No. 2286

United States

Circuit Court of Appeals

For the Ninth Circuit.

BERRY BROTHERS, a Corporation,

Appellant.

vs.

R. B. SNOWDON, as Trustee in Bankruptcy of EDWIN L. GRAVES and GEORGE E. LA BELLE, Co-partners as GRAVES & LA BELLE and FEDERAL PAINT & WALL PAPER CO., and EDWIN L. GRAVES, Individually, and GEORGE E. LA BELLE, Individually, Bankrupts,

Appellee.

In the Matter of EDWIN L. GRAVES and GEORGE E. LA BELLE, Copartners as GRAVES & LA BELLE and FEDERAL PAINT & WALL PAPER CO., and EDWIN L. GRAVES, Individually, and GEORGE E. LA BELLE, Individually.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT 330 JACKSON ST., S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Assignment of Error on Appeal	29
Bond for Costs on Appeal	32
Certificate of Clerk U. S. District Court to Transcript of Record	36
Citation on Appeal (Copy)	34
Citation on Appeal (Original)	38
Counsel, Names and Addresses	1
EXHIBITS:	
Exhibit "A" to Stipulation Regarding Objections to Claim of Berry Brothers—Agreement, Dated March 18, 1912, Berry Brothers, Ltd., and Graves & La Belle	8
Exhibit "B" to Stipulation Regarding Objections to Claim of Berry Brothers—Letter, Dated November 16, 1912, Berry Brothers, Ltd., to W. P. Fuller & Co	10
Claimant's Exhibit 1 (Letter Dated, March 29, 1912, Berry Brothers, Ltd., of Detroit, Mich., to Berry Brothers, San Francisco, Cal.)	12

Index.

Page

EXHIBITS—Continued:

Claimant's Exhibit 1 (Letter, Dated April 22, 1912, Berry Brothers, Ltd., to Graves & La Belle) 16

Claimant's Exhibit 1 (Letter, Dated April 27, 1912, Graves & La Belle to Berry Bros., Ltd.) 15

Claimant's Exhibit 1 (Letter, Dated May 3, 1912, Graves & La Belle to Berry Brothers) 13

Claimant's Exhibit 1 (Letter, Dated June 10, 1912, Graves & La Belle to Berry Bros., Ltd.) 14

Trustee's Exhibit "A" (Balance Sheet, Dated October 31, 1913, of Federal Paint and Wall Paper Co.) 11

Names and Addresses of Counsel..... 1

Objections to Claim of Berry Brothers..... 5

Opinion on Review of Referee's Decision..... 23

Order Confirming Decision of Referee..... 27

Order Granting Appeal and Fixing Amount of Bond on Appeal..... 31

Order of Referee in Bankruptcy Sustaining Objections to, and Disallowing Claim of Berry Bros. 16

Petition for Appeal 28

Petition to Review Order of Referee Sustaining Objections to, and Expunging the Claim of Berry Brothers 21

Proof of Claim of Berry Brothers..... 1

Index.

Page

Stipulation as to Testimony Presented at the Hearing of Objections to the Claim of Berry Brothers 17

Stipulations Regarding Objections to Claim of Berry Brothers 6

TESTIMONY ON BEHALF OF TRUSTEE:

SEYMOUR, F. D..... 18

Names and Addresses of Counsel.

FRANK E. GREEN, Esq., Attorney for Claimant and Appellant,
230 Burke Building, Seattle, Washington.

CASSIUS E. GATES, Esq., Attorney for Trustee and Appellee,
329 Central Building, Seattle, Washington.

HENRY F. McCLURE, Esq., Attorney for Trustee and Appellee,
1509 Hoge Building, Seattle, Washington.

WALTER A. McCLURE, Esq., Attorney for Trustee and Appellee,
1509 Hoge Building, Seattle, Washington.

WILLIAM E. McCLURE, Esq., Attorney for Trustee and Appellee,
1509 Hoge Building, Seattle, Washington.

[1*]

[Proof of Claim of Berry Brothers.]

To Frank E. Green, Seattle, Wash.

We, Berry Brothers, of Detroit, in the county of Wayne and State of Michigan, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such

*Page-number appearing at foot of page of original certified Record.

meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for us and in our name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for us to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due us under any composition, and for any other purpose in our interest whatsoever, with full power of substitution.

IN WITNESS WHEREOF, we have hereunto signed our name and affixed our seal the eighth day of February, A. D. 1913.

BERRY BROTHERS. [Seal]
W. R. CARNEGIE, [Seal]
Assistant Treasurer.

Signed, sealed and delivered in presence of
E. M. DILL.
H. J. WALSH. **[2]**

Acknowledged before me this eighth day of February, A. D. 1913.

[Seal] EVERETT M. DILL,
Notary Public, Wayne County, Michigan.

My commission expires June 19th, 1916.

State of Michigan,
County of Wayne,—ss.

On this eighth day of February, 1913, before me appeared W. R. Carnegie, to me personally known, who being by me duly sworn did say that he is the Assistant Treasurer of Berry Brothers, a corporation organized under the laws of the State of Michigan, and that he executed the within instrument on behalf of said corporation, being duly authorized so to do, and that the seal affixed thereto is the corporate seal of said corporation; and said W. R. Carnegie acknowledged said instrument to be the free act and deed of said corporation.

[Seal] EVERETT M. DILL,
Notary Public, Wayne County, Michigan.
My commission expires June 19th, 1916. [3]

State of Michigan,
County of Wayne,—ss.

On the 8th day of February, A. D. 1913, came W. R. Carnegie, of Detroit, in the county of Wayne, State of Michigan, and made oath and says that he is the assistant treasurer of Berry Brothers, a corporation organized and existing, under and by authority of the laws of the State of Michigan, and carrying on business at Detroit, in the said county of Wayne, and State of Michigan, and that the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said Berry Brothers, in the sum of Eighteen Hundred and Sixty-one and 50/100 Dol-

lars ($1861.50); that the consideration of said debt is as follows: Goods, wares and merchandise, sold and delivered as per itemized statement hereto attached; that no part of said debt has been paid (except none); that there are no setoffs or counterclaims to the same (except none) and that said Berry Brothers has not, nor has any person by their order, or to the knowledge or belief of said deponent, for their use, had or received any manner of security for said debt whatsoever—none—and that no note has been received for said account nor has any judgment been rendered thereon—none.

W. R. CARNEGIE.

Subscribed and sworn to before me this 8th day of February, A. D. 1913.

[Seal] EVERETT M. DILL,
Notary Public, Wayne County, Michigan.

My commission expires June 19th, 1916.

[Endorsed]: Proof of Claim of Berry Brothers, Detroit, Mich. Filed 7th day of March, A. D. 1913, 2 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Jun. 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [4]

Objections to Claim of Berry Brothers.

Comes now R. B. Snowdon, by his attorneys, McClure & McClure, and referring to the claim of Berry Brothers filed in the above-entitled proceedings on the 7th day of March, 1913, in the sum of Eighteen Hundred Sixty-one and 50/100 ($1861.50)

Dollars, objects to the allowance of the same for the following reasons:

1. That proper credits have not been allowed for payments made on said account.

2. That subsequent to the first day of the four months immediately preceding the filing of the petition by the above-named bankrupts, the said Berry Brothers, a corporation, claimant, with knowledge of the insolvency of the said Graves & LaBelle, and without any present consideration therefor, received from said Graves & LaBelle, certain goods, wares and merchandise, the same being the property of the bankrupts, of the value of approximately Three Thousand ($3,000) Dollars, thereby obtaining a preference, and enabling them to receive a larger proportion of their claim than the other creditors of said bankrupts of the same class, the said Graves & LaBelle being then insolvent.

McCLURE & McCLURE,
Attorneys for Trustee.

Service of within objections and receipt of copy admitted this 15th day of April, 1913.

FRANK E. GREEN,
Attorney for Berry Bros.

[Endorsed]: Objections to Claim of Berry Brothers. Filed April 15th, 1913, 3 P. M. John P. Hoyt, Referee. Filed U. S. District Court, Western District of Washington, June 5th, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [5]

Stipulations Regarding Objections to Claim of Berry Brothers.

IT IS HEREBY STIPULATED, by and between the Trustee in the above-entitled matter and Berry Brothers, claimants, each acting through their respective counsel, that the goods, wares and merchandise referred to in the objections to the claim of Berry Brothers filed herein by the said Trustee, were delivered by the said Berry Brothers to Graves & LaBelle, the bankrupts herein, under and by virtue of a written agreement, copy of which is hereto attached, marked Exhibit "A," and made an integral part of this stipulation.

IT IS FURTHER STIPULATED AND AGREED, that the said Berry Brothers paid the freight on said goods, wares and merchandise to Seattle, paid the cartage thereon from the cars to the warehouse of said Graves & LaBelle, and paid the insurance and storage thereon during the entire time said goods, wares and merchandise remained in said warehouse. The said goods, wares and merchandise were put in the warehouse of said Graves & LaBelle. That there were other goods, wares and merchandise belonging to the said Graves & LaBelle in the same warehouse.

IT IS FURTHER STIPULATED, that said Berry Brothers at the time said goods were shipped to Graves & LaBelle, delivered to the latter detailed statements covering the whole shipment, and that said Berry Brothers at various times withdrew parts of said goods, wares and merchandise stored as afore-

said and sold the same on their own account independent of, but with the knowledge of and without objection by said Graves & LaBelle. That whenever Graves & LaBelle withdrew any portion of said stock in their warehouse, report of such withdrawal was made to said Berry Brothers, whereupon monthly statements [6] were rendered by said Berry Brothers to said Graves & LaBelle for the amount of stock so withdrawn during the preceding month.

