D'Wolf Vs. Rabaud

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Appeal No. : 26 U.S. 476

Appellant : D'Wolf

Respondent : Rabaud

Judgement :

D'Wolf v. Rabaud - 26 U.S. 476 (1828)
U.S. Supreme Court D'Wolf v. Rabaud, 26 U.S. 1 Pet. 476 476 (1828)

D'Wolf v. Rabaud,

26 U.S. (1 Pet.) 476

ERROR TO THE CIRCUIT COURT OF NEW

YORK FOR THE SOUTHERN DISTRICT

SYLLABUS

A nonsuit may not be ordered by the court in any case without the consent and acquiescence of the plaintiff.

A question of the citizenship of a party to a cause cannot constitute a part of the issue on the merits, and must be brought forward by a proper plea in abatement in an earlier stage of the cause than the trial on the merits.

The statute of frauds of New York is a transcript on this subject of the statute 29 Charles II, ch. 3. It declares that no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another unless the agreement or some memorandum or note thereof be in the writing and signed by the party or by someone by him authorized. The words "collateral" or "original" promise do not occur in the statute, and have been introduced by courts to explain its objects and expound its true interpretation.

Whether, by the true intent of the statute of frauds it was to extend to cases where the collateral promise (so called) was a part of the original agreement and founded on the same consideration moving at the same time between the parties, or whether it was confined to cases where there was already a subsisting debt or demand and the promise was merely founded upon a subsequent and distinct understanding might, if the point were entirely new, deserve very great deliberation. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination, at least in those states where the English authorities have been fully recognized and adopted in practice.

If A agree to advance B a sum of money for which B is to be answerable, but at the same time it is expressly upon the understanding that C will do some act for the security of A and enter into an agreement with A for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather a trilateral contract. The contract of B to repay the money is not coincident with nor the same contract with C to do the act. Each is an original promise, though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A not solely upon the promise of either B or C, but upon the promise of both *diverso intuitu,* and each becomes liable to A not upon a joint but a several original undertaking. Each is a direct original promise founded upon the same consideration.

The case of *Wain v. Walters,* 5 East 10, was the first case which settled the point that it was necessary in order to escape from the statute of frauds that the agreement should contain the consideration for the promise as well as the promise itself. If it contain it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms or by necessary implication. That case has been adopted to a limited extent by the courts of New York into its jurisprudence as a sound construction of the statute.

Page 26 U. S. 477

The decisions in the courts of New York on the construction of its own statute and the extent of the rules deduced from it present to this Court a guide in its decisions upon the construction of their statute.

The defendants in error brought an action of assumpsit in the Circuit Court of the United States for the Southern District of New York against the plaintiff in error to recover damages for the breach of his contract to ship to them, at Marseilles, five hundred boxes of white Havana sugar.

The declaration contains several special counts, of which the first and second only were relied upon at the trial.

The first count stated that at the time of making the respective promises and undertakings of the defendant, the plaintiffs were co-partners in trade, carrying on business at Marseilles in France, under the firm of Rabaud Brothers & Company. That one George D'Wolf, of Bristol, Rhode Island, being desirous of drawing upon the plaintiffs at Marseilles, for 100,000 francs, on 15 March, 1825, at New York, in consideration that the plaintiffs, at the special instance and request of the defendant, would authorize the said George D'Wolf to draw bills of exchange upon the plaintiffs for the said sun of 100,000 francs, the defendant undertook and promised that he would ship for the account of George D'Wolf, on board of such vessel as George D'Wolf should direct, five hundred boxes of white Havana sugars consigned to the plaintiffs at Marseilles, and the plaintiffs afterwards did duly authorize George D'Wolf to draw bills of exchange upon them at Marseilles

for the said sum of 100,000 francs, which bills were drawn by him on 16 November, 1825, and paid by the plaintiffs on 3 March, 1826. That on 4 January, 1825, at the City of New York, George D'Wolf did direct and name a vessel, the brig *Quito,* then laying in the port of New York and ready to receive the said sugars, on board of which vessel the sugar should and ought to have been shipped by the defendant on account of George D'Wolf, and consigned to the plaintiffs at Marseilles, according to his said promise and undertaking, of all which promises the defendant had notice, and although he was then and there requested to ship the sugar on board the said vessel, yet he did wholly refuse the same.

