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Decided On : 1848

Appeal No. : 47 U.S. 23

Appellant : Bailey

Respondent : Dozier

Judgement :

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Bailey v. Dozier

47 U.S. (6 How.) 23

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SYLLABUS

Where a bill of exchange is presented for acceptance or payment, which is refused, it is sufficient if the officer who presents it makes a note at the time of the facts which occurred on presenting the bill. The formal protest may be drawn up

afterwards, at the convenience of the notary.

Under the laws of Mississippi, a protest is not essential to enable the endorsee of an inland bill of exchange to recover the amount of it. The statute of Mississippi is similar to the English statutes of 9th and 10th of William III, and 3d and 4th of Anne, and must receive the same construction with them.

Before those statutes, the endorsee of an inland bill had a right to recover the amount of it from the drawer. This right was not taken away by them, but they gave an additional right to interest and damages.The common law right remains.

If a plea to the jurisdiction and a plea of *nonassumpsit* be put in, and the issue be made up on the latter plea only, no notice being taken of the former, and upon this state of the pleadings the cause goes on to trial, the plea to the jurisdiction is considered as waived.

Although the declaration began with an averment that the drawer and endorser were citizens of the same state (which, of course, would oust the jurisdiction of the circuit court), yet as it afterwards averred that the endorser, who was also the payee, was an alien and citizen of Texas, this was sufficient to maintain the jurisdiction.

The facts were these.

On 18 January, 1838, the following inland bill was drawn.

"$2,670 *Paulding, 18 January, 1838* "

"Twelve months after date of this my first and only bill of exchange, pay to the order of John D. Fatheree two thousand six hundred and seventy dollars, for value received, and place the same to account of your ob't servant,"

"WILL. B. DOZIER"

"Mr. PIERSON LEWIS,"

" *Jackson, Mississippi* "

"Endorsed -- J. D. FATHEREE"

"Accepted -- PIERSON LEWIS"

Being endorsed by Fatheree and accepted by Lewis, it passed into the hands of Bailey, the plaintiff in error.

On 21 January, 1839, when the bill became due, it was presented and protested for nonpayment, under the circumstances which will presently be stated.

In April, 1841, Bailey brought suit in the circuit court of the United States against Dozier and Fatheree, who were both alleged in the writ to be citizens of Mississippi, Bailey being stated to be a citizen of Virginia. The declaration commenced with stating that Dozier and Fatheree were both citizens

of Mississippi, but afterwards, in reciting the bill, said,

"and then and there requested the said Lewis to pay, twelve months after the date of said bill of exchange, to John D. Fatheree, who is an alien and resident of the Republic of Texas,"

&c.; The declaration contained also counts for money "lent and advanced," "paid, laid out, and expended," and "had and received."

To this the defendant pleaded two pleas. The first was as follows:

"And the said defendant, William B. Dozier, in his own proper person, comes and says, that this Court ought not to have or take further cognizance of the action aforesaid, as to him, said Dozier, because he says that the said bill of exchange, in the plaintiff's declaration mentioned, was drawn in the State of Mississippi, to-wit, at Paulding, in Mississippi, payable at Jackson, in the said State of Mississippi, and that the drawer and endorser and acceptor thereof were, and yet are, citizens and resident in the State of Mississippi; and said bill is not a foreign bill of exchange; and this the said William B. Dozier is ready to verify; wherefore he

prays judgment, whether this Court can or will take further cognizance of the action aforesaid."

"And for further plea in this behalf, the said William B. Dozier says, that this Court ought not to have or take further cognizance of this action, because he says that the said William Bailey, the plaintiff, is a citizen of the State of Mississippi, to-wit, of the County of Rankin, in said state, and this he is ready to verify; wherefore he prays judgment, whether this Court can or will take further cognizance of the action aforesaid."

The second plea was *nonassumpsit.*

The record showed that the plaintiff joined issue upon the last plea, without taking any notice of the first.

In May, 1843, the cause went to trial, upon this state of the pleadings, after a discontinuance had been entered as to Fatheree, when the jury, under instructions given by the court, found a verdict for the defendant.

