

IN RE PENN ET AL.

[5 Ben. 500;¹ 8 N. B. R. 93.]

District Court, S. D. New York.

Feb., 1872.

SUIT BY ASSIGNEE.

An assignee in bankruptcy had commenced a suit in a state court, to recover certain property as having been the property of the bankrupts. Specifications of opposition to the discharge of the bankrupts were filed in the bankruptcy proceedings, which were held by the court not to have been proven, and discharges were granted. Thereupon, the defendants in the state court suit applied to this court, on affidavits showing that the allegations in the bill of complaint in that suit were the same as those of the specifications, to direct the assignee to discontinue the suit in the state court: *Held*, that it was more proper that the issues involved in that suit should be disposed of on hearing in that suit, than on a motion in the bankruptcy proceedings.

[In the matter of the bankruptcy of John R. Penn, Charles "V. Culver, and Lucien H. Culver. The proceedings are first reported as heard upon motion of certain creditors to have the adjudication of bankruptcy set aside. Case No. 10,926. It was next heard upon specifications filed in objection to the bankrupts' discharge. Cases Nos. 10,927 and 10,929. The discharges were granted.]

This was an application by the defendants in a suit brought by the assignee in bankruptcy in a state court, that this court would direct the assignee to discontinue the suit.

P. N. Bangs, for application.

A. B. McCalmont and R. Sewell, in opposition.

BLATCHFORD, District Judge. I do not deem it a discreet exercise of the power of the court in this case, to direct the assignee in bankruptcy to refrain from prosecuting, and to discontinue, the suit he has brought in the state court of Pennsylvania. The

grounds urged for doing so—that the allegations made in the bill of complaint in such suit are the same in substance as those stated in the specifications filed in this court, but not by such assignee, against the discharge of one of the bankrupts, which specifications were held by this court not to be proved, as matter of fact, and that the assignee in bankruptcy is bound by such decision of this court [Case No. 10,929], and that such suit was not commenced within the period of two years after the appointment and qualification of such assignee—raise grave questions, which, in my judgment, it is not seemly to dispose of in such a summary way. It is more proper that they should be determined in the plenary suit brought, if raised therein, and by the tribunal in which the suit is brought, with the provisions for review which obtain in a suit between party and party. As to the merits of the suit, if they shall be reached, it may very well be that the assignee in bankruptcy may produce evidence in his favor which was not before this court, or that, on such evidence as was before this court, the defences of a former adjudication and of the statutory limitation being overruled, the state court may regard the assignee as entitled to the relief he seeks. I cannot regard the case as one where the assignee ought to be restrained, as clearly exceeding his power or using it unreasonably. The application is, therefore, refused.

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