THE BANKRUPT LAW OF THE UNITED STATES, PASSED AUGUST 19, 1841: WITH A COMMENTARY CONTAINING A FULL EXPLANATION OF THE LAW OF BANKRUPTCY, (PP. 8-48 NOT COMPLETE, WITH ADVERTISEMENT)

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649268689

The Bankrupt Law of the United States, Passed August 19, 1841: With a Commentary Containing a full explanation of the law of bankruptcy, (pp. 8-48 not complete, with advertisement) by A member of the bar

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

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THE
BANKRUPT LAW
OF
THE UNITED STATES,
Passed August 19, 1841.

WITH A COMMENTARY
CONTAINING
A FULL EXPLANATION
OF THE
LAW OF BANKRUPTCY,
AND
AMPLE REFERENCES TO ENGLISH AND AMERICAN AUTHORITES, PREPARED FOR
POPULAR AND PROFESSIONAL USE.

BY A MEMBER OF THE BAR.

PHILADELPHIA:
ORRIN ROGERS, No. 67 SOUTH SECOND STREET:
NEW YORK, WM. BURRECK, 102 Broadway, and WILEY & PUTNAM;
BOSTON, OTIS, BROADERS & Co.; BALTIMORE, ARMSTRONG & BERRY;
PITTSBURG, JOHNSON & STOCKTON.

1841.

Merrihew & Thompson, Printers,
No. 7 Carter's Alley.

ADVERTISEMENT.

At the end of each section requiring elucidation, will be found full Notes, explaining, in a plain and familiar manner, its history and purport, and illustrated by a reference to the English statutes—to the former Bankrupt act of the United States—and to the judicial decisions of English and American courts. Without such explanation, it is, in many parts, unintelligible even to the practitioner who has not made the subject his particular study, and consulted books, rarely found in the law libraries of the United States. Every citizen has a deep interest in this subject, for every citizen may claim the benefit of the act, no matter what his pursuit or calling. They who do not contemplate applying have yet a great stake in ascertaining clearly what are the temptations held out to their debtors to escape from liability, and what, on the other side, are the guards and checks against abuse. There will be a general rush to the act, in the apprehension that it may be repealed after a short trial. Many who now confidently profess to feel sanguine about struggling through their difficulties, will think it most safe not to lose the present opportunity of wiping off, for ever, old claims, and taking a new start in the world. They are sure, thereby, of a perpetual shield against persecution; their future earnings are safe, and they put nothing at hazard, for should there, eventually, be a surplus in the hands of the assignee, after discharge of debts, it will, of course, be paid over to the bankrupt. A false step, however, from haste or ignorance, which vitiates the proceedings, may never be retrieved. The question how far former assignments containing preferences to endorsers, sureties, or particular creditors, deprive the applicant of the benefit of the act, or are *nullified* by its provisions, receives consideration. Particular attention, also, is drawn to the 14th section of the recent act, by which the business of any commercial firm may be arrested on the allegation of *insolvency*, without any act of *bankruptcy* charged; also, as to the manner in which existing mortgages and judgments are affected.

It is believed that this form of presenting the subject will prove the most acceptable to professional, as well as to general readers. Although the leading principles of a bankrupt law have always been referred to in our courts, for the purpose of illustration, yet no American lawyer of the present day is familiar with its complex practice. The process of mastering the details of the system is arduous, and must be attempted very often in haste, as questions of great moment start up. Now, the act of Congress of 1841 is, by no means, identical with the former bankrupt act of 1800; and they both differ widely from the English law, which has itself undergone, from time to time, many and essential changes. It seems all important, then, that the precise text of the existing act should never be lost sight of. Without this precaution, Eng-

lish or American cases may oftentimes fatally mislead; turning, as they frequently do, on a particular phrase, or on the collocation of words in a sentence. A copious table of contents, at the head of each section, directs the eye with readiness to the particular point of inquiry; and the very words of the statute being constantly present, there is a firm reliance on the applicability of what is attained.

