

not made returnable to, nor entered nor docketed in, the clerk's office within 21 days. These two sections of the federal statutes stand, and are to be construed, together to give due effect to both. The general provision of the one as to practice, pleading, and forms and mode of procedure applies to systems of judicial procedure as matters of separate study, and not to details of methods of doing the business of courts. *Nudd v. Burrows*, 91 U. S. 426; *Railroad Co. v. Horst*, 93 U. S. 291; *Sherry v. Navigation Co.*, 72 Fed. 565. These are left to be provided for by rules of court under the other section, and the returning of writs is there specially mentioned as a subject of such rules, which are within the power of the court, and valid when made. *Cutter Co. v. Jones*, 21 Blatchf. 138, 13 Fed. 567. This is not contrary to *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, which relates to the officer of a municipal corporation of the state upon whom process should be served, which must always depend upon the laws of the state; and the amendment allowed in *Mack v. Porter*, 18 C. C. A. 527, 72 Fed. 236, seems to have been within the statutes of the United States on that subject, although the statutes of the state were referred to in upholding it. These statutes of the state do not provide any new practice, pleading, form, or mode of procedure such as would be adopted by section 914; but relate to details provided for by section 918, and the rules under it, which are not affected by state statutes. So this writ appears to have been made returnable, and been returned, in the proper way, and the only proper way, as the statutes and rules now stand. Motion overruled.

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LOWENBERG et al. v. JEFFERIES et al.

(Circuit Court, D. Montana. May 8, 1896.)

No. 265.

1. SHERIFFS—RELEASE OF ATTACHED PROPERTY—APPOINTMENT OF RECEIVER.

When a sheriff holds, under attachment, property seized as that of the attachment debtor, and the court in which the attachment suits are pending appoints a receiver, in a suit commenced to determine conflicting rights in the property, and directs such property to be turned over to him, such taking of the property from the sheriff's possession is a proper defense, in an action against him, by the plaintiff in one of the attachment suits, for an unauthorized release of the attached property.

2. SAME—ACTION FOR UNAUTHORIZED RELEASE—MITIGATION OF DAMAGES.

An action against a sheriff for an unauthorized release of attached property is in tort, and the defendant has a right to set up, in mitigation of damages, the facts that the plaintiff's attachment was subsequent to many others, and that judgments have been rendered, in the other actions, more than sufficient to exhaust the attached property.

A. K. Barbour and J. A. Carter, for plaintiffs.  
 McConnell, Clayberg & Gunn, for defendants.

KNOWLES, District Judge. The above-named plaintiffs brought their actions against the above-named defendants to recover of  
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them the sum of \$12,181.13, with 10 per cent. interest and cost of suit. It is set forth in the complaint that plaintiffs commenced an action in the district court in and for Lewis and Clarke county, Mont., to recover said sum, against Isaac Greenwood and Ferdinand Bohm, as co-partners; that in this action they caused an attachment to issue against the property of Greenwood, Bohm & Co. for said sum, and to be delivered to the defendant Charles M. Jefferies, as sheriff of the above county; that under this writ the said Charles M. Jefferies, as sheriff, levied upon and took into his possession a large amount of the goods, wares, and merchandise of the said Greenwood & Bohm within the above county not exempt from execution; that the said property was worth the sum of \$50,000. Subsequently, it appears, plaintiffs obtained judgment against said Greenwood, Bohm & Co. for said sum of \$12,181.13. Upon this judgment execution was issued and delivered to said Jefferies, as sheriff, and at the time said sheriff had said property in his possession. It is also alleged that, on the 7th day of July, 1892, said execution was by said Jefferies, as sheriff, returned "Nulla bona." In said return it was recited that said execution was received by him on the 11th day of April, 1892, and that, after due and diligent search, he was unable to find any property of the said Greenwood, Bohm & Co. with which to satisfy said judgment. It is further alleged that said Jefferies, without the consent of plaintiffs, after said attachment, released the same, without taking any bond or security; that the said judgment is unpaid. Plaintiffs therefore ask judgment against defendants in the sum of \$12,181.13, and for \$50 as costs of suit, and interest.

