

Case No. 4,459.

IN RE EMISON.

{2 N. B. R. 595 (Quarto, 179);¹ 1 Chi. Leg. News, 342.}

District Court, D. Kentucky.

May 10, 1869.

BANKRUPTCY—WITHDRAWAL OF PROOF OF DEBT.

Proof of debt cannot be withdrawn from the files by the creditor. Semble—that it may be waived.

In this case Register Eginton certified to the court as follows: The Branch Bank of Kentucky, at Frankfort, by their attorney, Thomas N. Lindsey, Esq., moved to withdraw certain named proof of debts made by Mr. A. W. Dudley, president of said bank, on the ground that they had been proven through mistake and through the misapprehension of the directions of counsel, Thomas N. Lindsey, Esq., to which the bankrupt objected, and at the request of the bank the question here presented is certified for the decision of the district judge. Mr. A. W. Dudley, president of said bank, made proof of the above named debts on the 2d day of June, 1868, which proofs were on file, and voted at the first meeting of creditors, and some months afterwards, to wit, on the 10th day of October, 1868, the application for withdrawal was made. I do not feel that I would be authorized to permit these proofs to be withdrawn from the record for any cause whatever—they are as much an integral part thereof as the most important paper in the case. Because Mr. Dudley, the president of the bank, misunderstood the instructions of his counsel, is not, in my opinion, a sufficient reason to now mutilate the record, and take therefrom the authority by which Mr. Dudley's attorney in fact, voted for and assisted in electing an assignee. If the bank was in any wise to be the loser, it might furnish an excuse for their motion; but the fact of these proofs being in the case, does not preclude or prejudice any of the rights of the bank, as to any of the other parties upon said debts, and if it is to make complaint against the bankrupt that they desire to withdraw it, the objection should be made here, and not by an action in the state court, for if an action were commenced there, it could be stayed to abide the final result of this proceeding. In looking at the motion in this light, I am of the opinion that it should be denied. After the intimation from me against the withdrawal of said papers, each of the parties presented briefs, which are hereto appended, and all of which, with the new proof offered in lieu of the old ones, are submitted for the opinion of his honor, the district judge.

BALLARD, District Judge. I concur with the register. If the creditor wishes to withdraw the instrument proven, he may do so in pursuance to the provisions of the twenty-fourth section of the bankrupt act [of 1867 (14 Stat. 528)], but the proof cannot be withdrawn at all. Doubtless it may be waived, but it cannot be withdrawn.

¹ [Reprinted from 2 N. B. R. 595 (Quarto, 179), by permission.]