503/1

McAllister, Roger v. Budd, George K & Budd, Charles P.

628/5

33/417

McAllister (R)
v
Budd (A)
The State Fire & Marine
Insurance Co of Penn

Krumdecker
McClelland Moody (A)

Sharp, J (R)

Budd's made a net of exchange
to State Fire Co &
[illegible] to Mc -
[illegible]

Stew
March 62
Sept 60

Bill of Exchange

principal agent [illegible] [illegible]

Reversed & Remanded

1

State of Missouri } S.S.
County of St Louis }

Be it Remembered,
that heretofore, towit, on the 17th day of March,
1859. the following Petition was filed in
the Office of the Clerk of the St Louis Court
of Common Pleas. which is as follows. towit:

Petition

Roger C. McAllister, plaintiff.
against
The State Fire and Marine
Insurance Company, of
Pennsylvania, and George K.
Budd and Charles P. Budd, defendants

In the St Louis Court of Common Pleas
To the April Term. A.D. 1859.

Plaintiff states that on the first day of
December. A.D. 1858. at St Louis, in this State
defendants George K. Budd, and Charles P.
Budd, made their certain Bills of Exchange
in writing, by the description of "George K.
Budd & Son" agents. and directed the same
to the said State Fire and Marine Insur-
ance Company. of Harrisburg. Pennsylvania,
by which. they required said Insurance Company,
to pay, three months from the date thereof,
to the order of plaintiff, by the description
of Messrs. McAllister & Co Thirteen hundred
and Three Dollars, and Twelve cents, for
value received and to charge the same

to their account, and delivered the same to plaintiff; said Bill of Exchange, dated on the said first day of December, 1858. is hereto annexed.

Plaintiff states, that after the making and delivery of said bill and before its maturity, said State Fire and Marine Insurance Company, of Pennsylvania, by its proper agents, accepted the same by its acceptance thereon in writing. That said Insurance Company, then was, long before had been, and still is, a duly incorporated Company, and body corporate, by the laws of said State of Pennsylvania.

Plaintiff states, that when said Bill of Exchange became due and payable it was duly presented and shown to said Insurance Company by its proper agent for payment, payment thereof was then duly demanded, and payment thereof was refused and said Bill was then duly protested for nonpayment thereof of all of which, defendants George K. Budd and Charles P. Budd, were then duly notified.

Plaintiff states that the sum of money in said Bill specified, together with damages and interest, is yet due to him from defendants and for which he asks judgment.

F. C. Sharp.
Atty for Plff

Roger C McAllister said plaintiff, on his oath says that the foregoing petition

3.

and the matters therein as stated. he believes to be true.
He further states. that he has a just demand against defendants and that the amount which affiant believes he said plaintiff ought to recover after allowing all just credits and set.offs. is Thirteen Hundred and three Dollars and twelve cents. with damages and interest. and that he has good reason to believe and does believe, that Defendant, the State Fire and Marine Insurance Company. of Harrisburg. Pennsylvania. is a corporation. whose chief office. or place of business out of this State.

R. C. McAllister

Sworn to and subscribed before me. this 17th day of March. A. D. 1859. C. W. Hicks. Clerk.

And at the same time. the following Bond. was filed. to wit:

Bond.

Know all men by these presents. That we Roger C. McAllister. as principal and James. Keegan, as security. are indebted to the State of Missouri in the sum of Twenty-Eight Hundred dollars. for the payment whereof. we bind ourselves. our heirs. executors and administrators. jointly and severally. firmly by these presents. Sealed with our seals and dated at St Louis this 17th day of March, Eighteen Hundred and fifty nine.

The condition of this obligation is such, that whereas said Roger C. McAllister, is about to institute a suit in the St Louis, Court of Common Pleas, by attachment against The State Fire and Marine Insurance Company of Harrisburg Pennsylvania defendant, for the sum of Thirteen Hundred and three dollars and twelve cents, with damages and interest, Now if the said plaintiff shall prosecute, his action without delay and with effect refund all sums of money, that may be adjudged to be refunded to the defendant, or found to have been received by the plaintiff and not justly due to him and pay all damages and costs that may accrue to any defendant or any garnishee by reason of the attachment or any process or proceeding in the suit or by reason of any judgment or process thereon, then this obligation to be void, otherwise to remain in full force.

Approved. Attest
W. Hicks Park.

Roger C. McAllister (Seal)
James Meegan (Seal)

And thereupon the following Writ was issued, to wit:

The State of Missouri

Writ of Attch't

To the Sheriff of St Louis County, Greeting.

