

Erwin's Lessee Vs. Dundas

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Appeal No. : 45 U.S. 58

Appellant : Erwin's Lessee

Respondent : Dundas

Judgement :

Erwin's Lessee v. Dundas - 45 U.S. 58 (1846)

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Erwin's Lessee v. Dundas

45 U.S. (4 How.) 58

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF ALABAMA

SYLLABUS

Although by the law of Alabama, where an execution has issued during the lifetime of a defendant but has not been actually levied, an alias or pluries may go after his death, and the personal estate of the deceased levied upon and sold to satisfy the

judgment, yet this is not so with respect to the real estate.

By the common law, the writ of *fiery facias* had relation back to its *teste*, and if the execution was tested during the lifetime of a deceased defendant, it might be taken out and levied upon his goods and chattels after his death.

But if an execution issues and bears *teste* after the death of the defendant, it is irregular and void, and cannot be enforced against either the real or personal property of the defendant. The judgment must first be revived against the heirs or devisees in the one case, or personal representatives in the other.

Such is the settled law where there is but one defendant.

Where there are two defendants, one of whom has died, the judgment cannot be

Page 45 U. S. 59

enforced by execution against the real estate of the survivor alone, and as it has to issue against the real estate of both, the real estate of the deceased is protected by the same law which would govern the case if he had been the sole defendant. The judgment must be revived by *scire facias*.

Before and since the Statute of Westminster 2d (which subjected lands to an *elegit*), a judgment against two defendants survived against the personal estate of the survivor, and execution could be taken out against him within a year without a *scire facias*.

But before the real estate of the deceased can be subjected to execution, the judgment, which does not survive as to the real estate, must be revived against the surviving defendant and against the heirs, devisees, and terre-tenants of the deceased.

The interest of new parties would otherwise be liable to be suddenly divested without notice.

In these views the highest court of the State of Alabama concurs. (See 6 Ala. 657.)

This was an action of ejectment brought by Erwin, the plaintiff in error, to recover a lot in the City of Mobile, known as Hitchcock's cotton press, bounded on the north by Main Street, on the east by Water Street, on the south by Massachusetts Street, and on the west by Royal Street, under the following state of facts.

Prior to November, 1836, Henry Hitchcock was seized and possessed of the above lot, and on 2 November, 1836, a judgment was recovered against him in the Circuit Court of Alabama for Mobile County by William McGehee to the use of Abner McGehee.

By the laws of Alabama, this judgment was a lien upon the defendants' real estate.

On 21 December, 1836, Hitchcock sued out a writ of error to the Supreme Court of Alabama, giving the usual bond, with Robert D. James as surety, whereby the judgment was superseded.

On 23 June, 1838, the judgment of the circuit court was affirmed in the supreme court, which affirmance, by the laws of Alabama, operated as a judgment on the bond in error, against both parties obligors.

On 14 July, 1838, Hitchcock executed a mortgage of the lot in question to Cowperthwaite, Dunlap, and Cope, to secure the payment of a debt due to them.

On 18 August, 1838, a *fi. fa.* issued from the circuit court clerk's office, on the affirmed judgment against H. Hitchcock and Robert D. James, his security, which writ came to the hands of the Sheriff of Mobile County, being for the amount of the debt, besides the ten percent damages. The sheriff endorsed that he received this execution on 20 August, and levied the same on certain lots in Mobile, as the property of Robert D. James, and returned it to the fall term.

On 10 October, 1838, Hitchcock, with the consent of

the mortgagees, leased the property to Mansoney and Hurtell for a term of five years.

On 29 November, 1838, a *venditioni exponas* issued to the sheriff, commanding him to sell the property, on which he had levied, as shown by his return. To this *venditioni exponas* he returned that he had advertised the property for sale and that on 2 March, 1839, all further proceedings had been stopped by an injunction.

On 2 March, 1839, Henry Hitchcock filed in chancery a bill against McGehee, praying, for causes shown in the bill, relief against the judgment at law and that the same should be enjoined. On this bill an order was made for an injunction in the following words:

"On the complainant's executing bond, with good and sufficient security, in double the amount of the judgment at law, let an injunction issue agreeably to the prayer of the bill."

