contract was to be performed, and where the assets of Smith's estate are properly distributable. We find, upon reviewing the decisions of the highest court of that state, that the question here at issue was set at rest in Graham v. Graham's Ex'rs, 34 Pa. St. 475, in which the case of Jack v. McKee, 9 Pa. St. 240, holding a contrary doctrine, was carefully considered, and expressly overruled. In Graham v. Graham's Ex'rs, supra, the decedent agreed with two distant relations that, if they would come and live with him, they should share his property equally with his nephews after his death. He failed to carry out his agreement, and suit was brought against his executors to recover the value of the promised shares of his estate. The plaintiff offered to prove the value of the decedent's estate, and the share of each nephew, for the purpose of showing the damage sustained by the plaintiff. To this offer the defendants objected on the ground that the measure of damages was the value of the services rendered, and was not to be governed by the value of the decedent's estate. Strong, J., said:

"Without pressing the insufficiency of the proof of the contract, * * * it by no means follows that the measure of damages in an action for its breach is the value of the thing promised at the time of the breach. Jack v. McKee, supra, is no longer a rule. This court has returned from the departure which was made in that case."

The rule laid down in Graham v. Graham's Ex'rs has been invariably followed since by the courts of Pennsylvania, the latest case brought to our attention being Kauss v. Rohner, 172 Pa. St. 481, 33 Atl. 1016, in which the court said, "Proof of contract did not entitle plaintiff to recover value of the estate." We find no error in the instruction given by the learned judge, and the judgment of the circuit court should be affirmed.

In re WILCOX.

Ex parte ROUSS.

(District Court, D. Massachusetts. April 29, 1899.)

No. 43.

1. BANKRUPTCY—PARTNERSHIPS—RULE OF DISTRIBUTION—JOINT AND SEPARATE CREDITORS.
   Bankruptcy Act 1898, § 5, cl. f, prescribing the rule for the distribution of assets as between individual and firm creditors of bankrupt partners, applies not only to the case of the adjudication of the partnership as such, but also to the case where one member of the firm is adjudged bankrupt in his individual capacity.
2. SAME—NO JOINT ASSETS.
   Where a member of a co-partnership is adjudged bankrupt in his individual capacity, creditors of the firm are not entitled to receive dividends out of his separate estate until his individual creditors have been paid in full; and this rule prevails notwithstanding the fact that there are no partnership assets.

In Bankruptcy. On review of ruling of referee.

The certificate of the referee (Henry J. Field, referee in bankruptcy for Franklin county, Mass.) was as follows:

"The bankrupt, three or four years ago, was a member of a partnership at Lincoln, Nebraska. The other member of the firm left, with all the funds; and she set herself about to pay up the partnership debts, in which she succeeded so far as to pay all of them except the one in question, amounting to $1,000, besides accrued interest, which was presented for proof against her individual estate in bankruptcy, and allowed. Upon the question whether such creditor of a former partnership should share pro rata with the individual creditors, I ruled that as no evidence appeared showing that there are any assets of said partnership, and there was some evidence that there are none, under the law such creditor is entitled to share with the individual creditors; that is, pro rata."

The case was submitted to the judge without argument.

LOWELL, District Judge. The proper distribution of the joint estate of a bankrupt firm and of the separate estate of its component bankrupt partners has been the subject of much discussion in the courts of England and of this country for nearly 200 years, and the conclusions reached by the several courts, and by the same court at various times, have differed greatly. As was observed by Judge Ware in Re Marwick, 2 Ware, 229, 233, Fed. Cas. No. 9,181:

"The whole subject of marshaling the assets and claims between the joint and separate creditors in bankruptcy involves some of the most difficult problems that occur in the whole range of jurisprudence."

The historical development in England and in this country of the law upon this subject has often been stated imperfectly, and sometimes quite inaccurately, both in text-books and in reported opinions, and therefore it has seemed worth while to review with some degree of fullness that development from its beginning.

