AMSINCK *v.* BEAN, ASSIGNEE.

1. The assignee in bankruptcy of the estate of an individual partner of a debtor copartnership, cannot maintain a suit to recover back money previously paid to a creditor of the copartnership, upon the ground that the money was paid to such creditor in fraud of the other creditors of the firm, and in fraud of the provisions of the Bankrupt Act. The suit should be by the assignee of the partnership.
2. The mere fact that one partner of a firm composed of two partners, after a stoppage of payment, suffered the other, who had put in two-thirds of the capital, and who was in addition a large creditor of the partnership for money lent, to manage the partnership assets apparently as if they had been his own, proposing to creditors a compromise at seventy cents on the dollar, taking the partnership stock, transacting business in his own name, buying some new stock, selling old and new, and mingling the funds—though keeping separate accounts—does not, of itself, dissolve the partnership, and vest such acting partner with the partnership property in such way as that on a decree of bankruptcy against him *individually* the partnership assets pass to his assignee in bankruptcy.

APPEAL from the Circuit Court of the United States for the Southern District of New York; the case being thus:

The Bankrupt Act enacts in its thirty-sixth section, that persons trading as partners may be decreed bankrupt, as well as persons trading as individuals; and that when a partnership is decreed bankrupt, all the joint stock and property of the partnership and also all the separate estate of each of the partners shall pass to the assignee, who by the said section is to keep separate accounts of the two estates. Creditors of the firm, and the separate creditors of each partner, may prove their respective debts; and the net proceeds of the joint stock is to be appropriated to pay the former, and the net proceeds of the separate estate to pay the latter. If there be any balance of the separate estate of any partner, after payment of his separate debts, it is to be added to the joint stock to pay the joint creditors; and if there be any balance of the joint stock after payment of the joint debts, it is to be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it

would have been if the partnership had been dissolved without any bankruptcy.*

But the act does not contain any provisions by which, when one member alone of a partnership is decreed bankrupt, and there is no decree against the partnership itself, the property of the partnership passes as does the partner's individual property.

In this state of the law, on the 15th of February, 1869, a partnership composed of two persons, named respectively Kintzing and Lindsey, and trading at St. Louis, Missouri, as Kintzing & Co.—Kintzing being the senior partner, a contributor of two-thirds of the capital, and a large creditor of the firm for money lent—becoming embarrassed in their affairs, and having numerous creditors, including one named Amsinck (a large one, resident in New York) stopped payment.

From the date of this stoppage, Kintzing seemed to have proceeded as if the partnership had been dissolved. The assets of the firm with the tacit assent of Lindsey, the other partner, passed into the exclusive possession of Kintzing. *He* then submitted a written proposition to the partnership creditors, to pay them in discharge of existing debts, seventy per cent.—in *the firm notes*, however—at six, twelve, and eighteen months; the arrangement not to bind any creditor until agreed to by all.

Amsinck directed his agent in St. Louis to sign the agreement in behalf of him, Amsinck, on condition, to be privately made with Kintzing & Co., that they should "discount" the notes thus to be given; paying for them on such so-called operation of discount, one-third cash and the residue in thirty and sixty days; an arrangement which if Kintzing & Co. could not get on ultimately would prove more favorable, of course, to Amsinck than that proposed to the other creditors and accepted by about two-thirds of them. Kintzing & Co. agreed to this, and the fifty per cent. was paid to Amsinck; making a payment in cash of $16,275. The six, twelve, and eighteen months' compromise notes were sent

* 14 Stat. at Large, 534.

to those creditors who had agreed to accept them, though conditionally; the six months' notes maturing August 18th, 1869.

In the meantime Kintzing went on trying to get the other creditors to accept the terms of compromise proposed; he alone, as it seemed, administering the partnership assets for the benefit of the creditors as contemplated by the agreement of compromise. *He* took the partnership stock, made new purchases on his own account, transacted the business in his own name, and sold the old and new stock, mingling the funds as if all were his own, except that he kept separate books for each business. The $16,275 (the amount paid to Amsinck) was derived from such mingled funds.

