Bank of the United States Vs. Smith

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Appeal No. : 24 U.S. 171

Appellant : Bank of the United States

Respondent : Smith

Judgement :

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Bank of the United States v. Smith

24 U.S. (11 Wheat.) 171

ERROR TO THE CIRCUIT COURT

FOR THE DISTRICT OF COLUMBIA

SYLLABUS

On a demurrer to evidence, the judgment of the court stands in the place of the verdict of the jury, and the defendant may take advantage of any defects in the

declaration by motion in arrest of judgment or by writ of error.

It seems that as against the maker of a promissory note or against the acceptor of a bill of exchange payable at a particular place, no averment in the declaration or proof at the trial of a demand of payment at the place designated is necessary.

But as against the endorser of a bill or note, such an averment and proof is in general necessary.

Where the bill or note is made payable at a particular bank and the bank itself is the holder, such averment and proof may be dispensed with, and all that is necessary is for the bank to examine the account of the maker with them in order to ascertain whether he has any funds in their hands.

On a demurrer to evidence, the court is substituted in the place of the jury as judges of the facts, and everything which the jury might reasonably infer from the evidence is to be considered as admitted.

The practice of demurring to evidence is to be discouraged, and courts will be extremely liberal in their inferences where the party takes the question of fact from the appropriate tribunal.

Proof necessary to support an action against the endorser of a bill or note.

MR. JUSTICE THOMPSON delivered the judgment of the court.

This case comes before the court on a writ of error to the circuit court for the District of Columbia, and the questions presented for consideration grow out of a demurrer to the evidence, and out of exceptions taken to the declaration.

The action is by the plaintiffs, as endorsees,

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against the defendant as endorser of a promissory note drawn by William Young. The note is made payable at the office of discount and deposit of the Bank of the United States in the City of Washington. And the questions which have been

raised and argued relate in the first place to the sufficiency of the averment in the declaration of a demand of payment of the drawer of the note, and secondly to the sufficiency of the evidence to sustain the plaintiffs' right of recovery. It is alleged, however, on the part of the plaintiffs that this Court cannot look beyond the demurrer to the evidence and inquire into defects in the declaration. This position cannot be sustained. The doctrine of the King's Bench in England in the case of *Court v. Birkbeck,* Dougl. 208, that upon a demurrer to evidence, the party cannot take advantage of any objections of the pleadings does not apply. By a demurrer to the evidence, the court in which the cause is tried is substituted in the place of the jury. And the only question is whether the evidence is sufficient to maintain the issue. And the judgment of the court upon such evidence will stand in the place of the verdict of the jury. And after that the defendant may take advantage of defects in the declaration by motion in arrest of judgment or by writ of error. But, the present case being brought here on writ of error, the whole record is under the consideration of the court, and the defendant, having the judgment of the court below in his favor, may avail himself of all defects in the declaration

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that are not deemed to be cured by the verdict.

The objection to the declaration is that it does not contain an averment that a demand of payment of the maker of the note was made at the place where it was made payable.

It is a general rule in pleading that where any fact is necessary to be proved on the trial, in order to sustain the plaintiffs' right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. But the declaration need not contain any averment which it is not necessary to prove. For the purpose, therefore, of determining whether the declaration in this case is substantially defective for want of an express averment that demand of payment of the maker was made at the office of discount and deposit of the Bank of the United States in the City of Washington, it is proper to inquire whether proof of that fact was indispensably necessary to entitle the plaintiffs to recover.

Whether, where the suit is against the maker of a promissory note or the acceptor of a bill of exchange payable at a particular place, it is necessary to aver a demand of payment at such place, and, upon the trial, to prove such demand is a question upon which conflicting opinions have been entertained in the courts in Westminster Hall. But that question may perhaps be considered at rest in England by the decision in the late case of *Rowe v. Young,* 2 Brod. & Bingh. 165, in the House of Lords. It was

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there held that if a bill of exchange be accepted payable at a particular place, the declaration in an action on such bill against the acceptor must aver presentment at that place, and the averment must be proved. A contrary opinion has been entertained by courts in this country that a demand on the maker of a note, or the acceptor of a bill payable at a specific place, need not be averred in the declaration or proved on the trial. That it is not a condition precedent to the plaintiffs' right of recovery. As matter of practice, application will generally be made at the place appointed if it is believed that funds have been there placed to meet the note or bill. But if the maker or acceptor has sustained any loss by the omission of the holder to make such application for payment at the place appointed, it is matter of defense to be set up by plea and proof. 4 Johns. 183; 17 Johns. 248.

