
Syllabus.

Captain Williamson was ordered by the Adjutant-General of the Department of Missouri, by authority of the General of the Army, to proceed to his home and await orders, reporting thence by letter to the Adjutant-General of the Army, and to these headquarters.

The power to make this assignment was a portion of the executive authority, and was vested in the commander of the army. Captain Williamson was not only justified in obeying this order, but it was his duty to obey it. It was his duty to proceed at once to his home, there to remain, subject to orders to be communicated to him. He was expressly required by general order to make no application for special duty, but was informed that if his services were required a detail would be made without his application. He did proceed to his home and there remained waiting for orders until he was mustered out of the service. He was waiting orders, in pursuance of law, but was not absent from duty on leave.

It is not in the power of the executive department, or any branch of it, to reduce the pay of an officer of the army. The regulation of the compensation of the officers of the army belongs to the legislative department of the government. Congress has fixed the pay of a captain of infantry at \$165 per month. The deduction of one-half of the amount, when absent from duty on leave, is not applicable to the case of Captain Williamson. He is entitled to his full pay as a captain of infantry. The Court of Claims has done right, therefore, in giving its award in his favor for the amount withheld, and its judgment is

AFFIRMED.

FASHNACHT v. FRANK.

Where in a suit pending before it a State court dissolves an injunction (previously granted by it on an allegation by the mortgagor, that the mortgagee had agreed to give him further time) against proceeding to sell mortgaged premises, under a foreclosure already had, and after such

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dissolution—the effect of which is, of course, to leave in force a final decree of sale—an alien defendant petitions for a removal into the Circuit Court under the act of July 27th, 1866, “for the removal of causes in certain cases from State courts,” and the State court refuses to grant that petition, the defendant not excepting, and the case is afterwards taken to the Supreme Court *on an appeal from the decree dissolving the injunction*, no jurisdiction exists here to review the judgment of the Supreme Court under section 709 of the Revised Statutes, and on the ground that a right, title, privilege, or immunity has been claimed under a statute of the United States, and that a decision of the highest court of the State where a decision could be had has been against it. The refusal of the State court to grant a removal under the act of Congress not having been excepted to, and *that* matter not having been involved in what was before the Supreme Court, its judgment cannot be held to have embraced it, nor indeed anything but the matter of the dissolution of the injunction; a matter which involved no Federal question.

ON motion to dismiss, for want of jurisdiction, a writ of error to the Supreme Court of Louisiana.

The case was thus:

Frank, a citizen of New Orleans, having a mortgage on property in New Orleans of Fashnacht, a citizen of the Republic of Switzerland, obtained an order in the Fifth District Court for the Parish of New Orleans, for the seizure and sale of it.

Fashnacht thereupon procured from the same court an injunction on the sheriff and on Frank restraining the execution of the order, alleging in his petition for the injunction and as a ground for it, that at the time when the mortgage was executed and as an inducement to the execution, Frank, the mortgagee, had granted to him time for paying the bond, which the mortgage was given to secure; although that fact did not appear as a matter of mention in the contract.

The case came up January 16th, 1874, on the question of a permanent injunction. Testimony was taken, witnesses examined, letters read, &c., and the court on that day dissolved the injunction, with damages.

On the 20th of the same month a motion for a new trial was made and refused.

Fashnacht, the defendant, thereupon, on the 23d of Jan-

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uary—that is to say, three days after the refusal to allow him a trial—filed a petition to remove his case into the Circuit Court of the United States, under the act of July 27th, 1866, “for the removal of causes in certain cases from State courts;” an act which enacts that “in any suit in any State court against an alien, if the suit so far as relates to the alien defendant, is one in which there can be a final determination of the controversy so far as respects *him* without the presence of the other defendants as parties in the cause, then the alien defendant may at any time before the *trial* or *final hearing of the case*, file a petition for the removal of the cause, as respects *him*, into the next Circuit Court of the United States,” &c.

The petition of Fashnacht for the removal stated that the suit could be thus determined.