As already observed, about two-thirds of the creditors had signed the compromise agreement when the agent of Amsinck signed it for *him*. Kintzing continuing to make exertions to get the remaining creditors to sign, transacted business with the old assets and some new ones, in the way mentioned, for a certain time. However, finding that all the creditors would not sign, and so that the plan of compromise would be defeated, he made to the State assignee of Missouri, on the 21st of August, 1869—the six months' notes, which had matured three days before, being still unpaid—a general assignment under the laws of Missouri of *his* property, for the benefit of *his* creditors.

Certain of the creditors of the partnership now getting wind of the secret arrangement between Amsinck and Kintzing & Co., and that the $16,275 had been actually received by Amsinck, filed a petition in the District Court at St. Louis, representing that they were creditors of Kintzing, "*a member* of the late firm of Kintzing & Co.;" that the said Kintzing had committed various acts of bankruptcy specified (one of the acts specified being the payment to Amsinck), and praying that he, Kintzing (not Kintzing & Co., nor Lindsey, but Kintzing), might be decreed a bankrupt, and he was so decreed accordingly; one Bean being appointed his assignee in bankruptcy.

Statement of the case.

Thereupon Bean filed a bill in chancery—the bill in this case—against Amsinck, in the court below, praying that the payments made to Amsinck might be decreed to have been made in fraud of other creditors and of the Bankrupt Act, and that Amsinck might be decreed to account for and pay them over to him, Bean, the assignee. The answer denied fraud, &c., and set up in addition the point that the bankruptcy proceedings were against Kintzing alone, and not against Lindsey also, and not against the firm; that the complainant, Bean, was the assignee only of Kintzing individually, and not the assignee of the firm; that the copartnership had never been dissolved; that the complainant did not represent the interest of Lindsey in the claim sought to be recovered in the suit; and that Lindsey had an interest in it which did not pass to the complainant.

The court below did not, however, regard the objection as of force. It said:

"It is apparent, from the evidence, that the firm was regarded as dissolved by all parties concerned, by Kintzing, by Lindsey, and by the creditors, including the defendants, and that the assets and effects of the firm were regarded as being put into Kintzing's hands, in trust, to settle up the business as the appointee of the creditors, and pay the compromise notes. Kintzing passed into the hands of the State assignee all that was left of such assets, as being part of the estate of Kintzing. From the State assignee they passed to the plaintiff, as the assignee of Kintzing, as part of the estate of Kintzing."

It said in addition:

"The composition deed does not appear to have been assented to in any manner by Lindsey. He is not named in it, nor was he, so far as appears, a party to it potentially. . . . There does not seem to have been any authority, so far as Lindsey was concerned, to sign the firm name to the compromise notes, so as to bind him by them. The compromise notes, therefore, signed by Kintzing with the firm name, were the individual notes of Kintzing. Having given them, he was to have the assets to administer with which to pay them."

This objection arising from the fact of the decree in bank-

ruptcy being against Kintzing alone, being thus disposed of, and the transaction between Amsinck and Kintzing & Co. having been, as the court considered, a clear fraud on the other creditors of that firm, the court decreed a recovery. It said:

"Whether the money could or could not be recovered back by the *debtor*, the fourteenth section of the Bankruptcy Act especially vests in the assignee all property conveyed by the bankrupt in fraud of his creditors, and authorizes him to sue for and recover the same. This applies to conveyances fraudulent at common law, and to transfers of property such as that in the present case."*

From that decree Amsinck brought the case here, where three assignments of error—two of them not material to be stated—were made; the third one, and the one on which the decision in this court was rested, being this:

"That the decree was erroneous in deciding that the assignee of Kintzing individually could maintain this action; the appellants alleging that if they were liable at all they were liable to Kintzing & Co. or to *their* assignee."

Mr. A. F. Smith, for the appellant:

The bankrupt proceedings against Kintzing alone were ineffectual to vest in the assignee title to the partnership property.†

It is not pretended by the bill that Kintzing had any right or title to the partnership property to the exclusion of Lindsey. The most that is set up is that he had possession, by the consent of Lindsey, of the assets of the firm for the benefit of the creditors. It is not pretended that Lindsey had been released, or that he had assigned or otherwise parted with his legal interest in the partnership assets. On such a case it is plain that the action must fail.

