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BANKRUPTCY - PREFERENTIAL TRANSFERS - THE CHANDLER ACT AND ANTECEDENT DEBTS

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BANKRUPTCY — PREFERENTIAL TRANSFERS — THE CHANDLER ACT AND ANTECEDENT DEBTS — A canning company, in return for cans and supplies furnished it, gave its brokers the exclusive right to sell its canned goods and deduct the amount owing to them before turning over the proceeds. More than a year before the petition in bankruptcy, in compliance with a request for security from a seed company to which it was indebted, it made assignments of its right to these net proceeds to the seed company. The latter claims these proceeds as a secured creditor although they did not come into existence until after the petition in bankruptcy. Upon the referee's refusal to allow this as a secured claim on the ground that it constituted a preferential transfer, the seed company filed this petition for review. *Held*, referred back to referee for further determination of facts, and if present consideration was furnished at the time of the assignments there could be no preferential transfer. *In re Talbot Canning Corp.*, (D. C. Md. 1940) 35 F. Supp. 680.

Under section 60(b)[1] of the Bankruptcy Act before the amendment of 1938,

[1] 36 Stat. L. 842 (1910), 11 U. S. C. (1934), § 96. "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference. . . ."

the trustee would have no reason to contest this secured claim as a voidable preferential transfer. According to Maryland law, these assignments of prospective earnings were valid at the time they were made because the assignor had a potential interest in the future receipts under a contract existing at the date of the attempted transfer.[2] Since the recording of these assignments was not required under state law in order to preserve their validity against creditors, equitable liens relating back to the time of the assignments would attach to the proceeds although the funds were not collected or did not come into existence until well within the four-months period or even after an adjudication in bankruptcy.[3] Even if recording had been required, these particular lien transfers would still have dated from the time of the assignments, for recording was never made.[4] The assignments having been made more than four months before the petition in bankruptcy, the resulting equitable liens could not be classified as preferential transfers. This then leads to a consideration of the court's interpretation of section 60 as amended in 1938.[5] Under this amendment the transfer is deemed to have been made at the time when it became so far perfected that no creditor or bona fide purchaser could have obtained rights superior to those of the transferee, and if the transfer is not so perfected before the petition it shall be deemed to have been made immediately before bankruptcy. Therefore, the court regarded the transfer in the principal case as being made immediately before bankruptcy. No consideration having passed at that time, a question arises concerning the court's refusal to treat this as a transfer for an antecedent debt and therefore, as far as that element was concerned, preferential. Under the recent amendment to section 60, the trustee in bankruptcy is now allowed to set aside preferential transfers made before, but recorded within, the four-months period preceding the petition in bankruptcy regardless of whether state law requires recording as protection against a creditor of the trustee's standing.[6] He is also authorized to attack preferential

[2] Shaffer & Munn v. Union Mining Co. of Allegany County, 55 Md. 74 (1880); Seymour v. Finance & Guaranty Co., 155 Md. 514, 142 A. 710 (1928); Baust v. Commonwealth Bank of Baltimore, 158 Md. 280, 148 A. 236 (1929).

[3] Principal case, 35 F. Supp. 680 at 685; Union Trust Co. of Maryland v. Townshend, (C. C. A. 4th, 1939) 101 F. (2d) 903; Bank of Oakman v. Union Coal Co., (C. C. A. 5th, 1926) 15 F. (2d) 360; United States Fidelity & Guaranty Co. v. Sweeney, (C. C. A. 8th, 1935) 80 F. (2d) 235 at 239; Sexton v. Kessler & Co., 225 U. S. 90, 32 S. Ct. 657 (1911); Tobin v. Insurance Agency Co., (C. C. A. 8th, 1935) 80 F. (2d) 241.

[4] 4 REMINGTON, BANKRUPTCY, 4th ed., § 1798 (1935); In re Watson, (D. C. Ky. 1912) 201 F. 962 at 969: "In case the transfer has not been recorded, no other time for judging it in those particulars [i.e., as a preference] is provided than when it is made."

[5] 52 Stat. L. 869 (1938), 11 U. S. C. (Supp. 1939), § 96.

