

dinary purchaser, who has no claim to secure, and becomes a participant in the fraud of his vendor, if he is aware, or has reasonable grounds to believe, that his vendor contemplates a fraud. *Harris v. Russell*, 93 Ala. 59, 67, 9 South. 541; *Black v. Vaughan*, 70 Tex. 47, 7 S. W. 604; *Sanger v. Colbert*, 84 Tex. 668, 670, 19 S. W. 863; *McVeagh v. Baxter*, 82 Mo. 518; *Hart v. Sandy*, 39 W. Va. 644, 657, 20 S. E. 665; *Allen v. Stingel*, 95 Mich. 195, 54 N. W. 880; *Roeber v. Bowe*, 26 Hun, 554, 558; *Hanchett v. Goetz*, 25 Ill. App. 445; *Seger's Sons v. Thomas Bros.*, 107 Mo. 635, 641, 18 S. W. 33.

If the plaintiff was aware or had reasonable ground to believe that Oziah intended to defraud his other creditors, as the jury appear to have found, she had no right to purchase his entire stock in trade, which was of the confessed value of over \$1,200, to save herself from liability on the note for \$500 which she had executed, even though her debtor did refuse to protect her from liability on any other terms. Having timely notice of the intended fraud, she could doubtless have caused an attachment to be levied upon the debtor's stock in trade to secure the indebtedness for which she had become his surety; but, whether this remedy was or was not available, the purchase by her made was not justifiable, on the ground of necessity, and the trial court would have erred if it had permitted the jury to so find.

Several objections were made to the introduction of evidence, but the errors of this class are not well assigned, in conformity with rule 11 of this court, and an examination of the alleged errors shows that they are, in any event, unimportant.

The judgment of the United States court in the Indian Territory for the Third judicial division, and the judgment of the United States court of appeals in the Indian Territory, are each hereby affirmed.

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BROCHON et al. v. WILSON et al.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1899.)

No. 502.

**1 REVIEW — APPEAL OR ERROR — SUPPLEMENTARY PROCEEDINGS AFTER JUDGMENT.**

An application made by an assignee for the benefit of creditors of a judgment debtor, under an assignment made after levy, for the release of the levy under a state statute, is a proceeding in the nature of a supplementary bill in equity, and may be taken to the circuit court of appeals for review by an appeal.

**2. FEDERAL COURTS—STATE STATUTE—RELEASE OF LEVY.**

A state statute providing that, on the making of a general assignment for the benefit of creditors by a judgment debtor within 10 days after the levy of an execution on his property, such levy shall be dissolved, and the property shall be turned over to the assignee, as applied to indebtedness created after its enactment operates upon the contract, and makes the assignee, in the event of an assignment, the absolute owner of the property in trust, divested of the lien of the execution. As applied to a levy made under a judgment of a federal court based upon such a contract, the statute is not an interference with the jurisdiction of the court in favor of state tribunals, and should be recognized and enforced.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

On December 31, 1897, Hugh B. Wilson, Elijah C. Wilson, and William H. Wilson, the appellees, recovered judgment in the court below in an action at law against Louis N. Brochon, one of the appellants, upon a note executed by Brochon, dated August 27, 1897, payable on demand after date. Upon that judgment a writ of execution was issued out of the court to the marshal of that district, under which writ that officer levied upon and took into his possession a certain stock of goods contained in the store of the execution debtor at West Superior, Wis., and advertised the same for sale. On the 11th day of January, 1898, and within 10 days after such levy, the judgment debtor, Louis N. Brochon, executed to the appellant D. S. Culver, under the provisions of chapter 80 of the Revised Statutes of the State of Wisconsin and the acts amendatory thereof, an assignment of all his property in trust for the benefit of his creditors. Thereupon the assignee and judgment debtor, by petition filed in the court below, sought for an order directing the marshal to turn over to the assignee the property so levied upon under his said writ, and that the writ of execution be set aside, dissolved, and declared void; claiming that, by virtue of a statute of the state of Wisconsin, and by virtue of the assignment made in conformity therewith, the levy of the writ of execution was dissolved. The statute is as follows (Laws Wis. 1897, c. 334; Sanb. & B. Ann. St. Wis. 1898, § 1694a): "Whenever the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor, or a garnishment is made against such debtor, he may, within ten days thereafter, make an assignment of all his property and estate, not exempt, for the equal benefit of all his creditors, whereupon all such attachments, levies, garnishments or other process shall be dissolved and the property attached or levied upon shall be turned over to such assignee or receiver." To the petition so filed a demurrer was interposed, and upon the hearing the demurrer was sustained, and the prayer of the petition was denied by the court. Whereupon the petitioners prayed and were allowed an appeal to this court from that order or decree.

