
 Peck et al. v. Jenness et al.

*612] *PHILIP PECK AND WILLIAM BELLOWES, COPARTNERS, TRADING UNDER THE FIRM OF PHILIP PECK AND COMPANY, PLAINTIFFS IN ERROR, v. JOHN S. JENNESS, JOHN GAGE, AND JOHN E. LYON, TRADING UNDER THE NAME AND FIRM OF JENNESS, GAGE, AND COMPANY, DEFENDANTS IN ERROR.

The proviso of the second section of the bankrupt act passed on the 19th of August, 1841, preserves all liens which may be valid by the laws of the States respectively.¹

In some of the States, attachments are issued on mesne process, by which the property seized is held to await the result of the suit. This constitutes a lien, which is saved by the proviso in the bankrupt act.

The various kinds of liens explained.

Therefore, where an attachment was issued and the defendants afterwards applied for the benefit of the bankrupt act, a plea of bankruptcy was not sufficient to prevent a judgment from being rendered condemning the property under attachment.²

The fourth section of the statute, if it stood alone, would make a plea of bankruptcy a good plea in bar in discharge of all debts; but if the whole statute be construed together, this is not the result.

A rejoinder, setting forth that the District Court of the United States had decided that the attachment was not a valid lien upon the property, was not a good rejoinder.

The District Court could not oust the State court of its jurisdiction, which had already attached.³

THIS case was brought up from the Superior Court of Judicature for the State of New Hampshire, by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

Peck and Bellows were residents of the town of Walpole, in the county of Cheshire and State of New Hampshire. Jenness, Gage, and Company resided in Boston.

The facts in the case are sufficiently set forth in the opinion of the court.

It was argued by *Mr. Goodrich*, on behalf of the defendants in error.

C. B. Goodrich, for defendants in error

In October, 1842, the plaintiffs below sued out a process of attachment, upon which estate of the defendants below, real and personal, was attached. This process issues without the

¹ CITED. *Matter of Straus & Co.*, 61 How. (N. Y.) Pr., 248; *Matter of Allen*, 24 Hun (N. Y.), 412.

² APPLIED. *Goodsell v. Benson*, 13 R. I., 254. CITED. *Gibson v. Warden*, 14 Wall., 248; *Gilbert v. Lynch*, 17 Blatchf., 405.

³ CITED. *Riggs v. Johnson County*, 6 Wall., 195; *Evans v. Pack*, 2 Flipp., 274; *Hay v. Railroad Co.*, 4 Hughes, 352; *Brown v. Newman*, 66 Ala., 277; *Anderson v. Anderson*, 65 Ga., 523. See also *Carroll v. Carroll*, 16 How., 287.

 Peck et al. v. Jenness et al.

sanction of any judicial officer. It issues at the will of any one who assumes to be a creditor of the party against whom it issues. It is a proceeding *in personam* and *in rem*,—is available as the one or the other, as the party may elect.

The question for adjudication is whether the original plaintiffs can avail themselves of this process as a proceeding *in rem*. Howland, who is the several assignee of each of the original defendants, is in no proper sense a party to the record. He appears in the names of Peck and Bellows, and relies upon their rights. 5 Stat. at L., 443, ch. 9, § 3.

*Statutes operate upon property, contracts, or persons. The statutes of the United States and those of [613 a State may operate upon the same property, the same contracts, the same persons. Their action is distinct in time, or in purpose, or both. The operation of the two jurisdictions, each within prescribed limits, is independent.

Courts of equity cannot, in this country, in all things, exercise the same power, to the same extent, as do courts of equity in England. Courts of the United States and those of the States have a different origin; their jurisdictions are for different purposes. The one court will exercise its control over the citizen, so as not to impair his ability to yield obedience to the other, when and where such obedience is due. The jurisdiction of the courts of the United States and of the several States can never rightfully come in collision; where the jurisdiction is concurrent, the one which first attaches will retain it. There are only two modes in which a suit rightfully instituted in a State court can be proceeded in, or controlled by, the courts of the United States; the one is by transfer, the other under the twenty-fifth section of the Judiciary Act. The courts of the United States are invested with the exclusive power of construction of the laws and treaties of the United States; courts of the several States construe the laws thereof; the construction of each, within its appropriate sphere, is obligatory upon the other.

