

Case No. 5,192.

IN RE GALLAGHER ET AL.

{16 Blatchf. 410; 19 N. B. R. 224.}<sup>1</sup>

Circuit Court, S. D. New York.

June 11, 1879.<sup>2</sup>

BANKRUPTCY—WHAT PASSES TO ASSIGNEE—CITY MARKET  
LICENSES—ESTOPPEL.

A bankrupt had a permit from the comptroller of the city of New York to occupy a stand in a market, paying therefor a weekly rental. The license was revocable at the pleasure of the comptroller, and could not be transferred

without written permission. It was the custom of the city to allow such a permit to be assigned. It bore a value, as an article of sale. The bankrupt paid \$4,000 for his permit, to his assignor. He placed that value on it in a statement of his assets made by him, as a basis for credit, to a creditor who afterwards became his assignee in bankruptcy. The district court, on the petition of the assignee in bankruptcy, ordered that the bankrupt execute a transfer to the assignee of the right to the permit, and a request to the comptroller to consent to such transfer. On a petition of review, claiming that the permit was not property which passed to the assignee in bankruptcy: *Held*, that the bankrupt was estopped from asserting that the right enjoyed under the permit was not property in his hands; that the sale value of such right would, when realized by the assignee, under the transfer papers, be the proceeds of the property of the bankrupt; and that the order of the district court was proper.

[Cited in *Re Ketchum*, 1 Fed. 841.]

[Cited in *Lafountain v. Burlington Sav. Bank*, 56 Vt. 333.]

On the 16th of April, 1879, Horace W. Day, assignee in bankruptcy of Martin Gallagher and Daniel Lane, composing the firm of Gallagher & Lane, presented to the district court, in bankruptcy, a sworn petition, setting forth as follows: "That, for many years past, your petitioner and one Paolo Sgobel have transacted, in said city, a general commission business in imported fruits, particularly oranges and lemons, under the firm name of Sgobel & Day; that, during said years, it has been the custom of your petitioner's firm, as well as all other firms transacting similar business in said city, to sell the greater portion of their fruits through a certain firm of auctioneers; that it has also been the custom of said business for the several importers to require of all persons buying their goods on credit through said firm, to deposit with said auctioneers, at the beginning of each year, a statement showing their assets and liabilities, which statement was duly verified, and was the basis of such person's credit; that, during said years, the bankrupts were retail dealers in fruits, and had their place of business at a stand in Washington Market, New York, and were buyers of the fruits of your petitioner's firm, and other firms, through the aforesaid auctioneers; that, on or about the 10th of January, 1878, the said bankrupts, for the purpose of obtaining credit during that year on their purchases of fruit through said auctioneers, deposited, as aforesaid, a statement showing their assets and liabilities; that, according to said statement, the said bankrupts were the owners of the said stand in Washington Market, which was, in said statement, valued at the sum of \$4,000; that, by reason of said statement, and partially because of the alleged situation and value of said stand, the said bankrupts were permitted to buy on credit, as aforesaid, large quantities of fruit belonging to your petitioner's firm and said other firms; that, thereafter, and on the 4th of June, 1878, the said bankrupts then being indebted to said firms for said fruit, to an amount exceeding \$10,000, a petition in bankruptcy was filed in the said district court against said bankrupts, who were thereafter, and on the 15th day of said month, duly adjudicated bankrupts, and thereafter your petitioner was duly appointed and duly qualified as assignee of their estate, and still remains such assignee; that, as such assignee, your petitioner has inquired into the title and interest of said bankrupts in and to the aforesaid

