No. 12108

Supreme Court of Illinois

Newhall.

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vs.

Buckingham.

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Heaven

Newhall v. Buckingham

1853

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1853

12108

Reference

Edward Newhall & al.
Charles Newhall
vs.
Gilbert Buckingham
Assignee of Hoyt & Hoskins

Assignment of Errors =

In the Supreme Court of the State of Illinois =
October Term A.D. 1852
Appeal from Whiteside
County = Trial of right of Property

And the said Edward Newhall & Charles K. Newhall the appellants above named come & say that in the record and proceedings aforesaid there is Error in this to wit;

1.- That the Claimants Evidence shews no title to the goods &c as to authorize him to recover them as against the appellants in a suit at law =

2. That the partnership goods were liable to be seized at law to pay the separate debts of the partners & neither Hoyt nor Hoskins individually or jointly could take them or recover them at law, from the Sheriff = nor could either of them confer a power upon an assignee which was not possessed by himself =

3. The goods were in the custody of the law, & the act = -ual possession of others & so not the subject of Sale so as to pass the title to the goods, it was an assignment of a mere chose in action & did not vest the right of action for the goods in the assignee Buckingham =

4 One partner has not the power or authority to assign the goods & effects of the partnership so as to give preferences among partnership creditors much less between the individual creditors of the other partners and even if he had such power a levy upon partnership property cannot be defeated in this way = The remedy is not at law but in Equity where an account between the partners can be taken =

5th The Court erred in finding for the Claimant

6th The Court Erred in rendering judgment against the appellants when it ought to have been rendered in their favor = Wherefore the said appellants pray that the said judgment may be reversed and that a judgment may be rendered in this Court in favor of these appellants and against said Claimants =

Higgins & Scholfield
Atty's for Appellants

[12108-J]

Filed May 27th 1852.
L. Leland Clk.
By P. K. Leland Depy.

To L. D. Crandall, Sheriff of Whiteside County.

Sir,—You are hereby Notified, that the ware, goods, & Merchandise, upon which you have levied, by Virtue of a Writ of Attachment, in your hands, in favor of Newhall & Co. against Jonathan C. Hoyt, is not the seperate property of Jonathan C. Hoyt, but that the same, when levied upon, was the property of the firm of Hoyt & Hoskins,—that the said firm of Hoyt & Hoskins has executed a deed of assignment to me, in trust, for the benefit of the Creditors of said Firm, of the said property, together with all the other effects of said Firm. I therefore notify you, that I claim the said property, so by you attached, and of my intention to prosecute the same.

G. Buckingham, Assignee
of Hoyt & Hoskins.

June 26, 1850

[12168-2]

Verdict of the Jury.

We the Jury empannelled to try the right of property in the case of Gilbert Buckingham, Assignee of Hoyt & Hosking, Claimant, against E. Newhall & Co. find the right of property in the Claimant

Albany Whiteside County, Ill. July 3d, 1850.

J. Brewer.
C. N. Wood
C. H. Slocumb.
D. C. Ridgeon.
W. W. Slocumb
Austin M. George.
Jas. H. Booth
Samuel Montgomery
Wm. G. Hewitt
S. W. Slocumb
Isaac Crosby.
Jusnian Carter.

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Gilbert Buckingham
Assignee of Hoyt & Hoskins.
Claimant,
vs.
Newhall & Co.

