JOBBINS v. MONTAGUE et al.

Case No. 7,329.

{5 Ben. 422;[1] 6 N. B. R. 117.}

District Court, S. D. New York. Dec. 27, 1871.

BANKRUPTCY ACT—JURISDICTION—ORIGINAL PROCESS—SERVICE OUTSIDE OF THE DISTRICT.

1. A subpoena to appear and answer, in a suit in equity brought by an assignee in bankruptcy to restrain the foreclosure of a mortgage, is original process in a civil suit, within the 11th section of the judiciary act of 1789 {1 Stat. 79}.

2. No authority is to be found in the bankruptcy act {of 1867 (14 Stat. 517)} for the service of such a subpoena on a defendant in the cause, outside of the limits of the district within which such suit is brought.

{Cited in Von Roy v. Blackman, Case No. 16,997; Re Litchfield, 13 Fed. 868; Romaine v. Union Ins. Co., 28 Fed. 636.}

{This was a bill in equity by William F. Jobbins, assignee, etc., against Ebenezer Montague, Townsend Jackson, Benjamin Albertson and wife, and Andrew Mount, sheriff of Hudson county, New Jersey.}

[2] {The defendant Jackson and his copartner, Joseph P. Brouner, were on the twenty-second of January, eighteen hundred and seventy, adjudged bankrupts by this court on the petition of a creditor of theirs. The plaintiff was appointed to be their assignee on the eighteenth of February, eighteen hundred and seventy, and received the usual assignment, under which his title relates back to the thirteenth of January, eighteen hundred and seventy, the date of the filing of the petition. The assignment was recorded in the office of the clerk of Hudson county, New Jersey, on the twenty-fourth of June, eighteen hundred and seventy. On and prior to June fifteenth, eighteen hundred and sixty-nine, Jackson was seized in fee simple of certain real estate in Hudson county, New Jersey. On that day Jackson and his wife executed a mortgage to the defendant Montague, on such real estate to secure the payment of a bond for ten thousand dollars and interest, executed by Jackson to Montague. The bill alleges that the bond was given with the knowledge of Montague, to shield the property from the just claims of the creditors of Jackson, and that the ten thousand dollars was never due on the bond. On the twenty-fourth of November, eighteen hundred and sixty-nine, Jackson and his wife conveyed the said real estate, with other property, by deed, to the defendant Albertson, in fee simple, professedly for the consideration of fifteen thousand dollars. The deed was recorded in Hudson county on the fourth of December, eighteen hundred and sixty-nine. The bill alleges that the deed was made in contemplation of bankruptcy, and for the purpose of delaying, hindering and defrauding the creditors of Jackson,

prelimith the knowledge of Albertson. On or about the twenty-sixth of February, eighteen hundred and seventy, the plaintiff filed a bill in equity in this court, to set aside the said deed to Albertson and other conveyances made by Jackson, and to have a receiver appointed of the said property, and other property similarly conveyed, and to enjoin Jackson and Albertson and others, grantees of Jackson, who were made defendants to that bill, from disposing of said properties. On that bill this court granted an injunction to the foregoing effect on the twenty-eighth of February, eighteen hundred and seventy, which was duly served on Jackson and Albertson. On the twenty-third of September, eighteen hundred and seventy, the plaintiff was appointed receiver in that cause of the said real estate in Hudson county, and of other property. In opposition to the motion for the appointment of such receiver an affidavit made by said Montague was read. On the eleventh of October, eighteen hundred and seventy, a copy of the order appointing the plaintiff such receiver was served on the said Montague in person. On the seventeenth of October, eighteen hundred and seventy, Montague filed his bill of complaint in the court of chancery of New Jersey against Jackson and his wife and Albertson and his wife, for the foreclosure of the said mortgage. On such bill a decree was taken by default for ten thousand seven hundred and ninety-five dollars and twenty-six cents, principal and interest on said mortgage, on the seventh of February, eighteen hundred and seventy-one, and thereupon an execution was issued out of the said court of chancery, directed to the sheriff of Hudson county, New Jersey, commanding him to sell said real estate in Hudson county to satisfy said mortgage. The said sheriff advertised the property for sale at public auction on the fourth of May, eighteen hundred and seventy-one, but the sale was adjourned from time to time until the twenty-first of September, eighteen hundred and seventy-one.

