FRESH v. GILSON.

Case No. 5,112.

{5 Cranch, C. C. 533.}[1]

Circuit Court, District of Columbia. Nov. Term, 1838.[2]

INDEBITATUS ASSUMPSIT—CONTRACT UNDER SEAL—ACTION AGAINST DEFENDANTS NOT PARTY TO THE CONTRACT.

The plaintiff cannot recover in an action of indebitatus assumpsit, for work and labor done under a contract under seal, unless the whole work has been done according to the contract; nor in an action against three defendants, upon a contract under the seal of one defendant only; unless the contract was made for the benefit of all the defendants, and the work performed according to the contract.

{See note at end of case.}

The defendants {Riah Gilson and others} had a contract with the Chesapeake and Ohio Canal Company for making culvert No. 116, in section No. 150; and the plaintiff {W. H. Fresh}, by a written contract under his seal and that of Gilson, one of the defendants, undertook to do the work, by the 4th of July, 1833, at a less price as to part of the work, and at the contract price as to the residue. This contract was given in evidence by the plaintiff. The defendants gave evidence tending to show that, according to a stipulation in that contract, Midler, one of the defendants, (not Gilson, who had signed and sealed the contract,) not being satisfied with the progress of the work, some time in July, 1833, came and declared the plaintiff's contract to be abandoned, and proceeded to finish the work before the 21st of December, 1833. The defendants attempted to prove the amount which they had been obliged to pay to complete the contract; the vouchers produced were disputed at every step, and the plaintiff took four bills of exception to the admission of evidence.

Brent & Brent, for plaintiff.

Mr. Bradley, for defendants.

THE COURT, at the motion of Mr. Bradley, the defendants' counsel, instructed the jury, that if they should find from the evidence that there was an agreement under seal between the plaintiff and the defendants for the execution of the work and labor for which this action is brought, the plaintiff is not entitled to recover.

CRANCH, Chief Judge, would have added, "unless they should also be satisfied by the evidence that the plaintiff had performed the work according to his agreement"

THE COURT also instructed the jury, at the instance of the defendants' counsel, that if they should find from the evidence, that the plaintiff performed the work and labor for which this action is brought, under a sealed agreement between the plaintiff and Riah Gilson, the plaintiff is not entitled to recover in this action.

CRANCH, Chief Judge, would have added, "unless they should be satisfied by the evidence, that the plaintiff had done the work according to the written contract; and that the contract was made by Gilson for the benefit of all the defendants and with their consent, and that they recognized it"

To these instructions the plaintiff also excepted, and took his bills of exception. Verdict and judgment for defendants.

{NOTE. This judgment was reversed by the supreme court, Mr. Justice Daniel delivering the opinion, in which it was held:

{1. 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.

{2. 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.

{3. 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. 16 Pet. {41 U. S.) 327.}

FRETTER, The JOHN. See Case No. 7,342.

[1] {Reported by Hon. William Cranch, Chief Judge.}

[2] {Reversed in 16 Pet. (41 U. S.) 327.}