

court has jurisdiction. But there is no cause for an equitable action here. The bill fails, and there is nothing left but the legal right for the recovery of damages, which must, under the federal practice, be asserted in a court of law, and it cannot be joined with an equitable cause of action, and, if it fails, then he asserted in the same suit as a legal remedy. This is now a rule beyond question in the federal courts. *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. Rep. 249; *Kramer v. Cohn*, 119 U. S. 355, 7 Sup. Ct. Rep. 277; *Dowell v. Mitchell*, 105 U. S. 430; *Hunt v. Hollingsworth*, *supra*.

The demurrer to the bill must be sustained, injunction refused, and the bill dismissed, without prejudice.

JENKINS v. FUNK.

(Circuit Court, W. D. Pennsylvania. February 11, 1888.)

PRINCIPAL AND AGENT—SPECIAL AGENT—POWERS.

A special agent, acting simply by virtue of a power of attorney to sell and convey certain real estate, cannot employ a broker to procure a purchaser and negotiate a sale, so as to raise a privity between his principal and the broker, and give the latter a right of action for his compensation directly against the principal.¹

At Law. On motion for new trial.

James W. Jenkins sued Mrs. Eliza Funk to recover commissions on a sale of real estate made by plaintiff under authority from Mrs. Funk's agent. Verdict for defendant, and motion for new trial by plaintiff.

Samuel T. Neill, for motion.

George B. Gordon, *contra*.

ACHESON, J. As the foundation of his right of action, the plaintiff put in evidence the power of attorney from Mrs. Funk, the defendant, to M. A. McDonald, and by that instrument is the extent of the latter's agency to be determined. It is very clear that McDonald's alleged declarations, made in the absence of Mrs. Funk, are not evidence as against her to expand his written authority. *Grim v. Bonnell*, 78 Pa. St. 152. Nor was there any offer of evidence to show a general or local usage from which might arise an implication of authority in McDonald to employ a

¹The acts of an agent varying from those contemplated by the evidence of his authority are wholly void. *New York Life Ins. Co. v. Fletcher*, 6 Sup. Ct. Rep. 837; *Jackson v. Badger*, (Minn.) 26 N. W. Rep. 908; *Siebold v. Davis*, (Iowa,) 25 N. W. Rep. 773; *Veeder v. McMurray*, (Iowa,) 23 N. W. Rep. 285; *Rountree v. Davidson*, (Wis.) 18 N. W. Rep. 518; *Hampton v. Moorhead*, (Iowa,) 17 N. W. Rep. 202; *Thomas v. Joslyn*, (Minn.) 15 N. W. Rep. 675; *Campbell v. Campbell*, (Wis.) 15 N. W. Rep. 183; *Jeffrey v. Hursh*, (Mich.) 12 N. W. Rep. 898; *Luke v. Grigg*, (Dak.) 30 N. W. Rep. 171. The acts of an agent within the apparent authority given him will bind the principal. *Sacalaris v. Eureka & P. R. Co.*, (Nev.) 1 Pac. Rep. 835; *Webster v. Wray*, (Neb.) 24 N. W. Rep. 207; *Dewar v. Bank of Montreal*, (Ill.) 3 N. E. Rep. 746; *Schley v. Fryer*, (N. Y.) 2 N. E. Rep. 280. See, also, *Frink v. Roe*, (Cal.) 11 Pac. Rep. 890, and note.

sub-agent with the right to look to the primary employer for his compensation. The rejected offers fell far short of that measure of proof. By her letter of attorney Mrs. Funk simply authorized McDonald to sell and convey her real estate. The agency was special, created for a particular and defined purpose. Such an instrument is to be construed strictly, (Story, Ag. § 68;) and the formal language, "Hereby giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises," etc., will be presumed to be used in subordination to the particular subject-matter of the power, and limited accordingly, (Id. § 62; 1 Devl. Deeds, § 359.) True, the letter of attorney contains a clause in the common form, granting to McDonald the "power of substitution;" but, clearly, he did not exercise that power. Indeed, this is not asserted. Hence that clause cannot affect the rights of the parties to this suit.

