Peck Vs. Jenness

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Appeal No. : 48 U.S. 612

Appellant : Peck

Respondent : Jenness

Judgement :

Peck v. Jenness - 48 U.S. 612 (1849)
U.S. Supreme Court Peck v. Jenness, 48 U.S. 7 How. 612 612 (1849)

Peck v. Jenness

48 U.S. (7 How.) 612

ERROR TO THE SUPERIOR COURT OF JUDICATURE

FOR THE STATE OF NEW HAMPSHIRE

SYLLABUS

The proviso of the second section of the bankrupt act passed on 19 August, 1841, preserves all liens which may be valid by the laws of the states respectively.

In some of the states, attachments are issued on mesne process by which the property seized is held to await the result of the suit. This constitutes a lien, which is saved by the proviso in the bankrupt act.

The various kinds of liens explained.

Therefore, where an attachment was issued and the defendants afterwards applied for the benefit of the bankrupt act, a plea of bankruptcy was not sufficient to prevent a judgment from being rendered condemning the property under attachment.

The fourth section of the statute, if it stood alone, would make a plea of bankruptcy a good plea in bar in discharge of all debts, but if the whole statute be construed together, this is not the result.

A rejoinder setting forth that the district court of the United States had decided that the attachment was not a valid lien upon the property was not a good rejoinder.

The district court could not oust the state court of its jurisdiction, which had already attached.

Peck and Bellows were residents of the Town of Walpole, in the County of Cheshire and State of New Hampshire. Jenness, Gage, and Company resided in Boston.

The facts in the case are sufficiently set forth in the opinion of the Court.

Page 48 U. S. 618

MR. JUSTICE GRIER delivered the opinion of the Court.

The defendants in error, Jenness, Gage & Co., instituted this suit against Philip Peck and William Bellows, in the Court of Common Pleas of Cheshire county, New Hampshire, demanding the sum of $2,000, for goods sold and delivered. The action was served according to the practice of that state on 10 October, 1842, by the attachment of the goods, chattels, and lands of the defendants. The cause was

continued till April term, 1844, when Aaron P. Howland, assignee in bankruptcy of each of the defendants, was on motion admitted by the court to come in and defend in their names. He pleaded severally their application to the District Court of the United States, at Portsmouth on 26 November, 1842, for the benefit of the bankrupt law, on which they were decreed bankrupts on 28 December, 1842. That Howland was appointed assignee and that defendants severally received a certificate of discharge on 21 June, 1843.

To these pleas the plaintiffs below replied that before the filing of said petitions by the defendants, to-wit, on 8 October, 1842, the plaintiffs in good faith sued and prosecuted out of the court of common pleas their writ of attachment against the defendants for a just debt, by virtue of which the sheriff attached and took into his custody and possession, as security for such judgment as the plaintiffs in their said suit might obtain, certain goods and chattels on a schedule annexed, and now retains the custody thereof, and therefore pray judgment to be levied of the same.

To this replication the defendants rejoined that Howland, the assignee, on 25 July, 1843, presented to the district court of the United States a petition setting forth the plaintiffs' attachment of the goods, and averring that such attachment

Page 48 U. S. 619

was not a valid lien on the said goods, and that therefore the sheriff had no right to detain them, and prayed the court to order and decree that the sheriff should deliver the goods to the assignee, or account for their value, and that the court, after notice to the parties and hearing, had decreed accordingly.

To these rejoinders the plaintiffs demurred, and the court of common pleas entered their judgment as follows:

"That the plaintiffs recover against the said Philip Peck and William Bellows $1,818.87 damages and costs of suit, which sums are to be levied only of the goods and chattels and estate of the defendants attached upon the plaintiffs' writ aforesaid, and described in the plaintiffs' said replications, and not otherwise."

This judgment of the court of common pleas was removed by writ of error to the Superior Court of Judicature of the State of New Hampshire, at the instance of the defendants, and, on hearing the judgment of the court below, was affirmed.

The defendants, now plaintiffs in error, then prosecuted their writ of error to this Court under the twenty-fifth section of the Judiciary Act of 1789. As the record shows that the highest court of judicature of the State of New Hampshire has decided against a title claimed under a statute of the United States, it is clearly a proper case for the revision of this Court. Various questions have been made on the argument of this case, as to the regularity of the bankrupt proceedings, and the validity of the certificates of discharge set forth in the pleas of the defendants below. But we do not think it necessary to notice them, and shall therefore assume that the bankrupt proceedings are regular and properly set forth in the pleas.

