Case No. 17,875.

# IN RE WINKENS.

{2 N. B. R. 349 (Quarto, 113); 1 Chi. Leg. News, 163; 2 Am. Law T. Bankr. 53.}[1]

District Court, S. D. New York. Jan. 16, 1869.

BANKRUPTCY OF PARTNER—DISCHARGE FROM FIRM LIABILITIES.

Where a member of an existing firm has filed an individual petition in bankruptcy where there are firm debts and firm assets, the firm must be declared bankrupt before a member thereof can be discharged from its liabilities. This applies only to copartnerships actually existing, or where there are assets belonging to the firm.

{Cited in Re Stevens, Case No. 13,393; Re Webb, Id. 17,317; Wilkins v. Davis, Id. 17,664.}

I, James F. Dwight, register of said court in bankruptcy, do hereby certify that in the course of the proceedings in this cause, the following question arose pertinent to said proceedings, and is submitted to the district judge for his decision under provisions of the act {of 1867; 14 Stat. 517}:

On the 31st day of December, 1868, Daniel Winkens, of New York City, filed in the court his petition to be adjudicated a bankrupt and discharged from his debts. Attached to the petition were Schedules A and B, as provided for by the bankrupt act. The petition was in form No. 1, established by the supreme court; and petition and schedule were correct in form. The matter was duly referred to me, as register, to make adjudication in bankruptcy, and to take such other proceedings as are required by the act On the return day of the order of reference, January 6th, 1869, the bankrupt appeared by his attorney, and filed a certified copy of his petition and schedules, as directed in said order. On an examination of said Schedule A, it appears that the petitioner owes debts, both individually and as a member of the firm of Thomas & Co., and as a member of the firm of Daniel Winkens' Nephew. And that it appeared by an examination of said Schedule B, that among the assets set forth, is the individual property of the petitioner, certain claims and debts due the firm of Thomas & Co., and certain property of the firm of Daniel Winkens'Nephew; which firm of Thomas & Co. was composed of John J. Thomas and this petitioner, and became insolvent in March, 1868, and his property has been put in the hands of a receiver. And the firm of Daniel

Winkens' Nephew was composed of the petitioner and Charles Marquandt, and was engaged in business at the time of filing the petition. (Charles Marquandt is also petitioner for adjudication in a separate proceeding pending before me.) Upon which facts the register declines to make adjudication in bankruptcy of the petitioner, until his copartners in the firms referred to are brought into the proceedings, under the provisions of the thirty-sixth section of the act, and rule 18 of the supreme court. To this decision the bankrupt excepts, and prays that the question may be certified to the district judge, that his opinion may be had on the question, as to whether the register erred in declining to make adjudication against the petitioner, as prayed for; which prayer is granted, and this certificate made in accordance thereto.

Opinion.

I do not think that the petitioner is entitled to be adjudged a bankrupt or discharged in these proceedings, unless his co-partners are joined with him. He shows debts jointly with co-partners in two firms, and assets, the property of the same firms, but the co-partners in neither of these firms are parties to these proceedings, or sought to be brought in under the provisions of section 36 of the law, or rule 18, which provides for the bankruptcy of co-partnerships. He seeks a discharge from his debts due as a member of firms, that he does not ask to be adjudged bankrupt, and offers to pay his individual as well as co-partnership debts, with firm property, the members of which firms are not joined. I understand the law to be that, when there are firm debts and firm assets, the firm must be declared bankrupt (by either voluntary or involuntary proceedings) before any member of the firm can be discharged from its liabilities; and that this applies only to copartnerships actually existing, or where there are assets belonging to the firm, and not to co-partnerships terminated heretofore by bankruptcy, insolvency, assignment, or otherwise. In the case of In re Little {Case No. 8,390}, where I certified a question to the court, February 29, 1868, a decision is given on this point; and as I am aware that some misapprehension and uncertainty exists in the profession as to the effect of the decision in Little's Case, I would respectfully suggest to the court that this occasion be taken advantage of to definitely settle the law and practice in cases of petitions where firms are concerned.

Which facts and opinion are respectfully submitted this 15th day of January, 1869.

BLATCHFORD, District Judge. The register has stated, in his opinion, with accuracy and conciseness, the law on the subject referred to, as held by this court, and applied by it in repeated cases. His decision in the present case is correct

[1] {Reprinted from 2 N. B. E. 349 (Quarto, 113), by permission. 2 Am. Law T. Bankr. 53, and 1 Chi. Leg. News, 163, contain only partial reports.}