Very Vs. Levy

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SooperKanoon Citation : sooperkanoon.com/80333

Court : US Supreme Court

Decided On : 1851

Appeal No. : 54 U.S. 345

Appellant : Very

Respondent : Levy

Judgement :

Very v. Levy - 54 U.S. 345 (1851)
U.S. Supreme Court Very v. Levy, 54 U.S. 13 How. 345 345 (1851)

Very v. Levy

54 U.S. (13 How.) 345

APPEAL FROM THE CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF ARKANSAS

SYLLABUS

In equity, where a creditor agrees to receive specific articles in satisfaction of a debt, even although it be a debt upon bond secured by mortgage, he will be held to the performance of his agreement.

But in order to bring a case within this principle there must be

1. An agreement not inequitable in its terms and effect.

2. A valuable consideration for such agreement.

3. A readiness to perform and the absence of laches on the part of the debtor.

Where the agreement to receive payment in goods was made by a person who acted under a power of attorney from the creditor, authorizing him to trade, sell, and dispose of notes, bills, bonds, or mortgages, and under this power a partial payment was received in goods which was afterwards recognized as a payment by the creditor, the power was sufficient to authorize an agreement to receive the remaining amount, also in goods, at any time when called for within twelve months, especially as the bond had yet four years to run.

This agreement was not inequitable; there was a valuable consideration for it and the debtor was always ready to comply with it on his part.

The creditor cannot now allege fraud in his debtor. It is not charged in the bill, and although he may not have known of the agreement when the bill was framed, yet when the answer came in he might have amended his bill and charged fraud.

In 1841, one Darwin Lindsley owned a lot of land in the Town of Little Rock and State of Arkansas which was known as lot No. 7, in block or square No. 35 in that part of the city west of the Quapaw Line, and known as the Old Town.

On 3 March, 1841, he sold this lot to Jonas Levy, who gave two bonds, each for $4,000, one payable five years after date and the other six years after date. Both were to carry interest, at 7 percent, payable quarter-yearly. The bond, payable in five years, was not involved in the present suit, and no further notice need be taken of it. Both bonds were secured by a mortgage of the property.

On 25 March, 1841, Lindsley assigned the six years' bond to Martin Very, a citizen of the State of Indiana.

This bond had the following credits endorsed upon it:

1841, March 15 . . . . . $550.00

1842, January 29 . . . . . 181.12

1843, March 3 in goods 1898.25

The last credit was signed Martin Very, by J. S. Davis, and arose in this way:

On 25 November, 1842, Davis addressed the following letter to Levy.

"NEW ALBANY, Indiana, Nov. 25, 1842"

"DEAR SIR -- My object in writing to you, is to inquire what

Page 54 U. S. 346

you will give in cash and jewelry for the last note that you gave to Darwin Lindsley, and which was assigned by him to Martin Very. I have bought a part of the note, and am authorized to make disposition of it, and I thought, as a matter of justice, you should have the refusal of the note at a considerable discount if you desired it. Please let me hear from you at your earliest convenience. I write for myself and Mr. Very."

"I am, respectfully yours, &c.;"

"Mr. JONAS LEVY JOHN S. DAVIS"

"[Endorsed] -- Mr. JONAS LEVY, Little Rock, Arkansas"

"[Postmarked] -- New Albany, Ind., Nov. 26"

On 28 January, 1843, Very executed the following power of attorney to Davis:

"Know all men by these presents that I, Martin Very, of the County of Floyd and State of Indiana, have made, constituted, and appointed and do by these presents make, ordain, constitute, and appoint John S. Davis, of the City of New Albany,

Indiana, my true and lawful attorney for me, and in my name, and for my use to ask, demand, sue for, recover, and receive all such sum of sums of money, notes, bills, bonds, mortgages, or debts which are or shall be due, owing, or belonging to me in any manner or by any means whatsoever, and I hereby give my said attorney full power and authority to trade, sell, and dispose of any notes, bills, bonds, or mortgages held or owned by me on any resident or residents of the State of Arkansas, and I hereby give my said attorney full power and authority in and about the premises to have, use, and take all lawful ways and means in my name for the purposes aforesaid, and upon the receipt of such debts, dues or sums of money to make, seal, and deliver acquittances and other sufficient discharges for me and in my name, or, upon the sale of any bill, bond, note, or mortgage, to execute a good and sufficient assignment of the same to the purchaser thereof for me and in my name, and generally to do and perform in my name all other acts and things necessary to be done and performed in and about the premises as fully and amply to all intents and purposes as I myself could or might do if personally present, and attorneys, one or more, under him for the purpose aforesaid to make and constitute and again at pleasure revoke. And I hereby ratify and confirm all and whatsoever my said attorney shall lawfully do in my name in and about the premises by virtue of these presents, and I hereby make this power of attorney irrevocable to all intents and purposes. In testimony whereof I have hereunto

Page 54 U. S. 347

set my hand and seal this the 28th day of January in the year of our Lord 1843."

