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Appellant : Johnston

Respondent : Jones

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Johnston v. Jones

66 U.S. (1 Black) 209

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

SYLLABUS

1. A bill of exceptions should contain only so much of the evidence as is necessary to present the legal question raised. When more than this is inserted in the bill, it is an irregularity to be condemned as a departure from established practice,

inconvenient and embarrassing to the court.

2. Where a series of propositions are embodied in the instructions of the court which are excepted to in a mass, the exception must be overruled if any one proposition be sound.

3. The right which the owner of a water lot has to the accretions in front of it depends on its condition at the date of the deed which conveyed him the legal title, and cannot be carried back by relation to the date of a title bond previously assigned to him, and under which he procured the deed.

4. Maps, surveys, and plats are not necessarily and of themselves independent evidence, and are therefore to be received only so far as they are shown to be correct by other testimony in the cause.

5. Where a lot had no waterfront, and the plaintiff who was the owner of it had therefore no right to any part of the accretions for which he was suing, and it is apparent from the record that the fact was so found by the jury, this Court will not reverse for an error committed by the court below with respect to the rule by which the alluvium should be divided among those who are owners.

6. *Jones v. Johnston,* 18 How. 150, and *Deerfield v. Arms,* 17 Pick. 45, affirmed as laying down the rule to which this Court adheres for measuring the rights of riparian proprietors in the accretions formed along the water line.

7. Where a lot was conveyed by A to B as having a waterfront, and reconveyed by B to A as having no such front, and afterwards conveyed by A to the plaintiff, a deed from B to the plaintiff made after suit brought cannot be given in evidence to show the right of the plaintiff to a waterfront and consequently a title in the alluvium.

8. If there was a mistake in the original deed, the remedy should have been sought in chancery, by a proceeding against all parties interested; the rights of third persons cannot be affected by a private agreement and a deed made in pursuance of it.

9. A witness cannot be permitted to make a calculation founded upon a map which is not itself original and reliable evidence, and permission to ask a question calling for such a calculation is properly refused by the court.

10. The extent to which a cross-examination maybe carried beyond what is necessary to exhibit the merits of the case must be guided and limited by the discretion of the judge who presides at the trial, and is not the subject of review in a court of error.

11. This Court will not interfere with the practice of the circuit courts concerning the order and time of introducing evidence, nor reverse a judgment for the rejection of evidence as rebutting, which ought to have been given in chief.

William S. Johnston brought ejectment in the circuit court against John A. Jones and another for a part of the land formed by accretion on the shore of Lake Michigan north of the north pier of the harbor of Chicago. The cause was tried in the circuit court, and a verdict and judgment were given for the plaintiff, when the defendant brought it up to this Court by writ of error, where it was reversed and a *venire facias de novo* awarded. The facts as they appeared upon the record at that time are fully stated in the opinion of MR. JUSTICE NELSON, 59 U. S. 18 How. 150. On the second trial, the same evidence was given, with no new additions except the two documents pertaining to the plaintiff's title which are mentioned in the opinion of MR. JUSTICE SWAYNE. That opinion also contains a statement of the facts upon which the several rulings of the circuit court upon the admissibility of evidence were based, and quotes at sufficient length the instructions which were given to the jury. The verdict and judgment were in favor of the defendant, and the plaintiff took this writ of error.

MR. JUSTICE SWAYNE.

This case was before this Court at December term, 1855. It is reported as then presented, in 54 U. S. 13 How. 250. The judgment of the circuit court was reversed and the cause remanded for further proceedings. The action below was ejectment, brought to recover a part of the land formed by accretion on the shore of Lake Michigan north of the north pier of the harbor in the City of Chicago. The land in controversy was claimed to belong to water lot No. 34, in Kinzie's addition to that city. The plaintiff in error sought to recover it in virtue of his ownership of that lot. Upon the last trial, many days were consumed in submitting to the jury the parol and documentary evidence of the parties. The former was printed as the cause proceeded.

At the close of the argument, prayers for instructions to the

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jury were submitted by both parties. All the testimony given in the case, the instructions asked for by both parties, and the entire charge of the court as given are embodied in the record. They make an aggregate exceeding four hundred and fifty printed pages. The bill of exceptions embraces all this matter. It commences with an introduction, setting forth that the whole of the printed evidence was made a part of it, and terminates with a supplement containing the exceptions taken by the plaintiff in error. Six of these exceptions are to the rulings of the court in excluding testimony. They are in this form: "2. Also to the ruling of the court in excluding the testimony of Samuel S. Greeley, as stated on pages 133 and 134 of the printed report." The pages of the "printed report" do not agree with the pages of the printed record. The reference, therefore, affords no aid in finding the matter referred to.

