

Matheson's Admin. Vs. Grant's Admin.

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Court : US Supreme Court

Decided On : 1844

Appeal No. : 43 U.S. 263

Appellant : Matheson's Admin.

Respondent : Grant's Admin.

Judgement :

Matheson's Admin. v. Grant's Admin. - 43 U.S. 263 (1844)

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How. 263

Matheson's Admin. v. Grant's Admin.

43 U.S. (2 How.) 263

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF ALABAMA

SYLLABUS

The court below, on motion, arrested a judgment for the plaintiff after verdict, but without entering also that he took nothing by his writ.

The declaration contained two counts; in the first, the plaintiff sued as administrator, and in the second in his own personal right. A general verdict was given, and the judgment arrested on account of the misjoinder of counts.

Afterwards, and before a writ of error was brought, a motion was made by the plaintiff to set aside the order arresting the judgment and for leave to enter a *nolle prosequi* upon the second count.

An affidavit was filed by the plaintiff's counsel stating that the only evidence offered on the trial was given on the part of the plaintiff, and that the defendant

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offered no evidence whatever. The nature of the evidence was also stated, and the facts stated in the affidavit were not controverted.

The court below set aside the order arresting the judgment a year after it was made, and allowed the verdict to be amended by entering the same *nunc pro tunc* on the first count only.

In this there was no error.

All that is required is that the court should amend the verdict within a reasonable time, and this maybe done upon the judge's notes of the evidence given at the trial or upon any other clear and satisfactory evidence. The practice is a salutary one, and in furtherance of justice.

The necessity of a profert of letters of administration depends upon the local laws of a state.

Where the declaration alleges a partnership and the jury finds a general verdict, they must be presumed to have found that fact, and proof that the chose in action was endorsed in blank was sufficient to sustain the first count. The plaintiff has a

right to elect in what right he sues.

After all, the question of amendment was a question of discretion in the court below upon its own review of the facts. This Court has no right or authority, upon a writ of error, to examine the question; it belonged appropriately and exclusively to the court below.

In 1818 and 1820, the following promissory note and due bill were given:

"\$3,428.18 30 September, 1818"

"Four months after date, I promise to pay Grant and McGuffie or order three thousand four hundred and twenty-eight dollars eighteen cents, value received."

"WM. MATHESON"

"Endorsed:"

"GRANT & Mc GUFFIE"

"Charleston, 25 February, 1820"

"Due Grant and McGuffie or bearer, on demand, three hundred and forty-four dollars sixty-six cents, with interest from date."

"\$344.66 WILLIAM MATHESON"

In 1838, Angus Stewart as the administrator of Grant, who was alleged to be the surviving partner of Grant and McGuffie, brought a suit in the Circuit Court of the United States for the Southern District of Alabama against Murphy and Darrington, administrators of Matheson.

The record (as brought up by a certiorari) showed that the declaration contained the two following counts, first:

"Angus Stewart, who is a citizen of the State of South Carolina and administrator of all and singular the goods and chattels, rights and credits, of Alexander Grant, deceased, who was survivor of McGuffie, late merchants and partners, trading under the name and firm of Grant & McGuffie, who at the time of their death and at the time of the execution of the contract herein set forth, were also citizens of the State of South Carolina, complains of John Murphy and John Darrington, administrators with the will annexed of William Matheson, deceased, citizens of the State of Alabama, in custody, and so forth, in a plea of trespass on the case and so forth, for that whereas the said William Matheson, in his lifetime, on 30 September, 1818, at Charleston, to-wit, in the district aforesaid, made his promissory note in writing, by which he promised to pay said Grant & McGuffie or order, four months after the date thereof, \$3,428.18, value received, and then and there delivered said note to said Grant & McGuffie, and also, on 25 February, 1820, said Matheson executed his due bill or promissory note at Charleston, to-wit, in district aforesaid, by which he promised to pay said Grant & McGuffie or bearer, on demand, \$344.66, with interest from the date of said note, which periods have long since elapsed; and being so liable, he, the said Matheson, in his lifetime, and his said administrators since his death, promised and assumed to pay to said plaintiff the said sums of money, to-wit, the sums of \$3,428.18 and \$344.56, according to the tenor and effect of said notes, yet neither the said Matheson in his lifetime nor his said administrators since his death have paid the said several sums of money according to their several promises and assumptions, and the tenor and effect of the said notes, either to said Grant & McGuffie in their lifetime or to said administrator since their death, to the damage of said administrator \$16,000."

