed, as the consideration for the said loan, to secure the said Yates the payment of the sum of six thousand dollars, and interest thereon, part of the said loan, and the said Harry F. Turner, with Robert Turner and Absalom Hancock, have entered into a bond similar to this, for the payment of the other six thousand dollars and interest."

"Now the condition of the above obligation is such that if the said William H. F. Turner, at the expiration of twelve months from the date hereof, shall well and truly pay to the said Joseph G. Yates, his executors, administrators, or assigns all such sum or sums of money as may be owing to the said Yates by the said William H. F. Turner, evidenced as aforesaid, at the said expiration of the said twelve months, or in case the said William H. F. Turner should fail or omit to pay said sum or sums of money at said time if the said Sterling Thomas and James F. Purvis, or either of them, shall well and truly pay to the said Yates, his executors, administrators or assigns, so much of said sum or sums of money as may then be owing as shall amount to six thousand dollars and interest, in case so much be owing, with full legal interest thereon, or such sum or sums of money as may be owing with interest thereon, in case the same should amount to less than six thousand dollars, then this obligation to be null and void, otherwise to remain in full force and virtue in law."

"HARRY F. TURNER [SEAL]"

"STERLING THOMAS [SEAL]"

"JAMES F. PURVIS [SEAL]"

The defense was that seven hundred boxes of bacon had been consigned by William Turner to Gray & Co. in London for sale, and having been sold, the whole of its proceeds ought to be credited against the advance of twelve thousand dollars mentioned in the condition of the bond. The plaintiff did not deny that the merchandise was received by Gray & Co. for sale and sold by them, but insisted that the property belonged to Harry, and not to William Turner, and so no part of its proceeds were thus to be credited, and that if bound to credit any part of these proceeds, there was first to be deducted the amount of a draft for $5,733, drawn by Harry Turner on the plaintiff specifically against this property, which draft the plaintiff was admitted to have accepted and paid.

Upon this part of the case the district judge who presided at the trial ruled:

"If the jury believe that defendants executed and delivered the bond now sued upon and that Harry F. Turner, in the transactions, after occurring, in relation to the bacon at Chattanooga, was either the principal in such transactions or acted as agent of William H. F. Turner, then defendants are entitled only to be credited for one-half the net amount of the shipments of bacon made by them, after deducting from the proceeds of sales of such bacon all liens thereon, including in such liens the draft of $5,733 drawn as an advance on such bacon."

This ruling having been excepted to, several objections to its correctness have been urged at the bar by the counsel of the plaintiffs in error.

The first is that the bond does not show the advances were actually made, and therefore the judge ought to have directed the jury to inquire concerning that fact. It is a sufficient answer to this objection to state what the record shows that in the course of the trial the plaintiff, having put in evidence drafts corresponding with those mentioned in the bond amounting to $12,000, the defendants admitted their genuineness and that they were all paid at the times noted thereon. The fact that the $12,000 was advanced was not, therefore, in issue between the parties, and there was no error in not directing the jury to inquire concerning it.

It is further objected that in his instruction to the jury the judge assumed that the draft of $5,733 was drawn against this consignment, instead of leaving the jury to find whether it was so drawn. The draft itself and the letter of advice were in the case. The draft requested the drawee to "charge the same to account as advised." The letter of advice states: "I have this day drawn on you at ninety days for $5,733, being ten dollars and fifty cents per box on 544 boxes singed bacon &c.;" This was a part of the merchandise in controversy. It was clearly within the province of the court to interpret these written papers and inform the jury whether they showed a drawing against this property. When a contract is to be gathered from a commercial correspondence which refers to material extraneous facts or only shows part of a course of dealing between the parties, it is sometimes necessary to leave the meaning and effect of the letters, in connection with the other

evidence, to the jury. *Brown v. McGran,* 14 Pet. 493.

