

Case No. 8,419.  
[2 Dall. 300.]

LIVINGSTON ET AL. V. SWANWICK.

Circuit Court, D. Pennsylvania.

1793.

WITNESS—PRINCIPAL AND AGENT—AUTHORITY OF AGENT.

[A broker who makes a contract on behalf of his principal to deliver stock is competent to testify as to the transaction, and his authority to make such contract, in a suit against the principal for damages for nondelivery.]

This was an action on the case to recover the difference upon a stock contract which Samuel Anderson, as the broker and agent of the defendant, who resided in Philadelphia, had entered into with the plaintiffs, who resided in New York, in the following terms: "I do hereby engage to deliver to John R. Livingston, Esq., the engagement of John Swanwick, Esq., of Philadelphia, to deliver to J. R. Livingston, Esq., aforesaid, one hundred shares of the bank stock of the United States, on the 5th of January next ensuing, upon receiving from the said John R. Livingston payment for the same at the rate of twenty-one shillings and six pence in the pound. (Signed) Samuel Anderson. New York, 15th July, 1791."

I. On the trial of the cause, the plaintiffs produced a correspondence between Anderson and the defendant in relation to the contract, after it was made, and then offered Anderson himself as a witness, to prove that he had received a verbal authority to make the contract for the defendant; that he had accordingly executed the instrument above set forth; and that there had been a punctual compliance with the stipulations on the part of the plaintiffs. The defendant objected that Anderson was not a competent witness to prove his own authority, and that he was interested in the question, as he had an action actually depending for his commission on making the contract.

BY THE COURT. The witness is competent to prove every part of the transaction. He is not interested in the event of the suit; nor can the verdict in this case be given in evidence upon the trial of the action for his commissions. Anderson was a known, established broker; and unless he was admitted to give evidence of the instructions he received (which were oral in this case, and are usually so in similar cases), it would be impracticable to ascertain the facts that are essential to enable the court to decide upon the merits of the controversy.

The witness was there upon admitted.

II. To the action and declaration (which contained five counts), the following exceptions were taken, in the course of the defence: 1st. That the action is brought in the names of Brockholst and J. R. Livingston, whereas the contract in writing is made with J. R. Livingston only. 2nd. That the first count states an agreement by Swanwick to transfer stocks at a certain day, but the evidence is only of an agreement to deliver an engagement for

that purpose. 3rd. That the second and fourth counts state an agreement by Swanwick to deliver an engagement to transfer stock to J. R. Livingston, or order, but the evidence does not prove that he engaged to transfer stock to the plaintiff's order. 4th. That the third count states a contract being made by Anderson, as the authorized agent of Swanwick, that Swanwick should transfer stock to the plaintiff, but the evidence only shows a contract by Anderson that there should be delivered to the plaintiff an engagement of Swanwick to transfer the stock. 5th. That the fifth count states the plaintiff's attendance at the place of transfer, but there is no proof of the fact. But the exceptions were considered and overruled, in the charge of the jury, of which, in that respect, the following is the substance:

BY THE COURT. The objection to the form of the action ought not to prevail. The contract is proved by the testimony of Anderson, and the written paper is merely corroborative. At the time, then, of forming the contract, it was perfectly understood by the parties transacting the business that Brockholst and J. R. Livingston were jointly concerned; and, if the action had not been instituted in their joint names, it might have been pleaded in abatement. Nor is the objection to the variance between the declaration and the written contract, on account of the words "or order" being stated in the former, though not contained in the latter, material in point of law. It was unnecessary to set forth the written contract at all

in the declaration; and it is only now offered as additional evidence to prove the parol bargain between the parties. In the case of a bond, bill of exchange, or promissory note, there would be more weight in the objection; because they are, exclusively, the evidence of the respective contracts to which they give existence, character, and operation; but the written paper, in the present instance, is of no more force, than any other testimony of its contents would be. The words in the declaration must, therefore, be considered as surplusage, and do not affect the material parts of the charge. As to the other variances between the contract as laid, and the written contract produced, the same principles will apply. And the nonattendance of the plaintiffs at the place of transfer is sufficiently excused by the waiver, which has been proved on the part of the defendant.

Lewis, Rawle, Randolph & Dallas, for plaintiffs.

R. Tilghman and Ingersoll, Wilcocks & Serjeant, for defendant.<sup>1</sup>

Verdict for the plaintiffs for \$19,400.

<sup>1</sup> The defendant's counsel tendered a bill of exceptions to the admission of Anderson's testimony, and also to the opinion of the court on the points stated in the charge. A writ of error was accordingly brought, but never prosecuted.