United States Vs. Boyd

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Appellant : United States

Respondent : Boyd

Judgement :

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United States v. Boyd

46 U.S. (5 How.) 29

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SYLLABUS

The Act of Congress, passed on 24 April, 1820, 3 Stat. 566, which substituted cash payments in lieu of credit sales of the public lands, made no exception in favor of the receiver. If he can purchase at all, it must be by placing his own

money with the other moneys which he holds in trust for the government.

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The returns of the receiver to the Treasury Department are not conclusive evidence in an action by the government against the sureties upon the receiver's bond. If the sums of money stated in such returns were not actually in the hands of the receiver, the sureties are allowed to show how the fact was.

The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them.

An instruction given by the court below, *viz.,* that if the jury believed that a fraudulent design existed on the part of the receiver and an agent of the government to conceal defalcations existing prior to the date of the bond, then the bond was fraudulent and void, was erroneous.

The condition of the bond was prospective, and fraud in respect to past transactions, not within the condition, could not render the instrument void prospectively.

Nor should the acts and declarations of the agent of the government have been allowed to be given in evidence, without first establishing his agency.

Secondary proof of the contents of a letter of appointment should not have been received, without first accounting for the nonproduction of the original.

Where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder, this Court cannot be asked to decide upon the demurrer. The point was waived by the filing of the amended rejoinder.

If a judgment for costs be given against the United States by the court below, it must be reversed, as the United States are not liable for costs.

This case was formerly before the Court, and reported in 40 U. S. 15 Pet. 187.

The following statement of the case was made out by MR. JUSTICE NELSON, and prefixed to the opinion of the court.

The plaintiffs brought an action of debt against the defendants in the court below, upon a receiver's bond, in the District of Mississippi, for defalcation in office, and in which the latter obtained the verdict.

The declaration was in the usual form for the penalty, to which several of the defendants, after craving oyer, pleaded performance. The bond bore date 15 June, 1837, in the penalty of $200,000, and after reciting that Boyd had been appointed receiver for the term of four years from 27 December, 1836, the condition was that he should faithfully execute and discharge the duties of the office.

The plaintiffs in their replication assigned for breach, that after 27 December, 1836, and while he was receiver, and as such, the said Boyd received divers large sums of the public moneys, amounting to the sum of $59,622.60, and which he had failed and neglected to pay over to the government.

To this replication the defendants demurred, and therefore the plaintiffs put in an amended replication, and in which a second breach was assigned, alleging that the said Boyd, after 27 December, 1836, and on divers days and times between that day and 30 December, 1837, while he was receiver of the public moneys, and as such received divers large sums of the public moneys, amounting in the whole to the sum of $59,622.60, and

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further, that this sum remained in the hands of the said Boyd, as such receiver, on 30 September, 1837, and that he then and there wholly failed and neglected to pay over the same.

To this amended replication the defendants demurred, and assigned for causes:

1. That the breaches set forth did not state the time when the said Boyd, as such receiver, received the moneys mentioned therein; nor whether the said sum was received before or after the day of the date of the bond.

2. That the said breaches did not state that the said Boyd failed or neglected to pay over the money received by him as such receiver, at any time after the date of the bond.

The plaintiffs joined a demurrer, and the court below gave judgment for the defendants. The cause came up to this Court on a writ of error, upon which the judgment was reversed and the case remanded for further proceedings.

When the cause came back to the court below, Boyd, after craving oyer, pleaded separately performance, and to the replication assigning breaches he rejoined, setting forth a former recovery in assumpsit in bar of the action against him -- to which the plaintiff answered *nul tiel record.* This issue being found for the defendant, he was discharged without day.

The other defendants then put in a rejoinder to the amended replication of the plaintiffs, and alleged that the said Boyd did not, as a receiver, receive any public moneys at the time of the execution of said bond or at any time thereafter and before the commencement of the suit, and that no public moneys of the United States for the payment of which the defendants were chargeable by virtue of their bond remained in the hands of the said Boyd as such receiver at the time of the execution of the bond or at any time thereafter and before the commencement of the suit, which the said Boyd had failed or neglected to pay over to the government.

