13FED.CAS.—9

Case No. 7,086.

IN RE IRWINE.

[1 Pa. Law J. 291; 1 Pa. Law J. Rep. 82.]

Circuit Court, E. D. Pennsylvania. Oct. 13, 1842.

VOLUNTARY BANKRUPTCY—ACT 1841, § 2—CONSTRUCTION.

The second proviso, in the second section of the bankrupt law [of 1841 (5 Stat. 442)], is to be read as if pointed thus: "In case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignment or otherwise, given or secured any preference," &c, "he shall not receive a discharge," &c.

Irwine having been decreed a bankrupt, his discharge was opposed on the ground that on the 15th June, 1841, he had made a general assignment containing a preference. (The exception, in point of fact, alleged that the preference had been made "in contemplation of the passage of the bankrupt law," but there was no evidence of this beyond the mere assignment, and the question was discussed on general grounds.) The right to the discharge depended upon the construction of the second proviso in the second section of the bankrupt act. This section (the part material unpunctuated), reads thus: "And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, *subsequent to the first day of January last or at any other time in contemplation of the passage of a bankrupt law,"* given a preference, &c, he shall not be discharged, except with the assent of a majority in interest of the unpreferred creditors. The question was, whether the part in italics

should be pointed thus, has, subsequent to the first day of January last or at any other time, in contemplation; or thus, has, subsequent to the first day of January last, or at any other time in contemplation, &c. If the former way, then, of course, the preference in this case would bar a discharge, though it had not been made in contemplation of the passage of a bankrupt law; while, if the passage were to be read the latter way, it would be no bar, unless the preference had been made in contemplation of the passage of the act. As printed in several copies the pointing was thus, "has, subsequent to the first day of January last, or at any other time, in contemplation," &c, which, of course, did not make the mere assignment a bar. The question was started several weeks ago, when Judge Randall said, that although his first impression had been the same as that imparted by the printed copies, and, accordingly, that a preference subsequent to the 1st of January, 1841, would not be a bar, unless made in contemplation of the passage, &c, yet the more he reflected on the language of the act, the more his doubts increased. He therefore wished to have the point argued. It was accordingly argued, in another case, by St. G. T. Campbell, against the right to a discharge, and by J. A. Phillips, on the other side. The judge gave no opinion, but some time afterward said that he would prefer to have the case spoken to again in the circuit court. He accordingly adjourned it, and it now came on to be argued.

Mr. Meredith.

In construing a statute no regard is to be had to the pointing. Neither as reported, considered, passed, or approved, are legislative bills pointed. Punctuation is a matter done afterwards by the compositor, out of his own head. It is a matter of fancy, and in regard to which the practice of scarcely any two offices agrees. The court must look at the act as it was passed by congress—that is to say, without any punctuation, and give to its language, in that state, a judicial interpretation. The language here is, if the bankrupt has, &c, "subsequent to the first day of January last or at any other time in contemplation of the passage," &c. Now, put a comma after the word "time" only, and the language means, if the bankrupt has, at any time, in contemplation, &c; a construction which discards as senseless, a great part of the language of the provision. If congress meant "has, at any time," why have they not used that form of expression? It would be shorter, clearer, as comprehensive, and more natural. Congress does not use this language, and it is, therefore, to be inferred does not mean what this language conveys. Point the language differently, and you give effect to every part of the enactment. It then reads, "subsequent to the first day of January last (or at any other time in contemplation of the passage of a bankrupt act), &c. By this mode of punctuation alone can effect be given to the whole passage. It being the duty of the court to interpret the statute from itself, it does not import us to consider whether or not this matter of punctuation will carry out the sense which, in a political view, we may deem to have been that of congress. The court will not speculate on that subject. The court would observe, likewise, that the fact of a preference did not inevitably

debar a bankrupt from a discharge, it did so only where his application was voluntary, and where he could not obtain the assent of a majority of his unpreferred creditors to his final certificate. The provision therefore did not destroy the general object of the law. The proceedings in invitum—the only proceedings which had ever existed in any system of bankruptcy but that of our last law—were left undisturbed. The permission to make an application voluntarily was a feature entirely new to bankruptcy; it was a great privilege to a debtor, and there was no reason why it should be granted in every case. It was only where a party came into the court free from any reproach of having made a preference, that he could himself insist on the benefits of a system with whose terms any sort of preference was at war.

Mr. Clarkson, in favor of the discharge.