The bill of exceptions taken by the plaintiff, after reciting the bill and protest by David H. Dickson, calling himself a justice of the peace and *ex officio* notary public, proceeded thus:

"The plaintiff then introduced David H. Dickson, the notary, as a witness, who, being first duly sworn, stated on oath, that, on the day the bill fell due, he went to the Union Bank in Jackson, and demanded payment of said bill of the teller of said bank, and was answered by him that there were no funds in the bank to pay said bill. Witness did not know where said Pierson Lewis, the acceptor, lived, but on coming out of

the bank a person was pointed out to him as said Lewis, the acceptor of the bill. Whereupon witness demanded payment of said Lewis, who answered that he could not pay the same. Whereupon witness protested said bill for nonpayment, as well against the acceptor as all other parties to the same, and on that day

deposited in the post office at Jackson notice of the dishonor of said bill, in season to go out by the next mail, directed to Paulding, Mississippi, for said Will. B. Dozier, the defendant, which is the residence and post office of said Dozier, who is the drawer of said bill, advising him of the nonpayment thereof by the acceptor, and that the holder looked to him for payment."

"On his cross-examination, witness stated, that after he left the bank a person was pointed out to him by the plaintiff as Pierson Lewis, of whom he made demand of payment, which was refused; that the protest now attached to said bill of exchange is not the original protest made out by him on the day of said above-named demand."

"That on making demand of said bill, as above stated, he made out a protest and attached the same to the bill by wafer, and delivered the bill and protest to the plaintiff; that afterwards the plaintiff sent a messenger to him, stating that said protest would not do, and requesting another; and thereupon witness tore the bill away from it, and made out another, differing from the first, and delivered it, also annexed to said bill, to said messenger. That near a year afterward the plaintiff applied, in person, to said witness, and stated that said second protest was also materially defective, and requested witness to make out another; and witness then again separated said bill from said second protest, and made out a third protest, and after wafering the bill thereto, delivered the said bill and protest to the said plaintiff, which last is the protest now read to the jury, and the two rents or mutilations on said bill designate the parts at which it was wafered to each of said protests."

"That the original protest differed from the second, and the third from both the preceding."

"Whereupon the defendant, by attorney, moved the court to exclude said bill of exchange from the jury for the want of valid protest, which motion, after argument, the court sustained, and instructed the jury that the plaintiff could not sustain his action on the bill of exchange, unaccompanied by a protest."

"To which plaintiff's counsel excepted, and tendered this bill of exceptions before the jury retired from the box, and prayed that the same may be signed, sealed, and made a part of the record in this cause; which is done accordingly."

"S. J. GHOLSON [SEAL]"

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Upon this bill of exceptions the case came up to this Court.

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MR. JUSTICE NELSON delivered the opinion of the Court.

The suit was brought on an inland bill of exchange by the endorsee against the drawers, and resulted, in the court below, in a verdict for the defendant on an objection taken to the validity of the protest.

The statute of Mississippi provides for protesting inland bills in case of nonacceptance, or of nonpayment by the drawee, after due presentment, in like manner as in case of foreign bills of exchange; and allows five percent damages on the amount for which the bill is drawn. Howard & Hutchinson, Statutes of Miss. 372, § 8; 375, § 17; and 376, § 20.

On the trial, the notary was called as a witness by the plaintiff, and proved the presentment of the bill at maturity, demand of payment, and refusal, and notice to the drawers. And further that he drew up the protest in form at the time and delivered it to the holders, but that on account of some alleged defect which is not stated in the bill of exceptions, it was returned to him, and a second one made out, and delivered, which was also subsequently returned, and a third drawn up, which was the protest offered in evidence. It was made out nearly a year after the presentment.

The court below decided that the protest was invalid, and instructed the jury that the plaintiff could not recover, unless the bill had been duly protested according to the requirement of the statute. Whereupon a verdict was rendered for the defendant.