But this was not such a case, and we think the judges rightly informed the jury that this draft was drawn against this property. Whether, being so drawn, it bound the property and its proceeds, so that in this action its amount was to be deducted

Page 57 U. S. 24

therefrom, depended upon other considerations, which are exhibited in the other part of the instruction. Assuming what we shall presently consider, that there was evidence from which the jury might find that Harry, who drew the draft, was either himself the owner of the property, and so the principal, or if not that he was the agent of William, there can be no doubt of the correctness of this instruction unless there was something in the case to show that the owner of the consignment could not bind its subject by a draft made and accepted on the faith of it. This is not to be presumed, and if the two defendants, who were sureties on this bond, assert that they had a right to have the whole of the proceeds of this property appropriated to the repayment of the advance of $12,000, for which they were in part liable, it was incumbent on them to prove that the ordinary power of a consignor, by himself or his agent, to draw against his property, with the consignee's consent, was effectually restrained by some contract with the sureties, or of which they could avail themselves. We have carefully examined the evidence on the record, and are unable to discover any which would have warranted the jury in finding such a contract.

The bond itself contains no intimation of it. And although the evidence tends to prove that the sureties had reason to expect that bacon would be packed and sent to Gray & Co., and that, through such consignments, the advance of $12,000 might be partly or wholly repaid, they do not appear to have stipulated or understood that William was to have no advance on such property. Indeed, the real nature of the transaction seems to have been that the bond was taken to cover an ultimate possible deficit, after the property should have been sold and all liens satisfied, leaving William, their principal, free to create such liens as he might find expedient in the course of the business.

We are also of opinion that there was evidence in the case from which the jury might find that Harry was held out to the plaintiff, by William, as his agent, as well for the purpose of drawing against this property as for other purposes. The letter from William Turner to the plaintiff of the 14th November, 1849, and the agreement of Harry appended to it, tend strongly to prove this. They are as follows:

"CHATTANOOGA, Tenn., Nov. 14, 1849"

"MR. JOS. C. YATES: "

"DEAR SIR: In consideration of the advance of twelve thousand dollars made me by you for the purpose of packing meats for the English market, I hereby bind myself to make my whole shipments, of whatever kind they may be, to your friends in

London or Liverpool, Messrs. B. Charles T. Gray & Son, for the entire season, or longer, till such advance shall have been paid off, together with any other that I may be permitted to draw for."

"I am, dear sir, your most obedient servant,"

"W. H. F. TURNER"

"I agree to see the above carried out in good faith, and bind myself for the due fulfillment of it."

"HARRY F. TURNER, *Agent of* "

"W. H. F. TURNER"

It thus appears that further advances to William were contemplated as a part of the arrangement with him, and Harry, as agent of William, was to see the whole arrangement carried out upon his personal responsibility. If, as these witnesses show, Harry was agent for William for carrying out the whole arrangement, and further drawing was contemplated as a part of it, it necessarily follows he was his

agent thus to draw. It is shown by the correspondence that Harry had the sole charge of getting the property down to the seaboard from the interior and of shipping it, and that he had incurred large debts on account of it, and, finally William Turner has not, so far as appears, repudiated his act in drawing, and the defendants now claim the benefit of a consignment, on the faith of which the draft in question was accepted.

Under these circumstances, our opinion is that it was not improper for the judge to leave it to the jury to find whether Harry was the agent of William, if he were not himself the owner of the property. Nor do we think these two states of fact present such inconsistent grounds as ought not to have been submitted to the jury. It is true Harry could not be at the same time principal and agent, but it often happens in courts of justice that a right may be presented in an alternate form or upon different grounds.

If one party has dealt with another as an agent, it would be strange if the transaction should be held invalid because it is proved on the trial he was principal -- and *e converso.* The substantial question in such a case is a question of power to do an act, and this power may be shown either by proving he had it in his own right or derived it from another. Of course there may be cases where the allegations of the parties on the record restrict them to one line of proof, and there may be others in which the court, to guard against surprise, should not allow a party to open one line of proof, and in the course of the trial abandon it and take an inconsistent one. But this last is a matter of practice, subject to the sound discretion of the court, and not capable of revision here upon a writ of error.

