Cornell Law Review

Volume 11
Issue 3 *April 1926*

Article 2

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Recommended Citation

Albert Levitt, *Federal Bankruptcy Act: Section Twenty-Nine* , 11 Cornell L. Rev. 300 (1926)
Available at: http://scholarship.law.cornell.edu/clr/vol11/iss3/2

Federal Bankruptcy Act: Section Twenty-nine

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The federal bankruptcy act[1] has been in existence a little over a quarter of a century. During that time surprisingly few cases have been brought under section twenty-nine of the statute which deals with offenses against the bankruptcy act.[2] Not all of the provisions of this section have been brought into litigation and courts have not yet construed many of these provisions. Nor can any help be found from the cases decided under the prior bankruptcy act[3] as the present section differs so very much from the parallel section in the earlier act.[4] The writer, therefore, will be compelled to rely, in many instances, upon the bare words of the text, and upon general principles applicable to those words, in analysing and construing the existing provisions.

The subdivisions of the section will be considered in the order in which they appear in Section Twenty-Nine.

I

> *Subdivision "a."* "A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee."

(i) The exact wording of the statute would seem to make it obvious that the subdivision applies only to the trustee in bankruptcy. But when reference is made to section one of the Bankruptcy Act a fair question is raised as to whether it applies also to those who participate with the trustee in the forbidden conduct or not. Section one deals with definitions of terms used in the statute. Subdivision nineteen of section one states that "persons" shall include, ". . . when used with reference to the commission of acts which are herein forbidden" those "who are participants in the forbidden acts."

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[1]Act of July 1, 1898, Ch. 541; 30 Stats. at Large 544. For an historical introduction to the Bankruptcy Act see Williston, Cases in Bankruptcy, pp. 1–4.

[2]A list of cases dealing with offenses against the Bankruptcy Act is given as an appendix to this article. The list is of the date of December 15, 1925.

[3]Collier on Bankruptcy, p. 560. (Tenth Edition.)

[4]See act of 1867 par. 45 *et seq.* R. S. par. 5132.

Suppose that the trustee in bankruptcy spends money belonging to the estate in bankruptcy through an agent who knows that the money belongs to the estate in bankruptcy and yet willingly assists the trustee to spend the money. It is submitted that such an agent or any one who aids the trustee in doing any of the acts which the trustee is forbidden to do would be amenable to punishment in the same way that any one who aids a bankrupt to conceal his assets is deemed to be a participant in the acts of the bankrupt.[5]

As a *de facto* trustee in bankruptcy has all the rights and duties of a *de jure* trustee[6] this section of the statute applies to him also.

(ii) Six offenses are created by subdivision "a." These are:

(1) Knowingly and fraudulently appropriating to one's own use property belonging to the estate of the bankrupt.

(2) Knowingly and fraudulently embezzling[7] property belonging to the estate of the bankrupt.

(3) Knowingly and fraudulently spending property belonging to the estate of the bankrupt.

The foregoing three provisions are clear and self explanatory. Their evident purpose is to prevent the trustee from using any of the bankrupt's property for his own enrichment. He takes the property as a fiduciary. He holds it for the benefit of the creditors. He operates with it as an arm of the bankruptcy court. To utilize the property for his own benefit would be to deprive the creditors of what is their just due and to abuse the purpose of the Bankruptcy Act under color of office. This the law cannot permit. The trustee's compensation is fixed. He cannot receive more than what the statute allows.[7a]

No reported cases relating to the foregoing provisions have been found although diligent search has been made.

(4) Knowingly, fraudulently and unlawfully transferring any property belonging to the estate in bankruptcy.

This provision does not prevent the transfer of property by the trustee in the proper performance of his legal duties or in the exercise of his legal rights or privileges.[8] It is specifically directed towards

[5]U. S. v. Young and Holland Co., 170 Fed. 110 (1909). Certiorari denied 225 U. S. 710 (1912).

[6]Sharfsin v. U. S., 265 Fed. 916 (1920). But compare Gilbertson v. U. S., 168 Fed. 672 (1909).

[7]It is not the purpose of the writer to discuss the nature of offenses which are entirely clear to those dealing with criminal law, except when peculiar elements are presented by the Bankruptcy Act.

[7a]See Bankruptcy Act, sec. 72.

[8]See Bankruptcy Act sections 47, 70.

"*unlawful*" transfers. An unlawful transfer is a transfer which is not within the powers conferred upon the trustee by the Bankruptcy Act.[9]

The word "transfer" has been defined in the Bankruptcy Act as follows:

> "'Transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."[10]

This definition is obviously intended to include every conceivable method of passing title to, or possession of, property. It applies to absolute and conditional transactions. The word "sale" simply indicates one method of passing title and possession. The phrase "as a payment, pledge, mortgage, gift or security" indicates other types of transactions, and has been held to be illustrative of the methods in the minds of Congress and not as excluding other types of transactions.[11] The phrase "and every other and different mode" is, with the exception of sales, all-inclusive. It applies to every type of transaction which passes title or possession. The intent of Congress is too plain to admit of any mistake.

(5) Knowingly and fraudulently secreting any document belonging to the estate in bankruptcy.

To secrete a document means to hide it away from any person who is lawfully entitled to see or to possess it.[12] The Bankruptcy Act states that " 'document' shall include any book, deed or instrument in writing."[13]

(6) Knowingly and fraudulently destroying any document belonging to the estate in bankruptcy.

The foregoing two provisions (5) and (6), are clear and, in the main, self-explanatory. Their obvious purpose is to prevent the secretion or destruction of any documents which may be of value in settling the estate in bankruptcy and in safeguarding the rights of the creditors, the rights of the bankrupt and the proper functioning of the Court. But an interesting question arises as to the meaning of the word "document." Is the definition in the Bankruptcy Act illustrative of the meaning or is it exclusive? Are books, deeds and instruments in writing the *only* documents not to be concealed or destroyed? Does the phrase "instrument in writing" include letters

[9]*Ibid.*
[10]Bankruptcy Act Sec. 1 (25).
[11]For a discussion of this term see Collier on Bankruptcy p. 13. (Tenth Edition.)
[12]Webster; International Dictionary, "Secrete."
[13]Bank. Act Sec. 1 (13).

and memoranda of various kinds? Ordinarily documents include letters, memoranda and various writings.[14] Usually instruments in writing are not inclusive of letters and memoranda.[15] If the definition of the Bankruptcy Act is illustrative then letters and memoranda are documents. But if the definition is exclusive then letters and memoranda are probably not documents. The distinction would be of importance in a case like the following:

Suppose that a bankrupt has concealed property and that the only clue to the existence of the concealed property consists of some rough memoranda and business, or private, letters which the bankrupt has inadvertently failed to remove or destroy. The trustee in examining the papers of the bankrupt finds these writings. He decides to appropriate the concealed property to his own use. To aid him in this he secretes or destroys the memoranda and the letters. Can he be indicted for secreting or destroying a "document?"

If the definition in the Bankruptcy Act is illustrative, or if the phrase "instrument in writing" is interpreted by the court to include memoranda and letters, the indictment will lie. But if the definition is exclusive and the court refuses to interpret the phrase "instrument in writing" to include letters and memoranda the indictment will be bad.

No reported case has been found which decides this question. It is submitted, however, that when the case arises the courts will follow the method used in interpreting the word "transfer" already discussed above,[16] and hold that the indictment will lie and thus fulfill the purpose of the statute, which is to hold the trustee to absolute honesty in carrying out his duties as trustee.

This leads to the final aspect of the subdivision. The prohibition extends only to property and documents which come to the trustce in his official capacity "as trustee." This means, of course, during the entire time that he is acting as trustee. Any property or documents which he receives during his incumbency must be accounted for and properly used.

Punishment for violation of this subdivision is imprisonment for a term not to exceed five years.

