DOES THE RELATION OF LANDLORD AND TENANT BECOME SEVERED BY OPERATION OF THE BANKRUPT LAW?

Referee Hotchkiss, of Buffalo (*In re* Collignon, 4 Am. B. R. 250), 1900, in speaking of unaccrued rent, says: "The law has been fairly well settled, and seems to be that, at the time of the bankruptcy, installments of rent accruing thereafter are neither provable debts against the bankrupt's estate, nor affected by his discharge." Citing *In re* Jefferson (2 Am. B. R. 206), 93 Fed. 948 (1899); *In re* Goldstein (2 Am. B. R. 603), 1 N. B. N. 422 (1899); *In re* Shilliday, 1 N. B. N. 475 (1899); *In re* Mahler, 2 N. B. N. Rep. 70 (1899).

As to the proposition that installments of rent, accruing after an adjudication of bankruptcy, are incapable of being proven, there is no doubt whatever that such is the accepted rule. But there is a difference of opinion amongst judges and referees as to such rent *not being affected by a discharge.* In other words, it has been decided in some tribunals that, "the relations of landlord and tenant are severed by operation of the bankrupt law;" while in other jurisdictions it is as emphatically laid down that the relation is "not determined by the bankruptcy of the lessee."

Since the passage of the Bankruptcy Act of 1898 the judicial utterances on the subject of the effect of bankruptcy on unaccrued rent have been three in number, viz.: those of Judge Evans, of the District Court of Kentucky, *In re* Jefferson, 93 Fed. 848, 2 Am. B. R. 206 (1899); Judge Lowell, of the District Court of Massachusetts, *In re* Ells, 3 Am. B. R. 564 (1900); and Judge Purnel, of the District Court of North Carolina, in *Bray* v. *Cobb,* 3 Am. B. R. 788 (1900). In addition to the opinions of the aforesaid U. S. Circuit Court Judges, there are quite a number of reported opinions of referees, representing jurisdictions in various parts of the country.

Judge Evans, in the course of his opinion *In re* Jefferson (*supra*) says: "The court sees no way to avoid the conclu-

sion that the relation of landlord and tenant in all such cases ceases, and must of necessity cease when the adjudication is made. If the relation does cease, the landlord afterwards has no tenant and the tenant has no landlord. At the time of the adjudication the bankrupt is clearly absolved from all contractual relations with, and from all personal obligations to, the landlord growing out of the lease, subject to the remote possibility that his discharge may be refused,—a chance not worth considering. After the adjudication there is no obligation on the part of the tenant growing out of the lease. He not only owes no subsequent duty, but any attempt on his part to exercise any of the rights of a tenant would make him a trespasser. His relations to the premises and to the contract are henceforth the same as those of a stranger. He can neither use nor occupy the property. No obligation on his part to pay rent can arise when he can neither use nor occupy the property. The one follows the other, and it seems clear that no provable debt, and indeed no debt of any sort against the bankrupt, can arise for future rent. No rent can accrue after the adjudication in such a way as to make it the debt of the bankrupt."

In line with this opinion is *Bray* v. *Cobb* (*supra*), in which Judge Purnel says, *inter alia:* "An adjudication in bankruptcy terminates all contractual relations of the bankrupt. The object of the proceeding is to administer completely the bankrupt's estate, to collect his assets, apply them to the payment of his debts then owing and discharge him from further liability. As to the rent . . . , the contractual relations being terminated, a landlord is not entitled to prove a claim for rent against a bankrupt after such bankrupt ceases to use the building. The relations of landlord and tenant are severed by operation of the bankrupt law."

On the other hand we have the opinion of Judge Lowell, of Massachusetts, *In re* Ells (*supra*), in the course of which he states that: "The law concerning the effect of bankruptcy upon a leasehold is stated in *ex parte* Houghton, 1 Low. 554, Fed. Cas. No. 6725 (1871): 'The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have reasonable time to elect whether they will assume a lease which they find in possession, and if

they do not take it, the bankrupt retains the term on precisely the same footing as before, with the right to occupy and the obligation to pay rent. If they do take it, he is released, as in all other cases of valid assignment, from all liability, excepting on his covenants; and from these he is not discharged in any event.' " (See also Hall, "Landlord and T.," 346.)

"I can find nothing in the act of 1898 to produce a result different from that of the act of 1867. Had there been no clause giving the lessor the right to re-enter, the trustee in bankruptcy would have had a reasonable time to elect whether to assume or to refuse the lease. If he had assumed it, the bankruptcy would have operated like any other assignment, and would have released the bankrupt from all liability, except upon those of his covenants not already broken which would have remained binding upon him after any assignment. If the trustee had refused to take the lease, the bankrupt would have remained as before."