IT IS FURTHER STIPULATED, that on or about November 16, 1912, said Berry Brothers, with knowledge of the financial condition of said Graves & LaBelle, and with knowledge that bankruptcy proceedings might be instituted within a short time after said date withdrew from said Graves & LaBelle, the goods, wares and merchandise theretofore delivered by Berry Brothers then remaining in said warehouse of the value of about Three Thousand ($3,000.00) Dollars. That some of the creditors of said bankrupts interposed objections to the return of said goods, but that in order to avoid litigation said objections were waived and Berry Brothers were allowed to retake said stock upon condition that they would, in case of bankruptcy proceedings within four months of said date, permit the question of their right to the possession of said goods be submitted to the bankruptcy court of this district. That a copy of such agreement, directed to one of the creditors of said bankrupts, is hereto attached, marked Exhibit "B," and made a part of this stipulation; that the trustee does not waive the contention that the said agreement (Exhibit "B") was intended to

and did leave the parties in the condition in which they were before the execution of said agreement and the carrying out of the same, it being the intent and purpose of said agreement, as the trustee contends, that the retaking of said merchandise by said Berry Brothers should not be deemed to be, and should not be, a waiver by the bankrupts, or by their creditors, of any right or rights whatsoever. [7]

IT IS FURTHER STIPULATED, that either party may introduce proof in addition to the matters and things recited in this stipulation.

McCLURE & McCLURE,
Attorneys for Trustee.
FRANK E. GREEN,
Attorney for Berry Brothers. [8]

[Exhibit "A" to Stipulation Regarding Objections to Claim of Berry Brothers—Agreement, Dated March 18, 1912, Berry Brothers, Ltd., and Graves & LaBelle.]

March 18, 1912.

Agreement between Berry Brothers, Limited, of Detroit, Michigan, Party of the First Part, and Graves & LaBelle of Seattle, Washington, Party of the Second Part:

The Party of the Second Part hereby agree to store such goods that the Party of the First Part may ship on consignment to the Party of the Second Part for the purpose of Sale by said Graves & LaBelle.

The Party of the Second Part agree to report on the first of each month the amount of goods sold by

them from said Stock for which Party of the First Part will render an Invoice at the regular Terms and Prices of such goods according to the quantity sold.

The Party of the First Part agree to pay the Party of the Second Part the cost of Cartage in Seattle from the Car to their Warehouse of each consignment of goods, and 3¢ per case per month for Storage based on the Stock on hand at the first of each month.

The Party of the First Part will carry and pay for such Insurance as they deem necessary for the goods on consignment.

The Party of the First Part will render a Memo Invoice to the Party of the Second Part of all goods shipped on consignment, and will credit to such consignment account the amount of goods that are sold each month from said Stock, and the Party of the Second Part agree to pay for such goods sold by them, or taken from consigned goods while in their possession on the Terms which they are billed by the Party of the First Part on their regular Invoice.

It is also agreed that this Contract can be terminated at any time upon thirty days' written notice from either Party.

BERRY BROTHERS, LIMITED.
JAS. S. STEVENS,
Asst. Genl. Mngr.
GRAVES & LaBELLE.
By G. E. LaBELLE. [9]

[Exhibit "B" to Stipulation Regarding Objections to Claim of Berry Brothers—Letter, Dated November 16, 1912, Berry Brothers, Ltd., to W. P. Fuller & Co.]

November 16, 1912.

W. P. Fuller & Co.,
Seattle, Washington.

Gentlemen:

Inasmuch as you have interposed certain objections to the taking possession by *use* of certain goods heretofore delivered by us to Graves & LaBelle, and which goods we claim we delivered by virtue of a consignment agreement between ourselves and Graves & LaBelle, and inasmuch as you claim that the creditors of Graves & LaBelle will be entitled to these goods, or their value, in case of bankruptcy proceedings, we hereby agree that if you waive your objections and allow Graves & LaBelle to return these goods to us at this time, we will, in case of bankruptcy proceedings within four months from date, permit the question of our right to the possession of the goods to be submitted to the bankruptcy court of this district, and that we will, if in such event ordered to do so by said court, turn the said goods over to the Trustee in bankruptcy.

Yours very truly,
BERRY BROTHERS, LIMITED,
By R. L. HILTON,
Agent.

[Endorsed]: Stipulation. Filed May 21, 1913, 3 P. M. John B. Hoyt, Referee. Filed in the United

States District Court, Western District of Washington. Jun. 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [10]

[Trustee's Exhibit "A"—Balance Sheet, Dated October 31, 1913, of Federal Paint and Wall Paper Co.]

FEDERAL PAINT AND WALL PAPER CO.

BALANCE SHEET.

October 31st, 1912.

ASSETS:

Cash on hand	$ 70.36	
Cash in bank	20.60	
Cash deposits	65.00	
Accounts receivable	6,208.06	6,364.02
Merchandise—Inventory		15,596.77
Fixtures and Equipment—Inventory		2,750.00
Insurance—Unexpired		57.45
Total Assets		24,768.24
Deficit (Excess of Liabilities over Assets)		3,190.49
		27,958.73

LIABILITIES:

Notes payable	3,725.00
Accounts payable	23,976.44
Labor—Unpaid	23.63
Salaries "	133.66
Rent "	100.00
	27,958.73

[Endorsed]: Trustee's Exhibit "A." Filed May 21, 1913, 3 P. M. John P. Hoyt, Referee. Filed U. S. District Court, Western District of Washington, June 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [11]

[Claimant's Exhibit 1—Letter, Dated March 29, 1912, Berry Brothers, Ltd., of Detroit, Mich., to Berry Brothers, San Francisco, Cal.]

MEMORANDUM.

Address all correspondence to the house.

In your Reply refer to No. 70.

From

Berry Brothers, Limited.
Varnish Manufacturers,
Shellac Bleachers
and Refiners of Wood Alcohol.

Detroit, March 29th, '12.

To Messrs. Berry Brothers, Ltd.,
San Francisco, Calif.

Gentlemen:

We are this day shipping a car of Varnish for Graves & LaBelle, Seattle, to be placed in storage for us. The car no. is M. St. P. & S. S. M. 28304, and is routed M. C., C. G. W. & G. N.

We trust same will reach them promptly and in good condition.

Yours very truly,
BERRY BROTHERS, LIMITED.
per D. STEWART.

M. F. [12]

[Claimant's Exhibit 1—Letter, Dated May 3, 1912, Graves & LaBelle to Berry Brothers.]

GRAVES AND LA BELLE.
JOBBERS.
414 Union Street.
Seattle, Wash.

Paints
Oils
Glass and
Wallpapers

Painters
Paper-hangers
and
Janitor's Supplies

Berry Brothers, Ltd.,
San Francisco, Cal.

Gentlemen:

You may credit the account of Henry Bender with 12 gal. Elastic Interior Finish which we were able to get for him. Charge same to out warehouse account.

If Mr. Bender is still in error and we can assist you, call on us.

Thanking you, we are,

Yours very truly,
GRAVES & LA BELLE.
GEL.

GELB. 5/3/12

P. S.—Charge us with the following goods, drawn by us from warehouse stock in April:

1 case Liquid Granite in 4s
1 " Orange Shellac " "
1 " White " " "
3 " B Japan " 5's
1 " Liquid Granite " 1's

[13]

[Claimant's Exhibit 1—Letter, Dated June 10, 1912, Graves & LaBelle to Berry Bros., Ltd.]

GRAVES AND LA BELLE.

JOBBERS.

414 Union Street.

Seattle, Wash.

Paints
Oils
Glass and
Wallpapers

Painters
Paper-hangers
and
Janitor's Supplies

Berry Bros., Ltd.,
San Francisco, Cal.

Gentlemen:

Charge our account with the following:

1 case of Crescent Hard Oil.....1s
1 " " " " 1/2
1 " " " " 4
1 " Apex Paint & Varnish Remover.1
1 " " " " " .. " ...1/2
1 " " " " " " ...4
1 " Liquid Granite.. 1
1 " " " 1/2
1 " " " 4
1 " Gloss Coach..... .....1/2
1 " Bronzing Liquid..... 4
1 " " " 8
1 " B Japan..... 1
1 " " 1/2
25 Gal. Gloss Coach 5/5
5 " B Japan.... ....1/5

We are enclosing invoice for storage on 543 cases $16.29.

Yours truly,
GRAVES & LA BELLE.

GELB. 6/10/12 L. [14]

[Claimant's Exhibit 1—Letter Dated April 27, 1912, Graves & LaBelle to Berry Bros., Ltd.]

GRAVES AND LA BELLE.
JOBBERS.
414 Union Street.
Seattle, Wash.

Paints
Oils
Glass and
Wallpapers

Painters
Paper-hangers
and
Janitor's Supplies

Berry Bros., Ltd.,
San Francisco, Cal.

Gentlemen:

We are checking up a car of assorted goods arriving yesterday and find no advertising matter with the exception of 1 doz. sheet iron signs, and the Shingle Stain will surely be a dead stock without a color card. We should have a large number of shingle sets to distribute to architects, etc.

We will send you a warehouse slip in a day or so.

Attend to the advertising matter at once.

Thanking you, we are,

Yours very truly,
GRAVES & LA BELLE.
GEL.

GELB. 4/27/12 [15]

[Claimant's Exhibit 1—Letter, Dated April 22, 1912, Berry Brothers, Ltd., to Graves & LaBelle.]

April 22nd, 1912.

Graves & LaBelle,
Seattle, Wash.

Gentlemen:

We understood from our Mr. C. H. Adams that you would send us on the first of each month a memorandum of all stock sold so that this could be billed to you in accordance with our Contract.

Mr. Adams has been out of the city for a week or ten days and we are writing you direct to save time in case this matter has been overlooked. If the list was sent us, kindly mail us a duplicate as the original has failed to reach*ed* us.

Yours very truly,
BERRY BROTHERS, LTD.

THG/LEF. Office Mgr.

[Endorsed]: Claimant's Exhibit 1. Filed May 21, 1913, 3 P. M. John P. Hoyt, Referee. Filed U. S. District Court, Western District of Washington, June 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [16]

[Order of Referee in Bankruptcy Sustaining Objections to and Disallowing Claim of Berry Bros.]

