Breedlove Vs. Nicolet

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Decided On : 1833

Appeal No. : 32 U.S. 413

Appellant : Breedlove

Respondent : Nicolet

Judgement :

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Breedlove v. Nicolet

32 U.S. (7 Pet.) 413

ERROR TO THE DISTRICT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF LOUISIANA

SYLLABUS

Jurisdiction. The plaintiffs, aliens, were residents of the State of Louisiana at the time of the execution of the note sued on in the district Court of the United States for the Eastern District of Louisiana, and continued to reside in New Orleans since,

having a commercial house there; they are, however, absent six months in the year, but when absent have their agent to attend to their business. The defendants in the suit were residents of the City of New Orleans and citizens of the State of Louisiana when the note was given. The residence of aliens within the state constitutes no objection to the jurisdiction of the federal court.

The commercial partnership, the drawers of the note upon which the suit was instituted, was composed of three persons, one of whom was a resident citizen of Alabama, and out of the jurisdiction of the court when the suit was brought, and the remaining two, the defendants, were resident citizens of Louisiana. *Held* that although the suit being against two of the three obligors might not be sustained at common law, yet as the courts of Louisiana do not proceed according to the rules of the common law, their code being founded on the civil law, this suit is properly brought.

The note, being a commercial contract, is what the law of Louisiana denominates a contract *in solido,* by which each party is bound severally as well as jointly, and may be sued severally as well as jointly.

The plaintiff Sigg was denominated in the petition and writ "J. J. Sigg." The omission of his Christian name at full length was alleged as error. By the court:

"He may have had no Christian name. He may have assumed the letters 'J. J.'"

as distinguishing him from other persons of the name of Sigg. Objections to

the name of the plaintiff cannot betaken advantage of after judgment. If J. J. Sigg was not the person to whom the promise was made, was not the partner

of Theodore Nicolet & Co., advantage should have been taken of it sooner. It is too late to allege it as error in this Court.

The petitioners aver that they are aliens. This averment is not contradicted on the record, and the court cannot presume that they are citizens.

If originally aliens, they did not cease to be so, or lose their right to sue in the federal court, by a residence in Louisiana. Neither the Constitution nor the acts of Congress require that aliens should reside abroad to, entitle them to sue in the courts of the United States.

The suit not having been brought against Bedford, one of the partnership, it was not necessary to aver that he was subject to the jurisdiction of the courts of the United States.

After issue joined in the district court, the defendants filed a plea that the firm of Theodore Nicolet & Company, the plaintiffs consisted of other

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persons in addition to those named in the writ and petition, and that those other persons were citizens of Louisiana. The court, after receiving the plea, directed that it be taken from the files of the court. *Held* that this was a proceeding in the discretion of the court, and was not assignable as error in this Court.

The plea was offered after issue was joined on a plea in bar, and the argument of the cause had commenced. The court might admit it, and the court might also reject it. It was in the discretion of the court to allow or refuse this additional plea. As it did not go into the merits of the case, the court would undoubtedly have acted right in rejecting it.

All the proceedings in a case are supposed to be within the control of the court while they are in paper, and before a jury is sworn, or judgment given. Orders made may be revised, and such as in the judgment of the court may have been irregular or improperly made, may be set aside.

Construction of the insolvent laws of Louisiana.

This action was instituted in the district court by Theodor Nicolet and J. J. Sigg, both averred to be aliens and citizens and subjects of the Republic of Switzerland, but at present residing and trading in the City of New Orleans, under the firm and style of Theodor Nicolet & Co.

The petition of the plaintiffs set out a joint and several demand against J.R. Bedford, James W. Breedlove, and William L. Robeson, formerly partners in trade, and doing business in the said city, under the firm and style of Bedford, Breedlove & Robeson. The cause of action was a promissory note, subscribed by Bedford, Breedlove & Robeson, for $2,964.10, dated at New Orleans, 22 November, 1826, payable sixty days after date, to the order of the petitioners. The petition then averred that said Bedford, Breedlove & Robeson had become indebted to the petitioners in the amount of said note, with interest and costs. It further averred that Breedlove and Robeson were citizens of the State of Louisiana, and resided in New Orleans, and that each of them were liable, as aforesaid, and prayed that Breedlove and Robeson might be cited, and that judgment be rendered against them, jointly and severally, for the amount due. Attached to the petition was an affidavit, setting forth that Breedlove and Robeson were jointly and severally indebted, &c.; Two separate writs of *capias ad respondendum* were issued,

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the one against Robeson, the other against Breedlove, upon which they were severally arrested and held to bail, under a special order of the judge.

