CRAGIN v. THOMPSON.

Case No. 3,320.

{2 Dill. 513;[1] 12 N. B. R. 81.}

Circuit Court, D. Iowa. 1873.

BANKRUPT ACT—ASSIGNMENT UNDER STATE LAW—RIGHTS AND REMEDIES OF ASSIGNEE IN BANKRUPTCY—LIABILITY OF ASSIGNEE UNDER STATE LAW.

1. An assignment by a debtor, under a state law, of his property for the benefit of his creditors, is an act of bankruptcy.

2. Remedies of the assignee in bankruptcy to recover the property from the assignee under the state law, discussed.

{Cited in Re Pitts, 9 Fed. 544.}

3. Where the assignee, in an assignment made under the state law, qualified and became an officer of the state court, and received possession of the assigned property before the commencement of proceedings in bankruptcy against the debtor, and such state assignee, acting

in good faith, sold the assigned property under the orders of the state court, and by its direction paid over the proceeds to creditors who proved up under the assignment, and this was done before the assignee in bankruptcy brought suit against him: *Held,* that he was not liable, as in trover, for the value of the property received under the deed of assignment.

[Cited in Wehl v. Wald, 3 Fed. 4.]

This is a writ of error to the district court for the district of Iowa. The plaintiff is the assignee in bankruptcy of the late firm of S. & B. Stern, and the defendant was the assignee in a deed of voluntary assignment made by the said firm before they were proceeded against in bankruptcy. The present action is in the nature of trover for the value of the property assigned to the defendant. In answer, the defendant denied all liability, and set up as a special defence that before the adjudication of bankruptcy the Messrs. Stern made a general assignment of all their property to the defendant for the benefit of all of their creditors under the provisions of the laws of Iowa; that the defendant accepted the trust in good faith, gave bond, and qualified and became an officer of the district court of the state for the county of Dubuque and subject to its orders, and that before this action was brought, the defendant, by the order of said court, had fully administered all of said property and distributed the proceeds among the creditors of the said S. & B. Stern.

A jury was waived and the cause tried to the court. The court below made a special finding of facts and gave judgment for the defendant [case not reported]. The facts specially found are sufficiently referred to in the opinion of the court. To reverse this Judgment, the assignee in bankruptcy brings the case here by writ of error.

Shiras, Van Duzee & Henderson, for plaintiff in error.

Griffith & Knight, for defendant in error.

DILLON, Circuit Judge. As this case comes here on a writ of error, only questions of law can be reviewed. The sole question of law presented by the record is, whether, assuming the truth of the facts specially found by the district court, the defendant is personally liable to the assignee in bankruptcy for the value of the property he received from the Messrs. Stern. The material facts are these: The assignment to the defendant under the statute of Iowa, and the defendant's qualification as such assignee by filing in the state court the requisite bond, and his possession of the assigned property under the deed of assignment, all preceded the initiation of proceedings against the assignors under the bankrupt act. After the adjudication the assignee in bankruptcy demanded of the defendant the property, which he refused to surrender. To compel such surrender summary proceedings were instituted in the federal district court, but were subsequently dismissed in order that the present action might be brought, which was commenced therein February 24, 1872. Meanwhile, however, acting under the orders of the state district court, the defendant had sold the property assigned to him, and had distributed the proceeds under the orders of that court. This was before the present action was brought. The fact is expressly found that the defendant acted in good faith, that he had no interest in the as-

signment and derived no benefit from it, and that he pursued the state law and paid over the proceeds of all property which came to his hands under the orders of the state court to the creditors who proved their debts under the assignment. Under these circumstances the question for decision is, whether the defendant is personally liable to the assignee in bankruptcy for the value of the property assigned to him, or its proceeds.

