

1960

George E. Charlton v. George L. Hackett : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

GEORGE E. CHARLTON,
Plaintiff and Respondent,

vs.

GEORGE L. HACKETT,
Defendant and Appellant.

Case No. 9243

APPELLANT'S BRIEF

UNIVERSITY OF UTAH

JUL 10 1967

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} Case No. 9243

APPELLANT'S BRIEF

STATEMENT OF FACTS

This is an action for breach of contract. The contract admitted in evidence as Exhibit 1 is reproduced herein. The agreement provided for the exchange by plaintiff, George E. Charlton, of one jeep and one trailer for 68,333 shares of stock of J-A Uranium, Inc. at its par value.

Mr. Charlton delivered the jeep and trailer but never received the stock.

George E. Charlton became acquainted with defendant (appellant herein) in February 1956.

They met in the office of Ackerson-Hackett Investment Company in the Continental Bank Bldg., Salt Lake City, Utah (Tr. 5). Mr. Charlton had been referred to Ackerson-Hackett Investment Company by an attorney then practicing in this City relative to becoming underwriter for an issue of securities in a company Mr. Charlton was in the process of registering with the Utah Securities Commission (Tr. 21).

The matter of the underwriting was first discussed and then the matter of the exchange which is the subject of this lawsuit (Tr. 22). Mr. Hackett testified that he stated to plaintiff, George Charlton, that he could effect a transaction on behalf of the company for the shares of J-A Uranium, Inc. stock in exchange for the jeep and trailer which Mr. Charlton was offering for sale (Tr. 20). He was informed that Ackerson-Hackett Investment was underwriter for these securities and that a public offering of the securities was then or would be commenced shortly (Tr. 26). The stock was to be delivered to Mr. Charlton upon the conclusion of the public offer and he was informed that it was anticipated that the offering would be concluded in approximately ninety days (Tr. 20). Exhibit 1 was then prepared and signed by Mr. Charlton. The offering was never concluded (Tr. 21) and the stock not delivered.

Mr. Charlton commenced this action against Mr. Hackett individually. Defendant contended that the agreement was with his principal Ackerson-Hackett Investment Company. The court found that the agreement was with defendant personally and found that the reasonable value of the shares Mr. Charlton did not receive was 3¢ per share and awarded judgment for \$2049.99.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN FINDING THAT GEORGE L. HACKETT WAS A PARTY TO THE EXCHANGE AGREEMENT.

POINT II

THE COURT ERRED IN ASSESSING DAMAGES IN THE AMOUNT OF \$2049.99.

ARGUMENT

POINT I

THE COURT ERRED IN FINDING THAT GEORGE L. HACKETT WAS A PARTY TO THE EXCHANGE AGREEMENT.

The issue is whether George L. Hackett was acting as agent for a disclosed principal in this transaction.

Restatement of the Law, Second, Agency 2d, Volume II, §320.

“Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.

Comment:

a. Whether or not a person purporting to act as agent for another becomes a party to the contract depends upon the agreement between such person and the other party. See §146. As stated in Section 4, a principal is disclosed if, at the time of making the contract in question, the other party to it has notice that the agent is acting for a principal and of the principal's identity. One who purports to contract on behalf of a designated person does not manifest by this that he is making a contract on his own account, and only where he so manifests does the agent become a party to a contract which he makes for the principal. In the absence of other facts, the inference is that the parties have agreed that the principal is, and the agent is not,

a party. This is true although the agent uses such an expression as, "I will sell."

Comment:

b. Burden of proof. One bringing an action upon a contract has the burden of showing that the other is a party to it. This initial burden is satisfied in the plaintiff proves that the defendant has made a promise, the form of which does not indicate that it was given as agent."

Restatement of the Law, Second, Agency 2d, Volume I, §4.

"(1) If, at the time of a transaction conducted by an agent, the other party thereto has notice that the agent is acting for a principal and of the principal's identity, the principal is a disclosed principal.

Comment:

d. If the manifestations of the principal or agent are such as reasonably to indicate to the other party the identity or existence of the principal, the latter is disclosed or partially disclosed, and this is true although the other party believes that he is dealing with the agent alone."

Restatement of the Law, Second, Agency 2d, Volume I, §9.

"(1) A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it.

Comment:

d. Reason to know. A person has reason

to know of a fact if he has information from which a person of ordinary intelligence, or of the superior intelligence which such person may have, would infer that the fact in question exists or that there is such a substantial chance of its existence that, if exercising reasonable care with reference to the matter in question, his action would be predicated upon the assumption of its possible existence. The inference drawn need not be that the fact exists; it is sufficient that the likelihood of its existence is so great that a person of ordinary intelligence, or of the superior intelligence which the person in question has, would, if exercising ordinary prudence under the circumstances, govern his conduct as if the fact existed, until he could ascertain its existence or non-existence.

Comment:

e. Should know. A person should know of a fact if a person of ordinary prudence and intelligence, or the intelligence which such person has or professes to have, would ascertain, in the performance of his duty to another, that such fact exists or that there is such a substantial chance of its existence that his action would be predicated upon its possible existence. The words "should know" express the idea that the person of whom they are spoken has a duty to others to ascertain facts or, if he does not ascertain them, to act with reference to the likelihood that such facts exist.

