Statement of the case.

CHITTENDEN ET AL. *v.* BREWSTER ET AL.

1. It is the duty of assignees, for the benefit of creditors, who have once accepted the trust, not only to appear, but so far as the nature of the transaction, and the facts and circumstances of the case will admit or warrant, to defend the suit. And if a Federal court is already seized of the question of the validity of the trust, they should set up such pending proceeding against any attempt by parties in a *State* court to bring a decision of the case within its cognizance. If, when the Federal court has acquired previous jurisdiction, they submit with a mere appearance, and without any opposition to the jurisdiction of the State court, and pass over to a receiver appointed by *it* the assets of the trust, they will be held personally liable for them all in the Federal court.
2. A party *not* appealing from a decree cannot take advantage of an error committed against himself; as for example, that the appellant had omitted to prove certain formal facts averred in his bill, and which were prerequisite of his case. But where—assuming the fact averred, but not proved to be true—a decree given against a party in the face of such want of proof is reversed in his favor, it may be reversed with liberty given to the other side to require him to prove that same fact which the appellee, *when seeking here to maintain the decree*, was not allowed to object that the appellant had failed, below, to prove.

THIS was an appeal from a decree of the Circuit Court for the Northern District of Illinois.

The suit was a creditor's bill filed against a judgment debtor and his assignees, the defendants in the case, to set aside an assignment made by the debtor to hinder and delay creditors. The assignment was made on the 4th of November, 1857, to Brewster and Clark, two of the defendants, and purported to convey to them all the property, real and personal, of the debtor, in trust, to convert the same into money, either at public or private sale, and pay certain preferred creditors named. The judgment debtor made no defence. The assignees put in a joint answer, and *after requiring the complainants to make proof of their judgments and executions as charged in their bill*, set forth, among other grounds of defence, that, after the filing of the bill below, a bill in chancery had been filed against them in one of the State courts, in behalf of *other* creditors of the judgment debtor.

praying for the appointment of a receiver to take possession and charge of the property conveyed by the assignment, and that the trusts therein created be carried into effect; and that, upon the filing of the bill in the State court, and after hearing the motion for a receiver, the motion was granted; and that they had afterwards, in pursuance of the order of the State court, transferred and set over to the said receiver, one Mitchell, all the property, real and personal, that had come to their hands.

To this answer a replication was filed, and the parties went to their proofs. There was no evidence that, on the application in the State court for a receiver, which was made on the alleged ground of faithless execution of the trust, the assignees had made opposition. They had done nothing but acknowledge service on themselves of the notice of the intended motion for a receiver; employ a solicitor to enter an appearance for them, and to give their assent to the hearing of the motion at the February Term of the court, then at hand. The State court accordingly granted the prayer of the bill before it, and appointed a receiver, one Mitchell, in the case. But no fraud was proved nor specifically alleged on the part of the assignees in any part of the proceeding.

The bill below was taken, as confessed, by Brewster, the debtor, and dismissed as to two other defendants; and the court, after hearing the case on the pleadings and proofs, declared the assignment fraudulent, and set it aside, and appointed a *receiver*, one Moulton, and directed the judgment debtor to assign and transfer in writing to him all his property, real and personal; and further, that Brewster and Clark, the assignees, should assign and transfer in writing to him all the property and effects of every description that came into their hands by the assignment of the 4th of November, 1857, *except such property and effects so assigned to them, which have, since the service of process in this suit, been transferred to Mitchell, the receiver, under the proceedings had in the State court*, and which was set forth in the answer filed by them. From this decree the complainants appealed to this court, the ground being essentially that the proceeding in

the State court should have been treated as an interference with the Federal jurisdiction previously acquired.

In order to understand this question of priority, it is necessary here to say that the bill in *the Circuit Court* was filed on the *4th of January*, 1858; the subpœna served on the defendants on the next day; and their appearance entered on the 1st of February following. The bill in the *State* court was filed on the *1st of February*, 1858, and the subpœna served on the 20th of the same month. The receiver was appointed afterwards on notice. The evidence did not show that the defendants conveyed the effects of the judgment debtor in their hands to the receiver, but the fact was apparently assumed both by the counsel and the court below, and no point upon it was made by the court here.

