

Case No. 4,132.
[8 Ben. 541.]¹

IN RE DUNCAN ET AL.

District Court, S. D. New York.

Nov. Term, 1876.

EXAMINATION OF WITNESS BY CREDITOR—RIGHT OF BANKRUPT TO HAVE NOTICE AND TO CROSS-EXAMINE.

Bankrupts having applied for their discharge, a creditor, having given notice of his intention to oppose a discharge, but not having filed specifications of objection, began an examination of one of the bankrupts. While it was pending, the creditor subpoenaed a witness for examination. The counsel for the bankrupts appeared at such examination and objected to its proceeding, on the ground that no notice had been given to the bankrupts of such examination, and claimed the right to appear and cross-examine the witness. *Held*, that the bankrupts were not entitled to such notice, or to such cross-examination.

In this case the bankrupts [William Butler Duncan, William Watts Sherman, and Francis H. Grain] had applied for their discharge. A creditor, who had given notice of his intention to oppose a discharge, began, before his time to file specifications had expired, an examination of one of the bankrupts, which was continued by various adjournments. While that was so pending the creditor obtained a subpoena duces tecum for the examination of a witness. Counsel for the bankrupts appeared at the examination of such witness, and on their behalf claimed the right to have notice of such examination and to attend such examination and cross-examine the witness. The register held that the bankrupts had no such right. The following questions were then certified to the court:

1. Whether, after the bankrupts have instituted proceedings to obtain a discharge, and after specifications have been filed, and after a particular creditor has obtained time to file specifications, the bankrupts are not entitled to appear by counsel upon the examination of any witness called by the particular creditor adversely to the bankrupts.

2. Whether a creditor, who, after the bankrupts have applied for a discharge, has entered upon the examination of the bankrupts, and has procured such examination to be adjourned from time to time and has obtained time to file specifications, has a right to enter upon a general ex-parte examination of a witness, without notice to the bankrupts or their counsel and without opportunity to the bankrupts or their counsel to attend and cross-examine the witness and exercise the other rights of adverse counsel.

The register gave the following opinion: "Here is pending the examination by a creditor of the bankrupts, before specifications filed under their application for discharge; and here is pending the examination of a witness summoned on behalf of the same creditor and required to produce books and papers. They are separate proceedings in this matter of bankruptcy. The deposition of the witness to be made here would not be competent evidence if offered as such upon the trial of specifications that may be filed against the bankrupts in opposition to their discharge. Upon that trial witnesses must be produced and

examined as in other cases, and the legal rights of all parties then are secured to them. The final words of the first question, as proposed by the bankrupts' counsel, assume the proceeding to be adverse to the bankrupts; and an adverse proceeding, without right to appear and defend, seems unjust. But if the foregoing paragraphs are not mistaken those final words need qualification. In the Matter of Bach, December, 1872 [case unreported], a witness was under examination at the instance of the assignee, and the counsel for the bankrupt claimed the right to cross-examine and otherwise act as opposing counsel may, because, otherwise, evidence might be improperly obtained to operate against the bankrupt upon his application for discharge. The register held that the bankrupt was not then a party and that the evidence given could not be used against him on his application for discharge, when all issues would be tried independently of proceedings had elsewhere; and this court sustained the decision. In the Matter of Levy [Case No. 8,295] the examination

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of the bankrupts had been begun and adjourned over, and the assignee summoned a witness, in the meantime, for examination as to the bankrupts' property, without notice to them. Upon objection to this by the bankrupts' counsel, the objection was overruled by the court and the examination was allowed to proceed. Upon authority, I have felt bound to deny the motion of the bankrupts' counsel."

BLATCHFORD, District Judge. I concur with the register in his conclusions and in the reasons he assigns therefor.

[NOTE. For other proceedings in this case, see Cases Nos. 4,131 and 4,133.]

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