We command you to attach, The State Fire and Marine Insurance Company, of

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Harrisburg Pennsylvania by all and sin=
gular its lands and tenements goods chat=
tels moneys credits and effects or so much
thereof as shall be sufficient to secure
the sum of Thirteen Hundred and three
Dollars and twelve cents with interest
and costs of suit in whose hands or pos=
session soever the same may be found
in your bailiwick and that you summon
the said State Fire and Marine Insurance
Company of Harrisburg Pennsylvania and
also George K. Budd and Charles P. Budd
to appear at the next term of the St Louis
Court of Common Pleas before the Judge thereof
on the first day of the said term to be holden
at the City of St Louis within and for the Coun=
ty of St Louis on the First Monday of April
next then and there to answer the complaint
of Roger C McAllister as set forth in the
annexed petition and also that you might
summon all and every person in whose hands
or possession soever any such lands tenements
goods chattels moneys credits or effects may
be found and particularly George K. Budd
Charles P. Budd Nicholas Springer and
Thomas Yamall that they be and appear
before the Judge of our said Court on the
first day of the Term aforesaid then and
there to answer unto what may be objects=
ed against them and have you then
and there this writ

Witness Charles W. Hicks. Clerk of our said Court. with the seal thereof hereto affixed. at office in the City of St Louis. this 17th day of March. in the year of our Lord Eighteen Hundred and fifty nine.

Seal

C. W. Hicks. Clerk.

Upon which writ is endorsed the following Sheriffs Return, towit:

Sheriffs Return.

No goods. chattels. or real estate found in my County. belonging to the within defendant. whereon to levy this writ. I did on the 17th day of March 1859. summon George K. Budd. as agent of the defendant. Nicholas Sprunger. Thomas Darnell. and George K. Budd to appear. at the Return term of this writ to answer the interrogatories. that may be exhibited by the plaintiff. touching their indebtedness to the defendant. I further. declared to them. that I did attach in their hands (and summons them as Garnishees). any goods. chattels. moneys. or evidences of debt. which they may have. belonging. to the said defendant. and further I did attach in their hands. all debts due from them. to said defendant, or so much thereof. as shall be sufficient. to satisfy the debt. interest and costs in above case. Further executed this writ in St Louis County. by delivering a Copy of the writ and petition as

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by the Clerk. to George K Budd. Charles P Budd. not found in my County

M. S. Cerre. Sheff.

By I. S. Wilkins. Dpy

And on the 5th day of April. 1859. the following Answer. was filed. towit:

Answer

Said George K. Budd. and Charles P. Budd for Answer to plaintiffs petition. state. that they deny. that they made their certain. Bill of Exchange. in writing. as stated in said petition. Said defendants further state. that they as the authorized agents of said Company with full authority. so to do. drew said Bill of Exchange. as and for the Bill of said Company. That it was the act of said Company by them. as its authorized agents. and not in any sense. the act of these defendants; that they received no value. nor any other consideration. for said bill. Said Bill. was made by said Company. through the agency of these defendants. for a debt due from said Company. to the plaintiff and was received by him. as the Bill of said Company. drawn by it. upon itself. he at the time. well knowing. and in fact denying that said George K. and Charles P. Budd. were not. in any way. to be held bound for its payment The defendants. have no knowledge or information sufficient to form a belief whether or not said bill. was duly presented for payment and payment refused. or

whether or not. said Bill. was then and there. duly protested

W Clellan. Moody & Killyer.
attys for Budd & Budd.

George K. Budd. on oath says. he believes the foregoing Answer and the matters therein as stated. are true.
Subscribed and sworn to Geo. K. Budd
before me. April 5th 1859
Peter W. Johnstone, Justice of the Peace.

And afterwards. at the April Term 1859 of said Court the following proceedings were had towit:

Leave to Am'd Petition by striking out "Harrisburg"

On motion of the plaintiff by attorney. leave is given him to amend his petition herein by striking out the word "Harrisburg." where the same occurs in the name of the defendant. The State Fire & Marine Ins. Co. and said amendment is accordingly made

And at the November Term 1859. the following further proceedings were had towit:

Friday. Febry 17. 1860

Dis'd as to Ins. Co. & Ct. Sub and Ind't. vs other Defts

Now at this day comes the plaintiff. by. his attorney and dismisses this suit as to the defendant, The State Fire and Marine. Insurance Company of ~~Philadelphia~~. Pennsylvania. the defendants. also come. by their attorneys and no Jury being required. the parties submit this cause to the Court. and the Court. after hearing the evidence herein

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and being fully advised in the premises, doth find the issues herein joined, in favor of the plaintiff and doth assess his damages at the sum of Fourteen Hundred and eighty-eight dollars, and forty-two cents. Therefore, it is considered by the Court, that the plaintiff recover of said defendants, the damages aforesaid, as assessed, together with his costs herein expended and have execution therefor. Motion for new trial, filed

And at the April Term 1860 of said Court, the following further proceedings were had towit:

Saturday April 21. 1860

Motion for New trial. Over^d

The Court having heard and fully considered the defendants' motion, for a New trial herein, doth overrule the same.

May. 21. 1860

Affdt. for Appl. filed, " allowed Bond filed & app^d

The defendants file an affidavit, for appeal, and on their motion by attorney, an appeal, is allowed, them to the Supreme Court, from the judgment rendered, herein. They thereupon file an appeal Bond, with themselves as principals and Hannah Patterson and Alexander Leitch as securities which bond is approved by the Court

And the Affidavit for Appeal filed herein is as follows, towit:

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Affd. for Appeal

George K Budd. for himself and his co-defendant. on oath says, that the appeal herein made by defendants. George K. Budd and Charles P. Budd. is not made for vexation or delay. but because affiant believes that the appellants are aggrieved by the Judgment or decision of the Court

Geo. K. Budd.