Mr. E. S. Smith for Chittenden et al., appellants: The law is settled, that courts of different but of co-ordinate jurisdiction, cannot interfere with each other, either in process, person, or property, to prevent the first jurisdiction, which attaches or takes cognizance of the subject-matter in dispute, from determining the case conclusively. Now the law of *lis pendens* we assume to be equally settled. We assume that filing a bill in a court of equity and service of process is notice to the world of all the rights claimed by the complainant as set up in his bill. It was thus decided so long ago as in decisions reported by Vernon,* and it has been confirmed by many since.

Consider the action of the parties to the proceeding in the State court. Soon after the service of process in this case, the parties appear in the State court, on the first day of February, 1858, and a bill is filed by somebody, charging the assignees with neglect of duty. The assignees receive service, submit to the charge, and in fact, though not in form, confess a decree. They deliver without resistance to Mitchell the property and effects, to be taken to himself, under the assignment. When the assignees did this, they

* 1 Vernon, 318.

knew the fact of the proceedings by the appellants in the Federal court, to set aside the assignment, and subject the property to the payment of other judgments. If property, situated as the estate in this case was, can, by a proceeding in another jurisdiction, after right and lien had attached, be taken absolutely from the court, then proceedings by judgment creditors in the Federal court, after exhausting their remedy at law, are valueless. It will be impossible for a man to suggest a case, where the debtor, with the aid of a friendly creditor, could not concoct a proceeding to defeat every action by judgment creditors in courts of equity. Before a receiver could be appointed and take possession of the effects, such a proceeding, as the record in this case shows, could defeat the justice of the court. Notice for an injunction can be postponed; time will elapse before a receiver can be appointed. Assignees refuse or neglect to deliver over, and before that is done, an order comes from another jurisdiction, requiring the assignees to deliver the effects to another, who is appointed ostensibly to carry out the trusts. This order the assignees comply with, and thereby arrest the proceedings, because the property could not be reached; leaving the creditor powerless and his debt lost. Such proceedings cannot be tolerated by courts of justice. The rights of parties should not be subjected to schemes which might defeat the ends of justice, nor should parties, who use a court of justice in such a manner as these defendants stand under suspicion of having used one of those of the State of Illinois, go unpunished.

Mr. Washburne, contra, for the assignees: There is no evidence in the record showing that appellants acquired a prior lien. It does not appear they ever sued out executions upon their judgments or placed such executions in the hands of the marshal, or had any return made thereon. The obtaining of a judgment, suing out of execution, and a return of *nulla bona* are indispensable prerequisites to the establishment of a prior equitable lien.*

* Jones v. Green, 1 Wallace, 330.

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If the appellants acquired a prior equitable lien by the filing of their bill of complaint, they lost the same by the superior diligence of the complainants in the State court. The lien obtained by the filing of a creditor's bill is an inchoate one, which may be perfected by the appointment of a receiver, and may be displaced by the superior diligence of other creditors in perfecting similar liens. It is urged that the court below should have treated the proceedings of the State court as fraudulent and void; but it will be noticed that there was neither allegation nor proof of fraud in the case.

If the appellants had a superior lien upon the property in the hands of the receiver appointed by the State court, the proper mode of enforcing that lien was for the receiver of the court below to intervene in the State court by petition, *pro interesse suo*, where the lien, when established, would have been recognized and duly enforced. Upon establishing the right of the receiver of the court below to the property in the hands of the receiver of the State court, in the mode indicated, the State court would have ordered its officer to deliver the property over to the officer of the United States court. The court below declared the assignment void, appointed a receiver, and compelled the defendant, Brewster, to assign all his interest in the property. This was all the court could do; it could not order the assignees to deliver over property not in their hands, and which they had already delivered to the officer of the State court under its order.

Mr. Justice NELSON delivered the opinion of the court.

It does not appear from the proofs in the case, that executions had been issued, and returned unsatisfied, as averred in the bill, and for the proof of which the answer of defendants called; and it is objected by the counsel for the appellees that this defect is fatal to the right of the complainants to maintain their bill. This would be so, if the appellees, against whom the decree was rendered, had appealed from

the same, as in the case of *Jones* v. *Green*.* See also, *Day et al.* v. *Washburn et al.*† But here the complainants only have appealed, and the rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself, and also, that the party appealing cannot allege error in the decree against the party not appealing.‡ If the appellees desired to avail themselves of this error in the decree, they should have brought a cross appeal. By omitting to do so, they admit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing.