Trial of Right of Property,
June 26th, 1850. Received notice from G. Buckingham Claimant that he claims the property taken by me on the writ of Attachment, wherein Newhall & Co. is plaintiff and S. E. Hoyt Defendant, as assignee of Hoyt & Hoskins. (Said Attachment issued out of the Circuit Court of Doe Davies County, Illinois) and signifies his intention to prosecute the same. Whereupon the day for trial was set on July 3d, 1850, at Slocumb's Tavern, in the Town of Albany, at one o'clock, P. M. Also gave notice to Newhall on June 26th, 1850 by enclosing a copy of the notice given by the claimant. July 3d, 1850, 1 o'clock, P. M. Jury summoned. Court called, and M. D. Henry and Hugh Wallace, appeared for the Claimant and Van H. Higgins appeared for Newhall & Co. as atty. The parties being ready for trial, the following named men were called as Jurors, and sworn to try the above cause to wit:— C. H. Slocumb, W. R. Slocumb, W. G. Revett, S. W. Slocumb, D. C. Pelgar, Truman Parker, C. P. Rood, A. M. George, Jas. H. Booth, Samuel Montgomery, and Isaac Crosby. The Jury being empannelled and sworn, the following witnesses were summoned and sworn, to wit:— W. S. Barnes, Samuel Happer, Hoskins, Thomas Crew, and W. G. Wetzell, and after hearing all the evidence in the case, the said Jury retired to make up their verdict— and afterwards, on the same day, said Jury came into Court, and presented the following verdict, by their foreman, to wit: "We the Jury, empannelled to try the right of property in the case of Gilbert Buckingham, assignee of Hoyt & Hoskins, Claimant, against Newhall & Co. find the right of property in the claimant" & signed by all of the Jury. Whereupon the Defendant Newhall & Co. by their Attorney, Van H. Higgins, immediately prayed an appeal to the Circuit Court, and the Bond having been

duly executed, and approved by me, as by law, is made and provided, in such case, an appeal was granted to the Circuit Court of Whiteside County, — Whereupon the papers were duly made out, for the Circuit Court.

Sheriff's Fees.

For summoning Jury, and attending trial day	$2.00
" 30 miles travel	1.50
" Summoning four witnesses, 35 cts. each & return	1.40
" Calling & Swearing Jury 15 cts. Administering 5 oaths, 31 cts.	46
" Entering appearance of party & two Atty. 10 each, Clerk,	30
Defendant — one Atty 10 "	10
" " "	
" Receiving and entering Verdict of Jury	10
" Docketing suit 10 — making transcript 30	40
Total Sheriff's costs	$6.26.

Witnesses' Fees.

W. S. Barnes — one day	.50
Thos. Crew " "	50
Samuel Happer " "	.50
Hoskins " "	.50
W. Y. Wetzell " "	.50
	2.50
Jury Fees paid by G. Buckingham, assignee	3.00
Total amount	$11.76.

Given under my hand and Seal at Sterling July 5th, 1850.

L. D. Crandall, Sheriff
of W. C. Illinois.

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Know all men by these presents, that we, Edward Newhall and Charles Newhall, Partners under the firm of E. Newhall & Son, as principals, and Horatio Newhall and Van H. Higgins, as security, are held and firmly bound unto Gilbert Buckingham, in the sum of Seventy five dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our heirs, Executors and Administrators, jointly and severally, and firmly by these presents. Witness our hands and seals, this 3d day of July, A. D. 1850.

The Condition of the above obligation is such, that Whereas, the said E. Newhall & Son, did on the 17th day of May, A. D. 1850, levy an attachment, issued against Jonathan C. Hoyt, on certain goods & chattels, as the property of said Hoyt, and whereas, the said Buckingham, interposed a claim to said property, and whereas the said Sheriff of Whiteside County, Illinois, did, on the 3d day of July, A. D. 1850, call a jury to try the right of said Buckingham to said property, in pursuance of the Statute in such case made and provided, — and whereas the said Buckingham, on the trial of said right of property, did obtain a verdict of said Jury, finding the right of property to be in said Buckingham, — And whereas the said Edward Newhall & Son, feeling agrieved by the verdict, did on the said 3d day of July, A. D. 1850, pray an appeal to the Circuit Court of said Whiteside County, and tendered their bond with Horatio Newhall as security — Now the condition of the above obligation is such, that if the said E. Newhall & Son shall prosecute their said appeal without delay, and shall pay all costs that have accrued, or that may accrue on said appeal, if judgment be given against them in the Circuit Court, on the trial of said appeal, then the above obligation to be void, otherwise to

[13106-b]

[over]

remain in full force and effect.