* Knowlton *v.* Moseley, 105 Massachusetts, 136; Bean *v.* Brookmire, 1 Dillon, 151, 154.

† Bankrupt Act, § 36; General Order in Bankruptcy, 18; Re Shepard, 3 Bankrupt Register, 42; Re Crockett, 2 Id. 75; Re Lewis, 1 Id. 19; Re Prankard, Ib. 51; Re Little, Ib. 74.

Nor is the point technical; for if it is well taken, it would be no answer for Amsinck, in the event of his being sued hereafter by the assignee of Kintzing & Co., to plead that they had paid the money to the assignee of an individual member of the firm.

Nor can it be argued that the money paid to the appellants belonged to Kintzing individually. The case shows that it belonged to the partnership.

Messrs. E. T. Allen and E. B. Merrill, contra, for the assignee:

It is not necessary for the dissolution of a partnership as between partners, that a deed of dissolution under the hand and seal of the partners be executed, recorded, and published. A partnership may be dissolved in fact—dissolved by matter *in pais*—as well as by document technically written and executed in form.

Now, the case here shows a dissolution in fact, immediately on the stoppage. Kintzing was the chief capitalist, a creditor, and the person most interested. Lindsey did not, apparently, think his interest worth looking after. He abandoned the wreck; and from that time forth Kintzing took possession of everything; he proposed the compromise; he gave the notes; all, in short, belonged to *him;* this "all," however, being the *damnosa hereditas* of paying all debts, and the "forlorn hope" of getting any surplus, necessarily small, if after paying debts anything remained.

In such a case the assignee of Kintzing was assignee of all the assets of the firm, including this claim on Amsinck, to refund what he had got in virtue of a fraud on the other creditors.

Mr. Justice CLIFFORD, having stated the case, delivered the opinion of the court.

Waiving the first two errors assigned, the single question presented for decision is whether the complainant, as the assignee of the estate of an individual partner of a debtor copartnership, can maintain a suit to recover back money

previously paid to a creditor of the copartnership, upon the ground that the money was paid to such creditor in fraud of the other creditors of the firm and in fraud of the provisions of the Bankrupt Act.

Assignees in bankruptcy of the estate of an insolvent copartnership may, perhaps, maintain such a suit for such a claim, even though the money was paid by an individual partner under such an agreement to compromise his separate debts, as the assignees in such a case are required to keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member of which the copartnership is composed; and the provision is that the net proceeds of the joint stock and property shall be appropriated to pay the creditors of the copartnership, and that the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors.

None of the proceeds of the separate estate of the individual partners can be appropriated to pay the partnership debts, unless the proceeds from that source exceed what is necessary to pay the separate debts of the partner, nor can any part of the proceeds of the joint stock or property of the copartnership be appropriated to pay the separate debts of the individual partner, unless there is an excess from that source beyond what is required to pay the partnership debts.*

These regulations show that, in cases where they apply, the assignees in bankruptcy of the joint stock and property of a copartnership are required to administer the separate estate of the individual members of the firm or company as well as the described estate of the copartnership, but the Bankrupt Act contains no regulations of a corresponding character applicable in a case where an individual member of a copartnership is adjudged a bankrupt without any such decree against the copartnership or the other partner or partners of which the copartnership is composed.

Instead of that the Bankrupt Act provides that in all

* 14 Stat. at Large, 535.

other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. Partners are not entitled in any case to come in competition with the joint creditors upon the partnership funds, whatever may be the rights and equities which would otherwise attach between them and the bankrupt partner or partners.