The second count was as follows:

"And whereas also the said Angus Stewart complains of said defendants, administrators as aforesaid, in custody &c.;, for that whereas the said William Matheson, on 30 September, 1818, at Charleston &c.;, made his certain promissory note, in writing, whereby he promised to pay, four months after date thereof, to one Grant & McGuffie or order, \$3,428.18, and then and there delivered

the said note to Grant & McGuffie, and the said Grant & McGuffie, to whose order the said note was payable, then and there endorsed and delivered the same to the said plaintiffs, of all which

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the said Matheson had full notice, which period has now elapsed. And the said Matheson also, on 25 February, 1820, at Charleston, aforesaid &c.;, made his note in writing, whereby he promised to pay to Grant & McGuffie, or bearer, on demand, \$344.66, with interest from the date of the said note, and then and there delivered the same to said Grant & McGuffie, who then and there delivered the same to the said Angus Stewart. And the said note being due and demanded in the lifetime of the said Matheson, he was liable to pay the same, and being so liable, the said Matheson, in his lifetime, undertook and promised to pay the same and his administrators since his death, but neither did the said Matheson in his lifetime nor have his administrators since his death paid the said sums of money according to their several promises and the tenor and effect of the said notes, although said Matheson in his lifetime was, and his administrators have been since his death, frequently requested to do so, to the damage of the said plaintiff \$16,000, and thereof he brings suit &c.;"

To this declaration the plaintiffs in error, Murphy and Darrington, put in two pleas, viz.: the general issue and the statute of limitations.

The case was tried at November term, 1840, when the jury found for the plaintiff, and assessed his damages at \$8,250.

At the same term, a motion for arrest of the judgment was made and granted on the ground of a misjoinder of counts and causes of action in the declaration.

At March term, 1841, nothing was done in the case, but in the November term, 1841, on motion of the counsel for the plaintiff, the order of the November term, 1840, arresting the judgment was vacated, the verdict was ordered to be amended so as to apply to the first count in the declaration, the plaintiff was permitted to enter a *nolle prosequi* on the second count in the declaration, and judgment was

directed *nunc pro tunc* upon the verdict, applying it to the first count in the declaration, and judgment was entered accordingly.

The ground upon which the court set aside the order arresting the judgment &c., was the following affidavit, which was filed, accompanied by the deposition of Chapman Levy, which was the same that was read upon the trial. The deposition is too long to be inserted, but stated in substance that the notes and due bill were handed to Levy for collection in 1821 or 1822, and that long afterwards he, Levy, had a conversation with Matheson, which was supposed to take the case out of the statute of limitations.

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" *Affidavit* "

"Personally appeared before me, P. Phillips, an attorney of this Court, who, being duly sworn, says: that on the trial of the cause of *Angus Stewart v. John Murphy and John Darrington*, in which a verdict was rendered for the plaintiff at the November term, 1840, of this Honorable Court, the plaintiff offered the depositions of Chapman Levy, Jacob Axon, and _____ McKenzie, and the notes, of which are now on file; that this was the only evidence offered by plaintiff, and that no evidence was offered by the defendants, and that the cause went to the jury upon the above depositions of the plaintiff alone."

"P. PHILLIPS"

"Sworn to and subscribed in open court, 3 December, 1841."

"DAVID FILES, C.C. C. S. D. Ala."

To review the decision of the court in setting aside the order for arresting the judgment &c., the writ of error was brought.

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MR. JUSTICE STORY delivered the opinion of the Court.

The original action was assumpsit brought by Stewart (the defendant in error) as administrator of Alexander Grant, who was the surviving partner of the firm of Grant & McGuffie, against Murphy and Darrington as administrators of Matheson upon a certain note and due bill made and signed by Matheson in his lifetime. The note was as follows:

"Charleston, 30 Sept., 1818. Four months after date I promise to pay Grant & McGuffie, or order, three thousand four hundred and twenty-eight dollars eighteen cents, value received."

The due bill was as follows:

"Charleston, 25 February, 1820. Due to Grant & McGuffie, or bearer, on demand, three hundred and forty-four dollars sixty-six cents, with interest from date."

The note was endorsed in blank, "Grant & McGuffie."