The second count differs from the first only in stating the contract to have been that

"in consideration that the plaintiffs, at the request of the defendant, would authorize George D'Wolf to draw bills of exchange upon them at Marseilles for another sum of 100,000 francs on account of other five hundred

Page 26 U. S. 478

boxes of white Havana sugar, to be shipped by the defendant for account of George D'Wolf on board of such vessel as George D'Wolf should direct, and consigned to them the plaintiffs at Marseilles, the defendant undertook, &c.;,"

and averring that relying on the promise and undertaking of the defendant so made, they, the plaintiffs, after the making thereof, did duly authorize George D'Wolf to draw bills of exchange upon them for another sum of 100,000 francs, on account of the last mentioned five hundred boxes of white Havana sugars, to be shipped by the defendant on account of George D'Wolf and consigned to the plaintiffs at Marseilles.

The cause was tried at the October term of the Circuit Court of the United States for the Southern District of New York in 1826, when the jury, under the charge of the court found a verdict for the plaintiffs below for $19,950.85. The opinion of the court, in the charge to the jury, was excepted to by the counsel for the defendant, and a bill of exceptions sealed by Mr. Justice Thomson, sitting as judge of the

circuit court, and the opinion delivered by him states the evidence adduced in the cause.

On the trial of the cause in the circuit court, the plaintiffs below gave evidence by the testimony of George D'Wolf, who was examined under a commission at Havana, that he, George D'Wolf, had several transactions with the plaintiffs previous to that which gave rise to this suit, and had at various times drawn bills on them. That he had three interviews with Mr. Belknap on the subject of the shipment of the sugars, which interviews were had first in Wall Street in the City of New York; secondly, at the counting house of James D'Wolf, Jr., the plaintiff in error; and thirdly at the boarding house of Mr. Belknap. James D'Wolf, Jr., was present at the first interview, and he with a certain Frederick G. Bull was present at the second at his counting house.

Mr. George D'Wolf stated that the transactions relative to the shipment of the sugars were that, in Wall Street, he proposed to Mr. Belknap to address him five hundred boxes of sugars to the house at Marseilles, on receiving authority to draw on account of the same, to the extent of 100,000 francs. Mr. Belknap, being engaged, an interview was proposed at the counting house of Mr. James D'Wolf Jr., which took place and at which Mr. Belknap observed that the advance was heavy, and a calculation was made by F. G. Bull, the confidential clerk of Mr. James D'Wolf Jr., and by Mr. James D'Wolf himself, of the value of the sugar compared with the proposed advance, the conclusion of which was an agreement that the sugars should be shipped, and the authority to draw granted to George D'Wolf, Mr. James D'Wolf engaging by

Page 26 U. S. 479

letter to ship the sugars in behalf of George D'Wolf, which form of letter was afterwards carried by George D'Wolf to Mr. Belknap, was assented to by him, was signed by Mr. James D'Wolf Jr., and the authority to draw granted and used accordingly.

This letter, and the authority to draw, are in the following terms:

"New York, 15 November, 1825"

"MR. JAMES D'WOLF, JR."

"Dear Sir: You will please ship for my account, on board of such a vessel as I shall direct, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brother & Co. Marseilles, and oblige your friend and obedient servant."

"GEORGE D'WOLF"

"Agreed to, JAMES D'WOLF, JR."

"New York, 15 November, 1825"

"Messrs. RABAUD, BROTHERS & CO., Marseilles"

"I have this day authorized George D'Wolf Esq. to draw on you for _____ thousand francs, and I request you to honor his bills to that amount."

"Your obedient servant, A. E. BELKNAP"

Mr. George D'Wolf also stated that his object was to ship the sugars in one of his own vessels; that he was then indebted to the house in Marseilles, about thirty thousand francs, but could not say that Mr. James D'Wolf knew of the debt. The sugars were shipped to obtain the usual advance, and the consignees were to have the usual commissions in the transaction.

