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Bankruptcy-Fradulent Transfers-Venue for Plenary Actions Under Section 70(e)

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RECENT DECISIONS

BANKRUPTCY—FRAUDULENT TRANSFERS—VENUE FOR PLENARY ACTIONS UNDER SECTION 70(e)—Plaintiff trustee in bankruptcy brought a plenary action under section 70(e) of the Bankruptcy Act[1] in the Federal District Court for the Northern District of Illinois for recovery of fraudulently transferred property located within the district. The defendants were citizens of Illinois, except the bankrupt's daughter, a California citizen. The district court granted the daughter's motion to dismiss for lack of venue. On appeal, *held*, reversed and remanded. Sections 23(b)[2] and 70(e)(3)[3] of the Bankruptcy Act exclude actions under section 70(e) from the requirements of the general venue provision of Title 28, U.S.C.;[4] in all cases under section 70(e) except those for monies only, venue is governed by the location of the real or personal property in dispute. *Yorke v. Frank*, 295 F.2d 580 (7th Cir. 1961), *cert. denied*, 369 U.S. 818 (1962).

Congress has implemented the broad constitutional grant of bankruptcy power[5] by designating all United States district courts as courts of bankruptcy[6] and by giving them jurisdiction, *inter alia*, to "determine controversies in relation" to bankruptcy.[7] However, district court jurisdiction of plenary actions[8] between the trustee or receiver and adverse claimants is generally limited to those cases where jurisdiction would have existed if the controversy had been between the bankrupt and the adverse claimants and bankruptcy had not intervened.[9] Congress, in formulating section 23(b)

1 This section empowers the trustee in bankruptcy to recover for the estate property transferred by the bankrupt where such transfer would be voidable by a creditor of the bankrupt under any applicable federal or state law. 52 Stat. 882 (1938), as amended, 11 U.S.C. § 110(e) (1958); see 4 COLLIER, BANKRUPTCY ¶ 70.90 (14th ed. 1962).

2 "Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act." 52 Stat. 854 (1938), 11 U.S.C. § 46(b) (1958).

3 "For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction." 52 Stat. 882 (1938), 11 U.S.C. § 110(e)3 (1958).

4 28 U.S.C. § 1391 (1958). This section provides that in actions founded only on diversity venue may be laid in a district where either all plaintiffs or all defendants reside, "except as otherwise provided by law." Where jurisdiction is not founded solely on diversity, the suit may be brought only in the district where all defendants reside, "except as otherwise provided by law."

5 U.S. CONST. art. I, § 8.

6 Bankruptcy Act § 1(10), 66 Stat. 420 (1952), 11 U.S.C. § 1(10) (1958).

7 Bankruptcy Act § 2(a)7, 66 Stat. 420 (1952), 11 U.S.C. § 11(a)7 (1958).

8 A summary proceeding is a relatively brief, less formal hearing conducted by the bankruptcy court where the dispute arises respecting property in its possession, the defendant consents, or the act expressly or implicitly authorizes such a proceeding. A plenary proceeding—an independent civil action by the trustee—is otherwise necessary. Central Republic Bank & Trust Co. v. Caldwell, 58 F.2d 721 (8th Cir. 1932); see 2 COLLIER, *op. cit. supra* note 1, ¶ 23.02; Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 REF. J. 36, 73 (1962).

9 Bankruptcy Act § 23(a), 52 Stat. 854 (1938), 11 U.S.C. § 46(a) (1958); Bardes v.

of the Bankruptcy Act of 1898, removed this limitation from suits by the trustee where consent of the defendant is obtained.[10] Initial interpretation of section 23(b) developed along two lines. Several courts held that the consent clause necessarily made 23(b) a venue provision.[11] Others interpreted consent of the defendant under 23(b) as conferring subject-matter jurisdiction.[12] In 1934, *Schumacher v. Beeler*[13] resolved this conflict by holding 23(b) to be a jurisdictional provision.[14] The principal case, relying on authority antedating *Schumacher*,[15] returns to the discarded venue interpretation of 23(b).

Amendments in 1903 and 1910 further narrowed the applicability of the jurisdictional limitation in section 23(b) by excluding from its operation actions by the trustee to avoid transfers and liens under sections 60, 67, and 70,[16] and by granting jurisdiction of these actions to "any court of bankruptcy"[17] without the defendant's consent.[18] This exception, like 23(b) itself, concerns subject-matter jurisdiction, not merely venue;[19] and

Hawarden Bank, 178 U.S. 524 (1900). See also Williams v. Austrian, 331 U.S. 642 (1947); 2 COLLIER, *op. cit. supra* note 1, ¶ 23.12; 5 REMINGTON, BANKRUPTCY § 2135 (5th ed. 1953). Corporate reorganization proceedings under chapter X, however, are excluded from the jurisdictional limitations of § 23(a). Bankruptcy Act § 102, 52 Stat. 840 (1938), 11 U.S.C. § 502 (1958).

