

Penn v. Butler.

Dallas obtained a rule to show cause, why the verdict should not be set aside for that reason.

On the argument in *support* of the rule, it was contended: 1st. That the trial by jury, entire, was anxiously adopted by the United States, as well as by this state; including the right and causes of challenge as at common law, in civil and in criminal cases. 1 Dall. Laws, App. 55, § 9, 11; Ibid. 58, § 25; 3 Ibid. 36, § 9, 6; 4 vol. Acts Cong. p. 25, art. 8, 9; 1 Dall. Laws, 134, § 4; 2 Ibid. 802, § 2; 3 Ibid. 606, § 16; 2 Ibid. 264, § 9, 12, 3; 1 vol. Acts Cong. 113, § 30; Ibid. 68, § 29. 2d. That on principle, as well as on authority, alienage was a cause of challenge to a juror, before verdict. 3 Dall. Laws, Const. art. VIII.; 1 Acts Cong. Const. art. VI.; Ibid. 67, § 29; 1 Roll. Abr. 657; Co. Litt. 156 b; 3 Bl. Com. 362; Gilb. P. C. 94; 1 Dall. 74. 3d. That if the cause of challenge was unknown, when the jury was qualified, it may be used to set aside the verdict, as for a mistrial. 3 Dall. 515; 11 Mod. 119; 2 Wood. 352; An. Reg. 1790, p. 46; 2 Ld. Raym. 1410; 1 Str. 640; 1 Acts Cong. 6, § 17; 2 Str. 1000, 593.

E. Tilghman and *Ingersoll*, in opposition to the rule, contended, 1st. That, in Pennsylvania, alienage was not a cause of challenge to a juror. But 2d. That the objection was too late, after the juror was sworn, and the verdict was given.

THE COURT, after a long advisement upon the subject, seemed to think, that alienage might have been a cause of challenge, before the juror was sworn; but upon an extensive review of the authorities, they decided, that advantage could not be taken of it, after verdict.

Rule discharged.(a)

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Possession of securities.

The survivor of two joint obligees, is, at law, entitled to the possession of the joint securities; and a court of equity will not interfere with the disposition of them, unless some ground is laid for its interposition.

THESE were bills in equity, involving a great variety of facts, respecting the disposition of the estates of the late proprietary family: but the principal object of all of them, was submitted for the opinion of the court, on the following agreement:

"It is agreed, that these suits be submitted for the opinion of the court *355] upon the following statement of facts, admitted by *all the parties, except the fact, that Anthony Butler, for his own accommodation, and without the consent, knowledge or approbation of John Penn, the elder, took, *inter alia*, in part payment of certain sales hereinafter mentioned, certain bonds and mortgages, in the joint names of John Penn, the elder, and John Penn, the younger, as obligees and mortgagees; which fact, it is agreed,

(a) Since the discussion of this case, the marshal has been directed not to return aliens upon the panel; and, in many instances, when aliens have been returned, the state, as well as the federal, courts have discharged them, upon their own application.

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shall be decided by the court, on evidence to be produced; and that such formal decrees be eventually drawn and entered in each, as will effectuate the opinion which the court shall pronounce.

Case. John Penn, the elder, and John Penn, the younger, after the act of assembly of Pennsylvania, passed November 27th, 1779, entitled "an act for vesting the estates of the late proprietaries of Pennsylvania in this commonwealth," remained seised and possessed, as tenants in common, of all their manors, reserved tracts, &c., in Pennsylvania, with power to sell in fee: three-fourth parts being the property of John Penn, the younger; and one-fourth part being the property of John Penn, the elder. On the 19th of November 1787, John Penn, the elder, appointed John F. Mifflin his attorney, with power to sell and convey, &c., to receive payment for lands sold, either in money or securities; and to substitute any agent or agents; and on the 23d of December 1787, John F. Mifflin substituted Anthony Butler. On the 29th day of June, in the year 1787, John Penn, the younger, appointed Robert Millegan and John F. Mifflin his attorneys, with power to sell and convey, &c., to receive payment for lands sold, either in money or securities; and to substitute any agent or agents. And on the 29th day of June, in the year 1787, Robert Millegan and John F. Mifflin substituted Anthony Butler. John Penn, the younger, afterwards revoked the power of attorney, which he had granted to Robert Millegan and John F. Mifflin; and on the 29th of April 1788, John Penn, the younger, appointed the said Anthony Butler his attorney, with power to sell and convey, and to receive in payment money or securities.

