

NEW YORK COURT OF APPEALS

Lawrence v. Fox

20 N.Y. 268 (N.Y. 1859) · Decided December 5, 1859

OPINION

GRAY, J.

The first objection raised on the trial amounts to this: That the evidence of the person present, who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant, was mere hearsay and therefore not competent. Had the plaintiff sued Holly for this sum of money no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterwards sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an objection from any source.

All the defendant had the right to *Page 270 demand in this case was evidence which, as between Holly and the plaintiff, was competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground and warranted the verdict of the jury. But it is claimed that notwithstanding this promise was established by competent evidence, it was void for the want of consideration.

It is now more than a quarter of a century since it was settled by the Supreme Court of this State — in an able and pains-taking opinion by the late Chief Justice SAVAGE, in which the authorities were fully examined and carefully analysed — that a promise in all material respects like the one under consideration was valid; and the judgment of that court was unanimously affirmed by the Court for the Correction of Errors.

(Farley v. Cleaveland, 4 Cow., 432; same case in error, 9id., 639.) In that case one Moon owed Farley and sold to Cleaveland a quantity of hay, in consideration of which Cleaveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleaveland from Moon was a valid consideration for Cleaveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery.

The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the

collection of a debt, the promise although made for the benefit of the plaintiff could not enure to his benefit.

The hay which Cleaveland delivered to Moon was not to be paid to Farley, but the debt incurred by Cleaveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid. That case has been often referred to by the courts of this State, and has never been doubted as sound authority for the principle upheld by it.

(*Barker v. Buklin*, 2 Denio, 45; *Hudson Canal *Page 271 Company v. The Westchester Bank*, 4 id., 97.) It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon but to the plaintiff Farley.

In this case the promise was made to Holly and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and defendant.

As early as 1806 it was announced by the Supreme Court of this State, upon what was then regarded as the settled law of England, "That where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." *Schermerhorn v. Vanderheyden* (1 John. R., 140), has often been re-asserted by our courts and never departed from.

The case of *Seaman v. White* has occasionally been referred to (but not by the courts) not only as having some bearing upon the question now under consideration, but as involving in doubt the soundness of the proposition stated in *Schermerhorn v. Vanderheyden*.

In that case one Hill, on the 17th of August, 1835, made his note and procured it to be indorsed by Seaman and discounted by the Phœnix Bank. Before the note matured and while it was owned by the Phœnix Bank, Hill placed in the hands of the defendant, Whitney, his draft accepted by a third party, which the defendant indorsed, and on the 7th of October, 1835, got discounted and placed the avails in the hands of an agent with which to take up Hill's note; the note became due, Whitney withdrew the avails of the draft from the hands of his agent and appropriated it to a debt due him from Hill, and Seaman paid the note indorsed by him and brought his suit against Whitney.

Upon this state of facts appearing, it was held that Seaman could not recover: first, for the reason that no promise had been made by Whitney to pay, and second, if a promise could be implied from the facts that Hill's accepted draft, with which to raise the means to pay; the note, had been placed by Hill in the hands of Whitney, the promise would not be to Seaman, but to the Phœnix Bank who then owned the note; although, in the course of *Page 272 the opinion of the court, it was stated that, in all cases the principle of which was sought to be applied to that case, the fund had been appropriated by an express undertaking of the defendant with the creditor.

But before concluding the opinion of the court in this case, the learned judge who delivered it conceded that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor. This question was subsequently, and in a case quite recent, again the subject of consideration by the Supreme Court, when it was held, that in declaring upon a promise, made to the debtor by a third party to pay the creditor of the debtor, founded upon a consideration advanced by the debtor, it was unnecessary to aver a promise to the creditor; for the reason that upon proof of a promise made to the debtor to pay the creditor, a promise to the creditor would be implied.

And in support of this proposition, in no respect distinguishable from the one now under consideration, the case of *Schermerhorn v. Vanderheyden*, with many intermediate cases in our courts, were cited, in which the doctrine of that case was not only approved but affirmed. (*The Delaware and Hudson Canal Company v. The Westchester County Bank*, 4 Denio, 97.)

The same principle is adjudged in several cases in Massachusetts. I will refer to but few of them. (*Arnold v. Lyman*, 17 Mass., 400; *Hall v. Marston*, id., 575; *Brewer v. Dyer*, 7 Cush., 337, 340.) In *Hall v. Marston* the court say: "It seems to have been well settled that if A promises B for a valuable consideration to pay C, the latter may maintain assumpsit for the money;" and in *Brewer v. Dyer*, the recovery was upheld, as the court said, "upon the principle of law long recognized and clearly established, that when one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis, that the law operating on the act *Page 273 of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded."

There is a more recent case decided by the same court, to which the defendant has referred and claims that it at least impairs the force of the former cases as authority. It is the case of *Mellen v. Whipple* (1 Gray, 317).

In that case one Rollins made his note for \$500, payable to Ellis and Mayo, or order, and to secure its payment mortgaged to the payees a certain lot of ground, and then sold and conveyed the mortgaged premises to the defendant, by deed in which it was stated that the "granted premises were subject to a mortgage for \$500, which mortgage, with the note for which it was given, the said Whipple is to assume and cancel."

The deed thus made was accepted by Whipple, the mortgage was afterwards duly assigned, and the note indorsed by Ellis and Mayo to the plaintiff's intestate. After Whipple received the deed he paid to the mortgagees and their assigns the interest upon the mortgage and note for a time, and

upon refusing to continue his payments was sued by the plaintiff as administratrix of the assignee of the mortgage and note.

The court held that the stipulation in the deed that Whipple should pay the mortgage and note was a matter exclusively between the two parties to the deed; that the sale by Rollins of the equity of redemption did not lessen the plaintiff's security, and that as nothing had been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins, there was no consideration to support an express promise, much less an implied one, that Whipple should pay Mellen the amount of the note.

This is all that was decided in that case, and the substance of the reasons assigned for the decision; and whether the case was rightly disposed of or not, it has not in its facts any analogy to the case before us, nor do the reasons assigned for the decision bear in any degree upon the question we are now considering. But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law will not imply a promise.

I agree that many of the cases where a promise was implied were cases of trusts, *Page 274 created for the benefit of the promiser. The case of *Felton v. Dickinson* (10 Mass., 189, 190), and others that might be cited, are of that class; but concede them all to have been cases of trusts, and it proves nothing against the application of the rule to this case.

The duty of the trustee to pay the cestuisque trust, according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay.

The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases.

It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and therefore the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to

maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit and in accordance with legal presumption accepted by him (*Berley v. Taylor*, 5 Hill, 577-584, et seq.), until his dissent was *Page 275 shown.

The cases cited, and especially that of *Farley v. Cleaveland*, establish the validity of a parole promise; it stands then upon the footing of a written one. Suppose the defendant had given his note in which, for value received of Holly, he had promised to pay the plaintiff and the plaintiff had accepted the promise, retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may.

No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this State, from a very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed. JOHNSON, Ch. J., DENIO, SELDEN, ALLEN and STRONG, Js., concurred. JOHNSON, Ch. J., and DENIO, J., were of opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.