IN RE LEE.

Case No. 8,179.

{14 N. B. R. 89; 23 Pittsb. Leg. J. 196.}[1]

District Court, N. D. New York. March, 1876.

BANKRUPTCY—ILLEGALLY PREFERRED CREDITORS—RIGHT TO PROVE DEBT—TWO CLAIMS, ONLY ONE PREFERRED.

1. The amendments of 1874 {18 Stat. 178}, so far as they change the existing law in reference to the rights of assignees to recover property transferred in contravention of the bankrupt act {of 1867 (14 Stat. 517)}, and in reference to the proof of debts by creditors who have taken a preference, are not retroactive and do not apply where the proceedings in bankruptcy had been previously commenced.

{Cited in Warren v. Garber, Case No. 17,196.}

2. Under the prior law a preferred creditor who did not surrender his preference until he was compelled to do so by the judgment of a court, could not prove his debt.

3. If a preferred creditor has two separate claims and receives a preference on one of them alone, he may prove the other.

{Cited in Re Aspinwall, 11 Fed. 138.}

{In the matter of John F. Lee, a bankrupt.}

WALLACE, District Judge. I am of opinion that the Security Bank is not entitled to prove the claim upon which it received an illegal preference in 1872. This conclusion necessarily involves the decision of two questions against the bank, upon both of which my views conflict with authorities entitled to great respect.

First. The amendments of 1874, so far as they change the existing law in reference to the rights of assignees to recover property transferred in contravention of the bankrupt act, and in reference to the proof of debts by creditors who have taken a preference are not retroactive, and do not apply where the proceedings in bankruptcy had been previously commenced. If the amendments had merely removed a prohibition in the nature of a penalty upon creditors who had taken a preference, without affecting the substantial rights of others, there would be no difficulty in giving it retrospective effect. But it is to be observed that by the same amendment and in the same sentence two vigorous innovations upon the existing law are introduced, one of which defeats a recovery by an assignee where his right was clear, and the other diminishes a fund for the resort of innocent creditors, by authorizing another class of creditors to share in its distribution, who were theretofore precluded from doing so because of their wrongful acts. The former, in effect, alters a rule of property affecting the validity of all titles derived from bankrupts since the act went into operation; the latter defeats one of the most valuable advantages conferred upon innocent creditors. If one is retrospective, both are; for there is no language in the

section which permits a discrimination in favor of one, and against the other. If retrospective, the legislation disregards the settled doctrine that the character and consequences of particular acts are to he determined by the law in force, when the acts were done. In reliance upon the statute as it existed, many proceedings in bankruptcy had been instituted by creditors to obtain a distribution of assets in conformity with its provisions, and many actions were pending, brought by assignees upon the faith of those provisions. The injustice of depriving these creditors of the fruits of their diligence and of the benefits of the expenditures which they have incurred, is manifest; and no construction, not required by plain language, should be given to the amendments which would work this result. The general rule is well settled that, in the absence of plain and unequivocal language requiring it, a retroactive operation is not to be given to a statute. While this rule is greatly modified in construing repealing statutes and acts regulating procedure in actions, it has been repeatedly applied to such legislation when substantial rights of action or remedies would otherwise be injuriously affected. Thus, acts changing statutes of limitation, rules of evidence, rights of appeal and of redemption, creating new defenses or modifying previous remedies, have been repeatedly limited in their operation to cases arising after the passage of the act. In the absence of any language in the amendments indicating the legislative intent that these provisions shall apply to pending proceedings, I am clearly of opinion that they should be confined to cases arising after the amendments were passed. By the same amendment, new provisions in the act which relate to the form and requisites of proceedings for involuntary adjudication are made retroactive, and by express language applicable to all proceedings commenced after December 1, 1873; but the rights of parties prosecuting such proceedings are saved by provisions authorizing the proceedings to be conformed to the new requirements. By implication this limits the operation of the amendments to these proceedings only, and affords strong evidence of the legislative intent that the changes should not be otherwise retroactive.

Second. Treating the case as one to be determined by the law in force prior to the amendments, the creditor who has not surrendered a preference until he has been compelled, after contest, to do so by the judgment of the court, is precluded from proving the debt upon which the preferential payment was received. I have held repeatedly that under the terms of the 23d section of the act, prior to the amendment, a voluntary surrender was a prerequisite to the right to prove, and that it was too late for the creditor to avail himself of the privilege after he had elected to contest the assignee's title to the money or property preferentially received. Whether the action of the creditor was in actual fraud of the act, or only a constructive fraud upon it, he is chargeable with knowledge of its illegality, and must be assumed to have made his election with such knowledge. As to the note for one thousand and seventy-three dollars and eighty-six cents, of date of December 13, 1871, it does not appear that any part of the preference, received by the bank, was received upon

this note. On the contrary, the payments were made with the intention that they should be applied upon the other obligations upon which the bankrupt was liable to the bank, and they were applied accordingly. The bank is entitled to prove this note against the estate of the assignee. The decision of the court is, that the claim of the Security Bank be disallowed and its proof of debt expunged, except as to the amount due upon this note.

[1] {Reprinted from 14 N. B. R. 89, by permission. 23 Pittsb. Leg. J. 196, contains only a partial report.}