BODDY v. THOMPSON.

Opinion delivered February 25, 1929.

1. APPEAL AND ERROR—CONCLUSIVENESS OF JURY'S FINDING.—A finding of the jury upon a question of fact, supported by some substantial testimony, will not be disturbed on appeal.
2. FRAUDS, STATUTE OF—ORAL LEASE.—An oral contract for the lease of land for one year, to commence at a date subsequent to the making thereof, is not within the statute of frauds (Crawford & Moses' Dig., § 4862).
3. CONTRACT—CONSIDERATION.—A renewal contract for lease of lands for another year was not without consideration, though the tenant made a payment of a mortgage indebtedness for which he was already bound, where he suffered some detriment or disadvantage on account of it.

4. REPLEVIN—LIABILITY OF DEFENDANT.—Where a mortgagor recovered in replevin from the mortgagee, the latter was nevertheless entitled to judgment for the amount due under the mortgage, less the amount found to be due to the mortgagor for the value of the mortgaged chattels sold by the mortgagee and damages for its unlawful detention.
5. MORTGAGES—AUTHORITY OF MORTGAGOR TO SELL—EVIDENCE.—In determining whether the mortgagee authorized the mortgagor to sell mortgaged chattels, the jury was properly directed to consider all the facts and circumstances in evidence, including the parties' conduct, acts, and statements.
6. TRIAL—AMENDMENT OF INSTRUCTION.—In replevin for mortgaged cotton sold to defendant by the codefendant mortgagor, it was not error to amend plaintiff's requested instruction that he could recover the value of the cotton unless he authorized the mortgagor to sell it and receive the proceeds, by striking out the words "and receive the proceeds," where the court instructed the jury to find for defendant if plaintiff consented for the mortgagor to market and collect for the cotton.
7. MORTGAGES—AUTHORITY TO SELL CHATTELS.—Authority to a mortgagor from the mortgagee to sell mortgaged cotton in his possession necessarily included the right to receive the sale price.

Appeal from Little River Circuit Court; *B. E. Isbell,* Judge; reversed in part.

STATEMENT BY THE COURT.

This appeal challenges the correctness of two judgments of the Little River Circuit Court in actions of replevin, brought for foreclosure of a mortgage, consolidated for trial, the one judgment being in favor of appellee Farnsworth-Evans Company, for possession of 109 bales of cotton taken under replevin in appellant's suit therefor, and the other in favor of appellee Thompson, lessee on appellant's plantation, for the personal property taken from him under the writ of replevin for foreclosure of the mortgage thereon and the value thereof fixed by the jury at $5,298.30, with $1,000 damages for its wrongful detention.

Appellant, the owner of the plantation in Little River County, leased same to appellee Thompson for the year 1927, taking Thompson's mortgage, dated February 24, 1927, for $27,000 for rent and supplies, payable Novem-

ber 1, 1927, with a chattel and crop mortgage from him, executed said date, conveying certain mules, wagons, harness, farming implements and all the crops to be planted and grown on the farm for the year 1927, specifying the number of acres to be planted in corn and cotton for the payment of the rent and supplies.

Appellant brought suit for the possession of the chattels included in his mortgage in order to foreclose same, alleging there was a balance due from Thompson under the mortgage of $15,858.74, with interest upon the note given for rent and supplies. Appellant advertised the property taken under the writ of replevin, and sold it, as appraised, under the power in the mortgage, for $5,238.90. He brought replevin against Farnsworth-Evans Company, appellee, to recover 109 bales of cotton raised on his plantation by Thompson, and alleged to have been sold by Thompson without his consent to said company, and that he was entitled to possession thereof under his mortgage.

Thompson first filed a plea in abatement, alleging that he had made a new contract with appellant for the rent of the farm for the year 1928, and, on payment of $2,800 on his indebtedness, appellant had agreed to extend the time for collection of the balance due to the end of the said year, and furnish him other supplies necessary for making the crop for that year. He then, without insisting on his plea in abatement, filed an answer and cross-complaint. He denied that he had sold the 109 bales of cotton without the consent of appellant, and alleged that he was authorized by him to make the sale thereof; admitted the execution of the promissory note for $27,000; alleged that he had sold the cotton on the 2d day of October, 1927, with the knowledge and consent of appellant, and paid him $10,000 of the proceeds thereof upon his indebtedness; that he had, on the 19th day of December, 1927, paid him the further sum of $2,800 derived from the proceeds of the sale of the 109 bales of cotton replevined, which he alleged was sold with the knowledge and consent of appellant, and that he was

entitled to the credit of both amounts on the alleged indebtedness; denied that he had unlawfully taken from appellant's possession and converted to his own use the specified personal property alleged to be of the value of $10,500, and alleged, in other paragraphs of the cross-complaint, that he was entitled to certain other amounts for digging ditches, clearing lands and delivering goods on appellant's order to other persons, the loss of money paid sharecroppers and tenants for accounts due him and expected to be paid in the 1928 season on the farm, damages for loss of rent on lands, and also for malicious prosecution.

