

Case No. 14,806.

UNITED STATES v. CLARK.

[1 Lowell. 402;<sup>1</sup> 4 N. B. R. 59 (Quarto. 14); 1 Am. Law T. Rep. Bankr. 237; 3 Am. Law T. 226; 2 Leg. Gaz. 294.]

Circuit Court, D. Massachusetts.

1869.

BANKRUPTCY—INDICTMENT FOR FRAUDULENT DISPOSITION OF PROPERTY—OMISSION OF PROPERTY IN SCHEDULES—INDICTMENT.

1. Whether congress has power to punish a fraud committed by a debtor on his creditor both residing within the same state, unless the act is done in contemplation of bankruptcy or in connection with some other matter within the federal jurisdiction, quære?
2. Section 44 of the bankrupt act [of 1867 (14 Stat. 539)] punishing bankrupts who within three months before their petition is filed, dispose of goods otherwise than in the due course of trade with intent to defraud, does not refer to an intent to defraud only the original seller of the goods thus disposed of.

[Cited in U. S. v. Penn. Case No. 16,025; U. S. v. Myers, Id. 15,848.]

3. The crime of fraudulently omitting property or effects from an bankrupt's schedule is complete when the false schedule is filed.

[Cited in Huntington v. Saunders, 64 Fed. 480.]

4. An indictment for omitting property and effects from the schedule need not allege that the bankrupt took the oath of allegiance prescribed by section 11 of the bankrupt act.

Indictment [against Hugh Clark] for a misdemeanor under the bankrupt act. After a verdict of guilty, the defendant moved in arrest of judgment.

M. F. Dickinson. Jr. Asst. U. S. Dist. Atty.

E. Avery, for defendant.

LOWELL, District Judge. The third count of this indictment charges that the defendant within three months next before the commencement of proceedings in bankruptcy did dispose of, otherwise than by bona tide transactions in the ordinary way of his trade, certain of his goods and chattels, described, which he had obtained on credit, and which remained unpaid for, with intent to defraud a certain creditor. It is objected that congress cannot legislate for frauds committed by a debtor on a single creditor within the same state, unless the act relates to bankruptcy or to some other matter within the federal jurisdiction; and that it has not in fact so legislated in this case. Without now passing upon the constitutional question, which, however, seems to me well taken. I may say that on the construction of the clause under consideration I am of opinion with the defendant, that the scope of the act is to punish frauds on the creditors generally and not on the particular creditor who sold the goods, nor any other single creditor, and that this count, which charges a fraud on one creditor only, cannot be sustained. If the goods were obtained on credit with intent to dispose of them to raise money, the fraud on the seller would be the most obvious one; but the statute seems to be directed against frauds upon the creditors

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as a body, and it does not refer the intent to the time of the purchase, but to that of the disposal of the goods out of the usual course of trade, and at that time the fraud could not injure one creditor more than the rest.

But the verdict cannot be set aside, if either of the other counts is good, for it was a several finding on each of the three charges. The first and second counts both allege specified omissions of property and effects from the schedule of assets filed by the defendant with his voluntary petition in bankruptcy. It is urged that all the acts and omissions mentioned in the first part of section 44 [of the bankrupt act (14 Stat. 539)] must take place after the proceedings are begun; whereas, the filing of the schedules in voluntary petitions is contemporaneous with the beginning of the proceedings. Upon a careful reading of the section, it appears by no means necessary to hold that the clause beginning, "or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee or omit from his schedule." is qualified by the original limitation of time. It is a new division of the subject, and one which requires no such limitation, because the prohibited acts cannot be committed before bankruptcy. The offence is complete if a bankrupt fraudulently omits from his schedule any property or effects, with the designated intent. An English case was cited to show that a bankrupt ought not to be held guilty of omission and concealment until he had passed his last examination. But that case was decided under St. Geo. IV. c. 16. § 112, which punishes a bankrupt who shall not, upon his examination deliver up his estate, books, &c. and it was held that he had a locus penitentie until his last examination. Under our act, his duty is to file accurate schedules at the outset, and if they are fraudulently inaccurate he is punishable. We have no last examination of bankrupts, nor any examination at all, unless specially ordered. The whole system is so different in this respect, that the case cited has no relation to the subject of inquiry.

Another objection is, that the indictment does not sufficiently show that the bankrupt court had jurisdiction, and that the proceedings were regular and sufficient. Under this head, again, there was much reliance placed upon the English cases. It is hardly necessary to consider now how far an indictment must go in this direction. We have never adopted the English practice of requiring in every action tried by an assignee evidence of every fact necessary to show that he is rightfully such. The assignment is conclusive evidence of his right; and the bankrupt court is a superior court whose acts are presumed to be regular. In this case, however, enough is pleaded to show that the district court, sitting in bankruptcy, had jurisdiction

of the subject-matter and the person, and that proceedings were duly begun. The absence of an allegation that the defendant took the oath of allegiance is more especially relied on. To this there are two answers: First, that the omission of effects from the schedule with intent to defraud might be complete before the oath of allegiance was taken; because, although the prescribed form contemplates that the oath shall be annexed to the petition, yet it cannot be doubted that under section 11 it might lawfully be filed at any time afterwards and before further proceedings are had, with precisely the same effect as if annexed. It may be doubted, too, whether the bankrupt can take advantage of the omission of his duty in this respect. Another answer is, that neither the law nor the prescribed form requires that the petition should state whether the bankrupt is a citizen of the United States or not; and this indictment does not show this defendant to be a citizen; and as the statute is equally applicable to resident aliens, while the oath is to be taken only by citizens, there is nothing on the face of this indictment which calls for an allegation that the oath was taken. If the defendant was a citizen, and neglected to take the oath, he must show it in defence. The indictment, in setting out the petition, follows the form of petition prescribed by the supreme court, and actually adopted in this case.

Motion denied.

{The defendant was thereupon sentenced to imprisonment in the jail of the commonwealth at Dedham in the county of Norfolk, for the space of fifteen months.}<sup>2</sup>

<sup>1</sup> {Reported by Hon. John Lowell. LL. D. District Judge, and here reprinted by permission.}

<sup>2</sup> {From 4 N. B. R. 59 (Quarto, 14).}