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Appeal No. : 41 U.S. 327

Appellant : Fresh

Respondent : Gilson

Judgement :

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Fresh v. Gilson

41 U.S. (16 Pet.) 327

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

FOR WASHINGTON COUNTY IN THE DISTRICT OF COLUMBIA

SYLLABUS

Liability for the acts of others may be created either by a direct authority given for their performance or it may flow from their adoption, in some instances from acquiescence in those acts. But presumptions can stand only whilst they are

compatible with the conduct of those to whom it may be sought to apply them, and must still more give place when in conflict with clear, distinct, and convincing proof.

The Circuit Court of the District of Columbia admitted as evidence a statement by one witness of what had been testified by another on the trial of a cause, to which the plaintiff in the cause and against whom the evidence was to operate was not a party. *Held* that this was error. Wherever the rights of a party, founded upon a deed, are dependent on the terms and conditions of that deed, the instrument thus creating and defining those rights must be resorted to and must regulate, moreover, the modes by which they are to be enforced at law. These identical rights cannot be claimed as being derived from a different and inferior source. If the deed be in force, all who claim by its provisions must resort to it.

When the contract contained in a deed has been varied or substituted by the subsequent acts or agreements of the parties, thereby giving rise to new relations between them, the remedies originally arising out of the deed may be varied in conformity with them. An action upon the deed would not be insisted upon or permitted, because the rights and obligations of the parties to the suit would depend on a state of things by which the deed had been put aside.

DANIEL, JUSTICE, delivered the opinion of the Court.

This case arises under the attachment law of the State of Maryland, passed in 1795, and comes before this Court upon a writ of error to the Circuit Court of the District of Columbia, for Washington county, within which the law of Maryland above mentioned is in force. The proceedings instituted in this case, although commencing by an attachment and upon what is termed a short note, in lieu of a formal declaration, assume nevertheless the essential character, and in some respects, the usual forms of the action of assumpsit, and must be governed by the

rules applicable to such an action. The defendants dissolved the attachment, by appearing and entering special bail, and pleading " *nonassumpsit,* " and upon the issue made up on this plea the cause was tried in the circuit court.

Upon the trial, exceptions were taken in five separate instances to the rulings of the circuit court, and in each of them the exception sealed by the judges is made a part of the record. To test the accuracy both of the decisions thus pronounced and of the objections alleged against them, it will be necessary to advert to the facts adduced in proof.

It appears, that on 23 August 1832, the defendants in error entered into a covenant with the Chesapeake & Ohio Canal Company for certain rates and prices stipulated in a covenant sealed between the defendant and the company by their president, and in a specification appended to the said covenant to construct, in a substantial and workmanlike manner, culvert No. 116, on the 150th section of the Chesapeake & Ohio Canal, and to prosecute the work upon the said culvert, without intermission, with such force as should, in the opinion of the resident engineer, secure its completion by the first day of August, 1833. On 3 November, 1832, a covenant was entered into between the plaintiff in error and the defendants, or rather with Riah Gilson, one of the defendants, styling himself superintendent for Gilson & Company, by which the construction of the culvert, No. 116, was let to the plaintiff, at the contract prices to be paid by the company for the work, with the exception that Fresh should pay to the defendants, from whom he took this contract, the sum of $100, which sum appears to have been a profit reserved to themselves by the first contractors upon the transfer of their undertaking. In this second covenant, the plaintiff in error bound himself "to be urgent in the performance of the work, so that it might progress in accordance with the specification and directions of the engineers." And further that in the event of neglect or failure on his part, the defendants should have authority to declare the work abandoned, to assume the direction, and to complete it at the plaintiff's expense. Having thus obtained a contract under the defendants, the plaintiff, on 2 May, 1833, made an agreement with Elijah Barret, for building of this culvert by the latter,

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stipulating to pay Barret the price of one dollar, twelve and a half cents for every perch of stone work of twenty-five cubic feet, upon a certificate and approval of the

engineer or superintendent of masonry as to the fidelity of the work. The plaintiff, on the trial, offered these several contracts in evidence; also an account against the defendant, stated on 24 December, 1833, for masonry, excavation, and paving performed, and for cement not supplied by the plaintiff in the construction of culvert 116, on which account, after allowing a credit of $1,142.73, a balance of $1,343.01 was claimed. This was the account on which the warrant of attachment issued. The plaintiff further proved the delivery of the letter, dated December 25, 1833, addressed by him to Wells, the agent of the defendant, in which he required a statement of his account with them and expressly forbade the payment to Elijah Barret of any amount whatever.

