

Case No. 3,886.

IN RE DIBBLEE ET AL.

[4 Ben. 137;¹3 N. B. R. 754 (Quarto, 185).]

District Court, S. D. New York.

May 4, 1870.

BANKRUPTCY—COUNSEL FEES OF PETITIONING CREDITOR.

A claim by petitioning creditors in involuntary bankruptcy, for counsel fees incurred by them, in the proceedings before adjudication, cannot be entertained by the register in the first instance, but must be presented to the court, on petition.

[In bankruptcy. In the matter of Henry E. Dibblee, John J. Krauss, and David P. Bin-gley. See Cases Nos. 3,884 and 3,885.

[By I. T. Williams, Register:] I, the undersigned, one of the registers in bankruptcy, do hereby certify to this honorable court, that James R. Clark, Jr., through his counsel, Charles H. Smith, Esq., presents a claim of his firm of Garrett, Clark & Co., against the estate of the bankrupts, for sums of money paid or incurred by them for services of coun-sel in proceedings had by them as petitioning creditors of the said bankrupts before the adjudication; and asks me to specify such sum as upon the final auditing and passing of his accounts, as assignee, may be allowed therefor, and make an order of distribution for the payment of the same—according to the custom and practice in cases of distribution by him in the ordinary discharge of his duties as assignee. He cites a decision of the cir-cuit court in the Case of the New York Mail Steamship Company—a manuscript copy of which, furnished me by Mr. Smith, I annex hereto. [Case No. 12,208.] It appears from the decision, that the claim is one that the law recognizes, and which is an equitable lien upon the estate or funds in the baunds of the assignee—and if so, it would seem right that the assignee should pay it, or such sum as may be just and reasonable, from such funds. The question, however, that presents itself is, whether this claim is not one strictly within the equity jurisdiction of this court, to be passed upon in each case by the court, and then sent down to the register to ascertain what would be a reasonable sum, and order distrib-ution accordingly. I think this court has favored a practice in harmony with the suggestion, and that the practice of filing a petition,

on the part of the creditors, and obtaining an order of reference, has, in similar cases, prevailed. I am more reluctant to act in this case without a special order, as the petitioning creditor and the assignee are the same person. In such case, it is, no doubt, the duty of the register to act with caution, and perhaps not without notice to other creditors. All of which is respectfully submitted.

BLATCHFORD, District Judge. The register cannot entertain the application in the first instance. There must be a petition to the court, by the party, setting out the facts, and asking the relief desired.

{NOTE. For further proceedings in this case, see Case No. 3,887.}

¹ {Reported by Robert D. Benedict, Esq., and here reprinted by permission.}