Brown Vs. Clarke

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Appeal No. : 45 U.S. 4

Appellant : Brown

Respondent : Clarke

Judgement :

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Brown v. Clarke

45 U.S. (4 How.) 4

ERROR TO THE DISTRICT COURT OF THE UNITED

STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI

SYLLABUS

By the law of Mississippi, a judgment is a lien upon personal as well as real estate from the time of its rendition.

Where there has beets a judgment, an execution levied upon personal property, and a forthcoming bond, the property levied upon is released by the bond, and the lien of the judgment destroyed.

If, therefore, after this, another judgment be entered against the original defendant, this second judgment is a lien upon the property which has been released by the bond.

The lien thus acquired by the second judgment is not destroyed by subsequently quashing the forthcoming bond. The effect of such quashing is not to revive the first judgment, and thus restore the lien which was superseded by the execution of the bond.

If the forthcoming bond had been shown to have been void *ab initio,* the result would be different.

In cases of conflicting executions issued out of the federal and state courts, a priority is given to that under which there is an actual seizure of the property first.

The mode in which bills of exceptions ought to be taken, as explained in *Walton v. United States,* 9 Wheat. 651, and in 29 U. S. 4 Pet. 102, will be strictly adhered to by this Court.

This was a writ of error to the District Court of the United States for the Northern District of Mississippi, to bring up for review certain instructions delivered to the jury in an action of trover, brought by the defendant in error against the plaintiff in error, and in which the plaintiff below obtained the verdict.

The case was this. Brown, the defendant below, obtained a judgment of $8,640.37, by confession, against one Haywood Cozart, in the Circuit Court of Lafayette County, Mississippi, which was docketed on 18 May, 1840. Upon which execution was issued on 6 and delivered to the sheriff on 20 June following, and a levy made the same day on several slaves, the property of the defendant on the execution. A forthcoming bond was given by the defendant, with H. M. Cozart as surety, and which was approved of by Brown, the plaintiff.

This bond is in the penalty of double the amount of the judgment, made payable to the plaintiff in the execution, and conditioned well and truly to deliver the property levied on to the sheriff on 17 August (then) next, the day of sale, at a certain place, to be sold to satisfy the judgment, unless the same should be previously paid.

Clarke, the defendant in error, recovered a judgment of $2,117.31 against the same Haywood Cozart, in the District Court of the United States for the Northern District of Mississippi, at the June term of said court, 1840; upon which an execution was issued to the marshal of the district, and a levy made, on 9 November following, upon six of the slaves in the possession of Cozart, and which had been before levied on under Brown's execution. They were sold by the marshal on 7 December thereafter, and purchased in by Clarke, the plaintiff, the highest bidder.

The sheriff returned upon the execution in the case of *Brown v. Cozart,* and upon the forthcoming bond, that the property was not delivered in pursuance of the condition, nor the money paid, and that it was therefore forfeited. And Brown, at the November term of the Circuit Court of Lafayette County, at which the execution was returnable, made a motion to the court to quash the bond, which was granted accordingly; the ground of the motion is not stated. And on the same day, 23 November, 1840, he sued out an alias *fieri facias* on the original judgment, returnable at the next term of said court.

To this execution, the sheriff returned that he had levied upon six slaves, naming them, in the hands of the Marshal of the Northern District of Mississippi, and also on other property which it is not material to notice. And further, that after the sale of the slaves by the marshal, he was indemnified by Brown, and required to make a levy upon them on 7 December, 1840, and that, on 4 January following, he sold them, by virtue of the execution, to Brown, the highest bidder.

It further appeared that, at the time the marshal levied on the slaves, 9 November, 1840, Cozart had some fifteen or eighteen other slaves in his possession; that the

marshal took those levied on into his custody, and on the sale under the execution delivered them to Clarke, the purchaser; and that they were afterwards taken out of his possession by the sheriff, under his execution, by the direction of Brown; that Hiram M. Cozart, the surety in the forthcoming bond, was a brother of Haywood Cozart, was a man of but little property, and lived with his brother, some six miles distant from Prown; and that after the levy by the marshal, and before the sale, the two Cozarts left the State of Mississippi for Texas, and carried away with them the fifteen or eighteen slaves not levied on by this officer.

