

Barton Vs. Petit and Bayard

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Court : US Supreme Court

Decided On : 1812

Appeal No. : 11 U.S. 194

Appellant : Barton

Respondent : Petit and Bayard

Judgement :

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Barton v. Petit & Bayard

11 U.S. (7 Cranch) 194

ERROR TO THE CIRCUIT COURT

FOR THE DISTRICT OF VIRGINIA

SYLLABUS

A plaintiff who has declared jointly against two defendants as being in custody when in fact only one of the defendants was taken on the *capias* cannot abate his own action against the party not taken unless authorized so as to do by the return

of the process against that party.

If the marshal of Virginia return that the defendant is no inhabitant of the District of Virginia, the suit shall abate as to such defendant.

The general rule certainly is that if two or more persons are sued in a joint action, the plaintiff cannot proceed to obtain a judgment against one alone, but must wait until the others have been served with process or until the other defendant have been proceeded against as far as the law authorizes for the purpose of forcing an appearance.

The transcript of the record which was sent up, began by stating that

"Heretofore to-wit, at rules held in the clerk's office of the said court in the month of December in the year 1807, Andrew Petit and Andrew Bayard, by Philip N. Nicholas, Esq., their attorney appeared and filed their certain bill against Seth Barton and Thomas Fisher, which bill is in the following words, to-wit:"

" United States, Fifth Circuit, District of Virginia, to-wit, Andrew Petit and Andrew Bayard, citizens and inhabitants of the State of Pennsylvania, merchants and partners, trading under the firm of Petit & Bayard, plaintiffs, complain of Seth Barton and Thomas Fisher, citizens and inhabitants of the State of Virginia, late merchants and partners trading under the firm of Barton & Fisher, defendants in custody, of a plea that the said defendants render unto the said plaintiffs the sum of four thousand dollars, also one thousand and four pounds of tobacco at twelve shillings and six pence the hundredweight, being of the value of twenty dollars and ninety-two cents, which to the said plaintiffs the said defendants owe, &c.; stating a judgment of the General Court of Maryland."

The record then states that the defendant, Seth Barton, having been arrested upon the *capias ad respondendum*, and being called, but not appearing, it was ordered

that he appear at the next rules and give special bail, &c.;, which he did and pleaded payment, upon which the issue was joined, and verdict for the plaintiffs. Whereupon the defendant, Barton, moved in arrest of judgment because,

1. The declaration states a joint cause of action against this defendant and a certain Thomas Fisher, and therefore a judgment ought not to be rendered against this defendant alone.
2. Because the plaintiff has not in and by his declaration made a profert of the judgment stated in the declaration, under the seal of the General Court of Maryland, where the said judgment is stated to have been rendered.
3. Because the said Thomas Fisher ought, upon a joint judgment against him and this defendant (the said Thomas being stated to be in life and a citizen and inhabitant of the district of Virginia) to be a party to the judgment, if one is rendered against the said defendant, and
4. Because the verdict is insufficient, uncertain, and wants form.

This motion was overruled, and judgment entered upon the verdict against the defendant, Barton, alone,

"for \$4,000, also one thousand and four pounds of tobacco at twelve shillings and six pence the hundredweight, of the value of twenty dollars and ninety-two cents, and their costs, &c.;"

Whereupon the defendant brought his writ of error.

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WASHINGTON, J. delivered the opinion of the Court as follows:

This was an action of debt brought in the Circuit Court for the District of Virginia by Petit & Bayard against Seth Barton and Thomas Fisher, upon a judgment rendered in the General Court of Maryland. The declaration is against the said Barton & Fisher, late merchants and partners, trading under the firm of Barton &

Fisher, citizens and inhabitants of the State of Virginia, both of whom are alleged to be in the custody of the marshal. The record states that Barton, who had been arrested upon the *capias*, gave bail and put in the plea of payment, on which an issue was joined, and a verdict was rendered against him. He afterwards moved in arrest of judgment, and amongst other reasons assigned the following, *viz.*, that the declaration states a joint cause of action against the said Barton and one Thomas Fisher, and that therefore a judgment ought not to be rendered against him alone. The

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motion in arrest of judgment having been argued and overruled, judgment was rendered against Barton, and the record has been removed into this Court by writ of error.

The general rule certainly is that if two or more persons are sued in a joint action, the plaintiff cannot proceed to obtain a judgment against one alone, but must wait until the others have been served with process or until the other defendants have been proceeded against as far as the law authorizes for the purpose of forcing an appearance. In England the plaintiff must proceed to outlaw the defendants who have not been served before he can proceed against those who appear. In Virginia, where this suit was brought, the plaintiff might have taken out an alias and a pluries *capias* or *testatum capias*, or, at his election, an attachment against the estate of such defendant, or, upon the return of a pluries not found, the court may order a proclamation to issue warning the defendant to appear on a certain day, and if he fail to do so, judgment by default may be entered against him.

But whatever may be the mode provided by law for forcing an appearance, the plaintiff cannot proceed to obtain a judgment against one defendant in a joint action against two until he has proceeded against the other as far as the law will authorize, unless the law dispenses with the necessity of proceeding against the other defendant beyond a certain point to force an appearance. Thus, in Pennsylvania (as is known to one of the judges of this Court) if the sheriff return

non est as to one defendant, the plaintiff may proceed against the other on whom the writ was served, stating in his declaration the return of the writ as to his companion.

To remove the objection which arises in this case, the plaintiff obtained a certiorari to the Circuit Court of Virginia on a suggestion of diminution, and it now appears by the certificate of the clerk of that court that an alias *capias* issued against Thomas Fisher, which was not returned, but the plaintiff's attorney caused the suit to be abated as to the said Fisher, upon information which he had received that the said Fisher was no inhabitant of the District of Virginia. Had the

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marshal returned the writ and stated this fact, the law would have abated it as to Fisher, in which case the objection to the subsequent proceedings against Barton would have been removed. But since the plaintiff could not have supported his action originally against one defendant on a joint cause of action where it appeared by his own showing or by a plea in abatement that there was another person who was jointly bound and might be sued, he ought not to be permitted, after stating a joint cause of action, to abate or discontinue his action against one unless authorized to do so by the return of the process against that defendant. If he does so, it furnishes a good ground for arresting the judgment.

It is contended in support of this judgment that, as, by the law of Virginia, the plaintiff must file his declaration at the next succeeding rule day after the defendant shall have entered his appearance, or that the defendant may rule him to do so, which if he fails to do, he shall be nonsuit, the plaintiff not only may but is bound to proceed against one defendant alone after he has appeared. But the Court understands this law as applying to a single defendant or, if there be more, to the appearance of all the defendants.

Judgment reversed.

