RECENT CASES

Bankruptcy—Exemptions—Validity of Assignment to Creditor of Property Later to Be Exempted in Bankruptcy—[Federal].—Within four months prior to bankruptcy the bankrupt gave the plaintiff creditor two notes in which the debtor purported to "transfer, assign, and convey" a sufficient amount of his "homestead and exemption" to pay the debts owed the plaintiff. The notes also provided that "In case of bankruptcy, the holder .... of this note is appointed attorney in fact to claim .... all homestead exemption allowed by law." In his original schedule in involuntary bankruptcy, the debtor claimed the homestead exemption of $1600 (Ga. Code 1933, c. 51, § 101). The plaintiff filed his claim on the notes, assignments and powers of attorney, joining with the bankrupt in his application for exemption and alleging title to the exemption. After the trustee had separated the property designated by the debtor and sold it as exempt, but before the trustee filed his report or the sale was confirmed and the exemption formally set apart, the bankrupt renounced his exemption claim. The plaintiff protested the disclaimer and sought to require the trustee to report the property as exempt. The referee thought the bankrupt's renunciation effective. This decision was reversed by the district court. In the circuit court, *held*, reversal affirmed. Under the laws of Georgia, the assignment of the exempted property was valid and the plaintiff's preferred position could not be defeated after the bankrupt had claimed the exemption and the property was set apart physically. *Kronstadt v. Citizens and Southern Nat'l Bank of Savannah*, 80 F. (2d) 260 (C.C.A. 5th 1935).

Under § 6 of the Bankruptcy Act the bankruptcy courts are bound to follow state exemption laws. 30 Stat. 548 (1898), 11 U. S. C. A. § 24 (1926). Georgia law provides that a debtor who is head of a family, etc., may secure an exemption of $1600 worth of property by formal application to the Court of Ordinary. Ga. Code 1933, c. 51, § 2. The same exemption may be secured in bankruptcy. *Broach v. Powell*, 79 Ga. 79, 3 S.E. 763 (1887). A debtor may by special provision in his notes waive his right to have his exemptions later set aside. Ga. Code 1933, c. 51, § 11. If he does so, the waiver-note holder may obtain judgment and levy execution on any of the debtor's property whether set aside as exempt or not. *Dickens v. Breedlove*, 34 Ga. App. 459, 129 S.E. 886 (1925); *Anderson v. Ashford & Co.*, 174 Ga. 660, 163 S.E. 741 (1934). A bankrupt may, by failing to claim or by renouncing his claim before the exemption is formally set apart in bankruptcy, defeat the waiver-creditor's possibility of a preference. *In re Bowers*, 278 Fed. 681 (D.C. Ga. 1922), aff'd *sub nom. McWhorter v. Barnes*, 283 Fed. 1022 (C.C.A. 5th 1922). Under the authority of a growing group of cases, a debtor may also "assign" and "convey" his exemption to a creditor either before or after the exempted property is set aside in bankruptcy. *Strickland Hardware Co. v. Fletcher*, 152 Ga. 445, 110 S.E. 229 (1921); *Saul v. Bowers*, 155 Ga. 450, 117 S.E. 86 (1923); *Martin v. Citizens' Bank*, 170 Ga. 717, 128 S.E. 785 (1923); *Livingston v. Epstein-Roberts Co.*, 50 Ga. App. 25, 177 S.E. 79 (1934). An assignment before bankruptcy will operate as a valid transfer against the bankrupt's general creditors of whatever property is later set apart in bankruptcy. *Strickland Hardware Co. v. Fletcher*, 152 Ga. 445, 110 S.E. 229 (1921). It will also prevail over holders of prior waiver notes

(*Norris v. Aikens*, 155 Ga. 488, 117 S.E. 248 (1923)), and against a creditor who has secured an assignment from the bankrupt after the property was set aside. *Saul v. Bowers*, 155 Ga. 450, 117 S.E. 86 (1923). However, Georgia decisions have never made clear whether an "assignment" is a transfer of property later to be set apart or an assignment of the right to claim the exemption in bankruptcy. See *Martin v. Citizens' Bank*, 170 Ga. 180, 152 S.E. 234 (1930); *cf. Citizens Bank v. Pendergrass Banking Co.*, 164 Ga. 302, 138 S.E. 223 (1927). Hence the federal courts were free to hold, as they did, that the bankrupt himself could defeat an assignment, otherwise valid, by failing to claim or by renouncing his claim to his exemption at any time before it was formally set apart to him. *In re Martin Bros.*, 294 Fed. 368 (D.C. Ga. 1923); *In re Herrin & West*, 215 Fed. 250 (D.C. Ga. 1914); see *In re Anderson*, 224 Fed. 790 (D.C. Ga. 1915). And the Georgia Supreme Court has in *dicta* admitted that possibility, even while insisting that the exemption, upon being set apart in bankruptcy, passed automatically to the assignee. See *Strickland Hardware Co. v. Fletcher*, 152 Ga. 445, 449, 110 S.E. 229, 231 (1921); *Saul v. Bowers*, 155 Ga. 450, 456, 117 S.E. 86, 89 (1923). The federal decisions show the reluctance of bankruptcy courts to administer exempt property for the benefit of a particular creditor. An attitude unfavorable to the assignee would be expected especially where the assignment was within four months of bankruptcy and would have amounted to a voidable preference if it had transferred non-exempt property.

