IN RE HUNT ET AL.

Case No. 6,882.
{5 N. B. R. 433.}[1]

District Court, D. New Jersey. Oct. 17, 1871.

BANKRUPTCY—PETITIONING CREDITOR—PROVABLE DEBT—MERGER IN JUDGMENT—PREFERENCE—SURRENDER.

1. Creditors petitioned to have debtors adjudged bankrupts. The debt due the creditors had been merged in a judgment which was clearly a fraudulent preference. *held,* that the debt having been thus merged it was not a provable debt, and a petition founded upon it could not be sustained.
2. In such a case, however, creditors will be allowed to surrender their preference, and upon their doing so, the acts of bankruptcy being confessed, an adjudication will be ordered.

{In bankruptcy. In the matter of M. Hunt and W. E. Hornell.}

NIXON, District Judge. Objections are made to an adjudication of bankruptcy in this case, because the petitioning creditor's debt is not one provable in bankruptcy. The petition alleges that the nature of the creditor's demand against the alleged bankrupts is, first, a promissory note dated February eighth, eighteen hundred and seventy-one, for one hundred and ninety-one dollars and ninety-seven cents, payable two months after date, and a book account for goods, wares and merchandise, sold and delivered by the petitioning creditors to the debtors, amounting in the aggregate to four hundred and seventeen

dollars and fire cents: and that the acts of bankruptcy committed are (1) a general assignment of their property under the state law, and (2) the non-payment of commercial paper more than fourteen days after its maturity. The acts of bankruptcy are admitted, but the adjudication is resisted upon the ground that the debt of the petitioning creditors has been merged, in a judgment; that a suit has been brought upon the said debt in the state court and a judgment obtained thereon against the debtors; that said judgment is still outstanding and a lien upon their property, and that the same was obtained by the creditors after they had reasonable cause to believe the debtors to be insolvent, and hence is a fraud upon the provisions of the bankrupt act [of 1867 (14 Stat. 517)]. This is an involuntary proceeding, and one of the facts necessary to exist in order that the court may have jurisdiction is that the petitioning creditor shall have a debt against the alleged bankrupt provable under this act amounting at least to two hundred and fifty dollars.

As this case is now presented to the court, the petitioning creditors have not a debt of this character. With a full knowledge that their debtors had committed an act of bankruptcy by allowing their commercial paper to go to protest, and not paying it within a period of fourteen days, and thus having reasonable cause to believe them to be insolvent, instead of taking their debtors into the court of bankruptcy, that their property might be administered and equally distributed according to the beneficient aims of the bankrupt act, they hurried into the state courts and obtained a judgment upon their claim hoping, in a race of diligence, to outstrip and obtain a preference over other creditors, contrary to and in fraud of its provisions. Finding that they were foiled in their endeavor to acquire a lien upon their debtors' property by the conveyance of all their estate to an assignee, for the benefit of their creditors, under the state law the petitioning creditors then filed their petition in bankruptcy in this court, against their debtors, alleging their debt to consist of the promissory note and book account, which had already been merged in the judgment then and now subsisting and outstanding against their debtors. The evidence of debt which the petitioning creditors have against the alleged bankrupts, is not the promissory note and book accounts, but the judgment in which they have merged, and the judgment obtained under these circumstances is clearly not a debt provable under the act, but is void as a fraudulent preference.

The petitioning creditors having placed themselves in this dilemma, is there no remedy for them? The answer to this question will be found in a lawful consideration of the provisions of the twenty-third and thirty-ninth sections of the act. By the twenty-third section it is provided that, "any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit or ad-

vantage received by him under such preference." In the thirty-ninth section it is enacted "that any person who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money or other property, or procure or suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors, or to defeat or delay the operation of this act, shall be deemed to have committed an act of bankruptcy, and shall be adjudged a bankrupt, and if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred contrary to the act, provided, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy."

The provisions of these two sections, upon their face so contradictory, must, if possible, be so reconciled that both may stand. The most satisfactory way to do this is to hold that the prohibition of the creditor to prove his debt, in the thirty-ninth section, only applies to those cases where he has refused upon demand to surrender his preference and compelled the assignee by suit, to recover back the money or property so claimed and held by him in fraud of the provisions of the act. He may surrender his preference under either section, and prove his debt before a recovery against him by judgment, but after a recovery he is not permitted to prove under either. In re Montgomery {Case No. 9,728}; In re Davidson {Id. 3,599}. But this construction of the apparently contradictory provisions of these sections does not quite reach the difficulty in the present case. The surrender provided for is a surrender to the assignee. Can it be made by a petitioning creditor, when he files his petition and before an assignee has been appointed, so as to make his debt provable under the act? Looking at the spirit of the law and the design of the surrender, I am of the opinion that he can, by setting forth in his petition all the proceedings that have been had to obtain the preference, and by voluntarily surrendering such preference for the general benefit of the creditors of the estate. After the petition has been filed, the creditor himself and all his interest in the alleged bankrupt's property as well, are under the

control of the court, and the court is in a position to compel him, at any subsequent stage of the proceedings, to make good his tender, and to surrender to the assignee, before he shall participate in a dividend, and thus the object of the law, to wit, equality in the distribution of the assets, is secured.

In the present case, if the petitioning creditor shall amend his petition, setting forth to the court the judgment obtained and making a surrender of all preference under or by virtue of it, an order of adjudication will be made upon the acts of bankruptcy alleged and confessed. If not so amended, the proceedings do not disclose a provable debt under the act, and the petition must be dismissed with costs.

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