

he was the obligor to the bank, and bound, as such, to pay the debt. In this view, the overdraft was Frank's debt. If it be considered that he was a mere guarantor, and the statute of frauds applies, we do not see that this makes any difference upon the question of bankruptcy, since the sale and transfer were to pay that debt, and by this means the debt has been paid, and Smith's creditor, whoever he may be, in law, was preferred. We conclude, taking the entire answer, that it does not present a good defense, and that upon the face of the pleadings the petitioners are entitled to an adjudication adjudicating Smith a bankrupt.

We do not see that the Kentucky act, as embodied in section 1910 of the Kentucky Statutes, has any application to this question, since the inquiry is whether or not the defendant, Smith, has committed acts of bankruptcy, under the provisions of the bankrupt act. Under the Kentucky law, as we understand it, if a preference is not attacked by a creditor within six months, the preference would be good; and, where there is a preference prohibited by the Kentucky statute, it does not of itself make the preference a general assignment, but requires some proceedings in the state court to have it so declared. Hence we have not regarded it as applicable to the question under consideration.

In regard to the intervening petition of A. C. Franks to be made a party defendant, the order should go allowing this petition to be filed, and that he be made a party defendant. What rights he may have as creditor are not now intended to be adjudicated upon, but may be presented by him either by filing his intervening petition as an answer or cross bill, or by amending his pleadings, as he may think proper. The order, for the present, will be that the intervening petition of A. C. Franks, marked, "Filed Jan. 6, 1899," is filed of record, and that he be made a party defendant to the petition filed by the petitioning creditors herein, with leave to plead further, if he so desires, within 20 days. This order should be entered before the order adjudicating Smith a bankrupt.

Unless counsel for the defendant has some other pleadings to present, the proper order should go, declaring that Smith's answer does not present a defense, and that he, upon the petition and answer, be adjudged a bankrupt, and the case referred to the proper referee.

In re GHIGLIÒNE.

(District Court, S. D. New York. April 10, 1899.)

BANKRUPTCY—DISMISSAL OF PETITION—COUNSEL FEES.

The provision of section 3 (e) of the bankruptcy act (30 Stat. 546), for the allowance of "costs, counsel fees, expenses, and damages" to the respondent when a petition in involuntary bankruptcy is dismissed, applies only to cases where an application to seize and hold the property of the alleged bankrupt pending the hearing was granted, and bond given, as provided in the same subdivision of section 3. In other cases the court cannot allow counsel fees, in addition to costs, to the successful defendant, the matter being governed by rule 34.

In Bankruptcy.

Coudert Bros., for petitioning creditors.

Bullowa & Bullowa, for respondent.

BROWN, District Judge. On the 11th of November, 1898, a creditors' petition was filed against Ghiglione to have him declared a bankrupt, charging insolvency and concealment of property. Upon an answer denying both charges, and two jury trials thereon, there being a disagreement on the first trial, the issue was finally determined in favor of the defendant, and the petition has been dismissed. Prior to the taxation of costs, defendant's counsel move for "counsel fees" to be allowed and taxed by the court pursuant to section 3 (e) of the bankrupt act. That clause provides as follows:

(e) "Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt and an application is made to take charge of and hold the property of the alleged bankrupt prior to the adjudication, the petitioner shall file a bond * * * conditioned for the payment, in case such petition is dismissed, * * * all costs, expenses and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt.

"If such petition be dismissed by the court, or withdrawn by the petitioner, the respondent shall be allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking or detention of such property. Counsel fees, costs, expenses and damages shall be fixed and allowed by the court and paid by the obligors in such bond."

The prior subdivision (b) of section 3 contains the general provisions for petitions by creditors against alleged bankrupts. Subdivisions (c) and (d) regulate the proceedings in defense and the trial thereof: while subdivision (e) provides for the special case of a seizure of the defendant's property before adjudication.

Rule 34 of the supreme court in bankruptcy is evidently intended to govern the allowance of costs in ordinary involuntary proceedings. It provides that the petitioning creditor if successful shall recover "the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner."

There is no other provision in the bankrupt act or in the rules, authorizing this court in bankruptcy cases to allow or tax a counsel fee on dismissal.

On careful consideration of the arguments of counsel on these provisions, I am of the opinion that the last paragraph of subdivision (e) above quoted, applies only to cases arising under the first paragraph of that subdivision, and where the application "to take charge of and hold the property of the alleged bankrupt" prior to adjudication has been granted and the bond given. The allowance of "counsel fees" in addition to costs can rest only on express statutory provision. It is contrary to the ordinary federal practice, and seems to have been designed to afford a fuller measure of indemnity to the defendant than is ordinarily afforded in legal proceedings in the federal courts, for an unjustifiable interference with his property. Such interference may at times be ruinous, and by breaking up a man's business make him insolvent when he was not insolvent before. It is an available weapon which may be misused, and is there-

fore justly guarded by special provisions for the most complete indemnity to the accused. Ordinary cases of involuntary proceedings, not accompanied by such injurious interference, fall as respects costs under the provisions of rule 34, which does not allow counsel fees in addition to costs.

In the present case though an application was made for a receiver, the application was denied as unnecessary; no bond was given; nor was any injunction issued interfering with the transaction of the defendant's business in the manner in which it had been theretofore carried on. The motion for counsel fees must therefore be denied, and the costs taxed under rule 34.

In re MOYER.

(District Court, E. D. Pennsylvania. April 12, 1899.)

No. 6.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—SUFFERING PREFERENCE.

Under Bankrupt Act 1898, § 3, cl. 3, providing that it shall be an act of bankruptcy if a debtor shall have "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings," and not vacated or discharged such preference "at least five days before a sale or final disposition of any property affected," where a creditor actually obtains a preference by entering judgment on a warrant of attorney previously given by the debtor, and levying execution on his stock in trade, the debtor being then insolvent, such debtor commits an act of bankruptcy if he fails to discharge such preference by filing his voluntary petition in bankruptcy (having no valid defense against the debt or the lien obtained by the levy), although he does not in any degree procure the entry of the judgment, or even know of it.

2. SAME—PREFERENCE—WARRANT OF ATTORNEY.

Within the meaning of the bankrupt act, a creditor obtains a preference by entering judgment on a warrant of attorney, and levying an execution thereunder on the debtor's stock in trade, within the time limited by the act, the debtor being then insolvent, notwithstanding that the warrant of attorney was given more than four months before the filing of the petition in bankruptcy against such debtor, and at a time when he was solvent.

In Bankruptcy. On motion for adjudication in involuntary bankruptcy.

Greenwald & Mayer, for petitioning creditors.

Thomas H. Capp, for certain creditors.

Howard C. Shick, for alleged bankrupt.

McPHERSON, District Judge. This is a case of involuntary bankruptcy, and the motion to adjudicate rests upon the following facts: Between December, 1897, and June, 1898, Henry Moyer was a solvent merchant. At different times during that period he borrowed about \$6,500 from several members of his family, securing the respective loans by promissory notes containing warrants of attorney to confess judgment. These creditors took no steps to collect their debts until November 14 and 16, 1898, when they entered judgment upon the notes in the court of common pleas of Lebanon county, and issued ex-