This question, however, does not necessarily arise in the case now before the Court, and we do not mean to be understood as expressing any decided opinion upon it, although we are strongly inclined to think that, as against the maker or acceptor of such a note or bill, no averment or proof of demand of payment at the place designated would be necessary.

But when recourse is had to the endorser of a promissory note, as in the present case, very different considerations arise. He is not the original and real debtor, but only surety. His undertaking is not general, like that of the maker, but conditional, that if, upon due diligence having

been used against the maker, payment is not received, then the endorser becomes liable to pay. This due diligence is a condition precedent and an indispensable part of the plaintiffs' title and right of recovery, against the endorser. And when, in the body of the note, a place of payment is designated, the endorser has a right to presume that the maker has provided funds at such place to pay the note, and has a right to require of the holder to apply for payment at such place. And whenever a note is made payable at a bank and the bank itself is not the holder, an averment, and proof of the demand at the place appointed in the note are indispensable. In the present case, the bank at which the note is made payable is the holder, and the question arises whether in such case an averment and proof of a formal demand are necessary. If no such proof could be required, the averment would be immaterial and the want of it could not be taken advantage of upon a writ of error.

In the case of *Saunderson v. Judge,* 2 H.Bl. 509, the plaintiffs, at whose house the note was made payable, being themselves the holders of the note, it was held to be a sufficient demand for them to turn to their books, and see the maker's account with them, and it was deemed a sufficient refusal to find that the maker had no effects in their hands. So in the case of *Berkshire Bank v. Jones,* 6 Mass. 524, decided in the Supreme Judicial Court of Massachusetts, Chief Justice Parsons,

in delivering the opinion of the court, said that

"The plaintiffs being the holders of the note, we must presume it was in their bank, and there it was made payable. They were not bound to look up the maker, or to demand payment of him at any other place. The defendant, by his endorsement, guaranteed that on the day of payment the maker would be at the bank and pay the note, and if he did not pay it there, he agreed he would be answerable for it without previous notice of the default of the maker."

The rule here laid down has received the sanction of that court in subsequent cases, 12 Mass. 404; 14 Mass. 556, and is founded in good sense and practical convenience, without in any manner prejudicing the rights of the maker or the endorser of the note. The endorser, knowing that the maker has bound himself to pay the note at a place appointed, has a right to expect that he will provide funds at that place to take up the note, and he will be more likely to be exonerated from his liability by having the demand made there than upon the maker personally. But, if the bank where the note is made payable is the holder and the maker neglects to appear there when the note falls due, a formal demand is impracticable by the default of the maker. All that can in fitness be done or ought to be required is that the books of the bank should be examined to ascertain whether the maker had any funds in their hands, and if not, there was a default which gave to the holder a right to look

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to the endorser for payment. And even this examination of the books was not required in the cases cited from the Massachusetts Reports. The maker was deemed in default by not appearing at the bank to take up his note when it fell due. We should incline, however, to think that the books of the bank ought to be examined, to ascertain whether the maker had any balance standing to his credit, for if he had, the bank would have a right to apply it to the payment of the note, and no default would be incurred by the maker which would give a right of action against the endorser.

The declaration in this case does contain an averment that the note was presented to the maker, that he refused to pay it, and that notice of the nonpayment was given to the endorser. Whether this averment is broad enough to admit all the proof necessary to sustain the action against the endorser, is the question which arises upon the declaration. If, by reason that the bank where the note was made payable was the holder, no personal presentment or demand of the maker, could be required, the averment, so far as it asserts such presentment, is surplusage, and no proof was necessary to support it. What, then, in such case is a presentment of the note? It would be an idle ceremony to require the bank to take

the note from its files, and lay it upon the counter, or make any other public exhibition of it. All that could be required is that the note be there, ready to be delivered up if payment should be offered. When the note

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is held by a third person, it is practicable, and there is a fitness in requiring the holder to inquire at the bank for the maker, and whether he has provided any funds there to pay the note. But when the bank itself is the holder, it would be impracticable for it to make such inquiry in any other manner than by ascertaining that the note was there, and examining the books to see if the maker had any funds in the bank. If the note was there, it was a presentment, and if the maker had no funds in the bank, it was a refusal of payment, according to the legal acceptation of these terms under such circumstances.