Where all the partners become bankrupt the general rule is that the separate estate of one partner shall not claim against the joint estate of the partnership in competition with the joint creditors, nor shall the joint estate claim against the separate estate in competition with the separate creditors.*

Doubt upon that subject cannot be entertained, and it is equally clear that a solvent partner cannot prove his own separate debt against the separate estate of the bankrupt partner, so as to come in competition with the joint creditors of the partnership, for the plain reason that he is himself liable to all the joint creditors, which is sufficient to show that in equity he cannot be permitted to claim any part of the funds of the bankrupt before all the creditors to whom he is liable are fully paid.†

Neither can a solvent partner prove against the separate estate of the bankrupt partner in competition with the separate creditors of the bankrupt until all the joint creditors of the partnership are paid or fully indemnified, for if a dividend were reserved to such a party on such proof the joint creditors might be injured by such solvent partner stopping the surplus of the separate estate, which would otherwise be carried over to the joint estate, or the separate creditors might be injured by the funds being stopped and the transmission of the same be delayed.‡

Two exceptions are admitted to that rule: (1.) Where

* McLean *v.* Johnson, 3 McLean, 202.

† Emery *v.* Bank, 7 National Bankrupt Register, 217.

‡ Story on Partnership, 406; Robson on Bankrupt (2d ed.), 621; Ex parte Lodge & Fendal, 1 Vesey, Jr., 166; Ex parte Maude, Law Reports, 2 Chancery Appeals, 555.

the property of a partner has been fraudulently applied for the purposes of the partnership. (2.) Where a distinct trade is prosecuted by one or more of the members of the firm.*

Subject to the preceding rules, as explained, the solvent partners retain their full right, power, and authority over the partnership property after bankruptcy, in the same manner and to the same extent as if no bankruptcy of a particular partner had occurred. Their lien also remains in full force, not only to have the partnership funds applied to the discharge of the partnership debts and liabilities, but also to the discharge of all the debts due by the partnership to them or any one of them, as well as for their own distributive shares, if any, in the surplus.†

Debts due by the bankrupt partner to the partnership are entitled to priority in preference to the debts due by him to his separate creditors, and if the joint funds prove insufficient to discharge his debt to the partnership the solvent partners have a right to prove the deficiency against the separate estate of the bankrupt *pari passu* with the separate creditors.‡

Bankruptcy, it is said, when decreed by a competent tribunal, dissolves the copartnership, but the joint property remains in the hands of the solvent partner or partners, clothed with a trust to be applied by him or them to the discharge of the partnership obligations and to account to the bankrupt partner or his assignee for his share of the surplus.§

Exceptions undoubtedly exist to that rule where it appears that the partnership or all the partners are insolvent, even though some of them may not be in bankruptcy.‖

Assets are to be marshalled between the creditors of the

* 1 Deacon (3d ed.), 852.

† Bump on Bankruptcy (7th ed.), 660; Collier on Partnership (3d Am. ed.), § 860.

‡ Bump on Bankruptcy (7th ed.), 220.

§ Ex parte Norcross, 5 Law Reporter, 124; Harvey *v.* Crickett, 5 Maule & Selwyn, 339.

‖ Ayer *v.* Brastow, 5 Law Reporter, 501; Murray *v.* Murray, 5 Johnson's Chancery, 60; Barker *v.* Goodair, 11 Vesey, 86; Smith *v.* Stokes, 1 East, 367; Parker *v.* Muggridge, 2 Story, 348.

copartnership and the separate creditors of the partners only when there are partnership assets and separate assets of individual partners, and proceedings have been instituted against the partnership and the individual members, as provided in the thirty-sixth section of the Bankrupt Act.*

Certain exceptions also exist to that rule where both the joint and separate estates are administered by the assignees of the copartnership.†

Many decided cases support the proposition that the bankruptcy of one partner operates as a dissolution of the copartnership, but such an adjudication obtained by one partner against another will not be sustained if the real object of the petitioner is to dissolve the firm and the adjudication is not required for any other purpose.‡

Involuntary proceedings in bankruptcy were instituted in this case against the senior partner of the copartnership, and it is conceded that no such proceedings have ever been commenced against the copartners or the other partner. Proofs were introduced to show that the other partner was largely indebted to the firm, and it may be conceded that the proofs are sufficient to show that the firm is insolvent, but there is nothing in the record to show that the complainant possesses any other authority to maintain the suit than what he derives by virtue of his appointment as assignee of the estate, real and personal, of the bankrupt senior partner of the copartnership.