In June, 1829, the defendants filed their joint and separate answer to the petition, in which, reserving all legal exceptions, they averred that the said commercial house of Bedford, Breedlove & Robeson, of which they were partners, having become embarrassed by misfortunes, after the execution of the note sued on, to-wit, March 16, 1827, made out a full and complete schedule, exhibiting the debts due by them, and the property and debts belonging and due to them, jointly and severally, which said property was duly accepted by the judge of the parish court, for the benefit of the creditors placed upon said schedule. Among their creditors were the plaintiffs, Theodor Nicolet & Co., then residents of New Orleans, in the State of Louisiana, and who were also residents of the same place, at the time of the execution of the note sued on. After the said acceptance so made by said parish judge, a meeting of the creditors of Bedford, Breedlove & Robeson was duly called. At the appointed time and place, the creditors who assembled approved of the acceptance of the property made by the judge as aforesaid. Upon

these proceedings, judgment of discharge was finally rendered in favor of the defendants.

Afterwards, the original note was filed, to-wit, January 4, 1830, and on the following day, *viz.,,* January 5, 1830, the defendants filed a plea to the jurisdiction. In this plea, after setting out the note, they alleged that the district court could not properly exercise jurisdiction over the case, because they alleged, that said note was drawn by Bedford, Breedlove & Robeson, payable to the order of T. Nicolet & Co., who endorsed and assigned the same to one Frederick Beckman, who endorsed and assigned the same to J. J. Sigg, who assigned the same to Theodor Nicolet & Co., the present plaintiffs. The defendants then averred that the said firm of T. Nicolet & Co., was composed of various other persons than the said Theodor Nicolet and J. J. Sigg; that among the

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partners in said firm one Germain Mussen, and one M. P. Durell, and one Charles Lessept, all and each of whom were citizens of the United States and State of Louisiana. Further, they averred that Frederick Beckman, a remote endorser on said note, was, prior to 5 July, 1828, and at the time of his transfer to J. J. Sigg, an alien, and a subject of the Hanseatic Towns; that on 5 July, 1828, he became a citizen of the United States and State of Louisiana, and was so at the time of the institution of this suit, &c.; This plea was filed on 5 January, after the hearing of the cause had been commenced, and the objection of the petitioner's counsel against then receiving it, was overruled.

On 20 May, 1830, on motion to reconsider and annul the order of January, which permitted the defendants to file the plea to the jurisdiction, it was objected, that it came too late, the cause having been put upon the jury calendar, and regularly called on that calendar for trial. The court rescinded the order: 1st, because it was not filed in time; the defendants having pleaded to the merits, before oyer was given of the note; and upon this plea, the cause was at issue, when the plea to the jurisdiction was filed; 2d, oyer of the note was not necessary to enable a party to plead in abatement the citizenship of the plaintiffs; that both branches of the plea

to the jurisdiction denied the capacity of the plaintiffs to sue, and therefore, ought to have been pleaded in abatement, and before issue joined on the merits, and that no material step was taken in the cause, between the reception of said plea and its subsequent rejection, on reconsideration.

On June 7, 1830, the cause came on for trial, when the following facts were admitted on the record:

That the persons, composing the firm of T. Nicolet & Co., were residents of the state at the time of the execution of the note sued, and had continued so up to that time; that they are absent about six months in the year; but when so absent, had their agents to attend their business, and their commercial house had existed in New Orleans ever since the execution of said note; that Breedlove and Robeson were residents of the City of New Orleans, and citizens of the State of Louisiana.

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The proceedings under the insolvent law of Louisiana were admitted in evidence. The plaintiffs filed the protest of the note, which appeared to have been made November 22, 1827, at the instance of Frederick Beckman.

On 10 June, 1830, judgment was entered for the following terms: the court having maturely considered this case, now orders and adjudges that judgment be entered up in favor of the plaintiffs against the defendants, jointly and severally, for the sum of $2,964.10, with interest at the rate of five percent per annum, from 24 January, 1827, until paid, and costs of suit. To reverse this judgment, the defendants prosecuted this writ of error.

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

This suit was instituted in the court of the United States for the Eastern District of Louisiana by Theodor Nicolet and J. J. Sigg, subjects of the Republic of

Switzerland, merchants and partners trading under the firm of Theodor Nicolet & Co., against James W. Breedlove and William L. Robeson, members of a commercial company, consisting of J. R. Bedford, James W. Breedlove and William L. Robeson, merchants and partners, formerly doing business under the firm of Bedford, Breedlove & Robeson. The petition, which in the courts of Louisiana supplies the place of a declaration at common law is founded on a promissory note in the following words:

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"$296.10 New Orleans, Nov. 22, 1826"

"Sixty days after date, we promise to pay to order of Messrs. Theodor Nicolet & Co. twenty-nine hundred sixty-four and ten hundredths dollars, value received."

