

Savage's Assignee Vs. Best

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Court : US Supreme Court

Decided On : 1845

Appeal No. : 44 U.S. 111

Appellant : Savage's Assignee

Respondent : Best

Judgement :

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Savage's Assignee v. Best

44 U.S. (3 How.) 111

CERTIFICATE OF DIVISION OF OPINION IN THE CIRCUIT

COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY

SYLLABUS

In Kentucky, the creditor obtains a lien upon the property of his debtor by the delivery of a *fi. fa.* to the sheriff, and this lien is as absolute before the levy as it is afterwards.

Therefore a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff.

The following is the entire record in the case:

"The following statement of questions and points of law which arose in this case, and the adjournment thereof into the Supreme Court of the United States for decision, was ordered to be entered, to-wit: "

"Savage had the title to the land; the plaintiff claimed under the decree of his bankruptcy, the defendant, under a sheriff's sale under an execution."

"The act of bankruptcy of Savage was committed on 27 April, 1842; the petition of his creditors was filed against him in the district court on 25 day of June, 1842, and he was declared a bankrupt on 26 October, 1842; the plaintiff was appointed the assignee, and this is his title."

"An execution of *fieri facias* on a judgment against the estate of Savage was delivered to the sheriff on 9 April, 1842, before the act of bankruptcy, and was levied on the land on the day of before the petition; but after the act of bankruptcy the defendant purchased at the sheriff's sale, had his deed, and this was his title."

"The question was, has the plaintiff, by the decree of bankruptcy and its relation back to the act of bankruptcy, the elder and better title, or has the defendant, by the prior delivery of the execution into the hands of the sheriff, and his levy of it before the petition was filed, the prior and superior title?"

"On this question the judges were divided and opposed in opinion; whereupon, on motion of the counsel of the plaintiff, the question is stated and ordered to be certified to the supreme court for decision. "

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MR. CHIEF JUSTICE TANEY delivered the opinion of the Court.

This case comes before the court upon a certificate of division between the judges of the Circuit Court of the United States for the District of Kentucky upon the following statement:

"Savage had the title to the land; the plaintiff claimed under the decree of his bankruptcy; the defendant, under a sheriff's sale under an execution."

"The act of bankruptcy of Savage was committed on 27 April, 1842; the petition of his creditors was filed against him in the district court on 25 June, 1842, and he was declared a bankrupt on 26 October, 1842; the plaintiff was appointed the assignee, and this is his title."

"An execution of *fiery facias* on a judgment against the estate of Savage was delivered to the sheriff on 9 April, 1842, before the act of bankruptcy, and was levied on the land on the ____ day of _____ before the petition; but after the act of bankruptcy, the defendant purchased at the sheriff's sale, had his deed, and this was his title."

"The question was has the plaintiff, by the decree of bankruptcy and its relation back to the act of bankruptcy, the older and better title, or has the defendant, by the prior delivery of the execution into the hands of the sheriff and his levy of it before the petition was filed, the prior and superior title?"

The statute of Kentucky upon this subject provides

"That no writ of *fiery facias* or other writ of execution shall bind the estate of the defendant or defendants but from the time such writ shall be delivered to the sheriff or other proper officer to be executed."

According to the laws of that state, a judgment is not a lien upon land and the real as well as personal estate is not bound until the process of execution against the property of the defendant is delivered to the officer. The question to be determined is whether the delivery of the *fiery facias* to the sheriff to be executed created a lien on the property of the defendant for the amount for which the execution was

issued? If it, did, the title of the defendant is the superior and better title, and protected by the last proviso in the 2d section of the act to establish a uniform system of bankruptcy throughout the United States.

In construing the statute above mentioned, the decisions of the courts of Kentucky have not been entirely uniform. In the case of *Tabb v. Harris*, 4 Bibb 29, decided in 1816, it was held that the delivery to the sheriff created no lien on the property of the defendant. In a subsequent case, however, in the same volume, *Daniel v. Cochrane's Administrator*, 4 Bibb 532, decided in 1817, the court, in delivering their opinion, speak of the lien of *feri facias*, from the time it was delivered to the sheriff to be executed, as if it were a known and settled principle of law in that state. But this was out the main point in that case, which turned upon the question, whether the execution continued to bind the property of the debtor until the judgment was satisfied. The court held that it did not, and that the lien ceased after the return day of the execution, if it was not levied before. The question, as to the lien acquired by the delivery to the officer, again arose in the case of *Kilby v. Haggin*, 3 J.J.Marsh. 208, and in this case, which was decided in 1830, the doctrine in the case of *Tabb v. Harris* was fully sustained, and it was directly and distinctly decided that the delivery to the sheriff created no lien against any other creditor and that an execution afterwards placed in the hands of the sheriff, if first levied upon the property, was entitled to a preference.

But in the case of *Million v. Ryley*, 1 Dana 360, decided in 1833, the court held that the plaintiff obtained a lien by the delivery to the sheriff, and that the title acquired by the purchaser, when the execution was regularly levied and the property sold, related back to the delivery to the officer, and they speak of this lien as secured to the creditor by the Kentucky statute. In 1837, this subject again came before the court, in the case of *Addison v. Crow*, 5 Dana 274, and in this case the question appears to have been very fully considered, and the case of *Million v. Ryley* was referred to and commented on, and the principle decided in it in relation to the lien of an execution reaffirmed. In this case, the court said

"the levy of a *feri facias* upon the land of the debtor undoubtedly renders the lien more specific, and being a necessary step in the execution of a writ, completes the

authority of the officer to sell, and has the further effect of giving continuance both to the authority and the lien, which would otherwise expire with the return of the writ. And we do not perceive any necessity or reasonable ground for ascribing to it any other efficacy than this,"

and in page 277 of the same case, the court again said,

"no reason appears for attributing to a levy any efficacy except as one step towards the consummation of the lien arising from the delivery of the execution to the officer. "

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This is the latest decision in the courts of the state to which we have been referred, or of which we are aware, and, as we have already said, it appears to have been well considered. And whatever doubts might before have been entertained, we must, under the authority of this case, regard it as the settled law of the state, that the creditor obtains a lien upon the property of his debtor by the delivery of the *fiери facias* to the sheriff; that it acquires no additional validity or force by being actually levied, but that the lien is as absolute before the levy as it is afterwards, and continues while the process remains in the hands of the sheriff to be executed.

In this view of the subject, it is unnecessary to examine or to remark upon the cases which have been decided in other states or in England, because the question depends altogether upon the law of Kentucky. And as by the laws of that state a *fiери facias*, when delivered to the sheriff, is a lien upon the property of the debtor while it continues in the hands of the officer to be executed, the creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff. In the case before us, therefore, the Court is of opinion that the defendant, by the prior delivery of the execution and the subsequent levy and sale, has the prior and superior title, and we shall

Certify accordingly to the circuit court.

