

Bankruptcy: Title of a Trustee to Bankrupt's Cause of Action for Personal Injuries

Peter S. Balistreri

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Peter S. Balistreri, *Bankruptcy: Title of a Trustee to Bankrupt's Cause of Action for Personal Injuries*, 47 Marq. L. Rev. 565 (1964).
Available at: <http://scholarship.law.marquette.edu/mulr/vol47/iss4/10>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

the police themselves who might be mistaken for prowlers and be shot down by fearful householders."²⁵ Such a requirement apparently has not been a millstone around the neck of federal officers, nor would it appear to create serious obstacles to law enforcement.

In summary, *Ker* seems to clarify the basis for the Court's decision in *Miller*. It now appears that evidence obtained in violation of the provisions of section 3109, extended to cover arrests, whether by federal or state officers, will lead to the exclusion of that evidence in a federal court proceeding. Whether all state officers will be required to give announcement of authority and purpose before making arrests, in order to utilize subsequently obtained evidence in a state prosecution, is still unclear. If the majority in the future clearly states that announcement of authority and purpose is required by the fourth amendment, the Court will still be evenly divided as to the circumstances which would justify a non-compliance with the announcement requirement. Justice Harlan, utilizing a completely independent test of 'fundamental fairness,' prevents, for the time being, a clear cut decision of the Court in this troubled area.

WYLIE A. AITKEN

Bankruptcy: Title of a Trustee to a Bankrupt's Cause of Action for Personal Injuries—Stephen LeRoy Buda, while a passenger in an automobile, sustained personal injuries as a result of an accident. Without commencing an action against his tortfeasor, he filed a voluntary petition in bankruptcy three months after the accident. Buda's personal injury claim was settled by his attorney, with the stipulation of the trustee, for \$1,200.00, which, after expenses were paid, left a balance of \$560.00. The referee, interpreting section 70a(5) of the Bankruptcy Act, held that the bankrupt's cause of action did not vest in the trustee. The referee's decision was affirmed in the district court and by the circuit court of appeals.¹ Section 70a of the Bankruptcy Act states:

The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (1) . . . (2) . . . (3) . . . (4) . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action ex delicto for libel, slander,

²⁵ *Miller v. United States*, *supra* note 19, at 313.

¹ *In re Buda*, CCH BANKR. L. REP. §60,954 (1963).

*injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process; . . . [Emphasis added.]*²

The broad issue in the *Buda* case was whether, in applying the proviso of section 70a, the laws of the state of Wisconsin subject the right of action for personal injuries to attachment, execution, garnishment, sequestration, or other judicial process. The narrower issue involved the interpretation of the word "property" as that word is used in the Wisconsin creditors' rights statutes. The following Wisconsin statutes were found by the court to be pertinent to these issues:

1. Chapter 272—*Executions*

It was determined that only a judgment could be enforced by execution. *Buda* had not obtained a judgment, so the trustee could not be vested with title to the bankrupt's naked cause of action.³

2. Chapter 273—*Remedies Supplementary to Execution*

The trustee contended that interpreting section 273.08⁴ in conjunction with section 990.01(27),⁵ defining personal property, a court could order that the "right of action" for personal injuries be taken over by the receiver and that the receiver actually proceed against the tortfeasor. The referee refuted this contention by interpreting the word "property" in section 273.08 as not including a mere right of action for personal injuries. The referee relied upon the old Wisconsin case of *Gibson v. Gibson*⁶ as authority for the proposition that a "cause of action" is not a "thing in action" until the cause of action is reduced to a judgment.⁷ In other words, only a judgment gives rise to a debt which debt is "property."

3. Chapter 128—*Creditors' Actions*

The trustee contended that he was vested with title to the bank-

² BANKRUPTCY ACT, §70a, 66 STAT. 429 (1952), 11 U.S.C. §110 (1962).

³ Cf. WIS. STAT. §272.04 (1961).

⁴ WIS. STAT. §273.08 (1961). "*Property to be applied to judgment.* The court or judge may order any property of the judgment debtor or due to the judgment debtor, not exempt from execution, to be applied toward the satisfaction of the judgment; but if it appear that any person alleged to have property of the judgment debtor or to be indebted to him claims an adverse interest in the property or denies the debt, such interest or debt shall be recoverable only in an action against such person by the receiver; and a transfer or other disposition of such property or interest may be restrained till a sufficient opportunity be given to the receiver to commence the action and prosecute the same to judgment and execution or until security therefor shall be given as ordered."

⁵ WIS. STAT. §990.01(27) (1961). "*Personal Property.* 'Personal Property' includes money, goods, chattels, things in action, evidences of debt and energy." [Emphasis added.]

⁶ 43 Wis. 23 (1877).

