

Case No. 8,178.

EX PARTE LEE.

[1 N. Y. Leg. Obs. 83; 4 Law Rep. 486.]

District Court, S. D. New York.

1842.

BANKRUPTCY—WHEN DECLARED BANKRUPT—WHEN DEEMED BANKRUPT.

An applicant for a decree in bankruptcy may be examined before a commissioner prior to his being declared a bankrupt; a petitioner is deemed a bankrupt from the time he applies to the court for a decree.

This was a motion to have the petitioner examined before a commissioner, prior to a decree being passed. It was urged on behalf of the petitioner that until he was declared a bankrupt, he was not subject to examination. *Cur ad vult.*

BETTS, District Judge. This is an important point, but I think that the counsel for the petitioner is mistaken in his reading of the law [of 1841 (5 Stat. 443)]. He will find by the fourth section, that the bankrupt shall be always subject to examination orally or by interrogatories before the court or commissioners touching all matters relating to the bankrupt, and his acts and doings as the court may think proper. It is said, that congress intended only that he should be subject to an examination after being declared a bankrupt. But in referring to another section of the act, it will be found, that he takes the name of bankrupt before he is pronounced so by the court. On filing their petitions they are deemed bankrupts, and that is the *descriptio personae*. And though he has still to be declared so by the court, yet on showing cause and giving

notice, he is nominally, and for the purpose of enforcing this act deemed a bankrupt from the time he applies to the court. And I have no doubt that congress intended to subject him to examination from the time he applied to be made a bankrupt. But it also appears by another section, that it was intended to subject him to the orders of the court; and that he cannot get his discharge until he complies with all the orders of the court; and one of the orders of the court is, that certain matters shall be sent to the commissioners; and if the court order the bankrupt to go to the commissioners for examination, it is as much an order as it would be to desire him to show his books; and it is an order in strict conformity with the act. But the court is also authorized to proceed summarily as in chancery. And in summary proceedings in equity, it is the ordinary practice to send matters before a master in chancery for examination. In either point of view, he is therefore bound to go before the commissioners for examination, before he is declared a bankrupt. He is bound to go there, because it is one of the orders of the court, which he is bound to comply with, or because it is a proceeding in the nature of equity, and in either of these points of view he is bound to go there, and the court has power to make him do it. The act manifestly intended that the creditor should have the right to go into the whole matter, in order to show, if he can, that the petitioner has not complied with the law, and thus cut him off from a decree.

There can be no doubt, that when the framers of this act first prepared it, they contemplated only the voluntary bankruptcy, but it was afterwards thought better to couple with it the involuntary, and in order to do so this mode of proceeding was provided. It would of course be unjust to let a creditor proceed against a bankrupt, without giving him any remedy, and it is manifest that congress intended to let the debtor come in and show that the creditor had no right to stop his business and take away his property, and it therefore gave him this proceeding to counteract it. But in doing so they have attached to the voluntary proceeding the same privilege as to the involuntary proceeding, and have given to the creditor the same power as to the debtor, and in both cases it is competent for the parties to show, by matter of fact or law, why the proceeding should not go on. It is sometimes the interest of the creditor to prevent the bankrupt getting a decree, as his not doing so might better insure individual debt, and therefore it was his interest to prevent him. Ordinarily it is for the interest of all parties that the proceeding should go on and the property go to the assignee. But the creditors have liberty in this incipient stage of the proceeding to show that the bankrupt is not entitled to a decree.