"BEDFORD, BREEDLOVE & ROBESON"

In June, 1829, the defendants filed their plea and answer, setting forth that after the execution of the said note, their affairs having become embarrassed, they made out a full and complete schedule, exhibiting all their property and the debts due to and from them, which said property was duly accepted by the judge of the parish court, for the benefit of the creditors placed on the said schedule, among whom were the plaintiffs, Theodor Nicolet & Co., who were then and at the time of the execution of the said note residents of New Orleans. The answer then sets forth at large the proceedings after the acceptance of the property, and the final discharge of the defendants by the judgment of the parish court, given in pursuance of the laws of the state, which judgment they plead in bar of the action.

Afterwards, in January, 1830, the cause came on for trial, when the following entry was made:

"This cause came on for hearing before the court, when, after hearing the arguments of counsel in part, it is ordered, that this cause be set for trial on the jury docket on the plea filed this day."

And afterwards, on the same day, "came the defendants, by their counsel, and filed the following plea."

This plea objects to the jurisdiction of the court, because the note in the petition mentioned was drawn by Bedford, Breedlove & Robeson, payable to the order of Theodor Nicolet & Co., which said firm of Theodor Nicolet & Co. is composed of other persons than the said Theodore Nicolet and the said J. J. Sigg, to-wit, Germain Musson and others, all and each of whom are citizens of the United States and State of Louisiana. The plea further alleges that Frederick Beckman, a remote endorser on the said note, had, since the endorsement, become a citizen. The plaintiffs objected to the reception of this plea to the jurisdiction because it came too late. Afterwards, in May, 1830, the court, on a rehearing,

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overruled the plea to the jurisdiction, which had been received at the January term. The defendants excepted to this decision.

The cause came on for trial before the court, a jury not having been required, when the following admissions were made.

"It is admitted that the persons composing the firm of T. Nicolet & Co. were residents of the state, at the time of the execution of the note sued, and have continued so up to the present date; that they are, however, absent about six months in the year, but, when so absent, have their agents to attend to their business; and that their commercial house has existed in New Orleans ever since the execution of the said note. It is also admitted, that at the time of the execution of said note, the defendants J. W. Breedlove and William L. Robeson were residents of the City of New Orleans, and citizens of the State of Louisiana."

These admissions are of no importance in the cause. The residence of aliens within the state constitutes no objection to the jurisdiction of the federal court.

The defendants offered in evidence the record of the bankrupt proceedings from the parish court. It was admitted that the meeting of the creditors was duly

advertised in the public prints. The plaintiffs objected to the admission of this record, but the court determined that it should be read.

The defendants also gave in evidence the record of the proceedings of the court, in a suit brought by the plaintiff, J. J. Sigg, on the same note, against Bedford, Breedlove & Robeson, to which the defendants, James W. Breedlove and William L. Robeson, appeared, and pleaded to the jurisdiction of the court, on which the suit was discontinued, on motion of the plaintiffs' counsel.

In June, 1830, the court rendered its judgment in favor of the plaintiffs, for the amount of the note, with interest, which judgment is brought before this Court by writ of error.

The plaintiffs assign the following errors in the proceedings of the district court.

1st. The action was irregularly instituted, no process having been sued out against Bedford, one of the partners, and the contract being joint as well as several.

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2d. Neither in the petition, writ, nor in any part of the proceedings, is the Christian name of Sigg set forth.

3d. There is no evidence that the petitioners are aliens. They are shown to have been, at the date of the note, and to the time of the trial, residents of New Orleans.

4th. If originally aliens, their residence in New Orleans renders them incapable of suing in the courts of the United States.\

5th. There is no averment or proof that Bedford, one of the parties to the note, was subject to the jurisdiction of the court.

6th. The plea to the jurisdiction was properly filed, and ought not to have been taken from the files of the court.

7th. The plaintiffs being parties to the insolvent proceedings, were estopped from questioning the sufficiency of the discharge.

1. The first error assigned, that the suit is brought against two of three obligors, might be fatal at common law. But the courts of Louisiana do not proceed according to the rules of the common law. Their code is founded on the civil law, and our inquiries must be confined to its rules.

