

Schimmelpennick Vs. Turner

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Court : US Supreme Court

Decided On : 1832

Appeal No. : 31 U.S. 1

Appellant : Schimmelpennick

Respondent : Turner

Judgement :

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U.S. Supreme Court Schimmelpennick v. Turner, 31 U.S. 6 Pet. 1 1 (1832)

Schimmelpennick v. Turner

31 U.S. (6 Pet.) 1

ON CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT

OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

SYLLABUS

The declaration contained two counts. The first, setting out the cause of action, stated

"For that whereas the said defendants and co-partners, trading under the firm of Josiah, Turner & Company in the lifetime of said William, on 1 March, 1821,"

were indebted to the plaintiffs; and being so indebted,

&c.;

The second count was upon an *insimul computassent*, and began

"And also whereas the said defendants afterwards, to-wit, on the day and year aforesaid, accounted with the said plaintiffs of and concerning divers other sums of money due and owing from the said defendants,"

&c.; The defendants, to maintain the issue on their parts, gave in evidence to the jury that William Turner, the person mentioned in the declaration, died on 6 January, 1819, that he was formerly a partner with Josiah and Philip Turner, the defendants, under the firm of Josiah Turner & Company, but that the partnership was dissolved in October, 1817, and that the defendants formed a co-partnership in 1820. The defendants prayed the court to instruct the jury that there is a variance between the contract declared on and the contract given in evidence, William Turner being dead.

By the court:

"The only allegation in the second count in the declaration, from which it is argued that the contract declared upon was one including William Turner with Joseph and Philip is 'that the said defendants accounted with the plaintiffs.' But this does not warrant the conclusion drawn from it. The defendants were Josiah and Philip Turner;

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William Turner was not a defendant, and the terms 'the said defendants' could not include him. There was no variance between the contract declared upon in the second count and the contract proved upon the trial with respect to the parties thereto."

In the circuit court, the plaintiffs, on 29 April, 1825, sued out a writ of *capias ad respondendum* in an action of assumpsit against "Josiah Turner, and Philip Turner, surviving partners of William Turner, citizens of Maryland, merchants."

The declaration in the case contained two counts; the first count charged the defendant for work, labor, and services, for goods sold and delivered, and for money lent, paid, and advanced in the following terms:

Josiah Turner, and Philip Turner, surviving partners of William Turner, citizens of Maryland, merchants, were attached to answer the plaintiffs

"of a plea of trespass on the case, &c.;, and thereupon the said plaintiffs, by J. Glenn their attorney, complain for that whereas the said defendants, merchants and co-partners, trading under the firm of Josiah Turner & Company, in the lifetime of the said William,"

on the 1 March, 1822, were indebted to the plaintiffs, &c.;

The second count was on an alleged *insimul computassent*, charging that

"The said defendants afterwards, to-wit on the day and year aforesaid, accounted with the said plaintiffs of and concerning divers other sums of money, before that time due and owing from the said defendants to the said plaintiffs, and then being in arrears and unpaid. . . ."

The defendants pleaded *nonassumpsit*; and before the case came on for trial, depositions of witnesses were taken in New York and in Holland, under commissions issued for the purpose, which showed that the ground of action was for advances made by the agent of the plaintiffs in September and October, 1819, and in January, 1820, on shipments of tobacco, the property of Josiah Turner and Philip Turner consigned to the plaintiffs and by them sold for the account of the defendants. From these transactions a balance was by the accounts current of the plaintiffs claimed to be due to them, and the accounts current of the plaintiffs were by the testimony in the case shown to have been furnished to the defendants by

the agent of the plaintiffs at different periods, and particularly in June, 1822. No acknowledgement or admission of the correctness of the account was given in evidence.

The defendants, to maintain the issue on their part, gave in evidence to the jury that William Turner, the person mentioned in the declaration, died on 6 January, 1819; that the said William was formerly a partner with the said Josiah and Philip under the firm of Josiah Turner & Company, but that the said co-partnership was dissolved in October, 1817; and that a new co-partnership was formed between the said Josiah and Philip in 1820, under the firm of Josiah Turner & Company.

