JACOB v. UNITED STATES.

Case No. 7,157.
{1 Brock. 520.}[1]

Circuit Court, E. D. Virginia. Nov. Term, 1821.

PENALTIES—ACTION TO RECOVER—DEBT—DEMURRER TO EVIDENCE.

1. In England, where a penalty is given by statute, and no remedy for its recovery is expressly given, debt lies, and, it seems, that this principle is equally applicable here.

{Cited in U. S. v. Gates, Case No. 15,191; Stockwell v. U. S., Id. 13,466; U. S. v. Willetts, Id. 16,699: Stockwell v. U. S., 13 Wall. (80 U. S.) 543; U. S. v. The C. B. Church, Case No. 14,762; U. S. v. Elliot, Id. 15,043.}

{Cited in Ransdell v. Patterson, 1 D. C. Ct. App. 491.}

2. It is a rule of law, that a statute, applicable in its terms to particular actions, cannot be applied by construction, to other actions, standing on the same reason.

{Cited in Wilson v. Rousseau, Case No. 17,832; U. S. v. Laescki, 29 Fed. 700.}

{Cited in Adkison v. Hardwick, 12 Colo. 582, 21 Pac. 908; Bedell v. Janney, 4 Gilman (Ill.) 207.}

3. An action of debt, founded upon an act of congress, is brought to recover a Penalty, in which the declaration charges, that the defendant "did forcibly rescue, or cause to be rescued, from the said collector, or one of them, the said spirits," &c., adopting the phraseology of the act. *Held:* That, although the offence might have been stated with more precision, and, although the declaration might have been held ill, on special demurrer, yet it is a defect of form merely, which after judgment, is cured by the statute of jeofails.

{Cited in U. S. v. Clarke, 20 Wall. (87 U. S.) 106.}

4. An action of debt to recover a penalty, is a "civil cause," within the meaning of the 9th section of the judicial act {1 Stat. 76}, from which a writ of error lies from the district court, to the circuit court of the United States.

{Cited in Boyd v. Clark, 13 Fed. 909.}

5. A demurrer to evidence, supposes that evidence to be already admitted, and no objection can then be taken to it, on the ground that it is inadmissible. Where incompetent testimony is admitted, the proper remedy is, by a bill of exceptions. If the party declines taking this course, and demurs to the evidence, he waives all objection to its admissibility, and places his cause on its sufficiency to establish the fact in controversy.

6. A party, who demurs to evidence, is bound to admit every conclusion that may fairly be deduced from it.

7. The rule that secondary evidence is inadmissible, when primary evidence is attainable, though a sound general rule, is subject to some exceptions where general convenience requires it. Proof, for example, that an individual has acted notoriously as a public officer, is prima facie evidence of his character, without producing his commission or appointment.

{Cited in Com. v. Kane. 108 Mass. 425; North v. People, 139 Ill. 102, 28 N. E. 971.}

{Error to the district court of the United States for the Eastern district of Virginia.}

The United States brought an action of debt, and obtained a judgment in the district court at Richmond, against the plaintiff in error for $500, and their costs. This suit was brought to recover a penalty for an alleged violation of the act of congress, of the 21st of

December, 1814,—2 Story's Laws, p. 1439, c. 168, repealed [3 Stat. 152], entitled "An act to provide additional revenue, for defraying the expenses of government and maintaining the public credit, by laying duties on spirits, distilled within the United States, and territories thereof, and by amending the act laying duties on licenses to distillers of spirituous liquors." The 9th section of that act, provides that if any person

