Camden Vs. Doremus

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SooperKanoon Citation : sooperkanoon.com/79903

Court : US Supreme Court

Decided On : 1845

Appeal No. : 44 U.S. 515

Appellant : Camden

Respondent : Doremus

Judgement :

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Camden v. Doremus

44 U.S. (3 How.) 515

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF MISSOURI

SYLLABUS

Where a general objection is made in the court below to the reception of testimony, without stating the grounds of the objection, this Court considers it as vague and nugatory; nor ought it to have been tolerated in the court below.

Where at the time of the endorsement and transfer of a negotiable note, an agreement is made that the holder shall send it for collection to the bank at which it was on its face made payable, and in the event of its not being paid at maturity, should use reasonable and due diligence to collect it from the drawer and prior endorsers before resorting to the last endorser, the holder is bound to conditions beyond those which are implied in the ordinary transfer and receipt of commercial instruments.

Evidence of the general custom of banks to give previous notice to the payer of the time when notes will fall due was properly rejected unless the witness could testify as to the practice of the particular bank at which the note was made payable.

A presentment and demand of payment of the note at maturity, within banking hours, at the bank where the note was made payable was a sufficient compliance with the contract to send it to the bank for collection.

The record of a suit brought by the holder against the maker and prior endorsers was proper evidence of reasonable and due diligence to collect the amount of the note from them, and it was a proper instruction that if the jury believed that the prior endorsers had left the state and were insolvent, the holder of the note was not bound to send executions to the counties where these endorsers resided at the institution of the suit.

The diligent and honest prosecution of a suit to judgment with a return of *nulla bona* has always been regarded as one of the extreme tests of due diligence.

And the ascertainment, upon correct and sufficient proofs, of entire and notorious insolvency is recognized by the law as answering the demand of due diligence, and as dispensing with the more dilatory evidence of a suit.

If the holder cannot obtain a judgment against the maker for the whole amount of the note in consequence of the allowance of a setoff as between the maker and one of the prior endorsers, this is no bar to a full recovery against the last endorser, provided the holder has been guilty of no negligence.

The defendants in error were citizens of the State of New York and partners in trade under the name and style of Doremus, Suydams & Nixon. The plaintiff in error was the surviving partner of the mercantile house of John B. & Marbel Camden, which carried on business at St. Louis under the name and firm of J. B. & M. Camden. The plaintiff in error was sued in the court below as endorser of the following promissory note.

On 8 June, 1836, Ewing F. Calhoun executed this note, *viz.:*

"$4219 90"

"Twelve months after date, I promise to pay Judah Barrett, or order, four thousand two hundred and nineteen dollars and ninety cents, negotiable and payable at the Commercial Bank of Columbus, June 8, 1836."

"EWING F. CALHOUN"

"Mississippi + 1809 Columbus, Mississippi"

Which note was endorsed by Barrett to Sterling Tarpley, or order, by him to J. B. & M. Camden, or order, and by them to Doremus, Suydams, and Nixon, or order.

On 22 August, 1836, the plaintiffs and defendant entered into the following agreement:

"New York, August 22, 1836"

"Memorandum of an agreement and trade made by and between Doremus, Suydams & Nixon, of the City of New York, of the one part, and J. B. & M. Camden, of the City of St. Louis, of the other part, witnesseth:"

"Whereas the said Camdens have this day sold and assigned unto the said Doremus, Suydams & Nixon a note for four thousand two hundred and nineteen 90/100 dollars, payable twelve months after date, and dated the eighth day of

June, 1836, and negotiable and payable at the Commercial Bank of Columbus, Miss., executed by Ewing F. Calhoun to Judah Barrett, and endorsed by the said Judah Barrett and Sterling Tarpley and J. B. & M. Camden, now it is expressly understood and agreed by the contracting parties that the said Doremus, Suydams & Nixon are to send the said note to the said Commercial Bank of Columbus, Mississippi, for collection, and in the event of its not being paid at maturity, they are to use reasonable and due diligence to collect it of the drawer and two endorsers before they call upon the said Camdens; but in the event of its not being made out of them, then the said Camdens bind and obligate themselves, so soon as informed of the fact, to pay the said Doremus, Suydams & Nixon, the principal of the said note, together with its interest and all legal costs they may have incurred in attempting its collection."

"J. B. & M. CAMDEN"

"DOREMUS, SUYDAMS & NIXON"

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The note not being paid at maturity, suit was brought by the endorsers against the plaintiff in error as surviving partner of the endorsers J. B. & M. Camden.

