

OPINION
65-21

October 18, 1965 (OPINION)

Mr. Eugene A. Kruger

State's Attorney, Cass County

RE: Bankruptcy - Filing of Orders - Register of Deeds

This is in reply to your letter of October 13, 1965, in regard to bankruptcy proceedings pending in this state, particularly with regard to recording of the certified copy of the order approving the trustee's bond and of a certified copy of the petition with the schedules omitted and similar materials under Sections 47 (c) and 21 (g) of the Bankruptcy Act. These sections as currently stated in USCA are as follows:

11 USCA Section 75 (c) "The trustee shall, within ten days after his qualification, record a certified copy of the order approving his bond in the office where conveyances of real estate are recorded in every county where the bankrupt owns real property or an interest therein, not exempt from execution, and pay the fee for such filing. He shall receive a compensation of fifty cents for each copy so filed which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the expenses of administration.
* * *"

and

11 USCA Section 44 (g) "A certified copy of the petition with the schedules omitted, of the decree of adjudication or of the order approving the trustee's bond may be recorded at any time in the office where conveyances of real property are recorded, in every county where the bankrupt owns or has an interest in real property. Such certified copy may be recorded by the bankrupt, trustee, receiver, custodian, referee, or any creditor, and the cost of such recording shall be paid out of the estate of the bankrupt as part of the expenses of administration. Unless a certified copy of the petition, decree, or order has been recorded in such office, in any county wherein the bankrupt owns or has an interest in real property in any state whose laws authorize such recording, the commencement of a proceeding under this title shall not be constructive notice to or affect the title of any subsequent bona fide purchaser or lienor of real property in such county for a present fair equivalent value and without actual notice of the pendency of such proceeding: PROVIDED, HOWEVER, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. The exercise by any court of the United States or of any state of jurisdiction to authorize or effect a judicial sale of real property of the bankrupt within any county in any state whose laws authorize the recording aforesaid shall not be impaired by

the pendency of such proceeding unless such copy be recorded in such county, as aforesaid, prior to the consummation of such judicial sale: PROVIDED, HOWEVER, That this subdivision shall not apply to the county in which is kept the record of the original proceedings under this title."

For further understanding of Section 47 (c) above, we believe the following from 8 C.J.S. 924, BANKRUPTCY, Section 163, might be appropriate:

* * * The Bankruptcy Act Section 47 (c), 11 USCA Section 75 (c), provides that the trustee shall record a copy of the order approving his bond in the office where conveyances of real estate are recorded in every county where the bankrupt owns real property or an interest therein, not exempt from execution. The purpose of this provision is to give notice to all concerned that the property of the bankrupt is in custodia legis and to avoid complications with respect to state proceedings against property standing in the name of the bankrupt estate."

To further clarify the situation, we believe the following historical material from 2 PATTON ON TITLES, Second Edition, Copyright 1957, Pages 578 - 580, from Section 653, is helpful:

The act provides that 'a certified copy of the order approving the bond of the trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and, if recorded, shall impart the same notice that a deed from the bankrupt to the trustee, if recorded, would have imparted, had no bankruptcy proceedings intervened' and that the 'trustee shall, within thirty days after the adjudication file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution.' But if the trustee fails to record in the counties where the bankrupt's real estate is situated copies of the decree or of the order approving his bond, it is held nevertheless that title passes to the trustee. In this respect the bankruptcy act infringes on the power of the states to prescribe the methods which may be employed to transfer title to real property located within their respective jurisdictions, and it is held, as to a bona fide purchaser from the bankrupt, that any conflict between the federal bankruptcy act and a state recording act must be resolved in favor of control of the latter.

The original act provided for passage of title to the trustee of all real property of the bankrupt located anywhere in the United States. In an attempt to show transfers by virtue of bankruptcy of the record owner, the abstracters included in their abstracts bankruptcy searches for the federal district in which the property was located. To have been conclusive, there would have been needed a search for the district or districts in which was located the residence, domicile, or principal place of business of each grantor (these being the districts in which he might be the subject of a bankruptcy proceeding).