The first part of section second [of the act of 1811 (5 Stat. 442)] enacts, that preference in contemplation of bankruptcy shall bar a discharge; but as preferences had probably been made in anticipation of the passage of the law, when bankruptcy, in its technical sense, could not exist, it is natural to look for a provision against preferences made in contemplation of the passage of a bankrupt law. This is exactly what we do find in the proviso, if our construction be adopted. The opposite construction forces into this provision an independent and dissimilar enactment, which is this. If the bankrupt, &c, "has, subsequent to the 1st day of January last, by assignment or otherwise given or secured any preference to one creditor over another," &c, he shall be barred of a discharge. Now this language is general. It extends to every preference made or to be made "subsequent," i. e. any time subsequent, to the 1st day of January last; and this preference, be it observed, is a bar, no matter in what circumstances or with what purpose it has been made. How can such a proviso be reconciled with the main and prior part of the section, which declares, that after the passage of the law, a preference is a bar, only when given "in contemplation of bankruptcy, and for the purpose of giving a preference."

This argument can be eluded but in one way, viz. by saying that the proviso applies to such preferences only as were made between the 1st of January and the 10th of August, the date of the enactment of the

law. It is an answer to this to say that no such restriction as this appears in the expression "subsequent to the 1st day of January last," and that no words restrictive of the expression are used in any other part of the act. But in any event, we still ask, what reason can there be, except the "contemplation of the passage of a bankrupt law," why a preference made between January 1st and August 19th shall be a bar, while a preference before January 1st is no bar? How senseless the enactment is made. Up to January the 1st, a preference is no bar unless made in contemplation of the passage of a bankrupt law. Between January the 1st and August the 19th, it is a bar, though not so made. Then again, after the 19th, the law changes back, and the preference is no bar unless made in contemplation, &c. What reason can be assigned why these seven months and nineteen days should have been thus distinguished from the time anterior and the time subsequent? The court is asked to say that congress supposed that every preference during this time must have been made in contemplation of the passage of the law. But if the words "contemplation of bankruptcy," used in the first part of the section had, before their introduction in the act, acquired a settled construction—one under which "contemplation" is a question of fact—how is it that contemplation of the passage of a bankrupt law is meant to be made an unavoidable conclusion of law. Is it not against sense to say, that after the act has passed, "contemplation of bankruptcy" is a matter of pure fact—while before the act passed—while there was yet the double doubt, 1st whether a law would pass, and 2nd, whether the party would ever be affected by it—that contemplation then is an unremovable inference of law?

Prior to the passage of the bankrupt law, preferences were lawful, even though made in insolvency, and for the purpose of giving a preference. They were therefore certainly lawful when not so made. Can it be, then, that the act thus punishes the suffering debtor for an act which was lawful when he aid it, and which the bankrupt law so far now regards as not to attempt to disturb? The other construction makes the law more severe towards a preference made before the passage, than towards one after the passage; for one of the latter kind is no bar unless made "in contemplation of the bankruptcy, and for the purpose of giving a preference," while one of the former kind (if made between the 1st of January and the passage of the act) is a bar at all events. That is to say, the act affixes a penalty to a preference made during a time when preferences were encouraged; and takes away the penalty the first moment that the only law which discouraged them comes into existence. The construction which we contend for harmonizes the different parts of the act. If the preference has been made after the passage, then as in all cases it must be shown to have been made in contemplation of bankruptcy, so, if made before the passage, it must be equally shown to have been made in contemplation of the passage of a bankrupt law. In point of grammar the language of the clause is simply ambiguous; for from the words alone we should be entirely unable to tell which meaning was the true one. Seeing then, that the language may, grammatically, mean one thing precisely as much

as the other, the passage is left to be interpreted exclusively by the reason and sense of the case; and the considerations already presented we think decisive in that respect. The whole argument on the other side is, that congress has not expressed itself with the most energetic brevity of which the English language is capable. But this brevity is not the characteristic of statutory enactments. On the contrary, the expression used, is more according to legal precision than the other way. There is a certain manner of specifying and particularizing adopted so generally in statutes, that every ear recognizes it as the legislative style. Wherever a general notion is to be expressed, it is not done by a single comprehensive expression (for that would be too vague and abstract for the specific character of law), but one particular is first fixed that a definite example may be lodged in the mind, and then that particular is enlarged by generalities. This is a style so usual and so proper in statutes, that every draftsman adopts it. Thus, would the legislature give a preference to the United States, in the case of all persons indebted to it, in any way. The language is, "any revenue officer, or other person hereafter becoming indebted to the United States by bond or otherwise" (Act March 3, 1797 [1 Stat. 515); not that the legislature meant revenue officers more than any other persons, or bond debts more than simple contract debts; for when this objection was made (U. S. v. Fisher, 2 Cranch [7 U. S.] 358), that if the legislature had meant all persons and all debts, it would have said so, the court, by the chief justice, Marshall, said that the two expressions were equally appropriate, and that "between the two, there is no difference of meaning." Does the legislature of Pennsylvania make an enactment respecting all instruments of writing for the payment of money. The enactment is thus made, "bills, notes, bonds, or other instruments of writing for the payment of money." Act March 28, 1835. So, this very section enacts that nothing in the bankrupt law shall impair "liens, mortgages, or other securities"; and an example is found even in the proviso under consideration: it says, "if the bankrupt &c, subsequent to the first day of January last &c, by assignment or otherwise." In fact so usual and so proper is this form, that the other—the naked generality—would have been unusual, and less proper; and we conclude from the general practice in this respect that if the legislature had intended to say.

