Buddicum Vs. Kirk

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SooperKanoon Citation : sooperkanoon.com/78375

Court : US Supreme Court

Decided On : 1806

Appeal No. : 7 U.S. 293

Appellant : Buddicum

Respondent : Kirk

Judgement :

Buddicum v. Kirk - 7 U.S. 293 (1806)
U.S. Supreme Court Buddicum v. Kirk, 7 U.S. 3 Cranch 293 293 (1806)

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7 U.S. (3 Cranch) 293

ERROR TO THE CIRCUIT COURT

OF THE DISTRICT OF COLUMBIA

SYLLABUS

Notice of the time and place of taking a deposition, given to the *attorney at law* of the opposite party, is not such notice as is required by the act of assembly of Virginia. But the attorney at law may agree to receive, or to waive notice, and shall

not afterwards be permitted to allege the want of it.

If notice be given that a deposition will be taken on 8 August and that if not taken in one day, the commissioners will adjourn from day to day until it shall be finished, and the commissioners meet on the 8th and adjourn from day to day till the 12th, and from the 12th to the 19th, when the deposition is taken, such deposition is not taken agreeably to notice.

Error to the Circuit Court of the District of Columbia in an action of debt against the defendant as heir at law of the obligor of a bond dated 20 September, 1774, conditioned to pay 994 3s. 5d. Virginia currency in equal installments at six and twelve months from the date of the bond.

The defendant being an infant, pleaded by Archibald McLain, his guardian,

1. Payment, to which there was a general replication and issue.

2.

"That after the execution of the bond, *viz.* on the ___ day of _____ 1784, at . . . , it was accorded and agreed between the plaintiff and the said James Kirk (the obligor) in his lifetime that the said James Kirk should assign, and make over to the plaintiff all the balances of money due to the said James Kirk and one Josiah Moffett arising from a store kept by them in partnership in the Town of Leesburgh in discharge and satisfaction of the said bond, and that the said James Kirk did afterwards, on the day and year last mentioned, at the town aforesaid, pursuant to the said accord and agreement, assign and make over to the plaintiff all the aforesaid balances, and the plaintiff did then and there receive the said assignment and transfer of the said balances in satisfaction for the said bond, and this he is ready to verify. . . ."

This plea was adjudged bad on general demurrer.

3.

"That after the execution of the said writing obligatory, the plaintiff, by his certain deed of release, with his seal sealed, which said deed is lost and destroyed by time and accident, did release and discharge the said James, in his lifetime, and his heirs of and from the payment of the said writing obligatory, that is to say, on the ___ day of _____ in the year 1784, at the county aforesaid, and this is ready to verify."

To which plea, there was a general replication and issue.

Upon the trial, the jury found both the issues of fact for the defendant, and the plaintiff took two bills of exceptions.

1. The first stated that the defendant offered in evidence the deposition of Patrick Cavan tending to prove that wheat, to the amount of 166 8s. 10d. had been delivered by the obligor to the plaintiff on account of the bond, and sundry debts due to Kirk and Moffett, had been assigned to the plaintiff in full discharge of the bond, and that the plaintiff had indulged some of the debtors until the debts were barred by the statute of limitations. That notice was given to the plaintiff's attorney that the deposition would be taken on 8 August, 1801, and if not taken in one day, that the commissioners would adjourn from day to day until it should be finished, and that he agreed that it might be taken on that day, whether he attended or not, but did not assent or object to its being taken on any other day. That the commissioners, to whom the dedimus was directed, met on 8 August, 1801, and adjourned to Monday the 10th, and from the 10th to the 11th, from the 11th to the 12th, and from the 12th to the 19th, when the deposition was taken. That the plaintiff's attorney did not attend on the 8th, or any of the other days, and had no notice of the several adjournments.

That the defendant also offered to prove by Archibald McLain, that the plaintiff's attorney, after the deposition was taken, read it, but did not then object

to its being read in evidence, and that the said Patrick Cavan died before the trial. To the reading of this deposition, the plaintiff objected, but the court suffered it to be read.

2. The 2d bill of exceptions stated that the plaintiff prayed the court to instruct the jury that the defendant was not entitled, on the plea of payment, to discount the bonds and notes assigned to the plaintiff, as mentioned in the deposition of Cavan, unless it should appear to the jury that the same had been collected by the plaintiff; which instruction the court refused to give, but directed the jury, that the deposition was competent evidence to be offered in proof of a discount on the plea of payment.

Page 7 U. S. 297

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court to the following effect:

This case comes up on two bills of exceptions.

1. As to the notice of taking the deposition, and

2. As to its applicability.

1. As to the notice. There are two modes of taking depositions under the act of Congress. By the first, notice in certain cases is not necessary, but the forms prescribed must be strictly pursued. This deposition is not taken under that part of the act. By a subsequent part of the section, depositions may be taken by *dedimus potestatem,* according to common usage. The laws of Virginia, therefore, are to be referred to on the subject of notice. Those laws do not authorize notice to an attorney at law. The word "attorney" in the act of assembly means attorney in fact. An attorney at law is not compellable to receive notice, but he may consent to receive, or he may waive it, and shall not afterwards be permitted to object the want of it. But this deposition was not taken agreeably to the notice received. The commissioners did not adjourn from day to day, but passed over the intermediate time between 12 and 19 August.

This circumstance, however, is not by the Court deemed fatal under the particular circumstances of this case, though without those circumstances it might perhaps be so considered. The agreement that the deposition might be taken whether the attorney were present or absent; his subsequent examination of the deposition without objecting to the want of notice and the death of the witness were sufficient grounds for the defendant to believe that the objection would be waived.

2. The objection to the competency of McLain is totally unfounded, as it does not appear upon the record

Page 7 U. S. 298

that he was the guardian, and especially as the defendant became of full age, before the trial.

3. The objection to the applicability of the deposition is also void of foundation. For although it was not conclusive evidence, it was still admissible.

The Court is therefore of opinion that there is no error in the judgment below.

Judgment affirmed.