# THE LAW JOURNAL

FOR

## THE YEAR 1828:

COMPRISING

## REPORTS OF CASES

IN THE

## Courts of Chancery, King's Bench, and Common Pleas,

FROM

MICHAELMAS TERM 1827, TO TRINITY TERM 1828,

BOTH INCLUSIVE.

AND

## Cases connected with the Duties and Office of Magistrates,

DECIDED DURING THOSE TERMS.

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## VOL. VI.

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LONDON:
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FOR J. W. PAGET, 5, QUALITY COURT, CHANCERY LANE.

MDCCCXXVIII.

apply it, they could sustain a bill to compel the obligor to pay it again.

The following cases were cited: *Angell* v. *Haddon*, (1) *East India Company* v. *Edwards*, (2) *Morgan* v. *Morrack*. (3)

November.

*The Vice Chancellor* was of opinion, that there was not a sufficient case of interpleader stated upon the bill, and he allowed the demurrer.

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The plaintiff appealed.

On the appeal, *Mr. Sugden* and *Mr. Norton* were in support of the demurrer.

*Mr. Heald* and *Mr. Knight* were in support of the bill.

The argument was to the same effect as in the court below.

*The Lord Chancellor* was of opinion, that, upon the facts, as stated on the record, the trustees of the legacy could have maintained a bill against the obligor, and, therefore, that the obligor was entitled to the relief which belongs to an interpleading plaintiff.

The demurrer was over-ruled, and the injunction was to stand revived.

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1827. December. } EX PARTE ELLIS, IN RE BADNALL.

*A, B, C, D, and E, having been in partnership, as bankers, under the firm of A, B, and Co., the partnership is dissolved as to A, but the name of A is retained for some time in the firm, and he leaves in the hands of his co-partners* 7,100*l.*, *secured by their joint and several bond: they also covenant to indemnify him against all liabilities arising from the past or future use of his name in the firm: then the partnership is dissolved as to C, D, and E, and afterwards these three persons, who carried on also a distinct trade, become bankrupt; afterwards, the name of A ceases to be used in the firm, and then a commission of bankrupt issues against B, there being joint estate of the firm, and also unsatisfied joint debts:—*

*Held, that A was not entitled to prove the amount of the bond against the separate estate of B;*

*That he was not entitled, upon indemnifying the estate against the joint creditors, to prove the amount of what he might pay in respect of his liability for joint debts, but that it was necessary for him to satisfy all the joint creditors before he could prove.*

The petition of Richard Rogers Ellis stated, that, in the year 1825, Richard Rogers Ellis, Richard Badnall, Richard Badnall the younger, Francis Gybbon Spilsbury, and Henry Cruso, began to carry on business in co-partnership, as bankers, at Leek, under the firm of Badnall, Ellis and Co.; that Ellis brought into the capital of the concern the sum of 10,000*l.*, as his contributive share thereof; that, shortly after the commencement of the business, the parties agreed that the co-partnership, so far as regarded Ellis, should cease and determine from the 1st of January 1826, and that he should be permitted to retire and withdraw from the said co-partnership without any participation in the profits, and without any contribution to the losses thereof; and that Ellis should permit 7000*l.*, part of the said sum of 10,000*l.*, to remain in the hands of his late co-partners for the term of four years, upon having the repayment thereof at the expiration of that period, with interest in the mean time, secured to him by the joint and several bond of his said late co-partners. That, in pursuance of this agreement, an indenture, bearing date 1st January 1826, was made and executed by and between Richard Badnall, Richard Badnall the younger, Francis Gybbon Spilsbury, and Henry Cruso of the one part, and R. R. Ellis of the other part, whereby it was witnessed, that the said parties had dissolved and determined the co-partnership business from the date of the indenture; and they did thereby severally covenant, that the said late co-partnership ceased from the said 1st January, and that the notice of such dissolution, which had been signed by the parties, might, at any time thereafter, at the request of Ellis, be inserted in the London Gazette; but that unless such insertion should be required by him, his ex-

(1) 15 Ves. 244; 16 Ves. 202.
(2) 18 Vesey, 376.
(3) 2 Meriv. 109.

