Dickson Vs. Wilkinson

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Court : US Supreme Court

Decided On : 1845

Appeal No. : 44 U.S. 57

Appellant : Dickson

Respondent : Wilkinson

Judgement :

Dickson v. Wilkinson - 44 U.S. 57 (1845)
U.S. Supreme Court Dickson v. Wilkinson, 44 U.S. 3 How. 57 57 (1845)

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44 U.S. (3 How.) 57

ON CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE

CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

SYLLABUS

There was a judgment against an administrator of assets *quando acciderint.*

Upon this judgment a *scire fascias* was issued containing an averment that goods, chattels, and assets had come to the hands of the defendant.

Upon this *scire fascias* there was a judgment by default; execution was issued, and returned *nulla bona.*

A *scire facias* was then accorded against the administrator to show cause why the plaintiffs should not have execution *"de bonis propriis."*

It was then too late to plead that the averment in the first *scire facias* did not state that assets had come into the hands of the administrator subsequent to the judgment *quando.*

A judgment by default against an executor or administrator is an admission of assets to the extent charged in the proceeding against him.

If a party fail to plead matter in bar to the original action and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment, nor in a *scire facias.*

A demurrer reaches no further back than the proceedings remain *in fieri* or under control of the court.

All the facts which are necessary to an understanding of the point are stated in the certificate, as follows:

The plaintiffs, at September term, 1837, with the defendant's consent, had a judgment of assets *quando acciderint.* On 2 October, 1838, upon their suggestion of assets come to the defendant's hands, a *scire facias* was accorded them to be made known to the defendant to show cause why they should not have execution of those assets. This *scire facias* was issued on 10 January, 1839, and after reciting the judgment *quando* it contained the following, and no other, averment of the coming of assets to the defendants' hands:

"And whereas, afterwards, to-wit, on 2 October, 1838, it was suggested to the said court on behalf of the said plaintiffs that goods, chattels, and assets had come to the hands of the defendant sufficient to satisfy the said judgment, and it was thereupon ordered by said court that a *scire facias* issue, and we therefore hereby command you,"

&c.; This writ was made known to the defendant, and the plaintiffs thereupon, by his default, at September term, 1839, had judgment of execution of the intestate's goods in the defendant's hands to be administered, if so much, and if not, then the costs *de bonis propriis.* On 9 October, 1839, execution was issued accordingly and returned to March rules, 1840, *nulla bona* except as to the costs, which were levied *de bonis propriis.* A *scire facias* was now accorded against the defendant to show cause why the plaintiffs should not have execution of their demand *de bonis propriis,* and this writ was issued, made known to the defendant, and returned to September term, 1840, when he appeared and pleaded to it fully administered, and a special plea, that the insolvency of the intestate's estate has been suggested to the proper Tennessee authority, and a bill in equity filed in a state court to administer his effects according to the laws of Tennessee. To these pleas the plaintiffs demurred, and on the argument of the demurrer the defendant's counsel, against awarding execution *de bonis propriis,* showed for cause that the judgment by default upon the first *scire facias* did not establish the fact that any goods, &c.;, had come to the defendant's hands since the judgment of assets *quando acciderint,* because the said first *scire facias* did not aver that goods, &c.;, had come to the defendant's hands since the said judgment *quando,* but only that those goods had come to his hands, without saying when, and a judgment by default only admits such facts as are alleged;

Page 44 U. S. 59

that unless the record showed that assets had come to his hands since the said judgment *quando* and that such assets had been eloigned and wasted, no execution could issue against the defendant to be levied *de bonis propriis.* And the counsel for the plaintiffs insisted that advantage should have been taken of the alleged defect in the first *scire facias* as the term to which it was returnable, and

returned, by plea or demurrer; that the judgment by default was a waiver of errors in the process, and so that the said error, if it be one, could not be reached by the demurrer aforesaid.

"And upon said point, whether advantage could be taken of the aforesaid defective averment in the first *scire facias,* upon the plaintiff's demurrer to the defendant's pleas to the second *scire facias,* the opinions of the judges are opposed."

"And it is thereupon ordered that the foregoing statement of facts involving said point, upon which said disagreement occurs, made under the direction of the judges and at the request of the plaintiffs by their attorney, be certified to the supreme court for its opinion upon said point according to the act of Congress in that case made and provided. "

Page 44 U. S. 60

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

This case is brought before this Court upon a certificate of division of opinion of the Circuit Court for the Middle District of Tennessee.