The defendants, to rebut the plaintiff's demand, offered the account, exhibit C, commencing December 5, 1832, and terminating 21 December, 1833, amounting to the sum of $1,369.36, and proved by their clerk, that the work on the said culvert was completed on 21 December, 1833, and that the account last mentioned was received by the plaintiff, without objection, except as to the quantity of cement charged therein. The defendants likewise offered in evidence several orders, numbered from 1 to 7, drawn by Elijah Barret, by himself and his agents, in favor of William Harris upon the defendants, at different periods during the autumn and winter of 1833, and claimed the benefit of them, as payments to the plaintiff. These orders purport to have been paid all on the same day, *viz.,* April 29, 1835, rather more than two years posterior to the date of the letter delivered to the defendant's agent, positively forbidding any payment to be made to Barret, or to his order, and nearly one month after the institution of this suit. And it is admitted that the orders were never shown to the plaintiff, nor expressly recognized by him at any time. The defendant offered seven other papers, purporting to be orders and due bills signed and certified by Elisha Barret, in November and December, 1833; three of them

said to be for work done upon culvert No. 116, and amounting in the whole to $273.50; these last orders and certificates, it is also admitted, were never shown to the plaintiff, nor acknowledged by him, and it does not appear that they have

ever been paid. Oral testimony was also introduced on the part of the defendants, in order to show that the work had been abandoned by the plaintiff, and its completion assumed and accomplished by the defendants, and on the part of the plaintiff, like evidence was offered to prove that he continued on the work and labored on it until it was finished on 21 December, 1833.

Upon the foregoing state of facts, the counsel for the plaintiff moved the court to exclude from the jury the orders drawn by Barret in favor of Harris as well as the evidence offered to prove the payment of those orders in April, 1835, more than two years after their payment had been forbidden by the plaintiff; the court admitted this evidence to go to the jury, and this produces the question presented by the first bill of exceptions.

We are unable to perceive upon what correct legal principle this question was ruled as it has been by the circuit court. There is no express power apparent in the record, nor indeed, was any attempted to be shown in the proofs, existing in Barret, to bind Fresh for any amount, with any person. It is true that under the contract between them, the former would have had a claim on his own behalf, whenever he should have fulfilled his undertaking; but not even then until he should have procured a certificate from the engineer of the company. But the right or claim he would then have acquired, differs essentially from the pretension sanctioned by the decision of the court, which amounts to an evasion of the stipulated test of his own conduct and his own rights, and to a claim, by that very evasion, to bind his employer *ad libitum* to any amount and to any person. Nor is it perceived that the admission of these orders was warranted by any presumption arising from the fact that orders previously drawn by the same person were comprised in the account proved to have been presented by Fresh, and not objected to by him, except as to the quantity of cement charged therein, Liability for the acts of others may be created, either by a direct authority given for their performance, or it may flow from their adoption, or, in some instances, from

acquiescence in those acts. But presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them, and still more must give place, when in conflict with clear, distinct and convincing proof. 3 Bac.Abr. 318(H), Presumptive Proof; 4 Stark.Evid. 53. The letter of the plaintiff, Fresh, delivered to the agent of the defendants, more than two years anterior to the alleged payment of the orders drawn by Barret, fully accords with the character of the proof just described; it justified no presumption of right or authority in Barret to make, nor of any obligation upon the defendants to pay, those drafts, and the circuit court therefore erred in permitting them to be given as evidence instead of excluding them wholly from the jury.

The next question arises upon the admissibility of the second series of orders and certificates or due bills signed by Barret, amounting together to $372.50, embraced in the second bill of exceptions. These orders are obnoxious to even stronger objections than those existing against the former orders drawn by Barret; they not only, like the former, were never (as is admitted) shown to or acknowledged by the plaintiff, but they carry on their face no receipt or other semblance of payment, nor is proof attempted *aliunde,* that the defendants have given, or are bound to give, any consideration for them. The circuit court should have excluded these papers also.

