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BANKRUPTCY ACT, SECTION 3, *a* (3)—ACT OF BANKRUPTCY—SUFFERING PREFERENCE THROUGH LEGAL PROCEEDINGS.—In the case of *Duncan and Gehly* v. *Landis & Co.* (Circuit Court of Appeals, 3d Circ., September Term, 1900; not yet reported), a very able opinion by Judge Gray has been handed down, overruling several district court decisions in that circuit, and, contrary to all the decisions so far reported on the question of what constitutes the third act of bankruptcy under section three of the act of 1898. Judge Dallas concurs in the result of the case, on other points, but dissents from the view of the majority of the court on this question.

The facts of the case are, briefly, that one Sallie E. Duncan was the proprietor of a department store in Williamsport, Pa., that in

1896, she gave certain of her creditors promissory notes with warrants of attorney to confess judgment. December 31, 1898, judgments were entered thereon in the Common Pleas Court against Mrs. Duncan, executions issued, and a levy made by the sheriff on her property. January 7, 1899, a petition in bankruptcy was filed by other creditors, on the ground that Mrs. Duncan had committed an act of bankruptcy, in that she did, on the thirty-first day of December, 1898, *suffer and permit,* while insolvent, certain of her creditors to obtain a preference through legal proceedings, and had not, within five days before the time fixed by the sheriff for the sale of her property, vacated and discharged such preference. The entry of judgments and issuance of execution were then set out specifically as such preferences. The alleged bankrupt and also one of her creditors filed pleas denying the act of bankruptcy and denying insolvency, and demanded a jury trial.

On the trial the court charged the jury that if they found that respondent was insolvent at the time the judgments were entered and the executions issued, then, as a matter of law, they must find that she had given an undue preference to the judgment creditors. This instruction was one of the errors assigned on appeal.

The Circuit Court of Appeals unanimously held that there was error in the court's instruction as to what constituted insolvency as well as in the portion of the charge above mentioned, Judge Dallas dissenting only from so much of the opinion as deals with the question of preference.

The reasons assigned by Judge Gray for holding that the court below was in error may be briefly summarized, as follows:

1. Section three of the Bankruptcy Act is headed "*Acts* of Bankruptcy." This signifies, not inaction, but some positive result of the bankrupt's will.

2. The words of the section are, "Acts of bankruptcy *by* a person shall consist of his *having* . . . (3) *suffered or permitted*" a preference by legal proceedings. It is said that Acts 1, 2, 4, 5, unquestionably contemplate a voluntary act by the bankrupt, and if so, why was this third act thrown into the same grammatical and structural form, if not to signify that it was a thing of the same nature?

3. Both the words "suffer" and "permit" while they do not connote strong affirmative action, do involve such an exercise of the will as effects results. They may consist merely of connivance between debtor and creditor, but however weak affirmative action they denote, they mean more than mere passivity. The words are used synonymously. They denote acts of the debtor not acts of the creditor. A debtor cannot suffer or permit what he cannot hinder. Citing *In re Nelson*, 98 Fed. 76.

4. It is said by the court *In re Moyer*, 93 Fed. 188, 1 Am. B. R. 577, That the debtor even though he cannot prevent the preference, can always vacate the same within five days of sale and thus release the hold of the Bankruptcy Act on him; that if he has no other weapon for destroying the preference, voluntary bankruptcy is always

open to him, or if he does not wish to avail himself of this he admits his insolvency, wilfully persists in countenancing the preference and ought to be adjudicated. Judge Gray's answer is twofold. (*a*) Such a weapon is not under the law open to a corporation, which cannot go into voluntary bankruptcy. (*b*) If, as seems to be the case, the court is to import a wilfulness and positivity to the "vacating or discharging" feature of the act of bankruptcy, why should not the same ingredient be present in the "suffering or permitting."

5. The so-called weapon of voluntary bankruptcy is turned by the ruling of *In re Moyer* (supra) into a quasi-involuntary thing. For the bankrupt is on the horns of a dilemma. Into bankruptcy he must go, because of mere insolvency, whether he will or not. *Wilson* v. *City Bank*, 17 Wallace, is cited to the effect that there is no moral duty on a man under any circumstances to avail himself of the voluntary feature of the act.