This brings the case down to the question as to the effect to be given to the suit in the State court; and to the order of that court appointing a receiver, and directing the defendants to assign and set over to him all the effects of the judgment debtor in their hands, under his assignment of the 4th of November, 1857.

The bill in the Circuit Court of the United States, to set aside the assignment to these defendants as fraudulent against creditors, was first filed, and consequently operated as the first lien upon the effects of Brewster, the judgment debtor.

We agree that the defendants, as bailees and trustees of the property intrusted to their care and management for the benefit of the creditors of Brewster, were responsible only for common or ordinary diligence, such as prudent men exercise in respect to their own private affairs. But this degree of diligence the law exacts, and the courts of justice are bound to enforce. When, therefore, the bill was filed against them by the judgment creditors in the Circuit Court of the United States, to set aside the assignment as fraudulent, it was their duty, arising out of their acceptance of the trust, to appear and defend the suit, as they have done, and

* 1 Wallace, 330.

† 24 Howard, 355, 356.

‡ Kelsey *v.* Weston, 2 Comstock, 505; Norbury *v.* Meade, 3 Bligh, 261; Mapes *v.* Coffin, 5 Paige, 296; Idley *v.* Bowen, 11 Wendell, 227.

protect their title to the fund in controversy, so far as the nature of the transaction and the facts and circumstances of the case would admit or warrant. Their whole duty appears to have been discharged in this respect, and we perceive no ground of complaint against them. But, this duty was equally incumbent upon them in respect to the suit in the State court. They should have appeared and defended that suit; and, in addition to the defence on the merits, that is of their faithful execution of the trust, which was impeached by the bill, they should have set up the pending proceedings against them in the Federal court, which tribunal had first acquired jurisdiction over them, and over the fund in dispute, and were entitled to deal with it, and with all questions growing out of the relations existing of debtor and creditor of the parties concerned. Instead, however, of pursuing this course, no defence, as appears, was set up by the defendants to the suit; no answer filed, nor even opposition made to the motion for the appointment of a receiver. The only part they seem to have taken in the proceedings is, besides acknowledging service of the notice of the motion for a receiver, the solicitors entered their appearance in the cause, and gave consent that the motion might be made at the then February Term of the court. It was at once made, and the receiver appointed and gave the requisite security.

Now, we think, here was a clear omission of duty on the part of the defendants, as trustees and bailees of the property in question, and for which they should have been held personally responsible. They should have appeared and defended the suit in the State court, and set up the pending proceedings in the Federal court, which was a complete answer to the jurisdiction of the former; and if this defence had been overruled, a remedy existed by a writ of error to this court, under the 25th section of the Judiciary Act.

The court below, therefore, erred in excepting from the transfer of the effects of the judgment creditors in the hands of the defendants to Moulton, the receiver, the property and effects transferred to Mitchell, under the order of the State court. For this error, the decree of the court below must

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be reversed, and the cause remanded to the court below, with directions to proceed on the same in conformity with this opinion; but liberty is given to the defendants to require proof before the court of the issuing of executions and return unsatisfied, as averred in the bill of complaint.*

DECREE, ETC., ACCORDINGLY.

CAMPBELL *v.* READ.

A question involving the construction of a statute regulating intestacies within the District of Columbia, is not a question of law of "such extensive interest and operation," as that if the matter involved is not of the value of $1000 or upwards, this court will assume jurisdiction under the act of Congress of April 2d, 1816.

THE act of Congress of April 2d, 1816,† regulating appeals and writs of error from the Circuit Court of the District of Columbia to this court, limits them to cases in which the matter in dispute is of the value of $1000 or upwards. It provides, however, that if "any questions of law of *such extensive interest and operation* as to render the final decision of them by the Supreme Court desirable" are involved in the alleged errors of the Circuit Court, the case may be heard here, even though the matter in dispute is of less value than $1000; and any judge of the court, if he is of opinion that the questions are of such a character, may allow the writ or appeal accordingly.

With this statute in force, Campbell, by will, left legacies to his widow and several illegitimate children; but, after paying them all, a fund of $141 remained in the hands of the executor undisposed of; there being no residuary legatee named in the will, and no parents, &c., legitimate children,

* Levy *v.* Arredondo, 12 Peters, 218; Marine Insurance Company *v.* Hodgson, 6 Cranch, 206; Mandeville *v.* Burt, 8 Peters, 256–7.

† 3 Stat. at Large, 261.