# MATTOCKS v. FARRINGTON.

Case No. 9,298.
{2 Hask. 331.}[1]

District Court, D. Maine. Feb. 1879.

BANKRUPTCY—ATTACHMENT IN STATE COURT—OBJECTION BY ASSIGNEE—RETURN—APPRAISERS—JUDGMENT—LEVY—PRIORITY—DETERMINATION BY ASSIGNEE.

1. A creditor, having attached the property of his debtor four months prior to the latter's bankruptcy proceedings, if the assignee in bankruptcy does not intervene and object, may prosecute his suit in a state court to judgment and execution, regardless of the bankrupt proceedings, and may levy the execution upon the property attached.
2. The return of an officer, stating that the appraisers who acted in making a levy upon real estate are disinterested persons, is conclusive evidence of that fact.
3. Under the statutes of Maine the return of an officer, stating that the land levied upon by virtue of an execution cannot be divided by metes and bounds without damage to the whole, wherefore he levied the same upon a fractional part of the premises, is conclusive upon the parties to the judgment and their privies.
4. A levy is held to take effect from the date of an attachment when it appeared from the whole record that the land levied upon was the same that had been attached, even though the officer's return upon the execution did not disclose the fact.
5. It is not the duty of an assignee in bankruptcy, when a parcel of the bankrupt's estate is wholly absorbed by the first lien thereon, to determine the validity of subsequent liens, nor their priority.

Bill by {Charles P. Mattocks} the assignee in bankruptcy of Moses A. Pennett against {Ira P. Farrington and others} various creditors of the bankrupt to determine the validity of their respective pretended liens upon the property of the bankrupt under levies of an execution against him made thereon, after he was adjudged bankrupt, without leave from the bankrupt court.

The respondents answered that their respective levies were made upon executions from the state court in accordance with the provisions of the statutes of Maine to enforce attachments existing more than four months prior to their debtor's bankruptcy proceedings, and that the same are valid.

Thomas H. Haskell, and Nathan Webb, for orator.

Herbert M. Sylvester and Moses M. Butler, for respondents.

FOX, District Judge. Pennett was adjudged bankrupt February 5, 1878, on his voluntary petition filed January 29, 1878, and the complainant was appointed assignee March 1, 1878. He has brought this bill to determine the validity and amount of certain liens and incumbrances on an estate in this city which formerly belonged to the bankrupt, all persons interested having been made respondents.

The claims of Farrington, being of the greatest amount and involving the full value of the estate, and it being claimed that they are entitled to a priority, will first be examined.

In December, 1876, Pennett mortgaged this estate to one Valpy to secure the payment of $700. This mortgage was assigned to Farrington January 23, 1878. No question is made by any party as to the validity of this mortgage, or as to its priority over any other incumbrance, and Farrington, therefore, is entitled to hold the same, and to receive the full amount thereof from the estate.

Various parties, having under the laws of Maine claims for laborers and materials furnished by them to Pennett to be used and employed in the erection by him of the house on this estate, and for which they had a lien by Revised Statutes of Maine more than four months before the filing of this petition by Pennett, duly commenced their actions for the enforcement of their respective liens, and therein attached this property; these actions were duly entered at the September term of the supreme court for this county, and were all defaulted and continued from term to term for judgment. In January, 1878, all these claims and the suits then pending were assigned to Farrington, and a special judgment was rendered in each of said suits on the fourteenth day of March, 1878, by the direction of Farrington and for his benefit, and the same were afterwards satisfied by a levy on the estate within thirty days after the rendition of the judgments. These judgments were so taken without any application to the district court for authority so to do; nor was any notice given to the assignees of the pending of said actions, or that the plaintiffs intended to take their judgments and issue executions thereon; and for these reasons, it is urged that the judgments were invalid and the liens were lost.

Whether a party, having an attachment in the state court upon a bankrupt's estate saved from the operation of the bankrupt act, could without the sanction of the bank-rapt court, proceed in his suit, obtain judgments, and satisfy the same from the bankrupt's estate so attached, was for a long time a matter of serious doubt, the practice now being uniform in the various districts. In Maine, application was usually made to the district court for leave to prosecute the suit in the state court to final judgment, which was granted upon condition that the judgment should be satisfied upon the property incumbered by the attachment.

In Doe v. Childress, 21 Wall. {88 U. S.} 642, the supreme court of the United States decided that when an attachment in a suit returnable to the state court was made more than four months before commencement of bankruptcy proceedings, if the assignee did not intervene, the state court might proceed and render judgment and issue execution, and the sale of the property so attached

would vest a good title in the purchaser. In the opinion, the court on page 646, says: "Where the power of a state court to proceed in a suit is subject to be impeached, it cannot be done except upon an intervention of the assignee, who shall state the facts and make the proof necessary to terminate such jurisdiction. This rule gains whether the four months' principle is applicable, or whether it is not applicable."

