THE RULE OF EX PARTE WARING

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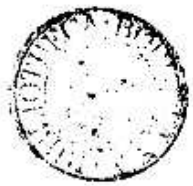

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CHAPTER I.

THE rule of *Ex parte Waring*[a] which was laid down by Lord Eldon in the year 1815 has ever since been held as an established principle in Equity.

The cases to which it has been applied, especially in recent times, have been of very frequent occurrence; have arisen under varied circumstances; and have sometimes involved considerable difficulty.

I have thought that it might be useful to collect these cases in chronological order, so as to trace the successive stages through which the rule has passed from its earliest establishment down to the present time.

This may be of more practical importance as, under the recent Judicature Acts, this rule (being one of the rules of Equity) may have to be applied by all the Divisions of the High Court of Justice.[b]

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[a] 19 Ves. 345; s. c. 2 Gl. & Jam. 404; 2 Rose, 182.

[b] 36 & 37 Vict., c. 66, s. 25, sub-s. 11.

The case of *Ex parte Waring* (which is reported in 19 Ves. 345, and also to the same effect in 2 Gl. & Jam. 404, and 2 Rose 182) was as follows :—

Brickwood & Co. were bankers in London, and *Bracken & Co.*, manufacturers in Lancashire, were customers of their Bank. *Bracken & Co.*, by virtue of an agreement between themselves and *Brickwood & Co.*, were in the habit of drawing bills upon the latter, and depositing with them other bills and securities for the purpose of meeting their acceptances at maturity. *Brickwood & Co.* became bankrupts in July, 1810. At that time they were under acceptances in favour of *Bracken & Co.* to the amount of £24,000, but to meet those acceptances they held securities which had been deposited for that purpose by *Bracken & Co.* in the shape of short bills and title deeds of an estate. These securities were more than sufficient to cover the acceptances.

In August, 1810, *Bracken & Co.* also became bankrupt. The holders of the bank's acceptances proved under both commissions of bankruptcy against both estates, and received dividends. Afterwards they presented a petition to the Court of Bankruptcy, insisting that they were entitled to have the produce of the securities deposited by *Bracken & Co.* with *Brickwood & Co.* specifically applied in discharge of their acceptances. Lord Eldon, after disallowing the ground upon which the billholders based their claim, *viz.*, that those who had contracted out of the deposited securities

to pay certain debts were liable in Equity to the demand of the persons to whom payment was to be made, proceeded as follows (p. 348):—

"The first consideration is, what was the nature of the demand of *Bracken & Co.*, who did not become bankrupt until August, upon *Brickwood & Co.*, at the moment of their bankruptcy, on the 7th July. If these bill-holders are to have payment in preference to the other creditors, it must be by the effect of an equity between those two houses, rather than by any demand directly in their own right upon any fund in the hands of *Brickwood & Co.* With regard to the demand of *Bracken's* house, upon the 7th of July, it is impossible to deny that, if they had either paid, or undertaken to pay (*i. e.*) to relieve *Brickwood's* house from those acceptances, the short bills and the mortgage must have been restored to them. It is, on the other hand, equally clear, that they never could have raised any demand against the house of *Brickwood* in respect of either the cash balance, the short bills, or the mortgage, without bringing in the amount of those acceptances; admitting, that what the house of *Brickwood* had of their property in short bills, &c., must be first applied to the discharge of those acceptances, for the sake, not of the bill-holders, but of the house of *Brickwood;* who had become liable to them; and had a right to have that liability cleared away before any demand could arise for the *Brackens.* That then being the equity between these houses in the interval between their respective bankruptcies it does not appear to me varied by the bankruptcy of the *Brackens* in August; supposing their assignees to have put the estate of *Brickwood* in the same situation as the house they represent, if solvent, must have done, to entitle themselves to the short bills; and having regard to the demands of all the creditors and the bankrupts, in this circuitous way, I think, the billholders must be paid, not as having a demand upon these funds in respect of the acceptances they hold, but as the estate of *Brickwood & Co.*, must be

cleared of the demand by their acceptances; and the surplus, after answering that demand, must be made good to *Bracken & Co.*"

I subjoin in the appendix a copy of the order made in the case. It will also be found in a note to the case of *Powles* v. *Hargreaves*.[a]

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[a] 3 De G. M. & G. 445.