Bills to the amount of the advance were afterwards drawn and negotiated in Boston, and the proceeds of the same applied as follows: $13,000 remitted to Mr. James D'Wolf in checks on the bank and in an acceptance of Isaac Clapp, a broker in Boston, and the residue of the proceeds of the transaction passed to the account of George D'Wolf by Mr. Clapp. It was admitted that the bills were regularly paid at Marseilles by the defendants in error.

It was also in evidence by the testimony of Mr. George D'Wolf that at the time of the negotiation for the bills, Mr. George D'Wolf had in the hands of the plaintiff in error from three to four hundred boxes of sugar, of which sixty had been remitted

from Rhode Island, on account of which he drew the sum of $4,000, and the remainder were purchased for his account by Mr. James D'Wolf Jr., and at the same time he was indebted to Mr. James D'Wolf Jr. a considerable amount.

Page 26 U. S. 480

Mr. George D'Wolf also testified that the sugars to be shipped were to be on his account, and not on that of the plaintiff in error -- that the agreement with Mr. James D'Wolf was that the proceeds of the negotiation of the advance should be remitted to him, and upon this verbal agreement, Mr. James D'Wolf granted his signature to the letter of 15 November, 1825. Mr. James D'Wolf afterwards wrote to the witness that he should decline to make the shipment in question until he should receive the remittances agreed upon. When the letter was first presented, Mr. James D'Wolf declined signing it, deferring it to the next morning, when he should see Mr. Bull, and it was signed the next morning. That the letter or memorandum of agreement had for its sole object the shipment of the sugars to Marseilles, that market being preferred to New York, and to place in the hands of Mr. James D'Wolf, Jr. the proceeds of the bills in order to further the shipment, and not with reference to accounts existing between him and the plaintiff in error, and that the plaintiff in error knew the defendants, and particularly Mr. Belknap, in the transaction as stated.

Mr. George D'Wolf also stated in his evidence that he did not know that Mr. Belknap was acquainted with the circumstance that the proceeds of the bills were to go to the plaintiff in error or with the state of accounts between him and Mr. James D'Wolf, Jr.

Evidence was also given to show, that the plaintiffs below carried on business in Marseilles, in France, and that all of the said parties, with the exception of Mr. Belknap, were native subjects of France and that Mr. Belknap was a native citizen of the United States, had resided some years in France, and now, always considering Boston as his home, resided in Boston, where he lodged in a boarding house, in which he hired rooms by the year, and was understood to pay taxes in

Boston; his letters of business were addressed to Boston, and he was absent from there in the United States occasionally for the purposes of transacting business for the firm in Marseilles.

Soon after the negotiation of 15 November, Mr. George D'Wolf became insolvent, and at the time of his failure he was largely indebted to the plaintiff in error. Being thus embarrassed, he addressed to Mr. Belknap the following letter:

"Bristol, R.I. 27 December, 1825"

"M. A. E. BELKNAP."

"Dear Sir,"

"I am in receipt of yours of the 23d instant, and note its contents. Owing to my embarrassments, the *Magnet,* which I

Page 26 U. S. 481

had wrote you would proceed to New York to take the sugars which Mr. James D'Wolf, Jr. was to ship to your house in Marseilles, will not go on. You are therefore at liberty to make any arrangements with him you may think proper for the interest of all concerned. I am extremely sorry that you met with an accident to prevent your visiting me, as it would have afforded me much pleasure in seeing you."

"Believe me, very truly your friend,"

"GEORGE D'WOLF"

Which letter was upon 27 December, 1825 shown to the plaintiff in error by Mr. Belknap and a copy of the same was, upon 3 January, 1826, delivered to him enclosed in the following letter:

"New York, January 3, 1826"

"MR. JAMES D'WOLF Jr., New York"

"Sir: I enclose you a copy of a letter which I yesterday received from Mr. George D'Wolf, of Bristol, Rhode Island. In pursuance of the authority given me by him, I shall without delay engage and provide a vessel on board of which I shall require you (according to your contract of t15 November last) to ship for account of Mr. George D'Wolf five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., Marseilles."