Charles Newhall, Seal
Edward Newhall, Seal
Horatio Newhall, Seal
Van H. Higgins Seal

By Van H. Higgins, atty in fact.

Approved the 3d day of July, A.D. 1850 by me,
L. D. Crandall
Sheriff, W.C. Ill.

Approved by me, at my office, this 4th day of July, A.D. 1850.
R. L. Wilson, Clerk
Circuit Court, Whiteside Co

[12108-7]

Gilbert Buckingham, Claimant, } In Whiteside Circuit Court,
vs. } of the April Term, A.D. 1852.
Edward Newhall, & Charles H. } Trial of Right of Property.
Newhall, attaching Creditors. }

Appeal from before the Sheriff.

Be it remembered that when the above entitled cause came on for trial, the same, by agreement of parties, by their Counsel, was submitted for trial in the Court on the agreed Statement of facts hereinafter set forth, which said agreement of facts was and is in the words and figures following; viz: — "It is admitted that Hoyt absconded and left the county, and never returned, that after he left, Edward Newhall and Charles Newhall attached the goods of Hoyt, and also the goods of the firm of Hoyt & Hoskins, on an individual demand against Hoyt — that some days after, the Sheriff had seized said goods, and while they were in his custody, Hoskins in the name of the firm, made an assignment of the goods and chattels of the firm of Hoyt & Hoskins [which assignment is to be put in evidence, subject to the objections hereinafter named] — that the assignment was made by Hoskins alone, in the name of the firm, in the absence of Hoyt — that the goods in controversy belonged to the firm of Hoyt & Hoskins, at the time they were seized, and before from their purchase and since, — that said Newhalls sued out their attachment on notes made by Hoyt individually, and the attachment was against Hoyt alone, and not against the firm, — that all of the debts named in the schedule annexed to the assignment were made upon the purchases of Hoyt individually, and for goods which were bought for the use of the firm, and that the goods came into the business and firm of Hoyt and Hoskins, and that the same were used by them, — That the firm of Hoyt & Hoskins traded and did business under the name and style of Hoyt & Hoskins, and that the same was known to the several creditors mentioned in the schedule to said assignment annexed, at the time of making of said indebtedness in the said assignment schedule mentioned, and that the said creditors, at the time of selling the said goods knew of the existence

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of the firm of Hoyt & Hoskins, and that at the time of the sale of said goods, as aforesaid, the said several creditors took the individual notes of said Hoyt, for said goods, and that the several notes named in the assignment are the same notes so taken, that there were partnership notes executed by the firm, under and by their firm name, of Hoyt & Hoskins, to Jones, Mills & Co. for $86.[22]/[100], and to A. Young & Co. for $5.[88]/[100], and to Jones, Brothers, & Co. for $127.00 made at the time the severally bear date, and that they are now due and unpaid, — that all of the other indebtedness, ~~xxx~~ although the goods were purchased for, and came to the use of, the firm of Hoyt & Hoskins, was contracted by Hoyt, alone, for the firm, & for goods which came to the use of Hoyt & Hoskins, and that said Hoyt, on the sale of said goods, executed his individual notes for the same, as herein before stated, and that the notes in the deed of assignment and schedule named, are the same notes so taken as aforesaid, and amount to more than the value of the partnership property at the time of said attachment.

It is agreed that the assignment shall be read in evidence, subject to the defendants right to raise the objection that one partner cannot make an assignment of the partnership property to a Trustee to pay the debts of the firm, — and also the further objection that he cannot give preferences among creditors without the assent of his Co-partners, — and also, that the deed of assignment is ~~fraudulent~~ void in law, and fraudulent on its face, as a matter of law.

