

TORONTO ADMIRALTY DISTRICT.

1921

January 26.

BETWEEN

WHITE & COMPANY, LIMITED.. PLAINTIFF;

AND

THE SHIP IONIA..... DEFENDANT.

Exchequer Court in Admiralty—Bankruptcy Act—Mortgage—Rights of secured creditors.

Held: That an assignment under the Bankruptcy Act does not interfere with or lessen the rights of a secured creditor to enforce or retain his security.

2. That inasmuch as the assignment itself only vests the property of the debtor in the assignee subject to the rights of secured creditors it can only affect what the debtor owns, namely, the equity of redemption in the property.
3. That such an assignment did not prevent the holder of a mortgage upon a vessel from enforcing his security before the Exchequer Court in Admiralty, and that a motion by the assignee to set aside the writ of summons and warrant of arrest issued in said court by the mortgagee against the ship for its condemnation in the amount of the mortgage therein and interest should be dismissed with costs, which costs should be added to the mortgage debt.
4. That in the premises the only right of the assignee under the bankruptcy Act is to defend the action and that he could not otherwise interfere therein.

Quaere: Does the fact that creditor fails to file an affidavit under section 46 of the Bankruptcy Act valuing his security deprive him of the right to participate in any dividend?

MOTION in Chambers to set aside the service of the Writ of Summons and Warrant of Arrest issued by a mortgagee to condemn a ship in the amount of their mortgage thereon and interest.

January 17th, 1921.

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WHITE &
COMPANY
LIMITED.v.
THE SHIP
IONIA.Reasons for
Judgment.Hodgins,
L.J.A.

Motion argued in chambers before the Honourable
Mr. Justice Hodgins.

A. D. MacKenzie for the authorized assignee under
the Bankruptcy Act.

G. M. Willoughby for plaintiffs.

The facts are stated in the reasons for judgment.

HODGINS, L. J. A. now (January 26, 1921) delivered
judgment.

Motion by assignee to set aside the service of the
writ and warrant of arrest and to stay proceedings in
this action, brought by mortgagees to enforce their
mortgage by sale of the ship.

The assignment was made on 11th November, 1920,
the writ herein was sued out on the 23rd December,
1920, and served on the ship and on the assignee on
the 28th December, 1920, and the 5th January, 1921,
respectively. The ship was arrested on 28th Decem-
ber, 1920, by warrant issued in this action and is now
in the custody of the marshall of the Exchequer Court.

The plaintiffs filed with the assignee on the 23rd
November, 1920, an affidavit of claim which stated
the security held but did not value it pursuant to
section 46 of the Bankruptcy Act and no proceeding
to enable or compel the assignee to elect to take or
refuse the security has been had. The affidavit is
not in compliance with the Act and does not effect
any change in the positions of the plaintiffs or of
the assignee. It is simply a careless and useless
proceeding.

The provisions of the Bankruptcy Act respecting secured creditors are definite and precise. By making an authorized assignment the assignor commits an act of bankruptcy, enabling his creditors to seek a receiving order but the assignment in itself does not appear to make the assignor a bankrupt under the Act. Under section 2, s.s. (q) he is "an insolvent assignor whose debts provable under this Act exceed \$500.00." See also s.s. (t). By section 4, s.s. 6, the Court can refuse to make a receiving order and may allow the estate to be administered under the assignment. The bankruptcy of a debtor commences only on the service of a petition on which a receiving order is made, section 4, s.s. 10.

Under section 6, s.s. 1, when a receiving order is made the trustee is constituted receiver of the bankrupt's property but it is expressly provided that "this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

Under Section 10, the effect of an authorized assignment is stated to be "Subject to the right of secured creditors" and by section 11 such an assignment takes precedence over attachments or debts and the attachments, executions or other process against the property. But as the assignment itself only vests the property subject to the rights of secured creditors it can only affect what the debtor owned, namely, the equity of redemption in the property. (See section 46, s.s. 6, and the Merchants Shipping Act, R.S.C., c. 113, s. 45.)

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The combined effect of sections 6 and 10 is to declare that the bankruptcy proceedings do not interfere with, or lessen the rights of a secured creditor (defined in section 2, s.s. (gg) as a person holding a mortgage hypothec, pledge, charge, lien or privilege on or against the property of the debtor) to enforce or retain his security unaffected by bankruptcy proceedings. It is a question, however, whether he is not bound by section 46 to file an affidavit valuing that security, at the risk of losing the right to participate in any dividend (s.s. 10).

The assignee has, in my judgment, at the present time, no right to interfere in this action, otherwise than by defending it, if he so desires. I extend the time for his appearance to the writ for one week, and dismiss his motion with costs to be taxed, and added to the mortgage debt.

Judgment accordingly.
