Oelricks Vs. Ford

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Appeal No. : 64 U.S. 49

Appellant : Oelricks

Respondent : Ford

Judgement :

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Oelricks v. Ford

64 U.S. (23 How.) 49

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF MARYLAND

SYLLABUS

Where there was a written contract for the delivery of a certain number of barrels of flour at a given price, to be delivered within a named time at the seller's option, and evidence was offered by the purchaser of an usage existing that a margin

should be put up, the court below was right in refusing to, allow this evidence to go to the jury because it was too indefinite and uncertain to establish an usage.

And moreover, if the usage existed, the proof would have been inadmissible to affect the construction of the contract, in which there was no ambiguity or doubt on the face of the instrument.

Any parol evidence of conversations or of an understanding of the parties that the contract was made subject to such an usage was inadmissible, as these were merged in the written instrument.

The contract was made in Baltimore, between the purchasers and an agent of the seller, the seller residing in New York. The latter, and not the agent, was bound to bring the suit, as the character of the agent was disclosed on the face of the contract. There is no distinction in the principle governing agencies of this description between the cases of a home or foreign principal.

This was an action of assumpsit brought by Ford, a citizen of New York, against Oelricks & Lurman, merchants of Baltimore, upon a contract in writing made by the defendants, who agreed to purchase from Bell, agent for Ford, ten thousand barrels of flour, deliverable at seller's option at the prices

and upon the terms stated in the contract, which is fully set forth in the opinion of the Court and need not be repeated. Ballard was the broker who made the contract on behalf of Oelricks & Lurman.

The evidence given upon the trial by the plaintiff and defendants was very voluminous, and was both oral and written.

The points of law which arose in the case will be manifest from the prayers to the court offered by the counsel for the plaintiff and from the instructions to the jury given by the court, which were as follows:

1. That the evidence in this case is insufficient to authorize the jury to find that there is an usage in the City of Baltimore with regard to contracts for the sale of merchandise to be delivered at a future time by which the defendants were authorized to annul the contract bearing date the 7th November, 1855, given in evidence, upon the failure of the plaintiff to put up a margin in money, as security for its performance, in compliance with the demand contained in the letter of the witness, Ballard, to J. W. Bell, of the 21st December, given in evidence.

2. That such an usage, if found by them to exist, is invalid and not binding, because it is unreasonable.

3. That evidence of such an usage, if it should be established by competent evidence and be held reasonable by the court, is inadmissible in this case because it contradicts or waives the written contract dated the 7th November, 1855, given in evidence.

4. That if the jury find that before the 21st day of December, 1855, J. W. Bell had left the City of Baltimore without authorizing any person to represent him in his absence, and have never since returned, the letters of the witness, Ballard, of the 21st and 24th December, 1855, left at the former place of business of said Bell, as proved by the said Ballard, did not affect the plaintiff with notice of the demand for a margin mentioned in said letters, even if, under any usage or contract, the defendants were authorized to make such demand.

5. That if the jury find that the witness, Ballard, reduced the said contract, dated the 7th November, and given in evidence,

to writing, at the request of the defendant Lurman, and that said Ballard signed two copies of the same and procured the approval of the defendants, and of Bell, as agent of the plaintiff, to the same, by their signatures thereto, and delivered one of the said contracts to the defendants, and the other, which has been given in evidence by the plaintiff, to said Bell, and shall further find all this was done on the 23d November, 1855, after the interview at the Exchange between the defendant,

Lurman, and the said Bell, spoken of by the witness, Ballard, and shall also find that at said interview the defendant Lurman declined to have the clause inserted in said contract having reference to putting up a margin, and if the jury find that said Bell, upon the 12th and 15th December, delivered 2,000 barrels of flour under said contract, which were received by the defendants and paid for by them, and if the jury shall further find that the plaintiff offered to deliver, and was prepared and willing to deliver, the balance of the 8,000 barrels contracted to be delivered under said contract at the times and at the prices testified to by the witnesses of the plaintiff, and that the defendants refused to receive the same, then the plaintiff is entitled to recover in this suit the difference between the price of flour mentioned in said contract $9.25 and the market value of the parcels of flour tendered by the plaintiff on the days on which they were respectively tendered, with interest thereon from such periods respectively. But the court rejected the prayers of the plaintiff, and each of them, and in lieu of them granted the following instructions to the jury:

