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Buckingham Vs. Mclean

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Decided On : 1851

Appeal No. : 54 U.S. 151

Appellant : Buckingham

Respondent : Mclean

Judgement :

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Buckingham v. McLean

54 U.S. (13 How.) 151

APPEAL FROM THE CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF OHIO

SYLLABUS

Where a bill in chancery was filed by the assignee of a bankrupt claiming certain shares of bank stock, the same being also claimed by the bank and by other persons who were all made defendants, and the answer of the bank set forth

apparently valid titles to the stock, which were not impeached by the complainant in the subsequent proceedings in the cause nor impeached by the other defendants, the circuit court decreed correctly in confirming the title of the bank.

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A power of attorney to confess a judgment is a security within the second section of the Bankrupt act, 5 Stat. 442.

And this security is void if given by the debtor in contemplation of bankruptcy. But by these terms is meant an act of bankruptcy on an application by himself to be decreed a bankrupt, and not a mere state of insolvency.

In this case there is evidence enough to show that the debtor contemplated a legal bankruptcy when the power of attorney was given.

It is not usury in a bank which has power by its charter to deal in exchange to charge the market rates of exchange upon time bills.

On 27 May, 1842, John Mahard, Jr., filed his petition in bankruptcy, and on 20 July, 1842, was declared a bankrupt.

Nathaniel C. McLean was appointed his assignee in bankruptcy.

John Mahard had been transacting business at Cincinnati with his brother, William Mahard, under the firm of J. & W. Mahard, and at New Orleans, under the firm of Mahard & Brother.

On 12 August, 1842, William Mahard filed his petition in bankruptcy.

On 5 January, 1843, McLean filed his bill in the circuit court against a great number of persons, who had outstanding liens on the property of John Mahard, Jr., at the time of his filing his petition in bankruptcy. They were the President, Directors, and Company of the Lafayette Bank of Cincinnati; the President, Directors, and Company of the Northern Bank of Kentucky; Andrew Johnson; John S. Buckingham; Mark Buckingham; the Ohio Life Insurance and Trust Company;

the President, Directors, and Company of the Bank of the United States, incorporated by the State of Pennsylvania; the President, Directors, and Company of the Commercial Bank of Cincinnati; the President, Directors, and Company of the Franklin Bank of Cincinnati; James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, assignees &c.; John Mahard, Sen., John McLaughlin, George Milne and James Keith, partners, doing business in the firm name of Geo. Milne & Co., Charles B. Dyer, Frederick Trow, John C. Avery, late sheriff, and John H. Gerard, present Sheriff of Hamilton County.

The assignee, McLean enjoined proceedings in the state courts where the parties were prosecuting their several liens, and brought all matters connected with the bankrupts into the circuit court of the United States.

In the progress of the cause, a number of collateral matters were brought into the case, but the facts upon which the questions arose before this Court are stated in the opinion, to which the reader is referred.

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MR. JUSTICE CURTIS delivered the opinion of the Court.

Nathaniel C. McLean as the assignee of John Mahard, Jr., a bankrupt, filed his bill in the Circuit Court of the United States for the District of Ohio for the purpose of relieving property of the bankrupt from encumbrances thereon alleged to have been created in fraud of the Bankrupt act. A final decree having been entered in the cause, John S. Buckingham and Mark Buckingham, parties defendant to the bill, have prosecuted this appeal.

They allege that the decree of the circuit court was erroneous in three particulars.

The first is that the title of John S. Buckingham to forty-nine shares of the stock of the Lafayette Bank has been declared

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to be subject to an encumbrance thereon in favor of the bank, whereas John S. Buckingham had the better title thereto.

The amended bill states

"That said Mahard, before and at the time of filing his petition to be declared bankrupt, was the owner of forty-nine shares, of one hundred dollars each, of the capital stock of the Lafayette Bank of Cincinnati; that the said Lafayette Bank and John S. Buckingham set up some claim to said forty-nine shares of stock, of the particular nature of which your petitioner is ignorant. And your petitioner charges that neither said Lafayette Bank nor John S. Buckingham have any valid legal claim to said shares of stock, but that petitioner, assignee &c.;, is justly entitled thereto."

The answer of the bank responds to this allegation in the bill

"That said John Mahard was the owner of forty-nine shares of the capital stock of the bank of these respondents, on each of which the sum of one hundred dollars had been paid; that he became the owner of said shares, so far as these respondents are advised, on the 13th day of September, 1841, and afterwards transferred the same to the cashier of said bank as collateral security for the debt of J. & W. Mahard to these respondents, and these respondents now claim to have the control of said shares in virtue of said transfer, and also in virtue of their lien upon the capital stock of said bank, owned by debtors to the same, which lien is created and confirmed by the charter granted to these respondents by the Legislature of the State of Ohio."

