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Wilcox Vs. Executors of Plummer

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Court : US Supreme Court

Decided On : 1830

Appeal No. : 29 U.S. 172

Appellant : Wilcox

Respondent : Executors of Plummer

Judgement :

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U.S. Supreme Court Wilcox v. Executors of Plummer, 29 U.S. 4 Pet. 172 172 (1830)

Wilcox v. Executors of Plummer

29 U.S. (4 Pet.) 172

ON DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT

OF THE UNITED STATES FOR THE DISTRICT OF NORTH CAROLINA

SYLLABUS

Action of assumpsit to recover from the defendant, in the character of an attorney at law, the amount of a loss sustained by reason of neglect or unskillful conduct.

A promissory note was by the plaintiff placed in the hands of P. for collection. He instituted a suit in the state court thereon against the drawer on 7 May, 1820, but neglected to do so against the endorser. The drawer proved insolvent. On 8 February, 1821, he sued the endorser, but committed a fatal mistake by a misnomer of the plaintiffs, upon which, after passing through the successive courts of the state, a judgment of nonsuit was finally rendered against the plaintiffs. Before that time, the action against the endorser was barred by the statute of limitations, to-wit on 9 November, 1822. This suit was instituted on 27 January, 1825. The statute of limitations of North Carolina interposes a bar to actions of assumpsit after three years.

The questions in the case were whether the statute of limitations commenced running when the error was committed in the commencement of the action against the endorser or whether it commenced from the time the actual damage was sustained by the plaintiffs by the judgment of nonsuit -- whether the statute runs from the time the action accrued, or from the time that the damage was developed or be came definite. *Held* that the statute began to run from the time of committing the error by the misnomer in the action against the endorser.

The ground of action here is a contract to act diligently and skillfully, and both the contract and the breach of it admit of a definite assignment of date. When might this action have been brought is the question, for from that time the statute must run.

When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps in that event no more than nominal damages may be proved, and no more recovered, but on the other hand it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear that the damage is not the cause of the action.

This was an action of assumpsit, to which was pleaded the statute of limitations.

It was alleged, and proof offered, that on 28 January, 1820, the testator of the defendants, who was a collecting

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attorney accustomed to collect for John V. Wilcox & Company, received from them for collection a note which had been drawn by Edmund Banks on 2 October, 1819, payable to John Hawkins two months after date and by him endorsed, on 9 November, 1819, to Hinton & Brame, and by them subsequently to the plaintiffs.

On 7 February, 1820, the testator, Kemp Plummer, instituted a suit in the name of John V. Wilcox and Thomas Wilcox, who composed the firm of John V. Wilcox & Company, against Banks, and at August, 1820, recovered a judgment against him. Banks proved insolvent, and on 8 February, 1821, the testator caused a writ to be issued in the names of John V. Wilcox, Arthur Johnson, and Major Drinkherd, as co-partners in the firm and style of John V. Wilcox & Company, against Hawkins, the endorser of the note.

This action, thus instituted and docketed as a suit by John V. Wilcox & Company against John H. Hawkins was, after various delays, brought to a trial in April, 1824, when the plaintiffs were nonsuited, and this nonsuit was affirmed on an appeal to the supreme court at June term 1824.

Thereupon the present suit was instituted, *viz.,* on 27 January, 1825, by John V. Wilcox and Thomas Wilcox, co-partners under the firm and style of John V. Wilcox & Company, against the testator of the defendants; and on his death this suit was revived against them by *scire facias.*

Two breaches were assigned in distinct counts by the plaintiffs in their declaration:

The first, that the testator neglected to institute any suit for them against the endorser until 9 November, 1822, on which day the remedy against the endorser was barred by statute.

The second, that he instituted and carried on for them the suit, as hereinbefore stated, against the endorser negligently and unskillfully, and before the same was

terminated, the remedy against him was barred as aforesaid, as fully appears by the record.

The jury found a verdict for the plaintiffs subject to the opinion of the court on the statute of limitations. The time allowed by this statute for bringing all actions on the case

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is three years after the cause of action accrues, and not afterwards.

In the circuit court, it was contended by the defendants that on the first count of the declaration, the cause of action arose from the time when the attorney ought to have sued the endorser, which was within a reasonable time after the note was received for collection, or at all events after the failure to collect the money from the marker, and that on the second count his cause of action arose at the time of committing the blunder in the issuing of the writ in the names of the wrong plaintiffs.

It was contended by the plaintiffs that on the first count their cause of action accrued when the testator of the defendants suffered the remedy to be extinguished by a neglect to sue on or before 9 November, 1822, and on the second count when the suit unskillfully brought and prosecuted was terminated or, at all events, on 9 November, 1822.

It was agreed that if the positions taken on the part of the defendants be correct on both counts, then a judgment is to be entered for the defendants.

If those taken by the plaintiffs be correct, then a judgment is to be entered for the plaintiffs on both counts; or if either of the positions thus taken by the plaintiffs be correct, then a judgment to be entered for the plaintiffs on the count wherein the statute ought not to bar.

On which questions the judges divided in opinion, and directed the difference to be certified to the supreme court.