To this rejoinder the plaintiffs demurred, and the defendants joined in the demurrer. The court below gave judgment for the plaintiffs, but allowed the defendants to amend, which was done accordingly; and in the amended rejoinder they aver that no public moneys of the United States came to the hands of the said Boyd as such receiver after the execution of the said bond, nor were there any such public moneys for the payment of which the defendants were chargeable by

virtue of the said bond, received by him prior to the execution of the same, remaining in the hands of said receiver in his official capacity at the time of the execution of said bond, or at any time thereafter, which had not been paid or accounted for according to law, before the commencement of the suit, upon which issue was taken.

On the trial the plaintiffs gave in evidence two Treasury transcripts, one dated Feb. 27, 1838, adjusting a balance against Boyd, as

receiver, of $59,622.60, due to the government on 30 Sept., 1837, the other dated Sept. 17, 1838, adjusting a like balance against him of that date.

The plaintiffs also gave in evidence the returns of Boyd, as such receiver, to the Treasury Department, containing the account current as kept by him with the government, covering a period from Dec. 31, 1836, to Sept. 25, 1837, and which agreed substantially with the balance due, as shown by the Treasury transcripts. They were made monthly to the department.

Upon this the plaintiffs rested.

The defendants then proved that no lands had been entered or sold at the office of the registers at Columbus, or receiver's certificates issued by the receiver (Boyd) after 29 May, 1837. The last tract of land sold was entered on that day. This was proved by the register and confirmed by the records on file in the land office.

It was further proved that while the sales of the public lands were going on at Columbus, and in the month of January or February, 1837, Boyd permitted one Pearle to enter lands to the amount of some $12,000 or $15,000, without paying any money for the same, taking only his checks upon the Planters' Bank in the vicinity, which were uniformly dishonored as soon as presented for payment.

It further appeared that Boyd himself, while such receiver, and before the execution of the bond in question, made entries in his own name and in the name of others for his benefit, of a large quantity of the public lands at the register's

office, and gave the usual certificates for that purpose without paying for the same except by simply charging himself in his accounts with the receipt of so much money.

In the course of the trial, evidence was given that a person by the name of Garesche appeared at Columbus, in May, 1837, claiming to be an agent from the Land Office Department authorized to examine the books and accounts of certain land offices, of which that at Columbus was one; he produced a letter from the department of his appointment, which was recognized as genuine, and thereupon the offices of the register and receiver were examined. The defalcation of Boyd was discovered by the agent, who communicated it to the register, but enjoined secrecy.

The counsel for the plaintiffs objected to the competency of the evidence offered to prove the agency of Garesche, but the objection was overruled, and the decision of the court excepted to.

The defendants then offered Boyd, the receiver, as a witness, and with a view to remove all objections, on the ground of interest, releases were executed from them to him, discharging him from all liability in case a judgment should be rendered against them. They also produced a certificate of the clerk, stating that an amount of money had been deposited in court by Cocke, one of the

defendants, to cover all costs, and also a release by the said Cocke to the other defendants, discharging them from contribution.

The witness was still objected to, but admitted, to which decision the counsel for the plaintiffs excepted.

In the course of the examination of this witness, an objection was taken to his testimony going to prove that he had no moneys in his hands belonging to the United States at the date of the bond on the ground it would be in contradiction of the statements contained in his official returns to the Treasury Department. The

objection was overruled and the testimony admitted, to which decision the counsel excepted.

The witness testified that he had no money in his lands, as receiver, or otherwise, in court for the United States at the date of the bond, and that he had so informed Garesche, the agent, before the execution of the same, and that after the execution he had paid over all moneys which he had received.

The testimony here closed, and the counsel for the plaintiffs prayed the court to instruct the jury:

1. That the official returns of the receiver to the Treasury Department were conclusive against the sureties.

2. That there was no sufficient legal evidence before the jury of the agency of Garesche.

3. That fraud could not be imputed to the United States.

And the counsel for the defendants prayed the court to instruct the jury:

1. That if the jury found that the balance claimed by the United States from Boyd arose from his returns, as receiver, of entries of public lands, made by him and others, prior to the execution of the bond, and that no money had been paid for the same on such entries before or after the execution of said bond, and that the entries had been made unlawful without payment, then the sureties were not liable.

