Miller Vs. Stewart

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Appellant : Miller

Respondent : Stewart

Judgement :

Miller v. Stewart - 22 U.S. 680 (1824)
U.S. Supreme Court Miller v. Stewart, 22 U.S. 9 Wheat. 680 680 (1824)

Miller v. Stewart

22 U.S. (9 Wheat.) 680

ON CERTIFICATE OF DIVISION OF OPINION OF THE JUDGES

OF THE CIRCUIT COURT FOR THE DISTRICT OF NEW JERSEY

SYLLABUS

The contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms.

Where a bond was given, conditioned for the faithful performance of the duties of the office of deputy collector of direct taxes for eight certain townships, and the instrument of the appointment, referred to in the bond, was afterwards altered so as to extend to another township without the consent of the sureties, *held* that the surety was discharged from his responsibility for moneys subsequently collected by his principal.

This was an action of debt upon bond, and the material facts disclosed in the pleadings were that the plaintiff, Ephraim Miner, being collector of the direct taxes and internal duties for the Fifth Collection District of New Jersey by an instrument of appointment, under seal and pursuant to law, appointed Stephen C. Ustick his deputy collector for eight townships within his

Page 22 U. S. 681

district. Upon that occasion, the defendant, Thomas Stewart, and certain other persons as sureties executed a writing obligatory, with Ustick, to Miller, in the penalty of $14,000 upon the following condition, *viz.,*

"The condition of the foregoing obligation is such, whereas Ephraim Miller, Esquire, collector, as aforesaid, hath, by authority vested in him by the laws of the United States, appointed the said Stephen B. Ustick, deputy collector of direct taxes and internal duties in the Fifth Collection District of New Jersey, for the Townships of Nottingham, Chesterfield, Mansfield, Springfield, New Hanover, Washington, Little Egg Harbor, and Burlington, in the County of Burlington, now therefore if the said Stephen C. Ustick has truly and faithfully discharged and shall continue truly and faithfully to discharge the duties of the said appointment according to law and shall particularly faithfully collect and pay according to law all money assessed upon said townships, then the above obligation to be void, and otherwise shall abide and remain in full force and virtue."

After the execution of this bond, and before Ustick had in any manner acted under this appointment or collected or received any moneys under the same, Miller, with the assent of Ustick but without the assent or knowledge of the defendant Stewart,

altered the same instrument of appointment by interlining in it another township, called, "Willingborough," thereby making it an appointment for nine instead of eight townships, and under the appointment, so altered, Ustick received, within the original

Page 22 U. S. 682

eight townships, certain moneys as taxes which he omitted to account for, and this omission was the breach stated in the declaration. The question for the opinion of the court upon the special pleadings and demurrer was whether the alteration so made, without the consent of Stewart, discharged him from any responsibility for the moneys so subsequently collected by Ustick.

Page 22 U. S. 702

MR. JUSTICE STORY delivered the opinion of the Court, and after stating the case proceeded as follows:

Nothing can be clearer both upon principle and

Page 22 U. S. 703

authority than the doctrine that the liability of a surety is not to be extended, by implication beyond the terms of his contract. To the extent and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it and a variation is made, it is fatal. And courts of equity as well as of law have been in the constant habit of scanning the contracts of sureties with considerable strictness. The class of cases which have been cited at the bar where persons have been bound for the good conduct of clerks of merchants and other persons illustrate this position. The whole series of them, from *Lord Arlington v. Merrick,* 2 Saund. 412, down to that of *Pearsall v. Summersett,* 4 Taunt. 593, proceed upon the ground, that the undertaking of the surety is to receive a strict interpretation, and is not to be

extended beyond the fair scope of its terms. Therefore, where an indemnity bond is given to partners, by name, it has constantly been held that the undertaking stopped upon the admission of a new partner. And the only case, that of *Barclay v. Lucas,* 1 T.R. 291, note a, in which a more extensive construction is supposed to have been given, confirms the general rule, for that turned upon the circumstance that the security was given to the house as a banking house, and thence an intention was inferred that the

Page 22 U. S. 704

parties intended to cover all losses notwithstanding a change of partners in the house.

Now what is the purport of the terms of the present condition? The recital stated a special appointment which had then been made by Miller of his deputy for eight townships, particularly named. It was not a case of several distinct appointments for each township, but a single and entire appointment for all the townships, and the condition is that Ustick has and "shall continue, truly and faithfully to discharge the duties of said appointment, according to law." Of what appointment? Plainly the appointment stated in the recital to which the condition refers and to which it is tied up -- that is to say, the appointment already made and executed for the eight townships. If this be the true construction of the condition, and it seems impossible to doubt it, then the only inquiry that remains is whether any money unaccounted for was received under that appointment. To this the plea answers in the negative unless the subsequent alteration of the instrument created no legal change in the appointment. To the consideration of this point, therefore, the attention of the Court will be addressed.

