*Livingston *et al. v.* Swanwick.

Witness.—Pleading.—Variance.

A broker is a competent witness, to prove his own authority to make the agreement upon which the suit is brought, notwithstanding his commission may depend upon the establishment of the contract.

In an action on a contract, made by a broker on behalf of the defendant, for the delivery of stock, a variance between the declaration and the written agreement is not material; the actual contract being proved as laid, of which the writing is merely corroborative.

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 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.

New York, 15th July 1791. Samuel Anderson."

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

---

law of nations seems to require, that a consul should be independent of the ordinary criminal justice of the place where he resides. Vatt. lib. 2, c. 2, § 34. 3d. But that, exclusive of the legal exceptions, the prosecution had not been maintained in point of evidence; for it was all circumstantial and presumptive, and that too, in so slight a degree, as ought not to weigh with a jury on so important an issue. 2 Hale H. P. C. 289; 4 Smol. Hist. Eng. p. 382 in note.

Rawle, in reply, insisted, that the offence was indictable at common law; that the consular character of the defendant gave jurisdiction to the circuit court, and did not entitle him to an exemption from prosecution, agreeable to the law of nations; and that the proof was as strong as the nature of the case allowed, or the rules of evidence required. In support of this argument, he cited the following authorities. 4 Bl. Com. 142, 144; 1 Lev. 146; 1 Keb. 809; 4 Bl. Com. 180; Str. 193–4; Bl. Com. 242; Crown Circ. 376; Fost. 128; Leach, 204; 1 Dall. 338; 1 Sid. 168; Comb. 304; Leach, 39; Ld. Raym. 1461; 1 Dall. 45.

The Court were of opinion, in the charge, that the offence was indictable, and that the defendant was not privileged from prosecution, in virtue of his consular appointment.

The jury, after a short consultation, pronounced the defendant, guilty; but he was afterwards pardoned, on condition (as I have heard) that he surrendered his commission and *exequatur*.

As to the question of jurisdiction, see United States *v.* Worrall, *post*, p. 384.

had an action actually depending for his commissions on making the contract. But—

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, thereupon, 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. [*301

2d. That the first count states an agreement by Swanwick to transfer stock at a certain day: but the evidence is only of an agreement to deliver an engagement for that purpose.

3d. 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 authorised 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 to 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 non-attendance *302] of the plaintiffs at the place of transfer, *is sufficiently excused by the waiver, which has been proved on the part of the defendant.

Verdict for the plaintiffs, for $19,400.

Lewis, Rawle, Randolph and *Dallas* for the plaintiffs. *E. Tilghman, Ingersoll, Wilcocks* and *Sergeant,* for the defendant.(*a*)

APRIL TERM, 1794.

Present, WILSON and PETERS, Justices.

BRUDENELL *et al. v.* VAUX *et al.*

Computation of time.

A statute requiring mortgage to be recorded within six months, held, to mean calendar, not lunar months.

THE question in this cause arose upon the act of assembly for recording mortgages (1 Dall. Laws, 112), the mortgage of the defendants having been recorded after the expiration of six lunar, but within six calendar, months, from the date: And THE COURT, having compared this with other acts of the legislature, were of opinion, that by the word "months," calendar months were intended.[1]

Lewis and *Tilghman,* for the plaintiff. *Ingersoll, Rawle* and *Thomas,* for the defendant.

(*a*) 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.

[1] Commonwealth *v.* Chambre, 4 Dall. 143; 4 Wend. 512; People *v.* New York, 10 Id. 393; Moore *v.* Houston, 3 S. & R. 159; Snyder *v.* Leffingwell *v.* White, 1 Johns. Cas. 99; Sheets Warren, 2 Cow. 518; Parsons *v.* Chamberlin, *v.* Selden, 2 Wall. 177.