

Davy v. Faw.

3. The discharge under the insolvent law, only discharges the person it is no bar to an action.

March 4th, 1812. All the judges (except DUVAL J.) being present, MARSHALL, Ch. J., delivered the opinion of the court to the following effect:— In this case, the whole evidence is spread upon the record by the bill of exceptions, and the court below refused to instruct the jury (as requested by that defendant), that it was not sufficient in law to enable the plaintiff to recover in this action. If the court ought to have given this instruction, their refusal is certainly error.

The evidence shows that a note was given, or money paid by the plaintiff for the use of the defendant; but *it is objected, that it was not paid at the request of the defendant. If the plaintiff was not bound to pay it, and if it was paid, without the request of the defendant, it is certain that the plaintiff is not entitled to recover. But the court thinks that the recital in the deed of assignment is evidence from which the jury might infer a request.

The court is also of opinion, that the recital in the deed is sufficient to take the case out of the statute of limitations. Although the court is not willing to extend the effect of casual or accidental expressions farther than it has been, to take a case out of that statute, and although the court might be of opinion, that the cases on that point have gone too far, yet this is not a casual or incautious expression: the deed admits the debt to be due on the 15th of July 1804, and five years had not afterwards elapsed, before the suit was brought.

Then it is objected, that there is no evidence of the payment of the money by the plaintiff; but the court thinks that the recital of the deed is evidence from which the jury might infer the payment.

There was no error respecting the discharge under the insolvent act. It was only a discharge of the person, and could not affect the judgment.

Judgment affirmed.

DAVY'S Executors v. FAW. (a)

Arbitrament and award.

An award will not be set aside, in equity, on account of an omission by the arbitrators to act upon part of the matters submitted, unless that omission have injured the complainant.

When the price of land, and not the question of title, is submitted, the submission and award need not be by deed.

Faw v. Davy, 1 Cr. C. C. 440, affirmed.

THIS case seems to be sufficiently stated in the following opinion, delivered by MARSHALL, Ch. J., on the 9th of March. (All the judges being present.)

This is an appeal from a decree of the Circuit Court for the county of Alexandria, sitting in chancery, by which that court set aside an award made between the parties, and directed an account. *The bill impeaches the award, because: 1. The arbiters exceeded their power: 2. They

(a) March 3d, 1812. Present, all the judges.

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made no award with respect to a part of the matter submitted to them : 3. They were partial, and proceeded to make their award, without hearing the party against whom it was made.

The arbitration-bond binds the parties to submit to the award, order and arbitrament of Francis Peyton, Theophilus Harris and Thomas Herbert, or any two of them, respecting a controversy of several accounts and contracts existing between them. A judgment at law has been obtained for the amount of the award ; for relief against which, and against the award itself, this suit was instituted.

By the plaintiffs in error, it is contended, that excess of power in arbiters is a defence at law, and is, therefore, not examinable in this court. That the injured party may avail himself of this defence in a court of law, where the excess of power is apparent on the face of the award, is not controverted. But in this case, it is not shown by the award itself, and the defendant insists, that he was not at liberty, in a court of law, to avail himself of evidence *dehors* the award ; and in support of this opinion the case of *Wills v. Maccarmick*, 2 Wils. 149, has been much relied upon. Without deciding that question, the court will proceed to inquire, whether the defendant in error has succeeded in proving, that, in this case, the arbiters have, in fact, exceeded their power ?

It appears, that Abraham Faw sold to David Davy a lot of ground, the purchase-money for which was payable in four years, in four equal annual payments. Davy conveyed to Faw, about the same time, a lot which he had purchased from Elisha C. Dick, and which he held on the condition of making certain improvements. Davy becoming insolvent, it was agreed, that *173] his contract *with Faw should be annulled, that the bonds he had given Faw for the purchase of the lot should be returned to him, and that he should surrender the bond for a title, which Faw had executed. It had been stipulated, that, in the event of his failing to pay the purchase-money, and of the contract being avoided, the money actually paid by Davy to Faw should be considered as rent, so far as rent was allowed. There had been some other dealings between the parties, and there had been a small piece of ground rented to Davy, on which he had put some inconsiderable improvements.

In this state of things, they agreed to submit their affairs to arbitration, and the bond was executed which has been stated. The arbiters awarded that Faw should pay Davy 314*l.* 4*s.* 11*d.*, and it is proved, that in making up the account between the parties, they debited Faw with 300*l.*, for the lot which had been conveyed to him by Davy. Faw contends that this was not a contract subsisting between the parties, and consequently, is not included within the terms of the submission.

