

McClenachan Vs. McCarty

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Court : US Supreme Court

Decided On : 1788

Appeal No. : 1 U.S. 375

Appellant : McClenachan

Respondent : McCarty

Judgement :

MCCLLENACHAN v. MCCARTY - 1 U.S. 375 (1788)

U.S. Supreme Court MCCLLENACHAN v. MCCARTY, 1 U.S. 375 (1788)

1 U.S. 375 (Dall.)

McClenachan et al.

v.

McCarty

Court of Common Pleas of Philadelphia County

December Term, 1788

This was a Foreign Attachment, in which judgment was entered at the third term; and a writ of inquiry being afterwards executed, a motion was made, on behalf of the Defendant, to quash the return, because the Sheriff and Inquest had refused to hear his evidence at the time of executing the writ.

On the argument the nature of the evidence that had been excluded, was stated, and Ingersoll, in support of the motion, contended 1st, That, upon general principles, both parties are entitled to be heard before the Inquest; and that, although they are bound to find some damages, yet, if there is no proof of any being sustained, they will find no more than a single penny; and that merely to satisfy the form of the proceeding. The writ commands the Inquest diligently to enquire what damages &c.; so that to inform their consciences, they ought certainly to hear the allegations of both parties; and if they assess the damages too high, or too low, their return will be set aside, which proves that the Court has a superintending power over Juries of Inquiry. 2 Lill. Abr. 721. 2. Sayre's Law of Dam. 123. 193. 203. 233. It is a maxim, indeed, that damages cannot be assened without a Jury. 3 Bl. Com. 395. 396. 7.

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and it is clear that under the rules at Nisi Prius, a Defendant may submit to judgment being entered, and yet contest the matter before the Jury of Inquiry, so as to affect the quantum of damages, for which the judgment shall stand. 2ndly, The case of a Foreign Attachment makes no exception to the general rule. In London only actions of debt can be brought within the custom; so that the judgement being compleat, no damages are to be assessed. There are many other points in which the Custom of London differs from the practice under our attachment law. Lands, and, in short, every other subject of property, are liable in Pennsylvania to an attachment; being as much so in his absence, as the Defendant's person would be, if he were here. But the Custom of London proceeds only on the supposition of a debt due from the Garnishee to the Defendant. Hence the analogy between the custom there, and our practice, is very trifling. The act of Assembly does not prescribe a writ of inquiry; nor does the Freeholders law, upon a judgment by default after summons; yet, in both cases, writs of inquiry are uniformly issued to assess damages; and for the plain reason already assigned, that damages cannot be assessed without the intervention of a Jury. Besides, it has been the uniform practice under the attachment law to give notice of executing the writ; which necessarily implies a right to controvert the

quantum of damages; and the question is not whether the evidence would have availed, but whether it ought to have been heard.

Wilson and Wilcocks for the Plaintiffs. It is in the power of the Defendant to appear, and entitle himself to a trial in Court; but it would be unjust in this manner to permit him to draw the decision of an important question from the proper tribunal. Admitting, however, that the law is what the Defendant's counsel states, where a party is completely in Court, and afterwards suffers judgment to go by default, it is not applicable to the case of an attachment, the object of which is to compel an appearance. The custom of London, which is certainly the ground-work of our attachment law, admits no such privilege as the Defendant now claims. In London the Plaintiff is not obliged to execute a writ of inquiry, or to prove his debt in Court, but merely to swear to it; nor does any expression in our act of Assembly enjoin the execution of a writ of inquiry; but that, as well as the notice in office, depends entirely upon usage; for, the only trial mentioned in the act is on the scire facias between the Plaintiff and Garnishee. Nor does the Legislature precipitate the cause: judgment cannot be entered 'till the third term, and twelve months afterwards are given to obtain a trial upon the merits. In this action, likewise, the Plaintiff acquires no general lien by his judgment, as in other actions, but can only issue execution against the property attached: so that, upon the whole, there can be no reason, on principles of equity, that the Defendant should be heard without putting in special bail. The Freeholders act can furnish no argument; for the law in that case, prescribes a mode by which

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the Defendant shall be brought into Court; but, in an attachment, the Defendant is never in Court until bail is filed.

