

## WEHL v. WALD, Assignee, etc.

(Circuit Court, S. D. New York. ———, 1880.)

1. **BANKRUPTCY—ASSIGNEE—PRIOR ASSIGNMENT.**—An assignee in bankruptcy cannot avoid a voluntary assignment in part only.

WALLACE, D. J. The plaintiff is the assignee of the Netters, under a voluntary general assignment, for the benefit of creditors, made December 26, 1877. Within six months after the assignment the Netters filed their petition in bankruptcy, and were thereafter adjudicated bankrupts, and the defendant was appointed their assignee in bankruptcy. The plaintiff, as assignee of the Netters under the voluntary assignment, and the defendant, as their assignee in bankruptcy, both made claim to a sum of money deposited with the firm of Sternberger & Co. in trust for the Netters. The plaintiff brought this suit against Sternberger & Co. to recover the fund, and thereupon the latter obtained an order of interpleader, whereby the present defendant was brought into the action.

The present action involves the single question whether the voluntary assignee has the better title to the sum in dispute than the assignee in bankruptcy. Undoubtedly the voluntary assignment was void at the election of the assignee in bankruptcy as a transfer in contravention of the bankrupt act. *In re Biesenthal*, 15 N. B. R. 228; *McDonald, Assignee, v. Moore*, 15 N. B. R. 26; *Platt v. Preston*, 19 N. B. R. 241; *Belden v. Smith*, 16 N. B. R. 302. But the assignee in bankruptcy has not obtained a decree setting aside the voluntary assignment; and in order to prevail here he must establish the proposition that the voluntary assignment was not merely void at his election, but so absolutely void that the plaintiff's title under it can be assailed and defeated collaterally. No authority is cited sustaining this proposition, and it is not tenable under any reasonable construction of the bankrupt act.

The statute declares that prohibited transfers "shall be void," and that the assignee in bankruptcy "may recover the

property, or the value thereof, as assets of the bankrupt." The assignee in bankruptcy is, therefore, authorized to acquire the title to the property transferred, or sue for its value, and for this purpose to adopt any appropriate remedy at his election. But it cannot be doubted that he may affirm the transfer; and in practice this is usually done by filing a bill against the voluntary assignee for an accounting. And in such actions the voluntary assignee is usually protected in all payments made for the benefit of the estate. *Jones, Assignee, v. Kinney et al.* 4 N. B. R. 649; *In re Cohn*, 6 N. B. R. 379; *Cragin v. Thompson*, 12 N. B. R. 81. These cases, and many others that might be cited, proceed upon the theory that the assignment is not void *ab initio*, even as against the assignee in bankruptcy, but voidable at his election. As is stated in *Belden v. Smith*, 16 N. B. R. 302, until the general assignment shall have been set aside as void as against the assignee in bankruptcy, the title remains in the voluntary assignee.

It is not necessary to decide that an assignee in bankruptcy does not manifest his election to treat the assignment as void until he brings suit against the voluntary assignee to have it declared void, and obtains a decree. It suffices to hold that he does not do this by making claim to a part only of the assigned property. He must elect to treat it as void *in toto*, or not at all. He cannot elect to consider it void as to the particular sum of money now involved, and valid as to everything else which the voluntary assignee claims under the assignment. Until he has elected to treat the assignment as void, it is to be treated as valid; and as the title of the voluntary assignee is first in time, he is entitled to the sum in controversy.

The case is to be considered as though the assignee in bankruptcy had brought an action to recover money owing to the assignors before he has elected whether he will treat the voluntary assignment as valid or as void. He cannot manifest his election in this manner, nor can the assignment be thus declared void collaterally.

Judgment is ordered for the plaintiff.

## SCHNEIDER v. THILL.

(Circuit Court, E. D. New York. June 16, 1880.)

## 1. PATENT—PRACTICE—REARGUMENT.

*C. H. Watson and George Gifford*, for plaintiff.

*E. H. Brown and J. J. Allen*, for defendant.

BENEDICT, D. J. This action was brought to establish the validity of a patent re-issued to the plaintiff as the assignee of Carl Volti, and numbered re-issue 7,511, and also of a patent issued to the plaintiff as assignee of Homer Broobe, on the twenty-ninth of May, 1877, and numbered 191,224. The cause proceeded regularly to a hearing upon pleadings and proofs, and, having been argued in behalf of the respective parties, is now before the court for its decision upon the merits. In this stage of the case the defendant applies for permission to take further proofs and to reargue the case.

While technically and legally the application is made by the defendant, and the defendant, to some extent, at least, has a substantial interest in the determination of the cause, it is plain to be seen that the reason why this application is made is not because of defendant's interest in the result, but because of the effect upon the interests of a third party in certain other patents, which such party has come to believe may be produced by a determination of this cause in favor of the plaintiff. This circumstance would be no reason for refusing the defendant's application, if it were matter of right; but this is an application for a favor, and is strongly opposed by the plaintiff. I confess that it is not easy to see how the plaintiff can desire to see the decision in this case to be made upon a part of the evidence material to the issue, inasmuch as the very fact that evidence affecting the issue was not before the court must deprive the decision of any value which it might otherwise have as a ground upon which to apply for preliminary injunction in other suits. Nor is it easy to see how any serious result to any person not a party to this suit can arise from a decision in this case, if the testimony now