

## IN RE SIMS.

{16 N. B. R. (1878) 251.}<sup>1</sup>

District Court, E. D. Michigan.

BANKRUPTCY—MORTGAGE GIVEN AFTER  
COMMENCEMENT OF PROCEEDINGS—MOTION  
TO SET ASIDE.

An assignee may petition summarily to set aside a mortgage given after the commencement of proceedings in bankruptcy. Resort to a bill in equity is unnecessary.

On petition of assignee to set aside mortgage. A creditor's petition was filed against Stephen Sims July 11, 1876. On July 20<sup>th</sup> he gave a mortgage to Atkinson & Atkinson, to secure their pay for services to be rendered by them in resisting the creditor's petition. He was duly adjudicated a bankrupt October 23d.

Burt & Burritt, for assignee.

Mr. Atkinson, in pro. per.

BROWN, District Judge. Respondents defended solely upon the ground that this court has no jurisdiction to proceed, summarily, to set aside the mortgage, and claim that the assignee must be driven to a bill in equity. In support of this position, the cases of *Smith v. Mason*, 14 Wall. [81 U. S.] 419; *Marshall v. Knox*, 16 Wall. [83 U. S.] 551; and *In re Marter* [Case No. 9,143], decided by this court, are relied upon. I am clearly of the opinion that these cases have no application to a proceeding like the one under consideration, where it is sought to set aside a mortgage given by the bankrupt after proceedings in bankruptcy have been commenced. The rule, in the opinions above cited, has been confined to cases where the adverse party claims an absolute title and dominion over the property of the bankrupt acquired by him prior to the proceedings in bankruptcy. The title of the assignee relates back to the commencement

of those proceedings, and a mortgage upon the estate taken after that, is virtually an incumbrance upon the property of the assignee. While the taking of such mortgage is not unlawful, and the same would constitute a valid incumbrance upon the property, if the petition were dismissed, of course the mortgagee must assume the risk of being required to release it, if the petition is sustained. Where the property affected by the lien is confessedly the property of the bankrupt, and has passed to the assignee, and it only remains to ascertain and liquidate the alleged lien, the summary jurisdiction of this court is entirely adequate. In re Clark [Id. 2,801]; In re Ulrich [Id. 14,328]; Ex parte Bryan [Id. 2,061]. An order will be entered requiring the mortgagees to release the mortgage.

{See Case No. 12,889.}

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