shall forcibly rescue, or cause to be rescued, any spirits, still, boiler, or other vessel, after the same shall have been seized by the collector, the person so offending shall, for every such offence, forfeit and pay the sum of $500. The declaration adopted the phraseology of this section, and charged the offence in the alternative, viz: that the defendant did forcibly rescue, or cause to be rescued from the said collector, or one of them, &c. No objection was made to the declaration in the court below. The defendant pleaded the general issue of nil debet, and, on the trial, the plaintiff offered in evidence the depositions of John Gilfillen and Benjamin Harvie, Sen deputies of William M'Kinley, collector of internal duties in the 5th collection district of Virginia, going to show that the said M'Kinley was the collector of internal duties, and that the defendant Jacob, had applied to him, in that character, for a license to carry on the business of distilling, which license M'Kinley refused to issue, the defendant not having complied with the requisitions of the act of congress. That notwithstanding the refusal of the collector to issue the license, until the terms of the law were complied with, the defendant engaged extensively in the business of distilling spirits, and by direction of their principal, the deponents repaired to the distillery of the defendant, which they found in full operation, and seized fourteen barrels of spirits, as being forfeited to the United States, which were forcibly rescued by the defendant Jacob. These depositions were read in evidence, under written agreements of the counsel for the defendant, that they were to be admitted in evidence, in like manner, as if the matter thereof was testified to in open court, by the witnesses, after being informed that, if otherwise, they were entitled to any part of the penalty, they would not, being called on as witnesses, be entitled thereto: every objection to the credit of the witnesses, and to their competency, except such as might be made were the witnesses testifying in open court, being reserved to the defendant. To this testimony the defendant, by his counsel, demurred, and the jury found a verdict for the plaintiffs, subject to the opinion of the court, on the demurrer to evidence. The court below overruled the demurrer, and gave judgment for the plaintiffs. The defendant obtained a writ of error to this judgment, and on the 11th of December, 1821, the following opinion was delivered by

MARSHALL, Circuit Justice. This is a writ of error to a judgment, rendered in favour of the United States, in the district court, in an action of debt, brought to recover a penalty, alleged to be incurred by the defendant, in violating some of the provisions of an act of congress, imposing duties on spirits, distilled within the United States. The defendant below, demurred to the testimony, and now insists that the judgment ought to be reversed, because: 1st. The declaration is insufficient, in not alleging the offence with precision. 2d. The testimony is insufficient, because it does not show, that the goods received were seized by an authorized officer.

1st. As to the sufficiency of the declaration. It states the seizure, and adds, that the defendant did forcibly rescue, or cause to be rescued, from the said collector, or one of

them, the said spirits, &c. The plaintiff in error contends, that this charge is too vague, and that the declaration, instead of alleging in the alternative, that he had committed one, or another, of several different offences, ought to have alleged, specifically and singly, the offence that he did commit. The cases cited in argument, prove conclusively, that this error would have been fatal in an indictment or information;[2] but the counsel for the plaintiff, has shown no case, and I can find none, in which it has been deemed fatal in an action of debt. He contends, that in England, an action of debt is not brought in such a case; but the books say, expressly, that where a penalty is given by a statute, and no remedy for its recovery is expressly given, debt lies.[3] He contends with more reason, that where different remedies are allowed, the form of the remedy adopted, ought not to vary the case; nor ought a court to sanction, in one species of action for a penalty, a more lax mode of proceeding, than is allowed by the general principles which regulate suits for penal offences. If a precise charge would be required in an information, there can be no reason, he contends, for dispensing with this precision, in an action of debt, brought to recover the same penalty, for the same offence. This is true, in reason. But it is equally true in law, that a statute, applicable, in its terms, to particular actions, cannot be applied by construction, to other actions standing on the same reason. But the application of such statute, to an action which it expressly comprehends, cannot, on that account, be denied.

Upon this principle, it is contended on the part of the United States, that the act of jeofails, applies to this declaration, and cures the fault which has been assigned in it. The 32d section of the judicial act, enacts, "that no summons, &c., or other proceedings

