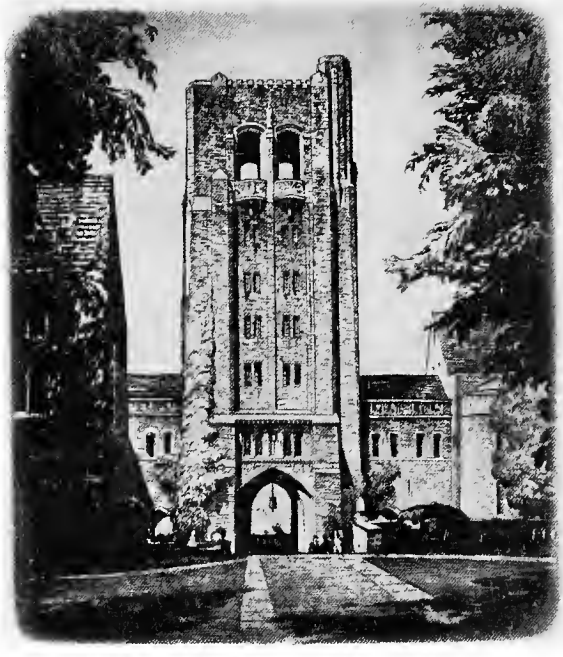

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A TREATISE

ON

FRAUDULENT CONVEYANCES

AND

CREDITORS' BILLS.

BY

FREDERICK S. WAIT,

OF THE NEW YORK BAR,

Author of "Insolvent Corporations," "Trial of Title to Land," etc.

THIRD EDITION.

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To the Memory

of

DANIEL G. ROLLINS.

PREFACE TO THIRD EDITION.

In this edition much fresh matter has been embodied in the original text, a number of new sections have been written, and the citations of authorities increased several thousand cases over the number contained in the former edition. Over one hundred and eighty pages of entirely new matter has been written for this edition. Special efforts have been put forth to utilize the latest important authorities bearing upon the topics discussed. Most of the old questions have been fought over in the courts since our last edition. The multitude of recent cases involving fraudulent alienations and covinous schemes devised to defeat the claims of creditors, demonstrates how important and far-reaching the subject under consideration has become. Sometimes a creditor's entire fortune is dependent upon a correct exposition of the statute of Elizabeth. The writer is confirmed in his early conviction that the policy resulting in a relaxation of remedies against the person which an enlightened civilization seemed to demand, has created a numerous and very obnoxious class of what may be called professional fraudulent debtors. The spendthrift trust cases now so numerous reflect no credit upon the body of our law. The policy of enlarging statutory exemptions; of depriving creditors of the right to resort to powers as assets; of upholding shifting liens

upon personal property; of shielding debtors with an undeserved mantle of presumptions; and of exacting explicit proof of notice sufficient to charge alienees with bad faith — is certainly working injustice to the creditor class.

The aim of this treatise is to furnish suitors with a practical guide in this kind of litigation. The earlier statutes and decisions concerning fraudulent alienations to defeat creditors have been noticed; the debtor's rights and interest in property available to creditors have been considered; and the different forms of remedies or of procedure which may be invoked either at law or in equity; the status essential to entitle a creditor to maintain a bill; questions of parties, complainant and defendant; of pleading; the form and effect of the judgment; and the rules regulating provisional relief, reimbursement and subrogation have been treated, the discussion embracing both chancery practice and the reformed procedure.

The discussion, however, has not been limited to the details of practice or procedure. Chapters have been devoted to the subjects of intention, consideration, and *indicia* of fraud; to the important questions relating to change of possession, and generally to evidence and defenses as appertaining to these suits. The rules applicable to frauds upon creditors springing out of the relationship of husband and wife, and relative to covinous general assignments and fraudulent chattel mortgages, have been examined, and the doctrine of spendthrift trusts discussed. Special pains have been taken in the treatment of the law of notice, actual and constructive, as applied to our subject.

One of the chief aims of a work of this kind is to bring side by side the decisions in different States upon kindred questions and construing similar statutes. Federal authorities have been frequently quoted, cited, and relied upon, because more universally accredited, and in pursuance of a belief that such a policy tends to render the body of our law more symmetrical and harmonious. Still, the great mass of the decisions collated and discussed has been drawn from the courts of last resort in the various States.

The writer acknowledges the valuable assistance of Adolph L. Pincoffs, Esq., and Paul M. Goodrich, Esq., both of the New York Bar, in preparing this edition.

No. 10 Wall Street,
New York, *October*, 1897.

CONTENTS.

FRAUDULENT CONVEYANCES AND CREDITORS' BILLS.

CHAPTER I.

PAGE

INTRODUCTORY OBSERVATIONS. — GROWTH OF THE LAW CONCERNING FRAUDULENT CONVEYANCES. — PHASES OF THE SUBJECT, ... 1

CHAPTER II.

PROPERTY SUSCEPTIBLE OF FRAUDULENT ALIENATION. — ASSETS AVAILABLE TO CREDITORS, ... 53

CHAPTER III.

CREDITORS' REMEDIES, ... 96

CHAPTER IV.

STATUS OF ATTACKING CREDITORS, ... 139

CHAPTER V.

EXISTING CREDITORS, ... 180

CHAPTER VI.

SUBSEQUENT CREDITORS, ... 193

CHAPTER VII.

WHO MAY BE COMPLAINANTS, ... 213

CHAPTER VIII.

PAGE
PARTIES DEFENDANT, ... 249

CHAPTER IX.

COMPLAINT, ... 270

CHAPTER X.

OF THE PLEA OR ANSWER, ... 300

CHAPTER XI.

OF THE JUDGMENT OR DECREE, ... 311

CHAPTER XII.

PROVISIONAL RELIEF.—INJUNCTION.—RECEIVER.—ARREST, . 331

CHAPTER XIII.

REIMBURSEMENT AND SUBROGATION, ... 340

CHAPTER XIV.

INTENTION, ... 351

CHAPTER XV.

CONSIDERATION, ... 373

CHAPTER XVI.

INDICIA OR BADGES OF FRAUD, ... 398

CHAPTER XVII.

CHANGE OF POSSESSION.—DELIVERY, ... 442

CHAPTER XVIII.

EVIDENCE, ... 473

CHAPTER XIX.

PAGE
DEFENSES, ... 505

CHAPTER XX.

HUSBAND AND WIFE.— FRAUDULENT MARRIAGE SETTLEMENTS, 522

CHAPTER XXI.

FRAUDULENT GENERAL ASSIGNMENTS, ... 546

CHAPTER XXII.

FRAUDULENT CHATTEL MORTGAGES, ... 617

CHAPTER XXIII.

SPENDTHRIFT TRUSTS, ... 636

CHAPTER XXIV.

BONA FIDE PURCHASERS. — ACTUAL AND CONSTRUCTIVE NOTICE. — FRAUDULENT GRANTEES, ... 665

CHAPTER XXV.

PREFERENCES, ... 703

CHAPTER XXVI.

CONVEYANCES VALID BETWEEN THE PARTIES. — RELIEF TO DEFRAUDED GRANTORS, ... 716

CHAPTER XXVII.

JURISDICTIONAL QUESTIONS. — CONCLUSION, ... 738

TABLE OF CASES.

[*References are to pages.*]

Aaronson *v.* Deutsch, 565.
Abbey *v.* Dewey, 15.
v. Deyo, 94, 531, 532.
Abbot *v.* Johnson, 288.
Abbott *v.* Goodwin, 630.
v. Tenney, 40, 67, 106, 107.
v. Wood, 47.
Abegg *v.* Bishop, 221, 233, 597, 602, 603, 706.
Aber *v.* Brant, 187.
Abercrombie *v.* Bradford, 558.
Abney *v.* Kingsland, 469, 497.
Abraham *v.* Ordway, 511.
Acer *v.* Westcott, 673, 675.
Acker *v.* Leland, 299.
v. White, 349.
Ackerman *v.* Gorton, 79.
v. Hunsicker, 391.
Ackworth *v.* Kempe, 520.
Acme Lumber Co. *v.* Hoyt, 581.
Adams *v.* Davidson, 217, 242, 428, 492, 493, 495,
v. Edgerton, 538.
v. Fassett, 297.
v. Franklin, 475, 476.
v. Hull, 396.
v. Way, 154.
Addington *v.* Etheridge, 619.
Addison *v.* Bowie, 242.
Adee *v.* Bigler, 149, 171, 332.
v. Cornell, 563.
Adler *v.* Apt, 406.
v. Cloud, 613.
v. Ecker, 137, 550, 558.
v. Fenton, 101, 117, 143.
v. Milwaukee P. B. Mfg. Co., 253.
Adsit *v.* Butler, 140, 148, 157, 161, 176, 177, 178, 271.
v. Sanford, 165, 271.
Ætna Ins. Co. *v.* Johnson, 15.
Ætna Nat. Bank *v.* Fourth Nat. Bank, 81.
v. Manhattan Life Ins. Co., 51, 67, 68.
v. U. S. Life Ins. Co., 51, 57, 541.
Ager *v.* Duncan, 722.
v. Murray, 71, 73
Akers *v.* Rowan, 481.
Albany City Bank *v.* Schermerhorn, 709.
Albany & R. I. & S. Co. *v.* Southern Agr. Works, 615.
Alberger *v.* National Bank of Commerce, 703.
v. White, 357.
Albert *v.* Back, 298.
Albertoli *v.* Branham, 278.
Alden *v.* Gregory, 282.
Aldrich *v.* Blake, 348.
v. Earle, 490.
Aldridge *v.* Muirhead, 94, 508, 531.
Alexander, *In re*, 410.
v. Alexander, 95.
v. Caldwell, 489.
v. Crittenden, 524.
v. Gould, 151, 184.
v. Pendleton, 509.
v. Quigley, 264.
v. Todd, 430, 468.
Alkire *v.* Alkire, 544.
Allan *v.* McTavish, 19.
Allen *v.* Berry, 109, 133, 340, 344.
v. Center Valley Co., 102.
v. Cole, 304.
v. Cowan, 459, 463.
v. Craft, 640.
v. Fortier, 497.
v. Halliday, 697, 702.
v. Kennedy, 704.
v. Kinyon, 353.
v. Kirk, 436.
v. Massey, 47, 136.
v. Montgomery, 230.
v. Mower, 302.
v. Rundle, 46, 372.
v. Smith, 465, 466, 506.
v. Steiger, 214, 454.
v. Stingel, 675.
v. Thomas, 81.
v. Vestal, 264.
v. White, 640.

Allenspach *v.* Wagner, 214.
Allentown Bank *v.* Beck, 468.
Alley *v.* Connell, 310, 340, 342.
Allison *v.* Hagan, 697, 717, 724.
v. Weller, 251, 259.
Allyn *v.* Thurston, 155, 177, 270.
Alnutt *v.* Leper, 140.
Alsager *v.* Rowley, 156.
Alston *v.* Rowles, 222, 438.
Alton *v.* Harrison, 411, 412.
Altringer *v.* Capeheart, 396.
Ambler *v.* Choteau, 274.
Amer. Brewing Co. *v.* McGruder, 358.
Amer. Exch. Bank *v.* Inloes 581.
Amer. Oak Leather Co. *v.* Fargo, 619.
v. Wyeth H. & M. Co., 620.
Amer. Sugar Ref. Co. *v.* Fancher, 84.
Amer. Union Tel. Co. *v.* Middleton, 738.
Ames, *Ex parte*, 391, 411, 714.
v. Blunt, 560, 592, 717.
v. Gilmore, 10, 415.
v. Moir, 29, 317, 339, 518.
Amherst's Trusts, *In re*, 647.
Ammon's Appeal, 210, 437.
Amsden *v.* Manchester, 486, 487, 501.
Amy *v.* Manning, 337.
Anderson *v.* Blood, 673, 676, 682.
v. Bradford, 168, 169.
v. Briscoe, 315.
v. Brooks, 470.
v. Cary, 643.
v. Dunn, 379.
v. Etter, 47, 669.
v. Goldsmith, 56.
v. Lachs, 714.
v. Pilgrim, 115.
v. Radcliffe, 247.
v. Reed, 338.
v. Roberts, 7, 478, 700.
v. Wheeler, 517.
Andrew *v.* Hinderman, 226.
Andrews *v.* Jones, 383, 484.
v. Marshall, 45.
v. Rowan, 90, 116.
v. Spurlin, 640.
v. Whitney, 85, 87, 639, 650.
Andruss *v.* Doolittle, 228, 722.
Angier *v.* Ash, 133.
Annin *v.* Annin, 187, 203, 261, 294.
Anniston Carriage Works *v.* Ward, 594.
Anonymous (1 Wall. Jr. 107), 194, 380.
v. Gelpcke, 562.
Ansonia B. & C. Co. *v.* New Lamp Chimney Co., 518.
Ansorge *v.* Barth, 108.
Antelope (The), 269.
Anthony *v.* Harrison, 396.
v. Stype, 605.
v. Wade, 31, 92.
v. Wood, 159, 175.
Anthracite Ins. Co. *v.* Sears, 58.
Antrim *v.* Kelly, 209.
Apperson *v.* Burgett, 318, 415, 468.
Appolos *v.* Brady, 559.
Arbuckle Bros. Coffee Co. *v.* Garrity, 140.
v. Werner, 164, 170.
Archer *v.* Lapp, 414, 500, 501.
v. Long, 435.
Ardesco Oil Co. *v.* North Amer. Oil & M. Co., 615.
Ardis *v.* Theus, 523.
Arglasse *v.* Muschamp, 738.
Arledge *In re*, 231.
Armfield *v.* Armfield, 383.
Armington *v.* Rau, 246, 717.
Armitage *v.* Mace, 530.
Armory *v.* Delamirie, 500.
Armstrong *v.* Carr, 390.
v. Dunn, 217.
v. Holland, 595.
v. Lachman, 498.
v. Sanford, 338.
v. Scott, 310.
Arnett *v.* Coffey, 284.
Arnholt *v.* Hartwig, 668 671.
Arnold *v.* Arnold, 290.
v. Hagerman, 379.
v. Second Nat. Bank, 388.
Arnot *v.* Erie Ry. Co., 396.
Arnwine *v.* Carroll. 65.
Arthur *v.* Commercial & R. R. Bank, 33, 480, 556, 576.
v. Griswold, 502.
Artman *v.* Giles, 101, 113, 141, 260.
Arundell *v.* Phipps, 446.
Arzbacher *v.* Mayer, 639.
Ashcroft *v.* Simmons, 449.
v. Walworth, 73, 74.
Ashfield *v.* Ashfield, 59, 76.
Ashhurst *v.* Given, 650, 662.
Ashhurst's Appeal, 694.
Ashmead *v.* Hean, 363.
Aspden *v.* Nixon, 154.
Aspinall *v.* Jones, 117.
Astor *v.* Wells, 357.
Athey *v.* Knotts, 60.
Atlantic Nat. Bank *v.* Tavener, 524, 525, 704.
Atty-Gen'l *v.* Brown, 305.
v. Corporation of Poole, 260.
v. Cradock, 288.
v. Day, 337.
v. Dean of Windsor, 500.
Atwood *v.* Impson, 190, 688, 690.
Auburn Exch. Bank *v.* Fitch, 704, 706.
Augusta Sav. Bank *v.* Stelling, 740.
Aulman *v.* Aulman, 593.
Aultman & T. Co. *v.* Pikop, 54.
Aurand *v.* Schaffer, 539.
Austin *v.* Barrows, 118.
v. First Nat. Bank, 483.
v. Morris, 167.
v. Winston, 726.

Averill *v.* Loucks, 611.
Avery *v.* Hackley, 267.
v. Johan1, 322, 688.
v. Judd, 247.
v. Street, 403, 468.
Ayres *v.* Husted, 409.
v. Scribner, 9.

Babb *v.* Clemson, 416, 463.
Babcock *v.* Eckler, 16, 22, 30, 187, 188, 192, 205, 208, 351, 369, 377, 524, 534.
v. Middlesex Sav. Bank, 483.
Bachman *v.* Lawson, 552.
v. Sepulveda, 264, 318, 329.
Bachrack *v.* Norton, 594.
Backhouse *v.* Harrison, 687.
v. Jett, 17.
Bacon *v.* Horne, 614.
v. P. Brockman Com. Co., 632.
v. Scannell, 461.
Badger *v.* Badger, 282, 283, 284, 512.
v. Story, 229.
Baer *v.* Rooks, 11, 549, 558, 566.
v. Wilkinson, 563, 709.
Bagley *v.* Bowe, 590, 605, 606.
Bailey *v.* Bailey, 183, 198, 222.
v. Burton, 149, 150.
v. Glover, 284, 513.
v. Lane, 117.
v. Mills, 564.
v. Ryder, 294, 329, 739.
Bailie *v.* McWhorter, 654, 660.
Bainton *v.* Ward, 76, 77.
Baird *v.* Baird, 396.
v. Mayor, etc., of N. Y., 10, 566.
Baker *v.* Bartol, 218.
v. Bliss, 674, 680, 686, 688.
v. Connell, 396.
v. Gilman, 184, 211, 212, 727.
v. Humphrey, 37.
v. Keiser, 659.
v. Kelly, 372.
v. Lyman, 128.
v. Palmer, 518.
v. Pottle, 420.
v. Union Mut. Life Ins. Co., 396.
Baldwin *v.* Buckland, 593.
v. Cawthorne, 720.
v. Flash, 633, 634.
v. Freydendall, 436.
v. Hale, 517,
v. June, 343, 345.
v. Martin, 285.
v. Peet, 110, 553, 577, 600.
v. Rogers, 34, 92.
v. Ryan, 176.
v. Short, 340, 342, 347, 373, 375.
Ball *v.* Campbell, 394.
v. Hancock, 640.
v. Loomis, 450, 551.
v. Slaften, 232, 233, 553.
v. Slafter, 229
Ballentine *v.* Beall, 149, 150, 215, 220.
Ballin *v.* Loch, 154.
Ballou *v.* Jones, 161, 168.
Balto. & O. R. R. Co., *Ex parte*, 741.
v. Hoge, 430, 499.
Bamberger *v.* Schoolfield, 8, 10, 12, 365, 398, 458, 478, 705.
Bancroft *v.* Blizzard, 357.
v. Curtis, 533.
Bane *v.* Detrick, 618.
Banfield *v.* Whipple, 354, 705.
Bank *v.* Brier, 347, 620.
v. Cooper, 229.
v. Forney, 64.
v. Gilmer, 402, 414.
v. Harris, 170, 171, 259.
v. Kennedy, 262.
v. Martin, 584, 607.
Bank of Commerce *v.* Fowler, 669.
v. Payne, 553.
v. Schlotfeldt, 7.
Bank of Georgia *v.* Higginbottom, 411.
Bank of Leavenworth *v.* Hunt, 619, 714.
Bank of Middlebury *v.* Rutland, 484.
Bank of Rome *v.* Haselton, 216.
Bank of Silver Creek *v.* Talcott, 8, 607.
Bank of the Metropolis *v.* Guttschlick, 81.
Bank of the U. S. *v.* Housman, 188, 191, 419, 468.
Bank of Utica *v.* City of Utica, 328.
Banner *v.* May, 431.
Banning *v.* Sibley, 549.
Bannister *v.* Phelps, 358.
Baptist Church *v.* Brooklyn Fire Ins. Co., 496.
Barbarin *v.* Saucier, 132.
Barbour *v.* Conn. Mut. L. I. Co., 57.
v. Priest, 694.
Barhydt *v.* Perry, 208.
Barker *v.* Barker, 165.
v. Bradley, 81.
v. Davis, 643.
v. Dayton, 115, 336.
v. French, 424.
v. Smith, 232.
Barker's Estate, 663.
Barkow *v.* Sanger, 407, 478.
Barling *v.* Bishopp, 183, 206, 244, 245.
Barlow *v.* Arnold, 285.
v. Myers, 82.
Barnard *v.* Moore, 391.
Barnes, Matter of, 561.
v. Brown, 729.
v. Dow, 658, 660.
v. Gill, 243.
v. Morgan, 58, 73, 74, 75, 115.
v. Sammons, 182.
Barnet *v.* Fergus, 619.
Barnett *v.* Blake, 647.
v. Kinney, 124, 551, 615.
Barney *v.* Griffin, 556, 560, 577, 584, 631.
Barnitz *v.* Rice, 20.
Barnum *v.* Hempstead, 431, 607, 703.
Barr *v.* Church, 434, 435, 706.

Barr *v.* Cubbage, 83.
v. Reitz, 443, 458, 462, 466.
Barrack *v.* McCulloch, 60.
Barrett *v.* Hart, 494.
v. Nealon, 194, 356.
Barron *v.* Morris, 626, 628.
Barrow *v.* Bailey, 16, 140, 305, 415, 426.
v. Barrow, 277, 383, 717.
v. Paxton, 448.
Barry *v.* Abbot, 126, 220.
v. Equitable L. A. Soc., 56.
v. Kennedy, 69.
Barstow *v.* Kilvington, 40.
Barth *v.* Backus, 614, 615, 739.
Bartle *v.* Nutt, 724.
Bartles *v.* Gibson, 414, 688.
Bartlett *v.* Blake, 7, 449.
v. Cheesbrough, 435.
v. Cheesebrough, 520.
v. Cleavenger, 405, 407, 448.
v. Drew, 237, 240, 241, 268.
v. McNeil, 116.
Barto's Appeal, 100.
Barton *v.* Briscoe, 646.
v. Hosner, 151, 156, 168, 224, 225, 229, 234.
v. Sitlington, 622.
v. Vanheythuysen, 37.
v. White, 73, 74.
Basset *v.* Nosworthy, 700.
Bassett *v.* Budlong, 640.
v. McKenna, 209, 224.
v. St. Albans Hotel Co., 140.
Batchelder *v.* White, 8.
Bate *v.* Graham, 225, 262, 318.
Bates *v.* Ableman, 598.
v. Bradley, 229, 230.
v. Callender, 93.
v. Campbell, 469.
v. Cobb, 203.
v. Lidgerwood, Mfg. Co., 164, 242.
v. Lyons, 142.
v. Plonsky, 159, 161, 217.
Batten *v.* Smith, 233.
Battenhausen *v.* Bullock, 675.
Battles *v.* Laudenslager, 9, 499.
Baughman *v.* Penn, 8, 9.
Bauknight *v.* Sloan, 215, 218, 259.
Baum *v.* Pierce, 608.
Baumann *v.* Jefferson, 552.
Bauserman *v.* Blunt, 123.
Baxter *v.* Moses, 140, 142, 145, 167, 172.
Bay *v.* Cook, 156, 166.
Bayard *v.* Hoffman, 40, 51, 58, 67, 107, 127, 129.
Bayne *v.* State, 526.
Bayspoole *v.* Collins, 374.
Bay State Iron Co. *v.* Goodall, 262, 309.
Baze *v.* Arper, 133.
B. C. Evans Co. *v.* Reeves, 689.
Beach *v.* Bestor, 172.
Beach *v.* Viles, 135.
v. White, 210.
Beadle, *In re*, 574.
Beal *v.* Lehman-Durr Co., 278.
Beals *v.* Guernsey, 448.
Beamish *v.* Hoyt, 66.
Bean *v.* Edge, 81.
v. Patterson, 593.
v. Smith, 48, 88, 111, 343, 416, 700.
Beans *v.* Bullitt, 549.
Beard *v.* Dedolph, 529.
Beards *v.* Wheeler, 365.
Beardsley *v.* Frame, 566.
Beardsley Scythe Co. *v.* Foster, 251, 252, 270, 271.
Beasley *v.* Bray, 427.
Beatty *v.* Fishel, 12.
Beaubien *v.* Beaubien, 274, 284, 516.
Beaumont *v.* Herrick, 111, 266.
Beaupre *v.* Noyes, 184.
Beck *v.* Burdett, 6, 97, 129, 148.
v. Parker, 564.
Beck's Estate, 663.
Becker *v.* Torrance, 82, 115, 235, 298.
Beckwith *v.* Burrough, 51, 450, 465.
v. Union Bank, 553.
Bedell *v.* Chase, 370, 494.
v. Scruton, 517.
Bedford *v.* Penny, 688.
Beebe *v.* Saulter, 224.
Beecher *v.* Clark, 360, 376, 419.
v. Wilson, 534.
Beeckman *v.* Montgomery, 203, 206.
Beels *v.* Flynn, 32, 411.
Beene *v.* Randall, 302.
Beer *v.* Hooper, 517.
Beidler *v.* Crane, 342, 423, 425.
Belden *v.* Younger, 94.
Belford *v.* Crane, 29.
Belgard *v.* McLaughlin, 316.
Belknap *v.* Bender, 81.
Bell *v.* Fleming's Exrs., 391.
v. Johnson, 214.
v. Lamprey, 517.
v. Leggett, 712.
v. McCloskey, 462, 466.
v. Merrifield, 293, 294, 311, 324.
v. Watkins, 659.
Bellamy *v.* Bellamy, 717, 726.
Bellows *v.* Wells 470.
Belmont Branch Bank *v.* Hoge, 687.
Belt *v.* Ferguson, 544.
v. Rauget, 437.
Belton *v.* Hatch, 71.
Benedict *v.* Huntington, 606, 607.
Benevolent Order, etc. *v.* Sanders, 614.
Benfield *v.* Solomons, 592.
Benford *v.* Schell, 458, 466.
Benjamin *v.* McElwaine-Richards Co., 495.
Benne *v.* Schnecko, 406, 407, 410, 536.
Bennet, *Ex parte*, 647.
Bennett *v.* Buchan, 674.

Bennett *v.* Chapin, 640.
v. Ellison, 557, 577, 584.
v. McGuire, 115, 116.
v. Minott, 167.
v. Stout, 140.
v. Wright, 334.
Benson *v.* Benson, 182.
v. Flower, 68.
Bentley *v.* Whittemore, 614.
Benton *v.* Allen, 255.
v. Snyder, 451.
v. Thornhill, 408.
Bentz *v.* Rockey, 19, 34.
Bergen *v.* Carman, 110, 121, 315.
v. Snedeker, 315.
Bergen *v.* Varrelmann, 548, 597, 603, 708.
Bernard *v.* Barney Myroleum Co., 126.
Berney Nat. Bank *v.* Guyon, 616.
Bernheim *v.* Beer, 38.
v. Dibrell, 502.
Bernheimer *v.* Rindskopf, 9, 10, 389.
Berry *v.* Riley, 556.
Berryman *v.* Sullivan, 153.
Bery *v.* Hall, 414.
Besson *v.* Eveland, 533, 534.
Best *v.* Staple, 246.
Beste *v.* Burger, 563, 579.
Bethel Steam Mill Co. *v.* Brown, 465.
Betts *v.* Carroll, 703.
v. Union Bank, 395.
Betz *v.* Snyder, 554.
Beuerlein *v.* O'Leary, 351, 501.
Beus *v.* Shaughnessy, 584, 586.
Beyer *v.* Thoeming, 88.
Bholen *v.* Cleveland, 614.
Bibb *v.* Baker, 411, 426.
v. Freeman, 18, 181.
Bice *v.* Rogers, 370.
Bickham *v.* Lake, 610, 611.
Bickler *v.* Kendall, 415.
Bicknell *v.* Mellett, 480, 685.
Biddinger *v.* Wiland, 692.
Bidlack *v.* Mason, 239.
Bierne *v.* Ray, 275, 413, 434, 435, 504.
Bigelow *v.* Andress, 159, 172.
v. Ayrault, 51, 58, 276.
v. Doolittle, 410, 411.
v. Stringer, 428, 568, 573, 609.
Billhofer *v.* Heubach, 150.
Billings *v.* Billings, 352.
v. Marsh, 87, 660.
v. Russell, 351, 352, 368, 373, 374, 375, 381.
v. Stewart, 115.
Billingsley *v.* Bunce, 609.
v. White, 458.
Billington *v.* Sweeting, 526.
Billson *v.* Crofts, 647.
Billups *v.* Sears, 113.
Bingham *v.* Weiderwax, 396.
Binks *v.* Rokeby, 219.
Binnie *v.* Walker, 176.
Bird *v.* Andrews, 431.
Bird *v.* Bolduc, 437.
Birdsall *v.* Russell, 672, 673, 674.
Birdsall W. & P. Mfg. Co. *v.* Schwarz, 613.
Birely's Ex'rs *v.* Staley, 114.
Birkbeck *v.* Ackroyd, 392.
Birmingham D. G. Co. *v.* Kelso, 480, 621, 622.
v. Roden, 480, 621, 622.
Birmingham Nat. Bank *v.* Steele, 302.
Bisbing *v.* Third Nat. Bank, 469.
Bishop *v.* American Preserver's Co., 724.
v. O'Connell, 454, 461.
v. Schneider, 668.
v. Stebbins, 410, 666, 703.
v. Warner, 619.
Bissell *v.* Hopkins, 443, 448.
Black *v.* Kuhlman, 374.
v. Nease, 194, 203.
Blackman *v.* Preston, 406, 419.
v. Wheaton, 37, 38, 451.
Blackstone Bank *v.* Davis, 639, 640, 642, 654.
Blaechinska *v.* Howard Mission, etc., 392.
Blair *v.* Finlay, 273.
v. Illinois Steel Co., 149.
v. Smith, 88, 698.
Blaisdell *v.* Cowell, 12.
Blake *v.* Blake, 223, 724.
v. Boisjoli, 34, 54, 188.
v. Freeman, 738.
v. Sawin, 231.
v. White, 501.
Blakeslee *v.* Rossman, 406, 452, 619, 630, 632, 633.
Blanc *v.* Paymaster Min. Co., 167, 254, 255.
Blanchard *v.* Mann, 485.
Bland *v.* Fleeman, 690.
Blandin, *In re*, 524.
Blankenship & B. Co. *v.* Willis, 494.
Blant *v.* Gabler, 370, 450, 459.
Bleecker *v.* Johnston, 432.
Bleiler *v.* Moore, 436.
Blenkinsopp *v.* Blenkinsopp, 100.
Blennerhassett *v.* Sherman, 52, 374, 375, 406, 412, 418, 419, 420, 422.
Blight *v.* Schenck, 592.
Blish *v.* Collins, 498.
Bliss *v.* Matteson, 535, 597, 711.
v. West, 379.
Block *v.* Darling, 727, 730, 731.
Blodgett *v.* Chaplin, 426.
Bloedorn *v.* Jewell, 88.
Blondheim *v.* Moore, 333.
Bloodgood *v.* Clark, 116, 331.
Bloom *v.* Moy, 180.
Blount *v.* Costen, 215.
Bloxam *v.* Elsee, 73.
Blue *v.* Penniston, 498.
Blum *v.* McBride, 26.
v. Simpson, 674, 690.

Blumer *v.* Bennett, 357, 478.
Bluthenthal *v.* Magnus, 193, 576.
Boardman *v.* Halliday, 579, 606, 611.
Boatmen's Sav. Bank *v.* Overall, 201.
Bobb *v.* Bobb, 251, 292.
Bobbitt *v.* Rodwell, 575.
Bockes *v.* Lansing, 245 315.
Boese *v.* King, 548.
Bogan *v.* Cleveland, 89.
Boggess *v.* Richards, 94, 532.
Boggs *v.* McCoy, 264.
v. Thompson, 90.
Bohannon *v.* Combs, 545.
Bohn *v.* Weeks, 537, 538.
Boice *v.* Conover, 670.
Boid *v.* Dean, 183, 244.
Boils *v.* Boils, 244.
Bolles *v.* State Trust Co., 641.
Bomar *v.* Means, 215, 254.
Bomberger *v.* Turner, 164.
Bonesteel *v.* Sullivan, 717, 734.
Bongard *v.* Block, 183, 244.
Bonsall *v.* Comly, 93.
Bonwit *v.* Heyman, 579.
Boog *v.* Boog, 183
Booher *v.* Worrill, 412, 416, 426.
Boone *v.* Chiles, 512, 669.
v. Hall, 229.
Boone County *v.* Burlington & M. R. R. Co., 509.
v. Keck, 259.
Boone County Nat. Bank *v.* Latimer, 84.
Booss *v.* Marion, 389, 562, 563, 609.
Booth *v.* Barnum, 674.
v. Bunce, 36, 109, 133, 498.
v. Carstarphen, 16, 352, 355.
v. Clark, 238.
v. Patrick, 228.
v. Powers, 485.
v. Warrington, 286, 513.
Boothby *v.* Brown, 454.
Boothroyd, *In re*, 92.
Borden *v.* Doughty, 341.
Borland *v.* Mayo, 415.
v. Walker, 340.
Born *v.* Shaw, 122, 437, 453.
Borst *v.* Corey, 541.
Boston Music Hall Assoc. *v.* Cory, 465.
Bostwick *v.* Blake, 419, 480, 481.
v. Burnett, 364.
v. Menck, 116, 234, 235, 236, 316.
Boswell *v.* Goodwin, 391.
Botsford *v.* Beers, 167.
Bott *v.* Smith, 60.
Boud *v.* Bronson, 462.
Bouquet *v.* Heyman, 194.
Bourne *v.* Stevenson, 228.
Bouslough *v.* Bouslough, 183, 224, 244.
Bowden *v.* Johnson, 234, 281, 303, 432.
v. Spellman, 491, 492.
Bowdish *v.* Page, 634.
Bowe *v.* Arnold, 160.
v. Campbell, 126.
Bowen *v.* Bramidge, 600.
Bowen *v.* Clark, 623.
v. Evans, 670.
v. Gent, 215.
v. Hoskins, 103.
Bowerman *v.* Bowerman, 487.
Bowers *v.* Keesecher, 288.
Bowery Bank Case, 615.
Bowes *v.* Foster, 717.
Bowlsby *v.* Tompkins, 245.
Bowman *v.* Houdlette, 434.
Bownes *v.* Weld, 142.
Bowser *v.* Cole, 618.
Box *v.* Goodbar, 548.
Boyce *v.* Grundy, 99.
Boyd, *Ex parte*, 116, 140, 281.
v. Beck, 671,
v. Boyd, 283, 285.
v. De La Montagnie, 728, 729, 730.
v. Dunlap, 341, 343.
v. Ellis, 414, 415.
v. Hoyt, 251, 260, 289, 291.
v. Jones, 496.
v. Olvey, 230.
v. Turpin, 374.
Boyer *v.* Berryman, 475.
Boyle *v.* Zacharie, 517.
Boynton *v.* Rawson, 298, 708.
v. Rees, 698.
v. Veazie, 465.
Bozman *v.* Draughan, 375.
Brace *v.* Berdan. 391.
Brackett *v.* Griswold, 119, 502.
v. Harvey, 229, 584, 619, 621, 623, 630, 631.
v Waite, 437.
v. Watkins, 93.
Bradbury *v.* Falmouth, 673.
Bradford *v.* Bradford, 670.
v. Rice, 518.
v. Tappan, 717.
Bradford's Appeal, 539.
Bradley *v.* Bischel, 564, 612.
v. Buford, 303, 410, 454.
v. Converse, 237.
v. Fuller, 118.
v. Obear, 45.
v. Peixoto, 641.
v. Ragsdale, 363, 374.
Bradner *v.* Holland, 252, 291.
Bradshaw *v.* Yates, 730.
Bradwell *v.* Weeks, 81.
Brady, Matter of, 518.
v. Briscoe, 375.
Braem *v.* Merchants' Nat. Bank, 120.
Bragg *v.* Gaynor, 58, 67, 106.
Brainerd *v.* Dunning, 567, 607, 610, 616.
Braman *v.* Johnson, 55.
v. Stiles, 656.
Bramhall *v.* Ferris, 65, 86, 640, 647, 654, 660, 661.
Branch Bank of Decatur *v.* Kinsey, 394.
Branch Bank of Montgomery *v.* Hodges, 312.

Brandies *v.* Cochrane, 75, 77, 78.
Brandon *v.* Aston, 647.
v. Robinson, 64, 65, 641, 646, 651, 654, 657, 663.
Brantom *v.* Griffits, 471.
Brashear *v.* West, 549, 571, 704.
Brasher *v.* Jamison, 347.
Brawn *v.* Keller, 445, 463.
Breathwit *v.* Bank of Fordyce, 488.
Breckenridge *v.* Taylor, 483.
Bree *v.* Holbech, 514.
Breeding *v.* Davis, 95.
Brenan *v.* Burke, 68.
Brennan *v.* Willson, 554, 562.
v. Wilson, 433.
Brett *v.* Carter, 625, 626, 627, 628.
Brewer *v.* Connell, 543.
Brewster *v.* Power, 108, 242.
Brice *v.* Lide, 483.
v. Myers, 37, 45, 437.
Brick *v.* Campbell, 56.
Brickett *v.* Downs, 387.
Bridge *v.* Eggleston, 489, 490.
v. Ward, 661.
Briggs *v.* Beach, 381.
v. Merrill, 322, 342, 722.
v. Mitchell, 355, 535.
v. Oliver, 139, 219.
v. Parkman, 626.
v. Spaulding, 262.
Brigham *v.* Luddington, 239.
v. Tillinghast, 585.
Brinckerhoff *v.* Bostwick, 144, 263.
Brine *v.* Insurance Co., 650.
Brinkerhoff *v.* Brown, 148, 172, 176, 178, 217, 260, 288, 521.
Brinks *v.* Heise, 363, 431.
Brinley *v.* Spring, 428.
Brisco *v.* Norris, 354, 534.
Briscoe *v.* Bronaugh, 20.
Bristol Co. Sav. Bank *v.* Keavy, 485, 503.
Brittain *v.* Crowther, 474, 497, 688.
Britton *v* Lorenz, 592.
Broadway Nat. Bank *v.* Adams, 65, 87, 644, 655, 658, 660, 742.
Brockenbrough *v.* Brockenbrough, 635.
Broderick's Will, 694.
Bronson *v.* Wilmington N. C. Life Ins. Co., 253.
Brooks *v.* Caughran, 244.
v. Hanford, 553.
v. Peck, 220.
v. Powers, 449.
v. Schwerin, 392.
v. Stone, 100, 148, 159.
v. Wilson, 147, 151, 311.
v. Wimer, 609.
Brookville Nat. Bank *v.* Kimble, 524.
Broughton *v.* Broughton, 734.
Brouwer *v.* Harbeck, 481, 482.
Brower *v.* Peabody, 669.
Brown, Matter of, 199.
v. Armstrong, 591.
v. Ashbough, 123.
Brown *v.* Bank of Miss., 172, 178.
v. Bates, 154, 218.
v. Bronson, 135, 543.
v. Brown, 155, 225.
v. Campbell, 153, 515.
v. Chase, 336.
v. Chubb, 108, 164, 313, 343.
v. County of Buena Vista, 511.
v. Dean, 9.
v. Farmers' & M. Banking Co., 232.
v. Fitz, 31.
v. Gilmore, 235.
v. Guthrie, 548, 631.
v. Haven, 288.
v. Heathcote, 230.
v. Herr, 479.
v. John V. Farwell Co., 297.
v. J. Wayland Kimball Co., 141.
v. Knox, 577.
v. Long, 141.
v. Nichols, 115, 129, 130, 708.
v. O'Neal, 454.
v. Platt, 634.
v. Rawlings, 387.
v. Reilly, 737.
v. Ricketts, 215.
v. Smart, 517.
v. Snell, 109, 133.
v. Spivey, 540.
v. Texas C. H. Co., 414.
v. Volkening, 442.
v. Williamson, 65, 650, 662.
v. Work, 618.
Brown Chemical Co. *v.* Meyer, 72.
Browne *v.* Hernsheim, 141, 214.
Brownell *v.* Curtis, 231, 304.
v. Stoddard, 526.
Browning *v.* Bettis, 68, 116.
v. Hart, 231.
v. Morris, 729.
Brownsword *v.* Edwards, 29.
Bruen *v.* Dunn, 669.
Bruggerman *v.* Hoerr, 184.
Brummel *v.* Stockton, 454.
Brundred *v.* Patterson Machine Co., 484.
Bruner *v.* Brown, 22, 312.
Bruns *v.* Stewart Mfg. Co., 339.
Brunswick *v.* McClay, 463.
Bryan *v.* Knickerbacker, 660, 661.
v. Spruill, 275.
Bryans *v.* Taylor, 67.
Bryant *v.* Bryant, 225.
v. Kelton, 20.
v. Simoneau, 8, 15.
v. Young, 424.
Bryce *v.* Foot, 589.
Buchanan *v.* Marsh, 100, 152.
v. Smith, 481.
Buck *v.* Ross, 237.
v. Sherman, 8.
v. Voreis, 113, 114, 375, 473, 506, 698.

Buckingham *v.* Walker, 215, 218.
Buckland *v.* Gallup, 561.
Buckley *v.* Duff, 193.
v. Dunn, 95.
v. Wells, 532, 533.
v. Wheeler, 92.
Buckner *v.* Calcote, 284, 285.
v. Stine, 482.
Budd *v.* Atkinson, 701.
Buell *v.* Rope, 24, 413, 557, 611.
Buffington *v.* Harvey, 253, 254.
Buffum *v.* Jones, 434.
Buford *v.* Keokuk N. L. Packet Co., 214.
v. Shannon, 396.
Bugbee *v.* Sargent, 288.
Buhl Iron Works *v.* Teuton, 451, 463.
Bulger *v.* Rosa, 369, 389, 390, 460.
Bulkley *v.* Buffington, 426.
Bull *v.* Bray, 377.
v. Griswold, 470.
Bullene *v.* Smith, 27.
Bullis *v.* Montgomery, 491.
Bullitt *v.* Taylor, 153, 154, 717.
Bullock *v.* Narrott, 15.
v. Williams, 444, 618.
Bulmer *v.* Hunter, 536, 537.
Bumpas *v.* Dotson, 434, 435.
Bunn *v.* Ahl, 28, 352, 375.
v. Bunn, 309,
Bunnell *v.* Gardner, 85, 87, 639, 650.
Burbank *v.* Wiley, 493.
Burchinell *v.* Weinberger, 458.
Burdell *v.* Burdell, 335.
Burdick *v.* Gill, 206, 366, 372, 413.
v. Jackson, 714.
v. Post, 26.
Burdsall *v.* Waggoner, 278.
Burford *v.* Steele, 272.
Burgert *v.* Borchert, 7, 25, 26, 354, 454.
Burgett *v.* Burgett, 214.
Burke *v.* Adams, 214.
v. Burke, 432.
v. Smith, 507.
Burkey *v.* Self, 437.
Burlen *v.* Shannon, 367.
Burley *v.* Hartson, 602.
Burns *v.* Cade, 68.
Burnett *v.* Gould, 140, 155, 171.
Burnham *v.* Brennan, 24, 450, 490, 674.
v. McMichael, 523.
Burns *v.* Morse, 146.
Burr *v.* Beers, 81, 82.
v. Clement, 23, 593, 704.
Burras *v.* Looker, 310.
Burrows *v.* Purple, 183, 222.
Burt *v.* Keyes, 113, 136, 137, 220, 272, 709.
v. Panjaud, 469.
v. Timmons, 60, 198.
Burtis *v.* Dickinson, 103.
Burton *v.* Boyd, 436.
v. Farinholt, 51, 58, 223.
v. Gibson, 536.
Burton *v.* Platter, 193, 199, 477.
Burtus *v.* Tisdall, 3, 281.
Burwell *v.* Fauber, 680.
Busey *v.* Smith, 740.
Bush *v.* Collins, 375.
v. Roberts, 488, 489, 681, 683, 686, 691.
v. Rogan, 717.
Bushnell *v.* Bushnell, 224.
v. Eastman, 121.
Buswell *v.* Lincks, 176, 178, 293, 329.
Butcher *v.* Harrison, 229.
v. Stultz, 423.
Butler *v.* Butler, 544.
v. Hildreth, 232, 723.
v. Howell, 459.
v. Moore, 44.
v. Spann, 215, 288.
v. Watkins, 498.
v. Wendell, 551.
Butterfield *v.* Stanton, 528.
Butterworth, *In re*, 203.
Button *v.* Rathbone, 141, 143, 619.
Butts *v.* Peacock, 406.
Byrne *v.* Becker, 357, 558.
Byrnes *v.* Clarke, 392.
v. Lewis, 306, 307.
v. Stilwell, 643.
Byrod's Appeal, 214.

Cadbury *v.* Nolen, 466.
Cadogan *v.* Kennett, 34, 37, 38, 42, 46, 52, 363, 456.
Cadwallader *v.* West, 730.
Cady *v.* Leonard, 275.
v. Whaling, 168.
Cahill *v.* Bigelow, 387.
Cahn *v.* Person, 109.
Cahoon *v.* Marshall, 492.
Cake *v.* Pottsville Bank, 370.
Caldwell *v.* Montgomery, 68.
Callan *v.* Statham, 416, 417.
Callanan *v.* Shaw, 336.
Callis *v.* Waddy, 514,
Cambridge Valley Bank *v.* Delano, 672, 675, 694.
Camden *v.* Stuart, 238.
Camp *v.* Thompson, 451.
Campau *v.* Chene, 640.
Campbell *v.* City of Haverhill, 73, 74.
v. Colorado Coal & I. Co., 704, 705,
v. Dearborn, 736.
v. First Nat. Bank, 725.
v. Fish, 66.
v. Foster, 86, 638, 650.
v. Genet, 62, 115.
v. Hamilton, 463.
v. James, 74.
v. Jones, 254, 255.
v. Mackay, 287.
v. Smith, 81.
v. Woodworth, 567, 589, 607.
Campion *v.* Cotton, 383.

Canal & C. Sts. R. R. Co. *v.* Hart, 116.
Candee *v.* Lord, 146, 194, 475.
Cannon *v.* Norton, 304.
v. Young, 485.
Cansler *v.* Sallis, 181.
Canton *v.* Dorchester, 720.
Cantrell, *In re*, 619, 623.
Capital City Bank *v.* Parent, 151
v. Wakefield, 255.
Capron *v.* Porter, 444, 452.
Carbiener *v.* Montgomery, 196.
Card *v.* Walbridge, 229.
Carey *v.* Giles, 46.
Carey-Halliday Lumber Co. *v.* Cain, 423.
Cargill *v.* Kountze, 281.
Carhart *v.* Harshaw, 92.
Caring *v.* Richmond, 631.
Carl *v.* Smith, 93, 437.
Carleton *v.* Banks, 315.
Carlisle *v.* Tindall, 107, 176.
Carll *v.* Emery, 719, 723.
Carnahan *v.* McCord, 666.
v. Wood, 492.
Carney *v.* Carney, 492.
Carpenter *v.* Buller, 608.
v. Carpenter, 206.
v. McClure, 196.
v. Muren, 407, 489.
v. Osborn, 270.
v. Roe, 191, 192, 199, 208, 361, 534.
v. Tatro, 529.
v. Underwood, 573.
Carr *v.* Breese, 191, 196, 199, 200, 207, 208.
v. Briggs, 354.
v. Carr, 423, 736.
v. Effinger, 640.
v. Gale, 231.
v. Hilton, 236, 284, 514.
v. Van Hoesen, 158, 159, 241.
Carroll *v.* Aldrich, 216.
v. Else, 575.
v. Hayward, 681, 685.
Carson *v.* Stevens, 523.
Carter *v.* Bennett, 146, 476.
v. Carter, 647.
v. Castleberry, 109.
v. Grimshaw, 206, 358, 361, 376.
v. Gunnels, 15.
v. Kerr, 288.
v. Willard, 449, 464.
Cartwright *v* Phœnix, 466.
Cartwright's Case, 353.
Carver *v.* Barker, 204, 421.
v. Peck, 73.
Carver Gin & M. Co. *v.* Bannon, 388.
Cary *v.* Hotailing, 501.
Casanova *v.* Aregno, 520.
Case *v.* Beauregard, 100, 102, 139, 140, 141, 142, 145, 166, 178, 388, 389.
v. Gerrish, 712,
Case *v.* Phelps, 135, 199, 203.
Case Mfg. Co. *v.* Perkins, 525.
Casey *v.* Janes, 588.
Casey's Trust, *In re*, 647.
Cason *v.* Murray, 556.
Cassaday *v.* Anderson, 170.
Cassell *v.* Williams, 93.
Cassidy *v.* Meacham, 271.
Castle *v.* Bader, 172.
v. Bullard, 400, 431, 486, 497, 498.
v. Lewis, 160, 175,
v. Palmer, 31.
Caswall, *Ex parte*, 76.
Caswell *v.* Bunch, 740.
v. Hill, 60.
Catchings *v.* Manlove, 150.
Cates *v.* Allen, 100, 101, 136, 137, 139.
Cathcart *v.* Robinson, 47.
Catlin *v.* Currier, 620, 623.
v. Doughty, 115.
v. Eagle Bank, 615.
v. Wilcox S. P. Co., 615.
Caton *v.* Mosely, 590.
Catt *v.* Wm. Knabe & Co. Mfg. Co., 583.
Caulfield *v.* Maguire, 647.
Cavanagh *v.* Morrow, 547.
Cavender *v*, Smith, 414.
Cecil Bank *v.* Snively, 108.
Cedar Rapids Ins. Co. *v.* Butler, 507.
Central Bank of Washington *v.* Hume, 56, 57, 541, 542.
Central Nat. Bank *v.* Seligman, 597, 601, 602, 603, 704.
Central R. R. & B. Co. *v.* Brunswick & W. R. R. Co., 553.
Central Trust Co. *v.* Continental Iron Works, 391.
Cerf *v.* Wallace, 233.
Chadbourn *v.* Williams, 530, 534.
Chadbourne *v.* Coe, 139.
Chadwick *v.* Fonner, 490.
Chafee *v.* Blatchford, 583.
v. Fourth Nat. Bank, 123, 551, 614.
Chaffee *v.* Fort, 561.
Chalfont *v.* Grant, 84.
Chamberlain *v.* O'Brien, 233, 698.
v. Stern, 459.
v. Twyne, 412.
Chamberlin *v.* Jones, 323.
Chambers *v.* Sallie, 93, 540.
v. Smith, 610.
v. Spencer, 80, 437.
Chandler *v.* Hollingsworth, 544.
v. Parsons, 381.
v. Powers, 506.
v. Von Roeder, 110.
Chapin *v.* Jenkins, 232.
v. Pease, 717, 720, 724.
v. Thompson, 506, 551.
Chapman *v.* Banker & T. Pub. Co., 54, 215.

Chapman *v.* Emery, 670.
v. Sargent, 619.
Charlton *v.* Low, 670.
Charter *v.* Stevens, 219.
Charter Oak Life Ins. Co. *v.* Brant, 541.
Chase *v.* Chase, 183, 244, 489, 526.
v. Flagg, 517.
v. Horton, 490.
v. Ralston, 466.
v. Redding, 291.
v. Searles, 104, 259, 289.
v. Walters, 357.
Chautauque Co. Bank *v.* Risley, 66, 161, 268, 313, 315, 316, 317, 335.
v. White, 317.
Cheatham *v.* Hawkins, 22, 460, 609, 619, 626.
Cheever *v.* Rutland & B. R. R. Co., 336.
Chenery *v.* Palmer, 424, 632.
Chester *v.* Bower, 464.
Chesterfield *v.* Janssen, 28, 98.
Chew *v.* Ellingwood, 615.
Chewett *v.* Moran, 220, 264
Chicago Bridge Co. *v.* Anglo-Amer. Pack. Co., 153, 167.
Chicago & A. Oil & M. Co. *v.* U. S. Petroleum Co., 336.
Chickering *v.* Hatch, 424.
v. White, 458.
Child *v.* Brace, 148, 179.
Childs *v.* Connor, 208.
v. Hurd, 394.
v. Kendall, 57.
Chillingworth *v.* Eastern Tinware Co., 474.
Chipman *v.* McClellan, 481.
v. Peabody, 124.
Chittenden *v.* Brewster, 155.
Chophard *v.* Bayard, 619.
Choteau *v.* Jones, 223.
Christian *v.* Atlantic & N. C. R. R. Co., 215, 249.
v. Greenwood, 323.
Christie *v.* Bridgman, 416, 506.
Christy *v.* Scott, 469.
Chubb *v.* Upton, 237.
Church *v.* Chapin, 437, 476.
v. Church, 697.
v. Muir, 720, 726.
Churchill *v.* Hill, 610.
v. Wells, 209, 210.
Cipperly *v.* Rhodes, 91.
Citizens' Bank *v.* Bholen, 368.
v. Williams, 389, 550, 704.
Citizens' Nat. Bank *v.* Hodges, 272, 426.
City Bank *v.* Blackmore, 84.
v. Smisson, 94.
v. Westbury, 631.
City Nat. Bank *v.* Bridgers, 434, 436.
v. Goodrich, 619.
v. Hamilton, 187, 204, 206, 366, 376, 491, 533, 534.
City of Lexington *v.* Butler, 263.
City of Newark *v.* Funk, 58, 67.
Claflin *v.* Ambrose, 529.
v. Ballance, 492.
v. Claflin, 658.
v. Frenkel, 123.
v. Gordon, 298, 709.
v. Lenheim, 672.
v. Lisso, 317.
v. McDermott, 122, 140, 153, 154.
v. Mess, 197.
v. Ostrom, 82.
v. Rosenberg, 454.
v. Smith, 307.
Clagett *v.* Gibson, 244.
Clan Ranald *v.* Wyckoff, 75.
Clapp *v.* Dittman, 594.
v. Ely, 408.
v. Ingraham, 75.
v. Leatherbee, 244.
v. Smith, 67.
Clark *v.* Andrews, 710, 713.
v. Anthony, 146, 476.
v. Beecher, 326, 545.
v. Bever, 131, 237.
v. Chamberlain, 358, 361.
v. Clark, 521.
v. Clough, 224.
v. Depew, 188, 426.
v. Dickinson, 560.
v. Douglass, 37, 146, 408, 476.
v. Finlon, 423.
v. Foxcroft, 146, 242.
v. French, 196.
v. Gibson, 386.
v. Hougham, 514.
v. Howard, 81.
v. Hyman, 625, 628.
v. Killian, 7, 206, 208.
v. Krause, 294, 329, 346, 414, 432, 435, 468, 474, 475, 502, 542, 704.
v. Lee, 461.
v. Morrell, 365.
v. Robbins, 574.
v. Stanton, 591.
v. Van Riemsdyk, 432.
v. Wilson, 491.
v. Wise, 410, 411.
Clarke *v.* Boorman's Ex'rs, 511.
v. Laird, 139.
v. Rist, 298.
v. White, 308, 501.
Clarkson *v.* De Peyster, 149, 157, 176, 178, 218.
Clary *v.* Frayer, 453.
Clason *v.* Morris, 304.
Clay *v.* McCally, 379.
v. Smith, 185.
v. Walter, 383.
v. Williams, 726.
Clayton *v.* Brown, 437.
v. Johnson, 577.
Cleghorn *v.* Sayre, 595.

Clemens *v.* Brillhart, 11.
Clement *v.* Cozart, 181, 187, 190, 196.
Clements *v.* Moore, 32, 37, 38, 44, 52, 84, 308, 310, 320, 321, 341, 345, 346, 357, 432, 479, 490, 681, 689, 692.
Cleveland *v.* Chambliss, 166.
Clews *v.* Kehr, 489.
Clift *v.* Moses, 345, 346.
Clinton Hill L. & M. Co. *v.* Strieby, 425.
Clough *v.* Thompson, 231.
Clow *v.* Woods, 453, 463, 466.
Clute *v.* Fitch, 467.
v. Newkirk, 468.
Coates *v.* Day, 264.
v. Gerlach, 406, 419.
Coats *v.* Donnell, 615.
Cobb *v.* Day, 11.
Coburn *v.* Pickering, 24, 446, 449, 619.
v. Proctor, 685, 686.
Cochran *v.* Wiechers, 268.
Cockell *v.* Taylor, 247.
Cocks *v.* Varney, 160.
Cockshott *v.* Bennett, 711,
Coe *v.* Whitbeck, 150.
Coffey *v.* Norwood, 264.
Coffin *v.* Day, 390.
v. Douglass, 564, 607.
Coflin *v.* Kelling, 551.
Cogburn *v.* Pollock, 332.
Coghlan *v.* South Carolina R. R. Co., 123.
Cohen *v.* Knox, 382, 530.
v. Meyers, 103, 332.
v. N. Y. Mutual Life Ins. Co., 166.
v. Wolff, 217.
Cohn, Matter of, 233, 591, 593.
Cohn *v.* Goldman, 273.
v. Ward, 394, 592, 612.
Coiron *v.* Millaudon, 343, 346.
Colbern *v.* Robinson, 425.
Colby *v.* Peabody, 69.
Cole *v.* Malcolm, 349.
v. McGlathry, 285.
v. Millerton Iron Co., 237, 268, 359, 416, 616.
v. Tyler, 18, 161, 192, 313, 314, 317, 335.
v. Varner, 194.
v. White, 445, 456, 457.
v. Yancey, 407.
Coleman, *In re*, 646.
v. Burr, 13, 16, 18, 19, 23, 355, 369, 377, 392, 568, 584, 695.
Coley *v.* Coley, 392, 407, 434.
Colgan *v.* Jones, 341.
Colie *v.* Jamison, 230.
Collier *v.* Davis, 570.
v. Hanna, 363, 389.
Collingridge *v.* Paxton, 60.
Collingsworth *v.* Bell, 618.
Collins, *In re*, 143. 229.
v. Carlile, 391.
Collins *v.* Myers, 451, 619, 625.
v. Nelson, 518.
v. Shaffer, 132.
v. Taggart, 468.
v. Thompson, 303.
Collinson *v.* Jackson, 146, 254, 295, 316, 387, 476.
Collumb *v.* Read, 62, 321, 666.
Colman *v.* Dixon, 99.
Colombine *v.* Penhall, 536, 537.
Columbia Bank *v.* Jacobs, 424.
Columbus Watch Co. *v.* Hodenpyl, 147, 150, 476.
Combs *v.* Watson, 164.
Comegys *v.* Vasse, 230.
Comer *v.* Allen, 382.
Comey *v.* Pickering, 666.
Comly *v.* Fisher, 465.
Commercial Bank *v.* Meach, 150.
Commercial Nat. Bank *v.* Nebraska State Bank, 548.
Commonwealth *v.* Duffield, 76, 664.
v. Evans, 367.
Commonwealth Ins. & T. Co. *v.* Brown, 525.
Comstock *v.* Rayford, 428, 433.
Comyns *v.* Riker, 719.
Conard *v.* Adriatic Ins. Co., 391.
Conde *v.* Hall, 340.
Cone *v.* Cross, 340.
v. Hamilton, 126.
Confer *v.* McNeal, 497.
Conger *v.* Lowe, 644.
Conkling *v.* Shelley, 630.
Conly *v.* Friedman, 458.
Connah *v.* Sedgwick, 593.
Conn. Mut. L. I. Co. *v.* Smith, 414, 432, 515, 692.
Conover *v.* Beckett, 481.
Conro *v.* Port Henry Iron Co., 130, 217, 220.
Conrow *v.* Little, 547.
Consolidated T. L. Co. *v.* Kansas City Varnish Co., 167.
Constable *v.* Hardenbergh, 307, 610.
Constant *v.* University of Rochester, 12, 357.
Continental Trust Co. *v.* Wetmore, 86.
Converse *v.* Hartley, 210.
v. Sickles. 84, 561.
Conway, *Ex parte*, 7, 9, 615.
v. Edwards, 452, 466.
Cook *v.* Bennett, 619.
v. Holbrook, 538.
v. Hopper, 474.
v. Johnson, 111, 181, 187.
v. Ligon, 185.
v. Lindsey, 284.
v. Lowry, 85.
v. Mason, 487.
v. Moffat, 516.
v. Scott, 93.
v. Swan, 133.
v. Tibbals, 271, 279.

Cook *v.* Tullis, 230, 378.
Cooke *v.* Cooke, 51, 183, 221, 357, 478, 498.
Coolidge *v.* Heneky, 689.
v. Melvin, 361, 480, 619, 629, 634.
Cooney *v.* Cooney, 89, 116, 235.
Cooper *v.* Davison, 413,
v. Galbraith, 12.
v. Gunn, 73.
v. Lee, 513.
v. Reynolds, 475.
v. Wyatt, 647.
Cooper's Estate, 663.
Copis *v.* Middleton, 11, 190, 258, 380.
Corbitt *v.* Cutcheon, 508.
Corby *v.* Bean, 113.
Corder *v.* Williams, 244.
Cordes *v.* Straszer, 406.
Corey *v.* Greene, 108.
Corlett *v.* Radcliffe, 42, 417, 419.
Cornell, Matter of, 232, 547, 553, 561, 588.
v. Radway, 6, 97, 176, 255, 264, 265.
Corning *v.* Fowler, 60.
v. McCullough, 269.
v. White, 129, 148, 709.
Cornish *v.* Dews, 564.
Cornwell *v.* Lee, 288.
Cortland Co. *v.* Herkimer Co., 496.
Cosby *v.* Ferguson, 660.
Coster *v.* Mayor, etc., 81,
Cottingham, Succession of, 31.
Cotton *v.* Hart, 689.
Cottrell *v.* Moody, 103.
Cottrell's Appeal, 348.
Coulter *v.* Lumpkin, 576.
County of Morgan *v.* Allen, 131.
County of Warren *v.* Marcy, 298.
Coursey *v.* Morton, 18, 355, 392, 553, 574, 609, 611.
Courtenay *v.* Wright, 542.
Couse *v.* Columbia Powder Mfg. Co., 699.
Coutts *v.* Acworth, 77.
Covanhovan *v.* Hart, 27, 363, 364.
Covell *v.* Chadwick, 72.
Cowee *v.* Cornell, 7.
Cowell *v.* Springs Co., 640, 643.
Cowling *v.* Estes, 398, 399, 433, 689.
Cox *v.* Cox, 401.
v. Einspahr, 499.
v. Fraley, 426.
v. Gruver, 96, 97.
v. Miller, 363.
v. Peoria Mfg. Co., 389.
v. Shropshire, 94.
v. Wilder, 31, 92, 545.
Coyne *v.* Sayre, 530.
v. Weaver, 490, 567, 590, 607.
Craft *v.* Bloom, 609.
v. Wilcox, 193, 289.
Cragie *v.* Hadley, 84.
Cragin *v.* Carmichael, 168.
Craig *v.* Fowler, 402.
v. Hone, 661.
Craig's Appeal, 469.
Cram *v.* Mitchell, 551, 592, 593.
Cramer *v.* Blood, 320.
v. Reford, 203, 539.
Crandall *v.* Brown, 457, 632.
v. Lincoln, 131, 237.
Crane *v.* Bunnell, 113.
v. Stickles, 381.
Cranson *v.* Smith, 125.
Cranstown *v.* Johnston, 304.
Crapo *v.* Kelly, 615.
Crapster *v.* Williams, 433.
Crary *v.* Goodman, 31.
Craven *v.* Brady, 647.
Craver *v.* Miller, 415.
Crawford *v.* Andrews, 483.
v. Beard, 340.
v. Berry, 484.
v. Davis, 446.
v. Kirksey, 7, 9, 187, 293, 304, 367, 416, 426, 430, 448, 451, 703.
v. Lehr, 224, 717.
v. Logan, 208, 537.
v. Lundy, 640.
v. Neal, 462, 480.
v. Ross, 338.
Credland *v.* Potter, 31.
Cresswell *v.* McCaig, 387.
Cribb *v.* Morse, 389.
Crim *v.* Kessing, 476.
v. Walker, 140, 153, 154.
Crippen *v.* Hudson, 148, 149, 150, 157, 171, 177, 271.
Crocker *v.* Bellangee, 736.
v. Craig, 228.
Crockett *v.* Phinney, 341.
Croft *v.* Arthur, 536.
v. Townsend, 4.
Crompton *v.* Anthony, 141, 166.
Crook *v.* Jadis, 687.
v. Rindskopf, 8, 47, 389, 500, 562, 605, 606, 609.
Crooke *v.* County of Kings, 77, 78, 663.
Crooks *v.* Stuart, 445.
Cropsey *v.* McKinney, 140.
Crosby *v.* Baker, 94.
v. Hillyer, 554.
v. Taylor, 350.
Cross *v.* Brown, 224, 227.
v. Truesdale, 81.
Crouse *v.* Frothingham, 66, 67, 225, 229, 232, 318, 480.
Crow *v.* Andrews, 9.
v. Beardsley, 24, 26.
v. Coons, 517.
v. Red River Co. Bank, 630.
Crowinshield *v.* Kittridge, 707, 722.
Crumbaugh *v.* Kugler, 437.
Crummen *v.* Bennet, 31, 90.
Cubbedge *v.* Adams, 100.
Cumming *v.* Fryer, 46.

Cumming *v.* Mayor of Brooklyn, 328.
Cummings *v.* McCullough, 374.
Cummins *v.* Griggs, 454.
v. Hurlbutt, 13.
Cunningham *v.* Dwyer, 7, 395.
v. Freeborn, 23, 308, 369, 568 584, 616.
v. Norton, 19, 348, 485.
Curd *v.* Lackland, 105.
Curran *v.* Olmstead, 273.
Currie *v.* Hart, 592.
v. Misa, 373.
Currier *v.* Sutherland, 31, 93.
Curry *v.* Lloyd, 114,
v. McCauley, 421.
Curtain *v.* Talley, 577.
Curtin *v.* Isaacsen, 448, 451.
Curtis *v.* Fox, 192, 328,
v. Leavitt, 37, 205, 278, 359, 482, 576.
v. Moore, 497.
v. Valiton, 357.
v. Wortsman, 526.
Cushwa *v.* Cushwa, 726 734.
Cutcheon *v.* Corbitt, 321.
Cutler *v.* Tuttle, 720.
Cutter *v.* Copeland, 457, 459.
v. Griswold, 108.
v. Hume, 601, 612, 704.
v. Pollock, 703.
Cutting, *Ex parte*, 476.
v. Cutting, 76, 77, 85, 650, 663, 742.
v. Jackson, 449.
Cuyler *v.* Ensworth, 223.
v. McCartney, 490, 495, 496, 557, 564, 591.

Daggett B. & H. Co. *v.* Bulfer, 392.
Dahlman *v.* Jacobs, 140.
Dale *v.* Roosevelt, 738.
Dalglish *v.* McCarthy, 365.
Dalpay, Matter of, 123.
Dalton *v.* Currier, 600.
v. Stiles, 708.
Damon *v.* Bryant, 520.
Dana *v.* Haskell, 177.
Danbury *v.* Robinson, 667.
Danby *v.* Sharp, 431, 439, 486.
Dance *v.* Seaman, 25.
Danforth *v.* Beattie, 31,
v. Dart, 674, 687.
Daniel *v.* Vaccaro, 8.
Daniels *v.* Eldredge, 655.
v. McGinnis, 495.
Danjean *v.* Blacketer, 428.
Dannmeyer *v.* Coleman, 694.
Danzey *v.* Smith, 227.
Darby *v.* Gilligan, 389.
Dargan *v* Waring, 111, 176.
Darling *v.* Rogers, 19, 610.
Darvill *v.* Terry, 365.
Daugherty *v.* Daugherty, 410.
Davenport *v.* Cummings, 26.
Davenport *v.* Foulke, 619.
v. Kelly, 115, 298.
v. Wright, 407, 409.
David *v.* Birchard, 688, 692, 706.
Davidson *v.* Burke, 129, 381.
v. Graves, 384, 536.
v. Jones, 395.
v. Little, 415.
Davis *v.* Bigler, 444, 453, 462.
v. Bonney, 708.
v. Briggs, 391.
v. Bruns, 153.
v. Clayton, 304.
v. Cornue, 475.
v. Davis, 543.
v. Dean, 153.
v. Fredericks, 532.
v. Garrison, 357.
v. Getchell, 414.
v. Graves, 320, 725.
v. Howard, 387, 604.
v. Leopold, 321, 340, 342, 707.
v. McKinney, 107, 187.
v. Ransom, 619.
v. Schwartz, 49, 52, 375, 402, 406, 417, 425, 435, 443, 593, 740.
v. Sharron, 67.
v. Stern, 489.
v. Swanson, 223, 717, 724.
v. Turner, 37, 443, 445, 446, 449, 451, 455, 456, 459.
Davis S. M. Co. *v.* Dunbar, 405.
Davy *v.* Garrett, 275.
Dawes *v.* Cope, 453.
Dawley *v.* Brown, 32, 138, 317.
Dawson *v.* Coffey, 140.
v. Niver, 414.
Day *v.* Cole, 416.
v. Cooley, 51, 194, 196, 198, 209, 229, 231.
v. Goodbar, 418, 421.
v. Washburn, 710.
Dayton *v.* Borst, 237, 240.
Dean, Matter of, 561, 588.
v. Negley, 29, 386.
v. Skinner, 480.
De Armond *v.* De Armond, 543.
De Berry *v.* Wheeler, 523.
De Camp *v.* Alward, 615.
v. Dempsey, 661.
Decker *v.* Decker, 107, 146, 147.
Deering *v.* Tucker, 640.
v. Washburn, 454.
Deerfield *v.* Nims, 253.
De Farges *v.* Ryland, 394. 504, 537, 538.
De Forest *v.* Bacon, 580.
Degnan *v.* Farr, 524.
Degraw *v.* Clason, 87.
Dehorty *v.* Jones, 640.
Deitrich *v.* Hutchinson, 704.
Delany *v.* Mansfield, 336.
Delashmut *v.* Tran, 92.
Delaware *v.* Ensign, 415, 417, 632.

Del Valle *v.* Hyland, 387.
De Mares *v.* Gilpin, 666, 690.
Demarest *v.* House, 357.
v. Terhune, 434, 436.
Demeritt *v.* Miles, 486.
Dempsey *v.* Gardner, 449, 463.
Denike *v* N. Y. R. Lime & C. Co., 426.
Denman *v.* Campbell, 483.
Dennick *v.* Railroad Co., 269.
Dennis *v.* Arnold, 127.
Dennis' Case, 367.
Denny *v.* Bennett, 19, 88.
Densmore *v.* Tomer, 13, 452.
Dent *v.* Ferguson, 416, 480, 716, 717, 720, 722, 723, 724.
Denton *v.* Ontario Co. Nat. Bank, 357.
Department of Parks, Matter of, 32.
De Peyster *v.* Michael, 641.
Deposit Nat. Bank *v.* Wickham, 708.
Derby *v.* Weyrich, 90, 92, 574.
De Ruyter *v.* St. Peter's Church, 615.
Des Brisay *v.* Hogan, 145.
Deshon *v.* Wood 541,
Des Moines & M. R. Co. *v.* Alley, 279.
Detroit, etc., Rolling Mills *v.* Ledwidge, 140.
Deutsch *v.* Reilly, 160.
Devoe *v.* Brandt, 699.
Devol *v.* McIntosh, 81, 82.
Devoll *v.* Brownell, 309.
Devonshire *v.* Gauthreaux, 451.
De Votie *v.* McGerr, 301, 534.
De Walt *v.* Doran, 495.
Dewey *v.* Kelton, 83.
v. Long, 107, 188.
v. Moyer, 146, 195, 215, 218, 229, 230, 495.
Dewing *v.* Durant, 127.
De Witt *v.* Van Sickle, 680, 689, 692.
De Wolf *v.* Sprague Mfg. Co., 288, 291, 557, 581, 587.
Dexter *v.* McAfee, 7, 10, 274.
v. Smith, 363.
Dick *v.* Hamilton, 61, 200, 301.
v. Lindsay, 470.
v. Pitchford, 64, 657, 659.
Dickerson *v.* Benham, 604.
v. Tillinghast, 671.
Dickinson *v.* Bankers' Loan, etc., Co., 273, 274.
v. Burrell, 247.
Dickson *v.* McLarney, 419.
Diefendorf *v.* Spraker, 214.
Dietz *v.* Atwood, 60.
Diffenderfer *v.* Fisher, 93.
Diggs *v.* McCullough, 395, 527, 534.
Dillman *v.* Nadelhoffer, 172, 176, 527.
Dillon *v.* Anderson, 370.
Dilworth *v.* Curts, 323.
Dimmock *v.* Bixby, 104, 289.
Dimock *v.* Revere Copper Co., 518.
Dimon *v.* Delmonico, 553.
v. Hazard, 389, 564, 589.
Ditman *v.* Raule, 193, 197, 453.
Divver *v.* McLaughlin, 407.
Dix *v.* Briggs, 150.
v. Van Wyck, 247.
Dixon *v.* Hill, 668.
Doak *v.* Brubaker, 452, 464, 465.
Dobson *v.* Pearce, 476.
v. Snider, 406, 418, 420, 421.
Dockray *v.* Mason, 111, 255, 264.
Dodd *v.* Adams, 63.
v. Gaines, 688.
v. Levy, 140, 143, 168.
v. McCraw, 368, 437.
Dodge *v.* Freedman's Sav. & Trust Co., 490, 733.
v. Goodell, 495.
v. Griswold, 160.
v. Pyrolusite Manganese Co., 332.
v. Wellman, 423.
Doe (*d.* Grimsby) *v.* Ball, 229.
(*d.* Abbott) *v.* Hurd, 717.
(*d.* McIntyre) *v.* McIntyre, 640.
(*d.* Davis) *v.* McKinney, 107, 187.
v. Routledge, 380.
(*d.* Bland) *v.* Smith, 520.
v. West, 469.
Doebler's Appeal, 640.
Doerfler *v.* Schmidt, 272.
Doherty *v.* Holliday, 217, 709.
Dolin *v.* Gardner, 394.
Dollard *v.* Taylor, 116, 331.
Dominguez *v.* Dominguez, 507.
Donalds *v.* Plumb, 659.
Donaldson *v.* Farwell, 104, 230.
Donley *v.* McKiernan, 270, 474.
Donnebaum *v.* Tinsley, 376.
Donnelly *v.* West, 236.
Donovan *v.* Dunning, 25, 33, 104, 259, 634.
v. Finn, 41, 68.
Doran *v.* Simpson, 156.
Dorr *v.* Beck, 416, 666.
Dorsett *v.* Dorsett, 647.
Dorsey *v.* Smithson, 232.
Dorsey Machine Co. *v.* McCaffrey, 285, 286.
Dortic *v.* Dugas, 100.
Dosche *v.* Nette, 199.
Doucet *v.* Richardson, 449.
Dougherty *v.* Cooper, 482, 667.
Doughten *v.* Gray, 415.
Doughty *v.* Miller, 717.
Douglass, *In re*, 390.
v. Huston, 709.
Douglass Merch. Co. *v.* Laird, 402, 612.
Douthitt *v.* Appelgate, 415.
Douw *v.* Shelden, 55.
Dow *v.* Berry, 64.
v. Platner, 62, 573, 574.
Dowell *v.* Appelgate, 393.
Downer *v.* Rowell, 311.
Downs *v.* Kissam, 425.

Dows *v.* McMichael, 227.
Doyle *v.*. Peckham, 231.
Dozier *v.* Matson, 519.
Drake *v.* Paulhamus, 704.
v. Rice 40, 43, 51, 58, 67, 106, 122.
Dresher *v.* Corson, 412.
Dreutzer *v.* Bell, 31, 88.
Drexel *v.* Berney, 248.
Drexler *v.* Tyrrell, 712.
Dreyfuss *v.* Seale, 475.
Dringer *v.* Receiver of Erie Ry., 9.
Drinkwater *v.* Drinkwater, 722.
Drucker *v.* Wellhouse, 589.
Drummond *v.* Commissioners, 132.
v. Couse, 357.
Drury *v.* Cross, 346.
v. Roberts, 338.
v. Wilson, 703.
Drysdale *v.* Piggott, 542.
Dubois *v.* Cassidy, 115.
Dudley *v.* Congregation, etc., St. Francis, 293.
v. Danforth, 359, 365, 557.
v. Dudley, 544.
Duffin *v.* Furness, 40.
Dugan *v.* Massey, 545.
v. Trisler, 183.
v. Vattier, 232.
Dull *v.* Merrill, 88.
Dummer *v.* Corporation of Chippenham, 305.
Duncan *v.* Custard, 316.
v. Roselle, 539.
Duncan's Appeal, 544.
Dundas *v.* Bowler, 135.
v. Dutens, 67.
Dunham *v.* Byrnes, 234.
v. Cox, 271.
v. Griswold, 354.
v. Waterman, 21, 319, 548, 568, 580, 583, 584, 631.
Dunlap *v.* Bournonville, 434.
v. Hawkins, 189, 191, 208, 376, 377.
Dunlevy *v.* Tallmadge, 111, 141, 142, 148, 149, 159, 172.
Dunn *v.* Chambers, 310
v. Dunn, 190.
v. Whalen, 725.
Dunning *v.* Mead, 619.
Dunphy *v.* Kleinsmith, 99, 326, 328, 405.
Dupuy *v.* Gibson, 219.
Durand *v.* Hankerson, 262.
Durant *v.* Pierson, 563.
Duress *v.* Horneffer, 529.
Durian *v.* Central Verein, 56, 542.
Dutcher *v.* Swartwood, 632, 633.
Dutchess Co. Mut. Ins. Co. *v.* Van Wagonen, 554, 602, 613.
Duttera *v.* Babylon, 526.
Dutton *v.* Jackson, 242.
Duvall *v.* Rollins, 92.
Dwight *v.* Germania Life Ins. Co., 306.
Dyer *v.* Homer, 717, 722.
v. Taylor, 689, 690.
Dygert *v.* Remerschnider, 186, 192, 194, 377, 379, 383, 537, 541.

Eadie *v.* Slimmon, 56.
Eads *v.* Mason, 324.
v. Thompson, 542,
Eagle Fire Co. *v.* Lent, 642.
Eames *v.* Dorsett, 193.
Earl of Chesterfield *v.* Janssen, 28, 98.
Early *v.* Owens, 187.
Earnshaw *v.* Stewart, 426.
Easterly *v.* Keney, 653, 654, 659.
Eastlake *v.* Jordan, 660.
Easton Nat. Bank *v.* Buffalo Chem. Works, 271.
Eastwood *v.* Brown, 446.
Easum *v.* Pirtle, 415.
Eaton *v.* Perry, 736.
Ecker *v.* Lafferty, 211.
v. McCallister, 371.
Eckman *v.* Munnerlyn, 620.
Eddy *v.* Baldwin, 482.
Ede *v.* Knowles, 59, 195.
Edelsten *v.* Vick, 73.
Edgell *v.* Hart, 369, 472, 619, 621, 622, 623.
v. Haywood, 129.
Edgerly *v.* First Nat. Bank, 419.
Edgington's Trusts, *Re*, 647.
Edmeston *v.* Lyde, 51, 58, 67, 130, 148, 217, 251.
Edmonson *v.* Meacham, 31.
Edmonston *v.* McLoud, 115, 708.
Edmunds *v.* Mister, 128, 474.
Edson *v.* Cumings, 146.
v. Hayden, 539.
Edwards *v.* Currier, 368, 371.
v. Dickson, 452.
v. Entwisle, 61, 209, 539, 540.
v. Harben, 446, 619.
v. McGee, 184, 213.
v. Mitchell, 555.
v. Reid, 94, 367.
v. Stinson, 34.
Egbert *v.* Baker, 551.
Egery *v.* Johnson, 6, 637, 665, 667, 681.
Ehrisman *v.* Roberts, 20, 574.
Eicks *v.* Copeland, 591.
Eigleberger *v.* Kibler, 188, 507.
Eilers *v.* Conradt, 94.
Eisner *v.* Heilman, 719.
Eldridge *v.* Phillipson, 704.
Elias *v.* Farley, 66, 574.
Eliot *v.* Merchants' Exchange, 70, 71.
Elizabethtown Sav. Inst. *v.* Gerber, 142.
Ellett *v.* Newman, 331.
Ellington *v.* Currie, 720.
Elliott *v.* Bently, 529, 539.

Elliott *v.* Pontius, 215.
v. Stoddard, 489.
Elliott's Ex'rs' Appeal, 541.
Ellis *v.* Higgins, 717.
v. Horrman, 674.
v. McHenry, 518.
v. Valentine, 19.
v. Whitlock, 46.
Ellison *v.* Moses, 596.
Ellsworth *v.* Cook, 66.
v. Phelps, 630.
Elme *v.* Da Costa, 247.
Elmendorf *v.* Taylor, 512, 516.
Elmer *v.* Welch, 453.
Elmore *v.* Spear, 216.
Elwell *v.* Johnson, 270.
Ely *v.* Cooke, 609.
Emans *v.* Emans, 219.
Embry *v.* Palmer, 154, 511.
Embury *v.* Klemm, 436.
Emerson *v.* Badger, 71.
v. Bemis, 24, 187, 540.
v. Opp, 188, 519.
v. Senter, 558, 563, 579, 580.
Emery *v.* Van Syckel, 647.
v. Yount, 272.
Emigrant Ind. Sav. Bank *v.* Roche, 553, 554, 608.
Emma Silver Min. Co. *v.* Grant, 18.
Emmerich *v.* Hefferan, 377.
Emmons *v.* Barton, 226.
v. Bradley, 424.
Emonds *v.* Termehr, 414.
Enders *v.* Swayne, 406
England *v.* Adams, 104.
v. Downs, 544.
v. Russell, 137, 139.
English *v.* Friedman, 565.
Engraham *v.* Pate, 30, 400, 435, 436, 497.
Enos *v.* Tuttle, 493.
Erb *v.* Cole, 7, 8.
v. West, 387, 562.
Erdall *v.* Atwood, 234, 485
Erfort *v.* Consalus, 267, 501.
Erickson *v.* Paterson, 63.
v. Quinn, 125, 285, 286, 315, 513.
Ernst *v.* Shinkle, 660.
Estabrook *v.* Messersmith, 231.
Estes, *In re*, 254, 316.
v. Gunter, 565, 593, 610, 612.
v. Howland, 223, 224.
v. Wilcox, 111, 154, 155, 156, 165, 171, 177.
Estwick *v.* Caillaud, 23, 704.
Esty *v.* Long, 146.
Etheridge *v.* Sperry, 472, 620, 625, 626, 627.
Ettlinger *v.* Kahn, 530.
Eustis *v.* Bolles, 185.
Evans *v.* Bicknell, 304.
v. Hamilton, 190.
v. Hill, 140, 165, 176.
v. Jones, 412.
v. Lewis, 183, 244.
Evans *v.* Rugee, 539.
v. Wall, 660.
v. Warner, 604.
Evans Co. *v.* Reeves, 689.
Everett *v.* Raby, 166.
Everingham *v.* Vanderbilt, 318.
Everitt *v.* Everitt, 77.
Every *v.* Edgerton, 468.
Ewing *v.* Handley, 224.
v. Runkle, 357.
Exchange Bank of St. L. *v.* Rice, 82.
Eyre *v.* Potter, 294, 330.
Eyston, *Ex parte*, 647.

Failey *v.* Stockwell, 591.
Fairbanks *v.* Antrim, 47.
Fairchild *v.* Lynch, 569.
Fairfield *v.* Baldwin, 409.
Fairfield Bridge Co. *v.* Nye, 449.
Fairfield Packing Co. *v.* Kentucky Jeans Clothing Co., 594.
Falconer *v.* Freeman, 160, 175.
Falk *v.* Janes, 239.
Falkner *v.* Leith, 394.
Fanshawe *v.* Lane, 579.
Fargo *v.* Ladd, 724.
Farley *v.* Carpenter, 675, 676, 678, 680.
v. Kittson, 302, 303.
Farlin *v.* Sook, 324.
Farmer *v.* Calvert, 13.
v. Walter, 354.
Farmers' Bank *v.* Douglass, 375, 635, 690.
Farmers' & M. Nat. Bank *v.* King, 83.
Farmers' & M. Sav. Bank *v.* Brewer, 659.
Farned *v.* Harris, 153, 172.
Farnham *v.* Campbell, 62.
Farnsworth *v.* Bell, 244.
v. Strasler, 149.
v. Wood, 238.
Farrar *v.* Bernheim, 716, 719, 724.
v. Haselden, 169.
Farrington *v.* Stone, 435.
Farrow *v.* Hayes, 20, 569, 608.
Farwell *v.* Cohen, 550, 608.
v. Furniss, 604.
v. Nilsson, 594, 596.
Fassit *v.* Phillips, 55.
Faulkner *v.* Hyman, 614.
Faxon *v.* Ball, 307.
Fay *v.* Grant, 574, 610.
Fearn *v.* Ward, 181.
Fecheimer *v.* Baum, 104.
v. Hollander, 176.
v. Robertson, 548.
Feigley *v.* Feigley, 11, 222, 244.
Fein *v.* Fein, 244.
Feise *v.* Randall, 712.
Felch *v.* Bugbee, 517.
Felix *v.* Patrick, 283.
Fell *v.* Brown, 250.
Fellows *v.* Emperor, 386.
v. Fellows, 16, 251, 260, 290.
v. Lewis, 31.

Fellows *v.* Smith, 187, 188.
Felton *v.* Wadsworth, 409.
Fenelon *v.* Hogoboom, 529.
Fenner *v.* Dickey, 28, 711.
Fera *v.* Wickham, 562.
Ferbrache *v.* Martin, 474, 486.
Ferguson *v.* Bobo, 140, 270.
v. Dent, 136.
v. Hillman, 322, 324, 669.
v. Kumler, 92.
v. Spear, 523, 703.
Ferris *v.* Irons, 497.
v. McQueen, 405, 406.
Fessenden *v.* Woods, 235.
Fetter *v.* Cirode, 408.
Feurt *v.* Rowell, 618.
Fick *v.* Mulholland, 13.
Fidelity Ins., T. & S. D. Co. *v.* Huntington, 260, 521.
Fidler *v.* John, 613.
Fiedler *v.* Darrin, 269, 505.
Field *v.* Andrada, 227.
v. Chapman, 102.
v. Hastings & B. Co., 281.
v. Holland, 304.
v. Holzman, 332.
v. Ridgely, 421.
v. Sands, 235, 709.
Fifield *v.* Gaston, 357.
Filebeck *v.* Bean, 624.
Filer *v.* N. Y. Central R. R. Co., 392.
Filley *v.* Register, 437.
Finch *v.* Houghton, 336.
Fincke *v.* Funke, 236.
Finding *v.* Hartman, 454.
Findlay *v.* McAllister, 101, 117, 121.
Fink *v.* Denny, 194.
v. Jetter, 308.
v. Patterson, 167.
Finn *v.* Krut, 91.
Finnin *v.* Malloy, 89.
First Mass. Turnp. Co. *v.* Field, 514.
First Nat. Bank *v.* Anderson, 634.
v. Bertschy, 341, 362.
v. Buck, 484.
v. Chalmers, 81.
v. Cooper, 229.
v. Cummins, 347, 350.
v. Dwelley, 95.
v. E. T. Barnum Wire & Iron Works, 336, 338.
v. Gage, 332.
v. Hamilton, 357, 530.
v. Holmes, 592.
v. Hosmer, 128, 295.
v. Hughes, 598.
v. Irons, 10.
v. Jaffray, 423.
v. Kansas City Lime Co., 480.
v. Kavanagh, 523.
v. Knowles, 430.
v. Lowrey, 501.
v. Moffatt, 435.
First Nat. Bank *v.* Schuler, 129, 148, 249, 253, 256, 261.
v. Sloman, 154.
v. Smith, 435.
v. Wittich, 620.
v. Wood, 413.
Fish *v.* Clifford, 450.
Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 72.
Fishel *v.* Ireland, 417.
Fisher, *Ex parte*, 714.
v. Andrews, 144.
v. Bassett, 248.
v. Bishop, 730.
v. Boody, 329.
v. Henderson, 33, 634.
v. Herron, 435.
v. Lewis, 204.
v. Moog, 435, 478.
v. Shelver, 415, 435, 527.
v. Taylor, 650, 662.
v. Tuller, 286.
Fiske *v.* Foster, 517.
Fitch *v.* Burk, 466.
v. Smith, 298.
Fitzburgh *v.* Everingham, 331.
Fitzgerald *v.* Quann, 46.
Flack *v.* State of N. Y., 126.
Flagg *v.* Mann, 303, 674.
v. Willington, 501,
Flamank, *In re*, 536.
Flanagan *v.* Wood, 464.
Flannery *v.* Van Tassel, 487, 489, 490.
Flash *v.* Conn, 268, 269.
v. Wilkerson, 220, 349.
Fleischer *v.* Dignon, 434.
Fleming *v.* Buchanan, 76.
v. Grafton, 139, 142.
v. Slocum, 10.
v. Yost, 480.
Flemington Nat. Bank *v.* Jones, 358.
Fletcher *v.* Ashley, 544.
v. Bonnet, 451.
v. Fletcher, 726, 728.
v. Holmes, 140, 155, 229.
v. Martin, 312, 630.
v. Peck, 668.
v. Powers, 626.
Flewellen *v.* Crane, 274.
Fliess *v.* Buckley, 121.
Flint *v.* Clinton County, 615.
Florence S. M. Co. *v.* Zeigler, 34, 366.
Flournoy *v.* Johnson, 660.
Flower *v.* Cornish, 231.
Flynn *v.* Jackson, 534.
Focke *v.* Blum, 577.
Fogg *v.* Blair, 131, 237, 238, 240, 268.
v. Lawry, 125.
Foley *v.* Bitter, 109, 133, 361.
v. Burnell, 64.
Follansbee *v.* Follansbee, 545.
Folsom *v.* Clemence, 418, 419,
Fonda *v.* Gross, 470.
Foote *v.* Cobb, 187.

Forbes, *In re*, 633.
v. Howe, 714.
v. Logan, 178.
v. Overby, 281.
v. Scannell, 433.
v. Waller, 173, 371, 557, 558.
Force *v.* Brown, 661.
Ford *v.* Chambers, 467.
v. Douglas, 132.
v. Harrington, 729.
v. Hennessy, 730.
v. Johnston, 51, 183, 194, 416.
v. Williams, 369, 450, 630, 631.
Forde *v.* Exempt Fire Co., 224.
Fordyce *v.* Hicks, 709.
Forkner *v.* Stuart, 449.
Forrester *v.* Moore, 703.
Forsyth *v.* Matthews, 434, 435.
Fortner *v.* Whelan, 7!
Fort Payne Bank *v.* Alabama Sanitarium, 241, 615.
Fort Stanwix Bank *v.* Leggett, 229, 261, 262, 553.
Fosdick *v.* Delafield, 248.
Foster *v.* Brown, 7.
v. Foster, 98, 183, 187, 222, 346.
v. Hackley, 229.
v. Hall, 357, 490.
v. Knowles, 413.
v. McGregor, 31, 88.
v. Mansfield, C. & L. M. R. R. Co., 507, 508.
v. Saco Mfg. Co., 581.
v. Smith, 640.
v. Townshend, 236.
v. Wallace, 454.
v. Woodfin, 23, 407.
Fouche *v.* Brower, 1.
Fourth Nat. Bank *v.* Stout, 740.
Fowler *v.* Frisbie, 183.
v. Jenkins, 567.
v. McCartney, 111.
v. Trebein, 109, 133.
Fowler's Appeal, 113, 155, 226, 333.
Fox *v.* Curtis, 336, 563.
v. Edwards, 180.
v. Hills, 38, 51, 244, 245.
v. Moyer, 128, 142, 155, 177, 178, 191, 253, 254, 265, 534.
v. Peck, 65.
v. Wallace, 151.
Frakes *v.* Brown, 244.
Francis *v.* Lawrence, 140, 162, 206, 207.
v. Page, 478.
v. Rankin, 365.
Francisco *v.* Aguirre, 717.
v. Ryan, 626.
Francklyn *v.* Fern, 229.
Franey *v.* Smith, 554.
Frank *v.* Bobbitt, 124, 551.
v. Kessler, 170.
v. King, 526, 527.
v. Mutual L. I. Co., 56.
v. Robinson, 610.
Frank's Appeal, 382.
Frankhouser *v.* Ellett, 626.
Franzen *v.* Zimmer, 615.
Fraser *v.* Charleston, 265.
v. Thompson, 383.
Frazer *v.* Thatcher, 365, 704.
Frazier *v.* Barnum, 337, 661.
v. Fredericks, 446.
Frederick *v.* Shorey, 533.
Fredericks *v.* Davis, 733.
Freedman's Sav. & T. Co. *v.* Earle, 708.
Freeholders of Hunterdon *v.* Henry, 661, 662.
Freeland *v.* Freeland, 45, 185, 231, 232, 722.
Freelove *v.* Cole, 729.
Freeman *v.* Bowen, 647.
v. Deming, 229.
v. Elmendorf, 245.
v. Freeman, 519.
v. Hartman, 544.
v. Pope, 187.
v. Sedwick, 726.
v. Smith, 93.
Freider *v.* Leinkauff, 140.
Frelinghuysen *v.* Nugent, 83.
French *v.* Andrews, 616.
v. Breidelman, 319.
v. Burns, 423.
v. Edwards, 571.
v. French, 17, 59, 64.
v. Holmes, 23, 55, 79, 188, 190, 437, 538.
v. Motley, 387, 506, 525, 703.
v. Shotwell, 247, 736.
Frenche *v.* Kitchen, 508.
Freund, *v.* Yaegerman, 594.
Friedburgher *v.* Jaberg, 564, 610.
Friedenwald *v.* Mullan, 308, 666.
Friedman *v.* Fennell, 57.
Frisbey *v.* Thayer, 142.
Frisk *v.* Reigelman, 430, 432.
Frith *v.* Cartland, 83.
Frost *v.* Mott, 158, 159, 262.
v. Warren, 407.
Frothingham *v.* Hodenpyl, 140, 147.
Fulkerson *v.* Sappington, 480.
Fullagar *v.* Clark, 98.
Fuller *v.* Bean, 184.
v. Brewster, 7, 11, 190, 415, 426, 468, 478.
v. Brown, 21, 183, 187.
v. Griffith, 424.
v. Kent, 56.
v. Pinson, 671.
v. Roberts, 354.
Fullerton *v.* Viall, 322, 323.
Fullington Northwestern Imp., etc., Assoc., 197.
Fulp *v.* Beaver, 7, 523.
Fulton *v.* Fulton, 640.
v. Woodman, 301, 698.
Funkhouser *v.* Lay, 698.
Furman *v.* Tenny, 92.

Fury *v.* Strohecker, 62.
Fusze *v.* Stern, 130.

Gable *v.* Columbus Cigar Co., 1, 203, 374, 392, 527, 529.
Gadsden *v.* Woodward, 269.
Gaffney's Assignee *v.* Signaigo, 424.
Gage *v.* Dauchy, 95, 532, 533.
Gainer *v.* Russ, 304.
Gaines *v.* Chew, 288.
v. Relf, 137.
Galbreath *v.* Cook, 395.
Gale *v.* Williamson, 187.
Galentine *v.* Wood, 225.
Gallagher, *In re*, 69.
v. Rosenfield, 619, 623.
Gallagher's Appeal, 390.
Gallatian *v.* Cunningham, 308.
Galle *v.* Tode, 319, 358, 603.
Gallman *v.* Perrie, 100, 108, 246.
Galpin *v.* Galpin, 722.
Gamber *v.* Gamber, 530.
Games, *Ex parte*, 619.
Gannard *v.* Eslava, 182, 187.
Gans *v.* Thieme, 348.
Garahy *v.* Bayley, 674.
Garbutt *v.* Smith, 62.
Garden *v.* Bodwing, 619.
Gardenier *v.* Tubbs, 470.
Gardiner *v.* Sherrod, 118.
Gardiner Bank *v.* Wheaton, 17.
Gardinier *v.* Otis, 322.
Gardner *v.* Baker, 181.
v. Broussard, 431.
v. Cole, 37, 668.
v. Commercial Nat. Bank, 567.
v. Gardner, 144.
v. Kleinke, 187, 197.
v. Lansing, 177.
v. McEwen, 410, 621.
v. Ogden, 738, 739.
v. Oliver Lee's Bank, 517.
Gardner's Admr. *v.* Schooley, 392.
Gardom *v.* Woodward, 370, 494.
Garesché *v.* MacDonald, 678.
Garfield *v.* Hatmaker, 107, 108, 164, 242.
Garland *v.* Garland, 644, 655, 658, 660.
Garman *v.* Cooper, 453, 461.
Garner *v.* Graves, 224, 490.
v. Second Nat. Bank, 147, 531, 535, 536, 593.
Garnsey *v.* Rogers, 81.
Garr *v.* Klein, 523.
Garrahy *v.* Green, 491.
Garretson *v.* Hackenberg, 446, 466.
v. Kane, 68, 735.
Garrett *v.* Wagner, 539.
Garrison *v.* Monaghan, 55, 80.
Garrity *v.* Haynes, 533.
Garrow *v.* Davis, 304.
Garvin *v.* Williams, 730.
Gary *v.* Jacobson, 726.
Gasherie *v.* Apple, 605.
Gates *v.* Andrews, 563.
Gates *v.* Boomer, 215, 218.
v. Mowry, 733.
v. Young, 115, 125.
Gay *v.* Bidwell, 22, 625.
v. Hamilton, 423.
v. Parpart, 114.
Gayler *v.* Wilder, 73.
Gaylord *v.* Imhoff, 93.
Gaylords *v.* Kelshaw, 252, 254.
Gebhard *v.* Sattler, 720.
Gebhart *v.* Merfeld, 51, 221, 245.
Geery *v.* Geery, 57, 142, 156, 177.
Geisse *v.* Beall, 555.
Geist *v.* Geist, 396.
Genesee County Bank *v.* Bank of Batavia, 219.
Genesee River Nat. Bank *v.* Mead, 208, 276, 377.
Genet *v.* Beekman, 639.
Gentry *v.* Kelley, 370, 494.
George *v.* Grant, 563.
v. Milbanke, 76.
v. Norris, 452.
v. Williamson, 129, 130, 223, 708, 717.
Gere *v.* Murray, 568.
German Bank *v.* Leyser, 224, 226.
German Ins. Bank *v.* Nunes, 433, 572.
Gerrish *v.* Mace, 246.
Gettelmann *v.* Gitz, 529.
Getzler *v.* Saroni, 31.
Ghormley *v.* Smith, 662, 663.
Gibbons *v.* Pemberton, 176.
Gibbs *v.* Neely, 497.
v. Thayer, 231.
v. Thompson, 407, 430.
Gibson *v.* Crehore, 224.
v. Herriott, 512.
v. Hill, 452.
v. Jeyes, 729.
v. Love, 453.
v. Seymour, 424.
v. Shufeldt, 740.
v. Warden, 230.
Giddings *v.* Sears, 480, 703, 705.
Gifford *v.* Corrigan, 81.
v. Helms, 284, 513.
Gilbert *v.* Decker, 452.
v. Glenny, 530.
v. Lewis, 274.
v. Stockman, 166.
Gilhooly *v.* American Surety Co., 307.
Gill *v.* Carter, 29.
v. Griffith, 422.
v. Weston, 333.
Gilleland *v.* Rhoads, 93.
Gillespie *v.* Allen, 374.
v. Cooper, 287, 513.
Gillet *v.* Moody, 237.
v. Phelps, 427.
Gillett *v.* Bate, 95, 325,
v. Gaffney, 469.
Gillette *v.* Bate, 73, 74, 84.
Gilliland *v.* Jones, 361.

Gilman *v.* Hunnewell, 71.
v. Lockwood, 517.
Gilson *v.* Hutchinson, 135, 291, 543.
Ginn *v.* Brown, 144.
Ginther *v.* Richmond, 549, 590, 606.
Girault *v.* A. P. Hotaling Co., 534.
Glann *v.* Younglove, 539.
Glascock *v.* Brandon, 525.
Glass *v.* Zutavern, 529.
Gleason *v.* Fayerweather, 640.
v. Wilson, 276, 630.
Glen *v.* Hope Mut. Life Ins. Co., 81.
Glendon Iron Co. *v.* Uhler, 567.
Glenn *v.* Farmers' Bank, 170.
v. Glenn, 410.
Glenny *v.* Langdon, 229, 230, 235, 591.
Glidden *v.* Hunt, 698.
Glover *v.* Lee, 704.
Goddard *v.* Weil, 459, 465.
Godden *v.* Kimmell, 512, 516.
Godding *v.* Brackett, 108.
Godfrey *v.* Germain, 416.
v. Miller, 431, 690.
Goe's Estate, 663.
Goff *v.* Kelly, 231.
v. Rogers, 397, 406, 407.
Gogebic Inv. Co. *v.* Iron Chief Min. Co., 241.
Goldsmith *v.* Goldsmith, 276.
v. Russell, 60, 127.
Goll & F. Co. *v.* Miller, 180.
Gollober *v.* Martin, 431, 689, 691.
Gollobitsch *v.* Rainbow, 498.
Gomez *v.* Hagaman, 703.
Gooch's Case, 46.
Goodbar *v.* Cary, 388, 389.
Goodbar Shoe Co. *v.* Montgomery, 613.
Goode *v.* Garrity, 140.
v. Hawkins, 9.
Goodell *v.* Fairbrother, 450.
Goodheart *v.* Johnson, 619.
Goodman *v.* Harvey, 687.
v. Simonds, 9.
v. Wineland, 437.
Goodnow *v.* Smith, 476.
Goodrich *v.* Downs, 568, 573.
Goodwin *v.* Hubbard, 358.
v. Kelly, 463.
v. Snyder, 312.
v. Wertheimer, 301, 561.
Goodwyn *v.* Goodwyn, 717.
Goodyear Vulcanite Co. *v.* Frisselle, 116, 154.
Googins *v.* Gilmore, 449, 625, 635.
Gordon, Matter of, 573, 589, 610.
v. Anthony, 73.
v. Cannon, 347.
v. Hobart, 137.
v. Reynolds, 181, 294, 296.
v. Ritenour, 486, 700.
v. Worthley, 537.
Gorham *v.* Innis, 613.
Gormerly *v.* Chapman, 109, 133.
Gormley *v.* Potter, 111.
Gorrell *v.* Dickson, 73, 136.
Goshorn *v.* Snodgrass, 15, 400, 402, 405, 410, 432, 666, 698, 700.
Goss *v.* Neale, 704.
Gottlieb *v.* Thatcher, 435, 436.
Goudy *v.* Gebhart, 722.
Gould *v.* Emerson, 56, 541.
v. Steinburg, 246.
v. Ward, 418.
Governor *v.* Campbell, 357, 558.
Gowan *v.* Gowan, 725, 737.
Grabill *v.* Moyer, 524, 525, 535.
Graff *v.* Bonnett, 86.
Graff's Estate, 348.
Graffam *v.* Burgess, 7.
Gragg *v.* Martin, 375.
Graham *v.* Chapman, 18.
v. Culver, 309.
v. Furber, 432.
v. Meyer, 711.
v. Railroad Co., 205, 240, 247, 359, 377, 717, 736.
Graham Button Co. *v.* Spielmann, 237.
Grand Island Banking Co. *v.* Costello, 425.
Granger *v.* George, 514.
Grant, *Ex parte*, 69.
v. Carpenter, 640.
v. Green, 393.
v. Lewis, 460.
v. Libby, 502.
v. Lloyd, 310.
v. Morse, 733.
v. National Bank, 9, 694.
v. Sutton, 524, 527, 529.
v. Ward, 9, 188, 528.
Graver *v.* Faurot, 741.
Graves *v.* Blondell, 25, 34.
v. Corbin, 252, 260, 521.
v. Davenport, 392, 526.
v. Dolphin, 64, 646, 654.
v. Graves, 370, 494.
Gray *v.* Blanchard, 640.
v. Chase, 128.
v. Corbit, 660.
v. Galpin, 434.
v. McCallister, 364.
v. Obear, 640.
v. Schenck, 250, 258.
Great Falls Mfg. Co. *v.* Worster, 738.
Great Western Tel. Co. *v.* Burnham, 123.
Greaves *v.* Gouge, 144, 221, 225.
Greeley *v.* Dixon, 577.
Green *v.* Adams, 222.
v. Creighton, 137, 156.
v. Early, 692.
v. Givan, 188.
v. Hicks, 251.
v. Kimble, 118.
v. Milbank, 249.
v. Nixon, 28.
v. Richardson, 81.
v. Sarmiento, 517.

Green *v.* Spicer, 646, 657.
v. Tanner, 302.
v. Tantum, 67.
v. Trieber, 20.
v. Van Buskirk, 123.
v. Walkill Nat. Bank, 263.
v. Wallis Iron Works, 233.
Greene *v.* Breck, 220.
v. Greene, 87.
v. Keene, 67, 73.
v. Sprague Mfg. Co., 184, 214.
Greenebaum *v.* Wheeler, 454, 623.
Greenfield's Estate, 188.
Greenleaf *v.* Mumford, 110, 159, 175, 241.
Greenleve *v.* Blum, 363.
Greenway *v.* Thomas, 140, 168, 169.
Greenwood *v.* Brodhead, 51, 149.
v. Marvin, 320.
Greer *v.* O'Brien, 418, 433.
Gregg *v.* Bigham, 476.
v. Cleveland, 583, 610.
Gregory *v.* Gray, 416, 435.
Grider *v.* Graham, 720.
Gridley *v.* Watson, 190.
Griffin *v.* Barney, 575, 606, 609.
v. Doe *d.* Stoddard, 214.
v. Macaulay, 726.
v. Marquardt, 370, 557, 559, 568, 616, 668.
v. New Jersey Oil Co., 391.
v. Nitcher, 111, 140, 141, 142.
v. Peters, 390.
v. Stanhope, 419.
Griffith *v.* Griffith, 297, 672, 673.
v. Parks, 484.
v. Townley, 349.
Grimes *v.* Hill, 489.
Grimes D. G. Co. *v.* Shaffer, 368, 481.
Grimsby *v.* Ball, 229.
Grimstone *v.* Carter, 674.
Griswold *v.* Sheldon, 443, 459, 622.
Grocers' Bank *v.* Murphy, 69.
Grogan *v.* Cooke, 58, 67.
Gross, Estate of, 79, 80.
v. Daly, 143, 158, 175, 241.
v. Eddinger, 526.
Grotenkemper *v.* Harris, 437.
Grover *v.* Grover, 301.
v. Wakeman, 7, 10, 18, 26, 363, 548, 573, 577, 590, 607.
Grover & B. S. M. Co. *v.* Radcliff, 277.
Groves *v.* Rice, 233, 547.
Grubbs *v.* Greer, 433.
Grunsky *v.* Parlin, 358.
Guckenheimer *v.* Angevine, 340, 349.
Guerin *v.* Hunt, 592, 593, 598.
Guernsey *v.* Powers, 335.
v. Wood, 517.
Guest *v.* Barton, 718.
Guice *v.* Sanders, 451.
Guidry *v.* Grivot, 35, 242, 723.
Guignard *v.* Aldrich, 470.
Guillander *v.* Howell, 123.
Guion *v.* Liverpool, L. & G. Ins. Co., 476.
Gullickson *v.* Madsen, 111.
Gumberg *v.* Treusch, 372, 401.
Guthrie *v.* Gardner, 108, 164.
Gutzweiler *v.* Lackmann, 12.
Gwin *v.* Selby, 102.
Gwyer *v.* Figgins, 188.

Haack *v.* Weicken, 728.
Haak's Appeal, 246, 366, 717.
Haas *v.* Chicago Bldg. Soc., 336.
v. Sternbach, 354, 421.
Habenicht *v.* Lissak, 71, 337.
Hackett *v.* Manlove, 617.
Hackley *v.* Headley, 354.
Hadden *v.* Spader, 16, 40, 51, 58, 67, 74, 107, 130.
Hadley *v.* Morrison, 61.
Hadock *v.* Hill, 674, 688.
Haenschen *v.* Luchtemeyer, 492.
Hafner *v.* Irwin, 5, 419, 422, 556.
Hagan *v.* Walker, 156, 166.
Hagar *v.* Shindler, 247, 317.
v. Thomson, 9, 12.
Hagerman *v.* Buchanan, 193.
Haggarty *v.* Pittman, 103.
Haggerty *v.* Nixon, 107, 140.
Hahn *v.* Penney, 486.
Haines *v.* Hollister, 251, 259, 261.
Halbert *v.* Grant, 157.
Hale *v.* Baldwin, 517.
v. Metropolitan Omnibus Co., 440.
v. Nashua & L. R. R. Co., 289.
v. Sweet, 457, 632.
v. Taylor, 370.
v. West Va. Oil & Land Co., 478.
v. Wetmore, 223.
Hall *v.* Arnold, 26, 357, 365.
v. Callahan, 224.
v. Germain, 357.
v. Hall, 29, 77.
v. Law, 512.
v. Marston, 81.
v. Moriarty, 213.
v. Ritenour, 486.
v. Russell, 516.
v. Sands, 55, 183.
v. Stryker, 160.
v. Tufts, 643.
v. Williams, 656.
Hallet's Estate, *In re*, 83.
Hallett *v.* Thompson, 65, 85, 654, 661.
Hallgarten *v.* Oldham, 614.
Halloch *v.* Alvord, 494.
Halloran *v.* Halloran, 737.
Hallowell *v.* Bayliss, 231.
Halsey *v.* Cheney, 511.
Halstead *v.* Grinnan, 507.
v. Westervelt, 661, 662.
Halsted *v.* Halsted, 121.
Ham *v.* Gilmore, 432.
v. Van Orden, 396.

Hamburger *v.* Grant, 54.
Hamett *v.* Dundass, 30, 181, 182.
Hamilton *v.* Cone, 107, 127, 164, 242, 358.
v. Russel, 37, 452, 453.
v. Scull, 722.
Hamilton Nat. Bank *v.* Halsted, 6, 321, 343, 344, 345, 718.
Hamilton-Brown Shoe Co. *v.* Mercer, 550.
Hamlen *v.* McGillicuddy, 111, 258, 276.
Hamlin *v.* Wright, 217, 218, 234, 236, 258.
Hammond *v.* Hopkins, 283, 507, 511, 516.
v. Hudson River I. & M. Co., 220.
Hanby *v.* Logan, 80.
Hancock *v.* Sears, 116, 117.
Hand *v.* Kennedy, 81.
Handley *v.* Stutz, 237.
Hanes *v.* Tiffany, 232.
Hanford *v.* Artcher, 393, 451, 458, 466.
v. Obrecht, 470.
v. Paine, 614.
v. Prouty, 389.
Hangen *v.* Hachmeister, 347, 619, 621.
Hann *v.* Van Voorhis, 86.
Hannan *v.* Oxley, 529.
Hanover Nat. Bank *v.* Blake, 711, 713.
v. Klein, 304.
Hanover R. R. Co. *v.* Coyle, 487.
Hanson *v.* Bean, 406, 409.
v. Buckner, 187.
v. Metcalf, 563.
Hapgood *v.* Fisher, 667.
Hard *v.* Ashley, 371.
Hardenburgh *v.* Blair, 661.
Hardesty *v.* Kinworthy, 482.
Hardey *v.* Green, 190.
Harding *v.* Bunnell, 306, 307.
v. Elliott, 160, 365.
v. Handy, 274.
Hardmann *v.* Bowen, 558, 565, 592.
Hardt *v.* Heidweyer, 284, 285, 425, 596.
Hardware Co. *v.* Implement Co., 597.
Hardy *v.* Mitchell, 519.
v. Potter, 449.
v. Simpson, 22, 24.
Harget *v.* Blackshear, 520.
Harkness *v.* Russell, 450.
Harlan *v.* Maglaughlin, 366.
Harlin *v.* Stevenson, 264.
Harman *v.* Hoskins, 19, 20, 22, 351, 609, 619.
Harmon *v.* Harmon, 717.
Harper *v.* Harper, 733.
v. Perry, 396.
Harrell *v.* Godwin, 449.
v. Kea, 513.
v. Mitchell, 394, 404, 432, 435, 500.
Harriman *v.* Gray, 545.
Harris *v.* Alcock, 407.
Harris *v.* Burns, 428.
v. Harris, 183, 244, 728.
v. Russell, 359, 407, 491, 492.
v. Sangston, 338.
v. Sumner, 609, 702.
Harrison *v.* Gibbons, 150.
v. Hallum, 290.
v. Mayor, etc., of Southampton, 29.
v. Trustees of Phillips Academy, 424.
Hart, Matter of, 227.
v. Chalker, 391.
v. Flinn, 392.
v. Sandy, 428, 429, 431, 432.
v. Sansom, 739.
v. Ten Eyck, 219, 308.
v. Wing, 454.
Harter *v.* Christoph, 13.
Hartlepp *v.* Whiteley, 271.
Hartley *v.* White, 387.
Hartman *v.* Diller, 497.
Harton *v.* Lyons, 487, 493.
Hartshorn *v.* Eames, 26, 111, 301, 363, 410, 416, 426, 429.
v. Williams, 424.
Harvey *v.* Bresbin, 79.
v. McDonnell, 229, 262, 547.
v. Varney, 716, 722, 723, 733.
Harvey's Estate, *In re*, 77.
Harwick *v.* Weddington, 399, 494.
Harwood *v.* Railroad Co., 511.
Hasie *v.* Connor, 9, 12, 411, 688, 703.
Haskett *v.* Auhl, 689.
Hassam *v.* Barrett, 423, 425, 737.
Haston *v.* Castner, 155, 166, 186, 187, 206, 226.
Haswell *v.* Haswell, 647.
Hatch *v.* Bayley, 8.
v. Dana, 68, 131, 237, 240, 241.
v. Daniels, 338.
v. Dorr, 129.
Hathaway *v.* Brown, 370, 371.
v. Moran, 570, 572.
v. Noble, 507.
Hatstat *v.* Blakeslee, 452, 453.
Hauer's Estate, 536.
Hauselt *v.* Harrison, 618.
v. Vilmar, 364, 600.
Haven *v.* Richardson, 418.
Havens *v.* Healy, 660, 661.
Hawes *v.* Loader, 223.
v. Oakland, 144, 221.
Hawkins *v.* Alston, 408.
v. Davis, 666.
v. Gathercole, 336.
v. Glenn, 172.
v. Hastings Bank, 630, 631.
v. Kansas City H. P. B. Co., 465.
Hawley *v.* Cramer, 689.
v. Fairbanks, 740.
v. Hampton, 93.
v. Hunt, 517.
v. James, 560.

Hawley *v.* Northampton, 640.
Haxtun *v.* Bishop, 615.
Haydock *v.* Coope, 547, 577, 578, 715.
Haydock Carriage Co. *v.* Pier, 560.
Hayes *v.* Westcott, 348.
Haynes *v.* Brooks, 563, 579, 609.
v. Hoffman, 613.
v. Hunsicker, 466.
v. Rogers, 368, 478.
Hays *v.* Montgomery, 381.
Heacock *v.* Durand, 101, 588.
Heard *v.* Murray, 337.
v. Sturgis, 552.
Heartt *v.* Corning, 303.
Heath *v.* Bishop, 65, 657, 660.
v. Heath, 106.
v. Page, 25, 183, 319, 498.
Heaton *v.* Prather, 674.
Hebbard *v.* Haughian, 396.
Heck *v.* Fisher, 60.
Heckman *v.* Messinger, 89, 553, 574.
Hedges *v.* Polhemus, 633, 635.
Hedman *v.* Anderson, 626.
Hedrick *v.* Strauss, 375, 668, 671.
Heeren *v.* Kitson, 392.
Hefner *v.* Metcalf, 26.
Hegeler *v.* First Nat. Bank, 421.
Hegewisch *v.* Silver, 337.
Heiatt *v.* Barnes, 149, 150, 188.
Heilman *v.* Jones, 247.
Heineman *v.* Hart, 234.
Heintze *v.* Bentley, 406.
Helms *v.* Green, 402, 432, 528.
Hempstead *v.* Johnston, 7.
Henckley *v.* Hendrickson, 7.
Henderson *v.* Brooks, 150.
v. Downing, 634.
v. Henderson, 180, 211, 317, 432.
v. Hoke, 209.
v. Hunton, 343.
Hendricks *v.* Mount, 214.
v. Robinson, 16, 148, 281.
Hendrickson *v.* People, 400.
Hendrix *v.* American F. L. M. Co., 336.
Henkel, *In re*, 91.
Henley *v.* Hotaling, 423.
Hennequin *v.* Clews, 339, 518.
Henning *v.* Harrison, 640.
Henry *v.* Harrell, 406.
v. Henry, 498.
v. Hinman, 25, 34, 100, 109, 110.
v. Sargeant, 269.
v. Vermilion R. R. Co., 68.
Hentz *v.* Phillips, 265.
Hepworth *v.* Union Ferry Co., 183.
Herkelrath *v.* Stookey, 405.
Herman *v.* McKinney, 667.
Herrick *v.* Borst, 278, 481, 482.
Herring *v.* N. Y., L. E. & W. R. R. Co., 141.
v. Richards, 12, 190, 191, 194, 212, 366.
v. Wickham, 7, 9, 374, 383, 530.
Herrlich *v.* Brennan, 681.
Herschfeldt *v.* George, 206.
Hershy *v.* Latham, 525, 526,
Hess *v.* Hess, 158, 228, 262.
v. Voss, 664.
Hesse *v.* Stevenson, 73, 74.
Hesser *v.* Wilson, 454.
Hesthal *v.* Myles, 454.
Hevenor, Matter of, 550, 551.
Hewitt *v.* Commercial Banking Co., 368.
v. Williams, 523.
Hews *v.* Kenney, 534.
Heydock *v.* Stanhope, 135.
Heye *v.* Bolles, 160, 175.
Heyneman *v.* Dannenberg, 160, 332.
Heywood *v.* City of Buffalo, 245.
Hibernia Ins. Co. *v.* St. Louis, etc., Tr. Co., 241.
Hibernia Nat. Bank *v.* Lacombe, 614.
Hickey *v.* Ryan, 482.
Hickman *v.* Trout, 399, 402, 403.
Hickox *v.* Elliott, 24, 253, 255.
Hicks *v.* Campbell, 290.
v. Sharp, 491.
Hiern *v.* Mill, 672.
Higby *v.* Ayres, 215, 218.
Higgins *v.* Crouse, 273, 287, 351, 507, 684.
v. Gillesheiner, 236.
v. Spahr, 429.
High *v.* Wilson, 520.
Hildebrand *v.* Bowman, 89, 574.
Hildeburn *v.* Brown, 419.
Hildreth *v.* Fitts, 463, 464.
v. Sands, 246, 419, 468.
Hilgenberg *v.* Northup, 8.
Hill, *Ex parte*, 647.
Matter of, 147.
v. Agnew, 589.
v. Ahern, 670.
v. Bowman, 404, 704.
v. Draper, 562.
v. Reed, 615.
v. Ryan Grocery Co., 303.
v. Woodberry, 564, 566.
Hilliard *v.* Cagle, 206, 366, 419, 421.
v. Phillips, 492.
Hills *v.* Carlton, 516.
v. Eliot, 480.
v. Sherwood, 156, 224, 476.
Hilton *v.* Guyot, 154.
v. Morse, 193, 366.
Hinchliffe *v.* Shea, 545.
Hinchman *v.* Parlin & O. Co., 526.
Hinckley *v.* Kreitz, 222.
Hinde *v.* Vattier, 689.
Hinde's Lessee *v.* Longworth, 189, 190, 194, 205, 208, 380, 395, 437, 534, 540.
Hinds *v.* Hinds, 183.
v. Keith, 370, 478, 689.
Hine *v.* Bowe, 548.
Hines *v.* Hawkins, 489.
Hinkle *v.* Wilson, 526, 539.

Hinkle's Appeal, 663.
Hinton *v.* Greenleaf, 497.
Hirschfeld *v.* Williamson, 490.
Hise *v.* Hartford L. I. Co., 57.
Hisle *v.* Rudasill, 381.
Hitchcock *v.* Cadmus, 581.
v. Kiely, 206, 360, 361, 376.
Hitt *v.* Ormsbee, 58, 68.
Hixon *v.* George, 91, 92.
Hoag *v.* Sayre, 408.
Hobart *v.* Hobart, 243.
Hobbs *v.* Davis, 35, 365, 368.
v. Smith, 641, 660.
Hoboken Bank *v.* Beckman, 303, 306.
Hockley *v.* Mawbey, 77.
Hodges *v.* Coleman, 705.
v. New England Screw Co., 279.
v. Silver Hill Min. Co., 145, 178.
v. Spicer, 493.
v. Winston, 92.
Hodgman *v.* Western R. R. Co., 553.
Hodgson *v.* Butts, 380.
v. Newman, 408.
Hoey *v.* Pierron, 539.
Hoffer *v.* Gladden, 432.
Hoffman *v.* Henderson, 502.
v. Junk, 51, 183, 244, 366.
v. Mackall, 26.
v. Noble, 45.
v. Nolte, 528, 529.
v. Pitt, 446.
v. Susemihl, 703.
Hoffman's Appeal, 133.
Hogan *v.* Burnett, 1/2.
Hoke *v.* Henderson, 699.
Holbird *v.* Anderson, 26, 363, 365, 408, 600, 704.
Holbrook *v.* Holbrook, 490.
v. New Jersey Zinc Co., 298, 299.
Holcombe *v.* Ehrmanntraut, 481.
Holden *v.* Burnham, 188, 277, 376.
Holdship *v.* Patterson, 65, 650, 657, 662.
Hollacher *v.* O'Brien, 450, 459, 460.
Holladay Case, The, 128, 177, 689.
Holland *v.* Brown, 446.
v. Cruft, 224.
Hollingsworth *v.* Crawford, 330.
Hollins *v.* Brierfield Coal & Iron Co., 131, 136, 140, 359.
Hollister *v.* Abbott, 518.
v. Barkley, 338.
v. Loud, 301, 353.
Holliway *v.* Holliway, 726, 730.
Holmberg *v.* Dean, 274, 594.
Holmer *v.* Viner, 712.
Holmes *v.* Coghill, 77.
v. Gardner, 666, 670.
v. Gilman, 84.
v. Hubbard, 608.
v. Marshall, 609.
v. Penney, 375.
v. Sherwood, 253.
Holt *v.* Creamer, 28, 52, 353, 391, 408.
Hombeck *v.* Vanmetre, 451.
Home Bank *v.* Brewster & Co., 615.
Hone *v.* Henriquez, 555, 708.
Hooberry *v.* Harding, 660.
Hood *v.* Jones, 524.
Hooley *v.* Gieve, 63, 83.
Hooper *v.* Baillie, 564.
v. Winston, 336.
Hoopes *v.* Knell, 433.
Hooser *v.* Hunt, 689, 692.
Hoot *v.* Sorrell, 415.
Hope Mut. Life Ins. Co. *v.* Taylor, 239.
Hopkins *v.* Bishop, 461, 462.
v. Joyce, 534.
v. Langton, 357, 693.
Hopkirk *v.* Randolph, 55, 79, 96.
Horbach *v.* Hill, 180, 193, 198, 203, 366.
Hord's Admr. *v.* Colbert, 7, 9.
Horn *v.* Horn, 40, 107.
v. Keteltas, 423.
v. Ross, 194.
Horne *v.* Chatham, 590.
Horneffer *v.* Duress, 529.
Horner *v.* Zimmerman, 101.
Horsey *v.* Heath, 223.
Horsford *v.* Gudger, 273.
Horstman *v.* Kaufman, 309.
Horton *v.* Dewey, 524, 528, 529.
v. Kelly, 88, 545.
v. Williams, 619.
Horwitz *v.* Ellinger, 27, 566, 601.
Hospes *v.* Northwestern Mfg., etc., Co., 237.
Houck *v.* Heinzman, 21.
Houseman *v.* Grossman, 244.
Houston *v.* Blackman, 395.
Hovenden *v.* Lord Annesley, 40, 512, 513.
Hovey *v.* Elliott, 260, 315.
v. Holcomb, 294, 736.
How *v.* Taylor, 464.
Howard *v.* Leonard, 86, 87, 638.
v. Prince, 136, 449, 451.
v. Rynearson, 392.
v. Sheldon, 150.
Howard Express Co. *v.* Wile, 499.
Howard Ins. Co. *v.* Halsey, 674.
Howard Nat. Bank *v.* King, 123.
Howe *v.* Bishop, 107, 164, 358.
v. Johnson, 454.
v. Ward, 44.
v. Whitney, 142.
Howe Machine Co. *v.* Claybourn, 357, 692.
Howell *v.* Donegan, 13.
v. Edgar, 19.
v. Mitchell, 374.
v. Thompson, 182.
Howland *v.* Blake, 13.
Howse *v.* Moody, 257, 263.
Howson *v.* Hancock, 712.
Hoxie *v.* Price, 188, 246, 527, 529.
Hoxsey *v.* Hoxsey, 640.
Hoyt, Estate of, 662.
v. Godfrey, 34, 54, 339.

Hoyt & Bros. Mfg. Co. *v.* Turner, 692.
H. T. Simon-Gregory Co. *v.* McMahan 489.
v. Schooley, 673, 679.
Hubbard *v.* Allen, 374, 394, 430, 504.
v. Hubbard, 100.
v. McNaughton, 577.
v. Moore, 389.
Hubbell *v.* Currier, 323.
v. Lerch, 219.
v. Meigs, 9.
v. Merchants' Nat. Bank, 251.
Hubler *v.* Waterman, 576.
Hudgins *v.* Kemp, 306, 415, 426.
Hudnal *v.* Wilder, 224, 672.
Hudson *v.* Osborne, 72.
v. Plets, 68, 69, 116.
v. White, 716, 717.
Hudspeth *v.* Harrison, 89.
Huebler *v.* Smith, 452.
Huey's Appeal, 31, 93.
Huggans *v.* Fryer, 494.
Huggins *v.* Perrine, 206.
Hughes *v.* Bell, 523.
v. Bloomer, 592.
v. Cory, 36, 444, 618, 625, 628.
v. Epling, 618.
v. Littrell, 515.
v. Monty, 489.
v. Northern Pacific R. R. Co., 295.
v. Roper, 411.
Hughitt *v.* Hayes, 562.
Huguenin *v.* Baseley, 77, 127.
Hugunin *v.* Dewey, 31, 92.
Hugus *v.* Robinson, 455.
Huiskamp *v.* Moline Wagon Co., 390.
Hulings *v.* Hulings Lumber Co., 580.
Hull *v.* Deering, 341, 563.
v. Hull, 243.
v. Sigsworth, 453.
Humbert Trinity Church, 31.
Hume *v.* Beale, 512.
v. Randall, 78.
Humes *v.* Scruggs, 30, 146, 212, 302, 311, 312, 534.
Humphrey *v.* Spencer, 60, 61, 182.
Hun *v.* Cary, 262.
Hungerford *v.* Earle, 406, 419.
Hunsinger *v.* Hofer, 183.
Hunt *v.* Bender, 740.
v. Conrad, 553.
v. Field, 140, 160.
Hunter *v.* Bradford, 305.
v. Corbett, 626.
v. Hunter, 294.
Hunterdon Freeholders *v.* Henry, 661, 662.
Hunters *v.* Waite, 33, 365.
Huntington *v.* Attrill, 269.
v. Saunders, 326.
Huntley *v.* Kingman, 27, 49, 703.
Huntzinger *v.* Harper, 501
Hurd *v.* Ascherman, 304.
Hurlburd *v.* Bogardus, 431, 464.
Hurley *v.* Osler, 669.
Huschle *v.* Morris, 454.
Hussey *v.* Castle, 528.
Hussman, *In re*, 311.
Hutcheson *v.* Peshine, 615.
Hutchins *v.* Gilchrist, 466.
v. Heywood, 315.
v. Hutchins, 119.
Hutchinson *v.* Boltz, 529, 545.
v. First Nat. Bank, 232, 273, 277, 280, 418.
v. Lord, 586.
v. Murchie, 267.
Hutton *v.* Benkard, 77.
Hyde *v.* Chapman, 177.
v. Ellery, 103, 332.
v. Frey, 531.
v. Woods, 65, 70, 87, 645, 657.
Hyman *v.* Kelly, 336.
Hymes *v.* Estey, 311.
Hyslop *v.* Clarke, 577.

Idaho, The, 64.
Iley *v.* Niswanger, 209.
Imhoff's Appeal, 93.
Importers' & T. Nat. Bank *v.* Quackenbush, 114, 115, 142, 147, 151 177.
Imray *v.* Magnay, 133.
Ingalls *v.* Herrick, 449, 459.
Inglehart *v.* Thousand Island Hotel Co., 20, 22, 506.
Ingliss *v.* Grant, 412.
Inhabitants of Pelham *v.* Aldrich, 182.
Inloes *v.* Amer. Exch. Bank, 20.
Inloes' Lessee *v.* Harvey, 260.
Innes *v.* Lansing, 220, 579.
Innis *v.* Carpenter, 370, 480.
Insurance Co. *v.* Shoemaker, 418.
Ionia Co. Sa. Bank *v.* McLean, 392, 541.
Irish *v.* Bradford, 391.
v. Clayes, 345.
Irons *v.* Manufacturers' Nat. Bank, 238.
Isaac *v* Wilisch, 307.
Iselin *v.* Peck, 485.
Iseminger *v.* Criswell, 524.
Isham *v.* Schafer, 60.
Ithaca G. L. Co. *v.* Treman, 54.
Ives *v.* Stone, 424.

Jackman *v.* Robinson, 255, 258, 259, 264.
Jacks *v.* Nichols, 302.
Jackson *v.* Andrews, 297.
v. Badger, 377.
v. Burgott, 133.
v. Cornell, 562.
v. Davison, 570, 572.
v. Duchaire, 712.
v. Edwards, 317.
v. Garnsey, 716.
v. Given, 509.
v. Glaze, 357.
v. Hart, 306.
v. King, 10, 112.

Jackson *v.* Lewis, 187,360.
v. Lomas, 712.
v. Losee, 553.
v. Mather, 690.
v. Middleton, 64.
v. Miner, 191, 385.
v. Myers, 51, 133, 182, 183, 221, 244, 245.
v. Plyler, 194.
v. Post, 191, 208.
v. Schutz, 643.
v. Seward, 51, 182.
Jackson Bank *v.* Durfey, 388.
Jacobs *v.* Allen, 8.
v. Morrison, 360, 482, 676, 683, 686.
v. Totty, 428.
Jacoby *v.* Parkland Dist. Co., 92.
Jacoby's Appeal, 109, 133.
Jacot *v.* Boyle, 104.
Jaeger *v.* Kelley, 9, 357, 358, 413, 502, 557.
Jaffers *v.* Aneals, 417.
Jaffray *v.* Greenbaum, 626, 628.
v. McGehee, 47, 135, 570, 572.
Jaffrey *v.* Brown, 420.
v. McGough, 524.
James *v.* Bird, 726.
v. Gard, 640.
v. Van Duyn, 7.
James Goold Co. *v.* Maheady, 528.
Jamison *v.* Bagot, 476.
v. Beaubien, 133.
v. King, 415.
v. McNally, 374.
Janes *v.* Whitbread, 412, 581.
Janvrin *v.* Fogg, 633.
Jaques *v.* Greenwood, 601.
Jarboe *v.* Hey, 644, 660.
Jauretche *v.* Proctor, 640.
Jeffres *v.* Cochrane, 709.
Jencks *v.* Alexander, 191.
Jenkins *v.* Clement, 188, 189, 190.
v. Einstein, 433.
v. Eldredge, 674.
v. Fowler, 567.
v. Lockard, 18, 181.
Jenkyn *v.* Vaughan, 58, 209.
Jenne *v.* Joslyn, 474, 487.
Jenney *v.* Andrews, 76, 77.
Jennings *v.* Howard, 279.
v. Prentice, 593.
Jenny *v.* Jenny, 543.
Jerome *v.* Carbonate Nat. Bank, 688
v. McCarter, 230.
Jessup *v.* Hulse, 276.
Jetton *v.* Tobey, 668.
Jewell *v.* Knight, 10, 12, 13, 28, 30, 628, 703, 741.
v. Parr, 499.
v. Porter, 214.
Jewett *v.* Bowman, 8.
v. Guyer, 450.
v. Noteware, 525, 704, 707.
Jiggitts *v.* Jiggitts, 135, 543.
Jimmerson *v.* Duncan, 107.
Johnson *v.* Alexander, 58.
v. Cushing, 76.
v. Elkins, 89.
v. Farnum, 332.
v. Gibson, 299, 697.
v. Griffin, 739.
v. Herring, 592.
v. Holloway, 454.
v. Jones, 155, 166, 224.
v. Lovelace, 485.
v. McAllister, 576, 587.
v. Powers, 154, 226, 227.
v. Rapalyea, 604.
v. Rogers, 298, 509.
v. Sharp, 548.
v. Willey, 462.
Johnston *v.* Dick, 436.
v. Johnston, 524.
v. Jones, 499.
v. Thompson, 496.
v. Tuttle Bros., 19.
v. Zane, 194, 660.
Joiner *v.* Franklin, 524.
Jones, *In re*, 535.
v. Barkley, 712.
v. Bryant, 62.
v. Clifton, 78, 538.
v. Comer, 726.
v. Conn. Bank, 315.
v. Conoway 514.
v. Davenport, 226.
v. Easley, 469.
v. Graham, 141, 619.
v. Green, 6, 97, 140, 145, 147, 155, 159, 167.
v. Huggeford, 626.
v. Jones, 478.
v. King, 181.
v. Light, 194, 425, 665, 670, 719.
v. Massey, 274.
v. Morrison, 290.
v. Nevers, 440.
v. Pugh, 335.
v. Rahilly, 737.
v. Reeder, 323.
v. Reese, 660.
v. Shaddock, 83.
v. Simpson, 7, 8, 9, 10, 12, 365, 398, 478.
v. Smith, 674.
v. Snyder, 491.
v. Syer, 580, 581, 582.
v. Van Doren, 83.
Jones' Appeal, 383.
Jordan *v.* Gillen, 553.
v. National Shoe & L. Bank, 562.
v. White, 81, 704.
Joseph *v.* Levi, 609, 619.
v. McGill, 160, 333.
Josselyn *v.* Josselyn, 646.
Journeay *v.* Brown, 336.
Jourolmon *v.* Massengill, 655, 658, 660.

Judson *v.* Courier Co., 252.
Justh *v.* Wilson, 452, 480.
Juzan *v.* Toulmin, 7.

Kahanaiki *v.* Kohala Sugar Co., 639.
Kahley, *In re*, 619, 623.
Kaighn *v.* Fuller, 338.
Kain *v.* Larkin, 186, 187, 188, 192, 244, 272, 274, 277, 377, 426, 480, 727.
Kaine *v.* Weigley, 9, 13, 15.
Kalk *v.* Fielding, 407, 618.
Kalmus *v.* Ballin, 232, 318.
Kamp *v.* Kamp, 165.
Kanawha Valley Bank *v.* Atkinson, 524.
v. Wilson, 60, 198.
Kane *v.* Bloodgood, 516.
v. Drake, 451.
v. Hibernia Ins. Co., 15.
v. Roberts, 212.
Kankakee W. N. Co. *v.* Kampe, 167.
Kansas City Packing Co. *v.* Hoover, 44, 583, 584, 587.
Kansas Pacific Ry. Co. *v.* Couse, 460.
Karll *v.* Kuhn, 410.
Karst *v.* Gane, 142, 633.
Karstorp's Estate, 344.
Kasson *v.* People, 126.
Kaufer *v.* Walsh, 24, 368, 501.
Kaufman *v.* Whitney, 528.
Kavanagh *v.* Beckwith, 568.
Kayser *v.* Heavenrich, 578.
Keach, *In re*, 74.
Keagy *v.* Trout, 8, 25, 408.
Keating *v.* Retan, 502.
Keel *v.* Larkin, 717, 725.
Keen *v.* Kleckner, 387, 704.
Keener *v.* Keener, 381.
Keeney *v.* Good, 539.
v. Home Ins. Co., 236.
Keep *v.* Sanderson, 586, 587.
Keevil *v.* Donaldson, 584.
Kehr *v.* Smith, 209, 538, 541.
Keith *v.* Fink, 389.
v. Proctor, 406.
Kellar *v.* Taylor, 366, 675.
Keller *v.* Blanchard, 451.
v. Paine, 124.
v. Payne, 161.
Kelley *v.* Connell, 529.
v. Flory, 390, 563.
v. People, 495.
Kelley-Goodfellow Shoe Co. *v.* Scales, 591.
Kellog *v.* Richardson, 594.
Kellogg *v.* Aherin, 309, 357.
v. Barber, 607.
v. Cayce, 563.
v. Clyne, 407, 500.
v. Olmsted, 264.
v. Root, 432.
v. Slauson, 8, 478, 585, 586, 606, 607.
v. Slawson, 7.
Kelly *v.* Baker, 564.
Kelly *v.* Campbell 488.
v. Crapo, 615.
v. Fleming, 434.
v. Lane, 241.
v. Lenihan, 20.
v. McGrath, 523, 524.
Kelsey *v.* Kelley, 381.
Kemp *v.* Folsom, 527.
v. Small, 423.
Kempner *v.* Churchill, 7, 11, 30, 374, 375, 405, 414.
Kempton *v.* Hallowell, 660.
Kendal *v.* Wood, 390.
Kendall *v.* Fitts, 464.
v. New Eng. Carpet Co., 580.
v. Samson, 450.
Kennedy *v.* Barandon, 316.
v. Creswell, 226, 227.
v. Divine, 490, 495, 496.
v. Gibson, 263.
v. Green, 672, 674, 693.
v. Lee, 526, 534.
v. McKee, 564.
v. Nunan, 315.
v. Thorp, 234, 601.
Kensington *v.* White, 288.
Kent *v.* Curtis, 140.
v. Lasley, 13.
v. Riley, 540.
Kepple's Appeal, 640.
Kerbs *v.* Ewing, 594.
Kercheis *v.* Schloss, 611.
Kerr *v.* Hutchins, 316, 411.
Kesner *v.* Trigg, 524, 540.
Kessinger *v.* Kessinger, 386.
Ketchum, Matter of, 69.
Keteltas *v.* Wilson, 616.
Kevan *v.* Crawford, 408.
Keys *v.* Grannis, 520.
Keyser *v.* Angle, 667.
Keyser's Appeal, 663.
Kibbe *v.* Wetmore, 123.
Kidd *v.* Johnson, 72.
v. Rawlinson, 49, 446.
Kidder *v.* Horrobin, 229.
Kidney *v.* Coussmaker, 210.
Kilbourn *v.* Sunderland, 98, 112, 113.
Kilbourne *v.* Fay, 232.
Killam *v.* Perce, 487.
Killian *v.* Clark, 7, 206.
Killinger *v.* Reidenhauer, 543.
Kilner, *Ex parte*, 714.
Kilpatrick-Koch D. G. Co. *v.* Strauss, 425.
Kilroy *v.* Wood, 87, 638, 650, 661.
Kimball *v.* Fenner, 394, 529.
v. Harman, 118.
v. Noyes, 82.
v. Thompson, 25.
Kimble *v.* Smith, 366.
Kimmel *v.* McRight, 108.
Kinealy *v.* Macklin, 318.
King *v.* Bailey, 454.
v. Dupine, 40, 107.

King v. Holland Trust Co., 676.
v. Hubbell, 406.
v. Moon, 112, 402, 429.
v. Poole, 371, 498.
v. Ruble, 610.
v. Russell, 404, 405, 435.
v. Tharp, 146, 475.
v. Trice, 126, 297.
v. Wilcox, 341, 346, 416.
King's Estate, 664.
King's Heirs v. Thompson, 278.
King (The). See Rex.
Kingen v. Stroh, 90.
Kingsbury v. Earle, 81.
Kinnan v. Guernsey, 77.
Kinnard v. Daniel, 538.
Kinsley v. Scott, 122.
Kip v. Bank of N. Y., 553.
Kipling v. Corbin, 604.
Kipp v. Hanna, 61, 210, 437.
v. Lamoreaux, 451, 478.
Kipper v. Glancey, 155, 169.
Kirby v. Boyette, 659.
v. Bruns, 60.
v. Ingersoll, 18.
v. Lake Shore & M. S. R. R. Co., 283, 511, 513, 515.
v. Masten, 492.
v. Schoonmaker, 389.
v. Tallmadge, 500, 693.
Kirkbride, *Re*, 623, 626.
Kirkley v. Lacey, 531.
Kirkpatrick v. Clark, 717, 724, 732.
Kirksey v. Snedecor, 204, 212.
Kirtland v. Snow, 456.
Kiser v. Dannenberg, 594.
Kissam v. Edmundson, 209.
Kisterbock's Appeal, 355.
Kitch v. St. Louis, K. C. & N. Ry. Co., 689.
Kitchen v. McCloskey, 434, 435.
Kittering v. Parker, 301.
Kittredge v. Sumner, 357.
Kitts v. Willson, 423, 717, 719.
Klapp v. Shirk, 564.
Klein v. Hoffheimer, 52.
v. Horine, 275.
v. McNamara, 31.
v. Richardson, 421.
Kleine v. Nie, 574.
Kley v. Healy, 349.
Klosterman v. Mason Co. Cent. R. Co., 139.
v. Vader, 79, 394.
Klous v. Hennessey, 118, 119.
Klumpp v. Gardner, 563, 564.
Knapp v. City of Brooklyn, 273.
v. Day, 527, 528.
v. Homœopathic Mut. L. I. Co., 56.
v. Lee, 722.
v. McGowan, 575, 605, 606, 611.
v. Smith, 532.
Knatchbull v. Hallet, 83.
Knefler v. Shreve, 660.
Knight v. Forward, 212, 462, 492.
v. Glasscock, 273
v. Hunt, 712.
Knoop v. Kelsey, 128.
Knott, *Ex parte*, 670.
Knower v. Cadden Clothing Co., 495, 676, 681, 686, 691.
v. Central Nat. Bank, 592, 716.
Knowles v. Toone, 13.
Knowlton v. Hawes, 669.
v. Mish, 30, 539.
Knox v. McFarran, 133, 489.
v. Moses, 351.
v. Yow, 94.
Knye v. Moore, 288.
Koenig v. Steckel, 126.
Koster v. Hiller, 188, 189.
Kraemer v. Adelsberger, 13.
Kreider's Estate, 93.
Kreth v. Rogers, 587.
Kreuzer v. Cooney, 453.
Krumdick v. White, 233.
Kruse v. Prindle, 478.
Kuevan v. Specker, 31.
Kuhl v. Martin, 187.
Kuhlman v. Baker, 513.
v. Orser, 607.
Kurtz v. Miller, 654.
Kutz's Appeal, 524.
Kuykendall v. McDonald, 378.
Kvello v. Taylor, 88.
Kyle v. O'Neil, 139.

La Bau v. Huetwohl, 335.
Lacassagne v. Chapius, 260.
Lachman v. Martin, 532.
Lacker v. Rhoades, 553.
Lackland v. Smith, 660.
Lackman v. Wood, 696.
La Crosse Nat. Bank v. Wilson, 58.
Lacrosse & M. R. R. Co. v. Seeger, 214.
Ladd v. Newell, 531.
v. Wiggin, 424.
Ladnier v. Ladnier, 405.
Lady Washington Consol. Co. v. Wood, 283, 694.
Laidlaw v. Gilmore, 415.
Laird v. Davidson, 497, 525, 706.
Lake v. Billers, 520.
v. Morris, 430, 464.
Lake Shore Banking Co. v. Fuller, 602.
Lalone v. United States, 16.
Lamar Ins. Co. v. Moore, 237.
Lamb v. Stone, 117.
Lamberton v. Pereles, 661.
Lambrecht v. Patten, 527.
Lamont v. Cheshire, 315.
Lampert v. Haydel, 644.
Lamson v. Patch, 471.
Landauer v. Mack, 374.
Landes v. Brant, 698.
Landon v. Townshend, 267.

Lane *v.* Lane, 640.
v. Lutz, 617, 618.
v. Starr, 630.
Lang *v.* Lee, 410, 619.
v. Stockwell, 449, 463, 480.
Langford *v.* Fly, 51, 244, 429.
v. Thurlby, 525, 533.
Lanmon *v.* Clark, 296.
Lant *v.* Morgan's Admr., 281.
Lario *v.* Walker, 640.
Larkin *v.* McAnnally, 93.
v. McMullin, 199.
Lassells *v.* Cornwallis, 76.
Lassiter *v.* Davis, 361, 376.
v. Hoes, 523.
Lathrop *v.* Bampton, 83.
v. Clapp, 235, 458, 466, 555.
v. Clayton, 451, 465.
Latimer *v.* Batson, 446, 469.
Lattin *v.* McCarty, 104.
Laughlin *v.* Calumet & C. Canal & D. Co, 509.
Laughton *v.* Harden, 51, 190, 197, 255, 360, 376, 437.
Lavelle *v.* Clark, 479.
Lavender *v.* Boaz, 432.
Law *v.* Payson, 476.
Lawrence *v.* Bank of the Republic, 110, 242, 251, 252, 259, 290.
v. Davis, 554.
v. Fox, 81, 82.
v. Norton, 577, 578.
v. Tucker, 391, 396.
Lawson *v.* Ala. Warehouse Co., 407.
v. Funk, 354, 355.
v. Moorman, 476.
Lawton *v.* Buckingham, 396.
Lay *v.* Neville, 454.
Lea *v.* Hinton, 542.
Leach *v.* Flack, 668.
v. Francis, 357.
v. Kelsey, 231.
v. Shelby, 394, 396.
Leadman *v.* Harris, 23.
Leasure *v.* Coburn, 405.
v. Forquer, 273.
Leather Cloth Co *v.* Amer. Cloth Co., 72.
Leavitt *v.* Beirne, 650.
v. Blatchford, 703.
Ledyard *v.* Butler, 503, 670.
Lee *v.* Chase, 227.
v. Cole, 232, 318, 327, 526, 527.
v. Figg, 360, 361, 376.
v. Kilburn, 484, 487.
v. Lamprey, 495.
v. Lee, 278.
v. Pearce, 15.
Leeds *v.* Cameron, 391.
Le Fevre *v.* Phillips, 149, 169.
Leffel *v.* Schermerhorn, 427.
Leffingwell *v.* Warren, 571.
Leggett *v.* Standard Oil Co., 508.
Le Goaster *v.* Barthe, 132.
Legro *v.* Lord, 31, 88.
Lehman *v.* Bentley, 391, 397.
v. Greenhut, 411.
v. Kelly, 63.
v. Meyer, 293.
v. Rosengarten, 550.
Lehmberg *v.* Biberstein, 212.
Leicester *v.* Rose, 712.
Leigh *v.* Harrison, 653, 655, 660.
Leighton *v.* Orr, 29, 386.
Leiman, Matter of, 232.
Leitch *v.* Hollister, 577, 609.
v. Wells, 298, 299.
Leland, *In re*, 232.
Lemmon *v.* People, 269.
Le Neve *v.* Le Neve, 683.
Lenox *v.* Roberts, 615.
Leonard *v.* Baker, 419.
v. Bolton, 183, 194.
v. Bryant, 476.
v. Clinton, 56, 57, 542.
v. Forcheimer, 309.
v. Green, 253.
v. Nye, 552.
Le Page *v.* Slade, 358.
Leppig *v.* Bretzel, 434.
Leque *v.* Smith, 8, 668.
Lerow *v.* Wilmarth, 189, 437, 717.
Le Roy *v.* Dunkerly, 315.
Lesem *v.* Herriford, 457.
Lesher *v.* Getman, 557.
Leukener *v.* Freeman, 245.
Levy *v.* James, 547.
Levy's Accounting, 550.
Lewis, Matter of, 551.
v. Burnham, 274.
v. Caperton, 428.
v. Castleman, 212.
v. Miller, 548.
v. Palmer, 222, 223.
v. Rogers, 146, 476.
v. St. Albans Iron & Steel Works, 290.
v. Shainwald, 131.
v. Simon, 203.
v. Smith, 122.
v. Wilcox, 462, 490.
Lexington *v.* Butler, 263.
Lichtenberg *v.* Herdtfelder, 140, 145, 151, 155, 156, 225, 233, 710.
Lidderdale *v.* Robinson, 348.
Lightfoot *v.* Wallis, 618.
Lillard *v.* McGee, 39, 221, 244.
Lillie *v.* Wilson, 133.
Lillis *v.* Gallagher, 725.
Liming *v.* Kyle, 414.
Lincoln *v.* Claflin, 495.
Lincoln's Ex'x *v.* Foster, 371.
Lindell Real Estate Co. *v.* Lindell, 740.
Lindle *v.* Neville, 409.
Lindley *v.* Cross, 169.
Lindsay *v.* Harrison, 661.
Lindsey *v.* Delano, 475.
Lingan *v.* Henderson, 304.

Lininger *v.* Herron, 434.
v. Raymond, 601.
Linn *v.* Wright, 15.
Linton *v.* Butz, 463, 466.
Lion, The, 722.
Lionberger *v.* Baker, 414.
Lipperd *v.* Edwards, 270.
Lippincott *v.* Evens, 653, 661.
Lishy *v.* Perry, 31.
Litchfield *v.* White, 587.
Little *v.* Lichkoff, 495.
Littleton *v.* Littleton, 543, 544.
Livermore *v.* Boutelle, 183, 222, 526.
v. McNair, 114.
v. Northrup, 565, 598.
v. Rhodes, 605.
Livey *v.* Winton, 435.
Livingston *v.* Livingston, 223.
Lloyd *v.* Foley, 717.
v. Fulton, 29, 47, 113, 135, 186, 187, 188, 351, 376, 387, 437, 650.
v. Passingham, 335.
Load *v.* Green, 669.
Lobstein *v.* Lehn, 340.
Locke *v.* Lewis, 100.
v. Mabbett, 86.
Lockhard *v.* Beckley, 13, 15, 30, 33, 60, 199, 365.
Lockyer *v.* Savage, 647.
Loehr *v.* Murphy, 187, 201.
Loeschigk *v.* Addison, 194.
v. Bridge, 301, 427, 428.
Logan *v.* Brick, 17.
v. Logan, 111.
London *v.* Martin, 603.
Long *v.* Dollarhide, 529.
v. Knapp, 465.
Loomis *v.* Tifft, 156, 223, 724.
Loos *v.* Wilkinson, 62, 232, 321, 340, 342, 343, 345, 479, 487, 489, 493, 559.
Lord *v.* Bunn, 646.
v. Devendorf, 562.
v. Harte, 58, 72.
Lord Cranstown *v.* Johnston, 304.
Lore *v.* Dierkes, 25, 225, 260, 343, 349, 666, 669.
Loring *v.* Dunning, 415.
Losey *v.* Stanley, 87.
Lott *v.* Kaiser, 244.
Love *v.* Geyer, 330.
v. Mikals, 155.
Lovett *v.* Gillender, 640, 643.
v. Kingsland, 640, 643.
Low *v.* Bartlett, 154.
v. Marco, 107.
v. Wortman, 416, 434, 703.
Lowe *v.* Matson, 454.
Lowery *v.* Clinton, 542.
Lowry *v.* Beckner, 15.
v. Coulter, 230.
v. Fisher, 181.
v. Pinson, 221.
v. Smith, 545, 670.
Lowry *v.* Tew, 519.
Lucas *v.* Brooks, 542.
Ludlow *v.* McBride, 469.
v. Simond, 312.
Ludwig *v.* Highley, 468.
Lukins *v.* Aird, 23, 25, 33, 355, 424, 480, 621, 622, 634.
Luna *v.* Inhab. of Tyngsborough, 488.
Lush *v.* Wilkinson, 80.
Lux *v.* Davidson, 143, 158.
Lycoming Rubber Co. *v.* King, 425.
Lyell *v.* Supervisors of St. Clair, 269.
Lyford *v.* Thurston, 83.
Lyman *v.* Place, 262.
Lynch *v.* Crary, 161.
v. Johnson, 115, 129, 130, 708.
Lynchburg Iron Co. *v.* Taylor, 249.
Lynde *v.* McGregor, 61, 127, 231, 406.
Lynn *v.* Smith, 95.
Lyons *v.* Leahy, 676, 681.
v. Murray, 156.
Lytle *v.* Beveridge, 656, 657, 658.

Maass *v.* Falk, 221, 233, 602, 603, 704, 708.
McAfee *v.* McAfee, 392.
McAllaster *v.* Bailey, 151.
McAlpine *v.* Sweetser, 736.
McAninch *v.* Dennis, 278.
McArtee *v.* Engart, 296.
McArthur *v.* Hoysradt, 66, 341.
v. Scott, 249.
McAuliffe *v.* Farmer, 140.
McBurney *v.* Wellman, 423.
McBurnie, *Ex parte*, 383, 536.
McCabe *v.* Brayton, 501.
McCaffrey *v.* Hickey, 335.
McCain *v.* Wood, 394.
McCall *v.* Pixley, 227, 243.
McCalmont *v.* Lawrence, 176, 178, 214, 316.
McCanless *v.* Flinchum, 376.
McCarron *v.* Cassidy, 423.
McCarthy *v.* Goold, 67.
v. Scanlon, 329.
McCartin *v.* Perry, 230.
McCartney *v.* Bostwick, 111, 153, 165, 177.
McCarty *v.* Fletcher, 430.
McCaskle *v.* Amarine, 394.
McCauley *v.* Rhodes, 297.
McClair *v.* Wilson, 354.
McClaugherty *v.* Morgan, 193.
McCleary *v.* Ellis, 639.
McCleery *v.* Allen, 584.
McClellan *v.* Pyeatt, 37.
v. Sanford, 13.
McCleskey *v.* Leadbetter, 717.
McClintock *v.* Loisseau, 718.
McCloskey *v.* Stewart, 63.
McClure *v.* Cook, 659.
v. Goodenough, 560.
v. Smith, 424.
McClurg *v.* Lecky, 575.
McCluskey *v.* Cromwell, 46.

McCole *v.* Loehr, 278.
McConihe *v.* Derby, 320, 551, 625.
McConnel *v.* Dickson, 223.
McConnell *v.* Barber, 387.
v. Citizens' State Bank, 278.
v. Scott, 223, 391.
v. Sherwood, 557, 567, 590, 611.
McCool *v.* McNamara, 336.
McCormick *v.* Atkinson, 35.
v. Hyatt, 357.
v. Joseph, 370.
McCrasly *v.* Hasslock, 620.
McCrea *v.* Purmort, 396.
McCreary *v.* Skinner, 618.
McCulloch *v.* Hutchinson, 45.
McCullough *v.* Colby, 175, 176.
v. Gilmore, 641, 643.
McCutcheon's Appeal, 57.
McDermott *v.* Blois, 140.
McDermutt *v.* Strong, 130, 169, 217.
Macdona *v.* Swiney, 446.
McDonald *v.* Bowman, 492.
v. Cash 563.
v. Farrell, 439.
McDonnell *v.* Eaton, 288.
McDonogh *v.* Murdoch, 640.
McDougall *v.* Page, 123, 518.
McDowell *v.* Brown, 640.
v. Cochran, 166.
v. Goldsmith, 146.
v. Rissell, 497.
McElfatrick *v.* Hicks, 491.
McElmoyle *v.* Cohen, 154.
McElwain *v.* Willis, 143, 172, 173, 175, 271.
McEvony *v.* Rowland, 435, 502.
McEvoy *v.* Appleby, 84, 85, 650, 661.
McEwen *v.* Brewster, 661.
McFadden *v.* Mitchell, 190, 413, 415.
McFarland *v.* Bate, 563, 564.
v. Goodman, 31, 92.
McFarlane *v.* Griffith, 137.
McFerran *v.* Jones, 67.
McGahan *v.* Crawford, 61.
McGarvy *v.* Roods, 392.
McGay *v.* Keilback, 80.
McGee *v.* McGee, 543.
McGhee *v.* Importers' & T. Nat. Bank, 140, 451.
McGintry *v.* Reeves, 394.
McGlinsey's Appeal, 536.
McGoldrick *v.* Slevin, 332.
Macgregor *v.* Dover & Deal R. R. Co., 570, 572.
McGuire *v.* Miller, 717.
McIlhargy *v.* Chambers, 551, 554.
McIlvaine *v.* Smith, 65, 660.
McIntosh *v.* Ladd, 544.
v. Smiley, 461.
Mackason's Appeal, 76.
Mackay *v.* Douglas, 203.
MacKaye *v.* Soule, 334.
McKee *v.* Judd, 552, 553.
Mackellar *v.* Pillsbury, 368, 405, 451.
McKenna *v.* Crowley, 131, 221, 361.
McKenzie's Appeal, 640.
McKeown *v.* Allen, 355, 362.
McKibbin *v.* Martin, 28, 30, 403. 431, 453, 463, 466.
Mackie *v.* Cairns, 609.
McKim *v.* Thompson, 304.
McKinley *v.* Bowe, 140.
McKinney *v.* Wade, 425.
McKinnon *v.* Reliance Lumber Co., 489.
McKinster *v.* Babcock, 396, 406.
McKnight *v.* Morgan, 224, 225.
McKown *v.* Furgason, 482.
v. Whitmore, 285.
McLachlan *v.* Wright, 619.
McLain *v.* Ferrell, 284.
McLane *v.* Johnson, 196, 224, 489.
McLaughlin *v.* McLaughlin, 224.
McLean *v.* Cary, 313, 325.
v. Clapp, 698.
v. Lafayette Bank, 288, 623.
v. Letchford, 309, 345.
v. Meek, 154.
v. Weeks, 45.
McLendon *v.* Commrs. of Anson, 170.
McLeod *v.* First Nat. Bank, 83.
McLure *v.* Benini, 172.
McMahan *v.* Bowe, 31.
McMahon *v.* Allen, 231, 247.
McMaster *v.* Campbell, 230, 718.
v. Morrison, 640.
McMillan *v.* Knapp, 610.
v. McNeill, 517, 518.
McMinn *v.* Whelan, 140, 159.
McMurtrie *v.* Riddell, 377.
McNally *v.* City of Cohoes, 673.
McNaney *v.* Hall, 565.
Macomber *v.* Peck, 25, 480.
McPherson *v.* Kingsbaker, 194, 204.
McRea *v.* Branch Bank of Ala. 426.
McReynolds *v.* Dedman, 573.
Macungie Sav. Bank *v.* Bastian, 268.
McVeagh *v.* Baxter, 432.
McVeigh *v.* Ritenour, 183.
McVicker *v.* May, 434.
McWilliams *v.* Cornelius, 577.
v. Rodgers, 420.
Maders *v.* Whallon, 7, 109, 110.
Magawley's Trust, 209.
Magee *v.* Badger, 687.
Magirl *v.* Magirl, 433.
Magniac *v.* Thompson, 382, 383, 530, 593, 689.
Maher *v.* Hibernia Ins. Co. 276.
Mahler *v.* Schmidt, 250, 252.
Mahr *v.* Norwich Union F. I. Soc., 250, 258.
Maiders *v.* Culver's Assignee, 231.
Main *v.* Lynch, 557.
Malcolm *v.* Hodges, 20.
Malony *v.* Horan, 545.
Manby *v.* Scott, 2.
Manchester *v.* McKee, 151.

Manchester *v.* Tibbetts, 386, 522, 523, 524, 528.
Mandel *v.* Peay, 558.
Mandeville *v.* Avery, 16, 234, 235, 342, 343, 619, 622, 633.
v. Reynolds, 146, 476.
Mandlebaum *v.* McDonell, 640, 641.
Mangum *v.* Finucane, 528.
Manhattan Co. *v.* Evertson, 308, 670.
Manikee *v.* Beard, 543.
Manley *v.* Rassiga, 234.
Mann *v.* Appel, 326.
Manning *v.* Beck, 318, 597, 603, 708.
v. Carruthers, 527.
v. Chambers, 647.
v. Hayden, 516.
v. Reilly, 353.
v. Riley, 538.
v. San Jacinto Tin Co., 694.
Mansell *v.* Mansell, 83.
Mansfield *v.* Dyer, 666.
v. First Nat. Bank, 232.
Manton *v.* Moore, 443, 458.
Manufacturers' Bank *v.* Rugee, 452.
Manufacturing Co. *v.* Bradley, 113, 121, 141.
Mapes *v.* Scott, 335.
Mapleback, *In re*, 723.
Marcy *v.* Kinney, 133.
Marden *v.* Babcock, 362.
Mark's Appeal, 592.
Markey *v.* Umstattd, 461.
Marks *v.* Bradley, 354, 389, 562, 568, 609.
Marksbury *v.* Taylor, 15, 98.
Marmon *v.* Harwood, 355, 362, 363.
Marrin *v.* Marrin, 319.
Marriott *v.* Givens, 407.
Marsh, Matter of, 553.
v. Bennett, 556.
v. Benson, 55.
v. Burroughs, 68, 84, 220, 260.
v. Dunckel, 481.
v. Falker, 10, 12.
v. Pier, 146.
Marshall *v.* Croom, 61, 204, 435, 477
v. Green, 399, 431.
v. Means, 288.
v. Roll, 193, 197, 212.
v. Sherman, 269.
v. Van De Mark, 608.
v. Whitney, 165.
Marston *v.* Dresen, 275, 534.
v. Vultee, 368.
Martin *v.* Adams, 464.
v. Bolton, 224.
v. Bowen, 350.
v. Crosby, 90.
v. Davis, 660.
v. Elden, 164.
v. Fox, 435, 482.
v. Hausman, 594.
v. Kunzmuller, 562.
v. Margham, 647.
Martin *v.* Marshall, 688.
v. Martin-Wilson, etc., Co., 111.
v. Michael, 140, 144, 159.
v. Root, 80, 224.
v. Smith, 284.
v. Tidwell, 113, 121.
v. Walker, 183, 223.
Martin-Perrin Merc. Co. *v.* Perkins, 619.
Martindale *v.* Booth, 447.
Marx *v.* Tailer, 260.
Maryland Grange Agency *v.* Lee, 658.
Mason *v.* Franklin, 406.
v. Lord, 247.
v. Pierron, 322, 323.
v. Vestal, 37, 274.
Massey *v.* Yancey, 538.
Massie *v.* Watts, 74.
Masson *v.* Bovet, 349.
Masterson *v.* Little, 516.
Masterton *v.* Beers, 352.
Mateer *v.* Hissim, 437.
Mathes *v.* Dobschuetz, 61, 358.
Mathews *v.* Feaver, 379, 412,
v. Paradise, 660.
v. Poultney, 557, 564.
v. Reinhardt, 7, 413, 414.
Matson *v.* Melchor, 187.
Matthai *v.* Heather, 7, 204.
Matthews *v.* Ott, 550.
v. Rice, 358.
Mattingly *v.* Nye, 146, 205, 540.
Mattison *v.* Judd, 610.
Maule *v.* Rider, 694.
Mawman *v.* Tegg, 73.
Maxwell *v.* Kennedy, 510.
May *v.* First Nat. Bank, 551.
v. Greenhill, 332.
v. Le Claire, 694.
v. State, Nat. Bank, 195, 197, 199.
v. Tenney, 548.
v. Walker, 577.
Mayer *v.* Clark, 102, 448, 451.
v. Hellman, 548, 599, 704.
v. Webster, 460.
Mayers *v.* Kaiser, 95, 532.
Maynard *v.* Cleaves, 644, 660.
Maynes *v.* Atwater, 469.
Mayor of New York *v.* Brady, 476.
Mays *v.* Rose, 335.
Meacham *v.* Sternes, 556.
Mead *v.* Combs, 353.
v. Dowd, 573.
v. Gardiner, 450, 451.
v. Noyes, 429, 459.
v. Phillips, 556.
Meade *v.* Smith, 453, 460.
Meader *v.* Norton, 507.
Means *v.* Dowd, 26, 27, 33, 35, 620, 625.
v. Hicks 474, 477.
Mebane *v.* Layton, 217.
v. Mebane, 64, 65, 657, 659.
Mechanics' & T. Bank *v.* Dakin, 103, 110, 173, 174.

Meddowcroft *v.* Huguenin, 29.
Medsker *v.* Bonebrake, 525.
Meeker *v.* Harris, 146, 150, 274, 476.
v. Saunders, 433.
v. Wilson, 446.
Megehe *v.* Draper, 92.
Mehaffey's Estate, 662.
Mehlhop *v.* Pettibone, 357, 478.
Meigs *v.* Weller, 343.
Melbye *v.* Melbye, 725.
Melville *v.* Brown, 159.
Memphis & L. R. R. *v.* Dow, 348.
Menagh *v.* Whitwell, 339, 389.
Menken Co. *v.* Brinkley, 641.
Menton *v.* Adams, 706.
Menzies *v.* Pulbrook, 247.
Mercantile Trust Co. *v.* Wood, 625.
Mercer *v.* Mercer, 717.
v. Peterson, 714.
Merchant *v.* Bunnell, 532.
Merchants' Bank *v.* Thomson, 122, 545.
Merchants' Exch. Nat. Bank *v.* Comml. Warehouse Co., 506.
Merchants' Nat. Bank *v.* Paine, 144, 155, 169.
Merchants' & M. Sav. Bank *v.* Lovejoy, 63.
Merchants' & M. Tr. Co. *v.* Borland, 56, 57, 156.
Meredith *v.* Johns, 119.
Merrell *v.* Johnson, 190, 270, 278, 349.
Merriam *v.* Sewall, 160.
Merrick *v.* Butler, 722.
Merrill *v.* Englesby, 555.
v. Grinnell, 553.
v. Locke, 416, 426, 468.
Merriman *v.* Chicago, etc., R. R. Co., 219.
Merry *v.* Fremon, 156, 166, 223, 255, 264, 724.
Mertens *v.* Welsing, 414, 426, 431.
Merwin *v.* Richardson, 221.
Messersmith *v.* Sharon Sav. Bank, 131.
Messmore *v.* Huggard, 128.
Metcalf *v.* Munson, 484, 487.
v. Watertown, 142.
Metropolitan Bank *v.* Durant, 319, 415, 505.
v. Godfrey, 670.
v. St. Louis Dispatch Co., 516.
Metropolitan Nat. Bank *v.* Rogers, 194, 230.
Meux *v.* Anthony, 140, 169, 178.
v. Howell, 43, 412.
Meyer *v.* Lowell, 82.
v. Virginia & T. R. R. Co., 490.
Michael *v.* Gay, 309.
Michoud *v.* Girod, 516.
Micou *v.* Moses, 332, 336.
v. National Bank, 706.
Middleton *v.* Sinclair, 435.
v. Taber, 550.
Middletown Sav. Bank *v.* Bacharach, 288.
Miers *v.* Zanesville & M. Turnp. Co., 68, 709.
Miles *v.* Barry, 514.
v. Edelen, 497.
v. Miles, 304.
Miller, Matter of, 46.
v. Bryan, 357.
v. Campbell, 56.
v. Cox, 524.
v. Davidson, 131, 169.
v. Dayton, 128, 183.
v. Earle, 319.
v. Florer, 81.
v. Fraley, 308.
v. Garman, 461.
v. Hall, 251, 254, 257, 265.
v. Hanley, 474, 494.
v. Hilton, 181.
v. Jamison, 249, 294.
v. Jones, 626, 628, 635.
v. Lacey, 454, 466.
v. Lehman, 279.
v. Lockwood, 407, 450, 630.
v. Long Island R. R. Co., 459.
v. McCoy, 396.
v. McIntyre, 516.
v. Mackenzie, 236.
v. McKenzie, 396.
v. Miller, 45, 87, 140, 211, 545.
ads. Pancoast, 446, 451, 459, 626.
v. Post, 570, 572.
v. Sauerbier, 391.
v. Sherry, 129, 295, 296, 739.
v. Wilson, 437, 544.
Millholland *v.* Tiffany, 689, 692.
Millington *v.* Hill, 340, 342, 670.
Mills *v.* Argall, 717.
v. Block, 125, 140, 159.
v. Gore, 304.
v. Howeth, 690.
v. Parkhurst, 233, 547, 552, 613.
v. Pessels, 589.
v. Thompson, 492.
v. Van Voorhies, 134.
Milwaukee Harvester Co. *v.* Culver, 532.
Milwaukee & M.R.R.Co.*v.* Milwaukee & W. R. R. Co., 247.
Minchin *v.* Minchin, 736.
Miner *v.* Lane, 107, 108.
v. Phillips, 371.
v. Warner, 183.
Minor *v.* Mead, 228.
Mish *v.* Main, 484.
Mississippi Mills *v.* Cohn, 98.
Missouri L. M. & S. Co. *v.* Reinhard, 241.
Mitchell *v.* Barnes, 335.
v. Bunch, 739.
v. Mitchell, 410, 481.
v. Stetson, 34.
v. Stiles, 319.
v. Thompson, 514.
v. Van Buren, 319.

Mitchell *v.* West, 451, 466.
v. Winslow, 230, 626.
Mittnacht *v.* Kelly, 621, 622.
Mobile Sav. Bank *v.* McDonnell, 11, 477, 493.
Mobley *v.* Letts, 619.
Mohawk Bank *v.* Atwater, 18, 176, 361, 376.
Molitor *v.* Robinson, 451, 498.
Moncure *v.* Hanson, 231.
Monell *v.* Scherrick, 410.
Monroe *v.* Douglass, 124.
v. Hussey, 446, 453.
v. Smith, 212, 366.
v. Trenholm, 659.
Montefiore *v.* Behrens, 647.
Montefiori *v.* Montefiori, 718.
Monteith *v.* Bax, 20, 352, 368, 531.
Montgomery *v.* Bayliss, 367.
v. Goodbar, 610.
v. Kirksey, 593.
Montgomery Web Co. *v.* Dienelt, 15, 240, 241, 401.
Moody *v.* Burton, 118.
Moog *v.* Benedicks, 409, 451.
v. Farley, 435.
v. Talcott, 293.
Mooney *v.* Olsen, 442, 469.
Moore *v.* Blondheim, 204.
v. Cord, 245.
v. Eastman, 644.
v. Flynn, 92.
v. Greene, 284, 286, 513.
v. Griffin, 607.
v. Hinnant, 43, 353.
v. Jordan, 730.
v. Kidder, 102.
v. Meacham, 487.
v. Meyer, 596.
v. Page, 522, 534, 538.
v. Roe, 424, 439.
v. Schoppert, 144.
v. Shields, 495.
v. Stege, 557, 612.
v. United States, 400.
v. Williamson, 96, 675, 681.
v. Wood, 19, 24, 481.
Moorer *v.* Moorer, 232.
Moores *v.* White, 68.
Moorman *v.* Shockney, 272.
Moran *v.* Dawes, 100, 143.
Morehead Banking Co. *v.* Whitaker, 613.
Moreland *v.* Atchison, 379.
Morford *v.* Dieffenbacker, 431.
Morgan, *In re*, 550.
v. Abbott, 185, 723.
v. Ball, 457.
v. Bogue, 172, 280, 576.
v. Elam, 29.
v. Harris, 305.
v. Hecker, 368.
v. Worden, 635.
Morgan County *v.* Allen, 131.
Moritz *v.* Hoffman, 189, 209, 211.
v. Miller, 337.
Morland *v.* Isaac, 542.
Morrill *v.* Kilner, 20.
v. Little Falls Mfg. Co., 284.
Morris *v.* Lindauer, 347, 689.
v. Morris, 224.
v. Tillson, 396.
Morris Canal & B. Co. *v.* Stearns, 416.
Morrison *v.* Abbott, 92.
v. Atwell, 184, 213, 214, 242.
v. Clark, 437, 540.
v. Morrison, 183, 222, 244.
v. Oium, 458, 463.
Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 359, 689.
v. Peabody, 139.
Morse *v.* Hill, 303.
v. Riblet, 135.
Morton *v.* Morris, 354.
v. Noble, 545.
v. Ragan, 31, 454.
v. Weil, 289.
Moseley *v.* Anderson, 92.
v. Moseley, 214, 225, 242, 723, 726.
Moses *v.* Micou, 659.
Motley *v.* Downman, 72.
v. Sawyer, 415, 416.
Mott *v.* Danforth, 120.
Mountford *v.* Taylor, 281.
Movius *v.* Lee, 262.
Mowry *v.* Agricultural Ins. Co., 391.
v. Schroder, 118.
Moyer *v.* Dewey, 229, 230, 235.
Muchmore *v.* Budd, 575.
Muggeridge's Trusts, *Re*, 647.
Mulford *v.* Peterson, 48, 97, 107, 108.
v. Shirk, 89, 574.
Mull *v.* Dooley, 421.
Mullanphy Sav. Bank *v.* Lyle, 701.
Mullen *v.* Wilson, 189, 199, 204, 206, 366.
Muller *v.* Balke, 717.
v. Inderreiden, 31, 92.
v. Norton, 19, 348.
Mulloy *v.* Young, 610.
Mulock *v.* Wilson, 247.
Multnomah St. Ry. Co. *v.* Harris, 176.
Mumper *v.* Rushmore, 450.
Munger *v.* Perkins, 545.
Municipal Ins. Co. *v.* Gardiner, 739.
Munn *v.* Marsh, 264.
Munoz *v.* Wilson, 350.
Munro *v.* Alaire, 607.
Munroe *v.* Hall, 639, 640.
Munson *v.* Arnold, 413.
v. Carter, 88.
Murphy, *In re*, 647.
v. Briggs, 320, 347, 350, 666, 670, 671, 704.
v. Crouch, 31.
v. Hubert, 734.
Murray *v.* Ballou, 297.

Murray *v.* Briggs, 267, 268.
v. Burtis, 368.
v. Fox, 252.
v. Green, 640.
v. Hay, 215.
v. Judson, 506.
v. McNealy, 458.
v. Murray, 544.
v. Riggs, 634, 702.
v. Rottenham, 517.
v. Walker, 423.
Murtha *v.* Curley, 293, 294, 324, 330.
Musselman *v.* Kent, 111.
Mutual Life Ins. Co. *v.* Bowen, 121.
v. Shipman, 117.
Myers *v.* Becker, 321, 555.
v. Davis, 562.
v. Estell, 336.
v. Fenn, 220.
v. Harvey, 469.
v. Sheriff, 8, 274.

Nadal *v.* Britton, 358, 418.
Naglee's Appeal, 640.
Nail *v.* Punter, 77.
Nairn *v.* Prowse, 383.
Nance *v.* Nance, 88, 382, 530.
Nantes *v.* Corrock, 58, 67.
Nantz *v.* McPherson, 689.
Nash *v.* Geraghty, 213.
National Bank *v.* Barkalow, 274, 347
v. Beard, 489.
v. Carpenter, 284, 511.
v. Dillingham, 269.
v. Insurance Co., 83.
National Bank of Balto. *v.* Sackett, 564.
National Bank of Metropolis *v.* Sprague, 203.
National Bank of Oshkosh *v.* National Bank of Ironwood, 485.
National Bank of Republic *v.* Dickinson, 523.
v. Hodge, 589.
National Bank of Rondout *v.* Dreyfus, 142.
National Bank of Troy *v.* Scriven, 564.
National Bank of West Troy *v.* Levy, 151, 156, 225.
National Butcher's & D. Bank *v.* Hubbell, 560, 561, 569.
National Park Bank *v.* Goddard, 163.
v. Lanahan, 110.
v. Whitmore, 578, 604, 605, 613, 713.
National Shoe & L. Bank *v.* August, 634.
National Tel. Mfg. Co. *v.* Du Bois. 54.
National Tradesmen's Bank *v.* Wetmore, 100, 106, 144, 149, 155. 166, 168, 169, 225.
National Trust Co. *v.* Miller, 239.
v. Murphy, 239.
National Tube Works Co. *v.* Ballou, 172.
Neal *v.* Clark. 339.
Neal *v.* Foster, 492, 493, 709.
v. Williams, 45.
Neale *v.* Day, 64.
v. Neales, 295.
Neate *v.* Marlborough, 127.
Neely *v.* Jones, 220.
Neisler *v.* Harris, 369.
Nellis *v.* Clark, 37, 722, 726.
Nelson *v.* Edwards, 615.
v. Frey, 90.
v. Henry, 421.
v. Kinney, 706.
v. Smith, 482.
Neppach *v.* Jones, 510
Nerac, Matter of, 58.
Neslin *v.* Wells, 422.
Neuberger *v.* Keim, 181, 193, 195, 198, 203, 204, 205, 366.
Neusbaum *v.* Keim, 150.
Nevers *v.* Hack, 278, 279, 482.
Neville *v.* Wilkinson, 719.
New *v.* Bame, 334.
New Albany *v.* Burke, 237, 694.
New Albany Ins. Co. *v.* Wilcoxson, 451.
Newark *v.* Funk, 58, 67.
New Bedford Inst. for Savings *v.* Fairhaven Bank, 348.
Newdigate *v.* Jacobs, 149, 150.
Newell *v.* Cutler, 117.
v. Newell, 717.
v. People, 46.
Newkerk *v.* Newkerk, 640.
Newland, *Re*, 542.
Newlin *v.* Lyon, 493, 495.
Newlove *v.* Callaghan, 64.
Newman *v.* Black, 595.
v. Clapp, 611.
v. Cordell, 14, 16, 30, 280, 352, 432.
v. Kirk, 402, 407.
v. Van Duyne, 270.
v. Willetts, 130, 172, 176.
New Orleans Pac. Ry. Co. *v.* Parker, 740.
Newton *v.* Bronson, 738.
N. Y. Commercial Co. *v.* Carpenter, 476.
N. Y. Guaranty & Ind. Co. *v.* Gleason, 495, 496.
N. Y. Life Ins. Co. *v.* Mayer, 313, 314.
N. Y. Mutual Life Ins. Co. *v.* Armstrong, 45, 400.
N. Y. & Harlem R. R. Co. *v.* Kyle, 476.
N. Y. & New Haven R. R. Co. *v.* Schuyler, 219, 263, 288.
Nicholas *v.* Murray, 229.
Nichols *v.* Eaton, 59, 65, 85, 87, 88, 91, 636, 643, 644, 645, 647, 648, 650, 653, 654, 657, 658, 661.
v. Ellis, 364.
v. Levy, 59, 64, 65, 135, 313, 636, 661.
v. McCarthy, 725, 726.
v. McEwen, 550, 589, 606.

Nichols *v.* Patten, 7, 45, 464, 717.
v. Pinner, 279.
v. Wallace, 537.
Nicholson *v.* Condon, 690.
v. Leavitt, 26, 551, 556, 575, 584, 631.
Nickell *v.* Handly, 650.
Nicol *v.* Crittenden, 12, 20, 671.
Nicolay *v.* Mallery, 474, 497.
Nicoll *v.* Boyd, 337.
v. Spowers, 554.
Nightingale *v.* Harris, 567.
Nimmo *v.* Kuykendall, 365.
Nininger *v.* Knox, 484.
Nippes' Appeal, 56, 541.
Niver *v.* Crane, 107, 111, 165.
Noble *v.* Hammond, 29, 339, 518.
v. Hines, 278, 519.
v. Holmes, 143, 158.
v. Noble, 717.
Noonan *v.* Lee, 274.
Norcutt *v.* Dodd, 51, 58.
Nordlinger *v.* Anderson, 389, 562, 563.
Norfolk & W. R. R. Co. *v.* Read, 552.
Norris *v.* Haggin, 508, 513, 690.
v. Lake, 8, 408, 451.
North *v.* Bradway, 104, 215, 251, 290.
North Amer. Fire Ins. Co. *v.* Graham, 155, 157, 175, 176.
Northcote, *In re*, 640.
Northwestern Iron Co. *v.* Central Trust Co., 128.
Norton *v.* Doolittle, 453, 461.
v. Matthews, 589, 610.
v. Norton, 209, 224.
Norwalk *v.* Ireland, 526, 527, 528.
Norwegian Plow Co. *v.* Hanthorn.
Noyes *v.* Hall, 698.
v. Morrill, 491.
v. Sanger Bros., 590.
Nuckolls *v.* Pinkston, 483.
Nudd *v.* Hamblin, 285.
Nugent *v.* Nugent, 140.
Nunn *v.* Wilsmore, 412.

Oatis *v.* Brown, 492, 493.
Oberholser *v.* Greenfield, 100.
Oberholtzer *v.* Herzen, 434.
O'Brien *v.* Browning, 314.
v. Chamberlain, 470.
v. Coulter, 155, 169.
v. Fitzgerald, 295.
v. Whigam, 182.
Ocean Nat. Bank *v.* Olcott, 108, 160, 163, 166, 177.
Ockerman *v.* Cross, 123, 614.
O'Connell *v.* Kilpatrick, 357.
O'Conner *v.* Ward, 35, 88, 92, 729.
O'Connor *v.* Boylan, 155.
v. Gifford, 227.
O'Daniel *v.* Crawford, 209.
O'Dell *v.* Burnham, 513.
Odell *v.* Flood, 534.
v. Montross, 423.
O'Donnell *v.* Barbey, 75.
v. Hall, 474, 491, 497.
v. Segar, 15, 91.
Oelrichs *v.* Spain, 99, 113, 121, 178.
Offutt *v.* King, 155.
Ogden *v.* Arnot, 236.
v. Peters, 580, 599.
v. Prentice, 182.
v. Saunders, 517.
v. Wood, 84.
Ogden State Bank *v.* Barker, 485, 488.
Ogilvie *v.* Knox Ins. Co., 68, 240, 241.
O'Hare *v.* Duckworth, 488.
Ohio Coal Co. *v.* Davenport, 490.
Ohm *v.* Superior Court, 155.
Old Folks' Society *v.* Millard, 312.
Oldham *v.* Oldham, 647.
Olive-Finnie Grocer Co. *v.* Miller, 577.
Oliver *v.* King. 184.
v. Moore, 341, 397.
v. Pratt, 83, 288, 697.
Oliver Lee & Co.'s Bank *v.* Talcott, 23, 33.
Olney *v.* Balch, 75.
v. Tanner, 234, 235, 239, 564, 591.
Olson *v.* Scott, 7.
Omaha Hardware Co. *v.* Duncan, 432.
O'Mahoney *v.* Belmont, 339.
O'Neil *v.* Birmingham Brew. Co., 218.
v. Hudson Valley Ice Co., 81.
v. Patterson & Co., 666.
v. Salmon, 562.
Ontario Bank *v.* Root, 274.
Ordendorf *v.* Budlong, 96, 108, 246.
Oriental Bank *v.* Haskins, 424, 722.
Orman *v.* English & S. Merc. Inv. Trust, 620, 623.
Orr *v.* Gilmore, 316.
Orton *v.* Madden, 332.
v. Orton, 620.
Orvis *v.* Powell, 650.
Osborne *v.* Tuller, 453.
v. Wilkes, 94, 95, 531, 532.
v. Williams, 727, 729.
Osen *v.* Sherman, 452, 457.
Osgood *v.* Laytin, 234, 237.
v. Ogden, 237.
v. Thorne, 703.
Ostrander *v.* Weber, 219, 312.
Otis *v.* Sill, 457.
v. Spencer, 538.
Otley *v.* Manning, 29.
Ott *v.* Smith, 312.
Overman *v.* Quick, 630.
Overman's Appeal, 662.
Overmire *v.* Haworth, 168.
Overton *v.* Holinshade, 410.
Owen *v.* Arvis, 431, 564.
v. Body, 581.
Ownes *v.* Ownes, 725.
Oxley *v.* Lane, 640, 641.

Pabst Brewing Co. *v.* Butchart, 619.
Pace *v.* Pace, 654, 659.

Pacific Bank *v.* Robinson, 74.
Pack *v.* Bathurst, 76, 77.
Packard *v.* Wood, 446. 449.
Paddon *v.* Taylor, 666, 669.
Page *v.* Dillon, 377.
v. Waring, 230, 673.
Paget *v.* Perchard, 619.
Pahquioque Bank *v.* Bethel Bank, 263.
Paige *v.* Cagwin, 490.
Paine *v.* Lester, 614.
Painter *v.* Drum, 498.
Palen *v.* Bushnell, 105.
Palmer *v.* Goodwin, 517.
v. Hawes, 89.
v. Myers, 564.
v. Whitmore, 77.
Palmour *v.* Johnson, 424.
Pancoast *v.* Gowen, 70.
v. Spowers, 554.
Pardue *v.* Givens, 640.
Parish *v.* Lewis, 172.
v. Murphree, 189, 191.
Park *v.* Battey, 380.
Parker *v.* Browning, 236.
v. Conner, 666, 673, 675, 676, 681, 683, 684, 686, 687, 691, 692, 697.
v. Flagg, 224, 291.
v. Phetteplace, 135, 503.
v. Roberts, 354.
Parkhurst *v.* McGraw, 7, 294, 302, 504.
Parkinson *v.* Trousdale, 338.
Parkman *v.* Welch, 196, 198, 303, 306.
Parks *v.* Parks, 608.
Parmenter *v.* Fitzpatrick, 450.
Parrish *v.* Danford, 23.
Parshall *v.* Eggert, 632.
Parsons *v.* Bowne, 297.
v. Dickinson, 446.
v. Spencer, 654.
Partee *v.* Mathews, 100, 108, 109, 176.
Partelo *v.* Harris, 357.
Parton *v.* Hervey, 570, 572.
Partridge *v.* Cavender, 658, 660.
v. Gopp, 40, 80, 107, 380.
v. Stokes, 199, 366.
Parvin *v.* Capewell, 539.
Paschal *v.* Acklin, 738.
Pashby *v.* Mandigo, 223.
Pass *v.* Lynch, 213, 214.
Passavant *v.* Bowdoin, 233.
v. Cantor, 307, 604.
v. Sickle, 307.
Patchen *v.* Rofkar, 145, 149, 151, 152, 169.
Patrick *v.* Grant, 599.
v. Riggs, 406, 618.
Patten *v.* Casey, 355, 437.
v. Smith, 92.
Patterson *v.* Bodenhamer, 409.
v. Brown, 709.
v. Lynde, 172, 253.
v. McKinney, 190, 326, 437.
Pattison *v.* Letton, 419, 423.
Patton *v.* Conn, 523.
v. Royal B. P. Co., 561.
v. Taylor, 274.
Paul *v.* Crooker, 480, 481.
Paulk *v.* Cooke, 209.
Paulling *v.* Sturgus, 468.
Paulsen *v.* Van Steenbergh, 142.
Pawley *v.* Vogel, 206.
Paxton *v.* Boyce, 11.
v. Smith, 452, 620.
Payne *v.* Becker, 66, 117.
v. Drewe, 136.
v. Eden, 712.
v. Graham, 132.
v. Hook, 239.
v. Miller, 542.
v. Sheldon, 144, 167, 176, 271.
v. Stanton, 201, 208.
v. Wilson, 88.
Payson *v.* Hadduck, 264.
Peabody *v.* Knapp, 428, 481.
Peake *v.* Stout, 371.
Pearce *v.* Creswick, 113.
Pearsall *v.* Smith, 283, 507.
Pearson *v.* Carter, 453.
v. Howe, 685.
Pease *v.* Egan, 348, 349.
v. Shirlock, 381.
Peaslee *v.* Barney, 223.
Peay *v.* Morrison's Ex'rs, 169.
Peck *v.* Burr, 570, 572.
v. Crouse, 368, 557.
v. Hibbard, 517.
Peebles *v.* Horton, 403, 406, 432.
Peeler *v.* Peeler, 528, 529.
Peet *v.* Morgan, 132.
Peirce *v.* Partridge, 409.
Peiser *v.* Peticolas, 20, 368, 620.
Pelham *v.* Aldrich, 182.
Pence *v.* Croan, 47, 188, 190.
v. Makepeace, 57.
Pendleton *v.* Hughes, 183, 184, 244.
v. Perkins, 58, 67, 140, 169, 709.
Peninsular Stove Co. *v.* Roark, 92.
Penn *v.* Lord Baltimore, 738.
v. Whitehead, 94.
Penn's Ex'r *v.* Penn, 558.
Pennell *v.* Deffell, 83.
Pennington *v.* Clifton, 108.
v. Seal, 46, 51, 182, 223.
Pennock *v.* Freeman, 514.
Penrod *v.* Morrison, 120.
Penzel Grocer Co. *v.* Williams, 610.
People *v.* Albany & Vt. R. R. Co., 260.
v. Baker, 370.
v. Bristol, 626.
v. Chalmers, 550.
(*ex rel.* Hoyt) *v.* Commrs. of Taxes, 123.
v. Cook, 352.
v. Crennan, 46.
v. Dyle, 432.
v. Kelly, 339.
v. Mead, 115.

People *v.* Remington, 96.
v. Tioga Common Pleas, 553.
v. Utica Ins. Co., 46.
(*ex rel.* Cauffman) *v.* Van Buren, 102, 103, 110, 143, 144, 159, 160, 161, 162, 173, 175, 333.
v. Woodruff, 46.
People's Sav. Bank *v.* Bates, 140, 167, 626, 703.
Pepper *v.* Carter, 200, 208.
Percy *v.* Cockrill, 690.
Perkins *v.* Center, 277.
v. Dickinson, 660.
v. Hays, 656.
v. Hutchinson, 576.
v. Kendall, 150.
v. Perkins, 437, 540.
v. Sanders, 253.
Perry *v.* Corby, 594.
v. Cross, 640.
v. Ensley, 330.
v. Hardison, 407.
v. Meddowcroft, 29.
Personette *v.* Cronkhite, 355, 368.
Peters *v.* Bain, 19, 23, 44, 47, 83, 268, 348, 558, 562.
v. Goodrich, 674.
v. Light, 62.
Peters-Miller Shoe Co. *v.* Casebeer, 490.
Peterson *v.* Brown, 717, 734.
v. Schroeder, 502.
Petree *v.* Brotherton, 182, 193, 279.
Pettee *v.* Dustin, 634.
Pettibone *v.* Stevens, 29.
Pettit *v.* Parsons, 558.
Petty *v.* Petty, 134, 135, 543.
Peyton *v.* Lamar, 100.
v. Rose, 105.
Pfohl *v.* Simpson, 220.
Phalen *v.* Clark, 284.
Pharis *v.* Leachman, 264.
Phelan *v.* Boylan, 247.
v. Kelly, 469.
Phelps *v.* Borland, 517.
v. Curts, 24, 229.
v. Foster, 100, 101.
v. McDonald, 229, 230, 730.
v. Platt, 156, 225.
v. Smith, 7, 377.
Phenix Ins. Co. *v.* Fielder, 90, 717.
Phenix Nat. Bank *v.* A. B. Cleveland Co., 267.
Phettiplace *v.* Sayles, 190, 467.
Phifer *v.* Erwin, 370.
Philbrook *v.* Eaton, 446.
Phillips *v.* Frye, 524.
v. Kesterson, 426.
v. Mullings, 77.
v. Negley, 511.
v. Reitz, 452.
v. Wooster, 184, 191, 205, 208, 213, 733.
Phinizy *v.* Clark, 402, 424.
Phipps *v.* Sedgwick, 84, 326, 537, 545.
Phœnix Bank *v.* Stafford, 207.
Phœnix Ins. Co., *Ex parte*, 740.
Pickens *v.* Dorris, 660.
Picket *v.* Garrison, 183.
Pickett *v.* Pipkin, 272, 274, 409.
Pickstock *v.* Lyster, 363, 600.
Picquet *v.* Swan, 250.
Pidcock *v.* Voorhies, 180.
Piddock *v.* Brown, 479.
Pier *v.* Duff, 490.
Pierce *v.* Brew, 396.
v. Hill, 62.
v. Hoffman, 501.
v. Hower, 271.
v. Kelly, 458.
v. Milwaukee Constr. Co., 68, 218, 241.
v. Wagner, 620.
Pierce Steam Heating Co. *v.* Ransom, 605 713.
Piercy *v.* Fynney, 390.
v. Roberts, 64.
Pierson *v.* Manning, 554.
v. Slifer, 357.
Pierstoff *v.* Jorges, 147.
Pike *v.* Bacon, 27, 600, 601.
v. Miles, 31, 88.
Pilling *v.* Armitage, 304.
v. Otis, 26, 403, 430.
Pillsbury *v.* Kingon, 231.
Pinckard *v.* Woods, 680.
Pinckston *v.* Brown, 726, 729.
Pine *v.* Rikert, 607.
Piper *v.* Hoard, 384.
v. Johnston, 93.
Pitkin *v.* Mott, 533.
Pitney *v.* Leonard, 674.
Pitts *v.* Wilder, 733.
Pittsburg Carbon Co. *v.* McMillin, 234, 237, 238.
Pittsfield Nat. Bank *v.* Tailer, 271.
Place *v.* Hayward, 725, 729, 730.
v. Langworthy, 619.
v. Minster, 496.
Planck *v.* Schermerhorn, 556, 610.
Planters' Bank *v.* Willea Mills, 26.
Planters' & M. Bank *v.* Borland, 374.
v. Walker, 39, 111.
Platt *v.* Hunter, 609.
v. Jones, 69, 70.
v. Lott, 608.
v. Matthews, 168.
v. Mead, 156, 166, 229, 276, 278.
v. Preston, 291.
v. Routh, 77.
Plimpton *v.* Goodell, 194, 419.
Plumb *v.* Fluitt, 672.
Plunkett *v.* Plunkett, 363, 419.
Poillon *v.* Lawrence, 518.
Pollak *v.* Searcy, 478.
Pollock *v.* Jones, 379.
Pomeroy *v.* Bailey, 188, 395, 437, 501, 502.
v. Pomeroy, 543.

Pond *v.* Kimball, 93.
Ponsford *v.* Hartley, 220, 264.
Poole *v.* Mitchell, 470.
Poore *v.* Clark, 250.
Pope *v.* Allen, 442.
v. Cole, 115.
v. Solomons, 168.
v. Wilson, 19, 197.
Pope's Exrs. *v.* Elliott, 650, 657, 660.
Pormann *v.* Frede, 476.
Porter *v.* Goble, 534.
v. Green, 671.
v. James, 558.
v. Lazear, 545.
v. Lee, 660.
v. Pico, 315.
v. Pittsburg Bessemer Steel Co., 205.
v. Williams, 116, 234, 236, 237.
Portland Bldg. Assoc. *v.* Creamer, 334.
Post *v.* Berwind-White C. M. Co., 462.
v. Dart, 247.
v. Stiger, 51, 183, 244, 327, 527.
Posten *v.* Posten, 437.
Postlewait *v.* Howes, 167, 264.
Potter *v.* Adams, 96.
v. Couch, 65, 639, 640, 641, 643.
v. Gracie, 32, 347, 385, 395.
v. Holland, 75.
v. McDowell, 17, 19, 278, 353, 355, 437, 488.
v. Payne, 368, 460.
v. Phillips, 255.
Potts *v.* Blackwell, 102.
v. Hart, 619, 623.
Powell *v.* Howell, 55, 67, 142.
v. Ivey, 701, 719.
v. Spaulding, 216.
v. Waldron, 70, 71.
Power *v.* Alston, 24.
Powers *v.* Graydon, 184, 214, 242.
Powles *v.* Dilley, 304.
Prather *v.* Parker, 454.
Pratt *v.* Burr, 93.
v. Chase, 517.
v. Curtis, 190.
v. Pratt, 8, 10, 502.
Pray *v.* Hegeman, 85.
Pregnall *v.* Miller, 452.
Preiss *v.* Cohen, 333.
Premo *v.* Hewitt, 88.
Prentice *v.* Janssen, 219.
Prentiss *v.* Bowden, 142, 147, 155, 225.
Prentiss Tool & S. Co. *v.* Schirmer, 450, 460, 630.
Presas *v.* Lanata, 132.
Prescott *v.* Hayes, 424.
Prestidge *v.* Cooper, 366, 672.
Preston *v.* Crofut, 699.
v. Smith, 281.
v. Southwick, 450, 459.
v. Turner, 357.
Preusser *v.* Henshaw, 704.
Prevost *v.* Gratz, 282.
Prewit *v.* Wilson, 199, 359, 374, 382, 383, 384, 530, 593, 690, 693.
Price *v.* Haynes, 574, 607.
v. Mazange, 626.
v. Pitzer, 35, 453.
v. Sanders, 279.
Prickett *v.* Prickett, 392.
Pride *v.* Andrew, 732.
Prime *v.* Brandon Mfg. Co., 75.
v. Koehler, 81.
Primrose *v.* Browning, 531.
Prince's M. P. Co. *v.* Prince Mfg. Co., 72.
Pringle *v.* Phillips, 674, 687.
v. Pringle, 228.
Pritchard *v.* Bailey, 640.
v. Norton, 123.
Probst *v.* Welden, 565, 609.
Produce Bank *v.* Morton, 150, 433, 555.
Prosser *v.* Edmonds, 247, 736.
v. Henderson, 415.
Prout *v.* Vaughn, 89.
Prouty *v.* Prouty, 244.
Pryor *v.* Downey, 573.
Public Works *v.* Columbia College, 140, 142, 296.
Pulliam *v.* Newberry, 52.
v. Taylor, 176.
Pullis *v.* Robinson, 210.
Pulsifer *v.* Waterman, 55.
Pulver *v.* Harris, 553.
Purkitt *v.* Polack, 259, 426, 438.
Pusey *v* Gardner, 7, 275, 434, 478, 504, 512, 720.
Putnam *v.* Bicknell, 529.
v. Hubbell, 557.
v. Osgood, 443, 635.
v. Reynolds, 419.
Putney *v.* Fletcher, 225.
v. Whitmire, 740.
Pyeatt *v.* Powell, 618.

Quackenbos *v.* Sayer, 505.
Quarles *v.* Kerr, 635.
Queen (The). See Reg.
Quimby *v.* Dill 211.
Quinby *v.* Strauss, 120, 325.
Quincy *v.* Hall, 242.
Quiriaque *v.* Dennis, 470.
Quirk *v.* Thomas, 726.

Radley *v.* Riker, 538.
Railroad Co. *v.* Howard, 240.
v. Soutter, 349.
v. Trimble, 73.
Raleigh *v.* Griffith, 571.
Randall *v.* Buffington, 91.
v. Carman, 619, 622.
v. Howard, 724.
v. Vroom, 35.
Randegger *v.* Ehrhardt, 489, 490.
Randolph *v.* Daly, 257, 272, 290.
Randolph's Exr. *v.* Quidnick Co., 509.
Ranken *v.* Patton, 730.

Ranlett *v.* Blodgett, 625.
Rapalee *v.* Stewart, 185, 585, 606.
Ratcliff *v.* Trimble, 11, 415.
Rathbun *v.* Platner, 559.
Raventas *v.* Green, 471.
Ravisies *v.* Alston, 581.
Rawley *v.* Brown, 442, 469.
Rawson *v.* Fox, 316.
Rawson Mfg. Co. *v.* Richards, 449.
Ray *v.* Raymond, 454.
v. Roe *ex dem.* Brown, 416.
v. Teabout, 301.
Raymond, Matter of, 553.
v. Morrison, 9.
v. Richmond, 311, 561.
Raynor *v.* Mintzer, 250.
Rea, Matter of, 182.
v. Missouri, 13, 357, 372, 498, 499.
Read *v.* Mosby, 58, 64.
v. Patterson, 297.
v. Worthington, 24, 606, 616.
Reade *v.* Livingston, 186, 187, 192, 194, 197, 205, 209, 541.
Reber *v.* Gundy, 694.
Receiver of State Bank *v.* First Nat. Bank, 551.
Redfield *v.* Buck, 410, 490.
Redfield & Rice Mfg. Co. *v.* Dysart, 416.
Redhead *v.* Pratt, 688.
Redpath *v.* Lawrence, 377.
Red River Valley Bank *v.* Freeman, 232, 574.
Reed *v.* Bott, 273.
v. Emery, 592.
v. Gannon, 674, 675, 686.
v. McIntyre, 548, 599, 704.
v. Minor, 462.
v. Noxon, 15.
v. Pelletier, 609.
v. Reed, 449.
v. Stryker, 104, 215, 290.
v. Wheaton, 179.
v. Woodman, 211, 423.
Reeder *v.* Speake, 155.
Reehling *v.* Byers, 434.
Reel *v.* Livingston, 182, 536.
Reese *v.* Reese, 526.
v. Shell, 526, 527.
Reeves *v.* Ayers, 102.
v. Dougherty, 12.
v. Peterman, 574.
v. Skipper, 500.
Reg. *v.* Smith, 309.
Regli *v.* McClure, 463.
Reichart *v.* Castator, 717.
Reid *v.* Lloyd, 482.
Reifsnyder *v.* Hunter, 640.
Reiger *v.* Davis, 436, 438.
Reiley *v.* Haynes, 487.
Reilly *v.* Barr, 29, 410.
Remington *v.* Linthicum, 133.
Remington Paper Co. *v.* O'Dougherty, 247.
Renfrew *v.* McDonald, 732.
Renney *v.* Williams, 435.
Rennie *v.* Bean, 554, 592.
Renninger *v.* Spatz, 446, 459.
Renton *v.* Kelly, 581.
Retzer *v.* Wood, 515.
Reubens *v.* Joel, 140.
Rex *v.* Duchess of Kingston, 29.
v. Earl of Nottingham, 634.
Reyburn *v.* Mitchell, 167, 389.
Reynell *v.* Sprye, 28.
Reynes *v.* Dumont, 179.
Reynolds, *In re*, 182.
v. Crook, 428.
v. Ellis, 547.
v. Gawthrop, 11, 13, 15, 16, 395, 405, 418, 497.
v. Johnson, 388, 390.
v. Park, 267.
v. Robinson, 392.
v. Welch, 140.
Rhawn *v.* Pearce, 516.
Rhead *v.* Hounson, 109, 274.
Rheinstein *v.* Bixby, 332, 335.
Rhem *v.* Tull, 224.
Rhine *v.* Ellen, 396.
Rhoads *v.* Blatt, 415.
Rhodes *v.* Wood, 530.
Ribon *v.* Railroad Cos., 249.
Ricard *v.* Sanderson, 81.
Rice *v.* Cunningham, 480.
v. Morner, 406.
v. Perry, 278, 352.
v. Savery, 81.
Rich *v.* Braxton, 136.
v. Levy, 100.
Richards *v.* Kountze, 12.
v. La Tourette, 520.
v. Leveille, 704.
v. Levin, 576.
v. Pierce, 288.
v. Vaccaro, 477.
Richardson *v.* Green, 237.
v. Marqueze, 89, 574, 704.
v. Mounce, 513.
v. Rardin, 454.
v. Rhodus, 187.
v. Root, 224.
v. Smallwood, 209.
v. Stringfellow, 370, 458, 574, 610.
v. Thurber, 548, 602, 613, 710.
v. Trimble, 147.
v. Wyman, 545.
Riches *v.* Evans, 365.
Richmond *v.* Irons, 292.
Richmond Nervine Co. *v.* Richmond, 72.
Richolson *v.* Freeman, 494, 688, 689.
Richtmeyer *v.* Remsen, 552.
Rickards *v.* Attorney-General, 37.
Rickerson R. M. Co. *v.* Farrell, F. & M. Co., 334.
Riddell *v.* Munro, 372, 499, 667.
Riddle *v.* Lewis, 702.

Riddle *v.* Mandeville, 264.
Rider *v.* Ham, 665.
v. Hunt, 7, 347.
v. Kidder, 67, 182, 223.
v. Mason, 86.
Ridge *v.* Greenwell, 436, 502.
Ridgely *v.* Bond, 114, 280.
Ridgway *v.* English, 392.
Ridout *v.* Burton, 450.
Rife *v.* Geyer, 65, 657, 659.
Riggan *v.* Wolf, 347, 354.
Riggins *v.* Brown, 483.
Riggs *v.* Buckley, 307.
v. Murray, 33, 621, 634, 702.
v. Palmer, 45, 46.
Riley *v.* Carter, 563, 568.
v. Mayor, etc., of N. Y., 371.
v. Vaughan, 533, 534.
Rinchey *v.* Stryker, 110, 143, 158, 159, 241, 262.
Rindskopf *v.* Myers, 371.
Rindskoph *v.* Kuder, 666.
Rinehart *v.* Long, 289.
Ringgold *v.* Ringgold, 309.
v. Waggoner, 426.
Ringold *v.* Suiter, 322.
Riper *v.* Poppenhausen, 278, 481.
Rippon *v.* Norton, 657.
Ritchie *v.* McMullen, 154.
Ritterband *v.* Baggett, 69.
Roach *v.* Bennett, 528.
v. Brannon, 388.
Robb *v.* Brewer, 88.
Robbins *v.* Armstrong, 538.
v. Butcher, 583.
v. Oldham, 454.
v. Parker, 635.
v. Sand Creek Turnp. Co., 216.
Roberge *v.* Winne, 547.
Robert *v.* Hodges, 138, 163.
Roberts *v.* Albany & W. S. R. R. Co., 130, 709.
v. Anderson, 48, 338, 699, 700.
v. Buckley, 7, 12, 46, 477, 567, 570, 606, 613.
v. Gibson, 294.
v. Guernsey, 12.
v. Hawn, 450, 454.
v. Medbery 490.
v. Shepard, 427.
v. Stevens, 644, 655, 660.
v. Tobias, 602.
v. Vietor, 19, 23, 347, 355, 551, 566.
Robertson *v.* Johnston, 660.
v. Sayre, 107, 164, 242, 720, 723.
v. Western, etc., Ins. Co., 661.
Robinson *v.* Bates, 545.
v. Clark, 526.
v. Consolidated R. E. & F. I. Co., 391.
v. Dryden, 7.
v. Elliott, 27, 471, 619, 620, 625, 626, 633.
Robinson *v.* Frankel, 428, 435, 436.
v. Holt, 52, 323.
v. Huffman, 60.
v. Stevens, 523, 525.
v. Stewart, 61, 62, 115, 140, 209, 306, 350, 534, 708.
v. Wallace, 539.
v. Williams, 391.
Robinson Notion Co. *v.* Foot, 705.
Rocheblave *v.* Potter, 454.
Rochford *v.* Hackman, 65, 647, 657.
Rockford Boot & S. Mfg. Co. *v.* Mastin, 706.
Rock Island Nat. Bank *v.* Powers, 621.
Rockland County *v.* Summerville, 434, 706, 707.
Rockwell *v.* McGovern, 609.
Rocky Mountain Nat. Bank *v.* Bliss, 151, 152, 153.
Rodgers *v.* Dibrell, 217.
Rodman *v.* Harvey, 331.
v. Henry, 116, 235.
Roe *v.* Hume, 389, 562, 563, 609.
v. Meding, 445, 451.
v. Mitton, 374.
v. Moore, 359.
Roeber *v.* Bowe, 674.
Roffey *v.* Bent, 647.
Rogers *v.* Albany & W. S. R. R. Co., 129.
v. Brent, 133.
v. Brown, 515.
v. Decker, 269.
v. Gosnell, 81.
v. Hall, 497.
v. Jones, 58, 67, 672.
v. Ludlow, 77.
v. Rogers, 146, 267.
v. Verlander, 191, 199, 394.
Rohrbough *v.* Johnson, 454.
Rollins *v.* Mooers, 667.
Romaine *v.* Chauncey, 87.
Roman *v.* Mali, 726.
Romans *v.* Maddux, 523.
Rome Exchange Bank *v.* Eames, 637.
Romine *v.* Romine, 330.
Rood *v.* Welch, 232.
Rooker *v.* Rooker, 374.
Root *v.* Reynolds 375.
Roper *v.* McCook, 172.
Rose *v.* Brown, 60, 198, 366.
v. Colter, 190, 393, 451, 519.
v. Hatch, 87.
v. Renton, 601.
v. Sharpless, 93.
Roseboom *v.* Roseboom, 643.
Rosenberg *v.* Moore, 103, 333.
Rosenblatt *v.* Johnston, 262.
Rosenstein *v.* Coleman, 584.
Rosenthal *v.* Coates, 260, 521.
v. Walker, 284.
Rosher, *In re*, 640.
Ross *v.* Bridge, 339.
v. Caywood, 673.

Ross *v.* Crutsinger, 418.
v. Duggan, 424.
v. Hardin, 95.
v. McLung, 135.
v. Wellman, 478, 501.
v. Wood, 147.
Rosseau *v.* Bleau, 225.
Rothchild *v.* Rowe, 449.
Rothgerber *v.* Gough, 431.
Rothschild *v.* Kohn, 708.
v. Mack, 520.
v. Salomon, 574, 609, 610, 611.
Rouett *v.* Milner, 414.
Rourke *v.* Bullens, 449.
Rouse *v.* Bowers, 557, 560.
v. Southard, 285.
Rowland *v.* Coleman, 274.
Roy *v.* Bishop of Norwich, 45.
Royal Baking Powder Co. *v.* Sherrell, 72.
Royall *v.* McKenzie, 483.
Royce *v.* Gazan, 370, 477.
Royer Wheel Co. *v.* Fielding, 176, 389, 562, 595.
v. Frost, 350.
Rozek *v.* Redzinski, 88.
Rozell *v.* Vansyckle, 733.
Rozier *v.* Williams, 454.
Rucker *v.* Abell, 341.
v. Moss, 481.
Ruckman *v.* Conover, 718.
Rudy *v.* Austin, 209, 377.
Ruffing *v.* Tilton, 218.
Ruffner *v.* Welton C. & S. Co., 347.
Rugan *v.* Sabin, 690.
Ruggles *v.* Brock, 237.
Ruhl *v.* Phillips, 357, 427, 557.
Rumery *v.* McCulloch, 564 717.
Runals *v.* Harding, 331.
Rupe *v.* Alkire, 24, 354.
Ruse *v.* Bromberg, 216, 423.
Rush *v.* Barr, 514.
v. Vought, 114.
Russell, *Ex parte*, 203.
v. Clark, 167, 169, 250.
v. Dyer, 109, 133.
v. Grinnell, 656.
v. Lasher, 267.
v. Lennon, 93.
v. O'Brien, 464.
v. Rutherford, 619.
v. Winne, 133, 347, 353, 408, 621, 623, 629.
Rutherford *v.* Chapman, 532.
v. Schattman, 495.
Ruyter *v.* Reid, 122.
Ryall *v.* Rolle, 37, 40, 107.
Ryan *v.* Jones, 68.
v. Spieth, 271, 273.
v. Staples, 697.
v. Webb, 554.
Ryder *v.* Hulse, 539.
v. Sisson, 660.
v. Wombwell, 499.
Ryhiner *v.* Ruegger, 547.
Ryland *v.* Callison, 133, 246.
Ryle *v.* Falk, 126.

Sabin *v.* Columbia Fuel Co., 357, 481.
Sacry *v.* Lobree, 481.
Safford *v.* Douglas, 708.
Sage *v.* Memphis, etc., R. R. Co., 167.
v. Mosher, 215, 216, 258.
St. George *v.* Wake, 544.
St. George's Church Soc. *v.* Branch, 391.
St. John *v.* Benedict, 720.
v. Pierce, 219.
St. Louis & S. F. Ry. Co. *v.* Johnston, 273, 274.
Salisbury *v.* Morss, 260.
Salmon *v.* Bennett, 187, 437.
v. Smith, 304.
Salt Springs Nat. Bank *v.* Fancher, 322.
Sammons *v.* O'Neill, 676, 679.
Samuel *v.* Kittenger, 426.
v. Salter, 660.
Sanborn *v.* Kittredge, 113.
Sanders *v.* Clason, 82.
v. Logue, 183.
Sandman *v.* Seaman, 126, 415.
Sands *v.* Codwise, 38, 229, 343, 431.
v. Hildreth, 301.
Sanford *v.* Lackland, 65.
v. Sanford, 396.
Sanger *v.* Colbert, 426, 487.
v. Flow, 549.
v. Upton, 131.
Sangston *v.* Gaither, 20.
Sankey *v.* O'Maley, 336.
Saratoga County *v.* Deyoe, 163, 219.
Sargent *v.* Salmond, 40, 67, 106, 107.
Sarle *v.* Arnold, 399, 410, 450, 451, 497, 498.
Satterlee *v.* Matthewson, 574.
Sauer *v.* Behr, 420, 619.
Saunders *v.* Lee, 666.
v. Parrish, 498.
v. Reilly, 389, 562.
v. Waggoner, 611.
Savage *v.* Dowd, 704.
v. Hazard, 667.
v. Knight, 47.
v. Murphy, 135, 193, 195, 208, 209, 360, 361, 534.
v. O'Neil, 124, 524.
v. Smith, 520.
Savings Bank of N. H. *v.* Bates, 615.
Savoye *v.* Marsh, 517.
Sawin *v.* Guild, 74.
Sawyer *v.* Almand, 700.
v. Bradshaw, 406.
v. Harrison, 474.
v. Hoag, 131, 237, 240 268.
v. Levy, 703, 715.
v. Noble, 219.
v. Thayer, 227.

Sayles *v.* Best, 79.
Sayre *v.* Flournoy, 68.
v. Fredericks, 35, 52, 306, 308, 375, 410.
v. Hewes, 408.
Scales *v.* Scott, 160.
Schafer *v.* Reilly, 121.
Schaferman *v.* O'Brien, 259, 416.
Schaible *v.* Ardner, 19, 700.
Schatz *v.* Kirker, 414.
Scheble *v.* Jordan, 490.
Scheitlin *v.* Stone, 301, 433.
Schermerhorn *v.* De Chambrun, 724.
v. Merrill, 62.
v. Negus, 640.
Schiele *v.* Healy, 609.
Schleisinger *v.* Sherman, 110.
Schloss *v.* Wallach, 115, 125, 555.
Schmidlapp *v.* Currie, 102, 388.
Schmidt *v.* Niemeyer, 476.
v. Opie, 374, 375.
Schneider *v.* U. S. Life, etc., Co., 56.
Schnicker *v.* People, 487.
Schoeffler *v.* Schwarting, 338.
Scholey *v.* Worcester, 184, 213.
Schram *v.* Taylor, 357.
Schrenkeisen *v.* Miller, 320.
Schreyer *v.* Scott, 180, 181, 188, 193, 196, 198, 200, 203, 204, 205, 523.
Schribar *v.* Platt, 92.
Schroder *v.* Tompkins, 548, 551, 614, 615.
Schroeder *v.* Bobbitt, 408, 703.
v. Walsh, 357.
v. Young, 8.
Schroer *v.* Pettibone, 145.
Schumacher *v.* Bell, 432, 497.
Schuster *v.* Stout, 183.
Schwartz *v.* Soutter, 563.
Schwed *v.* Smith, 740, 741.
Schwier *v.* N. Y. Cent. & H. R. R. R. Co., 432.
Schwinger *v.* Hickok, 116.
Scofield *v.* Spaulding, 492.
Scoggin *v.* Schloath, 395, 396
Scott *v.* Alford, 587, 620.
v. Davis, 363, 379.
v. Depeyster, 279.
v. Gill, 81.
v. Hartman, 183, 244, 245.
v. Indianapolis Wagon Works, 51, 100.
v. McFarland, 271.
v. McMillen, 168, 169.
v. Magloughlin, 222, 521
v. Mills, 554.
v. Morgan, 163.
v. Neely, 7, 137, 139.
v. Nevius, 86, 661.
v. Wallace, 172.
v. Winship, 415, 459.
Scottish Amer. Mortgage Co. *v.* Follanshee, 219.
Scouton *v.* Bender, 298.
Scoville *v.* Canfield, 269.
Scribner *v.* Fisher, 517.
Scrivenor *v.* Scrivenor, 419.
Sea Ins. Co. *v.* Stebbins, 336.
Seale *v.* Vaiden, 578.
Seaman *v.* Stoughton, 229.
Sears *v.* Choate, 660.
v. Hanks, 31.
v. Putnam, 640.
v. Shafer, 431.
Seasongood *v.* Ware, 60, 61, 529.
Seaver *v.* Bigelows, 216, 740.
Seavey *v.* Walker, 45.
Seavy *v.* Dearborn, 676, 686.
Sebrauth *v.* Dry Dock Sav. Bank, 116.
Second Nat. Bank *v.* Brady, 724.
v. Merrill, 208, 357, 421, 531.
v. Schrauck, 550.
v. Yeatman, 413, 431, 432.
Secor *v.* Lord, 81.
Sedgwick *v.* Stanton, 31.
v. Tucker, 370.
Seeleman *v.* Hoagland, 277, 301, 489.
Seger's Sons *v.* Thomas Bros., 407, 431, 703.
Seitz *v.* Mitchell, 302, 303, 435, 526, 527, 539.
Seivers *v.* Dickover, 343.
Selleck *v.* Phelps, 349.
Selover *v.* Coe, 264.
Semmens *v.* Walters, 7, 539.
Semmes *v.* Hartford Ins. Co., 166.
Senter *v.* Mitchell, 116.
Sere *v.* Pitot, 231.
Severs *v.* Dodson, 181, 182.
Seward *v.* Jackson, 183, 186, 189, 192, 205, 376.
Sexey *v.* Adkinson, 140.
Sexton *v.* Anderson, 389.
v. Wheaton, 60, 96, 100, 106, 189, 194, 204, 205, 209, 221, 223, 412, 533.
Seymour *v.* McKinstey, 666.
v. O'Keefe, 453, 460.
v. Wilson, 32, 276, 370, 371, 397, 637, 665, 666.
Shackelford *v.* Shackelford, 102.
Shackleford *v.* Collier, 229.
Shaeffer *v.* Fithian, 344.
Shafer *v.* O'Brien, 290.
Shainwald *v.* Lewis, 58, 116, 296, 331.
Shand *v.* Hanley, 199, 220, 268, 298, 314, 337, 342, 346, 366.
Shankland's Appeal, 650, 657, 662.
Shanks *v.* Klein, 389.
Shannon *v.* Commonwealth, 634.
Sharp *v.* Cosserat, 647.
v. Sharp, 297.
v. Teese, 712.
Sharpe *v.* Davis, 717.
v. Freeman, 225.
Shattuck *v.* Freeman, 591.
Shauer *v.* Alterton, 435, 446, 457, 690, 693.

Shaul *v.* Harrington, 452.
Shaver *v.* Brainard, 251.
Shaw *v.* Dwight, 146, 155, 176, 177, 178, 247, 476.
v. Levy, 453.
v. Manchester, 146.
v. Millsaps, 255, 264, 717.
v. Spencer, 674.
v. Thompson, 449.
v. Wilshire, 449.
Shawano County Bank *v.* Koeppen, 88.
Shay *v.* Security Bank, 233.
v. Wheeler, 414.
Shea *v.* Knoxville & Ky. R. R. Co., 157.
Sheafe *v.* Sheafe, 100, 111, 158, 160.
Shealy *v.* Edwards, 403, 497, 703.
Shean *v.* Shay, 183, 244, 416.
Shearon *v.* Henderson, 434.
Shee *v.* Hale, 647.
Sheldon *v.* Weeks, 88.
Sheldon H. B. Co. *v.* Eickemeyer H. B. M. Co., 221.
Shelley *v.* Boothe, 704.
Shellington *v.* Howland, 166.
Shelton *v.* Church, 414.
Shepard *v.* Walker, 55.
Shepherd *v.* Trigg, 454.
v. Woodfolk, 340, 342.
Sheppard *v.* Thomas, 204, 212.
Sheppard's Estate, 506.
Sheppards *v.* Turpin, 583.
Sherman *v.* Barrett, 32.
v. Blodgett, 483, 484.
v. Elder, 532, 552.
v. Hogland, 9, 190, 278, 403, 413, 435, 495, 502.
Sherrill Roper Air Engine Co. *v.* Harwood, 339.
Sherron *v.* Humphreys, 451.
Sherwin *v.* Gaghagen, 619, 626.
Sherwood *v.* Sutton, 286, 513.
Shields *v.* Barrow, 249.
Shine *v.* Gough, 670.
Shipman *v.* Ætna Ins. Co., 231.
v. Furniss, 29, 386.
Shirley *v.* Long, 231.
v. Teal, 594.
Shirras *v.* Caig, 406.
Shober *v.* Wheeler, 413, 435.
Shoemaker *v.* Cake, 28.
Shone *v.* Lucas, 278.
Shontz *v.* Brown, 181, 183, 222.
Short *v.* Tinsley, 340.
Shorten *v.* Woodrow, 164.
Short Staple (The), 12.
Shotwell, *In re*, 356.
Showman *v.* Lee, 347, 425.
Shryock *v.* Waggoner, 593.
Shufeldt *v.* Boehm, 100, 101, 131, 167.
Shultz *v.* Hoagland, 10, 435, 553, 558, 564, 565, 566, 567, 592, 593, 609, 611.
Shumway *v.* Rutter, 449.
Shumway *v.* Shumway, 330.
Shurtleff *v.* Willard, 449, 635.
Shurts *v.* Howell, 155.
Shutts *v.* Fingar, 223.
Sibly *v.* Hood, 454.
Sibthorp *v.* Moxom, 80.
Sickle, Matter of, 115, 555.
Sickles *v.* Sharp, 47.
Sickman *v.* Wilhelm, 351, 368.
Sidensparker *v.* Sidensparker, 146, 476, 667.
Sides *v.* McCullough, 213.
v. Scharff, 278.
Siedenbach *v.* Riley, 450.
Sigler *v.* Knox County Bank 102
Sillick *v.* Mason 86.
Silliman *v.* Haas, 491.
v. United States, 354.
Sillyman *v.* King, 529.
Silverman *v.* Lessor, 517.
Silvers *v.* Hedges, 12.
Silvis *v.* Oltmann, 474.
Simar *v.* Canaday, 134, 215, 543.
Simmons *v.* Ingram, 108, 264, 366.
v. Jenkins, 619.
Simms *v.* Morse, 9, 435, 503, 539.
Simon *v.* Ellison, 253.
v. Norton, 589.
Simon-Gregory Co. *v.* McMahan, 489.
v. Schooley, 673, 679.
Simpson *v.* Dall, 95.
v. Del Hoyo, 666.
v. Warren, 231.
Sims *v.* Gaines, 19, 51, 66, 424, 480.
v. Phillips, 92.
v. Thomas, 59, 77.
Simson *v.* Brown, 81.
Singer *v.* Goldenburg, 426.
v. Jacobs, 681, 688, 689.
v. Wheeler, 117, 374.
Singree *v.* Welch, 374.
Sipe *v.* Earman, 416, 559.
Sipley *v.* Wass, 666.
Skarf *v.* Soulby, 51.
Skeate *v.* Beale, 354.
Skeele *v.* Stanwood, 140.
Skellie *v.* James, 526.
Skipwith *v.* Cunningham, 416.
Skowhegan Bank *v.* Cutler, 36.
Slater *v.* Sherman, 51.
Slattery *v.* Schwannecke, 357.
Sledge *v.* Obenchain, 212.
Sleeper *v.* Chapman, 401, 626.
Slingluff *v.* Smith, 561.
Sloan *v.* Birdsall, 21.
v. Huntington, 530.
Small *v.* Boudinot, 275.
v. Owings, 114.
v. Small, 418.
Smart *v.* Bement, 669, 670.
Smeltzer *v.* Goslee, 663.
Smets *v.* Williams, 55.
Smillie *v.* Quinn, 56, 88.
Smith *v.* Acker, 617.

