Tyler Vs. Hand

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SooperKanoon Citation : sooperkanoon.com/80060

Court : US Supreme Court

Decided On : 1849

Appeal No. : 48 U.S. 573

Appellant : Tyler

Respondent : Hand

Judgement :

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Tyler v. Hand

48 U.S. (7 How.) 573

ERROR TO THE DISTRICT COURT OF THE UNITED

STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI

SYLLABUS

A general demurrer by the defendant, assigning reasons why the plaintiff should not recover must be considered and treated as a special demurrer, which is an objection for defects in form.

In this case, none of the reasons are valid as objections to a matter of form, but the Court nevertheless will examine them as if brought forward to sustain a general demurrer.

Where bonds were given to the President of the United States and his successors in office for the use of the orphan children of certain Indians, and the declaration so averred, it was not a good cause of demurrer to allege that they were taken without authority of law. They were valid instruments, though voluntarily given and not prescribed by law, and as the demurrer admitted the facts stated in the declaration, the defendant was estopped from contesting the right of the obligee to sue.

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So also it was not a valid reason to say in support of the demurrer that the bonds were given without consideration, and if there was any illegality in the transaction, it should have been pleaded in bar.

Where the defendant demurred, and assigned as a reason that the place of abode of the plaintiff, or his right to sue, was not set forth in the declaration, it was demurring in abatement, and the judgment of the court, if the demurrer be overruled, will be final for the plaintiff.

So also it is not a good ground for the defendant to say that the plaintiff has shown no title to the bonds. It is not a good objection to a matter of form or substance.

Nor was it a good ground of demurrer to say that the *cestui que use* was not named in the declaration. The demurrer admits that the recital of the use in the declaration was correct, and it was not necessary for the plaintiff to set out the individual uses when the uses were general in the bonds.

The circumstances were these.

By the Treaty of Dancing Rabbit Creek, of 27 September, 1830, the Choctaw nation ceded to the United States the entire country they owned and possessed

east of the Mississippi River. The nineteenth article, 7 Stat. 336, 337, allowing certain reservations to be made, by its sixth section provides as follows:

"Sixthly. Likewise, children of the Choctaw nation, residing in the nation, who have neither father nor mother, a list of which, with satisfactory proof of parentage and orphanage, being filed with the agent in six months, to be forwarded to the War Department, shall be entitled to a quarter-section of land, to be located under the direction of the President, and with his consent the same may be sold, and the proceeds applied to some beneficial purpose for the benefit of said orphans."

The number of orphans entitled to the provision above recited was one hundred and thirty-four, and the lands having been selected, the same were sold in quarter-sections at public sale in 1838 by Mr. Aaron V. Brown, under the direction of President Van Buren, for a sum amounting to upwards of one hundred and thirty-five thousand dollars. The purchasers were entitled to a credit of two, four, and six years, were to give security for the payment of the purchase money, with interest, and no title was to be given until the whole amount of principal and interest was paid. Thomas G. Blewett became a purchaser of several pieces of the land, and, together with John H. Hand and John Huddleston, executed joint and several bonds to

"Martin Van Buren, President of the United States, and his successors in office, for the use of the orphan children provided for in the nineteenth article of the treaty with the Choctaws of September, 1830."

The bonds bore the

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following dates, and were for the following sums of money, *viz.:*

image:a

The bonds were given as security for the payment of the interest upon certain notes for the principal, which last-mentioned notes were recited in the above ten bonds.

In May, 1843, John Tyler, as President of the United States, brought an action of debt upon these bonds in the District Court for the Northern District of Mississippi, which exercised the jurisdiction of a circuit court.

The declaration contained a count for each separate bond, the first of which was as follows, *viz.:*

