Ross Vs. Duval

Ross Vs. Duval

SooperKanoon Citation : sooperkanoon.com/79644

Court : US Supreme Court

Decided On : 1839

Appeal No. : 38 U.S. 45

Appellant : Ross

Respondent : Duval

Judgement :

Ross v. Duval - 38 U.S. 45 (1839)
U.S. Supreme Court Ross v. Duval, 38 U.S. 13 Pet. 45 45 (1839)

Ross v. Duval

38 U.S. (13 Pet.) 45

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF VIRGINIA

SYLLABUS

A judgment was obtained in the circuit court of the United States for the District of Virginia in December, 1821, and a writ of *fieri facias* was issued on this judgment in January, 1822, which was not returned, and no other execution was issued until

August, 1836, when a *capias ad satisfaciendum* was issued against the defendant. *Held* that this execution issued illegally, in consequence of the lapse of time between the rendition of the judgment and the issuing of execution in 1836.

The result of the opinion of the Supreme Court in the case of *Wayman v. Southard,* 10 Wheat. 1, delivered by Mr. Chief Justice Marshall, was that the execution laws of Kentucky, having passed subsequent to the process acts, did not apply to executions issued by the circuit courts of the United States, and that under the judiciary and process acts, the courts had power to regulate proceedings on executions. The power of the court to adopt such rules was not embraced in the point certified for the decision of the Court, and was not expressly adjudged, but it is the clear result of the argument of the Court.

The act of the Legislature of Virginia in 1792 to regulate proceedings on judgments is substantially and technically a limitation on judgments, and is not, therefore, an act to regulate process. It is a limitation law, and is a rule of property, and under the 34th section of the Judiciary Act is a rule of decision for the courts of the United States.

The act of the Legislature of Virginia of 1792, limits actions and executions on judgments rendered in the state courts, and the same rule must be applicable to judgments obtained in the courts of the United States.

The Process Act of Congress of 1828 was passed shortly after the decision of the Supreme Court of the United States in the case of *Wayman v. Southard,* and *United States Bank v. Halstead,* and was intended as a legislative sanction of the opinions of the court in those cases. The power given to the courts of the United States by this act to make rules as a regulation of proceedings on final process, so as to conform the same to those of state laws on the same subject extends to future legislation and as well to the modes of proceeding on executions as on the forms of writs.

Acts of limitation are of daily cognizance in the courts of the United States, and in fixing the rights of parties, they must be regarded as well in the federal as in the

state courts. The rule is well settled that to avoid a statute, a party must show himself to be within its exceptions.

A declaration in the Circuit Court of the United States for the Virginia District stated the plaintiffs to be "merchants, and partners trading under the firm and by the name and style of Duval & Co., of Philadelphia, in Pennsylvania." This was insufficient to give jurisdiction to the court in the action if the exception had been taken by plea or by writ of error within the limitation of such writ.

Construction of the act of limitations of Virginia of 1829. It is a sound principle that where a statute of limitations prescribes the time within which suit shall be brought or an act dare, and a part of the time has elapsed, effect may be given to the act, and the time yet to run being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases. This rule is believed to be founded on principle and authority.

On 7 December, 1821, James S. Duval, Lewis Duval, and John Rheinhart obtained a judgment against William Ross. A writ of *fieri facias* was issued on the judgment on 10 January, 1822, which was never returned. No other execution was issued on the judgment until 11 August, 1836. A *capias ad satisfaciendum* was then sued out and executed on the body of Ross, who gave up property in discharge of his body, and entered

Page 38 U. S. 46

into a bond with Henry King as surety for the forthcoming of the property on the day and at the place of sale. This bond was forfeited, and a motion was made upon it for an award of execution -- the award of execution was opposed on the ground of the lapse of time between the rendition of the judgment and the award of execution, in August 1836, and it was insisted that the execution had issued illegally and that the same, as well as the forthcoming bond taken under it, ought to be quashed.

The circuit court overruled the motion to quash the execution and the bond, and gave judgment for the plaintiff for the amount of the bond.

The defendants prosecuted this writ of error.

Page 38 U. S. 57

MR. JUSTICE Mc LEAN delivered the opinion of the Court.

On 7 December, 1821, James S. Duval, Lewis Duval, and John Reinhart, obtained a judgment in the circuit court against

Page 38 U. S. 58

William Ross. A writ of *fieri facias* issued on the judgment 10 January, 1822, which was delivered to the attorney for the plaintiffs and never returned. No other execution was issued until 11 August, 1836. A *capias ad satisfaciendum* was then sued out and executed on the body of Ross, who gave up property in discharge of his body, and entered into bond with Henry King as surety for the delivery of the property on the day and at the place of sale.