John S. Buckingham and Mark Buckingham both demurred to this amendment of the bill. Their demurrer was overruled, but no answer to this particular allegation was filed by either of them, and the record contains no evidence, introduced by any party touching the title to this stock. In this state of the record, it is most manifest only one decree could be made. The bank, in response to the allegations of the bill, having disclosed two titles to this stock, either of which was sufficient, if valid, and the assignee having shown nothing to impeach either title, his claim

could not be allowed, and John S. Buckingham, being entirely silent respecting the charge in the bill that he makes some claim to this stock. does in effect make none in this cause, and cannot complain of a decree for not awarding to him what he does not appear to have claimed.

The second objection made by the appellants to the decree is that it declares their title to certain moneys, made by the levy of an execution in their favor on personal property of the bankrupts, to be invalid as against the assignee.

On the 7th of April, 1842, a power of attorney to William M. Corry, Esq., to confess a judgment against the mercantile firm

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of the bankrupts in favor of John S. Buckingham for the sum of fourteen thousand eight hundred dollars was executed by John Mahard, Jr., for himself and his co-partner, William Mahard, who was at the time in New Orleans. By virtue of this power, a judgment for that sum was confessed on 8 April. On 20 April, William Mahard, by an instrument under seal which recited the substance of this power, and that it was given with his concurrence, confirmed and ratified it as his act. On 22 May, 1842, execution was taken out and levied on personal property of the judgment debtors. On 27 May, 1842, John Mahard, Jr., filed his petition and was subsequently decreed a bankrupt thereon. The judgment, though confessed in favor of John S. Buckingham alone, was founded on a debt due to both the appellants, who were *bona fide* creditors of J. & W. Mahard.

The question is whether these proceedings came within the second section of the Bankrupt Act, 5 Stat. 442. This section provides:

"That all future payments, securities, conveyances, or transfers of property, or agreements, made, or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person any preference or priority over the general creditors of such bankrupt, shall be deemed utterly void, and a fraud upon this act."

By the law of Ohio, a judgment creates a lien on the real estate of the judgment debtor, and the levy of an execution creates one on his personal estate levied on. A power of attorney to confess a judgment, whenever a judgment is taken under it, does in fact operate to create a security upon the debtor's real estate, and when an execution issues on that judgment, to create a lien on the personal estate levied on. It is true these liens arise by operation of law from the judgment and execution and its levy, which are the acts of officers of the law, and not of the debtor. But the power of attorney is designed to and does produce those acts, which depend upon it for their validity, and therefore through those acts does create the security. The operation of law is always necessary to give effect to any form of security, which indeed is but the legal consequence of the act of the party, and the lien created by a judgment is none the less the legal consequence of the act of the party because it is necessary that after the power is executed, a judgment should be rendered. When it is rendered, the creditor has a security, by operation of law, through the act of the debtor, and therefore such a security may be correctly said, in the language of this section, to be made or given by the debtor.

If it were not so, one of the acts of bankruptcy described in the first section of this statute would make a valid title to the

creditor. It is an act of bankruptcy for the debtor willingly to procure his goods or lands to be attached, distrained, sequestered, or taken on execution. It cannot be supposed that what was in itself an act of bankruptcy and done for the purpose of giving a preference over the general creditors was intended to be left valid and effectual to defeat one of the two great objects of the law, which were to grant a discharge to honest debtors who should conform to its provisions and to distribute their property ratably among all their creditors.

But if a judgment confessed by the debtor through a power of attorney be not a security given by him, there is nothing in this act which defeats a preference thus created, and the provisions of this second section become practically inoperative

in respect to all property of the debtor which may be bound by a judgment, or even by the levy of an execution, since a speedy and well known mode of preferring a creditor by confessing a judgment is left open to all debtors who may desire to give preferences, even in contemplation of bankruptcy. This consequence, while it would not justify a forced construction of the words used in the act, does certainly require that the utmost meaning and effect fairly attributable to them should be laid hold of to prevent so great a mischief.

The language employed in the English bankrupt acts shows that under that system, a judgment is treated as a security. The 21 James I, c. 19, 9, uses the language "that, if any person have a security for his debt by judgment, statute," &c..; The revising act, 6 Geo. 4, c. 16, 108, provides that

"No creditor, having security for his debt &c.;, shall receive more than a ratable part of such debt except in respect to any execution or extent served and levied by seizure upon or any mortgage or lien upon any part of the property of such bankrupt before the bankruptcy."

