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Bankruptcy-Liens-Unrecorded Mortgage

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RECENT CASE NOTES

BANKRUPTCY—LIENS—UNRECORDED MORTGAGE—The bankrupt executed a chattel mortgage. No notice of intention to execute such mortgage had been recorded. The mortgage was then recorded at a later date than its execution. A year later the mortgagor filed a voluntary petition in bankruptcy. In this bankruptcy proceeding three classes of creditors are represented. 1. Those existing at the date of the mortgage; 2. those who became such between the date of the mortgage and its recording; 3. those so becoming subsequent to the recording of the mortgage. For the purpose of the points herein involved, the California statute which governed the mortgage, made it void as to creditors of the first and second class because of the failure to record notice of intention, but valid as to creditors of the third class. The trustee in bankruptcy now contends that the mortgage is also void as to the third class at the suit of the trustee, and, according to the opinion of the lower court, bases his contention on section 70 e of the Bankruptcy Act. The United States Supreme Court held the mortgage void as to the third class, reversing the holding below.¹

The reasoning of the court in the principal case is very unsatisfactory. At the outset the court says, "The trustee gets title to all property which has been transferred by the bankrupt in fraud of creditors or which prior to the petition he could by any means have transferred or which might have been levied on and sold under federal process against him." This is a summarization of 70a (4) (5) of the Act.

The wording of the California statute involved here was "will be conclusively presumed to be fraudulent and void as against the existing creditors, etc." It is true there is authority holding that the fraud involved in section 70a (4) includes fraud by statute law, or by any other rule of law of the state.²

Section 70a (4) provides the trustee gets title to property transferred by the bankrupt in fraud of his creditors. Does this mean that the validity of a lien on such property is to disregarded? It is submitted it does not. Section 70e takes care of a situation in which less than all creditors have the right to avoid a transfer. *Knapp v. Milwaukee Trust Co.*, *supra*, was a case of a transfer void as to all creditors. The syllabus to *Bush v. Export Storage Co.*, *supra*, contains the following statement which is borne out by the opinion. "The title which passes to a trustee under 70a (4) is limited to such property as might have been recovered by creditors, in whose right the trustee takes, under the laws of the state, and as may be recovered by him under 70e. This amounts to saying that under 70a (4) the trustee's rights are the same as the creditors' rights. Evidently, the court in the principal case did not intend to innovate the doctrine that section 70a (4) means that the validity of a lien is to be disregarded. It did not go beyond a brief statement of section 70a (4);

¹ *Moore v. Bay* (1931), 52 Sup. Ct. 3.

² *Bush v. Export Storage Co.* (1904), 136 Fed. 918, 14 A. B. R. 141; and see *Knapp v. Milwaukee Trust Co.* (1910), 216 U. S. 545, 24 A. B. R. 761, 54 L. Ed. 610, 30 Sup. Ct. 412.

it did not specifically say anything that could be construed as supporting such doctrine; it did not cite any authority supporting such a doctrine. It is noteworthy that the principal case, apparently, is not decided on the basis of fraud.³

Section 70a (4) stated briefly by the court is of no assistance in this case. This subdivision states what property rights of the bankrupt passes to the trustee. Nothing contained therein operates to extinguish the extent of the validity of an encumbrance on property of the bankrupt. The lien in the present case can no more be said to be void than it can be said to be valid. To say a lien is void impliedly precludes the possibility of any validity. Each term used unqualifiedly, excludes the other. The lien here was valid to some extent and void to some extent.

The court goes on to say "by section 67 a claim which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." It may be plausibly argued that since the mortgage was a "valid lien as against the claims of 'some' of the creditors of the bankrupt," 67a does not apply. If in reply to this it is contended that this would be reading something into 67a arbitrarily, so as to make it read "claims which * * * would not have been valid liens as against *all* the creditors * * * shall not be valid liens * * *," then the same argument would nullify the contention that 67a must read "claim which * * * would not have been valid liens as against *some* of the creditors * * * shall not be valid liens * * *." It would seem that when "the creditors" of a person are spoken of generally, all the creditors are those to whom it is thus referred. It is submitted that a sound restatement of 67a would be this: Any claim which for any reason would not have been a valid lien as against the claims of all the creditors of the bankrupt, excluding the claimant, shall not be a lien against the bankrupt's estate. The exclusion of the claimant in this statement does not add anything which is not by necessary inference in 67a.

S. K.

CONSTITUTIONAL LAW—VESTED RIGHT IN REMEDY—The appellant was indicted on September 12, 1930, for the alleged robbery of a bank on August 26, 1927. At the time of the commission of the alleged offense section 20, c. 6, Acts of 1905—Section 2052, Burns' 1926—provided that prosecutions for such offenses must be commenced within two years. On May 19, 1929, the above statute was repealed by section 1, c. 198, Acts of 1929, which provided that the period of limitation should be enlarged to five years. The appellant contends that the prosecution was barred by the statute of limitations that was in effect at the time of the commission of the offense. *Held*, the prosecution is not barred; statutes of limitations pertain to remedy, and there is no vested right in a remedy or mode of procedure.¹

³ See further, on 70a (4) *In re Mullen* (1900), 101 Fed. 413, where the court held that 70e (4) did not preclude the gaining of rights superior to the trustees; this is mentioned only to show that 70a (4) does not confer an unlimited right.

¹ *Streepy v. State*, Supreme Court of Indiana, October 13, 1931, 177 N. E. 897.