When a statute of the United States adopts or engrafts upon itself a statute or law of one of the States, *quoad* the law adopted, the construction of such law, at the time of its adoption, by the highest judicial tribunal of the State whose law is adopted is also adopted. If this be not so, the same law, acting within the same territory and upon the same person, may mean one thing in one court-room, something else in another. A State law adopted by the laws of the United States does not cease to be a State law. The jurisdiction of the District Court of the United States, sitting in bankruptcy, over property, is coextensive with the effect produced by the

Peck et al. v. Jenness et al.

decree of bankruptcy; which is to pass the property of the bankrupt, *cum onere*.

The judgment of the court below should be affirmed, and I submit,—

I. That the District Court of the United States for the District of New Hampshire acquired no jurisdiction of the several original petitions of Philip Peck and of William Bel- lows to be declared bankrupt, and its proceedings upon said several petitions are void. This is so, because the pleas do not aver or show that the petitions were verified by oath, *614] without which oath and verification the petitions were nullities; because the pleas do not aver that the peti- tioners represented to said District Court that they owed debts not created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or while act- ing in any other judiciary character; because the pleas do not aver or exhibit the notice which was ordered, or which was published, of the time when the said several original applica- tions to be declared bankrupt would be considered. 5 Laws U. S., 440, ch. 7, § 1; *United States v. Marvin*, 3 How., 620; *Elliott v. Piersol*, 1 Pet., 338; *Ex parte Bollman*, 4 Cranch, 93; *Sharp v. Spier*, 4 Hill (N. Y.), 76; *Sharp v. Johnson*, Id., 92; *Bank of Utica v. Rood*, Id., 535; 2 Christian's Bank. Law, 20, 21, 22; Cooper on Bank. Sta., 165; *Buckland v. Newsome*, 1 Taunt., 477; *Sackett v. Andros*, 5 Hill (N. Y.), 330; *Steph- ens v. Ely*, 6 Id., 608; *Brereton v. Hull*, 1 Denio (N. Y.), 75; *Varnum v. Wheeler*, Id., 331; *Maples v. Burnside*, Id., 332; *Thatcher v. Powell*, 6 Wheat., 119; *Wilcox v. Jackson*, 13 Pet., 511, 516, 517; *Walden v. Craig's Heirs*, 14 Pet., 147; *Hickey v. Stewart*, 3 How., 762; *Wheeler v. Townsend*, 3 Wend. (N. Y.), 247; *Gordon v. Wilkinson*, 8 T. R., 507; 1 Chitty on Plead., 223; Owen on Bank. App., 25; Archbold on Bank. App., 9, and 97; *Wyman v. Mitchell*, 1 Cow. (N. Y.), 316; *Frary v. Dakin*, 7 Johns. (N. Y.), 75; *Ex parte Balch*, 3 McLean, 221; *United States v. Clark*, 8 Pet., 444, 445; *Garland v. Davis*, 4 How., 131.

II. The several rejoinders of the original defendants, and the matters therein set up, amount in law to a departure from their several pleas. 1 Chitty on Plead., 648.

III. The statute of the United States, in relation to bank- ruptcies, passed Aug. 19, 1841, as to all matters of liens and securities adopts the laws of the States respectively, and exempts from the operation of the decree of bankruptcy all property which, at the time of the decree, might be charged with any duty, lien, or security valid by the law of the State in which the duty, lien, or security might arise.

This position is sustained by the language of the act, and is in consonance with the uniform policy of the United States, which has been to adopt the laws, usages, and modes of proceeding of the several States so far as practicable. 1 Laws, 92, 1789, ch. 20, § 34; 1 Laws, 93, 1789, ch. 21, § 2; 1 Laws, 276, 1792, ch. 36, § 2; 4 Laws, 278, 1828, ch. 68, § 1; 4 Laws, 281, ch. 68, § 2; 1 Laws, 79, ch. 20, § 12; 2 Laws, 123, ch. 32, § 3; 1 Laws, 106, ch. 5; 5 Laws, 393, ch. 43, § 4; 5 Laws, 394, ch. 47, § 1; 5 Laws, 321, ch. 35; 5 Laws, 410, ch. 2, § 1.

An attachment on mesne process was known to the laws of *the United States, as a lien and security, and recognized by its judiciary, prior to the bankrupt statute. 1 [615 Laws, 602, ch. 75, § 16; 3 Laws, 33, ch. 16, § 28; 3 Laws, 83, ch. 56, § 6; 1 Laws, 594, ch. 71, § 15; *United States v. Graves*, 2 Brock., 381; *Tyrell's Heirs v. Rountree*, 1 McLean, 95; s. c., 7 Pet., 464; *Beaston v. Farmers' Bank of Delaware*, 12 Pet., 102; *Wallace v. McConnell*, 13 Pet., 151.

