No. 13179

Supreme Court of Illinois

Kimball

vs.

Walker et al

71641

SUPREME COURT,

Third Grand Division.

No. 230.

Kimball
vs
Major

1319

Printed by Beach & Barnard, 14 S. Clark St.

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APRIL TERM, A. D. 1861.

Granville Kimball,
Plaintiff in Error.
vs.
Martin O. Walker and James Moore,
Defendants in Error.

ARGUMENT FOR THE PLAINTIFF.

In addition to the points already filed in this cause, and to the suggestions and authorities cited in the petition for rehearing, I propose to submit a few considerations:

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The question of jurisdiction I do not deem it necessary to discuss elaborately, for the reason:

First—That it is undisputed that the Court *may* entertain jurisdiction in a case like this, where no objection has been taken by plea or demurrer.

Second— If the Court *may* entertain jurisdiction, then it is submitted that this is a case which appeals strongly to the justice of this Court to exercise its equitable jurisdiction, that justice may be done between the parties; and, as suggested in the petition for rehearing in a court of law, we should be met with a plea of statute of limitations, and the whole claim of the complainant would probably be lost.

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I trust I shall be excused for here repeating the language of Chancellor Kent in *Underhill vs. Van Courtland*, 2 John. Ch. page 369, where he says in a similar case: "*It would be an abuse of justice, if the defendants were to be permitted to protract a litigation to this extent, and with the expense that has attended this suit, and then, at the final hearing, interpose with this preliminary objection.*"

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The next question I shall discuss is, that which grows out of the arbitration.

At the hearing before the arbitrator, Kimball (the plaintiff) insisted that the notes should be taken into consideration. The defendants objected; and the arbitrator excluded them from his consideration, "*because, in his judgment, they were not included in the submission.*"

On Abstract page 11, in Vernon's examination, he testifies as follows:

Interrogatory 15*th.*—In that adjudication, did you take into consideration and include in your award the notes heretofore spoken of?

Answer. — I *did not.*

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Ans. — He did, frequently.

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In answer to the 18th interrogatry, he says: "Kimball insisted that the notes should come into the adjudication. Moore and Walker said no, but gave no reasons."

Now, it is evident that the Arbitrator did not take the notes into consideration, *because he thought they were not embraced into the submission;* they were not, therefore, before him—they were not passed upon. It is like evidence offered to a jury, but excluded by the Court.

It is well settled that where a submission is made, be it ever so broad, matters not *passed* upon by the Arbitrator does not preclude the party from enforcing his claim for such cause of action in another way. It is as if there had been no arbitration, so far as that claim is concerned. This is fully sustained by the following authorities:

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It is said that the cases I have cited are all cases of deeds of conveyance; if this was so, it is no answer. The reason why this evidence is allowed is not because it varies or contradicts the deed; it does not vary or contradict the agreement; the contract or deed is evidence of its agreements or covenants, but it is put upon the ground that the acknowledgment of payment is a receipt,—no matter whether it is in the deed, or upon the back of the deed, or upon a separate piece of paper, it is still a *receipt*. If the evidence is admissible in case of a deed of conveyance, why not in any other deed? Is there any reason upon principle against it? It is not limited to deeds of conveyance.

In a bill of lading for goods, acknowledging to have received the goods in *good order*, it may be shown they were not in good order; this has been frequently decided; it is no part of the *contract*; it is not an agreement to do a thing—it is a receipt. Upon this point I beg leave to refer the Court to the authorities cited in my Points, heretofore filed.

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The rule in no sense conflicts with the doctrine, that a written agreement cannot be contradicted or varied by parol—the *agreement* is not varied nor contradicted, it is simply the *receipt* part of it, that is contradicted.

The rule is a familiar one and a salutary one, and is now sought to be narrowed and fretted away, to enable the defendants to practice a stupendous fraud.

How natural was this transaction to a simple minded man. Kimball is a confiding man,—he goes with his friend Moore to an attorney;

Moore says, I have become liable on these notes, now give me something to show for my interest; the counsel draws up an ordinary bill of sale; Kimball now asks for payment of the notes, and he now by his counsel turns upon him and says, the receipt cuts you off.

Is the law—the law to which the injured and the oppressed flee as a refuge from the spoiler, and the tribunal to which they appeal for justice — so unreasonable, so hard, as to send away the petitioner for relief, in disappointment and sorrow, while the offender may exult in its protection of his villainy?

Again, the appellee claims that the doctrine of estoppel applies to the plaintiff. If he is at liberty to show that he did not receive the money receipted on the bill of sale, then there can be no estoppel. The doctrine of estoppel, I supposed, applied to a case, where a party, by holding his peace, allowed a third party to do some act which he would not have done if the other party had asserted his claim. I am at a loss to know how that can apply here.

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It is also claimed that Moore paid Kimball in the due-bill and receipts, Ab. p. 321. This is another of the dishonest attempts to mislead and pervert the facts. To this, our first answer is, that the whole matter was *submitted to and passed upon* by the Arbitrator.

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Answer. — *I did*, as I understood them.

See Abstract, page 14.

DIRECT EX. RESUMED.—*Interrogatory* 1*st.* — State whether the three Exhibits 7, 8 and 9 were submitted to you by Mr. Moore, on the arbitration, for adjudication, and whether you passed upon them, and state such explanation in relation to the matter as you may be able to give.

