

pensation for the defendants' services, aggregate \$1,579.39. This sum the committee charged proportionally upon the 91 bonds deposited under the agreement of November, 1894, thus reaching a charge of \$56.92 upon each bond. The apportionment is made upon the theory that the work done before November, 1894, was useful to the bonds deposited under the agreement of that date, and, indeed, was so necessary that, if it had not been previously done, it would have certainly fallen upon the subscribers to that agreement. There is some force in this argument, but, after full consideration, I am not able to adopt it. What might have been necessary is after all speculative, and I think it is the safest course to lay upon the parties to each agreement no more than the expenses incurred under that particular contract. They authorized no other outlay, and there is nothing to support the charge against them of expenses previously incurred, except the implied ratification that may be inferred from the supposed benefit which they may have derived from such expenses. Under the facts in proof, this benefit is so uncertain that I do not feel justified in deciding that the defendants' apportionment is correct. The \$3,000 paid to the defendants under the agreement with the Southern Railway Company was for expenses and services after June 8th, and is therefore not to be taken into account.

The result is that the plaintiff has been overcharged as follows:

Total expenses to May 29, 1895, per account.....	\$5,179 39
Less expenses under agreement of June, 1893.....	1,646 59

Expenses under agreement of November, 1894.....	\$3,532 80
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—Or \$38.82 upon each of the 91 bonds deposited under that agreement, making the plaintiff's share of the expenses \$388.20. He was therefore entitled to have refunded in cash \$611.80, instead of the \$430.80 that he has already received. For the balance (\$181), with interest from October 3, 1895, he is entitled to a decree, with costs of suit.

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In re HEYMAN.

(District Court, S. D. New York. July 25, 1899.)

**BANKRUPTCY—PROOF OF DEBTS—RIGHTS OF BANKRUPT'S SURETY.**

Under Bankruptcy Act 1898, § 57, subd. i, where a creditor has received partial payment of his debt from a surety of the bankrupt, the right to prove the claim, for its entire amount, against the estate in bankruptcy, is in the creditor, in preference to the surety.

In Bankruptcy. On review of decision of referee in bankruptcy.

Meyer & Josephson, for surety.

Lyon & Smith, for proving creditor.

THOMAS, District Judge. The question for decision is whether a surety may discharge a part of a debt due from a bankrupt, and be at once subrogated pro tanto to the rights of the creditor, and prove his claim against the estate. Section 57, subd. i, provides:

"Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor."

Rev. St. § 5070 (Bankruptcy Act 1867, § 19), provides as follows:

"Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders."

Section 57 of the act of 1898 states that the surety may prove the claim in the name of the creditor in case the latter do not make such proof, and enables the surety, in case he discharge the debt in whole or in part, to be subrogated to the rights of the creditor. The construction would be permissible that the surety is subrogated to the rights of the creditor to the extent to which he has paid the debt, but, if he has paid nothing, he must await the action of the creditor; and, in default of such action, the surety may act for the creditor in the matter of proving the claim. The construction placed upon section 19 of the act of 1867 leads to a contrary conclusion. That section states in terms that the surety who has discharged the debt in whole or in part shall be entitled to prove the debt, or, if the creditor has proved it, to stand in his place. That section further states that, if the surety has not paid the whole of the debt, but is still liable for the same, or any part thereof, he may, if the creditor omits to prove the debt, prove the same, either in the name of the creditor or otherwise, as may be provided, etc. These two sentences of section 5070, Rev. St., on certain state of facts might not entirely accord, but it is considered that the section is the full equivalent, and no more than an equivalent, of subdivision i of section 57 of the act of 1898. In such case it seems suitable to follow the interpretation placed upon section 5070, Rev. St. From the decisions relating to the former act, it appears that the creditor is entitled to prove his full claim in preference to a surety, who has discharged a part of his indebtedness. The authorities tending to establish this holding are: *In re Ellerhorst*, 5 N. B. R. 144, Fed. Cas. No. 4,381; *In re Hollister*, 3 Fed. 452; *Stewart v. Armstrong*, 56 Fed. 171; *In re Souther*, 2 Low. 322, Fed. Cas. No. 13,184; *Bank v. Pierce*, 137 N. Y. 444, 33 N. E. 557. See *Downing v. Bank*, 11 N. B. R. 372, Fed. Cas. No. 4,046. The motion to set aside the order of the referee is denied.

## HESELTIME v. PRINCE et al.

(District Court, D. Massachusetts. July 6, 1899.)

No. 1,011.

## 1. BANKRUPTCY—PROPERTY VESTING IN TRUSTEE—ESTATE BY CURTESY.

In Massachusetts, under the statutes of that state, a husband's interest in the real estate of his wife, during her lifetime and after issue born, is not property which he could convey or assign, and consequently it will not pass to his trustee in bankruptcy as assets of his estate.

## 2. SAME—POWERS.

A husband's interest in his wife's real estate during her life is not a "power," within the meaning of Bankruptcy Act 1898, § 70(3), vesting in a bankrupt's trustee "powers which he might have exercised for his own benefit."

In Bankruptcy. On demurrer to a bill in equity filed by the complainant, as trustee in bankruptcy, to reach certain property alleged to be assets of the estate in bankruptcy.

Hesseltine & Hesseltine, for complainant.

James P. Prince, for defendants.

LOWELL, District Judge. This was a bill in equity filed in the district court, under the provisions of the bankrupt law, to reach the interest of a husband, after the birth of issue, in the real estate of which his wife is seised; the wife being still alive. The defendant raised no objection to the jurisdiction of the court or to the form of proceeding, but demurred to the bill for want of equity. It is necessary, therefore, to determine if the right of the husband, whether it be properly described as tenancy by the curtesy initiate, or otherwise, passes to the trustee in bankruptcy, under the present law. The rights of the husband in the property of his wife are limited by the statutes of Massachusetts, and this court is governed by the interpretation put upon those statutes by the supreme court of the commonwealth. In *Lynde v. McGregor*, 13 Allen, 182, 184, it was said by Mr. Justice Gray that "these statutes are inconsistent with the hypothesis that the husband has any estate in his wife's land which he can convey separately during her lifetime, or which will pass to his assignees in insolvency." The insolvent law of Massachusetts (Gen. St. c. 118, § 44) vested in the assignee in insolvency all the property of the debtor which the latter could have lawfully sold, assigned, or conveyed. This language is as broad as that of section 70(5) of the bankrupt act, and hence it must be taken that the husband's right in his wife's real estate above described does not pass to the trustee in bankruptcy. See, also, *Walsh v. Young*, 110 Mass. 396, 399. Section 70(3) was relied upon in argument by counsel for the trustee; but, however the husband's right in his wife's real estate should be described, it certainly is not a power. Demurrer sustained, and bill dismissed, with costs against the estate.