In Eyster v. Gaff, 91 U. S. 525, Judge Miller says: "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the district court, which has so adjudged, draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee's contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of these rights in a summary way. This court has steadily set its face against this view." It was there decided that a state court cannot take judicial notice of the proceedings in bankruptcy in another court, and that it is its duty to proceed as between the parties before it until, by some proper pleading in the case, it is informed of the changed relations of any of the parties to the subject matter of the suit.

By section 5106, Bev. St., it is provided that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay." To obtain the benefit of this provision, it is necessary that the state court should be legally notified of the pending of the proceedings in bankruptcy; if not so notified, it may proceed with the cause. The statute would seem to contemplate that the bankrupt should apply for the stay of the proceedings, and in Louisiana it was held that he alone could move in this behalf (Jones v. Clifton [Case No. 7,457]); while in Massachusetts it was held that the state court, in such a case, might proceed to judgment, "if neither the bankrupt nor the assignee moves for a stay of proceedings" (Ray v. Wight, 119 Mass. 426).

Language may be found in the opinion in Norton v. Switzer, 92 U. S. 364, 365, that may seem to imply that a cause thus pending in a state court could not be prosecuted to judgment excepting to determine the amount; but it could not have been intended that a state court was unauthorized to render judgment in a suit in which there was a valid attachment made more than four months prior to the commencement of proceedings in

bankruptcy, and in which the bankruptcy of the defendant was not brought to the notice of the court, as the contrary had been repeatedly decided by the supreme court.

Under the later decisions of the supreme court, the judgments in these suits in the supreme court were not affected by the proceedings in bankruptcy, nor by the plaintiffs not having obtained the consent and authority of the district court to prosecute the same to judgment and execution, and levy on the estate attached.

Various objections are taken to the levies, three of which are alone worthy of much consideration.

I. It is said that it does not appear that the appraisers were disinterested men as required by the statute. Upon the execution, the officer states in his returns that the appraisers were disinterested, and, in all of his returns, he refers to and adopts as a part of his return, the returns of the appraisers; and in every instance in their return, they state they were disinterested; by this practice, the appraisers' return becomes incorporated with and a part of the officer's return, as sanctioned by Rev. St. c. 76, § 5; and he has thus certified to their being disinterested. The return of this fact by an officer on an execution has always been held conclusive on the parties and privies; and the fact, that one of the appraisers was a brother-in-law of Farrington, the assignee of the execution, cannot be received to contradict the officer's return; and if admissible, it would seem not to be entitled to any effect in destroying the levy, as this appraiser was selected by the debtor, who should be estopped from disturbing the levy on this account, after having seen fit to choose a relative of the creditor in interest to act in his behalf.

II. A further objection to these levies is, that they were made on undivided fractional portions of the premises, and the officer, as he states in his return, determined that the premises could not be divided by metes and bounds without damage to the whole. It is said it was the duty of the appraisers to determine this fact, and not the duty of the officer, and, therefore, the requirements of the statute have not been complied with. It may be that in Massachusetts, under the language of their act, appraisers are the proper persons to decide this question. Such would seem to be the result of the authorities cited in Pickering v. Reynolds, 111 Mass. 83; Sanborn v. Chamberlin, 101 Mass. 408; but the statute in this state is somewhat different, and in Mansfield v. Jack, 24 Me. 98, it was decided that "the return of an officer, that the land upon which an execution is to be

levied cannot be divided without prejudice to or spoiling the whole, is conclusive of the fact as between the creditor and debtor and those claiming under them."

III. It is further objected that it does not appear from the execution to what estate the lien attached, or that the property levied upon was the same to which the lien did attach, or that it was taken for the purpose of enforcing a lien. When the whole record is examined, it discloses all the facts that are requisite to establish the validity of the hen, and that the estate levied upon was that to which the lien attached; and there is no provision of law, which requires that all such facts should again be set forth in the officer's return; they having become a part of the record, it is all that is requisite.

As the entire estate is exhausted by the prior claims of Farrington, it is unnecessary to determine as to the rank and position of the subsequent claims of other respondents; and as the unsecured creditors can in no event realize any advantage therefrom, it is not the duty of the assignee to call upon the court to pass upon the rights of these various parties; but they should be required, at their own expense, to litigate these matters between themselves, if they are advised so to do. Decree accordingly.

[1] {Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.}