I. The first question that will present itself for our consideration will be, whether the replication of the plaintiffs below sets forth matter in avoidance of the plea which will entitle them to the judgment prayed for, and afterwards rendered by the court. In order to test its sufficiency, we must first inquire, whether an attachment of property under the process peculiar to New Hampshire and some other states creates a lien or security on the property attached, within the true meaning and intention of the proviso of the second section of the bankrupt act.

The words of this proviso are as follows:

"And provided also that nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women or any liens, mortgages, or other securities on property, real or

personal, which may be valid by the laws of the states respectively and which are not inconsistent with the provisions of the second and fifth sections of this act."

As it is not alleged that the attachment in this case is subject to any imputation of inconsistency with the provisions of the second and fifth sections of the act, it will

not be necessary to give them further attention. Taking the words of the proviso disconnected with this exception, they are of the most general and expansive character; they are equivalent to a saving of all liens or securities, &c.;, from any construction of the act that shall in any wise annul, destroy, or impair them, and furthermore to test their validity, we are referred to the laws of the states respectively.

At common law, there can be no lien without possession. It is there defined a right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied. *Hammond v. Barclay,* 2 East 235. In maritime law, liens exist independently of possession, either actual or constructive. In courts of equity, the term "lien" is used as synonymous with a charge or encumbrance upon a thing, where there is neither *jus in re* nor *ad rem* nor possession of the thing. Hence a judgment which, by virtue of the Statute of Westminster 2d, commonly called the Statute of Elegit, is a charge upon the lands of the debtor, is called in courts of equity in England and in the courts of law of many of these states a lien, and executions which bind the personal property of the debtor, after their delivery to the sheriff, are termed "liens" both before and after the property is seized and taken into the custody of the law by its officer. In the case of *Waller v. Best,* 3 How. 111, this Court decided that 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 after, and that 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, and "it is unnecessary," say the Court, "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."

It would be an arbitrary and fanciful exposition of the terms of this proviso to say that it saved common law liens and not statute liens, liens after judgment and not liens before judgment, or to assert that it is the policy of the bankrupt act to save the lien of a factor or bailee while it annuls that of the judgment or execution creditor.

It is clear, therefore, that whatever is a valid lien or security upon property, real or personal, by the laws of any state is exempted by the express language of the act.

Let us inquire, then, whether an attachment on mesne process is a valid lien or security on the property attached by the laws of New Hampshire as expounded by her courts.

This species of process is peculiar to the New England states. As early as the year 1650, while New Hampshire was united to the Massachusetts Colony, it was enacted that

"Henceforth goods attached upon any action shall not be released upon the appearance of the party or judgment, but shall stand engaged until the judgment or the execution granted on the same be discharged."

Charters and Colony Laws 50. And a proviso was added in 1659 that when execution was not taken out within one month after judgment, the attachment shall be released and void in law &c.;

The earliest provincial legislation of New Hampshire adopted the same system, which has been continued with some variations to the present day. In 1718, they describe the goods attached as "security to satisfy the judgment" which the plaintiff might recover on the trial. Provincial Laws N.H. 113. In the statute of July, 1822, and of November sessions, 1842, ch. 2, the charge or encumbrance created by an attachment is denominated a lien.

The mode of proceeding and practice, as at present established, under writs of attachment in the State of New Hampshire, is thus described by the superior court of that state in the case of *Kittridge v. Warren.*

"In an attachment of personal estate, the sheriff, upon the service of the writ, takes the possession of the goods and acquires thereby a special property in them for the purpose of enforcing and protecting the attachment, and the rights of all

concerned in the attachment and in goods. He is then accountable both to the plaintiff and to the defendant for the disposition of them. If the plaintiff obtains a judgment, they are seized and sold upon the execution. If he fails, they are returned to the debtor. Some person may become accountable for them, and they may thus go back into the hands of the debtor and the attachment be dissolved, the sheriff having, by means of a receipt for them, the security of some third person, which is in that case to be made available to the creditor. But if the attachment is not dissolved, it fastens itself upon the goods as a charge or encumbrance like the attachment upon real estate, and the avails of them are first to be applied to the satisfaction of the judgment when recovered. Subsequent attachments may be made upon them by the same sheriff, and

