

Case No. 4,173.

IN RE DUNN ET AL.

{9 N. B. R. 487;¹ 12 Blatchf. 42.}

Circuit Court, S. D. New York.

May, 1874.

BANKRUPTCY—TESTIMONY—HOW TAKEN.

1. Section 30, act of 1789 (1 Stat. 88), authorizing testimony in the United States court to be taken de bene esse, and the act of 1817 conferring power to take testimony (3 Stat. 350), and of 1872 (17 Stat. 89), before commissioners of the circuit court, do not apply to proceedings in bankruptcy.
2. Testimony in bankruptcy proceedings can only be taken on commission, and cannot be taken on notice.

WOODRUFF, Circuit Judge. A petition has been filed in the district court for the northern district of Ohio, by creditors of R. A. De Forrest et al., charging acts of bankruptcy. The debtors deny the commission of such acts; a trial has been had and a verdict of the jury rendered in favor of the debtors. Such verdict has been set aside and the proceedings continued with a view to another trial. The petitioning creditor, Wild, now seeks to procure testimony. He has applied to a commissioner and given notice of the intention to take the testimony of Dunn and others, (respondents in this application,) de bene esse under the act of 1789, § 30 (1 Stat. 88), and the subsequent act of 1817, conferring power to take testimony on commissioners of the circuit court (3 Stat. 350), and of 1872 (17 Stat. 89), and to that end subpoenas were issued and served on the proposed witnesses. They did not attend in obedience to the subpoena, and this court is now moved to grant an attachment against them for their disobedience. *Ex parte* Humphrey [Case No. 6,867]; *Ex parte* Judson [Id. 7,561].

While on the one hand I am of opinion that, had the act to establish a uniform system of bankruptcy been silent upon the subject proceedings under that statute must have been deemed a civil cause pending in a court of the United States within the meaning of section 30 of the act of 1789, yet, on the other hand, I am decidedly of opinion that such proceedings have, by the bankrupt act, been regulated with such minute detail as a statutory proceeding, that as to matters which are the subject of specific regulation, its provisions must be held exclusive. Section 38 of the bankrupt act, in terms, declares how evidence may be taken to be used in “any of the proceedings” under the act And to meet the precise case of the creditor now applying to this court it authorizes the taking of testimony on commission. By that means these witnesses may be examined. I think that provision excludes the taking of testimony on mere notice as provided in the act of 1789, and that it was so intended. The applicant should resort to a commission. Motion denied.

¹ [Reprinted by permission.]