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Joseph Hodges v. I. A. Smoot and C. M. Croft : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH HODGES, *Respondent*,

vs.

I. A. SMOOT and C. M. CROFT,
Appellants.

Respondent's Brief.

NEWEL G. DAINES,
Attorney for Respondent.

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

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Appellants.

STATEMENT OF CASE.

There are three causes of action in this case. The first based on a promissory note for \$1300.00, and the second on one for \$529.20, and the third is stated in two counts. The first count of the third cause of action states a cause of action on a note for \$3,931.30, which it is alleged is a renewal of the note set out in the second count of the third cause of action in the sum of \$2835.00.

As a defense to the first cause of action, the defendants plead the statutes of limitations, second that the said note was given for the use and benefit of the Gordon Creek Coal Company; and, third, that said plaintiff agreed to surrender said note for stock in the Gordon Creek Coal Company.

As an affirmative defense to the second cause of action, the defendants plead that the note in question was given as an accommodation to the plaintiff.

As a defense to the first count in the third cause of action, the defendants attempt to plead that the note in question was delivered conditionally, said condition being that it was not to become effective unless the signature of one W. W. Seegmiller was obtained on said note with the two defendants. Plaintiff maintains that this is the only question in the whole case raised by the pleadings that should have been submitted to the jury.

As a defense to the second count in the third cause of action, the defendants allege that said note was barred by the statute of limitations, and that the same was paid and delivered to W. W. Seegmiller for cancellation. The case was tried to a jury, and the judge indicated that he was going to submit the case to the jury on a special verdict. Plaintiff requested that the jury be required to bring in a general verdict on the three causes of action, but the Court denied the request and submitted the special interrogatories (Tr. 117, 171, 181).

At the close of the evidence on the first day of the trial the plaintiff made a motion for a directed verdict in all three causes of action; whereupon the defendants requested the court to direct a verdict for the defendants on the third cause of action. The Court then indicated that it was his intention, when the court again convened, to deny both motions and to submit the case to the jury on special interrogatories (Tr. 171). When the court did convene, some evidence was submitted, but the case was sub-

mitted to the jury on special interrogatories. Counsel for plaintiff requested a general verdict (Tr. 181, 182).

The jury returned the special verdict in favor of the plaintiff, which said findings or special verdict was filed May 9, 1939 (Tr. 40). On May 23, 1939, defendants' attorney filed a notice of motion for new trial, and on May 25, 1939, filed a motion for a new trial (Tr. 41-43). Counsel for plaintiff in open court moved to strike the motion and notice of motion on the ground that it was not filed in time (Minute Entry Tr. p. 214). The Court however, granted counsel for defendants time to make a showing, which showing consisted of an affidavit filed by the attorney for the defendants that he did not know that the time for filing a motion for a new trial had started to run from the time the special verdict was filed (Tr. 50, 51). The Court permitted the motion to be filed and heard the same, but denied it, and ordered judgment and findings to be entered in favor of the plaintiff and against the defendants. (Minute Entry Tr. 214). The findings and judgment were dated June 8, 1940, and notice of judgment June 10, 1940, whereupon after some extension of time, notice of appeal was served and the bill of exception settled. However, no abstract of the record was ever prepared or served on counsel, and no assignments of error were ever made, except what is argued in counsel's brief.

REPLY TO ARGUMENT.

In counsel's brief he states, without having made an assignment of errors, that he relies on three errors committed by the Court, to-wit: First: That the court erred in submitting the case to the jury because of the fact that both plaintiff and defendants made a motion for a directed verdict on the third cause of action; Second: the insufficiency of the evidence to justify the findings of the jury; and, Third: prejudice of the jury.

We assume that this court will consider only the grounds stated or assigned as error in the appellants' brief. Therefore, we will discuss no other matters in our brief, except to reply to arguments of counsel.

We maintain that the court did not commit error in submitting the case to the jury on the third cause of action, for the following reasons.

First: That at the time the motions were made for a directed verdict and denied, the court indicated his intention to submit the case to the jury on special findings, and asked both parties to submit instructions if they desired. To this statement of the court the defendants made no objection and never indicated that the court should take the case away from the jury except to grant or deny their motion and took no exception thereto, and thereby waived any objections they might have had and said matter cannot be considered for the first time in the Supreme Court.