Shippen, President. This is a motion to set aside the inquisition of a Jury of Inquiry in a foreign attachment, on the ground of the Defendant's evidence being refused to be heard before the Sheriff and Inquest, on the execution of the writ of inquiry. On the part of the Plaintiffs two points have been made and argued: 1st, That on the execution of writs of Inquiry generally, no evidence on the part of the

Defendant ought to be heard, as by suffering judgment to go by default, he had admitted the Plaintiffs cause of action; and that, therefore, evidence on the part of the Plaintiffs only should be heard. 2ndly, That, although it were admitted, that, generally, on executing writs of Inquiry, after an interlocutory judgment, such evidence might be heard; yet, in those cases where writs of Inquiry are executed to ascertain the Plaintiff's demand, after judgments on foreign attachments, no such evidence should be admitted; because the foreign attachment issues only to compel an appearance, and the Defendant has it in his power, even after the return of the Inquisition, by entering special bail, to try the cause in the usual manner, before a Court and Jury. As to the first point, the law seems settled, that, after a judgment by default, the Defendant has a right to offer his evidence to the Jury of Inquiry to combat the Plaintiff's proofs; and that where the Sheriff refuses to hear the evidence on both sides, the Court will direct a new writ of Inquiry. As to the second point, it will be necessary to consider the law of attachments of 1705, and the practice under it, together with the reasons and extent of that practice. The Legislature, in framing this act, certainly took for their model the Custom of London, concerning foreign attachments; the principles of the law and mode of proceeding are in many respects conformable to that Custom; and the difference appears to be less in the act itself, than in the practice under it. In London the proceeding is by plaint against the Defendant, supported by the oath of the Plaintiff. On this is founded the attachment and proceedings against the Garnishee; but no further proceeding is had against the Defendant till he enters special bail, and then a declaration is filed and a trial had in the usual way. The practice under our act is first to obtain judgment against the Defendant, then to file a declaration against him according to the nature of the demand; if in debt, the judgment stands for the sum declared for, without even an oath to support it; if in case, a writ of Inquiry issues for a Jury to ascertain the demand, and then the scire facias issues against the Garnishee. No actual Notice is given to the Defendant of the execution of the writ of Inquiry; his attendance is never expected, and

is in most cases impossible. It seems to be a mode adopted, not for a trial of the merits, but only to conform to the nature of an action on the case, which requires a Jury of Inquiry to ascertain the sum for which execution is to issue; and it may be considered as a proceeding to inform the conscience of the Court, in the room of the supposed oath in the action of debt. In its nature it appears to be an ex parte proceeding, and not within the reason of the rules in executing writs of Inquiry on Judgments by default; where the Defendant has regular notice, and has no other opportunity of making a defence.

The attachment law, and all proceedings under it, suppose the Defendant to be an absent person, and he has, in truth, no day in Court, till he enters special bail, and thereby dissolves the attachment; or comes in afterwards, when the money is recovered from the Garnishee, to disprove the debt, which is done by a scire facias ad disprobandum debitum; in either of which cases, he puts the Plaintiff upon the legal proof of his demand, and is admitted to make a full defence. The right of making that defence before the Jury of Inquiry has no foundation either in the act or the practice under it. The law supposes, from his absence, that he is then incapable of making a defence; and, for that reason, has afforded him ample time and opportunity afterwards to do it; nor does it accord with legal ideas, that he should have this opportunity of trying his cause, and also another afterwards upon entering special bail.

It has been said, that notice of executing these writs of Inquiry has been usually set up in the Prothonotary's and Sheriff's Offices; and that the notice would be vain, if the party might not appear and make his defence. This practice of putting up notices, must have been introduced by the Gentlemen of the Law ex majore cautela. If it were a new case, we should perhaps think it nugatory; as a person abroad cannot be supposed to take notice of a paper put up in the office, which he could never see. However, as it is the practice, it is proper it should be continued; and it may, at least, serve the purpose of giving the Garnishee, or the Attorney in fact, of the Defendant, an opportunity of knowing, and apprizing his constituent, of the nature of the Plaintiff's demand, that he may be prepared to defend himself against it.

Upon the whole, we are of opinion, that the refusing to admit the Defendant in the attachment to produce his evidence before the Jury of Inquiry, is not a sufficient reason for setting aside the Inquisition.

Rule discharged.

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