"John Tyler, who is a citizen of Virginia, President of the United States, and successor in office of Martin Van Buren, and trustee for the use of the orphan children provided for in the nineteenth article of the Treaty with the Choctaws of September, 1830, by attorney, complains of Thomas G. Blewett, John Huddleston, and John H. Hand, citizens of the State of Mississippi, being in the custody of the marshal &c.;, of a plea that they render unto him the sum of thirty-four hundred and fifty dollars, which to him they owe, and from him unjustly detain; for that whereas the said defendants, by the way and style of Thomas G. Blewett, John Huddleston, and J. H. Hand, heretofore, to-wit, on 28 May, A.D. 1838, at, to-wit, in the district aforesaid, by their certain writing obligatory, sealed with their seals, and now here to the court shown, the date whereof is a certain day and year therein mentioned, to-wit, the day and year aforesaid, jointly and severally acknowledged themselves to be held and firmly bound to Martin Van Buren, President of the United States, and his successors in office, for the use of the orphan children provided for in the nineteenth article of the Treaty with the Choctaws of September, 1830, in the sum of three hundred dollars, to be paid to the said Martin Van Buren, President as aforesaid, and his successors in office, in good and lawful money of the United States; and the said plaintiff avers that he is President of the United States, and a successor in office of Martin Van Buren, which said writing obligatory was and is subject to a condition thereunder written, to-wit, that whereas the said Thomas G. Blewett, on 28 May, 1838, at a public sale of the Choctaw orphan lands, had and held in the town of Columbus,

became and was the purchaser of northwest quarter of section thirty-two, township twenty-three, range eight east, for which the said Thomas G. Blewett has executed

his three several notes with Thomas McGee, John Huddleston, and John H. Hand, his security, to Martin Van Buren, President of the United States, for the use of the Choctaw orphan children provided for in the nineteenth article of the Treaty with the Choctaws of September, 1830, to-wit, one note dated 28 May, 1838, and due 28 May, 1840, for two hundred and fourteen dollars and twenty-six cents; one other note of same date and amount, due 28 May, 1842; and one other note of the same date and amount, due 28 May, 1844. All of said several bonds or notes, by the terms of said purchase, are to bear interest from their date at the rate of six percent per annum. Now if said Thomas G. Blewett shall pay or cause to be paid interest at the rate of six percentum per annum on said several notes at the expiration of each and every year from the date of the same, in good and lawful money of the United States, at the office of the Commissioner of Indian Affairs in Washington City, then this obligation to be void, otherwise to be good and binding as by the said writing obligatory, and the condition thereof will more fully and at large appear."

"Nevertheless,"

&c.; (setting out the breach).

To this declaration the defendants filed the following demurrer, *viz.:*

"And said defendants, by attorney, come and defend the wrong and injury, when &c.;, and say that the plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the declaration and matter therein contained are insufficient in law for the plaintiff to maintain his aforesaid action thereof against them, and that they are not bound by law to answer the same, and this they are ready to verify; wherefore, they pray judgment, and that the plaintiff be barred from having or maintaining his aforesaid action thereof against them, and according to the statute they state and show the following causes of demurrer, *viz.:* "

"1st. That there is no sufficient averment in the proceedings or record showing the citizenship or place of abode of the plaintiff, or that he is, by reason of the nature

of his place of abode and citizenship, entitled by law to maintain said suit."

"2d. That the plaintiff shows no title to the bonds or obligations sued on, nor such an interest in the suit as will authorize him to maintain the same."

"3d. That the parties for whose use the suit is brought (who,

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by the laws of Mississippi, are the real plaintiffs, and responsible for costs) are not named in the record."

"4th. That said bonds sued on were taken without authority of law, the said Martin Van Buren, President of the United States, having no such delegated power, and having no right to make the same payable to himself and his successors in office, or to assume to himself or his successors in office a legal perpetuity and succession unknown to the said office and not given by law."

"5th. That said bonds in the declaration mentioned appear, from the face of the pleadings, to have been given without any actual consideration, and by virtue of an assumption of authority on the part of said Martin Van Buren to dispose of said orphan Indian lands at public sale, without any legal right to sell the same. And because the said declaration is in other respects informal and insufficient."

The plaintiffs joined in demurrer, and in December, 1844, the case was argued upon the demurrer, which was sustained by the court.

To review this judgment, a writ of error brought the case up to this Court.

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MR. JUSTICE WAYNE delivered the opinion of the Court.

This suit is brought upon ten bonds payable to Martin Van Buren, President of the United States, and his successors in office, for the use of the orphan children provided for in the nineteenth article of the Treaty with the Choctaw Indians of

September, 1830.

The principal and interest due upon the bonds are demanded, and the plaintiff in the action, John Tyler, sues as successor of Martin Van Buren and trustee for the orphan children.

The defendants have demurred to the plaintiff's declaration, pursuing the usual form of a general demurrer, and have added thereto several special causes of demurrer. There is a joinder in demurrer. Upon these pleadings, the court below sustained the demurrer of the defendants. It is that judgment which is now before this Court by writ of error.