After making all the search that was practicable, short of one in every division and district of the United States, there was always some uncertainty in the matter, though the chances of loss were negligible. To overcome that situation the American Bar Association and other organizations appointed committees to secure amendment of the two sections, 21 (e) and 47 (c), so as to expressly provide that the title should not pass to the trustee as against a bona fide purchaser from the bankrupt unless the pendency of the bankruptcy was made a matter of record in the federal court of the division where the land is located or in the local deed records. As a result of the work of these committees or otherwise, the revised statute, known as the Chandler Act, contains a Section 21 (sub.g.) which provides that any state which enacts a statute authorizing recording ('in the office where conveyances of real estate are recorded') of a certified copy of the bankruptcy petition with the schedules omitted, the decree of adjudication or the order approving the trustee's bond thereby reduces the required extent of search by a subsequent bona fide purchaser or lienor to the local deed records except in the county 'in which is kept the record of the original proceedings under this act.' Like the slowness in securing passage of conformity acts to make similar limitations on the territorial extent of the liens of judgment in federal courts (Section 654, infra.), lawyers have not acted as promptly as should have been the case in presenting bills to their legislatures for the purpose of securing the benefits of this section of the Chandler Act. So far as ascertained the acts passed to conform to the section are as follows:

Colorado. 1939 Session Laws, c. 77.

Florida. 1941 Session Laws, c. 90.

Georgia. 1939 Session Laws, p. 242.

Iowa. 50 G.A. (1943) c. 250.

Kansas. 1945 Laws, S.B. 282.

Kentucky. 1944 Acts, c. 21, Section 2.

Massachusetts. 1941 Acts, c. 89.

Minnesota. 1939 Session Laws, c. 117.

New Jersey. 1941 session Laws, c. 389.

New York. 1946 Laws, c. 997, as amended by 1947 Laws, c. 86.

North Carolina. 1939 Session Laws, c. 254.

Ohio. 1943 Laws, p. 705.

South Carolina. 1939 Session Laws, No. 131.

Washington. 1943 Laws, c. 23, Section 1."

While we have not researched the matter to the extent of determining whether the foregoing list of states is complete to the current date or to the copyright date of the text, we have checked current statutes of the State of North Dakota and find no particular act specifically purporting to be enacted to conform to the so-called Chandler Act prior to Section 47-19-53 of the 1965 Supplement to the North Dakota Century Code enacted at the 1961 Session of the Legislative Assembly of this state. Said statute provides as follows:

47-19-53. RECORDING PETITION, DECREE OF ADJUDICATION, OR ORDER APPROVING TRUSTEE'S BOND IN BANKRUPTCY PROCEEDING. When a petition for bankruptcy, or a decree of adjudication, or an order approving the trustee's bond is made, pursuant to the Federal Bankruptcy Act of 1898, as amended by the Bankruptcy Act of 1938, Chapter 575, 52 Statutes 840, Section 21 (g), the bankrupt, trustee, receiver, custodian, referee, or any creditor may record a certified copy of the petition, decree, or order in the office of the register of deeds of any county in this state wherein is located real property of the bankrupt as shown by the schedules of the bankruptcy proceedings."

In view of this specific provision we do not believe it appropriate at the current time, in regard to the present question, to consider whether Section 47-19-01 of the North Dakota Century Code also authorizes such recording. Said statute has provided since 1911 that:

47-19-01. INSTRUMENTS ENTITLED TO RECORD. Any instrument affecting the title to or possession of real property may be recorded as provided in this chapter."

While we must recognize that the statutes do not specifically prescribe a procedure for indexing such proceedings when recorded and while it is possible that the statutorily prescribed fees set out in Chapter 11-18 of the North Dakota Century Code may not be adequate compensation for the amount of work that may be involved in such indexing, we do not believe that this would be adequate reason to hold said Section 47-19-53 to be invalid.

You ask two specific questions, which are as follows:

1. Is it permissible for a County or District Clerk of Court to record or file the Order Approving Trustee's Bond, and would such a recording or filing be considered public notice that the bankrupt has been divested of title to his property and that the same has been vested in his Trustee in Bankruptcy.
2. Which office in the county is the proper office in which a trustee can properly file or record an Order Approving Trustee's Bond."

Our answer to your first question must be that the Bankruptcy Act and the laws of this state specifically prescribe where such instruments must be filed to have the desired effect and neither the Bankruptcy

Act nor the laws of this state authorize or suggest a variation on such specifically prescribed procedure.

Our answer to your second question is that the register of deed's office is the proper office in which a trustee can properly record an Order Approving Trustee's Bond.

HELGI JOHANNESON

Attorney General