

**HENRY W. PEABODY & COMPANY, PLAINTIFF AND APPELLANT,
VS. J. F. BROMFIELD AND JAMES ROSS, DEFENDANTS AND
APPELLEES.***G.R. No. 13510, October 23, 1918*

Ponente: STREET, J.

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This action was instituted by the plaintiff, Henry W. Peabody & Company, in the Court of First Instance of the city of Manila, to recover a sum of money of the two defendants named in the caption hereof. From a judgment dismissing the action the plaintiff has appealed.

The liability which is sought to be established is based upon a document (Exhibit B) purporting to be a contract of guaranty signed by the two defendants herein, J. F. Bromfield and James Ross, also by Edward B. Bruce, the latter not being included as a defendant in this action.

At the time when the document in question was executed, the Commercial Vehicle Company, a corporation organized under the laws of the Philippine Islands, was engaged in the business of selling automobiles and automobile supplies in the city of Manila, its purchases being made in the United States through the plaintiff, Henry W. Peabody & Company, a partnership having its office in the city of New York. The capital resources of the Commercial Vehicle Company were apparently inadequate for the business it was conducting, and it was compelled to rely upon the credit extended to it by the plaintiff. In the year 1912, the officials in charge of the affairs of the Vehicle Company were informed by the plaintiff that their capital must be increased to P50,000, or the plaintiff would exercise its right, under the contract then existing between the two parties, to curtail the credit which the plaintiff had been extending.

It should be explained here that the house of Henry W. Peabody & Company was then represented in Manila, by its agent P. M. Scott, and the latter occupied the position of local manager at all times during the period when the matters here under consideration were being transacted. In the original contract, dated November 11, 1911, by which Henry W. Peabody & Company undertook to purchase and forward merchandise to the Commercial Vehicle Company, it was provided that the plaintiff's local manager should be a member of the board of directors of the Commercial Vehicle Company and should have the right to determine whether orders given by the Commercial Vehicle Company for goods shipped from the United States were from responsible people. In conformity with this provision Scott became a member of the board of directors of the Commercial Vehicle Company, attended its meetings upon all occasions, and consulted with the other directors about the company's business. In order to qualify him in this respect one share of the stock of the Commercial Vehicle Company was issued to him, and in July, 1912, when the stock issue was increased he subscribed for common shares of the Vehicle Company in the sum of P2,000 and for preferred shares of the same company in a like amount. The evidence shows that the taking of these shares in the name of P. M. Scott was a mere formality and that the real subscriber, or party in interest, was the house of Henry W. Peabody & Company itself. This clearly appears in a

letter written on July 29, 1917, by Scott to Bradlee, manager of the home office in New York City, wherein Scott says: "As I do not desire to become personally interested I have taken up these shares in the interest of Henry W. Peabody & Company."

With reference to the relation of P. M. Scott to the home office of Henry W. Peabody & Company it is further to be observed that, as manager in this city, he exercised plenary authority in the conduct of the affairs of this branch; and so far as the facts pertinent to this lawsuit are concerned, it must be considered that Henry W. Peabody & Company in Manila and P. M. Scott are one and the same. The home office did not interfere in any way with his management, and Scott exercised in this city, throughout the transactions which are now under scrutiny, all the powers of a vice-principal.

After the plaintiff had, as above stated, notified the management of the Commercial Vehicle Company that its capital must be increased, several of the individuals principally interested in the affairs of the latter company discussed the matter among themselves and arrived at the conclusion that the necessary capital could not be raised by an increase of stock. The meeting of the board of directors at which this conclusion was announced and accepted occurred apparently in July, 1912. There were present on this occasion, of the board of directors, Edward B. Bruce, J. F. Bromfield, James Ross, and P. M. Scott, the latter in representation of Henry W. Peabody & Company. This conclusion having been reached it was of course realized by all present that, if Henry W. Peabody & Company should remain firm and discontinue or curtail its credit, the Commercial Vehicle Company would have to be liquidated. In contemplation of this eventuality, Clark, the company's auditor and accountant, was called upon to make a statement to the board as to its financial condition. He said that the company's affairs were in an excellent shape and that it could then be liquidated at a profit.

