

question which has been twice considered by the circuit court of appeals for the Ninth circuit in parallel cases, and the conclusion reached on both occasions was at variance with the position taken by counsel for the appellants. *Bank v. Mathews*, 29 C. C. A. 491, 85 Fed. 934, and *Brown v. Tillinghast*, 93 Fed. 326. The decree in the equity case and the judgment in the law case are each affirmed.

In re VON BORCKE.

(District Court, D. New Jersey. April 24, 1899.)

BANKRUPTCY—TIME OF FILING PETITION.

A petition in bankruptcy is to be deemed "filed," within the meaning of the bankruptcy law, when it is delivered personally to the clerk of the court of bankruptcy, and received by him for the purpose of being kept on file, though not at his office, nor during office hours.

In Bankruptcy. Wolf S. A. Von Borecke, the alleged bankrupt, gave a chattel mortgage on his property to a trustee to secure certain of his creditors; the same being dated October 31, 1898, and recorded November 3, 1898. A petition in involuntary bankruptcy against him, alleging the giving of such mortgage as an act of bankruptcy, was placed in the hands of the clerk of the district court, at his residence, at 8 o'clock in the evening of March 3, 1899, and was taken by the clerk to his office on the following day. Counsel for the bankrupt, contending that the petition had not been "filed" within four months after the commission of the alleged act of bankruptcy, sued out a rule on the petitioning creditors to show cause why the petition should not be marked filed as of March 4, 1899. Rule discharged.

Joseph Anderson, for petitioning creditors.

William M. Dougherty, for bankrupt.

KIRKPATRICK, District Judge. It appears from the testimony which has been taken in this matter, and from the file mark on the papers, that the petition for the adjudication of Von Borecke as a bankrupt was delivered to the clerk of this court, in person, on the third day of March last, at 8 o'clock p. m. It is beyond dispute that the clerk was the proper officer to receive the petition, and there is no denial of the fact that it was delivered to, and received by, him for the purpose of being kept on file. "A paper is said to be on file when it is delivered to the proper officer to be kept on file." 7 Am. & Eng. Enc. Law, p. 960. The test of filing seems to be whether the officer in whose custody the paper is placed is the one entitled to retain the same. It was upon the ground that the person to whom the paper was delivered was not such officer authorized by law to retain its custody, but merely the messenger of such officer, that the decision of *Garlick v. Sangster*, 9 Bing. 46, was rested. The paper had not reached the hands of the court's custodian.

The case of *People's Sav. Bank & Trust Co. v. Batchelder Egg Case Co.*, 4 U. S. App. 609, 2 C. C. A. 126, and 51 Fed. 130, is very much in point. There the law required certain papers to be "filed" before

a writ of attachment could be issued. These papers were delivered to the clerk outside of his office, after office hours, and by him marked "Filed." The attachment issued immediately, and before the papers so marked had actually reached the clerk's office. The United States circuit court of appeals for the Eighth circuit held that the levy made by virtue of the writ issued under these circumstances was valid, saying that a construction of the law such as is contended for in this matter "would be too narrow and technical for the practical and business methods that should obtain in the administration of the law." I am of the opinion that the petition in this cause was filed on March 3, 1899, as appears by the indorsement of the clerk thereon, verified by the testimony adduced on the hearing. The rule heretofore granted in the cause will be discharged.

In re LIPMAN.

(District Court, S. D. New York. May 13, 1899.)

1. **BANKRUPTCY—PROVABLE DEBTS—STATUTE OF LIMITATIONS.**

A claim founded on a judgment is not provable in bankruptcy against the estate of the judgment debtor when at the time of filing the petition in bankruptcy all right of action thereon was barred by the statute of limitations of the state where the judgment was recovered and by that of the state where the creditor resides, as well as by the law of the state where the bankruptcy proceedings are pending.

2. **SAME—DEBT LISTED IN SCHEDULE.**

The fact that a bankrupt includes in his schedule of debts a claim already barred by the statute of limitations does not revive such claim, so as to make it a provable debt against his estate, to the prejudice of his other creditors.

