

Case No. 5,975.

IN RE HAMBURGER ET AL.

{12 N. B. R. 277; 1 N. Y. Wkly. Dig. 53.}¹

District Court, S. D. New York.

1875.

BANKRUPTCY—RENT.

If the officers of the court keep possession of the premises the landlord is entitled to a reasonable compensation for the time that they are so occupied.

[Cited in *Re Ives*, Case No. 7,116; *Re Secor*, 18 Fed. 320.]

By the Register:

This cause is pending before me, at the chambers of this court, by an order, dated the 27th day of March, 1875, “to inquire on proofs and report what is a proper amount, if any, to be paid out of the assets of the estate for the use and occupation of the said premises by any officer of the court, or by the assignee, since the petition in bankruptcy was filed.” I do here by certify and report that the petitioners and the assignee have appeared before me: That the facts as appears from the testimony before me taken on this trial, and the proceedings in the matter, are as follows: The above named bankrupts [Max Hamburger and Berthold Frankel] on the 10th day of August, 1874, filed a petition for an adjudication in bankruptcy of themselves, and were duly adjudged bankrupts the same day, and there upon surrendered to me their estate and effects, consisting in part of pictures, picture-frames,

mouldings, machinery, etc., situated on the third and fourth lofts of the premises, Nos. 18 and 20 Vesey street, in the city of New York, which remained in my possession until on or about the 18th day of February, 1875, when an assignee was appointed. That the assignee subsequently sold said property, and on the 15th day of March, 1875, delivered the keys of said premises to the petitioners, the landlords of said premises, from whom the said bankrupts held a lease of said premises at a yearly rental of one thousand eight hundred dollars, which said lease is here unto annexed. That the said bankrupts sought to effect a compromise with their creditors, under the provisions of section 5103a of the Revised Statutes, which was accepted by their creditors at a meeting held for that purpose on the 2d day of October, 1874, and afterwards duly ratified by the required number and value of their creditors, and subsequently approved by this honorable court, but by reason of the failure of the bankrupts to procure the indorsement of their composition paper by the person relied upon and mentioned by them, at the said composition meeting, the terms of said composition were not carried out That the order for the first meeting on composition is dated the 12th day of September, 1874, and the second report on composition was filed in the office of the clerk of this court on the 26th day of November, 1875. That pending said proceedings, the petitioners applied to the attorneys for the bankrupts a number of times for possession of said premises, by whom they were told the bankrupts would certainly effect a compromise with their creditors, and they would then pay the rent and remove the goods. That the petitioners also demanded possession of said premises from the undersigned, by whom they were told "that they would have to proceed in the state courts to dispossess him," that is, the register, and that he, the register, "did not know but that this court would enjoin the petitioners from putting the goods on the sidewalk." That no formal proceedings, were taken by the petitioners to get possession of the said premises until after the failure of the bankrupts to carry out the terms of the said composition, when they applied to this court by petition dated the 11th day of December, 1874, praying "for an order directing me, the said register, to sell said property stored in said lofts, as aforesaid, according to the rules and practice of this court." That said petition was referred to the undersigned, by an order of this court, dated the 6th day of January, 1875, to take proofs and report to this court what ought to be done in the matter. That several witnesses were examined under said order, but before the testimony was completed, the bankrupts applied to the undersigned for a warrant for the first meeting of creditors for the purpose of electing an assignee, where upon the petitioners suspended further proceedings under the said order, and the undersigned as register and the assignee of said bankrupts retained successively undisturbed possession of said premises until the 15th day of March, 1875, when the keys there of were surrendered to the petitioners by the said assignee. That the testimony taken under the order of January 6th, 1875, is here with returned as a part of these proceedings, it having been offered in evidence by the attorney

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for the assignee. That no agreement was entered into by the undersigned, or the assignee here in, with the petitioners, as to what rent should be paid for said premises while occupied by them in their respective capacities as register and assignee. A witness as an expert testifies that the said premises were and are worth the sum of one thousand six hundred dollars per annum, whether used for manufacturing purposes or merely for storage. That he never had occasion to collect rent from a tenant holding without an agreement.

