

erty in controversy to be the property of plaintiff, finding the value thereof under the testimony, and specifying the same in your verdict.

The conditions of the contract spoken of are conditions favoring the plaintiff, and he may waive the same verbally by acts or in writing. If you shall find from the testimony that the company received notice or waived the notice provided for in the contract, then your inquiry will be, what was the machinery such as was sold worth, and was it as good as machinery of the kind, ordinarily, in considering the aims to which such machinery is put? The law presumes the amount agreed on by the parties is the true value of the property sold, and it is for defendant to show that it is not. For the purpose of determining the value of the property you will carefully examine the whole of the evidence, the length of time the defendants used the machinery, and whether or not such continued use of the machinery was induced by the acts of plaintiff's agent. In order that you may know the nature of your verdict and finding, I hand you for your use the following instructions:

In case the jury finds the issues for plaintiff, they will find the value of the property taken by plaintiff from defendant and specify the amount in their verdict. If the jury find the issues for the defendant, they will first find the value of the machinery sold by plaintiff to the defendant, and if the value thereof is greater than the payments made thereon by the defendants, allow the plaintiff the difference and specify that difference in their verdict. If the jury find from the evidence that the amount paid by defendant is as great or greater than the value of the machinery, they will find the issues for the defendant.

BRISWALTER v. LONG.

(Circuit Court, D. California. February 14, 1881.)

BANKRUPTCY—ADJUDICATION.

The district court has authority, under the bankrupt act, to adjudge a party a bankrupt, both as an individual and as the surviving partner of a firm.

Smith, Glassell & Chapman, for plaintiff.

L. D. Latimer, for defendant.

SAWYER, C. J. This is a demurrer to the answer. There is a defect in the answer which ought to be corrected,—I suppose a clerical error,—describing the proceedings to have been in "this court," being

the superior court of Los Angeles county, instead of in the district court of the United States for the district of California, as it should have been. With that correction I think the answer is good.

The point is whether the district court has authority under the bankrupt act to adjudge a person individually, and at the same time as surviving partner of a firm, to be a bankrupt. Undoubtedly, where the partnership is dissolved by the death of one of the partners, the surviving partner is entitled to wind up the partnership affairs. This is so at common law, and expressly so under the Civil Code. Nobody else could wind up the partnership affairs and collect the moneys due to the firm so well as he; therefore, the administration of the partnership assets is left in the hands of the surviving partner.

In this case Mr. Temple was adjudged a bankrupt on his own petition. He filed his petition both individually and as surviving partner of the firm of Temple & Workman, and was adjudged a bankrupt in his individual capacity and as surviving partner of that firm; the assignment was duly made of his individual property, and of the assets of the partnership, and the assets were afterwards administered in the court of bankruptcy. The question was raised in the district court by the plaintiff that no authority could be found for Temple to be adjudged a bankrupt as a surviving partner. The court, however, held otherwise, and adjudged accordingly. I think the court had authority to make that adjudication. Otherwise, I do not see how the affairs of the firm could be wound up, for nobody else had authority in the matter but Mr. Temple, as surviving partner. It was his business to close up the affairs of the firm, and pay off the indebtedness so far as he could. But he became bankrupt as an individual, and as a member of the partnership, and the district court took charge of his affairs. After becoming bankrupt, he could no longer act in settling up the partnership affairs. If the district court could not settle his affairs as surviving partner, as well as his individual matters, nobody else could.

The administrator had nothing to do with the matter except to receive the share of the surplus, if any there should be, after settlement of the partnership affairs belonging to the deceased partner. The powers of the court in bankruptcy upon an adjudication of bankruptcy are, necessarily, called into action. The court accordingly takes charge of the partnership assets, settles up the matters, and applies the partnership funds, so far as is necessary, to the partnership debts, and the portion of the surplus, if any, belonging to Temple goes to his personal assets, and are distributed to his individual

creditors, and the portion of the surplus belonging to the estate of the deceased partner is paid over to his administrator. If Temple could not longer act in the settlement, then nobody else was empowered to take charge of it but the district court. The district court, therefore, had jurisdiction to adjudge Temple bankrupt as surviving partner, as well as in his individual capacity, and had power to take charge and control of the partnership property; and having adjudged him a bankrupt in due form that judgment is valid. That being so, it disposes of the case, and the demurrer must be overruled upon the technical amendment being made to which I have called attention.

MOLINE WAGON Co. v. RUMMELL and others.*

In re HUISKAMP BROS., Interpleaders.

(Circuit Court, W. D. Missouri, W. D. October Term, 1882.)

1. PARTNERSHIP—ASSETS—RIGHTS OF CREDITORS.

All the assets of a partnership, together with all property of the partners, in case of insufficiency of partnership assets, are liable for debts created by the partnership, and an individual partner can neither mortgage the property of the firm nor deliver possession thereof, to pay an individual debt.

2. SAME—DISSOLUTION—DIVISION OF PROPERTY.

Where a partnership is dissolved, and the property of the firm has been divided and was held separately by each partner as individual property and not as property of the firm, each partner may convey, mortgage, or deliver possession of his individual share; but, if no legal dissolution has taken place, such property remains partnership property as to creditors of the firm who knew nothing of the division and who extended credit to the firm.

3. DEBTOR AND CREDITOR—PREFERENCE.

A debtor has a right under the limitations of the state laws to pay, secure, or prefer one creditor over another, and to make a mortgage to secure an individual debt and out of his individual property; but the transaction must be in good faith, and not done to defraud, hinder, or delay his creditors.

4. SAME—PREFERENCE IN FRAUD OF CREDITORS.

The fact that the intention of the debtor, in making the mortgage to secure a creditor, was fraudulent, is not of itself sufficient to make the mortgage fraudulent as to such creditor, if such creditor in no way participated in the fraud, or aided or assisted in the illegal act.

5. SAME—DEALINGS WITH DEBTOR—GOOD FAITH ESSENTIAL.

In dealing with a debtor under such circumstances, and in taking possession of a debtor's property, a creditor must exercise the utmost good faith, and his failure to do so deprives him of any right under the mortgage.

James Hagerman and Tannehill & Fee, for interpleaders.

James J. Parks and Gage & Ladd, for plaintiffs.

*Reversed. See 7 Sup. Ct. Rep. 899.