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stand in said market, and has ascertained from the authorities of the city and county of New York, that said city owns the fee of the land upon which said stand is erected, and, as such owner, claims title to the said stand; but deponent is further informed, that said bankrupts, at the aforesaid times, held and now hold a license or permit from said city to occupy and enjoy said stand and conduct their business therein; and that, because of certain long prevailing customs, said license is practically irrevocable, and the right to occupy there under may continue unquestioned for an indefinite number of years, subject to the payment of a small yearly rent to said city; and that it is the custom and practice of said authorities to allow the holders of such licenses or permits to assign the same, and for said city to transfer such license to such assignee, and thereafter recognize such assignee as entitled to occupy said stand; that said permits are held by the owners thereof at a large price or premium; that said bankrupts have informed your petitioner that they paid to the assignor of their permit, and as consideration for the transfer thereof to them, the said bankrupts, about the sum of \$4,000, which was the basis of the value of said stand, as set forth in said statement of assets, and your petitioner verily believes that a purchaser could be found for said permit, who would pay nearly the above mentioned sum therefor, provided the same would be transferred to him by said city; that your petitioner has exhibited the general assignment of said bankrupt's effects by the register in bankruptcy herein, to said authorities, but they refuse to recognize the same, and refuse, by virtue thereof, to transfer the said license or permit now held by said bankrupts to your petitioner, but your petitioner is informed and verily believes, that, if said bankrupts should personally, under their own hands, execute an assignment of said license to your petitioner, the said authorities would recognize the same, and would thereupon transfer said license to your petitioner, and thus enable your petitioner to obtain the value thereof for the benefit of the creditors therein; that said bankrupts have, ever since the adjudication herein, continued to use and occupy said stand for their own benefit, and now are conducting their business therein; and that said creditors have received no benefit therefrom." The petition prayed for an order directing

the bankrupts to severally execute an assignment to the petitioner of their interest in the said license, so that the value thereof might be secured to their creditors. The bankrupts answered the petition. The answer sets forth as follows: "That, prior to the year 1863, and under and by virtue of certain ordinances of the mayor, aldermen and commonalty of the city of New York, passed under the authority of the charter granted to said, the mayor, &c., by an act of the legislature of the state of New York, passed April 14, 1857, (Laws N. Y. 1857, c. 446, p. 874), a department was created, called and known as, 'Of the City Inspector's Department,' which embraced a 'Bureau of Markets;' that the provisions of said ordinance, with respect to markets, are as follows: Section 45, Revision of 1859: 'This bureau, the chief officer of which shall be called the "Superintendent of Markets," is charged with the duty of superintending the public markets, the inspection, regulation and management thereof, and of the transferring stalls and stands, and all other stalls and stands therein, and shall receive an annual salary of two thousand dollars;' that the said ordinances contain these further provisions respecting the occupation of stalls and stands in the public markets, to wit: 'Sec. 50. He may, with the consent of the city inspector, grant permits, in writing, to such persons as may be proper, at a daily rate, to be mentioned therein, to occupy stands in the public markets, and may, at any time, with the like consent, annul such permits.' 'Sec. 57. It shall be the duty of the superintendent of markets to prepare a register or list of all permanent stalls or stands of the several markets; the names of those occupying, and the fee or rent per week or month, paid for the same; and the superintendent, under the direction of the city inspector, for that purpose, shall have the power to arrange and renumber the stands or stalls in the several markets, and equalize the rents or fees thereof; and the occupants of such stands or stalls, shall immediately, at their own expense, cause numbers to be placed thereon. A copy of such register or list shall, immediately after the same has been prepared, be filed by said superintendent with the comptroller, and all returns of market rents or fees shall be made in accordance with such register or list. Sec. 58. No transfer or assignment of any stall or stand, in any of the public markets, shall be made without written permission of the city inspector and the superintendent of markets, and such transfer duly entered upon such register or list, and notice thereof given to the comptroller, who shall consent to such transfer before any removal can be made of such transfer. In case of any person being removed, or any permit being annulled, the party or parties in interest shall have the privilege of making an appeal to the common council on any decision made by the city inspector concerning such removal.' 'Sec. 65. They, (the clerks of markets,) may suspend any person having a stated stall or stand in the public market, to which they are respectively attached, or occupying a part thereof, or of the street adjoining the same, from occupying or using any part of such market or street, whether he be a licensed butcher or not. Sec. 66. Immediately upon such suspension, the clerk making the same shall report the facts thereof, with the reasons