Subscribed and sworn to before me. May 26. 1860.

L. J. Papin. Clk.

And the Appeal Bond filed herein. is as follows. to wit:

Appeal Bond.

Know all men. by these presents. That we George K. Budd. Charles P. Budd. as principal and Hannah Patterson & Alexander Leitch. as securities. are indebted to Roger C. McAllister. in the sum of Three Thousand Dollars for the payment whereof. we bind ourselves. our heirs executors and administrators. jointly and severally. firmly by these presents Sealed with our seals and dated at St. Louis. this 26th day of May. One Thousand Eight Hundred and sixty.

The condition of this obligation. is such that whereas George K. Budd. & George P. Budd have appealed from the Judgment rendered against them. and in favor of Roger C. McAllister. in the St Louis Court of Common Pleas. for the sum of Fourteen

hundred and Eighty-Eight dollars and forty two cents, together with costs. Now if the said appellants, shall prosecute their appeal, with due diligence to a decision, in the Supreme Court and shall perform such judgment as shall be given by the Supreme Court, or such as the Supreme Court may direct the St Louis Court of Common Pleas to give, and if the judgment of such Court or any part thereof, be affirmed, that they will comply with and perform the same, so far as it may be affirmed and will pay all damages and costs which may be awarded against them, by the Supreme Court, then this obligation to be void, otherwise to remain in full force.

Approved May 26. 1860 by the Court.
Attest. L. J. Papin Clk

Geo. K. Budd
C. P. Budd
H. Patterson
Alex. Leitch

And on the 20th day of June. 1860. the following Bill of Exceptions was filed, to wit.

Bill of Exceptions

Be it Remembered that at the present term of this Court, the issues between plaintiff and said George K. Budd, and Charles P. Budd, coming on to be heard they were by consent submitted to the Court without a Jury, and the plaintiff gave

12. in evidence the following Bill of Exchange. with proof of presentment. protest and notice:

Bill of Exchange &c.

$1303.12 – St Louis Decr 1st 1858

Three months from date Pay to the order of Mess. McAllister & Co. Thirteen Hundred & three ~ 12 Dollars value received and charge the same to account of

To. State Fire & Marine. Ins. Co. Harrisburg. Penn^a

Geo. K. Budd & Son agents

(Endorsed) McAllister & Co.

Cr. L.A. Benoist & Co.

Pay J. W. Weir Esq. Cash. or order

W. Rushton Jr. asst. cash.

Protest. (copy as above)

Be it Known. That on the day of the date hereof. at the request of the Harrisburg Bank

I. H. Murray. Graydon. Notary Public for the Commonwealth of Pennsylvania, duly commissioned and qualified. residing in the Borough of Harrisburg. in the County of Dauphin, and State aforesaid. called with the original draft whereof the above is a true copy. at the office of the State. F. & M. Ins. Co. at Harrisburg. Pa, between 3. & 4. o'clock. in the afternoon, whereat it is payable. to demand payment thereof and found said office closed. so that I could not obtain. admission. I afterwards. met the Secretary Pro. Tem. of said Co: who informed me that the draft

would not be paid. of which I gave due notice to the Drawers and Endorsers there. of and to the acceptor.

Wherefore I the said Notary. at the request aforesaid. have protested. and by these presents. do solemnly protest. as well against the deceptor of said draft. as against all others concerned. for all costs, damages and interest suffered for want of payment thereof. Thus. done and protested at the Borough of Harrisburg aforesaid.

In testimony whereof. I have hereunto. set my hand and affixed my Notarial Seal. this Fourth day of March 1859.

Seal

N. W. Grayden,
Notary Public

And this was all the evidence on the part of the plaintiff

The said defendants Budd and Budd. then called B. A. Hill, a witness on their part. who testified as follows:

Testimony of B. A. Hill.

I know plaintiff and defendants. and saw the Bill of Exchange sued on at the time it was drawn. I was then a Clerk of defendants Budd. Defendants Budd and Budd. were then and had been. for a long time before. agents of said Insurance Company. at St Louis. Plaintiff had before that time had other transactions. with

defendants, as such agents; and plaintiff at the time said bill was made by defendants, Budd, well knew that they were agents, and were such at the time said bill was drawn aforesaid,

B. F. Beasley, had effected insurance with said Insurance Co. through the agency of the defendants Budd & Budd and a loss had occurred and upon the adjustment of said loss the defendants, Budd and Budd as such agents drew said Bill on said Company. The Bill in question was taken by the plaintiff, in settlement of his said claim, upon said Insurance Company. This was the only purpose for which said Bill was made — There was no consideration whatever moving to the defendants Budd and Budd: they had no interest in said Company except as agents, nor were they bound in any way for said loss, Defendants also produced, and read in evidence a letter from the Secretary of said Company dated prior to the drawing of said Bill of Exchange as follows;

Letter from Secry of Co

The State Fire and Marine
Insurance Company of Pa
Harrisburg, Penn, Nov. 20. 1858

Geo K. Budd Esq

Dear Sir,

I have been expecting Mr. Gillett's return almost

15. daily for 2 weeks. He is still detained by his private affairs (has sold his Hartford place &c) I wish his action particularly on the Low Water case: I see no way but for me to assume the responsibility of authorizing you to close it out on the best terms possible Make payment 4. 5. & 6. months.