"This Assignment, made the third day of June Anno Domini one thousand eight hundred and fifty, between the firm of Hoyt & Hoskins, (said firm being composed of Jonathan C. Hoyt, and Thomas Hoskins,) of the County of Whiteside and State of Illinois, of the first part, and Gilbert Buckingham, of the same place, of the second part,— Whereas the said firm of Hoyt & Hoskins, are justly indebted, in sundry and diver sums of money, which they have become unable fully and promptly to pay and discharge, and the said party of the first part being desirous of making a fair and just distribution of all the property of, and belonging to said firm, among the Creditors of said firm,— Now, therefore, this assignment Witnesseth, That the said Thomas Hoskins, in the name, and in the right of the said firm, in consideration of the premises, and the sum of one dollar, to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, released, assigned, and set over, and by these presents do grant, bargain and sell, release, assign, transfer and set over, unto the said party of the second part, and to his heirs and assigns forever, all and singular the goods and chattels, merchandize, bills, bonds, notes, book accounts, claims, demands, choses in action, books of account, judgments, evidences of debt, and property of every name and nature whatever, of, to, and belonging to the said firm of Hoyt & Hoskins. To have and to hold the same, and every part and parcel thereof, to the said party of the second part, his heirs, executors, administrators, and assigns,— In trust nevertheless to and for the following uses, interests and purposes, that is to say, that the said party of the second part, shall take possession of all and singular the property and effects hereby assigned and sell and dispose of the same upon such terms and conditions as in his judgment he may think best, and most for the interest of the parties concerned, and convert the same into money. And also to collect all and singular, the said debts, due bills, bonds, notes, accounts, claims, demands, and choses in action, or so much thereof, as may prove collectable, and thereupon to execute, acknowledge, and deliver all

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necessary instruments, and receipts for the purposes aforesaid; and by and with the proceeds of such sales, and collections, the said party of the second part, shall first pay and disburse all the just and reasonable expenses, costs, charges, and commissions, of executing and carrying into effect this agreement, and by and with the residue or net proceeds and avails of such sales, and collections, the said party of the second part shall — First — pay and discharge in full the several debts, notes, and sums of money, due or to grow due, from the said party of the first part, or for which they are liable to the persons and firms hereinafter designated, and named, to wit. To the firm of Archibald Yorny & Co. of St. Louis, the sum of One thousand and eight 12/100 dollars, due and to become due and owing for goods sold and delivered, to and for the use of said firm of Hoyt & Hoskins, for a part of which sum, said J. E. Hoyt executed his two promisory notes, — one dated St. Louis, March 18, 1850, for the sum of $501.12, due 60 days after date, and one for the sum of $501.12 due 6 months after date, dated March 18, 1850, — for the balance of said sum Hoyt & Hoskins executed their note, dated Albany, May 28, 1850, due one day after date, for $5.88. — Also to the firm of Wade & Osborne, for goods sold and delivered to, and for the use of said firm of Hoyt & Hoskins, the sum of $424.96, for which sum said J. E. Hoyt executed his two promisory notes, dated St. Louis, march 19, 1850, one for $212. due Sixty days after date, — the other for $212.46 due ninety days after date. Also, to the firm of Jones, Mills & Co. for goods sold and delivered, to said firm of Hoyt and Hoskins, the sum of $86.39, for which the firm of Hoyt & Hoskins executed their note, dated Albany, February 11th 1850, — due ninety days after date, — together with all interest money, due or to grow due, thereon, — and if the said net proceeds and avails shall not be sufficient to pay and discharge the same in full, then such net proceeds and avails shall be distributed pro rata, share and share alike, among the said several firms, as above named, according to the amount of their respective claims — And secondly, by and with the residue and remainder of the net proceeds, if any there shall be, the said party of the second part