At common law the creditor of a partnership was the joint creditor of the partners. He might sue them, obtain judgment against them, and take out execution against them jointly, and satisfy the execution from any part of the estate of either or both, whether such estate were joint or separate. On the other hand, the separate creditor of one partner, having sued that partner, having obtained judgment against him, and having taken out execution thereupon, might satisfy the execution either from that partner's separate estate, or from his share of the joint estate. If, however, a partner's share of the joint estate was sold to satisfy a separate execution issued against him, the purchaser of the share found himself somewhat differently situated from the purchaser of an undivided share of property held jointly by persons not partners. The former was limited by a court of equity to take, not an undivided share of the joint partnership estate, but only the net amount due the debtor partner after the affairs of the partnership had been settled, and after all its debts had been paid. Hence the separate creditor of an individual partner found his claim upon his debtor's share of the partnership estate subordinated to the right of the remaining partners to apply the joint partnership estate in satisfaction of the claims of the partnership creditors. See Lindl. Partn. (6th Ed.) 308; Fox v. Hanbury, Cowp. 445.

Statutes of bankruptcy are of considerable antiquity in England, the first having been passed in the reign of Henry VIII. The bankrupt law of the present day descends from statutes passed in the

reigns of Elizabeth and of James I., which have been frequently amended from that time to this. Previous to the year 1822 these statutes contained but a single mention of bankrupt partners or partnerships, viz. that contained in St. 10 Anne, c. 15, § 3, which provided that the discharge of a bankrupt should not discharge a bankrupt partner or co-obligor. Before 1822, therefore, the rules regulating the distribution in bankruptcy of the joint and separate estates of partners were established altogether by judicial decision. An examination of the earliest records of the English courts of bankruptcy would be necessary to determine precisely how commissions of bankruptcy against members of a trading partnership were issued in the seventeenth century and in the first years of the eighteenth. It is pretty clear that a joint commission against all the partners was not unusual. In 2 Christ. Bankr. (2d Ed.) 33, it is stated that the first reported instance of a joint commission against two partners occurred in 1682. Nothing in the report suggests that the practice was then deemed extraordinary. In the case mentioned, the separate creditors of one partner alleged that the commissioners intended to divide the joint property among the joint creditors without permitting the separate creditors to share in the same, and they filed a bill to secure their own admission to come upon the joint fund. The assignees alleged that the partnership articles provided that joint debts should be paid out of joint assets, and that those assets should not be charged with the separate debts of the individual partners. Lord North decreed, in substance, that the joint assets should be applied to the payment of the joint debts, and that, if there was any surplus, it should be applied to the payment of the separate debts of the individual partners. If, however, the joint estate was insufficient, and the separate estates of the partners were drawn upon for payment of the joint debts, then, in that case, if either partner paid more than the other, he might be admitted to prove for such surplus against the separate estate of the other partner. It is not stated if the separate creditors of the several partners had, as against the separate estate of the several partners, a claim prior to that of the joint creditors; and it does not clearly appear whether Lord North's decision was rested by him upon the articles of partnership or upon the general law, though the latter is probable. Craven v. Knight, Goodinge, Bankr. 149; s. c. sub nom. Craven v. Widdows, 2 Cas. Ch. 139. It was thus established that, in case of a joint commission against all the partners, the joint creditors could avail themselves of the equitable right of the partners of a bankrupt to subordinate to the settlement of the partnership accounts the claims of his separate creditors upon his share of the joint estate. In 1693 a partner indebted to the partnership was made bankrupt under a separate commission, and the commissioners (for what reason does not plainly appear) assigned the partnership goods to the assignees in bankruptcy under that commission. The other partners brought a bill for an account, and urged that the assignees in bankruptcy took no more than the net share of the bankrupt after his debts had been paid. Of this opinion the court seemed to be, and the joint creditors were given priority in payment out of the joint estate. This, however,

was done, not in execution of the bankrupt law, but only after the interposition of a court of equity. The joint debts, though paid by the assignees, were proved before a master in chancery. Richardson v. Gooding, 2 Vern. 293. From this case it appears that, under a separate commission against one partner, joint creditors could enforce their prior claims upon the joint estate only by bill in equity, and not by petition in bankruptcy. See Gross v. Dusfresnay (1734) 2 Eq. Cas. Abr. 110. As has been said, it is impossible to determine what was the practice, at or about the year 1700, concerning the issuance of joint and separate commissions in cases where both partnership and partners were bankrupt, and where there were joint and separate assets and debts. In such cases, probably, both joint and separate commissions were issued and subsisted at the same time, the joint assignees acquiring the joint estate and paying the joint debts, and the separate assignees acquiring the separate estate and paying the separate debts; but the data are too imperfect to establish plainly that this course, or any other, was invariably pursued. See Ex parte Crowder (1715) 2 Vern. 706; In re Simpsons (1752) 1 Atk. 137.

