

Case No. 2,811.

{17 N. B. R. 554.}<sup>1</sup>

IN RE CLARK ET AL.

District Court, S. D. New York.

May 8, 1878.

VACATING PROVISIONAL WARRANT.

A provisional warrant issued in voluntary proceedings upon papers regular on their face, and upon proof by affidavit of facts showing that it was very necessary for the protection of the estate, will not be vacated where such facts are not disproved and it appears that the purpose of the bankrupts in making the motion is to deprive the marshal of his fees, and this whether it was one which the court had power to issue or not.

{In the matter of James A. Clark, a bankrupt}

Hugh Porter, for motion.

Wm. P. Scott, contra.

CHOATE, District Judge. Motion to vacate a provisional warrant. The bankrupts filed their voluntary petition March 28, 1878. April 4th, and before adjudication, this warrant was issued, on affidavit of a creditor showing that the property of the firm was not safe in the hands of the bankrupts. The affidavit also stated that an adjudication had been made. The bankrupts gave notice of this motion on proof that an adjudication had not been made, and on affidavits tending to disprove in part the facts alleged in the moving papers as to the danger of allowing the bankrupts to retain possession. Before the hearing of the motion, an adjudication was made and an assignee appointed. The averment in the creditor's affidavit, that an adjudication had been made, was made by mistake. It is now insisted that the court had no power, in a voluntary case, to issue a provisional warrant before adjudication. But, without determining this question, the motion must be denied. The only object of vacating the warrant since the appointment of an assignee, is to deprive the marshal of his charges for the custody of the property, as a charge on the estate. This is the avowed purpose of the bankrupts in pressing this motion. The warrant was issued on papers in any view regular on their face, and upon proof by affidavit of facts showing that it was very necessary for the protection of the estate, facts which the affidavits now produced in behalf of this motion do not disprove. Under these circumstances it would be highly unjust to deprive the marshal of his proper charges incurred in good faith, and whether the warrant was one which the court had power to issue or not. I do not feel called upon to vacate it. Motion denied.

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