"P. T. HARRIS"

"28 February, 1839"

"To the Clerk of the Circuit Court of Mobile County, Alabama"

The complainant, Hitchcock, filed a bond by himself and William Crawford, as his security, in the penal sum of \$8,404, payable to McGehee, dated 2 March, 1839, with a condition which, after reciting the rendition of the judgment, the filing the bill, and granting of the injunction &c., ran in these words:

"Now therefore, if the said Henry Hitchcock shall pay and satisfy all damages that the defendant McGehee may sustain by the wrongful exhibition of said bill, and in all things abide by and perform the ultimate decree which may be rendered in the cause, then this obligation to be void and of no effect, otherwise to be and remain in full force and virtue."

A writ of injunction issued on 2 March, 1839, commanding the sheriff to stay proceedings on the execution, on which he returned that on the same day he

desisted from all farther proceedings, and returned the execution as enjoined.

On 12 August, 1839, Hitchcock died.

At the fall term of the chancery court, on 25 November, 1839, the following order was made in the cause:

"HITCHCOCK v. Mc GEHEE"

"This day came the defendant, by his solicitor, and suggests to the court that the complainant has died since the last term of this court, and thereupon it is ordered, on motion of defendant's counsel, that the representatives of the complainant revive the proceedings by bill against the defendant by 1 April next, or

Page 45 U. S. 61

the injunction shall be from thence dissolved, and the defendant have leave to proceed at law."

At the Spring term, 1840, 22f May, 1840, the following order was made:

"At the last term of this Court an order was made suggesting the death of the complainant, and that unless the suit be revived on or before the first day of the next term of said court, that the injunction be dissolved, and no party complainant being made, it is ordered that the suit abate, and that the complainant's administrator and heirs and security on the injunction bond pay the costs."

Hitchcock, by his will, bequeathed all his real and personal property to his wife, as trustee, with authority to make public or private sales and conveyances for payment of debts, and constituted her executrix.

On 8 July, 1840, Mrs. Hitchcock, without having taken out letters testamentary on the will, made an absolute sale and conveyance of the lot in question to Cowperthwaite &c.;, subject to the lease above mentioned.

On 10 July, 1840, an alias *fi. fa.* issued on the affirmed judgment at law against Henry Hitchcock and Robert D. James for the amount of the debt and ten percent

damages, given on affirmance, which came to the hands of the Sheriff of Mobile County, on which he returned that he had levied on the land (now the subject of this action of ejectment) as the property of Henry Hitchcock, pointed out to him by Isaac H. Erwin, executor of Henry Hitchcock, deceased, and that on the first Monday of November, 1840, he had sold the said land to James Erwin, who was the highest bidder, for four thousand five hundred dollars.

On 10 February, 1841, the tenants attorned to Cowperthwaite &c., as landlords.

On 3 March, 1841, Erwin brought this suit against the tenants, who thereupon attorned to him and agreed to hold under him as landlord.

On 8 September, 1841, Cowperthwaite &c., conveyed all their estate and interest in the premises to Dundas and others, the present defendants in error, who, on 22 March, 1842, applied to the court to be admitted into the consent rule and to defend the action as landlords on filing certain affidavits. This motion was resisted by the plaintiff Erwin and also by the tenants, but in March, 1843, the court admitted them to defend the suit. Whereupon the cause went to trial and, under the instructions of the court, the jury found a verdict for the defendants.

The plaintiff took the two following bills of exceptions.

"First Exception. Be it remembered, that at the Spring term, 1843, of this Court, James Dundas, Mordecai D. Lewis, Robert L.

