

the fact that the company, although it was originally made a party defendant, declined to be a defendant, and availed itself of its right to cause the action to be dismissed as to itself, and withdrew from the open connection with the case. There was in this fact a distinct intimation to the plaintiff that the company desired to place itself in an attitude where it should not be bound by any judgment that might be rendered in that case, but would be left free to litigate its rights thereafter. This was further evidenced by the fact that, by the terms of the judgment entry then made, the action was dismissed as to the Singer Manufacturing Company, "without prejudice to the right of plaintiff to commence another suit for the same cause of action." The rule announced by the authorities above cited is supported by sound reason, and its justice is illustrated by its application to the facts of the present case. The plaintiff sued for a large sum of money as damages for infringement of his patent. He attempted to recover the same from the Singer Manufacturing Company and its agent. The company asserted its right to withdraw as a party defendant, for want of legal service upon it. Numerous reasons suggest themselves why its subsequent relation to the defense—a relation which was secret and undisclosed to the plaintiff—should not now operate to prevent his recourse against it. Estoppels must be mutual. If Cramer had obtained a judgment against Fry in the former action, by what means could he have enforced it against the Singer Manufacturing Company? How could he have known, or, if he suspected such to be the case, how could he have proven, that that corporation secretly aided the defense and paid the expenses thereof? Again, circumstances may readily be conceived under which the plaintiff, in an action such as this, might be unwilling or unable to incur the expense of a thorough vindication of his rights, as against an infringer's agent who might be without the means to meet a judgment for the damages, and whose principal was not known to be so identified with the defense as to be bound by the conclusion of the suit. This view of the principal point in the case renders it unnecessary to consider the other assignments of error. We think the circuit court erred in instructing the jury to return a verdict for the defendant. The judgment will be reversed, and the cause remanded for a new trial.

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In re HOLLOWAY.

(District Court, D. Kentucky. April 6, 1899.)

No. 11.

**BANKRUPTCY—FORECLOSURE OF MORTGAGE—SALE BY STATE COURT.**

Where a mortgagee has obtained a judgment for foreclosure and sale in a state court before the institution of proceedings in bankruptcy against the mortgagor, and the court of bankruptcy is satisfied that the mortgaged property will not sell for enough to pay the mortgage debt, whether sold under authority of the state court or by the trustee in bankruptcy, and that the mortgagee has no intention to delay the sale unreasonably or

prevent the property bringing a fair price, proceedings in the state court will not be stayed, nor will the bankruptcy court take control of the property for the purpose of a sale by the trustee.

### In Bankruptcy.

R. H. Cunningham, for petitioner.

Clay & Clay, for Farmers' Bank of Kentucky.

EVANS, District Judge. Robert A. Holloway on his own petition was adjudged a bankrupt on the 6th day of September, 1898. In 1897, in a suit brought in the Henderson circuit court, by the Farmers' Bank of Kentucky, a judgment was recovered against Holloway for over \$10,000, and in that suit a judgment was also rendered for the sale of the mortgaged property described in the pleadings therein. The master commissioner of the court was directed to execute the judgment; but, owing to the willingness of the bank to indulge its debtor, a sale of the mortgaged property was not in fact made. That property embraced all of the real estate of Holloway. Since the adjudication in bankruptcy, a controversy has arisen here resulting from the petition of the trustee in bankruptcy asking for a stay of proceedings in the state court, and praying that the bankrupt's estate, so far as it was mortgaged, and so far as it was directed to be sold under the judgment of the state court, shall also be administered in these proceedings. It is urged, however, on behalf of the bank, that the mortgaged property is clearly insufficient to pay the mortgage debt; that there cannot in any event be any surplus for the trustee in bankruptcy; that the state court proceedings had advanced to a judgment long before the bankruptcy of Holloway, and, indeed, long before the passage of the bankrupt law; and that it can only result in additional and unnecessary costs, practically to the extent of the trustee's fees, to require the mortgage property to be sold in these proceedings, instead of permitting it to be done under the judgment of the state court. On the trial of the petition of the trustee in this case, it was frankly admitted by his counsel that there was no likelihood of there being any surplus for the general creditors; the mortgaged property being probably insufficient to pay the judgment of the state court. It appears from other testimony, to the satisfaction of the court, that it is entirely certain that the mortgaged property will not sell for enough to pay the mortgage debt, and that it is not in fact worth the amount of the judgment.

The question presented is, shall the court, under circumstances of this character, stay the proceedings of the state court, and require a sale of the property to be made by the trustee in bankruptcy, and the proceeds to pass through his hands? It seems to the court, from the provisions of the bankrupt law contained in sections 11 and 47, that after the adjudication the matter is entirely within the discretion of the court, to be determined as may appear best for the interest of the general creditors. If it were probable that a larger sum would be realized from the sale by the trustee than from a sale by the master commissioner of the state court, and that the general creditors would be the beneficiaries of this increased price, it would be the duty of the court to see that the best results were obtained for the general credit-

ors. But, where it is apparent or extremely probable, that the mortgaged property will not be sufficient to pay the mortgage debt, it would be neither necessary nor judicious for this court to interfere with the state court proceedings. It seems that this was the well-established practice of the bankrupt courts under the act of 1867. Many adjudications might be referred to in which bankrupt courts were then guided by similar considerations. Should the property bring more than enough to satisfy the mortgage debt in this case, when sold under the judgment of the Henderson circuit court, it would be the duty of the trustee in bankruptcy to apply for the surplus. For the purpose of ascertaining what the surplus is, and for the purpose of being ready to obtain it, should it unexpectedly be realized, it might be well for the trustee to intervene in the state court proceedings, or at least keep in touch with them, so as to be ready promptly to look after the interest of the bankrupt's general creditors. Matters of this sort being in the discretion of the bankrupt court, should there be unreasonable delay in the state court proceedings, or should any unexpected complications arise, it might be the duty of the court on that account to stay other proceedings, and permit the trustee to take charge of the sale in lieu of the state court officers; but, as there does not appear to be any purpose upon the part of the judgment creditor in the state court to delay the sale of the property, nor to do anything to prevent its bringing a fair price, the motion of the trustee in this case will for the present be overruled, reserving power to take another course should the circumstances of the case require it.

The court is also of the opinion that the rights of other persons claiming liens on the same property can be better adjusted in the state court, as the questions arising upon these matters afford no reasonable expectation of any benefit to unsecured creditors. The interest of the latter is rather diminished than increased by the other lien claims.

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JOHNSON v. WALD et al.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1899.)

No. 801.

1. **BANKRUPTCY—ACTS OF BANKRUPTCY—PREFERENCE.**

Under Bankruptcy Act 1898, § 3, providing that it shall be an act of bankruptcy if a person shall have "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors," the payment and discharge of a debt, by an insolvent debtor, by a conveyance to the creditor of personal property of greater value than the debt, the debtor receiving the difference in cash, is a preference of such creditor, and an act of bankruptcy.

2. **SAME—INTENT TO PREFER.**

Where an insolvent debtor transfers to one of his creditors, in payment of his debt, personal property sufficient in value to satisfy the debt in full, his "intent to prefer such creditor over his other creditors," necessary to make such transfer an act of bankruptcy, will be presumed; the preference being the natural result of the transfer.

Appeal from the District Court of the United States for the Northern District of Georgia.