IN RE WILSON.

Case No. 17,784.

{2 Lowell, 453;[1] 13 N. B. R. 253.}

District Court, D. Massachusetts. Dec, 1875.

BANKRUPTCY—PETITION OF PARTHER AGAINST COPARTHER—INVOLUNTARY PROCEEDING—DISCHARGE.

1. A proceeding in bankruptcy by a parther against his coparther is not an involuntary proceeding, within section 9, Act 1874, c. 390 (18 Stat. 180).

2. Therefore, a parther, who is in bankruptcy, upon the petition of his coparther, cannot obtain his discharge without the assent of creditors or the amount of assets required in voluntary proceedings.

{Cited in Re Duncan, Case No. 4,132; Be Austin, Id. 662.}

W. F. Wilson was adjudged bankrupt upon the petition of one Harrington, alleging himself a parther with Wilson, and that the firm was insolvent. Wilson denied the partnership, and a jury trial was had, which resulted in a verdict for the petitioner. Wilson now applied for his discharge, but filed no assent of creditors, and had not paid a sufficient dividend to enable him to dispense with the assent, if any is required. A creditor objected on this ground, and alleged certain frauds besides.

E. Avery, for the bankrupt, cited Act 1874, c. 390, § 9 (18 Stat. 180); In re Penn {Case No. 10,927}.

N. B. Bryant, for the creditor.

LOWELL, District Judge. An able argument has been addressed to me, that section 9 of the new statute absolves the defendant from obtaining the consent of his creditors,

on the ground that, as to him, the proceedings are compulsory.

It is true that this defendant did not consent to he adjudged bankrupt in connection with one whom he denied to be his coparther, and that rule 18 requires, in such cases, notice and other proceedings, including jury trial, if demanded, precisely as if the petition were by creditors; and that the discharge of each parther is separate and distinct from that of any other. Still I am of opinion that these are not involuntary or compulsory proceedings under section 9 of the act of 1874. That statute requires a considerable number of creditors to join in a petition, and, as has been pointed out by Judge Blatchford, precisely the number required to assent to the discharge of a voluntary bankrupt; so that the theory of the statute appears to be that those creditors who have chosen to put a person into bankruptcy against his will are presumed to assent to his discharge, if he has committed no actual fraud or misdemeanor against the meaning of the statutes. That presumed assent is not given when one parther petitions.

Again, creditors can only proceed for certain acts of bankruptcy; but a parther may petition on the ground that the firm is insolvent. Rule 18, indeed, seems to imply that a parther may allege acts of bankruptcy against the firm; but the statute speaks only of insolvency as the ground for a voluntary petition; or rather it says that, partners may petition or be petitioned against like individuals; and an individual can only petition on the ground of his insolvency. I apprehend It would be very difficult to find any case in which a parther would not be estopped to petition for joint acts of bankruptcy. No such petition has ever been brought in this court.

If, then, partners are insolvent, either has a right to insist that the firm shall go into bankruptcy, and the statute does not even say the other shall be notified; but the court very wisely has adopted notice as a rule of practice to prevent fraud and surprise. If the insolvency is proved, the case is made out. No involuntary case, of the ordinary kind, can be made out by such evidence. In truth, the verdict in such a case as this simply establishes that the recusant parther ought to have joined in the voluntary proceedings.

Then look at the consequences. One parther, disposed to do his whole duty by his creditors, brings the petition; the other resists it, and is rewarded by a gift of his discharge; or the partners put forward one to take the burden, and compensate him in some way for the risk; or they take in a parther for the very purpose of playing this part.

It was argued that the words "compulsory" and "involuntary" describe two classes of cases: one by creditors, and one by partners. But it is plain that the words are used throughout this statute as strict synonymes. See especially section 6, where "compulsory" is evidently so used. Upon the whole, I am satisfied that section 9 refers only to the ordinary case of petitions in invitum.

If this case should be taken to the circuit court, I wish it to be distinctly understood that I have not passed upon the allegations of fraud. Discharge refused.

[1] {Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.}