Thus classing judgments with mortgages, under the word securities. And the Irish Bankrupt act, 11 & 12 Geo. 3, c. 8, 5, enacted, that "nothing herein contained shall extend to any security by judgment, obtained before the bankrupt became a trader." Mr. Eden (Eden on Bankruptcy 285) remarks concerning the difference in phraseology between the 21 James I and 6 Geo. IV that the general term "security" employed by the latter would necessarily include all the particulars enumerated in the old statute -- that is, security necessarily includes judgments. In many of the states, a bond and warrant of attorney to enter up judgment is a usual mode of taking security for a debt, and judgments thus entered are treated as securities, and an equitable jurisdiction exercised over them by courts of law. In some states, they operate only as a lien on the lands of the debtor, in others, on his personal estate

also; *Brown v. Clarke,* 4 How. 4, and wherever by the local law a judgment or an execution operates to make a lien on property, we are of opinion it is to be deemed a security, and when rendered upon confession, under a power given by the debtor for that purpose, it is a security made or given by him within the meaning of the Bankrupt Act, and is void if accompanied by the facts made necessary by that act to render securities void. These facts are that the security was given

"in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person, a preference or priority over the general creditors of such bankrupt."

The inquiry whether this security was given in contemplation of bankruptcy involves the question what is meant by those words. It is understood that while the Bankrupt Law was in operation, different interpretations were placed upon them in different circuits. By some judges they were held to mean contemplation of insolvency -- of a simple inability to pay, as debts should become payable -- whereby his business would be broken up; this was considered to be a state of bankruptcy, the contemplation of which was sufficient. By other judges it was held that the debtor must contemplate an act of bankruptcy or a voluntary application for the bankrupt law. *In re Pearce,* 6 Law 261; *In re Rowell,* 6 Law 298; *Jones v. Howland,* 8 Met. 377; *Taylor v. Whitehouse,* 5 Humph. 340.

It is somewhat remarkable that this question should be presented for the first time for the decision of this Court after the law has been so long repealed and nearly all proceedings under it terminated. Perhaps the explanation may be found in the fact that when securities have been given within two months before the presentation of a petition by or against the debtor, the evidence would usually bring the case within either interpretation of the law. However this may be, it is now presented for decision, and we are of opinion that, to render the security void, the debtor must have contemplated an act of bankruptcy or an application by himself to be decreed a bankrupt.

Under the common law, conveyances by a debtor to *bona fide* creditors are valid, though the debtor has become insolvent and failed, and makes the conveyance for the sole purpose of giving a preference over his other creditors. This common law right, it was the object of the second section of the act to restrain, but at the same time in so guarded a way as not to interfere with transactions consistent with the reasonable accomplishment of the objects of the act. To give to these words, contemplation of bankruptcy, a broad scope, and somewhat loose meaning, would not be in furtherance of the general purpose with which they were introduced.

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The word "bankruptcy" occurs many times in this act. It is entitled "An act to establish a uniform system of bankruptcy." And the word is manifestly used in other parts of the law to describe a particular legal status, to be ascertained and declared by a judicial decree. It cannot be easily admitted that this very precise and definite term is used in this clause to signify something quite different. It is certainly true in point of fact, that even a merchant may contemplate insolvency and the breaking up of his business, and yet not contemplate bankruptcy. He may confidently believe that his personal character, and the state of his affairs, and the disposition of his creditors are such that when they shall have examined into his condition they will extend the times of payment of their debts, and enable him to resume his business. A person, not a merchant, banker &c.;, and consequently not liable to be proceeded against and made a bankrupt, though insolvent, may have come to a determination that he will not petition. The contemplation of one of these states not being in fact the contemplation of the other, to say that both were included in a term which describes only one of them, would be a departure from sound principles of interpretation. Moreover, the provisos in this section tend to show what was the real meaning of this first enacting clause. The object of these provisos was to protect *bona fide* dealings with the bankrupt more than two months before the filing of the petition by or against him provided the other party was ignorant of such an intent on the part of the bankrupt, as made the security invalid under the first enacting clause. And the language is

"provided that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act."