Answer. — They were amongst the papers, the first statement I made, and I included them. In thinking over it, I came to the conclusion they should not be included, for the reason that I had charged Mr. Kimball with every dollar that Kimball, Moore & Co. and G. Kimball & Co. had ever received from all sources. Then I gave him credit for all the bills paid, and rejected those three amounts, for the reason that I believed they were included in the gross amounts I had charged to Mr. Kimball. I also rejected similar items against Mr. Moore in favor of Kimball, for the same reason. Mr. Moore, in talking with him, when the amounts were brought up, never pretended that he had ever put into the concern more than $1500, and then said I *did right in rejecting those items.*

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Such dishonest efforts to pervert the course of justice is enough to make the Genius of Justice veil her face with shame.

[NOTE.—In this interrogatory and answer, the witness refers to them as Exhibits 7, 8 and 9; they are so named as annexed to his deposition, Ab. p. 24. On page 32, they are annexed to Cutting's deposition as numbers 1, 2 and 3.]

Again, in answer to the second re-cross-interrogatory on Abstract page 15, Vernon says:

"I charged him (Kimball) with everything the company got from passengers, mails, extra services in carrying the mails, for all the stock that was disposed of from time to time, and with every dollar that the firm was owing to third persons, so far as I could find it out. I did not charge him for any moneys he had received from Moore, but allowed, as near as I could find out from Moore, to him (Moore) the amount which he paid accounts for."

It cannot be denied that these matters were *passed upon* by the Arbitrator, and, if so, his award upon them is conclusive.

It is very clear that the due bill and receipts were not for moneys due Moore individually, but were memorandums of what Kimball was to account for in settlement of the staging business.

Look at the due bill:

"Due James Moore, on settlement *third quarter* 1855, sixteen thousand nine hundred and ninety-four 98-100 dollars."

That is, Kimball is to account to him on settlement of the staging business for the third quarter 1855, &c.

Now, by turning to the account made by Vernon, he charges Kimball "To amount received for horses &c. sold, third quarter 1855, $959.50." See Rec. p. 86. On the Abstract this is put '53, instead of 1855; it is wrong in the Abstract.

On same page Kimball is charged "Fares collected, third quarter 1855, $13,291.76." Then on same page is this charge: "Amount for transporting mails third quarter 1854 to first quarter 1855, $69,219.24.'

In settling an account, as Vernon did, of over $500,000, we shall not pretend to show just how he arrived at his conclusions; we think his statement, that he passed upon those matters, and actually allowed them,

by charging Kimball the gross amount of everything the company received, should be satisfactory.

The next receipt is in these words: "Received from James Moore five thousand two hundred and forty two dollars 29-100, in cash items, to be returned, or accounted for on settlement of *fourth quarter* 1855."

By turning to Rec. page 86, the Court will see that Kimball was charged, for fourth quarter 1855, two sums, one of $1,817.30, and one of $26,398.08.

Now it is very evident that these receipts and due bill were mere memorandums between them, relating to the partnership matters.

Since the partnership matters were all settled by the arbitration, he has again got hold of those papers, and seeks to make a dishonest use of them.

At the arbitration, all parties understood them as partnership memorandums; Vernon so understood them, and so did Moore.

Vernon says, in answer to third cross-interrogatory, Ab. p. 15: "I don't believe it was money, at all. It was receipts of matters in partnership, passing from one to another; that is my belief. I don't *know*, otherwise than *Mr. Moore told me so.*" And yet these defendants seek to use these vouchers to defeat the recovery of an honest debt.

V.

By referring to the points heretofore filed on the part of the defendants, I find that they claim that Kimball, by his assignment to them, transferred his claim for moneys advanced to Moore & Walker, for their part of the capital stock, and cited the case of *Taylor vs. Coffing*, in 23 Ill.

My first answer to that is, that the contract does not assign his capital

stock in the concern. It was intended, and such, I think, is the interpretation of the contract, to sell his interest in all the "stage horses and mail contracts." It does not include, as in *Taylor vs. Coffing*, "debts, accounts, notes, books and papers," although plaintiff has never claimed payment for his part of the capital stock.

2. No such claim is made in the answer of defendants; there is no such issue by the pleadings.

3. This was an advance to Moore of one third, and an advance of a portion of Walker's share to him; so far as Kimball's own share (being one third) is concerned, he has never claimed it; but he claims the moneys he advanced to the other parties; it is claimed by defendants that these advances were not made to the firm, and were in no respects part of the partnership effects or assets, and therefore Walker and Moore are not jointly liable. Their own argument refutes the idea that those advances were any part of the partnership property. Kimball assigns his interest in the property of *Kimball, Moore & Co.* Now, the indebtedness of Moore and of Walker, for moneys advanced to them, were not partnership property, and were not assigned by Kimball to them. I think this a conclusive answer.

4. Another conclusive answer is this. The assignment was not an unconditional one, but it was agreed that an account was to be taken, and a settlement was to be made by William Vernon "of and concerning all moneys received by said Kimball belonging to said firm, and of and concerning all disbursements made by said Kimball for and on account of said firm; and all accounts between said late firm of Kimball, Moore & Co. and said Kimball are to be finally and fully settled by the decision of said Vernon," &c. Rec. 84–85.

