


No. 13983

Supreme Court of Illinois

Perkins

vs.

Rudolph

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Mr. Justice

delivered the opinion of the Court: This was an action of debt upon a special bond, in the usual form, to which the defendant pleaded that he signed the bond as surety; that by agreement of the plaintiff and defendant in special, and without his knowledge or consent, the action was removed, by order of Court, to another, who made their award and reported the same to the Court, without defendant's knowledge or approbation, and that the Court, by agreement of the parties, without defendant's knowledge or approbation, entered judgment in the special writ in accordance with the award, in favour of the defendant in special, and against the plaintiff therein, for the sum of two hundred and forty dollars and costs, whereby this defendant was discharged from liability by reason of signing the bond.

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A demurrer to this plea was overruled, and for default of other replication, judgment was rendered against the plaintiff for costs, who brings the case here by writ of error, ^{and} ~~affirms~~ this judgment as error.

It is urged by the plaintiff in error, that the surety in such a bond, especially stipulates that his principal shall prosecute his suit with effect, and without delay and

make return of the property if the Court so orders, and have and keep the Sheriff harmless, and that it is of the essence of his contract, to make himself answerable for his principal's conduct of the suit, before it culminates in a judgment, and for his action, after, and under the judgment. Hence it follows, that the surety is bound by all the steps his principal may, in good faith take, in prosecuting the suit, and is bound by the result of the litigation thus conducted; and if the Court had jurisdiction of the parties, and the subject matter of the suit, he is bound by all the orders and judgments of the Court in the cause. That the surety is bound by all the modes of adjudication within the sphere of the Court, known to the law at the time the bond was executed, upon the principle, that the law in force when a contract is made, forms a part of the contract.

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Upon the first point, reference is made to the case of *Wills vs Piffin 2 Head (Term) 568*. We have not that book to examine, yet accord the general principle as announced.

We agree also, that at the time this duty bound himself, it was competent to parties to agree to refer any suit pending in a

Court of record, to exhibit a bond.

The question then is, does the subscrip-
 tion of a writ in Reglevin ~~dis~~ without
 the consent of the ^{in the bond,} ~~County~~ discharge
 him. The plaintiff in error contends
 it does not, and refers to the case of
 Moore vs Bowmaker 1 Eng. Com. Law Rep. 417
 He finds the case reported in 1 Eng. C. Law 663,
 and the note of it is that a defendant in
 Reglevin does not, by giving time to the plain-
 tiff in Reglevin, discharge the sureties in the
 Reglevin bond, which is not, the precise point
 made here. ~~Barber in that case was~~
~~opinion on a case where the plaintiff~~
~~deprived the defendant of the right to sue~~
~~against the plaintiff, by the plaintiff that~~
~~had fraudulently procured the judgment to~~
~~be set aside, and the plaintiff fraudulently~~
~~obtaining the writ, and the plaintiff to have~~
~~been granted for the purpose of defeating~~
 the sureties. The point there was, that although
 by the reference to arbitrators the plaintiff had
 been given ~~time~~ ^{time} to the defendant, there was no analogy
 in such case to the case of a creditor giving
 time to his debtor, without the consent of
 the surety, as the surety had been deprived
 of his right, or placed in ^{no} a worse situation,
 and it was not thought to have any
 resemblance to a case where the writ

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are prevented from ^{disregarding} surrendering the principal,
since, it is not in the power of a surety
in a replevin bond, to take the goods and
restore them to the defendant.

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~~It~~ He finds a case in 25 Eng. C.L.
Rep. 53 Aldridge vs Harper et al., where it
was held it was no plea to an action a-
gainst sureties on a replevin bond, that
the replevin cause was referred to an
arbitrator and that he, without the
knowledge of the sureties, ~~released~~
the goods to the principal. That relief
might be had ^{by application} by motion, or by a bill in equity

It is insisted by the defendant in
error, that Moore vs Brownaker has
been overruled and ^{he} cites Brownaker vs
Moore et al. 1 Exch. Rep. 355. This was
a motion for an injunction, to restrain Moore
from prosecuting at law in an action on
a common replevin bond against the
plaintiff, the same error case cited above.
The court said, the question lay in a
narrow compass. The bond was conditioned
that the principal should prosecute his
suit with effect against the landlord. The
action of replevin is in fact actual; but
afterwards an agreement is entered into
between the landlord and tenant, without

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 The concurrence of the Surety, whereby the
 tenant is precluded from proceeding
 according to the condition. By that
 agreement, a residue is chalked out
 for ascertaining and answering their
 mutual demands, and in the ^{mean} ~~mean~~
 time, all proceedings are to be stayed;
 so that the tenant is restrained by the
 act of the landlord, from doing that
 which his surety has engaged he
 shall do. It turns out that the same
 justice after wards agree, that the
 action shall proceed, so as to give
 the landlord his original remedy
 against the surety; but that is what
 we cannot begin after what has
 been done. When the agreement of reference
 was executed, the bond, as against
 the surety, was functus officio.

On a review of these cases by the
 common pleas, the ^{two} first, having originated
~~there~~ in that court, Park J. in the case
 of Archer vs Hale 15 E. C. L., 42, held
 that a reference of a replevin writ,
 without the consent of the surety in the
 replevin bond, discharged the surety,

and this in accordance with the case cited from 1. Exch. Reports. Justice Parkes says, the cases from the Exchequer, were never mentioned to the Court, when they made the decisions in Moore vs. Brownlow and in Alford vs. Bapers.

J

This case of Archer vs. Daley, affirming the correctness of the decision in 1 Exch. R., establishes the doctrine contended for by the respondent in error.

In Calman vs. Wade et al. 2 Selw. (N. Y.) ^{cited by respondent in error} it was held, ^{where} that, an award upon a subscription between a creditor and principal debtor, extends the time for payment by the debtor beyond that fixed in the contract, & that for the performance of the contract, are discharged.

This is on the familiar principle that ^{giving} time to ^{the} principal, ^{discharges} the surety, for the reasonish opinion. The surety of the principal of paying the debt, and then bringing his action against the principal.

~~In Archer vs. Daley~~ ^{however} the Court placed its decision on the ground that the surety in the bond, undertook only ~~to~~ ^{to} that the principal ^{should} promote his debt with effect and without delay and make return of the property pledged ~~but for the purpose~~ of a ~~very~~ ^{return} if a return should be adjudged. This undertaking, to promote the debt

with effect and without delay, has a proper
 reference to its prosecution in Court before
 the Court and not ~~secretly~~ ^{privately}, before arbitrators.
 Has it been prosecuted in Court,
 as it would have been without this
 arrangement to arbitrate between the
 plaintiff and defendant, the Court
 might have awarded a return of
 the property, which would have enabled
 the party to take the necessary ~~steps~~
 steps to effect a recovery to the
 officers, or to secure himself in some
 way on the issuing of the writ of return
habeas. He did not ~~offer~~ ^{undertake} to pay
 a proffers for money in amount
 equal to the value of the property
 involved; and that without an investigation in
 Court. These being the views entertained
 by the circuit Court, its proffers must
 be affirmed.

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return habeas

Proffers affirmed

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Polkins

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opinion by

Messrs J.

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