I now recur to the position, that the bankrupt statute adopts liens which are so by the laws of the several States. Its correctness is evident from the proviso in the second section of the act, and from the fact that the act professes to pass only such property as the bankrupt might convey; the act gives him no new right of property, or power over it. *Ex parte Christy*, 3 How., 316, fully sustains the principle, in which the court say, "There is no doubt that the liens, mortgages, and other securities within the purview of this proviso, so far as they are valid by the State laws, are not to be annulled, destroyed, or impaired under the proceedings in bankruptcy, but they are to be held of equal obligation and validity in the courts of the United States as they would be in the State court." It is not necessary to ascertain what constitutes a lien at common law, in equity or admiralty, or in the civil law. The lien protected is such a one as is known to the law of the State in which the question arises. *Savage v. Best*, 3 How., 119; *Norton v. Boyd*, 3 How., 436. How will this court ascertain what constitutes a lien by the laws of New Hampshire? By a resort to the adjudications of its highest judicial tribunal; this course is in conformity with general principles and with the course of this court. *Green v. Neal*, 6 Pet., 295; *Livingston v. Moore*, 7 Pet., 542; *Jackson v. Chew*, 12 Wheat., 153; *Shelby v. Guy*, 11 Wheat., 361.

IV. An attachment on mesne process, on the 19th of August, 1841, and on the 10th of October, 1842, was a

lien or security valid by the laws of the State of New Hampshire.

In support of this, I refer to the laws of New Hampshire, edition of 1830, pp. 58, 59, 101, 105, 106; to *Kittridge v. Warren* and *Kittridge v. Emerson*, in manuscript, not yet reported. These cases, and the authorities cited in them, exhibit the law of New Hampshire as it has been recognized from its early history. The principle is sustained by the courts of other States. *Kilbourn v. Lyman*, 6 Metc. (Mass.), 304; *Hubbard v. Hamilton Bank*, 7 Id., 342; *Am. Ex. Bank v. Morris Canal Co.*, 6 Hill (N. Y.), 367; *Storm v. Waddell*, 2 Sandf. (N. Y.) Ch., 494; *Davidson v. Clayland*, 1 Harr. & J. (Md.), 546. I refer, also, to an opinion of a distinguished jurist, Hon. Jeremiah Mason, which sustains the views submitted.

*In opposition to the two last positions, *Ex parte* *616] *Foster*, 2 Story, 131, is relied upon. I submit that the authorities relied upon in this case do not support the judgment pronounced. The cases mainly relied upon in *Ex parte Foster* are *Atlas Bank v. Nahant Bank*, 23 Pick., (Mass.), 488; *Conard v. Atlantic Ins. Co.*, 1 Pet., 386, 441, 443; *Giles v. Grover*, 6 Bligh, 279. An examination of them will show that they sustain, so far as applicable, the views which I have presented; the case of *Giles v. Grover* proceeded entirely upon the ground of prerogative, and it was so regarded in a subsequent case. *Godson v. Sanctuary*, 1 Nev. & M., 52.

The case *Ex parte Foster* is not sustained by the reasons; our answer to them is complete. A statute lien is exactly what the statute makes it, and it derives no aid from the analogies of other liens. Several of the adjudications of this court, to which I have referred, are in opposition to the doctrines of *Ex parte Foster*.

V. Assuming that the bankrupt statute adopts the laws of the States respectively as to liens and securities, and that an attachment of mesne process, as recognized by the laws of New Hampshire, is regarded by such law as a valid lien or security, it results, *ex necessitate*, that a discharge of the bankrupt does not and cannot defeat a lien or security rightfully created and existing prior to any act of bankruptcy.

Assuming the third and fourth propositions as sound, the one now taken is a necessary deduction from them. It is sustained by the express terms of the proviso. It is so independent of the proviso. The decree of bankruptcy passes the property, and its effect cannot be enlarged or diminished by the discharge, or by a denial of the discharge, to the bankrupt.