Now, if these moneys were part of the partnership property, then they were embraced in the submission, and Vernon ought to have passed upon them; not having done so, complainant is entitled to recover the money in this action. If they were not embraced in the submission it is because they were not partnership property, and then they did not pass by the

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Argt for Plaintiff
in Error — on rehearing.

E. Van Buren
Atty for Plff in Error.

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It is very clear that the due bill and receipts were not for moneys due Moore individually, but were memorandums of what Kimball was to account for in settlement of the staging business.

Look at the due bill:

"Due James Moore, on settlement *third quarter* 1855, sixteen thousand nine hundred and ninety-four 98-100 dollars."

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Now, by turning to the account made by Vernon, he charges Kimball "To amount received for horses &c. sold, third quarter 1855, $959.50." See Rec. p. 86. On the Abstract this is put '53, instead of 1855; it is wrong in the Abstract.

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by charging Kimball the gross amount of everything the company received, should be satisfactory.

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Now it is very evident that these receipts and due bill were mere memorandums between them, relating to the partnership matters.

Since the partnership matters were all settled by the arbitration, he has again got hold of those papers, and seeks to make a dishonest use of them.

At the arbitration, all parties understood them as partnership memorandums; Vernon so understood them, and so did Moore.

Vernon says, in answer to third cross-interrogatory, Ab. p. 15: "I don't believe it was money, at all. It was receipts of matters in partnership, passing from one to another; that is my belief. I don't *know*, otherwise than *Mr. Moore told me so.*" And yet these defendants seek to use these vouchers to defeat the recovery of an honest debt.

V.

By referring to the points heretofore filed on the part of the defendants, I find that they claim that Kimball, by his assignment to them, transferred his claim for moneys advanced to Moore & Walker, for their part of the capital stock, and cited the case of *Taylor vs. Coffing*, in 23 Ill.

My first answer to that is, that the contract does not assign his capital

stock in the concern. It was intended, and such, I think, is the interpretation of the contract, to sell his interest in all the "stage horses and mail contracts." It does not include, as in *Taylor vs. Coffing*, "debts, accounts, notes, books and papers," although plaintiff has never claimed payment for his part of the capital stock.

2. No such claim is made in the answer of defendants; there is no such issue by the pleadings.

3. This was an advance to Moore of one third, and an advance of a portion of Walker's share to him; so far as Kimball's own share (being one third) is concerned, he has never claimed it; but he claims the moneys he advanced to the other parties; it is claimed by defendants that these advances were not made to the firm, and were in no respects part of the partnership effects or assets, and therefore Walker and Moore are not jointly liable. Their own argument refutes the idea that those advances were any part of the partnership property. Kimball assigns his interest in the property of *Kimball, Moore & Co.* Now, the indebtedness of Moore and of Walker, for moneys advanced to them, were not partnership property, and were not assigned by Kimball to them. I think this a conclusive answer.

4. Another conclusive answer is this. The assignment was not an unconditional one, but it was agreed that an account was to be taken, and a settlement was to be made by William Vernon "of and concerning all moneys received by said Kimball belonging to said firm, and of and concerning all disbursements made by said Kimball for and on account of said firm; and all accounts between said late firm of Kimball, Moore & Co. and said Kimball are to be finally and fully settled by the decision of said Vernon," &c. Rec. 84–85.

Now, if these moneys were part of the partnership property, then they were embraced in the submission, and Vernon ought to have passed upon them; not having done so, complainant is entitled to recover the money in this action. If they were not embraced in the submission it is because they were not partnership property, and then they did not pass by the

assignment. So, in either aspect of the case, the position of defendants is wholly untenable.

I have now gone hastily through this case. If I have shown an over-zealousness in this matter, it is because of the conviction I have of the justice of the plaintiff's claim, and because, if he does not obtain at the hands of this court a decree for the moneys he has thus actually paid for these men, the evening of his days must be clouded with want, while the men who have his money are revelling in wealth, acquired by the use of his money.

It will be seen that even according to Walker's own account of the matter, there is yet something due from him, and Moore has never paid a dollar.

As the litigation has been quite protracted, I beg leave to suggest to the Court that it should ascertain the amount, and have a final decree rendered in this court, instead of sending us back to take an account.

This seems to be peculiarly proper, as all the evidence that can be got is in the case.

E. VAN BUREN,

Solicitor for Complainant, for Appellant.

230 1858

Supreme Court

Granville Kimball

vs

Martin O. Walker et al

Argt for Plaintiff in Error on rehearing.

E. Van Buren

atty for Pltff in Error

Printed by Beach & Barnard, 14 S. Clark St.

SUPREME COURT

OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1861.

Granville Kimball,
Plaintiff in Error.

vs.

Martin O. Walker and James Moore,
Defendants in Error.

ARGUMENT FOR THE PLAINTIFF.

In addition to the points already filed in this cause, and to the suggestions and authorities cited in the petition for rehearing, I propose to submit a few considerations:

I.

The question of jurisdiction I do not deem it necessary to discuss elaborately, for the reason:

First—That it is undisputed that the Court *may* entertain jurisdiction in a case like this, where no objection has been taken by plea or demurrer.