Smith *v.* Allen, 88, 383.
v. Babcock, 296.
v. Barclay, 69.
v. Bellows, 569.
v. Blake, 118.
v. Bowen, 83.
v. Boyer, 425.
v. Bromley, 729.
v. Brown, 432.
v. Bryan, 740.
v. Buchanan, 518.
v. Champney, 471.
v. Clark, 640.
v. Collins, 279, 483.
v. Conkwright, 26, 634.
v. Craft, 221, 458, 592, 628, 702, 703, 705, 713, 714.
v. Crisman, 469.
v. Davis, 608.
v. Ely, 619, 623, 633.
v. Emerson, 93.
v. Felton, 520.
v. Garey, 76.
v. Greer, 197.
v. Grim, 255, 264.
v. Henkel, 11.
v. Henry, 690.
v. Howard, 575, 717.
v. Hubbs 732.
v. Hunter, 453.
v. Hurst, 634.
v. Johnson 567.
v. Kay, 275, 729.
v. Kearney, 58.
v. Kehr, 31.
v. Kelley, 336.
v. Longmire, 159, 175.
v. Lowell, 437, 480.
v. Meaghan, 243.
v. Millett, 140.
v. Mitchell, 89, 553.
v. Moore, 65, 457.
v. Muirheid, 35, 153.
v. Munroe, 578, 613.
v. National Benefit Soc., 487, 488.
v. New York L. I. Co., 227, 425.
v. Onion, 423, 424.
v. Quartz Min. Co., 737.
v. Railroad Co., 101, 140, 172.
v. Reid, 18, 23, 109, 110, 188, 192, 314, 315, 435.
v. Riggs, 533.
v. Rumsey, 31, 92, 158.
v. Sanborn, 64.
v. Sands, 324.
v. Schulting, 218.
v. Schwed, 501, 706.
v. Sipperly, 389.
v. Skeary, 704.
v. Smith, 352, 389, 390, 517, 543, 563.
v. Spencer, 377.
v. Towers, 644, 654, 655, 658.
v. Vodges, 188, 204, 437.
Smith *v.* Vreeland, 187.
v. Water Comm'rs of Norwich, 357.
v. Weeks, 115, 173.
v. Welch, 459.
v. White, 433.
v. Williams, 54.
v. Wise, 321, 340, 560, 561.
v. Wood, 96, 273, 275.
v. Yell, 437.
Smith's Appeal, 551, 614.
Snedecor *v.* Watkins, 516.
Snell *v.* Harrison, 431.
Snelling *v.* McIntyre, 350.
Snodgrass *v.* Andrews, 104, 156, 172, 215, 223.
v. Branch Bank of Decatur, 286, 513.
Snow *v.* Lang, 723.
v. Paine, 370.
Snowdon *v.* Dales, 64, 657.
Snyder *v.* Braden, 354.
v. Christ, 206, 366.
v. Dangler, 278.
v. Free, 190, 351, 352, 392, 394, 488.
Societa Italiana *v.* Sulzer, 301.
Sockman *v.* Sockman, 111.
Soden *v.* Soden, 182, 416.
Sohier *v.* Johnson, 71.
Solinger *v.* Earle, 712.
Solinsky *v.* Lincoln Sav. Bank, 84, 324.
Somerville *v.* Donaldson, 330.
Somes *v.* Skinner, 502.
Sommermeyer *v.* Schwartz, 203, 414, 537.
Sommerville *v.* Horton, 635.
Songer *v.* Partridge, 717.
Sorenson *v.* Sorenson, 208.
Souder's Appeal, 113, 121.
Soule *v.* Chase, 517.
Southall *v.* Farish, 273, 504.
Southard *v.* Benner, 57, 139, 142, 168, 225, 229, 231, 233, 553, 619, 623.
South Branch Lumber Co. *v.* Ott, 571, 595, 596, 606, 612.
South Danvers Nat. Bank *v.* Stevens, 551.
South Sea Co. *v.* Wymondsell, 513.
Southwick *v.* First Nat. Bank, 273, 504.
Southworth *v* Adams, 136.
Spackman *v.* Evans, 17.
Spader *v.* Davis, 58, 128, 148
Sparhawk *v.* Cloon, 65, 656.
v. Yerkes, 70, 71, 74.
Sparks *v.* Brown, 490, 619.
v. Dawson, 15.
v. De La Guerra, 58.
v. Mack, 481, 619.
Spaulding *v.* Blythe, 278, 361, 519.
v. Fisher, 164.
v. Keyes, 55, 501, 525, 630.
v. Strang, 577, 578, 604, 704, 715.
Speiglemyer *v.* Crawford, 157, 223.

Spelman *v.* Freedman, 139, 177, 221, 229, 233, 248, 271, 332, 547, 597, 602, 603.
Spence *v.* Bagwell, 556.
v. Smith, 424, 478, 700.
Spencer *v.* Armstrong, 155.
v. Ayrault, 387.
v. Cuyler, 115.
v. Godwin, 127.
v. Jackson, 601.
v. Myers, 56.
v. Spencer, 544.
Sperry *v.* Etheridge, 628.
Spicer *v.* Ayers, 155.
v. Hunter, 321.
v. Spicer, 10.
Spindle *v.* Shreve, 59, 65, 84, 85, 87, 136, 638, 650, 652, 653.
Spirett *v.* Willows, 60.
Splawn *v.* Martin, 357.
Spokane Co. *v.* Clark, 83.
Spotts *v.* Commonwealth, 475.
Sprague *v.* Cochran, 251.
v. Haines, 516.
Spraights *v.* Hawley, 444, 618.
Spring *v.* Short, 57, 231, 232, 553.
Spring Co. *v.* Knowlton, 731.
Springer *v.* Savage, 660.
Springfield Homestead Assoc. *v.* Roll, 701, 717.
Stacy *v.* Deshaw, 55, 503.
v. Thrasher, 154.
Stadelman *v.* Loehr, 564.
Stafford *v.* Merrill, 610.
Stall *v.* Fulton, 529.
Stambaugh's Estate, 662.
Stamper *v.* Hibbs, 709.
Stanbro *v.* Hopkins, 474.
Stanford *v.* Lockwood, 553.
Stanley *v.* Bunce, 609.
v. National Union Bank, 459, 462.
v. Robbins, 381.
v. Schwalby, 377.
v. Stanton, 285.
v. Thornton, 660.
Stanton *v.* Green, 308.
v. Kirsch, 529.
v. Shaw, 725.
v. Westover, 564.
Staples *v.* Bradley, 109, 133.
v. Smith, 501.
Starin *v.* Kelly, 38, 358, 370, 478, 559, 560, 666.
Stark *v.* Grant, 450, 451.
v. Starr, 8.
Starke *v.* Littlepage, 726, 734.
Starks *v.* Curd, 232.
Starr *v.* Peck, 10, 12.
v. Starr, 397.
State *v* Bowen, 129, 141.
v. Burkeholder, 245.
v. Busch, 618, 619.
v. Casteel, 470.
State *v.* Durant, 470.
v. Estel, 20.
v. Evans, 394.
(*ex rel.* Smith) *v.* Flynn, 462, 463.
(*ex rel.*) Baumunk) *v.* Goetz, 454.
v. Hemingway, 397.
v. Hope, 347.
v. Keeler, 433, 558.
v. King, 461
v. McBride, 58, 63.
v. Mason, 357, 405, 676, 685, 691.
(*ex rel.* Peirce) *v.* Merritt, 426, 431, 676.
v. Miller, 124.
(*ex rel.* Brown) *v.* Mitchell, 399, 458.
v. Mueller, 26.
v. Phœnix Bank, 500.
v. Purcell, 691.
v. Roever, 624, 633.
(*ex rel.* Enderlin State Bank) *v.* Rose, 550, 557.
v. Rosenfeld, 460.
v. Thomas, 102.
v. Williams, 518.
State Bank *v.* First Nat. Bank, 551.
v. Whittle, 393.
State Sav. Bank *v.* Buck, 421.
Staton *v.* Pittman, 231.
Steadman *v.* Wilbur, 524, 525.
Stearns *v.* Gage, 360, 675, 676, 678, 679, 683, 684, 686, 692.
v. Harris, 73.
v. Page, 284, 285, 286, 513.
Stebbins *v.* Miller, 486.
Steel *v.* De May, 434.
v. Goodwin, 614.
Steele *v.* Benham, 457, 459, 632.
v. Ward, 357.
Steelwagon *v.* Jeffries, 463.
Steere *v.* Hoagland, 84, 154, 156, 166, 167, 325, 415.
Steib *v.* Whitehead, 660.
Stein *v.* Hermann, 322.
v. Munch, 632.
Stephens *v.* Adair, 717.
v. Cady, 71, 73, 74.
v. Gifford, 450, 453.
v. Meriden Britannia Co., 235.
v. Perrine, 234, 633.
v. Regenstein, 610.
v. Whitehead, 141, 288.
Stephenson *v.* Donahue, 538.
Stern Auction & C. Co. *v.* Mason, 414.
Sternbach *v.* Leopold, 420.
Sterry *v.* Arden, 383, 672.
Stetson *v.* Miller, 594.
Stevens *v.* Breen, 618.
v. Brennan, 345.
v. Carson, 529.
v. Dillman, 415, 431, 432, 486.
v. Gladding, 74.
v. Hinckley, 423, 424.
v. Irwin, 457.

Stevens *v.* Merrill, 3.
v. Myers, 338.
v. Pierce, 428.
v. Robinson, 23, 190, 437.
v. Wiley, 736.
v. Works, 182.
Stevens Lumber Co. *v.* Kansas City P. M. Co., 357.
Stevenson *v.* Stevenson, 51.
v. White, 94.
Steward *v.* Thomas, 468.
Stewart *v.* Beale, 165.
v. Dunham, 136, 740.
v. Emerson, 104.
v. English, 58, 67.
v. Fagan, 140.
v. Fenner, 488, 498.
v. Hopkins, 419.
v. Isidor, 298.
v. Johnson, 495.
v. McMartin, 68, 117.
v. Mills Co. Nat. Bank, 417.
v. Platt, 230, 378, 617, 618, 717.
v. Rogers, 190.
v. Spenser, 577.
v. Stewart, 543, 544.
v. Thomas, 491.
v. Wilson, 416.
Stickney *v.* Stickney, 536.
Stileman *v.* Ashdown, 189, 204, 412.
Still *v.* Focke, 564.
v. Spear, 650, 662.
Stillings *v.* Turner, 720, 728.
Stillwell *v.* Stillwell, 258, 735.
Stilwell *v.* Van Epps, 126.
Stimson *v.* White, 529.
v. Wrigley, 182, 448, 470, 633.
Stinson *v.* Hawkins, 363, 406.
v. Williams, 58, 67.
Stiles *v.* Champion, 595.
Stix *v.* Chaytor, 452.
Stock Growers' Bank *v.* Newton, 104, 247, 419, 421.
Stockwell *v.* Blamey, 491, 492.
v. Silloway, 367.
Stoddard *v.* Butler, 37, 416.
Stokes *v.* Amerman, 56, 541.
v. Coffey, 57.
Stokoe *v.* Cowan, 51, 58.
Stone *v.* Anderson, 160.
v. Chisolm, 131.
v. Grubham, 412.
v. Locke, 45.
v. Myers, 183.
v. Peacock, 471.
v. Spencer, 363, 364.
v. Stone, 543.
v. Westcott, 144, 660.
Stoneburner *v.* Jeffreys, 581.
Storey *v.* Agnew, 365.
Storm *v.* Davenport, 231, 556.
v. United States, 515.
v. Waddell, 74, 115, 129, 708, 709.
Stout *v.* Phillipi Mfg. & M. Co., 702.
Stout *v.* Stout, 259.
v. Watson, 594, 610.
Stovall *v.* Farmers' & M. Bank, 342.
Stover *v.* Herrington, 406, 426.
Stow *v.* Chapin, 662.
Stowe *v.* Taft, 449.
Stowell *v.* Hastings, 640.
v. Hazelett, 489.
Strader *v.* Mullane, 498.
Stramann *v.* Scheeren, 523.
Strang *v.* Bradner, 518.
Stratford *v.* Ritson, 264.
Strathmore *v.* Bowes, 544.
Stratton *v.* Putrey, 424, 480.
Strauss *v.* Kranert, 13.
v. Parshall, 525.
Strike *v.* McDonald, 220.
Striker *v.* Mott, 609.
Stroff *v.* Swafford, 413.
Strong *v.* Clem, 117.
v. Skinner, 62.
v. Strong, 51.
v. Taylor School Township, 217, 293.
Strouse *v.* Becker, 93.
Stuart *v.* McClelland, 533.
v. Smith, 409.
v. Stuart, 183.
Stucky *v.* Masonic Sav. Bank, 694.
Stumbaugh *v.* Anderson, 391.
Stump *v.* Rogers, 223.
Sturges *v.* Crowninshield, 517.
v. Vanderbilt, 140.
Sturm *v.* Chalfant, 15, 387.
Sturtevant *v.* Ballard, 29, 445.
Suau *v.* Caffe, 392.
Suffern *v.* Butler, 338.
Sugg *v.* Tillman, 89.
Suiter *v.* Turner, 468.
Sukeforth *v.* Lord, 355.
Sullice *v.* Gradenigo, 224.
Sullivan *v.* Iron & Silver Min. Co., 277.
v. Miller, 156, 560, 592.
v. Portland & K. R. R. Co., 512.
v. Smith, 564.
v. Sullivan, 442.
Summers *v.* Babb, 545.
Sumner *v.* Brady, 712.
v. Cook, 490.
v. Dalton, 449, 463.
v. Hicks, 135, 571, 585.
v. Newton, 661.
Supervisors of Saratoga Co. *v.* Deyoe, 163, 219, 288.
Susong *v.* Williams, 700.
Sutherland, *In re*, 69.
v. Bradner, 19, 355, 356 569, 575 576, 611.
Sutphen *v.* Fowler, 738.
Sutton *v.* Ballou, 454, 465.
v. Hanford, 26.
Suydam *v.* Northwestern Ins. Co., 270.
Swaby's Appeal, 664.
Swaine *v.* Perine, 543.

Swan *v.* Morgan, 488, 490.
v. Robinson, 694.
v. Smith, 158, 222, 341.
Swan Land & C. Co. *v.* Frank, 141, 172, 249, 252, 253. 268.
Sweeney *v.* Conley, 370.
Sweeny *v.* Grape Sugar Ref. Co., 129.
Sweet *v.* Converse.
v. Dean, 477.
v. Scherber, 703.
v. Tinslar, 720.
v. Wright, 52, 488.
Sweetser *v.* Bates, 487.
v. Silber, 111.
v. Smith, 703.
Swift *v.* Agnes, 442.
v. Hart, 321, 703.
v. Mass. Mut. Life Ins. Co., 487.
Swinford *v.* Rogers, 323.
Sydnor *v.* Gee, 456.
Syracuse Chilled Plow Co. *v.* Wing, 368, 374, 536.

Taaffe, *Ex parte*, 647.
Tabor *v.* Van Tassell, 490, 558.
Taff *v.* Hosmer, 248.
Taft *v.* Marsily, 552.
Taggart *v.* Stanbery, 396.
Talbott *v.* Randall, 140.
Talcott *v.* Harder, 703, 704, 705.
v. Hess, 371, 609.
Talley *v.* Curtain, 7.
Tallmadge *v.* Sill, 76.
Tallon *v.* Ehison, 620.
Taltarum's Case, 651.
Tams *v.* Bullitt, 232.
Tantum *v.* Green, 58, 68, 690, 693.
v. Miller, 717, 728.
Tapia *v.* Demartini, 391.
Tappan *v.* Evans, 126, 178.
Tapscott *v.* Lyon, 37.
Tarback *v.* Marbury, 422.
Tarbell *v.* Griggs, 153, 154.
Tarrant *v.* Backus, 659.
Tarsney *v.* Turner, 523.
Tasker *v.* Moss, 142.
Tate *v.* Liggat, 140.
Taylor *v.* Atwood, 341.
v. Baker, 674.
v. Bowker, 139, 140, 142, 145, 167, 172.
v. Branscombe, 160, 168.
v. Cloud, 739.
v. Dickinson, 338.
v. Harwell, 640.
v. Holmes, 144, 221.
v. Jones, 40, 107, 380.
v. Mason, 640.
v. Miles, 373.
v. Missouri Glass Co., 389.
v. Robinson, 490.
v. Taylor, 312.
v. United States, 47.
v. Van Deusen, 184.
Taylor *v.* Webb, 252, 255, 264, 491.
v. Weld, 737.
v. Wendling, 406.
Teabout *v.* Daniels, 469.
Teague *v.* Lindsey, 436.
Tedesco *v.* Oppenheimer, 632.
Tedrowe *v.* Esher, 492, 495.
Teed *v.* Valentine, 146, 193, 194, 366, 476.
Teese *v.* Huntingdon, 499.
Tefft *v.* Stern, 347.
Teller *v.* Randall, 235.
Ten Broeck *v.* Sloo, 68, 69.
Ten Eyck *v.* Witbeck, 379.
Tennent *v.* Battey, 159.
Tennessee Nat. Bank *v.* Ebbert, 619, 625.
Tenney *v.* Evans, 61, 358.
Terrell *v.* Green, 403.
Terry *v.* Anderson, 131, 145, 172.
v. Calnan, 220.
v. Hopkins, 544.
v. Munger, 547.
v. Tubman, 178.
v. Wheeler, 465.
Tessier *v.* Wyse, 333.
Tevis *v.* Doe, 108.
Texas *v.* Chiles, 474, 475.
Texas & Pac. Ry. Co. *v.* Cox, 269.
Thacher *v.* Phinney, 196, 198, 370.
Thames *v.* Rembert, 301, 399, 666, 699.
Thatcher *v.* Candee, 562.
Thayer *v.* Thayer, 543.
Third Nat. Bank *v.* Guenther, 393, 531.
Thomas, *In re*, 230.
v. Beals, 341.
v. Black, 491.
v. Hubbell, 476.
v. Mackey, 272, 275, 277.
v. McEwen, 55.
v. Merchants' Bank, 151.
v. Pyne, 416.
v. Sullivan, 400.
v. Talmadge, 558.
Thomason *v.* Neeley, 109, 110, 309.
Thompson *v.* Adams, 70.
v. Baker, 297.
v. Bickford, 61, 340.
v. Blanchard, 450, 459.
v. Brown, 226.
v. Crane, 193.
v. Cundiff, 56, 541.
v. Diffenderfer, 103.
v. Drake, 407.
v. Duff, 692.
v. Feagin, 526.
v. Fry, 547.
v. Furr, 34.
v. Hall, 485.
v. Loenig, 529.
v. Moore. 45, 214.
v. Murphy, 660.
v. Nixon, 68.

Thompson *v.* Paret, 453.
v. Pennell, 424.
v. Rainwater, 549.
v. Richardson Drug Co., 425, 618.
v. Robinson, 183, 416.
v. Sanders, 304.
v. Sherrard, 335.
v. Thompson, 87, 638.
v. Tower Mfg. Co., 394, 434.
v. Towne, 75.
v. Van Vechten, 142, 167, 219, 247.
v. Whitmarsh, 561.
v. Wilhite, 470.
v. Yeck, 454.
Thompson's Appeal, 146.
Thomson *v.* Crane, 92, 180.
v. Dougherty, 199, 203, 209, 210.
v. Hester, 181.
Thornberry *v.* Baxter, 258.
Thornburgh *v.* Hand, 520.
Thorne *v.* Bank, 451.
Thornton *v.* Cook, 462.
v. Hook, 7.
v. Tandy, 490.
Thorp *v.* Keokuk Coal Co., 81.
Thouron *v.* Pearson, 418, 419.
Thrasher *v.* Bentley, 549.
Threlkel *v.* Scott, 276.
Throckmorton *v.* Chapman, 432.
v. Rider, 478.
Thurber *v.* Blanck, 103, 110, 159, 161, 173, 174, 175, 242.
Thurston *v.* Rosenfield, 551.
Tibbals *v.* Jacobs, 468.
Tichenor *v.* Allen, 258.
Ticknor *v.* McClelland, 454, 470.
Ticonic Bank *v.* Harvey, 167.
Tiernan *v.* Poor, 280.
Tiernay *v.* Claflin, 670.
Tildesley *v.* Lodge, 670.
Tilford *v.* Burnham, 129.
Tillinghast *v.* Bradford, 65, 637, 650, 654, 657, 660.
Tillman *v.* Heller, 478.
Tillotson *v.* Wolcott, 90, 116.
Tillou *v.* Britton, 705.
Tilson *v.* Terwilliger, 459, 461, 488, 490, 493.
Tilton *v.* Beecher, 306.
v. Cofield, 260, 297, 315, 697, 702.
Tisch *v.* Utz, 491.
Tobey *v.* Leonards, 303.
Tobie & Clark Mfg. Co. *v.* Waldron, 183.
Todd *v.* Lorah, 387, 388.
v. Monell, 35, 66.
v. Nelson, 193, 195, 196.
v. Sawyer, 640.
Tognini *v.* Kyle, 7, 20, 399, 452, 465.
Toker *v.* Toker, 77.
Tolbert *v.* Horton, 140.
Tolland Co. Ins. Co. *v.* Underwood, 659.
Tolles *v.* Wood, 84, 85, 86, 638, 650, 661.
Tolman *v.* Marlborough, 80.
v. Ward, 357, 382.
Tolputt *v.* Wells, 408.
Tomlinson *v.* Matthews, 525.
Tompkins *v.* Fonda, 66, 68, 117, 545.
v. Hunter, 46, 549, 594, 596, 705.
v. Nichols, 303, 468, 477, 478.
v. Purcell, 116, 154.
v. Sprout, 32, 346, 349.
Toney *v.* McGehee, 7, 9, 12, 197
Toof *v.* Martin, 481.
Tool Co. *v.* Norris, 597.
Tooley *v.* Bacon, 371.
Topping *v.* Lynch, 457.
Torbert *v.* Hayden, 628.
Totten *v.* Brady, 704.
Towers *v.* Hagner, 524.
Towle *v.* Hoit, 33, 480.
Town of Norwalk *v.* Ireland, 526, 527, 528.
Town of Venice *v.* Woodruff, 263.
Towne *v.* Fiske, 493.
v. Smith, 517.
Townsend *v.* Early, 647.
v. Little, 463, 670, 672.
v. Mayor of New York, 245.
v. Stearns, 478, 567, 605, 606, 607.
v. Tuttle, 184
v. Whitney, 223.
v. Williams, 306.
Townshend *v.* Windham, 76, 77, 209.
Tracy *v.* Cover, 92.
v. Tuffly, 563, 612.
Trade-Mark Cases, 72.
Traders' Nat. Bank *v.* Day, 452.
v. Steere, 707, 723.
Tradesman Pub. Co. *v.* Knoxville C. W. Co., 240.
Traer *v.* Clews, 587.
Train *v.* Kendall, 614.
Traip *v.* Gould, 111.
Trapnell *v.* Conklyn, 94.
Trappes *v.* Meredith, 657.
Trask *v.* Bowers, 463.
Travers *v.* Ramsay, 452.
Traynor & Keith, *In re*, 640.
Trefts *v.* King, 673.
Trego *v.* Skinner, 104, 259, 267.
Tremain *v.* Richardson, 555.
Trenton Banking Co. *v.* Duncan, 507, 509.
Tresch *v.* Wirtz, 94, 531.
Treusch *v.* Ottenburg, 359, 502.
Trezavent *v.* Terrell, 180, 181.
Trier *v.* Herman, 150, 365.
Trimble *v.* Turner, 210.
v. Woodhead, 229, 230, 235.
Tripp *v.* Vincent, 294.
Troll *v.* Carter, 720.
Trotter *v.* Watson, 493.
Trough, Estate of, 542.
Troughton *v.* Troughton, 76.

Troup *v.* Smith, 514.
Trovinger *v.* McBurney, 599.
Trowbridge *v.* Bullard, 139, 520.
Troxall *v.* Applegarth, 7.
Troy *v.* Smith, 477.
Truax *v.* Slater, 489, 490, 491.
Truesdell *v.* Bourke, 474.
v. Sarles, 195, 207, 273, 294, 504.
Trull *v.* Bigelow, 698.
Trumbull *v.* Hewitt, 356, 361, 474, 501.
v. Union Trust Co., 563.
Truscott *v.* King, 391, 396.
Trust Co. *v.* Sedgwick, 326, 545.
Trustee Relief Act, *In re*, 51.
Tryon *v.* Flournoy, 418, 421.
v. Whitmarsh, 685.
Tucker *v.* Andrews, 360.
v. Drake, 92.
v. Parks, 301.
v. Tucker, 104, 543.
v. Zimmermar, 266.
Tuckwood *v.* Hawthorn, 486.
Tudor *v.* De Long, 397.
Tuite *v.* Stevens, 185.
Tumlin *v.* Crawford, 30.
Tupper *v.* Thompson, 100, 110.
v. Wise, 740.
Turbeville *v.* Gibson, 407.
Turley *v.* Massengill, 640, 660.
Turner *v.* Adams, 140, 145, 167, 168, 169.
v. Douglass, 577.
v. First Nat. Bank, 263.
v. Fowler, 640.
v. Hallowell Sav. Inst., 640.
v. Jaycox, 607, 608.
v. Nye, 524.
v. Robinson, 260.
v. Turner, 183, 244.
v. Vaughan, 89.
Turnley *v.* Hooper, 59.
Tuthill *v.* Skidmore, 485.
Tuttle *v.* Turner, 297.
Tuxbury *v.* Miller, 712.
Tuxworth *v.* Moore, 464.
Twyne's Case, 36, 38, 46, 48, 49, 50, 51, 52, 188, 375, 380, 402, 412, 416, 443, 447, 621, 741.
Tyberandt *v.* Raucke, 434.
Tyler *v.* Angevine, 372, 496, 513.
v. Peatt, 140.
v. Tyler, 221, 222, 243, 381, 720.
Tyler Paper Co. *v.* Orcutt-Killick Lith. Co., 421.

Uhl *v.* Dillon, 100, 101, 332.
v. Robison, 452.
Uhlfelder *v.* Levy, 105, 146.
Uhre *v.* Melum, 270.
Ullrich *v.* Ullrich, 102, 271, 526.
Unangst *v.* Goodyear I. R. Mfg. Co., 491.
Underwood *v.* Sutcliffe, 234, 235, 242, 314.
Union Bank *v.* Ellicott, 615.
v. Kansas City Bank, 135, 387.
Union Nat. Bank *v.* Reed, 280.
v. Warner, 313, 314, 322, 324, 342, 707.
Union Stock Yards Bank *v.* Gillespie, 83.
Union Trust Co. *v.* Southern Inland Nav. & Imp. Co., 297.
United States *v.* Amer. Bell Tel. Co., 219, 287.
v. Amistad, 29, 113.
v. Beebee, 509.
v. Budd, 304.
v. Griswold, 204, 341, 406, 492.
v. Hooe, 34, 391.
v. Lotridge, 416.
v. Stiner, 194.
v. Thirty-six Barrels of High Wines, 500.
v. Throckmorton, 147.
v. Union Pacific Ry., 99.
v. Wilson, 110.
Updike *v.* Ten Broeck, 392.
v. Titus, 392.
Upshur *v.* Briscoe, 339.
Upton *v.* Englehart, 237.
v. McLaughlin, 284, 513, 515.
v. Tribilcock, 237, 240, 268.
Usher *v.* Hazeltine, 211, 667.
Utterson *v.* Vernon, 37.

Valentine, Matter of, 86.
v. Austin, 298.
v Lunt, 666, 670.
v. Richardt, 293, 324, 325, 330.
Van Alstyne *v.* Cook, 298.
Van Bibber *v.* Mathis, 20, 368, 540.
Van Buskirk *v.* Warren, 123.
Vance *v.* McNabb Coal, etc., Co., 237.
v. Phillips, 368.
v. Schroyer, 242.
Vanderpoel *v.* Gorman, 614, 615.
v. Van Valkenburgh, 251, 259.
Van Deusen *v.* Sweet, 336.
Van Doren *v.* Mayor, etc., 245.
Van Dyck *v.* McQuade, 279.
Van Etten *v.* Hurst, 158.
Van Heusen *v.* Radcliff, 143, 232.
Van Horne *v.* Campbell, 640.
Van Kleeck *v.* Miller, 147, 259, 291, 534.
Vanmeter *v.* Estill, 454, 626.
Van Nest *v.* Yoe, 556, 573.
Van Patten *v.* Burr, 596.
Van Raalte *v.* Harrington, 676, 686, 691.
Van Rensselaer *v.* Dennison, 640.
v. Van Rensselaer, 330.
Van Schaick *v.* Third Ave. R. R. Co., 81.
Van Valkenburgh *v.* Torrey, 47.
Van Weel *v.* Winston, 273, 274.
Van Wickle *v.* Calvin, 223.
Van Winkle *v.* Armstrong, 569.
v. McKee, 717.

Van Wy *v.* Clark, 717.
Van Wyck *v.* Baker, 276, 316, 317, 341.
v. Seward, 181, 183, 191, 208.
Vernum *v.* Hart, 616.
Vasser *v.* Henderson, 128, 140, 172, 176.
Vattier *v.* Hinde, 670.
Vaughan *v.* Thompson, 31.
Vause *v.* Woods, 335.
Veazie *v.* Somerby, 449.
Veeder *v.* Baker, 269.
Venable *v.* Bank of the U. S., 267, 406.
Venice *v.* Woodruff, 263.
Verner *v.* Downs, 177.
Vernon *v.* Morton, 556, 573.
Verplank *v.* Sterry, 189, 383.
Verselius *v.* Verselius, 281.
Vertner *v.* Humphreys, 528.
Very *v.* McHenry, 517.
Vick *v.* Lane, 253.
Vietor *v.* Levy, 419, 703, 704.
v. Nichols, 613.
Violett *v.* Violett, 357.
Virginia F. & M. Ins. Co. *v.* Cottrell, 275.
Vogler *v.* Montgomery, 31, 92.
Vogt *v.* Ticknor, 476.
Von Sachs *v.* Kretz, 489.
Voorhees *v.* Bonesteel, 94, 274, 303, 531, 532.
v. Carpenter, 233, 709.
v. Howard, 111, 140, 179.
v. Seymour, 140, 476, 708.
Voorhis *v.* Gamble, 251.
Voshell *v.* Hynson, 338.
Vredenbergh *v.* White, 448.
Vreeland *v.* N. J. Stone Co., 1, 505.
Vrooman *v.* Turner, 81.

W. *v.* B. (32 Beav. 574), 729.
Wabash St. L. & P. Ry. Co. *v.* Ham, 205, 237.
Waddams *v.* Humphrey, 482.
Waddell *v.* Lanier, 111, 228.
Waddingham *v.* Loker, 7.
Wade *v.* Rusher, 105.
Wadhams *v.* Gay, 114.
Wadsworth *v.* Lyon, 223.
v. Schisselbauer, 128.
v. Williams, 196, 198, 229, 363, 491.
Wafer *v.* Harvey Co. Bank, 420, 500.
Wager *v.* Hall, 481.
v. Link, 81.
Waggoner *v.* Speck, 58.
Wagner *v.* Law, 110, 247.
v. Smith, 34.
Wait *v.* Bull's Head Bank, 401.
v. Day, 385
Waite, Matter of, 239, 614, 738.
v. Harper, 712.
Wake *v.* Griffin, 534.
Wakeman *v.* Dalley, 9, 12, 568.
Wakeman *v.* Grover, 130, 560, 592.
Waldele *v.* N. Y. Central & H. R. R. R. Co., 487, 488.
Walden *v.* Murdock, 465, 466, 703.
Waldman *v.* O'Donnell, 117.
Wales *v.* Bowdish, 75.
v. Lawrence, 162, 163, 271.
Walkenshaw *v.* Perzel, 482.
Walker *v.* Adair, 714.
v. Collins, 8, 688, 689, 690.
v. Denne, 335.
v. Lovell, 184.
v. Pease, 278.
v. Powers, 219, 265, 287, 288.
v. Reamy, 539.
v. Vincent, 640, 642.
v. Walker, 543.
Walkow *v.* Kingsley, 278.
Wall *v.* Fairley, 215, 217, 264.
v. Provident Inst., 228.
Wallace *v.* Eaton, 251.
v. Lawyer, 58, 67.
v. Nodine, 445, 450, 470.
v. Penfield, 200, 201, 205, 208, 297.
v. Smith, 660.
v. Treakle, 708.
Waller *v.* Shannon, 259.
v. Todd, 158.
Walradt *v.* Brown, 51, 244.
Walsh *v.* Ketchum, 437.
v. Mutual L. I. Co., 56.
Walter *v.* Gernant, 470.
v. Lane, 16, 189, 194, 204.
v. Riehl, 259, 267.
Walters *v.* Walters, 506.
v. Whitlock, 614.
Walthall *v.* Rives, 270.
Waltham *v.* Broughton, 5.
Walton *v.* Bonham, 726.
v. Ely, 232.
v. Tusten, 720, 735.
Wanner *v.* Snyder, 659, 663.
Waples Platter Co. *v.* Low, 158.
Ward *v.* Northumberland, 219.
v. Roy, 117.
v. Saunders, 492.
v. Trotter, 573.
v. Webster, 552.
Warden *v.* Jones, 60.
v. Marshall, 464.
Wardour *v.* Berisford, 500.
Ware *v.* Galveston City Co., 243.
v. Gardner, 412.
Waring *v.* Mackreth, 305.
Warmoth *v.* Dryden, 485.
Warner *v.* Blakeman, 30, 111, 114, 276, 280, 324.
v. Callendar, 105.
v. Daniels, 98.
v. Dove, 188, 278.
v. Hopkins, 506.
v. Jaffray, 553, 554, 614.
v. Littlefield, 485, 549, 603, 703.

Warner *v.* Mower, 615.
v. Norton, 418, 452, 453, 459.
v. Percy, 372.
v. Warren, 356.
Warner Glove Co. *v.* Jennings, 703.
Warren *v.* His Creditors, 630.
v. Jones, 703.
v. Lee, 594.
v. Marcy, 298.
v. Moody, 229, 230..
v. Warren, 288.
v. Warren Thread Co., 71, 72.
v. Williams, 185, 491, 501.
Warren County *v.* Marcy, 298.
Wartman *v.* Wartman, 353.
Warwick *v.* Petty, 408.
Washband *v.* Washband, 358, 376.
Washburn *v.* Goodheart, 92.
v. Huntington, 278, 675.
v. Sproat, 61.
Washer *v.* Brown, 338.
Washington Central Bank *v.* Hume, 56, 57, 541, 542.
Washington Union Ins. Co. *v.* Wilson, 15.
Waterbury *v.* Sturtevant, 402.
Waterman *v.* Sprague Mfg. Co., 507.
Waters *v.* Dashiell, 231.
v. Taylor, 5.
Watkins *v.* Arms, 424.
v. Dorsett, 67.
v. Jones, 730, 733.
v. Worthington, 484.
v. Wortman, 153.
Watkins Nat. Bank *v.* Sands, 597.
Watkyns *v.* Watkyns, 639
Watrous *v.* Lathrop, 178.
Watson *v.* Bourne, 517.
v. Dodd, 64.
v. Riskamire, 18, 360.
v. Sutherland, 99.
Watson & Woods, *In re*, 639.
Watt *v.* Grove, 430.
Watts *v.* Creswell, 695.
v. Wilcox, 249.
Waverly Nat. Bank *v.* Halsey, 601, 609.
Way *v.* Bragaw, 260, 290.
Wead *v.* Gray, 640.
Wear *v.* Skinner, 286.
Weare *v.* Williams, 675.
Wearse *v.* Pierce, 521.
Weatherbee *v.* Cockrell, 717.
Weaver *v.* Fisher, 71.
v. Haviland, 140, 143, 177, 271, 513, 515.
v. Nugent, 377.
v. Owens, 368, 399, 405.
Webb *v.* Armistead, 581.
v. Helion, 105.
v. Ingham, 431, 526.
v. Read, 297.
v. Thomas, 616.
Weber *v.* Armstrong, 620.
v. Mick, 24, 354, 549, 594, 596, 618.
Weber *v.* Rothchild, 308.
v. Weber, 139.
Webster *v.* Clark, 139, 140, 142, 172.
v. Folsom, 107, 164.
v. Hildreth, 60.
v. Lawrence, 140, 158.
v. Peck, 462.
v. Upton, 237.
v. Withey, 667.
Weed *v.* Davis, 437.
v. Pierce, 51, 58, 106.
Weeden *v.* Hawes, 406.
Weeks *v.* Hill, 368, 386.
v. Prescott, 450.
Weider *v.* Maddox, 549, 614.
Weigtman *v.* Hatch, 131, 149, 172, 176.
Weil *v.* Lankins, 159.
Weir *v.* Day, 51, 183, 244.
Weis *v.* Dittman, 568.
v. Goetter, 332.
Weise *v.* Wardle, 255.
Welch *v.* Bradley, 479.
Welcker *v.* Price, 305.
Welcome *v.* Mitchell, 274, 491.
Welde *v.* Scotten, 222, 245
Welles *v.* Fish, 514.
v. March, 563, 564.
Wellington *v.* Small, 118.
Wells *v.* Knox, 252.
v. Langbein, 343, 632, 633.
v. Morrow, 671.
v. O'Connor, 146, 476.
Welsh *v.* Britton, 578.
v. Solenberger, 95, 249.
v. Welsh, 224, 291.
Wemyss *v* White, 87.
Wendell *v.* Van Rensselaer, 508.
Werborn *v.* Kahn, 332, 708.
Werner *v.* Zierfuss, 359, 364, 408.
Werts *v.* Spearman, 487.
Wescott *v.* Gunn, 617.
Wessels *v.* Beeman, 372.
v. McCann, 454.
West *v.* Snodgrass, 33, 634.
West Coast Grocery Co. *v.* Stenson, 273.
Westerman *v.* Westerman, 243.
Western Transp. Co. *v.* Kilderhouse, 269.
Westmoreland *v.* Powell, 244.
Weston *v.* Blake, 288.
West Side Bank *v.* Pugsley, 114, 116.
Wetherbee *v.* Baker, 253.
Wetmore *v.* Truslow, 87.
v. Wetmore, 84, 85, 86, 87, 638, 650, 662.
v. Woods, 667.
Weyand *v.* Tipton, 520
Weymouth *v.* Chicago & N. W. Ry. Co., 529.
Whaley *v.* Dawson, 219.
Wharton *v.* May, 479.
Wheadon *v.* Huntington, 502.
Wheatcroft *v.* Hickman, 581.
Whedbee *v.* Stewart, 20.

Wheelden *v.* Wilson, 17, 371, 400, 411, 430, 434.
Wheeler *v.* Billings, 396.
v. Konst, 452.
v. Millar, 268.
v. Sage, 724.
v. Wallace, 325.
v. Wheedon, 267.
Whipple *v.* Pope, 607.
Whitaker *v.* Gavit, 569.
v. Whitaker, 392.
v. Williams, 569.
Whitbread *v.* Jordan, 674, 675.
Whitcomb *v.* Fowle, 579.
White *v.* Banks, 555.
v. Benjamin, 14, 319, 398, 418, 479, 526, 527, 536, 609.
v. Bogart, 475.
v. Cotzhausen, 594, 595, 596, 607, 702, 706.
v. Davis, 318, 593.
v. Fagan, 573.
v. Geraerdt, 156.
v. Givens, 92.
v. Hall, 154.
v. Kuntz, 711, 713.
v. McPheeters, 353.
v. Perry, 7, 8, 9, 30, 498.
v. Thomas, 660.
v. White, 65, 657, 660.
White's Bank of Buffalo *v.* Farthing, 215, 216, 218, 313, 314, 317, 335.
Whitesel *v.* Hiney, 278.
Whiting *v.* Barrett, 88.
Whitney *v.* Davis, 104, 140, 143, 144, 146, 159, 160, 161, 162, 171, 174, 332.
v. Levon, 624.
v. Marshall, 165.
v. Rose, 432.
Whiton *v.* Snyder, 522, 524, 530.
Whitridge *v.* Whitridge, 516.
Whittaker *v.* Amwell Nat. Bank, 348.
v. Merrill, 552.
Whittington *v.* Jennings, 76.
Whittlesey *v.* Delaney, 146, 276, 476.
Wich *v.* Parker, 309.
Wickham *v.* Miller, 52.
Wicks *v.* Hatch, 356.
Wieting *v.* Bellinger, 641.
Wiggin *v.* Bush, 712.
Wiggins *v.* Armstrong, 7, 101, 143, 148.
v. McDonald, 81.
Wilcox *v.* Fitch, 51.
v. Howland, 354.
v. Kellogg, 102.
Wilcoxen *v.* Morgan, 438, 697.
Wiles *v.* Suydam, 268.
Wiley *v.* Carter, 733.
v. Gray, 528.
v. Knight, 19.
Wilkerson *v.* Schoonmaker, 476.
Wilkes *v.* Ferris, 607.
Wilkinson *v.* Babbitt, 349.
v. Paddock, 313, 317, 545.
v. Yale, 153.
Willetts *v.* Vandenburgh, 148.
Williams *v.* Ayrault, 739.
v. Bankhead, 249.
v. Banks, 204, 212, 223, 437.
v. Barnett, 399.
v. Benedict, 136.
v. Carle, 544.
v. Clink, 722.
v. Davis, 29, 206.
v. Evans, 20.
v. Ewing, 297.
v. Harris, 28, 523, 526, 527.
v. Hart, 493.
v. Higgins, 717, 718.
v. Hubbard, 97.
v. Jackson, 670.
v. Kirtland, 135.
v. Leech, 640.
v. Lomas, 77.
v. Lord, 12.
v. Merritt, 229.
v. Michenor, 160.
v. Neel, 290.
v. Rawlins, 32.
v. Sexton, 115.
v. Spragins, 272, 275.
v. Thorn, 84, 85, 86, 87, 115 638, 650, 661.
v. Whedon, 563, 579.
v. Williams, 493.
v. Winsor, 232, 626.
Williamson *v.* Brown, 672, 673, 674, 683, 689.
v. Goodwyn, 415.
v. Williams, 7, 303, 325, 493.
Willison *v.* Desenberg, 407.
Willoughby *v.* Willoughby, 670.
Wilmerding *v.* Jarmulowsky, 676.
Wilson *v.* Anthony, 512.
v. Berg, 567.
v. Clark, 494.
v. Forsyth, 214, 557, 565.
v. Hill, 465.
v. Horr, 294, 702.
v. Hunter, 694.
v. Jordan, 415.
v. Kohlheim, 188.
v. Lazier, 12.
v. Lott, 405, 434.
v. McMillan, 94, 95, 392.
v. Marion, 360, 560, 569, 665, 676, 686.
v. Pearson, 365.
v. Perrin, 136.
v. Prewett, 357, 690.
v. Robertson, 339, 389, 562, 563, 609.
v. Russell, 391.
v. Spear, 357.
v. Sullivan, 630.
v. Watts, 29.

Wilson Bros. W. & T. Co. *v.* Daggett, 547.
Wilt *v.* Franklin, 20.
Wimbish *v.* Tailbois, 45.
Winans *v.* Graves, 718.
Winch's Appeal, 245.
Winchester *v.* Charter, 190, 196, 198, 203, 355, 368, 372, 407, 437, 491, 498.
v. Gaddy, 88.
Winchester & P. Mfg. Co. *v.* Creary, 490, 491, 496.
Windhus *v.* Bootz, 377.
Windstandley *v.* Stipp, 272.
Winfield Nat. Bank *v.* Croco, 523, 610, 706.
Wingler *v.* Sibley, 626.
Winkley *v.* Hill, 629.
Winslow *v.* Dousman, 258.
Winsor *v.* McLellan, 230.
v. Mills, 640, 643.
Wisconsin Granite Co. *v.* Gerrity, 142, 176, 178.
Wise *v.* Tripp, 80.
v. Wheeler, 493.
v. Wilds, 432.
v. Wimer, 558.
Wisner *v.* Barnet, 516.
Wiswall *v.* Sampson, 136.
Wiswell *v.* Jarvis, 538.
Witherwax *v.* Riddle, 414.
Withrow *v.* Biggerstaff, 501.
Witmer's Appeal, 333.
Witz *v.* Osburn, 194.
Wolf *v.* Arthur, 355, 357.
v. Gray, 577.
v. Stix, 339.
Wolfe *v.* Claflin, 332.
Wolfer *v.* Hemmer, 640.
Wolford *v.* Farnham, 387.
Wollaston *v.* Tribe, 77.
Wollensak *v.* Reiher, 283, 284.
Wood *v.* Amory, 273.
v. Carpenter, 283, 284, 285, 693, 694, 696.
v. Chambers, 31, 88.
v. Chapin, 247, 698.
v. Clark, 9.
v. Conrad, 567.
v. Dixie, 365, 705.
v. Dummer, 237.
v. Goff's Curator, 340.
v. Harrison, 529.
v. Hunt, 340, 342.
v. Robinson, 268, 671.
v. Scott, 406.
v. Sidney Sash, etc., Co., 249, 252, 259.
v. Stark, 374.
v. United States, 500.
Woodbridge *v.* Allen, 517.
v. Tilton, 523.
Woodburn *v.* Mosher, 586.
Woodhull *v.* Whittle, 393.
Woodmeston *v.* Walker, 646.
Woodruff *v.* Bowles, 357.
Woods *v.* Bugbey, 454, 466.
v. James, 285.
v. Morrell, 305.
Woodward *v.* Brooks, 614.
v. Marshall, 581.
v. Wyman, 381.
Woodworth *v.* Paige, 545.
v. Sweet, 531, 536.
Wooldridge *v.* Gage, 183.
Wooten *v.* Clark, 33, 480.
v. Steele, 171.
Wordall *v.* Smith, 446, 463.
Worman *v.* Kramer, 453, 463.
Wormley *v.* Wormley, 671.
Worseley *v.* Demattos, 29, 399, 419, 422, 619.
Worthington *v.* Bullitt, 346, 437.
v. Shipley, 437.
Worthy *v.* Brady, 352, 353.
W. O. Tyler Paper Co. *v.* Orcutt-Killick Lith. Co., 421.
Wray *v.* Davenport, 35.
Wright *v.* Campbell, 150, 156, 166.
v. Davis, 515.
v. Delafield, 294.
v. Hencock, 409.
v. Lee, 549.
v. Linn, 497.
v. McCormick, 431, 443, 454.
v. Mack, 293.
v. Mahaffey, 423.
v. Nostrand, 99, 115.
v. Oroville M. Co., 113.
v. Towle, 492.
v. Wheeler, 302.
v. Wright, 382.
v. Zeigler, 547.
Wyatt *v.* Brooks, 299.
Wyckoff *v.* Carr, 489.
Wylie *v.* White, 660.
Wyman *v.* Brown, 197, 672.
v. Mathews, 594.
Wynne *v.* Cornelison, 283.
v. Mason, 525, 526, 540.

Xenia Bank *v.* Stewart, 100.

Yale *v.* Bond, 451.
Yardley *v.* Torr, 182, 379.
Yates *v.* Law, 524.
v. Yates, 469, 492.
Yates County Nat. Bank *v.* Carpenter, 89, 90.
Yeatman *v.* Savings Inst., 230.
Yeaton *v* Lenox, 216.
Yeend *v.* Weeks, 182.
Yocum *v.* Bullit, 132.
York *v.* Bright, 514.
v. Merritt, 712.
v. Rockwood, 279.
Yost *v.* Hudiburg, 437.
Youmans *v.* Boomhower, 55, 88.

Young *v.* Brush, 560.
v. Clapp, 596.
v. Edwards, 15.
v. Frier, 149.
v. Heermans, 21, 25, 34, 46, 66, 181, 277, 480.
v. Lathrop, 700.
v. McClure, 453, 461.
v. Parker, 260, 521.
v. Ward, 341.
v. Willis, 35.
v. Young, 660.
Youngs *v.* Carter, 134, 543.

Zabriskie *v.* Smith, 552.
Zane *v.* Fink, 720.
Zell Guano Co. *v.* Heatherly, 294, 558.
Zick *v.* Guebert, 666.
Zimmer *v.* Miller, 371, 400, 410, 413.
Zimmerman *v.* Heinrichs, 689.
v. Willard, 277.
Zoeller *v.* Riley, 299, 312, 666, 670.
Zoll *v.* Soper, 223, 264.
Zuver *v.* Clark, 246.

FRAUDULENT CONVEYANCES

AND

CREDITORS' BILLS.

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CHAPTER I.

INTRODUCTORY OBSERVATIONS. — GROWTH OF THE LAW CONCERNING FRAUDULENT CONVEYANCES. — PHASES OF THE SUBJECT.

§ 1. Severity of the Roman law — Modern changes.
2. Prevalence of fraudulent transfers — The cause.
3. Scope of the inquiry.
4. Forms of relief.
5. } Onus as to fraud — Suspicions
6. } insufficient — Absence of presumptions.
7. Judge Black's views.
8. Proof of moral turpitude.
9. Fraud in fact and fraud in law.
10. The cases considered.
11. Words "hinder, delay, or defraud."
12. Word "disposed" construed.
§ 13. No definition of fraud.
14. Restraints upon alienation.
15. Fraudulent conveyances — Characteristics and classes.
16. Fraudulent conveyances at common law — Statutes declaratory.
17. Covinous transfers of choses in action.
18. Early statutes avoiding fraudulent conveyances.
19. Statute, 13 Eliz. c. 5, and its object.
20. Its interpretation and construction.
21. Statute, 27 Eliz. c. 4.
22. Twyne's Case.

"The rule is universal, whatever fraud creates, justice will destroy. — Vice-Chancellor Van Fleet in *Vreeland* v. *New Jersey Stone Co.*, 29 N. J. Eq. 190.

§ 1. Severity of the Roman law — Modern changes. — It has been truly observed that the protection and preservation of the rights of creditors must be a fundamental policy of all enlightened nations.[1] The method by which

[1] Story's Eq. Jur. § 350; Creditors are "a favored class," Fouche v. Brower, 74 Ga. 251; Gable v. Columbus Cigar Co., 140 Ind. 563, 566, 38 N. E. Rep. 474, citing the text.

this protection may be extended and rendered practically effectual is, however, a problem very difficult of solution. The barbarous practice which prevailed among the ancient Romans of putting an insolvent to death, or selling him into slavery,[1] pictures to our imaginations the strong legal and moral foundation which a pecuniary obligation had in the minds of the people in early times. The penalty for the failure to pay a debt was as severe as that which is now ordinarily imposed upon criminals for the commission of the most heinous of crimes.[2]

[1] Holmes' Common Law, p. 14, says: "This line of thought, together with the *quasi* material conception of legal obligations as binding the offending body which has been noticed, would perhaps explain the well-known law of the Twelve Tables as to insolvent debtors. According to that law, if a man was indebted to several creditors and insolvent, after certain formalities they might cut up his body and divide it among them. If there was a single creditor he might put his debtor to death or sell him as a slave."

[2] "After the judicial proof or confession of the debt, thirty days of grace were allowed before a Roman was delivered into the power of his fellow-citizens. In this private prison, twelve ounces of rice were his daily food; he might be bound with a chain of fifteen pounds' weight; and his misery was thrice exposed in the market-place, to solicit the compassion of his friends and countrymen. At the expiration of sixty days, the debt was discharged by the loss of liberty or life; the insolvent debtor was either put to death, or sold in foreign slavery beyond the Tiber; but if several creditors were alike obstinate and unrelenting, they might legally dismember his body, and satiate their revenge by this horrid partition. The advocates for this savage law have insisted, that it must strongly operate in deterring idleness and fraud from contracting debts which they were unable to discharge." Gibbon's History of the Decline and Fall of the Roman Empire, vol. iv., pp. 372–373. It seems incredible that the following extract could ever have found its way into an English report: "If a man be taken in execution, and lie in prison for debt, neither the plaintiff at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink, or clothes; but he must live on his own, or on the charity of others; and if no man will relieve him, let him die in the name of God, says the law; and so say I." Hyde, Justice, in Manby v. Scott, 1 Mod. 132 (A. D. 1663). In Maine's Ancient Law, 11th ed., p. 321, it is said: "Considered historically, the primitive association of Conveyances and Contracts explains something which often strikes the scholar and jurist as singularly enigmatical, I mean the extraordinary and uniform severity of very ancient systems of law to *debtors*, and the extravagant powers which they lodge with *creditors*."

The chains which held a debtor in the power of his creditor have one by one been broken,[1] but the sacredness of a promise to pay a debt, notwithstanding the abrogation of the ancient penalties, is still voluntarily cherished by the mass of mankind. Yet, unfortunately, the protection and preservation of the rights of creditors is often the last consideration with a numerous class of careless or dishonest insolvents. Satisfied of utter inability to pay maturing debts, their remaining property is frequently diverted to inequitable purposes or squandered with reckless profusion. The confiding creditor, when driven to the necessity of seeking a discovery of equitable assets, often finds at the end of the litigation nothing but a mass of worthless securities or "a beggarly account of empty boxes."[2] The underlying reasons for this deplorable condition of affairs will be briefly considered.

§ 2. Prevalence of fraudulent transfers — The cause.— Since the general abolition of imprisonment for contract debts, dishonest people have grown bolder and more reckless, and the power of creditors to enforce payment of just obligations has been correspondingly diminished. This humane reform in our law, which was inspired by the desire to relieve honest but unfortunate debtors from the painful consequences formerly incident to insolvency, is now eagerly availed of by unscrupulous people, who contract obligations with little expectation and no probability of fulfilling them. Abolition of imprisonment for debt removed the chief barrier and preventive of fraudulent conveyances, viz. : the terror of the debtor's prison. The personal liberty of the debtor being no longer at

[1] "The tendency of legislation for the last century has almost uniformly been in favor of the poor but honest debtor, and the object of nearly every law upon the subject has been to discourage and discountenance, or entirely prevent, the efforts of unfeeling creditors to oppress and punish him for his poverty." Stevens v. Merrill, 41 N. H. 315.

[2] Burtus v. Tisdall, 4 Barb. (N. Y.), 590.

stake, the natural tendency has been to promote reckless and extravagant expenditures, and to encourage and foster wild business speculations.

The cost of every reform must be borne by some person or class of persons, and creditors are, at the present time, paying the great price exacted by this radical change in remedies. The collection of a debt by ordinary process of execution against property on a judgment is now, comparatively, a rare occurrence. Hence we have in our modern jurisprudence a perplexing problem with which our forefathers were little vexed,— *i. e.*, the question how to neutralize or avoid, in favor of creditors, colorable or covinous transfers of property which this violent change in remedies has rendered it difficult, if not impossible, to wholly prevent or suppress. Collusive voluntary conveyances and secret fraudulent trusts and reservations of a thousand dyes, calculated to hinder and defraud creditors, are the constant and daily subject of investigation in our courts. The temptation of debtors who have not the skill to acquire property honestly, or who have been overwhelmed by some unavoidable disaster, to enrich themselves, or their trusted relatives, at the expense of creditors, by some transaction "wearing a deep complexion of fraud," seems to be irresistible. This is especially the case in a country such as ours, where the comforts and delights which accumulated property brings are so accessible and well guarded, and in which the acquisition of wealth may be regarded as a profound passion. It may be possible to pity the infirmity of the human mind sinking under an approaching pressure of distress, and resorting to fraudulent means of protection and provision for a family, but the law cannot approve or sanction such transactions.[1] Probably the most severe trial to which an honest man can be subjected is the inability to pay his

[1] See Croft v. Townsend, 3 Desaus. (S. C.) 229.

debts, even by the application of all his means. He forgets to render unto Cæsar the things which are Cæsar's. He is assailed by temptations of interest, of pride, of shame, of affection, to wander from the straight line of duty and integrity, while at the same time he is intrusted by the law with dominion over property which equitably and justly should be devoted to his creditors.[1]

The quantity of litigation engendered by fraudulent conveyances is appalling, and the cunning devices and intricate schemes resorted to by debtors to elude the vigilance of creditors would, if no moral turpitude was involved, challenge admiration. The condition of the body of our law upon this subject is far from satisfactory, and may be said to still be in a formative and unsettled state.

§ 3. **Scope of the inquiry.**— It will be our purpose to elucidate the principles of law affecting conveyances made by debtors in fraud of creditors, both in this country and in England, to collate the authorities, and to point out, somewhat at length, the practical methods by which such collusive trusts can be successfully exposed and unraveled, the property regained for creditors, and the prevalent modern tendency of debtors to hinder, delay, and defraud their creditors, by colorable transfers and secret trusts, correspondingly repressed. Bills filed to reach equitable assets, not subject to execution, will necessarily receive incidental consideration.

The power of a creditor to inflict anything in the nature of a punishment upon his debtor being practically abrogated in civil procedure,[2] his right to a thorough and

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[1] Hafner v. Irwin, 1 Ired. (N. C.) Law, 499.

[2] It is not the function of a court of equity to consider fraud in the light of a crime, nor to punish the guilty party by imposing exemplary costs. See Waltham v. Broughton, 2 Atk. 43. Nor to exercise any censorial authority. See Waters v. Taylor, 2 Ves. & B. 299. Chancery jurisdiction in cases of fraud may be invoked in a civil but not in a criminal point of

searching investigation as to transfers of the debtor's property, in the disposition of which the creditor may justly claim to have an equitable interest,[1] at least to the extent of his demand, should manifestly be facilitated. Such, we are happy to notice, is the general modern tendency of the law, and one of the aims of this treatise will be to show the need of a still further enlargement of these facilities. The practical details of procedure in this class of litigation will receive particular attention. The rights of *bona fide* purchasers and grantees of debtors for valuable consideration will necessarily be embraced in the discussion

§ 4. **Forms of relief.**— The general purpose of creditors' actions, it may be observed, is two-fold; first, to reach assets, such as choses in action, which, by reason of their intrinsic nature, cannot be taken on execution at law; and second, to recover property, whether tangible or intangible, which has been fraudulently alienated by the debtor.[2] In the one case the creditor comes into court "to obtain satisfaction of his debt out of the property of the defendant, which cannot be reached by execution at law;" in the other case he proceeds "for the purpose of removing some obstructions fraudulently or inequitably interposed to prevent a sale on execution."[3] It is

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view. In Hamilton Nat. Bk. v. Halsted, 134 N. Y. 522, 31 N. E. Rep. 900, the court say, "If a fraudulent transferee sell the property before the commencement of the action to set aside the transfer, a judgment for the value of the interests transferred to him may be recovered, but however scandalous the fraud may be the court is powerless to award judgment against him for a sum exceeding such value."

[1] See Egery v. Johnson, 70 Me. 261, where the court say: "Creditors have an equitable interest in the property of their respective debtors — it being the foundation of trusting them — which the law will, under certain circumstances, enforce." See also § 14.

[2] See Chap. III.

[3] Cornell v. Radway, 22 Wis. 264; Beck v. Burdett, 1 Paige (N. Y.) 305. In Jones v. Green, 1 Wall. 331, Field, J., said: "A court of equity exercises its jurisdiction in favor of a judgment-creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or

believed that as to the first class of cases the jurisdiction of equity in favor of creditors was created to supplement the imperfect relief given by execution.

§ 5. **Onus as to fraud — Suspicions insufficient — Absence of presumptions.**— The great obstacles to the effective development of the branch of our law under consideration from the creditor's standpoint are, the natural tendency of the courts not to presume fraud,[1] in the absence of substantial proof of it, and the extreme difficulty attendant upon showing that a transaction, fair and perfect on its face, and having every semblance of validity,[2]

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the enforcement of the legal remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it." See Scott v. Neely, 140 U. S. 113, 11 S. C. Rep. 712; Wiggins v. Armstrong, 2 Johns. Ch. (N. Y.) 144; Talley v. Curtain, 54 Fed. Rep. 45.

[1] See Crawford v. Kirksey, 50 Ala. 591; Kempner v. Churchill, 8 Wall. 369; Erb v. Cole, 31 Ark. 556; Pusey v. Gardner, 21 W. Va. 469; Toney v. McGebee, 38 Ark. 427; Matthai v. Heather, 57 Md. 484; White v. Perry, 14 W. Va. 86; Hord's Adm'r v. Colbert, 28 Gratt. (Va.) 49; Williamson v. Williams, 11 Lea (Tenn.) 356; Tognini v. Kyle, 15 Nev. 464; Hempstead v. Johnston, 18 Ark. 123; Thornton v. Hook, 36 Cal. 223; Foster v. Brown, 65 Ind. 234; Parkhurst v. McGraw, 24 Miss. 134; Henckley v. Hendrickson, 5 McLean 170; Bartlett v. Blake, 37 Me. 124; Waddingham v. Loker, 44 Mo. 132; Kellogg v. Slawson, 15 Barb. (N. Y.) 58, affi'd 11 N. Y. 302; *Ex parte* Conway, 4 Ark. 356; Burgert v. Borchert, 59 Mo. 80; Herring v. Wickham, 29 Gratt (Va.) 628; Semmens v. Walters, 55 Wis. 684, 13 N. W. Rep. 889; James v. Van Duyn, 45 Wis. 512; Fuller v. Brewster, 53 Md. 359; Grover v. Wakeman, 11 Wend. (N. Y.) 192; Troxall v. Applegarth, 24 Md. 163; Anderson v. Roberts, 18 Johns. (N. Y.) 515; Cunningham v. Dwyer, 23 Md. 219; Juzan v. Toulmin, 9 Ala. 662; Nichols v. Patten, 18 Me. 231; Cowee v. Cornell, 75 N. Y. 99; Killian v. Clark, 3 MacAr. (D. C.) 379, affi'd as Clark v. Killian, 103 U. S. 766; Jones v. Simpson, 116 U. S. 615, 6 S. C. Rep. 538; Dexter v. McAfee, 163 Ill. 508; Mathews v. Reinhardt, 149 Ill. 635, 37 N. E. Rep. 85; Roberts v. Buckley, 145 N. Y. 215, 224, 39 N. E. Rep. 966; Phelps v. Smith, 116 Ind. 387, 17 N. E. Rep. 602; Fulp v. Beaver, 136 Ind. 319, 36 N. E. Rep. 250; Rider v. Hunt, 6 Tex. Civ. App. 238; Bank of Commerce v. Schlotfeldt, 40 Neb. 212, 58 N. W. Rep. 727; Robinson v. Dryden, 118 Mo. 534, 24 S. W. Rep. 448; Olson v. Scatt, 1 Col. App. 94, 27 Pac. Rep. 879; Fortner v. Whelan, 87 Wis. 88, 58 N. W. Rep. 253; Maders v. Whallon, 74 Hun (N. Y.) 372, 26 N. Y. Supp. 614.

[2] In Graffam v. Burgess, 117 U. S. 180, 186, 6 S. C. Rep. 686, the court say: "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are com-

the guilty participants in which are often the chief witnesses in subsequent judicial inquiries, is, in fact, vicious and colorable. Then there exists in some quarters an unconscious or mistaken sympathy with or for debtors, whose fraudulent acts and transactions bear the imprints of intellectual acuteness. The clever or brilliant scoundrel too often escapes with his ill-gotten gains in the maze of admiration excited by his audacity. Fraud, it is also argued, will not be lightly imputed,[1] and cannot be established by circumstances of mere suspicion.[2] This same general proposition may be stated in an infinite variety of ways, and by the use of different words. Thus irregularities and carelessness sufficient to arouse a suspicion do not supply the place of proof of fraud.[3] The presence of fraud will not be presumed where an instrument admits of an opposite construction.[4] The law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done for an honest purpose. The common law,[5] it is argued, is tender of presuming fraud from circumstances, and expects that it be made manifest or plainly inferable.[6] Courts will attribute errors

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mitted in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law." S. P., Schroeder v. Young, 161 U. S. 339, 16 S. C. Rep. 512.

[1] Jones v. Simpson, 116 U. S. 615, 6 S. C. Rep. 538; Walker v. Collins, 59 Fed. Rep. 73; Hatch v. Bayley, 12 Cush. (Mass.) 30; Bamberger v. Schoolfield, 160 U. S. 163, 16 S. C. Rep. 225.

[2] Erb v. Cole, 31 Ark. 556; Pratt v. Pratt, 96 Ill. 184; Myers v. Sheriff, 21 La. Ann. 172; White v. Perry, 14 W. Va. 86; Bryant v. Simoneau, 51 Ill. 327; Buck v. Sherman, 2 Doug. (Mich.) 176; Jewett v. Bowman, 29 N. J. Eq. 174; Batchelder v. White, 80 Va. 103; Daniel v. Vaccaro, 41 Ark. 325.

[3] Jewett v. Bowman, 29 N. J. Eq. 174.

[4] Bank of Silver Creek v. Talcott, 22 Barb. (N. Y.) 560; Keagy v. Traut, 85 Va. 390, 7 S. E. Rep. 329; Norris v. Lake, 89 Va. 513, 16 S. E. Rep. 663; Jacobs v. Allen, 18 Barb. (N. Y.) 550; Kellogg v. Slauson, 11 N. Y. 302; Crook v. Rinskopf, 105 N. Y. 476, 12 N. E. Rep. 174.

[5] Jones v. Simpson, 116 U. S. 615, 6 S. C. Rep. 538; Baughman v. Penn, 33 Kan. 504, 6 Pac. Rep. 890; Hilgenberg v. Northup, 134 Ind. 94, 33 N. E. Rep. 786; Stark v. Starr, 1 Sawyer 15.

[6] Roberts on Fraud. Conv., p. 12; Leque v. Smith, 63 Minn. 27, citing the text

to mistake rather than to fraud,[1] and will not base conclusions of fraud upon mistaken or careless expressions of opinion.[2] A dishonest purpose should not be presumed.[3] Then it is vaguely asserted that fraud is a fact which must be proved. Courts will not strive to force conclusions of fraud, is the language employed.[4] There must be something more than mere speculative inference to establish its existence.[5] And if the party charging fraud does no more than create an equilibrium, he fails to make out his case.[6] In Dringer v. Receiver of Erie Railway,[7] Van Fleet, V. C., said: "Although entertaining painful doubts touching the honesty and fairness of many of the transactions charged to have been fraudulent," this court "felt constrained, for the want of a sure conviction of the truth of the evidence mainly relied on to establish the fact of fraud, to dismiss the complainant's bill." As we shall presently see, it is considered not to be enough to create a suspicion of wrong.[8] The creditor must prove tangible and substantial facts from which a legitimate inference of a fraudulent intent can be drawn.[9] The evidence must convince the understanding that the transaction was entered into for a purpose pro-

[1] Ayres v. Scribner, 17 Wend. (N. Y.) 407; Goode v. Hawkins, 2 Dev. Eq. (N. C.) 393.

[2] See Hubbell v. Meigs, 50 N. Y. 480; Wakeman v. Dalley, 51 N. Y. 27.

[3] Raymond v. Morrison, 59 Iowa 374, 13 N. W. Rep. 332; Hager v. Thomson, 1 Black, 80; Grant v. Ward, 64 Me. 239; Jones v. Simpson, 116 U. S. 615, 6 S. C. Rep. 538; Brown v. Dean, 52 Mich. 267, 17 N. W. Rep. 837; Wood v. Clark, 121 Ill. 359, 12 N. E. Rep. 271; Baughman v. Penn, 33 Kan. 504, 6 Pac. Rep. 890.

[4] Crawford v. Kirksey, 50 Ala. 591.

[5] Battles v. Laudenslager, 84 Pa. St. 451; *Ex parte* Conway, 4 Ark. 356; Toney v. McGehee, 38 Ark. 427; Goodman v. Simonds, 20 How. 360.

[6] Kaine v. Weigley, 22 Pa. St. 179; Bernheimer v. Rindskopf, 116 N. Y. 436, 22 N. E. Rep. 1074.

[7] 52 N. J. Eq. 574.

[8] Crow v. Andrews, 24 Mo. App. 159.

[9] Jaegar v. Kelley, 52 N. Y. 276; Sherman v. Hogland, 73 Ind. 477; White v. Perry, 14 W. Va. 86; Hord's Adm'r v. Colbert, 28 Gratt. (Va.) 49; Herring v. Wickham, 29 Gratt. (Va.) 628; Hasie v. Connor, 53 Kan. 721, 37 Pac. Rep. 128. Circumstances amounting to mere suspicion of fraud are not to be deemed notice of it. Simms v. Morse, 4 Hughes 582. See Grant v. National Bank, 97 U. S. 80.

hibited by law.[1] It may be circumstantial, but it must be persuasive.[2] Hence "a court will not presume fraud and undue influence merely from the fact that the conveyance is made by a sister to a brother;"[3] nor from circumstances which merely indicate unusual generosity.[4] Finch, J., in delivering the opinion of the New York Court of Appeals, said: "Fraud is to be proved and not presumed.[5] It is seldom, however, that it can be directly proved, and usually is a deduction from other facts which naturally and logically indicate its existence. Such facts, nevertheless, must be of a character to warrant the inference. It is not enough that they are ambiguous, and just as consistent with innocence as with guilt. They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting."[6] Daniels, J., said, in Marsh v. Falker:[7] "In all actions for deceit the presumption is in favor of innocence; and on that account the intent or design to deceive the plaintiff must be affirmatively made out by evidence."[8] But courts of justice, while conceding to honest acts their wide and ample defense, must look through the devious ways and the thin gauze, by which fraud is sought to be hid-

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[1] Pratt v. Pratt, 96 Ill. 184; Lalone v. United States, 164 U. S. 257.

[2] Lalone v. United States, 164 U. S. 257.

[3] Spicer v. Spicer, 22 J. & S. (N. Y.) 281.

[4] First National Bank v. Irons, 28 N. J. Eq. 43.

[5] Citing Grover v. Wakeman, 11 Wend. (N. Y.) 188. See Jones v. Simpson, 116 U. S. 615, 6 S. C. Rep. 538; Bernheimer v. Rindskopf, 116 N. Y. 436, 22 N. E. Rep. 1074; Baird v. Mayor, etc., of N. Y. 96 N. Y. 567.

[6] Shultz v. Hoagland, 85 N. Y. 467; Bernheimer v. Rindskopf, 116 N. Y. 436, 22 N. E. Rep. 1074. See Ames v. Gilmore, 59 Mo. 537; Jewell v. Knight, 123 U. S. 426, 8 S. C. Rep. 193.

[7] 40 N. Y. 566.

[8] See Fleming v. Slocum, 18 Johns. (N. Y.) 403; Jackson v. King, 4 Cowen (N. Y.) 220; Starr v. Peck, 1 Hill (N. Y.) 270; Bamberger v. Schoolfield, 160 U. S. 163, 16 S. C. Rep. 225; Dexter v. McAfee, 163 Ill. 508.

den, and must not let it go scot-free for want of direct, explicit and positive testimony.[1]

§ 6.— The badges and evidence of fraud will be discussed presently.[2] We may here observe that mere inadequacy of consideration, unless extremely gross,[3] does not *per se* prove fraud.[4] The disparity as to consideration[5] must be so glaring as to satisfy the court that the conveyance was not made in good faith.[6] Neither can fraud be presumed unless the circumstances on which such presumption is founded are so strong and pregnant that no other reasonable conclusion can be drawn from them,[7] and it seems that even strong presumptive circumstances of fraud will not always outweigh positive testimony against

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[1] Reynolds v. Gawthrop, 37 W. Va. 13, 16 S. E. Rep. 364. In Baer v. Rooks, 50 Fed. Rep. 900, the court say: "It is the prevailing practice, in cases involving an issue of fraud in fact, for the court to repeat to the jury this trite scrap of judicial phraseology [fraud is never presumed but must be proved], and it is commonly followed by a statement that fraud, like any other fact, may be proved by circumstantial evidence; but it would be an unwarranted impeachment of the intelligence of the juries of this country to suppose that they do not have a knowledge of these common truths. Every man knows that fraud, no more than murder, trespass or debt, is presumed against a man, and that fraud, as well as murder, trespass or a debt, may be proved by circumstances as well as by the positive testimony of eye witnesses."

[2] See Chap. XVI.

[3] Cobb v. Day, 106 Mo. 300, 17 S. W. Rep. 323.

[4] Kempner v. Churchill, 8 Wall. 369; Smith v. Henkel, 81 Va. 529.

[5] See Chap. XV.

[6] Fuller v. Brewster, 53 Md. 361. Compare Feigley v. Feigley, 7 Md. 537; Copis v. Middleton, 2 Madd. 410; Ratcliff v. Trimble, 12 B. Mon. (Ky.) 32. In Mobile Savings Bank v. McDonnell, 89 Ala. 447, 8 So. Rep. 137, the court say: "We are fully aware that the view we have taken is something of a departure from the generally received doctrine in other courts, as well as former *dicta* of this court, which are to the effect, in general terms, that mere inadequacy of price, short of a disparity so gross as to shock the conscience of mankind, is only a badge of fraud, and, of itself, is not to be taken as establishiug the existence of evil intent; but, in our jurisprudence, that doctrine, if any weight is to be given to our repeated enunciations on the subject, or to the reasons upon which our decisions are based, is and must be confined to sales other than in the payment of antecedent debts by insolvent debtors drawn in question by other creditors."

[7] Paxton v. Boyce, 1 Tex. 317. See Clemens v. Brillhart, 17 Neb. 337.

it;[1] nor will fraud be inferred from an act which does not necessarily import it.[2] If an honest motive can be imputed equally as well as a corrupt one, the former, as we have already seen, should be preferred.[3]

Good faith in business transactions is a settled presumption of law,[4] and, manifestly, as we have seen, the burden of proof is on the party who assails good faith and legality.[5] Many an important case has been wrecked at the trial, or abandoned by the creditor, on account of the great embarrassments which this formidable *onus* imposed. This presumption is the creditor's stumbling block on the one hand and the shield of unscrupulous debtors on the other. The creditor is constantly forced to carry the war into the enemy's country, and to take by storm the fortifications which the fraudulent debtor or his allies have carefully constructed to impede or repel the attack. It is said in Nicol v. Crittenden,[6] that it is impossible for a transfer to be in fraud of creditors unless it is made with a fraudulent intent, and that the nature of the intent will not be presumed as matter of law, but is to be inferred by the jury from the facts in evidence.[7] This broad statement of the principle is at least debatable and will be

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[1] The Short Staple, 1 Gall. 104.

[2] Toney v. McGehee, 38 Ark. 427.

[3] Herring v. Richards, 1 McCrary, 574; Roberts v. Buckley, 145 N. Y. 224; Constant v. University of Rochester, 133 N. Y. 648.

[4] Hager v. Thomson, 1 Black, 80; Cooper v. Galbraith, 3 Wash. 546; Blaisdell v. Cowell, 14 Me. 370; Gutzweiller v. Lackmann, 39 Mo. 91; Roberts v. Guernsey, 3 Grant (Pa.) 237; Reeves v. Dougherty, 7 Yerg. (Tenn.) 222; Richards v. Kountze, 4 Neb. 200; Best on the Right to Begin and Reply, p. 57; Williams v. Lord, 75 Va. 390; Wakeman v. Dalley, 51 N. Y. 31; Marsh v. Falker, 40 N. Y. 566; Starr v. Peck, 1 Hill (N. Y.) 270; Beatty v. Fischel, 100 Mass. 448; Jones v. Simpson, 116 U. S. 615, 6 S. C. Rep. 538.

[5] Gutzweiler v. Lackmann, 39 Mo. 91; Silvers v. Hedges, 3 Dana (Ky.), 439; Wilson v. Lazier, 11 Gratt. (Va.) 477; Jones v. Simpson, 116 U. S. 615; 6 S. C. Rep. 538; Bamberger v. Schoolfield, 160 U. S. 149, 16 S. C. Rep. 225; Hasie v. Connor, 53 Kan. 721, 37 Pac. Rep. 128.

[6] 55 Ga. 497.

[7] See Jewell v. Knight, 123 U. S. 426, 435, 8 S. C. Rep. 193.

considered presently.[1] Then in Cummings v. Hurlbutt,[2] it was asserted that to set aside a written instrument on the ground of fraud, the evidence of the fraud must be clear, precise, and indisputable. A jury should not be permitted to find fraud sufficient to impeach a settlement in writing, on any fancied equity, or on vague, slight, or uncertain evidence, even though they might think it fairly and fully satisfied them. As a general rule the transaction which is the subject of attack has been evidenced in writing, and the cases show that a deliberate deed or writing, or a judgment of a court, is of too much solemnity to be brushed away by loose and inconclusive evidence.[3] But an instrument which is part of the same transaction, explaining the purpose of a deed absolute on its face may be relied upon to show fraud connected with the deed even though the instrument is not of even date with the deed.[4]

Fraud, on the other hand, is rarely perpetrated openly and in broad daylight. It loves darkness and is committed in secret and privately, and is usually shrouded in mystery and hedged in and surrounded by all the guards which can be invoked to prevent discovery and exposure. Its operations are invariably circuitous and difficult of detection.[5] The proof of it is very seldom positive and direct,[6] but, as we shall presently see, is dependent upon very many little circumstances[7] and conclusions to be

[1] See Coleman v. Burr, 93 N. Y. 31, and cases cited. See §§ 9, 10.

[2] 92 Pa. St. 165.

[3] See Howland v. Blake, 97 U. S. 624; Fick v. Mulholland, 48 Wis. 413, 4 N. W. Rep. 346; Kent v. Lasley, 24 Wis. 654; Harter v. Christoph, 32 Wis. 246; McClellan v. Sanford, 26 Wis. 595.

[4] Howell v. Donegan, 74 Hun (N. Y.) 410, 26 N. Y. Supp. 805. See Knowles v. Toone, 96 N. Y. 534; Kraemer v. Adelsberger, 122 N. Y. 467, 25 N. E. Rep. 859.

[5] Kaine v. Weigley, 22 Pa. St. 182.

[6] Strauss v. Kranert, 56 Ill. 254; Rea v. Missouri, 17 Wall. 532; Densmore v. Tomer, 11 Neb. 118; Lockhard v. Beckley, 10 W. Va. 87; Farmer v. Calvert, 44 Ind. 209.

[7] See Jewell v. Knight, 123 U. S. 426, 8 S. C. Rep. 193; Reynolds v. Gawthrop, 37 W. Va. 13, 16 S. E. Rep. 364.

drawn from the general aspects of the case.[1] Hence the field of inquiry must be broad.[2]

§ 7. **Judge Black's views.** — The learned Chief Justice Black urged that the proposition that fraud could never be presumed, but must be proved, could be admitted only in a qualified and very limited sense. The idea that it was a fundamental maxim of the law, incapable of modification, and open to no exception, was denied, and the principle, as commonly declared, was said to have scarcely enough extent to give it the dignity of a general rule. This vigorous writer observes: "It amounts but to this: that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial. It is not true that fraud can *never* be presumed. Presumptions are of two kinds, *legal* and *natural*. Allegations of fraud are sometimes supported by one and sometimes by the other, and are seldom, almost never, sustained by that direct and plenary proof which excludes all presumption. A sale of chattels without delivery, or a conveyance of land without consideration, is conclusively presumed to be fraudulent as against creditors, not only without proof of any dishonest intent, but in opposition to the most convincing evidence that the motives and objects of the parties were fair. This is an example of fraud established by mere presumption of law. A natural presumption is the deduction of one fact from another. For instance: a person deeply indebted, and on the eve of bankruptcy, makes over his property to a near relative, who is known not to have the means of paying for it. From these facts a jury may infer the fact of a fraudulent intent to hinder and delay creditors. A presumption of fraud is thus

[1] Newman v. Cordell, 43 Barb. (N. Y.) 448–461. See *infra*, Chap. XVI. on Indicia or Badges of Fraud.

[2] White v. Benjamin, 150 N. Y. 265.

created, which the party who denies it must repel by clear evidence, or else stand convicted. When creditors are about to be cheated, it is very uncommon for the perpetrators to proclaim their purpose, and call in witnesses to see it done.[1] A resort to presumptive evidence, therefore, becomes absolutely necessary to protect the rights of honest men from this, as from other invasions."[2] The popular statement that "fraud will not be presumed" must be accepted understandingly, for it certainly *can* be inferred from facts and circumstances,[3] and from deceptive assertions and incidents,[4] and it is considered to be error to charge a jury that they cannot predicate fraud upon inference or implication,[5] or that the proof must be "irresistible,"[6] or "clear and undoubted,"[7] or that it must be established beyond a reasonable doubt,[8] for evidence that satisfies the mind will support a conclusion of fraud, although it may not lead to a conviction of absolute certainty.[9] Fraud is hardly ever proven positively, and usually is shown by the outlook, the circumstances and environment of the transaction, and the situation and relations of the parties, and must be tested by our knowl-

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[1] See Montgomery Web Co. v. Dienelt, 133 Pa. St. 594, 19 Atl. Rep. 428.

[2] Kaine v. Weigley, 22 Pa. St. 183; Goshorn v. Snodgrass, 17 W. Va. 717; Sturm v. Chalfant, 38 W. Va. 248, 18 S. E. Rep. 451.

[3] Lowry v. Beckner, 5 B. Mon. (Ky.) 43; Sturm v. Chalfant, 38 W. Va. 248, 18 S. E. Rep. 451; Goshorn's Exr. v. Snodgrass, 17 W. Va. 766.

[4] Sturm v. Chalfant, 38 W. Va. 248, 260, 18 S. E. Rep. 451; Reynold's Admr. v. Gawthrop, 37 W. Va. 13, 16 S. E Rep. 364.

[5] Bullock v. Narrott, 49 Ill. 62; O'Donnell v. Segar, 25 Mich. 367; Reed v. Noxon, 48 Ill. 323; Goshorn's Exr. v. Snodgrass, 17 W. Va. 766; Sturm v. Chalfant, 38 W. Va. 248, 18 S. E. Rep. 451.

[6] Carter v. Gunnels, 67 Ill. 270.

[7] Abbey v. Dewey, 25 Pa. St. 413.

[8] Kane v. Hibernia Ins. Co. 39 N. J. L. 697; Lee v. Pearce, 68 N. C. 76; Sparks v. Dawson, 47 Tex. 138; Washington Union Ins. Co. v. Wilson, 7 Wis. 169; Ætna Insurance Co. v. Johnson, 11 Bush (Ky.) 587.

[9] Marksbury v. Taylor, 10 Bush (Ky.) 519; O'Donnell v. Segar, 25 Mich. 367; Lee v. Pearce, 68 N. C. 76; Linn v. Wright, 18 Texas 317; Lockhard v. Beckley, 10 W. Va. 87; Young v. Edwards, 72 Pa. St. 257; Bryant v. Simoneau, 51 Ill. 324.

edge of human nature, and the motives and purposes which move men in the ordinary transactions and affairs of life.[1]

§ 8. **Proof of moral turpitude.** — The authorities have been multiplying, in certain quarters at least, to strengthen the efforts of creditors to overcome this difficulty arising from the presumption of validity and good faith in litigations to reach property fraudulently alienated. Many of the cases attach little importance to the sworn assertion of perfect good faith and entire honesty on the part of the purchaser,[2] or of the seller, and the courts are trying to unravel these forbidden transfers without exacting explicit proof of moral turpitude.[3] The intent or intention is regarded as an emotion of the mind, evidenced by acts and declarations, and, as acts speak louder than words, if a party is guilty of an act which defrauds another, his declaration that he did not, by the act, intend to defraud, is weighed down by the evidence of his own act.[4] A per-

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[1] Reynold's Admr. v. Gawthrop's Heirs, 37 W. Va. 13, 16 S. E. Rep. 364.

[2] See Hadden v. Spader, 20 Johns. (N. Y.) 572, 573; Hendricks v. Robinson, 2 Johns. Ch. (N. Y.) 300; Fellows v. Fellows, 4 Cow. (N. Y.) 709; Barrow v. Bailey, 5 Fla. 20; Walter v. Lane, 1 MacAr. (D. C.) 275.

[3] Mr. May says: "The statute is directed not only against such transfers of property, as are made with the express intention of defrauding creditors, but . . . . extends as well to such as virtually and indirectly operate the same mischief, by abusing their confidence, misleading their judgment, or secretly undermining their interests; to obviate which it has gradually grown into a practice to regard certain acts or circumstances as indicative of a so-called fraudulent intention in the construction of the statutes, although perhaps there was, in fact, no actual fraud or moral turpitude. It is difficult in many cases of this sort, to separate the ingredients which belong to positive and intentional fraud from those of a mere constructive nature, which the law thus pronounces fraudulent, upon principles of public policy." May on Fraudulent Conveyances, p. 4.

[4] Babcock v. Eckler, 24 N. Y. 623; Coleman v. Burr, 93 N.Y. 31; Mandeville v. Avery, 44 N. Y. St. Rep. 4; Newman v. Cordell, 43 Barb. (N. Y.) 456. In Booth v. Carstarphen, 107 N. C. 395, 401, 12 S. E. Rep. 375, the court say: "The fraudulent intent of a party charged with fraud in any transaction or matter appears from, and must be determined by, acts done or omitted to be done — their nature, connections, purpose and effect in con-

son would not be likely to perform or accomplish an act and afterwards proclaim that it was prompted by corrupt motives. The moral sense is much weaker in some men than in others, and it would be a strange rule which made the rights of one man dependent upon the moral sense of another man. There are certain rules founded in experience, and established by law, for determining the validity of transfers under the statutes concerning fraudulent conveyances; and a transgression of these rules will justify courts and juries in avoiding the transaction without regard to the opinions of the parties to it, and their evidence should have little weight.[1]

In French v. French,[2] Lord Chancellor Cranworth remarked: "I shall not say that the transfer was voluntary or *fraudulent*, but simply void as against the creditors of William French." Again he observed in Spackman v. Evans:[3] "I do not attribute moral fraud to the appellant, but the whole transaction was fictitious." So in Backhouse v. Jett,[4] Chief-Justice Marshall said: "The policy of the law very properly declares this gift void as to creditors, but looking at the probable views of the parties at the time, there appears to be no moral turpitude in it."[5] This principle may be further illustrated from Gardiner Bank v. Wheaton,[6] where the court say: "When we pronounce the transaction between the defendants, in respect to the conveyance from Gleason

templation of law. Such intent does not depend upon nor consist in, nor is it to be ascertained from simply the thought and purpose of the mind, but it depends upon, and is to be ascertained from such thoughts and purposes evidenced and manifested by and taken in connection with the acts done or not done, and pertinent facts and circumstances. It is the act or thing done or not done that gives cast, quality and character to the thought and purpose of the mind — the intent — and of this the law takes notice." See Chapter XIV on Intention.

[1] Potter v. McDowell, 31 Mo. 73.

[2] 6 De G. M. & G. 103.

[3] L. R. 3 Eng. & Ir. App. 189.

[4] 1 Brock. 511.

[5] See Logan v. Brick, 2 Del. Ch. 206.

[6] 8 Me. 381. See Wheelden v. Wilson, 44 Me. 11.

to Cole, as fraudulent, we do not mean to insinuate that there was any moral turpitude on the part of Prince; nor do we believe there was any; but though the motives of a party may be good in such a transaction, still, where the design, if sanctioned, would defeat or delay creditors . . . . neither law nor equity can sanction the proceeding; and on that account it is termed a legal fraud, or a fraud upon the law."[1] "It was not necessary," said Dwight, C., in Cole v. Tyler,[2] "that there should be any actual fraudulent intent.[3] The requisite intent may be inferred from the circumstances of the case."[4] The act may be adjudged covinous although the parties deny all intention of committing a fraud,[5] and it is not necessary to impute to the parties "a premeditated or wicked intention to destroy or injure" the interests of others.[6] A man may commit a fraud without believing it to be a fraud.[7] The statute, 13 Eliz., refers to a legal, and not a moral intent; that is, not a moral intent as contradistinguished from a legal intent. It supposes that every one is capable of perceiving what is wrong, and, therefore, if he does that which is forbidden, intending to do it, he will not be allowed to say that he did not intend to do a prohibited act. A man's moral perceptions may be so perverted as to imagine an act to be fair and honest which the law justly pronounces fraudulent and corrupt.[8] "It is not important what *motives* may have animated the parties," if the necessary effect of the disposition is to hinder and

[1] See Jenkins v. Lockard, 66 Ala. 381; Bibb v. Freeman, 59 Ala. 612.

[2] 65 N. Y. 77. Compare Smith v. Reid, 134 N. Y. 568, 31 N. E. Rep. 1082; Coursey v. Morton, 132 N. Y. 556, 30 N. E. Rep. 231.

[3] Citing Mohawk Bank v. Atwater, 2 Paige (N. Y.) 54.

[4] Compare Watson v. Riskamire, 45 Iowa, 233; Coleman v. Burr, 93 N. Y. 31; Graham v. Chapman, 12 C. B. 85; Smith v. Reid, 134 N. Y. 568, 31 N. E. Rep. 1082.

[5] Kirby v. Ingersoll, 1 Harr. Ch. (Mich.) 191.

[6] Kirby v. Ingersoll, 1 Doug. (Mich.) 477, 493.

[7] Emma Silver Mining Co. v. Grant, L. R. 17 Ch. D. 122.

[8] Grover v. Wakeman, 11 Wend. (N. Y.) 225.

delay creditors.[1] It results that the mental operation or emotion of the debtor, and the legal conclusion from the acts and circumstances may be diametrically opposed.[2]

§ 9. **Fraud in fact and fraud in law.**— Some of the authorities maintain that there is not, for any practical purpose, so far as the validity of a particular transaction may be concerned, any difference between fraud in fact and fraud in law;[3] between a fraud proved by direct evidence, and a fraud inferred by law from facts which are consistent with the absence of an actual mental intent to defraud. Whenever the effect of a particular transaction with a debtor is to hinder, delay, or defraud creditors, the law infers or supplies the intent, though there may be no direct evidence of a corrupt or dishonorable motive, but, on the contrary, an actual honest, but mistaken, motive existed. The law interposes, and declares that every man is presumed to intend the natural and necessary consequences of his acts; and the courts must presume the intention to exist, when the prohibited consequences must necessarily follow from the act, and will not listen to an argument against it.[4] Hence it has been remarked

[1] Moore v. Wood, 100 Ill. 451.

[2] See Chap. XIV; Coleman v. Burr, 93 N. Y. 17; Roberts v. Vietor, 130 N. Y. 600, 29 N. E. Rep. 1025; Sutherland v. Bradner, 116 N. Y. 410, 22 N. E. Rep. 554; Johnston v. Tuttle Bros., 65 Miss. 494.

[3] See § 51. In Peters v. Bain, 133 U. S. 688, 10 S. C. Rep. 354, the court say: "We agree with the Circuit Court that, as respects fraud in law as contradistinguished from fraud in fact, where that which is valid can be separated from that which is invalid, without defeating the general intent, the maxim 'void in part, void *in toto*,' does not necessarily apply, and that the instrument may be sustained notwithstanding the invalidity of a particular provision." Citing Denny v. Bennett, 128 U. S. 489, 496, 9 S. C. Rep. 134; Cunningham v. Norton, 125 U. S. 77, 8 S. C. Rep. 804; Muller v. Norton, 132 U. S. 501, 10 S. C. Rep. 147; Darling v. Rogers, 22 Wend. (N. Y.) 483; Howell v. Edgar, 4 Ill. 417, 419; Ellis v. Valentine, 65 Tex. 534.

[4] Sims v. Gaines, 64 Ala. 396; Pope v. Wilson, 7 Ala. 694; Wiley v. Knight, 27 Ala. 336; Potter v. McDowell, 31 Mo. 69. See Bentz v. Rockey, 69 Pa. St. 77; Harman v. Hoskin, 56 Miss. 142; Allan v. McTavish, 8 Ont. App. Rep. 440, and cases cited; Coleman v. Burr, 93 N. Y. 31, and cases cited; Schaible v. Ardner, 98 Mich. 70, 56 N.

that where a conveyance, *by its terms*, operates to hinder, delay, or defraud creditors, the intent to do so is imputed to the parties, and *no evidence of intention* can change that presumption. A different intent cannot be shown and made out by the reception of parol testimony, nor deduced from surrounding circumstances.[1] What is meant by these cases is that, whether the fraudulent intent is reasoned out and declared by the court, by the proper application of the rules of legal construction and interpretation, to the particular transaction or instrument under consideration, or whether it is found by a jury to exist as matter of fact,[2] in either case the transfer is made with the intent to defraud creditors, and may be avoided. Hence it is said that where the fraudulent intent is not apparent on the face of the deed, it is a question of fact for the jury,[3] and the court has not the power to infer the intent.[4]

§ 10. **The cases considered.**— This subject may perhaps be illustrated from the case of Harman v. Hoskins,[5]

W. Rep. 1105; Morrill v. Kilner, 113 Ill. 318. Compare State v. Estel, 6 Mo. App. 6. In Wilt v. Franklin, 1 Binn. (Pa.) 517, the court observed: "Although the statute, 13 Eliz., is bottomed on the supposition of an immoral intention, yet it has been judged necessary to determine that certain circumstances, which, in their nature, tend to deceive and injure creditors, shall be considered as sufficient evidence of fraud." In Inglehart v. Thousand Island Hotel Co., 109 N. Y. 465, the court say: "The legislature has been averse to the rule, at one time adopted by the courts, that fraud in such cases was a question of law, and sought to end the controversy, which had raged most bitterly, by explicitly enacting that in such cases the question of fraud should be one of fact."

[1] Farrow v. Hayes, 51 Md. 505; Green v. Trieber, 3 Md. 11. See Sangston v. Gaither, 3 Md. 40; Malcolm v. Hodges, 8 Md. 418; Inloes v. Amer. Ex. Bank, 11 Md. 173; Barnitz v. Rice, 14 Md. 24; Whedbee v. Stewart, 40 Md. 414.

[2] Nicol v. Crittenden, 55 Ga. 497; Williams v. Evans, 6 Neb. 216.

[3] Van Bibber v. Mathis, 52 Tex. 409. See Briscoe v. Bronaugh, 1 Tex. 327; Bryant v. Kelton, 1 Tex. 415; Peiser v. Peticolas, 50 Tex. 638.

[4] Ehrisman v. Robert, 68 Pa. St. 308; Kelly v. Lenihan, 56 Ind. 450; Tognini v. Kyle, 15 Nev. 468; Monteith v. Bax, 4 Neb. 166.

[5] 56 Miss. 142.

where it is laid down that the intent may be vicious, though the deed is fair and regular upon its face, and a full price was paid. The intent must then be proved *aliunde*. In cases where the transaction *on its face* is fair, if it sprung from the motive to "hinder, delay, or defraud" creditors, then the intent is purely a question of fact to be established by the testimony. But a party will be held as intending the natural and inevitable legal effects of his acts. Hence if his deed, by its recitals, necessarily operates to interpose unreasonable hindrance and delay to creditors, or to entirely defeat their claims, the question of intent will be practically a conclusion of law.[1] A deliberate act which naturally and inevitably produces a certain result, must, in law, be held to have been contrived and performed to carry out and consummate that result. The court in such a case arrives at the conclusion, by a proper construction of the instrument, that such is its direct and inevitable effect, and it results, as matter of law, that the statute is satisfied. In other words, the transaction itself so palpably and conclusively establishes the intent that testimony upon that point would be superfluous, and a finding of a jury of an intent different from that which the legitimate construction of the instrument furnishes, would be erroneous.[2] Thus in Young v. Heermans,[3] a conveyance by a debtor of all his property, real and personal, without consideration, and in trust for the grantor's benefit during his life, and after his death for the payment of his debts, was declared to be fraudulent *per se*; no evidence *aliunde* being deemed necessary to establish the fraudulent intent. Proof of the intention to enter into the prohibited transaction is all that is requisite. When the courts declare an instrument

[1] Houck v. Heinzman, 37 Neb. 463.

[2] See Dunham v. Waterman, 17 N. Y. 21.

[3] 66 N. Y. 374. See Fuller v. Brown, 76 Hun (N. Y.) 557, 28 N. Y. Supp. 189; Sloan v. Birdsall, 58 Hun (N. Y.) 321, 11 N. Y. Supp. 814.

fraudulent on its face, it does not necessarily mean that it was the offspring of a corrupt intent considered as a mental operation, but that "it is an instrument the law will not sanction or give effect to, as to third persons, on account of its susceptibility of abuse, and the great danger of such contracts being used for dishonest purposes.[1]

It may scarcely be proper to say in these cases that there is a presumption or conclusion of law that the transaction is fraudulent, but rather that the circumstances of the transaction, *or the transaction itself*, or the necessary and inevitable inference, furnish conclusive evidence of fraud; and if, against such evidence, a jury, a judge, or referee should find that there was no fraud, a new trial would be granted, not because any legal presumption or conclusion had been violated, but because the finding was against the weight of evidence; against conclusive evidence.[2] The intent is gathered from the instrument, and no external aid is necessary to develop it.[3] The fraud is self-evident.[4] But to find fraud as matter of law it must so expressly and plainly appear in the instrument as to be incapable of explanation by evidence *dehors*.[5]

Grover, J., an able judicial officer, and vigorous writer, ignored the distinction between fraud in law and fraud in fact, in these words: "A distinction is attempted, in some of the cases, between fraud in law and fraud in fact. I think there is no solid foundation for it. When upon the face of the assignment any illegal provision is found, the presumption at once conclusively arises that such illegal

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[1] Gay v. Bidwell, 7 Mich. 531, dissenting opinion of Manning, J.

[2] Babcock v. Eckler, 24 N. Y. 632; Inglehart v. Thousand Island Hotel Co., 109 N. Y. 454, 465. See Bruner v. Brown, 139 Ind. 600, 609, 38 N. E. Rep. 318.

[3] Harman v. Hoskins, 56 Miss. 145.

[4] Hardy v. Simpson, 13 Ired. (N. C.) Law, 132, 139; Bigelow on Fraud, p. 468.

[5] Cheatham v. Hawkins, 76 N. C. 335.

object furnished one of the motives for making the assignment; and it is upon this ground adjudged fraudulent and void. The result is the same when the illegal design is established by other evidence. The inquiry is as to the intention of the assignor."[1] Coleman v. Burr[2] is an extreme illustration. The referee found that the conveyance was honest, but the transaction was set aside because, from the facts found, the inference of fraud was inevitable. The same principle is enunciated in Roberts v. Vietor.[3]

"Fraud," said Mr. Justice Buller, in Estwick v. Caillaud,[4] "is sometimes a question of law, sometimes a question of fact, and sometimes a mixed question of law and of fact." Perhaps it would be more accurate to say that fraud is never purely a question of law, nor exclusively a question of fact,[5] though it frequently partakes more largely of the one quality than of the other. Fraud is not to be considered as turning solely on intent as an emotion, but as a legal deduction. "What intent," said Ruffin, J., is in law fraudulent, the court must inform the jury, else the law can have no rule upon the doctrine of fraud; and every case must create its own law."[6] Perhaps the clearest division of fraud is into three classes; first, fraud that is self-evident, with which the jury have nothing to do; second, fraud which depends upon a variety of circumstances usually connected with motive and intent, which is an open question of fact for the jury,

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[1] Oliver Lee & Co.'s Bank v. Talcott, 19 N. Y. 148. See, in this connection, Lukins v. Aird, 6 Wall. 79, per Davis, J.; Burr v. Clement, 9 Col. 1; Stevens v. Robinson, 72 Me. 381; French v. Holmes, 67 Me. 189; Cunningham v. Freeborn, 11 Wend. (N. Y.) 252; Peters v. Bain, 133 U. S. 670, 10 S. C. Rep. 354.

[2] 93 N. Y. 31. See Smith v. Reid, 134 N. Y. 575, 31 N. E. Rep. 1082; Roberts v. Vietor, 130 N. Y. 600, 29 N. E. Rep. 1025.

[3] 130 N. Y. 600, 29 N. E. Rep. 1025.

[4] 5 T. R. 420.

[5] Foster v. Woodfin, 11 Ired. (N. C.) Law, 339.

[6] Leadman v. Harris, 3 Dev. (N. C.) Law, 146; Parrish v. Danford, 18 Fed. Cases, 1231, 1 Bond, 345.

with instructions as to what constitutes fraud; third, presumptive fraud where the presumption may be rebutted.[1]

§ 11. **Words "hinder, delay, or defraud."**— To hinder and delay creditors is to do something which is an attempt to defraud, rather than the successful accomplishment of a fraud; to put some obstacle in the path, or interpose unjustifiably some period of time before the creditor can reach his debtor's property and apply it toward the liquidation of the debt.[2] The words "hinder," "delay,"[3] and "defraud" are not synonymous.[4] A conveyance may be made with intent to hinder or delay without an intent to absolutely defraud. Either intent is sufficient.[5]

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[1] Hardy v. Simpson, 13 Ired. (N. C.) Law, 139. In Coburn v. Pickering, 3 N. H. 415, Richardson, C. J., lays down the rule that whether there was any trust is a question of fact, but the trust being proved or admitted, the fraud is an inference of law which the court must pronounce. His exact language, after a discussion of the authorities, is as follows: "It thus seems to us, to be settled, as firmly as any legal principle can be settled, that the fraud which renders void the contract, in these cases, is a secret trust, accompanying the sale. . . . It is, therefore, very clear, that fraud is sometimes a question of fact, and sometimes a question of law. When the question is, was there a secret trust? it is a question of fact. But when the fact of a secret trust is admitted, or in any way established, the fraud is an inference of law, which a court is bound to pronounce." So, upon like principle, it was held in Phelps v. Curts, 80 Ill. 112, not to be important what motives may have animated the parties, if they have so disposed of the property that the necessary effect is to hinder and delay creditors. Such a disposition is, in judgment of law, a legal fraud. To the same effect, also, is Power v. Alston, 93 Ill. 587; Emerson v. Bemis, 69 Ill. 537; Moore v. Wood, 100 Ill. 454.

[2] Burnham v. Brennan, 42 N. Y. Superior Ct. 63.

[3] In Read v. Worthington, 9 Bosw. (N. Y.) 628, Robertson, J., said: "To hinder any one in his course is, necessarily, to delay him. Not being able to perceive the distinction, I must hold that none exists. Many such pleonasms are to be found in old English statutes, where they are introduced for caution's sake, more than with any precise idea as to what they were intended to effect."

[4] Hickox v. Elliott, 22 Fed. Rep. 21.

[5] Crow v. Beardsley, 68 Mo. 439; Rupe v. Alkire, 77 Mo. 641; Buell v. Rope, 6 App. Div. (N. Y.) 113; Kaufer v. Walsh, 88 Wisc. 63, 59 N. W. Rep. 460. But in Weber v. Mick, 131 Ill. 520, 23 N. E. Rep. 646, it was held that an instruction to the effect that it was not necessary to show that the conveyance was made to defraud, but that intent to hinder and delay was

The statute is in the disjunctive and attempts to attach a separate and specific meaning to each of the words which it employs.[1] An instance of hindrance and delay within the statute is given in a case in Pennsylvania, where a debtor departed from the State leaving no property subject to the process of his creditor, and making no provision for the payment of his debts.[2] A better illustration is to be found in a case in the New York Court of Appeals, where the debtor conveyed his property in trust for his own benefit during his life, and after his death for the payment of his debts.[3] A conveyance made by an embarrassed debtor with a view, which was known to the purchaser, to secure the property from attachment, is void as against creditors, though honestly made, the debtor intending that all creditors should be paid in full.[4] The authorities avoiding assignments by the terms of which the assignee is empowered to sell upon credit are, perhaps, more in point than any of the illustrations given. A conveyance of real estate by a debtor upon the understanding that the grantee should hold it in trust for the grantor, and as fast as money could be realized therefrom, should apply it to the payment of his debts, necessarily operates to hinder and delay creditors. A debtor's property is, in theory of law, subject to immediate process issued at the instance of his creditors, and the debtor will

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sufficient, was properly refused. In Dance v. Seaman, 11 Gratt. (Va.) 778–782, the court say: "The fact that creditors may be delayed or hindered, is not of itself sufficient to vacate such a deed, if there is absence of fraudulent intent. Every conveyance to trustees interposes obstacles in the way of the legal remedies of the creditors, and may, to that extent, be said to hinder and delay them." See Keagy v. Trout, 85 Va. 394, 7 S. E. Rep. 329.

[1] Burgert v. Borchert, 59 Mo. 83.

[2] Heath v. Page, 63 Pa. St. 108.

[3] Young v. Heermans, 66 N. Y. 374. See S. P. Graves v. Blondell, 70 Me. 194; Henry v. Hinman, 25 Minn. 199; Macomber v. Peck, 39 Iowa 351; Lukins v. Aird, 6 Wall. 78; Donovan v. Dunning, 69 Mo. 436; Lore v. Dierkes, 19 J. & S. (N. Y.) 144.

[4] Kimball v. Thompson, 58 Mass. (4 Cush.) 446.

not be permitted to hinder or delay them by any device which leaves it, or the avails of it, subject to his control and disposition; and it makes no difference that the debtor intends to apply the avails of it to the payment of his debts.[1] So a deed of trust creating a lien upon personalty for an indefinite period, the natural operation of which is to benefit the grantor, is fraudulent as to creditors,[2] as is also a sale on a credit to a son of the debtor on the eve of attachment proceedings.[3]

The statute seems to be aimed at three things which it is supposed insolvents would possibly be tempted to do for the purpose of avoiding or deferring the payment of their debts. First, they might dispose of their property in such manner as to interpose obstacles to legal process, with intent to hinder creditors in the collection of their demands; or, second, to delay payment to some future period; or, third, to defraud their creditors by absolutely defeating all attempts to enforce their claims. Any one of these purposes is sufficient to avoid the transaction.[4] If the design of a transfer is a lawful one, it matters not that a creditor is thereby deprived of property which might otherwise have been reached and applied to the payment of his debt. Hence it is that a general assignment,[5] or a preference,[6] is upheld, though each is often made or given to thwart some belligerent creditor.[7] The secret motives that prompt the act in such cases are unim-

[1] Smith v. Conkwright, 28 Minn. 23.

[2] State v. Mueller, 10 Mo. App. 87.

[3] Blum v. McBride, 69 Tex. 60, 5 S. W. Rep. 641.

[4] Burdick v. Post, 12 Barb. (N. Y.) 172, affi'd 6 N. Y. 522. See Pilling v. Otis, 13 Wis. 495; Burgert v. Borchert, 59 Mo. 80; Crow v. Beardsley, 68 Mo. 435; Planters' Bank v. The Willea Mills. 60 Ga. 168; Sutton v. Hanford, 11 Mich. 513; Davenport v. Cummings, 15 Iowa 219; Means v. Dowd, 128 U. S. 273, 281, 9 S. C. Rep. 65. See, especially, the case of Nicholson v. Leavitt, 6 N. Y. 510, 10 N. Y. 591.

[5] Hoffman v. Mackall, 5 Ohio St. 124; Hefner v. Metcalf, 1 Head (Tenn.) 577; Grover v. Wakeman, 11 Wend. (N. Y.) 194.

[6] Hall v. Arnold, 15 Barb. (N. Y.) 599; Hartshorn v. Eames, 31 Me. 98.

[7] Hartshorn v. Eames, 31 Me. 98; Holbird v. Anderson, 5 T. R. 235.

portant.[1] Speaking of devices to aid the debtor, Davis, J., said in Robinson v. Elliott:[2] "The creditor must take care, in making his contract, that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract." A debtor cannot take the law into his own hands and attempt to secure the delay which can only be obtained by the consent of the creditors.[3]

§ 12. **Word "disposed" construed.** — In Bullene v. Smith,[4] it appeared that section 398 of the Revised Statutes of Missouri, authorized an attachment to issue in the following, among other cases: Where the defendant had fraudulently *conveyed* or assigned his property so as to hinder or delay his creditors; where the defendant had fraudulently concealed, removed, or *disposed* of his property or effects, so as to hinder his creditors. The court held that the word *disposed*, as here used, covered all such alienations of property as might be made in ways not otherwise pointed out in the statute: for example, pledges, gifts, pawns, bailments, and other transfers and alienations which might be effected by mere delivery and without the use of any writing, assignment, or conveyance. Other species of conveyances were excluded. Hence it

[1] Horwitz v. Ellinger, 31 Md. 504; Pike v. Bacon, 21 Me. 280; Covanhovan v. Hart, 21 Pa. St. 500.

[2] 22 Wall. 523.

[3] Means v. Dowd, 128 U. S. 273, 281, 9 S. C. Rep. 65. Compare Huntley v. Kingman, 152 U. S. 535, 14 S. C. Rep. 688.

[4] 73 Mo. 151.

was held that a charge to a jury to the effect that the defendant had fraudulently disposed of his property was not supported by proof that he had executed a fraudulent mortgage.

§ 13. **No definition of fraud.**— Fraud is as difficult to define[1] as it is easy to perceive. Courts of equity have skilfully avoided giving a precise and satisfactory definition of it,[2] so various is it in its form and color.[3] It is sometimes said to consist of "any kind of artifice employed by one person to deceive another," conduct that operates prejudicially on the rights of others,[4] or withdraws the property of a debtor from the reach of creditors.[5] But the term is one that admits of no positive definition, and cannot be controlled in its application by fixed and rigid rules. Fraud is "so subtle in its nature, and so protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade."[6] It is to be inferred or not, according to the special circumstances of every case. Whenever it occurs it usually vitiates the transaction tainted by it.[7] "Fraud cuts down

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[1] See Green v. Nixon, 23 Beav. 530; Reynell v. Sprye, 1 De G., M. & G. 691. Fraud may be passive as well as active. Holt v. Creamer, 34 N. J. Eq. 189.

[2] See Beach on Contributory Neg., § 2. Compare Chesterfield v. Janssen, 1 Atk. 352; Shoemaker v. Cake, 83 Va. 5, 1 S. E. Rep. 387.

[3] Williams v. Harris, 4 So. Dak. 26, 54 N. W. Rep. 926.

[4] Bunn v. Ahl, 29 Pa. St. 390.

[5] McKibbin v. Martin, 64 Pa. St. 356.

[6] Shoemaker v. Cake, 83 Va. 5, 1 S. E. Rep. 387. In Jewell v. Knight, 123 U. S. 432, the court say "The question of fraud or no fraud is one necessarily compounded of fact and of law."

[7] Fenner v. Dickey, 1 Flippin, 36.

Undue influence.— So what constitutes undue influence is a question depending upon the circumstances of each particular case. It is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded. The following principle, we think, is sound, both in law and morals, and though a departure from the former rule, is sustained by the more modern authorities. When one living in illicit sexual relations with another, makes a large gift of his property to the latter, especially in

everything." "Fraud," said De Grey, C. J., "is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal."[1] It is the judgment of law on facts and intents.[2] Its existence is often a presumption of law from admitted or established facts, irrespective of motive, and too strong to be rebutted.[3] "Fraud," said Story, J., "will vitiate any, even the most solemn transactions; and an asserted title to property, founded upon it, is utterly void."[4] "Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test."[5] Fraud does not consist in mere intention, but in intention carried out by hurtful acts.[6] "Fraud or no fraud is generally a question of fact to be determined by all the circumstances of the

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cases where the donor excludes the natural objects of his bounty, the transaction will be viewed with such suspicion by a court of equity as to cast on the donee the burden of proving that the donation was the result of free volition, and was not superinduced by fraud or undue influence. See Shipman v. Furniss, 69 Ala. 555, and cases cited, 44 Am. Rep. 528, and note; Leighton v. Orr, 44 Iowa, 679; Dean v. Negley, 41 Pa. St. 312.

[1] Rex v. Duchess of Kingston, 20 How. St. Tr. 544, 2 Smith's L. C. 687. See Brownsword v. Edwards, 2 Ves. Sen. 246; Meddowcroft v. Huguenin, 4 Moo. P. C. 386; Perry v. Meddowcroft, 10 Beav. 122: Harrison v. Mayor, etc, of Southampton, 4 De G., M. & G. 137; Gill v. Carter, 6 J. J. Marsh (Ky.) 484; Hall v. Hall, 1 Gill (Md.) 391; Wilson v. Watts, 9 Md. 356.

[2] Pettibone v. Stevens, 15 Conn. 26; Sturtevant v. Ballard, 9 Johns. (N. Y.) 342; Otley v. Manning, 9 East, 64; Morgan v. Elam, 4 Yerg. (Tenn.) 438; Worseley v. Demattos, 1 Burr. 467.

[3] Belford v. Crane, 16 N. J. Eq. 265.

[4] United States v. Amistad, 15 Peters, 594.

[5] Per Swayne, J., Lloyd v. Fulton. 91 U. S. 485.

[6] Williams v. Davis, 69 Pa. St. 28; see Reilly v. Barr, 34 W. Va. 95, 11 S. E. Rep. 750. The fraud against which a bankruptcy discharge is not a defense is "positive fraud, or fraud in fact involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law." Ames v. Moir, 138 U. S. 311; Noble v. Hammond, 129 U. S. 69.

case."[1] Direct proof of positive fraud in the various kinds of covinous alienations which we are to discuss, is not, as we shall presently see, generally attainable, nor is it vitally essential. The fraudulent conspirators will not be prompted to proclaim their unlawful intentions from the housetops, or to summon disinterested parties as witnesses to their nefarious schemes. The transaction, like a crime, is generally consummated under cover of darkness, with the safeguards of secrecy thrown about it. Hence it must be scrutinized and judged by all the surrounding circumstances of the case. The evidence is "almost always circumstantial. Nevertheless, though circumstantial, it produces conviction in the mind often of more force than direct testimony."[2] In such cases, where fraud is in issue, "the field of circumstances ought to be very wide."[3] From the very nature of the case it can rarely ever be proved otherwise than by circumstantial evidence.[4] And if the facts and circumstances surrounding the case, and distinctly proven, are such as would lead a reasonable man to the conclusion that fraud in fact existed, this is all the proof which the law requires.[5] It may be observed that there can be no fraud unless there exist claims and rights which can be delayed and hindered, and which, but for the fraudulent conveyance, could be asserted. The law takes no cognizance of fraudulent practices that injure no one. Fraud without injury will not furnish a cause of action. Unless these

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[1] Per Hunt. J., Humes v. Scruggs, 94 U. S. 22–28. See McKibbin v. Martin, 64 Pa. St. 356; Knowlton v. Mish, 8 Sawyer, 627.

[2] See Kempner v. Churchill, 8 Wall. 369; Newman v. Cordell, 43 Barb. (N. Y.) 456; Babcock v. Eckler, 24 N. Y. 623; Hamett v. Dundass, 4 Pa. St. 181; Warner v. Blakeman, 4 Abb. App. Dec. (N.Y.) 535; Tumlin v. Crawford, 61 Ga. 128; Engraham v. Pate, 51 Ga. 537.

[3] Engraham v. Pate, 51 Ga. 537.

[4] See Jewell v. Knight, 123 U. S. 426, 8 S. C. Rep. 193.

[5] Lockhard v. Beckley, 10 W. Va. 87; White v. Perry, 14 W. Va. 86.

elements co-exist, the courts are powerless to render any relief.[1]

§ 14. **Restraints upon alienation.**— A conveyance as regards real property may be defined to be "the transfer of the title of land from one person, or class of persons, to another,"[2] or as "a deed which passes and conveys land from one man to another."[3] The usual incident of property of every kind owned or possessed by persons *sui juris* is the power of alienation; generally speaking, every man may in theory of law do what he pleases with that which is his own.[4] Almost the sole remaining restraint upon the power of alienation of land is that which adjudges void conveyances of real property held adversely by a third party at the date of the conveyance. Statutes adjudging such conveyances void "were originally introduced partly upon the theory that it would be dangerous to permit the transfer of disputed or 'fighting' titles, lest powerful and influential persons might purchase and use such titles as a means of oppressing poor people."[5] But these statutes

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[1] Fellows v. Lewis, 65 Ala. 354; Castle v. Palmer, 6 Allen (Mass.) 401; Legro v. Lord, 10 Me. 161; Foster v. McGregor, 11 Vt. 595; Danforth v. Beattie, 43 Vt. 138; Crummen v. Bennet, 68 N. C. 494: Sears v. Hanks, 14 Ohio St. 298; Vaughan v. Thompson, 17 Ill. 78; Muller v. Inderreiden, 79 Ill. 382; Anthony v. Wade, 1 Bush. (Ky.) 110; Morton v. Ragan, 5 Bush. (Ky.) 334; Lishy v. Perry, 6 Bush. (Ky.) 515; Kuevan v. Specker, 11 Bush (Ky.) 1; Vogler v. Montgomery, 54 Mo. 577; Smith v. Rumsey, 33 Mich. 183; Hugunin v. Dewey, 20 Iowa, 368; Edmonson v. Meacham, 50 Miss. 34; Wood v. Chambers, 20 Tex. 247; McFarland v. Goodman, 6 Biss. 111; Cox v. Wilder, 2 Dill. 45; Smith v. Kehr, 2 Dill. 50; Dreutzer v. Bell, 11 Wis. 114; Pike v. Miles, 23 Wis. 164; Murphy v. Crouch, 24 Wis. 365; Succession of Cottingham, 29 La. Ann. 669. Compare Getzler v. Saroni, 18 Ill. 511; Currier v. Sutherland, 54 N. H. 475; Huey's Appeal, 29 Pa. St. 219. See §§ 46–48.

[2] Klein v. McNamara, 54 Miss. 105.

[3] Brown v. Fitz, 13 N. H. 285. "There is no magical meaning in the word 'conveyance;' it denotes an instrument which carries from one person to another an interest in land." Lord Cairns, L. C., in Credland v. Potter, L. R. 10 Ch. App. 12.

[4] See § 52.

[5] Sedgwick & Wait on Trial of Title to Land (2d ed.), § 190. See Sedgwick v. Stanton, 14 N. Y. 295; Crary v. Goodman, 22 N. Y. 177; McMahan v. Bowe, 114 Mass. 145; Humbert v.

are being rapidly abolished, circumvented, or ignored as impracticable and unnecessary in this country, and even this restraint upon alienation will soon be wholly superseded.[1] The restriction which we are about to consider upon a debtor's power of effectual alienation of property at the expense of his creditor is one that has existed from time immemorial, and which will not outlive its usefulness so long as people are dishonest or inclined to be generous before they are just. The claims of creditors, it may be observed, rest upon legal obligations higher than the demands of affection or generosity, commendable as a response to these may be when no duties which the law declares paramount intervene.[2] Creditors, as we have said, have an equitable interest for the payment of their claims in their debtor's property, or in "the means he has of satisfying their demands,"[3] and there is in our jurisprudence a clear restraint upon the debtor's right of alienation, where it is attempted to be exercised for the purpose of hindering, delaying, or defrauding his creditors, or defeating their lawful right to subject his property by legal process to the satisfaction of their lawful demands. The cardinal principle running through all such cases is, that the property of the debtor shall not be diverted from the payment of his debts, to the injury of his creditors by means of the fraud.[4] The law does not restrain a man's dominion over his own property so long as he acts with

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Trinity Church, 24 Wend. (N. Y.) 611; Matter of Department of Parks, 73 N. Y. 560; Dawley v. Brown, 79 N. Y. 390; Williams v. Rawlins, 33 Ga. 117.

[1] Ibid.

[2] See Potter v. Gracie, 58 Ala. 303; Sherman v. Barrett, 1 McMull. (S. C.) Law 147.

[3] Seymour v. Wilson, 19 N. Y. 418; In Beels v. Flynn, 28 Neb. 580, 44 N. W. Rep. 732, the court say: "But when a debtor has incurred debts on the strength of his being the owner of certain property, his creditors have an equitable claim thereon, and may insist that he use his property honestly and fairly, and without any intention of hindering and delaying them in the collection of their claims."

[4] Clements v. Moore, 6 Wall. 312; Thompkins v. Sprout, 55 Cal. 36.

fairness and good faith; but it avoids all fraudulent alienations devised to secure property from the pursuit of his creditors; it is fraudulent to defeat them by a reservation of benefit to himself; it is equally fraudulent to defeat them by benefactions conferred upon others.[1]

"The current of law," says Professor Gray,[2] "has for centuries been in favor of the removal of old restraints on alienation; in favor of the disallowance of new ones; and especially in favor of compelling a debtor to apply to his debts all property which he could use for himself or give at his pleasure to others. The legislatures and the courts have co-operated to this end. Family and ecclesiastical pride, natural dishonesty, and narrow precedents have been formidable obstacles to this movement, but its general success has been unmistakable." The debtor must devote all his property absolutely to the payment of his debts; reserve no control for himself;[3] provide for no benefit to himself,[4] other than what may result from the payment of his debts; impose no condition upon the right of the creditors to participate in the fund; authorize no delay on the part of the trustee.[5] A debtor may be said to sustain two distinct relations to his property: that of owner and *quasi* trustee for his creditors. As owner he may contract debts to be satisfied out of his property, create liens upon it, and sell or give it to others at pleasure, and, as we shall presently see, so far as he is personally concerned, he will be bound by his own acts. The law, however, lays upon him an obligation to pay his debts, and in

[1] Lockhard v. Beckley, 10 W. Va. 96; Hunters v. Waite, 3 Gratt. (Va.) 26.

[2] Restraints on the Alienation of Property, by John Chipman Gray, Esq., Story Professor of Law in Harvard University.

[3] West v. Snodgrass, 17 Ala. 554; Riggs v. Murray, 2 Johns. Ch. (N. Y.) 565; Donovan v. Dunning, 69 Mo. 436; Fisher v. Henderson, 8 N. B. R. 175; Means v. Dowd, 128 U. S. 281, 9 S. C. Rep. 65.

[4] See Lukins v. Aird, 6 Wall. 79; Wooten v. Clark, 23 Miss. 75; Arthur v. Com. & R. Bank, 17 Miss. 394; Towle v. Hoit, 14 N. H. 61.

[5] Oliver Lee & Co.'s Bank v. Talcott, 19 N. Y. 148.

behalf of his creditors holds him to the exercise of good faith in all transactions relating to the fund upon which they necessarily depend for payment. The debtor, therefore, cannot be permitted to create fictitious debts, or to do any of the acts specified *mala fide* to the prejudice of his creditors.

§ 15. **Fraudulent conveyances — Characteristics and classes.**— A fraudulent conveyance may be defined to be a conveyance the object, tendency, or effect of which is to defraud another, or the intent of which is to avoid some duty or debt due by or incumbent upon the party making it.[1] As was said by Lord Mansfield in Cadogan v. Kennett:[2] "The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a *trick and contrivance* to defeat creditors." The same test has been referred to as decisive by Mr. Justice Story[3] and Chief-Justice Marshall.[4] As we shall presently see, to constitute such a disposition of property, three elements must concur — first, the thing disposed of must be of value, out of which the creditor could have realized all or a portion of his claim; second, it must be transferred or disposed of by the debtor; and third, this must be done with intent to defraud.[5] Stated in another form: in order to bring a

[1] See 2 Kent's Com. 440; 4 Id. 462. "One of the surest tests of a fraudulent conveyance is that it reserves to the grantor an advantage inconsistent with its avowed purpose, or an unusual indulgence." Thompson v. Furr, 57 Miss. 484; see Bentz v. Rockey, 69 Pa. St. 71; Edwards v. Stinson, 59 Ga. 443; Mitchell v. Stetson, 64 Ga. 442. Such, for instance, as a support. Graves v. Blondell, 70 Me. 194; Henry v. Hinman, 25 Minn. 199; Young v. Heermans, 66 N. Y. 374.

[2] 2 Cowp. 434.

[3] 2 Story's Eq. Jur. § 353.

[4] United States v. Hooe, 3 Cranch, 73. "The test as to whether a conveyance is fraudulent or void as to a creditor is, does it hinder him in enforcing his debt? Does it deprive him of a right which would be legally effective if the conveyance or device had not been resorted to?" Wagner v. Smith, 13 B. J. Lea (Tenn.) 569.

[5] Hoyt v. Godfrey, 88 N. Y. 669. See Florence Sewing Machine Co. v. Zeigler, 58 Ala. 224; Blake v. Boisjoli, 51 Minn. 296, 53 N. W. Rep. 637. See Baldwin v. Rogers, 28 Minn. 544, 11 N. W. Rep. 77. See § 23.

case within the terms of the statute, there must exist a creditor to be defrauded, a debtor intending to defraud, and a conveyance of property which is appropriable by law to the payment of the debt due.[1] Usually, to avoid the transaction there must be some interest in the property left in the debtor;[2] some reservation inconsistent with a true sale; or some hiding or cloaking of the surplus so as to cover it up for the benefit of the debtor or his family.[3] Whether a conveyance be fraudulent or not, as against creditors, depends on whether it was made on good consideration and *bona fide*. It is not enough that it be on good consideration *or bona fide;* it must be both. If it be defective in either particular, though good between the parties and their representatives, it is voidable as to creditors.[4] It has been observed that to avoid a fraudulent transfer three things are necessary: Fraud on the part of the vendor; fraud on the part of the vendee; and an injury to the party complaining.[5] This, as we shall see, is too general a statement, for in certain cases of voluntary alienations proof of actual participation in the fraud by the vendee is not essential to annul the transaction. Again, these covinous alienations with respect to the rights of the creditors, existing and subsequent, and the character of the debtor's interest, are divisible into three classes. (1). Where a debtor conveys a title in fraud of creditors. (2). Where a person not indebted alienates property with the intention to defraud future creditors. (3). Where the property is paid for by the

[1] O'Connor v. Ward, 60 Miss. 1036.

[2] Means v. Dowd, 128 U. S. 281, 9 S. C. Rep. 65; Young v. Willis, 82 Va. 296; McCormick v. Atkinson, 78 Va. 8; Wray v. Davenport, 79 Va. 19.

[3] See Hobbs v. Davis, 50 Ga. 214; Price v. Pitzer, 44 Md. 527; Todd v. Monell, 19 Hun (N. Y.) 362; Young v. Willis, 82 Va. 296.

[4] Randall v. Vroom, 30 N. J. Eq. 358; 1 Story's Eq. Jur. § 353; Sayre v. Fredericks, 16 N. J. Eq. 205; Smith v. Muirheid, 34 N. J. Eq. 6.

[5] Guidry v. Grivot, 2 Martin N. S. (La.) 13

debtor, but the conveyance is taken in the name of a third party. Dillon, J., observed: "Any instrument is fraudulent which is a mere trick or sham contrivance, or which originates in bad motives or intentions, that is made and received for the purpose of warding off other creditors."[1] In another case[2] this language may be quoted: "Whether the contract be oral or in writing; whether executed by the parties with all the solemnities of deeds by seal and acknowledgment; whether in form of the judgment of a court, stamped with judicial sanction, or carried out by the device of a corporation organized with all the forms and requirements demanded by the statute in that regard, if it be contaminated with the vice of fraud the law declares it to be a nullity. Deeds, obligations, contracts, judgments, and even corporate bodies may be the instruments through which parties may obtain the most unrighteous advantages. All such devices and instruments have been resorted to to cover up fraud, but whenever the law is invoked all such instruments are declared nullities; they are a perfect dead letter; the law looks upon them as if they had never been executed. They can never be justified or sanctified by any new shape or cover, by forms or recitals, by covenants or sanctions which the ingenuity, or skill, or genius of the rogue may devise." In a case before the Supreme Court of Maine it is said that "a fraudulent transfer, however perfect in form, is void" as to creditors.[3]

§ 16. Fraudulent conveyances at common law — Statutes declaratory. — By the rules of the common law all conveyances made in fraud of creditors were regarded as voidable at the instance and suit of such creditors.[4] The

[1] Hughes v. Cory, 20 Iowa, 405.

[2] Booth v. Bunce, 33 N. Y. 156.

[3] Skowhegan Bank v. Cutler, 49 Me. 318.

[4] See notes to Twyne's Case (3 Rep. 80), 1 Smith's Leading Cases 1, continued from 1866 to 1879, in 18 American Law Register N. S. 137;

famous statutes of Elizabeth, to be presently considered, avoiding fraudulent conveyances, were merely declaratory of the common law;[1] the same result would have been worked out without the aid of the statutes.[2] The statutes were not necessary to this result;[3] but are to be received when such transfers are brought in question only as a true and accurate declaration of the common law.[4]

Cadogan v. Kennett, 2 Cowper, 432; Curtis v. Leavitt, 15 N. Y. 124; Clements v. Moore, 6 Wall. 299, 312; Nellis v. Clark, 20 Wend. (N. Y.) 27; Blackman v. Wheaton, 13 Minn. 326; Stoddard v. Butler, 20 Wend. (N. Y.) 516; Clark v. Douglass, 62 Pa. St. 416; Brice v. Myers, 5 Ohio, 121; Baker v. Humphrey, 101 U. S. 499; Hamilton v. Russel, 1 Cranch, 310. In California a sale of this character is held to be absolutely void. Mason v. Vestal, 88 Cal. 396, 26 Pac. Rep. 213; Tapscott v. Lyon, 103 Cal. 310, 37 Pac. Rep. 225.

[1] Clements v. Moore, 6 Wall. 312; Davis v. Turner, 4 Gratt. (Va.) 429. See §§ 18–21.

[2] Cadogan v. Kennett, 2 Cowp. 432.

[3] Baker v. Humphrey, 101 U. S. 499; Clements v. Moore, 6 Wall. 299.

[4] Clark v. Douglass, 62 Pa. St. 416; Rickards v. Attorney Genl., 12 Cl. & F. 44. See Barton v. Vanheythuysen, 11 Hare, 126-132; Ryall v. Rolle, 1 Atk. 178; Utterson v. Vernon, 3 T. R. 546. In Gardner v. Cole, 21 Iowa, 209, Dillon, J., after remarking that the statutes 13 Eliz. and 27 Eliz. had never been legislatively re-enacted in Iowa, said: "But antedating as these statutes do the settlement of this country, and being mainly, if not wholly, declaratory of the common law, which sets a face of flint against frauds in every shape, they constitute the basis of American jurisprudence on these subjects, and are, in this State, part of the *unwritten law*." In McClellen v. Pyeatt, 32 U. S. App. 104, 107, Sanborn, J., says: "On May 2, 1890, then, for the first time in the Indian Territory, the law declares that a voluntary conveyance by a debtor to delay or defraud his creditors 'shall be void.' In the absence of such a statute it was perfectly competent for an insolvent debtor to give his property to his wife or to his friend, and thus to deprive his creditors of an opportunity to enforce the collection of their claims from any of his property upon which they had fastened no liens. The debtor's right of disposition was unrestricted in this respect, and it was undoubtedly the frauds that this condition of the law permitted that originally induced the enactment of the statute 13 Elizabeth in England, and the adoption of the provisions of that statute in the various States of this Nation." Certainly this statement ignores the settled doctrine that the statute of Elizabeth is merely declaratory of the common law, and that the same result could have been worked out without the enactment of this famous statute. Experience has shown that the promulgation by statutory enactment of a well formulated principle of the common law has a salutary influence in enforcing an observance of what was theretofore the unwritten law. Perhaps it may be argued in the case just quoted that the common law did prevail in the Indian Territory, but the conclusion of the court is not founded upon that theory.

Lord Coke[1] comments on the word "declare" in the statute as showing that this was the case, and Lord Mansfield, in Cadogan v. Kennett,[2] said that "the principle and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5 and 27 Eliz. c. 4."[3] And Chancellor Kent asserted that the "statute of Elizabeth" was "only in affirmance of the principles of the common law."[4] This feature of our jurisprudence is of the highest importance, and creditors are justified in invoking it in cases where it is sought to defeat their claims as not coming exactly within the precise wording of the statute avoiding a particular kind of transfer. The flexible principles of the common law supplement and support the technical framework of the statute, and constitute the deep and broad foundation upon which the creditor's rights are founded. The mere omission of a provision embracing "goods, chattels, and things in action," from a section of the statute declaring void conveyances and assignments of estates or interests in land, made with intent to hinder, delay, or defraud creditors, will not be construed to be a repeal of the common-law rule which renders a conveyance of goods and chattels, made with such intent, fraudulent and void as to creditors.[5] In Fox v. Hills,[6] the statute concerning fraudulent conveyances was construed not to comprehend claims founded on tort, but it appearing that a vol-

[1] Co. Litt. 76a, 290b; Twyne's Case, 3 Rep. 82b (2 Coke, 219).

[2] 2 Cowp. 434.

[3] See Clements v. Moore, 6 Wall. 299; Starin v. Kelly, 88 N. Y. 421.

[4] Sands v. Codwise, 4 Johns. (N. Y.) 596, 4 Am. Dec. 313.

[5] Blackman v. Wheaton, 13 Minn. 331. "The principle of the court of equity is that a provision for the wife, contrived to conceal the means of the husband from his creditors by placing the ostensible title in her, though not within the statute of frauds, is void as to creditors, by the unwritten law." Bernheim v. Beer, 56 Miss. 151.

[6] 1 Conn. 298.

untary deed had been given to avoid such a claim, the instrument was promptly adjudged void at common law as to the creditor. In Lillard v. McGee,[1] which was a suit to set aside a conveyance at the instance of a creditor whose claim was a judgment for damages in an action of slander, the court said: "Fraud is one of the main pillars of the jurisdiction of a court of equity, and there is no question of its competency, prior to the statute, to give relief in a case of this sort. Now as the statute is made in affirmance, not in derogation of the common law, it cannot have the effect of taking from a court of equity its jurisdiction; for it is a settled rule that an affirmative statute does not repeal the common law."

"The common law of England,"[2] says Roberts, "abhors every species of covin and collusion; but being tender of *presuming* fraud from *circumstances*, statutes have been specially framed to suit the exigencies of the times,[3] which are as fertile in the artifices of concealment as in the opportunities of deceit. It was the prevention and not the punishment of fraud in which the common law was defective, for there is no instrument or act which is not liable by the law of this country to be rendered absolutely void by clear and explicit evidence of fraudulent intention. So general, indeed, is the condemnation of all fraudulent acts by the law of England, that a fraudulent estate is said, in the masculine language of the books, to be no estate in the judgment of the law,"

These words are employed in Alabama: "The right of the creditor to subject property of his debtor, fraudulently conveyed, is founded in that principle of the common law which enjoins integrity as a virtue paramount to generosity."[4]

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[1] 4 Bibb (Ky.) 166

[2] Roberts on Fraudulent Conveyances (ed. 1807), p. 120.

[3] *Quæ natura videntur honesta esse, temporibus sunt inhonesta*, Cic. de Off. lib. 3.

[4] Planters & Merchants' Bank v. Walker, 7 Ala. 946.

§ 17. **Covinous transfers of choses in action.**— By the law of England, before the American Revolution, as established by decisions of Fortescue, M. R., Lord Hardwicke, and Lord Northington, fraudulent conveyances of choses in action, though not specified in the statute, were voidable equally with transfers of tangible assets, but from the nature of the subject-matter the remedy of the creditors must be sought in equity.[1]

Gray, C. J., in the opinion in Drake v. Rice,[2] says: "Of the only case before our Revolution cited in the learned argument for the claimant, we have but this brief note: 'A man, being much in debt, six hours before his decease gives £600 for the benefit of his younger children; this is not fraudulent as against creditors; though it would have been so of a real estate, or chattel real.'[3] The report, having been published in 1740, cannot have been unknown to the eminent English judges who made the decisions already cited; and, as observed by Lord Redesdale, the book is anonymous and of not much authority.[4] The opinions of the English and Irish courts of chancery since our Revolution, cited for the claimant, cannot outweigh the cases above referred to, as evidence of the law of England at the time of the separation of the colonies from the mother country. In the case at bar, it is agreed that the law of New York respecting fraudulent conveyances is the same as the common law and the law of Massachusetts; and that by the law of New York choses in action, although they

[1] Drake v. Rice, 130 Mass. 410; Taylor v. Jones, 2 Atk. 600; King v. Dupine, 2 Atk. 603, note; Horn v. Horn, Ambler, 79; Ryall v. Rolle, 1 Atk. 165, 1 Ves. Sen. 348; Partridge v. Gopp, 1 Eden, 163, Ambl. 596; Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450; Hadden v. Spader, 20 Johns. (N. Y.) 554; Abbott v. Tenney, 18 N. H. 109; Sargent v. Salmond, 27 Me. 539. See § 33, and cases cited.

[2] 130 Mass. 413.

[3] Duffin v. Furness, Sel. Cas. Ch. 216.

[4] Barstow v. Kilvington, 5 Ves. 593, 598; Hovenden v. Lord Annesley, 2 Sch. & Lef. 607, 634.

cannot be attached or levied upon, yet may, after execution issued on a judgment at law, be reached by proceedings before a magistrate in the nature of proceedings under the poor debtor acts of this commonwealth, and by the appointment of a receiver to take and dispose of the debtor's property."[1]

§ 18. Early statutes avoiding fraudulent conveyances. — The widely known statute, 13 Eliz. c. 5 (1570), perpetuated by 29 Eliz. c. 5 (1587), was not, by any means, as many suppose, the first legislative attempt to formulate and declare the principles of the common law on this subject, or to repress covinous transfers by statutory enactment. By 3 Hen. VII. c. 4 (1487), "all deeds of gift of goods and chattels made or to be made of trust to the use of the person or persons that made the same deed of gift," are declared "void and of none effect." And the prior act of 50 Edw. III. c. 6 (1376), reads as follows: "Divers people . . . . do give their tenements and chattels to their friends, by collusion to have the profits at their will, and after do flee to the franchise of Westminster, of St. Martin-le-Grand of London, or other such privileged places, and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt, and release the remnant, it is ordained and assented, that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattels as if no such gift had been made." The statute, 2 Rich. II., stat. 2, c. 3 (1379), contained provisions on the same subject, and from its recitals was evidently framed to repress the hypo-

[1] See Donovan v. Finn, 1 Hopkins' Ch. (N. Y.) 59, 14 Am. Dec. 531, especially the learned note at page 542. See § 33.

critical religious zeal of fraudulent debtors,[1] and to furnish a method of substituted service of process.[2] The quaint provisions of these early statutes show conclusively that fraudulent conveyances are not entirely the offspring of our modern civilization. Fraud, which the common law so greatly abhorred, was so much practiced by debtors upon creditors in early times as to attract the attention of Parliament, and to constitute a subject of frequent legislation. "These statutes," said Lord Mansfield, "cannot receive too liberal a construction, or be too much extended in suppression of fraud."[3] It may be observed in explanation of this early legislation against fraudulent transfers that these statutes were enacted to more clearly formulate the common law, with a view to suppress voluntary conveyances and secret trusts made by debtors who had escaped arrest for debt, or avoided service of process by fleeing to sanctuaries or holy ground. The number of

[1] "ITEM, *in case of debt*, where the debtors make feigned gifts and feoffments of their goods and lands to their friends and others, and after withdraw themselves, and flee into places of holy church privileged, and there hold them a long time, and take the profit of their said lands and goods so given by fraud and collusion, whereby their creditors have been long and yet be delayed of their debts and recovery, wrongfully and against good faith and reason; it is ordained and established, That after that the said creditors have thereof brought their writs of debt, and thereupon a *capias* awarded, and the sheriff shall make his return that he hath not taken the said persons because of such places privileged in which they be or shall be entered, then . . . . another writ shall be granted . . . . that proclamation be made openly at the gate of the place so privileged, where such persons be entered, by five weeks continually, every week once, that the same person be at a certain day, ... before the King's justices, and . . . if the said persons called come not . . . . judgment shall be given against them upon the principal for their default. . . . . Executions shall be made of their goods and lands, being out of the place privileged, as well, that is to say, of those lands and goods so given by collusion, as of any other out of the same franchise, after that such collusion or fraud be duly found in the same manner as that ought to have been, if no devise had been thereof made, notwithstanding the same devise."

[2] By a Manx statute "all fraudulent assignments, or transfers of the debtor's goods or effects, shall be void, and of no effect against his just creditors." Mills' Statute Law of Isle of Manx, p. 238. Corlett v. Radcliffe, 14 Moo. P. C. 121-132.

[3] Cadogan v. Kennett, Cowp. 434.

these conveyances, however, was comparatively small, and their appearance is said to have been spasmodic and premature, and "far in advance of the time for their normal natural development." Sanctuaries, or cities of refuge for fraudulent and absconded debtors, do not seem to have been wholly abolished until during the reign of James I., and one such sanctuary, the noted White-friars which flourished in the reign of that monarch, has been immortalized by Sir Walter Scott in his "Fortunes of Nigel."[1]

§ 19. Statute 13 Eliz. c. 5, and its object. — This statute was passed for the protection of creditors, and is the great model which has been re-enacted in substance, or copied wherever Anglican law prevails. It was, in its perfected form, an offspring of the brilliant Elizabethan age, and adds to the lustre of the achievements of that unsurpassed period of the world's development. The leading object of the statute was to prevent those collusive transfers of legal ownership which place the property of a man indebted out of the reach of his *bona fide* creditors, and leave to him the beneficial enjoyment of that which ought in conscience to be open to their legal remedies.[2] It was meant to prevent deeds "fraudulent in their concoction," says Lord Ellenborough.[3] By its provisions all conveyances and dispositions of property, real or personal, made with the intention of defrauding creditors, are declared to be null and void as against the creditors.[4] Mr. Reeves says that several acts had been formerly passed on the subject of fraudulent conveyances, "but none of them had gone so far" as the statutes 13 Eliz. and 27 Eliz. "to

[1] Essay by John Reynolds, Esq., on Fraudulent Conveyances, etc., read before New York State Bar Association, Nov. 18, 1879.

[2] Roberts on Fraudulent Conveyances, p. 554.

[3] Meux v. Howell, 4 East, 14. See Moore v. Hinnant, 89 N. C. 459.

[4] See Drake v. Rice, 130 Mass. 410.

restrain these feigned gifts."[1] Mr. Justice Story observes that this statute (13 Eliz.) "has been universally adopted in America as the basis of our jurisprudence" upon the subject.[2] It may be found enacted almost intact in many of our statute-books, and is still popularly called "the statute of Elizabeth," just as statutory remedies for the trial of title to real property are known by the familiar title of ejectment. Professor Pomeroy says:[3] "The operative statute in England, which is also the basis of all legislation and judicial decision in the United States, is the celebrated act 13 Eliz. c. 5." The historic name of the eccentric, but fortunate, queen is constantly linked with the struggles of creditors to enforce the payment of honest demands. The general interpretation placed upon the statute of Elizabeth is well illustrated in an important case in Maine,[4] in which the court say: "We derived our law in relation to conveyances fraudulent as to creditors, from the stat. 13 Eliz. c. 5, which has been adopted here as common law.[5] This statute, declaring that conveyances made with intent to 'delay, hinder, or defraud creditors,' shall be 'deemed and taken (only as against creditors, etc.) to be clearly and utterly void, frustrate, and of none effect,' has been invariably construed as plainly implying that they are valid as between the par-

[1] 5 Reeves' Hist. Eng. Law, pp. 244, 245.

[2] Story's Eq. Jur. § 353. In Peters v. Bain, 133 U. S. 685, 10 S. C. Rep. 354, Chief Justice Fuller says: "The statute of Elizabeth, c. 5, against fraudulent conveyances has been universally adopted in American law as the basis of our jurisprudence on that subject (Story Eq. Jur. § 353), and re-enacted in terms, or nearly so, or with some change of language, by the legislatures of the several States." In Clements v. Moore, 6 Wall. 312, the court say: "The statute of the 13th Elizabeth has been substantially enacted in Texas." The statutes of Elizabeth for the prevention of fraudulent conveyances, are in full force in the District of Columbia, and stood without a single amendment until Feb. 24, 1893. Kansas City Packing Co. v. Hoover, 1 D. C. Ct. App. 272.

[3] 2 Pom. Eq. § 968.

[4] Butler v. Moore, 73 Me. 154.

[5] Howe v. Ward, 4 Me. 196. 199.

ties and their representatives;[1] and can be avoided only by creditors on due proceedings;[2] or their representatives, such as assignees in bankruptcy or insolvency of the grantor,[3] and the executors or administrators of grantors since deceased whose estates have been declared insolvent.[4] And notwithstanding the words 'utterly void,' etc., applied to such conveyances, they are not, even as to creditors, void but voidable;[5] and all the courts concur in holding that if the fraudulent grantee convey the premises to a *bona fide* purchaser for a valuable consideration before the creditor moves to impeach the original conveyance, the purchaser's title cannot be disturbed."[6]

§ 20. **Its interpretation and construction.**—"Notwithstanding," says Mr. Roberts, "these laws are greatly penal, the rule still holds of giving them an extended and liberal exposition."[7] Statutes in suppression of deceit and covin should be equitably expounded, although they are highly penal.[8] In McCulloch v. Hutchinson,[9] Sergeant, J., said:

[1] Nichols v. Patten, 18 Me. 231; Andrews v. Marshall, 43 Me. 274; Benjamin on Sales, 3d Am. ed., p. 476, and note.

[2] Miller v. Miller, 23 Me. 22; Thompson v. Moore, 36 Me. 47; Stone v. Locke, 46 Me. 445.

[3] Freeland v. Freeland, 102 Mass. 475, 477.

[4] McLean v. Weeks, 65 Me. 411, 418.

[5] Andrews v. Marshall, 43 Me. 272.

[6] Neal v. Williams, 18 Me. 391; Hoffman v. Noble, 6 Met. (Mass) 68; Bradley v. Obear, 10 N. H. 477.

[7] Roberts on Fraudulent Conveyances, p. 542. *In hiis enim quae sunt favorabilia animæ, quamvis sunt damnosa rebus, fiat aliquando extensio statuti.* In Riggs v. Palmer, 115 N. Y. 511, Earl, J., says: "All laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of the New York Mutual Life Insurance Company v. Armstrong (117 U. S. 591). There it was held that the person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon."

[8] Wimbish v. Tailbois, Plowd. Com. 59. See Roy v. Bishop of Norwich, Hob. 75; Brice v. Myers, 5 Ohio, 123.

[9] 7 Watts (Pa.) 435.

"The statutes on this subject are liberally expounded for the protection of creditors, and to meet the schemes and devices by which a fair exterior may be given to that which is in reality collusive."[1] "The statute," says Allen, J., "has always had a liberal interpretation for the prevention of frauds."[2] The law "loves honesty and fair dealing," and "so construes liberally statutes to suppress frauds,[3] as far as they annul the fraudulent transaction."[4] As early as Twyne's Case,[5] it was resolved that "because fraud and deceit abound in these days more than in former times, ... all statutes made against fraud should be liberally and beneficially expounded to suppress the

[1] See Cadogan v. Kennett, 2 Cowp. 432; Gooch's Case, 5 Rep. 60 (3 Coke, 121); Allen v. Rundle, 50 Conn. 31.

[2] Young v. Heermans, 66 N. Y. 383. See Pennington v. Seal, 49 Miss. 525. An innocent construction of an instrument will be favored in preference to one that will impute a fraudulent intent. Roberts v. Buckley, 145 N. Y. 215–224, 39 N. E. Rep. 966.

[3] Citing Twyne's Case, 3 Rep. 80b (2 Coke, 212); Cadogan v. Kennett, 2 Cowp. 432–434.

[4] Bishop on the Written Laws, § 192. "Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule [that penal statutes are to be construed strictly]; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender and inflicts a penalty, as a pillory or a fine, it is then to be taken strictly; *but when the statute acts upon the offense,* by setting aside the fraudulent transaction, here it is to be construed liberally." 1 Bl. Com. 88. See Carey v. Giles, 9 Ga. 253; Cumming v. Fryer, Dudley (Ga.) 182; Ellis v. Whitlock, 10 Mo. 781. In Riggs v. Palmer, 115 N. Y. 510, 22 N. E. Rep. 188, the court say: "Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui hæret in litera, hæret in cortice.*" In People v. Crennan, 141 N. Y. 244, this language is used, "whatever is necessarily implied in a statute is just as much a part thereof as if written therein." See People v. Utica Ins. Co., 15 Johns. (N. Y.) 358. In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction, and courts have no right to add or take away from that meaning. Tompkins v. Hunter, 149 N. Y. 122, citing Newell v. People, 7 N. Y. 9, 97; McCluskey v. Cromwell, 11 N. Y. 593, 601; People v. Woodruff, 32 N. Y. 355, 364; Matter of Miller, 110 N. Y. 216. A statute will be held to abrogate the common law only in so far as the clear import of the language absolutely requires it. Fitzgerald v. Quann, 109 N. Y. 441.

[5] 3 Rep. 82a (2 Coke, 219).

fraud." It may be suggested that, in construing statutes to prevent frauds, suppress public wrongs, or effect a public good,— objects which the law favors,— there is a pressure toward a liberal interpretation; but if they also provide a penalty, which is a thing odious to the law, there is another pressure toward the strict rule; so the balance may be in equipoise, or the one scale or the other may preponderate, according to the special circumstances of the case, or the views of the particular judge.[1]

The provisions of the statute are considered to be so plain that "he that runs may read."[2] In Federal tribunals, and in the Supreme Court of the United States, in controversies arising under this statute, involving as they do, the rights of creditors locally, and a rule of property, the conclusions of the highest judicial tribunal of the State are accepted as controlling.[3]

§ 21. **Statute 27 Eliz** c. 4.— This statute was enacted in favor of purchasers, and renders void, as against subsequent purchasers of the same land, all conveyances, etc., made with the intention of defeating them,[4] or containing a power of revocation. Mr. May observes[5] that "in one respect, however, both these statutes were moulded in strict conformity with the rules of the common law; for if 'simplicity was the striking feature of the common

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[1] Compare Taylor v. United States, 3 How. 197; Fairbanks v. Antrim, 2 N. H. 105; Abbott v. Wood, 22 Me. 541; Sickles v. Sharp, 13 Johns. (N. Y.) 497; Van Valkenburgh v. Torrey, 7 Cow. (N. Y.) 252 In construction the courts will strive "to make atonement and peace among the words." It may be recalled that an assignment is to be construed like any other contract. Crook v. Rindskopf, 105 N. Y. 476-485, 12 N. E. Rep. 174.

[2] See Savage v. Knight, 92 N. C. 497.

[3] Peters v. Bain, 133 U. S. 686, 10 S. C. Rep. 354, citing Jaffray v. McGehee, 107 U. S. 361, 364, 2 S. C. Rep. 367; Lloyd v. Fulton, 91 U. S. 479, 485; Allen v. Massey, 17 Wall. 351.

[4] See Anderson v. Etter, 102 Ind. 120. Compare Cathcart v. Robinson, 5 Pet. 264; Pence v. Croan, 51 Ind. 336.

[5] May on Fraudulent Conveyances (London, 1871), p. 3.

law,'[1] it was, in an almost equal degree, the chief feature of the statutes of Elizabeth, which are couched in very general terms, so as to include, and allow their application by the courts to any fraudulent contrivances to which the fertility of man's imagination might have resorted, as a means of eluding a more precise and inflexible law."[2]

§ 22. **Twyne's Case.**[3] — This celebrated case is the creditor's beacon-light in suits to annul covinous transfers. The decision was promulgated in 1601, thirty years after the enactment of the statute 13 Eliz. c. 5. Brilliant statesmanship and diplomacy, signal success in battle against threatened foreign invasion, and the birth of immortal literary and dramatic productions, were not the only characteristics of this fascinating period in English history. Evidently covinous dispositions of property were at that time beginning to attract attention and become troublesome, for, as already shown, it was resolved that "because fraud and deceit abound in these days more than in former times, all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud." It appeared, in this case, that P. was

[1] Citing Sugden on Powers, Introduction, p. 1.

[2] As to the interpretation of these statutes as applied to *bona fide* purchasers, see Bean v. Smith, 2 Mason, 272, per Story, J., reviewing Roberts v. Anderson, 3 Johns. Ch. (N. Y.) 371, per Chancellor Kent. In Mulford v. Peterson, 35 N. J. Law, 133, the court said: "The statute, 13 Eliz. c. 5, makes utterly void, frustrate, and of no effect, every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, goods, and chattels, or any of them, devised and contrived to delay, hinder, or defraud creditors, as against such creditors, any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary. By the 27 Eliz. c. 4, conveyances made to defraud subsequent purchasers are declared void as to persons defrauded. In both statutes a penalty is provided for, which parties to such conveyances, or such as are privy to or knowing of such fraud, incur, who shall put in use or maintain, justify, or defend, such conveyances as made *bona fide* or upon good consideration."

[3] 3 Rep. 80 (2 Coke, 212); 1 Smith's Lea. Cas. 1, 18 Am. Law Reg. N. S. 137.

indebted to T. in £400, and was indebted also to C. in £200. C. brought an action of debt against P., and pending the writ P., being possessed of goods and chattels of the value of £300, *secretly* made[1] a general deed of gift of all his goods and chattels, real and personal whatsoever, to T., in satisfaction of his debt; notwithstanding which P. continued in possession of the goods, some of which he sold again, sheared the sheep, and marked them with his own mark. Afterwards C. had judgment against P. and took out a *fieri facias* directed to the sheriff of Southampton, who, by force of the writ, came to levy upon the goods. Divers persons, by the command of T., resisted the sheriff by force, claiming the goods as the goods of T. by virtue of the gift; and whether the gift, on the whole matter, was a good gift, or fraudulent and void within the 13 Eliz. c. 5, was the question. It was determined by the Lord Keeper of the Great Seal, by the Chief-Justices, and by the whole Court of Star Chamber, that the gift was fraudulent within the statute. And as the signs and marks of fraud, it was said by the court: (1). That the gift was general, without exception of the donor's apparel, or of anything of necessity. (2). The donor continued in possession, and used the goods as his own; and by means thereof traded with others, and defrauded and deceived them. (3) It was made in secret. (4). It was made pending the writ. (5). There was a trust between the parties; for the donor possessed all, and used them as his proper goods; and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud. (6). The deed expressed that the gift was made honestly, truly and *bona fide; et clausulæ inconsueta semper inducunt suspicionem.*[2] This case is popularly

[1] See Huntley v. Kingman, 152 U. S. 533, 14 S. C. Rep. 688.

[2] See Roberts on Fraudulent Conveyances (ed. 1845), pp. 544, 545; Davis v. Schwartz, 155 U. S. 639, 15 S. C. Rep. 237. Lord Eldon, in Kidd v. Rawlinson, 2 Bos. & P. 59, cited with approval from Buller's Nisi Prius, where the following synopsis of Twyne's Case may be found: "A., being in-

regarded as the fountain from which our modern law as to fraudulent conveyances flows, and the profession frequently refer to and draw from it in preference to selecting from the "myriad of precedents" and "single instances" which financial crises and the greed of dishonest debtors have since called into being. The leading doctrine taught by this case has been practically superseded in England, but it still holds a prominent place in our jurisprudence. This may be likened to the use of statutory real writs in parts of the United States after their complete abandonment in the mother country.[1] The exact point decided in Twyne's Case is that a conveyance by a debtor of tangible property, if actually fraudulent, is void as to existing creditors. The impression that the principles of this case are sufficient to meet the exigencies of our modern jurisprudence is clearly erroneous. Though Twyne's Case has been characterized as a "wonderful decision," and amazement has been expressed that the question involved should have come up for adjudication at such an early period, yet it must be conceded that the facts of the case were too restricted to enable the court to furnish rules sufficient to answer all the varying imperative demands of creditors at the present day. Since this great decision was rendered its principles have been extended, as we shall presently see, to avoid covinous conveyances not

debted to B. in £400, and to C. in £200, C. brings debt, and hanging the writ, A. makes a secret conveyance of all his goods and chattels to B. in satisfaction of his debt, but continues in possession, and sells some, and sets his mark on other sheep; and it was holden to be fraudulent within this act; (1) because the gift is general; (2) the donor continued in possession and used them as his own; (3) it was made pending the writ, and it is not within the proviso, for though it is made on a good consideration, yet it is not *bona fide*. But yet the donor continuing in possession, is not in all cases a mark of fraud; as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money." Bull. Nisi Prius, p. 258.

[1] See Sedg. & Wait on Trial of Title to Land, 2d ed., §§ 72–76, c. II.

only as to existing creditors, but in certain cases as to subsequent creditors,[1] and even as to contingent subsequent creditors;[2] so it has been held to embrace creditors who were suing the debtor for tort,[3] as for slander,[4] or assault and battery,[5] or the misapplication of trust moneys more than fifteen years before the conveyance.[6] The statutes "are not limited in their operation by any Procrustean formula."[7] The doctrine of the case has been enlarged to cover transfers of intangible rights and choses in action, such as stocks,[8] transfer of an annuity,[9] of a policy of life insurance,[10] of an equity of redemption,[11] of certificates of stock,[12] of a legacy,[13] insurance premiums,[14] and all mere choses in action.[15] Even an allowance for support to a wife under a judgment for a divorce may be reached by her creditors.[16] Still Twyne's Case has taken deep hold in our law, and the main principles that control the determination of the different phases of fraudulent conveyances can generally be traced to this parent root. That the case should at

[1] See Laughton v. Harden, 68 Me. 212; Day v. Cooley, 118 Mass. 527.

[2] See Jackson v. Seward, 5 Cow. (N. Y.) 71; Pennington v. Seal, 49 Miss. 525; Hoffman v. Junk, 51 Wis. 614, 8 N. W. Rep. 493. See Chap. VI.

[3] See Post v. Stiger, 29 N. J. Eq. 558; Weir v. Day, 57 Iowa, 87, 10 N. W. Rep. 304; Langford v. Fly, 7 Hum. (Tenn.) 585; Walradt v. Brown, 6 Ill. 397; Gebhart v. Merfeld, 51 Md. 325; Cooke v. Cooke, 43 Md. 522; Fox v. Hills, 1 Conn. 295.

[4] Jackson v. Myers, 18 Johns. (N. Y.) 425; Cooke v. Cooke, 43 Md. 531; Wilcox v. Fitch, 20 Johns. (N. Y.) 472.

[5] Ford v. Johnston, 7 Hun (N. Y.) 567; Slater v. Sherman, 5 Bush (Ky.) 206.

[6] Strong v. Strong, 18 Beav. 408.

[7] Beckwith v. Burrough, 14 R. I. 368.

[8] Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450, per Chancellor Kent; Hadden v. Spader, 20 Johns. (N. Y.) 554; Weed v. Pierce, 9 Cow. (N. Y.) 723, per Chancellor Walworth; Edmeston v. Lyde, 1 Paige (N. Y.) 641; Beckwith v. Burrough, 14 R. I. 366.

[9] Norcutt v. Dodd, 1 Cr. & Ph. 100.

[10] Stokoe v. Cowan, 29 Beav. 637; Skarf v. Soulby, 1 Macn. & G. 364; *In re* Trustee Relief Act, 5 DeG. & S. 1; Burton v. Farinholt, 86 N. C. 260; Ætna Nat. Bank v. Manhattan Life Ins. Co., 24 Fed. Rep. 769.

[11] Sims v. Gaines, 64 Ala. 397.

[12] Scott v. Indianapolis Wagon Works, 48 Ind. 78.

[13] Bigelow v. Ayrault, 46 Barb. (N. Y.) 143.

[14] Ætna Nat. Bank v. United States Life Ins. Co., 24 Fed. Rep. 770.

[15] Greenwood v. Brodhead, 8 Barb. (N. Y.) 597; Drake v. Rice, 130 Mass. 410.

[16] Stevenson v. Stevenson, 34 Hun (N. Y.) 157.

this late day be so widely cited and relied upon[1] is conclusive proof that it embodies a forcible exposition of sound and necessary rules affecting covinous transfers, which neither lapse of time nor change in circumstances can supersede. The case attains the same relative prominence as a precedent in the authorities that is accorded to the statute 13 Eliz. c. 5, as a model for modern legislative enactments. It seems indeed strange that so many evidences and badges of fraud, common with us now, should have been concentrated in such an early case, and should have been so swiftly and skilfully detected and labeled. If the facts of this case are not partially fictitious, and there is little reason to credit the intimation that they are, then it follows that the methods and devices of the fraudulent debtor have undergone few alterations since this remarkable decision was promulgated.

[1] In Davis v. Schwartz, 155 U. S. 638, 15 S. C. Rep. 237, Mr. Justice Brown said: "It has been the accepted law ever since Twyne's Case, 3 Coke, 80, that good faith as well as a valuable consideration is necessary to support a conveyance as against creditors. In that case Pierce, being indebted to Twyne in £400, was sued by a third party for £200. Pending such suit he conveyed all his property to Twyne in consideration of his debt, but continued in possession, sold certain sheep and set his mark on others. It was resolved to be a fraudulent gift, though the deed declared that it was made *bona fide*. Most of the cases illustrative of this doctrine, however, have been like that of Twyne, wherein a debtor, knowing that an execution was to be taken out against him, had sold his property to a vendee having knowledge of the facts, for the express purpose of avoiding a levy, or receiving a consideration which could not be reached by execution. In such cases the fact that he receives a good consideration will not validate the transaction, unless at least the creditor has obtained the benefit of the consideration. A like principle applies where a mortgage is given and withheld from record in order to give the mortgagor a fictitious credit. Cadogan v. Kennett, Cowp. 432; Blennerhassett v. Sherman, 105 U. S. 117; Sayre v. Fredericks, 16 N. J. Eq. 205; Sweet v. Wright, 57 Iowa, 514, 10 N. W. Rep. 870; 1 Story's Eq. Juris. § 353; Klein v. Hoffheimer, 132 U. S. 367, 10 S. C. Rep. 130; Holt v. Creamer, 34 N. J. Eq. 181; Clements v. Moore, 6 Wall. 299; Wickham v. Miller, 12 Johns. (N. Y.) 320; Pulliam v. Newberry, 41 Ala. 168; Robinson v. Holt, 39 N. H. 557. In Twyne's Case, the facts that the sale was accompanied by a secret trust in favor of the debtor, and that the vendor remained in possession, showed that it was not intended as a *bona fide* preference to the creditor, but merely as a trick to keep the property away from the other creditors."

CHAPTER II.

PROPERTY SUSCEPTIBLE OF FRAUDULENT ALIENATION. — ASSETS AVAILABLE TO CREDITORS.

§ 23. Interests available — Life insurance.
24. Tangible property and intangible interests.
25. English statutes and authorities.
26. Recovering improvements — Rents and profits.
27. Rule as to crops.
28. Property substituted or mingled.
29. Estates in remainder and reversion.
30. Equitable interests.
31. Equity of redemption.
32. Reservations.
33. Choses in action.
34. Claims for pure torts—Damages.
35. Seats in stock exchanges.
36. Trade-marks.
37. Reacbing book royalties.
38. Patent rights.
§ 39. Powers, when assets for creditors.
40. Statutory change as to powers in New York.
41. Gifts of small value.
42. Debts forgiven or canceled.
43. Enforcing promises of third parties.
44. Tracing the fund.
45. Income of trust estate.
46. Rule as to exempt property.
47. Fraudulent purchases of exempt property.
48. Covinous alienation of exemptions.
49. Conflicting cases.
50. Abandoned exemptions.
50*a*. What cannot be reached.
50*b*. Payments made to a debtor.

§ 23. Interests available — Life insurance. — Having considered the principles of the common law and the early statutes and authorities relating to covinous alienations,[1] and taken a general view of the subject, it becomes necessary next to discuss the various classes of property, and the rights and equitable interests of debtors which may constitute the subject-matter of fraudulent alienations, or which can be reached by creditors' bills or other appropriate remedies, or through the instrumentality of a receiver, liquidator, or assignee. We have already seen that in general one of the requisites of a fraudulent

[1] See §§ 19–22.

transfer which will persuade the courts to interfere is that the property or thing disposed of by the debtor should be of some value, out of which the creditor might have realized the whole or a portion of his claim.[1] Hence, where a debtor canceled upon his books, without consideration, an old account against one who was insolvent, it was declared that the transaction did not amount to a disposition of property with intent to defraud creditors.[2] The foundation of this rule is self-evident. The court will not interest itself in any attempt to extend relief to a creditor unless its process and judgment can be rendered practically effectual, and as a result of its action, a substantial benefit can be conferred upon the creditor. If the property transferred, and sought to be reached and subjected to the process of the court, is not liable to execution,[3] or if the debtor has no beneficial interest in it, the court will not inquire into the modes or motives of its disposition. Such an inquiry would be futile. Hence, it was held in Minnesota, that a conveyance of real estate encumbered for more than its value would not be declared void at the instance of creditors of the grantor, though made with the intent to put the real estate beyond their reach.[4] In Hamburger v. Grant,[5] it appeared that the amount of the indebtedness to the complainant was three dollars and fifty cents. In an action to cancel a fraudulent conveyance, Kelly, J., observed: "The interposition of a court of equity ought not to be asked to set aside a deed on the ground of fraud for such a small sum of money."[6] The value of the assigned property is always

[1] See § 15.

[2] Hoyt v. Godfrey, 88 N. Y. 669.

[3] See § 46.

[4] Aultman & T. Co. v. Pikop, 56 Minn. 531, 58 N. W. Rep. 551; Blake v. Boisjoli, 51 Minn. 296, 53 N. W. Rep. 637.

[5] 8 Oregon, 182.

[6] Compare Ithaca Gas Light Co. v. Treman, 93 N. Y. 660; Chapman v. Banker & Tradesman Pub. Co., 128 Mass. 478; Smith v. Williams, 116 Mass. 510, 513; National Tel. Mfg. Co. v. Du Bois, 165 Mass. 117, 42 N. E. Rep. 510.

important as bearing upon the question of fraud.[1] It is difficult to understand how a transfer of property which is of no value,[2] or in which the creditor has no substantial interest,[3] can be considered as in fraud of creditors.[4] In New York it is provided by statute that insurance may be placed upon a husband's life for the sole benefit of his wife free from creditors where the annual premium

[1] By the former chancery practice in New York if the amount or value in dispute did not exceed $100, the defendant could, under the statute and rule, raise the objection that the sum in controversy was beneath the dignity of the court, and thus secure a dismissal of the bill (see Shepard v. Walker, 7 How. Pr. (N. Y.) 46; Douw v. Shelden, 2 Paige (N. Y.) 323; Smetz v. Williams, 4 Paige (N. Y.) 364; Thomas v. McEwan, 11 Paige (N. Y.) 131), but the statute and practice have since been changed, and equitable actions involving less than $100 will now be entertained in that State. Marsh v. Benson, 34 N. Y. 358; Braman v. Johnson, 26 How. Pr. (N. Y.) 27.

[2] Stacy v. Deshaw, 7 Hun (N. Y.) 451. See § 41.

[3] Youmans v. Boomhower, 3 T. & C. (N. Y.) 21; Hall v. Sands, 52 Me. 359: Spaulding v. Keyes, 5 N. Y. Supp. 227; Pulsifer v. Waterman, 73 Me. 238.

[4] In Garrison v. Monaghan, 33 Pa. St. 234, the court said: "The deeds by which these premises passed to the defendant were clearly fraudulent and void, and the sheriff's sale, therefore, vested the real title to them in the purchaser and his assigns. It is, therefore, his land, and as he takes it freed from all judgments and liens, except the reduced ground-rent of $50, no one claiming under the defendant in the execution can pretend to hold it against him upon the ground that it has or had no value. If I have a title to real or personal property, no person can withhold it from me upon the simple allegation that it is of no value, and then ask to have that question submitted to a jury. The case of Fassit v. Phillips, 4 Whart. (Pa.) 399, which proceeded on this erroneous principle, has been repeatedly overruled, after giving rise to numberless lawsuits." It is apparently regarded as a most dangerous innovation upon the well-settled principle that the owner of real or personal estate, who is entitled to its possession, shall enjoy it himself, and that a stranger will not be heard to assert that the property is worth nothing when called upon to restore it to the true owner. This may seem to conflict with the text. While the argument of the learned court as to the right of an owner to recover his property, even though it is without pecuniary value, is sound, yet, technically speaking, a creditor cannot be regarded as the owner of his debtor's property. Especially in cases where the creditor appeals to the equity side of the court, and seeks a discovery of assets, the machinery of justice ought not to be set in motion to reach property of trivial or nominal value. It is not easy to see how property of this character can be the subject of a fraudulent design. See French v. Holmes, 67 Me. 190; Hopkirk v. Randolph, 2 Brock. 140.

does not exceed a specified amount.[1] Policies of this kind are held, in a general sense, not to be assignable by the wife in the absence of an enabling statute.[2] In a case, however, where a wife assigned such a policy to her children, and her creditors sought to avoid the transfer, it was held that they were not in a position to do so, but the transfer was to be regarded in the light of a disposition of property exempt from execution, concerning which the creditor had no right to complain.[3] A married woman may not, however, claim the benefit of a policy issued for her benefit without her knowledge, without at the same time assuming responsibility for a failure to perform its essential conditions.[4] A married man, we

[1] Laws of New York, 1840, c. 80. See Stokes v. Amerman, 121 N. Y. 337, 24 N. E. Rep. 819, to the effect that a court of equity will protect the right of a creditor to the amount of insurance in excess of what is declared exempt by statute. cf. Merchants' & Miners' Trans. Co. v. Borland, 53 N. J. Eq. 287, 31 Atl. Rep. 272.

[2] Eadie v. Slimmon, 26 N. Y. 9; Brick v. Campbell, 122 N. Y. 344; Miller v. Campbell, 140 N. Y. 457, 35 N. E. Rep. 651; Barry v. Equitable Life Assurance Society, 59 N. Y. 587. In Spencer v. Myers, 150 N. Y. 272, the court say: "The obvious purpose of these statutes was to remove this disability, and it is not contended that the incapacity still exists in general, but only in particular cases."

[3] Smillie v. Quinn, 90 N. Y. 492; cf. Frank v. Mutual Life Ins. Co., 102 N. Y. 266, 275, 6 N. E. Rep. 667. See § 46. Insurance placed upon his life by an insolvent for the benefit of his wife, is not necessarily in fraud of creditors. Thomson v. Cundiff, 11 Bush (Ky.) 567. Compare Nippes' Appeal, 75 Pa. St. 478; Gould v. Emerson, 99 Mass. 154; Durian v. Central Verein, 7 Daly (N. Y.) 171; Leonard v. Clinton, 26 Hun (N. Y.) 290. And in order to maintain an action in behalf of creditors of a deceased person against a life insurance company to recover premiums alleged to have been fraudulently paid by the decedent while insolvent, for the benefit of his family, it must be alleged and proved that the company participated in the fraud. Washington Central Bank v. Hume, 128 U. S. 195, 9 S. C. Rep. 41. An assignment of a policy issued in favor of a wife to an assignee who has no insurable interest in the assured husband, is valid in New York if made with the husband's assent. Fuller v. Kent, 13 App. Div. (N. Y.) 529. See as to various phases. Anderson v. Goldsmidt, 103 N. Y. 617, 9 N. E. Rep. 495; Spencer v. Myers, 150 N. Y. 272; Walsh v. Mutual Life Ins. Co., 133 N. Y. 408.

[4] Schneider v. United States Life, etc., 123 N. Y. 109. See Knapp v. Homœopathic Mutual Life Ins. Co., 117 U. S. 413, 6 S. C. Rep. 807.

may here observe, according to some authorities, has a right to devote a reasonable portion of his earnings to life insurance for the benefit of his family,[1] though the statutes vary and the courts are not entirely in harmony on the subject.[2]

It has been said to be a well-settled rule that a creditor's bill, filed for the purpose of removing a fraudulent obstruction, must show that such removal will enable the judgment to attach upon the property;[3] hence a valid general assignment will supplant a creditor's proceedings to cancel an instrument [4] such as a mortgage[5] if the assignee and not the creditor would be the party benefited by a successful issue in the suit.

§ 24. Tangible property and intangible interests.— What interests then can be reached by creditors? Manifestly all *tangible* property, whether real or personal, which would

[1] Washington Central Bank v. Hume, 128 U. S. 195, 9 S. C. Rep. 41. *Contra*, Friedman v. Fennell, 94 Ala. 270, 10 So. Rep. 649; Merchants & Miners' Trans. Co. v. Borland, 53 N. J. Eq. 287, 31 Atl. Rep. 272. In the latter case the court say: "I am unable to discover any principle or well considered authority upon which such a transaction can be sustained against creditors. To do so would, as it seems to me, be to run counter to principles so well settled and familiar as hardly to require recital. A husband cannot settle money or property in any shape upon his wife while he is indebted. If he attempts it the creditors are entitled to the aid of this court to reach the property so settled, in whatever form it may be found." The notion that creditors could only recover the amount of their premiums (Ætna Nat. Bank v. United States Life Ins. Co., 24 Fed. Rep. 770; Hise v. Hartford Life Ins. Co., 90 Ky. 102; Pence v. Makepeace, 65 Ind. 345), is not accepted by the writer of an article in Vol. 25, Amer. Law Rev. 185, where the subject is reviewed and the decision in Washington Central Bank v. Hume, 128 U. S. 195, is criticized. Examine in this general connection McCutcheon's Appeal, 99 Pa. St. 133; Stokes v. Coffey, 8 Bush (Ky.) 533. In the latter case, the debtor exchanged a policy on his life in his own favor for a similar policy payable to his wife. It was held that this transaction was void as to antecedent creditors.

[2] See Barbour v. Conn. Mutual, 61 Conn. 248; Friedman v. Fennell, 94 Ala. 571, 10 So. Rep. 649.

[3] Spring v. Short, 90 N. Y. 545. See Geery v. Geery, 63 N. Y. 252; Southard v. Benner, 72 N. Y. 424.

[4] Childs v. Kendall, 17 Weekly Dig. (N. Y.) 546.

[5] Spring v. Short, 12 Weekly Dig. (N. Y.) 360; affi'd 90 N. Y. 545. But, see Leonard v. Clinton, 26 Hun (N. Y.) 288.

have been subject to levy and sale under execution, is susceptible of fraudulent alienation, and may be reclaimed and recovered by the creditor where it has been transferred by the debtor with the requisite fraudulent intention. The line is not drawn here, however. The manifest tendency of the authorities is to reclaim every species of the debtor's property, prospective, expectant[1] or contingent, for the creditor. If a conveyance of land is set aside, the products of the land may also be reached.[2] As has been shown, transfers of intangible interests[3] and rights in action, stocks,[4] annuities,[5] life insurance policies,[6] promissory notes,[7] book royalties,[8] patent rights,[9] property of imprisoned felons,[10] legacies,[11] money, bank bills,[12] and choses in action generally,[13] may be reached. It has been observed[14] that the principle toward which the highest

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[1] See Read v. Mosby, 87 Tenn. 759, 11 S. W. Rep. 940.

[2] State v. McBride, 105 Mo. 265, 15 S. W. Rep. 72.

[3] A bare possession or possibility cannot be reached by creditors: Smith v. Kearney, 2 Barb Ch. (N. Y.) 533; Waggoner v. Speck, 3 Ohio, 293; nor can they enforce a moral claim which a debtor may have upon the conscience of an executor. Sparks v. De La Guerra, 18 Cal. 676.

[4] Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450; Weed v. Pierce, 9 Cow. (N. Y.) 723; Edmeston v. Lyde, 1 Paige (N. Y.) 641.

[5] Norcutt v. Dodd, 1 Craig & Ph. 100.

[6] Burton v. Farinholt, 86 N. C. 260; Stokoe v. Cowan, 29 Beav. 637; Jenkyn v. Vaughn, 3 Drew. 419; Anthracite Ins. Co. v. Sears, 109 Mass. 383.

[7] La Crosse Nat. Bank v. Wilson, 74 Wis. 391, 43 N. W. Rep. 153; Bragg v. Gaynor, 85 Wis. 468, 55 N. W. Rep. 919; Johnson v. Alexander, 125 Ind. 575, 25 N. E. Rep. 706.

[8] Lord v. Harte, 118 Mass. 271.

[9] Barnes v. Morgan, 3 Hun (N. Y.) 704.

[10] Matter of Nerac, 35 Cal. 392.

[11] Bigelow v. Ayrault, 46 Barb. (N. Y.) 143.

[12] See Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 451; Spader v. Davis, 5 Johns. Ch. (N. Y.) 280; Hadden v. Spader, 20 Johns. (N. Y.) 554; Shainwald v. Lewis, 6 Fed. Rep. 770.

[13] Drake v. Rice, 130 Mass. 410; Pendleton v. Perkins, 49 Mo. 565; Powell v. Howell, 63 N. C. 283; Edmeston v. Lyde, 1 Paige (N. Y.) 637; Stinson v. Williams, 35 Ga. 170; Rogers v. Jones, 1 Neb. 417; City of Newark v. Funk, 15 Ohio St. 462; Hitt v. Ormsbee, 14 Ill. 233; Tantum v. Green, 21 N. J. Eq. 364. But compare Stewart v. English, 6 Ind. 176; Wallace v. Lawyer, 54 Ind. 501; Grogan v. Cooke, 2 Ball & B. 233; Nantes v. Corrock, 9 Ves. 188.

[14] Essay by John Reynolds, Esq., cited *supra*.

courts in England and in all the States are more or less rapidly working is: "That the entire property of which a debtor is the real or beneficial owner, constitutes a fund which is primarily applicable, to the fullest extent of its entire value, to the payment of its owner's debts. And the courts will not allow any of that value to be withdrawn from such primary application, if they can find any legal or equitable ground on which to prevent such withdrawal."

Creditors should remember that whether an equitable interest in real estate is liable to be appropriated by legal process to the payment of the debts of the beneficiary is to be determined by the local law where the property has its *situs*.[1]

§ 25. **English statutes and authorities.** — Mr. May, an English writer upon this general subject of fraudulent alienations, speaking of the kinds of property or interests which may be reached by creditors, says:[2] "The preamble of the 13 Eliz. c. 5, declares it to be made 'for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts,' etc., 'as well of lands and tenements as of goods and chattels,' made to delay or defraud creditors; and it seems that under this description are included all kinds of property, real and personal, legal and equitable,[3] vested, reversionary,[4] or contingent,[5] which are subject to the payment of debts, or liable to be taken in execution at the time of the fraudulent conveyance.[6] Generally speaking, the same general

[1] Spindle v. Shreve, 111 U. S. 542; Nichols v. Levy, 5 Wall. 433. See Nichols v. Eaton, 91 U. S. 716–729.

[2] May on Fraudulent Conveyances, p. 17.

[3] Ashfield v. Ashfield, 2 Vern. 287.

[4] Ede v. Knowles, 2 Y. & C. N. R. 172.

[5] French v. French, 6 De G. M. & G. 95.

[6] Sims v. Thomas, 12 Adol. & El. 536; Turnley v. Hooper, 2 Jur. (N. S.) 1081.

principle and rule of interpretation may be deduced from the American authorities.[1]

§ 26. **Recovering improvements — Rents and profits.**—An extreme illustration of the disposition of the courts to favor creditors is the familiar and salutary rule that improvements placed by a debtor upon real property of another, acting in concert with him to defraud creditors, can be followed, and the realty charged in favor of creditors of the debtor with the value of such improvements.[2] In Isham v. Shafer,[3] Johnson, J., said: "Where no debt has been created between the parties to the

[1] Mr. May further observes: "By 1 and 2 Vict. c. 110, many kinds of property have been made available to creditors for the payment of debts. So that now copyhold land [1 and 2 Vict. c. 110, s. 11, and see Bott v. Smith, 21 Beav. 511], money and bank notes [ibid. § 12, Barrack v. McCulloch, 3 K. & J. 110; Collingridge v. Paxton, 11 C. B. 683] (whether of the Bank of England or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money [Spirett v. Willows, 11 Jur. (N. S.) 70], and stock and shares in public funds and public companies [1 and 2 Vict. c. 110, §§ 14 and 15; Warden v. Jones, 2 De G. & J. 76; Goldsmith v. Russell, 5 De G. M. & G. 547], are to be considered as 'goods and chattels' within the meaning of this section [13 Eliz. c. 5, § 1]." May on Fraudulent Conveyances, p. 21.

[2] See Rose v. Brown, 11 W. Va. 137; Seasongood v. Ware, 104 Ala. 212; Heck v. Fisher, 78 Ky. 644; Robinson v. Huffman, 15 B. Mon. (Ky.) 82; Athey v. Knotts, 6 B. Mon. (Ky.) 29; Sexton v. Wheaton, 8 Wheat. 229: Kirby v. Bruns, 45 Mo. 234; Lockhard v. Beckley, 10 W. Va. 87; Burt v. Timmons, 29 W. Va. 453, 2 S. E. Rep. 780; Dietz v. Atwood, 19 Brad. (Ill.) 99; Isham v. Schafer, 60 Barb. (N. Y.) 317; but compare Webster v. Hildreth, 33 Vt. 457; Caswell v. Hill, 47 N. H. 407. In Humphrey v. Spencer, 36 W. Va. 11, 18; 14 S. E. Rep. 410, the court say: "That money of a husband diverted from payment of his debts, and expended in permanent improvements on his wife's land, can be followed by his then creditors, whether the act be done with fraudulent purpose or not, I regard settled in this State. Lockhard v. Beckley, 10 W. Va. 87; Rose v. Brown, 11 W. Va. 137; Kanawha Valley Bank v. Wilson, 25 W. Va. 242; Burt v. Timmons, 29 W. Va. 441, 2 S. E. Rep. 780. Mr. Bishop, in his work on Law of Married Women (volume 2. § 472), expresses the opinion that it is only where a fraudulent purpose on the part of the wife is shown that her land can be so charged; but he admits that this opinion does not accord with the weight of authority. This doctrine is opposed in the cases of Webster v. Hildreth, 33 Vt. 457; Corning v. Fowler, 24 Ia. 584; Robinson v. Huffman, 15 B. Mon. (Ky.) 80."

[3] 60 Barb. (N. Y.) 330.

fraudulent transaction, and the personal property of the judgment-debtor has merged in, and become part of the real estate of another in this way, the appropriate, if not the only remedy is to fasten the judgment upon the real estate to the extent of the judgment-debtor's property thus made part of the realty." In a New Hampshire case it was held that a guardian could not purchase property and place it on the land of his ward to the injury of his creditors ;[1] but the property was not attached to the freehold, and the doctrine may well be doubted whether an infant's land can be subjected to the claims of creditors against a debtor who has placed improvements on it.[2] In Lynde v. McGregor,[3] where it appeared that an insolvent husband had made extensive expenditures upon lands belonging to his wife, and had increased the value of the estate, Gray, J., observed: "The amount of such increase in value, for which no consideration has been paid by the wife, and which has been added to her estate by the husband in fraud of his creditors, in equity belongs to them, and may be made a charge upon the land for their benefit." Temporary or perishable improvements,[4] which do not add to the permanent value of the land, cannot ordinarily be reached.

It is certainly reasonable, and it seems to be clear, that rents and profits can be recovered from a fraudulent grantee who holds the property under a secret trust for the debtor.[5] A creditor, by filing a bill after the return of an

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[1] Tenney v. Evans, 14 N. H. 343, 40 Am. Dec. 194.

[2] Mathes v. Dobschuetz, 72 Ill. 438. Compare Washburn v. Sproat, 16 Mass. 449.

[3] 13 Allen (Mass.) 182; Seasongood v. Ware, 104 Ala. 212, 16 So. Rep. 51; Humphrey v. Spencer, 36 W. Va. 11.

[4] See Sedgwick & Wait on Trial of Title to Land, (2d. ed.) § 702; Dick v. Hamilton, 1 Deady, 322.

[5] Marshall v. Croon, 60 Ala. 121. See Kipp v. Hanna, 2 Bland's Ch. (Md.) 26; Robinson v. Stewart, 10 N. Y. 190. Compare Edwards v. Entwisle. 2 Mackey (D. C.) 43; Hadley v. Morrison, 39 Ill. 392; Thompson v. Bickford, 19 Minn. 17; McGahan v. Crawford (S. C.) 25 S. E. Rep. 123.

execution unsatisfied, may also obtain a lien upon the rents and profits of the real estate of his judgment-debtor, which accrued during the fifteen months allowed by law to redeem the premises from a sale by the sheriff on execution, and satisfaction of the judgment may be decreed out of such rents and profits. The chancellor said: "Upon what principles of justice or equity can the debtor claim to retain the whole rents and profits of a large real estate, for the period of fifteen months, when such rents and profits are necessary to pay the debts which he honestly owes to his creditors?"[1] In Loos v. Wilkinson,[2] Earl, J., used these words: "These debtors could no more give away the rents and profits of their real estate than they could give away the real estate itself."[3]

§ 27. **Rule as to crops.**—The same general principle pervades the cases as to growing crops. Thus, in Fury v. Strohecker,[4] it was decided that a judgment-creditor was entitled to resort to crops grown upon the land of his debtor after it had been transferred in fraud of his rights, so far at least as the fraudulent grantor retained an interest in them, by an understanding with the grantee; and where there was reason to suppose such collusion existed all doubts should be solved in the creditor's favor.[5] And in Massachusetts it was decided that if a debtor conveyed land to his wife, with a design to defraud his creditors, and the wife participated in the intent, hay cut on the

[1] Farnham v. Campbell, 10 Paige (N. Y.) 598–601. See Campbell v. Genet, 2 Hilt. (N. Y.) 296; Dow v. Platner, 16 N. Y. 565; Schermerhorn v. Merrill, 1 Barb. (N. Y.) 517; Strong v. Skinner, 4 Barb. (N. Y.) 558.

[2] 110 N. Y. 214, 18 N. E. Rep. 99. second appeal, 113 N. Y. 485, 21 N. E. Rep. 392, involving rules as to an accounting by a fraudulent grantee.

[3] But compare Robinson v. Stewart, 10 N. Y. 189; Collumb v. Read, 24 N. Y. 505.

[4] 44 Mich. 337.

[5] Compare Pierce v. Hill, 35 Mich. 201; Peters v. Light, 76 Pa. St. 289; Jones v. Bryant, 13 N. H. 53; Garbutt v. Smith, 40 Barb. (N. Y.) 22.

land was liable to be taken on execution to satisfy the claim of a creditor of the husband, upon a debt contracted subsequent to the conveyance.[1] Even if the land itself is exempt, the crops growing thereon, if subject to levy, can be reached in the hands of a fraudulent grantee.[2] The rule here laid down applies also to the product of mineral lands.[3]

§ 28. **Property substituted or mingled.**— Property cannot be placed beyond the reach of creditors by a change in its form or character. It may be traced and identified. In McClosky v. Stewart,[4] the creditor sought to reach certain machinery, tools, etc., constituting the "plant" of a business fraudulently transferred, and the defendant attempted to limit the recovery to such property as was in existence at the time of the transfer. The court declined to apply this rule to the new tools and machinery which had been purchased for the purpose of supplying the waste incident to ordinary wear and tear. The parties in possession having had the benefit of the machinery and tools, and having partially worn them out in the business, might be said to have had the benefit of the waste, and there was no reason in law or in equity why the repairs and new tools, which were rendered necessary to supply such waste, should not follow the property itself.[5]

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[1] Dodd v. Adams. 125 Mass. 398. A mortgage of crops by which an interest is reserved to the mortgagor is void. Merchant's & M. Sav. Bank v. Lovejoy, 84 Wis. 601, 55 N. W. Rep. 108.

[2] Erickson v. Paterson, 47 Minn. 525, 50 N. W. Rep. 699.

[3] State v. McBride, 105 Mo. 265, 15 S. W. Rep. 72.

[4] 63 How. Pr. (N. Y.) 142. See Lehman v. Kelly, 68 Ala. 192.

[5] It was further decided in this same case that where a fraudulent transferee mingled his own property with that which he had fraudulently received, he would not be allowed to claim that the property so mingled should subsequently be assorted and set aside for the payment of the creditors. The inference seems to be that he would lose it all. If the property could be readily identified and separated, it is difficult to see why this harsh rule should be applied. Compare Hooley v. Gieve, affirmed 82 N.

§ 29. **Estates in remainder and reversion.**— A vested remainder in fee is liable for debts in the same way as an estate vested in possession. Though the time of possession is dependent upon the termination of a life estate, this only lessens its value for the time being. The liability of the estate to creditors is not in the least affected. In Nichols v. Levy,[1] Swayne, J., delivering the opinion of the United States Supreme Court, said: "It is a settled rule of law that the beneficial interests of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent, that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go."[2] In French v. French,[3] it was held that a contingent reversionary interest is within the statute.[4] An assignment without consideration of an estate in expectancy by an insolvent heir apparent has been held to be fraudulent.[5] The husband's half or portion in an estate in entirety can be reached by his creditors.[6]

Y. 625, on opinions in New York Common Pleas; s. c., 9 Abb. N. C. (N. Y.) 8, 41, and note of the editor; Dow v. Berry, 17 Fed. Rep. 121; Smith v. Sanborn, 6 Gray (Mass.) 134; The "Idaho," 93 U. S. 575.

[1] 5 Wall. 433.

[2] Citing Graves v. Dolphin, 1 Simon, 66; Mebane v. Mebane, 4 Ired. Eq. (N. C.) 131; Bank v. Forney, 2 Ired. Eq. (N. C.) 181-184; Snowdon v. Dales, 6 Simon, 524; Foley v. Burnell, 1 Bro. C. C. 274; Brandon v. Robinson, 18 Ves. 429; Piercy v. Roberts, 1 Mylne & K. 4; Dick v. Pitchford, 1 Dev. & Bat. (N. C.) Eq. 484.

[3] 6 De G. M. & G. 95. See Neale v. Day, 28 L. J. Ch. 45.

[4] A contingent remainder is not subject to execution. Jackson v. Middleton, 52 Barb. (N. Y.) 9; Watson v. Dodd, 68 N. C. 528.

[5] Read v. Mosby, 87 Tenn. 759, 11 S. W. Rep. 940.

[6] Newlove v. Callaghan, 86 Mich. 297, 48 N. W. Rep. 1096.

§ 30 Equitable interests.— Equitable interests constitute a frequent subject-matter of creditors' suits. In Sanford v. Lackland,[1] the learned Dillon, J., held that if property was given to trustees to hold for A. until he reached the age of twenty-six years, when it was to be paid over to him, and A. became bankrupt before he arrived at twenty-six, his assignee in bankruptcy was entitled to the property. Chief-Justice Gray, in Sparhawk v. Cloon,[2] says, that "the equitable estate for life is alienable by and liable in equity to the debts of the *cestui que trust*, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser, or limitation of the estate itself, can protect it from his debts."[3] We shall presently consider the cases, which must be distinguished from the ones just cited, in which it is held that the founder of a trust may secure the enjoyment of it to other persons, the objects of his bounty, by providing that it shall not be alienable by them, or be subject to be taken by their creditors, and that his intentions in this regard will, in certain cases, be respected by the courts.[4]

A creditor's bill, through the instrumentality of a receiver, will reach the interest of the debtor in his deceased

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[1] 2 Dillon, 6.

[2] 125 Mass. 266.

[3] See Brandon v. Robinson, 18 Ves. 429, 1 Rose, 197; Rochford v. Hackman, 9 Hare, 475; 2 Spence's Eq. Jur. 89, and cases cited; Tillinghast v. Bradford, 5 R. I. 205; Mebane v. Mebane, 4 Ired. Eq. (N. C.) 131; Heath v. Bishop, 4 Rich. Eq. (S. C.) 46; Smith v. Moore, 37 Ala. 327; McIlvaine v. Smith, 42 Mo. 45; Sanford v. Lackland, 2 Dillon, 6; Walworth, C., in Hallett v. Thompson, 5 Paige (N. Y.) 583, 585; Comstock, J., in Bramhall v. Ferris, 14 N. Y. 41, 44; Swayne, J., in Nichols v. Levy, 5 Wall. 433, 441; Fox v. Peck, 151 Ill. 226, 37 N. E. Rep. 873. Compare Potter v. Couch, 141 U. S. 296, 11 S. C. Rep. 1005.

[4] See Sparhawk v. Cloon, 125 Mass. 266; White v. White, 30 Vt. 338, 344; Arnwine v. Carroll, 8 N. J. Eq. 620, 625; Holdship v. Patterson, 7 Watts. (Pa.) 547; Brown v. Williamson, 36 Pa. St. 338; Rife v. Geyer, 95 Pa. St. 393; Nichols v. Eaton, 91 U. S. 716, 727–729; Hyde v. Woods, 94 U. S. 523, 526; Broadway Nat. Bank v. Adams, 133 Mass. 171; Spindle v. Shreve, 9 Biss. 199, 4 Fed. Rep. 136. See §§ 39, 40.

father's estate;[1] so an inchoate interest such as a tenancy, by the courtesy,[2] and a widow's dower,[3] may be reached by the aid of a court of equity.

§ 31. **Equity of Redemption.** — In a controversy which arose in Alabama,[4] it was said that, aside from constitutional and statutory exemptions, a debtor could not own any property or interest in property which could not be reached and subjected to the payment of his debts, and that an equity of redemption was property, and was a valuable right, capable of being subjected to the payment of debts, in courts of law and in equity; and hence a transaction by which an embarrassed debtor concealed the existence of such an interest from his creditors must necessarily hinder and delay them.[5]

§ 32. **Reservations.** — Debtors often make reservations in conveyances for their own benefit, but such subterfuges are idle so far as subserving the debtors' personal interest is concerned.[6] In Crouse v. Frothingham,[7] the debtor reserved the right to use and occupy a part of the premises conveyed for three years without rent, and it was shown that such use and occupation were worth $750. The court held that if the reservation was effectual to vest in the debtor a legal interest in the premises to the extent stated, his judgment-creditors could reach it. And if the debtor merely had a parol lease for three years, which was void by the statute of frauds, the consideration being fully paid, equity would decree a specific performance of it, and

[1] McArthur v. Hoysradt, 11 Paige (N. Y.) 495.

[2] Ellsworth v. Cook, 8 Paige (N. Y.) 643; Beamish v. Hoyt, 2 Robt. (N. Y.) 307.

[3] Tompkins v. Fonda, 4 Paige (N. Y.) 447; Payne v. Becker, 87 N. Y. 157.

[4] Sims v. Gaines, 64 Ala. 393.

[5] See Chautauque County Bank v. Risley, 19 N. Y. 369; Campbell v. Fish, 8 Daly (N. Y.) 162.

[6] Young v. Heermans, 66 N. Y. 382, and cases cited; Todd v. Monell, 19 Hun (N. Y.) 362.

[7] 27 Hun (N. Y.) 125; reversed, 97 N. Y. 105. See Elias v. Farley, 2 Abb. Ct. App. Dec. (N. Y.) 11.

thus the debtor would have an equitable interest of some value which the creditors might reach. The court of last resort, however, reversed the decision on the insufficiency of the evidence.[1]

§ 33. **Choses in action.**— While the books and cases are full of general expressions to the effect that intangible interests fraudulently alienated by the debtor may be reclaimed by the creditor, yet the rule that choses in action can be reached by creditors and subjected to the payment of debts, has not been established without a struggle, and is not even now universal in its operation.[2] When we consider that vast fortunes may be concentrated in this species of property, it manifestly becomes of paramount importance to a creditor to know whether his process will cover it. Cases can be found holding that even equity is ordinarily powerless to require the debtor to apply choses in action in liquidation of debts,[3] but it seems to us that the better authority by far is to the effect that such interests can be reached by creditors,[4] and many cases, more or less founded upon statutory provisions, upholding the creditors' right to reach this class of assets might be cited.[5] Thus creditors may reach the

[1] Crouse v. Frothingham, 97 N. Y. 105.

[2] See § 17; Greene v. Keene, 14 R. I. 388; Clapp v. Smith, 16 R. I. 717, 19 Atl. Rep. 330.

[3] Grogan v. Cooke, 2 Ball. & B. 233; Nantes v. Currock, 9 Ves. 188; Rider v. Kidder, 10 Ves. 368; McCarthy v. Goold, 1 Ball. & B. 387; Dundas v. Dutens, 1 Ves. Jr. 196; McFerran v. Jones, 2 Litt. (Ky.) 219; Green v. Tantum, 19 N. J. Eq. 105; Wallace v. Lawyer, 54 Ind. 501; Stewart v. English, 6 Ind. 176; Watkins v. Dorsett, 1 Bland's Ch. (Md.) 533. See Greene v. Keene, 14 R. I. 388.

[4] Drake v. Rice, 130 Mass. 410; Bragg v. Gaynor, 85 Wis. 468; 55 N. W. Rep. 919, case citing the text; Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450; Powell v. Howell, 63 N. C. 283; Abbott v. Tenney, 18 N. H. 109; Sargent v. Salmond, 27 Me. 539; Stinson v. Williams, 35 Ga. 170; Rogers v. Jones, 1 Neb. 417; Pendleton v. Perkins, 49 Mo. 565; Edmeston v. Lyde, 1 Paige (N. Y.) 637; Hadden v. Spader, 20 Johns. (N. Y.) 554; Ætna Nat. Bank v. Manhattan Life Ins Co., 24 Fed. Rep. 769.

[5] City of Newark v. Funk, 15 Ohio St. 462; Bryans v. Taylor, Wright (Ohio) 245; Davis v. Sharron, 15 B.

proceeds of a fraudulently transferred insurance policy.[1] The principle running through these cases is highly important, for under it the creditor may impound money of the debtor in the hands of a sheriff,[2] money earned but not yet due,[3] money due to heirs or distributees in the hands of personal representatives,[4] and dower before admeasurement.[5] And creditors of a corporation may sustain a bill to compel stockholders to pay their subscriptions.[6]

§ 34. **Claims for pure torts — Damages.** — The mere right of action of a judgment-debtor for a personal tort, as for assault and battery, slander, or malicious prosecution, cannot, in the nature of things, be reached by a complainant in a judgment-creditor's action.[7] Nor will a claim of this kind pass to a receiver under the usual assignment by the defendant in such a suit.[8] This rule proceeds upon the theory that such claims or rights of action are non-assignable. It must be remembered in this connection, however, that, in the case of a tort, causing an injury to the

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Mon. (Ky.) 64; Hitt v. Ormsbee, 14 Ill. 233; Burnes v. Cade, 10 Bush. (Ky.) 251; Tantum v. Green, 21 N. J. Eq. 364. "The words 'chose in action' might be broad enough to include even actions for damages in torts, were it not that they probably have never been regarded strictly as property; nor as assignable." Ten-Broeck v. Sloo, 13 How. Pr. (N. Y.) 30. See Hudson v. Prets, 11 Paige (N. Y.) 180. See § 34.

[1] Ætna Nat. Bank v. Manhattan Life Ins. Co., 24 Fed. Rep. 769.

[2] Brennan v. Burke, 6 Rich. Eq. (S. C.) 200.

[3] Thompson v. Nixon, 3 Edw. Ch. (N. Y.) 457. See Browning v. Bettis, 8 Paige (N. Y.) 568.

[4] Moores v. White, 3 Gratt. (Va.) 139; Caldwell v. Montgomery, 8 Ga. 106; Ryan v. Jones, 15 Ill. 1; Sayre v. Flournoy, 3 Ga. 541.

[5] Stewart v. McMartin, 5 Barb. (N. Y.) 438; Tompkins v. Fonda, 4 Paige (N. Y.) 448. See note to Donovan v. Finn, 14 Am. Dec. 542.

[6] Miers v. Zanesville & M. Turnp. Co., 11 Ohio 273, 13 Ohio, 197; Henry v. Vermilion R. R. Co., 17 Ohio 187; Hatch v. Dana, 101 U. S. 205; Ogilvie v. Knox Ins. Co., 22 How. 380; Pierce v. Milwaukee Construction Co., 38 Wis. 253. See Marsh v. Burroughs, 1 Woods, 467.

[7] Hudson v. Plets, 11 Paige (N. Y.) 183; Ten Broeck v. Sloo, 13 How. Pr. (N. Y.) 30. See Garretson v. Kane, 27 N. J. Law, 211.

[8] Benson v. Flower, Sir W. Jones' Rep. 215; Hudson v. Plets, 11 Paige (N. Y.) 183.

property of the judgment-debtor, accruing before the filing of the creditor's bill, by means of which injury certain property to which the creditor was entitled to resort for the payment of his debts has been disminished in value or destroyed, the right of action appears to be such an interest as may properly be reached and applied to the payment of the complainant's claim.[1]

§ 35. **Seats in stock exchanges.**— Counsel have contended in many cases that a membership of a stock exchange was a mere personal privilege or license, and was not property or a right to property which the creditors of the member could reach. Probably the enormous pecuniary value which not infrequently attaches to such a membership has inspired the courts to consider this so-called privilege as a species of property, the value of which the debtor should not be allowed to withhold from his creditors. It may be said to differ from the membership of a social club in that the latter has no general value or marketable quality, there being usually no provision for its transfer, and nothing remaining after the member's death. Stock exchange memberships, on the other hand, being held for purposes of pecuniary gain, may, ordinarily, be bought and sold subject to the regulations of the association, and, after the owner's death, may be disposed of and the proceeds distributed. For these reasons such interests are held to be assets,[2] and, in a certain sense, prop-

[1] Hudson v. Plets, 11 Paige (N. Y.) 184. See Ten Broeck v. Sloo, 13 How. Pr. (N. Y.) 30.

[2] See Grocers' Bank v. Murphy, 60 How. Pr. (N. Y.) 426; Matter of Ketchum, 1 Fed. Rep. 840: Ritterband v. Baggett, 42 Superior Ct. (N. Y.) 556; Colby v. Peabody, 52 N. Y. Superior, 394; Platt v. Jones, 96 N. Y. 29; Smith v. Barclay, 14 Chicago Leg. News, 222; and compare *Ex parte* Grant, 42 L. T. (N. S.) 387, 22 Alb. L. J. 70. *In re* Gallagher, 19 N. B. R. 224, it was decided that a license or permit to occupy certain stalls in Washington Market, New York City, was property that passed to an assignee. But *In re* Sutherland, 6 Bissell, 526, on the contrary, maintains that a right of membership of a board of trade does not become vested in an assignee. Compare Barry v. Ken-

erty.[1] In Hyde v. Wood,[2] such a membership is characterized as an incorporeal right which, upon the bankruptcy of the member, passed, subject to the rules of the stock board, to an assignee. It is said, however, not to be a matter of absolute purchase or sale, but is to be taken with the incumbrances and conditions which its creators imposed upon it. Hence, a provision that debts due other members shall be first paid is valid and must be carried out. In Powell v. Waldron,[3] Finch, J., one of the most facile judicial writers, declared: "Although of a character somewhat peculiar, its use restricted, its range of purchasers narrow, and its ownership clogged with conditions, it was nevertheless a valuable right, capable of transfer and correctly decided to be property. It was something more than a mere personal license or privilege, for it could pass from one to another of a certain class of persons and belong as fully to the assignee as it did to the assignor. That characteristic gave it not only value which might attach to a bare personal privilege, but market-value which usually belongs only to things which are the subjects of sale. However it differed from the incorporeal rights earlier recognized and described, it possessed the same essential characteristics. It could be transferred from hand to hand and all the time keep its inherent

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nedy, 11 Abb. Pr. N. S. (N. Y.) 421. It seems clear that the seat or license is not liable to legal proceedings on *fieri facias* or execution; Eliot v. Merchants' Exchange of St. Louis, 28 Alb. L. J. 512. In Thompson v. Adams, 93 Pa. St. 55, 66, in a *per curiam* opinion in which the learned Justice Sharswood participated, it is said: "The seat is not property in the eye of the law; it could not be seized in execution for the debts of the members." Again, it is observed in Pancoast v. Gowen, 93 Pa. St. 71: "A seat in the board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately a license to buy and sell at the meetings of the board. It certainly could not be levied on and sold under a *fi. fa.*" There is a tendency in these cases that is to be regretted.

[1] Platt v. Jones, 96 N. Y. 29.

[2] 94 U. S. 524. See Sparhawk v. Yerkes, 142 U. S. 12, 12 S. C. Rep. 104.

[3] 89 N. Y. 331. See Platt v. Jones, 96 N. Y. 29, and cases cited.

value, and be as freely and fully enjoyed by the permitted purchaser as by the original owner. We should make of it an anomaly, difficult to deal with and to understand, if we fail to treat it as property. The authorities which determine it to be such seem to us better reasoned and more wisely considered than those which deny to it that character, although the subject of ownership, of use, and of sale." The cases upon this subject are fully reviewed by the St. Louis Court of Appeals, in Eliot v. Merchants' Exchange of St. Louis,[1] and the court in conclusion say: "There can be no doubt that the weight of authority is, that the seat of a member in a stock board or merchants' exchange is a species of property not subject to ordinary execution, but which may be reached by equity processes in such a way as to respect the rules of the exchange and the rights of all parties interested, and at the same time, by proceedings in aid of the execution, to compel an insolvent member to transfer his seat under the rules of the board, and apply the proceeds to the satisfaction of the debts of his judgment-creditor."[2]

§ 36. **Trade-marks.**— It seems to be regarded as settled law that the right to use a trade-mark, in connection with the business in which it has been used, is property which will be protected by the courts, and which may be sold and transferred.[3] In Sohier v. Johnson,[4] the right to use a trade-mark was recognized as property which would

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[1] 28 Alb. L. J. 512.

[2] In Sparhawk v. Yerkes, 142 U. S. 12, 12 S. C. Rep. 104, Chief Justice Fuller, writes concerning membership seats: "While the property is peculiar and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors. Ager v. Murray, 105 U. S. 126; Stephens v. Cady, 14 How. 528; Powell v. Waldron, 89 N. Y. 328; Belton v. Hatch, 109 N. Y. 593, 17 N. E. Rep. 225; Habenicht v. Lissak, 78 Cal. 351, 20 Pac. Rep. 874; Weaver v. Fisher, 110 Ill. 146."

[3] Warren v. Warren Thread Co., 28 Alb. L. J. 278, 134 Mass. 247; Emerson v. Badger, 101 Mass. 82; Gilman v. Hunnewell, 122 Mass. 139.

[4] 111 Mass. 238.

pass to an assignee, as an incident under a transfer of the business and good-will.[1] The fact that the trade-mark bears the owner's name and portrait does not render it unassignable.[2] The same general principle may be found in the English law, and it has been held that under the bankrupt law a trade-mark passes to the assignee of the owner.[3] It may be doubted whether mere personal trade-marks, the use of which, by any person other than the originator, would operate as a fraud upon the public, are subject to this rule. Where, however, the trade-marks are mere signs or symbols designating the place or the establishment at which the goods are manufactured, and not implying any peculiar skill in the originator as the manufacturer, or importing necessarily that the goods are manufactured by him, they constitute property and pass to an insolvent assignee.[4]

§ 37 **Reaching book royalties.**— An instructive case, illustrative of the nature of creditors' remedies, is Lord v. Harte.[5] The plaintiff was a judgment-creditor of Bret

[1] Kidd v. Johnson, 100 U. S. 617; Trade-mark Cases, 100 U. S. 82; Warren v. Warren Thread Co., 28 Alb. L. J. 278.

[2] Richmond Nervine Co. v. Richmond, 159 U. S. 293, 16 S. C. Rep. 30; Fish Bros. Wagon Co. v. La Belle Wagon Works 82 Wis. 546, 52 N. W. Rep. 595; Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 S. C. Rep. 625.

[3] Leather Cloth Co. v. American Cloth Co., 11 H. L. Cas. 523; Motley v. Downman, 3 Myl. & Cr. 1; Hudson v. Osborne, 39 L. J. Ch. 79.

[4] Warren v. Warren Thread Co., 134 Mass. 247. See Covell v. Chadwick, 153 Mass. 267; Prince's Metallic Paint Co. v. Prince Mfg. Co., 57 Fed. Rep. 942. In Kidd v. Johnson. 100 U. S. 617, the court said: "When the trade-mark is affixed to articles manufactured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer." See Trade-Mark Cases, 100 U. S. 82; Royal Baking Powder Co. v. Sherrell, 93 N. Y. 334; Richmond Nervine Co. v. Richmond, 159 U. S. 293, 16 S. C. Rep. 30.

[5] 118 Mass. 271.

Harte, the well-known writer of prose and poetry, and the bill in question was filed, under the General Statutes of Massachusetts,[1] against Harte and his publishers, to reach moneys due or that might thereafter accrue to him for royalties upon books sold by the publishers. Devens, J., after observing that the defendant Harte had a valuable interest under an existing contract which could not be attached, said: "Any remedy which the plaintiffs may have by the trustee process, and no other is suggested, is uncertain, doubtful and inadequate, and there is, therefore, presented a case for relief by this bill."[2]

§ 38 Patent rights.— The monopoly which a patent confers is considered as property;[3] the interest of the patentee may be assigned by operation of law in case of bankruptcy of the patentee,[4] and it may be subjected by a bill in equity to the payment of his judgment debts,[5]

[1] Gen. Sts. c. 113, § 2.

[2] See Stephens v. Cady, 14 How. 531.

[3] Gayler v. Wilder, 10 How. 477, per Taney, Chief-Justice; Ager v. Murray, 105 U. S. 126; Barnes v. Morgan, 3 Hun (N. Y.) 704. See Railroad Co. v. Trimble, 10 Wall. 367.

[4] Hesse v. Stevenson, 3 Bos. & P. 565; Bloxam v. Elsee, 1 Car. & P. 558; 6 Barn. & C. 169; Mawman v. Tegg, 2 Russ, 385; Edelsten v. Vick, 11 Hare, 78; Campbell v. City of Haverhill, 155 U. S. 619, 15 S. C. Rep. 217, and cases cited; Barton v. White, 144 Mass. 281, 10 N. E. Rep. 840. In the latter case the court say (p. 283): "In Stearns v. Harris, 8 Allen (Mass.), 597, it was said that 'the words of the insolvent law, describing and enumerating the property and rights of property which pass by the assignment, are large and comprehensive, and have always been liberally construed by the court, so as to include every valuable right in property, real or personal, not clearly excepted, whether legal or equitable, absolute or conditional, which could have been enforced by the debtor in any kind of judicial process.' The defendants further contend, though without laying very much stress upon this ground of argument, that the state has not the power to enact a statute which has the effect to pass a title to letters-patent of the United States; but we have no doubt upon this point." But, compare Ashcroft v. Walworth, 1 Holmes, 152; Gordon v. Anthony, 16 Blatchf. 234; Carver v. Peck, 131 Mass. 291; Cooper v. Gunn, 4 B. Mon. (Ky.) 594. See Ager v. Murray, 105 U. S. 126.

[5] Ager v. Murray, 105 U. S. 126; Campbell v. City of Haverhill, 155 U. S. 619, 15 S. C. Rep. 217; Barton v. White, 144 Mass. 281, 10 N. E. Rep. 840; Gillette v. Bate, 10 Abb. N. C. (N. Y.) 38; Gorrell v. Dickson, 26 Fed. Rep. 454. But see Greene v. Keene, 14 R. I. 388.

and may be taken by a receiver,[1] or assignee in insolvency.[2] Lord Alvaney, referring to the proposition that an invention was an idea or scheme in a man's head, which could not be reached by process of law, said: "But if an inventor avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry."[3] And in Stephens v. Cady,[4] Justice Nelson said in relation to the incorporeal right secured by the statute to an author to multiply copies of a map by the use of a plate, that, though from its intangible character it was not the subject of seizure or sale at common law, it could be reached by a creditor's bill and applied to the payment of the author's debts.[5] If the courts should declare patent rights exempt from appropriation, it would, as suggested in Sawin v. Guild,[6] be practicable for a debtor to lock up his whole property, however ample, from the grasp of his creditors, by investing it in profitable patent rights, and thus to defeat the administration of justice.[7] We find the statement, advanced, however, that it is the patent only which gives the exclusive property, and while the right is inchoate it is at least doubtful whether it has the characteristics of property, such as to justify a compulsory transfer by the debtor.[8]

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[1] *In re* Keach, 14 R. I. 571.

[2] Barton v. White, 144 Mass. 281, 10 N. E. Rep. 840; Campbell v. City of Haverhill, 155 U. S. 619, 15 S. C. Rep. 217.

[3] Hesse v. Stevenson, 3 Boss. & P. 565.

[4] 14 How. 531; Sparhawk v. Yerkes, 142 U. S. 12, 12 S. C. Rep. 104.

[5] See Hadden v. Spader, 20 Johns. (N. Y.) 554; Gillette v. Bate, 86 N. Y. 87; Pacific Bank v. Robinson, 57 Cal. 520; Stevens v. Gladding, 17 How. 447; Massie v. Watts, 6 Cranch, 148; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494.

[6] 1 Gall. 485.

[7] See Barnes v. Morgan, 3 Hun (N. Y.) 704; Campbell v. City of Haverhill, 155 U. S. 619, 15 S. C. Rep. 217.

[8] Gillette v. Bate, 86 N. Y. 94; Hesse v. Stevenson, 3 Bos. & P. 565. Compare Ashcroft v. Walworth, 1 Holmes, 152; Campbell v. James, 18

§ 39. **Powers, when assets for creditors.**— Chief-Justice Gray, in delivering the opinion of the Supreme Judicial Court of Massachusetts,[1] said: "It was settled in the English Court of Chancery, before the middle of the last century, that where a person has a general power of appointment, either by deed or by will, and executes this power, the property appointed is deemed in equity part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees.[2] The rule perhaps had its origin in a decree of Lord Somers, affirmed by the House of Lords, in a case in which the person executing the power had in effect reserved the power to himself in granting away the estate.[3] But Lord Hardwicke repeatedly applied it to cases of the execution of a general power of appointment by will of property of which the donee had never had any ownership or control during his life; and, while recognizing the logical difficulty that the power, when executed, took effect as an appointment, not of the testator's own assets, but of the estate of the donor of the power, said that the previous cases before Lord Talbot and himself (of which very meagre and imperfect reports have come down to us) had established the doctrine, that when there was a general power of appointment, which it was absolutely in the donee's pleasure to execute or not, he might do it for any purpose whatever, and might appoint the money to be paid to his executors if he pleased, and, if he executed it voluntarily and without consideration for

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Blatchf. 92; Prime v. Brandon Mfg. Co., 16 Blatch, 453; Clan Ranald v. Wyckoff, 41 N. Y. Superior, 530; Potter v. Holland, 4 Blatchf. 206; Barnes v. Morgan, 3 Hun, (N. Y.) 703.

[1] Clapp v. Ingraham, 126 Mass. 200; Olney v. Balch, 154 Mass. 318, 28 N. E. Rep. 258: Brandies v. Cochrane, 112 U. S. 352.

[2] See Olney v. Balch, 154 Mass. 318, 28 N. E. Rep. 258. Compare O'Donnell v. Barbey, 129 Mass. 453; Wales v. Bowdish, 61 Vt. 23, 11 Atl. Rep. 1000.

[3] Thompson v. Towne, Prec. Ch. 52, 2 Vern. 319.

the benefit of third persons, the money should be considered part of his assets, and his creditors should have the benefit of it.[1] The doctrine has been upheld to the full extent in England ever since.[2] Although the soundness of the reasons on which the doctrine rests has been impugned by Chief-Justice Gibson *arguendo*, and doubted by Mr. Justice Story in his Commentaries, the doctrine is stated both by Judge Story and Chancellor Kent as well settled; and it has been affirmed by the highest court of New Hampshire, in a very able judgment, delivered by Chief-Justice Parker, and applied to a case in which a testator devised property in trust to pay such part of the income as the trustees should think proper to his son for life; and after the son's death, to make over the principal with any accumulated income, to such persons as the son should by will direct.[3] A doctrine so just and equitable in its operation, clearly established by the laws of England before our Revolution, and supported by such a weight of authority, cannot be set aside by a court of chancery because of doubts of the technical soundness of the reasons on which it was originally established." Cases establishing this general rule are numerous.[4] The *jus disponendi* is to be considered as

[1] Townshend v. Wildham, 2 Ves. Sen. 1, 9, 10; *Ex parte* Caswell, 1 Atk. 559, 560; Bainton v. Ward, 7 Ves. 503, note; cited 2 Ves. Sen. 2, and Belt's Suppl't, 243; 2 Atk. 172; Pack v. Bathurst, 3 Atk. 269.

[2] Chance on Powers, c. 15, § 2; 2 Sugden on Powers (7th ed.) 27; Fleming v. Buchanan, 3 De G. M. & G. 976.

[3] Commonwealth v. Duffield, 12 Penn. St. 277, 279-281; Story's Eq. Jur. § 176, and note; 4 Kent's Com. 339, 340; Johnson v. Cushing, 15 N. H. 298.

[4] Smith v. Garey, 2 Dev. & Bat. Eq. (N. C.) 49; Mackason's Appeal, 42 Pa. St. 338; Tallmadge v. Sill, 21 Barb. (N. Y.) 51 (but compare Cutting v. Cutting, 86 N. Y. 522); 2 Chance on Powers, § 1817; Whittington v. Jennings, 6 Simons, 493; Lassells v. Cornwallis, 2 Vern. 465; Bainton v. Ward, 2 Atk. 172; Cack v. Bathurst, 3 Atk. 269; Troughton v. Troughton, 3 Atk. 656; Townshend v. Windbam, 2 Ves. Sen. 1; Jenny v. Andrews, 6 Madd. 264; Ashfield v. Ashfield, 2 Vern. 287; Cutting v. Cutting, 20 Hun (N. Y.) 366; reversed, in part, in 86 N. Y. 522; George v. Milbanke, 9 Ves. Jr. 196; Flemming v.

the property itself,[1] and the general power of disposition is in effect property.[2] In Williams v. Lomas,[3] the court said: "Jenney v. Andrews,[4] which has been followed by other authorities,[5] decides this: that where a person having a general power of appointment by will makes an appointment, the appointee is a trustee for the creditors. and the appointed fund is applicable to the payment of the debts of the donee of the power." And it has been observed that there is no reason in the nature of things why a gift or bequest of personal property, with a power of disposition, should not be measured by the same rule as a grant or devise of real estate with the same power.[6]

Buchanan, 3 De G., M. & G. 976; Palmer v. Whitmore, 2 Cr. & M. [in note] 131; Nail v. Punter, 5 Sim. 555. As to creditor's right to enforce the execution of a power, examine Rogers v. Ludlow, 3 Sand. Ch. (N. Y.) 104, 108; Kinnan v. Guernsey, 64 How. Pr. (N. Y.) 253. In Brandies v. Cochrane, 112 U. S. 352, the court say: "It is indeed a rule well established in England, and recognized in this country, that where a person has a general power of appointment, either by deed or by will, and executes this power, the property appointed is deemed, in equity, part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees."

[1] Holmes v. Coghill, 12 Ves. 206. See Platt v. Routh, 3 Beav. 257.

[2] Bainton v. Ward, 2 Atk. 172. See Adams on Equity, 99, note 1. *In re* Harvey's Estate, L. R. 13 Ch. Div. 216; Crooke v. County of Kings, 97 N. Y. 457. Mr. May says: "The exercise of a general power of appointment, either of land (Townshend v. Windham, 2 Ves. Sr. 1), or a sum of money (Pack v. Bathurst, 3 Atk. 269), may be fraudulent and void under the statute, but where a man has only a limited or exclusive power of appointment of course it is different. He never had any interest in the property himself which could have been available to a creditor, or by which he could have obtained credit." May on Fraud. Conv. p. 29. See Sim's v. Thomas, 12 Ad. &. E. 536; Hockley v. Mawbey, 1 Ves. Jr. 143, 150.

[3] 16 Beav. 3.

[4] 6 Madd. 264.

[5] 2 Sugden on Powers (6th ed.) 29; 1 Sugden on Powers (6th ed.) 123.

[6] Cutting v. Cutting, 86 N. Y. 547; Hutton v. Benkard, 92 N. Y. 295. The reservation of a power of revocation or appointment to other uses does not affect the validity of a conveyance until the power is exercised, nor does it tend to create an imputation of bad faith on the transaction. See Huguenin v. Baseley, 14 Ves. 273; Coutts v. Acworth, L. R. 8 Eq. 558; Wallaston v. Tribe, L. R. 9 Eq. 44; Everitt v Everitt, L. R. 10 Eq. 405; Hall v. Hall, L. R. 14 Eq. 365; Phillips v. Mullings, L. R. 7 Ch. App. 244; Hall v. Hall, L. R. 8 Ch. App. 430; Toker v. Toker, 3 De

§ 40. **Statutory change as to powers in New York.** — The principle which we have been considering did not meet the entire favor of the revisers of the statutes of New York, and the rule just laid down seems to have been practically overturned by statute in that State.[1] The facts in Cutting v. Cutting, a case in which the statutes relating to the abolition of powers in New York were construed, were as follows: C. gave real and personal estate to her executor to collect the income during the life of her son and apply it to his use, and after his death to transfer the estate to the person the son might designate by will. The son having made the appointment, it was held that the estate was not chargeable after the son's death with a judgment obtained against him in his lifetime. It will be apparent at a glance that the result of the legislation in New York as interpreted in this case, constitutes an important innovation upon what was a settled principle of equity, and places beyond the reach of creditors property which equity considered should be subject to their remedies.[2] A policy which enables debtors to contract obligations, and defeat their payment by exercising a power of appointment in favor of a gratuitous appointee, deprives creditors of an important source of relief, and tends to establish in the debtor rights over property which the creditor cannot reach, a result to be universally deplored.[3]

G., J. & S. 487. The power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. The grantor could exercise the power either by deed or will, but he could not vest the power in any other person to be thus executed. Nor is the power a chose in action; nor does it constitute assets of a bankrupt which will vest in an assignee. Jones v. Clifton, 101 U. S. 225, per Field, J.; Brandies v. Cochrane, 112 U. S. 353.

[1] Cutting v. Cutting, 20 Hun (N. Y.) 367, on appeal, 86 N. Y. 537; Crooke v. County of Kings, 97 N. Y. 457. See Hume v. Randall, 141 N. Y. 499, 36 N. E. Rep. 402.

[2] See § 39, and cases cited.

[3] Where the debtor is entitled to the proceeds of lands arising under a power, such lands or the proceeds

§ 41. **Gifts of small value.** — The Supreme Court of Maine[1] recognize the rule already adverted to that gifts cannot be regarded as fraudulent if, from their almost infinitesimal value, the rights of creditors would not be impaired. In French v. Holmes,[2] it appeared that the father made a gift to his child of a lamb which the ewe refused to recognize. The court observed that if the lamb had been attached it would not have sold for a sum sufficient to pay the fees of the officer making the sale, much less the costs of obtaining the judgment. Gifts of insignificant intrinsic value, made from time to time by a husband to his wife, will not be avoided because he dies insolvent.[3] If the property was exempt, the gift was clearly no interference with the rights of creditors. The court further argued: "Now could such a gift hinder, delay, or defraud creditors? The fraudulent intent is to be collected from the comparative value and magnitude of the gift. Can any one believe the existence of a fraudulent intent?" The opinion cited with approval Hopkirk v. Randolph,[4] where the gift consisted of two negro girls and a riding horse. The learned Chief-Justice Marshall in that case seemed to consider that trivial gifts, made without any view to harm creditors, and with intentions obviously fair and proper, ought to be exempted from the general rule in favor of creditors. "They do not," continued the Chief-Justice, "much differ from wedding clothes, if rather more expensive than usual, from

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cannot be taken on execution. The equitable interests of the debtor therein must be reached in equity, and the return of execution is a condition precedent to maintaining the suit. Harvey v. Brisbin, 143 N. Y. 151, 38 N. E. Rep. 108. Where the debtor is vested with the title to land subject to a power to be exercised for his benefit a judgment against him attaches to the proceeds and does not follow the land. Sayles v. Best, 140 N. Y. 368; Ackerman v. Gorton, 67 N. Y. 63.

[1] French v. Holmes, 67 Me. 193; Klosterman v. Vader, 6 Wash. 99, 32 Pac. Rep. 1055.

[2] 67 Me. 193. See § 23.

[3] Estate of Gross, 19 Phila (Pa.) 80.

[4] 2 Brock. 140.

jewels, or an instrument of music, given by a man whose circumstances justified the gift. I have never known a case in which such gifts so made have been called into question."[1]

§ 42. **Debts forgiven or cancelled.** — In Sibthorp v. Moxom,[2] it was said that where a testator gave or forgave a debt this was a testamentary act, and would not be good as against creditors.[3] Manifestly a cancellation by an insolvent of a live and subsisting asset, is a fraud upon creditors. Hence, where a debtor gave up and cancelled without payment, a note held by him against a third party, the court very promptly decided that, after the debtor's decease, his administrator might ignore the cancellation, and sue upon the note for the benefit of creditors.[4] Martin v. Root[5] is a pointed illustration of a different phase of this doctrine. One Larned conveyed a farm to Root and others, and furnished the grantees the means with which to remove the incumbrances upon it, the conceded object of the transaction being to keep the farm out of the reach of Larned's creditors. Root gave Larned a note for $5,072.43, and at the same time took back a written promise from Larned that the note should never be collected. Larned having died insolvent, his administrator was allowed to recover on the note, and the agreement that the note should not be collected was held void in respect to creditors.