The further advantage is gained of bringing within a reasonable compass the materials for an opinion as to the merits and defects of this particular act, so as, in the approaching struggle for its repeal, to aid the cause of Truth, lead where it may.

exhibits a compromise. The right to seek its benefits is not made to depend upon the pursuit or calling of the applicant or the amount of his debts. But no one can be subjected to its operation, against his will, unless he fall within the enumerated classes, and his debts amount to at least two thousand dollars.

VOLUNTARY BANKRUPTCY.

"All persons whatsoever, residing in any state, district or territory of the United States, owing debts *which* shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity," may apply for and obtain the benefit of the act.

A question of some importance may arise under this phraseology. Is it meant that a person who owes money by reason of infidelity to a trust shall be altogether excluded from applying for the benefit of the act, or merely that debts of this character shall not of themselves be the basis of the application? From the words of the act, it might seem that the existence of any debts which do not originate in this odious way will sustain the application. Yet they are susceptible of the construction, that *all* the debts which he owes shall be free from this stain; and he is required to exhibit a list of his creditors. The 4th section of the act, however, contains a general provision, applicable to the case of voluntary as well as involuntary bankruptcy, that no person shall be entitled to a Certificate or Discharge "who, *after the passing of this Act* shall apply trust funds to his own use." As the matter of voluntary bankruptcy is novel in legislation, it might be rash to affirm, positively, what will be the decision of the courts. But it would seem the better opinion, on comparing these two passages, that the penalty of forfeiting all right to take advantage of the law, is incurred only by breaches of trust committed *after* the passage of the act, viz: 19th August, 1841. If so, the effect of the first section is only to declare that a debt, originating in a prior breach of trust, shall not in itself authorize a voluntary application, and shall not, perhaps, be affected by the discharge. Some such distinction is found in many of the State Insolvent Laws.

It will be seen that *residence* is necessary to authorize a voluntary application.

INVOLUNTARY BANKRUPTCY.

To render a person liable to be pursued as a bankrupt, it is necessary,

FIRST. That he should be "a merchant, or one using the trade of merchandise, or a retailer of merchandise, or a banker, factor, broker, underwriter, or marine insurer."

It has been decided in England, that the word *broker* includes not only those concerned in the purchase and sale of merchandise, but, also, stockbrokers, Cullen 68, shipbrokers, Pott, vs. Turner, 6 Bingham 702, (19 Eng. C.

L. 211,) and pawnbrokers, Rawbison vs. Pearson, 5 B. & A. 124, (7 Eng. C. L. 46.)

The words of the Bankrupt Act of 4th April, 1800, are, "Any merchant or other person *residing within the U. S.* actually using the trade of merchandise by buying and selling in gross, or by retail, or *dealing in exchange*, or as a broker, factor, under-writer, or marine insurer."

This condition of *residence* within the U. S. is omitted in the act of 1841. Judge Cooper, in his work, entitled "The Bankrupt Law of America, compared with the Bankrupt Law of England," published in 1801, speaking of the act of 1800, says, "*Residence* seems purposely introduced into our law of Congress, as a necessary ingredient in the description, although it has been determined otherwise in England; but with the reluctant acquiescence of Lord Mansfield, in Alexander vs. Vaughan, Cowper 398. See Bird vs. Sedgwick, 1 Salk. 110, Inglis vs. Green, 5 T. R. 530.

The act of 1841 provides, in the 7th section, that a petition in every case of bankruptcy, voluntary or involuntary, shall be addressed to the District Court of the U. S. "in which the person supposed to be a bankrupt shall reside, *or have his place of business*, at the time when such petition is filed." One of the cases for involuntary bankruptcy, recited in the first section, is where the debtor "shall depart from the state, district or territory of which he is an *inhabitant*, with intent" &c.

Judge Cooper, in remarking on the act of 1800, says, with apparent justice, that its variation of phraseology from the English statutes seems rather with a view to avoid needless tautology, than to establish a distinction on principle. With respect to the enumeration in the respective acts of 1800 1841, it is difficult to recognise any essential diversity aimed at, although we would suppose that the framer of the last act would not have departed, without very sufficient reason, from the language of the precedent before him. The words "dealing in exchange," used in the act of 1800, are dropped in the act of 1841. If they were in a part of the act conferring a benefit on the debtor, we might conjecture a reason for the omission in a supposed deference to the humour of the day. But they occur in the compulsory clause into which, as will be recollected, an attempt was made to force even banking *corporations*. It could hardly have been deliberately intended to leave dealers in exchange at liberty to profit by the act, as voluntary applicants, and yet deny to their creditors compulsory process against them. We are inclined to think that there has been no nice discrimination in the matter; and that it would only mislead to ponder anxiously over particular words.

