


No. 14206

Supreme Court of Illinois

Blankenship

vs.

Cutrell.

71641 7

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Abraham Blankenship v Joseph Cutrell

The defendant Cutrell declared in Assumpsit upon a special Contract to pay him the worth of an improvement ~~made~~ upon the public land.

On trial of the general issue, it appeared in evidence, that after Blankenship had purchased the land of the Government, upon which Cutrell had made the improvement, they met casually in the road, when Cutrell asked him, what he had concluded to do about that land - to which he replied, I have concluded to let you have twenty acres, and John twenty acres, (meaning Cutrell's son). To this Cutrell rejoined, I will not do that; for take it either way, it will split up my field, so that I will lose part of my labor. To this Blankenship again replied, I do not want your labour for nothing; I will do what is right about it. Thereupon Cutrell invited Blankenship to come over to his house and stay all night, which Blankenship agreed to do.

This was all the evidence, substantially, in relation to the contract. As we deem it insufficient to support the declaration, I shall not notice that, relative to the value of the improvement.

A promise, made after the land was purchased of the United States, to pay for improvements made before the purchase, was held to be without consideration by this Court in *Cannon v Blair* 1 Summ R 113 *Wentlow v Overton* id 170 See also *Blair v Worley* id 178 *Roberts v Garwin* id 396 *Townsend v Briggs* id 472.

Doubts seemed to exist as to the validity of such a promise made before entry or purchase from the United States.

The act of 1831 was made to remove all doubt by

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Declaring such promises valid; and so the law stood until 1839, when another act declared that "contracts, promises, ^{well as} assumpsits or undertakings," made subsequent, ^{as to those} made previous to the purchase of such lands from the government of the United States: Should be valid & binding. Rev Stat 1845 pp 336. Sect 1. 617 Sects 1. 2.

Under the former act this court held in *Judson v Houlton* 1 Scam R 534, that an express promise to pay for an improvement upon the public land, was binding upon the promissor, although no price was fixed by him, but that the value might be shown by evidence.

This principle has been recognized and enforced since the act of 1839 extended the promise ^{to cases} after purchase of the government, in *Taylor v Davis* 11 Cts R 11.

This last case has gone as far as it is possible for the court to go in sustaining this class of promises. The court, so far disposed with mutuality in the contract, as to hold the promise to pay, to be of a gratuity, enforceable by the statute, and which, in the absence of an express dissent, they would presume was accepted by the promissor. This presumption is put upon the ground, that all remedy being gone, the party can only accept what the other may please to offer. - and is therefore presumed to accept.

We shall not extend this principle further, to civil cases of this character, as no greater liberality of presumption can possibly be indulged.

Tested by these principles, the defendant has not brought himself within the rules laid down by them. The consideration does not amount to a valuable one in law, and at most can only be classed with those which might raise a moral obligation.

Therefore no "contract, promise, assumption or undertaking" can be implied in law, but the party must show an express agreement to pay. Now while, the amount or value of the improvement might be added by evidence to an express promise to pay the value—we cannot go further, by allowing a promise or offer to sell the land itself, to be construed and converted into a promise to pay for the improvement in money. Nor can we presume an acceptance of such an offer, against the express refusal of the party.

The substance and manner of Cutrell's question to Blackenship, clearly conveys the impression that the parties had had previous conversation about a sale of all or part of the land itself—and this is so understood by Blackenship, as shown in his answer, that he had concluded to let Cutrell and his son have, each, twenty acres of the land. This offer is promptly and fully rejected—and no ground is left for a presumption of acceptance to rest upon. This, then, does not constitute the contract, promise or undertaking. The remainder is no better. Blackenship says "I do not want your labour for nothing, I will do what is right"—and this was accepted. What is "right" as contained within the terms of this promise? Cutrell had rejected the offer of twenty acres, saying "take it either way it will split up my field, so that I will lose part of my labour" take the lines of twenty acres "either way" and they cannot be made to cover my improvement, seems to be the ground of the objection. In this light, or in the case you let me have the forty, instead of my son twenty, still the whole improvement is not included. In what sense can this objection be understood? It seems to me to matter but little so

far as the subsequent promise has application. "I will do what is right" in reference to the ground of your objection to my offer, which you reject as made. If twenty acres cannot be made to cover your improvements, instead of letting your son have twenty, I will let you have forty, may be better understood, than a promise to pay in cash the valuation of the improvements. Again, if forty acres, in two twentys, or forty together, will not meet the objection, it may be better understood as a promise to enlarge the quantity sufficiently to include the improvement, and so secure to him his labour. We are not able to give to this promise a definiteness and point to pay the value in cash, without adding to its terms, our own conclusion of what we think he ought to have done; and which might be as various as the number called upon to decide; without in effect, making a contract for the party.

