Zacharie Vs. Franklin

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Court : US Supreme Court

Decided On : 1838

Appeal No. : 37 U.S. 151

Appellant : Zacharie

Respondent : Franklin

Judgement :

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Zacharie v. Franklin

37 U.S. (12 Pet.) 151

ERROR TO THE DISTRICT COURT OF THE

UNITED STATES FOR EAST LOUISIANA

SYLLABUS

Under the laws of Louisiana and the decisions of the courts of that state, a mark for the name to an instrument by a person who is unable to write his name is of the same effect as a signature of the name.

A bill of sale of slaves and furniture reciting that the full consideration for the property transferred had been received, and which does not contain any stipulations or obligations of the party to whom it is given, is not a synalagmatic contract, under the laws of Louisiana, and the law does not require that such a bill of sale shall have been made in as many originals as there were parties having a direct interest in it, or that it should have been signed by the vendee.

Evidence will be legal as rebutting testimony as to repel an imputation or charge of fraud which would not be admissible as original evidence.

The defendants in error, Henry Franklin and wife, on 23 January, 1836, presented a petition to the District Court of the United States for the Eastern District of Louisiana for the recovery of certain slaves, with their children, and also of certain stock and household furniture which the petition alleged had been sold to him by Joseph Milah by a bill of sale duly recorded in the proper notarial office. The bill of sale was in the following words:

"State of Louisiana, Parish of St. Helena"

"Know all men to whom these presents may come that I, Joseph Milah, have this day bargained, sold, and delivered unto Henry Franklin, his heirs, executors, administrators, and assigns, six negroes, namely, one negro woman, named Neemy; one boy, do. John; one do. Sam; one do. Nels; one negro girl, named Harriet; one do. Jenny; together with all of my cattle, hogs, horses, household and kitchen furniture, for the sum of twenty-eight hundred dollars, to me in hand paid, which property I do warrant and defend from me, my heirs, executors, and assigns, to him, his heirs, executors, administrators, and assigns forever. "

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"In witness whereof, I have hereunto set my hand and seal, this 17 July, 1819."

"[Signed] JOSEPH his X mark MILAH"

"Test: "

"WM. Mc MICHAEL,"

"JOEL OTT [L.S.]"

The condition of the above bill of sale is such, that the above mentioned property remain in my possession so long as I live, and after my body is consigned to the grave, to remain, as above-mentioned, in the above bill of sale.

"[Signed] JOSEPH his X mark MILAH"

"Test: "

"WM. Mc MICHAEL"

"JOEL OTT"

" *[Endorsed]* "

"I certify the within to be truly recorded in register, in page 55, according to the law and usage of this state. In faith whereof, I grant these presents under my signature, and the impress of my seal of office, at St. Helena, this 23 July, 1819."

"[Signed] JAMES Mc KIE [SEAL]"

Joseph Milah died in July, 1834, and the petition claimed that the plaintiffs were entitled to the negroes, with their children, and the other property mentioned in the bill of sale, which, at the time of bringing the suit, were in the possession of the defendants, who held and detained them, and have refused to deliver them to the petitioners.

On the fifth day of February, 1836, John and Letitia Zacharie answered the petition, admitting they were in the possession of the negroes mentioned in the petition, and they aver that Letitia Zacharie is in such possession, in her capacity of tutrix of her minor children, who are the lawful proprietors of them by inheritance, from their father, Joseph Milah. They deny that the bill of sale was ever signed by Joseph Milah, and if signed by him, it was done in error

and through false and fraudulent representations of the plaintiff, and no consideration was given for the same, and the same was fictitious and collusive and intended to cover or conceal a disguised donation of the slaves mentioned in the same, and was therefore null and void. The defendants asked for a trial by a jury. Afterwards, by a supplemental answer, the defendants say that at the time of the alleged sale, under private signature, Joseph Milah had neither children or descendants actually living, and since the same, the children of which Letitia Zacharie is the tutrix have been born and are now living.

On the trial there was given in evidence by the plaintiffs, among other documents, an instrument executed in South Carolina, Richland District, by Joseph Milah on 11 July, 1805, by which Joseph Milah, under his hand and seal, gave a negro wench and a negro boy, and also his personal property, to Sarah McGuire. This deed was regularly acknowledged; and was recorded in the Richland District in South Carolina on 10 December, 1805.

The cause was tried by a jury, and a verdict was rendered for the plaintiffs, on which the court gave a judgment. The defendant took two bills of exceptions.

