No. 14315

Supreme Court of Illinois

Phillips

vs.

Kerr

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

14315

No. 310.

Phillips
vs
Kerr

1862

State of Illinois

Charles B. Phillips
Plaintiff in Error.
vs
William P. Kerr
defendant in Error.
Error to Cook,
County Court of
Common Pleas.

If the Court please;

The undersigned, attorney for the Plaintiff in error, respectfully urges on his behalf, that a rehearing be granted in the above entitled cause, for the reasons hereinafter given.

The Court in affirming the judgment say (Walker Judge delivering the opinion) "It is urged that the Court erred in rendering judgment for a larger sum than was claimed in the affidavit to procure the capias. The affidavit states that appellant was indebted in the sum of $5.92.86 with interest for money had and received of the appellee in August 1857: this affidavit does not limit the indebtedness to the sum specified, but it alleges that it was the sum named, with interest from August 1857. upon computing interest on that sum, from the date named, until the judgment was rendered, the amount will be found to exceed the finding of the Court"

This reasoning is conclusive upon that question, but the Court does not go on to determine another and most important error assigned, "that interest cannot be recovered under the declaration in this case"

The Court decides, and properly that there is interest in the judgment, but does not pass upon the question whether interest could be recovered.

If interest could not be taken under this declaration, then the judgment is erroneous, and should be reversed.

It is upon this point alone that I ask a re-hearing and a reversal of the judgment.

The statute of this state in regard to interest reads as follows:

(Chap. 54. R.S. 82. Stat. of 1845)

"creditors shall be allowed to receive at the rate of six per centum per annum for all moneys after they become due on any bond, bill, &c." on any judgment &c." "likewise on money lent or money due on the settlement of accounts from the day of liquidating accounts between the parties and ascertaining the balance: on money received to the use of another, and retained without the owners know-ledge, and on money withheld by an unreasonable and vexatious delay of payment" [See (on Page 546) the language of Judge Trumbull in Samis

as Clark val, 13. Ill R. 544, that it was not the intention of the Legislature to permit creditors to demand interest in the cases not enumerated in the Statute].

The declaration here counts for.
1st money had and received "by the defendant to the use of the plaintiff"
2nd Interest Count.
3rd Money loaned.

4th money "found to be due from the defendant to the plaintiff on an account before that time stated between them".

Interest could not be taken under the first count (money had and received) since it is only on money received "to the use of another and retained without the owners knowledge" that interest can be recovered on money had and received, and this Count neither avers nor is it pretended in the affidavit that the money was received "to the use of another and retained without the owners knowledge".

Nor could interest be taken under the 4th Count (money found to be due &c)

The Statute says "on money due on the settlement of accounts from the day of liquidating accounts between the parties & ascertaining the balance"

the declaration to the cause of action specified in the affidavit upon which the proceeding is based". And the same reasoning applies to the Count for balance due &c.

Even if interest could be recovered under either of these Counts it could only be from the day the debt becomes due if it is not paid.

The declaration alleges that the deft. was on the 1st day of March 1858 indebted for money had and received &c. and that defendant "afterwards, to wit on the day and year last aforesaid in consideration &c. undertook and then and there promised the plaintiff to pay him &c".

The promise and undertaking to pay is alleged to have been on the 1st day of March 1858. Interest, then, could not be collected for any time prior to the 1st day of March unless under the interest Count.

The sum sworn to was $5.921.86

The judgment was recovered Decr 17. 1858. Interest on the amount from March 1st 1858 to December 17. 1858. at the outside is $283.26

to which add $5921.86

and it brings $6.205.12

The amount of the judgment is $6.410.78

from which take $6.205.12

leaving an excess of $205.66

which is erroneous even if interest could be recovered at all under the three counts mentioned, which I have endeavored to show could not be done

I have purposely omitted any mention of the interest count which is the 2d

Under this count interest could not be taken for it is fatally erroneous in that it does not allege the forbearance to have been at defendants request, The count is: "also in the sum of two thousand dollars for the forbearance of money due by the defendant to the plaintiff before that time".

This is an executed consideration and must be averred to have arisen, "at the defendants request",

1 Chitty's Pleading Marg. Paging 343.
1 Saunders R 264. n. 1.
Livingston as Rogers, 1 Caines R. 583.
Comstock as Smith 7. Johnsons. R. 86
Johnson as Greenough 33. N.H. 396.
(See cases cited)

"an express promise without an express previous request can in no case furnish a cause of action"

See also Carson as Clark 1. Seammon 113.

That a remittitur cannot be entered see.

Fournier as Faygett 3. Seam. R. 350.
Pickering as Pulsifer 4 Gil 79

Walcott vs Holcomb. 24 Ill. 341.
Rumell vs Chicago 22 Ill. 283.
This Court will never correct a judgment where the evidence on which it is founded is not before them.
Howell vs Benett 30 Ill. 434.
(& cases.
Jones vs Lloyd Breese 174

I transmit herewith the opinion heretofore filed in this cause and the printed argument herein, with leaves turned down to the discussion of this point - It commences page 19, printed argument

Melville W. Fuller
Atty. for Petitioner

Perhaps I ought to add that this is a case in which there are no data from which this Court can give a correct judgment should they desire to affirm this one as amended, for even if the bill of particulars were a part of the record which it is not, still the Court will see from the account composed as it is of drafts, exchange &c, &c, it is impossible to ascertain what amount should be assessed - There are data enough to determine that the judgment is wrong but not enough to indicate what would be right, if any.

M.W. Fuller

Supreme Court

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Charles B. Phillips

v

Wm P. Kerr

Petition for a
Rhearing

Rehearing Denied

Filed Apr. 24-1862

L. Laland

Clerk

In Supreme Court of Illinois
Third Grand Division
April T. 1876

Chas. B. Phillips
v
Wm. P. Kerr

Errors, Thomas & Roberts
Attys for Defts. in Error

Please take notice that I shall apply on behalf of ~~Plff~~ in Error for a rehearing of the above entitled cause, in the Supreme Court at the present term thereof

W. W. Heller
Chicago, April 10th 1876 Plff in Error's Atty.

Rehearing denied, April 10 1876
Robins, Thomas & Roberts
for defts in error

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Phillips

v

Kerr

Notice &
application for
rehearing

Filed Apr. 24-1862
L. Leland
Clerk