

PINE BLUFF IRON WORKS *v.* ARKANSAS FOUNDRY COMPANY.

4-2740

Opinion delivered November 21, 1932.

1. PRINCIPAL AND AGENT—LOSS OF REMITTANCE TO PRINCIPAL.—Where an agent deposited money received for materials sold for its principal to its own account, and drew a check thereon to the principal's order, the agent was liable to the principal for the amount of the check which was returned unpaid on account of the bank's failure.
2. PLEADING—AMENDMENT TO CONFORM TO PROOF.—Allowing a complaint to be amended to conform to proofs introduced without objection was not error where no new or different cause of action was stated therein.

Appeal from Jefferson Circuit Court; *T. G. Parham*, Judge; affirmed.

STATEMENT BY THE COURT.

This appeal comes from a judgment against appellant for a balance claimed to be due for materials furnished by the appellee for use in the construction and reconditioning of a store building in Pine Bluff.

Parish Construction Company, of Jackson, Tennessee, had the contract for making the improvements, and

there was an understanding, in so far as it was practicable, that all building materials and labor should be procured locally—in the Pine Bluff market.

The Pine Bluff Iron Works, appellant, contracted to furnish certain materials, but was unable to supply all the steel required from its yard, and the Arkansas Foundry Company, appellee, entered into a mutual arrangement whereby the foundry would supply and furnish certain of the items in the name of and through the Iron Works, which was in turn to receive a commission of \$75 plus \$25 for hauling and handling the transaction.

The foundry made an estimate of the particular material it would furnish, which amounted to \$1,236, and addressed the quotations or bid to the Pine Bluff Iron Works, which thereupon, under its own name, quoted the contractor, and used the identical terms and prices made it by the Foundry Company. The contractor accepted the bid of the Iron Works, and the materials were furnished thereunder, first, by the foundry to the Iron Works, and then by the Iron Works to the contractor, in due course in the erection of the building. The Foundry Company billed the Iron Works directly for the materials, which were by them billed to the contractor. During the progress of the work the contractor executed its checks to the Pine Bluff Iron Works in partial settlement for materials furnished, including materials coming originally from the Arkansas Foundry Company's yards. The checks were indorsed and paid to the credit of the Iron Works, and, when collected, the Iron Works paid the Arkansas Foundry Company, using checks drawn against its own general checking account.

On completion of the contract, the Construction Company delivered to the Iron Works a check drawn to its order in full settlement for the steel and iron used in the structure, the check being in excess of \$840. This check was deposited to the credit of the Iron Works, and, when credited in the usual course, the Iron Works drew and forwarded a check in the sum of \$600, covering the balance due the Arkansas Foundry Company on the ma-

terials furnished. The \$600 check was received in due course, and by the Foundry Company indorsed and deposited to its own credit in the American Exchange Trust Company, which indorsed and forwarded it to the Merchants' & Planters' Bank & Trust Company of Pine Bluff for collection and remittance. On November 15, 1930, the payee bank paid the check and charged it to the Pine Bluff Iron Works, which had on deposit in the bank on that day approximately \$3,600. On November 17, the Pine Bluff bank suspended payment for 5 days, and did not resume business, being taken over by the State Bank Commissioner for liquidation. The 15th of November was on Saturday, and the bank did not thereafter open. The Pine Bluff bank did not remit to the American Exchange Trust Company the proceeds of the \$600, nor did it deliver the check to the Pine Bluff Iron Works. On November 26, the Bank Commissioner reversed the charge on the books of the bank, and credited the charge back to the Pine Bluff Iron Works, returning the check to the American Exchange Trust Company, which in turn surrendered it to the Arkansas Foundry Company. The Pine Bluff Iron Works filed its claim with the Bank Commissioner for the full amount of its deposit as shown on the books of the bank, including the \$600 item which had been reversed and credited back to its account by the Bank Commissioner on November 26. After filing the claim, the Iron Works remembered that it had included the \$600 item, and thereupon wrote for and received back the check from the Arkansas Foundry Company. Two dividends were paid to the Pine Bluff Iron Works, totaling 20 per cent., and of this sum received the Iron Works remitted the sum of \$120 to the Arkansas Foundry Company and received proper credit therefor. The Pine Bluff Iron Works did not keep a separate account of the money it received from the Construction Company for the materials furnished it by the Arkansas Foundry Company, but comingled said funds with its own.

