IN RE MCULTA.

U. S. District Court, Middle District of Pennsylvania, June, 1911.

EXEMPTIONS—EFFECT OF CONDUCT OF BUSINESS BY BANKRUPT UNDER AN ASSUMED NAME.

About six years prior to adjudication, a bankrupt whose real name was McCleas, had removed from Maine, owing to domestic troubles, and settled in Pennsylvania under the assumed name of McUlta, where, for four years prior to adjudication, he conducted a grocery business under such assumed name. His creditors knew him only as McUlta, and dealt with him only under that name. Upon objection to the allowance of any exemption to the bankrupt on the ground that there was no such person as McUlta, and that the bankrupt could not obtain title to goods which he claimed as exempt where he had obtained such goods by fraud in that he did not inform his creditors of his right name, *held,* that at common law a man may lawfully change his name and as there was no statute in Pennsylvania prohibiting such change, the bankrupt and those with whom he dealt were bound by the name assumed by him and as the assumption of such name was not, of itself, a fraud upon creditors dealing with him, the bankrupt was entitled to his exemption.

SAME—EFFECT OF CONTINUANCE OF BUSINESS BY BANKRUPT AFTER FILING OF PETITION.

Nor will an exemption be denied because the bankrupt continued to sell goods in his business between the date of filing the petition and the date of the appointment of the trustee, such possession and sale having been permitted by the creditors without the appointment of a receiver; but the amount received on such sales should be deducted from the exemption allowed.

On certificate from referee.

The following is the certificate of the referee:

I, Arthur A. Smith, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose, pertinent to the said proceedings:

The facts as disclosed by the evidence are as follows: The bankrupt's residence before his removal to Williamsport, Pa., about six years ago, was at Maine, New York, where he was known by his real name, Truman Day McCleas. Owing to domestic troubles he deserted his wife and family, came to Williamsport, assumed the name of J. D. McUlta, obtained employment at the Park hotel, where he worked for two years under his assumed name. He then engaged in the grocery business in said city, which he conducted for the past four years under the name of J. D. McUlta, his assumed name. No person in the city of Williamsport knew of his past life, or that he was living under an assumed name. Shortly after his arrival in Williamsport he wrote a letter to his wife, informing her of his whereabouts and his assumed name. He conducted his grocery store, did business and was known in and about Williamsport by the name of J. D. McUlta. All goods were sold to him under that name and his creditors knew him only as J. D. McUlta, delivered goods to him and extended him credit under that name.

Four objections to the allowance of any exemption to the bankrupt are raised by the exceptions, which we will dispose of in their order.

1. Because there is no such person as J. D. McUlta, who claims to be entitled to the benefit of the exemption provided by the Act of Congress establishing a uniform system of bankruptcy throughout the United States, approved Nov. 28, 1898, and its several supplements.

At common law a man may lawfully change his name and will be bound by any contract into which he enters under his adopted or reputed name; and by such name he may sue and be sued. (*Doe vs. Yeates,* 5 Barn. and Ald. 544; *The King vs. Inhabitants of Billinghurst,* 3 M. & S. 250; *Petrie vs. Woodworth,* 3 Caines [N. Y.] 219; *In re Snook,* 2 Pitts R. 26; *Linton vs. First National Bank of Kittanning,* 10 U. S. Dist. Rep. 894.)

There is in force a statute in Pennsylvania, passed April 9th, 1852, P. L. 301, which provides a method for a person to change his name; said Act reads as follows:

"It shall be lawful for the Court of Common Pleas of any county * * * to make a decree, changing the name of any person resident in said county, at any time three months after being petitioned to do the same by such person; provided, that notice of the decree, after the same shall be made, shall be published in one or more newspapers to be designated by the court, for four successive weeks."

The Act of 1852 did not change the common law rule, but was passed in affirmance and aid of the common law. Without the aid of that Act, a man may change his name or names, first or last, and when his creditors and the community have acquiesced and recognized him by his new designation, that becomes his name. (*Laflin & Rand Company vs. Steytler,* 146 P. S. 434.) Hence there was no law in force in the State of Pennsylvania when the bankrupt came to this State, and changed his name, prohibiting such a change and the same being allowed under the common law, he and those with whom he dealt were bound by the name which he assumed while in the State of Pennsylvania.

2. Because Truman Day McCleas, who claims the exemption under the assumed name of J. D. McUlta is estopped from claiming the benefit of the exemption provided by the Acts of Congress, out of the goods in the hands of the trustee as said goods were purchased and acquired of the creditors by fraud in that the said Truman Day McCleas represented himself to said creditors as being J. D. McUlta, when in fact he was not.