{The bill in this suit was filed on the nineteenth day of September, eighteen hundred and seventy-one. It sets forth the foregoing facts, and avers that the plaintiff was not made a party to the said proceedings in foreclosure, and had no notice thereof, and did not know that they were in progress until after the final decree for foreclosure had been made, and a few days before the day first fixed for the sale; that the foreclosure proceedings were instituted and carried on by collusion between Montague and Jackson and Albertson for the purpose of delaying, hindering and defrauding the plaintiff, as such assignee and receiver, in his pursuit of his rights and remedies against the property mentioned in the mortgage, and with the intent that, by a sale under the foreclosure proceedings, Montague, Jackson and Albertson, or some of them, might either acquire a title to the property, or realize more money than is justly due on the mortgage, in fraud of the plaintiff's rights; that, in the foreclosure proceedings, no proofs appear to have been taken as to the amount due on the bond and mortgage, other than their production; that the plaintiff, from the fullest examination of the circumstances of Jackson and the giving of the mortgage, believes that

the bond and mortgage do not truly show the real amount due; and that Jackson and Albertson and his wife reside in the state of New York, and Montague and the sheriff of Hudson county reside in New Jersey. The bill prays for a discovery from all the defendants except the sheriff of Hudson county; and that the conveyance from Jackson and his wife to Albertson may be decreed to be void and of no effect as against the plaintiff and the creditors of Jackson and of him and Brouner as copartners; and that an account may be taken of the amount due on the bond and mortgage to Montague; and that the plaintiff may be decreed to be entitled to redeem the mortgaged premises upon paying or tendering to Montague or his legal representatives the amount which may be so found to be due; and that Montague may be decreed to deliver up the mortgage to the plaintiff to be cancelled, upon payment or tender of said amount; and that Jackson and Albertson and his wife may be enjoined from selling, leasing, encumbering or otherwise disposing of or interfering with the mortgaged property, or its rents, issues or profits; and that Montague may be restrained from proceeding further in his suit for the foreclosure of said mortgage, and from instituting any other suit for its foreclosure, or for the sale or possession of the mortgaged property, and from taking any other proceedings for procuring the sale or possession of said property; and that the sheriff of Hudson county may be restrained from proceeding further in the execution of the writ for the sale of the property, and from executing any other writ at the suit of Montague for the sale of the property, until the further order of this court. Montague, Jackson, Albertson and his wife, and the sheriff of Hudson county, are made defendants to the bill.

{On this bill, and affidavits accompanying it, an ex parte injunction was issued by this court, restraining the defendants as prayed in the bill. On the same day a subpoena to appear and answer was issued, directed to the defendants and returnable on the first Tuesday of November, eighteen hundred and seventy-one. The subpoena and the injunction were served on Montague personally, at Hackensack, New Jersey, on the twenty-fifth of October, eighteen hundred and seventy-one, by a deputy of the marshal of the United States for this district. Montague now moves this court, by solicitors who appear for him only for the purpose of the motion, to set aside the service of the injunction and the service of the subpoena on

him, and to declare such service void and of no effect, on the ground that such service was irregular and unlawful.

[The plaintiff, on the nineteenth of May, eighteen hundred and seventy-one, filed a bill in equity in the district court of the United States for the district of New Jersey, against the persons who are defendants in this suit, making the same allegations made, and praying the same relief prayed for, in the bill in this court, and in such suit procured an injunction staying the sale under the foreclosure decree. Montague answered the bill and then moved for a dissolution of the injunction. On that motion the counsel for Montague raised the question of the jurisdiction of the district court for New Jersey to entertain the suit, inasmuch as the proceedings in bankruptcy against Jackson and Brouner were proceedings instituted and pending in this court and not in the district court for New Jersey. The court dissolved the injunction and dismissed the bill for want of jurisdiction, on the ground that the bankruptcy proceedings were not proceedings instituted and pending in the district court for New Jersey. After that decision was announced the bill in this case was filed.][3]

W. B. Putney, for the motion.

D. McMahon, opposed.

BLATCHFORD, District Judge. The service of the subpoena in this case on the defendant Montague, in New Jersey, is claimed to be irregular and without force to compel his appearance in the suit on pain of having the bill taken as confessed against him, on the ground that such service was in violation of the provision of the 11th section of the act of September 24, 1789 (1 Stat. 79). That provision is as follows: "No person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." It is contended, on the part of the plaintiff, that this court has power, under the provisions of the 1st and 2d sections of the bankruptcy act of March 2, 1867 (14 Stat. 517), to bring the defendant Montague into this court to answer this bill, by process served upon him in New Jersey.

