

IN RE O'DOWD.

{8 N. B. R. 451.¹}

District Court, S. D. Georgia.

Sept, 1873.

BANKRUPTCY—WHAT PASSES TO
ASSIGNEE—USUFRUCT IN PROPERTY.

Where the bankrupt has only a usufruct in property, not capable of being transferred by sale, except with the owner's permission, such usufruct does not pass to the assignee in bankruptcy.

{In the matter of Michael O'Dowd, a bankrupt}

By ALBERT G. FOSTER, Register:

Upon the appointment of the assignee, the entire property of the bankrupt and all interest held by him in property, under the provisions of the fourteenth section of the bankrupt act, are vested in said assignee in the same manner and to the same extent as the same was held by the bankrupt at the time of the filing of the petition against him.

The question as to what interest the assignee took in said property must be determined and controlled by the terms of the written instrument conveying the same from Schley to O'Dowd. The verbal contract in reference to said lease, existing between the parties prior to the execution of said instrument, was on the execution of same merged into and is controlled by it. What interest, then, did O'Dowd take in the property under said instrument? It cannot be that he took an estate for years, for such an estate passes as realty (Irwin's Rev. Code, § 2249), and "the owner has as absolute a right to use the property, as if he had a greater estate, not injuring the revenue" (43 Ga. 22(5), and the seller's only remedy for unpaid purchase money would be by a common law action, and not by distress, and in that event the relation of landlord

and tenant could not exist. In this case, however, the relation of landlord and tenant does exist, it being so expressly stipulated, and this instrument has one of the most marked ingredients of a lease, to wit: The agreement to pay rent; thereby clearly creating the relation of landlord and tenant. The interest of the tenant under said instrument would cease and determine at any time upon the non-payment of the rents, as set forth therein, and the landlord could re-enter, oust the tenant and distrain for rent, which he could not do if O'Dowd's interest in said property was an estate for years.

For these reasons the register is of the opinion that O'Dowd took simply the right to possess and enjoy the use of said property as the tenant of Schley, and not such an interest as could be conveyed by him to a third party without the consent of Schley. Irwin's Rev. Code, § 2253; 41 Ga. 594; 43 Ga. 226; 38 Ga. 121. All of which is respectfully submitted.

ERSKINE, District Judge. I have given the matter involved in this question, certified to me by Register Foster, careful consideration, and my conclusion is that the view he presents in regard to the effect of the lease. &c, is correct and I affirm his opinion.

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