This matter coming on duly and regularly to be heard upon the objections of the trustee to the claim of Berry Bros., and the Court having considered the stipulation with reference to the facts in the case and

having heard the evidence introduced by the trustee, and having heard the arguments of counsel, and it appearing to the Court that said objections to the claim of Berry Bros. are well taken,

NOW, THEREFORE, IT IS ORDERED, that the objections to the said claim be sustained and that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

Dated at Seattle, Washington, this 2d day of June, 1913.

JOHN P. HOYT,
Referee.

[Endorsed]: Order Expunging Claim of Berry Brothers. Filed June 2, 1913, 11 A. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. June 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [17]

Stipulation as to Testimony Presented at the Hearing of Objections to the Claim of Berry Brothers.

It is hereby stipulated by and between the trustee for the bankrupts herein, and Berry Brothers, claimants, acting through their respective counsel, that besides the facts hereinbefore stipulated, testimony was taken before the Referee at the hearing of the objections to the claim of said Berry Brothers which was in substance as follows:

[Testimony of F. D. Seymour, for Trustee.]

F. D. SEYMOUR, being called as a witness in behalf of the trustee, after having been duly sworn, testified that he is the manager of W. P. Fuller & Co., of Seattle, Washington, and has been such for several years last past; that for a period of several months preceding the date of the filing of the petition in voluntary bankruptcy of the bankrupts herein, he was well acquainted with the affairs and financial condition of the said bankrupts; that on the 16th day of November, 1912, and for some time prior thereto, the said bankrupts were insolvent; that the statement hereto attached and marked trustee's Exhibit "A," is the statement delivered to said witness by said bankrupts before the said 16th day of November, 1912, which statement was prepared by the bankrupts and was delivered to the witness as a statement of the financial condition of the bankrupts; that the witness believed said statement to be a true and correct statement of the financial condition of said bankrupts on the date named in said exhibit; that the merchandise received by the bankrupts from Berry Brothers, and warehoused at Seattle at that time, was included in the said statement as a portion of the assets of said bankrupts, the same being the identical merchandise which was thereafter retaken by said Berry Brothers; that on or about November 1, 1913, at the request of some of the creditors of [18] Graves & LaBelle, he undertook to superintend the business of said Graves & LaBelle, and in such capacity all matters pertain-

ing to their business were referred to him; that on or about November 16, 1912, Berry Brothers, through their agent, R. L. Hilton, informed him that said Berry Brothers was desirous of obtaining possession of certain goods in the warehouse of said Graves & LaBelle, which had, previous to said date, been shipped to Graves & LaBelle by Berry Brothers; that he informed said Hilton that the creditors of said bankrupts were entitled to said goods. But in order to prevent litigation said Berry Brothers were allowed to retake said goods upon the conditions set forth in the letter attached to the first stipulation herein between said Berry Brothers and the trustee, and with a further understanding that the creditors waived no rights by allowing the return of said goods, and that in case of bankruptcy proceedings the trustee was to be regarded as in the same position as though he had such goods in his possession. The aforesaid statement marked Trustee's Exhibit "A" was then by the trustee offered in evidence. All the foregoing testimony was objected to by said Berry Brothers on the grounds that it was immaterial and irrelevant.

Five letters pinned together and marked Claimant's Exhibit "1" were thereupon offered in evidence in behalf of the claimant Berry Brothers.

It is further agreed and stipulated by the parties hereto, as facts to be considered by the Court in the above-entitled matter, that each time goods were withdrawn by the said Graves & LaBelle from the stock in their warehouse of the goods shipped them by said Berry Brothers under and by virtue of the

agreement marked Exhibit "A," and attached to the original stipulation of facts herein, that said goods were, upon being so withdrawn, taken to the salesrooms of said Graves & LaBelle, [19] which were separate from said warehouse and at a distance of several blocks therefrom, and that the claim of said Berry Brothers herein amounting to $1,861.50, objected to by the trustee, is for the goods having been removed to the salesrooms as aforesaid, and that none of such goods were retaken by said Berry Brothers. It is also stipulated that the goods shipped by Berry Bros. arrived at Graves & LaBelle's warehouse in Seattle in March, 1912, and were not included by Graves & LaBelle as an asset until Oct. 31, 1912, and then without the knowledge and consent of Berry Brothers.

McCLURE & McCLURE,
Attorneys for Trustee.
FRANK E. GREEN,
Attorney for Berry Brothers. [20]

[Endorsed]: Stipulation as to Testimony Presented at the Hearing of Objections to the Claim of Berry Brothers. Filed June 4, 1913, 2 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Jun. 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [21]

Petition to Review Order of Referee Sustaining Objections to, and Expunging the Claim of Berry Brothers.

To the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington:

The petition of Berry Brothers, a corporation, under the laws of the State of Michigan, one of the creditors of the aforesaid bankrupts, respectfully represents that manifest error to the prejudice of this complainant was made by the Referee in said matter in the findings and conclusions entered herein on the 26th day of May, 1913, and in the order sustaining the objections to, and disallowing and expunging the claim of said corporation against said bankrupts from the list of allowed claims upon the trustee's record in said case, which said order was entered on the 2d day of June, 1913.

The errors complained of are:

1. Said Referee erred in finding from the evidence that this claimant had, shortly before the adjudication of bankruptcy, received from the bankrupts merchandise of the value of more than $3,000.00.

2. Said Referee erred in finding that at the time the aforesaid merchandise was taken by this claimant, the bankrupts were insolvent and said fact was known to this claimant.

3. Said Referee erred in finding that the title to the aforesaid merchandise passed from this claimant, as to creditors [22] of the bankrupts, to the trus-

tee who now represents the bankrupts.

4. Said Referee erred in finding that the delivery of the aforesaid merchandise to the possession of the bankrupts conveyed absolute title thereto to the bankrupts so far as the rights of creditors are concerned.

5. Said Referee erred in finding that the bankrupts had entire control of the aforesaid merchandise with the absolute right to sell any part, of the whole thereof, at any time they might elect so to do.

6. Said Referee erred in finding that the taking of the merchandise in question was prejudicial to the rights of creditors, and constituted a preference.

7. Said Referee erred in finding that this claimant must surrender the aforesaid merchandise before the claim presented by this claimant can be allowed.

8. Said Referee erred in his conclusions of law from the evidence offered at said hearing.

WHEREFORE, the said Berry Brothers prays that it may be decreed by the Court to have its claim against said bankrupts' estate allowed for the full amount thereof, and that it be restored to all things lost by reason of the finding and order of the Referee in said matter.

BERRY BROTHERS.
By FRANK E. GREEN,
Its Attorney.

Copy of within Petition received and service of the same acknowledged this 3d day of June, 1913.

McCLURE & McCLURE,
Attorneys for Trustee.

[Endorsed]: Petition to Review Order of Referee Sustaining Objections to, and Expunging the Claim of Berry Brothers. Filed June 4, 1913, 2 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Jun. 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [23]

Opinion on Review of Referee's Decision.

CUSHMAN, District Judge.

This matter is before the Court for a review of the Referee's decision sustaining objections to the claim of Berry Bros., a corporation, one of the creditors, the objections being made upon the ground that this creditor had obtained an unlawful preference by retaking certain goods of the bankrupt within four months of the filing of the petition herein for adjudication, by the bankrupts.

Under the claim made by Berry Brothers, these goods were delivered to the bankrupt under a contract providing:

"Agreement between Berry Brothers, Limited, of Detroit, Michigan, Party of the First Part, and Graves & LaBelle of Seattle, Washington, Party of the Second Part;

"The Party of the Second Part hereby agree to store such goods that the Party of the First Part may ship on consignment to the Party of the Second Part for the purpose of Sale by said Graves & LaBelle.

"The Party of the First Part agree to pay the

Party of the Second Part the cost of cartage in Seattle from the car to their Warehouse of each consignment of goods, and 3¢ per case per month for Storage based on the Stock on hand at the first of each month.

"The Party of the First Part will carry and pay for such Insurance as they deem necessary for the goods on consignment.

"The Party of the First Part will render a Memo Invoice to the Party of the Second Part of all goods shipped on consignment and will credit to such consignment account the amount of goods that are sold each month from said Stock, and the Party of the Second Part agree to pay for such goods, sold by them, or taken from consigned goods while in their possession on the Terms which they are billed by the Party of the First Part on their regular Invoice.

"It is also agreed that this Contract can be terminated at any time upon thirty days' written notice from either Party."

Upon this contract and stipulated facts, the Referee decided: [24]

"The stipulation of the parties and the undisputed proofs showed that the claimant had shortly before the adjudication of bankruptcy received from the bankrupt merchandise of the value of more than $3,000.00; that at the time the merchandise was so taken by the claimant the bankrupts were insolvent and the fact known to the claimant; that the goods so taken had been furnished to the bankrupts under a contract made between the parties on the 18th day of March, 1912. It was agreed by the claimant that the

taking of such goods from the possession of the bankrupts or their voluntary trustee should not affect the rights of the parties, but that the question as to whether these goods were the property of the bankrupts or of the claimant should be determined in the Bankruptcy Court the same as it might have been had the goods gone into the possession of the trustee in bankruptcy. The substantial question to be decided is as to whether or not under the contract in question the title to the goods delivered by the claimant to the bankrupts in pursuance thereof so passed to the bankrupts that the trustee in said bankruptcy had the right to them as against said claimant. As between the parties it is clear that the title to the merchandise did not pass, but in the opinion of the Referee such title did pass as to creditors of the bankrupts and the trustee who now represents them. The contract in question presents some feature not heretofore considered in this Court, but when taken as a whole the Referee is of the opinion that its interpretation comes within rules heretofore announced in this District, and that thereunder it must be held to have conveyed absolute title to the bankrupts so far as the rights of creditors are concerned. The bankrupts had entire control of the merchandise, with the absolute right to sell any part or the whole thereof at any time they might elect so to do. Such sales to be made in their own name and at any price which they might see fit to charge, and with no provision whatever that the particular funds derived from each sale should become the property of the claimant. It being only required that they should

render an account of such sales and pay for the goods sold during the preceding month, when billed to them by the claimant. This being so the Referee is unable to find that the secret agreement between the claimant and the bankrupts requiring claimant to pay freight and storage charges should in any way affect the question of the change of title as to creditors.

