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Court : US Supreme Court

Decided On : 1841

Appeal No. : 40 U.S. 167

Appellant : Levy

Respondent : Fitzpatrick

Judgement :

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40 U.S. (15 Pet.) 167

ERROR TO THE CIRCUIT COURT FOR

THE EASTERN DISTRICT OF LOUISIANA

In the circuit court, Edmund and David Fitzpatrick, citizens of the State of Virginia, filed a petition stating that the plaintiffs in error, Barnett and Eliza Levy, citizens of Louisiana and resident in the Eastern District of Louisiana, were indebted to them

in solido in the sum of $12,100, with interest at the rate of ten percent until paid from the second day of February 1838. That on 26 March, 1838, Barnett Levy, Eliza Levy and one Moses E. Levy (the latter being then a resident in the State of Mississippi, and not within the district of Louisiana) gave their obligation, duly executed by them, to the said Edmund and David Fitzpatrick, binding themselves and each of them *in solido* to pay to them the said sum of $12,100 on 2 February, 1839, with interest, &c.;, "negotiable and payable at the residence of the said Barnett Levy, in the State of Louisiana." The petition alleged that a demand of payment of the said obligation had been duly made at the residence of Barnett Levy, but the obligors had wholly failed to pay the same. The petition stated that a public act of hypothecation and mortgage, at the time the obligation was given, was executed by M. A. Levy, Barnett Levy and Eliza Levy, by which certain real estate and slaves were given in pledge for the security of the said debt, which was duly recorded in the proper office in the Parish of Madison in the State of Louisiana. The mortgage was joint, not joint and several. The petition asked that executory process might issue in the premises and that, after due proceedings, the land and slaves might be sold to pay the debt and interest due the petitioners under executory process. The petition also alleged that the act of hypothecation imported a confession of judgment and entitled the petitioners to executory process. The bond and a certified copy of the act of mortgage were annexed to the petition.

The mortgage, executed by Eliza Levy and Barnett Levy in their proper persons and by Barnett Levy under a power of attorney from M. A. Levy which was not annexed to nor filed with the mortgage, stipulated that one-third of the debt should be paid on 2 February, 1839; one-third on 2 February, 1840, and the residue on 2 February, 1841,

"and on failure to pay the said note in the three several installments as aforesaid, or any one thereof, at its maturity, they hereby empower and authorize the said Edmund Fitzpatrick and David Fitzpatrick, or either of them, to avail themselves of

all the advantages of this special mortgage and to proceed to seizure and sale of the said lands and slaves hereby mortgaged by executory process, according to law, for the whole sum of $12,100."

The Honorable P. K. Lawrence, judge of the circuit court, gave an order for process on the petition, "as prayed for." Two of the mortgagors, the defendants in the circuit court, prosecuted this writ of error to the supreme court. The errors assigned in the petition for the writ of error in the circuit court were the following:

1st. No oath or affidavit has been made by the creditors, or either of them, that the debt is due upon which the order of seizure and sale has been obtained. *See* Civil Code of Louisiana, art. 3361.

2d. The power of attorney, if any exists, of Moses A. Levy, one of the defendants, is not attached to the papers nor filed in this suit, and there is no authentic evidence of it; there is a mere recital of it in the act.

3d. The certified copy of the act of mortgage is not completed, inasmuch as a certified copy of said power of attorney does not accompany it, though said act declares that said power of attorney was attached to it, and is of course an important part of the record.

4th. Though the written obligation may be joint and several, yet the act of mortgage is only joint, and it is indivisible; therefore it is illegal to proceed by executory process against any one or two of the joint obligators to the exclusion of the other one or two.

5th. The proceedings generally are irregular and illegal, and cannot be sustained.

Lastly, that no presentment or demand of payment of the note or obligation sued upon was made before the commencement of this suit at the place where the same was made payable, and that no protest or other evidence of such demand is exhibited.

Mc KINLEY, JUSTICE, delivered the opinion of the Court.

