Amis Vs. Smith

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Appeal No. : 41 U.S. 303

Appellant : Amis

Respondent : Smith

Judgement :

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Amis v. Smith

41 U.S. (16 Pet.) 303

ERROR TO THE DISTRICT COURT OF THE UNITED

STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI

SYLLABUS

Mississippi. Action on a promissory note against sundry persons surviving partners of the unincorporated Real Estate Bank of Columbus, Mississippi, founded on their certificate of deposit. All the defendants except Wright joined in the plea of

nonassumpsit. Wright afterwards pleaded nonassumpsit separately. At the trial, all the defendants except Wright withdrew their plea and permitted judgment to go by default against them, and the plaintiff then discontinued the suit against Wright. Execution was issued and was levied on the property of Amis, who gave to the marshal a forthcoming bond with security, and the bond being forfeited, it was so returned by the marshal, which, by the statute of Mississippi, gives the bond the force and effect of a judgment against the obligor and his surety. At the succeeding term, Amis moved the court to quash the bond, which motion was overruled. The plaintiff in error claimed, 1. that the circuit court erred in permitting the plaintiff below to discontinue the suit against Wright and in rendering judgment against the other defendants; 2. the *fieri facias* was illegal because it included interest, not authorized by the judgment; 3. the overruling the motion to quash the forthcoming bond was a final judgment which ought to be reversed.

If the contract be joint and several and the defendants sever in their pleas, whatever may have been the doubts and conflicting opinions of former times as to the effect of a *nolle prosequi* in such a case, it has never been held that a simple discontinuance of a suit amounts to a *retraxit,* or that it in any manner worked a bar to the repetition of the plaintiff's action.

By a statute of Mississippi, all promises, contracts, and liabilities of co-partners are to be deemed and adjudged joint and several, and in all suits on contracts in writing made by two or more persons, it is lawful to declare against any one or more of them. This is such a severance of the contract as puts it in the power of the plaintiff to hold any portion of them jointly, and the others severally bound by the contract, and there is no obligation on the part of the plaintiff to put the defendants in such condition, by their pleadings, as to compel each to contribute his portion for the benefit of the others. Cited, *Minor v. Mechanics' Bank of Alexandria,* 1 Pet. 46.

On a joint and several bond, suit must be brought against all the obligors jointly or against each one severally, because each is liable for the whole, but a joint suit cannot be maintained against a part, omitting the rest. Whatever may be the defects or illegality of the final process, no error can be assigned in the Supreme

Court on a writ of error for that cause. The remedy, according to the modern practice, is by motion in the court below to quash the execution. If the question of the right to include the interest on the judgment in the execution were properly before the court, no reason could be seen why interest in a judgment, which is secured by positive law, is not as much a part of the judgment as if expressed in it.

The provisions of the third section of the Act of Congress of 19 May, 1828, adopted the forthcoming bond in Mississippi as a part of the final process of that state at the time of the passage of the act. "A final process" is understood by the court to be all

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the writs of execution then in use in the state courts of Mississippi which were properly applicable to the courts of the United States, and the phrase "the proceedings thereupon" is understood to mean the exercise of all the duties of the ministerial officers of the state prescribed by the laws of the state for the purpose of obtaining the fruits of judgments -- among those are the provisions of the laws relating to forthcoming bonds, which must be regarded as part of the final process.

The proceeding which produced the forthcoming bond was purely ministerial; the judicial mind was in no way employed in its production. It does not then possess the attributes of a judgment, and ought therefore to be treated in this Court as final process, or at least as part of the final process.

As far as the decisions of the state courts of Mississippi settle rules of property, they will be properly respected by the Supreme Court. But when the effect of a state decision is only to regulate the practice of courts and to determine what shall be a judgment, the Supreme Court cannot consider itself bound by such decisions upon the ground that the laws upon which they are made are local in their character.

It is the duty of the Supreme Court to preserve the supremacy of the laws of the United States, which it cannot do without disregarding all state laws and state decisions which conflict with the laws of the United States.

No rule, under the third section of the act of 1828, which authorizes the courts of the United States to alter final process so far as to conform it to any changes which may be adopted by state legislation and state adjudications made by a district Judge, will be recognized by the Supreme Court as binding except those made by the district courts exercising circuit court powers.

The statute of Mississippi taking away the right to a writ of error in the case of a forthcoming bond forfeited can have no influence whatever in regulating writs of error to the circuit courts of the United States. A rule of court adopting the statute as a rule of practice would therefore be void.

Regarding the forthcoming bond as part of the process of execution, a refusal to quash the bond is not a judgment of the court, and much less a final judgment, and therefore no writ of error lies in such a case.

In an action on a certificate of deposit, instituted on 7 November 1839, by the defendant in error, Nathan Smith, in the District Court of the United States for the Northern District of Mississippi against the plaintiff in error, with others, who were the surviving partners in the Real Estate Bank of Columbus, Mississippi, the plaintiff obtained a judgment by default against all the defendants except Daniel W. Wright. who had been sued with them as one of the partners. All the defendants except Wright had entered a plea of *nonassumpsit,* which they afterwards, at the trial, withdrew, on which a judgment was entered

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by *nil dicit* for $2,584.74. Wright pleaded *nonassumpsit* separately, and the plaintiff then discontinued the suit against Wright.

