dealt with the subject. The general rule has been followed or recognized in Mississippi (Oakey v. Rabb's Ex'rs, Freem. Ch. 546; Irby v. Graham, 46 Miss. 425, 430, 432); in Nebraska (Bowen v. Billings, 13 Neb. 439, 443, 14 N. W. 152); in Iowa (Hubbard v. Curtis, 8 Iowa, 1; Miller v. Clarke, 37 Iowa, 325); in Minnesota (Ives v. Mahoney, 73 N. W. 720); in Tennessee (Fowlkes v. Bowers' Heirs, 11 Lea, 144). In none of these states has there been found a case which deals with the exception in the absence of joint estate. Both the rule and the exception have been recognized in Alabama (Smith v. Mallory's Ex'r, 24 Ala. 628; Van Wagner v. Chapman's Adm'r, 29 Ala. 172; Evans v. Winston, 74 Ala. 349); in New Jersey (Davis v. Howell, 33 N. J. Eq. 72); in Illinois (Rainey v. Nance, 54 Ill. 29; Young v. Clapp, 147 Ill. 176, 32 N. E. 187, and 35 N. E. 372; Ladd v. Griswold, 4 Gilman, 25, 39); in Missouri (Level v. Farris, 24 Mo. App. 445; Hundley v. Farris, 103 Mo. 78, 15 S. W. 312); in Rhode Island (Colwell v. Bank, 16 R. I. 288, 290, 15 Atl. 80, and 17 Atl. 913; Pearce v. Cooke, 13 R. I. 184); in Wisconsin (Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007); in Maine (Harris v. Peabody, 73 Me. 262). The exception has been somewhat doubtfully recognized in Georgia (Toombs v. Hill, 28 Ga. 371; Keese v. Coleman, 72 Ga. 658). The rule has been recognized, and the exception disapproved, in Indiana (Weyer v. Thornburgh, 15 Ind. 124; Warren v. Able, 91 Ind. 107; Warren v. Farmer, 100 Ind. 593), and in Massachusetts (Potters Works v. Minot, 10 Cush. 592). In New Hampshire the rule has been recognized, and the exception declared to be unreasonable, though it is established in bankruptcy. If there be no preference where there is no joint estate, it is said by the court that there should be no preference where there is no separate estate. Weaver v. Weaver, 46 N. H. 188, 192. In Ohio the rule was disapproved in principle, though admitted to be established in bankruptcy, in Grosvener v. Austin's Adm'rs, 6 Ohio, 104. In Rodgers v. Meranda, 7 Ohio St. 179, both the rule and the exception were approved. In Brock v. Bateman, 25 Ohio St. 609, where the joint estate was not sufficient to pay the costs, the exception was allowed to operate, and, in the confusion of mind caused by an attempt to reconcile the theory of the exception with the theory of the rule, the court declined to say what would happen where the partnership assets would yield to the joint creditors less than the separate assets would yield to the separate creditors. Plainly, the court was inclined to reduce the rule to a mere marshaling of assets. In Kentucky it appears to be established that the joint creditor may waive his right to proceed against the joint estate, and, if he does so, may share equally with the separate creditor in both joint and separate estate; otherwise, the separate creditor receives from the separate estate as large a dividend as the joint creditor has received from the joint estate, and thereafter joint and separate creditors are paid pro rata from the separate estate. Bank v. Keizer, 2 Duv. 169. The general rule has been disapproved in Vermont. The numerous exceptions ingrafted thereon, it is said, show that the rule rests on no satisfactory basis. Bardwell v. Perry, 19 Vt. 292. It has been disapproved in Connecticut (Camp v. Grant, 21 Conn. 41), and in Virginia (Pettyjohn v. Woodroof, 10 S. E. 715). In Kansas the matter seems to be left in some doubt. Fullam v. Abrahams, 29 Kan. 725. The list above given is not supposed to be exhaustive, but it represents with some fullness the rule of distribution as administered in the courts of equity of the several states. It should be added that some of the decisions above cited rest upon the language of particular statutes, as well as upon general principles of law.