ecutors, or administrators, it should not take place until the 1st January then next; and it was thereby declared, that Richard Badnall, Richard Badnall the younger, Francis Gybbon Spilsbury, and Henry Cruso, and the survivors and survivor of them, should (if Ellis, his executors, or administrators, did not require the earlier public dissolution of the said co-partnership), until 1st January 1827, but no longer, be at liberty to carry on the banking business under the style or firm of Badnall, Ellis, & Co., as theretofore, and to use the name of Ellis in the said business; but that, from the 1st January 1827, or such earlier required dissolution, in case the same should be required, they should cease to use that style or firm, and should no further or longer use or employ the name of Ellis in the affairs of the business, than as by law might be requisite to wind up matters and things theretofore begun, and then subsisting unconcluded; and also, that the sum of 7,100*l.*, belonging to the petitioner, should for the term of four years remain upon the security of a bond therein mentioned, and should not be called in otherwise than according to the condition of the bond; and further, that all debts due to the said parties, and all debts owing by them, in respect of their late co-partnership, should be paid to and received by the said Richard Badnall, Richard Badnall the younger, Francis Gybbon Spilsbury, and Henry Cruso, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, on their own account; and that all business, which, since the commencement of the co-partnership, had been transacted under the style or firm of Badnall, Ellis and Co., should be considered as done for the benefit of Richard Badnall, Richard Badnall the younger, Francis Gybbon Spilsbury, and Henry Cruso, exclusively of Ellis; and they, Francis Gybbon Spilsbury and Henry Cruso, did thereby, for themselves, their heirs, executors, and administrators, and each and every of them did thereby for himself, his heirs, executors, and administrators, covenant, that they, some or one of them, would at all times, save, defend, keep harmless, and indemnified, Ellis, his heirs, executors, and administrators, from and against all loss, liability, and responsibility, in respect or on account of his name having been hitherto used, or being thereafter used, in the firm of Badnall, Ellis and Co.

The petition further stated, that, at the time of the execution of that indenture, Richard Badnall, Richard Badnall the younger, Francis Gybbon Spilsbury, and Henry Cruso, executed a joint and several bond, in the penal sum of 15,000*l.*, with a condition to be void, if the said Richard Badnall, Richard Badnall the younger, Francis Gybbon Spilsbury, and Henry Cruso, their heirs, executors, or administrators, or any of them, should pay, or cause to be paid unto Ellis, his executors, administrators, or assigns, the sum of 7,100*l.* on the 1st of August 1830, together with lawful interest for the same, to be computed from the date of the bond; that the notice of dissolution, mentioned in the indenture to have been then signed, was not actually signed; that Rich. Badnall the younger, Francis Gybbon Spilsbury, and Henry Cruso, were co-partners in the silk trade, under the firm of Badnall, Spilsbury & Co., which co-partnership, in the month of July 1826, fell into embarrassed circumstances; and, that accordingly, a notice of dissolution as to them was given, which was as follows: "Notice is hereby given, that the partnership carried on by Richard Badnall the elder, Richard Ellis, Richard Badnall the younger, Francis Gybbon Spilsbury, and Henry Cruso, at Leek, in the county of Stafford, as bankers, under the firm of Badnall, Ellis, Badnall, Spilsbury & Cruso, is this day dissolved so far as respects the said Richard Badnall the younger, Francis Gybbon Spilsbury, and Henry Cruso, and will in future be carried on by the said Richard Badnall the elder, and Richard Ellis, on their own account."

The petition next stated, that, shortly afterwards, a commission of bankrupt issued against Richard Badnall the younger, Francis Gybbon Spilsbury, and Henry Cruso, and they were thereupon duly found and declared bankrupts by the major part of the commissioners in and by the said commission named and authorized; that, after the aforesaid notice was published, Richard Badnall the elder alone carried on the banking business, and possessed himself of the property belonging thereto, and ever since had remained in the possession of such property, and had received the debts belonging thereto; that, shortly after the

date of the notice, Badnall, of his own authority and without the permission of Ellis, altered the description of the said banking-house in the notes issued by him, from Badnall, Ellis & Co. to Badnall and Ellis; that, in the month of December, and subsequently, Ellis, in order to protect himself from further liability towards third persons, frequently required, but without effect, that Richard Badnall should not use his name any longer in the firm of the bank, and should cause an advertisement to be inserted in the *London Gazette*, announcing that he, Ellis, was not a partner therein; that the conduct of Richard Badnall in continuing to use Ellis's name, contrary to his express agreement, and without permission, was a fraud upon Ellis; that, at length, Richard Badnall consented to permit the dissolution of the partnership to be advertised, which was accordingly done on the 15th of May 1827; that, on the 19th of June 1827, a commission of bankrupt issued against Richard Badnall; that Ellis had tendered proof of his bond debt to the commissioners; but, that, though the execution and validity of the bond was admitted, and the reality of the debt secured by it, was not questioned, the commissioners had refused to receive such proof, but had adjourned the choice of assignees under the commission in the mean time, in order (among other things) that Ellis might apply by petition to the Lord Chancellor; that the outstanding debts which Richard Badnall, as between him or his estate and Ellis, ought to pay, but for which Ellis was liable to the creditors, amounted to 4000*l.*; and that Ellis claimed to be entitled to prove against the estate of Richard Badnall so much as he should pay of the debts for which he was so jointly liable.