6. *Wilson* v. *City Bank* (supra) is cited as an authority; and it is said that there is no difference in the mattor of intent between the provisions of the act of 1867 and those of the act of 1898. Nor is there a material difference between the words "procure or suffer" as used in the former act and "suffer or permit" as used in the present act.

7. It is argued that if Congress had intended that no voluntary act on the part of the debtor was necessary to this act of bankruptcy, such intention could have been clearly expressed by the use of fewer words. The wording of the English Bankruptcy Statute is quoted as being unequivocal in this respect, and it is said that unless some different provision than that contained in that statute was intended, there was no reason for Congress to use such different phraseology. This argument is reinforced by reference to section 67 *f* of the present act, which provides that certain liens "obtained through legal proceedings" shall be void. It is said that if Congress had meant to exclude the idea of intent or will in section 3 *a* (3), as they clearly did in section 67 *f*, it would have been a simple matter to use the same phraseology.

8. Lastly, the harshness of the ruling of the lower court in its bearing on the alleged bankrupt is given as a reason against its adoption.

Judge Dallas dissents, on several grounds.

1. There is no special significance in the use of the word "Act." It is often used as synonymous with "conduct." We often say a man acts unreasonably when he fails to do something he should do. The word "act" was used in the law of 1867 with regard to many acts of bankruptcy which involved no positive or affirmative action on the part of a bankrupt.

2. The failure to use in section three, the phrase "with intent to give a preference" as used in section 39 of the act of 1867, is said to render the two acts dissimilar in their effects.

3. The reasoning in such cases as *In re Moyer* (*supra*) is adapted, and the general result of inconvenience and dissimilarity of interpretation in different jurisdictions is mentioned.

The statement of the two above opinions seems to be all that is necessary to show what the real question at issue is, and the conflict raised by the decision of the court in this case will have to be ultimately settled by the Supreme Court. It seems idle, in view of this fact, to speculate as to what may be done with the question by that court or to attempt a justification of either view, as against the other. Suffice it to say that prior to this decision, it would hardly have been believed that so good a case could be made for the view Judge Gray has taken, as he has succeeded in making. The authorities prior to this decision, which went the other way, were *In re Reichman*, 91 Fed. 624, 1 Am. B. R. 17; *In re Moyer*, 93 Fed. 188, 1 Am. B. R. 577; *In re Rome Planing Mills*, 96 Fed. 812, 3 Am. B. R. 123; *In re Thomas*, 103 Fed. 272, 4 Am. B. R. 571; *In re Meyers*, 1 Am. B. R. 1; *In re Collins*, 2 Am. B. R. 1. One case takes the view taken in the principal case, but is distinguishable on its facts, as in it no execution was issued and no sale threatened. *In re Nelson*, 98 Fed. 76, 1 Am. B. R. 63.

Owen J. Roberts.

State ex rel Scott v. *Lowell et al.* Supreme Court of Minnesota, 80 N. W. 877 (1899). The relator, Alexander W. Scott and Sadie Lowell, a girl only thirteen years and eleven months old, the daughter of the respondent, were married without the consent of the girl's parents, but by a minister of the gospel and otherwise in due form. Cohabitation followed the marriage. On the day following the father went to the husband's house and forcibly and against her will took his daughter away and detained her. The County District Court discharged a writ of *habeas corpus* in her behalf on the relation of her husband and remanded her to her father's custody and control. From this order the relator appealed to the Supreme Court.

Two questions were presented to be decided. First, what was the relation between the relator and Sadie Lowell? and, second, what effect had this relation on the father's right of control over his daughter?

By the common law the marriage of a male over fourteen or of a female over twelve was valid. But a Minnesota statute (Gen. St. 1894, Sec. 4,769) provides that every male person who has reached the age of eighteen and every female who has reached the age of fifteen shall be competent to marry. The statute does not declare that a marriage to which one of the parties is under this age is void, but merely imposes penalties on public officers or ministers solemnizing such a marriage. It is everywhere held that statutes of this kind, which do not contain express words of nullity, do not render such marriages, when duly solemnized and valid by the common law, void; but are only directory upon ministers and magistrates and are intended to prevent, as far as possible, the solemnization of marriages when the prescribed conditions are not fulfilled: *Parton* v. *Hervey*, 67 Mass. 119 (1854); *Meister* v. *Moore*, 96 U. S. 76 (1877). Therefore the statute did not render this marriage void, but merely imperfect

and incohate—to be avoided or affirmed when the age of consent is reached, and until that time to be treated for all legal purposes as entirely valid.