Second: The rule which counsel seeks to invoke in this matter is based on the theory that by both parties making a motion for a directed verdict, they each waive a jury and thereby consent that the case may be decided by the trial judge. But where instructions to the jury are submitted, the Courts hold that such rule is not to be invoked, even in those jurisdictions where the rule applies, and our Supreme Court has held such to be the law.

Third: That the matter of submitting special findings to the jury is within the discretion of the trial judge, and unless such discretion is abused error cannot be predicated thereon.

1. *Objection Not Made and Hence Waived.*— Title 104, Chapter 39, Section 1 Revised Statutes of Utah, 1933, defines an exception and states what exceptions are saved by the statutes, and states: "The exception must be taken at the time the decision is made, except as provided in the next section." Title 104, Chapter 39, Section 2, enumerates the exceptions which are saved by the statutes, and the improper submission of a case to the jury is not therein enumerated, hence the objection would have to be taken at the time, or else it is waived. In discussing this question the Court in the case of *Felice vs. Biscardi*, 246 Pac. 535, 67 Utah 171, said:

"The defendant, however, contends that the court erred in submitting the issue of payment to a jury. There are two answers to the contention, either one of which is conclusive against the de-

fendant: (1) the record does not disclose any objection or exception to the court's action in calling a jury and in submitting the issue to it; and (2) even if there had been such an objection and exception the matter of calling a jury as advisory to the court was clearly within the sound discretion of the court, and hence this assignment must fail."

This question cannot be considered when raised for the first time in this Court. Many cases could be cited, but we think the following should be sufficient:

Geros vs. Harries, 236 Pac. 220, 65 Utah 227;

Van Cott vs. Wall, 178 Pac. 42, 53 Utah 272.

WHERE INSTRUCTIONS ARE REQUESTED CASE IS TO BE SUBMITTED TO JURY. On the second point counsel has answered the question himself in his brief, as he quotes Christensen vs. Utah Rapid Transit Company, 83 Utah 231, 27 Pac. (2nd) 468, and Wood vs. Kinter, 86 Utah, 279, 43 Pac. (2nd) 192, wherein this court holds that if instructions to the jury are requested that the rule is waived and cannot be invoked. See also, 64 C. J. 440, and in particular notes 85 and 86.

3. MATTER WITHIN DISCRETION OF TRIAL JUDGE. We submit that where there is a question of fact to be decided and a jury has been requested and instructed, the trial judge may always submit the question of fact to the jury without committing error. (See 64 C. J. 440 and cases there cited.) An error might be committed by the trial judge in taking a case away from the jury

2. INSUFFICIENCY OF THE EVIDENCE. We now turn to the purported assignment No. 2, wherein it is claimed that the evidence is insufficient to support the special verdict. In this connection we admit that counsel has correctly stated the law and we adopt his citations. In his quotation from *Jackson vs. James*, 97 Utah 41, 89 Pac. (2nd) 235, we find:

“This being an action ^{at} ~~of~~ law and the jury having found the facts, we cannot disturb the verdict if there is evidence from which a jury as reasonable men could so have found.”

On page 21 of counsel's brief in discussing the answer to special interrogatory No. 3, we submit that counsel has stated himself right out of court wherein he says:

“Here one witness testified that the signatures were absolute, and two witnesses testified that they were conditional.”

What more can be required? The jury had a right to believe the one witness as against two if they choose to do so.

The court gave the jury the following stock instructions, which are given in practically every jury case and conceded to be the law, to-wit: (Tr. 36)

By the preponderance of the evidence is meant the greater weight of the evidence, that which is the more convincing as to its truth. It is not necessarily determined by the number of witnesses for or against a proposition, although, all other things being equal, it may be so determined.

You are the exclusive judges of all questions of fact, and of the credibility of witnesses. In judging of their credibility you have the right to take into consideration their deportment on the witness stand, their interest, if any is shown, in the result of the suit, the reasonableness of their statements, their apparent frankness or candor, or the want of it; their opportunities to know and understand, and their capacity to remember. You have the right to consider any fact or circumstance in evidence which in your judgment affects the credibility of any witness. If you believe from the evidence that any witness who has testified in this case has knowingly and wilfully testified falsely to any material fact in this case, you may disregard the whole testimony of such witness, unless the witness is corroborated by other credible evidence or you may give such weight to the evidence of such witness on other points as you may think it entitled to; the jury are the exclusive judges of the weight of the testimony.

