

SCHECK v. KELLY.

(Circuit Court, W. D. Arkansas. August 2, 1899.)

No. 164.

INJUNCTION—DAMAGES FOR WRONGFUL ISSUANCE—RIGHT OF ACTION.

Where an injunction has been granted without bond, and subsequently the injunction is dissolved, and the bill dismissed, no action will lie at the instance of the defendant against the plaintiff in the injunction suit for damages sustained by reason of the issuance of said injunction.

On Demurrer to Complaint.

Ira D. Oglesby, for plaintiff.

H. C. Mechem, for defendant.

ROGERS, District Judge. The defendant, Harry E. Kelly, sued the plaintiff, A. Scheck, in the chancery court of Phillips county, Ark., and procured an injunction against him restraining him from entering upon, cutting down, or removing timber already cut upon certain lands in that county. Subsequently the injunction was dissolved, and the bill was dismissed. Scheck, who is a citizen of Germany, residing in the state of Tennessee, now sues Kelly, who is a resident of the Ft. Smith division of the Western district of Arkansas, in this court for damages sustained by reason of said injunction. The suit is not based upon any injunction bond, nor does it appear that any was given, but is a simple suit at law for damages, alleging that he sustained damages in the sum of \$3,537.60. Kelly demurs to the complaint generally for insufficiency, and, secondly, that plaintiff's complaint is not based upon any bond given to obtain said injunction, and that aside from and without such a bond there is no liability for any damages because of the issuance of said injunction. The court is of opinion that this demurrer should be sustained. In the case of *City of St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 354, it is said:

"It seems that, without some security given before the granting of an injunction order, or without some order of the court or a judge requiring some act on the part of the plaintiff which is equivalent to the giving of security, such as a deposit of money in court, the defendant has no remedy for damages which he may sustain from the issuing of the injunction, unless the conduct of the plaintiff has been such as to give ground for an action for malicious prosecution."

There is nothing in the complaint upon which to base a suit for malicious prosecution. See, also, *Russell v. Farley*, 105 U. S. 433; *Lawton v. Green*, 64 N. Y. 326; *Hayden v. Keith* (Minn.) 20 N. W. 195. The demurrer is sustained.

In re WALTHER.

(District Court, S. D. New York. August 5, 1899.)

BANKRUPTCY—OPPOSITION TO DISCHARGE—INSUFFICIENT SCHEDULES.

Where the bankrupt, previous to the adjudication, had acted as administratrix of her husband's estate, and had mingled property of her own with the property of such estate, it is her duty, in the bankruptcy pro-

ceedings, to present a correct and intelligible statement of her affairs, showing clearly what property her husband left, what she added thereto, and the disposition made of each class of property, and thereupon to account for the property that should inure to the benefit of her creditors. Until she does this, her discharge will be withheld.

In Bankruptcy. On application of the bankrupt for discharge.

Hoffman & Hoffman, for bankrupt.

Mr. Cohn and Friend, House & Grossman, for creditors.

