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Court : US Supreme Court

Decided On : 1853

Appeal No. : 57 U.S. 38

Appellant : Conrad

Respondent : Griffey

Judgement :

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U.S. Supreme Court Conrad v. Griffey, 57 U.S. 16 How. 38 38 (1853)

Conrad v. Griffey

57 U.S. (16 How.) 38

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF LOUISIANA

SYLLABUS

In 52 U. S. 11 How. 430, it is said,

"where a witness was examined for the plaintiff and the defendant offered in evidence declarations which he had made of a contradictory character, and then the plaintiff offered to give in evidence others affirmatory of the first, these last affirmatory declarations were not admissible, being made at a time posterior to that at which he made the contradictory declarations given in evidence by the defendant."

The case having been remanded to the circuit court under a *venire facias de novo,* the plaintiff gave in evidence, upon the new trial, the deposition taken under a recent commission, of the same witness whose deposition was the subject of the former

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examination, when the defendant offered to give in evidence the same affirmatory declarations which, upon the former trial, were offered as rebutting evidence by the plaintiff.

The object of the defendant being to discredit and contradict the deposition of the witness taken under the recent commission, the evidence was not admissible. He should have been interrogated respecting the statements when he was examined under the commission.

If his declarations had been made subsequent to the commission, a new commission should have been sued out, whether his declarations had been written or verbal.

This case was before this Court at December term, 1850, and is reported in 52 U. S. 11 How. 480.

In order to give a clear idea of the point now brought up for decision, it may be necessary to remind the reader of some of the circumstances of that case.

Griffey was a builder of steam engines in Cincinnati, and made a contract with Conrad, a sugar planter in Louisiana, to put up an engine upon his plantation for a certain sum. Disputes having arisen upon the subject, Griffey brought his action

against Conrad to recover the amount claimed to be due.

Upon the trial in 1849, the testimony of Leonard N. Nutz, taken under a commission, was given in evidence. He was the engineer who was sent by Griffey to erect and work the machine. The deposition was taken on the 1st April, 1847. This evidence being in favor of Griffey, the counsel for Conrad offered the depositions of three persons to contradict the evidence of Nutz. Griffey then produced, as rebutting evidence, a letter written by Nutz to him under date of April 3, 1846, which was admitted by the court below, and the propriety of which admission was the point brought before this Court in 11 Howard. This Court having decided that the letter ought not to have been received in evidence, the cause was remanded under an order to award a *venire facias de novo.*

Before the cause came on again for trial, Griffey took the testimony of Nutz again under a commission on the 28th of June, 1852, when the following proceedings were had and bill of exceptions taken.

"Be it known that on the trial of this cause, the plaintiff having read in evidence the deposition of Leonard N. Nutz, taken under commission on the 28th June, 1852, and filed on the 9th July, 1852, the defendant then offered in evidence a letter of Leonard N. Nutz, dated at New Albany, on the 3d April, 1846, with an affidavit annexed by said Nutz of the same date, all addressed to the plaintiff in this cause, and as preliminary proof to the introduction of said letter the defendant adduced the bill of exceptions

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signed upon a former trial of this cause and filed on the 23d February, 1849, and the endorsement of the clerk upon said letter of its being filed, showing that said letter had been produced by the plaintiff in said former trial, and read by his counsel in evidence as the letter of said Nutz in support of a former deposition of the same witness. And the said letter and affidavit were offered by said defendant to contradict and discredit the deposition of said witness taken on the said 28th of June, 1852; but upon objection of counsel for the plaintiff that the said witness had

not been cross-examined in reference to the writing of said letter or allowed an opportunity of explaining the same, and that upon the former trial the counsel for defendant had objected to the same document as evidence, and the objection had been sustained by the Supreme Court of the United States, the court sustained by said objections and refused to allow the said letter and affidavit annexed to be read in evidence, to which ruling the defendant takes this bill of exceptions and prays that the interrogatories and answers of said Nutz, taken on said 28 June, 1852, the said letter and affidavit annexed, of date the 3d April, 1846, with the endorsement of the clerk of filing the same, and the bill of exceptions filed on the 23d February, 1849, be all taken and deemed as a part of this bill of exceptions, and copied therewith accordingly."