§ 43. **Enforcing promises of third parties.** — The doctrine

[1] See Partridge v. Gopp, Amb. 596. Compare Hanby v. Logan, 1 Duv. (Ky.) 242; Garrison v. Monaghan, 33 Pa. St 232; Estate of Gross, 19 Phila. (Pa.) 80, reviewing the cases, Lush v. Wilkinson, 5 Ves. 384; Chambers v. Spencer, 5 Watts (Pa.) 404. See §§ 15, 23, and note.

[2] 3 Atkyns 581.

[3] Compare, generally as to the effect of cancellation, Martin v. Root, 17 Mass. 222, per Chief-Justice Parker; McGay v. Keilback, 14 Abb. Pr. (N. Y.) 142; Wise v. Tripp, 13 Me. 12.

[4] Tolman v. Marlborough, 3 N. H. 57.

[5] 17 Mass. 222.

of Lawrence v. Fox,[1] and cases embodying the general principle that where one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third person, the latter, who would enjoy the benefit of the act if performed, may maintain an action for breach of the engagement,[2] has been successfully invoked in aid of creditors. Thus in Kingsbury v. Earle,[3] it appeared that a father had conveyed lands to his sons upon their orally agreeing, in consideration of the conveyance, to pay all his debts. The court held that the creditors of the father might avail themselves of the agreement, and bring actions founded on the promise against the sons to recover debts, even though the amount of the debts exceeded the value of the land, and that the consideration named in the deed would not determine its actual value. An agreement of this character is not a promise to pay the debt of another within the statute of frauds. And where partnership assets are assigned, and as part of the consideration the purchaser agreed to pay the firm debts,

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[1] 20 N. Y. 268. See Prime v. Koehler, 77 N. Y. 91; Gifford v. Corrigan, 117 N. Y. 263, 22 N. E. Rep. 756; Clark v. Howard, 150 N. Y. 238.

[2] Hand v. Kennedy, 83 N. Y. 154; Wager v. Link, 134 N. Y. 122, 31 N. E. Rep. 213; First Nat. Bk. v. Chalmers, 144 N. Y. 432, 39 N. E. Rep. 331; Clark v. Howard, 150 N. Y. 238; Burr v. Beers, 24 N. Y. 178; Glen v. Hope Mutual Life Ins. Co., 56 N. Y. 381; Ricard v. Sanderson, 41 N. Y. 179; Secor v. Lord, 3 Keyes (N. Y.) 525; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Campbell v. Smith, 71 N. Y. 26; Van Schaick v. Third Ave. R. R. Co., 38 N. Y. 346; Coster v. Mayor etc., 43 N. Y. 411; Barker v. Bradley, 42 N. Y. 319; Vrooman v. Turner, 69 N. Y. 284; Garnsey v. Rogers, 47 N. Y. 236; Hall v. Marston, 17 Mass. 575; Cross v. Truesdale, 28 Ind. 44; Scott v. Gill, 19 Iowa, 187; Rice v. Savery, 22 Iowa, 470; Devol v. McIntosh, 23 Ind. 529; Allen v. Thomas, 3 Met. (Ky.) 198; Jordan v. White, 20 Minn. 91; Rogers v. Gosnell, 58 Mo. 590; Wiggins v. McDonald, 18 Cal. 126; Miller v. Florer, 15 Ohio St. 151; Green v. Richardson, 4 Col. 584; Bank of the Metropolis v. Guttschlick, 14 Peters, 31; Bradwell v. Weeks, 1 Johns. Ch. (N. Y.) 206. Compare Ætna Nat. Bank. v. Fourth Nat. Bank, 46 N. Y. 82; Bean v. Edge, 84 N. Y. 514; Simson v. Brown, 68 N. Y. 355; Belknap v. Bender, 75 N. Y. 449.

[3] 27 Hun (N. Y.), 141, cf. O'Neil v. Hudson Valley Ice Co., 74 Hun (N. Y.) 165, 26 N. Y. Supp. 598.

any creditor may avail himself of the promise and sue the purchaser for the amount of his claim ;[1] and if, under such circumstances, a bond is taken, the creditors may get the benefit of it.[2] But the principal running through these cases is not universally recognized. It does not fully obtain in the English cases or in Massachusetts. In the latter Commonwealth, Gray, J., in the course of an opinion, said : " The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter."[3] It is foreign to the scope of this treatise to fully discuss in all its bearings the rule allowing third parties to enforce these promises made for their benefit. It certainly has obtained a deep and wide foundation in our law; its operation avoids circuity of action, reduces the expense and volume of litigation, and brings the real claimant and party beneficially interested in the controversy before the court. The arguments against its adoption, based upon common-law theories and rules, are inequitable and technical, and lead to a harsh result.[4]

[1] Sanders v. Clason, 13 Minn. 379 ; Barlow v. Myers, 6 T. & C. (N. Y.) 183 ; Meyer v. Lowell, 44 Mo. 328.

[2] Kimball v. Noyes, 17 Wis. 695 ; Devol v. McIntosh, 23 Ind. 529. Especially Claflin v. Ostrom, 54 N. Y. 581.

[3] Exchange Bank of St. Louis v. Rice, 107 Mass. 41.

[4] In Becker v. Torrance, 31 N. Y. 631-643, it appeared that the plaintiff had levied upon certain property of the defendant; subsequently a receiver was appointed at the instance of another creditor. The sheriff released the levy upon receiving a promise from the receiver that the latter would sell the property and apply the proceeds upon the plaintiff's execution. The receiver realized on the sale. The plaintiff in the execution brought this action against the receiver on the parol promise made to the sheriff for plaintiff's benefit. The court decided that although the promise was not made to the plaintiff directly, it was available to him on the principle of Lawrence v. Fox, 20 N. Y. 268, and Burr v. Beers, 24 N. Y. 178, and that he had the right to adopt and enforce the promise instead of proceeding directly against the sheriff.

44. Tracing the fund.—It is a clearly established principle in equity jurisprudence that whenever a trustee has been guilty of a breach of trust, and has transferred the property by sale or otherwise to any third person, the *cestui que trust* has a full right to follow such property into the hands of the third person, unless the latter stands in the position of a *bona fide* purchaser for valuable consideration without notice; and if the trustee has invested the trust property or its proceeds in any other property into which it can be distinctly traced, the *cestui que trust* may follow it into the new investment.[1] This doctrine has been appropriated and applied to cases of property alienated in fraud of creditors; and it has been expressly held that a complaining creditor has a right to follow the fund resulting from the covinous alienation, into any property in

[1] Oliver v. Piatt, 3 How. 401; McLeod v. First Nat. Bank, 42 Miss. 99; Jones v. Shaddock, 41 Ala. 262; Lathrop v. Bampton, 31 Cal. 17; Story's Eq. Jur. § 1258; Mansell v. Mansell, 2 P. Wms. 679; Dewey v. Kelton, 18 N. B. R. 218; Pennell v Deffell, 4 De G., M. & G. 372; Frith v. Cartland, 2 Hem. & M. 417, 420; *In re* Hallet's Estate, Knatchbull v. Hallet, L. R. 13 Ch. D. 696; Farmers' & Mechanics' Nat. Bank. v. King, 57 Pa. St. 202. Compare Smith v. Bowen, 35 N. Y. 83; Lyford v. Thurston, 16 N. H. 399; Barr v. Cubbage, 52 Mo. 404; Hooley v. Gieve, 9 Abb. N. C. (N. Y.) 8. See § 28. Examine especially National Bank v. Insurance Co., 104 U. S. 54; Jones v. Van Doren, 130 U. S. 691, 9 S. C. Rep. 685; Union Stock Yards Bank v. Gillespie, 137 U. S. 421, 11 S. C. Rep. 118; Spokane Co. v. Clark, 61 Fed. Rep. 538; Peters v. Bain, 133 U. S. 670, 10 S. C Rep. 354. It is said by Mr. Justice Bradley in Frelinghuysen v. Nugent, 36 Fed. Rep. 229, 239. "Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it, depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried." Quoted in Peters v. Bain, 133 U. S. 694, 10 S. C. Rep. 354.

which it was invested, so far as it can be traced,[1] But in creditors' suits the subject-matter of pursuit should be something so specific that, as to it, either in law or in equity, the plaintiff's judgment or execution, or the filing of the bill, or the appointment of a receiver, will create a lien or make a title.[2] In Gillette v. Bate,[3] the fraudulent grantee had taken stock in a corporation in exchange for the property fraudulently transferred, and it was held that creditors could reach the stock, although it had increased in value.[4] Where property is obtained by fraud, and the proceeds of a sale of it, such as notes, are identified in the hands of a voluntary assignee of the fraudulent vendee, a court of equity may reach such proceeds for the defrauded vendor.[5] So a defrauded vendor may follow the proceeds of his goods in the hands of a sheriff who has levied on them,[6] and a *cestui que trust* may recover the proceeds of a life-insurance policy taken out by a defaulting trustee with the trust moneys in the name of the trustee's wife.[7] To sustain a claim for payment out of a fund in the hands of an assignee or receiver upon the ground of fraud, it must appear that the fund was increased by having in its mass the very thing parted with or its proceeds.[8]

§ 45. **Income of trust estate.** — Williams v. Thorn[9]

[1] Clements v. Moore, 6 Wall. 315, 316. See Chalfont v. Grant, 1 Am. Insolv. R. 251; Marsh v. Burroughs, 1 Woods, 463; Solinsky v. Lincoln Savings Bank, 85 Tenn. 372.

[2] Ogden v. Wood, 51 How. Pr. (N. Y.) 375. See § 28.

[3] 10 Abb. N. C. (N. Y.) 92.

[4] See Steere v. Hoagland, 50 Ill. 377. Compare Phipps v. Sedgwick, 95 U. S. 3.

[5] American Sugar Refining Co. v. Fancher, 145 N. Y. 552, 40 N. E. Rep. 206.

[6] Converse v. Sickles, 146 N. Y. 200, 40 N. E. Rep. 777.

[7] Holmes v. Gilman, 138 N. Y. 369, 34 N. E. Rep. 205.

[8] City Bank of Hopkinsville v. Blackmore, 43 U. S. App. 617; Boone Co. Nat. Bank v. Latimer, 67 Fed. Rep. 27; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. Rep. 537.

[9] 70 N. Y. 270. See McEvoy v. Appleby, 27 Hun (N. Y.) 44; Tolles v. Wood, 99 N. Y. 616; Wetmore v. Wetmore, 149 N. Y. 520. Compare Spindle v. Shreve, 111 U. S. 546, 4 S.

firmly established the doctrine, in New York State at least, that the income of a trust fund enjoyed by the debtor beyond a sum considered necessary for the actual support of himself, his wife and infant children,[1] may be reached by judgment-creditors, and, like the rest of the debtor's estate, such surplus income is liable to be taken for the payment of creditors. This doctrine was not established without a struggle, and debtors are still constantly seeking to circumvent it.[2] The Chancellor observed in Hallett v. Thompson[3] that it was contrary to sound policy to permit a person to have the ownership of property for his own purposes, and be able at the same time to keep it from his creditors. A creditor, by filing a bill, acquires a lien on such surplus income superior to the claims of general creditors or assignees of the beneficiary.[4] In Williams v. Thorn,[5] Rapallo, J., said: "By the analogy which courts of justice have always endeavored to preserve between estates or interests in land, or the income thereof, and similar interests in personal property, the right of a judgment-creditor to reach the surplus rents and profits of land, beyond what is necessary for the support and maintenance of the debtor and his family, entitles him to maintain a creditor's bill which will reach a similar interest of the debtor in the surplus income of personal property held by another for his use and benefit; but not that part of the income

C. Rep. 522; Nichols v. Eaton, 91 U. S. 716; Cutting v. Cutting, 86 N. Y. 546. If in a suit to which the beneficiary is a party a trust has been declared valid, the decree is binding on the judgment creditors. Pray v. Hegeman, 98 N. Y. 351; Cook v. Lowry, 95 N. Y. 111.

[1] Wetmore v. Wetmore, 149 N. Y. 529; Tolles v. Wood, 99 N. Y. 616; Bunnell v. Gardner, 4 App. Div. (N. Y.) 321; Andrews v. Whitney, 82 Hun (N. Y.) 117; McEvoy v. Appleby, 27 Hun (N. Y.) 44.

[2] See Nichols v. Eaton, 91 U. S. 716; Spindle v. Shreve, 111 U. S. 542, 546, 4 S. C. Rep. 522; Wetmore v. Wetmore, 149 N. Y. 520; also Chap. XXIII.

[3] 5 Paige N. Y. 586.

[4] Tolles v. Wood, 99 N. Y. 616, 1 N. E. Rep. 251.

[5] 70 N. Y. 273.

which may be necessary for the support of the judgment-debtor." The debtor's station in life, the manner in which he has been reared and educated, his habits and the means he may have to aid in his support are considered.[1] The doctrine of Williams v. Thorne, with reference to reaching surplus trust income seems to have been acknowledged in the earlier New York cases, both as to the income of realty and personalty[2] though there is a *dictum* by Wright, J., in Campbell v. Foster,[3] denying that the income of the *cestui que trust* can be diverted to creditors.[4] The confusion introduced into this branch of the law in New York State which led to the general, but erroneous, belief that a debtor's trust income, though fabulous in amount, was not, in any form, available to creditors, was partially attributable to the fact that the unsuccessful actions had been instituted by receivers in supplementary proceedings,[5] as to whom the courts held the right to reach income did not pass until it had actually accumulated.[6] But where the judgment creditor sues, not only the income accumulated in the trustees' hands,[7] which may also be reached by supplementary proceedings, but the future income, above the sum found necessary for the support and use of the *cestui que trust*, and those legally dependent upon him, may be impounded.[8] Hann v. Van Voorhis,[9] holding that only

[1] Wetmore v. Wetmore, 149 N. Y. 520.

[2] See Rider v. Mason, 4 Sandf. Ch. (N. Y.) 351; Sillick v. Mason, 2 Barb. Ch. (N. Y.) 79; Bramhall v. Ferris, 14 N. Y. 41; Scott v. Nevius, 6 Duer (N. Y.) 672; Graff v. Bonnett, 31 N. Y. 9.

[3] 35 N. Y. 361.

[4] See Locke v. Mabbett, 2 Keyes (N. Y.) 457, 3 Abb. App. Dec. (N. Y.) 68.

[5] Continental Trust Co. v. Wetmore, 67 Hun (N. Y.) 9, 21 N. Y. Supp. 746.

[6] See Graff v. Bonnett, 31 N. Y. 9; Scott v. Nevius, 6 Duer (N. Y.) 672; Locke v. Mabbett, 2 Keyes (N. Y.) 457; Campbell v. Foster, 35 N. Y. 361.

[7] The beneficiary may assign accrued income. Tolles v. Wood, 99 N. Y. 616, 1 N. E. Rep. 251; Matter of Valentine, 5 Misc. (N. Y.) 479, 26 N. Y. Supp. 716.

[8] Williams v. Thorn, 70 N. Y. 270; Wetmore v. Wetmore, 149 N. Y. 520; Howard v. Leonard, 3 App. Div. (N. Y.) 277.

[9] 15 Abb. Pr. N. S. (N. Y.) 79.

actual accumulations in the hands of the trustees could be reached, must be regarded as overruled by Williams v. Thorn.[1] The burden of proving that the income exceeds the requirement of the debtor rests upon the creditor.[2] A creditor, it may be noted, may also get the benefit of an annuity given by a will in lieu of dower.[3] A wife may also reach her former husband's surplus income and apply it to the payment of the alimony due her. In some respects she stands in the position of an ordinary creditor, in others her rights are superior to those of an ordinary creditor, as it is the duty of the husband to maintain her according to the directions of the decree notwithstanding the divorce.[4]

§ 46. Rule as to exempt property.— It being a test of a fraudulent transfer that the property alienated must be of some value out of which the creditor could have realized the whole or a portion of his claim,[5] it would seem to follow logically that exempt property is not susceptible

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[1] 70 N. Y. 279. Wetmore v. Wetmore, 149 N. Y. 529. See, also, *infra*, Chap. XXIII on Spendthrift Trusts; and compare Nichols v. Eaton, 91 U. S. 716; Broadway Nat. Bank v. Adams, 133 Mass. 170; Billings v. Marsh, 153 Mass. 311, 26 N. E. Rep. 1000; Wemyss v. White, 159 Mass. 484, 34 N. E. Rep. 718; Spindle v. Shreve, 9 Biss. 199; Hyde v. Woods, 94 U. S. 523, 526. Wetmore v. Truslow, 51 N. Y. 338, was not a suit to reach surplus, but the whole income, on the ground that the beneficiary was also a trustee. As to the effect of appointing the beneficiary trustee see Losey v. Stanley, 147 N. Y. 560, 42 N. E. Rep. 8; Rose v. Hatch, 125 N. Y. 427, 26 N. E. Rep. 467; Greene v. Greene, 125 N. Y. 506, 26 N. E. Rep. 739.

[2] Bunnell v. Gardner, 4 App. Div. (N. Y.) 321; Kilroy v. Wood, 42 Hun (N. Y.) 636. Where a wife is the beneficiary and debtor her creditors may reach such surplus income as is not needed for the support of the wife and children. Howard v. Leonard, 3 App. Div. (N. Y.) 277.

[3] Degraw v. Clason, 11 Paige (N. Y.) 136.

[4] Examine Romaine v. Chauncey, 129 N. Y. 566; Wetmore v. Wetmore, 149 N. Y. 520; Andrews v. Whitney, 82 Hun (N. Y.) 117; Miller v. Miller, 7 Hun (N. Y.), 208; Thompson v. Thompson, 52 Hun (N. Y.) 456, 5 N. Y. Supp. 604.

[5] See § 23.

of fraudulent alienation.[1] As the creditor possesses no right to have that class of property applied in satisfaction of his claim while the debtor owns it, and would be powerless to seize or appropriate it for that purpose were it restored to the debtor's possession, the legitimate deduction would seem to be that the creditor's process could not be fastened upon it in the hands of the debtor's alleged fraudulent vendee.[2] As to alienations of exempt property there may be a bad motive but no illegal act.[3] When a fraudulent transfer has been avoided, it leaves the creditor to enforce his remedy against the property in the same manner as if the fraudulent transfer had never been executed. The creditor cannot ask to be placed in a better position in respect to the property than he would have occupied if no fraudulent bill of sale had ever been made.[4] On the point whether the fact that

[1] In Denny v. Bennett, 128 U. S. 495, 9 S. C. Rep. 134, the court say: "No reason has been suggested why the legislature could not exempt all interests in landed estate from execution and sale under judgments against the owner, and perhaps all his personal property."

[2] See Wood v. Chambers, 20 Texas, 247; Foster v. McGregor, 11 Vt. 595; Whiting v. Barrett, 7 Lans. (N. Y.) 106; Bean v. Smith, 2 Mason, 252; Winchester v. Gaddy, 72 N. C. 115; Legro v. Lord, 10 Me. 161; Smith v. Allen, 39 Miss. 469; Youmans v. Boomhower, 3 T. & C. (N. Y.) 21; Pike v. Miles, 23 Wis. 164; Dreutzer v. Bell, 11 Wis. 114; Smillie v. Quinn, 90 N. Y. 493; Robb v. Brewer. 15 Rep. 648; Premo v. Hewitt, 55 Vt. 363; Blair v. Smith, 114 Ind. 114, 15 N. E. Rep. 817; Bloedorn v. Jewell, 34 Neb. 650, 52 N. W. Rep. 367; Shawano County Bank v. Koeppen, 78 Wisc. 533, 47 N. W. Rep. 723; Beyer v. Thoeming, 81 Ia. 517, 46 N. W. Rep. 1074; Payne v. Wilson, 76 Ia. 377, 41 N. W. Rep. 45; Dull v. Merrill, 69 Mich. 49, 36 N. W. Rep. 677; Horton v. Kelly, 40 Minn. 193, 41 N. W. Rep. 1031; Munson v. Carter, 40 Neb. 417, 58 N. W. Rep. 931; Rozek v. Redzinski, 87 Wisc. 525, 58 N. W. Rep. 262; Nance v. Nance, 84 Ala. 375, 4 So. Rep. 699; Kvello v. Taylor, 5 N. Dak. 78.

[3] O'Connor v. Ward, 60 Miss. 1037. "To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by State laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held, that, as to contracts made thereafter, the exemption were valid." Nichols v. Eaton, 91 U. S. 726.

[4] Sheldon v. Weeks, 7 N. Y. Leg. Obs. 60.

land has been purchased with money which itself was exempt, such as pension money, prevents the claims of creditors from attaching to it, the decisions are conflicting. Kentucky denies the exemption,[1] while New York favors it.[2] And it seems from the current of adjudications that a conveyance of lands set aside for fraud at the suit of creditors does not estop the grantor from claiming a homestead in the premises thus conveyed. Such a conveyance does not constitute an abandonment of the homestead so as to open it to creditors.[3] A person may change his homestead, and where in order to reduce the encumbrance on his new homestead he gives such encumbrancer a mortgage on his old one, this transaction cannot be attacked by his creditors.[4] A general assignment is not invalidated by a clause which reserves all exempt property;[5] nothing is withheld which the creditors are entitled to have included in the trust; and in New York a receiver of a judgment-debtor gets no title to exemptions.[6] The exemption is said, however, to endure only during the lifetime of the party, and

[1] Johnson v. Elkins, 90 Ky. 163, 13 S. W. Rep. 448; Hudspeth v. Harrison, 6 Ky. Law Rep. 304.

[2] Yates Co. Nat. Bank v. Carpenter, 119 N. Y. 550, 23 N. E. Rep. 1108.

[3] Turner v. Vaughan, 33 Ark. 460; Thompson on Homesteads, § 408, etc., and cases cited. "It is evident," says Mr. Freeman, "that creditors cannot be defrauded, hindered, or delayed by the transfer of property which, neither at law nor in equity, can be made to contribute to the satisfaction of their debts. Hence it is almost universally conceded that property which is, by statute, exempt from execution, cannot be reached by creditors on the ground that it has been fraudulently transferred." Freeman on Executions, § 138. "Fraud against creditors is not predicable of the conveyance of property thus exempt; and so the title to it is not impeachable by creditors of the debtor making such conveyance." Prout v. Vaughn, 52 Vt. 459.

[4] Palmer v. Hawes, 80 Wisc. 474, 50 N. W. Rep. 341; Bogan v. Cleveland, 52 Ark. 101, 12 S. W. Rep. 159.

[5] Richardson v. Marqueze, 59 Miss. 80, 42 Am. Rep. 353; Hildebrand v. Bowman, 100 Pa. St. 580. See Smith v. Mitchell, 12 Mich. 180; Mulford v. Shirk, 26 Pa. St. 473; Heckman v. Messinger, 49 Pa. St. 465. *Contra*, Sugg v. Tillman, 2 Swan (Tenn.) 208.

[6] Finnin v. Malloy, 33 N. Y. Super. Ct. 382; Cooney v. Cooney, 65 Barb. (N. Y.) 524.

consequently a gift of exempt personalty, intended to take effect upon the death of the donor, and made with the object of defrauding creditors, cannot be sustained.[1] The property must have been exempt at the time the conveyance was made; if the right of exemption has arisen since the alleged fraudulent conveyance, the better rule is that it cannot be relied upon as a defense.[2]

§ 47. **Fraudulent purchases of exempt property.** — In conformity with the general rule that exempt property is not usually susceptible of fraudulent alienation as regards creditors,[3] the courts have decided that there is no intelligible ground upon which it can be held to be fraudulent for a person whose property does not, in the aggregate,

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[1] Martin v. Crosby, 11 Lea (Tenn.) 198. In Tillotson v. Wolcott, 48 N. Y. 190, it appeared that the debtor had recovered a judgment against a creditor for an unlawful levy upon and sale of the debtor's exempt property. A creditor sought to get the benefit of this judgment on the ground that the character of the property had been changed. The court said: "It would be useless to grant the privilege contained in the statute if it could be rendered of no effect by refusing an adequate remedy for the invasion of the exemption; or by permitting a recovery, when obtained for such invasion, to be wrested from the debtor by proceedings on behalf of his creditors. The judgment, when recovered by the debtor for the wrongful invasion of his privilege of the exemption of his property from levy and sale, represents the property for the value of which it was recovered. He may make another investment of the money to be recovered in the same description of property, in the possession of which, as a householder, or person providing for the support of his family, the statute will again protect him. . . . . The proceeds of the judgment should be held to be protected under the statute, as exempt property, until sufficient time has elapsed to afford the debtor a reasonable opportunity to again purchase the description of property necessary to enable him to support his family, and in the possession of which the law will protect him as against the claims of creditors." See Andrews v. Rowan, 28 How. Pr. (N. Y.) 126.

[2] Phenix Ins. Co. v. Fielder, 133 Ind. 557, 33 N. E. Rep. 270; Kingen v. Stroh, 136 Ind. 610, 36 N. E. Rep. 519.

[3] Boggs v. Thompson, 13 Neb. 403; Derby v. Weyrich, 8 Neb. 174; Crummen v. Bennet, 68 N. C. 494. See § 46; Nelson v. Frey, 4 Tex. App. Civ. Cas. 248; Yates County Nat. Bank v. Carpenter, 119 N. Y. 550, 23 N. E. Rep. 1108.

exceed the value of all the exemptions, but a portion of which property is in a form not exempt, to convert or exchange it into the particular kinds of property which are exempt. Thus in O'Donnell v. Segar,[1] the court argued: "The only fraud claimed to have existed in reference to the oxen, was that he might fraudulently have acquired them from the proceeds or exchange of other property which was not exempt, and this with the intent to defeat the claims of creditors. This, in my opinion, if true, does not constitute legal fraud, so long as he was, *in fact*, engaged in one of the occupations mentioned. . . . . in which the use of the cattle was needed." In Randall v. Buffington,[2] the court decided that a general creditor of an insolvent debtor could not subject a homestead to liability for his debts nothwithstanding the insolvent had applied property in his hands to the payment of a debt which was a lien on the homestead.[3] "It must be remembered," said Chief-Justice Breese, "that it is not a fraud on creditors to buy a homestead which would be beyond their reach."[4] This would seem to afford a debtor an opportunity to practice a species of petty fraud upon his creditors, but, as exemptions of property from execution are usually very limited in amount,[5] and the policy of the law is to prevent the creditor from absolutely stripping the debtor of every vestige of property, and of all the necessary conveniences of living, or means of gaining a subsistence, the result is not to be deprecated. Manifestly the creditor should not be favored to the extent of absolutely crippling and pauperizing the debtor,[6] or rendering him a public charge.

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[1] 25 Mich. 377.

[2] 10 Cal. 493.

[3] See *In re* Henkel, 2 Sawyer, 308.

[4] Cipperly v. Rhodes, 53 Ill. 350. See, also, Finn v. Krut, (Tex. Ct. Civ. App. 1896) 34 S. W. Rep. 1013.

[5] See Nichols v. Eaton, 91 U. S. 726.

[6] See Hixon v. George, 18 Kansas 253. "The debtor, by securing a homestead for himself and family, whether by an arrangement with creditors who might levy on it, or by

But where the statute exempts from the claims of creditors a homestead, especially when such exemption is irrespective of its value, it would lead to the grossest fraud if a debtor, on the eve of insolvency, were allowed to invest his money in exempt property of this kind.[1]

§ 48. **Covinous alienations of exemptions.** — A conveyance of homestead by an embarrassed debtor and his wife to a third party, and by the third party to the wife, cannot be set aside as fraudulent and void as to creditors, for the homestead is out of their reach,[2] and in general a voluntary conveyance of property exempt from execution vests a good title in the donee, as against the creditors of the donor.[3] The creditor, as we have said, cannot be injured or defrauded by the transfer of property which is, by positive law, expressly exempt from seizure to satisfy their debts.[4] The dissolution of an insolvent firm and

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the purchase of a house, or by moving into a house which he already owns, takes nothing from his creditors which the law has secured to them, or in which they have any vested right. He conceals no property. He merely puts his property into a shape in which it will be the subject of a beneficial provision for himself which the law recognizes and allows." Hoar, J., in Tucker v. Drake, 11 Allen, (Mass.) 146.

[1] *In re* Boothroyd, 3 Fed. Cases, 892, 14 N. B. R. 223; Peninsular Stove Co. v. Roark, (Ia.) 63 N. W. Rep. 726. But see Jacoby v. Parkland Distilling Co., 41 Minn. 227, 43 N. W. Rep. 52.

[2] Morrison v. Abbott, 27 Minn. 116. See Ferguson v. Kumler, 27 Minn. 156; Baldwin v. Rogers, 28 Minn. 544; McFarland v. Goodman, 6 Biss. 111; Vogler v. Montgomery, 54 Mo. 578; Cox v. Wilder, 2 Dillon, 46; White v. Givens, 29 La. Ann. 571; Muller v. Inderreiden, 79 Ill. 382; Hugunin v. Dewey, 20 Iowa, 368; Buckley v. Wheeler, 52 Mich. 1; Schribar v. Platt, 19 Neb. 631; Moore v. Flynn, 135 Ill. 74, 25 N. E. Rep. 844; Hodges v. Winston, 95 Ala. 514, 11 So. Rep. 200.

[3] Furman v. Tenny, 28 Minn. 77; Duvall v. Rollins, 68 N. C. 220; Moseley v. Anderson, 40 Miss. 49; Anthony v. Wade, 1 Bush (Ky.) 110; Patten v. Smith, 4 Conn. 450; Tracy v. Cover, 28 Ohio St. 61. See § 46.

[4] Morrison v. Abbott, 27 Minn. 116; Carhart v. Harshaw, 45 Wis. 340, 30 Am. Rep. 752, and notes; Delashmut v. Trau, 44 Iowa, 613; Smith v. Rumsey, 33 Mich. 183; Derby v. Weyrich, 8 Neb. 174; Megehe v. Draper, 21 Mo. 510; Washburn v. Goodheart, 88 Ill. 229; Hixon v. George, 18 Kans. 253; O'Conner v. Ward, 60 Miss. 1036; Thomson v. Crane, 73 Fed. Rep. 327; Sims v. Phillips, 54 Ark. 193, 15 S. W. Rep. 461.

division of the assets among the partners with a view of securing the members the benefit of individual exemptions, if accomplished without actual fraud, is valid.[1] Unsevered partnership property is, of course, not exempt.[2]

§ 49. **Conflicting cases.** — The cases are not, however, uniform in this regard, and are in some instances disinclined to allow a debtor to turn what was intended as a shield of poverty into an instrument of fraud;[3] and there are decisions of at least local authority which deny the benefit of the exemption laws to a dishonest debtor who shuffles and conceals his property,[4] or executes a homestead deed in furtherance of a design to hinder, delay, and defraud creditors in the recovery of their just debts.[5] And it has been held that the privileges of the homestead act may be forfeited by fraud,[6] and the right to claim exemption also forfeited and lost.[7] This does not, it seems to us, vary the general principle already stated, for in these latter cases the property is not considered to be under the cover or protection of the exemption statutes,

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[1] Bates v. Callender, 3 Dak. 256, 16 N. W. Rep. 506.

[2] Bates v. Callender, 3 Dak. 260, 16 N. W. Rep. 506; Bonsall v. Comly, 44 Pa. St. 442; Russell v. Lennon, 39 Wis. 570; Hawley v. Hampton, 160 Pa. St. 18, 28 Atl. Rep. 471; Gaylord v. Imhoff, 26 Ohio St. 317; Pond v. Kimball, 101 Mass. 105.

[3] Brackett v. Watkins, 21 Wendell (N. Y.) 68.

[4] Strouse v. Becker, 38 Pa. St. 192; Imhoff's Appeal, 119 Pa. St. 355. In Kreider's Estate, 135 Pa. St. 584, the court says: "The authorities cited by the court fully sustain the position that if the debtor equivocates and dissembles, denies the ownership of that which he cannot hide, and embarrasses the officers of the law in the execution of their legal duties, he forfeits his right to exemption."

[5] See Rose v. Sharpless, 33 Gratt. (Va.) 156. See generally Smith v. Emerson, 43 Pa. St. 456; Gilleland v. Rhoads, 34 Pa. St. 187; Diffenderfer v. Fisher, 3 Grant's Cases (Pa.) 30; Piper v. Johnston, 12 Minn. 67; Chambers v. Sallie, 29 Ark. 407; Huey's Appeal, 29 Pa. St. 219; Currier v. Sutherland, 54 N. H. 475, 20 Am. Rep. 143, and note.

[6] Pratt v. Burr, 5 Biss. 36.

[7] Cook v. Scott, 6 Ill. 335; Cassell v. Williams, 12 Ill. 387; Freeman v. Smith, 30 Pa. St. 264; Larkin v. McAnnally, 5 Phil. (Pa.) 17; Carl v. Smith, 8 Phil. (Pa.) 569.

and by the rule of construction just stated, is liable to the claims of creditors much the same as though it had never been even colorably embraced within the exemptions.

§ 50. **Abandoned exemptions.** — It is asserted in Crosby v. Baker,[1] that if the debtor changes his purpose to use the exempt articles in his business, and determines to and does in fact sell them to a third person, such bargain being made to defraud creditors, and this purpose being participated in by the vendee, the conveyance gives no title to the purchaser, and the property may be reclaimed and held by the assignee of the insolvent debtor in an action against the purchaser.[2] The change of intention, it is argued, takes away one of the requisites for the exemption of the property. The same principle applies to abandoned homesteads.[3]

§ 50a. **What cannot be reached.**— While the property or accumulations of a debtor may be reached by his creditors, this is not true of his talents or industry.[4] Said Hunt, C. :[5] "The application of the debtor's property is rigidly directed to the payment of his debts. He cannot transport it to another country, transfer it to his friend, or conceal it from his creditor. Any or all of these things he may do with his industry. He is at liberty to transfer his person to a foreign land. He may bury his talent in the earth, or he may give it to his wife[6] or

[1] 6 Allen (Mass.), 295.

[2] See Stevenson v. White, 5 Allen (Mass.) 148.

[3] Cox v. Shropshire, 25 Texas, 113. See Edwards v. Reid, 39 Neb. 645, 58 N. W. Rep. 202; Belden v. Younger, 76 Iowa, 567, 41 N. W. Rep. 317.

[4] Compare Boggess v. Richards, 39 W. Va. 575; Penn v. Whitehead, 17 Gratt. (Va.) 527; Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. Rep. 570.

[5] Abbey v. Deyo, 44 N. Y. 347; Eilers v. Conradt, 39 Minn. 242; Knox v. Yow, 91 Ga. 367, 17 S. E. Rep. 654; City Bank v. Smisson, 73 Ga. 422.

[6] See Voorhees v. Bonesteel, 16 Wall. 31; Tresch v. Wirtz, 34 N. J. Eq. 129; Aldridge v. Muirhead, 101 U. S. 399; Wilson v. McMillan, 62 Ga. 19; Osborne v. Wilkes, 108 N. C. 654, 13 S. E. Rep. 285.

friend. No law, ancient or modern, of which I am aware, has ever held to the contrary."[1] In Mayers v. Kaiser,[2] the court say: "We are unable to understand how the husband's creditors can be said to be defrauded, when they cannot compel him to labor for their benefit, if he voluntarily bestows on others, or on his wife, that which under the law they cannot reach for the satisfaction of their demands." Justice Bleckley says: "While a debtor cannot give away his property to the prejudice of his creditors, he may give away his labor."[3] And a debtor who receives the title of property for the specific purpose of conveying it to another, acquires no such interest in it as would make the execution of the trust a fraud upon his creditors.[4] A husband's curtesy initiate in his wife's lands cannot be sold to pay his debts.[5]

§ 50b. Payments made to a debtor. — In the case of Simpson v. Dall,[6] it was declared that where a debt was about to be attached by a creditor of the person to whom it was due, and the person owing the debt made payment and settled the matter in full, the creditor of such creditor could not compel payment by such debtor over again to him, though it might be inferred that a settlement was had or hastened with his creditor, the effect of which was to prevent an attachment being levied on the debt in his hands issued against his creditor.

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[1] Compare Lynn v. Smith, 35 Hun (N. Y.) 275; Ross v. Hardin, 79 N. Y. 90, 91; Gage v. Dauchy, 34 N. Y. 293; Gillett v. Bate, 86 N. Y. 94. See § 303. Buckley v. Dunn, 67 Miss. 710, 7 So. Rep. 550; Osborne v. Wilkes, 108 N. C. 651, 13 S. E. Rep. 285; Mayers v. Kaiser, 85 Wis. 382, 55 N. W. Rep. 688.

[2] 85 Wis. 282, 396, 55 N. W. Rep. 688.

[3] Wilson v. McMillan, 62 Ga. 16, 19.

[4] First Nat. Bk. v. Dwelley, 72 Me. 223.

[5] Welsh v. Solenberger, 85 Va. 441, 8 S. E. Rep. 91; Breeding v. Davis, 77 Va. 639; Alexander v. Alexander, 85 Va. 353, 7 S. E. Rep. 335.

[6] 3 Wall. 460.

CHAPTER III.

CREDITORS' REMEDIES.

§ 51. Concurrent remedies — Legal and equitable.
52. No injunction against debtor before judgment.
53. Certain exceptional cases.
54. Joinder of claims.
55. Uniting causes of action.
56. Exclusive jurisdiction in equity.
57. Land purchased in name of third party.
58. Relief before and after sale.
59. The remedy at law.
60. By suit in equity.
61. Supplementary proceedings.
62. Assumpsit — Case — Conspiracy.
62*a*. Reference not ordered.
§ 63. Relief collateral to main action.
64. Remedy governed by *lex fori*.
65. Cumulative remedies — Allowed and disallowed.
66. Effect of imprisonment of debtor.
67. Election of remedies.
68. Creditors' bills.
69. Direct and collateral attack — Exceptional doctrine in Louisiana.
70. Forms of relief in cases of fraud on wife.
71. Procedure in Federal tribunals.
72. Recapitulation.

§ 51. Concurrent remedies — Legal and equitable. — Equity has concurrent jurisdiction with law over frauds under the statute 13 Eliz. c. 5, or similar enactments,[1] and the same general rules of construction govern in both courts.[2] Thus it was remarked by the Supreme Court of New Jersey: "Courts of law and courts of equity have

[1] Orendorf v. Budlong, 12 Fed Rep. 24; Potter v. Adams, 125 Mo. 118, 126, 28 S. W. Rep. 490, citing the text; Cox. v. Gruver, 40 N. J. Eq. 474, 3 Atl. Rep. 172; Moore v. Williamson, 44 N. J. Eq. 496, 15 Atl. Rep. 587; Smith v. Wood, 42 N. J. Eq. 563, 7 Atl. Rep. 881. In Potter v. Adams, 125 Mo. 125, the court say: "If that deed was made to hinder, delay or defraud the creditors of Thomas Baine, then it was and is void at law as well as in equity, and such an issue may be tried in an action of ejectment as well as in a suit in equity to set aside the fraudulent conveyance."

[2] Sexton v. Wheaton, 1 Am. Lea. Cas. (5th ed.) 58, 59, note; Hopkirk v. Randolph, 2 Brock. 133. The contractual relation of debtor and creditor remains unchanged in equity, and the creditor is entitled to prove his full claim without regard to collaterals. People v. Remington, 121 N. Y. 328, 24 N. E. Rep. 793. See § 4.

concurrent jurisdiction over frauds, under the statute concerning fraudulent conveyances. In cases where the legal title to the property is such that it cannot be seized under execution, resort to equity is necessary — as where the legal title has never been in the debtor, having been conveyed by a third person directly to another, in secret trust for the benefit of the debtor, with a design fraudulently to screen it from his creditors.[1] But where the legal title has been in the debtor, so as to be subject to execution at law, and might be made available for the satisfaction of the debt, if the fraudulent conveyance had not been interposed, the creditor, or a third person having taken title under a sheriff's sale, may bring ejectment, and avoid the fraudulent conveyance by proof of the illegal purpose for which it was made."[2] It will be seen presently that this latter illustration is not of universal application.[3] The forms of relief available to creditors are outlined in our opening chapter,[4] where it is shown that creditors may invoke the aid of equity in two cases, after proceeding to judgment and execution at law, without obtaining satisfaction of the debt.[5] In the first class of cases the complainant proceeds simply upon the ground of fraud, and in support or furtherance of the remedy at law, while in the other class of cases relief is sought upon the theory that the remedy at law has been exhausted, and that it is inequitable and unjust on the part of the debtor to refuse to apply any intangible property or choses in action toward the payment of the judgment.[6] Resort by cred-

[1] See § 57.

[2] Mulford v. Peterson, 35 N. J. Law, 133. See Cox v. Gruver, 40 N. J. Eq. 474, 3 Atl. Rep. 172.

[3] See § 69.

[4] See § 4.

[5] Williams v. Hubbard, Walker's Ch. (Mich.) 28; Cornell v. Radway, 22 Wis. 264; Beck v. Burdett, 1 Paige (N. Y.) 305, Jones v. Green, 1 Wall. 331.

[6] Williams v. Hubbard, Walker's Ch. (Mich.) 29.

itors to courts of equity is of very frequent occurrence because the common-law is not sufficiently flexible.[1] Of necessity, in a common-law action, a purchase is treated as either valid or void.[2] There is no middle ground.[3] Proof of absolute fraud, which is usually difficult, is, for that reason, generally required at law, while in equity it is said that an unfair or inequitable transaction — one not of necessity absolutely fraudulent in the full sense of that term — may be unraveled in the interest of creditors.[4] In such cases the rights of an innocent vendee can be preserved and protected by the plastic hand of equity. In other words, certain cases seem to imply that proof of fraud need not be so complete in equity as at law;[5] but it is not so easy to illustrate the distinction or to state clearly a substantial justification for its existence.[6] Mr. Abbott observes in an editorial in the New York *Daily Register*:[7] "In the quaint language of Westminster Hall, 'legal fraud' means illegal fraud, that is to say, fraud for which an action at law lay to recover damages. So 'equitable fraud' means inequitable conduct, not illegal in the sense of sustaining an action for damages, but yet

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[1] In Mississippi Mills v. Cohn, 150 U. S. 207, 14 S. C. Rep. 75, the court say: "A court of equity will aid a judgment-creditor to reach the property of his debtor by removing fraudulent judgments, or conveyances or transfers which defeat his legal remedy at law." Citing 2 Beach on Modern Eq. Jur. § 883.

[2] See Chap. XIII.

[3] See § 193. Foster v. Foster, 56 Vt. 540.

[4] See Kilbourn v. Sunderland, 130 U. S. 515, 9 S. C. Rep. 594, where the court say: "As the remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud has in equity a more extensive signification than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations between the parties throughout the period of their connection, we concur with the Supreme Court of the District in sustaining the jurisdiction."

[5] Warner v. Daniels, 1 Woodb. & M. 103; Fullagar v. Clark, 18 Ves. 483; Earl of Chesterfield v. Janssen, 2 Ves. Sen. 143; Kilbourn v. Sunderland, 130 U. S. 515, 9 S. C. Rep. 594. See § 60.

[6] See Marksbury v. Taylor, 10 Bush. (Ky.) 519.

[7] Nov. 15, 1888.

so like it in effect that the Chancellor would give a remedy." [1]

Though in some States legal and equitable jurisdictions have been united in the same tribunals, yet the distinctions which formerly appertained in the forms of action, of pleading, and of relief, are by no means superseded or obliterated. In territory where the system of common law and chancery both prevail, and the only adequate relief is in equity, and the pleadings are framed in accordance with this view, the suit must be tried as a chancery case by the modes of procedure known to courts of equity. The judge or chancellor is responsible for the decision, and, though he may, by means of feigned issues, refer any questions of fact to a jury,[2] still his own conscience must be satisfied that the finding is correct, and the decree must be rendered as the result of his individual judgment, aided, it may be true, by the finding of the jury. Hence, where the trial in such a case is conducted as though it were a controversy in a common-law action, and a judgment is rendered upon a verdict as at common law, it will be reversed for error.[3] In an equitable proceeding of this character, as will presently be shown, a decree in the nature of a judgment for damages cannot

[1] In United States v. Union Pacific Railway, 160 U. S. 51, the court remark: "In Boyce v. Grundy, 3 Peters 210, 215, this court said. 'It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' The circumstances of each case must determine the application of the rule. Watson v. Sutherland, 5 Wall. 74, 79. In Oelrichs v. Spain, 15 Wall. 211, 228, an objection was raised that the remedy at law was ample. The court, observing that the remedy at law was not as effectual as in equity, said, among other things, that a 'direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation.'"

[2] See Wright v. Nostrand, 94 N. Y. 31; Coleman v. Dixon, 50 N. Y. 572.

[3] Dunphy v. Kleinsmith, 11 Wall. 615. In an equity suit to set aside a fraudulent transfer the defendant is not entitled to a jury trial, but the court may in its discretion frame issues to be tried before a jury. Wright v. Nostrand, 94 N. Y. 31.

be rendered against the defendant who is alleged to have fraudulently taken an assignment of the insolvent's property. The decree must be for an accounting as to the property which has come into the hands of the fraudulent vendee.[1] Where property which is legally liable to be taken in execution has been fraudulently conveyed or encumbered, the jurisdiction is usually concurrent, as the creditor may either issue an execution at law and sell the property, or file a bill in equity to have the conveyance set aside.[2] The remedy in equity, as will presently appear,[3] is necessarily exclusive in cases where the subject-matter of contention is not subject to execution.

§ 52. **No injunction against debtor before judgment.** — As a general rule, a simple contract creditor who has no lien on the property, cannot enjoin his debtor from selling it, nor will he be allowed to come into equity to invoke its interference to preserve the property until a judgment can be obtained.[4] If the property of an honest struggling debtor could be tied up by injunction upon mere unadjusted legal demands, he might be constantly exposed to the greatest hardships and grossest frauds, for which

[1] See §§ 176–179.

[2] See note to Sexton v. Wheaton, 1 Am. Lea. Cas. (5th ed.) 58, 59; Bispham's Equity, § 242; Blenkinsopp v. Blenkinsopp, 1 De. G., M. & G. 500; Partee v. Mathews, 53 Miss. 146; Sheafe v. Sheafe, 40 N. H. 516; Scott v. Indianapolis Wagon Works, 48 Ind. 75; Gallman v. Perrie, 47 Miss. 131, 140; Barto's Appeal, 55 Pa. St. 386; Tupper v. Thompson, 26 Minn. 386; Henry v. Hinman, 25 Minn. 199.

[3] See § 56.

[4] Peyton v. Lamar, 42 Ga. 134; Cubbedge v. Adams 42 Ga. 124; Oberholser v. Greenfield, 47 Ga. 530; Shufeldt v. Boehm, 96 Ill. 560; Moran v. Dawes, 1 Hopk. Ch. (N. Y.) 365; Cates v. Allen, 149 U. S. 451, 13 S. C. Rep. 883, 977; Dortic v. Dugas, 52 Ga. 231; Buchanan v. Marsh, 17 Iowa, 494; Rich v. Levy, 16 Md. 74; Phelps v. Foster, 18 Ill. 309; Brooks v. Stone, 19 How. Pr. (N. Y.) 395; Uhl v. Dillon, 10 Md. 400; Hubbard v. Hubbard, 14 Md. 356; National Tradesmen's B'k v. Wetmore, 124 N. Y. 241. Compare Case v. Beauregard, 99 U. S. 125; Locke v. Lewis, 124 Mass. 1. See § 73. Nor can a creditor having possession of the debtor's property, without judicial process and against the debtor's will, sell the property and apply its proceeds to the payment of the debt. Xenia Bank v. Stewart, 114 U. S. 224, 5 S. C. Rep. 845.

the law would afford no adequate remedy. It would deprive him of the means of payment, or of defending himself against vexatious litigation, and force him into unconscionable compromises to prevent the ruin of his business pending the controversy.[1] An injunction ought not to issue to compel parties to hold goods pending a trial at law, with the expectation that they may be wanted to answer an execution upon a judgment which the creditor hopes to obtain.[2] "The authorities are clear," says the learned and lamented Mr. Justice Campbell,[3] "that chancery will not interfere to prevent an insolvent from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to establish it." "The reason of the rule," says Chancellor Kent, "seems to be that until the creditor has established his title he has no right to interfere, and it would lead to an unnecessary and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds."[4] So the simple contract cred-

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[1] Shufeldt v. Boehm, 96 Ill. 560.

[2] Phelps v. Foster, 18 Ill. 309; Heacock v. Durand, 42 Ill. 230; Horner v. Zimmerman, 45 Ill. 14.

[3] Adler v. Fenton, 24 How. 411; see Findlay v. McAllister, 113 U. S. 114, 5 S. C. Rep. 401.

[4] Wiggins v. Armstrong, 2 Johns. Ch. (N. Y.) 145, and the able opinion of Chancellor Kent. Cates v. Allen, 149 U. S. 458, 13 S. C. Rep. 883, 977; Smith v. Railroad Co., 99 U. S. 398; Artman v. Giles, 155 Pa. St. 415, 26 Atl. Rep. 668. Uhl v. Dillon, 10 Md. 500, was a bill for an injunction and receiver filed by a simple contract creditor, charging that the defendant was deeply in debt; that he was disposing of his stock; had already parted with his real estate; and was collecting debts due to him, with the intention to defraud creditors and abscond. An injunction was allowed and a receiver appointed. The appellate court in reversing the decree and dismissing the bill, said (p. 503): "The bill filed by the appellees in this cause, states no sufficient case entitling them to the relief prayed. No authority has been shown to this court, nor can any be produced entitled to consideration, which sanctions the exercise of the high and extraordinary power of a court of chancery, to interpose, by writ of injunction, in a case like the one before us, restraining a debtor in the enjoyment and power of disposition of his property. The appellees (the complainants below) are merely general cred-

itors of a firm ordinarily have no specific lien upon the firm property which will enable them to interfere with any disposition which the firm may make of it.[1] And a wife having no judgment cannot restrain her husband's vendee from taking possession of real estate upon the ground that the transfer was in fraud of her right of support, and deprived her of the right to attach the land in a suit for divorce and alimony.[2]

§ 53. **Certain exceptional cases.** — Occasional exceptions may be found in some States to the rule that equity will not interfere at the instance of a simple contract creditor. But the exceptions prove the force of the rule. In Moore v. Kidder,[3] the bill distinctly charged a fraudulent intention on the part of a debtor summoned as trustee, and an attempt to dispose of his property, and put it beyond the reach of creditors, for the purpose of defeating the plaintiffs in the collection of any judgment that might be obtained in a suit at law, and asked for an injunction to

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itors of the appellant, who have not prosecuted their claim to judgment and execution, nor in any other manner acquired a lien upon the debtor's property, and were not entitled to the writ of injunction nor to the appointment of a receiver. Whatever may be the supposed defects of the existing laws of the State, in leaving to the debtor the absolute power of disposing of his property, and leaving the creditor to the slow and very inadequate legal remedies now provided, if such defects exist, it is solely in the power of the legislature to correct them. It is not within the province of the chancery courts to stretch their power beyond the limits of the authorities of the law, for the purpose of remedying such defects. Such a course would be productive of great mischief, and make the rights of the citizen depend upon the vague and uncertain discretion of the judges, instead of the safe and well-defined rules of law."

[1] Wilcox v. Kellogg, 11 Ohio, 394; Gwin v. Selby, 5 Ohio St. 97; Sigler v. Knox County Bank, 8 Ohio St. 511; Potts v. Blackwell, 4 Jones' Eq. (N. C.) 58; Field v. Chapman, 15 Abb. Pr. (N. Y.) 434; State v. Thomas, 7 Md. App. 205; Shackelford v. Shackelford, 32 Gratt. (Va.) 481; Allen v. Center Valley Co., 21 Conn. 130; Schmidlapp v. Currie, 55 Miss. 597; Reeves v. Ayers, 38 Ill. 418; Mayer v. Clark, 40 Ala. 259; see Case v. Beauregard, 99 U. S. 125.

[2] Ullrich v. Ullrich, 68 Conn. 580.

[3] 55 N. H. 491. See People ex rel. Cauffman v. Van Buren, 136 N. Y. 261, 32 N. E. Rep. 775.

prevent that mischief and wrong. The court said that the bill very clearly showed a case for equitable interference, in aid of the remedy at law, and that without such relief the suit at law would be rendered fruitless by the active fraud of the defendant.[1] Clearly this would be a proper case for the issuance of an attachment or other suitable provisional relief in the action at law. In another case where a bill charged insolvency in the debtor, and averred that he had fraudulently transferred his goods to a third person, who was implicated in the fraud, and that the debtor had purchased the goods with intent to defraud the plaintiffs, a receivership was allowed before judgment.[2] Here the relief was extended upon the theory that the goods for which the indebtedness was created were fraudulently obtained, and that the debtor never acquired title to them. This would seem to be substantially substituting a bill in equity for the relief usually incident to replevin. An equitable action in the nature of a creditor's bill for an injunction, may be brought in aid of a lien by attachment before the recovery of judgment in the attachment action where there is danger that the property may be removed from the jurisdiction of the court.[3] The court in People ex rel. Cauffman v. Van Buren[4] claim that there is no conflict between Thurber v. Blanck[5] and Mechanics' and Traders' Bank v. Dakin.[6] But as will presently appear,[7] People ex rel. Cauffman v. Van Buren[8] has been in a measure

[1] Compare Bowen v. Hoskins, 45 Miss. 183; Cottrell v. Moody, 12 B. Mon. (Ky.) 502; Thompson v. Diffenderfer, 1 Md. Ch. 489.

[2] Cohen v. Meyers, 42 Ga. 46. Compare Hyde v. Ellery, 18 Md. 500; Rosenberg v. Moore, 11 Md. 376; Haggarty v. Pittman, 1 Paige (N. Y.) 298.

[3] People ex rel. Cauffman v. Van Buren, 136 N. Y. 252, 32 N. E. Rep. 775. Compare Burtis v. Dickinson, 81 Hun (N. Y.) 345, 30 N. Y. Supp. 886.

[4] 136 N. Y. 252, 259, 32 N. E. Rep. 775.

[5] 50 N. Y. 80.

[6] 51 N. Y. 519.

[7] See § 81.

[8] 136 N. Y. 252, 32 N. E. Rep. 775.

limited by the more recent case of Whitney v Davis.[1] Where goods are sold on credit, but such credit has been obtained by false representations and concealment of insolvency, such as would entitle the vendor to rescind, he is not considered as being an ordinary creditor, but he may disaffirm and obtain an injunction against the disposal of the goods.[2] Creditors will, as a rule, find these exceptional cases not easy to support.

§ 54. **Joinder of claims.** — The assets of the fraudulent debtor are, as a rule, scattered among different friends, in different forms, and by transactions had at different times. This requires some notice of the authorities as to uniting or joining claims. In cases where the sole object of the bill is to secure satisfaction of a judgment out of property fraudulently alienated, the suit may be framed to avoid several distinct conveyances made to as many grantees. Such a bill is said to embody a single cause of action.[3] This principle applies although the defendants may have separate and distinct defenses.[4] In Lattin v. McCarty,[5] it was decided that an equitable cause of action to cancel and remove, as a cloud upon plaintiff's title, a deed given by mistake by a third party to the defendant, under which the latter had fraudulently obtained possession, could be united with a claim to recover possession of the premises, and asserted in the same complaint. The principle of this case was expressly

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[1] 148 N. Y. 261, 42 N. E. Rep. 661.

[2] Fechheimer v. Baum, 37 Fed. Rep. 167; cf. England v. Adams, 157 Mass. 449, 32 N. E. Rep. 665; Donaldson v. Farwell, 93 U. S. 633; Stewart v. Emerson, 52 N. H. 301.

[3] Trego v. Skinner, 42 Md. 432; North v. Broadway, 9 Minn. 183; Chase v. Searles, 45 N. H. 511; Jacot v. Boyle, 18 How. Pr. (N. Y.) 106; Tucker v. Tucker, 29 Mo. 350; Snodgrass v. Andrews, 30 Miss, 472; Reed v. Stryker, 4 Abb. App. Dec. (N. Y.) 26; Dimmock v. Bixby, 20 Pick. (Mass.) 368.

[4] Donovan v. Dunning, 69 Mo. 436.

[5] 41 N. Y. 107; Stock Growers' Bank v. Newton, 13 Col. 247, 22 Pac. Rep. 444.

repudiated in Missouri in an action involving substantially the same state of facts, on the theory that a bill in equity was not a proper form of action for the recovery of the possession of real estate, there being an adequate remedy at law.[1] But this latter reason does not commend itself as necessarily conclusive. Fraudulent confessions of judgments entered in different courts may be attacked in one suit.[2] So a partner may sue his copartners for an accounting, and may join in the same action alienees of his copartners, to whom the latter have collusively transferred partnership assets in fraud of the partnership, and seek a cancellation of the transfer as well as an accounting. "Why," it has been said, "should not all this be embraced in one action? The object is single, viz.: To bring about a complete and final settlement of the partnership."[3]

§ 55. **Uniting causes of action.** — Questions relating to the joinder of causes of action of necessity frequently arise for adjudication in contests of the class under consideration, where debtors have sought to conceal property by different subterfuges. In Palen v. Bushnell,[4] the plaintiff, as receiver in supplementary proceedings, instituted an action against the debtor and a third party, (1). To recover moneys usuriously exacted by the third party from the debtor; (2). To compel the third party to account for securities belonging to the debtor; and (3). To set aside as fraudulent certain transfers of real and personal property alleged to have been made by the debtor to the third party. The court observed: "What

[1] Peyton v. Rose, 41 Mo. 257; Curd v. Lackland, 43 Mo. 140.

[2] Uhlfelder v. Levy, 9 Cal. 607.

[3] Compare, upon this general subject, Webb v. Helion, 3 Rob. (N. Y.) 625; Wade v. Rusher, 4 Bosw. (N. Y.) 537. A judgment-creditor of an insolvent railroad corporation may in Ohio join in the same action a claim to compel payment of unpaid subscriptions and a claim to enforce the individual liability of stockholders. Warner v. Callender, 20 Ohio St. 190.

[4] 46 Barb. (N. Y.) 25.

is the subject of the action in this case? It is the restitution of the property of the judgment-debtor whom the plaintiff represents. To entitle himself to this relief, the plaintiff avers in his complaint different transactions out of which his right to restitution flows."[1] This statement is criticised by Mr. Pomeroy,[2] as follows: "There is here a plain confusion of ideas. The restitution of the debtor's property, which is the relief demanded, is the *object* of the action. If there is anything connected with this matter clear, it is that the authors of the code used the terms 'subject of action' and 'object of the action' to describe different and distinct facts." The criticism upon the particular language employed in this case has some foundation, but we cannot suppress the conviction that a system of procedure which prohibited the joinder of claims, such as those specified in a single action, would furnish most unsatisfactory and inadequate redress to creditors.

§ 56. **Exclusive jurisdiction in equity.**— The subjects of fraud and trusts are peculiarly matters of equity jurisdiction.[3] Manifestly in cases where property is of such nature that it never was subject to execution at law, the remedy of creditors desiring to reach it, as we have observed, is exclusively in chancery.[4] Thus, as has already been shown,[5] it was observed by Chief-Justice Gray, in delivering the opinion of the Supreme Court of Massachusetts, in Drake v. Rice,[6] that, "by the law of

[1] A cause of action against one for fraudulently procuring a conveyance of property from a decedent in his life-time cannot be joined with a cause of action against another for fraudulently procuring the making of a will cutting off the plaintiff. Heath v. Heath, 18 Misc. (N. Y.) 521.

[2] Remedies and Remedial Rights, § 470.

[3] National Tradesmen's B'k v. Wetmore, 124 N. Y. 241.

[4] See Weed v. Pierce, 9 Cow (N. Y.) 722; Sexton v. Wheaton, 1 Am. Lea. Cas. (5th ed.) 59; Drake v. Rice, 130 Mass. 412; Abbott v. Tenney, 18 N. H. 109; Sargent v. Salmond, 27 Me. 539.

[5] See § 17.

[6] 130 Mass. 412. See Bragg v. Gaynor, 85 Wis. 468, 55 N. W. Rep. 919.

England before the American Revolution, ... fraudulent conveyances of choses in action, though not specified in the statute, were equally void, but from the nature of the subject, the remedy of the creditor must be sought in equity."[1]

§ 57. Land purchased in name of third party. — The creditor may encounter a practical difficulty in reaching realty paid for by the debtor, the title to which is fraudulently taken in the name of a third party. This is a very common device. The courts are somewhat at variance upon the question as to whether or not real estate so held can be sold on execution against the debtor, and recovered by the purchaser in ejectment, or, in fact, whether it can be reached by any proceedings at law. Authorities can be cited to the effect that an execution sale of land, the title to which is held in this manner, passes nothing to the purchaser;[2] the creditor's proper remedy to reach it

[1] Citing Taylor v. Jones (1743), 2 Atk. 600; King v. Dupine (1744), 2 Atk. 603, note; Horn v. Horn (1749), Ambl. 79; Ryall v. Rolle (1749), 1 Atk. 165, 1 Ves. Sr. 348; Partridge v. Gopp (1758), 1 Eden, 163, Ambl. 596; Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450; Hadden v. Spader, 20 Johns. (N. Y.) 554; Abbott v. Tenney, 18 N. H. 109; Sargent v. Salmond, 27 Me. 539. See §§ 17, 33.

[2] Mulford v. Peterson, 35 N. J. Law, 133; Haggerty v. Nixon, 26 N. J. Eq. 42; Garfield v. Hatmaker, 15 N. Y. 475; Dewey v. Long, 25 Vt. 564; Davis v. McKinney, 5 Ala. 719; Webster v. Folsom, 58 Me. 230; Low v. Marco, 53 Me. 45; Jimmerson v. Duncan, 3 Jones (N. C.) Law, 537; Carlisle v. Tindall, 49 Miss. 229; Howe v. Bishop, 3 Met. (Mass.) 26. See Hamilton, v. Cone, 99 Mass. 478. In Niver v. Crane, 98 N. Y. 40, it was decided that the fact that the debtor paid the consideration for property conveyed to another did not alone authorize a judgment taking the property to satisfy the debt. Under the provision of the statute of uses and trusts (1 R. S. 728, §§ 51, 52), which declares that a grant made to one person, the consideration for which is paid by another, shall be presumed fraudulent as against the creditors at that time of the person paying the consideration, and where fraudulent intent is not disproved, a trust shall result in favor of such creditors, to make out such a trust the consideration must be paid at or before the execution of the conveyance. See Decker v. Decker, 108 N. Y. 128. Such trust is exclusively in favor of creditors; the heirs at law cannot enforce it. Robertson v. Sayre, 134 N. Y. 97, 31 N. E. Rep. 250; Miner v. Lane, 87 Wis. 348, 57 N. W. Rep. 1105.

is declared to be by bill in equity;[1] the grantee is considered to hold the title impressed with a trust in favor of creditors,[2] and may be compelled to quit-claim his interest.[3] The principle embodied in these authorities seems to commend itself as logical, but it is not universally recognized. There are cases holding that an execution purchaser on a judgment against the debtor may recover the lands in ejectment, even though the title was never in the debtor, if it is shown that the fraudulent grantee held it for the debtor's benefit,[4] and that such an interest may be attached.[5] It may be observed that a purchase of personal property by a debtor in the name of a third party does not exempt it from direct seizure by creditors.[6]

§ 58. **Relief before and after sale.** — The jurisdiction of a court of equity is ample either before or after sale under a judgment, to set aside a deed made in fraud of creditors — before sale to enable the creditor to present and sell an unembarrassed title; after sale to remove clouds from the title.[7] It will thus be seen how important the jurisdiction of equity becomes in connection with fraudu-

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[1] Mulford v. Peterson, 35 N. J. Law, 133.

[2] Garfield v. Hatmaker, 15 N. Y. 475; Corey v. Greene, 51 Me. 114; Simmons v. Ingram, 60 Miss. 900. Such trust exists in favor of all the creditors of the person who pays the consideration; one creditor cannot acquire a preference by taking proceedings in equity. Miner v. Lane, 87 Wis. 348, 57 N. W. Rep. 1105; cf. Brown v. Chubb, 135 N. Y. 174, 31 N. E. Rep. 1030.

[3] Cutter v. Griswold, Walker's Ch. (Mich.) 437; Ansorge v. Barth, 88 Wis. 553, 60 N. W. Rep. 1055. Must the creditor first recover judgment in such a case? See Ocean Nat. Bank v. Olcott, 46 N. Y. 22. See *infra*, Chap. IV.

[4] Kimmel v. McRight, 2 Pa. St. 38; Tevis v. Doe, 3 Ind. 129; Pennington v. Clifton, 11 Ind. 162; Guthrie v. Gardner, 19 Wend. (N. Y.) 414; Brewster v. Power, 10 Paige (N. Y.) 569; Garfield v. Hatmaker, 15 N. Y. 477.

[5] Cecil Bank v. Snively, 23 Md. 253.

[6] Godding v. Brackett, 34 Me. 27. See § 82.

[7] Gallman v. Perrie, 47 Miss. 131. See Orendorf v. Budlong, 12 Fed. Rep. 25; Partee v. Mathews, 53 Miss. 146.

lent transfers. It would often be impossible, especially in cases affecting realty, to render the title marketable until the flexible hand of a court of equity had removed the simulated transfers and incumbrances in which the debtor has involved it. Equity alone can disentangle the title from the doubts and embarrassments which interfere with a realization of a fair price; and to that extent and for that purpose its invaluable assistance is usually asked.[1] In Rhead v. Hounson,[2] the court said: "The bill must be construed in reference to its nature. It is not filed to reach property incapable of seizure on execution, and therefore based on the theory that the legal remedy has been exhausted. Very far from it. The principle on which it proceeds is that a legal remedy is in fact progressing, and which, being fraudulently obstructed, the aid of the court is needed to remove that obstruction. The claim made is that the deed from the judgment-debtor to his son is fraudulent as against the creditor, and that the farm is therefore subject to levy and the deed exposed to be removed out of the way of it by the assistant jurisdiction of equity."

§ 59. **The remedy at law.** — A judgment-creditor may proceed at law to sell under execution lands or property which his debtor has fraudulently alienated,[3] which are subject to execution. The attempted transfer may be treated as a nullity, and the property subjected to seizure and sale upon execution the same as though no such

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[1] Partee v. Mathews, 53 Miss. 146; Cahn v. Person, 56 Miss. 363.

[2] 46 Mich. 246.

[3] Carter v. Castleberry, 5 Ala. 277; Booth v. Bunce, 33 N. Y. 139; Henry v. Hinman, 25 Minn. 199; Brown v. Snell, 46 Me. 490; Thomason v. Neeley, 50 Miss. 313; Jacoby's Appeal, 67 Pa. St. 434; Allen v. Berry, 50 Mo. 90; Fowler v. Trebein, 16 Ohio St. 493; Staples v. Bradley, 23 Conn. 167; Foley v. Bitter, 34 Md. 646; Gormerly v. Chapman, 51 Ga. 421; Russell v. Dyer, 33 N. H. 186; Smith v. Reid, 134 N. Y. 576, 577, 31 N E. Rep. 1082; Maders v. Whallon, 74 Hun (N. Y.) 378, 26 N. Y. Supp. 614. But see § 69.

covinous transfer had ever been made.[1] The creditor in such cases may consider the debtor as still the owner of the property, and may pursue it to secure satisfaction of the claim the same as though the title were unembarrassed by the fraudulent deed or transfer.[2] The general principle was involved in Rinchey v. Stryker,[3] in which case it was decided that where an attachment was issued to a sheriff he was entitled to seize under it any property which the debtor might have disposed of with intent to defraud his creditors; that by such seizure a specific lien was acquired upon the property attached, and the sheriff, when sued for wrongfully taking the property, had a right to show, even before judgment in the attachment suit, that the title of the purchaser from the debtor was fraudulent and voidable as against the attaching creditor.[4] Incidentally it may be recalled that where the plaintiff has the legal title to land, and it is held out of possession by the defendant, he must proceed at law. Bills *quia timet* cannot ordinarily be brought by one out of possession,[5]

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[1] Tupper v. Thompson, 26 Minn. 386; Henry v. Hinman, 25 Minn. 199; National Park Bank v. Lanahan, 60 Md. 513; Smith v. Reid, 134 N. Y. 568; 31 N. E. Rep. 1082; Maders v. Whallon, 74 Hun, 372, 26 N. Y. Supp. 614; Wagner v. Law, 3 Wash. St. 500, 28 Pac. Rep. 1109, 29 Id. 927; Bergen v. Carman, 79 N. Y. 153.

[2] Thomason v. Neeley, 50 Miss. 313. It has been observed that where the "deed is a mere pretence, collusively devised, and the parties do not intend other than an ostensible change of the property, the property does not pass as to creditors; and even when the parties intend an irrevocable disposition of the property, but the conveyance has been made with the intent to defraud creditors," it may be avoided. Chandler v. Von Roeder, 24 How. 227; Baldwin v. Peet, 22 Tex. 708, note. In Massachusetts, jurisdiction in equity is limited to property or rights which cannot be attached or taken on execution. Schleisinger v. Sherman, 127 Mass. 209.

[3] 26 How. Pr. (N. Y.) 75, 31 N. Y. 140.

[4] See Greenleaf v. Munford, 30 How. Pr. (N. Y.) 30, 31. But compare Thurber v. Blanck, 50 N. Y. 83, with Mechanic's & Traders' Bank v. Dakin, 51 N. Y, 519, reaffirmed in People ex rel. Cauffman v. Van Buren, 136 N. Y. 252, 32 N. E. Rep. 775. See Lawrence v. Bank of the Republic, 35 N. Y. 320; *infra*, § 81.

[5] United States v. Wilson, 118 U. S. 89, 6 S. C. Rep. 991.

unless the absence of possession is excused by local statute.

§ 60. By suit in equity.—Fraud is one of the recognized subjects of equity jurisdiction, and is the most ancient foundation of its power.[1] The primary jurisdiction in equity is *in personam*.[2] The existence of a remedy at law does not interfere with the right of a creditor to resort to a court of equity[3] to secure a cancellation of a fraudulent conveyance as an obstacle in the way of the full enforcement of a judgment, and a cloud on the title to the property sought to be reached.[4] The same rule applies where it is sought to set aside fraudulent chattel mortgages and judgments fraudulently confessed.[5] The suit in equity is sometimes said to be an ancillary relief in aid of the legal remedy,[6] since a court of equity does not intervene to enforce the payment of debts.[7] It

[1] Hartshorn v. Eames, 31 Me. 97; Story's Equity, § 68. See Warner v. Blakeman, 4 Keyes (N. Y.) 507; Logan v. Logan, 22 Fla. 564.

[2] Wilson v. Martin-Wilson, etc. Co., 151 Mass. 517, 24 N. E. Rep. 784.

[3] See § 51.

[4] Planters' & M. Bank v. Walker, 7 Ala. 926; Sheafe v. Sheafe, 40 N. H. 516; Dargan v. Waring, 11 Ala. 988; Cook v. Johnson, 12 N. J. Eq. 52; Bean v. Smith, 2 Mason, 253; Hamlen v. McGillicuddy, 62 Me. 269; Waddell v. Lanier, 62 Ala. 347; Traip v. Gould, 15 Me. 83; Beaumont v. Herrick, 24 Ohio St. 456; Sockman v. Sockman, 18 Ohio, 368; Musselman v. Kent, 33 Ind. 452; Dockray v. Mason, 48 Me. 178. In Gormley v. Potter, 29 Ohio St. 599, the court said: "The petition was founded upon the fact that the land had been taken in execution, and had for its object the removal of the cloud cast upon the title by the fraudulent conveyance. The removal of this cloud was in the interest of both the debtor and the creditors by enabling the property to be sold at a better price." Again, it has been observed that "The creditor has not only a right to have the property subjected to the payment of his judgment, but to have it subjected in such manner that it will bring its fair market value." Fowler v. McCartney, 27 Miss. 510.

[5] Sweetser v. Silber, 87 Wis. 102, 58 N. W. Rep. 239; Gullickson v. Madsen, 87 Wis. 19, 57 N. W. Rep. 965.

[6] See McCartney v. Bostwick, 32 N. Y. 57, and compare Niver v. Crane, 98 N. Y. 40, and Estes v. Wilcox, 67 N. Y. 264.

[7] Dunlevy v. Tallmadge, 32 N. Y. 459; Voorhees v. Howard, 4 Keyes (N. Y.) 383; Griffin v. Nitcher, 57 Me. 272; Logan v. Logan, 22 Fla. 564. See § 73.

may be asked why resort is so frequently had to a creditor's bill seeking a decree to avoid or cancel the covinous transfer when the property may be more expeditiously seized under attachment or execution. The creditor's bill, or a suit to clear the fraudulent transfer, is, for many reasons, entitled to preference as a means of relief. Should the creditor attempt to sell the disputed property arbitrarily under execution, bidders would be deterred from purchasing lest they should buy a lawsuit, hence the market value of the land embraced in the covinous transfer is practically destroyed. Then the seizure of the property subjects the creditor to the peril incident to proving that the transfer was fraudulent, and in the event of failure to establish fraud, of paying damages for the unwarrantable interference, seizure, and sale. By filing a creditor's bill practically the only risk incurred is the costs and expense of the suit, for generally no seizure is effected unless the suit is successful, in which event the covinous transfer and cloud on the title is cleared away. Then, as already stated, equity procedure is more flexible than the procedure at law,[1] and in equity an inequitable transaction, not absolutely fraudulent in the full sense of that term, may be avoided at the suit of a creditor. Fraud it is said may be presumed in equity but must be proved at law;[2] but this is a loose and unreliable statement, for it must be proved in either forum. Courts of equity it is true will act upon circumstance indicating fraud which courts of law might scarcely deem satisfactory proofs; and will grant relief upon the ground of fraud established by presumptive evidence of such character as courts of law would not always deem sufficient to justify a verdict.[3]

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[1] See § 51.

[2] King v. Moon, 42 Mo. 555. See Kilbourn v. Sunderland, 130 U. S. 515, 9 S. C. Rep. 594.

[3] See Jackson v. King, 4 Cow. (N. Y.) 207, 3 Greenl. Ev. § 254, 1 Story's Eq., Jur. §§ 190–193. "*Fraud* is not to be considered as a simple

In Kilbourn v. Sunderland,[1] the court says "Fraud has in equity a more extensive signification than at law." The Supreme Court of Pennsylvania,[2] in commenting upon the applicability of equity to suits involving fraudulent alienations, remark: "It is especially adapted to this class of cases. Its process is plastic and may be readily moulded to suit the exigencies of the particular case. A court of equity proceeds with but little regard to mere form. It moves with celerity, and seizes the fruits of a fraud in the hands of the wrong-doer." Having jurisdiction for one purpose equity will make a complete disposition of the cause.[3] Equity endeavors to deal with the substance of affairs; to look beyond the observance of mere forms;[4] to regulate its judgment according to the

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fact, but a *conclusion* to be drawn from all the circumstances of the case. It may be inferred from the nature of the contract itself, or from the condition or circumstances of the parties. The general principle is well settled, that equity will give relief against *presumptive frauds*, and therein will go further than courts of law, where fraud must be proved and not presumed . . . . There are many instances of fraud that would in equity affect instruments in writing concerning lands, of which the law could not take notice." Burt v. Keyes, 1 Flipp. 63. Compare United States v. Amistad, 15 Pet. 594; Lloyd v. Fulton, 91 U. S. 483. See § 15.

[1] 130 U. S. 515, 9 S. C. Rep. 594. Compare 1 Story, Eq. Jur. § 450.

[2] Fowler's Appeal, 87 Pa. St. 454. In Artman v. Giles, 155 Pa. St. 416, 26 Atl. Rep. 668, the right of simple contract or attaching creditors to restrain a judgment-creditor from enforcing his judgment was denied. The court says: "The only case at all analogous to the present, in which a creditor not having a judgment has been permitted to interfere with the debtor's disposition of his property, is Fowler's Appeal, 87 Pa. St. 449. In that case the bill averred that the debtor had conveyed land to his son-in-law, by collusion to defraud his creditors, and that the grantee was about to convey to *bona fide* purchasers. The debtor having died, the bill was sustained upon the ground that the creditor complainant, though without a judgment, had an express statutory lien, which gave him a standing. To sustain the present injunction would be going a decided step farther than any case adjudicated, and in opposition to established principles."

[3] Manufacturing Co. v. Bradley, 105 U. S. 182; Oelrichs v. Spain, 15 Wall. 211; Crane v. Bunnell, 10 Paige (N. Y.) 333; Billups v. Sears, 5 Gratt. (Va.) 31; Pearce v. Creswick, 2 Hare, 296; Martin v. Tidwell, 36 Ga. 345; Sanborn v. Kittredge, 20 Vt. 632; Souder's Appeal, 57 Pa. St. 498, 502; Corby v. Bean, 44 Mo. 379.

[4] Wright v. Oroville M. Co., 40 Cal. 20. In Buck v. Voreis, 89 Ind. 117, Elliott, J., said: "Forms are of little

real purposes which controlled parties in the various matters brought before it for relief or correction;[1] to tear aside the covering beneath which the perpetrators of the fraud seek concealment; to deal with actual facts, not with pretexts and disguises. The Supreme Court of Illinois say: "Equity will penetrate beyond the covering of form, and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem."[2]

Rules of pleading in equity are not so strict in matters of form as at law.[3]

§ 61. **Supplementary proceedings.** — Supplementary proceedings have, in New York and in some of the other States which have appropriated its reformed system of procedure, taken, in some measure, the place of creditors' actions or suits in equity to reach equitable assets. This remedy is now a special proceeding in New York,[4] and not a proceeding in the original action. These proceedings furnish, to a certain extent, a substitute[5] for a

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moment, for where fraud appears courts will drive through all matters of form and expose and punish the corrupt act." Of course, equity "cannot create a title where none exists." . . . . "Creditors can work out equities only through the rights of the parties where there is no fraud." Rush v. Vought, 55 Pa. St. 438, 444, quoted in Curry v. Lloyd, 22 Fed. Rep. 265.

[1] Livermore v. McNair, 34 N. J. Eq. 482; Buck v. Voreis, 89 Ind. 117.

[2] Wadhams v. Gay, 73 Ill. 415, 435. See Gay v. Parpart, 106 U. S. 699, 1 S. C. Rep. 456.

[3] Birely's Ex'rs v. Staley, 5 Gill. & J. (Md.) 432; Ridgely v. Bond, 18 Md. 450; Small v. Owings, 1 Md. Ch. 367. In Warner v. Blakeman, 4 Keyes (N. Y.) 507, Woodruff, J., said: "It is the just and proper pride of our matured system of equity jurisprudence that fraud vitiates every transaction; and, however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail."

[4] N. Y. Code Civ. Pro. § 2433. Compare West Side Bank v. Pugsley, 47 N. Y. 368.

[5] In Importers' and Tr. Nat. Bk. v. Quackenbush, 143 N. Y. 571, the court says: "Proceedings supplementary to execution are remedies in equity for the collection of the creditor's judgment, and were intended as a substitute for the creditor's bill, as formerly used in chancery."

creditor's bill,[1] for the discovery and sequestration of property,[2] and by their commencement a lien is said to be acquired upon the debtor's equitable assets,[3] though another creditor may gain precedence if, after the service of the order for the examination of the debtor, and before the appointment of a receiver, he discovers property liable to execution and levies upon it.[4] Generally speaking these proceedings will reach whatever property is available on a creditor's bill,[5] and have, as we have seen, been held to be a simple substitute for it,[6] and are entitled to all the presumptions of regularity which appertain to proceedings in courts of general jurisdiction.[7] Supplementary proceedings are not exclusive.[8] The judgment-creditor may abandon them and institute a suit in his own name to annul a fraudulent alienation,[9] and he may invoke both remedies at the same time.[10] If a third

[1] Spencer v. Cuyler, 9 Abb. Pr. (N. Y.) 382; People v. Mead, 29 How. Pr. (N. Y.) 360; Pope v. Cole, 64 Barb. (N. Y. 409; affi'd, 55 N. Y. 124; Importers' & Tr. Nat. Bk. v. Quackenbush, 143 N. Y. 571, 38 N. E. Rep. 728. Compare Catlin v. Doughty, 12 How. Pr. (N. Y.) 459.

[2] Becker v. Torrance, 31 N. Y. 631; Billings v. Stewart, 4 Dem. (N. Y.) 269.

[3] Lynch v. Johnson, 48 N. Y. 33; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494; Brown v. Nichols, 42 N. Y. 26; Edmonston v. McLoud, 16 N. Y. 544; Billings v. Stewart, 4 Dem. (N. Y.) 268. Compare Dubois v. Cassidy, 75 N. Y. 300; Campbell v. Genet, 2 Hilt. (N. Y.) 290; Robinson v. Stewart, 10 N. Y. 196. Although the lien acquired by the judgment-creditor in these proceedings is not divested by the death of the debtor, it cannot be enforced in a Surrogate's Court unless prior to the death a receiver was appointed or an order was made directing the application of the debtor's property to the satisfaction of the judgment. Billings v. Stewart, 4 Dem. (N. Y.) 265.

[4] Becker v. Torrance, 31 N. Y. 631. See Davenport v. Kelly, 42 N. Y. 193.

[5] Barnes v. Morgan, 3 Hun (N. Y.) 703; Barker v. Dayton, 28 Wis. 367.

[6] Lynch v. Johnson, 48 N. Y. 33; Smith v. Weeks, 60 Wis. 100, 18 N. W. Rep. 778; Importers' & Tr. Nat. Bk. v. Quackenbush, 143 N. Y. 571, 38 N. E. Rep. 728. Compare Williams v. Thorn, 70 N. Y. 270. See § 45.

[7] Wright v. Nostrand, 94 N. Y. 31.

[8] Williams v. Sexton, 19 Wis. 42.

[9] Bennett v. McGuire, 58 Barb. (N. Y.) 625; Anderson v. Pilgrim, 41 S. C. 423, 19 S. E. Rep. 1002, 20 Id. 64.

[10] Gates v. Young, 17 Weekly Dig. (N. Y.) 551; Schloss v. Wallach, 16 Abb. N. C. (N. Y.) 319*n*, 38 Hun (N. Y.) 638, 102 N. Y. 683; Matter of Sickle, 52 Hun (N. Y.) 527, 5 N. Y. Supp. 703. See §§ 51, 65.

party makes claim to any property which the examination discloses, the rights of the claimants cannot be determined in this proceeding, but resort must be had to a suit.[1] The procedure is usually by order, made upon proof of the return of an execution unsatisfied, requiring the debtor to appear in person in court, to be examined concerning his property.[2] The judgment upon which the order is procured must be *in personam*.[3] Property or equitable assets being thus disclosed, a receiver is appointed, who, upon qualifying, becomes vested with the debtor's assets and equitable interests, without conveyance or assignment,[4] though he does not get title to exempt property.[5] The receiver represents creditors, and thus may impeach the debtor's fraudulent sales [6] in the right of creditors. It seems to be no objection to the exercise of the jurisdiction appointing a receiver that the debtor has no assets,[7] or that such property as he is possessed of is sub-

[1] West Side Bank v. Pugsley, 47 N. Y. 372; Bennett v. McGuire, 58 Barb. (N. Y.) 634; Rodman v. Henry, 17 N. Y. 484; Sebrauth v. Dry Dock Savings Bank, 20 Alb. L. J. 197. Supplementary proceedings may be instituted before a judge of a Federal court, on a judgment at law recovered in the United States Courts. *Ex parte* Boyd, 105 U. S. 647; Canal & C. Sts. R. R. Co. v. Hart, 114 U. S. 654, 661. Compare Senter v. Mitchell, 5 McCra, 147. But the examination cannot be held in a State court upon a Federal judgment. Tompkins v. Purcell, 12 Hun (N. Y.) 662. Compare Goodyear Vulcanite Co. v. Frisselle, 22 Hun (N. Y.) 175.

[2] Bartlett v. McNeil, 49 How. Pr. (N. Y.) 55; affi'd 60 N. Y. 53.

[3] Bartlett v. McNeil, 3 Hun (N. Y.) 221. Compare Schwinger v. Hickok, 53 N. Y. 280.

[4] Porter v. Williams, 9 N. Y. 142; Cooney v. Cooney, 65 Barb. (N. Y) 524; Bostwick v. Menck, 40 N. Y. 383.

[5] Cooney v. Cooney, 65 Barb. (N. Y.) 525; Hudson v. Plets, 11 Paige (N. Y.) 180; Andrews v. Rowan, 28 How. Pr. (N. Y.) 126. See Tillotson v. Wolcott, 48 N. Y. 190; Hancock v. Sears, 93 N. Y. 79.

[6] Dollard v. Taylor, 33 N. Y. Super. 498; Bostwick v. Menck, 40 N. Y. 384; Porter v. Williams, 9 N. Y. 142.

[7] See Browning v. Bettis, 8 Paige (N. Y.) 568; Bloodgood v. Clark, 4 Paige (N. Y.) 574; Shainwald v. Lewis, 6 Fed. Rep. 776. Monell J., held, in Dollard v. Taylor, 33 N. Y. Superior Ct. 496, that where the only purpose of appointing a receiver in supplementary proceedings was to attack a fraudulent assignment, the application was properly denied as the judgment-creditor could himself file a bill for that purpose, and in a proper case secure a receiver pending the suit.

ject to execution.[1] As an illustration of the utility of this remedy it may be stated that a widow's unassigned right of dower can be reached by her creditors[2] in supplementary proceedings,[3] for it is liable to their claims,[4] and a receiver appointed in these proceedings may bring an action for its admeasurement.[5]

§ 62. **Assumpsit — Case — Conspiracy.** — A fraudulent assignment will not ordinarily authorize a judgment against the purchaser for the original debt;[6] nor is an action on the case considered to be an appropriate form of procedure against the debtor and his fraudulent alienee. The latter form of action is discussed at much length in Lamb v. Stone,[7] and the language of the court is quoted with approval by the learned and lamented Mr. Justice Campbell, in Adler v. Fenton,[8] as follows: "The plaintiff complained of the fraud of the defendant in purchasing the property of his absconding debtor, in order to aid and abet him in the fraudulent purpose of evading the

[1] Bailey v. Lane, 15 Abb. Pr. (N. Y.) 373, in note. The order in supplementary proceedings usually forbids the debtor from making a transfer of his property until further directions; but in New York his earnings within sixty days of the commencement of the proceedings are exempt and it is not considered a contempt of the court's order for him to apply them to the support of his family. Hancock v. Sears, 93 N. Y. 79; Newell v. Cutler, 19 Hun (N. Y.) 74, is overruled. The salary of a municipal officer cannot be reached in these proceedings. Waldman v. O'Donnell, 57 How. Pr. (N. Y.) 215. But examine Singer v. Wheeler, 6 Ill. App. 225.

[2] Mutual Life Ins. Co. v. Shipman, 119 N. Y. 330, 24 N. E. Rep. 177.

[3] Strong v. Clem, 12 Ind. 37; Payne v. Becker, 87 N. Y. 153.

[4] Tompkins v. Fonda, 4 Paige (N. Y.) 448; Mutual Life Ins. Co. v. Shipman, 119 N. Y. 324, 24 N. E. Rep. 177.

[5] Payne v. Becker, 87 N. Y. 153. See Stewart v. McMartin, 5 Barb. (N. Y.) 438. It may be noted in concluding this section that an attorney employed to collect a claim has authority to institute supplementary proceedings, but is not authorized under the original retainer to direct the receiver to institute an action to annul a fraudulent transfer. Ward v. Roy, 69 N. Y. 96.

[6] Aspinall v. Jones, 17 Mo. 212. See Chap. XI.

[7] 11 Pick. (Mass.) 527.

[8] 24 How. 412; compare Findlay v. McAllister, 113 U. S. 104, 5 S. C. Rep. 401.

payment of his debt. The court ask, what damage has the plaintiff sustained by the transfer of his debtor's property? He has lost no lien, for he had none. No attachment has been defeated, for none had been made. He has not lost the custody of his debtor's body, for he had not arrested him. He has not been prevented from attaching the property, or arresting the body of his debtor, for he had never procured any writ of attachment against him. He has lost no claim upon, or interest in the property, for he never acquired either. The most that can be said is, that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing his intention. . . . . On the whole, it does not appear that the tort of the defendant caused any damage to the plaintiff. But even if so, yet it is too remote, indefinite and contingent, to be the ground of an action." Many cases might be cited to the same general effect.[1] In an action on the case for conspiracy which arose in Rhode Island,[2] the plaintiffs, who were simple contract creditors, claimed that the defendants and the debtor had combined together to prevent plaintiffs and other creditors from obtaining payment of their debts; that the debtor, among other things, had made fictitious mortgages to the defendants under cover of which the latter had secreted the property and removed it out of the debtor's possession, so that plaintiffs were prevented from attaching it, and had thus lost their claims. The court ruled that the action could not be maintained.[3] "A simple conspiracy," says Nelson, J.,

[1] Smith v. Blake, 1 Day (Conn.) 258; Moody v. Burton, 27 Me. 427; Gardiner v. Sherrod, 2 Hawks (N. C.) 173; Kimball v. Harman, 34 Md. 407; Austin v. Barrows, 41 Conn. 287; Green v. Kimble, 6 Blackf. (Ind.) 552; Wellington v. Small, 3 Cush. (Mass.) 146; Bradley v. Fuller, 118 Mass. 239; Mowry v. Schroder, 4 Strob. (S. C.) Law 69.

[2] Klous v. Hennessey, 13 R. I. 335.

[3] Chief-Justice Durfee said: "There is some conflict of authority on the question thus raised, but the more

in Hutchins v. Hutchins,[1] "however atrocious, unless it resulted in actual damage to the party, never was the subject of a civil action, not even when the old form of a writ of conspiracy, in its limited and most technical character, was in use."[2] Yet authority can be cited tending to uphold a recovery in such cases. In Meredith v. Johns,[3] it appeared that an action of tort had been brought, and a verdict for £500 rendered, against a third party, for secretly and maliciously taking, carrying away, and concealing the slaves and property of one Peter May (against whom the plaintiff had a cause of action), and also for aiding, assisting and counseling May to absent himself, to the end that the creditor might be prevented from recovering against him. The Supreme Court of Appeals of Virginia declined to interfere in equity to restrain the enforcement of the judgment, and took the position that the defense was a legal one, and that the party aggrieved must seek redress in a law court. It seems,

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numerous, and, we think, the better reasoned and stronger cases are against the action. The principal ground of decision in these cases is that the damage, which is the gist of the action, is too remote, uncertain and contingent, inasmuch as the creditor has not an assured right, but simply a *chance* of securing his claim by attachment or levy, which he may or may not succeed in improving. It is impossible to find any measure of damages for the loss of such a mere chance or possibility. Another ground, added in some of the cases, is that no action would lie in favor of such a creditor against the debtor for putting his property beyond the reach of legal process, if the debtor were to do it by himself alone, and that what would not be actionable if done by himself alone, cannot be actionable any the more when done by him with the assistance of others. The first of these grounds, which is the fundamental one, and has been chiefly relied on, has been so exhaustively analyzed and discussed in the cases that it is impossible for us to add anything to the reasons adduced in support of it." Klous v. Hennessey, 13 R. I. 335.

[1] 7 Hill (N. Y.) 107.

[2] In Brackett v. Griswold, 112 N. Y. 467, 20 N. E. Rep. 376, the court say: "A mere conspiracy to commit a fraud is never of itself a cause of action. . . . The principles which govern an action for fraud and deceit are the same, whether the fraud is alleged to have originated in a conspiracy, or to have been solely committed by a defendant without aid or co-operation."

[3] 1 H. & M. (Va.) 595.

however, to have approved the procedure.[1] The case of Quinby v. Strauss,[2] of which the reports are meagre and unsatisfactory, is another illustration. The action was instituted by judgment-creditors of one of the defendants against such defendant and his attorney, charging them with having fraudulently conspired together to keep the debtor's personal property out of the reach of his creditors by the execution of chattel mortgages thereon to secure fictitious debts, one of them to the attorney, under which the property had been sold and bid off in the attorney's interest. The property so sold exceeded in value the amount of the creditor's judgment. The jury found that there was a conspiracy and the judgment was upheld, the appellate court saying that as the property appropriated by the attorney to his own use exceeded in value the amount of the creditor's claim, it was but just that he should pay the creditor whose demand he had sought to defeat. The point that nominal damages only could be awarded was expressly overruled. The recovery in this case must, however, be rested upon the ground that the attorney had a sufficient amount of the debtor's property in his hands to satisfy the complaining creditor's claim. In such a case the rule that only nominal damages are recoverable is not controlling.[3]

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[1] Compare Mott v. Danforth, 6 Watts (Pa.) 307; Penrod v. Morrison, 2 P. & W. (Pa.) 126.

[2] 90 N. Y. 664. But in Braem v. Merchants' Nat. Bank, 127 N. Y. 514, 28 N. E. Rep. 597, a damage suit by one creditor against another was defeated. The defendant had procured a judgment by consent against a corporation in violation of the statute forbidding corporate preferences and collected its claim. Plaintiff sued the defendant for so doing. The action failed. Bradley, J., said: "This is in the nature of an action on the case, and its purpose was to recover damages which the plaintiffs claim to have suffered by the alleged tortious and wrongful act of the defendant in taking its judgment and issuing execution upon it, thus apparently defeating the lien of their execution and the benefits which they otherwise would have derived from it." The court adds that plaintiff had no lien when defendant levied its judgment, and that redress could not be had in this form of action.

[3] The authorities establish the right of a judgment creditor to his action

§ 62a. **Reference not ordered.** — In New York State an action to set aside a fraudulent conveyance will not be referred. Gilbert, J., said: "References are proper only as aids to facilitate the transaction of business. The growing multiplication of them within the last fifteen years has been an evil prolific of individual injustice and public alarm."[1]

§ 63. **Relief collateral to main action.** — The rule is established in New York that in surplus-money proceedings in a foreclosure suit, the referee has the authority to inquire as to the validity of liens or conveyances, and they may be attacked as fraudulent.[2] In a reference as to title in partition, a party can assail a mortgage held by another party on the ground that it is fraudulent and void as against creditors.[3] It is asserted that no good reason exists why the fraudulent character of conveyances cannot be tested in such proceedings. When the jurisdiction of equity is once acquired, the court has the right to proceed to the end and administer complete justice between the parties.[4] This practice is considered more convenient for the disposition of cases of this character, and avoids the tedious process and increased expense incident to a distinct and separate action instituted for that purpose. Again, actions in aid of an execution at law are ancillary to the original suit, and are, in effect, a continu-

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against rescuers of the person or goods of the debtor, seized by the sheriff to satisfy the judgment, or against those who prevent the seizure of the debtor's goods on execution, or who conspire to prevent the levy of a tax to satisfy a judgment. Findlay v. McAllister, 113 U. S. 104, 5 S. C. Rep. 401, and cases cited.

[1] Bushnell v. Eastman, 2 Abb. Pr. N. S. (N. Y.) 411.

[2] Bergen v. Carman, 79 N. Y. 147; 1 Am. Insolv. Rep. 341. Compare Schafer v. Reilly, 50 N. Y. 61; Mutual Life Ins. Co. v. Bowen, 47 Barb. (N. Y.) 618; Fliess v. Buckley, 90 N. Y. 292.

[3] Halsted v. Halsted, 55 N. Y. 442.

[4] Manufacturing Co. v. Bradley, 105 U. S. 182; Oelrichs v. Spain, 15 Wall. 211; Martin v. Tidwell, 36 Ga. 345; Souder's Appeal, 57 Pa. St. 498, 502.

ance of the suit at law to obtain the fruits of a judgment, or to remove obstacles to its enforcement.[1] Usually the titles of adverse claimants cannot be litigated in foreclosure.[2]

§ 64. **Remedy governed by lex fori.** — In a case already cited which arose in Massachusetts,[3] it was said that the law of New York respecting fraudulent conveyances was the same as the common law and the law of Massachusetts; and that although choses in action could not be attached or levied upon in New York, yet after execution issued on the judgment at law, such interests might be reached by supplementary proceedings; while in Massachusetts these kinds of rights were subject to trustee process. The court said that the assignment having been found by the judge, before whom the case was tried without a jury, to have been made in fraud of the plaintiff, as a creditor of the assignor, and being under the law of either State voidable by creditors in some form of judicial process, the question whether it should be relieved against on the common-law, or on the equity side of the court, was a question of remedy only, and governed by the *lex fori*.[4] It may be observed that the general rule that the *lex fori* governs the remedy controls the right to arrest the debtor. Thus where goods were sold in New York on credit to parties who transacted business in Alabama, and the debtors subsequently disposed of their property in the latter State with intent to defraud their

[1] Clafflin v. McDermott, 12 Fed. Rep. 375, 20 Blatchf. 522.

[2] Kinsley v. Scott, 58 Vt. 420; Merchants' Bank v. Thompson, 55 N. Y. 11; Lewis v. Smith, 9 N. Y. 514; Ruyter v. Reid, 121 N. Y. 503, 24 N. E. Rep. 791.

[3] Drake v. Rice, 130 Mass. 413. See § 17.

[4] In the case of a sale of horses and mules that took place in Virginia, where the stock was subsequently sent to Pennsylvania for pasturage, and was there seized on a foreign attachment against the vendor, it was held that the validity of the transfer must be tested by the laws of Virginia. Born v. Shaw, 29 Pa. St. 288.

creditors, the New York Supreme Court held that an order of arrest was properly issued against the defendants by that court.[1] In Pritchard v. Norton,[2] the court said: "The principle is that whatever relates merely to the remedy, and constitutes part of the procedure, is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation, and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attached to it, is governed by the law of the contract."[3] It is foreign to the scope of this treatise to discuss at length the question of how far a transfer of personal property, which is lawful in the owner's domicil, will be respected in the courts of the country where the property is located, and where a different rule as to transfer prevails. This is a question upon which the courts are much at variance. It must be remembered that there is no absolute right to have such a transfer respected in the foreign forum, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields in cases where the laws and policy of the State in which the property is located have prescribed a different rule of transfer from that of the State in which the owner lives.[4] The general rule

[1] Claflin v. Frenkel, 3 Civ. Pro. (N. Y.) 109; Brown v. Ashbough, 40 How. Pr. (N. Y.) 226. See § 191. A fraudulent disposition of property in Pennsylvania may be made the subject of attachment in New York. Kibbe v. Wetmore, 31 Hun (N. Y.) 424.

[2] 106 U. S. 129; Coghlan v. South Carolina R. R. Co., 142 U. S. 109, 12 S. C. Rep. 150.

[3] See McDougall v. Page, 55 Vt. 187, 28 Alb. L. J. 372; Great Western Tel. Co. v. Burnham, 162 U. S. 339, 16 S. C. Rep. 850, and cases cited. Compare Bauserman v. Blunt, 147 U. S. 652, 13 S. C. Rep. 466; Metcalf v. Watertown, 153 U. S. 673, 14 S. C. Rep. 947.

[4] Green v. Van Buskirk, 7 Wall. 151, reversing *sub nomine*, Van Buskirk v. Warren, 4 Abb. App. Dec. (N. Y.) 457. Compare Guillander v. Howell, 35 N. Y. 657; Ockerman v. Cross, 54 N. Y. 29; Howard Nat. Bank, v. King, 10 Abb. N. C. (N. Y.) 346; People *ex rel.* Hoyt v. Commissioners of Taxes, 23 N. Y. 225; Chafee v. Fourth Nat. Bank, 71 Me. 514, and cases cited in the arguments of counsel. See, also, Matter of Dalpay, 41 Minn.

that a voluntary transfer of personal property, wheresoever situated, is to be governed by the law of the owner's domicil, always yields where the policy of the State where the property is actually located has provided a different rule of transfer.[1]

§ 65. **Cumulative remedies allowed and disallowed.** — We have disclaimed the consideration of fraud in the light of a crime,[2] and entertain no design of noticing the penal statutes enacted for the punishment of fraudulent insolvents or their co-conspirators. This subject more legitimately appertains to a treatise on criminal law,[3] and is a matter regulated by statute, Sometimes resort to the penal statutes conflicts with the pursuit of the civil remedy. In a controversy which arose in Maine it was decided that one who had commenced an action to recover the penalty provided by the Revised Statutes[4] of that State, for knowingly aiding a debtor in the fraudulent transfer of his property to secure it from the creditors,

532, 43 N. W. Rep. 564. As to real property the rule seems to be that the validity of the transfer must be judged by the law of the State where the land was situated. So a mortgage on land situated in Maine to secure an antecedent indebtedness, valid by the laws of Maine, was upheld in Massachusetts, although not authorized by the laws of that State. Chipman v. Peabody, 159 Mass. 420, 34 N. E. Rep. 563. There is no presumption that the common-law prevails in Russia (Savage v. O'Neil, 44 N. Y. 300)— a presumption of its existence is indulged in by the courts only in reference to England and the States which have taken the common law. In the absence of proof of the foreign law, the law of the forum must furnish the rule for the guidance of the court. Savage v. O'Neil, 44 N. Y. 301; Monroe v. Douglass, 5 N. Y. 447. In Barnett v. Kinney, 147 U. S. 476, an assignment with preferences made by one citizen of Utah to another, valid by the laws of Utah, was held to be valid in Idaho against an attaching creditor as to property in Idaho, of which the assignee had taken possession, though the statutes of Idaho prohibited assignments containing preferences. See Frank v. Bobbitt, 155 Mass. 112, 29 N. E. Rep. 209.

[1] Keller v. Paine, 107 N. Y. 83, 13 N. E. Rep. 635.

[2] See § 3.

[3] An indictment alleging the making of a fraudulent conveyance is sufficient where its recitals charge the language of the statute. State v. Miller, 98 Ind. 70.

[4] Chap. 113, § 51.

waived his right to prosecute his suit by filing a petition against his debtor and having him declared a bankrupt, and then causing a suit to be commenced against the alleged fraudulent transferee by the assignee in bankruptcy, to recover the value of the property alleged to have been fraudulently transferred.[1] As to civil remedies it was decided in Michigan that where a judgment-creditor had elected to treat as fraudulent a conveyance made by his debtor before the judgment, and, notwithstanding the transfer of title, had proceeded to sell the property on an execution, he could not afterward maintain a bill in equity to set aside the conveyance.[2] The logic of this ruling is scarcely apparent. Again, a creditor who has instituted an action at law for the recovery of a debt, and levied an attachment, cannot, before judgment, bring a second suit to recover the debt, annul an alleged fraudulent judgment recovered against the debtor and restrain its collection.[3] In New York, on the other hand, a complainant may institute supplementary proceedings and prosecute a suit to establish his judgment as a lien upon real estate; he may prosecute either or both proceedings until his judgment is satisfied.[4] So he may bring a creditor's action to remove a cloud upon title, and also sell the debtor's land under execution.[5] And in Massachusetts a remedy is given by statute,[6] which enables a creditor to maintain a bill to reach any property of a debtor liable to be attached or taken on execution in a suit at law and fraudulently conveyed. Before that statute a creditor could reach property fraud-

[1] Fogg v. Lawry, 71 Me. 215.

[2] Cranson v. Smith, 47 Mich. 647. But see Erickson v. Quinn, 15 Abb. Pr. N. S. (N. Y.) 168.

[3] Mills v. Block, 30 Barb. (N. Y.) 549. See § 85.

[4] Gates v. Young, 17 Weekly Dig. (N. Y.) 551; Schloss v. Wallach, 16 Abb. N. C. (N. Y.) 319*n*, 38 Hun (N. Y.) 638, affi'd 102 N. Y. 683.

[5] Erickson v. Quinn, 15 Abb. Pr N. S. (N. Y.) 166.

[6] Public Statutes, Ch. 151, § 3.

ulently conveyed by attachment and execution. The statute gave him a concurrent remedy in equity to enforce the same right, without having previously recovered a judgment at law, and without admitting other creditors to join in prosecuting the suit.[1] It was decided that this remedy was not superseded by the grant of general equity powers.[2]

§ 66. **Effect of imprisonment of debtor.** — It may be considered as settled law that while the creditor has the body of the debtor in execution on a *ca. sa.* his right to proceed against property is suspended.[3] So long as the defendant is in custody the creditor cannot file a bill in chancery to reach his equitable assets.[4] This rule proceeds upon the theory that the arrest and imprisonment of the debtor constitute a satisfaction of the judgment during the continuance of the imprisonment.[5] When the constructive imprisonment is terminated by operation of law, the creditor's remedy is no longer suspended.[6]

§ 67. **Election of remedies.** — In Cone v. Hamilton,[7] the Supreme Court of Massachusetts said it had been decided in that State that levies of executions in favor of creditors passed no title where, at the time of the conveyance (which was before the Stat. of 1844, c. 107, took effect), there was no statute by which land paid for and occupied by a debtor, the legal title to which had never been in him, but had been conveyed by his procurement to other persons in order to secure it from his creditors, could be attached or

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[1] Bernard v. Barney Myroleum Co., 147 Mass. 356, 17 N. E. Rep. 887.

[2] Barry v. Abbot, 100 Mass. 396.

[3] See Flack v. State of New York, 95 N. Y. 469.

[4] Stillwell v. Van Epps, 1 Paige (N. Y.) 615; Tappan v. Evans, 11 N. H. 321; King v. Trice, 3 Ired. Eq. (N. C.) 573.

[5] Koenig v. Steckel, 58 N. Y. 475; Bowe v. Campbell, 63 How. Pr. (N. Y.) 170; Ryle v. Falk, 24 Hun (N. Y.) 255. Compare, especially, Kasson v. People, 44 Barb. (N. Y.) 347.

[6] Sandman v. Seaman, 84 Hun (N. Y.) 337, 32 N. Y. Supp. 338.

[7] 102 Mass. 57.

taken on execution at law as his property.[1] Gray, J., continuing, said: "Upon this state of facts, either of two remedies was opened to the judgment-creditors. The conveyance being fraudulent as against them, the parties who took the legal title (though not participating in the fraud), paying no consideration for the conveyance, and the equitable title being in the debtor who paid the purchase-money, the judgment-creditors might doubtless have maintained bills in equity to charge the land with their debts.[2] Or, it appearing that the land cannot be held under their levies, they might by *scire facias*, have obtained new executions on the original judgments.[3] It does not, however, follow that this bill can be maintained in its present form. The plaintiff has acquired no interest in those judgments, or in the debts on which they were recovered. The only transfers from the judgment-creditors, under which she claims are quit-claim deeds, without covenants of warranty, of the land taken on execution, which, as the grantors had no title, passed none. Those creditors are not made parties to this suit, either as plaintiffs or defendants, and would, therefore, be at liberty, notwithstanding any decree therein, to pursue their remedy by *scire facias* against their debtor. It would be inconsistent with the principles and the practice of courts of equity to maintain this bill, upon the ground that the original conveyance was fraudulent and void as against the judgment-creditors, without making them parties to the suit in due form." It may be further observed that a judgment-creditor is not obliged to follow all the fraudulent conveyances which may have been

[1] Hamilton v. Cone, 99 Mass. 478.

[2] Huguenin v. Baseley, 14 Ves. 273; Neate v. Marlborough, 3 Myl. & Cr. 407; Goldsmith v. Russell, 5 De G., M. & G. 547; Bayard v. Hoffman, 4 Johns Ch. (N. Y.) 450; Lynde v. McGregor, 13 Allen (Mass.) 182.

[3] Dennis v. Arnold, 12 Met. (Mass.) 449; Dewing v. Durant, 10 Gray (Mass.) 29; Gen. Stats. of Mass. c. 103, § 22.

made by several execution defendants, but may leave some of them to stand while he seeks to set aside others;[1] nor can the debtor or the fraudulent alienee, as a general rule, compel the creditor to elect which method of procedure or class of property he will pursue.[2] But after a creditor has made his election between two inconsistent remedies, he is bound by it. So it was held that a judgment-creditor who had sold on execution the equity of redemption, belonging to his debtor, could not afterwards bring an action to set the mortgage aside as fraudulent.[3] The same rule applies when he sells simply all the debtor's right and title. In such case the right to attack the existing mortgage as fraudulent passes to the purchaser on such sale.[4]

§ 68. **Creditors' bills.** — It is said in New York,[5] that the object of a creditor's bill in that State[6] is to reach choses in action and equitable assets of the judgment-debtor which cannot be reached by execution. And, before such a bill can be filed, it is always necessary that an execution should be issued to the county where the judgment-debtor resides,[7] and be returned unsatisfied;[8]

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[1] First Nat. Bank v. Hosmer, 48 Mich. 200, 12 N. W. Rep. 212; Miller v. Dayton, 47 Iowa, 312.

[2] Gray v. Chase, 57 Me. 558; Vasser v. Henderson, 40 Miss. 519; Edmunds v. Mister, 58 Miss. 766; Baker v. Lyman, 53 Ga. 339.

[3] Knoop v. Kelsey, 102 Mo. 291, 14 S.W. Rep. 110; Messmore v. Huggard, 46 Mich. 559, 9 N. W. Rep. 853.

[4] Knoop v. Kelsey, 121 Mo. 642, 26 S. W. Rep. 683.

[5] Fox v. Moyer, 54 N. Y. 128. Mr. Bispham says, in his Principles of Equity, § 246: "In many of the States, property of an equitable character, and property conveyed in fraud of creditors, may be reached by a *creditor's bill;* a remedy which may be considered as having originated in the case of Spader v. Davis (5 Johns. Ch. [N. Y.] 280, decided by Chancellor Kent) in the year 1821, and which has been very extensively employed since that time"

[6] See 2 R. S. 174; 2 Barb. Ch. Pr. 147.

[7] Compare Wadsworth v. Schisselbauer, 32 Minn. 87, 19 N. W. Rep. 390; Northwestern Iron Co. v. Central Trust Co., 90 Wis. 570, 63 N. W. Rep. 752, 64 Id. 323.

[8] Compare the Holladay Case, 27 Fed. Rep. 845.

and in such an action all the judgment-debtors are necessary parties, unless it can be shown that one omitted is insolvent or a mere surety for the defendant. The filing of a creditor's bill, and the service of process, as we have said,[1] creates a lien in equity upon the effects of the judgment-debtor.[2] It has been aptly termed an "equitable levy."[3] It may be here observed that a creditor's bill, in many of our States, is an appropriate remedy to annul a conveyance in fraud of creditors. It ought always to be resorted to where this latter relief is desired. "A creditor's bill is the continuation of the former controversy, so far as the fruits of the judgment are concerned. The complainant asks the aid of the court to reach the assets of the defendant, so as to be made liable to his judgment, which assets have been secreted or fraudulently assigned to defeat the judgment."[4] Usually creditors' bills are largely regulated by statute, and the relief extended is often, in a measure, dependent upon the local laws governing the subject. It may be asked in what respects a creditor's bill differs from an ordinary bill in equity, prosecuted to cancel a covinous conveyance or remove a fictitious transfer. The answer is that the creditor's bill, at least in some States, is broader and more effectual in its operations and results. The ordinary bill or suit in equity is generally brought to unravel some particular transaction, and to annul some particular conveyance, or remove

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[1] See § 61.

[2] Per Swayne, J., in Miller v. Sherry, 2 Wall. 249. Citing Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450; Beck v. Burdett, 1 Paige (N. Y. 308; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494; Corning v. White, 2 Paige (N. Y.) 569; Edgell v. Haywood, 2 Atk. 352. See Brown v. Nichols, 42 N. Y. 26; Lynch v. Johnson, 48 N. Y. 33; Roberts v. Albany & W. S. R. R. Co., 25 Barb. (N. Y.) 662; George v. Williamson, 26 Mo. 190; State v. Bowen, 38 W. Va. 91, 18 S. E. Rep. 375; Sweeny v. Grape Sugar Refining Co., 30 W. Va. 443, 4 S. E. Rep. 431; First Nat. B'k v. Shuler, 153 N. Y. 172.

[3] Tilford v. Buruham, 7 Dana (Ky.) 110; Miller v. Sherry, 2 Wall. 249.

[4] Hatch v. Dorr, 4 McLean 112; Davidson v. Burke, 143 Ill. 139, 32 N. E. Rep. 514.

a specific cloud on a particular title.[1] A creditor's bill, on the other hand, is usually in the nature of a bill of discovery,[2] and is more extended in its results; not only does it reach property described therein, but by means of this form of remedy every species of assets, and even debts due the debtor of which the creditor knew nothing, and which were not referred to in the bill, may be reached through the instrumentality of a receiver, and applied to the claim. For this reason it is appropriately called an omnibus bill.[3] "Creditors' bills," says

[1] See Brown v. Nichols, 42 N. Y. 26; Lynch v. Johnson, 48 N. Y. 33; Roberts v. Albany & W. S. R. R. Co., 25 Barb. (N. Y.) 662; George v. Williamson, 26 Mo. 190.

[2] See Newman v. Willetts, 52 Ill 101.

[3] In Conro v. Port Henry Iron Co. (12 Barb. [N. Y.] 58), the court said: "There are two sorts of creditor's bills known to our jurisprudence; the one is the statutory bill, framed under 2 R. S. 173, in aid of a judgment-creditor who has exhausted his remedy at law, to enable him to discover the debtor's property, and to reach his equitable interests. This bill was known before the statute. (Hadden v. Spader, 20 Johns. [N. Y.] 554.) And the statute was framed to aid in carrying out the principle of that and other like decisions. In proceedings under such bill, it had always been held that several creditors, by judgment, of the same debtor, might unite in the action, though they had no other common interest than in the relief sought. (Edmeston v. Lyde, 1 Paige [N. Y.] 637; Wakeman v. Grover, 4 Paige [N. Y.] 23.) All the judgment-creditors were *proper* parties, though not *necessary* parties, because the action could not be sustained by a single judgment-creditor. The same rule existed before the statute, and was applied in a creditor's suit by Chancellor Kent in McDermutt v. Strong (4 Johns. Ch. [N. Y.] 687). The other class of creditors' suits, not depending upon any statute, are suits brought for the administration of assets, to reach property fraudulently disposed of, or held in trust, etc. The bill in such case is filed in behalf of the plaintiff or plaintiffs, and all others standing in a similar relation, who may come in under such bill and the decree to be made. It may be filed by simple contract creditors; and does not require a judgment to have been obtained. (Barb. Chan. Prac. vol. II, p. 149)." In Fusze v. Stern, 17 Bradw. (Ill.) 432, the court said: "There are several kinds of original bills known to our laws, wherein courts of equity entertain jurisdiction to aid a creditor in obtaining satisfaction of his claim from his debtor, and which are generally denominated creditors' bills, not only by the members of the legal profession, but by the courts as well, as where a debtor seeks to satisfy his debt out of some equitable estate of the defendant which is not subject to levy and sale under an execution at law; then before he can have the aid of a court of equity to decree the *equitable* estate, subject to the payment of his debt, the creditor must show by his bill, as in other cases

Mr. Bispham,[1] "are bills filed by creditors for the purpose of collecting their debts out of the real or personal property of the debtor, under circumstances in which the process of execution at common law could not afford relief. This equitable remedy may be made use of during the life-time of the debtor, or after his death. Creditors' bills filed against the estate of a decedent, gen-

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where invoking equitable jurisdiction, that he has no adequate remedy at law, which can only be shown by alleging and proving that he has exhausted all the means provided by the law for the collection of his debt, viz., a recovery of judgment, the issuing of execution, and its return *nulla bona* by the officer charged with its collection. Another kind of bill analogous to this is where the creditor, having recovered judgment against his debtor, seeks to remove a fraudulent conveyance or incumbrance out of the way of an execution issued or to be issued upon such judgment. In such case equity will afford relief on the ground that such judgment is an equitable lien upon real estate, nominally held by a third party under such fraudulent conveyance, and the creditor having this lien is entitled to levy upon and sell upon his execution such real estate discharged and untrammeled from the cloud upon it caused by such conveyance. In bills of this kind the complainant need not even prove the return of execution *nulla bona*, as such conveyances are void by the statute, and courts of equity do not hesitate to declare them void because of such fraud, and place the creditor in the same position, respecting his judgment, that he would have occupied if such conveyance had not been made. A recovery of a judgment which at time of filing the bill would, in absence of such conveyance, be a legal lien under the statute upon the land, is all that is necessary to aver and prove." Citing Miller v. Davidson, 8 Ill. 518; Weigtman v. Hatch, 17 Ill. 281; Shufeldt v. Boehm, 96 Ill. 561. See also McKenna v. Crowley, 16 R. I. 364, 17 Atl. Rep. 354. Mr. Bispham says, in Principles of Equity, § 527: "The threefold advantage of reaching property otherwise exempt, of setting aside fraudulent conveyances, and of discovery, renders a creditor's bill a very effective instrument for the collection of debts." Creditors' bills are much used against insolvent corporations where the capital stock is treated as a trust fund. See Sawyer v. Hoag, 17 Wall. 610; Sanger v. Upton, 61 U. S. 56; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 381; Hatch v. Dana, 101 U. S. 205; County of Morgan v. Allen, 103 U. S. 498; Crandall v. Lincoln, 52 Conn. 73; Terry v. Anderson, 95 U. S. 628, 636; Clark v. Bever. 139 U. S. 110; Fogg v. Blair, 139 U. S. 125; Messersmith v. Sharon Savings Bank, 96 Pa. St. 440; Stone v. Chisolm, 113 U. S. 302, 5 S. C. Rep. 497. Such a bill can be entertained by a Federal court by virtue of the jurisdiction attaching in cases of fraud and independent of any statute. Lewis v. Shainwald, 48 Fed. Rep. 492.

[1] Bispham's Principles of Equity, § 525.

erally, though not necessarily, partake of the nature of administration suits."

§ 69. Direct and collateral attack. — Exceptional doctrine in Louisiana. — A novel principle relating to covinous conveyances, derived from the civil law, prevails in Louisiana. If a sale is fraudulent as to creditors, it must be regularly set aside in a direct action or proceeding instituted for that purpose. Not only is it binding between the original parties, which is the universal rule,[1] but it is conclusive upon third parties until nullified by the form of action which the law provides, and the possession of the vendee is legal until the fraudulent instrument is avoided in the due course of law.[2] The reasons for this practice are ingeniously given in Peet v. Morgan,[3] by Porter, J., who there says: "Of its correctness the court entertains no doubt. It is clearly supported by authority, and it is sanctioned by reason and utility. The principle on which it rest is, that men are presumed to act honestly until the contrary is proved; that the conveyances alleged to be fraudulent are *prima facie* correct and fair; and that it is improper in opposition to these presumptions, the creditor should exercise rights that could only properly belong to him, in case the acts of his debtor were null and of no effect. In many instances, should a contrary doctrine prevail, sales which were alleged fraudulent might turn out to be *bona fide*, and the purchaser be deprived of the use and enjoyment of property which was honestly his. In the uncertainty which must prevail until the matter undergoes a judicial investigation,

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[1] See Chap. XXVI.

[2] Yocum v. Bullit, 6 Mart. N. S. (La.) 324, 17 Am. Dec. 184, and the learned note of A. C. Freeman, Esq. See Barbarin v. Saucier, 5 Mart. N. S. (La.) 361; Le Goaster v. Barthe, 2 Rob. (La.) 388; Drummond v. Commissioners, 7 Rob. (La.) 234; Presas v. Lanata, 11 Rob. (La.) 288; Collins v. Shaffer, 20 La. Ann. 41: Payne v. Graham, 23 La. Ann. 771; Ford v. Douglas, 5 How. 166.

[3] 6 Mart. N. S. (La.) 137.

it is certainly the wisest course, and the one most conducive to general utility, to consider the thing sold as belonging to him in whom the title is vested." It is idle to speculate as to the utility of this doctrine, for it is entirely opposed to the general practice in the other States, and to the English and American authorities. The fraudulent transfer is not generally regarded as being effectual against creditors; it does not as to them divest the debtor's title, but his interest remains subject to their remedies, and may be seized and sold on execution.[1] The property may be treated and reached by creditors as though the transfer had never been made.[2] Thus in Imray v. Magnay,[3] the court said; "It is now of frequent occurrence that the sheriff is bound to take goods which have been fraudulently conveyed or assigned to defeat creditors, and is responsible in an action for a false return at the suit of a creditor." Though the principle embodied in these Louisiana cases may seem logical and fair upon its face, certainly its practical operation would not be commensurate with the needs of creditors generally. The creditor cannot be expected to lay formal siege to every semblance of an obstruction that the debtor rears in his pathway. The theory concerning a fraudulent conveyance is that it has only the color and

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[1] Jacoby's Appeal, 67 Pa. St. 434; Hoffman's Appeal, 44 Pa. St. 95; Russell v. Dyer, 33 N. H. 186; Allen v. Berry, 50 Mo. 90: Ryland v. Callison, 54 Mo. 513; Fowler v. Trevein, 16 Ohio St; 493; Staples v. Bradley, 23 Conn. 167; Foley v. Bitter, 34 Md. 646; Gormerly v. Chapman, 51 Ga. 421; Freeman on Executions, § 136. "In an action of ejectment it is competent to show that a conveyance relied upon by one of the parties to the action was made with intent to defraud creditors." Knox v. McFarran, 4 Col. 595; citing Jackson v. Myers, 11 Wend, (N. Y.) 535; Jackson v. Burgott, 10 Johns. (N. Y.) 456; Remington v. Linthicum, 14 Pet. 84; Rogers v. Brent, 10 Ill. 580; Jamison v. Beaubien, 4 Ill. 114; Baze v. Arper, 6 Minn. 220; Cook v. Swan, 5 Conn. 140; Marcy v. Kinney, 9 Conn. 397; Lillie v. Wilson, 2 Root (Conn.) 517.

[2] Russell v. Winne, 37 N. Y. 591; Brown v. Snell, 46 Me. 490; Booth v. Bunce, 33 N. Y. 139; Angier v. Ash, 26 N. H. 99.

[3] 11 M. & W. 267.

appearance of a valid act, and is not in itself effectual; why then should the creditor be forced to undergo the vexatious delay and expense incident to procuring a formal adjudication vacating every covinous alienation of property which the ingenuity of the debtor may devise? If the transfer is in fact fraudulent, then, by seizing and selling the property on execution, the controversy is practically concluded without further trouble or suit, and the fraudulent alienee will not be rash enough to attempt to reclaim it. On the other hand, if the transfer is *bona fide*, the creditor is legally accountable for the seizure. If the creditor unjustly refuses to treat the transfer as valid the purchaser, if it relate to realty, may hold the possession and defend in ejectment; while if it be personalty, he may recover it by replevin or sue in trover. In either case, if the vendee claims the property, indemnity would be exacted by the officer making the seizure. Under the Louisiana system a debtor, by selecting an irresponsible vendee, could shield him with a simulated transfer, and enable him to dissipate the property in practical defiance of the creditor.

§ 70. **Forms of relief in cases of fraud on wife.** — Special treatment of the relationship of husband and wife as bearing upon fraudulent transfers will be found in the body of the work.[1] We may allude here to the rule that where a husband has fraudulently alienated his real property, as against the rights of his wife or prospective wife, she may, even during his lifetime, bring suit to annul the deed as a fraud upon her right of dower;[2] for an inchoate right of dower is an interest which the courts will protect.[3] It is as much a fraud for a man to place his property out of his

[1] See Chap. XX.

[2] Youngs v. Carter, 10 Hun (N. Y.) 194; Petty v. Petty, 4 B. Mon. (Ky.) 216.

[3] Mills v. Van Voorhies, 20 N. Y. 412; Simar v. Canaday, 53 N. Y. 298.

hands for the purpose of avoiding the right of dower which is about to attach to it, as it is for a debtor who contemplates the contraction of debts to voluntarily dispose of his property in order to defeat the efforts of future creditors to secure their payment. The latter result, it is conceded, as elsewhere shown,[1] cannot be successfully accomplished.[2] The wife may in such cases maintain a bill in equity to reach the property fraudulently conveyed,[3] or she may, according to some of the cases, file a bill in chancery to recover her dower in the property as though no conveyance had ever been executed.[4]

§ 71. **Procedure in Federal tribunals.** — Statutes passed by State legislatures affecting rights of creditors, being local enactments and involving a rule of property, the Federal courts will adopt the construction which has been given to the statutes by the highest judicial tribunal of the State,[5] even though, were it an open question "depending upon the general principles of jurisprudence," the conclusion of the court might have been different.[6] A Federal court is bound to apply such a rule of property precisely as though it were sitting as a local court in the State ; and this is true as to the observance of a State rule governing voluntary conveyances,[7] general assignments,[8]

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[1] See Chap. VI.

[2] See Savage v. Murphy, 34 N. Y. 508 ; Case v. Phelps, 39 N. Y. 164.

[3] Gilson v. Hutchinson, 120 Mass. 27; Petty v. Petty, 4 B. Mon. (Ky.) 215.

[4] See Brown v. Bronson, 35 Mich. 415 ; Jiggitts v. Jiggitts, 40 Miss. 718.

[5] Nichols v. Levy, 5 Wall. 443, 444; Sumner v. Hicks, 2 Black, 532; Dundas v. Bowler, 3 McLean, 397; Heydock v. Stanhope, 1 Curtis, 471; Beach v. Viles, 2 Pet. 675. See Williams v. Kirtland, 13 Wall. 306 ; Ross v. M'Lung, 6 Pet. 283 ; Morse v. Riblet, 22 Fed. Rep. 501.

[6] Nichols v. Levy, 5 Wall 443.

[7] Lloyd v. Fulton, 91 U. S. 485.

[8] Parker v. Phetteplace, 2 Cliff. 70 ; Jaffray v. McGehee, 107 U. S. 364, 2 S. C. Rep. 367; Sumner v. Hicks, 2 Black, 532 ; Union Bank v. Kansas City Bank, 136 U. S. 223, 10 S. C. Rep. 1013.

exemptions,[1] or sales rendered void for want of a change of possession.[2] And sometimes relief may be had in a Federal court where the jurisdiction of the State court would have proven imperfect.[3] Where a State court acquires possession and control over an insolvent debtor's property it has power to dispose of it and to give a good title. To this extent, as against a Federal court, the State law is a rule of property.[4] Where a creditor's suit is removed from a State court to a Federal court on the ground that the controversy is between citizens of different States, jurisdiction is not lost by admitting as plaintiffs other creditors who are citizens of the same State as the defendants.[5] As we have shown, the local law where the property has its *situs* governs in controversies to reach such property by creditors.[6] It may be here observed that leave to sue and defend *in forma pauperis* will be accorded to infants in the Federal courts, though a different rule prevailed in the State tribunals,[7] and that equity jurisdiction in the Federal courts is wholly independent of the local laws of the State,[8] and is the same in its nature and extent in all the States; and that Federal courts are bound to proceed in equity causes according to the principles, rules and usages which belong

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[1] Wilson v. Perrin, 62 Fed. Rep. 629.

[2] Allen v. Massey, 17 Wall. 351. See Howard v. Prince, 11 N. B. R. 327. As to supplementary proceedings in Federal courts, see § 61, n.

[3] See Gorrell v. Dickson, 26 Fed. Rep. 454.

[4] Burt v. Keyes, 1 Flipp. 62. See Wiswall v. Sampson, 14 How. 52; Williams v. Benedict, 8 How, 107; Payne v. Drewe, 4 East, 523.

[5] Stewart v. Dunham, 115 U. S. 61, 5 S. C. Rep. 1163.

[6] Spindle v. Shreve, 111 U. S. 542, 4 S. C. Rep. 522.

[7] Ferguson v. Dent, 15 Fed. Rep. 771. See Southworth v. Adams, 2 Flipp. 282, *in notis*.

[8] In Hollins v. Brierfield Coal & Iron Co., 150 U. S. 379, 14 S. C. Rep. 127, the court say: "The line of demarcation between equitable and legal remedies in the Federal courts cannot be obliterated by State legislation." See Cates v. Allen, 149 U. S. 451, 13 S. C. Rep. 883, 977; Rich v. Braxton, 158 U. S. 405, 15 S. C. Rep. 1006.

to the courts of chancery, as contradistinguished from common-law courts.[1] But "the general proposition as to the enforcement in the Federal courts of new equitable rights created by the States, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States."[2] Federal courts have no jurisdiction to entertain a creditor's bill for a simple contract creditor.[3]

Questions as to appellate jurisdiction in Federal tribunals will be presently considered.[4]

§ 72. **Recapitulation.** — As regards the enforcement of a judgment against real property fraudulently conveyed a creditor then may be said to have three modes of obtaining satisfaction of his demand.

First. To obtain a decree of a court of equity declaring the conveyance fraudulent, setting it aside, and thereafter proceeding to sell the land on execution.

Second. By inserting in the decree in an equitable action, in addition to the provisions avoiding the transfer, a further clause appointing a referee to sell at public auction and directing the debtor to unite in the conveyance; or a clause appointing a receiver and directing that the debtor convey the land to him and that he sell it.

Third. The creditor may sell the land on execution, and the purchaser may then set up the fraud in the

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[1] Gordon v. Hobart, 2 Sumner, 405; Burt v. Keyes, 1 Flipp. 69, per Story, J.; McFarlane v. Griffith, 4 Wash. C. C. 585; Gaines v. Relf, 15 Pet. 9. See Green v. Creighton, 23 How. 90. A creditor having a standing in the Federal courts can contest the validity of a voluntary assignment, and a State law cannot deprive him of this right. Adler v. Eckler, 1 McCrary 257.

[2] Scott v. Neely, 140 U. S. 109, 11 S. C. Rep. 712.

[3] England v. Russell, 71 Fed. Rep. 818; Cates v. Allen, 149 U. S. 458, 13 S. C. Rep. 883, 997.

[4] See Chap. XXVII.

debtor's conveyance, and if this is established, obtain a judgment entitling him to the possession of the land.[1]

The advantages incident to a judicious selection from these remedies in particular cases should not be overlooked.[2]

Stated in a form of more universal application, it is, as we have seen, a familiar and unquestioned doctrine of equity, that the court has power to aid a judgment-creditor to reach the property of his debtor, either by removing fraudulent judgments or conveyances which obstruct or defeat the plaintiff's remedy under the judgment, or by appropriating toward the satisfaction of the judgment rights or equitable interests of the debtor, which are not the subject of legal execution.[3]

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[1] Dawley v. Brown, 65 Barb. (N. Y.) 120.

[2] See Chap. XI.

[3] Robert v. Hodges, 16 N. J. Eq. 302.

CHAPTER IV.

STATUS OF ATTACKING CREDITORS.

§ 73. Rights of creditors at large.
74. Judgment conclusive as to indebtedness.
75. Creditor must have lien before filing bill.
76. Judgments sufficient.
77. Judgments insufficient.
78. Foreign judgments.
79. Creditors of a decedent.
80. Rule as to judgments in equitable actions.
81. Specific lien by attachment.
§ 82. Property of the debtor taken in name of third party.
83. When judgment is unnecessary.
84. Absconding and non-resident debtors.
85. Practice in Indiana, North Carolina, Alabama and Texas.
86. Return of execution unsatisfied.
87. Distinction between realty and personalty as to issuance of execution.
88. Raising the objection.

"Courts of equity are not tribunals for the collection of debts."—*Webster* v. *Clark*, 25 Me. 314.

§ 73. Rights of creditors at large. — A creditor at large, commonly called a simple creditor, cannot assail, as fraudulent against creditors, an assignment or transfer of property made by his debtor, until the creditor has first established his debt by the judgment of a court of competent jurisdiction, and has either acquired a lien upon specific property, or is in a situation to perfect a lien thereon, and subject it to the payment of his judgment, upon the removal of the obstacle presented by the fraudulent assignment or transfer.[1]

[1] Southard v. Benner, 72 N. Y. 426. See Case v. Beauregard, 101 U. S. 668; Cates v. Allen, 149 U. S. 457, 13 S. C. Rep. 883, 977, citing the text; Spelman v. Friedman, 130 N. Y. 425, 29 N. E. Rep. 765; England v. Russell, 71 Fed. Rep. 818; Taylor v. Bowker, 111 U. S. 110, 4 S. C. Rep. 397; Briggs v. Oliver, 68 N. Y. 336; Kyle v. O'Neil, 88 Ky. 127, 10 S. W. Rep. 275; Chadbourne v. Coe, 10 U. S. App. 78, 2 C. C. A. 327, 51 Fed. Rep. 479; Morrow Shoe Mfg. Co. v. Peabody, 18 U. S. App. 256, 6 C. C. A. 508, 57 Fed. Rep. 685; Scott v. Neely, 140 U. S. 106, 11 S. C. Rep. 712; Trowbridge v. Bullard, 81 Mich. 451, 45 N. W. Rep. 1012; Klosterman v. Mason County Cent. R. Co., 8 Wash. 281, 36 Pac. Rep. 136; Weber v. Weber, 90 Wis. 467, 63 N. W. Rep. 757; Clarke v. Laird, 60 Mo. App. 289; Fleming

This principle is elementary.[1] A rule of procedure which allowed any prowling creditor, before his claim

v. Grafton, 54 Miss. 79; Francis v. Lawrence, 48 N. J. Eq. 511, 22 Atl. Rep. 259; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 S.C. Rep. 127; Weaver v. Haviland, 142 N. Y. 534, 37 N. E. Rep. 641; Whitney v. Davis, 148 N. Y. 256, 42 N. E. Rep. 661; Frothingham v. Hodenpyl, 135 N. Y. 630, 32 N. E. Rep. 240; Talbott v. Randall, 3 N. Mex. 226. 5 Pac. Rep. 533; Goode v. Garrity, 75 Ia. 713, 38 N.W. Rep. 150; Arbuckle Bros. Coffee v. Werner, 77 Texas, 45, 13 S. W. Rep. 963. See § 52.

[1] Dodd v. Levy, 10 Mo. App. 122; Smith v. Railroad Co., 99 U. S. 401; Turner v. Adams, 46 Mo. 95; Crim v. Walker, 79 Mo. 335; Dawson v. Coffey, 12 Ore. 519, 8 Pac. Rep. 838; Baxter v. Moses, 77 Me. 465; Bassett v. St. Albans Hotel Co., 47 Vt. 314; Pendleton v. Perkins, 49 Mo. 565; Jones v. Green, 1 Wall. 330; Skeele v. Stanwood, 33 Me. 309; Meux v. Anthony, 11 Ark. 411; Webster v. Clark, 25 Me. 313; Voorhees v. Howard, 4 Keyes (N. Y.) 371; Barrow v. Bailey, 5 Fla. 9; Burnett v. Gould, 27 Hun (N. Y.) 366; Reubens v. Joel, 13 N. Y. 488; Alnutt v. Leper, 48 Mo. 319; Mills v. Block, 30 Barb. (N. Y.) 552; Martin v. Michael, 23 Mo. 50; Public Works v. Columbia College, 17 Wall. 530; Kent v. Curtis, 4 Mo. App. 121; Tate v. Liggat, 2 Leigh (Va.) 84; Greenway v. Thomas, 14 Ill. 271; Fletcher v. Holmes, 40 Me 364; Adsit v. Butler, 87 N. Y. 585; Tyler v. Peatt, 30 Mich. 63; Tolbert v. Horton, 31 Minn. 520, 18 N. W. Rep. 647; Vasser v. Henderson, 40 Miss. 519; People's Savings Bank v. Bates, 120 U. S. 562; 7 S. C. Rep. 679; McKinley v. Bowe, 97 N. Y. 93; Webster v. Lawrence, 47 Hun (N. Y.) 566; Lichtenberg v. Herdtfelder, 33 Hun (N. Y.) 57; Bennett v. Stout, 98 Ill. 47; Detroit, etc. Rolling Mills v. Ledwidge, 162 Ill. 305, 44 N. E. Rep. 751; McAuliffe v. Farmer, 27 Mich. 76; Smith v. Millett, 12 R. I. 59; Ferguson v. Bobo, 54 Miss. 121; Claflin v. McDermott, 12 Fed. Rep. 375; Haggerty v. Nixon, 26 N. J. Eq. 42; Cropsey v. McKinney, 30 Barb. (N. Y.) 47; Stewart v. Fagan, 2 Woods, 215; McMinn v. Whelan, 27 Cal. 200; Hunt v. Field, 9 N. J. Eq. 36; Robinson v. Stewart, 10 N. Y. 189; McDermott v. Blois, 1 R. M. Charlt. (Ga.) 281; Sturges v. Vanderbilt, 73 N. Y. 384; Evans v. Hill, 18 Hun (N. Y.) 464; Sexey v. Adkinson, 34 Cal. 346; Dahlman v. Jacobs, 15 Fed. Rep. 863; Miller v. Miller, 7 Hun (N. Y.) 208; Griffin v. Nitcher, 57 Me. 270; Nugent v. Nugent, 70 Mich. 52, 37 N. W. Rep. 706; See *Ex parte* Boyd, 105 U. S. 653. Compare Case v. Beauregard, 101 U. S. 688, and see Taylor v. Bowker, 111 U. S. 110. In Alabama "a creditor without a lien may file a bill in chancery to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed, by his debtor." Revised Code, § 3446. In construing this statute the court said that it was obviously the intention of the legislature to enlarge the jurisdiction of the court of chancery, and in cases where the simple and pure relationship of debtor and creditor existed to invest the creditor without a lien or a judgment with the privilege formerly confined to judgment-creditors. Reynolds v. Welch, 47 Ala. 200. It must appear that the debt has become due and that he is in a position to enforce it at law. Freider v. Lienkauff, 92 Ala. 469, 8 So. Rep. 758; McGhee v. Importers' & T. Nat. Bank,

was definitely and finally established by formal judgment, and without reference to the character of his demand, to file a bill to discover equitable assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, it is asserted would, manifestly, be susceptible of the grossest abuse. A more powerful weapon of oppression of a debtor, could not be placed at the disposal of unscrupulous litigants.[1] A creditor at large,[2] having no lien or trust,[3] is not favored in the class of litigation under consideration,[4] and, generally speaking, has absolutely no status in court for the purpose of filing a creditor's bill.[5] The possibility of a judgment will not suffice.[6] The rule is peremptory. "A court of equity never interposes," says Ruffin, C. J.,[7] "in behalf of a mere legal demand, until the creditor has tried the legal remedies, and found them ineffectual." It was recently said in New York, "the creditor must pursue his remedy at

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93 Ala. 192, 9 So. Rep. 734. In Mississippi equity is given jurisdiction by section 503 of the Code of 1892, even where no judgment has been obtained or execution been returned. The debt must be actually due before the bill is filed. Browne v. Hernsheim, 71 Miss. 574, 14 So. Rep. 36. The statute in West Virginia recognizes the same rule. State v. Bowen, 38 W. Va. 91, 18 S. E. Rep. 375. So in Indiana, see Field v. Holzman, 93 Ind. 205. Same rule applied in Brown v. J. Wayland Kimball Co., 84 Me. 492, 24 Atl. Rep. 1007.

[1] Cited in Artman v. Giles, 155 Pa. St. 417, 26 Atl. Rep. 668. See Swan Land & Cattle Co. v. Frank, 148 U. S. 612, 13 S. C. Rep. 691.

[2] Button v. Rathbone, 126 N. Y. 192, 27 N. E. Rep. 266; Jones v. Graham, 77 N. Y. 628.

[3] Case v. Beauregard, 101 U. S. 688. Compare Manufacturing Co. v. Bradley, 105 U. S. 175.

[4] Herring v. New York, L. E. & W. R. R. Co., 63 How. Pr. (N. Y.) 502.

[5] Dunlevy v. Tallmadge, 32 N. Y. 459. But the simple contract creditor is not always without redress in cases where a fraudulent disposition of property has been made. An attachment or process in that nature may be secured against the fraudulent debtor, and the property improperly transferred, or any other property the debtor may have, can be seized under such provisional process and held pending the suit.

[6] Griffin v. Nitcher, 57 Me. 272. Compare Crompton v. Anthony, 13 Allen (Mass.) 36; Stephens v. Whitehead, 75 Ga. 297.

[7] Brown v. Long, 1 Ired. Eq. (N. C.) 193.

law to every available extent before he can resort to equity for relief."[1] It is not intended by this rule to exclude simple contract creditors from the operation of the statutes against fraudulent conveyances, they being, except, perhaps, as regards statutory liens, as much protected, in theory of law, as creditors by judgment; but until such creditors have obtained a judgment and acquired a lien, or a right to a lien upon the debtor's property, they are not in a position to assert their rights by a creditor's action.[2] It is observed by Brown, J., in Paulsen v. Van Steenbergh,[3] that "a court of equity is not the *forum* for litigating disputed claims, and, as a general rule, will not entertain an action or afford relief to a creditor until he has established his debt in a court of law."[4] Courts of equity are not tribunals for the collection of ordinary demands.[5] "The debt," said Field, J., "must be established by some judicial proceeding, and it must generally be shown that legal means for its collection have been exhausted.[6] So the statute of limitations does not begin to run against the right to maintain a creditor's action till the recovery of judgment on the

[1] Importers' & Tr. Nat. Bk. v. Quackenbush, 143 N. Y. 567, 571, 38 N. E. Rep. 728.

[2] Southard v. Benner, 72 N. Y. 426; Karst v. Gane, 136 N. Y. 323, 32 N. E. Rep. 1072; Thompson v. Van Vechten, 27 N. Y. 568; Geery v. Geery, 63 N. Y. 256. See Frisbey v. Thayer, 25 Wend. (N. Y.) 396; National Bank of Rondout v. Dreyfus, 14 Weekly Dig. (N. Y.) 160.

[3] 65 How. Pr. (N. Y.) 342; Howe v. Whitney, 66 Me. 17; Taylor v. Bowker, 111 U. S. 110, 4 S. C. Rep. 397; Webster v. Clark, 25 Me. 313; Griffin v. Nitcher, 57 Me. 270; Fleming v. Grafton, 54 Miss. 79.

[4] See Tasker v. Moss, 82 Ind. 62; Baxter v. Moses, 77 Me. 465.

[5] Webster v. Clark, 25 Me. 314. See Dunlevy v. Tallmadge, 32 N. Y. 457; Bownes v. Weld, 3 Daly (N. Y.) 253.

[6] Public Works v. Columbia College, 17 Wall. 530; Powell v. Howell, 63 N. C. 284; Fox v. Moyer, 54 N. Y. 128. Compare Case v. Beauregard, 101 U. S. 688. Wisconsin Granite Co. v. Gerrity, 144 Ill. 77, 33 N. E. Rep. 31; Prentiss v. Bowden, 145 N. Y. 342, 40 N. E. Rep. 13. A creditor's bill may be filed on a judgment at law, after execution, notwithstanding the recovery of another judgment on the judgment. Elizabethtown Savings Inst. v. Gerber, 34 N. J. Eq. 132, note; Bates v. Lyons, 7 Paige (N. Y.) 85.

general claim and the return of execution unsatisfied.[1] When a conveyance is said to be void or voidable against creditors the reference is to such parties when they are clothed with judgments and executions, *or such other titles* as the law has provided for the collection of debts.[2] Judge Bronson, in Noble v. Holmes,[3] after declaring that a fraudulent sale could not, under the provisions of the Revised Statutes of New York, be impeached by a creditor at large, added: "It must be a creditor having a judgment and execution, *or some other process which authorized a seizure of the goods.*" It may be urged that, where a debtor is manifestly guilty of fraudulent conduct with reference to his property, the prerequisites of a judgment and execution will prove serious impediments to an ordinary contract creditor who desires to take immediate action to reach the property which the debtor is dissipating or concealing.[4] But the answer to this proposition has generally been that the remedy of a creditor so situated is not by creditor's bill; he must seek provisional relief by arrest or attachment, or both, in a suit founded upon his contract claim.[5] A creditor in this position is not, as we have seen, usually entitled to interfere by injunction before judgment with any contemplated alienation of property by the debtor,[6]

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[1] Weaver v. Haviland, 142 N. Y. 534, 37 N. E. Rep. 641.

[2] Per Denio, J., in Van Heusen v. Radcliff, 17 N. Y. 580; Gross v. Daly, 5 Daly (N. Y.) 545; McElwain v. Willis, 9 Wend. (N. Y.) 561; Button v. Rathbone, 126 N. Y. 192, 27 N. E. Rep. 266, and cases cited.

[3] 5 Hill (N. Y.) 194; Rinchey v. Stryker, 28 N. Y. 45; Lux v. Davidson, 56 Hun (N. Y.) 347, 9 N. Y. Supp. 816.

[4] See People *ex rel* Cauffman v. Van Buren, 136 N. Y. 252; Whitney v. Davis, 148 N. Y. 260, 42 N. E. Rep. 661.

[5] See Dodd v. Levy, 10 Mo. App. 121. "The non-existence of a judgment and execution in favor of Warner & Co. is a radical defect. It is not in the nature of a technical or formal objection, but one going to the essential merits of the case." *In re* Collins, 6 Fed. Cas. 116.

[6] Wiggins v. Armstrong, 2 Johns. Ch. (N. Y.) 145; Adler v. Fenton, 24 How. 411; Moran v. Dawes, Hopk. Ch. (N. Y.) 365. See § 52.

even after instituting suit by attachment,[1] though an attempt has been made under peculiar circumstances, to extend equitable relief to preserve an attachment lien and hold the property in the jurisdiction of the court.[2] So stockholders cannot sue in the right of a corporation without first trying to set the body itself in motion;[3] and a creditor or member who desires to sue in place of a receiver must set forth that the receiver declines to proceed,[4] unless it appears that the receiver is himself one of the parties to be sued.[5]

To recapitulate, then, the judgment and execution are usually necessary to a creditor before proceeding in equity—First, to adjudicate and definitely establish the legal demand, and save the debtor harmless from interference at the instigation of unconscionable claimants; second, to exhaust the legal remedy.[6]

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[1] Martin v. Michael, 23 Mo. 50. See Whitney v. Davis, 148 N. Y. 260, 42 N. E. Rep. 661.

[2] People ex rel. Cauffman v. Van Buren, 136 N. Y. 252, 32 N. E. Rep. 775. But see Whitney v. Davis, 148 N. Y. 260, 42 N. E. Rep. 661, affi'g 88 Hun (N. Y.) 168, 35 N. Y. Supp. 531.

[3] Taylor v. Holmes, 127 U. S. 492, 8 S. C. Rep. 1192; Greaves v. Gouge, 69 N. Y. 157; Moore v. Schoppert, 22 W. Va. 291; Hawes v. Oakland, 104 U. S. 450.

[4] Fisher v. Andrews, 37 Hun (N. Y.) 180; Wait on Insol. Corps. § 100.

[5] Brinckerhoff v. Bostwick, 88 N. Y. 52.

[6] See Merchants' National Bank v. Paine, 13 R. I. 594. In Stone v. Westcott, 18 R. I. 518, 28 Atl. Rep. 662, the court said: "In Merchants' National Bank v. Paine, 13 R. I. 592, the defendant had absconded, leaving no legal assets which could be attached so that a judgment at law could be obtained against him, and this court held that as legal process was thereby rendered impossible, the reason for said rule failed, and the plaintiff might therefore proceed at once to enforce his claim in equity. In Gardner v. Gardner, 17 R. I. 751, 24 Atl. Rep. 785, it was held that if the debtor be dead the creditor may proceed in equity without first pursuing his legal remedy. In the case at bar the defendant had not absconded, he was not dead, nor is it even alleged that he was insolvent, so as to bring the case within the exception made by those authorities which hold that such an allegation dispenses with the necessity for the issue and return of an execution before proceeding in equity. See cases cited in Ginn v. Brown, 14 R. I. 524. Nor does the bill allege that the defendant has conveyed his property to another in fraud of the judgment-creditor so as to excuse him from the service of execution. See Payne v. Sheldon, 63 Barb. (N. Y.) 169." See also National Tradesmen's Bank v.

The maxim, "*Lex neminem cogit ad vana seu inutilia peragenda*," has struggled for application in cases where it is manifest the judgment at law will be ineffectual or worthless,[1] but, though the sympathy of the profession seems to favor a relaxation of the rule requiring a judgment and execution before a proceeding by creditor's bill will lie, yet, generally speaking, the absence of a judgment proves fatal to such a bill.[2] A guarded statutory reform might be suggested with a view to enlarge the facilities of creditors to reach equitable assets. Complainants holding liquidated demands, founded upon written instruments or express contracts, might safely be given a right to proceed to attack transfers, against debtors who have made general assignments, or against whom unsatisfied judgments rest, or who have suspended business solely from lack of funds or have become notoriously insolvent.

§ 74. Judgment conclusive as to indebtedness.— In cases where fraud is established, the creditor does not claim *through* the debtor, but adversely to him, and by a paramount title, which overreaches and annuls the fraudulent conveyance or judgment by which the debtor himself would be estopped. It follows, from the principles suggested, that a judgment obtained without fraud[3] or collusion, and which concludes the debtor, whether rendered upon default, by confession or after contestation, is, upon all questions affecting the title to his property, conclusive

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Wetmore, 124 N. Y. 241, 26 N. E. Rep. 548; Patchen v. Rofkar, 12 App. Div. (N. Y.) 475, 42 N. Y. Supp. 35.

[1] See Lichtenberg v. Herdtfelder, 33 Hun (N. Y.) 57, 60, dissenting opinion of Davis, P. J.; case affi'd, 103 N. Y. 302, 8 N. E. Rep. 526; Case v. Beauregard, 101 U. S. 690; Hodges v. Silver Hill Mining Co., 9 Ore. 202; Turner v. Adams, 46 Mo. 95; Des Brisay v. Hogan, 53 Me. 554; Terry v. Anderson, 95 U. S. 636. See § 83.

[2] See Taylor v. Bowker, 111 U. S. 110, 4 S. C. Rep. 397; Baxter v. Moses, 77 Me. 476, 1 Atl. Rep. 350; Jones v. Green, 1 Wall. 330.

[3] Equity will interfere to restrain the enforcement of a judgment grounded on a fictitious demand. Schroer v. Pettibone, 163 Ill. 42, 45 N. W. Rep.

evidence against his creditors, to establish, first, the relation of creditor and debtor between the parties to the record, and secondly, the amount of the indebtedness.[1] This principle is assumed in the New York statute in relation to creditors' bills,[2] and is so decided in Rogers v. Rogers.[3]

[1] In Whitney v. Davis, 148 N. Y. 261, 42 N. E. Rep. 661, Gray, J., said: "The principle of equitable intervention to annul or set aside transfers of a debtor's property, for being fraudulent as to his creditors, demands for its application an adjudication of the fact of the debt."

[2] 2 R. S. 174, § 38.

[3] 3 Paige (N. Y.) 379. See 2 Greenl. Ev. 531; Marsh v. Pier, 4 Rawle (Pa.) 288; Candee v. Lord, 2 N. Y. 275; Decker v. Decker, 108 N. Y. 128, 15 N. E. Rep. 307; Mattingly v. Nye, 8 Wall. 373, and cases cited; Shaw v. Manchester, 84 Iowa, 246, 50 N. W. Rep. 985. Compare Teed v. Valentine, 65 N. Y. 471. Creditors may of course attack a collusive judgment when it is a fraud upon them. Lewis v. Rogers, 16 Pa. St. 18; Sidensparker v. Sidensparker, 52 Me. 481; Edson v. Cumings, 52 Mich. 52; Clark v. Douglass, 62 Pa. St. 416, per Sharswood, J.; Wells v. O'Connor, 27 Hun (N. Y.) 428. Compare Voorhees v. Seymour, 26 Barb. (N. Y.) 569; Meeker v. Harris, 19 Cal. 278; Thompson's Appeal, 57 Pa. St. 175; Clark v. Foxcroft, 6 Me. 298; Uhlfelder v. Levy, 9 Cal. 607. See especially Shaw v. Dwight, 27 N. Y. 244; Mandeville v. Reynolds, 68 N. Y. 545; Burns v. Morse, 6 Paige (N. Y.) 108; Whittlesey v. Delaney, 73 N. Y. 571. So the alienee from whom it is sought to recover property may show that the judgment is fraudulent and collusive (Collinson v. Jackson, 14 Fed. Rep. 309, 8 Sawyer, 357. See Freeman on Judgments, §§ 335–7), or that there is, in fact, no indebtedness (Clark v. Anthony, 31 Ark. 549; King v. Tharp, 26 Iowa, 283; Esty v. Long, 41 N. H. 103), for judgments may be fraudulent as well as deeds. Carter v. Bennett, 4 Fla. 283; Decker v. Decker, 108 N. Y. 128. Finch, J., said: "It does not alter the character of this fraudulent arrangement, or enable it to defy justice, that it was accomplished through the agency of a valid judgment regularly enforced. That often may be made an effective agency in accomplishing beyond its own legitimate purpose a further result of fraud and dishonesty." Decker v. Decker, 108 N. Y. 128, 135, 15 N. E. Rep. 307. One who is in possession of property of the debtor transferred with intent to defraud creditors cannot defend himself on the ground that the debtor might have had a defense against the judgment had he chosen to assert it (Dewey v. Moyer, 9 Hun [N. Y.] 479); but confession of judgment by an administrator cannot deprive the grantee of his intestate of the defense of the statute of limitation. McDowell v. Goldsmith, 24 Md. 214. Then a decree confirming a conveyance of real estate from a husband to a wife in a suit between them, is not conclusive upon the husband's assignee in bankruptcy, seeking to annul the transfer as having been made in fraud of creditors. Humes v. Scruggs, 94 U. S. 22. Mr. Justice Hunt said in this case: "There would be little difficulty in making and sustaining fraudulent transfers of property, if the parties thereto could by a subsequent suit between themselves so fortify the deed that no others could attack it." See

The execution issued upon the judgment shows that the remedy afforded at law has been pursued and of course is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and, because of the embarrassments which would attend any other rule, the return is generally considered to be conclusive. The court will not ordinarily entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy.[1] A general creditor cannot attack another creditor's judgment.[2] But the fraudulent use of a valid judgment may be overturned[3] and the validity of an execution may be assailed in a creditor's suit,[4] and a judgment-creditor attacking another creditor's judgment by suit assumes the burden of showing that the judgment assailed was not *bona fide* and represented no debt.[5]

§ 75. **Creditor must have lien before filing bill.**—We must then accept the general rule that a court of equity will not usually interfere to enforce the payment of debts until the creditor has exhausted all the remedies known to the law to obtain satisfaction of the judgment. It is usually essential, in order to give the court jurisdiction, and to

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also Van Kleeck v. Miller, 19 N. B. R. 494, and compare Garner v. Second Nat. Bank, 151 U. S. 420–435, 14 S. C. Rep. 390. A debtor may attack a judgment as having been obtained by fraud. Richardson v. Trimble, 38 Hun (N. Y.) 409; Matter of Hill, 2 Con. (N. Y.) 27. We may here state that the frauds which will sustain a bill to set aside a judgment or decree *between the parties* rendered by a court of competent jurisdiction are those which are extrinsic or collateral to the issues litigated. United States v. Throckmorton, 98 U. S. 61, and cases cited; Ross v. Wood, 70 N. Y. 9.

[1] Jones v. Green, 1 Wall. 332; Pierstoff v. Jorges, 86 Wis. 129, 56 N. W. Rep. 735.

[2] Frothingham v. Hodenpyl, 135 N. Y. 630, 32 N. E. Rep. 240.

[3] Decker v. Decker, 108 N. Y. 135.

[4] Prentiss v. Bowden, 145 N. Y. 342, 40 N. E. Rep. 13. See Importers & Tr. Nat. Bk. v. Quackenbush, 143 N. Y. 567, 38 N. E. Rep. 728.

[5] Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430, 32 N. E. Rep. 239. See Brooks v. Wilson, 125 N. Y. 256, 26 N. E. Rep. 258; Sweet v. Converse, 88 Mich. 1, 49 N. W. Rep. 899.

reach equitable assets, that an execution should have been issued upon the judgment, and returned unsatisfied, or, if an action is brought in aid of an execution at law, that it be outstanding. The commencement of the action will then give the creditor a specific lien [1] except as regards chattels subject to be taken on execution.[2] The rule that the legal remedy must be exhausted by the judgment-creditor before relief can be solicited to reach property not subject to the lien of the judgment is an ancient one. It existed in England, and was recognized by the Court of Chancery in New York, before the provisions made by the Revised Statutes [3] of that State, which require that an execution be issued and returned unsatisfied in whole or in part, before a bill can be filed to compel a discovery of property and to prevent a transfer of it. "This statute," says Chancellor Walworth, in Child v. Brace,[4] "is only declaratory of a principle which had before been adopted in this court." [5] Hence the creditors of an insolvent partnership must acquire a legal or an equitable lien upon the property of the firm to authorize them to invoke the equitable powers of the court in its

[1] Adsit v. Butler, 87 N. Y. 587; below, 23 Hun (N. Y.) 45; Crippen v. Hudson, 13 N. Y. 161; Beck v. Burdett, 1 Paige (N. Y.) 305; Dunlevy v. Tallmadge, 32 N. Y. 461. In First National Bank v. Shuler, 153 N. Y. 171, the court says: "The rule is well settled in this state that the plaintiff in a creditor's action acquires, by the commencement of the suit, a lien upon the choses in action and equitable assets of the debtor, which entitles him, in the successful event of the action, to priority of payment thereout in preference to other creditors, irrespective of the priority of the respective judgments (Edmeston v. Lyde, 1 Pai. 637; Corning v. White, 2 Id. 567), and this lien is not displaced or defeated by the death of the debtor before judgment Brown v. Nichols, 42 N. Y. 26."

[2] First National Bank v. Shuler, 153 N. Y. 172.

[3] 2 N. Y. R. S. 174, § 38.

[4] 4 Paige (N. Y.) 309.

[5] See Dunlevy v. Tallmadge, 32 N. Y. 460; Adsit v. Butler, 87 N Y. 587; Wiggins v. Armstrong, 2 Johns. Ch. (N. Y.) 144; Hendricks v. Robinson, 2 Johns. Ch. (N. Y.) 283; Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 671; Spader v. Davis, 5 Johns. Ch. (N. Y.) 280; s. c. on error, 20 Johns. (N. Y.) 554; Willetts v. Vandenburgh, 34 Barb. (N. Y.) 424; Crippen v. Hudson, 13 N. Y. 161; Brooks v. Stone, 19 How. Pr. (N. Y.) 396.

administration.[1] Nor does the fact that the debtor is an insolvent corporation, and has alienated its property in contravention of the statute, authorize a resort to equity until the remedy at law has been exhausted by judgment and execution returned unsatisfied.[2] But where in such case the property is in the hands of the receiver, against whom no execution can be levied, a creditor's bill will lie without such an execution.[3] In general it may be said that while the mere fact that the execution will probably prove worthless is not enough to warrant the bringing of a creditor's action without a levy and a return *nulla bona*, it is different where such levy is impossible by provision of law.[4]

§ 76. Judgment sufficient. — An ordinary money-judgment rendered in the State in which the debtor resides and the concealed property is located, is manifestly a proper foundation for a creditor's suit. A bill of this character may also be filed "to aid in the collection of money decreed in chancery."[5] "I have no doubt, however," said Chancellor Walworth, "that a creditor, by a decree in chancery, upon the return of his execution unsatisfied, is entitled to the same relief, against the equitable rights and property of his debtor, as a creditor by a judgment at law."[6] A justice's judgment will suffice,[7] especially if docketed in a court of record.[8] And

[1] Crippen v. Hudson, 13 N. Y., 161; Dunlevy v. Tallmadge, 32 N. Y. 457. See Greenwood v. Brodhead, 8 Barb. (N. Y.) 593; Young v. Frier, 9 N. J. Eq. 465.

[2] Adee v. Bigler, 81 N. Y. 349.

[3] Blair v. Illinois Steel Co., 159 Ill. 350, 42 N. E. Rep. 895.

[4] National Tradesmen's Bank v. Wetmore, 124 N. Y. 241, 26 N. E. Rep. 548; Patchen v. Rofkar, 12 App. Div. (N. Y.) 475, 42 N. Y. Supp. 35. See Le Fevre v. Phillips, 81 Hun (N. Y.) 232, 30 N. Y. Supp. 709.

[5] Farnsworth v. Strasler, 12 Ill. 485; Weigtman v. Hatch, 17 Ill. 281.

[6] Clarkson v. De Peyster, 3 Paige (N. Y.) 320.

[7] Bailey v. Burton, 8 Wend. (N. Y.) 339; Newdigate v. Jacobs, 9 Dana (Ky.) 18; Heiatt v. Barnes, 5 Dana (Ky.) 220; Ballentine v. Beall, 4 Ill. 204.

[8] See Crippen v. Hudson, 13 N. Y. 161.

a judgment by confession, even though defective in form and particularity of statement, authorizes the creditor to impeach a fraudulent transfer.[1] Judgment entered upon an offer will stand,[2] and will not be set aside at the suit of another creditor because this method was adopted for the purpose of avoiding the statutory form of confession of judgment.[3] So a demand classified and allowed by a probate court will suffice.[4] Under a judgment against joint debtors only part of whom were served with process, a creditor's action may be prosecuted to reach joint property, but not the separate property of those not served with process in the original suit.[5] Supplementary proceedings may be taken on a judgment so recovered to reach joint property.[6]

§ 77. **Judgment insufficient.**— It seems clear in New York, at least, that a creditor's action cannot be founded upon a judgment recovered in a justice's court where the execution had only been issued to and returned by the justice.[7] It should be docketed in, and made a judgment of, a court of record. It then becomes as much entitled to the aid of a court of equity as though originally recovered in a court of record.[8] So supplementary pro-

[1] Neusbaum v. Keim, 24 N. Y. 325. Compare Harrison v. Gibbons, 71 N. Y. 58. If a creditor attacks a confession of judgment as being fraudulent against him he must plead the grounds of the objection. A general averment will not suffice. Meeker v. Harris, 19 Cal. 278.

[2] Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430, 32 N. E. Rep. 239; Trier v. Herman, 115 N. Y. 163, 21 N. E. Rep. 1034.

[3] Trier v. Herman, 115 N. Y. 163, 21 N. E. Rep. 1034.

[4] Wright v. Campbell, 27 Ark. 637. Compare Catchings v. Manlove, 39 Miss. 671.

[5] Billhofer v. Heubach, 15 Abb. Pr. (N. Y.) 143. See Produce Bank v. Morton, 67 N. Y. 199. Compare Howard v. Sheldon, 11 Paige (N. Y.) 558; Commercial Bank of Lake Erie v. Meach, 7 Paige (N. Y.) 448.

[6] Perkins v. Kendall, 3 Civ. Proc. (N. Y.) 240.

[7] Crippen v. Hudson, 13 N. Y. 161. See Dix v. Briggs, 9 Paige (N. Y.) 595; Coe v. Whitbeck, 11 Paige (N. Y.) 42; Henderson v. Brooks, 3 T. & C. (N. Y.) 445.

[8] Bailey v. Burton, 8 Wend. (N. Y.) 339; Newdigate v. Jacobs, 9 Dana (Ky.) 18; Heiatt v. Barnes, 5 Dana (Ky.) 220; Ballentine v. Beall, 4 Ill. 204.

ceedings, or a creditor's bill cannot be founded upon a judgment that did not bind all of the debtor's property.[1]

Again, a judgment in an attachment suit, where the defendant has not been brought into court so as to make it a personal judgment, is not evidence of the debt in another suit founded upon that record;[2] and a creditor's bill cannot be brought upon a judgment barred by the statute of limitations,[3] or upon a claim the consideration of which is illegal.[4] And an action based upon a judgment rendered against executors in their representative capacity, is not maintainable to set aside, as fraudulent as against creditors, a conveyance of real estate made by a decedent.[5] This latter combination of facts might well in some instances result in a seeming denial of justice. The court said that if the facts recited in the complaint were true, it was the duty of the executors to reclaim the real estate. Earl, J., observed: "The fact that the fraudulent grantee is one of the executors furnishes no

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[1] Importers & Traders' Nat. Bank v. Quackenbush 143 N. Y. 567, 38 N. E. Rep. 728; Thomas v. Merchants' Bank, 9 Paige (N. Y.) 215; Rocky Mountain Nat. Bank v. Bliss, 89 N. Y. 338.

[2] Manchester v. McKee, 9 Ill. 520. "It is apparent that the plaintiff could in no way secure a judgment in this State against the assignor for the amount of his indebtedness before commencing this action. The assignor was not within the jurisdiction of the courts in this State, and no personal service of summons could be made upon him. No service could be made by publication of the summons so as to procure a personal judgment against him, inasmuch as no attachment could be levied upon any property of his in this State after the making of the assignment. Code Civ. Proc. § 1217; Capital City Bank v. Parent, 134 N. Y. 527, 31 N. E. Rep. 976. The money in the hands of the assignee could not be attached. McAllaster v. Bailey, 127 N. Y. 583, 28 N. E. Rep. 591; Patchen v. Rofkar, 12 App. Div. (N. Y.) 477, 42 N. Y. Supp. 35."

[3] Fox v. Wallace, 31 Miss. 660.

[4] Alexander v. Gould, 1 Mass. 165. See Brooks v. Wilson, 125 N. Y. 262, 26 N. E. Rep. 258.

[5] Litchtenberg v. Herdtfelder, 103 N. Y. 302, 8 N E. Rep. 526. In New York the personal representative must sue to annul a fraudulent transfer made by the decedent (National Bank v. Levy, 127 N. Y. 552, 28 N. E. Rep. 592; Barton v. Hosner, 24 Hun (N. Y.) 467, Laws of 1858, ch. 314; but the creditor may bring action where the personal representative refuses. National Bank v. Levy, 127 N. Y. 552, 28 N. E. Rep. 592.

insurmountable obstacle. If she should refuse to restore the lands to the estate, she could be removed from her office of executrix, and then the remaining two executors could, under the act of 1858, disaffirm the conveyances of the real estate and bring an action to set them aside. Or the two executors could commence the action making the executrix a defendant, and in such an action obtain for the estate the relief demanded. If the two defendants refused to commence the action upon the application of the creditors or some of them, they could be compelled to commence it by an order of the surrogate." Parties experienced in suits instituted to annul fraudulent conveyances will readily appreciate the perfunctory manner in which these executors would be likely to prosecute their associate.

§ 78. **Foreign judgments.** — Usually a foreign judgment will not suffice as the foundation of a creditor's bill.[1] In Buchanan v. Marsh,[2] which was an action in the courts of the State of Iowa on a judgment rendered in Canada, an injunction was asked restraining the defendants from alienating or encumbering their real estate until the rights of the parties should be determined at law. Wright, C. J., said: "Plaintiffs are not judgment-creditors. For the purpose of the present inquiry, their action is like any ordinary one upon a note, account, or any simple contract, or evidence of indebtedness. They have a foreign judgment; but until it becomes a judgment in our courts, they are no more than creditors at large, and until they obtain the recognition of their claim by the adjudication of our State tribunals, they have no other or different rights as to the property of their debtor than if their demand was

[1] Patchen v. Rofkar, 12 App. Div. (N. Y.) 475, 42 N. Y. Supp. 35; Rocky Mountain Nat. Bank v. Bliss, 89 N. Y. 338.

[2] 17 Iowa, 494.

indorsed by a less solemn or conclusive proceeding or instrument. For, however effectual such judgment may be, or whatever the faith and credit to which it may be entitled, it is very certain that it cannot be enforced here until its validity is recognized and passed upon by the judgment of our courts. This being so upon common law principles, we know of no principle upon which plaintiffs were entitled to this injunction. The rule is, as far as we know, without exception, that the creditor must have completed his title at law, by judgment (if not by execution) before he can question the disposition of the debtor's property." In Rocky Mountain National Bank v. Bliss,[1] the court say: "In requiring the creditor to exhaust his legal remedies against the corporation, before resorting to the personal liability of the stockholders, the statute could not have contemplated that the recovery of a judgment and issue of an execution against the company in any State of the Union should be a compliance with the condition. The legal remedies afforded by the courts of this State, where the corporation was created and is domiciled, are those which the legislature must be deemed to have intended." The weight of authority sustains this view.[2] On the other hand, upon a judgment recovered in Pennsylvania, an attachment was issued in New Jersey, and the lien thereby created was held to be sufficient to enable the creditor to attack a fraudulent transfer.[3] Again, in Wilkinson v. Yale,[4] a creditor's bill was maintained in the United States Circuit Court,

[1] 89 N. Y. 342.

[2] See McCartney v. Bostwick, 31 Barb. (N. Y.) 390, overruled 32 N. Y. 53; Claflin v. McDermott, 12 Fed. Rep. 375; Davis v. Bruns, 23 Hun (N. Y.) 648; Berryman v. Sullivan, 21 Miss. 65; Tarbell v. Griggs, 3 Paige (N. Y.) 207; Farned v. Harris, 19 Miss. 366; Davis v. Dean, 26 N. J. Eq. 436; Crim v. Walker, 79 Mo. 335; Brown v. Campbell, 100 Cal. 635, 35 Pac. Rep. 433.

[3] Smith v. Muirheid, 34 N. J. Eq. 4. See Watkins v. Wortman, 19 W. Va. 79; Chicago Bridge Co. v. Anglo-Amer. Pack. Co., 46 Fed. Rep. 584.

[4] 6 McLean 16. See Bullitt v. Taylor, 34 Miss. 708.

founded upon a judgment of a court of the State in which the Federal court was sitting.[1] Still the general rule is that a foreign judgment ranks as a simple contract debt; it does not have the force and operation of a domestic judgment except for the purposes of evidence, beyond the jurisdiction in which it is obtained.[2]

§ 79. **Creditors of a decedent.**—The question of the necessity of a judgment as the foundation of a creditor's proceedings, in cases where the debtor is dead, has created much dissension in the courts. Estes v. Wilcox,[3] an important case in the New York Court of Appeals, is to the effect that a creditor without judgment and execution returned, cannot maintain an action to enforce a resulting trust under the statutes of uses and trusts, in lands purchased and paid for by the debtor, and deeded to another, although the debtor died insolvent. It was held that these facts did not dispense with the observance of the

[1] Compare, however, Tompkins v. Purcell, 12 Hun (N. Y.) 664; Tarbell v. Griggs, 3 Paige Ch. (N. Y.) 208; Steere v. Hoagland, 39 Ill. 264; Bullitt v. Taylor, 34 Miss. 708, 743; Brown v. Bates, 10 Ala. 440; Goodyear Vulcanite Co. v. Frisselle, 22 Hun (N. Y.) 174; Crim v. Walker, 79 Mo. 335; Claflin v. McDermott, 12 Fed. Rep. 375. But see to the effect that a judgment in a United States court is to be considered a domestic judgment of the State within which it is rendered. First Nat. Bk. v. Sloman, 42 Neb. 350, 60 N. W. Rep. 589; Ballin v. Loeb, 78 Wis. 404, 47 N. W. Rep. 516; Embry v. Palmer, 107 U. S. 3, 2 S. C. Rep, 25; Adams v. Way, 33 Conn. 419. In Johnson v. Powers, 139 U. S. 156, 159, the court said: "A judgment recovered against the administrator of a deceased person in one State is no evidence of debt, in a subsequent suit by the same plaintiff in another State, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. Aspden v. Nixon, 4 How. 467; Stacy v. Thrasher, 6 How. 44; McLean v. Meek, 18 How. 16; Low v. Bartlett, 8 Allen (Mass.) 259." As to when a foreign judgment is only *prima facie* evidence in this country and for an exhaustive review of the authorities, see Hilton v. Guyot, 159 U. S. 113, and cases cited. To impeach a foreign judgment, the fraud must be distinctly alleged, Ritchie v. McMullen, 159 U. S. 242; White v. Hall, 12 Ves. 321.

[2] McElmoyle v. Cohen, 13 Pet. 312. An administrator appointed in one State cannot sue in another State, Johnson v. Powers, 139 U. S. 156, 11 S. C. Rep. 525.

[3] 67 N. Y. 264.

general rule that a debt must be fixed and ascertained by judgment, and the legal remedies exhausted.[1] It is contended that the reason of the rule that a creditor's debt must be ascertained by judgment before proceeding in equity, does not necessarily fail by the death of the debtor before judgment recovered upon the debt. The creditor may prosecute the claim to judgment against the personal representatives of the debtor, and although it will not be conclusive against his heirs or his grantees by title acquired before his death, it would conclude the creditor as to the amount of his claim.[2] But we cannot discover that the judgment against the personal representatives would be of much worth to the creditor.[3] This case certainly extended the requirement to an extreme limit.[4] Recent cases uphold the rule in all its strictness where the action is brought exclusively for the benefit of the complainant.[5] But by recent legislation creditors can bring without judgment or execution an action to set aside a fraudulent conveyance, if it is brought on behalf of all parties interested.[6] In a number of States the principle is asserted that no proof of the recovery of judgment is necessary where the debtor is dead,[7] as the judgment

[1] See Allyn v. Thurston, 53 N. Y. 622; Fox v. Moyer, 54 N, Y. 129; Shaw v. Dwight, 27 N. Y. 249: North American Fire Ins. Co. v. Graham, 5 Sandf. (N. Y.) 200; Jones v. Green, 1 Wall. 332, per Justice Field; Chittenden v. Brewster, 2 Wall. 196. See also § 73.

[2] Estes v. Wilcox, 67 N. Y. 266; Burnett v. Gould, 27 Hun (N. Y.) 366; followed in Ohm v. Superior Court, 85 Cal. 548, 26 Pac. Rep. 244. See O'Connor v. Boylan, 49 Mich. 209, 13 N. W. Rep. 519; Fletcher v. Holmes, 40 Me. 364.

[3] Lichtenberg v. Herdtfelder, 103 N. Y. 302.

[4] See Merchants' Nat. Bank v. Paine, 13 R. I. 594.

[5] Prentiss v. Bowden, 145 N. Y. 342, 40 N. E. Rep. 13; ch. 487, Laws of 1889.

[6] See § 112. See N. Y. Laws 1889, ch. 487; Brown v. Brown, 83 Hun (N. Y.) 162, 31 N. Y. Supp. 650. See Nat. Tradesmen's Bank v. Wetmore, 124 N. Y. 241, 26 N. E. Rep. 248.

[7] Johnson v. Jones, 79 Ind. 141; Kipper v. Glancey, 2 Blackf. (Ind.) 356; O'Brien v. Coulter, 2 Blackf. (Ind.) 421; Spencer v. Armstrong, 12 Heisk. (Tenn.) 707; Love v. Mikals, 11 Ind. 227; Spicer v. Ayers, 2 T. & C. (N. Y.) 628; Reeder v. Speake, 4 S. C. 293; Haston v. Castner, 29 N. J. Eq. 536; Offutt v. King, 1 MacA. (D. C.) 314; Fowler's Appeal, 87 Pa. St. 449; Shurts v. Howell, 30 N. J.

would be useless and unmeaning.[1] In Hagan v. Walker,[2] Mr. Justice Curtis, a very learned and able jurist, held that a simple creditor might maintain a suit to remove a covinous conveyance and reach assets, against the administrator and the fraudulent alienee of a deceased debtor. The court was of opinion that such a case was not to be treated as an application by a judgment-creditor for the exercise of the ancillary jurisdiction of the court to aid him in executing legal process, but came under the head of original jurisdiction in equity.[3] The authorities upon this subject cannot be reconciled. The best reasoning would seem to be with the cases holding that no judgment need be recovered against the decedent's estate, and in favor of allowing the creditor both to establish his claim, and to discover assets to be applied toward its payment, in the same action. The practice of allowing executors and administrators to prosecute actions to annul fraudulent transfers, in the interest and right of creditors, will be noticed presently. Where the personal representatives sue, the necessity for judgment and execution returned unsatisfied is superseded.[4]

§ 80. **Rule as to judgments in equitable actions.**— The remedy, it seems, must also be exhausted where the judgment proceeded upon was rendered in an equity suit. Thus in Geery v. Geery,[5] which was an action brought to

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Eq. 418; Phelps v. Platt, 50 Barb. (N. Y.) 430; Steere v. Hoagland, 39 Ill. 264; Lyons v. Murray, 95 Mo. 23, 8 S. W. Rep. 170.

[1] Platt v. Mead, 9 Fed. Rep. 96; Loomis v. Tifft, 16 Barb. (N. Y.) 541, (*contra*, Estes v. Wilcox, 67 N. Y. 264); Doran v. Simpson, 4 Ves. 651; Alsager v. Rowley, 6 Ves. 749; Wright v. Campbell, 27 Ark. 637.

[2] 14 How. 32. See Merchants', etc. Trans. Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. Rep. 272.

[3] See Green v. Creighton, 23 How. 106; Bay v. Cook, 31 Ill. 336; Merry v. Fremon, 44 Mo. 518; Snodgrass v. Andrews, 30 Miss. 472. Compare Hills v. Sherwood, 48 Cal. 386.

[4] Barton v. Hosner, 24 Hun (N. Y.) 471. Compare National Bank v. Levy, 127 N. Y. 552, 28 N. E. Rep. 592; Lichtenberg v. Herdtfelder, 103 N. Y. 302, 8 N. E. Rep. 526. See §§ 112, 113.

[5] 63 N. Y. 252; overruling White v. Geraerdt, 1 Edw. Ch. (N. Y.) 336. See Sullivan v. Miller, 106 N. Y. 641, 13 N. E. Rep. 772.

set aside conveyances of real estate alleged to have been made by the defendant, through other persons, to his wife, in fraud of creditors, there was no proof of the docketing of a judgment, and of execution returned unsatisfied, and the point was taken that the ordinary remedy usually available to creditors had not been exhausted. The creditor sought to obviate this objection by urging that the rule did not apply where the judgment sought to be collected was rendered in an equitable action. It appeared that the foundation of the complainant's claim was a judgment rendered upon a partnership accounting, but the judgment had not been docketed, nor had any execution been issued upon it. Earl, J., said: "I can perceive no reason for a distinction. A suit in equity to enforce satisfaction of a judgment should not be allowed so long as there is a more simple and obvious remedy. The statute law gives a remedy by execution, and that remedy, upon every reason of public policy and convenience, should be exhausted before a new suit should be allowed to be maintained."[1] Then Johnson, J., observed, in Crippen v. Hudson,[2] that "the court of chancery required executions to be returned unsatisfied, when issued on its own decrees, before it would entertain creditors' bills founded upon them."[3] There is, however, a rule running through some of the cases to the general effect that, where the claim asserted is purely equitable, and such as a court of equity will take cognizance of in the first instance, equity will at the same time go to the extent of inquiring into the matter of obstructions which have been placed in the way of enforcing the demand.[4]

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[1] See *supra*, §§ 76, 77. Clarkson v. De Peyster, 3 Paige (N. Y.) 320; S. P., Adsit v. Butler, 87 N. Y. 585–589.

[2] 13 N. Y. 161.

[3] See North Am. Fire Ins. Co. v. Graham, 5 Sandf. (N. Y.) 198; Speiglemyer v. Crawford, 6 Paige (N. Y.) 254.

[4] Halbert v. Grant, 4 Mon. (Ky.) 583. Compare Shea v. Knoxville & Kentucky R. R. Co., 6 Baxter (Tenn.) 277.

For instance, where a surety has paid money for a principal, chancery has jurisdiction of a suit for its recovery, and the complainant may add a prayer seeking to annul a fraudulent conveyance that stands in the way of a settlement or is calculated to defeat or embarrass the remedial action of the court.[1]

§ 81. **Specific lien by attachment.** — In cases where the sheriff takes property upon attachment, which is of a nature subject to seizure and sale, but which has been fraudulently transferred, it seems rather clearly established that the plaintiff, after the service of the attachment, is not considered a mere creditor at large, but, according to some of the authorities, one having a specific lien upon the goods attached, and that the sheriff has a like lien, and the right to show, as a defense to an action for taking the property, or in support of his possession, that the title of the party claiming it from the officer is fraudulent as against the attaching creditor.[2] Hence it was held, in an action brought by a general assignee for the benefit of creditors, to recover goods seized by a sheriff on a warrant of attachment issued against the assignor, that it was permissible for the sheriff to show that the assignment was fraudulent and void as against the attaching creditors.[3] There is some confusion, how-

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[1] Waller v. Todd, 3 Dana (Ky.) 508. Compare Smith v. Rumsey, 33 Mich. 184; especially Swan v. Smith, 57 Miss. 548. But see § 85.

[2] Gross v. Daly, 5 Daly (N. Y.) 542; Rinchey v. Stryker, 28 N. Y. 45, 26 How. Pr. 75; Noble v. Holmes, 5 Hill (N. Y.) 194; Van Etten v. Hurst, 6 Hill (N. Y.) 311; Sheafe v. Sheafe, 40 N. H. 516; Webster v. Lawrence, 47 Hun (N. Y.) 565; Lux v. Davidson, 56 Hun (N. Y.) 345, 9 N. Y. Supp. 816; Waples Platter Co. v. Low, 10 U. S. App. 704, 4 C. C. A. 205, 54 Fed. Rep. 93.

[3] Carr v. Van Hoesen, 26 Hun (N. Y.) 316; Rinchey v. Stryker, 28 N. Y. 45; Hess v. Hess, 117 N. Y. 308, 22 N. E. Rep. 956. In the latter case the court says: "Goods and chattels fraudulently assigned by a debtor, to hinder, delay and defraud creditors, are attachable in the hands of his voluntary assignee at the suit of a creditor defrauded by the assignment. Rinchey v. Stryker, 28 N. Y. 45; Frost v.

ever, in the authorities on the question of the right of an attaching creditor to attack fraudulent transfers. The Supreme Court of Nebraska and the courts of some other States deny such right in a variety of instances.[1] The Nebraska case is rested upon the authority of Brooks v. Stone,[2] which proceeds on the theory that the creditor's remedy at law is not exhausted, his claim is not definitely established, and perhaps he will never succeed in getting a judgment.[3] So garnishment process does not create a sufficient lien to uphold a creditor's bill.[4] In New York, a State in which the authorities relating to different phases of our general subject are burdened with subtle distinctions, and show apparent conflicts, it is said that an attaching creditor could not maintain an independent action in the nature of a creditor's bill to set aside a fraudulent transfer of a chose in action.[5] This case rested upon the theory that the attachment, owing to the nature of the property, created no lien; but where a lien is in fact acquired, the rule, as already stated, may be different,[6] as for example, when the attaching creditor or

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Mott, 34 id. 253. The rule which prevents the levy of an execution, under similar circumstances, upon equitable assets or choses in action, proceeds upon peculiar grounds, not applicable to chattels, of which there can be a manual tradition. Thurber v. Blanck, 50 N. Y. 80; Anthony v. Wood, 96 id. 180. If, therefore, the present action had been continued against the sheriff, there can be no doubt that he could have defended the original taking by showing that he took the goods under a valid attachment against Hirschhorn & Co., and that the assignment to the plaintiff was fraudulent as to the plaintiff in the attachment suit." Compare Bates v. Plonsky, 28 Hun (N. Y.) 112.

[1] Weil v. Lankins, 3 Neb. 384; Tennent v. Battey, 18 Kan. 324; Martin v. Michael, 23 Mo. 50; Greenleaf v. Mumford, 19 Abb. Pr. (N. Y.) 469; Mills v. Block, 30 Barb. (N. Y.) 549; Melville v. Brown, 16 N. J. Law, 364; McMinn v. Whelan, 27 Cal. 300.

[2] 19 How Pr. (N. Y.) 395: see Dunlevy v. Tallmadge, 22 N. Y. 457.

[3] Compare Jones v. Green, 1 Wall. 331. See § 73.

[4] Bigelow v. Andress, 31 Ill. 322.

[5] Thurber v. Blanck, 50 N. Y. 80. See Whitney v. Davis, 148 N. Y. 260, 42 N. E. Rep. 661, explaining People ex rel. Cauffman v. Van Buren, 136 N. Y. 252, 32 N. E. Rep. 775.

[6] Carr v. Van Hoesen, 26 Hun (N. Y.) 316; Rinchey v. Stryker, 28 N. Y. 45. Compare Frost v. Mott, 34 N. Y. 255; Smith v. Longmire, 24 Hun (N.

the sheriff is a defendant, at the suit of the fraudulent alienee, and relief will be, in certain instances, extended, both in that State and in sister States, for the protection and vindication of the lien.[1] The words of the statute usually make a judgment an absolute prerequisite to the creditor's bill. While it is admitted that a creditor may attach assets fraudulently transferred, it remains doubtful whether he can use the attachment lien for any other than purely defensive purposes, at least until he has obtained judgment. But where there is danger that assets fraudulently transferred which have been attached will be taken from the jurisdiction of the court, an injunction will be granted to the attaching creditor.[2] In Whitney v. Davis,[3] the case of People ex rel. Cauffman v. Van Buren,[4] is explained and certainly not extended.[5] In Bowe v. Arnold[6] the courts of New York held that the plaintiffs, in an action instituted by attachment, could not join with the sheriff in a suit against an assignee claiming the property under an assignment which it was sought to set aside in the action as fraudulent. It was conceded that such

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Y.) 257; Hall v. Stryker, 27 N. Y. 596; Castle v. Lewis, 78 N. Y. 131; Ocean Nat. Bank v. Olcott, 46 N. Y. 12; Deutsch v. Reilly, 57 How. Pr. (N. Y.) 75; Whitney v. Davis, 148 N. Y. 260, 42 N. E. Rep. 661.

[1] Heyneman v. Dannenberg, 6 Cal. 378; Scales v. Scott, 13 Cal. 76; Joseph v. McGill, 52 Iowa, 128; Heye v. Bolles, 33 How. Pr. (N. Y.) 266; Merriam v. Sewall, 8 Gray (Mass.) 316; Falconer v. Freeman, 4 Sandf. Ch. (N. Y.) 565; Stone v. Anderson, 26 N. H. 506; Dodge v. Griswold, 8 N. H. 425; Hunt v. Field, 9 N. J. Eq. 36; Williams v. Michenor, 11 N. J. Eq. 520; Sheafe v. Sheafe, 40 N. H. 516; Whitney v. Davis, 148 N. Y. 260, 42 N. E. Rep. 661.

[2] People ex rel. Cauffman v. Van Buren, 136 N. Y. 252, 32 N. E. Rep. 775.

[3] 148 N. Y. 256, 42 N. E. Rep. 661.

[4] 136 N. Y. 252, 32 N. E. Rep. 775.

[5] Where the attachment is issued against property of non-resident debtors, the right may now be enforced in New York by an action in aid of the attachment. Chap. 504, N. Y. Laws 1889; Harding v. Elliott, 91 Hun (N. Y.) 506, 36 N. Y. Supp. 648. In New Jersey an affirmative action may be brought by a creditor having a lien. Cocks v. Varney, 45 N. J. Eq. 72, 17 Atl. Rep. 108. See Taylor v. Branscombe, 74 Iowa, 534, 38 N. W. Rep. 400.

[6] 18 Weekly Dig. (N. Y.) 326; 31 Hun (N. Y.) 256; affi'd 101 N. Y. 652.

parties might join in that State,[1] in actions to collect debts, effects, or choses in action attached by the sheriff,[2] but the court observed that this was not such a case. The counsel sought, upon the authority of Bates v. Plonsky,[3] to maintain the action as being instituted for the protection, preservation, and enforcement of the lien obtained by the supposed levy of the attachment, but the court said that the precedent cited was a suit of a different nature, and was prosecuted merely to enjoin the distribution of a fund until the rights of the conflicting claimants could be established. It is observed in the course of the opinion that a creditor could only file a bill to annul a fraudulent transfer after return of execution unsatisfied,[4] or in aid of the execution after the recovery of a judgment.[5]

The judgment in this case may have been correct, but in view of the other authorities cited, the decisions of that State relative to the rights of an attaching creditor are not in a very clear or satisfactory condition. We incline to deny that a mere attaching creditor can, under any correct theory of law and without legislative aid, become an actor in a creditor's suit. Indeed the underlying principles of the cases in which it is sought to make a lien acquired by the provisional remedy of attachment the practical equivalent of a lien procured by final judgment, are subversive of the time-honored policy and rule of the courts, that a creditor's bill must be founded upon

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[1] See N. Y. Code Civ. Pro. §§ 655–667.

[2] Compare Thurber v. Blanck, 50 N. Y. 86; People ex rel. Cauffman v. Van Buren, 136 N. Y. 252, 32 N. E. Rep. 775; Whitney v. Davis, 148 N. Y. 260, 42 N. E. Rep. 661; Lynch v. Crary, 52 N. Y. 183.

[3] 28 Hun (N. Y.) 112. See People ex rel. Cauffman v. Van Buren, 136 N. Y. 261, 32 N. E. Rep. 775; Keller v. Payne, 22 Abb. N. C. (N. Y.) 352, 1 N. Y. Supp. 148; Whitney v. Davis, 148 N. Y. 256, 42 N. E. Rep. 661.

[4] See Chatauque Co. Bank v. Risley, 10 N. Y. 370; Cole v. Tyler, 65 N. Y. 73; Ballou v. Jones, 13 Hun (N. Y.) 629.

[5] See Adsit v. Butler, 87 N. Y. 585.

a definite claim, established by a judgment at law.[1] If the innovations in modern procedure call for the abrogation of this old chancery practice, it should not be superseded by indirection, but deliberately, and by some carefully formulated legislative substitute. The requirement is neither artificial nor technical; it is a necessary protection and safeguard to the debtor. Manifestly, where the property in controversy is of such character as not to be susceptible to an attachment lien, the attaching creditor cannot, either as plaintiff or defendant, avoid or attack any alienation or disposition that may have been made of it; he has no status and no lien. Where, however, an attachment lien has been actually acquired, and the officer or attaching creditor is made defendant in a suit by the fraudulent alienee, the efficacy of the lien may be vindicated by setting up the fraud by way of defense, because the plaintiff will be forced to recover upon the strength of his own title, and if it be shown that such title is affected with fraud as regards the defendant or attaching creditor, the plaintiff will fail to make out a good title.[2] Chancellor Green said in New Jersey:

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[1] See § 73. Wales v. Lawrence, 36 N. J. Eq. 209.

[2] In Whitney v. Davis, 148 N. Y. 261, 42 N. E. Rep. 661, Gray, J., said: "All that the *Cauffman* case (People ex rel. Cauffman v. Van Buren, 136 N. Y. 252, 32 N. E. Rep. 775) decided was, that special circumstances might exist and if shown that they would authorize the granting of equitable relief at the instance of an attaching creditor, though prior to judgment and execution, in order to preserve the debtor's property in a condition where a recovery by the attaching creditor could be made effective. It was not intended to hold that an equitable action was within the power of the attaching creditor to maintain, ordinarily, prior to judgment and execution, nor to introduce any innovation upon the settled rule. It was considered, however, that where the debtor's property was about being transferred beyond the reach of the sheriff, in whose hands it was, a case was presented where the court might properly extend its equitable arm and stay the threatened transfer. . . . . What reason is there, or what justification exists for allowing an attaching creditor, before he has established his claim against his alleged debtor, to attack an apparently valid transfer of real estate?" An attaching creditor may proceed by creditor's bill in New Jersey. Francis v. Lawrence, 48 N.

"Equity will not, of course, grant its aid to enforce legal process."[1]

§ 82. Property of the debtor taken in name of third party. — The rules of procedure in cases where property has been paid for by the debtor, but the title taken in the name of third parties, have already been noticed.[2] The New York Court of Appeals, in The Ocean National Bank v. Olcott,[3] said, ill-advisedly as we think, that it was difficult to perceive the reason for any distinction between the rights of creditors as to the property fraudulently transferred by the debtor personally, and property paid for by him and transferred by the vendor or grantor to a third person. "Why," said Chief-Justice Church, "should creditors have different and superior rights to enforce their debts, in the latter case, to those enjoyed in the former? I can see no reason for any distinction, and I do not believe the statute has created any. But, in either case, the commencement of an equitable action is necessary to constitute a lien or charge, in any legal sense, upon the land. . . . . The harmony and analogies of the law are better preserved by requiring all available legal remedies to be resorted to, as a preliminary requisite to an action for the application of the trust property." In Ohio it is said that the statute[4] does not apply to cases where the title is taken in the name of a third party for the

J. Eq. 512, 22 Atl. Rep. 259. An attaching creditor was allowed in National Park Bank v. Goddard, 131 N. Y. 494, to file a bill and secure an injunction, the appointment of a receiver and the sale of an attached stock of goods, also claimed by numerous defendant creditors who had revoked the sales for fraud and had brought replevin suits, each claiming disputed portions of the partially manufactured stock. Compare Supervisors of Saratoga Co. v. Deyoe, 77 N. Y. 219; Scott v. Morgan, 94 N. Y. 509, as bearing upon the jurisdiction which was hotly contested.

[1] Robert v. Hodges, 16 N. J. Eq. 303. See Wales v. Lawrence, 36 N. J. Eq. 209.

[2] See § 57.

[3] 46 N. Y. 22.

[4] Swan & Sayler's Stats. 397, regulating the mode of administering assignments in trust for the benefit of creditors.

reason that the avoidance of the conveyance merely leaves the title in the grantor, which, of course, does not benefit the creditor;[1] such an interest it is argued must be reached by a creditor's bill.[2] It cannot be sold on execution.[3] This question arose in Spaulding v. Fisher.[4] It was held that property purchased with the funds of the debtor, though taken in the name of a third party, was the property of the debtor as regards his creditors. The court said: "Its fraudulent transfer and concealment is equally established, whether the transfer is directly from the debtor or from another by his direction and procurement, the property transferred having been purchased with his funds. The object of the statute is to afford a remedy to the creditor against any one to whom the property of his debtor no matter in what it consisted, or how situated, has been fraudulently transferred for the purpose, and with the intent on the part of the debtor transferring, and the individual receiving such transfer, to conceal the same, so as 'to secure it from the creditors and prevent its attachment or seizure on execution.'"[5] Even where by statute his interest can be sold on attachment or execution it has been held that this did not change the nature of the interest which those claiming under him take in the property so conveyed.

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[1] Shorten v. Woodrow 34, O. S. 645.

[2] Bomberger v. Turner, 13 O. S. 263. See Martin v. Elden, 32 O. S. 282. Compare Combs. v. Watson, 32 O. S. 228.

[3] Garfield v. Hatmaker, 15 N. Y. 475. An equitable trust arises in favor of creditors enforceable in equity. Brown v. Chubb, 135 N. Y. 177, 31 N. E. Rep. 1030. Bates v. Ledgerwood M'f'g Co., 130 N. Y. 205, 29 N. E. Rep. 102. Robertson v. Sayre, 134 N. Y. 99, 31 N. E. Rep. 250.

[4] 57 Me. 415. See § 57.

[5] In Massachussetts, until the St. of 1844, c. 107, took effect, land paid for and occupied by a debtor, the legal title to which had never been in him, but had been conveyed to another person in order to secure it from his creditors, could not be attached or taken on execution as his property. Hamilton v. Cone, 99 Mass. 478; Howe v. Bishop, 3 Met. (Mass.) 26. See also Garfield v. Hatmaker, 15 N. Y. 475; Webster v. Folsom, 58 Me. 230. Compare Guthrie v. Gardner, 19 Wend. (N. Y.) 414; and see Arbuckle Brothers Coffee Co. v. Werner, 77 Tex. 43; 13 S. W. Rep. 963.

As to them the conveyance is valid, so that *e. g.* his wife is not entitled to any interest in the property by virtue of the marriage.[1]

§ 83. **When judgment is unnecessary.**— It has been decided, though the question is a debatable one, that in special cases, if the execution cannot be issued in the State in which the land lies, it will suffice if issued in the State of the debtor's residence;[2] and if the debtor's property is in the hands of a receiver appointed by the court, so that a levy cannot be made, levy is excused;[3] the same rule applies when the property is in the hands of an assignee in bankruptcy;[4] and where, by reason of special circumstances, the creditor has no remedy at law, it has been argued that the legal remedy cannot be exhausted before proceeding in equity.[5] McCartney v. Bostwick[6] seems to be in its general statements overruled by Estes v. Wilcox;[7] at least the courts have so held.[8] A distinction is drawn in McCartney v. Bostwick between property fraudulently alienated by the debtor, and property paid for by him and taken in the name of a third party. In the former instance, the proceeding is to remove impediments in the way of reaching the *debtor's* property; in the latter, it is to charge with a statutory lien the property of a *third party*, which the debtor never owned; in the one case, it is to exercise auxiliary jurisdiction in aid of legal process; in the other to enforce a trust of which the courts

[1] Marshall v. Whitney, 43 Fed. Rep. 343; but see Whitney v. Marshall, 138 Ind. 472, 37 N. E. Rep. 964.

[2] McCartney v. Bostwick, 32 N. Y. 53.

[3] Stewart v. Beale, 7 Hun (N. Y.) 405. This case contains an important review of the authorities, and is affirmed without an opinion in the Court of Appeals. See 68 N. Y. 629. See also Adsit v. Sanford, 23 Hun (N. Y.) 49.

[4] Barker v. Barker, Assignee, 2 Fed. Cas. 807.

[5] Kamp v. Kamp, 46 How. Pr. (N. Y.)143; overruled in other respects, 59 N. Y. 212. See § 80.

[6] 32 N. Y. 53. Compare Niver v. Crane, 98 N. Y. 40.

[7] 67 N. Y. 264.

[8] Evans v. Hill, 18 Hun (N. Y.) 465.

of law have no jurisdiction. We have already shown that Chief-Justice Church, in a later case, could see no reason for this distinction.[1] In a controversy which arose in Georgia, it was decided that where a creditor of an insolvent estate was under injunction not to sue the executor, this constituted a good excuse for not obtaining judgment on his debt before proceeding by bill in equity to cancel a voluntary conveyance made by the testator in his lifetime.[2] The court in this case seemed determined to favor the creditor, for it was held that if, during the pendency of the bill, a judgment or decree establishing the amount of the debt was obtained against the executor, it might be brought into the bill by way of amendment, and used as effectively as if the adjudication had preceded the filing of the bill, and had been originally alleged therein.[3] Where the performance of a condition becomes impossible or illegal, performance is excused.[4] So in some States creditors may proceed against an insolvent estate without the return of an execution.[5] In Case v. Beauregard,[6] Mr. Justice Strong observed: "But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without

[1] The Ocean National Bank v. Olcott, 46 N. Y. 22. See § 82.

[2] Compare Shellington v. Howland, 53 N. Y. 371.

[3] Cleveland v. Chambliss, 64 Ga. 352.

[4] Shellington v. Howland, 53 N. Y. 374; Cohen v. N. Y. Mutual Life Ins. Co., 50 N. Y. 610; Semmes v. Hartford Ins. Co., 13 Wall. 158.

[5] Steere v. Hoagland, 39 Ill. 264; McDowell v. Cochran, 11 Ill. 31; Bay v. Cook, 31 Ill. 336; Hagan v. Walker, 14 How. 32; Merry v. Fremon, 44 Mo. 518; Haston v. Castner, 29 N. J. Eq. 536; Johnson v. Jones, 79 Ind. 141; Platt v. Mead, 9 Fed. Rep. 96. Compare Crompton v. Anthony, 13 Allen (Mass.) 36; Wright v. Campbell, 27 Ark. 637; Everett v. Raby, 104 N. C. 479, 10 S. E. Rep. 526; Gilbert v. Stockman, 81 Wisc. 802, 51 N. W. Rep. 1076, 52 Id. 1045.

[6] 101 U. S. 690. "This rule is not so unrelenting as to deny to a party the interposition of the equity powers of the court when the situation is such as to render impossible the aid of a court of law to there take the preliminary steps and produce what ordinarily may be treated as the condition precedent to the application for equitable relief." National Tradesmen's Bk. v. Wetmore, 124 N. Y. 249.

remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, '*Bona, sed impossibilia non cogit lex.*' It has been decided that where it appears by the bill that the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference.[1] This is certainly true where the creditor has a lien or a trust in his favor."[2] The observations of Mr. Justice Strong were not accorded hearty approval for a long time in the Supreme Court itself.[3] The rule laid down by him has been followed, however, in many cases, especially where a trust existed in favor of the creditor.[4] In Russell v. Clark,[5] Chief-Justice Marshall, in discussing the general subject, said: "If a claim is to be satisfied out of a fund, which is accessible only by the aid of a court of chancery, application may be made, in the first instance, to that court, which will not require that the claim should be first established in a court of law."[6] Then, as we shall presently see,[7] in cases where the statute gives a

[1] Citing Turner v. Adams, 46 Mo. 95; Postlewait v. Howes, 3 Ia. 365; Ticonic Bank v. Harvey, 16 Ia. 141; Botsford v. Beers, 11 Conn. 369; Payne v. Sheldon, 63 Barb. (N. Y.) 169. See Fink v. Patterson, 21 Fed. Rep. 609.

[2] See Austin v. Morris, 23 S. C. 403.

[3] Taylor v. Bowker, 111 U. S. 110, 4 S. C. Rep. 397; People's Savings Bank v. Bates, 120 U. S. 556, 7 S. C. Rep. 679. Compare Thompson v. Van Vechten, 27 N. Y. 568, 582; Baxter v. Moses, 77 Me. 476 1 Atl. Rep. 350; Jones v. Greene, 1 Wall. 330.

[4] Chicago Bridge Co. v. Anglo-Amer. Pack. Co., 46 Fed. Rep. 584; Consolidated T. L. Co. v. Kansas City Varnish Co., 45 Fed. Rep. 7; Kankakee Woolen Mill Co. v. Kampe, 38 Mo. App. 234; Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. Rep. 592; Sage v. Memphis, etc. R. R. Co., 125 U. S. 376, 8 S. C. Rep. 887; Blanc v. Paymaster Mining Co., 95 Cal. 524, 30 Pac. Rep. 765.

[5] 7 Cranch 89.

[6] See Shufeldt v. Boehm, 96 Ill. 563; Steere v. Hoagland, 39 Ill. 264.

[7] See Chap. VII. Bennett v. Minott 28 Oreg. 339, 44 Pac. Rep. 288.

new remedy in favor of creditors at large, by giving to an assignee or trustee for their benefit a statutory right to property conveyed in fraud of creditors, this statutory right takes the place of the specific lien required by law as a condition of the right of individual creditors to contest the validity of the transfers.[1]

§ 84. **Absconding and non-resident debtors.**— The fact that the debtor is a non-resident, and has no property within the State, has been considered not to be proof that all the legal remedies have been exhausted.[2] If he has fraudulently alienated real property within the State, his interest, whatever it may be, must be first reached by attachment.[3] Where, however, the debtor has absconded so that no personal judgment can be obtained against him, and there is no statutory proceeding by which his property can be reached, it has been held that a creditor's bill will lie in the first instance, and from the necessity of the case,[4] and where a State statute provides that in case of fraudulent alienations a trust results to creditors where the debtor is a non-resident and has no property in the State, an action to enforce the trust may be begun without first obtaining judgment.[5] It is considered as analogous to a proceeding to reach and subject the equities of a deceased debtor to the claims of creditors, or to satisfy a debt from a specific equitable fund, as to enforce a lien, in neither of which cases is a personal

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[1] Southard v. Benner, 72 N. Y. 427; Barton v. Hosner, 24 Hun (N. Y.) 471; Cady v. Whaling, 7 Biss. 430; Cragin v. Carmichael, 2 Dillon, 520; Platt, Assignee, v. Matthews, 10 Fed. Rep. 280.

[2] Ballou v. Jones, 13 Hun (N. Y.) 631. But see National Tradesmen's Bank v. Wetmore, 124 N. Y. 241, 26 N. E. Rep. 548.

[3] Dodd v. Levy, 10 Mo. App. 121; Greenway v. Thomas, 14 Ill. 272. *Contra*, Anderson v. Bradford, 5 J. J. Marsh. (Ky.) 69; Scott v. McMillen, 1 Litt. (Ky.) 302.

[4] See Turner v. Adams, 46 Mo. 95; Pope v. Solomons, 36 Ga. 541; Taylor v. Branscombe, 74 Ia. 534, 38 N. W. Rep. 400.

[5] Overmire v. Haworth, 48 Minn. 372, 51 N. W. Rep. 121.

judgment required.[1] A full review of the authorities upon this question may be found in Merchants' National Bank v. Paine,[2] an important and well-considered case. The court there maintain the right of a creditor, before the recovery of judgment, to file a bill to reach equitable assets where the absconding debtor had left no legal assets liable to attachment,[3] and cite in support of their conclusion cases from Kentucky,[4] Virginia,[5] Indiana,[6] South Carolina,[7] and Missouri,[8] and adopt the views of the Supreme Court of Missouri, already quoted. Where a judgment by personal service, or jurisdiction by attachment, are both impossible, the courts of New York are now inclining to allow a simple contract creditor to file a creditor's bill.[9]

§ 85. Practice in Indiana, North Carolina, Alabama and Texas. — In some States where the tendency to dispense with the prerequisite of a judgment has been introduced a novel practice as to joinder of claims prevails. Thus a claim to cancel a conveyance of real property from a husband to his wife, as being fraudulent against creditors, may be united with a demand against the husband arising out of contract.[10] Then in an action against a husband and wife,

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[1] Pendleton v. Perkins, 49 Mo. 565. Compare O'Brien v. Coulter, 2 Blackf. (Ind.) 421; Russell v. Clark, 7 Cranch 89, per Chief-Justice Marshall. See § 79.

[2] 13 R. I. 592.

[3] Scott v. McMillen, 1 Litt. (Ky.) 302. Compare Russell v. Clark, 7 Cranch 69, 89; Miller v. Davidson, 8 Ill. 518, 522; Greenway v. Thomas, 14 Ill. 271; Anderson v. Bradford, 5 J. J. Marsh. (Ky.) 69; Meux v. Anthony, 11 Ark. 411. See Turner v. Adams, 46 Mo. 95, 99; McDermutt v. Strong, 4 Johns. Ch. (N. Y.) 687, 689.

[4] Scott v. McMillen, 1 Litt. (Ky.) 302.

[5] Peay v. Morrison's Exrs., 10 Gratt. (Va.) 149.

[6] Kipper v. Glancey, 2 Blackf. (Ind.) 356; O'Brien v. Coulter, 2 Blackf. (Ind.) 421.

[7] Farrar v. Haselden, 9 Rich. Eq. (S. C.) 331.

[8] Pendleton v. Perkins, 49 Mo. 565.

[9] Nat. Tradesmen's Bank v. Wetmore, 124 N. Y. 241, 26 N. E. Rep. 548; Patchen v. Rofkar, 12 App. Div. (N. Y.) 475, 42 N. Y. Supp. 35. See Le Fevre v. Phillips, 81 Hun (N. Y.) 232, 30 N. Y. Supp. 709.

[10] Lindley v. Cross, 31 Ind. 106.

instituted to obtain judgment against the husband for the price of goods sold, a fraudulent conveyance from the husband to the wife may be set aside so as to let in the lien of the judgment when recovered.[1] In North Carolina the court declares it obvious that the rule exacting the recovery of a judgment at law before proceeding in equity grew out of the relations of the two courts under the former system, one acting as an aid to the other, and that it was essential to the harmony of their action in the exercise of their separate functions in the administration of the law. Chief-Justice Smith continuing, said: "It must of necessity cease to have any force, when the powers of both, and the functions of each, are committed to a single tribunal, substituted in place of both. Why should a plaintiff be compelled to sue for and recover [judgment on] his debt, and then to bring a new action to enforce payment out of his debtor's property in the very court that ordered the judgment? Why should not full relief be had in one action, when the same court is to be called on to afford it in the second? The policy of the new practice, and one of its best features, is to furnish a complete and final remedy for an aggrieved party in a single court, and without needless delay or expense."[2] The same rule is recognized in Texas,[3] and in Alabama

[1] Frank v. Kessler, 30 Ind. 8.

[2] Bank v. Harris, 84 N. C. 210. Claims for judgment upon coupons and for a mandamus to coerce payment were joined. McLendon v. Commissioners of Anson, 71 N. C. 38. So it was held competent to proceed in the same action against an insolvent debtor bank and against stockholders upon their individual liabilities under the charter. Glenn v. Farmers' Bank, 72 N. C. 626.

[3] Cassaday v. Anderson, 53 Tex. 535; Arbuckle Bros. Coffee Co. v. Werner, 77 Tex. 43, 13 S. W. Rep. 963. But it was held in Cassaday v. Anderson, 53 Tex. 535, that while as between two creditors if one has already obtained his judgment and instituted proceedings to set the fraudulent conveyance aside, he will have the right to have his debt satisfied out of the property, but the bringing of a suit to set aside the conveyance by a simple contract creditor gives him no priority over the purchaser at an execution sale of another creditor.

a creditor without a lien may file a bill in chancery to discover assets.[1] The method of procedure indicated seems to be an innovation. New York, the birthplace and stronghold of the reformed procedure, clings, in the main, tenaciously to the old practice of requiring a judgment and execution before an appeal can be made to the equity side of the court. Not only has the rule been rigidly enforced in that State, but, as is shown elsewhere, it has been in some respects extended and strengthened.[2] The rule has been relaxed in other States, but the cases which completely subvert or overturn it are comparatively few The old method of procedure did not result, as the court supposed in Bank v. Harris,[3] wholly from the relation of courts of law to courts of equity, nor is the necessity for its observance abrogated by the amalgamation of these jurisdictions. If the creditor is to be allowed to prove and recover judgment upon his simple demand, and cancel fraudulent conveyances, or reach equitable assets in the same action, it would seem to follow that the usual incidents of a creditor's suit would attach to the proceeding. The creditor in an action for assault and battery, libel, or slander,[4] might apply for an injunction against the debtor, or for a receiver of his property, or embarrass him by filing a *lis pendens*. The time-honored rule that the debtor's management and control of his property should not be interfered with by injunction or otherwise, before judgment, would be uprooted,[5] and an unscrupulous creditor, having only the faintest shadow of a claim, could work out the debtor's financial destruction. The ancient practice must not be regarded as technical or artificial,

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[1] Wooten v. Steele, 109 Ala. 565.

[2] See Estes v. Wilcox, 67 N. Y. 264; Burnett v. Gould, 27 Hun (N. Y.) 366; Crippen v. Hudson, 13 N. Y. 161; Adee v. Bigler, 81 N. Y. 349; Whitney v. Davis, 148 N. Y. 256, 42 N. E. Rep. 661. See §§ 79, 80.

[3] 84 N. C. 210.

[4] See § 90.

[5] See § 52.

but as a safeguard to the debtor dictated alike by reason and necessity. If the practice is to undergo a change, as seems likely in some States, then the joinder should be limited to cases of liquidated demands of creditors, certain in their character, and provisional relief should be withheld. The union of remedies is calculated to crowd into a single action a multitude of complicated issues concerning distinct transactions, as to the debt and the facts attending the alienation, a result always to be deprecated; and would necessitate the presence of the alleged fraudulent vendee in the action.[1]

§ 86. **Return of execution unsatisfied.**— A cloud of cases may be cited to the general effect that, to reach personal property or equitable assets, by bill, a creditor must first secure the return of an execution unsatisfied[2] unless it can be shown that the property is not susceptible to levy.[3] And it is immaterial that the return of the execution was

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[1] See § 131.

[2] Morgan v. Bogue, 7 Neb. 429; Castle v. Bader, 23 Cal. 76; Newman v. Willetts, 52 Ill. 98; Brown v. Bank of Mississippi, 31 Miss. 454; McElwain v. Willis, 9 Wend. (N. Y.) 548; Hogan v. Burnett, 37 Miss. 617; Vasser v. Henderson, 40 Miss. 519; Scott v. Wallace, 4 J. J. Marsh. (Ky.) 654; Roper v. McCook, 7 Ala. 318; Baxter v. Moses, 77 Me. 465; Weigtman v. Hatch, 17 Ill. 286; Bigelow v. Andress, 31 Ill. 334; Beach v. Bestor, 45 Ill. 346. In National Tube Works Co. v. Ballou, 146 U. S. 523, 13 S. C. Rep. 165, Mr. Justice Blatchford said: "Where it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegations showing that it is impossible to obtain such a judgment in any court within such jurisdiction." Citing Taylor v. Bowker, 111 U. S. 110, 4 S. C. Rep. 397; Webster v. Clark, 25 Me. 313; Parish v. Lewis, Freeman's Ch. 299; Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 671; Dunlevy v. Tallmadge, 32 N. Y. 457; Terry v. Anderson, 95 U. S. 628; Smith v. Railroad Co., 99 U. S. 398; Hawkins v. Glenn, 131 U. S. 334, 9 S. C. Rep. 739; McLure v. Benini, 2 Ired. Eq. (N. Car.) 513; Farned v. Harris, 19 Miss. 371; Patterson v. Lynde, 112 Ill. 196; Swan Land, etc. Co. v. Frank, 148 U. S. 612, 13 S. C. Rep. 691. In Illinois the judgment-creditor need not wait for the return of execution unsatisfied. Dillman v. Nadelhoffer, 162 Ill. 625, 45 N. E. Rep. 680.

[3] Snodgrass v. Andrews, 30 Miss. 472.

made at the request of the plaintiff and within sixty days after its issuance.[1] A seeming conflict of decisions, more or less embarrassing, must be noticed, between the Court of Appeals of New York, in Thurber v. Blanck,[2] and the Commission of Appeals of the same State, in Mechanics' and Traders' Bank v. Dakin.[3] The Commis-

[1] Forbes v. Waller, 25 N. Y. 430.

[2] 50 N. Y. 80.

[3] 51 N. Y. 519; reargument denied, 54 N. Y. 681. Compare McElwaine v. Willis, 9 Wend. (N. Y.) 561; reviewed in Smith v. Weeks, 60 Wis. 100. See the reconciliation of these cases stated by Maynard, J. In People *ex rel.* Cauffman v. Van Buren, 136 N. Y. 259, 32 N. E. Rep. 775, the court says: "In Thurber v. Blanck (50 N. Y. 80), it was held that an attaching creditor had no standing in court to reach equitable assets until his remedy at law was exhausted, nor to attack a fraudulent transfer of the property of his debtor until after judgment; and in the Mechanics' and Traders' Bank v. Dakin (51 N. Y. 519), the Commission of Appeals held that an attaching creditor, after the recovery of judgment and the issuing of execution may maintain an equitable action in his own name to set aside a fraudulent transfer of the property which had been seized under the attachment. The impression seems to have prevailed that there was an irreconcilable conflict between these two cases, and the reporter, in a foot note in the 51 N. Y., says: 'This case, it will be perceived, was argued prior to the decision of the case of Thurber v. Blanck (50 N. Y. 80), with which it is in conflict. That case had not been brought to the attention of the Commission at the time of the decision herein.' But we fail to discover any real ground of antagonism between them. In Thurber v. Blanck the court was dealing with an attempt on the part of an attaching creditor to reach equitable assets, which it has been uniformly held cannot be done until judgment has been recovered, execution issued and returned unsatisfied, and an action or proceeding in the nature of a creditor's bill instituted. The provisions of the Revised Statutes (now §§ 1871–9 of the Code) which authorized a judgment-creditor's action imperatively required the recovery of a judgment and the issue and return of an execution unsatisfied as an indispensable condition of the creditor's right to bring the action. In Bank v. Dakin, the attaching creditor had, by the recovery of judgment and the issue of execution, acquired the right to have the attached property applied to the satisfaction of the execution, but in the assertion of this right he found the way obstructed by the interposition of a conveyance of the property by his debtor, which was apparently valid, but which was, in fact, void. In such cases it has always been held that while the process for the collection of the debt was outstanding the equitable jurisdiction of the court could be invoked to remove the fraudulent obstruction to the legal process and permit it to be effectually enforced. The subsequent decisions bearing upon the question in this court have all been in line with the principles enunciated in these two typical cases, but none of them involved the point here presented of

sion held that when a suit had been commenced by attachment, and a judgment recovered, the plaintiff, after issuance of execution, and before its return, could maintain an equitable action to set aside a fraudulent assignment of a bond and mortgage, to the end that it might be applied toward the satisfaction of the judgment; the theory being, that, by the service of the attachment, a lien was acquired upon the bond and mortgage, which could be enforced after judgment, and to which the fraudulent assignment was no impediment.[1] The Court of Appeals held, however, that an equitable action could not be brought in a somewhat different case until the remedy at law was first exhausted; that is, until the execution on the judgment had been returned unsatisfied; that no lien could be acquired by the attachment upon a bond and mortgage, the legal title to which was in a third person; that in the case of *choses in action* and debts, the lien is constructive, and cannot operate through an intermediate or inchoate legal title; that in such a case no debt at law is owing to the defendant, and there is nothing for the attachment to operate upon, since it can only act upon legal rights, and not upon mere equitable interests; that *debts* and *choses in action* are legal assets under the attachment law only when the process acts directly upon the legal title, and that when they are so situated as to require the exercise of the equitable powers of the court

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the right of an attaching creditor to prevent the application of the attached property to the payment of a prior lien. It must be apparent that unless such a right exists the remedy by attachment will be lost in many cases. The sheriff must sell the property under the prior executions and apply the proceeds to their payment, and the plaintiff would be in no better condition than if his attachment had not issued." Judge Gray also says in Whitney v. Davis, 148 N. Y. 260, 42 N. E. Rep. 661, that Thurber v. Blanck, 50 N. Y. 80, and Mechanics' and T. Bank v. Dakin, 51 N. Y. 519, "were not in conflict with each other, because contemplating different conditions of the property sought to be reached."

[1] See § 81.

to place them in that condition they are to be regarded as equitable assets only, and that, in such a case, to allow the equitable action upon the issuance of an execution, and before its return, would be in direct conflict with the rule that a creditor has no standing in court to reach equitable assets until his remedy at law is exhausted. The decision of the Commission of Appeals, it may be observed, was unanimous, while that of the Court of Appeals was rendered by a majority of the court, three judges dissenting, and three concurring with the chief-justice. The Commission of Appeals was a temporary court, called into existence to relieve the overcrowded calendar of the Court of Appeals. Its duration as a court was limited and it has ceased to exist. The Court of Appeals being the permanent appellate court its decision, if there be a real conflict, which the cases attempt to deny, has been generally followed,[1] though it must be conceded that the relief which the Commission of Appeals attempted to extend would, in many instances, prove highly serviceable to creditors. The decision of the New York Court of Appeals, in Thurber v. Blanck,[2] is not to be taken as being in conflict with the class of cases in which it has been held that an equitable action may be brought after the issuance of an execution, and before its return unsatisfied, to set aside a fraudulent transfer of goods and chattels, or of real estate which can be levied upon under the execution when the fraudulent impediment is removed.[3] A rule ought to be deduced from the authori-

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[1] Gross v. Daly, 5 Daly (N. Y.) 543; Castle v. Lewis, 78 N. Y. 137. See Smith v. Longmire, 1 Am. Insolv. R. 426; Anthony v. Wood, 96 N. Y. 185, citing this section.

[2] 50 N. Y. 80. See People *ex rel* Cauffman v. Van Buren, 136 N. Y. 252, 32 N. E. Rep. 775.

[3] Gross v. Daly, 5 Daly (N. Y.) 542; McElwain v. Willis, 9 Wend. (N. Y.) 561; Heye v. Bolles, 2 Daly (N. Y.) 231; McCollough v. Colby, 5 Bosw (N. Y.) 477; North America Fire Ins. Co. v. Graham, 5 Sandf. (N. Y.) 200; Falconer v. Freeman, 4 Sandf. Ch. (N. Y.) 565; Greenleaf v. Mumford, 30

ties that no return of an execution need be shown where the creditor is seeking equitable assets solely.

§ 87. **Distinction between realty and personalty as to issuance of execution.** — The predicate of the jurisdiction as affecting realty is that the creditor has a lien,[1] and of course if the lien has expired the creditor's action will fail.[2] A judgment is usually a lien upon real property by statute, and hence authority can be found for the proposition that a covinous conveyance of real property can be attacked by a judgment-creditor without the issuance, levy, or return of an execution.[3] Jurisdiction is invoked in such cases in aid of the remedy at law. It may be observed that, as a creditor must usually exhaust the personal property of the judgment-debtor before having recourse to the realty, it is generally essential to show, in proceedings to reach the latter, that an execution has been issued.[4] There is, however, an absence of harmony in the authorities. The question came before the New

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How. Pr. (N. Y.) 30. See Gibbons v. Pemberton, 101 Mich. 397, 59 N. W. Rep. 663. Although in some States the distinction between suits to remove obstructious and suits to reach equitable assets is lost sight of, and it is required in both cases that execution should issue, the correct rule is that it is only required in the first class of cases. Wisconsin Granite Co. v. Gerrity, 144 Ill. 77, 33 N. E. Rep. 31 ; Fecheimer v. Hollander, 6 Mackey (D. C.), 512.

[1] Partee v. Mathews, 53 Miss. 146 ; Pulliam v. Taylor, 50 Miss. 551–554 ; Carlisle v. Tindall, 49 Miss. 229–232.

[2] Evans v. Hill, 18 Hun (N. Y.) 464.

[3] Cornell v. Radway, 22 Wis. 260 ; Mohawk Bank v. Atwater, 2 Paige (N. Y.) 58 ; Clarkson v. De Peyster, 3 Paige (N. Y.) 320 ; Shaw v. Dwight, 27 N. Y. 249 (*contra*, Adsit v. Butler, 87 N. Y. 587) ; Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 671 ; Royer Wheel Co. v. Fielding, 61 How. Pr. (N. Y.) 437 ; McCalmot v. Lawrence, 1 Blatch. 232 ; Newman v. Willetts, 52 Ill. 98 ; Dillman v. Nadelhoffer, 162 Ill. 625, 43 N. E. Rep. 378 ; Vasser v. Henderson, 40 Miss. 519 ; Baldwin v. Ryan, 3 T. & C. (N. Y.) 253 ; Binnie v. Walker, 25 Ill. App. 82 ; Multnomah Street Ry. Co. v. Harris, 13 Ore. 198, 9 Pac. Rep. 402 ; Payne v. Sheldon, 63 Barb. (N. Y.) 169 ; Weigtman v. Hatch, 17 Ill. 281 ; Dargan v. Waring, 11 Ala. 993. See Buswell v. Lincks, 8 Daly (N. Y.) 518.

[4] North Am. Fire Ins. Co. v. Graham, 5 Sandf. (N. Y.) 197 ; reviewed in McCollough v. Colby, 5 Bosw. (N. Y.) 477.

York Court of Appeals,[1] and the result of the decision is briefly to the effect that, in an action to set aside a fraudulent conveyance of realty, the complaint must allege the issuance of an execution and its return unsatisfied, or the action must be brought in aid of an execution then outstanding. The authorities in that State, on the general proposition that all available legal remedies must be pursued before resort to equity,[2] are reviewed, and Shaw v. Dwight[3] distinguished. This decision being an important utterance of the court of last resort, it follows that in New York State, at least, execution must issue upon a judgment before a creditor's action, or a suit to annul a fraudulent conveyance of realty can be supported. This places real property and equitable interests on substantially the same basis, as regards the status of an attacking creditor, and in some measure restricts his rights.[4]

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[1] Adsit v. Butler, 87 N. Y. 586. See Spelman v. Freedman, 130 N. Y. 425, 29 N. E. Rep. 765; Weaver v. Haviland, 142 N. Y. 537, 37 N. E. Rep. 641; Gardner v. Lansing, 28 Hun (N. Y.) 415; Importers' & Tr. Nat. Bank v. Quackenbush, 143 N. Y. 571, 38 N. E. Rep. 728.