Suit was brought for the balance claimed to be due covering the materials furnished by the Arkansas Foun-

dry Company, and the appellant company denied any indebtedness to the Foundry Company, and alleged it was only acting as agent for its undisclosed principal in making the sale of the materials and collecting and remitting the money therefor, and was guilty of no negligence whatever in forwarding the money, which was lost to the Foundry Company through the failure of the bank, without fault on its part.

After the evidence was in, on motion of the plaintiff, the court treated the complaint as amended to conform to the proof, and rendered judgment for the said balance due, \$480, and costs, with interest in the sum of \$13.30 to date of judgment and 6 per cent. thereafter until paid, and from this judgment the appeal is prosecuted.

Hooker & Hooker, for appellant.

Barber & Henry and *Troy W. Lewis*, for appellee.

KIRBY, J., (after stating the facts). The case was tried by the court without the intervention of a jury, and without any special findings of facts requested or made or separate conclusions of law stated.

It is insisted that the court erred in treating the complaint as amended to conform to the proof, and that there is not sufficient evidence to support the judgment.

The suit was brought upon the theory of the sale of the materials by the appellee company directly to the appellant company, and the failure to pay the balance due therefor, and apparently decided upon the theory that appellant was the agent only of an undisclosed principal in making the sale of the materials to the Construction Company and in collecting and remitting the money due therefor, the complaint being amended, after the introduction of the proof without objection, to conform and correspond thereto.

If appellant was only the agent, as he claims to have been, in the sale and delivery of the materials to the contractor, he evidently regarded himself bound to the collection and remittance of the money due and received for the materials, and deposited the contractor's drafts and check paid therefor in his own bank to the credit of his

checking account, sending the amount due appellee company by his own check after taking out his commission, etc.

He received the check from the construction company for the balance due the Arkansas Foundry Company, together with the amount due him and his company, deposited it to his own credit in his bank, and sent his own check for the balance due for the materials furnished by the appellee company. This check was put in the bank here, forwarded to the bank at Pine Bluff for collection, and charged against appellant's account, but the bank failed and was taken over by the Bank Commissioner, who afterwards reversed the charge on the bank's books against appellant's account and returned the check unpaid. Appellant made out his claim for all his account in the failed bank, including the \$600 not paid out on this check, which was returned to the payee and afterwards demanded by appellant company, and paid out of the two dividends received on the amount from the failed bank, \$120, to appellee company for credit on its account.

Appellant need not have been considered a guarantor of the collection of the account and sale price of the materials delivered by him to the contractor, but, according to his own understanding, he was authorized to collect for the materials, and could, not, of course, accept other than money in payment therefor. The undisputed testimony shows that he deposited the money received for the materials in his own bank to his credit without anything to indicate that he received it on account of or for his principal, or anything to indicate that it was not his own money, and, having so deposited it, he became liable for the loss of it through the bank failure. Of course, if he had deposited it to his principal's credit or in such a manner as to indicate that it was not to his own personal account, such would not have been the case. *Darragh Company v. Goodman*, 124 Ark. 532, 187 S. W. 673, 31 Cyc. 1468 (f); see also 2 C. J. 742.

No error was committed by the court in allowing the complaint to be amended to conform to the proof intro-

duced without objection, since no new or different cause of action was stated thereby. *Griffin v. Anderson-Tully Co.*, 91 Ark. 292, 121 S. W. 297; *Shapleigh Hdw. Co. v. Hamilton*, 70 Ark. 319, 68 S. W. 490.

The original suit was on account for goods or materials sold and delivered to appellant, and the facts showed that the materials were delivered to appellant only as agent and by him sold to the Construction Company without disclosure of his principal and with authority to collect and remit the proceeds of the sale.

We find no error in the record, and the judgment is affirmed.
