Court of Common Pleas

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IN THE COURT OF COMMON PLEAS

8 July 1862

B e f o r e :

WILLES, J
BYLES, J.
KEATING, J.

Between:

PAUL FELTHOUSE

v

BINDLEY

This was an action for the conversion of a horse. Pleas, not guilty, and not possessed.

The cause was tried before Keating, J., at the last Summer Assizes at Stafford, when the following facts appeared in evidence: The plaintiff was a builder residing in London. The defendant was an auctioneer residing at Tamworth. Towards the close of the year 1869, John Felthouse, a nephew of the plaintiff, being about to sell his farming stock by auction, a conversation took place between the uncle and nephew respecting the purchase by the former of a horse of the latter; and, on the 1st of January, 1860, John Felthouse wrote to his uncle as follows:

> "Bangley, January 1st, 1861.
>
> "Dear Sir, I saw my father on Saturday. He told me that you considered you had bought the horse for 30l. If so, you are labouring under a mistake, for 30 guineas was the price I put upon him, and you never heard me say less. When you said you would have him, I considered you were aware of the price, as I would not take less.
>
> "JOHN FELTHOUSE."

The plaintiff on the following day replied as follows:

> "London, January 2nd, 1862.
>
> "Dear Nephew, Your price, I admit, was 30 guineas. I offered 30l,-never offered more: and you said the horse was mine. However, as there may be a mistake about him, I will split the difference, - 30l. 15s. - I paying all expenses from Tamworth. You can send him at your convenience, between now and the 25th of March. If I hear no more about him, I consider the horse mine at 30l. 15s.
>
> "PAUL FELTHOUSE."

To this letter the nephew sent no reply; and on the 25th of February the sale took place, the horse in question being sold with the rest of the stock, and fetching 33l., which sum was handed over to John Felthouse. On the following day, the defendant (the auctioneer), being apprised of the mistake, wrote to the plaintiff as follows

> "Tamworth, February 26th, 1861.
>
> "Dear Sir, I am sorry I am obliged to acknowledge myself forgetful in the matter of one of Mr. John Felthouse's horses. Instructions were given me to reserve the horse: hut the lapse of time, and a multiplicity of business pressing upon me, caused me to forget my previous promise. I hope you will not experience any great inconvenience. I will do all I can to get the horse again: but shall know on Saturday if I have succeeded. "
>
> WILLIAM BINDLEY."

On the 27th of February, John Felthouse wrote to the plaintiff, as follows:

> "Bangley, February 27th, 1861.
>
> "My dear Uncle, My sale took place on Monday last, and we were very much annoyed in one instance. When Mr. Bindley came over to take an inventory of the stock, I said that horse (meaning the one I sold to you) is sold. Mr. B. said it would be better to put it in the sale, and he would buy it in without any charge. Father stood by whilst he was running it up, but had no idea but he was doing it for the good of the sale, and according to his previous arrangement, until he heard him call out Mr. Glover. He then went to Mr. B. and said that horse was not to be sold. He exclaimed he had quite forgotten, but would see Mr. Glover and try to recover it, and says he will give 5l. to the gentleman if he will give it up: but we fear it doubtful. I have kept one horse for my own accommodation whilst we remain at Bangley: and, if you like to have it for a few months, say five or six, you are welcome to it, free of any charge, except the expenses of travelling: and if, at the end of that time, you like to return him, you can; or you can keep him, and let me know what you think he is worth. I am very sorry that such has happened; but hope we shall make matters all right; and would have given 5l. rather than that horse should have been given up.
>
> "JOHN FELTHOUSE."

On the part of the defendant it was submitted that the letter of the 27th of February, 1861, was not admissible in evidence. The learned judge, however, overruled the objection. It was then submitted that the property in the horse was not vested in the plaintiff at the time of the sale by the defendant. A verdict was found for the plaintiff, damages 33l., leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the objection was well founded. Dowdeswell, in Michaelmas Term last,

accordingly obtained a rule nisi, on the grounds that "sufficient title or possession of the horse, to maintain the action, was not vested in the plaintiff at the time of the wrong; that the letter of John Felthouse of the 27th of February, 1861, was not admissible in evidence against the defendant: that, if it was admissible, being after the sale of the horse by the defendant, it did not confer title on the plaintiff; and that there was at the time of the wrong no sufficient memorandum in writing, or possession of the horse, or payment, to satisfy the statute of frauds." *Carter v. Toussaint*, 5 B. & Ald. 855, 1 D. & R. 515, and *Bloxam v. Sanders*, 4 B. & C. 941, 7 D. & R. 396, were referred to.

