Notre Dame Law Review

Volume 9 | Issue 2 Article 5

1-1-1934

Recent Decisions

Myron Murphy

William M. Cain

Donald F. Wise

down the offending branches; Second, that the severed branches and whatever fruit is thereon belong to the owner of the tree, and that the latter may enter upon neighboring land to pluck this fruit without being subject to suit, except in the case of actual damage; and Third, that "line" trees are owned in common by neighboring landowners, and that they may not be cut without the consent of both, and in the event of any such cutting, the party cutting shall be liable in damages to the other tenant in common.

Joseph A. McCabe.

RECENT DECISIONS

BANKRUPTCY—EFFECT UPON AN ASSIGNMENT OF FUTURE WAGES.—On December 30, 1930, appellee executed an assignment of his future wages to be earned over a period of twenty-four months therefrom to secure a promissory note in the sum of $1,800. On May 12, 1932, appellant notified appellee's employer of the assignment. Five days later appellee was adjudicated a bankrupt and subsequently filed his petition for a discharge in bankruptcy, which petition remained pending during the hearing of this suit. At the June term, 1932, the employer filed a bill of interpleader in the Circuit Court of Cook County, alleging appellee's employment, service of notice of the assignment, and the withholding of the wages, and offered to pay the money into court and abide its decision with relation thereto between appellant and appellee. At that time said employer was withholding $633.26 of appellee's wages, sixteen dollars of which was earned prior to the time he was adjudicated a bankrupt. Appellant answered the interpleader claiming the funds by reason of the note and the assignment, and appellee also claimed the funds. The bankrupt then petitioned the district court to restrain appellant from in any manner enforcing or attempting to enforce such assignment of wages except to the extent of $16. Appellant answered setting up its ownership of the note, the validity of the assignment, the service of notice thereof on the employer, and its opposition to the issuance of the restraining order. On hearing the court issued the restraining order as prayed, from which order appellant prosecuted his appeal. The Circuit Court of Appeals affirmed the decree. *In re Skorcz,* 67 Fed. (2d) 187 (C. C. A. 1933).

Appellant contended that the court erred in entering the restraining order because: (1) The note, assignment of wages, and notice of such assignment, under the law of Illinois, created a lien on the wages of the bankrupt after adjudication, when and as such wages were earned, and that lien was not dischargeable in bankruptcy; (2) The wages included in the restraining order constituted no part of the bankrupt's estate, and appellant had instituted no suit of any kind for their recovery prior to the issuance of the order, nor had it made any threat to collect the same; and (3) The Circuit Court of Cook County had assumed jurisdiction of the subject matter and of the parties prior to the issuance of the order, and the district court had no authority under the Bankruptcy Act to issue it.

It was not denied that the decisions of the Supreme Court of Illinois hold that an assignment of future wages made more than four months prior to adjudication in bankruptcy to secure any indebtedness creates a lien on such wages, but the Court found with the appellee's contention that such a rule is contrary to the weight of reason and authority of the federal and some state courts which hold that wages to be earned in the future are not property upon which a lien

may attach and that the decisions of the state courts are not binding on the federal courts in the determination of what is property under the Bankruptcy Act. Since future wages are dependent upon performance of the services to be rendered and are consequently conditional in their nature, an assignment of the same attaches merely an equitable lien as the property comes into being, which lien ceases when the debt is discharged in bankruptcy. The Court further reasoned that bankruptcy being an equitable proceeding, a federal court in bankruptcy in the interpretation of an equitable lien is not bound by the decisions of state courts, and the federal court possesses the power to protect by injunction the bankrupt's future wages to carry out the purposes of the Bankruptcy Act, although such wages included in the restraining order constitutes no part of the bankrupt's estate.