When the testimony closed, the counsel for the plaintiff, Clarke, requested the court to give the following instructions to the jury, namely, that if they believed the marshal made lawful levy on the property in dispute, the sale under his execution was valid, and vested in the purchaser a good title against other executions, whether founded on judgments of the state or federal courts; and that if they believed that the sheriff levied his execution on the slaves and took a forthcoming bond, which was afterwards forfeited, the same was a satisfaction of the original judgment, and the subsequent quashing of the same did not affect the rights of the plaintiff, acquired by virtue of the marshal's levy after such forfeiture of the bond, and also, if they believed that the sheriff, after his levy, took a forthcoming bond, which was afterwards forfeited, and that the salves therein named remained in the possession of the defendant Cozart, the levy of the marshal, made after the forfeiture of said bond and sale in pursuance thereof, were

valid, notwithstanding the bond was quashed before the sale, but after the levy. And, further, if the jury believed that the defendant, Brown, agreed to approve of the surety on the forthcoming bond, and thereby permitted the slaves to remain in the possession of the said Cozart, the subsequent quashing of the bond upon his own motion did not place him in any better situation than if he had not issued an execution on the judgment. And, also, if they believed the approval of the bond by Brown was with a view to allow Cozart to remain in possession of said slaves, and to keep off and delay other creditors, then they should find for the plaintiff, and, also, if they believed the conduct of Brown was fraudulent in obtaining

proceedings on his judgment, then they should find for the plaintiff. All which instructions were objected to by the defendant's counsel, but the objection was overruled by the court, and the instructions given.

The counsel for the defendant proposed the following instructions, namely that, if the jury believed from the evidence, the defendant, Brown, obtained a prior judgment in the circuit court of Lafayette County to the judgment obtained by the plaintiff, Clarke, in the district court of the United States, Brown thereby obtained a prior lien upon Cozart's property for the satisfaction of his judgment, and that said lien could only be defeated and postponed by some act of Brown fraudulent in law; that the taking of the forthcoming bond by the sheriff, and the quashing of the same, were not acts deemed fraudulent in law; that the levy and sale of the slaves of Cozart by the marshal, by virtue of an execution on a junior judgment, was subject to the lien of the prior judgment, and communicated no title to the purchaser paramount to the lien of the prior judgment; that the forfeiture of a forthcoming bond, which is quashed for want of conformity to the statute, is not such an one as has the force and effect of a judgment, because not in conformity to the statute. Which instructions were objected to by the counsel for the plaintiff, and were refused by the court.

The record adds the jury returned a verdict for the plaintiff, and the defendant moved the court to set it aside and grant a new trial, which motion was overruled. To all which the defendant excepts, and tenders this his bill of exceptions, which he prays may be signed and sealed by the court.

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MR. JUSTICE NELSON delivered the opinion of the Court.

By the law of the State of Mississippi, a judgment is a lien upon the personal as well as real property of the defendant, from the time of its rendition, *Smith v. Everly,* 4 How. 178; *Commercial Bank of Manchester v. Coroner of Yazoo County,* 6 How. 350, and if the first judgment obtained by Brown against Cozart could be upheld against the objections taken to it, there is no doubt, according to

the law of Mississippi, that the instructions given by the court below to the jury were erroneous. That judgment was docketed on 18 May, 1840, whereas Clarke's was not recovered till 16 June following.

It is insisted, however, that the seizure of the property of the defendant by the sheriff, under the first judgment, an discharge of it on the execution and delivery of the forthcoming bond, operated to extinguish the lien, and let in that of the junior judgment of Clarke, so as to give it the preference. This raises the principal question discussed in the case.