Judge Lowell then considers the opinion of Judge Evans *In re* Jefferson (*supra*), and comments thereon as follows: "With all respect for the learned judge, I must think the above remarks made somewhat hastily, unless they are to be taken as limited to the particular lease in question, or made to depend upon some peculiar statutes of Kentucky. . . . It follows, then, that the lease here in question was not determined by the bankruptcy of the lessee, but only by the re-entry of the lessor. *Savory* v. *Stocking,* 4 Cush. 607 (1849); *Treadwell* v. *Marden,* 123, Mass. 390 (1877)."

The opinions of referees, on the question under discussion, are numerous and various. The majority of them seem to incline to the idea that the relations of landlord and tenant are not severed by bankruptcy of the tenant, although others view the question from the opposite standpoint.

It is, perhaps, interesting to notice that Vol. IV, No. 2, of the advance sheets of Am. B. R. has the two views expressed within the space of nine pages. On page 246 (*In re* Arnstein *et al.*) (1900), Referee Pendleton, of the Southern District of New York, holds that a lease is terminated and the right to collect unaccrued rent gone where the landlord, after the bankruptcy of the lessee, rents the property to the

trustee and receives compensation therefor, and the property is thereafter surrendered by the trustee to the landlord. In the case next reported in the same pamphlet, viz., *In re* Collignon, page 259 (1900), Referee Hotchkiss, of the Northern District of New York, opines that, rent to accrue on a lease not expired at the time of the bankruptcy is not affected by the bankrupt's discharge.

Perhaps the opinion which evidences the most careful preparation and which thoroughly discusses the question is that of Referee Harlow P. Davock, of the Eastern District of Michigan, *In re* Mahler, 2 N. B. N. Rep. 70. In that case the referee holds that a lessor's rights against the bankrupt are unaffected by the discharge in bankruptcy, but he can collect payment from after-acquired property only. He reasons that rent afterwards to accrue, not being a personal debt, is not provable and, unless the creditor, at the time allowed for proving claims, be able to produce and verify such debt, he will not be entitled to receive from the bankrupt's estate his dividend; *ergo,* he should not be barred from his future action against the bankrupt.

Referee Davock's opinion bristles with authorities, both English and American. He cites cases construing the former bankruptcy acts, and all of the cases referred to by him seem to sustain his view of the case; although, had he been so inclined, he, doubtless, might have found some cases in support of the opposite view of the question, even under the former bankruptcy acts. For example, there is *In re* Breck, 12 N. B. R. 215, 8 Ben, 93; Fed. Cas. 1822 (1875). In that case (which was under the Bankruptcy Act of 1867) Judge Blatchford, of the U. S. District Court for the Southern District of New York, said that a lease, which cannot be assigned without the consent of the landlord, is canceled by the bankruptcy of the tenant.

Referee Davock's opinion, weighted with "numberless precedents," is in strange contrast to Judge Evans' decision *In re* Jefferson (*supra*), which is a bare but logical and fair-minded exposition of the law, based upon the broad ground of public policy.

While it is true that no prior decision should be reversed without good and sufficient cause, yet the rule of *stare de-*

cisis is not in any sense ironclad, and the future and permanent good to the public is to be considered rather than any particular case or line of cases. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. The benefit to the public in the future is of greater moment than any incorrect decision in the past.

Of the four bankruptcy acts passed by Congress, the Act of 1867 is the only one which, in specific and direct terms, refers to the subject of rent. Section 19 of that act provides that where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove, for a proportionate part thereof, as if the same accrued from day to day, and not at such fixed and stated periods. This act, like all the other bankruptcy acts, is, however, silent on the question of a bankrupt's liability for future accruing rent.

What is the object of the bankruptcy law? Is it not twofold, viz., (1) the distribution of the property of an insolvent debtor amongst his creditors and (2) the discharge of the debtor from his liabilities? *In re* Klein, 1 How. (U. S.) 227; *In re* Silverman, 4 B. R. 523; *In re* Reiman *et al.*, 11 B. R. 21.

That being the case, and the fact that legislation and judicial decision should, as far as practicable, be based upon the broad ground of public policy, does it not seem proper that a discharge in bankruptcy should sever the relations of landlord and tenant? Alexander the Great, at Gordium, unable to find the ends of the knot which fastened the famous chariot, cut the cords asunder with his sword, and, tradition doth say, was thus enabled to conquer the world. Judge Evans, with the apodictical sword of common sense, has cut the cords of "dialectical subtleties" which would not release the bankrupt from the very obligations that he sought the law to relieve him of.

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