

IN RE PECK.

[3 N. B. R. 757 (Quarto, 186).]¹

District Court, S. D. New York. April 26, 1870.

BANKRUPTCY—CERTIFICATION OF QUESTIONS
NOT MATERIAL TO POINTS IN ISSUE.

Where an action had been commenced in the superior court of Connecticut against a firm doing business in New York, attachment laid, judgment recovered, and execution issued, without the consent or privity of said firm, in part for money loaned, and the balance upon promissory notes for money loaned, a portion of which (about fifteen thousand dollars) fell due subsequent to the commencement of said action, Q. 1. Is it lawful for the plaintiff to continue his action in said superior court for the purpose of condemning the property attached, and for perfecting his lien thereon—or is it the duty of plaintiff to discontinue said action? 2. Is it the duty of the plaintiff to release said lands from the lien of said attachment? 3. Ought plaintiff to amend his deposition for proof of debt and, if so, in what manner? 4. Ought the real estate attached to be sold subject to the lien thereon, and, if so, in what manner? *Held*, the questions are not certified by the register as being upon any point or matter which has arisen in the course of proceedings before him, and are not within the first subdivision of section 6 [of the act of 1867 (14 Stat. 520)].

By ISAAC DAYTON, Register: I, Isaac Dayton, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to said proceedings, and were, by Charles N. Judson, Esq., attorney and counsel for John J. Cisco, one of the creditors of said bankrupt, stated for the opinion of the court thereon. The facts, as submitted to me, are as follows: On the 10th day of June, 1868, John J. Cisco, of the city of New York, commenced an action in the superior court of the state of Connecticut against Bronson Peek, then doing business in said city of New York, under the

firm name of Bronson Peck & Co.; and on the 11th day of June, 1868, attached certain lands situated at Greenwich, in the state of Connecticut, valued at less than fifteen thousand dollars, as the property of said Bronson Peck. That said Bronson Peck had, for ten years prior to the 75 commencement of said action, carried on business in said city of New York, either in his own name, or under the firm name of Bronson Peck & Co.; and that at the time of the commencement of said action, said John J. Cisco was aware that said Bronson Peck and said Bronson Peck & Co. were in an embarrassed condition in their business matters. That in October, 1868, said John J. Cisco recovered judgment in said action by default against said Bronson Peck for the sum of forty-three thousand eight hundred and ninety-eight dollars and four cents, or thereabouts; and thereupon, to wit, on the 15th day of October, 1868, the aforesaid lands were set off, in accordance with the laws of the state of Connecticut, on execution issued upon said judgment against said Bronson Peck, at a valuation of seven thousand two hundred and twenty-five dollars. The sheriff's fees on said execution being the sum of one hundred and fifty-five dollars and seventy-two cents. That said action was commenced, said attachment was laid, said judgment was recovered, and said set-off was made, without the consent or privity of said Bronson Peck, or said Bronson Peck & Co., and without any collusion or connivance on his or their part. That the debt for which said judgment was recovered, and the lands set off as aforesaid, was in part for money loaned said Bronson Peck, or said Bronson Peck & Co., and the balance upon promissory notes given for money loaned said Bronson Peck, or said Bronson Peck & Co., a portion of which latter, to wit, of the sum of fifteen thousand dollars, or thereabouts, fell due subsequent to the commencement of said action, but prior to October 1st, 1868. That at the commencement of the

December term, in the year 1868, of said superior court of Connecticut, a motion was made in behalf of said Bronson Peck to open said judgment, and to permit said Peck to defend said action, and afterwards, to wit, on or about the 1st day of March, 1869, said judgment was opened, vacated, and set aside upon condition of trial upon the merits, and no plea in abatement to be filed or received. And that said action is now upon the calendar of said superior court, waiting to be tried, but the trial thereof is delayed by injunctions from said superior court, obtained by said Bronson Peck, or by his assignee in bankruptcy, John Todd; and that the attachment on said land is still undischarged of record. That on the 31st day of December, 1868, and more than six months after the commencement of the action as before set forth, said Bronson Peck filed his petition in this court to be declared a bankrupt, and thereafter, on said petition, was duly declared a bankrupt, and on the 2d day of March, 1869, John Todd was appointed assignee of the effects and estate of said bankrupt; and on the 13th day of March, 1869, said assignment was duly recorded in the record office of the town of Greenwich, state of Connecticut aforesaid. That on or about the 16th day of February, 1869, and prior to the decision of the motion to open said judgment, as hereinbefore set forth, said John J. Cisco made and filed with the register in charge of said bankruptcy, his deposition for proof of debt without security, alleging therein, "That Bronson Peck, the said bankrupt, is justly and truly indebted to him in the sum of thirty-six thousand eight hundred and twenty-eight dollars and seventy-six cents, and interest from October 15, 1868, being the amount unpaid of a judgment obtained in the superior court of the state of Connecticut, by him against the said bankrupt, said judgment so recovered being for the sum of forty-four thousand and fifty-three dollars and seventy-six cents, recovered October 15, 1868, of

which the sum of seven thousand two hundred and twenty-five dollars was paid upon an execution issued upon said judgment.” That said amount so alleged to be due included the amount of the sheriff’s fees on execution in the set-off as aforesaid; and that said proof of debt was made in good faith, and in the belief that the recovery of the judgment and the set-off of the lands aforesaid were valid and legal proceedings under the laws of the state of Connecticut. That on the 4th day of January, 1870, said Bronson Peck received from the district court of the Southern district of New York a discharge from all his debts. That said John J. Cisco has offered to have the value of said real estate ascertained by agreement with said assignee, or to have the same sold subject to his lien, if any he may have thereon, and to have his deposition for proof of debt amended in accordance with the facts hereinbefore set forth, but said assignee has refused to assent thereto. That in accordance with the first division of the 6th section of the act entitled, “An act to establish a uniform system of bankruptcy throughout the United States,” the said John J. Cisco asks the opinion of the court as to his duty in the premises.

The question of law submitted for the opinion of the court is as follows: “First is it lawful for said John J. Cisco to continue his said action in said superior court for the purpose of condemning the property attached as aforesaid, and for the purpose of perfecting his lien thereon, or is it the duty of said Cisco to discontinue said action? Second. Is it the duty of said John J. Cisco to release said lands from the lien of said attachment? Third. Ought the said John J. Cisco to amend his deposition for proof of debt, and, if so, in what manner? Fourth. Ought the real estate attached as aforesaid to be sold subject to the lien of said John J. Cisco thereon, and, if so, in what manner? John J. Cisco, by Charles N. Judson, his Attorney, 167 Broadway, N. Y.”

BLATCHFORD, District Judge. The within questions are not upon any point or matter 76 which has arisen in the course of any proceedings before the register, and are not so certified by the register. They are, therefore, not within the first subdivision of section 6.

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