By the act of 1827, Laws of Miss., 123, 2, the sheriff or other officer is required, upon the levy of an execution upon personal property, to take a bond, if tendered, with sufficient security, from the debtor, payable to the creditors, reciting the service of such execution, and the amount due thereon, in a penalty of double the amount of such execution, with condition to have the property levied on forthcoming at the day of sale; and if the owners of such property or the defendant in the execution shall fail to deliver the same according to the condition of the bond, such sheriff or other officer shall return the bond so forfeited, with the execution, to the court from which the same issued, on the return day thereof; and every bond so forfeited shall have the force and effect of a judgment, and execution shall issue against all the obligors thereon &c.;

Under this statute, it appears to have been uniformly held in the courts of Mississippi, that the bond thus given to the creditor on the seizure of the goods was intended as a substituted security for the lien acquired by the judgment and seizure, and consequently, on its execution and delivery, the goods, by operation of law, are released from all charge, and left in the possession of the debtors as free and unencumbered as before it attached, and if the property is not delivered, in pursuance of the condition, the remedy is then upon the bond, which on the breach or forfeiture becomes, by

operation of the statute, a statutory judgment against the defendant and sureties from that time, followed by a new lien upon the real and personal estate of all the obligors. The original judgment is merged and satisfied by the new and more comprehensive statutory judgment upon the bond, and the remedy of the creditors limited to the enforcement of this judgment.

This is, in substance, the view of the statute as expounded by the courts of Mississippi in several cases, and particularly in the case of *Bank of the United States v. Patton,* 5 How. 200, in the court of appeals, which was argued twice, and very fully considered by the court. *Stewart v. Fuqua,* Walk.R. 175; *Witherspoon v. Spring,* 3 How. 60; *Archibald v. Anderson,* 2 How. 852; *King v. Terry,* 6 How. (Miss.) 513; *Minor v. Lancashire,* 4 How. 347. In the case of *Bank of the United States v. Patton,* the Court, speaking of what would have the effect of the forthcoming bond, if the statute had not annexed to it the force of a judgment, say

"As it releases the levy, and restores the property to the debtor, it is tantamount to a satisfaction of the execution, and the creditor would be left to pursue his remedy upon the bond."

The court then liken it to the replevin bond in Virginia, which had been held to be a substitute for the original judgment, and operated as a satisfaction; and add

"It was no doubt in view of this principle that the framers of our statute saw proper to relieve the creditors from the delay and expense of a second suit upon the bond, by giving to it after forfeiture the force of a judgment against all the obligors therein, with a consequent right to have execution on the same, and also to provide, that no security should be taken on the execution which is sued out upon the new judgment."

It will be seen, therefore, that the forthcoming bond and statutory judgment consequent upon the forfeiture, in its operation and effect, reversed the original position of these parties in respect to the priority of lien under their respective judgments, and gave to Clarke, the plaintiff below, the preference, his judgment

having been docketed 16 June, and the new judgment of Brown not taking effect till 17 August, the date of the forfeiture of the bond. *(Minor v. Lancashire.)*

If the case stood upon this footing, it is very plain that Clarke, the purchaser under the sale of the marshal, acquired the better title to the property in question, and that the instructions were in conformity to the law of the case.

It is contended, however, that the quashing of the forthcoming bond, and consequently the new statutory judgment, operated to revive the original one, and to restore the priority of lien, the same as it stood before any of the proceedings on that judgment had intervened.

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We do not assent to this view of the effect of the order vacating the new judgment, so far, at least, as respects the liens or rights of third parties which have legally attached in the meantime to the goods of the defendant, discharged from the original judgment by the giving of the forthcoming bond. After that lien was suspended or discharged, the original judgment being in contemplation of law satisfied by the new and substituted security, the debtor was at liberty to deal with the property as his own, and it remained in his possession, subject to any charge or lien impressed upon it either by the act of the party or by operation of law the same after the forthcoming bond as before the entry of the original judgment. Possibly as between the parties the judgment revived, but it would be against principle, and work manifest injustice, to give to it this retrospective operation so as to extinguish the intermediately acquired legal rights of third persons. We deny to it this effect.

