

IN RE ELDRIDGE.

Case No. 4,330.

[2 Biss. 362;¹ 3 Chi. Leg. News, 177; 4 N. B. R. 498 (Quarto, 162).]

Circuit Court, E. D. Wisconsin.

Oct., 1870.

MORTGAGE ON AFTER-ACQUIRED PROPERTY.

1. A mortgage of personal property being, under the laws of Wisconsin, ineffectual to pass after acquired property, the assignee in bankruptcy is entitled to such property as against the mortgagee.

[Cited in Re Foster, Case No. 4,964.]

2. Though a mortgage be valid as to property then in possession, the authority in a mortgage subsequently given to cover the property afterward acquired, does not enable the mortgagee, by taking possession of such property to hold it as against the assignee. This would be, in effect, a preference, and against the spirit of the act.

3. A mortgagee in possession being entitled to retain all property upon which his mortgage was valid, on a sale of such property by order of the district court, he should only be charged with the reasonable expenses of the sale of such property, and not with any portion of the costs in bankruptcy.

4. A chattel mortgage "of all the goods and merchandise" in a store, here *held* not to include fixtures.

In bankruptcy. Spencer Eldridge and Leslie R. Treat were merchants engaged in business in Janesville in this state, and on the 1st day of April, 1867, borrowed of Robert B. Treat, two thousand dollars. They continued business until November 21, 1867, when Treat sold out his interest to Fenton F. Stevens. Eldridge and Stevens became responsible for the debts of Eldridge and Treat and among the rest for the debt due Robert B. Treat. On the 12th of March, 1868, Stevens sold his interest in the firm to Eldridge. Robert B. Treat agreed to release Stevens, and Eldridge agreed to pay Robert B. Treat and the other debts of Eldridge and Stevens. Eldridge, on the 13th of March, 1868, gave Stevens a mortgage for \$3,200 on his stock. At this time the stock was estimated to be worth between eleven and twelve thousand dollars. On the same day Eldridge gave a second mortgage to R. B. Treat, to secure his debt of two thousand dollars. These mortgages purported in terms to cover all after acquired property.

On the eighth day of May, 1868, Eldridge gave Stevens and Treat new mortgages intended to cover goods obtained since the 12th of March. These last mortgages made no reference to any after acquired property. Between the 8th of May and the 15th of October, 1868, Eldridge had purchased and put into the store at Janesville a quantity of goods invoiced at \$6,644.45. On the last named day Treat and Stevens took possession, under their mortgages, of all the goods in the store. On the 19th of October, 1868, a petition in bankruptcy was filed against Eldridge, and on the 30th of October of that year he was adjudged a bankrupt by the district court for this district. The court decided that the mortgages were valid on all the goods in the store at the time the mortgagees took

In re ELDRIDGE.

possession. The property was sold by the assignee under the order of the district court, and the proceeds paid into court.

No question being made but that the mortgage of Stevens was prior to that of R. B. Treat, the district court decided that out of the money in court there should be paid, in the first place, all the costs and expenses connected with the proceedings in bankruptcy and the sale of the goods; secondly, the mortgage of Stevens; and lastly, the balance to be applied upon the mortgage of R. B. Treat. There was not, in fact, without the after acquired property, sufficient to pay the mortgages. From this order the assignee appealed.

Conger & Sloan, for Stevens, first mortgagee.

Jackson & Ebberts, for Treat, second mortgagee.

Palmer & Cassidy, for assignee.

DRUMMOND, District Judge. The questions in this case must depend in part upon the law of Wisconsin. The 14th section of the bankrupt law [of 1867 (14 Stat. 523)] declares that no mortgage of any goods or chattles

made as security for any debt or debts in good faith and for present consideration, and otherwise valid, and duly recorded pursuant to any statute of the United States, or of any state, shall be invalidated or affected by the bankrupt law.

Under the law of Wisconsin, in order to render a mortgage of chattels valid, the mortgagee must be in possession, or the mortgage must be recorded in the manner particularly pointed out in the statute.

The supreme court of Wisconsin has held in *Chynowieth v. Tenney*, 10 Wis. 397, and in *Single v. Phelps*, 20 Wis. 398, that mortgages of personal property do not cover what is afterwards acquired—that as to such property it is in the nature of a revocable license to take possession.

The point is not entirely free from difficulty, but on the whole my opinion is that the mortgages of the 13th of March and the 8th of May, 1868, for the property actually in possession of the mortgagor at the time, are valid under the law of Wisconsin. They appear to have been executed in good faith and for a valuable consideration, and were duly recorded. I see no good reason, therefore, for disturbing the decree of the district court on that point. But as to the property afterwards acquired there was not a valid mortgage, but only authority to take possession, and the rights of creditors, under the bankrupt law, must depend upon its effect upon the property at the time the act was done which might be supposed to operate as a transfer. This was the taking possession under the license contained in the mortgage. Then Eldridge was insolvent and the mortgagees must have known it, or had reason to believe it. The 35th section of the bankrupt law declares in substance that if any insolvent person within four months before proceedings in bankruptcy are commenced by or against him, and in order to give a preference to a creditor, makes a transfer of his property, and the person to whom it is made has reasonable cause to believe him insolvent the transfer shall be void as to general creditors. It is true in this case there was not in one sense, a transfer made on the 15th of October, 1868, because the instruction or authority to take possession of after acquired property, as the supreme court of Wisconsin construes it was given in the mortgages executed some months before. But it is not competent for a party to give this authority in relation to property which he may afterwards acquire, and thus prefer a creditor who shall take possession when he is known to be insolvent, and thus avoid the effect of the bankrupt law because literally he has not made a transfer. That certainly would be a facile method of evading the scope and spirit of the law. In legal effect it was a transfer within the meaning of the law. It was a continuing act from the date of the authority to the taking possession, the last act being the consummation of the transfer, and in this instance the transfer giving a preference, the mortgagor being insolvent and the mortgagees knowing the fact. It must be treated as if a mortgage were made of the after acquired property at the time the mortgagees took pos-

