Clements Vs. Berry

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Court : US Supreme Court

Decided On : 1850

Appeal No. : 52 U.S. 398

Appellant : Clements

Respondent : Berry

Judgement :

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Clements v. Berry

52 U.S. (11 How.) 398

ERROR TO THE SUPREME

COURT OF TENNESSEE

SYLLABUS

Where the marshal of the United States had levied an execution upon certain property under a judgment in the circuit court, which was taken out of his custody by a writ of replevin issued by a state court, and the supreme court of the state

decided adversely to the claim of the marshal, it is within the jurisdiction of this Court to review that decision.

It is the uniform practice of the federal and state courts in Tennessee to test executions as on the first day of the term, and as between creditors, the lien attaches equally to all the judgments entered at the same term.

Where a judgment by default in an action upon a promissory note was entered upon the 8th day of the month, but not fully entered up as to the amount due until the 10th, and upon the 10th, a few minutes before the court opened, the debtor recorded a deed of trust conveying away all his property, this deed cannot defeat the lien of the judgment.

The judgment by default created the lien; it was a mere clerical duty to calculate and enter up the amount due.

To note the precise time when deeds are left for record is attended with no difficulty as between deeds, but to settle the exact comparative creation of a lien between a recorded deed and a judgment by a court is attended with much embarrassment. The timepiece of the register cannot settle the validity or invalidity of a judgment lien.

The process act of 1828, passed by Congress, refers to state laws for the creation and effect of liens, but the preparatory steps by which they are created depend upon the rules adopted by the United States courts.

Clements, the plaintiff in error, was the Marshal of the United States District of Middle Tennessee.

The action was a replevin brought by Berry against Clements in the Circuit Court of Davidson County, Tennessee (state court), and upon the trial in that court the following statement of facts was agreed upon.

" *DANIEL BERRY v. J. B. CLEMENTS"*

" *Replevin -- Circuit Court, Davidson County"*

"In this case the defendant comes and defends the wrong and injury, when &c.;, and says he is not guilty in manner and form as the plaintiff in declaration hath alleged, and of this he puts himself on the country, and the plaintiff also, and the following facts are agreed upon between the parties:"

"On 20 January, 1848, William H. Inskeep, Albert Moulton, Edward D. Woodruff, and John Sibley, citizens of the State of Pennsylvania trading in partnership under the firm Inskeep, Moulton & Woodruff, brought an action of debt against Charles F. Berry, a citizen of the State of Tennessee and resident of Nashville, in the Circuit Court of the United States for the District of Middle Tennessee, upon several notes of

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hand executed by said Berry, payable to said Inskeep, Moulton & Woodruff; the writ and copy of the declaration was served by the marshal upon the said Charles F. Berry on 20 January, 1848. The writ was returned to the court with the declaration at March term, 1848, and the following entries were made on the rule docket and minutes, as by the copy hereunto annexed, and made part of the case agreed, marked A: Inskeep, Moulton & Woodruff, debt, 20 January, 1848, executed and delivered defendant a copy of declaration. Declaration filed March 1, 1848; ruled for plea by 8 March; no plea being filed by attorney, takes judgment by default. Circuit Court of United States, Middle Tennessee District. Thursday, March 9, 1848, court adjourned until tomorrow morning, 10 o'clock. Friday, March 10, 1848, court met according to adjournment. William H. Inskeep, Albert Moulton, Edward W. Woodruff, and John Sibley, trading under the firm of Inskeep, Moulton & Woodruff v. Charles F. Berry. The plaintiffs appear by their attorney, and a judgment by default having been taken in this cause on 8 March, 1848, and no motion having been made to have the same set aside, it is therefore considered by the court that said judgment by default be affirmed and that the plaintiffs recover against said defendant $1,316.68, their balance of debt in the declaration mentioned, and the further sum of $44.22, their damage sustained by reason of the detention thereof, and their cost in this behalf expended, and that execution issue. Session of court commenced on 6 March, 1848. A true copy. J. McGavock,

clerk, by G. M. Fogg, deputy. Berry's deed received at register's office 51 minutes after 9, on 10 March. Inskeep & Co. Judgment obtained about half-past ten o'clock same day."

