

As a request for a charge as to the measure of damages, it was rightly refused, because it was fully embraced in the general charge, in terms of which the plaintiff could not and does not complain, to illustrate which we quote from the general charge, as follows:

"Where an attachment is levied upon property that has been placed in the hands of a trustee, if no creditor has accepted before the attachment is levied the trustee cannot recover; but, if any creditor has accepted the terms of that instrument before the attachment has been levied, the trustee can recover, unless defeated upon the ground of fraud. What I mean by that is this: This matter has been argued before you, and ably upon both sides,—well presented by the attorneys for the parties on both sides. The contention has been that, even if some one creditor did accept, that the trustee could recover only to the extent of the debt thus accepted. The other party has contended that that was not the law; we being in a court of law, that you could not marshal assets, and have an adjustment of the equities; that consequently it was legal or illegal. I agree with the latter contention. I hold, as a matter of law, that if you find, as a matter of fact, that if any creditor accepted the terms of this instrument before the levy of the attachment, and you do not find that debt to be infected with fraud, as I shall hereafter instruct you, in that event you are instructed the entire property named in this deed passed to the trustee, and for this action he may recover for whatever it may be shown the property was worth at the time and place it was taken. \* \* \* I mean, if you believe from the evidence that there is a single excepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in the possession of facts that would have put a reasonably prudent person upon inquiry, you will find a verdict for the plaintiffs for the value of the goods on the 23d day of December, 1892, in Galveston, Texas, with interest at the rate of 6 per cent. per annum from that date until now."

We express no opinion as to the instructions just quoted, further than to say, as we have above said, that the plaintiff does not and cannot complain of them. Our conclusion on the case is that the plaintiff does not suggest and now urge any error in the rulings of the circuit court for which its judgment should be reversed, and it is therefore affirmed.

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MARION COUNTY et al. v. COLER et al.

(Circuit Court of Appeals, Fifth Circuit. June 2, 1896.)

No. 482.

1. MANDAMUS—PRACTICE—JURY TRIAL.

When the material facts involved in an application for a mandamus are admitted by the pleadings, a jury trial is unnecessary, and a refusal thereof is not error.

2. SAME—DEMAND.

When a plaintiff has shown himself entitled to a mandamus to compel the levy and collection of taxes by a county to pay a judgment against it, he is entitled to one which will set in motion all the necessary machinery, including the action of an assessor and collector, required to be taken after the levy of the tax by the county court, although no demand has been made on such officers to perform the acts so required.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

F. H. Prendergast, for plaintiffs in error.

W. S. Herndon and Ben. B. Cain, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and SPEER, District Judge.

PARDEE, Circuit Judge. This cause has been presented to this court on an assignment of errors complaining that the trial court refused a jury trial; that J. C. Hart, tax collector, and J. E. Cooke, tax assessor, were improperly included in the judgment awarding a mandamus, because no demand and refusal were shown against them; and that, as to Marion county, the judgment awarded was excessive, illegal, and oppressive. The material facts in the case were admitted in the pleadings, and the trial in the court below was practically upon the petition and answers. If no material fact was at issue, a jury was unnecessary. The defendants J. C. Hart, tax collector, and J. E. Cooke, tax assessor, appeared in the court below, and filed a demurrer to the plaintiffs' petition on the ground that the same did not show any legal duty resting on the defendants to do anything which they had failed to do, and did not show any demand on them to do anything which they refused to do. What disposition was made of this demurrer in the court below does not appear. The court, however, in awarding judgment, directs that the said defendants, J. E. Cooke, assessor of taxes for Marion county, and J. C. Hart, collector of taxes for Marion county, proceed forthwith, as provided by the laws for the assessment and collection of state and county taxes, to assess and collect the said taxes to be levied as aforesaid, and keep the same separate and apart from other taxes, etc. The plaintiffs' petition, in addition to showing their right to have a tax levied and assessed in Marion county to pay their judgment, set forth the machinery for levying and collecting taxes under the laws of Texas, by which it appears that the said tax collector and tax assessor have certain duties to perform after the county court has levied the necessary taxes. If the plaintiffs were entitled to a mandamus to compel the levy and collection of taxes, they were certainly entitled to one which would set all the machinery necessary for the levy, assessment, and collection of taxes in motion. It does not appear from the record that the mandamus to officers in Marion county to levy a tax to pay the plaintiffs' judgment is otherwise excessive, illegal, and oppressive than would be any other legal remedy to compel Marion county to pay its debts. The amount of tax ordered to be levied, based upon the taxable property in the county of Marion, as admitted in the pleadings, is hardly sufficient to pay the accruing interest on the plaintiffs' demands and provide a small amount for a sinking fund. It would take, at the same rate of taxation on the same valuation of property, at least 20 years to pay off the plaintiffs' judgment.