In our opinion, there is error in the judgment. We shall reverse it, with an order to the court below to enter up a final judgment for the plaintiff.

The cause is not before us on the grounds upon which it was placed in argument by the counsel of the defendants, except as to the insufficiency of the facts averred in the plaintiff's declaration to entitle him to recover, or to enable the defendants to sustain their demurrer.

A demurrer is an objection made by one party to his opponent's pleading, alleging that he ought not to answer it, for

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some defect in law in the pleading. It admits the facts, and refers the law arising thereon to the court. Co.Lit. 71 *b* ; 5 Mod. 132. The opposite party may demur when his opponent's pleading is defective in substance or form, but there can be no demurrer for a defect not apparent in the pleadings. This being so, the question now is whether or not, notwithstanding the objections in substance and form which the defendants have made to the plaintiff's declaration, sufficient matter appear in the pleadings, upon which the court may give judgment according to the very right of the case. Five special causes of demurrer are assigned; they were of course meant to be objections for defects in form, as none other can be assigned in a special demurrer. A general demurrer lies only for defects in substance, and

excepts to the sufficiency of the pleading in general terms, without showing specially the nature of the objection. A special demurrer is only for defects in form, and adds to the terms of a general demurrer a specification of the particular ground of exception.

Our first remark, then, is that neither of the special causes of demurrer alleged in this case is for a matter of form. They are as follows:

"1st. That there is no sufficient averment in the proceedings or record showing the citizenship or place of abode of the plaintiff, or that he is, by reason of the nature of his place of abode and citizenship, entitled by law to maintain said suit."

"2d. That the plaintiff shows no title to the bonds or obligations sued on, nor such an interest in the suit as will authorize him to maintain the same."

"3d. That the parties for whose use the suit is brought (who, by the laws of Mississippi, are the real plaintiffs, and responsible for costs) are not named in the record."

"4th. That said bonds sued on were taken without authority of law, the said Martin Van Buren, President of the United Stats, having no such delegated power, and having no right to make the same payable to himself and his successors in office or to assume to himself or his successors in office a legal perpetuity and succession unknown to the said office, and not given by law."

"5th. That said bonds in the declaration mentioned appear, from the face of the pleadings, to have been given without any actual consideration, and by virtue of an assumption of authority on the part of said Martin Van Buren to dispose of said orphan Indian lands at public sale, without any legal right to sell the same. And because the said declaration is in other respects informal and insufficient."

The case, then, is before the Court upon a general demurrer,

in which must be considered the whole record, and judgment should be given for the party who on the whole appears to be entitled to it. *Le Bret v. Papillon,* 4 East 502. It cannot be better shown in this case for whom the judgment should be than by showing that the special causes of objection assigned, supposing them to have been made as matters of substance, are not sufficient in law to prevent a recovery by the plaintiff. We will first speak of the fourth and fifth, because they are the chief reliance of the defendants to show that no judgment can be rendered against them.

The fourth is that the bonds given by the defendants were taken without authority of law. The fifth is that it appears from the face of the pleadings they were given without any actual consideration. Neither of these points can be raised in this case by a demurrer. As to the first of the two, it was not necessary to aver in the declaration that the bonds were taken with the authority of law -- nor is it so averred. The bonds are made to the President of the United States and his successors in office, for the use of the orphan children provided for in the nineteenth article of the Treaty with the Choctaw Indians of September, 1830. They are so recited in the declaration, and are admitted by the defendants to have been given by them. In point of law, then, they are valid instruments, though voluntarily given, and not prescribed by law. *United States v. Tingey,* 5 Pet. 115. It is not the case of a bond given contrary to law or in violation of law, but that of bonds given voluntarily for a consideration expressed in them to a public officer, but not happening to be prescribed by law. Nor does it matter that they are made to the President of the United States and his successors in office, if the political official character of the President is recognized in them and is so averred in the declaration. This cause of demurrer, whether well taken or not, admits the fact that the bonds were given, and estops the defendants from denying it as a matter of form or from contesting by a demurrer the right of the obligee and his successors in office to sue the obligors at law. As to the alleged want of consideration for these bonds, as stated in the fifth special cause of demurrer, that affords no ground for a demurrer, as a bond cannot be avoided at law either for a want or failure of consideration, and anything illegal in the consideration can only be pleaded in bar to the action. *Fallowes v. Taylor,* 7 T.R. 475.