"THEO. H. Mc CALEB, U.S. Judge [SEAL]"

Upon this exception, the case came up again to this Court.

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

This action was brought to recover the balance of three

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thousand seven hundred and eighty-one dollars and fifty-eight cents claimed to be due under a contract to furnish, deliver, and set up, on the plantation of the defendant, in the Parish of Baton Rouge, a steam engine and sugar mill boilers, wheels, cane carriers, and all other things necessary for a sugar mill, all which articles were duly delivered.

The defendant in his answer set up several matters in defense.

The error alleged arises on the rejection of evidence offered by the defendant on the trial before the jury, and which appears in the bill of exceptions. The plaintiff read in evidence the deposition of Leonard N. Nutz, taken under a commission on

the 28th of June, 1852, and filed the 9th of July succeeding. The defendant then offered in evidence a letter of the witness dated at New Albany on the 3d April, 1846, with an affidavit annexed by him of the same date, addressed to the plaintiff Griffey. As preliminary proof to the introduction of said letter, the defendant adduced the bill of exceptions signed upon a former trial of this cause and filed on the 23d February, 1849, showing that the letter had been produced by the plaintiff in the former trial and read by his counsel in evidence as the letter of Nutz in support of a former deposition made by him. And the said letter and affidavit were offered by the defendant to contradict and discredit the deposition of the witness taken the 28th June, 1852, but upon objection of counsel for the plaintiff that the witness had not been cross-examined in reference to the writing of said letter or allowed an opportunity of explaining the same, it was rejected.

At the former trial, the letter was offered in evidence by the plaintiff in the circuit court to corroborate what Nutz, the witness, at that time had sworn to; and the letter was admitted to be read for that purpose by the court. On a writ of error, this Court held that the circuit court erred in admitting the letter as evidence, and on that ground reversed the judgment. *Conrad v. Griffey,* 11 How. 492.

The rule is well settled in England that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to unless, on his examination, he was asked whether he had not made such statements to the individuals by whom the proof was expected to be given. In *The Queen's Case,* 2 Brod. & Bing. 312; *Angus v. Smith,* 1 Moody & Malkin 473; 3 Starkie's Ev. 1740, 1753, 1754; *Carpenter v. Wall,* 11 Adol. & Ellis 803.

This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the

statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony.

This rule is generally established in this country as in England. *Doe v. Reagan,* 5 Blackford 217; *Franklin Bank v. Steam Nav. Co.,* 11 Gill & Johns. 28; *Palmer v. Haight,* 2 Barbour's Sup.Ct. 210, 213; 1 McLean 540; 2 *id.* 325; 4 *id.* 378, 381; *Jenkins v. Eldridge,* 2 Story 181, 284; *Kimball v. Davis,* 19 Wend. 437; 25 Wend. 259.

"The declaration of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions, is inadmissible if objected to. The only way for the party to avail himself of such declarations is to sue out a second commission. . . . Such evidence is always inadmissible until the witness, whose testimony is thus sought to be impeached, has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation."

This rule equally applies whether the declaration of the witness, supposed to contradict his testimony, be written or verbal. Starkie's Ev. 1741.

A written statement or deposition is as susceptible of explanation, as verbal statements. A different rule prevails in Massachusetts and the State of Maine.

The letter appears to have been written six years before the deposition was taken which the letter was offered to discredit. This shows the necessity and propriety of the rule. It is not probable that, after the lapse of so many years, the letter was in the mind of the witness when his deposition was sworn to. But, independently of the lapse of time, the rule of evidence is a salutary one, and cannot be dispensed with in the courts of the United States. There was no error in the rejection of the letter, under the circumstances, by the circuit court; its judgment is therefore 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 Eastern District of Louisiana, 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 Louisiana.

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