

Case No. 7,127.

IN RE JACKSON ET AL.

{2 N. B. R. 508 (Quarto, 159).}¹

District Court, North Carolina.

1869.²

BANKRUPTCY—HOMESTEAD—ACCOUNT OF ASSIGNEE.

1. Where bankrupts claimed under the state law, and the assignee attempted to set apart homesteads out of their real estate, and the creditors excepted to the assignees report in that respect, *held*, that the bankrupts were not so entitled, and a failure or refusal by the assignee to sell the real estate in question for benefit of creditors makes him responsible.
2. *Semble*, that it was unnecessary to except to the report of the assignee. Exception to his account for omission to charge himself with value of said real estate would suffice. *In re Farish* [Case No. 4,647], affirmed.

I, W. A. Guthrie, one of the registers of said court of bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions, pertinent to the same, arose upon exceptions, and were stated and agreed to by Thos. Chatterton & Co., Wesson & Huntling, George A. Davis & Co., and Haviland, Titus & Co., by their attorney, John W. Hinsdale.

First. Whether said bankrupts [Jackson & Pearce], or either of them, are entitled to a homestead under the bankrupt law [of 1867; 14 Stat. 517], they never having complied with any of the requirements of the act of 1858 and 1859, of the general assembly of North Carolina, entitled, "An act to establish a freehold homestead," ratified February 16th, 1859 [Laws N. C. 1858-9, p. 81].

Second. Whether the present is a proper time for creditors to except to the action of the assignee in setting apart, as exempted property, to the bankrupts any real property, the report of the assignee having been filed more than twenty days prior to the taking of exceptions thereto.

The creditors by their attorneys insisted that:

First. This assignment of homestead cannot be made under the head of "necessaries." See decision of Brooks, J., in *Re Thornton* [Case No. 13,994].

Second. The assignment can only be made under general clause forty-seven, section fourteen of the bankrupt act of 1867, of which the following is an extract: "Provided, however, that there shall be excepted from the operation of the provisions of this section, And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution, or other process, or order of any court by the laws of the state in which the bankrupt has his domicil, at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws, in force in the year eighteen hundred and sixty-four." The only homestead exemption law of North Carolina in force in 1864 was the act of 1858 and 1859 (chapter

38) ratified 16th day of February, 1859. This act does not exempt a homestead per se, but prescribes certain forms by which a homestead may be exempted, the observances of which are conditions precedent to the exemption, and must be followed strictly. Section third of this act declares that the homestead or house so laid off, shall not be subject to execution, &c., plainly indicating that unless it shall be laid off according to the provisions of said act, it will remain subject to execution.

Third. The first section of the act requires that a petition be filed in the county court for the laying off of a homestead of a certain value, upon which three freeholders are to be appointed to lay off and allot the said homestead by metes and bounds, and return the same to the next term of said court. The second section directs that the return shall be recorded by the register of the county, and that certain public notice of the same shall be given by the clerk. The omission of a single one of the above requirements invalidates the exemption.

Fourth. It is against public policy to exempt a homestead without notice to the public of such exemption. It is also against public policy that a homestead be exempted which has not been ascertained, limited, and set apart beforehand. Creditors have a right to know what property is to be exempted; this cannot be known when it has never been ascertained or limited. Section third expressly provides that the homestead laid off according to the act shall not be subject to execution for any debts contracted or cause of action arising after the same is registered. The necessary inference from which is, that although the land might have been set apart, unless the return of the freeholders shall have been registered, it is still subject to levy and sale. It is not pretended that any one of the requirements of the act has been complied with. In re Farish [Case No. 4,647].

Fifth. The assignments of homesteads to the bankrupts by the assignee is void, ab initio, and may be treated as a nullity by the court 1st. The assignee derives his title to all the land and other property not excepted by the bankrupt act, by virtue of the act itself—and the assignment made to him by the judge or register pursuant thereto. As to the real estate, the assignee takes an estate to himself and his heirs. 2d. All the real estate of the bankrupts in North Carolina passes to the assignee, except that of one who has had a homestead regularly allotted to him according to the act of '58-59. See In re Farish [supra]. 3d. The assignment of the assignee to the bankrupt of any real estate which had not been previously set apart to him under the act of '58-59 does not in any way divest the assignee of his title

to the said land, and is a nullity, for—4th. The assignment by assignee to bankrupt is not a deed—being without a seal. 5th. It is without a consideration. 6th. It is fraudulent as to creditors, being a wrongful and unauthorized diminution of the assets in which they were interested.

Sixth. The present is a proper time to bring the matter before the court. If the assignment is void *ab initio*, the court can set it aside at any time upon proper application. Rule XIX., general orders in bankruptcy, requiring the assignee to make report to the court within twenty days after receiving the deed of assignment of the articles set off to the bankrupt by him according to the fourteenth section of the act, with the estimated value of each article, and giving the right to any creditor to take exceptions to the determination of the assignee within twenty days after the filing of the report, has application only when the property is such as it is within the discretion of the assignee to set apart, as household or kitchen furniture or other articles and necessaries. The twenty days' limitation does not apply where land is set apart. For the assignee cannot set apart land not previously exempted. The assignee is not required by rule XIX. to make a report of land set apart, as real estate is not comprehended under the term "articles" (see decision of Brooks, J., in *Re Thornton* [supra]), and consequently the creditor need not except to the determination of the assignee, within twenty days, as to land which is property, not included under the head of "Articles." The time in which to except to an exemption of real estate is therefore unlimited.

Seventh. The title to the real property in question having never passed out of the assignee, it is competent for the court to order its sale.

BROOKS, District Judge. The register should have furnished with his certificate a copy of the report of the assignee, making exemption in this case, or stated the substance of the same. He has, however, stated barely enough to enable us to infer that the said report contains anything in relation to a homestead. The register, at least, should have stated that the assignee attempted to exempt a homestead or refused to do so. Both questions propounded in this certificate have been fully answered by me in the opinion filed in the office of Mr. Register Shaffer in *Re Farish* [supra]. I doubt whether it is necessary to except to the report of an assignee, in which he attempts to exempt land at any time. I rather incline to the opinion that any such attempt is so entirely void, that it would be sufficient to hold the assignee responsible for the value of the land so attempted to be exempted, if creditors should except to his account for the [omission to charge himself with such value. The assignee in this case will be held responsible if he refuses or fails to sell the real estate—attempted to be reserved to the bankrupt, or either of them; and accounts for the proceeds, in his general account of assets received.

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² [District not given.]