1. It has been decided in this circuit that a voluntary assignment by a debtor, under state laws, though free from fraud in fact and embracing all of his property, and made for the benefit of all of his creditors, is an act of bankruptcy within the meaning of the bankrupt law [of 1867 (14 Stat 522)]. In re Burt [Case No. 2,210]; Hobson v. Markson [Id. 6,555]. The assignee in bankruptcy is entitled, as against the assignee under the state law, to the possession and control of the estate. So far there can be no doubt.

2. I am of opinion that while such an assignment is an act of bankruptcy, the assignment itself is not absolutely void abinitio, but only subject to be avoided by proceedings taken under the bankrupt act. If the assignors are adjudicated bankrupts, the property assigned passes to, and becomes vested in, the assignee in bankruptcy, and he is entitled to its possession so that it may be used by him to pay the debts which shall be proved against the estate in the bankruptcy court. The proceedings under the state law which contemplates that creditors shall there prove their debts and receive dividends are inconsistent with the proceedings under the bankrupt act, which requires all assets to be administered and all debts established in the bankruptcy court. There cannot be two concurrent administrations of the same estate, and of course the state enactment must give way in cases where it is brought into collision with the bankrupt act.

If the present action were against the creditors who received dividends under the assignment, there could, as it now seems to me, be little or no doubt as to their liability. But is the defendant liable, since he had no property in his possession when this action was brought, and had, before that time, paid over in good faith all the proceeds of the assigned property under the orders of the state court? It is my judgment that the defendant should not, under these circumstances, be held personally liable. It is not

necessary so to hold in order to prevent the bankrupt act from being evaded or its operation defeated. One plain remedy for the assignee in bankruptcy was to apply to the state court which, down to the adjudication of bankruptcy, at all events, if not afterwards, was rightfully exercising its jurisdiction over the assigned estate, and ask for an order upon the assignee under the state law, to surrender the estate to him. If improperly denied, the assignee in bankruptcy would have a remedy by appeal to the supreme court of the state, whose final judgment, if against him, would be subject to revision by the supreme court of the United States. I do not say, nor in this case is it necessary to affirm, that this would be the only remedy of the assignee in bankruptcy. If the property whose value is sought in this case were still in the hands of the defendant, it may be that he would be liable in respect to it if he should refuse to surrender it to the assignee in bankruptcy. This would depend upon the question, whether, after the adjudication of bankruptcy and the appointment of an assignee (thus superseding the rightfulness in law of any further administration under the state statute), the property assigned was in the custody of the law, i. e. of the state court and its officer, the assignee under the state law.

I have strong doubts, notwithstanding the argument of the district judge, whether property in the hands of an assignee under the state law is in custodia legis after the adjudication of bankruptcy, so as to exempt such assignee from liability to the assignee in bankruptcy or from proceedings in the federal courts to protect the rights of creditors under the bankrupt act. If the state assignee should surrender the property, he ought to be protected in so doing by the state court, but if it denied him such protection he could take the case, if necessary, to the supreme court of the United States. On the other hand, if the mere making of a voluntary assignment under the state laws withdraws the property and the assignee wholly from the operation of the bankrupt act and the machinery it has provided for the collection and distribution of assets under the supervision of the court it has established for that purpose, the bankrupt act would, to this important extent, seem easy of evasion. But I do not need to pursue the subject further or inquire what remedies the assignee in bankruptcy would have under other circumstances. What I hold is, that under the special findings of the district court—which not only exonerated the defendant from bad faith, but affirmatively found that he acted in good faith and under the orders of the state court, whose jurisdiction and right to act were in no way questioned therein by the assignee in bankruptcy—the defendant is not personally liable to the present plaintiff. He must now seek his remedy against those who have received payments from the defendant in contravention of the bankrupt act. Affirmed.

NOTE [from original report]. See Marshal v. Knox (Sup. Ct. U. S. Dec. term, 1872) 16 Wall. [33 U. S. 531]; Johnson v. Bishop [Case No. 7,373]; Peck v. Jenness, 7 How. [48 U. S.]612.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]