And in the first place, upon principle, how does the case stand? Can it be affirmed that the alteration wrought no change in the appointment? This will scarcely be pretended. In point of fact, the first appointment was for eight townships only; the alteration made it an appointment for nine townships. It is not like the case where an appointment is made for eight townships and another

distinct appointment is made for the ninth, for then there are, in legal contemplation, two distinct and separate appointments. But here, the original appointment is extended; it was one and entire when it included eight townships; it is one and entire when it includes the nine. Can it then be legally affirmed to remain the same appointment when it no longer has the same boundaries? An appointment for A. is not the same as an appointment for A. and B. In short, the very circumstance, that there is an alteration in the appointment, *ex vi termini,* imports that its identity is gone. If an original appointment is altered by the consent of the parties to the instrument, that very consent implies that something is added to or taken from it. The parties agree that it shall no longer remain as it was at first, but that the same instrument shall be not what it was, but what the alteration makes it. It shall not constitute two separate and distinct instruments, but one consolidated instrument. A familiar case will explain this. A. gives a note to B. for $500; the parties afterwards agree to alter it to $600. In such case, the instrument remains single; it is not a note for $500 and also for $600, involving separate and distinct liabilities, but an entire contract for $600, and the obligation to pay the $500 is merged and extinguished in the obligation to pay the $600. To bring the case nearer to the present, suppose there was a bond given as collateral security to pay the note of $500; it will scarcely be pretended that the alteration would not extinguish

the liability under the bond. The instrument would indeed remain, but it would no longer possess its former obligation and identity. Nothing can be better settled than the doctrine that if an obligation be dependent on another obligation (and, by parity of reasoning, upon the legal existence of another instrument) and the latter be discharged or become void, the former is also discharged. Sheppard, in his Touchstone, p. 394, puts the case and illustrates it by adding

"as if the condition of an obligation be to perform the covenants of an indenture, and afterwards the covenants be discharged or become void; by this means, the

obligation is discharged and gone forever."

It is not denied at the bar that the same would be the legal operation in the present case if there had been an actual revocation of the first appointment or an extinguishment of the instrument of appointment. But the stress of the argument is that here there was an enlargement, and not an extinguishment, of the appointment; that, the consent of the immediate parties being given to the alteration, it remained in full force, with all its original validity, as to the eight townships. We cannot accede to this view of the case. After the alteration was made, it is, as between the parties, to be considered by relation back either as an original appointment for the nine townships or as a new appointment for the nine townships from the time of the alteration. It is immaterial to the present decision whether it be the one or the other, for in either case it is not that appointment which the defendant Stewart referred to in

Page 22 U. S. 707

the condition of the bond, and in respect to which he contracted the obligation. It is no answer to say that it is not intended to make him liable for any money except what was collected in the eight townships. He has a right to stand upon the terms of his bond, which confine his liability to money received under an appointment for eight townships, and the pleadings admit that none was received until the appointment was altered to nine. It will scarcely be denied that if, upon the agreement to include the ninth township, the original instrument had been destroyed and a new instrument had been executed, the obligatory force of the bond would, as to the surety, have been gone. And in reason or in law there is no difference between that and the case at bar. The alteration made the instrument as much a new appointment, as if it had been written and sealed anew. It is not very material to decide whether the alteration operated by way of surrender, or as a revocation, or as a new appointment superseding the other. It was, to all intents and purposes, an extinguishment of the separate existence of the appointment for the eight townships.

This point is susceptible of still further illustration from considerations of a more technical nature. The Act of Congress of 22 July, 1813, ch. 16. sec. 20, under which this appointment was made, provides "that each Collector shall be authorized to appoint, by an instrument of writing under his hand and seal, as many deputies as he may think proper," &c.; The appointment must therefore be by deed, and the