One alternative, however, had been suggested, and was already to some extent under consideration. This was that a few responsible persons interested in the success of the Commercial Vehicle Company should sign a contract of guaranty, holding Henry W. Peabody & Company harmless in case the Commercial Vehicle Company should prove unable to satisfy any debt which it might contract with the former.

When Clarke, at the meeting above mentioned, informed the directors that the business of the Commercial Vehicle Company was in a promising condition and could be liquidated at a profit, one of the directors interested exclusively in the Commercial Vehicle Company, speaking for all three, observed that it would be better to liquidate than for them to give a guaranty of the tenor above stated. Upon this Scott said that he saw no reason why this should be done, as his company—Henry W. Peabody & Company—merely desired something that would serve in lieu of an increased capitalization. One of the three, Bruce, Bromfield, or Ross, thereupon said to Scott that, if this were so, he (Scott) would probably have no objection to becoming a party to such a guaranty himself. Scott assented and after some further conversation it was agreed that the four, to wit, Bruce, Bromfield, Ross, and Scott, would sign the guaranty. That Scott made this agreement is proved not only by the testimony of Ross but also by a letter written a few days later by Scott himself to Bradlee, to his own house in New York City. In this letter, dated July 29, 1912, Scott says:

"* * * For our own protection I have arranged a personal guarantee in the terms of the enclosed agreement to reimburse H. W. P. & Co. all loss resultant from their financing this business, to which will be attached the signature of the majority of stockholders—their individual positions warranting this a good security for any reasonable amount. To bring this about they required me to take a personal interest in the Company by purchasing shares to the value of P2,000 preferred stock of the Company; an additional P5,000 being subscribed by present members of the Company, thereby increasing the capital from P10,000 to P19,000 and having the articles of incorporation altered to allow for this increase. My name therefore will appear as one of the guarantors to H. W. P. & Co., but as I do not desire to become personally interested have taken up these shares in the interest of H.

W. P. & Co. * * *."

It is furthermore noteworthy that, although Scott appeared in court as a witness for the plaintiff, he did not deny making the agreement to sign the guaranty. It is therefore to be considered that the making of this agreement is as fully and satisfactorily demonstrated as if its existence had been formally admitted in court by the adverse party.

The proof shows that the labor of drafting the contract of guaranty, in pursuance of the mutual agreement which had been made, was assigned to Bruce. Accordingly, Bruce drew up the document in question and, after it had been signed by the three gentlemen whose names appear thereon forwarded it on August 5, 1912, with a note to Scott couched in the following terms:

"Dear Scott:

"I enclose herewith the guarantee of the account of the Commercial Vehicle Company with Henry W. Peabody & Company, which has been signed by Bromfield, Ross and myself.

"Faithfully yours.

"Edward B. Bruce."

The material portion of the guaranty itself is as follows:

"Whereas, the undersigned are stockholders in the Commercial Vehicle Company, which company has entered into an arrangement with Henry W. Peabody & Company, by the terms of which said Henry W. Peabody has undertaken to finance the said Company, as provided in a certain agreement entered into between said Henry W. Peabody and the Commercial Vehicle Company, under date of November 11, 1911:

* * * * *

"Now, therefore in consideration of the promises, the undersigned hereby, jointly and severally, bind themselves to reimburse Henry W. Peabody & Company for any loss which said company shall incur by reason of the business done by said company for the Commercial Vehicle Company in purchasing automobiles and automobile supplies for the Commercial Vehicle Company, extending drafts and rendering other accommodations in accordance with the terms of said contract.

"This guarantee shall remain in full force and effect as to all business transacted up to January 1, 1915.