"has, at any time," they would have said it in some such form as this. The form adopted is the proper legislative style of saying, "at any time." The first of January, being the beginning of the year, and the time about which the passage of the law became probable, the legislature meant no more than to fix that day as a leading date. The construction contended for on the other side, is not less inelegant than ours; and supposes congress to have used the extremest condensation of diction. Why, for example, did not congress say, if the bankrupt "has, subsequent to the 1st day of January last, or (has) at any other time, in contemplation of the passage of a bankrupt law, by assignment or otherwise," &c, &c. The insertion of the word "has" would have presented the sense contended for by the opposite counsel; and manifold forms exist of presenting the same idea. In placing, in such a place, a provision of so severe effect—one purely arbitrary, and discordant with the analogies of the act, congress would have expressed itself clearly.

On the whole, the passage, under any reading, is inelegant. Our version is inelegant on the side of particularity, the besetting sin of statutes. Theirs is inelegant on the side of extreme costiveness—a rare characteristic of legislative style.

Dillingham on the same side.

The object of the bankrupt law is to relieve honest but unfortunate debtors who make a full surrender of their property. The proviso of the second section is in restraint of the general remedy and in its nature penal. It should, therefore, be construed strictly. The very evil which the law would guard against, is the unwillingness of creditors to assent to the discharge of their debtors: to require that such assent from any portion of them should be procured, prior to a discharge, is to debar petitioners in a measure from the remedy. The law should therefore receive a construction in accordance with its general spirit. It is easy to comprehend why congress should have guarded against preferences given purposely to anticipate and counteract the passage of the law; but that preferences given without such thought or object should be regarded in the same light and visited with the same consequences is quite incomprehensible.

It is submitted, that the words of the proviso do not call for such a construction; that it is opposed to the whole spirit and meaning of the law; and that it is equally opposed by everything in pari materia. The words "ii it shall be made to appear to the court," used in connection with "the contemplation of the passage of a bankrupt law," leave no room for argument that the motive of the preference, when it bears at all upon its character, is to be established by proof of some overt act. "Contemplation" being an operation of the mind, could be susceptible of proof only by words or actions, indicating the motive. Wherever the phrase applies, therefore, it is not used as descriptive of the character of these preferences, in and of themselves. In relation to the analogous phrase in the first part of the same section, providing for cases "in contemplation of bankruptcy," the position that this is a fact to be proved affirmatively by the opposing creditor, and not a legal

presumption, was fully established in Breneman's Case [Case No. 1,830], and in Ex parte Potts [Id. 11,344]. See also the cases there cited, especially Fidgeon v. Sharpe, 5 Taunt. 539, 1 Marsh. 196, and M'Menomy v. Roosevelt, 3 Johns. Ch. 446. Here we have the precedent words "if it shall be made to appear to the court," which makes an argument a fortiori. There is no pretence of any proof in this case, and I am instructed to say, if proof on the subject be admitted, that the contrary can be clearly established, and that the preference was compulsory.

Again: it having been already shown that the proviso is in the nature of a penal enactment, restraining the remedial character of the law, it is contrary to every principle in the administration of justice, to adopt the construction which presumes a wrong motive while there is room for any other. Fraud is never to be presumed. It cannot be contended but that thousands of cases of preference may have occurred since the 1st of January, 1841, when no thought of the passage of a bankrupt law entered the mind of the unfortunate debtor. The words are so general as to include every possible case of payment of every debt, although contracted for the necessary subsistence of a petitioner and his family. Nay, it is obvious that by far the larger class of preferences must necessarily have been without bad motive; and the construction urged, is in effect to repeal the bankrupt law as to every man who has paid a debt since the 1st January, 1841. Nor is it to be admitted that the passage of the law was to be considered as a matter of course after this date. Its passage was still very uncertain, and so far from the idea being everywhere rife, in the county (where petitioner resides)[1] it was but little thought of. This is proved by the fact that up to this time, from Chester county, with a population of sixty thousand, there are not a dozen applicants.

