

IN RE KING.

Case No. 7,785.
[1 N. Y. Leg. Obs. 276.]

District Court, S. D. New York.

1842.

BANKRUPTCY—DEBT PAYABLE IN THE FUTURE—WHETHER WILL SUPPORT A DECREE—BANKRUPT AS A WITNESS.

1. A petitioning creditor's debt, which is certain and liquidated though payable in future, will support a decree in bankruptcy.

[Cited in Linn v. Smith, Case No. 8,375.]

2. The bankrupt cannot be examined as a witness, either to support the petition for a decree, or to defeat it.

[In the matter of Samuel King, a bankrupt.]

BETTS, District Judge. The point, presented by the objection, that petitioning creditor's debt is not yet due and payable, and cannot accordingly supply a foundation for the proceeding in this case, has already been fully considered and decided by this court. Mead's Case [Case No. 9,365], Nov. 11. Debts, certain and liquidated, though payable in future, afford sufficient ground for a petition to compel a decree in bankruptcy. It is set up by the bankrupt that the promissory note given by him included as part of its consideration certain outstanding debts due him and the petitioners as co-partners, the collection of which he assumed, but was not to be responsible for the amount until the same should be actually collected. If it is permissible at law, or in equity, to a party to prove part failure of the consideration of a promissory note in limitation of the recovery thereon, it is at least questionable on the evidence now produced whether the bankrupt did not accept the transfer of the debts absolutely, and undertake to account for the amount to his copartner. It would not be at all an unusual arrangement on the dissolution of a firm for one partner to receive the effects and outstanding credits of the co-partnership at a stipulated sum, and agree to pay so much therefor to his co-partner. Many other considerations would have weight in such adjustments of joint concerns beyond the actual money equivalent obtained on the one side or the other. The party proceeded against as a bankrupt was called and admitted as a witness to prove facts to defeat the proceedings, though objected to by the petitioning creditor. The bankrupt is subject to a personal examination by order of the court, but he cannot be made a witness to support the petition or to defeat it. This is incontestably the English rule in bankruptcy. Archb. Bankr. 414, 415; Owen, Bankr. 271, 273. And although in our practice the opposition to a decree may be made by others than the bankrupt, the principle of the rule would still apply so far certainly as to preclude his admissibility on behalf of those who seek to defeat the petition. The matter must accordingly be referred back to the commissioner, if the opposing creditors supposed they obtained testimony from the bankrupt important to their case, to enable them to supply it

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from other sources. The case must also go back for a more definite statement in respect to the trading of King. It is admitted he bought sand, coal, and various materials employed in the manufacture of brick, and one witness states that he purchased fire mineral coal for King for that purpose, but it is left uncertain and equivocal, whether or no these materials, or any of them, entered into the composition and manufacture of the brick. It is plainly understood otherwise

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by the counsel for King, because a material point in opposition to the decree, argued by him on the authorities and reasons of the case, rested upon the assumption that the entire manufacture had been carried on in the use of the products of King's own soil, and that the articles purchased in no way composed any part of the manufactured article. This is a material point, and the ambiguity resting upon the report of the proofs can only be removed by a reference of the case back to the commissioner to have the facts given with distinctness and certainty. Ordered accordingly.