

Case No. 6,425.

IN RE HERRMAN ET AL.

[4 Ben. 126;<sup>1</sup> 3 N. B. R. 649 (Quarto, 161).]

District Court, S. D. New York.

April, 1870.

PROOF OF DEBT.—POSTPONED CLAIM.

A proof of a claim, which has been postponed by the register until after the election of an assignee, is then to be treated as if it had not been tendered before the election of the assignee.

In this case [in the matter of Adolph B. Herrman and Herman Herrman], the register, at the first meeting of creditors, postponed certain claims till after the election of the assignee. After the election the proofs were again presented. The question arose, how such proofs should be treated, and the register certified it to the court.

[By I. T. WILLIAMS, Register; I, the undersigned, one of the registers of this honorable court, do respectfully certify and report that, at the first meeting of creditors, I postponed the claims of Isidor Rosenthal and others until the assignee should be elected. After the election of assignee, the said Rosenthal, by his counsel, Mr. Mackie, again presents his proofs. The question is, what is then the proper practice? Mr. Seixas, who objected to the proving of the claims before the election of the assignee, suggests that the proofs must now be received by the register as if now for the first time offered and thereupon, in the usual course, handed over to the assignee to share the same future as all other proofs, unless the assignee or some creditors should petition the court to strike out such proof, or reject the claims. If such application be so made, the court will refer it to the register to take proof, and on the coming on of the proof will decide upon the validity of the claims. But if no such action is taken on the part of the assignee or creditors, the party will be entitled to share in the dividend. Mr. Mackie, on the other hand, suggests the apprehension that the claim having been so far the subject

of adjudication, that it is postponed under a quasi direction to the assignee to investigate the same, may require affirmative action on his part, to place the claim upon the footing of claims not so objected to and postponed. It would seem that under section 22 [of the act of 1867 (14 Stat. 527)], the burden of proof in opposition to a claim, proved in the usual form, is with the party, assignee or creditor, objecting to it. Yet, when a claim is postponed from the expressed opinion of the register that it ought to be investigated by the assignee, I am not sure that this does not change the burden of proof, and make it the duty of the creditor whose claim is so postponed to take proof before the register, on notice to the assignee and objecting creditors, making a prima facie case at least, of the justness of his claim; thus holding the affirmative in case the assignee desires to proceed and give evidence in opposition to it. If, upon the testimony so taken, there be an opposing interest, the register must certify to the court for decision. If not, he may deem the proof satisfactory, if indeed it be satisfactory, and order distribution accordingly.]<sup>2</sup>

BLATCHFORD, District Judge. The proof of claim, when now tendered, is to be treated, in all respects, as if it had not been tendered before the election of assignee and postponed.

{See Case No. 6,426.}

<sup>1</sup> [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

<sup>2</sup> [From 3 N. B. R. 649 (Quarto, 161).]