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MR. JUSTICE JOHNSON delivered the opinion of the Court.

This suit was instituted in the Circuit Court of the United States in North Carolina to recover of the defendants the amount of a loss sustained by reason of the neglect or unskillful conduct of their testator while acting in the character of an attorney at law.

A promissory note was placed in his hands for collection by the plaintiffs. He instituted a suit in the state court thereon against Banks, the drawer, on 7 February, 1820, but neglected to do so against Hawkins the endorser. Banks proved insolvent, and then, to-wit, on 8 February, 1821, he issued a writ against the endorser, but committed a fatal misnomer of the plaintiffs, upon which, after passing through the successive courts of the state, a judgment of nonsuit was finally rendered against them. Before that time, the action against the endorser was barred by limitation -- to-wit, on 9 November, 1822, and this suit was instituted on 27 January, 1825.

The form of the action is assumpsit, and the plea now to be considered is the act of limitation, which in that state creates a bar to that action in three years.

The case is presented in a very anomalous form, but in order to subject it to any known class of rules, we must

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consider it as coming up upon opposite bills of exceptions craving instructions, on which the court divided. This Court can only certify an opinion on the points so raised; that part of the agreement stated in the record which relates to the rendering of judgment on the one side or on the other must have its operation in the court below.

There were two counts in the declaration: the one laying the breach in not suing at all until the note became barred, thus treating as a mere nullity the suit in which

the blunder was committed, and the other laying the breach in the commission of the blunder, but both placing the damages upon the barring of the note by the act of limitation. As this event happened on 22 November, 1822, this suit is in time if the statute commenced running only from the happening of the damage. But if it commenced running either when the suit was commenced against the drawer, or a reasonable time after, or at the time of Banks' insolvency, or at the time when the blunder was committed, in any one of those events the three years had run out. And thus the only question in the case is whether the statute runs from the time the action accrued or from the time that the damage is developed or becomes definite.

And this we hardly feel at liberty to treat as an open question.

It is not a case of consequential damages, in the technical acceptation of those terms, such as the case of *Gillon v. Boddington,* 1 B. & P. 541, in which the digging near the plaintiff's foundation was the cause of the injury, for in that instance no right or contract was violated, and by possibility the act might have proved harmless, as it would have been had the wall never fallen. Nor is it analogous to the case of a nuisance, since the nuisance of today is a substantive cause of action, and not the same with the nuisance of yesterday, any more than an assault and battery.

The ground of action here is a contract to act diligently and skillfully, and both the contract and the breach of it admit of a definite assignment of date. When might this action have been instituted is the question, for from that time the statute must run.

When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered, but on the other hand it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the

day of the verdict. If so it is clear the damage is not the cause of action.

This is fully illustrated by the case from Salkeld and Modern in which a plaintiff, having previously recovered for an assault, afterwards sought indemnity for a very serious effect of the assault which could not have been anticipated and of consequence could not have been compensated in making up the verdict. The cases are numerous and conclusive on this doctrine. As long ago as the 20th Eliz. 1 Croke 53, this was one of the points ruled in the *Sheriffs of Norwich v. Bradshaw.* And the case was a strong one, for it was altogether problematical whether the plaintiffs ever should sustain any damages from the injury. The principle has often been applied to the very plea here set up, and in some very modern cases. That of *Battley v. Faulkner,* 3 B. & A. 288, was exactly this case, for there the damage depended upon the issue of another suit, and could not be assessed by a jury until the final result of that suit was definitely known. Yet it was held that the plaintiff should have instituted his action, and he was barred for not doing so. In the case of *Short v. McCarthy,* which was assumpsit against an attorney for neglect of duty, the plea of the statute was sustained, though the proof established that it was unknown to the plaintiff until the time had run out. And the same point is ruled in *Granger v. George,* 5 B. & C. 149. In both cases the court intimating that if suppressed by fraud, it ought to be replied to the plea if the party could avail himself of it. In *Howell v. Young,* the same doctrine is affirmed and the statute held to run from the time of the injury, that being the cause of action, and not from the time of damage or discovery of the injury.

The opinion of this Court will have to be certified in the

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language of the defendants' supposed bill of exceptions, to-wit,

"That on the first count in the declaration, the cause of the action arose at the time when the attorney ought to have sued the endorser, which was within a reasonable time after the note was received for collection, or at all events after the failure to collect the money from the maker. And that on the second count his

cause of action arose at the time of committing the blunder in issuing the writ in the names of wrong plaintiffs."

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of North Carolina and on the points and questions on which the judges of the said circuit court were opposed in opinion and which were certified to this Court for its opinion in pursuance of the act of Congress in such case made and provided, and was argued by counsel, on consideration whereof it is ordered and adjudged by this Court that it be certified to the said Circuit Court of the United States for the District of North Carolina that on the first count in the declaration the cause of action arose at the time when the attorney ought to have sued the endorser, which was within a reasonable time after the note was received for collection, or at all events at the failure to collect the money from the maker, and that on the second count his cause of action arose at the time of committing the blunder in issuing the writ in the names of wrong plaintiffs, all of which is accordingly hereby certified to the said Circuit Court of the United States for the District of North Carolina.

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