An interesting question suggests itself here—whether when the younger party reaches the age of consent the marriage becomes void unless affirmed, or valid unless avoided. Although some courts hold the former to be the law (*Shafher* v. *State*, 20 Ohio, 1), the great majority, including the English courts, consider the marriage valid unless avoided by a decree of nullity or by unequivocal conduct by one of the parties: *Beggs* v. *State*, 55 Ala. 108 (1876); *Walls* v. *State*, 32 Ark. 565 (1877).

Considering the necessity of preserving the marriage relation from all uncertainty and the danger of allowing children to be made illegitimate by mere negligence on the part of their parents, the latter view seems much the better and the safer one.

As to the second question, as a general rule marriage emancipates a minor child from parental control. But is the child emancipated when she marries without her parents' consent, which by the common law is necessary to the legality of a marriage? Here also the effect is only to impose a fine on the minister solemnizing the marriage of a minor without the parents' consent or to subject the husband to imprisonment, but not to impair the validity of the marriage: I Bl. Com. 437; II Kent Com. 86.

Therefore in this case, though the marriage took place without Lowell's consent, when it had once been solemnized in due form, it was valid to all intents and purposes. Thereupon the new relation of husband and wife arose, entailing the new duties of wife to her husband, entirely inconsistent with those of child to its parent.

On these grounds the court held Sadie Lowell emancipated from the respondent's control and directed her to be put at liberty and returned to her husband.

SUBSURFACE WATER.—*Forbell* v. *City of New York*, 58 N. E. 644 (N. Y), 1900. Chief Justice Tindal was the first of the English judges to lay down the rule as to subsurface water, in the case of *Acton* v. *Blundell*, 12 M. and W. 324, which has been pretty generally followed in England and America from that day to this.

He decided that in cases where a landowner, by digging or mining in his own land, intercepts or drains away the water which flows through the land of his neighbor in a subterranean course, he is not liable in any action, and the inconvenience suffered by the neighbor falls within the description *damnum absque injuria*.

The recent case of *Forbell* v. *City of New York*, 58 N. E. 644, illustrates the hardship which would be caused by a strict application of this rule.

In this case the City of New York was the owner of two acres of land, and having ascertained, "at least to a business certainty," that such was the percolation and underground flow from the surrounding land that it could force all the water into its own wells, built a

pumping station and drilled several artesian wells for the purpose of supplying a portion of the city with water. With the aid of powerful suction pumps they succeeded in drawing all the percolating water from the surrounding country and sold it in supplying their customers throughout the city.

Plaintiff was the lessee of a piece of ground lying near by which was specially adapted to the cultivation of celery and water cresses. By the action of the defendant the percolating water was withdrawn and the land was rendered barren and totally unfit for the purpose for which it had been used.

Plaintiff asked for an injunction to restrain such use of the wells and the injunction was granted by the Court of Appeals.

This is unquestionably a most just decision, but upon its face there seems to be a clear breaking down of the rule that so far as the extraction or diversion of underground waters upon land of one proprietor affects no surface stream or pond upon the neighboring land, but simply the underground water, therein there is no liability: *Acton* v. *Blundell*, 12 M. and W. 324; *Pixley* v. *Clark*, 35 N. Y. 520; *Wheatley* v. *Baugh*, 25 Pa. 528; *Frazier* v. *Brown*, 12 Ohio, 294; *Williams* v. *Ladeur*, 161 Pa. 283

The reasons upon which the courts have established this rule, as nearly as may be gathered, are two: The first is very clearly stated by Mr. Henry Budd in 30 AMERICAN LAW REGISTER (N. S.), 246: "The reason assigned for the exemption of percolating water from the rules governing water courses is generally based on the ground that water percolating is a part of the soil, or at least cannot be distinguished from it, so that if correlative rights as to a flow of percolating water were recognized between adjacent owners 'the landowner would be deprived of that absolute dominion over his soil which is his by the common law.'"