The 8th exception is as follows: "Also to the charge of the court as contained on page 453, and as stated on page 462."

It is then stated that in compliance with the rule of this Court and for the sake of greater caution, the plaintiff below "specially excepted on the trial, and the exceptions were allowed by the court" to the parts of the charge which follow.

The first part of the charge as thus set out contains a distinct legal proposition. To this the plaintiff distinctly excepted. This was proper. Then follows nearly two pages containing the views and reasonings of the court, comments upon the evidence, and several legal propositions. They are followed by this exception: "To the instructions as given by the court to the jury the plaintiff then and there excepted." Exception was also taken to the refusal of the court to give to the jury the instructions prayed for by the plaintiff.

It has been found irksome and inconvenient to the Court to look through this record and find the parts that are necessary to be considered. The necessity of performing this office has imposed upon us a labor which would have been avoided if the bill of exceptions had been properly framed. In 27 U. S. 2 Pet. 15, *Pennock & Sellers v. Douglas,* Mr. justice Story remarked upon the irregularity, inconvenience, and expense of putting

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the entire testimony in a case into the bill of exceptions, and expressed the regret of the Court that such a practice should prevail.

In 45 U. S. 4 How. 297, *Zeller's Lessee v. Eckert,* MR. JUSTICE NELSON, in delivering the opinion of the Court, said:

"This mode of making up the error books is exceedingly inconvenient and embarrassing to the Court, and is a departure from familiar and established practice. . . . Only so much of the evidence given on the trial as may be necessary to present the legal questions thus raised and noted should be carried into the bill of exceptions. All beyond serves only to encumber and confuse the record, and to perplex and embarrass both court and counsel."

The Court desires to put on record again its condemnation of this irregularity, and to express the hope that a better practice may prevail hereafter in all cases intended to be brought before this Court for revision.

The 38th rule of this Court, adopted at January term, 1832, directs that thereafter

"the judges of the circuit and district courts do not allow any bill of exceptions which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge, but that the party excepting be required to state distinctly the several matters in law in such charge, to which he excepts, and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court."

The rule was not observed in this case. It is questionable whether the exceptions in respect of the greater part of the charge are so distinct and specific that this Court, if the point had been made, could consider them. It is well settled, that if a series of propositions be embodied in instructions and the instructions are excepted to in a mass, if any one of the propositions be correct, the exception must be overruled. 3 Seld. 273; *Hunt v. Maghee,* 2 Kernan 313; *Decker v. Matthews.*

The point was not made by the defendants. We have therefore not thought it necessary to consider it. As it may arise hereafter in other cases, we have deemed it proper thus to call attention to the subject.

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The same evidence substantially was given upon this trial which was given upon the former trial, as reported in 18 Howard. It would unnecessarily encumber this opinion here to repeat it. The only features claimed to be new by the plaintiff in error are 1st, the title bond of Robert A. Kinzie to Gordon S. Hubbard, of June 10, 1835, for lot 34, and other property therein described. Johnston, the plaintiff, became the assignee of this bond, and under it procured his deed of October 22, 1835, from Robert A. Kinzie, for lot 34. 2d. The deed from John H. Kinzie to the plaintiff, dated July 1, 1857. This deed was offered, but not received in evidence.

The plaintiff in error relies upon the following exceptions. They will be considered as we proceed:

1. The court instructed the jury

"that the controversy turned upon what the fact was, on the 22d October, 1835, as to this waterfront. Had lot 34 a waterfront at that time north of the north pier?"

The instruction was according to the ruling of this Court when the case was formerly here. 59 U. S. 18 How. 157.

The counsel for the plaintiff in error insists that the deed from Robert A. Kinzie to Johnston related back to the date of the title bond from Kinzie to Hubbard, and that this was a new element in the case which required a change of the rule as to the point of time to which the attention of the jury should have been directed. We do not think so. The doctrine of relation cannot be made to work such a result. It is a legal fiction, invented to promote the ends of justice. It is a general rule that it shall do no wrong to strangers. It is applied with vigor between the original parties when justice so requires, but it is never allowed to defeat the collateral rights of third persons, lawfully acquired. 4 J.R. 234, *Jackson v. Bard,* 3 Caine's 262, *Case v. DeGoes;* 18 Vin.Abr. 287, Relation B.; 13 Coke 21, *Menville's Case;* 7 Ohio St. 291, *Wood v. Furguson.*

The plaintiff could recover only upon a legal title. That title was vested in him, if at all, by the deed from Robert A. Kinzie of the 22d of October, 1835. The equities subsisting

at any time between those parties could not in any wise affect the result of the action.