Page 48 U. S. 622

where there are several attachments, the attaching creditors have a right to priority of satisfaction, so far as those goods are concerned, not by priority of judgment, but by that of the attachment. *Poole v. Symonds,* 1 N.H. 292, 294; *Bissell v. Huntington,* 2 *id.* 142; *Hackett v. Pickering,* 5 *id.* 24; *Kittredge v. Bellows,* 7 *id.* 428; *Clarke v. Morse,* 10 *id.* 238."

The statute of *elegit* has never been adopted in this state, and hence a judgment is not treated as a charge or lien on the lands of the defendant, and the reason would seem to be because the plaintiff could select his security upon specific property by his attachment at the commencement of his suit and hold it for thirty days after judgment for the purpose of satisfaction. Hence their courts have denominated the charge or security thus obtained a lien. *See Dunken v. Fales,* 5 N. 538; *Kittredge v. Bellows,* 7 *id.* 427; *Clarke v. Morse,* 10 *id.* 238; *Burnam v. Folsom,* 5 *id.* 568; *Kittridge v. Warren; Kittridge v. Emerson,* &c.;

In Massachusetts also the charge or encumbrance created by an attachment is denominated a lien. *See* 9 Mass. 210; *Fettyplace v. Dutch,* 13 Pick. 392; *Arnold v. Brown,* 24 Pick. 95; *Kilborn v. Lyman,* 6 Met. 299 &c.; In Connecticut also, *see Carter v. Champion,* 8 Conn. 550.

Having thus shown that an attachment on mesne process creates a charge on the property attached in favor of the plaintiff, which is, in the language of the statutes and courts of New Hampshire, called a "security" and a "lien," it will be unnecessary to notice arguments which have been urged against them on the ground of their peculiarities or distinctive features. The mere accidents of the subject cannot alter its essence. It is a statute lien, and therefore as much protected by the general language of the proviso as a common law lien.

II. Could this lien be defeated by the interposition of the plea of bankruptcy as a bar to a judgment in favor of the plaintiff?

By the fourth section of the act it is declared that

"The certificate or discharge, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act, and shall or may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever."

And it is contended as the lien of the attachment was defeasible and could only be rendered absolute and of practical benefit to the plaintiff by the recovery of a judgment for his demand, which is effectually barred by the plea, that therefore the action and the lien must fall together.

This conclusion would be undoubtedly correct if we construe

Page 48 U. S. 623

this section of the act by itself, and without regard to other provisions of the same act.

But it is among the elementary principles with regard to the construction of statutes that every section, provision, and clause of a statute shall be expounded by a reference to every other, and if possible, every clause and provision shall avail and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The

most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together.

The proviso to the second section of this act declares "that nothing in this act contained shall be construed to annul, destroy, or impair" any liens &c.; Here, then, is an absolute prohibition to the court to construe the general terms of the fourth section so as to defeat the lien saved by the second. It is clear, therefore, that the court, while it grants the defendant the benefit of his discharge, must do it in such a manner as not to impair the rights saved to the plaintiff. All liens, whether by mortgage or judgment, by common law or by statute, are for the purpose of obtaining satisfaction of some debt or claim, and the construction of the fourth section which would treat the bankrupt's certificate as an absolute discharge from all his debts, for every purpose, would be alike destructive of them all. The mortgagee, the factor, or the bottomry lender is in no better condition than the judgment or attachment creditor. And an attempt to make a distinction between them which would save the rights of one and impair or destroy those of the other, would be judicial legislation -- *jus dare,* not *jus dicere.* In order, therefore, to give full effect to all the provisions of the act, the bankrupt's certificate must be made to operate as a discharge of his person and future acquisitions, while at the same time the mortgagees or other lien creditors shall be permitted to have their satisfaction out of the property mortgaged or subject to lien. A legal right without a remedy would be an anomaly in the law.