An attachment is of double aspect; it is a proceeding *in personam* and *in rem*; so far as it is *in personam*, the discharge is a protection; so far as it is *in rem*, the discharge cannot avail to destroy a right which the act protects. It is clearly competent for the court to render a judgment *in rem*, and thus uphold every part of the act. *Wallace v. Blanchard*, 3 N. H., 395; *Chickering v. Greenleaf*, 6 N. H., 51; *Buxton v. Marden*, 1 T. R., 80; *Steward v. Dunn*, 11 Mees. & W., 63; *Newton v. Scott*, 4 Id., 434; s. c., 10 Id., 471. Whether the court of New Hampshire has power to render a conditional judgment where the law and justice require such judgment is a matter exclusively cognizable by that court.

VI. The order of the District Court exhibited in the rejoinders is not an authority, within the meaning of the twenty-fifth section of the Judiciary Act of 1789; and if it be such *authority, neither Peck nor Bellows claims title under [*617 it; for which reasons, the decision of the State court upon the effect of such order cannot be reëxamined in this court.

A judgment of a court of the United States must be enforced by itself. If the party relies upon it in a State court, he must be content with such effect as the State court gives to it; otherwise, causes will come here indirectly, which cannot, under the laws of the United States, come here directly. *Osborn v. United States*, 6 Wheat., 738; *Montgomery v. Hernandez*, 12 Wheat., 129; *Williams v. Norris*, 12 Wheat., 117; *Crowell v. Randall*, 10 Pet., 368; *Mackay v. Dillon*, 4 How., 447; *Owings v. Norwood*, 5 Cranch, 334; *Hickie v. Starke*, 1 Pet., 98.

VII. The District Court had no jurisdiction to make the order which it set up in the several rejoinders of the defendants below. It is an attempt by the District Court, contrary to the provisions of the twenty-fifth section of the Judiciary Act, to exercise appellate jurisdiction over the State court. The property at the time the order was made was *in custodia legis*. *Ashton v. Heron*, 2 Myl. & K., 390; 2 Story Eq., § 891. *Ex parte Christy* admits that the District Court cannot reach the State courts; if it can reach their offices, the protection is of no value. *Ship Robert Fulton*, 1 Paine, 620; *Hogan v. Lucas*, 10 Pet., 403; *Brown v. Clark*, 4 How., 4; *Knox v. Smith*, 4 How., 316; *Harris v. Dennie*, 4 Pet., 294; *Ex parte Dorr*, 3 How., 103; *Ex parte Bellows and Peck*, 2 Story, 443; *Slocum v. Mayberry*, 2 Wheat., 1.

I have assumed, so far, that all the doctrines of *Ex parte Christy* are to be sustained by this court. I submit, however, "that a suit rightfully instituted in a State court, before the

 Peck et al. v. Jenness et al.

institution of proceedings in a court of the United States, cannot be arrested by injunction from any court of the United States." If this be not so, our complex system of government cannot be upheld. 1 Laws, 334, 335, ch. 22, § 5; *Annis v. Smith*, 16 Pet., 313. This proposition is in harmony with the analogy which may be drawn from the English law of bankruptcy. *Ex parte Pease*, 19 Ves. 46; *Ex parte Heath*, Mon. & Bligh, 171; *Ex parte Bocherley*, 2 Glyn & J., 369; *Ex parte Tindal*, Buck, 305.

VIII. The order of the District Court can have no effect upon the rights of the parties before this court. The defendants in error were not parties to the proceeding before the District Court. The order is, *in personam*, against the sheriff and his deputy, and does not reach, or in any manner fasten upon, the property. *Ramsey v. Eaton*, 10 Mees. & W., 22; *Bellows and Peck*, 3 Story, 428; *Marshall v. Beverley*, 5 Wheat., *313; *Conn v. Penn*, 5 Wheat., 424; *Russell v. Clark*, *618] 7 Cranch, 69; *Aspden v. Nixon*, 4 How., 497, 498; *Hollingsworth v. Barber*, 4 Pet., 475.

IX. The several petitions of Peck and of Bellows to be declared bankrupt do not aver the insolvency or inability of Philip Peck & Co., as a firm, to pay its debts; and the several decrees of bankruptcy do not subject the joint or partnership property to the action of the bankruptcies. The fourteenth section of the bankrupt statutes especially provides for the case of partnerships. *Taylor v. Feilds*, 4 Ves., 396; *Ex parte Ruffin*, 6 Ves., 126; *Young v. Keighly*, 15 Ves., 557; *Dutton v. Morrison*, 1 Rose, 213; *Ex parte Farlow*, 1 Rose, 421; *Shriver v. Lynn*, 2 How., 43.