The defendants in error addressed a petition to the Circuit Court for the Eastern District of Louisiana, stating, that the plaintiffs in error were indebted to them *in solido* in the sum of $12,100, with interest at the rate of ten percent per annum, by their certain writing obligatory, executed by them and one Moses A. Levy, who was then out of the jurisdiction of the court. To secure the payment of which sum of money the said Barnett Levy, for himself and as attorney in fact for the said Moses A. Levy, together with the said Eliza Levy, by a public act hypothecated and mortgaged to the petitioners a certain tract of land and several slaves therein mentioned, which public act, they alleged, imports a confession of judgment, and entitled them to executory process, which they prayed the court to grant. Without any process requiring the appearance of the debtors, one of the judges signed an order directing the executory process to issue. To reverse this order they sued out this writ of error.

Had this proceeding taken place before a judge of competent authority in Louisiana, the debtors might have appealed from the order of the judge to the supreme court of that state, and that court might, according to the laws of Louisiana, have examined and decided upon the errors which have been assigned here. But there is a marked and radical difference between the jurisdiction of the courts of Louisiana and those of the United States. By the former, no regard is paid to the citizenship of the parties, and in such a case as this no process is necessary to bring the debtors before the court. They, having signed and acknowledged the authentic act according to the forms of the law of Louisiana, are, for all the purposes of obtaining executory process, presumed to be before the judge. Louisiana Code of Practice, art. 733-734. An appeal will lie to the Supreme Court of Louisiana from any interlocutory or incidental order made in the progress of the cause which might produce irreparable injury. *State v. Lewis,* 9 Mart. 301-302;

Broussard v. Trahan's Heirs, 4 *id.* 497; *Gurlie v. Coquet,* 3 Mart.N.S. 498; *Seghus v. Antheman,* 1 *id.* 73; *State v. Pitot,* 12 Mart. 485.

The jurisdiction of the courts of the United States is limited by law, and can only be exercised in specified cases. By the 11th section of the Judiciary Act of 1789 it is enacted

"That the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States is plaintiff or petitioner, or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. And no civil suit shall be brought before said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ."

The construction given by this Court to these provisions is that no judgment can be rendered by a circuit court against any defendant who has not been served with process issued against his person in the manner here pointed out unless the defendant waive the necessity of such process by entering his appearance to the suit. *Toland v. Sprague,* 12 Pet. 300. And by the 22d section of the same act, final judgments in civil actions commenced in the circuit courts by original process, may be reexamined and reversed or affirmed upon a writ of error. It is obvious that the debtors were not before the judge in this case by the service of process or by voluntary appearance when he granted the executory process. In that aspect of the case, then, the order could not be regarded as a final judgment within the meaning of the 22d section of the statute.

But was the order a final judgment, according to the laws of Louisiana? The fact of its being subject to appeal does not prove that it was, as has already been shown. Nor could it *per se* give to the execution of the process, ordered by the judge, the dignity of a judicial sale. Unless at least three days previous notice were given to the debtors, the sale would be utterly void. *Grant v. Walden,* 5 La. 631. This proves that some other act was necessary on the part of

the plaintiffs to entitle them to the fruits of their judgment by confession. And in that act is involved the merits of the whole case, because, upon that notice, the debtors had a right to come into court and file their petition, which is technically called an opposition, and set up, as matter of defense, everything that could be assigned for error here, and pray for an injunction to stay the executory process till the matter of the petition could be heard and determined. And upon an answer to the petition coming in, the whole merits of the case between the parties, including the necessary questions of jurisdiction, might have been tried and final judgment rendered. Art. 738-739 of the Code of Practice. From this view of the case, we think, the order granting executory process cannot be regarded as anything more than a judgment *nisi.* To such a judgment a writ of error would not lie. The writ of error in this case must therefore be

Dismissed.

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 ordered and adjudged by this Court that this writ of error be and the same is hereby dismissed with costs.