Faw alleges in his bill, that this whole transaction was closed ; that the lot conveyed to him by Davy formed no part of the consideration given for the lot he had sold, but was conveyed to him, because Davy considered the rent reserved on that lot and the conditions of improvement, which were inserted in the deed, as equivalent to its full value. These allegations are denied in the answer ; and the defendant avers, that the price of the lot purchased by him was 500*l.* ; that he conveyed the lot he had purchased from Dick at 100*l.*, and gave his bonds for 400*l.*, the residue of the purchase-money ; that,

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when this contract was annulled, he became entitled to his lot, or to its value, and that this was one of the subjects submitted to the referees.

In addition to this testimony, furnished by the answer, the defendant has produced the testimony of a witness who was present when the arbitration was agreed upon, and the bond executed. He says, that the lot purchased by the defendant from the plaintiff, and that which had been conveyed by the defendant to the plaintiff, as well as other accounts between the parties, formed the subjects of conversation.

Francis Peyton, one of the arbiters, declares, that he considered all the transactions between Faw and Davy as submitted to them; [*174 that Faw himself laid before them the bond he had given to Davy for a conveyance of the lot he had sold, and that he always understood from Mr. Faw, during the arbitration, that he was willing to pay 100% for the lot conveyed to him by Davy. Peyton adds, that the mode adopted by the arbiters for arranging that part of the subject, was understood by them to be the one which was most agreeable to Mr. Faw. The court is of opinion, that the plaintiff in the court below has failed in showing that the arbiters have exceeded their powers.

2. A second objection to this award is, that the arbiters have not settled the accounts between the parties, for flour stored by Faw for Davy, which accounts were clearly within the submission. The defendant has not shown that he is injured by this omission, and it is, therefore, unnecessary to decide whether, had he been injured, a court of equity could or could not have afforded relief.

3. A third ground, on which the application for relief is placed, is the partiality and improper conduct of the arbiters. That judges chosen by the parties themselves, as well as those who are constituted by law, ought to be exempt from all imputation of partiality or corruption; that their conduct ought to be fair, and their proceedings regular, so as to give the parties an opportunity to be heard, and themselves the means of understanding the subjects they are to decide, are propositions not to be controverted. But corrupt motives are not lightly to be ascribed to the arbiter, nor is partiality to be attributed to him, on account of difference of opinion with respect to the decision he has made.

The charge made in this case, that the parties were not sufficiently heard, is not supported, and is contradicted by the testimony in the cause. The general *charge of partiality is also contradicted, and is expressly denied by the arbiters, who have been made defendants, and by the [*175 deposition of Francis Peyton who did not sign the award.

Some particular facts have been proved, by which this charge, it is supposed by the counsel for the defendant in error, may be supported. McKinsey Talbot deposes, that, after the arbiters had separated, Thomas Herbert, who was one of them, said, that David Davy ought to buy his winter's meat for him, without making any charge on account of the particular service he had rendered him in the said arbitration. That such language is unbecoming in a judge will not be denied; and if the circumstances leading to these expressions, and the manner in which they were uttered, had been stated in the record, and there had been reason to believe, that the words were spoken seriously, they would have furnished objections to the award, not easily to be removed. But nothing is stated, which could give these expressions a

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serious aspect. They appear not to have been delivered confidentially ; and as it is difficult to conceive, that a man, who could be chosen as an arbiter, would thus wantonly and unnecessarily expose the depravity of his own conduct, the court must consider these words, as spoken in sport, with indiscreet levity, but not as seriously indicative of an opinion that he had made an unjust award.

The same witness, in another deposition, states that he was present at a meeting of the arbiters, and heard Thomas Herbert say, that they had the hands of Abraham Faw so fast tied, that he could not, for his life, get them loose. It is impossible to consider these expressions in an arbiter, without some disapprobation. But what led to the employment of them, does not appear ; nor is the court informed of the temper in which they were employed. It is worthy of remark, that Thomas Herbert does not appear to have had an opportunity of cross-examining this witness, and that this *176] deposition was *taken, before the arbiters were made parties to the cause.

There is some testimony respecting some altercations or jealousies between Faw and some of the arbiters, at a corporation election, but they were too trivial to be worthy of notice ; and as they occurred about the time of the submission, and before the arbiters proceeded on the business, it is supposed, that they would have induced Faw, had he thought them of any importance, to make some effort to prevent an award.

Upon a view of the whole case, the court is of opinion, that the plaintiff in the court below has not shown sufficient matter to set aside the judgment at law, and doth, therefore, direct that the decree of the circuit court be reversed and annulled.

March 13th. After the decision of the cause, *C. Lee*, for the defendant in error, cited *Kyd on Awards*, to show that where the dispute is about land, the submission and award must be by deed.

MARSHALL, Ch. J.—That is, where the title is in question. But here the title was conveyed ; the dispute was only as to the price. The question of title was not submitted.

LIVINGSTON, J.—Although that point was not made in the argument, yet it was considered by the court.

Judgment reversed.