But it is said that these bonds were given without any actual consideration, the President, as it is alleged, having no authority to dispose of the land. What of that? The declaration does not state of whom the purchase was made, or by

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what authority the sale took place. The defendants admit that a sale did take place, that they were purchasers of the lands, and that they gave the bonds voluntarily, according to the terms of sale. Neither of these questions, then, can be raised under the demurrer of the defendants, and could not have been the foundation of the judgment given in their favor.

Having disposed of the fourth and fifth special causes of demurrer, we will now inquire, in their order, whether or not the judgment which was given can be sustained upon either of the other alleged grounds.

The first is

"That three is no sufficient averment in the proceedings showing the citizenship or place of abode of the plaintiff, or that he is, by reason of the nature of his place of abode and citizenship, entitled by law to maintain this suit."

This cannot justify the judgment, because it is demurring in abatement. In such a case, the plaintiff is entitled to final judgment. If the matter of abatement be extrinsic, the defendant must plead it. If intrinsic, the court will act upon it upon motion, or notice it of themselves. *Dockminique v. Davenant,* Salk. 220. But it does not follow, because a demurrer in abatement cannot be available for the defendant, that it is to be rejected altogether from the pleading if tendered in proper time. It will be received, but being erroneously put in, it entitles the plaintiff to final judgment, so that for this reason the judgment of the court below would have to be reversed.

Perhaps the best exposition of this point of pleading anywhere to be found is that given in *Furniss v. Ellis and Allen* in 2 Brockenbrough's Reports 17, by Chief Justice Marshall. He says,

"The cases quoted to show that the demurrer is not good, do not show that even in England it ought not to be received if tendered in proper time. In 5 Bac.Abr. 459 it is said if a defendant demur in abatement, the court will, notwithstanding, give a final judgment, because there cannot be a demurrer in abatement. This does not prove that the demurrer shall be rejected, but that it shall be received, and that the judgment upon it shall be final. A judgment on a plea in abatement or on a demurrer to a plea in abatement is not final, but on a demurrer which contains matter in abatement it shall be final, because a demurrer cannot partake of the character of a plea in abatement. Salk. 220 is quoted by Bacon, and is to the same purport, indeed in the same words. These cases show that a demurrer, being in its own nature a plea to the action and being even in form a plea to the action, shall not be considered as a plea in abatement, though the

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special cause alleged for demurring be matter of abatement. This Court will disregard these special causes and, considering the demurrer independently of them, will decide upon it as if they had not been inserted in it."

And then the Chief Justice adds, in respect to the particular case then in hand, that

"these cases go far to show that the court would overrule the demurrer, and decide the cause against the party demurring, not that it should be expunged from the pleadings."

The second ground of special demurrer is that the plaintiff shows no title to the bonds or obligations sued on, nor such an interest in the suit as will authorize him to maintain an action on the same. Neither fact stated is a matter of form, and cannot therefore be a cause for a special demurrer. But taking them as matters of substance, the insertion of them in the plaintiff's declaration is not necessary to show his right to sue and recover upon these bonds, or material for the defendants in their plea. This objection will not avail to sustain the judgment.

The remaining objection to be considered is the third in order stated, and may be as briefly and as satisfactorily disposed of as some of the rest have been. It is that

the parties for whose use the suit is brought are not named, who by the laws of Mississippi are the real plaintiffs, and responsible for costs. We remark that for whose use the bonds were taken is not recited as personal to any of the Choctaw orphans, but as an aggregate for all such as were entitled to lands under the nineteenth article of the treaty. The demurrer admits that the bonds were so made by the defendants, and that the recital in the declaration is as the fact is expressed in the bonds. The inquiries, then, into who are individually the orphan children residing in the Choctaw nation, or who by name are entitled to a quarter-section of land, or any such averments in the plaintiff's declaration, were not necessary to entitle him to recover, and could not be shown either as a cause of special demurrer or be urged under a general demurrer, to prevent a recovery in this case.

All of us are of the opinion that there is nothing in the causes of demurrer which were shown in argument, or in the special causes assigned, to sustain the demurrer, and thinking as we all do that nothing has been shown to lessen the obligation of the defendants to pay these bonds or their liability to be sued for them at law, we shall direct the judgment of the court below to be

Reversed with costs, and shall order the cause to be remanded to the district court with directions to that court to enter judgment in this case (principal and interest) for the plaintiff in that court.

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ORDER

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern 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 district 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 district court, with directions to that court to enter judgment in this case for both principal and interest for the plaintiff in that court.