"It follows that in the opinion of the Referee, the taking of the merchandise in question was prejudicial to the rights of creditors and constituted a preference which must be surrendered before the claim in question can be allowed.

"An order will be made and entered sustaining the objections and expunging the claim.

"Dated at Seattle, in said District, this 26th day of May, 1913."

GATES & EMERY, McCLURE & McCLURE, for Trustee.

FRANK E. GREEN, for Claimant, Berry Brothers. [25]

The Trustee relies upon the following authorities:

5 Cyc. 169;

35 Cyc. 28;

1 Loveland on Bankruptcy, 832;

12 Cyc. 628, 644;

Re Penny & Anderson, 23 A. B. R. 115;

Re Hassam, 18 A. B. R. 745; 153 Fed. 932.

Claimant relies upon the following authorities:

Hunt vs. Wyman, 100 Mass. 198;

Strum vs. Boker, 150 U. S. 312;

Guss vs. Nelson, 200 U. S. 298;

Rumpf vs. Bartow, 10 Wash. 382;

Peterson vs. Woolery, 9 Wash. 390;
Columbus Buggy Co., 143 Fed. 859;
Wood Mowing & Reaping Mach. Co. vs. Vanstory, 171 Fed. 375;
Southern Hdwe. & Supp. Co. vs. Clark, 201 Fed. 1;
L. C. Smith & Bros. Typewriter Co. vs. Alleman, 199 Fed. 1;
In re Marx Tailoring Co., 28 A. B. R. 147.

The order of the Referee is confirmed. While the arrangement between the creditor and the bankrupt was not an ordinary sale, yet as to the creditors, if not an absolute sale, it was a conditional one, requiring recording as against creditors. The contract and stipulated facts show that as a bailment it was merely colorable.

[Endorsed]: Opinion on Review of Referee's Decision. Filed in the United States District Court, Western District of Washington. June 27, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [26]

Order Confirming Decision of Referee.

The above matter coming on duly and regularly to be heard upon the petition of Berry Bros., claimant, for a review of the Referee's decision sustaining objections to the claim of Berry Bros., a corporation, one of the creditors in the above-entitled matter, the said objections being made upon the ground that said creditor obtained an unlawful preference by retaking certain goods of the bankrupts within four months of the filing of the petition herein for adjudication by

the bankrupts, and said matter having been duly argued before the Court on the 9th day of June, 1913, and the Trustee being represented by Gates & Emory, and McClure & McClure, his attorneys, and the claimant being represented by Frank E. Green, its attorney, and the Court having heard the arguments of counsel, and having duly considered the matter, and having heretofore and on June 27, 1913, filed his memorandum of decision herein,

NOW, THEREFORE, by virtue of the law and reason in the premises, IT IS ORDERED AND ADJUDGED, that the said decision of the Referee sustaining the objections to said claim of Berry Bros., a corporation, be and the same is hereby in all things approved and confirmed.

Done in open court this 3d day of July, 1913.

EDWARD E. CUSHMAN,
Judge. [27]

Due and timely service of within order this 2d day of July, 1913, and receipt of a copy thereof, admitted.

FRANK E. GREEN,
Attorney for Berry Brothers.

[Endorsed]: Order Confirming Decision of Referee. Filed in the United States District Court, Western District of Washington. Jul. 3, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [28]

Petition for Appeal.

PETITION ON APPEAL OF BERRY BROTHERS, A CORPORATION, CLAIMANT.

The above-named Berry Brothers, claimant, con-

sidering itself aggrieved by the decision made and entered on the 27th day of June, 1913, and the judgment made and entered on the 3d day of July, 1913, in the above-entitled cause confirming the order of the Referee expunging the claim of this claimant, does hereby appeal from such decision and such judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Error, which is filed herewith, and it prays that this appeal may be allowed, and that transcript of the record, proceedings and papers upon which said decision and judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

FRANK E. GREEN,
Attorney for Berry Brothers, Claimant.

Copy of within Petition received and service of the same acknowledged this 7th day of July, 1913.

McCLURE & McCLURE and
GATES & EMERY,
Attorneys for Trustee.

[Endorsed]: Petition on Appeal of Berry Brothers, a Corporation, Claimant. Filed in the United States District Court, Western District of Washington. Jul. 7, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [29]

Assignment of Error on Appeal.

And now on the seventh day of July came the said Berry Brothers, a corporation, a creditor of the above-named bankrupts, and say that the decision

and judgment order in said cause are erroneous and against the just rights of said creditor of said bankrupts for the following reasons:

1. Because the stipulated facts and evidence show that the claim of said Berry Brothers should have been allowed as a valid debt against the estate of the bankrupts.

2. Because the stipulated facts and evidence show that as to the goods retaken by Berry Brothers from the warehouse of the bankrupts, November 16, 1912, did not constitute an unlawful preference within four months of the filing of the petition herein for adjudication by the bankrupts.

3. Because the stipulated facts and evidence herein show that the goods retaken by Berry Brothers, November 16, 1912, from the warehouse of the bankrupts were not a conditional sale requiring record as against creditors.

4. Because the stipulated facts and evidence herein show that the goods retaken by Berry Brothers, November 16, 1912, from the warehouse of the bankrupts were not a colorable [30] bailment, but that while said goods remained in said warehouse were in fact and law a bailment.

5. Because there is no evidence, stipulated or otherwise, showing that the retaking of the goods in the warehouse November 16, 1912, by Berry Brothers, constituted a preference to Berry Brothers, or prejudiced the rights of any other creditor of the bankrupts.

6. Because the stipulated facts and evidence herein show that the order of the Referee disallowing the claim of Berry Brothers and expunging the same

from the records of the Trustee on the objections of the Trustee, should have been reversed.

7. Because the stipulated facts and evidence herein show that the decision and judgment order should have been in favor of this creditor of the above-named bankrupts and against the Trustee of the above-named bankrupts.

WHEREFORE, the said creditor and claimant of the above-named bankrupts prays that said decision and judgment order and decree be reversed, and that said District Court may be directed to enter a decree and judgment allowing said claim of said creditor, Berry Brothers, as a proved debt against the estate of the bankrupts.

FRANK E. GREEN,
Attorney for Said Creditor and Claimant Berry Brothers.

Copy of within assignment received and service of the same acknowledged this 7th day of July, 1913.

GATES & EMERY and
McCLURE & McCLURE,
Attorneys for Trustee.

[Endorsed]: Assignment of Error on Appeal. Filed in the United States District Court, Western District of Washington. Jul. 7, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [31]

[Order Granting Appeal and Fixing Amount of Bond on Appeal.]

ORDER GRANTING APPEAL OF BERRY BROTHERS, CLAIMANT.

The claimant, Berry Brothers, having heretofore

filed herein its petition for appeal and assignment of error, and having given notice to the Trustee in the above-entitled cause, and the said Trustee being represented by his attorneys, Gates & Emery and McClure & McClure, said appeal is allowed to said petitioner upon the execution of a cost bond in the sum of Two Hundred and Fifty Dollars ($250.00).

The GLOBE INDEMNITY COMPANY of New York is accepted on said bond as surety, and said bond is now approved.

Dated at Seattle, Washington, this 7th day July, 1913.

EDWARD E. CUSHMAN,
District Judge.

Copy of within Order received and service of the same acknowledged this 7th day of July, 1913.

GATES & EMERY and
McCLURE & McCLURE,
Attorneys for Trustee.

[Endorsed]: Order Granting Appeal of Berry Brothers, Claimant. Filed in the United States District Court, Western District of Washington. Jul. 7, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [32]

Bond for Costs on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Berry Brothers, a corporation of the State of Michigan, a claimant in the above-entitled cause, as principal, and Globe Indemnity Company, a corporation organized under the laws of the state of

New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto R. B. Snowdon as Trustee in bankruptcy in the above-entitled cause in the just and full sum of Two Hundred and Fifty Dollars ($250.00), to be paid to the said R. B. Snowdon, Trustee, or his successors, to which payment well and truly to be made, we bind ourselves, our assigns and successors, jointly and severally by these presents.

Sealed with our seal and dated this 7th day of July, in the year of our Lord one thousand nine hundred and thirteen.

The condition of this obligation is such that whereas, the claim of the above-named claimant, Berry Brothers, as a creditor of the above-named bankrupts, was by the Referee in bankruptcy in the above-entitled court on the second day of June, 1913, on objections by the Trustee in said cause, disallowed and ordered expunged from the list of claims upon the Trustee's record in said cause, and

Whereas, on the 27th day of June, 1913, the above-entitled court in a decision filed in said cause and in an order of judgment filed in said cause on the 3d day of July, 1913, confirmed the decision of said Referee and sustained the objections to said claim of said claimant, and

Whereas, the above-named principal, Berry Brothers, having obtained an appeal and filed a copy thereof in the clerk's office of the said court, from said decision and judgment of [33] said District

Court to the United States Circuit Court of Appeals for the Ninth Circuit,

NOW, THEREFORE, if the said Berry Brothers shall prosecute its appeal to effect and answer all costs and damages that may be awarded against it on said appeal, if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

BERRY BROTHERS.
By FRANK E. GREEN,
Its Attorney.

GLOBE INDEMNITY COMPANY.
By L. V. BREWER,
Resident Vice-President.

[Seal] Attest: A. H. KENAGA,
Resident Assistant Secretary.

Approved this 7th day of July, A. D. 1913, by
EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Bond for Costs on Appeal. Filed in the United States District Court, Western District of Washington. Jul. 7, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [34]

Citation [on Appeal (Copy)].