Upon the trial of the cause, the plaintiff offered to read in evidence sundry depositions and also a voluminous record, which are all set forth in full in the first bill of exceptions but which it is impossible to insert here on account of their great length. They were,

1. The deposition of Thomas B. Winston, that he presented the note at the Commercial Bank of Columbus, and demanded payment thereof, which was refused; that payment was demanded on 10 June, 1837, because the day of payment fell on Sunday; that it was protested, and notices thereof sent to the first, second, and third endorsers.

2. The deposition of Ewing F. Calhoun, proving his own signature; the handwriting of the first and second endorsers; that he was sued at the first court after the note became due; that the suit was prosecuted as diligently as possible to a judgment and execution; that deponent continued to reside in Lowndes County, Mississippi, but that at the rendition of the judgment Barrett resided in South Carolina, and Tarpley in Texas; that Barrett and Tarpley were both insolvent, and had no property within the State of Mississippi, out of which to make the judgment, or any part thereof; that at the trial deponent was allowed a setoff against Tarpley, of about $1,500, which Tarpley owed deponent at the time of the commencement of the suit, and before he received notice of Tarpley's endorsement.

3. The deposition of Samuel F. Butterworth, that the suit was prosecuted as diligently as possible to judgment and execution; that at October term, 1838, a verdict was rendered for the plaintiffs, which was set aside; that in April, 1839, another verdict was rendered, which was also set aside; that in December, 1839, a verdict was rendered for only $3,498.46, upon which a *fieri facias* was issued, the statutes of the state not authorizing process against the person; that no property could be found out of which the execution or any part thereof could be made.

4. A document purporting to be a transcript of the record of the suit spoken of above, showing its progress up to the final return of the sheriff, which was as follows:

"The within named Ewing F. Calhoun, Judah Barrett, and Sterling O. Tarpley, have no goods or chattels, lands or tenements, within my county, whereof I can make the sums within mentioned, or any part thereof. March 28, 1842."

Each one of these papers was severally objected to by the defendant, but the court overruled the objection and permitted them to be read in evidence. The admission of these four papers constituted the ground of the first bill of exceptions.

Bill of exceptions No. 2.

"Be it remembered, that on the trial of this cause, the plaintiffs, in addition to the evidence in the former bill of exceptions in this case contained, examined Pardon D. Tiffany as a witness, who testified, that shortly before this suit was brought, as well as after, he had conversations with the defendant in relation to the claim of the plaintiffs against him, and the defendant told the witness that he had transferred the note in question in the present action to the plaintiffs, for goods purchased from them, and that at the time he transferred the note to the plaintiffs he was indifferent whether they took it or not, as he considered some of the parties thereto as good as George Collier (who is known to the court and jury as a very rich man). Witness did not know whether defendant saw the note or not. The witness received a copy of the record of the suit in Lowndes County, Mississippi, brought by the plaintiffs against Ewing F. Calhoun, the maker of the note, and Judah Barrett and Sterling Tarpley, the endorsers; but witness could not say whether he received the copy from Mr. Adams, the agent of the plaintiffs, or from the defendant, or from Mr. Gamber, the counsel of the defendant. The defendant in his conversation with witness was aware of the nature of the plaintiffs' claim against him, and objected to the claim, alleging that the plaintiffs had not used due diligence to collect the amount of the note; he did not say that if he were satisfied that diligence had been used he would pay the claim, but he did say, that he was not bound to pay, and would not pay the claim, but made no other objection to the claim but want of diligence."

The plaintiffs next gave in evidence an act of the Legislature of the State of Mississippi, entitled "an act to abolish imprisonment for debt," approved February 15, 1839, which act the parties here in open court agree may be read in any court in which this cause may be pending, from the printed statutes of the State of Mississippi.

The plaintiffs then proved the handwriting of the defendant to the following letter addressed to the plaintiffs, and read the same in evidence to the jury in the words following:

"Saint Louis, October 24, 1839"

"Messrs. DOREMUS, SUYDAMS & NIXON, New York: "

"GENTS: Your favor of the 11th inst. is received, and contents noted. It is quite out of our power to send you any New Orleans bills for your note on E. F. Calhoun. We trust you will before long receive a judgment for the entire debt, interest and cost, and that you will find by the virtue of an execution that 'insolvency has not passed upon them all.' Those who have gone to Texas may yet make a great rise in that fine country. We regret that the note has been so difficult of collection. We scarcely know which, you or we, made the worst trade; we have many of the goods on hand we got for it."

"Your friends,"

"J. B. & M. CAMDEN"

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"Your message to Mr. Homans, cashier, has been attended to, and delivered."