Mr. Justice GRIER delivered the opinion of the court.

The defendants in error, Jenness, Gage, & Co., instituted this suit against Philip Peck and William Bellows, in the Court of Common Pleas of Cheshire county, New Hampshire, demanding the sum of \$2,000, for goods sold and delivered. The action was served according to the practice of that State, on the 10th of October, 1842, by the attachment of the goods, chattels, and lands of the defendants. The cause was continued till April term, 1844, when Aaron P. Howland, assignee in bankruptcy of each of the defendants, was, on motion, admitted by the court to come in and defend in their names. He pleaded severally their application to the District Court of the United States, at Portsmouth, on the 26th of November, 1842, for the benefit of the bankrupt law; on which they were decreed bankrupts, on the 28th day of December, 1842. That Howland was appointed assignee, and that defendants

severally received a certificate of discharge on the 21st of June, 1843.

To these pleas the plaintiffs below replied, that, before the filing of said petitions by the defendants, to wit, on the 8th of October, 1842, the plaintiffs in good faith sued and prosecuted out of the Court of Common Pleas their writ of attachment against the defendants for a just debt; by virtue of which the sheriff attached and took into his custody and possession, as security for such judgment as the plaintiffs in their said suit might obtain, certain goods and chattels on a schedule annexed, and now retains the custody thereof; and therefore pray judgment to be levied of the same.

To this replication the defendants rejoined, that Howland, the assignee, on the 25th of July, 1843, presented to the District Court of the United States a petition, setting forth the plaintiffs' attachment of the goods, and averring that such *attachment was not a valid lien on the said goods, [*619 and that therefore the sheriff had no right to detain them; and prayed the court to order and decree that the sheriff should deliver the goods to the assignee, or account for their value: and that the court, after notice to the parties and hearing, had decreed accordingly.

To these rejoinders the plaintiffs demurred; and the Court of Common Pleas entered their judgment, as follows:—"That the plaintiffs recover against the said Philip Peck and William Bellows \$1818.87, damages and costs of suit; which sums are to be levied only of the goods and chattels and estate of the defendants attached upon the plaintiffs' writ aforesaid, and described in the plaintiffs' said replications, and not otherwise."

This judgment of the Court of Common Pleas was removed by writ of error to the Superior Court of Judicature of the State of New Hampshire, at the instance of the defendants; and, on hearing the judgment of the court below, was affirmed.

The defendants, now plaintiffs in error, then prosecuted their writ of error to this court, under the twenty-fifth section of the Judiciary Act of 1789. As the record shows that the highest court of judicature of the State of New Hampshire has decided against a title claimed under a statute of the United States, it is clearly a proper case for the revision of this court. Various questions have been made on the argument of this case, as to the regularity of the bankrupt proceedings, and the validity of the certificates of discharge set forth in the pleas of the defendants below. But we do not think it necessary to notice them; and shall

therefore assume that the bankrupt proceedings are regular, and properly set forth in the pleas.

I. The first question that will present itself for our consideration will be, whether the replication of the plaintiffs below sets forth matter in avoidance of the plea which will entitle them to the judgment prayed for, and afterwards rendered by the court. In order to test its sufficiency, we must first inquire, whether an attachment of property under the process peculiar to New Hampshire and some other States creates a lien or security on the property attached, within the true meaning and intention of the proviso of the second section of the bankrupt act.

The words of this proviso are as follows:—"And provided, also, that nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, or any liens, mortgages, or other securities on *620] property, real or *personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act."

As it is not alleged that the attachment in this case is subject to any imputation of inconsistency with the provisions of the second and fifth sections of the act, it will not be necessary to give them further attention. Taking the words of the proviso, disconnected with this exception, they are of the most general and expansive character; they are equivalent to a saving of all liens or securities, &c., from any construction of the act that shall in any wise annul, destroy, or impair them; and, furthermore, to test their validity, we are referred to the laws of the States respectively.

