

**Dier Vs. Banton**

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**Court :** US Supreme Court

**Decided On :** May-07-1923

**Appeal No. :** 262 U.S. 147

**Appellant :** Dier

**Respondent :** Banton

**Judgement :**

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**Dier v. Banton**

**No. 330**

**Argued April 17, 1923**

**Decided May 7, 1923**

**262 U.S. 147**

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES*

*FOR THE SOUTHERN DISTRICT OF NEW YORK*

## SYLLABUS

1. One who has been adjudged an involuntary bankrupt and has complied with an order requiring him to turn over his books and papers to a receiver is not privileged by the Fourth and Fifth Amendments to prevent their production by the receiver before a grand jury in a state court upon the ground that he might thus be incriminated. P. [262 U. S. 149](#) .

2. Books and papers in the possession of a receiver in bankruptcy appointed by a federal court cannot be taken by a subpoena issuing from a state court unless the federal court, exercising its discretion with due regard for comity, shall consent. P. [262 U. S. 151](#) .

279 F. 274 affirmed.

Appeal from an order of the district court discharging a rule *nisi* and refusing to enjoin the production of books and papers, in the custody of its receiver in bankruptcy, before a grand jury in a state court.

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MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This appeal is from an order of the District Court for the Southern District of New York discharging a rule *nisi* and

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refusing an injunction. On January 14th, a petition in involuntary bankruptcy was filed against Elmore D. Dier and others, partners, as E.D. Dier & Co. Two days after the filing of the petition, Mandred Ehrich was appointed receiver of the estate of the alleged bankrupts, and they and their servants were directed to turn over all their property, assets, account books, and records, and were restrained from suing out of any other court any process to impound or take possession of them. This order was complied with, and the receiver took possession of the books and

papers of the alleged bankrupts and of the firm. On February 16th, Dier informed the court that the District Attorney of New York City had applied to the receiver for the production of these books and papers before the grand jury, and asked for the rule *nisi* against the receiver and the district attorney, and, upon a hearing thereof, an injunction to prevent the use of such books and papers against him before the grand jury on the ground that they would incriminate him and that his right to refuse to testify against himself under the Fourth and Fifth Amendments would thus be violated by the process of the federal district court. Judge Learned Hand, sitting in bankruptcy, discharged the rule and refused to enjoin the proposed use of the books. Judge Hand's action was based on the ruling of this Court in *Johnson v. United States*, [228 U. S. 457](#) . He quoted the language used in the *Johnson* case: "A party is privileged from producing the evidence, but not from its production."

He alluded to the circumstance that, in the *Johnson* case, there were both title and possession in the trustee, whereas, in this case, the books and papers were in the hands of the receiver, who has no title, but that, he said, made no difference. We agree with this view, and hold that the right of the alleged bankrupt to protest against the use of his books and papers relating to his business as evidence against him ceases as soon as his possession

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and control over them pass from him by the order directing their delivery into the hands of the receiver and into the custody of the court. This change of possession and control is for the purpose of properly carrying on the investigation into the affairs of the alleged bankrupt and the preservation of his assets pending such investigation, the adjudication of bankruptcy *vel non*, and, if bankruptcy is adjudged, the proper distribution of the estate. It may be that the allegation of bankruptcy will not be sustained, and in that case the alleged bankrupt will be entitled to a return of his property, including his books and papers, and, when they are returned, he may refuse to produce them and stand on his constitutional rights. But while they are, in the due course of the bankruptcy proceedings, taken out of his possession and control, his immunity from producing them, secured him under

the Fourth and Fifth Amendments does not inure to his protection. He has lost any right to object to their use as evidence because, not for purpose of evidence, but in the due investigation of his alleged bankruptcy and the preservation of his estate pending such investigation, the control and possession of his books and papers relating to his business were lawfully taken from him.

It is pressed upon us that the bankrupt may prevent the use of such books and papers taken over by a receiver in the bankruptcy proceedings for evidence in a criminal case in the state court by resisting surrender and protesting against their use for such a purpose at the time the receiver took possession. But we think the alleged bankrupt has no such right. We so held in *Matter of Fuller, ante*, [262 U. S. 91](#) , in which it was sought to attach conditions of this kind to the turning over of the books and papers of a bankrupt to the trustee in bankruptcy. We are of opinion that the same principle must apply to the delivery of the books and papers relating to the bankrupt's business and property included in the estate into the custody of the receiver of the bankruptcy court.

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Of course, where such books and papers are in the custody of the bankruptcy court, they cannot be taken therefrom by subpoena of a state court except upon consent of the federal court. In granting or withholding that consent, the latter exercises a judicial discretion dependent on the circumstances, and having due regard to the comity which should be observed toward state courts exercising jurisdiction within the same territory. *Ponzi v. Fessenden*, [258 U. S. 254](#) , [258 U. S. 259](#) . All we hold here is that, the court below having exercised discretion to allow the use of the books and papers in the custody of its officer upon subpoena by another court, the alleged bankrupt's rights under the Fourth and Fifth Amendments have not been violated.

*Order affirmed.*