The prayer was, that it might be declared that Ellis was entitled to prove under the commission against the said bankrupt the principal of the said bond, and the interest due thereon; and that the commissioners might be directed to ascertain the amount of the debts for which the petitioner was liable jointly with the bankrupt; and that the petitioner might be at liberty to make a claim against the estate of Richard Badnall for the said amount of debts; and that he might be declared entitled to prove, and receive dividends in respect of such proof, for the amount of the said debts which he should have paid, or against which he should indemnify the estate of the said bankrupt.

The bankrupt, in an affidavit filed in opposition to the petition, stated, that, at the time when the bond and deed of indemnity, dated respectively the 1st of January 1826, were executed, Richard Rogers Ellis had sustained the loss, as deponent had since discovered, of the whole of his capital embarked in the partnership, after deducting what he had previously withdrawn; but that no account was taken at the time of the dissolution, to ascertain whether the property of the partnership firm was or not adequate to the payment of its engagements.

Before the bankruptcy the bond had become forfeited at law by reason of the non-payment of the interest.

*Mr. Bickersteth* and *Mr. Russell* appeared in support of the petition:

*Mr. Rose* and *Mr. Montague* appeared for the petitioning creditor, to resist it.

*Mr. Rose* objected that the petition was defective in form, because it did not state the reasons for which the commissioners had rejected the proof.

It was answered, that the rule as to stating the grounds of the judgment of the commissioners, meant only, that the facts on which they proceeded should not be suppressed on the petition, but that it would be quite contrary to all the analogy of pleading, to enter into a detail of argumentative reasons: In fact, in the present case, the commissioners had assigned no reasons.

*Mr. Rose* answered, that the petition ought to have stated that the commissioners had assigned no reason for their judgment.

*The Lord Chancellor* over-ruled the objection.

On the merits, *Mr. Rose* and *Mr. Montague* contended, that the proof could not be allowed, because it was a settled rule, that a partner could not prove against a partner. Here there were debts, for which both Badnall and Ellis were jointly liable. Till those debts were all paid, Ellis could not in any degree diminish the estate of

Badnall, which was a fund applicable to the payment of these demands, to which both were liable.

If Badnall could not prove his bond-debt, still less could he be entitled to prove the amount of the joint debts for which he was answerable, or which he might pay. Both points had been expressly decided by Lord Eldon, in cases not reported, arising out of the failure of the *Portsmouth Bank*, and in *Ex parte Moore* in the matter of *Sheath*.

*Mr. Bickersteth* and *Mr. Russell* contended, that the rule was, that a partner could not prove against the partnership, of which he was himself a member, but that there was neither authority nor principle for saying that A should not prove a separate debt against the separate estate of B, because A and B happened to be partners. A partner could not prove against a partnership, because he was there coming into direct competition with his own creditors. But here, there was joint estate, so that none of the joint debts could be proved under Badnall's commission. Ellis, therefore, in proving under it, was not coming into competition with his own creditors, but merely with the separate creditors of another person. In *Parker* v. *Ramsbottom*, (1) one of several partners advanced money to the partnership upon the security of the other partners; afterwards he retired from the business, and the continuing partners covenanted to repay to him the money which he had advanced; afterwards they became bankrupt. There being outstanding debts for which the retiring partner was liable, some of those debts he afterwards paid; and it was held, that he was entitled to prove under the commission both the debts which he had so paid and the money which he had advanced. That case ruled the very points which were in discussion here. *Wright* v. *Hunter* (2) also proved that one partner might prove against another.

Here Ellis might proceed at law against Badnall on the bond; and, in respect of every joint debt which he paid, he might proceed against him upon the covenant for indemnity. To these actions there could be no defence; and it would be impossible to file a bill in equity, upon which an injunction to restrain them, could be gotten and supported. If then Ellis had this legal right of action, uncontrolled by any equity, upon what ground would he be excluded from proving his demand under the commission?

*The Lord Chancellor.*—Mr. Badnall, Mr. Ellis, and three other persons, carried on business as bankers, at Leek. In 1825, shortly after they had entered into partnership, it was agreed, that at the end of the year, or rather at the commencement of the following year, on the 1st January 1826, Ellis should retire from the partnership, but that no alteration should take place in the firm till the 1st January 1827: and it was also agreed, that Ellis, having lent 10,000*l.* to the firm, 7,100*l.*, part of that 10,000*l.*, should continue in the partnership upon certain terms, to be secured by bond.

After this arrangement had been entered into, Ellis withdrew from the firm, and the business went on in the usual manner.