for the suspension, to the city inspector, who shall hear the same, upon sufficient notice to the person suspended, and an opportunity afforded him to be heard in his defence, and whose decision upon the matter shall be final, provided the mayor shall approve the same;’ that, by section 1 of the act of legislature of the state of New York, passed April 24, 1863, and known as chapter 227 of the Laws of 1863 (Laws N. Y. 1863, p. 407), it was provided, among other things, as follows: ‘The bureau for the inspection, regulation and management of the public markets of the city of New York shall hereafter be in the finance department of said city, and all laws and ordinances now in force relative to the bureau of markets, or superintendent or other officers thereof, shall apply to the said bureau as herein provided;’ that, by the said city charter (section 22,) the comptroller is made the chief officer of the finance department, and that, under and by virtue of the said statute, the word ‘comptroller’ has been substituted for the word ‘city inspector,’ wherever the same occurs; that, by a certain other act of the legislature of said state of New York, known as chapter 158 of the Laws of 1832 (Laws N. Y. 1832, p. 251), it was provided, in substance, that any and all ordinances of the mayor, aldermen and commonalty of the city of New York might be read in evidence from a volume of said ordinances printed by authority of the common council of said city of New York; that, under said charter, laws and ordinances, and not otherwise, and on or about the 27th of September, 1873, a permit or license was issued to your respondents, in the following words and figures, to wit: ‘No.—. City and County of New York, Comptroller’s Office, New York, September 27th, 1873. Permission is hereby granted to Martin Gallagher and Daniel Lane to occupy the stand Nos. ½ of 305, 306 and 307, 33, 35, 37, Country Row, in Washington Market, at the weekly rental of thirteen 75-100 dollars, or such other increased weekly rental as may be established from time to time, the said Gallagher and Lane stipulating and agreeing, in the use and occupancy of said stand, to be governed by and obey the ordinances, rules and regulations now established, or to be established hereafter, for the management of the public markets; the above stand to be occupied only as a stand for the sale of country produce. This permit is revocable

at the pleasure of the comptroller, and cannot be transferred without his written permission. And. H. Green, Comptroller. Thos. F. Devoe, Superintendent of Markets; that a permit or license given under the aforesaid provisions does not constitute property; that it confers upon its holder no right or interest cognizable by courts, or capable of being protected by them; and that courts cannot compel a permit to be given, nor prevent one from being annulled, nor in any manner review the actions of any of the officers mentioned in the ordinance, nor compel the recognition of one who should purchase or acquire a permit under its order or decree, nor put such a purchaser or party acquiring such license in possession, or protect him in his possession.”

The case was heard on such petition and answer, by the district court [Case No. 5,197], and that court (Choate, District Judge) made the following decision: “This is a motion to compel the bankrupts to transfer to the assignee their license or permit to occupy certain stalls in Washington Market. The objection is taken, that it is not property which passes to the assignee under the bankrupt law. It appears, that the right to use and occupy a certain portion of the market is granted by the city for a certain fixed rent, without limit of time; that it is revocable at the will of the city; and that its assignment gives the assignee no rights, unless consented to by certain officers of the city. It appears, however, that such rights have a well established pecuniary value, and, by an established usage of the city in dealing with them, there is no practical difficulty in the transfer of them from one party to another; that, in a statement of their assets made to induce credit in their business, these bankrupts, within a year before their bankruptcy, put down these Washington Market stands as worth \$4,000; that they cost about that sum, and can be sold for nearly as much; and that the creditors of the bankrupts were, in fact, induced to give them credit, partly on the ownership of these rights. The assignee, having applied, under his general assignment in bankruptcy, to the city, has been refused any recognition as assignee of the license, and now shows, by affidavit, that, if he shall have an assignment directly from the bankrupts, his rights as assignee will, probably, be recognized. I think the objection, as applied to this case cannot avail. It is obvious enough, that this license or right, or whatever it may be called, has a fixed pecuniary value. It was a part of the bankrupts’ capital in business, in which they had invested their money, and on the faith and credit of which they incurred their debts. It is grossly unjust and inequitable, under these circumstances, that they should be permitted, on merely technical grounds, to withhold it from their creditors. If, in one sense, and for some purposes, it cannot be regarded as ‘property,’ as, for instance, for the purpose of being held by a receiver,—*Barry v. Kennedy*, 11 Abb. Pr. (N. S.) 421,—yet it seems to me that it is clearly property within the province of the bankrupt law. There is a distinction between this purely business right and the right of membership in a business exchange or company. Thus, it has been held, that the right of membership in a board of trade did not pass to the assignee, though having a pecuniary