"1. If the jury shall find from the evidence in this case that the defendants entered into the written contract dated the 7th of November, 1855, which has been offered in evidence, and that the plaintiff offered to deliver to the defendants in the months of January and February, 1856, eight thousand barrels of flour in pursuance of the stipulations of said contract and in the mode therein pointed out, and that when said offers were made by the said plaintiff, he had the requisite amount of flour to comply in good faith with said offers, and could have delivered the same if the defendants had been

willing to receive the same, and shall further find that the defendants wholly refused to receive and pay for said flour according to the terms of said contract, then the plaintiff is entitled to recover such damages as the jury may find from the evidence he has suffered from said refusal of defendants to execute the said contract on their part."

"2. The rule of damages in this case is the difference between the contract price of the flour and the market value in the City of Baltimore of the same on the several days on which the plaintiff offered to deliver the same in accordance with the provisions of said contract, with interest on such sum in the discretion of the jury."

To the granting of which instructions the defendants prayed leave to except, and upon this exception the case came up to this Court.

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MR. JUSTICE NELSON 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 suit was brought by Ford against the defendants in the court below upon the following contract:

"BALTIMORE, November 7, 1855"

"For and in consideration of one dollar, the receipt whereof is hereby acknowledged, I have this day purchased from J. W. Bell, agent for Benjamin Ford, New York, for account of Oelricks & Lurman, Baltimore, ten thousand barrels superfine Howard Street or Ohio flour, deliverable, at seller's option, in lots of five hundred barrels, each lot subject to three days' notice of delivery and payable on delivery at the rate of nine dollars and twenty-five cents per barrel, *viz.:* "

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2,000 barrels, seller's option, all December, 1855

4,000 " " " January, 1856

4,000 " " " February, 1856

10,000

"L. E. BALLARD, Broker"

"Approved:"

"OELRICKS & LURMAN"

The 2,000 barrels deliverable in December were delivered, accepted, and paid for as per contract. The 4,000 barrels to be delivered in each of the months of January and February were duly tendered to the defendants and payments demanded, and which were refused.

The only objection to the acceptance of the flour at the time tendered was the refusal of Ford to a demand made upon his agent to deposit $5,000 in one of the banks in Baltimore to secure the punctual delivery of the flour at the time mentioned. This demand for a deposit of money was denied by the plaintiff on the ground that the contract contained no such stipulation.

After much testimony given by both parties on the trial on the subject of a usage among the dealers in flour in the City of Baltimore to demand on time contracts a deposit of money, or margin, as it is called, and the right to rescind the contract if refused, the court charged the jury that if they shall find from the evidence the defendants entered into the contract given in evidence, and that the plaintiff offered to deliver the flour therein mentioned according to its terms, and that when the offer was made, he had the requisite quantity of flour to comply with the contract, and could have delivered it if the defendants had been willing to receive it, and that they had refused, then the plaintiff was entitled to recover. The court further instructed the jury that the rule of damages was the difference between the contract price of the flour and the market value in the City of Baltimore on the several days of the tenders, with interest on this sum, in the discretion of the jury. The jury found for the plaintiff.

One of the principal grounds of objection to the ruling of the court is its refusal to submit the question of usage which was the subject of evidence on the trial to the jury.