2. That the facts stated in the transcripts to the returns made by Boyd of moneys on hand were not conclusive against the defendants, but might be explained, contradicted, or disproved by the evidence.

3. That if the jury believed that the balance claimed by the United States arose out of moneys received by Boyd before the execution of the bond, and that the same was not held by him as receiver, in trust for the government, at or after the execution of the bond, but had been used, wasted, or converted by him to his own

use prior to said execution, then the sureties were not liable.

The court charged the jury that the evidence on the part of the plaintiffs made out a *prima facie* case, but that if they believed from the whole evidence that the defalcation of Boyd arose from the entry of lands in his own name and in the name of others without payment

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of money for the same, and previous to 15 June, 1837, the date of the bond, the sureties were not responsible.

The court further charged the jury that if they believed from the evidence that a fraudulent design existed on the part of Boyd and Garesche to conceal the fact of Boyd's defalcation from the sureties until they should execute the bond, and that such design was communicated to the Secretary of the Treasury, and his answer received before the actual execution of the bond, that then the bond would be fraudulent and void and the sureties not liable.

To the instructions as given and also to the refusal of the court to give the constructions as prayed for the counsel for plaintiffs excepted. The jury found a verdict for the defendants.

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MR. JUSTICE NELSON, after reading the statement in the commencement of this report, proceeded to deliver the opinion of the Court.

When this cause was formerly before the Court, involving a question arising out of the pleadings, it was held, that the condition of the bond was prospective, and subjected the sureties to liability only in case of default or official misconduct of the principal occurring after the execution of the instrument, and that if intended to cover past dereliction of duty, it should have been made retrospective in its language; that the sureties had not undertaken for past misconduct. 40 U. S. 15 Pet. 187.

The case is now before us after a trial on the merits, and the question is whether or not any breach of duty has been established, which entitled the government to recover the amount in question, or any part of it, against the sureties within the condition of the bond as already expounded.

Since the verdict rendered under the instruction given by the court below, we must assume that the whole amount of the $59,622.60, of which the receiver is in default to the government, accrued against him in consequence of the entry of public lands in his own name and in the name of others without the payment of any money in respect to the tracts entered in his own name, and without exacting payment of others, in respect to the tracts entered in their names, and all happening before 15 June, 1837, the date of the bond. So the jury has found.

The fraud thus developed was accomplished at the time by means of false certificates of the receipt of the purchase money by the receiver, which were given by him in the usual way, as the entries for the several tracts of land were made at the register's office, and also by entering and keeping the accounts with the government the same as if the money had been actually paid as fast as the lots were entered. The monthly or quarterly returns to the proper department would thus appear unexceptionable, and the fraud concealed until payment of the balances should be called for by the government.

According to the finding of the jury, therefore, the whole of the money, of which the receiver is claimed to be, and no doubt is, in default, and for which the sureties are and ought to be made responsible, were not only not in his hands or custody at the time of the execution of the bond, but in point of fact never had been in his hands at any time before or since. No part of it was ever received by anybody. The whole of the account charged was

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made up by means of fabricated certificates of the receiver, and false entries in his returns to the government.

The Act of Congress of 24 April, 1820, 2, 3 Stat. 566, provides

"That credit shall not be allowed for the purchase money on the sale of any of the public lands which shall be sold after the first day of July next, but every purchaser of land sold at public sale thereafter shall, on the day of the purchase, make complete payment therefor, and the purchaser at private sale shall produce to the register of the land office a receipt from the Treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase money on any tract, before he shall enter the same at the land office."

The acts of the receiver out of which the defalcation in question arose were in direct violation of this provision of law, and constituted a breach of official duty, which made him liable at once as a defaulter to the government, and would have subjected his sureties upon the official bond, if one had been given, covering this period. It was doubtless by some accident that the bond was omitted, as it will be seen by reference to the Acts of Congress, 3 March, 1833, 5, 4 Stat. 653, and 3 March, 1803, 4, and 10 May, 1800, 6, 2 Stat. 75, 230, that a bond with sufficient sureties should have been given by the receiver before he entered upon the duties of his office.