Second—If the Court *may* entertain jurisdiction, then it is submitted that this is a case which appeals strongly to the justice of this Court to exercise its equitable jurisdiction, that justice may be done between the parties; and, as suggested in the petition for rehearing in a court of law, we should be met with a plea of statute of limitations, and the whole claim of the complainant would probably be lost.

The argument of the appellee, heretofore submitted in this case upon this point, it seems to me has no applicability to this case; instead of discussing the *right* of the Court to take jurisdiction, where the defendants have submitted to its jurisdiction by answer—have acquiesced to its jurisdiction—have litigated the whole case upon its merits for three years; and then at the hearing for the first time claim the right to avail themselves of a mere technical objection.

They discuss the question of *joint* liability; that question I shall hereafter present. I will here merely suggest that the question of *jurisdiction* does not depend on a joint liability; the Court may make such decree touching the rights and liabilities of each and all of the parties as they deem just and proper.

I trust I shall be excused for here repeating the language of Chancellor Kent in *Underhill vs. Van Courtland*, 2 John. Ch. page 369, where he says in a similar case: "*It would be an abuse of justice, if the defendants were to be permitted to protract a litigation to this extent, and with the expense that has attended this suit, and then, at the final hearing, interpose with this preliminary objection.*"

III.

The next question I shall discuss is, that which grows out of the arbitration.

At the hearing before the arbitrator, Kimball (the plaintiff) insisted that the notes should be taken into consideration. The defendants objected; and the arbitrator excluded them from his consideration, "*because, in his judgment, they were not included in the submission.*"

On Abstract page 11, in Vernon's examination, he testifies as follows:

Interrogatory 15th.—In that adjudication, did you take into consideration and include in your award the notes heretofore spoken of?

Answer. — I *did not.*

Int. 16th. — Did not Mr. Kimball, during the progress of that investigation, request that the notes should be taken into consideration by you?

Ans. — He did, frequently.

Int. 17th. — Please state why you excluded them.

Ans. — I excluded them because, in my judgment, they were *not included in the submission to me.*

In answer to the 18th interrogatry, he says: "Kimball insisted that the notes should come into the adjudication. Moore and Walker said no, but gave no reasons."

Now, it is evident that the Arbitrator did not take the notes into consideration, *because he thought they were not embraced into the submission;* they were not, therefore, before him—they were not passed upon. It is like evidence offered to a jury, but excluded by the Court.

It is well settled that where a submission is made, be it ever so broad, matters not *passed* upon by the Arbitrator does not preclude the party from enforcing his claim for such cause of action in another way. It is as if there had been no arbitration, so far as that claim is concerned. This is fully sustained by the following authorities:

Kyd on Awards 179–180.
2 Greenleaf's Ev. Sc. 78.
2 Starkie's Ev. 4 part, 139–140.
19 Ill. R. 415.
2 N. H. 26.
5 Mass. R. 334.

It would be a very hard rule indeed to conclude a party against enforcing a demand, which, without his fault, had been excluded by a Court from all consideration.

The plaintiff was anxious to have them passed upon by the Arbitrator. If it had been done, he would long since have had his money; for, at that time these defendants had never disputed his claim for the moneys paid upon these notes. It was not until astute counsel, under the influence of an elastic conscience, advised them that possibly, by urging technical objections, they might swindle him out of this money, that they conceived the unhallowed thought of making an attempt to cheat him out of some $29,000, the use of which these men have had for years, and out of which they have grown fabulously rich, while the plaintiff, in his old age, is left almost penniless.

III.

It is also claimed that that amount has been paid; a more impudent attempt to thwart justice has seldom been seen in courts of justice. If I use language that seems to be harsh, the Court will pardon me, for I admit I feel a burning indignation at the assumed sincerity with which an ingenious and studied effort is made to wrong the complainant in this case.

Now, if this money had been paid, how has it been paid? It certainly would have been an easy matter, in the answer, at least, to have stated how, when and where it was paid; instead of this, he merely says he has paid it.

On the trial he dodges about; at one time claims he paid it when Kimball gave him a bill of sale; at another time claims it was paid by the receipts.

It is not unfrequently the case that men, in practicing injustice, so over-act as to betray themselves.

The appellee's counsel says in his point heretofore submitted: "Moore paid the full consideration for his third of the property, and also advanced large sums of money to Kimball over and above." Now it is a curious fact that Moore never knew that, until his counsel told him of it. He never claimed anything of that sort in his answer. until after the

proofs were all taken; and at the hearing below, he amended his answer so as to claim a set-off; this was done to keep up an appearance.

Now, how was this money paid?

They claim that the bill of sale is evidence of payment. Record 90.

The testimony of Judge Lord, who drew that agreement, is very short and pointed. Rec. 65–66, he puts an end to that pretence,—he says *no money was paid.* "Moore said *he had made himself liable to pay his portion of the purchase-money and he should have a paper showing or acknowledging his interest.* I was then directed to draw this paper," &c. Now, that is just what we claim; the bill of sale was given because he had signed the notes; now when we come to collect the notes, he says: "Why, you acknowledged payment in the bill of sale."

