No. 13319

Supreme Court of Illinois

Waughop

vs.

Weeks, et al

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SUPREME COURT,

JOHN W. WAUGHOP,
Appellant,
vs.
BENJAMIN WEEKS and
CALEB D. WEEKS,
Appellees.

APPELLANT'S POINTS.

I.

The Court, against the objection of defendant below, permitted the plaintiffs to call Carter & Randall, architects, and prove by them, that certain work claimed by plaintiffs as extra work, did not constitute a mere change of design, but was in fact extra work. (See abstract, pages 7 and 8.) This was a fatal error. The parties by their contract, had agreed upon a particular person and mode of determining that question. (Abstract page 2.) The duties of the superintendent consisted, among other things, "in giving on demand any certificates that the contractor may be entitled to, and *settling all deductions of or additions to the contract price, which may grow out of alterations of the design*, after the same is declared to be contract, *also determining the amount of damages which may accrue from any cause*," &c. (Rec. p. 15.) "The owner reserves the right to alter or modify the design, and add to or diminish the contract price; *the difference to be adjusted as provided above.*" (Rec. page 15.)

It is absurd to claim that the superintendent is not the chosen arbiter to determine what is and what is not an alteration of the design. He is "to settle all deductions of or additions to the contract price which *may grow out of alterations of the design.*" He is the sole judge as to what *is* an alteration of the design, what *grows out of* such alteration, and whether it adds to or diminishes from the contract price. The owner expressly reserved the right to alter the design, diminish from or add to the contract price; and that the difference should be adjusted as provided above, viz: by the superintendent.

He never agreed that the witness, Carter or Randall, however capable or honest they might be, should determine any of those matters.

The cases of *McEvoy v. Long et al.* 13 Ill. 147 and
Canal Trustees v. Lynch, 5 Gilm. 526, are decisive of this point.

But it is claimed by the appellees that the error is cured by the Court striking out the evidence. This is not true; the Court struck out the evidence as to one item only, viz: the cornice or center pieces. The plaintiffs below did not withdraw any of the other items, but on the contrary proved the value of the pressed brick (Rec. p. 38); so also of the coping. (Rec. pp. 33, 38.) So also of taking down chimney. H. B. Weeks testified that it was worth $50—(p. 34)—and all of these items were submitted to the jury.

Can this Court say, that by legal necessity the admission of this illegal evidence could do no injury and therefore is no cause of reversal? The safer rule is that, "when the error is in the admission of illegal evidence which bears in the least degree on the qustion in issue, it cannot be disregarded."

Worrell v. Parmelee, 1 Comstock, 519.
The People v. Wiley, 3 Hill, 194, 214.

II.

The certificates given in evidence, were not such final certificates, as contemplated by the contract.

Beside the provisions of the contract above cited and which provided that the superintendent was to determine the amount of the damages which might accrue from any cause, the covenant of defendant below to pay for the work, is upon the express condition that the work was done *to the full and complete satisfaction of Wm. W. Boyington or his Assistant Superintendent*, and the balance of fifteen per cent. was payable upon the completion of the contract, provided *that the superintendent should certify in writing that they* (contractors) *were entitled thereto.*

The object of this last provision was obviously to keep the said balance in abeyance, subject to the decision of the superintendent upon every point in the job, upon which the right to the money in any wise depended.

To be *entitled* to a payment of money, is to have the right to demand and receive it. To certify that they had a right to the money, necessarily implies the power to determine and fix the amount; which would involve the finding of the amounts paid on the job—the deduction from or additions to the contract price, and any loss the owner might have sustained by reason of defective work, or the non-performance of the contract, as to time. In short, the superintendent at the close of the transaction, was to certify to the owner how much the contractors were to receive.

That such was the intention of the parties, reference to the provision of the contract, will make too clear to be questioned.

The right to alter or modify a design—to add to or diminish from the contract price, is expressly reserved to the owner; and the difference so caused, is to be determined,—by whom? the parties? the owner? No: by the superintendent; who is also to determine *the amount of damages that may accrue from any cause.* Then at the end of the contract is reserved a certain per centage kept in abeyance, as we say, subject to all the foregoing provisions. Who will question but that such per centage may be more or less than 15 per cent. as the superintendent shall under all the circumstances determine? It may be increased by additions, it may be diminished by imperfect work, delays or some other cause of damage; all of which is to be determined by the superintendent. Now with what propriety can the contractor, under the provisions of this contract, present to the owner certificates which specify no amount whatever, and demand payment? How can he know what he should pay? He has no right to decide upon these additions or deductions, because he has agreed that the superintendent shall decide them. The contractor has no business to make up an account and insist upon it for the same reason. The whole substance of the matter is, that the owner has covenanted to pay only upon condition that he is presented with the certificate of the superintendent in writing to the effect that the contractor is entitled to the 15 per cent. or more or less as the case may be, and without that he cannot be put in default.

U. S. v. Robeson, 9 Peter, 319.
Morgan v. Birnie, 9 Bing. 672.
Worsley v. Wood, 6 Term R. 710.

The Court will also see authorities cited in the argument filed in the case of *John R. Mills v. the same Appellees*, wherein this same question is likewise involved.

But this point is clear from the very language of the contract: "And the balance, fifteen per cent., will be paid in full on the completion of the contract; *Provided*, the said superintendent shall certify in writing that they are entitled *thereto.*" What does the word *thereto* refer to, unless to the balance of fifteen per cent.? Is there any such certificate proved in this case? That the certificate of the 25th October, 1858, was not

intended to be final is too clear for question. The superintendent does not pretend to fix the amount of damage for the delay. He merely says that the owner is entitled to a fair rent, and after deducting that and some other things, he tells the Weekes that they will then be entitled to the balance, *if any*, due according to contract.

The other certificates make no reference to the balance whether it is to be fifteen per cent. or more, or less. They are no more final certificates than was that in the case of *Birnie v. Morgan*, 23, E. C. L. 414, above cited.

III.

The Court erred in overruling the motion for a new trial.

1. Because no cause of action was proved. There was no proof that the work in question was done to the full and complete satisfaction of the superintendent.

Butler v. Tucker, 24 Wend. 446.

2. The plaintiffs could not recover under the common counts; the contract was neither performed nor rescinded. It was the duty of the plaintiffs below, and part of their contract to prove the requisite certificates, and to show full performance of the contract, or a sufficient excuse.

5 Gill. 526.
15 Wend. 89, 90, 92.

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Caleb D. Weeks

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L. Leland

Clerk

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