

MARTIN, ASSIGNEE, *v.* FULLINGS, EXECUTRIX.

District Court, D. New Jersey.

July 1, 1880.

1. ASSIGNEE IN BANKRUPTCY—FRAUD—STATUTE OF LIMITATIONS.—In a suit by an assignee in bankruptcy, to recover possession of certain bonds fraudulently concealed by the assignor, the statute of limitations does not begin to run until the discovery of the fraud.

In Equity.

Guild & Lunn, for complainant.

NIXON, D. J. The bill is filed in this case by Robert M. Martin, assignee in bankruptcy of Edward Fullings, deceased, to recover 12 several bonds of the Atlantic, Tennessee & Ohio Railroad Company, of the par value of \$500 each, numbered respectively 4, 5, 6, 7, 8, 9, 10, 55, 56, 57, 58 and 59, with coupons attached from the first day of November, 1863, alleged to be the property of the late bankrupt, and which he fraudulently omitted from his schedules and withheld from the hands of his assignee in bankruptcy.

It appears that the said Edward Fullings, being a resident of the town of Charlotte, in the state of North Carolina, on the twenty-eighth of May, 1868, filed a voluntary petition in the district court of the United States for the district of North Carolina to be adjudged a bankrupt, and that such proceedings were had there on that an adjudication took place on the ninth day of June following; that on the twenty-second of July the creditors first chose his son, Edward B. Fullings, assignee, and that upon his resigning the office, on the sixth day of August of the same year, a new meeting of creditors was called for the fifth of October, 1868, when the complainant was duly chosen assignee. Shortly after the commencement of the proceedings in bankruptcy the said Edward Fullings left the state of North Carolina and removed to Irvington, in the

state of New Jersey, where he continued to reside until the month of September, 1877, when he departed this life, leaving a last will and testament, in which letters testamentary were first granted to his son, Edward, B. Fullings, ²⁰⁷ and afterwards, upon his removal, to the defendant, Abby Fullings, the widow of the testator.

While the said Edward B. Fullings was administering the estate of his father, as executor, a controversy arose in the orphans' court of the county of Essex, between him and some of the representatives of the estate, in regard to the ownership of the 12 railroad bonds in suit. The executor claimed them as his individual property, asserting that they had been transferred to him by his father in his life-time, in payment of certain advances made by him, while the opposing party contended that they should be accounted for as assets of the estate. The orphans' court decided that they belonged to the estate. Pending the litigation the assignee in bankruptcy brought this suit, claiming that they were the property of Edward Fullings at the time of the filing of his bankruptcy petition, and had been fraudulently omitted from his schedule and withheld from him as assignee.

Two questions are thus presented: *First*, as to the ownership of the bonds when the bankruptcy proceedings commenced; *second*, whether the assignee is barred from bringing suit by the statute of limitations.

1. As to the first, the evidence shows that the bankrupt obtained these bonds in the month of May, 1865, from one John M. Springs, in payment of moneys due to him from a former partnership of Fullings, Springs & Co., of which he was a member and a large creditor.

Previous to filing the petition in bankruptcy, to-wit, on the twenty-first of December, 1867, Fullings left 10 of the bonds in the hands of Emerson Coleman, in the city of New York, subject to his own order. Coleman

says he knows of no purpose for which they were deposited with him, except to be afterwards called for by Fullings. The remaining two had been pledged by the bankrupt, with two of his creditors in New York, as collateral security for the payment of debts due to them respectively. Through the instrumentality of Coleman these debts were subsequently paid by Fullings, and the bonds surrendered by the creditors to Coleman. On the twentyfifth of February, 1869, the whole 12 were delivered by

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Coleman to the bankrupt, who continued in the possession of them to the day of his death, receiving for several years the interest accruing upon them.

In the absence of all contradictory proof I have no hesitation in holding that the deposit of the bonds with Coleman was a device of the bankrupt to get the property out of the reach of his creditors, and that under the deed of assignment the assignee of the bankrupt was entitled to have and receive the same as assets of the bankrupt estate.

2. I do not find evidence of laches on the part of the assignee in bringing the suit which should bar him from a recovery at this late date. The action was commenced within a few weeks after the assignee discovered the fraud. He had had some knowledge of the existence of the bonds, and none appearing upon the sworn schedules of the bankrupt he made inquiry of him, and was led to believe that they were not the property of the bankrupt, but belonged to his son. There is no proof that the assignee, living in North Carolina, had any information of the acts of the ownership subsequently exercised by the bankrupt over the bonds in New Jersey. Nothing appears which ought to have put him on inquiry. The supreme court, in *Bailey, Assignee, v. Glover*, 21 Wall. 342, held that where an action was interceded to obtain redress against a fraud concealed by the party, or which from

its nature remained a secret, the bar of the statute of limitations did not commence to run until the fraud was discovered. Any other doctrine, said Mr. Justice Miller, speaking for the whole court, would make the law, which was designed to prevent fraud, the means by which it is made successful and secure.

There must be a decree for the complainant, but as there is no evidence that the defendants Abby Fullings, executrix, and George D. G. More, had any knowledge of the fraud, no costs are awarded against them.

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