To pretend that he paid the money when he gave that bill of sale is a shallow pretext, a naked falsehood, a high-handed attempt to rob the plaintiff of his earnings and make him a beggar.

When Kimball, at the arbitration, insisted that the notes should be taken into consideration, did Moore or Walker pretend they had been paid? Not at all; they knew it had not been paid; they objected to their going into the arbitration—why? They gave no reason, but the reason doubtless was, that they were liquidated, and there was no necessity of having an award upon them.

If they had been paid, they surely would have said so. They did not deny that they owed them, when Kimball wanted the Arbitrators to include them in his award.

Again, Vernon says (see Abstract, page 15) *Moore never pretended that he had ever put into the concern more than* $1,500. This is in direct contradiction with the pretense that he had paid these notes. If he had paid these notes, he would have claimed it. If he paid the notes, why did he not take them up?

I beg leave to refer the Court to the suggestions in my Points, heretofore filed, on this point.

Again, it it is claimed that the receipt mentioned in the bill of sale is *conclusive* evidence of the payment of the money. The cases cited in my points conclusively establish the right to show that the money was not paid.

It is said that the cases I have cited are all cases of deeds of conveyance; if this was so, it is no answer. The reason why this evidence is allowed is not because it varies or contradicts the deed; it does not vary or contradict the agreement; the contract or deed is evidence of its agreements or covenants, but it is put upon the ground that the acknowledgment of payment is a receipt,—no matter whether it is in the deed, or upon the back of the deed, or upon a separate piece of paper, it is still a *receipt*. If the evidence is admissible in case of a deed of conveyance, why not in any other deed? Is there any reason upon principle against it? It is not limited to deeds of conveyance.

In a bill of lading for goods, acknowledging to have received the goods in *good order*, it may be shown they were not in good order; this has been frequently decided; it is no part of the *contract*; it is not an agreement to do a thing—it is a receipt. Upon this point I beg leave to refer the Court to the authorities cited in my Points, heretofore filed.

The counsel for appellees says: "A receipt containing an agreement, condition or stipulation between the parties, is in the nature of a contract, and its stipulations or conditions cannot be varied by parol." That is true,—that is, that part which contains an *agreement* cannot be varied, but that part which acknowledges the *amount received* can be. That authority sustains my position.

The rule in no sense conflicts with the doctrine, that a written agreement cannot be contradicted or varied by parol—the *agreement* is not varied nor contradicted, it is simply the *receipt* part of it, that is contradicted.

The rule is a familiar one and a salutary one, and is now sought to be narrowed and fretted away, to enable the defendants to practice a stupendous fraud.

How natural was this transaction to a simple minded man. Kimball is a confiding man,—he goes with his friend Moore to an attorney;

Moore says, I have become liable on these notes, now give me something to show for my interest; the counsel draws up an ordinary bill of sale; Kimball now asks for payment of the notes, and he now by his counsel turns upon him and says, the receipt cuts you off.

Is the law—the law to which the injured and the oppressed flee as a refuge from the spoiler, and the tribunal to which they appeal for justice — so unreasonable, so hard, as to send away the petitioner for relief, in disappointment and sorrow, while the offender may exult in its protection of his villainy?

Again, the appellee claims that the doctrine of estoppel applies to the plaintiff. If he is at liberty to show that he did not receive the money receipted on the bill of sale, then there can be no estoppel. The doctrine of estoppel, I supposed, applied to a case, where a party, by holding his peace, allowed a third party to do some act which he would not have done if the other party had asserted his claim. I am at a loss to know how that can apply here.

IV.

It is also claimed that Moore paid Kimball in the due-bill and receipts, Ab. p. 321. This is another of the dishonest attempts to mislead and pervert the facts. To this, our first answer is, that the whole matter was *submitted to and passed upon* by the Arbitrator.

It is a well known principle of law that an award is *conclusive as to all matters* PASSED UPON *by the Arbitrators.* It is deemed unnecessary to cite authorities to this point.

Was it passed upon?

In Vernon's deposition, after testifying that he excluded the notes, he testified as follows, Ab. p. 12:

Interrogatory 20th. — Did you, in that adjudication, take into consideration all other accounts growing out of the partnership?

Answer. — *I did*, as I understood them.

See Abstract, page 14.

DIRECT EX. RESUMED.—*Interrogatory* 1*st.* — State whether the three Exhibits 7, 8 and 9 were submitted to you by Mr. Moore, on the arbitration, for adjudication, and whether you passed upon them, and state such explanation in relation to the matter as you may be able to give.

Answer. — They were amongst the papers, the first statement I made, and I included them. In thinking over it, I came to the conclusion they should not be included, for the reason that I had charged Mr. Kimball with every dollar that Kimball, Moore & Co. and G. Kimball & Co. had ever received from all sources. Then I gave him credit for all the bills paid, and rejected those three amounts, for the reason that I believed they were included in the gross amounts I had charged to Mr. Kimball. I also rejected similar items against Mr. Moore in favor of Kimball, for the same reason. Mr. Moore, in talking with him, when the amounts were brought up, never pretended that he had ever put into the concern more than $1500, and then said I *did right in rejecting those items.*

Here, then, these matters were *passed upon*, and he was actually allowed them, by charging Kimball the gross amounts. Moore said the Arbitrator did right in not charging Kimball with them again, and yet now his counsel claims that they should be charged to Kimball again.