The witnesses introduced by the defendants to prove the usage speak in a very qualified manner as to its existence, as well as to the instances in which they have known it to have been adopted or acquiesced in, and all of them admit they have no knowledge that it was general among the dealers. Some of them state that they recognized and had acted upon a custom in their own business under which either party to the contract might require a margin to a reasonable amount, to be put up to secure the performance, and that the contract might be rescinded if the party refused; that they could not say such was the general custom; that different persons have different customs; some consider there is such a usage and some do not. One witness states that he had at all times in his business considered it to be a right which might be exercised by either party to a time contract whenever he apprehended a risk; that if the party was solvent, he supposed there was no right to demand it; another that in his business he had always considered such contracts to be subject to the right of either party to demand the margin; that the occasion of exercising it was rare, as contracts made by his house were made with responsible persons; that he did not know that this was a general usage in Baltimore. The broker who negotiated the contract for the defendants states that he considered it a clearly understood right of both parties to such contracts to demand a margin to a reasonable amount; that he entertained the belief from conversations with various merchants on the subject; that he recollected but one instance where, when the demand was made, the margin was put up, which was a margin of twenty-five cents on the barrel in a contract for 500 barrels.

There were ten witnesses, flour merchants for many years in the city, who state that they knew of no such usage.

It will thus be seen from a careful analysis of the evidence that the defendants wholly failed to prove any general or established usage or custom of the trade in Baltimore, as claimed in the defense. Every witness called on their behalf fails to

prove facts essential to make out the custom in the sense of the law; on the contrary, most of them expressly disprove it. They express opinions upon the subject of a margin as a right to be exercised in their own business, but admit that it is not founded upon any general usage, and none of them speaks of its having been claimed or exercised in his own business but in one or two instances. Whether a usage or custom of the kind set up existed in the trade in Baltimore was a question of fact to be proved by persons who had a knowledge of it from dealing in the article of flour. Opinions of persons as to what rights they might exercise in their own business in respect to time contracts fall far short of any legal proof of the fact, especially when they admit that there was no general usage of the kind known to them.

Then as to the precise limit or character of the custom claimed, the opinions of the witnesses are various and indefinite. The margin, they say, must be reasonable, but the pretended usage contains no rule by which a reasonable margin may be determined. It is said the amount may be referred to merchants. But there is no evidence that this is a part of the custom, or that any such mode of adjusting it ever occurred in the trade. Some of the witnesses state that the margin must be a sum of money sufficient to make the party safe according to the state of the market. One states that at the time the demand was made in this case for a margin, flour had fallen, and the price lower than the price in the contract; yet this, in his judgment, did not affect the right to make the demand, as the general opinion among dealers was that the price would advance; that there were great fluctuations in the price, and that, in such a condition of things, a reasonable margin would depend upon the extent and character of the fluctuations, and upon the speculative ideas of the future value of flour.

The broker of the defendants, who purchased this flour, states his view of the reasonableness of the margin, which is the difference between the intrinsic value of the flour and its speculative value; by intrinsic value, he says he means the cost of the production, and by speculative value, the price at

which it was rating above its intrinsic value; and to a question what, in his opinion, would be a reasonable margin under the custom, when flour in the market was lower than the contract price, he answered, that he considered the demand reasonable in this case, because he believed flour was going up to twelve dollars per barrel. It would be difficult to describe a custom more indefinite and unsettled.

But, independently of the total insufficiency of the evidence to establish the usage, we are satisfied, if it existed, the proof would have been inadmissible to affect the construction of the contract. This proof is admissible in the absence of express stipulations, or where the meaning of the parties is uncertain upon the language used, and where the usage of the trade to which the contract relates, or with reference to which it was made, may afford explanation, and supply deficiencies in the instrument. Technical, local, or doubtful words may be thus explained. So where stipulations in the contract refer to matters outside of the instrument, parol proof of extraneous facts may be necessary to interpret their meaning. As a general rule, there must be ambiguity or uncertainty upon the face of the written instrument arising out of the terms used by the parties in order to justify the extraneous evidence, and, when admissible, it must be limited in its effect to the clearing up of the obscurity. It is not admissible to add to or engraft upon the contract new stipulations, not to contradict those which are plain. 2 Kent Com. 556; 3 *id.* 260, and note; 1 Greenl.Ev., sec. 295; 2 Cr. and J. 249, 250; 55 U. S. 14 How. 445