The plaintiff issued an execution, which was levied on personal property belonging to John D. Amis, who thereupon executed a forthcoming bond, with Samuel F. Butterworth as surety, which bond being duly forfeited, operated, under the laws of Mississippi, as a judgment against the obligors in the bond, on which execution might be issued forthwith. On 14 December, 1840, John D. Amis and Samuel Butterworth moved the court to quash the forthcoming bond 1. because it

increases the costs, not warranted by law, the execution having included interest on the judgment; 2. that there is no authority for taking the said bond, or any such bond, and the bond creates a judgment against the obligors and precludes them from a defense and a trial by jury secured by the Constitution of the United States. The court overruled the motion, and the defendant, John D. Amis, prosecuted this writ of error.

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Mc KINLEY, JUSTICE, delivered the opinion of the Court.

Smith brought an action of assumpsit against Amis and others, surviving partners of the Real Estate Banking Company, of Columbus, Mississippi, founded upon their certificate of deposit. All the defendants joined in a plea of *nonassumpsit,* and Wright, one of them, afterwards pleaded the same plea separately. At the trial, all the defendants except Wright withdrew their plea and permitted judgment to go against them by *nil dicit,* for the sum of $2,584.74, and the plaintiff then discontinued the suit

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against Wright. Upon the judgment, execution issued and was levied by the marshal on the property of Amis, who, in conformity with a statute of Mississippi, entered into bond, with security conditioned for the forthcoming of the property on the day fixed for its sale. Amis failed to deliver the property according to the condition of the bond to the marshal, who thereupon made return that it was forfeited, which, by the statute, gave it the force and effect of a judgment. Howard & Hutchinson Stat. Laws of Miss. 653. Amis, at the next term, moved the court to quash the bond, which motion was overruled, and thereupon he prosecuted this writ.

To reverse the judgment, he relies on these grounds: 1. the court erred in permitting the plaintiff to discontinue the suit against Wright and in rendering judgment against the other defendants; 2. the *fieri facias* was illegal because it

included interest not authorized by the judgment; 3. overruling the motion to quash the forthcoming bond was a final judgment by the court, which ought to be reversed.

Whether a discontinuance of the suit can be entered against one of several defendants in a case arising on contract depends upon the character of the contract and the state of the pleadings between the parties. If the contract be joint and several and the defendants sever in their pleas, whatever may have been the doubts and conflicting opinions of former times as to the effect of a effect of a *nolle prosequi* in such a case, it has never been held that a simple discontinuance of a suit amounted to a *retraxit,* or that it in any manner worked a bar to the repetition of the plaintiff's action. By a statute of Mississippi, all promises, contracts and liabilities of co-partners are to be deemed and adjudged joint and several. And in all suits founded on promises, agreements, or contracts in writing by two or more persons as co-partners, signed by one or more of them or by any person as agent in their behalf, it shall be lawful to declare against any one or more of them. Howard & Hutchinson Stat. Laws of Miss. 595. This is such a severance of the contract as puts it in the power of the plaintiff to hold any portion of them jointly, and the others severally, bound for the contract. And there is no obligation on his part to put them in such condition by his pleadings as to

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compel each to contribute his portion for the benefit of the others. This reduces the inquiry to this simple question -- is the discontinuance in this case authorized by law?

In the case of *Minor v. Mechanics' Bank of Alexandria,* a suit was brought on the office bond of the cashier of the bank against him and his sureties. The bond was joint and several, and the defendants pleaded jointly to the action, and as in this case, the cashier afterwards pleaded severally, whereupon judgment was rendered against the sureties, and afterwards the plaintiff entered a *nolle prosequi* against the other defendant. This Court sustained this proceeding and held that it did not affect the judgment against the sureties. 26 U. S. 1 Pet. 46. That case, we

think, is decisive of the first point made in this. On a joint and several bond, suit must be brought against all the obligors jointly or against each one severally, because each is liable for the whole, but a joint suit cannot be maintained against a part, omitting the rest. There is therefore no analogy between the right of action and the right to enter a *nolle prosequi* against one, as was done in that case. In this case, the plaintiff had a legal right to sue any number of the joint and several promisors and to omit the others, and therefore there is a perfect analogy between the right of action and the right to discontinue the action against one after judgment against the others. Thus far the propriety of this judgment is undoubted.

The second point involves a question not cognizable in this Court. Whatever may be the defects or illegality of the final process, no error can be assigned here for that cause. The remedy, according to modern practice, is by motion to the court below to quash the execution. If, however, the question were properly before the Court, we can see no good reason why interest upon a judgment which is secured by positive law is not as much a part of the judgment as if expressed in it. The legislature said, "all judgments shall bear interest at the rate of eight percent." Can the judgment be satisfied without paying the interest? It is the practice in Mississippi and several other states to include no interest in the judgment except what is then due, but to leave it to the collecting officer to calculate the amount of interest according to law when he settles with the defendant.