Whereupon the defendants by their counsel prayed the opinion of the court and its direction to the jury that the plaintiffs are not entitled to recover, because the defendants are sued as surviving partners of William Turner, whereas the proof is that William Turner had departed this life some months before the first transaction took place between the plaintiffs and defendants, and therefore could not constitute one of the firm of the defendants at any time during the transactions in question, and that therefore there is a variance between the contract declared on and the contract given in evidence, upon which prayer the opinions of the judges were opposed, and the same, on motion of the plaintiffs by their counsel was certified to the Supreme Court agreeably to the act of Congress.

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MR. JUSTICE THOMPSON delivered the opinion of the Court.

This case comes up from the Circuit Court for the District of Maryland upon a division of opinion in that court upon a point stated on the record in the following manner, *viz.*,

"And thereupon the defendants, to maintain the issue on their part, gave in evidence to the jury that William Turner, the person mentioned in the declaration in this cause, died on 6 January, 1819. That the said William was formerly a partner with the said Josiah and Philip under the firm of Josiah Turner & Company, but

that the said co-partnership was dissolved in October, 1817, and that a new co-partnership was formed between the said Josiah and Philip in 1820 under the firm of Josiah Turner & Company."

"Whereupon the defendants by their counsel prayed the

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opinion of the court and its direction to the jury that the plaintiffs are not entitled to recover, because the defendants are sued as surviving partners of William Turner, whereas the proof is that William Turner had departed this life some months before the first transaction took place between the plaintiffs and defendants, and therefore could not constitute one of the firm of the defendants at any time during the transaction in question, and that therefore there is a variance between the contract declared on and the contract given in evidence. Upon which prayer the opinions of the judges were opposed."

The declaration contains two counts. The first, setting out the cause of action, states as follows:

"For that whereas the said defendants, merchants and co-partners trading under the firm of Josiah Turner & Co. in the lifetime of said William, on 1 March in the year 1821, were indebted to the plaintiffs, &c.;, and being so indebted, the defendants undertook and promised to pay, &c.;"

The second count is upon an *insimul computassent*, and begins:

"Whereas also the said defendants afterwards, to-wit, on the day and year aforesaid, accounted with the said plaintiffs of and concerning divers other sums of money due and owing from the said defendants and then in arrear and unpaid, and being so found in arrear, the defendants promised to pay,"

&c.;

Whatever objection may arise under the first count in the declaration with respect to a variance between the contract or cause of action and the evidence to maintain

it, that objection does not exist as to the second count. It is to be borne in mind that it forms no part of the question upon which the opinion of the judges was opposed whether the evidence was admissible under the count upon an *insimul computassent*. The point of objection was that the cause of action as stated in the declaration arose against the defendants and William Turner, and the evidence only showed a cause of action against the two defendants unconnected with William Turner, and which arose since his decease.

The only allegation in the second count in the declaration from which it is argued that the contract declared upon was one including William Turner with Josiah and Philip is that the said defendants accounted with the plaintiffs, &c.; But

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this does not warrant the conclusion drawn from it. The defendants were Josiah and Philip Turner. William Turner was not a defendant, and the reference by the terms the said defendants could not include him. It does not even describe the defendants as survivors, or allege that they accounted as such or in the lifetime of William Turner. But the whole cause of action as set out in this count arose against Josiah and Philip, entirely unconnected with William. The evidence therefore showing that William Turner died before the first transaction took place between the defendants and plaintiffs did not show any variance between the contract declared upon in this count and the contract proved. The one declared upon in the second count was between the plaintiffs and the defendants Josiah and Philip Turner, and the evidence did not show a contract varying from it.

We are accordingly of opinion that there was no variance between the contract declared upon in the second count and the contract proved upon the trial with respect to the parties thereto.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland and on the point and question on which the judges of the said circuit court were opposed in opinion, and which point was certified to this Court for its opinion in pursuance of the act of

Congress in such case made and provided, and was argued by counsel, on consideration whereof it is the opinion of this Court that there was no variance between the contract declared upon in the second count and the contract proved upon the trial with respect to the parties thereto, whereupon it is ordered and adjudged by this Court that it be certified to the said circuit court as the opinion of this Court that there was no variance between the contract declared upon in the second count and the contract proved upon the trial with respect to the parties thereto.

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