We quote from the examination of Mr. Hodges by Mr. Bird: (Tr. 108)

Q.: "Now, Mr. Hodges, when the defendants signed Exhibit "D", which is a note for thirty nine hundred dollars, did they state that they were signing upon condition, or conditioned upon your receiving the signature of Mr. Seegmiller?"

A.: They didn't.

Q.: Did they say they were obliged for the entire amount?

A.: Yes, sir.

* * * *

Q.: Didn't they say that they would sign only if you

would get Seegmiller's signature? (Tr. 110.)

A.: No, they didn't. They told me that Seegmiller would not sign it. They were sure that he would not sign.

We submit that is very substantial evidence and entirely sufficient to sustain the finding of the jury. We do not know what more would be necessary.

SPECIAL INTERROGATORY No. 2 and 4. In testifying as to the reason for the note for \$529.20 Mr. Hodges said: (Tr. 92).

"Q.: And is that the note sued upon in the second cause of action? (Meaning Exhibit "B", note for \$529.20.)

A.: Yes, sir.

Q.: Now, does that note have any relation to this five hundred dollar endorsement here? (Indicating \$500.00 endorsement on \$1300.00 note.)

A.: Yes, sir.

Q.: What is it?

A.: That is a renewal of the five hundred dollar note that is endorsed on that note." (The \$1300.00 note.)

Mr. Croft testified: (Tr. 140)

"Q.: What was the conversation at the time exhibit "B" was signed on October 27th, 1927? (1937)

A.: If I remember right the \$500.00 note was a short time note. He brought this one down, if we would sign this note, including the interest, so as to bring it, that other note up to date so that it could be used." (Meaning the \$1300 note.)

Mr. Smoot testified as follows: (Tr. 155, 156)

“Q.: Now, you notice this five hundred dollar endorsement on the back of the note?

A.: Yes. sir.

Q.: You didn't pay the five hundred dollars in cash?

A.: No, sir.

Q.: Was that the note that has been introduced in evidence here as plaintiff's exhibit “B”?

A.: I take it, that one here, taken up as a renewal, was to apply on that other note. I assume that.” (Meaning the \$1300.00 note.)

All three of these witnesses testified that this note was signed to be used as an endorsement of interest on the \$1300.00 note. That is sufficient to justify the jury in finding that the note was given for a valuable consideration as all three parties testified that it was. We might here observe that if the defendants do not owe this note then they owe five hundred dollars more interest on the \$1300.00 note. However, we do not need to rely on that to toll the statutes of limitations on the \$1300.00 note.

In paragraph four of the first cause of action (Tr. 2) we allege that an action was started on this note on October 15, 1935; that is, two days before it was outlawed, and that said action remained pending until the 6th day of December, 1939. Counsel stipulated in open court that these facts were true, (Tr. 91-92) and the court found said facts to be true. (Findings No. 4, Tr. 54.)

The statutes of limitations did not run while the other action was pending and we had one year after December

6, 1939, in which to file an action on said note. See Title 104, Chapter 2, Section 41 of the Revised Statutes of Utah, 1933, and the following cases:

Luke vs. Bennion, 36 Utah 61, 106 Pac. 712;

Salisbury vs. Poulson, 51 Utah 552, 172 Pac. 315;

Platz vs. International Smelting Company, 61 Utah 342, 213 Pac. 187.

We maintain, that this is an absolute answer to counsel's argument regarding the statute of limitation on the first cause of action. However, Mr. Hodges testified (Tr. 91) defendants sent him a car of coal to be applied on the several obligations and he applied \$11.05 on this particular note. The defendants testified (Tr. 148) that they sent Mr. Hodges two cars of coal, that he paid them for one, but they gave him the other. The jury, however, found that it was a payment on the note and there is ample evidence to justify such a finding.

