

tion of the private sale in the mode in which it was obtained. Having obtained title to the property by means of this act, the defendants cannot disclaim it as non-essential.

Construing these various steps together, they seem to me to constitute, moreover, in effect an "indirect transfer" by the bankrupt of his property to the defendants by means of a judgment, execution, and consent to a private sale by the sheriff; means purposely adopted to avoid, if possible, the hazards of a *direct* conveyance to the same defendants for the same purpose of an unlawful preference.

Section 5128 makes a "transfer or conveyance" by the insolvent of any part of his property, either "directly or indirectly," also void under the conditions above named. Such proceedings as were had in this instance seems to me a mere collusive device to effect such an "indirect transfer" of all the debtor's property to the defendants. In the *Case of Schick*, 2 Ben. 5, BLATCHFORD, J., says:

"I think, also, that the transaction was, in substance and effect, within the provisions of section 39, a *transfer* of the property of the debtor, made by him, and so made with intent to delay, hinder, and defraud his creditors." *In re Pitts*, 8 FED. REP. 263.

The defendants should, therefore, account to the plaintiff as assignee for the value of the property, the same having been sold and converted to the defendants' use. As the value was appraised by sworn appraisers, and the purchase by the defendants was at the price of two-thirds the appraised value, no injustice can be done to the defendants by charging them with this purchase price; and, I think, it will be better for the estate to accept this amount as the value of the goods, rather than to seek to increase it through a difficult and tedious reference.

I allow judgment, therefore, against the defendants for the sum of \$7,144.30, with interest from June 24, 1878, with costs.

In re DIEHL, Bankrupt.

(District Court, S. D. New York. February 9, 1883.)

BANKRUPTCY—PREFERENCE—DISCHARGE, WHEN BARRED—SECTIONS 5021, 5110.

Where debtors in insolvent circumstances make transfers of their property for the security of a portion of their creditors only, without making equal provision for other creditors known to them, such transfers constitute a preference which will bar the debtor's discharge in bankruptcy under subdivision 9

of section 5110, without regard to the lapse of time, and although proceedings in bankruptcy were not commenced until eight months afterwards.

In such a case the provisions of the act of July 26, 1876, (19 St. at Large, 102,) amending section 5021, do not apply.

Application for Discharge in Bankruptcy.

J. Homer Hildreth, for bankrupt.

G. A. Seixas, for opposing creditors.

BROWN, J. The petitioner, Diehl, was a partner in the firm of Behning & Diehl. In 1877, the firm being indebted to the amount of about \$18,000, of which about \$9,000 was owing to the opposing creditor, Speers, and being in embarrassed circumstances, a meeting of their creditors was called, the result of which was that the property of the firm, except certain real estate, was divided between the two partners, each agreeing to pay certain specified creditors, and each gave mortgages of the property in trust as collateral security for the payment of certain creditors' claims. The opposing creditor, Speers had previously held a second mortgage on the firm's factory property. They refused to take this property in settlement of their claim, and no provision was made for them in the creditors' arrangement, or in the distribution of the property above referred to, nor did they assent to the arrangement. About eight months afterwards, on the fourth of May, 1878, Diehl was adjudicated a bankrupt in involuntary proceedings. Prior to this time he had paid certain of the creditors whom he had agreed to pay in accordance with the previous arrangement, and others had not been paid anything.

The discharge of Diehl is opposed by Speers under subdivision 9 of section 5110.

On behalf of the bankrupt it is contended that, as the arrangement in behalf of the other creditors, and the securities for them, were made more than six months prior to the adjudication, the objections under subdivision 9 are not available.

It is clear that the arrangement made with respect to the other creditors, without the assent of Speers, for the distribution of the firm property for the payment of the other creditors, was an arrangement giving them a preference. From the evidence it must be assumed, also, that at this time the firm was insolvent within the meaning of the bankrupt law; and the arrangement as respects Speers was of itself an act of bankruptcy, and therefore, within numerous decisions, an act in contemplation of bankruptcy under subdivision 9, § 5110. All the real estate was subsequently sold, and realized nothing above the first mortgage. Speers, who had a second mortgage on a part,

obtained nothing from his security. The event, therefore, shows that he was equitably justified in refusing to take the mortgaged property for his debt, which was nearly half what the debtors owed; and the arrangement made between the other creditors and the bankrupts was wholly indefensible legally as against him.

The court cannot relieve the debtors from the consequences of their acts. It has been repeatedly held that transfers of property in contemplation of bankruptcy and for the purpose of preferring creditors, are, under subdivision 9, a bar to a discharge, without reference to the lapse of time. In the *Case of Kasson*, 18 N. B. R. 379, the present circuit judge thus expressly held. The qualification in the act of July 26, 1876, (19 St. at Large, 102) does not avail the petitioner, inasmuch as these assignments by way of mortgage in trust for some of the creditors were not such an assignment as by that act is not to prevent a discharge in involuntary proceedings, since it was not an assignment of all the debtor's property, nor for the benefit of all their creditors ratably, but designedly excluded the present opposing creditor.

The discharge must, therefore, be denied.

LA CROIX *v.* MAY and others.

(Circuit Court, S. D. New York. January, 1883.)

1. TRADE-MARKS—RIGHTS OF ALIENS—PROPERTY IN, AS AFFECTED BY ACTS OF CONGRESS.

The fact that one is an alien does not affect his right of property in a trade-mark; but that fact is a necessary allegation to establish the requisite diversity of citizenship to confer jurisdiction upon a federal court. The acts of congress fortify the common-law right to a trade-mark by conferring a statutory title upon the owner, but "property in trade-marks does not derive its existence from an act of congress." 100 U. S. 82. By the express terms of section 10 of the present act of congress the common-law right in trade-marks is preserved intact.

2. SAME—DEMURRER.

Where the demurrer was to the whole bill, and the bill was in itself sufficient, aside from the allegations contained in it, upon which the demurrer was taken, the demurrer was overruled.

S. W. Weiss, for complainant.

Briesen & Betts, for defendants.

WALLACE, J. The facts alleged in the complainant's bill entitle him to an injunction restraining defendants from the use of his trade-