"Your obedient servant,"

"A. E. BELKNAP"

On 4 January, 1826, Mr. Belknap addressed the plaintiff in error in the following terms:

"New York, January 4 1826"

"MR. JAMES D'WOLF Jr., New York"

"Sir: In pursuance of the notice I gave you in my letter of yesterday, I have engaged the American brig *Quito,* Captain Wing, now lying at Fly Market Wharf in this city for the purpose of receiving, on freight for Marseilles, five hundred boxes of white Havana sugar. The Quito is a good staunch vessel, and is now ready to receive the sugar. I therefore require you to ship on board of her for account of Mr. George D'Wolf, of Bristol R.I. five hundred boxes of white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co. of Marseilles, according to your contract of 15 November last. Herewith is a copy of a letter I addressed to Mr. George D'Wolf on 23 December last, his answer to which I showed you yesterday at the same time I gave you a copy of it. If you prefer to ship the sugar in any vessel other than the *Quito,* I have no objection,

Page 26 U. S. 482

provided you will designate the vessel and give notice to me immediately and make the shipment without delay."

"Your obedient servant,"

"A. E. BELKNAP"

To this letter the plaintiff replied as follows:

"New York, January 5 1826"

"MR. A. E. BELKNAP."

"Sir: In answer to your letter of the 4th instant, I have merely to say that whenever Mr. George D'Wolf, or any person authorized by him, will pay me for five hundred boxes of Havana sugar, I will ship the same, consigned to Messrs. Rabaud, Brothers & Co. at Marseilles."

"Your obedient servant,"

JAMES D'WOLF JR.

Evidence was also given, that the brig *Quito* was engaged early in January, 1826, by Mr. Belknap to carry the sugar to Marseilles, that she was a competent vessel for the purpose, and that the freight to be paid for the transportation of the sugar was the usual and customary charge for the same.

The plaintiffs in error objected at the trial to the reading of the letter 27 December, 1825, from George D'Wolf to Mr. Belknap, which objection was overruled by the court.

On the part of the plaintiffs in error, at the trial of the cause before the circuit court, Frederick G. Bull was introduced as a witness, whose testimony is stated in the bill of exceptions to have been given as follows:

That he is, and for nine years past has been, a confidential clerk in the employment of the said James D'Wolf, Jr.; that he was present at the counting room of the said defendant on 15 November, 1825, when the interview mentioned and described in the said deposition of the said George D'Wolf took place between the said George D'Wolf, the said Andrew E. Belknap, and the said James D'Wolf, Jr.; that the said George D'Wolf and Andrew E. Belknap came into the counting

room on 15 November in company, and were conversing together; that they there found the said James D'Wolf, Jr., and the witness; that after some little time had elapsed, the said James D'Wolf, Jr. and the witness withdrew into an inner apartment or adjoining room, and were in a few minutes followed by the said George D'Wolf, and the said Andrew E. Belknap; that while the said Andrew E. Belknap and the said George D'Wolf were in conversation, the latter addressed a question to the said James D'Wolf, Jr., and asked him how much five hundred

Page 26 U. S. 483

boxes of sugar would bring or amount to at some specified price; that the said James D'Wolf, Jr. turned to the witness and asked him to make the calculation; that the witness did make a hasty calculation, and gave for answer, "about $17,000;" that he heard no proposition made by the said James D'Wolf, Jr., to the said Andrew E. Belknap, nor by the said Andrew E. Belknap to the said James D'Wolf, Jr., nor any conversation between the said Belknap and the said defendant of any importance, although he thinks that the said defendant did speak to the said Belknap once or twice during the said interview; that the said James D'Wolf, Jr., appeared, so far as the witness observed, to take little or no interest in the conversation or business which was going forward and taking place between the said George D'Wolf and the said Andrew E. Belknap; that during the time of said conversation and interview (which occupied not more than ten or fifteen minutes), the said James D'Wolf, Jr., left the counting room for a short time and returned; that the said James D'Wolf, Jr., is in the habit of communicating all matters of business to the witness and consulting him concerning the same, and the witness does not think it at all probable that the said James D'Wolf, Jr., would have made any contract or agreement with the said Andrew E. Belknap, either at that time or any other, without the knowledge of the witness; that the said James D'Wolf, Jr., during part of the time of the said interview, was walking about his counting room while the said George D'Wolf and the said Andrew E. Belknap were conversing together, and at one time came up to the witness and addressed some remarks to him; that the witness was writing at the desk, and occupied in his own affairs of business, and did not pay very particular attention to the conversation of the said

