8FED.CAS.—12

Case No. 4,210.

DUTTON ET AL. V. FREEMAN.

{5 Law Rep. 447.}

Circuit Court, D. New Hampshire. Dec., 1842.

INVOLUNTARY BANKRUPTCY—WHO MAY CONTEST—PARTIES "INTERESTED"—ATTACHING CREDITOR—INJUNCTION—PROOF OF CLAIMS—AMENDMENT.

1. A person may he "interested" in a bankruptcy, and have a right to establish his debt, but it does not follow that he has a right to appear and contest every question which may arise in the progress of the proceedings under the bankruptcy.

2. The language of the bankrupt act in reference to "persons interested" applies to those who have a direct, immediate interest in the matter put in controversy, and not merely a remote, consequential, or contingent interest.

3. Upon a petition by creditors, in invitum, against their debtor, to have him declared a bankrupt, the debtor alone is properly the "person interested" to appear and contest the facts stated as the grounds for the petition.

4. Where A. attached the property of B. on mesne process, and C., another creditor of B., filed a petition in invitum to have B. declared a bankrupt, and also obtained an injunction against A. from proceeding in his said suit until the hearing on the petition in bankruptcy; it was *held,* that A. had no right to appear and contest the facts asserted in the original petition of C. to maintain a decree of bankruptcy against B.

5. A party will not be permitted to exercise the rights of a creditor in the proceedings in bankruptcy, until he has proved his debt; but where the proof it not regularly or technically made, it is amendable under the authority of the court.

{Distinguished in Re Thomas, Case No. 13,891.}

6. Creditors, who prove their debts in bankruptcy, must do so absolutely, without any protest, or qualification, or reservation.

7. As to the effect of a proof of his debt by the creditor under the circumstances of the present case;—quaere.

This was the case of a petition in bankruptcy, by Dutton and Richardson, in the district court of the district of New Hampshire, praying that Otis R. Freeman might be declared a bankrupt, under the bankrupt act of 1841 {5 Stat. 440}, and alleging certain specified acts of bankruptcy to have been committed by Freeman. Freeman appeared and made answer, denying all the supposed

acts of bankruptcy, and contested the right of the petitioners to a decree. At this stage of the proceedings, and before any hearing or decree upon the petition and answer, or any proofs taken upon the points in issue, Edward Brinley, a creditor of Freeman, appeared before the district court and filed the following petition: "Respectfully represents, Edward Brinley, of Boston, in the county of Suffolk, and commonwealth of Massachusetts, merchant, that the said Otis R. Freeman is justly and truly indebted to your petitioner in the sum of two thousand dollars and upwards, upon three several promissory notes, and upon an account; that your said petitioner caused a writ of attachment to be issued in his favor against said Freeman, founded upon said notes and account, upon which writ property of said Freeman was attached, sufficient to satisfy your petitioner's claim, which said writ was returnable to the court of common pleas for Grafton county, in the state of New Hampshire, at the February term of said court, A. D. 1842, when and where said writ was returned, and duly entered, at said term of said court, when and where the action brought against said Freeman was continued to the next September term of said court, during which said term, to wit, September term, 1842, an injunction, issued by the district court of the United States for the district of New Hampshire, upon the petition of said Dutton and Richardson, was served upon the agent of your petitioner, W. C. Horton, his attorney in said suit, Wm. H. Duncan, and the sheriff of the county of Grafton, enjoining your petitioner, his agents and attorneys, and the sheriff of said Grafton county from further proceedings in said suit, till further proceedings were had upon the petition of said Dutton and Richardson in this court. Whereupon said action was continued to the next February term of said court of common pleas, in which court the said action is now pending. Said action was commenced on or about the 28th of August, A. D. 1841. And now your petitioner further prays that he may be admitted to oppose the prayer of the petition of said Dutton and Richardson, without furnishing any further proof of the indebtedness of said Freeman to your petitioner, or of the interest that your petitioner has to oppose the petition of Dutton and Richardson aforesaid, than what arises from the foregoing statement of facts." And he also filed the following proof of his debt, with the annexed protest: "Respectfully represents, Edward Brinley, of Boston, in the county of Suffolk, and commonwealth of Massachusetts, merchant, that on the 19th of October, A. D. 1842, he proved a debt of two thousand dollars and upwards against said Freeman, upon the several promissory notes and an account, in short, setting forth particularly the said notes and account, and in his said proof stated that he had not received any security for said debt, except what he may have obtained by an attachment made of the property of said Freeman, on or about the 28th of September, A. D. 1841. The proof of said debt was made before a commissioner of this court, and was in the usual form, with the above exceptions. Said proof was accompanied by a protest, as follows: 'I make proof of my debt against said Freeman, under the following circumstances,