It was admitted by defendant's counsel that the endorsements on the note given in evidence were filled up in the handwriting of Josiah Spalding, the counsel of the plaintiffs in this action, for the purposes of this suit. It was also admitted that the laws of the State of New York placed the liability of endorsers upon promissory notes on the same footing with the liability of endorsers upon inland bills of exchange under the general law merchant.

The plaintiffs having here closed their case, the defendant produced one William C. Anderson as a witness, who, being sworn, testified that he had been employed in several banks, and had conducted one in St. Louis himself; that the practice in banks in relation to notes deposited with them for collection, was to give notice to the payer of the note that it was in the bank, and when it would become due; that the effect on the credit of a payer, if a failure to pay the note when it became due, was different in eastern and western banks. In banks at the east, paper deposited for collection was considered almost as sacred as paper discounted by the banks,

and a failure to pay would stop the accommodation of the payer at the bank; but in the western banks, the effect of permitting collection paper to lie over was not of much consequence to the credit of the payer. The defendant's counsel having asked the witness, whether a note presented at a bank for payment on the last day of grace, by a notary public, would be considered as having been sent to the bank for collection, within the meaning of the contract between plaintiffs and defendant, the question was objected to by the plaintiffs' counsel, and the court not only refused to allow the question to be answered, but rejected all testimony given by the witness, or which might be given, in relation to the practice of banks on notes deposited for collection, unless the witness could testify as to the practice or usage of the Commercial Bank of Columbus, mentioned in the note of Calhoun, to which opinion of the court the defendant, by his counsel, excepts.

Instructions asked by defendant.

"The defendant, by his counsel, moved the court to instruct the jury that the plaintiffs were bound to send the note of Ewing F. Calhoun, endorsed by Judah Barrett and Sterling Tarpley, to the Commercial Bank of Columbus, Mississippi, for collection, and that unless it is proved to the satisfaction of the jury that this was done by the plaintiffs, they must find for the defendant; which instruction was given to the jury by the court, with this explanation: that if the jury believes the note was presented at the bank, and had [?] there, by the agent of the plaintiffs, at the banking hours on the day it fell due, so as to be a valid demand on the maker, then it was duly at the bank, as required by the contract sued on. To which explanatory instruction the defendant by his counsel excepts. "

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"The defendant, by his counsel, further moved the court to instruct the jury that the plaintiffs were bound to use diligence by suit against Calhoun, the maker of the note, and Barrett and Tarpley, the endorsers thereof, in order to collect the money, and that if the plaintiffs neglected to prosecute their action with diligence against either of said parties, the defendant is not responsible on his endorsement of the note in question, which instruction was given by the court."

"The defendant by his counsel then moved the court to instruct the jury that the record from the Circuit Court of Lowndes County, given in evidence, does not show due diligence by suit against Calhoun, the maker, and Barrett and Tarpley, the endorsers, of the note in question, which instruction the court refused to give and in lieu thereof instructed the jury that so far as the record goes, it does show due diligence on part of the plaintiffs, and if the jury believe from the evidence given in addition to the record that the two endorsers had left the State of Mississippi, and were insolvent, and had left no property in that state at the time the judgment was rendered, that the plaintiffs were not bound to cause executions to be sent to the counties where the endorsers respectively resided at the time they were sued. To which opinions of the court, in refusing the instruction asked by the defendant as last above mentioned, and in giving the instruction in lieu thereof which was given by the court, the defendant, by his counsel, excepts."

"The defendant by his counsel then moved the court to instruct the jury that the plaintiffs, under the law of Mississippi, were entitled to a judgment against Tarpley for the full amount of the note notwithstanding any payment or setoff between Calhoun, the maker of the note, and Tarpley, the endorser, and that if the plaintiffs have neglected to assert their right to such judgment and have suffered a judgment by their neglect to pass for a smaller amount, the defendant is discharged by such neglect for all accountability for the sum thus lost, which instructions the court refused to give because the record from Mississippi furnished all the evidence on the subject to which this instruction refers, and no negligence appears from said record in prosecuting the suit against Tarpley, to which opinion of the court the defendant by his counsel excepts. And the defendant by his counsel prays the court to sign and seal this his bill of exceptions, and that the same may be made part of the record, which is done."

"J. CATRON [L.S.]"

"R. W. WELLS [L.S.]"

MR. JUSTICE DANIEL delivered the opinion of the Court.

