
Peale v. Phipps et al.

ests of the persons aforesaid, it is the opinion of this court, that the judgment of the Circuit Court entered *pro forma* in this case is a nullity and void, and that no writ of error will lie upon it. On consideration whereof, it is now here ordered and adjudged by this court, that the writ of error be, and the same is hereby, dismissed, each party paying his own costs, and that this cause be, and the same is hereby, remanded to the said court, to be dealt with as law and justice may require.

ELIJAH PEALE, TRUSTEE AND ASSIGNEE OF THE PRESIDENT, DIRECTORS, AND COMPANY OF THE AGRICULTURAL BANK OF MISSISSIPPI, PLAINTIFF IN ERROR, *v.* MARTHA PHIPPS AND MARY RICE, WHO IS AUTHORIZED AND ASSISTED IN THE SUIT BY HER HUSBAND, CHARLES RICE.

An error in a citation, calling Mary Rice the wife of Charles Bowers, whereas she was the wife of Charles Rice, is not fatal in a case coming from Louisiana. The practice there is for the husband to assent when the wife brings a suit, so that his name is merely a matter of form.

Nor is it a fatal error when the citation was issued at the instance of E. Peale as plaintiff in error, instead of Elijah Peale, Trustee of the Agricultural Bank of Mississippi.

The acceptance of the service of the citation by the attorney for the parties shows that the error led to no misapprehension.

THIS case was brought up, by writ of error, from Louisiana, and a motion was made by *Mr. Henderson* to dismiss it, upon the grounds stated in the opinion of the court.

*257] *Mr. Justice McLEAN delivered the opinion of the court.

A motion is made to dismiss this writ of error on three grounds:—

1. Because there is no citation to the defendants in error, as the law requires.

2. Because the citation is addressed to Martha Phipps and Mary Rice, "wife of George Bowers, and by him assisted," who are not the persons or parties defendants in the record.

3. Because said citation is stated to have been issued at the instance of E. Peale, as plaintiff in error,—instead of Elijah Peale, Trustee of the Agricultural Bank of Mississippi, &c.

The suit was brought by Martha Phipps and Mary Rice;

Wilson *v.* Barnum.

and in the petition they are called Martha Phipps and Mary Bowers, wife of Charles Rice, "who is authorized and assisted in this suit by her said husband, Charles." The defendant is named "Elijah Peale, in his capacity of Trustee and Assignee of the President, Directors, and Company of the Agricultural Bank of Mississippi." The decree is in favor of Martha Phipps and Mary Rice.

The citation appears to have been issued by E. Peale, and was directed to Martha Phipps and Mary Rice, "wife of George Bowers, and by him assisted." And the service of the citation was accepted by S. S. Prentiss, plaintiff's attorney, at New Orleans, the 22d of October, 1849.

The names of the defendants in error are correctly stated in the citation, except that Mary Rice is represented as the wife of George Bowers, instead of the wife of Charles Rice. Under the procedure in Louisiana, the husband is named in the petition as assenting to the suit brought in the name of his wife. He is not a party to the suit, nor is he responsible for costs. The use of the name of the husband is merely formal, and the misnomer alleged could not have misled the defendants in error. Nor could they have been misled by the omission in the notice of the capacity of trustee, in which the defendant below was sued, and in which he necessarily prosecutes the writ of error. The acceptance of the service of the notice by the counsel of the defendants in error, without exception, shows that there could have been no misapprehension in regard to it. The motion to dismiss the case is overruled.

Order.

On consideration of the motion to dismiss this writ of error, submitted to the court by General Henderson, on a prior day ^[*258] of the present term of this court, to wit, on Friday, the 28th ultimo, it is now here ordered by this court, that said motion be, and the same is hereby, overruled.

JACOB P. WILSON, COMPLAINANT, *v.* DANIEL BARNUM.

The following question, sent up to this court upon a certificate of division in opinion between the judges of the Circuit Court,—viz., "Whether, according to the true construction of the Woodworth patent, as amended, the machines made or used by the defendant at the time of filing the bill, or either of them simply, do or do not infringe the said amended letters patent?"—is a question of fact, over which this court has no jurisdiction.