During a part of the year 1826, towards the close of that year, three of the partners, who had been engaged in another business, fell into embarrassments, and, in consequence of their falling into embarrassments, the partnership was dissolved, as far as related to them; they soon after became bankrupts. The only person, therefore, who really remained in the firm, was Badnall: but Ellis continued nominally in the firm. After the three persons had retired from the firm, Badnall changed the firm, without notice to Ellis, from the former firm, to the firm of Badnall and Ellis. On the 1st of January 1827, according to the stipulation contained in the original agreement with Ellis, Ellis insisted that the dissolution of the partnership should be advertized: Badnall, however, objected to it; but, at length, in May 1827, he agreed, and the dissolution of the partnership was advertized in the Gazette. In the following month, June 1827, Badnall became a bankrupt. In this situation of things, Ellis (the bond being a joint and several bond) made a claim on Badnall's estate for 7,100*l.*, due upon the bond. As Ellis had allowed his name to be used in the firm, it followed that he was responsible to the joint creditors of the firm; and

(1) 3 B. & C. 268; 5 D. & R. 138; 3 Law Journ. K.B. 16.
(2) 1 East, 21.

under these circumstances, Ellis contended before the commissioners, that he was entitled to prove for the bond of 7,100*l.*, under Badnall's commission; and the commissioners having rejected that proof, he has petitioned this Court to allow that proof to be received. He has also prayed, that, upon indemnifying the estate against the claims of the joint creditors, an account should be taken of the joint debts to which he was liable, and that he might prove to that amount against the joint estate of Badnall.

I am of opinion, upon the argument, and upon the authorities, that he is not entitled to prove for the bond of 7,100*l.* in competition with the joint creditors.

No proposition is more distinctly settled, than that, where one of two partners becomes bankrupt, the solvent partner cannot prove under his commission in competition with the joint creditors. He cannot diminish that fund, out of which the joint creditors are entitled to be paid: he cannot diminish that fund, he being himself liable to the joint creditors. All the authorities are uniform upon that point.

Two or three cases at law were cited, (among others, *Parker* v. *Ramsbottom*, in the Court of King's Bench), for the purpose of leading to a different conclusion. It appears to me, on looking at those cases, that they have no application to the present question. The case of *Parker* and *Ramsbottom* had nothing to do with the question of proving in competition with the joint creditors. The questions there, were merely with respect to the effect and operation of the commission, and the certificate, upon the particular debts claimed. I am therefore, clearly of opinion, that the commissioners were right in refusing permission to Mr. Ellis, to prove this bond debt in competition with the joint creditors:—there can be no doubt as to that point.

Then, with respect to the second point, as to whether or not, upon this petition, the commissioners should be directed to take an account of the debts to which Mr. Ellis, under these circumstances, is liable, and then, upon his indemnifying Badnall's estate against the amount of those debts, whether he should be allowed to prove to that extent. A case, *Ex parte Ogleby*, was cited, in support of the application, and that appears to be a case distinctly and expressly in point. In that case, Ogleby and Wilson were in partnership; they agreed to dissolve their partnership, and Wilson was to continue the business of the old firm, upon his undertaking to pay the joint debts, and to indemnify Ogleby. He soon after became bankrupt. One of the creditors applied to Ogleby to be paid a debt of 350*l.* Ogleby was bound, of course, to pay that debt. He applied to prove, under the commission; the commissioners rejected his proof, and an application was made to this Court; and the question was, whether, under such circumstances, he was entitled to prove: the case was argued upon that point; and a case, *Ex parte Young*, was cited; but the Lord Chancellor said, "In both the cases cited, all the joint creditors were paid: the petitioner cannot prove in competition with them." The argument was there directed solely to that point, as to whether he was entitled to prove: afterwards, and without any argument, the order was made. The order declared the petitioner entitled to prove, indemnifying the joint estate against the joint debts; but there was no argument upon that particular form of order, or upon the question of indemnity. The case, therefore, is, in form, a case in point, to support this application. But the question, afterwards, came before the Lord Chancellor (Lord Eldon) in a much more serious and deliberate form, in the case of *Ex parte Moore and others, in the matter of Sheath*; and the whole question was considered; and the case, *Ex parte Ogleby*, was cited on that occasion: and, after the argument, Lord Eldon was clearly of opinion, that it was not sufficient to indemnify; but that the debts must be paid. Unless, therefore, there is a discharge of the creditors, mere indemnity is not sufficient. I agree entirely with that opinion, and I think, therefore, that in this case, Mr. Ellis is not entitled to prove, upon indemnifying the estate; but if he can get a discharge from the creditors, in that case he will be entitled to stand in their situation, and under such circumstances he may be allowed to prove: I am of opinion, therefore, that this petition must be dismissed.

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