No question has been raised on this record in reference to the original character of the instrument on which the action was founded as a negotiable and commercial paper nor in reference to the duties and obligations of the parties arising purely from their positions as parties to such a paper. And for aught that the record discloses, every requirement of the law merchant with respect to the note or

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with respect to the rights of the endorsers thereof appears to have been fulfilled. Presentment at maturity and within due time was made at the Bank of Columbus, Mississippi, and payment there demanded; the failure to make payment was followed by regular protest and by like notice to all the endorsers. The exceptions specifically urged by the defendant in the court below, and pressed in his behalf before this Court, grow out of an agreement signed by the firm of the Camdens and by the defendants in error at the time that the note of Calhoun was endorsed by the former to the latter, and which agreement, it is contended, bound the defendants in error to undertakings and acts beyond the usual duties incumbent upon endorsers and holders of negotiable paper, and without the fulfillment of which no right of recovery against the plaintiffs in error could arise. Before entering upon an examination of this agreement and of the questions which it has given rise to, it is proper to dispose of an objection by the defendant in the court below, which seems to have been aimed at the entire testimony adduced by the plaintiffs, but whether at its competency, or relevancy, or at its regularity merely that objection nowhere discloses. After each deposition offered in evidence by the plaintiffs to the jury, it is stated that to the reading of such deposition the defendant by his counsel objected, and that his objection was overruled. A similar statement is made with regard to the record of the suit instituted in the court of Hinds County against Calhoun, the maker of the note, and offered in this cause as proof of due diligence. With regard to the manner and the import of this objection we would remark that they were of a kind that should not have been tolerated in the court below pending the trial of the issue before the jury. Upon the offer of testimony oral or written, extended and complicated as it may often prove, it could not be

expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view. It would be more extraordinary still if, under the mask of such an objection or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on, and which, if they had been openly and specifically alleged, might have been easily cured. 'Tis impossible that this Court can determine or do more than conjecture, as the objection is stated on this record, whether it applied to form or substance, or how far, in the view of it presented to the court below, if any particular view was so presented, the court may have been warranted in overruling it. We must consider objections of this character as vague and nugatory, and, if entitled to weight anywhere, certainly as without weight before an appellate court.

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Recurring to the agreement signed by the parties at the time of the transfer of the note, and to the instructions given and refused at the trial, with respect both to that agreement and the proceedings had in fulfillment thereof, we will remark, as to the agreement itself, it is clear that it bound the endorsees to conditions beyond those which are implied in the ordinary transfer and receipt of commercial instruments. Their obligations, therefore, to these endorsers could by no means be fulfilled by a compliance with such usual conditions. The language of the agreement is explicit. The said Doremus, Suydams & Nixon were to send the note passed to them to the Commercial Bank of Columbus, Mississippi, for collection, and in the event of its not being paid at maturity, they were to use reasonable and due diligence to collect it of the drawer and two previous endorsers before they were to call upon the said Camdens &c.; The obligation of the plaintiffs, as endorsees and holders, would have been fulfilled by regular demand, protest, and notice; from these a right of action would immediately have accrued. But the condition stipulated in the agreement is that before they can have any right to make demand upon their endorsers, they shall diligently endeavor to collect of the maker and previous

endorsers. With the view of showing a failure in the plaintiffs in fulfilling their contract, and of deducing therefrom their own exemption from responsibility, the defendants first offered a witness to prove a difference in the practice prevailing in eastern and western banks with respect to the management of paper deposited with them for collection; and inquired of the witness whether a note presented at a bank for payment on the last day of grace by a notary public would be considered as having been sent to the bank for collection, within the meaning of the contract. This question, on motion of the plaintiff's counsel, the court refused to allow, and rejected all testimony by the witness in relation to the practice of banks as to notes deposited for collection unless the witness could testify as to the practice or usage of the Commercial Bank of Columbus. The ruling of the court on this point we think was proper. The note was made payable at the Commercial Bank of Columbus; by the agreement between the parties, it was moreover expressly stipulated that it should be sent to that bank for collection; if, then, any custom or practice other than general commercial usage were to control the management of the note, it was the usage of the Bank of Columbus, certainly not the particular usage of other banks not mentioned in the contract, and perhaps never within the contemplation of the parties to that contract. The next exception is taken upon an instruction asked of the court to the jury that unless it was proved to their satisfaction that the note was sent to the Bank of Columbus for collection by the plaintiffs, they must find for the defendant. The court responded affirmatively to the proposition that the note should have been sent to the Bank of Columbus for collection, but declared

its opinion that by presentment and demand of payment of the note at maturity by the plaintiffs at the said bank, within banking hours, so as to make a legal demand on the makers, the requirement of the contract in this particular would be complied with. A nice distinction might be made between the language of the agreement and that of the instruction given upon this point. The distinction, however, we should deem to be more apparent and verbal than substantial, and not to be applicable either to the intention of the parties or to the real merits of the case. The note was payable at the Commercial Bank of Mississippi. The maker of the note