Powell shewed cause. There was an ample note of the contract in writing to satisfy the statute of frauds. When the parties met in December, 1860, it was agreed between them that the plaintiff should become the purchaser of the horse. It is true, there was a slight misunderstanding as to the price, the plaintiff conceiving he had bought it for 30l., the nephew thinking he had sold it for 30 guineas. On being apprised by the nephew that he was under a mistake, the plaintiff wrote to him proposing to split the difference, concluding with saying, "If I hear no more about him, I consider the horse is mine at 30l. 15s." The question is whether there has not been an acceptance of that offer by the vendor, though nothing more passed between the uncle and nephew until after the 25th of February, the day on which the sale by auction took place. Could the plaintiff after his letter of the 2nd of January have refused to take the horse? It is true that letter was unanswered; but it was proved that the nephew afterwards spoke of the horse as being sold to the plaintiff, and desired the auctioneer (the defendant) to keep it out of the sale. Although written after the conversion, the letter of the 27th of February was clearly evidence, and coupled with the plaintiff's letter of the 2nd of January, constituted a valid note in writing, even as between the uncle and the nephew. The letter of the nephew of the 27th is an admission by him that he had before that day assented to the bargain with the plaintiff. It was not necessary that he should assent to the contract by writing: it is enough to shew that he assented to it. It was not necessary that the assent to the terms of the plaintiffs letter should be in writing. In *Dobell v. Hutchinson*, 3 Ad. & E. 355, 5 N. & M. 251, it was held that, where a contract in writing, or note, exists which binds one party to a contract, under the statute of frauds, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any contract which contains them. So, in Smith v. Neale, ante, vol. ii., p. 67, it was held that a written proposal, containing the terms of a proposed contract, signed by the defendant, and assented to by the plaintiff by word of mouth, is a sufficient agreement within the 4th section of the statute of frauds. It is enough that the memorandum relied on to satisfy the statute of frauds is made at any time before action brought: *Bill v. Bament*, 9 M. & W. 36.

Montague Smith, Q. C., and Dowdeswell, in support of the rule.

The letter of the 27th of February was clearly inadmissible. The 17th section of the 29 Car. 2, c. 3, provides that "no contract for the sale of any goods, etc., shall be allowed to be good, except some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract," etc. At the time the sale complained of here took place, there clearly was no binding contract for the sale of the horse by the nephew to the plaintiff. He could not: he had no insurable interest. *Carter v. Toussaint*, 5 B. & Aid. 855, 1 D. & R. 515, is a far stronger case than the present. There, a horse was sold by verbal contract, but no time was fixed for payment of the price. The horse was to remain with the vendors for twenty days without any charge to the vendee. At the expiration of that time, the horse was sent to grass, by the direction of the vendee, and by his desire entered as the horse of one of the vendors; and it was held that there was no acceptance of the horse by the vendee, within the 29 Car. 2, c. 3, s. 17. And see Smith's Mercantile Law, 4th edit. p. 468, et seq. Here, the plaintiff had clearly no property in the horse on the 25th of February, the day of the sale by the defendant. How, then, can an admission ex post facto by a stranger affect the relative positions of the parties to this record on that day?

