

Howland was a "general truckman," and notwithstanding he had had a general order to take anything he might find for Barnes & Co. at the depot and bring it to the store, that order cannot be said to have continued after the store had been abandoned and all its contents removed, the traders having absconded. Moreover, the case finds that there was no evidence of any authority in Howland to act as the agent of Barnes & Co. for the purpose of taking possession of the shingles; and it was admitted at the trial that in taking possession of them and removing them he acted under the direction of the attaching officer, and not as agent of Barnes & Co. Barnes & Co. having no agent to receive or forward the goods, having themselves departed to parts unknown, the ultimate destination of the goods being unaccomplished and unknown, it can, in no sense, be considered that the goods had come to the possession of the vendees.

Such being the facts as proven or admitted, and no exception being taken to the instructions of the court upon the subject of constructive delivery and possession, I fail to discover any error in the proceedings of the court below, and am clearly of opinion there should be judgment upon the verdict.

The case mainly relied upon by the defendants,—*Dixon v. Baldwin*, before cited,—is very clearly distinguishable from the present in this respect: that the consignees had specially appointed the Metcalfes their agents to receive the goods from the carriers at Hull, and forward them to an ultimate destination prescribed by the consignees; and in that case, upon the principles which I have stated, the transit was properly regarded as terminated, so far as the vendors were concerned, upon the intervention of the Metcalfes at Hull.

CUSHING, C. J., and SMITH, J., concurred.

Exceptions overruled.

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BRANDON NATIONAL BANK v. HATCH.

Bankruptcy—Arrest—Discharge.

When the defendant has been properly arrested upon civil process, the subsequent commencement and pendency of proceedings in bankruptcy by or against him furnish no ground for his discharge from arrest.

But if the claim upon which he is arrested is one from which a discharge in bankruptcy will release him, he will be entitled to be discharged from arrest when a discharge in bankruptcy is obtained.

FROM CHESHIRE CIRCUIT COURT.

ASSUMPSIT. The writ was served by arresting the body of the defendant, the affidavit required by law having been made thereon. It was admitted that within sixty days after the service of the writ, as aforesaid, the defendant was adjudged a bankrupt. Upon the entry of the action at this term, the defendant moved that he be discharged from said arrest, and that his bail be discharged. It did not appear that the plaintiffs had proved their claim in bankruptcy.

The court *pro forma* granted the motion, and the plaintiffs excepted. Transferred by LADD, J.

F. A. Faulkner, for the plaintiffs.

Pike and Spring, for the defendant.

* SMITH, J. Section 5107 of the Revised Statutes of the United States provides that "No bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." This section is almost a literal reenactment of section 26 of the bankrupt act of 1867.

This provision applies only to arrests made subsequent to the date of proceedings in bankruptcy. When the debtor is arrested prior to the commencement of such proceedings, there is no provision of the bankrupt act that provides for his release. *Bump on Bankruptcy* 151 (5th ed.); *in re Walker*, 1 B. R. 60—S. C. 1 Low. 222; *in re Hazelton*, 2 B. R. 12—S. C. 1 Low. 270; *Minon v. Van Nostrand*, 4 B. R. 28—S. C. 1 Low. 458.

In re Walker, LOWELL, J., remarks,—“If it had been the intent of congress to release debtors in custody, it is probable that provision would have been made concerning the effect of such release upon the debt. And it is not at all improbable that some difficulty may have been felt in dealing with this point, for the reason that the effect of an arrest is a matter of local law, and congress might doubt its competency to relieve from the arrest and yet preserve the debt, if the local law held it to be discharged thereby.”

In *Minon v. Van Nostrand* it was held that a debtor, under arrest at the time his petition in bankruptcy is filed, cannot be released on *habeas corpus*. This conclusion is the necessary construction of the statute, and of the rule of the supreme court founded upon it, that the benefit of the writ was only for bankrupts after they became such. The same learned judge remarked,—“It may be that congress hesitated to interfere with a consummated arrest, under the apprehension that the debt might thereby be discharged, and not be revived if the bankrupt should fail to obtain his discharge in bankruptcy; or it may be that the case was overlooked. However I may regret the fact, a bankrupt

* LADD, J., did not sit.

seems to be left, under such circumstances, to the operation of the laws of the state.”

It does not appear whether this action is founded on a debt or claim from which a discharge in bankruptcy, if the defendant should obtain one, would release him. If it is not, then the defendant is not entitled to be discharged from arrest upon the ground that he has been adjudged a bankrupt. But, on the other hand, if it is, it is clear, upon the strength of the foregoing authorities, that the debtor is not entitled to be discharged from arrest until the question of his discharge in bankruptcy shall have been affirmatively settled. Congress has only provided for the exemption of the debtor from arrest during the pendency of proceedings in bankruptcy against him. Its omission to provide affirmatively for his discharge from arrest, made before such proceedings were commenced, affords very strong ground for inferring that it was not the intention of congress to provide for such a contingency. If the defendant shall obtain a discharge in bankruptcy, and this debt or claim is one from which such discharge will release him, the debt or claim will thereby become in effect extinguished, and with it will fall all proceedings to enforce it. The defendant will then be entitled to be discharged from arrest by the state court, and also by the district court, upon proceedings for that purpose. *In re Borst*, 2 B. R. 62.

CUSHING, C. J., and STANLEY, J., C. C., concurred.

Exceptions sustained.

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WATKINS v. WATKINS.

Equity practice.

When, in a proceeding in equity for the redemption of a mortgage, it appeared that the defendant had fraudulently prevented the plaintiff from seasonably redeeming the mortgage, and had neglected to render, when requested, an account of the amount due—*Held*, that the bill should not be dismissed, because the plaintiff did not tender or bring into court the amount due, and that the court below ought to determine the amount due, and decree that, on payment within some reasonable time to be fixed by the court, the defendant should release the mortgaged premises to the plaintiff.

FROM CHESHIRE CIRCUIT COURT.

This is a bill in equity, in which the plaintiff prays to be permitted