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Subdivision"b." "A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of

[14]19 C. J. 382; Cf. *In re* Hess, 134 Fed. 109, 111, (1905).
[15]32 C. J. 946. But see Loch v. Mayer, 100 N. Y. Supp. 837 (1906).
[16]See *supra*, n. 111.

the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings."

A. (i) Subsection (1) applies to a person who is a bankrupt [17] and to a person who has been a bankrupt and has received his discharge.[18] It does not apply to a person who is not or has not been a bankrupt.[19] This is of particular importance because the offense of concealing assets cannot occur except "while" the accused is a bankrupt, or "after his discharge" in bankruptcy. It cannot be committed by a person *before* he has been a bankrupt. Yet some of the decided cases show, as we shall indicate, that the courts have either departed from the express provisions of the statute or have defined the term "conceal" so as to conserve what they consider to be the spirit of the statute.

(ii) Subsection (1) is directed against the concealment of assets belonging to the estate in bankruptcy. The Bankruptcy Act states that " 'conceal' shall include secrete, falsify and mutilate."[20] It is submitted that this definition is illustrative and not exclusive. The word "secrete" is a synonym for "conceal." It is a commonplace of logic that definitions in terms of synonyms are not adequate definitions. To say that "conceal" means "secrete" is to say that "conceal" means "conceal" and we are back to where we started. Congress cannot be held to have intended an absurdity, so we may assume that the word "secrete" was used in its primary sense of meaning "to hide away." But hiding away, or withdrawing from view, is but one method of concealing.

Suppose this case: Part of the assets of the bankrupt is a certified

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[17]U. S. v. Lake, 129 Fed. 499 (1904); Field v. U. S. 137 Fed. 6 (1905); U. S. v. Rhodes, 212 Fed. 513 (1913); U. S. v. Rosenstein, 211 Fed. 738 (1914); U. S. v. Greenbaum 252 Fed.259 (1918); Tugendhaft v.U.S. 263 Fed. 562 (1920); Barron v. U. S., 5 Fed. (2d) 799 (1925).

[18]Greenbaum v. U. S., 280 Fed. 474 (1922). This is a case of composition with creditors, but the court holds that a composition with creditors has the same result as a discharge in bankruptcy under the Bankruptcy Act.

[19]Gilbertson v. U. S., 168 Fed. 672, (1909); Tugendhaft v. U. S. 263 Fed. 562 (1920), (semble). Cf. Connetto v. U. S. 251 Fed. 42 (1918). Aiders and abettors need not be bankrupt. U. S. v. Young and Holland Co., 170 Fed. 110 (1909).

[20]Bank. Act. sec. 1, (22).

check for five thousand dollars. The bankrupt takes the check and wraps it around the suspension cord of the electric light that hangs directly over his desk, and in plain sight of everyone. His intent is to keep that check from the trustee in bankruptcy. He is relying upon the well-known psychological fact that few people ever see what is actually within their view. The trustee takes over the desk of the bankrupt as his working desk. Several months go by. The trustee fails to see the check. The bankrupt is discharged. The statute of limitations runs its period. The bankrupt takes down the check and uses it for his own purposes. It can hardly be doubted that the act of the bankrupt in wrapping the check around the electric light cord was within the intendment of the statute. Yet by no stretch of the word "secrete" can he be said to have secreted the check. And he certainly did not falsify or mutilate it. But one meaning of the word "conceal" is "to withhold knowledge of." That is certainly what the bankrupt did. He withheld knowledge of the check's existence from the trustee. Hence he did "conceal" the check while he was a bankrupt. The courts apparently treat the definition in the Bankruptcy Act as illustrative and not exclusive of other methods of concealment. In *Glass v. United States*,[21] the court said that the same construction must be given to the word "conceal" in the subsection we are considering as is given to the word in Section 14 (b) of the Bankruptcy act which deals with reasons for withholding a discharge in bankruptcy.[22] Each section is deemed to deal with the same thing though in different ways and with different objects in view.[22a]

In *U. S. v. Greenbaum*[23] the court said:

> "The gist of the offense charged against defendant is the knowing and fraudulent withholding of property by him, while a bankrupt from his trustee.... Whether such a concealment was accomplished by secreting, falsifying, mutilating or through other means is entirely immaterial. The object of this statute is the protection of creditors from unscrupulous debtors, willing to evade the payment of just debts by wrongfully failing to turn over to the bankruptcy court property which in justice and law no longer belongs to them. Congress has wisely declared such conduct to be a criminal offense, and

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[21]231 Fed. 65 (1916).

[22]See In re Dauchy, 122 Fed. 688, 693 (1903); Cf. U. S. v. One Stradivarius Violin, 188 Fed. 542, 543 (1911). See also U. S. v. One Stradivarius Kieserwetter Violin, 197 Fed. 157, 159 (1912).

[22a]The diffcrence between the two sections is a difference in the proof which is required. In the civil action the preponderance of proof is enough to establish concealment, but in the criminal prosecution the concealment must be established beyond a reasonable doubt.

[23]252 Fed. 259 (1918), at p. 264.

the courts ought so far as possible to give effect to the obvious meaning of the statute."

In *Connetto v. United States*,[24] the court, in dealing with the sufficiency of an indictment for concealing assets, said:

"The concealment is alleged to have consisted in the failure of the accused to deliver the property to the trustee, or to account for the same, or to disclose their possession thereof and thereby concealment from the trustee was charged and the completion of the offense was sufficiently set forth."

In *United States v. Rhodes*[25] the court in dealing with a conspiracy to conceal assets said: " 'Conceal' is the withholding of assets with fraudulent intent."

It would seem, therefore, that concealment consists of secreting, falsifying, mutilating, and withholding of property, or of information concerning the whereabouts of property, in any manner whatever. This idea is strengthened by the fact that the bankrupt is under a duty to turn over all his property to the trustee.[26] The title to the property vests in the trustee as of the date of the adjudication.[27] The bankrupt is deemed to be a bankrupt as of the date of the filing of the petition.[28] It would follow, therefore, that the duty to reveal[28a] all his property is imposed upon the bankrupt as of the date of the petition, when the petition is a voluntary one, or the time when the schedule is filed when the petition is an involuntary one. This is probably what the court had in mind, in *United States v. Goldstein*,[29] when it said:

"It is true that clause 1 applies to concealing property from the trustee, and that in the case at bar the alleged concealment was prior to the appointment of the trustee. But when a person files his voluntary petition in bankruptcy he knows that a trustee will be appointed and that such trustee takes as of the date of the adjudication. It follows that a concealment of property after the adjudication, even if before the appointment of the trustee, is a concealment from the trustee."

Some of the courts, however, have not kept the proper definition of the word "conceal" clearly in mind. They have muddled up the law by bringing in the phrase "continuous concealment" which has no sanction whatever from the terms of the Bankruptcy Act and is

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[24] 251 Fed. 42, 44, (1918).
[25] 212 Fed. 513 (1913).
[26] Bank. Act, Sec. 7 (8).
[27] Bank. Act, Sec. 70a. See Everett v. Judson, 228 U. S. 474 (1913).
[28] *Ibid.*
[28a] See dissenting opinion of Buffington, J., in Gretsch v. U. S. 231 Fed. 57, (1916).
[29] 132 Fed. 789 (1904) at p. 792.

not at all necessary to reach the conclusions which they have reached in the specific cases before them for decision.

In *Johnson v. United States*,[30] the court said:

> "The offense (of concealment) is not making a misrepresentation at a given time and place; it is the continuous concealment of the property from the trustee during the whole of the bankruptcy proceedings or beyond."

In *Glass v. United States*,[31] the language of the court was:

> "By concealment of property the act contemplates a continuous concealment in instances where property is physically converted and concealed before bankruptcy and remains secreted and concealed after bankruptcy."