THOMAS, District Judge. After her husband's death, the bankrupt, as administratrix, took possession of her husband's stock of goods, and thereafter purchased other goods. In her schedules she included as creditors the persons from whom she made the additional purchases, but did not include any part of the goods thus purchased, although she mentioned certain outstanding accounts. She sold the stock of goods to a creditor of her husband in consideration of the discharge of such creditor's debt against her husband's estate, although there were other creditors of such estate. It is urged in her behalf that these goods were solely the goods belonging to the husband's estate. No books are produced, no statement of the goods left by her husband is made, no enumeration of the items of stock sold by her is offered, and no evidence of the disposition of the goods purchased by her is forthcoming. She evidently has a mere general knowledge of the facts, as it appears she left the entire conduct of the business to her stepson. The schedules may be correct, but her oath, however honestly intended, has no probative force. She has cast the whole matter of her estate and distinguishment of the same from her husband's estate upon the bankruptcy court, and is contented to allow the officers of the court to pursue and find the truth, if they may. Such a burden does not rest upon the court or its officers. It is the duty of the bankrupt to present an intelligent and true statement of her affairs, to show clearly what goods her husband left, what she added and commingled with the same, and the disposition made of each class of property, and thereupon to account for the property that should inure to the benefit of her creditors. The court will not permit her to plead ignorance, and assert that she acted through agents, and that all detailed knowledge rests with such agents, and that the court must look to such source for information. She, at a recent time, had property. What has she done with it? If she cannot, through herself or others, make the explanation, her discharge should be withheld. It is not the duty of the court to secure order from the present confusion, and it will not attempt a task that is imposed upon the bankrupt. Proceedings for the discharge will be continued to the 16th day of October next. If meantime the bankrupt shall have presented schedules showing her actual property, and all of the same, and shall have enumerated fully and correctly her debtors and creditors, and shall have satisfactorily explained by her books and papers or other evidence what the different classes of property that have come into her possession comprised, and what disposition she has made of the same, she should be discharged; otherwise, the discharge should be denied.

In re O'CONNOR.

(District Court, E. D. New York. August 7, 1899.)

1. BANKRUPTCY—LIENS—RECEIVERSHIP.

Where a creditor brings a suit to avoid a fraudulent sale of chattels by his debtor, and procures the appointment of a receiver therein, the lien acquired thereby dates from the appointment of the receiver; but, if the action was begun more than four months before the filing of a voluntary petition in bankruptcy by the debtor, the lien will be recognized and protected in the bankruptcy proceedings according to section 67, cl. c, of the bankruptcy act, though the receiver was appointed within the four months, and did not qualify until after the institution of the proceedings in bankruptcy.

2. SAME—VOLUNTARY AND INVOLUNTARY CASES.

Bankruptcy Act 1898, § 67, cl. f, providing that "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt," applies only to involuntary proceedings against a debtor, not to proceedings on his voluntary petition.

3. SAME—LIENS.

Where proceedings supplementary to execution against a debtor are suspended by his adjudication in bankruptcy on his voluntary petition, but their continuance is afterwards permitted by the bankruptcy court, and a receiver then appointed by the state court, the creditor acquires no lien upon, or specific interest in, the property of the bankrupt; for, the entire estate being under the control of the court of bankruptcy at the time of the appointment of the receiver, no title vests in the latter which could relate back to a time when the supplementary proceedings were begun.

In Bankruptcy.

Clinton T. Roe, for Pratt & Lambert, lienors.

P. Q. Eckerson, for Goodman, lienor.

Charles A. Kipling, for trustee in bankruptcy.

James J. Conway, Goeller, Shaffer & Eisler, Story & Stratton, and Howard Sperry, for opposing creditors.

THOMAS, District Judge. On May 2d O'Connor filed a petition in bankruptcy. More than four months prior thereto Goodman began a creditor's action to avoid a fraudulent sale of chattels by O'Connor, wherein, on May 1st, was appointed a receiver, who qualified after May 2d. Did the creditor thereby acquire a lien? The inception of the creditor's action created no lien as against a subsequent levy in favor of other creditors, but the appointment of the receiver operated as an equitable levy and sequestration of the chattels for the benefit of the plaintiff in the action, and perfected the lien. *Bank v. Shuler*, 153 N. Y. 163, 172, 47 N. E. 262. The commencement of a creditor's action to reach equitable assets does create a lien thereon, but this rule does not extend to chattels subject to be taken on execution. *Brown v. Nichols*, 42 N. Y. 26. In the present case the property was subject to levy on execution. *Davenport v. Kelly*, *Id.* 193; *Kitchen v. Lowery*, 127 N. Y. 53, 27 N. E. 357. Therefore no lien attached until one day preceding the filing of the petition. May this be avoided under the bankruptcy act? This depends upon the true construction of section 67, cls. c, f. Section 67