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Case No. 12,171.

IN RE RUST.

{1 N. Y. Leg. Obs. 326.}

District Court, N. D. New York. 1843.

BANKRUPTCY—EXECUTION—ACTUAL LEVY—DECREE—RELATION BACK.

1. The personal property of a bankrupt passes to the assignee in virtue of a decree of bankruptcy, notwithstanding the delivery to the sheriff of an execution against the bankrupt, prior to the filing of the petition.

{Cited in Re Paine, Case No. 10,673.}

{Cited in brief in Edwards v. Entwisle, 2 Mackey, 47.}

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2. It seems that an actual levy before petition filed would give to the plaintiff such a lien or priority as is protected by the bankrupt act.

3. The decree of the bankruptcy in compulsory cases, as in cases of voluntary application, operates by relation back to the time of filing the petition, at least.

4. Whether its operation does not also extend to the time of committing the act of bankruptcy, except so far as the doctrine of relation is limited by the first proviso of the second section of the bankrupt act {5 Stat. 440}, quære.

{In the matter of Elam Rust, an involuntary bankrupt.}

This case came before the court on the petition of the assignee of the bankrupt.

Mr. Hall, for assignee.

Mr. How, contra.

CONKLING, District Judge. The mere delivery of an execution to the sheriff does not give to the judgment creditor a lien which will prevail over the title acquired by the assignee to the personal effects of the defendant in the execution, under a decree of bankruptcy against him. Such is the established doctrine of the English courts; and there is nothing in the laws of this state, or in the bankrupt act, requiring or warranting a different rule. By the delivery of the

execution to the sheriff, the property of the defendant is bound for some purposes; but the title to the property remains in him, and passes to the assignee. Smallcomb v. Cross, 1 Ld. Raym. 252; Cooper v. Chitty, 1 W. Bl. 65, 1 Burrows, 20; Marsh v. Lawrence, 4 Cow. 461. As no levy was made in this case until after the institution of proceedings in bankruptcy, it is unnecessary to decide whether even a levy would have been sufficient to give a lien as against the assignee. I have met with no decision to this effect. A decree of bankruptcy is in the nature of a statute execution for all the creditors, and vests the property of the defendant, ipso facto, in the assignee. Strictly speaking, the title of the defendant is not divested by the seizure under an execution. Still, however, the plaintiff may, in virtue of the levy, acquire such a lien or priority as it was the intention of congress to protect; and as, by the laws of this state, the right thus acquired is superior to that acquired by a subsequent bona fide purchaser for a valuable consideration (Butler v. Maynard, 11 Wend. 548), there seems to be much reason for holding it to be within the saving of the bankrupt act.

For the reason already stated, it is also unnecessary to decide what would have been the effect of a seizure of the goods of the bankrupt on execution, before the filing of the petition on the 7th of August last, but after the day (the 4th of March last) on which the act of bankruptcy was committed. According to the well-known doctrine of the English courts, the adjudication of bankruptcy extends back by relation to the time of the act of bankruptcy, however remote; and avoids all the acts of the bankrupt; the maxim being that a bankrupt can hold no property, and that all his property, from the time of the act of bankruptcy, vests by relation in the assignee. This doctrine prevailed with some limitation until 1825, when, in the consolidated bankrupt act passed in that year, a saving

(like that contained in the 2d section of our act) was inserted in favor of persons dealing with the bankrupt in good faith, and without notice of the act of bankruptcy, more than two months before the date, and issuing of the commission. In giving a construction to our act with respect to voluntary applicants, the courts have very properly held that the decree of bankruptcy extends back by relation to the time of filing the petition. This gives to the decree a retroactive operation as extended as the nature of this class of cases admits. With respect to compulsory cases, I am not aware that any decision has been made upon this point. What construction ought to be given to the act in this respect, is a question of great importance. The principle of relation is, in effect, adopted by the 2d section in declaring all future payments, &c., made for the purpose of giving a preference, and in contemplation of bankruptcy, void as against the assignee; and it is also implied and recognized by the proviso in this section relative to dealings with the bankrupt more than two months prior to the filing of the petition. If this latter provision had been in some other part of the act in the form of an independent enactment, instead of following, as it does, the clauses against preferences and frauds, and being in the form of a proviso to it, the inference would have been very strong that the legislature contemplated the application of the doctrine of relation in compulsory cases arising under the act without any other limitation than that expressed in the proviso. By the order and form of enactment actually adopted the question is undoubtedly to some extent affected. Its satisfactory decision will require an attentive consideration of the policy of the act in connection with these particular provisions. I have assumed in this case that the retroaction of the decree cannot be less extensive in a compulsory than in a voluntary proceeding, and that it

must therefore relate back at least to the time of filing the petition by the creditor.