As a general rule, the grammatical construction is the legal construction. To arrive at the reading contended for the court is asked to change the natural and obvious punctuation as we find it in the printed copy of the law, for a theoretical and artificial punctuation;—to strike out the comma between the phrase "or at any other time" and the phrase "in contemplation of the passage of a bankrupt law,"—and to include both phrases in parentheses; thus absolutely fencing out the qualifying phrase from that which precedes the parenthesis. If it

be said that we are to construe the law without reference to punctuation, it is admitted. Still, the obvious, natural, common sense meaning of these words and phrases, without points, is to be found in the punctuation furnished by the printer or the proof reader, whose especial business it is to give the natural meaning. Upon a question of punctuation, the lawyer and legislator may inform himself by consulting a practical printer. Then again, we have the supervision of the department, or committee, or father of the bill under whose care it was printed. That this was the natural reading of the district court is obvious from a passage in the opinion in Breneman's Case, already cited. No one things of anything else until the opposite theory is started and that theory rests upon a bare possibility. The authorities say "that we must adhere to the words of a statute, construing them according to their nature and import, in the order in which they stand in the act"—"according to the plan and obvious meaning of the words." "Courts are not to presume the intention of the legislature, but to collect them from the words of the act" by a sound interpretation of its language, "according to reason and sound grammatical construction." Dwar. St. 703. And to come to the case in point, when the qualifying words are at the beginning; or at the end of a sentence, they refer to and govern the whole. Id. 704. This grammatical construction is fortified by everything else in the act. Looking at the provision in pari materia in the former part of this same second section, we find that a naked preference, even after the passage of the law, does not, in and of itself work a penalty, but, that it must be done "in contemplation of bankruptcy." This motive constitutes the all essential vice of the preference. How can it be conceived that congress should have intended to deal more harshly with preferences made prior to the passage of the law? It is contrary to reason. It would be reversing the order of things, and assuming a meritorious character for ex post facto laws, in the very face of our constitutional provision. Both classes of cases are in the same category, in the same? section, must have been in view of congress at the same time; and yet the court is called upon by a forced construction to say that congress intended in the one case to declare the preference a wrong in itself, and not in the other. Precisely the same argument arises from the provision respecting preferences before January 1st, 1841. Who can imagine a reason for such a difference, in the character of an act done on the first hour of that day, and an act done on the last hour of the day preceding? But this forced construction works an absolute wrong; because, if the phrase "in contemplation of the passage of a bankrupt law," has no reference to the words "assignment or otherwise," giving preference since January 1st, 1841, then there is no qualification or limitation to such preferences whatever. We are forced to read it, as though congress had said in so many words, "subsequent to the first day of January last, although not in contemplation of the passage of a bankrupt law." Can this be? It leads at once to the result, that however innocent, nay virtuous and meritorious, may have been the preference, and supposing that these good motives could be proved, the court would not be at liberty to hear the proof,

or if heard, to regard it. This would, indeed, be to punish virtue; for that there may be cases of preference meritorious and virtuous, is not only recognized in the act, but by the universal sense of the community. We cannot limit this construction to a mere matter of prima facie evidence—or legal inference until the negative be proved.

The opposite argument is that if the legislature had really meant to apply the phrase "in contemplation of," &c to all cases they would have used one general expression mat they might have done so is admitted—and that the law would have been more precise and clear if they had done so. But this is the extent of the argument. It is a matter of style. One draughtsman of a law is diffuse, another is concise—one is loose, another precise. But more frequently, by far, the most perfectly constructed law in point of style as it comes from the closet, is deformed and put awry and made to appear awkward by afterthoughts and amendments when it comes to be canvassed and criticised in a deliberative assembly. This argument is fully answered by the case of U. S. v. Fisher [2 Cranch (6 U. S.) 358]. Chief Justice Marshall there says in a case nearly analogous, "it is true the mode of expression which has been suggested is at least as appropriate as that which has been used; but between the two there is no difference of meaning, and it cannot be pretended that the natural sense of words is to be disregarded, because that which they import might have been better or more directly expressed." But this form of phrase is not without reason and use. That a particular day should have been named, does not necessarily imply "that within that time contemplation of the passage of a bankrupt law," shall be a matter of legal intendment. It may have been very natural and very well to have called the attention to a particular class of cases as more likely to come within this category. Less proof would perhaps be required by the court to establish the fact of such contemplation, where the preference was given, while the discussion of the law was going on, and its friends were everywhere urging it forward.