In Tucker v. Oxley (1809) 5 Cranch, 34, there was question concerning the right of the debtor of a bankrupt to set off against his debt to the bankrupt a debt due him from a firm of which the bankrupt was a member. The court permitted the set-off, and, in discussing the right of the joint creditor to prove against the separate estate of the bankrupt, Chief Justice Marshall made some statement of the history of the rule, not altogether full or accurate, but showing that he discriminated between bankruptcy and equity, and appreciated to some extent the reasons which determined the different practice adopted by Lords Thurlow and Loughborough. It is not necessary here to consider the decision in Tucker v. Oxley. The case is mentioned only for the reference made in the opinion of the court to the general rule of distribution. In Murrill v. Neill, 8 How. 414, the question came before the United States supreme court, not in bankruptcy, but in equity. The opinion of Mr. Justice Daniel states that "the rule in equity governing the administration of insolvent partnerships is one of familiar acceptation and practice." The learned justice then stated the history of the rule, partly in traditional version, but with some discrimination between equity and bankruptcy, though with little between separate and joint commissions. He noticed the two exceptions,—that of the petitioning creditor and that in the absence of joint estate,—which he termed "eccentric variations in the English practice"; and he further said of them, "They do not, for aught we have seen, appear to have been recognized by the courts in this country." He referred with approval to McCulloh v. Dashiell's Adm'r, and to Story, Partn. 376, and he mentioned Tucker v. Oxley.

To this history of the rule of distribution there should be added some short consideration of the principles upon which the rule is supposed to rest, and these can neither be found nor applied without difficulty. In several cases, and in the writings of many persons learned in the law, elaborate arguments have been made to show that the rule which gives the separate creditor a prior claim on the separate estate is unsound in principle, and works unfairly in not a few instances. Eden, Bankr. Law (2d Ed.) 169; 2 Christ. Bankr. (2d Ed.) 35; Evans' Letter to Sir S. Romilly (1810) p. 81; Story, Partn. § 376. Indeed, some of the arguments used in support of the rule rather make against it. Thus it has been said that the rule is based upon the theory that the joint creditor gives credit to the joint estate, and the separate creditor to the separate estate. The facts are often quite otherwise. A man lending money to a firm lends it upon the credit of the individual estates of the separate partners as well as upon that part of their property which is engaged in the firm business; and, on the other hand, the separate creditor of a partner—his butcher or tailor, for example—gives him credit quite as much upon the successful firm business in which he is supposed to be engaged as upon any property in his separate ownership. It has been said that, inasmuch as the law has laid down the rule of distribution as above stated, creditors know the rule, and give credit accordingly; but this argument, if made in support of the reasonableness of the rule, is vicious by proceeding in a circle. It makes the creditor give credit to a fund because such is the law, and makes the fact that he has given credit to the fund a reason for the law. The rule has been defended upon the ground that it is, in substance, a marshaling of assets; but it goes much further than the marshaling of assets in equity, and the confusion into which this treatment of the rule—as merely a marshaling of assets—brings a court is shown by the opinions in Lodge v. Prichard and other cases. The rule does not carry out the mercantile theory of the partnership relation. Cory, Accts. (2d Ed.) 124.

The historical origin of the rule lies not improbably in an ancient practice of distributing the joint estate under a joint commission and the separate estate under a separate commission, each commission dealing with its corresponding creditors. The best theoretic defense of the rule is probably this: The operation of the law of partnership which gives to any separate partner or his assignee only his net share of the partnership assets—a rule manifestly founded in justice and convenience—usually insures to the joint creditors a priority in the application of the joint estate, and therefore this half of the rule has seldom been questioned. The priority given to the separate creditor in the application of the separate estate is a rough, but practical, offset to the inequality caused by the rule governing the application of the joint estate. See the dissenting opinion of Judge Gibson in Bell v. Newman, 5 Serg. & R. 78. Entirely apart from statute, however, two things are quite clear: First, that the general rule, with some variations, is established in the courts of this country and of England; and, second, that these variations, and particularly the exception in the absence of joint estate, have tended to discredit the rule, and to confuse its operations, rather than to obviate its difficulties.

Thus far the history of the development in this country of the rule of distribution has been considered apart from the bankrupt acts. The explicit provisions of these acts and their construction by the courts remain to be dealt with. The bankrupt act of 1800 (2 Stat. 19), contained no reference to the distribution of the assets of a partnership and its component partners, and, except Tucker v. Oxley, no decision made under that act has been found which bears upon the question. Act 1841, § 14 (5 Stat. 448), reads in part as follows:

"The assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and, after deducting out of the whole amount received by such assignees the whole of the expenses and disbursements paid by them, and net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate debts of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors; and, if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective rights and interests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts."

This provision, it will be seen, recognizes the general rule of distribution, and says nothing about any exception thereto. In Re Marwick (1845) 2 Ware, 229, Fed. Cas. No. 9,181, there was no joint fund except $40, paid by a separate creditor for a worthless asset in order to create a nominal joint estate, and so to prevent the joint creditors from coming upon the separate estate. Judge Ware said:

"It has hitherto been found impracticable to establish any general rule that will meet the equities of all the various cases that come up in practice; and the courts have been finally compelled, instead of subjecting the whole to a rigorous analysis, and extracting a system of rules which will carry out the principles of natural justice, to cut down the difficulties by establishing a general rule, which at first seems conformable to general equity, and then to limit and qualify it by a number of arbitrary exceptions, in order to meet the particular equities of particular cases. This system is admitted to be not entirely satisfactory. It has sometimes been departed from, and again restored, and is now adhered to, not because it is in all respects conformable to the principles either of positive law or of natural equity, but partly as a rule of convenience, as it has been sometimes called, and partly because no system has been hitherto presented as a substitute which is not found to be encountered by equal difficulties." 2 Ware, 233, Fed. Cas. No. 9,181.