This exception charges the bankrupt with fraud in obtaining the goods and merchandise purchased, in that, he did not inform his creditors of his right name, and therefore, he did not obtain title to the goods which he claims as exempt. We dismiss this exception. A name is used merely to designate a person or thing. It is the mark or indicia to distinguish him from other persons, and that is as far as the law looks. (*In re Snook, supra; Rich vs. Mayer*, 7 N. Y. Sup. 69-70.) They are merely used as means of indicating identity of persons. (*Mayer vs. Indiana National Bank*, 61 N. E. 596.) There is nothing in the evidence to show that any fraud was committed by the bankrupt in purchasing the goods. They were sold to him under his assumed name (the creditors never knew until after the institution of bankruptcy proceedings and the adjudication, that the bankrupt was doing business under an assumed name); and he took title to the goods and could have disposed of them under his assumed name and given a good title to the same. Credit in this case was given to the man—not the name—and that man was J. D. McUlta. The creditors cannot now claim that they never parted with their goods because they learned that the man—the person or being—to whom they sold the goods was known before he came to this city, over six years ago, by a different name. The bankrupt has title to the goods free from any fraud, and such a title that he can claim his exemption allowed by the laws of the State of Pennsylvania therefrom.

3. Because Truman Day McCleas, under the assumed name of J. D. McUlta, sold goods of the bankrupt stock from the date of the filing of the petition in bankruptcy, Dec. 17th, 1910, to the meeting of creditors to choose a trustee, Jan. 16th, 1911, without keeping any account of the goods sold or the money realized from the sale thereof and is not entitled to have any goods set aside to him under the Act of Congress allowing an exemption.

The bankrupt was allowed to keep possession of his property and conduct his store from the date of the filing of the petition to the election of a trustee. It was the duty of the creditors, when they filed their petition, or after they filed their petition, and after the case was referred, to petition the court or referee for the appointment of a receiver to take charge of the goods; in which event, exceptions Nos. 3 and 4 would never have entered into the consideration hereof. On the other hand, it was the duty of the bankrupt to keep his stock intact and turn it over to his trustee when elected. It appears from the evidence, that between the date of the filing of the petition and the appointment of the trustee, the bankrupt conducted his business as usual; and this is assigned as a reason of depriving the bankrupt of his exemption. Such conduct on the part of the bankrupt is not sufficient to deprive him of his exemption under the law of the State of Pennsylvania.

4. If Truman Day McCleas, under the assumed name of J. D. McUlta, is entitled to the benefit of the exemption provided by the Act of Congress, he is only entitled to have goods set aside to him out of the bankrupt estate for an amount which is the difference between the value of the goods which J. D. McUlta sold after the filing of the petition in bankruptcy, December 17th, 1910, and the election of a trustee by the creditors, Jan. 16th, 1911, and the exemption of three hundred dollars.

We sustained this exception and directed the trustee to deduct from the goods set apart to the bankrupt the amount of goods which the bankrupt sold during the interval of the filing of the petition and the election of a trustee. The creditors claim that a sufficient amount has not been deducted and that the burden was upon the bankrupt to show the amount of goods which he sold.

During the examination of the bankrupt by his creditors, he admitted that he sold goods, keeping an account on slips, which he deposited in his cash register. When asked to produce the slips he stated that all could not be found, but produced such as were in his possession. The creditors established by the testimony of the bankrupt that he had sold certain goods, and then took the position that the burden of proof shifted from them to the bankrupt. The burden of proof rests upon him, who substantially asserts the affirmative of the issue. This burden never changes. The weight of the evidence may shift from one side of the case to the other. In the matter before us, the creditors showed that the bankrupt had sold certain goods, and the bankrupt later on in his examination admitted to selling more goods than the creditors were able to prove he had sold. The burden of proof that he sold more than he stated he had sold was then placed upon the exceptants, and they were unable to sustain their exception any further. Hence we were bound in our findings by the testimony taken before us; and we accordingly ordered the sum of $18.46 deducted from the amount which the bankrupt claimed, and made an order to that effect; which order has been appealed from.

We hand up to the court herewith the list of goods claimed by the bankrupt to be exempt, the list of goods set aside to the bankrupt by his trustee, the exceptions filed thereto by the creditors, the answer of the bankrupt to said exceptions, the order of the referee made thereon, and the testimony taken before the referee.

Sprout & Cupp, for claimant.

Ames & Hammond, for exceptants.

