

The defendant says, finally, that the plaintiff is estopped from maintaining the action because she proved certain notes against the estate and received a dividend upon them before bringing the action. The defendant has no ground for claiming that he was induced to include the beads in the assets of the estate by bad faith on the part of the plaintiff. She made no false representations in respect to her title to the beads; and she demanded them of the defendant repeatedly, claiming to own them. Apparently, the defendant, with full knowledge of the plaintiff's claim and of her intention to assert it, charged himself with the value or the proceeds of the beads of his own motion in his account of administration. The decree allowing the account was the act which caused the value of the beads to increase the plaintiff's dividend. When the plaintiff received the dividend she may not have known that it was increased in this way. The testimony failed to prove the essential elements of an equitable estoppel. *Horn v. Cole*, 51 N. H. 287.

Exceptions overruled.

All concurred.

Hillsborough, }
May 6, 1902. }

FULTON PULLEY Co. v. BATES MACHINE Co.

GAGE v. SAME.

KING v. SAME.

Whether a judgment by default should be vacated and the trustee in bankruptcy of the defendant be allowed an opportunity to contest the claim, on the ground that a valid defence to the action was not in fact adjudicated, is a proper subject for investigation and determination by the superior court.

Where it is claimed that an attachment and levy were rendered invalid by bankruptcy proceedings against the defendant, the trustee in bankruptcy has an ample remedy in a real action against the creditor to whom the land was set off, and cannot try the question of title upon a motion to bring forward the original action and vacate the judgment and levy therein.

MOTIONS, by the trustee in bankruptcy of the defendants, to bring forward the cases and vacate the judgments and levies therein. The defendants' real estate was attached in these actions

August 3, 1898. These actions were entered at the following September term, and the defendants appeared and made answer denying the validity of the claims sued. At the May term, 1899, counsel for the defendants withdrew, the actions were defaulted, and in October, 1899, judgments were entered for the plaintiffs. Within thirty days thereafter levies were begun upon the attached property, and the land was set off to the plaintiffs in full satisfaction of Gage's and King's judgments and in part satisfaction of the Pulley Company's judgment. The executions were returned January 2, 1900. July 19, 1901, the trustee appeared and made these motions.

December 8, 1898, a petition in bankruptcy against the defendants was filed, but was afterward dismissed because the petitioner was not a competent party. February 24, 1899, the Pulley Company filed a petition in bankruptcy against the defendant corporation, and it was adjudged a bankrupt April 25, 1900. The trustee was appointed November 27, 1900. Upon these facts the trustee asked that his motions be granted, on the ground that the attachments and all subsequent proceedings in the suits were rendered void by the bankruptcy proceedings, and because there is a good and valid defence to the claims sued upon in those actions, although no evidence was submitted upon this point. The motions were denied by *Peaslee, J.*, at the September term, 1901, of the superior court, and the trustee excepted.

Doyle & Lucier and *Edward A. Adler* (of Massachusetts), for the trustee.

Hamblett & Spring, for the plaintiffs.

WALKER, J. The claim of the trustee, that the plaintiffs' judgments should be vacated and that he should be allowed an opportunity to contest the plaintiffs' claims in the several suits, because the defendants had a good and valid defence to the actions which was not in fact adjudicated, was a proper subject for investigation in the superior court; but it presents no question of law for determination in this court. *Warner Bank v. Clement*, 58 N. H. 533; *Clough v. Moore*, 63 N. H. 111; *Reed v. Prescott*, 70 N. H. 88. Upon that claim no evidence was presented; and the sole contention of the trustee apparently was that the plaintiffs' attachments and levies were rendered invalid by the bankruptcy proceedings, and that the defendants' title to the real estate in question passed to him by operation of law as of the date of the decree in bankruptcy. If this position is sound, there is no occasion for vacating the judgments and declaring void the levies thereon.

Morse v. Davis, 24 N. H. 159, 162. If his title is superior to that acquired by the attachments and the subsequent levies, he has not been deprived of it by the prosecution of the plaintiffs' suits to which he was not a party. In this view, since the rights of third parties have not intervened, he has suffered no harm by the rendition of the judgments in those suits, and justice does not require the granting of his motion. He has an ample remedy by a real action for the possession of the land, where the question of title can be conveniently tried.

Exception overruled.

All concurred.

Sullivan, }
May 6, 1902. }

ROSSITER, *Adm'a*, v. COLBY.

An unaccepted offer by a debtor to pay the sum referees might find to be due upon a promissory note, and his proposal to compare books and papers with a view of determining his liability, do not constitute an unqualified admission of an existing debt, or an express promise to pay, sufficient to avoid the bar of the statute of limitations.

ASSUMPSIT, upon a promissory note payable to the plaintiff's intestate or order. Plea, the general issue, with a brief statement that the cause of action did not accrue within six years. Transferred from the November term, 1901, of the superior court by *Pike, J.*

The estate was settled in the insolvent course. At the commissioner's last hearing, the defendant presented a claim which was allowed in full. There was controversy as to whether the plaintiff's claim was submitted to the commissioner. The plaintiff's evidence tended to show that in the course of the discussion before the commissioner the defendant said, "I am willing to leave the matter to Mr. P., or any other fair-minded man, and if they say I owe the note, I'll pay it," but that this offer was not accepted by the plaintiff; that Edward Rossiter called upon the defendant in behalf of the plaintiff, and the defendant repeated the offer he had made to the plaintiff at the commissioner's hearing, and at the same time said, "I will compare books and papers, and if I owe that note I'll pay it"; that Rossiter accepted this offer to compare books and papers, and returned one evening for that purpose to the defendant's office, but the latter said to him, "I don't care to discuss this matter with you any further."

71	386
74	273
74	274