"In witness whereof the undersigned have executed this instrument, this 22 day of July, 1912.

(Sgd.) "Edward B. Bruce.

(Sgd.) "J. F. Bromfield.

(Sgd.) "James Ross."

Upon receiving this document, Scott appears to have put it away, without signing it himself; and it remained in his possession until produced two years later at the time demand was made upon the guarantors for the performance of the obligation expressed therein. The record fails to show that Scott sent any written communication acknowledging the receipt of this document to Bruce; and it can be surmised that he wished to reflect upon whether to put his own name upon it. In the end—if not at once—he evidently decided not to do so. It is possible that Scott may have imagined that his participation in the contract was waived by the failure of Bruce, in his note of transmissal, to mention as a condition of the liability of the signatory parties that Scott himself should also sign. At any rate, it is so contended here in behalf of the plaintiff on this appeal; and one of the questions to be decided in this case is whether or not the delivery of the guaranty to Scott in the manner above stated operated as a waiver of the requirement of his signature.

Leaving this question for later discussion, we proceed with the narrative of subsequent events in the history of the Commercial Vehicle Company. This in brief is a story of commercial disaster. Even at the time the guaranty was made the company apparently was not as prosperous as its auditor had reported; and, at any rate, in the next two years the company lost heavily. Under date of June 19, 1914, Henry W. Peabody & Company, by Scott, addressed a letter to Bruce, Ross, and Bromfield, as signatory parties to the contract of guaranty, in which, among other things, it was said:

"In view of the fact that a serious loss in the account of the Commercial Vehicle Co. is quite inevitable and cannot be averted, we are obliged to have recourse upon you on the terms of your undertaking of July 22, 1912, and to make demand upon you for the amount due from the said company, which the latter has been unable to pay. * * *

"We draw your attention to former letters addressed to Mr. E. B. Bruce on this subject, and would ask that you kindly arrange to cover the balance due to us and subsequent interest on or before July 1, 1914, or make some definite arrangement in regard to payment.

"Our head office writes that the fact of your inability to collect the outstanding accounts of the Commercial Vehicle Co. is no reason that we should await payment due to us, and we therefore request that you take prompt action in regard to this matter."

No written reply seems to have been made to this communication, and Scott again wrote upon July 31, 1914, calling attention to the fact that no attention had apparently been paid to his prior demand, and he added: "I have received further instructions from our head office to press for payment, and unless terms of settlement are arranged prior to August 10th I shall be reluctantly compelled to adopt other methods of procedure."

In reply to this, the three gentlemen, Ross, Bruce, and Bromfield, on August 3, 1914, addressed a letter signed by all of them to Henry W. Peabody & Company, in which they observed that they had no desire to interpose any legal objection to the enforcement of the undertaking, but they at the same time called attention to the abnormal financial conditions which had supervened in the Philippine Islands as a consequence of the outbreak of the European War, and said that it was absolutely impossible for them at once to raise the amount, about P46,000, which Henry W. Peabody & Company demanded. They also stated that there were some large outstanding accounts due to the Commercial Vehicle Company and that every effort was being made to get these assets in. "We believe," the letter continued, "that if a reasonable time is allowed for this purpose, a substantial amount can be realized. We therefore make the following proposition: that six months be allowed us to effect the collection of as many of these accounts as possible, the proceeds to be applied in reduction of your account. In view of all the circumstances connected with this transaction, we submit to you that a fair and equitable adjustment of this matter would be to reduce your account to an amount which will reimburse your firm for all sums actually paid out on account of the Commercial Vehicle Company. If the above propositions meet with your approval we will, at the expiration of the six months period above referred to, each give you a note for one third of the balance due you, payable at a time to be arranged with your representative."