parties; that the defendant and Belknap might have conversed on the subject of the sugar without the witness' knowing it; and the witness would not undertake to say that an agreement by the said defendant with the said plaintiff might not have been made without the knowledge of the witness; that the witness does not know that the said Andrew E. Belknap knew that the proceeds of said bills were to have been remitted to the said defendant by the said George D'Wolf before the said defendant was bound to ship the said sugar; that the said George D'Wolf was, on 15 November, 1825, and for a long period anterior thereto, and ever since has been, largely indebted to the said James D'Wolf, Jr.; that the sum of $13,000, for and on account of the five hundred boxes of sugar mentioned in the said deposition of George D'Wolf, was never paid by the said George to the said defendant and never came into his hands;

Page 26 U. S. 484

that George D'Wolf did, on or about 23 November, 1825, remit to the defendant, his, George D'Wolf's, draft *for $6,000,* on Isaac Clapp, of Boston, at three days' sight, and a check upon the United States Branch Bank at New York for *$1,000, which said draft and check were both paid and the amount thereof received by the said James D'Wolf, Jr.;* that the said George D'Wolf did also, shortly after, transmit to the defendant his, the said George D'Wolf's draft upon the said Isaac Clapp, at thirty days' sight, for $7,000, which was received by the defendant, but was never paid, either by the acceptor, the said Isaac Clapp, or the drawer, the said George D'Wolf, but the same was protested for nonpayment and still remains due and unpaid.

The counsel for the defendant below then offered to prove by Mr. Bull that there was an express understanding and agreement between the defendant and George D'Wolf at the time the said letter of 15 November was signed by the defendant that the latter should furnish the defendant with the funds necessary for the purchase of said sugar before the said defendant would be under any obligation to ship the same.

This testimony was not permitted to go to the jury, the court stating that

"the defendant below could offer no testimony to the jury of any arrangement between him and George D'Wolf relating to the funds for the payment for the sugar unless it should also appear that Mr. Belknap was party thereto or that the same was brought to his knowledge."

The counsel for the defendant below excepted to this opinion.

The defendant below also gave in evidence on the trial the following letter containing matter contradictory to the testimony of George D'Wolf.

"Boston, November 28, 1825"

"MR. JAMES D'WOLF, Jr.."

"Dear Sir,"

"I send you my draft on Mr. Clapp for $6,000 at three days' sight, as he cannot get any drafts or checks on New York, having tried all the banks and brokers; he has not sold the exchange, or any part of it as yet, but thinks he can in three or four days. Last sales 19 1/4 cents; money very scarce; the New Yorkers have sent on a great deal of paper; banks stopped discounting. He will remit you the balance as he sells, then, if a draft can be procured, or otherwise will authorize you to draw on him for the balance. I enclose a check on the Branch for $1,000, making $7,000 which credit this account."

