

Barry Vs. Foyles

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Court : US Supreme Court

Decided On : 1828

Appeal No. : 26 U.S. 311

Appellant : Barry

Respondent : Foyles

Judgement :

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Barry v. Foyles

26 U.S. (1 Pet.) 311

ERROR TO THE CIRCUIT COURT

FOR THE COUNTY OF WASHINGTON

SYLLABUS

The defendant in error had sued out an attachment under the law of Maryland against Robert Barry, and had filed an account against James D. Barry, said to have been assumed by Robert Barry, the plaintiff in error. Robert Barry appeared,

gave special bail, and discharged the attachment. The plaintiff. below then filed a declaration of *indebitatus assumpsit* "for money had and received" and "for goods sold and delivered," to which Robert Barry pleaded the general issue. The parties went to trial and a verdict and judgment were rendered for the defendant in error.

The Court attaches no importance to the variance between the account filed when the attachment issued and the declaration filed after the attachment was dissolved by the entry of bail and the appearance of the defendant. The defendant having pleaded to the declaration, the cause stood as if the suit had been brought in the usual manner and no reference can be had to the proceedings on the attachment.

Where the general agent of parties carrying on business in a tan yard, instead of a journal of hides received for the parties from day to day, gave at considerable intervals certificates of the total amount of hides received from the last preceding settlement up to the periods when the certificates bore date, such certificates are equally binding as certificates detailing the separate transactions of each day, and may be read in evidence to charge the parties whose agent the person giving the certificates was.

The principle is that a contract made by co-partners is several as well as joint, and the assumpsit is made by all and by each. It is obligatory on all and on each of the partners. If, therefore, the defendant fails to avail himself of the variant in abatement when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it at the time of trial.

The declaration in an action against one partner only never gives notice of the claim's being on a partnership transaction. The proceeding is always as if the party sued was the sole contracting party, and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained.

Where the suit is brought upon a partnership transaction against one of the partners and the declaration stated a contract with the partner who issued and

gave no notice that it was made by him with another person, evidence of a joint assumpsit may be given to support such a declaration, and the want of notice has never been considered as justifying an exception to such evidence at the trial.

In the Circuit Court for the County of Washington, the defendant in error issued an attachment against Robert Barry, the plaintiff in error, and according to the established practice the plaintiff in the attachment filed, at the time it was issued, an account or statement of his claim by which he alleged that Robert Barry, the defendant below, was indebted to him in the

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sum of \$3,410.25, for debts due from the firm of James D. Barry & Co. assumed by him to pay to the plaintiff in the attachment. This account or statement was accompanied by an affidavit that "it was just and true, is it stands stated." The plaintiff in error appeared and gave special bail, and a declaration was then filed, in *indebitatus assumpsit*, &c.;, and the plea of the general issue entered.

On the trial of the cause, the plaintiff offered in evidence to sustain his case three paper writings signed by E. Rice which are stated *in extenso* in the opinion of the Court.

In order to prove the defendant chargeable with the amount delivered by the plaintiff below, Thomas Rice was produced and sworn as a witness, who testified as set forth in the opinion of the Court.

The counsel for the defendant below objected to the evidence, and the objection being overruled, the case was brought by writ of error to this Court.

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This is a writ of error to a judgment of the Circuit Court of the United States for the District of Columbia, sitting in the County of Washington. The defendant in error

had sued out an attachment against Robert Barry, and had filed an account against James D. Barry & Co., said to be assumed by Robert Barry. Robert Barry appeared, gave special bail, and discharged the attachment. Thomas Foyles then filed a declaration of *indebitatus assumpsit* for money had and received and for goods, &c., delivered, to which Robert Barry pleaded the general issue, and the parties went to trial.

At the trial, the plaintiff in the circuit court offered in evidence three paper writings signed by Edmond Rice and also produced Thomas Rice, a witness, who swore that at the time the said paper writings bear date and for a long time before and after, E. Rice, whose name is signed to the said writings, was foreman and manager of a tan yard in Washington, kept the books, bought and sold leather, and managed the whole concern for the proprietors; that the said papers are in his handwriting; that the said Foyles for about seven years (including the dates of said writings) being a butcher, was in the habit of delivering from time to time, great numbers of hides to the said Rice at the said yard and had contracted with the said Rice to deliver there all the hides of the cattle slaughtered by him. That the said business was carried on in the name of James D. Barry, living in Washington, till a settlement, which witness understood took place between the said James D. Barry and Robert Barry; after a while it was carried on in the name of Robert Barry. The witness was not present at the settlement and does not know its nature or terms. During the time that the business was carried on in the name of James D. Barry, Robert Barry (who resided in Baltimore) came about twice a year to the yard in Washington, where he spent considerable time in examining and posting the books with the said E. Rice. Upon one of these occasions he directed a parcel of leather which E. Rice had prepared to send on to him to Baltimore to be kept in the yard till he should return to Baltimore or ascertain the price of leather there and give further directions concerning it. During all the time the business was conducted at Washington in the name of James D. Barry, the greater part of the leather manufactured in the yard was sent on to Baltimore to the defendant and there disposed of by him.

