IN RE JEWETT.

Case No. 7,304.

{1 N. B. R. 491 (Quarto, 130);[1] 7 Am. Law Reg. (N. S.) 291; 15 Pittsb. Leg. J. (O. S.) 354.}

District Court, N. D. Illinois. 1868.

BANKRUPTCY—INDIVIDUAL AND PARTNERSHIP CREDITORS—PAYMENT—NO JOINT FUND.

Where there are both individual and partnership creditors of a bankrupt, but the assets are individual only, though mainly consisting of goods purchased by the bankrupt from the partnership on its dissolution prior to the bankruptcy, and being principally the same goods, in the purchase of which the partnership debts had originated; the partnership creditors will be entitled to be paid pari passu with the individual creditors.

{Criticised in Re Byrne, Case No. 2,270. Cited in Re Knight, Id. 7,880; Re Rice, Id. 11,750; Re McEwen, Id. 8,783; Re Hamilton, 1 Fed. 812; Re West, 39 Fed. 203.}

{Cited in Curtis v. Woodward, 58 Wis. 506, 17 N. W. 328.}

By Hon. LINCOLN CLARK, Register: This being the day fixed for the second meeting of creditors, the assignee, Mark Kimball, Esq., made his report, by which it appeared that he had in his hands the sum of thirty-seven thousand six hundred and forty-six dollars and eighty-three cents ($37,646.83) cash, as assets subject to distribution, as the creditors or the assignee should determine according to section 27 of the act of bankruptcy {of 1867 (14 Stat. 529)}. Upon due consideration and in view of what might be necessary to meet future expenses and provide for claims not yet proved, &c, a majority of the creditors being present and declining to decide, the assignee, at their request, decided that twenty-five per cent of the cash in his hands should be distributed among those creditors who had proved their claims and who were legally entitled to receive a dividend out of the assets of the bankrupt's estate, and that the surplus should remain in his hands subject to future distribution. The said {Frederick} Jewett was forced into bankruptcy under the involuntary provisions of the act at the instance of the Third National Bank of Chicago. At the time of the adjudication of bankruptcy the said Jewett was a hardware merchant in the city of Chicago, and previous to February 1st, 1867, was in copartnership with one Oliver R. Butler for the space of ten years, under the firm and style of Jewett & Butler. On said 1st of February the said Jewett purchased the entire interest of Butler. The entire indebtedness of the bankrupt was more than one hundred thousand dollars ($100,000). The whole amount of the assets, good and doubtful, were estimated at between fifty thousand dollars ($50,000) and sixty thousand dollars ($60,000). About eighty-five thousand dollars ($85,000) of claims were proved by the individual creditors of Jewett, and about sixteen thousand dollars ($16,000) were proved by the creditors of Jewett & Butler. The Third National Bank, who instituted the proceeding, were individual and joint creditors. Upon this state of the proofs Mr. Clarkson, attorney for some of the individual creditors,

and also for some of the joint creditors, contended that the individual creditors and the joint creditors should be paid pari passu out of the assets. Mr. Waller, attorney in behalf of some of the individual creditors, contended that the joint creditors could receive no portion of the assets of the bankrupt until the claims of the individual creditors were fully satisfied. There was no evidence of the solvency of Oliver Butler, nor that there were any partnership assets; nor was there any evidence to the contrary, and thereupon the question arose whether the joint creditors were entitled to share equally with the individual creditors in the division of the assets. The register overruled the objection made by Mr. Waller, and decided that all the creditors were entitled to equal distribution, which question, by the agreement of the respective attorneys, is certified to the court for its decision. In this case the bankrupt is as much bound to pay the debts due and owing by Jewett & Butler, as he is to pay his own individual debts. In fact, the debts owing by the partnership are several as

well as joint; and the creditors have a right to proceed against any property or interest therein which he has for the satisfaction of their claims; and if there is any principle in equity which qualifies this rule it is not because the obligation of the bankrupt is any less, nor because all his interests in his property are not subject to the payment of his debts, but equity will interfere only to protect the relative rights of others as those rights shall be made to appear. It appears to me, then, that prima facie all the creditors of the bankrupt have the right to proceed against his property for the satisfaction of their debts.

It is undoubtedly a rule in equity that where there are individual creditors and partnership creditors, and individual assets and partnership assets, the individual creditors must resort to the individual assets, and the partnership creditors to the Partnership assets; and it is not denied that this rule is applicable in bankruptcy. But how stands the rule when there are separate and joint creditors, but no joint or partnership assets, all the assets being those of the bankrupt? There are exceptions upon this subject. Story, Partn. § 378, says: "These exceptions allow a joint creditor to share pari passu with the separate creditors in every ease to which they are applicable. They are of three sorts: (1) When the joint creditor is the petitioner for a separate commission against the bankrupt partner. (2) Where there is no joint estate and no living solvent partner. (3) Where there are no separate debts." The rule, then, is that "where there is no joint estate and no living solvent partner," the joint creditors shall share equally with the separate creditors. How, then, is the exception to be manifested? Under what circumstances shall it be considered that there is no joint estate and no solvent living partner? If there was any joint estate, the bankrupt was interested in it, and he was bound to set it out in his schedule, but he has set forth none. No doubt it would have been competent for the individual creditors to have proved that there was a joint estate and a solvent living partner, but they did not seek to do it, but contended that the individual debts should be first paid, although there was no joint estate, and although the individual debts would consume the whole amount of the assets. Can it be that the joint creditors have no rights against the assets until they allege and prove negative propositions? In equity where two parties have a lien upon one fund, and one of the parties has a lien also upon a second fund, the party having a lien upon the first fund can compel the other party to exhaust his remedy upon the second fund, before he can resort to the first. But must he not allege and prove the existence of the second fund? I suppose it is clear that he must. How does the statement of the facts and the proof in the foregoing case differ? There is a view of the subject which would render it exceedingly unjust that the joint creditors should be postponed to the individual creditors. The testimony of Jewett was taken in his deposition. He proves, that after he bought out the interest of his partner, he purchased but few goods; of course the debts of the joint creditors were made in the sale to the firm of Jewett & Butler of the goods which constituted chiefly the assets of Jewett. Should these goods be turned away from

the payment of the joint debts, which constituted the consideration for making them, to the payment of the individual debts? "Equity alone can restrain the joint creditors from receiving their full dividend until the joint effects are exhausted." See James, Bankr. Law, 91. I am of the opinion, in the present state of the proofs, that the joint creditors should be paid pari passu with the individual creditors.

DRUMMOND, District Judge. As there seems to be no joint fund or source of payment for the joint creditors, I think the decision of the register is right

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