

IN RE FREDENBERG.

Case No. 5,075.

{2 Ben. 133;¹ 1 N. B. R. 268 (Quarto, 34).}

District Court, S. D. New York.

Feb., 1868.

PARTY—EXAMINATION OF WITNESS—COUNSEL—CERTIFICATE OF REGISTER.

1. The only parties to bankrupt proceedings are the bankrupt and the creditors.
2. A witness in bankruptcy proceedings cannot take the opinion of the judge, on a certificate by a register, or be represented by counsel, except in a proceeding against him for contempt.

{Cited in Re Feinberg, Case No. 4,716.}

3. Where a witness, called for examination under the twenty-sixth section of the bankruptcy act [of 1867 (14 Stat. 529)], objected to being examined, on the ground that there was no authority to examine a witness under the act unless there was a question in controversy to be settled by testimony, and not until after the examination of the bankrupt himself, but, without insisting on the objection, submitted to an examination, and the register certified the question, involved in his objection, to the court: *Held*, that the objection was frivolous.

{Cited in Re Stuyvesant Bank, Case No. 13,582; Re Comstock, Id. 3,080.}

4. After the witness had waived his objection, there was no question to be certified, and the register should have refused to give a certificate.

{This was a proceeding in the matter of Michael W. Fredenberg, a bankrupt}

²{I, James F. Dwight, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause before me, the following questions arose, pertinent to the said proceedings, namely:

{Facts. On the 27th of January, one Henry Manheims, who had been regularly summoned as a witness herein by an order dated January 22d, made on the application of the assignee herein, was before the register for examination. The witness had appeared in obedience to said summons on the 23d inst, had been sworn, and his examination had commenced. By agreement between the assignee and witness, the examination had been continued and adjourned until the 27th inst. And at the commencement of the examination this day, the said witness objects to being examined, "because there is no authority to examine a witness in any matter unless there be a question in controversy to be settled by testimony, and not until after the examination of the bankrupt himself." Counsel for witness and the assignee being heard, the register overruled the objection, and decided that the witness may be examined as prayed for by the assignee. Whereupon the witness prays that the question may be certified to the judge for decision, under the provisions of section 6 of the act, whether he shall be examined. Without standing upon the objection, the witness submitted himself to examination, which was concluded. The bankrupt himself has not been examined. An assignee has been chosen and is duly qualified. The assignee has obtained an order for the examination of the bankrupt himself, but the bank-

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rupt could not be found within the district, although he has received no permission to depart, from the register.

[In my opinion the objection of the witness is not a valid one. Section 26 of the law provides that “the court may, on the application of the assignee in bankruptcy, require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath, upon all matters relating to the disposal or condition of his property,” &c. “And the court may, in like manner, require the attendance of any other person as a witness,” &c. There is no restriction in the statute as to the circumstances antecedent to the examination of a witness, and the provision of this section seems clear to me; otherwise, in the case of the death or absence of a bankrupt the assignee or creditor would be unable to gain information sought for, concerning the bankrupt’s property and disposition. I think the witness, Henry Manheims, was properly under examination.

[Which said facts and opinion of register are respectfully submitted, this 13th day of January, 1868, for the decision of the judge.]²

BLATCHFORD, District Judge. In answer to the question certified in this case, I reply:

1. The question is certified on the prayer of the witness, under section 6 of the act. The register might properly have refused to certify the question. It is only a party to the proceedings before the register, who can take the opinion of the district judge on a certificate of the register, on a matter arising in the course of such proceedings, or upon the result of them. The word “party” means the bankrupt or a creditor of his. It does not mean a witness who is not the bankrupt or a creditor of his.

2. I notice, from the certificate of the register, that the witness was represented before

the register by counsel. The certificate speaks of the "counsel for witness." This is an anomaly. It can only lead to confusion and delay. It is only parties, the bankrupt or a creditor, who are entitled to be represented by counsel, either before a register or the court, unless where a witness is made a party to a new and collateral proceeding, by being cited to answer for an alleged contempt.

3. The register was correct in his decision, that the witness was properly under examination.

4. The register certifies that the witness, without standing on the objection, submitted himself to examination. Section 7 of the act provides, that, if any person examined before a register refuses or declines to answer, the judge shall have power to order such person to pay the costs thereby occasioned, if such person be compellable by law to answer, and such person shall also be liable to be punished for contempt. The objection made by the witness in this case was so entirely frivolous, that, if he had not submitted to an examination, the case would have been a clear one for the imposition of costs and for punishment for contempt. The objection made was, that there is no authority to examine a witness in any matter under the bankruptcy act, unless there be a question in controversy to be settled by testimony, and not until after the examination of the bankrupt himself. The twenty-sixth section of the act, under which section the witness in this case was summoned, requires him to submit to an examination on oath upon all matters relating to the disposal or condition of the bankrupt's property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law. In addition to this, the court can compel the giving of testimony by witnesses, in the taking of evidence, under section 38 of the act. The objection made by the witness was wholly without foundation, and the fact, that he himself was unwilling to stand upon it, showed that he regarded it as untenable.

5. Although the objection was made, yet, by submitting to an examination, which the register states was concluded, the witness waived the objection, and after that there was no point or matter, within the meaning of section 6 of the act, to be certified by the register, and he ought on that ground to have refused to certify the question.

¹ [Reported by Robert D. Benedict, Esq. and here reprinted by permission.]

² [From 1 N. B. R. 268 (Quarto, 34).]

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