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Case No. 10,712.

IN RE PARHAM ET AL.

{17 N. B. R. 300.}[1]

District Court, E. D. North Carolina. March 15, 1878.

BANKRUPTCY—SURRENDER BY PREFERRED CREDITOR—EIGHT TO VOTE FOR ASSIGNEE.

P. & D., being insolvent, made an assignment of all their copartnership property to A., their largest creditor, upon which they were adjudicated bankrupt. At the first meeting of creditors, A., having sold out the partnership goods and collected its notes and accounts in part, appeared before the register and offered to surrender to him a roll of unaccounted bills as the net proceeds of the fraudulent preference, to prove his debt and vote for assignee. *Held,* that the surrender of a fraudulent preference can only be made to the assignee, and pending his appointment and qualification the proof of debt must be postponed, and the offer of the preferred creditor to vote for assignee be denied.

P. A. Dunn & Co., of Baltimore, creditors of the bankrupts, whose preference was the basis of the petition: and adjudication of bankruptcy, appeared at the first meeting of creditors, and by their counsel offered to surrender to the register the effects still remaining in their hands in specie, together with the net proceeds of sale under the fraudulent assignment, and asked leave to prove their debt and vote for assignee, which offer and 1095 request were refused by the register; and thereupon the following questions were stated and agreed upon by the counsel for the respective parties, to be certified by the register to the district judge for his opinion thereon: First. Has a creditor whose preference has been adjudged fraudulent a right to surrender to the register the proceeds of his preference, a part in specie, and a part the proceeds of sales and collections effected by him? Second. Has such creditor at such meeting the right to prove his debt in full, or only for a moiety thereof?

Third. If he has a right to prove at the first meeting, has he a right to vote for assignee? It is admitted: First. That the preferred creditors, P. A. Dunn & Co., were not parties in the proceedings instituted against Parham & Dunn, in which they were adjudicated bankrupts; that no recovery was had, and no suit was or had been instituted against P. A. Dunn & Co. about or concerning the property of the bankrupts; but that the said P. A. Dunn & Co. came forward and offered to surrender to the register every species of property, or the proceeds arising from the sale and collection thereof, which they have received at the hands of Parham & Dunn. Second. That the said P. A. Dunn & Co. did actively resist the adjudication of bankruptcy of the said Parham & Dunn, employing counsel, paying expenses of witnesses, etc., and instigating and carrying on the resistance made to the prayer of the petitioning creditors, ostensibly by J. H. Dunn, one of the bankrupt firm, and in the name of said firm, for the purpose of preventing the assignment made to them by said bankrupts from being impeached, and desired in making said surrender to retain in their hands out of the proceeds of sales made by them an amount sufficient to reimburse them for their outlay in making such resistance.

By A. W. SHAFFER, Register:

This is a proceeding in involuntary bankruptcy, and the act of bankruptcy charged was the fraudulent assignment by the bankrupts of all their estate, both real and personal, including a stock of merchandise, notes, and the book accounts of the bankrupt firm to P. A. Dunn & Co., to secure the debt which they now seek to prove and vote upon for assignee, to the amount of eight thousand four hundred and sixty-nine dollars and ninety-three cents. They have sold the merchandise in part at auction and in part in ordinary course, and collected some portion of the notes and open book accounts. It is admitted that, after

the fraudulent transfer, Junius H. Dunn, the member of the bankrupt firm who made the fraudulent transfer during his partner's illness and without his assent, became the agent of these creditors for the sale of the goods and the collection of the debts due the bankrupt firm so fraudulently transferred, and that while so acting as the agent of these creditors he took an inventory of the stock of merchandise so transferred, in the interest of these creditors, amounting to two thousand nine hundred dollars or thereabouts, at original Baltimore cost These creditors do not offer to surrender under this inventory, taken by themselves alone, but only the net proceeds of sales after deducting the cost, expenses and disbursements of such sales and collections, to wit, the sum of one thousand seven hundred dollars or thereabouts.

The unsecured creditors claim: First. That the surrender, if made, must be made upon the basis of the inventory, subject to a rigid scrutiny into the whole proceeding subsequent to the transfer. Second. That actual fraud was committed by P. A. Dunn & Co., and per consequence they may prove for a moiety only. Third. That the surrender of a preference, when it cannot be made in specie, can only be made to an assignee, who alone has power to determine the amount due the estate by the vendee of a fraudulent transfer.

With all deference to the learned counsel who stated and agreed upon the questions hereby certified, I submit that, stripped of all redundant matter, the controlling question is: Can a creditor who has received a fraudulent preference surrender the same to the register before the election of an assignee? If he can, then the right to prove his debt in full and vote for assignee must undoubtedly follow in natural sequence. That they might have surrendered to the marshal who executed the warrant of seizure against the estate of the bankrupt is doubtless true, for he was the legal

custodian of the estate pending the appointment of an assignee; but that such a surrender would have been a full settlement, binding upon the assignee, and restoring these creditors to all the rights and privileges of bona fide unsecured creditors, as claimed by their counsel in the argument of this cause, is by no means conceded. The wisdom of that provision of law which authorizes the postponement of proof of a doubtful claim until the appointment of the assignee was clearly demonstrated in this case. The meeting at which the offer to surrender and prove was made was the first meeting of creditors, called for the proof of debt and the choice of an assignee, a proceeding which no collateral matter should be permitted to interrupt or delay. This claim was contested at every salient point, and to determine its truth and justice would have consumed the time of the court in a long and exhaustive investigation into a stated account, running through several years, of mutual debt and credit. The tender made in surrender was a roll of uncounted money, unaccompanied by any schedule or statement of the disposition of the property, or the sources from whence the money was derived, whereby the register might judge whether it was or was not a "full surrender of all property, money, benefit, or advantage received by them under such 1096 preference." No adjudication had been made upon the question of actual fraud on the part of P. A. Dunn & Co. in receiving the fraudulent preference, whereby the register might determine whether the creditors were entitled to prove their debt in full, or only a moiety thereof; and even if, in an ordinary case, a register might temporarily receive the surrender of a preferred creditor, from one who tenders it in good faith, unimpaired and in specie, without opposition, such a receipt could not conclude or bind the assignee beyond a credit of the amount so received by the register and transferred to him, nor could it affect

the standing rights or privileges of the party so surrendering, in the court.

The supreme court of the United States have taken the precaution to amend the fifth rule of general orders in bankruptcy, inserting a proviso therein as follows: "Provided, however, that, by the surrender of a bankrupt mentioned and referred to in this order and in the act [of 1867 (14 Stat. 517)] in that behalf, is intended and understood a personal submission of the bankrupt himself for full examination and disclosure in reference to his property and affairs, and not a surrender or delivery of the possession of his property." And the words "and in the act in that behalf" in the above paragraph quoted refer to section 5084, Rev. St., and is as follows: "Any person who ... has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of the act ... shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit or advantage received by him under such preference.

I have devoted to this question much more careful consideration than the case seems to me to require, because of the eminent learning and acknowledged authority of the Baltimore counsel for these creditors, in whose views I have not been able to concur. I am of the opinion that the surrender of a fraudulent preference can only be made to the assignee, and that pending his appointment and qualification the proof of the debt on account of which the preference was given must be postponed, and the offer of the creditor receiving the preference, to vote for assignee thereon, denied. And I have ordered accordingly.

Geo. Badger Harris, for P. A. Dunn & Co. A. W. Tourgee and W. H. Young, for the estate.

BROOKS, District Judge. The questions certified by Mr. Register Shaffer, herewith filed, are examined and considered by the court, and the rulings of the register, are in all things approved and affirmed.

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