The letter does not explain what the circumstances were which, in the opinion of the authors of the letter, made it fair and equitable for Henry W. Peabody & Company to reduce the amount of their claim. Other evidence, however, adduced in the case supplies the explanation, which is, that, when the original contract was made, the necessity for Henry W. Peabody & Company to extend its credit to the Commercial Vehicle Company had been considered; and it was the contention of Bruce and his associates that the commissions which Henry W. Peabody & Company were allowed under the contract were substantially larger than would have been justified if it had been understood that a personal guaranty would be given to secure Henry W. Peabody & Company from any possible loss.

The offer of adjustment contained in the letter of August 3, 1914, was rejected by Henry W. Peabody & Company; and as Ross and Bromfield remained obdurate, this action was in consequence instituted against them on June 30, 1916, to recover the sum of P31,582.62, with interest. Their defense is based on the failure of Scott personally to sign the guaranty. As against this, it is insisted for the plaintiff that the contract sued upon is complete in its terms and that the delivery of the contract made by Bruce on August 5, 1912, was an absolute and unconditional delivery to Henry W. Peabody & Company.

The proper solution of the problem requires us to consider, first, and chiefly, the effect of the agreement made in July, 1912, when four men present at the meeting of the board of directors of the Commercial Vehicle Company mutually agreed to sign the contract in question. In making that agreement Scott was acting for his principal, Henry W. Peabody & Company; and when the situation is examined it will be seen that its effect was substantially the same as if it had been agreed that Henry W. Peabody & Company should, jointly with the other guarantors, carry one fourth the risk of any loss that might result from the extension of its credit to the Commercial Vehicle Company. The circumstance that the object in view was to be effected by Scott putting his personal name to the contract of guaranty is of no significance, for he himself immediately informed his principal in his letter of July 29, 1912, that although his name would appear as one of the guarantors he had no desire to become personally liable.

It was evidently in the interest of Henry W. Peabody & Company to secure the substitution of a responsible personal guaranty in place of the unsecured obligation of the Commercial Vehicle Company. Furthermore, by the arrangement which was in contemplation, the prior contract was continued in force by which the house of Henry W. Peabody & Company was entitled to the same commissions as before, and the necessity of liquidating the business of the Commercial Vehicle Company, then apparently in a prosperous condition, was avoided. It is possible that in the opinion of Scott the equity of the situation justified some concession from Henry W. Peabody & Company; and the making of the agreement by which his company was to bear one fourth of the risk incident to the future business of the Commercial Vehicle Company, down to January 1, 1915, appears to have been reasonable and judicious- No pretense can be made that his action in so agreeing was beyond the scope of his authority; but even so, it is clear that his principal, after receiving Scott's letter of July 29, 1912, must have acquiesced in the course which he proposed to pursue.

The original agreement between the parties being such as we have described, it is manifest that said agreement could not reach the state of a completed contract until the written document should be signed by each of the four who had agreed to put their names upon it; and when the three gentlemen whose names appear thereon as guarantors, had affixed their respective signatures, the contract, though externally perfect, was still incomplete, and it could only be completed by the addition of a fourth signature, to-wit, the name of P. M. Scott. The intention of the parties as revealed in their agreement, was that the words "the undersigned," appearing in the contract, should comprehend four persons; and the contract naturally could not operate in this sense until it should have passed into the hands of Scott and been signed by him.

Such being the situation, the contract was, as we have seen, dispatched on August 5, 1912, to Scott by Bruce with a simple note of transmission in which nothing is said about Scott's signature being required. The most natural interpretation of this act is that it was intended to place the contract in Scott's hands that it might be completed, and kept by him as the agent of the plaintiff for the purposes shown on its face. Scott knew that the agreement, in the form in which it was transmitted to him was incomplete and would remain so until his name should be put upon it. By failing, under these circumstances, to sign, he most undoubtedly placed his principal, Henry W. Peabody & Company in such a position that it cannot enforce this contract; for it is obvious that there is a lack of essential agreement in its creation, the document submitted being admittedly different from the agreement which

was in fact made. It is undoubtedly the duty of the courts to lend their assistance to the enforcement of any contract which has been honestly made; and evasions are not to be tolerated. But it is to be remembered the performance of the obligations of a contract is a duty incumbent on both parties; and where it appears, as here, that the agent of the plaintiff, through whose activities the contract was procured, has evaded the obligation which he proposed to assume, the enforcement of the contract is wholly out of the question.