"MARTIN VERY [SEAL]"

"Signed, sealed, and delivered in presence of"

"Jos. P. H. THORNTON"

Under this power, Davis went to Little Rock, and on 3 March, 1843, put the receipt above mentioned upon the back of the bond for $1,898.25, paid in goods, and on the same day executed the following paper, *viz.:*

"LITTLE ROCK, March 3, '43"

I hereby agree to take in goods, such as jewelry &c.;, the balance due me on a note assigned by D. Lindsley to me, as also a mortgage assigned by the said Lindsley, said goods to be delivered to m, or any agent at Little Rock, Arkansas, at reasonable prices, at said Little Rock, said goods to be called for within twelve months from this time. MARTIN VERY

"By J. S. DAVIS"

" *Attorney in fact* "

Davis stated in his deposition that in January, 1844, he wrote to Levy directing him to pay the balance in jewelry, watches &c.;, to Mr. Waring in Little Rock; that he received an answer from Levy declining to do so, but that he had lost or mislaid this answer from Levy.

On 3 February, 1844, Davis wrote to Levy the following letter:

"NEW ALBANY, Feb. 3, 1844"

"DEAR SIR -- If you can pay the balance of your note in good silver or gold watches and good jewelry at fair prices, say about half of each or two-thirds watches, you will please notify me of the fact by return of mail and I will send on for them at once. The things you let me have before were too high -- at least Mr. Very says so. Let me hear from you. I am your friend,"

"JOHN H. DAVIS."

"MR. J. LEVY."

"[Postmark] New Albany, Ind., Feb. 5"

"[Endorsed] MR. JONAS LEVY, Jeweler, Little Rock, Ark."

In April, 1848, Very filed his bill in the Circuit Court of the United States for the District of Arkansas against Levy for the purpose of foreclosing the mortgage. The

answer of Levy admitted all the allegations of the bill, but set up as a defense the execution of the power of attorney by Very to Davis, and the subsequent agreement between Davis and himself, by which

Page 54 U. S. 348

the goods were to be called for within twelve months. It was then alleged that not only during the next twelve months but always afterwards, Levy had kept on hand goods enough of the proper character to pay the balance due, been always ready and still was ready to deliver them, and had often urged the complainant to receive and accept them, and would deposit them in the custody of anyone directed by the court.

Levy brought into court a large quantity of goods and jewelry, which was placed in the hands of a receiver.

The case being heard on bill, amendment, answers replications, exhibits, and testimony, the court held Very bound by the agreement, and found that Levy had always had sufficient goods on hand ready to be delivered, and directed the master to ascertain the balance due on the bond and the value of the goods delivered to the receiver.

The master reported the balance due on 3 March, 1844, to be $2,002.59, and the value of the goods, $5,776.99. No exception was taken to the report, and it was confirmed.

The court then ordered the complainant to select out of the goods to the amount of $2,002.59, and on his failure, after notice to his solicitor, that the master should do so. The complainant failed to select; the master set apart the requisite amount, the residue were redelivered to Levy, and the court decreed that Very should receive the goods so set apart by the master and that the bond and mortgage were satisfied, denied the relief prayed, and dismissed the bill, all costs to be paid by the complainant.

Very appealed to this Court.

MR. JUSTICE CURTIS delivered the opinion of the Court.

This is a suit in equity to foreclose a mortgage commenced in the Circuit Court of the United States for the District of Arkansas. The bill alleges that on 3 March, 1841, the respondent, Levy, executed his writing obligatory for the sum of four thousand dollars, bearing interest at the rate of seven percent per annum, payable to Darwin Lindsley in six years after its date, and secured the same by a mortgage on certain premises situated in the City of Little Rock; that by assignment from Lindsley the complainant became the owner of this bond and mortgage on 25 March, 1841, and the bill prays for an account and foreclosure.