Applying these principles to the contract before us, it is quite clear that the proof of the usage attempted to be established was inadmissible, and should have been rejected. There is no ambiguity or uncertainty in its terms or stipulations, and the condition sought to be annexed was not by way of explanation or interpretation, but in addition to the contract. The plaintiff agrees to deliver a given number of barrels of flour on certain days, at the price of $9.25 per barrel, in consideration of which the defendants agree to receive the flour, and pay the price. This is the substance of the written contract. But the

defendants insist that besides the obligations arising out of the written instrument, the plaintiff is under an additional obligation to give security, whenever called upon, for the faithful performance, and this by the deposit in bank of the sum of $5,000. The written instrument bound only the personal responsibility of the plaintiff; the parol evidence seeks to superadd not a responsible name as a surety, but in effect the same thing, a given sum of money. The parol proof not only adds to the written instrument, but is repugnant to the legal effect of it.

It was also urged on the argument that this contract was entered into between the defendants and the agent of the plaintiff with the understanding at the time that it should be subject to the usage; but the answer to this is that no such usage existed, and if it did the terms of the contract exclude it. Any conversations and verbal understanding between the parties at the time were merged in the contract, and parol evidence inadmissible to engraft them upon it.

We are satisfied the court below was right in excluding the consideration of the evidence of the usage from the jury 1, because the usage was not proved, and 2, if it had been, it was incompetent to vary the clear and positive terms of the instrument.

An objection has been taken on the argument which was not presented to the court below, but which, it is insisted, is involved in the exception to the charge, and that is, inasmuch as it appears upon the evidence that the plaintiff was a resident of New York and the contract made at Baltimore in the State of Maryland by an agent, the presumption of law is that the credit was given exclusively to the agent, the principal being the resident of a foreign state, and hence that the contract, in legal effect, was made with the agent, and not with the principal, and the former should have brought the suit.

This doctrine is laid down by judge Story in his work on agency, and which was supposed to be the doctrine of the English courts at the time, and founded upon adjudged cases. Story on Agency, sec. 268 and note; secs. 290, 423. It did

not, however, at the time receive the assent of some of the courts and jurists of this country. 2 Kent's Com. 630, 631, and note; 22 Wend. 224; 3 Hill. 72. And the doctrine has recently been explained, and judge Story's rule rejected, by the English courts. In the case of *Green v. Kope,* 36 Eng.L. & Eq. 396, 399, 1856, the court denied that there was any distinction, as it respected the personal liability of the agent, whether the principal was English or a foreigner. The Chief justice observed: "It is in all cases a question of intention from the contract, explained by the surrounding circumstances, such as the custom or usage of the trade when such exists. No usage," he observed, "was proved in the present case, and I believe none could have been proved." Again he observed:

"It would be ridiculous to suppose that an agent, for a commission of one-half percent, is to guaranty the performance of a contract for the shipment of 1,000 barrels of tar."

The case was finally put upon the intent of the parties, as derived from the construction of the contract, and which was that the defendant contracted only as agent, and not to make himself personally liable. Willes, J., doubted if evidence of custom was admissible to qualify the express words of the contract, so as to make the agent liable.

See also 14 Com.B. 390; *Mahoney v. Kekule,* 5 Ellis & Black 125, 130.

In the present case, the broker's note, and which is approved by the defendants, affixing the firm name, is too clear upon the face of it to admit of doubt as to the person with whom the contract was made. The purchase is from "J. W. Bell, agent for Benjamin Ford, of New York," and the case shows that Bell had full authority. The name of the principal is disclosed in the contract, and the place of his residence, as the person making the sale of the flour, through his agent. This fixes the duty of performance upon him and exonerates the agent.

The judgment of the court below affirmed.