In Ex parte Crowder a joint commission issued against A. and B., joint traders. Their separate creditors applied by a petition in bankruptcy (not by a bill in equity), that they might be let in under the joint commission to prove their debts against the separate estates of the respective bankrupts; alleging as a reason for this course, then apparently unusual, that the separate estates were of such small value that they would not bear the charge of taking out the two separate commissions which would otherwise be required. Lord Chancellor Harcourt ordered the petitioners to be let in to prove their separate debts upon their paying contribution to the charge of the joint commission, "and directed that, as the joint or partnership estate was, in the first place, to be applied to pay the joint or partnership debts, so, in like manner, the separate estate should be, in the first place, to pay all the separate debts; and, as separate creditors are not to be let in upon the joint estate until all the joint debts are first paid, so, likewise, the creditors to the partnership shall not come in for any deficiency of the joint estate upon the separate estate until the separate debts are first paid." Lord Harcourt's opinion is a very short one, and his reasons do not fully appear; but it seems clear that he did not suppose that he was laying down a new rule of substantive law, and it is probable that he was applying to the distribution of joint and separate estates under a single joint commission the rule which had formerly been applied when, at the same time, joint estates were administered under a joint commission and separate estates under a separate commission. It is to be observed that Lord Harcourt's rule, and the decisions which follow it, applied only to cases in which joint and separate estates were administered under a joint commission. Not uncommonly this has been overlooked. It should be noticed, also, that a petition and order were required in each case, though the order issued as of course. Ex parte Sandon (1743) 1 Atk. 68.

In Ex parte Cook, 2 P. Wms. 500, decided in 1728, a joint commission had been taken out against two bankrupt partners, under which the commissioners made an assignment both of the joint and of the

separate estate. Afterwards the separate creditors took out separate commissions; thus doing that which, in Ex parte Crowder, they had applied to be relieved from doing. In the conflict which thereupon arose between the assignees under the several commissions, Lord Chancellor King held that the assignment made under the joint commission passed the separate as well as the joint estate, and stated that:

"It is settled, and is a resolution of convenience, that the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors."

This, it will be observed, is, in every detail, the rule laid down in Ex parte Crowder; and, though Lord King said he would not hinder the separate creditors from bringing a bill in equity for an account of the separate estate, evidently he did not consider this necessary, and eventually disposed of the whole matter in the court of bankruptcy. See, also, Howard v. Poole (1735) 2 Strange, 995; Wickes v. Strahan (1741) Id. 1157; Twiss v. Massey (1737) 1 Atk. 67.

The practice of taking out both joint and separate commissions was not definitely abandoned, however, and their co-existence continued to give much trouble to the courts. In Ex parte Yale (1721) 3 P. Wms. 24, note, it had been determined that a certificate under a separate commission discharged the bankrupt as well from his joint as from his separate debts. In Horsey's Case (1729) Id. 23, there were both joint and separate commissions, yet Lord King, on petition, let in the separate creditors, who had taken out the separate commissions (which were still subsisting), to prove their debts under the joint commission, in order to oppose the granting of a certificate thereunder. In 1752 Lord Hardwicke, in superseding a subsequent separate commission in favor of a prior joint commission, said that the practice of taking out both joint and separate commissions against the same persons, "being of late thought a very unreasonable one, as occasioning great confusion with regard to bankrupts' effects, has been discountenanced." In re Simpsons, 1 Atk. 137. For later cases, see Ex parte Hardcastle (1787) 1 Cox, Ch. 397; Ex parte Gillam (1789) 2 Cox, Ch. 193; Ex parte Poole (1790) Id. 227; Ex parte Brown (1793) 2 Ves. Jr. 67.