10 52 Stat. 840 (1938), 11 U.S.C. § 46(b) (1958); see 2 COLLIER, *op. cit. supra* note 1, ¶ 23.14.

11 *E.g.*, Matthew v. Coppin, 32 F.2d 100 (9th Cir. 1929); Coyle v. Duncan Spangler Coal Co., 288 Fed. 897 (E.D. Pa. 1923); McEldowney v. Card, 193 Fed. 475 (E.D. Tenn. 1911).

12 *E.g.*, Flanders v. Coleman, 250 U.S. 223 (1919); Bardes v. Hawarden Bank, 178 U.S. 524 (1900).

13 293 U.S. 367 (1934).

14 The *Schumacher* holding has received almost unanimous acceptance. Eisenrod v. Utley, 211 F.2d 678 (9th Cir. 1954); Halpert v. Engine Air Serv., Inc., 212 F.2d 860 (2d Cir. 1954), *petition for certiorari dismissed on motion of petitioner*, 350 U.S. 801 (1955); *In re* Wisconsin Cent. Ry., 74 F. Supp. 85 (D. Minn. 1947); Nicholson v. Scott, 50 F. Supp. 209 (E.D. Mich. 1943). *But cf.* Burnham v. Todd, 139 F.2d 338 (5th Cir. 1943) (dictum); Canright v. General Fin. Corp., 33 F. Supp. 241 (E.D. Ill. 1940) (dictum).

15 Collett v. Adams, 249 U.S. 545 (1919); Rodgers v. Bankers Commercial Co., 42 F.2d 906 (N.D. Ill. 1930); Detroit Trust Co. v. Ford Motor Co., 13 F.2d 942 (E.D. Mich. 1926).

16 32 Stat. 797 (1903) and 36 Stat. 838 (1910), as amended, 11 U.S.C. § 46(b) (1958).

17 "Court of bankruptcy" in the context of these sections means those courts so designated by Congress (see note 6 *supra*), and not just the primary bankruptcy court. *E.g.*, May v. Moss, 194 F.2d 133 (8th Cir. 1952). One court, however, has construed "any court of bankruptcy" as limiting federal jurisdiction of the subject matter to the courts in a district where the state tribunals would have had jurisdiction. Lawrence v. Lowrie, 133 Fed. 995 (M.D. Pa. 1903).

18 Bankruptcy Act § 60(b), 36 Stat. 842 (1910), as amended, 11 U.S.C. § 96(b) (1958) (voidable preferences); Bankruptcy Act § 67(e), 32 Stat. 800 (1903), as amended, 11 U.S.C. § 107(e) (1958) (voidable liens and fraudulent conveyances); Bankruptcy Act § 70(e)(3), 36 Stat. 879 (1910), as amended, 11 U.S.C. § 110(e)(3) (1958) (voidable transfers and obligations). A bill recently proposed in Congress but not acted upon would remove this jurisdictional grant from §§ 60, 67, and 70 and replace it with a provision enabling the primary bankruptcy court, after due notice to all parties in interest, to exercise summary jurisdiction of actions under these sections. H.R. 4855, 87th Cong., 1st Sess. (1961).

19 Wood v. Wilbert's Co., 226 U.S. 384 (1912).

at least since *Schumacher* the courts have looked to the provisions of 28 U.S.C. for rules regarding the venue of such actions.[20] The error of the principal case in denying the applicability of the general venue provision of 28 U.S.C.[21] to an action under section 70(e) apparently flows from a misintepretation of its principal authority, *Collett v. Adams*,[22] which held the general venue provision[23] inapplicable to an action for avoidance of a preferential transfer only because the suit was local within section 54 of the Judicial Code of 1911,[24] and not because section 23 of the Bankruptcy Act necessarily excludes the operation of the general venue statute. Though the principal case professes not to reach the question of the application of 28 U.S.C. section 1655,[25] its leading authorities base venue in such actions squarely on the provisions for local actions in the Judicial Code of 1911, including the predecessor of present section 1655.[26] By following these cases the court reaches the same result as if it resorted directly to section 1655.

The need for uniform application of bankruptcy laws and the practical necessity in bankruptcy proceedings of reaching property and persons beyond state lines were the principal reasons for the constitutional delegation of a comprehensive federal bankruptcy power.[27] Attempts to limit federal jurisdiction in bankruptcy, however, have been frequent. Proponents of enlarged state court jurisdiction in bankruptcy matters have argued that greater efficiency, as well as less disturbance of local debtor-creditor laws, would result from such a limitation of federal jurisdiction as was embodied in 23(b).[28] Nevertheless, recurring depressions and the development of a truly national economy have made clear the existence of a pervasive national interest in a fair and efficient system of bankruptcy administration.[29] Central to such a system and vital to any bankruptcy

20 *E.g.*, Crane v. Tannenbaum, 151 F. Supp. 725 (S.D.N.Y. 1957); Rollins v. Repper, 69 F. Supp. 976 (E.D. Mich. 1947); Cate v. Stapleton, 43 Cal. App. 2d 492, 111 P.2d 437 (1941); see 4 COLLIER, *op. cit. supra* note 1, ¶ 67.46; 5 REMINGTON, *op. cit. supra* note 9, § 2186.