⁷ The *Gibson* case was decided at a time when a cause of action for personal injuries was not assignable or transferable.

rput's cause of action under section 128.19(1)(b).⁸ The referee's disposal of this contention is perhaps the weakest point of the decision. To quote his rejoinder:

Under common law, an action for personal injury or a right of action therefor could not have been assigned. *Gibson v. Gibson*, supra. However, such a right of action is now assignable and is a *property right* which may pass by operation of law. *McGarvey v. Independent O & G Co.*, 156 Wis. 580. But I do not believe that it is property which can be levied upon or sold under judicial process. This statute, Section 128.19, states that the assignee-receiver becomes the owner of property which might have been levied upon or sold under process.⁹

It is to be noted that the last sentence quoted seemingly expresses only a half-truth. Subpart (1)(b) of section 128.19 uses the disjunctive "or," whereas the argument, at least to this writer, appears to presuppose the conjunctive "and." The opinion then proceeds to point out that section 128.19(1)(b) is a verbatim copy of the pre-Chandler Act, section 70a(5).

Two cases were cited as interpretive authority for section 70a(5): *Ruebush v. Funk*¹⁰ and *Sibley v. Nason*.¹¹ Both of these cases, however, relied upon state law which was interpreted as disallowing a person to transfer or assign his cause of action for personal injuries. These decisions might have gone the other way had state law at that time allowed assignment of a cause of action for personal injuries. The circuit court of appeal (7th Cir.) interpreted section 128.19 by stating:

... if the Wisconsin legislature intended "property" subject to "sequestration" should include a right of action for injuries to one's person it would not obscure that intention by the general language of paragraph (1)(b) of §128.19 but would have placed the words "his person or" following the word "to" in paragraph (1)(c). We conclude on this point that because the right of action was transferable by assignment it was not ipso facto property which vested under §128.19.¹²

⁸ WIS. STAT. §128.19(1)(b)(c) (1961). "*Title to Property*. The receiver or assignee upon his qualification shall be vested by operation of law with the title of the debtor as of the date of filing of the petition or assignment, hereunder, except so far as it is property which is exempt, including (b) property which prior to the filing of the petition or assignment he could by any means have transferred or which might have been levied upon and sold under judicial process against him. (c) Rights of action arising upon contracts or from the unlawful taking or detention of or injury to his property." [Emphasis added.]

⁹ *In re Buda*, Bankruptcy Court, No. 60-B-1110. (Wis. 1961). (Referee's opinion.)

¹⁰ 63 F. 2d 170 (4th Cir. 1933).

¹¹ 196 Mass. 125, 81 N.E. 887 (1907).

¹² *In re Buda*, supra note 1, at 69, 381.

Needless to say, it is difficult to rebut such a subjective interpretation of section 128.19.

To contrast the *Buda* case one can analyze the recent decision of *In re Kratoska*,¹³ a bankruptcy case applying California law to section 70a. This case is factually distinguishable from *Buda* only in that the bankrupt partially assigned her cause of action to her attorney after having commenced the action. The district court affirmed the referee's opinion which passed the title to the bankrupt's pending cause of action to the trustee under section 70a(5). Section 688.1 of the California Code of Civil Procedure was applied to the proviso of section 70a(5). The pertinent portion of section 688.1 states:

Upon motion of a judgment creditor of a plaintiff . . . the . . . judge . . . may in his discretion, order that the judgment creditor be granted a *lien upon the cause of action* and upon any judgment subsequently procured . . . and . . . may permit said judgment creditor to intervene therein. [Emphasis added.]¹⁴

The district court reasoned that the procedure under section 688.1 was similar to the type of remedy afforded by "attachment, execution, garnishment, or sequestration" so as to be included in the catch-all phrase "or other judicial process."¹⁵ It should be noted that this statute applies only to actions already commenced, thus making it inapplicable to the *Buda* case. The important concept to be gleaned from the California statute is that it allowed a lien on a cause of action. The attachment of a lien presupposes "lienable" *property*. It is at this juncture that California and Wisconsin part, at least under federal interpretation.

Another aside to the *Buda* case is speculation as to what will occur when a bankrupt, such as *Buda*, attempts to have his medical expenses discharged in the bankruptcy proceeding while at the same time claiming retention of his cause of action against the tortfeasor. Can he recover only for his pain and suffering or can he also recover his special damages? To quote from the *Sibley* case: "It is not, and never has been, the policy of the law to coin into money for the profit of his creditors the bodily pain, mental anguish, or outraged feelings of a bankrupt. . . ."¹⁶ One can readily sympathize with the reasoning of *Sibley* on a public policy basis, but it becomes rather difficult to mold its message to the framework of the Wisconsin statutes, especially section 128.19. It would seem that a cause of action for personal injuries more properly belongs to that status of "property exempt from execution" as embodied in chapter 272.18 of the Wisconsin statutes, and should be included therein.

PETER S. BALISTRERI

¹³ *In re Kratoska*, Bank. Nos. 116,225-MC and 116,226-MC (Cal. Dist. Ct. 1961).

¹⁴ CAL. CODE OF CIVIL PROC. §688.1 (1962).

¹⁵ Note 2 *supra*.

¹⁶ *Sibley v. Nason*, *supra* note 11, 81 N.E. at 889.