shall pay and discharge all the debts, demands, and liabilities whatsoever, now existing, whether due, or to become due, of the said firm of Hoyt and Hoskins, parties of the first part — provided such remainder shall be sufficient for that purpose, — and if insufficient, then the sum shall be applied pro rata, share and share alike, according to their respective amount. Lastly, the said party of the second part, shall disburse and pay over the surplus of the said proceeds, if any there shall be, to the respective partners, parties of the first part, their creditors or legal representatives, as law and equity may require and direct. And for the better execution of these presents, and of the several trusts hereby reposed, the said party of the first part does hereby make, nominate, and appoint the said party of the second part, and his Executors, administrators, and assigns, his true and lawful attorney, irrevocable, with full power and authority to do, transact, and perform all acts, matters and things which can or may be necessary in the premises, as fully and as completely as the said party of the first part might or could do were these presents not executed, — hereby ratifying and confirming all and every thing whatever my said attorney shall do or cause to be done in the premises. In witness whereof the party of the first part, has set their names the day and year above written

Signed and delivered in presence of
Hugh Wallace.

Hoyt & Hoskins.

"The following is a schedule of the probable amount of debts for which the firm of Hoyt & Hoskins, are liable

" 1st	To Archibald Young & Co.	$1008. 12
"	" Wade & Osborne	$ 424. 96
"	" Jones, Mills & Co	$ 86. 39
" 2d	" Jones & Brother	$ 127. 00
"	Snyder & Vanhorn	$ 20. 00
"	Manny & Weld	$ 618. 00
"	Canton Tea Company, Galena,	$ 12. 00
	Bull of Milwaukie	$ 80. 00

" The probable amount of notes, book a/c, and dues due and owing

to the said firm of Hoyt & Hoskins, that are available. On books—
about $400.00

" Notes & demands against B. F Barnett 100.00
not on books, " S. Baxter 6.00
" Ebar—about 5.00
" Grenell 2.00
" Cutler 15.00
"

Probable amount of goods now in Store room, (under cus-
tody of Sheriff, by reason of sundry writs of attachment a-
gainst Hoyt,) about $1000.00

"

Made this 3d day of June, A.D. 1850.
"Hoyt & Hoskins.

"

I hereby accept of the trust confered upon me, by virtue
of the within assignment, June 3d 1850.
G. Buckingham."

which was all of the testimony given or offered in this cause by either of the parties thereto — Whereupon, after argument, the Court found the right of property to be in the Claimant, Gilbert Buckingham, and thereupon the said Edward Newhall and Charles H Newhall, then and there moved the Court to set aside the finding, and for a new trial herein, for the reasons following to wit:— First, because the finding was contrary to law — Secondly, because the finding was contrary to the evidence, and the agreed Statement of facts, and for other reasons, which motion, after argument, was overruled by the Court, to which ruling of the Court, the said Edward Newhall and Charles H Newhall, by their counsel, then and there excepted, and prayed that this their Bill of Exceptions might be signed, sealed, and allowed, which is done in open Court, this 19th day of April, A. D. 1852. And the said Edward Newhall and Charles H Newhall, then and there prayed an appeal to the Supreme Court, which was and is granted, on condition that the said Edward Newhall and Charles H Newhall, with Van H. Higgins as their Security enter into bond in the penal sum of hundred dollars, conditioned, according to law, within sixty days from the date hereof. Signed, sealed and allowed, this 19th day of April, A. D. 1852.

Ira C. Wilkinson, Seal

Pleas before the Circuit Court of Whiteside County and State of Illinois begun and held at the Court House in the Town of Sterling in said County and State on the third Monday in the month of April in the year of our Lord one thousand Eight Hundred and fifty two (Which on the 19th day of April 1852)

Present. Ira O. Wilkinson.