Repeated decisions have settled the rule that an assignee of the estate of an individual partner has no such title as will enable him to call third parties to an account for partnership property, and it is difficult to see why that rule does not dispose of the case before the court.§

All of the debts embraced in the compromise agreement

* Ex parte Leland, 5 National Bankrupt Register, 222; Ex parte Downing, 1 Dillon, 36.

† Ex parte Warren Leland, 5 National Bankrupt Register, 229.

‡ Shelford on Bankruptcy (3d ed.), 186; Ex parte Christie, Montague & Bligh, 314; Ex parte Browne, 1 Rose, 151; Ex parte Johnson, 2 Montague, Deacon & De Gex, 678.

§ Bump on Bankruptcy, 660.

were partnership debts and the payments made to procure the signature of the appellants were made to discharge those debts; nor is the question affected in the least by the fact that some small part of the fund used to make those payments was earned by the senior partner in transacting the business of the copartnership subsequent to the time when the firm suspended payment. Most of the amount, it is conceded, was taken from the partnership assets, and the whole was paid as being the money of the copartnership.

Money paid under such circumstances, if it can be recovered back at all, must be claimed by the partnership in whose behalf it was paid, or by an assignee duly appointed to administer the joint estate, as it is quite clear that neither an individual partner nor his assignee can call the party to whom such a payment has been made to an account for such a payment any more than he could for any other debt due to the copartnership. If liable in fact, a voluntary payment to the appellee would not discharge the obligation, as the liability, if it exists, is to another party; nor would a judgment in this case, even if satisfied, be a bar to a subsequent suit in the name of the partnership or their duly appointed assignees.

Two principal suggestions are made in support of the theory set up by the appellees: (1.) That all the parties concerned in the attempt to effect a compromise between the debtors and their creditors proceeded as if the copartnership had previously been dissolved and as if the assets and effects of the debtor firm had been placed in the hands of the senior partner in trust to settle up the affairs of the debtors with their creditors and to pay the compromise notes. (2.) That the other partner never assented to the compromise agreement nor was he in fact a party to the final arrangement, and that the copartnership name was signed to the compromise agreement and to the notes without his authority.

Issuable matters are certainly involved in those propositions, but suppose they are fully proved, they are not sufficient to show that the other partner ever conveyed his

interest in the assets and effects of the copartnership to the bankrupt partner, or that he ceased to be a joint owner of the same when the estate of the bankrupt partner was assigned and conveyed to the complainant below as his assignee.*

Nothing is exhibited in the record to warrant the conclusion that the copartnership was ever in fact dissolved before the decree in bankruptcy against the senior partner, and as the compromise notes were given in the name of the copartnership, the other partner remained liable for their payment.

DECREE REVERSED and the cause remanded, with directions to

DISMISS THE BILL OF COMPLAINT.

UNITED STATES v. FARRAGUT.

Captors (Admiral Farragut and others) having filed a libel in the admiralty for prizes taken below New Orleans in April, 1862, they and the government agreed to refer the cause to the "final determination and award" of A., B., and C., "the award of whom," said the agreement of reference, "shall be *final* upon all questions of *law* and fact involved, said award to be entered as a rule and decree of court in said case, with the right also of either party to appeal to the Supreme Court of the United States, *as from other decrees or judgments in prize cases*"

The arbitrators made an award, finding certain matters wholly or chiefly of fact and also certain conclusions of law, and their award was, after exceptions to it, made a decree of the court where the libel was filed.

An appeal was taken to this court.

Held as principles of law applicable to the case:

1. That there was nothing in the nature of the admiralty jurisdiction, or of an appeal in admiralty, which prevented parties in the court of admiralty, whether sitting in prize or as an instance court, from submitting their case by rule of the court to arbitration.
2. That the award in the present case was to be construed here and its effect determined by the same general principles which would govern it in a court of common law or of equity.
3. That notwithstanding the expression in the agreement of submission, that all questions of *law* in the case were to be concluded by the award,

* Harrison *v.* Sterry, 5 Cranch, 302.