BAKER v. MIX

Case No. 775

{3 Cranch, C. C. 1}[1]

Circuit Court, District of Columbia. Dec. Term, 1826.

GARNISHMENT—PROCEDURE—NULLA BONA—ASSIGNMENT OF DEBT.

An assignment of the debt by the defendant to a third person, with notice to the garnishee, before service of the attachment cannot be given in evidence upon trial of the issue of nulla bona, hut must be pleaded specially.

{At law. Proceeding by John W. Baker against Elijah Mix, garnishee of Buckley & Co. See Baker v. Mix, Case No. 774.}

Under the plea of nulla bona by the garnishee, he offered in evidence a deed of assignment by Buckley, as surviving partner of Buckley & Co., to one Thomas Pryer, of all the effects of that firm, including the debt due to them by the garnishee, with notice thereof to the garnishee before the service of the plaintiff's attachment.

Mr. Reddln, for the plaintiff, objected to the evidence, and contended that the assignment could not be given in evidence upon the issue of nulla bona, but should have been specially pleaded, and cited 2 Har. Ent. 308, and Serg. Attachm. 91, 93, that a garnishee may plead an assignment.

Mr. Marbury, contra, contended that it was good evidence for the garnishee on the plea of nulla bona.

But the COURT, (CRANCH, Chief Judge, contra,) rejected the evidence on the issue of nulla bona.

Mr. Marbury moved for a new trial on the ground that the court erred in rejecting the evidence, and the motion came on to be argued at December term, 1826.

Mr. Marbury for the garnishee. Infancy may be given in evidence upon the general issue; so may coverture; yet in one case the plaintiff may reply, necessaries; and, in the other, special matter avoiding the marriage; so a parol release, or payment, and most matters in discharge of the action. 1 Chit PL 471; Miller v. Arls, 3 Esp. 234; Sullivan v. Montague, 1 Doug. 106; Serg. Attachm. 93; Wood v. Roach, 2 Dall. {2 U. S.} 180; Steuart v. West, 1 Har. & J. 536; Harding v. Hull, 5 Har. & J. 478; U. S. v. Vaughan, 3 Bin. 400.

Mr. Reddin, contra. The plea of nulla bona goes only to the existence of the debt; an assignment does not show the debt is not due, and therefore should be pleaded specially. It admits the debt to be due at law, and is only a kind of equitable defence which the plaintiff, who had no notice of the assignment, did not come prepared to answer upon the issue of nulla bona. 1 Chit Pi. 408. In the case from 3 Bin. 400, there was no question as to the form of the plea. In the case from 1 Har. & J. 536, the note

was negotiable so that there was no debt to the defendant after his indorsement; and in the case from 5 Har. & J. 478, the assignment transferred the legal title, as well as the equitable. The plaintiff claims equal equity with that of the assignee, and has a legal remedy against a legal debtor of his debtor. A lien must be pleaded. Clarke v. Hougham, 9 Serg. & Lowb. 42, [9 E. C. L. 73;] 2 Esp. N. P. 536.

Mr. Marbury, In reply. In Pennsylvania a common promissory note, payable to order, is not negotiable. U. S. v. Vaughan, 3 Bin. 394. An assignment need not be a transfer of the legal right of action to enable the garnishee to plead nulla bona.

The COURT (CRANCH, Chief Judge, contra,) refused to grant a new trial.

[1] {Reported by Hon. William Cranch, Chief Judge.}