Page 22 U. S. 708

effect of an alteration or interlineation of a deed is to be decided by the principles of the common law. Now by the common law, the alteration or interlineation of a deed, in a material part, at least, by the holder, without the consent of the other party *ipso facto* avoids the deed. It is the consent, therefore, that upholds the deed after such alteration or interlineation. The reason is that the deed is no longer the same. The alteration makes it a different deed; it speaks a different language; it infers a different obligation. It must, then, take effect as a new deed, and that can only be by the consent of the party bound by it. Whether by such consent, the deed takes effect by relation back to the time of original execution, or only from the time of the alteration, need not be matter of inquiry, because such relation is never permitted to affect the rights or interests of third persons, and cannot change the posture of the present case. If the deed, after the alteration, is permitted to have relation back, it is not the same deed of appointment recited in the condition and to which the obligation is limited, for that is an appointment for eight townships. If it has no such relation, then it is a deed of appointment made subsequent to the bond, and of course not included in its obligation. It cannot be at one and the same time a deed for eight and also a deed for nine townships, and the very circumstance that it is the one excludes the possibility of assuming it as the other. In truth, the assent of the parties to the alteration carries with it the necessary implication that it shall no longer be deemed an appointment

Page 22 U. S. 709

for eight townships only, and the same consent of parties which created is equally potent in dissolving the deed and changing its original obligation. It is no objection

that to constitute a new deed, a redelivery is necessary, for if it be so, the consent to the alteration is in law equivalent to a redelivery. Nor is it necessary that a surrender or revocation should be by an instrument to that effect. It may be by matter *in pais* or by operation of law. Every erasure and interlineation in the deed by the obligee or appointee without consent is a surrender, and a revocation may be implied by law. The passage cited at the bar from Co.Lit. 232(a) establishes that if the feoffee, by deed of land, grants his deed by parol to the feoffor, it is a surrender of the property as well as of the deed. And if in this case the deed of appointment had been delivered up to the collector, it would at once have operated as a surrender by the deputy, and a revocation by the collector.

An objection has been urged at the bar against this doctrine that the act of Congress giving the authority to the collector to appoint deputies also authorizes him "to revoke the powers of any deputy, giving public notice thereof in that portion of the district assigned to such deputy." Hence it is argued that no revocation can be unless by public notice. But this is certainly not the true interpretation of the act. The very terms suppose that the revocation is already made as between the parties, and the notice is to be given of the fact. The object of the legislature was

Page 22 U. S. 710

to protect the public from the mischief of payments to the deputy after his powers are revoked. It requires public notice to be given of the revocation so that no future imposition shall be practiced, and if the collector should make a private revocation without any public notice, the legal conclusion would be that all payments made to his deputy in ignorance of the revocation ought to be held valid, for no man is entitled to make his own wrongful omission of duty a foundation of right. But as between the parties, a revocation or surrender, if actually made, would be, to all intents and purposes, binding between them and release the sureties to the bond from all future responsibility.

Upon the whole, the opinion of the Court is that the fourth plea in bar is good and that the demurrer thereto ought to be overruled, and this opinion is to be certified to the circuit court.

MR. JUSTICE JOHNSON.

My brother TODD and myself are of opinion that the merits of this cause have been misconceived, the points on which it turns misapprehended, and the law of razures, if correctly laid down according to the law of the present day, erroneously applied to this cause.

The condition of Stewart's bond to the plaintiff recites no particular deed of appointment under which Ustick was constituted deputy collector, nor is there an iota in the bond or in the declaration that can identify the deed set forth in the plea with the deed under which Ustick held his deputation. The condition of the bond simply

Page 22 U. S. 711

states, "Whereas E. M., collector, as aforesaid, hath, by virtue of authority vested in him by the laws of the United States, appointed U. deputy collector," &c.; It is the plea that specifies a deed of a particular date and then proceeds to set forth a razure in avoidance of that deed, but it contains no averment that the deed so set forth is the same under which U. held the deputation under the plaintiff referred to in the condition. That the plea is faulty and, even with the averment, might have been the subject of a special demurrer cannot now be doubted, for it amounts to the general issue, and the general issue was the legitimate plea in this case. *Pigot's Case* and *passim.* But we also hold it bad in its present form upon a general demurrer, for unless the deed so pleaded was duly identified by the pleadings with that under which Ustick was constituted deputy, the plaintiff was not bound to answer it. We cannot conceive how the defendant can have judgment in the present state of the pleadings unless under the idea that the demurrer cures the failure to identify the deeds. This, however, cannot be sustained, since the want of identification is, in itself, a sufficient ground of demurrer.