It remains to deal with the disposition of the joint estate and with the rights of joint creditors where no joint commission was taken out, but a separate commission or separate commissions alone existed. This state of things might arise from any one of several causes; e. g. the unreadiness of the joint creditors; their inability to procure the issuance of a joint commission because one partner was an infant or deceased, or because one partner, though insolvent, had not committed a statutory act of bankruptcy. See Wats. Partn. (2d Ed.) 293. In Ex parte Baudier (1742) 1 Atk. 98, joint creditors petitioned to be admitted to prove their joint debts under each of the separate commissions taken out against two partners; no joint commission hav-

ing been issued. Lord Chancellor Hardwicke held that, although separate creditors might, upon petition, prove their debts under a joint commission, yet joint creditors could not be admitted to prove their debts under separate commissions, but "must proceed in the common course, by taking out a joint commission." The opinion is short, and not altogether clear. The rule of Ex parte Crowder was formulated, and there was a recognition that where there were separate commissions the joint creditors had a right in equity (apparently not in bankruptcy) to be paid out of the surplus of the separate estates after the separate creditors had been satisfied. It seems probable that the case was rested upon a theory that the joint estate could not be properly administered under a separate commission. In Ex parte Voguel (1743) 1 Atk. 132, the assignees under a separate commission had in fact obtained possession of some of the joint estate, and the joint creditors brought a petition that they might have priority in its division. Lord Hardwicke refused to give complete relief under the petition filed in bankruptcy, but gave the petitioners leave to bring a bill in equity for the same purpose, and in the meantime (probably for the sake of convenience) let them in to prove their debts, without prejudice, under the separate commission. The disposition of the estate, joint or several, was not determined; but the joint creditors were assumed to have priority in the distribution of the joint estate, and the separate creditors in the distribution of the separate estate. Soon after the decision of Ex parte Voguel the court of common pleas decided that a separate commission might be taken out against one partner by a joint creditor. Crispe v. Perritt, Willes, 467. In delivering the elaborate opinion of the court, Lord Chief Justice Willes, after stating that no help in deciding the question was to be derived from the wording of any of the bankrupt acts, referred to two early cases (one under Lord Macclesfield, the other under Lord Talbot) in which separate commissions had been taken out by a joint creditor. Ex parte Caruthers, Cooke, Bankr. Law (8th Ed.) 26; Ex parte Upton, Id. 27. The lord chief justice concluded that the commission should issue as a matter of principle, and showed that in some cases great inconvenience would result if a joint creditor was not permitted to take out a separate commission. He expressly stated that the court did not determine at all in what manner the effects should be marshaled under the commission, saying that was "the proper business of the court of chancery." In Ex parte Crisp (1744) 1 Atk. 133, Lord Hardwicke expressly followed Crispe v. Perritt. See, also, the note to In re Simpsons, 1 Atk. 138. In Lord Hardwicke's time the practice seems to have been established as follows: If a joint commission was first taken out, separate commissions were ordinarily refused, and the distribution of both joint and separate estate was made under the joint commission according to the rule laid down in Ex parte Crowder. If no joint commission was taken out, a separate commission might issue on the petition either of a joint or of a separate creditor, and in such case joint creditors as well as separate were admitted to prove their debts. Sometimes, it seems, the order admitting joint creditors to prove specified that they should prove only to assent to or dissent from the certifi-

cate; but at other times, if matters took their regular course, and no further steps were taken, all creditors who had proved—both joint and separate—were satisfied ratably from all the estate which came into the hands of the assignees, both joint and separate. Usually, however, it was for the interest of one class of creditors or the other that the accounts of the joint and separate estates should be kept distinct, and an order for that purpose was obtainable by petition in bankruptcy presented either by the joint or by the separate creditors. The order to keep distinct accounts included, as matter of course, an order to apply the joint estate, in the first place, to the payment of the joint debts, and the separate estate, in the first place, to the payment of the separate debts. Green, Bankr. Law (5th Ed.; 1777) 150, note; Wats. Partn. (2d London Ed.; 1807) p. 324; Ex parte Hayward, Cooke, Bankr. Law (8th Ed.; 1745) 268; Ex parte Oldknow, Id. 259. The petitioning joint creditor seems to have been allowed, in recompense for the burden he had borne in obtaining the commission, to receive a dividend thereunder from the separate estate ratably with the separate creditors. No decisions touching this subject made by Lord Hardwicke's successors, Lords Northington, Camden, and Apsley, have been found. It appears from Cooke, Bankr. Law (1st Ed.; 1786) 5, 163, 165, that the practice of taking out a joint commission against all the partners, after separate commissions had issued against some of them, was then common; and furthermore it appears that the rights of joint creditors under a separate commission were not then clearly defined.

