

*Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Agacio v. Forbes and others, from the Supreme Court of Hong Kong; delivered February 4, 1861.*

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Present :

LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

SIR EDWARD RYAN.

THE sole question open to the parties in this case is, whether the learned Judge in the Court below was right in ordering a non-suit to be entered on the ground of the non-joinder of the partner of the Plaintiff in the action.

The Plaintiff alleges by his declaration an agreement between himself and the Respondents, that in consideration that the Plaintiff would forbear, and not enforce at law certain claims against the firm of Robinet and Company, and would release and discharge them from further demand or claim on the footing or on account thereof, the Respondents promised the Plaintiff that they would remit to his agents in London in sterling bills, at the usual sight, the equivalent of 31,532 dollars and 70 cents.

It appears that the Plaintiff was a partner in the firm of Agacio Brothers, the business of which was carried on at Valparaiso and in China. The firm of Robinet and Company, of Hong Kong, were indebted to the Plaintiff's firm in the sum of 31,532 dollars and 70 cents, and Agacio, the Plaintiff, was, at the time the agreement was entered into, at Hong Kong, for the purpose of enforcing his claim against the house of Robinet and Company. In the pressure of the affairs of Robinet and Company the

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Respondents, who carried on business under the firm of Russell and Company, came forward and agreed to advance certain sums of money to enable them to satisfy some of their debts and to continue their business. An agreement was entered into between Russell and Company, and Robinet and Company, of the date of the 31st of March, 1858, by which, amongst other debts which Russell and Company agreed to advance money to meet, was the debt due to the firm of Agacio Brothers. The agreement stated that "this debt was to be guaranteed by Messrs. Russell and Company, and to be remitted for account of Messrs. Agacio at the expiration of six months from the date of this agreement." Mr. Agacio, the plaintiff, was not a party to this agreement, nor was he, probably, aware of the contents of it until the agreement upon which his action was brought was entered into. But after it was signed a communication took place between him and a person named Alvares, who was acting on behalf of Robinet and Company, in which Agacio proposed that if Russell and Company would bind themselves to remit the account to Agacio's agent in London, he would wait for six months without interest. Upon this the agreement in question was signed by Russell and Company in these terms:—

"Senor J. J. Agacio, Hong Kong.

"Dear Sir,—According to an agreement with Messrs. W. M. Robinet and Company, of China, we hereby agree to remit to your agent in London, Mr. Anselmo Arroyave, in sterling bills, at usual sight, the equivalent of 31,532 dollars and 70 cents at the expiration of six months from this date."

And Agacio receipted as paid the account current between Agacio Brothers and Robinet and Company.

Now the only question in the case is, whether Agacio, the Plaintiff, was entitled to maintain an action upon this agreement without joining his partner.

Various cases were cited, in the course of the argument, to show that when a contract is entered into with a person for the benefit, not of himself alone, but of himself and other persons, it is competent to him to sue upon the contract in his own

name, although the other parties for whose benefit the contract was entered into may be entitled also to sue upon it.

But the case of *Garrett v. Handley* was relied upon, on the part of the Respondents, to show that it was not competent to Agacio to sue upon this agreement, because it was entered into for the benefit of the firm; it related to a debt due to the firm, and the consideration of the agreement moved from the firm, and not from the Plaintiff alone.

With regard, however, to the case of *Garrett and Handley*, it is to be observed that there it was impossible to separate the consideration into parts, and to make the party who was suing, the person from whom the consideration alone moved. It was an advance of money which was to be made, not by him, but by the firm of which he was a member; it was a joint consideration in no manner separable, so as to apply any part of it to the separate partners.

But in this case there is no reason why a consideration should not be considered as having moved from Agacio, the Plaintiff. He was at Hong Kong for the purpose of obtaining a settlement of the account due from Robinet and Company to his firm. His partner was absent in a foreign country, and he was the person with whom alone either Robinet and Company, or Russell and Company, could negotiate for the arrangement of the debt. He had threatened to institute proceedings for its recovery. It was desirable that he should abstain from these proceedings, and Russell and Company having interfered for the protection of Robinet and Company, would naturally apply to Agacio to request a forbearance which depended upon him, and in consideration of it, undertake to remit the debt to the firm.

Under these circumstances, the contract was clearly entered into with Agacio, the Plaintiff, himself, although the benefit of it would result to the firm.

The nature of the consideration does not resemble that in the case of *Garrett v. Handley*. The agreement of Agacio himself to forbear to sue Robinet and Company would be an important consideration, flowing entirely from himself, and available to them. For again undertaking for himself not to sue Robinet and Company, his partner could

not maintain an action without his consent, and if the partner had brought an action in the name of the firm, Agacio might have released it.

The question then really depends upon the form of the agreement; because although their Lordships think that the agreement between Russell and Company and Robinet and Company must be regarded as a part of the agreement of the 5th April, 1858, and that the two must be read together, yet there is no reason, because the amount was to be guaranteed by Russell and Company to the firm, there should not also be an agreement with one of the partners that, in consideration of his personal forbearance, they would remit the amount to the agent of the firm in London within a certain time. The question, therefore, really is, whether there was this separate agreement with Agacio, the Plaintiff.

Upon the form of it there can be no doubt, because the letter of Russell and Company is addressed to him alone, and although, being for the benefit of the firm, they might be entitled to sue upon it, yet it appears to their Lordships to be a case in which, according to the authorities, Agacio was at liberty to carry the action in his own name, and therefore that the learned Judge in the Court below was in error in directing a non-suit to be entered.

Their Lordships are of opinion that that non-suit must be set aside, and the judgment be given for the plaintiff for the amount which was found by the verdict, 31,532 dollars and 70 cents, with interest at 12 per cent.

With these directions their Lordships will therefore recommend to Her Majesty that the Judgment of the Court below be reversed with costs.

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