[2] Ocean Nat. Bank v. Olcott, 46 N. Y. 12; Geery v. Geery, 63 N. Y. 252; Estes v. Wilcox, 67 N. Y. 264; Allyn v. Thurston, 53 N. Y. 622; McCartney v. Bostwick, 32 N. Y. 62; Fox. v. Moyer, 54 N. Y. 125; Crippen v. Hudson, 13 N. Y. 161.

[3] 27 N. Y. 244.

[4] See Verner v. Downs, 13 S. C. 449; Hyde v. Chapman, 33 Wis. 399; Dana v. Haskell, 41 Me. 25. In the Holladay Case, 27 Fed. Rep. 845, the court say: "The issue of an execution, and the return of *nulla bona* thereon, is considered sufficient evidence of the insolvency of the judgment-debtor, and that the judgment-creditor is remediless at law. But it is not the only evidence of that fact, nor, in my judgment, always the best. The authorities are in apparent conflict on this question. Wait Fraud. Conv. § 68; Bump, Fraud. Conv. 518, 527. But where the diversity is not the result of local legislation, I think the apparent conflict arises from confounding creditors' bills to subject personal propery to the satisfaction of a judgment with an ordinary bill in equity to set aside or postpone a conveyance of real property on which the plaintiff's judgment is, as against his debtor, a lien without an execution. In the latter case the right to maintain the suit is based on the unsatisfied judgment, the fraudulent conveyance, and the insolvency of the debtor; which latter fact may be proved by any competent evidence, as well as a return of *nulla bona* on an

To obtain an equitable lien upon property not the subject of levy and sale under execution, the creditor must, of course, have exhausted his remedy under his judgment or decree by the return of an execution unsatisfied.[1] The return of the execution, even as to personalty capable of being subjected to a lien, is not always essential. In Buswell v. Lincks,[2] Chief-Justice Daly said: "The equitable aid of the court to set aside a fraudulent conveyance is given where the one invoking it has a lien upon the property which is obstructed by the conveyance. In the case of personal property, a judgment-creditor acquires, by the issuing of an execution, a lien upon the personal property of the debtor as against a fraudulent conveyance, and the aid of the court is given in that case to remove the obstruction in the way of the execution, which cannot be done if the execution has been returned, for the lein under it is then at an end."[3]

§ 88. **Raising the objection.**—The objection that the creditor's remedy is at law, or that his bill is without equity, or his lien is suspended, may be raised at the hearing,[4] though it is, of course, safer to bring it up by demurrer, if apparent on the face of the pleading, or by answer, if the defect is not so shown. The court may itself raise the objection.[5]

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execution." Wisconsin Granite Company v. Gerrity, 144 Ill. 77, 33 N. E. Rep. 31. As to proof of insolvency, see Hodges v. Silver Hill Mining Co., 9 Ore. 200; Terry v. Tubman, 92 U. S. 156; Case v. Beauregard, 101 U. S. 688; McCalmont v. Lawrence, 1 Blatchf. 232.

[1] Clarkson v. De Peyster, 3 Paige (N. Y.) 320; Shaw v. Dwight, 27 N. Y. 249; Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 676; Adsit v. Butler, 87 N. Y. 587; Fox v. Moyer, 54 N. Y. 128.

[2] 8 Daly (N. Y.) 518.

[3] Citing Forbes v. Logan, 4 Bosw. (N. Y.) 475; Watrous v. Lathrop, 4 Sandf. (N. Y.) 700.

[4] Meux v. Anthony, 11 Ark. 423; Tappan v. Evans, 11 N. H. 311; Brown v. Bank of Mississippi, 31 Miss. 454.

[5] Oelrichs v. Spain, 15 Wall. 211. "The doctrine of these and similar cases is, that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery, at the pleasure of the parties interested; but it by no means follows, where the sub-

In concluding this chapter we may state that, as a general rule, under both the old Chancery system and the reformed procedure in New York, the bill should generally show affirmatively that an honest attempt has been made to collect the debt by the issuing of an execution against the debtor and its return unsatisfied, and, where there are several defendants jointly liable, that such effort has been made and the remedy exhausted against all the judgment-debtors before jurisdiction will be entertained in chancery.[1] Where the sole purpose of the bill is to subject real property fraudulently aliened to the lien of a judgment the exaction that execution should have been returned is not uniformly enforced.

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ject-matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case, it comes altogether too late even though, if taken *in limine*, it might have been worthy of attention." Reynes v. Dumont, 130 U. S. 354, 395, 9 S. C. Rep. 486.

[1] Voorhees v. Howard, 4 Keyes (N. Y.) 383. See Child v. Brace, 4 Paige (N. Y.) 309; Reed v. Wheaton, 7 Paige (N. Y.) 663.

CHAPTER V.

EXISTING CREDITORS.

§ 89. Classes of creditors — existing and subsequent.
90. Contingent creditors.
91. Who are not creditors.
92. Transfer of right to sue.
93. Voluntary alienations as to existing creditors.
94. Such conveyances only presumptively fraudulent.
95. Evidence of solvency.

"The complainant, not showing that he was at the time a creditor, cannot complain. Even a voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud."—Mr. Justice Field in Horbach v. Hill, 112 U. S. 149.

§ 89. Classes of creditors — existing and subsequent.—As appertaining to the subject-matter of this treatise, creditors may be said to resolve themselves into two great classes or subdivisions, commonly named existing creditors and subsequent creditors. Existing creditors are those whose claims or demands against the debtor were in being, or in existence, in some form at the date of the alleged voluntary[1] or fraudulent alienation.[2] Subsequent creditors are those to whom the insolvent became indebted at a time subsequent to the alienation which is

[1] See Thomson v. Crane, 73 Fed. Rep. 327; Horbach v. Hill, 112 U. S. 144, 149, 5 S. C. Rep. 81; Trezavent v. Terrell, 96 Tenn. 528.

[2] See Horbach v. Hill, 112 U. S. 149, 5 S. C. Rep. 81; Schreyer v. Scott, 134 U. S. 410, 10 S. C. Rep. 579. A person who becomes a creditor after the conveyance, but before possession under it is changed or notice given, is an existing creditor. Goll & F. Co. v. Miller, 87 Ia. 431, 54 N. W. Rep. 443; Fox v. Edwards, 38 Ia. 215. Concerning what evidence will be held not sufficient to show that the debt was in existence at the time of the conveyance, see Pidcock v. Voorhies, 84 Ia. 705, 42 N. W. Rep. 646, 49 Id. 1038. It was decided in Minnesota that a judgment-creditor who brings an action to set aside a conveyance made prior to his judgment is bound to show affirmatively that the debt for which it was rendered existed at the time the conveyance was made. Bloom v. Moy, 43 Minn. 397, 45 N. W. Rep. 715. As to a debt contracted partly before and partly after the conveyance, see Henderson v. Henderson, 133 Pa. St. 399, 19 Atl. Rep. 424.

the subject of inquiry. The rights of these two classes of creditors are manifestly and necessarily different;[1] the proofs in each case vary, and the measure of relief extended by the courts in particular instances is largely dependent upon the question as to which of these two classes or subdivisions the complaining creditor belongs. "The difference," says Chancellor Williamson, "between *existing* and subsequent debts, in reference to voluntary conveyances, is this — as to the former the fraud is an inference of law, but as to the latter there must be fraud in fact."[2] This latter distinction, as we shall presently see, is not universally applied. Manifestly if the debtor has made any secret reservation for his own benefit the alienation may be overturned by either class of creditors.[3] A party, we may observe, loses no rights by a change of his securities, and the holder of a new note given in exchange for an old one may attack a conveyance which is fraudulent as to the old note.[4]

§ 90. **Contingent creditors.** — In a multitude of cases it has been repeatedly adjudged that a party bound by a contract upon which he may become liable for the payment of money, although his liability be contingent, is a debtor within the meaning of the statute avoiding all grants made to hinder or delay creditors.[5] A contin-

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[1] See Gordon v. Reynolds, 114 Ill. 123, 28 N. E. Rep. 455; Jones v. King, 86 Ill. 225; Severs v. Dodson, 53 N. J. Eq. 633, 34 Atl. Rep. 7.

[2] Cook v. Johnson, 12 N. J. Eq. 54.

[3] See Gordon v. Reynolds, 114 Ill. 123, 28 N. E. Rep. 455; Neuberger v. Keim, 134 N. Y. 38, 31 N. E. Rep. 268; Schreyer v. Scott, 134 U. S. 411, 10 S. C. Rep. 579; Clement v. Cozart, 109 N. C 180, 13 S. E. Rep. 862.

[4] Thomson v. Hester, 55 Miss. 656. See Cansler v. Sallis, 54 Miss. 446; Gardner v. Baker, 25 Ia. 348; Lowry v. Fisher, 2 Bush (Ky.) 70; Trezavent v. Terrell, 96 Tenn. 530, 33 S. W. Rep. 109; Miller v. Hilton, 88 Me. 429, 34 Atl. Rep. 266.

[5] Young v. Heermans, 66 N. Y. 384; Fearn v. Ward, 65 Ala. 33; Van Wyck v. Seward, 18 Wend. (N. Y.) 375, 383, and cases cited; Shontz v. Brown, 27 Pa. St. 123; Bibb v. Freeman, 59 Ala. 612; Cook v. Johnson, 12 N. J. Eq. 52; Hamet v. Dundass, 4 Pa. St. 178; Jenkins v. Lockard, 66

uing liability to pay rent under a lease constitutes the relationship of debtor and creditor.[1] It follows that the person to whom the debtor is bound is a creditor.[2] A wife is a creditor under 13 Eliz. c. 5, in a case where her husband covenanted with trustees to pay her a sum of money after his death.[3] A surety is a creditor from the time the obligation is entered into,[4] or the bond signed;[5] a person liable contingently as an accommodation indorser is a creditor before the dishonor of the note;[6] and a warrantor, if at the date of the deed a paramount title was outstanding, is, from the time of the conveyance, a debtor to the warrantee.[7] A remainderman is a creditor against whose claim a voluntary conveyance made during the lifetime of the life tenant will be set aside.[8] A municipal corporation is, upon the issuance to the proper officer of a tax warrant, a creditor within the statute.[9] The date when the agreement or obligation

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Ala. 381; Benson v. Benson, 70 Md. 253; Yardley v. Torr, 67 Fed. Rep. 857; Petree v. Brotherton, 133 Ind. 695, 32 N. E. Rep. 300.

[1] O'Brien v. Whigam, 9 App. Div. (N. Y.) 113.

[2] See Jackson v. Seward, 5 Cow. (N. Y.) 67; Jackson v. Myers, 18 Johns. (N. Y.) 425.

[3] Rider v. Kidder, 10 Ves. 360.

[4] Pennington v. Seel, 49 Miss. 525; Howell v. Thompson, 95 Tenn. 396, 32 S. W. Rep. 309; Matter of Rea, 82 Iowa 231, 48 N. W. Rep. 78; Reel v. Livingston, 34 Fla. 377, 16 So. Rep. 284; Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. Rep. 410; cf. *In re* Reynolds, 20 Fed. Cases, 615; Barnes v. Sammons, 128 Ind. 596, 27 N. E. Rep. 747. So held in the case of a surety on a guardian's bond. Benson v. Benson, 70 Md. 253.

[5] Yeend v. Weeks, 104 Ala. 330, 16 So. Rep. 165.

[6] Hamet v. Dundass, 4 Pa. St. 178.

[7] Gannard v. Eslava, 20 Ala. 740; Pennington v. Seal, 49 Miss. 525. It is said in Severs v. Dodson, 53 N. J. Eq. 637, 34 Atl. Rep. 7, that none of the cases decide "that a contingent liability will, *per se*, raise an irrefutable inference of fraud so as to invalidate a conveyance made during the continuance of such a condition of affairs."

[8] Soden v. Soden, 34 N. J. Eq. 115.

[9] Stimson v. Wrigley, 86 N. Y. 332. A judgment for costs accrues at the time the judgment is rendered, and not when the action is commenced, as regards the question of whether the claimant is an existing or subsequent creditor. Inhabitants of Pelham v. Aldrich, 8 Gray (Mass.) 515; Ogden v. Prentice, 33 Barb. (N. Y.) 160; Stevens v. Works, 81 Ind. 449.

came into existence governs[1] in determining the complaining or attacking creditor's rights. As elsewhere shown, a person whose claim arises from a tort,[2] such as libel or slander,[3] is a creditor. The date the tort or injury was committed governs in determining the creditor's status, where the conveyance was made in pursuance of a fraudulent design to defeat the judgment which might be recovered upon it.[4] In such case the transfer will be set aside, if actual fraud is established. It is not enough that the conveyance is constructively fraudulent.[5] So a transfer to defeat a claim for deceit,[6] for usury penalties,[7] breach of promise to marry,[8] seduction,[9] bastardy,[10] and assault and battery,[11] may be annulled. And a wife may attack alienations intended to defeat claims for alimony.[12]

[1] Van Wyck v. Seward, 18 Wend. (N. Y.) 375; Seward v. Jackson, 8 Cowen (N. Y.) 406. See Wooldridge v. Gage, 68 Ill. 158; Stone v. Myers, 9 Minn. 309.

[2] Post v. Stiger, 29 N. J. Eq. 558; Scott v. Hartman, 26 N. J. Eq. 90; Pendleton v. Hughes, 65 Barb. (N. Y.) 136; Barling v. Bishopp, 29 Beav. 417; Shean v. Shay, 42 Ind. 375; Bongard v. Block, 81 Ill. 186; Weir v. Day, 57 Iowa 87; Jackson v. Myers, 18 Johns. (N. Y.) 425; Shontz v. Brown, 27 Pa. St. 131; Harris v. Harris, 23 Gratt. (Va.) 737; Tobie & Clark Mfg. Co. v. Waldron, 75 Me. 472; Hepworth v. Union Ferry Co., 62 Hun (N. Y.) 257, 16 N. Y. Supp. 692; Boid v. Dean, 48 N. J. Eq. 203, 21 Atl. Rep. 618. See § 123.

[3] Cooke v. Cooke, 43 Md. 522; Hall v. Sands, 52 Me. 355. But see Fowler v. Frisbie, 3 Conn. 320.

[4] Miller v. Dayton, 47 Iowa 312; Evans v. Lewis, 30 Ohio St. 11; Ford v. Johnston, 7 Hun (N. Y.) 563; Hepworth v. Union Ferry Co., 62 Hun (N. Y.) 257, 16 N. Y. Supp. 692.

[5] Fuller v. Brown, 76 Hun (N. Y.) 559, 28 N. Y. Supp. 189. See Sanders v. Logue, 88 Tenn. 355, 12 S. W. Rep. 722.

[6] Miner v. Warner, 2 Grant (Pa.) 448.

[7] Heath v. Page, 63 Pa. St. 108.

[8] Hoffman v. Junk, 51 Wis. 613, 8 N. W. Rep. 493; Thompson v. Robinson, 89 Me. 56; McVeigh v. Ritenour, 40 Ohio St. 107.

[9] Hunsinger v. Hofer, 110 Ind. 390, 11 N. E. Rep. 463.

[10] Schuster v. Stout, 30 Kans. 530, 2 Pac. Rep. 642. Leonard v. Bolton, 153 Mass. 428, 26 N. E. Rep. 1118.

[11] Martin v. Walker, 12 Hun (N. Y.) 46.

[12] Morrison v. Morrison, 49 N. H. 69; Bouslough v. Bouslough, 68 Pa. St. 495; Turner v. Turner, 44 Ala. 437; Dugan v. Trisler, 69 Ind. 553; Bailey v. Bailey, 61 Me. 361; Livermore v. Boutelle, 11 Gray (Mass.) 217; Chase v. Chase, 105 Mass. 385; Hinds v. Hinds, 80 Ala. 225, 227, citing this section; Foster v. Foster, 56 Vt. 546; Stuart v. Stuart, 123 Mass. 370; Burrows v. Purple, 107 Mass. 435; Picket v. Garrison, 76 Iowa 347, 41 N. W. Rep. 38; Boog v. Boog, 78 Iowa 524, 43 N. W. Rep. 515.

In Pendleton v. Hughes,[1] the defendants, at the date of the fraudulent alienation, had in their possession a 5–20 U. S. bond belonging to plaintiff which they afterward converted. The court held that plaintiff was equitably entitled to protection against the fraudulent transfer to the same extent as though the defendants had been indebted to her in that amount at the time of the fraudulent alienation.

§ 91. **Who are not creditors.** — In Baker v. Gilman,[2] the court, speaking by Johnson, J., said that the sole object of the statute "in declaring conveyances void, is to protect, and prevent the defeat of, *lawful* debts, claims or demands, and not those which are unlawful, or trumped up, and which have no foundation in law or justice, and the verity of which is never established by any judgment or by the assent of the person against whom they are made. As against claims and demands of the latter class, the statute does not forbid conveyances or assignments, nor declare them void." So a party who is not a *bona fide* creditor is not entitled to equitable relief on a creditor's bill.[3] A pretended creditor whose claim is illegal,[4] or void as against public policy,[5] or barred by statute at law,[6] or who is not concerned in the transfer,[7] or is estopped by his knowledge and acquiescence,[8] cannot support

[1] 65 Barb. (N. Y.) 136.

[2] 52 Barb. (N. Y.) 37.

[3] Townsend v. Tuttle, 28 N. J. Eq. 449. See § 73.

[4] Fuller v. Brown, 30 N. H. 861; Alexander v. Gould, 1 Mass. 165. See Walker v. Lovell, 28 N. H. 138; Taylor v. Van Deusen, 3 Gray (Mass.) 498.

[5] Bruggerman v. Hoerr, 7 Minn. 337.

[6] Edwards v. M'Gee, 31 Miss. 143.

[7] Morrison v. Atwell, 9 Bosw. (N. Y.) 503; Powers v. Graydon, 10 Bosw. (N. Y.) 630.

[8] Scholey v. Worcester, 4 Hun (N. Y.) 302. See Olliver v. King, 8 De G. M. & G. 110; Phillips v. Wooster, 36 N. Y. 412. See § 402. Greene v. Sprague Mfg. Co., 52 Conn. 330. In Beaupre v. Noyes, 138 U. S. 401, the court says: "That ground is that there was evidence tending to show that the defendants acquiesced in and assented to all that was done, and waived any irregularity in the mode in which the assignee conducted the business; and that the question whether the defendants so acquiesced

a creditor's action. A court of equity can only lend its aid to enforce a judgment which could be enforced at law, and the creditor must have clean hands.

§ 92. **Transfer of right to sue.**— It may be here observed that the right to avoid a fraudulent conveyance is not personal to the then existing creditor; his successors and assigns may enforce the right. Thus the subsequent purchaser of a pre-existing note may attack a transfer.[1] Campbell, J., says:[2] "No change in the ownership or the form of the debt affects the right incident to the debt to attack a conveyance fraudulent as to it." Davis, J., observed: "The conveyance was void as against the person intended to be defrauded, and his heirs, successors, executors, administrators, and *assigns*, if *their* actions, suits, debts, etc., were liable to be delayed or hindered thereby.[3]" In Massachusetts it has been held that a fraudulent conveyance may be avoided by an assignee in insolvency, but not by a transferee of such assignee, unless the assignee has first distinctly manifested his election to avoid the transfer.[4]

§ 93. **Voluntary alienations as to existing creditors.**— At first blush it would seem apparent that every voluntary alienation of a debtor's estate, aside from, or ignoring the question of intent, ought to be avoided as to existing creditors. The debtor's property is sometimes character-

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and assented with knowledge of all the facts, and thereby waived their right to treat the assignment as fraudulent, was properly submitted to the jury." See Eustis v. Bolles, 150 U. S. 368; Clay v. Smith, 3 Pet. 411. In Rapalee v. Stewart, 27 N. Y. 314, the court says: "Here is not only a waiver of any right to attack the assignment for fraud, but a ratification of it, by coming in and taking action, by agreement with other creditors, designed to prevent a sacrifice of the assigned property, by a disposal of it in the ordinary way, by the assignees."

[1] Warren v. Williams, 52 Me. 349.

[2] Cook v. Ligon, 54 Miss. 655.

[3] Warren v. Williams, 52 Me. 349.

[4] Morgan v. Abbott, 148 Mass. 507, 20 N. E. Rep. 165. See Freeland v. Freeland, 102 Mass. 475; Tuite v Stevens, 98 Mass. 305.

ized as the fund or evidence of means or stability upon which the creditor relied in extending the credit, and it is urged that, after the creditor's claim accrued, this fund should not be depleted and allowed to pass into the hands of persons who did not pay value for it to the detriment of the creditor whose claim remains unpaid. Exactly how to accomplish substantial justice in such cases to all parties, and yet to give full scope and effect to the proper presumptions and rules of law and evidence is not easily determined. Shall such voluntary conveyance be declared *prima facie* or absolutely void, or must the creditor assume the burden of showing something more than that the conveyance was voluntary?

Some of the confusion and uncertainty which has been introduced into this subject in this country may be traced to the discussion over the celebrated decision of Chancellor Kent in the widely known case of Reade v. Livingston,[1] in which it was held that a voluntary marriage settlement, after marriage, was of itself void as to existing creditors. This case has been declared by an essayist[2] to be "the grandest monument of legal acumen and wide and varied erudition which New York has ever produced," and while it is conceded that the case was repudiated by the courts of the very State which gave it birth,[3] it was asserted that "unless indications are wholly delusive the learned Chancellor was not more than a century in

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[1] 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520; Lloyd v. Fulton, 91 U. S. 479, and cases cited. See Haston v. Castner, 31 N. J. Eq. 697.

[2] Fraudulent Conveyances to *Bona Fide* Purchasers, etc., by John Reynolds, Esq., cited, *supra*.

[3] Seward v. Jackson, 8 Cow. (N. Y.) 406. By statue in New York, as elsewhere shown, the question of fraud is made one of fact, and no conveyance is considered fraudulent as against creditors or purchasers solely on the ground that it was not founded upon a valuable consideration. See Dygert v. Remerschnider, 32 N. Y. 636; Kain v. Larkin, 131 N. Y. 300, 30 N. E. Rep. 105.

advance of his age."[1] The English Court of Chancery in Freeman v. Pope,[2] substantially acknowledged the doctrine of this case and gave the following emphatic and extreme illustration: If at the time of a voluntary settlement, the settler had £100,000, and put £100 in the settlement, and a creditor for say £10, happened to be unpaid in consequence of the settler losing his money in the interval, that would be quite sufficient to set aside the voluntary settlement;" and the doctrine of the case is unreservedly followed in many American cases.[3] Salmon v. Bennett,[4] a leading early case created an exception to the rule set forth in Reade v. Livingston, and tends to uphold voluntary conveyances to relatives as distinguished from strangers, where actual fraud is not found.[5] In New York the Revised Statutes expressly declare that no conveyance shall be held fraudulent solely upon the ground that it was not founded on a valuable consideration. In that State it is declared that the burden to prove that the deed left the grantor insolvent and without property to pay his liabilities, rests upon the plaintiff.[6] In England it is provided by a recent statute, 56

[1] See Doe *d.* Davis v. McKinney, 5 Ala. 719; Foote v. Cobb, 18 Ala. 585; Gannard v. Eslava, 20 Ala. 732; Spencer v. Godwin, 30 Ala. 355; Crawford v. Kirksey, 55 Ala. 282; Early v. Owens, 68 Ala. 171; Cook v. Johnson, 12 N. J. Eq. 51; Smith v. Vreeland, 16 N. J. Eq. 198; Kuhl v. Martin, 26 N. J. Eq. 60; Haston v. Castner, 31 N. J. Eq. 697; City National Bank v. Hamilton, 34 N. J. Eq. 158; Aber v. Brant, 36 N. J. Eq. 116; Fellows v. Smith, 40 Mich. 689; Matson v. Melchor, 42 Mich. 477.

[2] L. R. 9 Eq. at p. 211.

[3] See Crawford v. Kirksey, 55 Ala. 282; Spencer v. Godwin, 30 Ala. 355; Hanson v. Buckner, 4 Dana (Ky.) 251; Emerson v. Bemis, 69 Ill. 540; Annin v. Annin, 24 N. J. Eq. 184; Richardson v. Rhodus, 14 Rich. Law (S. C.) 96; Clement v. Cozart, 109 N. C. 173, 13 S. E. Rep. 862; Jackson v. Lewis, 34 S. C. 1, 12 S. E. Rep. 560; Loehr v. Murphy, 45 Mo. App. 519; Gardner v. Kleinke, 46 N. J. Eq. 90, 18 Atl. Rep. 457.

[4] 1 Conn. 525.

[5] See § 242. Foster v. Foster, 56 Vt. 548; Lloyd v. Fulton, 91 U. S. 479; Babcock v. Eckler, 24 N. Y. 623; Gale v. Williamson, 8 M. & W. 405.

[6] Kain v. Larkin, 131 N. Y. 300, 30 N. E. Rep. 105; cf. Fuller v. Brown, 76 Hun (N. Y.) 557, 28 N. Y. Supp. 189.

and 57 Vict. ch. 21, that a voluntary conveyance, if made in good faith, shall not be avoided under the statute of Elizabeth. Thus do the principles of Twyne's case,[1] vanish from view. The burden imposed upon the creditor of being forced to show facts tending to establish fraud in addition, so to speak, to proof that the conveyance was voluntary, certainly creates a feeling of unrest in the courts, and in Smith v. Reid[2] the opinion sets forth the familiar rule that a voluntary conveyance by one indebted is presumptively fraudulent, while in the dissenting opinion, Kain v. Larkin,[3] is referred to as establishing that mere proof of the voluntary character of the conveyance will not make out the creditor's case.

§ 94. **Such conveyances only presumptively fraudulent.** — If the majority rule is to be applied in determining this conflict, or the cases are to be counted and not weighed, then it must be conceded that a voluntary alienation by a person who happens to be indebted at the time, is only *prima facie* fraudulent.[4] In Smith v. Vodges,[5] Swayne, J., said: "In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly

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[1] See § 22.

[2] 134 N. Y. 575, 31 N. E. Rep. 1082.

[3] 131 N. Y. 300, 30 N. E. Rep. 105.

[4] See note to Jenkins v. Clement, 14 Am. Dec. 705; Pence v. Croan, 51 Ind. 336; Gwyer v. Figgins, 37 Iowa 517; Wilson v. Kohlheim, 46 Miss. 346; Bank of U. S. v. Housman, 6 Paige (N. Y.) 526; Holden v. Burnham, 63 N. Y. 74; Eigleberger v. Kibler, 1 Hill's Ch. (S. C.) 113, 26 Am. Dec. 192; Heiatt v. Barnes, 5 Dana (Ky.) 220; Koster v. Hiller, 4 Bradw. (Ill.) 24; Fellows v. Smith, 40 Mich. 691; Grant v. Ward, 64 Me. 239; French v. Holmes, 67 Me. 190; Warner v. Dove, 33 Md. 579; Babcock v. Eckler, 24 N. Y. 623; Greenfield's Estate, 14 Pa. St. 489; Clark v. Depew, 25 Pa. St. 509; Pomeroy v Bailey, 43 N. H. 118; Dewey v. Long, 25 Vt. 564; Lloyd v. Fulton, 91 U. S. 485; Hoxie v. Price, 31 Wis. 82; Blake v. Boisjoli, 51 Minn. 296, 53 N. W. Rep. 637; Emerson v. Opp, 139 Ind. 27, 38 N. E. Rep. 330. The voluntary donee "is entitled only to that which his donor could honestly give." Adams' Equity, p. 149. See Green v. Givan, 33 N. Y. 343.

[5] 92 U. S. 183; Schreyer v. Scott, 134 U. S. 411, 10 S. C. Rep. 579.

to supervene, or creditors whose rights may and do so supervene; the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable."[1] "The sentiment of these cases," says Mr. Freeman,[2] is well expressed in Lerow v. Wilmarth,[3] by Chief-Justice Bigelow: 'We do not wish to be understood as giving our sanction to the doctrine that a voluntary conveyance by a father for the benefit of his child is *per se* fraudulent as to existing creditors, although shown not to have been fraudulent in fact, and is liable to be set aside, because the law conclusively presumes it to have been fraudulent, and shuts out all evidence to repel such presumption. The better doctrine seems to us to be that there is, as applicable to voluntary conveyances made on a meritorious consideration, as of blood and affection, no absolute presumption of fraud which entirely disregards the intent and purpose of the conveyance, if the grantor happened to be indebted at the time it was made, but that such a conveyance under such circumstances affords only *prima facie* or presumptive evidence of fraud which may be rebutted and controlled.'"[4]

§ 95. **Evidence of solvency.**— The Supreme Court of Maine regard it as established law that mere indebtedness is not sufficient to render a voluntary conveyance void. Consequently it was said that a man, though

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[1] Citing Sexton v. Wheaton, 8 Wheat. 229; Mullen v. Wilson, 44 Pa. St. 413; Stileman v. Ashdown, 2 Atk. 481.

[2] See note to Jenkins v. Clement, 14 Am. Dec. 705.

[3] 9 Allen (Mass.) 386.

[4] See Hinde's Lessee v. Longworth, 11 Wheat. 199; Verplank v. Sterry, 12 Johns. (N. Y.) 536, 559; Seward v. Jackson, 8 Cow. (N. Y.) 406; Dunlap v. Hawkins, 59 N. Y. 346; Walter v. Lane, 1 MacAr. (D. C.) 284; Parish v. Murphree, 13 How. 92; Moritz v. Hoffman, 35 Ill. 553; Koster v. Hiller, 4 Ill. App. 24.

indebted, may make a valid gift.[1] Mere insolvency will not, of course, render a deed fraudulent provided it was made with the sole view of paying a debt due to the grantee.[2] As a general rule if the donor is solvent, and has, after making the gift, sufficient assets remaining to satisfy his creditors, the gift will be upheld.[3] Subsequent insolvency will not generally render it invalid.[4] In such cases the creditors' trust fund, so called, cannot be said to have been depleted by the alienation. If their claims remain unsatisfied it is due to some subsequently accruing cause. Judge Lowell, in Pratt v. Curtis,[5] derives the following propositions from the cases: "(1). A voluntary conveyance to a wife or child is not fraudulent *per se;* but it is a question of fact in each case whether a fraud was intended. (2). Such a deed, made by one who is considerably indebted, is *prima facie* fraudulent, and the burden is on him to explain it. (3). This he may do by showing that his intentions were innocent, and that he had abundant means, besides the property conveyed, to pay all his debts."[6] The rule may be summed up to the effect that the gift, conveyance, or settlement will be upheld "if it be reasonable, not disproportionate to the

[1] French v. Holmes, 67 Me. 193; Stevens v. Robinson, 72 Me. 381; Laughton v. Harden, 68 Me. 212. See McFadden v. Mitchell, 54 Cal. 628; Patterson v. McKinney, 97 Ill. 47; Hinde's Lessee v. Longworth, 11 Wheat. 213; Merrell v. Johnson, 96 Ill. 230.

[2] Fuller v. Brewster, 53 Md. 362. See Copis v. Middleton, 2 Madd. 410; Phettiplace v. Sayles, 4 Mason 312; Hardey v. Green, 12 Beav. 182; Atwood v. Impson, 20 N. J. Eq. 150.

[3] Stewart v. Rogers, 25 Iowa, 395; Gridley v. Watson, 53 Ill. 193; Winchester v. Charter, 97 Mass. 140.

[4] Dunn v. Dunn, 82 Ind. 43. See Rose v. Colter, 76 Ind. 590; Evans v. Hamilton, 56 Ind. 34; Sherman v. Hogland, 54 Ind. 578; Pence v. Croan, 51 Ind. 336.

[5] 2 Lowell 90.

[6] See also note to Jenkins v. Clement, 14 Am. Dec. 707; Herring v. Richards, 1 McCrary 574. The question whether the funds left were ample to pay existing indebtedness is for the jury. Clement v. Cozart, 112 N. C. 412, 17 S. E. Rep. 486, and the proof to rebut the presumed fraudulent intent must be clear and satisfactory. Snyder v. Free, 114 Mo. 360; 21 S. W. Rep. 847.

husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors."[1] Dunlap v. Hawkins[2] embodies an important statement of the law upon this subject. The principle is asserted that a creditor cannot impeach a conveyance founded on natural love and affection, free from the imputation of fraud, when the grantor had, independent of the property granted, an ample fund to satisfy his creditors.[3] Allen, J., in the course of the opinion, said: "By proving the pecuniary circumstances and condition of the grantor, or him who pays for and procures a grant from others, his business and its risks and contingencies, his liabilities and obligations, absolute and contingent, and his resources and means of meeting and solving his obligations, and showing that he was neither insolvent nor contemplating insolvency, and that an inability to meet his obligations was not and could not reasonably be supposed to have been in the mind of the party, is the only way by which the presumption of fraud, arising from the fact that the conveyance is without a valuable consideration, can be repelled and overcome, except as the party making or procuring the grant may, if alive, testify to the absence of all intent to hinder, delay, or defraud creditors." And in Parish v. Murphree,[4] the court observed: "To hold that a settlement of a small amount, by an individual in independent circumstances, and which, if known to the public, would not affect his credit, is fraudulent, would be a perversion of the statute." In Carpenter v. Roe,[5] the

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[1] See Herring v. Richards, 1 McCrary, 574.

[2] 59 N. Y. 346; Carr v. Breese, 81 N. Y. 588; Jencks v. Alexander, 11 Paige (N. Y.) 619.

[3] See Jackson v. Post, 15 Wend. (N. Y.) 588; Phillips v. Wooster, 36 N. Y. 412; Bank of U. S. v. Housman, 6 Paige (N. Y.) 526; Fox v. Moyer, 54 N. Y. 125; Van Wyck v. Seward, 6 Paige (N. Y.) 62; Jackson v. Miner, 101 Ill. 554; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. Rep. 847.

[4] 13 How. 98.

[5] 10 N. Y. 227.

New York Court of Appeals held that, to invalidate a voluntary conveyance, belief by the debtor as to his insolvency was not absolutely necessary; it was sufficient if his solvency was contingent upon the stability of the market in the business in which he was engaged. In other words, a debtor has not the right to make voluntary alienations so as to leave himself in a condition in which he hazards the rights of creditors on the contingency of a fluctuating market. In Cole v. Tyler,[1] the court say: "It was at one time the rule that a voluntary conveyance by one indebted at the time was fraudulent, as *a matter of law*, towards his creditors. No evidence was allowed to rebut the presumption of fraud.[2] This rule was subsequently deemed to be too severe by the courts, and the less stringent rule was adopted that, while a conveyance by a person indebted was presumptively or *prima facie* fraudulent, the presumption might be rebutted by proof to the contrary.[3] This presumption, however, is not to be overthrown by mere evidence of good intent, or generous impulses or feelings. It must be overcome by circumstances showing on their face that there could have been no bad intent, such as that the gift was a reasonable provision, and that the debtor still retained sufficient means to pay his debts. He can no more delay his creditors by such voluntary conveyance than he can actually defraud them."[4] The statutory rule in New York that lack of consideration alone will not suffice to overturn a conveyance, and that other facts must be shown, is not to be overlooked.[5]

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[1] 65 N. Y. 78.

[2] Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481. See Kain v. Larkin, 131 N. Y. 300, 30 N. E. Rep. 105. See also § 93.

[3] Seward v. Jackson, 8 Cow. 406.

[4] Carpenter v. Roe, 10 N. Y. 230; Babcock v. Eckler, 24 N. Y. 623; Dygert v. Remerschnider, 32 N. Y. 648; Curtis v. Fox, 47 N. Y. 300.

[5] Kain v. Larkin, 131 N. Y. 300, 30 N. E. Rep. 105; Smith v. Reid, 134 N. Y. 581, 31 N. E. Rep. 1082.

CHAPTER VI.

SUBSEQUENT CREDITORS.

§ 96. } Fraud upon subsequent creditors.
97. }

98. Proof of intent.

99. Conveyance by embarrassed debtor.

100. Placing property beyond the risk of new ventures or speculations.

101. Conveyances avoided.

§ 102. Conveyances not considered fraudulent.

103. Subrogation of subsequent creditors.

104. Subsequent creditors sharing with antecedent creditors.

105. Mixed claims accruing prior and subsequent to alienation.

106. Creditors whose claims accrued after notice of alienation.

§ 96. Fraud upon subsequent creditors.— The great practical distinction between existing or antecedent creditors and subsequent creditors in most of the States is, that a voluntary alienation is usually considered, as to the former, presumptively fraudulent, while as to the latter the burden of proving an intention to commit a fraud, or the existence of a secret trust or reservation, rests upon the creditor. Generally speaking, subsequent creditors must elicit facts showing contemplation of future indebtedness by the insolvent,[1] or future schemes of fraud.[2] Voluntary deeds,

[1] See Todd v. Nelson, 109 N. Y. 327, 16 N E. Rep. 360; Teed v. Valentine, 65 N. Y. 474; Savage v. Murphy, 34 N. Y. 508; McClaugherty v. Morgan, 36 W. Va. 191, 14 S. E. Rep. 992; Thompson v. Crane, 73 Fed. Rep. 327; Horbach v. Hill, 112 U. S. 144, 5 S. C. Rep. 81; Schreyer v. Scott, 134 U. S. 405; 10 S. C. Rep. 579; Neuburger v Keim, 134 N. Y. 38, 31 N. E. Rep. 268; Petree v. Brotherton, 133 Ind. 692, 32 N. E. Rep. 300; Buckley v. Duff, 114 Pa. St. 595, 8 Atl. Rep. 188; Eames v. Dorsett, 147 Ill. 540, 35 N. E. Rep. 735; Hagerman v. Buchanan, 45 N. J. Eq. 292, 17 Atl. Rep. 946; Craft v. Wilcox, 102 Ala. 378, 14 So. Rep. 653; Ditman v. Raule, 124 Pa. St. 225, 16 Atl. Rep. 819; Bluthenthal v. Magnus, 97 Ala. 530, 13 So. Rep. 7; Marshall v. Roll, 139 Pa. St. 399, 20 Atl. Rep. 999.

[2] Horbach v. Hill, 112 U. S. 144, 149, 5 S. C. Rep. 81; Schreyer v. Scott, 134 U. S. 411, 10 S. C. Rep. 579; Hilton v. Morse, 75 Me. 258; Neuberger v. Keim, 134 N. Y. 35, 31 N. E. Rep. 268; Burton v. Platter, 53 Fed. Rep. 901.

it should be remembered, are ordinarily invalid or liable to attack only at the suit of antecedent creditors,[1] and the absence of evidence showing fraud in the transaction will usually defeat the actions of subsequent creditors.[2] As we shall presently see there is not the same presumption to aid the latter class.[3] A specific intent to defraud subsequent creditors will manifestly avoid the transfer as to them.[4] In the absence of proof of such an intent the transaction will stand.[5] Chancellor Kent, in his celebrated judgment pronounced in Reade v. Livingston,[6] a case already noticed, said: "The cases seem to agree that the subsequent creditors are let in only in particular cases; as where the settlement was made in contemplation of future debts, or where it is requisite to interfere and set aside the settlement in favor of the prior creditor."[7] Judge Story observed: "Where the settlement is set aside as an intentional fraud upon creditors, there is strong reason for holding it so as to subsequent creditors, and to

[1] Hinde's Lessee v. Longworth, 11 Wheat. 211; Sexton v. Wheaton, 8 Wheat. 229, 252, 1 Am. Lea. Cas. 17; Loeschigk v. Addison, 4 Abb. N. S. (N.Y.) 210, affi'd 51 N.Y. 660; Metropolite Bank v. Rogers, 47 Fed. Rep. 148. See § 89, and Chap. V.

[2] Ford v. Johnston, 7 Hun (N. Y.) 568; Dygert v. Remerschnider, 32 N. Y. 649; Cole v. Varner, 31 Ala. 244; Jackson v. Plyler, 38 S. C. 496, 17 S. E. Rep. 255.

[3] Herring v. Richards, 1 McCrary, 574; Barrett v. Nealon, 119 Pa. St. 177, 12 Atl. Rep. 861. In Jones v. Light, 86 Me. 442, 30 Atl. Rep. 71, the court says: "If the transaction is actually fraudulent against any creditor, any and all creditors may impeach and resist it, and are entitled to the aid of the law in appropriating the property, fraudulently conveyed, to the payment of their debts. The uniform construction of that statute includes subsequent as well as existing creditors." See Witz v. Osburn, 83 Va. 229, 2 S. E. Rep. 33; Fink v. Denny, 75 Va. 663.

[4] McPherson v. Kingsbaker, 22 Kan. 646; United States v. Stiner, 8 Blatchf. 544; Candee v. Lord, 2 N. Y. 275; Anon. 1 Wall. Jr. 113; Horn v. Ross, 20 Ga. 223; Black v. Nease, 37 Pa. St. 433; Johnston v. Zane, 11 Gratt. (Va.) 552; Day v. Cooley, 118 Mass. 524; Plimpton v. Goodell, 143 Mass. 365, 9 N. E. Rep. 791; Leonard v. Bolton, 153 Mass. 431, 26 N. E. Rep. 1118.

[5] Teed v. Valentine, 65 N. Y. 474, and cases cited; Bouquet v. Heyman, 50 N. J. Eq. 114, 24 Atl. Rep. 266.

[6] 3 Johns. Ch. (N. Y.) 497. See Chap. V.

[7] See Walter v. Lane, 1 MacAr. (D. C.) 275.

let them into the full benefit of the property."[1] In Savage v. Murphy,[2] it appeared that the judgment-debtor was engaged in an extensive business on credit, in which he was considerably indebted, and that he stripped himself of the title to all his property by transfer to his wife and children for a merely nominal pecuniary consideration, without any visible change of possession, and with the intent to contract and continue a future indebtedness in his business on the credit of his apparent ownership of the property transferred, and to avoid payment of his debts. After the transfer he continued in business, making new purchases on credit, and using part of the avails of each successive purchase to pay the indebtedness then existing, during a period of about ten months, at the end of which time he failed, owing debts thus contracted amounting to $3,500. The court, upon these facts, held that it was clear that the transfer thus made was fraudulent and void as against subsequent creditors. The design to obtain a credit after the conveyance by means of the continued possession and apparent ownership of the property, which the debtor thus placed beyond the reach of those who might give him future credit, was plainly fraudulent. The conclusion of fraud was not repelled by the circumstance that the debts owing by him at the time of the transfer were paid with the proceeds of credit subsequently acquired by the means already stated. The indebtedness then existing was merely transferred, not paid, and the fraud was as palpable as it would have been if the

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[1] See also Ede v. Knowles, 2 Y. & C. N. R. 172–178, cited in Story's Eq. Jur. § 361, n.; Dewey v. Moyer, 72 N. Y. 76; May v. State Nat. Bank, 59 Ark. 614, 28 S. W. Rep. 431.

[2] 34 N. Y 508. See Todd v. Nelson, 109 N. Y. 327, 16 N. E. Rep. 360; Neuberger v. Keim, 134 N. Y. 38, 31 N. E. Rep. 268; Truesdell v. Sarles 104 N. Y. 164, 10 N. E. Rep. 139, and cases cited.

debts remaining unpaid were owing to the same creditors to whom he was obligated at the time of the transfers.[1]

§ 97. — It may be here observed that a fraudulent and deceitful conveyance of property, made without valuable consideration, and with intent to injure the rights or avoid the debts of any other person, is invalid as to subsequent creditors as well as to those who were creditors at the time of the conveyance.[2] In Parkman v. Welch,[3] Dewey, J., in speaking of the rights of subsequent creditors, said: "This raises the question whether the effect of the statute of 13 Eliz. c. 5, is to avoid conveyances made upon secret trust and with fraudulent intent, as well in favor of subsequent as previous creditors. On this subject we apprehend the law is well settled, ... that a conveyance fraudulent at the time of making it, might be avoided in favor of subsequent creditors."[4] In

[1] See S. P. Carr v. Breese, 18 Hun (N. Y.) 134, 1 Am. Insolv. Rep. 355. In Todd v. Nelson, 109 N. Y. 327, Peckham, J., said: "The theory upon which deeds conveying the property of an individual to some third party have been set aside as fraudulent in regard to subsequent creditors of the grantor has been that he has made a secret conveyance of his property while remaining in the possession and seeming ownership thereof, and has obtained credit thereby, while embarking in some hazardous business requiring such credit, or the debts which he has incurred were incurred soon after the conveyance, thus making the fraudulent intent a natural and almost a necessary inference, and in this way he has been enabled to obtain the property of others who were relying upon an appearance which was wholly delusive." See Schreyer v. Scott, 134 U. S. 411, 10 S. C. Rep. 579.

[2] McLane v. Johnson, 43 Vt. 48. See Clark v. French, 23 Me. 221; Carbiener v. Montgomery (Iowa), 66 N. W. Rep. 900.

[3] 19 Pick. (Mass.) 237.

[4] See Carpenter v. McClure, 39 Vt. 9. In Day v. Cooley, 118 Mass. 527, the court observed: "It is well settled that if a debtor makes a conveyance with the purpose of defrauding either existing or future creditors, it may be impeached by either class of creditors, or by an assignee in insolvency or bankruptcy who represents both. Parkman v. Welch, 19 Pick. (Mass.) 231; Thacher v. Phinney, 7 Allen (Mass.) 146; Winchester v. Charter, 12 Allen (Mass.) 606; Wadsworth v. Williams, 100 Mass. 126. As it was proved in this case that the grantor had an actual fraudulent design which was participated in by the grantee, it is immaterial whether the demandants are to be regarded as subsequent or existing creditors as to the conveyance." See also Clement v. Cozart,

Tony v. McGehee,[1] the rule is recognized that a voluntary conveyance may be impeached by a subsequent

112 N. C. 412, 17 S. E. Rep. 486. In some States a different rule prevails, and a specific intent to defraud creditors must be found in order to avoid the deed as to them. Gardner v. Kleinke, 46 N. J. Eq. 90, 18 Atl. Rep. 459; cf. Ditman v. Raule, 124 Pa. St. 225, 16 Atl. Rep. 819; May v. State Nat. Bank, 59 Ark. 614, 28 S. W. Rep. 431; Fullington v. Northwestern Importers' etc. Assoc. 48 Minn. 490, 51 N. W. Rep. 475. The question whether such intent to defraud subsequent creditors exists is for the jury. Marshall v. Roll, 139 Pa. St. 399, 20 Atl. Rep. 999.

[1] 38 Ark. 427; 1 Story's Eq. Jurisp. § 361; Claflin v. Mess, 30 N. J. Eq. 211; Pope v. Wilson, 7 Ala. 690; Smith v. Greer, 3 Humph. (Tenn.) 118; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481.

Rights of subsequent creditors — Laughton v. *Harden.*—The rights of subsequent creditors are considered and the general policy of the courts in dealing with fraudulent transfers learnedly discussed in Laughton v. Harden, 68 Me. 208. The doctrine is there asserted that a voluntary conveyance from father to son, made with the intent to defraud creditors, may be avoided as to such creditors without allegations or proof that the grantee participated in the fraudulent intent. The court said: "The exact question presented is this: Is a voluntary conveyance from father to son, made by the grantor with an intent to defraud subsequent creditors, void as to such creditors, when there is no proof that the grantee participated in that intent when he received or accepted the deed? The statute of Elizabeth, c. 5, answers the question in the affirmative. It pronounces every conveyance, made to hinder, delay, or defraud creditors, utterly void as against such creditors, unless the estate shall be, 'upon good consideration, and *bona fide*, lawfully conveyed to such person,' not having at the time 'any manner of notice' of such fraud. Can it be said that this estate was *bona fide*, 'lawfully' conveyed, or that a grantee who pays no consideration for land fraudulently conveyed to him has 'no manner of notice' of the fraud? But this is not all of the statute. It threatens a penalty against a party to such conveyance who, being privy and knowing thereto, 'shall wittingly and willingly put in use, avow, maintain, justify, and defend the same,' as true and *bona fide* and upon good consideration. When a grantee in such a deed becomes informed of the grantor's intent does he not assist in executing that intent by an endeavor to uphold and maintain the deed? Is he not, in the eye of the law, presumed to be a participator in the fraud? Should not an honest grantee repudiate the deed? The grantee, by the fraudulent act of his grantor, becomes the trustee or depositary of property which belongs to the grantor's creditors. By attempting to withhold it from the creditors, does not the grantee himself commit a fraud? If innocent in the beginning, does he not become guilty in the end? The governing and acting intent was the grantor's. Does not the grantee endeavor to avail himself of it and adopt it when he holds on to the deed? No other conclusion can be reached. Of course it will not at this day be questioned that any conveyance may be avoided by subsequent as well as by prior creditors, if fraud was by such conveyance meditated against subsequent creditors. Wyman v. Brown,

creditor on the ground that it was made in fraud of existing creditors; but, to be successful, the subsequent creditor must show either that actual fraud was intended,[1] or that there were debts still outstanding, which the grantor owed at the time it was made.[2]

§ 98. **Proof of intent.** — The subject of the intent of the parties to an alleged fraudulent transfer will be considered presently.[3] Speaking of the sufficiency of the evidence of the intent to defraud subsequent creditors, Johnson, J., said:[4] "Upon the question of fraudulent intent, or whether the conveyance is fraudulent in fact, as to subsequent creditors, it is proper to consider the circumstances of its being voluntary, and the party indebted at the time; and if additional circumstances connected with those two be sufficient to show fraud in fact, it is void as to subsequent creditors. It is not necessary that there

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50 Me. 139; Bailey v. Bailey, 61 Me. 361. Any other view of this question than the one taken by us would permit and encourage most iniquitous frauds upon the part of badly disposed debtors. A man might convey all his property to his wife or minor children upon the eve of an expected bankruptcy, and, on account of his undoubted credit and apparent possession of means and property, be enabled to create a very great amount of subsequent indebtedness. How could a creditor show that the wife, and *a fortiori*, that the young minor children knew of the grantor's fraud, unless the knowledge can be imputed to them under such circumstances as a necessary implication of law? It would be unnatural for a debtor's wife and children to believe him to be a dishonest man, and uncommon for them to know much of his business affairs."

[1] Schreyer v. Scott, 134 U. S. 411, 10 S. C. Rep. 579; Horbach v. Hill, 112 U. S. 144, 149, 5 S. C. Rep. 81; Neuberger v. Keim, 134 N. Y. 38, 31 N. E. Rep. 268.

[2] In Day v. Cooley, 118 Mass. 527, the court says: "It is well settled that if a debtor makes a conveyance with the purpose of defrauding either existing or future creditors, it may be impeached by either class of creditors, or by an assignee in insolvency or bankruptcy who represents both. Parkman v. Welch, 19 Pick. 231, Thacher v. Phinney, 7 Allen, 146; Winchester v. Charter, 12 Allen, 606; Wadsworth v. Williams, 100 Mass. 126."

[3] See Chap. XIV.

[4] Rose v. Brown, 11 W. Va. 134. See Kanawha Valley Bank v. Wilson, 25 W. Va. 242; Burt v. Timmons, 29 W. Va. 453, 2 S. E. Rep. 780.

should be direct proof to show the fraud; it is to be legally inferred from the facts and circumstances of the case, where those facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the conveyance was made with intent to hinder, delay, or defraud existing or future creditors.[1] Where such actual intent to defraud future creditors is proved it is no defense to the action that the debtor may have in his hands at the time property sufficient to pay all existing debts.[2] Folger, J., delivering the opinion of the New York Court of Appeals in Shand v. Hanley,[3] observes upon this subject that "there is no difference in result, as there is no difference in the intention to produce the result, between a transfer of property to defraud a creditor existing at the time, and a creditor thereafter to be made."[4] Some of the re-enactments of the statute of Elizabeth mention subsequent creditors which the English statute does not do.[5] A conveyance intended to defraud creditors is voidable not only as to existing but as to future creditors.[6] The intent must be mutual. Marriage, as we shall elsewhere see, is a valuable consideration which is much respected in the law, and an ante-nuptial settlement, though made by the settler with the design of defrauding his creditors, will not be annulled in the absence of the clearest proof of participation in the fraud on the part of the wife.[7]

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[1] See Carpenter v. Roe, 10 N. Y. 227; Larkin v. McMullin, 49 Pa. St. 29.

[2] Dosche v. Nette, 81 Tex. 265, 16 S. W. Rep. 1013.

[3] 71 N. Y. 319, 322; Matter of Brown, 39 Hun (N. Y.) 27; Case v. Phelps, 39 N. Y. 164.

[4] See Mullen v. Wilson, 44 Pa. St. 416.

[5] May v. State Nat. Bk. 59 Ark. 614, 28 S. W. Rep. 433.

[6] Patridge v. Stokes, 66 Barb. (N. Y.) 586. See Case v. Phelps, 39 N. Y. 164; Carr v. Breese, 81 N. Y. 584; Thomson v. Dougherty, 12 S. & R. (Pa.) 448; Lockhard v. Beckley, 10 W. Va. 87; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. Rep. 847; May v. State Nat. Bk. 59 Ark. 614, 28 S. W. Rep. 431.

[7] Prewit v. Wilson, 103 U. S. 22. See Burton v. Platter, 53 Fed. Rep. 901. See Chap. XX.

§ 99. **Conveyance by embarrassed debtor.**— In Wallace v. Penfield,[1] it appeared that the debtor, who was somewhat indebted at the time, made a voluntary settlement upon his wife, by causing the title to the lands in question to be taken in her name, with the intention of immediately building upon and improving the land and using it as a permanent residence for himself and family. It was shown by a preponderance of evidence that when the settlement was effected, and during the period the land was being built upon and improved, the debtor had property which creditors could have reached, exceeding in value his indebtedness by several thousand dollars, and was engaged in an active business with fair prospects. All the creditors whose claims existed at the date of the settlement, or during the period when the debtor was making expenditures for improvements, had been fully paid and discharged. The plaintiff's claim accrued subsequently. The Supreme Court of the United States very properly decided that these facts were entirely consistent with an honest purpose to deal fairly with any creditors the debtor then had, or might thereafter have, in the ordinary course of his business, and that neither the conveyance to the wife, nor the withdrawal of the husband's means from his business for the purpose of improving the land settled upon the wife, had the effect to hinder or defraud his then existing or subsequent creditors. In Pepper v. Carter,[2] the Supreme Court of Missouri said: "Some would make an indebtedness *per se* evidence of fraud against existing creditors; others would leave every conveyance of the kind to be judged by its own circumstances, and from them infer the existence or non-existence of fraud in each

[1] 106 U. S. 260, 1 S. C. Rep. 216. Where a husband acquires property in his own name by the use of the separate property of the wife, a transfer to her is not voluntary. Schreyer v. Scott, 134 U. S. 406, 10 S. C. Rep. 579.

[2] 11 Mo. 543. See Carr v. Breese, 81 N. Y. 584; Schreyer v. Scott, 134 U. S. 419, 10 S. C. Rep. 579.

particular transaction. Without determining the question as to existing creditors, we may safely affirm that all the cases will warrant the opinion that a voluntary conveyance as to subsequent creditors, although the party be embarrassed at the time of its execution, is not fraudulent *per se* as to them; but the fact, whether it is fraudulent or not, is to be determined from all the circumstances. I do not say that the fact of indebtedness is not to weigh in the consideration of the question of fraud in such cases, but that it is not conclusive." The language of this case is quoted approvingly by the same court in the later case of Payne v. Stanton,[1] where it is said: "The doctrine is well settled that a voluntary conveyance by a person in debt is not, as to subsequent creditors, fraudulent *per se*. To make it fraudulent as to subsequent creditors, there must be proof of actual or intentional fraud. As to creditors existing at the time, if the effect and operation of the conveyance are to hinder or defraud them, it may, as to them, be justly regarded as invalid, but no such reason can be urged in behalf of those who become creditors afterwards." These cases in Missouri are quoted from at length, and declared to be controlling, by the United States Supreme Court in Wallace v. Penfield.[2] In the latter case, however, the facts proved and found by the court expressly repel the idea that the debtor was embarrassed or insolvent when the settlement was made; and the decision can scarcely be regarded as fully approving Payne v. Stanton and similar cases to the effect that an embarrassed debtor may make a voluntary conveyance which will be upheld against subsequent creditors. Some of these Missouri cases are at least dangerously near the border line. The court, in Payne

[1] 59 Mo. 159. See Boatmen's Savings Bank v. Overall, 16 Mo. App. 515; Loehr v. Murphy, 45 Mo. App. 524.

[2] 106 U. S. 260, 1 S. C. Rep. 216.

v. Stanton, draws the distinction between existing and subsequent creditors, and says that the conveyance might hinder, delay, and defraud the former, "but no such reason can be urged in behalf of those who become creditors afterwards." This, we respectfully urge, is attaching undue importance to the exact date or period of time when the creditor's claim accrued. The embarrassed debtor, under this rule, might voluntarily alienate the mass of his property, then secure loans or incur obligations to creditors, whose claims would thus be subsequent to the voluntary conveyance, and with the money thus acquired liquidate the obligations existing when the conveyance was effected. The embarrassment of the debtor when the transfer was made calls into being the claims of, and obligations to, the new creditors ; the deficit then existed, and the liability has been merely transferred to new parties, while the debtor's embarrassed estate has been further crippled or rendered hopelessly insolvent by the voluntary alienation. It seems to follow that the safer and more prudent rule would be to hold that no voluntary conveyance by an *embarrassed* debtor should be upheld against creditors, whether their claims accrued prior or subsequent to the transfer.

§ 100. **Placing property beyond the risk of new ventures or speculations.**— This brings us to the most important branch of the subject, viz., the effect of conveyances, gifts and settlements made to avoid the risks of losses likely to result from new business schemes. To illustrate, a baker who had been carrying on business for some years, being about to purchase a grocery business, which he intended to carry on together with his own trade, made a voluntary settlement of nearly the whole of his property upon his wife and children. He then purchased the grocery business, and having lost money sold it, but continued in business as a baker. Three years after the settlement he filed a liquida-

tion petition. The court held that independently of the question whether he was solvent at the date of the settlement, it was voidable as against the trustee in liquidation, under the stat. 13 Eliz. c. 5, on the ground that it was evidently executed with the view of putting the settler's property out of the reach of his creditors in case he should fail in the speculation on which he was about to enter, in carrying on a new business of which he knew nothing.[1] If a settlement is made "on the eve of a new business, and with a view of providing against its contingencies, it is as unavailing against new creditors as against old ones."[2] This same general principle was involved in Case v. Phelps,[3] in the New York Court of Appeals. Woodruff, J., a judge of much learning and great vigor of mind, said: "May a person about to engage in business which he believes may involve losses, with a view to entering upon such business, convey his property to his wife, voluntarily, without consideration, to secure it for the benefit of himself and family, in the event that such losses should occur? I cannot regard this question, as in substance, other than the inquiry, May a man, for the purpose of preventing his future credit-

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[1] *Ex parte* Russell. *In re* Butterworth, 19 Ch. D. 588, 51 L. J. Ch. 521, 46 L. T. N. S. 113, 30 W. R. 584; following Mackay v. Douglas, 14 L. R. Eq. 106. Compare Winchester v. Charter, 102 Mass. 272; Beeckman v. Montgomery, 14 N. J. Eq. 106; Cramer v. Reford, 17 N. J. Eq. 383; National Bank of Metropolis v. Sprague, 20 N. J. Eq. 25; Annin v. Annin, 24 N. J. Eq. 194; Case v. Phelps, 39 N. Y. 164; Gable v. Columbus Cigar Co., 140 Ind. 563, 38 N. E. Rep. 474; Bates v. Cobb, 29 S. C. 395, 7 S. E. Rep. 743; Lewis v. Simon, 72 Tex. 470, 10 S. W. Rep. 554; Sommermeyer v. Schwartz, 89 Wis. 66, 61 N. W. Rep. 311.

[2] Black v. Nease, 37 Pa. St. 438. The law should not be so framed or construed as to tempt men to desert their legitimate business, and engage in specious and hazardous speculations, concerning the dangers of which they are ignorant, by allowing them to "make a feather bed on which they may fall lightly," under the plea of affection for their wives and children. Thomson v. Dougherty, 12 S. & R. (Pa.) 451.

[3] 39 N. Y. 169; Neuberger v. Keim, 134 N. Y. 35, 31 N. E. Rep. 268; Schreyer v. Scott, 134 U. S. 406, 411, 10 S. C. Rep. 579; Horbach v. Hill, 112 U. S. 144, 149, 5 S. C. Rep. 81.

ors from collecting their demands out of his property then owned, and *for the purpose* of casting upon them the hazards of his success in the business in which he is about to engage, convey his property without consideration to his wife, in order to secure the benefit of it to himself and family, however disastrous such business may prove, and continue in the possession, not even putting the deeds upon record until after such subsequent indebtedness arises?"[1] The question of the validity of a gift or settlement, as to subsequent creditors, as we have said, turns upon the question as to whether it was made in contemplation of future debts,[2] or to secure the debtor "a retreat in the event of a probable pecuniary disaster in a hazardous business in which he proposed to embark."[3] To bring the transfer within this rule, "it must be executed with the intention and design to defraud those who should thereafter become his creditors,"[4] the debtor proposing to throw the hazards of the business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of the adverse results incident to all business enterprises.[5]

But these cases must be considered within proper restrictions. Thus, where a man who was solvent paid for property which he procured to be conveyed to his wife, and there was no evidence tending to show that by so doing he intended to defraud any subsequent creditors, it has been held that the conveyance is perfectly valid in her

[1] See City Nat. Bank v. Hamilton, 34 N. J. Eq. 160.

[2] Walter v. Lane, 1 MacAr. (D. C.) 282.

[3] Fisher v. Lewis, 69 Mo. 631; Neuberger v. Keim, 134 N. Y. 35, 38, 31 N. E. Rep. 268; Schreyer v. Scott, 134 U. S. 406, 411; 10 S. C. Rep. 579. See Carver v. Barker, 73 Hun (N. Y.) 416, 26 N. Y. Supp. 919.

[4] Matthai v. Heather, 57 Md. 484. See Williams v. Banks, 11 Md. 198; Moore v. Blondheim, 19 Md. 172.

[5] Smith v. Vodges, 92 U. S. 183; Sexton v. Wheaton, 8 Wheat. 229; Mullen v. Wilson, 44 Pa. St. 418; Stileman v. Ashdown, 2 Atk. 481. Compare United States v. Griswold, 7 Sawyer, 335; McPherson v. Kingsbaker, 22 Kan. 646; Sheppard v. Thomas, 24 Kan. 780; Kirksey v. Snedecor, 60 Ala. 192; Marshall v. Croom, 60 Ala. 121.

favor as against his subsequent creditors, and that a husband had a right to make a settlement of property upon his wife, provided it was free from fraud.[1] Subsequent indebtedness cannot be invoked to make that fraudulent which was honest and free from impeachment at the time.[2] In Graham v. Railroad Co.,[3] a leading and important case, it is said to be a well-settled rule of law that if an individual, being solvent at the time, without any actual intent to defraud creditors, disposes of property for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction. The argument advanced is that such creditors are not injured; they gave credit to the debtor in the status which he had after the voluntary conveyance was made. This rule was applied to an alienation by a corporation.[4]

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[1] Curtis v. Fox, 47 N. Y. 301; Phillips v. Wooster, 36 N. Y. 412. The rule obtaining in New York is clearly laid down in Scrheyer v. Scott, 134 U. S. 411, 10 S. C. Rep. 579, where it is said: "It is evident that the rule obtaining in New York, as well as recognized by this court, is that even a voluntary conveyance from husband to wife is good as against subsequent creditors; unless it was made with the intent to defraud such subsequent creditors; or there was secrecy in the transaction by which knowledge of it was withheld from such creditors, who dealt with the grantor upon the faith of his owning the property transferred; or the transfer was made with a view of entering into some new and hazardous business, the risk of which the grantor intended should be cast upon the parties having dealings with him in the new business." This language is cited with approval in Neuberger v. Keim, 134 N. Y. 38, 31 N. E. Rep. 268.

[2] See Babcock v. Eckler, 24 N. Y. 630; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 500; Seward v. Jackson. 8 Cow. (N. Y.) 406; Hinde's Lessee v. Longworth, 11 Wheat. 199.

[3] 102 U. S. 148. See Wallace v. Penfield, 106 U. S. 260, 1 S. C. Rep. 216; Mattingly v. Nye, 8 Wall. 370; Schreyer v. Scott, 134 U. S. 411, 10 S. C. Rep. 579; Sexton v. Wheaton, 8 Wheat. 239, per Marshal, C. J.; 1 Am. Lea. Cas. 17, where the law upon this subject is learnedly discussed in a note. In Porter v. Pittsburg Bessemer Steel Co., 120 U. S. 673, 7 S. C. Rep. 1206, the court said: "It is a well-settled principle that subsequent creditors cannot be heard to impeach an executed contract, where their dealings with the company, of which they claim the benefit, occurred after the contract became an executed contract."

[4] Compare Wabash, St. L. & P. Ry. Co. v. Ham, 114 U. S. 587, 594, 5 S. C. Rep. 1081.

§ 101. **Conveyances avoided.**—The Chancellor said, in Beeckman v. Montgomery:[1] "Aside from the fact that the deed was made by the father in contemplation of future indebtedness, there are strong circumstances indicating the existence of actual fraud. The deed was made on the eve of the grantor engaging in mercantile business, which would require for its successful pursuit both capital and credit. He disposed, at the time of the conveyance, of the entire control of his real estate, which constituted the bulk of his property, leaving himself an inadequate capital for conducting his business or raising loans. The credit which he obtained was due to his former standing as a man of responsibility. The conveyances to his children were not advancements adapted to the means and situation in life of the grantor — they absorbed his whole property. The deed to the defendant was made while he was an infant but sixteen years of age, not needing an advancement, and not of discretion to take charge and management of the property. It was kept secret for more than a year, and was not left at the office to be recorded till the day after a suit at law was commenced by the complainants for the recovery of their debt."[2] If a person about to contract debts makes a voluntary conveyance, with the intent to deprive future creditors of the means of enforcing collection of their debts, and this purpose is accomplished, it is very clear that such creditors are injured and defrauded.[3] A cred-

[1] 14 N. J. Eq. 112; see Haston v. Castner, 31 N. J. Eq. 704; Francis v. Lawrence, 48 N. J. Eq. 508, 22 Atl. Rep. 259.

[2] See City Nat. Bank v. Hamilton, 34 N. J. Eq. 158; Carpenter v. Carpenter, 25 N. J. Eq. 194; Dick v. Hamilton, Deady, 322; Burdick v. Gill, 7 Fed. Rep. 668; Carter v. Grimshaw, 49 N. H. 100; Snyder v. Christ, 39 Pa. St. 499; Mullen v. Wilson, 44 Pa. St. 413; Barling v. Bishopp, 29 Beav. 417; Clark v. Killian, 103 U. S. 766, affi'g Killian v. Clark, 3 MacAr. (D. C.) 379; Hitchcock v. Kieley, 41 Conn. 611; Williams v. Davis, 69 Pa. St. 21; Pawley v. Vogel, 42 Mo. 303; Hersch. feldt v. George, 6 Mich. 456; Hilliard v. Cagle, 46 Miss. 309; Huggins v. Perrine, 30 Ala. 396.

[3] Burdick v. Gill, 7 Fed. Rep. 670.

itor has a right when extending credit, to rely upon the honesty and good faith of the debtor, and may assume, without inquiry, that the debtor has made no fraudulent conveyances of property.[1] In Francis v. Lawrence[2] the court say: "The deed was not delivered to the grantee, and not placed upon the record, but was held by the wife, and the husband was thus enabled to trade upon the false credit which he acquired by being the apparent owner of the property, while the deed was ready to be put upon the record at a moment's notice. . . . . This transaction cannot be regarded in any other light than as a fraud upon the creditors."

§ 102. **Conveyances not considered fraudulent.** — But the courts will not willingly overturn a settlement or voluntary alienation at the suit of a subsequent creditor, upon slight, unsubstantial, or intangible proof. Carr v. Breese[3] is an illustration. In that case the New York Court of Appeals, overruling the court below, decided that where a husband, worth $22,000, owing debts amounting to $2,800, which were subsequently paid, and engaged in a prosperous business, purchased property costing about $16,000, and took it in the name of his wife, and paid about $10,000 of the consideration by mortgage on his real estate, and the balance by mortgage upon the premises purchased, the settlement was not unsuitable or disproportionate to his means. Miller, J., speaking for the court, said: "There was no insolvency in fact or in contemplation, no new enterprise started which involved unusual or extraordinary hazard, but the continuance of the business of the grantor for the period of three years, and no dishonest failure, or attempt in any form to defraud. An existing indebtedness alone does not render

[1] Ibid.
[2] 48 N. J. Eq. 511, 22 Atl. Rep. 259.
[3] 81 N. Y. 584; overruling 18 Hun (N. Y.) 134. See s. p. Phœnix Bank v. Stafford, 89 N. Y. 405; Truesdell v. Sarles, 104 N.Y. 168, 10 N. E. Rep. 139.

a voluntary conveyance absolutely fraudulent and void as against creditors, unless there is an intent to defraud.[1] This is especially the case when it is shown that the residue of the property was amply sufficient to pay all debts,"[2] and that the credit was given without any reliance on the ownership of the land conveyed.[3] It may be observed that although in Babcock v. Eckler,[4] the disproportion was far greater than in Carr v. Breese,[5] the conveyance was upheld; but in this case evidence was introduced tending to show that the conveyance was not entirely voluntary.[6] Again in Carpenter v. Roe,[7] the court, citing Hinde's Lessee v. Longworth,[8] says: "If it can be shown that the grantor was in prosperous circumstances and unembarrassed; and that the gift was a reasonable provision, according to his state and condition in life, and leaving enough for the payment of the debts of the grantor," the presumptive evidence of fraud would be met and repelled.[9]

§ 103. **Subrogation of subsequent creditors.**—A device to which fraudulent insolvents often resort consists in making a voluntary coveyance and following this up by paying all the antecedent or existing creditors, practically with the moneys derived from the credit extended by subsequent creditors. Savage v. Murphy,[10] already quoted,

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[1] Citing Van Wyck v. Seward, 6 Paige (N. Y.) 62; Second Nat. Bank of Beloit v. Merrill, 81 Wis. 142, 50 N. W. Rep. 503.

[2] Citing Jackson v. Post, 15 Wend. (N. Y.) 588; Phillips v. Wooster, 36 N. Y. 412; Dunlap v. Hawkins, 59 N. Y. 342.

[3] Sorenson v. Sorenson, 69 Mich. 351, 37 N. W. Rep. 358.

[4] 24 N. Y. 623.

[5] 81 N. Y. 584.

[6] See Childs v. Connor, 38 N. Y. Superior Ct. 471.

[7] 10 N. Y. 227.

[8] 11 Wheat. 213.

[9] See Crawford v. Logan, 97 Ill. 396; Clark v. Killian, 103 U. S. 766; Wallace v. Penfield, 106 U. S. 260, 1 S. C. Rep. 216; Pepper v. Carter, 11 Mo. 540; Payne v. Stanton, 59 Mo. 158; Genesee River Nat. Bank v. Mead, 92 N. Y. 637.

[10] 34 N. Y. 508. Barhydt v. Perry, 57 Iowa 419, 10 N. W. Rep. 820.

was such a case.[1] It is a most unsubstantial mode of paying a debt to contract another of equal amount. It is the merest fallacy to call such an act getting out of debt,[2] and the case should be treated as if the prior indebtedness had continued throughout,[3] or as a case of a continued or unbroken indebtedness.[4]

§ 104. Subsequent creditors sharing with antecedent creditors.—In a case which arose in Massachusetts, in which an administrator sought to annul a fraudulent alienation made by his intestate, Dewey, J., said: "Though the ground of avoiding this conveyance is that the land was liable to be taken to satisfy existing creditors only, yet when the conveyance is avoided, the proceeds of the sale will be assets generally, and other creditors will receive the benefit thereof incidentally."[5] In Kehr v. Smith,[6] Davis, J., observed: "It is well settled, where a deed is set aside as void as to existing creditors, that all the creditors, prior and subsequent, share in the fund *pro rata*."[7] Mr. Peachey observes:[8] "It has, however, never been disputed but that a subsequent creditor would participate in the benefit of a decree instituted by a prior creditor, and would have the same equity for having the property

[1] See § 96. See also Churchill v. Wells, 7 Coldw. (Tenn.) 364; Moritz v. Hoffman, 35 Ill. 553.

[2] Paulk v. Cooke, 39 Conn. 566.

[3] Edwards v. Entwisle, 2 Mackey (D. C.) 43; Antrim v. Kelly, 8 N. B. R. 587, 1 Fed. Cases, 1062; Rudy v. Austin, 56 Ark. 73, 19 S. W. Rep. 111.

[4] Paulk v. Cooke, 39 Conn. 566.

[5] Norton v. Norton, 5 Cush. (Mass.) 530.

[6] 20 Wall. 36.

[7] Citing Magawley's Trust, 5 De G. and Sm. 1; Richardson v. Smallwood, Jacob 552–558; Savage v. Murphy, 34 N. Y. 508; Iley v. Niswanger, Harp. Eq. (S. C.) 295; Robinson v. Stewart, 10 N. Y. 189; Thomson v. Dougherty, 12 S. & R. (Pa.) 448; Henderson v. Hoke, 3 Dev. (N. C.) Law 12–14; Kissam v. Edmundson, 1 Ired. Eq. (N. C.) 180; Sexton v. Wheaton, 1 Am. Lea. Cas. 45; Norton v. Norton, 5 Cush. (Mass.) 529; O'Daniel v. Crawford, 4 Dev. (N. C.) Law, 197–204; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481–499; Townshend v. Windham, 2 Ves. Sen. 10; Jenkyn v. Vaughan, 3 Drewry, 419–424. See Bassett v. McKenna, 52 Conn. 442, citing this section; Day v. Cooley, 118 Mass. 524.

[8] Peachey on Marriage Settlements, p. 197.

applied. Again no distinction has been drawn in such cases between the different classes of creditors, that is, between those whose debts existed at the time the deed was executed, and those who became creditors subsequently, or that any priority can be given to those who were creditors at the date of the instrument over the subsequent creditors; all would, in fact, participate *pro rata.*"[1] There has been, however, some hesitancy on the part of the courts in holding that a deed which existing creditors could avoid, was, after avoidance by them, to be considered void as to all creditors; for that is practically the effect of letting in subsequent creditors, especially to share *pro rata.* Though the deed cannot be set aside at the instance of subsequent creditors, yet the authorities seem to give them the same benefit when the antecedent creditors succeeded in annulling it. It would seem to result that while there is a discrimination in the right to attack the conveyance, there is none as to sharing in the successful result. In considering this feature, however, the rule that a creditor, by filing a bill, acquires an equitable lien and preference in certain cases, must not be overlooked.[2]

§ 105. Mixed claims accruing prior and subsequent to alienation.—The right of a grantee or vendee, from whom a creditor seeks to wrest property held in trust for a debtor, to require the creditor to show, in a proper case, that his debt accrued before the conveyance which is questioned, is clearly established. As a voluntary or fraudulent conveyance is ordinarily good between the parties, and can be upheld except as against certain classes of persons, it

[1] Cited with approval in Ammon's Appeal, 63 Pa. St. 289. See Churchill v. Wells, 7 Coldw. (Tenn.) 364; Trimble v. Turner, 21 Miss. 348; Kipp v. Hanna, 2 Bland's Ch. (Md.) 26; Beach v. White, Walker's Ch. (Mich.) 495; Thomson v. Dougherty, 12 S. & R. (Pa.) 448; Kidney v. Coussmaker, 12 Ves. Jr. 136, note. Compare Converse v. Hartley, 31 Conn. 379.

[2] See Pullis v. Robinson, 5 Mo. App. 548. See § 61; also Chap. XXV.

follows that the vendee can force the plaintiff to show that he comes within some privileged class entitled to impeach the transaction.

Where it is important or vital to the creditor's success to show that he was an existing creditor as to the conveyance, and it appears that some of the items of his claims accrued prior and others subsequent to the conveyance, and all these items are embodied in one judgment, it has been held in several cases that he is to be treated as a subsequent creditor, not entitled to attack the conveyance.[1] In Baker v. Gilman,[2] the creditor was an attorney, and his claim was for services. Johnson, J., said: "The plaintiff was clearly a subsequent creditor of Gilman. His employment, by virtue of his retainer, was a continuous one until the determination of the actions. It was a single demand for services, a small portion of which were rendered before the conveyance, and the far larger portion long afterwards. This being embraced in one judgment, nearly two years after the conveyance, renders the plaintiff clearly a subsequent creditor." In Reed v. Woodman,[3] it appeared from the evidence that the greater part of the debt which was the foundation of the judgment rendered in favor of the demandant accrued subsequent to the date of the challenged conveyance. The court said: "The levy was entire, and cannot be so apportioned or divided as to constitute a satisfaction for that part of his debt which was due prior to that deed. The demandant, having taken judgment for his whole demand, is to be regarded as a creditor subsequent to the conveyance of the land

[1] See Miller v. Miller, 23 Me. 22, 39 Am. Dec. 598, and notes; Reed v. Woodman, 4 Me. 400; Usher v. Hazeltine, 5 Me. 471; Quimby v. Dill, 40 Me. 528; Moritz v. Hoffman, 35 Ill. 558. *Contra*, Ecker v. Lafferty, 20 Pittsb. L. J. (Pa.) 135; Henderson v. Henderson, 133 Pa. St. 399, 19 Atl. Rep. 424.

[2] 52 Barb. (N. Y.) 38.

[3] 4 Me. 400.

in question by his debtor. He cannot therefore impeach that conveyance but by showing actual fraud." [1]

§ 106. **Status of creditors whose claims accrued after notice of alienation.** — As a general rule a subsequent creditor who acquired his claim with knowledge or notice of the conveyance sought to be annulled, cannot attack it as fraudulent.[2] In Baker v. Gilman,[3] Johnson, J., said: "I do not think a creditor, who has trusted his debtor after being fully informed by the latter that he has put his property out of his hands, by a conveyance, valid as between him and his grantee, though voidable as to existing creditors, should ever be allowed to come into court and claim that such conveyance was fraudulent and void, as to him, on account of such indebtedness. As to such creditor, a conveyance of that kind would not be fraudulent, in any sense, and could not, on that ground, be avoided." But the mere recording of a conveyance is not constructive notice to a creditor.[4]

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[1] See Humes v. Scruggs, 94 U. S. 22.

[2] Lehmberg v. Biberstein, 51 Tex. 457; Monroe v. Smith, 79 Pa. St. 459; Herring v. Richards, 3 Fed. Rep. 443. See Knight v. Forward, 63 Barb. (N. Y.) 311; Lewis v. Castleman, 27 Tex. 407.

[3] 52 Barb. (N. Y.) 39. See Sledge v. Obenchain, 58 Miss. 670; Kane v. Roberts, 40 Md. 594; Williams v. Banks, 11 Md. 198; Sheppard v. Thomas, 24 Kan. 780. Compare Kirksey v. Snedecor, 60 Ala. 192.

[4] Marshall v. Roll, 139 Pa. St. 399, 20 Atl. Rep. 999.

CHAPTER VII.

WHO MAY BE COMPLAINANTS.

§ 107. Parties complainant.
108. Joinder of complainants.
109. Suing on behalf of others.
110. "And others."
111. Surety.
112. } Executors and administrators.
113. }
114. Assignee in bankruptcy.
115. General assignee.
116. Receivers.
117. Receivers of corporations.
118. Foreign receivers.
§ 119. Creditors of corporations.
120. Sheriff.
121. Heirs — Widow.
122. Husband and wife.
123. Tort creditor.
124. Overseer of the poor.
125. Creditors having liens.
126. Purchaser removing incumbrances.
127. Creditors opposing will.
127*a*. *Cestui que trust.*

§ 107. **Parties complainant.** — The rights of the two great classes — existing and subsequent — into which creditors are necessarily divided, having been considered,[1] the discussion would not be complete without noticing, in detail, the cases in which complainants in different capacities are permitted to prosecute the various litigations under consideration. The principle must be kept constantly in view that fraudulent conveyances and secret trusts can be assailed only by those who have been injured,[2] and are voidable only in favor of parties occupying

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[1] See Chaps. V., VI.

[2] Sides v. McCullough, 7 Mart. (La.) 654; 12 Am. Dec. 519; Edwards v. McGee, 31 Miss. 143; Philips v. Wooster, 36 N. Y. 412; Morrison v. Atwell, 9 Bosw. (N. Y.) 503; Scholey v. Worcester, 4 Hun (N. Y.) 302; Pass v. Lynch, 117 N. C. 454. In Nash v. Geraghty, 105 Mich. 382, 63 N. W. Rep. 437, the court says: "Before a decree is granted on behalf of creditors setting aside a conveyance, it should be made affirmatively to appear that the creditors have been substantially injured by the transfer." Hall v. Moriarity, 57 Mich. 345. A. conveyed to B. in fraud of creditors. A railroad company agreed to take the land and pay an award of damages. When sued for the amount of the award the company set up that B. derived title by fraud. The plea

the positions of non-assenting[1] creditors[2] or subsequent purchasers.[3] The creditor who first institutes a suit in chancery to avoid a fraudulent conveyance is entitled to relief, without regard to other creditors standing in the same right, who have not made themselves joint parties with him,[4] or taken any proceedings. The creditors spoken of as entitled to discover equitable assets, or annul covinous transfers, are the creditors of the grantor or donor who has made the fraudulent conveyance,[5] or has title to the equitable assets. That a "fraud upon the public" was the design of the transfer is not regarded as a sufficient ground for avoiding it.[6] A fraudulent purpose is harmless if unattended with any wrongful effect.[7] Manifestly, the fraudulent intent, as we shall show, must be connected with the transaction assailed, and spring out of it, and not relate merely to some entirely independent act.[8] It does not follow from this rule that it is

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was held bad. Lacrosse & M. R. R. Co. v. Seeger, 4 Wis. 268. So a party with whom goods are deposited for safe keeping cannot set up fraud in the title, the court in one case saying: "We recognize the right of no man, in this way, to turn Quixote and fight against fraud, for justice sake alone. In the mouth, therefore, of this defendant, I do not perceive the right to set up this defense, even if it were true in fact." Hendricks v. Mount, 5 N. J. L. 738, 743. Compare Bell v. Johnson, 111 Ill. 374. See § 91.

[1] Greene v. Sprague Mfg. Co., 52 Conn. 330.

[2] See Mosely v. Mosely, 15 N. Y. 334; Allen v. Steiger, 17 Col. 556, 31 Pac. Rep. 226; Pass v. Lynch, 117 N. C. 453; Allenspach v. Wagner, 9 Col. 132, 10 Pac. Rep. 802; Burke v. Adams, 80 Mo. 504. The creditor's debt must be due before the bill will lie. Browne v. Hernsheim, 71 Miss. 574, 14 So. Rep. 36.

[3] Burgett v. Burgett, 1 Ohio 469, 13 Am. Dec. 634; Thompson v. Moore, 36 Me. 47; Jewell v. Porter, 31 N. H. 34; Byrod's Appeal, 31 Pa. St. 241.

[4] McCalmont v. Lawrence, 1 Blatchf. 235.

[5] See Chapter III. Morrison v. Atwell, 9 Bosw. (N. Y.) 503; Powers v. Graydon, 10 Bosw. (N. Y.) 630. A creditor's bill has been supported founded upon the judgment claim of a *cestui que trust*, against the personal representative of the trustee, to reach the proceeds of land sold by the trustee, which were held under a trust for the benefit of creditors. Diefendorf v. Spraker, 10 N. Y. 246.

[6] Griffin v. Doe, *d.* Stoddard, 12 Ala. 783.

[7] Buford v. Keokuk N. L. Packet Co., 3 Mo. App. 159.

[8] Wilson v. Forsyth, 24 Barb. (N. Y.) 128.

necessary that any particular creditor should be mentioned by name.[1] If the proofs establish that the alienation was made to defeat creditors, and that the plaintiff was a creditor, a case is made out.

It is well observed by Chancellor Kent, in Brown v. Ricketts,[2] that the question of parties to a suit is frequently perplexing and difficult to reduce to rule. The remark, as will be manifest, is peculiarly appropriate to the different actions and proceedings affecting fraudulent alienations. We may further state that suits by creditors against fraudulent debtors or their alienees, form no exception to the general rule which requires that all the parties in interest who are *in esse* shall be brought into the case.[3]

§ 108. **Joinder of complainants.**— Let us first notice the authorities relating to the joinder of complainants in the various forms of actions instituted by creditors against fraudulent alienees. It may be stated as a general proposition that parties who are creditors by several judgments may join as complainants in an action to reach property fraudulently alienated by a debtor.[4] Such parties

[1] Blount v. Costen, 47 Ga. 534.

[2] 3 Johns. Ch. (N. Y.) 555.

[3] Bowen v. Gent, 54 Md. 555. Compare Christian v. Atlantic & N. C. R. R. Co., 133 U. S. 241, 10 S. C. Rep. 260.

[4] Buckingham v. Walker, 51 Miss. 494; Butler v. Spann, 27 Miss. 234; Sage v. Mosher, 28 Barb. (N. Y.) 287; Snodgrass v. Andrews, 30 Miss. 472; North v. Bradway, 9 Minn. 183; Dewey v. Moyer, 72 N. Y. 74; Simar v. Canaday, 53 N. Y. 305; Banknight v. Sloan, 17 Fla. 286; Ballentine v. Beall, 4 Ill 203; White's Bank of Buffalo v. Farthing, 9 Civ. Pro. (N. Y.) 64, 101 N. Y. 344, 4 N. E. Rep. 734; Higby v. Ayres, 14 Kan. 331; Chapman v. Banker & Tredesmen Pub. Co., 128 Mass. 478; Gates v. Boomer, 17 Wis. 455; Wall v. Fairley, 73 N. C. 464; Reed v. Stryker, 4 Abb. App. Dec. (N. Y.) 26; Murray v. Hay, 1 Barb. Ch. (N. Y.) 59; Elliott v. Pontius, 136 Ind. 641, 35 N. E. Rep. 562, 36 Id. 421. In Bomar v. Means, 37 S. C. 520, 527, 16 S. E. Rep. 537, the court says: "It is true, that such a proceeding, called a creditor's bill, is usually brought in the name of one creditor, for himself and such others as will come in and contribute to the expenses. But I do not understand that, where several judgment-creditors go on the record as plaintiffs, it is a misjoinder of

possess the same status, and are in pursuit of a common object against the same fraudulent vendee, and the embarrassment of a multitude of suits is thereby avoided. In Robbins v. Sand Creek Turnpike Co.,[1] the court quoted the following language approvingly: "Several persons having a common interest arising out of the same transaction or subject of litigation, though their interests may be seperate, may join in one suit for equitable relief, provided their interests be not adverse or conflicting. . . . . And several judgment-creditors, holding different judgments, may unite in filing a creditors' bill to reach the equitable interests and choses in action of the debtor, or to obtain the aid of the court to enforce their liens at law."[2] And in Powell v. Spaulding,[3] the principle is laid down to the effect that "where there is unity in interest, as to the object to be obtained by the bill, the parties seeking redress in chancery may join in the same com-

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plaintiffs, of which the defendant debtor, or those who claim under him, have any right to complain. The judgment-creditors do not thereby make themselves partners with the other creditors, or claim that they have a joint interest in the cause of action, but that, as creditors, they are separate and distinct, having an interest in common to set aside fraudulent conveyances of their common debtor, which stand in the way of their being paid, according to their respective priorities." But compare Yeaton v. Lenox, 8 Pet. 123; Seaver v. Bigelows, 5 Wall. 208. Judgment-creditors cannot thus unite in an action at law. Sage v. Mosher, 28 Barb. (N. Y.) 288. Compare Carroll v. Aldrich, 17 Vt. 569. The court decided, in Elmore v. Spear, 27 Ga. 196, that where a creditor proposed to reach legal as distinguished from equitable assets, the suit technically was not a creditor's bill. Hence a single creditor was held to be entitled to institute a suit to reach legal assets, and if he thereby gained a priority over other creditors it was said he could retain this advantage, and was not forced to divide with the others, but was entitled to the control of his own case, and could not be required to make other creditors parties to his bill. See §§ 54, 55. In States where the practice prevails that a bill can be brought by simple contract-creditors, it has been held that several creditors can join in one suit. Ruse v. Bromberg, 88 Ala. 620, 7 So. Rep. 384.

[1] 34 Ind. 461. See Bank of Rome v. Haselton, 15 B. J. Lea (Tenn.) 216.

[2] In New York a motion to allow other judgment-creditors to intervene is discretionary with the court below. White's Bank v. Larching, 101 N. Y. 344, 4 N. E. Rep. 734.

[3] 3 Greene (Iowa) 443, 461.

plaint and maintain their action together."[1] In Brinkerhoff v. Brown,[2] Chancellor Kent ruled that different creditors might unite in one bill, the object of which was to set aside a fraudulent conveyance of their common debtor. It was so held also in McDermutt v. Strong,[3] Edmeston v. Lyde,[4] Conro v. Port Henry Iron Co.,[5] Wall v. Fairley,[6] and Mebane v. Layton.[7] And where a defendant in two separate bills, brought by different judgment-creditors to reach the same land, files one answer to both bills, it seems that he thereby virtually consolidates the suits, and they may be heard together as one cause, or as two causes under one style, without entering any specific order of consolidation.[8] In one case a sheriff, and the judgment-creditor under whose execution a levy had been made, were allowed to join in a creditors' bill.[9] Each, it was said, had an interest in preventing a multiplicity of suits, and in closing the matter in a single controversy; their interests were in harmony, and in no respect conflicting, and hence of such character as entitled them to unite in the suit.[10] There is, however, no obli-

[1] See Strong v. Taylor School Township, 79 Ind. 208; Cohen v. Wolff, 92 Ga. 199, 17 S. E. Rep. 1029. In Hamlin v. Wright, 23 Wis. 494, the court observed that "different judgment-creditors may join in one suit against the judgment-debtor and his fraudulent grantees, though the interests of the latter are separate and distinct, and were not acquired at the same time. The object of such a suit is to reach the property of the debtor."

[2] 6 Johns. Ch. (N. Y.) 139.

[3] 4 Johns. Ch. (N. Y.) 687.

[4] 1 Paige (N. Y.) 637.

[5] 12 Barb. (N. Y.) 27.

[6] 73 N. C. 464.

[7] 86 N. C. 571.

[8] Rogers v. Dibrell, 6 Lea (Tenn.) 69.

[9] Adams v. Davidson, 10 N. Y. 309, 315, where the court said: "It was also objected that the plaintiffs had no common interest in the recovery that entitled them to file their bill Each had an interest in preventing a multiplicity of suits, and having this whole matter closed by a single controversy. It could not have been done otherwise than by the course adopted; their interests were in harmony with each other, in no respect conflicting and were such as entitled them to unite in this suit." See § 81.

[10] Compare Bates v. Plonsky, 28 Hun (N .Y.) 112. See also Doherty v. Holliday, 137 Ind. 282, 32 N. E. Rep. 315, 36 Id. 907; Armstrong v. Dunn, 143 Ind. 433, 41 N. E. Rep. 540.

gation upon judgment-creditors to join.[1] Creditors by judgment and by decree may unite in one suit,[2] but judgment-creditors and simple contract-creditors cannot join.[3]

Where one party is a creditor by judgment and another by decree, both having acquired liens upon the property of their debtor which entitle them to similar relief against an act of the defendant, which is a common injury, they may join in a bill.[4] The general theory upon which creditors are permitted to unite as complainants is that they are seeking payment of their judgments out of a common fund, viz., the property of the debtor; his fraudulent conduct with reference to his assets affects them all, and is the subject-matter of investigation. A receiver is often appointed to reach and take possession of equitable interests or property fraudulently alienated, and as he can act equally well for the different creditors, the expense, delay, and confusion incident to conducting different suits are avoided.[5] A judgment-creditor of a firm who is

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Existing and subsequent creditors may join in a bill to set aside a conveyance. O'Neil v. Birmingham Brewing Co., 101 Ala. 382, 13 So. Rep. 576.

[1] White's Bank of Buffalo v. Farthing, 9 Civ. Pro. (N. Y.) 64.

[2] Brown v. Bates, 10 Ala. 432.

[3] Banknight v. Sloan, 17 Fla. 284.

[4] Clarkson v. De Peyster, 3 Paige (N. Y.) 320.

[5] See Gates v. Boomer, 17 Wis. 455; Hamlin v. Wright, 23 Wis. 491; Ruffing v. Tilton, 12 Ind. 259; Baker v. Bartol, 6 Cal. 483; Pierce v. Milwaukee Construction Co., 38 Wis. 253; Dewey v. Moyer, 72 N. Y. 74; below, 9 Hun (N. Y.) 476; Higby v. Ayres, 14 Kan. 331; Buckingham v. Walker, 51 Miss. 494. In Smith v. Schulting, 14 Hun (N. Y.) 54, the court says: "The principal issue presented by this complaint is the invalidity of the alleged release. It is manifest by the admissions of the complaint itself, that unless the release be set aside there can be no recovery of the indebtedness to the several firms. They have a common interest, therefore, in this principal issue, and inasmuch as the release is, or under the allegations of the complaint must be assumed to be, a joint one, obtained by a common fraud, there is no reason why all the parties to it may not unite in an action brought for the purpose of declaring it void, and setting it aside because of a common fraud practiced upon them in obtaining it. We think it comes directly within the principle of the cases cited by appellant's counsel, and although the plaintiffs were unconnected parties with respect to the

also a judgment-creditor of one of the members of the firm, may sue on both judgments to overturn an assignment.[1]

Obviously, hostile claimants cannot join in any form of action,[2] and a bill is demurrable where it appears that one of the complainants has no standing in court, or antagonistic causes of action are set forth, or the relief for which the complainants respectively pray in regard to a portion of the property sought to be reached, involves totally distinct questions requiring different evidence and leading to different decrees.[3]

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indebtedness to them, they may join in the suit because there was one connected interest among them all centering in the principal point in issue." Citing Binks v. Rokeby, 2 Madd. 234; Ward v. Northumberland, 2 Anstr. 469, 477; Whaley v. Dawson, 2 Sch. & Lef. 370.

[1] Genesee County Bank v. Bank of Batavia, 43 Hun (N. Y.) 295.

[2] See Hubbell v. Lerch, 58 N. Y. 237; St John v. Pierce, 22 Barb. (N. Y.) 362, affi'd in Court of Appeals, 4 Abb. App. Dec. (N. Y.) 140; Sedg. & Wait on Trial of Title to Land, 2d ed., § 188.

[3] Walker v. Powers, 104 U. S. 245. Compare United States v. Amer. Bell Telephone Co., 128 U. S. 352, 9 S. C. Rep. 90; Merriman v. Chicago, etc. R. R. Co., 64 Fed. Rep. 550; Emans v. Emans, 14 N. J. Eq. 114; Sawyer v. Noble, 55 Me. 227. The creditor may proceed by ancillary proceedings in any other court of concurrent jurisdiction with the court rendering the judgment, to remove clouds from the titles of any property which is deemed to be subject to the lien of the judgment. Each judgment makes a separate cause of action. Scottish-American Mortgage Co. v. Follansbee, 14 Fed. Rep. 125. In Ostrander v. Weber, 114 N. Y. 101, 21 N. E. Rep. 112, the court says: "The complaint sets forth these several subjects of equitable jurisdiction, viz: The foreclosure of chattel mortgages. (Briggs v. Oliver, 68 N. Y. 339; Hart v. Ten Eyck, 2 Johns. Ch. 99; Thompson v. Van Vechten, 5 Duer. 624; Dupny v. Gibson, 36 Ill. 200; Charter v. Stevens, 3 Denio, 33.) The determination of the extent and priority of various and conflicting liens between creditors under chattel mortgage and a judgment-creditor under levy by execution; a multiplicity of actions between such creditors (Supervisors v. Deyoe, 77 N. Y. 219; N. Y. & N. H. R. R. Co. v. Schuyler, 17 N. Y. 608) and the advantage of a sale of property suitable, used and adapted to a particular business, in lump, and not in separate parcels, to the end that the greatest sum may be realized for the benefit of all the creditors. (Prentice v. Janssen, 79 N. Y. 479-490). Every one of these subjects has been held sufficient to maintain an action in equity. Their combination in one complaint should not be held to defeat an equity action."

§ 109. **Suing on behalf of others.** — Mr. Pomeroy says:[1] "One creditor may sue on behalf of all the other creditors in an action to enforce the terms of an assignment in trust for the benefit of creditors, to obtain an accounting and settlement from the assignee, and other like relief; also, in an action to set aside such an assignment on the ground that it is illegal and void; and also one judgment-creditor may sue on behalf of all other similar creditors in an action to reach the equitable assets, and to set aside the fraudulent transfers of the debtor. In all these classes of cases the creditors have a common interest in the questions to be determined by the controversy.[2] The complainant may sue alone or with other judgment-creditors.[3] It is remarked by Nelson, J., in Myers v. Fenn,[4] that "the practice of permitting judgment-creditors to come in and make themselves parties to the bill, and thereby obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled;"[5] but this intention must be manifested by suitable averments in the bill;[6] and the creditor so applying must not have been guilty of laches;[7] and if, after a finding of a court annulling a fraudulent preference, other creditors seek to come in as co-complainants, they may be allowed to do so, but their demands will be postponed in favor of the original com-

[1] Pomeroy's Remedies & Remedial Rights, § 394. See Pfohl v. Simpson, 74 N. Y. 137.

[2] See Greene v. Breck, 10 Abb. Pr. (N. Y.) 42; Brooks v. Peck, 38 Barb. (N. Y.) 519; Innes v. Lansing, 7 Paige (N. Y.) 583; Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 59; Hammond v. Hudson River I. & M. Co., 20 Barb. (N. Y.) 378; Chewett v. Moran, 17 Fed. Rep. 820; Ponsford v. Hartley, 2 Johns. & H. 736; Ballentine v. Beall, 4 Ill. 203; Terry v. Calnan, 4 S. C. 508.

[3] Marsh v. Burroughs, 1 Woods, 467, and cases cited.

[4] 5 Wall. 207.

[5] Compare Strike v. McDonald, 2 H. & G. (Md.) 192; Shand v. Hanley, 71 N. Y. 324; Barry v. Abbot, 100 Mass. 396; Neely v. Jones, 16 W. Va. 625.

[6] Burt v. Keyes, 1 Flipp, 72.

[7] See Flash v. Wilkerson, 22 Fed. Rep. 689.

plainant.[1] Where an action is brought in aid of an assignment to subject to it property fraudulently diverted, it can be prosecuted by any creditor whether he has obtained a judgment or not.[2]

Stockholders may sue in the right of the corporation where the latter refuses to proceed;[3] but where there is unreasonable delay in bringing the suit, the cause of action may be defeated by the application of the doctrine of equitable estoppel.[4] "Where one incurs expense in rescuing property belonging to many, a court of equity has power unquestionably to direct that the expenses so incurred shall be paid from the common fund."[5]

§ 110. **"And others."** — It is a mistake to suppose that the statute of Elizabeth only avoids deeds and conveyances coming within its exact provisions as to creditors. The statute is much broader in its operation.[6] It enacts that every conveyance made to the end, purpose and intent to delay, hinder, or defraud creditors *and others* of their just and lawful actions, etc., shall be void. "It extends not only to creditors, but to *all others* who have cause of action or suit, or any penalty or forfeiture;" and, as elsewhere shown, embraces claims for slander, trespass, and other torts.[7] The claimant may not come within a sharply defined meaning of the word "creditor," but he may

[1] Smith v. Craft, 11 Biss. 340.

[2] Spelman v. Freedman, 130 N. Y. 421, 29 N. E. Rep. 765; Maass v. Falk, 146 N. Y. 34, 40 N. E. Rep. 504; Abegg v. Bishop, 142 N. Y. 286, 36 N. E. Rep. 1058.

[3] Taylor v. Holmes, 127 U. S. 492, 8 S. C. Rep. 1192; Hawes v. Oakland, 104 U. S. 450; Greaves v. Gouge, 69 N. Y. 157; Wait on Insolvent Corps. § 74.

[4] Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Machine Co., 90 N. Y. 607.

[5] Merwin v. Richardson, 52 Conn. 223, 237.

[6] See § 16. Tyler v. Tyler, 126 Ill. 536, 21 N. E. Rep. 616.

[7] Gebhart v. Merfeld, 51 Md. 325. See Cooke v. Cooke, 43 Md. 523; Sexton v. Wheaton, 1 Am. Lea. Cas. 42, notes; Jackson v. Myers, 18 Johns. (N. Y.) 425; Lillard v. McGee, 4 Bibb. (Ky.) 165; Lowry v. Pinson, 2 Bailey's (S. C.) Law, 324, 328, and other cases there cited; McKenna v. Crowley, 16 R. I. 366, 17 Atl. Rep. 354.

maintain his standing "in the equity of creditors."[1] So in Feigley v. Feigley,[2] the court say: "The statute seems to design to embrace others than those who are strictly and technically creditors; and if, under such a comprehensive clause as 'creditors and others,' a wife, who has been made the victim of her husband's fraud, is not to be included, we are at a loss to ascertain to whom else it was designed to relate."[3] Then the principle that a voluntary post-nuptial settlement made by a person indebted is *prima facie* fraudulent, as to creditors, applies as well in behalf of the representatives of a deceased partner as of general creditors;[4] and a partner who liquidates firm judgments stands in the position of a creditor with regard to fraudulent alienations of his co-partner.[5]

§ 111. **Surety.**— Sureties on an appeal bond may be subrogated to the rights of the judgment-creditor, to bring a creditor's action to set aside fraudulent deeds,[6] even

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[1] Shontz v. Brown, 27 Pa. St. 131.

[2] 7 Md. 561.

[3] See Welde v. Scotten, 59 Md. 72.

Conveyance to defeat alimony.— In Bailey v. Bailey, 61 Me. 363, the court very properly ruled that if an estate was conveyed to prevent the enforcement of a decree awarding alimony, or other proper aid, such conveyance was fraudulent as to the wife and might be avoided. It was contended on the part of the husband that a person in the situation of the wife could not be regarded as a creditor so as to come within the statutes of Elizabeth relating to fraudulent conveyances. The court decided, however, that the statute covered creditors *and others*, and cited Livermore v. Boutelle, 11 Gray (Mass.) 217, a similar case, in which the court said: "If she was not a creditor she was of the others whose just and lawful actions, suits, and reliefs would be delayed, hindered, or defeated by such conveyance." See Green v. Adams, 59 Vt. 602, 10 Atl. Rep. 742; Foster v. Foster, 56 Vt. 546; Burrows v. Purple, 107 Mass. 428; Morrison v. Morrison, 49 N. H. 69; Scott v. Maglougblin, 133 Ill. 36, 24 N. E. Rep. 1030. In Tyler v. Tyler, 126 Ill. 536, 21 N. E. Rep. 616, the court says: "If the wife be not, technically, a 'creditor,' she surely comes within the language 'other persons,' and she is, obviously, as much injured by such a conveyance as any creditor can be." This language was used in a case where a husband conveyed property to defeat a claim for maintenance.

[4] Alston v. Rowles, 13 Fla. 118.

[5] Swan v. Smith, 57 Miss. 548.

[6] See Lewis v. Palmer, 28 N. Y. 271; Hinckley v. Kreitz, 58 N. Y. 590.

though the principal informed the sureties of the fraud before they became bound.[1] Sureties may enforce their rights in the creditor's name if their interests require it,[2] for "a surety who pays a debt for his principal is entitled to be put in the place of the creditor, and to all the means which the creditor possessed to enforce payment against the principal debtor."[3] It may be here recalled that a surety is a creditor of the principal obligor, and of his co-sureties from the time the obligation is entered into,[4] and that a conveyance by a surety for inadequate consideration to defeat a contemplated liability for contribution to a co-surety will be set aside.[5] A person who pays a debt as security for a firm becomes a creditor of the firm, and is not entitled to any greater rights than simple contract creditors.[6]

§ 112. **Executors and administrators.** — Ordinarily an executor or administrator will not be allowed to impeach the fraudulent conveyance of his testator or intestate. Like the heirs, he is bound by the acts of the deceased.[7]

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[1] Martin v. Walker, 12 Hun (N. Y.) 53.

[2] Townsend v. Whitney, 75 N. Y. 425; affi'g 15 Hun (N. Y.) 93. Compare Cuyler v. Ensworth, 6 Paige (N. Y.) 32; Speiglemyer v. Crawford, 6 Paige (N. Y.) 254.

[3] Lewis v Palmer, 28 N. Y. 271. See Wadsworth v. Lyon, 93 N. Y. 214; Shutts v. Fingar, 100 N. Y. 543, 3 N. E. Rep. 588.

[4] Pennington v. Seal, 49 Miss. 525; Williams v. Banks, 11 Md. 242; Sexton v. Wheaton, 1 Am. Lea, Cas. 37; Rider v. Kidder. 10 Ves. 360. See § 90.

[5] Pashby v. Mandigo, 42 Mich. 172.

[6] McConnel v. Dickson, 43 Ill. 99. Chief-Justice Thurman said, in a case in Ohio: "A surety against whom judgment has been rendered, may, without making payment himself, proceed, in equity, against his principal, to subject the estate of the latter to the payment of the debt." Hale v. Wetmore, 4 Ohio St. 600. See McConnell v. Scott, 15 Ohio, 401; Horsey v. Heath, 5 Ohio, 354; Stump v. Rogers, 1 Ohio, 533.

[7] Blake v. Blake, 53 Miss. 193; Merry v. Fremon, 44 Mo. 522; Zoll v. Soper, 75 Mo. 462; Davis v. Swanson, 54 Ala. 277; George v. Williamson, 26 Mo. 190; Loomis v. Tifft, 16 Barb. (N. Y.) 545; Van Wickle v. Calvin, 23 La. Ann. 205; Choteau v. Jones, 11 Ill. 319; Snodgrass v. Andrews, 30 Miss. 472; Peaslee v. Barney, 1 D. Chip. (Vt.) 331; Hawes v. Loader, Yelv. 196; Livingston v. Livingston, 3 Johns. Ch. (N. Y.) 148; Estes v. Howland, 15 R. I. 128; Burton v.

"As a party to a fraudulent conveyance cannot allege its illegality, with a view to its avoidance, so neither can his heirs nor representatives coming in as volunteers, and standing, as it were, in his shoes."[1] This language is employed in Rhode Island: "If the deceased has conveyed his estates away in fraud of his creditors, the creditors who have been defrauded are the proper parties to prosecute the remedy."[2] Statutory changes supported by the tendency of the courts to prevent the confusion incident to splitting up the administration of estates between creditors and personal representatives, have led to the general establishment of the practice of permitting and imposing the duty upon executors and administrators to sue for property fraudulently alienated by the deceased in his lifetime.[3] Thus in New York, executors and administrators, who could not formerly effectually impeach the conveyances of the deceased on the ground that the same were made in fraud of cred-

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Farinholt, 86 N. C. 260. An exception is often recognized to exist independent of statute where the estate is insolvent. Clark v. Clough, 65 N. H. 43, 23 Atl. Rep. 526.

[1] McLaughlin v. McLaughlin, 16 Mo. 242. See Hall v. Callahan, 66 Mo. 316; Beebe v. Saulter, 87 Ill. 518; Crawford v. Lehr, 20 Kan. 509; Rhem v. Tull, 13 Ired. Law (N. C.) 57. It has been held in New York, that a surrogate had no jurisdiction to determine the validity of such a transfer. Richardson v. Root, 19 Hun (N. Y.) 473; Barton v. Hosner, 24 Hun (N. Y.) 468.

[2] Estes v. Howland, 15 R. I. 129, 23 Atl. Rep. 624.

[3] See Martin v. Root, 18 Mass. 222; Welsh v. Welsh, 105 Mass. 229; Gibson v. Crehore, 5 Pick. (Mass.) 154; Hills v. Sherwood, 48 Cal. 392; McKnight v. Morgan, 2 Barb. (N. Y.) 171; Morris v. Morris, 5 Mich. 171; McLane v. Johnson, 43 Vt. 48; Parker v. Flagg, 127 Mass. 30; Bouslough v. Bouslough, 68 Pa. St. 495; Bushnell v. Bushnell, 88 Ind. 403; Cross v. Brown, 51 N. H. 486; also note to Ewing v. Handley, 14 Am. Dec. 157; Barton v. Hosner, 24 Hun (N. Y.) 468; Johnson v. Jones, 79 Ind. 141; Holland v. Cruft, 20 Pick. (Mass.) 321; Martin v. Bolton, 75 Ind. 295; German Bank v. Leyser, 50 Wis. 258, 6 N. W. Rep. 809; Garner v. Graves, 54 Ind. 188; Forde v. Exempt Fire Co., 50 Cal. 299; Norton v. Norton, 5 Cush. (Mass.) 524; Sullice v. Gradenigo, 15 La. Ann. 582; note to Hudnal v. Wilder, 17 Am. Dec. 744, 4 McCord's S. C. Law, 294; Bassett v. McKenna, 52 Conn. 437.

itors, are now enabled to do so by statute.[1] This new remedy, however, is not exclusive. Formerly in that State a creditor could bring an action only when the personal representative was in collusion with the fraudulent vendee, against the personal representative and vendee to have the covinous transfer set aside, and the property applied as assets,[2] but by recent legislation [3] the right to sue is extended, and it is not necessary that the plaintiff should reduce his claim to judgment. The action must be brought on behalf of himself and other creditors, but the absence of such allegation is waived if not taken by demurrer or answer.[4] In Wisconsin the cred-

[1] N. Y Laws, 1889, ch. 487. See Moseley v. Moseley, 15 N. Y. 336; Bate v. Graham, 11 N. Y. 237; Barton v. Hosner, 24 Hun (N. Y.) 469; Bryant v. Bryant, 2 Rob. (N. Y.) 612; Southard v. Benner, 72 N. Y. 427; McKnight v. Morgan, 2 Barb. (N. Y.) 171; Lore v. Dierkes, 19 J. & S. (N. Y.) 144. National Bank of West Troy v. Levy, 127 N. Y. 549; Lichtenberg v. Hartfelder, 103 N. Y. 302. Where the deed was not delivered till after the death of the testator his executor can bring no action to set it aside. Rosseau v. Bleau, 131 N. Y. 177, 30 N. E Rep. 52; Putney v. Fletcher, 148 Mass. 247, 19 N. E. Rep. 370. In Massachusetts the remedy is exclusive. The same rule applies in Indiana. Ind. R. S. 1881, § 2333. See Galentine v. Wood, 137 Ind. 532, 35 N. E. Rep. 901.

[2] See Phelps v. Platt, 50 Barb. (N. Y.) 430; Sharpe v. Freeman, 45 N. Y. 802; Bate v. Graham, 11 N. Y. 237; Barton v. Hosner, 24 Hun (N. Y.) 468. See §§ 114, 115.

[3] N. Y. Laws, 1889, ch. 487. In National Bank v. Levy, 127 N. Y. 554, the court says: "The plaintiff as a creditor, on the refusal of the administrator to bring the action, was at liberty as it did to do so, making her a party defendant with a view to the same equitable relief which may have been awarded if she had been the party plaintiff. (Bate v. Graham, 11 N. Y. 237; Greaves v. Gouge, 69 N. Y. 154; Crouse v. Frothingham, 97 N. Y. 105)."

[4] Brown v. Brown, 83 Hun (N. Y.) 162, 31 N. Y. Supp. 650; Nat. Tradesmen's Bank v. Wetmore, 124 N. Y. 241, 26 N. E. Rep. 248. In Prentiss v. Bowden, 145 N. Y. 342, 40 N. E. Rep. 13, Finch, J., says: "Our whole theory of administration rests upon the idea that when a man dies his estate shall answer to his creditors equally and without preference, and the surrogate is purposely made master of the situation to prevent inequality of payment. This plaintiff could undoubtedly have maintained an action for the benefit of all the creditors, after refusal of the representatives, to set this conveyance aside, but instead of that she is seeking, by an ordinary creditor's action, to secure payment of her own debt, regardless of what may happen to others."

itor may, in a proper case, compel the executor or administrator to bring the action, or bring it himself.[1] In Pennsylvania it is said that the administrator's intervention would not seem to be necessary if the creditors prefer to proceed for themselves.[2] In Wisconsin the insufficiency of the estate to pay debts must first be ascertained by the county court.[3] This prerequisite of a formal establishment of the debt as already shown[4] is not now universally conceded to be essential. The Supreme Court of the United States asserts[5] that the authorities are abundant and well settled, that a creditor of a deceased person has a right to go into a court of equity for the discovery of assets, and to secure the payment of the debt; and the creditor, when there, would not be turned back to a court of law to establish his debt. The court being in rightful possession of the cause for a discovery and account, will proceed to a final decree upon all the merits.[6] So debts which are made by statute a lien upon lands of a deceased debtor, will furnish a creditor at large, the correctness of whose claim is acknowledged by the executor, a standing in court to file a creditors' bill to set aside conveyances alleged to have been made by the testator in fraud of creditors.[7] In California the rule is recognized that a creditor may bring the action, if the executor refuses, and that no request is necessary where the executor is also the alleged fraudulent grantee.[8] The action can only

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[1] German Bank v. Leyser, 50 Wis. 258, 6 N. W. Rep. 809. See Andrew v. Hinderman, 71 Wis. 148, 36 N. W. Rep. 624.

[2] Appeal of Fowler, 87 Pa. St. 454.

[3] German Bank v. Leyser, 50 Wis. 258, 6 N. W. Rep. 809.

[4] § 79.

[5] Kennedy v. Creswell, 101 U. S. 645. See Johnson v. Powers, 139 U. S. 165, 11 S. C. Rep. 525, dissenting opinion of Brown, J.

[6] Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619. See § 79.

[7] Haston v. Castner, 31 N. J. Eq. 697, and cases cited. See Jones v. Davenport, 44 N. J. Eq. 34, 13 Atl. Rep. 652. See § 87.

[8] Emmons v. Barton, 109 Cal. 662, 42 Pac. Rep. 303.

be brought by the executor where there is an insufficiency of assets in his hands.[1]

The creditor's bill in Kennedy v. Creswell[2] was filed against an executor and devisees, and alleged that the complainant held the testator's notes for $12,000; and recited that the personal assets were insufficient to meet the debts, and that the executor was paying some of the claims in full, and leaving others unsatisfied. The creditors prayed for an accounting of the personal estate, a discovery of the real estate, and an application of all the property to the payment of the debts. A plea was interposed setting forth that the executor had assets sufficient to pay the complainant and all other creditors. A replication was filed and proofs taken, which sustained the allegations of the bill, and demonstrated the falsity of the plea. The court decided that the complainant was entitled to a decree *pro confesso*,[3] and the defendant could not claim the right to answer after interposing a false plea; that the admission of the executor that he had assets, could "be taken against him for the purpose of charging him with a liability," but it could not "serve him as evidence to prove the truth of his plea."

§ 113.— The personal representative may render himself individually liable to creditors for a failure to recover property fraudulently alienated by the testator or intestate,[4]

[1] Field v. Andrada, 106 Cal. 107, 39 Pac. Rep. 323; Smith v. N. Y. Life Ins. Co., 57 Fed. Rep. 133; to same effect, McCall v. Pixley, 48 Ohio St. 379, 27 N. E. Rep. 887.

[2] 101 U. S. 641. See Johnson v. Powers, 139 U. S. 156.

[3] See Dows v. McMichael, 2 Paige (N. Y.) 345.

[4] Lee v. Chase, 58 Me. 436; Cross v. Brown, 51 N. H. 488; Danzey v. Smith, 4 Texas, 411. See Sawyer v. Thayer, 70 Me. 340; O'Connor v. Gifford, 117 N. Y. 275, 22 N. E. Rep. 1036. In Matter of Hart, 60 Hun (N. Y.) 516, 15 N. Y. Supp. 239, the court say: "It appeared that Archibald Johnston, who died in August, 1889, was for years prior to his decease insolvent, and that the administrators had knowledge of his insolvency. It further appeared that in 1886, for a nom-

and he should include such property in the inventory,[1] unless, of course, he has no knowledge of it.[2] The personal representative, as he stands for creditors when so acting, can only attack fraudulent transfers in cases where the estate is insolvent,[3] and with a view to recover a sum sufficient to satisfy the creditors. The complaint should allege that the action is instituted for the benefit of creditors.[4] The legislation clothing personal representatives with the power to appeal to the courts to annul covinous alienations made by the deceased is often highly salutary in practice. The concurrent right of the creditor to seek redress is manifestly of the utmost importance, for the personal representative is usually selected by, or is a near relative of, the deceased and may, in some cases, be prompted by motives of friendship or self-interest to shield the parties who have depleted the estate; and, in some instances, is himself the fraudulent alienee. Where the personal representatives sue, a multiplicity of suits is prevented in cases where the creditors are numerous and the necessity of a judgment

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inal consideration, he conveyed to one Harris an interest in this leasehold estate, which Harris upon the same day conveyed to the wife of said Johnston for a like consideration. Johnston being insolvent at the time of this conveyance, the same was a fraud upon his creditors if the lease was of any value whatever; and it would appear from the transactions had by the administrators, in respect to other interests in this lease, that it was valuable. Under these circumstances it certainly was the duty of the administrators to take proceedings to recover this property which Johnston had disposed of in fraud of his creditors. This the administrators, with full knowledge of these facts, failed to do, and it seems to us that they are chargeable with neglect of duty."

[1] Minor v. Mead, 3 Conn. 289; Bourne v. Stevenson, 58 Me. 504; Booth v. Patrick, 8 Conn. 106; Andruss v. Doolittle, 11 Conn. 283.

[2] Booth v. Patrick, 8 Conn. 106. In Alabama an administrator has such a right to the lands of his intestate as will enable him to maintain a bill in equity for the cancellation of a conveyance of the lands obtained by fraud, provided the heirs are made parties. Waddell v. Lanier, 62 Ala. 347.

[3] Hess v. Hess, 19 Ind. 238; Pringle v. Pringle, 59 Pa. St. 281; Wall v. Provident Inst., 3 Allen (Mass.) 96.

[4] Crocker v. Craig, 46 Me. 327.

or execution is avoided,[1] features important to the body of creditors.[2]

§ 114. **Assignee in bankruptcy.** — An assignee in bankruptcy, under the late bankrupt act, represented the whole body of creditors, and could in their behalf impeach, as fraudulent, a conveyance of property by the bankrupt, whenever the creditors might, by any process, acquire the right to contest its validity. This rule is of quite general application.[3] It is said, however, in the New York Court of Appeals,[4] that, "if the assignee should refuse or neglect to sue for and reclaim property fraudulently transferred, it is abundantly established that the creditors may commence an action to reach the property, making the assignee, the debtor, and his transferees parties defendant. And, in such an action, the property will be administered directly for the benefit of the creditors."[5] It is believed, however, that it is impossible to reconcile this doctrine

[1] Barton v. Hosner, 24 Hun (N. Y.) 471.

[2] Fletcher v. Holmes, 40 Me. 364.

[3] *In re* Collins, 6 Fed. Cases, 114; Foster v. Hackley, 9 Fed. Cases, 545; Southard v. Benner, 72 N. Y. 427; Platt v. Mead, 7 Fed. Rep. 95; Butcher v. Harrison, 4 Barn. & Adol. 129; Brackett v. Harvey, 25 Hun (N. Y.) 503; Nicholas v. Murray, 5 Sawyer, 320; Trimble v. Woodhead, 102 U. S. 647; Bates v. Bradley, 24 Hun (N. Y.) 84; Doe *d.* Grimsby v. Ball, 11 M. & W. 531; Moyer v. Dewey, 103 U. S. 301; Ball v. Slafter, 26 Hun (N. Y.) 354; Phelps v. McDonald, 99 U. S. 298; Glenny v. Langdon, 98 U. S. 28; Shackleford v. Collier, 6 Bush (Ky.) 149; Badger v. Story, 16 N. H. 168; Day v. Cooley, 118 Mass. 527; Wadsworth v. Williams, 100 Mass. 126. The adjudication exempted the debtor's property from attachment. Williams v. Merritt, 103 Mass. 184. As to when an assignee in bankruptcy cannot overturn a fraudulent conveyance, see Warren v. Moody, 122 U. S. 132, 7 S. C. Rep. 1063.

[4] Dewey v. Moyer, 72 N. Y. 78; Cronse v. Frothingham, 97 N. Y. 106; Harvey v. McDonnell, 113 N. Y. 531, 21 N. E. Rep. 695; Spelman v. Freedman, 130 N. Y. 427, 29 N. E. Rep. 765.

[5] Citing Sands v. Codwise, 2 Johns. (N. Y.) 487; Freeman v. Deming, 3 Sandf. Ch. (N. Y.) 327; Seaman v. Stoughton, 3 Barb. Ch. (N. Y.) 344; Fort Stanwix Bank v. Leggett, 51 N. Y. 552; Card v. Walbridge, 18 Ohio, 411; Phelps v. Curts, 80 Ill. 109; Francklyn v. Fern, Barn. Ch. 30; First Nat. Bank v. Cooper, 9 N. B. R. 529; Boone v. Hall, 7 Bush (Ky.) 66. See Bank v. Cooper, 20 Wall. 171; Sands v. Codwise, 4 Johns. (N. Y.) 536; Kidder v. Horrobin, 72 N. Y. 164; Bates v. Bradley, 24 Hun (N. Y.) 84.

with the decisions of the United States Supreme Court,[1] for, according to the latter court, if the assignee in whom the right is vested neglected to prosecute during the two years allowed by the act, the right to attack the fraudulent transfer would be absolutely gone.[2] The assignee appointed under the act became vested with the title to the bankrupt's assets by an assignment from the court, into whose custody the estate was, in theory of law, intrusted. Even a claim in favor of the bankrupt against a foreign government passed to the assignee.[3] The assignee is regarded merely as a trustee for creditors. When his accounts are passed, and he is discharged, the property not disposed of reverts to the debtor by operation of law without reassignment.[4] The assignee in bankruptcy takes only such rights as the bankrupt had, and, in the absence of actual fraud, a general assignment

[1] Compare Moyer v. Dewey, 103 U. S. 303; Trimble v. Woodhead, 102 U. S. 649; Glenny v. Langdon, 98 U. S. 20; Lowry v. Coulter, 9 Pa. St. 349; McMaster v. Campbell, 41 Mich. 514; McCartin v. Perry, 39 N. J. Eq. 201.

[2] Compare Bates v. Bradley, 24 Hun (N. Y.) 84; Allen v. Montgomery, 48 Miss. 101.

[3] Phelps v. McDonald, 99 U. S. 302; Comegys v. Vasse, 1 Pet. 195.

[4] See Dewey v. Moyer, 9 Hun (N. Y.) 480; Colie v. Jamison, 4 Hun (N. Y.) 284; Page v. Waring, 76 N. Y. 473, and cases cited; Boyd v. Olvey, 82 Ind. 294. In Stewart v. Platt, 101 U. S. 738, the court said: "In Yeatman v. Savings Institution, 95 U. S. 764, we held it to be an established rule that, 'except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt.' Brown v. Heathcote, 1 Atk. 160; Mitchell v. Winslow, 2 Story, 630; Gibson v. Warden, 14 Wall. 244; Cook v. Tullis, 18 Wall. 332; Donaldson v. Farwell, 93 U. S. 631; Jerome v. McCarter, 94 U. S. 734. He takes the property in the same 'plight and condition' that the bankrupt held it. Winsor v. McLellan, 2 Story, 402." Actual fraud is necessary to give the assignee a standing in court. Metropolitan Nat. Bank v. Rogers, 3 C. C. A. 666, 53 Fed. Rep. 770; Warren v. Moody, 122 U. S. 133, 7 S. C. Rep 1063; *In re* Thomas, 45 Fed. Rep. 784.

made prior to the assignment in bankruptcy is good against the assignee.[1]

§ 115. **General assignee.**— It is a general rule of law that a person cannot, by any voluntary act of his own transfer to another a right which he does not himself possess. A fraudulent transfer of property by a debtor, made with intent to defeat creditors, is, as we shall presently show, conclusive upon the debtor so that he cannot himself reclaim it. No logical theory can be easily framed upon which it can be said that an assignment, wholly voluntary on the debtor's part, vests in his assignee the right to attack fraudulent transfers.[2] Consequently, it has been decided that the right to impeach or set aside a mortgage which is fraudulent and void as against the creditors of the mortgagor, did not pass to an assignee of the mortgagor, by a voluntary general assignment in trust for the benefit of creditors, subsequently executed, and unaffected by any statute in force at the time.[3] Still, there are many States in which an assignment in insolvency or a voluntary assignment is held to vest in the assignee the right to avoid a conveyance made in fraud of creditors; and in some States the power is statutory.[4] Such an assignee may also set

[1] *In re* Arledge, 1 Fed. Cases, 1127.

[2] Pillsbury v. Kingon, 31 N. J. Eq. 619; Brownell v. Curtis, 10 Paige (N. Y.) 210; Storm v. Davenport, 1 Sandf. Ch. (N. Y.) 135; Sere v. Pitot, 6 Cranch, 332; Estabrook v. Messersmith, 18 Wis. 545; Browning v. Hart, 6 Barb. (N. Y.) 91; Leach v. Kelsey, 7 Barb. (N. Y.) 466; Maiders v. Culver's Assignee, 1 Duv. (Ky.) 164; Carr v. Gale, 3 Woodb. & M. 68; Flower v. Cornish, 25 Minn. 473, 1 Am. Insolv. Rep. 184; Day v. Cooley, 118 Mass. 527; Goff v. Kelly, 74 Fed. Rep. 327.

[3] Flower v. Cornish, 25 Minn. 473.

[4] Hallowell v. Bayliss, 10 Ohio St. 537; Gibbs v. Thayer, 6 Cush. (Mass.) 30; Blake v. Sawin, 10 Allen (Mass.) 340; Freeland v. Freeland 102 Mass. 475; Spring v. Short, 12 Weekly Dig. (N. Y.) 360, affi'd 90 N. Y. 544; Lynde v. McGregor, 13 Allen (Mass.) 172; Waters v. Dashiell, 1 Md. 455; Simpson v. Warren, 55 Me. 18; Shipman v. Ætna Ins. Co., 29 Conn. 245; Shirley v. Long. 6 Rand. (Va.) 735; Clough v. Thompson, 7 Gratt. (Va.) 26; Staton v. Pittman, 11 Gratt. (Va.) 99; Doyle v. Peckham, 9 R. I. 21; Southard v. Benner, 72 N. Y. 424; McMahon v. Allen, 35 N. Y. 403; Moncure v. Han-

aside a mortgage or other conveyance which is void as to creditors, for want of registration or other defects.[1] And in some cases it is held that the assignee may affirm such fraudulent conveyance, and thereby estop creditors from impeaching it.[2] In New York creditors cannot assail a fraudulent alienation so long as there is a valid assignment in force. The right of attack is vested by statute in the assignee.[3] But a creditor can, where the assignee refuses to act, bring an action in behalf of the whole body

son, 15 Pa. St. 385; Tams v. Bullitt, 35 Pa. St. 308; Matter of Cornell, 110 N. Y. 360, 18 N. E. Rep. 142. See 22 Alb. L. J. 60, 81; Kilbourne v. Fay, 29 Ohio St. 264. In Walton v. Ely, 53 Kan. 260, 36 Pac. Rep. 332, the court says: "This question has been practically decided in the affirmative in Chapin v. Jenkins, 50 Kan. 385, 31 Pac. Rep. 1084. In that case, the difference between common-law and statutory assignments was recognized. Under the former, the relations of the parties were controlled by contract, and the assignee had no power except such as was conferred upon him by contract. As he stood in the shoes of the assignor, he could assert no claim to property fraudulently conveyed which the assignor could not himself have asserted As has been decided in the cited case, our statute changes the effect of an assignment, and also the powers of the assignee, as well as his relations to the creditors. While the assignment, in the first instance, is the act of the assignor, thereafter the control and disposition of the property, and also the powers and duties of the assignee, are regulated by statute, and no direction or limitation of the assignor is of any effect. Under our statute, the assignee is made the representative of all the creditors, and it is his duty to protect the estate and defend the property assigned against adverse and unjust claims." Mansfield v. First Nat. Bank, 5 Wash. 665; Brown v. Farmers' & M. Banking Co., 36 Neb. 434; Red River Valley Bank v. Freeman, 1 N. Dak. 196; Moorer v. Moorer, 87 Ala. 545; Starks v. Curd, 88 Ky. 164. It has been held in some States that if the assignee refuses to bring the action, the creditor may bring it. Kalmus v. Ballin, 52 N. J. Eq. 290, 28 Atl. Rep. 791; Lee v. Cole, 44 N. J. Eq. 318, 15 Atl. Rep. 531.

[1] Rood v. Welch, 28 Conn. 157; Hanes v. Tiffany, 25 Ohio St. 549; *In re* Leland, 10 Blatchf. 503; Barker v. Smith, 12 N. B. R. 474. But see Williams v. Winsor, 12 R. I. 9; Dorsey v. Smithson, 6 H. & J. (Md.) 61; Van Heusen v. Radcliff, 17 N. Y. 580; Ball v. Slaften, 98 N. Y. 622. He may set up the fraudulent character of the conveyance or mortgage when it is attempted to be enforced against him. Hutchinson v. First Nat. Bank, 133 Ind. 271, 30 N. E. Rep. 952.

[2] Butler v. Hildreth, 5 Met. (Mass.) 49; Freeland v. Freeland, 102 Mass. 477. But see Matter of Leiman, 32 Md. 225; Dugan v. Vattier, 3 Blackf. (Ind.) 245.

[3] Loos v. Wilkinson, 110 N. Y. 209, 18 N. E. Rep. 99; Spring v. Short, 90 N. Y. 538; Crouse v. Frothingham, 97 N. Y. 105, 113; Laws of 1858, Chap. 314. In matter of Cornell, 110 N. Y. 360, the court says: "Under

of creditors, in aid of the assignment, where the instrument is valid as a whole, but certain of its provisions tend to deprive the creditors of property to which they are justly entitled.[1] The right to bring such an action is not revived by the discharge of the assignee.[2] The right to the cause of action and to the proceeds vests exclusively in him; after his appointment the judgment-creditors cannot bring an independant action.[3] In Minnesota it was held that a receiver in insolvency can bring suit to set aside fraudulent conveyances, and that it is not necessary that the claims of the creditors on whose behalf he sues should first have been reduced to judgment.[4] It is also held in the same State that it is to be presumed that the assignee represents creditors when he sues, and that a purchaser from the assignee may maintain a suit to avoid a fraudulent mortgage affecting the property purchased.[5] Of course the creditor may be estopped from attacking the assignment by accepting benefits under it.[6] It has been asserted that where the assignee is given by statute full power to attack fraudulent transfers, stronger reasons for setting aside an assignment on the ground of fraud must be shown.[7]

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the act chapter 314 of the Laws of 1858, an assignee for creditors, under a general assignment, may assail fraudulent transfers of property made by the assignor prior to the assignment, by action to set them aside. (Southard v. Benner, 72 N. Y. 424; Ball v. Shaften, 98 Id. 622; Lichtenberg v. Herdtfelder, 103 Id. 306). Nor do we entertain any doubt that it would be his duty so to do in a proper case, and that his negligent omission of this duty would constitute a breach of trust. (*In re* Cohn, 78 N. Y. 248)"

[1] Spelman v. Freedman, 130 N. Y. 421, 29 N. E. Rep. 765; Abegg v. Bishop, 142 N. Y. 286, 36 N. E. Rep. 1058; Maass v. Falk, 146 N. Y. 34, 40 N. E. Rep. 504.

[2] Voorhees v. Carpenter, 127 Ind. 300, 26 N. E. Rep. 838.

[3] Passavant v. Bowdoin, 60 Hun, (N. Y.) 433, 15 N. Y. Supp. 8.

[4] Chamberlain v. O'Brien, 46 Minn. 80, 48 N. W. Rep. 447.

[5] Shay v. Security Bank, 69 N. W. Rep. 920.

[6] Groves v. Rice, 148 N. Y. 227, 233, 42 N. E. Rep. 664; Mills v. Parkhurst, 126 N. Y. 89, 26 N. E. Rep. 1041. Cerf v. Wallace, 14 Wash. 249, 252, 44 Pac. Rep. 264.

[7] Batten v. Smith, 62 Wis. 92, 96, 22 N. W. Rep. 342. But see Krumdick v. White, 107 Cal. 37, 39 Pac. Rep. 1066; Green v. Wallis Iron Works, 49 N. J. Eq. 48, 23 Atl. Rep. 498.

§ 116. **Receivers.**—Under the practice in New York, and in some of the other States, the receiver of a debtor may impeach fraudulent transfers,[1] and disaffirm fraudulent dealings of the debtor.[2] The appointment confers upon him the right to set aside all transfers made by the debtor to defraud his creditors, which the creditors themselves could have avoided.[3] In Bostwick v. Menck,[4] it was decided that the right of a receiver representing creditors, and acting in their behalf, was no greater than that of the creditors themselves; that the legal and equitable right of the creditors was limited to securing a judgment setting aside transfers as fraudulent only in so far as might be necessary to satisfy debts; and that, when this was accomplished, the receiver's duties, and consequently his powers, and his right to act further in behalf of the creditors, ceased as to the property that had been conveyed by the debtor.[5] The receiver stands in the place of the judgment-creditor.[6] In Olney v. Tanner,[7] after a careful

[1] Osgood v. Laytin, 48 Barb. (N. Y.) 463; affi'd 5 Abb. Pr. N. S. (N. Y.) 9; Hamlin v. Wright, 23 Wis. 492; Barton v. Hosner, 24 Hun (N. Y.) 469; Porter v. Williams, 9 N. Y. 142; Underwood v. Sutcliffe, 77 N. Y. 62; Erdall v. Atwood, 79 Wis. 1, 47 N. W. Rep. 1124; Dunham v. Byrnes, 36 Minn. 106, 30 N. W. Rep. 402. In Mandeville v. Avery, 124 N. Y. 385, 26 N. E. Rep. 951, Brown, J., said: "A receiver appointed in supplementary proceedings under the Code is vested with the legal title to all the personal property of the judgment-debtor, and has the further right to prosecute actions to set aside all transfers of property made by the debtor to defraud his creditors." S. P., Stephens v. Perrine, 143 N. Y. 476, 39 N. E. Rep. 11. See Heineman v. Hart, 55 Mich. 64, 20 N. W. Rep. 792.

[2] Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46, 23 N. E. Rep. 530.

[3] A new receiver (Bowden v. Johnson, 107 U. S. 264, 2 S. C. Rep. 246), or an assignee of a bankrupt, may be substituted as plaintiff in the appellate courts.

[4] 40 N. Y. 386. In Stephens v. Perrine, 143 N. Y. 483, 39 N. E. Rep. 11, the court say: "It has been decided by this court that such a receiver can maintain an action of this nature where the assignment or mortgage is void on the ground that it was executed for the purpose of defrauding creditors, and we think the same principle reaches the case where the mortgage is void because it was not filed and there was no change of possession."

[5] See Manley v. Rassiga, 13 Hun (N. Y.) 290.

[6] Kennedy v. Thorp, 51 N. Y. 174. See Olney v. Tanner, 18 Fed. Rep. 636.

[7] 10 Fed. Rep. 113; affi'd 18 Fed. Rep. 636.

examination of the authorities,[1] the conclusion is reached that a receiver appointed in supplementary proceedings cannot be held to be vested by virtue of his appointment with the title to property fraudulently conveyed by the judgment-debtor. The court will refuse to put him summarily in possession of the property covinously alienated; it will not authorize him to meddle with it, and will refuse to protect him in so doing. The receiver may, as we have seen, assail the covinous transfer by an action.[2] Grover, J., said, in Bostwick v. Menck:[3] "He (the receiver) acquires no right to the property (fraudulently assigned), by succession to the rights of the debtor; . . . . no rights (*i. e.* of property) other than those of the debtor are acquired. He does not acquire the legal title to such property by his appointment. That is confined to property then owned by the debtor; and the fraudulent transferee of property acquires a good title thereto as against the debtor, and all other persons, except the creditors of the transferrer. The only right of the reciver is, therefore, as trustee of the creditors. The latter have the right to set aside the transfer and to recover the property from the fraudulent holder; and the receiver is, by law, invested with all the rights of all the creditors represented by him in this respect."[4]

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[1] See Rodman v. Henry, 17 N. Y. 484; Lathrop v. Clapp, 40 N. Y. 333; Brown v. Gilmore, 16 How. Pr. (N. Y.) 527; Teller v. Randall, 40 Barb. (N. Y.) 242; Field v. Sands, 8 Bosw. (N. Y.) 685; Bostwick v. Menck, 40 N. Y. 383; Becker v. Torrance, 31 N. Y. 637; Mandeville v. Avery, 124 N. Y. 376, 26 N. E. Rep. 951.

[2] It is only through the instrumentality of an asssignee, that a creditor can reach property fraudulently transferred by a bankrupt prior to adjudication. Olney v. Tanner, 18 Fed. Rep. 637; Glenny v. Langdon, 98 U. S. 20; Trimble v. Woodhead, 102 U. S. 647; Moyer v. Dewey, 103 U. S. 301. Where there is an assignee a receiver has no standing. Olney v. Tanner, 18 Fed. Rep. 637.

[3] 40 N. Y. 383.

[4] In New York the receiver takes title to the debtor's real property by virtue of his appointment. Cooney v. Cooney, 65 Barb. (N. Y.) 525; Fessenden v. Woods, 3 Bosw. (N. Y.) 556; Bostwick v. Menck, 40 N. Y. 384; Underwood v. Sutcliffe, 77 N. Y. 62. See Stephens v. Meriden Britannia Co., 13 App. Div. (N. Y.) 272, 43 N. Y. Supp. 226.

In New Jersey, a receiver, appointed by virtue of the statute providing a method for discovering the concealed property of a judgment-debtor,[1] can, in his official character, exhibit a bill in chancery to annul sales of such property or encumbrances upon it, on the ground that such sales or encumbrances are in fraud of creditors.[2] In the case first cited, Parker v. Browning,[3] is quoted with approval. In the latter case, in speaking of the course to be taken, when property, which is claimed by a receiver appointed by the chancellor, is in the hands of a third party, who claims the right to retain it, Chancellor Walworth says: "The receiver must either proceed by suit, in the ordinary way, to try his right to it, or the complainant should make such third person a party to the suit, and apply to have the receivership extended to the property in his hands."[4] A sequestrator or receiver of personal property and rents appointed in an action may, under the direction of the court, test a fraudulent alienation of property,[5] though this question is much confused in New York.[6]

[1] Revision of 1877, p. 393.

[2] Miller v. Mackenzie, 29 N. J. Eq. 292. But compare Higgins v. Gillesheiner, 26 N. J. Eq. 308.

[3] 8 Paige (N. Y.) 388.

[4] See Carr v. Hilton, 1 Curt. C. C. 230; Hamlin v. Wright, 23 Wis. 492; Bostwick v. Menck, 4 Daly (N. Y.) 68. Willard, J., in Porter v. Williams, 9 N. Y. 142, 150, said: "The act which the receiver seeks to avoid in this case was an illegal act of the debtor. The object of the action is to set aside an assignment made by the debtor with intent, as is alleged, to defraud the creditor under whose judgment and execution the plaintiff was appointed receiver, and the other creditors of the assignor. Such conveyance was void at common law, and is expressly forbidden by the statute. It is void as against the creditors of the party making it, though good as between him and his grantee. The plaintiff, representing the interests of the creditors, has a right to invoke the aid of the court to set aside the assignment. He stands in this respect, in the same condition as the receiver of an insolvent corporation, or as an executor or administrator, and like them can assail the illegal and fraudulent acts of the debtor whose estate he is appointed to administer."

[5] See Donnelly v. West, 17 Hun (N. Y.) 564; Foster v. Townshend, 2 Abb. N. C. (N. Y.) 29.

[6] See Foster v. Townshend, 68 N. Y. 203; Ogden v. Arnot, 29 Hun (N. Y.) 150; Keeney v. Home Ins. Co., 71 N. Y. 396; Fincke v. Funke, 25 Hun (N. Y.) 618.

§ 117. Receivers of corporations. — Receivers of insolvent corporations, when suing for portions of the capital, represent creditors,[1] and not the corporation,[2] and are clothed with other rights than those which the corporation possessed.[3] It is a fundamental principle, upon which the American cases at least proceed, that the capital of a corporation, especially after insolvency, is a trust fund for the benefit of creditors.[4] The same is true of

[1] Van Fleet, V. C., in Graham Button Co. v. Spielmann, 50 N. J. Eq. 124, said: "The receiver of an insolvent corporation becomes, as soon as he qualifies, invested, by force of the statute, with full power to demand, sue for and take into his possession all of the property of every description belonging to the corporation, and to convert the same into money. . . . . From that time forth its property is, by law, appropriated exclusively and irrevocably to the payment of its debts. Power is conferred on its receiver to take possession of all of its property and to convert it into money, to the end that the money thus obtained may be distributed among its creditors. No other application or disposition can be made of the money realized from its property. It must be paid to its creditors, and in distributing it among unsecured creditors, the statutory direction is that they must be paid equally in proportion to their respective debts."

[2] Osgood v. Ogden, 4 Keyes (N. Y.) 70; Ruggles v. Brock, 6 Hun (N. Y.) 164; Sawyer v. Hoag, 17 Wall. 610, 619; Webster v. Upton, 91 U. S. 65, 71; Chubb v. Upton, 95 U. S. 665, 667; Dayton v. Borst, 31 N. Y. 435, Wait on Insolv. Corps. Chap X.

[3] Ruggles v. Brock, 6 Hun (N. Y.) 164; Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46, 23 N. E. Rep. 530; Graham Button Co. v. Spielmann, 50 N. J. Eq. 120, 24 Atl Rep. 571; Upton v. Englehart, 3 Dillon, 496, 503; Osgood v. Ogden, 4 Keyes (N. Y.) 70, 88; Porter v. Williams, 9 N. Y. 142, 149; Osgood v. Laytin, 3 Keyes (N. Y.) 521; Gillet v. Moody, 3 N. Y. 479. A corporation is like a natural person in that any conveyance of its property without authority of law, and in fraud of existing creditors, is void as against them. Wabash, St. L. & P. R. R. Co. v. Ham, 114 U. S. 594, 5 S. C. Rep. 1081; Richardson v. Green, 133 U. S. 44, 10 S. C. Rep. 280.

[4] Wood v. Dummer, 3 Mason, 308; Sawyer v. Hoag, 17 Wall. 610; Hatch v. Dana, 101 U. S. 205; Dayton v. Borst, 31 N. Y. 435; New Albany v. Burke, 11 Wall. 96, 106; Upton v. Tribilcock, 91 U. S. 45, 47; Bartlett v. Drew, 57 N. Y. 587; Lamar Ins. Co. v. Moore, 1 Am. Insolv. Rep. 62; Wait on Insolv. Corps., § 142; Vance v. McNabb Coal, etc. Co., 92 Tenn. 47, 20 S. W. Rep. 424; Hospes v. Northwestern Mfg., etc. Co., 48 Minn. 174, 50 N. W. Rep. 1117; Bradley v. Converse, 3 Fed. Cases, 1143; Richardson v. Green, 133 U. S. 30, 10 S. C. Rep. 280; Clark v. Bever, 139 U. S. 109. 11 S. C. Rep. 468; Fogg v. Blair, 139 U. S. 125, 17 S. C. Rep. 476; Cole v. Millerton Iron Co, 133 N. Y. 168, 30 N. E. Rep. 847; Handley v. Stutz, 139 U. S. 427, 11 S. C. Rep. 530; Buck v. Ross, 68 Conn. 31; Crandall v. Lincoln, 52 Conn. 73, 94.

unpaid subscriptions.[1] It is foreign to our purpose to enter into the wide field of corporation law relative to insolvency,[2] but the principles of these cases are valuable as showing that the representative, receiver,[3] or liquidator of a corporation is, like an administrator, assignee, or receiver of a debtor, vested with the status of a creditor. Where a statute creates a cause of action in favor of creditors who are within certain prescribed conditions a receiver cannot enforce it.[4] The courts of the United States will not ordinarily interfere with a receiver appointed in the State court.[5] It may be observed here that the power of the comptroller of the currency to wind up the affairs of a national bank in certain contingencies does not exclude the authority of a competent tribunal to appoint a receiver in other cases.[6]

§ 118. **Foreign receivers.**— In Booth v. Clark,[7] the court says: "A receiver is appointed under a creditor's bill for one or more creditors, as the case may be, for their benefit, to the exclusion of all other creditors of the debtor, if there be any such. . . . . Whether appointed, as this receiver was, under the statute of New York, or under the rules and practice of chancery, as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has

[1] Fogg v. Blair, 139 U. S. 125, 11 S. C. Rep. 476; Camden v. Stuart, 144 U. S. 104, 12 S. C. Rep. 585.

[2] See Wait on Insolvent Corporations, Baker, Voorhis & Co., 1888.

[3] Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46, 23 N. E. Rep. 530.

[4] Farnsworth v. Wood, 91 N. Y. 308.

[5] Porter v. Sabin, 149 U. S. 480, 13 S. C. Rep. 1008.

[6] Irons v. Manufacturers' Nat. Bank, 6 Biss. 301.

[7] 17 How. 338.

no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment-creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."[1] So in Brigham v. Luddington,[2] which was a bill filed in the southern district of New York by a receiver appointed on a judgment-creditor's bill in the eastern district of Wisconsin, the suit was dismissed.[3] To the suggestion of counsel that, by the statutes of Wisconsin, receivers appointed on creditor's bills are vested with full title, and have full authority to maintain suits, which the Circuit Court of the United States for the southern district of New York ought to recognize, Mr. Justice Woodruff said: "(1). This receiver was appointed under and by virtue of the general power of courts of equity, and with such effect only as is due to the order of the court making the appointment. He was not appointed under or by virtue of any statute. (2). The statutes of the State of Wisconsin cannot enlarge or alter the effect of an order or decree of the Circuit Court of the United States, nor enlarge or modify the jurisdiction of that court or its efficiency."[4] A doctrine is growing up in favor of recognizing foreign receivers by comity.[5]

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[1] See especially Olney v. Tanner, 10 Fed. Rep. 104, and cases cited.

[2] 12 Blatchf. 237.

[3] See Hope Mutual Life Ins. Co. v. Taylor, 2 Rob. (N. Y.) 278, 284.

[4] Citing Payne v. Hook, 7 Wall. 425.

[5] National Trust Co. v. Miller, 33 N. J. Eq. 159; Falk v. Janes, 49 N. J. Eq. 489, 23 Atl. Rep. 813; Bidlack v. Mason, 26 N. J. Eq. 230; National Trust Co. v. Murphy, 30 N. J. Eq. 408. Compare Matter of Waite, 99 N. Y. 433.

§ 119. **Creditors of Corporations.**—Creditors of an indebted corporation may have the aid of a court of equity against the corporation and its debtors to compel the collection of what is due, and the payment of its debts,[1] and the winding up of its affairs.[2] In Graham v. Railroad Co.[3] will be found an important discussion, by the learned Mr. Justice Bradley, of the effect of a voluntary alienation of property by a corporation as affecting subsequent creditors. In this case counsel urged that the property of a corporation was a trust fund for creditors,[4] and that this meant all creditors becoming such during the life of the corporation. The court, however, could discover no reason why the disposal by a corporation of any portion of its assets should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so attacked.[5] This would seem to put corporations and individuals upon the same footing as to voluntary alienations, as regards a certain class of creditors; but the distinction must not be overlooked that the corporation itself may recover the property, where the voluntary or fraudulent transfer was effected by faithless or corrupt officials.

Creditors of a corporation who have exhausted their

[1] Ogilvie v. Knox Ins. Co., 22 How. 380; 2d appeal, 2 Black, 539; Hatch v. Dana, 101 U. S. 205.

[2] Tradesman Pub. Co. v. Knoxville Car Wheel Co., 95 Tenn. 634, 32 S. W. Rep. 1097.

[3] 102 U. S. 148; Montgomery Web Co. v. Dienelt, 133 Pa. St. 585, 19 Atl. Rep. 428.

[4] See Railroad Co. v. Howard, 7 Wall. 392; Sawyer v. Hoag, 17 Wall. 610; Dayton v. Borst, 31 N. Y. 435; Upton v. Tribilcock, 91 U. S. 45, 47; Bartlett v. Drew, 57 N. Y. 587. In Fogg v. Blair, 139 U. S. 126, 11 S. C. Rep. 476, the court says: "The principles which, by established law, govern the relations between a corporation and its creditors and stockholders, and the management of the corporate property, would be of little value, if the corporation, by its directors, could sell or dispose of its assets to the prejudice of creditors and stockholders under such circumstances, on such terms and at such prices as indicated, upon the face of the transaction, that they were being squandered recklessly or fraudulently in disregard of the trust committed to them." See § 117.

[5] See Chap. VI.

remedy at law, may proceed in equity to compel a stockholder to pay up a balance due upon a subscription.[1] So judgment-creditors of a corporation may follow corporate assets into the hands of stockholders amongst whom it was divided before the debts of the association were paid.[2] Where a corporation has changed its name or assumed a new organization to evade its liabilities, creditors may, as against stockholders who are not purchasers for value without notice, pursue the assets.[3]

§ 120. **Sheriff.** — When process comes to his hands the sheriff may undoubtedly attach any property which has been transferred by an alleged fraudulent assignment, and hold it subject to the decision of the court upon the question of fraud. In such a case the sheriff must defend the seizure in behalf of the creditors, and show that the assignment was fraudulent as to them. As to creditors the title to such property does not pass if the assignment is fraudulent, but it remains liable to seizure to satisfy their debt.[4] The case is different when the assigned property has been sold by the vendee and its identity destroyed; the proceeds cannot be attached or levied upon by the sheriff as the debtor's property. Merely setting aside the assignment would not vest the title to such proceeds in the debtor. The only remedy of the creditor in such a case is to institute a creditor's suit, and fasten a *trust* upon such proceeds for the benefit of cred-

[1] Hatch v. Dana, 101 U. S. 205; Ogilvie v. Knox Ins. Co., 22 How. 380; Pierce v. Milwaukee Constr. Co., 38 Wis. 253; Gogebic Investment Co. v. Iron Chief Min. Co., 78 Wis. 427, 47 N. W. Rep. 726.

[2] Bartlett v. Drew, 57 N. Y. 587; Missouri, L. M. & S. Co. v. Reinhard, 114 Mo. 218, 21 S. W. Rep. 488; Fort Payne Bank v. Alabama Sanitarium Co., 103 Ala. 358, 15 So. Rep. 618.

[3] Montgomery Web Co. v. Dienelt, 133 Pa. St. 597; Hibernia Ins. Co. v. St. Louis, etc., Transportation Co., 13 Fed. Rep. 516.

[4] See Kelly v. Lane, 42 Barb. (N. Y.) 610. Compare Greenleaf v. Mumford, 4 Abb. Pr. N. S. (N. Y.) 134; Gross v. Daly, 5 Daly (N. Y.) 542; Rinchey v. Stryker, 28 N. Y. 45; Carr v. Van Hoesen, 26 Hun (N. Y.) 316. See § 81.

itors, which necessarily confirms the legal title of the assignees to the assigned property, instead of annulling it, as would be the case if the sheriff had seized the assigned property instead of the proceeds.[1]

§ 121. **Heirs — Widow.** — The heir of a grantor cannot impeach his ancestor's deed on the ground that it was made in fraud of creditors, for he can claim no right which the ancestor was estopped from setting up. "This rule is a penalty imposed by the law for the prevention of frauds and for the protection of subsequent purchasers."[2] This rule applies even where the grantee was not a participant in the fraud, as where the title was taken in his name originally without his knowledge.[3] The statutes avoiding fraudulent transfers are, as we have shown,[4] available only to the person or persons who might be delayed, hindered, or defrauded.[5] The heir at law is

[1] Lawrence v. Bank of the Republic, 35 N. Y. 320. See Thurber v. Blanck, 50 N. Y. 83; Adams v. Davidson, 10 N. Y. 309, 315. See § 81. Compare Clark v. Foxcroft, 6 Me. 296, and Quincy v. Hall, 1 Pick. (Mass.) 357, 11 Am Dec. 198. In Robertson v. Sayre, 134 N. Y. 99, 31 N. E Rep. 250, where Follett, Ch. J., said: "D. H. Robertson having procured these lots to be conveyed to Messenger for the purpose of defrauding his creditors, had no legal estate in them which could be reached by execution (Garfield v. Hatmaker, 15 N. Y. 475) or which on his death descended to his heirs (Moseley v. Moseley, 15 Id. 334; Wait on Fraud. Convey. § 121. See also 1 R. S. 728, §§ 50, 51, 52; Underwood v. Sutcliffe, 77 N. Y. 58; Brewster v. Power, 10 Paige, 562; Bates v. Lidgerwood Mfg. Co., 50 Hun [N. Y.] 420; Hamilton v. Cone, 99 Mass. 478). This rule is a penalty imposed by the law for the prevention of frauds and for the protection of subsequent purchasers (Revisers' notes to sections cited), and the reason for its application is not weakened in case the grantee, as in the case at bar, was not a participant in the fraud."

[2] Robertson v. Sayre, 134 N. Y. 99; Moseley v. Mosćley, 15 N. Y. 334. See Vance v. Schroyer, 79 Ind. 380; Robertson v. Sayre, 134 N. Y. 99, 31 N. E. Rep. 250.

[3] Robertson v. Sayre, 134 N. Y. 99, 31 N. E. Rep. 250, citing the text.

[4] See Chap. III; also § 107.

[5] See Dutton v. Jackson, 2 Del. Ch 86; Morrison v. Atwell, 9 Bosw. (N. Y.) 503; Powers v. Graydon, 10 Bosw. (N. Y.) 630 See *infra*, Chap. XXVI.

Legatees. — A legatee cannot avoid, on the ground of fraud, a transaction which was binding on his testator. Guidry v. Grivot, 2 Mart. N. S. (La.) 13, 14 Am. Dec. 193; but in Addison v. Bowie, 2 Bland's Ch. (Md.) 606, it is said, a legatee may in certain cases file a creditor's bill.

not a proper party to enforce an alleged trust in personal property in favor of an intestate.[1] It may be here observed, though possibly extraneous to our general theme, that one of several heirs may maintain a suit to set aside a conveyance procured from the ancestor by means of the fraud and undue influence of the grantee, and that the other heirs may testify in the suit as to personal transactions with the deceased.[2]

A widow cannot sue in chancery to have her husband's lands sold, her dower right satisfied, and the balance applied to creditors;[3] nor can a widow who has knowingly joined in a fraudulent deed maintain a bill to set the transfer aside.[4]

§ 122. **Husband and wife.** — The relationship of husband and wife assumes considerable prominence in our subject, and will be specially treated We may here observe that a husband compelled to pay ante-nuptial debts of his wife becomes her creditor, and as such is entitled to set aside fraudulent conveyances made by her in contemplation of marriage;[5] so also a wife may attack conveyances executed by her husband with intent to defeat her right of dower which was about to attach,[6] or pending an action for support,[7] and is, when a creditor of the husband,

[1] Ware v. Galveston City Co., 111 U. S. 170, 4 S. C. Rep. 337. In McCall, Adm'r, v. Pixley, 48 Ohio St. 379, 388, 27 N. E. Rep. 887, the court says: "The statute which permits the sale, by an administrator, of lands which his intestate had conveyed in fraud of creditors, was not designed for the benefit of the heirs, or distributees of the estate. It was enacted solely in the interest of the creditors, whose remedy it advances, by enabling the administrator to accomplish in a single proceeding, what formerly might require many actions, thus avoiding multiplicity of suits, and accumulation of costs, which, where the creditors are numerous, is a matter of importance."

[2] Smith v. Meaghan, 28 Hun (N. Y.) 423; Hobart v. Hobart, 62 N. Y. 80.

[3] Hull v. Hull, 26 W. Va. 1.

[4] Barnes v. Gill, 21 Ill. App. 129.

[5] Westerman v. Westerman, 25 Ohio St. 500; affi'g 9 Am. Law Reg. (N. S.) 690.

[6] See § 70; also Chap. XX.

[7] Tyler v. Tyler, 126 Ill. 525, 21 N. E. Rep. 616.

entitled to file a creditor's bill.[1] "It seems to be well settled that, pending a divorce suit, a wife asserting a just claim for alimony is, within the meaning of statutes prohibiting fraudulent conveyances, to be deemed a creditor."[2]

§ 123. **Tort creditor.** — A right to damages arising from a tort is within the protection of the statute 13 Eliz. ch. 5,[3] and a conveyance made to defeat such right will be set aside.[4] If the intent was in part to evade fines upon criminal prosecution, and also to evade the payment of any judgment which might thereafter be obtained in the civil action, the conveyance would be wholly fraudulent. It cannot be upheld in part and avoided in part.[5] Hence it has been decided that an action at law, although *in malefício*, is within the meaning of the statute which protects "creditors *and others*" against conveyances made to defraud them of their just and lawful actions, suits, debts,

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[1] Houseman v. Grossman, 177 Pa. St. 453, 35 Atl. Rep. 736; Chase v. Chase, 105 Mass. 385.

[2] Lott v. Kaiser, 61 Tex. 665, 673, citing Feigley v. Feigley, 7 Md. 538; Clagett v. Gibson, 3 Cranch, C. C. 359; Boils v. Boils, 1 Coldw. (Tenn.) 285; Morrison v. Morrison, 49 N. H. 69; Turner v. Turner, 44 Ala. 438; Brooks v. Caughran, 3 Head (Tenn.) 465; Bouslough v. Bouglough, 68 Pa. St. 495; Frakes v. Brown, 2 Blackf. (Ind.) 295. But see Fein v. Fein, 3 Wyoming, 163, 13 Pac. Rep. 79.

[3] Post v. Stiger, 29 N. J. Eq. 558. See Lillard v. McGee, 4 Bibb. (Ky.) 165; Jackson v. Myers, 18 Johns. (N. Y.) 425; Farnsworth v. Bell, 5 Sneed (Tenn.) 531; Langord v. Fly, 7 Humph. (Tenn.) 585; Walradt v. Brown, 6 Ill. 397. See § 23.

[4] Scott v. Hartman, 26 N. J. Eq. 90; Boid v. Dean, 48 N. J. Eq. 203, 21 Atl. Rep. 618, citing the text; Jackson v. Myers, 18 Johns. (N. Y.) 425; Clapp v. Leatherbee, 18 Pick. (Mass.) 138; Fox v. Hills, 1 Conn. 295; Pendleton v. Hughes, 65 Barb. (N. Y.) 136; Barling v. Bishopp, 29 Beav. 417; Shean v. Shay, 42 Ind. 375; Bongard v. Block, 81 Ill. 186; Weir v. Day, 57 Iowa, 87; Corder v. Williams, 40 Iowa, 582; Harris v. Harris, 23 Gratt. (Va.) 737; Hoffman v. Junk, 51 Wis. 613, 8 N. W. Rep. 493; Westmoreland v. Powell, 59 Ga. 256; Prouty v. Prouty, 4 Wash. 174, 29 Pac. Rep. 1049; Kain v. Larkin, 4 App. Div. (N. Y.) 209, 38 N. Y. Supp. 546. But compare Evans v. Lewis, 30 Ohio St. 11.

[5] Weir v. Day, 57 Iowa 87, 10 N. W. Rep. 304.

accounts, damages, penalties, forfeitures, and demands.[1] The judgment-creditor in an action of trespass has a judgment for such a cause of action as justifies his attacking, in some form, any conveyance made by the defendant pending the suit, as being fraudulent against him, and should not be prevented by injunction from putting himself into such a position that he may have the question of the *bona fides* of the grantee's purchase tested in a court of law and before a jury through an action of ejectment.[2]

§ 124. **Overseer of the poor.** — In New York an overseer of the poor has no standing in court before judgment to impeach the voluntary deed of the father of a lunatic child, upon the theory that the conveyance was executed with the intention of imposing the burden of supporting the son upon the town. It seems to be clear that an overseer cannot secure equitable relief setting aside a fraudulent transfer, if he is not a creditor by judgment or by simple contract; and no liability has been established in his favor, by adjudication or otherwise, against the alleged fraudulent grantor.[3]

§ 125. **Creditors having liens.** — A conveyance is not considered fraudulent as to a creditor whose debt is secured by judgment or other lien upon the land transferred. The grantee necessarily takes subject to the lien, and the creditor may pursue the land in the

[1] Scott v. Hartman, 26 N. J. Eq. 90; Jackson v. Myers, 18 Johns. (N. Y.) 425. See Leukener v. Freeman, Freem. Ch. Rep. 236; Fox v. Hills, 1 Conn. 295; Barling v. Bishopp, 29 Beav. 417. See § 110.

[2] Welde v. Scotten, 27 Alb. L. J. 337, 59 Md. 72. See Gebhart v. Merfeld, 51 Md. 325; Bockes v. Lansing, 74 N. Y. 441; Freeman v. Elmendorf, 7 N. J. Eq. 475; Winch's Appeal, 61 Pa. St. 426; Moore v. Cord, 14 Wis. 413; Heywood v. City of Buffalo, 14 N. Y. 539; Townsend v. Mayor of New York, 77 N. Y. 542; Van Doren v. Mayor, etc. 9 Paige (N. Y.) 388. A conveyance made to escape payment of fines can be attacked by the State. State v. Burkeholder, 30 W. Va. 593, 5 S. E. Rep. 439.

[3] Bowlsby v. Tompkins, 18 Hun (N. Y.) 220.

same manner as if it had been conveyed to one who had purchased in good faith for a full consideration. He may follow the land irrespective of changes in the title, whether honest or dishonest. A judicial sale upon his lien vests in the purchaser the title which the debtor had when the lien attached, and of course divests the title of the debtor's grantee. The creditor, therefore, stands in no need of aid from a court of equity to revoke the debtor's transfer.[1] This question was considered in Armington v. Rau,[2] in which Haak's Appeal[3] was cited with approval, and the court further said: "The debtor conveys subject to the lien. He has a right, upon such condition, to sell or give away his land, and if he does so fraudulently, the grantee's title is good against all the world, except creditors and persons intended to be hindered, delayed or defrauded. A prior lien creditor is not such person. The conveyance, whether *bona fide* or fraudulent as respects creditors who have no liens, is no obstruction or hindrance to the enforcement of payment of the prior lien."

§ 126. **Purchaser removing incumbrances.** — A purchaser at execution sale takes the creditor's right to avoid all fraudulent conveyances and incumbrances,[4] and may file a bill in equity for that purpose.[5] A creditor who has

[1] Haak's Appeal, 100 Pa. St. 62; Zuver v. Clark, 104 Pa. St. 226.

[2] 100 Pa. St. 168.

[3] 100 Pa. St. 62.

[4] Gerrish v. Mace, 9 Gray (Mass.) 236; Orendorf v. Budlong, 12 Fed. Rep. 24; Hildreth v. Sands, 2 Johns. Ch. (N. Y.) 35; Best v. Staple, 61 N. Y. 78; Gallman v. Perrie, 47 Miss. 131. Chief-Justice Sherwood said: "The law is well settled in this State, that, where a debtor conveys his land with the fraudulent design above mentioned, a resulting trust is thereby created in favor of his creditors, and is the subject of execution sale. And it is equally well settled, that a purchaser at such sale will occupy as advantageous a position as though he were a creditor, when proceeding to set aside the debtor's conveyance on the ground of fraud." Ryland v. Callison, 54 Mo. 514.

[5] Gould v. Steinburg, 84 Ill. 170. See Hoxie v. Price, 31 Wis. 82–89. It appeared in this action that a deed of lands from defendant to a third person, and from him back to the

obtained judgment and issued execution, may seize and sell the property of his debtor, and try the title of any one who sets up a prior lien or incumbrance affected with usury.[1] So a conveyance of property gives to the grantee or assignee the right to file a bill to annul a previous invalid conveyance made by the same grantor,[2] and a judgment-creditor may compel the cancellation of prior judgments against the debtor upon the ground that they have been paid.[3]

§ 127. **Creditors opposing will.**—As a general rule no creditor has the right to oppose the probate of a will.[4]

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wife, and a patent of certain other lands to the wife, were considered as fraudulent and void as to the husband's creditors. A purchaser of the land, at execution sale under a judgment against the husband, and before becoming entitled to the sheriff's deed, brought a suit to set aside the wife's deed and patent and to restrain her from incumbering the land. The suit was upheld upon the theory that the wife, by alienating or incumbering the land to a *bona fide* purchaser or mortgagee, would absolutely defeat complainant's equitable rights. See Avery v. Judd, 21 Wis. 262; Phalen v. Boylan, 25 Wis. 679; Wood v. Chapin, 13 N. Y. 509. In Remington Paper Co. v. O'Dougherty, 81 N. Y. 481, the complainant was an execution purchaser; the time for redemption had expired as to the debtor but not as to other creditors. The purchaser was held to be possessed of an inchoate title and equitable interest sufficient to maintain an action for the cancellation of instruments or incumbrances, which, within the doctrine of courts of equity, are considered as clouds upon title. See Hager v. Shindler, 29 Cal. 48; Wagner v. Law, 3 Wash. St. 500, 28 Pac. Rep. 1109, 29 Id. 927. In Mulock v. Wilson, 19 Col. 302, 35 Pac. Rep. 532, the court says: "A judgment-creditor desiring to set aside a supposed fraudulent deed of real estate may bring his action therefor to test the validity of the deed before attempting to subject the premises to execution sale; or the purchaser, after such sale, may bring his action to remove the cloud from the title by cancelling the supposed fraudulent deed, and to recover possession of the premises." See Stock-Growers' Bank v. Newton, 13 Col. 249, 22 Pac. Rep. 444.

[1] Dix v. Van Wyck, 2 Hill (N. Y.) 525; Mason v. Lord, 40 N. Y. 486. See Post v. Dart, 8 Paige (N. Y.) 639; reversed, 7 Hill (N. Y.) 391; Thompson v. Van Vechten, 27 N. Y. 568.

[2] McMahon v. Allen, 35 N. Y. 403; See Dickinson v. Burrell, L. R. 1 Eq. 337. But compare Cockell v. Taylor, 15 Beav. 103; Anderson v. Radcliffe, D. B. & E. 806; Milwaukee & M. R. R. Co. v. Milwaukee & W. R. R. Co., 20 Wis, 174; Prosser v. Edmonds, 1 Y. & C. 481; French v. Shotwell, 5 Johns. Ch. (N. Y.) 555; especially, Graham v. Railroad Co., 102 U. S. 156.

[3] Shaw v. Dwight, 27 N. Y. 244.

[4] Menzies v. Pulbrook, 2 Curteis, 845; Heilman v. Jones, 5 Redf. (N. Y.) 398; Elme v. Da Costa, 1 Phillim. 173.

The right of contest is limited to the heirs at law and next of kin.[1] It may be here observed that, in Fisher v. Bassett,[2] it is said that no debtor of an estate could be allowed "to plead *ne unques* administrator in bar of an action for the recovery of a debt due to the estate The greatest confusion and mischief would ensue if such were the law; for then, wherever delay was desired, every debtor would deny the jurisdiction, and arrest the recovery of a just debt, by embarrassing inquiries as to the decedent's domicil or the place of his death."[3]

§ 127a. **Cestui que trust.**—A *cestui que trust* is not required to establish his claim by an action at law where he seeks an enforcement of the trust or desires to protect the trust property from unlawful interference.[4]

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[1] Taff v. Hosmer, 14 Mich. 249.

[2] 9 Leigh (Va.) 133.

[3] See Fosdick v. Delafield, 2 Redf. (N. Y.) 392; Drexel v. Berney, 1 Dem. (N. Y.) 163.

[4] Spelman v. Freedman, 130 N. Y. 421, 29 N. E. Rep. 765.

CHAPTER VIII.

PARTIES DEFENDANT.

§ 128. Debtor as defendant in creditors' actions.
129. When debtor not necessary defendant.
130. Defendants need not be equally guilty.
131. Fraudulent assignee or grantee must be joined.
132. Joining defendants.
132*a*. Conveyance pending suit.
132*b*. Bringing in representatives.
§ 133. Assignee and receiver as defendant.
133*a*. Suing directors.
134. Objection as to non-joinder—How raised.
135. Misjoinder of causes of action.
136. Executors, administrators, heirs and legatees.
137. Trustee and *cestui que trust*.
138. Party having lien.
139. Stockholders.

§ 128. Debtor as defendant in creditors' actions.—The doubts and difficulties incident to the selection or joinder of proper parties in creditors' suits are not restricted to complainants as a class, but, on the contrary, cases of alleged misjoinder and non-joinder of defendants are frequently up for adjudication in different forms. The general rule certainly is that all persons whose interests are directly to be affected by a suit in chancery must be made parties,[1] in order to give finality to litigation.[2] The general proposition that all persons participating in making a fraudulent conveyance are proper parties to a suit to set the transfer aside may be accepted.[3] "It is a general rule that all parties inter-

[1] Christian v. Atlantic, etc, R. R. Co. 133 U. S. 241, 10 S. C. Rep. 260; Shields v. Barrow, 17 How. 130, 139; Ribon v. Railroad Co's., 16 Wall. 446; Williams v. Bankhead, 19 Wall. 563; McArthur v. Scott, 113 U. S. 340, 5 S. C. Rep. 652; Green v. Milbank, 3 Abb. N. C. (N. Y.) 156; Lynchburg Iron Co. v. Taylor, 79 Va. 671.

[2] First National Bank v. Schuler, 153 N. Y. 170.

[3] Miller v. Jamison, 24 N. J. Eq. 41. Swan Land & Cattle Co. v. Frank, 148 U. S. 610, 13 S. C. Rep. 691; Wood v. Sidney Sash, etc. Co., 92 Hun (N. Y.) 25; 37 N. Y. Supp. 885; Watts v. Wilcox, 22 Civ. Pro. (N. Y. 164, 13 N. Y. Supp. 492; Welsh v. Solen-

ested in a controversy, or who may be affected by a decree rendered therein, should be made parties; all who are nominally or really interested may therefore be joined although the interests of all may not be affected alike by the relief which may be granted."[1] The burden of securing the presence of the necessary parties rests upon the plaintiff.[2] Let us briefly look through the authorities. The question of the necessity of joining the grantor or debtor as a party defendant in an action brought by a creditor to secure a discovery of assets, or cancel a fraudulent conveyance, is involved in some obscurity and confusion, and the authorities relating to the subject must be carefully distinguished and classified. Prof. Pomeroy says,[3] that "in an action by a judgment-creditor to reach equitable assets of the debtor in his own hands, or to reach property which has

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berger, 85 Va. 444, 8 S. E. Rep. 91; Mahler v. Schmidt, 43 Hun (N. Y.) 514. In Mahr v. Norwich Union Fire Ins. Soc., 127 N. Y. 460, 28 N. E. Rep. 391, the court say: "There is an essential difference between the practice at law and in equity in determining who are proper and necessary parties. Story, in his work on Equity Pleadings (§ 72), says that two general principles control courts of equity in this respect: 1. That the rights of no man shall be finally decided unless he himself is present, or at least has had a full opportunity to appear and vindicate his rights; 2. That when a decision is made upon any particular subject-matter, the rights of all persons whose interests are immediately connected with that decision and affected by it, shall be provided for as far as they reasonably may be. The learned author adds: 'It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also, that future litigation may be prevented.' As Lord Hardwicke once said, all persons ought to be made parties who are necessary to make the determination complete and to quiet the question (Poore v. Clark, 2 Atk. 515). Not only all persons whose rights may be affected by the judgment should be brought into court, but all whose presence is essential to the protection of any party to the action (Gray v. Schenck, 4 N. Y. 460; Russell v. Clark, 7 Cranch, 69, 98; Picquet v. Swan, 5 Mason, 561; Fell v. Brown, 2 Brown's Ch. 218)."

[1] Raynor v. Mintzer, 67 Cal. 164, 7 Pac. Rep. 431.

[2] Mahr v. Norwich Union Fire Ins. Soc., 127 N. Y. 452, 28 N. E. Rep. 391.

[3] Pomeroy on Remedies and Remedial Rights, § 347.

been transferred to other persons, or property which is held by other persons under such a state of facts that the equitable ownership is vested in the debtor, the judgment-debtor is himself an indispensable party defendant, and the suit cannot be carried to final judgment without him." This statement of the matter is, as we shall presently see, entirely too general and sweeping. In New York the necessity for making the debtor a party defendant is made to depend upon the nature of the particular proceeding. In Miller v. Hall[1] the action was brought to have an assignment of a bond and mortgage made by the debtor to the defendant declared fraudulent and void as to creditors. The New York Court of Appeals held that it was well settled, in the case of a creditors' bill to reach a chose in action, which was the character of the suit in question, the judgment-debtor was a necessary party. The earlier authorities show that the practice of joining the debtor prevailed.[2] In Shaver v. Brainard[3] the action was in the nature of a creditors' bill brought by a receiver to set aside a conveyance of real estate as fraudulent, and apply the proceeds upon the plaintiff's judgment. The grantor and judgment-debtor was not made a party defendant, and the judgment was reversed for that reason.[4] In another case, where a receiver filed a bill against a trustee of the debtor to reach equitable interests of the latter in a trust fund, the debtor was declared to be a necessary party.[5] In Haines v. Hollister[6] the assignee

[1] 70 N. Y. 252; below, 40 N. Y. Supr. Ct. 266; Sprague v. Cochran, 84 Hun (N. Y.) 243, 32 N. Y. Supp. 570; Hubbell v. Merchants' Nat. Bk. 42 Hun (N. Y.) 200.

[2] Edmeston v. Lyde, 1 Paige (N. Y.) 637; Boyd v. Hoyt, 5 Paige (N. Y.) 65; Fellows v. Fellows, 4 Cow. (N. Y.) 682; Bobb v. Bobb, 8 Mo. App. 259; Green v. Hicks, 1 Barb. Ch. (N. Y.) 309. See Wallace v. Eaton, 5 How. Pr. (N. Y.) 99.

[3] 29 Barb. (N. Y.) 25.

[4] See Allison v. Weller, 3 Hun (N. Y.) 608, affi'd 66 N. Y. 614; North v. Bradway, 9 Minn. 183.

[5] Vanderpoel v. Van Valkenburgh, 6 N. Y. 190. See Voorhis v. Gamble, 6 Mo. App. 1; Lawrence v. Bank of the Republic, 35 N. Y. 320; Beardsley Scythe Co. v. Foster, 36 N. Y. 561; Miller v. Hall, 70 N. Y. 252.

[6] 64 N. Y. 1.

of an insolvent firm, the personal representatives of a deceased partner, and the surviving partners, were held to be properly joined in a creditors' action to compel an accounting by the assignee, and to recover of the representatives the balance of the plaintiffs' claims.[1] In Lawrence v. Bank of the Republic[2] the court observed: "In a creditors' suit against a judgment-debtor to set aside a prior assignment made by him in trust for the benefit of creditors, on the ground of fraud, he is a necessary party. Indeed he must be deemed the principal party, otherwise different persons, claiming portions of the assignee's property, could not be joined as defendants. The common point of litigation is the alleged fraudulent transfer of the property."[3] The controversy is over the debtor's single scheme to defraud creditors consummated, it may be, by several acts.[4] The case of Gaylords v. Kelshaw[5] is sometimes cited[6] as an authority for the proposition that in any form of action to annul a conveyance as fraudulent the debtor must be summoned. The court said that the debtor was properly made defendant to the suit, as it was a debt which he owed which the creditor sought to collect, and it was his insolvency that was to be established, and his fraudulent conduct that required investigation. It was expressly held, however, that it was not necessary to decide whether the suit could proceed without him, because, as matter of fact, he had been found in the district and had answered the bill. Miller, J., said: "It is simply the case of a person made a defendant by

[1] Compare Wells v. Knox, 17 Civ. Pro. (N. Y.) 59, 7 N. Y. Supp. 45; Murray v. Fox, 39 Hun (N. Y.) 111.

[2] 35 N. Y. 324.

[3] See Beardsley Scythe Co. v. Foster, 36 N. Y. 566; Bradner v. Holland, 33 Hun (N. Y.) 290.

[4] Wood v. Sidney Sash, etc. Co., 92 Hun (N. Y.) 25, 37 N. Y. Supp. 885; Mahler v. Schmidt, 43 Hun (N. Y.) 514; Graves v. Corbin, 132 U. S. 586, 10 S. C. Rep. 196.

[5] 1 Wall. 81; Judson v. Courier Co., 25 Fed. Rep. 708; Swan Land & Cattle Co. v. Frank, 148 U. S. 610, 13 S. C. Rep. 691.

[6] See Taylor v. Webb, 54 Miss. 42.

the bill, who is also a proper [the court did not say necessary] defendant, according to the principles which govern courts of chancery as to parties, and who has been served with process within the district and answered the bill; but whose citizenship is not made to appear in such a manner that the court can take jurisdiction of the case as to him." A corporation is a necessary party to a creditors' bill against officers or stockholders who have divided the assets among themselves.[1]

In an action for unpaid subscriptions a judgment-creditor may join all the stockholders, or if they are too numerous he should so allege in the bill;[2] and the corporation may be joined.[3] In a suit to set aside as fraudulent a trust deed giving preferences to creditors, the beneficiaries should be parties,[4] and as we have seen, the debtor must be joined in a creditor's suit brought to impeach and set aside a general assignment.[5]

§ 129. **When debtor not necessary defendant.**— Fox v. Moyer[6] is an illustration of a case in which the debtor is not a necessary party defendant.[7] The plaintiff was a judg-

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[1] Deerfield v. Nims, 110 Mass. 115. See Swan Land & Cattle Co. v. Frank, 148 U. S. 610, 13 S. C. Rep. 691.

[2] Adler v. Milwaukee Patent Brick Mfg. Co., 13 Wis. 57; Vick v. Lane, 56 Miss. 681; Wetherbee v. Baker, 35 N. J. Eq. 501; Holmes v. Sherwood, 3 McCra. 405; Bronson v. Wilmington, N. C., Life Ins. Co., 85 N. C. 411.

[3] Wetherbee v. Baker, 35 N. J. Eq. 501; Perkins v. Sanders, 56 Miss. 733; Patterson v. Lynde, 112 Ill. 196; Taylor on Corps., § 704.

[4] Simon v. Ellison, 90 Va. 157, 17 S. E. Rep. 836.

[5] First National Bank v. Shuler, 153 N. Y. 168.

[6] 54 N. Y. 130. See Leonard v. Green, 34 Minn. 140, 24 N. W. Rep. 915; and compare First National Bank v. Shuler, 153 N. Y. 170; Buffington v. Harvey, 95 U. S. 103.

[7] See Hickox v. Elliott, 22 Fed. Rep. 20, citing the text. The court say: "So far as Ben Holladay is concerned, his indebtedness to the assignor of the plaintiff is established by the decree, and is no longer open to controversy; and the transfers and conveyances in question are good against him, and can only be avoided at the suit of a creditor. He has, then, no interest in this controversy. His indebtedness is fixed, and the property sought to be affected has passed beyond his control, and he cannot be prejudiced, in any legal sense, by a decree which may subject it to the payment of his

ment-creditor with execution returned unsatisfied. He claimed that his judgment was a lien upon certain real estate which one of the judgment-debtors had fraudulently conveyed to the defendant, and he commenced this action to have the cloud resting on the lien of his judgment removed, and to have his judgment satisfied out of this land, notwithstanding the conveyance. Earl, C., in delivering the opinion of the New York Commission of Appeals, said: "The conveyance was good, as between the parties thereto, and hence no one had any interest to defend this suit but the defendant, and he was therefore the only proper party defendant."[1] Fox v. Moyer was relied upon by the plaintiff's counsel in Miller v. Hall[2] as controlling, but the Court of Appeals said that the former case was not a creditors' bill, and was plainly to be distinguished from the other cases which we have noticed. In Buffington v. Harvey[3] it was urged that the assignee's bill was defective

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debts. *In re* Estes, 6 Sawy. 459; Collinson v. Jackson, 8 Sawy. 365; Bump, Fraud. Conv. 548; Wait, Fraud. Conv. §§ 129, 171; Fox v. Moyer, 54 N. Y. 128. It follows that while Ben Holladay is a proper party to this suit, he is not a necessary one, and might have been omitted from the bill. And his agents and trustees, who conveyed this property to Joseph Holladay under his direction, have less interest in the suit, or the subject-matter of it, if possible, than he has. As against them, also, the conveyances are good. They passed the legal title to Joseph Holladay. These parties have no longer any interest in the property or power over it. No relief is sought against them, and they cannot be prejudiced by any decree that may be given in the suit. The case of Gaylords v. Kelshaw, 1 Wall. 81, cited by counsel for Joseph Holladay, decides nothing to the contrary of this. Kelshaw, being the debtor and grantor in the alleged fraudulent conveyance, was a proper, although not a necessary, party in that case. But, being made a party defendant, without any averment as to his citizenship, it did not appear that the court had jurisdiction. Accordingly, the case was remanded, with leave to the plaintiffs to amend their bill generally, which they might do by alleging the citizenship of Kelshaw, if it was sufficient to give the court jurisdiction, or by omitting his name from the bill. The general rule is that no person need be made a party to a suit who has no interest in it, and against whom nothing is demanded."

[1] See Campbell v. Jones, 25 Minn 155; Bomar v. Means, 37 S. C. 520, 16 S. E. Rep. 537; Blanc v. Paymaster Mining Co., 95 Cal. 524, 30 Pac. Rep. 765.

[2] 40 N. Y. Supr. Ct. 268, affi'd 70 N. Y. 252.

[3] 95 U. S. 103.

because the bankrupt was not joined. Bradley, J., after remarking that the bankrupt had no interest to be affected except what was represented by the assignee, said: "As to the bankrupt himself the conveyance was good; if set aside it could only benefit his creditors. He could not gain or lose, whichever way it might be decided."[1] In Potter v. Phillips[2] the court said that though the debtor was a proper party, it did not see why he was to be regarded as a necessary party; whether the conveyances were fraudulent or in good faith the property irrevocably passed beyond his control. He could be prejudiced in no way, in a legal sense, by a determination which subjected the property to the payment of his debts. So it was decided in Minnesota that where a creditor sold land which the debtor had fraudulently alienated, the fraudulent grantee might bring an action against the purchaser to determine his title without bringing in the fraudulent grantor.[3] It is remarked in some of the cases that the fraudulent grantor should be joined because it is his conduct that is to be investigated. The Supreme Court of Mississippi observe, however, that the object of the proceeding is to reach property, not character. In truth the proceeding is *in rem*, and while the complainant may, if he choses so to do, join as defendants all who are connected with the property, or the transactions to be investigated, he is only compelled to join those in whom the legal title vests, or those who have a beneficial interest to be affected.[4] Cases are cited in consonance with this reasoning.[5]

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[1] Benton v. Allen, 2 Fed. Rep. 448; Weise v. Wardle, L. R. 19 Eq. 171; Hickox v. Elliott, 22 Fed. Rep. 20.

[2] 44 Iowa, 357; Capital City Bank v. Wakefield, 83 Iowa 48, 48 N. W. Rep. 1059.

[3] Campbell v. Jones, 25 Minn. 155.

[4] Taylor v. Webb, 54 Miss. 36; Blanc v. Paymaster Min. Co., 95 Cal. 524, 30 Pac. Rep. 765.

[5] Smith v. Grim, 26 Pa. St. 95; Dockray v. Mason, 48 Me. 178; Laughton v. Harden, 68 Me. 209; Merry v. Fremon, 44 Mo. 518; Cornell v. Radway, 22 Wis. 260. See Shaw v. Millsaps, 50 Miss. 380; Jackman v. Robinson, 64 Mo. 289.

What inference then is to be deduced from this mass of authority, and which class of cases embodies the best logic? Should the debtor be joined as a defendant in an action to annul a fraudulent transfer? The best reasoning of the authorities seems to establish the rule that the debtor's presence as a defendant is superfluous in suits brought against fraudulent alienees to annul specific covinous conveyances. The transfer is conclusive upon him, and hence his joinder cannot aid the creditor, or benefit the debtor; the suit is a proceeding *in rem* to clear the title to the property only so far as the creditor's needs may require; under established principles of law the debtor can gain nothing by it; he is practically a stranger to the property, nor can he be prejudiced by a decree which applies the property to the payment of a fixed judgment debt. On the other hand, where the suit prosecuted is purely a creditors' bill, embodying the elements of a bill of discovery, the debtor's presence would seem to be essential to the jurisdiction of the court.[1] The practitioner must be careful to distinguish between an action instituted to reach specific property fraudulently alienated, and a suit brought to discover equitable interests which are not subject to execution, and the title to which is in the debtor. In the latter case the debtor must of necessity be a defendant. Especially should the complainant make the debtor a defendant where it appears that parties holding separate property under distinct conveyances are joined. In such proceedings the debtor constitutes the king-pin of the action. In any case it is the safer and more prudent practice to summon the debtor as a defendant, for a vexed question is then put at rest, and the misfortune similar to that

[1] Compare First National Bank v. Shuler, 153 N. Y. 174.

which overwhelmed the creditors' representative in Miller v. Hall [1] will be averted.[2]

§ 130. Defendants need not be equally guilty. — As a general rule where the subject-matter of a suit is real or personal property, and the purpose of the plaintiff is to set aside fraudulent judicial proceedings in reference to it, the complainant should make all persons parties who were actors in the proceedings, especially if they claim a present interest in the property in dispute. A complaint so framed is not demurrable on the theory that there is an improper joinder of several causes of action against different persons; on the contrary it is regarded as a single cause of action affecting all the defendants. Westcott, J., in delivering the opinion of the Supreme Court of Florida,[3] very appropriately says: "It is apparent from the case stated that all of the defendants were not jointly and equally concerned in each distinct fraudulent act charged. There was a series of acts in this well-conceived network of fraud, all terminating in the deception and injury of the plaintiff. The defendants performed different parts in the drama. These acts affected the property of the debtor — some the personal property, others the real estate. The object of the plaintiff in this complaint is to get the assistance of this court in unravelling this network of fraud in respect to each species of property, and to have a due application of the same to the payment of the claims of creditors. The right of the plaintiff is against the whole property, and his right against all portions of it is of the same nature. The

[1] 70 N. Y. 252.

[2] When the sole design of a bill is to have individual property of one partner claimed to have been fraudulently alienated, applied in payment of a firm judgment, another partner against whom no fraud or concealment is imputed, no discovery sought, and no ruling asked, is neither a necessary nor a proper party. Randolph v. Daly, 16 N. J. Eq. 315.

[3] Howse v. Moody, 14 Fla. 63.

decree in chancery and the sale thereunder are but acts of fraud, which are sought to be set aside in order to enforce this general right. In fact, the right to set aside these proceedings can only coexist with an equity affecting the property which was the subject of them. There can be no such thing as an equity or right to set aside these proceedings distinct and independent of rights and equities attached to the subject-matter that they affect. The result is that these are not several causes of action, but are acts which, connected with the debt due plaintiff, constitute a ground for one action alone."

§ 131. **Fraudulent assignee or grantee must be joined.**— A judgment as a general rule only binds parties and privies. As the property which is the object of pursuit is usually in the hands of a transferee, it follows that such person must be joined as defendant, so that he may be affected and concluded by the judgment. The proceeding would be futile if it omitted him.[1] It was accordingly held, in a case where a creditors' bill was filed to reach moneys due upon a mortgage which was alleged to have been fraudulently assigned by the debtor, that the assignee of the mortgage, although he resided out of the State, must be joined as a defendant.[2] It is the plaintiff's misfortune if he is unable to secure the presence of the necessary parties.[3] Parties to intermediate conveyances

[1] Sage v. Mosher, 28 Barb. (N. Y.) 287. In Stillwell v. Stillwell, 47 N. J. Eq. 275, 20 Atl. Rep. 960, it was held that where a decree was made setting aside the conveyance as fraudulent to which the fraudulent grantee was not made a party, and a sale was had under such decree an action could be brought by the grantee to set aside such sale.

[2] Gray v. Schenck, 4 N. Y. 460. See also Tichenor v. Allen, 13 Gratt. (Va.) 15; Jackman v. Robinson, 64 Mo. 289; Hammond v. Hudson River I. & M Co., 20 Barb. (N. Y.) 379; Copis v. Middleton, 2 Madd. 410; Thornberry v. Baxter, 24 Ark. 76; Winslow v. Dousman, 18 Wis. 456; Hamlin v. Wright, 23 Wis. 491; Mahr v. Norwich Union Fire Ins. Soc., 127 N. Y. 461, 28 N. E. Rep. 391.

[3] Mahr v. Norwich Union Fire Ins. Soc., 127 N. Y. 452, 28 N. E. Rep. 391.

need not be joined,[1] nor grantees *pendente lite*, for they stand in no better position than those under whom they claim.[2]

In a suit to set aside a fraudulent conveyance there is no necessary inconsistency in averring the grantee to be a fictitious person, and stating that the deed in his name was made to hinder and defraud creditors.[3]

§ 132. Joining Defendants.— The rules with reference to the joinder of defendants will be noticed somewhat at length in discussing the subject of complaints bad for multifariousness.[4] The cases there reviewed seem to establish the principle that different fraudulent purchasers of distinct pieces of property may be joined as defendants. In such cases the debtor is a necessary party, as he is "the very link which unites them all together, the common centre to which they are all connected, and it is because he is a party defendant that they can all be joined in one action as co-defendents."[5] The defendants in such cases are said to be united in a common design. Each is charged with colluding with the debtor in order to defraud his creditors. Where there is one entire case stated, as against the debtor, it is no objection that one or more of the defendants to whom parts of the property had been fraudulently conveyed had nothing to do with the other fraudulent transactions.[6] The case against the debtor is so entire that it cannot be prose-

[1] Stout v. Stout, 77 Ind. 537; Walter v. Riehl, 38 Md. 211; Jackman v. Robinson, 64 Mo. 289.

[2] Schaferman v. O'Brien, 28 Md. 565.

[3] Purkitt v. Polack, 17 Cal. 327.

[4] See §§ 150, 151, 152.

[5] Pomeroy's Remedies and Remedial Rights, § 347; Lawrence v. Bank of the Republic, 35 N. Y. 324; Trego v. Skinner, 42 Md. 432; Haines v. Hollister, 64 N. Y. 1; Vanderpoel v. Van Valkenburgh, 6 N. Y. 190; Waller v. Shannon, 53 Miss. 500; Baulknight v. Sloan, 17 Fla. 284; Donovan v. Dunning, 69 Mo. 436; Van Kleeck v. Miller, 19 N. B. R. 484; Bank v. Harris, 84 N. C. 206. See § 150. Chase v. Searles, 45 N. H. 511; Allison v. Weller, 6 T. & C. (N. Y.) 291, affi'd 66 N. Y. 614; Boone County v. Keck, 31 Ark. 487.

[6] See Wood v. Sidney Sash, Blind, etc. Co., 92 Hun (N. Y.) 24.

cuted in several suits, and yet each of the defendants is a necessary party to some part of the case stated.[1] If, however, the party reached and made defendant has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that such persons are not made parties. A creditor might never get his money if he could be stayed until all the parties who were obligated could be made to contribute their proportionate shares of the liability.[2]

§ 132a. **Conveyance pending suit.** — The law is established that a party who intermeddles with property in litigation does so at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset.[3] Were the rule otherwise endless entanglements would result.[4]

[1] Way v. Bragaw, 16 N. J. Eq. 216. Compare Atty.-Genl. v. Corporation of Poole, 4 Mylne & Cr. 31; Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 671; Fellows v. Fellows, 4 Cow. (N Y.) 682; Boyd v. Hoyt, 5 Paige (N. Y.) 78; Turner v. Robinson, 1 Sim. & S. 313; Marx v. Tailer, 12 N. Y. Civ. Pro. 226. In Rosenthal v. Coates, 148 U. S. 147, the court say: "The suit was, in effect, one by the assignee to disencumber this fund in his possession of alleged liens, and the fact that each defendant had a separate defense to this claim did not create a separable controversy as to him. Fidelity Insurance Co. v. Huntington, 117 U. S. 280; Graves v. Corbin, 132 U. S. 571, 586; Young v. Parker, 132 U. S. 267."

[2] Marsh v. Burroughs, 1 Woods, 468. Where an action is brought to forfeit a charter a lessee of the corporation may be let in to defend. People v. Albany & Vt. R. R. Co., 77 N. Y. 232. The husband of the transferee is not a proper defendant in an action to set aside the transfer. Lore v. Dierkes, 19 J. & S. (N. Y.) 144. As to when a cause of action to set aside a mortgage on the ground of usury and a cause of action to annul a fraudulent conveyance cannot be joined, see Marx v. Tailer, 12 N. Y. Civ. Pro. 226. In Artman v. Giles, 155 Pa. St. 414, 26 Atl. Rep. 668, the bill was filed by a contract-creditor to prevent judgment-creditors and the sheriff from making a sale. The court says: "It joins separate respondents, acting in different capacities, upon different rights, and not chargeable with any joint liability or interest in the relief sought. Among these respondents are the sheriff and the assignee for the benefit of creditors, neither of whom is a proper party to a bill of this nature."

[3] Tilton v. Cofield, 93 U. S. 168; Inloes' Lessee v. Harvey, 11 Md. 524; Salisbury v. Morss, 7 Lans. (N. Y.) 359, affi'd 55 N. Y. 675; Hovey v. Elliott, 118 N. Y. 133, 23 N. E. Rep. 575; Lacassagne v. Chapuis, 144 U. S. 125, 12 S. C. Rep. 659.

[4] See § 157.

132b. Bringing in representatives. — Where, pending an action to set aside an assignment and certain specific transfers, the debtor dies, the action cannot proceed to judgment without the presence of his personal representatives.[1]

§ 133. Assignee and receiver as defendant. — In a case which arose in New York, in which the assignee of an insolvent copartnership had been joined as defendant, the Court of Appeals said: "As this is an equity action, the assignee of the firm, who had received its assets and never rendered any account for the same, was a proper party. He represents the firm, stands in its place so far as property is concerned, and the avails of the same in his hands are first liable to be appropriated to pay the demands of the plaintiffs. No valid reason exists why a person thus situated is not a proper party, in connection with the survivors of the copartnership and the representative of the deceased partner."[2] If an action is brought by a judgment-creditor to reach property fraudulently alienated, the fact that the debtor has made a general assignment for the benefit of creditors is no defense to the debtor or to his fraudulent alienee, because they can have no interest whatever in the fund, and are not vested with the right to guard any interests the assignee may possibly have; it is the assignee's exclusive privilege to personally assert such rights.[3] Furthermore, under some circumstances, the creditor may maintain an action in his own name to set aside a fraudulent conveyance, even though the assignee has the same right, if it can be shown that the assignee is in collusion with the fraudulent parties, or has refused on proper request to become a

[1] First National Bank v. Shuler, 153 N. Y. 171.

[2] Haines v. Hollister, 64 N. Y. 3.

[3] Fort Stanwix Bank v. Leggett, 51 N. Y. 554.

plaintiff.[1] In any case the defense of the non-joinder of the assignee, to be available, should be taken by demurrer or answer,[2] disclosing the names of the omitted parties,[3] or it will be considered waived.[4] Chattels fraudulently assigned may be attached by a creditor in the hands of a voluntary assignee.[5]

§ 133a. **Suing directors.** — The receiver of a national bank may, in his own name or in the name of the corporation, prosecute directors for the benefit of depositors and creditors of the bank for negligence or failure to perform duties.[6] The corporate capacity of the bank continues till its affairs are wound up and its assets distributed.[7] The directors are held liable for a want of that care which a man of ordinary prudence would exercise in the management of his own affairs.[8] But each case rests largely upon its own facts, and the general theme is too broad for extended discussion.

§ 134. **Objection as to non-joinder — How raised.** — Durand v. Hankerson[9] is perhaps an extreme illustration of the effect of the failure to raise the issue as to non-joinder. That action was prosecuted by a creditor to cancel a deed. The conveyance was held to be good, but it appeared that the debtor had taken back a mortgage upon the property, which remained unsatisfied, and the evidence tended to show that the debtor had assigned

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[1] Bate v. Graham, 11 N. Y. 237; Harvey v. McDonnell, 113 N. Y. 531, 21 N. E. Rep. 695. See § 114.

[2] Fort Stanwix Bank v. Leggett, 51 N. Y. 554.

[3] Bay State Iron Co. v. Goodall, 39 N. H. 234.

[4] Annin v. Annin, 24 N. J. Eq. 184; Lyman v. Place, 26 N. J. Eq. 30.

[5] Hess v. Hess, 117 N. Y. 308, 22 N. E. Rep. 956. See Rinchey v. Stryker, 28 N. Y. 45; Frost v. Mott, 34 N. Y. 253.

[6] Movius v. Lee, 30 Fed. Rep. 300; Bank v. Kennedy, 17 Wall. 19.

[7] See Rosenblatt v. Johnston, 104 U. S. 462.

[8] Hun v. Cary, 82 N. Y. 65. Compare Briggs v. Spaulding, 141 U. S. 132, 11 S. C. Rep. 924.

[9] 39 N. Y. 287.

the mortgage to a person not a party to the suit. It was proved and found that this assignment was fraudulent, and the purchaser from the debtor was directed to pay the mortgage to a receiver. The purchaser strenuously resisted this decree, upon the ground that the pretended assignee of the mortgage not being a party, was not bound by the judgment, but the learned Woodruff, J., held that while it presented a case of possible hardship, as payment might perhaps be enforced a second time, yet the purchaser should have protected himself by raising the objection in the manner prescribed by law. The defendant who neither by answer nor demurrer takes such an objection, waives it, and therefore cannot afterward be heard to object on that ground to any decree to which, upon the facts alleged and proved, the plaintiff may be entitled. The cause thereafter proceeds, as to him, with the like right in the plaintiff to a decree as if the supposed proper or necessary party had been brought into court.

We may here observe that the appointment of a receiver does not absolutely dissolve a national bank, and that in an action to establish the rejected claim of a creditor, the bank and the receiver may both be made parties defendant.[1]

§ 135. **Misjoinder of causes of action.** — A cause of action against sureties upon the bond of an administrator, claiming a breach of its condition, cannot be united in the same complaint with a cause of action arising out of the fraudulent disposition of property,[2] against the administrator of the deceased intestate and others.

[1] Green v. Walkill Nat. Bank, 7 Hun (N. Y.) 64; Brinckerhoff v. Bostwick, 88 N. Y. 61; Turner v. First Nat. Bank, 26 Iowa, 562. Compare Pahquioque Bank v. Bethel Bank, 36 Conn. 325; Kennedy v. Gibson, 8 Wall. 498; City of Lexington v. Butler, 14 Wall. 283.

[2] Howse v. Moody, 14 Fla. 59. Compare generally, N. Y. & N. H. R. R. Co. v. Schuyler, 17 N. Y. 607; Town of Venice v. Woodruff, 62 N. Y. 470.

§ 136. Executors, administrators, heirs, and legatees. — We have already considered the status of personal representatives,[1] heirs, and legatees,[2] as complainants. Let us briefly advert to the question of their joinder as defendants. In Allen v. Vestel,[3] it was said that a creditor, in an action to set aside a fraudulent conveyance to heirs of a deceased debtor, should allege that the personal property had been first exhausted, and should make the administrator a party; or, if there was none, should secure one to be appointed.[4] This is but another phase of the general question as to the necessity of joining the debtor as a defendant. Authorities can be cited to the effect that the administrator is not a necessary party to the creditor's proceedings,[5] and to the opposite effect,[6] and holding that heirs need not be joined,[7] and, in New York, as is elsewhere shown,[8] a distinction is made as to

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[1] See §§ 112, 113.

[2] See § 121.

[3] 60 Ind. 245.

[4] Boggs v. McCoy, 15 W. Va. 344. *Contra*, Jackman v. Robinson, 64 Mo. 289. Compare Smith v. Grim, 26 Pa. St. 95.

[5] Dockray v. Mason, 48 Me. 178; Merry v. Fremon, 44 Mo. 518; Taylor v. Webb, 54 Miss. 36; Cornell v. Radway, 22 Wis. 260; Zoll v. Soper, 75 Mo. 462; Jackman v. Robinson, 64 Mo. 289. See Coffee v. Norwood, 81 Ala. 516; Munn v. Marsh, 38 N. J. Eq. 410.

[6] Alexander v. Quigley, 2 Duv. (Ky.) 400; Postlewait v. Howes, 3 Iowa, 366; Coates v. Day, 9 Mo. 300; Boggs v. McCoy, 15 W. Va. 344; Pharis v. Leachman, 20 Ala. 662. See Bachman v. Sepulveda, 39 Cal. 688.

[7] Smith v. Grim, 26 Pa. St. 96; Wall v. Fairley, 73 N. C. 464; Shaw v. Millsaps, 50 Miss. 384. Compare Simmons v. Ingram, 60 Miss. 886. The conveyance made by their ancestor, it is said, though fraudulent, concludes them, and effectually cuts off all their interest in the property. Harlin v. Stevenson, 30 Iowa, 371. It may here be observed that the power of a court of equity to charge real estate in the hands of heirs with the payment of the ancestor's debts is undoubted. Chewett v. Moran, 17 Fed. Rep. 820; Payson v. Hadduck, 8 Biss. 293; Riddle v. Mandeville, 5 Cranch, 323; Stratford v. Ritson, 10 Beav. 25; Ponsford v. Hartley, 2 Johns. & H. 736; Adams Eq. 257; Story's Eq. Plead. 99–102. By statute in New York heirs of an intestate who have inherited land must, in certain cases, be sued jointly, and not separately, for a debt due from the deceased. Kellog v. Olmstead, 6 How. Pr. (N. Y.) 487. See Selover v. Coe, 63 N. Y. 438.

[8] See §§ 128, 129.

the form of the action, the debtor being a necessary party in a creditor's action,[1] but not in a suit in equity to remove a fraudulent cloud.[2] Where this distinction is recognized, it might be extended to cover the cases of personal representatives and heirs. The United States Supreme Court leans to the view that in a suit to charge real estate with the payment of a debt, the heirs and devisees should be made parties to the bill.[3]

In a creditors' bill under which an executor had been removed from office, the Supreme Court of South Carolina held that the legatees were necessary parties, and that the receiver appointed in the place of the deposed executor did not represent them.[4] Again the Supreme Court of Ohio has decided, that where the grantee dies after the rendering of a decree in favor of a judgment-creditor setting aside a conveyance and ordering a sale of the property, the failure to revive the decree

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[1] Miller v. Hall, 70 N. Y. 252.

[2] Fox v. Moyer, 54 N. Y. 130.

[3] Walker v. Powers, 104 U. S. 251.

Administrator not necessary party — *Cornell* v. *Radway*. — In an action which arose in Wisconsin, it appeared that a debtor in his lifetime received an absolute deed of land and failed to record it, and subsequently destroyed the deed with a fraudulent design, and procured the grantor to execute another deed to a third person without consideration. A judgment-creditor of the deceased debtor, whose judgment was recovered while the deceased held the first deed, brought a suit against the third party, and the widow and heirs of the deceased debtor, to establish the debtor's title and enforce the lien of the judgment. Objection was raised that the administrator was not a party. The court said: "This is well answered when it is said that this is a proceeding for the benefit of the estate, and that the administrator could make no opposition if he were present. We do not see, therefore, how the estate can be prejudiced or the plaintiff's right to relief affected by the absence of the administrator. The conveyance to the defendant Jones [the third party] being set aside, and the title adjudged to have been in the deceased judgment-debtor from the time of his purchase, the plaintiff will then proceed as if the debtor had died seized of the land with full evidence of title in himself. The administrator is not a necessary party." Cornell v. Radway, 22 Wis. 265. Compare Hentz v. Phillips, 23 Abb. N. C. (N. Y.) 15, 6 N. Y. Supp. 16.

[4] Fraser v. Charleston, 13 S. C. 533.

against the heirs of the grantee did not affect the title of a purchaser under the decree.[1]

What then is the result of the cases upon this point? Necessarily much the same conclusion must be reached as is gathered from the authorities upon the question of the joinder of the debtor in an action to reach assets in the hands of a third party. We have already seen that the personal representatives may, in certain cases, annul covinous alienations made by the deceased, but only so far as may be necessary to satisfy creditors.[2] In States where the right of the creditor to seek direct relief is upheld, it is difficult to see why the personal representatives or heirs should be joined; the conveyance is conclusive upon such parties, and their presence in the suit will neither aid the creditors nor benefit them.

§ 137. **Trustee and cestui que trust.** — Mr. Pomeroy says:[3] "There is a broad distinction between the case of an action brought in opposition to the trust, to set aside the deed or other instrument by which it was created, and to procure it to be declared a nullity, and that of an action brought in furtherance of the trust, to enforce its provisions, to establish it as valid, or to procure it to be wound up and settled. In the first case, the suit may be maintained without the presence of the beneficiaries, since the trustees represent them all and defend for them." The Supreme Court of Georgia,[4] adopting this general rule, held that where a creditor claims not under but in opposition to a deed of trust made by his debtor, and seeks to set the same aside on the ground that it is, as to him, fraudulent and void, he is at liberty to proceed against the fraudulent trustee who is the holder of the legal estate in the property, without joining the *cestui que*

[1] Beaumont v. Herrick, 21 Ohio St. 446.

[2] See §§ 128, 129.

[3] Remedies and Remedial Rights, § 357.

[4] Tucker v. Zimmerman, 61 Ga. 599.

trust.[1] The general rule is that, in suits affecting the trust, the trustee and *cestui que trust* must be joined.[2] There is an exception to the rule in case of voluntary general trusts for the benefit of creditors, growing out of the difficulty of joining all the creditors, and in such case it is sufficient to bring in the trustee, and the creditors will be bound on the principle of representation.[3] A decree setting aside the deed, or charging the property with the creditor's demand, will, if fairly and honestly obtained, conclude the *cestui que trust* as being represented by the trustee, but is subject to be impeached for fraud or collusion.[4]

§ 138. Party having lien. — It certainly is reasonable, and seems to be recognized as an established rule, that, where a party has a lien, by way of mortgage for example, upon the property which is the subject of contention, and no ruling is asked against such lien, and it is not assailed, but the title under it is conceded to be valid, there is no ground upon which the holder of the lien can be regarded as a necessary party to the suit.[5] The creditors, having elected to avoid the fraudulent conveyance, take the property as though the transfer had never been made, and subject to all lawful liens upon it.[6] But where the lien-holder is made a party to the suit, and the validity of his claim is investigated and disposed of by the judgment adversely to the validity of the lien, a sale by the receiver

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[1] Rogers v. Rogers, 3 Paige (N. Y.) 379. See Phenix Nat. Bk. v. A. B. Cleveland Co., 11 N. Y. Supp. 877.

[2] Landon v. Townshend, 112 N. Y. 99, 19 N. E. Rep. 424.

[3] Landon v. Townshend, 112 N. Y. 99.

[4] Russell v. Lasher, 4 Barb. (N. Y.) 232; Wheeler v. Wheedon, 9 How. Pr. (N. Y.) 300.

[5] Trego v. Skinner, 42 Md. 431. See Walter v. Riehl, 38 Md. 211; Venable v. Bank of the United States, 2 Pet. 107; Erfort v. Consalus, 47 Mo. 213. Compare Reynolds v. Park, 5 Lans. (N. Y.) 149; reversed 53 N. Y. 36.

[6] Hutchinson v. Murchie, 74 Me. 190; Avery v. Hackley, 20 Wall. 411. Compare Murphy v. Briggs, 89 N. Y. 446.

will transfer to the grantee a title superior to such lien or claim.[1]

§ 139. **Stockholders.**—The assets of a corporation are, as we have seen,[2] regarded as, in a sense, a trust fund for the payment of its debts,[3] and its creditors have a lien upon it, and the right to priority of payment over its stockholders.[4] Hence where property of a corporation had been divided among its stockholders before its debts had been paid, the court decided that a judgment-creditor, with execution returned unsatisfied, could maintain an action in the nature of a creditors' bill against any one stockholder to reach whatever had been received by him, whether wrongfully or otherwise. It is unnecessary to make all the stockholders defendants.[5]

The question of the statutory liability of stockholders to the creditors of a corporation where the capital has not been all paid in and a certificate to that effect filed as required by statute, has given rise to much litigation in New York and other States where such provisions exist. This liability is sometimes said to rest in contract,[6]

[1] Shand v. Hanley, 71 N. Y. 324. See Chautauque Co. Bank v. Risley, 19 N. Y. 372. Where a debtor has conveyed property in fraud of creditors, and the alienee at the debtor's request has given a mortgage upon it to a creditor whose debt existed at the date of the conveyance, the latter is regarded as a purchaser "for a valuable consideration," 2 R. S. N. Y. 137, § 5; and although the conveyance is set aside by other creditors, the lien of the mortgage cannot be affected. Murphy v. Briggs, 89 N. Y. 446, distinguishing and limiting Wood v. Robinson, 22 N. Y. 564.

[2] See §§ 117–119; Wait on Insolvent Corps. Chap. VII.

[3] Swan Land & Cattle Co. v. Frank, 148 U. S. 609, 13 S. C. Rep. 691; Fogg v. Blair, 139 U. S. 125, 11 S. C. Rep. 476; Peters v. Bain, 133 U. S. 691, 10 S. C. Rep. 354.

[4] Bartlett v. Drew, 57 N. Y. 587; Upton v. Tribilcock, 91 U. S. 45–47; Sawyer v. Hoag, 17 Wall. 610; Cole v. Millerton Iron Co., 133 N. Y. 164, 30 N. E. Rep. 847.

[5] Bartlett v. Drew, 57 N. Y. 587; Wheeler v. Millar, 90 N. Y. 361. A stockholder of an insolvent bank may be compelled to pay an unpaid subscription to the assignee, and he has no right to set off the amount of his deposit in the bank. Macungie Savings Bank v. Bastian, 1 Am. Insolv. Rep. 484.

[6] Flash v. Conn, 109 U. S. 371, 3 S. C. Rep. 263; Wiles v. Suydam, 64 N. Y. 173; Cochran v. Wiechers, 119 N. Y. 403, 23 N. E. Rep. 803.

but the liability of directors for failure to file an annual report, as directed by statute, is considered to be penal.[1] The statute in the former case in effect withdraws the protection of the corporation from the stockholders, and holds them liable as copartners.[2] If the liability was penal the statute could, of course, have no operation in another State,[3] for penal statutes are strictly local in their operations and results.[4] Hence it was held that, as the obligation imposed upon a stockholder under the New York statute rested in contract, it could be enforced in Florida,[5] the rule being that a transitory action may be brought in any court having jurisdiction of the parties and the subject-matter.[6]

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[1] Gadsden v. Woodward, 103 N. Y. 244, 8 N. E. Rep. 653; Veeder v. Baker, 83 N. Y. 160; National Bank v. Dillingham, 147 N. Y. 609, 42 N. E. Rep. 338.

[2] Corning v. McCullough, 1 N. Y. 47. See Rogers v. Decker, 131 N. Y. 492; Rogers v. Decker, 62 Hun (N. Y.) 17, 16 N. Y. Supp. 407; National Bank v. Dillingham, 147 N. Y. 608, 42 N. E. Rep. 338.

[3] Flash v. Conn, 109 U. S. 376, 3 S. C. Rep. 263; Marshall v. Sherman, 148 N. Y. 25, 42 N. E. Rep. 419: Huntington v. Attrill. 146 U. S. 657, 13 S. C. Rep. 224.

[4] See The Antelope, 10 Wheat. 66; Huntington v. Attrill, 146 U. S. 666, 13 S. C. Rep 224; Scoville v. Canfield, 14 Johns. (N. Y.) 338; Western Transp. Co. v. Kilderhouse, 87 N. Y. 430; Lemmon v. People, 20 N. Y. 562; Henry v. Sargeant, 13 N. H. 321; Story's Conflict of Laws (8th ed.), § 621.

[5] Flash v. Conn, 109 U. S. 379, 3 S. C. Rep. 263.

[6] Dennick v. Railroad Co., 103 U. S. 11; Texas & Pacific Ry. Co. v. Cox, 145 U. S. 593, 12 S. C. Rep. 905; Marshall v. Sherman, 84 Hun (N. Y.) 190, 32 N. Y. Supp. 193. We cannot here venture, except incidentally, into the wide field regulating the remedies of creditors against insolvent corporations or their officers. See Wait on Insolv. Corps. Chap. II. But it may be noted that a creditors' bill may be filed against a county. Lyell v. Supervisors of St. Clair, 3 McL. 580; Wait on Insolv. Corps. § 111.

CHAPTER IX.

COMPLAINT.

§ 140. Recitals of the complaint.
141. Pleading fraud.
142. Evidence not to be pleaded.
143. Alleging insolvency.
144. Allegations concerning consideration.
145. Fraudulent intent.
146. Pleading in equity.
147. Seeking discovery.
148. Excusing laches — Concealment of fraud.
149. Explaining delay—Discovery of fraud.
§ 150. Complaints bad for multifariousness.
151. } Pleadings held not multifari-
152. } ous.
153. Alternative relief.
154. Attacking different conveyances.
155. Prayer of complaint — Variance — Verification.
156. Amendment.
157. Description — *Lis pendens*.
157*a*. Change of venue — Territorial jurisdiction.

§ 140. **Recitals of the complaint.**—To successfully impeach a fraudulent conveyance, it ordinarily devolves upon the complainants to aver in the pleading that they were creditors at the time of the alienation in controversy,[1] and to state against whom the judgment proceeded upon was recovered.[2] The complaint will ordinarily be considered defective unless it appears upon its face that an indebtedness exists,[3] and that the plaintiff has exhausted his remedy at law;[4] and such averments cannot usually be

[1] Merrell v. Johnson, 96 Ill. 230; Uhre v. Melum, 17 Bradw. (Ill.) 182; Donley v. McKiernan, 62 Ala. 34; Walthall v. Rives, 34 Ala. 91. Compare Newman v. Van Duyne, 42 N. J. Eq. 485.

[2] Lipperd v. Edwards, 39 Ind. 169. See Chap. IV. A bill in chancery is not good as an attempt to set aside a fraudulent conveyance, procured by a debtor to be made to his daughter, if it neither alleges that there is a judgment against the father, nor that the debt due at the time the conveyance was made is still due, and fails to pray for such relief. Ferguson v. Bobo, 54 Miss. 121.

[3] Elwell v. Johnson, 3 Hun (N. Y.) 558, 74 N. Y. 80: Carpenter v. Osborn, 102 N. Y. 558, 7 N. E. Rep. 823.

[4] Beardsley Scythe Co. v. Foster, 36 N. Y. 565. See Allyn v. Thurston, 53 N. Y. 622; Suydam v. Northwestern

supplied by an allegation of a total want of property,[1] or the uselessness of an execution,[2] and, if it does not appear that the execution was issued to the county of the debtor's residence, or other proper county, the complaint is not aided by an averment that it was returned unsatisfied.[3] It must appear that a debt or duty due to the plaintiff has been in some way injuriously affected by the conveyance attacked.[4] According to some of the cases it is not sufficient to entitle the creditor to the aid of a court of equity merely to show that the debtor made a fraudulent disposition of a portion of his property. The complainant must set forth that the alienation of property complained of embarrassed him in obtaining satisfaction of his debt, "for if the debtor has other property subject to the judgment and execution sufficient to satisfy the debt, there is no necessity for the creditor to resort to equity."[5] An allegation that the execution has been returned wholly unsatisfied, and that the defendant has no other property out of which the plaintiff could collect the judgment, has been held sufficient on a demurrer based on the contention that these allegations failed to show that the defendant did not have sufficient property at the time of the conveyance.[6]

Ins. Co., 51 Pa. St. 394; Scott v. McFarland, 34 Miss. 363; Cassidy v. Meacham, 3 Paige (N. Y.) 311; Spelman v. Freedman, 130 N. Y. 425, 29 N. E. Rep. 765; Weaver v. Haviland, 142 N. Y. 537, 37 N. E. Rep. 641; Adsit v. Butler, 87 N. Y. 585; Wales v. Lawrence, 36 N. J. Eq. 209; Easton Nat. Bank v. Buffalo Chem. Works, 48 Hun (N. Y.) 560, 1 N. Y. Supp. 250. See Chap. IV.

[1] See McElwain v. Willis, 9 Wend. (N. Y.) 548; Crippen v. Hudson, 13 N. Y. 165; Beardsley Scythe Co. v. Foster, 36 N. Y. 565; Ryan v. Spieth, 18 Mont. 47.

[2] Adsit v. Sanford, 23 Hun (N. Y.) 45.

[3] Payne v. Sheldon, 63 Barb. (N. Y.) 176.

[4] Ullrich v. Ullrich, 68 Conn. 580.

[5] Dunham v. Cox, 10 N. J. Eq. 467. A complaint alleging that an assignment was void on its face and made to hinder, delay and defraud creditors, states one cause of action. Pittsfield Nat. Bank v. Tailer, 60 Hun (N. Y.) 130, 14 N. Y. Supp. 557.

[6] Cook v. Tibbals, 12 Wash. 207, 40 Pac. Rep. 935; Pierce v. Hower, 142 Ind. 626, 42 N. E. Rep. 223; Hartlepp v. Whiteley, 129 Ind. 577, 28 N. E.

The bill should recite facts sufficient to indicate that the judgment cannot be collected without equitable aid.[1] This averment is material, and a decree upon proofs without this necessary allegation is said to be erroneous, since "the defendant cannot be required to meet and overcome evidence not responsive to the pleadings."[2] General averments of facts from which, unexplained, a conclusion of law arises, are sufficient.[3] It may be here observed concerning the rules of pleading that, generally speaking, it is the right of an antagonistic defendant to have all the material facts on which relief is sought specifically set forth in the bill, to the end that such facts may be admitted or controverted by the answer and testimony; and usually no proofs will be admitted unless *secundum allegata*.[4] Hence, where it is the purpose of the complainants to seek relief for creditors other than themselves, such intention should be manifested by suitable aver-

Rep. 535, 31 Id. 203. But see Windstandley v. Stipp, 132 Ind. 548, 32 N. E. Rep. 302.

[1] Emery v Yount, 1 West Coast, Rep. 499, 7 Col. 109. In an action to set aside a conveyance of land upon the ground of fraud the complaint should aver the delivery of the deed claimed to be fraudulent. Doerfler v. Schmidt, 64 Cal. 265, 30 Pac. Rep. 816.

[2] Thomas v. Mackey, 3 Col. 393. In Randolph v. Daly, 16 N. J. Eq. 317, the court said: "It is not necessary to aver that the firm is insolvent in order to entitle the complainants to relief. The partnership property may be amply sufficient to satisfy all the debts of the firm, yet it may be so covered up, or placed beyond the reach of process, as not to be amenable to execution at law, and to render the interference of equity essential to the ends of justice. All that can be required is that it should appear by the bill that the complainant has exhausted his remedy at law, and that the aid of this court is necessary to enable him to obtain satisfaction of his judgment." So the complaint need not aver that the defendant has transferred all his property and is without means to satisfy the judgment where it shows the return of execution unsatisfied and alleges fraud in the conveyance attacked. Citizens' Nat. Bk. v. Hodges, 80 Hun (N. Y.) 475, 30 N. Y. Supp. 445: Kain v. Larkin, 141 N. Y. 144, 36 N. E. Rep. 9.

[3] Williams v. Spragins, 102 Ala. 430, 15 So. Rep. 247; Pickett v. Pipkin, 64 Ala. 520; Burford v. Steele, 80 Ala. 148.

[4] Burt v. Keyes, 1 Flipp. 72. Uncertainty in a pleading should be reached by motion. Moorman v. Shockney, 95 Ind. 88.

ments in the bill. It must be alleged that the plaintiff is the owner of the unsatisfied judgment.[1]

§ 141. **Pleading fraud.** — Fraud has been said in a general way to be a conclusion of law,[2] though perhaps, more correctly speaking, it is the judgment of law upon facts and intents.[3] Fraud lies in the intent to deceive.[4] A mere general averment that a deed was fraudulent, or that it was made with the intent to hinder, delay or defraud creditors, has been regarded as an insufficient method of pleading. Manifestly no judgment can be given in favor of a plaintiff upon grounds not stated in the complaint and no relief can be extended for matters not charged.[5] If statements showing fraud are followed by recitals contradictory thereof or inconsistent therewith, the pleading is insufficient, though fraud be charged.[6] "A suitor who seeks relief on the ground of fraud must do something more than make a general charge of fraud."[7] Peckham, J., has said: "Mere general allegations of fraud or conspiracy are of no value as stating a cause of action."[8] There must, ordinarily, be averments

[1] Ryan v. Spieth, 18 Mont. 49.

[2] Horsford v. Gudger, 35 Fed. Rep. 388.

[3] See § 13. Hutchinson v. First Nat. Bk., 133 Ind. 283, 30 N. E. Rep. 952.

[4] Higgins v. Crouse, 147 N. Y. 415; 42 N. E. Rep 6.

[5] Dickinson v. Banker's Loan, etc. 93 Va. 502.

[6] Truesdell v. Sarles, 104 N. Y. 167, 10 N. E. Rep. 139; Southwick v. First Nat. Bk., 84 N. Y. 420; Southall v. Farish, 85 Va. 410, 7 S. E. Rep. 534.

[7] Smith v. Wood, 42 N. J. Eq. 567, 7 Atl. Rep. 881; St. Louis, & S. F. Ry. Co. v. Johnston, 133 U. S. 577, 10 S. C. Rep. 390; Leasure v. Forquer, 27 Ore. 334, 41 Pac. Rep. 665; West Coast Grocery Co. v. Stenson, 13 Wash. 255, 43 Pac. Rep. 35.

[8] Wood v. Amory, 105 N. Y. 282; 11 N. E. Rep. 636, citing Van Weel v. Winston, 115 U. S. 228, 6 S. C. Rep. 22; Cohn v. Goldman, 76 N. Y. 284; Knapp v. City of Brooklyn, 97 N. Y. 520; Curran v. Olmstead 101 Ala. 692, 14 So. Rep. 398; Leasure v. Forquer, 27 Ore. 334, 41 Pac. Rep. 665; Knight v. Glasscock, 51 Ark. 390, 11 S. W. Rep. 580; Reed v. Bott, 100 Mo. 62, 12 S. W. Rep. 347, 14 Id. 1089. An allegation that a mortgage was fraudulent is not sufficient to allow evidence that part of the sum apparently secured by the mortgage was fictitious. Blair v. Finlay, 75 Tex. 210, 12 S. W. Rep. 983.

of the facts,[1] which constitute the fraud, or which tend to support the conclusion.[2] Relief will not be afforded upon the ground of fraud unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings.[3] "The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity."[4] In Flewellen v. Crane,[5] the averments were that a conveyance, purporting on its face to be made in payment of a debt due from the grantor to the grantee, was "fraudulent and void as against pre-existing creditors," and that it was "made with the intent to hinder, delay, or defraud said creditors."[6] There was no averment impeaching

[1] In St. Louis, & S. F. Railway Co. v. Johnston, 133 U. S. 566, 577, the court say: "The material facts on which the complaint relies must be so distinctly alleged as to put them in issue. Harding v. Handy, 11 Wheat. 103. And if fraud is relied on, it is not sufficient to make the charge in general terms. 'Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief.' Van Weel v. Winston, 115 U. S. 228, 237; Ambler v. Choteau, 107 U. S. 586, 591. The defendant should not be subjected to being taken by surprise, and enough should be stated to justify the conclusion of law, though without undue minuteness."