in civil causes, in any of the courts of the United States, shall be abated, arrested, quashed, or reversed, for any defect, or want of form, but the said courts, respectively, shall proceed and give judgment, according as the right of the cause, and matter in law, shall appear unto them, without regarding any imperfections," &c., except such as shall be alleged as causes of special demurrer. Judicial Act 1789; 1 Story's Laws, p. 66, c. 20, § 32 [1 Stat. 917. Is the defect in this declaration, an error of substance, or of form? The act of congress, 4 [Bior. & D. Laws] p. 730, § 9 [3 Stat. 155], describes the offence in the very words of the declaration. The penalty is incurred, by any person who "shall forcibly rescue, or cause to be rescued, any spirits, &c, after the same shall have been seized," by any collector. The offence is equally consummated, and the penalty equally incurred, by rescuing, or causing to be rescued, from any collector whatever, any spirits, &c., which he had previously seized. It might have been more technically correct, to have alleged the offence in the declaration, with more precision, and this declaration might have been ill, on a special demurrer. But if the defendant waives this exception, by going to trial on the fact of rescue, the defect appears to me, to be cured by the statute. The defect seems to me, to be a defect of form, whenever the defendant must, of necessity, be guilty of a breach of the law, and have incurred the penalty for which the suit is brought, if the allegation in the declaration be true. This seems to me, to constitute the difference between form and substance. The defendant has a right to insist on a precise statement of the offence with which he is charged, that he may know how to defend himself. This right is to be exercised by a special demurrer, and may be waived. If, instead of exercising it, he prefers going to trial on the fact, and it be found against him, the only question of substance, as it seems to me, which can arise upon the record, is, whether the fact be charged in such terms, that if committed, the penalty of the law must be incurred. If, then, the 32d section of the judicial act, applies to the case, the defendant comes too late with his exceptions to the declaration. That section, in its terms, applies to all civil causes, in any of the courts of the United States. An action for debt for a penalty, appears to me to be a "civil cause" under the 9th section of the judicial act, which defines the jurisdiction of the district courts. But I am relieved from a critical examination of this question, by the circumstance that, if it be not a civil cause, this court has no jurisdiction over it. The 22d section of the judicial act, under whch this writ of error must be sustained, allows it only in "civil actions." If, then, the 32d section of the act does not apply, because this is not a "civil cause," the writ of error must be dismissed for the same reason.[4]

But the counsel for the plaintiff contends, that the statute does not apply, for another reason. In England, a statute is not supposed to relate to the crown, unless the king be expressly named. I do not recollect, that this principle, which is a branch of the royal prerogative, has ever been recognized in the courts of the United States, nor does it appear to me, to be necessary to inquire, in this cause, how far the principle may be applicable in

our government. I do not think it necessary to make the inquiry, because the judicial act does expressly comprehend the United States. It gives the courts of the Union, jurisdiction in suits brought by the United States. The question, therefore, is not, whether a general statute, not mentioning the United States, shall comprehend them in its general provisions, but whether a statute, made both for the United States, and for individuals, shall embrace the United States, by provisions, not particularly mentioning them, but which are adapted to them, and made in terms sufficiently comprehensive to include them. This question is already settled in the supreme court. The 26th section of the act directs, that in all causes brought for a penalty annexed to articles of agreement, &c., the court shall render judgment in case of default, demurrer, &c., for so much as is due according to equity. This section does not mention the United States, but it has been determined in the supreme court to extend to them. So in the cases to be carried by appeal or writ of error, from an inferior to a superior tribunal, in the 21st and 22d sections of the act, the United States are not mentioned, but those sections have always been construed to comprehend their suits. I think it, then, very clear, that the 32d section of the judicial act extends to this case, and cures the error, if there be one, in this declaration. This is a point on which I have never entertained a doubt.

The second question appeared to me, at the argument, to deserve serious consideration, and I reserved the cause, in consequence of doubts which I then entertained upon it. Subsequent consideration has removed those doubts, and I now think the judgment of the district court correct on the demurrer to evidence, as well as on the sufficiency of the declaration. It was very properly observed, by the attorney for the United States, that a demurrer to evidence, supposes that evidence to be already admitted. If the testimony be inadmissible, its admission may be opposed;

and if the objection be improperly overruled, the remedy is by a bill of exceptions. If, instead of taking this course, the party chooses to admit the evidence, and to demur to its effects, he waives his objection to its inadmissibility, and places his cause on its sufficiency to establish the fact in controversy. The question, whether it ought to be rejected as mere secondary evidence, is no longer to be asked, and the cause rests upon the question, whether, being admitted, it proves the fact in controversy.[5] If a note, or other ordinary instrument of writing, have a subscribing witness, the paper cannot be proved even by a person who saw it executed; but if a witness, who saw it executed, be offered, and the party to the writing, instead of objecting to his being sworn, admits it, and demurs to the testimony, the only question, then, seems to me to be, whether his testimony be sufficient to convince the mind, that the paper was executed by the person charged therewith.