"The said circuit court of the United States commenced its session on Monday, 6 March, 1848. On 10 March, 1848, Charles F. Berry, the debtor, executed a deed of trust to the plaintiff in this cause, a copy of which is hereunto annexed, and made a part of this case agreed: "

" Know all men by these presents that I, Charles F. Berry, of the County of Davidson and State of Tennessee, of the one part, and Daniel Berry, of the county and state aforesaid, of the other part, witnesseth that I, the said Charles F. Berry, for and in consideration of the sum of $5, to me in hand paid by the said Daniel Berry, and the other consideration hereinafter mentioned, hath this day bargained, sold, transferred, and conveyed, and do by these presents bargain, sell, transfer, and convey, to the said Daniel Berry all my stock of dry goods of every description and all sorts of ware now in

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the storehouse occupied by me on the public square in Nashville, and also in a storeroom occupied by me in Nashville, amounting together to the sum of about $12,000, as per invoice book made out this day; three horses, one negro man slave, named Abraham, one buggy, all my accounts of every description, and the book containing the same; all the notes &c.;, that are due me, and also my interest, whatever it may be, in the unsettled business of the firm of A.D. & C. F. Berry; also, all the interest I have in and to the following-described lots or pieces of ground, *viz.,* lots No. 5 and 6, as described in a plat made by C. W. Nance, of lots adjacent to the town of Nashville, on Cherry Street, fronting thirty feet each on Cherry, and also lots A and B, in No. 20, in the plan of South Nashville, and lots No. 3 and 4 adjoining F. B. Fogg's lot on Cherry Street. To have and to hold said property, of every description to the said Daniel Berry, his heirs and representatives forever. I, the said Charles F. Berry, bind myself, my heirs and representatives to warrant and defend the title to the same, or any part thereof, to

the said Daniel Berry, his heirs and assigns, against the lawful claims of all persons whomsoever. But this deed is made for the following use and trust, and for no other purpose -- that is to say that the said Daniel Berry and A.D. Berry are my accommodation endorsers on the notes, most of them, embraced in schedule A, and whereas I am anxious to secure them, and also the payment of all the claims therein specified, to the persons to whom said claims are due, and also to secure the claims specified in the schedule B to the person therein named, which schedules are to be registered with this deed. Now if I, the said Charles F. Berry, shall well and truly pay off and satisfy said debts mentioned in schedules A and B on or before 1 December, 1849, then this deed to be void, but if I shall fail to do so, then the said Daniel Berry shall sell whatever remains of said property upon such terms as will be most for the interest of the creditors and apply the proceeds to the payment first, of the debts mentioned in schedule A, until they are all paid and satisfied, and secondly to the payment of the debts mentioned in schedule B, if there shall be enough after paying the expenses of executing this trust; if not, to make a *pro rata* distribution of the proceeds amongst them. In order to make it more certain that said debts shall be paid within the time specified, I hereby authorize the said Daniel Berry, as trustee, to take immediate possession of all the above-described property, and that he may proceed to sell the same upon such terms as will make it yield the most money, and that he take possession of all my books of accounts, notes &c.;,

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and proceed to collect the debts due me as speedily as he can, and to apply the proceeds of the goods and property, and the money collected by him, to the payment of the debts in the order above specified; but that he shall not be forced to make a general sale of said property, goods &c.;, until the expiration of said time."

" In testimony whereof, I, the said Charles F. Berry, have hereunto set my hand and seal, this 10 March, 1848."

