8FED.CAS.—59

Case No. 4,588.

IN RE EWING ET AL.

[17 N. B. R. 109.][1]

District Court, D. Massachusetts. Jan. 23, 1878.

BANKRUPTCY—COMPOSITION—ASSUMPTION OF DEBTS BY NEW FIRM—DISMISSAL OF PROCEEDINGS IN BANKRUPTCY—FAILURE OF NEW FIRM.

A resolution of composition was adopted in this case, by which the creditors agreed to accept notes of a new firm to be composed of two members of the old firm and such other person or persons, if any, as they might associate with them, with a fresh capital of at least twenty thousand dollars, which, if borrowed, should not be withdrawn until the composition was paid. The new firm was formed of all the members but one of the old firm, with the capital required, and a deed of release was signed by the creditors. The capital had been borrowed and was repaid soon after. The new firm paid the first and second instalments of the composition, but stopped payment on the third. A day or two before this the case had been dismissed. *Held,* that the dismissal should not be vacated and the case sent back into bankruptcy, because (1) creditors of the new firm could not prove their debts or be paid in this proceeding, and (2) because the remaining partner, himself innocent, lost his opportunity, by the discharge, of seeing that the composition was faithfully and fully carried out.

[Cited in Re Herman, Case No. 6,405.]

The firm of Ewing & Company, composed of Charles E. Ewing, Hugh W. Ewing, Nathaniel B. Blackstone, and Henry A. Leslie filed their petition in bankruptcy February 8, 1877, and on the next day proposed a composition to their creditors, which was accepted and recorded. The resolution provided for the payment of sixty-two and one-half per cent, upon all the joint debts, payable in three, six, nine, and twelve months, secured by the notes of a new firm to be composed of the two Ewings and such other person or persons, if any, as they might associate with them, the new firm to have the assets of the old firm, and a fresh capital of at least twenty thousand dollars, which, if borrowed, should not be withdrawn until the composition should be paid. The certificate of a committee of three

certain creditors to be evidence that the new firm had been formed and the fresh capital contributed. February 28, 1877, the committee certified that a new firm had been formed, of three of the partners of the old firm, omitting Mr. Leslie, and that the fresh capital had been paid in. On the fifth day of March following the creditors executed a deed, reciting these facts, and that they had severally received the notes of the new firm for the amounts due them under the composition, and that they were received in satisfaction and discharge of their debts against the old firm, and thereby releasing the said old firm, and each member thereof from the old debts, and consenting that all proceedings in the cause should be dismissed. The capital had not in fact been paid in as agreed, but had been borrowed without condition, and was repaid soon after, and the committee has been deceived by misstatements on the subject. The new firm anticipated the payment of the composition notes to certain of their friends, and paid the first and second instalments of the composition, and stopped payment upon the maturity of the third. A day or two before this, the release above mentioned was filed in court, and the case was dismissed on the same day, October 30, 1877. On 28th November, 1877, certain creditors filed a petition alleging the foregoing facts and praying that the order for dismissal might be vacated and the composition set aside, and that the case proceed in bankruptcy.

H. C. Hutchins, H. W. Suter, and F. Dabney, for petitioners.

D. Thaxter, R. D. Smith, G. R. and W. P. Fowler, opposing.

LOWELL, District Judge. I find the facts to be truly set forth in the petition. The creditors were deceived when they were given to understand that fresh capital had been paid in as provided for in the resolutions for composition. There is, however, no evidence that Mr. Leslie, the retired partner, had any privity with or knowledge of the fraud.

There are two decisive objections against opening the case in bankruptcy. The firm was formed with the consent of the creditors of the old firm, and has been trading and dealing for some months, and whatever debts it may have contracted ought to be paid, or at any rate ought to be provable; and I do not see how they could be proved, much less how they could be paid, if the case is to go on as of last February. The second reason is that Mr. Leslie, himself innocent, was discharged and exonerated by a release under seal, and thereby lost the opportunity, because he was released from the duty, of seeing that the composition was faithfully and fully carried out. After his release, most of the acts now complained of were done, and it would be unjust to hold him responsible for them.

I doubt whether it would ever be safe to send a case back to bankruptcy, under our statutes, which make no special provision for such cases, when the creditors have consented to the formation of a new firm, whose rights and liabilities might be most seriously complicated and interfered with by such a course. Truly, a way might be found in some cases, as for instance, if it could be shown that the debts of the new firm were all known, and that the creditors of the old firm were ready to pay them in full.

What I understand this petition to seek would scarcely ever be admissible; that is, to give an assignee the right to avoid all acts, however honest, which had been done under an arrangement which the creditors themselves had authorized.

For the fraud which has been committed, the creditors have various remedies at law and in equity, and perhaps in bankruptcy, which I need not particularly point out to them.

In the old bankruptcy they must abide by the deed they have made, because, by that deed, persons more innocent even than they, because not guilty even of negligence, may be injured by revoking or disregarding the deed. Petition denied.

[1] {Reprinted by permission.}