Such dishonest efforts to pervert the course of justice is enough to make the Genius of Justice veil her face with shame.

[NOTE.—In this interrogatory and answer, the witness refers to them as Exhibits 7, 8 and 9; they are so named as annexed to his deposition, Ab. p. 24. On page 32, they are annexed to Cutting's deposition as numbers 1, 2 and 3.]

Again, in answer to the second re-cross-interrogatory on Abstract page 15, Vernon says:

"I charged him (Kimball) with everything the company got from passengers, mails, extra services in carrying the mails, for all the stock that was disposed of from time to time, and with every dollar that the firm was owing to third persons, so far as I could find it out. I did not charge him for any moneys he had received from Moore, but allowed, as near as I could find out from Moore, to him (Moore) the amount which he paid accounts for."

It cannot be denied that these matters were *passed upon* by the Arbitrator, and, if so, his award upon them is conclusive.

It is very clear that the due bill and receipts were not for moneys due Moore individually, but were memorandums of what Kimball was to account for in settlement of the staging business.

Look at the due bill:

"Due James Moore, on settlement *third quarter* 1855, sixteen thousand nine hundred and ninety-four 98-100 dollars."

That is, Kimball is to account to him on settlement of the staging business for the third quarter 1855, &c.

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2. No such claim is made in the answer of defendants; there is no such issue by the pleadings.

3. This was an advance to Moore of one third, and an advance of a portion of Walker's share to him; so far as Kimball's own share (being one third) is concerned, he has never claimed it; but he claims the moneys he advanced to the other parties; it is claimed by defendants that these advances were not made to the firm, and were in no respects part of the partnership effects or assets, and therefore Walker and Moore are not jointly liable. Their own argument refutes the idea that those advances were any part of the partnership property. Kimball assigns his interest in the property of *Kimball, Moore & Co.* Now, the indebtedness of Moore and of Walker, for moneys advanced to them, were not partnership property, and were not assigned by Kimball to them. I think this a conclusive answer.

4. Another conclusive answer is this. The assignment was not an unconditional one, but it was agreed that an account was to be taken, and a settlement was to be made by William Vernon "of and concerning all moneys received by said Kimball belonging to said firm, and of and concerning all disbursements made by said Kimball for and on account of said firm; and all accounts between said late firm of Kimball, Moore & Co. and said Kimball are to be finally and fully settled by the decision of said Vernon," &c. Rec. 84–85.

Now, if these moneys were part of the partnership property, then they were embraced in the submission, and Vernon ought to have passed upon them; not having done so, complainant is entitled to recover the money in this action. If they were not embraced in the submission it is because they were not partnership property, and then they did not pass by the

assignment. So, in either aspect of the case, the position of defendants is wholly untenable.

I have now gone hastily through this case. If I have shown an over-zealousness in this matter, it is because of the conviction I have of the justice of the plaintiff's claim, and because, if he does not obtain at the hands of this court a decree for the moneys he has thus actually paid for these men, the evening of his days must be clouded with want, while the men who have his money are revelling in wealth, acquired by the use of his money.

It will be seen that even according to Walker's own account of the matter, there is yet something due from him, and Moore has never paid a dollar.

As the litigation has been quite protracted, I beg leave to suggest to the Court that it should ascertain the amount, and have a final decree rendered in this court, instead of sending us back to take an account.

This seems to be peculiarly proper, as all the evidence that can be got is in the case.

E. VAN BUREN,

Solicitor for Complainant, for Appellant.

230 — 158

Supreme Court.

Granville Kimball
vs
Martin O. Walker
Et al.

Arg'd for Plaintiff
in Error on rehearing.

E. Van Buren
Atty for Plff in Error.

To the Honorable the Judges of the Supreme Court of the State of Illinois.

The petition of Granville Kimball, respectfully shows that he asks this honorable Court for a rehearing of the case decided by this Court, at its last term in Springfield, in which Granville Kimball, your petitioner, was complainant, and Martin O. Walker and James Moore were defendants.

The decision of your Honors seems to be based upon the ground that the complainant had a remedy at Law. Your petitioner begs leave to state, that when the suit was brought on the Chancery side of the court it was so brought after great deliberation by his counsel, as to the court in which the action should properly be brought; and it was finally determined that the court of Chancery would be the most proper court, because the matters were so connected with the partnership transactions, that perhaps an objection to an action at Law might be sustained, and it was supposed to come within the cases of Bracken vs Kennedy 2 Scam R. 558-563-564. and Davenport vs Gear 2 Scam R 495-498.

2. Because there might, perhaps, be

some doubt, whether the notes were not embraced in the agreement of submission, and if so, it was supposed the court of Chancery would be the proper forum.-

8. Because it was supposed that in an action for contribution a court of Chancery had concurrent jurisdiction with the court at law.- And your petitioner would refer your Honors to the case of Whaley Estate 1 Maryland Chan. Decisions, 81. where it is said. "The "third obligor, who has been compelled by "the creditor to pay a sum, exceeding his "one third, will be allowed at once in Equity, "and without circuity, to go against the "party thus supposed to have received "two thirds of the consideration of the debt. "for such excess."