Judge of the Sixth Judicial Circuit in the State of Illinois

" W.B. Stillman. District attorney for said Sixth Circuit

" R.L. Wilson. Clerk of the Circuit Court of Whiteside County

" Perry L. Jeffers. Sheriff of said County and State

Be it remembered that heretofore to wit on the 19th day of April in the year of our Lord one thousand Eight Hundred and fifty two the following proceedings were had in the following entitled cause to wit

Gilbert Buckingham Assignee of Wood & Mosher

vs

Edward Needham & Charles Needham Appeal

trading under the name and Style of

Edward Needham & Son

This day came the said plaintiff by Wallace, Henry, King & Drew his attorneys, and the said defendants by Higgins their attorney. This cause having been argued and submitted to the Court at a former term of this Court, And after mature deliberation, and being fully advised, It is ordered and adjudged by the Court that the right of property mentioned and set forth in this cause is in the plaintiff

Whereupon the said defendant by their attorney moved the Court for a new trial. Which said Motion is overruled by the Court, To which ruling the said defendants by their attorney excepts. Whereupon it is ordered and adjudged by the Court that the plaintiff have the possession of the property above mentioned And that the plaintiff have and recover of the said defendants their cost. And that he have Execution therefore

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Whereupon the said Defendant Moved the Court for an appeal to the Supreme of the State of Illinois. Which motion is granted upon their filing a bond with good Security in the penal Sum of two Hundred Dollars

And afterward Comes on the Same day. the following proceedings were had, And recorded as follows to wit

Wilbur Buckingham Assignee of Voigt & Hartwig

vs

Edward Newhall & Charles Newhall Appellees
trading under the name & Style of
Edward Newhall & Son

And now again at this time comes the said Edward Newhall & Son and filed their appeal bond which is accepted by the Claimant & by his Attorneys.
And approved by the Court as Sufficient

Appeal Bond.

Know all men by these presents, that we Edward Newhall, and Charles H Newhall, by their Attorney in fact, Van H Higgins, as Principals, and Van H. Higgins, as Security, are held and firmly bound unto Gilbert Buckingham, assignee &c in the penal sum of two hundred dollars, of lawful money, for the payment of which well and truly to be made, we hereby bind ourselves, our heirs, executors & administrators, jointly, severally, and firmly by these presents. Witness our hands and seals, the 19th day of April, A.D. 1852.

The Condition of the above obligation is such, That, Whereas the said Gilbert Buckingham, did, on the 19th day of April, A. D. 1852 in the Circuit Court in and for the County of Whiteside, and State of Illinois, recover a judgment against the above bounden Edward Newhall & Charles H Newhall, for the sum of thirty nine ——— dollars, and ninety six cents, costs, and for the recovery of the property claimed by the said Buckingham, assignee &c. from which judgment aforesaid, the said Edward Newhall and Charles H Newhall have prayed for, and obtained an appeal, to the Supreme Court of said State, Now, if the said Edward Newhall & Charles H. Newhall shall duly prosecute their said appeal, with effect, and shall moreover pay the amount of the judgment, costs, interests, and damages rendered, and to be rendered against them in case the said judgment shall be affirmed, in the said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue

Edward Newhall, Seal

Charles H Newhall, Seal

By their attorney in fact.

Van H. Higgins, Seal

Van H. Higgins Seal

Taken and entered into before me, at my office, in Sterling, this 19th day of April, A.D. 1852

R L Wilson

Clerk

State of Illinois
Whiteside County } ss

I hereby Certify that the foregoing is a true full and Complete transcript of the original papers on file in my Office in this Cause to wit The Notice to the Sheriff that the said Claimed the penalty, The Verdict of the Jury in the trial of the right of property before the Sheriff The Sheriffs transcript of the proceedings had before him. The appeal Bond of defendant to the Circuit Court of Whiteside County Illinois The Bill of Exceptions by the defendant in the Circuit Court. A transcript of all orders in said Cause entered of record at the Upon Term of the Circuit Court of Whiteside County Illinois. And also the Appeal bond of the defendant Executed in pursuance to the order of Court allowing an appeal to the Supreme Court of the State of Illinois

Witness R L Wilson Clerk of our Circuit Court and the Seal of said Court. Done at the Court House in the Town of Sterling this 11th day of May AD 1859

R L Wilson
Clerk

Copy of original papers & of record 4.50
Certificate and Seal to Same .40

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12

Edward Newhall Adl.

vs.