Lord Chancellor Thurlow seems to have been the first to lay down a different rule for dealing with the assets under a separate commission. In Ex parte Cobham (1784) 1 Brown, Ch. 576, where joint creditors petitioned to prove their debts under separate commissions against the partners, he said that:

"It would be hard that the joint creditors should come upon the separate estate, to the prejudice of the separate creditors, and still have an exclusive power of coming upon the joint estate; but the separate assignees might, if they pleased, possess themselves of the bankrupt's proportion of the partnership effects, and then he thought the justice of the case would be that both the joint and separate creditors should come in, pari passu, upon both funds."

As the petition was consented to, however, he made the order. In this case Lord Thurlow substantially followed the former practice, though, as reported, he seems not to have distinguished clearly between proving to deal with the certificate and proving to receive dividends. In Ex parte Hayden (1785) 1 Brown, Ch. 454, however, he changed his practice. The report is as follows:

"Upon a separate commission of bankrupt against one partner, the joint creditors petitioned, and were allowed to prove their debts, and to receive a dividend pari passu with the separate creditors, there being no joint estate. Ex relatione."

In the fuller report given in Cooke, Bankr. Law (8th Ed.) 261, the decision seems to have turned upon want of proof that there had been a partnership, and the absence of joint estate is barely mentioned. In Ex parte Hodgson (1785) 2 Brown, Ch. 5, it was sought to rescind the proof of a joint debt under a separate commission. Lord Thur-

low said that there was no distinction as to sole or separate debts, and "that debts, whether sole or joint, ought to be paid out of the bankrupt's estate, which is composed of his separate estate, and of his moiety of the joint estate, and therefore ordered that she [the joint creditor] should come in pari passu with separate creditors." In this case it seems that Lord Thurlow determined that, in the ordinary course of courts of bankruptcy under a separate commission, joint and separate creditors should share equally in the distribution of both joint and separate estates. See Ex parte Page (1786) 2 Brown, Ch. 119; Ex parte Flintum, Id. 120. These cases settled the practice. Lord Thurlow's reasoning is nowhere clearly expressed, but it was substantially as follows: If no joint commission be taken out, the assignees under the separate commission are entitled to an account of the business of the partnership, and to the bankrupt's share of the partnership estate after the joint debts have been paid. If they are unwilling to bring a bill to procure this account, then, as the debts of the partnership are at law the debts of each partner as well, and as it is admitted that joint creditors may petition for a separate commission, and, even though they do not, may yet, by order of the court of bankruptcy, be let in upon petition to prove their debts in order to allow or dissent from the granting of the certificate, it follows that they may also share equally with the separate creditors in the dividend, whencesoever that dividend is derived. But the difference between Lord Thurlow and Lord Hardwicke was one of form rather than of substance. Under Lord Hardwicke, the joint creditor under a separate commission shared equally with the separate creditors in the distribution of all the estate which came into the hands of the assignees, unless the order admitting him to prove limited him to dealing with the certificate, or unless an order was obtained upon petition for the keeping of distinct accounts. Under Lord Thurlow this order for distinct accounts could not be obtained upon petition in bankruptcy, except with the consent of the assignees. Ex parte Tate, 1 Cooke, Bankr. Law (3d Ed.) 307. Upon the filing of a bill in equity against the other partners for an account of the partnership business, however, the assignees under the separate commission were enjoined from paying a dividend to the joint creditors out of the separate estate. In other words, that which Lord Hardwicke had permitted in pursuance of proceedings in bankruptcy, Lord Thurlow permitted to be accomplished only by bill in equity. Lord Hardwicke thought that, upon petition for the keeping of distinct accounts, the separate estate might be reserved for the separate creditors. Lord Thurlow would reserve it only upon filing a bill in equity for an account of the partnership business. Wats. Bankr. (2d Ed.) 332; Ex parte Elton, 3 Ves. 239. Apparently, even the joint creditors were not, upon petition, permitted to obtain priority in the distribution of the joint estate which came into the hands of the assignees under a separate commission, but only upon their filing a bill in equity. Until this was filed they were paid ratably with the separate creditors out of the separate estate and the bankrupt's share of the joint estate. Hankey v. Garrat (1792) 3 Brown, Ch. 457; Id., 1 Ves. Jr.

