Penyan v. Berry.

Garnishment: *Order to pay garnished debt; effect of: Action against garnishee.*

An order to pay over money made upon a garnishee in an attachment proceeding after his failure to appear therein, is not a judgment against him, and does not determine his liability to pay. The only effect of such order is to confer upon the attaching creditor the same right to collect whatever the garnishee owes the attached debtor that the latter himself had against the garnishee, and in an action brought by the plaintiff in the attachment to recover the garnished debt, the garnishee is not precluded from any defense he might have made before the garnishment.

APPEAL from *Madison* Circuit Court.

Henry Glitsch, Special Judge.

This is a suit in equity against a garnishee to recover the amount of a debt which he was ordered to pay to the plaintiff in an attachment proceeding, and to obtain a decree for the sale of certain lands mortgaged to secure the garnished debt. The complaint alleges that the plaintiff's intestate brought an action in the Benton Circuit Court against S. D. McReynolds, and sued out therein a writ of attachment, under which a debt which the defendant Berry owed to McReynolds, was attached. That the plaintiff afterwards recovered judgment against McReynolds in said action, for a debt amounting to $1105, and that the court rendering such judgment, having found that defendant, Berry, was indebted to McReynolds in the sum of $2,029, ordered said Berry to pay over to the plaintiff therefrom the sum due to the latter on said judgment. The complaint further alleges that said indebtedness of the defendant, Berry, was secured by a mortgage on certain real estate. Prayer for judgment against Berry for the amount of the plaintiff's debt, and that the mortgaged land be sold to satisfy the same. Berry's answer states that he paid in land and goods the whole amount due on the mortgage, and that McReynolds agreed to satisfy it. This alleged satisfaction of the garnished debt, it appears from defendant's tes-

timony, was made before plaintiff's suit against McReynolds was commenced. The finding of the Chancellor was in favor of the defendant, and the plaintiff appealed.

E. S. McDaniel and *Crump & Watkins,* for appellant.

1. The finding of the Chancellor is against the evidence, and should be reversed.

2. The court proceeded in the manner provided in garnishment cases. *Mansf. Dig., sec.* 343; 29 *Ark.,* 470; 45 *Ark.,* 271; 48 *Ark.,* 349; 3 *S. W. Rep.,* 439; *Wade on Att., secs.* 377-389, *Vol.* 2; and Berry is estopped to deny his indebtedness until the judgment against him is set aside. 2 *Wade Att., sec.* 522; 1 *Flor.,* 233; 46 *Am. Dec.,* 339 *and note;* 29 *Ark.,* 470.

C. R. Buckner and *J. D. Walker,* for appellee.

1. The evidence supports the finding of the court.

2. The order of the Benton Circuit Court in the garnishment suit does not preclude Berry from setting up any defense he might or may have had to the foreclosure suit. It was not a judgment against the garnishee, and does not determine his liability. 48 *Ark.,* 349; 94 *U. S., the A. & P. R. R. v. Hopkins;* 13 *Kan.,* 32; 6 *id.,* 165; *Wade Att.,* 348-352; *secs.* 220, 247-8, *Code*; 29 *Ark.,* 470.

Garnishment: Effect of order to pay, etc.

PER CURIAM. An order to pay money made by the court upon a garnishee after his failure to appear in the attachment proceedings wherein he was garnished, is not a judgment against the garnishee, and does not determine his liability to pay. *Giles v. Hicks,* 45 *Ark.,* 271; *Ry. v. Richter,* 48 *ib.,* 349. The garnishment proceeding is not instituted to settle the question of indebtedness between the attached debtor and third persons (*Moore v. Kelly,* 47 *Ark.,* 219), and the only effect of the court's order upon the garnishee is to confer upon the attaching creditor of his creditor, the same right to collect whatever he may owe his attached creditor, that the latter had against him, *i. e.,* the garnishee. *Giles v. Hicks, sup.* When suit is instituted by the attaching creditor to recover the gar-

nished debt, the order made in the attachment proceedings does not preclude the garnishee from setting up any defense he might have made before the garnishment.

The chancellor heard the witness orally, and had opportunities of judging of their credibility that we have not; and his finding of fact, if opposed to the preponderance of evidence at all, is not so grossly opposed to it, as to warrant our interference.

Affirmed.