These facts, of one of which a *bona fide* creditor must have notice, to render his security void, if taken more than two months before the filing of the petition, can hardly be supposed to be different from the facts which must exist to render the security void under the first clause, or, in other words, if it be enough for the debtor to contemplate a state of insolvency, it could hardly be required that the creditor should have notice of an act of bankruptcy, or an intention to take the benefit of the act. It would seem that notice to the creditor of what is sufficient to avoid the security, must deprive him of its benefits, and consequently, if he must have notice of something more than insolvency, something more than insolvency is required to render the security invalid, and that we may safely take this description of the facts which a creditor must have notice of to avoid the security, as descriptive also of what the bankrupt must contemplate to render it void.

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In construing a similar clause in the English bankrupt law, there have been conflicting decisions. It has been held that contemplation of a state of insolvency was sufficient. *Pulling v. Tucker,* 4 B. & Ald. 382; *Poland v. Glyn,* 2 Dow. & Ry. 310. But both the earlier and later decisions were otherwise, and in our judgment they contain the sounder rule. *Fidgeon v. Sharpe,* 5 Taunt. 545; *Hartshorn v. Slodden,* 2 Bos. & Pul. 582; *Gibbins v. Phillipps,* 7 B. & C. 529; *Belcher v. Prittie,* 10 Bing. 408; *Morgan v. Brundrett,* 5 Barn. & Ad. 297. *And see* the opinion of Patteson, J., in the last case.

Considering, then, that it is necessary to show that the debtor contemplated an act of bankruptcy or a decree adjudging him a bankrupt on his own petition, at what time in this case must he have had this in contemplation? He gave the power of attorney on 7 April; the judgment was confessed and entered up on the next day; the execution was taken out and levied, and the lien created thereby, on 22 May,

and five days afterwards, being less than two months after the execution of the power, the debtor presented the petition under which he was decreed a bankrupt. The only act done by the debtor was the execution and delivery of the power of attorney. It was a security by him made or given, only by reason of that instrument. What followed were acts of the creditor and of officers of the law, with which the debtor is no more connected than with the delivery by a creditor of a deed to the office of the register, to be recorded, or the act of the register in recording it. It would seem that if the intent of the debtor is to give a legal quality to a transaction, it must be an intent accompanying an act done by himself, and not an intent or purpose arising in his mind afterwards, while third persons are acting; and that, consequently, we must inquire whether the debtor contemplated bankruptcy when he executed the power. It is true this construction would put it in the power of creditors, by taking a bond and warrant of attorney while the debtor was solvent and did not contemplate bankruptcy, to enter up a judgment and issue execution, and by a levy acquire a valid lien, down to the very moment when the title of the assignee began. But this was undoubtedly so under the statute of James, which, like ours, contained no provision to meet this mischief; and it became so great that, by the 108th section of the revising act of 6 Geo. 4, it was enacted that

"no creditor, though for a valuable consideration, who shall sue out execution on any judgment obtained by default, confession, or *nil dicit* shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid ratably with such creditors."

If the Bankrupt act of 1841 had continued to exist, a

similar addition to its provisions would doubtless have become necessary.

It remains to inquire whether the debtor in this case, in point of fact, contemplated bankruptcy, and designed to give a preference to the appellants, when he executed the power on 7 April.

It has been stated at the bar that by some accident, much of the evidence bearing on this question was lost, and is not inserted in the record. We have no doubt of the fact, but this question must be decided here upon what remains, and we think there is sufficient now on the record to show that bankruptcy was in contemplation when the power was given. The petition to be decreed a bankrupt was filed only fifty days after the date of the power. No material change in the state of the debtor's affairs appears to have occurred between 7 April and t27 May. The only property which came into the hands of the assignee, uncovered by valid liens of particular creditors, was the thirteen hundred dollars made by this execution out of property already encumbered by a mortgage to another creditor, for the sum of upwards of fourteen thousand dollars, dated on 18 March preceding, and which has been adjudged by the circuit court to be void under the second section of the Bankrupt act, and no appeal taken.

The bankrupt was a member of a mercantile firm doing business in Cincinnati and New Orleans, and the commercial paper of this firm to a very large amount had been protested for nonpayment, and was known to the bankrupt to have been so, before this power was given. Holding an execution for $14,800, the appellants were able to make upon it only $1,300. Both the mercantile firm and the individual bankrupt were in a state of deep, and so far as appears, irretrievable insolvency, and there is no reason to doubt the bankrupt knew these facts. Though a competent witness for the appellants on the question of his own intent, and able to give decisive evidence, if believed, he has not been examined, nor is there any evidence in the record to control the strong presumption that the purpose he executed on 22 May, by filing his petition, existed in his mind fifty days before, when his circumstances were the same, and the inducements to take advantage of the act were is great, as at the time he actually attempted to do so.