A demurrer was sustained to each paragraph of the cross-complaint, except 3, 4 and 5. Appellant denied the allegations of the plea in abatement, that he had agreed to rent the place to Thompson for the year 1928 and to extend the time for payment of his indebtedness. Answering the cross-complaint, denied that the cotton was sold to appellee with his consent; and that he was paid $2,800 from the proceeds of the sale by Thompson; admitted the receipt of certain amounts of money for the sale of cotton, $10,000 of which was credited upon the indebtedness, the remainder being given to Thompson for use in gathering the crop; admitted receiving the $2,800, but denied that it was derived from the sale of any cotton made by Thompson with his consent, and that he had any knowledge or information of the source from which Thompson had received the money, and offered to return it to the person entitled thereto; denied taking any of the chattels and converting them to his own use, and that they were of the value claimed; alleged that they were all included in the mortgage, the conditions of which were breached by Thompson, and that an action of replevin had been brought for their possession for foreclosure of the mortgage, that at the sale made pursuant thereto the property sold for $5,078.44, to which Thompson was entitled to credit, except $70 expenses in making the sale; denied any indebtedness to

Thompson under any other of the paragraphs of the cross-complaint; prayed judgment against Thompson for the amount due under the mortgage, less the credits allowed, with interest from the maturity of the indebtedness.

The cotton company denied the allegations made against them, that the sale was made of the cotton by Thompson without the knowledge or consent of appellant, and alleged that they were innocent purchasers thereof.

The testimony is in conflict as to any agreement made by appellant to lease the plantation to Thompson for the year 1928 or extend the time for payment of the balance due on the indebtedness of the mortgage, there being some substantial testimony in support of such allegation. It was also in conflict as to whether the cotton was sold by Thompson to appellee cotton company without the knowledge or consent of appellant mortgagee, but there was substantial testimony in support of the allegations that Thompson was authorized to make such sale and that appellees were innocent purchasers, and sufficient to support the verdict of the jury in that case.

Certain of the instructions given are complained of, and also of the amendment made by the court to some of them, as well as to the admission of a great deal of testimony. The record is voluminous, and only a sufficient statement to show the points in issue is attempted to be made.

The jury found in favor of the appellee cotton company and also the appellee Thompson for the property taken under the writ of replevin, assessing the value thereof at $5,298.30, and also for Thompson "as damages for the usable value of said property the sum of $1,000." The court adjudged that appellant take nothing by reason of his complaints herein; that the Farnsworth-Evans Company retain the 109 bales of cotton; that Thompson recover the specified property taken from him under the writ of replevin, if to be had, otherwise that he have

judgment against plaintiff for $5,298.30, the value thereof, and for $1,000 damages for its wrongful detention, and for costs, from which judgment the appeal is prosecuted.

J. O. Livesay and *Lake, Lake & Carlton,* for appellant.

Otis Gilleylan and *Shaver, Shaver & Williams,* for appellee Thompson.

Wm. S. Atkins, for appellee Farnsworth-Evans Company.

KIRBY, J., (after stating the facts). There are numerous assignments of error, a few of which only are insisted upon here, and fewer still necessary to be considered under our determination of the matters in question.

The undisputed testimony shows that the replevin suits were brought for the property in an attempt to foreclose the mortgage thereon, under the terms of which was still due the appellant from Thompson, the mortgagor, $15,858.74. The jury found the issue in favor of Thompson, the mortgagor, fixing the value of the property replevined at the amount for which it was sold by the mortgagee, $5,298.30, and allowed $1,000 damages for the detention thereof. This was evidently done under its finding that appellant had breached his agreement to lease his plantation to Thompson for the year 1928 and extend the time for the payment of the balance due under the mortgage accordingly, and, as already said, there is some substantial testimony in support of this finding, which cannot therefore be disturbed, without regard to the weight of the testimony thereon.