You are aware we have still heavy payments for St. L. and we look to you to help us thro' as far as possible. This year has been shockingly disastrous. Your report came duly to hand per yours of 1st. Please in no case give us such aint's on any risk as to make it necessary for us to re-insure.

We do not know where to get it so as to be sure of our pay in case of loss

Only got our pay from the Gt. Western the other day after daily dogging and then not in full.

We do not wish to reinsure. Am glad we escape recent disasters. The settlement of the Sanderson claim is satisfactory under the circumstances.

We trust you will allow the aint due you on Profit & Loss a/c to remain until we are thro' with losses at least with Scarritt & Mason and Low Water.

Yours Truly

S. Ward, Secy. Pro Tem

I see you have $600. paper due lately. Hope paid. How about Capt. Welton's $600?

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And this was all the evidence in the cause.

And the plaintiff asked the following Instructions:

Plffs Nº. Given

The Court declares the law of this case as follows.

That from the evidence in the cause the defendants George K. and Charles P. Budd; and not the State Fire and Marine Insurance Company of Pennsylvania, - are to be deemed and taken as the Drawers of the Bill of Exchange sued on,

Which was granted by the Court and to which defendants at the time excepted,

And the defendants Budd and Budd, asked the following Instruction.

Defts Nº. Refused

If the Court finds from the evidence, that the defendants George K and Charles P. Budd, at the time they drew the draft in question, were acting, as the agents of the State Fire & Marine Insurance Company of Pennsylvania, - that the said draft was given in settlement of a debt due from said Insurance Company, to W Allister & Co, - that the plaintiff at the time he took said draft knew that George K Budd & Son, were the agents of said Insurance Company, - and if the Court also finds, that said George K,

17 Budd. & Son. were authorized to make said draft. then the plaintiff cannot recover in this action.

Which was refused by the Court. and to this refusal. defendants at the time. excepted.

And the Court found for plaintiff and rendered judgment accordingly. And afterwards. within four days. defendants Budd and Budd. filed their motion for a new trial, as follows:

Motion for New Trial

The defendants George K. and Charles P. Budd. come and move the Court. for a new trial. on the ground. that the Court erred in declaring the law in the instruction given.

2 That the Court erred in refusing to give the instruction asked by defendants G. K and C. P. Budd. and the judgment of the Court. is contrary to the evidence and the law

Moody. H. V. McClellan.
Krum. Harding. for Deft

Which motion. was overruled. by the Court. and to this ruling of the Court. defendants. at the time. excepted.

They pray that this Bill of Exceptions. be signed and made part of

18 the Record which is done.

Saml Reber. Esq
Judge &c,

State of Missouri
County of St Louis } S.S.

I. Leon J. Papin. Clerk of the St Louis Court of Common Pleas. in and for the county aforesaid. Certify that the above and foregoing. is a full. true and complete Transcript of the Record and proceedings. in the above entitled cause. as fully as the same remain on file in my office

In testimony whereof. I have hereunto set my hand and affixed hereto. the seal of our said Court. at office in the City of St Louis. this 31st day of July. A.D. 1860

Leon J. Papin Clk

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(5)

~~154.~~ ~~XXX~~ ~~XXX~~ ~~273~~

~~17~~ 17.

March Term 1863

Roger C. McAllister

Respondent

vs.

George K. Budd &

Charles P. Budd

Appellants

M. E.

Appeal from the

St Louis Court of Com Pleas

Filed September 4. 1860.

Wm L Glanville Clk

McClellan & Co

attys. for applts

F. C. Sharp

Gen'l atty for Respts

$7.50 paid by appellt

170

$10.00 pd Clk by applts atty. / assgt filed

1863 March 26. Respondents brief filed and submitted on brief

1863 April 10 Reversed & Remanded Opinion filed Dp 147

17.50 applts
3.00
.39
$20.84

Roger C. McAlister
Respondent
vs
George H. Budd &
Charles P. Budd Appellants

IN SUPREME COURT,
Oct TERM, 1860

AND now come the said Appellants and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellants assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Respondent
2. That said Court rejected proper and legal testimony offered by Appellants
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Appellants
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Respondent when it should have been rendered for the Appellants
10. That said Court overruled the motion for a new trial, made by Appellants

McClellan Moody & Hillyer
with Brown & Harding
for Appellants

And now come the Respondent and for joinder in error say, that there is no error in the record and proceedings of said Court below in said cause, as assigned by said appellants

F. C. Sharp
Attys for Respondent

Roger C. McAllister res.

vs.

