Case No. 17,317.

IN RE WEBB.

{4 Sawy. 326; 16 N. B. R. 258; 10 Chi. Leg. News, 27; 5 N. Y. Wkly. Dig. 174.}[1]

District Court, D. Nevada. Sept. 7, 1877.

BANKRUPTCY OF A PARTNER—JOINT CREDITOR—PROOF OF DEBT.

A joint creditor, in case of the separate bankruptcy of one member of the firm, has a right to prove his joint debt, and vote for assignee in the separate bankruptcy.

{In the matter of Watson T. Webb, a bankrupt.} Webb, at the time he was adjudged a bankrupt, was a member of the firm of Webb & Mallard. At the first meeting of his creditors the register permitted both joint creditors of Webb & Mallard and separate creditors of Webb to prove their debts and vote for assignee. But two votes were cast for assignee, one by a joint creditor for James Hood, and one by a separate creditor for A. H. Ricketts. The register declared a failure to elect, and, there being no opposition, appointed James Hood to be assignee. Exception was taken to the action of the register in allowing the joint creditor to prove and vote, and the point has been certified for decision. There is also an application on behalf of Ricketts for an order removing Hood and appointing him as assignee. The register certifies that the only assets surrendered are joint assets.

Whitman & Wood, for petitioner.

James Hood, in person, opposed.

HILLYER, District Judge. Whether a joint creditor may prove his joint debt and vote for assignee, in case of the separate bankruptcy of one member of the firm, is the question to be decided. Under our present bankrupt law {14 Stat. 517}, many important consequences result from the proof of a debt or the having a provable debt. By section 5034 the choice of assignee is to be made by the "greater part in value and in number of the creditors who have proved their debts." If it can be shown, then, that the joint creditors have a right to prove their debts, it would seem to follow that they have a right to vote for assignee. While there are conflicting decisions as to the effect of such proof, so far as my search has gone, all agree that the joint creditors may prove their debts in the separate bankruptcy, under section 5067. That section allows "all debts due and payable from the bankrupt" to be "proved against the estate of the bankrupt." Section 6 of the bankrupt act of 1800 (2 Stat. 23) allowed the "creditors" of the bankrupt to prove their debts, and under this general designation of "creditors" it was the opinion of the supreme court that a joint creditor might prove his debt in a separate bankruptcy. Tucker v. Oxley, 5 Cranch {9 U. S.} 34. Speaking of the joint debt in that case, Marshall, C. J., says: "Although due from the company, yet it is also due from each member of the company." It was also held that a proviso, similar to our present section 5118, that "the discharge should not affect any person liable as partner with the bankrupt," while the act did provide for a discharge

from all debts which were, or might have been, proved, removed all doubt as to the right of a joint creditor to prove against the estate of one partner in bankruptcy.

I should be content to rest my decision upon the language of the present bankrupt law and the authority of Tucker v. Oxley, but for the fact that the decisions under the existing law are not uniform.

It was held, directly, that the joint creditors could not vote for assignee in case of the separate bankruptcy of one partner. In re Purvis {Case No. 11,476}. Yet in that case the joint creditors had proved their debts, apparently without objection. In Wilkins v. Davis {Id. 17,664}, Lowell, J., states the true rule to be that the joint creditors may prove and vote for assignee.

In the following cases the right of the partnership creditors to prove their debts in the separate bankruptcy is conceded: In re Frear {Case No. 5,074}; In re Pease {Id. 10,881}; U. S. v. Lewis {Id. 15,595}. But no question as to their right to vote for assignee arose.

There are a number of other cases which indirectly touch this question. They are those upon the effect of a discharge granted to one partner in his separate bankruptcy. The law is (section 5119) that "a discharge in bankruptcy, duly granted, shall release the

bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy." Whether or not a creditor's claim is released by a discharge depends upon its provableness; whether or not he can vote for assignee depends upon his having proved his debt.

Under our present bankrupt law there are decisions that a discharge granted to one partner, in his separate bankruptcy, releases him from his joint as well as individual debts. Such are In re Downing {Case No. 4,044}; In re Stevens {Id. 13,393}; In re Abbe {Id. 4}; In re Leland {Id. 8,228}; Wilkins v. Davis {supra}. There are also cases holding that such a discharge does not so release him. Such are Hudgins v. Lane {Case No. 6,827}; In re Winkens {Id. 17,875}. And see In re Noonan {Id. 10,292}; In re Little {Id. 8,390}; In re Grady {Id. 5,654}.

These latter cases indirectly decide that the joint debts are not provable, as the former, it seems to me, decide that they are provable in the separate bankruptcy.

Again, it has been held that a joint debt is a provable debt under section 5021, and will support a petition for a separate adjudication against one partner. In re Melick {Case No. 9,399}. This has long been the rule in England. Ex parte Crisp, 1 Atk. 133; Ex parte Elton, 3 Ves. 238. And there, notwithstanding the general rule is to the contrary, the joint creditor, who takes out a separate commission, shares in the separate estate pari passu with the separate creditors. Story, Partn. § 278.

It may, then, be safely assumed that in this country the general current of authority is in favor of the provableness of the joint debts in the separate bankruptcy. It follows, from the language of the bankrupt act, that if the joint creditors may prove they may vote for assignee. Beyond this it is not necessary to decide the effect of proving the joint debts in the present case. The action of the register in allowing the joint creditors of Webb & Mallard to prove their debts and vote for assignee is approved, and the prayer of the petition is denied.

[1] {Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 5 N. Y. Wkly. Dig. 174, contains only a partial report.}