To R. B. Snowdon, as Trustee in Bankruptcy of the Above-named Bankrupts, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco in the State of California, within thirty days after the date of this citation pur-

suant to a petition on appeal and assignment of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, in the above-entitled matter in which Berry Brothers is claimant, to show cause, if any there be, why the judgment rendered in said cause confirming the order of the Referee in Bankruptcy disallowing and expunging the claim of said Berry Brothers, as in said petition of appeal mentioned, should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. EDWARD DOUGLASS WHITE, Chief Justice of the United States, this eighth day of July, 1913.

[Seal] EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

Copy of the foregoing citation on appeal received and due service thereof acknowledged this 8th day of July, 1913.

GATES & EMERY and
McCLURE & McCLURE,
Attorneys for R. B. Snowdon, Trustee.

[Endorsed]: No. 5030. In the District Court of the United States for the Western District of Washington, Northern Division. In the Matter of Edwin L. Graves and George E. LaBelle, et al., Bankrupts. Berry Brothers, Claimant. Citation. Filed in the United States District Court, Western District of Washington. Jul. 10, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. Frank E.

Green, Attorney for Claimant, P. O. Address: Suite 230 Burke Building, Seattle, King County, Wash. [35]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 39 typewritten pages numbered from 1 to 39, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, exhibits and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of this cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for in Praecipe by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the transcript of the record on appeal in the above-entitled cause from the District Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the claimant and appellant for the preparation and certification of the typewritten transcript

of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [36]

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905) for making transcript of the record for printing purposes, 76 folios at 20c per folio.....	$15.20
Certificate to certified copy of type-written transcript of record.....	.30
Seal to said certificate.....	.40
	$15.90

I hereby certify that the above cost for preparing and certifying record amount to $15.90 has been paid to me by Frank E. Green, Esq., attorney for claimant and appellant.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District this *th* day of July, 1913.

[Seal] FRANK L. CROSBY,
Clerk. [37]

In the United States District Court for the Western District of Washington, Northern Division.

No. 5030.

In the Matter of EDWIN L. GRAVES and GEORGE E. LaBELLE, Copartners as GRAVES & LaBELLE and FEDERAL PAINT & WALL PAPER CO., and EDWIN L. GRAVES, Individually, and GEORGE E. LaBELLE, Individually,

Bankrupts.

Citation [on Appeal (Original)].

To R. B. Snowdon, as Trustee in Bankruptcy of the Above-named Bankrupts, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco in the State of California, within thirty days after the date of this citation pursuant to a petition on appeal and assignment of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, in the above-entitled matter in which Berry Brothers is claimant, to show cause, if any there be, why the judgment rendered in said cause confirming the order of the Referee in Bankruptcy disallowing and expunging the claim of said Berry Brothers, as in said petition of appeal mentioned, should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. EDWARD DOUGLASS WHITE, Chief Justice of the United States, this eighth day of July, 1913.

[Seal] EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

Copy of the foregoing Citation on Appeal received and due service thereof acknowledged this 8th day of July, 1913.

GATES & EMERY and
McCLURE & McCLURE,
Attorneys for R. B. Snowdon, Trustee. [38]

[Endorsed]: No. 5030. In the District Court of the United States for the Western District of Washington, Northern Division. In the Matter of Edwin L. Graves and George E. LaBelle et al., Bankrupts. Berry Brothers, Claimant. Citation. Filed in the United States District Court, Western District of Washington. Jul. 10, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [39]

[Endorsed]: No. 2286. United States Circuit Court of Appeals for the Ninth Circuit. Berry Brothers, a Corporation, Appellant, vs. R. B. Snowdon, as Trustee in Bankruptcy of Edwin L. Graves and George E. LaBelle, Copartners as Graves & LaBelle and Federal Paint & Wall Paper Co., and Edwin L. Graves, Individually, and George E. LaBelle, Individually, Bankrupts, Appellee. In the Matter of Edwin L. Graves and George E. LaBelle, Copartners as Graves & LaBelle and Federal Paint & Wall Paper Co., and Edwin L. Graves, Individually, and George E. LaBelle, Individually. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Received July 15, 1913.

F. D. MONCKTON,
Clerk.

Filed July 17, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

BERRY BROTHERS, a corporation, *Appellant,* *vs.* R. B. SNOWDON, as Trustee in Bankruptcy, *Appellee,* In the Matter of EDWIN L. GRAVES and GEORGE E. LaBELLE, co-partners as GRAVES & LaBELLE, and FEDERAL PAINT & WALL PAPER COMPANY, and EDWIN L. GRAVES, individually, and GEORGE E. LaBELLE individually, Bankrupts.	No. 2286.

APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment order of the District Court of Western Washington confirming an order of the referee in bankruptcy disallowing

and expunging the claim of appellant, Berry Brothers, against the bankrupts.

The appellant is a corporation of the State of Michigan, with its principal offices and manufacturing plant at Detroit, and is engaged in the manufacturing and wholesaling of varnish and allied products. On March 18, 1912, appellant and bankrupts entered into a written agreement (Trans., pp. 8-9), whereby the bankrupts agreed to store in their warehouse in Seattle such goods as appellant would ship them from time to time. Appellant agreed to pay the freight, cartage, monthly warehouse charges, and to keep the stock of goods so stored, insured for its own protection. Under this agreement a stock of goods amounting to approximately $5,000.00 was shipped by appellant to bankrupts, and upon arrival in Seattle in March, 1912 (Trans., p. 20), appellant paid the freight, and cartage from the cars to bankrupts' warehouse, and thereafter paid storage to bankrupts monthly for the goods so stored, and kept the goods insured for its own protection (Trans., p. 6). On various occasions while appellant's goods were stored in bankrupts' warehouse, appellant withdrew portions of the stock and sold it independently of the bankrupts, with their knowledge and without objection on their part (Trans., pp. 6-7). By virtue of the

agreement, bankrupts were permitted to remove goods to sell from the stock so stored, provided that at the end of each month they reported to appellant the amount of goods so withdrawn from their warehouse, and appellant would thereupon render an invoice to bankrupts for goods so removed. There were other goods of bankrupts in the same warehouse, but there is no evidence tending to show that the goods stored for appellant were in any manner intermixed with other goods. Each time the bankrupts removed any of appellant's goods from the warehouse, the goods were taken to the salesrooms of the bankrupts, which were situated several blocks away from the warehouse (Trans., p. 20). Bankrupts included appellant's stored goods as an asset in a financial statement issued October 31, 1912, but did so without the knowledge or consent of appellant, and had not done so before that date, though the goods had been in their possession since March, 1912 (Trans., p. 20). By November 16, 1912, goods to the amount of $1,861.50 had been removed from the warehouse to bankrupts' salesrooms, and had in due course been invoiced and charged by appellant to the bankrupts (Trans., p. 20). On this latter date, appellant desiring to withdraw the goods remaining in the bankrupts' warehouse, and objection being made by a creditor of the

bankrupts to such withdrawal, appellant agreed with the objecting creditor that if bankruptcy proceedings result within four months from said date, appellant would permit the question of its right to withdraw said goods from bankrupts' warehouse to be adjudicated in such bankruptcy proceedings; whereupon appellant withdrew the goods then remaining in bankrupts' warehouse, amounting to approximately $3,000.00.

In due course, after bankruptcy proceedings were instituted (February, 1913), appellant filed its claim of $1,861.50 for the goods removed by the bankrupts from their warehouse to their salesrooms, which goods had been invoiced and charged to the bankrupts. To this claim the trustee for the bankrupts filed objections (Trans., pp. 4-5) on the ground that the withdrawal by appellant of the goods remaining in bankrupts' warehouse November 16, 1912, constituted a preference over the other creditors. The referee sustained the trustee's objections, and on petition for review to the District Court the referee's order was confirmed, from which judgment order or decree this appeal is prosecuted.

ASSIGNMENT OF ERRORS.

The court erred:

1. Because the stipulated facts and evidence

show that the claim of said Berry Brothers should have been allowed as a valid debt against the estate of the bankrupts.

2. Because the stipulated facts and evidence show that as to the goods retaken by Berry Brothers from the warehouse of the bankrupts, November 16, 1912, did not constitute an unlawful preference within four months of the filing of the petition herein for adjudication by the bankrupts.

3. Because the stipulated facts and evidence herein show that the goods retaken by Berry Brothers, November 16, 1912, from the warehouse of the bankrupts were not a conditional sale requiring record as against creditors.

4. Because the stipulated facts and evidence herein show that the goods retaken by Berry Brothers, November 16, 1912, from the warehouse of the bankrupts were not a colorable bailment, but that while said goods remained in said warehouse were in fact and law a bailment.

5. Because there is no evidence, stipulated or otherwise, showing that the retaking of the goods in the warehouse November 16, 1912, by Berry Brothers, constituted a preference to Berry Brothers, or prejudiced the rights of any other creditor of the bankrupts.

6. Because the stipulated facts and evidence herein show that the order of the referee disallowing the claim of Berry Brothers and expunging the same from the records of the trustee on the objections of the trustee, should have been reversed.

7. Because the stipulated facts and evidence herein show that the decision and judgment order should have been in favor of this creditor of the above named bankrupts and against the trustee of the above named bankrupts.

ARGUMENT.

This case was heard by the referee in bankruptcy on stipulated facts (Trans., pp. 6-10) and the testimony of one witness in behalf of the trustee (Trans., pp. 18-19) and certain exhibits offered in evidence (Trans., pp. 11-16). The testimony by the witness in behalf of the trustee tends to show that on November 16, 1912, the bankrupts were insolvent; that appellant knew of this insolvency at the time the stored goods were withdrawn by appellant from the bankrupts' warehouse; that in a financial statement prepared by the bankrupts October 31, 1912, the stored goods of appellant were included in said statement. All this testimony was objected to by appellant on the grounds that it was

immaterial and irrelevant (Trans., p. 19). In this argument we shall urge two principal points, either of which we submit is sufficient to reverse the lower court.

I.