We are satisfied with this instruction. Under it, the jury found a verdict for the defendants.

2. It is objected that the court did not instruct the jury correctly as to the value, as evidence, of the surveys, maps, and plats exhibited by the plaintiff upon the trial, but that, on the contrary, it was stated that they were not independent evidence, and that the jury were to receive them only insofar as they were shown to be correct by the other testimony in the case.

The facts touching these maps and plats are not stated in the bill of exceptions. We have been compelled to look over much of the testimony in our search for them. Without intending to lay down any general rule upon the subject or to question the soundness of the authorities relied upon by the counsel for the plaintiff in error, we content ourselves with saying that we are not satisfied that the court below committed any error in what was said in this connection.

3. It is insisted, that the court erred in laying down the rule for the partition of the alluvium. It would be sufficient to say that the jury having found that lot 34, at the time referred to, had no waterfront north of the north pier, the question did not arise. The instructions given and those refused were, in this view of the subject, abstract and speculative propositions. Those given, whether right or wrong, could not have injuriously affected the plaintiff. A party cannot be allowed to complain of an error which has done him no harm. 9 Gill 61, *Ramsey v. Jenkins.*

But as the views of the Court have been misapprehended, and that misapprehension may mislead in other cases, we prefer to deal with the subject as if it were properly before us. The court below instructed the jury in the language used by this Court when the case was here in 1855. Upon that occasion, it was intended to adopt the rule laid down by the Supreme Court of Massachusetts in 17 Pickering 45, 46, *Deerfield v. Arms.* That court said:

"The rule is -- 1, to measure the

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whole extent of the ancient bank or line of the river, and compute how many rods, yards, or feet each riparian proprietor owned on the river line; 2, the next step is, supposing the former line, for instance, to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this new river line as he owned rods on the *old.* When to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the *old* to the points thus determined, as the points of division on the newly formed shore. The new lines thus formed, it is

obvious, will be either parallel, or divergent, or convergent, according as the new shore line of the river equals, or exceeds, or falls short of the old."

It is further said:

"It may require modification, perhaps, under particular circumstances. For instance, in applying the rule to the ancient margin of the river, to ascertain the extent of each proprietor's title on that margin, the *general line* ought to be taken, and not the actual length of the line on that margin, if it happens to be elongated by deep indentations or sharp projections. In such case, it should be reduced by an equitable and judicious estimate to the general available line of the land upon the river."

To this rule we adhere. With the qualification stated, it may be considered as embodying the views of this Court upon the subject. In this case, if lot 34 had been found to have had a waterfront north of the north pier at the time stated, the pier front would have had nothing to do with the partition to be made. The lake front, where the accretion occurred, only could have been regarded. The whole of *that front* should have been taken as the basis of the adjustment.

4. The court refused to instruct the jury as prayed upon the subject of the possession of the alluvium in controversy by the plaintiff in error. It is sufficient to say that both the prayers upon that subject assume as an element that lot 34 had to some extent a front on the lake north of the north pier. The verdict of the jury, for the purposes of this case, is conclusive upon that subject. It is frankly admitted by the counsel for

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the plaintiff in error that if the lot had no such front, his propositions had no application to the case.

5. The court rejected the deed of John H. Kinzie to the plaintiff when offered in evidence.

Robert A. Kinzie was the patentee of the land upon which his addition to the Town of Chicago was laid out. He conveyed lot 34 to John H. Kinzie by a deed which, in describing the lot, referred to the *original plat* of the addition. John H. Kinzie conveyed the lot back to Robert by a deed describing it, with a reference to the plat as recorded. The original plat showed a waterfront to this lot. On the plat as recorded, this fact was wanting. The deed from John H. Kinzie to Johnston was executed for the consideration of twenty-five dollars, to correct the alleged error in the deed from John H. to Robert A. Kinzie, in pursuance of a covenant for further assurance in the deed of Robert A. Kinzie to Johnston, and thus to give the plaintiff a title to the alluvium claimed to belong to that lot, if he had not such title already.