True such a property right does exist, true such water is, in fact, a part of the land, but does the property right in one landowner enable him to infringe upon that same right in his neighbor? Is it not a principle of law that property rights are qualified by the equal rights of every adjoining landowner? Is it possible that under the shield and protection of this so-called property right courts would allow a man to deliberately and intentionally sink wells, and erect powerful suction pumps, for the purpose of draining the whole region of its percolating water, and thereby working irreparable damage to the adjoining landowners?

As Mr. Justice Hatch, in *Smith* v. *City of Brooklyn*, 18 App. Div. 344, very forcibly puts it, "An adjoining owner has no right to tunnel into another's land for water or minerals or take away soil lying under the surface. But if this doctrine is to be supported he may erect upon his own land an appliance which will draw out all the water which would otherwise remain, without liability, and if water why not the minerals and soil? So far as a property right is concerned one is as much land as the other."

Therefore it is quite clear that this reason for the rule wholly fails when applied to modern conditions, and, as is suggested by Justice

Hatch, should be limited to such water as naturally flows upon the land and not to a flow artificially created.

The other reason is that the percolation and underground flow are out of sight, and their exact operation and courses are conjectural and not susceptible of proof.

Such may have been true in the time of Mr. Justice Tindal, but to-day, in the advanced stages of science, who could believe it? It is monstrous to assert that the courses of underground water are conjectural. Mr. Justice Mitchell, in *Collins* v. *Chartiers Gas Co.*, 131 Pa. 159, speaking upon this very point, said: "Geology is a progressive and now, in many respects, a practical science, and, as truly remarked by the learned judge below, in his opinion on the motion for a new trial, 'since the decisions in *Acton* v. *Blundell* and *Wheatley* v. *Baugh*, probably more deep wells have been drilled in western Pennsylvania than had previously been dug in the entire earth in all time, and that which was then held to be necessarily unknown and merely speculative, as to the flow of water underground, has been by experience in such cases as this reduced almost to a certainty.'"

Our conclusions from the above discussion of the general rule may be summed up in the words of the same judge: "If the boundaries of knowledge have been so enlarged as to make an end of the reason, then *cessante ratione, cessat ipsa lex.*"

Now, having seen the defects in the reasons as applied to modern law, we think that the court was justified in disregarding the letter of the law and seeking to conform with its spirit.

The case may be distinguished from past decisions in four particulars: (1) The city did not take simply the natural supply, but by artificial means forced all the water into its own wells. (2) The water was not used for the benefit of the land, but was sold as merchandise. In another New York case the court said: "No case has gone so far as to apply the rule where the land was used for the purpose of draining and carrying away the water to a distant place, for the benefit and enjoyment of strangers who have no claim or shadow of right to it as against the adjoining landowners." (3) This was an unreasonable user of the land. The court in this case said that in all former cases "either the reasonableness of the acts resulting in the interference or unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land has been recognized. . . . To sink wells, and use pumps which drain all the water in the neighborhood, and by selling it prevent its return to the land, is unreasonable." (4) The city had knowledge, at least to a business certainty, of the percolation or flow before a well was drilled. This single instance should serve to take the case out of the general rule. For, as we tried to show above, there is no question now but that the existence, location and course of subterranean waters may be easily ascertained.

Having this knowledge of the injury they were going to do the plaintiff, the defendants proceeded, relying on the protection of this rule of law.

Could any path of duty be more plain than that taken by this court?

The whole trend of the opinion seems to be in accord with the thought that, no matter what the law may have been, if under modern civilization facts have been altered, it would be in violation of the spirit of the law not to recognize the change.