After saying that the general rule is based upon the theory of credit given to the different estates, the learned judge continued:

"The general rule therefore has its foundation in natural equity, and it is established by the law. The law itself makes no exception. Now, admitting the case of there being no joint estate to be a casus omissus, not contemplated, and therefore not within the purview of the law, it certainly covers all cases where there is a joint fund, without inquiring into its origin. And it is a rule in the construction of statutes that, when the statute covers the whole case in all its circumstances, and makes no exceptions, none can be made by the court." 2 Ware, 235, Fed. Cas. No. 9,181.

It will be perceived that the learned judge approved the general rule, disapproved the exception on principle, doubtfully recognized it upon authority, and avoided its effect by permitting its flagrant evasion.

Act 1867, § 36 (Rev. St. § 5121), is, in all essentials, the same as section 14 of the act of 1841. In Re Downing (1870) Fed. Cas. No. 4,044, Judges Dillon and Krekel held that the provision for distribution made by the act of 1867 did not apply where the commission was separate. The decision was rested largely upon section 27 of the act of 1867 (Rev. St. § 5091), which provides that "all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate pro rata, without any priority or preference whatever" (with certain immaterial exceptions). In Re Knight (1871) 2 Biss. 518, Fed. Cas. No. 7,880, Judge Drummond seems to have followed In re Downing, though it is a little hard to say whether he meant to declare that, under a separate commission, joint creditors could come ratably with the separate creditors upon the separate estate, even where there was joint estate (as would be the case if Rev. St. § 5121, and the general rule had no application to a separate commission), or meant to let them come upon the separate estate only where there was no joint estate. See In re Goedde, 6 N. B. R. 295, Fed. Cas. No. 5,500.

In Re Pease, 13 N. B. R. 168, Fed. Cas. No. 10,881, Judge Nelson, of Minnesota, held that Rev. St. § 5121, was wholly inapplicable in the case of a separate commission, saying:

"We thus have a firm dissolved, no assets, and all the partners insolvent and in bankruptcy, without any voluntary or invitum proceedings being instituted to declare them bankrupt as a firm. Under such circumstances, in my opinion, the individual creditors of Pease have no prior rights to the creditors of the old firm of which he was a member. Their claims have been duly proved, and they are entitled to share pro rata with the other creditors. The equity rule in regard to the rights of firm and individual creditors does not apply, for the reason that no proceedings have been instituted against the partnership under section 5121 of the Revised Statutes."

In Re Lloyd (1884) 22 Fed. 88, Judge Atchison apparently agreed with In re Knight, though the decision went upon another question. See, also, U. S. v. Lewis, 13 N. B. R. 33, Fed. Cas. No. 15,595. These decisions are a return—apparently quite unconscious—to the bankruptcy practice of Lord Thurlow, and to his distinction between joint and separate commissions, but apparently without that remedial intervention of equity which, under Lord Thurlow, made the exception in bankruptcy practically inoperative.

In Re Jewett (1868) Fed. Cas. No. 7,304, Judge Drummond confirmed the decision of the register, which held that the exception in the absence of joint assets was applicable under the statute. In Re Slocum, Fed. Cas. Nos. 12,950, 12,951, Judge Wheeler, and, upon appeal, Judge Blatchford, held that the exception in the absence of joint estate was applicable under the statute of 1867; and this even where there were joint assets insufficient to pay the expense of realizing them. No reasons were given. In Re Litchfield, 5 Fed. 47, Judge Choate followed In re Slocum, and he expressly differed from In re Knight in holding that section 5121 applied to separate, as well as to joint, commissions. In Re Blumer, 12 Fed. 489, Judge Butler held that, where there were joint assets collected which might have been divided, though they were afterwards spent in the vain attempt to realize other assets, the exception did not apply. Judge McKennan concurred in the opinion. In Re Byrne (1868) 1 N. B. R. 464, Fed. Cas. No. 2,270, Judge McCandless affirmed the decision of a register which held that the exception in the absence of joint estate was not applicable under the act of 1867. In Re Johnson, 2 Low. 129, Fed. Cas. No. 7,369, Judge Lowell intimated in his opinion that the exception was not applicable, but that point was not involved in the decision. See In re McLean, 15 N. B. R. 333, 337, Fed. Cas. No. 8,879.