Indeed we see no sufficient ground for admitting that the condition of the bond implies a deputation by deed at all. It is true that the 20th section of the act under which this collector was appointed authorizes him to appoint deputies under his

hand and seal, and as far as was necessary to enable the deputy to act against individuals, unquestionably the solemnities of a deed

Page 22 U. S. 712

were requisite to constitute him a deputy collector. But the demand in this action is for money received by him and not paid over, and surely a deputation of a less formal kind would have enabled him to bind his principal as to the actual receipt of money, so that the words of the condition do not necessarily imply a deputation by deed. He is expressly authorized in this 20th section to act for himself in collecting the revenue, and he could therefore act by his servant or deputy, constituted in a less solemn way than by deed, so far as to involve himself with the government.

But if a deed is to be implied from the condition, surely not this particular deed, and though a deed of a date antecedent to the bond is to be implied, it may have preceded it by a month, and yet the act and the condition of the bond both be complied with. But what form shall be presumed or implied to the deed? Why may it not have been several as to each county, or have comprised two or more?, and why may not a dozen deeds of the very date and form of this, have been in existence at the same time? A defendant who, like the present, places his defense upon the very highest stretch of legal "rigor" cannot complain if he has the same measure meted out to himself.

But if this ground is to be got over and we are to consider the bearing of the facts pleaded upon the law of the case, we then say that they imply no revocation of the deputation to Ustick against which this defendant entered into the contract of

Page 22 U. S. 713

indemnity. It is the intent that gives effect to the acts of parties; nothing was further from the minds of the parties here than the distinction of the power of Ustick as to the eight counties at the time of this interlineation. The plea avers no such intent, and as well might a delivery of a deed for perusal be tortured into a surrender and extinction of it, and its return into a revocation, as the acts of these parties respecting this interlineation be construed into a revocation and redelivery. *Non*

constat, from anything that appears in the plea, that the paper ever passed from the hands of the party legally holding it. It was unnecessary upon the facts stated that it should so pass; in fact, no redelivery is averred in the plea, nor any one of the formalities necessary to reexecution. It cannot be denied that this part of the defense savors too much of a perversion of the solemnities and rules of the law. It is a catch upon the unwary, an effort to attach to men's acts consequences which are directly negatived by their intentions.

As to the idea of the identity of this instrument being destroyed by the interlineation, we consider it as springing out of an incorrect view of the nature of the instrument and of the circumstances that fix its identity. It is not one entire thing, but a several deed for each county. A deputation as to the county of A. is not a deputation as to the county of B., although written on the same paper and comprised within the same words; it is as much a several deed as to each county as if written

Page 22 U. S. 714

on several sheets of paper; as much as a policy of insurance is the several contract of each underwriter, or as a bond would be the several deed of as many individuals as executed it, if it be so expressed, making them, if such be the letter of it, severally liable, and for various sums, no one for another. Interlining another county, then, left it still the original deed as to each county taken severally, and only operated as the creation of a new power as to another county if in fact, as there is no averment of a subsequent delivery, it was anything more than a mere nugatory act. Such is certainly the good sense of the law upon the subject, and it is supported, we conceive, by respectable opinions and by adjudged cases. Chief Baron Gilbert, in treating on this topic, observes,

"but if any immaterial part of the contract be added after sealing and delivery, as if A., with a blank left after his name, be bound to B., and after C. is added as a joint obligor, this does not avoid the bond, because this does not alter the contract of A., for he was bound to pay the whole money without such addition."

And the case of *Zouch v. Clay,* which he quotes, as reported in Ventris, undoubtedly sustains his doctrine, for there the court overruled the plea of *non est factum* on the interlineation on the ground that the bond remained the same as to him.

In this case, the bond emphatically remained

Page 22 U. S. 715

the same as to this defendant, for he was still liable only as to the eight counties, and no more, and was so guarded as to make it impossible that the interlineation of a thousand other counties could alter or increase his liability, since the names of the counties are inserted in the condition specifically. As to his liability, and as to its influence upon the power conferred in the eight counties, this interlineation was altogether insignificant, no more than a dash of the pen, and could have done him no more injury.

There is nothing in the argument which would attach importance to it, on the ground of producing difficulty and confusion -- it has been said even impracticability -- in rendering the accounts of this deputy. It is begging the question and urging the very thing as a difficulty which the plaintiff proffers to execute. He claims a sum collected in the eight counties specified, and no more, and unless he can prove so much collected in the eight original counties, it is very clear that he cannot have a verdict. But is he to be prejudged? -- is he not to be permitted to make out the case which he offers to prove?

Nor is there any more weight in the argument that "although the defendant may have been willing to indemnify against eight counties, it does not follow, that he would undertake to indemnify against nine." No one pretends to charge him with nine counties. Surely there was nothing in the contract to preclude the plaintiff from extending his deputation to this individual over his whole

Page 22 U. S. 716

district had he thought proper. Could a separate deed, as to the ninth county, have been pleaded as a defense?