It is next stated that in addition to the evidence previously introduced by the defendants, they offered to prove by a competent witness that at the trial of a cause brought by one Hammond against two of the defendants, and to which the plaintiff was not a party, certain facts were proved by a witness examined in that cause. The plaintiff asked the exclusion of this testimony by the court, but his motion was denied, and this denial presents the point upon the third bill of exceptions. The evidence let in by this decision of the circuit court was not the exhibition of a record, nor even of a judgment, nor of process, but simply a statement by one witness, of what had been testified by another, on the trial of a cause to which the plaintiff was not a party, without an attempt to account for the absence of the person whose testimony was thus given at second hand. The principles,

that the best evidence the nature of the case admits of must always be produced, and that a person shall not be affected by that which is *res inter alios acta,* are too familiar to require authorities to support them. We will mention, however, as applicable to these points, 3 Bac.Abr. 322, I; 3 East 192; 2 Wash. 287; 9 U. S. 5 Cranch 14; 1 Stark. Evid. 58-59. But familiar as these principles may be as rudiments of the law, they are elements which enter essentially into the security of life, character and property. The circuit court, in conflicting with these principles, has further erred.

In the fourth bill of exceptions, it is stated that defendants offered to prove that Riah Gilson and Christopher Midlar, two of the defendants, superintended the performance of the work on the culvert No. 116, and that their superintendence was worth $150. That to the admissibility of this proof, the plaintiff objected, but the court permitted it to be received. The questions here raised, or rather the facts which make the basis of those questions, are somewhat vaguely and imperfectly stated. Enough, however, can be gathered from them, to justify the following conclusions. 1st, that by the written contract between the plaintiff and the defendant, or by any oral agreement attempted to be shown between these parties, there is no condition established authorizing or requiring the defendants to become the supervisors of the plaintiff in the performance of his work. 2d, that if the defendants have performed the work, either in fulfillment of their original contract with the canal company, or in consequence of an abandonment by the plaintiff, a charge for superintendence would appear inconsistent with the position they would have occupied in either view. Such a claim is therefore regarded irregular and unauthorized, and should have been excluded.

Upon the fifth and final bill of exceptions, it is in substance set forth that the plaintiff having given in evidence the contract between the canal company and the defendants, and the contract under the seals of the plaintiff and Riah Gilson, one of the defendants; the latter offered their account against the plaintiff, and proof that the culvert No. 116, was not completed until after the 1st of August 1833, the period designated in the original contract with the company. The plaintiff then

offered evidence to

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show, that the work was carried on until 21 December, 1833, at which date it was completed, and afterwards accepted, formally and expressly, by the company. And the defendants offered oral evidence to prove, that the work had been abandoned by the plaintiffs, and was finished by the defendants. Then follow the instructions moved for and granted, in the following terms. The defendant then prayed the court to instruct the jury that

"If from the evidence, the jury shall find that there was an agreement under seal between the said plaintiff and the defendant, for the execution of the work and labor for which this action was brought, the plaintiff is not entitled to recover in this action,"

and further, that

"If from the evidence the jury shall find that the said plaintiff performed the work and labor for which this action is brought under a sealed agreement between the said plaintiff and Riah Gilson, then the plaintiff is not entitled to recover in this action,"

to the granting of which two "instructions, unless qualified, the plaintiff objected, but the court overruled the objection and gave the said instructions as prayed."

Had the ruling of the circuit court in this instance been limited to an affirmance of the second proposition insisted on by the defendants, this Court could not hesitate in sustaining the decision, for we hold it as invariably true that wherever the rights of a party founded upon a deed are dependent upon the terms and conditions of that deed, the instrument thus creating and defining those rights must be resorted to, and must regulate, moreover, the modes by which they are to be enforced at law. These identical rights cannot be claimed as being derived from a different and an inferior source. If the deed be in force, all who claim by its provisions must resort to it. This is regarded as a canon of the law, and numerous authorities might

be adduced to sustain it, both from compilations and from the adjudged cases. 2 Bac.Abr. tit. Debt, G, citing 13 Hen. IV 1, and Roll.Abr. 604; 1 Chit.Plead. 75; *Atty v. Parish,* 4 Bos. & Pul. 104; 12 East 585; *Clark v. Smith,* 14 Johns. 326; *Munroe v. Perkins,* 9 Pick. 298. These authorities, to which many more might added, are full and express to the point that where a deed is the foundation of the claim, and can still be regarded as subsisting and in full force between the parties, the action to enforce its provisions must