It is not contended that this court has not jurisdiction of the subject-matter of this suit. It has such jurisdiction by virtue of the 2d section of the bankruptcy act, which declares that this court, being the district court of the district where the proceedings in bankruptcy against Jackson and Brouner are pending, shall have jurisdiction of all suits in equity brought by the assignee in bankruptcy of the bankrupts, against any person claiming an adverse interest touching any property or rights of property of the bankrupts, or either of them, transferable to, or vested in, the assignee. The sole question is as to the jurisdiction

of this court over the person of Montague, by means of such service of subpoena as has been made.

That this is a civil suit, and that Montague is an inhabitant of the United States and of the district of New Jersey, and was not an inhabitant of this district, or found in it at the time of serving the subpoena, are facts not disputed. Nor can there, I think, be any doubt, that the subpoena by which this suit is brought is "original process." So far as Montague is concerned, the bill prays for an account of the amount due on the bond and mortgage to him, and for a decree that the plaintiff is entitled to redeem the mortgaged premises on paying to Montague the amount so to be found due, and that Montague shall then deliver up the mortgage to be cancelled, and that all suits and proceedings by Montague, now or hereafter, to foreclose the mortgage, or to sell or obtain possession of the mortgaged property, may be enjoined. This is not a cross-bill, in any sense. Montague has no suit pending in this court. It is an original bill, praying for original relief, and the subpoena issued on it is original process.

That this court, independently of any provision in the bankruptcy act, could not acquire jurisdiction of the person of Montague in this suit by such service of the subpoena as has been made in this case, is not doubtful. Independently of that act, this court could make effective no service beyond the limits of this district, of process of subpoena, in equity, to appear and answer, issued by it. Toland v. Sprague, 12 Pet. [37 U. S.] 300, 330; Herndon v. Ridgway, 17 How. [58 U. S.] 424, 425; Atkins v. Fibre Disintegrating Co. [Case No. 602].

Does, then, the bankruptcy act make lawful such service of the subpoena to appear and answer as was made in this case? In Toland v. Sprague (before cited) it is said, in reference to circuit courts: "Whatever may be the extent of their jurisdiction over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any state of the Union. It has not done so. It has not, in terms, authorized any original civil process to run into any other district, with the single exception of subpoenas for witnesses, within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons, in another district of the same state; and the other in favor of the United States, in any part of the United

States. We think that the opinion of the legislature is thus manifested to be, that the process of a circuit court cannot he served without the district in which it is established, without the special authority of law therefor." These views being founded on the language of the 11th section of the act of 1789, are equally applicable to the service of original process issued by a district court.

The jurisdiction conferred by the second section of the bankruptcy act, on this court, is one over "all suits at law or in equity which may or shall be brought by the assignee in bankruptcy, against any person claiming an adverse interest touching any property or rights of property of said bankrupt, transferable to, or vested in, such assignee." But, notwithstanding this grant of jurisdiction as to subject-matter, when the suit is brought against a defendant making a particular claim of interest touching certain specified property, it by no means follows that such jurisdiction must not be exercised in subordination to the provisions of the eleventh section of the act of 1789. There is nothing in the second section of the bankruptcy act dispensing with or repealing the provisions of the said eleventh section, and nothing repugnant to or inconsistent with them.