We all know and readily recognise, the difference between paying money and other property. The distinction is more marked, between an offer to sell property and a promise to pay money.

We think the proof shows an offer to sell part of the land to Cutrell, with a view of allowing him to secure his labour by purchase of the land upon which he had made the improvement; and is not a promise to pay for the improvement itself.

Taking this view of the testimony, we think the verdict clearly against the evidence and a new trial should have been granted.

Judgment reversed & Cause remanded

J. Blankenship & J. Cutrell

Opinion by
Scates Jr

Dec. 2

Copied

State of Illinois }
Williamson County } J. C.

Be it remembered that
heretofore to wit on the
11th day of February AD 1854
there was issued from the
Circuit Clerk's Office of
Williamson County in the State
of Illinois a summons
which is in the words and
figures following to wit

" State of Illinois }
" Williamson County } J. C.

" of Illinois to the Sheriff of Williamson
" County; Greeting

" We command you to
" summon Isham Blankenship if to
" be found in your County to appear before
" the Circuit Court of said County, on the
" 1st day of the next term thereof to be holden
" at the Court House in Marion on the
" fourth Monday in the month of April
" next to answer Joseph Cutrell in a
" plea of trespass on the Case on promises
" to his damage of Two hundred dollars
" as is alleged, and hereof make due
" return to our said Court as the law
" directs.

" Witness Henry Cuban Es Clerk of our
" said Court and the Judicial Seal
" thereof at Marion this 11th day of February
" AD 1854

Henry Cuban Es Clerk



Which said summons being put into the hands of the Sheriff was returned with the endorsement following to wit

"I return the within, executed
"by reading to defendant this February 20th 1854
"James Marks Shiff
"by A Reese Depty. Shiff

And afterwards to wit on the 24th day of March AD 1854 a Declaration was filed in the Circuit Clerk's office in said County which is in the words & figures following to wit

"State of Illinois } "April term Williamson
"Williamson County } "Circuit Court AD 1854
"Joseph Cutrell the plaintiff
"in this suit by William J Allen his Attorney
"Complains of Icham Blankenship the
"defendant in this suit who has been summoned
"to a plea of trespass on the case on
"promises, for that whereas here to fore to wit
"on the first day of in the year
"of our Lord one thousand eight and
"fifty three, the said plaintiff was the owner
"of and possessed of one improvement
"situate upon certain lands belonging to
"the Government of the United States, and
"described as follows to wit, the East half
"of the South East quarter, Section three (3)
"Township (9) nine, South Range (3) three
"East containing (80) Eighty acres, lying
"and being in the said County of Williamson
"and State of Illinois, and being such
"owner and so possessed of said

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"improvement as aforesaid, afterwards to wit
on the day of AD 1853 to Han
Blankenship the defendant in this suit
purchased the land above described in and
upon which the improvements of the said
plaintiff so described as aforesaid were
situate, at the Land Office at Shawana Town
Illinois where said lands were subject to
sale, And afterwards to wit, on the day
and year last aforesaid at the County
and Circuit aforesaid in consideration
that the said plaintiff at the special instance
and request of the said defendant had before
that time (and since the purchase of the
said lands and improvements by the said
defendant so described as aforesaid) sold
to the said defendant the said improvements
so described as aforesaid, he the said
defendant undertook, and then and there
faithfully promised the said plaintiff to
pay him so much money as said last
mentioned improvements at the time of
the said sale, was reasonably worth when
he the said defendant ~~it~~ should be thereunto
afterwards requested - And the said plaintiff
averts that the said last mentioned improv-
=vements at the time of the said sale thereof
was reasonably worth the sum of Two
hundred dollars to wit, at the County and
State aforesaid whereof the said defendant
afterwards to wit on the day and year
last aforesaid then and there had notice
yet the said defendant not regarding

" his said several promises and undertakings
 " but contriving &c, hath not as yet paid
 " the said sum of Two hundred dollars
 " above demanded, or any part thereof to
 " the said plaintiff, although often
 " requested so to do, but to pay the same
 " hath hitherto wholly neglected and refused
 " and still doth neglect and refuse to the
 " damage of the said plaintiff of \$200 and
 " therefore he brings his suit &c