The answer of Levy admits the execution of a bond and mortgage and their assignment to the complainant and avers that on 3 March, 1843, he agreed with the complainant, through one John S. Davis, his agent, to deliver goods such as jewelry &c.;, in which the respondent dealt, at Little Rock upon reasonable prices in satisfaction of this bond and mortgage within twelve months from 3 March, 1843; that in pursuance of that agreement he did actually deliver on that day a part of the goods, agreed to be of the value of $1,898.25, and

afterwards, on the same day, the complainant, through his agent, Davis, signed and delivered to the respondent a memorandum in writing as follows:

"Little Rock, March 3, '43. I hereby agree to take in goods such as jewelry &c.;, the balance due me on a note assigned by D. Lindsley to me, as also a mortgage assigned by said Lindsley, said goods to be delivered to me or any agent at Little Rock, Arkansas, at reasonable prices at said Little Rock; said goods to be called for within twelve months from this time. Martin Very. By J. S. Davis, Attorney in fact."

That in further pursuance of this agreement, the respondent kept in his hands and ready for delivery and withdrawn from his trade a sufficient amount of goods such

as are referred to in the memorandum during the whole year which elapsed after the making of the agreement, and was constantly ready and willing to deliver the same at Little Rock, but the complainant was not there, and did not authorize anyone to receive them; that the respondent has ever since been ready and willing to perform his agreement, and offers to bring the goods into court or place them in the hands of a receiver. The court below appointed a receiver, ascertained the amount of goods necessary to satisfy the unpaid residue of the bond, ordered the receiver, upon demand, to deliver the same to the complainant in full satisfaction of the bond and mortgage, decreed the mortgage satisfied, and ordered the complainant to pay the costs. From this decree the complainant appealed.

An agreement by a creditor to receive specific articles in satisfaction of a money debt is binding on his conscience, and if he ask the aid of a court of equity to enforce the payment, he can receive that aid only to compel satisfaction in the mode in which he had agreed to accept it. A court of equity will even go further, and in a proper case will enforce the execution of such an agreement. At law, a mere accord is not a defense, and before breach of a sealed instrument, there is a technical rule which prevents such an instrument from being discharged except by matter of as high a nature as the deed itself. *Alden v. Blague,* Cro.Jac. 99; *Kaye v. Waghorne,* 1 Taunt. 428; *Bayley v. Homan,* 3 Bin.N.C. 915. But no such difficulties exist in equity. On the broad principle that what has been agreed to be done shall be considered as done, the court will treat the creditor as if he had acted conscientiously and accepted in satisfaction what he had agreed to accept and what it was his own fault only that he had not received. Indeed, even a court of law, in a case free from the technical difficulties above noticed, will do the same thing. *Bradly v. Gregory,* 2 Camp. 383.

In order, however, to bring a case within these principles, three things are necessary -- an agreement, not inequitable in its terms and effect; a valuable consideration for such agreement; readiness to perform and the absence of laches on the part of the debtor.

In this case, the agreement was in writing, and one objection to it made by the complainant is that the person who executed it on his behalf was not authorized to do so. The authority was in writing, and gave the attorney

"full power and authority to trade, sell, and dispose of any notes, bills, bonds, or mortgages, held or owned by me, on any resident, or residents of the State of Arkansas."

Acting under this power, Davis did actually accept a partial payment in goods amounting to $1,898.25, and signed the memorandum in writing which is relied on. The bond, being produced, bears the following endorsement:

"Received on the within, in goods, the sum of eighteen hundred and ninety-eight dollars and twenty-five cents, March 3, 1843. Martin Very. By J. S. Davis."

The complainant in his bill treats this as a payment, and it does not appear that he made any objection to it, though Davis says in one of his letters he thought the prices were too high.

Upon this state of facts, we are of opinion Davis had authority to enter into the agreement in question. Besides the power to collect and sell is the power to trade this bond and mortgage. It might be difficult to attach any general legal signification to this word. But considered in reference to the particular facts of this case, we think its meaning sufficiently clear.