H. H. Grace, for appellants.

H. T. Briggs, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The appellees contend that this appeal should be dismissed within our ruling in *Stephens v. Clark*, 18 U. S. App. 584, 10 C. C. A. 379, and 62 Fed. 321, for the reason that the action below was one at law, and can only be brought here for review by writ of error. This contention cannot be sustained. The judgment below is not brought here for review. The proceeding is one after judgment to determine the right to the property levied upon by virtue of the writ of execution issued upon that judgment. It is a proceeding in the nature of a bill in equity, to bring before the court matters occurring subsequently to the judgment, and which it is said should avail to dissolve the lien of the execution. The proceeding, we think, cannot be characterized—as was said at the bar—as a substitute for the ancient writ of *audita querela*. That writ was an equitable proceeding to relieve a judgment debtor from the judgment upon good matter of discharge happening subsequently to the judgment; but we understand that writ to lie only at the instance of the defendant in the judgment, or possibly of one privy to the judgment, while here the judgment is not impugned, but the holding of the property under the writ of execution is chal-

lenged by the assignee because of the assignment subsequent to the levy. It is, however, in substance a bill in equity; not an independent bill, but one ancillary and dependent, supplementary merely to the action at law out of which it has arisen, or a proceeding in the nature of an interpleader, and is allowable in this informal way for the speedy determination of the rights involved, in the interest both of the claimant of the property and of the officer executing the writ. The proceeding is sanctioned and sustained in *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, and can be brought here by appeal.

Coming to the merits, it is insisted by the appellees that, in the seizure of this property for the purpose of applying the proceeds thereof to the satisfaction of the judgment, the court below and its officer were acting strictly within the scope and jurisdiction of their authority, and that this jurisdiction cannot be taken away or impaired by any state enactment, under the rule declared that state laws, whether general or special, cannot in any manner limit or affect the operation of the process or proceeding of the federal courts. The rule in this regard has been considered and asserted. *Borer v. Chapman*, 119 U. S. 587, 600, 7 Sup. Ct. 342; *Railroad Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. 155; *Chicot Co. v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, and cases cited; *In re Chetwood*, 165 U. S. 443, 460, 17 Sup. Ct. 392. In the latter case the rule is thus stated:

"The doctrine is firmly established that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court, and that, where property is actually in the possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court of concurrent jurisdiction."

It is alleged for the appellants that the statute of Wisconsin in question here operates upon the contract, and not upon the process of court, and is constitutional with respect to all contracts made subsequently to its passage. Its constitutionality has been sustained by the highest authority. *Denny v. Bennett*, 128 U. S. 489, 9 Sup. Ct. 134; *Bank v. Schranck*, 97 Wis. 250, 73 N. W. 31; *Peninsular Lead & Color Works v. Union Oil & Paint Co. (Wis.)* 76 N. W. 359; *Heath & Milligan Mfg. Co. v. Union Oil & Paint Co.*, 83 Fed. 776. The contract upon which this judgment was rendered appears to have been executed subsequent to the act of the legislature of Wisconsin here in question, and prima facie is governed by it; so that the only question presented is whether the principle invoked by the appellees is applicable here. We think it is not. It is not the case of a state law seeking to divest a federal court of its rightful jurisdiction, or to take from it property in its custody under its writ for the purpose of enforcing rights of other parties to that property in another tribunal. It is not like the case of *Railroad Co. v. Gomila*, supra, which was insisted upon as controlling of the question here. There the judgment debtor died after levy upon his property under writ of execution issued upon a judgment in a federal court, and his administrator applied to the federal court to have the sale under the execution suspended, and the property administered by the probate court of the state, and turned over bur-