APPELLANT'S GOODS WHILE STORED IN BANKRUPTS' WAREHOUSE CONSTITUTED A BAILMENT, AND WERE NOT SUBJECT TO LIENS OF BANKRUPTS' CREDITORS.

Under the amendment by Congress of June 25, 1910, to the Bankruptcy Act, the trustee in bankruptcy is vested with rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, and therefore the right of appellant to withdraw the goods from the bankrupts' warehouse November 16, 1912, must be determined by the rights of bankrupts' creditors to a lien on the goods at that time. If the bankrupts held the goods as bailors their creditors had no right of lien.

Counsel for the trustee argued in the lower court that the goods in question constituted a conditional sale, and by virtue of the local law a memorandum of such sale should have been filed with the county auditor within ten days from the time of delivery of the goods in order to preserve title in

appellant as against the bankrupts' subsequent creditors. This view seems to have been concurred in by the lower court. We submit, however, that on the facts in this case such a view is contrary to the decisions of the Supreme Court of the State of Washington.

In *Rumpf v. Bartow,* 10 Wash. 382, the court held that, where goods are delivered to a person under a memorandum agreement as follows:

> "These goods are sent for your inspection, the property of Rumpf & Mayer, and to be returned to them within demand days. Sale only takes effect from date of their approval of your selection, and until then goods are held subject to their order."

The transaction constitutes a bailment and not a conditional sale, and holds that this is true as well as to other innocent parties.

In *Peterson v. Woolery,* 9 Wash. 390, the court holds that the delivery of shingle bolts to a shingle manufacturer under a contract providing that title to the bolts was not to pass, and that payment therefor was to be at certain rate for shingles manufactured therefrom, does not constitute such a conditional sale of the shingle bolts as to require a record thereof to be made under the conditional sales statute of Washington in order to prevent the sale being treated absolute as to creditors.

The foregoing local cases are in harmony with the decisions of other courts, both federal and state:

In *Hunt v. Wyman,* 100 Mass. 198, the court makes the following distinction:

"An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

The above distinction is quoted approvingly by the Supreme Court of the United States in *Sturm v. Boker,* 150 U. S. 312, and *Guss v. Nelson,* 200 U. S. 298. Applying this distinction to the present case, we clearly have an option by bankrupts to purchase any portion of the goods stored in their warehouse by appelant, by removing such portion from the warehouse to their salesrooms. In other words, as long as the goods remained in the warehouse they were there entirely at the cost and risk of appellant, and bankrupts could purchase any portion of such goods by complying with the agreement and in no other way, that is, by removing the goods from the warehouse and reporting the items so removed.

In re Columbus Buggy Co., 143 Fed. 859, we quote from the syllabus as follows:

"A contract between a furnisher of goods and the receiver that the latter may sell them at such

prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expenses of insurance, freight, storage and handling and that he will hold the merchandise unsold subject to the order of the furnisher, discloses an agreement of bailment for sale, and does not evidence a conditional sale. Such a contract is not affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers."

In the foregoing case the court, in defining a contract of sale, says:

"An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and the agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale."

Measuring the agreement between the bankrupts and the appellant now before this court, by the foregoing definition of a sales contract, which, by the way, has been adopted and quoted by several of the Circuit Courts of Appeal up to the present time, it becomes apparent at once that the agreement now before the court lacks the one essential of purchase. In other words, there is no agreement on the part of bankrupts to buy any of the goods that were stored by appellant in their warehouse. They simply had an option to buy, but had not bought, and were not bound to buy. Even the referee, in his findings, frankly admits that appellant could

not have maintained an action against the bankrupts for the goods remaining stored in the warehouse under this agreement.

A case quite similar to the one now before the court is *Wood Mowing & Reaping Mach. Co. v. Vanstory,* 171 Fed. 375. The facts and conclusions are briefly stated in the first paragraph of the syllabus, as follows:

"Petitioner, a manufacturer of farm machinery, shipped machines by the carload to the bankrupt, which was a hardware company, under a contract by which the bankrupt received and stored the same and from time to time shipped machines out on orders from petitioner. The machines were not charged to the bankrupt, nor invoiced as part of its stock, but it was paid an agreed price for storage and transfer. It had the privilege of selling any of the same to its own customers, and machines, when so sold, were charged to it. At the end of the year an inventory was taken by petitioner of the machinery then on hand in storage. Held, that the transaction was a bailment, the title remaining in petitioner, and that on the bankruptcy it was entitled to reclaim possession of the machines on hand from the bankrupt's trustee."

In *Southern Hardware & Supply Co. v. Clark,* 201 Fed. 1, the court in part says:

"When the buyer is, by the contract, bound to do something as a condition precedent to the passing of the title to the property, the title will not pass till the condition is fulfilled, although the property is delivered into the possession of the buyer.

The buyer, in such case, acquires no property in the thing bought. He is only a bailee for a specific purpose. The delivery of possession, which, in ordinary cases, passes the title, can only have that effect when the condition is fulfilled—when, in a case like this, the purchase money is paid."

In re Smith & Nixon Piano Co., 149 Fed. 111.
In re Galt, 120 Fed. 64.
Butler Bros. Shoe Co., vs. U. S. Rubber Co., 156 Fed. 1.
Metropolitan Nat'l Bank vs. Benedict Co., 74 Fed. 182.

Counsel for appellee will no doubt argue that the foregoing cases were all decided before the amendment of June 25, 1910, but we submit that the distinction between a bailment and a conditional sale has in no way been changed by the amendment.

The written agreement of appellant and bankrupts as to the conditions under which these goods were delivered to the bankrupts, shows clearly by its terms that it was a contract of bailment, and as such the court should give it full force and effect against the trustee who stands in the position of a creditor.

In *L. C. Smith & Bros. Typewriter Co. v. Alleman*, 199 Fed. 1, the court in part says:

"While it is true that the mere use of the words 'lease' and 'rental' in a written agreement relating to personality, will not convert into a bailment what must otherwise be construed as a conditional sale, yet, even in a contest in which execution creditors

are concerned, if the contract by its terms is a bailment, the courts will give it its effect to the exclusion of the execution creditor."

In the lower court counsel for appellee relied largely upon the case of *Penny & Anderson,* 23 A. B. R. 115, decided by Referee Stanley W. Dexter, but we submit that case is clearly distinguishable from the case now before this court. In that case at page 117, the agreement between the parties is set forth in full. Omitting unessential details, the agreement is as follows:

"This agreement made the 10th day of June, 1909, by and between James M. McCunn & Co., party of the first part, and Penny & Anderson, parties of the second part, witnesseth:

"Whereas, the parties of the second part are about to open a restaurant with a bar at No. 152 Columbus Avenue, and whereas, the parties of the second part are unable to pay for said goods hereinafter described (here follows list of goods).

"The party of the first part agrees to stock the wine cellar of the parties of the second part * * * and in consideration of the foregoing it is agreed by and between the parties that the said wines and liquors shall be considered as placed at the premises No. 152 Columbus Avenue on consignment, and the title in and to said wines and liquors shall always be in the party of the first part until the full indebtedness to the party of the first part is paid and receipt in full therefor is given.

"It is also further agreed that the value of the

said wines and liquors hereby to be delivered under this agreement is $945.65."

It will be seen at a glance that by the above agreement Penny & Anderson agreed to purchase at a specified price, which are elements essential to a sale. By agreeing that the title was to remain in the vendors, it became a conditional sale. But the case now before the court is entirely different. Bankrupts did not agree to purchase any goods except as from time to time they removed goods stored in the warehouse, and thereby agreed to purchase such goods so removed. In addition to this, in the Penny & Anderson case the vendors of the goods did not pay storage for the goods, did not keep them insured to their own account, and there is nothing in the agreement indicating that the goods were stored, nor were the goods kept in a warehouse at a considerable distance from the goods displayed for sale by Penny & Anderson.

In re Marx Tailoring Co., 28 A. B. R. 147, we have a condition quite similar to the case now before this court, in which the amendment of June 25, 1910, is construed. For the sake of brevity we quote the facts and conclusions from the syllabus, as follows:

"Petitioner, upon closing out a tailoring business, entered into an agreement with bankrupt to handle as samples, on a commission basis, certain

piece goods which had constituted part of petitioner's stock in trade, the goods to be made up at petitioner's principal place of business when bankrupt could persuade his customers to consent. Petitioner was to pay taxes and insurance and be entitled to recall any of the goods at any time and all unsold goods at the end of the season. Goods damaged, while in bankrupt's possession, except by fire, were to be paid for by him. Bankrupt, moreover, was to have the privilege of using any of the piece goods to make up suits for customers who would not consent to have them made up by petitioner, and such goods as were so used were to be charged to bankrupt at twenty per cent above the list price, but he was not required to account to petitioner for the specific proceeds of the goods so used. Bankrupt used in this manner practically all of the piece goods disposed of by him at all, the remainder being in his possession when bankruptcy intervened. Held, that the conditional privilege of purchase did not convert the contract, which was otherwise one of bailment, into a contract of sale; and that since there was no sale until the privilege was exercised by the bankrupt, and then only as to the piece purchased in each instance, the goods which came into the hands of the bankrupt's trustee, as to which no option to purchase had been exercised by bankrupt prior to bankruptcy, were held by him as bailee, merely, and could be reclaimed by petitioner."