In *United States v. Rhodes*,[32] the court said:

> "A criminal concealment of property by a bankrupt is a continuous concealment of property from the trustee."

In the *Johnson* case and the *Glass* case the court was dealing with the situation where the accused had concealed some of his property *before* the petition had been filed or he had been adjudged to be a bankrupt. In each case the facts indicated that the concealment was made in contemplation of bankruptcy and with the evident intent to defraud creditors. The courts were in a dilemma. It seemed as though the spirit of the Bankruptcy Act had been violated. But the Act specifically stated that the concealment had to be made "while a bankrupt" or after discharge in bankruptcy. It could not be made before bankruptcy. Yet in the instant cases the concealment had actually been made before bankruptcy. In the *Glass* case the court was under the further embarrassment of having just decided, on the day before, that "concealment is a positive thing committed at some time or other with respect to a physical thing."[33] In making this statement they had refused to accept the argument of Buffington, J., who contended that concealment meant failure to reveal the whereabouts of the property, in a vigorous and, it is submitted, a sound opinion. In both cases the majority of the court held to the idea that concealment meant hiding away, secreting. This was their fundamental error. To get away from the fact that the secreting had occurred before bankruptcy they turned to the notion of a "continuous concealment." And this in spite of the fact that in the case of *Warren v. United States*,[34] which was decided four

[30] 163 Fed. 30, 33 (1908).
[31] 231 Fed. 65, 67 (1916).
[32] 212 Fed. 513, 516 (1913).
[33] U. S. v. Gretsch, 231 Fed. 57 was decided on March 24, 1916. Glass v. U. S. 231 Fed. 65, was decided by the same court on March 25, 1916.
[34] 199 Fed. 753 (1912).

years earlier, the court had distinctly pointed out that mere passivity on the part of the bankrupt after he had concealed the property was not enough to create a "continuous concealment" and had said that:

> "The fact that concealed property remains concealed does not continue the offense of concealing it, for the continuance of the results of a crime does not continue the crime."[35]

In the *Johnson* case the court was dealing with a conspiracy to conceal assets. It is easy to see how natural it was for the court to make the obvious, though false, analogy to the idea of a continuing conspiracy.[36]

It is submitted that the idea of a "continuous concealment" is opposed to both the spirit and the express language of the statute, as the following considerations will show.

The Bankruptcy Act is not concerning itself with the entire business life-time of the bankrupt prior to his adjudication as a bankrupt. It is interested in his acts only if they occurred within four months prior to his adjudication. He cannot be petitioned into bankruptcy for anything he has done more than four months before the date of the petition.[37] There are two conditions precedent which must exist before the petitioning creditor can have the debtor declared a bankrupt. The first is that there must be an act of bankruptcy and the second is that it must have occurred within four months prior to the filing of the petition. One of the acts of the debtor which will be considered to be an act of bankruptcy is the concealing, or destroying, of assets with the intent to "hinder, delay, or defraud his creditors."[38] But this concealment is simply one of the acts which allow the creditor the privilege of petitioning the debtor into bankruptcy. It is not the concealment with which the penal section of the statute is concerned. The earliest time when that concealment can occur is when the debtor has become a bankrupt within the meaning of the statute. Before that time his concealments are not criminal, they are not offenses against the Bankruptcy Act. Under no definition of the term "conceal" can the acts of the non-bankrupt debtor be brought under the statute. If he hides the property before he is a bankrupt the hiding is over when done. Thereafter it exists only as any completed action exists in the universe. But the mere exist-

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[35]*Ibid* at p. 756.
[36]For cases dealing with continuing conspiracy see U. S. v. Kissel, 218 U.S. 601 (1910); Crawford v. U. S., 212 U. S. 183 (1908); Hyde v. U. S. 225 U. S. 347 (1911). For a case dealing with conspiracy to conceal assets of a corporation in bankruptcy see Roukous v. U. S. 195 Fed. 353 (1912).
[37]Bankruptcy Act Sec. 3 b. See 17 C. J. p. 173.
[38]Bank. Act, 3 a (1).

ence of a hiding made previous to bankruptcy, is not penalized by the Bankruptcy Act. The hiding must occur "while a bankrupt" or thereafter. At the most the only "continuous concealment" with which the Bankruptcy Act is concerned is a concealment which *began with* bankruptcy. And the only meaning which "continuous concealment" can have is that an act has been done, which is forbidden by the statute, and the consequence of which are that the trustee is not getting that to which he is legally entitled as trustee. It may very well be that "conceal" as used in the statute is intended to include not only the act of concealing but also the natural and probable consequences of that concealing. It may also be the intendment of the statute to hold the bankrupt criminally responsible for those natural and probable consequences. But they must be the natural and probable consequences of the act of a *bankrupt*. They cannot be the results of the act of a non-bankrupt. The language of the statute is explicit in this regard. There can be no "continuous concealment" under the statute if "conceal" means "secrete."

Suppose, however, that "conceal" means to withhold information concerning the property. Can there be a "continuous concealment" in that situation? If the concealment occurred before bankruptcy then it is outside the purview of the statute. A non-bankrupt may withhold any information he pleases. The Bankruptcy Act does not deal with him. It imposes no duty upon him to reveal his property or information concerning it. But if the concealment occurred while the accused was a bankrupt and he fails to reveal the whereabouts of his property during the time that the estate in bankruptcy is being administered then the phrase "continuous concealment" may be a fairly accurate description of the legal situation, provided, that the courts are dealing with an *omission* and not with an *act*. This distinction is important. For an act changes a pre-existing situation while an omission allows the pre-existing situation to go on. If a bankrupt conceals property and then *does* nothing he is continuously failing to reveal that which he ought to reveal. But what is meant by "continuously" is a series of omissions. At every moment of time during the administration in bankruptcy, of the bankrupt's estate, the bankrupt is under a duty to reveal all his property. He is under a duty to act, to change the pre-existing state of ignorance on the part of the trustee of the whereabouts of the bankrupt's property. His failure to act at any given moment is a violation of the statute. There is a single duty covering the entire time of administration; but this duty may be breached a number of successive times. A series of consecutive breaches looked at, as a matter of convenience, as a whole may be termed, somewhat inaccurately, a "continuous concealment."

But in this case the phrase is an unnecessary one. It needlessly complicates a simple situation. So far as the members of the series of omissions existed before bankruptcy they are outside of the statute. No judicial interpretation of a term can properly bring them within the statute. So far as the series of omissions exist during bankruptcy any one of the series is a breach of the duty to reveal and there is no need to talk of a "continuous concealment." Not even the statute of limitations, as we shall indicate later, stands in the way of the fullest utilization of the spirit and express language of the statute to fulfill the purpose of the statute.

The true situation is that some of the courts have tried to read into the statute provisions for a situation which Congress has not dealt with. There is no provision for the criminal prosecution of a person who gets rid of his property, with intent to defraud his creditors, before, but with definite anticipation of, being declared a bankrupt. Some provision to meet this situation should be made. But it is not the function of the courts to make it. The idea of a "continuous concealment" has been used by some of the courts to do that which Congress has not done but which Congress, probably, should do.

Other courts have kept closer to the spirit and intent of the statute and refused to allow convictions unless the concealment occurred while the accused was a bankrupt.[39]

(iii) The bankrupt is forbidden to conceal "any of the property belonging to his estate in bankruptcy." This raises the question: "Which property belongs to the estate in bankruptcy?" The answer is: All the property which the bankrupt has belongs to his estate in bankruptcy. It is true that he is entitled to claim such exemptions as the state law allows him.[40] But this claim must be made at the time he presents his schedules.[41] He must reveal all the property he has. It is for the bankruptcy court to allow him his exemptions as provided for by law. The fact that the trustee does not take title to the exempted property as of the date when the debtor was adjudged to be a bankrupt[41a] does not release the debtor from revealing in his schedule the property which he claims as exempt. Indeed, it is

[39]See U. S. v. Goldstein, 132 Fed. 789 (1904); Kern v. U. S. 169 Fed. 617 (1909); Warren v. U. S., 199 Fed. 753 (1912); Schonfeld v. U. S. 277 Fed. 934 (1921).