At common law there can be no lien without possession. It is there defined, a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied. (*Hammond v. Barclay*, 2 East, 235.) In maritime law, liens exist independently of possession, either actual or constructive. In courts of equity, the term *lien* is used as synonymous with a charge or encumbrance upon a thing, where there is neither *jus in re*, nor *ad rem*, nor possession of the thing. Hence a judgment which, by virtue of the statute of Westminster 2d, (commonly called the Statute of Elegit,) is a charge upon the lands of the debtor, is called in courts of equity in England, and in the courts of law of many of these States, a *lien*, and executions which bind the personal property of the debtor, after their delivery to the sheriff, are termed *liens*, both before and after the property is seized and taken into the custody of

the law by its officer. In the case of *Waller v. Best*, 3 How., 111, this court decided that in Kentucky the creditor obtains a lien upon the property of his debtor by the delivery of a *fi. fa.* to the sheriff, and this lien is as absolute before the levy as after; and that a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor, committed before the levy is made, but after the execution is in the hands of the sheriff; and "it is unnecessary," say the court, "to remark upon the cases which have been decided in other States, or in England, because the question depends altogether upon the law of Kentucky."

It would be an arbitrary and fanciful exposition of the terms of this proviso to say that it saved common-law liens, and not statute liens; liens after judgment, and not liens before judgment; or to assert that it is the policy of the bankrupt act to save the lien of a factor or bailee, while it annuls that of the judgment or execution creditor.

*It is clear, therefore, that whatever is a valid lien or security upon property, real or personal, by the laws [621 of any State, is exempted by the express language of the act.

Let us inquire, then, whether an attachment on mesne process is a valid lien or security on the property attached by the laws of New Hampshire, as expounded by her courts.

This species of process is peculiar to the New England States. As early as the year 1650, while New Hampshire was united to the Massachusetts colony, it was enacted, that "henceforth goods attached upon any action shall not be released upon the appearance of the party or judgment, but shall stand engaged until the judgment or the execution granted on the same be discharged." (Charters and Colony Laws, 50.) And a proviso was added in 1659, that, when execution was not taken out within one month after judgment, the attachment shall be released and void in law, &c.

The earliest provincial legislation of New Hampshire adopted the same system, which has been continued with some variations to the present day. In 1718, they describe the goods attached as "security to satisfy the judgment" which the plaintiff might recover on the trial. (Provincial Laws N. H., 113.) In the statute of July, 1822, and of November sessions, 1842, ch. 2, the charge or incumbrance created by an attachment is denominated a *lien*.

The mode of proceeding and practice, as at present established, under writs of attachment in the State of New Hampshire, is thus described by the Superior Court of that State, in the case of *Kitttridge v. Warren*.

"In an attachment of personal estate, the sheriff, upon the

 Peck et al. v. Jenness et al.

service of the writ, takes the possession of the goods, and acquires thereby a special property in them, for the purpose of enforcing and protecting the attachment, and the rights of all concerned in the attachment and in the goods. He is then accountable, both to the plaintiff and to the defendant, for the disposition of them. If the plaintiff obtains a judgment, they are seized and sold upon the execution. If he fails, they are returned to the debtor. Some person may become accountable for them, and they may thus go back into the hands of the debtor, and the attachment be dissolved; the sheriff having, by means of a receipt for them, the security of some third person, which is in that case to be made available to the creditor. But if the attachment is not dissolved, it fastens itself upon the goods, as a charge or incumbrance, like the attachment upon real estate, and the avails of them are first to be applied to the satisfaction of the judgment, when recovered. Subsequent attachments may be made upon them by the same *622] sheriff, and *where there are several attachments, the attaching creditors have a right to priority of satisfaction, so far as those goods are concerned, not by priority of judgment, but by that of the attachment. *Poole v. Symonds*, 1 N. H., 292, 294; *Bissell v. Huntington*, 2 Id., 142; *Hackett v. Pickering*, 5 Id., 24; *Kittridge v. Bellows*, 7 Id., 428; *Clarke v. Morse*, 10 Id., 238."

The statute of *elegit* has never been adopted in this State, and hence a judgment is not treated as a charge or lien on the lands of the defendant, and the reason would seem to be, because the plaintiff could select his security upon specific property by his attachment at the commencement of his suit, and hold it for thirty days after judgment for the purpose of satisfaction. Hence their courts have denominated the charge or security thus obtained a lien. (See *Dunken v. Fales*, 5 N. H., 538; *Kittredge v. Bellows*, 7 Id., 427; *Clarke v. Morse*, 10 Id., 238; *Burnam v. Folsom*, 5 Id., 568; *Kittridge v. Warren*; *Kittridge v. Emerson*, &c.)

In Massachusetts, also, the charge or incumbrance created by an attachment is denominated a *lien*. See 9 Mass., 210; *Fettyplace v. Dutch*, 13 Pick. (Mass.), 392; *Arnold v. Brown*, 24 Id., 95; *Kilborn v. Lyman*, 6 Metc. (Mass.), 299, &c. In Connecticut, also, see *Carter v. Champion*, 8 Conn., 550.

