

COOPER et al. v. NEWELL et al.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1899.)

No. 511.

EVIDENCE—RECORD IN COLLATERAL SUIT.

In an action in a federal court in which it was sought to collaterally impeach a prior judgment of a state court, the admission in evidence of the record of a second suit in the state court, commenced by the person against whom the former judgment was rendered, to relieve himself therefrom, for the sole purpose of showing due diligence on his part, is not reversible error.

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

F. Chas. Hume, for plaintiffs in error.

Henry W. Rhodes and Thos. H. Franklin, for defendants in error.

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

PER CURIAM. The controlling question in this case, to wit:

"Was the judgment of the district court of Brazoria county, Texas (said court being a court of general jurisdiction), in the case of Peter McGreal v. Stuart Newell, subject to collateral attack in the United States circuit court for the Eastern district of Texas, sitting in the same territory in which said district court sat, in this suit, between a citizen of the state of New York and a citizen of the state of Texas, by evidence aliunde the record of the state court, showing that the defendant, Stuart Newell, in said suit in said state court, was not a resident of the state of Texas at the time the suit was brought, nor a citizen of said state, but a resident citizen of another state, and that he was not cited to appear in said suit, and that he did not have any knowledge of said suit, and that he did not in fact appear in said suit, and that he did not authorize J. A. Swett, the attorney who purported to appear for him in said suit, to make any such appearance, and that the appearance by said attorney was made without his knowledge or consent?"

—was certified to the supreme court, and has been answered in the affirmative. (Opinion not yet officially reported) 19 Sup. Ct. 506. The trial court admitted in evidence the transcript of the proceedings and judgment of the district court of Brazoria county, Tex., in the suit numbered 3,542, filed August 20, 1876, by Stuart Newell against the heirs of Peter McGreal, not as a muniment of title, but for the sole purpose of showing diligence on the part of Stuart Newell in relieving himself of the aforesaid judgment of the Brazoria court in said case No. 1,527 (Peter McGreal v. Stuart Newell). This was not reversible error.

The other questions raised by the assignment of errors are not insisted upon, and the judgment of the circuit court is affirmed.

In re FRANCIS-VALENTINE CO.

(Circuit Court of Appeals, Ninth Circuit. May 16, 1899.)

No. 538.

1. BANKRUPTCY — DISSOLUTION OF LIENS — POSSESSION OF PROPERTY UNDER LEVY.

Where actions are begun in a state court, and writs issued and levied on property of an insolvent debtor, within four months before the institution of proceedings in involuntary bankruptcy against him, the trustee is entitled to recover possession of such property from the sheriff holding the same under the levy, notwithstanding the pendency of an action of replevin in a state court against the sheriff by a stranger claiming ownership of the property; and the court of bankruptcy has jurisdiction to order the surrender of the property on summary petition by the trustee.

2. SAME—SHERIFF'S FEES.

A sheriff, holding property of an involuntary bankrupt under writs levied within four months before the commencement of the proceedings in bankruptcy, has no right, as against the trustee, to retain possession of the property until payment of his fees. Such fees are taxable in the court from which the writs issued, and, when there taxed and allowed, may be made the basis of a claim in the court of bankruptcy.

Petition for revision of an order of the district court of the United States for the Northern district of California, in bankruptcy. For opinion of the court below, see 93 Fed. 953.

Reddy, Campbell & Metson, for petitioner.

Gordon & Young, for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The jurisdiction conferred upon this court by subdivision b of section 24 of the bankruptcy act of July 1, 1898, is invoked in behalf of Richard I. Whelan, formerly the sheriff of the city and county of San Francisco, in a petition which shows that, at the time when the Francis-Valentine Company was adjudged a bankrupt, certain of its property was in the possession of the said Whelan, as sheriff, having been levied upon by him under writs of attachment and executions issued out of the superior court of the state of California in and for the city and county of San Francisco in actions then pending, in which the bankrupt had been the defendant; that on April 10, 1899, the trustee of the estate of said bankrupt, under appointment of the district court of the United States for the Northern district of California, filed in said district court an affidavit setting forth the facts that the trustee had taken possession of said estate under the provisions of the bankruptcy law, and that the said Whelan claimed to be in possession of portions of said property, and was interfering with the trustee's possession of the same; that upon said affidavit an order was made requiring the said Whelan to show cause why an order should not be made commanding him not to interfere with or disturb the trustee's possession of the bankrupt's property; that upon the order to show cause the sheriff alleged his right to the possession of the property to consist in the fact that he held the same under writs of attachment and execution on behalf of certain creditors of the bankrupt, and so held