KEIRLL v. McINTIRE.

Case No. 7,651.

{2 Cranch, C. C. 670.}[1]

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

PRISON-BOUNDS BOND—SUBSEQUENT COMMITMENT—ESCAPE—ACTION AGAINST SURETY—AUTHORITY FOR SECOND COMMITMENT.

1. If a defendant, who is out upon a prison-bounds bond, given upon a capias ad respondendum, petitions for the benefit of the act for the relief of insolvent debtors {2 Stat. 237}, and upon allegations filed is found guilty, in a summary proceeding before a judge who orders him into close custody, and that he be precluded from any benefit under the act, whereupon the debtor is committed to close custody, and afterwards escapes, the creditor at whose suit he was taken cannot maintain an action upon the prison-bounds bond, for that escape.

{Cited in McClean v. Plumsell, Case No. 8,693.}

2. Quaere, whether, if a petitioning debtor be convicted of fraud, upon allegations in a summary proceeding before a judge out of court, the judge has authority to order him into close custody; or whether the judge is merely to refuse to grant him the relief he seeks under the act?

Debt, on a prison-bounds bond against {Alexander McIntire} the surety of Daniel Donohogue, who was taken upon a capias ad respondendum at the suit of the present plaintiff, John W. Keirll. Donohogue applied to one of the judges to be discharged under the insolvent act. The plaintiff filed allegations charging the debtor with having disposed of part of his property with intent to defraud his creditors, upon which an issue was made up and tried by a jury, who found the debtor guilty; whereupon the judge ordered "that the said Daniel Donohogue be remanded to close custody, and be precluded from any benefit under the act of congress entitled an act for the relief of insolvent debtors within the district of Columbia." After being thus remanded he escaped, and broke the bounds; and the plaintiff brought this action of debt upon the prison-bounds bond, which was dated on the 7th of April, 1824, and in his declaration set forth the bond with its condition, which was in the usual form, and assigned for breach that the debtor (Donohogue) did not keep, remain, and stay within the prison-bounds, but departed therefrom on the 17th of May, 1824, before he had by due course of law been finally discharged from the said prison and bounds.

To this declaration the defendant, after protesting that Donohogue did not break the bounds, as alleged, pleaded specially, setting

forth the arrest and commitment of Donohogue upon the capias ad respondendum, and the prison-bounds bond; and averring that he did continually keep, remain, and stay within the prison bounds from the time of the execution and delivery of the bond until the 1st of June, 1824, when he was brought before CRANCH, Chief Judge of the circuit court of the District of Columbia, upon allegations filed against him by the plaintiff as a creditor, charging that he had disposed of part of his property with intent to defraud his creditors, upon which allegations issues were made up and tried by a jury, who found him guilty; whereupon it was ordered by the judge that he should be remanded to close custody; and be precluded from any benefit under the act; and that he was so remanded, and committed to close custody in the jail of Washington county, and was not any longer entitled to the benefit of the prison rules or limits, for which the bond was given, nor to any benefit under the act; and that the bond was no longer of any force or effect to obtain for the said Daniel the benefit of the prison bounds, nor was the defendant any longer liable or bound that the said Daniel should thereafter keep within the same. To this plea the plaintiff replied that Donohogue was not, after the making and delivery of the bond, remanded to close custody, or in any manner seized or taken or rendered or committed to close custody in manner and form as the defendant in his plea alleged, in virtue, or execution, of the writ or process in the condition of the bond mentioned, or in any manner at the suit or instance or by the procurement of the plaintiff, under or by virtue of the said writ or process, or In execution thereof; "and this the plaintiff Is ready to verify," &c. To this replication the defendant rejoined, that the said Daniel was committed to close custody by the order of the said judge, as this defendant hath already in pleading alleged, passed upon the finding of the jury upon the issue joined on the allegations filed against the said Daniel by the plaintiff as alleged by the defendant in his plea aforesaid, and upon no other cause, process, or order; "and so the defendant says that the said commitment last mentioned was by the procurement of the plaintiff, and in virtue of the original capias in the said condition mentioned; and this he is ready to verify."

To this rejoinder the plaintiff demurred specially, and assigned the following reasons: 1. That the defendant in rejoining to the plaintiff's replication as aforesaid, hath not taken issue upon, or in any manner traversed or confessed and avoided the matter by the plaintiff above in replying pleaded as aforesaid. 2. That the said rejoinder is a departure from the issue upon the matter pleaded by the plaintiff in his said replication; and also from the matter of the defendant's said plea. 3. That the matter by the defendant above in rejoining pleaded is wholly immaterial, and impertinent to the matter by the said plaintiff above in replying pleaded. 4. That the said rejoinder is a mere repetition of the matter of the plea, and offers to put the same matter in issue, without in any manner traversing or confessing and avoiding the matter of the said replication. 5. That the said rejoinder is altogether immaterial, informal, and vicious. The defendant joined in demurrer.

Mr. Key, for defendant, contended, that the liberty of the prison bounds was one of the benefits of the insolvent act of March 3, 1803 (2 Stat 237), it being given by the 16th section of that act; and that when the defendant ceased, by law, to enjoy that benefit the bond ceased to be obligatory; and when the debtor was committed to close custody by the order of the judge the bond was of no use. The liberty and the bond are correlative; neither can exist without the other. The commitment being at the instance of the plaintiff, he ought not to have the benefit of both. If he relies upon the commitment he must relinquish the bond. His remedy is against the marshal for an escape.

THRUSTON, Circuit Judge, requested to hear the other side.

Mr. Wallach and Mr. Jones, for plaintiff. The commitment and the order for commitment to close custody were illegal and void. The judge had no jurisdiction or power to order the commitment. The only judgment which the judge could give was to order that the debtor's petition should be dismissed. The penalty is merely negative. The benefit from which he is to be precluded, is, what is vulgarly called "the benefit of the act," that is, a personal discharge from arrest for any debt contracted before the discharge. That was what he was seeking and from which he was to be precluded; it was not what he already enjoyed. It was future benefit which was to be denied to him, not what he already had. The party may be required to answer interrogatories, not to convict him of a crime or a forfeiture, but to prevent him from obtaining that which he is seeking. The judge acts ministerially. He has no power to commit He has no power in this summary proceeding which is not expressly given to him by statute.

THE COURT (CRANCH, Chief Judge, contra) rendered judgment for the plaintiff on the demurrer.

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