

Ex Parte French

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Court : US Supreme Court

Decided On : 1879

Appeal No. : 100 U.S. 1

Appellant : Ex Parte French

Judgement :

Ex Parte French - 100 U.S. 1 (1879)

U.S. Supreme Court Ex Parte French, 100 U.S. 1 (1879)

Ex Parte French

100 U.S. 1

PETITION FOR A MANDAMUS AGAINST THE CIRCUIT COURT

OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA

SYLLABUS

In ejectment, where A., B., and the other defendants were respectively in the separate possession of specific parcels of the land, judgment was rendered against them for the recovery thereof and costs of suit, and also against each for damages for withholding the parcel whereof he was in possession, which exceed in the aggregate \$6,000. A writ of error was sued out by all the defendants.A. and

B., to render it a supersedeas of the judgment against them, severally gave a bond, which was duly approved and accepted. The court below thereupon ordered that the proceedings on the judgment as to A. and B. be stayed, and that a writ of restitution and execution be issued against the remaining defendants. *Held* that a mandamus directing that the judgment be carried into execution against all the defendants would not lie.

Upon the showing made by French in his petition, it appears that he brought a suit in ejectment in the court below against Lincoln, O'Ness, Onesti, DeSilva, and others, to recover the possession of a large tract of land. On the trial, the court found, among other things, that Lincoln was in the separate possession of a specific portion of the tract, and that O'Ness, Onesti, and DeSilva were in the possession of another portion. Judgment was rendered, Oct. 7, 1878, in favor of French against all the defendants jointly for the recovery of the entire tract and the costs of suit, amounting to \$959.25, and against Lincoln

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separately for \$330, damages for withholding possession; and against O'Ness, Onesti, and DeSilva for \$225, for like cause. Other separate judgments for damages were rendered against the other defendants, the aggregate of all the money judgments being \$6,091.

On the 28th of October a writ of error from this Court was sued out in the name of all the defendants, and the circuit court on the same day made the following order:

"And now, on motion of the defendants' attorneys, it is ordered that the amount of the bond to stay the execution of the judgment in this case, as to the possession of the land found by the findings filed herein to be in the separate possession of the defendant Lincoln, and also as to the judgment against him for damages and costs, be and the same is hereby fixed at \$3,000. And it is further ordered that the amount of the bond to stay the execution of the judgment as to the land found by the findings filed herein to be in the separate possession of the defendants O'Ness, Onesti, and DeSilva, and also to stay the execution of the judgment

against them for costs and damages, be and the same is hereby fixed at \$3,000."

On the following day separate bonds were filed by the defendants named in this order for the designated amounts, and conditioned as required by law for the stay of execution, which were approved and accepted in due form by the circuit judge, and on the 31st of October the following order was made by the circuit court:

"A writ of error having been sued out and perfected by the defendants in said action, and defendant L. M. Lincoln having given the proper bond to operate as a supersedeas as to the judgment against him, and the defendants Onesti, O'Ness, and DeSilva having given a similar bond as to the judgment against them, ordered, that proceedings be stayed as to the moneys recovered against said Lincoln, and as to the sixty acres of land found by the court to be in his possession, as described in the findings in said cause; and also that the proceedings be stayed as to the judgment for damages and costs against said O'Ness, Onesti, and DeSilva, and as to the land found to be in their possession, as described in the findings of the court in this cause; and that a writ of restitution and

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execution issue as to the remaining defendants, and the remainder of the land recovered in the action."

Afterwards, French applied to the clerk of the circuit court to issue execution against all the defendants, as well those who had filed supersedeas bonds as the others, and this being refused, he moved the court to vacate its order of October 31, and direct the complete execution of the judgment. This also being refused, he now prays

"that a writ of mandamus issue from this Court to the circuit court, . . . directing said circuit court to proceed and completely execute its said judgment, notwithstanding said writ of error and said orders of said circuit court. "

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MR. JUSTICE WAITE stated the case and delivered the opinion of the Court.

The argument in support of this petition is that as when the judgment or decree is for the recovery of money not otherwise secured, the rule of this Court (Rule 29) requires the bond for stay of execution to be for the whole amount of the judgment or decree; and as in this case the writ of error was sued out by all the defendants, and the aggregate of all the money judgments against them severally is more than \$6,000, the bonds that have been executed are insufficient, and therefore no stay of execution has been lawfully perfected. The object of the rule, which was made to put into form the practice that had prevailed before its promulgation, is to secure the eventual payment or performance of the judgment or decree, the execution of which is stayed by the supersedeas, in case the appeal or writ of error is not prosecuted to effect. Here, although the writ of error has been sued out to obtain the reversal of the entire judgment, a stay of execution is sought only as to certain specified parts. The judgment is severable as between the defendants, and has actually been severed by the court below for the purposes of the stay of execution. We see no impropriety in this, as in legal effect the judgment as it stands is against each of the several defendants for the lands they

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respectively occupy, and the damages they are respectively liable to pay. In this view of the case, the bonds are sufficient in amount and form. So far as the money parts of the judgment are concerned, they are far in excess in each instance of the amount recovered against the several defendants who seek the stay, and as to the damages on account of the detention of the property, we decided in [Jerome v. McCarter](#), 21 Wall. 17, that the amount of the bond rested in the discretion of the judge or justice who signed the citation or allowed the supersedeas, and would not be reconsidered here.

It is said, however, that if the judgment is separate, so that each defendant is entitled to a stay independently of the others, each must sue out his separate writ of error. To this we do not agree. The writ and the supersedeas are two separate things, and the writ can be sustained without a supersedeas. All the defendants want the judgment reviewed, but a part only desire to have the execution against them stayed; and we see no reason why they may not all join in the writ, and

separate when they ask for a stay. There is certainly no settled practice against it, and very strong reasons can be found in its favor. The whole question is one of practice and not of statutory law. "Good and sufficient security that the plaintiff in error or the appellant . . . shall answer all damages and costs," "if he fail to make his plea good," is all the statute, Rev.Stat. sec., 1000, requires; and the rules of practice are satisfied if the indemnity is commensurate with the damages that may follow from the stay which is effected. But if the writ is informal, the remedy is by motion to vacate the writ, and not by mandamus to have the judgment carried into execution.

Petition denied.

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