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be upon the instrument itself. In the case of *Tilson v. Warwick Gaslight Company,* 4 Barn. & Cres. 962, there are some expressions of Bayley, Justice, which indicate an opinion by that learned judge, in opposition to the doctrine above laid down, and as counsel in the case of *Atty v. Parish,* he had maintained an opposite doctrine; but it should be borne in mind, that in *Tilson v. Gaslight Company,* the decision did not turn upon the principle ruled in the several authorities above cited, but entirely upon a state of the pleadings in which the judges declared they would be justified, if necessary, in presuming the existence of a deed. It should be remembered too that in deciding the case of *Atty v. Parish,* Chief Judge Mansfield, after advisement and delivering the unanimous opinion of the court, declared the doctrine contended for by Justice (then Serjeant) Bayley, to be such as he did not understand or did not feel the application of. With all the deference justly due to so learned and able a jurist as Justice Bayley, his argument as counsel, or his opinion, intimated, not upon the point adjudged, should not overrule a current of authorities extending from the Year Books to our own day.

There cannot be a doubt that where the contract contained in a deed has been varied or substituted by the subsequent acts or agreements of the parties, thereby giving rise to new relations between them, the remedies originally arising out of the deed may be varied in conformity with them. An action upon the deed would not be insisted upon or permitted, because the rights and obligations of the parties to the suit would depend upon a state of things by which the deed had been put aside. Hence it has been ruled that where a person who had covenanted to perform certain work had failed or refused to fulfill his covenant, but had

afterwards, upon the parol engagement of the covenantee, or by his acts, amounting in law to an engagement, gone on, in whole or in part, to do the work, he might recover the value of the work in assumpsit upon a *quantum meruit.* So too, between partners, though articles of co-partnership have been sealed between them, yet upon an account stated and a balance struck, assumpsit will lie. This principle is illustrated in several of the authorities already quoted, and in none of them more forcibly then in those of *White v. Parkin,* 12 East 585; *Monroe v. Perkins,* 9 Pick, 289, to which may be added the cases of *Marine Insurance*

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Company v. Young, 1 Cranch 332; *Baird v. Blaigrove,* 1 Wash. 170; and *Latimore v. Harsen,* 14 Johns. 330; and in the case of *Fletcher v. Gillespie,* 3 Bing. 635, although a charter party had been entered into, yet expenses incurred by the master in loading the ship were recovered in assumpsit; for, said the court in that case,

"this claim does not rest upon the charter party, it is for money paid *dehors* the contract, for the ease and benefit of the defendants, and from which they have derived advantage."

Numerous cases applicable to the point here considered will be found collected by Saunders in his Treatise on Pleading and Evidence vol. i. 110. It is upon this well settled distinction, that the court, whilst it recognizes the principle affirmed by the second instruction contained in the fifth bill of exceptions, feel bound to disapprove and overrule the first instruction in that bill. It is manifest that at the trial, testimony was introduced tending to show that the contract between the defendants and the canal company, as well as that entered into between the same defendants and the plaintiff, had been modified or substituted by other and new contracts, tending too to show acts of performance by the parties to these new and modified engagements. It was certainly competent for the parties to use such evidence, and to rely upon its effect before the jury. The first instruction of the circuit court, contained in the last bill of exception, cuts off from the plaintiff, at least, all benefit

of such evidence, however, strong it might have been. In this we consider that instruction as having deprived the plaintiff of an undoubted legal right. We regard it, therefore, as erroneous, and for this cause, and for the reasons assigned for disapproving the rulings of the circuit court upon the other instructions given in this case, the judgment of that court is hereby reversed and the cause is remanded to be again tried by a jury in conformity with the principles of this decision.

Judgment reversed.