[6] See Carey v. Donohue, 240 U. S. 430, 36 S. Ct. 386 (1916); Martin v. Commercial National Bank of Macon, Georgia, 245 U. S. 513, 38 S. Ct. 176 (1917); Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 S. Ct. 50 (1915); 44 YALE L. J. 109 (1934); McLaughlin, "Aspects of the Chandler Bill to Amend the Bankruptcy Act," 4 UNIV. CHI. L. REV. 369 at 388 (1937); Mulder, "Ambiguities in the Chandler Act," 89 UNIV. PA. L. REV. 10 at 22 (1940); 4 REMINGTON, BANKRUPTCY, 4th ed., § 1793 ff. (1935) and 1940 Supplement.

transfers in the nature of liens given more than four months before the petition but perfected as of the original transaction by the transferee taking possession within the four-months period.[7] This certainly extends the right of the trustee to attack secret liens which were unassailable under section 60(b) as it existed before the Chandler Amendment. But it does not resolve the problem faced by the court in the principal case. Under 60(b) as it previously existed there would be two times of transfer to be considered, namely, the time of delivery of the instrument and the time of its recording.[8] If good consideration passed at the time of the first transfer, more than four months before the bankruptcy petition, would the recording of the instrument within the four-months period constitute a transfer for an antecedent debt? A careful examination of the statute will not determine the answer,[9] and the courts have replied in both the affirmative [10] and the negative.[11] The language of section 60 as amended by the Chandler Act does not indicate whether the receipt of consideration and the final perfecting of the transfer are to be regarded as one transaction having a present consideration, or as two transactions, the latter of which would constitute a transfer for an antecedent debt.[12] The report of the Judiciary Committee on the Chandler Bill states an intention to strike down secret liens, but fails to show that Congress had this more elusive problem in mind.[13] Professor McLaughlin in his article concerning the Chandler Bill does not treat this aspect,[14] but one writer has concluded that the amendment to section 60 clearly determines this to be a transfer for an antecedent debt.[15] At least one court besides the one in the principal case is in disagreement with this conclusion and has chosen to regard the passing of consideration and the subsequent perfecting of the transfer as contemporaneous, thus adhering to the interpretation it had

[7] 4 REMINGTON, BANKRUPTCY, 4th ed., § 1794 (1935) and 1940 Supplement.

[8] 4 REMINGTON, BANKRUPTCY, 4th ed., § 1791 (1935).

[9] 36 Stat. L. 842 (1910), 11 U. S. C. (1934), § 96(b): "and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required . . . the judgment or transfer then operate as a preference. . . ."

[10] Brigman v. Covington, (C. C. A. 4th, 1915) 219 F. 500; In re Caslon Press, (C. C. A. 7th, 1915) 229 F. 133.

[11] Border Nat. Bank v. Coupland, (C. C. A. 5th, 1917) 240 F. 355; Anderson v. Chenault, (C. C. A. 5th, 1913) 208 F. 400; In re Watson, (D. C. Ky. 1912) 201 F. 962.

[12] 52 Stat. L. 869 (1938), 11 U. S. C. (Supp. 1939), § 96(a). Granting that the transfer is deemed to have taken place at the time of recording, there is nothing contained within this section which dissolves the ambiguity concerning its preferential nature. See Adams v. City Bank & Trust Co. of Macon, Georgia, (C. C. A. 5th, 1940) 115 F. (2d) 453.

[13] H. REP. 1409, 75th Cong., 1st sess. (1937), by the Committee on the Judiciary, concerning the revision of the Bankruptcy Act.

[14] "Aspects of the Chandler Bill to Amend the Bankruptcy Act," 4 UNIV. CHI. L. REV. 369 (1937).

[15] Mulder, "Ambiguities in the Chandler Act," 89 UNIV. PA. L. REV. 10 at 22 (1940).

adopted before the amendment.[16] Which view a court will take in determining whether the transfer by a debtor has diminished his estate may well depend upon how far it is willing to go in favoring the general creditors at the expense of the secured creditors.

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[16] Adams v. City Bank & Trust Co. of Macon, Georgia, (C. C. A. 5th, 1940) 115 F. (2d) 453.