"I am your friend and obedient servant,"

"GEORGE D'WOLF"

Page 26 U. S. 496

MR. JUSTICE STORY, delivered the opinion of the Court.:

Messrs. Rabaud, Brothers & Co., of Marseilles, brought a suit in the Circuit Court of the Southern District of New York against James D'Wolf Jr. (the plaintiff in error)

to recover damages, for not shipping them 500 boxes of sugar on account of one George D'Wolf according to an agreement entered into by him with them. The declaration contained four counts, and in each of them the substance of the contract stated is that the defendant, in consideration that one Belknap (one of the partners in the house of Rabaud, Brothers & Co.) would authorize George D'Wolf to draw on the plaintiffs for 100,000 francs, undertook and promised, that he would ship for the account of George D'Wolf, on board such vessel as he, George D'Wolf should direct, five hundred boxes of white Havana sugar, consigned to the plaintiffs at Marseilles. The declaration then proceeds with the proper averments and breaches necessary to maintain the action; upon the trial under the general issue, the jury found a verdict for the plaintiffs, and judgment was given for them accordingly. The cause now comes before this Court upon a writ of error and bill of exceptions taken at the trial.

The bill of exceptions is voluminous, and contains at large the evidence admitted at the trial as well as the charge of the

Page 26 U. S. 497

learned judge who presided at the trial. It is unnecessary to refer to that evidence, or to consider its nature bearing and extent, upon which so ample a comment has been made at the bar, except so far as it applies to some question of law decided by the court to which an exception has been taken. The whole facts were left open to the jury, and so far as they were imperfect or inconclusive, the defendant has had the full opportunity of addressing his views to the jury, and they have found their verdict against him.

In the progress of the trial, a letter of 27 December, 1825, written by George D'Wolf to Belknap, was offered by the defendants in evidence for the purpose of showing an authority from George D'Wolf to Belknap to direct or name a vessel to the defendant on board of which the sugars might be shipped. The defendant objected to its admission and the objection was overruled. This constitutes the first ground of error now insisted on by the defendant. We are of opinion that the letter was rightly admitted for both of the reasons stated in the charge. It was evidence

of such an authority, and the defendant made no objection to it at the time on account of any insufficiency in this respect, but put his defense by his letter of 5 January, 1826, on an entirely distinct ground.

After the evidence for the plaintiffs was closed, the defendant moved for a nonsuit, which motion was overruled. This refusal certainly constitutes no ground for reversal in this Court. A nonsuit may not be ordered by the court upon the application of the defendant, and cannot, as we have had occasion to decide at the present term, be ordered in any case without the consent and acquiescence of the plaintiff, *Elmore v. Grymes, ante,* page 26 U. S. 469 . In the further progress of the trial, upon the examination of one Frederick G. Bull, a witness for the defendant, the counsel for the defendant offered to prove, by Bull, that it was an express understanding and agreement between the defendant and George D'Wolf at the time the letter of 15 November, 1825 (which will be hereafter more particularly noticed) was signed by the defendant, that the latter should furnish the defendant with the funds necessary for the purchase of the sugar before the defendant would be under any obligation to ship the same. This testimony was rejected by the court unless it should also appear that Belknap was a party thereto or that the same was brought home to his knowledge. We can perceive no error in this decision. If the defendant had entered into the contract with the plaintiffs stated in the declaration, and the private arrangement made between the defendant and George D'Wolf, constituted no part of that contract and was unknown to them, it certainly ought not to prejudice their rights. It was *res inter alios acta,* and had no

Page 26 U. S. 498

legal tendency either to disprove the plaintiffs' case or to exonerate the defendant from his liability.

The other exceptions are exclusively confined to the charge given to the jury upon the summing of the court upon points of law.

The first objection was to the sufficiency of the evidence to establish the citizenship of Belknap as averred in the declaration. This is now waived by the counsel, and indeed could not now be maintained, because it has been recently decided, by this Court upon full consideration that the question of such citizenship constitutes no part of the issue upon the merits, and must be brought forward by a proper plea in abatement in an earlier stage of the cause.

The great question upon the merits arises upon that part of the charge which relates to the agreement contained in the letter of 15 November, 1825, from George D'Wolf to the defendant and the accompanying assent of the latter with reference to the statute of frauds.

That letter is in the following terms:

"New York, 15 November, 1825"

"MR. JAMES D'WOLF, JR."

"Dear Sir: You will please ship for my account on board such vessel as I shall direct, five hundred boxes white Havana sugar consigned to Messrs. Rabaud, Brothers & Co. Marseilles, and oblige your friend and obedient servant,"

"GEORGE D'WOLF"

"Agreed to [Signed] JAMES D'WOLF, JR."