Your petitioner further shows, that no objection having been taken to the jurisdiction, either by demurrer or plea, the defendants have no right to make it on the hearing.

1 Daniels Chan. Practice. 686.
2 John. Chan. R. 369.
4 John. Ch R. 296.
23 Pick 158.
2 Page Ch R 509.

But I understand your Honors to admit the general rule to be, that the objection comes too late, when made for the first time at the hearing, as decided in the cases above cited; but that although the defendant has no right to make the objection, and that the Court may entertain Jurisdiction, yet it may also on its own suggestion, refuse to entertain such Jurisdiction, unless some good reasons are shown why the Court should grant relief.-

Your petitioner begs leave, respectfully to submit the following considerations:-

It is often difficult for counsel to determine whether the party has a remedy at law, or in Equity, and are consequently often embarrassed as to the forum they shall choose.- This difficulty in many of the States has induced the Legislatures to abolish the Court of Chancery, and all distinctions of actions.

Is it then right that the defendant may withhold his objection to the technical question of Jurisdiction, and invite the party to a long & expensive

litigation upon the merits, and then, at the court of last resort, throw him out of Court.-

I submit that in the language of Chancellor Kent in the case of Underhill vs Van Courtland 2 Johns Ch page 369. "It would be an abuse of "justice if the defendants were to be "permitted to protract a litigation to "this extent, and with the expense that "has attended this suit, and then at "the final hearing, interpose with this "preliminary objection."

The bill in this case was filed three years ago: the suit has been prosecuted at great expense: a large number of witnesses have been examined and both parties have tried it upon its merits.-

It is conceded that the Court has at least the right to overrule the objections to the Question of Jurisdiction as it was made too late; and we submit whether it would not better subserve the ends of Justice, and promote what is always desirable,- a speedy determination of the rights of parties,- to entertain the suit, and adjudicate those

rights, particularly as the Courts have almost uniformly, under like circumstances, entertained Jurisdiction. And inasmuch as the right to entertain jurisdiction is well established by an unbroken current of authority, instead of throwing the parties back upon another long and expensive litigation to obtain the same end.!

Your petitioner also submits to this Court, that without discussing the right of the Court to throw him out of Court upon a point which the defendant cannot raise upon the hearing, and where the Court unless the objection is set up by demurrer or plea, has Jurisdiction, he has been unable to find any case where the Court has acted upon such right, particularly when the consequence would be great delay and expence.—

Your petitioner will also submit another reason why the Court should hold on to its jurisdiction in this case: that is that the monies paid by Kimball upon the notes in question, were paid more than five years ago.— It does not appear precisely when the money was paid, but the notes were given in July 1854 Vernon says. (page 11. of abstract.) to Interrogatory 12 he had the notes till October 1. 1855.. In answer

to interrogatory 21. he says Kimball paid them &c they were in fact paid in October 1855. when Vernon gave them to Kimball

Now if an action at law should be brought the plaintiff may, perhaps, be defeated upon the plea of the Statute of limitations. If the defendant had demurred or pleaded to the jurisdiction, the complainant might have taken such a course as to save his claim against the Statute of limitations

Shall the defendant be permitted to sleep upon a technical objection for three years: invite the complainant to a trial upon the merits; wait till the Statute of limitations bars an action at law: and then drive him out of court upon a technical objection which is waived by his own conduct?

Such a course would be disastrous in the extreme; would result in a ruinous loss to the complainant of the monies he has actually paid for these defendants, and would teach suitors the sad lesson that while the law keeps "the word of promise to the ear, it breaks it to the hope."

Your petitioner begs leave further to state, that in the Circuit Court, the bill was dismissed without prejudice, in the decision of the Supreme Court, the judgment below is reversed, and the bill dismissed: if this is allowed to stand, will it not be a bar to a suit at law? So much of the decree as dismisses is reversed. Therefore submit it is a final judgment that would bar an action at law.

Your petitioner therefore, believing that some of the reasons above stated, in the vast amount of business crowding upon your Honors attention, may have escaped the consideration of the court, begs leave to submit the above considerations, and respectfully asks the court to grant the complainant a rehearing of this cause

Feby 26 1861

E. Van Buren
Sol^{r} for Complt^{t} &
Petitioner

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Supreme Court of the State of Illinois

Granville Kimball

vs

Martin O Walker
et al

Petition for Rehearing

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allowed

E VanBuren
Compl's Sol'r

To the Honorable the Judges of the Supreme Court of the State of Illinois

The petition of Granville Kimball respectfully shows that he asks this honorable Court for a rehearing of the case decided by this Court at its last term in Springfield, in which Granville Kimball, your petitioner, was complainant and Martin C. Walker and James Moore were defendants, —

The decision of your Honors seems to be based upon the ground that the complainant had a remedy at law. — Your petitioner begs leave to state that when the suit was brought on the Chancery side of the Court, it was so brought after great deliberation by his counsel, as to the court in which the action should properly be brought: and it was finally determined that the Court of Chancery would be the most proper court because the matters were so connected with the partnership transactions, that perhaps an objection to an action at law might be sustained, and it was supposed to come within the cases of Bracken vs Kennedy 2 Scam R 558. — 563 — 564, and Davenport vs Gear. 2 Scam R 495 — 498, —

2d Because there might perhaps, be some doubt whether the notes were not embraced in the agreement of submission, and if so, it was supposed the Court of Chancery would be the proper forum. —

3. Because it was supposed that in an action for contribution, a court of Chancery had concurrent jurisdiction with the court at law:- and your petitioner would refer your Honors to the case of Wheeler estate - 1 Maryland Chan Decisions 80.- where it is said, "the third obligor, who "has been compelled by the creditor, to pay a sum ex- "ceeding his one third, will be allowed at once, in Equity, "and without circuity, to go against the party, thus "supposed to have received two thirds of the consideration "of the debt, for such excess."