The court refused to allow the transfer. It said :

“The order is refused, for the reason that the case was tried and determined by this court after an appearance and pleading of the defendant therein. The order should have been asked for *in limine*, and the case having been finally determined, as far as this court had jurisdiction, the parties must abide its decision, unless they see proper to appeal therefrom.”

Thereupon, on the 31st of January, Fashnacht appealed to the Supreme Court of Louisiana from the decree of the Fifth District Court of the Parish of New Orleans, dissolving the injunction, but from nothing else.

The Supreme Court affirmed the decree of the court below.

From this judgment of affirmance the present writ of error was taken by Fashnacht, under the assumption that the case came within section 709 of the Revised Statutes, which gives such writ to bring here for re-examination, a final judgment or decree in the highest court of a State in which a decision in the suit could be had, in cases where any title, right, privilege, or immunity is claimed under any statute of the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under such statute.*

* See Appendix.

Opinion of the court.

Mr. Conway Robinson, in support of the jurisdiction :

The suit of Frank having been commenced against an alien, the alien defendant, before the trial or final hearing of the cause, filed a petition for the removal of the cause into the next Circuit Court of the United States, herein setting up and claiming a right, privilege, and immunity under a statute of the United States. It was, thereupon, the duty of the State court to proceed no further in the cause. But the court refused to grant a removal, and herein made a decision against the right, privilege, and immunity thus set up and claimed, under a statute of the United States, and this decision has been affirmed by a final judgment in the suit in the highest court of the State in which a decision in the suit could be had.

It is no answer to say that the petition to remove was too late, and that the decree of the Fifth Parish Court was right. If the decree of that court was against a right, privilege, and immunity set up by us, and if that decree has been affirmed in the Supreme Court of Louisiana—the highest court of the State—this court has jurisdiction to review the case; and this motion cannot prevail, whatever may be the ultimate decision of this court, when the matter of merits comes to be considered.

Mr. T. J. Durant, contra.

The CHIEF JUSTICE delivered the opinion of the court.

Previous to the time when the motion for a new trial was made and overruled, no question had been presented in the cause that could under any circumstances give this court jurisdiction upon a writ of error. On the 23d of January a petition was filed by the defendant for the removal of the cause to the Circuit Court of the United States. This petition was at once very properly overruled, for the reason that a final judgment had already been rendered. No exception was taken to this ruling. So far as appears the defendant was satisfied, as he should have been, that he could not have relief in that form against the judgment which had

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been rendered. On the 31st of January an appeal from the judgment was taken to the Supreme Court of the State. This was clearly the appropriate remedy for the correction of the errors of the District Court, if there were any. The action of the District Court in refusing the removal does not appear to have been presented to the Supreme Court upon this appeal. It could not properly have been presented, because the appeal was from the judgment alone, and this action was subsequent to the judgment and independent of it. We act only upon the judgment of the Supreme Court. Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered by us upon error.

WRIT OF ERROR DISMISSED.

CROSBY v. BUCHANAN.

1. A., in 1812, made a deed to V. conveying to him valuable estates, V. by a separate instrument, agreeing that if A. would, within five years, pay to him a certain sum (\$14,500), he would convey to A.'s children, then infants, a part of this estate, and convey also to them a part of certain other estates. Soon afterwards V. acknowledged that A. had paid to him a large part (\$11,600) of the money to be paid.

On proceedings in equity many years afterwards, in the Circuit Court of the United States, the children, now become of age, prayed for—

1st. A cancellation of the deed by A., as having been fraudulently procured by V.

2d. That if this would not be decreed, then, on payment by the children of the balance with interest, for a specific performance by V. of his contract to convey the two parts of the estates which he had agreed to convey, if \$14,500 were paid in five years.

3d. If the court would make neither of these decrees, then that it would decree that V. should refund with interest the \$11,600 purchase-money that had been paid to him.

The Circuit Court in 1853 refused to decree a cancellation of A.'s deed, refused also to decree that V. should specifically perform his agreement to convey; but as to the return of the \$11,600 purchase-money paid, the court said that it could not pass on that matter, proper parties not being before the court, and made no decree about it. Proper parties came in, and after hearing, the court refused to order a return of the purchase-