In the opinion which follows the court, in part, says:

"There is no doubt from the language and provisions of the written agreement that the intent of the parties to it was that the ownership of the goods was to remain in the petitioner, and this intent as between the parties will prevail unless the privilege granted the bankrupt of reselling is inconsistent

with such retention of ownership when the rights of subsequent creditors who may be presumed to have extended credit to the bankrupt on the faith of his apparent ownership of goods so placed in his possession prevents. * * * While the bankrupt's privilege to purchase existed from the time the contract was executed and might be exercised without limit so as to exhaust the entire stock, it remains true that there was to be no sales or purchase, either of the stock as an entirety or of any piece thereof, until a time in the future subsequent to the making of the agreement and delivery under it, when the privilege was actually exercised by the bankrupt under conditions authorized by the terms of the agreement. During the interim the title and ownership remained in the petitioner, the possession being in the bankrupt for the purpose only of use by him as samples. Until the privilege of purchase was in fact exercised by the bankrupt, the effect of the transaction was not a sale with retention of title to secure the purchase price, but a bailment for the purpose of use as samples and with the privilege of purchase when conditions justified. In such a contract title does not pass to the purchaser any more than in an ordinary bailment, and it is not void as to creditors. * * * If these citations correctly assert the law, the conditional privilege of purchase conferred on the bankrupt did not convert the contract, which concededly was otherwise one of bailment, into a contract of sale. There was no sale until the privilege was exercised by the bankrupt and then only as to the pieces purchased in each instance. Accordingly, the goods which came into the hands of the trustee, as to which no option to purchase had been exercised by the bankrupt before the filing of the petition, were held by him at that time as bailee merely, and are subject to be reclaimed by the petitioner."

Another case in which the 1910 amendment

is construed and applied to facts quite similar to those in this case, is *In re Reynolds,* 203 Fed. 162. The court says:

"This cause is before me on petition for review filed by the Birdsell Manufacturing Company, complaining of an order of the referee denying its petition, whereby it asserted ownership to certain property in the possession of the trustee. Its right thereto depends on the nature of its contract with the bankrupt under which the unsold property in the possession of the trustee and claimed by it was delivered to him. Was it a bailment for sale or a conditional sale? If a conditional sale, it was a mortgage, and, not having been recorded, the trustee takes precedence over it by virtue of the amendment of 1910, * * * and the petition was properly denied. It is only on the basis that it was a bailment for sale that the petitioner was entitled to any relief. I think that the contract was a bailment for sale under these authorities. *In re Galt* (C. C. A. 7th Cir.), 13 Am. Bankr. Rep. 575, 120 Fed. 64, 56 C. C. A. 470; *John Deere Plow Co. v. McDavid* (C. C. A. 8th Cir.), 14 Am. Bnkr. Rep. 653, 137 Fed. 802, 70 C. C. A. 422; *In re Columbus Buggy Co.* (C. C. A. 8th Cir.), 16 Am. Bankr. Rep. 759, 143 Fed. 859, 74 C. C. A. 611; *In re Pierce* (C. C. A. 8th Cir.), 19 Am. Bankr. Rep. 664, 157 Fed. 757, 85 C. C. A. 14; *Sturm v. Boker,* 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

"The fourth clause of the contract is mostly relied upon in support of the position that it was a conditional sale. By virtue thereof undoubtedly on the 1st day of each month all notes and accounts for wagons sold on time became the property of the bankrupt. The bankrupt at that time had to account for all goods sold during the preceding month, and for such as were sold on time he could settle to

the extent of $100 by executing his four months' note without interest. But this did not have the effect of making a sale of such goods as had not been sold. In case of *Parlett v. Blake* (C. C. A. 8th Cir.), 26 Am. Bankr. Rep. 25, 188 Fed. 200, 110 C. C. A. 72, 39 L. R. A. (N. S.) 620, it was assumed that an agency contract, containing a provision that at the expiration of its term the agent should buy all goods not theretofore sold at the then current prices, was not a sale contract before the expiration of the term. It became such only upon the expiration of the term as to goods then unsold. So here this contract, otherwise an agency contract as to goods not sold, is not made a sale contract as to them because on the 1st day of each month it became a sale contract as to the proceeds of goods sold during the preceding month on time. I think, however, that the petitioner's right is limited to the unsold goods. He has none as to the proceeds of goods sold because of this fourth clause.

"The order of the referee is reversed, with directions to allow petitioner the unsold goods claimed by it."

II.

NO PREJUDICE TO BANKRUPTS' OTHER CREDITORS HAS BEEN SHOWN.

There is not one word of evidence in this case to show that bankrupts' other creditors will receive less than the amount of their claims on account of the withdrawal by appellant of the goods in question.

In *Hart v. Emmerson-Brantingham Co.,* 203 Fed. 60, the court, in part, says:

"In addition to the reasons already indicated, there is another reason why the plaintiff in this case cannot recover. To entitle him to a judgment, it is incumbent on the plaintiff to both plead and prove that the effect of the transfer complained of was to enable the defendant to obtain a greater percentage of its debt than any other creditor of the bankrupt of the same class. *Swarts v. Fourth National Bank,* 8 Am. Bankr. Rep. 673, 117 Fed. 1, 54 C. C. A. 387; *Painter v. Napoleon Township* (D. C.), 19 Am. Bankr. Rep. 412, 156 Fed. 289. The plaintiff has properly pleaded this essential element of a voidable preference, but no evidence has been submitted to sustain the allegation. The evidence fails to show what assets came into the hands of the trustee, and what creditors are entitled to participate in the distribution, and hence it is impossible to determine whether the return of the defendant's goods has resulted in giving it a greater percentage of its debt than has, or will be, paid to other creditors.

We also invite the court's attention to the fact that there is no evidence in this case tending to show any creditors without notice subsequent to March, 1912, when the goods in question were received by bankrupts in Seattle.

The local law of the State of Washington provides that all conditional sales of personal property, where the property is placed in the possession of the vendee, shall be absolute as to subsequent creditors in good faith, unless within ten days after taking

possession by the vendee a memorandum of such sale, stating its terms and conditions, signed by the vendor and vendee, shall be filed in the Auditor's office of the county wherein the vendee takes possession of the goods.

Remington & Ballinger's Code, Par. 3670.

Therefore, even under the theory that the delivery of these goods constituted a conditional sale, which, of course, we do not concede, still rights of the trustee would be limited to subsequent creditors without notice.

In re Rutland-Perry Co., 205 Fed. 200.

Wherefore, it is respectfully submitted that the judgment order of the district court should be reversed with costs to appellant.

FRANK E. GREEN,
Attorney for Appellant.

9

In the United States Circuit Court of Appeals for the Ninth Circuit

BERRY BROTHERS, a corporation, *Appellant,* *vs.* R. B. SNOWDON, as Trustee in Bankruptcy, *Appellee.* In the Matter of EDWIN L. GRAVES and GEORGE E. LABELLE, co-partners as GRAVES & LABELLE, and FEDERAL PAINT & WALL PAPER COMPANY, and EDWIN L. GRAVES, individually, and GEORGE E. LABELLE, individually, Bankrupts.	No. 2286.

APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

In March, 1912, appellant delivered to bankrupts merchandise of the value of approximately five thousand ($5,000.00) dollars, delivering to the

latter at the same time a detailed statement of the whole shipment (Trans. p. 6). At or before the time of the delivery the parties entered into a contract (Trans. pp. 8-9) with reference to the goods. The merchandise referred to was placed in bankrupt's warehouse together with their other stock (Trans. p. 6) and all the property in the warehouse, including that in controversy, was listed by the bankrupts as an asset in a financial statement made by them (Trans. p. 8). They had absolute control of the merchandise; could remove all or any part of it to their salesrooms at will, or could sell it at wholesale or retail. The agreement placed no limitations upon their control of it. In November, 1912, and within four months of the bankruptcy proceedings, appellants retook $3,000 worth of said merchandise. Said retaking was done with the knowledge on the part of appellants of the insolvency of bankrupts and over the objections of one of the creditors.

ARGUMENT.

Appellant's first contention is that the goods while stored in bankrupt's warehouse constituted a bailment and were not subject to liens of the bankrupt's creditors.

It is apparent that the transaction in this case is either a sale, a mortgage, a bailment, a gift or an exchange. By process of elimination we will be able to arrive at the true character of the transaction.

If the agreement should be construed as a mortgage it would be void as against creditors for failure to record. No one will contend that a gift or exchange was intended. The question then is whether this is a bailment or a sale.

In the contract between the parties in this case the essential element of a bailment is entirely lacking.

"In a bailment, at most, only a special property passes to the bailee, who receives possession for a particular purpose, upon contract that after the purpose has been fulfilled it shall be redelivered to the bailor or otherwise dealt with according to his directions, while the general property remains in the bailor. The common test of bailment or sale is whether it is the intention of the parties that the thing delivered shall be returned."

35 *Cyc.* 28.

"It is essential that the parties to the contract should have intended a return of the specific thing bailed, even if in an altered form, or its delivery to some third person, with the express or implied consent of the bailor. Where there is no intention that

the specific articles should be returned or delivered to another, the transaction becomes either a sale, a mortgage, a gift or an exchange."

5 *Cyc.* 169.

1 *Loveland* 836.

"A bailment may be defined as a delivery of personalty for some particular purpose or on mere deposit upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it or otherwise dealt with according to his directions."

5 *Cyc.* 161.

There is absolutely no provision in this contract for the return of the specific thing which appellant claims was delivered to the bankrupts as bailees. True, there is a provision therein that the contract may be terminated upon thirty days' notice, but upon the admissions of claimants, during that thirty days there would have been nothing whatever to prevent the bankrupts from removing the stock to their store, and upon such action on the part of the bankrupts there would have been no contract between the parties to terminate.

The case before the court is easily distinguishable from the Washington cases cited by appellant on page eight of its brief. In one of those cases the goods were sent merely for inspection, and in

the other case shingle bolts were delivered to the manufacturer for a specific purpose, to-wit: to be manufactured into shingles. The conclusion to be drawn from an arrangement of this kind is manifestly different from the one to be drawn from the conditions similar to those existing in this case. The goods in question were not delivered for any other purpose than to be sold in the ordinary course of business.

The cases cited by appellant in so far as they are applicable to bankruptcy proceedings were, except as noted, all decided prior to the amendment of 1910.

"Under the amendment of 1910, the trustee is vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, although no such proceedings had actually been taken by a creditor. A title which would have been valid between the parties prior to the amendment is not necessarily valid as against the trustee in proceedings subsequent to the amendment.

"The reason is that the trustee is in the position of a creditor holding a legal or equitable lien for the purpose of attacking the claimant's title. The character or validity of title is to be determined by local law."