In the case of farmers, planters, &c. who have been tempted to wander from their distinctive simple pursuits, in the hope of speedier gain, there is a disposition in England, to lay hold of such collateral dealings, in order to bring the debtor within the scope of the bankrupt laws. Judge Cooper thinks that here the leaning should be the other way. "I should venture to suggest that it is of importance to what extent a man trades; and that a principal object of inquiry, proper for a jury to determine, is, what proportion does his trading bear to his principal means of getting his living? Otherwise two or three instances of buying and selling a few horses or cows would subject (contrary to the meaning of the legislature,) every farmer and planter of the

country, to a law pretended to be solely for the regulation of mercantile dealings."

The question is not of such urgent practical importance with us as in England, because in most of these cases of rash entanglement, it is the debtor himself who looks to the law as a measure of relief; and the voluntary application is always open to him under our act. Yet where injurious preferences have been given, it may often be important to a creditor to invoke the aid of the act. Being intended to consolidate the provisions of the English statutes, English decisions on the subject are applicable. 6 Johns. Ch. 266, Roosevelt vs. Mark. 5 Mass. 249, Summers vs. Fairfield. 3 Mass. 511, Livermore vs. Bagley. The following English cases will aid in showing when there can be successfully fixed upon the debtor a trading character, however seemingly incongruous to his original or main avocation.

There must be a buying and selling for the purpose of profit; but the *quantum* of dealing is immaterial; if there be sufficient evidence to support the inference of an intention to deal generally, a very small degree of actual trading will be sufficient. It will in all cases be a question for the jury to infer from the evidence, whether there was any intention to deal generally or not: Gale vs. Halfknight, 3 Stark. 56, (14 Eng. Com. Law 162.) Milliken vs. Brandon, 1 C. & P. 380, (11 Eng. C. L. 426.) Doe vs. Lawrence, 2 C. & P. 135, (12 Eng. C. L. 58.) Patman vs. Vaughan, 1 T. R. 572. Thus if a man buy horses to sell again, with a view to profit, he is liable to be a bankrupt, ex parte Gibbs, 2 Rose 38, Wright vs. Bird, 1 Price 22. But if he sell only such as he reared himself he is not. id. So if a butcher buy sheep and cattle, and kill and sell them with a view to profit, he is liable to be made a bankrupt, Dalby vs. Smith, 4 Burr. 2148; but if he kill and sell only such as he reared himself, he is not. id. If a fisherman be in the habit of purchasing fish from others, to sell again, with a view to profit, it is sufficient trading, Heanny vs. Birch, 3 Campb. 233: but is not if he merely sell the fish he has caught. id. Where a person buys coals for the purpose of again selling them, it is trading, Cooke 48, 73: but not if he sells only such as he procures from his own mines, Port vs. Turton, 2 Wils. 169. Where a person owns or rents a mine, works it, and sells the ore, or other productions of it, he is not on that account a trader, subject to the bankrupt laws, because although he sells, yet he does not buy, Port vs. Turton, 2 Wils. 169. So drawing and redrawing bills of exchange, and promissory notes, if there be a continuation with a view to gain profit on the exchange, is a trading, Richardson vs. Bradshaw, 1 Atk. 128: but a person drawing bills on his own account, and paying for their being discounted, with interest, and borrowing accomodation bills in exchange for his own to the same amount, will not make a man a trader, Hankey vs. Jones, Cowp. 745. *Brickmaking.*—With regard to brickmaking, the principle appears to be, that where the business of brickmaking is carried on as a mode of enjoying the profits of a real estate, it will not make the party liable to the bankrupt laws; but where it is carried on substantially, and independently as trade, it will do so; and there is no difference whether the party is a termor, or entitled to the freehold. Thus if a man makes bricks from his own land as a mode of enjoying the profit, even though he makes them for sale, and purchases sand and fuel, or