George K. Budd & al. aplts.

Filed September 4. 1860.

Wm. S. Glanville clk

Roger C McAllister Respondent
v
George R Bradt
Charles P Bradt } Appellants

The Respondent sued the ~~Pennsylvania~~ State Fire & Marine Ins Co and Appellants on the following bill of exchange.

"$1303,12 St Louis Dec 1st 1858

Three months from date pay to the order of Messrs McAllister & Co Thirteen hundred & three 12/100 Dollars Value received & charge the same to account of

To State Fire & Marine Ins Co, Harrisburg Penna } Geo R Bradt & son agents "

endorsed "McAllister & Co

R R Bradt & Co & C

The bill was accepted by the Company & duly protested for non payment.

Before trial Plff dismissed the suit as to the Ins Co. The case as to the appellants was tried by the court without a jury and judgment rendered for Plff was rendered for the amount of the bill with damages & interest.

Appellants moved for a new trial. The motion was overruled & appellants appealed to this court.

The instruction given by the Court for Plff is erroneous and ought not to have been given.

The instruction asked by defendants ought to have been given.

If the bill sued on had been an instrument under seal the ruling of the court

and the construction given to the bill might be correct.

The bill on its face discloses a principal for whom these appellants were acting. If it does not clearly show on its face that drawing it was the act of the Ins Co it at least bears that matter in doubt so as to let in evidence aliunde to explain the intention of the parties. The law in cases of this class has changed greatly in the last few years. The courts now construe such instruments according to the intention of the parties and where that intention is left in doubt by the instrument itself evidence aliunde is admitted to show what the parties intended. Some of the authorities hereafter quoted go so far as to admit evidence aliunde in all cases where the question is one of agency or not.

The proof admitted by the court below shows clearly that when McAllister got this bill from appellants he knew they were drawing it as agents of said company and that he never thought of any liability on their part until after the company failed. The bill still remains in his hands & for this reason the case is different from what it would be if in the hands of a third party who did not know the whole facts of the case.

Appellants refer to the following authorities

Smyth v Spalding 13 Mo pg 530-
This case when carefully examined is for appellants- The court it is true held that the party claiming to have acted as an agent was liable as principal- But it is plainly admitted in the opinion of the Court that if he had added agent to his signature he would not have been liable-
See also 10 Wendell pg 271
1 Am Leading cases pg 449
Brockway v Allen 17 Wendell pg 40
Dyer v Burnham 25 Maine pg 10.
Campbell v Nicholson 12 Robinson (La) pg 428
Key v Parkham 6 Harris & Johnson pg 418
Andrews v Estes 11 Maine pg 267
Robertson v Pope 1 Richardson pg 501
Story on Agency Sec. 154
F & M Bank v Troy City Bank 1 Douglas pg 457
Mec Bank v Bank of Columbia 5 Wheaton pg 328
Bank of Utica v Meagher 18 Johnson 341.
Mott v Hicks 1 Cowen 513
Miles v Oharra 1 Sargent & Rawle 32
Wyman v Gray 7 Harris & Johnson 409
Lazarus v Shearer 2 Alabama 719
Underhill v Gibson 2 N Hampshire 352
Cleveland v Stewart 3 Kelly 283
Kean v Davis 1 Gabrisky 683
O & M R R Co v Middleton 20 Illinois 629.
Hicks v Hinde 6 Howard's Practice Rep pg 1.
Thomas C Moody
With Krum & Decker
for Appellants

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McAllister

vs

Bruce & C.

C

Appellants statement & brief

Filed December 9/62

A W Mead

Clerk

J. C. Moore

with Irvine & Dickson

for appellants

Roger C. McAllister – Respondents
vs
George K. Budd, and
Charles P. Budd – Appellants –
In the Supreme Court of Missouri –

This was an action brought by respondent against the "State Fire and Marine Insurance Company of Pennsylvania" and the appellants, charging the appellants as drawers and the Insurance Company as acceptors of a bill of exchange, of which the following is a copy –

"$1303.12. St Louis Dec 12 – 1858.
Three Months from date pay to the order of Messrs McAllister & Co Thirteen hundred and three 12/100 Dollars, value received and charge the same to account of
G & C E Budd & Sons'
agents –
"To State Fire & Marine Ins
Company of Harrisburg Penn"

This bill was accepted by the State Fire & Marine Ins Company of Pennsylvania was endorsed by McAllister & Co. – by L. & Benoist & Co. & other subsequent holders.