Mr. Charlton testified that Ackerson-Hackett Investment Company was not mentioned during

their conversations, (Tr. 7) that he made no inquiries concerning the principal (Tr. 15) but admitted that the name Ackerson-Hackett Investment Company appeared on the office door (Tr. 9). He acknowledged that the name Ackerson-Hackett Investment Company appeared on the agreement that he signed (Exhibit 1) and on the stock confirmation he received (Exhibit 2). He did not deny that he had been referred to Ackerson-Hackett Investment Company by an attorney in this City in regard to a proposed public offering of stock in a company that he was registering with the Utah Securities Commission. There is no direct testimony nor can it be inferred, that George L. Hackett made any promises to plaintiff, George Charlton, in his individual capacity.

The circumstances surrounding this transaction clearly show the existence and identity of a principal, and such being the case, the defendant, George L. Hackett, was not a party to the contract.

See *State v. Bonnett*, 201 P. 2d 939 (Utah).

POINT II

THE COURT ERRED IN ASSESSING DAMAGES IN THE AMOUNT OF \$2049.99.

The lower court awarded judgment to plaintiff for the reasonable value of the shares of stock that he did not receive under the contract and found the value to be \$2049.99, or 3¢ per share.

As stated in *Volume 12A, Fletcher Cyclopedia Corporations*, §5631,

“If the seller of stock refuses or fails to perform in accordance with his contract, the purchaser may maintain an action for damages Ordinarily the measure of damages is the difference between the contract price and the market price at the time and place fixed for delivery If the stock has no market value, the plaintiff is entitled to recover its actual value to be ascertained from the value of the corporate assets the amount of its liabilities, the dividend earning capacity of the stock and the like. Nominal damages may be recovered where a breach of the contract is shown, although no damages proved.”

See also *18 Corpus Juris Secundum, Corporations* §415:

“The value of stock is generally ascertained by its market value, but resort may be held to other sources when necessary.

There is no presumption that the face value of the stock is its real value, and as a

general rule the manner of ascertaining its value, as a basis for estimating damages, is to show its market value at the time and place it should have been delivered, and not as of the date of the contract. Neither the book value nor the intrinsic value of the stock should enter into the estimate, unless it has no market value, in which case resort may be had to sources other than the market value to determine its actual value, and the property of the corporation as compared with its liabilities at that time may be shown, but the affairs of the corporation cannot be considered in determining market value, where there is evidence of several sales of such stock and the price for which it was sold, although it is not shown to be the subject of daily traffic. In order that stock may have a market value it is not necessary that it be the subject of daily traffic by being bought and sold on the streets or in the frequent dealings of trades people; it is enough if it is occasionally the subject of sale or exchange in the community so as to fix upon the stock at different times a customary price."

The rule may be stated concisely that the measure of damages for failure to deliver stock is the market price, if there is a market for the stock and if there is no market for the stock, then the measure of the damages is the actual or intrinsic value of the stock.

The shares of stock of J-A Uranium, Inc. did not have a market value from the date of the ex-

change contract, February 15, 1956, to and including the date of trial (Tr. 24). This fact was testified to by defendant. Plaintiff offered no evidence to the contrary.

Evidently, the court based its finding of value on the fact that J-A Uranium, Inc. had or was about to commence a public offering of stock at 3¢ per share, but there is no evidence whatever of any sales at that price. Such being the case, the court should have looked to the actual value of the stock and there was no evidence introduced as to its actual value.

“Generally the courts will indulge no presumption as to the value of particular property. Thus, no presumption exists in the absence of all supporting evidence that corporate stock is worth par or even that it has substantial value.” 20 *Am. Jur. Evidence* §242. 6 *A.L.R.* 2d 189.

At the conclusion of plaintiff's case, there was no evidence as to the market value or the actual value of the stock in question and no evidence of any sales under the company's public offering. The defendant's motion to dismiss (Tr. 15) should have been granted.

Grant vs. Lovekin, 132A. 342 (Penn.)

Wohlgemugh vs. Mendel, 172 N.Y. Supp. 259

Roder vs. Niles, 111 N.E. 340 (Ind.)

CONCLUSION

Appellant contends that the evidence is not sufficient to sustain the court's findings and judgment on two points, namely: (1) That appellant, George L. Hackett, was a party to the contract, and (2) that the value of the shares of J-A Uranium, Inc. was 3¢ per share.

(1) The evidence shows that plaintiff-respondent had notice of the existence and identity of the principal Ackerson-Hackett Investment Company, as that term is defined in the Restatement, and therefore, the complaint of plaintiff should have been dismissed.

(2) The record contains no evidence of the value of the shares of J-A Uranium, Inc. The court's finding of a value was arbitrary and completely without a foundation in the record.

The findings and judgment of the court should be set aside and the complaint of plaintiff-respondent dismissed.

Respectfully submitted,

EDWARD M. GARRETT

Attorney for Appellant

1307 Walker Bank Building
Salt Lake City, Utah

Ackerson-Hackett Investment Company

BROKERS • UNDERWRITERS • INVESTMENTS

TE 701 • CONTINENTAL BANK BUILDING • SALT LAKE CITY, UTAH

PHONE: DAVI: 2-2946

118159

February 15, 1956

GEORGE E. CHARLTON hereby agrees to sell, convey, assign, and transfer all his rights, title, and interest to one 1948 Willys 4 Jeep, four-wheel drive, Serial No. 195 356, Motor No. J224 358; and to one 195¹ Corsair, Kory Coach Company, Model K Arr. #1, Serial No. 5LK3327, twenty-three foot trailer house complete with refrigerator, stove, couch, bed, and table, and all other contents, for total consideration of sixty eight thousand three hundred and thirty three shares at par value of J-A URANIUM CORPORATION stock.

Witnesses:

R. C. Cavan

George E. Charlton

Jane Quinn
