DEXTER, HORTON & CO. v. SAYWARD.

(Circuit Court, D. Washington, N. D. February 12, 1897.)

LIABILITY OF SURETIES IN APPEAL BOND.

An appeal bond in an action in which an attachment has been levied operates as security only for the costs of appeal, where there has been no impairment of the security by waste of the property, and no burdens accruing upon it by nonpayment of taxes.

Memorandum of Decision on Motion for Judgment against Sureties on Supersedeas Bond.

E. F. Blaine and E. C. Hughes, for plaintiff.

J. B. Howe, Alfred Battle, and Thomas Burke, for defendant and his sureties.

HANFORD, District Judge. In this action a writ of attachment was issued and levied upon property of the defendant to secure the judgment, and the judgment rendered by this court contained an order to sell the attached property, and apply the proceeds to payment of the debt. The attached property has been sold for sums aggregating a great deal less than the amount of the judgment, and the plaintiff has now applied by motion for a judgment against the sureties on the supersedeas bond for the amount of the penalty thereof, which is less than the deficiency. In the case of Hotel Co. v. Kountze, 107 U. S. 378–402, 2 Sup. Ct. 911, the supreme court of the United States decided that an appeal bond in a foreclosure suit in the courts of the United States does not operate as security for the amount of the original decree, but only for the costs of appeal and damages by deterioration of the security by waste of the property, and burdens accruing upon it by nonpayment of taxes, and loss by fire. That is so because the judgment is otherwise secured by a lien upon the mortgaged property. In the opinion of the court the statutes and rules, and previous decisions of the supreme court, and the practice of the courts in this country from colonial times, and the practice in England, were carefully reviewed. The case is entitled to recognition as an authority by reason of the great research and learning appearing in the opinion, as well as for the fact that it is a declaration of the law by the highest court of this country. In this case the judgment was otherwise secured by the lien of the attachment, which was not disturbed by the proceedings upon the writ of error. Therefore it comes fairly within the rule of the decision of the supreme court in the case cited, and I am constrained by that authority to deny the relief applied for, without considering the other grounds of opposition suggested by counsel representing the defendant and the sureties upon the bond. It is not shown that the security was impaired during the pendency of the case in the circuit court of appeals (19 C. C. A. 176, 72 Fed. 758) by waste or destruction of any part of the attached property, nor that it became burdened by accruing taxes. Therefore the sureties are only liable for the costs upon the writ of error. The motion will be denied unless the plaintiff shall elect to take a judgment for the amount of the costs taxed on the writ of error.

AULTMAN & TAYLOR CO. v. SYME.

(Circuit Court of Appeals, Second Circuit. March 19, 1897.)

LIMITATION OF ACTIONS—NONRESIDENTS—ACTION ON JUDGMENT.

The New York Code of Civil Procedure provides (section 390) that when a cause of action, not involving the title to real property within the state, accrues against a person not then a resident of the state, an action cannot be brought thereon against him in a court of the state, after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the state in certain cases. *Held*, that the words "the laws of his residence" in such statute refer to the residence of the debtor at the time the cause of action accrues, and not at the time the action is brought, and accordingly that when a judgment has been recovered by one nonresident of New York against another, in the state of the latter's residence, and the judgment debtor afterwards removes to New York, no action on the judgment can be maintained against him there by the nonresident creditor, after the expiration of the period of limitation provided by the laws of the state where the judgment was recovered and where the debtor resided at the time of its recovery.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error by plaintiff below to review a judgment of the circuit court, Southern district of New York. Upon the trial verdict was directed for the defendant.

Wm. H. Blymzer, for plaintiff in error.

Edward F. Brown, for defendant in error.

Before PECKHAM, Circuit Justice, and LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The action was commenced June 25, 1895, by service of summons on the defendant in the city of New York. Plaintiff, an Ohio corporation, sued upon two judgments obtained by it against defendant in courts of record in Louisiana on January 27, 1885, and February 2, 1885, respectively. Defendant was a resident of the state of Louisiana at the time of the commencement of each of the actions on which said judgments against him were obtained, and was a resident there at the time of the entry of both of said judgments, but about one year thereafter he removed to New York, where he has since resided. He pleaded the statute of limitations in bar of plaintiff's claims.

The New York Code of Civil Procedure provides:

"Sec. 376 (Amended Laws 1877, c. 416; Laws 1894, c. 307). When Satisfaction of Judgment Presumed. A final judgment or decree for a sum of money, or directing the payment of a sum of money, heretofore rendered in a surrogate's court of the state, or heretofore or hereafter rendered in a court of record within the United States, or elsewhere, or hereafter docketed pursuant to the provisions of section thirty hundred and seventeen of this act, is presumed to be paid and satisfied, after the expiration of twenty years from the time when the party recovering it was first entitled to a mandate to enforce it. This presumption is conclusive, except as against a person who, within twenty years from that time, makes a payment or acknowledges an indebtedness of some part of the amount recovered by the judgment or decree, or his heir or personal representative, or a person whom he otherwise represents. Such an acknowledgment must be in writing, and signed by the person to be charged thereby."