An attachment was sued out against the Insurance Company & summons served on the appellants. – Subsequently – no effects of the Company being found in this State, the suit was dismissed as to the Insurance Company – and upon satisfactory evidence of the presentment & non-payment & protest of the bill & of its execution by appellants, a judgment was rendered against them therein

by the Common Pleas Court. - from which they appealed to this Court. -

F. C. Sharp
Atty for appellee

No 26 –

R. C. McAllister
vs
Geo K. Budd & als

Statement of the
case by appellee
by F. C. Sharp
his atty

Filed March 17. 1863
A W Mead
Clk

Roger C McAllister Respondent

vs

George K Budd & others appellants

In the Supreme Court of Missouri

This was an action in the ordinary form against the State Fire & Marine Insurance Company of Pensylvania, as acceptors and the appellants as drawers of a bill of exchange drawn in the usual form of bills of exchange - which bill was signed by respondents as drawers in their firm name of "Geo K Budd & Son" writing under their signature the word "agent" = the bill was drawn and dated at St Louis Missouri, upon and directed to the State Fire & Marine Insurance Company of Pensylvania at Harrisburgh Penn^a, was delivered to the drawer (the respondent) at St Louis - by him sent to Penn^a for acceptance & was then accepted - at maturity it was protested & notice given to the drawers at St Louis Mo's = = souri.

On the trial two questions were raised by appellants.

First - That by the bill, on its face, they were not drawers or individually liable thereon as they made the bill only as "agents" - and

Secondly - That appellants in making the bill

acted as Agents of said Insurance Company — that respondent knew that fact — & that it was competent for them by parol evi=dence — to explain & alter the nature of their liability as drawers of the bill.

These are the only questions raised by appellants in this Court, and are presented by the instructions as given & refused by the Court below — both of which respondent insists are untenable.

By the bill — on its face — and terms thereof — it is drawn by "Geo K Rudd & Son" is their bill and they are personally liable thereon as drawers & the word "Agents" written under their signature is merely descriptive — as if the word "Exr — Senr" "of Main St", or any other descriptive word had been affixed = By the terms of the bill it purported to be and was the bill of appellants — See

Story on Agency Secs 269. 270. 271. 272. 273. 274. and 278.

See also. Story on Agency Secs 155 — 156 — 157 — 158 & 159 — as to the legal effect of bills & notes drawn, endorsed or accepted — showing that by such signature a personal liability attaches

5th Taunton's reports — Le Fevre vs Lloyd page 749

6th Adolphus & Ellis. Repts Jones vs Littledale

page 486 to the effect, not only that the parties are individually liable but that it is conclusive & cannot be rebutted

13th Mo Reports. Smyth vs Spalding page 530 in this case it was offered to prove that, in drawing the bill - the defendant was the Agent of another was in no way interested in the bill, or the transaction on which it was made - that he acted only for his principal & the plaintiffs taking the bill well knew all the facts, but the Court held that he became liable as drawer & such evidence was not competent to change alter or explain such liability.

6th Massachusetts Reports - Forster vs Fuller page 58 - there the note was made "as guardian of Cd^d Scott"
2d Wheatons Reports - Duvall vs Craig - page 56 - and note "A" & numerous authorities their cited -
4th Mass Reports - Tippets vs Walker 597 = 7th Cowens Reports Stone vs Wood 453 & numerous cases their cited - and to the same effect almost innumerable list of cases might be cited -

As to the 2d proposition it is as well settled as any other principle or maxim of the law

that "parol evidence is not admissible to alter, explain, enlarge, or contradict a writing, or to vary the liability of the parties thereto" from what is the legal effect & construction of the instrument itself - and that "a person who on the face of an instrument in writing appears to contract will not be permitted to show by parol evidence with a view to exonerate himself that he contracted as Agent of another" See 2 Phillips Evidence Cowen & Hills notes page 681 & following 1st Vol Greenleafs Evidence page 364 & following A guarantor (whose undertaking is only conditional) cannot prove by parol, that he was only to be required to pay on certain contingency - as, when a fund of the principal was exhausted - the written promise must stand by itself -

7th Mass. Reports - page 518 - Case of Hunt vs Adams.

17th Mississippi Reports Jones vs Jeffries 577

But even were we to do violence to the well established rules & principles of the law and permit parol evidence to alter - explain or contradict the written agreement of appellants - in drawing the bill - yet the evidence offered by appellant utterly fails to exonerate them

from liability – The Insurance Company – was a foreign Corporation having no existence habitation or name in this State except as it existed & did business in the person of appellants – they had all the assetts in their hands.

Made all contracts, received all dues, paid all demands, if they were paid at all – they were an "Agency" of a foreign Company ~~is~~ & instead of paying this liability they propose to respondent to take their draft or bill. on time, respondent ~~saying~~ seeing, the draft, that appellants are drawers, & thereby he gets this additional security for his debt, accepts it releases his debt & looks to the drawers for payment, when the Insurance Company fails he is modestly told by the "Agency" that they have put the funds & assetts of the foreign Company out of their hands voluntarily, or do not choose to pay them to him, and now ask to be released from their liability as drawers – The Common Pleas Court correctly declared the law – that by the terms & tenor of the bill of exchange the appellants were the drawers thereof – and as such are liable on the bill

F. C. Shark
for Respondent

C

Roger C. McAllister
Respondent
vs
Geo. K. Budd & son
Appellants

Respondent's brief
F. C. Sharp
Atty. for resp.