There is another principle also applicable to the case. The party who demurs is bound to admit every conclusion, which the jury might rightfully draw from the testimony. Could the jury in this case have rightfully concluded, that this seizure was made by a collector of the internal revenue? It seems to me, the jury might very correctly draw this conclusion. The witness states that the plaintiff in error applied to M'Kinley, as the collector, for a license. The conversation shows, that the plaintiff in error had transacted business with him as collector. The witness, in positive terms, states him to be the collector. It is apparent that he acted as collector, and was understood by the plaintiff in error to be invested with that office. But had the defendant below excepted to the testimony, instead of admitting it, and demurring to it, I still think the question ought to be decided against him. The rule that secondary evidence shall not be admitted where primary evidence is attainable, although a sound general rule, has been relaxed in some cases where general convenience has required the relaxation. The character of a public officer is one of those cases. That he has acted notoriously as a public officer, has been deemed prima facie evidence of his character, without producing his commission or appointment. In the trial of the Gordons (Leach, Crown Cas. 515) this principle of evidence was sustained by all the judges, even in a case of murder. It is also laid down in 4 Term R. (Durn. & E.) 366; 3 Term R. 635; 3 Camp. 432; and in Phil. Ev. 180. The case at bar is, I think, completely within the principle of these cases.

The judgment of the district court is affirmed with costs.

[1] [Reported by John W. Brockenbrough, Esq.]

[2] See the authorities on this subject, collected in a note, to the case of The Caroline [Case No. 2,418].

[3] 1 Chit. Pl. 105; 1 Rolle, Abr. 598, pl. 18, 19; President & College of Physicians v. Salmon, 1 Ld. Raym. 682. The form of the action is not given by the statute, on which

this prosecution was founded, but the fines, penalties, and forfeitures, incurred by force of the act, might be sued for, by bill, plaint, or information. Section 21.

[4] A libel against a vessel claiming forfeiture thereof, for exporting cannon, &c, under the act of 22d of May, 1794 [1 Stat. 369], is a "civil cause," within the meaning of the judicial act. It is a process in the nature of a libel, in rem, and does not, in any degree, touch the person of the offender. U. S. v. La Vengeance, 3 Dall. [3 U. S.] 297, 1 Pet. Cond. R. 132.

[5] Mr. Stephens, in his Treatise on Pleading (page 112), says, that a party disputing the legal sufficiency of any evidence offered, or its admissibility in point of law, may demur to the evidence; but the case cited by him from 2 H. Bl. 208, does not justify this commentary. The question, whether the admissibility of evidence can be considered by the court in deciding on a demurrer to that evidence, did not arise in the case from Blackstone, nor does it appear ever to have arisen in any subsequent case in this country, or in England. In Bank of U. S. v. Smith, 11 Wheat. [24 U. S.] 171 (6 Pet. Cond. R. 261), Johnson, J., in delivering the opinion of the court, said, that by the demurrer to evidence the defendant had taken the questions of fact from the jury, where they properly belonged, and had substituted the court in the place of the jury, and that every thing which the jury could reasonably infer from the evidence demurred to, must be considered as admitted. Since such is the effect, then of the demurrer to evidence, it seems quite clear, that the question of the admissibility of evidence, is not open on a demurrer to evidence; its admissibility being a question of law which it is the exclusive province of the court, as such, to decide. See, also, The Palmyra, 12 Wheat. [25 U. S.] 1.