Page 57 U. S. 26

We hold the second instruction, which involved the merits of the case, to be correct.

The other bills of exception relate chiefly to questions of evidence.

In the course of the trial, the defendants introduced a witness who testified that he made out an invoice of the 700 boxes of bacon and sent it by mail to the plaintiff, who was the agent of Gray & Co., to whom the property was consigned in London.

The defendants then called on the plaintiff to produce this invoice under the following agreement:

"It is agreed between the plaintiff and defendant in this cause that either party shall produce, upon notice at the trial table, any papers which may be in his possession, subject to all proper legal exceptions as to their admissibility or effect as evidence, and that handwriting, where genuine, shall be admitted without proof."

"S. T. WALLIS, *for plaintiff* "

"BENJ. C. BARROLL, *for defendants* "

The plaintiff said the invoice was not in his possession. The defendants then offered to prove its contents. But the court was of opinion it was to be presumed the invoice had gone to the consignees in London, who were competent witnesses to produce the original, and therefore parol evidence of the contents of the paper was excluded.

This ruling was correct. So far as appears, this was the only invoice made. Every consignment of merchandise regularly made requires an invoice. It is the universal usage of the commercial world to send one to the consignee. The revenue laws of our own country, and we believe of all countries, assume the existence of such a document in the hands of the consignee on the arrival of the merchandise. It was the clear duty of the plaintiff, when he received the invoice, to send it to the consignees in London. The presumption was that he had done what is usually done in such cases and what his duty required. If the paper was in the hands of the consignees in London, secondary evidence was not admissible. For it was not within the written agreement to produce papers, which applied only to those in the possession of the plaintiff, and though the plaintiff was an agent of those consignees, and seems to have been suing for their benefit, yet aside from the written agreement, they must be treated either as parties or third persons. If as

parties, they were entitled to notice to produce the paper; if as third persons, their depositions should have been taken, or some proper attempt made to obtain it. This also disposes of the fifth exception, because if the evidence in the cause had some tendency to prove the document had been retained, the offer of the plaintiff to prove the contrary, and the election by

Page 57 U. S. 27

the defendants to rest their motion for the admission of the parol evidence upon a concession that the fact was as the plaintiff offered to prove it, instead of first calling for that proof, must preclude them now from objecting that the proof was not given.

The second exception relates to the admission of certain correspondence respecting this property between the plaintiff and Harry Turner and Messrs. Gadsden & Co., of Charleston, S.C., before the property was shipped to London, and also the accounts of sales of the property, which were introduced by the plaintiffs for the purpose of showing that they were dealing with Harry Turner as principal, and under a separate contract with him. We have no doubt of the admissibility of this evidence for the purpose for which it was offered. Whether Harry was principal or agent, it was competent and important for the plaintiff to prove that he was dealt with and treated as a principal, and there could be no better evidence of it than the correspondence concerning the transaction. On the trial of a commercial cause, such a correspondence is not only generally admissible, but it is often the highest evidence of the nature of the acts of the parties and the capacities in which they acted and the relations they sustained to each other. It must be observed that the plaintiff, in one aspect of his case, had three things to prove. First, that there was a distinct arrangement with Harry to ship property to Gray & Son and receive advances on it. Second, that the plaintiff and Gray & Son acted on the belief that this consignment was made under that arrangement. Third, that in point of fact this consignment was made by Harry on his own account, and not on account of William. And evidence showing that Harry, being in possession of the property, consigned it to them, accompanying or preceded by such letters as showed the consignment to be for his own account,

was clearly admissible upon each of these points. It is true it might nevertheless be the property of William, and really sent for his account, but that was a question for the jury upon the whole evidence.

The third exception relates to the admission of the testimony of Mr. Thomas respecting certain declarations made to him by Mr. Ward. We do not deem it necessary to detail the evidence, it being sufficient to say that so far as these declarations were made in the presence of all the defendants, they were of such a character, and made under such circumstances, as imperatively to have required them to deny their correctness if they were untrue, and therefore they were clearly admissible. So far as Mr. Ward's declarations were made to Mr. Teackle when the defendants were not present, they are stated to have been merely a repetition of his former statements.