value,—In re Sutherland [Case No. 13,637]; but that case was not a case of a right of a purely business character. The element of personal choice of associates constituted a part of the basis of the membership. That element is wanting here. It is not to be presumed that any such consideration would or could affect the action of the city in giving or withholding its assent to an assignment. In an unreported case in this district, Judge Blatchford refused to make an order for the sale at auction of a seat in the stock exchange, solely, however, on the ground that he would not permit a public sale to be made under the sanction of the court, in a case where the assignee could not undertake with the purchaser to deliver the thing sold. The question raised in this case was not determined, and that case was more nearly analogous to the case of In re Sutherland, supra, than to the present case. The Inclination of the courts in dealing with the question as to what passes by an assignment under bankrupt laws, has been to give a most liberal construction to it, for the benefit of creditors, in order to carry into effect their obvious purpose and intent. Thus, under the bankrupt law of 1800 [2 Stat. 19], it was held by the supreme court, reversing the decision of Mr. Justice Washington, that a claim against a foreign government, though a mere possibility of recovering through the future voluntary action of such government, was property that passed under the act. Technically, it was nothing which the law, for many purposes, could recognize as having any existence as property, yet it was within the purview of the act. *Vasse v. Comegys* [Case No. 16,893]; *Id.*, 1 Pet. [26 U. S.] 193. And see *Williamson v. Colcord* [Case No. 17,752]. I see no greater difficulty in the present case. It is true, that, the right of the bankrupts to assign is subject to the approval of the city, but so is the right of the lessee to assign his term often so subject to the approval of the lessor. The lease, nevertheless, passes in bankruptcy, if the assignee chooses to take it. It is, also, true that this permit or license is revocable at the will of the city. I do not think, under the circumstances of this case, this incident of the thing takes it out of the purview of the bankrupt law. The words denoting property, in the law, as it seems to me, ought not to be technically construed. There is an existing valuable right, perhaps, it may be called a chose in action or existing contract, of value, which, except in case of possible

action by the city, would continue to be in their hands, and has, in fact, continued to be, for all practical purposes, business capital. To allow the bankrupts to hold it, would encourage such debtors as should be disposed to defraud their creditors to make similar arrangements with their landlords, and thus lock up their business capital for their own use, permanently, and make the bankrupt law, so far as they are concerned, a farce. It is suggested, on behalf of the bankrupts, that any order the court may make, will be a brutum fulmen; that the bankrupts are at liberty to procure, at any time, the revocation of their license, and the grant of a new license to some person friendly to them; and that this would defeat any action their assignee in bankruptcy may propose to take to realize on this asset, if it be such. It is enough to say, in relation to this suggestion, which, indeed, I do not understand to be, in any sense, a threat of what the bankrupts intend to do, but only an argument, from what they may, as it is claimed, lawfully do, that the consequences of any interference with the action of the assignee or the court, in turning into money what is held to be property, whether such interference is direct or indirect, are likely to be very unpleasant. Such interference as is suggested, if it were attempted, would, of course, subject the bankrupts to proceedings for contempt. The motion is granted.”