Page 45 U. S. 62

Pittfield, Samuel W. Jones, and Robert Howell, appeared before the court by their counsel and filed the affidavit of H. Barney, which is made part of this bill of exceptions, and moved the court to be admitted to appear and defend the action against the plaintiff by entering into the consent rule and pleading. The tenants in possession, Hurtell, Mansoney, and Griffiths, resisted the said motion and showed cause on oath against the same, which showing, which is on file, is made a part of this bill of exceptions, together with the documents thereto appertaining and referred to, and the said motion was also resisted by the plaintiff. Whereupon, the

said motion coming on to be heard, the same was argued, and the hearing of said motion was continued from term to term till at this term, when the said motion was argued, and upon argument had, the said motion of the said applicants, claiming to be landlords, was granted, and the objections of the said plaintiffs, and of the tenants thereto, were overruled. And the said parties, admitted by the court to defend against the will of the said plaintiff and tenants, and the said tenants thereupon, refused to plead. For all which decisions of the court allowing said motion, the plaintiff excepts, and prays this to be sealed as a bill of exceptions, which is done accordingly."

"[Signed] J. Mc KINLEY [SEAL]"

"Second Exception. Be it remembered that on the trial of this cause, on the issue joined between the said plaintiff and the said James Dundas, Mordecai D. Lewis, Robert L. Pittfield, Samuel W. Jones, and Robert Howell, who have appeared as landlords, and entered into the consent rule and pleaded not guilty, the plaintiff, to maintain the title, on his part, produced and gave in evidence the proceedings had in the Circuit Court of Mobile County, in the State of Alabama, in an action wherein William McGehee, use of &c., was plaintiff, and Henry Hitchcock was defendant, together with the judgment, executions, sheriff's returns &c., copies of all which are hereto annexed, marked A. Also the proceedings of the Supreme Court of Alabama on the affirmance of said judgment, a copy of which is hereto annexed, marked B. Also the record of the proceedings in a chancery suit, wherein the said judgment was enjoined, the injunction &c., a copy of which is herewith, marked C. And the sheriff's deed on the sale of the property in controversy by the Sheriff of Mobile County, under the said judgment, after the injunction was dissolved, a copy of which is herewith, marked D, showing that the same was purchased by James Erwin."

"It further appeared that Henry Hitchcock died on 13 August, 1839, that at and before the time of the rendition of the judgments, he owned in fee simple and was in the possession of the property sued for and sold by the sheriff, and continued so till his

death, except that he executed a mortgage on 14 August, 1838, by which he conveyed the said land to Messrs. Dunlap, Cope, and Cowperthwaite, under whom the defendants claim title."

"Upon the evidence offered by the plaintiff, the court instructed the jury that the sale by the sheriff was irregular and void and that by such purchase at the sheriff's sale, under the said judgments and the executions aforesaid and the injunction proceedings, the sale and conveyance by the sheriff could convey no title to the plaintiff, and that therefore he was not entitled to recover in this action, to which the plaintiff excepts and prays the court to seal this as a bill of exceptions, which is done accordingly."

"[Signed] J. Mc KINLEY [SEAL]"

Upon these two exceptions the case came up to this Court.

MR. JUSTICE NELSON delivered the opinion of the Court.

The first execution issued upon the judgment in this case was issued on 18 August, 1838, during the lifetime of both the defendants, and was therefore regular and valid, but according to the return of the sheriff, a levy was made only upon the property of James, the surety, and was abandoned when the proceedings at law were enjoined by the bill in chancery. We may therefore

lay this execution out of the case. For although, according to the law of Alabama, when an execution has been issued during the lifetime of a defendant but not executed, an alias or pluries may go after his death, and the personal estate of the deceased be levied on and sold to satisfy the judgment, for the reason that the lien, thus regularly acquired under the first, is continued by the succeeding writs

down to the time of the sale, yet it appears to be well settled there that the practice has no application to the enforcement of executions against the real estate of the deceased. *Lucas v. Doe ex dem. Price*, 4 Ala. 679, N.S.; *Masonry v. U.S. Bank*, *id.*, 735; and *Abercrombie v. Hall*, 6 *id.* 657.

The validity of the plaintiff's title therefore must depend altogether upon the execution issued on 10 July, 1840, nearly one year after the death of Hitchcock, under and by virtue of which the premises in question were sold and conveyed to him.