The plaintiffs had judgment against the defendant for $1,169.88 debt and $110.94 damages.

"And it appearing to the satisfaction of the court by the admission of the plaintiffs that no assets of the intestate had come to the hands of the defendant,"

it was adjudged that the plaintiffs have "execution to be levied of the goods and chattels, and assets, which might thereafter come to the hands of the defendant to be administered." Upon this judgment a *fi. fa.* issued to be levied of the assets of the testator which might thereafter come to the hands of the defendant to be administered, which *fi. fa.* was returned by the marshal *nulla bona.* On 10 January, 1839, a *scire facias* issued against the defendant upon suggestion that assets of the intestate sufficient to satisfy the judgment had come to the hands of the defendant. Upon this *scire facias* there was judgment against the defendant by default, to be levied of the goods and chattels of the intestate in his hands to be

administered. A *fi. fa.* issued upon this judgment which was also returned *nulla bona.*

And thereupon another *scire facias* issued against the defendant to have judgment against him *de bonis propriis,* to which he pleaded first *plene administravit;* secondly, that no assets ever came to his hands; and thirdly, that the estate of the intestate was insolvent at the time the letters of administration were granted, and that in pursuance of the act of the general assembly in such case made and provided he had suggested to the clerk of the county court the insolvency of said estate &c.; To these pleas the plaintiffs demurred, and in argument the counsel for the defendant insisted

"That the judgment by default upon the first *scire facias* did not establish the fact that any goods, &c.;, had come to the hands of the defendant since the judgment of assets *quando acciderint,* because the said first *scire facias* did not aver that goods, &c.;, had come to the defendant's hands since the said judgment *quando;,* but only that said

Page 44 U. S. 61

goods, &c.;, had come to his hands, without saying when, and a judgment by default only admits such facts as are alleged. That unless the record showed that assets had come to his hands since the judgment *quando* and that such assets had been wasted, no execution could issue against the defendant to be levied *de bonis propriis.* "

And the counsel for the plaintiffs insisted

"That the alleged defect in the first *scire facias* should have been taken advantage of at the first term to which it was returnable by plea or demurrer, that the judgment by default was a waiver of errors in the process, and so the error, if it be one, could not be reached by the demurrer."

"And upon said point whether advantage could be taken of the aforesaid defective averment in the first *scire facias* upon the plaintiff's demurrer to the defendant's

pleas to the second *scire facias* the opinions of the judges were opposed."

A *scire facias* is an action to which the defendant may plead any legal matter of defense. And in this case the defendant might have pleaded the same matter in bar to the first *scire facias* which he offered to plead to the second. Or if he considered the first *scire facias* insufficient in law, he might have demurred to it. Having done neither, judgment by default was properly taken against him. And it is well settled that a judgment by default against an executor or administrator is an admission of assets to the extent charged in the proceeding against him, whether it be by action on the original judgment or by *scire facias. Ewing's Executors v. Peters,* 3 T.R. 685; *People v. Judges of Erie,* 4 Cow. 446. Failing to make the money out of the assets of the intestate on the first *scire facias,* the plaintiffs prosecuted the second to have judgment against the defendant, to be levied of his own proper goods &c.; To this he pleaded the three pleas before mentioned.

It is a universal rule of law that if the party fail to plead matter in bar to the original action and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment, nor in a *scire facias* (*see* the authorities above cited). The demurrer of the plaintiffs to the defendant's pleas was therefore well taken. And although either party may, on a demurrer, take advantage of any defect or fault in pleading in the previous proceedings in the suit, the demurrer can reach no further back than the proceeding remain *in fieri* and under the control of the court. The judgment on the first *scire facias,* although ancillary to the original judgment and the foundation of the proceeding on the second *scire facias,* was nevertheless a final judgment, and in that count conclusive upon the parties, and opposed an insuperable bar to any plea of either party, whether of law or of fact, designed to go beyond it.

It is the opinion of this Court, therefore, that advantage could not be taken of any defective averment in the first *scire facias* upon the demurrer of the plaintiffs to the pleas of the defendant, which is

" *Ordered to be certified to said circuit court.* "