Filed March 26. 1863
A. W. McCad Jr

Roger B. McAllister
Respondent
vs.
George K. Budd &
Son
Appellants

This was an action against the Appellants & State Fire and Marine Insurance Company of Penn. upon the following instrument of writing.

" #1303.12 St. Louis Dec. 1. 1858.

" Three months from date pay to the order " of Messrs McAllister & Co. Thirteen hundred & three " 12/100 dollars value received and charge to " account of Geo K Budd & Son " To State Fire & Marine Agents "
" Ins. Co Harrisburg Penn

across its face was written the words as they appear above -

The petition was in the ordinary form declaring against Appellants as drawers and against the Ins. Co. as acceptor of the bill. The plaintiff subsequently released the Ins. Co. by entering a nol. pros. against it.

The answer of Appellants denies the making of the bill as alleged - & avers that they as the authorized agents of said Ins. Co with full authority so to do drew said instrument as and for said Co.

that it was the act of said Co. by them as its authorized agents and not in any sense the act of these defendants - that they received no value nor any other consideration for said bill - that said bill was made by said Company through the agency of these defendants for a debt due from said Company to the plaintiff and was received by him as the bill of said Company drawn by it upon itself he at the time well knowing and intending that said defendants were not in any way to be held bound for its payment.

Upon the trial which was by the Court neither party requiring a jury, the plaintiff read the instrument above recited in evidence & the protest thereof

The defendants proved that they were the Agents of the Insurance Company named in the instrument; that the payee the plaintiff knew of his agency; that the bill was drawn to enable the plaintiff to obtain satisfaction of a claim for a loss which he held against the Ins. Co. - that there was no consideration moving to defendants Budd for drawing the bill - that they had no interest in

the Company other than as naked agents - the defendant also read a letter tending to prove his authority for drawing the bill to cover the plaintiffs lost.

The Court gave the following instruction for the plaintiff.

That from the evidence in the cause the defendants Budd and not the State Fire & Mar. Ins. Co are to be deemed and taken as the drawers of the bill.

The Court refused the following instruction asked by defendants.

If the Court finds that the defendants Budd at the time they drew the bill were acting as agents of the Ins. Co. - that the draft was given in settlement of a debt due the plaintiff by the Co. - that plaintiff at the time knew that defts were Agents of the Co - & if defts were authorized to make the draft by their principal, the plff cannot recover.

The Court found for the plaintiff - & rendered verdict & judgment accordingly.

Motion for new trial & exceptions to the ruling & finding of the Court were properly taken.

1 The instrument upon which the action is founded though in form a bill of exchange, is in fact between the original parties McAllister & Budd, a naked order without consideration as far as Budd is individually concerned.

A bill of exchange imports that a debt is due from the drawee to the drawer which is assigned to the payee of the bill - a bill is an assignment of funds of the drawer in the hands of the drawee

Story on bills sec. 13

Contracts.

The mere fact that one party gives an order to a second on a third party for a sum of money does not make the first liable to the second - it is the intention to guaranty its payment on valuable consideration which creates the consideration.

The payee did not receive the bill in this case as an assignment of any funds of Budd - he knew that Budd had no intention personally to pay the debt of the Company - and he could not have received it in that light - so far as McAllister is concerned the essential elements of a bill of exchange do not exist in this case.

The paper was a naked order intended only as a means by which McAllister was to obtain his debt from the Insurance Company

-it was a mere certificate of adjustment of the loss - it was the authority upon which the Insurance Co. were to act in paying the loss - until accepted by the Company it had no force so far as Budd was concerned - after acceptance by the Co. the principal ratified the drawing of the bill + adopted it as his own act.

2. No principle of law is better established than that an agent acting within the scope of his authority cannot be held personally liable

Contra. 580

That where an agent by his contract makes the principal liable, he is not held individually.

Especially where a Corporation is principal which can act only by agents.

The Insurance Co. was bound by the act of Budd in drawing the bill - + parol evidence was admissible to charge them upon the note in an action at law. 3 Am. Jur. 78 + 79.

Spittle v Lavender 8 Mees + W. 452

Conro v Port Henry Iron Co. 12 Barb. 54
Robinson v City St. Louis 28 Mo. 488.
Smith v Alexander 31 Mo. 194

Mc Tyer v Steele 26 Ala 488

Certainly the Company was liable in Equity.

Baker v Gregory 28 Ala. 545
Story on agency sec. 162

Boykin v McLauchlin 35 Ala. 288

The subsequent ratification of the Ins. Co relates back & binds the Company.

Chitty on Bills p 31 & 32 & notes

Comm v Port W. Ins Co. 12 Barb 54.

Spittle v Lavender 8 Mees & W. 452

3. The adjudged cases are mostly cases of absolute promises made by agents, as by promissory notes. &c.

And even in these cases, the tendency of late years has been to inquire into the real intention of the contracting parties - such has been the evident tendency in this State -

Smith v Alexander 31 Mo. 194.

But the distinction between the liability of the drawer and the maker of a note should be kept in mind - a note contains an positive absolute promise to pay. a bill is a mere assignment of funds in the hands of the drawee & at most imports a conditional obligation to pay.