To this complaint said Jefferies made answer, and, after some denials therein of matters set forth in the complaint, set up certain facts as new matter constituting a defense. The principal matters set forth are that the Merchants' National Bank of Helena commenced an action, previous to the action of plaintiffs against said Greenwood, Bohm & Co., to recover the sum of \$35,945.48 and caused the property of said firm to be attached therein, and subsequently procured judgment against them for that sum; that upon this judgment execution was issued, and thereon the said Jefferies returned, "No property to be found in my county to satisfy the foregoing execution, except the property attached herein, and embraced in an alleged assignment of Greenwood, Bohm & Co. to Max Kahn, on the 12th day of February, 1892, and except the garnishments, and I herewith return the said execution unsatisfied." Whereupon the said Merchants' National Bank filed a creditors' bill, for itself and any other judgment creditor of the said Greenwood, Bohm & Co. who might claim the benefit of the action, with the view of setting aside said assignment to Max Kahn as a fraud upon creditors. In this suit, on the motion of the said bank, a receiver was appointed to take charge of said property so attached and named in the above execution return. The answer also shows that there were attachments on said property, prior to that of plaintiffs, amounting to some \$90,000; that it was the same property named in the return to all the attachments, and that the

attachment of plaintiffs was levied subject to the prior rights of the prior attaching creditors; that, in said suits, judgments in the sum of \$75,000 have been entered.

To this answer plaintiffs filed their demurrer. The first ground of demurrer is that that part of the answer commencing on line 10 of the third page of said answer, and extending to and ending with paragraph 13, does not state facts sufficient to constitute a cause of defense, and that that part of said answer setting forth the prior attachments and judgments is irrelevant, and, if any defense, an equitable one.

The questions raised in these pleadings and demurrer are (1) as to whether the appointment of a receiver by the court is any defense to the matters set forth in the complaint, and (2) as to whether the facts set forth as to the attachments previous to that of plaintiffs, and judgments obtained thereon to the amount of \$75,000, are irrelevant, or, if relevant, matters constituting an equitable defense only.

It is probably true that the general rule is that, when a sheriff attaches the property of a defendant in an action at law, he acquires a special interest therein, and his possession thereof cannot be divested by a receiver, subsequently appointed, in another action, to which the said sheriff was a party, and in which appointment the receiver is commanded to take possession of all of the property of the attachment debtor. *Davis v. Gray*, 16 Wall. 203-218; *Parker v. Browning*, 35 Am. Dec. 717. Where the sheriff is an officer of the same court that appointed the receiver, and the action in which he attached the property in his possession is pending in that court, this general rule may be varied, and the court may have the power to direct the sheriff to deliver the attached property to the receiver. At times, it is said, attached property is in the custody of the law. In the federal courts it has been held that the possession of the attaching officer is that of the court. *Freeman v. Howe*, 24 How. 450; *Krippendorf v. Hyde*, 110 U. S. 280, 4 Sup. Ct. 27.

In the case of *Griffin v. Thompson*, 2 How. 244, the supreme court said:

"There is inherent in every court a power to supervise the conduct of its officers, and the execution of its judgments and process."

In the case of *Naumburg v. Hyatt*, 24 Fed. 898, 902, Judge Dick said:

"But, independent of the provisions of the above-named statute, I am of the opinion that there is an inherent power in a court of law, as well as a court of equity, over its own process, and in the disposition of property in the custody of the law so as to prevent serious injury to the parties interested in such property, and to afford just and adequate relief."

If a court has the power inherently to make such disposition of property as would seem to it proper when the same is in the custody of the court, or, as it is termed, in the custody of the law, then it may order the same to be turned over to a receiver, although such action may have been irregular and ill advised. Having the jurisdiction to act in this matter, its action cannot be attacked collaterally, and its judgment or determination or order may be a

justification to the officer affected thereby. In the case of *Naumburg v. Hyatt*, supra, a receiver was appointed under circumstances very similar to the one at bar, and it was held the court had power to make this appointment. It may be that the authority to make the appointment in that case was referred to a statute of the state. If so, there is a similar statute in the Montana Code of Civil Procedure. It should be observed that it appears, in this case, there was a contest as to the right to the possession of this property between Max Kahn, the assignee of Greenhood, Bohm & Co., and the sheriff; that the application for a receiver was made by the attaching creditors, who had the first lien upon the attached property; and that said property was taken into possession of the sheriff first by virtue of their attachments. If it is contended that the parties plaintiff or any of the attaching creditors of Greenhood, Bohm & Co., lost any rights on account of surrendering this property to a receiver under the order of court, I think the contention cannot be maintained. The attaching creditors obtained a lien upon the property attached in the order in which the attaching writs were delivered to the sheriff and levied thereon. The receiver took possession of the attached property subject to these liens, and the court could be called upon to direct that the proceeds derived from the sale of the attached property should be paid out to the attaching creditors in the order of their liens. *Naumburg v. Hyatt*, supra; *Becker v. Torrance*, 31 N. Y. 631; High, Rec. § 440. For these reasons I think it was a proper defense in this suit to show that the property was taken from the possession of the sheriff by the order of the court in which the attachment suits were pending, and turned over by an order of the same court to a receiver appointed by it. The first ground of demurrer, therefore, is not well taken.