It is proved by Davis that the power, though general in its terms, was given solely in reference to this particular bond and mortgage. The bond had yet four years to run. When, therefore, Davis was authorized to collect this bond, the parties to the letter of attorney must have had in view some agreement respecting its extinguishment which should vary its original terms of payment, and when he was further empowered to trade it, it is not an inadmissible interpretation that the new agreement for its extinguishment, which he was empowered to make, might be an agreement to receive specific articles in payment. It has been said that special powers are to be construed strictly. If by this is meant that neither the agent nor a third person dealing with him in that character can claim under the power any

authority which they had not a right to understand its language conveyed, and that the authority is not to be extended by mere general words beyond the object in view, the position is correct. But if the words in question touch only the particular mode in which an object admitted to be within the

Page 54 U. S. 359

power is to be effected and they are ambiguous, and with reasonable attention to them would bear the interpretation on which both the agent and a third person have acted, the principal is bound although, upon a more refined and critical examination, the court might be of opinion that a different construction would be more correct. *Le Roy v. Beard,* 8 How. 451; *Loraine v. Cartwright,* 3 Wash.C.C. 151; *De Tastett v. Crousillat,* 2 Wash.C.C. 132; 1 Liv. on Agency 403, 404; Story on Agency sec. 74. Such an instrument is generally to be construed as a plain man, acquainted with the object in view and attending reasonably to the language used, has in fact construed it. He is not bound to take the opinion of a lawyer concerning the meaning of a word not technical and apparently employed in a popular sense. *Witherington v. Herring,* 5 Bing. 456.

In this case, the complainant, besides empowering Davis to collect a bond not yet payable, has authorized him to trade it -- a word frequently used in popular language to signify an exchange of one article for another by way of barter.

This power was intended by the complainant to be acted on by the respondent, a jeweler in the State of Arkansas, and we think he cannot complain that it was understood in its popular sense, more especially when he accepted, without objection, goods amounting to $1,898.25 and gave the defendant no notice of his dissent from that construction of the power under which his agent received them in part payment of the bond.

But it is insisted that if Davis had authority to receive those goods in part payment, he had not power to enter into an executory agreement to receive the others. This might have presented a question of some difficulty if the effect of that agreement had been to give a credit to the obligor or to subject the principal to any risk or

place his claim in any less advantageous position than it would have been in if no contract had been made in reference thereto.

It must be borne in mind that it is proved by Marcus Dotter and Emanuel Levy and other witnesses that the defendant had on hand more than sufficient goods of the description mentioned at the time the other goods were delivered and the memorandum signed. By the memorandum, the residue of the goods was to be delivered at any time within twelve months when called for by the complainant. The defendant was obliged to keep this amount of these goods constantly on hand and ready for delivery. He could therefore gain nothing by delay. On the other hand, the complainant might have found it more convenient not to take all at one time; the bond bore interest which was accruing by the delay, and if the defendant,

Page 54 U. S. 360

upon demand, should fail to comply, the bond would remain in force, and no right of the complainant to the money debt or its security by the mortgage would be prejudiced.

Under these circumstances, we are of opinion that as Davis had authority to receive payment in goods, he had also authority to enter into this agreement, having the same object in view and providing for its accomplishment in a way apparently more beneficial for the creditor than the receipt of all the goods at the time the arrangement was made.

That the agreement itself imports a consideration deemed by the law valuable there can be no doubt. An agreement to give a less sum for a greater, if the time of payment be anticipated, is binding, the reason being, as expressed in *Pennel's Case,* 5 Co. 117, that peradventure parcel of the sum, before the day, would be more beneficial than the whole sum on the day. Co.Lit. 212, b; Com.Dig. Accord, B. 2; *Brooks v. White,* 2 Met. 283. And when the time of payment is not anticipated, the law deems the delivery of specific articles a good satisfaction of a money debt, because it will intend them to be more valuable than the money to the creditor who has consented to the arrangement. Bac.Ab. Accord, A; *Pennel's*

Case, 5 Co. 117; *Booth v. Smith,* 3 Wend. 66; *Kellogg v. Richards,* 14 Wend. 116; *Steinman v. Magnus,* 11 East 390; *Lewis v. Jones,* 4 B. & C. 513.

In this case both these rules apply, for the time of payment was to be anticipated, and specific articles delivered.

We consider it also clearly proved that the defendant has been ready to perform at all times since the agreement was made. It is said by Davis that in 1844, January, he thinks, he addressed a letter to Levy requesting him to pay the money coming to Very in jewelry, watches &c.;, and also requested him to put them up and deliver them to Mr. Waring in Little Rock, and that Levy declined paying as requested. That he has searched for Levy's letter, but cannot find it.