[40]Bank. Act, Section 6.

[41]*Ibid* Section 7 (8).

[41a]*Ibid* Section 70a.

difficult to see how the debtor can claim any exemptions unless he indicates that he has the property which he wishes to be included as exempt property.

A case is conceivable, however, where the question might properly arise. Suppose this case: The state statute allows the debtor an exemption of fifty dollars in cash. The debtor happens to have that sum of money in cash in his home. He fails to include the fifty dollars in his schedule of assets. But he does not put in any claim for exemptions, thinking that as he has the fifty dollars to which he would be legally entitled the matter is at an end. Has he violated the statute? Probably not. It was not a fraudulent concealment. The omission can be remedied by amending the schedule.[42]

(iv) The debtor is prohibited from concealing any of his assets "from his trustee." Does this mean that there can be no criminal concealment until a trustee has been appointed? Probably not. In the *United States v. Goldstein*[43] the court definitely said that the concealment of assets after the debtor had been adjudicated a bankrupt but before the trustee had been appointed was a criminal concealment. This is a reasonable interpretation of the statute. For, the trustee takes title to the property as of the date of the petition in bankruptcy. He is entitled to know of what the estate consisted at that time. It is the duty of the debtor to tell him. This notion is supported by the fact that the debtor if he becomes a voluntary bankrupt must file his schedule of assets with his petition, and if he is petitioned into involuntary bankruptcy he must file the schedule within ten days after the petition is filed, unless the court allows him a longer time.[44] The obvious intention of the Bankruptcy Act is to give the trustee the fullest information concerning the assets of the debtor.

It is to be noted, however, that there can be concealment only of the property to which the trustee is entitled as trustee.[44a] The trustee is not entitled to property held by the bankrupt as trust property for some one else;[45] nor to powers which the bankrupt may exercise on behalf of some one else.[46] But the fact that the debtor does not know that a trustee has been appointed, nor what his name is, does not release the debtor from revealing his assets to him nor negative

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[42]Gretsch v. U. S., 231 Fed. 57 (1916).
[43]U. S. v. Goldstein, 132 Fed. 789 (1904).
[44]Bank. Act, Section 7.
[44a]Cf. Malvin v. U. S. 252 Fed. 449 (1918).
[45]Miller v. U. S., 277 Fed. 721. (1921).
[46]Bank. Act, section 70 a (3).

criminal concealment.[47] It has been held that an honest belief on the part of the debtor that there is no concealment does not prevent the crime of concealment from being consummated.[48] But it is submitted that a criminal intent cannot exist when the debtor does not believe that he is concealing. In that case an honest concealment by the debtor could not be a fraudulent concealment and so the offense denounced by the statute would not be committed.

The use to which the bankrupt puts the concealed property is immaterial. Applying the concealed goods to the paying of a preferred creditor[49] or to the payment of other legitimate debts[50] does not prevent the crime from being consummated. Qualms of conscience which compel confession and disclosure of concealed assets come too late if they come after the concealment has been made.[50a] If new and correct schedules are put in they do not relate back to the time of the original schedules.[50b]

Concealment by the bankrupt can occur even if there is no demand for the property by the trustee,[51] as the statute does not make such demand an element of the offense.[52] If the trustee hears rumors, that some property of the bankrupt has been concealed, some time before he is appointed trustee and he makes no effort to find the goods for some time after his appointment as trustee, the bankrupt is not excused and the criminal concealment is not negatived.[53]

As in all criminal prosecutions, the burden of proving that there has been a criminal concealment of assets in bankruptcy rests upon the State. Proof is made out by showing that the bankrupt has failed to include the assets in his schedule.[54] Proof of concealment of any part of property or cash is all that is requisite for conviction.[55] But proof of concealment cannot rest upon a presumption.[56] That the bankrupt had money in his possession just prior to bankruptcy does not establish the fact that he possessed it at the time of bankruptcy.[57]

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[47]U. S. v. Comstock, 161 Fed. 644 (1908).

[48]Miller v. U. S. 277 Fed. 721 (1921) conspiracy to conceal assets in bankruptcy.

[49]Kalin v. U. S., 2 Fed. (2d) 58 (1924).

[50]U. S. v. Lowenstein, 126 Fed. 884 (1904); Corenman v. U. S., 188 Fed. 424 (1911); Miller v. U. S., 277 Fed. 721 (1921).

[50a]Reinstein v. U. S. 282 Fed. 214 (1922).

[50b]Kern v. U. S. 169 Fed. 617 (1909).

[51]Warren v. U. S., 199 Fed. 753, (1912); Meyer v. U. S. 220 Fed. 822 (1915); Kalin v. U. S., 2 Fed. (2d) 58 (1924).

[52]See *supra*, n. 51. Cf. *In re* Smith 112 Fed. 509 (1902).

[53]Barron v. U. S., 5 Fed. (2d) 799 (1925).

[54]U. S. v. Stern, 186 Fed. 854 (1911). Cf. Paszkiewicz v. U. S. 3 Fed. (2d) 272 (1924).

[55]*Ibid.*

[56]*In re* Stern, 215 Fed. 979 (1914).

[57]*Ibid.* But it is not error to introduce evidence of value of bankrupts stock before and after filing of petition to prove concealment; Jacobs v. U. S., 161 Fed. 694 (1908).

Nor is concealment made out by showing that the bankrupt removed property just prior to bankruptcy.[58]

The usual rules of law governing the validity of an indictment[58a] apply to indictments for concealing assets in bankruptcy. An indictment following the language of the statute is good.[59] The word "conceal" charges every element of the offense as it is defined, as in the statute, to mean "secrete, falsify and mutilate."[60] When coupled, in an indictment, with the words "unlawfully, knowingly and fradulently" the word "conceal" clearly excludes unintentional acts.[61] The method of concealment need not be set out.[62] Nor need the indictment set out which of the three things, "secrete, falsify and mutilate," was done.[63] An allegation of the ownership of the goods concealed is unnecessary.[64] And there need not be an averment that the accused knew that the assets he concealed belonged to his estate in bankruptcy.[65] But the indictment *must* allege that a trustee had been appointed, that property had been concealed, that the property were assets of the accused in bankruptcy, and that the property had been concealed from the trustee in bankruptcy.[66]

(v) Section 1 (19) of the Bankruptcy Act states that:

> "'Persons' shall include corporations, except where otherwise specified, and officers, partnerships and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers and members of the board of directors or trustees, or other similar controlling bodies of corporations."

It is obvious that the intent of Congress was to make provision for

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58Bean v. U. S., 192 Fed. 859 (1912). For a case dealing with law of "purging by oath" in relation to the law of concealment of assets in contempt cases see, In re Lasky, 163 Fed. 99 (1908).

58aSee Beale, Criminal Pleading and Practice, Part Two.

59U. S. v. Greenbaum, 252 Fed. 259 (1918); Meyer v. U. S. 220 Fed. 822 (1915).

60U. S. v. Greenbaum, 252 Fed. 259 (1918).

61U. S. v. Rhodes, 212 Fed. 513 (1913).

62U. S. v. Comstock, 161 Fed. 644, (1908); U. S. v. Greenbaum, 252 Fed. 259 (1918); U. S. v. Rhodes, 212 Fed. 513 (1913).

63U. S. v. Comstock, 161 Fed. 644 (1908).