Having thus shown that an attachment on *mesne* process creates a charge on the property attached in favor of the plaintiff, which is, in the language of the statutes and courts of New Hampshire, called a *security* and a *lien*, it will be unnecessary to notice arguments which have been urged against them on the ground of their peculiarities or distinctive feat-

ures. The mere accidents of the subject cannot alter its essence. It is a statute lien, and therefore as much protected by the general language of the proviso as a common law lien.

II. Could this lien be defeated by the interposition of the plea of bankruptcy as a bar to a judgment in favor of the plaintiff?

By the fourth section of the act, it is declared, that "the certificate or discharge, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act, and shall or may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever." And it is contended, as the lien of the attachment was defeasible, and could only be rendered absolute and of practical benefit to the plaintiff by the recovery of a judgment for his demand, which is effectually barred by the plea, that therefore the action and the lien must fall together.

This conclusion would be undoubtedly correct, if we *construe this section of the act by itself, and [*623 without regard to other provisions of the same act.

But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together.

The proviso to the second section of this act declares, "that nothing in this act contained shall be construed to annul, destroy, or impair," any liens, &c. Here, then, is an absolute prohibition to the court to construe the general terms of the fourth section so as to defeat the lien saved by the second. It is clear, therefore, that the court, while it grants the defendant the benefit of his discharge, must do it in such a manner as not to impair the rights saved to the plaintiff. All liens, whether by mortgage or judgment, by common law or by statute, are for the purpose of obtaining satisfaction of some debt or claim; and the construction of the fourth section which would treat the bankrupt's certificate as an absolute discharge from all his debts, for every purpose, would be alike destructive of them all. The mortgagee, the factor, or the bottomry lender, is in no better condition than the judgment or attachment creditor. And an attempt to make a distinction between

them, which would save the rights of one, and impair or destroy those of the other, would be judicial legislation,—*jus dare*, not *jus dicere*. In order, therefore, to give full effect to all the provisions of the act, the bankrupt's certificate must be made to operate as a discharge of his person and future acquisitions, while, at the same time, the mortgagees or other lien creditors shall be permitted to have their satisfaction out of the property mortgaged or subject to lien. A legal right without a remedy would be an anomaly in the law.

The judgment rendered in this case has fully attained both these objects. While it discharges the defendant from personal liability, it saves to the plaintiffs below their remedy, and awards their satisfaction out of the property attached, "and not otherwise." The books are full of precedents for such a judgment. When an administrator pleads *plene administravit*, the plaintiff may admit the plea, and take judgment of assets, *quando acciderint*. When the defendant pleads a discharge of his person under an insolvent law, the plaintiff may confess the *plea, and have judgment to be levied only of defendant's future effects. 1 Chitty, Pl., 548. [*624

III. The only question that remains to be considered is, whether the rejoinder of the defendants below is a sufficient answer to the replication.

It sets up, by way of avoidance of the attachment pleaded in the replication, that the District Court of the United States, on the petition of the assignee, and on notice to the plaintiff in this suit, had decreed that this attachment was not a lien on the property in custody of the sheriff, and ordered him to deliver it up to the assignee, or account to him for its value. It does not pretend to show how the proceedings in the Court of Common Pleas had been removed to the District Court, or how its judgment on the cause pending before it could be thus anticipated; nor that the District Court had found any means of enforcing its decree by compelling the sheriff to deliver the property attached to the assignee, and thus, in effect, destroy the lien: but it seems to rely on the decree as a judgment on the question, which should operate by way of estoppel. This necessarily involves the inquiry, whether the District Court was vested with any power or authority to oust the Court of Common Pleas of its jurisdiction over the cause, and supersede its judgment, by this summary proceeding.

The district Court has exclusive jurisdiction "of all suits and proceedings in bankruptcy." But the suit pending before the Court of Common Pleas was not a suit or proceeding in bankruptcy; and although the plea of bankruptcy was interposed by the defendants, the court was as competent to enter-

tain and judge of that plea as of any other. It had full and complete jurisdiction over the parties and the subject-matter of the suit; and its jurisdiction had attached more than a month before any act of bankruptcy was committed. It was an independent tribunal, not deriving its authority from the same sovereign, and, as regards the District Court, a foreign forum, in every way its equal. The District Court had no supervisory power over it. The acts of Congress point out but one mode by which the judgments of State Courts can be revised or annulled, and that is by this court, under the twenty-fifth section of the Judiciary Act. In certain cases, where one of the parties is a citizen of another State, he has the privilege of removing his suit to the courts of the United States. But in all other respects, they are to be regarded as equal and independent tribunals.