This bond being forfeited, a motion was made upon it, under the practice established in Virginia, for an award of execution. The motion was opposed, and the lapse of time between the rendition of the judgment and the execution of August, 1836, was relied on to show that the execution had been illegally issued, and consequently that the forthcoming bond was unauthorized and void. But the court entered up a judgment on the bond. To revise this judgment this writ of error is prosecuted.

In the investigation of the questions which arise in this case it becomes necessary to refer to certain acts of Congress, and also to certain statutes of Virginia.

By "an act to regulate processes in the courts of the United States," passed in 1789, it is provided

"That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style and modes of process in the circuit and district

courts in suits at common law shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."

And by the Act of May, 1792, it is declared

"That the forms of writs, executions, and other processes, except their style, and the forms and modes of proceeding in suits, in those of common law, shall be the same as are now used in the said courts respectively in pursuance of the act above recited."

These acts adopt the execution laws of the states as they stood in 1789. An act was passed in 1793 and also one in 1800 on the same subject, but as none of their provisions bears upon the present case, it is unnecessary to examine them.

In 1792, the State of Virginia passed a statute providing that

"Judgments in any court of record within the commonwealth, where execution hath not issued may be revived by *scire facias* or an action of debt brought thereon within ten years next after the date of such judgment, and not after, or where execution hath issued and no return is made thereon, the party in whose favor the same was issued shall and may obtain other executions or move against any sheriff or other officer, &c.;, for the term of ten years from the date of such judgment, and not after."

There is a saving in this statute in behalf of infants, &c.;, and persons beyond the commonwealth, giving five years after the removal of the disability to proceed on the judgment.

In the argument of this case in the circuit court, as appears from

Page 38 U. S. 59

the bill of exceptions, it was stated by the judges and admitted by the counsel on both sides that so far back as the recollection of the said judges and counsel extends, it has been the usage in the county and corporation courts, and in the superior courts of law, and in the general court of Virginia, where execution has

issued upon a judgment and no return made thereon, to allow other executions to be issued. But this recollection of the practice of the judges and counsel did not extend farther back than the above recited statute of 1792.

The circuit court, however, held that under the statutes and practice of Virginia prior to the act of 1792, where an execution had been issued within the year on a judgment, though not returned, the plaintiff was entitled to issue other executions without restriction as to time. And this is the ground taken by the counsel for the defendant in error.

A reference is made to the early statutes of Virginia which regulated executions, and also to the rule of the common law. And it is contended that the Virginia act of 1792, having passed subsequent to the taking effect of the process acts above cited, cannot affect the proceedings on the judgment of 1821. That the acts of 1789 and of 1792, which adopted the execution laws of the respective states as they stood in 1789, regulate the proceedings on the above judgment, unaffected by any subsequent legislation, either state or federal. And the decision of this Court in the case of *Wayman v. Southard,* 10 Wheat. 1, is referred to as fully sustaining this position.

The great question in that case was whether

"the laws of Kentucky respecting executions, passed subsequent to the process act, were applicable to executions which issued on judgments rendered by the federal courts."

In the very elaborate opinion which was delivered by the late Chief Justice, a construction was given to the process acts, and to the various sections of the act to establish judicial courts, of 1789. And in order fully to comprehend the effect of this decision, the points adjudicated will be stated.

The Court decided that the thirty-fourth section of the judicial act, which provides

"that the laws of the several states shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply, . . . has no

application to the practice of the court, or to the conduct of its officer, in the service of an execution."

It held that "so far as the process acts adopt the state laws, as regulating the modes of proceeding in suits at common law, including executions," &c.;, the adoption is confined to those laws in force in September, 1789. That the system, as it then stood, was adopted, subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time by rule to prescribe to any circuit or district court concerning the same.

Page 38 U. S. 60

The Court also held "that the fourteenth section of the Judiciary Act gave to the courts of the United States, respectively, a power to issue executions on their judgments." Other sections in the same act are referred to and construed, but they have no direct relation to the case under consideration.

The result of this opinion was that the execution laws of Kentucky, having passed subsequent to the process acts, did not apply to executions issued by the circuit court of the United States, and that under the judiciary and process acts, the courts had power to adopt rules to regulate proceedings on executions. The power of the court to adopt such rules was not embraced in the point certified for the decision of the Court, and was not expressly adjudged, but it is the clear result of the argument of the Court.

Having stated the points decided in this opinion, it is only necessary to apply such of them as are applicable to the case under consideration.

There is no evidence in the record that the Circuit Court of Virginia ever adopted any rule which by a fair construction could regulate executions. In this view, then, the case must stand upon the execution law of Virginia in 1789, adopted by the process acts. And under the decision in the above case of *Wayman v. Southard* it is clear that no subsequent changes in the process law of the State of Virginia can

be obligatory on the circuit court.

And here the question arises whether the Virginia act of 1792, having been passed subsequent to 1789, can have any effect in the present case.