[2] Pickett v. Pipkin, 64 Ala. 523; Flewellen v. Crane, 58 Ala. 627; Gilbert v. Lewis, 1 De G., J. & S. 49; Dexter v. McAfee, 163 Ill. 508; Myers v. Sheriff, 21 La. Ann. 172; Rhead v. Hounson, 46 Mich. 246; Jones v. Massey, 79 Ala 370. In a recent decision in New York, however, an allegation that the conveyance was without consideration and with the intent to hinder, delay and defraud creditors was held sufficient. Kain v. Larkin, 141 N. Y. 144, 36 N. E. Rep. 9.

[3] Patton v. Taylor, 7 How. 159; Noonan v. Lee, 2 Black, 508; Voorhees v. Bonesteel, 16 Wall. 29; Beaubien v. Beaubien, 23 How. 190; Lewis v. Burnham, 41 Kans. 546, 21 Pac Rep. 572. Where the party relying on the invalidity of the conveyance is the defendant, *e. g.* a sheriff, holding the property under an attachment, it is not necessary to plead fraud; a denial of plaintiff's title is sufficient. Mason v. Vestal, 88 Cal. 396, 26 Pac. Rep. 213; Welcome v. Mitchell, 81 Wis 566, 51 N. W. Rep. 1080; Holmberg v. Dean, 21 Kan. 73; see Nat. Bank v. Barkalow, 53 Kan. 69, 35 Pac. Rep. 796.

[4] Ambler v. Choteau, 107 U. S. 586, 591, 1 S. C. Rep. 556. See Dickinson v. Bankers' Loan, etc., 93 Va. 502.

[5] 58 Ala. 627.

[6] See Rowland v. Coleman, 45 Ga. 204; Meeker v. Harris, 19 Cal. 278.

the adequacy or *bona fides* of the consideration expressed; nor asserting that the debt was not justly due from the grantor to the grantee; no setting up a secret trust for the grantor. The pleading was declared insufficient to support a final decree, rendered upon a decree *pro confesso*, which adjudged the conveyance void for fraud. The rule is that the facts upon which the fraud is predicated cannot be left to inference, but must be distinctly and specifically averred.[1] If a bill is filed to set aside a deed upon the ground of undue influence, it is not necessary to allege every fact showing the actual exercise of undue influence, but the relations of the parties ought to be stated, and the general fact of undue influence alleged, and some specific instances given from which the court could infer it.[2] "No rule of equity pleading is better settled than that which declares that every material fact which it is necessary for a complainant to prove to establish his right to the relief he asks must be alleged in the premises of his bill, with reasonable fullness and particularity."[3] The common-law rule was clearly settled that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred wholly from the facts. While it may not be absolutely essential to employ the word "fraud" in the pleading, yet the facts stated should show distinctly that fraud is charged.[4] The New York Court of Appeals say that the use of the word "fraud" or "fraudulent," in order to

[1] Thomas v. Mackey, 3 Col. 393; Small v. Boudinot, 9 N. J. Eq. 391; Klein v. Horine, 47 Ill. 430; Bryan v. Spruill, 4 Jones' Eq. (N. C.) 27; Ontario Bank v. Root, 3 Paige (N. Y.) 478; Williams v. Spragins, 102 Ala. 424, 15 So. Rep. 247; Marston v. Dresen, 76 Wis. 418, 45 N. W. Rep. 110; Smith v. Wood, 42 N. J. Eq. 563, 7 Atl. Rep. 881.

[2] 1 Drewry's Eq. Pl. 15.

[3] Smith v. Wood, 42 N. J. Eq. 566, 7 Atl. Rep. 881. See Virginia Fire & Marine Ins. Co. v. Cottrell, 85 Va. 864, 9 S. E. Rep. 132; Bierne v. Ray, 37 W. Va. 577, 16 S. E. Rep. 804; Pusey v. Gardner, 21 W. Va. 476, 477.

[4] See Davy v. Garrett, 7 Ch. D. 489; Smith v. Kay, 7 H. L. Cas. 763; Cady v. Leonard, 81 Cal. 622, 22 Pac. Rep. 694.

characterize the transaction, or specify the ground of relief, is not absolutely necessary.[1] Where the circumstances are such as do not warrant the court in avoiding the transaction *in toto*, it may be avoided as an absolute conveyance, and permitted to stand as a security;[2] but such relief cannot be afforded unless the complaint contains allegations adapted thereto.[3] An averment of an intent to defraud is one of fact, and not a statement of a conclusion of law.[4] It must be alleged as well as proved,[5] and it may be directly testified to as a fact.[6] An allegation that a mortgage was not executed in good faith, but for the purpose of hindering, delaying and defrauding creditors is not sufficiently specific.[7] Where a valuable consideration has passed, it is also necessary to charge that the grantee had notice or knowledge of the fraudulent

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[1] Whittlesey v. Delaney, 73 N. Y. 575; Warner v. Blakeman, 4 Abb. Ct. App. Dec. (N. Y.) 530; Maher v. Hibernia Ins. Co., 67 N. Y. 283. See Hamlen v. McGillicuddy, 62 Me. 268. In Goldsmith v. Goldsmith, 145 N. Y. 318, the court says: "It is true that an intended fraud is not explicitly and by the use of that word charged in the complaint, but all the facts are there, fully and clearly stated, showing the fraud attempted to be perpetrated, and all that is omitted is the word or expression characterizing the necessary inference. We have held that such an omission after judgment is not material where the facts themselves have been sufficiently pleaded. Whittlesey v. Delaney, 73 N. Y. 575."

[2] Bigelow v. Ayrault, 46 Barb. (N. Y.) 143; May on Fraudulent Conveyances, p. 235. See § 51.

[3] Van Wyck v. Baker, 16 Hun (N. Y.) 171.

[4] Platt v. Mead, 9 Fed. Rep. 91.

[5] Genesee River Nat. Bank v. Mead, 18 Hun (N. Y.) 303; Threlkel v. Scott, 89 Cal. 351, 26 Pac. Rep. 879.

[6] Seymour v. Wilson, 14 N. Y. 570. "The complaint contains a distinct charge that the assignment was made to hinder, delay and defraud the creditors of the assignor, and that it is therefore fraudulent and void. This is unexceptionable and sufficient pleading, *where the vice of the instrument is inherent in its terms*. When an assignment contains provisions which necessarily tend to hinder, delay, and defraud creditors, these provisions are conclusive evidence of the design of the parties to the instrument. . . . . It is not necessary in pleading to point out the particular features or clauses of the instrument which are objected to." Jessup v. Hulse, 29 Barb. (N. Y.) 541; reversed, 21 N. Y. 168, on another point.

[7] Gleason v. Wilson, 48 Kan. 500, 29 Pac. Rep. 698.

design.[1] And where subsequent creditors sue, the complaint must allege fraud as to them.[2]

§ 142. Evidence not to be pleaded.— General certainty is sufficient in pleading in equity; and though a mere general charge of fraud is insufficient, it is not to be understood that the particular facts and circumstances which confirm or establish it should be minutely charged.[3] It is not necessary, or proper, that pleadings at law or in equity should be incumbered with all the matters of evidence the complainant may intend to introduce.[4] A general averment of facts — not of conclusions of law — upon which the rights of the parties depend, is sufficient. By the elementary rules of pleading facts may be pleaded according to their legal effect, without setting forth the particulars that lead to it; and necessary circumstances implied by law need not be expressed in the plea.[5] So much of the complaint, however, as sets out in detail the inceptive steps which culminated in the alleged fraudulent conveyance, is not irrelevant or redundant matter.[6]

§ 143. Alleging insolvency.— As elsewhere shown, a voluntary conveyance is not generally regarded as fraudulent *per se*.[7] If a debtor is perfectly solvent, he can do what he will with his property so long as he does not dispose of so much of it as to disable him from paying his debts. This is a rule of pleading as well as of evidence. Hence a bill which contained no allegation that the debtor at

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[1] Seeleman v. Hoagland, 19 Col. 231, 34 Pac. Rep. 995.

[2] Hutchinson v. First Nat. Bk. 133 Ind. 285, 30 N. E. Rep. 952; Barrow v. Barrow, 108 Ind. 345, 9 N. E. Rep. 371.

[3] Story's Eq. Pl. § 252.

[4] Zimmerman v. Willard, 114 Ill. 370, 2 N. E. Rep. 70.

[5] Sullivan v. Iron & Silver Mining Co., 109 U. S. 555.

[6] Perkins v. Center, 35 Cal. 714.

[7] Young v. Heermans, 66 N. Y. 374; Holden v. Burnham, 63 N. Y. 75; Thomas v. Mackey, 3 Col. 390. See §§ 93 and 208. Grover & Baker Sewing Machine Co. v. Radcliff, 63 Md. 496; Kain v. Larkin, 131 N. Y. 306, 30 N. E. Rep. 105.

the time of the alienation was insolvent or embarrassed, was held bad,[1] for it is only when an inadequate amount of property remains that creditors have the legal right to complain.[2] The court said that, for aught that appeared in the pleading, the debtor might have been possessed of ample means, other than the property in controversy, to pay his debts; and in such a case the conveyance is not ordinarily open to the attack of creditors. A complaint by an executor attacking a fraudulent conveyance should allege the existence of debts as to which the conveyance is void.[3] But it is not necesssary in the case of a voluntary conveyance to allege also that there was fraud on the part of the grantee.[4]

A man is said to be insolvent "when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do,"[5] or when all his obligations could not be collected by legal process out of his own means,[6] or his means of payment are so crippled and his embarrassment is so great that he cannot proceed with and carry on his business in the usual course of trade.[7] A complaint which states that "the said W. L. J.,

[1] Burdsall v. Waggoner, 4 Col. 261. See Merrell v. Johnson, 96 Ill. 230; McCole v. Loehr, 79 Ind. 431; Spaulding v. Blythe, 73 Ind. 93; Noble v. Hines, 72 Ind. 12; Sherman v. Hogland, 54 Ind. 578, 584; Nevers v. Hack, 138 Ind. 263, 37 N. E. Rep. 791; Rice v. Perry, 61 Me. 145; King's Heirs v. Thompson, 9 Pet. 204; Warner v. Dove, 33 Md. 579. But see Walkow v. Kingsley, 45 Minn. 283, 47 N. W. Rep. 807; *contra*, Beal v. Lehman-Durr Co., 110 Ala. 446, 18 So. Rep. 230; Snyder v. Dangler, 44 Neb. 600, 63 N. W. Rep. 20, holding that bad faith may be found even in the absence of insolvency. See Sides v. Scharff, 93 Ala. 106, 9 So. Rep. 228.

[2] Lee v. Lee, 77 Ind. 253. See Platt v. Mead, 9 Fed. Rep. 91; Noble v. Hines, 72 Ind. 12; Whitesel v. Hiney, 62 Ind. 168; McConnell v. Citizens' State Bank, 130 Ind. 132, 27 N. E. Rep. 616; Albertoli v. Branham, 80 Cal. 631, 22 Pac. Rep. 404; McConnell v. Citizens' State Bank, 130 Ind. 127, 27 N. E. Rep. 616.

[3] Walker v. Pease, 17 Misc. (N. Y.) 415, 41 N. Y. Supp. 219.

[4] McAninch v. Dennis, 123 Ind. 21, 22 N. E. Rep. 881.

[5] Shone v. Lucas, 3 Dowl. & Ry. 218; Washburn v. Huntington, 78 Cal. 573, 21 Pac. Rep. 305.

[6] Herrick v. Borst, 4 Hill (N. Y.) 652; Riper v. Poppenhausen, 43 N. Y. 68, 75; Potter v. McDowell, 31 Mo. 73.

[7] Curtis v. Leavitt, 15 N. Y. 141.

at the time of making said deed, did not have sufficient property remaining, subject to execution, to pay all his said debts, but by means of said conveyance rendered himself wholly insolvent, and has not now, nor has, at any time since said conveyance, had sufficient property, subject to execution, out of which said debts could be made," is sufficient.[1] The insolvency must exist both at the time the suit was brought and the conveyance was made.[2]

§ 144. Allegations concerning consideration.— As regards allegations of consideration, the bill will be upheld if it distinctly recites either of three things: First, that the conveyance was wholly without consideration; second, that it was fraudulent and there was a consideration which, in cases of technical or constructive fraud, the complainant was willing to allow or has offered to return; or third, that the complainant is not informed and has no means of ascertaining whether there was a consideration, and that these facts are peculiarly within the defendant's knowledge. In this latter case the bill should pray for a discovery.[3]

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[1] Jennings v. Howard, 80 Ind. 216. See Price v. Sanders, 60 Ind. 310; Miller v. Lehman, 87 Ala. 517, 6 So. Rep. 361; York v. Rockwood, 132 Ind. 353, 31 N. E. Rep. 1110. It is said by Danforth, J., in an important case before the New York Court of Appeals, Van Dyck v. McQuade, 86 N. Y. 44: "An individual may purchase property, contract debts, incur new liabilities, and keep on in business, although he has debts unpaid; and if he does this in good faith and hope of a more prosperous fortune, he violates no moral or legal duty. And this is so, although at the time of purchase he is aware that his property is not sufficient to pay his debts (Nichols v. Pinner, 18 N. Y. 295). The principle of this rule applies to the managers of corporations (Scott v. Depeyster, 1 Edw. Ch. [N. Y.] 513; Hodges v. New England Screw Co., 1 R. I 312)." In Smith v. Collins, 94 Ala. 394. 10 So. Rep. 334, it was held that a person who has sufficient property amenable to legal process to satisfy all demands is not insolvent, although he may not have money on hand to meet his liabilities as they may fall due in the course of trade.

[2] Petree v. Brotherton, 133 Ind. 692, 32 N. E. Rep. 300; Nevers v. Hack, 138 Ind 260, 37 N. E. Rep. 791; cf. Cook v. Tibbals, 12 Wash. 207, 40 Pac. Rep. 935.

[3] Des Moines & M. R. Co. v. Alley, 16 Fed. Rep. 733. See § 147.

§ 145. **Fraudulent intent.**— It is usually of vital importance that the creditor should allege in the bill that the conveyance attacked was made with the intent to hinder, delay, or defraud creditors.[1] The effect of intent, as related to fraudulent alienations, is elsewhere made a special subject of discussion.[2] We may here observe that an averment to the effect that the grantee, the debtor's wife, gave no consideration, and that the whole consideration came from the debtor, sufficiently shows bad faith or fraudulent intent on her part.[3] An intent to defraud is properly pleaded by an allegation of such intent without alleging any fact to show such intent.[4] There is manifestly in this regard a distinction between pleading fraud and pleading fraudulent intent.

§ 146. **Pleading in equity.** — The plaintiff's title and claim to the assistance of a court of equity must always be exposed by the pleadings; but the style and character of pleading in equity has always been of a more liberal cast than is permitted in other courts,[5] as mispleading in matter of form has never been held to prejudice a party, provided the whole case is just and right in matter of substance, and supported by proper evidence.[6] As a creditors' bill is often brought for a discovery as well as for relief, the complainant is at liberty to avail himself of any objections to proceedings on the part of the defendant affecting his rights, even though not specified or charged in the bill. This rule results from the necessity of the case, as a creditor cannot be supposed to be thoroughly acquainted with the conduct of his debtor

[1] See Morgan v. Bogue, 7 Neb. 434; Hutchinson v. First Nat. Bank, 133 Ind. 283, 30 N. E. Rep. 952. See §§ 9, 10, 11.

[2] See Chap. XIV. See §§ 9, 10, 11.

[3] Newman v. Cordell, 43 Barb. (N. Y.) 448.

[4] Union Nat. Bank v. Reed, 27 Abb. N. C. 5.

[5] See § 60.

[6] Tiernan v. Poor, 1 Gill & J. (Md.) 216; 19 Am. Dec. 225. See § 60. Ridgely v. Bond, 18 Md. 450; Warner v. Blakeman, 4 Keyes (N. Y.) 507.

toward third persons, especially when, as is generally the case in fraudulent transactions, efforts have been made to conceal the circumstances from the public.[1]

§ 147. **Seeking discovery.**— The complainant, especially if he is prosecuting in a representative capacity, as, for instance, an assignee in bankruptcy, in seeking to set aside a fraudulent conveyance of real and personal property, has the right, as ancillary to the principal relief, to have a discovery from the defendants, and he properly seeks it with a view to supply the deficiency in his own knowledge; and his ignorance of the particulars sought not only entitles him to the discovery, but excuses the want of more precise specification of the particular fraud alleged.[2] Since parties in interest have been allowed to give testimony as witnesses, bills of discovery have been in a measure superseded.[3]

§ 148. **Excusing laches — Concealment of fraud.** — It frequently becomes vitally important to excuse, by appropriate recitals in the bill, apparent laches on the part of the creditor in commencing the suit.[4] In Forbes v. Overby,[5] which was a bill filed by an assignee, charging fraud and conspiracy, and praying for a discovery and disclosure, the defendants contended, upon a motion to dissolve an injunction, that the bill was insufficient in form and substance, and ought to be dismissed; first, because of complainant's laches in bringing this suit (it having been brought

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[1] Burtus v. Tisdall, 4 Barb. (N. Y.) 580.

[2] Verselius v. Verselius, 9 Blatchf. 190, per Woodruff, J. Cargill v. Kountze, 86 Tex. 386, 22 S. W. Rep. 1015, 25 Id. 13. See Bowden v. Johnson, 107 U. S. 263, 2 S. C. Rep. 246, per Blatchford, J.; *Ex parte* Boyd, 105 U. S. 653, 655; Hendricks v. Robinson, 2 Johns. Ch. (N. Y.) 283; Mountford v. Taylor, 6 Ves. Jr. 788.

[3] Field v. Hastings & Bradley Co., 65 Fed. Rep. 279: Preston v. Smith, 26 Fed. Rep. 884; *Ex parte* Boyd, 105 U. S. 657.

[4] Lant v. Morgan's Admr., 43 U. S. App. 623.

[5] 4 Hughes, 441, 444.

within a year from the discovery of the clue to the fraud); and second, because the bill failed to set forth specifically the impediments to an earlier prosecution of the claim. It was objected that the bill did not explain why the complainant had remained in ignorance of his rights, and that it failed to recite the methods employed by defendants to fraudulently keep the complainant in such ignorance; and that it did not disclose how and when the complainant first came to a knowledge of the matter alleged as the basis of the suit. The court observed that there had been a great variety of decisions upon the question as to what lapse of time was sufficient to bar cases of this character, and declared the general rule to be that each suit must be governed by its own peculiar circumstances. The case under consideration, being a bill for a discovery, was distinguished by the court, on that ground, from Badger v, Badger,[1] and it was said that a court would not compel a complainant, who was manifestly ignorant of the particulars of a fraud, to set out in his bill the very particulars concerning which a disclosure was sought.

Lord Erskine said: "No length of time can prevent the unkennelling of a fraud." In Alden v. Gregory,[2] Lord Northington exclaims: "The next question is in effect whether delay will purge a fraud? Never while I sit here! Every delay arising from it adds to the injustice, and multiplies the oppression." Mr. Justice Story stated the rule as follows:[3] "It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an

[1] 2 Wall. 87, and *infra*.
[2] 2 Eden, 285.
[3] Prevost v. Gratz, 6 Wheat. 497.

aggravation of the offense, and calls more loudly upon a court of equity to give ample and decisive relief." It must be remembered, however: First, that the trust must be "clearly established;" second, that the facts must have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*.[1] Long acquiescence and laches by parties out of possession, are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the parties in possession which will appeal to the conscience of the chancellor. The party who makes such an appeal should set forth in his bill specifically what the impediments to an earlier prosecution of his claim were,[2] how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in the bill. Otherwise the courts will not grope after the truth of facts involved in the mists and obscurity consequent upon a great lapse of time.[3]

§. 149 **Explaining delay — Discovery of fraud.** — In cases where it is sought to avoid the statute of limitations, or

[1] Badger v. Badger, 2 Wall. 92. In Felix v. Patrick, 145 U. S. 331, 12 S. C. Rep. 862, the court say: "We are left to infer that his concealment was that of mere silence, which is not enough. Wood v. Carpenter, 101 U. S. 135, 143; Boyd v. Boyd, 27 Ind. 429; Wynne v. Cornelison, 52 Ind. 312."

[2] "'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded." Lady Washington Consol. Co. v. Wood, 113 Cal. 486.

[3] Hammond v. Hopkins, 143 U. S. 252, 12 S. C. Rep. 418; Pearsall v. Smith, 149 U. S. 236, 13 S. C. Rep. 833; Kirby v. Lake Shore, etc. R. R. Co., 120 U. S. 137, 7 S. C. Rep. 430; Wollensak v. Reiher, 115 U. S. 101, 5 S. C. Rep. 1137.

rather to come within the exception to it, the plaintiff has been held to stringent rules of pleading and evidence. "Especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made."[1] This is necessary to enable the defendants to meet the fraud and disprove the alleged time of its discovery.[2] A general allegation of ignorance at one time, and of knowledge at another, is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner.[3] Fraud that will arrest the running of the statute must be secret and concealed, and not patent or known.[4] The party seeking to elude the statute by reason of fraud must aver and show that he used due diligence to detect it;[5] and if he had the means of

[1] Wood v. Carpenter, 101 U. S. 140; Stearns v. Page, 7 How. 819, 829; National Bank v. Carpenter, 101 U. S. 567; Rosenthal v. Walker, 111 U. S. 190, 4 S. C. Rep. 382; Wollensak v. Reiher, 115 U. S. 96, 5 S. C. Rep. 1137; Arnett v. Coffey, 1 Col. App. 34, 27 Pac. Rep. 614; Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 21 L. R. A. 174, 55 N. W. Rep. 547.

[2] Moore v. Greene, 19 How. 72; Beaubien v. Beaubien, 23 Id. 190; Badger v. Badger, 2 Wall. 95.

[3] Carr v. Hilton, 1 Curt. C. C. 230.

[4] Martin v. Smith, 1 Dill. 85. This case contains a full review of the authorities. See also McLain v. Ferrell, 1 Swan (Tenn.) 48; Buckner v. Calcote, 28 Miss. 432; Cook v. Lindsey, 34 Miss. 451; Phalen v. Clark, 19 Conn. 421; Moore v. Greene, 2 Curt. C. C. 202, affi'd 19 How. 69, 72; Rosenthal v. Walker, 111 U. S. 189, 4 S. C. Rep. 382; Bailey v. Glover, 21 Wall. 342; Gifford v. Helms, 98 U. S. 248; Upton v. McLaughlin, 105 U. S. 640.

[5] In Hardt v. Heidweyer, 152 U. S. 558, 560, 14 S. C. Rep. 671, the court says: "It is well settled that a party who seeks to avoid the circumstances of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also when and how knowledge was obtained, in order that the court may determine whether reasonable effort was made by him to ascertain the facts. . . . . Tested by this rule, it is apparent that this bill must be held deficient in not showing how knowledge of the wrongs complained of was obtained by the plaintiffs. It is alleged that they were ignorant, and now

discovery in his power he will be held to have known it.[1] In Cole v. McGlathry,[2] it appeared that the plaintiff had provided the defendant with money to pay certain debts. The defendant falsely affirmed that he had paid them, and fraudulently kept possession of the money. It was decided that the plaintiff was not entitled to recover for the reason that he had at all times the means of discovering the truth of the statements by making inquiries of the parties who should have received the money. This principle is further illustrated in the analogous case of McKown v. Whitmore,[3] in which it appeared that the plaintiff had handed the defendant money to be deposited for the plaintiff in bank. The defendant told the plaintiff that he had made the deposit. It was held that even though the statement was false, and made with a fraudulent design, the plaintiff could not recover because he might at all times have inquired at the bank and learned the truth.[4] In Boyd v. Boyd,[5] it was ruled that the concealment which would avoid the statute must go beyond mere silence. It must be something done to prevent discovery. The concealment must be the result of positive acts.[6] An allegation that the defendants pretended and professed to the world that the transactions were *bona fide* was looked upon as being too general. In Wood v. Carpenter,[7] a pleading which reads as follows: "And the

have knowledge; and that they acquired such knowledge within a month prior to bringing the suit: but how they acquired it, and why they did not have the same means of ascertaining the facts before, is not disclosed."

[1] Buckner v. Calcote, 28 Miss. 432, 434. See Nudd v. Hamblin, 8 Allen (Mass.) 130. Compare Baldwin v. Martin, 35 N. Y. Super. Ct, 98; Barlow v. Arnold, 6 Fed. Rep. 355; Erickson v. Quinn, 3 Lans. (N. Y.) 302; Hardt v. Heidweyer, 152 U. S. 559, 14 S. C. Rep. 671; Stearns v. Page, 7 How. 829.

[2] 9 Me. 131.

[3] 31 Me. 448.

[4] See, further, Rouse v. Southard, 39 Me. 404; Woods v. James, 87 Ky. 513, 9 S. W. Rep. 513.

[5] 27 Ind. 429; Dorsey Machine Co. v. McCaffrey, 139 Ind. 557, 38 N. E. Rep. 208.

[6] Stanley v. Stanton, 36 Ind. 445.

[7] 101 U. S. 135; Hardt v. Heidweyer, 152 U. S. 559, 14 S. C. Rep. 671.

plaintiff further avers that he had no knowledge of the facts so concealed by the defendant until the year A. D. 1872, and a few weeks only before the bringing of this suit," was held to be clearly bad. The court in this case, in a critical and exhaustive opinion, review many of the cases which have just been considered, and then observe that a wide and careful survey of the authorities leads to the following conclusions: First, the fraud and deceit which enabled the offender to do the wrong may precede its perpetration. The length of time is not material, provided there is the relation of design and its consummation. Second, concealment by mere silence is not enough. *There must be some trick or contrivance intended to exclude suspicion or prevent inquiry.* Third, there must be reasonable diligence, and the means of knowledge are the same thing in effect as knowledge itself. Fourth, the circumstances of the discovery must be fully stated [pleaded] and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.[1]

In New York the statute expressly provides that, in actions to procure a judgment other than for a sum of

[1] In Erickson v. Quinn, 47 N. Y. 413, Rapallo, J., said: "The fundamental fact from which the conclusion of a fraudulent intent is drawn, is the absence of any valuable consideration for the conveyance. So long as the creditor was ignorant of that essential and controlling fact, the statute ought not to run against him." In Dorsey Machine Co. v. McCaffrey, 139 Ind. 554, 38 N. E. Rep. 208, the court says: "In suits of equity the decided weight of authority is in favor of the proposition that where a party has been injured by the fraud of another, and such fraud is concealed, or is of such character as to conceal itself, whereby the injured party remains in ignorance of it without any fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the person committing the fraud to conceal it from the knowledge of the other party. Wear v. Skinner, 46 Md. 265; Booth v. Warrington, 4 Bro. P. C. 163; Fisher v. Tuller, 122 Ind. 31, 23 N. E. Rep. 523; Stearns v. Page, 7 How. (U. S.) 819; Moore v. Greene, 19 How. (U. S.) 69; Sherwood v. Sutton, 5 Mason, (U. S.) 143; Snodgrass v. Branch Bk., 25 Ala. 161."

money, on the ground of fraud, the cause of action is not deemed to have accrued till the discovery of the facts constituting the fraud.[1] It has been held that a knowledge of the fraud will be imputed where a party deliberately shuts his eyes to the facts which call for investigation,[2] though this question of what constitutes notice is one that is much debated.

§ 150. **Complaints bad for multifariousness.** — Judge Story says that multifariousness is "the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill."[3] It is also said: "What is more familiarly understood by multifariousness as applied to a bill, is where a party is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatsoever."[4] In United States v. Bell Telephone Company,[5] Mr. Justice Miller used these words: "The principle of multifariousness is one very largely of convenience, and is more often applied where two parties are attempted to be brought together by a bill in chancery who have no common interest in the litigation, whereby one party is compelled to join in the expense and trouble of a suit in which he and his co-defendant have no common interest, or in which one party is joined as complainant with another party with whom in like manner he either has no interest at all, or no such interest as requires the defendant to

[1] N. Y. Code Civ. Proc. § 382.

[2] Higgins v. Crouse, 147 N. Y. 411, 42 N. E. Rep. 6. See, also, Gillespie v. Cooper, 36 Neb. 775, 55 N. W. Rep. 302.

[3] Story's Ex. Pl. § 271. See Walker v. Powers, 104 U. S. 251.

[4] Story's Eq. Pl. § 530. See Campbell v. Mackay, 1 Mylne & Cr. 617.

[5] 128 U. S. 352.

litigate it in the same action."[1] The authorities bearing upon this question are very numerous, but there is deducible from them all no positive inflexible rule as to what, in the sense of courts of equity, constitutes multifariousness, which is fatal on demurrer.[2] Indeed it seems to be generally recognized as an impossibility to formulate a general rule as to what is considered multifariousness; every case must be governed by its own circumstances, and the court must exercise a sound discretion on the subject.[3] The rule in relation to multifariousness, say the Supreme Court in Iowa, is one of convenience, and though the matters set forth in the pleadings are distinct, yet if justice can be administered between the parties without a multiplicity of suits, the objection will not prevail.[4] The objection that the bill is multifarious is always discouraged by the courts when, instead of advancing, it will defeat the ends of justice.[5]

§ 151. **Pleadings held not multifarious.** — Such being the general condition of the authorities as to multifarious pleadings, it follows that the practitioner must rely upon

[1] Citing Oliver v. Piatt, 3 How. 333; Walker v. Powers, 104 U. S. 245

[2] De Wolf v. Sprague Mfg. Co., 49 Conn. 292. See generally Att'y General v. Cradock, 3 Mylne & Cr. 85; Knye v. Moore, 1 Sim. & S. 61; Kensington v. White, 3 Price, 164; Cornwell v. Lee, 14 Conn. 524; Middletown Sav. Bank v. Bacharach, 46 Conn. 522; Board of Supervisors v. Deyoe, 77 N. Y. 225; Brinkerhoff v. Brown, 6 Johns. Ch. (N. Y.) 151; New York, & N. H. R R. Co. v. Schuyler, 17 N. Y. 608.

[3] Gaines v. Chew, 2 How. 619; Oliver v. Piatt, 3 How. 333. See McLean v. Lafayette Bank, 3 McLean, 415; Abbot v. Johnson, 32 N. H. 26; Carter v. Kerr, 8 Blackf. (Ind.) 373; Butler v. Spann, 27 Miss. 234; Brown v. Haven, 12 Me. 164; Richards v. Pierce, 52 Me. 560; Warren v. Warren, 56 Me. 360; Bugbee v. Sargent, 23 Me. 269; Weston v. Blake, 61 Me. 452. See § 132.

[4] Bowers v. Keesecher, 9 Iowa, 422.

[5] Marshall v. Means, 12 Ga. 61; Stephens v. Whitehead, 75 Ga. 298. Where two distinct subjects are embraced in a bill, *e. g.*, the avoidance of a marriage settlement and the annulment of a will, though the necessary parties to the suit may be the same, their interests and attitude are decidedly at variance, and the bill is bad for multifariousness. McDonnell v. Eaton, 18 Fed. Rep. 710.

instances, and illustrations drawn from reported cases, for his guidance.

In a suit before the Supreme Judicial Court of New Hampshire,[1] it was decided that it was not multifarious to join in a creditor's bill, as parties defendant with the debtor, several persons to whom he conveyed distinct parcels of property, out of which the creditor sought satisfaction of his debt, although such persons might have no common interest in the several parcels conveyed.[2] And in Dimmock v. Bixby,[3] it was held that a demurrer for multifariousness would hold good only when the plaintiff claimed several matters of a different nature, and not when one general right was asserted, although the defendants might have separate and distinct rights. The same principle is recognized in Boyd v. Hoyt.[4] That was a case of a creditor's bill brought to reach property of a judgment-debtor which has been fraudulently transferred to two or more persons holding different portions of it by distinct conveyances, and it was decided that such persons might be joined. The chancellor lays it down that when the object of a suit is single, but different persons have or claim separate interests in distinct or independent matters, all connected with and arising out of the single object of the suit, the complainant may bring such persons before the court as defendants, so that the whole object of the bill may be effected in one suit, and further unnecessary and useless litigation prevented. The case of Morton v. Weil[5] is an important illustration in point. Creditors by different judgments united in bringing a suit against the executors under the will of a decedent, alleging the fraud of that person in

[1] Chase v. Searles, 45 N. H. 519. See Hale v. Nashua & L. R. R., 60 N. H. 339.

[2] See §§ 54, 55, 132.

[3] 20 Pick. (Mass.) 377.

[4] 5 Paige (N. Y.) 65. See Rinehart v. Long, 95 Mo. 396, 8 S. W. Rep. 559. The debtor and all persons through whom he has conveyed the property as well as the present holder may be joined. Craft v. Wilcox, 102 Ala. 378, 14 So. Rep. 653.

[5] 33 Barb. (N. Y.) 30.

contracting the debts, and joined as defendants various parties having liens upon, or title to, the property in question by reason of judgments or assignments, alleging that such liens or titles were fraudulently obtained, and praying that the same might be vacated, and the defendants compelled to account for and pay over the property. On demurrer to the bill it was decided that the parties to it were properly joined, and that in other respects it was sufficient.[1] In another case,[2] a creditors' bill filed against the debtor and his grantees, for the purpose of setting aside a number of voluntary conveyances, severally made to each of the parties, was held to be good. And in Harrison v. Hallum,[3] the court say that it is proper, where there are several judgment-debtors in the same judgment, and one of them has made a fraudulent conveyance to one grantee, and another has made a similar conveyance to another grantee, and a third has made a like conveyance to still another grantee, to unite all the debtors and their several fraudulent grantees in one common bill for the relief of the judgment-creditors. Again, where a debtor, with intent to defraud his creditors, purchased land, causing the deed to be made to his wife, who participated in the fraud, and conveyed the land to another person with the same intent, who in turn conveyed it to a third, both grantees being cognizant of the fraud, it was held, in an action brought by a creditor to set aside the conveyances, that both transactions being of the same nature, though different in form, could be properly joined in the same complaint.[4] A bill is not

[1] See Lawrence v. Bank of the Republic, 35 N. Y. 320; Reed v. Stryker, 12 Abb. Pr. (N. Y.) 47; Fellows v. Fellows, 4 Cow. (N. Y.) 682; Lewis v. St. Albans Iron and Steel Works, 50 Vt. 481; Arnold v. Arnold, 11 W. Va. 449; Shafer v. O'Brien, 31 W. Va. 606, 8 S. E. Rep. 298. See, further, Way v. Bragaw, 16 N. J. Eq. 213; Hicks v. Campbell, 19 N. J. Eq. 183; Randolph v. Daly, 16 N. J. Eq. 313.

[2] Williams v. Neel, 10 Rich. Eq. (S. C.) 338.

[3] 5 Coldw. (Tenn.) 525.

[4] North v. Bradway, 9 Minn. 183. See Jones v. Morrison, 31 Minn. 140, 16 N. W. Rep. 854.

regarded as multifarious, though brought to recover different portions of the estate of a debtor from several defendants, if the alleged illegal transfers were the result of a common purpose on the part of the defendants to dismember the estate.[1]

§ 152. — The cases upon this subject are almost without number. In De Wolf v. Sprague Mfg. Co.,[2] it appeared that the plaintiff held a judgment lien upon certain real estate upon which a trust-mortgage had been executed, which, if valid, was entitled to priority. The suit was brought to set aside or postpone the mortgage, on the ground that it was void against the complaining creditor, and for a foreclosure of the judgment lien, and for possession, and the mortgagors and the trust-mortgagee were made defendants. The court, after protracted argument and an extended review of the authorities, held that the bill was not multifarious. In Parker v. Flagg,[3] the court says: "The bill is brought by the executor, representing all the creditors of an insolvent estate, to set aside conveyances made by the testator of all his property, real and personal, in fraud of those creditors, to his wife, who is the sole defendant; some of the property consists of mortgages, to recover which the plaintiff has no adequate remedy at law; all the conveyances appear to have been part of one scheme, and no objection is, nor, it would seem, could be taken to the bill for multifariousness. The demurrer was erroneously sustained, and should have been overruled."[4] It is perhaps unnecessary to further multiply illustrations. Some of the cases have certainly gone to an extreme limit, and parties have been

[1] Van Kleeck v. Miller, per Choate, J., 19 N. B. R. 486; citing Boyd v. Hoyt, 5 Paige (N. Y.) 65; Platt v. Preston, 19 N. B. R. 241. See Bradner v. Holland, 33 Hun (N. Y.) 290.

[2] 49 Conn. 282.

[3] 127 Mass. 30.

[4] Chase v. Redding, 13 Gray (Mass.) 418; Welsh v. Welsh, 105 Mass. 229; Gilson v. Hutchinson, 120 Mass. 27.

held together as defendants in one action by a very slender thread of reasoning. The St. Louis Court of Appeals, commenting upon the subject, says: "The principle that it is not sufficient that the defendants are all concerned in some general charge, such as fraud on the part of the debtor, or that as grantees of distinct properties by distinct conveyances they obtained title through him, but that all the defendants should at least have an interest in the principal point in issue in the case, is surely of some value as a general test. In cases like the present it would be decisive. Here there is no material issue in which all the defendants have a common interest, and consequently no tie to make them defendants in one suit. . . . . It is obvious that, merely from convenience to plaintiffs, the defendants ought not to be put to the trouble and expense of litigating matters with which they are unconnected."[1] These observations were made in a case in which there were twenty defendants having a common source of title from an alleged fraudulent grantor; the conveyances were separate and made at different times, and the defendants were beneficiaries and trustees indiscriminately joined. The bill was pronounced multifarious. The decision, however, can scarcely be harmonized with some of the authorities already discussed.[2]

§ 153. **Alternative relief.** — In Alabama it was held that a creditors' bill may be filed for a double purpose; asking in the alternative to have two or more conveyances cancelled as intended to hinder, delay, and defraud creditors, or to have them construed as together constituting a general assignment inuring, under the statute of that State, to the benefit of all the insolvent's creditors

[1] Bobb v. Bobb, 8 Mo. App. 260.

[2] As to bills held not to be multifarious, see Richmond v. Irons, 121 U. S. 27, 7 S. C.Rep. 788.

equally.[1] But in a later case in that State,[2] the court feel constrained to depart from and overrule the decision upon this point.

§ 154. **Attacking different conveyances.** — The fact that a plaintiff seeks to set aside two or more conveyances as fraudulent, does not require that each conveyance shall be set forth in a separate paragraph as the basis of a separate cause of action. They constitute but one cause of action, the fraudulent disposition of his property by the judgment-debtor.[3]

§ 155. **Prayer of complaint — Variance — Verification.** — As a general rule in the modern procedure a mistake in the demand for relief is not fatal.[4] In Buswell v. Lincks,[5] the court said: "The point is made that the bill was framed upon the basis of a claim that there had been a fraudulent trust-deed, and a receiver had been prayed for, while the relief given in setting aside the fraudulent conveyance and adjudging a sale of the leasehold under execution was inconsistent with the prayer of the complaint. The sufficient answer to this proposition is, that the judgment was such as the court was bound to give upon the allegations and proofs without reference to the relief demanded." It may adapt the relief to the exigencies of the case.[6] And where the bill, in addition to the general demand for relief, contained a prayer that a deed be set aside, it was held that, merely because of a prayer that the defendant be decreed to give the complainant possession of the land, the bill would not be

[1] Crawford v. Kirksey, 50 Ala. 591.

[2] Lehman v. Meyer, 67 Ala. 404; Moog v. Talcott, 72 Ala. 210.

[3] Strong v. Taylor School Township, 79 Ind. 208. See Wright v. Mack, 95 Ind. 332.

[4] See Bell v. Merrifield, 109 N. Y. 202, 16 N. E. Rep. 55; Dudley v. Congregation, etc., St. Francis, 138 N. Y. 459, 34 N. E. Rep. 281; Valentine v. Richardt, 126 N. Y. 277, 27 N. E. Rep. 255; Murtha v. Curley, 90 N. Y. 372.

[5] 8 Daly (N. Y.) 527.

[6] Dudley v. Congregation, etc., St. Francis, 138 N. Y. 459, 34 N. E. Rep. 281.

treated as a bill for possession, nor dismissed on the ground that ejectment was the proper remedy.[1] As a general rule complainants are entitled under a prayer for general relief, to any judgment consistent with the case made in their bill,[2] but they are not usually entitled to a decree covering and including matters not referred to in the pleadings, and as to which the respondents have never had their day in court.[3] The court will not hesitate to dismiss a bill which presents a case totally different from the testimony in the record;[4] and no decree can ordinarily be made on grounds not stated in the bill.[5] "The rule is explicit and absolute, that a party must recover in chancery according to the case made by his bill or not at all, '*secundum allegata*,' as well as '*pro bata*.'"[6] Matters not charged in the bill should not be considered on the hearing.[7] If, however, the special prayers are inapt and incongruous, and so framed that no relief can be granted under them, the court under the prayer for general relief may render any appropriate judgment consistent with the case made by the bill.[8] Courts of equity give judgment for money only where that is all the relief needed.[9] The bill may be framed in a double aspect, and ask for relief in the alternative, but the state of facts upon which relief is prayed must not be inconsistent.[10] The prayer of the complaint is sometimes

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[1] Miller v. Jamison, 24 N. J. Eq. 41. See Sedg. & Wait on Trial of Title to Land, 2nd ed., § 169.

[2] Bell v. Merrifield, 109 N. Y. 206, 16 N. E. Rep. 55.

[3] Wilson v. Horr, 15 Iowa, 492; Tripp v. Vincent, 3 Barb. Ch. (N. Y.) 613; Parkhurst v. McGraw, 24 Miss. 139; Hovey v. Holcomb, 11 Ill. 660.

[4] Roberts v. Gibson, 6 H. & J. (Md.) 123; Truesdell v. Sarles, 104 N. Y. 168, 10 N. E. Rep. 139.

[5] Bailey v. Ryder, 10 N. Y. 363; Wright v. Delafield, 25 N. Y. 266; Gordon v. Reynolds, 114 Ill. 123, 28 N. E. Rep. 455.

[6] Bailey v. Ryder, 10 N. Y. 370; Clark v. Krause, 2 Mackey (D. C.) 573; Eyre v. Potter, 15 How. 42.

[7] Hunter v. Hunter, 10 W. Va. 321.

[8] Annin v. Annin, 24 N. J. Eq. 188.

[9] Bell v. Merrifield, 109 N. Y. 207, 16 N. E. Rep. 55; Murtha v. Curley, 90 N. Y. 372.

[10] Zell Guano Co. v. Heatherly, 38 W. Va. 410, 18 S. E. Rep. 611.

resorted to in determining whether the action is legal or equitable, and the court will be guided by the relief asked in reaching a conclusion.[1]

The objection that a bill is not verified is immaterial, as a bill in equity need not usually be sworn to unless it is sought to use it as evidence upon an application for a provisional injunction or other similar relief.[2]

§ 156. **Amendment.** — A variance between the actual date of the judgment and that set forth in a creditors' bill based on it, may be corrected by amendment at any time during the proceedings; but as the complainant is not absolutely confined to the exact date stated in the bill the amendment may be unnecessary.[3] An amendment of a bill as to the description of the property, under well-established rules of procedure only operates from the time of the service of the amended pleading.[4] The bill may be amended on the final hearing in the United States Circuit Court, so as to state that the value of the matter in dispute exceeds five hundred dollars.[5] Speaking upon the subject of amendments, Davis, J., said, in Neale v. Neales:[6] "To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case, but this power would very often be ineffectual for the purpose, unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms that the party not in fault would have no reasonable ground to object to. That the court has this power and can, upon hearing the cause, if unable to do

[1] O'Brien v. Fitzgerald, 143 N. Y. 377, 38 N. E. Rep. 371.

[2] Hughes v. Northern Pacific R. R. Co. 1 West Coast Rep. 24.

[3] First Nat. Bank of M. v. Hosmer, 48 Mich. 200, 12 N. W. Rep. 212.

[4] Miller v. Sherry, 2 Wall. 250.

[5] Collinson v. Jackson, 8 Sawyer, 358.

[6] 9 Wall. 8.

complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authorities."[1] The granting of amendments of pleadings in chancery rests in the sound discretion of the court.[2]

§ 157. **Description — lis pendens.** — Aside from interests not liable to execution, the fact that a creditor is compelled to file a bill in equity usually implies ignorance on his part of the exact character and form in which the debtor has invested or secreted his property. If such were not the case, process of execution would be invoked. It should not, therefore, be necessary to particularly describe or indicate in the complaint, the assets, whether legal or equitable, which it is proposed to reach by the bill.[3] Thus a bill was entertained which alleged that the defendant "has equitable interests, things in action, and other property which cannot be reached by execution, and that he has also debts due to him from persons unknown."[4] In Miller v. Sherry[5] the original bill was in the form of a creditors' bill. It contained nothing specific except as to certain transactions between the debtor and one Richardson. There was no other part of the bill upon which issue could be taken as to any particular property. The court held that it was effectual for the purpose of creating a general lien upon the assets of the debtor, as a means of discovery, and as the foundation for an injunction and an order that the debtor execute a

[1] Citing Mitford's Chancery Pleading, 326, 331; Story's Equity Pleading, §§ 904, 905; Daniel's Chancery Pr. & Pl. 463, 466; Smith v. Babcock, 3 Sumner, 583; McArtee v. Engart, 13 Ill. 242.

[2] Gordon v. Reynolds, 114 Ill. 118, 28 N. E. Rep. 455.

[3] Shainwald v. Lewis, 6 Fed. Rep. 766.

[4] Lanmon v. Clark, 4 McLean, 18. "The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, even when there is no specific lien on the property, is undoubted." Public Works v. Columbia College, 17 Wall. 530.

[5] 2 Wall. 249.

conveyance to a receiver. Furthermore, that if it became necessary to litigate as to any specific claim, other than that against Richardson already specified, an amendment to the bill would have been indispensable. The bill did not create a *lis pendens*[1] operating as notice affecting any real estate. To have that effect the recital in the description must be so definite that any one reading it can thereby learn what property is intended to be made the subject of the litigation.[2] Where the complainant in a creditors' bill seeks to obtain satisfaction out of lands inherited or devised,[3] and is unable to specify the lands, he may state that fact in the bill, and call upon the heirs to discover the lands devised or inherited, so that they may be reached by amendment of the bill or otherwise.[4] If the description be indefinite, it may be aided by the evidence.[5]

The rule that an alienation of property made during the pendency of an action is subject to the final decree is, as shown by Mr. Bishop,[6] of very ancient origin. Murray v. Ballou[7] is the leading case in this country. The doc-

[1] As to the application of the doctrine of *lis pendens* to creditors' suits, see Webb v. Read, 3 B. Mon. (Ky.) 119; Jackson v. Andrews, 7 Wend. (N. Y.) 152.

[2] See Griffith v. Griffith, 9 Paige (N. Y.) 317. Compare Sharp v. Sharp, 3 Wend. (N. Y.) 278; King v. Trice, 3 Ired. (N. C.) Eq. 573; McCauley v. Rodes, 7 B. Mon. (Ky.) 462; Brown v. John V. Farwell Co., 74 Fed. Rep. 764.

[3] Compare Read v. Patterson, 134 N. Y. 128, 31 N. E. Rep. 445, where creditors sought to reach property in the hands of heirs and the executor's schedule was held not to be evidence of the debts due by the testator. See Adams v. Fassett, 73 Hun (N. Y.) 430, 26 N. Y. Supp. 447.

[4] Parsons v. Bowne, 7 Paige (N. Y.) 354. See § 147.

[5] Williams v. Ewing, 31 Ark. 235. The circumstance that a deed did not give an accurate description of the land intended to be conveyed will not defeat a settlement where the description used could leave no one in serious doubt as to the land intended. Wallace v. Penfield, 106 U. S. 263, 1 S. C. Rep. 216.

[6] Bishop on Insolvent Debtors, supplement, § 228*a*.

[7] 1 Johns. Ch. (N. Y.) 566. See Tilton v. Cofield, 93 U. S. 168; Thompson v. Baker, 141 U. S. 648, 12 S. C. Rep. 89; Tuttle v. Turner, 28 Tex. 759, 773; Union Trust Co. v. Southern Inland Nav. & Imp. Co., 130 U. S. 570, 9 S. C. Rep. 606.

trine is important both as regards the titles of purchasers and the question of preferences among judgment-creditors. In Scouten v. Bender,[1] where an assignment was overturned, it was decided that the creditors were entitled to satisfaction of their judgments, respectively, out of the funds derived from the real estate in the order of priority of the judgments; and out of the personal fund in the order in which the bills were filed and the equitable liens created. The doctrine of *lis pendens*, it may be further remarked, is said to have no application to corporate stock,[2] or negotiable securities.[3] Mr. Justice Bradley said in County of Warren v. Marcy:[4] "Whilst the doctrine of constructive notice arising from *lis pendens*, though often severe in its application, is, on the whole, a wholesome and necessary one, and founded on principles affecting the authoritative administration of justice, the exception to its application is demanded by other considerations equally important, as affecting the free operations of commerce, and that confidence in the instruments by which it is carried on, which is so necessary in a business community."[5] In New York, where an action in which a *lis pendens* was filed has been dismissed and the notice canceled, it ceases to be a statutory notice to *bona fide* purchasers of the premises described in it.[6] An attempt to discuss the various phases of the law of *lis*

[1] 3 How. Pr. (N. Y.) 185. See § 132*a*.

[2] Holbrook v. New Jersey Zinc Co., 57 N. Y. 616.

[3] County of Warren v. Marcy, 97 U. S. 96.

[4] 97 U. S. 109.

[5] For phases of the doctrine of *lis pendens*, and of the rule as to the preference obtained by filing a bill, see Leitch v. Wells, 48 N. Y. 585; Fitch v. Smith, 10 Paige (N. Y.) 9; Albert v. Back, 20 J. & S. (N. Y.) 550, affi'd 101 N. Y. 656; Davenport v. Kelly, 42 N. Y. 193; Van Alstyne v. Cook, 25 N. Y. 489; Becker v. Torrance, 31 N. Y. 631; Boynton v. Rawson, 1 Clarke (N. Y.) 584; Claflin v. Gordon, 39 Hun (N. Y.) 57; Shand v. Hanley, 71 N. Y. 324; Johnson v. Rogers, 15 N. B. R. 1, 13 Fed. Cases, 794; Clarke v. Rist, 5 Fed. Cas. 978, 3 McLean, (U. S.) 494; cf. Stewart v. Isidor, 5 Abb. Pr. N. S. (N. Y.) 68.

[6] Valentine v. Austin, 124 N. Y. 400, 26 N. E. Rep. 973.

pendens is not possible in this connection. Certainly under the reformed procedure which does not usually require the filing of the pleadings before judgment the old doctrine of *lis pendens* cannot be said to relate to innocent purchasers of personal property.[1] The exceptions that have crept into the rule that a party who meddles with property in controversy does so at his peril have frequently brought the proceedings of diligent creditors to naught.

§ 157a. **Change of venue — Territorial jurisdiction.** — In New York State a motion to change the place of trial of an action, brought to annul a fraudulent conveyance, to the county in which certain real estate passing under the assignment is situated, cannot be defeated by an offer on the part of the plaintiff to stipulate that he will not attempt to reach such real estate.[2] When a court of equity attempts to act directly upon real or personal property by its decree the property must be within the territoral jurisdiction of the court. "It is equally well settled that where one is the owner of land or other property in a foreign jurisdiction, which in equity and good conscience he ought to convey to another, the latter may sue him in equity in any jurisdiction in which he may be found, and compel him to convey the property. The decree in such case directing a conveyance of the property does not directly affect the title to the property, yet the enforcement of it does result in the complete change of the title.[3]

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[1] Leitch v. Wells, 48 N. Y. 609; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Zoeller v. Riley, 100 N. Y. 102, 2 N. E. Rep. 388.

[2] Wyatt v. Brooks, 42 Hun (N. Y.) 502. Compare Acker v. Leland, 96 N. Y. 384.

[3] Johnson v. Gibson, 116 Ill. 294, 6 N. E. Rep. 205.

CHAPTER X.

OF THE PLEA OR ANSWER

§ 158. Answer and burden of proof. General denial.
159. Avoiding denial.
160. Answer as evidence for or against co-defendant.
161. Pleading to the discovery and the relief.
§ 162. Particularity of denial in answer.
162a. Bill of particulars.
163. Denying fraud or notice.
164. Admission and avoidance.
165. Avoiding discovery.
166. Affirmative relief.
167. Waiver of verification.

§ 158. Answer and burden of proof. General denial.— Usually, as we have seen, in creditors' actions to reach assets, or bills in equity to annul fraudulent alienations, the debtor and the fraudulent alienees are made parties defendant. The latter are necessary parties to the end that the judgment may conclude them, and the court obtain jurisdiction over and possession of the property or assets in their hands, and annul the colorable transaction. It is manifest that the defendant alienee has rights in the suit different from and sometimes superior to those of the debtor. The latter is naturally concluded by the judgment upon which the bill should proceed, and can withhold from his creditor nothing but exempt property or certain trust income originating from third parties.[1] The alienee, on the other hand, may claim to be a *bona fide* purchaser, having a complete title, or may show the absence of actual fraud, and thus be allowed to hold the property as security for the amount of actual advances. The grantor may "intend a fraud, but if the grantee is a fair, *bona fide*, and innocent purchaser, his

[1] See Chap. XXIII.

title is not to be affected by the fraud of his grantor."[1] It follows that the alienee cannot be prejudiced by the fact that judgment *pro confesso* passes against the debtor,[2] or that fraud is admitted or alleged in the debtor's answer.[3] The defense that a party is a *bona fide* purchaser is an affirmative defense only in cases where fraud in some previous holder of the title has been shown,[4] and ordinarily a sworn answer responsive to a direct interrogatory or specific charge of fraud must be accepted as true until disproved.[5] Fraud, as we have already seen,[6] is not a thing to be presumed, but must be proved and established by evidence sufficient for that purpose,[7] although, as already made manifest,[8] it is sometimes practically a legal deduction from uncontroverted facts, or from evidence the weight of which is practically conclusive.[9] Distinct and even inconsistent grounds of defense may be set up.[10]

Where a defendant's title is attacked on the ground of fraud he may, under a general denial, introduce any proof showing that his title is not fraudulent.[11] In recent Colorado cases it is held that if a party desires to subject property held by a vendee under apparently valid *indicia* of ownership to the payment of a debt of his vendor, the attacking party must plead and prove the facts that vitiate such title, whether they constitute fraud or estoppel.[12]

[1] Sands v. Hildreth, 14 Johns. (N. Y.) 498, per Spencer, J.: Hollister v. Loud, 2 Mich. 310; Kittering v. Parker, 8 Ind. 44; Loeschigk v. Bridge, 42 N. Y. 423. See Chap. XXIV.

[2] Thames v. Rembert, 63 Ala. 561. See Dick v. Hamilton, 1 Deady, 322; Fulton v. Woodman, 54 Miss. 158–173.

[3] See Scheitlin v. Stone, 43 Barb. (N. Y.) 637.

[4] Fulton v. Woodman, 54 Miss. 172.

[5] Fulton v. Woodman, 54 Miss. 159; Hartshorn v. Eames, 31 Me. 98.

[6] See § 6.

[7] Grover v. Grover, 3 Md. Ch. 35.

[8] See §§ 9, 10.

[9] See § 10.

[10] Goodwin v. Wertheimer, 99 N. Y. 149, 1 N. E. Rep. 404; Societa Italiana v. Sulzer, 138 N. Y. 472, 34 N. E. Rep. 193.

[11] Ray v. Teabout, 65 Iowa, 157; See § 141.

[12] Tucker v. Parks, 7 Col. 62; De Votie v. McGerr, 15 Col. 467; Seeleman v. Hoagland, 19 Col. 231, 34 Pac. Rep. 996.

The lack of allegations of knowledge or notice of the fraudulent design, or complicity therewith, or participation therein on the part of the purchaser, will be sufficient to exclude evidence of such knowledge or conduct.

§ 159. **Avoiding denial.** — The general rule prevails, under equity procedure, that an answer under oath, so far as it is responsive, is to be taken as true unless overcome by competent proof.[1] When the defendant, by his answer under oath, has expressly negatived the allegations of the bill, and the testimony of only one person has affirmed what has been negatived, the court will not decree in favor of the complainant.[2] There is, then, oath against oath.[3] The complainant generally calls upon the defendant to answer on oath, and is therefore bound to admit the answer, so far as he has called for it, to be *prima facie* true, and as much worthy of credit as the testimony of any witness. This rule does not extend, however, to averments embodied in the answer not directly responsive to the allegations contained in the bill, since the complainant has not called for such averments.[4] Allegations not responsive to the bill, if denied by a general replication, must be proved before becoming available to the party making them.[5] In Green v. Tanner,[6] the court said: "That the answer, being responsive to the bill, is evidence for the defendant as to facts within their own knowledge, is not denied. And by a well-established rule of equity, the answer must be taken to be true, unless contradicted by two witnesses, or by one witness with

[1] Wright v. Wheeler, 14 Iowa, 13; Allen v. Mower, 17 Vt. 61; Parkhurst v. McGraw, 24 Miss. 134.

[2] Birmingham Nat. Bank v. Steele, 98 Ala. 85, 12 So. Rep. 783; Beene v. Randall, 23 Ala. 514.

[3] Jacks v. Nichols, 5 N. Y. 178.

[4] Seitz v. Mitchell, 94 U. S. 582. In Farley v. Kittson, 120 U. S. 317, 7 S. C. Rep. 534, the court says: "An answer under oath is evidence in favor of the defendant, because made in obedience to the demand of the bill for a discovery, and therefore only so far as it is responsive to the bill."

[5] Humes v. Scruggs, 94 U. S. 24.

[6] 8 Metc. (Mass.) 422.

probable and corroborating circumstances."[1] A plea which avoids the discovery prayed for is no evidence in the defendant's favor, though under oath and negativing material allegations of the bill.[2] In Bowden v. Johnson,[3] it was contended by counsel that, as the bill prayed that the defendant should answer its allegations on oath, the answer was evidence in his favor, and was to be taken as true unless it was overcome by the testimony of one witness, and by corroborating circumstances equivalent to the testimony of another witness. The court found facts "sufficient to satisfy the rule of equity," and cite from Greenleaf,[4] to the effect "that the sufficient evidence to outweigh the force of an answer may consist of one witness, with additional and corroborative circumstances, which circumstances may sometimes be found in the answer itself; or it may consist of circumstances alone, which, in the absence of a positive witness, may be sufficient to outweigh the answer even of a defendant who answers on his own knowledge."[5] It seems that the credibility of the defendants' answers setting forth consideration, will be destroyed by proof that the vendee permitted the vendor to assert in his hearing, without contradicting him, that no indebtedness existed.[6]

[1] Flagg v. Mann, 2 Sumner, 487. See Tompkins v. Nichols, 53 Ala. 198; Parkman v. Welsh, 19 Pick. (Mass.) 234; Hoboken Bank v. Beckman, 33 N. J. Eq. 55; Morse v. Hill, 136 Mass. 71. In Hill v. Ryan Grocery Co., 78 Fed. Rep. 25, the court says: "With only one witness, therefore, whose testimony was scarcely material, supplemented by the written instruments, which upon their face negative the case made by the bill, the complainants were without proofs to outweigh or impair the force of the positive denials of the answers, which, under the circumstances, must be taken as true. Tobey v. Leonards, 2 Wall. 430; Seitz v. Mitchell, 94 U. S. 582; Voorhees v. Bonesteel, 16 Wall. 30; Collins v. Thompson, 22 How. 253."

[2] Farley v. Kittson, 120 U. S. 317, 7 S. C. Rep. 534; Heartt v. Corning, 3 Paige (N. Y.) 566.

[3] 107 U. S. 262, 2 S. C. Rep. 246.

[4] Greenleaf on Evidence, vol. 3, § 289.

[5] S. P. Williamson v. Williams, 11 Lea (Tenn.) 365.

[6] Bradley v. Buford, Sneed (Ky.) 12.

§ 160. Answer as evidence for or against co-defendant. — The equity practice seems to be settled that, generally speaking, the answer of one defendant cannot be used *against* another defendant.[1] In Salmon v. Smith,[2] the rule is recognized that the answer of one defendant to a bill in chancery which shows that the complainant is not entitled to the relief sought, inures in favor of his co-defendant as evidence.[3] So it is said by Mr. Greenleaf,[4] "that where the answer in question is unfavorable to the plaintiff, and is responsive to the bill, by furnishing a disclosure of the facts required, it may be read as evidence in favor of a co-defendant, especially where the latter defends under the title of the former."[5] Where the complainants choose to rely upon admissions or confessions in an answer, the denials and admissions must, of course, be considered as a whole.[6] A sworn answer should be taken as true unless overcome by the testimony,[7] but the denials to make an answer evidence must be of facts stated in the bill.[8] It may be here recalled that the testimony of a single witness, uncorroborated by circumstances, has been considered not sufficient to overcome a verified answer positively denying fraud.[9]

§ 161. Pleading to the discovery and the relief. — Chancellor Walworth stated in Brownell v. Curtis,[10] that, in

[1] Salmon v. Smith, 58 Miss. 408; Powles v. Dilley, 9 Gill. (Md.) 222; McKim v. Thompson, 1 Bland (Md.) 161.

[2] 58 Miss. 400, 408; Hanover Nat. Bk. v. Klein, 64 Miss. 151, 8 So. Rep. 208.

[3] Davis v. Clayton, 5 Humph. (Tenn.) 446.

[4] 3 Greenl. Ev. § 283.

[5] See Mills v. Gore, 20 Pick. (Mass.) 28; Miles v. Miles, 32 N. H. 147; Powles v. Dilley, 9 Gill. (Md.) 222; Field v. Holland, 6 Cranch 8; Clason v. Morris, 10 Johns. (N. Y.) 524; Lingan v. Henderson, 1 Bland (Md.) 261. But see Cannon v. Norton, 14 Vt. 178.

[6] Crawford v. Kirksey, 50 Ala. 597.

[7] Hurd v. Ascherman, 117 Ill. 501, 6 N. E. Rep. 160. See United States v. Budd, 144 U. S. 165, 12 S. C. Rep. 575.

[8] Gainer v. Russ, 20 Fla. 162.

[9] See Garrow v. Davis, 15 How. 272; Evans v. Bicknell, 6 Ves. 184; Lord Cranstown v. Johnston, 3 Ves. 170; Pilling v. Armitage, 12 Ves. 78; Thompson v. Sanders, 6 J. J. Marsh (Ky.) 93. Compare Allen v. Cole, 9 N. J. Eq. 286.

[10] 10 Paige (N. Y.) 214.

certain cases, where the discovery asked for would tend to criminate the defendant, or subject him to a penalty or forfeiture, or entail a breach of confidence, the defendant was not bound to make a discovery to aid in establishing the facts,[1] although the complainant might be entitled to relief. In the course of the opinion it was further said: "But where the same principle upon which the demurrer to the discovery of the truth of certain charges in the complainant's bill is attempted to be sustained, is equally applicable as a defense to the relief sought by the bill, the settled rule of the court is that the defendant cannot be permitted to demur as to the discovery only, and answer as to the relief.[2] This general rule is equally applicable to the case of a plea; and the defendant cannot plead any matters in bar of the discovery merely, when the matters thus pleaded would be equally valid as a defense to the relief."

§ 162. **Particularity of denial in answer.** — Chancellor Kent, in Woods v. Morrell,[3] in discussing the sufficiency of an answer to the allegations of a bill in equity, said: "The general rule is, that to so much of the bill as is material and necessary for the defendant to answer, he must speak directly, without evasion, and not by way of *negative pregnant.* He must not answer the charges merely literally, but he must confess or traverse the substance of each charge positively, and with certainty; and particular precise charges must be answered particularly and precisely, and not in a general manner, even though a general answer may amount to a full denial of the charges."[4] This rule is well illustrated in Welcker v.

[1] Citing Atty.-Gen. v. Brown, 1 Swanst. 294; Dummer v. Corporation of Chippenham, 14 Ves. 245; Hare on Discovery, 5. See § 165.

[2] Citing Morgan v. Harris, 2 Bro. C. C. 124; Waring v. Mackreth, Forrest 129; Story's Eq. Pleadings, 254 n. 1; Welf. Eq. Pleadings 133.

[3] 1 Johns. Ch. (N. Y.) 107.

[4] See Hunter v. Bradford, 3 Fla. 285; Barrow v. Bailey, 5 Fla. 23.

Price,[1] where the bill charged that the land conveyed by the debtor to his wife was "all the property of which the said John F. was possessed." The answer set forth that the debtor "was then in good circumstances, with means enough and more than enough to pay all his debts." This latter statement was characterized as a mere legal conclusion which a party was not permitted to draw for himself, or to express an opinion concerning, without disclosing facts to justify it, and as being a mere evasion of the real issue as to the possession of other property.

It is a familiar rule that a positive denial of fraud in an answer will not prevail against admissions, in the same pleading, of facts which show that the transaction was fraudulent;[2] also, that in weighing the whole evidence in the case, the fact that the defendant answers only generally, denying the fraud, will operate against him whenever the bill charges him with particular acts of fraud.[3] A charge in a bill that the deed in question was never properly delivered, and that the grantor retained possession after the conveyance, should, if untrue, be specifically denied.[4]

§ 162a. **Bill of particulars.** — The granting of an order for a bill of particulars in an action rests largely in the sound discretion of the court. In actions *ex delicto* a bill of particulars is only allowed by grace.[5] Such orders have been granted in almost every form of action.[6] In a Special Term case in New York, prosecuted to set aside an assignment as having been made in fraud of creditors,

[1] 2 Lea (Tenn.) 667.

[2] Robinson v. Stewart, 10 N. Y. 194; Jackson v. Hart, 11 Wend. (N. Y.) 349, per Savage, Ch. J. See Hoboken Bank v. Beckman, 33 N. J. Eq. 53; Sayre v. Fredericks, 16 N. J. Eq. 205.

[3] Parkman v. Welch, 19 Pick. (Mass.) 234.

[4] Hudgins v. Kemp, 20 How. 52.

[5] Harding v. Bunnell, 14 Pa. Co. Ct. Rep. 417.

[6] See Dwight v. Germania Life Ins. Co., 84 N. Y. 493; Tilton v. Beecher, 59 N. Y. 176; Byrnes v. Lewis, 83 Hun (N. Y.), 310, 31 N. Y. Supp. 1028; Townsend v. Williams, 117 N. C. 336, 23 S. E. Rep. 461.

Lawrence, J., ordered the plaintiff to furnish certain preferred creditors with a bill of particulars of the times, places, acts, and things which it was intended to prove, as showing the fraudulent intent.[1] A similar application was denied in a later case upon slightly dissimilar facts.[2] It would be destructive to creditors' proceedings in many cases to allow a debtor to exact in advance a bill of particulars of the specific acts of fraud relied upon to support the action. Fraud is generally established by developing a series of minute circumstances, earmarks, and *indicia.* These sometimes appear at the trial for the first time when the creditor has obtained an opportunity to explore the enemy's country by cross-examination it may be. As the presumption of good faith in all transactions rests with the defendant, and the general character of the plaintiff's cause of action must be outlined in the pleading, it would seem to be most unjust to require, in addition, a statement of the items of the creditors' evidence in advance of the trial. Creditors are considered to be

[1] Claflin v. Smith, 13 Abb. N. C. (N. Y.) 205. See Byrnes v. Lewis, 83 Hun (N. Y.), 310, 31 N. Y. Supp. 1028; Gilhooly v. American Surety Co., 87 Hun (N. Y.) 395, 34 N. Y. Supp. 347.

[2] Passavant v. Cantor, 21 Abb N. C. (N. Y.) 259, 1 N. Y. Supp. 574, 48 Hun (N. Y.) 546; Faxon v. Ball, 50 N. Y. St. Reporter, 495, 21 N. Y. Supp. 737. Compare Isaac v. Wilisch, 69 Hun (N. Y.) 341, 23 N. Y. Supp. 589; Constable v. Hardenbergh, 76 Hun (N. Y.), 436, 27 N. Y. Supp. 1022; Passavant v. Sickle, 14 Civ. Pro. (N. Y.) 57; Riggs v. Buckley, 2 App. Div. (N. Y.) 618, 37 N. Y. Supp. 1095. In Gilhooly v. American Surety Co., 87 Hun (N. Y.), 397, an assignee sued for personal property. The answer denied that the assignor had assigned all his property, and alleged that the assignment was fraudulent. The court said: "We think the defendant should state whether it claims the assignment to be void on account of fraudulent preferences, in which case it should state what preferences are claimed to be fraudulent; or, if the alleged fraud consists in the failure of the assignor to transfer all his assets to the plaintiff, in that event the defendant should particularize what property, if any, it expects or intends to prove on the trial was withheld by the assignor from the assignee; and, if on both grounds, then all the particulars above specified should be given." In Harding v. Bunnell, 14 Pa. Co. Ct. Rep. 419, the court says: "We think the plaintiff should state what property was fraudulently incumbered and in what way."

a favored class, and are entitled, with proper restrictions, to "fish" through the debtor's transactions in pursuit of hidden assets, and should not be fettered by any restricting orders. An application for a bill of particulars is addressed to the sound discretion of the court, and, of course, will be denied where the moving party may fairly be presumed to possess the information.[1]

§ 163. **Denying fraud or notice.** — In order to entitle a party to protection as a purchaser without notice he must deny notice of the fraud fully and particularly, whether the defense be set up by plea or answer,[2] and even though notice is not charged in the bill.[3] A plea of *bona fide* purchaser for value and without notice must be as full under the Code as under the former system of equity pleading.[4] We may here observe that constructive fraud is not regarded as a fact, but is treated rather as a conclusion of law drawn from ascertained facts. Hence, as has been shown,[5] where an answer denies the fraud, but nevertheless admits facts from which the existence of fraud follows, as a natural and legal if not a necessary and unavoidable conclusion, the denial will not avail to disprove it.[6]

§ 164. **Admission and avoidance.** — It is an established rule of evidence in equity that, where an answer filed in a cause admits a fact, and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved; otherwise the admission stands as if the fact in avoidance had not been averred.[7]

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[1] Fink v. Jetter, 38 Hun (N. Y.) 163.

[2] Stanton v. Green, 34 Miss. 592; Gallatin v. Cunningham, 8 Cow. (N. Y.) 374; 2 Lea. Cas. in Eq. pp. 85, 86; Miller v. Fraley, 21 Ark. 22. Compare Friedenwald v. Mullan, 10 Heisk. (Tenn.) 226.

[3] Manhattan Co. v. Evertson, 6 Paige (N. Y.) 466.

[4] Weber v. Rothchild, 15 Ore. 388.

[5] See § 162.

[6] Sayre v. Fredericks, 16 N. J. Eq. 209; Cunningham v. Freeborn, 11 Wend. (N. Y.) 253.

[7] Clements v. Moore, 6 Wall. 315; Presley's Evidence, p. 13; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Clarke v. White, 12 Pet. 190. See

§ 165. **Avoiding discovery.** — An important question is frequently presented as to whether or not a defendant can defeat a discovery by pleading that the disclosure may subject him to a criminal prosecution. Such a plea has been held not sufficient to excuse a discovery,[1] while in many cases it is regarded as sufficient to excuse the party from answering.[2] This same question comes up in various forms in civil procedure, and at least in the United States, the general rule and practice is that a party may omit to verify a pleading, or decline to make a disclosure which will tend to degrade or criminate him.

§ 166. **Affirmative relief.** — No affirmative relief can ordinarily be accorded to the defendant unless it is claimed by cross petition, or as an affirmative defense; yet where such relief has been granted without objection in the court below, the decree will not always, for that reason, be reversed on appeal.[3] It may be here observed that under the practice in Alabama the fact that the debtor has other property which might be subjected to the payment of the judgment, is not available to a voluntary alienee unless presented by cross bill.[4] The homestead may be protected by cross bill.[5] As elsewhere shown, the vendee, when deprived of the property, may obtain reimbursement for the amount actually advanced if no intentional wrong is shown. It is intimated in McLean v. Letchford,[6] that the court would not consider his claim to

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Ringgold v. Ringgold, 1 H. & G. (Md.) 11, 18 Amer. Dec. 250.

[1] Devoll v. Brownell, 5 Pick. (Mass.) 448; Bunn v. Bunn, 3 New Rep. 679. See Wich v. Parker, 22 Beav. 59. Compare Reg. v. Smith, 6 Cox C. C. 31. See § 161.

[2] Michael v. Gay, 1 Fost. & Fin. 409; Bay State Iron Co. v. Goodall, 39 N. H. 237; Horstman v. Kaufman, 97 Pa. St. 147.

[3] Kellogg v. Aherin, 48 Iowa, 299.

[4] Leonard v. Forcheimer, 49 Ala. 145.

[5] Thomason v. Neeley, 50 Miss. 313. Where a homestead exemption is relied on, it must be specifically pleaded. Graham v. Culver, 3 Wyo. 639, 29 Pac. Rep. 270; 30 Id. 957.

[6] 60 Miss. 182.

reimbursement in the absence of a cross bill, though it is conceded that reimbursement has been made, in a proper case, where no cross bill had been filed.[1]

§ 167. **Waiver of verification.** — The pleadings in the class of litigation under discussion are usually verified. Where code practice prevails, if a verified bill of complaint is filed, all subsequent pleadings must be under oath except demurrers, which, of course, only raise questions of law. Though the complainant waive an answer under oath from the defendant, yet the latter may nevertheless verify the pleading. So held in Clements v. Moore.[2] Swayne, J., said: "It was her right so to answer, and the complainants could not deprive her of it. Such is the settled rule of equity practice, where there is no regulation to the contrary." It is said that the practice of waiving an answer under oath originated in the State of New York, by virtue of a provision incorporated in the statute,[3] at the suggestion of Chancellor Walworth, and was intended to introduce a new principle into the system of equity pleading. It was designed to leave it optional with the complainant to compel a discovery in aid of the suit, or to waive the oath of the defendant if the complainant was unwilling to rely upon his honesty, and chose to establish his claim by other evidence.[4]

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[1] Compare Dunn v. Chambers, 4 Barb. (N. Y.) 381; Grant v. Lloyd, 20 Miss. 192; Alley v. Connell, 3 Head (Tenn.) 578. See § 51.

[2] 6 Wall. 314. The 41st Rule in Equity of the Supreme Court now provides: "If the complainant in his bill shall waive an answer under oath, or shall only require an answer with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only," etc.

[3] N. Y. R. S., p. 175, § 44.

[4] See Armstrong v. Scott, 3 Greene (Ia.) 433; Burras v. Looker, 4 Paige (N. Y. 227.

CHAPTER XI.

OF THE JUDGMENT OR DECREE.

§ 168. The judgment conclusive.
169. Judgment *res adjudicata* though the form of procedure be changed.
170. Judgment appointing receiver.
170*a*. Enforcing judgment at law.
171. Judgment avoids sale only as to creditor — not absolutely.
172. Judgment transferring title.
173. No judgment in favor of unrepresented parties.
173*a*. Creditor suing in place of assignee.
174. Confession of judgment.
§ 175. Impounding proceeds of a fraudulent sale.
176. Accounting by fraudulent vendee to debtor or creditor.
177. } Personal judgment against
178. } fraudulent vendee.
179. Money judgment, when disallowed.
180. Personal judgment against wife.
181. Judgment must conform to relief demanded.
182. Must accord with complaint.
183. Contradictory verdicts..
183*a*. New trial.

§ 168. **The judgment conclusive.**— The form of the judgment or decree in suits to annul fraudulent transfers, or to reach equitable assets, and the rights secured by the adjudication, constitute important branches of our subject from a practical standpoint. The usual attributes attach to the judgment in this class of cases. The recovery of a judgment is regarded as an estoppel upon the parties as to the subject-matter investigated.[1] But the estoppel has no wider effect. Raymond v. Richmond[2] is an illustration of our meaning. There the action was instituted by an assignee against a sheriff and an execution creditor, for levying upon property which had theretofore been adjudged to belong to the assignee, in an action to

[1] See *In re* Hussman, 2 N. B. R. 441; Downer v. Rowell, 25 Vt. 336; Raymond v. Richmond, 78 N. Y. 351; Bell v. Merrifield, 109 N. Y. 211, 16 N. E. Rep. 55; Hymes v. Estey, 116 N. Y. 509, 22 N. E. Rep. 1087.

[2] 78 N. Y. 351; second appeal, 88 N. Y. 671; Brooks v. Wilson, 125 N. Y. 256, 26 N. E. Rep. 258; Humes v. Scruggs, 94 U. S. 22.

which the assignee, the assignor and the execution defendant were parties. The court very properly held that, as the creditor under whose judgment and execution the seizure had been effected, was not a party to the prior litigation, the adjudication did not conclude him. Hence such creditor was entitled to show that the transfer made by the execution defendant, although the title had been adjudged to be in the assignee, was fraudulent in fact, and the seizure of the property by the creditor therefore justifiable. Manifestly a purchaser of a chattel mortgage is not concluded by a subsequent adjudication in an action against the mortgagor and mortgagee to which he was not a party, declaring the mortgage to be fraudulent.[1] And a decree between husband and wife, establishing in the wife's favor a resulting trust in the husband's lands, is not conclusive upon the husband's existing creditors.[2] Nor is a judgment obtained on an attachment even *prima facie* evidence against a person who claims to be a *bona fide* purchaser for value of the property attached.[3]

Where fraud is essential to a cause of action it must be found as stated.[4]

If a court of equity has jurisdiction and entertains the case it will ordinarily retain the case till the whole subject is disposed of.[5]

§ 169. **Judgment res adjudicata though the form of procedure be changed.**—Where creditors seek by bill in equity to subject a vested estate in remainder to their claims,

[1] Zoeller v. Riley, 100 N. Y. 102, 2 N. E. Rep. 388.

[2] Old Folks' Society v. Millard, 86 Tenn. 657; Humes v. Scruggs, 94 U. S. 22; Branch Bank of Montgomery v. Hodges, 12 Ala. 118.

[3] Ott v. Smith, 68 Miss, 773, 10 So. Rep. 70. See also Goodwin v. Snyder, 75 Wis. 450, 44 N. W. Rep. 746.

[4] Bruner v. Brown, 139 Ind. 610, 38 N. E. Rep. 318; Fletcher v. Martin, 126 Ind. 55, 25 N. E. Rep. 886.

[5] Ostrander v. Weber, 114 N. Y. 102, 21 N. E. Rep. 112; Taylor v. Taylor, 43 N. Y. 578, 584; Ludlow v. Simond, 2 Cai. Cas. (N. Y.) 55.

and the courts decide against them, the question will be *res adjudicata* if the creditors afterward try to levy by execution on the same interest, when it has become an estate in possession by the death of the life tenant.[1]

§ 170. **Judgment appointing receiver.** — The particular form of a decree in a creditor's action to cancel a fraudulent conveyance is, in some instances, of vital importance to the complainant. A court of equity undoubtedly possesses the power to pronounce a judgment annulling and clearing away the fraudulent obstruction, and then, by acting upon the person of the debtor, to compel him to convey the title to a receiver.[2] It is considered irregular to appoint a referee in the judgment; there should be a receiver and a direction that the defendant convey to him.[3] The practitioner should be cautious about entering up judgment, as the title which the receiver or a purchaser from him acquires rests upon the debtor's own conveyance, and has no relation to the original judgment which is the foundation of the bill in equity. It has been intimated that when the creditor pursues this course he abandons the lien of his judgment and seeks satisfaction of his debt out of the debtor's property generally. In Chautauque County Bank v. Risley,[4] the creditor's

[1] Nichols v. Levy, 5 Wall. 433.

[2] Chautauque County Bank v. Risley, 19 N. Y. 374; Cole v. Tyler, 65 N. Y. 77. Compare McLean v. Cary, 88 N. Y. 391; White's Bank of Buffalo v. Farthing, 9 Civ. Pro. (N. Y.) 66, 101 N. Y. 344, 4 N. E. Rep. 734; New York Life Ins. Co. v. Mayer, 19 Abb. N. C. (N. Y.) 92; Union Nat. Bk. v. Warner, 12 Hun (N. Y.) 306.

[3] Union Nat. Bk. v. Warner, 12 Hun (N. Y.) 306.

[4] 19 N. Y. 374. In Brown v. Chubb, 135 N. Y. 180, 31 N. E. Rep. 1030, the court said: "On a bill filed to reach real property fraudulently transferred by the debtor, the claims of several creditors are satisfied in the order of the priority of the judgment." In Wilkinson v. Paddock, 57 Hun (N. Y.) 197, affi'd, 125 N. Y. 748, the court says: "The doctrine of the authorities seems to be to the effect that, as to real estate, judgment-creditors acquire liens thereon in the order in which their judgments are docketed, and that their priority is not affected by suits brought to set aside a fraudulent transfer of such

action was founded upon the first judgment recovered against the debtor, and the property was, under the order of the court, conveyed by the debtor to a receiver. It was decided that another creditor, whose judgment was subsequent to that which was the foundation of the creditor's bill, but which was entered prior to the time the bill was filed, might sell the real estate on execution, and the purchaser at such sale would acquire a better title than the grantee from the receiver. The creditor should therefore be careful not to sacrifice the advantage which the prior judgment gives him, and, having cleared the fraudulent conveyance out of the way, should, especially if subsequent judgments have been entered, proceed by execution and sale on his first judgment.[1] In Cole v. Tyler,[2] the judgment set aside the conveyance and merely directed that the receiver should sell, execute deeds, etc. It is not easy to discover the theory upon which the receiver could be said to have acquired the title. The improper form of the judgment was assigned as a ground for its reversal, but the court said that if the direction to sell, etc., was erroneous, the error would not be rectified by an appeal, but the correct procedure was by motion to correct the judgment, the matter being one merely of detail, and not affecting the decision upon its merits.

§ 170a. **Enforcing judgment at law.** — The position was urged by counsel in Smith v. Reid,[3] that, though the creditor's judgment and execution were regular, yet the real estate in controversy could not be sold until the

real estate. (White's Bank v. Farthing, 101 N. Y. 346, 347; Underwood v. Sutcliffe, 77 N. Y. 62; N. Y. Life Ins. Co. v. Mayer, 19 Abb. N. C. (N. Y.) 92; S. C. 12 N. Y. State Rep. 119; O'Brien v. Browning, 49 How. Pr. (N. Y.) 113)."

[1] Compare White's Bank of Buffalo v. Farthing, 101 N. Y. 344, 4 N. E. Rep. 734; Shand v. Hanley, 71 N. Y. 319; Union Nat. Bank v. Warner, 12 Hun (N. Y.) 309; Cole v. Tyler, 65 N. Y. 73.

[2] 65 N. Y. 77.

[3] 134 N. Y. 568, 577, 31 N. E. Rep. 1082.

alleged conveyance of it had been set aside by a valid judgment decreeing such conveyance to be fraudulent. Brown, J., said: "A judgment-creditor cannot be deprived of his legal right to enforce collection of his judgment against the lands of his debtor by a fraudulent conveyance thereof prior to the entry of the judgment, nor can he by such a conveyance be forced to pursue an equitable remedy for the collection of his debt, instead of a legal one, and the whole current of authority in this State is to the effect that notwithstanding the fraudulent conveyance, the judgment-creditor may sell the land under execution upon his judgment, and the purchaser may impeach the conveyance of the land in a suit at law to recover possession, or if he can gain possession defend the title thus acquired against the fraudulent grantee or those claiming under him."[1]

The jurisdiction over equitable interests at law is being extended.[2]

§ 171. Judgment avoids sale only as to creditor — not absolutely. — The principle must always be kept in view that

[1] See Chautauque County Bank v. Risley, 19 N. Y. 369; Bergen v. Carman, 79 N. Y. 153; Smith v. Reid, 11 N. Y. Supp. 739, 19 Civ. Pro. (N. Y.) 363. Compare, however, Lamont v. Cheshire, 65 N. Y. 30; Porter v. Pico, 55 Cal. 165, 175; Bergen v. Snedeker, 8 Abb. N. C. (N. Y.) 50–58; Bockes v. Lansing, 74 N. Y. 437; Erickson v. Quinn, 15 Abb. Pr. N. S. (N. Y.) 168. The rule as to *lis pendens* must be observed in this connection. In Hovey v. Elliott, 118 N. Y. 138, 23 N E. Rep. 475, the court says: "The theory of the doctrine of *lis pendens* is to preserve the situation, as it is when the original litigation is commenced, until its termination, that the successful party may then take the fruits of it without interruption from another, who may have, during its pendency, sought to obtain some right to the property in controversy. Tilton v. Cofield, 93 U. S. 163; Lamont v. Cheshire, 65 N. Y. 36, and cases there cited." An active creditor must inform himself concerning the exact status of pending controversies affecting the property which he has pursued, lest subsequent adjudications may relate back and undermine the apparent title or right which he has gained.

[2] Anderson v. Briscoe, 12 Bush. (Ky.) 344; Kennedy v. Nunan, 52 Cal. 326; LeRoy v. Dunkerly, 54 Cal. 452; Johnson v. Conn. Bank, 21 Conn. 148; Hutchins v. Heywood, 50 N. H. 591; Carleton v. Banks, 7 Ala. 32.

a fraudulent sale is good between the parties. Giving effect to this doctrine generally controls the form of the judgment in a creditor's action. Thus in Orr v. Gilmore,[1] the conveyance was found to be voidable as against the creditor, but the court decided that the only judgment to which the complainant was entitled was a decree for the sale of the lot in suit and the payment of the amount of the claim with interest and costs. The sale being valid between the debtor and the fraudulent vendee, there was nothing to warrant a judgment declaring it null and void as to every one. In the case cited the judgment which was held by the higher court to be erroneous declared that the property belonged to the debtor. This was manifestly wrong, for, where it does not appear that there are other creditors, the judgment, whether it directs a sale on execution by the sheriff,[2] or by a receiver,[3] should only declare the conveyance void as to the plaintiff's judgment, and direct a sale for the payment of that alone. The grantee is entitled to all that might remain of the proceeds in the shape of surplus,[4] and, when the creditor is paid, the decree cancelling the conveyance is satisfied.[5] "The action of chancery," said Nelson, J., "upon the fraudulent grantor or assignee, is only to the extent of supplying a remedy to the suitor creditor; as to all other parties, the assignment remains as if no proceedings had been taken.[6] Under the Civil Code in Louisiana if the action is successful the judgment is that the conveyance be avoided

[1] 7 Lans. (N. Y.) 345; Duncan v. Custard, 24 W. Va. 731; Kennedy v. Barandon, 67 Barb. (N. Y.) 209.

[2] Orr v. Gilmore, 7 Lans. (N. Y.) 345; Kennedy v. Barandon, 67 Barb. (N. Y.) 209; Belgard v. McLaughlin, 44 Hun (N. Y.) 557, 9 N. Y. St. Rep. 38.

[3] Chautauque Co. Bank v. Risley, 19 N. Y. 369.

[4] Van Wyck v. Baker, 10 Hun (N. Y.) 40; Collinson v. Jackson, 8 Sawyer, 365; *In re* Estes, 6 Sawyer, 460.

[5] Rawson v. Fox, 65 Ill. 202. See Bostwick v. Menck, 40 N. Y. 383; Kerr v. Hutchins, 46 Tex. 384.

[6] McCalmont v. Lawrence, 1 Blatchf. 235.

as to its effect on the complaining creditors.[1] Nor is the judgment-creditor entitled to get satisfaction out of anything but the actual interest of his debtor in the property conveyed; if he is a junior judgment-debtor, the fact that his judgment is used as a means of attack gives him no priority over senior judgments.[2]

§ 172. Judgment transferring title.—The court has no power to effect a transfer of title to land by ordering a sale of it, except in special cases authorized by statute, such as mortgage and partition sales, sales of infants' lands, ordinary execution sales, and the like. In suits brought to reach lands conveyed with intent to defraud creditors, the proper decree, in New York at least, is to set aside the fraudulent conveyance, and permit the creditor to issue an execution and sell under it, or compel the debtor to convey to a receiver and direct the latter to sell. It was said by Gilbert, J., in Van Wyck v. Baker,[3] that "the fraudulent deed being annulled, the title remains in the debtor, and can be passed only by her deed."[4] If however, the receiver is directed to sell without obtaining a prior conveyance from the debtor, the erroneous judgment is not, as we have seen,[5] to be rectified by an appeal from the judgment, but a motion should be made to correct it.[6] Where an execution purchaser seeks to cancel a cloud on his title, of course no conveyance is requisite, as the plaintiff will be left in the full enjoyment of the title acquired by the sheriff's deed.[7]

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[1] Claflin v. Lisso, 27 Fed. Rep. 420.

[2] Henderson v. Henderson, 133 Penn. St. 399, 19 Atl. Rep. 424; White's Bank v. Faithing, 101 N. Y. 346, 4 N. E. Rep. 734; Wilkinson v. Paddock, 57 Hun (N. Y.) 191, 11 N. Y. Supp. 442, affi'd 125 N. Y. 748, 27 N. E. Rep. 407.

[3] 10 Hun (N. Y.) 40.

[4] Citing Jackson v. Edwards, 7 Paige (N. Y.) 404; Chautauque Co. Bk. v. White, 6 N. Y. 236; Chautauque Co. Bk. v. Risley, 19 N. Y. 369. See Dawley v. Brown, 65 Barb. (N. Y.) 107.

[5] See § 170.

[6] Cole v. Tyler, 65 N. Y. 77.

[7] Hager v. Schindler, 29 Cal. 69. It is said in Ames v. Gilmore, 59 Mo. 541, that courts of chancery may, in

§ 173. **No judgment in favor of unrepresented parties.** — In a case before the Supreme Court of California[1] it was said to be an anomaly in practice to render judgment in favor of a party who was not before the court, and was not represented in any manner in the action. This observation was made in an action brought by a creditor against a fraudulent grantee to set aside a conveyance made by a deceased debtor, the ground of relief assigned being that the conveyance was made to hinder and delay creditors. The representative of the deceased debtor was not a party. The court very properly decided that it was error to render a judgment declaring a trust against the fraudulent grantee and in favor of the unrepresented estate of the grantor

§ 173a. **Creditor suing in place of assignee.** — If an assignee refuses in a proper case to institute proceedings to get possession of the assigned property, the creditors collectively, or one suing in the right of all who may join in the action, may compel the execution of the trust in equity,[2] or cause the removal of the assignee and the appointment of another. It seems, however, that in either case a decree for a single debt would be erroneous; the decree must follow the assignment, and the fruits of a recovery must be distributed according to its terms.[3]

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suits to annul a fraudulent deed, not only divest the title of a fraudulent grantee, but the decree may proceed to vest the title in the plaintiff. See Kinealy v. Macklin, 2 Mo. App. 241; Apperson v. Burgett, 33 Ark. 328. The logical theory upon which this procedure is founded is not easily discovered. In the absence of statutory authority how can a court become possessed of any title which it can confer or bestow upon the creditor? Its province is to clear incumbrances from titles, or to coerce transfers.

[1] Bachman v. Sepulveda, 39 Cal. 688.

[2] Lee v. Cole, 44 N. J. Eq. 322, 15 Atl. Rep. 531; White v. Davis, 48 N. J. Eq. 22, 21 Atl. Rep. 187; Kalmus v. Ballin, 52 N. J. Eq. 294, 28 Atl. Rep. 791.

[3] Crouse v. Frothingham, 97 N. Y. 105. Compare Bate v. Graham, 11 N. Y. 237; Everingham v. Vanderbilt, 12 Hun (N. Y.) 75; Manning v. Beck, 129 N. Y. 1, 29 N. E. Rep. 90; Lee v. Cole, 44 N. J. Eq. 318, 15 Atl. Rep. 531.

§ 174. **Confession of judgment.**— A transfer of property by a person heavily indebted, made by means of a confession of judgment and sale on execution, was adjudged void in Metropolitan Bank v. Durant,[1] upon proof that it was intended to defraud creditors, and that the purchaser had knowledge of the facts. Collusive judgments, as we have seen,[2] are always open to the attack of creditors. A judgment entered by confession upon an insufficient statement of facts is effectual and binding between the parties,. and a sale of property under it is legal and valid against all the world except existing creditors having a lien upon the property.[3] And while in the absence of knowledge on the part of the creditor the fraudulent intent of the debtor alone will not invalidate the judgment, yet where the judgment is entered and execution levied originally without his knowledge, his rights will be subordinate to the rights of creditors who took an attachment before the said acts were ratified.[4]

§ 175. **Impounding proceeds of a fraudulent sale.** — While it may be true that the money received by a fraudulent vendee from the sale of the property is not legally a debt due by the vendee to the fraudulent vendor, because the court will not assist to enforce or render effectual the fraud, yet in the intention of the parties it is a debt, and creditors may treat it as such and attach or reach it by judicial process.[5] The beneficent and remedial provisions of the statute 13 Eliz. would be of little avail if a fraudulent grantee could pass the property over to a mere volunteer without notice of the fraud, and upon that

[1] 22 N. J. Eq. 35; White v. Benjamin, 3 Misc. (N. Y.) 490, 23 N. Y. Supp. 981.

[2] See § 74, and note.

[3] Miller v. Earle, 24 N. Y. 112. Compare Marrin v. Marrin, 27 Hun (N. Y.) 602; Dunham v. Waterman, 17 N. Y. 9; Mitchell v. Van Buren, 27 N. Y. 300.

[4] Galle v. Tode, 148 N. Y. 270, 42 N. E. Rep. 673.

[5] Heath v. Page, 63 Pa. St. 124; French v. Breidelman, 2 Grant (Pa.) 319; Mitchell v. Stiles, 13 Pa. St. 306.

ground claim that the property or its proceeds were safe from the pursuit of creditors.[1]

§ 176. **Accounting by fraudulent vendee to debtor or creditor.** — Though a party may have intended to defraud the creditors of a debtor by taking and converting his property into cash, such intent is rendered harmless by his delivering the proceeds of the sale to the debtor or his authorized agent. If the party has accounted to the debtor for the proceeds of the property before proceedings are taken against him by the creditor, he cannot be forced to account for it over again.[2] The creditor must show that something remains which ought to be applied on the judgment. Where a third person has in good faith received a conveyance of the property in trust for an alleged fraudulent grantee, and has subsequently con-

[1] "Where a transfer of property is made, which is held void under the provisions of the bankruptcy act, as against the assignee in bankruptcy, the transferee is properly to be regarded as a trustee for the plaintiff, and to be held to account as such, especially where, as in this case, it appears that some, if not all, of the property, has passed away from the transferee." Schrenkeisen v. Miller, 9 Ben. 65. It does not affect the right of the creditor to an accounting that the property was no longer actually in the hands of the fraudulent grantee at the time the creditor obtained judgment, if the fraudulent grantee still retains a benefit from the illegal transaction. McConihe v. Derby, 62 Hun (N. Y.) 90, 16 N. Y. Supp. 474.

[2] Cramer v. Blood, 57 Barb. (N. Y.) 163, affi'd 48 N. Y. 684; Murphy v. Briggs, 89 N. Y. 446. See Cramer v. Blood, 57 Barb. (N. Y.) 671; Clements v. Moore, 6 Wall. 299; Davis v. Graves, 29 Barb. (N. Y.) 480. In Greenwood v. Marvin, 111 N. Y. 434, 19 N. E. Rep. 228, the New York Court of Appeals said: "The equitable rights of the parties were to remain the same; the legal owner was to account to the other party for the net profits of the business, and no other mode of division is suggested than that of equality. If, therefore, that agreement effected any change in the relations of the parties, it operated as a temporary expedient to bridge over the period of Le Grand Marvin's pecuniary embarrassment, presumably with a view of restoring the original relations of the parties at some future time when it would be safe to do so. If that agreement was executed, as seems very probable, with a view of hindering and delaying the creditors of Le Grand, it was still competent for the parties, in the absence of interference by creditors, to rescind it at any time, and restore to each other an equal legal interest in the property acquired under such agreement."

veyed it to such grantee, pursuant to the trust, it has been held that such third person is not a proper defendant in a creditor's action, simply because no cause of action exists against him.[1] The trustee, under an assignment of lands which is declared fraudulent at the suit of a creditor, cannot be compelled to account for the rents received and applied according to the provisions of the trust, before the commencement of the action.[2] And a fraudulent grantee who is forced to account to a creditor for rents and profits, is entitled to an allowance for payments made by him for taxes, interest on mortgages and repairs necessary for the preservation of the property. The accounting must proceed on equitable principles.[3]

§ 177. Personal judgment against fraudulent vendee. —The right of a judgment-creditor to a personal or money judg-

[1] Spicer v. Hunter, 14 Abb. Pr. (N. Y.) 4.

Relief at law and in equity.— In Clements v. Moore, 6 Wall. 312, the court said: "When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to — while it scans the transaction with the severest scrutiny — looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others it allows a security to stand for the amount advanced upon it. In others it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility."

[2] Collumb v. Read, 24 N. Y. 505. See § 26. As to when a judgment against an assignee cancelling an assignment as fraudulent is a final judgment, and how the same should be entered and enforced, see Myers v. Becker, 95 N. Y. 486.

[3] Loos v. Wilkinson, 113 N. Y. 485, 21 N. E. Rep. 392. See Smith v. Wise, 132 N. Y. 179, 30 N. E. Rep. 229; Hamilton Nat. Bk. v. Halsted, 134 N. Y. 520, 31 N. E. Rep. 900. Compare Davis v. Leopold, 87 N. Y. 620; Cutcheon v. Corbitt, 99 Mich. 578, 58 N. W. Rep. 479; Swift v. Hart, 35 Hun (N. Y.) 128.

ment against a fraudulent vendee of his debtor[1] comes up frequently for adjudication, and is discussed in many of the authorities. In the case of Ferguson v. Hillman,[2] in the Supreme Court of Wisconsin, the conveyances and mortgages had been adjudged fraudulent as to creditors, and knowledge of the fraud had been fastened upon the grantee. The familiar principle, elsewhere discussed, to the effect that a fraudulent grantee in possession of the property of the debtor cannot be protected, as against the creditors of the debtor, even to the extent of the money or other consideration given for the transfer, was invoked and applied.[3] The court observed that it seemed to follow as a necessary consequence that a fraudulent grantee could not be protected in the possession of the proceeds of such property received by him upon effecting a sale of it. The property in the hands of a fraudulent purchaser is held by him in trust for the creditors of the fraudulent vendor, and when the property is converted into money the fund thus created is impressed with the same trust. Were the rule otherwise, the grantee might defeat the creditor's claim by fraudulently changing the character of the property. In equity such money in the hands of the fraudulent grantee is a fund held for the benefit of the creditors of the grantor; and while such creditors may not be able to maintain an action at law for money had and received for their use, because they were never the owners of, or had title to the property which had been converted into money, yet a court of equity, having all the interested parties before it, possessed the power to direct such application of it as would

[1] See § 62.

[2] 55 Wis. 190, 12 N. W. Rep. 389. See Mason v. Pierron, 69 Wis. 585, 34 N. W. Rep. 921; Ringold v. Suiter, 35 W. Va. 186, 13 S. E. Rep. 46.

[3] Gardinier v. Otis, 13 Wis. 460; Stein v. Hermann, 23 Wis. 132; Avery v. Johann, 27 Wis. 246; Union Nat. Bank v. Warner, 12 Hun (N. Y.) 306; Briggs v. Merrill, 58 Barb. (N. Y.) 389; Fullerton v. Viall, 42 How. Pr. (N. Y.) 294; Salt Springs Nat. Bank v. Fancher, 92 Hun (N. Y.), 327, 36 N. Y. Supp. 742.

be just. The court further held that if, in a proper case, equity had the power to order the fraudulent grantee to pay or apply the money received by him in satisfaction of the debt of a creditor, then the fact that it directed a personal judgment to be rendered against him for the money so received, and that the amount be collected on execution, was merely a matter of form, which did not prejudice his rights, and of which he could not complain. Fullerton v. Viall[1] is an authority in point in this discussion. This important case, which certainly embodies features of vital interest to creditors and vendees whose good faith is questioned, seems to have been affirmed both at the general term of the Supreme Court and in the Court of Appeals of New York, without any written opinion having been given. The published report of the case was prepared by one of the counsel. The facts were briefly as follows: The defendant had taken from a debtor a conveyance of real estate, subject to a mortgage of $800, agreeing to pay $1,000 in addition. The sum of $500 was paid to the debtor in cash, and $500 by cancelling a debt due from the debtor to the grantee. Before the creditor's suit was instituted the grantee had sold the real estate to a *bona fide* purchaser, and realized from such sale the sum of $2,270. The court found that the conveyance was made in fraud of the grantor's creditors, and that the creditors were entitled to judgment against the fraudulent grantee for the value of the premises over and above the prior valid incumbrances. The recovery was not limited to the amount received by the fraudulent grantee on the sale, but his liability was held to extend to the value of the property fraudulently received by him.

[1] 42 How. Pr. (N. Y.) 294; Swinford v. Rogers, 23 Cal. 233; Jones v. Reeder, 22 Ind. 111; Hubbell v. Currier, 92 Mass. 333; Dilworth v. Curts, 139 Ill. 508, 29 N. E. Rep. 861; Chamberlin v. Jones, 114 Ind. 461, 16 N. E. Rep. 178; Mason v. Pierron, 69 Wis. 585, 34 N. W. Rep. 921; Christian v. Greenwood, 23 Ark. 258. See Robinson v. Holt, 39 N. H. 557.

and which he had put beyond the reach of the creditors of his fraudulent grantor, subject, as already stated, to the prior valid incumbrances. The grantee must have found in this case that the way of the transgressor was hard, for he was neither allowed credit for his own debt, which constituted part of the consideration, nor for the $500 paid to his grantor in cash.[1]

§ 178. — Murtha v. Curley[2] apparently puts this question of the creditors' right to a personal judgment against the fraudulent vendee at rest in New York. The vendee had foreclosed a fictitious chattel mortgage upon the property of the debtor, and had converted the proceeds, which exceeded the creditors' claim, to his own use. A money judgment was directed against the vendee for the amount of the plaintiffs' claim. The court held that this did not stamp the action as being legal rather than equitable, and that the judgment was proper in form. Earl, J., said: "A court of equity adapts its relief to the exigencies of the case in hand. It may restrain or compel the defendant; it may appoint a receiver, or order an accounting; it may compel specific performance, or order the delivery to the plaintiff of specific real or personal property; or it may order a sum of money to be paid to the plaintiff, and give him a personal judgment therefor." Where the property has been converted there is nothing to be sold, and no occasion for a receiver and

[1] See Union Nat. Bank v. Warner, 12 Hun, 306–308; Ferguson v. Hillman, 55 Wis. 192, 12 N. W. Rep. 389.

[2] 90 N. Y. 372; 12 Abb. N. C. (N. Y.) 12, and notes; S. P., Warner v. Blakeman, 4 Abb. Ct. App. Dec. (N. Y.) 530; Smith v. Sands, 17 Neb. 498, 23 N. W. Rep. 356, citing the text; Valentine v. Richardt, 126 N. Y. 277, 27 N. E. Rep. 255; Bell v. Merrifield, 109 N. Y. 207, 16 N. E. Rep. 55; Farlin v. Sook, 30 Kan, 401, 1 Pac. Rep. 123. In Solinsky v. Lincoln Savings Bank, 85 Tenn. 372, the court says: "When a fraudulent vendee has so concealed or disposed of the property that creditors cannot reach or identify it, the creditor may, in equity at least, recover the proceeds or value thereof." Compare Eads v. Mason, 16 Bradw. (Ill.) 545.

no special need to state an account.[1] In Williamson v. Williams,[2] the fraudulent vendee had sold the land to a *bona fide* purchaser, and it was said that having deprived the creditor of the property, and obtained its price, he must be held responsible by reason of this fraudulent disposition of the property to the amount of the consideration received by him. The money stood for the land in his hands.[3]

§ 179. **Money judgment, when disallowed.**— McLean v. Cary,[4] in the New York Court of Appeals, is a peculiar case in which a money judgment was denied. Plaintiff was a judgment-creditor. It was proved substantially that the debtor Greene sold to the other defendants certain machinery with an agreement that $12,000 of the consideration was to be paid in steam power. At a time when $9,000 remained unpaid a settlement was effected practically on the basis of a balance of $4,000. The court avoided the settlement as being fraudulent against the creditor, and the question as to the authority to render a money judgment against the defendants was presented The complaint, it may be observed, prayed that the settlement be set aside as fraudulent, that a receiver be appointed, and that the creditor be paid out of the moneys realized by the receiver. No money judgment was demanded, and the court held that under the circumstances none

[1] See also Gillett v. Bate, 86 N. Y. 87, 10 Abb. N. C. (N. Y.) 88; Steere v. Hoagland, 50 Ill. 377; Quinby v. Strauss, 90 N. Y. 664.

[2] 11 Lea (Tenn.) 370. In Valentine v. Richardt, 126 N. Y. 277, 27 N. E. Rep. 255, the court says: "The fraudulent conveyance which the defendant obtained from the owner of the land enabled him to sell it to a purchaser in good faith and the money that he received therefor, with the interest thereon, can, for all the purposes of this case, be considered in equity as the land itself."

[3] In Wheeler v. Wallace, 53 Mich. 355, 19 N. W. Rep. 33, it was held that creditors levying upon property fraudulently transferred had no right to take from the transferee the increase if they had allowed it to accumulate for a long time under his management before attacking the transaction.

[4] 88 N. Y. 391.

was authorized, as the contract was payable *in steam power* and not in money. Under the practice in Illinois it seems to be implied that a personal or money judgment is improper in an action to annul a fraudulent transfer. In Patterson v. McKinney [1] this objection was taken, but the court said that as the cause was to be remanded it could be obviated by making an alternative decree providing that, if the judgment was not paid within a time to be limited, the land should be sold on execution. In Dunphy v. Kleinsmith,[2] which was a creditors' suit against a fraudulent vendee, a judgment for damages was held to be improper; the correct relief was said to be by decree for an account.[3]

§ 180. **Personal judgment against wife.**—Where property is conveyed to a wife in fraud of her husband's creditors, it seems that a judgment *in personam* for its value cannot be taken against the wife, nor in case of her death, against her executors.[4] Miller, J., said: "While the books of reports are full of cases in which real or personal property conveyed to the wife in fraud of the husband's creditors has been pursued and subjected to the payment of his debts after it had been identified in her hands, or in the hands of voluntary grantees or purchasers with notice, we are not aware of any well-considered case of high authority where the pursuit of the property has been abandoned, and a judgment *in personam* for its value taken against the wife. Certainly no such doctrine is sanctioned by the common law; and, though the present suit is a bill in chancery, the decree in this case is nothing more than a judgment at law, and could as well have been maintained in a separate suit

[1] 97 Ill. 41, 52.

[2] 11 Wall. 615; compare Mann v. Appel, 31 Fed. Rep. 383.

[3] See § 51.

[4] Phipps v. Sedgwick, 95 U. S. 9; followed. Trust Co. v. Sedgwick, 97 U. S. 304; Huntington v. Saunders, 120 U. S. 78, 7 S. C. Rep. 356. The cases are approved in Clark v. Beecher, 154 U. S. 631.

at law for the money as in this suit. And the liability of the executors of the wife to this personal judgment must depend on the same principle as if, abandoning the pursuit of the *res*, the assignee had brought an action at law for the money." The modifications in the law peculiar to the relationship of husband and wife with reference to their property are so many and important that it would be impracticable to attempt to formulate rules intended for general application to the subject. These Supreme Court cases certainly accomplish an unfortunate result, and probably will not be universally accepted, if, indeed, the principles they embody are not superseded in some States by the removal of the disabilities incident to coverture. In Post v. Stiger [1] it appeared that property had been conveyed to a wife in fraud of the husband's creditors. The wife set up as a defense the fact that she had disposed of it. The court said that she must answer for its value. An attempt was made to show that she had subsequently lost by bad bargains all the property that she had acquired by the conveyance. The proofs did not seem to sustain this view, but the court remarked that even if it had been so proved this would not relieve her from liability, and continuing said: "She held the property as trustee of her husband's creditors, and dealt with it at her peril. A fraudulent grantee cannot repel the claims of the creditors of the grantor, by simply saying: 'I have lost, by imprudent bargains or collusive foreclosures, the property I attempted to conceal, and, therefore, I am answerable for nothing.'" It may be urged that this case is a *dictum* on the point cited. This is probably a legitimate criticism, for the court practically found that the wife still had the property; yet as an expression of opinion of a highly intelligent court pointing, as we claim, in the right direction, we regard the *dictum* as worthy of adoption as an absolute authority.

[1] 29 N. J. Eq. 558. See Lee v. Cole, 44 N. J. Eq. 318, 15 Atl. Rep. 531.

§ 181. **Judgment must conform to relief demanded.** — As a general rule, the judgment must harmonize with the demand for relief,[1] though, as we have seen under the modern procedure, a mistake in the prayer is not fatal, and equity may, in its discretion, award a judgment such as the facts justify. In Curtis v. Fox,[2] the plaintiff failed to establish that the conveyance by the debtor to his wife was fraudulent, and the complaint was consequently dismissed. It appeared that the wife died pending the action, and the creditor contended that the debtor defendant thereupon acquired a legal interest in her real estate, and that, instead of dismissing the complaint, a judgment should have been rendered providing for the sale of such interest, and an application of the proceeds to the satisfaction of the creditor's judgment. Cases like the Bank of Utica v. The City of Utica,[3] and Cumming v. The Mayor of Brooklyn,[4] were cited, in which it was held that where both parties agree to submit the case to the jurisdiction of chancery, or the defendant omits to raise the objection by plea or in his answer, the court will retain jurisdiction and determine the case, although the plaintiff may have an adequate remedy at law. But the court held that the principle of these cases had no application to the case of Curtis v. Fox above cited, because in that case Fox had no legal interest in the land, and did not acquire any until long after putting in his answer. The complaint did not allege any such interest, but sought relief solely upon the ground that the title of the wife was fraudulent as against the plaintiff, and this was the matter litigated. As the husband had no opportunity to raise the objection that a sale on execution was the proper remedy of the plaintiff, so far as the interest acquired upon the death of his wife was concerned, his silence did not waive it.

[1] Dumphy v. Kleinsmith, 11 Wall. 615.

[2] 47 N. Y. 299.

[3] 4 Paige (N. Y.) 399.

[4] 11 Paige (N. Y.) 596.

§ 182. **Must accord with complaint.** — It has been held in New York to be no ground of reversal of a judgment that the relief it extended was not prayed for in the complaint, provided it was such a decree as the plaintiff was entitled to upon the evidence.[1] While the effect of an erroneous prayer in a complaint can ordinarily be overcome, yet the general rule is that the allegations of the complaint must support the judgment. Thus, it was said by the Supreme Court of California, that a judgment which was not supported by the pleadings was as fatally defective as one which was not sustained by the verdict or finding. The judgment must accord with and be warranted by the pleadings of the party in whose favor it was rendered.[2] This may be true under the liberal interpretation of the statutes regulating the reformed procedure, but it is unwise for a complainant to place strong reliance upon such a rule of practice. On the contrary, the bill should shadow forth the case which the evidence is calculated to disclose, or the variance may prove fatal. Thus, where the bill impeached a deed, and prayed its avoidance upon allegations of actual fraud, there is authority that, where the defendant is brought into court to answer such a charge, and so effectually repels it that the court would not be justified in holding that the averment was proved, the complainant is not at liberty to change his ground, and obtain other relief, based upon proof of constructive fraud, or other equities supposed to be established by the evidence.[3] And, where a bill charges actual and intentional fraud,

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[1] Buswell v. Lincks, 8 Daly (N. Y.) 518.

[2] Bachman v. Sepulveda, 39 Cal. 689; Bailey v. Rider, 10 N. Y. 363. The plaintiff cannot support a recovery on a ground that he expressly repudiates. McCarthy v. Scanlon, 176 Pa. St. 262, 35 Atl. Rep. 189.

[3] Clark v. Krause, 2 Mackey (D. C.) 574. "If a bill charges fraud as a ground of relief, fraud must be proved. The proof of other facts, though such as would be sufficient, under some circumstances, to constitute a claim for relief under another head of equity, will not prevent the bill from being dismissed." See also Fisher v. Boody, 1 Curt. C. C. 206.

and the prayer for relief proceeds upon that theory, the complainant cannot, under the prayer for general relief, rely upon circumstances which make out a case for relief under a distinct head of equity, although such circumstances substantially appear in the bill, but are charged only in aid of the actual fraud alleged.[1]

Manifestly a court of equity may adapt its relief to the exigencies of the case.[2]

§ 183. **Contradictory verdicts.** — In Love v. Geyer,[3] which was an action brought by a judgment-creditor of the grantor, against the grantor and grantee, to avoid a fraudulent conveyance, a general verdict was returned against both defendants. A new trial was awarded to the grantor and denied to the grantee, and the case was continued without judgment. At a subsequent term the cause was tried by the court as to the grantor, and a finding and judgment rendered in his favor. The court, over the objection of the grantee, rendered judgment against him, upon the former verdict of the jury setting aside the conveyance as fraudulent. On review, the judgment was very correctly held to be erroneous.[4] Clearly, if no fraud had been practiced by the grantor, it was an absurdity to find that, as to the grantee, the conveyance was fraudulent. Both parties must necessarily be implicated in the fraud.

§ 183a. **New trial.** — The statutes granting statutory new trials as matter of right are not applicable to suits brought to annul fraudulent conveyances.[5]

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[1] Eyre v. Potter, 15 How. 42. See § 155.

[2] Valentine v. Richardt, 126 N. Y. 272; Murtha v. Curley, 90 N. Y. 372; Van Rensselaer v. Van Rensselaer, 113 N. Y. 208, 214, 21 N. E. Rep. 75.

[3] 74 Ind. 12.

[4] See Romine v. Romine, 59 Ind. 346; also Hollingsworth v. Crawford, 60 Ind. 70.

[5] See Somerville v. Donaldson, 26 Minn. 75, 1 N. W. Rep. 808; Shumway v. Shumway, 1 Lans. (N. Y.) 474, affi'd 42 N. Y. 143; Perry v. Ensley, 10 Ind. 378; Sedg. & Wait on Trial of Title to Land, (2d ed.) § 595.

CHAPTER XII.

PROVISIONAL RELIEF — INJUNCTION — RECEIVER — ARREST.

§ 184. Provisional relief.
185. Injunction, when allowed.
186. When injunction refused.
187. Receiver in contests over real property.
188. Receivers of various interests.
189. Title on death of receiver.
190. Removal and dismissal of receiver.
191. Arrest of defendant.

§ 184. **Provisional relief.** — In view of the class of debtors and alleged purchasers against whom creditors are compelled to litigate, it is perhaps needless to recall the great importance of prompt and efficient provisional remedies easily accessible to complainants. The defendants may be contemplating flight, or may be engaged in wasting or converting the property with a view of thwarting the creditors' proceedings. The relief afforded by final decree will perhaps come too late to be practically effectual. In some instances an order of arrest may be procured against the person of the debtor, or of his co-conspirators; in others an injunction may issue restraining any misuse, incumbrance, or disposition of the property claimed to have been covinously alienated; while in others a receiver may be appointed to take possession and care of the property pending the litigation.[1] Indeed, the appointment of a receiver in a creditors' suit is said to be almost a matter of course,[2] though this broad proposition has been denied.[3] A receiver may even be appointed before

[1] Ellett v. Newman, 92 N. C. 523.

[2] Bloodgood v. Clark, 4 Paige (N. Y.) 577; Fitzburgh v. Everingham, 6 Paige (N. Y.) 29; Runals v. Harding, 83 Ill. 75; Shainwald v. Lewis, 6 Fed. Rep. 776. See as to jurisdiction to appoint a receiver, Shainwald v. Lewis, 7 Sawy. 148.

[3] Rodman v. Harvey, 102 N. C. 1, 8 S. E. Rep. 888; Dollard v. Taylor, 33 N. Y. Super. Ct. 496.

answer filed in an urgent case,[1] or before judgment,[2] but only when it is manifest that the fund is in danger of being lost.[3] Misconduct and insolvency of the defendant enter into the merits of the application.[4] The receivership will be denied when it does not distinctly appear that there is any property to be preserved.[5]

§ 185. **Injunction, when allowed.** — As has been elsewhere shown, the courts will not, ordinarily, interfere by injunction, or otherwise, at the instance of a contract-creditor, to restrain the debtor's control over his business, or any disposition of his property.[6] Hyde v. Ellery[7] is an exception to the usual rule, additional to those heretofore noticed.[8] It appeared in that case that the debtor had, by fraudulent means, purchased a large quantity of goods from various merchants, upon credit, and had sold the goods at auction so that it was practically impossible to trace them. An injunction was allowed in favor of simple contract creditors, upon the theory that its issuance would prevent a multiplicity of suits, and furthermore, because, as the relief sought was to set aside a transaction entered into with the intention to defraud creditors, an injunction was necessary as ancillary to that relief. In another case which arose in Pennsylvania it was decided that a fraudulent severance of fixtures, made with a design

[1] Weis v. Goetter, 72 Ala. 259; Micou v. Moses, 72 Ala. 439.

[2] Cohen v. Meyers, 42 Ga. 46. See Heyneman v. Dannenberg, 6 Cal. 376; Field v. Holzman, 93 Ind. 205; Wolfe v. Claflin, 81 Ga. 64, 6 S. E. Rep. 599; Orton v. Madden, 75 Ga. 83; Cogburn v. Pollock, 54 Miss. 639.

[3] Rheinstein v. Bixby, 92 N. C. 307. See Werborn v. Kahn, 93 Ala. 207, 9 So. Rep. 729.

[4] Werborn v. Kahn, 93 Ala. 207, 9 So. Rep. 729.

[5] First National Bank v. Gage, 79 Ill. 207.

[6] Uhl v. Dillon, 10 Md. 500; McGoldrick v. Slevin, 43 Ind. 522; Dodge v. Pyrolusite Manganese Co., 69 Ga. 665; Johnson v. Farnum, 56 Ga. 144; Adee v. Bigler, 81 N. Y. 349; May v. Greenhill, 80 Ind. 124; Whitney v. Davis, 148 N. Y. 256, 42 N. E. Rep. 661; Spelman v. Freedman, 130 N. Y. 425, 29 N. E. Rep. 765. See § 52.

[7] 18 Md. 501.

[8] See § 53.

to defeat the lien of a judgment, could be restrained in equity.[1] And an injunction has been issued in aid of an attachment.[2]

In suits to annul fraudulent transfers relief by injunction is often indispensable. Thus, where the petition alleged that an action was pending by plaintiff against one of the defendants, in which certain real estate, which had previously been fraudulently conveyed to another defendant, was attached, and the defendants were about to dispose of such real estate for the purpose of defeating plaintiff's claim, it was decided that a temporary injunction restraining such sale was properly continued to the final hearing, notwithstanding the filing of an answer denying all fraudulent intent.[3] In a case in which the bill charged that the defendant, who was a trustee under an assignment for creditors, was a notoriously bad character, and had refused to allow an inventory of the assigned property to be made, and hence, if loss resulted, the creditors would be unable to show the extent of it, the court held that it was justified in granting an injunction and appointing a receiver without notice.[4] Doubts as to the good faith of an assignment and the solvency of the assignee will justify an injunction against a sale.[5] And where a suit was brought by creditors of a deceased debtor to reach property fraudulently alienated by him in his lifetime, it was decided that pending the suit the court properly enjoined the defendant from incumbering or conveying the land.[6] So an injunction may issue to stay waste.[7] So a defendant may be restrained pending

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[1] Witmer's Appeal, 45 Pa. St. 455. Compare Gill v. Weston, 110 Pa. St. 317, 1 Atl. Rep. 921.

[2] People, ex rel. Cauffman, v. Van Buren, 136 N. Y. 252, 32 N. E. Rep. 775.

[3] Joseph v. McGill, 52 Iowa, 127.

[4] Rosenberg v. Moore, 11 Md. 376. See Blondheim v. Moore, 11 Md. 365.

[5] Preiss v. Cohen, 112 N. C. 278, 17 S. E. Rep. 520.

[6] Appeal of Fowler, 87 Pa. St. 449.

[7] Tessier v. Wyse, 3 Bland's Ch. (Md.) 29.

the bill from incumbering shares of stock sought to be reached by a creditor.[1] A chattel mortgagee may be restrained from exercising his power of sale on a bill filed to annul the mortgage.[2] It may be observed that a denial in the defendant's answer that he has any property does not constitute a cause for dissolving an injunction restraining him from assigning or disposing of his property.[3] And if creditors choose to permit the officers and directors of an insolvent corporation to remain in possession and control of its assets, the mere fact of insolvency will not operate as an injunction against any creditor from obtaining a preference through legal process or by agreement with the corporation.[4]

§ 186. **When injunction refused.** — An injunction will not be issued unless facts are shown from which an issuance appears to be a necessity in order to save the creditor's rights, and to prevent the wasting of the subject-matter of which he is in pursuit. Thus, in Portland Building Association v. Creamer,[5] it appeared that a creditor's bill was was filed to set aside as fraudulent a conveyance of lands about one-half of which was woodland. The court held that an injunction which restrained the grantee from cutting and removing the timber from the premises would not be continued, it being shown that the value of the land, without the timber, was ample to satisfy the creditor's claim in case the conveyance should ultimately be annulled.

§ 187. **Receiver in contests over real property.** — Where real property is fraudulently transferred, the court, as we have seen, may adjudge and direct a transfer to a

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[1] MacKaye v. Soule, 25 N. Y. Supp. 798.

[2] Bennett v. Wright, 77 Hun (N. Y.) 331, 28 N. Y. Supp. 453.

[3] New v. Bame, 10 Paige (N.Y.) 502.

[4] Rickerson Rolling Mill Co. v. Farrell F. & M. Co., 43 U. S. App. 472.

[5] 34 N. J. Eq. 107.

receiver.[1] Vause v. Woods [2] is an illustration of the disinclination of the court to interfere by the appointment of a receiver of real property, where the party in possession has what purports to be the legal title. The case came up on appeal from an order appointing a receiver upon a creditor's bill to take possession of the property alleged to have been conveyed in fraud of the plaintiff. Simrall, J., said (p. 128): "As against the legal title, the interposition is with reluctance; it will only be done in case of fraud clearly proved, and danger to the property." [3] Provisional relief is not encouraged in land cases, because the subject-matter of contention is immovable, practically indestructible, and, unlike personalty, cannot be spirited away.[4] In New York a receiver will not be appointed in ejectment before judgment.[5] This practice has been a subject of criticism.[6] The rule is otherwise in an equitable action to annul a conveyance of real property, even though it is conceded that ejectment could have been brought in the place of the equitable action;[7]

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[1] Cole v. Tyler, 65 N. Y. 77; McCaffrey v. Hickey, 66 Barb. (N. Y.) 489, 492; Chautauque County Bank v. Risley, 19 N. Y. 369; White's Bank of Buffalo v. Farthing, 9 Civ Pro. (N. Y.) 66, 101 N. Y. 344, 4 N. E. Rep. 734. See § 170.

[2] 46 Miss. 120.

[3] Compare Lloyd v. Passingham, 16 Ves. Jr. 68; Mays v. Rose, Freem. Ch. (Miss.) 718; Jones v. Pugh, 8 Ves. 71; Walker v. Denne, 2 Ves. Jr. 170; Mapes v. Scott, 4 Ill. App. 268; Sedg. & Wait on Trial of Title to Land, Chapter XXIII; Rheinstein v. Bixby, 92 N. C. 307; Beach on Receivers, § 67.

[4] Sedg. & Wait on Trial of Title, § 631.

[5] Guernsey v. Powers, 9 Hun (N. Y.) 78; Burdell v. Burdell, 54 How. Pr. (N. Y.) 91; Thompson v. Sherrard, 35 Barb. (N. Y.) 593; Sedg. & Wait on Trial of Title (2d ed.), § 615. In La Bau v. Huetwohl, 60 Hun (N. Y.) 408, 15 N. Y. Supp. 491, the court says: "The law will not take the property of a defendant from him pending an action for its recovery; and that wise and salutary rule would be violated if a receiver could be appointed to take the rents."

[6] Sedg. & Wait on Trial of Title (2d ed.), § 632.

[7] Mitchell v. Barnes, 22 Hun (N. Y.) 194. See the dissenting opinion of Learned, P. J., in this case. The suit was instituted to annul a deed upon the ground that the grantor was insane, and the conveyance was procured by improper influences. The same relief could have been procured

but even in such cases the relief is not easily secured.[1]

§ 188. Receivers of various interests. — Receiverships are ordinarily allowed only in clear cases.[2] The receiver is appointed for the benefit of all parties who may establish rights in the case.[3] The pendency of the proceeding supersedes the right of the debtor to transfer his property.[4] On supplementary proceedings under the Wisconsin Code to enforce a decree for alimony, the court may appoint a receiver to take possession of the effects of the defendant in the divorce proceedings; the sheriff's return of the execution is sufficient ground therefor, and the receiver thus appointed may attack a fraudulent conveyance of the debtor's real estate made with intent to defeat the decree for alimony.[5] A receiver has been appointed of crops growing on a plantation;[6] and in a case where an annuity, which was charged upon real property, was in arrear,[7] and also of a living.[8] That the

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in ejectment. Van Densen v. Sweet, 51 N. Y. 378. Hence, as a receiver could not be had in ejectment, it was argued, in this dissenting opinion, that, by analogy, none should be appointed in the suit in equity. The majority of the court declined to adopt this view. A receiver is frequently appointed in suits to foreclose mortgages, when it appears that the security is insufficient and the mortgagor is insolvent. See Haas v. Chicago Building Society, 1 Am. Insolv. Rep. 201; Myers v. Estell, 48 Miss. 372; Hyman v. Kelly, 1 Nev. 179. See Ins. Co. v. Stebbins, 8 Paige (N. Y.) 565; Cheever v. Rutland & B. R. R. Co., 39 Vt. 654; Brown v. Chase, Walker's Ch. (Mich.) 43; Finch v. Houghton, 19 Wis. 150; Callanan v. Shaw, 19 Iowa, 183. And a receiver may be had in an action to foreclose a contract for the sale of land. Smith v. Kelley, 31 Hun (N. Y.) 387.

[1] McCool v. McNamara, 19 Abb N. C. (N. Y.) 344.

[2] Fox v. Curtis, 176 Pa. St. 52, 34 Atl. Rep. 952; Chicago & A. Oil & Mining Co. v. U. S. Petroleum Co., 57 Pa. St. 83.

[3] First Nat. Bk. v. Barnum Wire & Iron Works, 60 Mich. 499, 27 N. W. Rep. 567; Delany v. Mansfield, 1 Hogan (Irish Rolls Ct.) 234; Hooper v. Winston, 24 Ill. 353.

[4] Journeay v. Brown, 26 N. J. Law, 111.

[5] Barker v. Dayton, 28 Wis. 367.

[6] Micou v. Moses, 72 Ala. 439. See Hendrix v. American F. L. Mortgage Co., 95 Ala. 313, 11 So. Rep. 313.

[7] Sankey v. O'Maley, 2 Moll. 491.

[8] Hawkins v. Gathercole, 31 Eng. L. & Eq. 305; Beach on Receivers, § 619.

debtor is insolvent, the grantee a non-resident, and the goods are being taken from the jurisdiction will warrant a receiver.[1] The allegation of insolvency is vital under the reformed procedure, allowing a bill by a simple contract creditor.[2] Where a decision is rendered setting aside a sale of land, a receiver may be appointed to sell and convey the property.[3] A receiver was appointed after judgment in New Jersey to receive rings and jewelry, which were decreed not to be wearing apparel.[4] So a receiver may be had of a stock exchange seat.[5]

§ 189. **Title on death of receiver.** — Where a receiver of a debtor's property has been appointed, and the debtor has executed the usual assignment of the property to him, upon the death of the receiver the title to the property vests in the court. The receiver's possession is the court's possession, and he is merely its agent or representative. The functions of the receiver continue after the death of the appointee, and it is competent for the court to appoint a successor to conduct and complete the litigation, and in other respects fulfil the duties which the first receiver left incomplete.[6] Nor is it necessary that the defendants in the suits should be given notice of proceedings for the appointment of a successor to the first receiver.[7]

§ 190. **Removal and dismissal of receiver.**—The removal of a receiver is a matter resting in the sound discretion

[1] Heard v. Murray, 93 Ala. 127, 9 So. Rep. 514.

[2] Moritz v. Miller, 87 Ala. 331, 6 So. Rep. 269.

[3] Shand v. Hanley, 71 N. Y. 319. In Massachusetts a receiver will not be appointed to collect choses in action due the debtor from persons residing in another jurisdiction. Amy v. Manning, 149 Mass. 487, 21 N. E. Rep. 493.

[4] Frazier v. Barnum, 19 N. J. Eq. 316.

[5] Habenicht v. Lissak, 78 Cal. 351, 20 Pac. Rep. 874.

[6] Nicoll v. Boyd, 90 N. Y. 519. A change in receivers either by resignation or removal does not abate the action. Hegewisch v. Silver, 140 N. Y. 414, 35 N. E. Rep. 658.

[7] Nicoll v. Boyd, 90 N. Y. 519. See also Atty.-Genl. v. Day, 2 Madd. 246.

of the court.[1] "The jurisdiction of a court of equity," says Mr. High,[2] "which is exercised in the removal of receivers, bears a striking resemblance to that which is called into action upon the dissolution of an interlocutory injunction, and in both cases the power to terminate seems to flow naturally and as a necessary sequence from the power to create. And as an interlocutory injunction is usually dissolved upon the coming in of defendant's answer, denying under oath the allegations of the bill,[3] so in the case of a receivership, if the answer under oath fully and satisfactorily denies the equities of the bill, or the material allegations upon which the appointment was made, and these allegations are not sustained by any testimony in the case, the order of appointment will be reversed and the receiver removed."[4] It is said that the high prerogative act of taking property out of the hands of a party and putting it in pound ought not to be exercised except to prevent manifest wrong imminently impending. And when the court, upon the coming in of the answer, discovers that the danger is not imminent, and that there is no pressing necessity for the order, it may be revoked or modified on such terms as the court thinks wise.[5] We may here state that it is not a sufficient cause for removing a receiver of a judgment-debtor that he has employed the debtor as an agent to assist in collecting the assets, the receiver being solvent and the trust otherwise prop-

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[1] First Nat. B'k v. E. T. Barnum Wire & Iron Works, 60 Mich. 499, 27 N. W. Rep. 657.

[2] High on Receivers, § 826.

[3] Citing Hollister v. Barkley, 9 N. H. 230; Armstrong v. Sanford, 7 Minn. 49; Anderson v. Reed, 11 Iowa, 177; Stevens v. Myers, 11 Iowa, 183; Taylor v. Dickinson, 15 Iowa, 483; Hatch v. Daniels, 5 N. J. Eq. 14; Washer v. Brown, 5 N. J. Eq. 81; Suffern v. Butler, 18 N. J. Eq. 220; Parkinson v. Trousdale, 4 Ill. 367; Roberts v. Anderson, 2 Johns. Ch. (N. Y.) 202; Harris v. Sangston, 4 Md. Ch. Dec. 394; Kaighn v. Fuller, 14 N. J. Eq. 419; Schoeffler v. Schwarting, 17 Wis. 30.

[4] Citing Voshell v. Hynson, 26 Md. 83; Drury v. Roberts, 2 Md. Ch. Dec. 157.

[5] Crawford v. Ross, 39 Ga. 49.

erly executed.[1] In many cases the debtor's knowledge of the business peculiarly qualifies him to render valuable services to the receiver. And the receiver should be served with notice and a specification of the grounds upon which the removal is sought.[2] It may also be observed that where the order appointing a receiver was fraudulently procured, and was subsequently annulled, the receiver will be required to account for the fund intact, and will not be allowed any deductions.[3]

§ 191. **Arrest of defendant.**— In New York, to authorize the arrest of a defendant in an action for alleged fraudulent disposition of his property, actual intent to defraud must be clearly established.[4] Proof must be adduced of an actual and guilty intent to defraud creditors. A mere constructive fraud such as the law implies because an act is done in violation of the statute or of the rights of the creditors at common law, is not sufficient.[5] Hence an order of arrest against a partner who, with knowledge of the insolvency of the firm, paid individual debts with firm assets, was vacated.[6] Where there is no evidence of guilty knowledge, the debtor should not be subjected to arrest for acts of constructive fraud.[7] The *lex fori*, as we have seen,[8] governs in cases involving the question of the right of arrest.

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[1] Ross v. Bridge, 24 How. Pr.(N.Y.) 163.

[2] Bruns v. Stewart Mfg. Co., 31 Hun (N. Y.) 197

[3] O'Mahoney v. Belmont, 37 N. Y. Super. Ct. 224.

[4] Hoyt v. Godfrey, 88 N. Y. 669.

[5] Sherill Roper Air Engine Co. v. Harwood, 30 Hun (N. Y.) 11. Compare Neal v. Clark, 95 U. S. 704. Noble v. Hammond, 129 U. S. 65, 9 S. C. Rep. 235; Ames v. Moir, 138 U. S. 311, 11 S. C. Rep. 311; Wolf v. Stix, 99 U. S. 1; Hennequin v. Clews, 111 U. S. 676, 4 S. C. Rep. 576; Upshur v. Briscoe, 138 U. S. 365, 11 S. C. Rep. 313.

[6] Compare Wilson v. Robertson, 21 N. Y. 587; Menagh v. Whitwell, 52 N. Y. 146.

[7] Sherill Roper Air Engine Co. v. Harwood, 30 Hun (N. Y.) 11. See People v. Kelly, 35 Barb. (N. Y.) 444.

[8] See § 64.

CHAPTER XIII.

REIMBURSEMENT AND SUBROGATION.

§ 192. Actual and constructive fraud—Security or reimbursement of purchaser.
193. No reimbursement at law.
194. Void in part void *in toto*.
195 Subrogation of purchaser to creditors' lien.

"The law cares very little what a fraudulent party's loss may be, and exacts nothing for his sake." — Andrews, J., in *Guckenheimer* v. *Angevine*, 81 N. Y. 397.

§ 192. **Actual and constructive fraud — Security or reimbursement of purchaser.** — There is a plain and highly important distinction to be found in the authorities between actual and constructive fraud as affecting the question of repayment of the money actually advanced by a purchaser. If the transaction is fraudulent in fact, or tainted with moral fraud, it cannot stand even for the purpose of reimbursement,[1] or indemnity;[2] while if it is only constructively fraudulent,[3] it may be upheld in favor of the vendee or purchaser to the extent of securing restitution of the amount of the actual consideration given or paid by him, and only the excess of the property after such payment was made will be subjected to the creditor's debt.[4] When the grantee purchases without actual notice

[1] Baldwin v. Short, 125 N. Y. 559, 26 N. E. Rep. 928.

[2] Millington v. Hill, 47 Ark. 311; Davis v. Leopold, 87 N. Y. 620; Shepherd v. Woodfolk, 10 B. J. Lea (Tenn.) 598; Alley v. Connell, 3 Head (Tenn.) 582; Conde v. Hall, 92 Hun (N. Y.) 335, 37 N. Y. Supp. 411; Thompson v. Bickford, 19 Minn. 23; Allen v. Berry, 50 Mo. 90; Borland v. Walker, 7 Ala. 269; Loos v. Wilkinson, 113 N. Y. 490, 21 N. E. Rep. 392; Wood v. Hunt, 38 Barb. (N. Y.) 302; Smith v. Wise, 132 N. Y. 172, 30 N. E. Rep. 229.

[3] Lobstein v. Lehn, 20 Ill. App. 261. See s. c. 120 Ill. 549, 12 N. E. Rep. 68; Loos v. Wilkinson, 113 N. Y. 491, 21 N. E. Rep. 392.

[4] Wood v. Goff's Curator, 7 Bush (Ky.) 63; Short v. Tinsley, 1 Met. (Ky.) 398; Crawford v. Beard, 12 Ore. 458, 8 Pac. Rep. 537; Lobstein v. Lehn, 120 Ill. 555, 12 N. E. Rep. 68; Cone v. Cross, 72 Md. 102, 19 Atl.

of the fraud, but for a consideration which is so inadequate that it would be inequitable to allow the deed to stand as a conveyance, a court of equity may, upon appropriate allegations and proof, give it effect as a security for the consideration actually paid.[1] And in cases of mere suspicious circumstances as to the adequacy of the consideration and fairness of the transaction, the court will not entirely annul the conveyance, but, on the contrary, will so frame its judgment as to protect the purchaser to the amount of the money advanced.[2] Again, where strangers to the fraud paid off valid incumbrances upon the property, they are held entitled to be reimbursed, and to be provided for in the decree, before the complainant's claim is satisfied.[3] Where the bill in equity contains no offer to restore the purchase-money, the court may extend the relief conditional upon such repayment.[4]

The rule is laid down by Chancellor Kent in the great and leading case of Boyd v. Dunlap,[5] that a deed, fraudu-

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Rep. 391. It is not necessary to offer in the bill to repay the consideration; the court may make such repayment a condition for granting the relief. Thomas v. Beals, 154 Mass. 51, 27 N. E. Rep. 1004.

[1] Van Wyck v. Baker, 16 Hun (N. Y.) 171. See Clements v. Moore, 6 Wall. 312; McArthur v. Hoystradt, 11 Paige (N. Y.) 495; Hull v. Deering, 80 Md, 424, 31 Atl. Rep. 416. In Colgan v. Jones, 44 N. J. Eq. 274, 18 Atl. Rep. 55, it appeared that a debtor who had sustained personal injuries assigned his claim for $330 to his attorney, who recovered thereon a judgment of $4,000. It was decided that the assignment as to the excess beyond a reasonable compensation to the attorney for his services was voidable as to the debtor's antecedent creditors.

[2] United States v. Griswold, 8 Fed. Rep. 504, citing Boyd v. Dunlap, 1 Johns. Ch. (N. Y.) 478; Crockett v. Phinney, 33 Minn. 157, 22 N. W. Rep. 292. See Taylor v. Atwood, 47 Conn. 508; Oliver v. Moore, 26 Ohio St. 298; First Nat. Bank v. Bertschy, 52 Wis. 443, 9 N. W. Rep. 534; May on Fraudulent Conveyances, p. 235. In Borden v. Doughty, 42 N. J. Eq. 314, 3 Atl. Rep. 352, a wife was allowed to recover for improvements made in good faith where a deed to her was set aside as being in effect voluntary. See Rucker v. Abell, 8 B. Mon. (Ky.) 566; King v. Wilcox, 11 Paige (N. Y.) 589.

[3] Swan v. Smith, 57 Miss. 548. See Young v. Ward, 115 Ill. 264, 3 N. E. Rep. 512.

[4] Thomas v. Beals, 154 Mass. 51, 27 N. E. Rep. 1004.

[5] 1 Johns. Ch. (N. Y) 478.

lent in fact, will be declared absolutely void, and not permitted to stand as a security for any reimbursement or indemnity, and this principle is upheld and followed in many cases.[1] Thus in Shand v. Hanley,[2] the vendee was not allowed to absorb the value of the premises in a claim for improvements made after constructive notice to her of the insecurity of her title, and of the equitable lien of the creditor. In Briggs v. Merrill,[3] Johnson, J., said: A party bargaining with a debtor with fraudulent intent, "does it at the peril of having that which he receives taken from him by the creditors of the debtor whom he is attempting to defraud, without having any remedy to recover what he parts with in carrying out the bargain.[4] The learned judge adds: "The law will leave him in the snare his own devices have laid." The court, in Stovall v. Farmers' and Merchants' Bank,[5] said that there was no rule which gave a lien under a fraudulent contract. Every person who enters into a fraudulent scheme forfeits all right to protection at law or in equity. The law does not so far countenance fraudulent contracts as to protect the perpetrator to the extent of his investment. This would be holding out inducements to engage in schemes of fraud, as nothing could be lost by a failure to effectuate the entire plan. Judge Spencer said he presumed there was "no instance to be met with of any reimbursement or indemnity afforded by a court of chan-

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[1] See Davis v. Leopold, 87 N. Y. 620; Union Nat. Bank v. Warner, 12 Hun (N. Y.) 306; Wood v. Hunt, 38 Barb. (N. Y.) 302; Briggs v. Merrill, 58 Barb. (N. Y.) 389; Alley v. Connell, 3 Head (Tenn.) 582; Shepherd v. Woodfolk, 10 B. J. Lea (Tenn.) 598; Millington v. Hill, 47 Ark. 311, 1 S. W. Rep. 547; Beidler v. Crane, 135 Ill. 92, 25 N. E. Rep. 655; Loos v. Wilkinson, 113 N. Y. 490, 21 N. E. Rep. 392; Baldwin v. Short, 54 Hun (N. Y.) 473, 7 N. Y. Supp 717, affi'd 125 N. Y. 553, 26 N. E. Rep. 928; Mandeville v. Avery, 124 N. Y. 387, 26 N. E. Rep. 951.

[2] 71 N. Y. 323.

[3] 58 Barb. (N. Y.) 389.

[4] Union Nat. Bk. v. Warner, 12 Hun (N. Y.) 306.

[5] 16 Miss. 316.

cery to a *particeps criminis* in a case of positive fraud."[1] And Judge Story remarked, in Bean v. Smith :[2] "I agree to the doctrine laid down by Chancellor Kent in Boyd v. Dunlap[3] and Sands v. Codwise,[4] that a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent."[5] "The loss of the amount paid by a fraudulent grantee is the penalty that the law inflicts for the fraudulent transaction. To refund to such a grantee the amount he has paid would be to destroy the penalty."[6] But while the court will not protect the participant in a fraud, it will not hold him liable beyond the actual interest which the debtor had in the property. So, it was held, that where stock was fraudulently transferred, which was hypothecated for a valid debt, the grantee was to be held liable only for the surplus remaining, not for the nominal amount of the stock.[7] So disbursements for the benefit of the creditors will be allowed.[8] In Baldwin v. June,[9] it was held that the grantee was entitled to be credited with the value of the property given in exchange for the property fraudulently conveyed to him. The court cannot punish the fraudu-

[1] Sands v. Codwise, 4 Johns. (N. Y.) 598. Compare note to Lore v. Dierkes, 16 Abb. N. C. (N. Y.) 47.

[2] 2 Mason, 296.

[3] 1 Johns. Ch. (N. Y.) 478; but see Meigs v. Weller, 90 Mich. 629, 51 N. W. Rep. 681.

[4] 4 Johns. (N. Y.) 549.

[5] See Henderson v. Hunton, 26 Gratt. (Va.) 935; Coiron v. Millaudon, 19 How. 115; Brown v. Chubb, 135 N. Y. 174, 31 N. E. Rep. 1030.

[6] See Seivers v. Dickover, 101 Ind. 495, 498. In Mandeville v. Avery (124 N. Y. 387, 26 N. E. Rep. 951), the court says: "The mortgage being void, all proceedings under it were void, and although he may possess an honest claim, he cannot retain property obtained by him under a fraudulent mortgage against a pursuing creditor." See Wells v. Laugbein, 20 Fed. Rep. 183.

[7] Hamilton Nat. Bank v. Halsted, 134 N. Y. 520, 31 N. E. Rep. 900.

[8] Loos v. Wilkinson, 113 N. Y. 485, 21 N. E. Rep. 392.

[9] 68 Hun (N. Y.) 284, 22 N. Y. Supp. 852.

lent vendee by ordering judgment in excess of the value of the interest transferred.[1]

It may be here observed that there seems to be authority for the proposition that loss resulting from depreciation may be apportioned between the debtor and the grantee, according to the sums respectively invested,[2] when the conveyance is attacked by creditors. Thus in Shaeffer v. Fithian,[3] an insolvent purchased real estate for his wife taking the title in her name, and advancing $2,460 of the consideration, the wife paying the balance of $4,000. The court ordered a sale of the property, and directed that twenty-four-hundred-and-sixty sixty-four-hundred-and-sixtieths of the proceeds of sale be applied in payment of the complainant's debt. The court, after observing that they could see no error in this decree to the prejudice of the wife, said: "She might well have been regarded as the sole owner of the property, and the *quasi* debtor of her husband. As such, she would be bound to bear the whole loss arising from depreciation of the property. The court below seems, however, to have considered the husband's interest as a kind of resulting trust in the property, making him in equity a tenant in common. This was certainly the most favorable view in behalf of the wife that could have been taken of the case. It results in saddling the loss arising from depreciation *pro rata* upon both parties." In Karstorp's Estate,[4] the debtor and his wife had both contributed toward the purchase of the property about to be sold, and the relief extended to the husband's creditor was limited to the amount contributed by the debtor toward the purchase with interest. The Supreme Court of Missouri say, in Allen v. Berry,[5] that there is no principle

[1] Hamilton Nat. Bk. v. Halsted, 134 N. Y. 520, 31 N. E. Rep. 900.
[2] Shaeffer v. Fithian, 26 Ohio St. 282.
[3] 26 Ohio St. 282.
[4] 158 Pa. St. 30, 27 Atl. Rep. 739.
[5] 50 Mo. 91.

of equity which allows a fraudulent grantee to offset against the value of the property the amount he may have paid for it. "The fraud," observes Adams, J., "renders the deeds absolutely void as to creditors, and the plaintiff, who was a creditor, and as such became the purchaser, is entitled to recover the property and its rents, etc., as though no such fraudulent deeds ever had been made." Allowing the vendee to recover back the money would be in effect repaying him the amount which he expended in accomplishing the very thing which the law prohibits and condemns. As it was a wrong in him to obtain the title and the possession for a fraudulent purpose, it must be equally wrong to refund to him the price paid for it.[1] But where a mortgagor conveyed to the mortgagee in payment of the mortgage, and the conveyance was set aside, it was considered that the mortgage was in force as to the creditors.[2] In part, the theory of not allowing the fraudulent grantee any relief for partial consideration or necessary outlay, as regards the avoided transaction, is that the rights of creditors would be impaired by such allowance. Creditors might have seized the property intact but for the wrongful alienation. But equity sometimes hesitates, and, in its desire to do equity, evinces an inclination to allow the alienee for any consideration or outlays which the creditors could not have escaped paying.[3]

§ 193. **No reimbursement at law.** — While a court of equity, in setting aside a deed of a purchaser upon grounds other than those of positive fraud, annuls it

[1] McLean v. Letchford, 60 Miss. 183.

[2] Irish v. Clayes, 10 Vt. 81.

[3] See Baldwin v. June, 68 Hun (N. Y.) 286, 22 N. Y. Supp. 852; Hamilton Nat. Bk. v. Halsted, 134 N. Y. 520, 31 N. E. Rep. 900. Compare Loos v. Wilkinson, 113 N. Y. 485, 21 N. E. Rep. 392; Stevens v. Brennan, 79 N. Y. 254; Clift v. Moses, 75 Hun (N. Y.) 520, 27 N. Y. Supp. 728; Clements v. Moore, 6 Wall. 312.

upon terms, and requires a return of the purchase-money, or directs that the conveyance stand as a security for its repayment, this principle has no place as applied to an action at law. This constitutes one of the essential differences already discussed[1] between relief in equity and the judgment extended by a court of law. The latter court, as we have said, can hold no middle course. The entire claim of each party must rest and be determined at law upon the single point as to the validity of the deed; but it is the ordinary case in the former court to decree that a deed not absolutely void, yet, under the circumstances, inequitable as between the parties, may be set aside upon terms.[2]

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[1] See Chapter III. §§ 51, 60; Foster v. Foster, 56 Vt. 540.

[2] Coiron v. Millaudon, 19 How. 115. See Clark v. Krause, 2 Mackey (D. C.) 574; Drury v. Cross, 7 Wall. 299; Worthington v. Bullitt, 6 Md. 172.

Flexible jurisdiction of equity. — In Clements v. Moore, 6 Wall. 312, a case which we have frequently quoted and cited, the court said: "A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to, while it scans the transaction with the severest scrutiny, looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances, it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility. *The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud.*" See Tompkins v. Sprout, 55 Cal. 36; Clift v. Moses, 75 Hun (N. Y.) 520. A grantee may be allowed for improvements. King v. Wilcox, 11 Paige (N. Y.) 589; see Shand v. Hanley, 71 N. Y. 319, and the amount of incumbrances

§ 194. **Void in part void in toto.** — As a general rule, a transaction void in part for any cause is entirely void.[1] Russell v. Winne[2] is an illustration of our meaning. In that case the question presented was whether a mortgage which was fraudulent against creditors as to a part of the property mortgaged, could be upheld as to the residue. The court decided that as the mortgage was a single instrument, given to secure one debt, to render it valid it must have been given in good faith, for the honest purpose of securing the debt, and without any intent to hinder or defraud creditors. Grover, J., continuing, said: "This cannot be true when the object, in part, or as to part of the property, is to defraud creditors. This unlawful design vitiates the entire instrument. The unlawful design of the parties cannot be confined to one particular parcel of the property. Entire honesty and good faith is necessary to render it valid; and whenever it indisputably appears that one object was to defraud creditors to any extent, the entire instrument is, in judgment of law, void."[3] It is different where the instrument is given to secure separate debts, some of which are valid, and others fraudulent. In that case it will be sustained as to the former.[4] The rule, as we have seen,

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satisfied by the vendee may be allowed. Potter v. Gracie, 58 Ala. 303. So, when a conveyance is annulled, a mortgage in favor of a trust may be validated. First Nat. Bank v. Cummins, 39 N. J. Eq. 577. Compare Murphy v. Briggs, 89 N. Y. 446.

[1] National Bank v. Barkalow, 53 Kan. 68, 35 Pac. Rep. 796; Bank v. Brier, 95 Tenn. 331, 32 S. W. Rep. 205; State v. Hope, 102 Mo. 410, 14 S. W. Rep. 985; Brasher v. Jamison, 75 Tex. 140, 12 S. W. Rep. 809; Roberts v. Vietor, 130 N. Y. 600, 29 N. E. Rep. 1025; Hangen v. Hachemeister, 114 N. Y. 570, 21 N. E. Rep. 1046; Baldwin v. Short, 125 N. Y. 553, 26 N. E. Rep. 928.

[2] 37 N. Y. 591, 596. See Showman v. Lee, 86 Mich. 560, 49 N. W. Rep. 578.

[3] Baldwin v. Short, 125 N. Y. 553, 26 N. E. Rep. 928.

[4] Rider v. Hunt, 6 Tex. Civ. App. 238, 25 S. W. Rep. 314. See Morris v. Lindauer, 4 C. C. A. 162, 54 Fed. Rep. 23; Ruffner v. Welton Coal & S. Co., 36 W. Va. 244, 15 S. E. Rep. 48; Gordon v. Cannon, 18 Gratt. (Va.) 423; Riggan v. Wolf, 53 Ark. 538, 14 S. W. Rep. 922; Tefft v. Stern, 73 Fed. Rep. 591.

applies only where there is actual fraud. In cases where the fraud is constructive only, the court will uphold the valid provisions of the instrument, if it can be done without defeating the general intent.[1]

§ 195. **Subrogation of purchaser to creditors' lien.** — The doctrine of subrogation is founded upon principles of equity and benevolence, and it may be decreed where no contract or privity of any kind exists between the parties.[2] The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties.[3] In Lidderdale v. Robinson,[4] Chief-Justice Marshall said: "Where a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible, shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable intent and purpose, in the place of the creditor whose claim he has discharged."[5] It may be noted that the party seeking subrogation must come into

[1] Peters v. Bain, 133 U. S. 670, 10 S. C. Rep. 354; Hayes v. Westcott, 91 Ala. 143, 8 So. Rep. 337; Cunningham v. Norton, 125 U. S. 77, 8 S. C. Rep. 804; Muller v. Norton, 132 U. S. 501, 10 S. C. Rep. 147.

[2] Cottrell's Appeal, 23 Pa. St. 294. Compare Graff's Estate, 139 Pa. St. 70, 21 Atl. Rep. 233; Pease v. Egan, 131 N. Y. 272, 30 N. E. Rep. 102.

[3] Memphis, & L. R. R. v. Dow, 120 U. S. 301, 7 S. C. Rep. 482; Pease v. Egan, 131 N. Y. 272, 30 N. E. Rep. 102. See Gans v. Thieme, 93 N. Y. 225.

[4] 2 Brock. 168. See Pease v. Egan, 131 N. Y. 272, 30 N. E. Rep. 102.

[5] "It is also safe to say that when the principal debtor has given to his surety, endorser or guarantor any portion of his estate as a protection against liability, and both become insolvent, the creditor is entitled to be subrogated to the rights of such surety, guarantor or endorser, and to claim directly, and not through the representative of such surety, guarantor or endorser, the application to the discharge of his claim of all such assets." Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 418, 20 Atl. Rep. 203; New Bedford Inst. for Savings v. Fairhaven Bk., 9 Allen (Mass.) 175; Aldrich v. Blake, 134 Mass. 585.

court with clean hands.[1] The court will not protect a fraudulent party from loss.[2] This doctrine of subrogation is frequently invoked in cases where fraudulent conveyances are annulled. Thus, in Selleck v. Phelps,[3] it was said that a person who acquired the title to property under circumstances which enabled the creditors of the vendor to avoid the sale, whether he be a purchaser or a voluntary grantee, would, after the payment of the claims of attaching creditors, be subrogated to their rights so as to enable him to hold the property against subsequent attachments.[4] Where goods were fraudulently conveyed, but promptly seized by the creditors, and sold by them, it was held that the fraudulent vendee should not be charged a greater sum than was realized upon the sale, and that he was entitled to a lien upon the proceeds of sale for the amount of a *bona fide* debt paid by the debtor out of the price given by the vendee.[5] The right of subrogation was recognized in Cole v. Malcolm.[6] It appeared that one Crawford conveyed real estate to his wife with intent to defraud creditors Subsequently his wife died intestate and her heirs assigned the property to the defendant. One of Crawford's creditors then entered a judgment against him, and subsequently secured a decree setting aside the conveyance. The defendant then tendered the judgment-creditor the amount due him and

[1] Wilkinson v. Babbitt, 4 Dill. 207; Railroad Co. v. Soutter, 13 Wall. 517; Griffith v. Townley, 69 Mo. 13. The doctrine of equitable subrogation will not be applied to relieve a party from a loss occasioned by his own unlawful act. Guckenheimer v. Angevine, 81 N. Y. 394; Kley v. Healy, 127 N. Y. 561, 28 N. E. Rep. 593.

[2] Guckenheimer v. Angevine, 81 N. Y. 394; Masson v. Bovet, 1 Denio (N. Y.) 74.

[3] 11 Wis. 380.

[4] See Sheldonon Subrogation, § 40. Compare Acker v. White, 25 Wend. (N. Y.) 614; Tompkins v. Sprout, 55 Cal. 31; Merrell v. Johnson, 96 Ill. 224.

[5] Flash v. Wilkerson, 20 Fed. Rep. 257. Compare note to Lore v. Dierkes, 16 Abb. N. C. (N. Y.) 47.

[6] 66 N. Y. 363; overruling the court below, 7 Hun (N. Y.) 31. See Pease v. Egan, 131 N. Y. 262, 30 N. E. Rep. 102.

demanded an assignment of the judgment against Crawford. The court held that, under such circumstances, upon payment of the judgment, which he was obliged to satisfy in order to save his land from sale, the principles of justice and equity required that he should be subrogated to all the rights and securities of the judgment-creditor, especially as the latter had, when his judgments were paid, secured everything to which he was entitled.[1] So then, again, the tendency of the court to prevent a merger where injustice would result, has been applied to cases of this character. Thus, in Crosby v. Taylor,[2] it appeared that a grantee of land held it by a deed which was fraudulent as against the grantor's creditors. By a subsequent deed the grantee secured from a prior mortgagee a deed of quitclaim of all the latter's interest in the premises, containing this clause, "which said mortgage is hereby canceled and discharged." The court held that the deed constituted an assignment of the mortgage, and did not operate by way of merger of it as against the grantor's creditors.

A fraudulent vendee may create a valid lien upon the property in favor of a mortgagee in good faith.[3]

[1] See Snelling v. McIntyre, 6 Abb. N. C. (N. Y.) 471. Compare Robinson v. Stewart, 10 N. Y. 190.

[2] 15 Gray (Mass.) 64.

[3] Murphy v. Briggs, 89 N. Y. 446; First National Bank v. Cummins, 39 N. J. Eq. 577; Munoz v. Wilson, 111 N. Y. 305, 18 N. E. Rep. 855; Royer Wheel Co. v. Frost, 13 Daly (N. Y.) 233; Martin v. Bowen, 51 N. J. Eq. 464, 26 Atl. Rep. 823.

CHAPTER XIV.

INTENTION.

§ 196. What is intention?
197. Actual intent not decisive.
198. Fraud of agent binding upon principal.
199. Mutuality of participation in fraudulent intent.
200. Intent affecting voluntary alienations.
§ 201. Of intention where consideration is adequate.
202. Intention to defraud subsequent creditors.
203. When question of intent *res adjudicata*.
204. Intent a question for the jury.
205. Testifying as to intent.
206. Proving intent.

"The intent is seldom disclosed on the face of the transaction." — Andrews, Ch. J., in *Beuerlien v. O'Leary*, 149 N. Y 38, 43 N. E. Rep. 417.

"The vital question is always the good faith of the transaction." — Mr. Justice Swayne in *Lloyd* v. *Fulton*, 91 U. S. 485.

"The mental emotion is inferred from the facts." — Finch, J., in *Higgins* v. *Crouse*, 147 N. Y. 415, 42 N. E. Rep. 6.

"Where there is an actual intent to defraud, no form in which the transaction is put can shield the property so transferred from the claims of creditors." — Chief Judge Ruger in *Billings* v. *Russell*, 101 N. Y. 226, 234.

§ 196. **What is intention?** — Further time cannot be devoted to the discussion of the practical details of procedure in creditors' suits and proceedings. Let us next direct attention to a more complete consideration of the general principles and theories of law which these various remedies are devised to render effectual under the statute of Elizabeth. The rules of evidence commonly invoked in these proceedings which, as will appear, constitute a most important branch of the subject, will then be noticed in a very general way.

First, what is the fraudulent intent under the statute of Elizabeth which must ordinarily exist, and be found as a fact,[1] to enable a creditor to defeat the debtor's alienation?[2] Sutherland, J., in Babcock v. Eckler,[3] a

[1] Sickman v. Wilhelm, 130 Ind. 481, 29 N. E. Rep. 908.

[2] Harman v. Hoskins, 56 Miss. 142. See Knox v. Moses, 104 Cal. 502, 38 Pac. Rep. 318.

[3] 24 N. Y. 632. S. P., Snyder v. Free, 114 Mo. 376, 21 S. W. Rep. 847.

case already cited, used these words: "Intent or intention is an emotion or operation of the mind, and can usually be shown only by acts or declarations; and, as acts speak louder than words, if a party does an act which must defraud another, his declaring that he did not by the act intend to defraud is weighed down by the evidence of his own act."[1] Fraud, it must be noted, does not consist in mere intention, but in intention acted out, or made effectual by hurtful acts,[2] in conduct that operates prejudicially upon the rights of others, and which was so intended.[3] A fraudulent purpose is an important element in the case, but it is not the only essential requisite; there must be superadded to it, besides the sale or transfer, actual fraud, hindrance, or delay resulting therefrom to the creditors.[4] While it may possibly be true that the impressions, emotions, or operations of the mind are never effaced, yet they can be reproduced only by the person whose mind gave them birth. Their true nature can only be determined or guessed at by other persons from the color of the outward acts which the emotions inspired; from their nature, connection and effect.[5]

[1] See Newman v. Cordell, 43 Barb. (N. Y.) 456; Monteith v. Bax, 4 Neb. 171; Snyder v. Free, 114 Mo. 361, 21 S. W. Rep. 847; Booth v. Carstarphen, 107 N. C. 395, 12 S. E. Rep. 375.

[2] See § 13. Learned, P. J., said in Billings v. Billings, 31 Hun (N. Y.) 65, 69: "There must be not only the intent, but the intent must be so carried out that some creditors are actually hindered, delayed, or defrauded. . . . A conveyance is made with fraudulent intent only as to those who are in fact defrauded." This case was reversed, and the court says: "Where there is an actual intent to defraud, no form in which the transaction is put can shield the property so transferred from the claims of creditors, even though a full and adequate consideration be received for the same." Billings v. Russell, 101 N. Y. 226, 234, 4 N. E. Rep. 531. In People v. Cook, 8 N. Y. 67, 79, Willard, J., said: "Fraud can never, in judicial proceedings, be predicated of a mere emotion of the mind, disconnected from an act occasioning an injury to some one." See Masterton v. Beers, 1 Sweeny (N. Y.) 419.

[3] Bunn v. Ahl, 29 Pa. St. 390. Compare Smith v. Smith, 21 Pa. St. 370; Worthy v. Brady, 91 N. C. 269.

[4] Rice v. Perry, 61 Me. 150.

[5] Booth v. Carstarphen, 107 N. C. 395, 12 S. E. Rep. 375.

Hence the court, as we have shown, will not be concluded by the statement of the debtor's mental operations, for he is usually an interested party; nor will it accept his standard of morality as its test. In Potter v. McDowell,[1] this language is used: "When a voluntary deed is made by a debtor in embarrassed circumstances, and a question arises as to its validity, in order to render the deed fraudulent in law as to existing creditors, it is not necessary to show that the debtor contemplated a fraud in making it, or that it was an immoral or corrupt act. . . . . The law does not concern itself about the private or secret motives which may influence the debtor;" he may believe he had the right to make it, and that it was his duty to do it, yet if the deed is voluntary, and hinders and delays his creditors, it is fraudulent. It may be observed here that a conveyance is fraudulent if the grantor meant to hinder or defraud *any* of his creditors, and a charge conveying the idea that he must have meant to defraud *all* his creditors is misleading.[2] Also that it is not necessary to show that the fraudulent intent constituted the sole purpose, but only that it constituted a part of the purpose and design with which the scheme was entered into; if it is a *part* of the scheme to hinder or delay creditors, the whole transaction is void.[3] "The intent is the essential and poisonous element in the transaction."[4] The court will discriminate and frame its decree accordingly. Hence a mortgage made to two creditors may be sustained as to an innocent mortgagee

[1] 31 Mo. 69. See White v. McPheeters, 75 Mo. 294. In Wartman v. Wartman, Taney's Dec. 370, Chief-Justice Taney said: "As regards the question, whether a contempt has or has not been committed, it does not depend on the intention of the party, but upon the act he has done." See Cartwright's Case, 114 Mass. 239.

[2] Allen v. Kinyon, 41 Mich. 282.

[3] Manning v. Reilly, 16 Weekly Dig. (N. Y.) 230; Holt v. Creamer, 34 N. J. Eq. 187; Russell v. Winne, 37 N. Y. 596, and cases cited; Mead v. Combs, 19 N. J. Eq. 112.

[4] Moore v. Hinnant, 89 N. C. 455, 459; Worthy v. Brady, 91 N. C. 269; Hollister v. Loud, 2 Mich. 309.

and avoided as to a fraudulent mortgagee.[1] It must be borne in mind that an intent to hinder, delay, *or* defraud, is sufficient to avoid the sale;[2] it is not essential to show a union of these elements, though it must be conceded that it is not always an easy task to distinguish between an intent to hinder and an intent to delay.[3] It is considered in Massachusetts that knowledge of the fraudulent intent does not itself constitute participation in it.[4] The statute against fraudulent conveyances is aimed at the intent of the debtor, not the fraudulent intent of the grantee practiced upon a debtor, to procure a conveyance by unfair means.[5]

§ 197. **Actual intent not decisive.** —The question of the donor's actual intent is not then necessarily decisive.[6] A man may give his property to his wife or children in the belief that he has the right to do so, but if by so doing his existing creditors are hindered or delayed, the

[1] Riggan v. Wolf, 53 Ark. 537, 14 S. W. Rep. 922.

[2] See § 11.

[3] Rupe v. Alkire, 77 Mo. 642. See Burgert v. Borchert, 59 Mo. 83. See Weber v. Mick, 131 Ill. 520, 23 N. E. Rep. 646.

[4] Carr v. Briggs, 156 Mass. 80, 30 N. E. Rep. 470; Banfield v. Whipple, 14 Allen (Mass.) 13.

[5] Parker v. Roberts, 116 Mo. 657, 22 S. W. Rep. 914. In Morton v. Morris, 36 U. S. App. 550, 560, the court says: "The intent which actuates a creditor in seeking to enforce a legal claim or demand is ordinarily of no concern to the debtor, and is not a matter for judicial inquiry; the debtor is only entitled to complain when some act is done or threatened by the creditor which is in itself unlawful, or is contrary to equity. In the present case, the acts charged in the answer as the basis for relief consisted in a demand made by the plaintiff for an accounting and settlement when the defendant was in embarrassed circumstances, and in a threat to enforce such demand by a civil action. Neither of these acts was unlawful, or so far harsh, oppressive or unconscionable as to vitiate the settlement subsequently made. Silliman v. United States, 101 U. S. 465; Hackley v. Headley, 45 Mich. 569; Snyder v. Braden, 58 Ind. 143; Dunham v. Griswold, 100 N. Y. 224; Fuller v. Roberts, 35 Fla. 110; McClair v. Wilson, 18 Col. 82; Farmer v. Walter, 2 Edw. Ch. (N. Y.) 601; Skeate v. Beale, 11 Ad. & El. 983; Wilcox v. Howland, 23 Pick. (Mass.) 167."

[6] Haas v. Sternbach, 156 Ill. 54, 41 N. E. Rep. 51; Lawson v. Funk, 108 Ill. 502; Brisco v. Norris, 112 N. C. 676, 16 S. E. Rep. 850; Marks v. Bradley, 69 Miss. 1, 10 So. Rep. 922.

transaction is wrongful, and the conveyance will be set aside.[1] In McKeown v. Allen,[2] the court says: "The defendants deny that their intention was to defraud, hinder or delay creditors, in the execution of the conveyance between them. Such hindrance and delay of the complainant, however, has clearly been the result of the conveyance. Where such has been the effect of the conveyance, the real motives of the parties thereto are immaterial."[3] In Briggs v. Mitchell,[4] the court said: "The property conveyed to the wife so far exceeds in value the amount of the money which it was conveyed to secure, it is of itself sufficient to authorize the holding that the conveyance was fraudulent as against antecedent creditors, without the finding of *actual* or meditated fraud." The inference of fraud may arise despite an honest intent.[5] In Lukins v. Aird,[6] Davis, J., said: "It is not important to inquire whether, as matter of fact, the defendants had a purpose to defraud the creditors of Aird, for the fraud in this case is an inference of law, on which the court is as much bound to pronounce the conveyance in question void as to creditors, as if the fraudulent intent were directly proved." "An act innocent in the intention may be so injurious in the consequences, that the law declares it to be a fraud and forbids it."[7] An assignment which delays certain creditors is void,

[1] Winchester v. Charter, 97 Mass. 140; Potter v. McDowell, 31 Mo. 62; Patten v. Casey, 57 Mo. 118; Marmon v. Harwood, 124 Ill. 104, 16 N. E. Rep. 236. See Chaps. V., VI.

[2] 37 Fla. 497, 20 So. Rep. 556.

[3] Citing Marmon v. Harwood, 124 Ill. 104, 16 N. E. Rep. 236.

[4] 60 Barb. (N. Y.) 316.

[5] Coleman v. Burr, 93 N. Y. 17; Roberts v. Vietor, 130 N. Y. 600, 29 N. E. Rep. 1025; Sutherland v. Bradner, 116 N. Y. 410, 22 N. E. Rep. 554.

[6] 6 Wall. 79; Sukeforth v. Lord, 87 Cal. 400, 25 Pac. Rep. 497; Wolf v. Arthur, 118 N. C. 898, 24 S. E. Rep. 671.

[7] Kisterbock's Appeal, 51 Pa. St. 485. Compare Lawson v. Funk, 108 Ill. 507; Personette v. Cronkhite, 140 Ind. 586, 40 N. E. Rep. 59; Booth v. Carstarphen, 107 N. C. 395, 12 S. E. Rep. 375; Sutherland v. Bradner, 116 N. Y. 410, 22 N. E. Rep. 554; Coursey v. Morton, 132 N. Y. 556, 30 N. E. Rep. 231.

though no fraud was intended by the assignor or assignee.[1] A different doctrine seems to be recognized in Minnesota. An actual corrupt and dishonest design or purpose seems to be required.[2] That the debtor made the conveyance to avoid the plaintiff's claim because he did not believe it to be just will not sustain the transfer.[3] This subject has already been discussed.[4]

§ 198. **Fraud of agent binding upon principal.** — Warner v. Warren,[5] establishes the principle that actual fraudulent intent, sufficient to avoid a transfer, need not be personal to the debtor. In this case a husband obtained a power of attorney from his wife authorizing him to transact business as her agent. By means of false statements he established a fictitious credit for her, incurred liabilites in her name, and then induced the wife to make an assignment. The wife was a guileless, artless woman, who took no part in the business, and intended to commit no wrong, but was a mere passive instrument in the hands of her husband, by whom the frauds were perpetrated. In avoiding the assignment, in favor of an attaching-creditor, Grover, J., said that the husband's "objects became hers; his frauds were her frauds; and she is responsible therefor, however destitute of any knowledge thereof." This case is a valuable precedent, showing that intent may be established by implication or substitution, and that mental operation or emotion is not necessarily the test.[6]

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[1] Sutherland v. Bradner, 116 N. Y. 410, 22 N. E. Rep. 554. See Chap. XXI.

[2] *In re* Shotwell, 43 Minn. 389, 45 N. W. Rep. 843.

[3] Barrett v. Nealon, 119 Pa. St. 171, 12 Atl. Rep. 861.

[4] See §§ 8, 9, 10.

[5] 46 N. Y. 228; Wicks v. Hatch, 38 N. Y. Superior, 95; affi'd 62 N. Y. 535.

[6] See § 8. In Trumbull v. Hewitt, 65 Conn. 60, 31 Atl. Rep. 492, the doctrine of Warner v. Warren, 46 N. Y. 228, is applied to a case where a conveyance was made by the husband to his wife for a valuable consideration, and without knowledge or fraudulent

Incidentally it may be noted that there must be clear proof that the knowledge or notice was present in the mind of the agent at the time of the transaction in question in order to charge the principal.[1]

§ 199. Mutuality of participation in fraudulent intent. — Generally speaking, to render a conveyance fraudulent and voidable as against creditors, there must have been mutuality of participation in the fraudulent intent, on the part of both the vendor and the purchaser.[2]

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intent on her part, on the ground that the facts showed that, in the transaction, the husband acted not merely as grantor, but as agent for his wife, and therefore his fraud was held to be imputable to her. See also Smith v. Water Commrs. of Norwich, 38 Conn. 208; O'Connell v. Kilpatrick, 64 Md. 130, 21 Atl. Rep. 98.

[1] See Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. Rep. 631; Hall v. Germain, 131 N. Y. 536, 30 N. E. Rep. 591; Slattery v. Schwannecke, 118 N. Y. 543, 23 N. E. Rep. 922; Denton v. Ontario County Nat. Bank, 150 N. Y. 137, 44 N. E. Rep. 781.

[2] Curtis v. Valiton, 3 Mont. 157; Mehlhop v. Pettibone, 54 Wis. 652, 11 N. W. Rep. 553, 12 Id. 443; Hall v. Arnold, 15 Barb. (N. Y.) 600; Wilson v. Prewett, 3 Woods 635; Hopkins v. Langton, 30 Wis. 379; Steele v. Ward, 25 Iowa 535; Schroeder v. Walsh, 120 Ill. 403, 11 N. E. Rep. 70; Miller v. Bryan 3 Iowa 58; Chase v. Walters, 28 Iowa 460; Kittredge v. Sumner, 11 Pick. (Mass.) 50; McCormick v. Hyatt, 33 Ind. 546; Cooke v. Cooke, 43 Md. 522, 525; Fifield v. Gaston, 12 Iowa 218; Preston v. Turner, 36 Iowa 671; Drummond v. Couse, 39 Iowa, 442; Kellogg v. Aherin, 48 Iowa, 299; Rea v. Missouri. 17 Wall. 543; Demarest v. House, 91 Hun (N. Y.) 290, 36 N. Y. Supp. 291; Wolf v. Arthur, 118 N. C. 898, 24 S. E. Rep. 671; Jackson v. Glaze, 3 Okl. 143. 41 Pac. Rep. 79; Schram v. Taylor, 51 Kan. 552, 33 Pac. Rep. 315; Wilson v. Spear, 68 Vt. 145, 34 Atl. Rep. 429; First Nat. Bk. v. Hamilton, 59 N. Y. St. Rep. 331; Sabin v. Columbia Fuel Co., 25 Ore. 15, 34 Pac. Rep. 692; Tolman v. Ward, 86 Me. 303, 29 Atl. Rep. 1081; Stevens Lumber Co. v. Kansas City Planing Mill Co., 59 Mo. App. 373; Alberger v. White, 117 Mo. 347, 23 S. W. Rep. 92; The State v. Mason, 112 Mo. 374, 20 S. W. Rep. 629; Leach v. Francis, 41 Vt. 670; Partelo v. Harris, 26 Conn. 480; Ewing v. Runkle, 20 Ill. 448; Violett v. Violett, 2 Dana (Ky.) 323; Foster v. Hall, 12 Pick. (Mass.) 89; Byrne v. Becker, 42 Mo. 264; Bancroft v. Blizzard, 13 Ohio 30; Splawn v. Martin, 17 Ark. 146; Governor v. Campbell, 17 Ala. 566; Ruhl v. Phillips, 48 N. Y. 125; Jaeger v. Kelley, 52 N. Y. 274; Clements v. Moore, 6 Wall. 312; Astor v. Wells, 4 Wheat. 466; Howe Machine Co. v. Claybourn, 6 Fed. Rep. 441; Pierson v. Slifer, 52 Mo. App. 273; Blumer v. Bennett, 44 Neb. 873, 63 N. W. Rep. 14; Woodruff v. Bowles, 104 N. C. 197, 10 S. E. Rep. 482; Second Nat. Bank of Beloit v. Merrill, 81 Wis. 142, 50 N. W. Rep. 503; Davis

In discussing this subject Chief-Justice Church used these words: "Nor is the vendor's fraudulent intent sufficient. The vendee must be also implicated."[1] So in another case it is asserted that in order to set aside, as fraudulent against creditors, a conveyance to one creditor, he must have participated in or have been cognizant of the grantor's unlawful motives when he accepted the

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v. Garrison, 85 Iowa 447, 52 N. W. Rep. 359; LePage v. Slade, 79 Tex. 473, 15 S. W. Rep. 496; Bannister v. Phelps, 81 Wis. 256, 51 N. W. Rep. 417; Nadal v. Britton, 112 N. C. 180, 16 S. E. Rep. 914.

No participation by infant in fraudulent intent. — The creditor is sometimes embarrassed or foiled by a conveyance to some person not *sui juris*, as for instance an infant. In Hamilton v. Cone, 99 Mass. 478, Gray, J., said: "The only case cited for the tenant which requires special consideration is that of Goodwin v. Hubbard, 15 Mass. 210. But in that case the person to whom the conveyance was made, as well as his subsequent grantee, the demandant, participated in the fraudulent intent of the debtor, who paid the purchase-money; and the decision by which this court, having then no jurisdiction in equity to redress fraud, held that a grantee who participated in the fraudulent intent could not maintain a writ of entry against a creditor who had taken the land on execution against the fraudulent debtor, cannot be extended to this case, in which the demandant at the time of the conveyance to him was an infant of less than a year old, and could not participate in the fraud, and there was no offer to show that the conveyance was without adequate consideration." Citing Howe v. Bishop, 3 Met. (Mass.) 30; Clark v. Chamberlain, 13 Allen (Mass.) 257. See Mathes v. Dobschuetz, 72 Ill. 438; Tenney v. Evans, 14 N. H. 343; 40 Am. Dec. 194. See, also, § 26. In Matthews v. Rice, 31 N. Y. 460, it is asserted that the fact that the plaintiff was an infant and purchased partly upon credit from a firm in apparently straitened pecuniary circumstances, did not render the sale void in law as against creditors. The court said: "The infancy of the plaintiff did not alter or affect the transaction, save as a circumstance bearing upon the question of fraud in fact. There is no legal bar to the right of an infant to purchase property either for cash or upon credit; and the vendor cannot avoid or retract the sale, or question its validity on the ground that the vendee is an infant, much less can a stranger impeach the sale on that ground. In this, as in other cases of a sale of chattels, its invalidity as to creditors depends upon whether it was made with intent to defraud them." See Washband v. Washband, 27 Conn. 424; Carter v. Grimshaw, 49 N. H. 100.

[1] Jaeger v. Kelley, 52 N. Y. 275. See Starin v. Kelly, 88 N. Y. 421; Grunsky v. Parlin, 110 Cal. 179, 42 Pac. Rep. 575; American Brewing Co. v. McGruder (Ky.) 32 S. W. Rep. 603; Galle v. Tode, 148 N. Y. 270, 42 N. E. Rep. 673; Flemington Nat. Bk. v. Jones, 50 N. J. Eq. 249, 24 Atl. Rep. 928.

conveyance.[1] In Prewit v. Wilson,[2] Field, J., observed: "When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor.[3] It is held in Dudley v. Danforth,[4] by the New York Commission of Appeals, that where a vendee purchased property solely with a view of receiving payment of an honest debt, an intent on the part of the debtor to hinder and defraud creditors would not affect the vendee's title, although the vendee had notice of the intent, provided he did not participate in it.[5] In such case the purchase is in reality a preference of a creditor; an act allowed by law unless actual participation in the fraud is shown. A distinction should be made between conveyances made for a consideration paid to the grantor at the time of the conveyance and those made in payment of a debt. In the first case knowledge of the fraudulent intent on the part of the grantor, and his purpose to deprive the creditors of the consideration received should be enough to invalidate the conveyance. In such cases the payment of a consideration, knowing that the object of the sale is to

[1] Roe v. Moore, 35 N. J. Eq. 526.

[2] 103 U. S. 24.

[3] Werner v. Zierfuss, 162 Pa. St. 365, 29 Atl. Rep. 737.

[4] 61 N. Y. 626.

[5] Knower v. Central Nat. Bank, 124 N. Y. 552, 27 N. E. Rep. 247; Harris v. Russell, 93 Ala. 59, 9 So. Rep. 541; Werner v. Zierfuss, 162 Pa. St. 360, 29 Atl. Rep. 737; Treusch v. Ottenburg, 4 C. C. A. 629, 54 Fed. Rep. 867.

Rules as to Corporations. — The rules governing fraudulent transfers are also applicable to corporations. See Curtis v. Leavitt, 15 N. Y. 9. In Graham v. Railroad Co., 102 U. S. 161, Bradley, J., said: "We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation any more than a like disposal by an individual of his property should be so. The same principles of law apply to each." Morrow Shoe Mfg. Co. v. New England Shoe Co., 60 Fed. Rep. 341; Hollins v. Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. C. Rep. 127; Cole v. Millerton Iron Co., 133 N. Y. 164, 30 N. E. Rep. 847.

facilitate the covering up of assets, is an actual participation. It is different in the second case. A creditor has a right to have his debt paid, and by accepting such payment he does not enable the grantor to defraud his creditors, and mere knowledge of a fraudulent intent, in which he does not participate, should not invalidate the conveyance as to him.

§ 200. **Intent affecting voluntary alienations.** — The rule as to intent in voluntary alienation, as we shall presently see, necessarily differs from cases where a valuable consideration [1] is present. In the latter class of cases mutual participation in the fraudulent design must, of course, ordinarily be established. Where the alienation is voluntary the invalidity may, as already shown, be predicated of the fraudulent intent of the vendor without regard to the knowledge or motives of the vendee. In such cases the vendee is, of course, cognizant of the fact that nothing was paid for the property. The cases relating to this branch of the inquiry are reviewed by the Supreme Court of Maine in Laughton v. Harden,[2] an important case from which we have already quoted.[3] Judge Story thus

[1] See Chap. XV.

[2] 68 Me. 213. See Tucker v. Andrews, 13 Me. 124; Lee v. Figg, 37 Cal. 328; Watson v. Riskamire, 45 Iowa 233; Stearns v. Gage, 79 N. Y. 102; Jackson v. Lewis, 34 S. C. 1; Wilson v. Marion, 147 N. Y. 597, 42 N. E. Rep. 190; Jacobs v. Morrison, 136 N. Y. 105, 32 N. E. Rep. 552.

[3] See §§ 97, 98.

The cases as to intent — Voluntary conveyances.—The court, in Laughton v. Harden, 68 Me. 213, summarize the cases as follows: "In Hitchcock v. Kiely, 41 Conn. 611, it was decided that 'a voluntary conveyance, fraudulent in fact, will be set aside in favor of creditors, whether the grantee participated in the fraud or not.' In that case, the contending party was a creditor subsequent to the conveyance. In Beecher v. Clark, 12 Blatchf. 256, a voluntary conveyance was set aside for the benefit of both prior and subsequent creditors. Hunt, J., says: 'I cannot assent to the proposition, that it is necessary that the grantee should have known that the intent of the grantor was fraudulent, and that she should have been an intentional party to the fraud. The fact that a wife received a voluntary conveyance of the same, in ignorance of these facts (showing fraud in fact), will not make the conveyance a valid one.' Savage v. Murphy, 8 Bosw. (N. Y.)

states the rule borrowed from the civil law by both the common law and the courts of chancery: "Hence, all voluntary dispositions, made by debtors, upon the score of liberality, were revocable, whether the donee knew of the prejudice intended to the creditors or not." [1]

§ 201. Of intention where consideration is adequate. — The rule that a voluntary conveyance of property by a debtor

75, contains a learned review by Hoffman, J., of the earlier decisions by which subsequent purchasers and creditors were permitted to question conveyances as being fraudulent against them, and this proposition is there laid down: 'Where a deed is made to defraud creditors, by one at the time in debt, and who subsequently continued to be indebted, it is fraudulent and void, as to all such subsequent as well as existing creditors.' See also Carpenter v. Roe, 10 N. Y. 227. In Mohawk Bank v. Atwater, 2 Paige (N. Y.) 54, Chancellor Walworth says: 'It is of no consequence in this suit whether the son knew of the extent of his father's indebtedness or not. The grantee without valuable consideration cannot be protected, although he was not privy to the fraud.' In Carter v. Grimshaw, 49 N. H. 100, the intent of minor children upon whom a settlement was made was considered of no consequence at all. Coolidge v. Melvin, 42 N. H. 510, 534, sustains the same view. In Savage v. Murphy, 34 N. Y. 508, the same idea is strongly presented by the court. Among other things said about the rights of subsequent creditors against a voluntary deed, this is added: 'The indebtedness then existing was merely transferred, not paid, and the fraud is as palpable as it would be if the debts now unpaid were owing to the same creditors who held them at the time of the transfers.' In Clark v. Chamberlain, 13 Allen (Mass.) 257, 260, Hoar, J., remarks: 'Where the purpose of the grantor is shown to have been actually fraudulent as to creditors, it is sufficient to prove that the grantee takes without consideration, without proving otherwise his participation in the fraudulent intent.' Lee v. Figg, 37 Cal. 328, concludes an opinion thus: 'It (the allegation) avers that the conveyance to Ogden was without consideration, and this is sufficient to avoid it as to creditors of Lee (the grantor), whether Ogden was aware of the fraudulent purpose of Lee and actively aided it or not.' Lassiter v. Davis, 64 N. C. 498, decides that 'a voluntary gift is void, if it was the maker's intent to hinder, delay or defraud creditors, whether the party who takes the gift participated in the fraudulent intent or not.' In Foley v. Bitter, 34 Md. 646, it was held to the same effect, and it is there said: 'The innocence of the trustee, or of the creditors named in the deed, will not save it (an assignment) from condemnation under the statute (of Elizabeth) if fraudulent in fact on the part of the grantor.'"

[1] Story's Eq. Jur. §§ 351, 353, 355; Spaulding v. Blythe, 73 Ind. 94; Gilliland v. Jones, 144 Ind. 662, 43 N. E. Rep. 939; Trumbull v. Hewitt, 65 Conn. 73, 31 Atl. Rep. 492; Hitchcock v. Kiely, 41 Conn. 611; McKenna v. Crowley, 16 R. I. 364, 17 Atl. Rep. 354, citing the text.

may be annulled at the suit of creditors, where such conveyance leaves the debtor without the means to pay the remaining creditors,[1] seems to commend itself as being both necessary and reasonable. The theory of the law is sometimes said to be that the debtor's property constitutes a fund upon which the creditors are supposed to have relied in extending the credit,[2] and to which they are entitled to resort for payment of their claims, but this has been termed an inaccurate use of language. The technical qualities of a trust fund do not pertain to a debtor's estate. The plainest dictates of common sense and the simplest principles of justice require that any depletion of a debtor's estate should not be permitted to stand in favor of a voluntary alienee, in cases where creditors remain unpaid. Chief-Justice Shaw said: "In a voluntary absolute conveyance, the fact that no consideration is paid is, of course, known to both parties. If the grantor was in debt at the time, as such conveyance must necessarily tend to defeat the rights of creditors, and as all persons are presumed to contemplate and intend the natural and probable consequences of their own acts, the conclusion is irresistible that such conveyance was intended to defeat creditors, and is therefore fraudulent."[3] A different question, however, is presented where full pecuniary consideration has been paid by the purchaser.[4] Can the transfer be nullified in such cases, and if so, in what instances, by what procedure and upon what theory? The answer is that, generally speaking, a debtor's conveyance can be set aside where it is made with a mutual fraudulent intent to hinder, delay and defraud creditors, and that adequacy of consideration will not save it. In this class of cases "the question of intent becomes

[1] McKeown v. Allen, 37 Fla. 490, 20 So. Rep. 556.

[2] See Chap. II.

[3] Marden v. Babcock 2 Met. (Mass.) 104. See First Nat. Bank v. Bertschy, 52 Wis. 443, 9 N. W. Rep. 534.

[4] Marmon v. Harwood, 124 Ill. 104, 16 N. E. Rep. 236. See Chap. XV.

prominently material."[1] Lord Mansfield said, in discharging a rule for a new trial in Cadogan v. Kennett:[2] "If the transaction be not *bona fide*, the circumstance of its being done for a valuable consideration will not alone take it out of the statute. I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed, yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void." The "several cases" of which this learned jurist had knowledge, where conveyances founded upon adequate consideration had been overturned by reason of the bad faith of the participants, have grown to many thousands, and the principle has become one of vital interest and paramount importance to the parties concerned. That a conveyance, whether it be of real or personal property, founded upon adequate consideration, may be vacated at the suit of creditors for fraud, is established in an endless variety of cases, a few only of which we consider it necessary to cite.[3] A mere volunteer from a fraudulent grantee is in no better position.[4] In Wadsworth v. Williams,[5] Hoar. J.,

[1] Bradley v. Ragsdale, 64 Ala. 559; Scott v. Davis, 117 Ind. 232, 20 N. E. Rep. 139; Plunkett v. Plunkett, 114 Ind. 484, 16 N. E. Rep. 612, 17 Id. 562; Marmon v. Harwood, 124 Ill. 104, 16 N. E. Rep. 236. "A sale of property, even for full value, in order to hinder or delay creditors, both vendor and vendee knowing the fraudulent purpose, cannot be upheld." Treat, J., in Stinson v. Hawkins, 4 McCrary 504. In Greenleve v. Blum, 59 Tex. 127, the court says: "A purchaser not a creditor who should buy the property of a debtor, however adequate might be the consideration which he paid, with a knowledge that it was the intention of the debtor by the sale to put the property beyond the reach of his creditors, would be a *mala fide* purchaser and entitled to no protection as against creditors."

[2] 2 Cowp. 434.

[3] Brinks v. Heise, 84 Pa. St. 251; Ashmead v. Hean, 13 Pa. St. 584; Cox v. Miller, 54 Tex. 27; Stinson v. Hawkins, 13 Fed. Rep. 833; Hartshorn v. Eames, 31 Me. 93; Holbird v. Anderson, 5 T. R. 235; Pickstock v. Lyster, 3 M. &. S. 371; Covanhovan v. Hart, 21 Pa. St. 500; Grover v. Wakeman, 11 Wend. (N. Y.) 192; Stone v. Spencer, 77 Mo. 359; Collier v. Hanna, 71 Md. 253, 17 Atl. Rep. 1017.

[4] Dexter v. Smith, 2 Mason 303, 7 Fed. Cases, 621.

[5] 100 Mass. 130.

in delivering the opinion of the Supreme Court of Massachusetts, said: "A conveyance made with an actual purpose and intent to defraud creditors, present or future, is not valid against them in favor of a grantee who participates in the fraudulent intention, although made for a full consideration, and by a grantor in the possession of any amount of property." The learned Chief-Justice Black observed: "If a debtor, with the purpose to cheat his creditors, converts his land into money, because money is more easily shuffled out of sight than land, he, of course, commits a gross fraud. If his object in making the sale is known to the purchaser, and he nevertheless aids and assists in executing it, his title is worthless, as against creditors, though he may have paid a full price. But the rule is different when property is taken for a debt One creditor of a failing debtor is not bound to take care of another. It cannot be said that one is defrauded by the payment of another. In such cases, if the assets are not large enough to pay all, somebody must suffer. It is a race in which it is impossible for every one to be foremost."[1] It matters not what price was paid, or how early after the sale possession was changed, or how notorious the transaction was, if the vendor made the sale in order to defraud his creditors, and the vendee purchased with the design to aid him in the perpetration of the fraud, the sale is no more valid or effectual against such creditors than as if no consideration had passed.[2] The right of a debtor, even in failing circumstances, to prefer a creditor,[3] or to sell and dispose of his property in good faith and for value, to whomsoever he wishes, is generally unques-

[1] Covanhovan v. Hart, 21 Pa. St. 500; Nichols v. Ellis, 98 Mo. 344, 11 S. W. Rep. 741; Werner v. Zierfuss, 162 Pa. St. 366, 29 Atl. Rep. 737.

[2] Stone v. Spencer, 77 Mo. 359.

[3] Bostwick v. Burnett, 74 N. Y. 319; Hauselt v. Vilmar, 2 Abb. N. C. (N. Y.) 222; Gray v. McCallister, 50 Iowa 497.

tioned in the courts.[1] Thus the intention to defeat an execution creditor will not render the sale fraudulent if it was made for a valuable consideration, and is *bona fide* and absolute.[2] So a confession of judgment with intent to give priority is valid.[3] The transfers which we have instanced as objectionable are those which are merely colorable, or in which some secret right, benefit, favor, or interest is reserved to the debtor, or some unusual incident attends the transaction, stamping it as being out of the ordinary course of business, and as having been contrived to hinder, delay, or defraud creditors. Payment of the consideration is often in such cases a part of the scheme to more completely cover and conceal the fraud. Hence it is said that it is not the consideration, but the intent with which a conveyance is made, that makes it good or bad as to creditors.[4] Where such fraudulent intent is proved, the fact that the debtor had property in another State sufficient to pay his debt will not save the transaction.[5]

In Jones v. Simpson,[6] it was said that where bad faith in the vendor appeared, the burden was cast upon the vendee to show consideration, and this being established the creditors must assume the burden of attacking the vendee's good faith. This seems to state the rule correctly, but general expressions to the effect that proof of

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[1] Hobbs v. Davis, 50 Ga. 214; Hall v. Arnold, 15 Barb. (N. Y.) 599. See Chapter XXV.

[2] Wood v. Dixie, 7 Q. B. 892; Storey v. Agnew, 2 Ill. App. 353; Wilson v. Pearson, 20 Ill. 81; Francis v. Rankin, 84 Ill. 169; Dudley v. Danforth, 61 N. Y. 626; Dalglish v. McCarthy, 19 Grant (Ont.) 578; Nimmo v. Kuykendall, 85 Ill. 476; Riches v. Evans, 9 C. & P. 640; Frazer v. Thatcher, 49 Texas, 26; Clark v. Morrell, 21 U. C. Q. B. 600; Darvill v. Terry, 6 H. & N. 807.

[3] Beards v. Wheeler, 11 Hun (N. Y.) 539; affi'd 76 N. Y, 213. See Trier v. Herman, 115 N. Y. 163, 21 N. E. Rep. 1034; Holbird v. Anderson, 5 T. R. 235. See § 11.

[4] Hunters v. Waite, 3 Gratt. (Va.) 26; Lockhard v. Beckley, 10 W. Va. 96.

[5] Harding v. Elliott, 91 Hun (N. Y.) 502, 36 N. Y. Supp. 648.

[6] 116 U. S. 610, 6 S. C. Rep. 538. See Bamberger v. Schoolfield, 160 U. S. 150, 16 S. C. Rep. 225.

bad faith in the vendor throws the burden of establishing both consideration *and* good faith upon the vendee are frequently encountered in the authorities.

§ 202. **Intention to defraud subsequent creditors.**—We have elsewhere seen that, generally speaking, a voluntary alienation is, as to existing creditors, according to some cases, presumptively fraudulent, but, as to subsequent creditors, a fraudulent intent must be proved or established.[1] The element of contemplated future indebtedness or future schemes of fraud must be introduced.[2] While a conveyance made to defraud a subsequent judgment-creditor is within the statute,[3] it seems to be laid down in some of the cases that subsequent creditors can only avail themselves of the fraud which is practiced against them.[4] In Simmons v. Ingram,[5] the court said: "To make a deed void as to subsequent creditors, there must be proof of an intent to defraud them; it is not sufficient that there is an intent to defraud others whose debts were in existence at the time."[6] In Florence Sewing Machine Company v. Zeigler,[7] it was held that in order to avoid a sale founded upon an adequate new consideration — that is, not in payment of an antecedent debt — on the alleged ground that it was made to hinder, delay and defraud creditors, the creditor attacking the

[1] Rose v. Brown, 11 W. Va. 134; Shand v. Hanley, 71 N. Y. 319-322; Burdick v. Gill, 2 McCrary 488; Florence S. M. Co. v. Zeigler, 58 Ala. 224; Harlan v. Maglaughlin, 90 Pa. St. 293. See Mullen v. Wilson, 44 Pa. St. 416; Partridge v. Stokes, 66 Barb. (N. Y.) 586; Herring v. Richards, 1 McCrary 574; City Nat. Bank v. Hamilton, 34 N. J. Eq. 160. See Chapters V, VI.

[2] See § 96, Horbach v. Hill, 112 U. S. 144, 149, 5 S. C. Rep. 81; Hilton v. Morse, 75 Me. 258; Neuberger v. Keim, 134 N. Y. 35, 31 N. E. Rep. 268.

[3] Hoffman v. Junk, 51 Wis. 614, 8 N. W. Rep. 493.

[4] Harlan v. Maglauglin, 90 Pa. St. 293; Snyder v. Christ, 39 Pa. St. 499; Monroe v. Smith, 79 Pa. St. 459; Kimble v. Smith, 95 Pa. St. 69; Haak's Appeal, 100 Pa. St. 62.

[5] 60 Miss. 898.

[6] Citing Hilliard v. Cagle, 46 Miss. 309; Prestidge v. Cooper, 54 Miss. 74. Compare Teed v. Valentine, 65 N. Y. 474, and cases cited.

[7] 58 Ala. 224. See Kellar v. Taylor, 90 Ala. 290, 7 So. Rep. 907.

sale must show two things: first, that the vendor made the sale with such intent, and second, that the purchaser participated in such intent, or knew of its existence, or had knowledge of some fact calculated to put him on inquiry, and which, if followed up, would have led to the discovery that the vendor's intent was fraudulent.[1]

§ 203. When question of intent res adjudicata. — In Stockwell v. Silloway,[2] the Supreme Court of Massachusetts said: "To prove the intent of the defendant in making the conveyances alleged to be fraudulent in the charges filed by the plaintiff, it was competent to show other fraudulent conveyances made about the same time, and as a part of the same scheme of fraud. For this purpose the plaintiff introduced the record of a judgment of the Superior Court rendered in proceedings between the same parties, under the provisions of the general statutes in relation to poor debtors, adjudging the defendant guilty of the charges therein alleged against him. The plaintiff asked the court to rule that this judgment was conclusive evidence that the conveyances set forth in the former case as fraudulent, and upon which the defendant was then convicted, were fraudulent as alleged. We are of the opinion that the court erred in refusing this ruling. When a fact has once been put in issue and determined by a final judgment in the course of a judicial proceeding, such judgment is conclusive evidence of the existence of the fact in all controversies between the same parties in which it is material. It is to be regarded as a fixed fact between the parties for all purposes."[3]

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[1] Crawford v. Kirksey, 55 Ala. 282; Montgomery v. Bayliss, 96 Ala. 344, 11 So. Rep. 198; Edwards v. Reid, 39 Neb. 646, 58 N. W. Rep. 202.

[2] 113 Mass. 385.

[3] See Burlen v. Shannon, 99 Mass. 200, and cases cited; Commonwealth v. Evans, 101 Mass. 25; Dennis' Case, 110 Mass. 18.

§ 204. Intent a question for the jury. — The question of fraudulent intent is almost uniformly one of fact,[1] to be submitted in certain cases to a jury,[2] and it is regarded as error for the court to interfere with the province of the jury in this particular, unless,[3] as we have seen,[4] the fraud is apparent on the face of the instrument from a legal construction of it,[5] and is so manifest that but one conclusion can prevail. In determining the intent great latitude is allowed.[6] The rule as to submission to the jury is not departed from even in strong and apparently conclusive cases. If the jury err the verdict may be set aside. Thus, in Vance v. Phillips,[7] it appeared that an insolvent merchant sold his entire stock of goods to an infant, who was also his clerk and brother-in-law, taking the infant's note in payment, and then absconded. A verdict of a jury, affirming the validity of the transaction, was promptly set aside as contrary to evidence.[8] Especially will the verdict be overturned where it is apparent that the jury must have misapprehended the evidence.[9] By statute in New York the question of fraudulent intent in

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[1] Morgan v. Hecker, 74 Cal. 543, 16 Pac. Rep. 307; Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. Rep. 222; Billings v. Russell, 101 N. Y. 233, 4 N. E. Rep. 531; Citizens' Bank v. Bolen, 121 Ind. 301, 23 N. E. Rep. 146. In Indiana this is provided by statute. See Sickman v. Wilhelm, 130 Ind. 480, 29 N. E. Rep. 908; Personette v. Cronkhite, 140 Ind. 586, 40 N. E. Rep. 59.

[2] Weaver v. Owens, 16 Oregon 304, 18 Pac. Rep. 579; Weeks v. Hill, 88 Me. 111, 33 Atl. Rep. 778; Hewitt v. Commercial Banking Co., 40 Neb. 820, 59 N. W. Rep. 693; Kaufer v. Walsh, 88 Wis. 63, 59 N. W. Rep. 460; Grimes Dry Goods Co. v. Shaffer, 41 Neb. 112, 59 N. W. Rep. 741; Haynes v. Rogers, 111 N. C. 228, 16, S. E. Rep. 416.

[3] Peck v. Crouse, 46 Barb. (N. Y.) 151; Monteith v. Bax, 4 Neb. 171; Vance v. Phillips, 6 Hill (N. Y.) 433; Hobbs v. Davis, 50 Ga. 214; Murray v. Burtis, 15 Wend. (N. Y.) 214; Syracuse Chilled Plow Co. v. Wing, 85 N. Y. 426; Van Bibber v. Mathis, 52 Tex. 409; Winchester v. Charter, 102 Mass. 272; Peiser v. Peticolas, 50 Tex. 638.

[4] See §§ 8, 9, 10.

[5] Van Bibber v. Mathis, 52 Tex. 409.

[6] Winchester v. Charter, 102 Mass. 276.

[7] 6 Hill (N. Y.) 433.

[8] See also Dodd v. McCraw, 8 Ark. 83; Potter v. Payne, 21 Conn. 362; Marston v. Vultee, 12 Abb. Pr. (N. Y.) 143.

[9] Edwards v. Currier, 43 Me. 474.

these cases "shall be deemed a question of fact, and not of law," [1] and it was strenuously claimed in behalf of the vendee, in the widely known case of Coleman v. Burr,[2] that there was no finding by the referee of a fraudulent intent; but that, on the contrary, he had found the whole transaction to be fair and honest, and that, therefore, the transaction should stand. The court say, however, that the referee has "found facts from which the inference of fraud is inevitable, and although he has characterized the transactions as honest and fair, that does not make them innocent, nor change their essential character in the eye of the law. Mr. Burr [the debtor] must be deemed to have intended the natural and inevitable consequences of his acts, and that was to hinder, delay and defraud his creditors." [3] This principle has already been discussed in the opening chapter,[4] but in view of the peculiar wording of the New York statute, it is deemed important to give the construction placed upon it by the court of final resort.[5] In Bulger v. Rosa,[6] the court says: "The statute relating to fraudulent transfers and conveyances, which declares that the question of fraudulent intent arising thereunder shall be deemed a question of fact, and not of law,[7] does not, as now interpreted, interfere with the prerogative of the court to direct a verdict, provided the fraudulent intent is conclusively established on the face of the instrument of transfer, or by the uncontradicted verbal evidence." [8]

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[1] 2 N. Y. R. S. 137, § 4.

[2] 93 N. Y. 31; Bulger v. Rosa, 119 N. Y. 459, 24 N. E. Rep. 853. See Neisler v. Harris, 115 Ind. 565, 18 N. E. Rep. 39.

[3] Citing Bump on Fraud. Conv. (3d ed.) 22, 24, 272, 278; Cunningham v. Freeborn, 11 Wend. (N. Y.) 241; Edgell v. Hart, 9 N. Y. 213; Ford v. Williams, 24 N. Y. 359; Babcock v. Eckler, 24 N. Y. 623, 632.

[4] See §§ 9, 10.

[5] See, as to intent to violate usury statutes, Fiedler v. Darrin, 50 N. Y. 438.

[6] 119 N. Y. 464, 24 N. E. Rep. 853.

[7] 2 R. S. 137, § 4.

[8] Citing Edgell v. Hart, 9 N. Y. 213; Ford v. Williams, 24 N. Y. 359.

§ 205. **Testifying as to intent.** — A party called as a witness may testify as to his intention in performing an act where such intention becomes material.[1] The purchaser or vendee may, in answer to a question, testify directly that he did not have any fraudulent intent, and that the purchase was made by him in good faith. That it is proper to put such a question to the purchaser was directly decided in the case of Bedell v. Chase,[2] though the contrary seems to be held in Minnesota,[3] and Alabama.[4] In Blaut v. Gabler,[5] this question was asked: "Had anything transpired between Blaut and yourself — conversation or otherwise — whereby you gave him to understand, or whereby it was understood, that the transaction was for an improper purpose, or the purpose of defrauding your creditors?" The court decided that the question was properly excluded upon the theory that it did not call for a statement of the witness as to his intent to defraud, but went far beyond this, and asked for a conclusion from what had transpired. The question was characterized as being indefinite and complicated, and as not coming within the rule which sanctions an inquiry as to the intent of a party. As a general rule, it is proper to allow the parties to testify concerning their intentions,[6]

[1] Graves v. Graves, 45 N. H. 323. See Hale v. Taylor, 45 N. H. 406; Royce v. Gazan, 76 Ga. 79; Sedgwick v. Tucker, 90 Ind. 281; Gardom v. Woodward, 44 Kan. 758, 25 Pac. Rep. 199; cf. Sweeney v. Conley, 71 Tex. 543, 9 S. W. Rep. 548; Bice v. Rogers, 52 Kan. 207, 34 Pac. Rep. 796; Phifer v. Erwin, 100 N. C. 59, 6 S. E. Rep. 672; Gentry v. Kelley, 49 Kan. 82, 30 Pac. Rep. 186; Seymour v. Wilson, 14 N. Y. 567. Compare Cake v. Pottsville Bank, 116 Pa. St. 264, 9 Atl. Rep. 302; Dillon v. Anderson, 43 N. Y. 236.

[2] 34 N. Y. 386; Starin v. Kelly, 88 N. Y. 422.

[3] Hathaway v. Brown, 18 Minn. 414. See also Innis v. Carpenter, 4 Col. App. 30, 34 Pac. Rep. 1011.

[4] Hinds v. Keith, 57 Fed. Rep. 10, 6 C. C. A. 231; McCormick v. Joseph, 77 Ala. 236; Richardson v. Stringfellow, 100 Ala. 416, 14 So. Rep. 283.

[5] 77 N. Y. 465.

[6] Bedell v. Chase, 34 N. Y. 388; Griffin v. Marquardt, 21 N. Y. 121; Snow v. Paine, 114 Mass. 520; Thacher v. Phinney, 7 Allen (Mass.) 146; Seymour v. Wilson, 14 N. Y. 567. An accused person may testify as to his intention in receiving a certain sum of money. People v. Baker, 96 N. Y. 340.

though this class of testimony is necessarily subjected to close scrutiny. When the circumstances present conclusive evidence of a fraudulent intent, no proof of innocent motives, however strong, will overcome the presumption; but where the facts do not necessarily prove fraud, but only tend to that conclusion, the evidence of the party who made the conveyance, when he is so circumstanced as to be a competent witness, should be received for what it may be considered worth.[1] It is believed, however, not to be proper to allow a witness to testify concerning the intent or motive of another person,[2] even though he be an agent and has full knowledge of the transaction.[3]

§ 206. Proving intent. — The intent must be gathered from all the circumstances.[4] In King v. Poole,[5] the court

[1] Seymour v. Wilson, 14 N. Y. 569, 570; S. P. Edwards v. Currier, 43 Me. 474; Forbes v. Waller, 25 N. Y. 430; Wheelden v. Wilson, 44 Me. 1; Miner v. Phillips, 42 Ill. 123.

[2] See Hathaway v. Brown, 22 Minn. 216; Peake v. Stout, 8 Ala. 647. "It is not competent for one person to state the motives influencing the conduct of another." Riley v. Mayor, etc. of N. Y., 96 N. Y. 337. And it was said in the case last cited that: "Evidence of a secret and undisclosed intent, entertained by one party at the time of the making of a contract, either express or implied, is not admissible to vary the legal presumptions arising from the acts and conduct of the parties." Riley v. Mayor, etc., of N. Y., 96 N. Y. 339. See Talcott v. Hess, 31 Hun (N. Y.) 285. In Tooley v. Bacon, 70 N. Y. 37, the defense was that the property was placed in the intestate's hands for the purpose of defrauding creditors. Earl, J., said: "The plaintiff could not be examined as a witness 'in regard to any personal transaction or communication' between him and Bacon. The placing of property in the hands of Bacon was a personal transaction with him, and the intent with which it was done accompanied and characterized the transaction and was an element thereof. A witness examined as to such intent must, within the meaning of the Code, be held to be examined in regard to the transaction. There is the same reason for excluding the living party from testifying as to the intent with which a personal transaction with a deceased party was performed, as for excluding him as a witness to any other part of the transaction." See Hard v. Ashley, 117 N. Y. 619, 23 N. E. Rep. 177.

[3] Rindskopf v. Myers, 77 Wis. 649, 46 N. W. Rep. 818.

[4] Zimmer v. Miller, 64 Md. 296, 1 Atl. Rep. 858; Ecker v. McAllister, 45 Md. 309; Lincoln Exec'x v. Foster, 45 U. S. App. 623.

[5] 61 Ga. 374. See Kempner v. Churchill, 8 Wall. 369.

said: "In investigating an alleged fraud, the relevancy of a given fact does not depend upon its force, but upon its bearing. Does it bear, either directly or indirectly, with any weight whatever, on the main controversy or any material part of it? Not only is fraud subtle, but that ingredient of a transaction which renders it fraudulent in fact, namely, intention, is covered up in the breast, hidden away in the heart. Outward manifestations of it may be slow in appearing, and when they do appear, may be dim and indistinct. To interpret their meaning, or the full meaning of any one of them, it may be necessary to bring them together and contemplate them all in one view. To do this, one has to be picked up here, another there, and so on till the collection is complete."[1] Great latitude is allowed.[2] On an inquiry as to the state of mind, sentiments, or disposition of a person at a particular period, his declarations and conversations are admissible.[3] In concluding this chapter we may recall to the reader's attention the rule promulgated in some of the cases that, if a transaction is entered into for the purpose of defrauding any creditor, it is voidable at the suit of all creditors.[4]

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[1] Burdick v. Gill, 7 Fed. Rep. 668.

[2] Winchester v. Charter, 102 Mass. 276; Rea v. Missouri, 17 Wall. 542; Wessels v. Beeman, 87 Mich. 481, 49 N. W. Rep. 483; Gumberg v. Treusch, 103 Mich. 544, 61 N. W. Rep. 872; Riddell v. Munro, 49 Minn. 532, 52 N. W. Rep. 141.

[3] 1 Greenleaf's Ev. § 108; Tyler v. Angevine, 15 Blatch. 537; Baker v. Kelly, 41 Miss. 703.

[4] Allen v. Rundle, 50 Conn. 31. See Warner v. Percy, 22 Vt. 155.

CHAPTER XV.

CONSIDERATION.

§ 207. Concerning consideration and good faith.
208. Voluntary conveyances.
209. What is a valuable consideration?
210. Love and affection.
211. Transfer for grantor's benefit.
211*a*. Exchange of property.
212. Ante-nuptial settlement — Marriage as consideration.
213. Illicit intercourse.
214. Illegal consideration.
§ 215. Moral obligations.
216. Individual and copartnership debts.
217. Future advances.
217*a*. Gifts to charity.
218. Services by members of a family.
219. Proof of consideration.
220. Recitals of consideration as evidence.
221. Explaining recitals.
222. Sufficient consideration.
223. Insufficient consideration.

"Almost invariably some honest consideration is made the agency for floating a scheme of fraud against creditors." Finch, J., in *Baldwin* v. *Short*, 125 N. Y. 553, 560, 26 N. E. Rep. 928.

§ 207. Concerning consideration and good faith.— Consideration has been said to consist "either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." [1] It is not essential that the payment of the consideration be in money; it may be made in anything of value.[2] The subject cannot be here considered from an elementary point of view in all its ramifications, but some of its general bearings upon our particular topic will be briefly noticed. It will be found upon investigation that, generally speaking, the question of consideration becomes important in the class of litigation under discussion only in *bona fide* transactions. If the alienation is effected with a mutual design to hinder, delay or defraud creditors, the presence of even the most bounteous or adequate consideration [3] will not

[1] Currie v. Misa, L. R. 10 Exch. 162.
[2] Taylor v. Miles, 19 Ore. 550, 553, 25 Pac. Rep. 143.
[3] Billings v. Russell, 101 N. Y. 232, 4 N. E. Rep. 531,

save or cure it.[1] Thus a mortgage though given for a just debt may be assailed as fraudulent.[2] Unilateral evil intent will not, of course, suffice to overturn the transaction.[3] "*Mala fides*," says Mr. May, "supersedes all inquiry into the consideration, but *bona fides* alone is not always sufficient to support a transaction not founded on any valuable consideration."[4] The inadequacy of the consideration, as is elsewhere shown, is not a matter which the court will go into, except in so far as it may constitute evidence tending to show that the transaction was a sham;[5] and the law will not "weigh consideration in diamond scales."[6] Though grossly inadequate consideration will render a conveyance fraudulent,[7] the avoidance may be only to the extent of the inadequacy.[8] Generally speaking, as we have already seen, the question whether a conveyance is fraudulent or not depends upon its being

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[1] See Chap. XIV. Billings v. Russell, 101 N. Y. 282, 4 N. E. Rep. 531; Boyd v. Turpin, 94 N. C. 137; Landauer v. Mack, 43 Neb. 430, 61 N. W. Rep. 597: Gillespie v. Allen, 37 W. Va. 675, 17 S. E. Rep. 184; Gable v. Columbus Cigar Co., 140 Ind. 563, 566, 38 N. E. Rep. 474, citing the text. In Bradley v. Ragsdale, 64 Ala. 559, the court says: "If the conveyance be upon a valuable consideration, then the question of intent becomes prominently material. The consideration may be paid in money — may be valuable and fully adequate, yet if it was made 'with intent to binder, delay, or defraud creditors, purchasers or other persons, of their lawful suits, damages, forfeitures, debts, or demands,' it is void, and stands for nothing." Citing Code of 1876, § 2124; Planters' & M. Bank v. Borland, 5 Ala. 531; Cummings v. McCullough, 5 Ala. 324; Hubbard v. Allen, 59 Ala. 283; Howell v. Mitchell, in manuscript.

[2] Billings v. Russell, 101 N. Y. 233, 4 N. E. Rep. 531; Syracuse Chilled Plow Co. v. Wing, 85 N. Y. 421, 426; Schmidt v. Opie, 33 N. J. Eq. 141; Blennerhassett v. Sherman, 105 U. S. 117.

[3] Prewit v. Wilson, 103 U. S. 24; Wood v. Stark, 1 Hawaiian Rep. 10; Herring v. Wickham, 29 Gratt. (Va.) 628. See Chap. XIV.

[4] May on Fraud. Conveyances, p. 233.

[5] Per Sir W. M. James, in Bayspoole v. Collins, 18 W. R. 730.

[6] Per Lord Talbot, as quoted by Wilmot, C. J., in Roe v. Mitton, 2 Wils. 358 n

[7] Singree v. Welch, 32 Ohio St. 320; Gable v. Columbus Cigar Co., 140 Ind. 563, 568, 38 N. E. Rep. 474. See Rooker v. Rooker, 29 Ohio St. 1.

[8] Jamison v. McNally, 21 Ohio St. 295. See Black v. Kuhlman, 30 Ohio St. 196.

made upon good consideration *and bona fide.* It is not sufficient that it be upon good consideration *or bona fide;* it must be both.[1] The separation of these elements is fatal to the transaction as against creditors.[2] This rule is concisely stated in a case of much importance in the United States Supreme Court. "It is not enough," says Woods, J., "in order to support a settlement against creditors, that it be made for a valuable consideration. It must be also *bona fide.* If it be made with intent to hinder, delay, or defraud them, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration,"[3] unless at least the creditor has obtained the benefit of the consideration.[4] "Forms," said Elliott, J., in a well-considered case, "are of little moment, for where fraud appears courts will drive through all matters of form and expose and punish the corrupt act. A conveyance is not protected, although full consideration is paid, where grantor and grantee unite in a fraudulent design to defraud creditors."[5] The vendee will be protected only to the extent of the consideration parted with before notice of the fraud.[6]

§ 208. **Voluntary conveyances.** — It is perhaps unnecessary to observe that a voluntary conveyance "implies the

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[1] Sayre v. Fredericks, 16 N. J. Eq. 209; Schmidt v. Opie, 33 N. J. Eq. 141; Billings v. Russell, 101 N. Y. 232, 4 N. E. Rep. 531, citing the text.

[2] See § 15.

[3] Blennerhassett v. Sherman, 105 U. S. 117. See Twyne's Case, 3 Rep. 80, 2 Coke 212; Holmes v. Penney, 3 Kay & J. 90; Gragg v. Martin, 12 Allen (Mass.) 498; Brady v. Briscoe, 2 J. J. Mar. (Ky.) 212; Bozman v. Draughan, 3 Stew. (Ala.) 243; Farmers' Bank v. Douglass, 19 Miss. 469; Bunn v. Ahl, 29 Pa. St. 387; Root v. Reynolds, 32 Vt. 139; Kempner v. Churchill, 8 Wall. 362; Kerr on Fraud & Mistake, p. 200; Davis v. Schwartz, 155 U. S. 639, 15 S. C. Rep. 237.

[4] Davis v. Schwartz, 155 U. S. 639, 15 S. C. Rep. 237.

[5] Buck v. Voreis, 89 Ind. 117; Billings v. Russell, 101 N. Y. 226, 4 N. E. Rep. 531. See Baldwin v. Short, 125 N. Y. 559, 26 N. E. Rep. 928.

[6] Hedrick v. Strauss, 42 Neb. 492, 60 N. W. Rep. 928; Bush v. Collins, 35 Kan. 535, 11 Pac. Rep. 425.

total want of a substantial consideration," [1] or "is a deed without any valuable consideration." [2] Such a transfer is more easily susceptible to attack than a conveyance founded upon an adequate consideration; for a transfer by a debtor without consideration, made for the purpose of defrauding his creditors, can be impeached by the creditors for fraud, even though the grantee was ignorant of the fraudulent purpose for which the covinous conveyance was given.[3] The *onus* of establishing a fraudulent intent is not so great. In Lee v. Figg [4] the court observed that whether the voluntary alienee participated in and aided the covinous intent or not was immaterial; "he was not a purchaser in good faith." The distinction may be restated as follows: A voluntary gift or settlement is voidable if it was the intent of the maker to hinder, delay, or defraud creditors, whether the party who received the gift participated in the fraudulent intent or not; an absolute conveyance for a valuable consideration is good, notwithstanding the intent of the maker to defraud, unless the other party participated in the fraud.[5] We have elsewhere shown that, in the majority of the cases, a voluntary alienation is regarded as presumptively fraudulent as to existing creditors,[6] while in other cases this presumption is conclusive.[7] Where, however, a corporation, or individual, perfectly solvent at the time, and having no actual intent to defraud creditors, disposes of lands or property for an inadequate consideration, or by

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[1] Washband v. Washband, 27 Conn. 431.

[2] Seward v. Jackson, 8 Cow. (N. Y.) 430.

[3] Lee v. Figg, 37 Cal. 328; Beecher v. Clark, 12 Blatchf. 256; Laughton v. Harden, 68 Me. 213; Mohawk Bank v. Atwater, 2 Paige (N.Y.) 54; Hitchcock v. Kiely, 41 Conn. 611; Carter v. Grimshaw, 49 N. H. 100. See Chap. XIV.

[4] 37 Cal. 336.

[5] Lassiter v. Davis, 64 N. C. 498.

[6] Lloyd v. Fulton, 91 U. S. 485; Holden v. Burnham, 63 N. Y. 74; Dunlap v. Hawkins, 59 N. Y. 342; Donnebaum v. Tinsley, 54 Tex. 365.

[7] City Nat. Bank v. Hamilton, 34 N. J. Eq. 160. Compare McCanless v. Flinchum, 89 N. C. 373.

a voluntary conveyance, subsequent creditors of the corporation cannot question the transaction.[1] If, as we have seen, it was made with the design to defraud subsequent creditors, this will render it fraudulent. It must be remembered, however, that in New York the question of fraudulent intent is in all cases to be deemed a question of fact, and not of law, and it is declared that no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration.[2] It is not *per se* void even as to existing creditors,[3] and the burden of proof that the deed left the debtor insolvent is on the plaintiff.[4] In California the New York rule prevails, and a voluntary conveyance is not presumptively fraudulent even as against existing creditors.[5]

§ 209. **What is a valuable consideration?**—Much has been said concerning the true import of the expression "a valuable consideration." It may be other than the actual payment of money, and may consist of acts to be done after the conveyance,[6] or of a note on promise to pay,[7] or of a pre-existing debt,[8] or of an assumption of liability.[9] A moneyed consideration for an assignment of goods greatly disproportionate to the value of the property transferred, would not take a conveyance out

[1] Graham v. Railroad Company, 102 U. S. 148; Rudy v. Austin, 56 Ark. 73, 19 S. W. Rep. 111.

[2] Babcock v. Eckler, 24 N. Y. 629; Dunlap v. Hawkins, 59 N. Y. 345; Dygert v. Remerschnider, 32 N. Y. 629. Compare Coleman v. Burr, 93 N. Y. 31; Genesee River Nat. Bank v. Mead, 92 N. Y. 637; Emmerich v. Hefferan, 21 J. & S. (N. Y.) 101; Jackson v. Badger, 109 N. Y. 632, 16 N. E. Rep. 208.

[3] Dygert v. Remerschnider, 32 N. Y. 629.

[4] Kain v. Larkin, 131 N. Y. 300, 30 N. E. Rep. 105. See also Phelps v. Smith, 116 Ind. 387, 17 N. E. Rep. 602, 19 Id. 156.

[5] Windhus v. Bootz, 92 Cal. 617, 28 Pac. Rep. 557; Bull v. Bray, 89 Cal. 286, 26 Pac. Rep. 873.

[6] Stanley v. Schwalby, 162 U. S. 276, 16 S. C. Rep. 754.

[7] Weaver v. Nugent, 72 Tex. 278, 10 S. W. Rep. 458.

[8] McMurtrie v. Riddell, 9 Col. 497, 13 Pac. Rep. 181; Redpath v. Lawrence, 42 Mo. App. 101.

[9] Smith v. Spencer, 73 Ala. 299; Page v. Dillon (Vt.) 18 Atl. Rep. 814.

of the statute against covinous alienations. The consideration must be adequate; not that the courts will weigh the value of the goods sold and the price received in very nice scales, but after considering all the circumstances they will hold that there should be a reasonable and fair proportion between the price and the value. Cases in which the question of inadequacy of consideration arises between the grantor and grantee of a deed, where suit is instituted for the purpose of setting aside the grant on the ground of imposition, are not applicable in determining a question of the fairness of a consideration between a vendee and creditor under the statute concerning fraudulent conveyances. Such inadequacy of consideration as would induce a court to set aside a conveyance at the instance of the grantor on the ground of imposition, presents an entirely different question from that degree of inadequacy which would avoid an assignment on the ground of fraud, in a suit instituted by a creditor or purchaser against the alleged fraudulent assignee. A grantor must of necessity make out a stronger case, calling for the interference of the courts, than a creditor, because the latter is not a participant in the transaction, is guilty of no negligence or fraud, and belongs to a favored class. Unreasonable inadequacy of price is evidence of a secret trust, and it is said to be *prima facie* evidence that a conveyance is not *bona fide* if it is accompanied with any trust.[1] In Cook v. Tullis[2] the court observed that "a fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent."[3]

It is said in the New York Court of Appeals that a valuable consideration is something mutually interchanged between the parties, and that it is not necessary that the

[1] Kuykendall v. McDonald, 15 Mo. 420.

[2] 18 Wall. 340.