In considering the second ground of demurrer, it is apparent, from the nature of the action, that it is an action for damages for a release of attached property by the defendant sheriff without authority. It is contended on the part of plaintiffs that the action is one in contract. This position cannot be maintained. The very nature of the action and the allegations of the complaint preclude this position. The defendants had the right, therefore, to set forth the fact that the levy of the attachment in plaintiffs' case was made subject to many other attachments, stating the amount of claims sought to be collected thereby. Especially is this so when it appears that the property attached was delivered to a receiver, who held the same subject to the liens created by the subsequent attachments. The only amount that can be recovered from the defendant sheriff is the amount plaintiffs were damaged by his action. In order to show what this damage was, defendant sheriff has the right to have it appear what were the facts in the case. The second ground of demurrer cannot, therefore, be sustained.

The demurrer is, therefore, overruled.

McLEAN v. VALLEY COUNTY, NEB.

(Circuit Court, D. Nebraska. May 7, 1896.)

1. JURISDICTION OF FEDERAL COURTS—ASSIGNED COUNTY BONDS.

County bonds and coupons, being made by a corporation, come within the exception to the general rule that an assignee cannot sue on a chose in action in the federal courts unless the citizenship of the original owner was such as would have enabled him to maintain the suit.

2. COUNTY BONDS—INNOCENT PURCHASERS.

A purchaser of county bonds has a right to rely on the canvass and return made by the official canvassers, which show that the proposition to issue the bonds was carried by more than the requisite two-thirds of the votes cast on the question.

3. SAME—LIMIT OF INDEBTEDNESS—INNOCENT PURCHASERS.

A purchaser of county bonds, in determining whether the aggregate issue exceeds the statutory limit of 10 per cent. of the assessed value of the county property, has a right to rely on the amount of the assessment, as finally established by the board of equalization, and certified by the county clerk to the auditor of state, without going to the books of the several precinct assessors.

4. SAME—FUNDING BONDS—NEBRASKA STATUTES.

Under the acts of Nebraska of 1877 and 1879, prior to the amendment of 1883, the county of Valley had authority to issue bonds to the full limit of 10 per cent. of the assessed valuation of the county for the purpose of funding unpaid warrants and indebtedness, although there were still outstanding improvement bonds sufficient to make the total amount of bonds in excess of 10 per cent.

This was an action at law by Hector McLean against the county of Valley, Neb., to recover on certain county funding bonds and coupons issued January 6, 1886. The case was tried to the court, a jury being waived.

From the evidence submitted, I find the facts in this case to be as follows:

(1) I find that the plaintiff herein, Hector McLean, is now, and was when this suit was begun, a citizen of the state of New York; that the defendant, the county of Valley, was, when this suit was commenced, and is now, a county corporate of the state of Nebraska, created under the laws of the state of Nebraska, and that the amount involved in this controversy exceeds the sum of \$2,000, exclusive of interest or costs.

(2) I find that Valley county was duly organized in accordance with and under the provisions of the constitution and statutes of the state of Nebraska, such organization being completed in the year 1873; the affairs of the county being managed and controlled by a board of commissioners.

(3) I find that a legal meeting of the board of commissioners of said county of Valley was held on the 7th day of October, 1879, and at such meeting the following resolution was adopted and spread upon the records of the board: "Resolved, that the following proposition be, and the same is hereby, submitted to the qualified electors of said Valley county: 'Shall said Valley county issue its coupon bond in denominations of not less than fifty nor more than one thousand dollars to the amount of thirty-two thousand dollars (\$32,000), to pay the outstanding and unpaid warrants and indebtedness of said county, in the following order: First, the general fund; second, the special bridge fund; and, third, the land road fund. Said bonds to be dated January 1, 1880, and payable at the office of the county treasurer of said county, and to run twenty years with interest at the rate of seven per cent. per annum, payable annually: provided, that such bonds shall be redeemable at any time after ten years, upon giving at least thirty days' notice of such time of payment in a paper published in said county, and after the completion of said publication said bonds shall cease to draw interest. The above provisions shall be inserted in said bonds. The said bonds shall not be sold for less than ninety per cent. of their par value. There shall be