At common law, the writ of *fiери facias* had relation to its *teste*, though in fact issued subsequently, and bound the goods of the defendant from that date. The Act of 29 Car. II. (reenacted in most of the states) took away this relation as respected the rights of *bona fide* purchasers and confined its binding effect upon the goods as to them to the time of the delivery of the writ to the sheriff, but as between the parties, it remained as it stood at common law.

One consequence of this relation has been that if the execution can be regularly tested in the lifetime of a deceased defendant, it may be taken out and executed against his goods and chattels after his death the same as if that event had not intervened.

The theory or fiction upon which this result is arrived at is that the execution is taken in judgment of law to have been issued at the time it bears date, however the fact may have been, and that being prior to the death of the defendant and the goods being bound from the *teste*, or presumed issuing, execution upon them is deemed to have commenced in the lifetime of the party, and being an entire thing, may be completed notwithstanding his death.

It is regarded in the same light as if delivered into the hands of the sheriff and the goods bound in the lifetime of the defendant, for the reason the officer being entitled to seize them at any time after the *teste*, the death of the party could not alter the right, and therefore, though the execution came to the sheriff after, still if tested before, his death, the goods may be seized, in whose hands soever they

may be found.

In illustration of the extent to which this doctrine of relation is carried, we may add, it has been frequently held that if a judgment is entered in vacation against a defendant who died the preceding term, an execution tested on a day in the said term prior to the defendant's death may be sued out without a *scire facias*, for as the judgment signed in vacation relates

Page 45 U. S. 76

to and is considered as a judgment of the first day of the preceding term, and as the execution relates to the judgment, it may, in point of form, be considered as having commenced before the death of the defendant on account of the date or *teste*, and, of course, upon the ground above stated, being an entire thing, be completed afterwards.

There are numerous authorities establishing this view of the case in respect to the enforcement of judgments and executions against the goods or other personal estate of the defendant. Gilb. on Ex. 14, 15; Bing. on Ex. 135, 136, 190; 2 Tidd's Pr. 1000, 9th Lond. ed.; 7 T.R. 24; 6 *id.* 368.

This doctrine of relation is resorted to with a view of meeting and avoiding the objection which might otherwise be alleged that the rights of new parties, to-wit, the personal representatives of the deceased, would be affected by the issuing and enforcement of the writ upon the goods after the death of the defendant, who should be called in and made parties to the record for the purpose of enabling them to interpose a defense, if any, to the judgment. For upon the construction given, the writ is regarded as having been issued in the lifetime of the defendant himself, and inasmuch as he had not taken any steps to arrest it before his death, no good reason could be given for the interposition of his representatives. They, upon the view taken, were not new parties, nor parties at all to the proceedings, as the last step in the appropriation of the goods to the satisfaction of the judgment had been taken in the lifetime of their intestate.

The same doctrine, it seems, has been held to be equally applicable to executions against the lands and tenements of a deceased defendant, and therefore an *elegit* bearing *teste* before may be issued after his death, for the reasons given in the case of executions against the goods and chattels. 2 Tidd's Pr. 1034, 9th Lond. ed.

It is otherwise as respects the writ of extent issued against the King's debtor, for as that cannot be antedated, but must bear *teste* on the day it issues, it can only be issued against the lands and goods in the lifetime of the defendant. Another writ issues in case of his death to the sheriff to inquire into the special circumstances before execution is enforced. 2 Tidd's Pr. 1049, 1053, 1057.

This series of cases, coming down from the earliest history of the law on the subject, and the reasons assigned in support of them, necessarily lead to the result -- and which has also been confirmed by express decision in all courts where the authority of the common law prevails -- that an execution issued and bearing *teste* after the death of the defendant is irregular and void, and cannot be enforced either against the real or personal property of the defendant, until the judgment is revived against the heirs or devisees in the one case, or personal representatives in the other.

Page 45 U. S. 77

Fitz. N.B. 266; *Harwood v. Phillips*, O. Bridgman's R. 473; Dyer's R. 766; Pl. 31; 2 Wms. Saund. 6, n. 1; 2 Ld.Raym. 849; Archb.Pr. 282; 2 *id.* 88; *Woodcock v. Bennett*, 1 Cow. 711; 10 Wend. 212; *Hildreth v. Thompson*, 16 Mass. 191.