dened with any lien in favor of the plaintiff in the judgment which might have resulted from seizure. That, the supreme court said, could not be done, because it would be an abandonment or transfer of the jurisdiction of the federal court to the state court, and the suitor was entitled to have his rights determined and enforced by the federal court. But this proceeding does not seek to have the jurisdiction of the federal court divested, or jurisdiction imposed upon any state tribunal. The assignee, by virtue of the assignment, as to contracts subsequent to the going into effect of the act, became the absolute owner in trust of the property in question, divested of the lien obtained by the writ of execution. The law which worked the dissolution of the lien operated upon the contract itself. The contract was made in the light of the law, and as though the statute itself were incorporated in the contract, and any rights growing out of that contract were acquired subject to the contingencies contemplated by the statute. It is not, therefore, a case where a federal court is sought to be shorn of its rightful jurisdiction, but a case where the owner seeks to obtain possession of the property which by the law of the contract could not be held under any judgment obtained upon the contract, in the event of the subsequent assignment for the benefit of creditors within the time limited by the statute. It is not a case of administration or of jurisdiction; it is a question of title to property. It is, so to speak, a proceeding in the nature of an equitable replevin in the court by which the judgment was rendered. We think the cases are clearly distinguishable, and that it is both just and convenient that the federal court, recognizing the law of the state, should yield to the assignee the property which has been rightfully levied upon, but which has subsequently become the property of the assignee, freed of the lien of the levy, by virtue of the law of the state, which entered into and controls the contract upon which the judgment was rendered. The proceeding is summary, affording speedy determination of the rights of the parties by the court having jurisdiction, and is also protective of the rights of the officer who has seized the property under the writ; for, unquestionably, an action of trover would lie against him for the value of the property seized. *Denny v. Bennett*, supra. The decree or order appealed from is reversed, and the cause is remanded, with directions to the court below to overrule the demurrer, and to take such further proceedings upon the petition as may not be inconsistent with this opinion.

SHOWALTER, Circuit Judge, sat at the hearing of this case, but died before its decision.

## MITCHELL v. McCLURE et al.

(District Court, W. D. Pennsylvania. February 4, 1899.)

No. 10.

**BANKRUPTCY—JURISDICTION OF DISTRICT COURT—REPLEVIN.**

Under the bankruptcy act of 1898 (30 Stat. 552), a federal district court has no jurisdiction of an action of replevin, brought by a receiver or trustee in bankruptcy, to recover the possession of personal property alleged to belong to the bankrupt, but held adversely by the defendant under a claim of title thereto.

In Bankruptcy. Sur motion to abate writ of replevin.

Thomas Patterson, for receiver.

J. S. & E. S. Ferguson, for respondents.

BUFFINGTON, District Judge. A petition in bankruptcy having been filed in this court against one J. McD. Scott, Mr. S. D. Mitchell was appointed receiver. Thereafter said Mitchell, as receiver, brought the present action of replevin in the district court, against John McClure and others, to recover certain personal property. All parties are citizens of Pennsylvania. The defendants move to abate the writ on the ground of lack of jurisdiction in the district court. The motion involves the right of the plaintiff, as receiver or as trustee (for he has since been so made, and could be substituted as such), in a proceeding in bankruptcy, to maintain in the district court an action of replevin for alleged property of the bankrupt held adversely under claim of title. What the jurisdiction of the district court sitting as a court of bankruptcy may be in other forms of procedure, or what its power to reclaim or otherwise take possession of a bankrupt's property, are questions not now before us. The present one is as to the jurisdiction of the district court to entertain a plenary, common-law action.

While such question, as affected by the present law, is new, light is thrown upon it by the views announced by the supreme court of the United States on analogous jurisdictional questions, under the act of 1867. In conferring jurisdiction on the district court, that act provided, "The jurisdiction hereby conferred shall extend \* \* \* to the collection of all assets of the bankrupts." 14 Stat. 517.

In *Morgan v. Thornhill*, 11 Wall. 75, the right of appeal depended on what particular statutory provision vested jurisdiction. The third clause of section 2 of the act provided:

"Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district, of all suits at law, or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee." 14 Stat. 518.

After a full discussion of the act, it was held that the district court's jurisdiction in a plenary suit was based, not on the provision extending jurisdiction "to the collection of all the assets of the bankrupts," but to the clause above quoted. In reaching such conclusion, speaking of the prior clause, which conferred a supervisory jurisdiction on the