

as to the term creditor under the 24 & 25 Vic. ch. 134; and that the plaintiff could certainly prove his claim under the statute, on proceedings taken by another creditor.

The petition was thereupon dismissed with costs, as well on the law as on the merits.

The defendant appealed to this Court to revise and reverse the decision of the judge, and that it might be declared his estate was not, under the circumstances set forth in the affidavits on which the attachment was granted, subject to compulsory liquidation; and that all proceedings therein might be set aside, with costs to be paid by the plaintiff, and that all the defendant's property and rights might be re-invested in him, in the same manner as if the attachment had not been issued.

In Easter Term last, *Street* appeared for the appellant:

The main question was, whether proceedings under the Insolvency law could be taken by a person who had a claim against another before the claim was due; whether such person was a creditor under the statute, and the claim he had was a debt.

The English Act, 7 George. I. ch. 31, sec. 8, enabled creditors, whose debts were not due, to rank as creditors, but it prohibited them from being petitioning creditors: *Ex parte James*, 1 P. Wms. 610.

The Judge in the Court below relied on sec. 12, sub-sec. 5, and sec. 3 sub-sec. 7, and two late English decisions giving a meaning to the word creditor, in coming to the conclusion which he did.

*Harrison*, Q. C., contra:—

The fact that the section of 7 Geo. I. ch. 31, prohibited creditors, whose debts were not due, from becoming petitioning creditors, shows that but for the enactment they could have been such petitioners.

This section, too, was also expressly repealed by the 5 Geo. II. ch. 30, and therefore a creditor, whose debt was not due, could after that be a petitioning creditor, as was held in *Ex parte Douthat*, 4 B. & Al. 67.

The word creditor, under the Bankruptcy Acts, means a person having a claim, who can prove for it and claim the benefit of the Act: the cases referred to in the Court below shew this; L. R. 1 C. P. 204; L. R. 1 Exch. 91.

In addition to the section of the Act of 1864, referred to in the Court below, sec. 5, sub-sec. 2, expressly names "debts due, but not then actually payable."

A claim not due may be a debt, and though not due may be attached under the garnishment enactments: *Jones v. Thompson*, E. B. & E. 63.

By the English Bankruptcy Act of 1849, sec. 91, a creditor whose debt is not due may take initiatory proceedings: the same construction should be placed on our Acts. It was not an unreasonable proceeding, for a debtor should not be allowed to waste his estate to defraud his creditors, merely because the day of payment had not arrived.

*Street* in reply:—

Creditor is used in the statute to describe one who can prove a debt, in distinction to one whose claim is not an absolute one, but contingent only.

A. Wilson, J.—The question is one of novelty with us, and it is of great consequence it should be settled, both as respects debtors and creditors.

If our Insolvent Act is expressed, and is to be construed in the same way as the English Bankruptcy Acts, the policy of both being alike, the decision appealed from must stand.

Before the passing of the English Statute 7 Geo. I. ch. 31, none but creditors whose debts were due at the time of the act of bankruptcy committed were entitled to prove for their debts, or to be petitioning creditors for the Commission: *Tully v. Sparkes* (2 Ld. Ray. 1549).

The 7 Geo. I. ch. 31, enabled creditors who had security in writing, to prove for their debts, though not due when the Bankruptcy was committed, but it precluded such creditors from being petitioning creditors.

By the 5 Geo. II. ch. 30, sec. 22, this disability was removed, and under it the case of *Ex parte Douthat* (4 B. & A. 67) was decided.

The Statute of Geo. II. was confined to creditors who had security in writing for their debts. If the creditor, therefore, had a debt for goods sold and delivered, which was not due, but no agreement or note in writing for the amount payable at a certain time, he could not prove in respect of such debt: *Hoskins v. Duperoy*, (9 East. 498); *Price v. Nixon* (5 Taunt. 388).

The 6 Geo. IV. ch. 16, sec. 15, enabled every creditor, whose debt was not due at the time of the bankruptcy committed, to prove his debt or petition for a commission, whether he had a security in writing or not for his debt, and the 12 & 13 Vic. ch. 106, sec. 91, is to the same effect.

The question then, is, does our Insolvency Act permit a person, whose debt is not yet due, to make his debtor an insolvent in respect of that debt?

This power can only be exercised, if expressly or by plain implication it has been conferred on the creditor, for without it he can have no such power.

It is quite clear that debts not due may be proved against the estate by the direct language of the statute, and this goes far to establish the right to commence proceedings for them; for, as said by Abbott, C. J., in 4 B. & C. 71, in relation to the 7 Geo. I. ch. 31, and the 5 Geo. II. ch. 30, and some years before the 6 Geo. IV. was passed, "No distinction can now be taken between a proveable debt and that of the petitioning creditor."

The different parts of the Act of 1864, which apply to the question, are the following: Sec. 2, requires the person making a voluntary assignment to exhibit a statement to the creditors shewing, among other things, the amount due to each, "distinguishing between those amounts which are actually overdue and those which have not become due at the date of such meeting."

The form B in the schedule shews the distinction made, not as to direct liabilities, which is strange, but as to indirect liabilities, maturing before and after the day fixed for the first meeting of creditors.

The form of oath of the insolvent immediately following this schedule states, "That all the above-mentioned liabilities are honestly due by me, and that none of them were created or have been increased with the intention of giving to the creditor thereof any advantage either in voting at meetings of creditors or in ranking on my estate."