The controlling question in the case is whether a special agent, acting exclusively by virtue of a power of attorney which merely authorizes him to sell and convey certain real estate, can employ a broker to procure a purchaser and negotiate a sale, so as to raise a privity between his principal and the broker, and give to the latter a right of action for his compensation directly against the principal. At the trial the court determined this question negatively. That the decision was right it is not difficult to show. The general rule of law is that if an agent, in the conduct of his agency, employs a sub-agent, without authority to bind his principal, expressly given or fairly presumptive from the particular circumstances or the usage of business, the sub-agent must look to his immediate employer for his pay, and has no claim for compensation against the agent's principal, between whom and the sub-agent no privity exists. Story, Ag. § 387; Whart. Ag. § 348; *Stephens v. Badcock*, 3 Barn. & Adol. 354; *Warner v. Martin*, 11 How. 223, 224; *Corbett v. Schumacker*, 83 Ill. 403. Thus, in the case of *Cull v. Blackhouse*, 6 Taunt. 148, note, where a person who was commissioned by the defendant to purchase and ship wheat for him, employed the plaintiff to bring it down to the sea-coast and settle the shipping charges, etc., but failed to pay him, it was held that the plaintiff must sue, for his compensation, the person who actually employed him, and not the defendant. To the like effect was the ruling in *Schmaling v. Thomlinson*, 6 Taunt. 147. The foregoing citations reveal a principle decisive of the present case. Between the plaintiff and the defendant no privity, express or implied, exists, and, therefore, this action cannot be maintained. The plaintiff's contract was with McDonald, and he alone became responsible for the plaintiff's compensation. It follows, then, that the motion for a new trial must be overruled.

And now, February 11, 1888, the motion for a new trial is denied; and it is ordered that judgment be entered in favor of the defendant upon the verdict, with costs.

GRAHAM *et al.* v. PLANO MANUF'G CO. *et al.*

(Circuit Court, N. D. Illinois. February 20, 1888.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—HARVESTER.

An "improvement in harvesters," consisting of a "floating finger-bar," covered by letters patent No. 74,342, issued February 11, 1868, to Alvaro B. Graham, was not anticipated by the prior devices of Dolph, Zug, Ball, Bartlett, and Bramer, or by the Bradley machine, made in 1863, or the Preston machine, made in 1861, so as to make the patent void for want of novelty, or because the device was in use for more than two years prior to application therefor.

2 SAME—INFRINGEMENT—HARVESTER.

Letters patent No. 74,342, for an "improvement in harvesters," said improvement consisting of a "floating finger-bar," wherein the tilting and rocking motions of the finger-beam are secured by means of the swivel joint which attaches the vibratable link to the body of the machine, and the swivel joint located in the draft-rod at the joint where the draft-rod is attached to the shoe, are infringed by the defendants' device, which consists of substituting a ball and socket joint for the swivel joint.

In Equity. On bill for injunction.
Banning & Banning, for complainants.
Coburn & Thatcher, for defendants.

BLODGETT, J. The bill in this case charges the defendants with the infringement of letters patent No. 74,342, granted February 11, 1868, to Alvaro B. Graham for an "improvement in harvesters." Infringement is charged of the first and second claims of the patent, which describe and cover the device by which the finger-bar is made to rise and fall at either end, and rock forward or backward, independently of the gearing carriage, while maintaining its connection with it. The first claim is for the device shown, whereby the finger-beam is enabled to rise and fall at either end, and rock forward or backward independently of the gearing-carriage; and the second claim covers this device, together with a lever by which the finger-beam may be rocked by the driver or operator of the machine, for the purpose of setting its guard-fingers at any desirable inclination to the horizontal line. The defenses interposed are: (1) Want of patentable novelty. (2) Public use of the device for more than two years before the patent in question was applied for. (3) That defendants do not infringe.

This patent has been twice before this court—*First* in the case of *Graham v. Gammon*, in July, 1877, where the controversy was as to the validity of the claims now in question, (reported 7 Biss. 490;) and, *second*, in *Graham v. McCormick*, 10 Biss. 39, 11 Fed. Rep. 859, where the same claims were in controversy; and in the Eastern district of Wisconsin, in the case of *Graham v. Manufacturing Co.*, 11 Fed. Rep. 138, decided by his honor Judge DYER, in October, 1880, involving a controversy over the same claims. The defense in this case has made an exhaustive presentation in their proofs of the prior art covered by these two claims, and also several cases of alleged prior use of the devices for more than two years