It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and *whether its decision be correct or otherwise, its [*625 judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other.¹ Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice.² In the case of *Kennedy v. The Earl of Cassilis*, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the

¹ APPLIED. *Andrews v. Smith*, 19 Blatchf., 104. FOLLOWED. *Stout v. Lye*, 13 Otto, 68. LIMITED. *Watson v. Jones*, 13 Wall., 716. QUOTED. *Orton v. Smith*, 18 How., 266; *Randall v. Howard*, 2 Black, 589; *Amador Canal &c. Co. v. Mitchell*, 59 Cal., 178. CITED. *Hammock v. Loan and Trust Co.*, 15 Otto, 82.

² APPROVED. *Freeman v. Howe*, 24 How., 457. QUOTED. *Taylor v. Carryl*, 20 How., 596.

 Peck et al v. Jenness et al.

parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.

The act of Congress of the 2d of March, 1793, ch. 66, § 5, declares that a writ of injunction shall not be granted "to stay proceedings in any court of a State." In the case of *Diggs v. Wolcott*, 4 Cranch, 119, the decree of the Circuit Court had enjoined the defendant from proceeding in a suit pending in a State court, and this court reversed the decree, because it had no jurisdiction to enjoin proceedings in a State court.³

It follows, therefore, that the District Court had no supervisory power over the State court, either by injunction or the more summary method pursued in this case, unless it has been conferred by the bankrupt act. But we cannot discover any provision in that act which limits the jurisdiction of the State courts, or confers any power on the bankrupt court to supersede their jurisdiction, to annul or anticipate their judgments, or wrest property from the custody of their officers. On the contrary, it provides that "all suits in law and equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect as they might have been by such bankrupt."

Instead of drawing the decision of the case into the District *Court, the act sends the assignee in bankruptcy
*626] to the State court where the suit is pending, and admits its power to decide the cause. It confers no authority on the District court to restrain proceedings therein by injunction on any other process, much less to take property out of its custody or possession with a strong hand. An attempt to enforce the decree set forth in the rejoinder would probably have been met with resistance, and resulted in a collision of jurisdictions much to be deprecated.

In fine, we can find no precedent for the proceeding set forth in this plea, and no grant of power to make such decree or to execute it, either in direct terms or by necessary implication, from any provisions of the bankrupt act; and we are not at liberty to interpolate it on any supposed grounds of policy or expediency.

The plea cannot, therefore, be sustained, and the judgment of the Superior Court of New Hampshire must be affirmed.

³ FOLLOWED. *Watson v. Jones*, 31 Wall., 719. CITED. *Dial v. Reynold*, 6 Otto, 341.

 Colby v. Ledden.

ORDER.

This cause came on to be heard on the transcript of the record of the Superior Court of Judicature of the State of New Hampshire, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Superior Court of Judicature be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

ABRAHAM COLBY, PLAINTIFF IN ERROR, v. JAMES LEDDEN.

The decision of this court in the preceding case of *Peck v. Jenness* affirmed.

THIS, like the preceding case of *Peck v. Jenness*, was brought up from the Superior Court of Judicature of the State of New Hampshire, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

Ledden was an inhabitant of the Province of New Brunswick, and Colby of the State of New Hampshire. The attachment was issued in 1837.

The case was similar, in its principal circumstances, to that of *Peck v. Jenness*, and was argued together with it.

C. B. Goodrich, for the defendant in error.

As to the principal question, I rely upon the argument *submitted in the case of *Peck v. Jenness*. The at- [*627
tachment in this case was made before the passage of the bankrupt statute. It cannot with much reason be said, that the right which the defendant below acquired by his attachment, legal when made, can be taken from him by subsequent legislation. Every objection, however, can be made in this case, which can be taken in relation to any attachment. The debt is discharged here, to the same extent as any other debt.

As to the objections, that the statute requisites have not been complied with which are essential to constitute an attachment, I submit that the State court is the exclusive judge in this particular, and that its judgment is not open to review in this court.

Mr. Justice GRIER delivered the opinion of the court.

This case was argued with the case of *Philip Peck et al v.*
VOL. VII.—42. 657