It is certainly highly improbable that Levy, who had had these goods on hand and set apart from his trade, ready for delivery, ever after the agreement was made, should have thus refused to deliver them.

He produces a letter of Davis which, though it bears date on 3 February, 1844, is undoubtedly the letter Davis speaks of, and is as follows:

"New Albany, Feb. 3, 1844. Dear sir -- If you can pay the balance of your note in good silver or gold watches, and good jewelry, at fair prices, say about half of each, or two-thirds watches, you will please notify me of the fact by return mail, and I will send on for them at once. The things you let me

Page 54 U. S. 361

have before were too high -- at least Mr. Very says so. Let me hear from you. I am, your friend. John S. Davis. Mr. J. Levy."

It thus appears Davis was mistaken in supposing he designated a person in Little Rock to receive the goods, and unless it was the purpose of this letter to vary the original understanding of the parties in respect to the proportion of watches to be delivered, it is difficult to see what fair object it could have had. The testimony of Davis that Levy refused without undertaking to state the contents of Levy's letter or the substance of its contents cannot be deemed sufficient to prove a refusal by

Levy to perform his contract. Before the defendant can be prejudiced by testimony of a refusal, it is reasonable the court should know what it was. It certainly was not a refusal to deliver the goods to Waring, as Davis says, for Waring was not mentioned by Davis in his letter. The conduct of Davis in this matter is somewhat strange. He made the memorandum in writing as Very's agent, agreeing to accept payment of the balance of the bond in these articles; he delivered to Very the jewelry received, but says he did not tell Very of the contract to receive the balance in goods; and eleven months afterwards he wrote the letter of 3 February, which seems to be a new proposal, as if no contract had yet been made on the subject; he misstates the contents of his own letter in a material particular, says he has lost Levy's letter, but the latter declined paying as requested. We are not satisfied that a breach of contract by Levy, or any laches on his part, is made out.

It is asserted by the complainant's counsel that the contract was void on account of Levy's fraud; that it was obtained from Davis by false statements and the suppression of material facts by Levy, and, of course, cannot be the basis of any right in a court of equity.

But this ground is not open to the complainant. No fraud is charged in the bill, and though the complainant may not have anticipated, when the bill was filed, that this contract would be set up in the answer as a defense, yet on the coming in of the answer he might have amended his bill, as he did in another particular, averring that if any such agreement was in fact made, it was void, and charging in what the fraud consisted. Not having done so, he cannot now avail himself of it. Besides, the evidence comes in a very irregular way and is wholly unsatisfactory. It is brought out by Davis, in answer to interrogatories which do not call for any statements touching such subjects, but relate to wholly different matters. Thus the 19th interrogatory inquires: "For what reason was the agreement, marked

B, given or executed, if ever executed." To this Davis replies:

"That said agreement was executed and delivered for several reasons, the first of which reasons was that Levy represented that he had expended large sums of money in defending suits for the benefit of Very and for the purpose of saving Very from losing the money for which this suit is brought; the second reason was that said Levy represented himself as insolvent or wholly unable to pay the debt due Very; and thirdly that the property mortgaged was of little value, and would only pay at best a very small portion of the money intended to be secured by the mortgage; all which statements and representation thus made by said Levy said Davis, subsequent to the signing and delivering said agreement, found to be false."

The 20th interrogatory inquires, "What was the inducement and consideration for giving and executing the said agreement B?" To this he answers:

"That the inducement and consideration for giving and executing agreement 'B' were the false representations of said Levy of his circumstances, the value of the property mortgaged, and that he, said Levy, had paid large sums of money to save said debt secured by said mortgage for said Very; these statements and representations were made before and at the time said agreement 'B' was executed and delivered, and said Davis then believed them to be true, but subsequently found them to be false."

This is all the testimony in support of the charge of fraud. What he means when he says he "subsequently found the representations to be false" he does not explain. That he had any personal knowledge of their falsehood he does not say, and his statement indicates only that by subsequent inquiry and the information elicited thereby he became satisfied that he was deceived. It would not be in conformity with settled rules of pleading and evidence in courts of equity to convict a party of a fraud not charged on the record and brought out for the first time by the voluntary statements of a witness in answer to no question, and resting at last upon mere hearsay.

The decree of the circuit court is

Affirmed with costs

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Arkansas, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this Court that the decree of the said circuit court in this cause be and the same is hereby affirmed with costs.