1 *Loveland* 832.

The case of *Southern Hardware Co. vs. Clark,* 201 Fed. 1, cited by appellant, was a case in which the validity of a conditional sale contract of an auto-

mobile was involved. There is no statute in Florida requiring the recording of such contracts and it was therefore held that the contract was valid without recording.

In the case of *L. C. Smith & Bros. Typewriter Co. vs. Allerman,* 199 Fed. 1, the bankrupt leased a typewriter under a rent contract for hire for a term of seven months and on account of local law the transaction was held valid in this case. However, Bradford, J., concurred because, "the decisions of the Supreme Court of Pennsylvania having established the rule of property in force in that State on the subject of conditional sales and bailments of personal property, the Federal courts are under obligation to enforce it here without regard to its soundness or unsoundness." In the case of *Wood Mining and Reaping Machine Co. vs. Vanstone,* 171 Fed. 375, the court followed the ruling laid down in the case of *Walter A. Wood vs. Eubanks,* 169 Fed. 931, which latter decision was based upon the fact that *under the bankruptcy act as it then stood* "the trustee in bankruptcy gets no better title than that which the bankrupt had." It is, therefore, easily seen that these cases are not applicable. Furthermore, a contract for the sale of a typewriter, an automobile or machinery of any kind

is essentially different from a contract with reference to goods, wares and merchandise which are allowed to be mingled with other goods, wares and merchandise and are delivered to a party in the ordinary course of business and appear to be his property. The natural presumption on the part of creditors is that a man who has a stock of goods in his store is the owner of them, unless the records show something to the contrary.

The case *In re Marx Tailoring Co.,* 28 A. B. R. 147, is an Alabama case and is not in point with the case herein to be decided. The court in deciding that case distinguished it from the case *In re Priegle Paint Co.,* 171 Fed. 586, which is also an Alabama case and similar to the case before the court. In the latter case the goods were delivered to the bankrupt for no other purpose than for a re-sale, while in the Marx case the primary purpose for delivery of possession of the goods to the bankrupt was to furnish *samples* by which to take orders for the making of suits by the petitioner in Louisville. There is a manifest difference between samples delivered for use, and merchandise delivered apparently for sale, and the two cases are not parallel.

As between the claimant and the bankrupts there, perhaps, may be no question about the val-

idity of the agreement, but the question to be here decided is whether or not that agreement is valid as against the trustee, who under the amendment of 1910 succeeds not only to the rights of the bankrupts but to the rights of creditors holding a lien by legal or equitable proceedings although no such proceedings had actually been taken.

Many subterfuges are attempted between wholesale houses and persons in financial difficulties, and "of such class of subterfuges are attempted warehousings of insolvent debtors of their own property on their own premises, pretending the transaction to be pledges and bailments, *but retaining control and substantial possession all the time.*"

"*While it may be true as stated by respondent that he was only required to pay for each lot as fast as he disposed of it * * * yet in making sales, he did so in his own name,* and was held directly responsible, the securities obtained being taken to himself personally. * * * His obligations to Childs & Co. were plainly regarded as a debt, and he so speaks of them in his testimony. There are too many indicia in this of an ordinary purchase to warrant the conclusion that anything else was in fact intended."

Troy Wagon Works vs. Vastbinder, 12 A. B. R. 353, 130 Fed. 232.

"The goods were billed to the bankrupt as though it was a sale, and while this is not conclusive it is of more or less persuasive force."

In re Wood, 15 A. B. R. 411, 140 Fed. 964.

According to the stipulation and Exhibit "A" the goods were billed to Graves & LaBelle, and the latter were only required to pay for each lot as fast as they were disposed of, thus being closely in point with *Re Troy Wagon Works vs. Vastbinder, supra,* (p. 1) and *Re Woods, supra.*

"An arrangement whereby goods are delivered to a bankrupt and he is obliged to pay the invoice price as stated with each delivery by the consignor, and the latter is not obliged in the event of the bankrupt being unable to sell the goods, to receive the same back, constitutes as against the creditors of the bankrupt a sale, although the parties to the arrangement may describe it as one of consignment."

Ludvigh vs. Am. Woolen Co. et al., 23 A. B. R. 314.

We call particular attention to the case *In re Penny & Anderson,* 23 A. B. R. 115. This case was decided in the U. S. District Court for the Southern District of New York, in which district the decisions have been almost uniformly the same as the decisions of the courts of our circuit. In the case of Penny & Anderson the claimant delivered certain wines and liquors to the bankrupts, which were for consumption or sale in the ordinary course of business. A contract was taken called a "memoran-

dum of consignment," but contained a reservation of title in the vendor until full payment of the purchase price, but was silent as to the disposition of the proceeds of the sale. The goods were stored in the basement of the bankrupt's place of business and were used as required, and the court held that the transaction constituted a sale and that the title to such goods passed to the trustee. The court there said:

"The transaction in question did not create the relations of principal and factor, *for a factor cannot make a profit of his agency nor a valid purchase for himself* and receive a commission for his services."

"If it were claimed to be a warehousing contract it would be void against creditors because there was no change of possession, control or otherwise, *nor any real separation from other goods belonging to the bankrupts.* If it were claimed to be a chattel mortgage it would be void for non-filing as against the trustee. And if it were claimed to be a conditional sale it would be void as against creditors."

In that case the court cited *re Hassam,* 18 A. B. R. 745, 153 Fed. 932, in which Judge Martin of Vermont said:

"It has been repeatedly held that when personal property is delivered to a vendee for sale or to be dealt with *in any way inconsistent with the ownership of the seller,* or so as to destroy his lien or

right of property the transaction cannot be upheld as a conditional sale and is a fraud upon the creditors of the vendee."

The tendency in our State is to prevent secret arrangements which are liable to mislead creditors, and we have strict laws requiring the filing of chattel mortgages within a certain length of time; the filing of conditional sale contracts; the registering and licensing of commission merchants; and requiring that any contract of sale where there is a condition to be performed before vesting of title in the vendee must be recorded in the place where the vendee resides, and that without such filing the transaction is voidable.

As in many cases which come up where dealings are had with persons of limited means and meager credit, the transaction here has the appearance on its face of seeking to have the advantage of a sale, and at the same time retaining the security of a bailment. If claimant had contemplated at the time the agreement was entered into the return of the goods it certainly would have put a provision into that effect in the contract, but we think it clear that the only object of this agreement was to protect it in case of failure on the part of the vendees. As stated in the Penny & Anderson case, the transac-

tion here did not create the relation of principal and factor, for the factor cannot make a profit of his agency nor a valid purchase for himself and receive a commission for his services. Neither can it be held to be a warehousing contract for there was no real separation from other goods belonging to the bankrupts. Neither can it be held valid as a chattel mortgage, nor a conditional sale on account of the failure of the claimant to file the same of record, and it cannot possibly be termed a bailment because it lacks the main element, to-wit: the agreement to return the goods at a specified time, nor is there any specific description of the property whatever.

The goods were placed within the entire control of the bankrupts; were mingled with their other stock in their warehouse; portions of the goods were taken to their salesrooms as necessity required. Their statement on October 31, 1912, showed that the goods were included in their inventory as a part of their assets, and the appellant allowed the bankrupts to exercise that control over the goods which is absolutely inconsistent with the ownership of the merchandise by appellant.

It is difficult to embody the testimony of a witness in a stipulation, but the referee, who has had

wide experience in bankruptcy cases, and who had occasion to hear the testimony of the only witness in this case and to pass upon the facts as they were presented to him at the hearing, found in favor of the trustee. He stated:

"The bankrupts had entire control of the merchandise with the absolute right to sell any part or the whole thereof at any time they might elect to do so, such sales to be made in their own name and at any price which they might see fit to charge and with no provision whatever that the particular funds derived from each sale should be claimed by the claimant. * * * This being so the referee is unable to find that the secret agreement between the claimant and the bankrupts requiring the claimant to pay storage charges could in any way affect the question of the change of title as to creditors. It follows that in the opinion of the referee the taking of the merchandise in question was prejudicial to the rights of creditors and constituted a preference which must be surrendered before the claim in question can be allowed."

If agreements like this were allowed to stand and wholesale houses were permitted to enter into iron-clad contracts with a person in straightened circumstances, whereby they would be entitled to the return of any goods which they might ship such persons, unlimited fraud could be accomplished and no one would be safe in dealing with a retail merchant of limited resources. The tendency of the law is to

prevent such fraud and to enable all creditors to share alike in case of insolvency proceedings.

As to the second contention of counsel, to-wit: that no prejudice to bankrupts' other creditors has been shown, we call the court's attention to the fact that the goods in question were at all times mingled with the other stock of the bankrupts in their warehouse, and that they apparently exercised absolute control over the goods, and creditors had no notice, either actual or recorded, that the property in question was not the absolute property of the bankrupts. The burden of proof is not upon the trustee in a proceed of this kind to prove that the assets are insufficient to pay the creditors in full. This is not a separate suit as was the case of *Hart vs. Emmerson Brantinghan Co.,* 203 Fed. 60, cited by appellant, for the proceeding here comes up in the administration of the bankrupts' estate upon objections filed by the trustee, and the court will, of course, take judicial notice of the fact that the records in that case show that the assets of the bankrupts are less than their liabilities. In fact the condition of the proceedings at the present time would tend to indicate that less than fifteen per cent will be paid to the unsecured creditors.

It cannot be seriously contended that the retaking of these goods by the appellant, the value of which is over Three Thousand Dollars, did not enable appellant to secure a greater percentage of its claim than it would if it had not received such goods.

In conclusion we quote from the opinion of the District Judge:

"The order of the referee is confirmed. While the arrangement between the creditor and the bankrupt was not an ordinary sale, yet as to the creditors, if not an absolute sale, it was a conditional one, requiring recording as against creditors. The contract and stipulated facts show that as a bailment it was merely colorable."

The judgment appealed from should be affirmed.

Respectfully submitted,

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