"C. F. BERRY"

" *State of Tennessee, Davidson County* "

" Personally appeared before me, Robert B. Castleman, clerk of the county court of said county, the within-named C. F. Berry, the bargainer, with whom I am personally acquainted, and who acknowledges that he executed the within deed of trust for the purposes therein contained."

" Witness my hand at office, this 10 March, 1848."

"R. B. CASTLEMAN"

" *State of Tennessee, Davidson County* "

"Register's Office, March 11, 1848"

" I, William James, register of said county, do hereby certify that the foregoing deed of trust and certificate are duly registered in my office, Book No. 10, pages 574, 575, and that they were received March 10, 1848, 9 51/60 o'clock, A.M., and entered in Note Book 2, page 20."

"WILLIAM JAMES"

"And the same was lodged for registration in the register's office, at the time mentioned in the memorandum upon said deed, on 20 March, 1848; an execution, being a writ of *fieri facias,* issued upon said judgment, and came to the hands of the marshal on 21 March, and by him, on 24 March was levied upon the goods, wares, and merchandise particularly specified in the levy, a copy of which is hereunto annexed, marked C, together with the return of the marshal."

"The President of the United States to the Marshal of the Middle District of Tennessee, greeting: "

"You are hereby commanded, that of the goods and chattels, lands and tenements, of Charles F. Berry, in your district, you cause to be made $1,379.85, which William H. Inskeep, Albert Moulton, Edward W. Woodruff, and John Sibley, trading under the firm of Inskeep, Moulton & Woodruff, in the Circuit Court of the

United States for the Eighth Circuit, in the Middle

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District of Tennessee, recovered against him for balance of debt, damages, and cost, in a certain action of debt in the said court, lately determined, wherein the said Inskeep, Moulton & Woodruff were plaintiffs and said Charles F. Berry was defendant, whereof said defendant is convicted, as appears of record, and have the said money ready to render before the judge of our said court at Nashville on the first Monday in September next; herein fail not, and have then and there this writ."

"Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this first Monday in March, A.D. 1848, and in the seventy-second year of our independence."

"JACOB Mc GAVOCK, *Clerk* "

"Issued March 20, 1848; came to hand 21 March, 1848; levied this *fieri facias* upon the following goods, wares, and merchandise, as the property of Charles F. Berry, this 24 March, 1848. Then follows a long list of goods of several pages, specifying each article, item by item, amounting in all to the sum of $2,549.11; the prices annexed to the foregoing list of goods were the invoice prices as furnished by the defendant, but the defendant and myself not agreeing as to the present value of the goods, we called in the following persons, merchants of Nashville, to-wit, John B. Johnston, C. Connor, B. F. Shields, and A. J. Duncan, who valued the goods to be worth $1,402, or 55 cents in the dollar upon the invoice prices."

"J. B. CLEMENTS"

" *Marshal of the U.S. district of Middle Tennessee* "

"The sale of said goods, wares, and merchandise was stopped by a writ of replevin from the Circuit Court of Davidson County, sued out at the instance of Daniel Berry, against me, as marshal; which writ was executed upon me by the Sheriff of Davidson County, on 4 April, 1848, and the goods delivered up to said

Daniel Berry, by the advice and consent of the plaintiff's attorneys. September 4, 1848."

"J. B. CLEMENTS, *M.M.D.T.* "

"A true copy J. Mc GAVOCK, *Clerk* "

Marshal's fees, commissions on the amount of this

execution, by G. M. Fogg, deputy, say on $1,360.90,

at 2 1/2 percent $34.02

Serving this *fieri facias* 2.00

$36.02

These goods were in the store of Charles F. Berry, and had

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not been removed therefrom, but Daniel Berry, the trustee, was at the store at the time of the levy, and stated that the said Charles F. was his agent, and the trustee claimed the goods as included in the deed of trust; the goods levied upon were taken possession of by the marshal, and after the writ of replevin was served, they were delivered up by the marshal to Daniel Berry; the goods, wares, and merchandise levied upon were, before the execution of the deed of trust aforesaid, the property of Charles F. Berry. If, upon the above facts, the law is with the plaintiff, then judgment is to be rendered for him, with costs; if for the defendant, the marshal, then judgment is to be rendered for him against the plaintiff and his security, for the amount of the judgment in the federal court; interest and cost as taxed by the federal court.