Mr. Williams, in his note to the case of *Jefferson v. Morton*, 2 Wms.Saund. 6, n. 1, says that if the defendant dies within the year, the plaintiff cannot have an *elegit* under the Statute of Westm. 2 against his lands in the hands of his heirs or terre-tenants, or generally any other execution, without a *scire facias* against his heirs and terre-tenants, or personal representatives, although he may in some cases have a *fieri facias* against his goods in the hands of the executors, referring to the exception to the general rule, when issued in the lifetime of the defendant. So if the conusee dies within the year, his executor cannot have an *elegit* at common

law without a *scire facias*, nor, if the conusor dies within that time, can the conusee have an *elegit* against his heir or terre-tenant without such writ. The rule being, he says, that where a new person who was not a party to the judgment or recognizance derives a benefit or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment or recognizance. *Penoyer v. Brace*, 1 Ld.Raym. 245; S.C. 1 Salk. 319, 320; S.C. Carth. 404.

Such is, we apprehend, the settled law of the case where the judgment is against one defendant, and the execution issued and tested after his death.

In the case before us, the judgment upon which the execution was issued and the lands sold had been rendered against two defendants, one of whom was living at the time, but the lands sold belonged to the estate of the deceased. And it is material to inquire whether, in this aspect of the case, a different rule can be applied to the sale.

At common law, a judgment or recognizance in the nature of a judgment did not bind the lands of the defendant, nor did the execution disturb the possession, as it went only against the goods and chattels. The statute of Westm. 2, ch. 18 (13 Ed. I), first subjected the lands of the debtor to execution on a judgment recovered against him, and gave the plaintiff the writ of *elegit* by virtue of which the sheriff seized and delivered a moiety of the lands until the debt was levied out of the rents and profits. Under this statute, a moiety of the land is deemed bound from the rendition of the judgment. 2 Bac.Abr., tit. *Execution*, 685; 3 Bl.Com. 418; 3 Co. 12; *The People v. Haskins*, 7 Wend. 466.

Before the statute, a judgment was considered a charge only upon the personal estate of the defendant; since, a charge upon both the real and personal estate.

Before and since the statute, in case of a judgment against two defendants and the death of one, the charge of the judgment survived against the personal estate of the survivor, and execution

could be taken out against him within the year without a *scire facias*, and the debt levied. 2 Tidd 1120; 1 Salk. 320; Bing. on Ex. 136; *Norton v. Lady Harvey*, 2 Wms.Saund. 50, 51, n. 4, and 72, n. 3; 16 Mass. 193, n. 2; 1 Cow. 738.

The writ, however, must be in form against both, to correspond with the record, but it could be executed against the goods of the survivor only, or, on making a suggestion of the death upon the record, the writ could be against the survivor alone. *Ibid.*

And if the judgment against both defendants is founded upon contract, the surviving defendant is entitled to contribution out of the estate of the deceased, Bing. on Ex. 137, and cases cited; if upon tort, it would be otherwise.

But since the statute, if the plaintiff seeks to enforce the judgment against the real estate of the defendants in the case put, he must revive it be *scire facias* against the surviving defendant, and the heirs, devisees, and terre-tenants of the deceased before execution can regularly issue. For as to the real estate of the defendants, the charge of the judgment does not survive, and the execution must go against the lands of both; and as it cannot be regularly issued against the deceased codefendant, not be allowed to charge the estate in the hands of his heirs, devisees, or terre-tenants, until they have notice, and an opportunity to set up a defense, if any, to the judgment, a *scire facias* is indispensable to the regularity of the execution. 2 Wms.Saund. 51, n. 4; Bing. on Ex. 137, and cases cited; 4 Mod. 316; 2 Co. 14 a ; 1 Ld.Raym. 244; S.C. 1 Salk. 320; S.C. Carth. 404; 16 Mass. 193, n.; 1 Cow. 711.

