

De Sobry Vs. Nicholson

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Court : US Supreme Court

Decided On : 1865

Appeal No. : 70 U.S. 420

Appellant : De Sobry

Respondent : Nicholson

Judgement :

De Sobry v. Nicholson - 70 U.S. 420 (1865)

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De Sobry v. Nicholson

70 U.S. (3 Wall.) 420

ERROR TO THE CIRCUIT

COURT OF LOUISIANA

SYLLABUS

1. A motion to dismiss a case from want of proper citizenship in the parties cannot be made at the trial and after pleading a general issue and special defenses.

2. Where a contract, under which a party would be prevented, from want of proper citizenship, from suing in the federal courts is set out but as inducement to a subsequent one under which he would not be so prevented, the jurisdiction of such courts will not be taken away from the fact of the old contract's being set forth as inducement only somewhat indefinitely. Coming, in such a case, within the principle of a contract defectively stated, but not of one defective, the mode of stating it is cured by the verdict.

The Judiciary Act declares that the assignee of a chose in action shall not recover in a suit brought on it in the federal

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courts "unless a suit might have been prosecuted in such courts &c.;, if no assignment had been made."

With this provision in force, a partnership in Pennsylvania, of which a certain Nicholson was one member and Armstrong and others the remaining partners, made a contract with De Sobry, of Louisiana, "to build a mill" on his plantation. The Pennsylvania partnership, after the contract was made, went into liquidation, Nicholson remaining the liquidating partner, and after it had gone into liquidation, Armstrong became a resident of Louisiana, where, as already said, De Sobry also lived.

De Sobry not fulfilling his part of the contract, Nicholson brought suit against him in the Louisiana Circuit. Nicholson's declaration, or "complaint," as the old *narratio* appears to be called in that state, originally French, set forth the contract of De Sobry (entitled of Louisiana) with the Pennsylvania firm, the firm's then citizenship in Pennsylvania, the dissolution of the firm "before the completion of the contract," and that he, Nicholson, of Pennsylvania, "became liquidator of its affairs and owner of all its contracts." The plaintiff then represented that "the contract was fully executed on his part," and that the mill had been completely "put up and delivered, according to the contract on his part."

The defense of De Sobry, denying generally the allegations of Nicholson and that Nicholson was "the transferee" of the Pennsylvania firm, and showing further wherein the contract was not fulfilled, prayed that judgment might be rendered, "in reconvention (cross-demand), in his favor, against the said Nicholson."

On the trial, the defendant proved the fact that at the time of the suit brought, Armstrong was, with De Sobry, a resident of Louisiana, and moved to dismiss the case for want of jurisdiction, under well known principles of the court, for identify of citizenship between the parties suing.

The court overruled the motion; and the defendant excepting, the case, after verdict and judgment for the plaintiff, came here on error.

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MR. JUSTICE SWAYNE delivered the opinion of the Court.

No exception can be considered here which was not taken in the court below. [[Footnote 1](#)]

The point relied upon to reverse the judgment is not that the co-partners of the plaintiff below could not assign their interests in the original contract so as to vest in him the right to sue in his own name alone, but that one of the assignors was, at the time of the commencement of the action, a citizen and resident of the same state with the defendant, and that hence the circuit court had no jurisdiction.

To this there are two answers.

The objection to jurisdiction upon the ground of citizenship, in actions at law, can only be made by a plea in abatement. After the general issue, it is too late. It cannot be raised at the trial upon the merits. [[Footnote 2](#)] If a plea in abatement be filed with the general issue, the latter waives the former. [[Footnote 3](#)] Where a plea in abatement is relied upon, the burden of proof rests upon the defendant. [[Footnote 4](#)] In equity, the defense must be presented by plea or demurrer, and not by answer. [[Footnote 5](#)] The court below properly overruled the motion.

We think also that a new contract between the plaintiff

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and the defendant, and its execution by the plaintiff, are substantially averred, and that the original contract is set out as inducement. It is said by the counsel for the plaintiff in error that if such a contract be alleged, it is done with careful ambiguity and indefiniteness. Conceding this to be so, it is a case, not of a defective title, but of a title defectively stated, which is always cured by the verdict. [[Footnote 6](#)]

Judgment affirmed with costs.

[[Footnote 1](#)]

[Stoddard v. Chambers](#), 2 How. 285; [McDonald v. Smalley](#), 1 Pet. 620.

[[Footnote 2](#)]

[Smith v. Kernochen](#), 7 How. 216.

[[Footnote 3](#)]

[Bailey v. Dozier](#), 6 How. 30; [Sheppard v. Graves](#), 14 How. 505.

[[Footnote 4](#)]

[55 U. S. 14](#) How. 505, [55 U. S. 512](#) .

[[Footnote 5](#)]

[Livingston v. Story](#), 11 Pet. 351.

[[Footnote 6](#)]

1 Chitty's Pleading (10th American ed) 672.