"F. B. FOGG, *for Defendant* "

"EWING & WHITWORTH, *Attorneys for Plaintiffs* "

Upon this agreed state of facts, the Circuit Court of Davidson County were of opinion that the law was with Clements, the defendant, and gave judgment accordingly. Berry carried the case to the Supreme Court of Errors and Appeals of Tennessee, where the judgment of the circuit court was reversed. Clements sued out a writ of error under the twenty-fifth section of the Judiciary Act, and brought the case up to this Court.

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

The jurisdiction of this Court is the first question to be considered. The plaintiff sets up a lien on certain personal property, under a judgment rendered by the circuit court of the United States, held for the Middle District of Tennessee. The defendant asserts a lien under a deed of trust for the property, from Charles F. Berry, and the Supreme Court of Tennessee held that the lien of the deed was paramount to that of the judgment. This brings the case within the twenty-fifth section, as the decision was against the right asserted by Clements, under the authority of the United States.

The judgment was obtained by the firm of Inskeep, Moulton & Woodruff, at March term, 1848, for $1,316.68, against Charles F. Berry. The declaration was filed on 1 March; rule for plea by 8 March; no plea being filed within the rule, a judgment was entered by default. On 10 March,

"The plaintiffs appear by their attorney, and a judgment by default having been taken in this cause on 8 March, 1848, and no motion having been made to have the same set aside, it is therefore considered by the court that said judgment by default be affirmed,"

&c.;

The deed of trust was received at the register's office fifty-one minutes after nine A.M. on 10 March, the same day the deed bears date. The court, it seems, was opened on the 10th at ten o'clock, A.M., so that the deed was deposited with the register nine minutes before the court opened on that day. The register, by law, is required to enter on a record the exact time that an instrument is filed for record, and the lien attaches from such entry.

Execution was issued on the judgment, tested the first Monday of March, the day at which the term commenced. It was levied upon part of the goods assigned in the deed of trust, and those goods were replevied by Daniel Berry, the trustee, from Clements the marshal.

It is the uniform practice of the federal and state courts of Tennessee, to test executions as on the first day of the term, and the lien is held equally to attach to all the judgments, as regards creditors, entered at the same term. This rule would

not apply, perhaps, to a *bona fide* purchaser of real estate for a valuable consideration, beyond the day on which the judgment was rendered. It is admitted that the statute of 29 Charles II as to the liens of judgments and executions is not in force in Tennessee, and that the lien is regulated by the common law, modified to some extent by statutes. As against a *bona fide* purchaser of personal property, the lien would not attach prior to the award of execution. But the trustee in this case cannot be considered a purchaser, as the assignment was made to him not on a purchase for a valuable consideration, but for the benefit of certain creditors.

It would present a singular anomaly in judicial proceedings if the fruits of a judgment could be defeated by a transfer of all the property of the defendant on the day of its rendition, and with the express view of avoiding the claim of the plaintiff in the judgment by giving a preference to other creditors. That such an assignment would be fraudulent as tending to delay and defeat creditors is clear, but no such defense was made in the state court.

The decision must turn upon the effect of the entries made on the minutes of the circuit court. The term of the court commenced on 6 March. The declaration was filed on 1 March, and a rule for plea was taken in court by the 8th. The rule of court provides that if the pleadings are not filed by the defendant on or before the first day of the term, the court may on that day fix the time when the pleadings are to be closed and judgment entered.