64*Ibid.*

65"The charge that the accused did unlawfully, knowingly, wilfully and fraudulently conceal from his trustees etc., certain property belonging to the estate in bankruptcy, and which said property was in his hands and possession etc., carries with it a sufficient averment that the accused knew that the property he was charged with concealing belonged to his estate in bankruptcy." McNiel v. U. S. 150 Fed. 82, 85 (1909).

66U. S. v. Grant, 1 Fed. (2d) 723 (1924). For related points see U. S. v. Rosenstein, 211 Fed. 738, (1914); Tugendhaft v. U. S. 263 Fed. 562, (1920); Connetto U. S. 251 Fed. 42, (1918); Ulmer v. U. S., 219 Fed. 641 (1915); U. S. v. Freed, 179 Fed. 236, (1910); U. S. v. Coyle, 229 Fed. 256, (1916); Bartlett v. U. S. 106 Fed. 884 (1901).

getting at those who were actually carrying out the activities of organizations which were legal entities apart from the human beings connected with the legal entities. A partnership can act only through the partners or the agents of the partnership appointed by the partners. A corporation can act only through its officers, boards, agents and those appointed by them. To say that a corporation or a partnership can commit a crime means simply that the law looks through the corporate or partnership entity to those who are its agents, officers, etc., and holds the corporation responsible, so far as it can be punished, for the acts of its representatives. If, therefore, any person acting on behalf of the corporation or partnership commits a crime the corporation or partnership is said to commit the crime. Put shortly the rule is: A corporation can commit a crime.[67] Under Section 29 (b) (1) of the Bankruptcy Act some special difficulty was thought to be presented because it is provided that only a bankrupt can commit the offense of concealing assets in bankruptcy.

In *Field v. U. S.*,[68] the question was squarely raised as to whether an officer of a corporation could be indicted for concealing assets of the corporation. The facts were that the corporation became bankrupt. F. was vice-president of the corporation. He himself was not bankrupt. But he concealed assets of the bankrupt corporation from the trustee in bankruptcy. He was indicted and convicted. On appeal the question was whether the conviction was proper under the provisions of the Bankruptcy Act. The Circuit Court of Appeals held that the conviction was improper. Sanborn, C. J., said:

> "The act specifically designates the persons liable to the punishment which it prescribes. They are those who commit the offense denounced while they are bankrupt, or after they have received their discharge in bankruptcy. Under a familiar ruling this specification by the statute of those who are bankrupts, and those who have been bankrupts, as the persons liable to the punishment, necessarily excludes all others from that liability, and no other person can be lawfully punished under this section for the offense it denounces. As the plaintiff in error was not and never had been a bankrupt, it is difficult to perceive how he could have been guilty of the offense of having concealed while a bankrupt, or after his discharge, from his trustee, any of his estate in bankruptcy."[69]

The learned Chief Justice refuses to accept the argument that section 1 (19) broadened the scope of section 29 (b). "Present or past bankruptcy," he said, "is an essential attribute of every person who

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[67] 1 Bishop on Criminal Law sec. 417–24. (Ninth Edition.)
[68] 137 Fed. 6 (1905).
[69] *Ibid* at p. 6.

may be an offender under this statute."[70] He insisted upon it that a penal statute must be strictly construed and that therefore an officer of a corporation could not be guilty of concealing the assets of his bankrupt corporation.

It is submitted that the learned Chief Justice was in error. He was looking at the officer of the corporation as an individual. But the Bankruptcy Act makes him into an instrumentality used by the corporation. He cannot be guilty of concealing *his own* assets in bankruptcy unless he is, or has been, a bankrupt. But he can conceal the assets of a corporation in bankruptcy because the *statute says so*. Not *his* bankruptcy but the bankruptcy of the *corporation* is the essential attribute of the offense of concealing the assets of a bankrupt corporation. Otherwise the learned Chief Justice is compelled to take the position that a corporation cannot ever commit the offense of concealing its assets while a bankrupt. For, the bankruptcy of an officer of a corporation is not the bankruptcy of the corporation. He as an individual is a distinct and separate legal entity from the corporation. For the same reason, the bankruptcy of the corporation is certainly not the bankruptcy of the officer. A corporation cannot conceal its assets without the acts of its officers, etc. The corporation cannot even become bankrupt without the actions of its officers, etc. After the acts of the officers, etc., have made the corporation bankrupt there can be no concealment of its assets in bankruptcy unless an officer etc., does the concealing. But the statute says quite clearly that a corporation *can* conceal its assets in bankruptcy. This can only be because the acts of the officer, etc., plus the bankruptcy of the corporation are taken to mean the concealment of the assets of the corporation "while a bankrupt."

But it may be argued, that the fact that a corporation conceals its assets in bankruptcy by means of its officers, etc., does not indicate that the officer violates the statute and should be punished therefore. It is the corporation which violates the statute and should be punished for its own wrongdoing. If the Congress meant to prohibit an officer of a corporation from concealing the assets of the corporation, while bankrupt, it should have so stated in the statute.

The answer to this is two-fold. In the first place, the statute expressly says that with reference "to the commission of acts which are herein forbidden" persons shall include "agents, officers, and members of the boards of directors, etc.". It seems hardly reasonable, indeed it would be highly ludicrous, to contend that Congress

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[70] *Ibid* at p. 7.

meant by this language that the officer *himself* had to be a bankrupt at the time the corporation was bankrupt before he could be a participant in the forbidden act, by the bankrupt corporation, of concealing its assets in bankruptcy.

In the second place, the penalty for the offense of concealing assets in bankruptcy is "imprisonment for a period not to exceed two years." A corporation cannot be imprisoned. Is there to be no punishment for a corporation that conceals assets in bankruptcy? Where is the sense of designating a corporation as a possible offender when there is no way of getting at it for the offenses it commits. It would be futile. But you can imprison an officer of a corporation. All the purposes of a penal statute, punitive, preventive and deterrent, could be fostered by punishing an officer of a corporation who takes corporate assets and hides them from the trustee in bankruptcy.

Section 2 (4) of the Bankruptcy Act gives the courts of bankruptcy jurisdiction over such offenders and empowers their punishment. Under a familiar rule of interpretation it is clear that where one interpretation of the Bankruptcy Act would lead to nullification and the other would lead to carrying out the spirit and the express provisions of the act it is the latter interpretation which should prevail.

This is what has been done in later decisions. The courts have refused to follow *Field v. United States*. Five years after the *Field* case was decided, it was held in *United States v. Freed*,[70] that the president of a bankrupt corporation could be convicted if he participated in the concealment of the assets of the bankrupt corporation even though he himself was not bankrupt.[71] In *Wolf v. U. S.*[72] the court flatly held that the president of a bankrupt corporation could be convicted for concealing the assets of the corporation, though the accused was not convicted because of lack of evidence that he had concealed the assets.

In several cases of conspiracy to conceal assets of a bankrupt corporation the courts have held that the one who conceals the assets of the bankrupt corporation need not himself be bankrupt. The courts seem to rely on Section 332 of the Penal Code of 1910 (U. S.).[73] This section reads as follows:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

[71]U. S. v. Freed, 179 Fed. 236 (1910). Hand, D. J., considered Field v. U. S. 137 Fed. 6, (1905) as not binding after the decision in Cohen v. U. S. 170 Fed. 715, (1909). But it is submitted there is nothing in the latter case to discredit the Field Case.

[72]238 Fed. 902 (1916).

[73]Comp. Stat. par. 10506.

In *United States v. Young and Holland Company*[74] the court had to decide whether one who was not a bankrupt but who had aided in concealing the assets of a bankrupt could be indicted under Section 29 (b) (1) of the Bankruptcy Act. The court decided that he could, saying:

> "It (the section) is applicable not only to a bankrupt but also to all persons who unite with the bankrupt as participants in the act which is made an offense by the statute.... The term 'participants in the forbidden acts' seems an appropriate expression designed to cover persons who join with a bankrupt in the commission of offenses created by chapter 4, section 29, and framed in view of the rule that those who are present aiding, commanding or abetting are deemed principals."

