13FED.CAS.—12

Case No. 7,112.

IN RE ISRAEL.

{4 Dill. 501.}[1]

Circuit Court, D. Iowa. 1876.

BANKRUPT ACT—SURRENDER OF FRAUDULENT PREFERENCE—PROOF OF DEBT.

1. Section 23 of the original bankrupt act (section 5088 of the Revised Statutes), in relation to the surrender of fraudulent preferences, is not repealed by the 12th section of the amended bankrupt act of June 22, 1874 [18 Stat. 180], amending section 39 of the original bankrupt act, nor section 5021 of the Revised Statutes.

2. A creditor who, before presenting his claim for allowance in bankruptcy, and against whom no action has been brought by the assignee to defeat the preference, surrenders his preference under section 23, may prove his whole debt, and not simply a moiety of it

{Appeal from the district court of the United States for the district of Iowa.}

In bankruptcy. Irwin, Phillips & Co. presented a claim for allowance against the bankrupt's estate. The assignee filed objections, on the ground that they had received and accepted from the bankrupt a chattel mortgage with intent to obtain preference and defeat the operation of the bankrupt act To these objections the claimants answered to the effect that before they presented their claim for allowance in bankruptcy, they had fully surrendered their preference to the assignee. Demurrer by the assignee, on the ground that the surrender could not entitle the claimants to prove more-than a moiety of their debt Demurrer overruled by the district court, which held that the effect of the surrender was to entitle the claimants to prove their whole debt {Case unreported.} The assignee appealed from the decision of the district court

Howell & Anderson, for assignee.

James Hageman, for claimants.

DILLON, Circuit Judge. The question in this case is whether the creditors were entitled to prove the whole or only a moiety of their debt. They had surrendered their preference, without suit, to the assignee, before they presented their claim for allowance in bankruptcy. After a careful consideration of the 23d and 39th sections of the original bankrupt act, in connection with the amendment to the 39th section by the act of June 22, 1874 (section 12), my opinion is that the 23d section remains unrepealed by the amendment, and that if a preference be duly surrendered, as in this case, the surrendering creditor, whether his preference was an actual or only a constructive fraud upon the act, is thereupon entitled to prove his whole debt. It is not necessary to consider, on this appeal, what is a case of "actual fraud" within the meaning of the proviso to the 12th section of the amendment, for the reason that the amendment has no application to any ease where the creditor has, before suit brought against him by the assignee, under section 39, made

a full surrender of his preference. The opinion of the district judge, sent up with the record, as to the purpose and scope of the amendment of June 22, 1874, and the effect of the 12th section of that amendment on the law as it then stood, is so satisfactory on the question here involved, that it is not deemed necessary further to enlarge upon the subject Affirmed.

See Same Case {Case No. 7,111}.

[1] {Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.}