So far as this act can be held to regulate executions, it is clearly inapplicable under the process acts of 1789 and 1792 to the circuit court. But the act is substantially and technically a limitation on judgments. It is not, therefore, an act to regulate process. Executions are named in the act, and are authorized to be issued under certain circumstances, within a limited time, but this is only another mode of limiting the judgment, and is strictly and technically as much a limitation on the judgment as is imposed in the first part of the same section in reference to a *scire facias* or action of debt. The act provides that after the lapse of ten years from the rendition of a judgment, where no execution has been issued, neither an action of debt nor a *scire facias* shall be brought on it. And that where an execution has been issued and not returned, other executions and proceedings may be had within the ten years, but not afterwards.

If this, then, be a limitation law, it is a rule of property, and under the 34th section of the Judiciary Act is a rule of decision for the courts of the United States.

As an act of limitation, it is impossible to distinguish this from other acts which limit the time of bringing certain actions, either by a designation of the ground or the form of the action.

These acts are of daily cognizance in the courts of the United States, and no one has ever doubted that in fixing the rights of

parties, they must be regarded as well in the federal as in the state courts.

The original judgment in the case under consideration was entered in 1821, and although an execution was issued within the year, which was never returned, yet no other proceedings were had on the judgment until the execution of 1836. Here was a lapse of fifteen years, and if the statute apply, the plaintiffs were barred

unless they can bring themselves within the exception. And why does not this statute apply to the federal courts. It limits actions and executions on judgments rendered in the state courts, and the same rule must be applicable to judgments obtained in the courts of the United States.

In this view of the case, it is not necessary to look into the Virginia execution law of 1789 to ascertain whether, if an execution was issued on a judgment within the year and not returned, the plaintiff might issue other executions without limitation. It is enough to know that the act of 1792 imposes a limitation to actions and executions on judgments, which like all other limitation laws of the states, must be enforced by the federal courts.

After the lapse of ten years, under this statute, a judgment becomes inoperative. An action of debt will not lie upon it, nor can it be revived by a *scire facias.* Much less can an execution be issued on it. Its vitality is gone, beyond the reach of legal renovation.

In giving effect to this statute, no principle is impugned, which is laid down in the case of *Wayman v. Southard.* The state law, which the court in that case held not to apply in the federal courts, was a law that regulated proceedings on executions. It was a process act, and not an act of limitations.

Do the plaintiffs in this case bring themselves within the saving of the statute. The rule is well settled that to avoid the statute, a party must show himself to be within its exception.

No proof is offered to show that the plaintiffs in the circuit court were without the Commonwealth of Virginia. The statement in the declaration is relied on to establish this fact. This statement does not aver that the plaintiffs were citizens of Pennsylvania, but represents them as "merchants and partners, trading under the firm and by the name and style of Duval & Co., of Philadelphia, in Pennsylvania."

This was insufficient to give jurisdiction to the court in the original action if the exception had been taken by plea, or by writ of error within the limitation of such writ.

In 1821, the plaintiffs represent themselves to be of Philadelphia, in Pennsylvania; but does it follow that since that period they have not been within the Commonwealth of Virginia? Does the legal inference arise that they were not within the state when the judgment was entered? We think not. Indeed, there is no allegation of citizenship by the plaintiffs in the declaration. For aught that appears on the face of the record, the plaintiffs might have

Page 38 U. S. 62

been citizens of Virginia, and residents at the time of the rendition of the judgment.

The act of limitations of 1826 has been referred to in the argument, and it is proper to give a construction to it.

The first section of that act bars all actions founded upon bonds executed by executors, administrators, guardians, &c.;, and other persons in a fiduciary character, which shall not be commenced within ten years after the cause of action shall have accrued.

The third section repeals the saving of the act of 1792, and the fourth section provides that

"In computing the time within which rights of entry and of action then existing shall be barred by the provisions of the act of 1826, the computation shall commence from the date of the passage of that act, and not before."

Now the question arises what actions are barred by this art? The answer is all actions founded on bonds, given in a fiduciary character, as described in the first section. The statute does not embrace any action founded on a judgment or on any other ground except on a bond of the character above stated.

The saving clause of the act of 1792 as to nonresidents is repealed, the only effect of which is to bring within the limitation of the statute of 1792 those who were within its saving clause and against whom the statute had not begun to run. Against such persons the statute could not begin to operate until the repeal of the exception by the act of 1826.