The declaration contained two counts. The first count is by Stewart as administrator, upon both instruments, and upon promises made by Matheson in his lifetime, and by his administrators since his decease, to pay him (Stewart) as administrator. The second is upon both instruments, stating the note to have been endorsed by Grant & McGuffie to him (Stewart), and the due bill to have been transferred

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to him by delivery. So that in legal effect he claimed in the first count as administrator, and in the second in his own personal right. At the trial (for it is unnecessary to state the pleadings), the jury found a general verdict for the plaintiff, upon both counts, at the November term of the court, 1840. And at the same term, a motion was made in arrest of judgment for the misjoinder of the counts, which motion was sustained, and thereupon it was ordered by the court that the judgment be arrested. At the November term of the court, 1841, a motion was made to set aside the order in arrest of judgment, and for leave to amend the

verdict so that the same might be entered upon the first count, and a *nolle prosequi* entered upon the other count. In support of this motion, an affidavit was made by the plaintiff's counsel, that the only evidence offered at the trial by the plaintiff was the deposition of Chapman Levy, Jacob Axon, and _____ McKenzie, and the note and due bill which were on the files of the court, and that no evidence was offered by the defendants, and that the cause went to the jury upon the above depositions of the plaintiff alone. Upon this evidence after notice to and hearing the counsel for the defendants, who offered no evidence in opposition to the motion, the court made an order, vacating the order in arrest of judgment, and allowing the verdict to be amended by entering the same on the first count, and that judgment be entered upon that count *nunc pro tunc* for the plaintiff. Judgment was accordingly entered thereon, and from that judgment the present writ of error has been brought.

The main question which has been argued is whether the court had authority to make the amendment at the time and under the circumstances stated in the record. It is observable that there was no judgment in the present case originally entered, that the plaintiff takes nothing by his writ, *non obstante veredicto*, but a simple order passed arresting the judgment, which suspended all further proceedings until the court should put them again in motion, but still left the cause pending in the court. It is a case, therefore, in a far more favorable position for the exercise of the power of amendment, than it would have been if final judgment had passed against the plaintiff, or if judgment had passed for the plaintiff, and a writ of error had been brought to reverse it; for in the latter case, not only is the writ of error deemed in law a new action, [[Footnote 1](#)] but in contemplation of law the record itself is supposed to be removed from the court below.

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And first, as to the time of making the amendment. It is said that it should have been either at the term when the order for the arrest of judgment was made, or, at the furthest, at the next succeeding May term of the court, and it was too late to make it a whole year afterwards. But there is no time absolutely fixed within which

such an amendment should be moved. All that the court requires is that it should be done within a reasonable time, and when no such change of circumstances shall have occurred as to render it inconvenient or inexpedient. Nothing is more common than motions to amend the record after a writ of error has been brought -- nay, after a writ of error has been argued in the court above, and sometimes even after judgment in the court of error, pending its session. Especially in cases of misjoinder of counts, which are incompatible with each other, as well as in cases where there are several counts, some of which are bad and some good, and a general verdict given for the plaintiff, such applications, when made within a reasonable time, are usually granted after error brought and the verdict allowed to be amended so as to be entered upon the good counts, or upon the counts not incompatible with each other. This is most usually done upon the judge's notes of the evidence at the trial, establishing upon what counts the evidence was in fact given or to which it was properly addressed or limited. But it may be done upon any other evidence equally clear and satisfactory, which may be submitted to the consideration of the court. In the present case, we know from the most authentic sources contained in the record itself, and not disputed by anyone, the whole evidence which was given at the trial. The case, therefore, falls directly within the range of the principles above stated. The practice is a most salutary one, and is in furtherance of justice and to prevent the manifest mischiefs from mere slips of counsel at the trial, having nothing to do with the real merits of the case. The authority to allow such amendments is very broadly given to the courts of the United States by the 32d section of the Judiciary Act of 1789, ch. 20, and quite as broadly, to say the least, as it is possessed by any other courts in England or America; and it is upheld upon principles of the soundest protective public policy.

Without citing the authorities at large, which are very numerous upon this point, it will be sufficient to state a few only, which are the most full and direct to the purpose. In *Eddowes v. Hopkins*, 1 Doug. 376, there was a general verdict on a declaration consisting

