

Ad. Brit. Court of Chancery,

CASES IN BANKRUPTCY,

BY

THOMAS C. GLYN, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW, AND COMMISSIONER OF BANKRUPTS,

AND

ROBERT S. JAMESON, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

CONTAINING

Reports of Cases

DECIDED BY

LORDS CHANCELLORS ELDON AND LYNDHURST,

AND BY

VICE CHANCELLORS SIR JOHN LEACH, SIR ANTHONY HART,
AND SIR LANCELOT SHADWELL,

From Hilary Term 1825 to Easter Term 1828.

AND

A DIGEST

OF ALL THE CONTEMPORARY CASES RELATING TO THE
BANKRUPT LAWS IN THE OTHER COURTS.

VOL. II.

LONDON:

PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR HENRY BUTTERWORTH,
LAW-BOOKSELLER AND PUBLISHER, 7, FLEET-STREET;

BELL AND BRADFUTE, EDINBURGH; AND
R. MILLIKEN, DUBLIN.

1828.

L. C.
LINC. INN.
August 14,
1827.

Ex parte ELLIS. — In the matter of BADNALL.

A partner cannot prove or claim until the joint debts are paid.

BADNALL the elder, *Badnall* the younger, *Spilsbury*, *Cruso* and the petitioner *Ellis*, were in partnership as bankers at Leek. In January 1826 *Ellis*, who had brought a capital of 10,000*l.* into the business, retired from the partnership, having received from the remaining partners a joint and separate bond for 7,000*l.* in satisfaction of what was due to him from the firm. It was agreed that the name of *Ellis* should continue to be used, and that notice of the dissolution should not be published until the first of January 1827. In August 1826 *Badnall* the younger, *Spilsbury* and *Cruso* retired, and notice of the dissolution as to them, and that the business would in future be carried on "by *Richard Badnall* the elder and *Richard Ellis*, on their own account," was duly published; after which *Badnall* the elder possessed himself of the partnership property, and carried on the banking business alone, under the style of *Badnall* and *Ellis*. In December 1826 a commission issued against *Badnall* the younger, *Spilsbury* and *Cruso*, under which they were declared bankrupts, and in June 1827 *Badnall* the elder also was declared bankrupt.

The petition stated that there were outstanding debts due from *Badnall* the elder, but for which the petitioner was jointly liable, to the amount of 4,000*l.*, and he prayed that he might be at liberty to prove the said bond and interest (the proof of which had been rejected by the commissioners), and that the commissioners might be directed to ascertain the amount of the debts for which the petitioner was liable jointly with the bankrupt, with liberty to the petitioner to enter a claim for the

amount, and to prove and receive dividends upon such debts as he should pay, or against which he should indemnify the bankrupt's estate.

1827.

—
Ex parte
 ELLIS.
 In the matter
 of
 BADNALL.

Mr. *Bickersteth* and Mr. *Russell*, for the petition, contended, that a partner might prove against the separate estate of his copartner, whether there were joint creditors or not, since the proof against the separate estate would not interfere with the rights of the joint creditors, as it is not subject to their demand. The separate estate is to be appropriated to separate debts, and among such separate debts is the bond to the petitioner. In *Wright v. Hunter* (a) where the partner paid his liquidated proportion of the partnership debts to the other partners, who became bankrupt without having applied the whole of the money so received in payment of such debts, the solvent partner was declared to be entitled to prove the whole of the sum so misapplied; and they cited *ex parte Young*, and *ex parte Ogilvy* (b), and *Parker v. Ramsbottom* (c); and added, that as this was a debt which will be barred by the certificate, it would be both inconsistent and unjust to say that such a debt shall not be proved.

Mr. *Rose* and Mr. *Montagu contra*.

It is an unqualified rule that a partner can only prove when he has paid the joint debts. The only case in which this rule was relaxed, was in *ex parte Ogilvy*. But this case was, after great consideration, overruled by Lord *Eldon* in *ex parte Moore* (d), and in *ex parte Gibson*. (e) The cases at law do not apply, as they

(a) 1 *East*, 20.

(d) *Ante*, page 166.

(b) 3 *Ves. & Bea.* 135.

(e) *Ante*, page 233.

(c) 3 *Barn. & Cresw.* 268.

1827.

—
Ex parte
 ELLIS.

In the matter
 of
 BADNALL.

relate to proof only, and involve no question of proof in competition with joint creditors. The point at issue in *Wright v. Hunter* was simply this: there was a debt partly due before and partly after the commission, and the question was as to what part was barred by the certificate. The debt which was declared to be proveable by the partner was still liable to the ulterior question whether it could be proved in competition with joint creditors, which it clearly could not. The real question, in fact, is, not whether the debt may not be proveable, which is not denied, but whether the petitioner has placed himself in a situation to prove, by removing all the joint claims, which he does not pretend to have done.

The LORD CHANCELLOR.

The only partner remaining after the retirement of *Badnall* the younger, *Spilsbury* and *Cruso*, was *Badnall* the elder; but for present purposes the petitioner must be looked upon as a partner, since he authorized the use of his name as such. I am of opinion, upon the subject of proof, that the petitioner is not entitled; that the fund out of which the joint creditors are entitled to be paid cannot be diminished. *Parker v. Ramsbottom* and the other cases cited do not apply, since this is not an abstract question of proof, but a question of proof in competition with joint creditors — with those to whom the petitioner is an accounting party.

Upon the second part of the prayer, viz. as to the petitioner's entering a claim for the amount for which he is liable, and proving such debts against which he shall indemnify the bankrupt's estate, and in support of which the case of *ex parte Ogilvy* has been cited, I am equally

clear that this application also must be refused. The case of *ex parte Young* was also cited in *ex parte Ogilvy*; but the Lord Chancellor, by his remark in that case, shewed that he considered it not applicable; and the decision which was ultimately given in *ex parte Ogilvy* was made without argument. The order, however, that was made is in form favourable to the present application; but the question has since come on in a far more serious form, in *ex parte Moore*, and the case of *ex parte Ogilvy* must cease to be looked on as an authority. In *ex parte Moore* Lord Eldon says, that unless indemnity be accepted as a *discharge* by the joint creditors, the partner offering indemnity can never be considered entitled to prove as a person liable paying the debt after the bankruptcy within the act of parliament; and until the present petitioner produces such discharge, I can give no relief.

1827.

Ex parte
 ELLIS.
 In the matter
 of
 BADNALL.

Petition dismissed without costs.



Ex parte CHISMAN. — In the matter of RODEL.

V. C.
 LINC. INN.
 January 14,
 1828.

THIS was a petition to take an affidavit of the respondents off the file, not for scandal, but for impertinence; that is, for containing matter not material to the issue, and for setting out at length an examination before the commissioners of the petitioner and of a witness.

Mode of proceeding upon an irrelevant or scandalous affidavit.

Mr. Norton for the petition.

Mr. Montagu *contra*.