If the plaintiffs in the circuit court had brought an action of debt, or issued a *scire facias* on the original judgment, or issued an execution (an execution having been issued within the year of the rendition of the judgment, but not returned) within ten years from the passage of the act of 1826, they would not have been barred; if they could have shown that up to the passage of the act, they were within the saving of the act of 1792. But failing to do this, as they have failed in the present case, the action on the judgment and the execution would have been barred at the expiration of ten years from its rendition under the act of 1792. In the repeal of the saving clause of this act by the act of 1826, executions are not named as within the saving, but only "the right or title to any action or entry accrued," and a doubt has been suggested whether a person within the saving clause of the act of 1792 might not claim the right still to issue executions on a judgment on which no action of debt or *scire facias* could be sustained. We think that it was the intention of the legislature to repeal the saving clause of the act of 1792, as to nonresidents, in all its parts, although the language of the repealing clause does not include the term "execution." It cannot be supposed that the legislature would bar an action on a judgment and still authorize an execution to be issued on it.

There is another view of this case which, though not much considered in the argument, is deemed important by the Court.

And this arises under the process act of 1828. The third section

Page 38 U. S. 63

of this act provides

"That writs of execution and other final process issued on judgments and decrees, rendered in any of the courts of the United States, and the proceedings thereupon shall be the same, except their style, in each state, respectively, as are now used in the courts of such state, . . . provided however that it shall be in the power of the courts, if they see fit in their discretion, by rules of court, so far to alter the final process in said courts as to conform the same to any change which may be adopted by the Legislature of the respective states for the state courts."

This act adopts in specific terms the execution laws of the state, and if the limitation law of 1792 could be considered, so far as its provisions embrace executions, a process act, this act of 1828 adopts it, and the plaintiffs in the original judgment were bound to conform to its provisions.

To this it is objected that the courts of Virginia have uniformly construed the act of 1792 as not affecting judgments entered before its passage, and that as the law of 1828 adopts this statute, by the same rule of construction it cannot operate on judgments rendered prior to that time. The answer to this argument is, in the first place, if the act of 1792 or any part of it is to be considered as a process act merely, and not an act of limitations, the act of 1828 makes it the law of Congress for the State of Virginia and gives immediate effect to it. If it be viewed as an act of limitations merely, and not for the regulation of process, it then takes effect, as before remarked, as a rule of property, and is a rule of decision in the courts of the United States under the 34th section of the Judiciary Act. In either case, effect is given to the act of 1792 and it is decisive of the present controversy.

But if it be considered, as contended, an act of limitations adopted by the act of 1828, the answer is that the Court is to give a construction to the act of 1828. If this act be clear in its provisions, we are bound to give effect to it although it may to some extent vary the construction of the act of 1792. And this is no violation of the rule that this Court will regard the settled construction of a state statute as a rule of decision. For in this case the construction of the state law in regard to the effect it shall have is controlled by the paramount law of Congress.

The words are "that writs of execution and other final process issued on judgments and decrees rendered," not on judgments and decrees hereafter rendered. The law provides for executions, not judgments. And it operates on all executions issued subsequent to its passage, without reference to the time when the judgment was rendered.

The judgment in the circuit court was entered in 1821, so that seven years of the ten years' limitation of the act of 1792 had run when it was adopted by the act of 1828. Now the question is shall no effect be given to this act of Congress in

Virginia on judgments before its passage, because of the construction by the Virginia courts of the act of 1792?

Page 38 U. S. 64

It must be recollected that this act of 1828 is a national law, and was intended to operate in the national courts in every state. As it regards some of the states, it may at first have operated less beneficially in them than in others. But its provisions took immediate effect in all the states.

It is a sound principle that where a statute of limitations prescribes the time within which suit shall be brought or an act done, and a part of the time has elapsed, effect may be given to the act, and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases.

There may be some seemingly contradictory decisions on this point in some of the states which have been influenced by local considerations and the peculiar language or policy of certain acts of limitations. But the rule is believed to be founded on principle and authority.

The act of 1828 was passed shortly after the decision of the cases of *Wayman v. Southard* and *United States Bank v. Halsted,* and was intended as a legislative sanction to the opinions of the Court in those cases.

This act is more explicit than the previous acts on the same subject as to the power of the courts of the United States to adopt rules to regulate final process. And it is well remarked by MR. JUSTICE STORY in giving the opinion of the Court in the case of *Beers v. Haughton,* 9 Pet. 363, that under this law,

"the circuit court had authority to make such a rule, as a regulation of the proceedings upon final process, so as to conform the same to those of the state laws on the same subject."

And this power to adopt rules so as to conform to the state laws extends to the future legislation of the states, and as well to the modes of proceeding on executions as to the forms of the writs.

From the above considerations, the Court is of opinion, whether the proceedings in the circuit court, in issuing the execution and giving a judgment on the forthcoming bond, be considered as regulated by the process acts of 1789 and 1792 or by the process act of 1828, there is error in the judgment, and that it must be

Reversed.

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 Virginia, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said circuit court in this cause be, and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said circuit court for further proceedings to be had therein in conformity to law and justice and the opinion of this Court.