There is no merit in appellant's contention that the court erred in refusing to give his requested instruction No. 1, relative to the alleged oral contract for the rent of the place for the year 1928 being within the statute of frauds. It is true such oral contract was made in December, 1927, before, but it was for the lease of the place for the year 1928. An oral contract for the lease of lands for one year, to commence at a date subsequent to the

making thereof, is not within the statute of frauds. *Alexander-Amberg Co.* v. *Hollis,* 115 Ark. 589, 171 S. W. 915.

Neither could the entry into an entirely new contract by the parties for the lease of the lands for another year be regarded as without consideration, under the circumstances, even though appellee made payment of $2,800 of an indebtedness which he was already bound for in consideration thereof. If appellant derived no profit from the agreement, it would suffice if appellee, to whom the promise was made, suffered some detriment or disadvantage on account of it, which appears to have been the case. *Morgan* v. *Shackleford,* 174 Ark. 341, 295 S. W. 46; *Nothwang* v. *Harrison,* 126 Ark. 548, 191 S. W. 2; *Green* v. *Hollingshead,* 172 Ark. 578, 290 S. W. 51; *Engleman* v. *Brisco,* 172 Ark. 1088, 291 S. W. 795.

The court erred, however, in disregarding the undisputed testimony in the case and appellant's prayer for a judgment for the balance conceded to be due under his mortgage, which he was entitled to recover under the pleadings and prayer therefor, less any amount to which appellee could have shown himself entitled, under his claim to the right of possession of the property and damages for the detention thereof. The jury has found such amount to be as already set out, and the court should have entered judgment for appellant for the amount of the balance of the appellee's indebtedness to him under the mortgage, less the amount found to be due appellee for the value of the property replevined and the damages for its unlawful detention. *Brunswick-Balke-Collender* v. *Culberson,* 178 Ark. 957, 12 S. W. (2d) 903.

The judgment must accordingly be reversed, and, the case having been fully developed, judgment will be rendered here in appellant's favor for said balance due, in accordance with this opinion. It is so ordered.

In the case against appellee Farnsworth-Evans Company, as already stated, there was substantial testimony supporting the jury's finding that Thompson was author-

ized to make the sale of the cotton. Neither is there any merit in appellant's contention that the court erred in giving appellee's requested instruction No. 8, as follows:

"You are instructed that, in arriving at whether or not plaintiff authorized or consented for Thompson to sell the cotton from plaintiff's farm, you may take into consideration all the facts and circumstances in evidence, including the conduct, acts and statements of the parties had and made in reference thereto."

In *Beekman Lumber Company* v. *Kittrell*, 80 Ark. 228, 96 S. W. 988, the court said:

"It is true that, in an action against principal, the declarations or admissions of the agent are not competent to prove the agency; but this rule does not refer to the testimony of the agent, but to his unsworn declarations. An agency may be established by the testimony of an agent, as well as that of any other witness who has knowledge of the facts."

See also *Ayer-Lord Tie Company* v. *Young*, 90 Ark. 106, 117 S. W. 1080; *Concordia Ins. Co.* v. *Mitchell*, 122 Ark. 357, 183 S. W. 770; *Pine Bluff Heading Co.* v. *Bock*, 163 Ark. 237, 259 S. W. 408; *Oil City Iron Works* v. *Bradley*, 171 Ark. 45, 283 S. W. 362; *Southern Bauxite Co.* v. *Brown-Pearson Co.*, 172 Ark. 117, 288 S. W. 377; *General Motors* v. *Salter*, 172 Ark. 691, 290 S. W. 584.

Neither was error committed in striking out of appellant's requested instruction No. 1 the words "and received the proceeds from such sale," the instruction having told the jury that the value of the cotton may be recovered by the plaintiff, unless he authorized Thompson to sell the same and received the proceeds from such sale. The court told the jury, in appellee's requested instruction No. 1, that if they found from a preponderance of the evidence that the plaintiff "authorized and consented for the defendant Thompson to market and collect for the cotton, they would find for the defendant." This instruction is not in conflict with the instructions complained of, given as amended, and, if so, could not have been prejudicial to appellant.

If Thompson had the authority to sell the cotton of which he was in possession, as the jury found he had, it necessarily included the right to receive the sale price, regardless of his appropriation thereof. There is no question here of the indorsement by Thompson of a check drawn in favor of appellant, given in payment for the cotton, and the authorities relied upon in such case are not in point.

We find no reversible error in the record in this case, and the judgment will be affirmed. It is so ordered.