[3] See Stewart v. Platt, 101 U. S. 738.

subject-matters should be of equal values.[1] An assumption by a surety of the debt of his principal constitutes a valuable consideration.[2] It is also established that a gratuity cannot be subsequently converted into a debt so as to become the consideration of a conveyance made by the grantor to the injury of his creditors.[3] A covenant from which the covenantor may be relieved by reason of the failure of the transfer for which it was made is not a valuable consideration.[4] An insignificant or practically nominal consideration will not make the vendee a purchaser for valuable consideration under the New York Recording Act.[5]

§ 210. **Love and affection.**—In Mathews v. Feaver[6] Sir Lloyd Kenyon said: "This is a transaction between the father and the son, and natural love and affection is mentioned as part of the consideration, upon which, as against creditors, I cannot rest at all. It is true it is a consideration which, though not valuable, is yet called meritorious, and which in many instances the court will maintain, but not against creditors." Natural love and affection is a sufficient consideration[7] for a gift or voluntary transfer between a brother and a sister,[8] but as a general rule a conveyance for such a consideration cannot be supported against the rights of existing creditors.[9] It was said in

[1] Dygert v. Remerschnider, 32 N. Y. 642.

[2] Pollock v. Jones, 96 Ala. 492, 11 So. Rep. 529.

[3] Clay v. McCally, 4 Woods 605.

[4] Arnold v. Hagerman, 45 N. J. Eq. 200, 7 Atl. Rep. 93.

[5] Ten Eyck v. Witbeck, 135 N. Y. 40, 31 N. E. Rep. 994.

[6] 1 Cox Eq. Cas. 278, 280.

[7] See Bliss v. West, 58 Hun (N. Y.) 75, 11 N. Y. Supp. 374.

[8] Anderson v. Dunn, 19 Ark. 658.

[9] Moreland v. Atchison, 34 Tex. 351; Yardley v. Torr, 67 Fed. Rep. 857. In Scott v. Davis, 117 Ind. 233, 20 N. E. Rep. 139, the court says: "A conveyance is not fraudulent because the purchaser, in addition to the consideration paid in money and notes to third persons, agrees to support his father and mother during their lifetime; nor does such an agreement constitute a secret trust invalidating the conveyance, in cases where it is otherwise supported by an adequate consideration, and the grantee is not guilty of fraud."

Hinde's Lessee v. Longworth,[1] and the rule is still good, that "a deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under certain circumstances; but the mere fact of being in debt to a small amount would not make the deed fraudulent, if it could be shown that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to the child was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the debts of the grantor." The same principle appertains generally to conveyances founded upon such consideration.[2] A conveyance by a husband to a wife, made in consideration of love and affection and her promise to pay certain preferred claims and to support him, will not be upheld against creditors.[3]

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[1] 11 Wheat. 213. The same rule applies to a conveyance to an illegitimate child. Anonymous, 1 Wall, Jr. 107, 1 Fed. Cases, 1027.

[2] *Good and valuable consideration.*— Judge Story observes (1 Story's Eq. Jur. § 354): "A good consideration is sometimes used in the sense of a consideration which is valid in point of law; and then it includes a meritorious as well as a valuable consideration. Hodgson v. Butts, 3 Cranch 140; Copis v. Middleton, 2 Madd. 430; Twyne's Case, 3 Rep. 81, 2 Coke 212; Taylor v. Jones, 2 Atk. 601; Newland on Contracts, c. 23, p. 386; Partridge v. Gopp, Ambler 598, 599, 1 Eden, 167, 168; Atherley on Mar. Sett. c. 13, pp. 191, 192. But it is more frequently used in a sense contradistinguished from valuable; and then it imports a consideration of blood or natural affection, as when a man grants an estate to a near relation, merely founded upon motives of generosity, prudence and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems as an equivalent given for the grant, and it is therefore founded upon motives of justice. 2 Black. Com. 297, 1 Fonbl. Eq. B. 1, c. 4, § 12, note. Deeds made upon a good consideration only are considered as merely voluntary; those made upon a valuable consideration are treated as compensatory. The words 'good consideration' in the statute may be properly construed to include both descriptions; for it cannot be doubted that it meant to protect conveyances made *bona fide* and for a valuable consideration, as well as those made *bona fide* upon the consideration of blood or affection. Doe v. Routledge, Cowp. 708, 710, 711, 712; Copis v. Middleton, 2 Madd. 430; Hodgson v. Butts, 3 Cranch, 140; Twyne's Case, 3 Rep. 81, 2 Coke 212."

[3] Park v. Battey, 80 Ga. 353, 5 S. E. Rep. 492.

§ 211. **Transfer for grantor's benefit.** — As was observed by Peck, J., in Stanley v. Robbins,[1] one cannot transfer his property "in consideration of an obligation for support for life, or perhaps for support for any considerable length of time, unless he retains so much as is necessary to satisfy existing debts,[2] even if he acts in good faith.[3] In Crane v. Stickles,[4] the court said: "It seems, that one week before the plaintiff's note fell due, they took a sweeping sale of all the property of which the defendant was possessed, real and personal, and obligated themselves that they would support her for the same, as the only consideration, paying nothing, and agreeing to pay nothing, only by way of support — and leaving nothing for the payment of debts. Now if the law would tolerate a proceeding like this, any person, having the means, may make ample provision for himself and family during life, at the expense of his creditors. But that would not be permitted." But it has been held in some cases that, where such support had actually been given during a number of years, the conveyance will be upheld, if no actual fraud was intended.[5]

§ 211a. **Exchange of property.** — Converting property into a new or different form is a favorite subterfuge of debtors. In Billings v. Russell,[6] the New York Court of Appeals says: "Other situations can readily be conceived where the transfer of property, for a valuable consideration, may be made the cover for fraudulent prac-

[1] 36 Vt. 432.

[2] See Crane v. Stickles, 15 Vt. 252; Briggs v. Beach, 18 Vt. 115; Woodward v. Wyman, 53 Vt. 647; Tyler v. Tyler, 126 Ill. 525, 521 N. E. Rep. 616; Pease v. Shirlock, 63 Vt. 622, 22 Atl. Rep. 661. But see Chandler v. Parsons, 100 Mich. 313, 58 N. W. Rep. 1011.

[3] Davidson v. Burke, 143 Ill. 139, 32 N. E. Rep. 514.

[4] 15 Vt. 257.

[5] Hisle v. Rudasill, 89 Va. 519, 16 S. E. Rep. 673; Hays v. Montgomery, 118 Ind. 91, 20 N. E. Rep. 646; Kelsey v. Kelley, 63 Vt. 41, 22 Atl. Rep. 597; Keener v. Keener, 34 W. Va. 421, 16 S. E. Rep. 729.

[6] 101 N. Y. 231, 4 N. E. Rep. 531.

tices. Exchanges by which one kind of property is converted into another more easily concealed or transported; the incumbrance of visible and unavailable property, and the retention of that which is convertible, or even the reverse of this, and other cases, where the aggregate value of the debtor's property is not diminished, but an apparent obstacle to a creditor's proceedings is created, are among the methods by which frauds may be perpetrated, by an insolvent debtor."

§ 212. Ante-nuptial settlement — Marriage as consideration. — An ante-nuptial settlement, though made by the intended husband with the design of defrauding his creditors, will not be set aside in the absence of the clearest proof of the wife's participation in the fraud,[1] even though the husband be insolvent at the time of the settlement.[2] In Magniac v. Thompson,[3] the court said: "Nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. If the settler alone intended a fraud, and the other party have no notice of it, but is innocent of it, she is not and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value,[4] and from motives of the soundest policy is upheld with a steady resolution" The courts are averse to annulling such a settlement, because there can follow no dissolution of the marriage which was the

[1] Prewit v. Wilson, 103 U. S. 22. See § 199.

[2] Nance v. Nance, 84 Ala. 375, 4 So. Rep. 699.

[3] 7 Pet. 348, 393; approved and adopted in Prewit v. Wilson, 103 U. S. 22, 24; Frank's Appeal, 59 Pa. St. 194; Wright v. Wright, 59 Barb. (N. Y.) 505; affi'd 54 N. Y. 437; Comer v. Allen, 72 Ga. 12; Cohen v. Knox, 90 Cal. 266, 27 Pac. Rep. 215.

[4] Tolman v. Ward, 86 Me. 305, 29 Atl. Rep. 1081.

consideration for it.[1] The marriage subsists in full force, even though one of the parties should forever be rendered incapable of performing his or her part of the marital contract.[2]

Marriage is not only a valuable consideration, but, as Coke says, there is no other consideration so much respected in the law.[3] The wife is deemed to be a purchaser of the property settled upon her in consideration of the marriage, and she is entitled to hold it against all claimants.[4] In Sterry v. Arden,[5] Chancellor Kent observed: "The marriage was a valuable consideration, which fixed the interest in the grantee against all the world; she is regarded from that time as a purchaser, and as much so as if she had then paid an adequate pecuniary consideration. . . . . It is the constant language of the books, and of the courts, that a voluntary deed is made good by a subsequent marriage, and a marriage has always been held to be the highest consideration in law."[6] It is unnecessary to dilate upon this branch of the subject. Where the wife participated in the fraudulent intent and scheme, the transaction may, of course, be annulled.[7] The difficulties of implicating the wife in the fraudulent scheme are from the very nature of things often insuperable. Our meaning is illustrated by the language of Mr. Justice Field in a case which we have frequently cited: "It is not at

[1] Prewit v. Wilson, 103 U. S. 22; Barrow v. Barrow, 2 Dick. 504; Nairn v. Prowse, 6 Ves. 752; Campion v. Cotton, 17 Ves. 264; Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261; Herring v. Wickham, 29 Gratt. (Va.) 628; Andrews v. Jones, 10 Ala. 400.

[2] Herring v. Wickham, 29 Gratt. (Va.) 635.

[3] See Bishop's Law of Married Women, 775, 776; Magniac v. Thompson, 7 Pet. 348; Dygert v. Remerschnider, 32 N. Y. 642; Prewit v. Wilson, 103 U. S. 24.

[4] Herring v. Wickham, 29 Gratt. (Va.) 628; Clay v. Walter, 79 Va. 96.

[5] 1 Johns. Ch. (N. Y.) 260–271; affi'd Verplank v. Sterry, 12 Johns. (N. Y.) 536.

[6] Jones' Appeal, 62 Pa. St. 324; Armfield v. Armfield, Freem. Ch. (Miss.) 311; Smith v. Allen, 5 Allen (Mass.) 454; Andrews v. Jones, 10 Ala. 400; Barrow v. Barrow, 2 Dick. 504.

[7] *Ex parte* McBurnie, 1 De G., M. & G. 441; Fraser v. Thompson, 4 De G. & J. 659.

all likely, judging from the ordinary motives governing men, that, whilst pressing his suit with her, and offering to settle property upon her to obtain her consent to the marriage, he informed her that he was insolvent, and would, by the deed he proposed to execute, defraud his creditors. If he intended to commit the fraud imputed to him, it is unreasonable to suppose that he would, by unfolding his scheme, expose his true character to one whose good opinion he was at that time anxious to secure. If capable of the fraud charged, he was capable of deceiving Mrs. Prewit as to his pecuniary condition. She states in her answer that she knew he was embarrassed and in debt, but to what extent, or to whom, she did not know, and that it was because of the knowledge that he was embarrassed that she insisted upon his making a settlement upon her." [1] This is perhaps an extreme case, but it illustrates the statement already advanced, that the creditor will be forced to travel a thorny pathway to annul an ante-nuptial settlement. It is sometimes urged that the courts should not encourage a practice the result of which is, so to speak, to allow a man to barter for a wife for a pecuniary consideration.[2] This is scarcely a fair view of the transaction. By marriage the woman assumes new duties and responsibilities; forsakes a home to which the marriage will ordinarily unfit her to return; promises to live with her husband, and to bear her share of the burdens and cares of the family. Surely in assuming these responsibilities she is entitled to guard against poverty and distress. In Piper v. Hoard,[3] the court says: "There are some anomalies in the law relative to contracts or negotiations having marriage for their consid-

[1] Prewit v. Wilson, 103 U. S. 23.

[2] "There is certainly something very repulsive in the idea of a parent bartering off an amiable and accomplished daughter for lands and negroes, as he would sell a lamb for the shambles." Davidson v. Graves Riley's (S. C.) Eq. 236.

[3] 107 N. Y. 77, 13 N. E. Rep. 626.

eration, and such contracts are based upon considerations which obtain in no other contract. The family relations and their regulation are so much a matter of public policy that the law in relation to them is based on principles not applicable in other cases; and all business negotiations having marriage for their end are regarded in much the same light by our courts."

§ 213. Illicit intercourse. — A contract the consideration of which is future illicit cohabitation is said to be utterly void.[1] But a conveyance in consideration of past cohabitation, intended or regarded as reparation or indemnity for the wrong done, is treated at common law as founded on a *good* consideration, and may be upheld.[2] A transfer, however, to a mistress or her children, by way of gift or advancement, although not looking to future cohabitation, and intended merely as a provision for maintenance, is invalid as against existing creditors.[3] This distinction is manifestly important. In Wait v. Day[4] the court said, that although the debtor "may have been under no legal liability to the defendant, yet if he paid the money in discharge of what he deemed a moral obligation to indemnify the defendant against the consequences which had already resulted from their illicit intercourse, I think the case would not be within the statute. He had made her the mother of two illegitimate children, and was at liberty to refund the money which she had already expended for the necessary support and education of those children. Where there is an existing obligation, either legal or moral, to pay so much money, and the payment is not made with any reference to the future, nor by way of mere gratuity, the case is not within the mischief against which the legislature intended to pro-

[1] Potter v. Gracie, 58 Ala. 305; Jackson v. Miner, 101 Ill. 559.

[2] Ibid.

[3] Potter v. Gracie, 58 Ala. 305.

[4] 4 Den. (N. Y.) 439, 444.

vide." The same principle was applied in Fellows v. Emperor.[1] In that case the grantee had been deceived into a marriage with the grantor, and had innocently lived with him for years, supposing she was his lawful wife. It subsequently transpired that he had another wife living, whereupon she left him. The court, in sustaining the conveyance, held that the grantor was under the strongest moral, if not legal obligation, to compensate the grantee for her services, and to indemnify her as far as he could in a pecuniary point of view, against the consequences of his fraudulent and illegal acts. The conveyance was upheld against creditors.[2]

§ 214. **Illegal consideration.** — One who has freely paid his money upon an illegal contract is *particeps criminis*, and no cause of action arises in his favor upon an implied promise to repay it. But when an insolvent debtor, or one in embarrassed circumstances, pays his money upon such illegal consideration, he stands, in relation to his creditors in the same position as if he had made a voluntary conveyance of his property. In contemplation of law he has, in fact, parted with his money for no consideration,[3] because it is no consideration which can be set up in a court of law.[4]

§ 215. **Moral obligations.** — A debtor may acknowledge and prefer a claim barred by the statute of limitations,[5] and such conduct is not conclusive evidence of a want of

[1] 13 Barb. (N. Y.) 97.

[2] *Improper influences.* — Conveyances made by a dissolute man to a prostitute, who had a strong influence over him, may be annulled. Shipman v. Furniss, 69 Ala. 555, and cases cited, 44 Am. Rep. 528, and the learned note of Irving Browne, Esq., at p. 537; also Leighton v. Orr, 44 Iowa 679; Dean v. Negley, 41 Pa. St. 312; Kessinger v. Kessinger, 37 Ind. 341. See § 13 and note on "Undue Influence," giving the substance of the opinion in Shipman v. Furniss, 69 Ala. 555.

[3] 1 Story's Eq. §§ 353, 354; Clark v. Gibson, 12 N. H. 386.

[4] Weeks v. Hill, 38 N. H. 205.

[5] Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. Rep. 304.

good faith;[1] and he is not bound to set up the statue of frauds;[2] and an agreement by a husband to convey certain lands to his wife in consideration of her relinquishing an inchoate interest in his lands, which she carried out, is founded upon a valid consideration which the husband had a right to discharge.[3] So it is not absolutely necessary to the *bona fides* of a charge of interest in an account, that it should be of such a character that it might be recovered in a suit at law brought by a creditor against his debtor. There are many dealings amongst men in which interest is habitually charged and paid, when it could not be claimed on the ground of strict legal right. These transactions are regarded as fair and just as between the parties, and they cannot be considered fraudulent as to others.[4]

§ 216. Individual and copartnership debts. — One partner, it is asserted, cannot usually make a valid transfer of firm property in payment of his individual debt without the consent of his copartner.[5] It is said that every one is bound to know that a partner has no right to appropriate the partnership property to the payment of his individual debts, and if one so deals with him he must run the risk

[1] French v. Motley, 63 Me. 326; Keen v. Kleckner, 42 Pa. St. 529; Davis v. Howard, 73 Hun (N. Y.) 347, 26 N. Y. Supp. 194; Del Valle v. Hyland, 76 Hun (N. Y.) 493, 27 N. Y. Supp. 1059; affirmed without opinion, 148 N. Y. 751, 43 N. E. Rep. 986. But the fact that the debt is so barred is a circumstance upon which fraud may be predicated. Sturm v. Cbalfant, 38 W. Va. 248, 18 S. E. Rep. 451; McConnell v. Barber, 86 Hun (N. Y.) 360, 33 N. Y. Supp. 480.

[2] Cresswell v. McCaig, 11 Neb. 227, 9 N. W. Rep. 52; Cahill v. Bigelow, 18 Pick. (Mass.) 369. But see Lloyd v. Dutton, 91 U. S. 479.

[3] Brown v. Rawlings, 72 Ind. 505. But compare Collinson v. Jackson, 8 Sawyer 357.

[4] Spencer v. Ayrault, 10 N. Y. 205; Wolford v. Farnham, 47 Minn. 95, 49 N. W. Rep. 528. In Missouri one partner may execute a mortgage on firm assets to secure certain firm claims. Union Bk. v. Kansas City Bk., 136 U. S. 223, 10 S. C. Rep. 1013.

[5] Hartley v. White, 94 Pa. St. 36; Todd v. Lorah, 75 Pa. St. 155. See Erb v. West (Miss.) 19 So. Rep. 829; Brickett v. Downs, 163 Mass. 70, 39 N. E. Rep. 776.

of the interposition of partnership rights.[1] This broad proposition is disputed in Schmidlapp v. Currie.[2] The court said: "The firm creditors at large of a partnership have no lien on its assets, any more than ordinary creditors have upon the property of an individual debtor. The power of disposition over their property, inherent in every partnership, is as unlimited as that of an individual, and the *jus disponendi* in the firm, all the members co-operating, can only be controlled by the same considerations that impose a limit upon the acts of an individual owner, namely, that it shall not be used for fraudulent purposes. So long as the firm exists, therefore, its members must be at liberty to do as they choose with their own, and even in the act of dissolution they may impress upon its assets such character as they please. The doctrine that firm assets must first be applied to the payment of firm debts, and individual property to individual debts, is only a principle of administration adopted by the courts, where from any cause they are called upon to wind up the firm business, and find that the members have made no valid disposition of, or charges upon, its assets."[3] But if while such prior right of the firm creditors must generally be worked out through the rights of the partners as between themselves, still where the transfer of all the partnership assets to one member of the firm is done clearly with the intent of hindering the partnership creditors, their rights will be held to be superior to those of the individual creditors.[4]

A transfer by one of the partners, or a lien created by him on the *corpus* of the partnership property to pay an

[1] Todd v. Lorah, 75 Pa. St. 156.

[2] 55 Miss. 600.

[3] See Roach v. Brannon, 57 Miss. 490. See Goodbar v. Cary, 4 Woods 668; Case v. Beauregard, 99 U. S. 119; Reynolds v. Johnson, 54 Ark. 449, 16 S. W. Rep. 124; Carver Gin. & N. Co. v. Bannon, 85 Tenn, 712. 4 S. W. Rep. 831.

[4] Arnold v. Second Nat. Bank, 45 N. J. Eq. 186, 17 Atl. Rep. 93; Jackson Bank v. Durfey, 72 Miss. 971, 18 So. Rep. 456.

individual debt, has been in effect declared in New York to be fraudulent and void as to the creditors of the firm, unless the firm was solvent at the time.[1] The converse of the proposition is not generally admitted. Chief-Justice Ruger said, in Crook v. Rindskopf:[2] "It is lawful for an insolvent member of a firm to devote his individual property to the payment of firm debts, to the exclusion of his individual creditors."[3] Where the members of the partnership are all liable for a debt, although it was originally a debt of one of them only, it is no fraud on the partnership creditors to devote partnership funds to its payment.[4] The mere fact, however, that the money was used for the benefit of the partnership does not make the debt a partnership obligation.[5] It is settled in New York that it is a fraud upon firm creditors for a member of the firm to take firm property and apply it to his individual debt, or for an insolvent firm to apply firm property to the payment of the debt of an insolvent partner.[6]

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[1] Menagh v. Whitwell, 52 N. Y. 146; Goodbar v. Cary, 4 Woods, 668. See Wilson v. Robertson, 21 N. Y. 587; Keith v. Fink, 47 Ill. 272; Marks v. Bradley, 69 Miss. 1, 10 So. Rep. 922; Cribb v. Morse, 77 Wis. 322, 46 N. W. Rep. 126; Taylor v. Missouri Glass Co., 6 Tex. Civ. App. 337, 25 S. W. Rep. 466; Hubbard v. Moore, 67 Vt. 532, 32 Atl. Rep. 465; Cox v. Peoria Mfg. Co., 42 Neb. 660, 60 N. W. Rep. 933; Collier v. Hanna, 71 Ind. 253; Hanford v. Prouty, 133 Ill. 339, 24 N. E. Rep. 565; Sexton v. Anderson, 95 Mo. 373, 8 S. W. Rep. 564; Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. Rep. 592; Darby v. Gilligan, 33 W. Va. 246, 10 S. E. Rep. 400. Compare Case v. Beauregard, 99 U. S. 119; Shanks v. Klein, 104 U. S. 18; Crook v. Rindskopf, 105 N. Y. 482, 12 N. E. Rep. 174; Booss v. Marion, 129 N. Y. 536, 29 N. E. Rep. 832; Smith v. Smith, 87 Iowa 93, 54 N. W. Rep. 73.

[2] 105 N. Y. 482.

[3] Citing Dimon v. Hazard, 32 N. Y. 65; Saunders v. Reilly, 105 N. Y. 12; Royer Wheel Co. v. Fielding, 101 N. Y. 504, 5 N. E. Rep. 431; Kirby v. Schoonmaker, 3 Barb. Ch. N. Y. 46. See Citizens' Bank v. Williams, 128 N. Y. 77, 28 N. E. Rep. 33.

[4] Citizens' Bank v. Williams, 128 N. Y. 77, 28 N. E. Rep. 33; Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. Rep. 992.

[5] Roe v. Hume, 72 Hun, N. Y. 1, 25 N. Y. Supp. 576; Smith v. Sipperley, 9 Utah, 267, 34 Pac. Rep. 54.

[6] Berinheimer v. Rundskopf, 116 N. Y. 428, 22 N. E. Rep. 1074; Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. Rep. 992; Bulger v. Rosa, 119 N. Y. 459, 24 N. E. Rep. 853.

In Bulger v. Rosa[1] the court says: "Where an individual creditor of one of the members of an insolvent firm, knowing of such insolvency, takes a transfer of firm property in payment of his individual debt, his act is not merely a violation of an equitable right of the firm creditors, but it constitutes a fraud under the Statute of Elizabeth."[2] The authorities as to what disposition of individual or of copartnership assets will be upheld as against the respective classes of creditors are not in very satisfactory shape. In some States it is held that an appropriation of firm assets to individual debts by consent of all the partners, is valid, even when the firm is insolvent.[3] Other cases hold that such appropriation, while not in itself fraudulent, will be set aside if there is an actual intent to defraud firm creditors.[4] It seems perfectly clear, however, that where the courts get possession of the funds for distribution, the distinction between the rights of the two classes of creditors will be respected[5] and preserved.[6]

§ 217. **Future advances.** — A judgment or mortgage may be taken and held as security for future advances and responsibilities to the extent of the security, when that forms a part of the original agreement between the

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[1] 119 N. Y. 459, 465, 24 N. E. Rep. 853.

[2] *In re* Donglass, L. R. 7 Ch. 537; Kendal v. Wood, L. R. 6 Exch. 243; Piercy v. Fynney, L. R. 12 Eq. 69; Gallagher's Appeal, 114 Pa. St. 353, 356; cf. Huiskamp v. Moline Wagon Co., 121 U. S. 310, 9 S. C. Rep. 899.

[3] Armstrong v. Carr, 116 N. C. 499, 21 S. E. Rep. 175; Reynolds v. Johnson, 54 Ark. 449, 16 S. W. Rep. 124. See for an elaborate discussion of this subject, see 43 Am. St. Rep. 364–380.

[4] Kelley v. Flory, 84 Iowa 671, 51 N. W. Rep. 181; cf. Smith v. Smith, 87 Iowa 93, 54 N. W. Rep. 73.

[5] Coffin v. Day, 34 Fed. Rep. 687. See § 319 b.

[6] An assignment for the benefit of creditors, including all the property of the partners, as members of the firm and individually, should be construed so as to apply partnership assets to partnership debts, and individual assets for individual debts. Griffin v. Peters, 133 U. S. 670, 10 S. C. Rep. 354.

parties.[1] "It is frequent," says Chief-Justice Marshall, "for a person who expects to become more considerably indebted, to mortgage property to his creditor, as a security for debts to be contracted, as well as for that which is already due."[2] But in order to secure good faith and prevent error and imposition in dealing, it is necessary that the agreement, as contained in the record of the lien, whether by mortgage or judgment, should give all the requisite information as to the extent and character of the contract.[3] A conveyance in consideration of future services is declared to be void as against existing creditors,[4] and creditors may reach money paid to a third party as board money for two years in advance.[5]

§ 217a. **Gifts to charity.** — An insolvent debtor can no more give away his property for a charitable use in fraud of the rights of his creditors than he can to an individual.[6]

§ 218. **Services by members of a family.**—In the absence of an express agreement the law will not imply a promise to pay a daughter for services rendered in the debtor's family,[7] and a mortgage given to a daughter under such

[1] Truscott v. King, 6 N. Y. 157, and cases cited; Robinson v. Williams, 22 N. Y. 380; Tapia v. Demartini, 77 Cal. 383, 19 Pac. Rep. 641; Boswell v. Goodwin, 31 Conn. 74; Brace v. Berdan, 104 Mich. 356, 62 N. W. Rep. 568; Holt v. Creamer, 34 N. J. Eq. 188; Griffin v. New Jersey Oil Co., 11 N. J. Eq. 49; Bell v Fleming's Ex'rs, 12 N. J. Eq. 13; Central Trust Co. v. Continental Iron Works, 51 N. J. Eq. 607, 28 Atl. Rep. 595; Mowry v. Agricultural Ins. Co., 64 Hun (N. Y.) 143, 18 N. Y. Supp. 834; Barnard v. Moore, 90 Mass. 274; Robinson v. Consolidated Real Estate & F. I. Co. 55 Md. 109; Collins v. Carlile, 13 Ill. 254; McConnell v. Scott, 67 Ill. 276; Wilson v. Russell, 13 Md. 496. See Ackerman v. Hunsicker, 85 N. Y. 50.

[2] United States v. Hooe, 3 Cranch 89. See Lawrence v. Tucker, 23 How. 14; Leeds v. Cameron, 3 Sumner 492, per Story, J.; Conard v. Atlantic Ins. Co., 1 Pet. 448.

[3] Hart v. Chalker, 14 Conn. 77. The fact that the debtor is insolvent at the time does not prevent the enforcement of the contract. *Ex parte* Ames, 1 Low. 561, 1 Fed. Cases 746.

[4] Lehman v. Bentley, 60 N. Y. Super. 473, 18 N. Y. Supp. 778.

[5] Davis v. Briggs, 24 N. Y. State Rep. 896, 5 N. Y. Supp. 323.

[6] St. George's Church Soc. v. Branch, 120 Mo. 238, 25 S. W. Rep. 218.

[7] Miller v. Sauerbier, 30 N. J. Eq. 74; Irish v. Bradford, 64 Iowa 303, 20 N. W. Rep. 447; Stumbaugh v. Anderson, 46 Kan. 541, 26 Pac. Rep.

circumstances will be held to be without consideration, and fraudulent as against creditors.[1] A conveyance by an insolvent husband to his wife, in pursuance of a contract to compensate her for services in taking care of his aged mother, who resided with him, has been held in New York to be invalid and voidable as against creditors. The Court of Appeals of that State decided that the wife, by rendering service to her husband's mother, was simply performing a marital duty which she owed to her husband; that where she received no payment for the discharge of this duty from the person to whom the service was rendered, and was entitled to none, and brought no money or property to the husband by her service, she could not stipulate for compensation.[2] Earl, J., said: "It would operate disastrously upon domestic life, and breed discord and mischief, if the wife could contract with her husband for the payment of services to be rendered for him in his home; if she could exact compensation for services, disagreeable or other-

1045; Byrnes v. Clarke, 57 Wis. 13, 14 N. W. Rep. 815; Ionia Co. Savings Bank v. McLean, 84 Mich. 625, 48 N. W. Rep. 159.

[1] Gardner's Admr. v. Schooley, 25 N. J. Eq. 150. See Ridgway v. English, 22 N. J. Law 409; Updike v. Titus, 13 N. J. Eq. 151; Coley v. Coley, 14 N. J. Eq. 350; Updike v. Ten Broeck, 32 N. J. Law 105; Prickett v. Prickett, 20 N. J. Eq. 478. The services of a son after reaching majority were held to be a good consideration in Graves v. Davenport, 50 Fed. Rep. 881; Heeren v. Kitson, 28 Ill. App. 268. Parents may, as against creditors, compensate children for services. Howard v. Rynearson, 50 Mich. 309, 15 N. W. Rep. 486, per Cooley, J.; Wilson v. McMillan, 62 Ga. 17.

[2] Coleman v. Burr, 93 N. Y. 17, 25; 17 Weekly Dig. (N. Y.) 233. Compare Filer v. N. Y. Central R. R. Co., 49 N. Y. 47; Blaechinska v. Howard Mission, etc., 130 N. Y. 499, 29 N. E. Rep. 755; Coursey v. Morton, 132 N. Y. 556, 559, 30 N. E. Rep. 231; Suau v. Caffe, 122 N. Y. 320, 25 N. E. Rep. 488; Snyder v. Free, 114 Mo. 371, 21 S. W. Rep. 847; McGarvy v. Roods, 73 Ia. 363, 35 N. W. Rep. 488; Hart v. Flinn, 36 Ia. 366; McAfee v. McAfee, 28 S. C. 188, 5 S. E. Rep. 480; Whitaker v. Whitaker, 52 N. Y. 368; Brooks v. Schwerin, 54 N. Y. 344; Birkbeck v. Ackroyd, 74 N. Y. 356; Reynolds v. Robinson, 64 N. Y. 589; Gable v. Columbus Cigar Co., 140 Ind. 563, 38 N. E. Rep. 474. As against a subsequent creditor her services have been held to be a good consideration. Daggett, B. & H. Co. v. Bulfer, 82 Iowa 101, 47 N.W. Rep. 978.

wise, rendered to members of his family; if she could sue him upon such contracts, and establish them upon the disputed and conflicting testimony of the members of the household. To allow such contracts would degrade the wife by making her a menial and a servant in the home where she should discharge marital duties in loving and devoted ministrations, and frauds upon creditors would be greatly facilitated, as the wife could frequently absorb all her husband's property in the payment of her services, rendered under such secret, unknown contracts."[1] But the husband owes no duty to the wife to render her service in her separate business without compensation.[2] Manifestly a father may work for his son, and a debt for wages due by the father to the former will sustain a conveyance.[3]

§ 219. **Proof of consideration.** — In Hanford v. Artcher,[4] in speaking of the presumption of fraud arising from a failure to change possession, the court said that, to rebut this presumption, the statute imposed upon the party claiming under a sale or a mortgage, the burden of proving good faith and an absence of any intent to defraud creditors. "Proof of a valuable consideration," said Senator Hopkins, "or an honest debt, is essential to show good faith; and, if there be no such proof, I take it that the requirement of the statute in this respect is not complied with, and that the court may order a nonsuit. . . . . Such proof of consideration, too, must go beyond a mere paper acknowledgment of it, that might be binding between the parties." It is said by Chief-Justice Elliott, in Rose v. Colter,[5] that "if it be shown that a valuable consideration was paid for the property, and that when the

[1] See Grant v. Green, 41 Iowa 88; Dowell v. Applegate, 8 Sawyer 427.

[2] Third Nat. Bk. v. Guenther 123 N. Y. 576, 25 N. E. Rep. 986.

[3] Woodhull v. Whittle, 63 Mich. 575, 30 N. W. Rep. 368; State Bank v. Whittle, 48 Mich. 1, 11 N. W. Rep. 756.

[4] 4 Hill (N. Y.) 295.

[5] 76 Ind. 593.

sale was made the seller was possessed of property far more than sufficient to pay all his debts, the presumption arising from the retention of possession is plainly overcome." As we have already said, there ought to be a fair and reasonable consideration corresponding to the value of the article sold.[1] When the consideration is large there should be clear proof by the vendee, if his ability to purchase is questioned, of his means, or of the source from which he obtained the money. Absence of evidence of the disposition made by the grantor of the money alleged to have been received becomes a material circumstance.[2]

§ 220. **Recitals of consideration as evidence.** — It is said in Hubbard v. Allen,[3] that when a controversy arises between the grantee and an existing creditor as to the validity of a conveyance, it is a settled rule to regard the recital of a consideration as a mere declaration or admission of the grantor, and not as evidence against the creditor.[4] Recitals or statements of consideration in a deed, however specific, will not be sufficient to protect a purchaser where there is any fraud,[5] and, as we shall see, any kind of consideration may be proved.[6]

§ 221. **Explaining recitals.** — A conveyance of land made by a husband to his wife purported to be executed in consideration of love and affection, "and for the sum of one

[1] State v. Evans, 38 Mo. 150–154; Klosterman v. Vader, 6 Wash. 99, 32 Pac. Rep. 1055. See § 209.

[2] Thompson v. Tower Mfg. Co., 104 Ala. 146, 16 So. Rep. 116; Harrell v. Mitchell, 61 Ala. 270.

[3] 59 Ala. 296; Cohn v. Ward, 32 W. Va. 34, 9 S. E. Rep. 41; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. Rep. 847.

[4] Citing McCain v. Wood, 4 Ala. 258; Branch Bank of Decatur v. Kinsey, 5 Ala. 9; McGintry v. Reeves, 10 Ala. 137; McCaskle v. Amarine, 12 Ala. 17; Falkner v. Leith, 15 Ala. 9; Dolin v. Gardner, 15 Ala. 758. See Kimball v. Fenner, 12 N. H. 248; Cohn v. Ward, 32 W. Va. 34, 9 S. E. Rep. 41; Ball v. Campbell, 134 Pa. St. 602, 19 Atl. Rep. 802; Childs v. Hurd, 32 W. Va. 66–101, 9 S. E. Rep. 362; De Farges v. Ryland, 87 Va. 408, 12 S. E. Rep. 805.

[5] Snyder v. Free, 114 Mo. 368, 21 S. W. Rep. 847.

[6] Leach v. Shelby, 58 Miss. 681.

dollar cash in hand paid, the receipt whereof is hereby acknowledged." The court held that, the money consideration being manifestly nominal, parol evidence was inadmissible, in an action brought to set aside the deed as in fraud of creditors, to show that there was, in fact, an adequate pecuniary consideration.[1] But, in another case, where the consideration expressed in the deed was "five hundred dollars and other good causes and considerations," it was held competent to prove the consideration of blood.[2] This general subject is referred to in Hinde's Lessee v. Longworth,[3] where it was said that if the evidence had been offered for the purpose of showing that the deed was given for a *valuable consideration*, and in satisfaction of a debt, and not for the consideration of *love and affection*, as expressed in the deed, it might well be considered as contradicting the deed. It would then be substituting a *valuable* for a *good* consideration, and a violation of the well-settled rule of law, that parol evidence is inadmissible to annul or substantially vary a written agreement.[4] The subject was further considered in Betts v. Union Bank of Maryland,[5] a case argued by Reverdy Johnson on one side, and by Roger B. Taney, afterward Chief-Justice of the United States, on the other, and the conclusion of the court was that marriage cannot be given in evidence as the consideration of a deed of bargain and sale expressed to be made for a money consideration only.[6] A mortgage, the expressed con-

[1] Houston v. Blackman, 66 Ala. 559, 564; Galbreath v. Cook, 30 Ark. 417. See Potter v. Gracie, 58 Ala. 308; Reynolds v. Gawthrop, 37 W. Va. 3, 16 S. E. Rep. 364.

[2] Pomeroy v. Bailey, 43 N. H. 118.

[3] 11 Wheat. 214.

[4] See Cunningham v. Dwyer, 23 Md. 219.

[5] 1 Harr. & G. (Md.) 175.

[6] Galbreath v. Cook, 30 Ark. 425; Davidson v. Jones, 26 Miss. 63; Diggs v. McCullough, 69 Md. 592, 16 Atl. Rep. 453. In Scoggin v. Schloath, 15 Ore. 383, 15 Pac. Rep. 635, the court said: "The better rule appears to be that if the consideration expressed in the deed is natural love and affection, it cannot be shown to have been executed for a valuable consideration; or

sideration for which was $1,000, may be explained by showing that it was, in fact, given to secure the mortgagee against liability on two accommodation notes of $500 each.[1] The recital that the consideration has been paid may generally be contradicted by parol evidence;[2] and indeed there seems to be a prevalent tendency in the courts to admit parol proof of the true consideration of a deed in almost every case,[3] though a policy sometimes manifests itself to exclude evidence of consideration different in kind from that set forth in the instrument. Manifestly the recitals are not binding upon creditors in any event.

§ 222. **Sufficient consideration.**—A bond given by a minor son to his father in consideration of permission to leave home and work for himself, or for his board while he remains at home and works on his own account, if *bona fide*, is neither against the policy of the law nor fraudulent as to creditors.[4] And where a wife advances to her husband money to purchase land, under an agreement that the money shall be repaid to her children and its payment

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if voluntary, or on consideration of marriage and the like, it cannot be shown that the consideration was a moneyed one. This would be proving by parol that the consideration was different *in kind* from that expressed in the deed, and upon well-considered authority, is not allowable."

[1] McKinster v. Babcock, 26 N. Y. 378. See Truscott v. King, 6 N. Y. 147; Lawrence v. Tucker, 23 How. 14.

[2] Bingham v. Weiderwax, 1 N. Y. 514; Baker v. Connell, 1 Daly (N. Y.) 470; Altringer v. Capeheart, 68 Mo. 441; Miller v. McCoy, 50 Mo. 214; Rhine v. Ellen, 36 Cal. 362, 370; Sanford v. Sanford, 61 Barb. (N. Y.) 302; Arnot v. Erie Railway Co., 67 N. Y. 321; Baker v. Union Mutual Life Ins. Co., 43 N. Y. 287; Harper v. Perry, 28 Iowa 63; Lawton v. Buckingham, 15 Iowa 22; Pierce v. Brew, 43 Vt. 295; Anthony v. Harrison, 14 Hun (N. Y.) 210; Morris v. Tillson, 81 Ill. 616; Taggart v. Stanbery, 2 McLean 546; Wheeler v. Billings, 38 N. Y. 264; Adams v. Hull, 2 Denio (N. Y.) 306; Miller v. McKenzie, 95 N. Y. 578; Scoggin v. Schloath, 15 Ore. 383, 15 Pac. Rep. 635.

[3] Buford v. Shannon, 95 Ala. 211, 10 So. Rep. 263; Leach v. Shelby, 58 Miss. 681; McKinster v. Babcock, 26 N. Y. 380; McCrea v. Purmort, 16 Wend. (N. Y.) 469; Ham v. Van Orden, 84 N. Y. 257; Hebbard v. Haughian, 70 N. Y. 54; Baird v. Baird, 145 N. Y. 665, 40 N. E. Rep. 222.

[4] Geist v. Geist, 2 Pa. St. 441.

secured by mortgage, the contract is valid and may be set up as a defense to a suit charging the husband with mortgaging the lands to his children in fraud of creditors.[1] The liability of a surety on a bond for the acts of his principal is a sufficient consideration for a mortgage given as indemnity.[2]

§ 223. Insufficient consideration.—A deed from a debtor to his creditor is voluntary and not founded on a sufficient consideration if it is given for a pre-existing debt which was afterward treated by the parties as still due.[3] And, as against creditors of an insolvent, a party cannot make title to his property as a purchaser for a valuable consideration, where what purports to be the consideration is a debt against a third person which is found, as matter of fact, to be worthless; and this is true even though the transaction was in good faith on the part of the vendee.[4] So a conveyance in consideration of future services has been held void against existing creditors.[5]

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[1] Goff v. Rogers, 71 Ind. 459.

[2] State v. Hemingway, 69 Miss. 491, 10 So. Rep. 575. See Tudor v. De Long, 18 Mont. 499, 46 Pac. Rep. 258.

[3] Oliver v. Moore, 23 Ohio St. 479; Starr v. Starr, 1 Ohio 321.

[4] Seymour v. Wilson, 19 N. Y. 417.

[5] Lehman v. Bentley, 60 N. Y. Super. Ct. 478, 18 N. Y. Supp. 778.

CHAPTER XVI.

INDICIA OR BADGES OF FRAUD.

§ 224. The creditor's embarrassments — Proof of fraud.
225. Badges of fraud defined.
226. Question for the jury.
227. Circumstantial and direct evidence.
228. Recital of fictitious consideration.
229. Antedating instrument.
230. Description of the property.
231. Conveyance of whole estate.
231a. Continued possession.
232. Inadequacy of purchase price.
233. Transfer pending suit.
234. Evidence of secrecy.
234*a*. Secret trust.
§ 235. Suppression or concealment — Not recording — Subsequent fraud.
236. Evidence *aliunde*.
237. Concealment in fraud of bankrupt act.
238. Absolute conveyance by way of security.
238*a*. Excess of property mortgaged.
239. Insolvency.
240. Sales upon credit.
241. Unusual acts and transactions.
242. Effect of relationship upon debtor's transactions.
243. *Prima facie* cases of fraud.
244. Comments.

"Fraud is one of the broadest issues known to the law." — Vann, J., in *White* v. *Benjamin*, 150 N. Y., 265, 44 N. E. Rep. 956.

§ 224. The creditor's embarrassments — Proof of fraud. — The practical difficulties which a creditor encounters in seeking to discover equitable assets, or to reach property fraudulently alienated by the debtor, have already been the subject of comment.[1] A transaction or conveyance having every appearance of fairness and legality, and to which the ordinary presumptions of good faith attach,[2] is usually presented at the threshold of the litigation. The debtor, and the fraudulent alienees acting in collusion with him, will be found, in most instances, to have taken every precaution to hide the evidences and traces of their frauds behind barriers of apparent good faith,[3] and,

[1] See §§ 5, 6, 13.

[2] See § 6; Jones v. Simpson, 116 U. S. 615, 6 S. C. Rep. 538; Bamberger v. Schoolfield, 160 U. S. 149, 16 S. C. Rep. 225.

[3] Cowling v. Estes, 15 Ill. App. 261.

ordinarily, the guilty participants develop into witnesses prolific of plausible statements and ingenious subterfuges devised to uphold the colorable transactions. An intent to defraud is not proclaimed or published to the world, but, on the contrary, the usual course of the guilty participants is to give to the contract the appearance of an honest transaction, and to have the conduct of the interested parties correspond, as far as possible, with a *bona fide* act.[1] Parties practicing fraud naturally and almost uniformly resort to expedients to conceal the evidence of it.[2] Fraud always takes a tortuous course, and endeavors to cover and conceal its tracks.[3] Lord Mansfield said: "Hardly any deed is fraudulent upon the mere face of it."[4] Chief-Justice Bricknell observed: "Where a fraud is contemplated and committed upon creditors, concealment of it is the first, and generally the most persistent, effort of those who are engaged in it. Publicity would render their acts vain and useless. Leaving direct and positive evidence accessible to those injured by it would be the equivalent of a confession of the culpable intent, and of the defeasible character of the transaction. There are numerous circumstances, so frequently attending sales, conveyances, and transfers intended to hinder, delay and defraud creditors, that they are known and denominated *badges of fraud.* They do not constitute — are not elements of fraud, but merely circumstances from which it may be inferred."[5]

The question presents itself, How can a creditor most effectually thwart the deep-laid schemes of the debtor and

[1] Tognini v. Kyle, 15 Nev. 468.

[2] Sarle v. Arnold, 7 R. I. 585; Cowling v. Estes, 15 Ill. App. 261.

[3] Marshall v. Green, 24 Ark. 418. See § 13.

[4] Worseley v. Demattos, 1 Burr. 467, 484.

[5] Thames v. Rembert, 63 Ala. 567; Weaver v. Owens, 16 Ore. 304, 18 Pac. Rep. 579; Hickman v. Trout, 83 Va. 491, 3 S. E. Rep. 131; State, *ex rel.* Brown v. Mitchell, 102 N. C. 347, 9 S. E. Rep. 702; Harwick v. Weddington, 73 Iowa 302, 34 N. W. Rep. 868; Williams v. Barnett, 52 Tex. 130.

his fraudulent alienees, and overcome the usual presumptions of honesty and good faith which the parties will invoke? No witness can look into the minds of the parties and thus be able to swear positively that they intended to defraud the creditors of the vendor; and hence, as we have already shown in this discussion,[1] fraud can generally be established only by facts and circumstances which tend directly or indirectly to indicate its existence.[2] It is said in Maryland: "Although the actions of men can be conclusively proven, the motives which lurk in their bosoms and control their actions are not susceptible of positive proof."[3] Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as a means of ascertaining the truth.[4] "A deduction of fraud," says Kent, "may be made not only from deceptive assertions and false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design."[5] "Circumstances altogether inconclusive," says Clifford, J.,[6] "if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."[7] Or they may be "a link in a chain, which, altogether, is very strong."[8] Wills says:[9] "Although neither the combined effect of the evi-

[1] See § 13.

[2] Thomas v. Sullivan, 13 Nev. 249; Wheelden v. Wilson, 44 Me. 18.

[3] Zimmer v. Miller, 64 Md. 300, 1 Atl. Rep. 858.

[4] Castle v. Bullard, 23 How. 172, 187; Goshorn v. Snodgrass, 17 W. Va. 717.

[5] 2 Kent's Com. 484.

[6] Castle v. Bullard, 23 How. 187.

[7] Considerable latitude should be allowed on the question of motive. Hendrickson v. People, 10 N. Y. 13, 31; Moore v. United States, 150 U. S. 60, 14 S. C. Rep. 26. In New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 S. C. Rep. 877, the action involved the obtaining of an insurance policy for a fraudulent purpose, and evidence was admitted that policies in other companies had been obtained with like intent.

[8] Engraham v. Pate, 51 Ga. 537.

[9] Wills on Circumstantial Ev., p. 273.

dence, nor any of its constituent elements, admits of numerical computation, it is undubitable that the proving power increases with the number of the independent circumstances and witnesses, according to a geometrical progression. 'Such evidence,' in the words of Dr. Reid, 'may be compared to a rope made up of many slender filaments twisted together. The rope has strength more than sufficient to bear the stress laid upon it, though no one of the filaments of which it is composed would be sufficient for that purpose.'"[1] It can seldom be the duty of the court to instruct the jury that a single fact will warrant the jury in finding fraud. All the facts surrounding the transaction must be taken into account collectively.[2] The attention of the jury should be called to the effect of the evidence as a whole; it is error to take up each circumstance, one by one, discussing it with the remark that it does not prove the case.[3] The judgment must be based "upon all the circumstances of the particular case."[4] Clear proof leading to a "hearty conviction" is not the test, but rather proof that creates a belief that a fraud has been perpetrated.[5] The frequency with which fraud is practiced upon creditors; the difficulties of its detection; the powerful motives which tempt an insolvent debtor to commit it;[6] the plausible casuistry by means of which it is sometimes reconciled to the consciences even of persons whose previous lives have been without reproach; these are the considerations which prevent the court from classing it among the grossly improbable violations of moral duty; and therefore judges often pre-

[1] Citing Reid's Essay on the Intellectual Powers, Chap. III.

[2] Sleeper v. Chapman, 121 Mass. 404-409.

[3] Montgomery Web Co. v. Dienelt, 133 Pa. St. 585, 19 Atl. Rep. 428.

[4] Wait v. Bull's Head Bank, 19 N. B. R. 501; Cox v. Cox, 39 Kan. 121, 17 Pac. Rep. 847.

[5] Gumberg v. Treusch, 103 Mich. 543, 61 N. W. Rep. 872.

[6] See § 2.

sume it from facts which may seem slight.[1] "Fraud," says the Supreme Court of Iowa, "cannot always be shown by direct evidence, but is usually proved by circumstances. Neither can the knowledge of or participation in fraudulent designs and transactions be proved in many cases except by circumstances."[2] The very charge of fraud "implies color and disguise, to be dissipated by *indicia* alone."[3] The signs or earmarks of fraud instanced in Twyne's Case[4] have already been given,[5] and should be kept fresh in the memory of parties interested in this class of litigation. Mr. Roberts says, that the general conclusion to be derived from this remarkable case is "that evidence of the fraudulent intent supersedes the whole inquiry into the consideration, for no merit in any of the parties to a transaction can save it if it carries intrinsically or extrinsically the plain characters of fraud."[6] It may be observed that extrinsic proof of fraud can rarely be found unless it be in cases where the possession of a debtor contradicts "the visible purport of an absolute conveyance."

§ 225. **Badges of fraud defined** — Badges of fraud are suspicious circumstances that overhang a transaction,[7] or appear on the face of the papers.[8] The possible *indicia* of fraud are so numerous[9] that no court could pretend to anticipate and catalogue them.[10] A single one may

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[1] Goshorn v. Snodgrass, 17 W. Va. 767.

[2] Craig v. Fowler, 59 Iowa 203, 13 N. W. Rep. 116.

[3] Waterbury v. Sturtevant, 18 Wend. (N. Y.) 353, 362, per Cowen, J.; King v. Moon, 42 Mo. 555.

[4] 3 Rep. 80, (2 Coke 212). See Davis v. Schwartz, 155 U. S. 639, 15 S. C. Rep. 237.

[5] See § 22.

[6] Roberts on Fraudulent Conveyances, 546.

[7] Helms v. Green, 105 N. C. 265, 11 S. E. Rep. 470.

[8] Douglass Merchandise Co. v. Laird, 37 W. Va. 687, 17 S. E. Rep. 188.

[9] See Bank v. Gilmer, 116 N. C. 685, 22 S. E. Rep. 2.

[10] Phinizy v. Clark, 62 Ga. 623–627; Hickman v. Trout, 83 Va. 491, 3 S. E. Rep. 131; Newman v. Kirk, 45 N. J. Eq. 686, 18 Atl. Rep. 224.

stamp the transaction as fraudulent, and when several are found in combination, strong and clear evidence on the part of the upholder of the transaction will be required to repel the conclusion of fraud.[1] "Badges are as infinite in number and form, as are the resources and versatility of human artifice."[2] The statutes of Elizabeth produce the most beneficial effects, by placing parties under a disability to commit fraud in requiring for the characteristics of an honest act such circumstances as none but an honest intention can assume.[3] A badge of fraud was said by Chief-Justice Pearson, in Peebles v. Horton,[4] to be "a fact calculated to throw suspicion on the transaction," and which "calls for explanation."[5] Substantially the same language is used by Elliot, J., in Sherman v. Hogland.[6] So in Pilling v. Otis,[7] the court, in construing the

[1] Hickman v. Trout, 83 Va. 491, 3 S. E. Rep. 131.

[2] Shealy v. Edwards, 75 Ala. 411, 417.

[3] McKibbin v. Martin, 64 Pa. St. 356; Avery v. Street, 6 Watts (Pa.) 274.

[4] 64 N. C. 376; Shealy v. Edwards, 75 Ala. 417: Terrell v. Green, 11 Ala. 213; Hickman v. Trout, 83 Va. 491, 3 S. E. Rep. 131.

[5] In Hickman v. Trout, 83 Va. 491, 3 S. E. Rep. 131, the court says: "Certain circumstances are often refered to as *indicia* of fraud, because they are usually found in cases where fraud exists. Even a single one of them may be sufficient to stamp the transaction as fraudulent. When several are found in the same transaction, strong and clear evidence will be required of the upholder of the transaction to repel the conclusion of fraudulent intent. In the case here, ... quite a number of the usual badges of fraud are found grouped togetber and left unexplained. These are: gross inadequacy of price; no security taken for the purchase-money; unusual length of credit for the deferred instalments; bonds taken payable at long periods, when the pretence is that the deferred instalments evidenced by them had already been satisfied in the main by antecedent debts due by the obligee to the obligor; the conveyance made in payment of alleged indebtedness of father to son, residing together as members of one family; the indebtedness and insolvency of the grantor, and well known to the grantee; the threats and pendency of suits; the secrecy and concealment of the transaction; keeping the deed unacknowledged and unrecorded for over a year; grantor remaining in possession as before the conveyance, and cautioning the kinsman justice, who took the acknowledgment, to keep the matter private, and the relation between grantor and grantee."

[6] 73 Ind. 473.

[7] 13 Wis. 495.

meaning of the expression "badge of fraud" as used in the charge of a judge, said: "It does not mean that the evidence must be conclusive, nor that it must require the jury to find fraud, but only that it is one of the signs or marks of fraud, and has a tendency to show it. There may be great difference in the weight to which different facts, constituting badges of fraud, are entitled as evidence. One may be almost conclusive, another furnish merely a reasonable inference of fraud. Yet both would be badges of fraud, and either might be so explained by other evidence as to destroy its effect. The books accordingly speak of strong badges and slight badges of fraud, of conclusive badges, and badges not conclusive, meaning by the word 'badge' nothing more than that the fact relied on has a tendency to show fraud, but leaving its greater or less effect to depend on its intrinsic character." The expression is used "to distinguish the lighter grounds on which fraud may be established" as distinguished from the cases where the fraud is apparent upon the face of the instrument and necessarily involves its invalidity.[1] The circumstances which the law considers badges of fraud, and not fraud *per se*, should, as we shall see, be submitted to the jury, so that they may draw their own conclusions.[2] Where, then, a creditor shows *indicia*, or badges of fraud, the burden rests on the grantee to repel the presumptions which the facts so shown generated.[3] It may here be observed that when the consideration for the transfer is clearly established, and the transaction is in effect a preference, it will not be affected by any weak, foolish, or even criminal conduct in the way of an attempt to sustain the case by manufactured evidence.[4]

[1] Burrill on Assignments, § 346.
[2] King v. Russell, 40 Tex. 133.
[3] Harrell v. Mitchell, 61 Ala. 270.
[4] Hill v. Bowman, 35 Mich. 191, per Cooley, C. J.

§ 226. **Question for the jury.**—The question of fraud in a transfer must usually be submitted to a jury,[1] save in a few cases where the transaction is manifestly fraudulent upon its face. The distinction between legal and equitable jurisdiction as to this has already been pointed out;[2] and where the suit is in its nature purely equitable, the judge or chancellor is responsible for the decision, though, of course, he may secure the aid of a jury to pass upon framed issues.[3] Otherwise the jury must be permitted to consider and draw their own inferences from badges of fraud, and the court should not interfere to formulate conclusions for them.[4] To say that badges of fraud "constitute fraud in themselves, would be to carry the doctrine beyond the limits of reason or authority, and to shut out the light of wisdom and truth."[5] Where the entire suit is tried by and submitted to the court, without the aid of a jury, as is frequently the case in equity, the same consideration and effect should be given by the court to badges of fraud as though a jury had been summoned.

§ 227. **Circumstantial and direct evidence.**—Circumstantial evidence is often the only kind of evidence of which the case admits.[6] In Kempner v. Churchill[7] it appeared that the purchaser said to the debtor: "You had better not delay this matter. You had better let me have the goods

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[1] Weaver v. Owens, 16 Ore. 304, 18 Pac. Rep. 579; State v. Mason, 112 Mo. 374, 20 S. W. Rep. 629; McKellar v. Pillsbury, 48 Minn. 396, 51 N. W. Rep. 222; Ferris v. McQueen, 94 Mich. 367, 54 N. W. Rep 164; Ladnier v. Ladnier, 64 Miss. 373, 1 So. Rep. 492.

[2] See § 51.

[3] Dunphy v. Kleinsmith, 11 Wall. 615.

[4] Leasure v. Coburn, 57 Ind. 274; Herkelrath v. Stookey, 63 Ill. 486; King v. Russell, 40 Tex. 133.

[5] Wilson v. Lott, 5 Fla. 316.

[6] Bartlett v. Cleavenger, 35 W. Va. 719, 14 S. E. Rep. 273; Goshorn's Ex'r v. Snodgrass, 17 W. Va. 717; Reynold's Admr. v. Gawthrop, 37 W. Va. 13, 16 S. E. Rep. 364; Davis S. M. Co. v. Dunbar, 29 W. Va. 617, 622, 2 S. E. Rep. 91.

[7] 8 Wall. 369.

and put the money in your pocket, and let the creditors go to the devil." The circumstantial evidence which was held ample to confirm this direct evidence of fraud was as follows: First, false receipts given for full value on Saturday; second, account of stock made out on Sunday; third, removal of the goods into a cellar on Monday. "It is true the fraud must be in the inception of the transaction, but the subsequent acts of the parties are calculated to explain the motives which actuated them in the beginning, and give tone to the then original purpose."[1]

§ 228. **Recital of fictitious consideration.**—Let us now proceed to consider more minutely the particular circumstances and surroundings of a transaction which constitute badges of fraud, or awaken suspicions or create presumptions of the existence of fraud.

A false statement of the consideration of a mortgage,[2] or of a conveyance[3] or transfer,[4] or the creation of a

[1] Adler v. Apt, 31 Minn. 348, 350. See Hungerford v. Earle, 2 Vern. 261; Blennerhassett v. Sherman, 105 U. S. 100; Blackman v. Preston, 24 Ill. App. 240; Coates v. Gerlach, 44 Pa. St. 43.

[2] United States v. Griswold, 7 Sawyer 306; Stinson v. Hawkins, 16 Fed. Rep. 850; Patrick v. Riggs, 105 Mich. 616; Lynde v. McGregor, 13 Allen (Mass.) 179; McKinster v. Babcock, 26 N. Y. 382; Weeden v. Hawes, 10 Conn. 50; Butts v. Peacock, 23 Wis. 359; Blakeslee v. Rossman, 43 Wis. 123; Mason v. Franklin, 58 Ia. 507, 12 N. W. Rep. 554; Ferris v. McQueen, 94 Mich. 367, 54 N. W. Rep. 164; Hanson v. Bean, 51 Minn. 546, 53 N W. Rep. 871; Rice v. Morner, 64 Wis. 599, 25 N. W. Rep. 668; Heintze v. Bentley, 34 N. J. Eq. 562; Henry v. Harrell, 57 Ark. 569, 22 S. W. Rep. 433; Stover v. Herrington, 7 Ala. 142; Goff v. Rogers, 71 Ind. 459; Cordes v. Straszer, 8 Mo. App. 61; Venable v. Bank of U. S., 2 Pet. 112, per Story, J.; King v. Hubbell, 42 Mich. 599, 4 N. W. Rep. 440; per Cooley, J. If the actual amount of the debt intended to be secured by a deed of trust is more than the actual value of the property, it is immaterial that the deed recites that it is given to secure a larger amount than is actually due. Sawyer v. Bradshaw, 125 Ill. 440, 17 N. E. Rep. 812. See Keith v. Proctor, 8 Baxt. (Tenn.) 189; Shirras v. Caig, 7 Cranch 50; Dobson v. Snider, 70 Fed. Rep. 10; Davis v. Schwartz, 155 U. S. 644, 15 S. C. Rep. 237; Wood v. Scott, 55 Ia. 114, 7 N. W. Rep. 465; Taylor v. Wendling, 66 Ia. 562, 24 N. W. Rep. 40.

[3] Benne v. Schnecko 100 Mo. 250, 13 S. W. Rep. 82.

[4] Peebles v. Horton, 64 N. C. 374; Enders v. Swayne, 8 Dana (Ky.) 105;

fictitious or exaggerated [1] indebtedness,[2] or a misleading statement as to an encumbrance [3] is a badge of fraud, and is a proper element for the consideration of the jury in determining the *bona fides* of the transaction.[4] Such a recital does not usually render the instrument void *per se*,[5] and in some instances the transaction will be allowed to stand for the amount of the consideration given,[6] and will be void only for the excess [7] So the issuing of an execution for an excessive amount will, in the absence of bad faith, avail the plaintiff to the extent of the debt remaining due.[8] It may be observed here that the recital of the excessive consideration must be intentional, and not the result of a mere mistake in computation,[9] and both parties must have participated in the fraudulent purpose.[10] Hence, where a wife is ignorant

Thompson v. Drake, 3 B. Mon. (Ky.) 570; Foster v. Woodfin, 11 Ired. (N. C.) Law 346; Gibbs v. Thompson, 7 Humph. (Tenn.) 179; Perry v. Hardison, 99 N. C. 29, 5 S. E. Rep. 230; Turbeville v. Gibson, 5 Heisk. (Tenn.) 565; Marriott v. Givens, 8 Ala. 694; Divver v. McLaughlin, 2 Wend. (N. Y.) 600; Newman v. Kirk, 45 N. J. Eq. 677, 18 Atl. Rep. 224; Bartlett v. Cleavinger, 35 W. Va. 719, 14 S. E. Rep. 273; Benne v. Schnecko, 100 Mo. 250, 13 S. W. Rep. 82; Seger's Sons v. Thomas Bros., 107 Mo. 644, 18 S. W. Rep. 33; Harris v. Russell, 93 Ala. 59, 9 So. Rep. 541.

[1] Kellogg v. Clyne, 54 Fed. Rep. 696, 4 C. C. A. 557.

[2] Winchester v. Charter, 97 Mass. 140: Newman v. Kirk, 45 N. J. Eq. 677, 18 Atl. Rep. 224.

[3] Newman v. Kirk, 45 N. J. Eq. 687, 18 Atl. Rep. 224.

[4] Miller v. Lockwood, 32 N. Y. 299; Willison v. Desenberg, 41 Mich. 156, 2 N. W. Rep. 201; Lawson v. Alabama Warehouse Co., 80 Ala. 343. Elliott, J., said, in Goff v. Rogers, 71 Ind. 461: "There are no cases, however, that we have been able to find, going so far as to hold that a mortgage is to be conclusively presumed fraudulent from the bare fact that it purports, on its face, to secure a sum in excess of the debt really due. The farthest that any of the cases go, except those based on an express statute, is to hold that the fact that a mortgage expresses on its face an amount materially greater than the true amount of indebtedness, is a badge of fraud."

[5] Frost v. Warren, 42 N. Y. 207; Barkow v. Sanger, 47 Wis. 505, 3 N. W. Rep. 16; Cole v. Yancey, 62 Mo. App. 234.

[6] Coley v. Coley, 14 N. J. Eq. 354.

[7] Davenport v. Wright, 51 Pa. St. 292. See §§ 192, 195.

[8] Harris v. Alcock, 10 G. & J. (Md.) 227.

[9] Kalk v. Fielding, 50 Wis. 340, 7 N. W. Rep. 296.

[10] Carpenter v. Muren, 42 Barb. (N. Y.) 300. See § 199.

and innocent of fraud, the insertion of an inaccurate or untrue recital in a settlement will not vitiate it.[1] An immaterial misrecital will not be regarded.[2]

It is not our purpose, however, to lead the reader to consider an exaggerated or false recital of consideration as an unimportant factor in proving fraud. Far from it. In Hawkins v. Alston,[3] Chief-Justice Ruffin forcibly said: "No device can be more deceptive and more likely to baffle, delay, or defeat creditors, than the creating incumbrances upon their property by embarrassed men, for debts that are fictitious or mainly so. The false pretense of a debt, or the designed exaggeration of one, is an act of direct fraud." Mr. May observed, that the fact that confession of judgment "covers more property than is necessary, for satisfying the debt, is a suspicious circumstance."[4] Sharswood, J., declared that "a judgment confessed voluntary by an insolvent or indebted man for more than is due, is *prima facie* fraudulent within the statute of 13 Eliz. c. 5."[5] Then, in Warwick v. Petty,[6] it is asserted that a judgment laid upon property of a debtor for more than was actually due and owing, is a clear violation of the policy of the law, and is fraudulent, and subject to attack by junior creditors.[7] The judgment, however, must be knowingly, intentionally, and

[1] Kevan v. Crawford, L. R. 6 Ch. D. 39.

[2] Fetter v. Cirode, 4 B. Mon. (Ky.) 484; Norris v. Lake, 89 Va. 513, 16 S. E. Rep. 663; Schroeder v. Bobbitt, 108 Mo. 290, 18 S. W. Rep. 1093. In Keagy v. Trout, 85 Va. 399, 7 S. E. Rep. 329, the court says: "It need only be added that the validity of a deed of trust executed *bona fide* is not affected by the fact that the amount of the debt secured is not described with accuracy."

[3] 4 Ired. Eq. (N. C.) 145.

[4] May's Fraud. Conv. p. 88; citing Tolputt v. Wells, 1 M. & S. 395; Benton v. Thornhill, 7 Taunt. 149, 2 Marsh. 427; Hodgson v. Newman, mentioned in Holbird v. Anderson, 5 T. R. 236, 239.

[5] Clark v. Douglass, 62 Pa. St. 415. See Werner v. Zierfuss, 162 Pa. St. 360, 29 Atl. Rep. 737.

[6] 44 N. J. Law 552.

[7] Clapp v. Ely, 27 N. J. Law 555. Compare Sayre v. Hewes, 32 N. J. Eq. 652; Hoag v. Sayre, 32 N. J. Eq. 552; Holt v. Creamer, 34 N. J. Eq. 187; Russell v. Winne, 37 N. Y. 596.

fraudulently obtained for a greater sum than was due.[1] The same rule applies to a mortgage given for more than the amount actually due.[2] A transaction which, on its face, speaks an entirely different language from the real one, will always be "viewed by the law with the highest degree of distrust and disapprobation," [3] and will be "the object of doubt and suspicion," [4] though, as we have seen, suspicion alone is insufficient to establish fraud.[5]

It results, then, from a review of the authorities, that a false recital of consideration in an instrument, in the absence of explanation, justifies a finding of fraud; that the misrecital must be intentional and not accidental, and is subject to explanation; and that the evil design must be mutual; otherwise the transaction will stand against creditors except as to the excess.

§ 229. **Antedating instrument.**— Antedating an instrument seems to be regarded as an *indicium* of fraud,[6] and testimony tending to establish a fraudulent antedating of a paper is competent.[7] Antedating a mortgage, though very improper, does not, however, affect a mortgagee who is not privy to it.[8] It may be remarked that the date of a deed is not generally regarded as an essential part of the instrument; it may be good with an impossible date, or have no date; and though the date is *prima facie* evidence of the time of delivery, it may be contradicted.

§ 230. **Description of the property.**— A suspicion or inference of fraud is sometimes predicated of a loose and

[1] Fairfield v. Baldwin, 12 Pick. (Mass.) 388; Davenport v. Wright, 51 Pa. St. 292. Compare Peirce v. Partridge, 3 Met. (Mass.) 44; Felton v. Wadsworth, 7 Cush. (Mass.) 589

[2] Hanson v. Bean, 51 Minn. 546, 53 N. W. Rep. 871; Stuart v. Smith (Tex. Civ. App., Apl. 5, 1893) 21 S. W. Rep. 1026.

[3] Ayres v. Husted, 15 Conn. 513.

[4] Pickett v. Pipkin, 64 Ala. 526.

[5] See §§ 5, 6.

[6] Wright v. Hencock, 3 Munf. (Va.) 521. But compare Patterson v. Bodenhamer, 9 Ired. (N. C.) Law 96.

[7] Moog v. Benedicks, 49 Ala. 513.

[8] Lindle v. Neville, 13 S. & R. (Pa.) 228.

vague description of the goods or property conveyed. "All the entire stock of goods in the possession of the said Lee, in his store in the city of Williamsburg," were the words used in Lang v. Lee,[1] and, in commenting upon the case, the court said: "Does this look like a real *bona fide* transaction?" A clause in a mortage by which after-acquired property was attempted to be covered, was regarded as a feature for the consideration of the jury in Gardner v. McEwen.[2] So in a case in Tennessee,[3] in which the description in the conveyance was so indefinite and general that it was impossible to designate the property, this was considered a circumstance to be taken into account by the jury as an evidence of fraud.[4] Still, it does not follow by any means that an imperfect description of property in an instrument is of much weight as a badge of fraud. Carelessness in the character of the description in conveyances of realty, or in bills of sale, or mortgages of personalty, is very common in transactions concerning the good faith of which no question can fairly be raised. Misdescriptions are often the handiwork of honest but blundering scriveners.

§ 231. **Conveyance of whole estate.**— Lowell, J., observes: "I have often decided that the conveyance of the whole property of a debtor affords a very violent presumption of a fraudulent intent, so far as existing creditors are concerned."[5] In Bigelow v. Doolittle,[6] however, the court

[1] 3 Rand. (Va.) 423.

[2] 19 N. Y. 125.

[3] Overton v. Holinshade, 5 Heisk. (Tenn.) 683.

[4] See § 157.

[5] *In re* Alexander, 4 N. B. R. 181 [*46]. See Goshorn v. Snodgrass, 17 W. Va. 717; Glenn v. Glenn, 17 Iowa 498–501; Hartshorn v. Eames, 31 Me. 99; Sarle v. Arnold, 7 R. I. 582; Mitchell v. Mitchell, 42 S. C. 475, 20 S. E. Rep. 405; Zimmer v. Miller, 64 Md. 300, 1 Atl. Rep. 858; Sayre v. Fredericks, 16 N. J. Eq. 207; Clark v. Wise, 39 How. Pr. (N. Y.) 97; reversed, 46 N. Y. 612; Monell v. Scherrick, 54 Ill. 270; Redfield v. Buck, 35 Conn 328; Bradley v. Buford, Sneed (Ky.), 12; Reilly v. Barr, 34 W. Va. 95, 11 S. E. Rep. 750; Benne v. Schnecko, 100 Mo. 250, 13 S. W. Rep. 82; Daugherty v. Daugherty, 104 Cal. 221, 37 Pac. Rep. 889; Karll v Kuhn, 38 Neb. 539, 57 N. W. Rep. 379.

[6] 36 Wis. 119. See Bishop v. Stebbins, 41 Hun (N. Y.) 246.

refused to charge that "the conveyance of the whole property of a debtor affords a very violent presumption of a fraudulent intent, so far as existing creditors are concerned." In sustaining the ruling the appellate court observed that the generality of the conveyance was merely a circumstance to be considered by the jury in connection with all the other facts of the case, in determining whether or not the sale was fraudulent. Lyon, J., said: "Under some conditions the jury might regard such conveyance as raising a very violent presumption of fraud, while under other and different conditions the jury might properly determine that it was but a slight indication of a fraudulent intent."[1] Such a transfer must, however, be regarded as altogether unusual and extraordinary. The instances in which such transactions would occur in the usual course of business are very infrequent, and when the alienation proceeds from an embarrassed debtor, it creates a presumption of dishonesty and fraud.[2] The transfer, however, is not to be declared void as matter of law under such circumstances. Hence a sale by an insolvent debtor of all his real and personal estate, taking back notes payable in six, twelve and eighteen months, is not *per se* fraudulent; to avoid it there must be a finding of an actual fraudulent intent.[3] When questions of relationship intervene, the motive for making these absolute conveyances becomes important. Hence where, pending a suit, a debtor transferred all his

[1] Bigelow v. Doolittle, 36 Wis. 119; S. P. Kerr v. Hutchins, 46 Tex. 389–390.

[2] See Bibb v. Baker, 17 B. Mon. (Ky.), 305; Wheelden v. Wilson, 44 Me. 20; Hughes v. Roper, 42 Tex. 126; *Ex parte* Ames, 1 Low. 561, 1 Fed. Cases, 746; Beels v. Flynn, 28 Neb. 580, 44 N. W. Rep. 732. It is otherwise where the conveyance is made to a creditor in payment of a debt, and the burden in such cases to prove that such debt was not a *bona fide* one is on the creditor. Hasie v. Connor, 53 Kan. 713, 37 Pac. Rep. 128. But see *contra*, Lehman v. Greenhut, 88 Ala. 478, 7 So. Rep. 299.

[3] Clark v. Wise, 46 N. Y. 612. See Bigelow v. Doolittle, 36 Wis. 119; Alton v. Harrison, L. R. 4 Ch. App. 626. Compare Bank of Ga. v. Higginbottom, 9 Pet. 61.

property, save that which was exempt, to his wife, and hired out to her for his "board, clothing and lodging," the transaction was held to afford grounds for suspicion, and to call for satisfactory proof of good faith and fair consideration.[1] Commenting upon the effect of the generality of the gift, Mr. May says[2] that it is, "when taken in conjunction with other circumstances, a mark of fraud[3] for *dolus versatur in generalibus*;[4] yet it is no concluding proof either under this statute (13 Eliz. c. 5) or by the common law."[5] Then, as we have seen[6] in Twyne's Case, the very first mark of fraud specified was "that the gift was general, without exception of the donor's apparel, or of anything of necessity." Chief-Justice Marshall, in the leading case of Sexton v. Wheaton,[7] observed: "The proportional magnitude of the estate conveyed may awaken suspicion, and strengthen other circumstances; but, taken alone, it cannot be considered as proof of fraud." Among the prominent badges of fraud affecting a conveyance as to subsequent creditors may be mentioned the contracting of debts, and engaging in a hazardous business or speculation, with the intention of shouldering the risk of loss upon creditors. The cases and principles appertaining to this subject have already been considered.[8] To this class of evidence McCrary, J., adds another badge, viz.: "The fraudulent disposition of the remaining estate of the grantor very soon after the

[1] Dresher v. Corson, 23 Kan. 315; Booher v. Worrill, 57 Ga. 235. See § 242.

[2] May on Fraudulent Conveyances, p. 82.

[3] Citing Chamberlain v. Twyne (Twyne's Case), F. Moo. 638; Stileman v. Ashdown, 2 Atk. 477; Mathews v. Feaver, 1 Cox's Eq. Cas. 280; Ware v. Gardner, L. R. 7 Eq. 317. See Blennerhassett v. Sherman, 105 U. S. 100.

[4] Citing Twyne's Case, 3 Rep. 81*a*; Stone v. Grubham, 2 Bulstr. 225.

[5] Citing Chamberlain v. Twyne, F. Moo. 638; Nunn v. Wilsmore, 8 T. R. 528: Ingliss v. Grant, 5 T. R. 530: Meux v. Howell, 4 East 1; Janes v. Whitbread, 11 C. B. 406; Alton v. Harrison, L. R. 4 Ch. App. 622; Evans v. Jones, 11 Jur. (N. S.) 784.

[6] § 22.

[7] 8 Wheat. 229, 250.

[8] See §§ 96, 99, 100.

conveyance."[1] The conveyance of the greater part of the assets of a partnership to a corporation formed by the partners in consideration of the issue of stock was held to constitute a badge of fraud where it was made immediately before an assignment.[2]

§ 231a. **Continued possession.** — Continued possession by the debtor of the property attempted to be conveyed is a circumstance more or less potent as evidence that the debtor retains some hidden form of interest.[3] But an agreement with the creditor made at the time of the delivery of the conveyance that the debtor should remain upon the land to care for the stock kept thereon is not necessarily fraudulent.[4] Such a compact may be entered into in perfect good faith and be susceptible of complete explanation.

§ 232. **Inadequacy of purchase price.** — As has already been shown, to enable a creditor to invalidate a sale of property, tangible facts must be proved, from which a legitimate inference of a fraudulent intent can be drawn. It will not suffice to create a suspicion of wrong, nor will the jury be permitted to guess at the truth.[5] Mere proof of inadequacy of price by itself has been considered insufficient to implicate the vendee in the fraudulent intent or to impeach his good faith[6] and inadequacy of consid-

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[1] Burdick v. Gill, 7 Fed. Rep. 668. 670.

[2] Buell v. Rope, 6 App. Div, (N. Y.) 113, 39 N. Y. Supp. 475, cf.; First Nat. Bank v. Wood, 86 Hun (N. Y.) 491, 33 N. Y. Supp. 777.

[3] See Chap. XVII. Munson v. Arnold, 55 Mich. 134, 20 N.W. Rep. 825; Foster v. Knowles, 42 N. J. Eq. 226, 7 Atl. Rep. 290; Zimmer v. Miller, 64 Md. 297, 1 Atl. Rep. 858; Cooper v. Davison, 86 Ala. 367, 5 So. Rep. 650; Second Nat. Bk. v. Yeatman, 53 Md. 443.

[4] Stroff v. Swafford, 81 Ia. 695, 74 N. W. Rep. 1023.

[5] See §§ 5, 6.

[6] Jaeger v. Kelley, 52 N. Y. 274. See Sherman v. Hogland, 73 Ind. 477; McFadden v. Mitchell, 54 Cal. 629; Mathews v. Reinhardt, 149 Ill. 635, 37 N. E. Rep. 85; Shober v. Wheeler, 113 N. C. 378, 18 S. E. Rep. 328; Bierne v. Ray, 37 W. Va. 571, 16 S. E. Rep. 804. See § 6.

eration, unless extremely gross,[1] does not *per se* prove fraud.[2] It must appear that the price was so manifestly inadequate as to shock the moral sense and create in the mind at once, upon its being mentioned, a suspicion of fraud[3] It is even considered that, in the absence of other evidence tending to show fraud, the court would not deem inadequacy of consideration sufficient to do so.[4] In North Carolina it has been declared by recent decisions that inadequacy of price, however gross, and whether considered alone or in connection with other suspicious badges, was only a circumstance tending to show fraud.[5]

Gordon, J., said: "Other things being fair and honest, mere inadequacy of price cannot, of itself, beget even a presumption of fraud, much less is it *per se* fraudulent."[6] Still, authority is abundant to the effect that where a creditor or purchaser obtains the property or estate of an insolvent debtor at a sacrifice or an under rate or value, there is a strong and even violent presumption of a fraudulent intent.[7] Thus, where a first lien for $1,200 on a farm worth $13,000, was transferred for a consideration

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[1] Archer v. Lapp, 12 Ore. 202, 6 Pac. Rep. 672; Dawson v. Niver, 19 S. C. 606; Lionberger v. Baker, 88 Mo. 454; Witherwax v. Riddle, 121 Ill. 145, 13 N. E. Rep. 545; Shay v. Wheeler, 69 Mich. 254, 37 N. W. Rep. 210; Mathews v. Reinhardt, 149 Ill. 635, 37 N. E. Rep. 85.

[2] Kempner v. Churchill, 8 Wall. 369. See Rouett v. Milner, 57 Mo. App. 50.

[3] Clark v. Krause, 2 Mackey (D. C.) 566. In Liming v. Kyle, 31 Neb. 649, 48 N. W. Rep. 470, it was held that a charge to the effect that if the defendant sold goods to pay his debts, the transaction should be upheld irrespective of the adequacy or inadequacy of the consideration, was erroneous. Conn. Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. Rep. 623.

[4] Emonds v. Termehr, 60 Iowa 92, 96, 14 N. W. Rep. 197. See Cavender v. Smith, 8 Iowa 360; Boyd v. Ellis, 11 Iowa 97.

[5] Bery v. Hall, 105 N. C. 154, 10 S. E. Rep. 903; Bank v. Gilmer, 116 N. C. 684, 22 S. E. Rep. 2. See Davis v. Getchell, 32 Neb. 792, 49 N. W. Rep. 776.

[6] Schatz v. Kirker, 4 East. Rep. (Pa.) 141, 144.

[7] See Shelton v. Church, 38 Conn. 420; Bartles v. Gibson, 17 Fed. Rep. 297; Brown v. Texas Cactus Hedge Co., 64 Tex. 400; Stern Auction & C. Co. v. Mason, 16 Mo. App. 477; Mertens v. Welsing, 85 Iowa 508, 52 N. W. Rep. 362; Sommermeyer v. Schwartz, 89 Wis. 66, 61 N. W. Rep. 311.

of $400, this was considered evidence of fraud which must be submitted to a jury.[1] Again it is more strongly stated in Davidson v. Little,[2] that "the sale of lands or goods by an indebted person for less than their value is *ipso facto* a fraud in both vendor and vendee."[3] Where the value was $7,700, and the estimated consideration $1,537, it was held to be conclusively fraudulent.[4] The difference was regarded as "so great as to shock the common sense of mankind, and furnish in itself conclusive evidence of fraud."[5] The question, however, is usually submitted to the consideration of a jury,[6] to determine the intent of the parties,[7] and is almost always linked with other circumstances or *indicia* of fraud.[8] Inadequacy of consideration is a fact calling for explanation, and is often treated as a badge of fraud.[9] Insufficiency of price and insolvency of a debtor, say the Supreme Court of California, may be circumstances more or less potential in the determination of fraud as a question of fact, but failure of consideration is not in itself sufficient to justify a court in finding fraud as matter of law.[10]

[1] Rhoads v. Blatt, 84 Pa. St. 32, 1 Am. Insolv. R. 45. A conveyance by a husband to his wife of property worth $5,000, subject to a mortgage of $1,000, and for a consideration of $1,000 additional, was set aside. Sandman v. Seaman, 84 Hun (N. Y.) 337, 32 N. Y. Supp. 338.

[2] 22 Pa. St. 252.

[3] See Doughten v. Gray, 10 N. J. Eq. 330.

[4] Wilson v. Jordan, 3 Woods 642. See Ratcliff v. Trimble, 12 B. Mon. (Ky.) 32; Borland v Mayo, 8 Ala. 104; Prosser v. Henderson, 11 Ala. 484.

[5] Hoot v. Sorrell, 11 Ala 400.

[6] Craver v. Miller, 65 Pa. St. 456.

[7] Motley v. Sawyer, 38 Me. 68.

[8] Hudgins v. Kemp, 20 How. 50.

[9] See Fisher v. Shelver, 53 Wis. 498, 10 N. W. Rep. 681; Williamson v. Goodwyn, 9 Gratt. (Va.) 503; Laidlaw v. Gilmore, 47 How. Pr. (N. Y.) 68; Hudgins v. Kemp, 20 How. 50; Fuller v. Brewster, 53 Md. 361; Delaware v. Ensign, 21 Barb. (N. Y.) 85; Ames v. Gilmore, 59 Mo. 537; Scott v. Winship, 20 Ga. 429; Apperson v. Burgett, 33 Ark. 338; Boyd v. Ellis, 11 Iowa 97; Barrow v. Bailey, 5 Fla. 9; Loring v. Dunning, 16 Fla. 119; Bickler v. Kendall, 66 Iowa 703, 24 N. W. Rep. 518; Douthitt v. Applegate, 33 Kan. 396, 6 Pac. Rep. 575; Easum v. Pirtle, 81 Ky. 563; Steere v. Hoagland, 39 Ill. 264; Stevens v. Dillman, 86 Ill. 233. See Metropolitan Bank v. Durant, 22 N. J. Eq. 35.

[10] McFadden v. Mitchell, 54 Cal. 629; Jamison v. King, 50 Cal. 133. See

§ 233. **Transfer pending suit.** — The transfer of all, or, according to some authorities, of a portion of a man's goods during the pendency of a suit against him is a mark of fraud.[1] One of the circumstances specified in Twyne's case[2] was that the "transfer was made pending the writ."[3] This fact usually induces the suspicion that the conveyance was made to secure the property from attachment or execution in the pending suit, and to hinder, delay, or defraud creditors.[4] This inference may, of course, be rebutted.[5] In Ray v. Roe *ex dem.* Brown,[6] the court said that the pendency of a suit was "one of the many badges of fraud" which would induce a court of equity to set aside a conveyance, or a jury to regard it as covinous. In Shean v. Shay[7] it is characterized as "only one of the badges." The court further said: "The deed may be shown to be fraudulent and void as to creditors when no suit was pending to recover the debt or damages when it was made."

Motley v. Sawyer, 38 Me. 68. In Day v. Cole, 44 Iowa 452, the court say that where the incumbrances upon realty, with the consideration paid for its conveyance, very nearly equal its reasonable value, the fact that the consideration is small does not constitute a badge of fraud.

[1] Redfield & Rice Mfg. Co. v. Dysart, 62 Pa. St. 63; Godfrey v. Germain, 24 Wis. 416; Babb v. Clemson, 10 S. & R. (Pa.) 424; Thompson v. Robinson, 89 Me. 53; Ford v. Johnston, 7 Hun (N. Y.) 568; United States v. Lotridge, 1 McLean 246; Thomas v. Pyne, 55 Iowa 348, 7 N. W. Rep. 576; Schaferman v. O'Brien, 28 Md. 565; Crawford v. Kirksey, 50 Ala. 590; Hartshorn v. Eames, 31 Me. 99; Soden v. Soden, 34 N. J. Eq. 115; Bean v. Smith, 2 Mason 252; Callan v. Statham, 23 How. 477; Stoddard v. Butler, 20 Wend. (N. Y.) 507; Booher v. Worrill, 57 Ga. 235; Stewart v. Wilson, 42 Pa. St. 450; King v. Wilcox, 11 Paige (N. Y.) 589; Cole v. Millerton Iron Co., 133 N. Y. 164, 30 N. E. Rep. 847; Gregory v. Gray, 88 Ga. 172, 14 S. E. Rep. 187; Dent v. Ferguson, 132 U. S. 50, 10 S. C. Rep. 13; Low v. Wortman, 44 N. J. Eq. 200, 7 Atl. Rep. 654, 14 Id. 586; Christie v. Bridgman, 51 N. J. Eq. 334, 25 Atl. Rep. 939, 30 Id. 429; Morris Canal & Banking Co. v. Stearns, 23 N. J. Eq. 416.

[2] 3 Rep. 80; 1 Smith's Lea. Cas. 33.

[3] See § 22.

[4] See Merrill v. Locke, 41 N. H. 490; Dorr v. Beck, 76 Hun (N. Y.) 540, 28 N. Y. Supp. 206.

[5] Sipe v. Earman, 26 Gratt. (Va.) 563. See Skipwith v. Cunningham, 8 Leigh (Va.) 271.

[6] 2 Blackf. (Ind.) 258.

[7] 42 Ind. 377.

The pendency of a suit is a warning to a dishonest debtor to make haste to alienate and cover up his assets. While the service of process in a suit does not usually create a lien upon the defendant's property, and the doctrine of *lis pendens* is limited in its application, yet transfers pending a suit are justly scanned with very great suspicion; and where it is certain that judgment would be rendered against the vendor, and evidence of inadequacy of consideration is adduced, the courts will conclude that the conveyance is colorable, and made with a view to hinder, delay, and defraud creditors.[1] Mr. May[2] states the rule to be that where the conveyance is made *pendente lite*, it is, "when coupled with other circumstance, suggestive of fraud, but where the consideration is adequate, not a strong mark of a fraudulent intention." This, however, can scarcely be regarded, under the American authorities, as giving this important element of proof its proper weight.

§ 234. **Evidence of secrecy.**—An unusual degree of secrecy observed between the parties in the making of the sale is a badge of fraud;[3] and the secret removal of the property immediately after the sale indicates a dishonest purpose.[4] Circumstances indicative of concealment, or of a design to give a man the appearance of possessing property which he does not own, are evidences of fraud, and are

[1] Jaffers v. Aneals, 91 Ill. 487, 493.

[2] May's Fraudulent Conveyances, p. 83.

[3] Fishel v. Ireland, 52 Ga. 632; Stewart v. Mills Co. Nat. Bk., 76 Iowa 571, 41 N. W. Rep. 318. See Callan v. Statham, 23 How. 480; Corlett v. Radcliffe, 14 Moo. P. C. 140. In Davis v. Schwartz, 155 U. S. 642, 15 S. C. Rep. 237, the court says: "The fact that goods were spirited away from the store on Sunday night would undoubtedly assume a serious importance were it shown to have been done directly or indirectly for the benefit of Schwartz; but the goods seem to have been taken away in a sleigh by some of the clerks, who took this method of paying themselves for the amounts due them for wages. * * * There is no evidence to connect either Schwartz or the mortgagees with it."

[4] Delaware v. Ensign, 21 Barb. (N. Y.) 88.

proper for a jury to weigh.[1] Secrecy "is a circumstance connected with other facts from which fraud may be inferred."[2] An agreement, however, to conceal the fact of a purchase is not *per se* fraudulent, but is merely matter of evidence in favor of avoiding the sale, which, although perhaps very strong, is still capable of explanation.[3] In Haven v. Richardson,[4] the court said: "Secrecy is not of itself evidence of fraud. It is likely to accompany fraud, and may give force to other evidence, under particular circumstances." Thus it is held in Massachusetts that an arrangement or understanding in regard to withholding mortgages from record until the mortgagors should have trouble, did not render the mortgages void, but was a matter entitled to consideration by the jury in passing upon the question of fraud at common law.[5] On the other hand, an agreement that the transaction is to be kept secret until the debtor has an opportunity of escaping beyond the reach of process issued by his other creditors, or by which the deed is not to be offered for record until the other creditors threaten suit, will render it fraudulent.[6] Secrecy in such cases is a part of the considera-

[1] Ross v. Crutsinger, 7 Mo. 249; Dobson v. Snider, 70 Fed. Rep. 10.

[2] Warner v. Norton, 20 How. 460. In Small v. Small, 56 Kan. 8, 9, 42 Pac. Rep. 323, the court says: "Secrecy is often called a badge of fraud, but it is not fraud itself. If a man's disposition of his property is fair and lawful, the concealment of the transaction cannot render it fraudulent."

[3] Gould v. Ward, 4 Pick. (Mass.) 104; Day v. Goodbar, 69 Miss. 687, 12 So. Rep. 30.

[4] 5 N. H. 127. See Blennerhassett v. Sherman, 105 U. S. 117.

[5] Folsom v. Clemence, 111 Mass. 277. See Thouron v. Pearson, 29 N. J. Eq. 487; Greer v. O'Brien, 36 W. Va. 277, 15 S. E. Rep. 74; Reynolds v. Gawthrop, 37 W. Va. 3, 16 S. E. Rep. 364; White v. Benjamin, 3 Misc. (N. Y.) 490, 23 N. Y. Supp. 981. But where there is no evidence that any one was induced to give credit to the grantor on the faith of his apparent ownership, the failure to promptly register the deed was held to be of no importance. Nadal v. Britton, 112 N. C. 180, 16 S. E. Rep. 914. See Insurance Co. v. Shoemaker, 95 Tenn. 72, 31 S. W. Rep. 270. The presumption of fraud arising from failure to record is overcome by proof that the grantee was an alien, ignorant of the fact that registration was required. Tryon v. Flournoy, 80 Ala. 321.

[6] See Hutchinson v. First Nat. Bk., 133 Ind. 284, 30 N. E. Rep. 952; Blen-

tion; the transaction is contaminated by it, and ought not to be regarded as *bona fide*.[1]

§ 234a. Secret trust.—Of course, any form of a secret trust originating from the property of and created or reserved for the benefit of the debtor, vitiates the transfer as to creditors[2] entitled to attack it.[3]

§ 235. Suppression or concealment—Not recording—Subsequent fraud.—As long ago as the case of Hungerford v. Earle,[4] it was held that, "a deed not at first fraudulent may afterwards become so by being concealed, or not pursued, by which means creditors are drawn in to lend their money." This doctrine has been repeatedly recognized and reaffirmed in different forms in State and Federal tribunals.[5] In Coates v. Gerlach[6] it appeared that a deed of land had been made by a husband directly to his wife. The deed was dated March 23, 1857, but was not filed for record until December 2, 1857, over eight months

nerhasset v. Sherman, 105 U. S. 100; Hilliard v. Cagle, 46 Miss. 309; Stock Growers' Bk. v. Newton, 13 Col. 245, 22 Pac. Rep. 444; Putnam v. Reynolds, 44 Mich 113, 6 N. W. Rep. 198; Folsom v. Clemence, 111 Mass. 273; Stewart v. Hopkins, 30 Ohio St. 502; Dickson v. McLarney, 97 Ala. 383, 12 So. Rep. 398.

[1] Hafner v. Irwin, 1 Ired. (N. C.) Law, 499. Mr. May regards secrecy as always evidence, but not of itself conclusive evidence of fraud. May's Fraudulent Conveyances, p. 83. See Griffin v. Stanhope, Cro. Jac. 454; Worseley v. Demattos, 1 Burr. 467; Leonard v. Baker, 1 M. & S. 251; Corlett v. Radcliffe, 14 Moo. P. C. 139.

[2] Bostwick v. Blake, 145 Ill. 85, 34 N. E. Rep. 38; Plimpton v. Goodell, 143 Mass. 367, 9 N. E Rep. 791; Plunkett v. Plunkett, 114 Ind. 484, 16 N. E. Rep. 612, 17 Id. 562; Pattison v. Letton, 56 Mo. App. 331; Vietor v. Levy, 72 Hun (N. Y.) 263, 25 N. Y. Supp. 644.

[3] It was not regarded as a secret trust as to subsequent creditors for a debtor to provide a home for his family by a conveyance, through a third person, to his wife, but this case is certainly on the border line. Edgerly v. First Nat. Bk., 30 Ill. App. 425.

[4] 2 Vern. 261.

[5] Hildreth v. Sands, 2 Johns. Ch. (N. Y.) 35; Scrivenor v. Scrivenor, 7 B. Mon. (Ky) 374; Bank of the U. S. v. Housman, 6 Paige (N. Y.) 526; Beecher v. Clark, 12 Blatchf. 256; Blennerhassett v. Sherman, 105 U. S. 100; Coates v. Gerlach, 44 Pa. St. 43; Hafner v. Irwin, 1 Ired. (N. C.) Law 490; Blackman v. Preston, 24 Ill. App. 240. See Hildeburn v. Brown, 17 B. Mon. (Ky.) 779; Thouron v. Pearson, 29 N. J. Eq. 487; Stewart v. Hopkins, 30 Ohio St. 502.

[6] 44 Pa. St. 43, 46.

thereafter. On January 21, 1858, the husband, professing to act as the agent of the wife, effected a sale of the lands to a third party. The creditors of the husband attached the moneys in the hands of the vendees, and a contest arose as to which had the better right to the proceeds of the sale. Touching this controversy, Strong, J., said: "There is another aspect of this case, not at all favorable to the claim of the wife. It is that she withheld the deed of her husband from record until December 2, 1857. In asking that a deed void at law should be sustained in equity, she is met with the fact that she asserted no right under it; in fact, concealed its existence until after her husband had contracted the debts against which she now seeks to set it up. There appears to have been no abandonment of possession by the husband. . . . . Even if the deed was delivered on the day of its date, the supineness of the wife gave to the husband a false credit, and equity will not aid her at the expense of those who have been misled by her laches."[1] In Blennerhassett v. Sherman,[2] Woods, J., in delivering the unanimous opinion of the United States Supreme Court, observed: "But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit, actively conceals the mortgage which covers his entire estate and withholds it from the record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to

[1] See McWilliams v. Rodgers, 56 Ala. 87.

[2] 105 U. S. 117; Sauer v. Behr, 49 Mo. App. 86; Wafer v. Harvey Co. Bk., 46 Kan. 598, 26 Pac. Rep. 1032. See Sternbach v. Leopold, 50 Ill. App. 476; Baker v. Pottle, 48 Minn. 479, 51 N. W. Rep. 383; Dobson v. Snider, 70 Fed Rep. 11. In the latter case it is said that forgetfulness may be accepted as an excuse for failure to record. In Jaffrey v. Brown, 29 Fed. Rep. 481, the court said: "The mortgages to all the relatives of the defaulting firm . . . . were recorded October 14th, three days before the assignment. The suppression of these mortgages until this critical moment is a badge of fraud as to creditors, and they will be denied validity and effectiveness as liens upon the property of debtors."

give him credit, and he fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor."[1] But there must be some evidence of a preconcerted and contrived purpose to deceive and defraud the other creditors[2] of the mortgagor, of which scheme the withholding of the instrument from the record constitutes a part. The non-filing of the deed is a circumstance to be considered on the question of fraud.[3] It is said in Curry v. McCauley:[4] "When the mortgage was executed and delivered nothing further was necessary to its validity as a complete transaction. It has, therefore, been held in Pennsylvania, by a long series of decisions, that, as between the parties, a mortgage takes effect upon delivery, and that an unrecorded mortgage is good against an assignee for the benefit of creditors." So it is decided that new creditors cannot follow the proceeds of a sale of property made under the undisclosed security.[5]

§ 236. **Evidence aliunde.**—In a controversy which arose in Mississippi[6] it was decided that a deed of trust in the

[1] In cases where the statute requires that a deed should be recorded within a certain period, and the grantee neglects so to record it, a creditor of the grantor may pursue the ostensible title of the grantor, even though it may not be the real title of the debtor. Nelson v. Henry, 2 Mackey (D. C.) 259. The creditor must not, however, lose sight of the general rule that a judgment is not usually good against an unrecorded conveyance. If the conveyance is made with a fraudulent design the mere recording of it will not make it valid. Carver v. Barker, 73 Hun (N. Y.), 418, 26 N. Y. Supp. 919.

[2] See Hegeler v. First Nat. Bk., 129 Ill. 157, 21 N. E. Rep. 812; State Sav. Bank v. Buck, 123 Mo. 153, 27 S. W. Rep. 341; Second Nat. Bk. v. Merrill, 81 Wis. 142, 50 N. W. Rep. 503; Tryon v. Flournoy, 80 Ala. 321.

[3] Day v. Goodbar, 69 Miss. 690, 12 So. Rep. 30; Klein v. Richardson, 64 Miss. 41, 8 So. Rep. 204; Dobson v. Snider, 70 Fed. Rep. 11; Stock Growers' Bank v. Newton, 13 Col. 256; Haas v. Sternbach, 156 Ill. 44, 41 N. E. Rep. 51; Mull v. Dooley, 89 Iowa 312, 56 N. W. Rep. 513.

[4] 20 Fed. Rep. 584.

[5] W. O. Tyler Paper Co. v. Orcutt-Killick Lith. Co., 35 Ill. App. 502; Field v. Ridgely, 116 Ill. 424, 6 N. E. Rep. 156.

[6] Hilliard v. Cagle, 46 Miss. 309.

nature of a mortgage, valid on its face, and not made or received with any intent to defeat existing or future creditors, may nevertheless be held to be fraudulent and void as to all creditors, existing and future, by evidence *aliunde* showing the conduct of the parties in their dealings in reference to the deed. The principal circumstances relied on in this case to avoid the deed were the facts that the grantor retained possession of the property, and that the deed was withheld from record. This enabled the mortgagor to contract debts upon the presumption that the property was unincumbered. The court said: "The natural and logical effect of the agreement and assignment, and the conduct of the parties thereto, was to mislead and deceive the public, and induce credit to be given to Baggett [the mortgagor], which he could not have obtained if the truth had been known, and therefore the whole scheme was fraudulent as to subsequent creditors, as much so as if it had been contrived with that motive and for that object."[1]

§ 237. **Concealment in fraud of bankrupt act.**—In Blennerhassett v. Sherman,[2] a very important case, reviewing the authorities concerning suppression and concealment of transfers, the court held that a mortgage executed by an insolvent debtor with intent to give a preference to his creditors, was void under the bankrupt act. It appeared

[1] See Gill v. Griffith, 2 Md. Ch. Dec. 270. In this case the court decided that a party could not be permitted to take for his own security a bill of sale or mortgage of chattels from another, leaving the mortgagor at his request in possession and ostensibly the owner, and keep the public from a knowledge of the existence of the mortgage by withholding it from record for an indefinite period, renewing it periodically, and then receiving the benefit of the security by placing the last renewal upon record, to the prejudice of the other creditors who had trusted the debtor on the strength of the possession and ostensible ownership of the mortgaged property. The mortgage which was in controversy was declared void, and the decree was affirmed on appeal. See, further, Hafner v. Irwin, 1 Ired. (N. C.) Law 490; Worseley v. Demattos, 1 Burr. 467; Tarback v. Marbury, 2 Vern. 510; Neslin v. Wells, 104 U. S. 428.

[2] 105 U. S. 100–121.

that the creditor had reasonable grounds to believe the mortgagor insolvent, and knew that the instrument was made in fraud of the provisions of the bankrupt act; and that the mortgagee had, for the purpose of evading the bankrupt law, actively concealed the existence of the instrument, and withheld it from record for a period of more than two months. The security was avoided, notwithstanding it was executed over two months before the filing of the petition in bankruptcy.[1]

§ 238. **Absolute conveyance by way of security.** — It is familiar learning that a deed absolute on its face may, despite the statute of frauds, be shown by extrinsic evidence to be a mortgage,[2] and that the relationship of mortgagee and mortgagor with all the usual incidents may thus be established. If, however, the transfer was not devised by the debtor to defraud or delay his creditors, or if it was so designed, and the trustee or mortgagee afforded no aid in carrying out the intention of the principal, the transaction is valid,[3] though perhaps open to suspicion.[4] A conveyance by way of security must be in all respects as clean and clear as a conveyance for perma-

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[1] The repeal of the Federal Bankrupt Act renders unimportant the consideration of cases arising exclusively under its provisions.

[2] Horn v. Keteltas, 46 N. Y. 605; Carr v. Carr, 52 N. Y. 251; Murray v. Walker, 31 N. Y. 399; McBurney v. Wellman, 42 Barb. (N. Y.) 390; *sub nomine* Dodge v. Wellman, 43 How. Pr. (N. Y.) 427; Odell v. Montross, 68 N. Y. 499; Hassam v. Barrett, 115 Mass. 256; Henley v. Hotaling, 41 Cal. 22; Sedg. and Wait on Trial of Title to Land, 2d ed., § 337; Gay v. Hamilton, 33 Cal. 686; French v. Burns, 35 Conn. 359; Clark v. Finlon, 90 Ill. 245; Butcher v. Stultz, 60 Ind. 170; McCarron v. Cassidy, 18 Ark. 34; Kitts v. Wilson, 130 Ind. 492, 29 N. E. Rep. 401; Wright v. Mahaffey, 76 Iowa 96, 40 N. W. Rep. 112; Kemp v. Small, 32 Neb. 318, 49 N. W. Rep. 169.

[3] Stevens v. Hinckley, 43 Me. 441; Reed v. Woodman, 4 Me. 400; First Nat. Bank v. Jaffray, 41 Kan. 694, 21 Pac. Rep. 242; Carey-Halliday Lumber Co. v. Cain, 70 Miss. 628, 13 So. Rep. 239; Beidler v. Crane, 135 Ill. 92, 25 N. E. Rep. 655; Ruse v. Bromberg, 88 Ala. 620, 7 So. Rep. 384. See Pattison v. Letton, 56 Mo. App. 325.

[4] Smith v. Onion, 19 Vt. 429.

nent ownership.[1] If no fraud was in fact intended, the security may be enforced;[2] but if the debtor made a secret reservation,[3] or the creditor comes into court with a fraudulent claim of an absolute title,[4] other creditors may avoid the transaction.[5] Williams, Ch. J., said in Barker v. French:[6] "Although it is true that a person may take security for a debt by a deed absolute, or by a bill of sale, when it was intended for security, yet there should be no disguise, nor dissembling, nor falsehood; and if the party claims an absolute purchase when the sale was only intended for security, and thereby seeks to protect from the creditors the property of the vendor, and endeavors to conceal the true nature of the transaction, it is evidence of fraud." Probably the weight of the better authority and the sounder reasoning is to the effect that an absolute conveyance by way of security is a badge of fraud as regards creditors which may be removed by evidence of an honest intent.[7] It may be noted with refer-

[1] Phinizy v. Clark, 62 Ga. 623–627: Palmour v. Johnson, 84 Ga. 100, 10 S. E. Rep. 500.

[2] Gaffney's Assignee v. Signaigo, 1 Dill. 158; Chickering v. Hatch, 3 Sumner 474; Smith v. Onion, 19 Vt. 427.

[3] Lukins v. Aird, 6 Wall. 78. See Oriental Bank v. Haskins, 3 Metc. (Mass.) 332.

[4] Thompson v. Pennell, 67 Me. 162.

[5] The law is settled in Alabama that an absolute conveyance of lands intended as security for a debt, or, in other words, designed to operate as a mortgage, is fraudulent and void as to existing creditors. The court say that the parties may not intend fraud, there may be no actual intent to hinder, delay, or defraud creditors, yet, because such is its inevitable consequence, the law condemns it. Sims v. Gaines, 64 Ala. 396. See Bryant v. Young, 21 Ala. 264; Hartshorn v. Williams, 31 Ala. 149. To the same general effect, see Ladd v. Wiggin, 35 N. H. 426, and cases cited. Compare Prescott v. Hayes, 43 N. H. 593; Chenery v. Palmer, 6 Cal. 122.

[6] 18 Vt. 460; Spence v. Smith, 34 W. Va. 697, 12 S. E. Rep. 828.

[7] Ross v. Duggan, 5 Col. 85, 100; Stevens v. Hinckley, 43 Me. 440; Emmons v. Bradley, 56 Me. 333; Moore v. Roe, 35 N. J. Eq. 90. See Gibson v. Seymour, 4 Vt. 522; Columbia Bank v. Jacobs, 10 Mich. 349; Harrison v. Trustees of Phillips Academy, 12 Mass. 456; McClure v. Smith, 14 Col. 299, 23 Pac. Rep. 786; Fuller v. Griffith, 91 Iowa 632, 60 N. W. Rep. 247, citing the text; Stratton v. Putney, 63 N. H. 577, 4 Atl. Rep. 876; Watkins v. Arms, 64 N. H. 99, 6 Atl. Rep. 92. In Connecticut a deed intended as a mortgage is not valid against attaching creditors, the defeasance not being recorded. Ives v. Stone, 51 Conn. 446.

ence to the law upon this subject, that an absolute conveyance by way of security affords a convenient and tempting cover for fraud upon creditors, and the tendency to regard transactions of this kind with suspicion should be encouraged. Where the security is corrupted with fraud, not only can creditors secure it to be avoided,[1] but, as is elsewhere shown, the parties themselves can get no relief,[2] and in some courts a disposition is manifested to declare void as to creditors absolute conveyances taken as security.[3] Certainly such conveyances are calculated to mislead creditors.

§ 238a. Excess of property mortgaged. — The United States Supreme Court recently declared that it was not even a badge of fraud that a mortgage was made to cover more property than would secure the debt due.[4] In Downs v. Kissam,[5] Mr. Justice McLean said: "It is no badge of fraud for a mortgage, which is a mere security, to cover more property than will secure the debt due. Any creditor may pay the mortgage debt, and proceed against the property." But the cases upon this feature of the law are not entirely in harmony, and the taking of greater security than is needed is a circumstance that is often considered,[6] in connection with other facts as bearing upon the intent and good faith of the parties.

[1] Jones v. Light, 86 Me. 437, 30 Atl. Rep. 71.

[2] Hassam v. Barrett, 115 Mass. 258.

[3] Beidler v. Crane, 135 Ill. 98, 25 N. E. Rep. 655.

[4] Davis v. Schwartz, 155 U. S. 641, 15 S. C. Rep. 237. See McKinney v. Wade, 43 Mo. App. 152; Colbern v. Robertson, 80 Mo. 541; Grand Island Banking Co. v. Costello, 45 Neb. 139, 63 N. W. Rep. 376.

[5] 10 How. 108.

[6] See McKinney v. Wade, 43 Mo. App. 152; Lycoming Rubber Co. v. King, 90 Iowa 345, 57 N. W. Rep. 864; Smith v. New York Life Ins. Co. 57 Fed. Rep. 133; Smith v. Boyer, 29 Neb. 76, 45 N. W. Rep. 265; Thompson v. Richardson Drug Co., 33 Neb. 714, 50 N. W. Rep. 948; Showman v. Lee, 86 Mich. 556, 49 N. W. Rep. 578; Hardt v. Heidweyer, 152 U. S. 547, 14 S. C. Rep. 671; Kilpatrick-Koch D. G. Co. v. Strauss, 45 Neb. 793, 64 N. W. Rep. 223; Clinton Hill Lumber & Mfg. Co. v. Strieby, 52 N. J. Eq. 576, 29 Atl. Rep. 589.

§ 239. **Insolvency.** — Insolvency, as we have seen, does not deprive the owner of the power to sell or mortgage his property[1] to pay or secure his debts, whether to one or more of his creditors.[2] Indebtedness or hopeless insolvency is, however, an important element of proof in marshalling badges of fraud to overturn a covinous transaction.[3] The distinction between the right of existing and subsequent creditors which, of course, has an important bearing upon this subject,[4] is elsewhere considered. The conveyance, to be fraudulent, should bear such a ratio to the indebtedness as to tend directly to defeat the claims of creditors.[5] It is not necessary that the conveyance should leave the grantor entirely without property, but the amount transferred and the part retained are all circumstances to be weighed.[6] A heavy indebtedness of the grantor, together with a sale to a relative, of necessity form strong badges or indications of collusion and fraud,[7] but are not in themselves, unsupported by other material facts, deemed conclusive proofs of fraud.[8] Again, it is said that insolvency of the grantor, although a circumstance which may be taken, together with other

[1] Singer v. Goldenburg, 17 Mo. App. 549; Sanger v. Colbert, 84 Tex. 668, 19 S. W. Rep. 863.

[2] Crawford v. Kirksey, 50 Ala. 591; Stover v. Herrington, 7 Ala. 142; Samuel v. Kittenger, 6 Wash. 261, 33 Pac. Rep. 509. See §§ 52, 95. Insolvency of a corporation does not necessarily entitle stockholders to secure a receiver. Denike v. N. Y. & Rosendale L &. C. Co., 80 N. Y. 599. Wait on Insolv. Corps. § 178.

[3] Hudgins v. Kemp, 20 How. 45; McRea v. Branch Bank of Alabama, 19 How. 377; Bibb v. Baker, 17 B. Mon. (Ky.) 292; Bulkley v. Buffington, 5 McLean 457; Purkitt v. Polack, 17 Cal. 327; Hartshorn v. Eames, 31 Me. 93; Ringgold v. Waggoner, 14 Ark. 69; Blodgett v. Chaplin, 48 Me. 322; Clark v. Depew, 25 Pa. St. 509; Barrow v. Bailey, 5 Fla. 9. Compare Cox v. Fraley, 26 Ark. 20; State *ex rel.* Peirce v. Merritt, 70 Mo. 277; Fuller v. Brewster, 53 Md. 358; Earnshaw v. Stewart, 64 Md. 513, 2 Atl. Rep. 734.

[4] See Chaps. V, VI.

[5] Clark v. Depew, 25 Pa. St. 509.

[6] Citizens' Nat. Bank v. Hodges, 80 Hun (N. Y.) 471, 30 N. Y. Supp. 445; Kain v. Larkin, 141 N. Y. 144, 36 N. E. Rep. 9; cf., Phillips v. Kesterson, 154 Ill. 572, 39 N. E. Rep. 599.

[7] Mertens v. Welsing, 85 Iowa 508, 52 N. W. Rep. 362.

[8] Merrill v. Locke, 41 N. H. 490.

material facts, to show a fraudulent design in disposing of property, is not regarded as sufficient of itself to establish it.[1] The sale of all the effects of an insolvent copartnership upon credit at a fair valuation, to a responsible vendee, who knew of the insolvency, is not *per se* fraudulent;[2] nor does proof of a sale upon credit, by a party in failing circumstances, to one who had knowledge of these circumstances, necessarily establish fraud.[3]

§ 240. Sales upon credit. — It must be remembered that every delay to which a creditor is subjected in the collection of his debt is not necessarily fraudulent.[4] Insolvency, as is elsewhere shown, does not deprive a debtor of the right to sell his property;[5] and if the sale is made in good faith, and without any intent to hinder, delay, or defraud creditors, the mere fact that it was made upon credit does not require that it should be declared invalid.[6] The court, in Roberts v. Shepard, said:[7] "A sale upon credit of part of their property, by an insolvent firm, is a circumstance which may be considered, with others, bearing upon the question of fraudulent intent, but alone does not necessarily establish it." Certainly it will not do to say that the law presumes that every man who sells on credit does so with intent to hinder and delay his creditors.[8] In Ruhl v. Phillips,[9] the New York Commission of Appeals, reversing the court below,[10] held that the sale of the entire effects of an insolvent copartnership at a fair valuation, upon a credit ranging from four to twenty-four months, to a responsible vendee, having

[1] Leffel v. Schermerhorn, 13 Neb. 342.

[2] Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522.

[3] Loeschigk v. Bridge, 42 N. Y. 421.

[4] Loeschigk v. Bridge, 42 Barb. (N. Y.) 173: affi'd 42 N. Y. 421.

[5] See § 52. Beasley v. Bray, 98 N. C. 266, 3 S. E. Rep. 497.

[6] Beasley v. Bray, 98 N. C. 266, 3 S. E. Rep. 497.

[7] 2 Daly (N. Y.) 112.

[8] Gillet v. Phelps, 12 Wis. 399.

[9] 48 N. Y. 125.

[10] 2 Daly (N. Y.) 45.

knowledge of the insolvency, was not fraudulent *per se*. In the New York Court of Appeals[1] the principle is enunciated that the mere fact of a sale of his property by a party in failing circumstances, to a purchaser having knowledge of his condition, upon an average credit of sixteen months, did not *per se* establish fraud, or an intent to hinder or delay creditors.[2] Where, however, it appears upon the face of the transaction that the parties contemplated a large surplus, and the property is practically protected from forced sales or attachments or levies for two years, the instrument will be declared void as hindering and delaying creditors.[3] A sale upon a long credit to an irresponsible purchaser with no security is declared in Tennessee to be a badge of fraud.[4] So in Texas a sale on an indefinite credit is a badge.[5]

§ 241. **Unusual acts and transactions.** — Courts and juries are often influenced in favor of creditors by slight circumstances connected with the transaction indicating excessive efforts to give the conveyance the appearance of fairness,[6] or by facts which are not the usual attendants of business transactions.[7] Honesty requires no stratagem or subterfuge to support and aid it.[8] In Adams v. Davidson[9] the assignee took a fellow-clerk with him to witness an attempted transfer of possession, and requested him to "pay attention and recollect what he heard." The court were plainly influenced by the evi-

[1] Loeschigk v. Bridge, 42 N. Y. 421.

[2] Compare Brinley v. Spring, 7 Me. 241; Harris v. Burns, 50 Cal. 140; Lewis v. Caperton, 8 Gratt. (Va.) 148.

[3] Bigelow v. Stringer, 40 Mo. 195. Compare Reynolds v. Crook, 31 Ala. 634; Jacobs v. Totty, 76 Tex. 343, 13 S. W. Rep. 372.

[4] Robinson v. Frankel, 85 Tenn. 484, 3 S. W. Rep. 652.

[5] Jacobs v. Totty, 76 Tex. 343, 13 S. W. Rep. 372.

[6] Hart v. Sandy, 39 W. Va. 644, 20 S. E. Rep. 665.

[7] Stevens v. Pierce, 147 Mass. 510, 18 N. E. Rep. 411; Danjean v. Blackeeter, 13 La. Ann. 597; Peabody v. Knapp, 153 Mass. 242, 26 N. E. Rep. 696.

[8] Comstock v. Rayford, 20 Miss. 391.

[9] 10 N. Y. 309, 312.

dence of this request, and observed that it was wholly unnecessary if the parties intended to comply with the exactions of good faith in taking and holding possession of the property assigned. To a similar effect is the case of Hartshorn v. Eames.[1] In that case the court said that there was no indication of great formality in transacting business between the parties, except on the occasion in question, when great precision was resorted to; an accurate calculation and valuation gone into, and the claim of the grantee made to overbalance the valuation. These with other facts led the court to believe that the transaction resembled a farce rather than a *bona fide* transaction. Painstaking legal formalities may be a badge of fraud.[2] Again it is said that "*bona fide* transactions do not need to be clothed with the extraordinary pretense of prompt payment."[3] In Langford v. Fly[4] the deed of gift contained this clause: "Now this indenture is not to hinder or delay the collection of any of my just debts, but the same are to be paid." A suit for slander was pending at the time. The court said that this clause was evidently the result of a consciousness on the part of the assignor that others might think the deed was made with a fraudulent design, and, as he was otherwise free from debt, it indicated that his purpose in making the transfer was to defeat the judgment which might possibly be recovered in the action for slander.[5] "Studied formality and apparent fairness" will not save a fraudulent

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[1] 31 Me. 100.

[2] Higgins v. Spahr, 145 Ind. 167, 43 N. E. Rep. 11.

[3] King v. Moon, 42 Mo. 551, 561; Hart v. Sandy, 39 W. Va. 644, 20 S. E. Rep. 665.

[4] 7 Humph. (Tenn.) 587.

[5] In Mead v. Noyes, 44 Conn. 491, "the parties took the precaution to go through with the formality of procuring, executing and delivering a bill of sale of the property; conduct unusual in respect to property of this character where the sale is honestly made." This was regarded as one of the circumstances attending the sale which tended strongly to show the existence of actual fraud.

transaction.[1] In Crawford v. Kirksey[2] it was contended by counsel that very great and unusual particularity furnished badges of fraud.[3] The court observed that if the transaction was consummated quietly and without witnesses, then the complaint would be that it was secretly effected. If unusual publicity or particularity characterized the transaction, this would be urged as a badge of fraud. This, it was said, savored of the water test which in former years was applied to those suspected of witchcraft. If they sank they were innocent, but they incurred great hazard of losing their lives by drowning; if they swam they were adjudged witches and perished at the stake.

It may be observed that the absence of memoranda, or of any record of the consideration;[4] the failure to take an account of the stock and no agreement as to the exact terms of settlement;[5] a false admission of the receipt of the consideration;[6] unusual clauses in the instrument;[7] giving the vendee power to prefer other creditors to the

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[1] First Nat. Bank v. Knowles, 67 Wis. 385, 28 N. W. Rep. 225.

[2] 55 Ala. 300.

[3] The facts in Lake v. Morris, 30 Conn. 204, afford illustration of the general subject. The vendee was in actual possession of the property purchased. Hence counsel contended that the sale was void because there had been no actual delivery of possession. The court, in overruling the argument, said: "No such delivery could have taken place without first taking the horses from the plaintiff's possession for the mere purpose of redelivering them to him again. But a merely formal act like this we presume would never occur between parties whose only object was to place the purchased property in the hands of the purchaser for his use. The act, therefore, would rather be evidence of caution, like the direction sometimes given to scriveners to draw up strong writings, which, to say the least, would furnish as much ground to suspect the honesty of a transaction as it would evidence of its *bona fides*."

[4] Hubbard v. Allen, 59 Ala. 300; Alexander v. Todd, 1 Bond 179; McCarty v. Fletcher, 12 Wash. 244, 40 Pac. Rep. 939.

[5] Wheelden v. Wilson, 44 Me. 20; Frisk v. Reigelman, 75 Wis. 499, 43 N. W. Rep. 1117, 44 Id. 766.

[6] Alexander v. Todd, 1 Bond 180; Balto. & O. R. R. Co. v. Hoge, 34 Pa. St. 214; Watt v. Grove, 2 Sch. & Lef. 501.

[7] Pilling v. Otis, 13 Wis. 496; Gibbs v. Thompson, 7 Humph. (Tenn.) 179.

extent of the surplus;[1] a sale to a creditor without a surrender of the evidence of indebtedness;[2] a sale not conducted in the "usual and ordinary course of business;[3] conduct of the parties which is "exceptional and peculiar;"[4] a conveyance of real estate without adequate security;[5] a sale of a horse on the Sabbath without trying the same;[6] absence of authentic evidence of indebtedness, considerable in amount, other than a pencil memorandum;[7] contradictory and irreconcilable accounts of the transaction given by the vendor and vendee;[8] receiving the rents and managing the estate by the vendor after the alleged sale,[9] under an assumed agency from the vendee, but without any evidence of a genuine agency other than the uncorroborated assertion of the party;[10] absence of means in the vendee;[11] preparation of the deed at the sole instance of the grantee;[12] leaving the business sign the same;[13] continuing to act as owner,[14] employment of the vendor after the sale;[15] sacrificing

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[1] Seger's Son v. Thomas Bros., 107 Mo. 643, 18 S. W. Rep. 33; Barnum v. Hempstead, 7 Paige (N. Y.) 568.

[2] Gardner v. Broussard, 39 Tex. 372; Webb v. Ingham, 29 W. Va. 389, 1 S. E. Rep. 816.

[3] State *ex rel.* Peirce v. Merritt, 70 Mo. 283; Snell v. Harrison, 104 Mo. 158, 16 S. W. Rep. 152; Godfrey v. Miller, 80 Cal. 420, 22 Pac. Rep. 290.

[4] Brinks v. Heise, 84 Pa. St. 253; Gollober v. Martin, 33 Kan. 255, 6 Pac. Rep. 267; Hart v. Sandy, 39 W. Va. 644, 657, 20 S. E. Rep. 665.

[5] Owen v. Arvis, 26 N. J. Law 32.

[6] Godfrey v. Miller, 80 Cal. 420, 22 Pac. Rep. 290.

[7] Brinks v. Heise, 84 Pa. St. 253.

[8] Marshall v. Green, 24 Ark. 419.

[9] Banner v. May, 2 Wash. St. 221, 26 Pac. Rep. 248; Mertens v. Welsing, 85 Iowa 510, 52 N. W. Rep. 362.

[10] Sands v. Codwise, 4 Johns. (N. Y.) 536.

[11] Danby v. Sharp, 2 MacAr. (D. C.) 435; Stevens v. Dillman, 86 Ill. 233. See Castle v. Bullard, 23 How. 186. In Morford v. Dieffenbacker, 54 Mich. 593, 607, 20 N. W. Rep. 600, Cooley, C. J., said: "A sale to a person without means, when ready money was the nominal purpose, must necessarily be suspicious."

[12] Sears v. Shafer, 1 Barb. (N. Y.) 408.

[13] Danby v. Sharp, 2 MacAr. (D. C.) 435; Wright v. McCormick, 67 Mo 430.

[14] Second Nat. Bk. v. Yeaton, 53 Md. 443.

[15] McKibbin v. Martin, 64 Pa. St. 352; Hurlburd v. Bogardus, 10 Cal. 518; Rothgerber v. Gough, 52 Ill. 438. See Bird v. Andrews, 40 Conn. 542.

property for one-fourth of its value;[1] deeding property to relatives without their knowledge;[2] concealment;[3] absence of evidence which is supposed to be within the reach of the party charged with the fraudulent act;[4] vague and partial explanations;[5] taking goods in excess of a debt;[6] neglect to testify;[7] or to offer explanation;[8] destruction of letters relating to the controversy;[9] tendering security without solicitation;[10] transferring

[1] Stevens v. Dillman, 86 Ill. 235; Frisk v. Reigelman, 75 Wis. 499, 43 N. W. Rep. 1117, 44 Id. 766.

[2] Lavender v. Boaz, 17 Ill. App. 421; Omaha Hardware Co. v. Duncan, 31 Neb. 217, 47 N. W. Rep. 846.

[3] Hoffer v. Gladden, 75 Ga. 538.

[4] Newman v. Cordell, 43 Barb. (N. Y.) 448-461; Peeblee v. Horton, 64 N. C. 374.

[5] Smith v. Brown, 34 Mich. 455; Helms v. Green, 105 N. C. 252, 11 S. E. Rep. 470.

[6] McVeagh v. Baxter. 82 Mo. 518; Hart v. Sandy, 39 W. Va. 644, 657, 20 S. E. Rep. 665.

[7] Graham v. Furber, 14 C. B 410; Goshorn v. Snodgrass, 17 W. Va. 770; Conn. Mutual Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. Rep. 623; Ham v. Gilmore, 7 Misc. (N. Y.) 596, 59 N. Y. St. Rep. 291, 28 N. Y. Supp. 126; Throckmorton v. Chapman, 65 Conn. 454, 32 Atl. Rep. 930; Whitney v. Rose, 43 Mich. 27, 4 N. W. Rep. 557; Second Nat. Bk. v. Yeaton, 53 Md. 447; Henderson v. Henderson, 55 Mo. 559. See Harrell v. Mitchell, 61 Ala. 270. "The omission of Johnson to testify as a witness for himself, in reply to the evidence against him, is of great weight." Bowden v. Johnson, 107 U. S. 262, 2 S. C. Rep. 246. See Clark v. Van Riemsdyk, 9 Cranch 153; Clements v. Moore, 6 Wall. 299; Hoffer v. Gladden, 75 Ga. 538; Schwier v. N. Y. Cent. & H. R. R. R. Co., 90 N. Y. 564. In Bleecker v. Johnston, 69 N. Y. 311, the court says: "The non-attendance of the absent defendant at the trial may have been a proper subject of remark and for consideration by the jury, and if they, under all the circumstances, thought his absence suspicious, they might take a less favorable view of the testimony on the part of the defense; but this was the extent to which the plaintiff was entitled to any benefit from the circumstance. (People v. Dyle, 21 N. Y. 578). It was not a case for the application of the stringent maxim, '*Omnia presumatur contra spoliatorem.*' That is applied in its rigor to cases of a tortious destruction or suppression of documents, or other instruments of evidence, or resorting to improper means to get or keep witnesses away from the trial. If a party by his own tortious act withhold the evidence by which the nature of the case would be made manifest, a presumption to his disadvantage may be indulged by the jury." But see Clark v. Krause, 2 Mackey (D. C.) 570.

[8] Schumacher v. Bell, 164 Ill. 184, 45 N. E. Rep. 428.

[9] Burke v. Burke, 34 Mich. 455.

[10] Kellogg v. Root, 23 Fed. Rep. 525; Wise v. Wilds, 77 Iowa 592, 42 N. W. Rep. 553.

professedly to prevent the sacrifice of the property;[1] circuitous and evidently covinous series of transfers through relatives;[2] doing things for effect;[3] taking additional security by way of chattel mortgage on a claim already secured by mortgage on real estate;[4] extending unusual credit;[5] taking currency in payment instead of a check;[6] all these are *indicia* of fraud upon creditors proper for the consideration of the jury, or of a court of equity in cases where a jury trial is not had.

On the other hand, the purchase of land by an attorney without making an abstract of title is not necessarily evidence of fraud;[7] nor is a sale by an insolvent of his whole stock in trade upon credit always covinous,[8] though it is circumscribed by fraudulent presumptions. It has been even held that evidence of a sale by a party indebted, of an uninventoried stock of goods, on credit, to a near relative failed to establish fraud; nor is a trust void because not particularly declared.[9] Then the fact that the purchaser has no use for the property is not evidence of fraud.[10] The want of minute accuracy of language, and the disregard of the usual forms, will not render an assignment void,[11] nor is it affected by a failure to file schedules,[12] nor by the failure to record it for a few days.[13] The failure to describe the debt secured by a chattel mortgage will not invalidate it.[14]

In a Massachusetts case it was decided that a party was

[1] German Ins. Bank v. Nunes, 80 Ky. 334.

[2] Greer v. O'Brien, 36 W. Va. 287, 15 S. E. Rep. 74.

[3] Comstock v. Rayford, 20 Miss. 370.

[4] Crapster v. Williams, 21 Kan. 109.

[5] Cowling v. Estes, 15 Ill. App. 260.

[6] Smith v. White, 50 Hun (N. Y.), 603, 2 N. Y. Supp. 855.

[7] Jenkins v. Einstein, 3 Biss. 129.

[8] Scheitlin v. Stone, 43 Barb. (N. Y.) 634, Sutherland, J., dissenting.

[9] Forbes v. Scannell, 13 Cal. 287.

[10] Grubbs v. Greer, 5 Coldw. (Tenn.) 548.

[11] Meeker v. Saunders, 6 Iowa 67. Compare State v. Keeler, 49 Mo. 548.

[12] Produce Bank v. Morton, 67 N. Y. 203. See Brennan v. Wilson, 1 Am. Insolv. Rep. 77.

[13] Hoopes v. Knell, 31 Md. 553.

[14] Magirl v. Magirl, 89 Iowa 342, 56 N. W. Rep. 510.

not entitled to offer the testimony of witnesses to the effect "that the giving of a mortgage, such as the mortgage in question, would not be in the usual and ordinary course of such business." That was considered to be the question for the jury to decide.[1]

§ 242. **Effect of relationship upon debtor's transactions.** — The cases relating to the effect of proof of relationship of parties dealing with the debtor to him are numerous. A clearly formulated rule on the subject is not possible. It is said by the Supreme Court of Pennsylvania that "there is no law prohibiting persons, standing in near relations of business or affinity, from buying from each other; or requiring them to conduct their business with each other in special form."[2] The sale of property by a father to his son, or by the son to his father, cannot in itself be considered as a badge of fraud,[3] and sometimes the strongest considerations of duty may prompt a son to prefer the claim of a widowed mother.[4] The court may require a mother to show that she had the means to make advances as claimed to her son.[5] "The relationship of assignor and assignee," says Finch, J., "and their

[1] Buffum v. Jones, 144 Mass. 29, 31, 10 N. E. Rep. 471.

[2] Dunlap v. Bournonville, 26 Pa. St. 73. See Reehling v. Byers, 94 Pa. St. 323; McVicker v. May, 3 Pa. St. 224; Forsyth v. Matthews, 14 Pa. St. 100; Bumpas v. Dotson, 7 Humph. (Tenn.) 310; Shearon v. Henderson, 38 Tex. 250; Wilson v. Lott, 5 Fla 305; Bowman v. Houdlette, 18 Me. 245; Tyberandt v. Raucke, 96 Ill. 71; Pusey v. Gardner, 21 W. Va. 477; Lininger v. Herron, 18 Neb. 452, 25 N. W. Rep. 578; Oberholtzer v. Hazen, 92 Iowa 602, 61 N. W. Rep. 365; Rockland County v. Summerville, 139 Ind. 695, 39 N. E. Rep. 307; Barr v. Church, 82 Wis. 382, 52 N. W. Rep. 591; Gray v. Galpin, 98 Cal. 633, 33 Pac. Rep. 725; Bierne v. Ray, 37 W. Va. 577, 16 S. E. Rep. 804; Steel v. De May, 102 Mich. 274, 60 N. W. Rep. 684; Leppig v. Bretzel, 48 Mich. 321, 12 N. W. Rep. 199; Kelly v. Fleming, 113 N. C. 133, 18 S. E. Rep. 81; Reehling v. Byers, 94 Pa. St. 316; Kitchen v. McCloskey, 150 Pa. St. 384, 24 Atl. Rep. 688; Bank v. Bridgers, 114 N. C. 383, 19 S. E. Rep. 666.

[3] Shearon v. Henderson, 38 Tex. 251; Fleischer v. Dignon, 53 Iowa 288; Wheelden v. Wilson, 44 Me. 11; S. P., Demarst v. Terhune, 18 N. J. Eq. 49; Low v. Wortman, 44 N. J. Eq. 193, 7 Atl. Rep. 654; 14 Id 586.

[4] Coley v. Coley, 14 N. J. Eq. 350.

[5] Thompson v. Tower Mfg. Co., 104 Ala. 140, 16 So. Rep. 116.

intimacy and friendship, and the preference given to the latter as a creditor prove nothing by themselves. They are consistent with honesty and innocence, and become only important when other circumstances, indicative of fraud, invest them with a new character and purpose, and transform them from equivocal and ambiguous facts into positive badges of fraud." [1] The majority of the cases hold that relationship of the parties, however, is calculated to awaken suspicion,[2] and the transaction will be closely scrutinized,[3] if there are any facts which tend to indicate fraud, though the relationship is not of itself sufficient to raise a presumption of fraud.[4] It may be

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[1] Shultz v. Hoagland, 85 N. Y. 468; s. p., Clark v. Krause, 2 Mackey (D. C.) 566; Gottlieb v. Thatcher, 151 U. S. 271, 14 S. C. Rep. 319; Kitchen v. McCloskey, 150 Pa. St. 376, 24 Atl. Rep 688; Barr v. Church, 82 Wis. 382, 52 N. W. Rep. 591; First Nat. Bk. v. Smith, 93 Ala. 99, 9 So. Rep. 548; Shober v. Wheeler, 113 N. C. 370, 18 S. E. Rep. 328; Smith v. Reid, 134 N. Y. 568, 31 N. E. Rep. 1082; Bierne v. Ray, 37 W. Va. 571, 16 S. E. Rep. 804; Martin v. Fox, 40 Mo. App. 664. See Renney v. Williams, 89 Mo. 145, 1 S. W. Rep. 227.

[2] Bumpas v. Dotson, 7 Humph. (Tenn.) 310; Forsyth v. Matthews, 14 Pa. St. 100; Harrell v. Mitchell, 61 Ala 271; Engraham v. Pate, 51 Ga. 537; Sherman v. Hogland, 73 Ind. 473; Moog v. Farley, 79 Ala. 246; Gregory v. Gray, 88 Ga. 172, 14 S. E. Rep. 187; Fisher v. Moog, 39 Fed. Rep. 665; Davis v. Schwartz, 155 U. S. 638, 15 S. C. Rep. 237; First Nat. Bk. v Moffatt, 77 Hun (N. Y.) 468, 28 N. Y. Supp. 1078; Robinson v. Frankel, 85 Tenn. 478, 3 S. W. Rep. 652.

[3] Marshall v. Croom, 60 Ala. 121; Fisher v. Shelver, 53 Wis. 501, 10 N. W. Rep. 681; Seitz v. Mitchell, 94 U. S. 580; Simms v. Morse, 4 Hughes 582; Fisher v. Herron, 22 Neb. 185, 34 N. W. Rep. 365; Bartlett v. Cheesbrough, 23 Neb. 771, 37 N. W. Rep. 652; Farrington v. Stone, 35 Neb. 456, 53 N. W. Rep. 389; Middleton v. Sinclair, 5 Cranch, C. C. 409, 17 Fed. Cas. 275; McEvony v. Rowland, 43 Neb. 97, 61 N. W. Rep. 124; Archer v. Long, 32 S. C. 171, 11 S. E. Rep. 86; Livey v. Winton, 30 W. Va. 554, 4 S. E. Rep. 451; Shauer v. Alterton, 151 U. S. 607, 14 S. C. Rep. 442. Mr. May says: "A settlement or other conveyance in favor of a near relative is open to more suspicion than one to a mere stranger, inasmuch as it is more likely to be intended, not as a real transfer of property by which the donor puts it out of his own reach, but a feigned and collusive arrangement by which it is secretly understood that the donee shall hold the property against the claims of creditors or purchasers, and still let the donor receive benefits from it." May's Fraudulent Conveyances, p. 236.

[4] King v. Russell, 40 Tex. 132; Marshall v. Croom, 60 Ala. 121. Bierne v. Ray, 37 W. Va. 572, 16 S. E. Rep.

considered, with the other facts, by the jury,[1] and rather tends to aid the creditors,[2] for it is regarded as highly probable that a party intending to perpetrate a fraud would look for aid and connivance to a relative rather than to a stranger. Still an instruction to a jury that a deed given to a brother to secure a debt is *prima facie* fraudulent is erroneous.[3] When relationship is coupled with secrecy in the transaction, it may, unless explained or justified, be regarded as fraudulent.[4] The same rule applies when the transfer conveys the debtor's entire estate, and other badges accompany it.[5] In some cases it is held that in transactions between relatives no clearer proof of good faith is required than in transactions between strangers.[6] It may be observed here that the fact that the creditors who obtained judgments by confession bore intimate relations to the debtors, the delay in the levy of the execution, the unusual time and order under which the assignee took possession, and the agency of the same attorney in all the proceedings, though, perhaps, casting suspicion upon the proceedings, are not in themselves sufficiently strong to sustain an imputation of bad faith, or a charge of fraudulent preference.[7] We may here advert to the rule of the common law that a debtor has a right to prefer one class of creditors to another, and that it is error "to encourage a jury to take into consideration the exercise of this right as a circum-

804; Ridge v. Greenwell, 53 Mo. App. 479; Bleiler v. Moore, 88 Wis. 438, 60 N. W. Rep. 792; Robinson v. Frankel, 85 Tenn. 475, 3 S. W. Rep. 652; Allen v. Kirk, 81 Iowa 658, 47 N. W. Rep. 906.

[1] Engraham v. Pate, 51 Ga. 537; Burton v. Boyd, 7 Kan. 17.

[2] Demarest v. Terhune, 18 N. J. Eq. 49.

[3] City Nat. Bk. v. Bridgers, 114 N. C. 383, 19 S. E. Rep. 666. See Gottlieb v. Thatcher, 151 U. S. 279, 14 S. C. Rep. 319; Bleiler v. Moore, 88 Wis. 438, 60 N. W. Rep. 792.

[4] Reiger v. Davis, 67 N. C. 189.

[5] Embury v. Klemm, 30 N. J. Eq. 523; Johnston v. Dick, 27 Miss. 277.

[6] Teague v. Lindsey, 106 Ala. 266, 17 So. Rep. 538.

[7] Baldwin v. Freydendall, 10 Ill. App. 107.

stance of suspicion' in deciding upon the fairness of the transfer."[1]

The case of Salmon v. Bennett[2] has exerted a potent influence over decisions in this country concerning voluntary conveyances. In the course of the opinion Swift, C. J., said:[3] "Mere indebtedness at the time will not, in all cases, render a voluntary conveyance void as to creditors, where it is a provision for a child in consideration of love and affection; for if all gifts by way of settlement to children, by men in affluent and prosperous circumstances, were to be rendered void upon a reverse of fortune, it would involve children in the ruin of their parents, and in many cases might produce a greater evil than that intended to be remedied." This rule has been applied to conveyances to wives,[4] as well as to children,[5] grandchildren,[6] and other near relatives.[7]

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[1] Born v. Shaw, 29 Pa. St. 292.

[2] 1 Conn. 525. See 24 Am. Law Reg. N. S. 496.

[3] Salmon v. Bennett, 1 Conn. 525, 542.

[4] See Clayton v. Brown, 17 Ga. 217; S. C. again 30 Ga. 490; Weed v. Davis, 25 Ga. 684; Goodman v. Wineland, 18 Reporter (Md.) 622; Kipp v. Hanna, 2 Bland Ch. (Md.) 26; Filley v. Register, 4 Minn. 391; Walsh v. Ketchum, 12 Mo. App. 580; Patten v. Casey, 57 Mo. 118; Potter v. McDowell, 31 Mo. 62; Ammon's Appeal, 63 Pa. St. 284; Carl v. Smith, 8 Phila. (Pa.) 569; Perkins v. Perkins, 1 Tenn. Ch. 537; Yost v. Hudiburg, 2 Lea (Tenn.) 627; Morrison v. Clark, 55 Tex. 437; Belt v. Raguet, 27 Tex. 471; Smith v. Vodges, 92 U. S. 183; Lloyd v. Fulton, 91 U. S. 479; French v. Holmes, 67 Me. 186; Winchester v. Charter, 12 Allen (Mass.) 606.

[5] See Dodd v. McCraw, 8 Ark. 83; Smith v. Yell, 8 Ark. 470; Clayton v. Brown, 17 Ga. 217; Patterson v. McKinney, 97 Ill. 41; Worthington v. Bullitt, 6 Md. 172; Worthington v. Shipley, 5 Gill (Md.) 449; Smith v. Lowell, 6 N. H. 67; Brice v. Myers, 5 Ohio 121; Crumbaugh v. Kugler, 2 Ohio St. 373; Grotenkemper v. Harris, 25 Ohio St. 510; Miller v Wilson, 15 Ohio 108; Posten v. Posten, 4 Whart. (Pa.) 27; Chambers v. Spencer, 5 Watts (Pa.) 404 Mateer v. Hissim, 3 P. & W. (Pa.) 160; Burkey v. Self, 4 Sneed (Tenn.) 121; Hinde's Lessee v. Longworth, 11 Wheat. 199; Brackett v. Waite, 4 Vt. 39, 6 Vt. 411; Church v. Chapin, 35 Vt. 223; Lerow v. Wilmarth, 9 Allen (Mass.) 386; Laughton v. Harden, 68 Me. 208; Stevens v. Robinson, 72 Me. 381.

[6] Bird v. Bolduc, 1 Mo. 701; Williams v. Banks, 11 Md. 198.

[7] Pomeroy v. Bailey, 43 N. H. 118. See 24 Am. Law Reg. N. S. 497.

§ 243. **Prima facie cases of fraud.**—Taking a deed for property in the name of the wife, which property was purchased and paid for by the husband, who was involved in debt at the time, was said to make a *prima facie* case of fraud against creditors.[1] In Purkitt v. Polack[2] the court observed: "The control of the property after the alleged sale, the indebtedness of the grantor at the time, the absence of the grantee from the State, and the failure on the part of the latter to show any payment of consideration, were amply sufficient to raise a *prima facie* intendment of fraud in the transaction." In Reiger v. Davis,[3] the court remarked that when a much-embarrassed debtor conveyed property of great value to a near relative, and the transaction was secret, no one being present to witness it but relatives, it was to be regarded as fraudulent. In Wilcoxen v. Morgan[4] the court said that in addition to the evidence of certain declarations made at the time of the preparation of the conveyance, "the relationship of the parties; the fact that the conveyance was made without the knowledge of the grantee; the absence of consideration, and the subsequent long-continued possession and dominion of the premises by the grantor, sufficiently manifest that the purpose of G. in this conveyance was to put the estate beyond the reach of his creditors." When it appeared that after the conveyance the debtor had no other property subject to execution, that the grantee was his brother and had not means sufficient to enable him to pay for the property, that the debtor remained in possession and the grantee removed out of the State, these, and certain admissions of the covinous nature of the transfer, were considered sufficient to show that the conveyance was made to protect the prop-

[1] Alston v. Rowles, 13 Fla. 117.
[2] 17 Cal. 327–332.
[3] 67 N. C. 186.
[4] 2 Col. 477, 478.

erty from creditors.[1] In Danby v. Sharp [2] it is said that a sale of an entire stock-in-trade to a clerk in the employment of the vendor is colorable and fraudulent as to the creditors of the vendor, when the vendee has no means except that he receives ten dollars a week for his services, and where he pays nothing at the time of the sale, but gives his unsecured promissory notes for the whole amount of the purchase-money, and no public notice is given of the change, but the business sign remains the same, and the vendor is frequently about the premises. In Moore v. Roe [3] the court held that the transfer of all a debtor's property pending a suit against him ; the taking of an absolute deed as security for money owing by the debtor, and looseness or incorrectness in stating the consideration of the conveyance, or in determining the value of the property conveyed, were indications of fraud.

The further multiplication of these illustrations is a work of doubtful utility. Indeed the resources of fraudulent debtors are too great, the color and variety of the devices to elude creditors too numerous, to render classification of the different schemes by attempted recitals of details practicable. It is to be noticed that the illustrations last given combine different badges of fraud, and it is very common in creditors' suits to find many of these *indicia* existing in a single case.

§ 244. **Comments.** — Frequent comment is made upon the extreme difficulty of the task of defining and establishing fraud, and it seems to be regarded as impossible to formulate exact rules as to what is and what is not fraud. "To do so would be to give to persons fraudulently inclined the power of evading the jurisdiction of the courts by fresh contrivances which might be invented to elude

[1] McDonald v. Farrell, 60 Iowa 337, 14 N. W. Rep. 318.

[2] 2 MacAr. (D. C.) 435.

[3] 35 N. J. Eq. 90.

any invariable, inflexible rule."[1] "As to relief against frauds," says Hardwicke, "no invariable rules can be established. Fraud is infinite, and were a court of equity once to lay down rules how far they would go, and no further, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes, which the fertility of man's invention would contrive." Vice-Chancellor Kindersley expressed the modern doctrine in these terms: "It was at one time attempted to lay down rules that particular things were indelible badges of fraud, but in truth, every case must stand upon its own footing, and the court or the jury must consider whether, having regard to all the circumstances, the transaction was a fair one, and intended to pass the property for a good and valuable consideration."[2] In Jones v. Nevers,[3] Allen, C. J., said: "Every case must stand on its own footing." But this leads to unsatisfactory and uncertain results. The profession are not given sufficient fixed rules with which to guide their actions, or advise clients, and must resort to the wilderness of single instances and complicated facts contained in the reports to discover analogous cases. The courts protest that it is not permissible to guess at the truth in the pursuit and attempted discovery of fraud; that fraud must be proved and not presumed, and that speculative inferences are not the proper foundation of a legal judgment.[4] Yet the most casual reading of many reported decisions will demonstrate that transfers of property have been avoided, especially in equity, upon the most shadowy and intangible grounds, and that in many instances innocent pur-

[1] May's Fraudulent Conveyances, p. 80; Parke's History of Court of Chancery, p. 508. See § 13 and note.

[2] Hale v. Metropolitan Omnibus Co., 28 L. J. Ch. 777.

[3] 18 New Brunsw. 629.

[4] See §§ 5, 6.

chasers have been the victims of unfortunate circumstances. That, on the other hand, fraudulent alienees have constantly escaped the meshes of the law, and secured their ill-gotten gains, though the defrauded creditors, and in some cases the courts, were inwardly conscious of the fraud which both were powerless to establish, is a matter of common experience. The impulse "to color more strongly the constructive indications of fraud, for the protection of valuable rights," is to be encouraged. The degrees of weight to be attached to particular classes of *indicia* should be carefully considered, for, in the present aspect of the law, the marks of fraud which assume such prominence in this class of litigation often, like a two-edged sword, injure both creditors and *bona fide* alienees.

CHAPTER XVII.

CHANGE OF POSSESSION — DELIVERY.

§ 245. Concerning possession.
246. Change of possession.
247. Possession as proof of fraud.
248. Transfers presumptively or *prima facie* fraudulent.
249. The New England cases.
250. Rule in New York and various other States.
251. Fraudulent *per se* or conclusive.
252. Practical results of the conflicting policies.
253. Actual change of possession required.
254. Question for the jury.
255. Overcoming the presumption.
256. Possession within a reasonable time.
§ 257. Change of possession must be continuous.
258. Temporary resumption of possession.
259. Concurrent possession insufficient.
260. Possession of bailee.
261. No delivery where purchaser has possession.
262. When technical delivery is not essential.
263. Excusing want of change of possession.
264. Change of possession of realty.
265. Change of possession on judicial sale.
266. Delivery of growing crops.
267. Possession with power of sale.

"By the possession of a thing we always conceive the condition in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded."—*Von Savigny's Treatise on Possession*, translated by Sir Erskine Perry, p. 2.

§ 245. Concerning possession.— Possession, or "the owning or having a thing in one's own power," [1] with the right to deal with it at pleasure, to the exclusion of others,[2] is said to be a degree of title, although the lowest.[3] The effect of a failure to change possession, more especially as relating to sales of personalty, will be found upon investigation to occupy a very prominent place in the law regulating fraudulent conveyances. Indeed some of the writers seem to lose sight of the other characteristics of

[1] Brown v. Volkening, 64 N. Y. 80. Compare Pope v. Allen, 90 N. Y. 298.

[2] Sullivan v. Sullivan, 66 N. Y. 41.

[3] Swift v. Agnes, 33 Wis. 240; Rawley v. Brown, 71 N. Y. 85; Mooney v. Olsen, 21 Kan. 691.

Twyne's Case,[1] and mistakenly treat the question of the failure to change possession of the property as not only the controlling but the exclusive feature of the case. In Twyne's Case[2] the court said: "The donor continued in possession and used the goods as his own, and by reason thereof he traded and trafficked with others, and defrauded and deceived them."[3] Hence Coke, in commenting upon this case, gives the following advice to a donee: "Immediately after the gift take possession of the goods, for continuance of possession in the donor is a sign of trust." It will be at once manifest from this statement that the modern law upon the subject must have undergone a very material change since Coke wrote, for the failure to consummate the sale or gift by change of possession was then considered to be merely a mark, sign, or badge of fraud.[4] We cannot but regard this feature of the law as occupying too prominent a place, and as receiving too great attention as applied to transactions which it is sought to annul as fraudulent under the statute of Elizabeth.[5] The theory is that a sale or gift, unaccompanied by possession, is not apparent to third parties, but, on the contrary, is contradicted by the continued visible possession of the vendor. Yet, in the case

[1] See § 22.

[2] 3 Rep. 80, 81*a*; Davis v. Schwartz, 155 U. S. 639, 15 S. C. Rep. 237.

[3] See Putnam v. Osgood, 52 N. H. 156: Wright v. McCormick, 67 Mo. 430; Barr v. Reitz, 53 Pa. St. 256; Manton v. Moore, 7 T. R. 72; also Twyne's Case, 1 Smith's Lea. Cas. 1; "Sales and Conveyances without Delivery of Possession," 18 Am. Law Reg. (N. S.) 137. See § 22.

[4] "The statute does not introduce a new rule, nor does it make a forced or unnatural presumption. The direct tendency of a conveyance of goods without a change of possession is to deceive and to defraud creditors and purchasers; and the law always presumes, even in criminal matters, that a person intends whatever is the natural and probable consequence of his own actions." Griswold v. Sheldon, 4 N. Y. 593. For exceptions to the general rule see Bissell v. Hopkins, 3 Cow. (N. Y.) 166, *in notis*.

[5] In Davis v. Turner, 4 Gratt. (Va.) 441, the court observed: "The truth is, there is something rather loose and indefinite in the idea of a delusive credit gained by the possession of personal property."

of bailments in their many forms, the possession is held by parties who are not the owners, but this feature of the relationship is not regarded as giving rise to any presumption of fraud. Any one can safely put his personal property in another's possession, or give another the use of it without imperilling his title.[1] It is said that "the possession of property never owned by the possessor raises no . . . . presumption" of ownership.[2] This surely is an unsatisfactory explanation of the distinction. The acts of ownership exercised over property by a bailee and by an owner, either before or after sale, are not necessarily dissimilar. Inquiry in either case would generally be necessary to ascertain the status of the title. The exercise of these very acts of ownership constitute the mischief sought to be obviated by the rule calling for change of possession. Chattels are not negotiable. Possession is not, as in the case of mercantile paper and money, an assurance of title, or of authority or power of disposition. "The servant," said Woodruff, J., "intrusted with the possession of his master's property, does not thereby get authority to sell it, or to authorize another to sell it. The borrower of a chattel, or the ordinary bailee, does not, by his possession, gain any such power."[3] A man cannot be deprived of his property without his consent.

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[1] Capron v. Porter, 43 Conn. 389. Dillon, J., observes, that "the rule, deducing fraud as a conclusion of law from the simple retention of possession by the vendor or mortgagor, originated in England in a very early day, when there were no registry laws, or none requiring *such* instruments to be registered. It was founded upon public policy. That policy was to prevent a party from acquiring a false and deceptive credit on the strength of the possession of property which he had sold or mortgaged, and yet of which he retained the possession, enjoyment and apparent ownership. The statute of 13 Elizabeth did not declare that such retention would be fraudulent. This was a doctrine of the courts." Hughes v. Cory, 20 Iowa 402. See Bullock v. Williams, 16 Pick. (Mass.) 33.

[2] Capron v. Porter, 43 Conn. 389. See Davis v. Bigler, 62 Pa. St. 242.

[3] Spraights v. Hawley, 39 N. Y. 446.

Surely it is obvious that to prohibit altogether the separation of the title from the possession of personal property would be incompatible with an advanced state of society and commerce, and productive of great inconvenience and injustice in the pursuits and business of life.[1] It would be "a remedy worse than the disease."

§ 246. **Change of possession.** — It is believed that the rule of the common law had its foundation in the doctrine already noticed, that possession of personal property is *prima facie* evidence of ownership.[2] To allow the owner of such property to transfer the title by a secret conveyance, while retaining the possession and assuming to act as the owner, was regarded as permitting a fraud upon all persons who should deal with him upon the faith of his ownership.[3] As we have said, the theory was that his possession and apparent ownership gave him credit, and afforded him the means of defrauding others.[4] An agreement to let a vendor retain the possession and use of the property after an absolute sale is not considered to be a common and ordinary transaction in the usual course of business. Such an arrangement, it is urged, excites suspicion, and it is regarded in many of the cases as the bounden duty of the courts, for the safety and protection of creditors, to call upon and hold the vendee in all such

[1] Davis v. Turner, 4 Gratt. (Va.) 441.

[2] Wallace v. Nodine, 57 Hun (N. Y.) 239, 10 N. Y. Supp. 919.

[3] Roe v. Meding, 53 N. J. Eq. 350, 33 Atl. Rep. 394.

[4] See Crooks v. Stuart, 2 McCrary, 15. "The controlling argument . . . . is the danger of false credit and fraudulent evasion of debt whenever delivery and change of possession do not accompany and follow change of property whether absolute or qualified," per Verplanck, Senator, in Cole v. White, 26 Wend. (N. Y.) 523. Chief-Justice Kent said, in Sturtevant v. Ballard, 9 Johns. (N. Y.) 337, 339: "Delivery of possession is so much of the essence of the sale of chattels that an agreement to permit the vendor to keep possession is an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation." Again it is observed: "Retention of possession not only tends to give false credit to the seller, but it is a sign of a secret trust in his favor." Brawn v. Keller, 43 Pa. St. 106.

cases, to explain clearly and satisfactorily how an absolute sale could have been *bona fide*, and yet the vendor retain the use and possession.[1] The change of which we are speaking must be open and visible, and apparent by the changed appearance of the property or of its custody.[2] In these controversies regard must be had as to the character of the property, the nature of the transaction, the position of the parties, and the intended use of the property.[3]

Such is the general condition of the law relating to this branch of the subject, whatever may be the force of the criticisms suggested. The subject, by reason of its prominence, calls for consideration, and for some discussion of the many exceptions, real and apparent, to the general rule, arising from the necessities incident to particular cases and from other causes.[4]

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[1] Coburn v. Pickering, 3 N. H. 427. It must be remembered that, by the common law, delivery was not considered necessary upon a sale of chattels to vest the title in the vendee (Miller *ads.* Pancoast, 29 N. J. Law 253; Frazier v. Fredericks, 24 N. J. Law 169; Meeker v. Wilson, 1 Gall. 424; Monroe v. Hussey, 1 Oreg. 190; Davis v. Turner, 4 Gratt. [Va.] 426), as between the parties. Philbrook v. Eaton, 134 Mass. 398, 400; Parsons v. Dickinson, 11 Pick. (Mass.) 352; Packard v. Wood, 4 Gray (Mass.) 307.

[2] Shauer v. Alterton, 151 U. S. 623, 14 S. C. Rep. 442.

[3] Crawford v. Davis, 99 Pa. St. 576; Renninger v. Spatz, 128 Pa. St. 526, 18 Atl. Rep. 405; Garretson v. Hackenberg, 144 Pa. St. 113, 22 Atl. Rep. 875. The possession which will be equivalent to actual notice to a subsequent purchaser, must be an open and visible occupation. Holland v. Brown, 140 N. Y. 348, 35 N. E. Rep. 577.

[4] Mr. May says in his treatise on Fraudulent Conveyances, 2d ed., p. 118: "It by no means follows, though, that because there is no possession given therefore a transfer is fraudulent; for those cases where the judges have said that if possession was not given it was fraudulent (Edwards v. Harben, 2 T. R 587; Wordall v. Smith, 1 Campb. 332; Macdona v. Swiney, 8 Ir. C. L. R. 86) must be taken with reference to the circumstances of each case. The question of possession is one of much importance, but that is with a view to ascertain the good or bad faith of the transaction (Abbott, C. J., in Latimer v. Batson, 4 B. & C. 652; and see Arundell v. Phipps, 10 Ves. 139; Kidd v. Rawlinson, 2 B. & P. 59; Hoffman v. Pitt, 5 Esp. 22, 25; Eastwood v. Brown, Ry. & Mood. 312). In Arundell v. Phipps (10 Ves. 139, 145), Lord Eldon said that the mere circumstance of the possession of chattels, however familiar it might be to say that it proves fraud, amounts to no

§ 247. **Possession as proof of fraud.**— As we shall presently show, it is commonly stated in some of the reported cases that the continued possession of the subject-matter of the sale by the grantor or vendor is *prima facie* evidence of fraud, while other authorities regard it as conclusive proof that the transaction is covinous. A learned writer [1] has declared this to be a loose method of referring to the matter, and has ventured to assert that "a careful examination of this branch of the law will show that neither of the views so expressed is correct." The argument advanced by the writer is that bald possession is not conclusive evidence of fraud; it is only a circumstance admissible in evidence with other circumstances as bearing upon the question of the actual existence of fraud. The conclusion drawn in the article mentioned is that "possession is a link in a chain of circumstances, pertinent in proving fraud, having greater or less weight according to the circumstances of each case," and "is not necessarily either conclusive or *prima facie* evidence of fraud." Some accompanying circumstances attending the possession or, so to speak, coloring it, must be shown to establish fraud.

The statutory policy introduced in a number of the States, under which a failure to effect a change of possession is made either presumptively or conclusively

more than that it is *prima facie* evidence of property in the man possessing, until a title not fraudulent is shown under which that possession has followed; that every case, from Twyne's Case (3 Rep. 80 b; see the remarks of Littledale, J., in Martindale v. Booth, 3 B. & Ad. 498, 505) downwards, supports that, and there was no occasion otherwise for the statute of King James (21 Jac. 1 C. 19, §§ 10, 11, which originated the law with respect to property remaining in the reputed ownership or order and disposition of a bankrupt). There is no sufficient authority for saying that the want of delivery of possession makes void a bill of sale of goods and chattels; it is *prima facie* evidence of a fraudulent intention, and if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration. (Per Patteson, J., in Martindale v. Booth, 3 B. & Ad. 498, 587.)"

[1] Possession as Evidence of Fraud, 11 Cent. L. J. 21.

fraudulent, has robbed the question of much of its importance as a general proposition independent of local enactment. We cannot but regard the theory advanced by the writer referred to as sound, but we fail to discover that the cases are in line with his arguments.

§ 248. **Transfers presumptively or prima facie fraudulent.**— The question of how far retention of possession of the property by the vendor is to be considered as evidence of fraud in its sale has been a subject of much consideration by the courts and in legislative bodies in the United States.[1] In some States the matter is regulated by statute, but the statutes and the rules for their interpretation vary in the different States. In other States the question is left to be disposed of by the rules and principles which obtain at common law. The general subject is capable of extended discussion, both because of its importance and for the reason that the authorities relating to it are full of subtle distinctions. We can only consider its general outlines and notice the leading cases and the important exceptions to the general rule in the principal States. The main struggle is between two policies and rules of evidence or proof, viz.: whether the neglect to change possession of the property shall be considered presumptively or conclusively fraudulent as to creditors. The prevalent policy is to consider the absence of a change of possession as *prima facie* or presumptive evidence of fraud.[2]

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[1] It must be remembered that "the statute with its presumptions founded upon non-delivery and absence of changed possession draws no distinction between modes of transfer." Stimson v. Wrigley, 86 N. Y. 337.

[2] See Crawford v. Kirksey, 55 Ala. 300; Mayer v. Clark, 40 Ala. 259; Vredenbergh v. White, 1 Johns. Cas. (N. Y.) 156; Beals v. Guernsey, 8 Johns. (N. Y.) 446; Barrow v. Paxton, 5 Johns. (N. Y.) 258; Curtin v. Isaacsen, 36 W. Va. 391, 15 S. E. Rep. 171; Bartlett v. Cleavenger, 35 W. Va. 719, 14 S. E. Rep. 273. In Bissell v. Hopkins, 3 Cow. (N. Y.) 166, 188, Savage, Chief Justice, said: "The possession by the vendor of personal

§ 249. **The New England cases.** — The cases supporting the former theory will be first noticed, giving brief quotations from leading authorities. In Massachusetts, "possession of the vendor is only evidence of fraud, which, with the manner of the occupation, the conduct of the parties, and all other evidence bearing upon the question of fraud, is for the consideration of the jury."[1] In New Hampshire it is said that "in cases of absolute sales, possession and use by the vendor, after the sale, is always *prima facie*, and, if unexplained, conclusive evidence of a secret trust."[2] So in Maine failure to change possession is presumptive evidence of fraud, and the jury are to determine the good faith of the transaction.[3] In Roth-

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chattels after the sale is not conclusive evidence of fraud. The vendee may, notwithstanding, upon proof that the sale was *bona fide* and for a valuable consideration, and that the possession of the vendor after such sale was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase against creditors." See Davis v. Turner, 4 Gratt. (Va.) 422, where the doctrine of fraud *per se* is examined and repudiated. See Forkner v. Stuart, 6 Gratt. (Va.) 197; Howard v. Prince, 11 N. B. R. 322.

[1] Ingalls v. Herrick, 108 Mass. 354; Shurtleff v. Willard, 19 Pick. (Mass.) 202; Brooks v. Powers, 15 Mass. 244; Hardy v. Potter, 10 Gray (Mass.) 89; In Dempsey v. Gardner, 127 Mass. 381, Gray, C. J., said: "By the law as established in this commonwealth, it was necessary, as against subsequent purchasers or attaching creditors, that there should be a delivery of the property. No such delivery, actual or symbolical, was proved. The buyer did no act by way of taking possession or exercising ownership, and the seller did not agree to hold or keep the horse for him. . . . . There was no evidence of delivery for the consideration of the jury, except such as might be implied from the execution and delivery of the bill of sale. That was not enough. Carter v. Willard, 19 Pick. (Mass.) 1; Shumway v. Rutter, 7 Pick. (Mass.) 56, 58, 8 Pick. (Mass.) 443, 447; Packard v. Wood, 4 Gray (Mass.) 307; Rourke v. Bullens, 8 Gray (Mass.) 549; Veazie v. Somerby, 5 Allen (Mass.) 280, 289; Ashcroft v. Simmons, 163 Mass. 437, 40 N. E. Rep. 171."

[2] Coburn v. Pickering, 3 N. H. 428; Doucet v. Richardson (N. H. 1892) 29 Atl. Rep. 635. See Lang v. Stockwell, 55 N. H. 561; Cutting v. Jackson, 56 N. H. 253; Sumner v. Dalton, 58 N. H. 295; Stowe v. Taft, 58 N. H. 445; Shaw v. Thompson, 43 N. H. 130; Harrell v. Godwin, 102 N. C. 330, 8 S. E. Rep. 925; Rawson Mfg. Co. v. Richards, 69 Wis. 643, 35 N. W. Rep. 40.

[3] Shaw v. Wilshire, 65 Me. 485; Bartlett v. Blake, 37 Me. 124; Fairfield Bridge Co. v. Nye, 60 Me. 372; Googins v. Gilmore, 47 Me. 9; Reed

child v. Rowe[1] the Supreme Court of Vermont said: "The law is well settled in this State that there must be a substantial and visible change of possession to protect property from attachment by the creditors of the vendor. . . . . The vendee must acquire the open, notorious and exclusive possession of the property, and this implies that the vendor is divested of the use, possession, or employment of the property."[2] The rule that non-delivery of possession is *prima facie* evidence of fraud obtains in Rhode Island.[3]

§ 250. Rule in New York and various other States. — After much fluctuation and discussion, the general rule is now established by statute in New York, that the retention of possession by the vendor is presumptively fraudulent. This presumption may be overcome by proof satisfactory to a jury that the retention of possession was in good faith, for an honest purpose, and with no design to defraud creditors.[4] In other words, evidence may be

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v. Reed, 70 Me. 506. In the latter case the court says: "Without delivery the title does not pass as against an attaching creditor." Roberts v. Hawn, 20 Col. 77, 36 Pac. Rep. 886; Harkness v. Russell, 118 U. S. 663, 7 S. C. Rep. 51; cf., Stephens v. Gifford, 137 Pa. St. 219, 20 Atl. Rep. 542.

[1] 44 Vt. 389, 393.

[2] Compare Kendall v. Samson, 12 Vt. 515; Ridout v. Burton, 27 Vt. 383; Jewett v. Guyer, 38 Vt. 209; Fish v. Clifford, 54 Vt. 344; Weeks v. Prescott, 53 Vt. 57.

[3] Sarle v. Arnold, 7 R. I. 582; Mead v. Gardiner, 13 R. I. 257. See Beckwith v. Burrough, 13 R. I. 294; Goodell v. Fairbrother, 12 R. I. 233. As to the rule in Connecticut, see § 251.

[4] Ball v. Loomis, 29 N. Y. 412; Blaut v. Gabler, 77 N. Y. 461; Stark v. Grant, 42 N. Y. St. Rep. 36, 16 N. Y Supp. 526; Parmenter v. Fitzpatrick, 60 Hun (N. Y.) 580, 14 N. Y. Supp. 748; Wallace v. Nodine, 57 Hun (N. Y.) 250, 10 N. Y. Supp. 919; Siedenbach v. Riley, 111 N. Y. 560, 20 N. Y. St. Rep. 124, 19 N. E. Rep. 275; Preston v. Southwick, 115 N. Y. 139, 21 N. E. Rep. 1031; Prentiss Tool & Supply Co. v. Schirmer, 136 N. Y. 305, 32 N. E. Rep. 849. The fact that a valuable consideration was paid does not shift the burden of proof. Wallace v. Nodine, 57 Hun (N. Y.) 239, 10 N. Y. Supp. 919; Miller v. Lockwood, 32 N. Y. 293; Ford v. Williams, 24 N. Y. 359; Hollacher v. O'Brien, 5 Hun (N. Y.) 277; Burnham v. Brennan, 74 N. Y. 597; Thompson v. Blanchard, 4 N. Y. 303; Mumper v. Rushmore, 79 N. Y. 19.

given to repel the arbitrary inference of fraud resulting from the neglect to change possession.[1] If good faith is established, it is not essential in that State to show "a good reason for the want of change of possession,"[2] which is certainly crowding the rule to an extreme limit hostile to the creditor interests. The principle that the possession may be explained is extensively recognized. In addition to the States already named, it obtains in New Jersey,[3] Rhode Island,[4] West Virginia,[5] Virginia,[6] Alabama,[7] Louisiana,[8] Ohio,[9] Indiana,[10] Michigan,[11] Minnesota,[12] Wis-

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[1] Stark v. Grant, 42 N. Y. St. Rep. 36, 16 N. Y. Supp. 526.

[2] Mitchell v. West, 55 N. Y. 107; Hanford v. Artcher, 4 Hill (N. Y.) 271.

[3] Miller *ads.* Pancoast, 29 N. J. Law 253; Sherron v. Humphreys, 14 N. J. Law 220. "The possession by the vendor of personal chattels, after the sale, is not conclusive evidence of fraud. The vendee may, notwithstanding, upon proof that the sale was *bona fide* and for a valuable consideration, and that the possession of the vendor after sale was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase against creditors." Miller *ads.* Pancoast, 29 N. J. Law 253. But see Roe v. Meding, 53 N. J. Eq. 356, 33 Atl. Rep. 394, and Fletcher v. Bonnet, 51 N. J. Eq. 618, 28 Atl. Rep. 601, as to the necessity for and effect of filing mortgages on chattels.

[4] Harris v. Chaffee, 17 R. I. 193, 21 Atl. Rep. 104; Mead v. Gardiner, 13 R. I. 257; Sarle v. Arnold, 7 R. I. 582.

[5] Curtin v. Isaacsen, 36 W. Va. 391, 15 S. E. Rep. 171.

[6] Howard v. Prince, 11 N. B. R. 322; Davis v. Turner, 4 Gratt. (Va.) 423, a leading case of international repute; Norris v. Lake, 89 Va. 513, 16 S. E. Rep. 663.

[7] Mayer v. Clark, 40 Ala. 259; Crawford v. Kirksey, 55 Ala. 282; Moog v. Benedicks, 49 Ala. 512; McGhee v. Importers' & T. Nat. Bank, 93 Ala. 192, 9 So. Rep. 734.

[8] Keller v. Blanchard, 19 La. Ann. 53; Guice v. Sanders, 21 La. Ann. 463; Devonshire v. Gauthreaux, 32 La. Ann. 1132; Yale v. Bond, 45 La. Ann. 997, 13 So. Rep. 587.

[9] Hombeck v. Vanmetre, 9 Ohio 153; Collins v. Myers, 16 Ohio 547; Thorne v. Bank, 37 Ohio St. 254.

[10] Kane v. Drake, 27 Ind. 29; Rose v. Colter, 76 Ind. 590; New Albany Ins. Co. v. Wilcoxson, 21 Ind. 355; Seavey v. Walker, 108 Ind. 78, 9 N. E. Rep. 347.

[11] Molitor v. Robinson, 40 Mich. 200, per Cooley J.; Kipp v. Lamoreaux, 81 Mich. 304, 45 N. W. Rep. 1002; Buhl Iron Works v. Teuton, 67 Mich. 623, 35 N. W. Rep. 804.

[12] Blackman v. Wheaton, 13 Minn. 326; Benton v. Snyder, 22 Minn. 247; Lathrop v. Clayton, 45 Minn. 124, 47 N. W. Rep. 544; Mackellar v. Pillsbury, 48 Minn. 399, 51 N. W. Rep. 222; Camp v. Thompson, 25 Minn. 175.

consin,[1] Nebraska,[2] Nevada,[3] Arkansas,[4] Kansas,[5] South Carolina,[6] Texas,[7] in the Federal tribunals,[8] and the District of Columbia.[9]

§ 251. Fraudulent per se or conclusive. — The cases just considered give what may be termed the equitable and charitable view of the question. But the policy embodied in many of these cases, and in the statutes upon which they are in certain instances founded, is not considered in some of the States rigid or severe enough to suppress the evils supposed to be engendered by this class of transactions. Thus, in Connecticut, Loomis, J., in delivering the opinion of the court in the case of Capron v. Porter,[10] observed: "That the retention of the possession of personal property by the vendor after a sale raises a presumption of fraud which cannot be repelled by any evidence that the transaction was *bona fide* and for valuable consideration, is still adhered to and enforced by the courts in this State with undiminished rigor, as a most important rule of public policy. The reason of the rule is that as against a person who was once the owner of the property, and all who claim by purchase from him, the continued possession is

[1] Wheeler v. Konst, 46 Wis. 398, 1 N. W. Rep. 96; Blakeslee v. Rossman, 43 Wis. 116; Osen v. Sherman, 27 Wis. 505; Manufacturers' Bk. v. Rugee, 59 Wis. 221, 18 N. W. Rep. 251; Norwegian Plow Co. v. Hanthorn, 71 Wis. 529, 37 N. W. Rep. 825.

[2] Uhl v. Robison, 8 Neb. 272; Densmore v. Tomer, 14 Neb. 392, 15 N. W. Rep. 734; Paxton v. Smith, 41 Neb. 56, 59 N. W. Rep. 690.

[3] Conway v. Edwards, 6 Nev. 190. Compare Doak v. Brubaker, 1 Nev. 218; Tognini v. Kyle, 17 Nev. 209, 30 Pac. Rep. 829.

[4] George v. Norris, 23 Ark. 128. It is held in that State that a constructive delivery is sufficient. Shaul v. Harrington, 54 Ark. 305, 15 S. W. Rep. 835; Stix v. Chaytor, 55. Ark. 117, 17 S. W. Rep. 707.

[5] Phillips v. Reitz, 16 Kan. 396.

[6] Pregnall v. Miller, 21 S. C. 335.

[7] Traders' Nat. Bank v. Day, 87 Tex. 103, 26 S. W. Rep. 1049; Gibson v. Hill, 21 Tex. 225; Edwards v. Dickson, 66 Tex. 613, 2 S. W. Rep. 718.

[8] Warner v. Norton, 20 How. 448. But see Hamilton v. Russel, 1 Cranch 310; Travers v. Ramsay, 3 Cranch C. C. 354, 24 Fed. Cas. 143.

[9] Justh v. Wilson, 19 Dist. Col. 529.

[10] 43 Conn. 383; Gilbert v. Decker, 53 Conn. 405, 4 Atl. Rep. 685; Huebler v. Smith, 62 Conn. 191, 25 Atl. Rep. 658; Hatstat v. Blakeslee, 41 Conn. 302.

to be regarded as a sure *indicium* of continued ownership, and that the possessor would obtain by such continued possession a false credit to the injury of third persons, if there was no such rule to protect them."[1] Clow v. Woods[2] is the leading case in Pennsylvania. Gibson, J., said: "Where possession has been retained without any stipulation in the conveyance, the cases have uniformly declared that to be, not only evidence of fraud, but fraud *per se*. Such a case is not inconsistent with the most perfect honesty; yet a court will not stop to inquire whether there be actual fraud or not; the law will impute it, at all events, because it would be dangerous to the public to countenance such a transaction under any circumstances. The parties will not be suffered to unravel it and show that what seemed fraudulent was not in fact so."[3] In Born v. Shaw,[4] the court observed: "When possession is retained by the vendor, it is not only evidence of fraud, but fraud *per se*." In Maryland[5] a bill of sale may be recorded, and the title of the grantee is then as effectually protected as if the sale had been accompanied by delivery.[6] It is a well-settled doctrine in Ken-

[1] Compare Osborne v. Tuller, 14 Conn. 529; Norton v. Doolittle, 32 Conn. 405; Elmer v. Welch, 47 Conn. 56; Hull v. Sigsworth, 48 Conn. 258; Hatstat v. Blakeslee, 41 Conn. 301; Seymour v. O'Keefe, 44 Conn. 128; Meade v. Smith, 16 Conn. 346. See especially Hamilton v. Russel, 1 Cranch 310; and compare Warner v. Norton, 20 How. 448; Gibson v. Love, 4 Fla. 217; Monroe v. Hussey, 1 Oregon 188.

[2] 5 S. & R. (Pa.) 280.

[3] See Thompson v. Paret, 94 Pa. St. 275; Pearson v. Carter, 94 Pa. St. 156; McKibbin v. Martin, 64 Pa. St. 352; Garman v. Cooper, 72 Pa. St. 37; Worman v. Kramer, 73 Pa. St. 378; Dawes v. Cope, 4 Binn. (Pa.) 258; Davis v. Bigler, 62 Pa. St. 242; Shaw v. Levy, 17 S. & R. (Pa.) 99; Born v. Shaw, 29 Pa. St. 288; Young v. McClure, 2 W. & S. (Pa.) 151. "Clow v. Woods, 5 S. & R. (Pa.) 275, decided by this court in 1819, is the *magna charta* of our law upon this subject," per Sharswood, J., in McKibbin v. Martin, 64 Pa. St. 356; Stephens v. Gifford, 137 Pa. St 219, 20 Atl. Rep. 542. But as to subsequent creditors, actual intent to defraud must be shown. Ditman v. Raule, 124 Pa. St. 225, 16 Atl. Rep. 819.

[4] 29 Pa. St. 292,

[5] Kreuzer v. Cooney, 45 Md. 582.

[6] Clary v. Frayer, 8 G. & J. (Md.) 416. See Price v. Pitzer, 44 Md. 527. But see Smith v. Hunter, 5 Cranch C. C. 467, 22 Fed. Cas. 574.

tucky that where there is an absolute sale of movable property, the possession must accompany the title, or the sale will be void in law as to creditors or subsequent purchasers, even though the contract contain a stipulation that the vendor is to retain the possession till a future day.[1] After much conflict,[2] the rule seems to be established in Missouri that a sale without delivery of possession is conclusively presumed to be fraudulent.[3] In Illinois it is fraud *per se* to leave the vendor in possession.[4] Much the same policy is pursued in Iowa,[5] California,[6] Colorado,[7] and Delaware.[8]

§ 252. **Practical results of the conflicting policies.** — Brushing aside for the present the objections already outlined to the prominence accorded the question of change of

[1] Robbins v. Oldham, 1 Duv. (Ky.) 28; Brummel v. Stockton, 3 Dana (Ky.) 135; Bradley v. Buford, Sneed (Ky.) 12; Morton v. Ragan, 5 Bush (Ky.) 334; cf. Vanmeter v. Estill, 78 Ky. 456. See Cummins v. Griggs, 2 Duvall (Ky.) 87.

[2] See Claflin v. Rosenberg, 42 Mo. 448; Rocheblave v. Potter, 1 Mo. 561; Foster v. Wallace, 2 Mo. 231; Sibley v. Hood, 3 Mo. 290; King v. Bailey, 6 Mo. 575; Shepherd v. Trigg, 7 Mo. 151.

[3] Claflin v. Rosenberg, 42 Mo, 448; Bishop v. O'Connell, 56 Mo. 158; Burgert v. Borchert, 59 Mo. 80; Wright v. McCormick, 67 Mo. 426. See State ex rel. Baumunk v. Goetz, 131 Mo. 675, 33 S. W. Rep. 161.

[4] Thompson v. Yeck, 21 Ill. 73; Ticknor v. McClelland, 84 Ill. 471; Deering v. Washburn, 141 Ill. 153, 29 N. E. Rep. 558; Huschle v. Morris, 131 Ill. 588, 23 N. E. Rep. 643; Rozier v. Williams, 92 Ill. 187; Johnson v. Holloway, 82 Ill. 334; Richardson v. Rardin, 88 Ill. 124; Greenebaum v. Wheeler, 90 Ill. 296; Hart v. Wing, 44 Ill. 141. But the rule does not apply when the possession of the vendor is consistent with the deed of sale, or where the sale is of such a public character as to give notoriety thereto. Lowe v. Matson, 140 Ill. 108, 29 N. E. Rep. 1036.

[5] Prather v. Parker, 24 Iowa, 26; Boothby v. Brown, 40 Iowa 104; Hesser v. Wilson, 36 Iowa 152; Sutton v. Ballou, 46 Iowa 517. See Wessels v. McCann, 85 Iowa 424, 52 N. W. Rep. 346.

[6] See Lay v. Neville, 25 Cal. 552; Hesthal v. Myles, 53 Cal. 623; Woods v. Bugbey, 29 Cal. 466; Brown v. O'Neal, 95 Cal. 262, 30 Pac. Rep. 538; Howe v. Johnson, 107 Cal. 67, 40 Pac. Rep. 42; Rohrbough v. Johnson, 107 Cal. 149, 40 Pac. Rep. 37.

[7] Allen v. Steiger, 17 Col. 552, 31 Pac. Rep. 226; Ray v. Raymond, 8 Col. 467, 9 Pac. Rep. 15; Finding v. Hartman, 14 Col. 596, 23 Pac. Rep. 1004; Roberts v. Hawn, 20 Col. 77, 36 Pac. Rep. 886.

[8] Miller v. Lacey, 7 Houst. (Del.) 8, 30 Atl. Rep. 640.

possession in controversies of the class under consideration, it becomes important to consider which of the two rules or policies just instanced is the more salutary in practice. Possibly the creditor class would oftener effect a recovery when the presumption of fraud from failure to change possession is absolute. It does not follow, however, that the latter rule is a wise one, or the recovery in such cases always just. "In seeking to catch rogues" it is not the proper function of the courts to "ensnare honest men. We may become so zealous against fraud as to restrain the free action of honesty, a result that would be most disastrous. Better is it that many frauds should go undetected than that the means of detection or prevention should treat honest men as guilty, or teach them to be always suspicious of their neighbors, and watchful that honest acts be precisely measured according to the standard of legal morality."[1] Parties designing to make covinous alienations will so frame their actions as to endeavor to leave no *indicia*, or to create no presumptions of fraud. Honest people, on the other hand, conscious of no design to wrong others, and giving little thought to the appearance or form of the transaction, are often the victims of unfortunate circumstances, and suddenly discover that the law imputes to their innocent acts or omissions wicked designs, than which nothing was further from their minds. Hence Cabell, J., in commenting upon the mischievous operation of the absolute rule as to change of possession, said: "I have found myself compelled as judge to pronounce transactions to be fraudulent and void as to creditors which were known to be perfectly fair and *bona fide*, and were not intended or calculated to delay, hinder, or defraud creditors."[2] The rule creating a fraudulent

[1] Hugus v. Robinson, 24 Pa. St. 11.

[2] Davis v. Turner, 4 Gratt. (Va.) 422, 471.

presumption in these cases seems to be sufficiently severe in its operation. A policy which blindly ignores the real intent of the parties, practically excludes all evidence concerning the transaction or its underlying motives, and conclusively brands it as fraudulent by closing the mouths of the witnesses, should be adopted with great reluctance. In such cases "the question is not whether the transaction was honest or otherwise, but whether there is not that evidence of fraudulent intent which precludes inquiry into its integrity as a question of morals." It is a rule of policy as well as of evidence.[1] It seems clear that: "The statute of frauds ought not to be construed to make innocent parties sufferers."[2] That such is often the result cannot be questioned. It was found in Virginia that the cases of honest transfers in which the vendor retained possession were too numerous and too frequent to allow of a further adherence to the old arbitrary rule of fraud *per se*. It resulted in the decision of Davis v. Turner,[3] repudiating the rule as to absolute presumptions. The court said: "It seems to be carrying a distrust of juries too far to suppose them incapable, with the aid of a wholesome *prima facie* presumption, to administer justice on this subject, in the true spirit of the statute, and it is better to confine the interposition of the court to guiding, instead of driving them by instructions, and to the power of granting new trials in cases of plain deviation." In the same case the court observe that the conclusive presumption as a test of a fraudulent purpose has no claim to certainty; on the contrary, it concedes its own fallibility, by crushing mercilessly the most convincing evidence of fairness and good faith.[4]

[1] Kirtland v. Snow, 20 Conn. 28.

[2] Sydnor v. Gee, 4 Leigh (Va.) 545; Cadogan v. Kennett, 2 Cowp. 432, per Lord Mansfield.

[3] 4 Gratt. (Va.) 423, 444.

[4] *Cole* v. *White*. — "But when we look at the daily business of life, out of court, another aspect of this question presents itself. Mortgages of personal property, as ships, lake

§ 253. Actual change of possession required. — The words "actual and continued change of possession" in the statute in New York, are construed to mean "an open public change of possession, which is to continue and be manifested continually by outward and visible signs, such as render it evident that the possession of the judgment-debtor has ceased."[1] In Crandall v. Brown,[2] the court observed that "possession cannot be taken by words and inspection." It must be unequivocal, carrying with it the usual marks and indications of ownership by the vendee.[3] In Otis v. Sill,[4] Paige, J., said: "It has been repeatedly decided that if an assignee or mortgagee leaves goods assigned or mortgaged in the possession of the assignor or mortgagor as his agent, this is not an actual change of

vessels, canal boats, and river craft; the stock and implements of the mechanic or small manufacturer; the furniture of the innkeeper; assignments for the benefit of creditors, leaving the goods and debts assigned publicly to be managed and disposed of by the original owner as an agent, best acquainted with the business, and acting for the benefit of creditors who have full confidence in his integrity; all these have grown out of the usages of modern society; the necessities of commerce; the conveniences of daily life; the wants and usages of trade and industry. They have followed in the train of commerce, credit, and enterprise. Like them, they have been largely productive of benefits to society; yet those benefits, like the results of all other human action, are not unmixed with evil. By such means the adventure, capacity, acquirements, and industry of the young or needy have been aided and stimulated; large concerns of honorable but unfortunate merchants have been settled to the greatest advantage of the creditors and the least possible loss of the insolvent; and the kindness of parents or the generosity of friends has been enabled to preserve the comforts of a home to the wife and children of a bankrupt without the slightest injury or fraud (save in legal fiction) to prior creditors or subsequent purchasers. Society reaps nothing but unquestioned benefit from nine-tenths of such assignments or securities occurring in actual life." Cole v. White, 26 Wend. (N. Y.) 523.

[1] Topping v. Lynch, 2 Rob. (N. Y.) 488; approved in Steele v. Benham, 84 N. Y. 638. Compare Hale v. Sweet, 40 N. Y. 97; Cutter v. Copeland, 18 Me. 127; Osen v. Sherman, 27 Wis. 501; Lesem v. Herriford, 44 Mo. 323; Morgan v. Ball, 81 Cal. 93, 22 Pac. Rep. 331, 5 L. R. A. 579; Smith v. Moore, 4 Tex. App. Civ. Cases, § 217.

[2] 18 Hun (N. Y.) 461, 463.

[3] Shauer v. Alterton, 151 U. S. 624, 14 S. C. Rep. 442; Stevens v. Irwin, 15 Cal. 507.

[4] 8 Barb. (N. Y.) 102, 122.

possession within the meaning of the fifth section of the statute of frauds."[1] Rolling barrels of whiskey apart from the rest of the stock in the vendor's store and marking them with the buyer's name is not a change of possession.[2] In Billingsley v. White,[3] Williams, J., in delivering the opinion of the Pennsylvania Supreme Court, said: "The delivery must be actual, and such as the nature of the property or thing sold, and the circumstances of the sale will reasonably admit, and such as the vendor is capable of making." A mere symbolical or constructive delivery, where an actual or real one is reasonably practicable, is of no avail, unless the property is not capable of actual delivery.[4] There must be an actual separation of the property from the possession of the vendor at the time of the sale, or within a reasonable time afterward, according to the nature of the property.[5] Where a husband gave his wife a bill of sale which she accepted, and appointed him custodian of the property, this was deemed sufficient.[6] It is good if the possession taken of the goods is such as the nature of the case would permit.[7] The fact that the vendor is retained as a clerk in charge of the goods is considered in some of the cases to be only a circumstance bearing upon the question of good faith,[8] and is not in itself sufficient to invalidate the

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[1] See Hanford v. Artcher, 4 Hill (N. Y.) 271.

[2] Burchinell v. Weinberger, 4 Col. App. 6, 34 Pac. Rep. 911.

[3] 59 Pa. St. 466.

[4] Lathrop v. Clayton, 45 Minn. 124, 47 N. W. Rep. 544.

[5] Where the goods are locked up and the keys are delivered to the vendee, and the vendor removes from the house, this is as effectual as though the vendee had actually removed the property. Barr v. Reitz, 53 Pa. St. 256. See Benford v. Schell, 55 Pa. St. 393; Pierce v. Kelly, 25 Ore. 95; Chickering v. White, 42 Minn. 457, 44 N. W. Rep. 988; Morrison v. Oium, 3 N. Dak. 76, 54 N. W. Rep. 288; Conly v. Friedman, 6 Col. App. 160, 40 Pac. Rep. 348.

[6] State ex rel. Brown v. Mitchell, 102 N. C. 348, 9 S. E. Rep. 702.

[7] Manton v. Moore, 7 T. R. 71.

[8] Smith v. Craft, 123 U. S. 436, 8 S. C. Rep. 196; Bamberger v. Schoolfield, 160 U. S. 164, 16 S. C. Rep. 225; Murray v. McNealy, 86 Ala 234, 5 So. Rep. 565; Richardson v. String-

sale, but his retention would certainly be a dangerous act in States where the continued possession cannot be explained. It may be observed that the fact that a party testified in a general way that he took possesion, or was in possession, will have no weight when the evidence shows precisely what was done.[1] Where the purchaser replenished the stock and waited upon the customers, this was considered a change of possession;[2] and a wife may hold a valid possession against her husband without separating from him.[3]

It is obvious from a casual consideration of these cases that a change of possession which will protect the title of the purchaser, as against creditors, must consist of a complete surrender and discontinuance of the exercise of acts of ownership by the vendor and the assumption of such acts on the part of the vendee.

§ 254. Question for the jury. — The doctrine of Massachusetts,[4] followed by many of the States, makes continued possession, as evidence of fraud, a question for the jury.[5] It is a question of intent to be settled by them as a question of fact,[6] even though the evidence of good faith and absence of intent to defraud may be uncontradicted.[7] If the jury err, justice may be obtained by setting the

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fellow, 100 Ala. 416, 422, 14 So. Rep. 283; Preston v. Southwick, 115 N. Y. 150, 21 N. E. Rep. 1031.

[1] Steele v. Benham, 84 N. Y. 640; Miller v. Long Island R. R. Co., 71 N. Y. 380. Compare Stanley v. National Union Bk., 115 N. Y. 122, 22 N. E. Rep. 29.

[2] Butler v. Howell, 15 Col. 249, 25 Pac. Rep. 313.

[3] Stanley v. National Union Bk., 115 N. Y. 122, 22 N. E. Rep. 29.

[4] Ingalls v. Herrick, 108 Mass. 351.

[5] See Mead v. Noyes, 44 Conn. 487; Thompson v. Blanchard, 4 N. Y. 303; Griswold v. Sheldon, 4 N. Y. 581; Davis v. Turner, 4 Gratt. (Va.) 422; Cutter v. Copeland, 18 Me. 127; Tilson v. Terwilliger, 56 N. Y. 273; Smith v. Welch, 10 Wis. 91; Allen v. Cowen, 23 N. Y. 507; Hollacher v. O'Brien, 5 Hun (N. Y.) 277; Warner v. Norton, 20 How. 460; Scott v. Winship, 20 Ga. 430; Chamberlain v. Stern, 11 Nev. 268; Goddard v. Weil, 165 Pa. St. 419, 30 Atl. Rep. 1000.

[6] Miller *ads.* Pancoast, 29 N. J. Law 254; Renninger v. Spatz, 128 Pa. St. 524, 18 Atl. Rep. 405.

[7] Blaut v. Gabler, 77 N. Y. 461.

verdict aside,[1] but otherwise the court is not entitled to interfere with the prerogative of the jury.

§ 255. **Overcoming the presumption.** — The presumption of fraud which the statute raises from the fact that there was no actual change of possession of the chattels sold, practically becomes conclusive if not rebutted or overcome by competent proof in explanation.[2] There is nothing left for the jury to pass upon or to consider. On the other hand, where the evidence repels the statutory presumption, the trial court is justified in refusing to submit the question of fraud to the jury.[3]

It was observed in the Supreme Court of Kansas,[4] that the law did not imply that one purchasing property without taking actual possession, if there were creditors of the vendor, was presumptively engaged in a fraudulent transaction, and that his conduct was to be scrutinized accordingly, but simply that one claiming under such a purchase takes nothing until he shows good faith and consideration.

§ 256. **Possession within a reasonable time.** — It is frequently said that the vendee must acquire possession of the subject-matter of the sale within a reasonable time. According to some of the cases, a "reasonable time" must be construed not with reference to the mere convenience of the party, but only with reference to the time fairly required to perform the act of taking possession, or doing what is its equivalent.[5] The cases where it is held that immediate delivery is not practicable are usually

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[1] Hollacher v. O'Brien, 5 Hun (N. Y.) 277; Potter v. Payne, 21 Conn. 363.

[2] Mayer v. Webster, 18 Wis. 396; Cheatham v. Hawkins, 76 N. C. 388, and cases cited; State v. Rosenfeld, 35 Mo. 472. See Grant v. Lewis, 14 Wis. 487.

[3] Prentiss Tool & Supply Co. v. Schirmer, 136 N. Y. 305, 32 N. E. Rep. 849. See Bulger v. Rosa, 119 N. Y. 459, 24 N. E. Rep. 853.

[4] Kansas Pacific Ry. Co. v. Couse, 17 Kan. 571–575.

[5] See Seymour v. O'Keefe, 44 Conn. 132; Meade v. Smith, 16 Conn. 346.

illustrated in the books by the case of a sale of a ship at sea where immediate delivery is a physical impossibility; and the same principle has been applied to a case where the situation of the parties at the time of the sale was so remote from the place where the property was situated, that immediate manual delivery was impossible. What is a reasonable time must be determined by the circumstances of each case;[1] no definite rule can be laid down.[2] In McIntosh v. Smiley[3] it was held that even if the taking of possession was not within a reasonable time, the sale would be sustained, if possession was taken and continuously retained before the bringing of a suit by an existing creditor.

§ 257. **Change of possession must be continuous.** — In a controversy which arose in New York, it appeared that the sale was accompanied by an immediate delivery of the property to the vendee, and an actual change of possession, and that, after considerable time had passed, the property came again into the possession of the vendor. It was decided that the law would not measure the lapse of time from the sale and delivery to the renewed possession by the vendor directly from his vendee, and say that a change of possession continued for a longer period would satisfy the statute, but for a shorter period would not have that effect. The statute was said to be imperative that the sale must be followed by a continued change of possession or the fraudulent presumption would obtain.[4] If, however, the vendor takes possession openly

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[1] State v. King, 44 Mo. 238

[2] Bishop v. O'Connell, 56 Mo. 158.

[3] 107 Mo. 377, 17 S. W. Rep. 979. See also Markey v. Umstattd, 53 Mo. App. 20.

[4] See Tilson v. Terwilliger, 56 N. Y. 273; Garman v. Cooper, 72 Pa. St. 37; Young v. McClure, 2 W. & S. (Pa.) 147; Bacon v. Scannell, 9 Cal. 271; Miller v. Garman, 69 Pa. St. 134; Norton v. Doolittle, 32 Conn. 405; Clark v. Lee, 78 Mich. 221, 231, 44 N. W. Rep. 260; Hopkins v. Bishop, 91 Mich. 328, 51 N. W. Rep. 902.

as agent of the vendee, this fact does not raise a presumption of fraud.[1]

§ 258. **Temporary resumption of possession.** — Where it appears that the property passed into the hands of the vendor for a mere temporary purpose, and under circumstances which showed that the return of the property was not effected with a view of enabling the vendor to use it as his own while the legal title was in another, the creditors of the vendor will not be authorized to attack the sale as fraudulent and void. This was held where the subject-matter of the sale was a cutter which the vendee occasionally allowed the vendor to use.[2] Where after delivery the vendor takes forcible possession, his so doing does not render the property liable to seizure by his creditors.[3] Questions of this class often depend for their solution upon the *locus* of the action; whether it be in a State where the presumption can be rebutted or one where it is conclusive. By way of contrast with Knight v. Forward, is Webster v. Peck,[4] where it appeared that a vendor, who had sold a horse, within a week after the sale hired him of the vendee, and was using him to all appearances as his own, in the same manner as before the sale. This was considered to be a restoration of the possession,[5] and the vendee lost his horse to an attaching creditor of the vendor.[6]

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[1] Stanley v. Nat. Union Bank, 115 N. Y. 122, 22 N. E. Rep. 29; Hopkins v. Bishop, 91 Mich. 328, 51 N. W. Rep. 902; Reed v. Minor, 3 Cranch C. C. 82, 20 Fed. Cas. 446; Bell v. McCloskey, 155 Pa. St. 319, 26 Atl. Rep. 547; State *ex rel.* Smith v. Flynn, 56 Mo. App. 236; Crawford v. Neal, 144 U. S. 585, 12 S. C. Rep. 759; cf. Thornton v. Cook, 97 Ala. 630, 12 So. Rep. 403.

[2] Knight v. Forward, 63 Barb. (N. Y.) 311.

[3] Post v. Berwind-White Coal Mining Co., 176 Pa. St. 297, 35 Atl. Rep. 111.

[4] 31 Conn. 495.

[5] See Davis v. Bigler, 62 Pa. St. 248; Barr v. Reitz, 53 Pa. St. 256.

[6] Compare Bond v. Bronson, 80 Pa. St. 360; Johnson v. Willey, 46 N. H. 75; Lewis v. Wilcox, 6 Nev. 215.

§ 259. Concurrent possession insufficient. — The authorities seem to be almost unanimous in holding that concurrent possession by the vendor and vendee will not satisfy the rule or the statute requiring a change of possession.[1] "There cannot, in such case," said Duncan, J., "be a concurrent possession; it must be exclusive, or it would, by the policy of the law, be deemed colorable."[2] Again, it is said to be "mere mockery to put in another person to keep possession jointly with the former owner."[3] In Wordall v. Smith,[4] Lord Ellenborough observed: "To defeat the execution by a bill of sale, there must appear to have been a *bona fide*, substantial change of possession. . . . . A concurrent possession with the assignor is colorable. There must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors."[5] So it is no change of possession to leave the property in charge of the vendor's agent.[6]

§ 260 Possession of bailee. — The sale of personal property in the hands of a bailee is good against an execution creditor, though there be no actual delivery, provided the vendor do not retake the possession.[7] In Dempsey v. Gardner,[8] Chief-Justice Gray said: "Where property sold is at the time in the custody of a third person, notice

[1] Sumner v. Dalton, 58 N. H. 296; Lang v. Stockwell, 55 N. H. 561; Steelwagon v. Jeffries, 44 Pa. St. 407. Compare Townsend v. Little, 109 U. S. 504, 3 S. C. Rep. 357.

[2] Clow v. Woods, 5 S. & R. (Pa.) 287. See McKibbin v. Martin, 64 Pa. St. 359, per Sharswood, J.; Regli v. McClure, 47 Cal. 612; Brawn v. Keller, 43 Pa. St. 106.

[3] Babb v. Clemson, 10 S. & R. (Pa.) 428. See Worman v. Kramer, 73 Pa. St. 378.

[4] 1 Campb. 332.

[5] See Trask v. Bowers, 4 N. H. 314.

[6] Brunswick v. McClay, 7 Neb. 137. But compare Allen v. Cowan, 23 N. Y. 502; State *ex rel.* Smith v. Flynn, 56 Mo. App. 236.

[7] Linton v. Butz, 7 Pa. St. 89; Worman v. Kramer, 73 Pa. St. 385; Goodwin v. Kelly, 42 Barb. (N. Y.) 194.

[8] 127 Mass. 381, 383. The bailee in such case must either relinquish to the purchaser or consent to hold as his bailee. Campbell v. Hamilton, 63 Iowa 293, 19 N. W. Rep. 220; Hildreth v. Fitts, 53 Vt. 684; Morrison v. Oium, 3 N. Dak. 76, 54 N. W. Rep. 288; Buhl Iron Works v. Teuton, 67 Mich. 623, 35 N. W. Rep. 804.

to him of the sale is sufficient to constitute a delivery as against subsequent attaching creditors."[1] The reason of the rule calling for change of possession is entirely satisfied in such cases.[2]

§ 261. No delivery where purchaser has possession. — Where at the time of the sale the property is in the possession and subject to the control of the vendee, the law does not require an act of delivery. The sale is complete without it.[3] In Warden v. Marshall,[4] Hoar, J., said: "The oil being already in the plaintiff's possession in the bonded warehouse, no other delivery was necessary to complete the sale." In Lake v. Morris,[5] Hinman, C. J., observed: "At the time of the purchase the plaintiff was keeping the horses for his nephew, and the defendant claims that, because there was no formal delivery of the possession of them by the vendor to the purchaser, the sale was in point of law fraudulent and void against creditors. Of course no such delivery could have taken place without first taking the horses from the plaintiff's possession for the mere purpose of redelivering them to him again. But a merely formal act like this we presume would never occur between parties whose only object was to place the purchased property in the hands of the purchaser for his use." But where a principal transferred his property to his agent who resided at the store and did business in the name of the principal, it was held that unless the agent made known to the public that he held

[1] Citing Tuxworth v. Moore, 9 Pick. (Mass.) 347; Carter v. Willard, 19 Pick. (Mass.) 1; Russell v. O'Brien, 127 Mass. 349. See Hildreth v. Fitts, 53 Vt. 684; Doak v. Brubaker, 1 Nev. 218; How v. Taylor, 52 Mo. 592; Kendall v. Fitts, 22 N. H. 1.

[2] The rule is otherwise as to a mere servant; the possession of a servant is the possession of his employer. Hurlburd v. Bogardus, 10 Cal. 519; Doak v. Brubaker, 1 Nev. 218; Flanagan v. Wood, 33 Vt. 338. See Chester v. Bower, 55 Cal. 46.

[3] Martin v. Adams, 104 Mass. 262; Warden v. Marshall, 99 Mass. 305; Nichols v. Patten, 18 Me. 231; Lake v. Morris, 30 Conn. 204.

[4] 99 Mass. 306.

[5] 30 Conn. 204.

as principal and no longer as agent, the sale would be treated as fraudulent.[1]

§ 262. When technical delivery is not essential. — In some instances the necessities of the case render a technical delivery of the property impossible;[2] in such cases the usual penalties will not be visited upon the purchaser. Thus a sale of cattle roaming over uninclosed plains with those of other owners, if *bona fide*, will not be invalid as against creditors of the vendor, merely for want of delivery, until the purchaser has had a reasonable time to separate and brand the cattle; and the branding of the cattle by the purchaser will constitute a good delivery, although the cattle are afterward allowed to remain in the same uninclosed range of pasture.[3] It is not essential that a transfer of stock should be made on the books of a corporation, to be valid against attaching creditors, when not called for by some positive provision of the charter.[4]

A symbolical delivery of a large quantity of logs, landed upon a stream preparatory to driving, has been considered sufficient.[5] The law accommodates itself to the necessities of the business and the nature of the property, making a symbolical delivery sufficient where nothing but a constructive possession can ordinarily be had.[6] Where actual delivery is not possible by reason of bulkiness the property should be promptly placed within

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[1] Comly v. Fisher' Taney's Dec. 121, 6 Fed. Cas. 207.

[2] Goddard v. Weil, 165 Pa. St. 419, 30 Atl. Rep. 1000; Lathrop v. Clayton, 45 Minn. 124, 47 N. W. Rep. 544.

[3] Walden v. Murdock, 23 Cal. 540. *Contra*, Sutton v. Ballou, 46 Iowa 517.

[4] Boston Music Hall Assoc. v. Cory, 129 Mass. 435. See Beckwith v. Burrough, 13 R. I. 294, and cases.

[5] Bethel Steam Mill Co. v. Brown, 57 Me. 9. The same rule applies to bricks. Hawkins v. Kansas City Hydraulic Press Brick Co., 63 Mo. App. 64.

[6] Compare Terry v. Wheeler, 25 N. Y. 520; Boynton v. Veazie, 24 Me. 286; Doak v. Brubaker, 1 Nev. 218; Long v. Knapp, 54 Pa. St. 514; Allen v. Smith, 10 Mass. 308; Tognini v. Kyle, 17 Nev. 215, 30 Pac. Rep. 819. But compare Wilson v. Hill, 17 Nev. 401, 30 Pac. Rep. 1076.

the exclusive power and control of the purchaser.[1] "It often happens," says Sharswood, J., "that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timbers in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where it would be not indeed impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer."[2]

§ 263. **Excusing want of change of possession.** — The contention was urged by counsel, in Mitchell v. West,[3] that in addition to proof that the sale of the chattels was *bona fide*, and that there was no intent to defraud the creditors of the vendor, it was necessary to show some valid excuse or reason for leaving the property in the possession of the vendor, or stated in another form, that the absence of intent to defraud creditors could not be established without showing a good reason for the want of change of possession. The court, upon the authority of Hanford v. Artcher,[4] held that this was not the case. The very purpose of the law in presuming fraud from a failure to deliver possession was to suppress sales made in bad faith and without consideration. Manifestly this presumption ought to disappear where both good faith

[1] Miller v. Lacey, 7 Houst. (Del.) 8, 30 Atl. Rep. 640.

[2] McKibbin v. Martin, 64 Pa. St. 357. Citing Clow v. Woods, 5 S. & R. (Pa.) 275; Cadbury v. Nolen, 5 Pa. St. 320; Linton v. Butz, 7 Pa. St. 89; Haynes v. Hunsicker, 26 Pa. St. 58; Chase v. Ralston, 30 Pa. St. 539; Barr v. Reitz, 53 Pa. St. 256; Benford v. Schell, 55 Pa. St. 393. See also Fitch v. Burk, 38 Vt. 683; Hutchins v. Gilchrist, 23 Vt. 82; Allen v. Smith, 10 Mass. 308; Conway v. Edwards, 6 Nev. 190; Walden v. Murdock, 23 Cal. 540; Cartwright v. Phœnix, 7 Cal. 281; Woods v. Bugbey, 29 Cal. 472; Lathrop v. Clayton, 45 Minn. 124, 47 N. W. Rep. 544; Garretson v. Hackenberg, 144 Pa. St. 107, 22 Atl. Rep. 875; Bell v. McCloskey, 155 Pa. St. 319, 26 Atl. Rep. 547.

[3] 55 N. Y. 107.

[4] 4 Hill (N. Y.) 271.

and consideration are proved to exist. Clute v. Fitch [1] is an illustration of a sufficient excuse for failing to change possession. A sleigh was sold in July, and owing to the difficulty of removing it at that season of the year, was stored, by agreement, in the vendor's barn until the ensuing winter. This was considered a satisfactory explanation of the failure to change possession. It may be here noted that a vendee may continue at the old stand the business which he has purchased of the vendor.[2]

§ 264. Change of possession of realty.—There seems to be a distinction recognized in the law as to the effect of a failure to change possession of realty as distinguished from the rule applicable to personalty. In Phettiplace v. Sayles,[3] a leading and highly important case, Story, J., said: "Another circumstance, relied on to invalidate the good faith of this conveyance, is, that no change of possession took place, but the grantor continued in possession notwithstanding the sale, and occupied the farm as he had been accustomed to do. This circumstance is not without weight, and, in a doubtful case, would incline the court not to yield any just suspicions arising from other causes. But possession, after a sale of real estate, does not *per se* raise a presumption of fraud, as it does in the case of personal estate. In the latter case, possession is *prima facie* evidence of ownership, and where a party, who is owner, sells personal property absolutely, and yet continues to retain the visible and exclusive possession, the law deems such conduct a constructive fraud upon the public, and the sale as to creditors wholly inoperative, whether it be for a valuable consideration or not. This doctrine has its foundation in a great public policy, to protect creditors against secret

[1] 25 Barb. (N. Y.) 428.
[2] Ford v. Chambers, 28 Cal. 13.
[3] 4 Mason, 321.

collusive transfers. The same rule does not apply to real estates. Possession is not here deemed evidence of ownership. . . . . The public look not so much to possession as to the public records as proofs of the title to such property. The possession, therefore, must be inconsistent with the sale, and repugnant to it in terms or operation, before it raises a just presumption of fraud."[1] The rule seems to be established in New York to the effect that the continuance in possession of the grantor is merely a circumstance proper to be considered in connection with other evidence tending to establish a design to defraud creditors, but it did not of itself warrant a finding as a legal conclusion that the deed was fraudulent,[2] and no presumption of fraud is raised by such continuance in possession and receipt of profits where these acts are in accordance with the terms of the deed.[3]

The reader must not be misled by the observation of Judge Story, that "possession is not here deemed evidence of ownership." The word "here" is significant in this connection. The rule enunciated by the learned court is partially founded on the disinclination of the law to presume fraud and is limited in its application. Possession, on the other hand, ordinarily raises a presumption of ownership by the occupant of real property. True

[1] See Every v. Edgerton, 7 Wend. (N. Y.) 260; Bank of the U. S. v. Housman, 6 Paige (N. Y.) 526; Fuller v. Brewster, 53 Md. 363; Clark v. Krause, 2 Mackey (D. C.) 567.

[2] Clute v. Newkirk, 46 N. Y. 684. Compare Steward v. Thomas, 35 Mo. 202; Apperson v. Burgett, 33 Ark. 328; Tompkins v. Nichols, 53 Ala. 197; Collins v. Taggart, 57 Ga. 355. In Avery v. Street, 6 Watts (Pa.) 249. Chief-Justice Gibson said: "It is well established that where land is conveyed want of correspondent possession is less evincive of fraud than where a chattel is sold, because the title to the former is evinced by possession, not of the thing, but of the title deeds, which, like manual occupation in the case of a chattel, is the criterion." See Tibbals v Jacobs, 31 Conn. 431; Merrill v. Locke, 41 N. H. 489; Ludwig v. Highley, 5 Pa. St. 132; Allentown Bank v. Beck, 49 Pa. St. 394; Paulling v. Sturgus, 3 Stew. (Ala.) 95; Suiter v. Turner, 10 Iowa 517.

[3] Alexander v. Todd, 1 Bond 175, 1 Fed. Cas. 383; Hildreth v. Sands, 2 Johns. Ch. (N. Y.) 46.

it is the lowest degree of title, but nevertheless it is evidence of ownership;[1] descends to heirs;[2] is subject to taxation;[3] may be sold at sheriff's sale;[4] and is sufficient proof of title to support ejectment against trespassers.[5] In these cases the presumption of ownership arising from possession is indulged because it does not conflict with an honest and lawful intention, and does not lead to a conclusion bearing the stigma of fraud.

§ 265. Change of possession on judicial sale. — The rule is promulgated in Pennsylvania that a change of possession is not necessary to give validity to a judicial sale.[6] Chief Justice Sharswood said, in Smith v Crisman:[7] "Nothing is better settled in this State than that the purchaser of personal property at sheriff's or constable's sale may leave it in the possession of the defendant, as whose property it was sold, under any lawful contract of bailment." The retention of possession in such a case is not a badge of fraud, because the sale is not the act of the party retaining the property, but is the act of the law, and being a judicial sale, conducted by a sworn officer of the law, is deemed to be fair and honest until proved otherwise.[8]

The rule is quite universal in its application that where a stranger purchases and pays for property on execution sale, his failure to remove it from the possession of the defendant in execution does not render the sale fraudulent *per se* or presumptively fraudulent.[9] Under the statute

[1] Rawley v. Brown, 71 N. Y. 85. See Ludlow v. McBride, 3 Ohio, 241; Phelan v. Kelly, 25 Wend. (N. Y.) 389; Teabout v. Daniels, 38 Iowa 158; Gillett v. Gaffney, 3 Col. 351.

[2] Mooney v. Olsen, 21 Kan. 691–697.

[3] Blackwell on Tax Titles, pp. 5, 6.

[4] Yates v. Yates, 76 N. C. 142.

[5] Jones v. Easley, 53 Ga. 454; Bates v. Campbell, 25 Wis. 614; Doe v. West, 1 Blackf. (Ind.) 135; Christy v. Scott, 14 How. 282. See Burt v. Panjaud, 99 U. S. 180; Sedgwick & Wait on Trial of Title to Land, Chap. XXVII.

[6] Bisbing v. Third Nat. Bank, 93 Pa. St. 79; Maynes v. Atwater, 88 Pa. St. 496.

[7] 91 Pa. St. 430.

[8] Craig's Appeal, 77 Pa. St. 456; Myers v. Harvey, 2 P. & W. (Pa.) 478.

[9] Abney v. Kingsland, 10 Ala. 355; Latimer v. Batson, 7 Dowl. & R. 106;

in New York,[1] however, as interpreted by the courts,[2] the execution sale will be presumptively fraudulent unless accompanied by immediate delivery, and followed by an actual and continued change of possession, whether the plaintiff in execution or a third person be the purchaser. The reason of the rule and the evil at which it is aimed is said to justify these decisions. Finch, J., observed: "As an honest purchaser buys because he wants the property and its possession, and, therefore, naturally and usually takes it, the absence of this fact indicates some purpose different from that of an honest purchaser, and requires proof of good faith and honest intention. These considerations apply equally to cases where the transfer of title from the vendor is through the agency of a judgment and execution followed by a sheriff's sale."[3]

§ 266. **Delivery of growing crops.** — Where the property which is the subject-matter of sale is a growing crop, there is much dissension in the cases as to delivery of possession. It is said in Illinois that in the case of standing crops the possession is in the vendee until it is time to harvest them, and until then he is not required to take manual possession of them.[4] Chief-Justice Cockburn, in speaking upon this subject, said: "It is impossible that there can be present delivery of growing crops. A growing crop is valueless, except so far as by its continuing growth it may hereafter benefit the purchaser, and it is

Anderson v. Brooks, 11 Ala. 953; Walter v. Gernant, 13 Pa. St. 515; Dick v. Lindsay, 2 Grant (Pa.) 431; Poole v. Mitchell, 1 Hill's (S. C.) Law 404; Guignard v. Aldrich, 10 Rich. Eq. (S. C.) 253. See Hanford v. Obrecht, 49 Ill. 146. Compare O'Brien v. Chamberlain, 50 Cal. 285.

[1] 3 N. Y. R. S. 222, §§ 5, 6.

[2] Stimson v. Wrigley, 86 N. Y. 336; Fonda v. Gross, 15 Wend. (N. Y.) 628; Gardenier v. Tubbs, 21 Wend. (N. Y.) 169.

[3] Stimson v. Wrigley, 86 N. Y. 336. See Wallace v. Nodine, 57 Hun (N. Y.) 245, 10 N. Y. Supp. 919.

[4] Ticknor v. McClelland, 84 Ill. 471. See Bull v. Griswold, 19 Ill. 631; Thompson v. Wilhite, 81 Ill. 356; Bellows v. Wells, 36 Vt. 600. Compare Quiriaque v. Dennis, 24 Cal. 154. See State v. Casteel, 51 Mo. App. 143; State v. Durant, 53 Mo. App. 493.

only when it reaches maturity that it can be removed, nor is it intended that it shall be removed till it is ripe. . . . . In a popular and practical sense, growing crops are no more capable of removal than the land itself."[1] Kent said: "I do not know that corn, growing, is susceptible of delivery in any other way than by putting the donee into possession of the soil." Yet authority can be cited to the effect that the vendee does not acquire good title in such cases.[2]

§ 267. **Possession with power of sale.**—The effect of leaving a mortgagor in possession of the mortgaged goods, with power to sell the property and substitute by purchase other property in its stead, has created much dissension in the courts, and engendered a vast amount of litigation. The question came up before the United States Supreme Court in Robinson v. Elliott,[3] a case which we shall presently consider at length.[4] The mortgagors were authorized by the express terms of the mortgage to continue in possession of the mortgaged wares and merchandise, sell the same, supply their places with other goods by purchase, the lien of the mortgage to extend to the replenished stock. The mortgage was adjudged absolutely void. It was said that whatever might have been the motive which actuated the parties to the mortgage, it was manifest that the necessary result of what they did was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes, and this, too, for an indefinite length of time. A mortgage which in its very terms contemplates such results, besides being no security to the

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[1] Brantom v. Griffits, L. R. 2 C. P. D. 212.

[2] Smith v. Champney, 50 Iowa 174; Lamson v. Patch, 5 Allen (Mass.) 586; Stone v. Peacock, 35 Me. 385. See Raventas v. Green, 57 Cal. 255.

[3] 22 Wall. 513.

[4] See *infra*, Chap. XXII., on Fraudulent Chattel Mortgages.

mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent intent.[1]

[1] See Egdell v. Hart, 9 N. Y. 213. There is much confusion in the authorities concerning the validity of these shifting liens. See Etheridge v. Sperry, 139 U. S. 266, 11 S. C. Rep. 565.

CHAPTER XVIII.

EVIDENCE.

§ 268. Concerning evidence.
269. Competency of party as witness.
270. Proof and conclusiveness of judgments.
271. Burden of proof.
271*a*. Books of account.
272. Secret trust.
273. Proof of insolvency of debtor.
274. Insolvency of vendee.
275. General reputation.
276. Concerning *res gestæ*.
277. Declarations before sale — Realty and personalty.
§ 278. Declarations of debtor after sale.
279. Possession after conveyance.
279*a*. Professions of good faith.
279*b*. Intention — Knowledge.
279*c*. Consideration.
280. Declarations of co-conspirators.
281. Proof of circumstances.
282. Other frauds.
283. Suspicions insufficient.
284. Proving value.
284*a*. Recitals in deed.
285. Testimony must conform to pleadings.

"Where fraud appears courts will drive through all matters of form." — *Buck* v. *Voréis*, 89 Ind. 117.

§ 268. Concerning evidence. — Manifestly general principles and rules of evidence cannot receive extended consideration in a special treatise relating to fraudulent alienations and creditors' bills. The sufficiency of the proofs requisite to uphold or defeat a creditor's proceeding to discover equitable assets or annul fraudulent transfers must, however, necessarily receive passing attention in its prominent and peculiar phases. The character of the evidence germane to the subjects of consideration,[1] notice,[2] intention,[3] badges of fraud,[4] creditors' liens,[5] and change of possession,[6] has been regarded as of sufficient importance to call for incidental treatment in separate chapters devoted to those topics, and will not be here discussed anew. Voluntary and fraudulent conveyances,

[1] See Chap. XV.
[2] See Chap. XXIV.
[3] See Chap. XIV.
[4] See Chap. XVI.
[5] See Chap. IV.
[6] See Chap. XVII.

as elsewhere shown,[1] are regarded as valid and operative between the parties. Only a creditor[2] or a purchaser from the donor or grantor can assail them, or inquire into the consideration, or the intent inspiring their execution. If the relationship of debtor and creditor is not admitted, the burden of proving it rests upon the creditor; the primary question in such cases is the existence of this relationship,[3] for if it is not established, then the complainant stands in the attitude of an intermeddler, raising a clamor which a court of equity would be illy employed in silencing.[4] The evidence in these actions takes a wide range.[5] The debtor's acts, statements, correspondence, the character of his business, and his debts, may be investigated.[6] And contracts are to be interpreted according to the law of the State where made — the *lex loci* — unless it is plain the laws of some other State were in view.[7]

§ 269. **Competency of party as witness.**—Not only is it permissible for the defendant to testify as a witness in an equity cause,[8] but he may be compelled, under the modern procedure, to give evidence upon the demand of the complainant.[9] The rule of the common law that no party to the record could be called as a witness for or against himself, or for or against any other party to the

[1] See Chap. XXVI.

[2] Sawyer v. Harrison, 43 Minn. 297, 45 N. W. Rep. 434.

[3] Cook v. Hopper, 23 Mich. 517, per Cooley, J. See Stanbro v. Hopkins, 28 Barb. (N. Y.) 271; Edmunds v. Mister, 58 Miss. 765; Donley v. McKiernan, 62 Ala. 34.

[4] Means v. Hicks, 65 Ala. 243.

[5] Nicolay v. Mallery, 62 Minn. 119, 64 N.W. Rep. 108; Trumbull v. Hewitt, 65 Conn. 67, 31 Atl. Rep. 492; Miller v. Hanley, 94 Mich. 253, 53 N. W. Rep. 962; O'Donnell v. Hall, 157 Mass. 463, 32 N. E. Rep. 666; Ferbrache v. Martin (Idaho, 1893), 32 Pac. Rep. 252; Silvis v. Oltmann, 53 Ill. App. 392.

[6] Brittain v. Crowther, 54 Fed. Rep. 295; Jenne v. Joslyn, 41 Vt. 478.

[7] Chillingworth v. Eastern Tinware Co., 66 Conn. 318, 33 Atl. Rep. 1009. Where fraud is alleged as the basis of an action, it must be proved. Truesdell v. Bourke, 145 N. Y. 612, 40 N. E. Rep. 83.

[8] Clark v. Krause, 2 Mackey (D. C.) 571.

[9] Texas v. Chiles, 21 Wall. 488.

suit,[1] has been almost wholly abrogated.[2] Mr. Justice Swayne said in Texas v. Chiles:[3] "The innovation it is believed, has been adopted in some form in most if not in all the States and Territories of our Union.[4] It is eminently remedial, and the language in which it is couched should be construed accordingly." Objections to the admissibility of testimony must be specified.[5]

§ 270. **Proof and conclusiveness of judgments.**—We have already discussed the principle underlying the rule which requires a judgment as the foundation of a creditor's proceeding to annul fraudulent alienations or discover equitable assets;[6] and the sufficiency or insufficiency of particular judgments to satisfy this exaction.[7] A judgment, unless rendered without jurisdiction, is not open to collateral attack.[8] It follows from what has been already said, and indeed has been expressly decided, that a voluntary conveyance will be upheld as regards a judgment rendered against the debtor upon a fictitious debt.[9] It may be observed that where no evidence is offered to impeach the judgments, and it appears that they were regularly rendered by courts having jurisdiction, and were conclusive as between the parties, such judgments are competent evidence tending to prove the debt, even as to third parties, until something is shown to the contrary by

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[1] 1 Greenleaf's Ev. §§ 329, 330.

[2] See Texas v. Chiles, 21 Wall. 488; Clark v. Krause, 2 Mackey (D. C.) 571.

[3] 21 Wall. 490.

[4] Citing 1 Greenleaf on Evidence, § 329.

[5] Adams v. Franklin, 82 Ga. 168, 8 S. E. Rep. 44.

[6] See Chap. IV, §§ 74–77.

[7] See §§ 76, 77; Lindsey v. Delano, 78 Iowa 350, 43 N. W. Rep. 218; Boyer v. Berryman, 123 Ind. 451, 24 N. E. Rep. 249; Spotts v. Commonwealth, 85 Va. 531, 8 S. E. Rep. 375.

[8] Dreyfuss v. Seale, 18 Misc. (N. Y.) 551, 41 N. Y. Supp. 875; Cooper v. Reynolds, 10 Wall. 316; White v. Bogart, 73 N. Y. 256, 259; Candee v. Lord, 2 N. Y. 269. A court of one State may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another State, was obtained by fraud, and if it was may enjoin the enforcement of it. Davis v. Cornue, 151 N. Y. 179, 45 N. E. Rep. 449.

[9] King v. Tharp, 26 Iowa 283.

way of impeachment.[1] A third party may, as a general rule, show that the judgment was collusive, and not founded upon an actual indebtedness or liability.[2] Were the rule otherwise the greatest injustice would result, since a stranger to the record cannot ordinarily move to vacate the judgment or prosecute a writ of error or an appeal.[3] The fact that a judgment is entered upon an offer to allow it does not render such judgment collusive in any sense.[4] Teed v. Valentine [5] is a peculiar case relating to the admissibility of evidence to explain a judgment and the motives of the debtor. In that case it appeared that the debt, which was merged in the judgment, repre-

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[1] Vogt v. Ticknor, 48 N. H. 245; Church v. Chapin, 35 Vt. 231; N. Y. & Harlem R. R. Co. v. Kyle, 5 Bosw. (N. Y.) 587; Hills v. Sherwood, 48 Cal. 386; Law v. Payson, 32 Me. 521; Clark v. Anthony, 31 Ark. 546. See Goodnow v. Smith, 97 Mass. 69; Lawson v. Moorman, 85 Va. 880, 9 S. E. Rep. 150; Wilkerson v. Schoonmaker, 77 Tex. 615, 14 S. W. Rep. 223; Pormann v. Frede, 72 Wis. 226, 39 N. W. Rep. 385; Schmidt v. Neimeyer, 100 Mo. 207, 13 S. W. Rep. 405; Adams v. Franklin, 82 Ga. 168, 8 S. E. Rep. 44; Crim v. Kessing, 89 Cal. 478, 26 Pac. Rep. 1074; Jamison v. Bagot, 106 Mo. 240, 16 S. W. Rep. 697. See § 74, especially the note.

[2] Vogt v. Ticknor, 48 N. H. 247; Gregg v. Bigham, 1 Hill's (S. C.) Law, 299; Collinson v. Jackson, 14 Fed. Rep. 309, 8 Sawyer 357; Clark v. Anthony, 31 Ark. 549; Carter v. Bennett, 4 Fla. 283. See Lewis v. Rogers, 16 Pa. St. 18; Sidensparker v. Sidensparker, 52 Me. 481; Clark v. Douglass, 62 Pa. St. 416; Wells v. O'Connor, 27 Hun (N. Y.) 428. Compare Voorhees v. Seymour, 26 Barb. (N. Y.) 569; Meeker v. Harris, 19 Cal. 278; Shaw v. Dwight, 27 N. Y. 245; Whittlesey v. Delaney, 73 N. Y. 571; Mandeville v. Reynolds, 68 N. Y. 545. "Fraud and imposition invalidate a judgment as they do all acts." Dobson v. Pearce, 12 N. Y. 165. The fraud which will authorize one court to reverse, in a collateral proceeding, the judgment of another court is a fraud practiced in the procurement of the judgment, by which the defendant was excluded from availing himself of a defense. Mayor, etc., of N. Y. v. Brady, 115 N. Y. 599, 22 N. E. Rep. 237.

[3] See Guion v. Liverpool L. & G. Ins. Co., 109 U. S. 173, 3 S. C. Rep. 108; Sidensparker v. Sidensparker, 52 Me. 487; Leonard v. Bryant, 11 Met. (Mass.) 370; Thomas v. Hubbell, 15 N. Y. 405; *Ex parte* Cutting, 94 U. S. 14.