SPECIAL INTERROGATORY No. 6. This question asks whether or not the defendants acquiesced in the endorsement of \$11.05 on the \$1300.00 note. The fact that another action was pending prevents the \$1300.00 note from being outlawed, so it seems to us that this question becomes immaterial. However, all testified that the defendants sent Mr. Hodges a car of coal. The plaintiff testified that it was to apply on the defendants obligations and he so applied it. The defendants said they gave it to the plaintiff. The jury believed the plaintiff in that respect which they had a perfect right to do and as any

reasonable person would do. Therefore, we see no necessity of arguing this point any further. As evidence that the jury was very conscientious in their deliberation before they would make a finding on this point, they came back into the court and had the evidence read to them. (Tr. 185.)

SPECIAL INTERROGATORIES 5 , 7 and 8. As the jury has already found that the \$3931.50 note was not conditionally delivered, but that the defendants were bound thereby, the answers to question 5, 7 and 8 become immaterial as this is the same obligation represented by the \$3931.30 note. These questions all have to do with the \$2.00 which it was testified the defendant Smoot gave the son of the plaintiff. The evidence of Joseph D. Hodges, son of the plaintiff, on this point is as follows: (Tr. page 116)

“A.: I handed Mr. Smoot the order, upon which, after reading, he said that he was sorry that he could not do more for me at the time because of pressing obligations which he had, but because I was in Salt Lake, and I also needed a little money, that he would let me have two dollars on the account of what he owed my father.

Q.: Did he pay it to you?

A.: Yes, sir, he gave me the two dollars.

Q.: Did you subsequently report that to your father?

A.: Yes, sir, when I returned from Salt Lake.”

Mr. Smoot (Tr. 168) admitted the conversation with the plaintiff's son, and the payment of the \$2.00, but does-

n't admit that it was to apply on any obligation. Certainly the jury was amply justified in believing the son's testimony, and the plaintiff had a right to apply the \$2.00 payment on any obligation that was owing from defendants to plaintiff at that time.

We might here also observe that even if the jury had found that the \$3931.30 note was conditionally signed, still it would operate as a written acknowledgement of the \$2835.00 note and toll the statute of limitations on that note. So the defendants are bound regardless of how it is considered.

DEFENDANT'S MOTION FOR A NEW TRIAL.

In discussing this point our contention is that it was error for the court to even consider this motion for a new trial as it was not filed within the time required by law as previously stated. The only excuse that the appellants give for their failure to comply with the law is that counsel didn't know it. That is no excuse for the delay. However, the trial court was clearly right, after entertaining the motion, in overruling it. Here again we have no quarrel with counsel's statement of the law. The verdict should not be set aside unless there is a total lack of evidence to sustain the verdict. We have previously shown that there is ample evidence to sustain every question which was put to the jury and the jury was justified in finding as they did. They merely followed the instructions of the Court wherein they were intrusted that they were the sole judges of the facts, and that if they believed any wit-

ness had testified falsely they were at liberty to disregard the whole of the testimony of that witness. Apparently the jury believed the testimony of the plaintiff and his witness rather than the testimony of the defendants and this it had a perfect right to do according to the instructions given. Therefore, we will not enter into an extended argument on this question as we feel that it has already been covered.

As shown by the authorities cited by counsel, one of the main causes for granting a new trial is a miscarriage of justice. We ask this court to examine the evidence and see if there is any possible miscarriage of justice in this case. The defendants admit signing of all the notes sued upon. They admit having received the money. They say, however, that the money was used for the benefit of the Gordon Creek Coal Company. That is probably true, and the company probably should pay the money back if it had any. However, the plaintiff cannot look to that company for his money. He made the loan in good faith to the defendants, and by doing so, impaired his own credit. The defendants still claim to have faith in the coal mine which they developed and claim to own, and will probably make plenty of money out of it, if and when it comes into production. We think these defendants do not want to see the plaintiff lose his money, and that they would pay it back if they could conveniently do so. However, the fact that they made a poor investment

should not deny this plaintiff of his right to a judgment against them.

All of the defenses of the defendants are highly technical and seek to take every advantage which the law gives them. They haven't been cheated and they haven't been beaten in anyway. It would have been a miscarriage of justice for the jury to decide any other way than the way they did decide. The facts shown by the evidence and the law quoted by counsel for appellant and herein quoted show very clearly that the verdict of the jury and the judgment of the trial court should be upheld in every respect.

Respectfully submitted,

NEWEL G. DAINES,

Attorney for Respondent.