United States Vs. Dashiel

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Decided On : 1870

Appeal No. : 70 U.S. 688

Appellant : United States

Respondent : Dashiel

Judgement :

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United States v. Dashiel

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SYLLABUS

1. Where a writ of error is taken to this Court by a plaintiff below, who previously to taking the writ issues execution below and gets a partial but not a complete satisfaction on his judgment, the writ will not, in consequence of such execution merely, be dismissed.

2. Levy of an execution, even if made on personal property sufficient to satisfy the execution, is not satisfaction of the judgment, and accordingly, therefore, does not

extinguish it if the levy have been abandoned at the request of the debtor and for his advantage, as *ex. gr.* the better to enable him to find purchasers for his property.

The United States brought suit at *common law* -- "debt on bond" -- for $20,085.74 against Major Dashiel, a paymaster in the Army of the United States, and his sureties. Dashiel denied every part of the demand, but claimed specially a deduction of $13,000 from the sum sued for on the ground that while traveling in remote regions of Florida, where he was going with the whole sum in gold coin to pay the army, he had, without the least want of care on his part, been robbed of about $16,000, as was proved among other ways by the fact that a portion of the money, $3,000, easily identified,

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was discovered among negro slaves of the neighborhood and got back.

The jury under a charge from the court made allowance for the part of which Major Dashiel alleged that he had been robbed, and found for the United States for a portion only of the sum claimed, to-wit, $10,318.22. Judgment was entered accordingly. Not being satisfied with judgment for this amount, the United States, on the 1st September, 1860, took a writ of error to this Court. Dashiel had also excepted. On the 15th April, 1860, however -- before the government had thus taken its writ of error -- *it sued out execution,* and, Major Dashiel having waived advertisement, levied on a large amount of real estate and *on eight slaves.* A portion of the real estate was sold June 5th, 1860, $5,275 having been got for it. The sale was then adjourned.

The only evidence as to what led to an adjournment of the sale appeared in a letter from the deputy marshal who superintended it to the acting marshal, his principal, sent up in the record, which came up on certiorari for diminution after the writ of error was taken out. In regard to this, the record, or amended record as it may be called, after setting out the execution, levy, and return, thus in substance ran:

"Accompanying said return and enclosed with the execution, *whether as part of the return or explanatory of the same,* as made a part of the record, is the following letter, in words, to-wit:"

"SAN ANTONIO, TEXAS, June 7, 1860"

"TO W. MASTERSON, ESQ.,"

"Acting United States Marshal, Austin"

"DEAR SIR: Your note of the 4th June came to hand yesterday. You learned by my note of the 5th that I had adjourned the sale, after the bids amounted to $5,275, *as directed* by *your* note of the 2d. I now act upon your note of the 4th, received yesterday, and return, as you directed, the execution. I think the attorney will certainly approve of *your* action in staying the sale on the bids reaching $5,000, and I cannot but think that he will, upon seeing the *abundance of the levy* and learning that there is *no hindrances* thrown in the way of a forced collection, but *a modest*

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petition for time the better to enable the defendant to find purchasers for his property, now in the clasp of the law. The *sympathies of this community* for Major Dashiel, where he has long lived with his family, *all plead for extension of time,* if possible, to the next January Term of the honorable district court. The interest still accruing, would the United States be much injured by the extension?"

"Yours, respectfully,"

"S. NEWTON"

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MR. JUSTICE CLIFFORD delivered the opinion of the Court.

Defendants move to dismiss the case because it appears by the record, as they allege in the motion, that the judgment in the court below was in favor of the plaintiffs, and that before suing out the writ of error, they obtained satisfaction of the judgment "by execution and sale."

1. Principal defendant had been a paymaster in the Army of the United States, and the record shows that the suit was commenced against him and the other defendant, as one of his sureties on the official bond of the former, given for the faithful discharge of his duties. Breach of the bond as assigned in the declaration was that the principal obligor failed to pay over or account for the sum of twenty thousand and eighty-five dollars and seventy-four cents of the public moneys entrusted to his keeping, and for which he and his sureties were jointly and severally liable.