The bill was presented and the protest made out by a justice of the peace, as a notary *ex officio;* and on the argument the ruling of the court was sought to be sustained, on the ground, that the power of this officer to protest bills extended only to cases where the notary was absent or could not be procured. But, on looking into the laws of Mississippi, it was found that a subsequent statute had given the power to this officer in all cases, without any qualification, and the point was given up. How. & Hutch. 430, § 24.

The ground of objection, therefore, is narrowed down to the time when, and the circumstances under which, the notarial protest was drawn up, in form. And on looking into the cases and books of authority on the subject, it will be found, that if the bill has been duly presented for acceptance, or payment, and dishonored, and a minute made, at the time, of the steps taken, which is called noting the bill, the protest may be drawn up in form afterwards, at the convenience of the notary. And it has been held, if drawn up at any time before the trial, it will be sufficient. Chitty on Bills 334, 436, and cases. Ed. 1842.

The minute contains a brief record of the facts which transpired on presenting the bill, and the protest, as subsequently made out, is but an extension of them in the customary form. The time of the extension, therefore, would seem to be of no great importance.

For the same reason, if a mistake should occur, no great danger need be apprehended if the notary is permitted to correct it, provided the regular steps have been taken, and noted, to charge the parties. The amendment would not be made from memory or recollection, but from a written memorandum of the facts.

But, without pursuing this view of the case further, a decisive ground against the ruling of the court below is that a protest of the bill was not essential to enable the plaintiff to recover.

The statute of Mississippi is taken substantially from the 9 and 10 Wm. 3, ch. 17, amended by the 3 and 4 Anne, ch. 9, under which it has always been held by the courts in England that the action at common law was not thereby taken away; but that an additional remedy was given, by which the holder could recover interest and damages on an inland bill in cases where he was not entitled to them at common law. And that if he chose to waive the benefit of the statute, he might still recover the amount due on the bill, by giving the customary proof of default and notice. 2 Ld.Raym. 992; *S.C.* 1 Salk. 131; *S.C.* 6 Mod. 80; 2 Barn. & Ald. 696; Chitty on Bills, 466.

The act of Mississippi is not more explicit and positive in its terms, in respect to the duty of protesting, than that of the 9 and 10 Wm. 3, as will be seen on a comparison of the two acts, and should receive a similar interpretation. It follows, therefore, from this view, as the plaintiff did not claim the five percent damages given by the act, he should have been allowed to recover the amount of the bill, principal and interest, on the testimony of the notary alone, independently of the written protest.

It appears from the record, that the defendant put in two pleas to the jurisdiction in the court below, for the want of proper parties; and also the plea of *nonassumpsit.* To the latter, the *similiter* was added, upon which issue the cause went down to trial. No notice was taken of the pleas to the jurisdiction.

It is suggested that this affords ground of error on the record.

The plea of *nonassumpsit* in bar of the action operated as a waiver of the pleas to the jurisdiction, which doubtless furnishes the reason why no notice was afterwards taken of these pleas by either party. 3 Johns. 105; 6 Bac.Abr. tit. Pl. &

Pl., let. a, 186, 187; Gould, Pl. ch. 5, § 13.

They were virtually abandoned by the defendant.

It was also suggested, that it appeared from the declaration that Fatheree, the payee of the bill, was a citizen of Mississippi, and that the plaintiff deriving title from him, though a citizen of Virginia, could not maintain the action, for want of jurisdiction within the eleventh section of the Judiciary Act.

The answer to the suggestion is that the fact upon which it is founded is not sustained by the record. The suit was brought, originally, against Dozier and Fatheree, the drawer and payee, endorsers jointly, who are described in the commencement of the declaration as citizens of the State of Mississippi. But in a subsequent part of the declaration it is averred that Fatheree, at the time the bill was drawn, and also at the time of its transfer to the plaintiff, was an alien, and resident of Texas.

The suit was discontinued as to Fatheree before the trial, which left it between the plaintiff and the defendant alone.

The plaintiff being a citizen of Virginia, and deriving title through a person competent to maintain a suit in the circuit court against the defendant, that court properly took jurisdiction of the case.

In every view taken of the case, we think the court below erred, and that the judgment should be reversed.

Judgment reversed with venire de novo by the court below.

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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, with costs, 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.*

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