resided in the county in which the bank was situated; the endorsers Barrett and Tarpley, who were to be looked to for payment before proceeding against the Camdens, were also residents of the State of Mississippi. Every party upon the note must be presumed to have been cognizant of its character and to have known when and were it was payable, and was bound to prepare for his respective responsibility arising from his undertaking. Other notice than that to which the law entitled him from his peculiar position upon the note he had no right to claim. It would be going too far, then, to imply any other right or to admit it upon ground less strong than that of express and unequivocal contract. The language of the agreement we hold not to amount to this, and as being satisfied with the interpretation that the note should be regularly presented and payment thereof demanded at the Commercial Bank of Columbus, simply as one of the means of collection to be adopted before recourse should be had to the last endorsers.

But it has been contended that, had the note been placed under the management of the bank itself, notice might have been given by the bank to the maker and prior endorsers before the maturity of the note, and that thereby provision might have been made to meet it when due. In reply to this argument it may be said that the agreement itself expresses no such purpose or object, in requiring the note to be sent to the bank, and we do not think that such an object is necessarily implied in the requisition. In the next place, there is no proof that the bank would have given notice to the maker and endorsers, previously to the maturity of the note; nor is there anything in the record to show that this would have been in accordance with its practice in similar cases. Under the silence of the contract itself, and in the absence of proof *dehors* the agreement, we are not at liberty to set up a presumption which neither the language of the agreement nor justice to the parties imperatively calls for.

The defendants also excepted to the opinion of the court, given upon a prayer to instruct the jury, that the record of the suit by the plaintiffs, against the maker and prior endorsers of the note, did not show due diligence as to those parties. This instruction the court refused, but in lieu thereof instructed the jury that the record was proper evidence to show due diligence on the part of the plaintiff,

and that if they believed, from the evidence submitted in addition to the record, that the endorsers Barrett and Tarpley had left the State of Mississippi, were insolvent, and had left no property in the state at the time of the judgment in the said record, the plaintiffs were not bound to send executions to the counties in which those endorsers respectively resided at the time when suit was instituted against them. This Court can conceive no just foundation for this exception to the ruling of the circuit court. The condition to which the plaintiff was pledged was the practice of due -- that is, proper, just, reasonable -- diligence, not to the performance of acts which were obviously useless and from which expense and injury might arise, but from which advantage certainly could not. The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona,* has always been regarded as one of the extreme tests of due diligence.

This phrase and the obligation it imports may be satisfied, however, by other means. The ascertainment, upon correct and sufficient proofs, of entire or notorious insolvency is recognized by the law as answering the demand of due diligence and as dispensing under such circumstances with the more dilatory evidence of a suit -- evidence which, in instances that it may be easy to imagine, might prove prejudicial alike to him who should exact, and to him who would supply it. *Dulany v. Hodgkin,* 5 Cranch 333; *Violet v. Patten,* 5 Cranch 142; *Yeaton v. Bank of Alexandria,* 5 Cranch 49. We hold therefore that both as to the instruction refused and as to that which was given upon this prayer, the decision of the circuit court was correct.

We come now to the last exception taken to the opinion of the circuit court upon the points presented to it. The defendant in that court insisted that by the law of Mississippi, the plaintiffs were entitled to a recovery of the full amount of the note against the maker and endorsers, subject to no setoff between the maker and endorsers, and that if the plaintiffs had, by their neglect, permitted a judgment for a smaller amount, the defendant was discharged from all accountability for the sum thus lost. The court refused so to lay down the law, because the record from the court in Mississippi furnished the only evidence to which the instruction prayed for

referred, and no negligence appeared from the record in the prosecution of the suit against the defendants thereto. This refusal of the court was clearly right, and the reason assigned for it is quite satisfactory. The question to which the instruction asked was designed to apply was that of due diligence. The timely and *bona fide* prosecution of a suit is perhaps the highest evidence of due diligence. If, in the conduct of that suit, the party should be impeded or wronged by an erroneous decision of the tribunal having cognizance of his case, that wrong could on no just principle be imputed to him as a fault. It certainly does not tend to show him to have been the less diligent

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in the pursuit of his claim, and least of all should he be prejudiced thereby when the error insisted on has been induced by the person who seeks to avail himself of its existence.

Upon the whole, we consider the rulings of the circuit court, upon the several points before it, to be correct; its judgment is therefore

Affirmed.