3. **SAME—EXPUNGING CLAIM.**

A claim duly proved and allowed against the estate of a bankrupt may be expunged, on motion, when it is shown to have been barred by the statute of limitations at the time the petition in bankruptcy was filed.

In Bankruptcy.

Oppenheim & Severance, for creditors.

Wolf, Kohn & Ullman, for bankrupt.

BROWN, District Judge. Pending the taking of testimony before the referee upon specifications in opposition to the discharge of the bankrupt, a motion was made to expunge a proof of claim made by Brown Bros. & Co., a firm creditor of the bankrupt, stated in the schedules. The motion was granted by the referee, whose decision thereon has been brought before me for review. The claim proved, is a judgment recovered in Utah on November 2, 1888, for \$2,330, for debt and costs, upon a demand for goods sold and delivered to the bankrupt at Salt Lake City, where he then resided. The firm creditor was located and did business at San Francisco, where the holders of the claim still reside. By the statute of limitations of Utah, no action can be brought upon any judgment recovered in any state or territory after the lapse of five years. 2 Comp. Laws 1888. p. 224, §§ 3141, 3142. The same limitation of five years is prescribed by section 336 of the Code of Civil Procedure of California. The bank-

rupt continued to reside in Utah for more than five years thereafter, namely, until September, 1895, when he removed with his family to this city. His petition in bankruptcy was filed in January, 1899. The period of limitation for the commencement of actions on judgments in this state is 20 years (Code, § 376); but a special provision (section 390) enacts as follows:

"Where a cause of action * * * accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representative, after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the state, * * * (1) where the cause of action originally accrued in favor of a resident of the state; or (2) where before the expiration of the time so limited, the person, in whose favor it originally accrued, was or became a resident of the state; or the cause of action was assigned to, and thereafter continuously owned by, a resident of the state."

From the above provisions it is evident that at the time the petition in bankruptcy was filed, the claim of these creditors was barred by the statutes of limitation, not only in the states of Utah and California where the parties then resided, and where the judgment was obtained, but also in this state. Many, if not all, of the states have provisions similar to that of section 390 of the Code of this state above cited; and the principle of such statutes as statutes of repose, interstate comity and the public convenience, required the general application of that rule. By the federal law the state statute of limitation is ordinarily applied in legal proceedings arising within the state. Notwithstanding the decision in the case of *In re Ray*, 1 N. B. R. 203, Fed. Cas. No. 11,589, I think the weight of authority and of sound reason requires the claim to be expunged (*In re Cornwall*, 9 Blatchf. 114, 126, 137, 138, 6 N. B. R. 305, Fed. Cas. No. 3,250, and cases there cited; *In re Noesen*, 12 N. B. R. 422, Fed. Cas. No. 10,288; *In re Kingsley*, 1 N. B. R. 329, Fed. Cas. No. 7,819; *In re Harden*, 1 N. B. R. 395, Fed. Cas. No. 6,048), and the decision of the referee is therefore sustained.

The insertion of this debt in the schedules of the bankrupt was no revival of the claim. The rights of other creditors to the assets, if there are any assets, could not be thus prejudiced.

In re CLIFFE.

(District Court, E. D. Pennsylvania. June 2, 1899.)

No. 45.

1. BANKRUPTCY—SUFFICIENCY OF PETITION—WAIVER OF OBJECTIONS.

A petition in involuntary bankruptcy which alleges, as the act of bankruptcy on which an adjudication is asked, that the debtor suffered creditors to obtain a preference through legal proceedings, is insufficient if it merely follows the words of the statute, without specifying the details of the transaction constituting the preference. But this defect is amendable, and is waived by the respondent if he files a general denial, and demands a trial by jury.

2. SAME—ACTS OF BANKRUPTCY—SUFFERING PREFERENCE.

Under Bankruptcy Act 1898, § 3, cl. 3, providing that it shall be an act of bankruptcy if a debtor shall have "suffered or permitted, while in-