

Case No. 5,021.

{2 Lowell, 399.}<sup>1</sup>

IN RE FOYE.

District Court, D. Massachusetts.

March, 1875.

BANKRUPTCY—PROVABLE DEBTS—COSTS OF ATTACHMENT IN DIVORCE  
PROCEEDINGS AGAINST BANKRUPT.

The costs of an attachment laid by the wife of the bankrupt in a libel for divorce, are not provable in the bankruptcy, and are not an equitable charge against the assets in the hands of the assignee.

{In bankruptcy. In the matter of George F. Foye.}

R. M. Morse, Jr., for petitioner.

C. Blodgett, for assignee.

LOWELL, District Judge. The bankrupt's wife sued for a divorce, and by order of one of the justices of the court in which that cause was pending, passed in accordance with a statute of Massachusetts, she attached his personal property, to answer any decree for alimony, and incurred large costs in the custody thereof. Before that suit was decided, the husband became bankrupt, the attachment was dissolved, and the chattels, came to the possession of the assignee. The wife now applies for an order that her costs may be paid her in full.

In re FOYE.

The insolvent law of Massachusetts provided, that, when an attachment should be dissolved by the proceedings of the defendant in insolvency, and the plaintiff proved his debt, his costs should be a privileged claim upon the assets. Gen. St c. 118, § 127. In Fortune's Case [Case No. 4,955], I worked out an equity in favor of attaching creditors, for their costs incurred in putting the property into the custody of the law, for the general benefit.

It is insisted, on behalf of the petitioner, that she has an equity like that which was admitted in Fortune's Case. I do not think so. She has no provable debt, and whatever she may hereafter recover in the way of alimony, and for costs, will be a valid debt against her husband, notwithstanding his discharge in bankruptcy. In the case cited, the debt and costs would have been barred; and the costs were not even provable as an ordinary debt, and unless they could be paid by a sort of equitable privilege, they could not be paid at all. Besides, the action in behalf of the wife is not one which I could presume, as in the case cited, to have been intended for the general good. It was brought for a quasi tort, and tended to diminish the fund which would have inured to creditors. Suppose a writ of replevin is brought against the bankrupt claiming all his personal property, but the action is finally decided in favor of his assignees, it might be argued that, but for the replevin, the bankrupt would have squandered his estate, and therefore the costs ought to be allowed. It seems to me that the statute of Massachusetts adopted the true equity. Some bankrupts, indeed, may not be discharged, and then the debt and costs might be recovered; but those cases form a very small fraction of the whole number. If the bankrupt is discharged, those plaintiffs whose debts or demands are not provable, have, to be sure, lost their original security, which is a hardship; but, on the other hand, they hold their full claim, and may levy it out of the future acquisitions of the bankrupt. The debt not being a provable one, its incident is not so, either as privileged or otherwise. Petition denied.

FOYE, In re. See Case No. 9,823.

<sup>1</sup> [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]