to wit: Sometime in the month of August or September, A. D. 1841, I brought an action against said Freeman, upon said notes and account, and upon the writ which issued in said action, sufficient property of the defendant was attached to satisfy my claim, as I have been informed. Said writ was returnable to the court of common pleas for Grafton county, in said state of New Hampshire, February term, A. D. 1842, when and where said action was entered, and continued to the next September term of said court, when and where, to wit, at said September, 1842, an injunction was issued and served, enjoining my agents and attorneys, and the sheriff of said county of Grafton from further proceeding in my said suit, till further proceedings were had in this court,—whereupon said action was continued to the next February term of the court of common pleas, for the said county of Grafton, and is now pending in said court. I make proof of my debt solely for the purpose of defending against the said petition of said Dutton and Richardson, and for no other purpose—protesting, that by so doing, I do not waive my right of action or suit against said Freeman, nor surrender any proceedings already commenced, or which may be commenced by me in the state courts against said Freeman.' And now your petitioner prays to be admitted to oppose the prayer of said Dutton and Richardson's petition upon the proof, made as aforesaid, accompanied by said protest. William H. Duncan, Solicitor for Edward Brinley."

To this petition Dutton and Richardson filed the following exceptive allegation: "Respectfully represent, said Dutton and Richardson, that Edward Brinley, of Boston, in the district of Massachusetts, has filed in said court proof of his debts as creditor, against the said Otis R. Freeman, and claims to appear and object to the said Freeman being declared a bankrupt. And now the said Dutton and Richardson file their objections following to the said Brinley's proof of his pretended debts against said Freeman, and to his being permitted to appear and object to the said Freeman being declared a bankrupt: 1. Because the said Brinley, in his proof of his debts, does not describe the date or amount of his several promissory notes against said Freeman, or otherwise describe them with the particularity required by the law. 2. Because said Brinley offers said proof of his debts, accompanied with a protest, refusing to waive his right to proceed in the court of common

pleas for the county of Grafton, in said district, in the prosecution of a suit now pending in said court of common pleas, in his favor, against said Freeman on his said debts. And on said objections the said Dutton and Richardson ask the opinion of the court."

Upon these proceedings the district court ordered the following questions to be adjourned into the circuit court for a final decision: First. Whether the petitioner, Edward Brinley, shall be admitted to defend against the petition of Dutton and Richardson upon the statement of facts contained in the petition hereunto annexed, marked "B," the said facts having been agreed upon by said parties, without waiving his right to proceed in the state courts. Second. Whether the description of said Brinley's debt, as set forth in the proof of debt as described in paper hereunto annexed, marked "C," is sufficient Third. Whether said Brinley's proof of his debt, being accompanied with a protest refusing to waive his right to proceed with his action now pending in the state courts against said Freeman, is sufficient to authorize the said Brinley to appear and oppose the petition of Dutton and Richardson.

Mr. Duncan and P. W. Chandler, of Boston, for petitioner, Brinley.

Mr. Blaisdell, of Hanover, N. H., and Mr. Brigham, of Boston, for Dutton and Richardson.

Freeman did not appear at the hearing.

STORY, Circuit Justice. The first question is that, which embraces the merits of the controversy, so far as it respects the rights of the parties now before the court. Brinley, the attaching creditor, insists upon the right to appear in the present stage of the proceedings, and to contest the whole facts asserted in the original petition of Dutton and Richardson to maintain a decree of bankruptcy against Freeman, in invitum. And the petitioning creditors insist that he has no such right. My opinion is, that Brinley, the attaching creditor, has no such right under the provisions of the bankrupt act. It may be admitted that he is, in the sense of the act, a "person interested" in the bankruptcy; but that is not the sole point for the consideration of the court. A person may be interested in a bankruptcy, and have a right, as a creditor, to establish his debt; but it will by no means follow, that he has a right to appear and contest every question, which may arise in the progress of the proceedings under the bankruptcy. The act of congress could by no means have intended any such a general and sweeping right. Its language must, in its reasonable interpretation, be limited to cases where the "person interested" has a direct immediate interest in the matter put in controversy, such as a creditor has when his own debt or dividend is controverted by the bankrupt or the assignee, and not merely a remote, consequential, or contingent interest in the question to be decided. In this latter sense every creditor might be said to be interested in every question and decision made in bankruptcy, and clothed with full rights accordingly, which I am persuaded could never have been the intention of the act. The distinction between an interest in the question and an interest in the suit

is familiar to every lawyer; and we must put a reasonable and analogous interpretation upon the language of the bankrupt act in order to prevent the most inconvenient and even contradictory results, which might otherwise arise from it.