[4] Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430, 32 N. E. Rep. 239. But a confessed judgment will be set aside where, from a consideration of all the circumstances, it appears to have been part of a scheme to defraud creditors. New York Commercial Co. v. Carpenter, 4 Misc. (N. Y.) 240, 24 N. Y. Supp. 248.

[5] 65 N. Y. 471.

sented property sold after the delivery of the deed; that is, the complainant was a subsequent creditor. The debtor was allowed to testify that he purchased the property as agent for his son, and that he did no business for himself. Though the judgment was conclusive as establishing that he was liable for the debt, it was considered competent to show that the debtor acted as agent, and was not personally engaged in business, and hence did not contemplate future indebtedness, and had no design to defraud future creditors.[1] According to some authorities a judgment is only evidence of its own existence; the fact that the claim antedated the fraudulent conveyance must be otherwise shown.[2]

§ 271. **Burden of proof.** — In general the obligation of proving a fact rests upon the party who substantially asserts the affirmative of the issue.[3] The decisions in the various States differ on the point whether a *prima facie* case is made out by showing fraud on the part of the grantor, which, in the absence of evidence on the part of the grantee, that he is both a *bona fide* purchaser and a purchaser for value, entitles plaintiff to a judgment, or whether the plaintiff is bound to show, as part of his case, fraud or absence of consideration on the part of the grantee. The correct rule seems to be that a creditor may succeed by proving a fraudulent intent on the part of the grantee.[4] In some cases the rule is held to be that, in any contest between a grantee and an existing

[1] See Chap. VI., §§ 96–101.

[2] Sweet v. Dean, 43 Ill. App. 650; Burton v. Platter, 53 Fed. Rep. 901; Troy v. Smith, 33 Ala. 469; Means v. Hicks, 65 Ala. 241; Marshall v. Croom, 60 Ala. 121.

[3] Greenl. Ev. § 74; Tompkins v. Nichols, 53 Ala. 197; Roberts v. Buckley, 145 N. Y. 223, 39 N. E. Rep. 966. The right to open and conclude especially on the trial and sifting of facts to unravel the subtleties of fraud, is an important legal right, and if improperly denied, demands the granting of a new trial. Royce v. Gazan, 76 Ga. 79.

[4] See Richards v. Vaccaro, 67 Miss. 516, 7 So. Rep. 506; cf. Mobile Savings Bk. v. McDonnell, 89 Ala. 434, 8 So. Rep. 137.

creditor, the burden to prove good faith is on the grantee, even without evidence of fraud on the part of the grantee.[1] With the possible exception of conveyances to a wife by a husband,[2] the burden of proof, in cases where the instrument is valid upon its face, generally rests upon the creditor to show a fraudulent intent[3] or absence of consideration.[4] Where it is proved that the conveyance was in satisfaction of a valid indebtedness at a fair price, the burden to prove the existence of a secret trust or benefit is on the creditor.[5] If, however, the vendee having the burden cast upon him,[6] shows that valuable consideration was paid for the transfer of the property in controversy, the burden of proof shifts and the creditor, in order to recover, must prove fraud on the part of the grantee;[7] then there must be evidence of a fraudulent intent on the part of the vendee,[8] or proof that he had notice of the vendor's evil design.[9] Where a strong doubt of the integrity of the transaction is created, the duty of making full explanation, and the burden of proof

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[1] Fisher v. Moog, 39 Fed. Rep. 665.

[2] See Chap. XX.

[3] Kipp v. Lamoreaux, 81 Mich. 299, 45 N. W. Rep. 1002; Haynes v. Rogers, 111 N. C. 228, 16 S. E. Rep. 416.

[4] See §§ 5, 6. Fuller v. Brewster, 53 Md. 359; Cooke v. Cooke, 43 Md. 533; Anderson v. Roberts, 18 Johns. (N. Y.) 515; Mehlhop v. Pettibone, 54 Wis. 652, 11 N. W. Rep. 553, 12 Id. 443; Starin v. Kelly, 88 N. Y. 421; Tompkins v. Nichols, 53 Ala. 197; Barkow v. Sanger, 47 Wis. 500, 3 N. W. Rep. 16; Kellogg v. Slauson, 11 N. Y. 304; Pusey v. Gardner, 21 W. Va. 476; Hale v. West Va. Oil & Land Co., 11 W. Va. 229; Kruse v. Prindle, 8 Oregon 158; Jones v. Jones, 137 N. Y. 610, 33 N. E. Rep. 479; Townsend v. Stearns, 32 N. Y. 209. But see Francis v. Page, 97 Ala. 379, 11 So. Rep. 736.

[5] Pollak v. Searcy, 84 Ala. 259, 4 So. Rep. 137; Bamberger v. Schoolfield, 160 U. S. 149; 16 S. C. Rep. 225.

[6] Throckmorton v. Rider, 42 Iowa 86; Spence v. Smith, 34 W. Va. 697, 12 S. E. Rep. 828.

[7] Ross v. Wellman, 102 Cal. 4, 36 Pac. Rep. 402; Jones v. Simpson, 116 U. S. 610, 6 S. C. Rep. 538.

[8] Jones v. Simpson, 116 U. S. 609, 6 S. C. Rep. 538; Blumer v. Bennett, 44 Neb. 873, 63 N. W. Rep. 14; Hinds v. Keith, 6 C. C. A. 231, 57 Fed. Rep. 10; Tillman v. Heller, 78 Tex. 597, 14 S. W. Rep. 700; Bamberger v. Schoolfield, 150 U. S. 149, 16 S. C. Rep. 225.

[9] See Chap. XIV, §§ 196, 197.

to sustain the transfer, rests with the insolvent.[1] And where a debtor conveys all his unexempt property to a member of his family in consideration of alleged past services, a case is made out requiring full explanation on the part of the purchaser in respect to the consideration and the honesty of the transaction.[2] The same rule applies where the debtor takes the title to property as trustee for his daughter.[3] The fraud must usually be established by the party alleging it by a fair preponderance of proof.[4]

§ **271a. Books of account.**—Judgment-creditors can frequently make use of entries in the debtors' books of account. While such books are not ordinarily received in evidence in an action at law to recover a debt, except under peculiar circumstances, or as against the party who kept the books, yet in an action in equity they are admitted not only against the judgment-debtor, whose transactions they are supposed to record, but also against those deriving property from him, as to such entries as were made while such property was still in his possession. The New York Court of Appeals says: "Although the books are not competent as against a creditor seeking to recover a judgment for his debt, they may be introduced by a judgment-creditor to support an attack in equity upon the transfer of property by the judgment-debtor to a third person, claiming a valid debt as the consideration for the transfer. Entries made in the ordinary course of business, while the debt in dispute was in process of contraction, are competent as to another creditor, for the purpose of showing that there was no such debt."[5]

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[1] Clements v. Moore, 6 Wall. 315. See also Piddock v. Brown, 3 P. Wms. 289; Wharton v. May, 5 Ves. 49.

[2] Welch v. Bradley, 45 Minn. 540, 48 N.W. Rep. 440.

[3] Lavelle v. Clark (Ct. App. Ky. 1896) 38 S. W. Rep. 481.

[4] Brown v. Herr, 21 Neb. 128, 31 N. W. Rep. 246.

[5] White v. Benjamin, 150 N. Y. 266, 44 N. E. Rep. 956. See Loos v.

§ 272. Secret trust.—The most common forms of fraudulent conveyances are those in which a secret trust or benefit is reserved for the debtor. Manifestly the law will not permit an insolvent to sell his land and convey it without apparent reservation, and yet secretly [1] retain for himself the right to occupy it for a limited time for his own benefit.[2] A transfer of this character, even though founded upon a good consideration, lacks the elements of good faith, is not what it purports to be, conceals the real agreement existing between the parties, confers upon the debtor the enjoyment of a valuable right which it is intended to place beyond the reach of creditors, and constitutes a fraud upon them.[3] "A collusive transfer, placing the property of a debtor out of the reach of his creditors, while securing to him its beneficial enjoyment, is not to be tolerated." [4] It is immaterial whether the trust is express and apparent upon the face of the deed or is implied from extrinsic circumstances.[5] The whole

Wilkinson, 110 N. Y. 209, 18 N. E. Rep. 99; Fleming v. Yost, 137 Ind. 95, 36 N. E. Rep. 705; Bicknell v. Mellett, 160 Mass. 328, 35 N. E. Rep. 1130. Entries of payments of money made to a grantor at various times, the entries being made at the time of the payments, are admissible as a part of the *res gestæ* to illustrate and bring out the whole transaction in regard to the transfer and the consideration for it. Fleming v. Yost, 137 Ind. 95, 36 N. E. Rep. 705.

[1] Stratton v. Putney, 63 N. H 577, 4 Atl. Rep. 876; Kain v. Larkin, 4 App. Div. (N. Y.) 209, 38 N. Y. Supp. 546.

[2] Lukins v. Aird, 6 Wall. 79; Birmingham Dry Goods Co. v. Roden, 110 Ala. 511, *sub nom.* Birmingham Dry Goods Co. v. Kelso, 18 So. Rep. 135. See Wooten v. Clark, 23 Miss. 76; Arthur v. Commercial & R. R. Bank, 17 Miss. 394; Towle v. Hoit, 14 N. H. 61; Paul v. Crooker, 8 N. H. 288; Smith v. Lowell, 6 N. H. 67; Hills v. Eliot, 12 Mass. 26; Fulkerson v. Sappington, 104 Mo. 472, 15 S. W. Rep. 941; First Nat. Bank of Mankato v. Kansas City Lime Co., 43 Mo. App. 561; Justh v. Wilson, 19 Dist. Col. 532; Lang v. Stockwell, 55 N. H. 561.

[3] See § 22. Young v. Heermans, 66 N. Y. 382; Crouse v. Frothingham, 27 Hun (N. Y.) 125: Dean v. Skinner, 42 Iowa 418; Sims v. Gaines, 64 Ala. 392–397; Rice v. Cunningham 116 Mass. 469; Giddings v. Sears, 115 Mass. 505; Dent v. Ferguson, 132 U. S. 67. See Macomber v. Peck, 39 Iowa 351; Innis v. Carpenter, 4 Col. App. 30, 34 Pac. Rep. 1011; Bostwick v. Blake, 145 Ill. 85, 34 N. E. Rep. 38.

[4] Crawford v. Neal, 144 U. S. 595; 12 S. C. Rep. 759.

[5] Coolidge v. Melvin, 42 N. H. 510; Rice v. Cunningham, 116 Mass. 469.

estate of the debtor is in theory of law liable for the payment of his debts, and it is fraudulent to conceal or secrete any part of the insolvent's property from his creditors.[1] Where a father caused foreclosure proceedings to be brought against himself, and his son became the purchaser, and the creditors of the latter proceeded to acquire such interest, it was held that the father would not be permitted to give evidence of a secret trust in the son for the benefit of the father.[2] So a secret agreement upon a sheriff's sale to hold the property in trust for the debtor renders the sale void even as to subsequent creditors.[3]

Secret trusts are manifestly most difficult to establish in court. Surrounding circumstances and the relations of the parties and their conduct and bearing may be given in evidence. Sometimes the isolated bits of evidence shadowing forth the secret arrangement or benefit seem most inconclusive and unsatisfactory, but when grouped together and considered as a whole, the fraudulent device can be made manifest.

§ 273. **Proof of insolvency of debtor.** — The term insolvent is usually applied to one whose estate is not sufficient to pay his debts,[4] or a person who is unable to pay all his debts from his own means,[5] and cannot proceed with his

[1] Sparks v. Mack, 31 Ark. 670; Paul v. Crooker, 8 N. H. 288; Moore v. Wood, 100 Ill. 454; Conover v. Beckett, 38 N. J. Eq. 384. See Chap. II.

[2] Conover v. Beckett, 38 N. J. Eq. 384.

[3] Bostwick v. Blake, 145 Ill. 85, 34 N. E. Rep. 38; Grimes Dry Goods Co. v. Shaffer, 41 Neb. 112, 59 N. W. Rep. 741; Rucker v. Moss, 84 Va. 634, 5 S. E. Rep. 527.

[4] Mitchell v. Mitchell, 42 S. C. 483, 20 S. E. Rep. 405; Akers v. Rowan, 33 S. C. 470, 12 S. E. Rep. 165; Toof v. Martin, 13 Wall. 47.

[5] Riper v. Poppenhausen, 43 N. Y. 68; Marsh v. Dunckel, 25 Hun (N. Y.) 169, 170. See Buchanan v. Smith, 16 Wall. 308; Herrick v. Borst, 4 Hill (N. Y.) 652; Brouwer v. Harbeck, 9 N. Y. 594; Peabody v. Knapp, 153 Mass. 242, 26 N. E. Rep. 696; Sabin v. Columbia Fuel Co., 25 Ore. 15, 34 Pac. Rep. 692; Holcombe v. Ehrmanntraut, 46 Minn. 397, 49 N. W. Rep. 191; Chipman v. McClellan, 159 Mass. 368, 34 N. E. Rep. 379; Sacry v. Lobree, 84 Cal. 46, 23 Pac. Rep. 1088; Wager v. Hall, 16 Wall. 599.

business in the usual course of trade.[1] On the other hand, a party is solvent who has property subject to legal process sufficient to satisfy all his obligations.[2] A finding that a man was "financially embarrassed" is not equivalent to a finding of insolvency. One may be financially embarrassed and yet be possessed of abundant property, out of the proceeds of which, when realized upon, his debts could be paid.[3] The inquiry is, has the debtor such means that payment may be enforced at law?[4] An embarrassed debtor may, of course, effect any sales of his property which he deems advantageous, to enable him to raise the necessary means for paying off his creditors, and, within reasonable restrictions, to prevent its sacrifice at forced sale under execution, and for this purpose the law generally recognizes his right to sell either for cash or on credit.[5]

Proof of insolvency of the debtor at the date of the alienation is frequently of vital importance in creditors' suits.[6] Evidence of the insolvency of the vendor a year after the sale is not material,[7] and where a debtor has property sufficient to satisfy all his creditors he cannot be said to be insolvent though he lacks sufficient ready money to

[1] Curtis v. Leavitt, 15 N. Y. 141.

[2] Herrick v. Borst, 4 Hill (N. Y.) 652; approved, Walkensbaw v. Perzel, 32 How. Pr. (N. Y.) 240; Brouwer v. Harbeck, 9 N. Y. 594. See Eddy v. Baldwin, 32 Mo. 374; McKown v. Furgason, 47 Iowa 637. The term "open and notorious insolvency" is said to imply not the want of sufficient property to pay all of one's debts, but the absence of all property within reach of the law, applicable to the payment of any debt. Hardesty v. Kinworthy, 8 Blackf. (Ind.) 304.

[3] Jacobs v. Morrison, 136 N. Y. 104, 32 N. E. Rep. 552.

[4] Reid v. Lloyd, 52 Mo. App. 282

[5] Dougherty v. Cooper, 77 Mo. 531. See Hickey v. Ryan, 15 Mo. 62; Buckner v. Stine, 48 Mo. 407; Waddams v. Humphrey, 22 Ill. 663; Nelson v. Smith, 28 Ill. 495. In Jacobs v. Morrison, 136 N. Y. 104, 32 N. E. Rep. 552, the court says: "The finding that the grantor was 'financially embarrassed' does not affect his conveyance, and certainly is not equivalent to a finding of insolvency. One may be 'financially embarrassed' and yet be possessed of abundant property, out of the proceeds of which, when realized upon, his debts could be paid."

[6] Nevers v. Hack, 138 Ind. 260, 37 N. E. Rep. 791, and cases cited.

[7] Martin v. Fox, 40 Mo. App. 664.

meet maturing obligations.[1] How can the evidence upon this point of solvency be best adduced? It is the condition of the debtor and not his belief as to solvency that the law regards.[2] The rule has been formulated that "the opinion of a witness that a person is solvent or insolvent is inadmissible."[3] In Denman v. Campbell[4] this question was put: "Is Donal Campbell a man of responsibility?" and the answer given under objection was: "So far as I know, he was not responsible." The reception of this evidence was held to be error. The fact that a man is reputed among his neighbors to be worth a given sum does not prove that he is, nor is it admissible

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[1] Smith v. Collins, 94 Ala. 394, 10 So. Rep. 334.

[2] Austin v. First Nat. Bk., 47 Ill. App. 225.

[3] Lawson on Expert & Opinion Evidence, p. 515. Citing Brice v. Lide, 30 Ala. 647; Nuckolls v. Pinkston, 38 Ala. 615; Royall v. McKenzie, 25 Ala. 363. But see Breckinridge v. Taylor, 5 Dana (Ky.) 114; Crawford v. Andrews, 6 Ga. 244; Riggins v. Brown, 12 Ga. 273; Sherman v. Blodgett, 28 Vt. 149.

[4] 7 Hun (N. Y.) 88. In Babcock v. Middlesex Sav. Bank, 28 Conn. 306, the court said: "We think that the court below erred in receiving the opinion of the judge of probate as to the pecuniary ability of H. D. Smith, for the purpose of rebutting the evidence adduced by the defendants to show that he was destitute of property. The witness did not profess to have any knowledge whatever in regard to the property or pecuniary circumstances of Smith or any means of forming a judgment or opinion on that subject, excepting from the style in which he and his family lived, the manner of his leaving the State, and the fact that he had made, before the court of probate, no disclosure of his property under oath, in the proceedings in insolvency against him. Although, as to the value of property we resort to the judgment or opinion of persons acquainted with it, its existence and ownership are facts to be proved, whether directly or otherwise, like other facts, by the knowledge of witnesses, and not by their opinions, inferences or surmises, derived from whatever source. The present is not like the cases where an opinion is sought of an expert; or those in which, for certain purposes, the reputation of a person as to pecuniary ability may be shown by witnesses who have no personal knowledge of his situation. The inquiry here was not whether Smith was reputed to be, but whether he was in fact, destitute of property. On such an inquiry nothing could be more dangerous than to receive the opinions of persons founded on such fallacious grounds as common rumor, or a man's professions as to his circumstances, or the representations or opinions of others, or, what in many cases is still less to be relied on, his style or manner of living."

upon the issue of his making a fraudulent disposition of his property.[1] In a case which arose in New York, in which the primary and all-important question was whether a corporation was solvent or not,[2] many of the witnesses examined on the point expressed nothing more than an opinion upon the subject, without referring to any facts from which such opinion was formed. It was very properly ruled that such evidence was entirely insufficient, and could never form a basis for any action of the court.[3] Evidence that a man was generally reputed to be insolvent is competent upon the theory that the fact to be proved is of a negative character, scarcely admitting of direct and positive proof.[4] In the great majority of cases, it would be impracticable and exceedingly tedious and expensive to procure any other proof of insolvency than that of general reputation in the community where the debtor resides and is known.[5] If the witness is able to state numerous facts touching the property of the debtor, and the amount of his indebtedness, which show a very full and intimate acquaintance with his affairs and his utter insolvency, he may be permitted to answer a question whether or not the debtor was able to pay his

[1] First Nat. Bk. v. Buck, 56 Mich. 394, 23 N. W. Rep. 57.

[2] On the question of the insolvency of a corporation, evidence of a notary that he had protested for non-payment commercial paper due by it is admissible. Mish v. Main, 81 Md. 36, 31 Atl. Rep. 799.

[3] See Brundred v. Paterson Machine Co., 4 N. J. Eq. 295. Compare Nininger v. Knox, 8 Minn. 140; Andrews v. Jones, 10 Ala. 460. In Sherman v. Blodgett, 28 Vt. 149, the court said: "The solvency of an individual is a matter resting somewhat in opinion; and, in the present case, the witness had stated what property the bail owned at the time he entered bail, and his means of knowing the situation and circumstances of the bail; certainly there could then be no objection to his giving his opinion from his knowledge of the bail, and of his affairs, what he thought he was worth."

[4] Nininger v. Knox, 8 Minn. 148; Griffith v. Parks, 32 Md. 4; Crawford v. Berry, 6 Gill & J. (Md.) 63; Metcalf v. Munson, 10 Allen (Mass.) 493; Bank of Middlebury v. Rutland, 33 Vt. 414; Lee v. Kilburn, 3 Gray (Mass.) 594.

[5] Griffith v. Parks, 32 Md. 4; Watkins v. Worthington, 2 Bland (Md.) 509, 540, 541.

debts, at a particular time, in the usual course of business. This is considered as calling for a fact, and not for the opinion of the witness.[1] We may here state that there is no presumption of law, arising from knowledge of insolvency, that the assignee knew of the debtor's intention to defraud creditors.[2] Return of an execution *nulla bona* is *prima facie* evidence of insolvency.[3] But the mere fact that a vendee knows that his vendor was insolvent will not overturn a conveyance founded upon adequate consideration.[4] Where one engaged in commercial pursuit permits his commercial paper to be dishonored, and his property to be attached, this is evidence of insolvency.[5] And a statement that a party is indebted to divers persons in considerable sums of money, which he is unable to pay, is a declaration of insolvency. "When a person is unable to pay his debts, he is understood to be insolvent."[6]

§ 274. Insolvency of vendee. — The ability of the vendee to pay the purchase-money for the property, before and at the time of the transaction, is a material circumstance for the consideration of the jury, and testimony upon that point should be admitted.[7] The purchaser may testify as to the sources from which he procured the

[1] Thompson v. Hall, 45 Barb. (N. Y.) 216. See Blanchard v. Mann, 1 Allen (Mass.) 433; Iselin v. Peck, 2 Rob. (N. Y.) 629.

[2] Cannon v. Young, 89 N. C. 264. On the issue whether a conveyance of real estate is fraudulent as to creditors, evidence of the register of deeds for the district in which the estate lies, that he has searched the records of the registry, and found that there was no other property standing in the name of the grantor, is admissible. Bristol Co. Sav. Bank v. Keavy, 128 Mass. 298.

[3] Warmoth v. Dryden, 125 Ind. 355, 25 N. E. Rep. 433; Ogden State Bank v. Barker, 12 Utah 27, 40 Pac. Rep. 769.

[4] Erdall v. Atwood, 79 Wis. 1, 47 N. W. Rep. 1124; Warner v. Littlefield, 89 Mich. 329, 50 N. W. Rep. 721; National Bk. of Oshkosh v. Nat. Bk. of Ironwood, 100 Mich. 485, 59 N. W. Rep. 231.

[5] Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. Rep. 348; Booth v. Powers, 56 N. Y. 22, 32.

[6] Cunningham v. Norton, 125 U. S. 77, 90, 8 S. C. Rep. 804.

[7] Johnson v. Lovelace, 51 Ga. 19.

money.[1] For the purpose of showing that a mortgage is fraudulent, it is competent to prove that in the country where the mortgagee was born and grew up, and continued to reside, he was never known to have any property or means, or to be engaged in any business,[2] and was not in a position to lend money.[3] So the creditor may show that the grantee was a married woman, having no separate estate, notoriously poor, and destitute of means to make the payment claimed or contemplated.[4] Testimony of this kind is often of vital importance to creditors, as nothing is more common or more persuasive to the minds of a court or a jury as to the presence of fraud than proof that the debtor's property has passed into the hands of an irresponsible figurehead, who was not possessed of the means with which to purchase it, and had no use for it.

The schedules of an insolvent debtor are not competent evidence against a third party, to prove the indebtedness of the assignor.[5]

§ 275. **General reputation.** — Evidence of the general reputation of all the parties to an alleged fraudulent transaction, as to their credit and pecuniary responsibility, may be admitted.[6] In this respect the general reputation of the grantor is a fact which, with other circumstances, has some tendency to show that the grantee understood his motives in making the conveyance, and possibly participated in his unlawful purpose; and proof of the

[1] Tuckwood v. Hanthorn, 67 Wis. 326, 30 N. W. Rep. 705.

[2] Stebbins v. Miller, 12 Allen (Mass.) 597.

[3] Demeritt v. Miles, 22 N. H. 523.

[4] Amsden v. Manchester, 40 Barb. (N. Y.) 163. See S. P. Danby v. Sharp, 2 MacAr. (D. C.) 435; Stevens v. Dillman, 86 Ill. 233; Castle v. Bullard, 23 How. 186.

[5] Hahn v. Penney, 60 Minn. 487, 62 N. W. Rep. 1129.

[6] Hall v. Ritenour, 2 West. Rep. 496; *sub nom.* Gordon v. Ritenour, 87 Mo. 54; Ferbrache v. Martin (Idaho, 1892) 32 Pac. Rep. 252; Hahn v. Penney, 60 Minn. 487, 62 N. W. Rep. 1129.

grantee's want of credit would have a tendency to show that the conveyance was not made in good faith, especially if made in reliance upon his future ability to pay.[1] Evidence that the grantee's general credit was bad, though somewhat remote, cannot be said to be incompetent.[2] Where fraud is charged and sought to be established by proof of circumstances, evidence of general good character is admissible to repel it, as in criminal cases.[3] General reputation of doing business on borrowed money is admissible on the issue as to whether the defendant had reasonable cause to believe the debtor insolvent.[4]

§ 276. Concerning res gestæ. — Where it becomes necessary to discover the intention of a person, or to investigate the nature of a particular act, evidence of what the person said at the time of doing it or contemporaneous with the transaction[5] is received as part of the *res gestæ*.[6] This important doctrine has been liberally applied in the United States, and especially in the class of litigation under consideration. The declarations must relate to the act which they characterize; they must be calculated to unfold the nature and quality of the facts which they are intended to explain, and they must so harmonize with

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[1] Sweetser v. Bates, 117 Mass. 468.

[2] Cook v. Mason, 5 Allen (Mass.) 212. Compare Lee v. Kilburn, 3 Gray (Mass.) 594; Metcalf v. Munson, 10 Allen (Mass.) 491; Amsden v. Manchester, 40 Barb. (N. Y.) 163.

[3] Werts v. Spearman, 22 S. C. 219; Bowerman v. Bowerman, 76 Hun (N. Y.) 46, 27 N. Y. Supp. 579; affi'd 145 N. Y. 598; 40 N. E. Rep. 163.

[4] Killam v. Perce, 153 Mass. 502, 27 N. E. Rep. 520.

[5] Flannery v. Van Tassel, 131 N. Y. 639, 30 N. E. Rep. 24.

[6] Waldele v. New York Central & H. R. R. R. Co., 95 N. Y. 274; Hanover Railroad Co. v. Coyle, 55 Pa. St. 396; Loos v. Wilkinson, 110 N. Y. 211, 18 N. E. Rep. 99; Moore v. Meacham, 10 N. Y. 207; Schnicker v. People, 88 N. Y. 192; Swift v. Mass. Mutual Life Ins. Co., 63 N. Y. 186; Sanger v. Colbert, 84 Tex. 668, 19 S. W. Rep. 863; Reiley v. Haynes, 38 Kans. 259, 16 Pac. Rep. 440; Smith v. Nat. Benefit Soc., 123 N. Y. 85, 25 N. E. Rep. 197; Jenne v. Joslyn, 41 Vt. 478; Harton v. Lyons, 97 Tenn. 180, 36 S. W. Rep. 851.

those facts as to form one transaction.[1] The declarations must grow out of the principal fact or transaction, illustrate its character, be contemporaneous with it and derive some degree of credit from it.[2] Thus a wife may employ her husband as an agent, and his utterances while so acting, in taking a bill of sale, constitute part of the *res gestæ* and are competent evidence for the wife.[3] The declarations accompanying an act are admissible as explanatory of the character and motives of the act.[4] They in this way become part of the *res gestæ*. The declarations of the grantor made to the notary at the time of executing the deed may be shown;[5] so may the statement of the debtor to a clerk as to who is employing him.[6] It is the duty of the jury to determine the weight of these declarations, by ascertaining whether they were sincere, or were made to withdraw attention from the real nature of the act, or to hide the real purpose of it.[7] The declarations which are merely narrative of a *past* transaction are not admissible as part of the *res gestæ*,[8] but the declarations of a debtor prior to the alleged inception of the fraud are admissible in favor of the grantee.[9] The test is as to whether the testimony offered throws light upon the transaction.[10]

§ 277. **Declarations before sale — Realty and personalty.** — The conduct and declarations of the grantor[11] respecting

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[1] Smith v. Nat. Benefit Soc., 123 N. Y. 85, 25 N. E. Rep. 197; Tilson v. Terwilliger, 56 N. Y. 277.

[2] Bush v. Roberts, 111 N. Y. 282, 18 N. E. Rep. 732; Lund v. Inhabitants of Tyngsborough, 9 Cush. (Mass.) 36.

[3] Kelly v. Campbell, 1 Keyes (N. Y.) 29.

[4] See Stewart v. Fenner, 81 Pa. St. 177.

[5] Snyder v. Free, 114 Mo. 360, 21 S. W. Rep. 847.

[6] Sweet v. Wright, 57 Iowa 510, 10 N. W. Rep. 870.

[7] Potter v. McDowell, 31 Mo. 74.

[8] Waldele v. New York Central & H. R. R. R. Co., 95 N. Y. 274.

[9] Swan v. Morgan, 88 Hun (N. Y.) 380, 34 N. Y. Supp. 829.

[10] Ogden State Bk. v. Barker, 12 Utah 27, 40 Pac. Rep. 769.

[11] O'Hare v. Duckworth, 4 Wash. 470, 30 Pac. Rep. 724. See Breathwit v. Bank of Fordyce, 60 Ark. 35, 28 S. W.

the estate conveyed, tending to prove a fraudulent intention on his part before the conveyance, are proper evidence for the jury upon an inquiry into the validity of the conveyance by a creditor or subsequent purchaser, who alleges that it is fraudulent.[1] This evidence is considered competent to prove that the conveyance was fraudulent on the part of the grantor, and does not prejudice the grantee, who is not affected if he is a *bona fide* purchaser for a valuable consideration. The evidence is not admissible against him where there is a valuable consideration for the transfer in the absence of proof of conspiracy.[2] To avoid the transaction as convinous fraudulent intent must, as we have said, be shown on the part of the grantee as well as of the grantor.[3] So admissions made by one who, at the time, held the title to land, to the effect that he had contracted to sell it to another, and had received payment for it, are competent

Rep. 511; Chase v. Chase, 105 Mass. 388; Alexander v. Caldwell, 55 Ala. 517; Hiner v. Hawkins, 59 Ark. 303, 27 S. W. Rep. 65; Seeleman v. Hoagland, 19 Col. 231, 34 Pac. Rep. 995.

[1] Bridge v. Eggleston, 14 Mass. 245, per Parker, C. J., 7 Am. Dec. 209. See Alexander v. Caldwell, 55 Ala. 517; Knox v. McFarran, 4 Col. 596; Randegger v. Ehrhardt, 51 Ill. 101; Chase v. Chase, 105 Mass. 388; Stowell v. Hazelett, 66 N. Y. 635; Davis v. Stern, 15 La. Ann. 177; McKinnon v. Reliance Lumber Co., 63 Texas 31. See Elliott v. Stoddard, 98 Mass. 145; McLane v. Johnson, 43 Vt. 48; Grimes v. Hill, 15 Col. 359, 25 Pac. Rep. 698; National Bank v. Beard, 55 Kan. 773, 42 Pac. Rep. 320; Wyckoff v. Carr, 8 Mich. 44. In Truax v. Slater, 86 N. Y. 632, Earl, J., is reported in memorandum to have said: "The mere declarations of an assignor of a chose in action, forming no part of any *res gestæ*, are not competent to prejudice the title of his assignee, whether the assignee be one for value, or merely a trustee for creditors, and whether such declarations be antecedent or subsequent to the assignment." See Bush v. Roberts, 111 N. Y. 278. This statement of the rule would seem to be inaccurate. While a party holds the title and possession, it would clearly seem to be competent to give evidence of his declarations made while the possession continued as characterizing the nature of it. Compare in this connection Von Sachs v. Kretz, 72 N. Y. 548; Loos v. Wilkinson, 110 N. Y. 195; Clews v. Kehr, 90 N. Y. 633.

[2] Bush v. Roberts, 111 N. Y. 278, 18 N. E. Rep. 732; H. T. Simon-Gregory Dry Goods Co. v. McMahan, 61 Mo. App. 500. See Flannery v. Van Tassel, 127 N. Y. 631, 27 N. E. Rep. 393.

[3] Carpenter v. Muren, 42 Barb. (N. Y.) 300; Hughes v. Monty, 24 Iowa 499. See Chap. XIV.

evidence against those claiming title under him.[1] The principle upon which such evidence is received is that the declarant was so situated that he probably knew the truth, and his interests were such that he would not have made the admissions to the prejudice of his title or possession unless they were true. The regard which one so situated would have for his own interest is considered sufficient security against falsehood. In New York, after some uncertainty, the rule was finally settled[2] that such admissions in controversies concerning personal property would be excluded.[3]

§ 278. Declarations of debtor after sale.—As a general rule the declarations of a vendor, after transfer and delivery of possession, cannot be given in evidence against the vendee,[4] unless they are made in his pres-

[1] Chadwick v. Fonner, 69 N. Y. 404. The declarations of the debtor prior to the inception of the fraud are admissible in favor of the grantee. Swan v. Morgan, 88 Hun (N. Y.) 380, 34 N. Y. Supp. 829.

[2] Paige v. Cagwin, 7 Hill (N. Y.) 361; Chadwick v. Fonner, 69 N. Y. 407; Truax v. Slater, 86 N. Y. 630; Flannery v. Van Tassel, 127 N. Y. 631, 27 N. E. Rep. 393; Dodge v. Freedman's Sav. and Trust Co., 93 U. S. 379.

[3] Chadwick v. Fonner, 69 N. Y. 407.

[4] Tilson v. Terwilliger, 56 N. Y. 277; Cuyler v. McCartney, 40 N. Y. 221; Chase v. Horton, 143 Mass. 118, 9 N. E. Rep. 31; Roberts v. Medbery, 132 Mass. 100; Winchester & Partridge Mfg. Co. v. Creary, 116 U. S. 161, 6 S. C. Rep. 369; Burnham v. Brennan, 74 N. Y. 597; Ohio Coal Company v. Davenport, 37 Ohio St. 194; Coyne v. Weaver, 84 N. Y. 386; Flannery v. Van Tassel, 127 N. Y. 631; The Peters-Miller Shoe Co. v. Casebeer, 53 Mo. App. 640; Sparks v. Brown, 46 Mo. App. 529; Redfield v. Buck, 35 Conn. 328; Tabor v. Van Tassell, 86 N. Y. 642; Randegger v. Ehrhardt, 51 Ill. 101; Kennedy v. Divine, 77 Ind. 493; Garner v. Graves, 54 Ind. 188; Hirschfeld v. Williamson, 1 West Coast Rep. 150; Meyer v. Va. & T. R. R. Co. 16 Nev. 343; Sumner v. Cook, 12 Kan. 165; Scheble v. Jordan, 30 Kan. 353. In Holbrook v. Holbrook, 113 Mass. 76, Ames, J., said: "It has often been held, and is a well-established rule, that upon the trial of the question whether a particular conveyance was made to defraud creditors, it is not competent to show the acts or declarations of the grantor after the conveyance, to impair or affect the power of the grantee." Citing Bridge v. Eggleston, 14 Mass. 245; Foster v. Hall, 12 Pick. (Mass.) 89; Aldrich v. Earle, 13 Gray (Mass.) 578; Taylor v. Robinson, 2 Allen (Mass.) 562. See Clements v. Moore, 6 Wall. 299; Lewis v. Wilcox, 6 Nev. 215; Thornton v. Tandy, 39 Tex. 544; Pier v.

ence.[1] Such declarations are mere hearsay,[2] and not made under the sanction of an oath; the debtor bears no relation to the estate, and it has been frequently held that exceptions to the exclusion of this class of evidence should not be multiplied. A vendor after parting with his property has no more power to impress the title, either by his acts or utterances, than a mere stranger.[3] The declarations of a former owner to qualify or disparage his title are only admissible when made while the title is in him. Such utterances cannot be allowed to affect a title which is subsequently acquired.[4] The declarations of the

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Duff. 63 Pa. St. 59; City Nat Bank v. Hamilton, 34 N. J. Eq. 163; Garraby v. Green, 32 Tex. 202; Taylor v. Webb, 54 Miss. 36; Warren v. Williams, 52 Me. 346; Bullis v. Montgomery, 50 N. Y. 358; Wadsworth v. Williams, 100 Mass. 126; Silliman v. Haas, 151 Pa. St. 58, 25 Atl. Rep. 72; McElfatrick v. Hicks, 21 Pa. St. 402; Unangst v. Goodyear I. R. Mfg. Co., 141 Pa. St. 127, 21 Atl. Rep. 499; Tisch v. Utz, 142 Pa. St. 186, 21 Atl. Rep. 808; Winchester v. Charter, 97 Mass. 140; Clark v. Wilson, 127 Ill. 449, 19 N. E. Rep. 860; Jones v. Snyder, 117 Ind. 229, 20 N. E. Rep. 140; Thomas v. Black, 84 Cal. 231, 23 Pac. Rep. 1037; Hicks v. Sharp, 89 Ga. 311, 15 S. E. Rep. 314; O'Donnell v. Hall, 154 Mass. 429, 28 N. E. Rep. 349. Declarations after sale but before delivery were held admissible as against the grantee. Bowden v. Spellman, 59 Ark. 251, 27 S. W. Rep. 602. Compare Truax v. Slater, 86 N. Y. 630.

[1] Harris v. Russell, 93 Ala. 59, 9 So. Rep. 541.

[2] In Winchester & Partridge Mfg. Co. v. Creary, 116 U. S. 165, the court said: "The plaintiff was itself in actual possession, exercising by its agent full control. The vendors, it is true, entered plaintiff's service as soon as the sale was made and possession was surrendered, but only as clerks or salesmen, with no authority except such as employees of that character ordinarily exercise What they might say, not under oath, to others, after possession was surrendered, as to the real nature of the sale, was wholly irrelevant. They were competent to testify under oath, and subject to cross-examination, as to any facts immediately connected with the sale, of which they had knowledge; but their statements out of court, they not being parties to the issues to be tried, were mere hearsay. After the sale, their interest in the property was gone. Having become strangers to the title, their admissions are no more binding on the vendee than the admissions of others. It is against all principle that their declarations, made after they had parted with the title and surrendered possession, should be allowed to destroy the title of their vendee."

[3] Stewart v. Thomas, 35 Mo. 207.

[4] Noyes v. Morrill, 108 Mass. 396; Stockwell v. Blamey, 129 Mass. 312; Welcome v. Mitchell, 81 Wis. 566, 51 N. W. Rep. 1080. But where both grantor and grantee are made parties defendant, such subsequent decla-

grantee while on his way to the magistrate to obtain the acknowledgment of the grantor, and before the deeds were delivered, substantially to the effect that the deeds were being executed because of apprehensions on the part of the grantor that the property would be taken to satisfy the debt due the demandant, were excluded because the deed had not been delivered at the time the declarations were made, and it was clear that "as admissions in disparagement of title, the evidence was not competent." [1]

§ 279. **Possession after conveyance.** — Elsewhere in this discussion the failure to effect a change of possession is shown to raise either a *prima facie* or absolute presumption of fraud.[2] As proof of the continued possession of the vendor is competent evidence to impeach the supposed transfer, it would seem to follow that any acts or declarations of the possessor while so retaining the property must also be competent as characterizing his possession.[3] So long as the debtor remains in possession of

rations were admissible to show fraud of the grantor, although not admissible against the grantee. See also to same effect McDonald v. Bowman, 40 Neb. 269, 58 N. W. Rep. 704; Wright v. Towle, 67 Mich 255, 34 N. W. Rep. 578; Claflin v. Ballance, 91 Ga. 411, 18 S. E. Rep. 309. They are not admissible against the grantee even where there is evidence tending to show conspiracy. Scofield v. Spauldlng, 54 Hun (N. Y.) 523, 7 N. Y. Supp. 927; Harris v. Russell, 93 Ala. 59, 9 So. Rep. 541.

[1] Stockwell v. Blamey, 129 Mass. 312.

[2] See Chap. XVII, §§ 248–252.

[3] Kirby v. Masten, 70 N. C. 540; Carnahan v. Wood, 2 Swan (Tenn.) 502; Yates v. Yates, 76 N. C. 142; Haenschen v. Luchtemeyer, 49 Mo. 51; Carney v. Carney, 7 Bax. (Tenn.) 287; Tedrowe v. Esher, 56 Ind. 447; United States v. Griswold, 8 Fed. Rep. 560; Cahoon v. Marshall, 25 Cal. 202; Oatis v. Brown, 59 Ga. 716; Mills v. Thompson, 72 Mo. 369; Adams v. Davidson, 10 N. Y. 309; Neal v. Foster, 36 Fed. Rep. 34; United States v. Griswold, 7 Sawy. 316; Bowden v. Spellman, 59 Ark. 251, 27 S. W. Rep. 602. See Knight v. Forward, 63 Barb. (N. Y.) 311; Hilliard v. Phillips, 81 N. C. 104, Smith, C. J., dissenting upon the ground that the declarations in this latter case did not qualify or explain the possession, nor disparage declarant's title, but related to a pre-existing fact to impeach the validity and effect of his own act in conveying title. Its incompetency for such a purpose he considered fully established by the authorities. 1 Greenl. Ev. §§ 109, 110; Ward v. Saunders, 6

property which once belonged to him, and which his creditor is seeking to condemn as fraudulently conveyed, the *res gestæ* of the fraud, if any, may be considered as in progress, and his declarations, though made after he has parted with the formal paper title, may be given in evidence for the creditor against the claimant,[1] by reason of the continuous possession which accompanied them. Where the assignor continues in possession of the assigned property, his acts and declarations while in actual possession may be given in evidence as part of the *res gestæ*,[2] especially if there is absolutely no break made in the continuity of the possession after the real or pretended sale.[3] The declarations are received in such cases upon the ground that they show the nature, object or motives of the act which they accompany, and which is the subject of inquiry.[4] To be a part of the *res gestæ*, however, the declarations must be made at the time the act was done which they are supposed to characterize; they must be calculated to unfold the nature and quality of the facts which they purport to explain; and must harmonize with such facts so as to form one transaction.[5] The declarations must be concomitant with the principal act or transaction of which they are considered a part, and so connected with it as to be regarded as the result and consequence of co-existing motives.[6]

Ired. (N. C.) Law, 382; Wise v. Wheeler, 6 Ired. (N. C.) Law, 196; Hodges v. Spicer, 79 N. C. 233; Burbank v. Wiley, 79 N. C. 501.

[1] Williams v. Hart, 10 Rep. 74; citing Oatis v. Brown, 59 Ga. 716; Mobile Sav. Bank v. McDonnell, 89 Ala. 434, 8 So. Rep. 137; Neal v. Foster, 13 Sawy. 237; Harton v. Lyons, 97 Tenn. 187, 36 S. W. Rep. 851.

[2] Newlin v. Lyon, 49 N. Y. 661; Williamson v. Williams, 11 Lea (Tenn.) 368; Trotter v. Watson, 6 Humph. (Tenn.) 509.

[3] Adams v. Davidson, 10 N. Y. 309.

[4] Compare Williams v. Williams, 142 N. Y. 159, 36 N. E. Rep. 1053; Loos v. Wilkinson, 110 N. Y. 195, 211, 18 N. E. Rep. 99.

[5] Tilson v. Terwilliger, 56 N. Y. 277. See Enos v. Tuttle, 3 Conn. 250.

[6] In Towne v. Fiske, 127 Mass. 125, it is said that the mere fact that a person, pending a suit against him, is in possession of personal property which he has sold and constructively delivered, is not *prima facie* evidence that the sale is fraudulent as against

§ 279a. **Professions of good faith.** — It is not uncommon for fraudulent debtors to make professions of honesty. The Supreme Court of Iowa consider that the *bona fide* character of a debtor's transactions, when drawn in question, cannot be proved by such professions and that the same are not competent evidence.[1]

§ 279b. **Intention — Knowledge.** — As we have seen,[2] a party may testify concerning his intention in performing an act where such intention becomes material.[3] Hence a chattle mortgagee, where the mortgage contains a danger clause, may testify as to his deeming himself in danger where possession was taken by him prior to the maturity of the mortgage.[4] And a witness may be asked whether he conveyed away property to prevent it from being attached.[5] And it is competent for a vendee to testify that he had no knowledge or notice that the vendor intended to defraud his creditors.[6]

§ 279c. **Consideration.** — When a debtor undertakes to transfer his property in recognition of an indebtedness to his wife, originating twenty-five years before, no account of which had been kept, and no interest or principal paid or requested, the financial condition of both parties for the entire period is a proper subject of inquiry, and the broadest latitude should be allowed to the judgment-creditor.[7]

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a creditor. This is certainly a border case. The effect of the failure to change possession is elsewhere considered. See Chap. XVII.

[1] Harwick v. Weddington, 73 Iowa 302, 34 N. W. 868.

[2] See § 205.

[3] Graves v. Graves, 45 N. H. 323; Bedell v. Chase, 34 N. Y. 388; Wilson v. Clark, 1 Ind. App. Ct. 182, 27 N. E. Rep. 310; Gentry v. Kelley, 49 Kan. 82, 30 Pac. Rep. 186; Gardom v. Woodward, 44 Kan. 758, 25 Pac. Rep. 199; Blankenship & B. Co. v. Willis, 1 Tex. Civ. App. 657, 20 S. W. Rep. 952.

[4] Barrett v. Hart, 42 Ohio St. 41; Huggans v. Fryer, 1 Lans. (N. Y.) 276.

[5] Hallock v. Alvord, 61 Conn. 194, 23 Atl. Rep. 131.

[6] Richolson v. Freeman, 56 Kans. 465, 43 Pac. Rep. 772. Compare Gentry v. Kelley, 49 Kan. 88, 30 Pac. Rep. 186.

[7] Miller v. Hanley, 94 Mich. 253, 53 N. W. Rep. 962.

False recitals of consideration tend to deceive creditors and are badges of fraud.[1] But the general subject of consideration has been elsewhere considered.[2]

§ 280. **Declarations of co-conspirators** — Where it is proved that the debtor and others have joined in a conspiracy to defraud creditors by a fraudulent disposition of property, the acts and declarations of either of the parties, made in the execution of the common purpose, and in aid of its fulfilment, are competent evidence against any of the parties.[3] Nor is it of consequence that the particular declarations under consideration were in reference merely to proposed acts of fraud which may not have been consummated in the particulars proposed, if such proposed acts were *sui generis* with those committed. A foundation must first be laid, by proof sufficient to establish *prima facie* the fact of the conspiracy alleged in the complaint.[4] That being done, every declaration of the participants in reference to the common object is admissible in evidence.[5] It makes no difference at what time the defendant joins the conspiracy.[6] Every one who enters into a common design is generally deemed in law a party to every act which has before been done by the others, in furtherance of the common design ; and this rule extends

[1] De Walt v. Doran, 21 Dist. Col. 163.

[2] See §§ 207–223.

[3] Dewey v. Moyer, 72 N, Y. 79, 80. See Newlin v. Lyon, 49 N. Y. 661 ; Cuyler v. McCartney, 40 N. Y. 221, per Woodruff, J.; Tedrowe v. Esher, 56 Ind. 445 ; Sherman v. Hogland, 73 Ind. 472 ; Stewart v. Johnson, 18 N. J. Law 87 ; Lee v. Lamprey, 43 N. H. 13 ; Kennedy v. Divine, 77 Ind. 493 ; Adams v. Davidson, 10 N. Y. 309 ; N. Y. Guaranty & Ind. Co. v. Gleason, 78 N. Y. 503 ; Daniels v. McGinnis, 97 Ind. 552 ; Benjamin v. McElwaine-Richards Co., 10 Ind. App. 76, 37 N. E. Rep. 362 ; Dodge v. Goodell, 16 R. I. 48, 12 Atl. Rep. 236 ; Knower v. Cadden Clothing Co., 57 Conn. 202, 17 Atl. Rep. 580 ; Little v. Lichkoff, 98 Ala. 321, 12 So. Rep. 429. See Kelley v. People, 55 N. Y. 565.

[4] Rutherford v. Schattman, 119 N. Y. 604, 23 N. E. Rep. 440.

[5] Moore v. Shields, 121 Ind. 267, 23 N. E. Rep. 89.

[6] Dodge v. Goodell, 16 R. I. 50, 12 Atl. Rep. 236 ; Lincoln v. Claflin, 7 Wall. 132.

to declarations.[1] The statements of one of the co-conspirators, however, as to past transactions not connected with or in furtherance of the enterprise under investigation, are not competent.[2]

In case of conspiracy where the combination is proved, the acts and declarations of the conspirators are not received as evidence of that fact, but only to show what was done, the means employed, the particular design in respect to the parties to be affected or wronged, and generally those details which, assuming the combination and the illegal purpose, unfold its extent and scope, and its influence either upon the public or the individuals who suffer from the wrong, or show the *execution* of the illegal design. But when the only issue is whether there was a conspiracy to defraud, these declarations do not become evidence to establish it.[3] The court may, in its discretion, receive the declaration first and the evidence of connection subsequently,[4] though it is conceded that the rule calling for preliminary proof should not be departed from except under particular and urgent circumstances. It has

[1] Tyler v. Angevine, 15 Blatchf. 541, 1 Greenleaf's Ev. § 111.

[2] N. Y. Guar. & Ind. Co. v. Gleason, 78 N. Y. 503. See Johnston v. Thompson, 23 Hun (N. Y.) 90; Baptist Church v. Brooklyn F. I. Co., 28 N. Y. 153; Cortland Co. v. Herkimer Co., 44 N. Y. 22.

[3] Woodruff, J., in Cuyler v. McCarney, 40 N. Y. 229; Boyd v. Jones, 60 Mo. 454; N. Y. Guaranty & Ind. Co. v. Gleason, 7 Abb. N. C. (N. Y.) 334; Kennedy v. Divine, 77 Ind. 491. In Winchester & Partridge Mfg. Co. v. Creary, 116 U. S. 166, 6 S. C. Rep. 369, the court said: "Without extending this opinion by a review of the adjudged cases in which there was proof of a concert or collusion between vendor and vendee to defraud creditors, and in which subsequent declarations of the vendor were offered in evidence against the vendee to prove the true character of the sale, it is sufficient to say that such declarations are not admissible against the vendee, unless the alleged common purpose to defraud is first established by independent evidence, and unless they have such relation to the execution of that purpose that they fairly constitute a part of the *res gestæ*. There was no such independent evidence in this case, and there is no foundation for the charge of a conspiracy between the vendors and vendee to hinder creditors, outside of certain statements which Webb is alleged to have made after his firm had parted with the title and surrendered possession."

[4] Place v. Minster, 65 N. Y. 89.

been said that the testimony of one witness is enough to let in the acts and declarations of a wrong-doer, and that the court will not decide upon the question of his credibility;[1] and in Pennsylvania the rule seems to prevail that the least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all.[2]

§ 281. **Proof of circumstances.** — In litigations of the class under consideration, great latitude should undoubtedly be allowed in regard to the admission of circumstantial evidence,[3] for the purpose of proving participation in manifest fraud.[4] Objections to testimony as irrelevant are not favored in such cases, since the force of circumstances depends so much upon their number and connection.[5] The evidence should be permitted to take a wide range, as in most cases fraud is predicated of circumstances, and not upon direct proof.[6] Proof is said to establish the truth, and circumstantial evidence to lead toward it; hence any pertinent and legitimate facts, conducing to the proof of a litigated issue, constitute evidence of the disputed fact, stronger or weaker, according to the entire character and complexion of it, or as affected by conflicting evidence.[7] Though the evidence to prove fraud may be circumstantial and presumptive, it "must be

[1] Abney v. Kingsland, 10 Ala. 355, 361.

[2] Confer v. McNeal, 74 Pa. St. 115; Gibbs v. Neely, 7 Watts (Pa.) 307; Rogers v. Hall, 4 Watts (Pa.) 361; McDowell v. Rissell, 37 Pa. St. 164; Hartman v. Diller, 62 Pa. St. 37.

[3] Schumacher v. Bell, 164 Ill. 184, 45 N. E. Rep. 428.

[4] Curtis v. Moore, 20 Md. 96; Shealy v. Edwards, 75 Ala. 416; Nicolay v. Mallery, 62 Minn. 121, 64 N. W. Rep. 108; O'Donnell v. Hall, 157 Mass. 463, 32 N. E. Rep. 666; Allen v. Fortier, 37 Minn. 218, 34 N. W. Rep. 21; Brittain v. Crowther, 54 Fed. Rep. 295; Reynolds v. Gawthrop's Heirs, 37 W Va. 3, 16 S. E. Rep. 364. See § 13; Engraham v. Pate, 51 Ga. 537.

[5] Sarle v. Arnold, 7 R. I. 586; Castle v. Bullard, 23 How. 187.

[6] Ferris v. Irons, 83 Pa. St. 182. See Wright v. Linn, 16 Tex. 34; Laird v. Davidson, 124 Ind. 412, 25 N. E. Rep. 7; Hinton v. Greenleaf, 118 N. C. 7, 23 S. E. Rep. 924.

[7] Miles v. Edelen, 1 Duv. (Ky.) 270.

strong and cogent, such as to satisfy a man of sound judgment of the truth of the allegation."[1] But the allegation of fraud in a civil action need not, like the charge of crime, be proved by evidence excluding all reasonable doubt; a preponderance of evidence will suffice.[2] But in order to justify a finding of fraud, the inference to be drawn from the circumstances relied on must not only be consistent with the fraudulent acts charged, but inconsistent with honesty and good faith.[3] So it is not error to refuse to charge a jury that "they must be satisfied from the clearest and most satisfactory evidence," since it is the province of the jury to weigh the evidence.[4] "Circumstantial evidence," said Bradley, J., "is not only sufficient, but in most cases it is the only proof that can be adduced."[5] Often other things which go to characterize a transaction are more convincing than the positive evidence of any single witness, especially of an interested witness.[6] The only true test is whether the evidence can throw light on the transaction, or whether it is totally irrelevant.[7] It is the duty of the court, however, to see that such evidence has at least a natural and reasonable tendency to sustain the allegations in support of which it is introduced; that it is of such a character as to warrant an inference of the fact to be proved, and amounts to something more than a mere basis for conjecture or

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[1] Henry v. Henry, 8 Barb. (N. Y.) 592.

[2] Strader v. Mullane, 17 Ohio St. 626.

[3] Blish v. Collins, 68 Mich. 542, 36 N. W. Rep. 731.

[4] Painter v. Drum, 40 Pa. St. 467.

[5] Rea v. Missouri, 17 Wall. 543. See Cooke v. Cooke, 43 Md. 525; King v. Poole, 61 Ga. 374; Sarle v. Arnold, 7 R. I. 585; Castle v. Bullard, 23 How. 187; Winchester v. Charter, 102 Mass. 275, 276; White v. Perry, 14 W. Va. 66; Butler v. Watkins, 13 Wall. 456; Armstrong v. Lachman, 84 Va. 726, 6 S. E. Rep. 129; Saunders v. Parrish, 86 Va. 592, 10 S. E. Rep. 748.

[6] Molitor v. Robinson, 40 Mich. 202. See Blue v. Penniston, 27 Mo. 274.

[7] Heath v. Page, 63 Pa. St. 108-126, and cases cited. See Stewart v. Fenner, 81 Pa. St. 177; Booth v. Bunce, 33 N. Y. 159; Gollobitsch v. Rainbow, 84 Iowa 567, 51 N. W. Rep. 48.

vague speculation.[1] Evidence may be legally admissible as tending to prove a particular fact which by itself is utterly insufficient for that purpose. "It may be a link in the chain, but it cannot make a chain unless other links are added."[2] So in England it is settled that the preliminary question of law for the court is not whether there is absolutely no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. If there is evidence on which the jury can properly find for the party on whom the *onus* of proof lies, it should be submitted; if not, it should be withdrawn from the jury.[3]

Greater latitude is undoubtedly allowable in the cross-examination of a party who places himself upon the stand than in that of other witnesses.[4] The cross-examination of a witness not a party is usually confined within the scope of the direct examination.[5] Then again proof of

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[1] Battles v. Laudenslager, 84 Pa. St. 451.

[2] Howard Express Co. v. Wile, 64 Pa. St. 206.

Latitude of the inquiry.—In Baltimore & Ohio R. R. Co. v. Hoge, 34 Pa. St. 221, Thompson, J., said: "It is a great error, generally insisted on by defendants, in cases involving questions of fraud, that each item of testimony is to be tested by its own individual intrinsic force, without reference to anything else in the case; and if on such a test it does not prove fraud, it must be excluded. The system of destroying in detail forces designed for concentrated action does well, doubtless, in military operations; but a skillful general never suffers such a disastrous result, except when he cannot prevent it. Courts have the power, and must prevent such a system of assault, otherwise fraud would ever be victorious. It is a subtle element, and is to be traced out, if at all, by the small indices discoverable by the wayside where it travels; and to enable courts and juries to detect it, they must in most cases aggregate many small items, before the true features of it are discernible. Hence it is that great latitude in the investigation is a rule never departed from in such cases. This rule is elementary, and a citation of authorities to prove it would not only be useless, but superfluous."

[3] Ryder v. Wombwell, L. R. 4 Exch. 39; Jewell v. Parr, 13 C. B. 916.

[4] Rea v. Missouri, 17 Wall. 542; Cox v. Einspahr, 40 Neb. 411, 58 N. W. Rep. 941; Riddell v. Munro, 49 Minn. 532, 52 N. W. Rep. 141.

[5] Rea v. Missouri, 17 Wall. 542; Johnston v. Jones, 1 Black 216; Teese v. Huntingdon, 23 How. 2.

collateral facts tending to show a fraudulent intention is held to be admissible whenever a fraudulent intention is to be established.[1] The fact that at the time of the sale suits were pending against the debtor, or that he was apprehensive that suits would be commenced, and also his general pecuniary condition, or that the parties are relatives,[2] or the security larger than the debt,[3] are matters which the creditor should be permitted to show.[4] A promise not to disclose the existence of a mortgage is evidence of fraud.[5]

The maxim "*omnia præsumuntur contra spoliatorem*" is frequently invoked by creditors in cases where the debtor or those acting in collusion with him have spirited away witnesses,[6] or altered, destroyed, or suppressed documents.[7] And curiously enough the maxim "*De minimus non curat lex*" has been applied where the sum claimed to have been misappropriated by the debtor was insignificant in value or amount.[8]

We have already glanced at the effect of inadequacy of consideration,[9] and have seen that it may be so gross as to shock the conscience and furnish decisive evidence of fraud.[10] In an Oregon case this language occurs: "The fact that one person has obtained the property of another, under a form of purchase, without having paid any consideration therefor, and with a design of acquiring it for

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[1] United States v. 36 Barrels of High Wines, 7 Blatchf. 474; Wood v. United States, 16 Pet. 342–361.

[2] Reeves v. Skipper, 94 Ala. 407, 10 So. Rep. 309.

[3] Kellogg v. Clyne, 54 Fed. Rep. 696.

[4] Harrell v. Mitchell, 61 Ala. 278. See Chap. XVI.

[5] Wafer v. Harvey County Bank, 46 Kan. 597, 26 Pac. Rep. 1032.

[6] See Kirby v. Tallmadge, 160 U. S. 383.

[7] See Wardour v. Berisford, 1 Vern. 452; Attorney-General v. Dean of Windsor, 24 Beav. 679; Armory v. Delamirie, 1 Stra. 505. Compare State of Michigan v. Phœnix Bank, 33 N. Y. 9. But we cannot enter this wide field. See 18 Am. Law Rev. 185.

[8] Crook v. Rindskopf, 105 N. Y. 484, 12 N. E. Rep. 174.

[9] See § 232. Archer v. Lapp, 12 Ore. 202, 6 Pac. Rep. 672.

[10] See Pomeroy's Eq. Jur., § 927.

nothing, is fraudulent in itself.[1] It is error for the court to direct the jury as to what weight shall be given to particular items of the testimony.[2]

§ 282. **Other frauds.**—It is competent, in order to establish the fraudulent intent of the debtor, to give proof of other fraudulent sales[3] effected about the same time,[4] and of his proposals to make other covinous alienations together with his statements and declarations showing such intent.[5] Johnson, J., said:[6] "In actions involving questions of fraud, the intent is always a material inquiry, and for the purpose of establishing that, other acts of a similar character, about the same time, may always be shown."[7] This is especially the rule where there is any relation or connection between the different transactions,[8] or they form any part of a connected scheme to defraud.[9] When the motives and intent of the parties to an act become material, they may be shown by separate and independent acts and declarations accompanying or preceding the act in question. How far back such proof may extend must depend upon the nature and circumstances of each particular case, and no positive rule can

[1] Archer v. Lapp, 12 Ore. 202, 6 Pac. Rep. 672.

[2] First National Bank v. Lowrey, 36 Neb. 290, 54 N. W. Rep. 568.

[3] Compare Trumbull v. Hewitt, 65 Conn. 60, 31 Atl. Rep. 492.

[4] Benerlien v. O'Leary, 149 N. Y. 38, 43 N. E. Rep. 417; Cary v. Hotailing, 1 Hill (N. Y.) 311. See 80 N. Y. 374 n.

[5] Pomeroy v. Bailey, 43 N. H. 125, and cases cited; Blake v. White, 13 N. H. 267; Pierce v. Hoffman, 24 Vt. 527; Beuerlein v. O'Leary, 149 N. Y. 33; Spaulding v. Keyes, 125 N. Y. 113, 26 N. E. Rep. 15. But see Staples v. Smith, 48 Me. 470; Huntzinger v. Harper, 44 Pa. St. 204; McCabe v. Brayton, 38 N. Y. 198; Withrow v. Biggerstaff, 87 N. C. 176.

[6] Amsden v. Manchester, 40 Barb. (N. Y.) 163. Proof of other indebtedness on the part of the debtor is admissible on the question of intent. Ross v. Wellman, 102 Cal. 1, 36 Pac. Rep. 402.

[7] Warren v. Williams, 52 Me. 346; Flagg v. Willington, 6 Me. 386. Evidence that the grantee had been engaged in other fraudulent transactions, entirely distinct from the one under consideration, is not admissible. Kaufer v. Walsh, 88 Wis. 63, 59 N. W. Rep. 460.

[8] Erfort v. Consalus, 47 Mo. 212.

[9] Smith v. Schwed, 9 Fed. Rep. 483; Clarke v. White, 12 Pet. 193.

be laid down. In the case of fraudulent conveyances the proof will usually be limited to similar acts occurring about the same time.[1] Other conveyances tending to strip the debtor of his property may be proved.[2]

It has been considered, however, not competent for a party imputing fraud to another to offer evidence to prove that the other dealt fraudulently at other times and in transactions wholly disconnected with the one under consideration.[3] It is believed that such testimony would tend to prejudice the minds of the jury by impeaching the general character of the party charged with the fraud, when he had no right to expect such an attack, and could not be prepared to defend himself, however unimpeachable his conduct might have been.[4]

§ 283. **Suspicions insufficient.** — Mere suspicion of the existence of fraud, as we have said,[5] is not sufficient to establish its existence, but it must be clearly and satisfactorily shown.[6] The evidence must convince the understanding that the transaction was entered into for a purpose prohibited by law.[7] Tangible facts must be adduced from which a legitimate inference of a fraudulent intent can be drawn.[8] Again circumstances amounting

[1] Pomeroy v. Bailey, 43 N. H. 125; Bernheim v. Dibrell, 66 Miss. 199, 5 So. Rep. 693.

[2] Hoffman v. Henderson (Ind. 1896) 44 N. E. Rep. 629.

[3] Keating v. Retan, 80 Mich. 324, 45 N. W. Rep. 141.

[4] Somes v. Skinner, 16 Mass. 360; Grant v. Libby, 71 Me. 430. As to when false statements to a commercial agency as to assets and liabilities may be shown, see Treusch v. Ottenburg, 54 Fed. Rep. 867.

[5] Sherman v. Hogland, 73 Ind. 472; Clark v. Krause, 2 Mackey (D. C.) 565; Jaeger v. Kelley, 52 N. Y. 274; Ridge v. Grieswell, 53 Mo. App. 479; Petersen v. Schroeder, 75 Wis. 571, 44 N.W. Rep. 652; McEvony v. Rowland, 43 Neb. 98, 61 N. W. Rep. 124. See §§ 5, 6.

[6] In actions for false representations there must be representation, falsity, scienter, deception and injury. Arthur v. Griswold, 55 N. Y. 400; Brackett v. Griswold, 112 N. Y. 467, 20 N. E Rep. 376; Wheadon v. Huntington, 83 Hun (N. Y.) 372, 31 N. Y. Supp. 912.

[7] Pratt v. Pratt, 96 Ill. 184.

[8] Sherman v. Hogland, 73 Ind. 477; Jaeger v. Kelley, 52 N. Y. 274. See Chap. XVI.

to a suspicion of fraud are not to be deemed notice of it, and where an inference of notice is to affect an innocent purchaser, it must appear that the inquiry suggested would have resulted, if fairly pursued, in the discovery of the defect or fraud.[1] The transaction will not be overturned even though the court finds "that there is ground of suspicion."[2]

§ 284. Proving value.—As we have seen, the value of the assigned property is always important in the question of fraud.[3] Experts may be called to prove value. In Bristol Co. Savings Bank v. Keavy,[4] the witness was a real estate broker and auctioneer, and was accustomed to sell and value lands in various parts of the city in which the property was located, and had appraised land on the street where the premises were situated. He was held to be plainly qualified to testify as to the value of the land.

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[1] Simms v. Morse, 4 Hughes 583. See Ledyard v. Butler, 9 Paige (N. Y.) 132.

[2] Parker v. Phetteplace, 1 Wall. 685. Mr Jenks, the learned counsel for the creditor in this action, relied largely upon the suspicious circumstances in evidence, and urged that proof of a covenant to commit the fraud could not be adduced, nor even proof of words. Some of the greatest crimes which power has ever commanded have been consummated without a word of direct instruction. The learned reporter, in a note to this case, aptly quotes from King John, Act III, Scene III:

King John. . . . .
"Hear me without thine ears, and make reply
Without a tongue, using conceit alone,
Without eyes, ears, and harmful sound of words;
Then, in despite of broad-eyed watchful day,
I would into thy bosom pour my thoughts;
But ah, I will not:—
Dost thou understand me?
Thou art his keeper.
Hubert. And I will keep him so,
That he shall not offend your majesty."

Again, after the murder, Act IV, Scene II.:

King John. .
"Hadst thou but shook thy head or made a pause,
When I spake darkly what I purposed;
Or turn'd an eye of doubt upon my face,
As bid me tell my tale in express words;
Deep shame had struck me dumb, made me break off,
And those thy fears might have wrought fears in me:
But thou didst understand me by my signs,
And didst in signs again parley with sin,
Yea, without stop, didst let thy heart consent,
And, consequently, thy rude hand to act
The deed which both our tongues held vile to name.—"

[3] Stacy v. Deshaw, 7 Hun (N. Y.) 451. See §§ 23, 41.

[4] 128 Mass. 303.

§ 284a. **Recitals in deed.** — The recitals in a deed are manifestly not conclusive against creditors attacking the deed.[1] Any different rule would be destructive of the rights of creditors.

§ 285. **Testimony must conform to pleadings.** — The complainant will only be allowed to prove the truth of the allegations contained in his bill. Evidence relating to other matters will be excluded upon well-established principles of pleading which require the complainant to state the case upon which he seeks relief, to the end that the court may learn from the pleading itself whether the creditor is entitled to the relief prayed, and that the defendant may be advised as to the matters against which he is to defend.[2] Facts admitted in the pleading cannot be contracted or varied by evidence.

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[1] De Farges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805; Hubbard v. Allen, 59 Ala. 296.

[2] Parkhurst v. McGraw, 24 Miss. 139. See Truesdell v. Sarles, 104 N. Y. 167, 10 N. E. Rep. 139; Southwick v. First Nat. Bk., 84 N. Y. 420; Southall v. Farish, 85 Va. 410, 7 S. E. Rep. 534; Pusey v. Gardner, 21 W. Va. 476, 477; Bierne v. Ray, 37 W. Va. 577, 16 S. E. Rep. 804. See § 140.

CHAPTER XIX.

DEFENSES.

§ 286. As to defenses.
286*a*. Another action pending.
286*b*. Attacking judgment.
287. Laches — Estoppel.
288. } Lapse of time.
289. }
290. Discovery of the fraud.
291. Judge Blatchford's views.
292. Statute of limitations.
293. Limitations in equity.
293*a*. Statute of frauds.
§ 294. Insolvency or bankruptcy discharges.
295. Existing and subsequent creditors.
296. Sufficient property left — Gift of land.
297. What sheriff must show against stranger.
297*a*. Set-off.
297*b*. Attacking consideration.
297*c*. When controversies not separable.

§ 286. **As to defenses.** — The principal defenses interposed in suits prosecuted to annul fraudulent transfers, as is elsewhere shown, are, that the purchaser acquired the title or property *bona fide*, without notice of or participation in the grantor's fraudulent intent, and that adequate consideration was paid or given for it. The principles and authorities governing these branches of our investigation have been considered of sufficient moment to call for treatment in separate chapters,[1] and need not be again discussed, but there are certain lines of defense common to this class of litigation which command at least passing attention. It may be observed at the outset that the fact that forms of law have been pursued is no protection in a court of equity, if the result aimed at and reached, is a fraud.[2] The transaction must be judged by its real character, rather than by the form and color which the parties have seen fit to give it.[3] What cannot

[1] See Chaps. XV, XXIV.

[2] Metropolitan Bank v. Durant, 22 N. J. Eq. 35, 41.

[3] Quackenbos v. Sayer, 62 N.Y. 346; Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 190; Fiedler v. Darrin, 50

be done directly cannot be done by indirection; and when fraud appears, the forms will be discarded and the corrupt act exposed and punished.[1]

It is not a fraud for a debtor to fail to plead the statute of limitations,[2] and an abandonment by a debtor of a technical defense is not a fraud on other creditors.[3]

§ 286a. **Another action pending.** — The general and salutary principle of procedure that no person shall be twice vexed for the same cause, of course, applies to proceedings instituted by creditors. Thus, in a case which arose in Pennsylvania, where a creditor's bill was filed against directors of an insolvent bank, charging mismanagement of its affairs, and an assignee of the bank subsequently brought an action at law, in the name of the bank, against the directors for the same cause, it was held that the pendency of the bill was well pleaded in abatement in the action at law.[4]

§ 286b. **Attacking judgment.** — The judgment upon which the creditor's bill is founded is conclusive against the debtor.[5] Clear proof of fraud is required to impeach a judgment on which a creditor's bill is based.[6]

§ 287. **Laches — Estoppel.** — We have elsewhere discussed the cases relating to the sufficiency of pleas excusing

N. Y. 440, where the rule is applied to usurious transactions. Judgment-creditors are considered to be acting in privity with their debtor in attacking or defending any usurious contract which he may have made. Chandler v. Powers, 24 N. Y. Daily Reg., p. 1201 (Dec. 28, 1883). See Merchants' Exch. Nat. Bk. v. Commercial Warehouse Co., 49 N. Y. 642, and note. It seems that it is not a fraud upon creditors for a debtor or assignor to provide for the payment of a usurious debt. See Chapin v. Thompson, 89 N. Y. 271; Murray v. Judson, 9 N. Y. 73.

[1] Buck v. Voreis, 89 Ind. 117.

[2] Christie v. Bridgman, 51 N. J. Eq. 333, 25 Atl. Rep. 939, 30 Id. 429; Sheppard's Estate, 180 Pa. St. 61, 36 Atl. Rep. 422; Allen v. Smith, 129 U. S. 465, 9 S. C. Rep. 338; French v. Motley, 63 Me. 326.

[3] Inglehart v. Thousand Island Hotel Co., 109 N. Y. 454, 17 N. E. Rep. 358.

[4] Warner v. Hopkins, 111 Pa. St. 328.

[5] See § 74.

[6] Walters v. Walters, 28 Ill. App. 633.

apparent laches in filing a bill to annul a fraudulent transfer.[1] Endeavoring to avoid unnecessary repetition, let us recur to the subject of laches considered as a defense or bar to a suit. "Courts of equity do not impute laches by an iron rule. Circumstances are allowed to govern every case."[2] It may be asserted at the outset that equity will not be moved to set aside a fraudulent transaction at the suit of one who, after he had knowledge of the fraud, or after he was put upon inquiry, with the means of knowledge accessible to him, has been quiescent during a period longer than that fixed by the statute of limitations.[3] He must have used reasonable diligence to inform himself of the facts.[4] A stale and uncertain demand, as, for instance, a bill filed to set aside an alleged fraudulent conveyance nineteen years old, should not be allowed in a court of equity.[5] The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witnesses.[6] In Eigleberger v. Kibler,[7] it appeared that the complainant had permitted the conveyance in question to stand for nearly ten years, during which period many valuable improvements had been made by the grantee, and the creditor had also suffered other creditors, junior in date to him, to acquire prior liens, and

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[1] See §§ 148, 149. See Cedar Rapids Ins. Co. v. Butler, 83 Ia. 124, 48 N. W. Rep. 1026.

[2] Waterman v. Sprague Manuf. Co., 55 Conn. 574.

[3] Burke v. Smith, 16 Wall. 401. Compare Meader v. Norton, 11 Wall. 443; Trenton Banking Co v. Duncan, 86 N. Y. 221; Halstead v. Grinnan, 152 U. S. 412, 14 S. C. Rep. 641; Hathaway v. Noble, 55 N. H. 508; Higgins v. Crouse, 63 Hun (N. Y.) 139, 17 N. Y. Supp. 696.

[4] Foster v. Mansfield C. &. L. M. R. R. Co., 146 U. S. 88, 13 S. C. Rep. 28; Halstead v. Grinnan, 152 U. S. 417, 14 S. C. Rep. 641; Pearsall v. Smith, 149 U. S. 231, 13 S. C. Rep. 833.

[5] Dominguez v. Dominguez, 7 Cal. 424.

[6] Hammond v. Hopkins, 143 U. S. 224, 12 S. C. Rep. 418.

[7] 1 Hill's Ch. (S. C.) 113, 26 Am. Dec. 192.

thus consume the estate of the debtor. Upon this state of facts, the court very properly decided that the creditor, having by his supineness allowed the fund to be taken away, could not subsequently be permitted to make his own laches a ground of injury to another. Fifteen years' delay was considered fatal in Norris v. Haggin.[1] So it has been considered an important element that the transactions out of which the suit arose commenced about thirteen years before any attempt was made toward impeachment, and no efforts at concealment or secrecy were shown.[2] "After such delay," said Chief-Justice Waite, "we are not inclined to set aside what has been permitted to remain so long undisturbed, simply because of an inability to explain, with exact certainty, from what precise source the money came, which went into the purchase of each particular parcel of property."[3] A delay of twenty years was deemed fatal in New Jersey.[4]

Chancellor Kent said, upon this subject:[5] "There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound

[1] 136 U. S. 386, 10 S. C. Rep. 942. Compare Foster v. Mansfield, C. & L. M. R. R. Co., 146 U. S. 88, 13 S. C. Rep. 28; Leggett v. Standard Oil Co., 149 U. S. 294, 13 S. C. Rep. 902.

[2] Aldridge v. Muirhead, 101 U. S. 401.

[3] Aldridge v. Muirhead, 101 U. S. 402. See Norris v. Haggin, 136 U. S. 386, 10 S. C. Rep. 942.

[4] Frenche v. Kitchen, 53 N. J. Eq. 37, 30 Atl. Rep. 815.

[5] Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 354. In Corbitt v. Cutcheon, 79 Mich. 41, 44 N. W. Rep. 163, it was held that mere acquiescence by taking no present measure is not enough to prevent afterwards the bringing of an action, in the absence of facts upon which an estoppel could be predicated.

by this equitable estoppel."[1] The Court of Appeals of New York could "see no reason why the same principle should not protect creditors, who have given credit upon the faith of the apparent ownership of property in possession of the debtor, against a secret unrecorded conveyance, fraudulently concealed by the grantee; as when, with knowledge that the debtor is holding himself out as owner, and is gaining credit upon this ground, he keeps silence, giving no sign."[2] But in this latter case the creditor's suit failed because of his laches in not examining the record, and because of a lack of evidence of knowledge of circumstances which called upon the defendant to record his deed. Of course, if the creditor, with full knowledge of the fact which constitutes the fraud, assents to it, he cannot attack the conveyance, and he cannot, by making a colorable assignment of his claim, invest another with the right to attack the conveyance. But if he buys a claim from another creditor who had no knowledge of the fraud, he succeeds to all the rights of such creditor and can maintain a bill to set the conveyance aside.[3]

§ 288. **Lapse of time.** — The general principle of equity jurisprudence that lapse of time, independent of limitations or simple laches, may constitute a defense to a suit, is ably considered by McCrary, J., in United States v. Beebee,[4] in an action brought to annul fraudulent

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[1] Laches and limitations apply to municipal corporations and county commissioners. Boone Co. v. Burlington & M. R. R. Co., 139 U. S. 693, 11 S. C. Rep. 687.

[2] Trenton Banking Co. v. Duncan, 86 N. Y. 229; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 S. C. Rep. 655.

[3] Johnson v. Rogers, 15 N. B. R. 1, 13 Fed. Cas. 795. See Jackson v. Given, 8 Johns. (N. Y.) 137; Alexander v. Pendleton, 8 Cranch 462.

[4] 17 Fed. Rep. 37; Laughlin v. Calumet & Chicago Canal & Dock Co., 13 C. C. A. 1, 65 Fed. Rep. 441. It is not easy to define what constitutes a stale equity; length of time alone is not the test; the question must be determined by the facts and circumstances of each case, and according to the natural principles of

patents. The court says in substance that the authorities support the proposition that lapse of time may be a good defense in equity, independently of any statute of limitations, and it shows that the doctrine rests not alone upon laches; it is often put upon one or all of the following grounds, namely: First, that courts of equity must, for the peace of society, and upon grounds of public policy, discourage stale demands by refusing to entertain them; second, that lapse of time will, if long enough, be regarded as evidence against the stale claim, equal to that of credible witnesses, and which, being disregarded, would in a majority of cases lead to unjust judgments; third, that after the witnesses who had personal knowledge of the facts have all passed away, it is impossible to ascertain the facts, and courts of equity will, on this ground, refuse to undertake such a task. Thus Mr. Justice Story says: "A defense peculiar to courts of equity is founded upon the mere lapse of time, and the staleness of the claim, in cases where no statute of limitations directly governs the case. In such cases, courts of equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere when there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights."[1] And in Maxwell v. Kennedy,[2] the Supreme Court of the United States, in answer to the argument that there was no statute of limitations applicable to the case at bar, said: "We think the lapse of time, upon the facts stated in the bill and exhibits, is, upon principles of equity, a bar to the relief prayed, without reference to the direct bar of a statute of limitations." Chief Justice Fuller says: "In all cases where actual

justice. Neppach v. Jones, 20 Ore. 491, 26 Pac. Rep. 569, 849.

[1] 2 Story's Eq., § 1520.

[2] 8 How. 222.

fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. The hour-glass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused." [1]

§ 289. — Again, in Clark v. Boorman's Executors,[2] the same court observed: "Every principle of justice and fair dealing, of the security of rights long recognized, of repose of society, and the intelligent administration of justice, forbids us to enter upon an inquiry into that transaction forty years after it occurred, when all the parties interested have lived and died without complaining of it, upon the suggestion of a construction of the will different from that held by the parties concerned, and acquiesced in by them through all this time." In Brown v. County of Buena Vista,[3] the doctrine is expressed in these words: "The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded." In Harwood v. Railroad Co.[4] the principle is concisely and clearly stated thus: "Without reference to any statute of limitations, the courts have adopted the

[1] Hammond v. Hopkins, 143 U. S. 224, 274, 12 S. C. Rep. 418.

[2] 18 Wall. 509.

[3] 95 U. S. 161. See Embry v. Palmer, 107 U. S. 11; National Bank v. Carpenter, 101 U. S. 568; Kirby v. Lake Shore & M. S. R. R. Co., 120 U. S. 136, 7 S. C. Rep. 430; Phillips v. Negley, 117 U. S. 675, 6 S. C. Rep. 901; Abraham v. Ordway, 158 U. S. 416, 15 S. C. Rep. 894; Halsey v. Cheney, 68 Fed. Rep. 763.

[4] 17 Wall. 78, 81.

principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case." Lord Redesdale observed: "It is said that courts of equity are not within the statute of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have always been so considered."[1] Important discussions of this general principle may be found in Elmendorf v. Taylor[2] and Badger v. Badger.[3] In Boone v. Childs[4] the rule is thus laid down: "A court of chancery is said to act on its own rules in regard to stale demands, and independent of the statute. It will refuse to give relief where a party has long slept on his rights, and where the possession of the property claimed has been held in good faith, without disturbance, and has greatly increased in value." In Wilson v. Anthony,[5] cited with approval by the Supreme Court of the United States in Sullivan v. Portland & Kennebec Railroad Company,[6] the doctrine is well stated thus: "The chancellor refuses to interfere after an unreasonable lapse of time from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscured by time, and the evidence may be lost."

§ 290. **Discovery of the fraud.** — It is a general rule that where the party injured by the fraud remains in ignorance of it, without any fault or want of care on his part, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in

[1] Hovenden v. Lord Annesley, 2 Sch. & Lef. 607.

[2] 10 Wheat. 172.

[3] 2. Wall. 94.

[4] 10 Pet. 248.

[5] 19 Ark. 16. See Gibson v. Herriott, 55 Ark. 93, 17 S. W. Rep. 589.

[6] 94 U. S. 811. And see Hume v. Beale, 17 Wall. 343; Hall v. Law, 102 U. S. 465; Godden v. Kimmell, 99 U. S. 210; Pusey v. Gardner, 21 W. Va. 481.

privity with him.[1] "To hold that by concealing a fraud," says Miller, J., "or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."[2] This, as we have already shown, is a rule of pleading,[3] as well as a matter of evidence or of defense. The party defrauded must be diligent in inquiry.[4]

§ 291. **Judge Blatchford's views.** — This subject was ably discussed in Tyler v. Angevine,[5] by Blatchford, J., while a circuit judge. He said: "In suits in equity, the decided weight of authority is in favor of the proposition, that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts, on the part of the party committing the fraud, to conceal it from the knowledge of the other party.[6] On the question as it arises in actions at law, there is, in this country, a very decided conflict of authority. Many of the courts hold that the rule is sustained in courts of equity only on the ground that these courts

[1] Upton v. McLaughlin, 105 U. S. 640; Bailey v. Glover, 21 Wall. 349; Gifford v. Helms, 98 U. S. 248; Erickson v. Quinn, 47 N. Y. 413; Richardson v. Mounce, 19 S. C. 477; Harrell v. Kea, 37 S. C. 369, 16 S. E. Rep. 42; Weaver v. Haviland, 68 Hun (N. Y.) 376, 22 N. Y. Supp. 1012.

[2] Bailey v. Glover, 21 Wall. 349, *supra*; Kirby v. Lake Shore & M. S. R. R. Co., 120 U. S. 136, 7 S. C. Rep. 430.

[3] See §§ 148, 149.

[4] Gillespie v. Cooper, 36 Neb. 786, 55 N. W. Rep. 302; Norris v. Haggin, 28 Fed. Rep. 275; O'Dell v. Burnham, 61 Wis. 562, 21 N. W. Rep. 635; Kuhlman v. Baker, 50 Tex. 630; Cooper v. Lee, 75 Texas 114, 12 S. W. Rep. 483.

[5] 15 Blatch. 541.

[6] Citing Booth v. Warrington, 4 Bro. P. C. 163; South Sea Co. v. Wymondsell, 3 P. Wms. 143; Hovenden v. Lord Annesley, 2 Sch. & Lef. 634; Stearns v. Page, 7 How. 819; Moore v. Greene, 19 How. 69; Sherwood v. Sutton, 5 Mason 143; Snodgrass v. Branch Bank of Decatur, 25 Ala. 161.

are not bound by the mere force of the statute, as courts of common law are, but only as they have adopted its principle as expressing their own rule of applying the doctrine of laches in analogous cases. They, therefore, make concealed fraud an exception on purely equitable principles.[1] On the other hand, the English courts, and the courts of Connecticut, Massachusetts, Pennsylvania, and others of great respectability, hold that the doctrine is equally applicable to cases at law.[2] As the case before us is a suit in equity, and as the bill contains a distinct allegation that the defendants kept secret and concealed from the parties interested the fraud which is sought to be redressed, we might rest this case on what we have said is the undisputed doctrine of the courts of equity, but for the peculiar language of the statute we are considering. We cannot say, in regard to this Act of limitations, that courts of equity are not bound by its terms, for its very words are, that no suit *at law or in equity* shall in any case be maintained unless brought within two years, etc. It is quite clear that this statute must be held to apply equally, by its own force, to courts of equity and to courts of law, and, if there be an exception to the universality of its language, it must be one which applies, under the same state of facts, to suits at law as well as to suits in equity. . . . . And we are also of opinion, that this is founded in a sound and philosophical view of the principles of the statute of limitations. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired

[1] Citing Troup v. Smith, 20 Johns. (N. Y.) 33; Callis v. Waddy, 2 Munf. (Va.) 511; Miles v. Barry, 1 Hill's (S. C.) Law 296; York v. Bright, 4 Humph. (Tenn.) 312.

[2] Citing Bree v. Holbech, Doug. 655; Clark v. Hougham, 3 Dowl. & R. 322; Granger v. George, 5 Barn. & C. 149; First Mass. Turnpike Co. v. Field, 3 Mass. 201; Welles v. Fish, 3 Pick. (Mass.) 75; Jones v. Conoway, 4 Yeates (Pa.) 109; Rush v. Barr, 1 Watts (Pa.) 110; Pennock v. Freeman, 1 Watts (Pa.) 401; Mitchell v. Thompson, 1 McLean 96; Carr v. Hilton, 1 Curtis C. C. 230.

the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold that, by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure." Mr. Justice Harlan has said:[1] "It is an established rule of equity, as administered in the courts of the United States, that, where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered."

§ 292. **Statute of limitations.** — It follows then that, as to a creditor who seeks to impeach a deed made by his debtor conveying real estate to a third person in fraud of his creditors, the statute of limitations, when applicable, begins to run from the time the fraudulent deed is recorded or from the time the creditor has actual notice of the conveyance, whichever first occurs.[2] In New York the rule has been laid down that the statute does not begin to run until the creditor has obtained judgment and execution has been returned unsatisfied.[3] It is familiar learning that in the absence of a contrary rule established by statute, a defendant who desires to avail himself of a statute of limitations as a defense, must raise the question either in pleading, or on the trial, or before judgment.[4]

[1] Kirby v. Lake Shore & M. S. R. R. Co., 120 U. S. 136, 7 S. C. Rep. 430.

[2] Hughes v. Littrell, 75 Mo. 573; Rogers v. Brown, 61 Mo. 187; Wright v. Davis, 28 Neb. 479, 44 N. W. Rep. 490; Conn. Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. Rep. 623.

[3] Weaver v. Haviland, 142 N. Y. 534, 37 N. E. Rep. 641; Brown v. Campbell, 100 Cal. 635, 35 Pac. Rep. 433.

[4] Retzer v. Wood, 109 U. S. 187, 3 S. C. Rep. 164; Storm v. United States, 94 U. S. 81; Upton v. McLaughlin, 105 U. S. 640.

Ten years adverse possession is a good defense in Alabama to a suit to set aside a deed as fraudulent[1]

§ 293. **Limitations in equity.** — In the consideration of purely equitable rights and titles courts of equity act in analogy to the statute of limitations,[2] but are not bound by it.[3] As was said in the case of Hall v. Russell:[4] "When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property. So, in cases of implied or constructive trusts, where it is sought for the purpose of maintaining the remedy to force upon the defendant the character of trustee, courts will apply the same limitation as provided for actions at law."[5]

§ 293a. **Statute of frauds.** — A contract to convey land in consideration of labor or services to be rendered is manifestly within the statute of frauds.[6]

§ 294. **Insolvency or bankruptcy discharges.** — The insolvent laws of a State have, manifestly, no extra-territorial force. They affect only contracts between citizens of the State in which such laws were enacted.[7] As was tersely stated in Cook v. Moffatt,[8] a certificate of discharge will not bar an action brought by a citizen of another State on a contract with him. Such was the conclusion of the

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[1] Snedecor v. Watkins, 71 Ala. 48.

[2] See Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 448, 13 S. C. Rep. 944; Whitridge v. Whitridge, 76 Md. 85, 24 Atl. Rep. 645; Godden v. Kimmell, 99 U. S. 201; Hammond v. Hopkins, 143 U. S. 274, 12 S. C. Rep. 418.

[3] Manning v. Hayden, 5 Sawyer 379.

[4] 3 Sawyer 515.

[5] Citing Elmendorf v. Taylor, 10 Wheat. 176; Miller v. McIntyre, 6 Pet. 66; Beaubien v. Beaubien, 23 How. 207, to which may be added, Wisner v. Barnet, 4 Wash. C. C. 638; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 110; Michoud v. Girod, 4 How. 560.

[6] Masterson v. Little, 75 Tex. 682, 13 S. W. Rep. 154; Sprague v. Haines, 68 Tex. 217, 4 S. W. Rep. 371.

[7] Hills v. Carlton, 74 Me. 156; Rhawn v. Pearce, 110 Ill. 350.

[8] 5 How. 295.

Supreme Court of Maine in Felch v. Bugbee,[1] where this question is most carefully examined; and in Baldwin v. Hale,[2] citing that case with approbation, the court decided that a discharge under the insolvent law of one State was not a bar to an action on a note given and payable in the same State, the party to whom the note was given being a resident of a different State, and not having proved his debt against the defendant's estate in insolvency, nor in any manner having been a party to the proceedings.[3] In Pratt v. Chase[4] it is said that "as to creditors of the insolvent who are not citizens of the same State where the discharge is granted, the want of binding force to defeat the obligation of a contract is founded upon the want of jurisdiction over such creditors."[5] A debt contracted and payable in a foreign country is not barred by a discharge under the United States Bankrupt Act, where

[1] 48 Me. 9; Silverman v. Lessor, 88 Me. 605.

[2] 1 Wall. 223. In Brown v. Smart, 145 U. S. 457, the court says: "So long as there is no national bankrupt act, each State has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts; but a State cannot, by such a law, discharge one of its own citizens from his contracts with citizens of other States, though made after the passage of the law, unless they voluntarily become parties to the proceedings in insolvency. Sturges v. Crowninshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213; Gilman v. Lockwood, 4 Wall. 409."

[3] See Guernsey v. Wood, 130 Mass. 503; Bedell v. Scruton, 54 Vt. 493; Watson v. Bourne, 10 Mass. 337; Phelps v. Borland, 30 Hun (N. Y.) 362, 366, 17 Weekly Dig. (N. Y.) 556; McMillan v. McNeill, 4 Wheat. 209; Hale v. Baldwin, 1 Cliff. 517, affi'd as Baldwin v. Hale, 1 Wall. 223; Boyle v. Zacharie, 6 Pet. 635, 648; Soule v. Chase, 39 N. Y. 342; Ogden v. Saunders, 12 Wheat. 213; Green v. Sarmiento, 1 Pet. C. C. 74; Palmer v. Goodwin, 32 Me. 535; Very v. McHenry, 29 Me. 206; Fiske v. Foster, 10 Met. (Mass.) 597; Chase v. Flagg, 48 Me. 182; Savoye v. Marsh, 10 Met. (Mass.) 594; Bell v. Lamprey, 1 Am. Insolv. Rep. 10; Scribner v. Fisher, 2 Gray (Mass.) 43; Smith v. Smith, 2 Johns. (N. Y.) 235; Gardner v. Oliver Lee's Bank, 11 Barb. (N. Y.) 558; Towne v. Smith, 1 Woodb. & M. 115; Peck v. Hibbard, 26 Vt. 698; Hawley v. Hunt, 27 Iowa 303; Woodbridge v. Allen, 12 Met. (Mass.) 470; Beer v. Hooper, 32 Miss. 246; Anderson v. Wheeler, 25 Conn. 603; Crow v. Coons, 27 Mo. 512.

[4] 44 N. Y. 597.

[5] But compare Murray v. Rottenham, 6 Johns. Ch. (N. Y.) 52.

the creditor was not a party to and had no personal notice of the proceedings in bankruptcy.[1] The discharge of the debtor is not necessarily a bar to the creditor's proceedings to reach property fraudulently alienated. Thus, in State v. Williams,[2] it appeared that A, having made a fraudulent conveyance of his real estate, was afterward sued by B. During the pendency of the suit, A filed his petition in bankruptcy, and obtained his discharge before judgment was had against him. Afterward B filed a bill to set aside the fraudulent conveyance, and to subject the property to the payment of the judgment against A. The court held that the discharge in bankruptcy was no bar to the proceeding. The creditor's proceedings are *quasi in rem.*[3]

§ 295. **Existing and subsequent creditors.** — It is said in Collins v. Nelson[4] that, in a suit by a creditor to set aside a conveyance of real estate, alleged to have been executed by his debtor for the fraudulent purpose of cheating, hindering and delaying the creditor in the

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[1] McDougall v. Page, 55 Vt. 187, 28 Alb. L. J. 372; See McMillan v. McNell, 4 Wheat. 209; Smith v. Buchanan, 1 East 6; Ellis v. McHenry, L. R. 6 C. P. 228.

[2] 9 Baxt. (Tenn.) 64.

[3] A plea of discharge under a foreign insolvency law must set forth the law under which it was procured, and show that it discharged the debt sued upon. Baker v. Palmer, 1 Am. Insolv. Rep. 67. No discharge was granted under the United States Bankrupt Act to corporations. Ansonia B. & C. Co. v. New Lamp Chimney Co., 53 N. Y. 123. To secure the benefit of a discharge in bankruptcy it should be promptly interposed as a defense to any action pending against the bankrupt. Dimock v. Revere Copper Co., 117 U. S. 559. 6 S. C. Rep. 855, and cases cited; Bradford v. Rice, 102 Mass. 472; Hollister v. Abbott, 31 N. H. 442. As to attacking a discharge, see Poillon v. Lawrence, 77 N. Y. 207, and cases cited. As to claims barred and not barred, see Hennequin v. Clews, 111 U. S. 676, 4 S. C. Rep. 576; Strang v. Bradner, 114 U. S. 555, 5 S. C. Rep. 1038; Noble v. Hammond, 129 U. S. 69, 9 S. C. Rep. 235; Ames v. Moir, 138 U. S. 311, 11 S. C. Rep. 311. It may be here noted that, in New York, an imprisoned debtor is not entitled to a discharge upon making a voluntary assignment under the statute if it is shown that he made a disposition of his property with intent to defraud creditors. Matter of Brady, 69 N. Y. 215, 1 Am. Insolv. Rep. 102.

[4] 81 Ind. 75.

collection of the debtor's indebtedness to him, the answer of the debtor to the effect that, at the time of the commencement of the suit, no part of his indebtedness to the creditor was due and unpaid, will constitute a complete defense in bar of such suit. This statement is, it seems to us, misleading. As is elsewhere shown, subsequent creditors may attack conveyances made with the intention to avoid future liabilities [1] or schemes of fraud, or to place the risks of new ventures and speculations upon the creditor's shoulders.[2]

§ 296. **Sufficient property left—Gift of land.** — The general rule applicable to conveyances of both real [3] and personal property,[4] as announced by the Supreme Court of Indiana, is, that a sale cannot be impeached as fraudulent unless it is shown that the debtor had no other property subject to execution at the time the conveyance was made.[5] This is also a rule of pleading.[6]

Where a father in solvent circumstances made an oral gift of land to his son, who entered into possession and made lasting improvements on the property, the latter was considered to have a good title as against creditors of the father.[7] "Taking possession under a parol agreement with the consent of the vendor, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he previously occupied, has always been held to take such agreement out of the operation of the statute" of fraud.[8]

§ 297. **What sheriff must show against stranger.** — As a general rule process regular on its face, and issued by a

[1] See Chap. VI, §§ 96–101.

[2] See § 100.

[3] Hardy v. Mitchell, 67 Ind. 485; Noble v. Hines, 72 Ind. 12; Spaulding v. Blythe, 73 Ind. 93.

[4] Rose v. Colter, 76 Ind. 592.

[5] See Emerson v. Opp, 139 Ind. 27, 38 N. E. Rep. 330.

[6] See § 140.

[7] Dozier v. Matson, 94 Mo. 328, 7 S. W. Rep. 268.

[8] Sedg. & Wait on Trial of Title to Land (2d ed.), § 321*a*; Lowry v. Tew, 3 Barb. Ch. (N. Y.) 407; Freeman v. Freeman, 43 N. Y. 34.

tribunal or officer having authority to issue it, is sufficient to protect the officer, although it may have been irregularly issued. But when an officer attempts to overthrow a sale by a debtor on the ground that it was fraudulent as to creditors, he must go back of his process and show the authority for issuing it. If he acts under an execution, he must show a judgment; and if he seizes under an attachment, he must show the attachment regularly issued.[1]

§ 297a. **Set-off.** — The cases relating to set-off are full of technical statements. The field is a broad one. We may observe that where an assignee seeks to enforce a bond and mortgage which was part of the assigned estate, the defendant mortgagor is entitled to set-off in equity a debt due to him from the assignor, though the mortgage may not have been due when the assignment was made.[2]

§ 297b. **Attacking consideration and good faith.**—The subject of consideration is elsewhere discussed.[3] A mortgagor may, in defending foreclosure, show want of consideration, and, when this is shown, the mortgagee cannot rebut the defense by proving that the notes and mortgage

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[1] Keys v. Grannis, 3 Nev. 550; Thornburgh v. Hand 7 Cal. 561. See § 81. In Damon v. Bryant, 2 Pick. (Mass.) 413, Chief-Justice Parker said: "Where the goods taken are claimed by a person who was not a party to the suit, and he brings trespass, and his title is contested on the ground of fraud, under the statute 13 Eliz. c. 5, a judgment must be shown if the officer justifies under an execution, or a debt if under a writ of attachment, because it is only by showing that he acted for a *creditor*, that he can question the title of the vendee. The authorities to this point are Lake v. Billers, 1 Ld. Raym. 733; Bull. N. P. 91, 234; Ackworth v. Kempe, Doug. 41; Savage v. Smith, 2 W. Bl. 1104; Bac. Abr. Trespass, G. 1." See, also, Harget v. Blackshear, 1 Taylor (N. C.) 107; High v. Wilson, 2 Johns. (N. Y.) 46; Doe *d.* Bland v. Smith, 2 Stark. 199; Weyand v. Tipton, 5 Serg. & R. (Pa.) 332; Casanova v. Aregno, 3 La. 211; Trowbridge v. Bullard, 81 Mich. 451, 45 N. W. Rep. 1012; Bartlett v. Cheesebrough, 32 Neb. 339, 49 N. W. Rep. 360.

[2] Richards v. La Tourette, 119 N. Y. 54, 23 N. E. Rep. 531. See Rothschild v. Mack, 115 N. Y. 1, 21 N. E. Rep. 726; Smith v. Felton, 43 N. Y. 419.

[3] See Chap. XV.

were also given to defeat creditors.[1] A trust deed made with the design of preventing the enforcement of a judgment for alimony, will not be enforced in a court of equity,[2] and the facts may be brought out as a defense.

§ 297c. **When controversies not separable.** — In a suit by an assignee for the benefit of creditors, to disencumber a fund of alleged liens claimed by different creditors, the fact that each defendant had a separate defense will not create a separable controversy as to each.[3]

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[1] Clark v. Clark, 62 N. H. 271; Wearse v. Pierce, 24 Pick. (Mass.) 141.

[2] Scott v. Magloughlin, 133 Ill 36, 24 N. E. Rep. 1030.

[3] Rosenthal v. Coates, 148 U. S. 143, 13 S. C. Rep. 576. See Fidelity Ins. T. & S. D. Co. v. Huntington, 117 U. S. 280, 6 S. C. Rep. 733; Young v. Parker, 132 U. S. 267, 10 S. C. Rep. 75; Graves v. Corbin, 132 U. S. 586, 10 S. C. Rep. 196; Brinkerhoff v. Brown, 6 Johns. Ch. (N. Y.) 139.

CHAPTER XX.

HUSBAND AND WIFE — FRAUDULENT MARRIAGE SETTLEMENTS.

§ 298. The marriage relationship.
299. Wife as husband's creditor.
299*a*. Claim for support.
300. Transactions between, how regarded.
301. Burden of proof.
302. Mutuality of fraudulent design in cases of ante-nuptial settlements.
303. Husband as agent for wife.
304. Wife's separate property.
305. Mingling property of husband and wife.
305*a*. Book entries of transactions.
306. Marriage settlements—Amount of settlement.
§ 307. Post nuptial settlement.
308. Purchase by wife after marriage.
309. Valid gifts — Subsequent insolvency.
310. Articles of separation.
311. Statute of frauds.
312. Policies of insurance.
313. Competency of wife as witness.
314 Fraudulent conveyances in contemplation of marriage.
315. Fraudulent transfers as affecting dower.
315*a*. Judgment against wife.

§ 298. The marriage relationship. — It would be impracticable to devote separate chapters to the consideration of the different frauds upon creditors incident to each of the various relationships recognized by law; but, as the fairness and good faith of transactions and conveyances between husband and wife are so frequently challenged and assailed by creditors, the rules and decisions governing this branch of our subject must be discussed. As will appear, husband and wife have been made by legislation independent legal personages.[1] A debtor, when threatened with insolvency, naturally reposes confidence in his wife; the relationship inspires this confidence, and it very often results that she becomes wrongfully

[1] See Moore v. Page, 111 U. S. 118, 4 S. C. Rep. 388; Whiton v. Snyder, 88 N. Y. 304; Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. Rep. 304.

possessed of "the creditor's trust fund," so called. The statutes conferring upon married women the power to hold and convey property much the same as though they were single, have unfortunately encouraged husbands to confide to the keeping of their wives property which should have been turned over to creditors or held subject to their process. Frauds committed by the husband and wife upon one another, or in contemplation of, or after entering into the relationship, will call for incidental discussion as we proceed.

§ 299. **Wife as husband's creditor.** — A wife can become a creditor of her husband,[1] and he may pay an honest debt to her,[2] though as to other creditors the claim may appear stale and ancient. The debtor is not compelled by law to resort to the statute of limitations as a defense,[3] nor can others interfere or insist upon it for him, nor is the wife estopped to receive payment of a debt of this char-

[1] Garr v. Klein, 93 Iowa 313; Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. Rep. 304; Robinson v. Stevens, 93 Ga. 538, 21 S. E. Rep. 96; Romans v. Maddux, 77 Iowa 203, 41 N. W. Rep. 763; Ardis v. Theus, 47 La. Ann. 1438, 17 So. Rep. 865; Stramann v. Scheeren, 7 Col. Ct. App. 1, 42 Pac. Rep. 191; First Nat. Bk. v. Kavanagh, 7 Col. Ct. App. 160, 43 Pac. Rep. 217; Williams v. Harris, 4 S. Dak. 22, 54 N. W. Rep. 926.

[2] Patton v. Conn, 114 Pa. St. 183, 6 Atl. Rep. 468; Hewitt v. Williams, 47 La. Ann. 742; Fulp v. Beaver, 136 Ind. 319, 36 N. E. Rep. 250; Robinson v. Stevens, 93 Ga. 535, 21 S. E. Rep. 96; Lassiter v. Hoes, 11 Misc. (N. Y.) 1, 31 N. Y. Supp. 850; Hughes v. Bell, 62 Ill. App. 74; National Bank of Republic v. Dickinson, 107 Ala. 265, 18 So. Rep. 144; Tarsney v. Turner, 48 Fed. Rep. 818. Where money was loaned in good faith by the wife to the husband, it is no objection to the validity of the deed of the land given in repayment of such loan that it was given after a creditor had recovered judgment. Gaar v. Klein, 93 Iowa 313, 61 N. W. Rep. 918; cf., Carson v. Stevens, 40 Neb. 112, 58 N. W. Rep. 845. In Woodbridge v. Tilton, 84 Me. 95, 24 Atl. Rep. 582, the court says: "A husband who is justly indebted to his wife may appropriate his property to the payment of her claim, to the exclusion of his other creditors. Ferguson v. Spear, 65 Me. 277." See DeBerry v. Wheeler, 128 Mo. 84, 30 S. W. Rep. 338; Winfield Nat. Bank v. Croco, 46 Kan. 629, 26 Pac. Rep. 942. See Schreyer v. Scott, 134 U. S. 405, 10 S. C. Rep. 579.

[3] Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. Rep. 304; Burnham v. McMichael, 6 Tex. Civ. App. 496, 26 S. W. Rep. 887.

acter.[1] She has the same standing as any other creditor.[2] The rule as it prevailed at common law was, that a husband could not contract with his wife. Her money not held to her separate use, coming into his possession, was regarded as his property;[3] and his promise to repay such money to her could not be enforced either at law or in equity.[4] This rule, as we have said, has now been almost universally abrogated.[5] In many respects a wife may, under the existing policy of the law, deal with her husband, as regards her separate estate, upon the same terms as though the relationship had no existence. "When the wife, by proper and sufficient proof, shows that her husband owes her, she is entitled to the same remedies and has the same standing to enforce any security for the payment of the debt that she may have received as any other creditor."[6] Thus, in a case in Massachusetts, in which the opinion was rendered by Chief-Justice Gray, now one of the justices of the Supreme Court of

[1] Brookville Nat. Bank v. Kimble, 76 Ind. 195.

[2] Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. Rep. 304.

[3] Joiner v. Franklin, 12 B. J. Lea (Tenn.) 422; Whiton v. Snyder, 88 N. Y. 302; Yates v. Law, 86 Va. 117, 9 S. E. Rep. 508; Grant v. Sutton, 90 Va. 771, 19 S. E. Rep. 784.

[4] Atlantic Nat. Bank v. Tavener, 130 Mass. 409; Alexander v. Crittenden, 4 Allen (Mass.) 342; Turner v. Nye, 7 Allen (Mass.) 176; Phillips v. Frye, 14 Allen (Mass.) 36; Degnan v. Farr, 126 Mass. 297, 299; Kesner v. Trigg, 98 U. S. 54; Jaffrey v. McGough, 83 Ala. 202, 3 So. Rep. 594. In West Virginia (Miller v. Cox, 38 W. Va. 747, 18 S. E. Rep. 960; Kanawha Valley Bank v. Atkinson, 32 W. Va. 203, 9 S. E. Rep. 175) it is held that the presumption of law, where money is delivered by a wife to a husband, is that it is a gift, which presumption can only be overcome by clear evidence of a contrary understanding. But see Hood v. Jones, 5 Del. Ch. 77. Compare Iseminger v. Criswell (Iowa, 1896) 67 N. W. Rep. 289.

[5] Towers v. Hagner, 3 Whart. (Pa.) 48; Johnston v. Johnston, 1 Grant (Pa.) 468; Kutz's Appeal, 40 Pa. St. 90; Grahill v. Moyer, 45 Pa St. 530; Atlantic Nat. Bank v. Tavener, 130 Mass. 409; Babcock v. Eckler, 24 N. Y. 623; Whiton v. Snyder, 88 N. Y. 299; Savage v. O'Neil, 44 N. Y. 298; Steadman v. Wilbur, 7 R. I. 481; *In re* Blandin, 1 Lowell 543; Horton v. Dewey, 53 Wis. 410, 10 N. W. Rep. 599.

[6] Manchester v. Tibbetts, 121 N. Y. 222, 24 N. E. Rep. 304.

the United States, it was decided that where a wife loaned to her husband upon a promise of repayment money constituting a part of her separate estate, a conveyance of land made by him to her, through a third person, in repayment of such loan, and free from a fraudulent design, would be valid against his creditors.[1] A husband may, of course, give his wife a mortgage to secure a valid debt.[2] The wife may loan money to her husband and he has the right to prefer her,[3] and the wife when not questioned is not bound to proclaim the fact that she is a creditor.[4] While a husband has a right to pay his wife a *bona fide* debt, yet a deed by the husband to the wife cannot be supported as being founded upon a valuable consideration which rests upon his mere voluntary promise that he would at some time give her a sum of money;[5] nor will it be upheld where the consideration is grossly inadequate.[6]

Manifestly a wife's relinquishment of her dower right is a sufficient consideration for a reasonable settlement upon her out of the husband's property.[7] But joining in a release of property incumbered to almost its full value, is not sufficient consideration to support a conveyance of other realty by the husband to the wife;[8] and where the value of the property greatly exceeds the value of the dower right, the deed will be set aside as to such excess.[9]

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[1] Atlantic Nat. Bank v. Tavener, 130 Mass. 407; followed and approved by the United States Supreme Court in Medsker v. Bonebrake, 108 U. S. 66. 2 S. C. Rep. 351. See Tomlinson v. Matthews, 98 Ill. 178; Jewett v. Noteware, 30 Hun (N. Y.) 194; French v. Motley, 63 Me. 326; Grabill v. Moyer, 45 Pa. St. 530; Steadman v. Wilbur, 7 R. I. 481.; Langford v. Thurlby, 60 Iowa 105, 14 N. W. Rep. 135.

[2] Spaulding v. Keyes, 125 N. Y. 113, 26 N. E. Rep. 15.

[3] Laird v. Davidson, 124 Ind. 414, 25 N. E. Rep. 7; Strauss v. Parshall, 91 Mich. 475, 51 N. W. Rep. 1117.

[4] Robinson v. Stevens, 93 Ga. 538, 21 S. E. Rep. 96.

[5] Wynne v. Mason, 72 Miss. 433, 18 So. Rep. 422.

[6] Case Manufacturing Co. v. Perkins (Mich. 1895), 64 N. W. Rep. 201.

[7] Hershy v. Latham, 46 Ark. 542.

[8] Commonwealth Ins. & Trust Co. v. Brown, 166 Pa. St. 477, 31 Atl. Rep 205.

[9] Glascock v. Brandon, 35 W. Va. 84, 12 S. E. Rep. 1102.

§ 299a. **Claim for support.** — As has already appeared, a wife may bring suit to annul a conveyance made to defeat her claim for alimony,[1] but it seems to be doubted in a recent Connecticut case[2] whether the debt or duty to support the wife, which is a continuing one, is a debt or duty within the protection of the statute, or the rules of the common law against fraudulent conveyances. The court says: "We are not aware of any case anywhere, which holds that a duty of this kind is within the protection of any statute, or of the rules of the common law, against fraudulent conveyances The duty protected by such rules or statutes is generally some particular specific duty to pay money or money's-worth, and not a general continuing duty, like this of support, to pursue a certain course of conduct." Naturally the rule that a conveyance made to defeat a contingent claim will be overturned, should be applied to the case of a failure to discharge the duty of support.

§ 300. **Transactions between — How regarded.** — Transactions between husband and wife, to the prejudice of the husband's creditors, are, however, to be scanned closely,[3] and their *bona fides* must be clearly established,[4] as fraud

[1] See § 90. Chase v. Chase, 105 Mass. 385; Livermore v. Boutelle, 11 Gray (Mass.) 217.

[2] Ullrich v. Ullrich, 68 Conn. 585.

[3] Hershy v. Latham, 46 Ark. 550; Graves v. Davenport, 50 Fed. Rep. 881; White v. Benjamin, 150 N. Y. 258, 44 N. E. Rep. 956; Duttera v. Babylon, 83 Md. 544, 35 Atl. Rep. 64; Robinson v. Clark, 76 Me. 494; Frank v. King, 121 Ill. 254, 12 N. E. Rep. 720; Williams v. Harris, 4 S. Dak. 22, 54 N. W. Rep. 926; Hinchman v. Parlin & O. Co., 74 Fed. Rep. 698; Kennedy v. Lee, 72 Ga. 40; Gross v. Eddinger, 85 Ky. 168, 3 S. W. Rep. 1; Reese v. Shell, 95 Ga. 750, 22 S. E. Rep. 580; Skellie v. James, 81 Ga. 419, 8 S. E. Rep. 607; Brownell v. Stoddard, 42 Neb. 184, 60 N. W. Rep. 380; Wynne v. Mason, 72 Miss. 433, 18 So. Rep. 422; Billington v. Sweeting, 172 Pa. St. 161, 33 Atl. Rep. 543; Reese v. Reese, 157 Pa. St. 200, 27 Atl. Rep. 703; Town of Norwalk v. Ireland, 68 Conn. 14, 35 Atl. Rep. 804.

[4] Booher v. Worrill, 57 Ga. 235. See Thompson v. Feagin, 60 Ga. 82; Hinkle v. Wilson, 53 Md. 292; Seitz v. Mitchell, 94 U. S. 584; Lee v. Cole, 44 N. J. Eq. 328, 15 Atl. Rep. 531; Webb v. Ingham, 29 W. Va. 389, 1 S. E. Rep. 816; Curtis v. Wortsman, 25 Fed. Rep. 893; Bayne v. State, 62

is so easily practiced and concealed under cover of the marriage relation.[1] Lord Hardwicke said: "I have always a great compassion for wife and children, yet, on the other side, it is possible, if creditors should not have their debts, *their* wives and children may be reduced to want." The court observed in Hoxie v. Price:[2] "On account of the great facilities which the marriage relation affords for the commission of fraud, these transactions between husband and wife should be closely examined and scrutinized,[3] to see that they are fair and honest,[4] and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of his creditors." In all such cases the parties are under temptation to do themselves more than justice.[5] What is secured to the one is apt to be shared by the other. Ordinarily the claim of a creditor against a debtor is antagonistic, but in this class of cases they are sure to be in harmony, the debtor supporting the claims of the cred-

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Md. 103; Grant v. Sutton, 90 Va. 771, 19 S. E. Rep. 784; Kemp v. Folsom, 14 Wash. 16, 43 Pac. Rep. 1100. See § 308.

[1] White v. Benjamin, 150 N. Y. 265, 44 N. E. Rep. 956; Williams v. Harris, 4 S. Dak. 22, 54 N. W. Rep. 926; Town of Norwalk, v. Ireland, 68 Conn. 14, 35 Atl. Rep. 804.

[2] 31 Wis. 86. See Fisher v. Shelver, 53 Wis. 501, 10 N. W. Rep. 681.

[3] Resse v. Shell, 95 Ga. 749, 22 S. E. Rep. 580; Lambrecht v. Patten, 15 Mont. 260, 38 Pac. Rep. 1063.

[4] Gable v. Columbus Cigar Co., 140 Ind. 563, 38 N. E. Rep. 474; Knapp v. Day, 4 Col. App. 23, 34 Pac. Rep 1008.

[5] In Post v. Stiger, 29 N. J. Eq. 556, the court says: "A claim by a wife against a husband, first put in writing when his liabilities begin to jeopardize his future, should always be regarded with watchful suspicion, and, when attempted to be asserted against creditors upon the evidence of the parties alone, uncorroborated by other proof, should be rejected at once, unless their statements are so full and convincing as to make the fairness and justice of the claim manifest." Diggs v. McCullough, 69 Md. 592, 16 Atl. Rep. 453; Manning v. Carruthers, 83 Md. 6, 34 Atl. Rep. 254; Seitz v. Mitchell, 94 U. S. 583; Town of Norwalk v. Ireland, 68 Conn. 14, 35 Atl. Rep. 804. See S. P., Lee v. Cole, 44 N. J. Eq. 328. A conveyance by a husband to a wife may be treated as voluntary, where the alleged debt had not been recognized for many years, and no account kept or interest required. Dillman v. Nadelhoffer, 162 Ill. 625, 45 N. E. Rep. 680; Frank v. King, 121 Ill. 250, 12 N. E. Rep. 720.

itor.[1] When a creditor challenges such a contract for fraud, slight evidence will change the *onus* and cast on the conjugal pair the duty of manifesting the genuineness and good faith of the transaction by such evidence as will satisfy or ought to satisfy an honest jury.[2] "Dealings between husband and wife which result in the appropriation of the husband's property for the payment of a debt claimed to be due to the wife, to the exclusion of other creditors, it must be admitted, furnish uncommon opportunities for the perpetration of fraud, and should be carefully and rigidly scrutinized."[3] There is, however, no absolute legal presumption that a conveyance of land made by a debtor to his wife is fraudulent as against a creditor of the husband whose judgment was recovered after the conveyance.[4] A wife may be held as trustee *ex maleficio* for the benefit of her husband's creditors.[5]

§ 301. **Burden of proof.** — It is said by Mr. Justice Taylor, in the case of Horton v. Dewey,[6] that, "in a contest between the creditors of a husband and the wife, if the wife claims ownership of the property by a purchase, the burden of proof is upon her to prove, by clear and satisfactory evidence, such purchase, and that the purchase

[1] Knapp v. Day, 4 Col. App. 24, 34 Pac. Rep. 1008.

[2] It has been said, however, that "such dealings (though to be carefully scrutinized on account of the temptation to give an unfair advantage to the wife over other creditors) must be tested by the same principles as a conveyance by a debtor to a stranger, when brought into question as fraudulent against creditors." Kaufman v. Whitney, 50 Miss. 108. Citing Mangum v. Finucane, 38 Miss. 555; Vertner v. Humphreys, 22 Miss. 130; Roach v. Bennett, 24 Miss. 98; Wiley v. Gray, 36 Miss. 510; Butterfield v. Stanton, 44 Miss. 15. This does not seem to us to harmonize with the best authority relating to the subject.

[3] Manchester v. Tibbetts, 121 N. Y. 222, 24 N. E. Rep. 304; Town of Norwalk v. Ireland, 68 Conn. 14.

[4] Hussey v. Castle, 41 Cal. 239; Grant v. Ward, 64 Me. 239. But see § 308.

[5] James Goold Co. v. Maheady, 38 Hun (N. Y.) 296.

[6] 53 Wis. 413, 10 N. W. Rep. 599; Hoffman v. Nolte, 127 Mo. 120, 29 S. W. Rep. 1006; Peeler v. Peeler, 109 N. C. 631, 14 S. E. Rep. 59; Helms v. Green, 105 N. C. 257, 11 S. E. Rep. 470.

was for a valuable consideration, paid by her out of her separate estate, or by some other person for her."[1] And it is further observed, in the course of the opinion, that: "In all such cases the burden of proof showing the *bona fides* of the purchase is upon her, and she must show by clear and satisfactory evidence that the purchase was made in good faith, with her separate estate, or for a consideration moving from some person other than her husband. In all such cases the presumptions are in favor of the creditors, and not in favor of the title of the wife."[2] The mere recital of a valuable consideration in the instrument or bill of sale has been considered insufficient to support a verdict in favor of the wife.[3] Such a recital is regarded as evidence only between the parties and their privies.[4]

It must be remembered that the presumption of possession of the wife's property by the husband, and that he is therefore *prima facie* the owner, has been impaired by

[1] Citing Stanton v. Kirsch, 6 Wis. 338; Horneffer v. Duress, 13 Wis. 603; Weymouth v. Chicago & N. W. Ry. Co., 17 Wis. 550; Duress v Horneffer, 15 Wis. 195; Beard v. Dedoph, 29 Wis 136; Stimson v. White, 20 Wis. 563; Elliott v. Bently, 17 Wis. 591; Putnam v. Bicknell, 18 Wis. 333; Hannan v. Oxley, 23 Wis. 519; Fenelon v. Hogoboom, 31 Wis. 172; Hoxie v. Price, 31 Wis. 82; Carpenter v. Tatro, 36 Wis. 297; Gettelmann v. Gitz, 78 Wis. 439, 47 N. W. Rep. 660. In that case the ruling was put on the ground that the circumstances raised a strong presumption that the property belonged to the husband, which could be overcome only by clear proof on the wife's part. See also Glass v. Zutavern, 43 Neb. 334, 61 N. W. Rep. 579.

[2] See Gable v. The Columbus Cigar Co., 140 Ind. 563-569, 38 N. E. Rep. 474; Stevens v. Carson, 30 Neb. 550, 46 N. W. Rep. 655; Thompson v. Loenig, 13 Neb. 386, 14 N. W. Rep. 168; Seasongood v. Ware, 104 Ala. 212, 16 So. Rep. 51; Kelley v. Connell, 110 Ala. 543, 18 So. Rep. 9; Glass v. Zutavern, 43 Neb. 334, 61 N. W. Rep. 579; Hoffman v. Nolte, 127 Mo. 120, 29 S. W. Rep. 1006; Grant v. Sutton, 90 Va. 772, 19 S. E. Rep. 784; Wood v. Harrison, 41 W. Va. 376, 23 S. E. Rep. 560; Claflin v. Ambrose, 37 Fla. 78, 19 So. Rep. 628; Hutchinson v. Boltz, 35 W. Va. 754, 14 S. E. Rep. 267; Peeler v. Peeler, 109 N. C. 628, 14 S. E. Rep. 59.

[3] See Sillyman v. King, 36 Iowa 207. But compare, *contra*, Stall v. Fulton, 30 N. J. Law 430; Horton v. Dewey, 53 Wis. 410, 10 N. W. Rep. 599.

[4] Sillyman v. King, 36 Iowa 213; Long v. Dollarhide, 24 Cal. 218; Kimball v. Fenner, 12 N. H. 248. See § 220.

modern innovations in the law. Since under the present rule the wife may generally take by gift from her husband [1] as well as from others, and, by purchase, from any one, her separate and personal possession of specific articles must draw after it the presumption of ownership, and there is no longer any controlling reason for making her case exceptional, or excluding her from the operation of the general rule.[2] Of course the wife will not be protected when she co-operates with her husband in any scheme to keep his creditors at bay.[3]

§ 302. **Mutuality of fraudulent design in cases of ante-nuptial settlements.** — To render an ante-nuptial settlement fraudulent and voidable as to creditors, it is, as we have seen, necessary that both parties should concur in or have cognizance of the intended fraud.[4] If the settler alone intended a fraud, and the prospective wife had no notice of it, she cannot be affected by it.[5] Marriage, as already shown, is a consideration of the highest value, which, from motives of the soundest policy, is upheld with a steady resolution.[6]

Fraud may be imputed to the parties either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation in carrying the design into execution after notice of it.[7] The

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[1] Armitage v. Mace, 96 N. Y. 538.

[2] Whiton v. Snyder, 88 N. Y. 304; Gilbert v. Glenny, 75 Iowa 513, 39 N. W. Rep. 818; Chadbourn v. Williams, 45 Minn. 294, 47 N. W. Rep. 812; Ettlinger v. Kahn, 134 Mo. 498, 36 S. W. Rep. 37; Coyne v. Sayre, 54 N. J. Eq. 702, 36 Atl. Rep. 96; Rhodes v. Wood, 93 Tenn. 702, 28 S. W. Rep. 294.

[3] Sloan v. Huntington, 8 App. Div. (N. Y.) 93, 40 N. Y. Supp. 393.

[4] See Chap. XIV, §§ 199, 200. First Nat. Bk. v. Hamilton, 59 N. Y. St. Rep. 331, 27 N. Y. Supp. 1029.

[5] Prewit v. Wilson, 103 U. S. 22; Herring v. Wickham, 29 Gratt. (Va.) 628, Magniac v. Thompson, 7 Pet. 392.

[6] Prewit v. Wilson, 103 U. S. 22. See Nance v. Nance, 84 Ala. 375, 4 So. Rep. 699; Cohen v. Knox, 90 Cal. 266, 27 Pac. Rep. 215. See Chap. XV. §§ 210, 212.

[7] Magniac v. Thompson, 7 Pet. 393, per Story, J.

question of intent must, as in other cases, be submitted to the jury.[1]

§ 303. **Husband as agent for wife.** — It is settled beyond controversy that a husband may manage the separate property of his wife without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors.[2] The wife being vested with the right to hold and acquire property free from the control of her husband, the legitimate inference seems to result that she can employ whomsoever she desires as an agent to manage it.[3] To deny her the right to select her husband for that purpose would constitute a very inequitable limitation upon her right of ownership, compelling her to resort to strangers for advice and assistance, and would perhaps seriously mar the harmony of the marriage relation. In Tresch v. Wirtz,[4] the vice-chancellor said: "A man's creditors cannot compel him to work for them. A debtor is not the slave of his creditors. The marital relation does not disqualify a husband from becoming the agent of his wife. All the property of a married woman is now her separate estate; she holds it as a *feme sole*, and has a right to embark it in business. She may lawfully engage in any kind of trade or barter. If she engages in business, and actually furnishes the capital, so that the business is in fact and truth hers, she has a right to ask the

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[1] Monteith v. Bax, 4 Neb. 166; Primrose v. Browning, 59 Ga. 70. See § 254.

[2] Voorhees v. Bonesteel, 16 Wall. 16; Aldridge v. Muirhead, 101 U. S. 399, per Chief-Justice Waite; Tresch v. Wirtz, 34 N. J. Eq. 129; Hyde v. Frey, 28 Fed. Rep. 819; Second Nat Bk. v. Merrill, 81 Wis. 151, 50 N. W. Rep. 505; Garner v. Second Nat. Bk., 151 U. S. 420, 14 S. C. Rep. 390; Third Nat. Bk. v. Guenther, 123 N. Y. 568, 25 N. E. Rep. 986; Ladd v. Newell, 34 Minn. 107, 24 N. W. Rep. 366; Osborne v. Wilkes, 108 N. C. 672, 13 S. E. Rep. 285; Kirkley v. Lacey, 7 Houst. (Del.) 213, 30 Atl. Rep. 994.

[3] Hyde v. Frey 28 Fed. Rep. 823; Woodworth v. Sweet, 51 N. Y. 11; Garner v. Second Nat. Bk., 151 U. S. 420, 14 S. C. Rep. 390.

[4] 34 N. J. Eq. 129; Abbey v. Deyo, 44 N. Y. 347. Compare § 26.

aid of her husband, and he may give her his labor and skill without rendering her property liable to seizure for his debts."[1] In Merchant v. Bunnell,[2] Davies, Ch. J., said: "This court has frequently held that there is nothing in the marriage relation which forbids the wife to employ her husband as her agent in the management of her estate and property, and that such employment does not subject her property or the profits arising from such business, to the claims of the creditors of her husband."[3] But a husband cannot use his wife's name as a mere device to cover up and keep from his creditors the assets and profits of a business which is in fact his own. It must clearly appear that his wife is the *bona fide* owner of the capital invested, and that the accumulations which result from the conduct of the business are the legitimate outcome of the investment of her property.[4] In Boggess v. Richards Adm.,[5] it was held that in equity the wife's separate estate is chargeable with the debts of her husband when it is acquired by his skill and experience, even if the capital is furnished by her. We fail to perceive how this rule can be supported, for a debtor may give away his services if he desires.[6]

§ 304. **Wife's separate property.** — It follows from the cases cited that a creditor cannot subject to the payment of his claim lands belonging to the debtor's wife, the purchase-money of which constituted a part of her separate estate;[7] and where the wife was the owner of a farm

[1] Citing Voorhees v. Bonesteel, 16 Wall. 31. See § 218.

[2] 3 Keyes (N. Y.) 539, 541.

[3] Citing Sherman v. Elder, 24 N. Y. 381; Knapp v. Smith, 27 N. Y. 277; Buckley v. Wells, 33 N. Y. 518; Gage v. Dauchy, 34 N. Y. 293. See Milwaukee Harvester Co. v. Culver, 89 Hun (N. Y.) 601, 35 N. Y. Supp. 289; Abbey v. Deyo, 14 N. Y. 345.

[4] Lachman v. Martin, 139 Ill. 459, 28 N. E. Rep. 795.

[5] 39 W. Va. 567, 20 S. E. Rep. 599.

[6] Abbey v. Deyo, 44 N. Y. 347; Mayers v. Kaiser, 85 Wis. 382, 55 N. W. Rep. 688. See § 50*a*; Osborne v. Wilkes, 108 N. C. 654, 13 S. E. Rep. 285.

[7] Davis v. Fredericks, 104 U. S. 618. Compare Rutherford v. Chapman, 59 Ga. 177.

upon which she resided, and which the husband carried on in her name, without any agreement as to compensation, it was held that neither the products of the farm, nor property taken in exchange therefor, could be attached by creditors of the husband.[1] A husband must account to his wife for her moneys received by him.[2] And where a debtor conveyed to his father-in-law, in consideration of a debt due the latter, and the father-in-law conveyed by way of gift to the debtor's wife, the conveyance was upheld as against creditors of the debtor.[3]

§ 305. **Mingling property of husband and wife.**—If a wife permits her husband to take title to her lands, and to hold himself out to the world as the owner of them, and to contract debts upon the credit of such ownership, she cannot afterward, by taking title to herself, withdraw them from the reach of his creditors, and thus defeat their claims.[4] At least the courts of New Jersey so hold. And where a husband and wife acquire property by their joint industry and management, the title being taken and held in the husband's name, a conveyance of the property to the wife, without consideration, to the prejudice of existing creditors of the husband, will not, it seems, be supported.[5]

[1] Gage v. Dauchy, 34 N. Y. 293. See Buckley v. Wells, 33 N. Y. 518; Garrity v. Haynes, 53 Barb. (N. Y.) 599; Bancroft v. Curtis, 108 Mass. 47.

[2] Pitkin v. Mott, 56 Mo. App. 401.

[3] Smith v. Riggs, 56 Iowa 488, 8 N. W. Rep. 479, 9 Id. 385.

[4] City Nat. Bank v. Hamilton, 34 N. J. Eq. 162. "Having constantly consented he should hold himself out to the world as the owner of this property, and contract debts on the credit of it, up to the very hour of his disaster, it would be against the plainest principles of justice, and utterly subversive of everything like fair dealing, to permit her to step in now and withdraw from the process of the law, put in motion by his creditors, the very property she had permitted him, year after year, to represent to be his and the apparent ownership of which had given him his business credit and standing." Besson v. Eveland, 26 N. J. Eq. 471. See Sexton v. Wheaton, 8 Wheat. 229; Riley v. Vaughan, 116 Mo. 169, 22 S. W. Rep. 707; Frederick v. Shorey, 4 Wash. 75, 29 Pac. Rep. 766; Stuart v. McClelland, 31 Neb. 646.

[5] Langford v. Thurlby, 60 Iowa 107, 14 N. W. Rep. 135; Riley v. Vaughan, 116 Mo. 169, 22 S. W. Rep. 707; Frederick v. Shorey, 4 Wash. 75, 29 Pac. Rep. 766.

It is said by the Supreme Court of the United States: "If the money which a married woman might have had secured to her own use is allowed to go into the business of her husband, and be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is thus used for a series of years, there being no specific agreement when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. He cannot retain it until bankruptcy occurs and then convey it to his wife. Such conveyance is in fraud of the just claims of the creditors of the husband."[1] But the fact that the title was so placed in the husband for the purpose and the intent on the part of the wife that he should thereby acquire a fictitious credit, and that such credit was extended, must be specially alleged and proved.[2] If the creditor, when he extended the credit, had knowledge or notice sufficient to put a prudent man upon inquiry as to the real state of the title, the wife is not estopped to claim the property as her own.[3] Humes v. Scruggs is discussed and analyzed by Choate, J., in Van Kleeck v.

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[1] Humes v. Scruggs, 94 U. S. 27. Citing Fox v. Moyer, 54 N. Y. 125, 131; Savage v. Murphy, 34 N. Y. 508; Babcock v. Eckler, 24 N. Y. 623; Robinson v. Stewart, 10 N. Y. 190; Carpenter v. Roe, 10 N. Y. 227; Hinde's Lessee v. Longworth, 11 Wheat. 199; City Nat. Bk. v. Hamilton, 34 N. J. Eq. 158; Kennedy v. Lee, 72 Ga. 40; Riley v. Vaughan, 116 Mo. 178, 22 S. W. Rep. 707; Flynn v. Jackson, 93 Va. 341, 25 S. E. Rep 1, which cases do not all seem to be entirely in point for so broad a proposition. See Wake v. Griffin, 9 Neb. 47, 2 N. W. Rep. 461; Odell v. Flood, 8 Ben. 543; Besson v. Eveland, 26 N. J. Eq. 468; Moore v. Page, 111 U. S. 119, 4 S. C. Rep. 388; Beecher v. Wilson, 84 Va. 813, 6 S. E. Rep. 209; Diggs v. McCullough, 69 Md. 592; Porter v. Goble, 88 Iowa 565, 55 N. W. Rep. 530; Hopkins v. Joyce, 78 Wis. 443, 47 N. W. Rep. 722.

[2] Brisco v. Harris, 112 N. C. 671, 16 S. E. Rep. 850; De Votie v. McGerr, 15 Col. 467, 24 Pac. Rep. 923; Hews v. Kenney, 43 Neb. 815, 62 N. W. Rep. 204; Marston v. Dresen, 85 Wis. 530, 55 N. W. Rep. 896; Girault v. A. P. Hotaling Co., 7 Wash. 90, 34 Pac. Rep. 471.

[3] Chadbourn v. Williams, 45 Minn. 294, 47 N. W. Rep. 812.

Miller,[1] and it was very properly considered that the language was not to be deemed as asserting the doctrine that the wife, whose moneys were so received by the husband, ceased to be his creditor for the money so retained, or forfeited by the use which she had allowed the husband to make of the money any of her rights as creditor in case of bankruptcy.[2] If the money is received by the husband as his wife's, and to be accounted for or secured by him to her, he waiving his marital rights thereto, she has an equitable right to the fund sufficient to sustain a mortgage subsequently given to secure it, and the mere

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[1] 19 N. B. R. 496; Garner v. Second Nat. Bk. 151 U. S. 420, 14 S. C. Rep. 390. This language is employed by Hopkins, J., *In re* Jones, 6 Biss. 68, 73, in deciding a motion to expunge a proof of debt in bankruptcy filed by a wife against a husband: "She allowed him [the husband] to collect, deposit and use the money when collected as his own, and to enjoy the credit and reputation that the reception and use of the money necessarily gave him; and after parties have dealt with him, supposing and believing he was the owner of such money, she cannot be heard to assert her right to it, and thus defraud honest creditors who have trusted him, relying upon the truth of appearances of ownership which she permitted him to present." See Briggs v. Mitchell, 60 Barb. (N. Y.) 317, where Potter, P. J., said: "A quiet acquiescence that her husband should use her estate as his own, mingling it indiscriminately with his own, in business, for a period of from twelve to nineteen years, without the recognition of its separate existence by even a written receipt, memorandum, or separate investment, and without ever having during that period accounted for interest or principal or even having talked about it until the *bona fide* creditors were about to call for it, is a kind of trust or settlement that cannot be recognized by any rule of law or equity to stand against the rights of antecedent creditors." The arguments advanced in the cases last quoted tend strongly toward the repression of fraudulent transfers of assets by husband to wife. Since the emancipation of married women from the bondage of the common law as regards their right to hold property, they have become the convenient alienees of dishonest husbands who are seeking to elude the just claims of creditors. Nothing is more natural than that courts should rigidly examine, and, in proper cases, overturn transfers of this character. The chief ground usually assigned, that the husband gains a false credit by the apparent ownership and use of the wife's money and property, might, it seems to us, be urged against any creditor who sold personal property to the debtor upon credit, reserving title, or any bailor who had entrusted the debtor with the temporary custody of chattels.

[2] See Grabill v. Moyer, 45 Pa. St. 530.

lapse of time would not invalidate the security.[1] "Whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him."[2] Some of the cases, however, distinguish between principal and income, and incline to regard the use of the latter by the husband as implying a gift of it from her.[3] Where husband and wife both own a lot which they convey away for another which is conveyed directly to the wife, the creditors of the husband can sell the land to satisfy their claims, but the wife is entitled to the return of the amount which she contributed toward the purchase.[4]

§ 305a. **Book entries of transactions.** — Where a husband acts as the wife's agent his entries in his books of account may be given in evidence against her.[5]

§ 306. **Marriage settlements — Amount of settlement.** — Marriage settlements are always watched with considerable jealousy owing to the relations of the parties and the chances of fraud on creditors.[6] If the amount of property settled is extravagant, or grossly out of proportion to the station and circumstances of the husband, this has been regarded as of itself sufficient notice of fraud.[7] In an able opinion, in the case of Davison v. Graves,[8] Justice Nott says: "There is no case that I have seen where

[1] Syracuse Chilled Plow Co. v. Wing, 85 N. Y. 426; Woodworth v. Sweet, 51 N. Y. 9. See Reel v. Livingston, 34 Fla. 377, 16 So. Rep. 284.

[2] Garner v. Second Nat. Bk., 151 U. S. 433, 14 S. C. Rep. 390; Stickney v. Stickney, 131 U. S. 227, 9 S. C. Rep. 677.

[3] Hauer's Estate, 140 Pa. St. 420, 21 Atl. Rep. 445; McGlinsey's App., 14 S. &. R. (Pa.) 64; *In re* Flamank L. R., 40 Ch. Div. 461.

[4] Burton v. Gibson, 32 W. Va. 406, 9 S. E. Rep. 255.

[5] White v. Benjamin, 150 N. Y. 264, 44 N. E. Rep. 956.

[6] Benne v. Schnecko, 100 Mo. 250, 13 S. W. Rep. 82.

[7] *Ex parte* McBurnie, 1 De G., M. & G. 441; Croft v. Arthur, 3 Dessaus. (S. C.) 223.

[8] Riley's Eq. (S. C.) 236; Colombine v. Penhall, 1 Sm. & G. 228; Bulmer v. Hunter, L. R. 8 Eq. Cas. 46.

a man has been permitted to make an intended wife a mere stock to graft his property upon, in order to place it above the reach of his creditors. A marriage settlement must be construed like every other instrument. The question may always be raised, whether it was made with good faith, or intended as an instrument of fraud." [1] The usual test is that the settlement must be reasonable considering the grantor's circumstances.[2] If it complies with this requirement it will be upheld. When a person possesses a large estate, and, owing debts inconsiderable in amount, makes a voluntary settlement of a part of his property upon a wife and child, retaining enough of his property himself to pay his existing debts many times over, it would not be a fair or reasonable inference that such a transaction was intended to hinder or defraud persons to whom he happened to owe trifling debts.[3] A settlement upon a wife of all a man's property exempt from execution, cannot, of course, be upheld, unless the marriage was not only the sole consideration for it, but the agreement was entered into by the wife in ignorance of her husband's indebtedness, and without knowledge of circumstances sufficient to put her upon inquiry.[4] In Colombine v. Penhall,[5] a celebrated English case, the court said: "Where there is evidence of an intent to defeat and delay creditors, and to make the celebration of a marriage a part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement." [6]

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[1] See Phipps v. Sedgwick, 95 U. S. 3; Sommermeyer v. Schwartz, 89 Wis. 71, 61 N. W. Rep. 311; Bohn v. Weeks, 50 Ill. App. 236.

[2] Crawford v. Logan, 97 Ill. 399; De Farges v Ryland, 87 Va. 405, 12 S. E. Rep. 805; Nichols v. Wallace, 41 Ill. App. 627.

[3] Dygert v. Remerschnider, 32 N. Y. 637.

[4] Gordon v. Worthley, 48 Iowa 431.

[5] 1 Sm. & G. 256.

[6] See Bulmer v. Hunter, L. R. 8 Eq. Cas. 46.

§ 307. **Post-nuptial settlements.** — The court decided, in French v. Holmes,[1] that a voluntary gift by a husband to his wife, if he was indebted at the time, was *prima facie* fraudulent as to creditors.[2] Davis, J., states the rule to be that a voluntary post-nuptial settlement will be upheld "if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors."[3] Mr. Justice Field observes: "A husband may settle a portion of his property upon his wife, if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes for fraud."[4] Post-nuptial settlements are presumed to be voluntary.[5] A settlement consummated after marriage, in pursuance of an agreement entered into before marriage, will be upheld against creditors,[6] and a voluntary conveyance for the benefit of a wife and children will not be overturned at the suit of a mortgage creditor who, by reason of his own laches, has lost ample security.[7] An agreement by a wife to remove to and reside in a particular county does not as against creditors constitute a valuable consideration for a transfer to her, by the husband.[8]

§ 308. **Purchase after marriage.** – Purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with sus-

[1] 67 Me. 189. See De Farges v. Ryland, 87 Va. 404, 12 S. E. Rep. 805.

[2] Otis v. Spencer, 102 Ill. 622; Manning v. Riley, 52 N. J. Eq. 39, 27 Atl. Rep. 810; Massey v. Yancey, 90 Va. 626, 19 S. E. Rep. 184; Adams v. Edgerton, 48 Ark. 419, 3 S. W. Rep. 628.

[3] Kehr v. Smith, 20 Wall. 35; Cook v. Holbrook, 146 Mass. 66, 14 N. E. Rep. 943. See Wiswell v. Jarvis, 9 Fed. Rep. 87; Bohn v. Weeks, 50 Ill. App. 236.

[4] Moore v. Page, 111 U. S. 118, 4 S. C. Rep. 388. See Jones v. Clifton, 101 U. S. 225.

[5] Robbins v. Armstrong, 84 Va. 810, 6 S. E. Rep. 130.

[6] Kinnard v. Daniel, 13 B. Mon. (Ky.) 499.

[7] Stephenson v. Donahue, 40 Ohio St. 184.

[8] Radley v. Riker, 80 Hun (N. Y.) 354, 30 N. Y. Supp. 130.

picion, unless it clearly appears that the consideration was paid out of her separate estate.[1] The community of interest between husband and wife requires that purchases of this character which are so often made a cover for a debtor's assets, and so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, should be closely scrutinized, and in a contest between the creditors of the husband and those of the wife, there is, and should be, a presumption against her which she must overcome by affirmative proof. This was the rule of the common law, and it continues, though statutes have modified the doctrine which gave the husband title to the wife's personalty.[2]

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[1] Seitz v. Mitchell, 94 U. S. 582; Hinkle v. Wilson, 53 Md. 287; Simms v. Morse, 4 Hughes 579; Knowlton v. Mish, 8 Sawyer 627; Garrett v. Wagner, 125 Mo. 461, 28 S. W. Rep. 762. In Hoey v. Pierron, 67 Wis. 262, 269, 30 N. W. Rep. 692, the court said: "As to whether the debtor made and executed that mortgage to his wife with the intent to hinder, delay, or defraud his creditors, the court charged the jury that the burden of proof was upon the defendant to show by clear and satisfactory evidence that it was made by him with such intent. This is assigned as error. Undoubtedly the burden of proving that the mortgage to the wife was given to secure an actual indebtedness to her from her husband for moneys or property advanced by her from her separate estate, or by some other person for her use, was upon the wife; but when that was proved and, in effect, admitted, it shifted such burden to the defendant. Semmens v. Walters, 55 Wis. 683, 684, 13 N. W. Rep. 889; Evans v. Rugee, 57 Wis. 624, 16 N. W. Rep. 49. Assuming that the defendant made a case within the provisions of § 2319, R S., which, in such case, declares that 'the burden shall be upon the plaintiff to show that such mortgage was given in good faith, and to secure an actual indebtedness and the amount thereof,' yet it has often been held, in effect, by this court that the establishment of such 'actual indebtedness and the amount thereof,' satisfies the requirements of the section and shifts the burden of proof to such defendant." See § 300.

[2] Seitz v. Mitchell, 94 U. S. 582, 583; Gamber v. Gamber 18 Pa. St. 366; Keeney v. Good, 21 Pa. St. 349; Walker v. Reamy, 36 Pa. St. 410; Parvin v. Capewell, 45 Pa. St. 89; Robinson v. Wallace, 39 Pa. St. 129; Aurand v. Schaffer, 43 Pa. St. 363; Bradford's Appeal, 29 Pa. St. 513; Glann v. Younglove, 27 Barb. (N. Y.) 480; Edwards v. Entwisle, 2 Mackey (D. C.) 43; Ryder v. Hulse, 24 N. Y. 372; Duncan v. Roselle, 15 Iowa 501; Cramer v. Reford, 17 N. J. Eq. 367; Elliott v. Bently, 17 Wis. 591. See Edson v. Hayden, 20 Wis. 682.

§ 309. **Valid gifts. — Subsequent insolvency.** — It is said in a recent case in Texas, that a gift from the husband to the wife is not necessarily fraudulent and void as to existing creditors. It might be a badge of fraud, a circumstance to be considered in determining whether the intent was fraudulent, if it were shown that he was then heavily in debt. But it does not follow that, because a man may be indebted to an inconsiderable or even a considerable amount at the time, he cannot settle a part of his property upon his wife or children, provided, as we have seen, he retains an ample amount of property to liquidate his just debts.[1] Nor will the settlement be affected because it may turn out afterward, from accident or ill-fortune, that his property has perished or been swept away.[2] The general rule then is that a conveyance by a husband, solvent at the time, to his wife and children will be supported,[3] if he retains ample means to pay his debts,[4] and the gift or conveyance is a reasonable one.[5] If, on the other hand, the conveyance is made with the actual intent of defrauding persons who may subsequently become creditors, it is void as to them.[6]

§ 310. **Articles of separation.** — Where a husband and wife executed articles of separation by which the husband bound himself to pay, in trust for his wife, a certain amount of capital, and interest on it till paid, it becomes a voluntary settlement if the parties become reconciled

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[1] Van Bibber v. Mathis, 52 Tex. 407; Morrison v. Clark, 55 Tex. 444. See Emerson v. Bemis, 69 Ill. 537; Hindee's Lessee v. Longworth, 11 Wheat. 199.

[2] Ibid.; Cooper, Chancellor, in Perkins v. Perkins, 1 Tenn. Ch. 543.

[3] Brown v. Spivey, 53 Ga. 155.

[4] Chambers v. Sallie, 29 Ark. 407; Kent v. Riley, L. R. 14 Eq. Cas. 190.

[5] When a partner uses firm funds to purchase property to settle upon his wife, creditors of the copartnership may pursue the property in equity. Edwards v. Entwisle, 2 Mackey (D. C.) 43; Emerson v. Bemis, 69 Ill. 537; Mattingly v. Nye, 8 Wall. 370; Kesner v. Trigg, 98 U. S. 54.

[6] Wynne v. Mason, 72 Miss. 424, 18 So. Rep. 422. See §§ 93, 242.

and again cohabit, even though there be an agreement that the settlement shall stand.[1] A settlement has been avoided upon this theory, where it appeared that the amount of the husband's estate was $16,132, while the settlement was $7,000, leaving $9,132 to meet the debts confessedly due, amounting to $9,306.

§ 311. **Statute of frauds.**— In New York every agreement or undertaking made upon consideration of marriage, unless reduced to writing, and subscribed by the parties, is void,[2] and a settlement made subsequently, in pursuance of such void agreement, is to be considered as voluntary as against creditors.[3]

§ 312. **Insurance policies.**—As we have shown in New York, policies of life insurance may be placed upon a husband's life for the benefit of his wife, free from the claims of creditors,[4] the annual premiums being limited. But where assignments of policies, taken out by a debtor who was insolvent, are made in trust for the benefit of his wife, such transfers may be annulled in favor of creditors.[5] The court, however, says in the case last cited that they "do not mean to extend it to policies effected without fraud directly and on their face for the benefit of the wife, and payable to her; such policies are not fraudulent as to creditors."[6] In cases where a debtor at his own

[1] Kehr v. Smith, 20 Wall. 31.

[2] Dygert v. Remerschnider, 32 N. Y. 629.

[3] Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481; Borst v. Corey, 16 Barb. (N. Y.) 136, and cases cited. The same rule exists in Massachusetts. Deshon v. Wood, 148 Mass. 132, 19 N. E. Rep. 1.

[4] See § 23. Stokes v. Amerman, 121 N. Y. 337, 24 N. E. Rep. 819; Central Bank of Washington v. Hume, 128 U. S. 195, 9 S. C. Rep. 41; Ætna Nat. Bank v. United States Life Ins. Co., 24 Fed. Rep. 770; Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419. In Michigan it was held that a policy originally taken out to the insured's executors or administrators, and subsequently assigned to the wife, was not protected by the statute. Ionia County Sav. Bank v. McLean, 84 Mich. 635, 48 N. W. Rep. 159.

[5] Appeal of Elliott's Exrs., 50 Pa. St. 75.

[6] See Thompson v. Cundiff, 11 Bush (Ky.) 567. Compare Nippes' Appeal, 75 Pa. St. 478; Gould v. Emerson, 99

expense effects insurance on his life as security to a creditor, the representative of the debtor gets title to the surplus after the debt is paid. And if the debtor in his lifetime pays the debt, he is entitled to have the policy delivered up to him.[1] As already shown, a man may devote a portion of his earnings to insurance for the benefit of his family.[2]

§ 313. **Competency of wife as witness.** — On a creditor's bill to set aside a conveyance of land by a husband to his wife, she is regarded in Illinois as a competent witness to prove the consideration of the conveyance and its good faith.[3] It seems, however, to be doubted whether a wife can be compelled to testify against her husband when he is a co-defendant with her, if the husband objects to her examination.[4] While the act of Congress[5] cut up by the roots all objections in Federal courts to the competency of a witness on account of interest, it is considered that the statute has no application to a wife, as her testimony is excluded solely upon considerations of public policy and not of interest.[6]

§ 314. **Fraudulent conveyances in contemplation of marriage.**—Alienations of real property by a man about to be married, made without the knowledge of his intended

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Mass. 154; Durian v. Central Verein, 7 Daly (N. Y.) 171; Leonard v. Clinton, 26 Hun (N. Y.) 290; Estate of Henry Trough, 8 Phila. (Pa.) 214.

[1] *Re* Newland, 7 N. B. R. 477. See Lea v. Hinton, 5 De G., M. & G. 823; Drysdale v. Piggott, 22 Beav. 238; Courtenay v. Wright, 2 Giff. 337; Morland v. Isaac, 20 Beav. 389. As to who should sue to reach the proceeds of a policy where the debtor has made a general assignment, see Lowery v. Clinton, 32 Hun (N. Y.) 267.

[2] Central Bank of Washington v. Hume, 123 U. S. 195, 9 S. C. Rep. 41.

[3] Payne v. Miller, 103 Ill. 443. The testimony of a husband in favor of his wife, on a bill to subject land in her name to the payment of his debts, when not impeached, must be regarded the same as that of any other witness having a personal interest or feeling as to the matters about which he testifies. Eads v. Thompson, 109 Ill. 87

[4] Clark v. Krause, 2 Mackey (D. C.) 572.

[5] U. S. Rev. St. § 858.

[6] See Lucas v. Brooks, 18 Wall. 453.

bride, and with the intent and object of depriving her of the rights which she would otherwise acquire in his property by the marriage, may, as we have already seen,[1] be avoided by the wife as fraudulent.[2] In Smith v. Smith,[3] the chancellor said: "I am of opinion that a voluntary conveyance by a man, on the eve of marriage, unknown to the intended wife, and made for the purpose of defeating the interest which she would acquire in his estate by the marriage, is fraudulent as against her." The doctrine is not limited to covinous conveyances of realty, but where personal property is disposed of by a colorable transfer, the husband retaining a secret interest, and the ultimate object being to deprive the wife of her share of it, the conveyance may be avoided.[4] The rule is also applied and enforced where the conveyance is made by the husband during coverture with a like intent and purpose.[5] Thus in Gilson v. Hutchinson[6] it appeared that a mortgagor procured a sale of the mortgaged estate under a power contained in the mortgage, with a view to evade liabilities to his wife, from whom he had been separated, and to deprive her of her right of dower. The court held that she could maintain a bill in equity for the

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[1] See § 70.

[2] DeArmond v. DeArmond, 10 Ind. 191; Pomeroy v. Pomeroy, 54 How. Pr. (N. Y.) 228; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482; Youngs v. Carter, 1 Abb. N. C. (N. Y.) 136, n., affi'd 10 Hun (N. Y.) 194; Smith v. Smith 6 N. J. Eq. 515; Simar v. Canaday, 53 N. Y. 298; Petty v. Petty, 4 B. Mon. (Ky.) 215; Thayer v. Thayer, 14 Vt. 107; Brown v. Bronson, 35 Mich. 415; Smith v. Smith, 12 Cal. 217; Kelly v. McGrath, 70 Ala. 75; Manikee v. Beard, 85 Ky. 20, 2 S. W. Rep. 545; Smith v. Smith, 22 Col. 480, 46 Pac. Rep. 128. See § 70.

[3] 6 N. J. Eq. 522.

[4] See Littleton v. Littleton, 1 Dev. & B. (N. C.) Law 327; Davis v. Davis, 5 Mo. 183: Stone v. Stone, 18 Mo. 389; Tucker v. Tucker, 29 Mo. 359; McGee v. McGee, Ired. Law (N. C.) 105; Smith v. Smith, 22 Col. 480, 46 Pac. Rep. 128; Stewart v. Stewart, 5 Conn. 316.

[5] See Walker v. Walker, 66 N. H. 390, 31 Atl. Rep. 14.

[6] 120 Mass. 27. See Killinger v. Reidenhauer, 6 S. & R. (Pa.) 531; Brewer v. Connell, 11 Humph. (Tenn.) 500; Jenny v. Jenny, 24 Vt. 324; Jiggitts v. Jiggitts, 40 Miss. 718.

recovery of the property, both as administratrix and in her own right.[1] The rule has been said to embrace conveyances made by the intended wife as well as by the husband.[2] Brickell, C. J., said: "We confess an inability to distinguish the ante-nuptial frauds of the husband from the ante-nuptial frauds of the wife, or to perceive any sound reason for repudiating and avoiding the one, while permitting the other to work out its injustice and injury."[3] But making a settlement of a moderate amount on children of a former marriage does not constitute fraud as to the wife.[4] Whether a conveyance constitutes a fraud on the wife must depend on all the circumstances of the case[5] The weight of opinion is that mere non-communication to the wife is not in itself conclusive evidence of fraud.[6] In any case such conveyance can only be set aside by her to the extent of her dower right.[7]

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[1] In Littleton v. Littleton, 1 Dev. & B. Law (N. C.) 331 Chief-Justice Ruffin observed: "But *bona fide* conveyances, that is to say, such as are not intended to defeat the wife, do not seem to be more than within the words of the act. Such are sales, to make which an unfettered power is allowed the husband. Such, too, appear to be *bona fide* gifts, whereby the husband actually and openly divests himself of the property and enjoyment in his lifetime, in favor of children or others, thereby making, according to his circumstances and the situation of his family, a just and reasonable present provision for persons having meritorious claims on him, and with that view, and not with the view to defeat nor for the sake of diminishing the wife's dower." Compare McIntosh v. Ladd, 1 Humph. (Tenn.) 459; Miller v. Wilson, 15 Ohio 108; Stewart v. Stewart, 5 Conn. 317; Kelly v. McGrath, 70 Ala. 75.

[2] Kelly v. McGrath, 70 Ala. 75.

[3] See Butler v. Butler, 21 Kans. 522; Spencer v. Spencer, 3 Jones' Eq. (N. C.) 404; Terry v. Hopkins, 1 Hill's Ch. (S. C.) 1; Williams v. Carle, 10 N. J. Eq. 543; Freeman v. Hartman, 45 Ill. 57; Belt v. Ferguson, 3 Grant (Pa.) 289; Duncan's Appeal, 43 Pa. St. 67; Fletcher v. Ashley, 6 Gratt. (Va.) 332.

[4] Alkire v. Alkire, 134 Ind. 350, 32 N. E. Rep. 571; Murray v. Murray, 90 Ky. 1, 13 S. W. Rep. 244.

[5] St. George v. Wake, 1 Mylne & K. 610; Strathmore v. Bowes, 2 Cox 28.

[6] England v. Downs, 2 Beav. 522; Chandler v. Hollingsworth, 3 Del. Ch. 99.

[7] Dudley v. Dudley, 76 Wis. 567, 45 N. W. Rep. 602; Chandler v. Hollingsworth, 3 Del. Ch. 99.

§ 315. Fraudulent transfers as affecting dower.— It seems to be quite clearly established [1] that where a deed made by a husband and wife is set aside as a fraud upon creditors, the judgment will not operate to bar the wife's right of dower. The creditors cannot claim *under* the conveyance and *against* it, or ask to have it annulled as to creditors and held valid as against the wife.[2] The theory of the law is that the wife cannot release her dower in her husband's real estate, except by joining with him in a conveyance;[3] a release to a stranger to the title is ineffectual,[4] and as the husband's deed is declared void at the creditor's instigation, the wife's release falls with it.[5]

Dower is not barred by an assignment under the Bankrupt Act.[6]

§ 315a. Judgment against wife.—It has appeared [7] that, in the Federal courts, a personal money judgment cannot be had against a wife though she be a fraudulent alienee.[8]

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[1] See "Effect of Fraudulent Conveyances upon the Right of Dower." 5 Cent. L. J. 459, and cases cited.

[2] Robinson v. Bates, 3 Metc. (Mass.) 40; Summers v. Babb, 13 Ill. 483; Dugan v. Massey, 6 Bush (Ky.) 81; Cox v. Wilder, 2 Dillon 47; Woodworth v. Paige, 5 Ohio St. 70; Richardson v. Wyman, 62 Me. 280; Hutchinson v. Boltz, 35 W. Va. 754, 14 S. E. Rep. 267; Morton v. Noble, 4 Chic. L. N. 157; Maloney v. Horan, 12 Abb. Pr. (N. Y.) N. S. 289, 49 N. Y. 111; Lowry v. Smith, 9 Hun (N. Y.) 515; Follansbee v. Follansbee, 1 D. C. App. 326; Miller v. Miller, 140 Ind. 174, 39 N. E. Rep. 547.

[3] Tompkins v. Fonda, 4 Paige (N. Y.) 448: Merchants' Bank v. Thomson, 55 N. Y. 12.

[4] Harriman v. Gray, 49 Me. 537.

[5] Munger v. Perkins, 62 Wis. 499, 22 N. W. Rep. 511; Bohannon v. Combs, 97 Mo. 446, 11 S. W. Rep. 232; Horton v. Kelly, 40 Minn. 193, 41 N. W. Rep. 1031; Hinchliffe v. Shea, 103 N. Y. 155, 8 N. E. Rep, 477; Wilkinson v. Paddock, 57 Hun, 191, 11 N. Y. Supp. 442; aff'd 125 N. Y. 748; 27 N. E. Rep. 407. As to the question whether the wife has a right of dower in land paid for by her husband but taken in the name of a third party, if such land is subjected to the claims of creditors the authorities differ. See § 82.

[6] Porter v. Lazear, 109 U. S. 84, 3 S. C. Rep. 58.

[7] § 180.

[8] Phipps v. Sedgwick, 95 U. S. 9; Trust Co. v. Sedgwick 97 U. S. 304; Clark v. Beecher, 154 U. S. 632, 14 S. C. Rep. 1184.

CHAPTER XXI.

FRAUDULENT GENERAL ASSIGNMENTS.

§ 316. Voluntary assignments.
316*a*. Property transferred by assignment.
316*b*. Assent of assignee.
316*c*. Creditor's proceedings.
317. Word "void" construed.
318. Delay and hindrance.
319. Intent affecting assignments.
319*a*. Rights and duties of assignee.
319*b*. Partnership assignments.
320. Fraud must relate to instrument itself.
321. Good faith.
322. Void on its face.
322*a*. Power to reform.
322*b*. Purchaser under void assignment.
323. Constructive frauds defined by Story.
324. Assignments contravening statutes.
325. Transfers to prevent sacrifice of property.
326. Reservations — Exempt property.
327. Reserving surplus.
328. Releases exacted in assignments.
329. Preferring claims in which assignor is partner — Rights of survivor.
330. Authorizing trustee to continue business.
331. Illustrations and authorities.
§§ 332, 333. Delay — Sales upon credit.
333*a*. Exceptional rule.
334. Exempting assignee from liability.
335. Providing for counsel fees.
336. Authority to compromise.
337. Fraud of assignee.
338. Ignorance or incompetency of assignee as badge of fraud.
339. Transfers inuring as assignments.
339*a*. White v. Cotzhausen and conflicting cases.
340. Assets exceeding liabilities.
341. Assignments to prevent preference.
341*a*. Excessive preferences.
341*b*. Preferences of laborers.
341*c*. Notice to preferred creditors.
341*d*. Bill of particulars.
342. Threatening to make assignment.
342*a*. Antecedent agreement.
343. Construction of assignments.
344. Explaining obnoxious provisions.
345. Assignments held void.
345*a*. Insufficient grounds of attack.
345*b*. Defeated creditor entitled to dividend.
346. Foreign assignments.
346*a*. Assignments by corporations.
346*b*. Contingent creditors.

§ 316. **Voluntary assignments.** — To discuss the general phases of the law regulating voluntary assignments made by debtors for the benefit of creditors would require a

volume,[1] and is foreign to our purposes. Certain elementary features and principles easily traced through the multitude of cases illustrating this branch of our subject, will be considered. When, as is frequently the case, these assignments are mere contrivances, called into being to hinder, delay or defraud creditors, and from their surroundings, or upon their face, contravene the provisions of the statute 13 Eliz. c. 5, creditors or their representatives may attack and annul them. The principles of law regulating this branch of the subject are legitimately within the line of our discussion, and will, upon close investigation, be found to constitute a prolific source of legal controversy. It seems remarkable that the instrument under which an insolvent surrenders up his depleted estate to his creditors should be itself so frequently tainted with the poison of fraud. Historically it may be stated

[1] See Burrill on Assignments, 6th ed. Baker, Voorhis & Co., New York. See, especially, Chapter XXV of that work. See Bishop on Insolvent Debtors, 3d ed. Baker, Voorhis & Co., 1895. See §§ 114, 115 of the present treatise for the rules as to complainants. Also, Spelman v. Freedman, 130 N. Y. 427, 29 N. E. Rep. 765; Reynolds v. Ellis, 103 N. Y. 115, 123, 8 N. E. Rep. 392; Harvey v. McDonnell, 113 N. Y. 526, 531, 21 N. E. Rep. 695; Matter of Cornell, 110 N. Y. 360, 18 N. E. Rep. 142. As to election to accept benefits which will estop creditors from attacking an assignment, see Wilson Bros. W. & T. Co. v. Daggett, 9 Civ. Pro. (N. Y.) 408, and cases cited by McAdam, C. J.; Ryhiner v. Ruegger, 19 Ill. App. 162; Groves v. Rice, 148 N. Y. 233, 42 N. E. Rep. 664; Mills v. Parkhurst, 126 N. Y. 89, 26 N. E. Rep. 1041; Terry v. Munger, 121 N. Y. 161, 24 N. E. Rep. 272; Conrow v. Little, 115 N. Y. 387, 22 N. E. Rep. 346; Cavanagh v. Morrow, 67 How. Pr. (N. Y.) 241; Levy v. James, 49 Hun (N. Y.) 161, 1 N. Y. Supp. 604. Compare Roberge v. Winne, 144 N. Y. 709, 39 N. E. Rep. 631; Thompson v. Fry, 51 Hun (N. Y.) 296, 4 N. Y. Supp. 166. In Wright v. Zeigler, 70 Ga. 512, the court said: "So a creditor cannot be permitted both to assail and claim under an assignment; one or the other of these alternatives he must take. His election should be made before he commences proceedings, and he should not be permitted to await the result of his suit in order to make his election. This would be unfair to others claiming under the assignment." Compare Haydock v. Coope, 53 N. Y. 68. A creditor may be estopped from impeaching an assignment by accepting benefits under it. Groves v. Rice, 148 N. Y. 233, 42 N. E. Rep. 664; Mills v. Parkhurst, 126 N. Y. 89, 26 N. E. Rep. 1041.

that an assignment for the benefit of creditors has been characterized as a recent American device, though this statement has been challenged.[1] The word assignment is sometimes used with reference to the instrument which affects the transfer, and is sometimes applied to the transfer itself considered as a legal effect or result.[2] The validity of the assignment is generally determined, as we shall see, by the common law,[3] and the instrument will, as a rule, be favored where equality of distribution of assets is attempted.[4]

It may be recalled, as a preliminary to exploring this field, that to constitute a general assignment there must be an element of trust,[5] and the conveyance must be voluntary.[6] Voluntary assignments, for the benefit of cred-

[1] Dunham v. Waterman, 17 N. Y. 9–15; Grover v. Wakeman, 11 Wend. (N. Y.) 187, 216.

[2] Richardson v. Thurber, 104 N. Y. 610, 11 N. E. Rep. 133; Berger v. Varrelmann, 127 N. Y. 289, 27 N. E. Rep. 1065.

[3] Schroder v. Tompkins, 58 Fed. Rep. 672; Johnson v. Sharp, 31 Ohio St. 611.

[4] Reed v. McIntyre, 98 U. S. 507; Mayer v. Hellman, 91 U. S. 496; Boese v. King, 108 U. S. 379, 2 S. C. Rep. 765; Commercial Nat. Bank v. Nebraska State Bank, 33 Neb. 292, 50 N. W. Rep. 157.

[5] Hine v. Bowe, 46 Hun (N. Y.) 196; Brown v. Guthrie, 110 N. Y. 435; Fecheimer v. Robertson, 53 Ark. 101, 13 S. W. Rep. 423; May v. Tenney, 148 U. S. 66, 13 S. C. Rep. 491; Box v. Goodbar, 54 Ark. 6, 14 S. W. Rep. 925.

[6] Lewis v. Miller, 23 Weekly Dig. (N. Y.) 495. In Brown v. Guthrie, 110 N. Y. 441, 18 N. E. Rep. 254, Finch, J., said: "The view of the case which prevailed with the General Term was, that the mortgage and the agreement which led to it, taken together, amounted to a general assignment by an insolvent debtor, which was void because it reserved to him a possible surplus at the expense of unpaid creditors, and the right to make preferences subsequent to the conveyance. If the basis of the reasoning be sound, the result reached was a proper inference; but we are not satisfied that the mortgage and agreement amounted to a general assignment by the debtor. In form it was an absolute sale upon a chattel mortgage given for a fixed and agreed consideration; and while, nevertheless, such a sale, in spite of its form, may be proved to be an assignment in trust (Britton v. Lorenz, 45 N. Y. 51), yet, in the present case, we are unable to discover any such proof. The material and essential characteristics of a general assignment is the presence of a trust. The assignee is merely trustee, and not absolute owner. He buys nothing and pays nothing, but takes the title for the performance of trust duties. There

itors, have been defined to be transfers of property to an assignee, in trust, to apply the same in payment of debts and return the surplus to the debtor.[1] The requisite of good faith must appear.[2] A general assignment may be made in the absence of a statute.[3] The assignment is not a creature of the statute, but the voluntary act of the debtor, regulated by the statute as to details in its execution.[4]

The assignment is the exercise of the absolute dominion which a person possesses over his own property.[5] In Thrasher v. Bentley,[6] Folger, J., said: "The act of 1860 does not give the right to make an assignment in favor of creditors, with or without preferences. The right exists at common law, and if exercised honestly, and with no design to hinder, delay or defraud creditors, does not require the act of 1860 to warrant it. The act of 1860 is a statute, not of creation, but of direction. It recognizes the existence of the power in the citizen to make an assignment of his property to trustees, for the benefit of his creditors, and does no more than prescribe the mode in which the power shall be used, and furnish some safeguards against abuse." The general scope and object of the statute "was to secure a faithful application of the debtor's assets, under the terms and provisions of the assignment, and in that way to protect both debtors

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was no such element in the transaction between these parties. The purchaser became absolute owner, and paid or secured the full amount of his mortgage." See Warner v. Littlefield, 89 Mich. 329, 50 N. W. Rep. 721.

[1] Weber v. Mick, 131 Ill. 533, 23 N. E. Rep. 646. See Ginther v. Richmond, 18 Hun (N. Y.) 232. A power of attorney cannot be converted into an assignment. Beans v. Bullitt, 57 Pa. St. 221; Banning v. Sibley, 3 Minn. 389.

[2] Wright v. Lee, 2 S. Dak. 596, 51 N. W. Rep. 706.

[3] Tompkins v. Hunter, 149 N. Y. 121, 43 N. E. Rep. 532; Weider v. Maddox, 66 Tex. 372, 1 S. W. Rep. 168.

[4] See Sanger v. Flow, 48 Fed. Rep. 152, 156; Baer v. Rooks, 50 Fed. Rep. 898, 901; Thompson v. Rainwater, 49 Fed. Rep. 406.

[5] Brashear v. West, 7 Pet. 614.

[6] 1 Abb. N. C. (N. Y.) 43.

and creditors against the waste, improvidence, negligence and infidelity of the assignee, in the execution of the trusts created by it."[1] The property in possession of the assignee is not *in custodia legis*,[2] for the reason that the assignee is not technically an officer of the court,[3] but is a trustee, bound to account according to the terms of the instrument itself, and his authority depends upon the validity of the assignment, and is not technically conferred by the court.[4] Some cases consider him a *quasi* public officer,[5] in so far as the statutes regulate his procedure.

The assignee derives his power from the assignment, which is both the guide and measure of his duty, is the language of some of the cases.[6] It is the chart which he must follow.[7] Beyond that instrument or outside of its terms he is, ordinarily, powerless and without authority. The control of the court over his actions is limited in the same way, and can only be exercised to compel his performance of the stipulated and defined trust, and protect the rights which flow from it. He distributes the proceeds of the estate placed in his care according to the dictation and under the sole guidance of the assignment, and the statutory provisions merely regulate and guard his exercise of an authority derived from the will of the assignor. The courts, therefore, cannot direct him to pay a debt of the assignor, or give it preference in violation

[1] People v. Chalmers, 1 Hun (N. Y.) 686, affd. 60 N. Y. 154.

[2] See Lehman v. Rosengarten, 23 Fed. Rep. 642; State *ex rel.* Enderlin State Bk. v. Rose, 4 N. Dak. 319, 52 N. W. Rep. 514; Matthews v. Ott, 87 Wis. 399; S. C. *sub nom. In re* Morgan, 58 N. W. Rep. 774. In Iowa and Minnesota, a contrary rule prevails. Hamilton-Brown Shoe Co. v. Mercer, 84 Iowa 537, 51 N. W. Rep. 415; Second Nat. Bk. v. Schrauck, 43 Minn. 38, 44 N. W. Rep. 542.

[3] But see Farwell v. Cohen, 138 Ill. 216, 28 N. E. Rep. 35, 32 Id. 893.

[4] Adler v. Ecker, 1 McCrary 257.

[5] Levy's Accounting, 1 Abb. N. C. (N. Y.) 187; Nichols v. McEwen, 17 N. Y. 22, 27.

[6] Citizens' Bank v. Williams, 128 N. Y. 77, 28 N. E. Rep. 33; Matter of Hevenor, 144 N. Y. 273, 39 N. E. Rep. 393.

[7] Middleton v. Taber, 46 S. C. 355, 24 S. E. Rep. 282.

of the terms of the assignment and the rights of other creditors under it. To hold the contrary would be to put the court in the place of the assignor, and assert a right to modify the terms of the assignment, after it had taken effect, against the will of its maker, and to the injury of those protected by it. The assignee is merely the representative of the debtor and must be governed by the express terms of his trust.[1] The assignee is required to recognize and pay only claims which could be ascertained and fixed at the time when the assignment was made.[2] The parties cannot change the terms of the instrument,[3] or withdraw the property from the jurisdiction of the court, or absolve the assignee from its control. Nor can the assignor substitute a successor if the assignee resigns. The new appointment must be made by the court.[4]

Under a valid assignment the assignee, having possession of the goods taken in pursuance thereof, has a valid title to them as against the claims of subsequent attaching creditors.[5] There must, of course, be a change of possession to satisfy the statute,[6] or the presumption of fraud in the transfer will arise.[7]

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[1] Finch, J., in Matter of Lewis, 81 N. Y. 424. See Nicholson v. Leavitt, 6 N. Y. 519. Where, therefore, the debts set out in the assignment are fictitious or excessive, this may be a ground for setting aside the assignment, and the debts cannot be reduced to the proper amount, and the assignment as thus modified sustained. Roberts v. Victor, 130 N. Y. 585, 29 N. E. Rep. 1025.

[2] Matter of Hevenor, 144 N. Y. 274, 39 N. E. Rep. 393.

[3] See § 322*a*.

[4] Chapin v. Thompson, 89 N. Y. 280.

[5] Schroder v. Tompkins, 58 Fed. Rep. 676; Barnett v. Kinney, 147 U. S. 476, 13 S. C. Rep. 403; Frank v. Bobbitt, 155 Mass. 112, 29 N. E. Rep. 209; Butler v. Wendell, 57 Mich. 62, 23 N. W. Rep. 460; May v. First Nat. Bank, 122 Ill. 556, 13 N. E. Rep. 806; Smith's Appeal, 104 Pa. St. 381; Chafee v. Fourth Nat. Bank, 71 Me. 514; Coflin v. Kelling, 83 Ky. 649; Egbert v. Baker 58 Conn. 319, 20 Atl. Rep. 466; Receiver of State Bk. v. First Nat. Bk., 34 N. J. Eq. 450; Thurston v. Rosenfield. 42 Mo. 474.

[6] McConihe v. Derby, 62 Hun (N. Y.) 90, 16 N. Y. Supp. 474; Ball v. Loomis, 29 N. Y. 412; South Danvers Nat. Bk. v. Stevens, 5 App. Div. (N. Y.) 392, 39 N. Y. Supp. 298; McIlhargy v. Chambers, 117 N. Y. 532, 23 N. E. Rep. 561; Cram v. Mitchell, 1 Sandf. Ch. (N. Y.) 251.

[7] Compare McIlhargy v. Chambers, 117 N. Y. 532, 23 N. E. Rep. 561.

In Mills v. Parkhurst,[1] Gray, J., in explaining the general characteristics of these voluntary conveyances, said: "The assignment is not like a gift of property upon conditions, open to the acceptance or rejection of the donee. It is a payment by the assignor of his debts upon his own plan. The deed of assignment is in no sense a contract between the debtor and his creditors, and it does not depend for its validity in law upon their assent. It is a means or mode which the statute permits to be adopted by an insolvent debtor, for the distribution of his estate among his creditors, and so long as he has acted without fraud, in fact or in law, and has complied with the prescriptions of the act, his conveyance to an assignee for the purposes stated therein, will stand and be effective."

§ 316a. **Property transferred by assignment.**— The discussion has already embraced the authorities declaring what assets creditors may reach by bill or other proceeding.[2] As creditors are frequently forced practically to accept as payment of their claims whatever the assignee is able to realize from the property, it is important to know what estate is acquired by such voluntary transfer. Every interest to which the personal representatives of a deceased person could succeed may pass by a properly framed assignment.[3] The assignee may acquire title to a claim for conversion;[4] may gain a right to recover in

[1] 126 N. Y. 89, 94, 26 N. E. Rep. 1041.

[2] See Chap. II.

[3] See Zabriskie v. Smith, 13 N. Y. 322, 335. See Bishop on Insol. Debtors, § 143; Norfolk & W. R. R. Co. v. Read, 87 Va. 185, 12 S. E. Rep. 395. Property forfeited to the government does not pass to the assignee, and a subsequent remission of the forfeiture will not inure to the benefit of the assignee. Ward v. Webster, 9 Daly (N. Y.) 182. But, as to assignments of government claims, see Taft v. Marsily, 120 N. Y. 474, 24 N. E. Rep. 926; Bachman v. Lawson, 109 U. S. 659, 3 S. C. Rep. 479; Leonard v. Nye, 125 Mass. 455; Heard v. Sturgis, 146 Mass. 545, 16 N. E. Rep. 437.

[4] Whittaker v. Merrill, 30 Barb. (N. Y.) 389; Richtmeyer v. Remsen, 38 N. Y. 206; Sherman v. Elder, 24 N. Y. 381; McKee v. Judd, 12 N. Y. 622; Baumann v. Jefferson, 4 Misc. (N. Y.) 147, 23 N. Y. Supp. 685.

replevin,[1] and to sue a common carrier for the loss of goods.[2] He takes judgments,[3] moneys deposited in bank,[4] and lands[5] which belonged to the assignor. In Warner v. Jaffray,[6] the court said: "The assignment was a mere voluntary conveyance, and can have no greater effect, so far as passing title to the property assigned, than any other conveyance.[7] In New York State by statute the assignee is clothed with power to assail fraudulent alienations of property made by the assignor.[8] Rights of action for personal torts which die with the person are not assignable;[9] as, for instance, damages for an assault and battery,[10] and false imprisonment;[11] so the title to trust property does not pass;[12] nor does property in transit;[13] nor a wife's dower right;[14] nor exempt property.[15]

It is, of course, as we shall see, fraudulent for the assignor to withhold assets from the assignee.[16]

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[1] Jackson v. Losee, 4 Sandf. Ch. (N. Y.) 381.

[2] Merrill v. Grinnell, 30 N. Y. 594; McKee v. Judd, 12 N. Y. 622; Jordan v. Gillen, 44 N. H. 424.

[3] Emigrants' Ind. Sav'gs Bank v. Roche, 93 N. Y. 374.

[4] Beckwith v. Union Bank, 9 N. Y. 211.

[5] Matter of Marsh, 3 Cow. (N. Y.) 69.

[6] 96 N. Y. 254.

[7] Bank of Commerce v. Payne, 86 Ky. 446, 8 S. W. Rep. 856.

[8] Southerd v. Benner, 72 N. Y. 424; Spring v. Short, 90 N. Y. 538; Ball v. Slaften, 98 N. Y. 622; Fort Stanwix Bank v. Leggett, 51 N. Y. 552; Matter of Raymond, 27 Hun (N. Y.) 508; Matter of Cornell, 110 N. Y. 360, 18 N. E. Rep. 142. The assignee cannot divest himself or be divested of his right to sue for assets so long as the trust continues. Stanford v. Lockwood, 95 N. Y. 582.

[9] People v. Tioga Common Pleas, 19 Wend. (N. Y.) 73; Brooks v. Hanford, 15 Abb. Pr. (N. Y.) 342; Hodgman v. Western R. R. Co., 7 How. Pr. (N. Y.) 492; Cent. R. R. & B. Co. v. Brunswick & W. R. R. Co., 87 Ga. 386, 13 S. E. Rep. 520.

[10] See Pulver v. Harris, 52 N. Y. 73; Bishop on Insol. Debtors, § 143.

[11] Hunt v. Conrad, 47 Minn. 557, 50 N. W. Rep. 614.

[12] Kip v. Bank of New York, 10 Johns. (N. Y.) 63.

[13] Lacker v. Rhoades, 51 N. Y. 641.

[14] Dimon v. Delmonico, 35 Barb. (N. Y.) 554.

[15] Heckman v. Messinger, 49 Pa. St. 465; Baldwin v. Peet, 22 Tex. 708; Smith v. Mitchell, 12 Mich. 180.

[16] Coursey v. Morton, 132 N. Y. 556, 30 N. E. Rep. 231, Shultz v. Hoagland, 85 N. Y. 464.

The assignment, it may be here recalled, takes effect from the time of its delivery,[1] and the instrument should be so construed as to give effect to the intention of the parties.[2] The recording of the instrument is not a necessary prerequisite to the vesting of the title to the assigned property in the assignee.[3]

§ 316b. Assent of assignee. — To render the transfer effectual, the assignee must accept the trust. In New York State his assent to act as assignee must be acknowledged. After some controversy it has been decided that the assent may be written or contained on a paper separate from the assignment itself.[4] Without the assent of the assignee the assignment is void.[5] In Scott v. Mills,[6] the court says: "No form of consent is prescribed, and no place for its appearance in the assignment is designated, and the statute is fully satisfied by an appear ance of assent in the instrument." [7]

Where the assignment is made to more than one assignee, all who accept must act.[8]

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[1] Nicoll v. Spowers, 105 N. Y. 1, 11 N. E. Rep. 138; Warner v. Jaffray, 96 N. Y. 248; Dutchess County Mutual Ins. Co. v. Van Wagonen, 132 N. Y. 398, 30 N. E. Rep. 971. "Delivery is as essential since the statute of assignments as before its passage. It is the final act without which all other formalities are ineffectual, and the real date of the instrument is the time of its delivery." McIlhargy v. Chambers, 117 N. Y. 539, 23 N. E. Rep. 561; Betz v. Snyder, 48 Ohio St. 492, 28 N. E. Rep. 234.

[2] Emigrant Ind. Savings Bank. v. Roche, 93 N. Y. 374.

[3] Warner v. Jaffray, 96 N. Y. 248; Ryan v. Webb, 39 Hun (N. Y.) 435; Franey v. Smith, 125 N. Y. 49, 25 N. E. Rep. 1079; Pancoast v. Spowers, 20 J. & S. (N. Y.) 523.

[4] Franey v. Smith, 125 N. Y. 44, 25 N. E. Rep. 1079.

[5] Rennie v. Bean, 24 Hun (N. Y.) 123; Crosby v. Hillyer, 24 Wend. (N. Y.) 284; Lawrence v. Davis, 3 McL. 177; Pierson v. Manning, 2 Mich. 462.

[6] 45 Hun (N. Y.) 264, affi'd 115 N. Y. 376, 22 N. E. Rep. 156.

[7] The assignment "must be in writing and acknowledged, and the assignee must assent thereto in writing, and when it has thus been executed and delivered, it takes effect, and the title to the property passes to the assignee." Warner v. Jaffray, 96 N. Y. 252.

[8] Brennan v. Willson, 7 Daly (N.Y.) 59; affi'd, 71 N. Y. 502.

§ 316c. **Creditor's proceedings.** — The creditor, feeling aggrieved by an assignment, may proceed by action claiming the right to set it aside, and also institute supplementary proceedings.[1] The fact that the examination of the debtor may disclose the fraudulent character of the assignment is not a valid reason for declining to answer questions on the examination,[2] and a refusal to testify may be punished as a contempt.[3] In New York the assignee may be directed to account before a referee.[4]

§ 317. **Word "void" construed.** — The distinction between void and voidable acts is constantly arising. The term "void" is often interpreted to mean nothing more than "voidable," and this construction is especially true as applied to voluntary assignments.[5] Though the statute in characterizing assignments constantly uses the term "void as to creditors," it is obvious that "nothing more is intended than inoperative or voidable;"[6] or, as was observed by Chief-Justice Shaw, "such conveyance is not absolutely void, but voidable only by creditors."[7] It is the distinguishing characteristic of a void act that it is incapable of ratification, but an assignment which is fraudulent upon its face is capable of confirmation by creditors,[8] and is good between the parties, hence it is not, logically speaking, void.

§ 318. **Delay and hindrance.** — Mr, Burrill says:[9] "The term *delay* has an obvious reference to time, and *hindrance*

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[1] Matter of Sickle, 52 Hun (N. Y.) 527, 5 N. Y. Supp. 703; Schloss v. Wallach, 38 Hun (N. Y.) 638, 102 N. Y. 683.

[2] Lathrop v. Clapp, 40 N. Y. 328.

[3] Lathrop v. Clapp, 40 N. Y. 328; Tremain v. Richardson, 68 N. Y. 617.

[4] Produce Bank v. Morton, 67 N. Y. 199; Myers v. Becker, 95 N. Y. 486.

[5] See Burrill on Assignments, § 319.

[6] Per Redfield, Ch. J., in Merrill v. Englesby, 28 Vt. 155.

[7] Edwards v. Mitchell, 1 Gray (Mass.) 241.

[8] See White v. Banks, 21 Ala. 713. Compare Hone v. Henriquez, 13 Wend. (N. Y.) 242; Geisse v. Beall, 3 Wis. 367.

[9] Burrill on Assignments, § 335.

to the interposition of obstacles in the way of a creditor; but, to a certain extent, the one involves and includes the other. In point of fact, and as actually applied by the courts, they are always taken together. The following are prominent instances in which assignments have been declared void on the ground of hindrance and delay. Where the time of sale,[1] or of collection by the assignee,[2] or of finally closing the trust,[3] has been, by the terms of the assignment, unreasonably or indefinitely postponed; where the assignee has been expressly authorized to sell at retail, and on credit,[4] or on credit simply;[5] where the assignment has been made with a view to prevent a sacrifice of the property;[6] where the proceeds of the assigned property have been directed to be used in defending all suits which might be brought by creditors to recover their debts,[7] and where creditors who should sue have been expressly debarred from the benefit of the assignment;[8] or postponed until all the other creditors are paid.[9] All these were instances of *delaying* and *hindering* creditors in the prosecution of their remedies in the strict sense of the terms used in the statute." In the famous Sprague litigation it is said that a debtor has no right to postpone or put in peril the claims of his creditors without their consent, and that a conveyance which attempts so to do, or which is executed for the purpose of depriving creditors of their right to enforce their just claims against the

[1] Citing Hafner v. Irwin, 1 Ired. (N. C.) Law, 490.

[2] Citing Storm v. Davenport, 1 Sandf. Ch. (N. Y.) 135.

[3] Citing Arthur v. Commercial & R. R. Bk., 17 Miss. 394.

[4] Citing Meacham v. Sternes, 9 Paige (N. Y.) 398, 406.

[5] Citing Barney v. Griffin, 2 N. Y. 365; Nicholson v. Leavitt, 6 N. Y. 510.

[6] Citing Van Nest v. Yoe, 1 Sandf. Ch. (N. Y.) 4; Vernon v. Morton, 8 Dana (Ky.) 247. But see Cason v. Murray, 15 Mo. 378.

[7] Citing Planck v. Schermerhorn, 3 Barb. Ch. (N. Y.) 644; Mead v. Phillips, 1 Sandf. Ch. (N. Y.) 83.

[8] Citing Spence v. Bagwell, 6 Gratt. (Va.) 444; Berry v. Riley, 2 Barb. (N. Y.) 307.

[9] Citing Marsh v. Bennett, 5 McLean 117,

property of their debtor, by placing it beyond their reach or control for an unlimited, indefinite, or uncertain period, is in conscience, as well as in law, fraudulent.[1] An assignment or transfer with intent to delay the collection of a debt is condemned by the statute and the common law, no less than a transfer or assignment into which the element of actual fraud enters.[2]

§ 319. **Intent affecting assignments.** — "It is clear, however," says Mr. Burrill, "from the language of the English statute of 13 Elizabeth, that its provisions were directed exclusively against conveyances made with an *actual intent*,[3] on the part of debtors, to hinder, delay or defraud creditors, as distinguished from the mere *effect* or *operation* of such conveyances. The expressions in the preamble — '*devised* and *contrived*,' 'to the end, *purpose*, and *intent* to delay,' etc., leave no room for doubt on this point. Hence, it has sometimes been very expressively designated as the 'statute against fraudulent *intents* in alienation.'"[4] It will be presently shown that the learned writer has stated the rule too broadly, for a fraudulent intent is often imputed by the law in cases where the assignor's motives were undoubtedly honest.[5] Generally speaking the subject of inquiry in these cases is the intent of the assignor or debtor,[6] at the time of the execution of

[1] De Wolf v. Sprague Mfg. Co., 49 Conn. 325.

[2] Buell v. Rope, 6 App Div. (N. Y.) 115, 39 N. Y. Supp. 475. Citing McConnell v. Sherwood, 84 N. Y. 530.

[3] See Moore v. Stege, 93 Ky. 27, 18 S. W. Rep. 1019.

[4] Burrill on Assignments, § 332.

[5] See §§ 8, 9, 19, 322.

[6] Wilson v. Forsyth, 24 Barb. (N. Y.) 120; Mathews v. Poultney, 33 Barb. (N. Y.) 127; Griffin v. Marquardt, 17 N. Y. 28; Cuyler v. McCartney, 40 N. Y. 221; Bennett v. Ellison, 23 Minn 242, 1 Am. Insol. Rep. 36; Peck v. Crouse, 46 Barb. (N. Y.) 157; Putnam v. Hubbell, 42 N. Y. 106; Ruhl v. Phillips, 48 N. Y. 125; Lesher v. Getman, 28 Minn. 93, 9 N. W. Rep. 585; Jaeger v. Kelley, 52 N. Y. 274; Dudley v. Danforth, 61 N. Y. 626; State *ex rel.* Enderlin State Bk. v. Rose, 4 N. Dak. 325, 58 N. W. Rep. 514; Rouse v. Bowers, 108 N. C. 182, 12 S. E. Rep. 985; Main v. Lynch, 54 Md. 658; Forbes v. Waller, 25 N. Y. 439. "An assignee for the benefit of creditors stands in the place of the

the instrument,[1] though there is a growing line of authority tending to establish the rule that the fraudulent purpose sufficient to defeat or overturn the instrument must be participated in by the assignee, trustee[2] or beneficiaries.[3] The latter idea is certainly gaining ground. The testimony of both the assignor and assignee upon the question of intent is proper.[4] Recognizing the general rule, else-

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assignor, and is so affected with his intent, that if it is unlawful the instrument cannot stand." Tabor v. Van Tassell, 86 N. Y. 643. See § 316. In Adler v. Ecker, 1 McCrary 256, the court remarks that the only intent which will determine the validity of an assignment is that of the assignor, at the time it is made, and contemporaneous fraudulent acts are evidence of this intent. It is then observed of the case under consideration, that it is in proof that one E. being insolvent, and owing debts amounting to more than double the value of his assets, took from his business, within four weeks before his assignment, a sum equal to one-half of the value of the property assigned, and with it erected a building upon a lot owned by his wife. Within a short time thereafter he joined with his wife in giving a mortgage upon this property to his father-in-law, for three times the amount of any debt owing either by him or his wife, and this mortgage and accompanying notes were sent to the father-in-law, without any request on his part, or any information on the subject, until the papers were received. The court comment upon the fact that there is no evidence to counteract or explain why the mortgage was given for so large a sum, after one-fourth of the debtor's entire assets had been taken from his business in the manner stated, and under circumstances calculated to show an intent to put a portion of his available means beyond the reach of his creditors, and arrive at the conclusion that the assignment was fraudulent and void.

[1] Shultz v. Hoagland, 85 N. Y. 464; Hardmann v. Bowen, 39 N. Y. 200.

[2] Baer v. Rooks, 50 Fed. Rep. 901; Emerson v. Senter, 118 U. S. 3, 6 S. C. Rep. 981.

[3] See Thomas v. Talmadge, 16 Ohio St. 433; Governor v. Campbell, 17 Ala. 566; Byrne v. Becker, 42 Mo. 264; Abercrombie v. Bradford, 16 Ala. 560; State v. Keeler, 49 Mo. 548; Wise v. Wimer, 23 Mo. 237; Mandel v. Peay, 20 Ark. 329; Penn's Executor v. Penn, 88 Va. 361, 13 S. E. Rep. 707; Zell Guano Co. v. Heatherly, 38 W. Va. 410, 18 S. E. Rep. 611; Porter v. James, 30 U. S. App. 260; Pettit v. Parsons, 9 Utah 223, 33 Pac. Rep. 1038; Peters v. Bain, 133 U. S. 670, 10 S. C. Rep. 354. See Emerson v. Senter, 118 U. S. 3, 10, 6 S. C. Rep. 981, where the court says: "If the intentional omission by the grantor of certain property from his schedule, and his appropriation of it to his own use, was such a fraud as would vitiate the deed where the assignee or the preferred creditors have previous notice of such omission, that result cannot happen when they were ignorant of the fraud at the time they accepted the benefit of the conveyance."

[4] Forbes v. Waller, 25 N. Y. 439. See § 205. While it is proper to allow

where discussed, that a voluntary conveyance or gift may be annulled at the instigation of creditors, without proof of an absolute fraudulent intent on the part of the donee,[1] it would seem to follow by analogy that the cases which hold that proof of the fraudulent intent of the debtor or assignor is sufficient, establish the more logical and salutary rule. In a case which arose in New York it was expressly decided that an assignment by a debtor, with the intent to hinder or defraud creditors, may be avoided although the assignees were free from all imputation of participation in the fraudulent design, and were themselves *bona fide* creditors of the assignor.[2] In Loos v. Wilkinson,[3] Earl, J., said: "An innocent assignee may not be permitted to act under a fraudulent assignment. . . . . It may be true that in a particular case an honest assignee may . . . . undo all the fraudulent acts of the assignor preceding and attending the assignment and the preparation of the schedules under it. Yet, if the assignment was made by the assignor with the fraudulent intent condemned by the statute, the assignment may be set aside at the suit of judgment-creditors, and all powers of the assignee, however honest he may be, taken away. In assailing a voluntary assignment for the benefit of creditors, it is important only to establish the fraudulent

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parties to testify as to their intentions, yet as against third parties in a controversy as to whether a paper is an assignment or a mortgage, they cannot be allowed to testify as to what they had in mind in executing the paper. Appolos v. Brady, 49 Fed. Rep. 401.

[1] See § 200.

[2] Rathbun v. Platner, 18 Barb. (N. Y.) 272. "An assignee in trust for the benefit of creditors is not 'a purchaser for a valuable consideration,' however innocent he may be of participation in the fraud intended by the assignor. The uprightness of his intentions, therefore, will not uphold the instrument, if it would otherwise, for any reason, be adjudged fraudulent and void." Griffin v. Marquardt, 17 N. Y. 30. See Loos v. Wilkinson, 110 N. Y. 195, 18 N. E. Rep. 99; Starin v. Kelly, 88 N. Y. 418, and compare Sipe v. Earman, 26 Gratt. (Va.) 570.

[3] 110 N. Y. 209, 18 N. E. Rep. 99. See s. c. again 113 N. Y. 485, 21 N. E. Rep. 392.

intent of the assignor,[1] and when that has been established the assignment may be set aside, and creditors may then pursue their remedies and procure satisfaction of their judgments as if the assignment had not been made." Mere suspicion of a fraudulent intent is not enough to sustain an action to set aside an assignment.[2]

There should be evolved from the decisions a distinction between cases where the assignee is honest and where he has been guilty of bad faith. Where the trust estate has come into the hands of an honest assignee, the reasons upon which it may be overturned should be restricted. The technical grounds of assault upon this convenient form of liquidating an insolvent estate should be circumscribed, and the struggles of sharp attorneys to gain preferences for unconscionable clients by overturning these transfers on unsubstantial grounds should be repressed. The guiding consideration with the courts should be the general welfare of the body of creditors and the safety of the assets.

§ 319a. **Rights of assignee** — An assignee acting in perfect good faith under an assignment, subsequently declared fraudulent, will be protected from personal liability,[3] and need not account a second time for moneys paid out in good faith to creditors.[4] The assignee is not necessarily bound to take goods ordered by the assignor,[5] and is without power to proceed with the performance of the

[1] Citing Starin v. Kelly, 88 N. Y. 418.

[2] McClure v. Goodenough, 19 Civ. Pro. (N. Y.) 191, 12 N. Y. Supp. 459.

[3] Rouse v. Bowers, 108 N. C. 182, 12 S. E. Rep. 985; Burrill on Assignments, 6th ed., p. 567, Haydock Carriage Co. v. Pier, 78 Wis. 579, 47 N. W. Rep. 945; Barney v. Griffin, 4 Sandf. Ch. (N. Y.) 552; Hawley v. James, 16 Wend. (N. Y.) 182; Nat. Butchers & Dr. Bk. v. Hubbell, 117 N. Y. 397, 22 N. E. Rep. 1031: Smith v. Wise, 132 N. Y. 172, 30 N. E. Rep. 384; Wilson v. Marion, 147 N. Y. 589, 42 N. E. Rep. 190.

[4] Sullivan v. Miller, 106 N. Y. 643, 13 N. E. Rep. 772; Wakeman v. Grover, 4 Paige (N. Y.) 23; Young v. Brush, 28 N. Y. 671; Ames v. Blunt, 5 Paige (N. Y.) 13.

[5] Compare Clark v. Dickinson, 74 N. Y. 47.

assignor's incomplete contracts, yet if he does so without the sanction of the court, or the parties beneficially interested, and sues for such performance, the defendant may counterclaim damages.[1] For the purposes of completing such a contract, the matter must be treated as a transaction had with the assignee as an individual.[2] It may be further recalled that goods obtained by the assignor by the practice of fraud may be taken from the assignee, as the latter does not, according to the weight of authority, occupy the position of a purchaser for value.[3] But demand for such goods should precede any action to recover them from an innocent assignee.[4]

The obligations of an assignee for the benefit of creditors are those which appertain to voluntary trustees, not acting gratuitously, without compensation. They are bound to exercise that degree of diligence which persons of ordinary prudence are accustomed to use in their own affairs.[5] The trust fund should not be used for the individual benefit of the assignee, or mingled with other money,[6] or expended except for the care of the property and its conversion into cash.[7] Where the assignee is a party to the fraud which results in overturning an assignment, he will not be allowed for expenses incurred in defending himself[8] or commissions.[9] The assignee

[1] Patton v. Royal Baking Powder Co., 114 N. Y. 1, 20 N. E. Rep. 621.

[2] Patton v. Royal Baking Powder Co., 114 N. Y. 5, 20 N. E. Rep. 621. See Thompson v. Whitmarsh, 100 N. Y. 35, 2 N. E. Rep. 273; Buckland v. Gallup, 105 N. Y. 453, 11 N. E. Rep. 843.

[3] See Raymond v. Richmond, 78 N. Y. 351; Chaffee v. Fort, 2 Lans. (N. Y.) 81.

[4] Goodwin v. Wertheimer, 99 N. Y. 149, 1 N. E. Rep. 404; Converse v. Sickles, 146 N. Y. 207, 40 N. E. Rep. 777; Nat. Butchers and Drovers' Bank v. Hubbell, 117 N. Y. 384, 398, 22 N. E. Rep. 1031.

[5] Matter of Cornell, 110 N. Y. 357, 18 N. E. Rep. 142. See Matter of Barnes, 140 N. Y. 468, 35 N. E. Rep. 653.

[6] Matter of Barnes, 140 N. Y. 468, 35 N. E. Rep. 653.

[7] Matter of Dean, 86 N. Y. 398.

[8] Smith v. Wise, 132 N. Y. 172, 30 N. E. Rep. 229.

[9] Slingluff v. Smith, 76 Md. 558, 25 Atl. Rep. 674.

takes the debts or choses in action subject to the right of set-off.[1] The equitable rule as to set-off may also be compelled against the assignee.[2] Where several persons accept the trust they must act together.[3]

§ 319b. **Partnership assignments.** — The distinction between individual and copartnership creditors must be preserved,[4] especially where the possibility of an attempt to pay individual creditors with partnership assets is present.[5] In some cases it is declared absolutely that a transfer of partnership property to an individual creditor of one of the partners when the firm is insolvent is fraudulent as to partnership creditors,[6] but it seems the converse of the proposition is not true,[7] for an assignment of individual assets for the benefit of firm creditors will usually be upheld.[8] Evidently the theory upon which the cases proceed is that the appropriation of firm assets to individual debts is a fraud upon the partner who does not owe the debt, and also violates the equitable rule as to the marshalling of assets. The solvency of the partnership is

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[1] Jordan v. Nat. Shoe and Leather Bank, 74 N. Y. 474 : Martin v. Kunzmuller, 37 N. Y. 396 ; Myers v. Davis, 22 N. Y. 489.

[2] See Hughitt v. Hayes, 136 N. Y. 163, 32 N. E. Rep. 706. Compare Fera v. Wickham, 135 N. Y. 223, 31 N. E. Rep. 1028.

[3] Thatcher v. Candee, 4 Abb. Dec. (N. Y.) 387 ; Anon. v. Gelpcke, 5 Hun (N. Y.) 245, 255 ; Brennan v. Willson, 4 Abb. N. C. (N. Y.) 279.

[4] Peters v. Bain, 133 U. S. 670, 10 S. C. Rep. 354 : Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. Rep. 992.

[5] Roe v. Hume, 72 Hun (N. Y.) 1, 25 N. Y. Supp. 576; Wilson v. Robertson, 21 N. Y. 587 ; Booss v. Marion, 129 N. Y. 541, 29 N. E. Rep. 832 ; Lord v. Devendorf, 54 Wis. 495, 11 N. W. Rep. 903.

[6] Erb v. West (Miss.) 19 So. Rep. 829 ; Hill v. Draper, 54 Ark. 395, 15 S. W. Rep. 1025 ; Marks v. Bradley, 69 Miss. 1, 10 So. Rep. 922 ; Nordlinger v. Anderson, 123 N. Y. 548, 25 N. E. Rep. 992 ; Wilson v. Robertson, 21 N. Y. 587.

[7] Crook v. Rindskopf, 105 N. Y. 476, 12 N. E. Rep. 174 ; Saunders v. Reilly, 105 N. Y. 12, 12 N. E. Rep. 170 ; Royer Wheel Co. v. Fielding, 101 N. Y. 504, 5 N. E. Rep. 431.

[8] Crook v. Rindskopf, 105 N. Y. 476, 12 N. E. Rep. 174 ; Erb v. West (Miss.) 19 So. Rep. 829 ; *contra* Jackson v. Cornell, 1 Sandf. Ch. (N. Y.) 348. See O'Neil v. Salmon, 25 How. Pr. (N. Y.) 246.

an issuable fact [1] in insolvency cases. The court will resent schemes to defraud a firm's creditors.[2] On the other hand, firm creditors cannot set aside as fraudulent a voluntary transfer of property of an individual partner unless the firm assets are deficient and there are no individual creditors.[3] The respective powers of the partners in assignment cases have been a subject of much controversy. Only leading characteristics will be noticed. An insolvent surviving partner may make an assignment embracing both partnership [4] and his individual property.[5] In Illinois, in the absence of proof of a crisis in the affairs of the firm, two general partners cannot make an assignment in the absence of the assent of the third partner.[6] Ordinarily the partners must all join in an assignment.[7] A special partner need not unite,[8] nor a party who may possibly be liable as a partner as regards third parties.[9] A limited partnership cannot in New York assign with preferences.[10] A partner has no right to make a general assignment because his copartner is

[1] McDonald v. Cash, 45 Mo. App. 66.

[2] Kelley v. Flory, 84 Iowa 671, 51 N. W. Rep. 181; Smith v. Smith, 87 Iowa 93, 54 N. W. Rep. 73; Baer v. Wilkinson, 35 W. Va. 422, 14 S. E. Rep. 1; Roe v. Hume, 72 Hun (N. Y.) 1, 25 N. Y. Supp. 576; Booss v. Marion, 129 N. Y. 536; 29 N. E. Rep. 832; Durant v. Pierson, 124 N. Y. 444, 26 N. E. Rep. 1095; Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. Rep. 992; Wilson v. Robertson, 21 N. Y. 587.

[3] Hull v. Deering, 80 Md. 424, 31 Atl. Rep. 416.

[4] McFarland v. Bate, 45 Kan. 7, 25 Pac. Rep. 238.

[5] Hanson v. Metcalf, 46 Minn. 25, 48 N. W. Rep. 441; Riley v. Carter, 76 Md. 581, 25 Atl. Rep. 667; Williams v. Whedon, 109 N. Y. 333, 16 N. E. Rep. 365; Haynes v. Brooks, 116 N. Y. 487, 22 N. E. Rep. 1083; Emerson v. Senter, 118 U. S. 3, 6 S. C. Rep. 981; Durant v. Pierson, 124 N. Y. 452, 26 N. E. Rep. 1095; Beste v. Berger, 17 Abb. N. C. (N. Y.) 162, affi'd 110 N. Y. 644, 17 N. E. Rep. 734.

[6] Trumbull v. Union Trust Co., 33 Ill. App. 319.

[7] Kellogg v. Cayce, 84 Tex. 213, 19 S. W. Rep. 388; Fox v. Curtis, 176 Pa. St. 52, 34 Atl. Rep. 952; Welles v. March, 30 N. Y. 350; Klumpp v. Gardner, 114 N. Y. 158, 21 N. E. Rep. 99; Gates v. Andrews, 37 N. Y. 659.

[8] Tracy v. Tuffey, 134 U. S. 206, 10 S. C. Rep. 527.

[9] See Adee v. Cornell, 93 N. Y. 572, affi'g 25 Hun (N. Y.) 78.

[10] Schwartz v. Soutter, 103 N. Y. 683, 9 N. E. Rep. 448. See George v. Grant, 97 N. Y. 263.

temporarily insane.[1] But where one partner absconds those remaining may assign for the benefit of creditors.[2] And where after dissolution the firm assets have been transferred in good faith to one of the late partners as an individual, he may assign for the benefit of his individual creditors.[3] The omission to convey individual property in a partnership assignment may invalidate the instrument,[4] though this conclusion has been denied.[5] The certificate of acknowledgment of an assignment executed by one member of a firm need not state that the partner was authorized to sign his co-partners' names to the instrument. The assignment will be upheld if in fact he had such authority.[6] Oral assent of the non-joining partners is good.[7] The assent may be shown in a variety of ways.[8]

§ 320. **Fraud must relate to instrument itself.**—Where it is sought to annul a fraudulent transfer, the evidence must ascertain and establish the assignor's intent at the time[9] of the execution of the instrument.[10] If the assign-

[1] Stadelman v. Loehr, 47 Hun (N. Y.) 327; Friedburgher v. Jaberg, 20 Abb. N. C. (N. Y.) 279.

[2] Welles v. March, 30 N. Y. 344; National Bank of Balto. v. Sackett, 2 Daly (N. Y.) 395; Palmer v. Myers, 43 Barb. (N. Y. 509; Kelly v. Baker, 2 Hilt. (N. Y.) 531. See Klumpp v. Gardner, 114 N. Y. 153, 21 N. E. Rep. 99.

[3] See Dimon v. Hazard, 32 N. Y. 65; Stanton v. Westover, 101 N. Y. 265, 4 N. E. Rep. 529.

[4] See Kennedy v. McKee, 142 U. S. 606, 12 S. C. Rep. 303; Still v. Focke, 66 Tex. 715, 2 S. W. Rep. 59; Coffin v. Douglas, 61 Tex. 406, 407.

[5] Bradley v. Bischel, 81 Iowa 80, 46 N. W. Rep. 755; McFarland v Bate, 45 Kan. 1, 25 Pac. Rep. 238.

[6] Hooper v. Baillie, 118 N. Y. 413, 416, 23 N. E. Rep. 569; Klumpp v. Gardner, 114 N. Y. 160, 21 N. E. Rep. 99; National Bank of Troy v. Scriven, 63 Hun (N. Y.) 375, 18 N. Y. Supp. 277.

[7] Hooper v. Baillie, 118 N. Y. 413, 23 N. E. Rep. 569. See Sullivan v. Smith, 15 Neb. 476, 19 N. W. Rep. 620; Rumery v. McCulloch, 54 Wis. 565, 12 N. W. Rep. 65.

[8] Klumpp v. Gardner, 114 N. Y. 157, 21 N. E. Rep. 99.

[9] Cuyler v. McCartney, 40 N. Y. 221; Olney v. Tanner, 10 Fed. Rep. 115.

[10] Shultz v. Hoagland, 85 N. Y. 467; Mathews v. Poultney, 33 Barb. (N. Y.) 127; Beck v. Parker, 65 Pa. St. 262; Bailey v. Mills, 27 Tex. 434–438; Cornish v. Dews, 18 Ark. 172; Klapp v. Shirk, 13 Pa. St. 589; Owen v. Arvis, 26 N. J. Law 22; Hill v. Woodberry, 1 C. C. A. 206, 49 Fed. Rep. 138.

ment was valid in its creation, having been honestly and properly executed and delivered, no subsequent illegal acts, either of omission or commission, can in any manner invalidate it.[1] The subsequent acts should, however, be considered, as they "may reflect light back upon the original intent," and help to characterize and discern it more correctly.[2] It may be observed that neither conveyances without consideration, nor other frauds committed by a failing debtor prior to a general assignment for the benefit of his creditors, will operate to make it void as matter of law. These are circumstances which may be taken into consideration by a court and jury, if nearly contemporaneous, but are not conclusive of a fraudulent intent.[3] To render the assignment invalid, when good on its face, the fact of a fraudulent intent in making it must be legitimately found from evidence that will fairly support the finding, and it must also be an intent to commit a fraud on creditors by making the assignment, and not by some *entirely independent act* which might and probably would have been done precisely as it was, had no assignment been made or contemplated.[4]

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[1] Hardmann v. Bowen, 39 N. Y. 200; English v. Friedman, 70 Miss. 457, 12 So. Rep. 252. In Estes v. Gunter, 122 U. S. 455, 7 S. C. Rep. 1275, the court says: "The assignment was subsequent to the deed and carried all that could in any way be considered as a benefit secured by the deed to the assignor. The creditors were not, therefore, in any way hindered or defrauded by the alleged reservation. There is nothing in Gunter's payment to his wife of the $900, which can affect the validity of the assignment. . . . . A fraudulent disposition of property does not of itself impair a subsequent general assignment. The assignee may sue for its recovery, and, if successful, it will be for the benefit of the creditors precisely as if it had been included in the assignment."

[2] Shultz v. Hoagland, 85 N. Y. 468; McNaney v. Hall, 86 Hun (N. Y.) 415, 33 N. Y. Supp. 518.

[3] Livermore v. Northrup, 44 N. Y. 111; Probst v. Welden, 46 Ark. 408.

[4] Wilson v. Forsyth, 24 Barb. (N. Y.) 128. In Aaronson v. Deutsch, 24 Fed. Rep. 466, the court said: "The rule which the defendant seeks to invoke, that a deed valid in its inception will not be rendered invalid by any subsequent fraudulent or illegal act of the parties, has no application where the fraudulent or illegal act is

A fraudulent disposition of property invalidates a subsequent assignment only when the deed is actually part of a scheme to defraud creditors.[1] Proof of an intentional omission from the schedules of assigned property, of items of valuable property, is sufficient to establish a fraudulent intent. Referring to this subject, Finch, J., said: "The intentional omission, calculated to deceive, and to lull into slumber and inactivity the interest and diligence of the creditor, would plainly argue a fraudulent purpose. Not so, however, if shown to have been unintentional, and the result of accident or oversight. It would be hard to find any schedules absolutely perfect, or any debtor who could inventory every item of his property with strict accuracy. Room must be allowed for honest mistake, and possibly even for careless and thoughtless error; but, where the omission cannot thus be explained or excused, the inference of a fraudulent intent must follow."[2] Preferring fictitious claims will constitute a ground for attacking an assignment on the ground of fraud.[3] The motive to prevent creditors from gaining a preference will of course not avoid the assignment.[4] It may be here remarked that if an assignment is made in the form and manner provided by law, and duly recorded so as to pass all the property of the assignor, it is difficult to see how the motive existing in the assignor's mind can affect its validity. If in morals the motive be a bad one, yet in law it produces no forbidden result. In so far as it hinders or delays creditors it is a lawful hindrance and delay, and cannot be held

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the consummation of an illegal agreement made contemporaneously with the deed."

[1] Hill v. Woodbury, 1 C. C. A. 206, 49 Fed. Rep. 138; Baer v. Rooks, 2 C. C. A. 76, 50 Fed. Rep. 898.

[2] Shultz v. Hoagland, 85 N. Y. 469. See Baird v. Mayor, etc., of N. Y., 96 N. Y. 593. Beardsley v. Frame, 85 Cal. 134, 24 Pac. Rep. 721.

[3] Roberts v. Vietor, 130 N. Y. 585, 29 N. E. Rep. 1025.

[4] See § 341. Horwitz v. Ellinger, 31 Md. 504.

fraudulent. The commission of a lawful act is not made unlawful by the fact that it proceeded from a malicious motive.[1]

§ 321. **Good faith.** — The term "good faith,"[2] if interpreted to mean "sincerity or honesty of purpose," can scarcely be applied in that sense to voluntary assignments, for these instruments are often annulled from considerations of public policy in cases where nothing was more foreign to the intention of the debtor than a dishonest design considered as an emotion. The usual presumption of honesty and good faith incident to acts and transactions generally,[3] appertains to a voluntary assignment, and the instrument will be upheld where the language contained in it justifies a construction which will support it.[4] A mere mistake in the making of the inventory will not invalidate an assignment.[5]

§ 322. **Void on its face.** — An assignment for the benefit of creditors may undoubtedly contain a clause so plainly indicative of the fraudulent intent pointed out by the statute, or recognized by the policy of the law, "as to carry its death-wound upon its face." An instance of this might be a gratuitous provision out of the assigned property for the insolvent assignor or his family.[6] The New

[1] Wilson v. Berg, 88 Pa. St. 172, 1 Am. Insolv. Rep. 169; Jenkins v. Fowler, 24 Pa. St. 308; Fowler v. Jenkins, 28 Pa. St. 176; Glendon Iron Co. v. Uhler, 75 Pa. St. 467; Smith v. Johnson, 76 Pa. St. 191.

[2] See Wood v. Conrad, 2 S. Dak. 334, 50 N. W. Rep. 95.

[3] See §§ 5, 6, 224, 271.

[4] Townsend v. Stearns, 32 N. Y. 209, 218; Brainerd v. Dunning, 30 N. Y. 211; Campbell v. Woodworth, 24 N. Y. 304; Shultz v. Hoagland, 85 N. Y. 464; Coyne v. Weaver, 84 N. Y. 386, and cases cited.

[5] Roberts v. Buckley, 145 N. Y. 215, 39 N. E. Rep. 966.

[6] Nightingale v. Harris, 6 R. I. 329; criticised in Gardner v. Commercial Nat. Bank, 13 R. I. 155. Danforth, J., said, in McConnell v. Sherwood, 84 N. Y. 526: "Where, upon the face of an assignment or by proof *aliunde*, it appears to have been made with intent to hinder or delay creditors, it affords no protection to the assignee against a sheriff, who seeks to enforce by execution a judgment against the debtor."

York cases clearly establish the rule that where the assignment shows upon its face that it must necessarily have the effect of hindering and defrauding the creditors of the assignor, it is conclusive evidence of a fraudulent intent, and may be avoided.[1] The actual motive, emotion or belief of the debtor in such cases is immaterial. Where it is apparent from the face of the instrument itself that it is a conveyance to the use of the assignor, it is the duty of the court trying the cause to tell the jury, as a matter of law, that the conveyance is fraudulent as against creditors.[2] In the case of Dunham v. Waterman,[3] Mr. Justice Selden, referring to the opinion of the Court of Errors, in Cunningham v. Freeborn,[4] remarked: "It follows from the reasoning of Mr. Justice Nelson, which I regard as unanswerable, that wherever an assignment contains provisions which are calculated *per se* to hinder, delay or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding, if in opposition to the plain inference to be drawn from the face of the instrument. A party must in all cases be held to have intended that which is the necessary consequence of his acts."[5]

§ 322a. **Power to reform.** — It seems clear on principle and authority that an assignment void on its face cannot be reformed by an action so as to cut off a lien of a judgment recovered after the execution of the illegal

[1] Kavanagh v. Beckwith, 44 Barb. (N. Y.) 192; Goodrich v. Downs, 6 Hill (N. Y.) 438. See Wakeman v. Dalley, 44 Barb. (N Y.) 503, affi'd 51 N. Y. 27; Griffin v. Marquardt, 21 N. Y. 121; Coleman v. Burr, 93 N. Y. 31. See Marks v. Bradley, 69 Miss. 1, 10 So. Rep. 922; Weis v. Dittman, 4 Tex. Civ. App. 35, 23 S. W. Rep. 229; Riley v. Carter, 76 Md. 581, 25 Atl. Rep. 667; s. p. Bigelow v. Stringer, 40 Mo. 205, and cases cited.

[2] Bigelow v. Stringer, 40 Mo. 205.

[3] 17 N. Y. 9, 21.

[4] 11 Wend. (N. Y.) 240-251.

[5] See opinion of Ingraham, J., in Wakeman v. Dalley, 44 Barb. (N. Y.) 503; Gere v. Murray, 6 Minn. 305. See §§ 9, 10.

assignment and before its reformation.[1] A clerical error in an assignment where the true meaning of the instrument cannot be doubted will not avoid it, and no reformation is essential.[2]

§ 322b. **Purchaser under void assignment.** — An assignee under an assignment that might be declared fraudulent and void as to creditors may nevertheless convey a good title to a purchaser for valuable consideration who had no notice of the fraud of the assignor.[3] As elsewhere shown, an assignee will be protected, as regards acts done in good faith, before any other creditor has secured a lien.[4]

§ 323. **Constructive frauds defined by Story.** — "By constructive frauds," observes Mr. Justice Story, "are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their *tendency* to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law, as within the same reason and mischief as acts and contracts done *malo animo*." [5] Again the commentator says: "Another class of constructive frauds upon the rights, interests, or duties of third persons, embraces all those agreements and other acts of parties, which *operate* directly or virtually to *delay*, *defraud*, or deceive creditors. Of course we

[1] Sutherland v. Bradner, 116 N. Y. 410, 416, 22 N. E. Rep. 554; Whitaker v. Gavit, 18 Conn. 522; Whitaker v. Williams, 20 Conn. 98; Farrow v. Hayes, 51 Md. 504. In Van Winkle v. Armstrong, 41 N. J. Eq. 402, 5 Atl. Rep. 449, a bill was filed to rectify an assignment by inserting words of inheritance therein. The suit was before the court on motion.

[2] Smith v. Bellows, 3 N. Y. State Rep. 305. Compare Fairchild v. Lynch, 42 N. Y. Super. 265.

[3] Wilson v. Marion, 147 N. Y. 589, 42 N. E. Rep. 190.

[4] Nat. Butchers' & D. Bk. v. Hubbell, 117 N. Y. 397, 22 N. E. Rep. 1031. See § 319a.

[5] 1 Story's Eq. Jur. § 258.

do not here speak of cases of express and intentional fraud upon creditors, but of such as virtually and indirectly operates the same mischief, by abusing their confidence, misleading their judgment, or secretly undermining their interest. It is difficult, in many cases of this sort, to separate the ingredients which belong to positive and intentional fraud, from those of a mere constructive nature, which the law pronounces fraudulent upon principles of public policy. Indeed, they are often found mixed up in the same transaction."[1]

§ 324. **Assignments contravening statutes.** — The burden rests upon the attacking party to point out the illegal provision, or to establish the dishonest purpose in the assignment.[2] It may be stated, as a general rule, that an assignment which contravenes the provisions of a statute, or vests the assignee with a discretion contrary to the terms of an express provision of law, and authorizes him to effect sales of the assigned property in a manner not permitted by the statute, will be declared void.[3] This principle is learnedly discussed in a case in the Supreme Court of the United States.[4] The assignment provided as follows: "The party of the second part [the assignee] shall take possession of all and singular the property and effects hereby assigned, and sell and dispose of the same, either at public or private sale, to such person or persons, for such prices and on such terms and conditions, either for cash or upon credit, as in his judgment may appear best and most for the interest of the parties concerned,

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[1] 1 Story's Eq. Jur. § 349.

[2] Roberts v. Buckley, 145 N. Y. 215, 39 N. E. Rep. 966.

[3] Jaffray v. McGhee, 107 U. S. 361-365, 2 S. C. Rep. 367; Collier v. Davis, 47 Ark. 369, 1 S. W. Rep. 684. See Peck v. Burr, 10 N. Y. 294; Macgregor v. Dover & Deal R. R. Co., 18 Q. B. 618; Jackson v. Davison, 4 Barn. & Ald. 691; Miller v. Post, 1 Allen (Mass.) 434; Parton v. Hervey, 1 Gray (Mass.) 119; Hathaway v. Moran, 44 Me. 67.

[4] Jaffray v. McGhee, 107 U. S. 361, 2 S. C. Rep. 367.

and convert the same into money." It will be observed that the assignment did not, by its terms prevent the assignee, in the administration of his trust, from following the directions of the statute in all particulars. Counsel contended that the assignment was valid (1) because the discretion given the assignee by the assignment left him at liberty to follow the law, and (2) because even if the assignment required him to administer the trust in a manner different from that prescribed by law, only such directions as conflicted with the law would be void, and the assignment itself would remain valid. The Supreme Court of the United States, however, did not adopt this view, but followed the local construction given to the assignment law of Arkansas by the Supreme Court of that State in Raleigh v. Griffith,[1] to the effect that such an assignment was void as to creditors, and held that the construction put upon the law by the highest court of the State where the assignment was made, was binding on the courts of the United States.[2] The substance of the opinion in Raleigh v. Griffith,[3] is that the statute is disregarded in the deed of assignment, the assignee being authorized to sell at private or public sale, and for cash or on credit. The assignee was vested with a discretion to prolong the closing of the trust for an indefinite period. The legislature having deemed it expedient, as a matter of public policy, to require an assignee for the benefit of creditors, to sell the property within a specified time and prescribed manner, the dissenting creditors are not barred by a deed made in direct contravention of a plain provision of the statute. The provisions of the statute are mandatory and not directory,[4]

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[1] 37 Ark. 153.

[2] Brashear v. West, 7 Pet. 608; Sumner v. Hicks, 2 Black 532; Leffingwell v. Warren, 2 Black 599; South Branch Lumber Co. v. Ott, 142 U. S. 622, 12 S. C. Rep. 318. See § 71.

[3] 37 Ark. 153.

[4] See French v. Edwards, 13 Wall. 506.

and it follows, in the words of Mr. Justice Woods, that an assignment "which vests the assignee with a discretion contrary to the mandates of the statute, and in effect authorizes him to sell the property conveyed thereby in a method not permitted by the statute, must be void, for contracts and conveyances in contravention of the terms or policy of a statute will not be sanctioned." [1]

§ 325. **Transfer to prevent sacrifice of property.** — Superfluous recitals as to the intention with which the voluntary conveyance was made sometimes prove fatal to the paper. In German Insurance Bank v. Nunes [2] the material part of the deed read: "That whereas, the said first party is indebted to sundry persons in various sums, amounting in the aggregate to about thirty-eight thousand dollars, and is the owner of a large amount of assets, estimated to be worth more than fifty thousand dollars; and whereas, the said first party is unable to convert his said assets into money fast enough to discharge his said indebtedness as it matures, and is desirous that the same shall not be sacrificed, but so managed and disposed of that they will realize their fair value at as little cost as possible, and satisfy his creditors, in full, and leave a residue for him, etc." The court said, in the course of the opinion, that it was the intention of the parties which controlled, and that this intention could not be better determined than from the language employed in the conveyance. The deed declared that it was made "to prevent a sacrifice" of the property and "to leave a residue" to the debtor. It also avowed in the instrument that the assets were largely in excess of the liabilities, and it would seem

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[1] Jaffray v. McGhee, 107 U. S. 365, 2 S. C. Rep. 367. Citing Peck v. Burr, 10 N. Y. 294; Macgregor v. Dover & Deal R. R. Co., 18 Q. B. 618; Jackson v. Davison, 4 Barn. & Ald. 695; Miller v. Post, 1 Allen (Mass. 434; Parton v. Hervey, 1 Gray (Mass.) 119; Hathaway v. Moran, 44 Me. 67.

[2] 80 Ky. 334, 335.

to follow from the language that the primary object of the deed was not to secure creditors, but, on the contrary, to obstruct them in the enforcement of their legal remedies in order that the debtor might be benefited. The deed was declared to be fraudulent upon its face and was set aside.[1]

§ 326. **Reservations — Exempt property.** — A favorite ground of attacking voluntary assignments made by debtors for the benefit of creditors is, that a reservation has been made in the debtor's interest,[2] or that there has not been a complete surrender of the debtor's dominion and control over the assigned property.[3] The question comes up in various phases. Davis, P. J., observes: "It is well settled that the reservation of the least pecuniary character by the assignor or his family, and any device to cover up the property for the benefit of the assignor, or secure to him directly or indirectly any benefit, is fraudulent, and has always received the condemnation of the courts. The debtor who makes an assignment of this character must devote all his property to the payment of his debts, except such as is by law exempt from execution. The withholding of any considerable sum of money at the time of making an assignment, from the assignee, must, we think, in some form be explained, otherwise it is sufficient to establish a fraudulent intent."[4] An assignment in Michigan is void which does not include the assignor's

[1] See, also, Vernon v. Morton, 8 Dana (Ky.) 247, 264: Van Nest v. Yoe, 1 Sandf. Ch. (N. Y.) 4; Ward v. Trotter, 3 Mon. (Ky.) 1; Bigelow v. Stringer, 40 Mo. 195.