The judge left them to the jury with the following instruction:

"If the jury find that W. J. Ward, Esq., was, in his communication with the plaintiff's counsel, accompanied by the defendants, and that defendants referred plaintiff's counsel to said Ward to adjust and settle the differences between them, that said defendants are bound by the acts and declarations of said Ward, although he was only retained by H. F. Turner as such, unless such limitations of retainer were stated to plaintiff or his counsel."

This was sufficiently favorable to the defendants. It was really of no importance whether Mr. Ward was counsel for one or all the defendants, if they united in referring Mr. Thomas to him to adjust the mode of preparing the papers, and in our opinion there was evidence from which the jury might find such an authority to have been given by the defendants jointly.

We consider the fourth exception untenable. If it was usual to pay a commission for such services, it was properly charged in this case, there being no evidence, to show that there was a special agreement to render the services without pay or for

less than the customary commission.

The sixth exception was taken on account of the admission of the testimony of Mr. Teackle, and certain letters of Gray & Co. and Harry Turner. The former has already been disposed of in considering the third exception, and the latter in considering the second exception respecting the correspondence of Harry Turner, most of the observations upon which are applicable to these letters.

The remaining bill of exceptions is in the following words:

"Upon the further trial of this case, after the instructions prayed for had been argued, and the court had decided to refuse the same, and had granted the two instructions set out on the defendants' seventh exception, the defendants' counsel having prepared out of court their exceptions thereto, and to the other points of law ruled by the court and excepted to during this trial immediately after the court had so decided and before the bailiff to the jury was sworn or the jury had withdrawn from the bar of the court, presented their said exceptions and moved the court to sign and seal the same before the verdict should be rendered; but the court refused so to do, and refused to consider the said exceptions or either of them under the rule of that court, November 25, 1846, at the November term thereof."

"Ordered that whenever either party shall except to any opinion given by the court, the exception shall be stated to the court before the bailiff to the jury is sworn, and the bill of exceptions afterwards drawn out in writing, and presented to the court during the term at which it is reserved, otherwise it will not be sealed by the court. "

Page 57 U. S. 29

In *Walton v. United States,* 9 Wheat. 657, this Court said,

"We do not mean to say, and in point of practice we know it to be otherwise, that the bill of exceptions should be formally drawn and signed before the trial is at and end. It will be sufficient if the exception be taken at the trial and noted by the court with the requisite certainty, and it may afterwards, according to the rules of the court, be reduced to form and signed by the judge, and so in fact is the general

practice. But in all such cases the bill of exceptions is signed *nunc pro tunc,* and it purports on its face to be the same as if it had been reduced to form and signed during the trial, and it would be a fatal error if it were to appear otherwise, for the original authority under which bills of exception are allowed has always been considered as restricted to matters of exception taken pending the trial and ascertained before the verdict."

To what was there said this Court has steadily adhered. 29 U. S. 4 Pet. 106; 36 U. S. 11 Pet. 185; 45 U. S. 4 How. 15. The record must show that the exception was taken at that stage of the trial when its cause arose. The time and manner of placing the evidence of the exception formally on the record are matters belonging to the practice of the court in which the trial is held. The convenient dispatch of business in most cases does not allow the preparation and signature of bills of exceptions during the progress of a trial. Their requisite certainty and accuracy can hardly be secured if any considerable delay afterwards be permitted, and it is for each court in which cases are tried to secure by its rules that prompt attention to the subject necessary for the preservation of the actual occurrences on which the validity of the exception depends, and so to administer those rules that no artificial or imperfect case shall be presented here for adjudication. The rule of the Circuit Court for the District of Maryland is unobjectionable, and this exception is overruled.

The judgment of the circuit court is affirmed with costs.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and interest until paid, at the same rate per annum that similar judgments bear in the courts of the State of Maryland.

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