The remaining objection will now be examined. If an execution had issued upon the bond improperly, that might have been quashed on motion of the defendant. This leads us to the consideration of the grounds assumed by the counsel of the defendant.

By a statute of Mississippi it is enacted that, "no writ of error shall be granted in any case where a forthcoming bond shall have been given and forfeited." Howard & Hutchinson, Stat. Laws of Miss. 541, and the district judge has, it is said, adopted this provision of the statute by rule of court. This being the local law of

Mississippi, it is contended that this Court is bound by it, and by the expositions given to it by the supreme court of that state, and many decisions of that court have been referred to. In the case of *United States Bank v. Patton,* 5 How. 200, it is held that a forthcoming bond forfeited is an extinguishment of the original judgment, and that a writ of error will not lie to it, and the same doctrine was held in *Sanders v. McDowell,* 4 *id.* 9. If these doctrines are to prevail, the act of Congress authorizing a writ of error on final judgment would become a dead letter, and the laws of Mississippi on this subject become the supreme law in that state. If the forthcoming bond is applicable at all to the proceedings of the courts of the United States, it must be in the character of final process.

By the third section of the Act of Congress of 19 May 1828, it is enacted

"That writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state respectively, as are now used in the courts of such state, saving to the courts of the United States in the states in which there are not courts of equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rules of court, provided however that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change that may be adopted by the Legislature of the several states for the state courts."

4 Story's Laws United States 2121.

We think this section of the act of 1828 adopted the forthcoming bond in Mississippi as part of the final process of that

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state at the passage of the act. And we understand by the phrase "final process" all the writs of execution then in use in the state courts of Mississippi which were properly applicable to the courts of the United States, and we understand by the phrase "the proceedings thereupon" to mean the exercise of all the duties of the

ministerial officers of the states prescribed by the laws of the state for the purpose of obtaining the fruits of judgments. And among these duties is to be found one, prescribed to the sheriff, directing him to restore personal property levied on by him to the defendant upon his executing a forthcoming bond according to law, and the further duty to return it to the court forfeited if the defendant fail to deliver the property on the day of sale according to the condition of the bond. These are certainly proceedings upon an execution, and therefore the forthcoming bond must be regarded as part of the final process. It aids materially in securing the payment of the money to satisfy the judgment, and it is part of the process by which the plaintiff is enabled to obtain the payment of the money secured to him by the judgment.

But is this forthcoming bond a judgment as well as process? The statute declares that it shall have the force and effect of a judgment, simply, that an execution may issue upon it against the surety as well as the principal, and for all the costs incurred after the judgment. The same effect would have been produced if the statute had directed execution to issue upon the forthcoming bond without giving it the force and effect of a judgment. The proceeding which produced this bond was purely ministerial; the judicial mind was in no way employed in its production. It does not then possess the attributes of a judgment, and ought therefore to be treated in this Court as final process, or at least as part of the final process. With all due respect for the judicial decisions of state courts, we cannot concede to those of Mississippi all that is claimed for them in this case. So far as they settle rules of property, they will be properly respected by this Court. But when the effect of a state decision is only to regulate the practice of courts, and to determine what shall be a judgment, and the legal effect of that or any other judgment, this Court cannot consider itself bound by such decisions upon the ground that the laws upon which they are made are local in their character.

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It is the duty of this Court, by its decisions, to preserve the supremacy of the laws of the United States, which it cannot do without disregarding all state laws and state decisions which conflict with the laws of the United States.

In exercising the power conferred upon the circuit courts of the United States by the third section of the act of 1828, authorizing them to alter final process so far as to conform it to any change which may be adopted by the legislatures of the respective states for the state courts, there is the same danger to be apprehended as from state legislation and state adjudications on the same subject. And therefore no rule ought to be made without the concurrence of the circuit judge. No rule made by a district judge will therefore be recognized by this Court as binding except those made by district courts exercising circuit court powers. The statute of Mississippi taking away the right to a writ of error in the case of a forthcoming bond forfeited can have no influence whatever in regulating writs of error to the circuit courts of the United States; a rule of court adopting the statute as a rule of practice would therefore be void.

Regarding the forthcoming bond as part of the process of execution, a refusal to quash the bond is not a judgment of the court, and much less is it a final judgment, and therefore no writ of error lies in such a case. 31 U. S. 6 Pet. 648. But in this case, the writ of error is not to the supposed judgment in refusing to quash the forthcoming bond, but to the principal judgment. It has been sued out and prosecuted by one of several joint defendants, and without asking that the other defendants should be summoned and served; the defendant in error has, however, appeared and defended the suit, and thereby waived the irregularity. But one error has been assigned to the judgment of the court, the other two apply to the final process. The judgment of the court below must therefore be affirmed for the reasons here stated.

Judgment affirmed.