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A. M. Bell v. Parley P. Jones : Reply Brief of Appellant

Utah Supreme Court

Leon Fonnesbeck; Attorney for Defendant and Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

A. M. BELL,

Plaintiff and Respondent

vs.

PARLEY P. JONES,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

LEON FONNESBECK,

Attorney for Defendant and Appellant.

Appeal from the District Court of the First Judicial District of the State of Utah, in and for Cache County.

IN THE SUPREME COURT OF THE STATE OF UTAH

A. M. BELL,

Plaintiff and Respondent

vs.

PARLEY P. JONES,

Defendant and Appellant.

Respondent argues that plaintiff was a holder in due course and that the court erred in failing to so hold. Counsel says "there is no dispute in the evidence on this question, that Alfred J. Bell was owing plaintiff ~~$215.50~~ $1250.00 at the time the note was turned over to the plaintiff, and that plaintiff subsequently paid full value for the note." That statement is all disputed.

Appellant objected (Tr. 12, Ab. 16) to the plaintiff's conclusion that his father was indebted to him in the sum of ~~$215.50~~ $1250.00. This is cited as error in assignment No. 6. Such evidence was obviously self-serving, gave a mere conclusion on the part of the plaintiff the very conclusion which the court should draw from the evidence.

> "Witness will not be permitted to state a conclusion of law." 22 C. J. 634-39, and numerous cases cited in notes.

Furthermore, when plaintiff attempted to explain the ~~$215.50~~ $1250.00. he took various items from an old note book which he claimed he had expended for his father or mother (Ab. 19, Tr. 23). Such evidence was equally objectionable. The witness had even taken the liberty to write in his book, after this suit was started, that some of these items were "advanced for father". We submit that such self serving evidence thus built up for the occasion is not worthy of any consideration or belief, and should have been excluded by the court. The very fact that plaintiff had taken the liberty, after this suit was started, to add the notation "advanced for father", (Ab. 19) clearly shows that these items were not genuine obligations, and were not prior thereto considered as a bona fide obligation from father to son.

We have no quarrel with the rule that an existing bona fide indebtedness is good consideration for a note. But it must be real and actual past due debt.

> "On the other hand, if there is no pre-existing debt, as where a note is given for money or property advanced by a parent to his child, or a note is given to discharge a supposed liability where none existed, there is no consideration. There is no consideration where the debt or obligation for which a note is given has already been discharged either by the maker himself or by a third person."
> 8 C. J. 216.

"It is****well settled that, if money is given as an advancement, it cannot afterwards be made a debt. The note of $2116.25 was really without any consideration, for

from all the evidence it is perfectly clear that the father intended to give his son the money when he paid it." Boblett vs. Barlow, 83 SW 145, 26 KyL 1076.

We submit the evidence in case at bar fairly shows, by admissions of both father and son, that neither considered it a real indebtedness. The father had helped the son when he was younger in business, later the son paid father and mother back. Surely such dealings between father and son, cannot be deemed and considered as actual and bona fide indebtedness by father to son.

The son testified: "I loaned money from father, when I need it, when I was young in business. When I got older and got in business for myself, I intended to help father and mother back." This was exactly what he did, according to his own testimoney (Ab. 19-20). The father on this point said:

"I don't remember what my son had done for me before he came back from Honolulu. I can't remember where or when it was that I turned the note over to him. I know immediately after he returned from Honolulu he paid my wife's hospital bill. I could not say how soon. That was his mother. We, like other parents did a lot for our children, they help us back later on. I hope we are not different from other folks in that respect." (Ab. 26.)

Under such set of facts, I submit the son would not be permitted by any court to recover a judgment against his father, and if that be true there was no valid consideration for this note.

Furthermore, this note was transfered after maturity of the first installment thereof, which amount was unpaid at the time. One who takes after maturity is not a bona fide holder. 8 C. J. 344. One who takes an instrument after maturity is not a holder in due course, but takes it subject to all equities and defenses arising out of the paper itself and attaching to it, or out of the transaction with reference to which the paper was made. 3 R. C. L. 1945.

Equally there is no justification for counsel's statement that "plaintiff later paid full value for the note," because all of the evidence of purported payments offered subsequent to June 15, 1936, was excluded. (Ab. 17-18.)

Counsel says "even if Alfred J. Bell had told this plaintiff all that he had known about it, yet plaintiff would have been a bona fide purchaser for value under Section 61-1-57." We cannot agree. Had Alfred J. Bell told to his son all he knew, or what counsel claims to be the fact, about this he would have said, "here is a note for $850.00 signed by Alfred J. Bell. It represents the balance of the purchase price on the land I sold to Jones. When Jones got a Federal Land Bank loan on this land, I signed a scale-down agreement to take $150.00 as satisfaction in full of the existing indebtedness from Jones to me. When I signed that scale-down agreement, I represented to the Federal Land Bank that the existing indebtedness was only $400.00. It was in fact more than that, it was this note, $850.00, in addition to the $400.00. This $850.00

note was really a side-agreement between me and Jones, which I said nothing about in the scale-down agreement that I signed. Now you take this note, if you can collect it you can have it." I submit that if plaintiff had thus been told the facts, he would have "knowledge of such facts that his action in taking the instrument amounted to bad faith", as Section 61-1-57 provides.

Hence we submit that the court below made no error in holding that plaintiff was not a bona fide holder for value in due course.

On page 6, counsel attempts to justify the court's finding that defendant owed plaintiff $1250.00 as the balance on land contract, by saying Alfred J. Bell so testified. We submit that Alfred J. Bell did not so testify. If any one so testified it was his counsel, to which leading question Bell merely assented.

But counsel fails to answer the important question on this point which we raised in our main brief: If the existing indebtedness was $1250.00 (and not $400.00) then it is apparent that when Alfred J. Bell signed the scale-down agreement (scaling down to $150.00) he did so on condition, or at least with the understanding that appellant give him (Bell) a note for $850.00. In other words Jones was required by Bell to absorb $850.00 of the $1100.00 which Alfred J. Bell really scaled down. For Bell agreed to take $150.00 as settlement in full for the existing indebtedness between them. That is the very reason why the $850.00

note sued on is void, for such acts are against public policy, as we show by the authorities in our main brief. It was certainly equally viscious and equally misleading to the Federal Land Bank. If Bell had stated that the existing indebtedness was $1250.00, in his scale-down agreement, and had agreed to take $150.00 as settlement, then, counsel admits that Bell could not take a note from Jones for any part of the amount scaled down. But counsel argues that Bell is now in a more favored position, because he misstated and misrepresented what the existing indebtedness was.

We do not believe the court should allow Alfred J. Bell to do indirectly by misrepresentation what he could not do directly. If he had correctly stated the amount of the existing indebtedness and agreed to take $150.00 as settlement, that ends it. He could not then have a valid side agreement with debtor to pay any back part of the amount scaled down. Neither should he be allowed to falsely state the amount of the existing indebtedness to be $400.00, if it in fact was more; and then take a note from creditor representing the difference between the actual existing indebtedness and the amount which creditor Bell stated and represented it to be, in his signed scale-down agreement.

Respectfully submitted,

LEON FONNESBECK,

Attorney for Defendant and Appellant.