Upon this part of the case, the charge was as follows:

"It is said that this letter, under the statute of frauds, does not purport on its face to contain any binding contract on the part of the defendant, and that the defects cannot be supplied by parol evidence. This objection I think cannot be sustained. The first question to be settled and which is matter of fact for your determination is whether the arrangement between Belknap and George D'Wolf as to the authority to draw on the house in Marseilles on the shipment and consignment of five hundred boxes of sugar and the undertaking of the defendant were made and entered into at one and the same time, so as to form one entire transaction."

The judge then proceeded to sum up the evidence on this point and added

"The consideration for this undertaking was the authority given by Belknap to George D'Wolf, to draw on the plaintiffs for one hundred thousand francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And one question is whether it can be supplied by parol evidence, and I think it may if the undertaking of the defendant was entered into at

Page 26 U. S. 499

the same time with that between Belknap and George D'Wolf, so as to form one entire transaction. The evidence does not in any manner contradict the written agreement, and is perfectly consistent with it, as between the plaintiffs and George D'Wolf the consideration might be clearly supplied by parol proof, and if the undertaking of the defendant was at the same time, it required no consideration from the plaintiffs to him, the consideration to George D'Wolf was sufficient to uphold and support the contract of the defendant."

And he finally stated if he was mistaken in this view of the evidence

"and the jury should be of opinion that the contract between Belknap and George D'Wolf, was completed and unconnected with the engagement of the defendant before he undertook to make the shipment and consignment, then the evidence was not sufficient to maintain the present action. It will then be a collateral undertaking, made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract."

The question, then, so far as it was a question of fact whether the defendant did enter into the asserted agreement with the plaintiffs and whether it was a part of the original arrangement with George D'Wolf and upon the original consideration moving from the plaintiffs, was before the jury, and it has found in the affirmative. The question of law remains whether this was a case within the statute of frauds, so as to prevent parol evidence from being admissible to charge the defendant.

The statute of frauds of New York is a transcript on this subject of the statute of 29th of Charles II, ch. 3. It declares

"That no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another unless the agreement, or some memorandum or note thereof be in writing and signed by the party, or by anyone by him authorized."

The terms "collateral" or "original" promise do not occur in the statute, and have been introduced by courts of law to explain its objects and expound its true interpretation. Whether by the true intent of the statute it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration moving at the same time between the parties, or whether it was confined to cases where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking, might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination, at least in those states where the English authorities have been fully

Page 26 U. S. 500

recognized and adopted in practice. If A agree to advance B a sum of money for which B is to be answerable, but at the same time it is expressed upon the undertaking that C will do some act for the security of A and enter into an agreement with A for that purpose, it would scarcely seem a case of a mere collateral undertaking, but rather, if one might use the phrase, a trilateral contract. The contract of B to repay the money is not coincident with nor the same contract with C to do the act. Each is an original promise, though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A not solely upon the promise of B or C, but upon the promise of both, *diverso intuitu,* and each becomes liable to A not upon a joint but a several original undertaking. Each is a direct, original promise, founded upon the same consideration. The credit is not given solely to either, but to both; not as joint contractors on the same

contract, but as separate contractors upon coexisting contracts forming parts of the same general transaction. Of that very nature is the contract now before the Court, and if the intention of all the parties was that the letter of 15 November should be delivered to Belknap as evidence of the original agreement between all the parties, and indeed as part execution of it, to bind the defendant not merely to George D'Wolf, but to the plaintiffs; and so it has been established by the verdict, then it is not very easy to distinguish the case from that which was put.

But assuming that the true construction of the statute of frauds is, as the authorities seem to support, and that such a promise would be within its purview, it remains to consider whether the arguments at the bar do establish any error in the opinion of the circuit court.