This case represents the uniform holding of the federal courts and all the state courts except Illinois and Massachusetts, which jurisdictions hold such an assignment creates a lien which is preserved by Section 67d of the Bankruptcy Act, U. S. C. A. title 11, § 107, and is not affected by the bankruptcy of the assignor. In the case of *Mallin v. Wenham,* 209 Ill. 252, 70 N. E. 564 (1904), the court held that a discharge in bankruptcy does not render unenforceable a prior assignment of wages to be earned in the future since the discharge in bankruptcy is a personal release, which does not destroy the lien created by the assignment. In thus holding, the court said: "The only effect of a discharge in bankruptcy is to suspend the right of action for a debt against the debtor personally. It does not annul the original debt or liability of the debtor. . . . We think the decided weight of authority is to the effect that a discharge of a debtor in bankruptcy is but a personal release and does not exonerate the effects of a debtor to which a valid lien has attached, and which is not expressly annulled by the provisions of the Bankruptcy Act." Accord: *Monarch Discount Co. v. Chesapeake & O. R. Co.,* 285 Ill. 233, 120 N. E. 743 (1918); *Walbach R. Co. v. Meyer,* 119 Ill. App. 104 (1905). In considering this case, the court in the case of *Leitch v. Northern Pac. Ry. Co.,* 14 A. B. R. 411, 95 Minn. 35, 103 N. W. 704 (1905), said: "The decision . . . is based upon the admitted proposition that valid liens on property are not affected by a discharge in bankruptcy, and the statement that the creditor had a vested property right in the wages of his debtor to secure the payment of his debt which was not affected by a discharge in bankruptcy."

In *Citizens' Loan Assn. v. Boston & M. R. Co.,* 196 Mass. 258, 14 L. R. A. (NS) 1025, 124 Am. St. Rep. 584, 82 N. E. 696, 13 Ann. Cas. 365 (1907), the court held that an assignment of wages to be earned in an existing employment, given before bankruptcy, without fraud, to secure a valid existing debt, and duly recorded, could be enforced after the discharge of the assignor in bankruptcy, as to wages earned in the course of the original employment, by a creditor who had not proved his debt in bankruptcy.

Both the Illinois and Massachusetts courts base their conclusions on the reasoning that the lien upon the contract of employment, the wages being incident thereto and arising therefrom, and the lien, being in existence before the bankruptcy, therefore is not affected by the discharges. In respect to the majority view, the holding is governed by the contention that an assignment, as security for a debt, of wages thereafter to be earned by the debtor, either under a general or specific employment, creates no lien until the wages have been earned, and where, before that time the debtor is adjudged a bankrupt and is subsequently discharged, the debt is extinguished from the date of the adjudication, and no lien arises as to wages earned thereafter, but the same becomes the property of the bankrupt free from the claims of all his creditors, including the assignee.

Myron Murphy.

BANKS AND BANKING—CRIMINAL RESPONSIBILITY ON INSOLVENCY.—Two recent decisions of the Nebraska Supreme Court, affirming convictions of bankers for receiving deposits in insolvent banks knowing of such insolvency, are important as involving typical measures often taken by managers of failing banks to ward off the evil day. One of these measures is the promising to replenish the depleted resources of the bank from private funds, and the other the secret communication of knowledge of the impending crash to favored depositors to enable them to withdraw their deposits.

One of these cases is *Flannigan v. State,* 250 N. W. 908, and the other *Gutru v. State,* 250 N. W. 913, both decided November 16, 1933.

In the *Flannigan* case, the bank closed on December 1, 1930, and of the three deposits which the defendant was convicted of receiving, two had been made on November 22, 1930, and the other on November 26, 1930. On July 30, 1930, the defendant and his brother had a conversation with the state banking commissioner in which, after examining and criticising many of the assets of the bank, the commissioner told the brothers that he was convinced that the losses would aggregate $100,000 at least. Thereupon, the following conversation ensued between the commissioner and the defendant: Commissioner: " John (defendant), have you got the property? Have you got the financial ability? Can you and your brothers put in money in the next few months, if we give you time to make the bank solvent—to cover these losses and protect these depositors?" Defendant replied: "Yes, sir; we can, and we'll do it." Of course, this promise was never kept, but, on the faith of it, the commissioner permitted the bank to remain open until December 1, 1930. The defendant possibly thought it smart at the time to make this unenforceable oral promise, but it rose to haunt him at the trial for the court admitted evidence of it as tending to fasten upon him *knowledge* of the insolvent condition of the bank.

