

Case No. 8,295.

IN RE LEVY ET AL.

[1 Ben. 454;¹ 1 N. B. R. 107; Bankr. Reg. Supp. 24; 6 Int. Rev. Rec. 134.]

District Court, S. D. New York.

Oct. 3, 1867.

EXAMINATION OF WITNESSES IN BANKRUPTCY—NOTICE.

1. No notice need be given to the bankrupt of the examination of a witness called by the assignee in bankruptcy.
2. Such examination may be proceeded with, without reference to an examination of the bankrupt, which is being had on the part of creditors.

[This was a proceeding in bankruptcy against Samuel M. Levy and Mark Levy. For hearing upon the practice of the register as to the manner of receiving and certifying objections, see Case No. 8,298.]

In this case, an examination of the bankrupts on the part of creditors was pending, and was adjourned to a day. The assignee applied for and obtained a summons to a witness to appear on a previous day and answer as to the bankrupt's property. On the return of the summons, the bankrupts also appeared, and objected to the examination of the witness, because no notice had been given to the bankrupts of the time and place of the examination, and because an examination of the bankrupts was pending, and the proceedings on it stood adjourned to a subsequent day, until which day no proceedings could, as the bankrupts claimed, take place except on consent of the bankrupts or reasonable notice to them. The register directed the examination of the witness to proceed and certified the questions,

raised by the bankrupts' objections, to the judge.

By ISAAH T. WILLIAMS, Register:

² [That in the proceedings in said cause before him, the following questions arose pertinent to said proceedings, and was stated by the counsel for the opposing party, to wit: Mr. Samuel Boardman, who appeared for the bankrupt, Mr. C. H. Smith appearing for the assignee.

[The assignee, Mr. Sedgwick, by Mr. C. H. Smith, his solicitor, applied to the register for a summons (form 48), directed to William Secor, requiring him to appear before the said register and answer concerning the bankrupt's property at a time therein specified. At the time so specified the said witness appeared pursuant to said summons, Mr. Smith and Mr. Boardman also appeared for the parties aforesaid. Whereupon Mr. Boardman objected to the examination of the witness, and filed his objections in the words following, to wit: "In re Samuel Levy and Mark Levy, Bankrupts. The petitioners herein by their solicitors, Benedict & Boardman, object to the examination of the witness, William Secor, at the present time, upon the following grounds: 1st. That no notice of the time and place of the proposed examination has been given to the petitioners or their solicitors. 2d. That an examination of the petitioners under section 26 of the act being now pending, and the proceedings on said examination before the register having been regularly adjourned to the 26th day of September, 1867, at 1 p. m., no examination of the bankrupts or witnesses can take place except upon such adjourned day without the consent of, or reasonable notice given to the bankrupts or their solicitors. 3d. That the examination of witnesses under section 26 of the act being a proceeding in the matter, the bankrupts or their solicitors are entitled to reasonable notice of the time and place of such examination so as to enable them to be present and to have an opportunity to cross-examine the witnesses produced. 4th. That to allow the examination of witnesses to proceed except upon the regular adjourned days or times agreed upon, or of which due notice has been given, would lead to confusion, and might and would result in great injustice to the petitioners. (Signed) Benedict & Boardman, Solicitors for Petitioners. September 20, 1867."

[After hearing the parties, the register decided to certify the points made by Mr. Boardman to the courts for decision, but did not consider it a proper course to adjourn the examination until the coming in of the decision, as he thought no harm could come to the bankrupt from proceeding, and was given to understand that a loss might ensue if the testimony were not at once taken. The examination proceeded accordingly. As to the objections made by Mr. Boardman, the register says he thinks that when put as questions to the court they amount to the following: First. When an assignee desires to examine a witness for the purpose of discovering property (an assignee can have no other object in examining a witness or a bankrupt, and probably would not be allowed to use his office to get testimony to defeat the bankrupt's application for a discharge), is it necessary to

give notice to the bankrupt of the time of such examination? Second. When the creditors have commenced an examination of parties and witnesses before a register, and the further examination stands adjourned over to a future day, may the assignee, in the mean time, and before the adjourned day, come in and examine a witness, or must he wait until the adjourned day and then proceed? As to the first question, it is not without difficulty. On the one hand it would seem to be of no just concern to the bankrupt to oppose an assignee in finding and obtaining his assets, and clearly he cannot complain if the assignee does not require his aid. On the other hand, as the examination taken by an assignee on such an occasion must be returned to the court with the other papers in the case, and will comprise a part of the record in such case (see act, section 26 [14 Stat. 529]; also general order 7), it is clear that it may be read and referred to on an argument before the court by a creditor opposing the discharge of the bankrupt, and thus made testimony against the bankrupt, although he should have had no opportunity to cross-examine the witness. This would seem to be unjust; yet neither the act nor the general order in terms require a notice to be served upon the bankrupt or his solicitor, even in case the examination is by a creditor for the purpose of defeating the application for a discharge. The words "in like manner" in section 26, referring to the preceding words "upon reasonable notice," in the same section, refer to the witness and not to the bankrupt or his solicitors. It can hardly have been the intention of congress to allow a creditor to proceed and take testimony before a register for the purpose of defeating the bankrupt without giving notice and thus enable him to cross-examine the witness. It was probably left to the court to regulate the practice by an order, and has been overlooked by the court. It might be inconvenient for the assignee to give notice to the bankrupt or his solicitor in all cases; and in a case where he had reason to fear collusion between the witness whom he desired to examine, and the bankrupt, it might not be expedient to give such notice to the bankrupt. If he is at all times entitled to notice from the assignee, then it would be competent and perhaps just to adjourn the examination to suit the convenience or pretended convenience of the bankrupt or his solicitor, and thus, in case of collusion, the

whole purpose of the examination might be defeated. Judging from my own experience, I think the injury likely to be done to the bankrupt by the omission to give him notice of an examination by the assignee, and the loss of an opportunity to cross-examine the witness, would not be so great as that which would be likely to flow from an opposite course. In case testimony injurious to the bankrupt were so taken, it would be competent for the court on the trial to allow him to recall the witness for cross-examination. Besides, the register would be careful that the assignee's name should not be used by creditors for the purpose of getting in testimony clandestinely to defeat the bankrupt's discharge. As to the second question, it will be observed that the proceedings pending were proceedings by creditors; this is a different proceeding by the assignee. I don't see that one proceeding should be affected by the other.]³

BLATCHFORD, District Judge. It was not necessary to give notice to the bankrupts of the time and place of the examination of the witness on the summons applied for by the assignee. The examination of such witness was an independent proceeding, and could be proceeded with without reference to the examination on the part of the creditors. The clerk will certify this decision to the register Isaiah T. Williams, Esq.

{NOTE. This case was subsequently heard upon the right to examine one of the bankrupts as to property acquired since filing petition, and upon the right of his counsel to cross-examine him. Case No. 8,296. It was again heard upon the question as to whether attorney for creditors could act as counsel for assignee. Case No. 8,299. And, finally, upon whether or not a creditor who has not filed his claim may file objections to the bankrupt's discharge. Case No. 8,297.}

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

² [From 1 N. B. R. 107.]

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