It is true the appellants say in their answers they did not know or believe, when the power was given, and do not now believe, the debtor then contemplated bankruptcy. But their answer, though responsive in this particular to the bill, is entitled to little weight concerning the state of mind of the debtor, no reasons being given for their belief and none of the facts explained

from which an opposite inference is to be drawn, 13 U. S. 9 Cranch 160, and their own state of mind is not material, because the petition was filed within two months after the date of the power.

It has been suggested that the execution of the power of attorney by Mahard was in itself an act of bankruptcy, because he thereby procured his goods to be taken on execution. But the act requires that this should be done willingly or fraudulently. The Buckinghams being *bona fide* creditors, there is no ground upon which this act can be deemed fraudulent unless it was done in contemplation of bankruptcy and with intent to give a preference, and this would bring us back to the inquiry whether such contemplation and intent existed, and it is explicitly denied by the answers of the Buckinghams that the power was executed by Mahard willingly, it having been done under strong pressure by them, and only at last because a suit was threatened if he did not comply. There is no evidence to control these statements in their answers, so that we cannot say that *per se* the giving of the power was an act of bankruptcy. 1 Deacon's B.L. 446; *Thompson v. Freeman,* 1 T.R. 155; *Hunt v. Mortimer,* 10 B. & C. 44; *Morgan v. Brundrett,* 5 B. & Ad. 297.

We have therefore found it necessary to go into the inquiry whether the bankrupt did in fact contemplate bankruptcy when the power was given, and intend to give a preference thereby, and being of opinion that he did, there is no error in the decree of the circuit court in this particular.

The third objection made to the decree of the court below is that it established the validity of sundry mortgages on the property of the bankrupts, held by certain banking corporations. It is alleged by the appellants that these mortgages were void, on account of usury; that though, by the statute law of Ohio, a usurious contract is valid, for the principal sum lent, with lawful interest thereon, yet, if a banking corporation make a usurious contract, it is utterly void, because such a banking corporation has no lawful authority to make such a contract, exceeds its powers by attempting to do so, and consequently neither party is bound thereby.

We have not thought it necessary to examine this position, because we are of opinion that usury in either of these mortgages is not proved.

The power of these banking corporations to deal in exchange is not controverted. There is no usury on the face of anyone of these transactions. It is incumbent on the party who charges usury to prove it, and where it is alleged to consist in taking excessive rates of exchange or in resorting to the form of a bill of exchange in order to keep out of sight a usurious compensation for the simple loan of money, these facts must be proved.

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Andrews v. Pond, 13 Pet. 65; *Creed v. Commercial Bank,* 11 Ohio 489. The answer of each bank denies such intent, and avers that the exchange charged in each case was the customary and regular rate at the time of the discount of each bill. There is not evidence to prove the contrary. Indeed it was agreed by the counsel on both sides, during the argument, that the rates charged were the usual and customary prices of exchange between Cincinnati, where the bills were drawn, and New Orleans, where they were payable, at the times they were discounted. The counsel for the appellants urged that the rates were higher than were charged on sight bills. But these were time bills, and it is no proof of usury that the banks did not take the market rates on sight bills which they did not discount, if they took only the market rates on those they did discount. It was also insisted that the banks did not buy these bills, but were the first takers for loans of money made to the drawers. But we are unable to perceive how the fact that the banks were the first takers can be of any importance in this case, nor do we deem it material that the bills were discounted for the drawers.

The reason why the addition of the current rate of exchange to the legal rate of interest does not constitute usury is that the former is a just and lawful compensation for receiving payment at a place where the money is expected to be less valuable than at the place where it is advanced and lent. And this reason exists when the lender discounts the drawer's bill as well as when he buys a bill in the market of the payee. In neither case is it usury to take the regular and

customary compensation for the loss in value by change of place of payment. It is argued that no usage, or custom can make an unlawful contract valid. This must be admitted. But the contract is not unlawful unless more than six percent has been reserved or taken for interest; if more has been reserved or taken, not for the loan and forbearance but for a change in the place of payment, then the contract is lawful, and in determining whether the excess over six percent has been reserved for interest or as a just compensation for changing the place of payment, the custom, or the market value of this change, is evidence of the real intent of the parties, and so evidence of the validity of the contract.

Our opinion is that usury was not made out in either of these mortgages and that there was no error in the decree of the court below declaring their validity. The decree of the circuit court is affirmed with costs.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district

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of Ohio, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed, by this Court, that the decree of the said circuit court in this cause, be, and the same is hereby affirmed with costs.

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