2. Claim of the plaintiffs was for that sum, as shown in the Treasury transcript, but the defendants in their answer denied the whole claim, and they also pleaded specially that the principal obligor was entitled to a credit of thirteen thousand dollars because, as they alleged, he was robbed, without any negligence or fault on his part, of that amount of the moneys so entrusted to his custody, during the period covered by the declaration. Verdict was for the plaintiffs

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for the sum of ten thousand three hundred and eighteen dollars and twenty-two cents, and on the eighteenth day of January, 1860, judgment was entered on the verdict. Both parties excepted during the trial to the rulings and instructions of the court, and the record shows that their respective exceptions were duly allowed.

3. Execution was issued on the judgment on the fifteenth day of April in the same year, and the return of the marshal shows that on the twenty-eighth day of the same month, he seized certain real property and slaves sufficient in all to satisfy the judgment. Formality of an advertisement prior to sale was omitted by the marshal at the request of the principal defendant, and on the fifth day of June following, the marshal sold certain parcels of the real property at public auction,

amounting in the whole to the sum of five thousand two hundred and seventy-five dollars, as appears by his return. Nearly half the amount of the judgment was in that manner satisfied, but the clear inference from the return of the marshal and the accompanying exhibit is that the sale was suspended and discontinued at the request of the principal defendant and for his benefit. Request for the postponement of the sale came from him, and it was granted by the marshal, as stated in the record, the better to enable the defendant to find purchasers for his property. Writ of error was sued out by plaintiffs on the first day of September, 1860, and was duly entered here at the term next succeeding, and since that time the case has been pending in this Court.

4. Motion to dismiss is grounded solely upon the alleged fact that the judgment was satisfied before the writ of error was sued out and prosecuted. Matters of fact alleged in a motion to dismiss, if controverted, must be determined by the court. Actual satisfaction beyond the amount specified in the return of the marshal cannot be pretended, but the theory is that the levy of the execution in the manner stated affords conclusive evidence that the whole amount was paid, and it must be admitted that one or two of the decided cases referred to appear to give some countenance to that view of

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the law -- that is, they assert the general doctrine that the levy of an execution on personal property sufficient to satisfy the execution, operates *per se* as an extinguishment of the judgment. [Footnote 1] None of those cases, however, affords any support to the theory that any such effect will flow from the issuing of an execution and the levying of the same upon land. On the contrary, the rule is well settled that in the latter case no such presumption arises, because the judgment debtor sustains no loss by the mere levy of the execution and the creditor gains nothing beyond what he already had by the lien of his judgment. [Footnote 2] Reason given for the distinction is that the land in the case supposed remains in the possession of the defendant, and he continues to receive and enjoy the rents and profits. [Footnote 3] Many qualifications also exist to the general rule as applied to the levy of an execution upon the goods of the judgment debtor,

as might be illustrated and enforced by numerous decided cases. Where the goods seized are taken out of the possession of the debtor and they are sufficient to satisfy the execution, it is doubtless true that if the marshal or sheriff wastes the goods, or they are lost or destroyed by the negligence or fault of the officer, or if he misapplies the proceeds of the sale or retains the goods and does not return the execution, the debtor is discharged; but if the levy is overreached by a prior lien or is abandoned at the request of the debtor or for his benefit or is defeated by his misconduct, the levy is not a satisfaction of the judgment. [Footnote 4] Rightly understood, the presumption is only a *prima facie* one in any case, and the whole extent of the rule is that the judgment is satisfied when the execution has been so used as to change the title of the goods or in some way to deprive the debtor of his property. When the property is lost to the debtor in consequence of the legal

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measures which the creditor has pursued, the debt, says Bronson, C.J., is gone, although the creditor may not have been paid. Under those circumstances, the creditor must take his remedy against the officer, and if there be no such remedy, he must bear the loss. [Footnote 5]

Tested by these rules and in the light of these authorities, it is very clear that the theory of fact assumed in the motion cannot be sustained. Satisfaction of the judgment beyond the amount specified in the return of the marshal is not only not proved, but the allegation is disproved by the amended record.

