No. 14434

Supreme Court of Illinois

Brown

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vs.

Walker

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 206

Brown
vs
Miller
1863

14434

In the Supreme Court of Illinois
Third Grand Division.
April Term 1863.

James Brown and
James Hollingsworth
Defendants in Error.

ads

Martin O. Walker.
Plaintiffs in Error.

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

The defendants in Error submit the following petition for a rehearing in this case:

The facts in this case are so fully proved as to admit of no controversy. They may be briefly stated as follows:

On the thirteenth day of March A.D. 1858 Thomas Shergold was the owner of a brick building on Randolph street, in the City of Chicago. A. J. Hayward and Martin O. Walker each were the owners of two adjoining brick buildings. On that day Shergold acting for himself and professing to act for A. J. Hayward and M. O. Walker, signed the following instru-

ment in writing, the defendants in Error also signing on their part;

"We, the undersigned, agree to raise the five buildings east and adjoining Mr Brown's on the north side of Randolph ~~Street~~, between Dearborn and State Streets, up to the required grade on said street; also to Excavate and take care of said dirt, so that there shall be no damage to arise against said owners of the aforesaid block, or any obstruction that might be made by raising and Excavating under said block of buildings; also will take care of all water and gaspipes, so that there shall be no damage arise from the aforesaid pipes, and will perform and carry out with safety Every part or parcel of said block in as good a manner or condition as the block west that was raised for Mr Newhall, & will also agree that it shall be completed by the 30th day of April 1858. for the consideration of thirty five hundred dollars. to be paid as follows one half of the whole amt. when the buildings are raised to their required height & the other half of the amt. at the Expiration of six months from the above payment, we will faithfully perform the above requirements according as is required.

In witness thereof, we set our hands & seal this 13th day of March 1858.

James Brown (Seal)
James Hollingsworth (Seal)
Thos Shergold for himself }
A. J. Hayward, M. O. Walker } (Seal)

Shergold supposed himself authorized to sign the Contract for Walker, and the defendants in Error supposed it binding upon him. They proceeded at once and raised the buildings to grade. After the work was done Walker denied the authority of Shergold to execute the Contract for him, and repudiated it altogether. He was then sued upon the Contract, which was set forth in haec verba, and he pleaded non est factum, and made oath to his plea.

Vide page 12 of abstract, second Cross Examination of Thomas Shergold.

Also. page 6 of abstract, setting forth the pleadings in the suit on the contract, and Walker's affidavit to his plea of non est factum.

It is conceded by both parties in this suit, that Walker was not bound by that contract:

First. Because Shergold had no sufficient legal authority to execute a sealed instrument on behalf of Walker.

Second. Because Shergold had no authority to execute a joint contract binding Walker to pay an entire sum for improvements on his neighbor's property as well as his own.

Third. Walker has sworn that he was no party to that contract, and we have a right to accept his sworn statement as true.

Fourth. His counsel in the third point of their printed argument, page 10, declare that "Walker was not a party to it."

It is in proof that Walker was present during the performance of the service, did not object to it, employed a mason to do the necessary mason work, and previously told Shergold to make a contract for him.

Vide. testimony of Wm F. Otto. page 3 of abstract
" " " C. R. Adams, same page
" " " Cornelius Price, page 4.
" " " Thos Shergold " 12.

The work was well done, and completed within the time specified. On this point there is no controversy.

Your honors have decided that the only remedy of the defendants in Error is upon the written contract by action against

Shergold who assumed without sufficient authority to execute a sealed instrument, but who had full authority to make a simple contract for the plaintiff in error. The opinion proceeds upon the principle, for the first time asserted it is believed, that an express contract with any agent who did not bind his principal and to whom exclusive credit was not given and who did not intend or profess to bind himself and supposed he gave the obligation of the principal, is inconsistent with and excludes any implied promise by such principal springing from the receipt of the Consideration.

We are satisfied that the decision was made under some misapprehension of the facts of the case, and as this question was not argued by Counsel for the defendants in Error, and it is such manifest and Extreme injustice to charge the agent with a debt enuring to the benefit of the principal solely, we respectfully ask a rehearing upon this point.

In the opinion on file it is said "as in physics two solid bodies cannot occupy the same space at the same time, so in law and common sense there cannot be an Express and an implied contract for the same thing, Existing at the same time. This is an axiomatic truth. It

is only when parties do not expressly agree that the law interposes and raises a promise."

Now as a general rule this is undoubtedly stated with precision, but it is not true upon principle or authority that an express contract by an agent excludes the implied contract of the principal springing from his receipt and enjoyment of the consideration. In such a case the principal is liable on an implied assumpsit, unless exclusive credit is given to the agent.

Tiernan vs Andrews 4 Washington 474
" " " " " 565
The Bank of Rochester vs Monteath 1 Denio 402. 406
Comly vs McBride 4 Wharton 526
The Merchants Bank of Macon vs The Central Bank of Georgia 1 Kelly 418. 428
Dunlap's Paley 248 and note

The case of Allen vs Coit, 6 Hill 318 illustrates the ground upon which there is a right of recourse against the principal, viz: his interest in the consideration.

The defendant's agent drew a bill in his own name to the plaintiff's order on some of the defendants, which was accepted and discounted

at a bank, and the proceeds applied to the defendant's use. Held, that that the plaintiff could not recover on the bill as all their names were not on the bill, but could recover for money paid to their use.

The case of Sherman vs The New York Central Railroad, 22 Bar. 229 is paralled in all respects with the case before the Court.

A contract was made for the sale of wood to the N. Y. Central Railroad, and signed and sealed by E. Sandlot, who had verbal authority and professed to act for the Company. It was held that the contract was not binding on the agent as he did not intend or profess to contract for himself, and had verbal authority from the defendant, — not binding on the defendant as it was not Executed in its name. But it was held that the plaintiff could recover upon the Common Counts for wood sold and delivered.

Now in the case before the Court there can be no pretence that Sherwald professed or intended to bind himself to pay for the improvements to be made on Walker's land. He Erred in supposing that he had authority to Execute a sealed instrument, and did not bind his principal by the Contract, and perhaps

having no authority to sign such a contract he hds bound himself, but does it exclude all liability on the part of the principal? This is the only question in the case.

The Court say in the opinion on file "The question for our consideration comes up on the refusal of the Court to give the following instruction asked for by the plaintiff in error If the jury believe from the Evidence that the plaintiffs Entered into a contract in writing and under seal, with Thomas Shergold and others - the contract read in Evidence - and Performed the work sued for under said Contract, then the jury will find for the defendant."

Now the objection to this instruction is that it does not leave to the jury the question whether Exclusive Credit was given to ~~the jury~~ Shergold under the Contract. This is especially a question for the jury.

Pentz	vs. Stanton	10 Wen. 271
Bentley	" Griffin	5 Taunt. 356.
Leggat	" Reed	1 Car. & Payne 16
Tobey	" Holmes.	10 Conn. 500. 510
Cunningham	" Soules	7 Wend. 106.
Debee	" Robert	12 " 413. 417
Scott	" Messick	4 Monroe 535-6

Wilkins &c vs Duncan	2 Littell	168.
Hudson " Wilkins	5 do.	196
Presbyterian Church vs Manson &c.	4 Randolph.	197
Andrews vs Allen et al	4 Harrington	452.
Longbottom " Rodgers	2 Manning Unrep.	427

Supreme Court of Illinois

James Brown et al
Defts in Error
vs
Martin O. Walker
Pff in Error

Petition for Rehearing.

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S Sclavin
Clk

Gallup & Litchfield
Attys