Case No. 5,848.

GROW v. BALLARD et al.

{2 N. B. R. 194 (Quarto, 69);[1] 1 Am. Law T. Rep. Bankr. 111.}

District Court, D. California. Oct., 1868.

BANKRUPTCY—ASSIGNMENT BY INSOLVENT—EXEMPTION.

An assignment by an insolvent of all his property for the benefit of preferred creditors is an act of bankruptcy. Where property of an insolvent was assigned to the creditors with fraudulent preference, *held,* in an action brought by the assignee in bankruptcy to recover said property, that the value of property exempt from execution must be deducted, and judgment entered up for remainder.

[Cited in Graham v. Stark, Case No. 5,676; Re Marter, Id. 9,143.]

HOFFMAN, District Judge. This is an action by the assignee in bankruptcy to recover the value of certain goods, alleged to have been conveyed by the bankrupt to the defendants, contrary to the provisions of the bankrupt act. The bankrupt had, in the year 1866 and 1867, become indebted to the defendants, commission merchants in this city, for advances made to enable him to carry on his farming operations. To secure these advances he had executed two promissory notes, and had also consigned to them his crop to be applied in satisfaction of notes. After the crop had been sold the bankrupt gave an order on the defendants for the sum of——dollars. It happened that the partner with whom the business had chiefly been conducted was out of town when the order was presented. The other partner, forgetting for the moment the existence of the notes, merely referred to his accounts of the sales of the crop, and finding there was a balance still due the bankrupt, sufficient to meet the order, paid it. The next morning he discovered his mistake, and at once demanded a return of the money. This was refused by the party who had received it, and the bankrupt, at a demand of the creditor, thereupon executed an assignment or bill of sale of all his property, even including farming utensils and other property exempt from execution.

The question presented is: Is the transfer void under the bankrupt law? Under the bankrupt act of 1841 {5 Stat 440}, the general rule was that a transfer was not void as a fraudulent preference where it was not voluntary, but was procured by the pressure of the creditor, or by measures taken by him for the enforcement of his debt. 3 Hil. Bankr. 342; 2 Smith, Merc. Law, 481. Even if an act of bankruptcy be contemplated, yet if at the instance, and on the application of the creditor, he makes payment or assigns property, such payment or assignment is valid as against the assignees of the bankrupt. (Spencer, J.) Phoenix v. Ingraham, 5 Johns. 428; Ashby v. Steere {Case No. 576}. The authorities, however, were not unanimous, for in Atkinson v. Farmer's Bank {Id. 609}, it was held that a preference, in contemplation of bankruptcy, is no less an act of bankruptcy because he yielded to the threats and coercion of the creditor. But it seems to have been un-

questioned that an assignment to a creditor, with notice of an act of bankruptcy already committed, is as void under the English as our own bankrupt laws, and the title of the assignee in bankruptcy related back to the date of the act of bankruptcy. In Shawhan v. Wherritt, 7 How. [48 U. S.] 641, it was held by the supreme court of the United States that a lien acquired by decree of a state court, in a suit instituted after the notice of an act of bankruptcy committed by a merchant, was invalid, and the party who had received property of the bankrupt, or its proceeds, under such decree must account to the assignee therefor.

Both in England and America it is held that a general assignment by an insolvent of all his property for the benefit of preferred creditors, is an act of bankruptcy, though made without moral fraud and under the importunity of creditors. Ex parte Breneman [Case No. 1,830]. In Worseley v. de Mattos, Lord Mansfield observes: "A conveyance of a part may be public, fair and honest, but a conveyance of all must either be fraudulently kept secret or produce an immediate absolute bankruptcy." 1 Burrows, 467, 468. And in Wilson v. Day, 2 Burrows, 827, the same judge says: "This deed is an act of bankruptcy itself. It defeats the whole bankrupt law; nothing remains for the creditors in any shape, but his whole estate is put into the hands of his own trustees; therefore, of course, he is a bankrupt the moment he has executed the deed, for there is nothing at all left for his creditors. See Avery & H. Bankr. Law, 261, and cases cited. See, too, 7 East, 138; 1 W. Bl. 441; 7 Scott, N. R. 900. Even an assignment by trustees of one's whole estate for the purpose of equal distribution among all the creditors would, under our recent act, be held void, for it would be an attempt to substitute the trustee selected by the bankrupt for the assignee contemplated by the act, and the conveyance would be made with a view to prevent the property from coming to the assignee in bankruptcy, and to prevent the same from being distributed under the bankrupt act" 4 East, 230; 17 Ves. 139; Cowp. 123; 3 Esp. 229; 3 Scott, N. R. 245.

In the case at bar the insolvency of the debtor was, of course, known to the creditor, who procured a transfer to himself of the whole estate of the debtor. This, under the authorities above cited, was an act of bankruptcy per se, and was invalid under the English law, or under the act 1841. It was therefore, necessarily invalid under the act of 1867 [14 Stat 517], which is far more stringent in its provisions, and seems framed to deprive an insolvent debtor of any right to give a preference or to do any act which will prevent

the equal distribution of his property among all his creditors. Among the property transferred were several articles exempt from levy and sale on execution. As to these there could have been no intent to prevent them from coming "to the assignee or being distributed under the act," or any "design to hinder, delay, or impede the operation of the act," to give to one creditor what was the property of all. Being exempt from execution, they could not pass to the assignee, nor could their proceeds be distributed as assets, nor could any creditor have any claim to or interest in them. The value of these articles must, therefore, be deducted, but for the value of the remainder of the property a judgment must be entered.

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