The note being a commercial partnership contract, in what the law of Louisiana denotes a contract *in solido,* by which each party is bound severally as well as jointly, and may be sued severally or jointly. The Civil Code of Louisiana, article 2080, directs, "that in every suit on a joint contract, all the obligors must be made defendants," and the succeeding article directs that "judgment must be rendered against each defendant separately, for his proportion of the debt or damages."

Article 2086 says "there is an obligation *in solido* on the part of the debtors, where they are all obliged to the same thing, so that each may be compelled for the whole." Article 2088 says, "an obligation *in solido* is not presumed; it must be expressly stipulated."

This rule ceases to prevail only in cases where an obligation *in solido* takes place of right, by virtue of some provisions of the law. Pothier, from whom this article appears to be taken, part 2, ch. 3, art. 8, gives in No. 266, as one of the instances in which the law presumes it, "where partners in commerce contract some obligation in respect of their joint concern."

This, then, is a contract *in solido,* on which the parties may

be sued severally or jointly, and by which each is liable for the whole.

The Civil Code, so far as we are informed, does not affirm or deny that a suit may be sustained on such a contract against two of three obligors. The rules of practice in Louisiana, so far as we understand them, require that the petition should state the truth of the case, and should show a right in the petitioner to recover. It is not

denied, that this petition states the case truly, nor is it denied, that the petitioner has a right to recover from the defendants the sum demanded. It is alleged, that he has not a right to recover it, in the form of action which he has adopted. He might have obtained a judgment against each, for the whole sum, but not, it is said, against two of them, in one action. If this be the rule of the common law, it is a mere technical rule, not supported by reason or convenience. No reason other than what is merely technical can be assigned for requiring the additional labor and expense of two actions, for the attainment of that which may be as well attained by one. We have no reason for supposing that this technical principle has been engrafted on the civil law. The contrary is to be inferred from the practice of that branch of it with which we are familiar. It is a rule in chancery, that all those against whom a decree can be made, shall be brought before the court if they are within its jurisdiction. A court of equity, proceeding on the principles of the civil law, would not tolerate separate actions in this case. That court, in a case of which it should take cognizance, might require that all those bound in the note should be brought before it in the same suit, not that separate actions should be brought against those who might be sued in one. On the principles of the civil law, it would seem, that the defendants may be required to account for not joining the third promisor in the suit, not for joining two of them. The record contains ample evidence to this point.

In the bankrupt proceedings given in evidence by the defendants in the district court, the petitioners state John R. Bedford to be a resident of the State of Alabama, and the schedule required by law also states him to be of Alabama.

In the record of the proceedings brought by J. J. Sigg, on the same note against Bedford, Breedlove & Robeson, the

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defendants pleaded to the jurisdiction of the court, and alleged in the plea, that John R. Bedford, one of the members of the firm of Bedford, Breedlove & Robeson, was not a citizen of the State of Louisiana, but was an inhabitant and citizen of Alabama. The suit was discontinued, on the motion of the plaintiffs'

counsel. It was, then, fully shown to the court that Bedford could not have been joined in the action, and it has been repeatedly decided that in chancery, if the court can make a decree according to justice and equity between the parties before it, that decree shall not be withheld because a party out of its jurisdiction in not made a defendant, although he must have been united in the suit had he been within reach of the process of the court. In this case, the judgment conforms to right and justice, since the plaintiffs were entitled to claim the full sum from each of the defendants. In a question of doubtful practice, it ought not to be entirely disregarded that the defendants in the district court have not taken this objection, though they pleaded to the jurisdiction of the court. 2 Pothier 2, ch. 3, art. 8, No. 270-271, would seem to indicate that more than one and less than all the obligors when bound *in solido,* may be joined in the same suit. We think there was no error in joining two of the defendants in the same action.

2. The plaintiff Sigg is denominated in the petition and writ "J. J. Sigg." The omission of his Christian name at full length is alleged to be error. He may have had no Christian name. He may have assumed the letters "J. J." as distinguishing him from other persons of the surname of Sigg. Objections to the name of the plaintiff cannot be taken advantage of after judgment. If J. J. Sigg was not the person to whom the promise was made, was not the partner of Theodor Nicolet & Co., advantage should have been taken of it sooner. It is now too late.

3. The petition avers that they are aliens. This averment is not contradicted on the record, and the court cannot presume that they were citizens.

4. If originally aliens, they did not cease to be so nor lose their right to sue in the federal court by a residence in Louisiana. Neither the Constitution nor acts of Congress

require that aliens should reside abroad to entitle them to sue in the courts of the United States.