" W L Allen Atty for
 " plff

(Account sued on)

" Isham Blankenship:

" In acct with Joseph Cutrell
 " To one improvement \$200 $\frac{00}{100}$ -
 " And afterwards to wit on the 25th day of
 " April A.D 1854 the debt by his Counsel filed
 " the following plea, To wit

" April term of the Williamson
 " Circuit Court 1854

" Isham Blankenship }

ats,

} "Assumpsit

" Joseph Cutrell }

" And the said defendant by

" Corder and London his Attornies comes and
 " defends the wrong and injury where &c and
 " saith that he did not undertake or promise
 " in manner and form as the said plaintiff
 " hath above thereof complained against him
 " and of this he puts himself upon the

" Country &c"

} Corder & London, Atty for

" And the said plaintiff doth thence

" W L Allen, for plff

" Deft

And afterwards Towit at a
(April term 1854)
Circuit Court began and held at the Court
House in Marion in said County on Thursday
the 4th day of said term - it being the 27th day
of April A.D. 1854. There was entered of
Record the order following Towit -

" Joseph Cutrell
" as
" Asham Blankenships } Respects on the
" } Case on promises
" Now on this day came the said
" plaintiff by Allen his atty, as also the said
" defendant by his Counsel and issue being
" joined, therefore let a jury come, whereupon
" came the jurors of the jury Towit
" Nathan Poplin, Daniel Rechy, James H.
" Hays Benjamin Cidle, John R. Dillard,
" Francis M. Parks, Barnett Bradley, W. G.
" Beasley, John Brown, Jeremiah Rice,
" George W. Wright and Addison Reese,
" twelve good and lawful men of the
" County who being elected tried and sworn
" the truth to speak upon the issue joined
" whereupon the evidence being heard and
" and jury being unable to agree is
" discharged from the further consideration
" of this case, and ordered that this cause
" stand continued &c."

And afterwards Towit
at the September term A.D. 1854 of said
Court the orders following were made
and entered of record Towit -

" Joseph Cutrell }
" us } trespass on the case on
" Isham Blankenship } promises

" Now on this day came the said
" plaintiff by his Attorney, as also the said
" defendant by Counsel, and issue being joined
" therefore let a jury come, whereupon came
" the jurors of the jury to wit, Daniel Chapman
" Pleasant Roberts, Woodford J. Wiley, Joseph
" Grant, Abraham Beasley, Jacob M. Perry,
" J. A. Bradberry, John Gentry, Daniel G. Gilbert
" Robert Lipsey, John Taylor, and N. G. Joiner
" twelve good and lawful men of the County
" who being elected tried and sworn the truth
" to speak upon the issue joined, upon
" their oaths do say, we of the jury find for
" the plaintiff and assess his damages at
" one hundred and fifty dollars, thereupon
" the Counsel for the deft. moved the
" Court ~~to~~ herein for a new trial"

" Joseph Cutrell }
" us } Ass't,
" Isham Blankenship }

" And now again on this
" day, came the parties, by their Attornies, and
" argument having been heard by the Court
" upon the motion for a new trial herein
" and the Court now being fully advised &c
" It is considered by the Court that said
" motion be overruled, It is further con-
" sidered by the Court that the plaintiff
" recover of and from the deft, the sum

" of one hundred and fifty dollars, as
" assessed by the jury, together with his costs
" and charges by him about his suit in
" this behalf expended, and may thereof
" have execution &c

" Joseph Centrell }
" ns } apt,
" Isham Blankenship }

And now on this day came the
" deft. by his Counsel and prayed the Court
" for an appeal herein which is granted
" upon condition that the defendant enter
" into bond with Robert M Kennedy, or
" John Edwards as security in the sum
" of three hundred dollars. It is further
" ordered by the Court that said bill of
" exceptions may be signed and sealed
" in vacation Nunc pro tunc,-

And afterwards to wit on the
18th day of September A.D. 1854 a bond
was filed in the Circuit Clerk's office of
said ^{County} which is in the words and figures
following To wit

" Know all men by these presents
" that we Isham Blankenship and John
" Edwards of the County of Williamson and
" State of Illinois are held, and stand
" firmly bound unto Joseph Centrell of
" the County and State aforesaid in
" the penal sum of three hundred
" dollars lawful money of the United

