Waters Vs. Millar

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Court : US Supreme Court

Decided On : 1788

Appeal No. : 1 U.S. 369

Appellant : Waters

Respondent : Millar

Judgement :

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U.S. Supreme Court WATERS v. MILLAR, 1 U.S. 369 (1788)

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Waters
v.
Millar

Court of Common Pleas of Philadelphia County

December Term, 1788

On a motion in arrest of judgment after a verdict for the Plaintiff in this cause, it appeared, that the Defendant had given his note of hand to one Jefferow, which was expressed in these words: 'I promise to pay, or cause to be paid, unto George Jefferow, or order, the full sum of L.20. against or before the 27th day of

November, 1785.' This note was afterwards sold and delivered, for a valuable consideration, by Jefferow to the Plaintiff, but without any indorsement or written assignment; and the Defendant having refused to pay it, this action was instituted, in which the declaration, after stating the note &c.; proceeded as follows: 'And whereas the said George afterwards, to wit, on the 4th day of November, in the said year, in the city and county aforesaid, the said L. 20. being wholl, unpaid, for a valuable consideration to him by the said Nicholas (Waters) then and there paid, bargained and sold the said promissory note to the said Nicholas, and possession thereof to him then and there delivered; and in consideration whereof the said Jacob (Millar) afterwards, to wit, the same day and year last aforesaid, at the city and county aforesaid, at the special instance and request of the said Nicholas, assumed upon himself, and then and there promised the said Nicholas that he would pay him the said L.20. according to the tenor and effect of the said note. Nevertheless the said Jacob the said sum of money, according to the tenor and effect of the said note, hath not paid unto the said Nicholas, &c.;' [369-Continued.]

The question was, whether the Plaintiff could maintain the present suit in his own name, upon the mere sale and delivery of the note, without any indorsement or assignment from Jefferow to him?

Sergeant, for the Defendant, having premised, that, if there was a consideration, it was immaterial to lay a promise to pay the note, and, on the other hand, that, if there was no consideration, the promise was nugatory and void, contended, that a promissory note, being a chose in action, was not assignable by writing at common law, much less by delivery alone; Cun. L. B. E. 105. 3 Bac. Abr. 605. Salk. 129. Ld. Raym. 757. 774. and that this could not be likened to a note payable to Bearer, where possession gives the action; Cun. L. B. E. 129. but it is the case of a note payable to one, or his order, which order must be in writing to bring it within the statute. As, therefore, no indorsement, or assignment, is laid, the action cannot be maintained, in its present form. It is true, that the assignee of a bond may sue in the name of the obligee; and the Plaintiff might sue in the name of Jefferow; but, in that case, the Defendant could prove a set off, and shew the ballance to be in his favor. Of this advantage he would now, perhaps, be deprived;

nor would this action be final if a bona fide indorsee of Jefferow should hereafter appear.

Rawle, in opposing the motion, observed, that the verdict had cured all exceptions to the expressions of the declaration; and that

the Plaintiff had an equitable right to recover, having bought the note for a valuable consideration; which, of itself, was sufficient to induce the Court to consider him as agent, or attorney, to do what Jefferow might have done; and an attorney, &c.; who has a naked authority to receive, may sue in his own name on a promise to pay to him. Lev. 188. 1 Vent. 318. 332. 2 Black. Rep. Term. Rep. He then insisted, that the sale and delivery were a good assignment without writing; which is not necessary to a contract, otherwise than as evidence of it; 3 Burr. 1670. and, he contended, that there was a sufficient consideration for the assumpfit laid in the declaration; that being, he said, he material ground of the action, and not, as the adverse counsel suggested, the mere possession of the note; that the Plaintiff's receipt for the money would be a sufficient discharge from any claim on the part of Jefferow; and that, even if the promise were not strictly laid in the declaration, the practice of overlooking similar inaccuracies, in order to promote the justice of the case, would supply that defect. 3 Bl. Com. 394. Salk. 29. 1 Wils. 255. 3 Wils. 40. Salk. 364. 1 id. 218. 1 Vent. 40. There is, however, at least, so much consideration for the assumpsit as the possession of the note; and the question of damnification could not come before the Court on the present motion, which is in arrest of judgment, and not for a new trial. See Cro. E. 67. Hob. 4. 1 Sid. 31. Styl. 296. 1 Com. Dig. 138.

Shippen, President. This is a motion in arrest of judgment, on the ground that no consideration is laid in the declaration to sound the assumpsit upon: And as it tends to destroy the Plaintiff's action after a verdict given in his favor upon the merits, the Court would afford every aid in its power, consistently with law, to carry the verdict into effect; but they must not depart from the established principles of law, which are wisely calculated for general cases, although in particular ones they

may sometimes appear to be hard. The declaration states, that 'the Defendant Jacob Miller gave his promissory note to one George Jefferow for L.20. payable to him or his order; that by virtue of the statute the said Jacob became thereupon liable to pay to the said George, or his order, the said sum of L.20. That the said George afterwards for a valuable consideration bargained and sold the said note to the Plaintiff, and delivered him possession of it; and that in consideration thereof the Defendant assumed and promised to pay the L.20. to the Plaintiff, according to the tenor and effect of the said note.' The question is, whether the sale and delivery of the note to the Plaintiff is of itself, without any indorsement or assignment, a legal ground of the assumpsit; for no other consideration is laid. The note is a negotiable note, payable to Jefferow, or his order; the remedy, therefore, as upon the instrument itself, is confined to Jefferow, or his order; and it would, indeed, be confined to Jefferow himself, as a chose in action, if the act of Parliament, or act of Assembly, did not enable an assignee to sue in his own name.

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There must then be some collateral matter, some injury to the Plaintiff, or benefit to the Defendant, in the consideration itself, laid as a ground for the assumption. If the Defendant had promised to the Plaintiff, having possession of the note, and a power to sue for the money (though not in his own name) that if he would forbear to sue him, he would pay it; or, if the promise had been in consideration of his delivering the note up to be cancelled; these promises, though made to a person not having an assignment of the note, would perhaps have been sufficient to ground an assumpsit upon. But this is a bare promise to pay to the Plaintiff, a stranger, in consideration of a sale and delivery of the note by the payee to him, a consideration moving neither to, nor from, the Defendant, and which could not redound either to his benefit or injury. Besides, the promise laid, is to pay to the Plaintiff, according to the tenor and effect of the note, and the tenor and effect of the note was to pay to Jefferow, or his order, and not to any person to whom he should sell and deliver it. If the note had been payable to Jefferow, or Bearer, a bona fide purchaser of it might have maintained the action; because such notes

pass by delivery: But a note payable to order, must be assigned, to enable the holder to bring the action in his own name.

Bonds in England are every day assigned, attended with irrevocable powers to sue for the assignees use: Such an assignment one would think would be full evidence of a sale and delivery, yet no actions are ever brought on that ground, but always in the name of the obligees.

We would intend everthing we could to support the verict; but we cannot intend a consideration quite different from that which is laid, which we must do in the present case, if we were to give our opinion in favor of the Plaintiff.

The judgement, therefore, must be arrested.