Thereupon, on the 7th of May, 1879, the district court made an order that the bankrupts, and each of them, appear before the register in charge, and severally, but at the expense of the assignee, execute and deliver to him an assignment, in the usual form required by said city, of all the right, title and interest which they may have had on the 4th of June, 1878, in and to the stand Numbers ½ of 305, 306 and 307, 33, 35 and 37, Country Row, in Washington Market, New York City, occupied by them, and also in and to the license or permit to occupy the said stand, theretofore issued or granted to them by the city and county of New York, and that they also deliver said license or permit to the assignee. Subsequently, on the 26th of May, 1879, the district court made a further order, as follows: “The annexed paper, having been submitted to the court as a proposed form of assignment, to be executed and delivered by the bankrupts to the assignee, in pursuance of the order made herein on the 7th of May, 1879, (such paper being as similar to the usual form of transfer of market stands as the circumstances will permit of,) and the said bankrupts having objected to the said form because of the request to the city authorities contained therein, it is ordered that such objection be overruled, and that the bankrupts execute the aforesaid paper as required by said order.” The following was the paper annexed: “The undersigned, owners of stand known and designated as numbers 33, 35, 37, Country Row, West Washington Market, request that a permit may be issued for the same, in the name of Horace W. Day, assignee, and respectfully apply for permission to have such transfer made, and that the stand may be occupied for the sale of fruits.” “Whereas, the undersigned were, on the 4th day of June, 1878, duly adjudicated bankrupts by the district court of the United States for the Southern district of New



York, and Horace W. Day was thereafter duly elected and confirmed as assignee of their estate, which office was accepted by him, and, whereas, by an order of said district court, duly made and entered on the seventh day of May, 1879, the undersigned were ordered and directed to execute and deliver to said assignee an assignment of all the right title and interest which they, or either of them, had in and to the stand and permit hereinafter mentioned, on said fourth day of June, 1878, now, therefore, in pursuance of said order, we do hereby assign, transfer and set over unto said Horace W. Day, assignee, all the right title and interest which we, or either of us, had, on said fourth day of June, in and to that certain stand known and designated as numbers 33, 35, and 37 West Washington Market, the particulars of our ownership of said stand being as follows: Right acquired by purchase. Permit issued by Comptroller A. H. Green. T. F. Devoe, Superintendent of Markets. In the name of Gallagher & Lane. Occupied for sale of fruits. Rent, per week, as paid to present collector, \$13.50. Witness our hands." The bankrupts, after executing the papers provisionally, applied to this court, by petition, for a review of said orders, alleging that the license was not property to which the assignee in bankruptcy became entitled.

Gershom A. Seixas, for bankrupts.

Scudder & Carter, opposed.

BLATCHFORD, Circuit Judge. I think the bankrupts are estopped, by the facts shown, from asserting that the right enjoyed by them under the paper signed by the comptroller, dated September 27th, 1873, is not property in their hands. It may require the execution on their part of such papers as they have executed, dated May 28th, 1879, and the written permission, of the comptroller that such right be transferred, before the property is in such a condition that its salable value can be realized. But such value, when realized, will be the proceeds of the property of the bankrupts, owned by them when the petition in bankruptcy was filed, quite as much as an equal sum of money to be now received by them for the salable value of such right on its transfer by them, with the permission of the comptroller, would be the proceeds of such property. That the latter would be the proceeds of such property, I cannot doubt I concur in the views of Judge Choate in his decision.

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and am of opinion that the order of May 7th, 1879, and the order of May 26th, 1879, were proper orders. The prayer of the petition of review is denied.

GALLAGHER, In re. See Case No. 5,197.

<sup>1</sup> [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 19 N. B. R. 224, contains only the report of the case in the district court.]

<sup>2</sup> [Affirming Case No. 5,197.]