No. 14194

Supreme Court of Illinois

Voltz et al.

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vs.

Stephani et al.

71641

135.

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS,

APRIL TERM, A. D. 1867.

FREDERICK VOLTZ AND PHILLIP SCHAFFNER, Appellants,

vs.

JOHN STEPHANI AND JACOB STEPHANI, Appellees.

ARGUMENT AND BRIEF FOR APPELLANTS.

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This is one of those cases that occasionally occur, where a jury take the bit in their teeth and render a verdict without rhyme or reason. I am aware that courts hesitate to disturb a verdict resting upon facts found by a jury; still, where, as in this case, the verdict outrages all our notions of justice and right, courts will and ought to interfere to save individuals from ruin by the unjust finding of a jury, either wilfully prejudiced or grossly ignorant. I propose briefly to show why this judgment should be reversed and the suit dismissed.

1st. The court below erred in refusing the first and second instructions of defendants below.

The first instruction sets out a well settled principle of law, that a party having made his election to give credit to one of two parties is concluded by such election. The plaintiffs' evidence, so far as it goes, tends to show that the goods were delivered to Frederick on the order of Voltz, one of the appellants, but as the plaintiffs below contend, (though they fail to prove it) on the order of appellants; admitting, for the sake of the argument, that the goods were ordered by the appellants to be delivered to Frederick, and were by the appellants so delivered and accepted by Frederick, there can be no doubt, the appellees might charge the goods to appellants on the strength of the order, or to Frederick, who received the goods, and for whose use and benefit they were.

Now, the appellees by their own proof show that at the time of selling they made out the bills of sale in their own hand writing, not in the names of the appellants as purchasers of those goods, but in the name of Lewis Frederick as the purchaser, and shipped, or sent the goods to him. Can there be any question on appellees' own showing as to whom they gave credit. Again, had the appellees charged those bills on their books to appellants, but by mistake or blunder made out the bills in the name of Frederick, would they not have introduced their account books to have shown the original entry, to prove to whom credit was given at the time. The fact that the appellees did not attempt to show to whom they gave credit at the time, except that the bills of sale were made out in the name of Frederick as purchaser, leaves no doubt that the goods were charged to Frederick on their books, and they then elected to consider him their debtor, and are bound by such election.

Authorities in point: 1st Chitty's Pleadings, 379; Saunder's Pleadings, 537; Lawrence vs. Coles, 14th Ill.

R. 577, and authorities there cited; Smith's leading cases, 2d vol., 374.

Also the jury had no right to disregard the unimpeached testimony of Lewis Frederick. Roberts vs. Dodge, 28th Ill.R. 161.

The second instruction enunciates an equally well settled principle of law, viz: that one partner cannot bind the firm by a contract or engagement made by him in matters outside of the partnership business.

The facts to which this instruction more particularly applies is the testimony of appellees' witness, George Brohman, who testifies, vide pages 22 and 23 of the abstract, that the goods were shipped by appellees to Frederick on the order of Mr. Voltz, and when, to the illegal question of appellees, "do you mean Voltz or the firm?" the witness says: "I mean the firm." Yet, on cross examination, to the question, "who were present at the time this order was given?" Witness says: "John Stephani, who took the "order, myself, Mr. Voltz and Mr. Frederick." He further says that the bills were bought for Mr. Frederick by Mr. Voltz. This witness also states, and the whole testimony shows that appellants were partners in the produce commission business only, and not dealers in liquors. Now, what appellants contend for is, that if this witness is to be believed, the goods were ordered by Voltz for Frederick, and that the firm of Voltz & Shaffner were not and are not liable for such goods ordered by Voltz outside of their partnership business, and hence they asked for this second instruction, which ought to have been given to the jury by the court below.

Authorities in point: Long vs. Carter, 3d Iredell 238; Story on Partnership, sect's. 106, 107, 112, 113, 126 and 127; Gray vs. Ward, 18th Ills. R. 32, 4th Scan. 379.

But, independent of these errors committed by the court below, we insist that the verdict of the jury should have been set aside as being against the evidence. No man can read over the proofs in this case, and not be satisfied that an *unjust verdict* has been rendered. A verdict, which, if suffered to stand, takes from these appellants $3,000 without any equivalant, and will probably be the means of breaking up their business and casting them helpless upon the world without any fault of their own. We submit that the appellees' evidence only tends to charge the appellants on these grounds: 1st. That the goods were bought by Voltz for parties in Michigan—abstract, page 15; also, that the bills were presented to Schaffner, who said they 16 were all right and would be paid, but that they were then short. On cross-examination witness stated that appellants told Stephani that the money would 17 soon be remitted by Frederick. Witness further stated that the bills of these liquors shown him by 18 appellants was in the hand writing of Stephani, one 19 of the appellees. Appellees' other witness testified in substance that Stephani presented those bills to Voltz, who said that he was ready to pay the bills after three months, and Mr. Stephani said it was all right. 22 The goods were shipped by appellees to Lewis Frederick.

On direct examination, the goods were shipped on the order of Mr. Voltz. The above comprises the evidence substantially on which appellees relied for a verdict, and we contend it is insufficient to maintain the action. The appellees sued the appellants as partners, and of course were bound to prove them jointly liable. Now we submit their evidence utterly fails to connect Shaffner with the transaction, except that Shaffner said it was all right and would be paid, and that Frederick would soon remit.

Such a statement is the mere expression of an opinion that Frederick would soon remit the money. It does not amount to a promise to pay, and if it did there is no consideration, and such a promise would be void. Again, if the goods were ordered by Voltz, it could not bind the firm.

Beside, we have shown that appellees elected to charge the goods to Frederick, to whom they were delivered and are bound by such election. Hence we say, that the appellees failed on their own testimony to make out a case against appellants. But if any doubt existed as to whether appellants were entitled to a verdict on the evidence of the appellees, such doubt was effectually removed by the evidence introduced by appellants. Surely, if any person knew about this transaction, it must be Frederick,
26 who received the goods and had the benefit of them. He testifies that he had had dealings with appellees; that he ordered by letter the liquors in controversy of the appellees, and they were sent to him with bills of items, or invoices, in the hand writing of appellees, to him as the purchaser; that he purchased both bills of liquors declared on by appellees in this suit on credit; that the appellants never had anything to do with the purchase of said
27 goods from appellees, except that he wrote the appellants that he had ordered the goods of appellees, and wanted they should see that the goods were shipped to him.

If the testimony of this witness is to be believed, and there is certainly nothing in the case to impeach it, these appellants are utter strangers to the *whole transaction*, and there is no more propriety or justice in their paying this judgment than there would be in any other indifferent person.

If upon a careful examination of the evidence in this case, your honors shall be of the opinion that no

error was committed by the court below, and that justice has been done these appellants, of course you will affirm the judgment below, but if, on the contrary, you are satisfied, from such examination, as we believe you will be, that these appellants have been made the *victims* of a *prejudiced jury* and saddled with a large *debt*, which they neither created nor received any benefit from, and which they had no more idea of assuming than your honors have, then we ask that this judgment be reversed.

C. B. HOSMER,
Att'y for Appellants.