In the first place, there is no repugnance between the terms of that letter and the parol evidence introduced. The object of the latter was to establish the fact that there was a sufficient consideration for the agreement and what that consideration was, and also the circumstances under which it was written, as explanatory of its nature and objects. Its terms do not necessarily import that it was an agreement exclusively between George D'Wolf and the defendant. If the paper was so drawn up and executed by the assent of all the parties for the purpose of being delivered to Belknap as a voucher and evidence to him of an absolute agreement by the defendant to make the shipment, and so was in fact understood by all the parties at the time, there is nothing in its terms inconsistent with such an interpretation. The defendant agrees to the shipment. But with whom? It is said with George D'Wolf alone, but that does not necessarily follow, because it is not an instrument in its terms *inter partes.* If the parties intended that it should express the joint assent

of George D'Wolf and the defendant, to the shipment, and it was deliverable to Belknap accordingly, as evidence of their joint assent that it should be made upon the terms and in the manner stated in it, there is nothing which contradicts its proper purport, and it is then precisely what the parties require it to be. It was for

the jury to say whether the evidence disclosed that as the true object of it, and to give it effect accordingly as proof of an agreement in support of the declaration. The case of *Sargent v. Morris,* 3 Barn. & Ald. 277, furnishes no uninstructive analogy for its admission.

In the next place, was the parol evidence inadmissible to supply the defect of the written instrument as to the consideration and *res gestae,* between the parties? The case of *Wain v. Warlters,* 5 East 10, was the first case which settled the point that it was necessary to escape from the statute of frauds that the agreement should contain the consideration for the promise, as well as the promise itself. If it contained it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms or by necessary implication. That case has from its origin encountered many difficulties, and been matter of serious observation both at the bar and on the bench in England and America. After many doubts, it seems at last in England, by the recent decisions of *Saunders v. Wakefield,* 4 Barn. & Ald. 595, and *Jenkins v. Reynolds,* 3 Brod. & Bing. 14, to have settled down into an approved authority. It has however assumed a uniform recognition in America, although in several of the states, and particularly in New York, it has to a limited extent been adopted into its jurisprudence as a sound construction of the statute. On the other hand, there is a very elaborate opinion of the Supreme Court of Massachusetts in *Packard v. Richardson,* 17 Mass. 122, where its authority was directly overruled. What might be our own view of the question unaffected by any local decision it is unnecessary to suggest, because the decisions in New York upon the construction of its own statute and the extent of the rules deduced from it furnish in the present a clear guide for this Court. In the case of *Leonard v. Vredenburgh,* 8 John. 29, Mr. Chief Justice Kent, in delivering the opinion of the court, adverting to the fact that that case was one of a guarantee, or promise collateral to the principal contract, but made at the same time and becoming an essential ground of the credit given to the principal or direct debtor, added,

"and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary by parol proof, and

the decision in *Wain v. Warlters* did not stand in the way."

One of the points in that case was whether the parol proof

Page 26 U. S. 502

of the consideration was not improperly rejected at the trial, and the decision of the court was that it ought to have been admitted. It is not, therefore, as was suggested at the argument, a mere *obiter dictum* uncalled for by the case. It was one, though not the only one, of the points in judgment before the court. The same doctrine has been subsequently recognized by the same court in *Bailey v. Freeman,* 11 Johns. 221, and in *Nelson v. Dubois,* 13 Johns. 175.

It does not seem necessary to pursue this subject further, because here is a clear authority justifying the admission of the parol evidence upon the principal of the local jurisprudence. It seems to us a reasonable doctrine, founded in good sense and convenience and tending rather to suppress than encourage fraud. But whether so or not, it sustains the opinion of the circuit court in a manner entirely free from exception.

The next objection to the charge, founded on the variance between the declaration and proofs, has been abandoned at the argument and need not be dwelt upon. And the last objection, to-wit to the designation of a vessel for the shipment as ineffectually made, has been already in part answered, and we entirely coincide with the views expressed on this point by the circuit court.

Without, therefore, going more at large into the points of the case or commenting upon the various authorities and principles so elaborately brought out in the discussions at the bar, it is sufficient to say that we perceive no error in the judgment of the circuit court, and it is therefore to be

Affirmed with costs.