The court further held that a corporation may be guilty of concealing assets while a bankrupt.[75]

B. (i) Subsection (2) applies to any person who makes a false oath in or in relation to any proceedings in bankruptcy.[75a]

The Bankruptcy Act defines "oath" as including affirmations.[76] It further provides that,

> "Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath."[77]

The purpose of the statute is to penalize any false statements made under oath or under affirmation if they are part of or in relation to proceedings in bankruptcy. It is not confined to statements made by the bankrupt only. "Any person" means every person. Nor need the one making the statement be bankrupt. His solvency or insolvency is immaterial.

(ii) The statements may be made before any person who is legally qualified to make inquiries into the conditions of the bankrupt's estate in bankruptcy.[77a] Provided that the inquiries made are material to the proceedings in bankruptcy, inquiries may be made concerning any transactions no matter how long before the adjudication in bankruptcy they may have occurred.[78] It is not requisite

[74]170 Fed. 110 (1909).

[75]It is to be noted that a writ of *certiorari* was denied in this case in 225 U. S. 710 (1912). See Barron v. U. S. 5 Fed. (2d) 799 (1925); Kauffman v. U.S., 212 Fed. 613 (1914).

[75a]See also Bank. Act Section 20b which reads "Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath." See Bartlett v. U. S. 106 Fed. 884 (1901).

[76]Section 1 (17).

[77]See *supra* n. 75a. Edelstein v. U. S. 149 Fed. 636 (1906).

[77a]*Ibid.*

[78]U. S. v. Rosenstein, 211 Fed. 738 (1914); Edelstein v. U. S., 149 Fed. 636 (1906).

to conviction that the statement made be in writing and subscribed to.[79] The statements may be oral.[80]

(iii) The offense is committed when the bankrupt makes verification to a false schedule of assets,[81] or fails to include some of his assets in the schedule which he swears to.[82] It is also the offense of making a false oath if the bankrupt makes the assertion that his account books had been destroyed by fire when he actually had them safe in his home,[83] or if he says that he has used some of his assets to pay off debts when he had not done so[84] or that he had been held up and robbed when in fact he had not.[85] It is to be noted that if the same question is put several times, but in varying form, the several answers are not each a separate offense but are to be taken together as making up one offense only.[86]

(iv) Some cases have discussed the relation of the statute making perjury a federal criminal offense to the offense of making false oath in bankruptcy proceedings. The federal Criminal Code, Sec. 125 reads as follows:

> "Whoever, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years."[87]

In *Wechsler v. U. S.*,[88] W. was adjudged to be a bankrupt. While giving testimony under oath concerning certain of his business transactions he lied. He was indicted for perjury under R. S. 5392 (now the section above quoted), and convicted. He sued out a writ of error and his conviction was affirmed by the Circuit Court of Appeals. The court held that W.'s offense came under both the Bankruptcy Act and R. S. 5392. It further added that it was immaterial under which statute the prosecution was brought as the court would put

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79Barron v. U. S. 5 Fed. (2d) 799 (1925).
80Edelstein v. U. S., note 77 *supra*.
81U. S. v. Lake, 129 Fed. 499 (1904); Kern v. U. S. 169 Fed. 617 (1909); Gretsch v. U. S., 231 Fed. 57 (1916).
82U. S. v. Gray, 255 Fed. 98 (1918); Gordon v. U. S. 5 Fed. (2d) 943 (1925).
83Kovoloff v. U. S. 202 Fed. 475 (1912).
84Kahn v. U. S. 214 Fed. 54 (1914).
85Schonfeld v. U. S. 277 Fed. 934 (1921); Ulmer v. U. S. 219 Fed. 641 (1915); Kahn v. U. S., 214 Fed. 54 (1914).
86Ulmer v. U. S. 219 Fed. 641 (1915). *Certiorari* denied 238 U. S. 638.
87Penal Code 1909, Ch. 321, sec. 125; U. S. Comp. Stats. par. 10295.
88158 Fed. 579 (1907).

the prosecution under the proper statute if the prosecuting attorney had made a mistake in this matter.[89]

In *Ulmer v. United States,*[90] the facts were as follows:

The X Firm were tenants of U. When the firm first went into business they made a deposit with the Y Bank of $2000 in cash. U gave the firm a check for $1500. The firm drew three checks in his favor. The firm became bankrupt and was investigated by a referee in bankruptcy. He though that the deposit of the check given by U to the X Firm was colorable and that it was simply an exchange of checks to make it appear that the firm had a larger deposit in the bank that it really did have. U was called before the referee to testify in the matter. He declared that he received $1500 in cash from the X Firm when he gave them his check for that amount. This was found to be false. He was indicted for *perjury.*

It was contended for the defense that the indictment could be brought only under section 125 of the Federal Penal Code. But the court held that the prosecution was well brought under the Bankruptcy Act and followed *Wechsler v. United States,* discussed above. In *Rosenthal v. United States,*[91] R. swore falsely in bankruptcy proceedings. He was indicted for violating the Bankruptcy Act and also for violating the Federal Penal Code section 125. The question was whether there could be an offense under both statutes. The court held that there could not be, and said:

"Congress was undoubtedly of the opinion that false swearing in bankruptcy proceedings is not equal in enormity to the crime of perjury, as the punishment for false swearing in a proceeding in bankruptcy is less severe, and the time within which the prosecution must be instituted two years less than for the crime of perjury under section 125 P. C."[92]

Hence the indictment could properly be brought only under the Bankruptcy Act.

In *Kahn v. United States,*[93] the court said:

"If Congress regarded the crime of false swearing in bankruptcy proceedings as equal in enormity to the crime of perjury, what necessity was there for section 29 b (2) at all? The fact that the word perjury does not appear in the later act and that the term of imprisonment was reduced from five years to two years and the $2000 fine omitted altogether makes it clear that Congress in the Bankruptcy Act was dealing with a crime not in its judgment so aggravated as the crime of perjury.

[89]See Ulmer v. U.S. 219 Fed. 641 (1915); Williams v. U.S. 168 U.S. 382 (1897).
[90]Ulmer v. U. S. supra note 89.
[91]248 Fed. 684, (1918).
[92]*Ibid,* at p. 685.
[93]214 Fed. 54 (1914).

If this view of the situation be correct it is manifest that the burden of proof in perjury cases is not applicable here."[94]

In *Shonfeld v. United States*,[95] the court said that "false swearing in bankruptcy is not equal in enormity to the crime of perjury denounced by the general statute."

It would seem to be the law, therefore, that false swearing in bankruptcy proceedings cannot be punished under section 125 of the Penal Code of the United States and that whatever punishment is meted out to the offender is governed by the provisions in the Bankruptcy Act.[96]

(v) Subsection (2) applies also to any person who makes a false account in, or in relation to, any proceedings in bankruptcy. No case has been found which deals with this matter. The purpose of the subsection is, however, clear. There must be no interference with proper proceedings in bankruptcy through the medium of untrue accounts. The subsection is a general provision, applies to all persons, to all untrue accounts and to all proceedings in bankruptcy.

C. (i) Subsection (3) applies to every person who presents a false claim for proof against the estate of a bankrupt. No person can present such a claim for himself or for another. Nor can he use another person as his agent, proxy or attorney for the presentation of such claim.

(ii) The purpose of this subsection is patently to safeguard the operation of section 57 (a) of the Bankruptcy Act which reads thus:

> "Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and if so what, securities are held therefor, and whether any, and if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

This is particularly true when it is noticed that the subsection practically follows the definition of the word "creditor" as given in section 1 (9) which states that " 'Creditor' shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy."

