MAYS *v.* FRITTON.

1. Where the consideration of a question is *prima facie* within the jurisdiction and control of a State court—such as determining to whom the surplus of a fund raised by the foreclosure of a mortgage belongs—if the person who gave the mortgage becomes bankrupt and his assignee goes into the State court, submits to its jurisdiction, and nowhere asserts, in any way, the rights of the Federal courts in the matter—he cannot, after taking his chance for a decision in his favor, and getting one against him, raise in this court the point of want of jurisdiction in the State court.
2. To authorize the assignee to recover the money or property under the thirty-ninth section of the Bankrupt Act, it is necessary that he should establish the act of the bankrupt, not only of which he complains, but also that it was done with a view to give a preference over other creditors, and that the other party to the transaction had reasonable cause to believe that such person was insolvent. *Wilson* v. *City Bank* (17 Wallace, 473), affirmed. The statute assumes that there may be cases where the various acts of conveyance and disposition may be made, which would not amount to giving a preference.
3. Where, on a feigned issue directed to a jury, both of the necessary facts abovementioned have been found against the assignee, and this court has not the evidence before it, it must assume that the verdict of the jury is right.

ERROR to the Supreme Court of Pennsylvania; the case being thus:

In the year 1862, one Born executed a mortgage to Doll and others, on real estate which he then owned. Some years afterwards, that is to say, on the 16th of January, 1868, he gave to a Mrs. Fritton a bond for $4000, payable in one year, with warrant to confess judgment. On this warrant Mrs. Fritton caused a judgment to be entered on the day on which it was given.

On the 31st day of the same month, a petition was presented by a creditor of Born alleging that various acts of bankruptcy had been committed by him on the 1st, 3d, and 4th of the same month, and praying that he might be declared a bankrupt. On the 28th day of February, 1868, he was accordingly adjudged a bankrupt, and on the 18th of March one Mays was appointed assignee.

Statement of the case.

On the 6th of July, 1868, Doll, the mortgagee, already mentioned, foreclosed his mortgage in one of the county courts of Pennsylvania, and he having received from the sheriff the amount of it (no question as to the validity of his lien having existed), there remained a sum of $5192 above that amount, which the court referred to an auditor to distribute. Going before the auditor, Mrs. Fritton insisted that her judgment was a lien upon the proceeds of the property sold, and that she was entitled to the proceeds.

The assignees appeared by their counsel and claimed the entire fund, on the grounds:

"*First.* That it was the property of a bankrupt, and that, by reason of the bankruptcy, all his estate passed to the assignees.

"*Second.* That Mrs. Fritton's judgment was given in fraud of the Bankrupt law," and was void for various other reasons set forth.

The Bankrupt Act enacts:

"SECTION 35. If any person, being insolvent or in contemplation of insolvency, and within four months before the filing a petition by or against him, with a view to give a preference, procures his property to be attached or seized on execution, or makes any payment, pledge, transfer, or who shall within six months make any sale, transfer, conveyance, or other disposition of his property to any person having reasonable cause to believe that such person is insolvent and such payment, &c., is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, &c., from the person so to be benefited."

Mrs. Fritton denied the abovementioned allegations of fact made by the assignees, and on her affidavit that they were untrue, a jury was demanded and granted, in pursuance of the practice in such cases in Pennsylvania. The jury found that at the time of giving the bond and warrant Born was insolvent, but that Mrs. Fritton had not reasonable cause to believe that he was, and that the judgment was given to secure a prior debt, but was not given to enable Mrs. Fritton to obtain a preference over other creditors.

After the jury had thus passed upon the questions of fact, the counsel for the assignees again appeared before the auditor, claiming the fund and insisting that under the findings of the jury Born was insolvent when he executed the warrant of attorney to Mrs. Fritton; that it was given to secure a prior debt, and was a fraud upon the provisions of the Bankrupt Act.

The auditor awarded the fund to Mrs. Fritton, and the assignees took an appeal to the Supreme Court.

Upon the appeal to that court it was contended that there was error, among other things, "in disregarding the various provisions of the United States Bankrupt law in regard to preferences given by bankrupts, and in giving Mrs. Fritton a preference over other creditors, contrary to the twenty-ninth section of the United States Bankrupt Act."

In stating their position before the Supreme Court the assignees, in their argument, which was contained in the record, said:

"The inquiry is reduced to this: Who is entitled to the fund in court, Mrs. Fritton or Born's assignees?"

The Supreme Court affirmed the award below, which gave the fund to Mrs. Fritton, and the case was now brought here on error by the assignees.

Messrs. Durant and Horner, for the assignees, plaintiff in error:

1. The State court was without jurisdiction over Mrs. Fritton's claim. It erred in granting a feigned issue upon her affidavit, and in giving judgment in her favor. The whole subject belonged to the Federal courts to decide, and when it appeared that proceedings in bankruptcy had been taken and were still pending, the jurisdiction of the State court was at an end, and the matter should have been certified into the District Court of the United States for its determination. Whether the judgment creditor had a lien or not is a question which can only be solved in the Bankrupt court of the United States.

2. The judgment below was erroneous, because Mrs.

Fritton's judgment was given to secure a prior debt. The case of *Buchanan* v. *Smith*, recently decided by this court,* declares in effect that whatever enables a debtor to proceed more rapidly than if he was retarded by the necessary delay of an action, is a fraud upon the Bankrupt Act.

Messrs. A. V. Parsons and J. S. Parsons, contra:

1. Whether *if* the point now made by the opposing counsel as to jurisdiction had been made below, it would have been a good one, need not be in the least considered, since the record shows in the fullest manner that it was nowhere there made, and shows that everywhere, in fact, it was waived. A party cannot take, in this court, points not taken anywhere below. This is settled practice.