236. It is further to be observed that, contrary to the statements of many text-books, the rule laid down in Ex parte Crowder for the distribution of assets under a joint commission was not in any way altered by Lord Thurlow. This he expressly decided in Ex parte Marlin (1785) 2 Brown, Ch. 15, and it appears by plain implication in Ex parte Bate (1785) 1 Brown, Ch. 452; Ex parte Clowes (1789) 2 Brown, Ch. 595; Ex parte Hardcastle (1787) 1 Cox, Ch. 397; Ex parte Seddon (1788) 2 Cox, Ch. 49; Ex parte Bentley (1790) Id. 218; Ex parte Lodge (1790) 1 Ves. Jr. 166. The same appears also from sundry forms found in 2 Cooke, Bankr. Law (3d Ed.) 140, 238.

The law as it stood in 1793 is stated in the third edition of Cooke on Bankruptcy, which was published in that year, though an appendix, bound up with the only copy I have seen, was added in 1794. Under a joint commission, the joint estate was applied primarily to the payment of the joint debts, the separate estate to the payment of the separate debts; the separate creditors, upon payment of their share of charges, being let in under the joint commission by a special order made in each case, as of course, upon their petition. Under a separate commission joint creditors, by a similar special order (as to the special order, see Ex parte Copland, 1 Cox, Ch. 420), were admitted to prove and receive dividends ratably with the separate creditors out of such estate, both joint and separate, as came into the hands of the assignees under the commission. Where, however, the assignees under the separate commission took joint estate, the joint creditors admitted to prove their debts under the separate commission might apply, by petition in bankruptcy if the other partners consented, otherwise by bill in equity, to have an account taken of the partnership business. If that was done, the joint and separate estates were distributed as if the commission were joint. The right of the separate creditors under a separate commission to restrain the payment of dividends out of the separate estate to joint creditors was enforceable, as has been said, only in equity.

In 1793 Lord Loughborough, afterwards Lord Rosslyn, succeeded Lord Thurlow as chancellor, and on March 8, 1794, issued a general order, often mentioned, and commonly misunderstood. It may be found in 4 Brown, Ch. 548. Among other matters, it set out that special petitions in each case for leave to prove separate debts under a joint commission created delay and expense; and it therefore ordered that the commissioners under a joint commission should be at liberty to admit proof of separate debts under the same without special order, in which case the separate creditors so proving might vote on the question of assenting to or dissenting from the bankrupt's certificate. Separate accounts were to be kept, and the rule of distribution laid down in Ex parte Crowder was to be followed. The only change thus made by Lord Loughborough was to permit separate creditors to prove their debts under a joint commission without the special order formerly required in each case. The provision contained in Lord Loughborough's order concerning the distribution of the joint and separate estate introduced no change in the law whatsoever, and merely stated the practice which had always been followed under a

joint commission since Ex parte Crowder. The order in no way affected the practice under a separate commission. See 2 Christ. Bankr. Law (2d Ed.) 45.

In 1796 the case of Ex parte Elton came before Lord Loughborough. 3 Ves. 238. In that case a separate commission was taken out against one of two partners, and a joint creditor attempted to prove his debt thereunder for the purpose of receiving a dividend. The lord chancellor was evidently much perplexed, and his opinion, as reported, is not altogether clear. Following what was then the last edition of Cooke on Bankruptcy (the third), he stated that it had been understood for some time that a joint creditor might prove and receive a dividend in a case like that before him; but he noted the argument of counsel (Sir John Scott), "that if the assignees of the separate estate think fit, or will undertake, to file a bill [to wind up the partnership, and obtain for the joint creditors payment out of the partnership assets], in such case the joint creditor admitted to prove is to be restrained from receiving a dividend" (out of the separate estate). He observed upon the likeness between the application of each class of assets to the corresponding class of creditors, and the marshaling of assets, saying that the joint creditor had two funds upon which he could go, while the separate creditor had but one. Again, he pointed out that the joint creditor might proceed directly against the joint estate by a suit at law, while for every payment made out of the separate estate in discharge of the joint debt there must be suit in chancery by those representing the separate estate to be reimbursed from the joint estate:

"Wherever my order [i. e. to permit the joint creditors to prove for a dividend] will procure an account of the joint estate, there can be no harm [i. e. because, when an account of the joint estate is taken, the rights of the separate creditors against the separate estate are secured]; for then I should give the usual directions to apply the funds, respectively, the joint estate to the joint debts, the separate to the separate debts; the surplus of each to come in reciprocally to the creditors remaining upon the other. But, unless I can do this, every order I can make, to let a joint creditor receive a dividend from the separate estate, would carry a chancery suit in the bosom of it, to have the joint estate brought into the fund, to prevent the separate estate from being exhausted [i. e. if, from the nonassent of the solvent partner, or for other reason, an account of the partnership could not be obtained by order in bankruptcy, then, according to Hankey v. Garrat, a bill in equity would be necessary]; and I should make the order, and in the course of ten days suspend it by preventing him from receiving the dividend."

This quotation shows plainly that there had been no question of permitting the joint creditor to receive a dividend from the separate estate ratably with the separate creditor in any case where the joint and separate estate were both before the court, but only how to deal with the difficult and exceptional case of the rights of a joint creditor where only the separate estate was before the court under a separate commission. After much reflection and further argument, Lord Loughborough finally decided that a joint creditor might not prove to receive a dividend (thus restoring Lord Hardwicke's practice); and he observed that, if the joint creditors could receive a dividend in such case, there never would be a joint commission, but they would take out a separate commission against each partner. To this rule of ex-

cluding joint creditors who had made proof under a separate commission from receiving a dividend from the separate estate ratably with the separate creditors, Lord Loughborough admitted, arguendo, two exceptions. The first was the case of the petitioning creditor. It has been shown that a joint creditor might take out a separate commission. Having done so, and thus having borne the brunt of the suit, he was permitted to receive a dividend like a separate creditor. "With regard to the creditor suing out the commission, the separate creditors cannot object to his having the effect of the execution he has taken out." This exception had, of course, no application to the converse case under a joint commission. Again, and less clearly, in arguing concerning the marshaling of assets, Lord Loughborough said:

"It is not stated as a case where there are no joint effects. Here it is only that there are two funds. Their proper fund is the joint estate, and they must get as much as they can from that first."

Except Ex parte Hayden, before referred to, this is the first suggestion of that exception to the rule concerning the distribution of joint and separate estate which has caused so much debate and perplexity for a hundred years, and is in question in the case at bar. Ex parte Elton was followed by Lord Loughborough in Ex parte Abell (1799) 4 Ves. 837, although it seems that in that case there was no joint estate.

The law as it stood at the very beginning of this century is well stated in Cull. Bankr. Laws (London, 1800) p. 451. After observing that the taking out of both joint and separate commissions against the same persons had been discountenanced on grounds of expense, and that such commissions could not subsist together, the author states that the various classes of creditors, with some variations and restrictions, are let in under the same commission. Under a joint commission the assignees take all the property, joint and separate. Under a separate commission the assignees take all the separate property, and take the bankrupt's interest in the joint estate in the same manner as the separate creditor takes it upon an execution against the individual partner. All creditors can prove under either a joint or a separate commission, in order to assent to or dissent from the granting the certificate. As to dividends, separate creditors, formerly by special order, but since 1794 by general order, may prove under the joint commission, and may receive dividends from the separate estate and from the surplus of the joint estate. Under a separate commission, joint creditors cannot receive dividends from the separate estate until the separate debts have been paid in full. An exception to this rule is admitted in the case of a petitioning creditor, which exception is explained, but no mention is made of any exception where there is no joint estate. See, also, 1 Cooke, Bankr. Law (4th Ed.; 1797) 244. The latter author, writing between the decision in Ex parte Elton and that in Ex parte Abell, seems to recognize both exceptions.

In 1801 Lord Eldon succeeded Lord Loughborough as chancellor. In Ex parte Pinkerton, 6 Ves. 814, note, decided within a month of his becoming chancellor, a joint creditor petitioned to prove and re-