The judgment rendered in this case has fully attained both these objects. While it discharges the defendant from personal liability, it saves to the plaintiffs below their remedy and awards their satisfaction out of the property attached, "and not otherwise." The books are full of precedents for such a judgment. When an administrator pleads *plene administravit,* the plaintiff may admit the plea and take judgment of assets, *quando acciderint.* When the defendant pleads a discharge of his person under an insolvent law, the plaintiff may confess the

plea and have judgment to be levied only of defendant's future effects. 1 Chitty, Pl. 548.

III. The only question that remains to be considered is whether the rejoinder of the defendants below is a sufficient answer to the replication.

It sets up, by way of avoidance of the attachment pleaded in the replication, that the district court of the United States, on the petition of the assignee and on notice to the plaintiff in this suit, had decreed that this attachment was not a lien on the property in the custody of the sheriff, and ordered him to deliver it up to the assignee or account to him for its value. It does not pretend to show how the proceedings in the court of common pleas had been removed to the district court or how its judgment on the cause pending before it could be thus anticipated, nor that the district court had found any means of enforcing its decree by compelling the sheriff to deliver the property attached to the assignee, and thus in effect destroy the lien, but it seems to rely on the decree as a judgment on the question which should operate by way of estoppel. This necessarily involves the inquiry whether the district court was vested with any power or authority to oust the court of common pleas of its jurisdiction over the cause and supersede its judgment by this summary proceeding.

The district court has exclusive jurisdiction "of all suits and proceedings in bankruptcy." But the suit pending before the court of common pleas was not a suit or proceeding in bankruptcy, and although the plea of bankruptcy was interposed by the defendants, the court was as competent to entertain and judge of that plea as of any other. It had full and complete jurisdiction over the parties and the subject matter of the suit, and its jurisdiction had attached more than a month before any act of bankruptcy was committed. It was an independent tribunal, not deriving its authority from the same sovereign, and, as regards the district court, a foreign forum, in every way its equal. The district court had no supervisory power over it. The acts of Congress point out but one mode by which the judgments of state courts can be revised or annulled, and that is by this Court, under the twenty-fifth section of the Judiciary Act. In certain cases where one of the parties is a citizen of another state, he has the privilege of removing his suit to the courts of

the United States. But in all other respects they are to be regarded as equal and independent tribunals.

It is a doctrine of law too long established to require a citation of authorities that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and

Page 48 U. S. 625

whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court, and that where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy v. Earl of Cassilis,* Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved because it was admitted if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.

The act of Congress of 2 March, 1793, ch. 66, 5, declares that a writ of injunction shall not be granted "to stay proceedings in any court of a state." In the case of *Diggs v. Wolcott,* 4 Cranch 179, the decree of the circuit court had enjoined the defendant from proceeding in a suit pending in a state court, and this Court reversed the decree because it had no jurisdiction to enjoin proceedings in a state

court.

It follows, therefore, that the district court had no supervisory power over the state court, either by injunction or the more summary method pursued in this case, unless it has been conferred by the Bankrupt Act. But we cannot discover any provision in that act which limits the jurisdiction of the state courts or confers any power on the bankrupt court to supersede their jurisdiction, to annul or anticipate their judgments, or wrest property from the custody of their officers. On the contrary, it provides that

"All suits in law and equity then pending in which such bankrupt is a party may be prosecuted and defended by such assignee to its final conclusion in the same way and with the same effect as they might have been by such bankrupt."

Instead of drawing the decision of the case into the district

Page 48 U. S. 626

court, the act sends the assignee in bankruptcy to the state court where the suit is pending, and admits its power to decide the cause. It confers no authority on the district court to restrain proceedings therein by injunction or any other process, much less to take property out of its custody or possession with a strong hand. An attempt to enforce the decree set forth in the rejoinder would probably have been met with resistance and resulted in a collision of jurisdictions much to be deprecated.

In fine, we can find no precedent for the proceeding set forth in this plea, and no grant of power to make such decree or to execute it, either in direct terms or by necessary implication, from any provisions of the bankrupt act, and we are not at liberty to interpolate it on any supposed grounds of policy or expediency.

The plea cannot, therefore, be sustained, and the judgment of the Superior court of New Hampshire must be

Affirmed.

ORDER

This cause came on to be heard on the transcript of the record of the Superior Court of Judicature of the State of New Hampshire and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said Superior Court of Judicature be and the same is hereby affirmed with costs and damages at the rate of six percentum per annum.