It would be otherwise if the forthcoming bond had been shown to be void, as it might then be treated as a nullity and as affording no foundation for the statutory judgment consequent upon the forfeiture. Under such circumstances, the lien of the original judgment would remain unaffected, and might be enforced by execution; it would then, of course, continue uninterrupted by the lien of any subsequent judgment entered up against the defendant.

This view of the statute was taken by the court of Mississippi in *Carleton v. Osgood,* 6 How. 285.

But no such ground is presented in the record before us; nor did it exist in point of fact in the case. On the contrary, the forthcoming bond was in conformity to the statute, and the only reason for the action of the court in quashing the proceedings, for aught that appears or has been shown, was either that the tribunal conceded to the plaintiff the right to vacate his own judgment at his election, and thus voluntarily give up all the rights acquired under it, or that the surety was irresponsible, which latter ground would probably have been unavailing had the fact appeared before the court, the Brown himself, with full knowledge of all the circumstances, approved of the sufficiency of the security.

At all events, it is enough to sustain the ground upon which we have placed the priority of lien upon the property, that, for aught appearing in the case, the new judgment of Brown upon the forthcoming bond was regular, and existed in full force and effect until set aside and vacated on his own motion. For, if so, it is clear, upon the statute and decisions of the courts of Mississippi, that the lien of his original judgment against Cozart became thereby lost and postponed, so as to let in that of the junior judgment of Clarke, and consequently the sale of the marshal, by virtue of the execution under it, vested in the purchaser the better title.

We have thus far examined this case upon the law of Mississippi,

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where the cause of action arose, as we understand it to have been expounded and applied by the courts of that state.

Another view may be taken, leaving out of consideration the priority of lien as acquired under the judgments of the respective parties, and looking solely to priority as acquired by virtue of an actual seizure of the property under execution, regarding that as the test in cases where the conflicting executions issued out of the federal and state courts, and to the executive officers of the different jurisdictions. *Hagan v. Lucas,* 10 Pet. 400. In this aspect of the case, the legal

result is equally decisive in favor of the right of the plaintiff below.

If we have not misapprehended the rule of law prevailing in Mississippi in the view already taken, the right to the property acquired under the seizure of the first execution of Brown became extinguished by the operation and effect of the forthcoming bond. No title, therefore, can be set up by virtue of that seizure.

The case, then, as it respects the right depending upon priority of actual seizure and legal custody of the property, instead of priority of judgment, stands thus: the marshal levied upon the slaves on 9 November; the sheriff not till 7 December following. The former, therefore, under the law giving effect to the first seizure, was entitled to the property, and of course the purchaser at his call acquired the better title.

In every view we have been able to take of the case, we are satisfied the judgment of the district court was right, and should be

Affirmed.

The Court has had some difficulty in noticing the exceptions taken to the instructions in this case in the form in which they are presented upon the record. It is matter of doubt whether they point to the instructions given and refused to the jury, or the refusal of the court below to grant a new trial. If to the latter, no question is presented upon which error would lie according to the repeated decisions of this Court. 17 U. S. 4 Wheat. 213; 19 U. S. 6 Wheat. 542.

The counsel were probably misled, in making up the record, by the practice in Mississippi, where error will lie to the appellate court for a refusal to grant a new trial by statute. Laws of Miss., p. 493, 53. But the rule is otherwise in the federal courts. That state has also a statute providing for the case of exceptions to be taken in the progress of the trial in the usual form (p. 620, 40), which is the form that should have been observed in this case. The practice is particularly stated and explained in *Walton v. United States,* 9 Wheat. 651, and in several later cases, 29 U. S. 4 Pet. 102.

The practice is well settled and exceedingly plain and simple, and will be strictly adhered to by the Court.