There is no charge of positive injury in this plea, it will be observed; nor do the facts admit a suspicion of fraudulent intention. The sole effect of the interlineation, was to confide in U. to collect in another county without giving security. The defense rests upon certain inferences from, or consequences imputed to, the naked act of interlining the word "Willingborough," without even averring the acts necessary to make the instrument a deed as to that county, or the intent to revoke or reexecute the deed as to the residue

To us it appears that it ought no more to affect the rights of the parties than interlining the name of a region beyond the Atlantic, or a mere dash of the pen.

On the subject of razures, we would remark it is to be regretted that this plea had not been specially demurred to, that the question might have been taken from the court and sent to the jury. There is no doubt that they might have found this deed several in its nature as to each county, and therefore unaffected by the addition of another. The tendency of the decisions has been to carry such questions to that tribunal, and notwithstanding some contrariety of *dicta,* it is now clearly settled that a razure must make a deed void or it is immaterial, and therefore *non est factum* is held to be the proper plea. Chief Justice Holt has declared any other form of taking advantage of a razure impertinent, 6 Mod. 215,

and the rule is not now to be doubted. But as to the principle upon which a razure avoids a deed, it is not too much to say that the law of the subject appears to have got into some confusion. Modern decisions, particularly of our own courts, lean against the excessive "rigor" with which some writers and some cases disfigure it. In the case of the *United States v. Cutts,* 1 Gall. 69, a bond that had been cancelled and mutilated, the seal torn away by the joint act of the defendant and the plaintiff's bailee, was still held, and rightly held, to be sustainable as the deed of the party. In the case of *Speak v. United States,* 9 Cranch 28, a bond was

sustained notwithstanding the striking out of one joint and several co-obligor, in the absence of the others, and the insertion of another. And so, as to revenue bonds, there is not a court of the United States which has not sustained them against the plea of *non est factum* notwithstanding that both sum and parties have been inserted after the execution by one of the obligors, and this in his absence, because the contract was not altered, and the good sense of the law prevailed against its technicalities.

There is a great paucity of decisions in modern times on the subject of razures and interlineations. If we mount to its origin, we find it in the Year Books and in Perkins, who cites them, given as the ground of suspicion and inquiry. And so unquestionably it ought to be, and frauds or mutilations, to which the parties having the custody of deeds are privy, cannot be taken too strongly

Page 22 U. S. 718

against them. But when we encounter the doctrine, as laid down in *Pigot's Case,*

"that when a deed is altered in a point material by a stranger, without the privity of the obligee, even by drawing a pen through the midst of a material word, that it shall be void,"

without reference to the fraud, privity, or gross negligence of the obligor, it certainly is time to pause, and I highly approve of the hesitation of my brother STORY in *Cutts' Case,* as to the authority of *Pigot's Case.* As an adjudication, the value of that case should be limited to the single point "that an immaterial interlineation, without the privity or command of the obligee, does not avoid the bond." The case does not call for the decision of another point, for it is upon a special verdict, and that the only question submitted. Yet the reporter, who seldom lets an opportunity escape him that furnishes an apology for exemplifying his indefatigable research, makes it authority for a score of positive decisions and the introduction to a mass of law upon questions totally distinct. But it should be noted of this learned judge that his reports, like the text of Littleton, are only to be considered as the occasion or excuse for displaying his acquirements in the law learning of his day and

expressing his opinions upon juridical topics.

It is certainly true that some of the decisions in the books have carried this doctrine a great way. As, for instance, the case of the lease of the Dean of Paul's, in which the counterpart expressed a rent of 27 pounds, and the tenant altered his deed from 26 to 27 pounds, to make it accord with the counterpart and the true contract. Yet it was held to avoid his lease. 1

Page 22 U. S. 719

Roll. 27. Cro.Eliz. 627. But the utmost that can be made of these cases is that they apply to those instances in which the deed is necessarily an entire thing, and the reason assigned is that the witness can no longer testify to the deed, as the deed which he saw delivered. Surely this reason is not applicable to the present case, for, let the witness be examined upon this instrument, as to the county of A., as introductory to the proof of the money collected in A., and so on as to the counties B., C., and D., and what is to prevent his proving the execution of this deed? That which may just as well have been executed in as many detached sheets of paper as there are counties certainly has nothing of necessary entirety or indivisibility in its nature. Any other rule, as applied to this case would, we conceive, be permitting frauds to be covered by a principle which was intended to prevent frauds.

Certificate for the defendant.