

Case No. 1,276.

IN RE BELLIS ET AL.

{3 N. B. R. 270,<sup>1</sup> (Quarto, Go;) 1 Am. Law T. Rep. Bankr. 178; 38 How. Pr. 88.}

District Court, S. D. New York.

October, 1869.

BANKRUPTCY—EXAMINATION BEFORE REGISTER—COMPELLING BANKRUPT'S  
WIFE TO TESTIFY—ATTACHMENT.

The usual order and subpoena were issued for the wife of bankrupt to attend before the register

and be sworn and testify as a witness. She failed to appear, and counsel put in affidavit explanatory of her non-attendance, but questioned the authority of the court to compel her to testify in this cause. *Held*, the proper proceeding is to issue an order to show cause why an attachment should not issue against her.

{See Ex parte Woolford, Case No. 18,029; Ex parte Craig, Id. 3,323; Ex parte Gilbert, Id. 5,410.}

In bankruptcy. The attorney for the assignee in this cause applied before me for the usual order and subpoena for Mrs. Elizabeth R. Milligan, wife of James Milligan, one of the petitioners. The affidavit sets forth the facts, and is sufficient both in form and substance, is duly verified, and upon it the assignee is, by law, entitled to the order and subpoena asked for. In re Julius L. Adams, [Cases Nos. 39 and 40.] Section 26 of the bankrupt law [March 2, 1867; 14 Stat. 529] provides: "For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness, and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge, unless he shall prove, to the satisfaction of the court, that he was unable to procure the attendance of his wife." During the trial of this cause, and before the issuing of this order and subpoena, I permitted the attorney for the bankrupts to file an affidavit under section 26 of the bankrupt law, setting forth the reason why she had not obeyed previous orders of the court I considered that to be the correct practice in order to raise the question under section 26 of the bankrupt law, as to whether the disobedience of the wife to the mandate of the court prohibited the bankrupt Milligan from receiving a discharge. I consider it a well-settled rule of law, that the wife of a bankrupt must obey the orders of the court the same as any other witness, especially when, as in this case, it is shown that within a short time previous to the filing of a petition in bankruptcy by the husband he conveyed to her certain real estate, which now stands in her name of record, and the application asks for her examination touching said real estate. She must attend and be sworn; then any legal excuse or objections can be made in her behalf. "The courts do justice, and also require implicit obedience to their mandates." Any excuse or explanation can at the proper time be given. Courts are very lenient wherever a just or proper cause is shown—sickness and debility are proper excuses. Such excuses should, however, be shown by the certificates of physicians. In this case such certificates, if the facts warrant them, can readily be procured. None, as yet, have been produced before me. The return of the United States marshal shows that the witness was paid certain fees for her attendance as a witness. The proceedings in this cause before me show that the application for the examination of the witness was not made for delay, as the testimony of the witness, if given, must from the very nature of the case be of great materiality, both as to the assignee and the bankrupt Milligan. The courts cannot administer the laws unless they can enforce obedience to their process and orders. It is not the province of the witness to question the rights, power, or duties of the courts. It is their duty to obey. The courts will protect them in all their legal rights. In this case the

question whether the wife can be a witness for or against her husband does not arise; as her husband has been adjudicated a bankrupt, his effects, if any, pass into the hands of the assignee, and the contest for the title to the real estate is between the witness and the assignee. Mr. Puller, one of the counsel for the bankrupt, on presenting the affidavit giving the excuse for the non-attendance of the witness, made a very able and learned argument to show that the court had no power to compel the witness to testify in this cause, and on that ground, under section 26 of the bankrupt law, opposed the granting of the order, and desired that the same be certified to your honor.

I certify, as a matter of law, that this witness must attend and be sworn, and obey the order of the court the same as any other witness. That upon the affidavit showing that the witness was material, the assignee and creditors were entitled to the usual order and subpoena which were granted in this cause. That under and by virtue of said order the witness was compelled to attend. That the excuses shown by the affidavit referred to, unaccompanied by certificates of physicians, were insufficient. That such excuses, and all others which may be shown in extenuation for disobedience to the order of the court, should be shown before your honor, upon the motion on the part of the assignee for an order to show cause why an attachment should not be issued against the witness, etc., etc.

BLATCHFORD, District Judge. Under the circumstances of this case, I think an order to show cause why a warrant should not issue is the proper proceeding.

{NOTE. For prior proceedings in this matter, see Case No. 1,274. For subsequent proceedings, see Case No. 1,275.}

<sup>1</sup> [Reprinted by permission.]