The act of 1898 differs materially from the acts of 1841 and 1867. Clauses a, b, c, d, and e of section 5 provide for the adjudication and administration of a bankrupt partnership. Clauses f, g, and h are as follows:

"(f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after the paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

"(g) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

"(h) In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

Following In re Knight, it may be urged that the provisions of section 5, cl. f, apply only where a joint commission has been taken out, and that they are, therefore, inapplicable to the case at bar. But, if this be the true construction, then, under any separate commission, whether there be joint estate or not, the joint creditor will be allowed to take dividends from the separate estate ratably with the separate creditors. If this be the law, joint creditors will commonly take out separate commissions, as was pointed out by Lord Loughborough in Ex parte Elton. Lord Thurlow's rule, viz. that of paying all creditors ratably under a separate commission, did not prove so satisfactory even when it was tempered by the equitable remedies which he administered, that it should be readopted without those remedies. I hold, therefore, that section 5, cl. f, of the bankrupt act applies the rule of distribution to separate as well as to joint commissions, either directly or by analogy. See In re Litchfield, 5 Fed. 47.

Considering the plain language of the bankrupt act, which recognizes no exceptions to the general rule, the history of the exception in the absence of joint estate, the discredit and misconception which that exception has brought upon the general rule both in England and this country, the fantastic subexceptions imposed upon the exception, and the language used by the supreme court in Murrill v. Neill, I think that I am justified in holding that the exception is inapplicable under the present bankrupt act. If the language and decisions of some wise and learned judges are thereby disregarded, yet it has been shown that most, if not all, of those judges acted under a misapprehension of the history of the law. It is further to be noticed that section 5, cl. g, has, by permitting the joint estate to prove against the separate estate and vice versa, resolved a doubt which arose under the English law, and has enabled a court in bankruptcy to secure generally the equitable distribution of the property of the several estates. Section 5, cl. h, provides expressly for the settlement of the partnership affairs where one partner has been adjudged a bankrupt under a separate commission by directing the remaining partners to settle the partnership business; that is to say, to pay the joint debts. This provision removes, at least in part, the difficulty pointed out by Lord Eldon in the application of the gen-

**eral rule to a separate commission. The decision of the referee is reversed, and the petitioning creditor is not to receive a dividend until the separate debts have been paid in full.**

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CARTER v. HOBBS et al.

(District Court, D. Indiana. May 18, 1899.)

No. 5,945.

BANKRUPTCY—PREFERENCES—ACCOUNTING BY PREFERRED CREDITOR.

A lease of a manufacturing establishment, made by an insolvent debtor to one of his creditors, as part of a fraudulent scheme to place his property within the exclusive control of such creditor, and accepted by the latter with knowledge of the lessor's insolvency, and with the intention of securing to himself an advantage over the other creditors, will be set aside, on petition of the lessor's trustee in bankruptcy, as fraudulent and preferential; and the lessee will be required to account to such trustee for the net profits of the business conducted by him on the premises while the same remained in his possession.

In Bankruptcy. On petition of Walter Carter, as trustee in bankruptcy of Beecher Goodykoontz, against the bankrupt and Zachariah T. Hobbs, to set aside certain mortgages and a lease of a brickmaking establishment made by the bankrupt to Hobbs, as being preferential and fraudulent. For decision of the court overruling a demurrer to the petition, see 92 Fed. 594.

Gardiner, Barrett & Brown and Gifford & Coleman, for complainant.

Gavin & Davis and Fippen & Purvis, for defendants.

BAKER, District Judge. This is a suit by Carter, trustee, against the defendants for the purpose of setting aside two mortgages and a lease of certain real estate, on the ground that the same are severally preferential, and were executed for the purpose of hindering, delaying, and defrauding the creditors of the bankrupt, and of giving Hobbs a larger percentage than other creditors of the estate. On the 22d day of August, 1898, the bankrupt executed and delivered to Hobbs a mortgage on certain real estate described in the complaint to secure a note of even date for the sum of $2,150, due in 30 days. On the 14th day of November, 1898, the bankrupt executed and delivered to Hobbs a chattel mortgage on certain personal property therein described to secure the payment of a note for $1,798.67, due one day after date. The lease or agreement under which Hobbs took possession of the brick-manufacturing establishment and premises was made about the 22d day of August, 1898; and, under and in pursuance of it, Hobbs entered into possession and used the same until the 25th day of December, 1898. The defendant Hobbs answered the complaint, admitting that the two mortgages mentioned were invalid, as being preferential in their character, and that the same were void, as being within the inhibition of the bankruptcy law; but he denied that the agreement under which he took possession and used the leasehold premises was preferential, or taken by him for