

GETTINGS v. BURCH's Administratrix. (a)

Effect of answer.

It is error in the orphans' court for the county of Washington, in the district of Columbia, to decide a cause against the answer of a defendant, if the answer had not been denied by a replication; and if there be no evidence in the record contradicting that answer.

THIS was an appeal from the sentence of the Circuit Court for the district of Columbia, affirming that of the Orphans' Court for the county of Washington.

On the 13th of February 1813, the appellee, Jane Burch, filed in the orphans' court, a petition or libel, setting forth, that by an order of that court, on the 11th of June 1805, the property of the deceased, in her hands, was delivered to the appellant, who had become one of her sureties in the administration-bond, in the year 1803, and who obtained an order of that court to sell the same. That he had made no return of sales, nor rendered any account of his proceedings, but still had the property in his possession, consisting of a negro woman and her four children; and praying that the property might be re-delivered to her, she having been appointed guardian *373] of the infant children of the deceased, and being *ready to give good security to idemnify the appellant against his responsibility on her administration-bond, and to pay him any moneys he might have paid on her account, as administratrix.

A citation having been issued, the appellant appeared and filed his answer, in which he said, that in pursuance of the order of the court, he duly sold the property, and was ready to account for the proceeds.

It did not appear by the record, that any formal replication in writing was filed to this answer; and that circumstance seemed to have passed unnoticed in the courts below; and the cause was tried, without any objection having been made on that ground.

Upon the trial of the cause in the orphans' court, the judge ordered and decreed, that the appellant should deliver up the property to the appellee, upon her paying him certain sums of money which he had paid for her, as administratrix. The record did not show what evidence was before the orphans' court respecting the sale of the property by Gettings. Upon the appeal to the circuit court, the sentence of the orphans' court was affirmed.

The case was argued by *Jones*, for the appellant, and by *F. S. Key*, for the appellee, in the absence of the reporter.

February 23d, 1815. (Absent, Todd, J.) MARSHALL, Ch. J., ordered the following decree to be enrolled:—This cause came on to be heard, on the transcript of the record of the proceedings of the orphans' court for the county of Washington, and of the circuit court for the said county, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the decree of the orphans' court for the county of Washington, ordering the said Kenzy Gettings to deliver to the said Jane Burch, as administratrix of Jesse Burch, deceased, the slaves in the said decree mentioned, *when the petitioner had not, by replication, denied the *374] answer of the defendant, in which he stated a sale of the said slaves,

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in pursuance of an order of the said orphans' court, and without receiving any evidence that the said slaves were not sold, or that they remain still in possession of the said defendant, is erroneous, and that the decree of the circuit court, affirming the same, is also erroneous; and that the said decree of affirmance ought to be reversed and annulled, and the cause remanded to the said circuit court, with directions to reverse the said decree of the said orphans' court, and to remand the cause to the said court, that further proceedings may be had therein, according to law. All which is ordered and decreed accordingly.

UNITED STATES v. BRYAN and WOODCOCK, Garnishees of HENDRICKSON. (a)

Priority of the United States.

The 5th section of the act of the 3d of March 1797, giving a priority of payment to the United States out of the effects of their debtors, did not apply to a debt due before the passing of that act, although the balance was not adjusted at the treasury, until after the act was passed.

ERROR to the Circuit Court for the district of Delaware. This was an attachment of the effects of Hendrickson, a bankrupt, in the hands of his assignees, Bryan and Woodcock. Hendrickson was surety for George Bush, late collector of the customs, at Wilmington, in an official bond, dated in 1791. Bush died on the 2d of February 1797. By an adjustment of his accounts at the treasury, in 1801, it appeared, that the balance against him was \$3453.06.

In the court below, it was agreed, that the case should depend on the question, "Whether, under the 5th section of the act of congress of March the 3d, 1797, the United States are entitled to satisfaction of their demand *out of the effects of the bankrupt Hendrickson, in the hands of [375 the garnishees, as assignees of the bankrupt, prior to the claims, or any part of them, of other creditors of the said bankrupt being satisfied?" The judgment in the court below was against the United States, and they brought their writ of error.

Wells, for the defendants in error.—In respect to the priority supposed to be established by this act, if it be considered as applying to this case, it will be a priority set up, if not by an "*ex post facto* law," by a retrospective law.

Two questions here present themselves for consideration: 1. Was congress competent to enact such a retrospective law? 2. Has such a law been enacted? is the act of the 3d of March 1797, retrospective?

I. Was congress competent to enact such a retrospective law? It has never yet been contended, that these priorities rest, for support, upon any ancient and royal ground of prerogative. Our constitution is a government of definite, delegated authority: and the powers not given, belong to the people, not only by clear and unavoidable inference, but by positive and express reservation. No attempt has yet been made in any of the courts of the United States, to set up this claim, upon the ground of prerogative. Congress have considered it as not resting upon that ground; or they would have deemed it unnecessary to make statutory provisions upon the subject.