Nor is there anything in the circumstances of the case which preclude the guarantors from making this defense. It can not be successfully maintained that the signatory parties have waived the personal participation of Scott in the contract of guaranty by the unconditional note of transmittal. It is true that in this note Bruce had the delicacy not to remind Scott of the obligation he was under to sign the paper; and considering the fact that Bruce was speaking for parties whose business could be forced into liquidation on any day by Scott, it is not surprising that the writer of the letter refrained from using peremptory language. There is nothing whatever in this communication to show that the three signatory parties intended to depart in any respect from the agreement which had in fact been made; and it must be considered that the act of delivering the document to Scott was an act done in pursuance of the original agreement. It was impossible for the contract to be completed until Scott should sign, and the physical delivery of the document to him was necessary to that end. Delivery, under such circumstances as these, did not perfect the contract, nor make it any more complete than it had already been.

The case has been chiefly argued as if it turned exclusively upon the question of delivery. But in the making of any contract there is something antecedent to the final delivery of the document and even more important. It is the fundamental requisite of the approximation of the contracting minds in the act of agreement. The consent of the parties is an essential requisite in a contract (article 1261, Civil Code), and there is no consent until their minds meet in mutual agreement. If a document is produced, and it is admitted that it does not express the agreement of the parties, it can have no legal effect, however perfect it may be upon its face. The contract before us fails to express the agreement of the parties by placing on three men a burden which was intended to be borne by four.

Of course, if the parties who signed this guaranty had, by the manner of delivery or any other act, intentionally and deliberately led Scott to act on the assumption that they had excused him from signing, they could not in this or in any other action be permitted to take advantage of his failure to sign. (Section 333, Code of Civil Procedure.) There is, however, nothing in the record to show that Scott was in any wise misled on this point. On the contrary, it is more probable that his retention of the contract, without revealing his failure to sign, had the effect of misleading the other parties to their possible prejudice.

Much reliance is placed by the attorneys for the appellant upon American and English decisions in which the doctrine of delivery in escrow is applied; and we entirely agree with the proposition that the delivery which was made by Bruce on August 5, 1912, was not a delivery in escrow. It was, we think, an unconditional delivery made pursuant to the tenor of the original agreement, and the delivery was made in order that the contract might be completed. If Scott had put his name on the paper before locking it up in his safe, no further delivery could, of course, have ever been made. Speaking retrospectively, in such case, any court would have said that delivery occurred when Bruce transmitted the document to Scott. But a contract may fail for lack of essential agreement even though the external act of delivery is accomplished; and such is our opinion in the case now before us. It is not delivery which is here lacking; the trouble lies in the incompleteness of the execution. The inference which the appellant insists should be drawn from the fact that the delivery of the instrument was effected without any express reservation therefore fails.

We are not unmindful of the fact that many cases can be cited as authority for the proposition that a creditor in whose favor a contract of guaranty, or bond, is executed is not bound by a reservation, made without knowledge of such creditor, by the guarantor or surety, upon placing his signature on the document, to the effect that he will

not be bound unless some other person should sign in a similar capacity. In such case the creditor, not being cognizant of such reservation, cannot be affected by it. This well-known rule cannot operate in a case where, as here, the party in whose favor the instrument was executed was cognizant of the condition upon which the guarantors signed and agreed that the contract should be signed up in the manner contemplated.