The seventh section of the bankrupt act contemplates proceedings by petition, both by a voluntary bankrupt, and by creditors against an involuntary bankrupt; and, after requiring that notice of the hearing of every such petition for the benefit of the act shall be published, it provides that "all persons interested may appear at the time and place, where the hearing is to be had, and show cause, why the prayer of the said petitioner should not be granted." Now, upon a petition by creditors, in invitum, against their debtor to have him declared a bankrupt, (which is the present case,) the debtor alone is properly the "person interested" to appear and contest the facts stated as the grounds for the petition—namely, the petitioning creditor's debt—the debtor's being a trader, and his having committed one or more acts of bankruptcy, within the scope of the statute. All these touch the rights and property of the debtor himself, directly and immediately, and he is the very party in interest to admit or contest them. His creditors have no direct or immediate or absolute interest in the proceedings. If declared a bankrupt, he may never obtain a discharge; and, therefore, they have no necessary or positive interest in the proceedings at this stage, or at most only a possibility of interest, dependent altogether upon future events. But I do not rest my judgment upon these considerations, although there appears to me to be great weight in them, as a reasonable construction of the provisions of the act, as to "persons interested." What I rely on is the positive provision of the first section of the act, as a demonstration, that such is the proper, nay, the necessary construction of the act in all cases of petitions by creditors, in invitum, against their debtor, to have him declared a bankrupt. That section provides, "That any person so declared a bankrupt at the instance of a creditor, may, at his election, by petition to such court, within ten days after its decree, (declaring him a bankrupt) be entitled to a trial by jury, before such court, to ascertain the fact of such bankruptcy."

Now, it is plain from the very terms of this enactment, that this is a privilege exclusively given to the debtor himself. He, and he

alone, can demand a trial by jury; he and he alone can contest the "fact of bankruptcy." No other creditors can appear as adverse parties, and contest the "fact of such bankruptcy;" for here the maxim firmly applies, "Expressio unius personae est exclusio altorius." Yet the "fact of such bankruptcy" is the very question which Brinley by his petition seeks now to controvert before the court, and to put in issue. He seeks to supersede the debtor in his proceedings, or to act independently of him. Suppose the debtor should not choose to contest "the fact of such bankruptcy," or suppose, after contesting it, he is satisfied with the decision of the court, declaring him a bankrupt, or suppose the jury upon a trial should find "the fact of such bankruptcy," could other creditors be permitted to appear and contest the conclusion? It appears to me, upon the obvious purport of this provision of the statute, they could not. In short, the view which I take of this whole matter is that, in this stage of the proceedings against a debtor, in invitum, the only persons in interest, who are competent to appear and enter into contestation as to the "fact of such bankruptcy," are the petitioning creditors, on one side, and the debtor, on the other side, as the parties in adverse interest. All other creditors are but collaterally connected with these preliminary proceedings, and may contingently be affected thereby; but they are not persons having a right to present themselves in judgment before the court or, as the phrase is, they have no "persona standi in judico."

The third and second questions may be disposed of in a few words. If Brinley had a right to appear and contest the proceedings, it could be only in the character of a creditor of Freeman; and before he could be admitted to examine the rights of another creditor, he must prove his debt in the manner pointed out by the statute, and the rules of the court. The proof in this case is not regularly or technically made; but it is clear, that if sufficient in its form, it is properly amendable under the authority of the court.

The third question may be answered by the single suggestion that upon the proof of any debt by a creditor he must make it simpliciter, according to the rules of the court, and he is not at liberty to interpose any protest or qualifications, or reservations. Indeed, I go further, and say, that the court would have no authority to allow or sanction them. What would be the effect of an absolute proof of his debt by Brinley upon his attachment, it is unnecessary for this court now to consider. That is a point which cannot be entertained now; and belongs, if at all, to a future state of these proceedings.

Upon the whole, my answer to the several questions adjourned into this court are these: To the first, that Brinley ought not in this stage of the proceedings, upon the statement of facts in his petition, to be admitted to appear and contest the facts stated in the petition of Dutton and Richardson. To the second, that the description of Brinley's debt, as set forth in his proof of debt in the case, is not sufficient; but the proof is amendable under the order of the court. To the third, that Brinley's proof of his debt being accompanied with a protest, as stated in the question, is improper, no such protest being allowable,

and is not sufficient to authorize him to appear and oppose the petition of Dutton and Richardson.