21 See note 4 *supra*.

22 249 U.S. 545 (1919).

23 As then embodied in § 51 of the Judicial Code of 1911, 36 Stat. 1101.

24 36 Stat. 1102.

25 This provision allows venue regardless of the residence of the parties "in an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district . . . ." For an examination of the limitations of § 1655, see 2 MOORE, FEDERAL PRACTICE ¶¶ 4.34-.41 (2d ed. 1961).

26 Collett v. Adams, 249 U.S. 545 (1919); Detroit Trust Co. v. Ford Motor Co., 13 F.2d 942 (E.D. Mich. 1926). The only additional authority cited in the principal case is questionable precedent because of its confusion of venue with jurisdiction of the person. Rodgers v. Bankers' Commercial Co., 42 F.2d 906 (N.D. Ill. 1930).

27 THE FEDERALIST No. 42 (Madison); Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 220, 225 (1957); Olmstead, *Bankruptcy a Commercial Regulation*, 15 HARV. L. REV. 829, 831 (1902).

28 31 CONG. REC. 1785 (1898) (remarks of Rep. Henderson); see Williams v. Austrian, 331 U.S. 642, 649 (1946); Schumacher v. Beeler, 293 U.S. 367, 374 (1934).

29 WARREN, BANKRUPTCY IN UNITED STATES HISTORY 8-11 (1935).

proceeding is the swift and complete consolidation of all property rightfully a part of the bankrupt's estate. Congressional recognition of the singular importance of this process led to the amendments of 1903 and 1910, which excluded the trustee's actions to recover property for the estate from the jurisdictional limitations of 23(b). Congress thereby emphasized the special national interest which attaches to these important aspects of bankruptcy litigation.[30] This confirms the *Schumacher* conclusion that Congress intended a broad jurisdictional grant in actions by the trustee to avoid preferences or recover fraudulent transfers. Like reasoning suggests that venue in such litigation should receive an equally broad construction. Since these proceedings by their very nature concern the recovery of property, the courts can best facilitate the consolidation of the bankrupt's estate by recognizing many such actions as local within 28 U.S.C. section 1655,[31] permitting venue where the property is located and allowing the advantages of substituted, extraterritorial service.[32] Often, as in the principal case, much of the property the trustee seeks to recover is located in one district, while some or all defendants are residents of other districts or states. The trustee's judicious use of section 1655 in this situation will permit a single, comprehensive action in the district where the property is located,[33] thus minimizing the number of suits necessary to consolidate the estate, accelerating the process, and reducing the cost of administration.

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30 The express purpose of the 1903 and 1910 amendments, insofar as they affected §§ 60, 67, and 70, was to alter the holding in Bardes v. Hawarden Bank, 178 U.S. 524 (1900), which had properly interpreted § 23(b) as denying federal jurisdiction in such actions unless the defendant consented or other grounds of jurisdiction, *e.g.*, diversity, were present. Thus Congress acted to insure plenary federal jurisdiction in actions under §§ 60, 67, and 70. 35 CONG. REC. 6941 (1902) (remarks of Rep. Ray, Chairman of the Judiciary Committee); see Lawrence v. Lowrie, 133 Fed. 995 (M.D. Pa. 1903).

31 The courts have held actions by the trustee under §§ 60, 67, and 70 to be within 1655 even where such suits included an alternative demand for the value of the property. *E.g.*, Collett v. Adams, 249 U.S. 545 (1919); Commonwealth Trust Co. v. Reconstruction Fin. Corp., 28 F. Supp. 586 (W.D. Pa. 1939); Detroit Trust Co. v. Ford Motor Co., 13 F.2d 942 (E.D. Mich. 1926). Actions by general creditors to recover fraudulent transfers have seldom received such treatment. *E.g.*, Grapette Co. v. Grapette Bottling Co., 102 F. Supp. 517 (D.P.R. 1952). *Contra*, Mellen v. Moline Malleable Iron Works, 131 U.S. 352 (1889). See Annot., 30 A.L.R.2d 208, 234 (1953); 3 MOORE, *op. cit. supra* note 25, ¶ 18.11.

32 See Carney v. Commonwealth Oil & Gas Co., 5 F. Supp. 304 (D. Kan. 1933).

33 Where the action is not within § 1655, however, the trustee must usually resort to § 1391. See Crane v. Tannenbaum, 151 F. Supp. 725 (S.D.N.Y. 1957).