The only other section of the bankruptcy act, which it is supposed authorizes the service of subpoena made in this case, is the first section. But, that section only relates to the powers which this court is to exercise as a court of bankruptcy, in matters and proceedings in bankruptcy. It is now determined by the supreme court (Smith v. Mason, 14 Wall. {81 U. S.} 419), that the general clause in the first section, conferring jurisdiction on the district courts, must be considered in connection with all the other provisions of the act; that the clause, in such first section, specifically enumerating the cases and controversies to which the jurisdiction of said courts shall extend, does not enumerate the "suits at law or in equity" enumerated in the second section; that a cause involving a controversy such as that exhibited by the bill in this suit cannot be commenced by a petition, followed by an order to show cause why the prayer of the petition should not be granted, or be determined in a summary way by the district court sitting in bankruptcy, without due process of law; and that such a controversy falls within the provisions of the second section, and must be determined in a suit in equity or an action at law, as the case may be. In Morgan v. Thornhill, 11 Wall, {78 U. S.} 65, 80, it is said by the supreme court, that the jurisdiction conferred on the district courts by the second section of the bankruptcy act, is of the same character as that conferred on the circuit courts by the eleventh section of the act of 1789; and that the jurisdiction intended to be conferred on the circuit courts, by such second section, is the regular jurisdiction between party and party, as described in the act of 1789 and the third article of the constitution. The jurisdiction conferred by the second section on the circuit court for the district where the proceedings in bankruptcy are pending, over the suits therein mentioned, is conferred in the same terms in which it is conferred on the district court of the same district. In respect to each court it is an

enlargement of its jurisdiction. But for such provision, the circuit court would have no jurisdiction of a suit wherein one of the parties named in the second section is not a citizen of the state where the suit is brought while the adverse party is a citizen of another state; and, but for such provision, the district court would have no jurisdiction of such a suit as is mentioned in the second section. The conferring of the jurisdiction on the two courts concurrently, by the second section, in the same terms, indicates, plainly, that one of them cannot, under authority derived from the provision, exercise such jurisdiction to an extent, or in a manner, different from the other. If, therefore, it can be claimed that this court can make effective such service of process as has been made in this case, it follows that the circuit court for this district, if this bill were pending in that court, could make effective a like service of process. But, it is entirely clear, I think, that the jurisdiction conferred on both courts by the second section of the bankruptcy act, is a regular jurisdiction between party and party, of the same character as that conferred on the circuit courts by the eleventh section of the act of 1789, and is to be pursued, as to forms and modes of process, under the same rules which obtain as to suits brought in the circuit courts in pursuance of such eleventh section. There is nothing in the bankruptcy act indicating an intention on the part of congress that process in the suits specified in the second section of the bankruptcy act shall be served or made effective in any different manner from that required in suits brought in a circuit court under the jurisdiction in "suits of a civil nature at common law or in equity," conferred on such court by the eleventh section of the act of 1789.

It by no means follows, because, in bankruptcy proceedings proper, pending in a district court, a summons or order or notice issued by such court may, in some cases provided for by the act, effectually bind a person on whom it is served, although such service is not made personally at a place within the territorial limits of the district, that original process in the plenary suits mentioned in the second section of the act can be effectively served out of the territorial limits of the court issuing such process. Indeed, the act, in my judgment, clearly indicates, in numerous places, an intention on the part of congress, that service other than

personal infra-territorial service shall be allowed in bankruptcy proceedings proper, while there is not, in the act, any indication of any intention that extra-territorial service shall be allowed in the suits mentioned in the second section of the act.

The views thus suggested are confirmed by the language of general order No. 32, in bankruptcy, prescribed by the supreme court, which provides, that, "in proceedings in equity instituted for the purpose of carrying into effect the provisions of the act, or of enforcing the rights and remedies given by it, the rules of equity practice prescribed by the supreme court of the United States shall be followed, as nearly as may be." One of those rules, (rule 15) requires, that the service of all process shall be by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise, while rule 13 requires that the service of a subpoena shall be made by delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of the defendant, with a member of or a resident in the family. By the 27th section of the judiciary act of 1789, it is made the duty of the marshal of the district to execute "throughout the district" in and for which he is appointed, all lawful precepts directed to him and issued under the authority of the United States. There is nothing in the general orders in bankruptcy, or in the rules in equity prescribed by the supreme court, which authorizes a marshal to serve a subpoena to appear and answer, in an equity suit, at a place outside of the territorial limits of the district for which he is appointed. The service of the subpoena in this case having been irregular, it must be set aside, and so, also, must the service of the injunction.

{An injunction obtained against the defendant in the district court of New Jersey was dissolved on the ground of want of jurisdiction in the matter. Case No. 7,330.}

[1] {Reported by Robert D. Benedict, Esq., and here reprinted by permission.}

[2] {From 6 N. B. R. 117.}

[3] {From 6 N. B. R. 117.}