The plea not being filed within the rule, a judgment by default was entered. Now a judgment by default is interlocutory or final. When the action sounds in damages, as covenant, trover, trespass &c.;, it is only interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained. 1 Tidd's Pr. 568. But where the amount of the judgment is entered by the calculation of the clerk, no further steps being necessary, by a jury or otherwise, to ascertain the amount -- the judgment is final. And of this character was the judgment entered on 8 March. The action was debt, brought upon several notes of hand; the default admitted the execution of the notes, and the judgment which followed was final, leaving the clerk to make it up in form. The affirmance of this judgment on 10 March was unnecessary, as the judgment of the court on the 8th concluded the matter in controversy. It was a mere clerical duty to make the calculation and enter the judgment in form, and the equity on the 10th can be considered, in regard to the lien in question, in effect as nothing more than

the performance of this clerical duty, which had been authorized by the entry on the 8th. It was an affirmance of that which already had been fixed by the judgment of the court. What remained to be done was matter of form, as it added nothing to the legal effect of the judgment by default. Had the defendant been called and a default entered against him, the case would have stood for judgment at a future call of the docket. But under the rule of the court, "the pleadings were to be closed on the 8th and judgment entered." The defendant failed to plead, and a judgment by default consequently followed. The action being debt, founded upon notes of hand which were admitted to be genuine by the default, the court saw that no inquiry was necessary, and the judgment was therefore directed to be entered.

That judgment was final according to the forms of entering judgments at the common law. The omission by the clerk to make the calculation of the amount of the judgment and enter it in form on 8 March was supplied by the entry on the 10th. Such entry, therefore, we think, may be considered as having relation to the first judgment.

It is said to be a legal absurdity to suppose that the lien of the execution can attach prior to the judgment. An execution can be of no validity which has not a judgment to support it. But the judgments entered on the last day of the term, by the law of Tennessee, have relation to the first day of the term, so as to place all the judgments entered at the term on an equality in regard to liens. This, it is said, is proper to do equal justice to creditors whose judgments were necessarily entered on different days of the term from the arrangement of the causes on the docket. But it is said that a *bona fide* purchaser for a valuable consideration would limit the lien of the judgment and execution to the time the judgment was rendered. If this be so, it is not perceived how the principle can be applied to the case before us, unless the defendant in error be considered a *bona fide* purchaser. He cannot place himself in that attitude. He holds the property in trust for the creditors named, having paid at the time no consideration for it and having, as may be presumed from the circumstances, a knowledge that the assignment was made to avoid the effect of the judgment against the assignor. It would be difficult to maintain that this was a *bona fide* transaction, and especially that it was entitled to the favorable consideration of the court. In no sense can it be considered a *bona fide* sale for a valuable consideration. The trustee is made the agent to pay the creditors named, and he represents their interests as creditors. But if the property had been sold *bona fide,* from the effect of the

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judgment by default, and the relation to it of the formal judgment of affirmance subsequently entered, the lien would attach from the judgment on the 8th.

We admit that the lien of the judgment and execution in the federal courts arises under the state laws, and that the lien may be considered as a rule of property and

a rule of decision under the thirty-fourth section of the Judiciary Act of 1789. But the preparatory steps by which the judgment is obtained and the lien established depend upon the practice of the court, and that practice is settled by the federal courts, and not by the courts of the state. The process act of 1828

"adopted the forms of mesne process, except the style and forms and modes of proceeding in suits in the courts of the United States held in those states &c.;, subject, however, to such alterations and additions as the said courts of the United States respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court shall prescribe."