It will be seen, therefore, upon these authorities that the same objections exist, both in principle and in reason, as it respects the enforcement of a judgment against two by a sale of the real estate on execution after the death of one which have been shown to exist against the enforcement of a judgment against a single defendant after his death. For as the charge of the judgment against the lands does not survive, but continues upon the lands of both after the death of one, the same as before, and cannot be enforced against the real estate of the survivor alone, as in the case of the personalty, and the execution must therefore be issued

against both if issued at all, it is obvious the lands of the deceased, in that event, are as liable to be sold by the sheriff as the lands of the survivor. The rights of the heirs and devisees, and the reasons for protecting them by the *scire facias*, are the same in the one case as in the other, and when the law disables the plaintiff from suing out execution against the real estate on a judgment against one defendant after his death, it must equally disable him from suing it out on a judgment against two, after the death of one. Otherwise, in both cases, the interest of new parties, upon whom the estate has fallen, or to whom it may have passed, is liable to the suddenly and without notice divested by the silent, and till then dormant, power of the

Page 45 U. S. 79

law; parties, too, who from their age and situation in life will not unfrequently be the least qualified to understand and protect these interests, being the children of the deceased defendant.

This writ of *scire facias* is also made necessary in order to secure the judgment in cases where the plaintiff has neglected to take out execution within the year. And yet it has always been held that, if taken out after the year, and sale under it is valid, and the title of the purchaser protected. The execution is not void, but voidable, and may be regularly enforced unless set aside on motion.

In analogy to this course of decision, it has been argued that an execution issued after the death of the party should not be considered void, and the sale under it a nullity, and that the only remedy should be on a motion to set it aside.

Before the Statute Westm. 2, already referred to (ch. 45), if the plaintiff had neglected to take out execution within the year, his only remedy was an action of debt on the judgment. The law presumed it had been satisfied, and therefore drove the plaintiff to a new original. 2 Tidd 1102; 1 Bing. on Ex. 123, n. This statute extended to him the writ of *scire facias*, by means of which the judgment could be enforced after the year by execution, and as the writ could thus be issued after the year by a *scire facias*, the judges held, if issued without, and the defendant did

not interpose and set it aside, it was an implied admission that the judgment was unsatisfied and existed in full force. The issuing, under the circumstances, was regarded simply as an irregularity which it was competent for the party defendant to waive.

It is apparent that the analogy between this class of cases and the one under consideration is exceedingly remote and feeble, and that they stand upon different and distinct grounds, and the conclusions arrived at upon substantially different and distinct considerations.

Another ground has been urged in support of the sale in this case which deserves notice.

It has been argued that the grantees of lands sold on a judgment against the grantor, or previous owner, through whom the title was derived, where the sale confessedly would be valid, stand upon the same footing as the heirs or devisees in the case of a sale after the death of the defendant.

But the distinction between the two cases is manifest.

In the first place, the grantee, in making the purchase, is presumed to have made the proper inquiry into the nature and validity of his title, and therefore to have known of the existence of the encumbrance, and to have taken the necessary precautionary measures against it.

The sale on the execution cannot take him by surprise, with ordinary attention to his rights.

And in the second place, the defendant in the execution, not the

Page 45 U. S. 80

grantee, is the party most deeply interested in the proceeding, for if his grantee, or any succeeding grantee under the title, should be dispossessed by reason of a sale on a prior encumbrance by judgment, he, the defendant in the execution, would be answerable over upon his covenants of title.

The grantee therefore is neither exposed to a sale under the judgment by surprise nor is he the party usually interested in the sale. Upon the whole, without pursuing the examination farther, we are satisfied that, according to the settled principles of the common law and which are founded upon the most cogent and satisfactory grounds, the execution having issued and bearing *teste* in this case after the death of one of the defendants, the judgment was irregular and void, and that the sale and conveyance of the real estate of the deceased under it to the plaintiff was a nullity.

We may further add that since this suit was commenced, and while it was pending in the circuit court of the United States, the highest court in the State of Alabama have had the same question before them and have arrived at a similar result. 6 Ala. 657.

Judgment of the circuit court affirmed.