The following are the paper writings offered in evidence to which the testimony of Thomas Rice refers.

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No. 1. Balance due by James D. Barry to Thomas

Foyles on settlement, say \$1.640.75 up to this

date, say April 5, 1817 \$1,640.75

EDMOND RICE

No. 2. Amount of hides and skins received of

Mr. Thomas Foyles, from the 1st of April,

1817, to this date, say December 27, 1818

755 hides at 3.75 per hide. 2,831.25

10 Sheepskins at 50 cents each 5.00

7 Calf skins do. at \$1 each. 7.00

\$2 843.25

January 13, 1819 EDMOND RICE

No. 3. Amount of hides and skins received of

Mr. Thomas Foyles, from 2 February, 1819, to

2 December, 1819

346 hides at \$3.75 each. \$1,297.50

EDMOND RICE

The counsel for the defendant objected to the admission of these papers. His objection being overruled, an exception was taken to the opinion.

A verdict was found for the plaintiff below, the judgment on which has been brought into this Court by writ of error.

In argument some observations were made on the variance between the manner in which the plaintiff in error was charged in the account filed in the attachment, and in the declaration on which the cause was tried. In the account, he is charged on his assumpsit for a sum due from James D. Barry & Co. The declaration charges him as being originally indebted on a transaction with himself. The Court attaches no importance to this variance, because when the attachment was discharged by the appearance of the defendant and giving bail, and the plaintiff in consequence thereof filed a declaration to which the defendant pleaded, the cause stood in court as if the suit had been brought in the usual manner, and no reference can be had to the proceedings on the attachment.

Considering the case as it is made out in the pleadings, the defendant in the circuit court is charged on his original liability for a transaction of his own. Edmond Rice, having been manager of the whole concern for the proprietors of the tan yard in Washington, with power to buy hides and sell leather, there can be no doubt of his power to charge them for skins and hides received by him in the course of business. The papers No. 2 and 3 purport on their face to be an account of transactions of this description. The only objection made to them is that instead of the journal of hides delivered

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on each day, the manager has given at considerable intervals the total amount of hides received from the last preceding settlement up to that time. We are not aware of any principle which can make such a general certificate less binding than one detailing the separate transactions of each day. The proprietors themselves, or either of them, might have made the same acknowledgment, and we perceive

no reason why the acknowledgment of the manager, so far as respects the form in which it is made, should not be of the same obligation as that of the proprietors.

The paper No. 1 is more questionable. It does not purport to be given for hides received at the tan yard, nor does it express the items which constitute the charge, but it is said to be the balance due from James D. Barry (in whose name the business was conducted) "on settlement." Edmond Rice, the person who gave this certificate, had authority to give it on account of the transactions of the tan yard, and it does not appear that he had authority to give it on any other account. It is an additional circumstance of no inconsiderable weight that the account closes on 5 April, 1817, the day on which the subsequent account, which is avowedly for hides, commences. These circumstances combined were, we think, sufficient to justify the submission of this paper also to the jury.

The next objection to the admission of these papers is that the plaintiff in the circuit court has failed to prove that Robert Barry was one of the proprietors of the tan yard while the business was conducted in the name of James D. Barry.

The evidence on this point was given by Thomas Rice, and has been already fully stated. We think the testimony of a partnership was very strong. It could not with propriety have been withheld from the jury.

The question on which the plaintiff in error most relies, remains to be considered.

This suit is brought on a partnership transaction against one of the partners. The declaration states a contract with the partner who is sued and gives no notice that it was made by him with another. Will evidence of a joint assumpsit support such a declaration?

Although it has been held from the 36 H. 6. Ch. 38, that a suit against one of several joint obligors, might be sustained, unless the matter was pleaded in abatement, yet with respect to joint contracts, either in writing or by parol, a different rule was formerly adopted upon the ground of a supposed variance between the contract laid, and that which was proved. This distinction was overruled by Lord Mansfield in the case of *Rice v. Shute*, 5 Burn 2611. The same

point was afterwards

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adjudged in *Abbott v. Smith*, 2 W.Black. 695, and has been ever since invariably maintained. The principle is that a contract, made by co-partners, is several, as well as joint, and the assumpsit is made by all and by each. It is obligatory on all and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it at the trial.

The course of decisions since the case of *Rice v. Shute* has been so uniform that the principle would have been considered as too well settled for controversy, had it not lately been questioned by a judge from whose opinions we ought not lightly to depart.

That judge supposed that if the defendant had no notice in the previous stage of the proceedings, which might inform him of the nature of the action, he was guilty of no negligence in failing to plead in abatement, and ought not to be deprived of his defense at the trial.

But the declaration never gives this notice where the suit is brought against one only of the partners. He is always proceeded against as if he were the sole contracting party, and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. The case cited by Mr. Sergeant Williams in note 4 on the case of *Caleb v. Vaughan*, 1 Saund. 191, n. 4, shows conclusively that the want of notice has never been considered, since *Rice v. Shute* as justifying this exception to the evidence at the trial.

We think there is no error, and the judgment is affirmed.