In the *Gutro* case, the bank was closed July 16, 1929, and conviction was had on account of eight deposits made on and between May 26, 1929, and July 15, 1929. On June 3rd, 1929, various deposits were paid to members of the families of the defendant and other officers of the bank. The defendant himself drew out two deposits of substantial amounts, his father-in-law was paid a certificate of deposit for $1,500 not yet due by good notes owned by the bank. The defendant's boys and relatives of other officers of the bank, likewise, cashed certificates of deposit which were not due. All this may have been considered very "shrewd" at the time, but again the court held that evidence of these sudden and simultaneous withdrawals was properly admitted as tending to prove that the defendant *knew* that the bank was insolvent. The net result was that the defendant saved these favored depositors at his own expense. In the *Flannigan* case, the court excludes deceit as an element of the crime. Here is the syllabus on that point: "Intentional fraud, deceit, false reports of banking affairs, and wrongful entries on bank books are not elements of crime of receiving deposits knowing bank to be insolvent."

*William M. Cain.**

HOMICIDE—EVIDENCE—HEARSAY—DYING DECLARATION.—On petition for certiorari, it appeared that the petitioner, Charles A. Shepard, an army official, had been convicted of the murder of his wife, Zenana Shepard, at Fort Riley. The murder is charged to have been committed by poisoning. The petitioner alleges that prejudicial error has been committed in the trial court by the admission of evidence offered by the government in rebuttal when the trial was nearly over. This evidence was admitted in the form of a dying declaration. The deceased

*Associate Professor of Law, University of Notre Dame.

became ill on May 20, 1929, and at that time she was in a state of collapse; and two days later the deceased told her nurse that Doctor Shepard, the petitioner, had poisoned her. At the time of the making of this statement the deceased was much better in health and there seemed to be no danger of present death. On June 15, Mrs. Shepard died. The government was permitted to introduce the testimony of the nurse as to the statements made to her by the deceased. The defendant in error argued that if the statement of the deceased was not admissible as a dying declaration it was admissible to show the state of mind of the deceased and to contradict evidence as to the deceased's suicidal intentions. *Held,* that the declaration of the deceased is incompetent as a dying declaration; and also it is not to be considered as though admitted to rebut evidence of the deceased's suicidal intent. *Shepard v. United States,* 54 S. Ct. 22 (1933).

The admission of the statement of the deceased as a dying declaration was clearly error. To quote Justice Cardozo, who delivered the opinion, "To make out a dying declaration the declarant must have spoken without hope of recovery and in the shadow of impending death. . . . Fear or even belief that illness will end in death will not avail of itself to make a dying declaration. There must be 'a settled hopeless expectation' . . . that death is near at hand, and what is said must have been spoken in the hush of its impending presence. *Mattox v. United States,* 146 U. S. 140, 13 S. Ct. 50, 36 L. Ed. 917. . ."

There must be some factual basis for a dying declaration in order to render it admissible in evidence. The speaker must be giving expression to known facts and not to suspicion or conjecture. The key to the admission of dying declarations is *impending death and an absolute lack of hope of recovery. Wilkinson v. State of Mississippi,* 108 So. 711 (Miss. 1926); *Westbrook v. People,* 126 Ill. 81, 18 N. E. 304 (1888); *People v. Falletto,* 96 N. E. 355, 202 N. Y. 494 (1911).

A more difficult question is presented in the principal case as to the government's request to admit the testimony of the deceased as evidence of a state of mind of the declarant. Witnesses for the petitioner had testified as to statements made by the deceased which suggested a mind bent upon suicide. The declaration that she had been poisoned by her husband was admissible, says Justice Cardozo, "not as evidence of the truth of what was said, but as betokening a state of mind inconsistent with the presence of suicidal intent." But the testimony was neither offered nor received in this narrow sense. The testimony was offered and received as proof of a dying declaration. As a dying declaration the testimony was illegitimate and hence cannot be considered in an appellate court as though admitted for a different purpose, where that purpose would undoubtedly mislead uninstructed jurors. As Justice Cardozo says, "A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected. *People v. Zackowitz,* 254 N. Y. 192, 200; 172 N. E. 466."

Once again the words of the eminent Justice Cardozo seem to most aptly express the sense of the inadmissibility of this dying declaration for any other purpose. It is true that the defendant, by evidence evincing an unhappy state of mind of the deceased, "opened the door to the offer by the government of declarations evincing a different state of mind, declarations consistent with the persistence of a will to live. The defendant would have no grievance if the testimony in rebuttal had been narrowed to that point. What the government put in evidence, however, was something very different. It did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings. . . It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the government was free to prove, but not by hearsay declarations. It