The evidence upon the trial was introduced under this averment without objection, and if that is sufficient to entitle the plaintiff to recover, the court ought not readily to yield to technical objections, where the defendant has had the full benefit of whatever defense he had to make. Under this state of the case, we think, the exception taken to the declaration cannot prevail. And the next inquiry is whether the evidence to which the defendant demurred was sufficient to sustain the action.

By this demurrer, the defendant has taken the questions of fact from the jury, where they properly belonged, and has substituted the court in the place of the jury, and everything which the jury could reasonably infer from the evidence demurred to is to be considered as admitted. The language of adjudged cases on this subject is very strong to show that the court will be extremely liberal in its inferences where the

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party, by demurring, will take the question from the proper tribunal. It is a course of practice, generally speaking, that is not calculated to promote the ends of justice. If the objection to the sufficiency of the evidence is made by way of motion for a nonsuit, it might be removed by testimony within the immediate command of the

plaintiff. The deficiency very often arises from mere inadvertence and omission to make inquiries, which the witnesses examined could probably answer.

In order to determine whether the evidence was sufficient to support the action, it is proper to state what proof was necessary.

The plaintiffs, to entitle them to recover, were bound to show that they were the endorsees and holders of the note; that the note was at the bank, where it was made payable at the time it fell due; that the maker had no funds there to pay the note; and that due notice of the default of the maker was given to the defendant.

The endorsement of the note to the plaintiffs, and that it was discounted in the office of discount and deposit of the Bank of the United States at Washington, where it was made payable, was fully proved. And the jury would have had a right to presume that the note was then at the bank, where it was discounted, and the bank being the holder and owner of the note, the presumption, at least *prima facie,* is that it remained in the bank, to be delivered up when paid. This establishes the two first points, and to show that the maker had no funds in the bank,

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the bookkeeper was examined as a witness, who swore that on 19 July, 1817, when the note fell due, there was no balance to the credit of the drawer or either of the endorsers on the books of the bank. And the remaining question is whether due notice of the default of the maker was given to the defendant. The only objection to the sufficiency of the evidence on this point is that the notice of nonpayment was left at the post office in the City of Washington, addressed to the defendant at Alexandria, without any evidence that that was his place of residence. The testimony on this point is that of Michael Nourse, a notary public, who swore, that on the day the note fell due, he presented it at the store of the defendant, and demanded payment of his clerk, who replied that Mr. Young was not within, and he would not pay it. And that on the same day he put in the post office notice of nonpayment addressed to the defendant at Alexandria. If the

defendant's place of residence was Alexandria, it is not denied but that due and regular notice was given him. The notary was a sworn officer, officially employed to demand payment of this note, and it is no more than reasonable to presume that he was instructed to take all necessary steps to charge the endorsers. This must have been the object in view in demanding payment of the maker. And it is fair also to presume that he made inquiry for the residence of the defendant before he addressed a letter to him, for it is absurd to suppose he would direct to him at that

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place, without some knowledge or information that he lived there, this being the usual and ordinary course of such transactions, and with which the notary was no doubt acquainted. The jury would undoubtedly have been warranted to infer from this evidence that the defendant's residence was in Alexandria. If that was not the fact, this case is a striking example of the abuse which may grow out of demurrers to evidence. For a single question to the witness would have put at rest that point one way or the other if the least intimation had been given of the objection. It was manifestly taken for granted by all parties that the defendant lived at Alexandria. And if a party will, upon the trial, remain silent and not suggest an inquiry, which was obviously a mere omission on the part of the plaintiff, a jury would be authorized to draw all inferences from the testimony given that would not be against reason and probability, and the court, upon a demurrer to the evidence, will draw the same conclusions that the jury might have drawn.

We are accordingly of opinion that the evidence was sufficient to entitle the plaintiffs to recover. That the judgment of the court below must be

Reversed and the cause sent back, with directions to enter judgment for the plaintiffs upon the demurrer to evidence for the amount of the note and interest.

JUDGMENT. This cause came on, &c.;, on consideration whereof it is ORDERED and ADJUDGED that the judgment of the said circuit

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court on the demurrer to evidence in the said cause be reversed. And it is further ORDERED and ADJUDGED that the said cause be remanded to the said circuit court with instructions that judgment be entered there on said demurrer for the plaintiffs in the cause, and further that the court there does render judgment on the contingent verdict found for the plaintiffs according to the tenor thereof, with costs, &c.;