F. W. S.

NEGLIGENCE—COMMON CARRIERS—LIMITATION OF LIABILITY —REDUCED VALUATION.—*Gardner* v. *Southern Ry. Co.*, 37 S. E. 328, December 4, 1900. The facts of this case present the point of law in question most clearly. The plaintiff shipped a carload of stone by the defendant company, which was lost by the latter's admitted negligence. Damages for the full value, $218, were claimed; but the defendant maintained that the recovery should not exceed the valuation upon the face of the bill of lading. Under instructions from the defendant, the plaintiff had there valued the stone at 20 cents per cubic foot, at which rate the plaintiff would be entitled to but $46.60 damages. Upon this issue the court decided that the reduced valuation did not limit the defendant's liability.

The common-law rule that such a carrier was also an insurer against all loss except that resulting from an act of God, or of a public enemy, was early established. It is mentioned *obiter* in *Southcote's case*, 4 Rep. 84 (1601), in a way indicating that it was already settled law.

In *Morse* v. *Slue*, 1 Vent. 190, 238 (1672), Hale gives a decision to that effect, which Chief Justice Holt accepts in *Coggs* v. *Bernard*, 2 Ld. Raym. 909 (1703). The latter finds the reason for the doctrine in public policy. Lord Mansfield follows him in *Forward* v. *Pittard*, 1 T. R. 27 (1785), and goes so far as to say that the rule has become part of the fixed custom of the realm.

As a result of this stringency of the common law, carriers very soon sought to evade its effects by bringing home to the consignor a notice that they would not be liable. In the early case of *Morse* v. *Slue* (supra), there is a suggestion that this might exempt the carrier; as one of the reasons there given for holding the shipmaster liable is, "that he might have taken a caution for himself." But in *Hyde* v. *Proprietors of Trent and Mersey Navigation*, 1 Esp. 36 (1793), Lord Kenyon expressly denies the validity of such notice, saying that this is a liability imposed upon the common carrier by law, "And he cannot free himself from it by any act of his own, as, for example, by giving notice to that effect."

By 1804, however, the law had wandered far from the straight path of the old learning; and in *Nicholson* v. *Willan*, 5 East. 507, we find Lord Ellenborough allowing the validity of such a notice, and basing his decision upon the sanction of business usage.

The effects of this decision were far-reaching. Carriers did not fail to take advantage of it, and by 1830 this exemption by notice had become such a recognized evil in the law that the statute of 1

Wm. IV., Chap. 68, restored the common-law liability of carriers, by depriving them of the right to thus release their liability by notice. And in England this has been reinforced by the passage of the Railway and Canal Traffic Act of 1854, 17 & 18 Vict., Chap. 31, Sect. 7, which declares void all notices and contracts limiting the liability of common carriers except such as are just and reasonable.

The common-law liability in force in England at the adoption of the Declaration of Independence has been generally incorporated into our law, *Cole* v. *Goodwin*, 19 Wend. 251 (N. Y. 1838), being one of the earliest decisions to that effect. Some states, as Colorado, for instance, have adhered very closely to that doctrine, while others, as New York and West Virginia, have followed the later English deviation.

In the majority of jurisdictions, however, there has been a development along the line of limitation by contract.

This case presents squarely one of the questions involved in that development, which is: Can a common carrier limit his liability for negligence by requiring valuation of the shipment? We may say, from the cases, that he can, but only upon certain strictly applied conditions, as follows:

1. Any such valuation must be reasonable.
2. There must be a consideration for it, as, for example, a reduced freight rate.
3. It must be the clear intent of the parties expressed *in ipsissimis verbis.*

This is approximately the present state of the law on this point in American jurisdictions, there being, no doubt, some slight variation on each side of the line. In Pennsylvania the leaning is toward the strict common-law rule, although the courts have allowed some cases for the carrier where the special contract was most definite.

It will be seen that the bill of lading in the present case lacked all the requisites of a valid contract limiting liability, so the decision was rightly given against the defendant.

Finally, to sum up, the contest has been between the idea, on the one side, that this liability under discussion was imposed by law, and the belief, on the other side, that it resulted from the contract obligation of bailor and bailee. At first the former prevailed, it being good public policy, no doubt, for the law to give especial protection to the consignor in those unsettled times. But the advance of civilization and the increased certainty and dispatch of methods employed by carriers have largely removed that reason; and since where the reason ceases the law ceases also, the tendency to make this more and more a contract obligation is natural, and unless some other good reason appears for protecting the shipper against the carrier, we may say justifiable.