

Case No. 9,325.

IN RE MAY ET AL.

[7 Ben. 238;¹ 9 N. B. R. 419.]

District Court, S. D. New York.

March 28, 1874.

BANKRUPTCY—PROVABLE DEBT—RENT—MONTHLY INSTALMENTS—TIME OF BANKRUPTCY.

1. Premises were leased by C. to M. & B., by lease dated February 17th, 1871, and expiring May 1st, 1873. The rent was payable monthly, the rent for January, 1873, becoming due February 1st, 1873. On the 28th of December, 1872, a petition in bankruptcy was filed against M. & B., and the adjudication was made before February 1st, 1873. C. filed a proof of debt for the rent from January 1st, 1873, to May 1st 1873, to which the assignee objected: Held, that under the 19th section of the bankruptcy act [of 1867 (14 Stat. 525)], the rent for that period was not provable.

[Cited in *Bailev v. Loeb*, Case No. 739; *Be Hufnagel*, Id. 6,837.]

2. The words “time of the in,” in that section, mean the time of the filing of the petition.

{In the matter of August May and Aaron Berwin, bankrupts.}

By the register:

{I, the undersigned register in charge of the above entitled matter, do hereby certify that the firm of T. H. & T. W. Conkling have proved a claim before me against the said estate, of one thousand one hundred and one dollars and sixty-four cents, for rent of premises leased by them to the bankrupts from the 1st day of May, 1871, to the 1st day of May, 1873, at a rental of three thousand five hundred dollars, payable monthly on the first day of each and every

month, beginning with the first day of June, 1871, claiming the sum aforesaid as and for the rent due under the said lease, from January 1st, 1873, to May 1st of the same year, after crediting the sum of sixty-five dollars, paid them by the assignee for the use of said premises after the bankruptcy. The petition in bankruptcy was filed on the 28th day of December, 1872, the rent of said premises having been paid up to the 1st of January, 1873. The assignee objects to the proof on the grounds: (1) That after the bankruptcy he surrendered the premises to the landlords by delivering the keys to their agents. (2) That he hired the premises from the agent of the landlords, during the month of January, 1873, at a stipulated price of five dollars a day, and paid for the days he used and occupied the same, the sum of sixty-five dollars. (3) The assignee claims that the claim is not of the character specified in section nineteen, and cannot, therefore, under the last clause of that section, be allowed against the estate; that the language of the seventh clause of section nineteen, providing that, "where the bankrupt is liable to pay rent, which rent falls due at fixed or stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy," followed by the words in the last clause of the section, "no debt, other than those above specified, shall be proved or allowed against the estate," in effect forbids the proving of a claim for rent which accrued subsequently to the bankruptcy, and the parties desire said issue to be certified to the court for decision. Respectfully submitted.]²

Brewster & Crowell, for lessors.

T. Saunders, for assignee.

BLATCHFORD, District Judge. T. H. & T. W. Conkling have proved a claim against the bankrupts for \$1,101 64 and interest from May 1st, 1873, "being a balance for rent of premises" let to the bankrupts by T. H. & T. W. Conkling, by a lease bearing date February 17th, 1871, and expiring May 1st, 1873. The rent claimed in the proof is for the four months from January 1st, 1873, to May 1st, 1873, at the rate of \$291 66 per month, less a credit of \$65 00 as paid. The assignee of the bankrupts has filed with the register an objection to such claim and proof of debt, on the ground that the alleged debt or claim is not provable against the said estate under the bankruptcy act, "for the reason that the said debt or claim, or any part thereof, did not exist at the time of the filing of the petition for the adjudication of bankruptcy herein, to wit, the 28th day of December, 1872." The register has taken testimony in the premises, not under an order made by him, in pursuance of general order No. 34, on a petition to him for the reexamination of the claim, but apparently by the consent of the parties. Thereupon the register has certified to the court, under section 4 of the act, the question or issue as to whether the claim should be allowed. He also has certified the testimony and the proof of claim. The lease forms a part of the testimony.

The petition in bankruptcy was filed on the 28th of December, 1872. The rent under the lease was fully paid up to the 1st of January, 1873, before the petition in bankruptcy was filed. The rent reserved by the lease was payable monthly, on the first day of each month, at the rate of \$3,500 per year. The lease was for two years from the 1st of May, 1871. The first rent became payable on the 1st of June, 1871. The rent for the month from January 1st, 1873, to February 1st, 1873, did not become payable till February 1st, 1873. The adjudication of bankruptcy was made before February 1st, 1873.

The 19th section of the act provides, "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of contract, may be proved against the estate of the bankrupt. * * * Where the bankrupt is liable to pay rent or other debts falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods. If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, * * * the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate."

It is contended, for the lessors, that this claim for rent was, under the 10th section, a debt existing at the time of the adjudication of bankruptcy, but not payable until a future day, and that, therefore, it may, by the terms of that section, be proved against the estate. The case is sought to be likened to that where an article is purchased to be paid for in instalments, at fixed periods, and only part of the instalments are paid before an adjudication of bankruptcy, in which case, it is contended, the vendor can prove his debt for the remaining instalments, a rebate of interest being made if no interest is payable by the terms of the contract. This might be so if there were not a special provision for the case of rent falling due at fixed and stated periods. And there seems to be a reason for such special provision in regard to rent, in the fact that, where an article is purchased, the consideration is, or is assumed to be, executed, while, in the case of rent, the consideration is assumed

to be not executed, but executory, the use and occupation being in futuro. But, whatever the terms of payment of rent may be, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at the periods fixed by the contract of letting. The provision in regard to rent not yet due, and to proving for a proportionate part of it, with the further provision that no other than the specified debts shall be proved, makes it entirely plain that this debt, as proved, cannot be allowed. Whatever is not provable will not be discharged. The provisions in regard to what debts may be proved are arbitrary, but such provisions do not affect the existence or validity of such debts as are not provable, nor does a discharge release them. If the debt is provable, it comes in for a dividend, and can, unless it is an excepted debt, be discharged. If it is not provable, it does not come in for a dividend, but it will not be discharged.

The words "the time of the bankruptcy" mean the time when the petition was filed, to which time the adjudication relates. The rent to that time has been paid. The objection of the assignee to the proof of debt, as made, is sustained, and the claim set forth in the proof of debt is disallowed.

{For subsequent proceedings in this litigation, see Case No. 9,328.}

¹ {Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.}

² {From 9 N. B. R. 419.}