The entry by the register of the precise time at which all instruments are deposited with him for record, as required by the act of Tennessee, is no doubt a very proper regulation. It is salutary in relation to instruments deposited for record on the same day. In such cases, the priority of time may be ascertained with certainty; but when the fractions of a day are to be compared, under such entries, to a judgment lien, the propriety of the rule is not so apparent. The case before us would present a point of no small difficulty. From the entry, the trust deed appears to have been deposited for record nine minutes before the court was opened. And this is to render inoperative the lien of the judgment. Now how is the fact to be ascertained with certainty? Where shall the exact standard of time be found. A variation of nine or ten minutes is not uncommon in chronometers, and the timepiece of the register, it is supposed, could have no exclusive claim to regulate judgment liens. Whether good or bad, it would answer the purpose designed by showing the priorities of instruments left for record. But the test in regard to judgment liens would be uncertain and unsatisfactory. As a rule of property it would seem to be, at least in many cases, impracticable. How can one, five, or ten minutes be ascertained with the requisite certainty to lay the foundation of a right? It would hardly be contended that the entry of a ministerial officer, though made by authority of law, should limit or defeat a judgment lien in such a case. No other decision of the Supreme Court of Tennessee than the one now before us is applicable to this question. And if the case to be reviewed is to constitute the rule for our decision, as insisted, the power of revision would be useless.

Whilst we follow the construction of a state statute established by the supreme court of the state, care must be taken that our jurisdiction and practice shall not be limited or controlled by the statutes or decisions of the state, beyond the acts of Congress.

The judgment of the state court is reversed, and the cause is remanded to that court for further proceedings in conformity with this opinion.

MR. CHIEF JUSTICE TANEY, MR. JUSTICE CATRON, MR. JUSTICE DANIEL, and MR. JUSTICE NELSON dissented.

MR. JUSTICE CATRON.

By rule of court made when only one term was held in the year for the Districts of Tennessee, the United States circuit court adopted a rule requiring a copy of the declaration to be sent out with the writ, in all cases of suits on written agreements for the payment of money, where the plaintiff desires to obtain judgment at the return term. If a copy of this declaration is served with the writ on the defendant thirty days before the court commences, then the defendant is required to plead before the first day of the term, and if he fails to do so, it is the duty of the clerk to enter judgment by default at his office. This fact he reports to the court in all cases. And then such further time is given for making up the pleadings as may be deemed proper by the court itself, thus extending the time usually three days. But at March term, 1848, only two additional days to plead were allowed.

This office judgment has no force in itself further than to speed the final judgment. It stands over, like other causes, triable on an issue. When it is reached on the docket in due course, a jury inquires of damages, or if the sum be certain, then a regular and binding judgment is entered of record by the court.

An execution is uniformly awarded in terms by the final judgment, and to which the execution on its face refers by a brief recital.

To this award of execution the *fieri facias* relates, and binds personal property of the defendant.

The United States courts are governed by the state laws creating a lien, and the state laws are settled by uniform adjudications that the lien attaches by a final judgment and award of execution. From that time defendant's property is in custody of the law. *Johnson v. Ball,* 1 Yerger 292.

In this case there is no allegation of fraud. The debtor transferred his property to a trustee honestly and fairly, according

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to the face of this record. By the law of Tennessee, the deed of trust took effect the moment it was delivered to the register to be recorded. It was his duty by express law to endorse on the deed the exact time of delivery. After that, all liens were cut off. This was done before the judgment was rendered. It matters not whether defendant parted with his property on the day the judgment was rendered or on a subsequent day, as he was divested of it the moment the trustee delivered the deed to be recorded. If it was otherwise, and the execution related to a judgment by default which might remain unconfirmed for months, all executions or final judgments where a default had been entered would bind from the first day of the term and overreach sales made by retail dealers to an alarming extent -- a doctrine unknown and altogether inadmissible in the State of Tennessee or elsewhere, so far as I know.

The Supreme Court of Tennessee, to revise whose decision this writ of error is prosecuted, laid down the law correctly, as I think, in its opinion in this cause, and I am of opinion that the judgment ought to be affirmed. And I am instructed to say for my brother NELSON, who heard the cause, but is now absent, that this is his opinion also.

ORDER

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Tennessee and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said supreme 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 supreme court for further proceedings to be had therein in conformity to the opinion of this Court.