Gilbert Buckingham

Assignee &c

1853

Filed May 27th 1852.

L. Leland Clk.

By P. K. Leland Dep.

Refused

Supreme Court

Sitting at Ottawa

June A. D. 1852.

Edward Newhall et al.

Gilbert Buckingham apignee &c

Argument for deft in error.

In this case the defendant in error does not occupy the ground merely which the apignors occupied as against the plaintiffs in error. By the acceptance of the trust he became trustee and agent for the creditors of the partnership. Moses v. Murgatroyd 1 Johns Chy R. 119. 4 Johns Chy 136. 523, 529. Ward et al. v Lewis 4 Pick 518. 8 Pick. 113, 118. — 18 Pick 46, 50. 2 Jacq. 57. 6 Humph. 313. 4 B Munroe 296, 303. He is therefore the representative of all the rights of the creditors of the partnership in this action. 4 Conn. 543.

A voluntary apignment like this is a substitute for a commission in Bankruptcy and becomes like that of the nature of an execution for the creditors. 2 Kents Com. 532 Choses in action pass by the apignment. 1 Pet. R. 219. 5 Mason 64. 3 Leigh 14. 10 N.H. 260. 5 Shepley 327.

So that if the creditors mentioned in the apignment could by legal means claim the possession of the property in controversy; from the plaintiffs or the sheriff executing their process the apignee as their representative of such creditors could do so.

[12108-19]

In this form of action all rights of possession may be determined, and even a person having an existing lien may be a successful claimant. Grimsley v. Levering 1 Scam. 343.

11.

The levy of an execution against an individual member of a partnership upon the joint effects of the firm attaches to no part of the joint property: it merely gives to the purchaser under it a right to an account, and an interest in the surplus remaining to that partner after the adjustment of all the partnership debts. Dutton v Morrison 17 Vesey 205. Moody v. Payne 2 Johns Ch'y 548. Church v. Knox 2 Conn. 516. Brewster v. Hammet 4 Conn. 540. Barber v. Hartford Bank 9 Conn. 410. Witter v. Richards 10 Conn. 37. Commercial Bank v. Wilkins 9 Greenleaf 28. United States v. Hack et al. 8 Peters 273. Pierce v. Jackson 6 Mass. 242.

All the authorities concur in this. and this is the only valuable thing which is transferred by such levy and sale on execution.

The sheriff can only sell the interest of the partner in execution, and neither

~~Smith v Ramsey 1 Gilm 373~~
In the matter of Smith 16 Ark 102
Nickols vs Mumford 4 J. Ch R 525
Rodriguez vs Hefferman 5 J. Ch R 428
Taylor vs Fields 4 Vesey 396 & cases there cited

the sheriff or purchaser would have any right to the possession of the goods Matter of Smith 16 Johns 106. and note. Crane v. French & Wilkins 1 Wend. 311. Dunham v. Murdock 2 Wend. 554. Mumford v. McKay 8. Wend. 443. The sheriff cannot sell the specific property upon such execution Gibson v. Stevens 8 N. H. 356 Morrison v. Blodget et al. 4. Dev. 367 [2 U.S. Sup. Dig 492 § 384. And this method of proceeding has entirely the better reason to sustain it.

Jaspan v Blaisdell 8 N. H. 172

But however this may be, as the sole object and effect of such levy and sale is to compel an account in equity, and give to the purchaser the residue remaining after the payment of the partnership debts; where it is admitted there is no such residue, there is nothing which can be reached by the levy, and the levy or sale neither takes or transfers anything valuable which can be set up in an action of this description. Commercial Bank v. Wilkins 9 Greenleaf. 9 Greenleaf 28. 8 Peters 273.