5. Amended record undoubtedly shows that an execution was issued on the judgment and that the same was partially satisfied before the writ of error in this case was prosecuted, but the defendants scarcely venture to contend that a partial satisfaction of the judgment before the writ of error is sued out is a bar to the writ of error, or that it can be quashed or dismissed for any such reason. Doubt may have existed upon that subject in the early history of the common law, but if so it was entirely removed by the elaborate judgment of Lord C.J. Willes in the case of *Meriton v. Stevens,* [Footnote 6] which is most emphatically endorsed in a well considered opinion of this Court. Nothing is better settled at the common law, says

Mr. Justice Story in the case of *Boyle v. Zacharie,* [Footnote 7] than the doctrine that a supersedeas, in order to stay proceedings on an execution, must come before there is a levy made under the execution, for if it come afterwards, the sheriff is at liberty to proceed, upon a writ of *venditioni exponas,* to sell the goods.

Form of the supersedeas at common law was

"that if the judgment be not executed before the receipt of the supersedeas, the sheriff is to stay from executing any process of execution until the writ of error is determined."

Settled construction of that order was

"that if the execution be begun before a writ of error or supersedeas is delivered, the

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sheriff ought to proceed to complete the execution so far as he has gone."

Directions in the leading case were accordingly that the sheriff should proceed to the sale of the goods he had already levied, and that he should return the money into court to abide the event of the writ of error. [Footnote 8]

6. Effect of a writ of error under the twenty-second section of the Judiciary Act is substantially the same as that of the writ of error at common law, and the practice and course of proceedings in the appellate tribunals are the same except so far as they have been modified by acts of Congress or by the rules and decisions of this Court. Service of a writ of error, in the practice of this Court, is the lodging of a copy of the same in the clerk's office where the record remains. [Footnote 9] Whenever a defendant sues out a writ of error and he desires that it may operate as a supersedeas, he is required to do two things, and if either is omitted, he fails to accomplish his object: 1, he must serve the writ of error as aforesaid, within ten days, "Sundays exclusive," after the rendition of the judgment, and 2, he must give bond with sureties to the satisfaction of the court, for the benefit of the plaintiff, in a

sum sufficient to secure the whole judgment in case it be affirmed. [Footnote 10] Security for costs only is required of the defendant when the writ of error sued out by him does not stay the execution, and he is not compelled, in any case, to make the writ of error a supersedeas, although it may be sued out within ten days after the judgment. [Footnote 11]

Plaintiff also may bring error to reverse his own judgment, where injustice has been done him, or where it is for a less sum than he claims, but he, like the defendant, is required to give bond to answer for costs. [Footnote 12] Writs of error at common law, whether sued out by plaintiff or defendant, operated in all cases as a supersedeas, but it has never been heard in a court of justice since the decision in the case of

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Meriton v. Stevens, that they had any retroactive effect, or any effect at all, until they were allowed and served.

Applying these rules to the present case, it is clear that there was no conflict between the action of the marshal in obtaining partial satisfaction of the judgment in this case and the pending writ of error which was subsequently sued out and allowed. Partial satisfaction of a judgment, whether obtained by a levy or voluntary payment, is not and never was a bar to a writ of error where it appeared that the levy was made or the payment was received prior to the service of the writ, and there is no well considered case which affords the slightest support to any such proposition. Subsequent payment, unless in full, would have no greater effect; but it is unnecessary to examine that point, as no such question is presented for decision. Where the alleged satisfaction is not in full, and was obtained prior to the allowance of the writ of error, the authorities are unanimous that it does not impair the right of the plaintiff to prosecute the writ, and it is only necessary to refer to a standard writer upon the subject to show that the rule as here stated has prevailed in the parent country from a very early period in the history of her jurisprudence to the present time. [Footnote 13]