It is clear, therefore, that the defalcation had accrued and Boyd had become a defaulter and debtor to the government before the present sureties had undertaken for his fidelity in office, unless we construe their obligation to be retrospective and to cover past as well as future misconduct, which has already been otherwise determined.

Whether a receiver can purchase the public lands within his district in his own name or in the name of others for his benefit while in office, consistent with law and the proper discharge of his official duties, it is not now necessary to express an opinion.

The register is expressly prohibited, Act of Congress, 10 May, 1800, 10, 2 Stat. 77, and it would have been as well if the prohibition had included the receiver.

One thing, however, is clear, and which is sufficient for the purpose of this decision, the act of Congress, forbidding the sale of the public lands on credit,

makes no exception in favor of any officers. He must purchase, if he purchases at all, upon the terms prescribed. If this is impracticable, it only proves that the duty of the receiver is inconsistent and incompatible with the duty of the purchaser, which might amount to a virtual prohibition. But if otherwise, and the receiver allowed to purchase, the money must be paid over as in the case of other purchasers, and deposited at the time of the purchase with the other moneys received and held by him in trust for the government. The public moneys in his hands constitute

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a fund which it is his duty to keep and which the law presumes is kept, distinct and separate from his own private affairs. It is only upon this view that he can be allowed to purchase the public lands at all consistently with the provisions of the act of Congress.

It has been contended that the returns of the receiver to the Treasury Department after the execution of the bond, which admit the money to be then in his hands to the amount claimed, should be conclusive upon the sureties. We do not think so. The accounts rendered to the department of money received, properly authenticated, are evidence in the first instance of the indebtedness of the officer against the sureties, but subject to explanation and contradiction. They are responsible for all the public moneys which were in his hands at the date of the bond or that may have come into them afterwards and not properly accounted for, but not for moneys which the officer may choose falsely to admit in his hands in his accounts with the government.

The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them. The principle has been asserted and applied by this Court in several cases.

If the case had stood upon the first instruction of the court below, and to which we have already adverted, there would be no difficulty in affirming the judgment. But

the second instruction was erroneous.

The court charged that if the jury believed from the evidence that fraudulent design existed on the part of Boyd and Garesche to conceal the fact of the former's defalcation from the sureties until they had executed the bond, and that such design was communicated to the Secretary of the Treasury, and his answer received before the execution, in that case the bond would be fraudulent and void and the sureties not liable.

Now in the first place, there is no evidence in the case, laying a foundation for the charge of fraud in the execution of the bond, in the view taken by the court as matter of fact, and therefore the construction was improperly given. And in the second place, if there had been, inasmuch as the condition of the bond is prospective, any fraud in respect to past transactions not within the condition, which is the only fraud pretended, could not upon any principles have the effect of rendering the instrument null and void in its prospective operation. We may add also that so far as the agency of Garesche was material in making out the allegation of fraud for the purpose of defeating the action, the proof was altogether incompetent. His acts and declarations for the purpose were admitted without previous evidence of his appointment as agent, and also secondary proof of the contents of a pretended letter of appointment, without first accounting for the nonproduction of the original.

Before a party can be made responsible for the acts and declarations of another, there must be legal evidence of his authority to act in the matter.

The counsel for the defendants ask the court to revise the judgment of the court below, rendered upon the demurrer to the rejoinders of the defendants to the plaintiffs' amended replication, overruling the demurrer, insisting that the rejoinder was good and that judgment should have been rendered for the defendants.

The answer to this is that the withdrawal of the demurrer and going to issue upon the pleading operated as a waiver of the judgment.

If the defendants had intended to have a review of that judgment on a writ of error, they should have refused to amend the pleadings and have permitted the judgment on the demurrer to stand.

Another ground upon which the judgment must be reversed is that a judgment for costs was rendered against the plaintiffs. The United States are not liable for costs.

Some other points were made in the course of the trial, but it is unimportant to notice them.

Judgment of the court below reversed, with a venire de novo.

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 Mississippi 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 reversed, and that this cause be and the same is hereby remanded to the said circuit court with directions to award a *venire facias de novo.*