(iii) Only two eases have been found dealing with this subsection. In *Levinson v. United States*,[97] one L. bought stock in a corporation which became thereafter bankrupt, and paid for the stock. After

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[94]*Ibid*, at p. 56; Schonfeld v. U. S. 277 Fed. 934, (1921). See also Gordon v. U. S. 5 Fed. (2d) 943 (1925).
[95]277 Fed. 934 (1921).
[96]But see U. S. v. Coyle 229 Fed. 256 (1916), contra.
[97]263 Fed. 257 (1920).

the corporation became bankrupt L. filed a claim for the money he had paid for the stock and stated that he had given the money to the corporation as a loan. The question was whether such a statement was the making of a false claim. The court held that it was. In *Lybrand v. United States*,[98] and *Drafts v. Same*,[99] which two cases are inter-related, the facts were rather odd. One R. was a cotton merchant. He issued cotton bills to D. R. became bankrupt on March 30, 1912. In April, 1912, D. filed claims against the estate in bankruptcy based on the cotton bills given him by R. Proper dividends were given to him which he retained. On August 15, 1918, L. filed proof of claims with the trustees in bankruptcy of R., in which he swore that his claim was based on a cotton bill transferred to him by D. prior to the bankruptcy of R. On August 14, D. made affidavit to the effect that he had transferred the bill, upon which L. based his claim, prior to the bankruptcy of R. Both D. and L. are indicted for making a false claim. The prosecution against D. was based on the making of the affidavit of August 1918, which the government claimed was false. The prosecution against L. was based on his affidavit of August 15, 1918, which the government claimed was also false. Both were convicted for making false oaths. The Circuit Court of Appeals sustained the convictions.[100]

(iv) A false claim cannot be used in any composition with creditors either by a person acting for his own benefit or for the benefit of another. The subsection applies to the one making the claim and also to any one acting as the claimant's agent, proxy, or attorney.

D. (i) Subsection (4) is exceedingly perplexing. It forbids the receiving of "any material amount of property from a bankrupt after the filing of the petition, with intent to defeat" the Bankruptcy Act. What is meant by "material amount?" Does "material" refer to quantity, quality or value? Is the standard of measurement to be total property belonging to the bankrupt's estate or the amounts of the dividends which the creditors are to receive? Is this subsection meant to be correlative to subdivision (a) which forbids unlawfully transferring "any property . . . belonging to a bankrupt estate?" If so, what is to be done to the word "material?" Is it to be construed out of the statute? If not did Congress simply mean to call attention to the legal maxim *de minimis non curat lex?* No cases have been

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[98] 269 Fed. 601 (1920).

[99] *Ibid.*

[100] It is somewhat difficult to understand these cases. The facts are not quite clear. It seems as though Lybrand should have been indicted for making a false oath rather than for making a false claim.

found dealing with this subsection. No text writer seems to have discussed the matter.[101]

Perhaps a clue to the meaning of the subsection is found in the fact that the recipient must have the "intent to defeat" the Bankruptcy Act. It seems as though the Congress intended to deter any person from assisting in the dispersion of the bankrupt's property by receiving the property from the bankrupt to the detriment of the creditors. One of the very important purposes of the Bankruptcy Act is to secure to the creditors of the bankrupt as much as is possible of the bankrupt's assets. Any diminution of the bankrupt's assets effects the creditors adversely. It is submitted, therefore, that, perhaps, *any amount* of property which reduces the chances that the creditors, or any one of them, may have to get full payment of the debts that are due them, or him, is a "material amount of property." The test would be this: Is the property received by the accused of any value whatever to the creditors or any one of them? If so, there has been the receiving of a "material amount of property." If not, there has been no receiving of a "material amount of property."

It is to be noted that the offense is not completed unless (a) there has been a receipt of the property, (b) from the bankrupt (which means probably from the bankrupt directly or through an agent or instrumentality of the bankrupt), (c) after the filing of the petition in bankruptcy, (d) with the intent to defeat the Bankruptcy Act, and (e) that the recipient must have received the property knowingly and fraudulently.

E. (i) Subsection (5) deals with extortion. It prohibits every one from extorting or attempting to extort "any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings."

(ii) The offense created by this part of the Bankruptcy Act is different from the Common Law offense of extortion.[102] It may be committed by any person whether he is an official or not, and whether he acts under color of his office or not.[103] Under the Bankruptcy Act "to extort" means simply "to get." The getting of the money or property must be compensation for acting or failing to act in bankruptcy proceedings. The offense, therefore, cannot be committed unless proceedings in bankruptcy are under way. The extortion must be done knowingly and fraudulently.

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[101]See Black on Bankruptcy page 753; Collier on Bankruptcy, page 569 (Tenth Edition).

[102]U. S. v. Dunkley, 235 Fed. 1000 (1916).

[103]*Ibid.*

(iii) Only one case has been found dealing with this part of the statute. In *United States v. Dunkley*,[104] D. was present at a sale of the bankrupt's property as an agent of the bankrupt. X. bid $1500 for the property. D. protested against selling the property for so little as was bid and succeeded in getting the sale postponed. Then D. tells X. that he, D., will withdraw his objection to the sale to X. if X. will give him $50. X. gives D. the $50. D. withdraws his objection to the sale. The sale is made to X. D. is indicted for extorting money from X. D. defends on the ground that he was the legal agent of the bankrupt and had the legal privilege of using his influence to have the referee reject or accept whatever bids were made. The question was whether the existence of this legal privilege was a valid defense to D. The court held that it was not, because the statute does not say that the forbearing or acting must be unlawful. All extortions or attempts at extortion are forbidden.

(iv) As the subsection forbids even attempts at extorting it is obvious that the act or forbearance for which the consideration was extorted need never occur.[105]

F. The punishment for violating this subdivision of the statute is imprisonment for not more than two years.

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Subdivision "c" is as follows:

> "A person shall be punished by a fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do."

A. (i) Subsection (1) applies to a referee in bankruptcy proceedings. Any person who is directly, or indirectly, interested in a given case cannot be a referee in that case. The purpose of the statute is to put the bankruptcy proceedings into the hands of one who will not be swayed in his actions by considerations of self-interest.

The subsection ties in with section 39b (1), of the Bankruptey Act which says that:

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[104] *Ibid.*
[105] See Beale; "Criminal Attempts," 16 Harv. L. Rev. 491.

> "Referees shall not (1) act in cases in which they are directly or indirectly interested."

Under this section it has been held that the interest which will disqualify a person from acting as a referee is an interest in either the proceedings in bankruptcy or in the estate of the bankrupt.[106] That he is a debtor of the bankrupt does not disqualify him,[107] nor does the fact that he receives fees or commissions as a referee.[108]

It would seem, therefore, that the offense cannot be committed unless the person who acts as a referee knows that he has a pecuniary and personal interest in the proceedings, or the outcome of the proceedings, or the estate of the bankrupt.[109]

B. (i) Subsection (2) is directed against referees. They are prohibited from purchasing, either directly or indirectly, any property of the estate in bankruptcy in which they are acting.

This subsection is directly connected with Section 39b (3) which states that referees shall not "purchase, directly or indirectly, any property of the estate in bankruptcy."

There have been no cases found dealing with this subsection but its provisions and purpose are perfectly clear.

C. (i) Subsection (3) deals with both trustees and referees. It prohibits them from arbitrarily preventing parties interested in the bankruptcy proceedings or the property of the bankrupt from examining the accounts, papers and records of the estate and the proceedings. The referee and trustee are safeguarded from petty annoyances, and intermeddling, by the provisions that there must be a court order directing that the opportunity to examine the records, etc., and that the referee or trustee must know that the court order has been issued.

This subsection is obviously related to Section 39a (3) of the Bankruptcy Act which states that one of the duties of the referee is to

> "(3) Furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest."

and to Section 47a (5) which says that one of the duties of the trustee shall be to

> "(5) Furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest."