The first bill of exceptions was in the following terms:

"On the trial of this cause, the plaintiff offered in evidence an instrument in writing to his petition annexed, and bearing date 17 July, 1819, and purporting to be executed by Joseph Milah by the affixing of his mark, and offered to prove same by the evidence of William McMichael and Joseph Ott, whose signatures are affixed as subscribing witnesses, which instrument is made part of this bill of exceptions: the defendants objected to the introduction of said instrument and testimony on the ground 1st, that being an instrument purporting to convey slaves, the same was null and void as not having been signed by the vendor; and that no parol proof could be admitted to prove its execution; 2. that a mark is not a signature within the provision of the laws of Louisiana, in relation to the conveyance of slaves; 3. that the instrument, containing a synalagmatic contract or

mutual and reciprocal obligation, not being in the form of an authentic act, was invalid because not made in as many originals as there were parties having a direct interest; 4. that the same was not signed by the vendee. But the court overruled the objections."

The second bill of exceptions was taken to the admission in evidence

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of the instrument executed in Richland District, South Carolina, as a gift or donation of two slaves and certain personal property.

1. Because the plaintiffs in their petition claim to have a title to the slaves referred to in their petition by virtue of a bill of sale to Henry Franklin, one of the plaintiffs, under date of 17 July, 1819, and that they cannot offer evidence to establish title from any other source than that therein stated.

2. Because there is no evidence of the identity of the person by whom this instrument purports to have been executed, with James Milah, under whom plaintiffs claim, nor of the slaves named in the petition.

The defendants also moved for a new trial, on reasons filed; which motion was overruled by the court.

The defendants prosecuted this writ of error.

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MR. JUSTICE BARBOUR delivered the opinion of the Court.

It was a suit commenced by the defendant in error for himself and wife by a petition, according to the Louisiana practice, for the recovery of several slaves (with their increase) and other property, consisting of stock of several kinds, and household and kitchen furniture, which he alleged had been sold to him, by a certain Joseph Milah, by a bill of sale, duly recorded in the proper notarial office, of which bill of sale, profert is made in the petition, and which is in the following

words, *viz.,*

"Know all men to whom these presents may come that I, Joseph Milah, have this day bargained, sold and delivered unto Henry Franklin, his heirs, executors, administrators and assigns, six negroes [naming them], together with all of my cattle, hogs, horses, household and kitchen furniture, for the sum of twenty-eight hundred dollars to me in hand paid; which property, I do warrant and defend,"

&c.; Signed Joseph Milah, with his mark. To which was added the following condition, *viz.,*

"The condition of the above bill of sale is such that the above-mentioned property remain in my possession so long as I live, and after my body is consigned to the grave, to remain as above-mentioned in the above bill of sale."

The defendants, Zacharie and wife, filed their answer denying all the allegations in the petition except as they thereinafter specially admitted. They then proceed to state that the female defendant was in possession of the negroes referred to in the petition; that she possessed them in her capacity of tutrix of her minor children, John and Josiah, whom she avers to be the lawful proprietors thereof, by a just title, to-wit, by inheritance from their father, Joseph Milah; they denied that the writing attached to

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the plaintiff's petition, was ever signed or executed by Milah, and required strict proof thereof; they alleged that, if it ever were so signed and executed, it was done in error and through the false and fraudulent representations of the plaintiff, and that no consideration was ever given or received therefor; that if it ever were signed or executed by Milah, it was fictitious and collusive, intended to cover or conceal a disguised donation of the slaves therein mentioned, and that as such it was null and void, not having been made with the formalities required by law, and they prayed for a trial by jury.

The defendants afterwards filed a supplemental answer stating that, at the time when the alleged sale, under private signature, purported to have been executed, Milah had neither children nor descendants actually living, and that legitimate children of said Milah were afterwards born and were then living.

A verdict and judgment were rendered in favor of the plaintiff.

At the trial, one bill of exceptions was taken by the plaintiff, and two by the defendant. As the judgment was in plaintiff's favor, it is unnecessary to consider the exception taken by him; we therefore pass at once to the consideration of those taken by the defendant, now plaintiffs in error.

The first of these was taken to the admission in evidence of the bill of sale, of which profert was made in the petition, upon several grounds which amounted in substance to this; that the instrument, being one which purported to convey slaves, was null and void because it was not signed by the vendor, a mark not being, as alleged, a signature within the provision of the laws of Louisiana in relation to slaves, and that no parol proof could be admitted to prove its execution. And that the instrument being one which contained mutual and reciprocal obligations, and not being in the form of an authentic act, was invalid because not made in as many originals, as there were parties having a direct interest, and not signed by the vendee.