It is admitted in the agreement that the debts mentioned in the assignment exceed the partnership effects. The plaintiffs then cannot possibly have any interest in the property levied on under the attachment The levy is on nothing. It is a nullity.

[12108-18]

But it is objected that the credit was not given to the partnership for the debts mentioned in the article of assignment. It is true that the agreement shows that the purchases were made by one partner, but it was for the partnership. Now the question in such cases always is to whom was the credit given?

As the goods were purchased for the benefit of the firm the presumption is that credit was given to the firm: and the acceptance of the note of one member of the firm does not extinguish the debt. Waydell v Luer 5 Hill 448. Cole v. Sackett 1 Hill 516. Semb. Hughes v. Wheeler 8 Conn. 77. Deonau v. Williams 1 Scam. 154 For if the taking of the note of the firm would not extinguish the debt much less would the note of one member of the firm.

We assume then that the creditors mentioned in the article of assignment were creditors of the firm: That their credits exceeded the value of the partnership effects: That the assignee was their lawful representative in claiming the property levied on: That by the admission there was nothing upon which levy could be made as against those creditors, and that therefore the assignee was entitled to the possession of the goods claimed.

III An acting partner may make a valid assignment of the partnership property for the benefit of the creditors of the firm. Egbert v. Wood 3 Paige Ch. 517. 1 Brockenbrough 456. Robinson v. Crowder 4 M. & Cord 2 R. 519. Harrison v. Sterry 2 Pet Cond. 260. Mills v. Barber 4 Day 428. Hodges v. Harris 6 Pick. 360. Deckard v. Case 5 Watts 22. Lamb v. Durant 12 Mass. 54

It is objected that a partner cannot make a valid assignment of the partnership property preferring creditors; but, admitting this: such assignment is not absolutely void but only voidable. and could not be avoided on the motion of any one except some one whose interest would be affected by such assignment. Now in this case it is shown that there was no surplus of the partnership effects after the payment of the partnership debts: therefore the interest of the plaintiffs is in nowise affected by the assignment and they cannot object to its validity

Nostrand v. Atwood 19 Pick 281.

The mere insolvency of a partnership is sufficient to defeat an attachment made by a creditor of one of the firm

Commercial Bank v. Wilkins 9 Greenleaf 28.

Vide 8 Peters 275.

Vide. Conkling v. Carson 11 Ills. R. 503.

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IV

Let it be considered then that the apignment was valid. The apignee then becomes entitled to the popepsion of the propesty apigned. If he has a legal right to take popepsion it is the same in principle as if a subsequent attachment or execution were ipsued in favor of the creditors of the firm which would take the property from the prior attachment of the creditors of a member of the firm.

11 Mass 249. 1 Wend. 311. 2 Wend 554. Allen v. Wells 22 Pick 450. 6 Mass. 242. Tappan v. Blaisdell 5 N. H. 189.

V.

The levy of an attachment does not have the same effect as the levy of an execution when made on the separate share of an individual member in the partnership effects. The attachment holds the property subject to legal proceedings merely – subject to a judgment thereafter to be obtained perhaps: the execution takes them in satisfaction of a judgment already obtained. The creditors of the firm have a right in the nature of a lien upon the partnership goods – If the firm be insolvent the attachment would be postponing the

creditors of the firm who have a prior right.

But if there be a surplus in favor of the partner against whom the attachment is taken, his creditors have ample means provided to secure themselves by garnishee process.

Even by courts of law it is admitted that the purchaser at a sale of one partner's share under execution, only acquires a right to the surplus remaining after the adjustment of the partnership debts; and the only reason given for permitting the property to be actually taken is that a court of law cannot adjust the accounts between the partners and their creditors: Now this reason does not apply to proceedings under our attachment law - since the accounts can be adjusted, and that surplus reached by means of the garnishee process

Newhall et al.

vs

Buckingham, appe

Brief for defts

Manning & Conn