Your petitioner further shows that no objection having been taken to the jurisdiction, either by demurrer or plea, the defendants have no right to make it on the hearing

1 Dguiels Chan Practice 636
2 Johns Chan R 369
4 Johns Ch R 290.
23 Pick 153
2 Paige Chan R 509.—

But I understand your Honors to admit the general rule to be, that the objection comes too late when made for the first time at the hearing, as decided in the cases above cited; but that although the defendant has no right to make the objection, and that the court may entertain jurisdiction, yet it may also, on its own suggestion, refuse to entertain such jurisdiction unless some good reasons are shown why the Court should grant relief.—

Your petitioner begs leave respectfully to submit the

following considerations,——

It is often difficult for counsel to determine whether the party has a remedy at law, or in equity, and are consequently often embarraked as to the forum they shall choose.- This difficulty in many of the States has induced the Legislature to abolish the Court of Chancery, and all distinctions of actions.- Is it then right that the defendant may withhold his objection to the technical question of jurisdiction, and invite the party to a long and expensive litigation upon the merits, and then, at the court of last resort, throw him out of Court?

I submit that in the language of Chancellor Kent in the case of Underhill vs Van Cortland 2 Johns Ch. page 369, "It would be an abuse of justice, if "the defendants were to be permitted to protract a litiga- "tion to this extent, and with the expense that has attended "this suit, and then, at the final hearing, interpose with "this preliminary objection"

The bill in this case was filed three years ago:— the suit has been prosecuted at great expense; a large number of witnesses have been examined, and both parties have tried it upon its merits.- It is conceded that the court has at least the right to overrule the objections to the question of jurisdiction, as it was made too late: and we submit whether it would not better subserve the ends of justice and promote what is always desirable— a speedy

determination of the rights of parties — to entertain the suit & adjudicate those rights. particularly, as the Courts have almost uniformly, under like circumstances entertained jurisdiction, and inasmuch as the right to entertain jurisdiction, is well established by an unbroken current of authority, instead of throwing the parties back upon another long and expensive litigation to obtain the same end. —

Your petitioner also submits to this Court that without discussing the right of the Court to throw him out of Court upon a point which the defendant cannot raise upon the hearing, and when the Court, unless the objection is set up by demurrer or plea, has jurisdiction, he has been unable to find any case where the Court has acted upon such right, particularly, when the consequence would be great delay and expense. —

Your petitioner will also submit another reason why the Court should hold on to its jurisdiction in this case: that is, that the monies paid by Kimball upon the notes in question were paid more than five years ago. — It does not appear precisely when the money was paid, but the notes were given in July 1854. —

Vernon says (page 11 of abstract.) to interrogatory 12 he had the notes till October 1, 1855. — In answer to interrogatory 21. (page 11) he says. Kimball paid them &c. — They were, in fact, paid in October 1855, when Vernon gave them to Kimball

Now if an action at law should be brought, the

plaintiff may perhaps, be defeated upon the plea of the Statute of Limitations. If the defendant had demurred, or pleaded to the jurisdiction, the complainant might have taken such a course as to save his claim against the Statute of Limitations. — Shall the defendant be permitted to sleep upon a technical objection for three years, - invite the complainant to a trial upon the merits: wait till the statute of limitations bars an action at law, and then drive him out of Court upon a technical objection, which is waived by his own conduct? - Such a course would be disastrous in the extreme, would result in a ruinous loss to the complainant of the monies he has actually paid for these defendants, and would teach suitors the sad lesson that while the law keeps, "the words of promise to the ear, it breaks it to the hope"

Your petitioner begs leave further to state that in the Circuit Court the bill was dismissed without prejudice, in the decision of the Supreme Court, the judgment below is reversed, and the bill dismissed: if this is allowed to stand, will it not be a bar to a suit at law? So much of the decree as ~~reverses~~ dismisses, is reversed, therefore I submit it is a final judgment, that would bar an action at law.) —

Your petitioner therefor, believing that some of the reasons above stated in the vast amount of business crowding upon your Honors attention, may have escaped

the consideration of the Court. begs leave to submit the above considerations, and respectfully asks the Court to grant the complainant a rehearing of this cause

Febry 26, 1861.

E Van Buren

Solr for Compls & Petitioner

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Supreme Court of the State of Illinois

Granville Kimball

vs

Martin O. Walker
et al

Petition for Rehearing

I admit service of a copy of the within petition & of notice of filing same at the first term of this Court this 26 May 1861

W B Scates
Atty for Deft

E Van Buren
Compl[illegible] Sol[illegible]

Filed Mar [illegible] 1861
[illegible] Holland