

Case No. 3,071.

IN RE COMSTOCK ET AL.

[3 Ben. 236; 2 N. B. R. 561 (Quarto, 171); 2 Am. Law T. Rep. Bankr. 87.]¹

District Court, S. D. New York.

May 11, 1869.

BANKRUPTCY PRACTICE—CONTESTING PROOF OF DEBT.

On objection taken by a creditor to a proof of debt filed in bankruptcy proceedings, the order to show cause why the proof of debt should not be vacated must be made by the court, and not by a register.

[On certificate of register in bankruptcy.

[In the matter of Frederick S. Comstock and James M. Wheeler, bankrupts.

[Certificate of Isaac Dayton, Register:]

² [The undersigned, register in bankruptcy, having in charge the proceedings in this bankruptcy, hereby certifies, that on the 27th day of January, 1869, upon the objections made in writing, under oath, of Benjamin Hart, a creditor of Frederick S. Comstock and James M. Wheeler against the said bankrupts, the undersigned granted and issued an order requiring the said George M. Wheeler to show cause before the undersigned, at his office aforesaid, on the 2d day of February, 1869, at one o'clock in the afternoon, why the proof of debt made and filed in this matter by the said George M. Wheeler, on the 10th day of December, 1868, should not be vacated, and the record thereof cancelled, &c., which objections and order to show cause are thereto annexed. That, on the said 2d day of February, 1869, at his office aforesaid, the undersigned was attended by the said Benjamin Hart, by Mr. Augustus O. Brown, his counsel, and the said George M. Wheeler by Mr. Da Costa, his counsel; that upon proceeding with the said business, the objection was made on the part of the said George M. Wheeler, that the register had not jurisdiction to make the order aforesaid, and at the request of the counsel for the parties, the question is submitted to the honorable the district judge, whether the register has jurisdiction to summon and examine the bankrupt or any person tendering or who has made proof of claims, or persons capable of giving evidence concerning the proof, or the debt, under the last clause of the twenty-second section of the bankrupt act. The twenty-second section of the bankrupt act [of 1867 (14 Stat. 527)] provides that all proofs of debt against the estate of the bankrupt shall be taken before a register in bankruptcy, or before a commissioner of the

circuit court, or in foreign countries before a minister, consul, or vice-consul of the United States. The section, then provides as follows: "The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake." The twenty-ninth section of the act provides, that after certain time "the bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors" to show cause, &c. It is settled "that the court" in this section is the court and not the register. In the matter of John Bellamy [Case No. 1,267], the two provisions are substantially analogous. The order to show cause was made in the present case, in accordance with a practice which has to some extent obtained, rather than upon a particular examination of the provisions of the act. Probably the correct practice is for the assignee, or creditor, or bankrupt, to apply to the court for an order rejecting a claim as not duly proved. The court will then either take the proof and make the order, or direct a reference. Practically, hardly a case can occur in which an investigation of a claim can be had without any application.]²

BLATCHFORD, District Judge. The order made by the register ought to have been made by the court and not by the register.

¹ [Reported by Robert D. Benedict, Esq., and here reprinted by permission. Syllabus only in 2 Am. Law T. Rep. Bankr. 87.]

² [From 2 N. B. R. 561 (Quarto, 171).]