By virtue of the several powers above stated, Anthony Butler did, at sundry times, sell several tracts of land belonging to the said John Penn, the elder, and John Penn, the younger, as tenants in common, in the proportions aforesaid; and in payment therefor (*inter alia*) took, for his own accommodation, without the consent, knowledge or approbation of the said John Penn, the elder, certain bonds and mortgages, in the joint names of John Penn, the younger, and John Penn, the elder, as obligees and mortgagees. After the time of taking the said bonds and mortgages, to wit, on 9th of February 1795, John Penn, the elder, died, leaving Anne Penn and John F. Mifflin, executrix and executor of his last will and testament.

* "There are in the hands of Anthony Butler a number of bonds and mortgages, taken as aforesaid, in each and all of which bonds and mortgages, the said John Penn, the younger, is interested three undivided fourth parts; and the aforesaid executors of John Penn, the elder, are interested the other one undivided fourth part.

"Questions. 1st. Whether John Penn, the younger, as surviving obligee and mortgagee, is entitled to have and receive from Anthony Butler, all the said bonds and mortgages, for the purpose of collecting and distributing the money thereby secured and made payable, according to the respective interests of the parties?

"2d. Or, whether the executors of John Penn, the elder, are entitled to receive one-fourth part in value of the said specific bonds and mortgages, for their separate use and benefit?

"3d. Or, whether the court will consider the bonds and mortgages, under the circumstances of the case, as several, as well as joint, to be followed with the consequences inferrible from such principle?"

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On the hearing, Mr. Butler's testimony stated, "that he was, at first, the separate agent of John Penn, the younger, when Mr. T. Francis was the separate agent of John Penn, the elder; that during this period, the bonds for purchase-money of lands sold, were separately taken, according to the interest of the parties; that in September 1787, he became the agent of both the Penns, but continued, for some time, to take separate bonds; that the purchasers complained of the expense of giving separate bonds and mortgages, and he then determined to take them for the joint use of his principals; that he received no instructions upon the subject, from either party; and that he was not, in fact, aware of any difference between taking the bonds jointly, or severally." It also appeared, that Mr. J. R. Coates had been appointed the agent of John Penn, the younger; and the general question was, whether Mr. Butler should be directed to deliver up the joint bonds and mortgages to him, as the agent of the surviving obligee?

Ingersoll and *Mifflin* contended, against the claim of the surviving obligee: 1st. That it was founded merely on the mistake and misapprehension of the agent, acting for two parties, having distinct interests, and giving separate powers. 2d. That, under such circumstances, a court of equity can and ought to apportion the securities, by a fair division of them; so that each party may possess the entire interest and remedy in his proportion. 3d. That even if an apportionment could not be made, the court will appoint a receiver, to collect and divide the joint fund, in the regular proportions. On these points, the following books were cited: 3 P. Wms. *357] 158; 21 Vin. Abr. 509, pl. 4; Carth. 16; 1 Eq. Abr. 293; *3 Ves. jr., 628, 631, 399; 2 Com. Dig. 255, 258; 1 Eq. Abr. 290 a.

Rawle and *Dallas*, in support of the claim of the surviving obligee, urged, 1st. That the point of law is clearly in favor of the claim; and to set aside a plain rule of law, there must be strong, controlling principles of equity, in favor of the opposite party. 2d. That the act of taking joint securities was not a mistake or error; but a deliberate act, for the accommodation of purchasers. 3d. That there was no suggestion of a fraud, a breach of trust, wilful *laches*, or probable insolvency, in reference to the surviving obligee. 4th. That there is, therefore, no foundation for the interposition of the court to appoint a receiver; nor to justify a court of equity in compelling the parties to accede to an arbitrary apportionment of the securities. On these points were cited, Yelv. 177; Vent. 34; 3 Dyer 350; Sheph. 363, 356; 2 Brownl. 207; 1 Eq. Abr. 290; 2 Pow. 263; Ambl. 311; *Wallace v. Fitzsimons*, 1 Dall. 248; 2 Com. Dig. 110, 209, 213, 255; 2 Vern. 556.

THE COURT were decidedly of opinion, that, at law, the surviving obligee was entitled to the possession of the joint securities, that he might recover the amount; and that there was no ground laid, on the present occasion, for the interposition of a court of equity. (a)

(a) On this clear intimation of the opinion of the court, Mr. Coates liberally declared, that if the executors of John Penn, the elder, would concur in giving him immediate possession of the securities, he would not charge a commission for collecting and paying their proportion of the amount; and the proposition was, accordingly, agreed to.