In re ELDRIDGE.

session. It was in substance, then, the case described in the 35th section, and as against the assignee of Eldridge representing the general creditors, was void.

All the costs of the bankruptcy proceedings and expenses of the sale were, by decree of the district court, first to be paid out of the proceeds of the sale of the goods. The mortgagees should not have been taxed with the costs of the proceedings in bankruptcy. To the goods included in their mortgages they had a legal right. Over the goods not included, the district court had complete control for the benefit of the general creditors. It is only the fund within the legitimate power of the court that should have been charged with the costs and expenses of the proceedings in bankruptcy. But we have to deal with the case as it stands. The goods of the mortgagees have been converted into money, and that is now in court and it is not inequitable to charge them with what would have been reasonable expenses for the sale of their goods. If they had retained possession of them, this charge they would have been obliged to meet, and to that extent the claim on the fund in court will be allowed, as it is not claimed that the goods were not fairly sold.

Fortunately, in this case there is no difficulty in determining the amount and value of the goods included in the mortgages, and what were afterwards acquired, and the proceeds of the sale in each case. That part of the decree of the district court deciding that the after acquired property was covered by the mortgages, and that all the expenses of the bankruptcy proceedings and of the sale of the goods should be first deducted out of the money in court will therefore be modified, and the proceeds of the sale of the after acquired property will be directed to be paid over to the assignee, deducting the sum of one hundred dollars, which is allowed as a proper charge for selling that part of the property. There is a question made as to the fixtures in the store at the time the mortgages were executed. In the mortgage to Stevens the property is described as "all of the goods and merchandise now in the store." In the mortgage to Treat it is described as "all of the stock of goods and merchandise now in the store, and fixtures."

It was understood throughout that the mortgage of Stevens should take priority over that of Treat and it was first recorded; and therefore it becomes necessary to decide whether Stevens' mortgage included the fixtures. They were of the value of two hundred and sixty dollars. Under some circumstances the term "goods and merchandise

in the store” might perhaps be presumed to include the fixtures there; but here there are facts which seem to limit the construction of the language in the Stevens mortgage to the goods and merchandise proper in the store. The mortgages were written by the same person, it is to be inferred, under special instructions from the mortgagor; and in the one the fixtures were omitted, and in the other the description of the property is substantially the same, save that the fixtures are added. The mortgages were executed together on the 13th of March, and the fair inference is that the Stevens mortgage was not intended to include the fixtures.

NOTE [from original report] Consult *In re Kahley* [Case No. 7,593], and *Harvey v. Crane* (March Term, 1871) [Id. 6,178]. The bankrupt act leaves all deeds and instruments of writing not expressly saved, to the general principles of jurisprudence. *In re Wynne* [Id. 18,117]. It is as much the policy of the bankrupt act to uphold liens and trusts when valid, as it is to set them aside when invalid. *Id.* The preference which the law condemns is a preference made within the limited time by the bankrupt, and not a priority lawfully gained by a creditor. *Id.* Where a mortgage embraces property situated in two states, and is not recorded in one of them so as to make it valid as to the property there, it may nevertheless be valid as to the property situated in the state where it was recorded. *In re Soldiers etc., Dispatch Co.* [Id. 13,163]. A secured creditor should always prove his claim; any other theory is entirely irreconcilable with the provisions of the bankrupt act. If the enforcement of his lien satisfies his demand, the debt will be discharged; but if it does not, then the balance remains as a general claim against the estate, like all other unsecured claims. *In re Winn* [Id. 17,876]; *In re Davis* [Id. 3,618]; *In re Ruehle* [Id. 12,113]. But if he makes his proof without reference to his lien or security, and without apprising the bankrupt court of its existence, he thereby waives his lien, and relinquishes it to the assignee. *Stewart v. Isidor* [5 Abb. Pr. (N. S.) 681]; *In re Bloss* [Case No. 1,562]; *In re Stansell* [Id. 13,293]. Costs in bankruptcy are left by the act entirely in the discretion of the court, and questions arising in relation to them must be disposed of on equitable principles. *In re Dumont* [Id. 4,127]. Creditors who have endeavored to have a mortgage prima facie fraudulent, declared void are entitled to be reimbursed the amount of their reasonable costs, expenses and disbursements in the proceedings in bankruptcy, including the sale of the mortgaged property, from the proceeds of such sale. *Id.*

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