It also relates to Section 49a which provides that

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[106]Bray v. Cobb, 91 Fed. 102 (1898).

[107]*Ibid.*

[108]*In re* Strobel 155 Fed. 692 (1907); *In re* Abbey Press, 134 Fed. 51, (1904). See also note to *In re* Gardner, 4 Amer. Bank. Rep. 420.

[109]Compare Black on Bankruptcy p. 22 with Collier on Bankruptcy p. 603 (Tenth Edition).

"The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest."

(ii) The foregoing provisions are eminently sensible and practicable. Proceedings in bankruptcy are primarily for the benefit of the creditors of the bankrupt. The referee and trustee are officers appointed for the purpose of aiding the creditors in getting what is their due. The creditors are fairly entitled to be informed of the processes of the administration of the bankrupts estate and to be watchful of their own interests. The creditors must keep their desire for information within reasonable bounds and not unnecessarily interfere with the administration of the estate in bankruptcy. But the referee or trustee must not act in any arbitrary fashion. To do so would be to interfere with one of the functions of the proceedings. If he is arbitrary and refuses to obey the orders of the court he is not only fined five hundred dollars but is automatically removed from office at the moment of his conviction.

No cases have been found dealing with this subsection.

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Subdivision "d"—"A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense."

A. (i) This subdivision of the Bankruptcy Act is directed against the federal prosecuting authorities. It prevents them from bringing any prosecution later than one year after the offense has been committed. The important question is this; When has each of the offenses enumerated in the Bankruptcy Act been committed?

(ii) Offenses may consist of acts or omissions. If an offense consists of an act which has been forbidden, the offense "is committed" at tbe time that the act is done. If an offense consists of an omission, that is, of the failure to do that which the law requires should be done, the offense "is committed" at the moment the duty to act rests upon the offender and during every moment of time that the duty continues to rest upon him. So long as the duty to do remains, the failure to do is an offense.

B. (i) The offenses enumerated in subdivision "a" are all acts. They are committed when they are "knowingly and fraudulently" done. At that moment the statute of limitations begins to run.

(ii) The offense of concealment of property belonging to the estate in bankruptcy which is denounced by subdivision "b," subsection (1) may be either an act or an omission.

If the offender secretes, or falsifies or mutilates the property the offense is committed at the moment of secreting, falsification or mutilation. The statute of limitations begins to run from that moment. But if the offender fails to reveal the existence or the whereabouts of the property the offense consists of an omission. The duty to reveal does not cease until revelation is made. The statute of limitations will not begin to run until the last moment of the time when the duty ceases to exist.

When does the duty to reveal cease? Certainly not when the bankrupt receives his discharge in bankruptcy. The statute is explicit in saying that the offense can be committed *after* discharge in bankruptcy. The duty must continue until such time as the entire proceedings in bankruptcy are ended, the trustee in bankruptcy makes his final report and the trustee is discharged. The statute of limitations begins to run from the time that the trustee in bankruptcy is discharged from his duties.

In *Johnson v. United States,*[110] a bankrupt was indicted for concealing some assets from his trustee in bankruptcy. He omitted putting the property on his schedule of assets and liabilities. The question was whether the offense was consummated when the assets were omitted from the schedule. The court held that it was not, saying,

> "The offense is not making a misrepresentation at a given time and place; it is the continuous concealment of the property from the trustee during the whole course of the bankruptcy proceedings or beyond. The omission from the schedule would have amounted to nothing if the bankrupt had disclosed the property to the trustee."[111]

The court was, obviously, dealing with "conceal" as meaning "duty to reveal." It was quite right, therefore, in saying that the offense was not over when the assets were omitted from the schedule. The duty to reveal continues to the end of the proceedings in bankruptcy.

In *Warren v. United States,*[112] however, the court was operating with a different meaning of "conceal" and reached a different result. In that case W. disposed of some fertilizer and barbed wire that belonged to him in September or October of 1908. On November 18, 1908 W. filed a petition in voluntary bankruptcy, made schedules and was adjudicated a bankrupt. Thereafter he does nothing more. On December 18, 1909, that is more than twelve months after filing of petition in bankruptcy, and also more than twelve months after the appointment of a trustee in bankruptcy, he was indicted for

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[110]163 Fed. 30 (1908).
[111]*Ibid,* at p. 33.
[112]199 Fed. 753 (1912).

concealing assets. The indictment charged a continuous concealment of the assets. W. set up the statute of limitations as a defense. The question was whether the statute of limitations had run against the offense or not. The court held that it had as the offense was completed when the trustee was appointed and took title to the property. It further held that the fact that the property, once concealed, remained concealed was immaterial. There could be no continuous concealment. The court looked to the time when the bankrupt *secreted* his property and held that that time was when the statute began to run.

These two cases are, therefore, not in conflict. The courts are dealing with different *meanings* of the word "conceal." Both decisions are correct. The first looks to the failure to reveal, an omission. The second looks to the secreting, an act.

Two other cases are of value in this connection though they deal with the problem of jurisdiction over the offense of concealing assets.

In *Gretsch v. United States,*[113] G. and B. entered into a partnership to trade in jewelry. B. was a resident of New Jersey. G. resided in New York. The salesrooms were in New York. A safe containing some of the assets were in New York. They filed a voluntary petition in bankruptcy in New Jersey but did not include all their assets. Among the omitted assets were the jewels in the safe in New York. These jewels had never been in New Jersey. G. and B. were indicted for concealing assets from their trustee in bankruptcy. The indictment was brought in New Jersey. The question was whether the New Jersey courts had jurisdiction over the offense as the goods had never been in New Jersey. The court held that it had not and that the indictment violated Amendment VI of the Federal Constitution.[114] The court said:

> "Concealment is a positive thing committed at some time or other with respect to a physical thing. It must, therefore, be done somewhere, and wherever done in violation of the statute, there and there alone has the court jurisdiction of the offense."[115]

The court further held that the offense was not committed when the assets were omitted from the schedule.

The court was right. It was using the word "conceal" to mean "secrete." That act occurred in New York. The act was outside the jurisdiction of the courts in New Jersey.

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[113] 231 Fed. 57 (1916).
[114] This provides for trial by jury "of the State and district wherein the crime shall have been committed."
[115] 231 Fed. 57 at p. 59.

The same court that decided the *Gretsch* case also decided the case of *Glass v. United States*.[116] In that case G. was a merchant in New Jersey. He had a storeroom in New York. He became insolvent. He is threatened with bankruptcy proceedings by his creditors. He removes his books and some property from New Jersey to the storeroom in New York. Then his creditors petition him into involuntary bankruptcy. G. does not give his books and property which he had taken to New York to his trustee in bankruptcy. He is indicated in New Jersey for concealing some of his assets in bankruptcy. He pleads to the jurisdiction of the court but the court held that it had jurisdiction. The court says that there was a continuous concealment of the goods and that the concealment occurred in New Jersey, when the goods were physically converted in New Jersey, and carried off to New York. The *Gretsch* case is distinguished away.

The court was right in this case, also, it is submitted. It was looking at the duty to reveal. That continued throughout the bankruptcy proceedings. The duty existed in New Jersey. Failure to fulfill that duty occurred in New Jersey. Hence the New Jersey courts had jurisdiction over the offense. The statute of limitations would run in New York from the time the goods were secreted there, but it would begin to run in New Jersey from the time that the duty to reveal ceased legally to exist.

(iii) The offenses enumerated in subdivision "b" subsections (2), (3), (4), and (5) are all acts. The statute of limitations begins to run when the accused has "knowingly and fraudulently" committed the act.

(iv) Subdivision "c" deals entirely with acts. The offense is committed when the act is "knowingly" done. The statute of limitations begins to run from that time.

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[116]231 Fed. 65 (1916).