No adjudged case is produced by the counsel for the plaintiffs in error, in support of the first branch of the objection that the instrument has the mark, and not the signature of Milah. It is rested on a provision of the law of Louisiana which declares "that all sales of immoveable property or slaves shall be made by authentic act or private signature."

Signature is indeed required, but the question is what is a signature? If this question were necessarily to be decided by the principles of law as settled in the courts of England and the United States,

there would be no doubt of the truth of the legal proposition that making a mark is signing, even in the attestation of a last will and testament, which has been fenced around by the law with more than ordinary guards because they are generally made by parties when they are sick and when too they are frequently *inopes consilii,* and when they therefore need all the protection which the law can afford to them. This principle is fully settled by many cases, amongst others, 8 Vesey 185, 504; 17 Vesey 459. *See also* 5 John. 144.

But the question has been directly adjudicated in Louisiana. In 9 La. 512 it is said

"that the force and effect to be given to instruments which have for signatures only the ordinary marks of the parties to them depend more upon the rules of evidence than the *dicta* of law relating to the validity of contracts required to be made in writing. The genuineness of instruments under private signature depends on proof, and in all cases where they are established by legal evidence, instruments signed by the ordinary mark of a person incapable of writing his name ought to be held as written evidence. According to the rules of evidence as adopted in this state, the ordinary mark of a party to a contract places the evidence of it on a footing with all private instruments in writing."

To the same point, *see* the case of *Madison v. Zabriskie,* 11 La. 251. This branch then of the objection to the admission of the instrument in evidence is wholly untenable. Nor is the other branch of the objection to its admissibility better supported, as the first branch fails, as we have seen, for the want of law to support it, so this second branch fails for want of the fact the assumed existence of which is the only basis on which it rests. That is it is not, in the language of the law, a cynalagmatic contract -- or in other words it does not contain mutual and reciprocal obligations, to which description of contracts only does the objection at all apply.

All the words in the instrument, as well in its body as in the condition, are the words of the maker of the instrument, the vendor. The vendee does not sign it; he does not speak in it at all. Consequently there are not and could not be any direct stipulations by him, nor can any be implied from its language and provisions, for the paper acknowledges on its face the receipt of the whole purchase money, and

nothing whatsoever was to be done by the vendee.

The second exception taken by the defendant was to the admission in evidence on the part of the plaintiff of an instrument of writing bearing date July 11, 1805, in the State of South

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Carolina, purporting to have been executed by Joseph Milah as a gift or donation of two slaves and certain goods and household furniture to one Sarah McGuire. The court, however, admitted the evidence, and as we think, properly, for the reason assigned in the bill of exceptions. From that it appears that previously to the offering this last paper, the court had admitted evidence on the part of the defendant to prove fraud and want of consideration, and they then admitted the paper thus objected to as rebutting evidence. Had it been offered and received by the court, as is objected by the counsel of the defendant in error, as evidence of title, it would, under the petition, have been inadmissible upon the ground of a variance between the allegation and proof. But it was distinctly received only for the purpose of repelling the parol evidence, which had been given to prove fraud and want of consideration, by showing that Milah had, as early as 1805, manifested a disposition to give the property to the plaintiff's wife, who, as appears from the record, was the sister of the former wife of Milah, who had died without children; the plaintiff's wife is the person named as donee in the deed before stated, as having been executed by Milah in South Carolina.

When we speak of the plaintiff in this connection, we mean the plaintiff in the court below, the now defendant in error.

After the verdict was rendered, the defendant in the court below moved for a new trial for sundry reasons stated on the record, which was refused. The granting or refusing of new trials rests in the sound discretion of the court below, and is not the subject of reversal in this Court. Without making further citations in proof of this proposition, it will be sufficient to refer to 17 U. S. 4 Wheat. 220, where it is said by the Court that the first error assigned is that the court refused to grant a new

trial, but it has been already decided, and is too plain for argument, that such a refusal affords no ground for a writ of error. The judgment of the court below is vested, and is therefore

Affirmed with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana and was argued by counsel. On consideration whereof it is now here adjudged and ordered by this Court that the judgment of the said district court in this cause be and the same is hereby affirmed with costs.