Although the case has been argued chiefly on the point of delivery, the appellant also relies on the proposition that extrinsic evidence is not admissible to vary the terms of the guaranty by showing that there was an anterior agreement by virtue of which the liability of the three signatory parties was dependent on the addition of the signature of Scott as one of the guarantors. The rule that, generally speaking, extrinsic evidence is not admissible to vary the terms of a written contract is not open to question. Nevertheless, it must be remembered that this rule is concerned with evidence which, if admitted, would contradict the obligation expressed in a contract the existence of which is admitted or proved. It has no application to conditions and stipulations which are antecedent to the existence of the contract and on the faith of which the supposed contract is executed. (10 Ruling Case Law, 1038.) Or, as it is commonly expressed, a separate or collateral stipulation is admissible in evidence, though it relates to the same subject matter as the written contract, provided it does not contradict or vary the terms of such contract. (Opus citat, pp. 1033 et seq.) In the case now before us the stipulation that Scott should sign the contract in question in no wise varied any term of the guaranty in question. The making of said stipulation operated rather as one of the inducements which caused the others to sign.

The attorney for the appellant further insists that the letter of August 3, 1914, (Exhibit G) from which we have already quoted, contains an admission by Ross, Bruce, and Bromfield of their liability on the contract in question. Certainly, if the defendants herein had denied their signatures to the contract, the letter referred to would have furnished sufficient proof that they signed it. But that is not in dispute, and the question is whether the supposed contract of guaranty created a legal liability. Upon this point it is evident that if the execution and delivery of the contract in the manner already considered did not create legal liability the letter could not have such effect. The trial judge excluded the letter from consideration on the ground that, as appears on its face, it was intended merely as an offer of compromise. Whether admitted or rejected, it can in our opinion have no effect upon the determination of the lawsuit.

A question has been asked as to whether it would be possible to allow a recovery in favor of the plaintiff to the extent to which the defendants herein would have been liable if Scott had signed the guaranty. This suggestion contemplates performance by Scott and the enforcement of the obligation as thus reformed or completed. Apart from the fact that no such relief is sought by either litigant, it is apparent that the facts involved supply no basis for any such equitable adjustment of liability. The plaintiff neither asks nor offers to do equity. It stands upon its legal rights under the supposed contract, and is met by a defense based on the assertion that no contract was made. The case must, in our opinion, be determined on the issue thus defined. In this connection it should be observed that by the terms of the contract in question the liability of the parties was solidary and not apportionable.

But the further question may be asked; Cannot the court ignore the written contract as incomplete and yet permit recovery upon the oral contract made by the four individuals who agreed to become guarantors? The impossibility of such a course must be apparent when it is considered that the parties to the preliminary negotiation intended that a contract should be executed as the formal repository of their agreement. It was, indeed, necessary that their agreement should be reduced to writing in order to satisfy that provision of the law which says that a promise to answer for the debt or default of another shall be unenforceable unless reduced to writing and subscribed by the party to be charged. (Section 335, subsection 2, Code of Civil Procedure.) It is therefore evident that the parties could not have intended that any contract should exist except that which should be executed in accordance with this intention. Their purpose, as we have seen, failed of effect because the agent of the plaintiff, himself one of the

proposed guarantors, refrained from performing the act which would have made him liable with the other signatory parties. The necessary consequence, in our opinion, is that no action can be maintained by the plaintiff either on the preliminary verbal agreement or the imperfect contract which failed of effect.

It is no doubt true that if the three gentlemen who signed the contract (Exhibit B) had so desired, they could, upon learning of Scott's failure to sign the document, have forced him to sign it or return it to them; and this could have been accomplished by legal action, supposing that the parties could have had access to his letter file and have obtained the communication to Bradlee in which the making of the agreement is admitted in writing. We are unable, however, to see that this circumstance strengthens the case of the plaintiff company as against them.

From what has been said it is apparent that the trial court committed no error in absolving the defendants. The judgment appealed from is accordingly affirmed, with costs. So ordered.

Torres, Johnson, Araullo, Malcolm, and Avanceña, JJ., concur.

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