IN RE FUNKENSTEIN ET AL.

Case No. 5,157.

{1 Pac. Law Rep. 11.}

District Court, D. California. Nov. 8, 1870.

BANKRUPTCY—COMPETENCY OF AN ASSIGNEE—FITNESS OF NOMINEE—THE LAW APPLICABLE.

{The discretion reserved to the court by the act of 1867 (14 Stat 517) to approve or disapprove the creditors' election of an assignee is a legal discretion, and disapproval of an assignee elected by the great majority both in number and amount of creditors can only be warranted by the fact that the nominee is commercially dishonest, and has such a reputation in the commercial community; nor should the court take such action upon mere rumors, which, upon investigation, cannot be traced to any facts justifying them.}

{In bankruptcy. In the matter of J. Funkenstein & Co. Report of register.}

By, Asher B. Bates, Register:

To Hon. Ogden Hoffman, District Judge: Pursuant to the order entered in this case on the 20th of October, A. D. 1870, I have taken the proofs offered in relation to the competency and fitness of E. Suskind to serve as assignee, and also the testimony presented by E. Suskind, to establish his good reputation and in rebuttal of the testimony introduced by the opposing creditors, and the same as herewith reported to the court Before the examination took place, the counsel for the opposing creditors declared that it was their purpose to withdraw all opposition to A. Morris, the other person nominated as assignee, and that they admitted that E. Suskind was competent to act, being a man of commercial experience and pecuniary responsibility, and that they only desired to take testimony as to his fitness for the place to which he had been nominated. Preliminary to announcing my opinion upon the testimony taken, I deem it proper to state certain facts and principles, that have controlled me in the conclusions I shall announce.

First. The bankrupt act provides that a majority in amount and number of the creditors shall have the privilege of nominating and electing an assignee to take charge of the bankrupt's estate.

Second. It also reserves to the court the power of approval or disapproval of the nomination or election.

Third. It grants to the court the power to require of the assignee, when appointed, to give good and sufficient bonds for the faithful and honest discharge of the trust confided to him.

It was clearly the intention of congress, in granting to the creditors the privilege of nominating and electing assignees, that they should directly participate in the administration of bankrupt estates, and there is good reason why the bankrupt act should contain the provisions which I have stated. The creditors are alone interested in the distribution of the estate, and it is to be supposed that creditors having pecuniary interests will carefully

canvass and inquire into the qualifications of the assignee, to whom they recommend the estate to be entrusted; they are supposed to be commercial men, intimately acquainted with the affair of the bankrupts, and the qualifications essential and proper to fit a man to act as their trustee; and unless good and strong reasons are presented to the court, it seems to me, that the opinion of the creditors representing a large majority in amount and number of the parties interested, is entitled to great weight in determining who is the proper person to administer the estate, in which they are interested. It is conceded that creditors may be ignorant or misled as to their rights, and when it is apparent to the court that they have acted under a mistake as to the law, and in ignorance of grave charges, that can be sustained against the person they have nominated, it would clearly be the duty Of the court to disapprove of their nomination, if such facts should be made apparent, and refer the matter back again to the creditors for a new election, stating the reasons that controlled the court in disapproving of their prior decision; but until the court has before it clear and positive evidence that the parties nominated are commercially dishonest or disreputable in the commercial community, it seems to me it would be my duty to recommend their approval. In this case, a prolonged and earnest investigation has taken place as to the fitness of Mr. Suskind to discharge the duties of assignee, and the most liberal scope has been granted to the opposing creditors to introduce testimony to show that he is commercially dishonest, and has a bad reputation in the commercial community. It is apparent from the testimony

as recorded, that there have been rumors afloat in some way affecting his reputation, but when they have been traced to their source, as far as it has been possible, in the opinion of the register they have been based upon no sufficient foundation; as far as they have been traced to their origin it is to be inferred that they grew out of litigations that transpired some years since, in which there were many parties interested, and some of them defeated. No facts were elicited showing commercial dishonesty, and the opinions that were given by the witnesses as to his character appear to have been based upon some indefinite rumor, without the witnesses being able to state any good and sufficient reasons for their believing the rumors to be true. If Mr. Suskind is commercially dishonest or disreputable, the presumption is that facts could be produced to establish such a reputation. It seems to the register, it would be grossly unjust on his part to recommend to the court to disapprove of the nomination made in this case upon mere rumors. All men in actual business have their enemies, and if a man's character for commercial honesty and integrity is to be destroyed or injured by the simple declaration that he is unfit to discharge the trust, it would be difficult to find a man, who by experience and business habits is fitted for the place, who could not be successfully attacked. Even the very best men in the community are liable to be spoken evil of, and it appears to the register that facts should be presented to guide the court in-determining as to the fitness of any candidate presented, and that it should not be expected that the court would allow itself to be influenced in the least by mere public scandal. Upon a review of all the testimony in this case, the register is of the opinion that Mr. Suskind is fit to discharge the duties for which a majority in amount and number of the creditors have recommended him.

It was contended before me that the discretion vested in the court of approving or disapproving of an assignee was an arbitrary discretion, and it was not incumbent upon the court to give any reason, should it deem it proper, to disapprove of a nomination. I could not justify myself in recommending to the court to disapprove the nomination made in this case, unless I was able to state specific facts that justified me in so doing. In my opinion, the discretion invested in the court is a legal discretion, one that must be controlled, not by caprice, prejudice, partiality, likes or dislikes, or any other reason than the fact that the candidate is commercially dishonest, and has such a reputation in the commercial community, with whom he associates. Such being my opinion as to my own duty, I have come to the conclusions which I have stated; besides the bankrupt act, as I have already stated, provides for the protection of the minority, in granting to the court the power to require bonds of the assignee. In case I am mistaken in the opinion I have announced as to the fitness of Mr. Suskind to discharge his duty, the minority of the creditors, who have opposed his nomination, can be secured and protected in all of their rights by asking the court to require him to give good and sufficient bonds, for the honest and faithful discharge of the trust.

It is claimed that Mr. Suskind is a candidate of the bankrupts, but there is no proof to sustain the allegation that he is in any way in collusion with them. He has heretofore been frequently in their company, and been on intimate terms with them, but he is a creditor without security, to a large amount, and the presumption is, that his interest would prompt him to be faithful" in gathering in the estate, that his dividend might be increased. There is no evidence to show that he in any improper way sought for the nomination, or that the bankrupts were controlled in recommending him to one or two of the creditors to vote for him, by any other motive than a desire that their estate should pay the largest dividend practicable. I have no doubt that the opposing creditors were controlled by correct motives, and believed in the commencement of the investigation, and anticipated that they would be enabled to show that Mr. Suskind was commercially dishonest, and had such a general reputation among commercial men. I deem it proper to make this statement, that it may not be inferred that the opposition in this case was factious, or induced by a desire on the part of any one to acquire an unjust advantage of other creditors.