The court in the instant case seemed impressed with the assignee's precarious position. But it failed to make clear its reasons for holding *contra* to the above federal decisions. Since the exempted property had here been *physically* set apart, perhaps the court thought that the assignee's "equitable" or "inchoate" interest had become legal and fixed. But a holding that the property is irrevocably set apart before the trustee has filed his report is hard to reconcile with the usual allowance of a twenty-day period after the filing for objections by general creditors to the bankrupt's claim of exemption. General Orders in Bankruptcy XVII. This difficulty could be avoided on the theory that the mere "inchoate" interest of the assignee, though defeasible by general creditors on proper objections, was valid as against the bankrupt himself as soon as the latter had originally claimed his exemption. A still further possibility is that the assignment or the power of attorney in the instant case gave the creditor the right to claim the exemption originally and that the transfer of such a right or power was irrevocable from the time made. In most jurisdictions the right to claim is strictly personal to the bankrupt. *In re Schuller*, 108 Fed. 591 (D.C. Wis. 1901); *Mitchell v. Mitchell*, 147 Fed. 280 (D.C. N.C. 1906); *In re French*, 231 Fed. 255 (D.C. N.Y. 1916); *In re Baughman*, 183 Fed. 668 (D.C. Pa. 1910). In Georgia, the right to claim exemption in bankruptcy developed from the right of the debtor to apply formally to the state courts for his exemption (Ga. Code 1933, c. 51–2); thus the statute provides only for the debtor (Ga. Code 1933, c. 51–201) or his wife to claim. Ga. Code 1933, c. 51–702. But the Georgia Supreme Court decisions have struggled to make assignments prior to bankruptcy effective security devices and obviously, if the assignee cannot himself claim exemption in bankruptcy, his security is illusory. Moreover, there would be no justification for holding that a bankrupt's renunciation is ineffective against a prior assignment, but that he may defeat that assignment by failing to claim originally. It would seem logical therefore to hold that an assignment, accompanied by a power of attorney, is sufficient to give the assignee the right to claim. Michigan

bankruptcy courts have reached that conclusion on the basis of a Michigan statute which provides that an exemption may be claimed by the bankrupt, or "by an authorized agent." *In re Nat'l Grocer Co.*, 181 Fed. 33 (D.C. Mich. 1910). Iowa bankruptcy courts have reached the same result apparently on the construction of more general statutes. *Weber v. Lorenzen*, 292 Fed. 41 (C.C.A. 8th 1923); *Moody v. Century Bank*, 239 U.S. 374 (1915).

It might be argued that a power of attorney to claim an exemption is revocable because not "coupled with an interest" in the thing on which the power is to be exercised. However, the modern trend has been to recognize as irrevocable all powers given as security except in a situation where such a result is thought unduly prejudicial to the interests of other creditors. 39 Yale L. J. 110 (1929); Rest., Agency §§ 138, 139 (1933).

Constitutional Law—Constitutionality of New York Anti-Heart Balm Legislation—[New York].—The plaintiff brought an action for alienation of his wife's affections. The defendant moved for a dismissal on the grounds that the action had been abolished by a New York statute, in force at the time of the alleged injury, which provides that the "rights of action heretofore existing to recover . . . . damages for the alienation of affections, criminal conversation, seduction, or breach of contract to marry are hereby abolished." N.Y.L. 1935, c. 263, §§ 61a–61i. *Held*, motion for dismissal denied. The statute, as far as applicable to this action, is unconstitutional as a denial of due process under both the federal and New York constitutions. *Hanfgarn v. Marks*, U.S. Law Week, March 10, 1936, p. 6.

Six states have abolished heart balm actions (see 3 Univ. Chi. L. Rev. 68 (1935)), but the instant case presents the first test of the constitutionality of such legislation. The result of the principal case finds precedent in other situations in which courts have refused to permit the total extinction of common law rights and remedies by legislative enactment. See *Williams v. Port Chester*, 72 App. Div. 505, 510, 76 N.Y.S. 631 635 (1902); *Hanson v. Krehbiel*, 68 Kans. 670, 75 Pac. 1041 (1904); *cf. Hiemlich v. Dispatch Printing Co.*, 17 (Ohio) N.P. (n.s.) 161, 169 (1915); *Stewart v. Houk*, 127 Ore. 589, 271 Pac. 998 (1928). The basis for these decisions has been a free application either of the due process clause of the Fourteenth Amendment or of the common law doctrine that there can be no wrong without a remedy. *MacMullen v. City of Middletown*, 112 App. Div. 81, 98 N.Y.S. 145 (1906), rev'd on other grounds, 187 N.Y. 37, 79 N.E. 863 (1907); *Park v. Detroit Free Press*, 72 Mich. 560, 40 N.W. 730 (1888); see 69 U.S. L. Rev. 474, 484 (1935); see Broom, Legal Maxims 147 (6th Am. ed. 1868). This maxim has become a constitutional rule by virtue of express or implied incorporation into state constitutions. *Byers v. Meridan Printing Co.*, 84 Ohio St. 408, 95 N.E. 917 (1911); *MacMullen v. City of Middletown*, 112 App. Div. 81, 86, 98 N.Y.S. 145, 149 (1906). But there has been no constitutional objection to a "reasonable modification" of common law rights or remedies. *New York Central Ry. Co. v. White*, 243 U.S. 188 (1917); *Gibbes v. Zimmerman*, 290 U.S. 326 (1933). Upon this ground, the constitutionality of workmen's compensation acts has been upheld even though the amount of recoverable damages was limited, and no compensation at all was allowed for particular types of injury. *Hyett v. Northwestern Hospital*, 147 Minn. 413, 180 N.W. 552 (1920). Likewise, statutes destroying the action of an auto guest for the "ordinary" negligence of his host have been sustained on the theory that there has been a change merely in the standard of care required of the host and that a common law