The facts in the case are in no wise analogous to those in the cases cited by the counsel for the assignee in his brief, which is herewith submitted. In this case the landlords have from the time of the bankruptcy acted the part of just, honest, and honorable men, in every way, aiding the bankrupts to continue their business, and the creditors to obtain the percentage originally agreed upon. The refusal by the person named by the bankrupts, to indorse their composition notes, was not their fault; they waited patiently for the bankrupts to fulfill their agreement and to carry out the composition sanctioned by this court. That it could not be done was the bankrupt's misfortune, and not the fault of the landlords. The fault was in the over-estimate and exaggerated value put by the bankrupts upon their property and business. My experience has taught me that such is the fault common to all bankrupts. But for such a fault the landlords cannot, neither should they be punished by depriving them of a fair and just compensation for the use and occupation of their premises. Bankruptcy, like death, is the end of all things; contracts as well as all other things cease and end by an adjudication. In this case, the lease terminated with the bankruptcy, after which the landlord must apply to the court, as per practice, and must prove the value of the premises so occupied. This they have done, and the amount is not controverted nor disputed by the assignee. The court has had possession of the premises. To have removed the property and rented other premises would have been much more expensive, and entailed a much larger sum upon the estate than the amount claimed by the landlords. The retention of the premises has been for the best interest of the creditors. Equity and good conscience requires that the landlords should be fairly and justly dealt with. It is to be expected that assignees will be

cautious and resist all claims they deem doubtful; but the court should see that equal and exact justice was done as between all parties. This is clearly intended by the wording of the order of reference in this case. The testimony shows the value of the premises to be from one thousand six hundred to one thousand eight hundred dollars per annum, which is a reasonable sum to be paid there for by the estate. It is apparent that the premises were worth that sum to the estate. The court, by operation of law through its officers, becoming the occupant and deriving title by operation of the bankrupt act [of 1867 (14 Stat 517)], succeeds to all the rights and some of the liabilities of the bankrupts, especially those liabilities incurred in the preservation of the estate, as was done in this case. The landlords only claim the actual value of the use of the premises, nothing more.

I do not consider the decision in the case of McGrath [Case No. 8,808], as an adverse decision. The application for the order of reference to fix the amount due the landlords was the correct course to be pursued, and the finding of the court fixes the rate at which the landlords as well as the assignee must be bound, as the measure of compensation for the use and occupation of the premises. The landlords did not apply to the court for the possession of the property, nor to have a fixed and definite amount of rent agreed upon, but did consent to the occupation of the premises by the estate, and can therefore only be allowed for the use and occupation of the premises what they were worth, be it more or less than the sum named in the lease. The adjudication in bankruptcy canceled the lease, and if the landlords desired the immediate possession of the premises, or the payment of the rent as named in the lease, they should have applied to the court for the one or the other. Not having done so they can only have the value of the premises allowed them. In re Metz [Id. 9,509].

The testimony uncontradicted varies from one thousand six hundred to one thousand eight hundred dollars per annum. It has been the uniform practice, and I deem it the correct one, that the claimant pay the fees of the referee upon the making up of the report. In this case let the register's fees be a charge upon the estate in the hands of the assignee. I find, and do hereby so report, that the sum of nine hundred and fifty-five dollars and fifty-four cents is due the claimant for the rent of said premises, while the same were occupied by the officers of this court, to wit: from the 10th day of August, 1874, until the 15th day of March, 1875, being seven and one-sixth months at one hundred and thirty-three dollars and thirty three and one-third cents per month, or one thousand six hundred dollars per annum, and respectfully recommend that an order be entered herein empowering and directing the assignee herein to pay the same out of the funds in his hands belonging to the estate.

BLATCHFORD, District Judge. Let an order be entered in accordance with the decision of the register. [See Cases Nos. 5,971 and 5,974.]

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¹ [Reprinted from 12 N. B. R. 277, by permission. 1 N. Y. Wkly. Dig. 53, contains only a partial report.]

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