If there were any mistake in the original deeds of which Johnston had a right to avail himself, the remedy should have been sought by a proceeding in chancery had for that purpose, with all the proper parties before the court. The agreement of the parties themselves that there was such error, and a deed made in pursuance of that agreement, cannot affect the rights of third persons. A further and fatal objection to the admission of the deed in evidence is the time at which it was executed. It bears date more than seven years after the filing of the declaration in this case. In ejectment, the plaintiff must recover, if at all, upon the state of his title as it subsisted at the commencement of the suit. Evidence of any after acquired title is wholly inadmissible. 4 Term 680, *Goodlitle v. Herbert;* 11 Ill. 547, *Wood v. Martin;* 13 Ill. 251, *Pilkin v. Yaw;* 33 U. S. 8 Pet. 218, *Binney v. The Canal Co.*

6. "The ruling of the court, in excluding the testimony of Samuel S. Greeley, as stated on pages 133 and 134 of the printed report."

This, we suppose, refers to the following passage in the

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testimony of this witness as it appears in the printed record:

"2. [Presenting Allen's map of 1838.] Look at the accretion at the north side of the north pier, and tell me whether the ratio of increase between what is represented

there in '34 and '37, and what was made from '37 to '38, call for any accretions made in '34 and '35, and if so, to what extent and in what year?"

The facts disclosed in the testimony show that Allen's map was not itself original and reliable evidence. A calculation founded upon it was therefore clearly inadmissible. The admissibility of this evidence, as regards other objections, would depend upon a proper foundation being laid for it. As it is not necessary, we have not gone into any inquiry upon that subject.

7th. "The ruling of the court, in excluding the testimony of Capt. J. D. Webster, as shown on page 191 of the printed report."

It appears in the testimony of this witness that he went to Chicago in 1841 or 1842 as an officer of the United States. The following also appears:

"Question. Did you hold the position of superintendent of harbors here -- the same that Captain Allen did once?"

"Answer. Yes, sir, I did, for a while."

"Question. State whether it was any part of your duty as superintendent of the harbor to report to the government the changes that were occurring in and about the harbor?"

The latter question was objected to, and the objection sustained.

The testimony which the question objected to sought to elicit would in itself have been immaterial and irrelevant. If intended, as part of the evidence proposed to be drawn out to prove the duties of Lieut. Allen at a former period, as the language of the court, in deciding the point, seems to imply, it was inadmissible also upon that ground. The official duties of Lieut. Allen could not be proved in that way.

8th. "The rulings of the court, in excluding evidence tending to affect the credibility of one of defendant's witnesses,

viz., Benjamin Jones, as stated on pages 360 and 362 of the printed record."

The witness Jones was the brother of the defendant Jones, and had been examined in chief for him. In his cross-examination, he stated that his brother formerly owned lot 35, adjoining lot 34; that it had been sold at sheriff's sale; bought in by Dennison; by Dennison conveyed to him, and afterwards by him back to his brother.

He was asked: "Did you pay Dennison anything?"

This question was objected to by the defendants, and overruled by the court.

We estimate at its highest value "the power of cross-examination." The extent to which it may be carried, touching the merits of the case, was defined by this Court in 39 U. S. 14 Pet. 445, *Philadelphia & T. R. Co. v. Simpson.* The rule there laid down this Court has since adhered to. A cross-examination for other purposes must necessarily be guided and limited by the discretion of the court trying the cause. The exercise of this discretion by a circuit court cannot be made the subject of review by this Court. We have looked through the long and searching cross-examination to which this witness was subjected. There would have been no error if the objection had been overruled. There was none in sustaining it.

9. "The ruling of the court, in excluding the evidence of Theophilus Greenwood, offered by the plaintiff, as rebutting evidence to the evidence of possession of the alleged accretion by defendants, at the date of the deed to the plaintiff, as stated on page 424 of the printed report."

Upon looking through the testimony of the witness, we find he was allowed to testify fully upon the subject of possession. The court expressly held that he should be permitted to do so. The plaintiff in error then proposed to prove by him where, at a certain time,

"the actual waterline east of or upon water lot 34 was, in reference to the east line of said lot 34 . . . which the court refused, on the ground that it should have been introduced as evidence in chief, not as rebutting."

That this evidence was of the former and not of the latter character seems to us too clear to admit of discussion.

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"The mode of conducting trials, the order of introducing evidence, and the times when it shall be introduced are matters properly belonging to the practice of the circuit courts, with which this Court ought not to interfere."

39 U. S. 14 Pet. 448, *P. & T. R. Co. v. Simpson.*

These are substantially all the points pressed upon our attention by the counsel for the plaintiff in error in his able and elaborate argument. They are all to which we deem it necessary to advert.

We find no error in the record. The judgment below must be affirmed, with costs.

Decree of the circuit court affirmed.