IN RE JENKS.

Case No. 7,276.
[15 N. B. R. 301.][1]

District Court, D. Minnesota. March 20, 1877.

BANKRUPTCY—ATTACHMENT—FEES OF SHERIFF.

1. A claim by a sheriff for fees and expenses in attachment proceedings begun within four months prior to the commencement of proceedings in bankruptcy will not, as a general rule, be allowed.

2. But where it is conceded that the attachment conserved the property and benefited the general creditors, the court will allow such claim.

In bankruptcy.

By A. Edgerton, Register:

Under the above bankruptcy a claim is presented of J. C. Becht, sheriff of Ramsey county, for service of an attachment upon the bankrupt's property previous to the filing

of the petition for adjudication of bankruptcy, and for the care and custody of property for thirty (30) days after such service of attachment. On the 13th of May, 1876, H. Bosworth & Sons, as plaintiffs, procured an attachment and summons against H. E. P. Jenks, the bankrupt. On the 1st of June, 1876, a petition for adjudication, etc., was filed, and on the 6th of June, an adjudication was made and warrant issued, and on the 13th of June the sheriff turned the property so attached over to the marshal, with the understanding that whatever the sheriff's legal rights might be as to the matter of costs, should remain the same as if the goods were in his possession; and his bill, amounting to sixty-four dollars and thirty cents ($64.30), is presented for allowance by the attorney for the attaching creditors. The attaching creditors abandoned their suit and relinquished all liens which they may have claimed to have upon the bankrupt's property, by proving their claim in the bankrupt court. But the expenses of the attachment are sought to be made out of the estate through a claim made by the sheriff, that he has a lien for his fee upon the property attached.

By the 14th section of the bankrupt law [of 1867 (14 Stat. 522)], it is provided that an adjudication of bankruptcy and assignment of the bankrupt's property to an assignee, dissolves all attachments made within four months before the filing of the petition in bankruptcy. It seems to me that a dissolution of the attachment is a dissolution of all liens upon the property by virtue of the attachment; that the sheriff should look to attaching creditors for his costs. There can be no doubt of his right to do so, and is it not his duty as well? When a creditor, knowing his debtor is insolvent, seeks to get a preference by attachment, instead of attempting to put the debtor into bankruptcy, he does it at his own risk, knowing that the debtor is likely to be, and ought to be thrown into bankruptcy. And if bankrupt proceedings are instituted to prevent a preference being obtained, and for a distribution among all the creditors pro rata, it is not right that creditors thus attempting to obtain preference over the rest, shall take from the estate the costs of such attempt for preference. If such a construction can be sustained, it is an invitation to all creditors to make an effort to obtain a preference in this way; it is saying to them that in any event the cost of the attempted preference will be taken out of the assets of the debtor's estate.

There has been some ruling to the effect that a sheriff has a lien upon the property attached up to the time of filing the petition in bankruptcy. But a recent decision by Mr. Justice Miller establishes to my mind the contrary doctrine. In the case of Bracken v. Johnson [Case No. 1,761] U. S. Cir. Ct. D. Iowa, Oct., 1876. In that case the attachment at the suit of Johnson was levied upon property of the defendant Brown, September 23d, 1872. On the 21st of January, 1873, a petition in bankruptcy was filed against Brown. On the 14th of February, 1873, Brown was adjudged a bankrupt. On the 25th of February, 1873, a judgment was rendered against Brown in favor of Johnson for two thousand two hundred and sixty-four dollars and fifteen cents. On the 28th of February, 1873, execu-

tion was issued, and on the 22d of March, 1873, the property was sold by the sheriff for two thousand three hundred and forty-nine dollars and forty cents, the costs of suit and sale being included, amounting to one hundred and seventy-seven dollars and fifty cents. On the 22d of March, 1873, the plaintiff Bracken was appointed assignee, and received his deed of assignment. He demanded a return of the property from Johnson, which was refused, and he commenced suit in the U. S. district court for the district of Iowa. The district court gave judgment for the defendant, and the assignee appealed to the circuit court of said district. The case was heard before Mr. Justice Miller of the supreme court, who reversed the judgment of the district court, and ordered judgment for the plaintiff (assignee) for the full amount received by the sheriff for the goods so sold, although it appeared that one hundred and seventy-seven dollars and fifty cents was for costs of said sale, and which, of course, included the sheriff's costs for levying the attachment, execution, and for poundage.

It may be said that the point as to the sheriff's lien did not arise in that case, but I do not see why the exact amount of costs should have been stated, unless that question was discussed in connection with it; of course it was a small item when compared with the original claim, but the fact that the amount of costs was stated, affords a strong presumption that the question was incidentally raised and discussed, and certainly the decision covers it. When the creditor attempted to get a preference by resorting to attachment, the learned judge remarked that he "was informed by the provisions of the bankrupt law that he initiated his attachment proceeding subject to its being rendered ineffectual by proceedings in bankruptcy within four months."

I disallow the claim, and at the request of the attorney for attaching creditors, certify the matter to the court for its consideration.

NELSON, District Judge. The opinion of the register in regard to the claim ordinarily presented for sheriff's fees in attachment proceedings is concurred in; but in this case it is conceded by a large majority of the creditors that the attachment conserved the property and benefited them. For this reason the claim should be allowed.

Ordered accordingly.

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