5. The suit not having been brought against Bedford, it was not necessary to aver or prove that he was subject to the jurisdiction of the courts of the United States.

6. The sixth objection is that the plea to the jurisdiction was lawfully filed, and ought not to have been taken from the files of the court. This plea was that the firm of Theodor Nicolet & Co., consisted of other persons in addition to those named in the writ and petition, and that those other persons were citizens of Louisiana. It is admitted that a constitutional or legal disability in the court to exercise jurisdiction over the parties may be taken advantage of by plea in abatement, but they must be parties. If they are not, the objection is of a different character. In the case at bar, those persons who, if named as plaintiffs, might have ousted the jurisdiction of the court were not plaintiffs. To make them so was preliminary to any objection to them. The plea, therefore, was to be considered as objecting to the writ and petition, because all the members of the firm of Theodor Nicolet & Co. are not named. The incapacity of those members to sue was to be considered after they became plaintiffs. If persons who ought to join in a suit do not join in it, the objection is not to the jurisdiction of the court on account of their incapacity to sue, but because the proper plaintiffs have not all united in the suit. The plea is to be considered as if the averment that Germain Musson and others were citizens of Louisiana had not been contained in it. This plea was offered after issue was joined on a plea in bar and the argument of the cause had commenced. The court might admit it, and the court might also reject it. It was in the discretion of the court to allow or refuse this additional plea. As it did not go to the merits of the case, the court would undoubtedly have acted rightly in rejecting it. But it was received, and the question is whether, after its reception, all power over it was terminated. All the proceedings are supposed to be within the control of the court while they are in paper and before a jury is sworn or

a judgment given. If so, the orders made may be revised, and such as in the judgment of the court may have been irregularly or improperly made may be set aside. If such be the discretion of the court, this is not a case in which a supervising tribunal will control that discretion. The court very properly thought that

after issue was joined and the argument commenced, an additional plea, not going to the merits but which might defeat the action, ought not to have been received. We are not prepared to say they exceeded their power in correcting this order and setting it aside. If they did not exceed their power, they have committed no error in this exercise of it.

7. The seventh and last error assigned is that the plaintiffs, being parties to the insolvent proceedings, were estopped from questioning the sufficiency of the discharge. The act of Louisiana passed on 20 February, 1817, § 8, relative to the voluntary surrender of property, and to the mode of proceeding, &c.;, directs, when the judge shall be satisfied that the debtor is entitled to the benefit of the act,

"he shall order that the creditors of such debtor be called, in the manner and within the time prescribed for respites by the civil code, art. 4, title 16, book 3, and he shall appoint a counselor to represent the creditors absent or residing out of the state, if there be any mentioned in the schedule."

The provision referred to is in title 18, articles 3052, 3053, 3054, in the volume in possession of the court. The language of the code is

"the respite is either voluntary or forced. It is voluntary when all the creditors consent, &c.; . . . It is forced when a part of the creditors refuse to accept the debtor's proposal, and when the latter is obliged to compel them, by judicial authority, to consent to what the others have determined in the cases directed by law."

The forced respite takes place when the creditors do not all agree, for then the opinion of the three-fourths in number and in amount prevails over that of the creditors forming the other fourth, and the judge shall approve such opinion, and it shall be binding on the other creditors who did not agree to it. But in order that a respite may produce that effect, it is necessary 1. that the debtor should deposit, &c.;

2. that a meeting of the creditors of such debtor, domiciled in the state, shall be called on a certain day, at the office of a notary public, by order of the judge, at which meeting the creditors shall be summoned to attend, by process issued from he court, if the creditors live within the parish where the meeting shall take place, or by letters addressed to them by the notary, if they are not residing in the parish. It is further directed that the meeting as well as its object be advertised in English and in French. It was admitted that this advertisement was made; but it is not admitted or proved that the petitioners were summoned to attend by process from the court or by letters addressed to them by the notary. Nor did they appear voluntarily.

Is the judgment binding on them? It is unquestionable that summary proceedings of this description must be regular and that their regularity must be shown by the party who relies on them. Notice to the creditors is material, and the law prescribes that notice and defines it. Advertisement in the papers is not sufficient. Personal notice must be given to a resident within the parish by process, to a nonresident by a letter from the notary. The law deems this notice indispensable, and the court cannot dispense with it. For want of it the judgment of discharge was no bar to this action. There are other irregularities in the proceedings, but want of notice is fatal, and it is unnecessary to notice them.

Judgment affirmed, with costs and damages at the rate of six percent per annum.