WILLES, J. I am of opinion that the rule to enter a nonsuit should be made absolute. The horse in question had belonged to the plaintiff's nephew, John Felthouse. In December, 1860, a conversation took place between the plaintiff and his nephew relative to the purchase of the horse by the former. The uncle seems to have thought that he had on that occasion bought the horse for 30l., the nephew that he had sold it for 30 guineas: but there was clearly no complete bargain at that time. On the 1st of January, 1861, the nephew writes, "I saw my father on Saturday. He told me that you considered you had bought the horse for 30l. If so, you are labouring under a mistake, for 30 guineas was the price I put upon him, and you never heard me say less. When you said you would have him, I considered you were aware of the price." To this the uncle replies on the following day, " Your price, I admit, was 30 guineas. I offered 30l.; never offered more: and you said the horse was mine. However, as there may be a mistake about him, I will split the difference. If I hear no more about him, I consider the horse mine at 30l. 15s." It is clear that there was no complete bargain on the 2nd of January: and it is also clear that the uncle had no right to impose upon the nephew a sale of his horse for 30l. 15s. unless he chose to comply with the condition of writing to repudiate the offer. The nephew might, no doubt, have bound his uncle to the bargain by writing to him: the uncle might also have retracted his offer at any time before acceptance. It stood an open offer: and so things remained until the 25th of February, when the nephew was about to sell his farming stock by auction. The horse in question being catalogued with the rest of the stock, the auctioneer (the defendant) was told that it was already sold. It is clear, therefore, that the nephew in his own mind intended his uncle to have the horse at the price which he (the uncle) had named, 30l. 15s.: but he had not communicated such his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff down to the 25th of February, when the horse was sold by the defendant. It appears to me that, independently of the subsequent letters, there had been no bargain to pass the property in the horse to the plaintiff, and therefore that he had no right to complain of the sale. Then, what is the effect of the subsequent correspondence? The letter of the auctioneer amounts to nothing. The more important letter is that of the nephew, of the 27th of February, which is relied on as shewing that he intended to accept and did accept the terms offered by his uncle's letter of the 2nd of January. That letter, however, may be treated either as an acceptance then for the first time made by him, or as a memorandum of a bargain complete before the 25th of February, sufficient within the statute of frauds. It seems to me that the former is the more likely construction: and, if so, it is clear that the plaintiff cannot recover. But, assuming that there had been a complete parol bargain before the 25th of February, and that the letter of the 27th was a mere expression of the terms of that prior bargain, and not a bargain then for the first time concluded, it would be directly contrary to the decision of the court of Exchequer in *Stockdale v. Dunlop*, 6 M. & W. 224, to hold that that acceptance had relation back to the previous offer so as to bind third persons in respect of a dealing with the property by them in the interim. In that case, Messrs. H. & Co., being the owners of two ships, called the " Antelope" and the "Maria," trading to the coast of Africa, and which were then expected to arrive in Liverpool with cargoes of palm-oil, agreed verbally to sell the plaintiffs two hundred tons of oil,- one hundred tons to arrive by the "Antelope," and one hundred tons by the "Maria." The "Antelope" did afterwards arrive with one hundred -tons of oil on board, which were delivered by H. & Co. to the plaintiffs. The "Maria," having fifty tons of oil on board, was lost by perils of the sea. The plaintiffs having insured the oil on board the "Maria," together with their expected profits thereon, it was held that they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced.

BYLES, J. I am of the same opinion, and have nothing to add to what has fallen from my Brother Willes.

KEATING, J. I am of the same opinion. Had the question arisen as between the uncle and the nephew, there would probably have been some difficulty. But, as between the uncle and the auctioneer, the only question we have to consider is whether the horse was the property of the plaintiff at the time of the sale on the 25th of February. It seems to me that

nothing had been done at that time to pass the property out of the nephew and vest it in the plaintiff. A proposal had been made, but there had before that day been no acceptance binding the nephew.

WILLES, J. *Coats v. Chaplin*, 3 Q. B. 483, 2 Gale & D. 552, is an authority to shew that John Felthouse might have had a remedy against the auctioneer. There, the traveller of Morrisons, tradesmen in London, verbally ordered goods for Morrisons of the plaintiffs, manufacturers at Paisley. No order was given as to sending the goods. The plaintiffs gave them to the defendants, carriers, directed to Morrisons, to be taken to them, and also sent an invoice by post to Morrisons, who received it. The goods having been lost by the defendants' negligence, and not delivered to Morrisons, it was held that the defendants were liable to the plaintiffs.

Rule absolute.

End of Hilary Vacation.