Substance of the rule as there laid down is that where the execution is issued before the writ of error is sued out, if the sheriff has commenced to levy under the execution, he must proceed to complete what he has begun; but if when notified of the writ of error he has not commenced to levy, he cannot obey the command of the execution. [Footnote 14] Even the levy of the execution after the supersedeas has commenced to operate is no bar to the writ of error, but the court, on due application, will enjoin the proceedings and set the execution aside, and it has been held that the sheriff and all the parties acting in the matter, are liable in trespass. [Footnote 15]

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Neither the decisions of the courts, therefore, nor text writers afford any countenance to the theory that partial satisfaction of the execution operates as an extinguishment of the judgment or a release of errors, or that it takes away or impairs the jurisdiction of this Court. Carefully examined, it will be found that the cases cited assert no such doctrine, but that every one of them proceeds upon the ground that where the plaintiff has sued out execution, enforced his judgment, and obtained full satisfaction, there is nothing left on which a writ of error can operate.

Import of the argument is that a writ of error lies only on a final judgment and that the plaintiff, when he accepts full satisfaction for his judgment, removes the only foundation on which the writ of error can be allowed. Suffice it to say in answer to that suggestion that no such question arises in the case, which is all that it is necessary to say upon that subject at the present time.

The motion to dismiss is

DENIED.

[Footnote 1]

Mountney v. Andrews, Croke Eliz. 237; *Clerk v. Withers,* 1 Salkeld 322; *Ladd v. Blunt,* 4 Mass. 403; *Ex Parte Lawrence,* 4 Cowen 417.

[Footnote 2]

Shepard v. Rowe, 14 Wendell 260; *Taylor v. Ranney,* 4 Hill 621.

[Footnote 3]

Reynolds v. Rogers, 5 Ohio, 174.

[Footnote 4]

Green v. Burke, 23 Wendell 501; *Ostrander v. Walter,* 2 Hill 329; *People v. Hopson,* 1 Denio 578.

[Footnote 5]

Taylor v. Ranney, 4 Hill 621.

[Footnote 6]

Willes 272.

[Footnote 7]

31 U. S. 6 Pet. 659.

[Footnote 8]

Meriton v. Stevens, Willes 282.

[Footnote 9]

Brooks v. Norris, 11 How. 204.

[Footnote 10]

Catlett v. Brodie, 9 Wheat. 553; *Stafford v. Union Bank,* 16 How. 135.

[Footnote 11]

1 Stat. at Large 404.

[Footnote 12]

Johnson v. Jebb, 3 Burrow 1772; *Sarles v. Hyatt,* 1 Cowen 254

[Footnote 13]

Chitty's Archbold's Practice 558 (ed. 1862).

[Footnote 14]

2 Williams' Saunders 101, h.; *Perkins v. Woolaston,* 1 Salkeld 321; *Milstead v. Coppard,* 5 Term 272; *Kennaird v. Lyall,* 7 East 296; *Belshaw v. Marshall,* 4 Barnewall & Adolphus 336; *Messiter v. Dinely,* 4 Taunt. 280.

[Footnote 15]

2 Williams' Saunders 101, g.; 3 Bacon's Abridgment Error, H.; *Dudley v. Stokes,* 2 W. Blackstone 1183.

MR. JUSTICE GRIER (with whom concurred NELSON and SWAYNE, JJ.), dissenting:

I think this writ of error ought to be dismissed. The plaintiff having elected to take execution and satisfy his judgment, has no longer any judgment upon which the writ can operate. His election to accept and execute his judgment below is a *retraxit* of his writ of error. Such has been the unanimous decision of every court of law that has passed on the question. Appeals in chancery can furnish no precedent for a contrary decision. A decree in chancery may have a dozen different parts, some of which may stand good and be executed while others may be litigated on appeal. A judgment at law is one thing. The plaintiff cannot divide his claim into parts, and when he obtains judgment for part, accept that part and prosecute his suit for more. Having a right to elect to pursue his judgment or his writ of error, he cannot elect to have both.