On the whole case, we find no reversible error suggested by counsel, or patent upon the record. Judgment affirmed.

## STATE NAT. BANK OF MAYSVILLE v. ELLISON et al.

(Circuit Court, S. D. Ohio, W. D. June 1, 1896.)

## 1. PROBATE COURTS—JURISDICTION—RAISING ASSIGNMENT IN INSOLVENCY.

Under the insolvency laws of Ohio, the probate court in which an assignment is filed has jurisdiction, upon the consent of all creditors, to make an order raising the assignment, and directing the assignees to reconvey the property. *Garver v. Tisinger*, 18 N. E. 491, 46 Ohio St. 66.

## 2. JUDGMENTS—COLLATERAL ATTACK—ORDERS IN INSOLVENCY PROCEEDINGS.

An order of a probate court in Ohio, in a proceeding over which it had fully acquired jurisdiction, finding that all the creditors of an insolvent had assented to the raising of the assignment, cannot be collaterally impeached. *Wehrle v. Wehrle*, 39 Ohio St. 365, followed. *Noble v. Railroad Co.*, 13 Sup. Ct. 271, 147 U. S. 173, applied.

## 3. SAME—ESTOPPEL.

Where a firm creditor was notified of an order of the probate court, raising the assignment of one of the partners, and did not object thereto for two years, but continued to do business with the firm, *held*, that such creditor was thereby barred from subsequently objecting to the validity of the order, and hence from questioning, on that ground, a subsequent conveyance, for full consideration, of real estate owned by such partner.

## 4. INSOLVENCY—MORTGAGE FOR BENEFIT OF CREDITORS—SIGNING COMPOSITION AGREEMENT.

A mortgage made by an insolvent, covering the bulk of his property, in trust for all creditors who should sign a composition agreement, is a mortgage made in contemplation of insolvency, and under Rev. St. Ohio, § 6343, inures to the benefit of all creditors, whether they signed the composition agreement or not; subject, however, to the rule that the individual property shall be first applied to individual debts, and the surplus, if any, divided among partnership creditors.

On October 14, 1889, the defendant R. H. Ellison executed a deed of assignment of all his real and personal property for the benefit of his creditors under the insolvency laws of Ohio to his co-defendants, W. A. Blair, W. H. Pownell, and T. J. Shelton, who immediately filed the same in the probate court of Adams county, a court of competent jurisdiction, and qualified and assumed the trust. Prior to this date, Ellison had been for many years engaged in the banking business in Manchester, Ohio, on his individual account. In the spring of 1889, Ellison and his co-defendant Shelton formed a partnership, under the name of Ellison & Shelton, to trade in tobacco, and at the date of the assignment this firm was indebted to the complainant upon two promissory notes, aggregating \$7,000, and not then due.

Within a few days after the filing of the deed of assignment, which was caused by difficulties in Ellison's banking business, a composition was agreed upon between him and his individual creditors, and thereafter an order was made by the Adams county probate court finding that Ellison had settled with all his creditors, and directing his assignees to reconvey his property to him. Afterwards, in pursuance of this composition agreement, on October 28, 1889, Ellison executed to his co-defendants, Blair, Pownell, and Shelton, a mortgage upon all his property in trust for the benefit of his creditors, and providing for payments of claims of his individual creditors in installments at given dates. This mortgage gave specific power of sale to meet these payments. A copy of the order of the probate court setting aside the assignment was sent by Ellison's agent to the complainant, and was received November 4, 1889. The letter accompanying the copy of the order stated that Ellison was again in the banking business, and solicited a continuance of former relations between the two banks, for the complainant had been a correspondent of Ellison's bank prior to his failure. This relation was continued after his failure and resumption of business.

About this same time the defendant Shelton made from his individual means a partial payment upon the indebtedness of Ellison & Shelton to the