2. No doubt in *Buchanan* v. *Smith* many *dicta* are found which might militate against the present case. But it is manifest from what is said in the subsequent case of *Wilson* v. *The City Bank*, that *Buchanan* v. *Smith* did not express the views of this court, though it recorded its judgment upon the particular case. Indeed, since the case of *Wilson* v. *The City Bank*, it has not been regarded as of any authority.

Mr. Justice HUNT delivered the opinion of the court.

In looking into the record we do not find that the question of the jurisdiction of the State courts over Mrs. Fritton's claim, now made in the argument of the learned counsel of the assignees, was anywhere made in the courts below. It does not appear to have been made before the auditor, or before the Supreme Court on appeal. On the contrary, it affirmatively appears that the assignees submitted the question of the title to the fund to both of these courts, and asked its decision in their favor. In the proceeding before the auditor, before the jury passed on the questions of fact, this was the case. After the jury had passed upon them the counsel for the assignees again appeared before the auditor, claiming the fund and insisting that under the findings of

* 16 Wallace, 277.

the jury Born was an insolvent when he executed the warrant of attorney to Mrs. Fritton; that it was given to secure a prior debt, and was a fraud upon the provisions of the Bankrupt Act.

So, upon the appeal to the Supreme Court, the same ground was taken.

In all these instances the assignees submitted the decision of their claims to the State courts, and, in asking those courts to decide in their favor, necessarily asked them to decide the case.

While the assignees have made sufficient objection to the judgment rendered against them, we nowhere find an objection to the power of the court to render a judgment. An objection that the court has not decided correctly is a very different thing from an objection that the court has no power to decide.

The present was the case of the foreclosure of a mortgage under the State laws. The disposition of any surplus that might arise from a sale on such mortgage, under a proceeding in the State courts, *primâ facie* belonged to the State courts. The subject-matter was within their jurisdiction, and under their control. If special circumstances existed which altered that result, it was the duty of the party making such claim to state them and ask a ruling accordingly. Nothing of the kind was done in the present instance.

To be available here an objection must have been taken in the court below. Unless so taken it will not be heard here. It is not competent to a party to assent to a proceeding in the court below, take his chance of success, and, upon failure, come here and object that the court below had no authority to take the proceeding. This point comes before us at every term and is always decided the same way.*

We are not called upon, therefore, to decide whether, in

* Brown *v.* Clarke, 4 Howard, 4; Phelps *v.* Mayer, 15 Id. 160; Turner *v.* Yates, 16 Id. 14; Camden *v.* Doremus, 3 Id. 515; Bank *v.* Kennedy, 17 Wallace, 19; Read *v.* Gardner, Ib. 409; Ray *v.* Smith, Ib. 412; Insurance Co. *v.* Folsom, 18 Id. 237; Town of Ohio *v.* Marcy, Ib. 552; Lucas *v.* Brooks, Ib. 436; Shutte *v.* Thompson, 15 Id. 151; Prout *v.* Roby, Ib. 472.

a case like the present, the State court having the fund in its possession, was competent to proceed to its distribution, or whether if demand had been made, there having been previous to that time a decree of bankruptcy and the appointment of assignees, the whole subject should have been remitted to the United States court.*

The assignees contend further, that the judgment below was erroneous for the reason that the judgment of Mrs. Fritton was void under the Bankrupt Act, and that she was not entitled to the fund awarded to her. This is the question and the only question which was litigated by the assignees in the State courts.

The thirty-ninth section of the Bankrupt Act defines what acts of the debtor afford grounds for declaring him to be a bankrupt upon the petition of his creditor, among which are the following: "Or who being bankrupt or insolvent, . . . shall make any payment, gift, grant, sale, . . . or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors." The Bankrupt court, on the 31st of January, 1868, adjudged that Born had committed some of the acts in this section specified, by reason of which his creditor was entitled to have him declared a bankrupt.

Whether Mrs. Fritton shall retain this fund or shall lose it, depends upon the thirty-fifth section of the same act. That section enacts that if any person being insolvent or in contemplation of insolvency, and within four months before the filing a petition by or against him, with a view to give a preference, procures his property to be attached or seized on execution, or makes any payment, pledge, transfer, or who shall within six months make any sale, transfer, conveyance, or other disposition of his property to any person having reasonable cause to believe that such person is insolvent, and such payment, &c., is made in fraud of the pro-

* See Marshall *v.* Knox, 16 Wallace, 551.

visions of this act, the same shall be void and the assignees may recover the property, &c., from the person so to be benefited.

To authorize the assignees to recover the money or property under this section, it is necessary that he should establish the act of the bankrupt, not only of which he complains, but also that it was done with a view to give a preference over other creditors, and that the other party to the transaction had reasonable cause to believe that such person was insolvent. For a full discussion of the law on this general subject, see the recent case of *Wilson* v. *City Bank*.*

In the case before us, both of these necessary facts have been found against the assignees. In answer to the second inquiry submitted to them, the jury said that Mrs. Fritton had not reasonable cause to believe that Born was insolvent at the time he executed the warrant of attorney. In answer to the further inquiry, they said that this warrant of attorney was not given with a view to a preference over other creditors. The warrant of attorney cannot, therefore, be held void under the thirty-fifth section of the Bankrupt law. That section does not reach it, and as the act of the parties was valid under the statutes of Pennsylvania, there is nothing to impeach its validity.

We have not the evidence before us, and we must assume that the verdict of the jury is right. The statute assumes that there may be cases where the various acts of conveyance and disposition may be made, which would not amount to giving a preference.

We are of the opinion that the judgment of the Supreme Court of Pennsylvania was right, and that it should be

AFFIRMED.

* 17 Wallace, 473; see also Bump on Bankruptcy, 532–542, 547.