of different counts, some of which were inconsistent in point of law, it was held that as evidence had only been given upon the consistent counts, the verdict might be amended by the judge's notes at the trial. The same point was decided in *Harris v. Davis*, 1 Chitty 625. In *Williams' Exec. v. Breedon*, 1 Bos. & P. 329, where a general verdict was given on two counts, one of which was bad, and it appeared by the judge's notes that the jury calculated the damages in evidence applicable to the good count only, the court allowed the verdict to be amended and entered on the good count only, though evidence was given applicable to the bad count also. In *Doe v. Perkins*, 3 T.R. 749, the court allowed the verdict to be amended after error brought and joinder in error by striking out certain words from the postea. An objection was on that occasion taken that the amendment could not be made after the expiration of one term after the trial. But the court said that there was no foundation for this objection, for that, according to the practice of amending by the judge's notes, which was of infinite utility to suitors, and was as ancient as the time of Charles the First, the amendment might be made at any time. In *Henry v. Mayor Lyme Regis*, 6 Bing. 100, a verdict had been taken by consent on two counts, and upon application the court amended the postea, by entering it in one count to which the evidence applied, there being in fact but one cause of action, although the judge, who presided at the trial, declined to interfere. In *Richardson v. Mellish*, 3 Bing. 334, S.C. in error, 7 Barn. & C. 819, where a general verdict was given on a declaration, some of the counts of which were bad, the court allowed the postea to be amended, and entered up judgment upon a single count after argument in error, and the court in error sanctioned the proceeding. In *Harrison v. King*, 3 Barn. & Ald. 161, there was a general verdict for the plaintiff, and an application was made to the court to amend the verdict on the judge's notes after the lapse of eight years, and after the judgment had been reversed upon error; but the court refused it upon the ground of the long delay. In *Clarke v. Lamb*, 8 Pick. 415, the Supreme Court of Massachusetts, after a general review of the authorities, allowed the verdict to be amended upon the judge's notes. [[Footnote 2](#)]

We think then that the objection taken at the bar to the amendment and entry of the judgment is not maintainable, and that the

court acted within its rightful authority and jurisdiction in the allowance thereof.

Another objection, rather suggested than insisted on, is that there is no proof of the letters of administration. Whether that would constitute any objection whatsoever in the State of Alabama is a matter purely of local practice and proceedings. It is well known that in many states of the union, no proof of such letters is ever made, as, for example, in Massachusetts and other New England states. But the objection, if it has any foundation, is undoubtedly cured by the verdict.

Another objection is that the first count does not sufficiently allege a partnership between Grant and McGuffie, nor that Grant was the survivor of them. We think otherwise. The first count in the amended record brought upon the certiorari is by Stewart, as administrator of Grant, and it states in the introductory part that he was the survivor of McGuffie, late merchants trading under the firm of Grant and McGuffie; and alleges promises by Matheson to them in their lifetime, and by Matheson in his lifetime, and by his administrators, to the plaintiff, to pay the sums of money stated in the count, and alleges as a breach the nonpayment thereof, either to Grant and McGuffie in their lifetime or to the plaintiff since their decease. The count certainly is not drawn with entire technical precision and accuracy, but after verdict it must be taken to be sufficient for all the purposes of substantial justice.

But then it is said that if the first count is good, still the evidence offered at the trial was not sufficient to establish any partnership between Grant and McGuffie, and if the evidence did establish any case, it was a case within the scope of the second count, and not of the first. We think neither branch of the objection is maintainable. There was certainly evidence enough to go to the jury on this point, and the very instrument on which the suit was brought, *prima facie*, imported a partnership at least in these transactions; and the jury, by their verdict, must be presumed to have found the fact in the affirmative. In the next place, although the note was endorsed in blank by Grant and McGuffie, that endorsement was no proof that the

interest on the same had passed to Stewart, as alleged in the second count, and the possession of the due bill by Stewart was no necessary proof that he held it as owner in his own right. For aught that appears, he may have held them both solely in his capacity as administrator; and he had a right, and the sole right, to say in which

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capacity he elected to hold, as owner, or as administrator. He has elected the latter; and the evidence is sufficient to establish that right, *prima facie*. Besides, it can be of no concern to the plaintiff in error on which count the verdict is taken, for in either case it is equally a good foundation for a valid judgment against him, to the extent of the sums due thereon.

There is yet another view of this matter. The question of the amendment was a question of discretion in the court below upon its own review of the facts in evidence, and we know of no right or authority in this Court upon a writ of error to examine such a question, or the conclusion to which the court below arrived upon a survey of the facts, which seem to us to have belonged appropriately and exclusively to that court.

Upon the whole, in our opinion there is no error of the court below in the amendment and proceedings complained of, and the judgment is therefore

Affirmed with costs.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said circuit court, in this cause be, and the same is hereby affirmed with costs and damages at the rate of six percent per annum.

[[Footnote 1](#)]

2 Tidd's Practice, 1141, 9th edition 1828.

[[Footnote 2](#)]

See *also* 2 Tidd's Prac. 901, 9th ed., 1828.

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