An endorsement of a note is also a conditional liability to pay - but not necessarily so. - an endorser may show that the endorsement was merely a transfer of his interest in the bill "as agent" -

Root v Cowen Hicks 1 Cowen 513

Babcock v Beman 1 Kernan 200

A drawer of the bill after acceptance

stands in the same relation to it that an endorser holds to a note.

The same rules of law apply to him and none other – his liability is no greater

B Hicks v Hinde 9 Barb. S.C.R

All the cases in which an agent has been held individually by the drawing of a bill (& there are only few of such cases) it will appear that the consideration passed directly into his hands & he had the power to secure himself against liability – and in addition that his ~~character~~ agency was not expressed on the face of the paper.

Lefevre v Lloyd 5 Taunt 749
Leadbeter v Farrow 5 M. & S. 345
Mayhew v Prince 11 Mass 54
Smith v Spalding 13 Mo.

In the last case the Court intimate if the word "agent" had been added, the drawer would have been discharged.

The following cases so have been received with more favor by the Courts.

Roberts v Austin 5 Marton 313
overruling same case in 2 Miles 284
Wolf v Jewett 10 Louisiana R 389
Kennedy v Lubelung 3 Martin 644
Hicks v Hinde 9 Barb. R 528. cited with approbation in N. Y. & in Mo in 31 Mo 194 Smith v Alexander.

same doctrine appears by Prof Parsons in his late work on Bills & Notes

1 Parsons on Bills & Notes 94

4. The instruction given by the Court for the plaintiff is clearly erroneous - it asserts no principle of law - & stands simply like the verdict of a jury - it tends to mislead and confuse - & should have been refused.

Stone v Wood 7 Cowen 453 was on covenant under seal - & party was estopped by his deed from denying consideration -

Tippetts v Walker 4 Mass. 597 was also covenant under seal -

Duvall v Craig 2 Wheat 56 was also covenant under seal -

Lefevre v Lloyd 5 Taunt 750 - word "agent" did not appear to the drawers name - besides the agt receiving the consideration into his hands & had the means of securing himself -

Jones v Littledale 6 Ad & El. 486. was contract made by deft individually without disclosing even name of principal & consideration for promise came to agents hands - besides

case has no application –

Foster v Fuller 6 Mass 59 is a case of new consideration for the promise – release of debt against principal – besides the agent exceeded his authority in drawing bill & therefore made himself liable –

Krum & Decker
for Appellants

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McAllister
Respondent
v:
Budd
Appellant

Statut & Brief
by
Krum & Decker
Counsel for App.

Filed March 26. 1863
A. W. Head
Clk

F. C. Sharp for Respt
McClellan Moody & Hillyer Appts
Roger C. McAllister Respt } Appeal from Common Pleas
v
Geo K Budd & ~~Budd~~ Appts

This suit charges the defendants as drawers of a bill of Exchange as follows:

"1303.12 S Louis Decr 1st 1888

Three months from date pay to the order of Mess McAllister & Co thirteen hundred and three 12 dollars, value received and charge the same to account of

To State Fire & Marine Ins Co Harrisburg Penna } Geo K Budd & Son Agents

"

The plaintiff was meant by the name McAllister & Co

The bill was accepted by the drawee but not paid & was protested for nonpayment, and notice given the defendants.

The defendants answered that they as the authorized agents of said Company, with full authority so to do, drew said bill of exchange as and for the bill of said Company. That it was the act of said Company by them as its authorized agents and not in any sense the act of these defendants; that they received no value, nor any other consideration for said bill. Said bill was made by said Company through the agency of these defendants for a debt due from said Company to the plaintiff

and was received by him as the bill of said Company, drawn by it upon itself, he at the time well knowing and intending that said George K and Charles P Budd were not in any way to be held bound for its payment.

At the trial the defendants gave evidence tending to prove the matters stated in their answer and ask the Court to instruct "that if the defendants at the time they drew the draft in question were acting as the agents of the State Fire and Marine Insurance Company of Pennsylvania — that the said draft was given in settlement of a debt due from said Insurance Company to McAllister & Co - that the plaintiff at the time he took said draft knew that George K Budd & Son were the agents of said Insurance Company and if the Court also finds, that said George K Budd & Son were authorized to make said draft, then the plaintiff cannot recover in this action.

The Court refused to give that instruction and rendered judgment for the plaintiff.

We think the Court below erred. A bill drawn under such circumstances, cannot (in the hands of the payee) be understood to have been received by him as negotiable commercial paper, but rather as a certificate from the agents to their principal of the amount due its creditor. 1 Parsons on Notes & Bills 94, and the cases

there cited in the notes.

If the bill had been negotiated, the defendants might have been bound to an innocent holder.

The proper mode of drawing such a bill is to sign the name of the principal by the agents.

Judgment reversed and cause remanded.

Barton Bates

Judges Bay & Dryden concur.

McAllister
vs
Budd & Budd

Opinion
Reversed & remanded
Bates

Filed April 10, 1863
A.W. Mead
Clerk