" States, for the payment of which well and
" truly to be made we bind ourselves our
" heirs Executors and Administrators
" firmly by these presents, signed with our
" hands, and sealed with our seals, this 18th
" day of September A D 1854,

" The Condition of the above
" obligation is such that whereas the said Charles
" Cutrell did at the September term of the
" Williamson County Circuit Court 1854
" recover a judgment in said Circuit Court
" against the said Asham Blankenship
" for the sum of one hundred and fifty dollars
" damages, and costs of suit, from which
" Judgment the said Asham Blankenship
" has prayed an appeal to the Supreme
" Court of the State of Illinois, Now therefore
" if the said Asham Blankenship shall
" pay the Judgment, cost, interest and dam-
" ages in case said Judgment be affirmed
" by the Suprem - and shall prosecute
" his appeal, then this obligation to be void
" otherwise to remain in full force and
" effect."

Witness
" Myself }
" J. M. Campbell }
" } J. Asham Blankenship
" } John M. Edwards

And afterwards to wit on the 11th day of
November A D 1854 a bill of exceptions
was filed in the Circuit Clerk's office of
said County which is in the words
and figures following To wit

" State of Illinois } September Term of the Williamson
" Williamson County } Circuit Court A D 1854

" Joseph Cutrell }
vs } of trespass on the Case on
" Isham Blankenship } promises,

" Be it remembered that upon the trial
" of this Cause, at the term above stated
" the following witnesses were produced
" and sworn,

" 1st The plaintiff introduced Certificate of John
" M. Cunningham Register of the Land Office
" at Shawneetown, Illinois which is in the
" words and figures following, to wit,

" I John M. Cunningham Register
" of the Land Office at Shawneetown, Illinois
" do hereby certify that East half of the South
" East quarter of Section No. Three, in Township
" No. Nine, South of Range No. Three East, was
" entered by Isham Blankenship, on the
" 25th day of November A D 1853, as appears
" from the Maps, books, and Records of my
" Office.

" Given under my hand at the
" Register's Office, in Shawneetown
" this 29th day of March 1854

" John M. Cunningham
" Register

" William N. Mitchell a witness for the
" plaintiff states that he follows surveying
" & is County Surveyor, that some time last Spring
" he thinks in the month of March 1854, he
" surveyed for Isham Blankenship, the defendant,
" the East half of the South East quarter of

Section No. three, in Township No. nine, South
of Range No. three East, in Williamson County
that the West line of said Survey ran some
ten or fifteen feet East of Joseph Cutrell (the
plaintiff's) Barn; that the West line, of the Survey,
cut off the corner of two small lots which
left some one and a half or two acres of said lots
on the Survey, that there was also one enclosed
field of about ten acres near the Centre
of said Survey, entirely detached from Cutrell's
farm upon which he resided, but cannot
say how much the improvement on said
tract of land was worth,

John Cutrell a witness
for the plaintiff, states that he and his Father
Joseph Cutrell, the plaintiff, and his Uncle
Charles Cutrell, all rode out from Town
together home, that on the road they met
Blankenship the defendant, that when they met
a conversation took place between his Father
the plaintiff, and Blankenship. he states that
his Father asked Blankenship what he had
concluded to do about that land - Blanken-
-ship answered I have concluded to let you
have twenty acres, and John twenty acres
Father said to Blankenship I will not do
that, for take it either way it will split up
my field so that I will lose part of my
labor, Blankenship then said I do not
want your labor for nothing, I will
do what is right about it, Father (the
plff) then asked the def. to come over
and stay all night with him, and the

„ deft. said he would do so. Witness further stated
 „ that he did not certainly recollect and can
 „ not say positively, whether the plaintiff asked
 „ the deft. what he had concluded to do about that
 „ land, or what he had concluded to do about that
 „ improvement, but it was one or the other, witness
 „ supposed that the conversation between the parties was
 „ in relation to paying the plaintiff for his improvement.
 „ Witness further stated, that he has stated all the
 „ conversation between the parties as well as he now
 „ remembers, Witness states that he is well acquainted
 „ with the field spoken of by Mrs Mitchell and
 „ the corners of the lots that were included in the
 „ entry, that he helped to make them, that they belonged
 „ to his father Joseph Cutrell the plaintiff at the
 „ time Blankenship entered the land, and was worth
 „ at the the time the same was entered about one
 „ hundred and fifty or sixty dollars,