WITMER, District Judge:

The report of the learned referee contains a satisfactory discussion of the questions submitted, and I need only say that I agree with his reasoning and conclusions, in support of which I will add the thought moreover, that if the changed name was assumed by the bankrupt in fraud of anyone, it clearly appears that it is independent of his creditors, its taints do not run in the veins of the transaction before the court and hence do not corrupt the current. It does not follow that a party who is a rogue in his other dealings shall be deprived of his rights in another transaction wherein he has been

without fault. It is only where the fraud inheres in the very transaction itself, by its intended effect preventing the collection of the debt that the fraudulent debtor can claim no right of exemption under the law. The order of the referee is affirmed.

CUMMINS GROCERY CO. ET AL. v. TALLEY.

U. S. Circuit Court of Appeals, Sixth Circuit, May, 1911.

INVOLUNTARY PROCEEDINGS—DETERMINATION OF THE ISSUES—INSOLVENCY—PLEADING.

Upon the petition of creditors for an adjudication of bankruptcy against their debtor, it being alleged that there had been a conveyance of a large amount of real estate in trust for the benefit of a creditor with intent to prefer such creditor, the alleged bankrupt answered denying "that within four months next preceding the date of filing of said petition * * * he transferred while insolvent a portion of his property * * * for the use of the Bank of Commerce and Trust Company," etc. *Held,* that the answer was not in proper form as it contained no express denial of insolvency, such denial being only by way of negative pregnant and would have been stricken out before issue joined, but that by replying to said answer and joining issue thereon, petitioning creditors lost their right to move to strike out the plea.

SAME—ISSUE OF INSOLVENCY—FAILURE TO PRODUCE BOOKS AND PAPERS—BURDEN OF PROOF.

Where the alleged bankrupt failed to produce certain accounts and notes material on the question of solvency, and stated several times during the trial that he would do so, without at any time making an apparent effort to procure them, the burden of proving his solvency rested upon the bankrupt, under section 3-d of the Bankruptcy Act; but that statute does not require that the items, concerning which there was such failure to produce, shall be disregarded.

SAME—ISSUE OF INSOLVENCY—WHAT ARE ASSETS—SUFFICIENCY OF CHARGE.

Where the bankrupt scheduled, as an asset, an unliquidated claim against a railroad, and petitioning creditors requested a charge that "Expectation and hopes of realizing upon some claim at some remote day are too uncertain to stand as property of value in balancing up the assets and liabilities of the alleged bankrupt," the charge was properly refused.

SAME—NUMBER OF PETITIONING CREDITORS—PAYMENT AND WITHDRAWAL OF CREDITOR—ESTOPPEL.

Upon a day when a motion to strike out an original plea to an involuntary petition of three creditors was to be heard, the alleged bankrupt filed an additional plea alleging that since the petition was filed two of the petitioning creditors colluded in an attempt to compel the alleged bankrupt to pay the claim of the third and by various means procured a judgment by a justice of the peace, which the alleged bankrupt was compelled to and and did pay and satisfy; and that thereupon there was a failure of the requisite number of petitioning creditors. *Held,* that a motion to strike out such additional plea was properly denied, as, if true, the two petitioning creditors being responsible for the situation and the third creditor having obtained the judgment and payment thereof and been allowed to withdraw, the remaining two were estopped from proceeding further as petitioning creditors.

SAME—DISMISSAL OF PROCEEDINGS—NOTICE TO CREDITORS.

An alleged bankrupt had more than twelve creditors, three of whom joined in an involuntary petition against him. Two of the petitioning creditors colluded to compel the alleged bankrupt to pay the claim of the third who was permitted to withdraw as a petitioning creditor. All but two of the listed creditors, aside from the original petitioning creditors, signed a statement in writing that they objected to an adjudication and agreed not to participate in any effort to that end. The notices to creditors, contemplated by sections 58a (8) and 59d, of a proposed dismissal of the proceedings for lack of sufficient number of petitioning creditors and to give other creditors an opportunity to intervene, were not given and no creditors intervened. *Held,* that, one of the petitioning creditors having withdrawn and the other two being estopped from proceeding with the petition because of conduct in violation of their duty as petitioning creditors, the two remaining creditors who had not joined in the creditors' statement would not have been sufficient to make a jurisdictional petition and the court was warranted in dismissing the proceedings without the giving of the notice of proposed dismissal to creditors, especially after issue had been joined and a hearing had and where the question of lack of notice to other creditors was raised for the first time upon appeal.

Appeal from and error to the District Court of the United States for the Western District of Tennessee, to review an order adjudging Ben Talley not a bankrupt and dismissing an involuntary petition.

Before SEVERENS, WARRINGTON and KNAPPEN, Circuit Judges.

Thomas M. Scruggs, for appellants.

Caruthers Ewing, for appellee.