Meredith replied.

BALDWIN, Circuit Justice (after stating the facts). We are of opinion that the evident meaning of the law is asserted by the counsel against the discharge. To adopt the

contrary construction would be to strike out the words "subsequent to the 1st day of January last," or leave them utterly useless by making this clause read, or "has at any time in contemplation," &c, which would be contrary to the rule, that if the words admit of it, effect shall be given to them when no repugnancy would arise between the different parts of the clause. If these words indicated that no other cases than preferences given in contemplation of the passage of a bankrupt law were intended to be provided for, there can be no reason assigned for the introduction of a phrase, which can have no effect on a case fully define without it; provides for a case of a description entirely different, and in no wise governed by the intention of the bankrupt, but dependent on the time when the act of preference is done. That case is definitely described, a preference given "by assignment or otherwise," after "the 1st day of January, 1841," the very case now before the court. In so reading the law (for it can scarcely be called construing), we give effect to the language used as it is clearly intended; there is neither a repugnancy in its provisions, surplusage in its terms, or obscurity in the language throughout. It is not for us to usurp the province the legislature, by inquiring into, and adjudicating on the expediency or policy of this provision: it was within their constitutional power to act on this subject according to their discretion; and having exercised it, we are bound to carry their enactment into execution.

The argument which has been raised on the punctuation of this clause, tends to make it obscure and without meaning; which would be conclusive against it; but in the construction of laws, punctuation is no criterion of the sense of the legislature, unless it is in conformity with their intention as expressed in the words they use. Punctuation is generally the act of the clerk or printer, which the court will disregard, if taking the instrument by its four corners, and looking at all its provisions, a judicial construction points to an intention different from what the mere punctuation indicates, as is clearly the case here. Vide {Ewing v. Burnet} 11 Pet. {36 U. S.} 54.

In the construction of all laws, the best rule is to gather the intention of the legislature from the words used, rather than to attempt to infuse in their acts a meaning, which will require the omission of words which are used, or the insertion of words omitted, in order to extract the supposed meaning of its provisions. Every legislative body must be supposed competent to express their intention in intelligible language, and to have done so in prescribing a written rule of conduct "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey," legislatures "must be understood to have employed words in their natural sense, and to have intended what they have said." {Gibbons v. Ogden} 9 Wheat. {22 U. S.} 188. And the intention of the lawmaker is the law itself, when it is indicated by the use of plain words.

The present bankrupt law is an anomaly in legislation; the provision for voluntary bankruptcy, is in effect, the adoption of the insolvent laws of the states, but with an enure new and most important feature, the petitioner becomes entitled to a complete discharge from all his debts, whereas an insolvent law only secures his person from arrest. In this particular, congress have exercised power expressly prohibited to the states by the constitution of the United States, and not granted by it to congress, otherwise than by the express power "to establish uniform laws on the subject of bankruptcies throughout the United States." To this power there is no limitation, and consequently it is competent to congress to act on the whole subject of bankruptcy with a plenary discretion. Hence they may give to the discharge what effect they please, and in consequence may not only impair, but extinguish the obligations and the contracts of a bankrupt. Whatever doubts may exist as to the sound policy or justice of doing this on the application of the debtor, the power being the same to provide for one case as another, must be considered to be equally constitutional, whether the proceeding is on behalf of debtor or creditor. Congress have adopted a system which embraces both classes of cases, under the belief that the state of the country required it, and so far as they have authorized the discharge of a debtor on his own petition, the law must be executed by the appropriate court; but inasmuch as this is a principle unknown to the bankrupt law of England, and of these states before the constitution or the act of 1800 [2 Stat. 19], it ought not to be expanded by construction, so as to interfere with the rights of creditors, further than the law authorizes, or exempt the debtor from any restrictions imposed upon him as requisites to his discharge.

If then, the words of this clause were less explicit than they are, we should endeavor to give them the effect contended for by the creditor in this case, if they would admit of it; a provision for voluntary bankruptcy which gives the same effect to a discharge as an involuntary one, is an experiment in legislation which must have a fair trial, but must not be extended beyond the lines drawn by the law as it now stands. This should be done only by legislating for the future, not by construction of the past; hitherto bankrupt laws have not been favored by congress, and perhaps not in the general opinion of the community; they certainly will not become more so in either, if those points which favor the debtor and bear hard on the creditor, are too benignly viewed by the courts

in their exposition and execution of the present law.

It was certified to the district court that the petitioner in this case is not entitled to a discharge, without the consent of a majority of the creditors in interest who have not been secured.

[1] The petition was from Chester county.