„ Cross examined „

„ States he is the son of the plaintiff, states he
 „ helped make the improvement, that the field
 „ spoken of as belonging to his father and
 „ entered by Blankenship's lays off to its self
 „ separate and away from his father's farm on
 „ which he lives, that said entry butted up
 „ against the east side of his father's deceded
 „ land near to the barn, and out of the
 „ corner of two small lots or pastures, he
 „ states that he has told all the conversation
 „ which he heard between his father and
 „ Blankenship in relation to the matter, —

„ Charles Cutrell a witness for
 „ the plaintiff states that he went in company

" with Joseph Cutrell the plaintiff from Ligon
 " that they met Blankenship the defendant on
 " the road, that a conversation took place
 " between the plaintiff and defendant in relation
 " to some land, that that the defendant had entered
 " heard Cutrell, the plaintiff ask Blankenship
 " what he was going to do about this land of
 " mine you have entered, Blankenship
 " answered I have concluded to let you
 " have twenty acres, and John twenty acres
 " Cutrell replied, I will not do that, for
 " take it either way it will split up my field
 " so that I will lose part of my labor.
 " I then remarked to Blankenship you will
 " do what is right, Blankenship then said
 " to the plaintiff yes, I dont want your labor
 " for nothing I will do what is right about
 " it, I then said to the pliff, that is sufficient
 " lets go, & we went on home, witness states
 " that he is acquainted with the improvements
 " entered by Blankenship & thinks there were about
 " 15 or 20 acres under fence, and thinks the
 " improvement was worth about one hundred
 " and fifty dollars.

Cross examined

" I think the improvement is worth about
 " one hundred and fifty dollars, the conversation
 " that I heard between the plaintiff and defendant
 " was in relation to the land entered by the
 " defendant, I said to Blankenship you will
 " do what is right, he then said to the pliff, yes,
 " I dont want your labor for nothing I will
 " do what is right about it, I then said to my

" Brother (the plff.) that is sufficient he says
" he will do what is right, let's go home, my
" Brother then asked him to come over and
" stay all night with him, Blankenship said
" he would do so, we then went on, This, I
" think, is about all that was said between
" the parties.

" Joseph W Council a witness
" for the plff. states that he is acquainted
" with the field spoken of by Mitchell and
" other witnesses, states that he thinks it is
" worth about one hundred and fifty dollars
" never heard any conversation between
" the parties about the matter.

" This was all the evidence in the
" case - The Jury found the issue for
" the plaintiff and assessed his damages at
" one hundred and fifty dollars


" The defendant by his Counsel moved the Court
" for a new trial, upon the following grounds
" 1st. Because the verdict of the Jury was contrary
" to the evidence -

" 2nd. Because the verdict of the jury was against the law

" 3rd. Because the verdict of the jury was contrary to
" the law and the evidence.

" Which motion was overruled by the Court
" and judgment rendered on the verdict of
" the jury, in favor of the plaintiff and against
" the def. for \$150, and costs of suit to
" the overruling of which said
" motion for a new trial the
" def. by his Counsel then and
" there excepted and prays that this

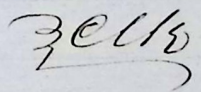
" his bill of exceptions be signed sealed
" and made a part of the record, all of
" which is accordingly done -

" William K Parrish 

State of Illinois }
Williamson County } Clk.

I Joseph Cuban Clk
Clerk of the Circuit Court in and for
the County of Williamson and State
aforesaid, do hereby certify that the foregoing
contains a correct Transcript of the
record in the case of Joseph Cutrell
against Isham Blankenship, in the
the Williamson County Circuit Court

In testimony whereof I have
hereunto set my hand and
affixed the Judicial Seal of said
Court this 13th day of November
A D 1857

Joseph Cuban Clk


No 29

Joseph Conbill

Wm H. Bence

John Blandford

Filed 11th Nov 1854

F. D. Preston etc

By J. C. ...

Reference

Argument of errors to

1st The Court erred in overruling motion for new trial

2^d The Court erred in rendering judgment on the verdict of the jury

3^d Errors in general -
founder in error Landau Corde & facts, ^{seems}
Allen & Logan for Appellant.
For Deft, 15 Nov. 1854

No 29.

November 1854.

Johann Blaudenship

vs

Joseph Cortiel

17206

Case to Williams

Opinion by

Scotts. J.

Judgment reversed &
Case remanded