[2] Means v. Dowd, 128 U. S. 273, 9 S. C. Rep. 65; McReynolds v. Dedman, 47 Ark. 351, 1 S. W. Rep. 552; Grover v. Wakeman, 11 Wend. (N. Y.) 187, 1 Am. L. Cas. 63: Goodrich v. Downs, 6 Hill (N. Y.) 438.

[3] In Carpenter v. Underwood, 19 N. Y. 520, it was held that an express exception from the grant of a portion of the property of the assignor, there being no reservation of benefit in the property actually assigned, did not render the instrument void. See Matter of Gordon, 49 Hun (N. Y.) 372, 3 N. Y. Supp. 589: Dow v. Platner, 16 N. Y. 562.

[4] White v. Fagan, 25 N. Y. Daily Reg. p. 269. (Feb. 8, 1884). See 18 Weekly Dig. (N. Y.) 358.

real estate.[1] A reservation of $800 worth of property[2] renders an assignment void on its face. The fact that the money so reserved is to be used for the purpose of a compromise is no excuse.[3] Nor, generally, that it was paid over to the assignee after the action to set aside the assignment was brought.[4] If, however, the amount retained was small and was handed over to the assignee before the suit was brought, the assignment will not necessarily be set aside.[5] An assignment is invalid if the debtor prefers his landlord's claim for rent of a dwelling-house with intent to secure occupation for himself and family subsequent to the assignment without further payment[6] An assignment for the benefit of creditors who will accept sixty per cent., reserving the surplus to the debtor, is manifestly invalid.[7]

We have already shown that according to the weight of the best authority, a conveyance of a debtor's exempt property or homestead[8] cannot be annulled as fraudulent. The same principle appertains in the law regulating fraudulent voluntary assignments reserving property exempt by statute. The assignment is not rendered void for the reason that creditors are "not hindered or delayed by the reservation of that which they have no right to touch."[9] This is an exception to the rule clearly deduci-

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[1] Price v. Haynes, 37 Mich. 487, per Cooley, C. J., 1 Am. Insolv. Rep. 138.

[2] Clark v. Robbins, 8 Kan. 574.

[3] Kleine v. Nie, 88 Ky. 542, 11 S. W. Rep. 590.

[4] Coursey v. Morton, 132 N. Y. 556, 30 N. E. Rep. 231.

[5] Fay v. Grant, 53 Hun, 44, 5 N. Y. Supp. 910, affi'd 126 N. Y. 624, 27 N. E. Rep. 410. See, also, Rothschild v. Solomon, 52 Hun (N. Y.) 486, 5 N. Y. Sup. 865.

[6] Elias v. Farley, 2 Abb. Ct. App. Dec. N. Y. 11.

[7] *In re* Beadle, 5 Sawyer 351.

[8] See Reeves v. Peterman, 109 Ala. 368, 19 So. Rep. 512.

[9] Hildebrand v. Bowman, 100 Pa. St. 582. See Mulford v. Shirk, 26 Pa. St. 474; Ehrisman v. Roberts, 68 Pa. St. 311; Richardson v. Marqueze, 59 Miss. 80, 42 Am. Rep. 353. See Derby v. Weyrich, 8 Neb. 176, 30 Am. Rep. 827; Dow v. Platner, 16 N. Y. 562; Heckman v. Messinger, 49 Pa. St. 465. Red River Valley Bank v. Freeman, 1 N. Dak. 196, 46 N. W. Rep. 36; Richardson v. Stringfellow, 100

ble from the cases, "that no debtor can, in an assignment, make a reservation at the expense of his creditors of any part of his income or property for his own benefit, nor can he stipulate for any advantage either to himself or family."[1] If exempt property is not reserved it seems it cannot be claimed.[2] Another reservation must be considered.

§ 327. **Reserving surplus.** — In cases where a debtor has assigned all of his property in trust to pay certain specified creditors, and then, without making provision for other creditors, to reconvey the residue of the property to the debtor, the instrument was declared fraudulent upon its face. The court held that it could not be made effectual by showing that there was, as matter of fact, no possible surplus resulting to the debtor after the preferred creditors were paid. Bronson, J., observed: "The parties contemplated a surplus, and provided for it; and they are not now at liberty to say that this was a mere form which meant nothing. And although it should ultimately turn out that there is no surplus, still the illegal purpose which destroys the deed is plainly written on the face of the instrument, and there is no way of getting rid of it."[3] In Knapp v. McGowan,[4] Earl, J., said: "An insolvent, and even a solvent debtor cannot convey all his property to trustees to pay a portion of his creditors, with a provision that the surplus shall be returned to him, leaving his other creditors unprovided for; because such

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Ala. 416, 14 So. Rep. 283; Bobbitt v. Rodwell, 105 N. C. 236, 11 S. E. Rep. 245. See §§ 46–50.

[1] McClurg v. Lecky, 3 P. & W. (Pa.) 91.

[2] Carroll v. Else, 75 Md. 301, 23 Atl. Rep. 740.

[3] Griffin v. Barney, 2 N. Y. 371. See Smith v. Howard, 20 How. Pr. (N. Y.) 128. Compare Nicholson v. Leavitt, 6 N. Y. 521. The defect cannot be remedied by a supplementary assignment, so as to cut off liens acquired in the meantime. Sutherland v. Bradner, 116 N. Y. 410, 22 N. E. Rep. 554. The New York rule is disapproved in Muchmore v. Budd, 53 N. J. Law 369, 22 Atl. Rep. 518.

[4] 96 N. Y. 85.

a conveyance ties up his property in the hands of his trustees, places it beyond the reach of his creditors by the ordinary process of the law, and thus hinders and delays them, and is, therefore, void as to the creditors unprovided for."[1] The Supreme Court of Nebraska,[2] however, refused to follow this doctrine, and considered that such a reservation was partial and only incidental. It merely stipulated for that which, had it been omitted, the law would have implied, and required to be done.[3] So in Hubler v. Waterman,[4] the court observed: "The reversionary clause is mere surplusage, for it would have been implied if it had not been expressed."[5] The principle set forth in these latter cases certainly embodies the more logical rule. There is, however, an obvious distinction in these cases. In Griffin v. Barney the surplus was to revert before *all* the creditors were paid, which was palpably fraudulent, while in the other cases the surplus contemplated was that remaining after *all* the creditors had been satisfied. Of course the law will not permit a debtor in failing circumstances to convey all his property to trustees, with a view to exempt it from execution for an indefinite time, to authorize them to hold it against creditors until the profits pay all charges, expenses and debts, and then to reconvey it or permit it to revert to the original owner. Property cannot be thus withdrawn from the operation of the law in its due course against the consent of existing creditors.[6] A provision in an assignment to a creditor to the effect that any surplus should be paid to another creditor has been held to be valid.[7]

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[1] See Sutherland v. Bradner, 116 N. Y. 410, 22 N. E. Rep. 554.

[2] Morgan v. Bogue, 7 Neb. 433.

[3] See Curtis v. Leavitt, 15 N. Y. 9; Coulter v. Lumpkin, 88 Ga. 277, 14 S. E. Rep. 614; Bluthenthal v. Magness, 97 Ala. 530, 13 So. Rep. 7.

[4] 33 Pa. St. 414.

[5] See S. P., Johnson v. McAllister, 30 Mo. 327; Richards v. Levin, 16 Mo. 598.

[6] Arthur v. Commercial & R. R. Bank, 17 Miss. 433.

[7] Perkins v. Hutchinson, 17 R. I. 450, 22 Atl. Rep. 1111.

§ 328. **Releases exacted in assignments.** — Voluntary assignments exacting releases from creditors are looked upon with great disfavor by the courts.[1] The law seems to be settled that assignments will be declared fraudulent and void if creditors are preferred *on condition* of their subsequently executing releases of their respective demands. The reason is obvious.[2] It is a clear attempt on the part of the debtor to coerce his creditors to accede to his terms,[3] and a withholding of his property from them unless they do so accede. As was observed in Hyslop v. Clarke :[4] "It does not actually give a preference, but is, in effect, an attempt on the part of the debtors to place their property out of the reach of their creditors, and to retain the power to give such preference at some future period. . . . . If they can keep it locked up in this way in the hands of the trustees, and set their creditors at defiance for three months, they may do so for three years, or for any indefinite period."[5] The right of giving preferences cannot be so exercised as to secure to the debtor the future control of the assigned property or its proceeds, as continuing the business in another's name.[6]

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[1] Hubbard v. McNaughton, 43 Mich. 224. See Lawrence v. Norton, 4 Woods 406; Leitch v. Hollister, 4 N. Y. 211; Baldwin v. Peet, 22 Tex. 708; Barney v. Griffin, 2 N. Y. 365; Bennett v. Ellison, 23 Minn. 242, 1 Am. Insolv. Rep. 36; Curtain v. Talley, 46 Fed. Rep. 580; Oliver-Finnie Grocer Co. v. Miller, 53 Mo. App. 107; Turner v. Douglass, 77 Tex. 619, 14 S. W. Rep. 221; McWilliams v. Cornelius, 66 Tex. 301, 17 S. W. Rep. 767; Focke v. Blum, 82 Tex. 436, 17 S. W. Rep. 770.

[2] Spaulding v. Strang, 38 N. Y. 12; Brown v. Knox, 6 Mo. 303; Bennett v. Ellison, 23 Minn. 242, 1 Am. Insolv. Rep. 36; May v. Walker, 35 Minn. 194; Greeley v. Dixon, 21 Fla. 425; cf. Stewart v. Spenser, 1 Curt 157, 23 Fed. Cas. 72. Clayton v. Johnson, 36 Ark. 406; Wolf v. Gray, 53 Ark. 75, 13 S. W. Rep. 512. In that State preference of assenting creditors is allowed provided that all the surplus is devoted to payment of non-assenting creditors.

[3] Oliver-Finnie Grocer Co. v. Miller, 53 Mo. App. 107.

[4] 14 Johns. (N. Y.) 458.

[5] See Grover v. Wakeman, 11 Wend. (N. Y.) 187.

[6] Haydock v. Coope, 53 N. Y. 68.

It has been considered competent for a debtor in failing circumstances to make an assignment for the benefit of creditors, providing that accommodation creditors shall be paid first; secondly, those creditors who had executed a conditional release should receive fifty per cent.; and thirdly, the residue of the creditors should be paid.[1] The whole estate was by this instrument devoted to the payment of the debts. It was considered that in no sense could it be said that an agreement by a debtor with a creditor to prefer him for one-half of his demand in an assignment, on condition or in consideration that the balance should be released, was a fraud upon those who refused to become parties to the contract. These cases certainly go to the verge in upholding an assignment of this character;[2] and where it is apparent from the face of the deed, or is a moral certainty, that nothing will be left to the non-assenting creditors, the court will annul the assignment.[3]

§ 329. **Preferring claims in which assignor is partner—Rights of survivor.**—It was contended by counsel in Welsh v. Britton,[4] that if an insolvent person made an assignment for creditors, and preferred a debt due another firm, one member of which was also a member of the assigning firm, this constituted such a reservation to one of the assignors as would avoid the assignment. The case of Kayser v. Heavenrich[5] was cited, but the court said that it could not be said to establish so broad a principle. In that case a preference was given to one Lowentholl, and one of the assigning firm was an equal partner with Lowentholl in the preferred claim. This was held to be

[1] Spaulding v. Strang, 37 N. Y. 135, 38 N. Y. 9; explained, Haydock v. Coope, 53 N. Y. 74. Compare Nat. Park Bank v. Whitmore, 104 N. Y. 304, 10 N. E. Rep. 524; Smith v. Munroe, 1 App. Div. (N. Y.) 77, 37 N. Y. Supp. 62.

[2] Seale v. Vaiden, 4 Woods 661.

[3] Seale v. Vaiden, 4 Woods 661. See Lawrence v. Norton, 4 Woods 406.

[4] 55 Tex. 122.

[5] 5 Kan. 324.

a secret trust for the benefit of that member of the firm and to invalidate the assignment. The fact of secrecy was also given prominence. On the other hand, the case of Fanshawe v. Lane[1] asserts the absolute right of an assigning firm to prefer such debts. The Supreme Court of Texas followed this latter case. In Bonwit v. Heyman,[2] it was held that a preference by members of a partnership of another firm of which they are the sole partners, will not be upheld unless it be clearly shown that the transaction is free from fraud. We may here state that the insolvent cannot delegate to the assignee the power to give preferences at his discretion.[3]

As we have seen, a special partner cannot be preferred for the amount of his investment,[4] and where a limited partnership becomes insolvent its assets are a special fund for the payment of its debts except those due to the special partner.[5] A surviving partner may make a general assignment of the firm assets.[6] Mr. Justice Harlan said: "But while the surviving partner is under a legal obligation to account to the personal representative of a deceased partner, the latter has no such lien upon joint assets as would prevent the former from disposing of them for the purpose of closing up the partnership affairs. He has a standing in court only through the equitable right which his intestate had, as between himself and the surviving partner, to have the joint property applied in good faith for the liquidation of the joint liabilities. As with the concurrence of all of the partners the joint property could have been sold or assigned, for the

[1] 16 Abb. Pr. (N. Y.) 82.

[2] 43 Neb. 537, 61 N. W. Rep. 716.

[3] Boardman v. Halliday, 10 Paige (N. Y.) 223.

[4] Whitcomb v. Fowle, 10 Daly (N. Y.) 23, 1 Am. Insolv. Rep. 160.

[5] Innes v. Lansing, 7 Paige (N. Y.) 583.

[6] Emerson v. Senter, 118 U. S. 3, 6 S. C. Rep. 981; Williams v. Whedon, 109 N. Y. 341, 16 N. E. Rep. 365; Haynes v. Brooks, 42 Hun (N. Y.) 528; Beste v. Burger, 17 Abb. N. C. (N. Y.) 162, and note on the rights of surviving partners, and representatives of a deceased partner.

benefit of preferred creditors of the firm, the surviving partner—there being no statute forbidding it—could make the same disposition of it. The right to do so grows out of his duty, from his relations to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay; and his authority to make such a preference — the local law not forbidding it — cannot, upon principle, be less than that which an individual debtor has in the case of his own creditors. It necessarily results that the giving of preference to certain partnership creditors was not an unauthorized exertion of power by Moores, the surviving partner."[1] A preference given by a board of directors to a firm of which two of them are members was held void.[2]

§ 330. **Authorizing trustee to continue business.** — An assignment drawn precisely as it ought to be will not undertake to speak to the assignee in detail in regard to his duties under the trust. These duties, unless the creditors themselves direct otherwise, are simply to convert the estate into money and pay the debts in the order and with the preferences indicated in the instrument.[3] There are numerous cases reported in which assignments in trust for the benefit of creditors have been sustained, although they contained provisions for the continuance of the business of the assignor, either by himself or by his trustee.[4] It will be found upon examination that, in

[1] Emerson v. Senter, 118 U. S. 3, 8, 6 S. C. Rep. 981.

[2] Hulings v. Hulings Lumber Co., 38 W. Va. 351, 18 S. E. Rep. 620.

[3] Ogden v. Peters, 21 N. Y. 24. "The true principle applicable to all such cases is, that a debtor who makes a voluntary assignment for the benefit of his creditors may direct, in general terms, a sale of the property and collection of the dues assigned, and may also direct upon what debts and in what order the proceeds shall be applied; but beyond this can prescribe no conditions whatever as to the management or disposition of the assigned property." Selden, J., in Dunham v. Waterman, 17 N. Y. 20; Jones v. Syer, 52 Md. 211.

[4] De Forest v. Bacon, 2 Conn. 633; Kendall v. The New England Carpet

many of these cases, the business authorized to be carried on by the assignment was merely ancillary to winding up the debtor's affairs, and that the authority was given with the view of more effectually promoting the interests of the creditors.[1] In cases where the authority is given chiefly for the benefit of the debtor,[2] or where it is intended or calculated to hinder and delay creditors for an unreasonable period in the collection of their debts, it renders the deed fraudulent and void.[3]

§ 331. **Illustrations and authorities.** — Authorities relating to this class of voluntary assignments are numerous. In Owen v. Body,[4] the assignment was made to trustees for the benefit of creditors, giving preferences, and contained provisions investing the trustees with power to carry on the trade of the debtor, and in furtherance of that purpose to lay out money in payment of rent and keeping up the stock in trade. The deed was adjudged void as being an instrument to which creditors could not reasonably be expected to assent. Lord Wensleydale, in giving his opinion in the House of Lords in the case of Wheatcroft v. Hickman,[5] referring to this deed said that the provisions contained in it allowing the effects of the debtor, which ought to have been divided equally amongst his creditors, to be put in peril by being employed in trade, prevented it from being a fair deed and good against creditors. In American Exchange Bank v. Inloes,[6] the deed contained a provision empowering the

Co., 13 Conn. 383; Foster v. Saco Manuf. Co., 12 Pick. (Mass.) 451; Woodward v. Marshall, 22 Pick. (Mass.) 468; Hitchcock v. Cadmus, 2 Barb. (N. Y.) 381; Ravisies v. Alston, 5 Ala. 297; Janes v. Whitbread, 11 C. B. 406; Stoneburner v. Jeffreys, 116 N. C. 78, 21 S. E. Rep. 29.

[1] See De Wolf v. Sprague Mfg. Co., 49 Conn. 326.

[2] Acme Lumber Co. v. Hoyt, 71 Miss. 106, 14 So. Rep. 64.

[3] Webb v. Armistead, 26 Fed. Rep. 70; Jones v. Syer, 52 Md. 211.

[4] 5 Adol. & El. 28, 31 Eng. C. L. 254; Acme Lumber Co. v. Hoyt, 71 Miss. 106, 14 So. Rep. 64; Jones v. Syer, 52 Md. 211; Renton v. Kelly, 49 Barb. (N. Y.) 536.

[5] 9 C. B. [N. S.] 101.

[6] 7 Md. 380.

trustee at his discretion to sell the property conveyed gradually, in the manner and on the terms in which, in the course of their business, the assignors had sold and disposed of their merchandise. For that reason the deed was adjudged void. Mason, J., said: "Without adverting to other objectionable, if not fatal, provisions in this deed, the one to which we have just referred is sufficient, in the judgment of this court, to render the deed null and void as against creditors. It simply seeks through the instrumentality of a trustee, to provide for carrying on the business of the concern in the same manner in which it had been before conducted, and for an indefinite period, free of all control or interference on the part of creditors. Surely if such a provision in a deed is not calculated to hinder and delay creditors, we are at a loss to know what could have such an effect, short of a conveyance in trust for the benefit of the grantor himself. A debtor cannot thus postpone his creditors to an indefinite period without their assent. A conveyance which thus attempts to deprive creditors of their just rights to enforce their claims against the property of their debtor, by placing it beyond their control for an uncertain and indefinite period, must be regarded in conscience and law as a fraud." In a later case in the same State[1] an assignment in trust for the benefit of creditors, authorizing the trustee to carry on and conduct the business "for such time as in his judgment it shall be beneficial to so do," or to sell all the goods and stock in trade "at such times, in such manner, and for such prices as he may deem proper," was adjudged void as against creditors. The court said: "It is obvious, the certain effect of this clause would be to hinder and delay creditors; and as against them such provision renders the deed utterly void. It is an attempt on the part of the debtor to place

[1] Jones v. Syer, 52 Md. 211.

his property, for an uncertain and indefinite period, beyond the reach of his creditors, and to make their rights in a great measure dependent upon the uncontrolled discretion of a trustee of the debtor's own selection. The law will tolerate no such attempt, but treats the act as a fraud upon creditors, and the instrument of conveyance as simply void as against them." [1] Where the deed required the trustee to carry on a school for eighteen months, and if unprofitable to pay the loss from the assigned estate the instrument was avoided.[2]

§ 332. **Delay — Sales upon credit.** — An insolvent debtor, it is held in New York, cannot deprive his creditors of

[1] See, also, Dunham v. Waterman, 17 N. Y. 9. Authority given in the assignment to the assignee to finish up unfinished work will not necessarily avoid the instrument. Robbins v. Butcher, 104 N. Y. 575, 11 N. E. Rep. 272. In this case the assignment contained the following clause : " And it is further provided that should it be necessary and to the better performance of the trust that the party of the second part shall have full power and authority to finish such work as is unfinished, to complete such buildings as are incompleted, and to pay all necessary charges and expenses for such completion prior to the payment of all debts and liabilities hereinbefore mentioned and provided." Finch, J., said : " The repetition of the word 'that' permits it to be said that this provision is an unfinished sentence and confers no authority at all ; but no such criticism is made, and the meaning of the language is more accurately expressed by disregarding the word 'that' where it occurs the second time. Both parties have argued the case upon such construction. The appellant claims that the provision confers upon the assignee an authority derived from the assignor to unduly delay the execution of the trust and divert the trust funds, in the exercise of his discretion, and free from the supervision and control of the courts, and so is fraudulent and void upon its face. The respondent contends that the authority given is upon a condition which rests in the discretion and judgment of the courts, and if exercised by the assignee without their prior permission and approval, must be so exercised at his peril and subject to their prohibition or direction at any moment, and upon the application of any person interested or aggrieved, and so does not involve an intent to hinder, delay, or defraud the creditors of the assignor. We think the latter view of the instrument discloses its true and intended meaning." A provision compelling the trustee to sell at the usual retail prices will vitiate the assignment. Gregg v. Cleveland, 82 Tex. 187, 17 S. W. Rep. 777 ; see also Kansas City Packing Co. v. Hoover, 1 D. C. Ct. of App. 274 ; Chafee v. Blatchford, 6 Mackey (D. C.) 459.

[2] Catt v. Wm. Knabe & Co. Manuf. Co., 93 Va. 741, 26 So. Rep. 246. See Sheppards v. Turpin, 3 Gratt. (Va.) 373.

their right to have his property converted into money without delay. He can make an assignment with preferences, but he cannot authorize his assignee to sell on credit.[1] No delay is permitted other than such as is reasonably necessary to secure the application of the property to the payment of his debts.[2] In Dunham v. Waterman,[3] Selden, J., following the reasoning of Nelson, J., in Cunningham v. Freeborn,[4] said: "That wherever an assignment contains provisions which are calculated *per se* to hinder, delay, or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding, if in opposition to the plain inference to be drawn from the face of the instrument. A party must in all cases be held to have intended that which is the necessary consequence of his acts."[5] It follows that when this objectionable feature is embodied in the face of the assignment, the court itself will stamp it as fraudulent. A provision that realty embraced in the assignment shall be held for two years, and then sold partially upon credit renders the assignment void.[6] In Beus v. Shaughnessy[7] the insolvent directed that the "times, places, and terms of selling the property shall be agreed on by the trustee and the majority in interest of the first and second-class creditors," and that if they did not agree, then two-thirds of all of the creditors should direct such "times, places, and terms." The court said there seemed

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[1] Nicholson v. Leavitt, 6 N. Y. 510; Kansas City Packing Co. v. Hoover, 1 D. C. Ct. App. 268; Rosenstein v. Coleman, 18 Mont. 463, 45 Pac. Rep. 1081; Barney v. Griffin, 2 N. Y. 365. Compare Brackett v. Harvey, 91 N. Y. 220.

[2] Bennett v. Ellison, 23 Minn. 242, 1 Am. Insolv. Rep. 36. See Keevil v. Donaldson, 20 Kans. 165, 1 Am. Insolv. Rep. 153.

[3] 17 N. Y. 21.

[4] 11 Wend. (N. Y.) 251–254.

[5] See Coleman v. Burr, 93 N. Y. 31; also §§ 9, 10.

[6] Bank v. Martin, 96 Tenn. 3, 33 S. W. Rep. 565.

[7] 2 Utah 499. See McCleery v. Allen, 7 Neb. 21.

to be but one question to consider, and that turned entirely upon the construction to be placed upon the words "terms of selling," whether these words in the deed of trust embraced the power to sell upon credit. Continuing, it was said that the courts generally held that deeds of assignment, giving authority to the assignee to sell upon credit, were fraudulent and void as to creditors not assenting thereto, and especially was this the case where the deeds made preferences between creditors. In New York this general rule is fully recognized. The case of Kellogg v. Slauson,[1] at first reading, would seem to be a departure from the rule, but upon a more careful consideration it will be found to be consistent with it. The assignees in that case were authorized to sell the property "on such terms as in their judgment might be best for the parties concerned, and convert the same into money." The court, in upholding the assignment, said that this discretion must be exercised within legal limits. In Brigham v. Tillinghast[2] the case of Kellogg v. Slauson is referred to, and the court says that the words "convert the same into money," limited the disposition of the property to sales for cash, and that such was the purport of the ruling in that case. The same rule is reiterated in Rapalee v. Stewart.[3] The assignment held to be valid in the case of Sumner v. Hicks[4] contained language similar to that

[1] 11 N. Y. 302.

[2] 13 N. Y. 215.

[3] 27 N. Y. 311. "The true rule to be observed is this: An insolvent debtor may make an assignment of all his estate to trustees to pay his debts with or without preferences; but such assignees are bound to make an immediate application of the property. And any provision contained in the assignment which shows that the debtor, at the time of its execution, intended to prevent such immediate application, will avoid the instrument, because it shows that it was made with 'intent to hinder and delay creditors in the collection of their debts.' Such an intent expressed in the instrument or proved *aliunde*, is fatal alike by the language of our statute and the well-settled adjudications of the English and American courts." Brigham v. Tillinghast, 13 N. Y. 215 220.

[4] 2 Black 532.

found in Kellogg v. Slauson, and, indeed, the closing words of the objectionable provision were precisely the same, viz.: "And convert the same into money."[1] The inference from these cases is that if these last words had been omitted the assignments would have been held void as authorizing sales upon credit.

The word "term" signifies, among other things, "a limit," "a boundary." If we say the power of sale is granted without "limit," without "boundary," it can be exercised to an unlimited extent and without bounds. In the case of Beus v. Shaughnessy[2] there was no restriction whatever upon the power of sale granted to the trustees and a fixed proportion of the creditors. They were authorized to sell upon such "terms" as they might deem proper, and this power had no limits, no bounds. This broad grant certainly would necessarily embrace the power to sell upon credit.

§ 333. — In Wisconsin, in the case of Hutchinson v. Lord,[3] where the assignment empowered the assignee to sell in such manner and "upon such terms and for such prices as to him shall seem advisable," it was held that this language gave power to sell upon credit, which would necessarily operate to hinder and delay creditors, and rendered the assignment fraudulent and void. In the case of Keep v. Sanderson,[4] although the objectionable words were exactly those found in Kellogg v. Slauson, yet the court held that they conferred an authority to sell upon credit, and thus avoided the whole assignment. In Woodburn v. Mosher[5] the authority to the assignees was to convert the property into money "within convenient time as *to them* shall seem meet." It was held that the assignment was void upon its face. In Keep v.

[1] See Keep v. Sanderson, 12 Wis. 362.
[2] 2 Utah 499.
[3] 1 Wis. 286.
[4] 2 Wis. 42.
[5] 9 Barb. (N. Y.) 255.

Sanderson [1] it was decided that a clause in an assignment authorizing the assignee to sell and dispose of the assigned property "upon such terms and conditions as in his judgment may appear best and most to the interest of the parties concerned," was authority to sell on *credit*, and that it was void as to creditors, in accordance with the decision on the former appeal.[2]

§ 333a. **Exceptional rule.** — In other States a different rule is adopted, and it is held that a general power to give credit is perfectly consistent with good faith, and not only does not render the assignment fraudulent in law, but is not even a badge of fraud.[3]

§ 334. **Exempting assignee from liability.** — Another subterfuge of insolvent debtors must be noticed. In De Wolf v. Sprague Mfg. Co.[4] the deed contained a clause which provided that "in case the same (meaning the mill, etc.) are thus run by him or otherwise, he shall not be liable personally for the expenses or losses arising therefrom, but the same shall be chargeable to the trust fund vested in him." This was held in connection with the right to run the mills and print works, to furnish additional evidence of the fraudulent purpose for which the assignment was executed. A failing debtor cannot be permitted to put at hazard the trust fund which justly belongs to his creditors by authorizing the trustee to manage it without due prudence and caution. This question was before the New York Court of Appeals in Litchfield v. White.[5] In that case the assignment contained a clause by which it was mutually agreed between the parties to it that the

[1] 12 Wis. 361.

[2] A trustee in bankruptcy may sell the property of the estate on credit where he deems such action most for the benefit of creditors. Traer v. Clews, 115 U. S. 528, 6 S. C. Rep. 155.

[3] Kreth v. Rogers, 101 N. C. 263, 7 S. E. Rep. 682; Johnson v. McAllister, 30 Mo. 327; Scott v. Alford, 53 Tex. 82.

[4] 49 Conn. 328.

[5] 7 N. Y. 442; Kansas City Packing Co. v. Hoover, 1 D. C. App. Cas. 268.

assignee should not be held liable or accountable for any loss that might result to the trust property or the proceeds of it, unless the same should happen by reason of the gross negligence or willful misfeasance of the assignee. The assignment was adjudged void. Chief-Justice Ruggles said: "A failing debtor by an assignment puts his property where it cannot be reached by ordinary legal process. He puts it into the hands of a trustee of his own selection, often his particular friend, sometimes a man to whom the creditors would not have been willing to confide such a trust. The debtor has an interest in the application of the trust funds to the payment of his debts; but the creditors have usually a far greater interest therein; and that interest depends in many cases on the competency and diligence of the assignee. The debtor cannot be permitted, by creating a trust for his creditors, to place his property where it cannot be reached by ordinary legal remedy, and at the same time exempt the trustee from his proper responsibility to his creditors."[1]

§ 335. **Providing for counsel fees.** — The question of the right of the assignor to provide for or interfere in the matter of the assignee's counsel fees has been before the courts in various forms. In Heacock v. Durand[2] the assignee was a lawyer, and by the provisions of the assignment was to be entitled to "a reasonable and lawful compensation or commission for his own services, both as assignee as aforesaid, and as the lawyer, attorney, solicitor, and counsel in the premises." The assignment was annulled on the theory that the power given to charge counsel fees tended so directly to the impairment of the fund and the injury of creditors, that it was impossible to offer a valid reason in its support. The provision places

[1] Compare Casey v. Janes, 37 N. Y. 611; Matter of Cornell, 110 N. Y. 357, 18 N. E. Rep. 142; Matter of Dean, 86 N. Y. 398, as to duties of assignee.

[2] 42 Ill. 231.

the assignee in two inconsistent positions. This question was before the New York Court of Appeals in Nichols v. McEwen,[1] and the court held that such a clause was fraudulent in its character, and would vitiate the assignment. Roosevelt, J, observed that to sanction such a clause "would be establishing a practice pregnant in many cases with the most mischievous consequences." Denio, J., says, that an insolvent debtor has no right "to create such an expensive agency for the conversion of his property into money, and distributing it among his creditors. Besides being wrong in principle, it is calculated to lead to obvious abuses."[2] It is no objection, however, to the instrument, that provision is made for the payment of a reasonable attorney's fee for the examination of the facts, and for advice and services in drawing up the assignment[3] and securing it to be properly acknowledged and placed on record. But at this point the control of the assignor ceases,[4] and the assignor has no power to contract with attorneys for any further services; that is a matter entirely within the control of the trustee.

§ 336. **Authority to compromise.** — The authority given to the assignees "to compromise or compound any claim by taking a part for the whole, when they shall deem it expedient so to do," was considered by the New York Supreme Court not to expressly authorize or require an illegal act

[1] 17 N. Y. 22; Norton v. Matthews, 7 Misc. (N. Y.) 569, 28 N. Y. Supp. 265; Matter of Gordon, 49 Hun (N. Y.) 370. 3 N. Y. Supp. 589; Hill v. Agnew, 12 Fed. Rep. 232.

[2] Compare Campbell v. Woodworth, 24 N. Y. 305; Dimon v. Hazard, 32 N. Y. 71. Where an assignment gives preferences it cannot provide for the payment of a counsel fee incurred by the preferred creditors in defending such preference. Simon v. Norton, 56 Mo. App. 338.

[3] See Bryce v. Foot, 25 S. C. 467; Drucker v. Wellhouse, 82 Ga. 129, 8 S. E. Rep. 40.

[4] Hill v. Agnew, 12 Fed. Rep. 233. A provision allowing the assignee his "reasonable costs, charges and expenses, including the necessary attorney's fees," was held unobjectionable. National Bank of the Republic v. Hodge, 3 Ct. App. (D. C.) 140; see Mills v. Pessels, 55 Fed. Rep. 588.

to be done, and the court refused to vitiate the assignment.[1] And where the instrument authorized the assignee to compound "choses in action, taking a part for the whole when he shall deem it expedient," the assignment was sustained. This clause was held to vest no arbitrary power in the assignee to compromise where such action was neither necessary nor proper, but merely to confer the discretion which the law recognizes to compound doubtful and dangerous debts in cases where the safety and interest of the fund demanded such action. "It confers upon the assignee," said Finch, J., "no unlawful or arbitrary power, and takes away from the creditors no just protection."[2] On the other hand, the power given in the assignment to the assignee to compromise with creditors, is held to restrain the creditors until the attempt to compromise is made. Thus they would be hindered, and a delay even for a single day would be fatal to the assignment, and whether the delay was directed by the instrument, or justified by its provisions, or made necessary in the execution of its provisions, made no difference.[3]

§ 337. **Fraud of assignee.** — The fiduciary character of his position precludes the assignee from taking any advantage of his influence as such, or from using, for purposes of personal gain or profit, any information acquired while acting in that capacity. Every agreement having such

[1] Ginther v. Richmond, 18 Hun (N. Y.) 234.

[2] Coyne v. Weaver, 84 N. Y. 391, 1 Am. Insolv. Rep. 395; s. p., McConnell v. Sherwood, 84 N. Y. 522; Bagley v. Bowe, 105 N. Y. 177, 11 N. E. Rep. 386.

[3] McConnell v. Sherwood, 84 N. Y. 531. In Noyes v. Sanger Bros., 8 Tex. Civ. App. 393, 27 S. W. Rep. 1022, the court says: "We think it is the law, that when an assignee of an insolvent debtor has power under the assignment to prefer creditors, or to change preferences made by the instrument, or to compromise the debts of the insolvent, or when the instrument does not declare the uses for which the property was assigned, the assignment is fraudulent and therefore void." Citing Caton v. Mosely, 25 Tex. 375; Horne v. Chatham, 64 Tex. 36; McConnell v. Sherwood, 84 N. Y. 522; Grover v. Wakeman, 11 Wend. (N. Y.) 203.

an object in view, made with the assignors, or with any of the creditors, especially if not approved by and communicated to all the parties in interest, is looked upon by the courts with great suspicion and distrust, and if tainted with the slightest evidence of fraud, concealment, or misconduct on the part of the assignee in its procurement, will be set aside as inequitable and unjust, and he will not be permitted to reap any personal advantage from it.[1] The fact of his having an interest conflicting with his duties as assignee, is a sufficient ground for removal.[2]

An assigment honestly made for a lawful purpose cannot be defeated by proof that the assignee abused his trust, misappropriated the property, or acted dishonestly in its disposal.[3] Where the assignee is guilty of neglect or misfeasance, the creditor feeling aggrieved should apply to the court for a compulsory accounting,[4] or seek his removal, and secure the appointment of a new trustee or assignee.[5] Brown, J., said, in Olney v. Tanner:[6] "If an assignment is legally complete and perfect, and is intended to devote, and does devote, all the debtor's property to the payment of his debts, it cannot be invalidated through the subsequent remissness or inefficiency of the assignee. Creditors have ample remedy against the assignee for his misconduct, if any; and they should be held to these remedies, rather than be allowed to subvert the assignment on the claim that such remissness is

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[1] Clark v. Stanton, 24 Minn. 232, 1 Am. Insolv. Rep. 86. See Failey v. Stockwell, 12 Pa. Co. Ct. Rep. 403.

[2] Brown v. Armstrong, 18 R. I. 537.

[3] Cuyler v. McCartney, 40 N. Y. 237; Olney v. Tanner, 10 Fed. Rep. 114, 115; Eicks v. Copeland, 53 Tex. 581. But see Kelley-Goodfellow Shoe Co. v. Scales, 12 U. S. App. 610, 58 Fed. Rep. 161, 7 C. C. A. 140.

[4] Shattuck v. Freeman, 1 Met. (Mass.) 15.

[5] Olney v. Tanner, 10 Fed. Rep. 115. Compare Glenny v. Langdon, 98 U. S. 29, and cases cited; Benfield v. Solomons, 9 Ves. 83; Matter of Cohen, 78 N. Y. 248, 1 Am. Insolv. Rep. 221.

[6] 10 Fed. Rep. 114, 115.

an evidence of original fraudulent intent."[1] On the other hand, if the assignment is set aside as fraudulent, the acts of the assignee, performed in good faith in the execution of the trust, will not, as elsewhere shown, be disturbed; whether the assignment be fraudulent in fact or constructively so, the assignee will not be held to account for the property or its proceeds which have been paid out by him in good faith.[2]

§ 338. Ignorance or incompetency of assignee as badge of fraud.—The selection of an incompetent assignee is regarded in the law as a badge of fraud.[3] Blindness in the assignee is considered an *indicium* of fraud on the part of the assignor who selects him.[4] So, choosing an insolvent assignee has been said to be *prima facie* evidence of an intent to defraud;[5] as is the selection of an assignee unfit to attend to business by reason of a lingering disease.[6] It was with much doubt and hesitation that entire latitude in the selection of the trustee or

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[1] Citing Hardmann v. Bowen, 39 N. Y. 200; Shultz v. Hoagland, 85 N. Y. 465.

[2] Smith v. Craft, 11 Biss. 351; Wakeman v. Grover, 4 Paige (N. Y.) 23; Knower v. Central Nat. Bank, 124 N. Y. 552, 27 N. E. Rep. 247; Sullivan v. Miller, 106 N. Y. 643, 13 N. E. Rep. 772; Ames v. Blunt, 5 Paige (N. Y.) 13. In Pennsylvania the assignment vests the title although the assignee may be ignorant of the assignment; it is valid whether the assignee accepts the trust or not, for a trust will not fail for want of a trustee (Mark's Appeal 85 Pa. St. 231; *sub nom.* First Nat. Bank v. Holmes, 1 Am. Insolv. Rep. 150. See Johnson v. Herring, 46 Pa. St. 415; Blight v. Schenck, 10 Pa. St. 285), but in New York the trust must be assented to, and the instrument acknowledged by the assignee. Rennie v. Bean, 24 Hun (N. Y.) 123, 1 Am. Insolv. Rep. 420; Hardmann v. Bowen, 39 N. Y. 196; Britton v. Lorenz, 45 N. Y. 51. If a party allows his name to be used in a fraudulent assignment and suffers the property to be squandered he may be compelled to account to creditors. Hughes v. Bloomer, 9 Paige (N. Y.) 269.

[3] Guerin v. Hunt, 6 Minn. 395.

[4] See Cram v. Mitchell, 1 Sandf. Ch. (N. Y.) 252.

[5] Reed v. Emery, 8 Paige (N. Y.) 417. But in some States the court may uphold the deed and appoint a receiver to carry it into effect. Cohn v. Ward, 32 W. Va. 34, 9 S. E. Rep. 41.

[6] Currie v. Hart, 2 Sandf. Ch. (N. Y.) 353.

assignee was confided to the debtor,[1] and the insolvent having the choice of his own assignee,[2] without consultation with or consent of his creditors, must see to it that he appoints a person competent to protect the rights of all parties interested under the assignment. If it appears that the selection of an incompetent assignee was made in order to allow the assignor to control the administration of the estate, then the assignment will be avoided, because such an intent would be a fraud upon creditors.[3] Where the assignee, however is selected without any improper motive, and proves incompetent, he may be removed upon a proper application, and a suitable person substituted by the court to carry out the trust.[4] The words "misconduct" and "incompetency," as used in the New York statute relating to the removal of an assignee, are construed to have no technical meaning, but were intended to embrace all the reasons for which an assignee ought to be removed.[5]

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[1] See Cram v. Mitchell, 1 Sandf. Ch. (N. Y.) 253.

[2] See Burr v. Clement, 9 Col. 1, 9 Pac. Rep. 633.

[3] In Davis v. Schwartz, 155 U. S. 638, 15 S. C. Rep. 237, the court says: "The fact that the assignee or the preferred creditor of an insolvent debtor is a relative or intimate friend is doubtless calculated to excite suspicion; yet in reality there is nothing unnatural in a dealer or trader who is in need of credit, or a loan of money to carry on his business, first applying to his relatives for such loans, and if the evidence be undisputed that the money was advanced, the fact that the persons making the loan are relatives, ought not to debar them from receiving security. Their rights are neither increased nor diminished by the fact of relationship." Citing Magniac v. Thompson, 7 Pet. 348; Prewit v. Wilson, 103 U. S. 22; Estes v. Gunter, 122 U. S. 450, 7 S. C. Rep. 1275; Bean v. Patterson, 122 U. S. 496, 7 S. C. Rep. 1298; Garner v. Second National Bank, 151 U. S. 420, 432, 14 S. C. Rep. 390; Aulman v. Aulman, 71 Iowa 124, 32 N. W. Rep. 240.

[4] See Guerin v. Hunt, 6 Minn. 395.

[5] Matter of Cohn, 78 N. Y. 248, 1 Am. Insolv. Rep. 223. As to the effect of the selection of an incompetent assignee, see Jennings v. Prentice, 29 Mich. 421; Connah v. Sedgwick, 1 Barb. (N. Y.) 210; Shryock v. Waggoner, 28 Pa. St. 430; Shultz v. Hoagland, 85 N. Y. 464; Baldwin v. Buckland, 11 Mich. 389; Matter of Cohn, 78 N. Y. 48, 12 Am. Insolv. Rep. 221; Montgomery v. Kirksey, 26 Ala. 172; White v. Davis, 48 N. J. Eq. 22, 21 Atl. Rep. 187; Burrill on Assignments, § 92. The

In Bachrack v. Norton,[1] Mr. Justice Bradley said: "Independently of a statute on the subject, we do not see why, as a mere matter of law, an assignment should be held void because the assignee is not a citizen or resident of the State where the assignment is made and the debtor resides, provided he complies with the conditions prescribed by the law. A citizen, or resident of another State may, in a particular case, be a very proper assignee. A large part of a debtor's assets may be located in a State other than that in which he resides."

§ 339. **Transfers inuring as assignments.**—Preferences in the absence of a bankrupt act are usually upheld, though avoided by the statutory system prevailing in some parts of the Union. A curious policy exists upon this subject in some of the States.[2] Thus in Alabama it is said to be a settled proposition of law that a mortgage or deed of trust which conveys *substantially all the debtor's property* for the security of one or more particular creditors to the exclusion of others, the intention of which is to give a preference or priority of payment to the former, operates as a general assignment under the statute, and inures to the benefit of all the creditors equally.[3] In Illinois there has been much confusion upon this feature of the law.[4] It

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fact that the assignee is required to give a bond will not relieve the assignor from the exercise of prudence in his selection. Holmberg v. Dean, 21 Kan. 73.

[1] 132 U. S. 339, 10 S. C. Rep. 106.

[2] See Wyman v. Mathews, 53 Fed. Rep. 678; Kiser v. Dannenberg, 88 Ga. 541, 15 S. E. Rep. 17.

[3] Shirley v. Teal, 67 Ala. 451; Code, Ala. (1876), § 2126; Warren v. Lee, 32 Ala. 440; Stetson v. Miller, 36 Ala. 642; Fairfield Packing Co. v. Kentucky Jeans Clothing Co., 110 Ala. 536, 20 So. Rep. 63; Anniston Carriage Works v. Ward, 101 Ala. 670, 14 So. Rep. 417.

[4] White v. Cotzhausen, 129 U. S. 329, 9 S. C. Rep. 309; Weber v. Mick, 131 Ill. 520, 23 N. E. Rep. 646; Farwell v. Nilsson, 133 Ill. 45, 24 N. E. Rep. 74. See Tompkins v. Hunter, 149 N. Y. 126, 43 N. E. Rep. 532; Kellog v. Richardson, 19 Fed. Rep. 70, 72; Martin v. Hansman 14 Fed. Rep. 160; Freund v. Yaegerman, 26 Fed. Rep. 812, 814; Perry v. Corby, 21 Fed. Rep. 737; Clapp v. Dittman, 21 Fed. Rep. 15; Kerbs v. Ewing, 22 Fed. Rep. 693; Stout v. Watson, 19

is held in Mississippi that "any assignment that purports to convey only specific property must be treated as a partial assignment until the contrary be shown. But, if it be clearly shown that in fact it does convey all of the assignor's property liable for his debts, then it becomes a general assignment, regardless of its terms, and must be so dealt with."[1] In New Jersey several separate instruments may be construed together as constituting an assignment and declared void as creating a preference.[2] A mortgage given by way of preference immediately preceding an assignment will be construed as part of one transaction, and if equality of distribution does not result the transaction will not stand in Florida.[3] In Colorado conveyances made prior to an assignment for creditors, and in fraud of it, will not operate to invalidate the assignment, but the assignee may recover the property so fraudulently conveyed.[4] In New York, however, it was held that a specific assignment of property by a debtor for the benefit of one or a portion of his creditors did not come within the provisions of the assignment act of that State, and was not void by reason of its not being executed in compliance with the provisions of the assignment act.[5]

§ 339a. White v. Cotzhausen, and conflicting cases. — The decision of the Supreme Court of the United States in White v. Cotzhausen[6] to the effect that a preferential transfer by an insolvent debtor of substantially his entire estate, with a possible view to evade the provisions of

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Ore. 251, 24 Pac. Rep. 230. See also § 339*a*.

[1] Newman v. Black, 73 Miss. 244, 18 So. Rep. 543.

[2] Stites v. Champion, 49 N. J. Eq. 446, 24 Atl. Rep. 403.

[3] Armstrong v. Holland, 35 Fla. 160, 17 So. Rep. 366.

[4] Cleghorn v. Sayre, 22 Col. 400, 45 Pac. Rep. 372.

[5] Royer Wheel Co. v. Fielding, 101 N. Y. 504.

[6] 129 U. S. 329, 9 S. C. Rep. 309. Compare South Branch Lumber Co. v. Ott, 142 U. S. 629, 12 S. C. Rep. 318.

the State Assignment Act operates as an assignment, has resulted in much controversy over insolvent estates. The decision purports to follow Illinois decisions, but has been repudiated in that State,[1] and there is a tendency not to regard it as a controlling authority.[2] In a later case Mr. Justice Brewer said: "Several instruments executed by a debtor, at about the same time, may be considered as parts of one transaction, and in law forming but one instrument; and if, as thus construed, they have the effect of a general assignment with preferences, they are within the denunciation of the statute,"[3] providing that no general assignment for the benefit of creditors shall be valid unless made for the benefit of all creditors in proportion to their respective claims. The attempts to construe meanings into these instruments, which were probably not in the contemplation of the parties at the time such instruments were executed, have not been uniformly fortunate.

The case of White v. Cotzhausen[4] was not followed in Tompkins v. Hunter.[5] In the latter case the insolvent made a preferential transfer by bill of sale of all his property to one creditor. A technical general assignment was not made and the court refused to construe the transfer to the preferred creditor so as to convert it into a general assignment. Martin, J., said: "There is a broad and well defined distinction between such an assignment and a deed or bill of sale. The former is a transfer by a

[1] Weber v. Mick, 131 Ill. 520, 23 N. E. Rep. 646; Young v. Clapp, 147 Ill. 184, 32 N. E. Rep. 187, 35 Id. 372; Farwell v. Nilsson, 133 Ill. 45, 24 N. E. Rep. 74. Compare Tompkins v. Hunter, 149 N. Y. 126, 43 N. E. Rep. 532; Moore v. Meyer, 47 Fed. Rep. 99; Hardt v. Heidweyer, 152 U. S. 556, 14 S. C. Rep. 671.

[2] Moore v. Meyer, 47 Fed. Rep. 99; Hardt v. Heidweyer, 152 U. S. 556, 14 S. C. Rep. 671.

[3] South Branch Lumber Co. v. Ott, 142 U. S 622, 629, 12 S. C. Rep. 318, following Van Patten v. Burr, 52 Iowa 518, 3 N. W. Rep. 524. See Ellison v. Moses, 95 Ala. 221, 11 So. Rep. 347.

[4] 129 U. S. 329, 9 S. C. Rep. 309.

[5] 149 N. Y. 117, 43 N. E. Rep. 532.

debtor of his property to another in trust to sell, convert it into money, and distribute the proceeds among his creditors. It implies a trust, and contemplates the intervention of a trustee. The others import an absolute sale and transfer of the title, to be held and enjoyed by the purchaser without any attending trust." In Berger v. Varrelmann [1] the court decided that a preferential confession of judgment followed by a general assignment was voidable under the statute of 1887, prohibiting preferences in excess of a particular portion of the estate, and the same rule was followed in Spelman v. Freedman.[2] The cases were followed in later decisions where the confession was a part of the scheme which was to culminate in a general assignment and hence was within the prohibition of the assignment act.[3] In Manning v. Beck [4] the court says: "But the statute does not and was not intended to prevent a creditor from obtaining payment of or a security, and thereby a preference for his debt, even from an insolvent debtor." The court further adds: "The debtor might also neglect to make an assignment and then it would look as if the acts of preference would be legal." In Central Nat. Bank v. Seligman,[5] Andrews, Ch. J., said: "If no assignment had been made the judgments could not have been assailed by the other creditors." It results from these decisions that in some of the States at least the danger of forfeiting a preference is avoided in cases where the insolvent omits to follow up the preferential act by making a voluntary assignment.

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[1] 127 N. Y. 281, 27 N. E. Rep. 1065.

[2] 130 N. Y. 421, 29 N. E. Rep. 765.

[3] See Manning v. Beck, 129 N. Y. 1, 29 N. E. Rep. 90; Central Nat. Bank v. Seligman, 138 N. Y. 435, 34 N. E. Rep. 196; Abegg v. Bishop, 142 N. Y. 286, 36 N. E. Rep. 1058. See Hardware Co. v. Implement Co., 47 Kan. 423, 28 Pac. Rep. 171; Watkins Nat. Bk. v. Sands, 47 Kan. 591, 28 Pac. Rep. 618.

[4] 129 N. Y. 14, 16, 29 N. E. Rep. 90.

[5] 138 N. Y. 435, 445, 34 N. E. Rep. 196.

§ 340. **Assets exceeding liabilities.**—The question often arises as to what classes of persons are entitled to make assignments. Where it is clear that the assets are largely in excess of the liabilities of the debtor, it may raise a presumption of an intent to hinder and delay creditors in the collection of their just demands, and amount to a *prima facie* case of fraud.[1] In the Missouri Court of Appeals an assignment which, after reciting that the assets amounted to three times the liabilities, clothed the trustees with discretionary power to carry on the business of the firm "for such time as the trustees shall deem for the best interest of the creditors, and necessary for the purpose of preventing shrinkage and loss, and of closing out and liquidating the same to the best advantage," was declared voidable as tending to hinder, delay, and defraud creditors.[2] It is sometimes contended that, as assignments for the benefit of creditors are generally made by embarrassed and insolvent debtors, such dispositions of property can only be made by that class of persons. "This doctrine," said Comstock, J., "has no foundation in principle or authority. These assignments are in their nature simply trusts for the payment of debts. The power to create such trusts is certainly not peculiar to insolvent men. On the contrary, it is a power more unquestionably possessed by men who are entirely solvent. . . . . This right of disposition, on general principles of law and justice, was never doubtful except in case of a debtor's inability to meet his engagements. In that condition the claims of creditors are in justice paramount, and the debtor's power to dispose of his estate, even for their benefit, was not established without a struggle. In short, it was the insolvency rather than the solvency of a

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[1] Livermore v. Northrup, 44 N. Y. 109; Guerin v. Hunt, 8 Minn. 477. See Bates v. Ableman, 13 Wis. 644.

[2] First Nat. Bank v. Hughes, 10 Mo. App. 14.

debtor which suggested the doubt in regard to the right of putting the whole or any part of his property in trust for the benefit of creditors."[1] As gathered from the authorities, the vital question in these cases is, whether the transfer is honestly made with the sole intention of applying the property in satisfaction of the creditors' demands, or whether it is merely a scheme or contrivance to place the debtor's estate, for a time, beyond the reach of the creditors' remedies, prevent a sacrifice of the property, secure the payment of the creditors' claims, and ultimately realize a surplus to the assignor. In the latter case it should clearly be regarded as a plan devised to hinder and delay creditors. Resort by a solvent man to the methods devised for insolvents is justly calculated to arrest attention and excite the most searching inquiry as to hidden motives.

§ 341. **Assignments to prevent preference.** — According to the doctrine of the common law, the validity of an assignment cannot be assailed simply because its effect is to prevent a party from obtaining, by judgment and execution, a priority and preference over other creditors[2] Temporary interference with particular creditors in the prosecution of their claims by the ordinary legal remedies, is a necessary and unavoidable incident to a just and lawful act, which, however, in no respect impairs the validity of the transaction.[3] The rule of equity requires the equal and ratable distribution of the debtor's property for the benefit of all his creditors. It would be strange indeed if the debtor, by making a disposition of his property with the design to effectuate the application of this rule, should be adjudged guilty of hindering and delaying his creditors. This precise question arose in

[1] Ogden v. Peters, 21 N. Y. 24.
[2] Reed v. McIntyre, 98 U S. 510
See Chap. XXV.
[3] Mayer v. Hellman, 91 U. S. 500.

Pickstock v. Lyster.[1] In that case a debtor, being sued, made an assignment by deed of all his effects, for the equal benefit of his creditors. The jury having been instructed that they must find the deed void if made with the intent to defeat the plaintiff in his execution, returned a verdict in his favor. But the verdict was set aside upon the ground that the jury was misdirected. Lord Ellenborough held that the assignment was "to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor, to make the fund available for the whole body of creditors. . . . . It is not the debtor who breaks in upon the rights of the parties by this assignment, but the creditor who breaks in upon them by proceeding in his suit. I see no fraud; the deed was for the fair purpose of equal distribution." In the same case, Bayley, J., said: "It seems to me that this conveyance, so far from being fraudulent, was the most honest act the party could do. He felt that he had not sufficient to satisfy all his debts, and he proposed to distribute his property in liquidation of them; this was not acceded to, for the plaintiff endeavored by legal process to obtain his whole debt, the obtaining of which would have swept away the property from the rest of the creditors."[2] If the assignment has been fairly and legally made, and creditors obtain a benefit from it, their rights cannot be divested by proof of any stratagem practiced

[1] 3 Maule & S. 371.

[2] See Pike v. Bacon, 21 Me. 281; Hauselt v. Vilmar, 2 Abb. N. C. (N. Y.) 222, affi'd 76 N. Y. 630; Baldwin v. Peet, 22 Tex. 708; Bowen v. Bramidge, 6 C. & P. 140. See Holbird v. Anderson, 5 T. R. 235. It is said, however, in Dalton v. Currier, 40 N. H. 246, that as the avowed purpose and aim of the assignment, and its only object and consideration, as stated in the instrument, was to defeat the liability of the property to be attached, whereby some of the creditors might obtain an unjust preference, and to secure it to be applied for the benefit of all the creditors, the assignment was fraudulent and void.

by the assignor to prevent attachments till this object could be secured. If no attachments were issued, even fraud practiced by the debtors to defeat such process would give the creditor no lien upon the property; notwithstanding the grossest dishonesty of this kind, it would remain as it was; and so long as it continued the property of the debtors, unaffected by any attachments, no fraudulent conduct, calculated to impose upon a creditor and keep him at bay, would disqualify the debtor from making a valid assignment under the statute for the benefit of creditors generally.[1] Fraud or misrepresentation on the part of the assignor, entering into or affecting the debt of a particular creditor, will not be sufficient to annul a general assignment in favor of creditors.[2]

Jaques v. Greenwood,[3] constitutes a possible exception to the rule above stated. A judgment had been entered against the members of a firm by default; they secured a stay of proceedings upon pretence of a defense to the action, which they failed to show, and upon an assurance given by their attorney that no assignment would be made. Meanwhile a preferential assignment was filed, and the judgment-creditors were prevented from realizing anything upon execution issued on the judgment. The assignment was, upon this state of facts, adjudged to be made to hinder and delay creditors in the collection of their debts.

§ 341a. **Excessive preferences.** — In New York a preference in excess of the amount allowed by statute does not invalidate the instrument.[4] Gray, J. said: "The pur-

[1] Pike v. Bacon, 21 Me. 286.

[2] Kennedy v. Thorp, 51 N. Y. 174; Spencer v. Jackson, 2 R. I. 35; Linginger v. Raymond, 12 Neb. 19, 9 N. W. Rep. 550; Horwitz v. Ellinger, 31 Md. 504. But compare Waverly Nat. Bank v. Halsey, 57 Barb. (N. Y.) 249.

[3] 12 Abb. Pr. (N. Y.) 234.

[4] Central Nat. Bank v. Seligman, 138 N. Y. 435, 34 N. E. Rep. 196; Cutter v. Hume, 43 St. Rep. (N. Y.) 242, 17 N. Y. Supp. 255; Rose v. Renton, 37 St. Rep. (N. Y.) 683, 13 N. Y. Supp. 592.

pose of the statute is to prevent any preference, other than that for wages or salaries of employees, beyond one-third of the assigned estate, and if that amount is exceeded, the penalty is not the annihilation of the assignment, but the reduction of the preference to the prescribed limit.[1] Where that is the condition of affairs under a general assignment of the debtor's property, the remedy of creditors aggrieved by their debtors' act is by an action in aid of the assignment for the benefit of the body of creditors, if their rights are not asserted by the assignee."[2]

§ 341b. **Preferences of laborers.** — In New York[3] it is provided that wages and salaries due employees shall in assignment proceedings be preferred before any other debt. The omission to prefer such debts will not invalidate the assignment, as the instrument will be read in connection with the statute.[4]

§ 341c. **Notice to preferred creditor.** — There seems to be a struggle in the authorities over the question whether the preference given in anticipation of making an assignment may be avoided in all cases, or whether it will be avoided only in cases where the preferred creditor had knowledge of the impending assignment and knew of the debtor's insolvency at the time of receiving the preference. In a Pennsylvania case[5] this language is used: "Nor can we agree that a mere intent of a debtor, unexpressed

[1] Citing Central Nat. Bank v. Seligman, 138 N. Y. 435, 34 N. E. Rep. 196.

[2] Maass v. Falk, 146 N. Y. 40, 40 N. E. Rep. 504. Citing Spelman v. Freedman, 130 N. Y. 421, 29 N. E. Rep. 765; Central Nat. Bank v. Seligman, 138 N. Y. 435, 34 N. E. Rep. 196; Abegg v. Bishop, 142 N. Y. 286, 36 N. E. Rep. 1058.

[3] See Chap. 466, Laws of 1877, § 29, as amended by Chap. 328, Laws of 1884.

[4] Richardson v. Thurber, 104 N. Y. 606, 11 N. E. Rep. 133; Burley v. Hartson, 109 N. Y. 656, 16 N. E. Rep. 684; Roberts v. Tobias, 120 N. Y. 5, 23 N. E. Rep. 1105; Dutchess County Mutual Ins. Co. v. Van Wagonen, 132 N. Y. 402, 30 N. E. Rep. 971.

[5] Lake Shore Banking Co. v. Fuller, 110 Pa. St. 156, 1 Atl. Rep. 731.

to the creditor, to give him a preference by paying or securing the debt, although at the time he contemplated, and soon after executed, a general assignment, operated to defeat such preference on the ground that it is contrary to the act of 1843. Such an intent is not unlawful and cannot be inferred from a proper act. But even if it were, the creditor who has a perfect right to accept payment or security of his debt, and has not participated in the alleged unlawful intent, should not be compelled to forfeit his preference on that account. He at least is innocent and may in good conscience hold the advantage he has obtained." The New York Court of Appeals followed this case in Manning v. Beck.[1] In Berger v. Varrelmann [2] it is intimated that a want of knowledge on the part of the creditor of the debtor's intention to prefer him on the eve of an assignment will not save the preference. In Spelman v. Freedman [3] the preferred creditor manifestly had knowledge of the insolvency and contemplated assignment, and his preference was lost. In Central National Bank v. Seligman [4] the preference was cut down to the statutory limit of one-third of the estate, but the assignment was otherwise sustained. In Maass v. Falk [5] the preference was upheld, as it appeared that the creditor was innocent of any knowledge of the impending assignment, and Manning v. Beck [6] was followed. These two cases are recognized and re-stated in Galle v. Tode,[7] but the preferred creditor in the last case did not have a valid levy and the preference was for that reason lost. In the lower courts in New York[8] various conclusions

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[1] 129 N. Y. 1, 15, 29 N. E. Rep. 90.

[2] 127 N. Y. 281, 27 N. E. Rep. 1065.

[3] 130 N. Y. 429 29 N. E. Rep. 765. See Warner v. Littlefield, 89 Mich. 329, 50 N. W. Rep. 721.

[4] 138 N. Y. 435, 34 N. E. Rep. 196.

[5] 146 N. Y. 42, 40 N. E. Rep. 504.

[6] 129 N. Y. 1, 29 N. E. Rep. 90.

[7] 148 N. Y. 270, 280, 42 N. E. Rep. 673.

[8] Abegg v. Bishop, 66 Hun (N. Y.) 8, 20 N. Y. Supp. 810; reversed, 142 N. Y. 286, 36 N. E. Rep. 1058; London v. Martin. 79 Hun (N. Y.) 229, 29 N.

have been formulated, but it would seem to be the prevailing idea in that State at present, that an innocent preferred creditor may hold his advantage as against a subsequent voluntary assignment.

§ 341d. Bill of particulars. — As already shown,[1] the courts are not disposed to readily grant applications for bills of particulars of the alleged fraudulent acts upon which the creditor relies in attacking an assignment.[2]

§ 342. Threatening to make assignment. — Threatening to make a voluntary assignment seems to constitute no ground for provisional relief by attachment in New York,[3] provided the threat is not to make a fraudulent assignment. "An unlawful coercion of a creditor," says Fullerton, J., "cannot be predicated of the declaration of an intention by a debtor to do what the law sanctions as right and proper."[4]

Y. Supp. 396; Johnson v. Rapalyea, 1 App. Div. (N. Y.) 463, 37 N. Y. Supp. 540.

[1] See § 162*a*.

[2] Passavant v. Cantor, 21 Abb. N. C. (N. Y.) 259, 1 N. Y. Supp. 574.

[3] Kipling v. Corbin, 66 How. Pr. (N. Y.) 13; Evans v. Warner, 21 Hun (N. Y.) 574; Dickerson v. Benham, 20 How. Pr. (N. Y.) 343.

[4] Spaulding v. Strang, 37 N. Y. 139; Davis v. Howard, 73 Hun (N. Y.) 347, 26 N. Y. Supp. 194; Farwell v. Furniss, 67 How. Pr. (N. Y.) 188. In the case of National Park Bank v. Whitmore, 104 N. Y. 305, 10 N. E. Rep. 524, Earl, J., said: "But we think there were sufficient facts set forth in the affidavits to give the court jurisdiction to determine whether or not the defendants in threatening to make and in making the assignment, were actuated by a fraudulent intent. A few days before the assignment was made the defendants reported that they were entirely solvent and could pay all their debts in full, and they made a statement of their affairs showing a large surplus of assets over liabilities. Soon after these representations they claimed that they could not pay their debts in full, and that they were insolvent, and proposed to pay their creditors a compromise of fifty cents on the dollar, payable in nine, twelve and fifteen months without security. The evidence tended to show that they had been engaged in a prosperous business, yielding them large profits, and they gave no satisfactory or intelligible explanation of their sudden alleged insolvency. They threatened that unless their offer of compromise was accepted they would make an assignment, preferring Whiting, and that then the rest of their creditors would get little or nothing. The efforts of the defendants, with the co-operation of their assignee after

On the other hand, there are cases tending to support the view that a debtor cannot use the power he possesses of assigning his property preferentially to intimidate creditors into abstaining from pressing the remedies allowed by law to collect debts, without being chargeable with intent to defraud creditors.[1] In Gasherie v. Apple,[2] the court observed: "The law allows a debtor to assign his property to pay his debts, and even to make preferences; but compels him to make his selection without any conditions for personal gain to himself; thus he cannot, by an assignment, hold out a hope of an extra share of his assets, or a fear of loss of any participation therein as a means to induce a creditor to abandon all, or any part of his claim, or to forbear pursuing his legal remedies therefor." This certainly embodies the safer rule.

§ 342a. **Antecedent agreement.** — As elsewhere shown,[3] a secret agreement to prefer a creditor is not fraudulent, and such a preference will be upheld.[4]

§ 343. **Construction of assignments.** — In construing the provisions of a general assignment, we are to be governed by the rules applicable to ordinary conveyances.[5]

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the assignment, apparently to coerce a compromise of twenty-five cents on the dollar, their offer 'to fix it up' with a creditor afterward if he would assent to the compromise, their selection of a foreign assignee, the relations between him and them, and the secret promise of a future preference, are also pertinent facts. The court at General Term, looking at no one fact, but at all the facts, before and after the assignment, could, we think, find that the assignment was threatened and made by the assignors, not solely for the honest purpose of devoting their assets to the payment of their just debts, but, while not actually insolvent, to coerce a favorable compromise from their creditors, and thus secure a benefit to themselves."

[1] See Anthony v. Stype, 19 Hun (N. Y.) 267; Gasherie v. Apple, 14 Abb. Pr. (N. Y.) 64; Livermore v. Rhodes, 27 How. Pr. (N. Y.) 506.

[2] 14 Abb. Pr. (N. Y.) 64, 68.

[3] See § 394.

[4] National Park Bk. v. Whitmore, 104 N. Y. 304, 10 N. E. Rep. 524; Pierce Steam Heating Co. v. Ransom, 16 App. Div. (N. Y.) 260.

[5] Townsend v. Stearns, 32 N. Y. 213; Bagley v. Bowe, 105 N. Y. 171, 11 N. E. Rep. 386; Knapp v. McGowan, 96 N. Y. 75; Crook v. Rindskopf, 105

Such a construction should be adopted as will sustain the assignment, rather than defeat it,[1] especially if the effect of overturning the instrument by reason of its preferential surroundings results in creating a preference in favor of a subsequent attaching creditor.[2] Preferential assignments are not usually encouraged.[3] The law tolerates rather than approves such instruments, and they can only be supported when they make a full and unconditional surrender of the property to the payment of debts.[4] In Read v. Worthington,[5] in construing a general assignment, the court said: "There are three general rules of interpretation, which, applied to this case, show that the

N. Y. 485, 12 N. E. Rep. 174; Ginther v. Richmond, 18 Hun (N. Y.) 234. Compare Rapalee v. Stewart, 27 N. Y. 315.

[1] Roberts v. Buckley, 145 N. Y. 223, 39 N. E. Rep. 966.

[2] South Branch Lumber Co. v. Ott, 142 U. S. 622, 12 S. C. Rep. 318.

[3] Nichols v. McEwen, 17 N. Y. 24. See Boardman v. Halliday, 10 Paige (N. Y.) 230.

[4] Griffin v. Barney, 2 N. Y. 371.

[5] 9 Bosw. (N. Y.) 626. In Crook v. Rindskopf, 105 N. Y. 485, 12 N. E. Rep. 174, Ruger, Ch. J., said: "While heretofore there has been some diversity of opinion in the courts in respect to the proper rule to be applied in the construction of such instruments, we think the tendency of modern decisions, especially those of most approved authority, has been to adopt the same rules which obtain in the interpretation of other contracts. (Knapp v. McGowan, 96 N. Y. 75, 87; Rapalee v. Stewart, 27 N. Y. 310, 315; Benedict v. Huntington, 32 N. Y. 219; Townsend v. Stearns, 32 N. Y. 209.) Among those rules is that requiring such an interpretation as will render the instrument consistent with innocence, and the general rules of law, in preference to such as would impute a fraudulent intent to the assignor, or defeat the general purpose and intent of the conveyance. (Bagley v. Bowe, 105 N. Y. 171, 11 N. E. Rep. 386; Ginther v. Richmond, 18 Hun [N. Y.] 232, 234; Rapalee v. Stewart, 27 N. Y. 315; Benedict v. Huntington, 32 N. Y. 219; Townsend v. Stearns, 32 N. Y. 209.) Such transfers are sanctioned by law, and are, when made, like other contracts, to be fairly and reasonably construed with a view of carrying out the intentions of the parties making them. When authority to do an act is conferred in general terms it will be deemed to be and to have been intended to be exercised within the limits prescribed by law. (Kellogg v. Slauson, 11 N. Y. 302.) In such cases, as in others, doubtful and ambiguous phrases admitting of different meanings, are, in accordance with the maxim, '*ut res magis valeat quam pereat*,' to be so construed as to authorize a lawful disposition of the property only, although there may be general language in the instrument susceptible of a different construction. (Townsend v. Stearns, 32 N. Y. 209.)"

intent on the face of the instrument was honest to creditors: Firstly, that the general intent of the parties is to govern; secondly, that the leaning of all constructions should be in favor of supporting, and not overthrowing, an instrument; and thirdly, that fraud is not to be presumed,[1] and assignments are subject to no different rules."[2] Courts are therefore under no obligation to be astute to destroy them,[3] and an unreasonable construction should not be given to the language used in the assignment to render it void.[4] The scope of the assignment is to be gathered from the whole instrument,[5] and where two constructions are possible, that is to be chosen which upholds and does not destroy the instrument.[6] "A court," said Finch, J., "may wrestle, if need be, with unwilling words to find the truth or preserve a right which is endangered."[7] It must be remembered that if a general clause be followed by special words which accord with the general clause, the deed should be construed according to the special matter.[8] The case may, however, be taken out of its operation by the evident intent of the parties and the clearly expressed purpose

[1] Citing Kellogg v. Slauson, 15 Barb. (N. Y.) 56; Kellogg v. Barber, 14 Barb. (N. Y.) 11; Barnum v. Hempstead, 7 Paige (N. Y.) 569; Kuhlman v. Orser, 5 Duer (N. Y.) 250; Bank of Silver Creek v. Talcott, 22 Barb. (N. Y.) 561. See §§ 5, 6.

[2] Citing Pine v. Rikert, 21 Barb. (N. Y.) 469.

[3] See Turner v. Jaycox, 40 Barb. (N. Y.) 164; affi'd, 40 N. Y. 470. Especially Townsend v. Stearns, 32 N. Y. 209; Grover v. Wakeman, 11 Wend. (N. Y.) 193; Kellogg v. Slauson, 11 N. Y. 302.

[4] Whipple v. Pope, 33 Ill. 334; Bank v. Martin, 96 Tenn. 5, 33 S. W. Rep. 565, citing the text.

[5] Price v. Haynes, 37 Mich. 487, 1 Am. Insolv. Rep. 137.

[6] Coyne v. Weaver, 84 N. Y. 390. See Townsend v. Stearns, 32 N. Y. 209; Brainerd v. Dunning, 30 N. Y. 211; Campbell v. Woodworth, 24 N. Y. 304; Benedict v. Huntington, 32 N. Y. 219; Coffin v. Douglass, 61 Tex. 406.

[7] Coyne v. Weaver, 84 N. Y. 390, 1 Am. Insolv. Rep. 392. A voluntary assignment act is to be liberally construed. White v. Cotzhausen, 129 U. S. 329, 9 S. C. Rep. 309, and cases cited.

[8] Munro v. Alaire, 2 Caines (N. Y.) 320. See Moore v. Griffin, 22 Me. 350; Wilkes v. Ferris, 5 Johns. (N. Y.) 335.

of the deed.[1] Thus where the instrument under consideration is a general assignment of all the property and effects of the assignor, and the intent to place all the property of every description within the trust is apparent in every part of the deed, although it contain a reference to a schedule of the assigned affects as annexed, this will not be construed as indicating an intention to qualify or limit the comprehensive or general language, and property not mentioned in the schedule will pass to the trustee.[2] In construing assignments the rule favoring constructions "*ut res majis valeat quam pereat*" must be observed.[3] In Kansas, it is said: "It is the creditors who are the real parties beneficially interested in the assignment. Unless it is apparent that they are to be defrauded the assignment should be upheld."[4]

§ 344. **Explaining obnoxious provisions.** — The acts relating to assignments should be liberally construed.[5] When it is shown that the obnoxious provisions of the deed were not made deliberately, understandingly, or even knowingly, then the law's presumption of the intent to defraud is rebutted. The reason ceasing, the rule ceases. In an inquiry collateral to the deed it is competent to show by parol that the deed was made in its objectionable form by the mistake of the scrivener, and without the intention and knowledge of the parties to it, and so to rebut the presumption of fraud.[6]

§ 345. **Assignments held void.** — It would be an arduous task to collate and cite the numerous cases in which

[1] Platt v. Lott, 17 N. Y. 478.

[2] Holmes v. Hubbard, 60 N. Y. 185; Turner v. Jaycox, 40 N. Y. 470; Emigrant Ind. Sav. Bank v. Roche, 93 N. Y. 377.

[3] Baum v. Pearce, 67 Miss. 700, 7 So. Rep. 548.

[4] Marshall v. Van De Mark, 57 Kan. 310, 46 Pac. Rep. 308.

[5] Farwell v. Cohen, 138 Ill. 216, 28 N. E. Rep. 35, 32 Id. 893.

[6] Farrow v. Hayes, 51 Md. 500, 501. See Carpenter v. Buller, 8 M. & W. 212; Parks v. Parks, 19 Md. 323; Smith v. Davis, 49 Md. 470.

voluntary assignments have been overturned at the instigation of creditors or their representatives. The important features of some of the cases will, however, be briefly noticed. The instrument was avoided where it provided that the debtor "shall have the privilege of continuing his business for one year."[1] In fact, it may be regarded as settled that any reservation of benefit to the grantor is considered fatal to the transfer.[2] Stipulating for possession of the assigned property,[3] and providing for the payment of individual debts out of copartnership assets,[4] are additional illustrations of obnoxious provisions which will annul the instrument.[5] So, as we have seen, the instrument is rendered void by intentional omissions of assets,[6] and the insertion of fictitious liabilities.[7] Whether the insertion of a provision for the continued employment of the assignor furnishes some evidence of fraudulent

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[1] Holmes v. Marshall, 78 N. C. 262.

[2] Cheatham v. Hawkins, 76 N. C. 335; Bigelow v. Stringer, 40 Mo. 195; Griffin v. Barney, 2 N. Y. 371; Leitch v. Hollister, 4 N. Y. 211; Mackie v. Cairns, 5 Cow. (N. Y.) 547; Harris v. Sumner, 2 Pick. (Mass.) 129; Marks v. Bradley, 69 Miss. 1, 10 So. Rep. 922; Burrill on Assignments, § 343.

[3] Billingsly v. Bunce, 28 Mo. 547; Reed v. Pelletier, 28 Mo. 173; Brooks v. Wimer, 20 Mo. 503; Stanley v. Bunce, 27 Mo. 269. See Cheatham v. Hawkins, 76 N. C. 335; Harman v. Hoskins, 56 Miss. 142; Joseph v. Levi, 58 Miss. 843.

[4] Wilson v. Robertson, 21 N. Y. 587; Schiele v. Healy, 61 How. Pr. (N. Y.) 73, 1 Am. Insolv. Rep. 417; Roe v. Hume, 72 Hun (N. Y.) 1, 25 N. Y. Supp. 576; Booss v. Marion, 129 N. Y. 541, 29 N. E. Rep. 832; Haynes v. Brooks, 116 N. Y. 487, 22 N. E. Rep. 1083; Platt v. Hunter, 11 Weekly Dig. (N. Y.) 300. But see Crook v. Rinkskopf, 105 N. Y. 476, 12 N. E. Rep. 174.

[5] An assignment is invalid as a conveyance of a debtor's estate under the insolvency statutes of New York (2 R. S., p. 16), when the preliminary proceedings upon which it is based are void. Rockwell v. McGovern, 69 N. Y. 294, 1 Am. Insolv. Rep. 59. See Ely v. Cooke, 28 N. Y. 365. But compare Striker v. Mott, 28 N. Y. 90. In such a case the only beneficial interest vested in the assignee is that prescribed by the statute.

[6] Probst v. Welden, 46 Ark. 409; Shultz v. Hoagland, 85 N. Y. 464; Waverly Nat. Bank v. Halsey, 57 Barb. (N. Y.) 249; White v. Benjamin, 3 Misc. (N. Y.) 497, 23 N. Y. Supp. 981, affi'd 150 N. Y. 258, 44 N. E. Rep. 956; Rothschild v. Salomon, 52 Hun (N. Y.) 486, 5 N. Y. Supp. 865; Coursey v. Morton, 132 N. Y. 556, 30 N. E. Rep. 231; Craft v. Bloom, 59 Miss. 69.

[7] Talcott v. Hess, 31 Hun (N. Y.) 282.

intent is a point as to which the authorities differ.[1] An attempt to restore the proceeds of property fraudulently transferred in connection with an assignment will not purge the fraud in the instrument.[2] An assignment which directs a disposition of property different from that prescribed by statute;[3] or that omits creditors;[4] or that is immediately preceded by a gift of a sum of money to the assignor's wife;[5] or that reserves a sum of money to be used by the assignor in purchasing necessaries for his family,[6] and the transaction is not satisfactorily explained;[7] or that gives power to lease or mortgage;[8] or that directs the assignee to sell the assets and pay the assignor the amount of his exemptions;[9] or that intentionally withholds property not exempt;[10] or that omits property;[11] or that places any surplus indefinitely beyond the reach of creditors;[12] or that provides for the payment of attorney's services to be rendered after the transfer;[13] or that retains the assignor at a salary;[14] or that prefers a fictitious debt;[15] or that reserves the right to the assignor to

[1] Frank v. Robinson, 96 N. C. 32, 1 S. E. Rep. 781. Cf. Richardson v. Stringfellow, 100 Ala. 416, 14 So. Rep. 283.

[2] Friedburgher v. Jaberg, 20 Abb. N. C. (N. Y.) 279.

[3] Churchill v. Hill, 59 Ark. 54, 26 S. W. Rep. 378.

[4] Stout v. Watson, 19 Ore. 251, 24 Pac. Rep. 230.

[5] Chambers v. Smith, 60 Hun (N. Y.) 248, 14 N. Y. Supp. 706; Rothschild v. Salomon, 52 Hun (N. Y.) 486, 5 N. Y. Supp. 865. *Contra*, Estes v. Gunter, 122 U. S. 450, 7 S. C. Rep. 1275.

[6] Montgomery v. Goodbar, 69 Miss. 333, 13 So. Rep. 624; Constable v. Hardenbergh, 4 App. Div. (N. Y.) 143, 38 N. Y. Supp. 694.

[7] Fay v. Grant, 53 Hun (N. Y.) 44, 5 N. Y. Supp. 910.

[8] Darling v. Rogers, 22 Wend. (N. Y.) 483; Planck v. Schermerhorn, 3 Barb. Ch. (N. Y.) 644.

[9] King v. Ruble, 54 Ark. 118, 16 S. W. Rep. 7.

[10] Penzel Grocer Co. v. William, 53 Ark. 81, 13 S. W. Rep. 736.

[11] McMillan v. Knapp, 76 Ga. 171.

[12] Gregg v. Cleveland, 82 Tex. 187, 17 S. W. Rep. 777.

[13] Norton v. Matthews, 7 Misc. (N. Y.) 569, 28 N. Y. Supp. 265; Brainerd v. Dunning, 30 N. Y. 211; Matter of Gordon, 49 Hun (N. Y.) 370, 3 N. Y. Supp. 589; Mattison v. Judd, 59 Miss. 99; Winfield Nat. Bk. v. Croco, 46 Kan. 639, 26 Pac. Rep. 942.

[14] Stephens v. Regenstein, 89 Ala. 561, 8 So. Rep. 68.

[15] Stafford v. Merrill, 62 Hun (N. Y.) 147, 16 N. Y. Supp. 467; Bickham v. Lake, 51 Fed. Rep. 892. In Bickham

make future preferences;[1] or that authorizes the assignee to compromise with creditors;[2] or that delays the collection of a debt;[3] or that provides for payment of part of the creditors,[4] and the restoration of the surplus back to the assignor;[5] or that permits the grantor to occupy and use the property;[6] or that is accompanied by the secreting of assets;[7] or is accompanied with the abstracting and hiding of a considerable sum of money on the eve of an assignment,[8] these are illustrations of fraudulent acts which by themselves, or in combination, have been deemed sufficient to overturn voluntary transfers for the benefit of creditors. Falsehoods recited in an assignment calculated to deceive

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v. Lake, 51 Fed. Rep. 895, the court says: "I think it must follow that a general assignment like the present, providing for the payment of fictitious or simulated debts, is fraudulent and void for all purposes. The question is, what are simulated and fictitious debts? To be held such, the debt must be fabricated and trumped up, must have no consideration to support it, must be a pretense, and nothing more. For the assignment to be rendered void on this ground, the conveyance, debt, or assignee debt must have been inserted by the grantor with a knowledge that it was not a real and valid debt, or that he was so careless and negligent in ascertaining whether or not it was a fictitious debt as to estop him from denying his knowledge of its invalidity, and not an honest mistake."

[1] Boardman v. Halliday, 10 Paige (N. Y.) 223; Averill v. Loucks, 6 Barb. (N. Y.) 470; Kercheis v. Schloss, 49 How. Pr. (N. Y.) 284.

[2] McConnell v. Sherwood, 84 N. Y. 522.

[3] Buell v. Rope, 6 App. Div. (N. Y.) 115, 39 N. Y. Supp. 475.

[4] Bickham v. Lake, 51 Fed. Rep. 892.

[5] Sutherland v. Bradner, 116 N. Y. 410, 22 N. E. Rep. 554. In Knapp v. McGowan, 96 N. Y. 85, the court says: "An insolvent, and even a solvent debtor cannot convey all his property to trustees to pay a portion of his creditors, with a provision that the surplus shall be returned to him, leaving his other creditors unprovided for; because such a conveyance ties up his property in the hands of his trustees, places it beyond the reach of his creditors by the ordinary process of the law and thus hinders and delays them, and is, therefore void as to the creditors unprovided for."

[6] Saunders v. Waggoner, 82 Va. 316.

[7] Newman v. Clapp, 20 Misc. (N. Y.) 68; Coursey v. Morton, 132 N. Y. 556, 30 N. E. Rep. 231; Shultz v. Hoagland, 85 N. Y. 464; Rothschild v. Salomon, 52 Hun (N. Y.) 486, 5 N. Y. Supp. 865.

[8] Coursey v. Morton, 132 N. Y. 556, 30 N. E. Rep. 231; Shultz v. Hoagland, 85 N. Y. 464; Rothschild v. Salomon, 52 Hun (N. Y.) 486, 5 N. Y. Supp. 865.

creditors constitute notice to the assignee of the assignor's fraudulent intent.[1]

§ 345a. **Insufficient grounds of attack.**—A cancellation by a surviving partner, by agreement, on the eve of making an assignment, of a claim against his son, who had rendered services to the firm of the reasonable value of the cancelled claim, will not invalidate an assignment;[2] nor is the instrument rendered void by bad management of the assignee;[3] nor by the fact that a debt preceding the assignment was fraudulently contracted;[4] nor by the fact that the assignor expected to compromise with his creditors;[5] nor, in Texas, by the fact that the schedule embraces a debt that cannot be paid ratably with the claims of other creditors;[6] nor because the insolvent's wife took a small amount of supplies from the assignor's store;[7] nor by the insolvency of the assignee,[8] though certainly such a transfer should be scrutinized; nor by the failure to comply with a statute directing that the residence, kind and place of business, etc., of the assignor

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[1] Douglass Merch. Co. v. Laird, 37 W. Va. 687, 17 S. E. Rep. 188.

[2] Cutter v. Hume, 62 Hun (N. Y.) 622, 17 N. Y. Supp. 255; affi'd 138 N. Y. 630, 33 N. E. Rep. 1084.

[3] Bradley v. Bischel, 81 Iowa 80, 46 N. W. Rep. 755.

[4] South Branch Lumber Co. v. Ott, 142 U. S. 622, 12 S. C. Rep. 318.

[5] Moore v. Stege, 93 Ky. 27, 18 S. W. Rep. 1019. In this case, the court says: "His evidence shows, however, that he was then conducting his business honestly, and the most that can be said, when all the testimony is considered, is, that when the assignment was made he had an expectation, a hope of compromising with his creditors. This does not vitiate the assignment. If so, one would rarely be upheld. It is, probably, seldom that a debtor assigns without at least some expectation of this character."

[6] Tracy v. Tuffly, 134 U. S. 225, 10 S. C. Rep. 527.

[7] Estes v. Gunter, 122 U. S. 450, 456, 7 S. C. Rep. 1275. The court says that Mrs. Gunter "was a clerk in the store and took the money from the drawer in the course of business, and supplies for Gunter's house were generally taken from the store. It was quite natural, therefore, that he should take needed supplies before the assignment was executed. There is no evidence that the supplies were excessive or unreasonable, but even if they were, that fact would constitute no ground for setting the subsequent assignment aside."

[8] Cohn v. Ward, 32 W. Va. 40, 9 S. E. Rep. 41.

shall be stated;[1] nor by omitting preferred claims of laborers;[2] nor by a mistake in the inventory of the property, or in the assignment with respect to the description of the debt, or its amount or form, in the absence of actual fraud;[3] nor because a preference is made in order to carry out an antecedent promise to prefer;[4] nor by withdrawing a small sum of money to apply to family wants;[5] nor by mistakes as to individual and copartnership debts;[6] nor by reserving exempt property.[7]

§ 345b. Defeated creditor entitled to dividend. — A creditor who fails to overturn an assignment is not precluded from sharing in a distribution of the assigned estate.[8] And a judgment-creditor will not forfeit or lose his honest judgment against the debtor because he may have advised the latter to cheat another creditor.[9]

§ 346. Foreign assigments. — The rule generally obtains that the statute laws of a particular State regulating assignments for the benefit of creditors, do not apply to

[1] Dutchess County Mutual Ins. Co., etc. v. Van Wagonen, 132 N. Y. 398, 30 N. E. Rep. 971.

[2] Richardson v. Thurber, 104 N. Y. 606, 11 N. E. Rep. 133.

[3] Roberts v. Buckley, 145 N. Y. 223, 39 N. E. Rep. 966. See Goodbar Shoe Co. v. Montgomery, 73 Miss. 73, 19 So. Rep. 196.

[4] Smith v. Munroe, 1 App. Div. (N. Y.) 77, 37 N. Y. Supp. 62; National Park Bank v. Whitmore, 104 N. Y. 304, 10 N. E. Rep. 524. See § 394.

[5] Vietor v. Nichols, 13 St. Rep. (N. Y.) 461, affi'd 114 N. Y. 617, 20 N. E. Rep. 880; Birdsall W. & P. Mfg. Co. v. Schwarz, 3 App. Div. (N. Y.) 301, 38 N. Y. Supp. 368.

[6] Gorham v. Innis, 115 N. Y. 87, 21 N. E. Rep. 722.

[7] Haynes v. Hoffman, 46 S. C. 157, 24 S. E. Rep. 103; Adler v. Cloud, 42 S. C. 272, 20 S. E. Rep. 393; Morehead Banking Co. v. Whitaker, 110 N. C. 345, 14 S. E. Rep. 920.

[8] Mills v. Parkhurst, 126 N. Y. 89, 26 N. E. Rep. 1041.

[9] Fidler v. John, 178 Pa. St. 117, 35 Atl. Rep. 976, where the court says: "If the owner of the honest judgment had a valid lien, which is not and cannot be disputed, by what conceivable process of reasoning did he lose it? If he had it before he advised the fraudulent conveyance how did he lose it because of that advice? If it was a good judgment before the advice was given, because it was given for a valuable consideration, it was a good judgment thereafter because it was still a judgment which was given for a valuable consideration. Therefore, it was still a good judgment. The fact of good consideration was precisely the same after as before the advice was given."

foreign assignments;[1] such transfers, if valid by the law of the place where made, are valid everywhere,[2] and will protect the property from attachment,[3] except perhaps as regards creditors who are residents of the particular State in which it is sought to enforce the provisions of the instrument. As the foreign assignment is allowed to operate partially as a matter of comity, the court sometimes refuse to enforce it to the prejudice of their own citizens,[4] and seize upon the absence of local requirements as a means of accomplishing that result.[5] In New York State no discrimination is permitted between residents of that State and of other States.[6] Manifestly an assignment will not take effect to pass title to personal property situated in another State, in express contravention of the statute law of that State.[7] The distinction should not be overlooked between assignments by act of the party and those which are involuntary,[8] or by oper-

[1] Ockerman v. Cross, 54 N. Y. 29; Chafee v. Fourth Nat. Bank of N. Y., 71 Me. 524; Bentley v. Whittemore, 19 N. J. Eq. 462.

[2] See Benevolent Order, etc. v. Sanders, 28 W. N. C. (Pa.) 321; Woodward v. Brooks, 128 Ill. 222, 20 N. E. Rep. 685.

[3] Ockerman v. Cross, 54 N. Y. 29; Bholen v. Cleveland, 5 Mason 174; Barth v. Backus, 140 N. Y. 234, 35 N. E. Rep. 425.

[4] Chafee v. Fourth Nat. Bank, 71 Me. 524. See Matter of Waite, 99 N. Y. 433, 2 N. E. Rep. 440. Compare Train v. Kendall, 137 Mass. 366.

[5] See Faulkner v. Hyman, 142 Mass. 53, 6 N. E. Rep. 846; Bentley v. Whittemore, 19 N. J. Eq. 462; Bacon v. Horne, 123 Pa. St. 452, 16 Atl. Rep. 794; Steel v. Goodwin, 113 Pa. St. 288, 6 Atl. Rep. 49.

[6] Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367; Vanderpoel v. Gorman, 140 N. Y. 563, 573, 574, 35 N. E. Rep. 932. See Paine v. Lester, 44 Conn. 196; Hanford v. Paine, 32 Vt. 442.

[7] Warner v. Jaffray, 96 N. Y. 248. In Hallgarten v. Oldham, 135 Mass. 1, 7, the court says: "When a sale, mortgage, or pledge of goods within the jurisdiction of a certain State is made elsewhere, it is not only competent, but reasonable, for the State which has the goods within its power to require them to be dealt with in the same way as would be necessary in a domestic transaction, in order to pass a title which it will recognize as against domestic creditors of the vendor or pledgor."

[8] Schroder v. Tompkins, 58 Fed. Rep. 675; Smith's Appeal, 104 Pa. St. 381; Weider v. Maddox, 66 Tex. 372, 1 S. W. Rep. 168; Walters v. Whitlock, 9 Fla. 86; Barth v. Backus, 140 N. Y. 235, 35 N. E. Rep, 425.

ation of law. The latter class of conveyances are generally founded upon statutory provisions, and have no extra-territorial force.[1] A conveyance of personal property, valid according to the *lex loci contractus*, is ordinarily binding and effectual to transfer title wherever located.[2] This, however, is a line of inquiry foreign to our subject.

§ 346a. **Assignments by corporations.** — Where charter restrictions or statutory inhibitions do not exist, a corporation may make a general assignment.[3] Such a transfer was formerly not possible to carry out under the statute in New York,[4] but the rule in that State has been changed.[5] In Vanderpoel v. Gorman,[6] Peckham, J., said: "There can be no doubt that an insolvent corporation could at common law make a general assignment in trust to an assignee for the benefit of its creditors."[7]

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[1] See Hutcheson v. Peshine, 16 N. J. Eq. 167; Kelly v. Crapo, 45 N. Y. 86; reversed, Crapo v. Kelly, 16 Wall. 610. See § 294.

[2] Schroder v. Tompkins, 58 Fed. Rep. 675; Barnett v. Kinney, 147 U. S. 476, 13 S. C. Rep. 403; Catlin v. Wilcox Silver Plate Co., 123 Ind. 477, 24 N. E. Rep. 250; Barth v. Backus, 140 N. Y. 234, 35 N. E. Rep. 425.

[3] Albany & R. Iron & S. Co. v. Southern Agricultural Works, 76 Ga. 135; De Ruyter v. St. Peter's Church, 3 Barb. Ch. (N. Y.) 124, affi'd 3 N. Y. 238; Haxtun v. Bishop, 3 Wend. (N. Y.) 13; Bowery Bank Case, 5 Abb. Pr. (N. Y.) 415; Hill v. Reed, 16 Barb. (N. Y.) 280; De Camp v. Alward, 52 Ind. 473; Nelson v. Edwards, 40 Barb. (N. Y.) 279; Union Bank of Tenn. v. Ellicott, 6 Gill & J. (Md.) 363; Vanderpoel v. Gorman, 140 N. Y. 568, 35 N. E. Rep. 932; Home Bank v. Brewster & Co., 17 Misc. (N. Y.) 442, 41 N. Y. Supp. 203; Savings Bank of New Haven v. Bates, 8 Conn. 505; Coats v. Donnell, 94 N. Y. 178; Chew v. Ellingwood, 86 Mo. 273; Lenox v. Roberts, 2 Wheat. 373; Warner v. Mower, 11 Vt. 385; Flint v. Clinton Co., 12 N. H. 431; *Ex parte* Conway, 4 Ark. 304; Catlin v. Eagle Bank, 6 Conn. 233; Ardesco Oil Co. v. North Am. Oil & M. Co., 66 Pa. St. 375. A transfer by officers of an insolvent corporation conveying all its property to another corporation without providing for debts and dividing the bonds received in payment among the stockholders and officers is fraudulent as to the vendor. Fort Payne Bank v. Ala. Sanitarium, 103 Ala. 358, 15 So. Rep. 618.

[4] Chap. 564, Laws of 1890, § 48.

[5] Vanderpoel v. Gorman, 140 N. Y. 568, 35 N. E. Rep. 932; Home Bank v. Brewster & Co, 17 Misc. (N. Y.) 442, 41 N. Y. Supp. 203.

[6] 140 N. Y. 563, 568, 35 N. E. Rep. 932.

[7] Franzen v. Zimmer, 90 Hun (N. Y.) 103, 35 N. Y. Supp. 612.

Where assignments by corporations are allowed they are subject to attack "upon substantially the same grounds as in the cases of similar transfers by individuals."[1] Hence a conveyance by an insolvent corporation to one of its directors, who assumed the debts and agreed to pay them within eighteen months is voidable.[2]

A corporation, like an insolvent person, may permit its creditors to take hostile proceedings and allow those to obtain preferences who are the most vigilant.[3]

But the ramifications of corporation law cannot be followed in detail.

§ 346b. **Contingent creditors.**—The fact that the assignor has incurred obligations that are of a contingent nature at the date of the assignment will not preclude provision being made for the protection of such contingent creditors out of the assigned estate.[4]

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[1] In Cole v. Millerton Iron Co. 133 N. Y. 164, 30 N. E. Rep. 847, it was held that a transfer by a corporation of all its assets, which has the effect of terminating the regular business of the corporation is illegal as against creditors.

[2] Berney Nat. Bank v. Guyon, (Ala. 1896) 20 So. Rep. 520.

[3] Varnum v. Hart, 119 N. Y. 105, 23 N. E. Rep. 183; French v. Andrews, 145 N. Y. 443, 40 N. E. Rep. 214.

[4] Brainerd v. Dunning, 30 N. Y. 211; Griffin v. Marquardt, 21 N. Y. 121; Keteltas v. Wilson, 36 Barb. (N. Y.) 298; Cunningham v. Freeborn, 11 Wend. (N. Y.) 241; Webb v. Thomas, 49 St. Rep. (N. Y.) 462, 21 N. Y. Supp. 69; Read v. Worthington, 9 Bosw. (N. Y.) 628.

CHAPTER XXII.

FRAUDULENT CHATTEL MORTGAGES.

§ 347. Chattel Mortgages.
348. } Rule in Robinson v. Elliott.
349. }
350. Proof extrinsic to the instrument.
351. Comments in the cases.
352. } Opposing rule and cases.
353. }
354. Discussion of the principle involved.
355. Authorizing sales for mortgagee's benefit.
§ 356. Sales upon credit.
356*a*. Secret trust.
356*b*. Change of possession.
357. Possession — Independent valid transactions.
358. Right of revocation — Reservations.
359. Rule as to consumable property.
359*a*. Distinct claims.

§ 347. Chattel mortgages.— Questions affecting the validity of chattel mortgages as regards creditors are so largely dependent upon and regulated by local statutory provisions, that the general principles governing the subject can be discussed with but little satisfaction. These instruments are in some respects a higher security than a mortgage on land. Such mortgages are, as a general rule, valid between the parties,[1] even though not

[1] Stewart v. Platt, 101 U. S. 731; Hackett v. Manlove, 14 Cal. 85. See Lane v. Lutz, 1 Keys (N. Y.) 213; Smith v. Acker, 23 Wend. (N. Y.) 653. See Chap. XXVI. In Stewart v. Platt, 101 U. S. 739, the court said: "Although the chattel mortgages, by reason of the failure to file them in the proper place, were void as against judgment-creditors, they were valid and effective as between the mortgagors and the mortgagee. Lane v. Lutz, 1 Keys (N. Y.) 213; Wescott v. Gunn, 4 Duer (N. Y.) 107; Smith v. Acker, 23 Wend. (N. Y.) 653. Suppose the mortgagors had not been adjudged bankrupts; and there had been no creditors, subsequent purchasers, or mortgagees in good faith to complain, as they alone might, of the failure to file the mortgages in the towns where the mortgagors respectively resided, it cannot be doubted that Stewart, in that event, could have enforced a lien upon the mortgaged property in satisfaction of his claim for rent. The assignee took the property subject to such equities, liens, or incumbrances as would have affected it, had no adjudication in bankruptcy been made. While the rights of creditors whose executions

recorded;[1] and recording the instrument is made by statute in some States a substitute for actual change of possession, and repels the imputation of fraud which would arise from the retention of possession by the vendor.[2] The creditor must keep in mind in taking a chattel mortgage to secure his debt that he cannot use his claim for any other purpose than his own indemnity.[3] Taking a mortgage in excess of the debt,[4] or upon all the property of the debtor of a value greatly in excess of the debt;[5] making an unfair sacrifice at the sale so as to prevent a surplus;[6] taking the mortgage, among other things, to hinder other creditors;[7] or reciting an over statement of the consideration;[8] or obtaining the instrument under duress[9] or altering a mortgage;[10] are illustrations of acts and combinations of facts which will overturn such a security. Many questions concerning the validity of these instruments are to be found in the reports, only the more prominent of which will be noticed. Naturally, from

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preceded the bankruptcy were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund, after satisfying those executions, belonged to the mortgagee, and not to the assignee for the purposes of his trust. The latter representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors." See Hauselt v. Harrison, 105 U. S. 406.

[1] Stewart v. Platt, 101 U. S. 731; Lane v. Lutz, 1 Keyes (N. Y.) 213; Pyeatt v. Powell, 10 U. S. App. 200, 51 Fed. Rep. 551, 2 C. C. A. 367.

[2] See Bullock v. Williams, 16 Pick. (Mass.) 33; Feurt v. Rowell, 62 Mo. 524; Hughes v. Cory, 20 Iowa 403, and cases cited; Spraights v. Hawley, 39 N. Y. 441. A reasonable delay by the mortgagee in taking possession will not be considered a badge of fraud. Stevens v. Breen, 75 Wis. 595, 44 N. W. Rep. 645.

[3] Hughes v. Epling, 93 Va. 424; 25 S. E. Rep. 105. See State v. Busch, 38 Mo. App. 440.

[4] Patrick v. Riggs, 105 Mich. 616, 63 N. W. Rep. 532.

[5] Thompson v. Richardson Drug Co., 33 Neb. 714, 50 N. W. Rep. 948; Brown v. Work, 30 Neb. 800, 47 N. W. Rep. 192.

[6] Collingsworth v. Bell, 56 Kan. 342, 43 Pac. Rep. 252.

[7] Weber v. Mick, 131 Ill. 526, 23 N. E. Rep. 646; McCreary v. Skinner, 83 Iowa 366, 49 N. W. Rep. 986.

[8] Kalk v. Fielding, 50 Wis. 339, 7 N. W. Rep. 296.

[9] Lightfoot v. Wallis, 12 Bush (Ky.) 498. See Bane v. Detrick, 52 Ill. 19.

[10] Bowser v. Cole, 74 Tex. 222, 11 S. W. Rep. 1131.

what precedes, a mere creditor-at-large cannot assail a chattel mortgage.[1]

§ 348. **Rule in Robinson v. Elliott.**—The Supreme Court of the United States, in Robinson v. Elliott,[2] committed itself to the doctrine that an instrument which provided for the retention of the possession of the mortgaged personalty by the mortgagor, accompanied with the power to dispose of it for his own benefit in the usual course of trade, was inconsistent with the idea of a security, or the nature and character of a mortgage, and of itself furnished a pretty effectual shield to a dishonest debtor, and consequently should be regarded as voidable as to creditors.[3]

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[1] Button v. Rathbone, 126 N. Y. 190, 27 N. E. Rep. 266; Jones v. Graham, 77 N. Y. 628.

[2] 22 Wall. 513.

[3] See Worseley v. Demattos, 1 Burr. 467, per Lord Mansfield; Edwards v. Harben, 2 T. R. 587; Bannon v. Bowler, 34 Minn. 418, 26 N. W. Rep. 237; Paget v. Perchard, 1 Esp. 205, per Lord Kenyon; Lang v. Lee, 3 Rand. (Va.) 410; Addington v. Etheridge, 12 Gratt. (Va.) 436; McLachlan v. Wright, 3 Wend. (N. Y.) 348; Edgell v. Hart, 9 N. Y. 213; Brackett v. Harvey, 91 N. Y. 214; Potts v. Hart, 99 N. Y. 168, 1 N. E. Rep. 605; American Oak Leather Co. v. Fargo, 77 Fed. Rep. 671; Hangen v. Hachemeister, 114 N. Y. 566, 21 N. E. Rep. 1046; Mandeville v. Avery, 124 N. Y. 376, 26 N. E. Rep. 951; Sparks v. Brown, 46 Mo. App. 530; Sauer v. Behr, 49 Mo. App. 86; Russell v. Rutherford, 58 Mo. App. 550; Cook v. Bennet, 60 Hun (N. Y.) 8, 14 N. Y. Supp. 683; Gallagher v. Rosenfield, 47 Minn. 507, 50 N. W. Rep. 696; Randall v. Carman, 89 Hun (N. Y.) 86, 35 N. Y. Supp. 53; Sherwin v. Gaghagen, 39 Neb. 238, 57 N.W. Rep. 1005; State v. Busch, 38 Mo. App. 442; Martin-Perrin Merc. Co. v. Perkins, 63 Mo. App. 310; Pabst Brewing Co. v. Butchart (Minn.) 69 N. W. Rep. 809; Chapman v. Sargent, 6 Col. App. 438, 40 Pac. Rep. 849; Coburn v. Pickering, 3 N. H. 415; Bank of Leavenworth v. Hunt, 11 Wal. 391; Coolidge v. Melvin, 42 N. H. 520; Collins v. Myers, 16 Ohio 547; Chophard v. Bayard, 4 Minn. 533; Horton v. Williams, 21 Minn. 187; Bishop v. Warner, 19 Conn. 460; Place v. Langworthy, 13 Wis. 629; Blakeslee v. Rossman, 43 Wis. 116; Smith v. Ely, 10 N. B. R. 553; *In re* Cantrell, 6 Ben. 482; *In re* Kahley, 2 Biss. 383; Southard v. Benner, 72 N. Y. 424; *Ex parte* Games, L. R. 12 Ch. D. 314; Cheatham v. Hawkins, 80 N. C. 164; Tennessee Nat. Bank v. Ebbert, 9 Heisk. (Tenn.) 154; Joseph v. Levi, 58 Miss. 845; Harman v. Hoskins, 56 Miss. 142; Dunning v. Mead, 90 Ill. 379; Goodheart v. Johnson, 88 Ill. 58; Davenport v. Foulke, 68 Ind. 382; Barnet v. Fergus, 51 Ill. 352; Davis v. Ransom, 18 Ill. 396; Simmons v. Jenkins, 76 Ill. 479; Mobley v. Letts, 61 Ind. 11; Garden v. Bodwing, 9 W. Va. 122; City Nat. Bank v. Goodrich, 3 Col. 139; Sparks v. Mack, 31 Ark.

Davis, J., said: "In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien. Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time."[1] The same court, following a State decision, was, later, inclined to uphold a mortgage of this kind, where the State from which the appeal was taken tolerated such an arrangement.[2] That the courts should look with any favor upon such instruments seems extraordinary, but the principle of Robinson v. Elliott is certainly not gaining ground. It must be remem-

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666; Orton v. Orton, 7 Ore. 378; Peiser v. Peticolas, 50 Tex. 638; Scott v. Alford, 53 Tex. 82; Weber v. Armstrong, 70 Mo. 217; Tallon v. Ellison, 3 Neb. 63; McCrasly v. Hasslock, 4 Baxt. (Tenn.) 1; Catlin v. Currier, 1 Sawyer, 7; Orman v. English & S. Merc. Inv. Trust, 9 C. C. A. 356, 61 Fed. Rep. 38; Pierce v. Wagner (Minn.) 66 N. W. Rep. 977; Bank v. Brier, 95 Tenn. 331, 32 S. W. Rep. 205; American Oak Leather Co. v. Wyeth Hardware & Mfg. Co., 57 Mo. App. 297; Paxton v. Smith, 41 Neb. 56, 59 N. W. Rep. 690; Eckman v. Munnerlyn, 32 Fla. 367, 13 So. Rep. 922; First Nat. Bank v. Wittich, 33 Fla. 681, 15 So. Rep. 552; Rock Island Nat. Bank v. Powers, 134 Mo. 444, 34 S. W. Rep. 869, 35 Id. 1132. See "An American Phase of Twyne's Case," by James O. Pierce, Esq., 2 Southern L. Rev. (N. S.) 731; "Fraudulent Mortgages of Merchandise," by Leonard A. Jones, Esq., 5 Southern L. Rev. (N. S.) 617; "A Reply," by Mr. Pierce, 6 Southern L. Rev. (N. S.) 96; "Frauds in Chattel Mortgages," by Mr. Jones, 7 Southern L. Rev. (N. S.) 95; Reviewed by Ed. J. Maxwell. Esq., 7 Southern L. Rev. (N. S.) 205. This discussion relates mainly to Robinson v. Elliott, 22 Wall. 513. The controversy gave birth to a work entitled "Fraudulent Mortgages of Merchandise, a Commentary on the American Phases of Twyne's Case, by James O. Pierce," F. H. Thomas & Co., 1884. The positions taken by Mr. Pierce in the Law Review, in support of Robinson v. Elliott, are re-stated in this volume with commendable clearness and force, and the different authorities in State and Federal tribunals bearing upon the question are collated and discussed down to that date.

[1] Robinson v. Elliott, 22 Wall. 525. See Means v. Dowd, 128 U. S. 284, 9 S. C. Rep. 65; Etheridge v. Sperry, 139 U. S. 266, 11 S. C. Rep. 565.

[2] Etheridge v. Sperry, 139 U. S. 266, 11 S. C. Rep. 565.

bered that, in Twyne's Case, where the transfer was avoided, one of the objections urged against the transaction was that the debtor *used* the goods as his own.[1] Mr. Pierce observes: "A mortgage or conveyance of this kind presents a false appearance, is only a pretence as a mortgage, is calculated to deceive, cannot fail to deceive if it be operative, furnishes unusual facilities for fraud, reserves benefits to the grantor, and prejudices other creditors. When it thus appears that the transaction is, in its result, so fraudulent, and so injurious to creditors, that few transactions could be more so, even where an intent to defraud exists so as to bring them within the statute of 13 Eliz., the courts are as ready to adjudge the transaction fraudulent as they would be if a fraudulent intent appeared."[2]

§ 349. — In Edgell v. Hart,[3] the license to sell was inferred from a written schedule attached to the instrument. Chief-Justice Denio held, with the concurrence of a majority of the court, that "the existence of such a provision out of the mortgage or in it, would invalidate it as matter of law, and that where the facts are undisputed this court should so declare."[4] "Such an agreement," said Finch, J., "opens the door to fraud, and permits the mortgagor to use the property for his own benefit, utilizing the mortgage as a shield against other creditors."[5] The debtor, in the language of Kent, "sports with the property as his own."[6] A debtor can-

[1] See § 22.

[2] Pierce on Fraudulent Mortgages of Merchandise, § 122. Compare Birmingham Dry Goods Co. v. Roden, 110 Ala. 511; s. c., *sub nom.* Birmingham Dry Goods Co. v. Kelso, 18 So. Rep. 135; Lukins v. Aird, 6 Wall. 78.

[3] 9 N. Y. 213. See Hangen v. Hachemeister, 114 N. Y. 566, 21 N. E. Rep. 1046.

[4] Compare Gardiner v. McEwen, 19 N. Y. 123; Mittnacht v. Kelly, 3 Keyes (N. Y.) 407; Russell v. Winne, 37 N. Y. 591.

[5] Brackett v. Harvey, 91 N. Y. 223, 224.

[6] Riggs v. Murray, 2 Johns. Ch. (N. Y.) 565.

not as against creditors be allowed to make an apparently valid transfer of property so that it shall continue a source of profit to him.[1] In Mittnacht v. Kelly,[2] Parker, J., observed: "The mortgaging the whole stock in trade, ... *with the increase and decrease thereof*, and the providing for the continued possession of the mortgagor, can have no other meaning than that the mortgagee should all the time retain a lien on the whole stock by way of mortgage, the mortgagor making purchases from time to time, and selling off in the ordinary manner, the intent being not to create an absolute lien upon any property, but a fluctuating one, which should open to release that which should be sold and take in what should be newly purchased. This is just such an arrangement as was held in Edgell v. Hart[3] to render the mortgage void. The case cannot be distinguished from that, and the law as pronounced in that case, must be held applicable to this." In Griswold v. Sheldon,[4] Bronson, C. J., says: "There would be no hope of maintaining honesty and fair dealing if the courts should allow a mortgagee or vendee to succeed in a claim to personal property against creditors and purchasers, after he had not only left the property in the possession of the debtor, but had allowed him to deal with and dispose of it as his own." "To attempt," says Mr. Pierce,[5] "to fasten a valid and certain lien upon goods which may at any moment, at the will of the debtor, fly out from under the lien, is to attempt a legal and moral impossibility." It is a sham, a nullity — a mere shadow of a mortgage, only calculated to ward off

[1] Birmingham Dry Goods Co. v. Roden, 110 Ala. 511; s. c., *sub mon.* Birmingham Dry Goods Co. v. Kelso, 18 So. Rep. 135; Lukins v. Aird, 6 Wall. 78.

[2] 3 Keyes (N. Y.) 407.

[3] 9 N. Y. 213; Randall v. Carman, 89 Hun (N. Y.) 86, 35 N. Y. Supp. 53; Mandeville v. Avery, 124 N. Y. 376, 26 N. E. Rep. 951; Barton v. Sitlington, 128 Mo. 164, 30 S. W. Rep. 514.

[4] 4 N. Y. 590.

[5] Pierce on Fraudulent Mortgages of Merchandise, § 125.

other creditors — a conveyance in trust for the benefit of the person making it, and therefore void as against creditors.[1]

§ 350. Proof extrinsic to the instrument.— The rule, as we have seen, is the same, whether the agreement is recited in the instrument or is extrinsic to it.[2] Thus Allen, J., remarked: "Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact and render it harmless. If it is satisfactorily established, the result upon the security must be the same."[3] When not embodied in the instrument the agreement to sell must be proved. The mere expectation of one party or the other that this right is to be given is not enough; there must be a conscious assent of both.[4] In Potts v. Hart,[5] Earl, J., said: "A mortgage thus given is fraudulent and void as to creditors because it must be presumed that at least one of the purposes, if not the main purpose for giving it, was to cover up the mortgagor's property and thus hinder and delay his other creditors. It matters not whether the agreement that the mortgagor may continue to deal in the property for his own benefit is contained in the mortgage or exists in parol outside of it; and where the agreement exists in parol, it matters not whether it

[1] Catlin v. Currier, 1 Sawyer 12; Orman v. English & S. Merc. Inv. Trust, 9 C. C. A. 356, 61 Fed. Rep. 38. A provision requiring the mortgagor in possession to replenish the stock will not render such mortgage valid. Greenebaum v. Wheeler, 90 Ill. 296; Gallagher v. Rosenfield, 47 Minn. 507, 50 N. W. Rep. 696.

[2] Edgell v. Hart, 9 N. Y. 213; McLean v. Lafayette Bank, 3 McLean 623; Bowen v. Clark, 1 Biss. 128; *In re* Kahley, 2 Biss. 383; *In re* Cantrell 6 Ben. 482; Smith v. Ely, 10 N. B. R. 553; *Re* Kirkbride, 5 Dill. 116; Catlin v. Currier, 5 Fed. Cas. 300, 1 Sawyer 7.

[3] Southard v. Benner, 72 N. Y. 432; S. P. Russell v. Winne, 37 N. Y. 591.

[4] Brackett v. Harvey, 91 N. Y. 224.

[5] 99 N. Y. 172.

is valid, so that it can be enforced between the parties or not; for whether valid or invalid, it is equally effectual to show the fraudulent purpose for which the mortgage was given, and the fraudulent intent which characterizes it. It is always open to creditors to assail, by parol evidence, a mortgage or a bill of sale of property as fraudulent and void as to them. While between the parties the written contract may be valid, and the outside parol agreement may not be shown or enforced, yet it may be shown by creditors for the purpose of proving the fraudulent intent which accompanied and characterized the giving of the written instrument. It is usually difficult to prove by parol an agreement in terms that the mortgagor may continue to deal in the property for his own benefit. Parties concocting a fraudulent mortgage would not be apt to put the transaction in that unequivocal form. But all the facts and circumstances surrounding the giving of the mortgage, and the subsequent dealing in the property with the knowledge and assent of the mortgagee, may be shown, and they may be sufficient to justify the court or jury in inferring the agreement; and so the parol agreement was inferred in all the cases which have come under our observation." The intent to defraud and the power of sale must be found to have existed at the time the mortgage was made, and the subsequent conduct of the mortgagor is relevant only in so far as it shows the existence of such intent *ab initio*.[1]

§ 351. **Comments in the cases.**— Chief-Justice Parker, in speaking of these shifting liens, observes that "if this doctrine were admitted, a mortgage of personal property would be like a kaleidoscope, in that the forms represented would change at every turn; but, unlike that instrument, in that the materials would not remain the

[1] Filebeck v. Bean, 45 Minn. 307, 47 N. W. Rep. 969; Whitney v. Levon, 34 Neb. 443, 51 N. W. Rep. 972; State v. Roever, 55 Mo. App. 448.

same."[1] The objection may be re-stated, to the effect that the mortgagor may dispose of the property, defeat the mortgage, and put the money in his own pocket; but if he refuses to pay a debt, and creditors seize the property in execution against his will, the mortgage steps in and restores it to the debtor.[2] Again, it is said that there is no specific lien, but "a floating mortgage, which attaches, swells, and contracts, as the stock in trade changes, increases, and diminishes; or may wholly expire by entire sale and disposition, at the will of the mortgagor."[3] Such stipulations are not only inconsistent with the idea of a mortgage, but tend inevitably to give a fraudulent advantage to the debtor over his other creditors.[4]

§ 352. **Opposing rule and cases.** — The rule embodied in Robinson v. Elliot[5] has, however, been a subject of much discussion and dissension. It seems to be conceded in the great mass of the cases, that an agreement for the retention of possession, with power of disposition by the mortgagor, may constitute evidence of fraud, proper to be considered by the jury or the court as a fact in connection with all the circumstances arising in each particular case. The contention against the rule in Robinson v. Elliott is that the agreement does not render the instrument void *per se*, or as matter of law or conclusively fraudulent, and that whether it is fraudulent in *fact* or not, should be "decided upon all the evidence, including, of course, the terms of the instrument itself."[6]

[1] Ranlett v. Blodgett, 17 N. H. 305; Mercantile Trust Co. v. Wood, 8 C. C. A. 658, 60 Fed. Rep. 346.

[2] Collins v. Myers, 16 Ohio 547.

[3] Collins v. Myers, 16 Ohio 554; McConihe v. Derby, 62 Hun (N. Y.) 90, 16 N. Y. Supp. 474.

[4] Tennessee Nat. Bank v. Ebbert, 9 Heisk. (Tenn.) 153.

[5] 22 Wall. 513. See Means v. Dowd, 128 U. S. 284, 9 S. C. Rep. 65; Etheridge v. Sperry, 139 U. S. 266, 11 S. C. Rep. 565.

[6] Hughes v. Cory, 20 Iowa 399–410, per Dillon, J.; Brett v. Carter, 2 Lowell, 458; Gay v. Bidwell, 7 Mich. 519; Googins v. Gilmore, 47 Me. 9; Clark v. Hyman, 55 Iowa 14, 7 N.

§ 353. — Lowell, J.,[1] seemed "to doubt both the generality and the justice" of the rule stated by Davis, J., in Robinson v. Elliott,[2] and regarded the doctrine as substantially settled, that when a vendor or mortgagor was permitted to retain the possession and control of his goods and act as apparent owner, the question whether this was a fraud or not was one of fact for the jury. The court observed: "A conveyance for a valuable present consideration is never a fraud in law on the face of the deed, and if fraud is alleged to exist, it must be proved as a fact." It is considered plain that the doctrine of Robinson v. Elliott "virtually prevents a trader from mortgaging his stock at any time for any useful purpose; for if he cannot sell in the ordinary course of trade, or only as the trustee and agent of the mortgagee, he might as well give possession to the mortgagee at once and go out of business."

It is to be noticed that the court by this sentence expresses the belief that shifting liens upon merchandise,

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W. Rep. 386; Fletcher v. Powers, 131 Mass. 333; Briggs v. Parkman, 2 Met. (Mass.) 258; Jones v. Huggeford, 3 Met. (Mass.) 515; Hunter v. Corbett, 7 U. C. Q. B. 75; Miller *ads.* Pancoast, 29 N. J. Law, 250; Price v. Mazange, 31 Ala. 701; Sleeper v. Chapman, 121 Mass. 404; People v. Bristol, 35 Mich. 28; Wingler v. Sibley, 35 Mich. 231; Hedman v. Anderson, 6 Neb. 392; Cheatham v. Hawkins, 76 N. C. 335; Mitchell v Winslow, 2 Story 647; Miller v. Jones, 15 N. B. R. 150; Barron v. Morris, 14 N. B. R. 371; Frankhouser v. Ellett, 22 Kan. 127, 31 Am. Rep. 171; Willams v. Winsor, 12 R. I. 9; Sherwin v. Gaghagen, 39 Neb. 238, 57 N. W. Rep. 1005; Jaffray v. Greenbaum, 64 Iowa 492, 20 N. W. Rep. 775; Vanmeter v. Estill, 78 Ky. 456; Etheridge v. Sperry, 139 U. S. 275, 11 S. C. Rep. 565. See s. c. 17 Alb. L. J. 359, and cases cited. It may be observed that Dillon, J., adopted the other rule when sitting as a circuit judge. He said: "A conveyance of personal property to secure creditors, when the grantor, by the understanding of the parties, expressed or implied, is to remain in possession of the property, with a power of sale, is void upon a principle of public policy embodied in the State, irrespective of any question of actual and intended fraud." *Re* Kirkbride, 5 Dill. 117.

[1] Brett v. Carter, 2 Lowell 458; Francisco v. Ryan, 54 Ohio St. 313; Peoples' Savings Bk. v. Bates, 120 U. S. 561, 7 S. C. Rep. 679.

[2] 22 Wall. 513.

which open and close at the will of the mortgagor, are not necessarily fraudulent contrivances devised to defeat creditors; on the contrary, such mortgages seem to be contemplated as capable of subserving a "useful purpose." Many of the cases, however, which follow Brett v. Carter, in holding that fraud is a question of fact, concede, and often expressly state, that contrivances of this class are convenient covers for fraud upon creditors. It seems to have been admitted in Brett v. Carter,[1] that there was no fraud in fact as it is commonly termed; that the transaction showed that all the stock, present and future, was hypothecated to the payment of a certain debt by instalments. "No offer is made," said Lowell, J., "to prove that any one was deceived, or even was ignorant of the mortgage; but I am asked to find fraud in law, when I know, and it is admitted, there was none in fact." The court cites Mr. May's treatise as authority for the statement that fraud is a question of fact,[2] but omits to note that the learned author was on the page cited discussing the question of the effect of the simple retention of possession, and fails to note the following observation:[3] "The rule seems to be that where there is an absolute conveyance, and the grantor remains in possession *in such a way as to be able to use the goods as his own*, it is always void against creditors, even though made on valuable consideration.[4]

In Etheridge v. Sperry,[5] Mr. Justice Brewer said: "Indeed if this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith; and it is at least worthy of thought,

[1] 2 Low. 458.

[2] May on Fraudulent Conveyances, p. 106.

[3] Ibid. p. 100.

[4] See Pierce on Fraudulent Mortgages of Merchandise, § 123.

[5] 139 U. S. 277, 11 S. C. Rep. 565.

whether the rulings made by the Supreme Court of Iowa do not tend to make chattel mortgages more valuable for commercial purposes, without endangering the rights of unsecured creditors. The law now generally requires a record of all such instruments, and that, like the recording of a real estate mortgage, gives notice to all parties interested of the fact and extent of incumbrances. Why should a transaction like this be condemned, if made in good faith and to secure an honest debt? The owner of a stock of goods may make an absolute sale of them to his creditor, in payment of a debt. If an absolute, why not a conditional, sale, with such conditions as he and his creditor may agree upon? As between the parties no court would question this right, or refuse to enforce the conditions. . . . . If the question were open, or a new one, unaffected by any settled law of the State, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith."[1] The ideas advanced by Judge Lowell in Brett v. Carter[2] are certainly being favored, and are said to prevail in one-half of the States of the Union.

§ 354. **Discussion of the principle involved.** — It is foreign to our design to kindle the smouldering embers of this discussion into new flame. It will be seen at a glance that the subject-matter of contention in the controversy is the much-debated distinction between fraud in law and fraud in fact. The conclusion is reached in our opening chapter,[3] that this distinction is largely mythical, and relates only to the character and quantity of the proof

[1] See Torbert v. Hayden, 11 Iowa 435; Hughes v. Cory, 20 Iowa 399; Clark v. Hyman, 55 Iowa 14, 7 N. W. Rep. 386; Sperry v. Etheridge, 63 Iowa 543, 19 N. W. Rep. 657; Jaffray v. Greenbaum, 64 Iowa 492, 20 N. W. Rep. 775; Jewell v. Knight, 123 U. S. 426, 8 S. C. Rep. 193; Smith v. Craft, 123 U. S. 436, 8 S. C. Rep. 196; Barron v. Morris, 14 Nat. Bk. Reg. 371; Miller v. Jones, 15 Nat. Bk. Reg. 150.

[2] 2 Lowell 458.

[3] See §§ 9, 10.

adduced to nullify the transaction. Where the evidence is of such a conclusive nature that the fraudulent intent unmistakably fastens its fangs upon the transfer, so that a verdict or finding contrary to the evident evil design so established would be erroneous, the court pronounces the transaction covinous, and imputes the fraudulent intent to the parties in obedience to the principle of law that they must have contemplated the natural and necessary consequences of their acts. Where the facts are not controverted and do not admit of a construction consistent with innocence, surely the burden is cast upon the court to declare the result. There is no question of intention to be submitted to the jury. As the mortgage shows upon its face that it was not designed by the parties as an operative instrument between them, its only effect is to prejudice others. The court should "pronounce it void, for the reason that the evidence conclusively shows it fraudulent."[1] It is because such trusts are calculated to deceive and embarrass creditors, because they are not things to which honest debtors can have occasion to resort in sales of their property, and because they constitute the means which dishonest debtors commonly and ordinarily use to cheat their creditors, that the law does not permit a debtor to say that he used them for an honest purpose in any case.[2] Chief-Justice Ryan said: "Intent does not enter into the question. Fraud in fact goes to avoid an instrument otherwise valid. But intent, *bona fide* or *mala fide*, is immaterial to an instrument *per se* fraudulent and void in law. The fraud which the law imputes to it is conclusive. . . . . Fraud in fact imputed to a contract (valid on its face) is a question of evidence; not fraud in law. And no agreement of the parties in

[1] Russell v. Winne, 37 N. Y. 595.

[2] Coolidge v. Melvin, 42 N. H. 520; Winkley v. Hill, 9 N. H. 31.

parol can aid a written instrument fraudulent and void in law."[1]

§ 355. **Authorizing sales for mortgagee's benefit.**—Three cases,[2] decided in the New York Court of Appeals in rapid succession, and approved in the same court in a later case,[3] held that a chattel mortgage was not *per se* void because of a provision contained in it allowing the mortgagor to sell the mortgaged property and account to the mortgagee for the proceeds, and apply them to the mortgage debt.[4] "These cases," says Finch, J., "went upon the ground that such sale and application of proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its lawful operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee, to do exactly what the latter had the right to do, and what it was his privilege and his duty to accomplish."[5] It may be observed that a subsequent judgment-creditor is entitled to have an account of the sales so made stated, and to have the amount thereof applied to reduce the mortgage debt,[6] and the mortgagee must be charged with the amount of any goods sold on credit.[7]

§ 356. **Sales upon credit.** — The rule being established that the mortgagor may sell the property and account for

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[1] Blakeslee v. Rossman, 43 Wis. 124.

[2] Ford v. Williams, 24 N. Y. 359; Conkling v. Shelley, 28 N. Y. 360; Miller v. Lockwood, 32 N. Y. 293.

[3] Brackett v. Harvey, 91 N. Y. 221. See Hawkins v. Hastings Bank, 1 Dillon 462; Spaulding v. Keyes, 125 N. Y. 117, 26 N. E. Rep. 15; Gleason v. Wilson, 48 Kan. 500, 29 Pac. Rep. 698.

[4] See Prentiss Tool and Supply Co. v. Schirmer, 136 N. Y. 305, 32 N. E. Rep. 849.

[5] Brackett v. Harvey, 91 N. Y. 221; S. P. Wilson v. Sullivan, 58 N. H. 260; Hawkins v. Hastings Bank, 1 Dillon 462; Overman v. Quick, 8 Biss. 134; Abbott v. Goodwin, 20 Me. 408; Crow v. Red River Co. Bank, 52 Tex. 362; Fletcher v. Martin, 126 Ind. 55, 25 N. E. Rep. 886; Lane v. Starr, 1 S. Dak. 107, 45 N. W. Rep. 212.

[6] Ellsworth v. Phelps, 30 Hun (N. Y.) 646.

[7] Warren v. His Creditors, 3 Wash. St. 48, 28 Pac. Rep. 257.

the proceeds to the mortgagee, and that such an arrangement is not fraudulent in law if made with an honest intention,[1] another phase of the controversy must be considered. What will be the effect if the mortgagor is not restricted to sales for cash, but is allowed to sell upon credit, in his discretion? Elsewhere it is shown that general assignments permitting the assignee to sell upon credit are regarded as fraudulent, because such agreements hinder and delay creditors and prevent the immediate application of the debtor's property to the payment of their claims.[2] The same principle has been extended and applied to sales of the mortgaged property made upon credit by the mortgagor for the mortgagee. The arrangement is calculated to keep the creditors at bay, and is regarded as fraudulent *per se*.[3] If, however, the accounts, where the sales are effected on credit, are immediately transferred to the mortgagee at their face, and credited or allowed upon the mortgage debt, the objectionable elements of the transaction are eliminated, and the arrangement will be tolerated.[4] In Brown v. Guthrie,[5] Finch, J., said: "The dealing, therefore, must be treated as a chattel mortgage by the debtor to his creditor, the consideration of which was evidenced and settled by the outside agreement. So regarded, the findings declare it to have been in good faith and not fraudulent. The arrangement for the sale on credit was made harmless by the stipulation that Guthrie should take the credits as cash, and himself bear the delay, and risk the solvency of the purchasers."[6]

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[1] Ford v. Williams, 24 N. Y. 359; Brackett v. Harvey, 91 N. Y. 221; Hawkins v. Hastings Bank, 1 Dill. 462.

[2] Nicholson v. Leavitt, 6 N. Y. 510; Barney v. Griffin, 2 N. Y. 365; Dunham v. Waterman, 17 N. Y. 21. See §§ 332, 333.

[3] City Bank v. Westbury, 16 Hun (N. Y.) 458.

[4] Caring v. Richmond, 22 Hun (N. Y.) 370.

[5] 110 N. Y. 435, 443.

[6] Citing Brackett v. Harvey, 91 N. Y. 214.

§ 356a. **Secret trust.** — In a controversy in Nebraska, where the chattel mortgage covered all the debtor's property, and was not recorded, and the mortgagee took formal possession and held the same subject to the direction of the mortgagor, until by sale or lease the debt secured should be paid, the mortgagor to receive the balance, the arrangement was held fraudulent as to the other creditors.[1]

§ 356b. **Change of possession.** — In most States it is provided by statute that a mortgage of chattels not accompanied by a change of possession shall be void as against creditors unless the mortgage shall be filed. It is a necessary feature of the possession to which the statute refers that it should be open, visible and free from concealment. It then becomes notice in its highest form of the claim of the possessor, and the constructive notice which arises from the filing of the mortgage becomes unnecessary. But when the change of possession is not of that character, so that it fails to disclose itself to others than the immediate parties to the transfer, however honest they may have been in their intentions, the situation exists which the statute was designed to prevent.[2]

§ 357. **Possession — Independent valid transactions.** — Manifestly selling or taking possession of the property under and by virtue of the fraudulent mortgage cannot purge it of the vice of fraud.[3] The title remains fraudu-

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[1] Bacon v. P. Brockman Com. Co., 48 Neb. 365, 67 N. W. Rep. 304.

[2] Tedesco v. Oppenheimer, 15 Misc. (N. Y.) 524, 37 N. Y. Supp. 1073; Crandall v. Brown, 18 Hun (N. Y.) 461; Hale v. Sweet, 40 N. Y. 97; Steele v. Benham, 84 N. Y. 634.

[3] In Wells v. Laugbein, 20 Fed. Rep. 183, 186, the court observes: "The Supreme Court of California, in Chenery v. Palmer, 6 Cal. 123; the Supreme Court of New York, in Delaware v. Ensign, 21 Barb. (N. Y.) 85, and Dutcher v. Swartwood, 15 Hun (N. Y.) 31; the Court of Appeals of New York, in Parshall v. Eggert, 54 N. Y. 18; the Supreme Court of Wisconsin, in Blakeslee v. Rossman, 43 Wis. 116, and the Supreme Court of Minnesota, in Stein v. Munch, 24 Minn. 390,— all hold that where the mortgage is void for fraud as to creditors, taking pos-

lent and voidable still as against creditors.[1] Before and after taking possession, the title of the mortgagee rests equally upon the mortgage, and the question, as regards creditors of the mortgagor, is the validity of his paper title. The mortgagee's possession under the mortgage is as good or as bad as the mortgage itself, and the court has not the power to transmute a void mortgage into a valid pledge.[2] In Stephens v. Perrine,[3] the court says: "The mortgage, as to the creditors of the mortgagor, was always void. It continued to be void notwithstanding the fact that the mortgagee assumed to take possession under and to sell the property by virtue of such void instrument. . . . . I cannot see the force of the reasoning which, while admitting that the mortgage is void as to creditors, nevertheless asserts that a title to the property covered by it may be obtained by the mortgagee by proceedings taken under it and which assert the validity of such instrument. . . . . If void, what right has the mortgagee, as against creditors, to take possession in her character of mortgagee and to sell or dispose of property described in it?" But even in cases where the mortgage is fraudulent, if the mortgagee repudiates the instrument and casts it aside, and obtains a pledge of the goods, accompanied by delivery and an open change of possession, and by a distinct agreement subsequent to and inde-

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session thereunder, before a lien is obtained on the property in favor of a creditor, will not render it valid. The fraud existing in the mortgage itself vitiates all steps taken under it."

[1] Smith v. Ely, 10 N. B. R. 563.

[2] Blakeslee v. Rossman, 43 Wis. 127. See Robinson v. Elliott, 22 Wall. 513; Dutcher v. Swartwood, 15 Hun (N. Y.) 31; Stimson v. Wrigley, 86 N. Y. 332; State v. Roever, 55 Mo. App. 448; Hedges v. Polhemus, 9 Misc. (N. Y.) 680, 30 N. Y. Supp. 556; *In re* Forbes, 5 Biss. 510; Janvrin v. Fogg, 49 N. H. 340; Wells v. Langbein, 20 Fed. Rep. 183, 186; Mandeville v. Avery, 124 N. Y. 376, 26 N. E. Rep. 951; Karst v. Gane, 136 N. Y. 316, 32 N. E. Rep. 1073. But compare Baldwin v. Flash, 59 Miss. 66, and cases cited.

[3] 143 N. Y. 476, 480, 39 N. E. Rep. 11.

pendent of the mortgage, his rights will be protected as against the other creditors.[1]

§ 358. **Right of revocation — Reservations.** — We have seen that a debtor, before any lien attaches in favor of creditors, possesses the right to make any disposition of his property.[2] The contract, however, by which he parts with it must be absolute and unconditional, for if he retain the right to revoke the contract and resume the ownership of the property, the reservation is considered as inconsistent with a fair, honest and absolute sale, and renders the transfer fraudulent and void.[3] In the great case of Riggs v. Murray,[4] in which the various instruments of transfer contained powers of revocation, Chancellor Kent held the transfers void, saying that there was a necessary inference of a purpose to "delay, hinder or defraud creditors," that the only effect of these assignments was "to mask the property;" and that such powers of revocation are fatal to the instrument and poison it throughout, appears to have been well established by authority.[5] So a deed reserving the right to the grantor to sell and convey the property without the consent of the grantee, is inconsistent with the idea of a sale, and may be avoided by creditors.[6]

§ 359. **Rule as to consumable property.**—The mortgaging of property, the use of which involves its consumption, is

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[1] Pettee v. Dustin, 58 N. H. 309; Brown v. Platt, 8 Bosw. (N. Y.) 324; First Nat. Bank v. Anderson, 24 Minn. 435; Baldwin v. Flash, 58 Miss. 593; Bowdish v. Page, 153 N. Y. 104; Nat. Shoe & Leather Bank v. August, 54 N. J. Eq. 182.

[2] See § 52.

[3] West v. Snodgrass, 17 Ala. 554.

[4] 2 Johns. (N. Y.) 565. But see Murray v. Riggs, 15 Johns. (N. Y.) 571.

[5] Compare Smith v. Conkwright, 28 Minn. 23; Shannon v. Commonwealth, 8 S. & R. (Pa.) 444; The King v. Earl of Nottingham, Lane 42; Smith v. Hurst, 10 Hare 30.

[6] Fisher v. Henderson, 8 N. B. R. 175. Compare Henderson v. Downing, 24 Miss. 106; Coolidge v. Melvin, 42 N. H. 510; Donovan v. Dunning, 69 Mo. 436; Lukins v. Aird, 6 Wall. 78. See May on Fraudulent Conveyances, 93, 94. See § 11, and cases cited.

an evidence of fraud of much weight Unless satisfactorily explained it will cause the condemnation of the instrument.[1] Of course articles in their nature subject to be consumed in their use may be mortgaged without any imputation of fraud, provided they are not to be used, and may be kept without damage until the mortgage debt shall become payable.[2] If, however, the mortgage covers articles which would perish or be destroyed before the debts secured by the mortgage mature, it becomes manifest that the object was not to apply these things to the payment of the mortgage, but to secure the debtor in their possession and enjoyment.[3]

§ 359a. Distinct claims. — Manifestly an honest creditor does not lose his security because the mortgage constituting the security embraces the separate claim of a party who participated with the mortgagor in perpetrating a fraud.[4]

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[1] Farmers' Bank v. Douglass, 19 Miss. 540; Brockenbrough v. Brockenbrough, 31 Gratt. (Va.) 590; Sommerville v. Horton, 4 Yerg. (Tenn.) 550; Shurtleff v. Willard, 19 Pick. (Mass.) 202; Robbins v. Parker, 3 Met. (Mass.) 120. See Googins v. Gilmore, 47 Me. 14; Putnam v. Osgood, 51 N. H. 200; Hedges v. Polhemus, 9 Misc. (N. Y.) 680, 30 N. Y. Supp. 556.

[2] Robbins v. Parker, 3 Met. (Mass). 120. Compare Miller v. Jones, 15 N. B. R. 154.

[3] Farmers' Bank v. Douglass, 19 Miss. 541. See Quarles v. Kerr, 14 Gratt. (Va.) 48.

[4] Morgan v. Worden, 145 Ind. 600.

CHAPTER XXIII.

SPENDTHRIFT TRUSTS.

§ 360. Aversion to exemptions other than statutory.
361. Restraints upon alienation.
362. } Repugnant conditions.
363. }
364. Nichols v. Eaton; the point actually involved.
365. The *dictum* in Nichols v. Eaton.
366. The correct rule.
§367. Broadway National Bank v. Adams.
367*a*. Spread of the doctrine.
367*b*. New York rule as to trust income.
368. Spendthrift trusts in Pennsylvania.
368*a*. Powers — When not assets.

"The general introduction of spendthrift trusts would be to form a privileged class, who could indulge in every speculation, could practice every fraud, and yet, provided they kept on the safe side of the criminal law, could roll in wealth. They would be an aristocracy, though certainly the most contemptible aristocracy with which a country was ever cursed." — Professor Gray in *Restraints on Alienation*, § 262.

"It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors." — Mr. Justice Swayne in *Nichols* v. *Levy*, 5 Wall. 441; overshadowed in *Nichols* v. *Eaton*, 91 U. S. 716.

§ 360. Aversion to exemptions other than statutory. — Aside from statutory exemptions trivial in amount,[1] the idea of the existence of rights of property of any kind, legal or equitable, in a debtor, which cannot be reached by creditors and applied toward the satisfaction of debts, is or should be abhorrent to modern convictions of justice toward the creditor class. This sentiment is reflected in the legislation limiting exemptions to very small sums. The personal liberty of the debtor being no longer in danger, and his body being exempt from torture or slavery at the hands of infuriated creditors, there exists

[1] See §§ 46–50, 365. Arkansas, Kansas, Texas and Nevada are States that have rather liberal exemption statutes. Beyond the point of protecting absolute necessaries, such statutes are harmful to a State, as they frighten away commerce and capital and destroy the credit of the people.

no controlling check upon his recklessness and improvidence,[1] other than his sense of honor, which too often proves to be an undeveloped quantity. This is the source of the strong tendency, manifested in some of the courts, to strengthen, enlarge and perfect the creditors' remedies and recourses against the property and interests of the debtor class, who operate under the guise of contract obligations, skillfully eluding the sharp edges of the statutes against larceny. The plain purpose manifested in our modern law in extending relief to creditors is twofold: first, to enforce the creditors' equitable lien upon the debtor's property considered as somewhat in the nature of a trust fund;[2] and secondly, to inflict a species of negative punishment upon the debtor by depriving him of the personal comforts and enjoyments which result from the possession and use of property or accumulated wealth. This latter wise and necessary policy of the law has been almost obscured by an out-pouring of sentimental sophistry in the courts. There should be no spectacle more revolting to the mass of mankind, and especially in a community such as ours, than that of a bankrupt or insolvent debtor revelling and dwelling in luxury, and disporting himself with the proceeds of another man's goods, and enjoying a trust income that judicial writs cannot touch. It is opposed to a wise public policy that a man "should have an estate to live on, but not an estate to pay his debts with,"[3] or that he should possess "the benefits of wealth without the responsibilities."[4] Chief-Justice Denio said: "It is against general principles that one should hold property, or a beneficial interest in property, by such a title that creditors cannot touch it."[5]

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[1] See § 2.

[2] See Egery v. Johnson, 70 Me. 258; Seymour v. Wilson, 19 N. Y. 418.

[3] Tillinghast v. Bradford, 5 R. I. 205, 212.

[4] Gray on Restraints on Alienation, p. 169.

[5] Rome Exchange Bank v. Eames, 4 Abb. App. Dec. (N. Y.) 83, 99, "That grown men should be kept all

We earnestly protest against almost every line of these obnoxious income exemption cases. The force of the bad example seems to be forgotten in permitting the growth of spendthrift trusts. The spectacle of a judgment-debtor living unmolested upon protected income, or money that is under a charm, without fleeing from his creditors to sanctuary ground as of yore, is not calculated to awaken feelings of thrift, or to inspire habits of economy, in other people. It tends rather to suppress the natural and laudable ambition of industrious people to accumulate property through the usual lawful channels of intelligent enterprise, having due consideration for the rights of creditors, and proper respect for the perils of insolvency, and a wholesome dread of its privations. It tends also to cheapen regard for accumulated wealth, and its comforts, considered solely as an honest reward for skill and patient industry. It neglects to enforce necessary precepts of honesty. It lifts the profligate insolvent above the class in which his own achievements would place him, and clothes him with borrowed plumage and deceptive *indicia* of thrift.

The feelings of the industrial world were shocked at the *dictum* of Wright, J., in Campbell v. Foster,[1] to the effect that the surplus of a trust fund created by a third party, for the benefit of a judgment-debtor, was not available to his creditors. The more recent opinion of Rapallo, J., in Williams v. Thorn,[2] holding that, whether

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their lives in pupilage, that men not paying their debts should live in luxury on inherited wealth, are doctrines as undemocratic as can well be conceived. They are suited to the times in which the Statute De Donis was enacted, and the law was administered in the interest of rich and powerful families." Gray on Restraints on Alienation, p. 174.

[1] 35 N. Y. 361; Howard v. Leonard, 3 App. Div. (N. Y.) 277, 38 N. Y. Supp. 363. See § 45.

[2] 70 N. Y. 270; 2d Appeal, 81 N. Y. 381; Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. Rep. 169; Tolles v. Wood, 99 N. Y. 616, 1 N. E. Rep. 251; Thompson v. Thompson, 52 Hun (N. Y.) 456; Spindle v. Shreve, 111 U. S. 546, 4 S. C. Rep. 522; Kilroy v. Wood, 42 Hun

the trust relate to realty or personalty, the surplus income of such an estate, beyond what was needed for the suitable support and maintenance of the *cestui que trust* and those dependent upon him, could be reached by a creditors' bill, was greeted with satisfaction, as being good as far as it went. A tendency is manifesting itself, however, to close another source of possible relief to creditors, by the classes of cases already referred to[1] and which will presently be considered more at length,[2] depriving creditors of the right to treat powers as assets and limiting or denying their right to reach trust income arising from third parties. First, however, we will glance at the authorities which discuss the rights of the parties in cases where property has been conveyed with a restraint imposed upon its alienation, or an attempt has been made to vest it in the grantee without subjecting it to liability to his creditors.

§ 361. **Restraints upon alienation.**—The theory of the law is that no person shall be permitted to enjoy or hold any interest in property to which the incidents of ownership, *i. e.*, the right of alienation and liability to the claims and remedies of creditors, do not attach.[3] A condition or proviso in a grant or devise that the land shall not be subject to alienation, attachment, or levy, is commonly treated as void.[4] The policy of the law will not permit

(N. Y.) 636; Bunnell v. Gardner, 4 App. Div. (N. Y.) 322; Andrews v. Whitney, 82 Hun (N. Y.) 123, 31 N. Y. Supp. 164; Genet v. Beekman, 45 Barb. (N. Y.) 382; Watkyns v. Watkyns, 2 Atykns 96. See Arzbacher v. Mayer, 53 Wis. 391, 10 N. W. Rep. 440.

[1] See §§ 40, 45, and note.

[2] See §§ 364–367.

[3] See Chap. II.

[4] Blackstone Bank v. Davis, 21 Pick. (Mass.) 42; McCleary v. Ellis, 54 Iowa 311, 6 N. W. Rep. 571, 20 Am. Law Reg. N. S. 180; and the learned note by Henry Wade Rogers, Esq., at page 185, reviewing the authorities. Prof. Gray says (Gray's Restraints on Alienation), p. 14: "As in England, so in America, a condition, or a conditional limitation, restraining the owner in fee simple from selling his land, is bad." Potter v. Couch, 141 U. S. 296; Munroe v. Hall, 97 N. C. 206; *In re* Watson & Woods, 14 Ont. 48; Kahanaiki v. Kohala Sugar Co., 6 Hawaiian 694;

property to be so limited as to remain in a party for life, free from the incidents of property, and not subject to

Henning v. Harrison, 13 Bush (Ky.) 723; Smith v. Clark, 10 Md. 186; Gleason v. Fayerweather, 4 Gray (Mass.) 348; Campau v. Chene, 1 Mich. 400; McDowell v. Brown, 21 Mo. 57; Pardue v. Givens, 1 Jones' Eq. (N. C.) 306; Schermerhorn v. Negus, 1 Denio (N. Y.) 448; Lovett v. Kingsland, 44 Barb. (N. Y.) 560; *sub nom.* Lovett v. Gillender, 35 N. Y. 617; Walker v. Vincent, 19 Pa. St. 369; Williams v. Leech, 28 Pa. St. 89; Naglee's Appeal, 33 Pa. St. 89; Jauretche v. Proctor, 48 Pa. St. 466; Kepple's Appeal, 53 Pa. St. 211; Lario v. Walker, 28 Grant (Ont.) 216. These cases are decisions directly in point, and *dicta* to the same effect are found in abundance, *e. g.*, in Taylor v. Mason, 9 Wheat. 325, 350; McDonogh v. Murdoch. 15 How. 367, 412; Andrews v. Spurlin, 35 Ind. 262, 268; Deering v. Tucker, 55 Me. 284, 289; Hawley v. Northampton, 8 Mass. 3, 37; Gray v. Blanchard, 8 Pick. (Mass.) 284, 289; Van Rensselaer v. Dennison, 35 N. Y. 393; Turner v. Fowler, 10 Watts (Pa.) 825; Reifsnyder v. Hunter, 19 Pa. St. 41; Doebler's Appeal, 64 Pa. St. 9; Grant v. Carpenter, 8 R. I. 36; Doe *d.* McIntyre v. McIntyre, 7 U. C. Q. B. 156; McMaster v. Morrison, 14 Grant (Ont.) 138, 141; Crawford v. Lundy, 23 Grant (Ont.) 244, 250; Fulton v. Fulton, 24 Grant (Ont.) 422. See Dehorty v. Jones, 2 Harr. (Del.) 56, note; Newkerk v. Newkerk, 2 Cai. (N. Y.) 345; and see Allen v. Craft, 109 Ind. 476, 483; Todd v. Sawyer, 147 Mass. 570; Winsor v. Mills, 157 Mass. 362, 364; Jauretche v. Proctor, 48 Pa. St. 466; James v. Gard, 13 Vict. L. R. 908, 913; Bassett v. Budlong, 77 Mich. 338. The authorities are in much confusion as to the validity of a condition against alienation, confined to a limited period. See Cowell v. Springs Co., 100 U. S. 55, 57; Blackstone Bank v. Davis, 21 Pick. (Mass.) 42; Munroe v. Hall, 97 N. C. 206, 210; *In re* Northcote, 18 Ont. 107; Mandelbaum v. McDonell, 29 Mich. 78; *In re* Rosher, 26 Ch. Div. 801; Potter v. Couch, 141 U. S. 296; Bennett v. Chapin, 77 Mich. 526; Pritchard v. Bailey, 113 N. C. 521. A gift over of a fee simple, if the owner does not convey, is not valid. See Van Horne v. Campbell, 100 N. Y. 287; McKenzie's Appeal, 41 Conn. 607; Wead v. Gray, 78 Mo. 59; Perry v. Cross, 132 Mass. 454; Carr v. Effinger, 78 Va. 197; Wolfer v. Hemmer, 144 Ill. 554; Ball v. Hancock, 82 Ky. 107; Hoxsey v. Hoxsey, 37 N. J. Eq. 21; Stowell v. Hastings, 59 Vt. 494. The rule applies also to personalty. Foster v. Smith, 156 Mass. 379; Hoxsey v. Hoxsey, 37 N. J. Eq. 21; Allen v. White, 16 Ala. 181. On this general subject of the ineffectual nature of restrictions upon alienations see Oxley v. Lane, 35 N. Y. 340; Williams v. Leech, 28 Pa. St. 89: Murray v. Green, 64 Cal. 363; Lane v. Lane, 8 Allen (Mass.) 350; Turner v. Hallowell Sav. Inst. 76 Me. 527; *Re* Traynor & Keith, 15 Ont. 469; Blackstone Bank v. Davis. 21 Pick. (Mass.) 42; Sears v. Putnam, 102 Mass. 5, 9; Winsor v. Mills, 157 Mass. 362. So provisions that equitable interests in fee shall not be liable for the debts of the *cestuis que trust* are inoperative. Taylor v. Harwell, 65 Ala. 1; Turley v. Massengill, 7 Lea (Tenn.) 353. See Gray v. Obear, 54 Ga. 231, cited in Gray on Restraints, § 115. Bramhall v. Ferris, 14 N. Y. 41, 44. Some authorities assert that where the beneficiary is also the trustee his

his debts.[1] At least this is what has been taught and commonly accepted.

§ 362. **Repugnant conditions.**—Restraints upon either voluntary or involuntary alienation are not favored in the law, and are defeated upon another ground. In De Peyster v. Michael,[2] after a careful review of the authorities, the New York Court of Appeals observed: "Upon the highest legal authority, therefore, it may be affirmed that in a fee-simple grant of land, a condition that the grantee shall not alien, or that he shall pay a sum of money to the grantor upon alienation, is void, on the ground that it is repugnant to the estate granted." In Potter v. Couch,[3] the court says: "The right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised." So in Bradley v. Peixoto,[4] the court say that it is "laid down as a rule long ago established, that where there is a gift with a condition inconsistent with, and repugnant to such gift, the condition is wholly void. A condition that tenant in fee shall not alien is repugnant."[5] In Mandlebaum v. McDonell[6] will be found an elaborate review of the cases and an exhaustive consideration of the question. The court conclude that the only safe rule of decision is that which prevailed at common law for ages, to the effect that "a condition or restriction which would suspend all power of

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interest may be taken on execution. Bolles v. State Trust Co., 27 N. J. Eq. 308. See Hobbs v. Smith, 15 Ohio St. 419.

[1] 4 Kent's Com., p. 311. See Menken Co. v. Brinkley, 94 Tenn. 730, 31 S. W. Rep. 92.

[2] 6 N. Y. 467, 497; Oxley v. Lane, 35 N. Y. 346; Wieting v. Bellinger, 50 Hun (N. Y.) 328, 3 N. Y. Supp. 361.

[3] 141 U. S. 296, 315, 11 S. C. Rep. 1005.

[4] 3 Ves. Jr. 324.

[5] See Brandon v. Robinson, 18 Ves. Jr. 429; McCullough v. Gilmore, 11 Pa. St. 370.

[6] 29 Mich. 78, 107.

alienation for a single day is inconsistent with the estate granted, unreasonable, and void." In Blackstone Bank v. Davis,[1] a leading and important case, it appeared that one Davis devised to his son the use of a farm of one hundred and twenty acres, with a provision that the land should not be subject or liable to conveyance or attachment. The plaintiffs recovered a judgment against the devisee and levied an execution upon the premises as being land held by the defendant in fee. The court said: "By the devise of the profits, use, or occupation of land, the land itself is devised. Whether the defendant took an estate in fee or for life only, is a question not material in the present case. The sole question is, whether the estate in his hands was liable to attachment and to be taken in execution as his property. The plaintiffs claim title under the levy of an execution against the defendant, and their title is valid if the estate was liable to be so taken. That it was so liable, notwithstanding the proviso or condition in the will, the court cannot entertain a doubt."

§ 363. — In Walker v. Vincent[2] the testator devised certain real estate to his daughter and to her legal heirs forever, upon the express condition that she should "not alien or dispose of the same, or join in any deed or conveyance with her husband for the transfer thereof, during her natural life." The court held the condition void, and that a fee-simple estate was devised, and said: "It makes no difference that the testator has expressly withheld one of the rights essential to a fee-simple, for the law does not allow an estate to be granted to a man and his heirs, with a restraint on alienation, and frustrates the most clear intention to impose such a restraint, just as it allows alienation of an estate tail, though a contrary intent is manifest.

[1] 21 Pick. (Mass.) 42.

[2] 19 Pa. St. 369.

And it would be exceedingly improper, in any court, in construing a devise to a man and his heirs, to endeavor to give effect to the restraint upon alienation by changing the character of the estate to a life estate, with a remainder annexed to it, or with an executory devise over." [1] In Hall v. Tufts [2] the testator devised certain real estate to his wife for her life, and "the remainder of his estate, whether real or personal, in possession or reversion, to his five children to be equally divided to and among them, or their heirs, respectively, always intending and meaning that none of his children shall dispose of their part of the real estate in reversion before it is legally assigned them." The court held that the children took a vested remainder in the real estate given to the wife for her life, and that the clause restraining them from alienating it before the expiration of the life estate was void.[3] It is also a canon of construction that an estate in fee created by will, cannot be cut down or limited by a subsequent claim unless it is as clear and decisive as the language of the clause which devises the estate.[4]

§ 364. Nichols v. Eaton; the point actually involved.— This brings us to the question of the liability of trust income for debts. The principle embodied in Nichols v.

[1] *Restraints upon personalty.* — A condition against alienation cannot be imposed upon an absolute interest in personalty. Lovett v. Kingsland, 44 Barb. (N. Y.) 560, affi'd *sub nom.* Lovett v. Gillender, 35 N. Y. 617; Barker v. Davis, 12 U. C. C. P. 344.

[2] 18 Pick. (Mass.) 455.

[3] "Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character." Field, J., in Cowell v. Springs Co., 100 U. S. 57, citing, Sheppard's Touchstone, 129, 131. See Winsor v. Mills, 157 Mass. 362, 364, 32 N. E. Rep. 352; Jackson v. Schutz, 18 Johns. (N. Y.) 174, 184. *Contra*, Anderson v. Cary, 36 Ohio St. 506; McCullough v. Gilmore, 11 Pa. St. 370. Compare Potter v. Couch, 141 U. S. 315, 11 S. C. Rep. 1005. The authorities cannot be reconciled.

[4] Byrnes v. Stilwell, 103 N. Y. 460, 9 N. E. Rep. 241; Roseboom v. Roseboom, 81 N. Y. 356.

Eaton,[1] and succeeding cases, and more especially the language employed by Mr. Justice Miller, in delivering the opinion of the Supreme Court in that case, have provoked extended discussion and sharp criticism,[2] in reviews, philosophical productions and dissenting opinions. The influence of the case has spread like the murrain among sheep. The importance that the case has assumed seems to call for an extended statement of the facts and features involved. It appeared that property had been devised to trustees with directions to pay the income to the children of the testatrix in equal shares, and on the death of each child, his or her share was to go over. If

[1] 91 U. S. 716. See Roberts v. Stevens, 84 Me. 325, 24 Atl. Rep. 873; Maynard v. Cleaves, 149 Mass. 307, 21 N. E. Rep. 376; Smith v. Towers, 69 Md. 77, 14 Atl. Rep. 497; 15 Id. 92; Garland v. Garland, 87 Va. 763, 13 S. E. Rep. 478; Jarboe v. Hey, 122 Mo. 349, 26 S. W. Rep. 968; Lampert v. Haydel, 96 Mo. 439, 9 S. W. Rep. 780; Conger v. Lowe, 124 Ind. 371, 24 N. E. Rep. 889.

[2] This decision called forth an essay by Professor Gray, already cited, entitled Restraints on the Alienation of Property. These sentences may be found in the preface: "How far the law will allow a man to enjoy rights in property which he cannot transfer, and which his creditors cannot take for their debts, is a question becoming more and more frequent in this country. In 1876 I shared the surprise, common to many lawyers, at the opinion of the Supreme Court of the United States, in the case of Nichols v. Eaton, 91 U. S. 716, containing, as it did, much that was contrary to what, both in teaching and practice, I had hitherto supposed to be settled law." The preface adds that the book was substantially written before the decision of the Supreme Judicial Court of Massachusetts in Broadway Nat. Bank v. Adams, 133 Mass. 170, See *infra*, § 367. In the preface to the second edition of his essay Professor Gray says: "If I had written with any expectation of affecting the course of decision, I should have been grievously disappointed. State after State has given in its adhesion to the new doctrine; the courts of Maine, Maryland, Illinois, and Vermont have adopted it; those of Delaware, Indiana, and Virginia have used language which leaves little doubt that they will adopt it at the first opportunity; and in Missouri and Tennessee, where the old doctrine has been expressly declared, it has now been thrown aside, and the new views embraced. Were it not for an occasional dissenting opinion, especially an extremely able one of Chief Justice Alvey, late of the Court of Appeals of Maryland, I should be *vox clamantis in deserto*." The authorities pertaining to trust incomes and spendthrift trusts down to 1895 may be found stated and classified in this essay to which the student desiring to study all the cases in detail is referred.

the sons respectively should alienate, or by reason of bankruptcy or insolvency, or any other cause, the income could no longer be personally enjoyed by them respectively, but would become vested in and payable to some other person, then the trust as to such portion so divested should immediately cease and determine. In that event, during the residue of the life of such son, the income was to be paid to his wife or child, and in default of such person, to be added to the principal, and further, "in case, after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts, in case the forfeiture hereinbefore provided for had not happened." One of the sons became a bankrupt, and his assignee in bankruptcy brought a bill against the trustees to have the income of the son's share applied for the benefit of creditors.[1]

Mr. Justice Miller, in the opening sentences of his opinion, observes that the claim of the assignee is founded on the

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[1] *Nichols v. Eaton, re-stated.* — In Hyde v. Woods, 94 U. S. 526, Mr. Justice Miller observes that his own opinion in Nichols v. Eaton, 91 U. S. 716, "was well considered," and says: "In that case, the mother of the bankrupt Eaton, had bequeathed to him by will the income of a fund, with a condition in the trust that on his bankruptcy or insolvency the legacy should cease and go to his wife or children, if he had any, and if not, it should lapse into the general fund of the testator's estate, and be subject to other dispositions. The assignee of the bankrupt sued to recover the interest bequeathed to the bankrupt, on the ground that this condition was void as against public policy. But this court, on a full examination of the authorities, both in England and this country, held that the objection was not well taken; that the owner of property might make such a condition in the transfer of that which was his own, and in doing so violated no creditor's rights and no principle of public policy."

proposition "that a will which expresses a purpose to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void on grounds of public policy, as being in fraud of the rights of creditors; or as expressed by Lord Eldon in Brandon v. Robinson:[1] 'If property is given to a man for his life, the donor cannot take away the incidents to a life estate.'" "There are two propositions," continues the learned judge, "to be considered as arising on the face of this will as applicable to the facts stated: (1) Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? and (2), If so, is that principle to be the guide of a court of the United States sitting in chancery?" After reviewing the English authorities, the opinion continues: "Conceding to its fullest extent the doctrine of the English courts, their decisions are all founded on the proposition that there is somewhere in the instrument which creates the trust a substantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency, and after the cesser of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing line in the cases which are apparently in conflict. Applying this test to the will before us, it falls short, in our opinion, of conferring any such right on the bankrupt. Neither of the clauses of the provisos contain anything more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that dis-

[1] 18 Ves. 433. For variations of the English rule see *Re* Coleman, 39 Ch. Div. 443, 452; Barton v. Briscoe, Jac. 603; Woodmeston v. Walker, 2 Russ. & M. 197; Graves v. Dolphin, 1 Sim. 66; Green v. Spicer, Taml. 396; Josselyn v. Josselyn, 9 Sim. 63; Lord v. Bunn, 2 Y. & C. C. C. 98.

cretion in his favor, that the testatrix has in express terms said that such exercise of this discretion is not 'in any manner obligatory upon them,' — words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made; and to do it by a decree of a court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it." Thus far we cannot but consider the case as correctly reasoned and decided, since a gift of a life estate or interest, with a proviso that it shall go over to a third person upon alienation, voluntary or involuntary, by the life tenant, is considered valid. We can formulate no well-founded objection to such a transaction. Probably the earliest case in which the point is so held is Lockyer v. Savage,[1] decided in 1773, but the question seems now to be no longer a matter of dispute.[2]

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[1] 2 Stra. 947.

[2] Shee v. Hale, 13 Ves. Jr. 404; Cooper v. Wyatt, 5 Madd. 482; Martin v. Margham, 14 Sim. 230; Rochford v. Hackman, 9 Hare 475; Brandon v. Aston, 2 Y. & C. N. R. 24: *Re* Edgington's Trusts, 3 Drew 202; Manning v. Chambers, 1 DeG. & Sm. 282; Carter v. Carter, 3 Kay & J. 617; Barnett v. Blake, 2 Dr. & Sm. 117; *Re* Muggeridge's Trusts, Johnson 625; Sharp v. Cosserat, 20 Beav. 470; Haswell v. Haswell, 28 Beav. 26; Dorsett v. Dorsett, 30 Beav. 256; Townsend v. Early, 34 Beav. 23; Freeman v. Bowen, 35 Beav. 17; Montefiore v. Behrens, 35 Beav. 95; Oldham v. Oldham, L. R. 3 Eq. 404; Roffey v. Bent, L. R. 3 Eq. 759; Craven v. Brady, L. R. 4 Eq. 209, L. R. 4 Ch. App. 296; *In re* Amherst's Trusts, L. R. 13 Eq. 464; Billson v. Crofts, L. R. 15 Eq. 314; *Ex parte* Eyston, 7 Ch. D. 145; Caulfield v. Maguire, 5 Ir. Ch. 78; Nichols v. Eaton, 91 U. S. 716; Bramhall v. Ferris, 14 N. Y. 41; Emery v. Van Syckel, 17 N. J. Eq. 564, cited in Gray's Restraints on Alienation, § 78. Where a man settled his property upon himself for life, or until he should become a bankrupt or insolvent, and after his death, bankruptcy or insolvency, in trust for his wife and children, and the settlor being insolvent assigned his property to trustees for the benefit of creditors, it was held that the trust was void as against the assignee. *In re* Casey's Trusts, 4 Irish Ch. 247. A bond payable to trustees for the benefit of a wife on bankruptcy of the obligor is not good. *Ex parte* Hill, 1 Cooke's Bkr. Law 228; *Ex parte* Bennet, 1 Cooke's Bkr. Law 228; *In re* Murphy, 1 Sch. & Lef. 44; *Ex parte* Taaffe, 1 Glyn & J. 110.

§ 365. **The dictum in Nichols v. Eaton.**—The court, however, seemed disinclined to limit the discussion to the questions before it. The controverted doctrine against which we complain is declared to be a *dictum*, for the court says:[1] "We have indicated our views in this matter rather to forestall the inference, that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel, than because we have felt it necessary to decide it." The opinion adds that the lack of time has not "permitted any further examination into the decisions of the State courts." Even the successful counsel did not argue in favor of, and manifestly did not believe in the advanced positions taken by the court. These positions were not necessary to gain his case. Referring to the implication in the remark of Lord Eldon, already quoted, the court were unable to see that the power of alienation was a *necessary* incident to a life estate in real property, or that the rents and profits of real property, and the interest and dividends of personal property, might not be enjoyed by an individual *without liability for his debts attaching as a necessary incident to such enjoyment.* The statement is made that the English Chancery doctrine hostile to spendthrift trusts "is comparatively of modern origin." These obnoxious trusts certainly are modern creations, and Chancery was loyally following the common law in promptly declaring the estate of the beneficiary therein alienable and liable for debts. The ruling of Chancery was not "ingrafted" upon the common law as stated in Nichols v. Eaton; it followed it.[2] The opinion continues: "Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives*, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift

[1] 91 U. S. 729.

[2] See Gray on Restraints, § 256.

the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived." In other words vagabond spendthrifts are, with infants and lunatics, to be favored with special protection. But the infant cannot use his protection as a sword; if he does the protection is forfeited; while the beneficial contracts of a lunatic are binding upon his estate. The spendthrift, on the other hand, may with impunity use the exemption of his trust income as a rapier. We lodge our protest not against provision being made for "the ills of life," or "improvidence," or "incapacity" of the object of the donor's affection, but against raising barriers for the protection of the donee from the righteous wrath of the creditor whom he has wronged. If the spendthrift enjoys the comforts of income, so does the creditor whose property he has taken. If the spendthrift has children dependent upon him, so has the creditor. Is it a wise public policy to allow individuals to practically create disabilities in cases where the general policy of the law has raised none, and to devise trust schemes to enable worthless insolvents to elude the payment of righteous claims? Should we allow a donor to cover the worthless object of his regard with an asbestos blanket which judicial writs cannot penetrate. The opinion argues that the only ground on which a spendthrift trust is against public policy "is that it defrauds the creditors of the beneficiary." This is scarcely correct. Public policy is, or should be, hostile to inalienable estates, whether legal or equitable, and opposed to repugnant conditions that hamper property; hostile to property

rights divested of property responsibilities; hostile to the creation of unnecessary disabilities to protect people *sui juris*; hostile to exemptions which protect more than the simple necessaries of life; hostile to combinations that divest insolvency of its sting. The cases cited in support of the views of the court[1] were chiefly from Pennsylvania,[2] and closed with the well-known and unfortunate New York case of Campbell v. Foster.[3] This authority, as we have already seen,[4] contains a *dictum* to the effect that the interest of a beneficiary in a trust fund created by a person other than the debtor, is not available to creditors, but, as heretofore shown,[5] this *dictum* is expressly repudiated and exploded by Rapallo, J., in delivering the opinion of the New York Court of Appeals in Williams v. Thorn,[6] and the principle in support of which the case is cited in Nichols v. Eaton has been proved over and over again never to have been the law of that State.

Nichols v. Eaton embodied a dangerous and startling *dictum*, the influence of which is spreading like the black plague. It refused to recognize or follow the law of the State[7] where the appeal originated,[8] and repudiated

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[1] Leavitt v. Beirne, 21 Conn. 1; Nickell v. Handly, 10 Gratt. (Va.) 336; Pope's Ex'rs v. Elliott, 8 B. Mon. (Ky.) 56.

[2] Fisher v. Taylor, 2 Rawle (Pa.) 33; Holdship v. Patterson, 7 Watts (Pa.) 547; Shankland's Appeal, 47 Pa. St. 113; Ashhurst v. Given, 5 W. & S. (Pa.) 323; Brown v. Williamson, 36 Pa. St. 338; Still v. Spear, 45 Pa. St. 168. See § 368.

[3] 35 N. Y. 361. See Cutting v. Cutting, 86 N. Y. 546.

[4] See §§ 45, 360.

[5] See §§ 45, 360.

[6] 70 N. Y. 270; 2d Appeal, 81 N. Y. 381, 44 N. E. Rep. 169; Wetmore v. Wetmore, 149 N. Y. 520; Kilroy v. Wood, 42 Hun (N. Y.) 636; Spindle v. Shreve, 111 U. S. 546, 4 S. C. Rep. 522; Andrews v. Whitney, 82 Hun (N. Y.) 123, 31 N. Y. Supp. 164; Bunnell v. Gardner, 4 App. Div. (N. Y.) 322, 38 N. Y. Supp. 569; McEvoy v. Appleby, 27 Hun (N. Y.) 44. See Tolles v. Wood, 99 N. Y. 616, 1 N. E. Rep. 251, 16 Abb. N. C. (N. Y.) 1, and the collection of cases in the notes.

[7] Local decisions on legal or equitable property rights will be followed in Federal tribunals. Orvis v. Powell, 98 U. S. 176; Lloyd v. Fulton, 91 U. S. 479; Brine v. Ins. Co., 96 U. S. 627.

[8] Tillinghast v. Bradford, 5 R. I. 205.

the settled English rule.[1] It revives in a measure the principle of the objectionable statute De Donis which was practically superseded by Taltarum's Case[2] in 1472. Are we to be turned back to the thirteenth century rule in which family pride and military oppression were rampant? If the question whether or not it was permissible aside from the rules of law establishing the tenure by which property is held and transferred, to allow a debtor to enjoy a right or interest in property free from the claims of creditors, were an open one, we should certainly answer that popularly speaking such a policy was neither judicious, safe nor wise.[3] This conclusion is not necessarily rested wholly upon the theory that such a form of vesting property in a debtor is a fraud upon creditors, but rather upon the idea that property, by the rules of law, should include not only the right of enjoyment, but also the right of alienation and the incident of liability for debts. While it is true that the owner of property may, while he owns it, use it as he likes, yet he should not be permitted to limit or control its use after he parts with it[4] by creating an income for a spendthrift which in its power to confer enjoyment upon the beneficiary is, in general essentials, much the same as a property right, but which the beneficiary need not guard or protect by keeping his obligations or respecting the rights of his fellowmen, since the income cannot be touched or taken from him. These trust estates and incomes are, in the opinion, likened to statutory exemptions; the analogy is mistakenly considered perfect; the creditor, it is said, has no right to look to either of these sources for satisfaction of his claim. We challenge the justness of the analogy and question the correctness of the rule sought to be formulated from it. It must have been thoughtlessly employed.

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[1] Brandon v. Robinson, 18 Ves. 433.
[2] 12 Ed. 4, 19 Pl. 25.
[3] See § 360.
[4] See 10 Am. Law Rev. 595.

Statutory exemptions are trivial in value; they do not clothe the debtor with *indicia* of wealth, or furnish him with comforts or luxuries while his creditors remain unpaid It would be inhumane to permit the creditor to take the insolvent's clothing from his back, the food from his table or the bed from his house. It is equally against a wise public policy to deprive the professional man of his library, the mechanic of his tools, or the teamster of his horses, for by so doing the insolvent would be pauperized and perhaps rendered a public charge, and the possibility of repairing his ill-fortune by future industry irretrievably lost. These guarded exemption statutes, so universal in their operation, reflect the charitable sentiments of a noble and generous people, and exhibit a willingness on the part of the law-makers to extend a protecting hand, in a limited way, to unfortunate struggling insolvents by enabling them to work and to restore their fallen fortunes unmolested; not by protecting them in a life of opulent idleness. We deny that the kindly spirit which inspired this humane and necessary legislation can be tortured or perverted so as to subserve the purpose of shielding vagabond spendthrifts from the remedies of their creditors[1]

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[1] In Spindle v. Shreve, 9 Biss. 199, 200, 4 Fed. Rep. 136, the will contained this provision: "One-half of each share (which half I wish to be income-paying real estate) I desire to be set apart and conveyed to a trustee, to be held for the use and benefit of each child during his or her life, and then descend to his or her heirs, without any power or right on the part of said child to encumber said estate, or anticipate the rents thereof." One of the children became a bankrupt, and the question presented upon a bill filed by his assignee was whether this child "had such an interest in this property that it passed to the assignee, and so could be held for the benefit of the creditors; or whether it was an estate which was to be held for his personal benefit for life, and over which he had no power or control, and which could not go for the benefit of creditors. I have come to the conclusion," continues Drummond, J., "that under the provisions of this will there was no estate which passed to the assignee, but that the property in Chicago is to be held by the trustee to whom it was conveyed by the executor, for the benefit of the son during his life, and that the rents and profits of the estate are to be paid over to him personally, and that he has no power to transfer any

In Mississippi the court says: "Our statutes upon the subject of exemptions indicate a clear public policy that exemption from personal pauperism is of greater concern than the rights of creditors." [1] This is true as regards mechanics' tools, simple household essentials and similar exemptions, but trust incomes are not within the spirit, letter or equity of these statutes. The analogy is being abandoned and the exemption of trust incomes justified upon the ground that the donor of the trust may do as he pleases with his money. But is it wise to permit him in so doing to violate public policy; to attach repugnant conditions to equitable estates, to create funds which confer the comforts of wealth divested of its responsibilities; to put creditors out of the category of the favored class; to create estates that are exempt from judicial writs; and to control the execution of these extraordinary trusts from the tomb? Is it not wiser that the donor's power to dispose of his wealth should be regulated by reason and made to conform to a wise public policy?

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interest which he has in the estate so as to defeat the provisions made in the will. This will is attacked on the ground that the provision made for the son is contrary to public policy, and is, therefore, inoperative and void. I hardly think the authorities warrant that conclusion, and, if they do not, then the only question is, What is the legal effect of this provision in the will, and what was the testator's intention in relation to the estate which was to be held by the trustee? The authorities collected in the case of Nichols v. Eaton, 91 U. S. 716, show that it was competent for the testator to make such a provision as this, namely: to declare by his will that his estate, or any portion of it, might be held for a child's sole benefit during life, and in such a way that it could not be reached by creditors." See Spindle v. Shreve, 111 U. S. 547. It is said in New Jersey that the jurisdiction of the Court of Chancery in reaching property of a judgment-debtor does not extend to trust property where the trust has been created by some person other than the debtor. Hence where a sum was left to executors in trust to pay the income and such part of the principal as the *cestui que trust* should wish, to her, and she requested the trustees to invest the fund in a farm, it was held that such farm could not be reached by a creditor of the *cestui que trust*. Lippincott v. Evens, 35 N. J. Eq. 553. See Easterly v. Keney, 36 Conn. 18.

[1] Leigh v. Harrison, 69 Miss. 923, 934, 11 So. Rep. 604.

§ 366. **The correct rule.** — The true rule should be that "whatever a man can demand from his trustees, that his creditors can demand from him."[1] In Tillinghast v. Bradford,[2] it appeared that the devise was to T. in trust to pay the income to H. for life; anticipation or payment to assigns was prohibited, the income being intended for the sole and separate use of H. An assignee of H. for the benefit of creditors was awarded the income for the life of H. The court said: "This has been the settled doctrine of a court of chancery, at least since Brandon v. Robinson,[3] and, in application to such a case as this, is so honest and just that we would not change it if we could. Certainly no man should have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purposes of pleasure or profit should be also amenable to the demands of justice."[4] In Bramhall v. Ferris,[5] Comstock, J.' observed that if a bequest is given "absolutely for life, with no provision for its earlier termination, and no limitation over in the event specified, any attempt of the testator to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory. Such an attempt would be clearly repugnant to the estate in fact devised or bequeathed, and would be ineffectual for that reason as well as upon the policy of the law."[6] And where trustees held property with power to apply such portion of it as

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[1] Gray on Restraints, § 166. Compare Parsons v. Spencer, 83 Ky. 305; Smith v. Towers, 69 Md. 103, 14 Atl. Rep. 497; 15 Id. 92.

[2] 5 R. I. 205.

[3] 18 Ves. 429.

[4] See Pace v. Pace, 73 N. C. 119; Bailie v. McWhorter, 56 Ga. 183; Easterly v. Keney, 36 Conn. 18. It should be noted that Nichols v. Eaton, 91 U. S. 716, came up on appeal from the State in which Tillinghast v. Bradford, 5 R. I. 205, was decided.

[5] 14 N. Y. 41.

[6] Citing Blackstone Bank v. Davis, 21 Pick. (Mass.) 42; Hallett v. Thompson, 5 Paige (N. Y.) 583; Graves v. Dolphin, 1 Sim. 66; Brandon v. Robinson, 18 Ves. 429.

they saw fit to the education and maintenance of a beneficiary until he should reach twenty-five years, and then to convey the principal with all accretions to him, the power being given to the trustees in their discretion to convey the estate to the beneficiary before he was twenty-five years of age, it was held that the beneficiary's interest was liable for his debts.[1]

But what are we to expect next when the courts declare that "large masses of property are, in pursuance of a public policy, finding expression in legislation, exempt from liability for debts?"[2] And what are we to expect when the courts of a State like Massachusetts incline to hold that equitable rights can be exempted from the process of creditors by a declaration to that effect contained in the deed or will?

§ 367. Broadway National Bank v. Adams. — We will next notice an important case in Massachusetts — Broadway National Bank v. Adams,[3] another pillar in the temple of spendthrift trusts. The object of the bill was to reach and apply to the payment of the plaintiff's claim the income of a trust fund created for the debtor's benefit by the will of his brother. Briefly the will gave $75,000 to executors, in trust, to pay the net income to the debtor semi-annually during his natural life, the payments to be made personally or upon his order or receipt in writing, "in either case free from the interference or control of his creditors, my intention being

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[1] Daniels v. Eldredge, 125 Mass. 356. See Havens v. Healy, 15 Barb. (N. Y.) 296.

[2] Jourolmon v. Massengill, 86 Tenn. 81, 104, 5 S. W. Rep. 719.

[3] 133 Mass. 170. See Billings v. Marsh, 153 Mass. 311, 26 N. E. Rep. 1000; Wemyss v. White, 159 Mass. 484, 34 N. E. Rep. 718; Jourolmon v. Massengill, 86 Tenn. 81, 5 S. W. Rep. 719; Roberts v. Stevens, 84 Me. 325, 24 Atl. Rep. 873, and cases cited; Smith v. Towers, 69 Md. 84, 14 Atl. Rep. 497, 15 Id. 92; Garland v. Garland, 87 Va. 763, 13 S. E. Rep. 478; Leigh v. Harrison, 69 Miss. 932, 11 So. Rep. 604.

that the use of said income shall not be anticipated by assignment." The income after the debtor's death was to go to his wife and children, and upon the death or remarriage of the wife, the principal and accumulations were to be divided among the children. Manifestly the intention of the testator was that the income should be free from the claims of creditors, and that the courts should be unable to compel the trustee to divert the income unless the provisions and intention were unlawful. The court observe at the outset that "the question whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated" in Massachusetts, but say that the tendency of the decisions has been in favor of such a power in the founder.[1] The reason of the rule that a restriction upon the power of alienation is void because it is repugnant to the grant, is said not to apply to the case of a transfer of the property in trust, as by the creation of the trust the property passes to the trustee with all its incidents and attributes unimpaired. The trustee "takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable." It is conceded by the court that, from the time of Lord Eldon, the rule has prevailed in the English Court of Chancery, to the effect that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que*

[1] Citing Braman v. Stiles, 2 Pick. (Mass.) 460; Perkins v. Hays, 3 Gray (Mass.) 405; Russell v. Grinnell, 105 Mass. 425; Hall v. Williams, 120 Mass. 344; Sparhawk v. Cloon, 125 Mass. 268.

trust, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts.[1] The English rule, the court observes, has been followed in some of the American cases,[2] while other courts "have rejected it, and have held that the founder of a trust may secure the benefit of it to the object of his bounty, by providing that the income shall not be alienable by anticipation, nor subject to be taken for his debts."[3] Morton, C. J., said: "The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. . . . . We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or a limitation over, or by giving his trustees a discretion as to paying it. He has the entire *jus disponendi*, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives. Under our system creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given."

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[1] Brandon v. Robinson, 18 Ves. 429; Green v. Spicer, 1 Russ. & Myl. 395; Rochford v. Hackman, 9 Hare 475; Trappes v. Meredith, L. R. 9 Eq. 229; Snowdon v. Dales, 6 Sim. 524; Rippon v. Norton, 2 Beav. 63.

[2] Tillinghast v. Bradford, 5 R. I. 205; Heath v. Bishop, 4 Rich. Eq. (S. C.) 46; Dick v. Pitchford, 1 Dev. & B. Eq. (N. C.) 480; Mebane v. Mebane, 4 Ired. Eq. (N. C.) 131.

[3] Citing Holdship v. Patterson, 7 Watts (Pa.) 547; Shankland's Appeal, 47 Pa. St. 113; Rife v. Geyer, 59 Pa. St. 393; White v. White, 30 Vt. 338; Pope's Ex'rs v. Elliott, 8 B. Mon. (Ky.) 56; Nichols v. Eaton, 91 U. S. 716; Hyde v. Woods, 94 U. S. 523.

This is probably one of the most advanced statements of the objectionable doctrine, though Claflin v. Claflin [1] in some respects outranks it. Reference is here made to cases like Broadway National Bank v. Adams, and to the *dictum* in Nichols v. Eaton, now much quoted and relied upon, not as embodying salutary rules or wise principles of law, but rather to record a protest against the existence and growth of a class of cases of which these have been the forerunners. The creation of an aristocracy of prodigals who can dwell in luxury and defy their creditors, brings the administration of justice into disrepute, and has a demoralizing influence upon industrious people. The creditor, as we have said, is unjustly deprived of the power to compel his debtor to forego the comforts and luxuries of wealth, or to feel the privations and inconveniences incident to insolvency. The tendency of these cases must be checked by legislation, or the sober second thought of the courts; the doctrine will not be indefinitely tolerated by the American people, for it is both undemocratic and not in keeping with the spirit of American institutions.

§ 367a. **Spread of the doctrine.**—None of the defects and inaccuracies instanced moved the courts to re-examine the *dictum* in Nichols v. Eaton. It has spread in all directions, and some States have reversed former well-decided cases and hastened to adopt the unfortunate conclusions of the *dictum*. Smith v. Towers,[2] in Maryland, is one of the most startling and instructive of the cases following Nichols v. Eaton,[3] and Broadway National Bank v. Adams,[4] and departing from the old landmarks. The devise was made to a trustee to pay the income into the debtor's "own hands,

[1] 149 Mass. 19, 20 N. E. Rep. 454.

[2] 69 Md. 77, 14 Atl. Rep. 497, 15 Id. 92; Maryland Grange Agency v. Lee, 72 Md. 161, 19 Atl. Rep. 534. See s. p. Barnes v. Dow, 59 Vt. 530, 10 Atl. Rep. 258; Partridge v. Cavender, 96 Mo. 452, 9 S. W. Rep. 785; Jourolmon v. Massengill, 86 Tenn. 81, 5 S. W. Rep. 719; Garland v. Garland, 87 Va. 758, 13 S. E. Rep. 478.

[3] 91 U. S. 727.

[4] 133 Mass. 170.

and not into another, whether claiming by his authority or otherwise." On the debtor's demise the property was given in fee to his children. The creditor's suit failed to reach the debtor's interest in this income. Alvey, C. J., filed a strong dissenting opinion which clearly sets forth the arguments advanced against these obnoxious trusts.[1] In Connecticut the cases are not uniform. The court employs this language in one decision: "All property exempt by statute from attachment is within the exception; so is ordinary trust property designed to secure a maintenance for some unfortunate debtor; so also the income of trust property, where it is payable to the beneficiary at the discretion of the trustee."[2] In Pennsylvania it is said: "We do not approve of that portion of the opinion of the learned court below in which it was held that a married woman cannot make a valid spendthrift trust in favor of her husband."[3] As will appear, the decisions are in some confusion in that State. In Wanner v. Snyder,[4] a charge upon the income was held to exempt it from the attack of the creditors of the beneficiary, and much the same position is assumed in West Virginia.[5] North Carolina now leans somewhat against alienations of equitable estates,[6] though some cases are the other way.[7] The trust tendency shows itself a little in Alabama,[8] though most of its cases follow the English

[1] Compare Baker v. Keiser, 75 Md. 338, 23 Atl. Rep. 735.

[2] Tolland County Ins. Co. v. Underwood, 50 Conn. 493. But compare Farmers' & M. Savings Bank v. Brewer, 27 Conn. 600; Tarrant v. Backus, 63 Conn. 277, 287, 28 Atl. Rep. 46; Donalds v. Plumb, 8 Conn. 447; Easterly v. Keney, 36 Conn. 18.

[3] Wanner v. Snyder, 177 Pa. St. 208, 35 Atl. Rep. 604. See § 368; Rife v. Geyer, 59 Pa. St. 393.

[4] 177 Pa. St. 208.

[5] McClure v. Cook, 39 W. Va. 579, 20 S. E. Rep. 612.

[6] Monroe v. Trenholm, 112 N. C. 634, 17 S. E. Rep. 439; Kirby v. Boyette, 116 N. C. 165, 21 S. E. Rep. 697; s. c. again 118 N. C. 244, 24 S. E. Rep. 18.

[7] See Mebane v. Mebane, 4 Ired. Eq. (N. C.) 131; Dick v. Pitchford, 1 Dev. & Bat. Eq. (N. C.) 480; Pace v. Pace, 73 N. C. 119.

[8] Moses v. Micou, 79 Ala. 564. Compare Bell v. Watkins, 82 Ala. 512.

rule.[1] The new doctrine has been taken up in Vermont,[2] Missouri,[3] Tennessee,[4] Virginia,[5] Mississippi,[6] Indiana,[7] Delaware,[8] Massachusetts,[9] Illinois[10] and Maine.[11] Against these trusts are Rhode Island,[12] New York prior to its statutory policy,[13] and in a limited way under its statutory policy,[14] South Carolina,[15] Georgia,[16] Ohio,[17] Kentucky,[18] though the decisions waver,[19] New Jersey but for its statu-

[1] Jones v. Reese, 65 Ala. 134; Robertson v. Johnston, 36 Ala. 197.

[2] Barnes v. Dow, 59 Vt. 530, 10 Atl. Rep. 258. Compare White v. White, 30 Vt. 338.

[3] Partridge v. Cavender, 96 Mo. 452, 9 S. W. Rep. 785; Jarboe v. Hey, 122 Mo. 349, 26 S. W. Rep. 968. Compare McIlvaine v. Smith, 42 Mo. 45; Lackland v. Smith, 5 Mo. App. 153; Pickens v. Dorris, 20 Mo. App. 1.

[4] Jourolmon v. Massengill, 86 Tenn. 81, 5 S. W. Rep. 719. See Porter v. Lee, 88 Tenn. 782, 14 S. W. Rep. 218. Compare Turley v. Massengill, 7 Lea (Tenn.) 353; Hooberry v. Harding, 3 Tenn. Ch. 677; S. C. on appeal, 10 Lea (Tenn.) 392.

[5] Garland v. Garland, 87 Va. 758, 13 S. E. Rep. 478. Compare Johnston v. Zane, 11 Gratt (Va.) 552; Perkins v. Dickinson, 3 Gratt (Va.) 355.

[6] See Leigh v. Harrison, 69 Miss. 923.

[7] See Thompson v. Murphy, 10 Ind. App. 464, 37 N. E. Rep. 1094; Martin v. Davis, 82 Ind. 38.

[8] Gray v. Corbit, 4 Del. Ch. 135.

[9] Broadway Nat'l Bank v. Adams, 133 Mass. 170; Billings v. Marsh, 153 Mass. 311. In Evans v. Wall, 159 Mass. 164, the court says: "The general rule is that income may be reached by a creditor, unless there is something in the language of the instrument creating the trust clearly showing an intention to the contrary. Sears v. Choate, 146 Mass. 395, 398, 15 N. E. Rep. 786; Maynard v. Cleaves, 149 Mass. 307, 308, 21 N. E. Rep. 376."

[10] Steib v. Whitehead, 111 Ill. 247. See Springer v. Savage, 143 Ill. 301, 32 N. E. Rep. 520.

[11] Roberts v. Stevens, 84 Me. 325, 24 Atl. Rep. 873. In Maine a guardian may be appointed for a spendthrift. Young v. Young, 87 Me. 44, 32 Atl. Rep. 782.

[12] Tillinghast v. Bradford, 5 R. I. 205. Compare Ryder v. Sisson, 7 R. I. 341; Stone v. Westcott, 29 Atl. Rep. 833.

[13] Bryan v. Knickerbacker, 1 Barb. Ch. (N. Y.) 409; Havens v. Healy, 15 Barb. (N. Y.) 296; Bramhall v. Ferris, 14 N. Y. 41.

[14] See § 367b.

[15] Heath v. Bishop, 4 Rich. Eq. (S. C.) 46. Compare Wylie v. White, 10 Rich. Eq. (S. C.) 294.

[16] Bailie v. McWhorter, 56 Ga. 183. Compare Kempton v. Hallowell, 24 Ga. 52; Mathews v. Paradise, 74 Ga. 523.

[17] Wallace v. Smith, 2 Handy (Ohio) 79; Hobbs v. Smith, 15 Ohio St. 419; Stanley v. Thornton, 7 Ohio C. C. 455.

[18] Flournoy v. Johnson, 7 B. Mon. (Ky.) 693; Cosby v. Ferguson, 3 J. J. Marsh. (Ky.) 264; Eastlake v. Jordan, 3 Bibb (Ky.) 186; Samuel v. Salter, 3 Met. (Ky.) 259; Ernst v. Shinkle, 95 Ky. 608, 26 S. W. Rep. 813; Knefler v. Shreve, 78 Ky. 297.

[19] White v. Thomas, 8 Bush (Ky.) 661; Pope v. Elliott, 8 B. Mon. (Ky.) 56.

tory policy,[1] such policy exempting income unless it reaches $4,000,[2] Arkansas[3] and Wisconsin.[4] These trusts have certainly gained a stronger footing since our last edition. The Federal decisions are not to be reconciled and are naturally overshadowed by Nichols v. Eaton,[5] though Nichols v. Levy,[6] where the English rule is stated, is sometimes cited.

§ 367b. **New York rule as to trust income.** — Cases arising outside the provisions of the Revised Statutes of New York favor the seizure of equitable interests.[7] The statute provides that income "beyond the sum that may be necessary for the education and support" of the beneficiary shall be liable in equity for debts, and that the beneficiary cannot assign his beneficial interest.[8] It has already appeared,[9] that under these statutes surplus income may be reached by a creditor's bill.[10] Kilroy v. Wood,[11] in that State, has been sharply criticised because it alludes to the debtor as "a gentleman of high social standing, whose associations are chiefly with men of leisure, and is connected with a number of clubs, with the usages and customs of which he seems to be in harmony both in practice and expenditure." But the court was, in

[1] Hardenburgh v. Blair, 30 N. J. Eq. 42; Halstead v. Westervelt, 41 N. J. Eq. 100. Compare Force v. Brown, 32 N. J. Eq. 118; Frazier v. Barnum, 4 C. E. Green (N. J.) 316; Lippincott v. Evans, 35 N. J. Eq. 553.

[2] Freeholders of Hunterdon v. Henry, 41 N. J. Eq. 388.

[3] Lindsay v. Harrison, 8 Ark. 302.

[4] Bridge v. Ward, 35 Wis. 687; Lamberton v. Pereles, 87 Wis. 449, 58 N. W. Rep. 776. But see Sumner v. Newton, 64 Wis. 210; 25 N.W. Rep. 30.

[5] 91 U. S. 716.

[6] 5 Wall. 433.

[7] Bryan v. Knickerbacker, 1 Barb. Ch. (N. Y.) 409. See Havens v. Healy, 15 Barb. (N. Y.) 296; Bramhall v. Ferris, 14 N. Y. 44.

[8] See Tolles v. Wood, 99 N. Y. 616, 1 N. E. Rep. 251.

[9] See Chap. II.

[10] Williams v. Thorn, 70 N. Y. 270, 81 N. Y. 381; McEvoy v. Appleby, 27 Hun (N. Y.) 44; Tolles v. Wood, 99 N. Y. 616, 1 N. E. Rep. 251; Hallett v. Thompson, 5 Paige (N. Y.) 583; Craig v. Hone, 2 Edw. Ch. (N. Y.) 376; Scott v. Nevius, 6 Duer (N. Y.) 672; DeCamp v. Dempsey, 10 N. Y. Civ. Pro. 210; McEwen v. Brewster, 17 Hun (N. Y.) 223.

[11] 42 Hun (N. Y.) 636.

the language quoted, merely stating the claim of counsel, for it adds that "it would seem that evidence might have been adduced which would establish his ability to live upon a smaller sum than the whole income," and regrets that the plaintiff was so weak with his proofs.[1] The range of the inquiry and the nature and extent of the judgment impounding income is fully set forth in Wetmore v. Wetmore.[2] In New Jersey trust income beyond $4,000 may be the subject of discovery in aid of execution.[3]

§ 368. **Spendthrift trusts in Pennsylvania.**— It is common to refer to Pennsylvania as the birthplace and stronghold of the doctrine of spendthrift trusts.[4] Professor Gray places the blame on Chief-Justice Gibson and adds: "The interference of equity to compel people to pay their debts seems to have moved the wrath of that sturdy common lawyer."[5] Chief-Justice Agnew said, in Overman's Appeal:[6] "It [a spendthrift trust] is exceptionable in its very nature, because it contravenes that general policy which forbids restraints on alienation and the non-payment of honest debts. . . . . A trust to pay income for life may last for the longest period of human existence, and may run for seventy or eighty years. While the law simply tolerates such a trust, it cannot approve of it as contributing to the general public interest. Property tied up for half a century contributes nothing to the general

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[1] See Estate of Hoyt, 12 N. Y. Civ. Pro. 208, 220; and compare Stow v. Chapin, 4 N. Y. Supp. 496.

[2] 149 N. Y. 521; 44 N. E. Rep. 169.

[3] Laws N. J. 1880, p. 274. See Halstead v. Westervelt, 41 N. J. Eq. 100; Hunterdon Freeholders v. Henry, 41 N. J. Eq. 388.

[4] See Fisher v. Taylor, 2 Rawle (Pa.) 33; Holdship v. Patterson, 7 Watts (Pa.) 547; Shankland's Appeal, 47 Pa. St. 113; Ashhurst v. Given, 5 W. & S. (Pa.) 323; Brown v. Williamson, 36 Pa. St. 338; Still v. Spear, 45 Pa. St. 168; Stambaugh's Estate, 135 Pa. St. 596, 19 Atl. Rep. 1058; Ghormley v. Smith, 139 Pa. St. 584, 19 Atl. Rep. 135; Mehaffey's Estate, 139 Pa. St. 283, 20 Atl. Rep. 1056.

[5] Gray on Restraints, § 219.

[6] 88 Pa. St. 276, 281.

wealth, while it is a great stretch of liberality to the ownership of it to suffer it to remain in this anomalous state for so many years after its owner has left it behind him. Clearly it is against public interest that the property of an after generation shall be controlled by the deed [*qu.* dead] of a former period, or that the non-payment of debts should be encouraged."[1] The case of Ghormley v. Smith[2] seems to show a disposition to limit spendthrift trusts to settlements made by a parent in favor of a child. It is doubtful if such a limitation will stand in that State. The court says that Brandon v. Robinson[3] is in part the law of the State, and gravely says that "a person *sui juris* could not settle his entire estate upon himself, free from liability for debts." The cases applicable to these trusts are in much confusion in Pennsylvania. The authorities were started in the wrong direction partially by the lack of equity jurisdiction in the early history of that State. Even the proverbial Philadelphia lawyer could not deduce from them any unbending rule.[4] Generally the creditor is defeated in that State in pursuing income, though in a measure each case is a law unto itself. The creation of spendthrift trusts has conflicted with the rule against restraints and repugnant conditions, and is not approved by some of the judges.

§ 368a. Powers—When not assets. — Elsewhere[5] the statutory policy of New York State in effect removing powers from the category of assets for creditors[6] is considered

[1] See Gray on Restraints, § 234.

[2] 139 Pa. St. 584, 592, 21 Atl. Rep. 135.

[3] 18 Ves. 429.

[4] See Smeltzer v. Goslee, 172 Pa. St. 298, 34 Atl. Rep. 44; Keyser's Appeal, 57 Pa. St 236; Cooper's Estate, 150 Pa. St. 576, 24 Atl. Rep. 1057; Hinkle's Appeal, 116 Pa. St. 490, 9 Atl. Rep. 938; Beck's Estate, 133 Pa. St. 51, 19 Atl. Rep. 302; Goe's Estate, 146 Pa. St. 431, 23 Atl. Rep. 383; Barker's Estate, 159 Pa. St. 518, 28 Atl. Rep. 365, 368; Wanner v. Snyder, 177 Pa. St. 208, 35 Atl. Rep. 604.

[5] See § 40.

[6] See Cutting v. Cutting, 20 Hun (N. Y.) 367, on appeal, 86 N. Y. 537; Crooke v. County of Kings, 97 N. Y. 457.

and deplored. The same general principle of the exemption of powers from the process of creditors has been introduced into Pennsylvania,[1] a State in which the courts evince a tenacious disposition to shield equitable assets from the attacks of creditors.

[1] Commonwealth v. Duffield, 12 Pa. St. 277; King's Estate, 16 Phila. (Pa.) 306; s. c. under name of Swaby's Appeal, 14 W. N. C. 553.

CHAPTER XXIV.

BONA FIDE PURCHASERS — ACTUAL AND CONSTRUCTIVE NOTICE — FRAUDULENT GRANTEES.

§ 369. Rights of *bona fide* purchasers.
370. Generality of the rule.
371. Mortgagee as *bona fide* purchaser.
371*a*. Execution purchaser.
372. Without notice.
373. Kinds of notice.
374. Constructive notice of fraud.
375. } Rule in Stearns v. Gage.
376. }
376*a*. Anderson v. Blood.
377. Carroll v. Hayward—Actual belief.
378. Parker v. Conner.
379. } Facts sufficient to excite inquiry.
380. }
381. }
§ 382. Actual belief.
383. Purchaser with notice.
384. Purchaser with notice from *bona fide* purchaser.
384*a*. Possession as notice.
385. Fraudulent grantee as trustee.
386. Title from fraudulent vendee.
387. Creditors of fraudulent grantees.
388. Liability between fraudulent grantees.
389. Fraudulent grantee sharing in the recovery.
389*a*. Purchaser *pendente lite*.

§ 369. Rights of bona fide purchasers. — As has been observed, creditors have an equitable interest in the property of their debtors, or in the means the latter have of satisfying the creditors' demands,[1] which the law will, under certain circumstances, enforce, since the insolvent's property constituted the foundation and inducement of the trust and credit.[2] But the interests of a *bona fide* purchaser[3] of a debtor's property are superior to those of

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[1] Seymour v. Wilson, 19 N. Y. 418. See Chap. II.

[2] Egery v. Johnson, 70 Me. 261. See § 5.

[3] In Ricker v. Ham, 14 Mass. 141, the court says: "The term *bona fide*, as used in the law upon this subject, means only that the purchase shall be a real and not a feigned one." S. P. Jones v. Light, 86 Me. 443, 30 Atl. Rep. 71. One who purchases from an assignee for the benefit of creditors under a void assignment may be a purchaser for a valuable consideration. Wilson v. Marion, 147 N. Y. 589, 42 N. E. Rep. 190. A *bona fide*

creditors,[1] for the obvious reason that the former has not, like a mere general creditor, trusted "to the personal responsibility of the debtor, but has paid the consideration upon the faith of the debtor's actual title to the specific property transferred."[2] In such a case the interests of the general creditors are superseded or defeated[3] by the purchaser's superior equity.[4] It is merely a substitution of property. The value given or paid by the purchaser has taken the place of the property which he received. Hence the rights of a *bona fide* grantee who has paid a full valuable consideration are protected,[5] though the grantor may have been actuated by a fraudulent intention.[6] Still, as we have seen, a grantee is not protected when he has not paid such a consideration,

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purchaser from a fraudulent vendee takes a good title. O'Neil v. Patterson & Co., 52 Ill. App. 26.

[1] Compare Valentine v. Lunt, 115 N. Y. 496, 22 N. E. Rep. 209, where a *bona fide* purchaser for value from a fraudulent vendee, held the title against the defrauded vendor.

[2] Seymour v. Wilson, 19 N. Y. 417, 420; Holmes v. Gardner, 50 Ohio St. 175, 33 N. E. Rep. 644. See Friedenwald v. Mullan, 10 Heisk. (Tenn.) 229; Goshorn v. Snodgrass, 17 W. Va. 717; Thames v. Rembert, 63 Ala. 561; Collumb v. Read, 24 N. Y. 516; Mansfield v. Dyer, 131 Mass. 200; Comey v. Pickering, 63 N. H. 126; Zoeller v. Riley, 100 N. Y. 102, 2 N. E. Rep. 388; Simpson v. Del Hoyo, 94 N. Y. 189; Paddon v. Taylor, 44 N. Y. 371; Lore v. Dierkes, 16 Abb. N. C. (N. Y.) 47; Saunders v. Lee, 101 N. C. 3, 7 S. E. Rep. 590; Bishop v. Stebbins, 41 Hun (N. Y.) 248.

[3] See Dorr v. Beck, 76 Hun (N. Y.) 540, 28 N. Y. Supp. 206.

[4] In Zoeller v. Riley, 100 N. Y. 108, 2 N. E. Rep. 388, Earl, J., said: "A debtor may dispose of his property with the intent to defraud his creditors and yet give a good title to one who pays value and has no knowledge of, and does not participate in the fraud. (2 R. S. 137, § 5; Starin v. Kelly, 88 N. Y. 418; Murphy v. Briggs, 89 N. Y. 446; Parker v. Conner, 93 N. Y. 118.)" It seems that where the title of an innocent purchaser is relied on he must positively deny notice of the equitable rights of another, although not specifically charged. Seymour v. McKinstry, 106 N. Y. 230, 12 N. E. Rep. 348, 14 Id. 94.

[5] See Hawkins v. Davis, 8 Baxt. (Tenn.) 508; Zick v Guebert, 142 Ill. 154, 31 N. E. Rep. 601; Rindskoph v. Kuder, 145 Ill. 607, 34 N. E. Rep. 484; Carnahan v. McCord, 116 Ind. 67, 18 N. E. Rep. 177; Sipley v. Wass, 49 N. J. Eq. 463, 24 Atl. Rep. 233.

[6] Where a resulting trust is not evidenced by anything of record, an innocent *bona fide* purchaser without notice will take the estate divested of the trust. De Mares v. Gilpin, 15 Col. 76, 24 Pac. Rep. 568.

though he may have acted in good faith. The two must concur.[1] If no consideration has been given then there has been no substitution of property. The amount of the consideration is not necessarily material when the grantor is solvent,[2] but when he is insolvent the kind and amount of consideration become material and important, even in the absence of actual intent to defraud. Thus an agreement to support an insolvent grantor may be a valuable consideration, but it is not sufficient to uphold a conveyance as against prior creditors,[3] even though there may have been no actual intent to defraud.[4] Persons receiving a conveyance from a grantor for such a consideration must see to it that the existing debts of the grantor are paid,[5] and it is immaterial that the consideration comprises a present sum of money paid in addition to the agreement for support, provided the money alone were palpably inadequate.[6]

Three things must concur to protect the title of the purchaser.[7] (1) He must buy without notice of the bad intent on the part of the vendor. (2) He must be a purchaser for a valuable consideration; and (3) He must have paid the purchase-money before he had notice of

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[1] Savage v. Hazard, 11 Neb. 327, 9 N. W. Rep. 83; Danbury v. Robinson, 14 N. J. Eq. 213. See §§ 15, 207. In Keyser v. Angle, 40 N. J. Eq. 481, 4 Atl. Rep. 641, it appeared that a sister purchased land of a brother who was in debt. She paid $50 cash and gave her note for $650, which he held for four years though very needy. It was held that if the sister had notice of the fraud before she paid the note she was not a *bona fide* purchaser, even though she had no notice when she took the deed.

[2] Usher v. Hazeltine, 5 Me. 471; Hapgood v. Fisher, 34 Me. 407.

[3] Rollins v. Mooers, 25 Me. 192–199.

[4] Webster v. Withey, 25 Me. 326.

[5] Hapgood v. Fisher, 34 Me. 407.

[6] Sidensparker v. Sidensparker, 52 Me. 481. See Egery v. Johnson, 70 Me. 261.

[7] Dougherty v. Cooper, 77 Mo. 532; Herman v. McKinney, 47 Fed. Rep. 758. The purchaser is protected only to the extent of actual payments made before he had notice of the fraud, unless he be liable on his contract in excess of that amount. Wetmore v. Woods, 62 Mo. App. 265; Riddell v. Munro, 49 Minn. 532, 52 N. W. Rep. 141.

the fraud.[1] Chief-Justice Marshall observes that "the rights of third persons, who are purchasers without notice for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed if this principle be overturned."[2] In a recent Minnesota case it is said that the burden of rebutting the presumption of a fraudulent intent arising from the continued possession of the property by the vendor rests on the vendee as against creditors. The court continued: "But there is no such burden resting upon the vendee to show that the vendor was not implicated in the fraud, because the fraudulent intent of the vendor cannot legally affect the rights of a *bona fide* purchaser for a valuable consideration and without notice. It is sufficient if the vendee is innocent of any fraud, and did not participate therein, and had no notice of the fraudulent intent of the vendor."[3] Dillon, J., in Gardner v. Cole,[4] said that "where the first conveyance originates in a fraudulent purpose, and is without any consideration

[1] See Arnholt v. Hartwig, 73 Mo. 485; Bishop v. Schneider, 46 Mo. 472; Dixon v. Hill, 5 Mich. 408; Hedrick v. Strauss, 42 Neb. 485, 60 N. W. Rep. 928.

[2] Fletcher v. Peck, 6 Cranch 133. Manifestly one who purchases personal property on credit and never pays for it is not entitled to protection as a *bona fide* purchaser. Jetton v. Tobey, 62 Ark. 84, 34 S. W. Rep. 531.

[3] Leqve v. Smith, 63 Minn. 26, 65 N. W. Rep. 121. See also Leach v. Flack, 31 Hun (N. Y.) 605; Griffin v. Marquardt, 21 N. Y. 121.

[4] 21 Iowa 205, 214.

of value, and the grantor remains in possession, and claiming ownership, sells the property as his own to a party who buys without actual notice of the prior deed and pays value, the latter purchaser may avoid the prior voluntary and fraudulent conveyance."[1] We have seen that conveyances are void which are made to defraud subsequent purchasers for a valuable consideration.[2] Of course, as we have seen, where it is found as matter of fact that the purchase of the property was made by collusion with the debtor, with the intent to hinder and delay creditors, the purchaser has no equities against such creditors even as regards the amount actually paid.[3]

§ 370. **Generality of the rule.** — A court of equity acts only on the conscience of the party; and if he has done nothing that taints it, no demand can attach so as to give jurisdiction.[4] The rule is not limited to cases where conveyances are made in fraud of creditors, but applies to cases in which the vendor has been swindled out of his property by a vendee, for whenever the property reaches the hands of a *bona fide* purchaser for value, the rights and equities of the defrauded owner are cut off.[5]

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[1] See Hurley v. Osler, 44 Iowa 646. See note as to the rights of transferees and others under conveyances in fraud of creditors and of trusts, at end of Lore v. Dierkes, 16 Abb. N. C. (N. Y.) 47, 59.

[2] Anderson v. Etter, 102 Ind. 121, 26 N. E. Rep. 218. See § 21.

[3] Bank of Commerce v. Fowler, 93 Wis. 245; Ferguson v. Hillman, 55 Wis. 190, 12 N. W. Rep. 389. See § 193.

[4] Boone v. Chiles, 10 Pet. 177. In Knowlton v. Hawes, 10 Neb. 534, 7 N. W. Rep. 286, it appeared that a father, after an obligation had been incurred, but before judgment, conveyed his real estate, worth more than $5,000, to his son, who had but little means, for an expressed consideration of $4,900, $300 being paid in cash, $250 in a span of horses, and $450 for labor alleged to have been previously performed, two unsecured notes, one for the sum of $1,000, payable in two years, and one for $2,000, payable in five years, and $900 to be paid in certain mortgages. It was held, on the testimony, that the son was not a *bona fide* purchaser of the land, and that it was liable for the payment of the judgment.

[5] Paddon v. Taylor, 44 N. Y. 371; Brower v. Peabody, 13 N. Y. 121; Load v. Green, 15 M. & W. 216; Smart v. Bement, 4 Abb. App. Dec. (N. Y.) 253; Bruen v. Dunn, 87 Iowa

"A purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well-known maxim that when the equities are equal the law shall prevail."[1]

If creditors condone the fraud the grantee's title is good against all comers.[2]

§ 371. **Mortgagee as bona fide purchaser.** — A mortgagee is a purchaser[3] to the extent of his interest.[4] New York has taken an advanced position on this question. It is held in that State that where property is conveyed to a voluntary grantee, and the latter, at the grantor's request, executes a mortgage upon the land to a creditor of the grantor, to secure a debt of the grantor's which existed at the time of the conveyance, the mortgagee is a *bona fide* purchaser for a valuable consideration, and though the conveyance may be set aside by other creditors, the mortgagee will not be affected.[5] The giving of the mort-

483, 54 N. W. Rep. 468. Though the Rhode Island statute omits the provision about *bona fide* purchasers for value contained in the English statute, it is considered that the statute should be construed the same as though that provision had not been omitted. Tiernay v. Claflin, 15 R. I. 220, 2 Atl. Rep. 762.

[1] Townsend v. Little, 109 U. S. 512, 3 S. C. Rep. 357. Citing Williams v. Jackson, 107 U. S. 478, 2 S. C. Rep. 814; Willoughby v. Willoughby, 1 T. R. 763; Charlton v. Low, 3 P. Wms. 328; *Ex parte* Knott, 11 Ves, 609; Tildesley v. Lodge, 3 Sm. & Giff. 543; Shine v. Gough, 1 Ball & B. 436; Bowen v. Evans, 1 Jones & La T. 264; Vattier v. Hinde, 7 Pet. 252. Absence of good faith must be made out by a clear preponderance of evidence. Bradford v. Bradford, 60 Iowa 202, 14 N. W. Rep. 254.

[2] Millington v. Hill, 47 Ark. 309, 1 S. W. Rep. 547.

[3] Boice v. Conover, 54 N. J. Eq. 531, 35 Atl. Rep. 402.

[4] Ledyard v. Butler, 9 Paige (N. Y.) 132; Murphy v. Briggs, 89 N. Y. 451; Zoeller v. Riley, 100 N. Y. 108, 2 N. E. Rep. 388; Holmes v. Gardner, 50 Ohio St. 167, 33 N. E. Rep. 644; Jones v. Light, 86 Me. 443, 30 Atl. Rep. 71; Chapman v. Emery, 1 Cowper 278; Hill v. Ahern, 135 Mass. 158; Valentine v. Lunt, 115 N. Y. 496, 22 N. E. Rep. 209.

[5] Murphy v. Briggs, 89 N. Y. 446. See upon this confused question 2 Pomeroy's Eq. Jur. §§ 748, 749, and cases cited; Metropoliton Bank v. Godfrey, 23 Ill. 579: Manhattan Co. v. Evertson, 6 Paige (N. Y.) 457; Lowry v. Smith, 9 Hun (N. Y.) 514; Smart v. Bement, 4 Abb. App. Dec. (N. Y.) 253; Willoughby v. Willoughby,

gage was regarded as merely applying the property for the benefit of creditors by rescinding the fraudulent transaction, and entering into a new valid contract. As we have seen,[1] the law does not deprive parties of the right to restore to its legitimate purposes property which has been fraudulently appropriated.[2]

§ 371a. **Execution purchaser.** — A purchaser at an execution sale may bring suit to set aside a prior deed of the land made in fraud of the judgment-creditor's claim.[3]

§ 372. **Without notice.** — Judge Story observes that: "It is a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase-money." [4] On the other hand, it was said in a case which arose in Georgia that the purchaser at a sale made with intent to defraud creditors, if himself free from all responsibility for the fraud, was not affected upon afterward discovering the seller's fraudulent intent, even though he had not then paid the purchase-money, and the notes given for it had not passed beyond the control of himself and the seller, it not appearing that he alone could control the notes without the co-operation of the seller, or that the latter could have been induced to cancel or surrender the notes, which were negotiable.[5] In the United States, even in States where the statutes are a literal rescript of the English statutes of 13 and 27 Elizabeth, the general doctrine is, that the right of the subsequent purchaser to avoid the first

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1 T. R. 763; Dickerson v. Tillinghast, 4 Paige (N. Y.) 215; Boyd v. Beck, 29 Ala. 713; Wells v. Morrow, 38 Ala. 125; Porter v. Green, 4 Iowa 571.

[1] See § 176.

[2] Murphy v. Briggs, 89 N. Y. 446. But compare Wood v. Robinson, 22 N. Y. 564.

[3] Fuller v. Pinson, 98 Ky. 441, 33 S. W. Rep. 399.

[4] Wormley v. Wormley, 8 Wheat. 449; Hedrick v. Strauss, 42 Neb. 485, 60 N. W. Rep. 928. See Arnholt v. Hartwig, 73 Mo. 485.

[5] Nicol v. Crittenden, 55 Ga. 497.

conveyance will depend on whether he had notice of its existence at the date of his purchase.[1] This leads us to the consideration of one of the most important branches of our subject, the doctrine of notice as applied to covinous alienations.

§ 373. **Kinds of notice.** — Notice is of two kinds, actual and constructive.[2] Actual notice may be shown to have been received or given by all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts; and, like other legal presumptions, does not admit of dispute.[3] "Constructive notice," says Judge Story, "is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted."[4] Substantially the same language is employed by Mr. Justice Woods in Townsend v. Little.[5] Chancellor Kent said: "I hold him chargeable with constructive notice, or notice in law, because he had information sufficient to put him upon inquiry."[6] "Constructive notice," says Wright, J., "is a legal inference from established facts;

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[1] See Prestidge v. Cooper, 54 Miss. 77. Wyman v. Brown, 50 Me. 148, lays down the rule, however, that a fraudulent voluntary conveyance is void as against a subsequent purchaser even with notice. See Hudnal v. Wilder, 4 McCord's (S. C.) Law 295.

[2] Lord Erskine in Hiern v. Mill, 13 Ves. 120.

[3] Selden, J., in Williamson v. Brown, 15 N. Y. 359; Griffith v. Griffith, 1 Hoffm. Ch. (N. Y.) 155; Hiern v. Mill, 13 Ves. 120; Claflin v. Lenheim, 66 N. Y. 306; Birdsall v. Russell, 29 N. Y. 220, 249.

[4] Story's Eq. Jur. § 399; Rogers v. Jones, 8 N. H. 270; Cambridge Valley Bank v. Delano, 48 N. Y. 339.

[5] 109 U. S. 511, 3 S. C. Rep. 357. Citing Plumb v. Fluitt, 2 Anstr. 432; Kennedy v. Greene, 3 Mylne & K. 699.

[6] Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261, 267.

and when the facts are not controverted, or the alleged defect or infirmity appears on the face of the instrument, and is a matter of ocular inspection, the question is one for the court." [1] Constructive notice has been said to be of two kinds; that which arises upon testimony and that which results from a record.[2]

Actual notice is usually a question for the jury, and is to be established by implication or inference from other facts [3] or circumstances.[4] There is no particular kind of evidence necessary to establish it; anything that proves it or constitutes legal evidence of knowledge is competent.[5] It is otherwise as to constructive notice. There the law imputes notice to the purchaser, and whether or not this will be done upon a conceded state of facts is not a question for the jury.[6]

§ 374. **Constructive notice of fraud.** — The principles which govern and control the general doctrine of constructive notice of fraud as bearing upon our subject are not always entirely clear. Williamson v. Brown,[7] already cited, contains an important review of the authorities by the learned Justice Selden, as to the general subject of

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[1] Birdsall v. Russell, 29 N. Y. 249. See Page v. Waring, 76 N. Y. 471.

[2] Griffith v. Griffith, 1 Hoffm. Ch. (N. Y.) 156.

[3] Bradbury v. Falmouth, 18 Me. 65; H. T. Simon-Gregory Dry Goods Co. v. Schooley, 66 Mo. App. 413.

[4] McNally v. City of Cohoes, 127 N. Y. 350, 27 N. E. Rep. 1043; Ross v. Caywood, 16 App. Div. (N. Y.) 592; Anderson v. Blood, 152 N. Y. 285, 46 N. E. Rep. 493.

[5] Trefts v. King, 18 Pa. St. 160

[6] Birdsall v. Russell, 29 N. Y. 249. "If the doctrine of constructive notice is applicable, it is immaterial how the fact is. The jury may be satisfied that the purchaser was, in fact, entirely innocent and free from any guilty knowledge, or even suspicion of fraud; but if they find that facts were known to him which were calculated to put him on inquiry, his want of diligence in making such inquiry is equivalent to a want of good faith, and the presumption of notice is a legal presumption which is uncontrovertible." Rapallo, J., in Parker v. Conner, 93 N. Y. 124. "The whole basis of the rule is negligence in the purchaser. It is a question of good faith in him." Peckham, J., in Acer v. Westcott, 46 N. Y. 384, 389.

[7] 15 N. Y. 362; H. T. Simon-Gregory Dry Goods Co. v. Schooley, 66 Mo. App. 413.

notice. Baker v. Bliss,[1] where the question was as to whether or not a purchaser took with knowledge of the fraud affecting the title of his vendor, seems to clearly establish the rule that to charge a party with such notice the circumstances known to him must be of such character as ought reasonably to have excited his suspicion, and led him to inquire.[2] It appeared that the purchaser had paid a valuable consideration, and had testified and the referee had found, that he had no actual notice or knowledge of the fraud which rendered the conveyance void as against creditors, "but that he had sufficient knowledge to put him upon inquiry, and that such knowledge was equivalent to notice, and in law amounted to constructive notice." Cases like Williamson v. Brown[3] are cited and applied in the opinion. In Ellis v. Horrman,[4] a record act case, Tracy, J., said: "Notice sufficient to make it the duty of a purchaser to inquire, and failure so to do when information is easily accessible, is equivalent to actual notice within the rule of the authorities." Paige, J., observed in Williamson v. Brown:[5] "A party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry suggested by such information, prosecuted with due diligence, would have disclosed to him."[6] In Reed v.

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[1] 39 N. Y. 70.

[2] See Burnham v. Brennan, 10 J. & S. (N. Y.) 79; reversed, 74 N. Y. 597; Blum v. Simpson, 71 Tex. 628, 9 S. W. Rep. 662; Hadock v. Hill, 75 Tex. 193, 12 S. W. Rep. 974.

[3] 15 N. Y. 362.

[4] 90 N. Y. 473.

[5] 15 N. Y. 364.

[6] See Howard Ins. Co. v. Halsey, 4 Sandf. (N. Y.) 578; Kennedy v. Green, 3 Mylne & K. 699; Flagg v. Mann, 2 Sumner 534; Bennett v. Buchan, 76 N. Y. 386; Grimstone v. Carter, 3 Paige (N. Y.) 421; Taylor v. Baker, 5 Price 306; Jones v. Smith, 1 Hare 43–55. Compare Pringle v. Phillips, 5 Sandf. (N. Y.) 157; Danforth v. Dart, 4 Duer (N. Y.) 101; Roeber v. Bowe, 26 Hun (N. Y.) 556; Pitney v. Leonard, 1 Paige (N. Y. 461; Peters v. Goodrich, 3 Conn. 146; Booth v. Barnum, 9 Conn. 286; Whitbread v. Jordan, 1 Y. & C. 328; Shaw v. Spencer, 100 Mass. 390; Jenkins v. Eldredge, 3 Story 181; Heaton v. Prather, 84 Ill. 330; Garahy v. Bayley, 25 Tex. Supp. 294; Birdsall v.

Gannon,[1] it appeared that the parties dealt upon the assumption that there were liens or incumbrances upon the property, but their number, extent or character was not stated. Rapallo, J., said: "The insertion of these clauses in the instrument was sufficient to put the plaintiffs on inquiry as to the extent and description of the existing incumbrances referred to." It was such notice as in the language of the authorities "would lead any honest man, using ordinary caution, to make further inquiries."[2] "Constructive notice," said Haight, J., in Farley v. Carpenter,[3] "is a knowledge of circumstances which would put a careful and prudent person upon inquiry, or such acts as the law will presume the person had knowledge of, on the grounds of public policy; as, for instance, the laws and public acts of the government, instruments recorded pursuant to law, advertisements in a newspaper of a notice or process authorized by statute."[4]

§ 375. **Rule in Stearns v. Gage.** — The question of what constitutes "notice" of fraud, or of a fraudulent intent, is one of manifest importance to creditors and purchasers.

Russell, 29 N. Y. 220; Moore v. Williamson, 44 N. J. Eq. 496, 15 Atl. Rep. 587; Kellar v. Taylor, 90 Ala. 289, 7 So. Rep. 907; Allen v. Stingel, 95 Mich. 195, 54 N. W. Rep. 880; Weare v. Williams, 85 Iowa 253, 52 N. W. Rep. 328; Washburn v. Huntington, 78 Cal. 573, 21 Pac. Rep. 305.

[1] 50 N. Y. 345. See Parker v. Conner, 93 N. Y. 126.

[2] Whitbread v. Jordan, 1 Y. & C. 328. See Acer v. Westcott, 46 N. Y. 384; Cambridge Valley Bank v. Delano, 48 N. Y. 340. Compare, however, Battenhausen v. Bullock, 11 Ill. App. 665.

[3] 27 Hun (N. Y.) 362.

[4] "The doctrine of constructive notice," says Rapallo, J. "has been most generally applied to the examination of titles to real estate. It is the duty of a purchaser of real estate to investigate the title of his vendor, and to take notice of any adverse rights or equities of third persons which he has the means of discovering, and as to which he is put on inquiry. If he makes all the inquiry which due diligence requires, and still fails to discover the outstanding right, he is excused; but if he fails to use due diligence, he is chargeable, as matter of law, with notice of the facts which the inquiry would have disclosed." Parker v. Conner, 93 N. Y. 124. See Acer v. Westcott, 46 N. Y. 384, and cases cited.

Some apparent dissension has been introduced into this branch of the subject by a *dictum* of Miller, J., in Stearns v. Gage,[1] followed by the New York Supreme Court in Farley v. Carpenter,[2] and approved in Parker v. Conner,[3] and still being applied in the Court of Appeals.[4] According to the court's own statement it could not "be claimed that any question as to constructive notice was presented upon the trial" in Stearns v. Gage, and it seems unfortunate that the debatable sentences should have been embodied in the opinion. The court observes that "actual notice is required where a valuable consideration has been paid." The statute relating to fraudulent conveyances[5] in New York contains a provision that it "shall not be construed in any manner, to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." The court says that "this plainly means that actual notice shall be given of the fraudulent intent or knowledge of circumstances which are equivalent to such notice. *Circumstances to put the purchaser on inquiry where full value has been paid are not sufficient.*[6] . . . . No authority has been cited which sustains the principle that a purchaser

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[1] 79 N. Y. 102. See Wilmerding v. Jarmulowsky, 85 Hun (N. Y.) 285, 32 N. Y. Supp. 983; Wilson v. Marion, 147 N. Y. 596, 42 N. E. Rep. 190; Jacobs v. Morrison, 136 N. Y. 105, 32 N. E. Rep. 552; Anderson v. Blood, 152 N. Y. 285, 46 N. E. Rep. 493; King v. Holland Trust Co., 8 App. Div. (N. Y.) 117, 40 N. Y. Supp. 480.

[2] 27 Hun (N. Y.) 359. See 23 Alb. L. J. 126.

[3] 93 N. Y. 118. See Lyons v. Leahy, 15 Ore. 8, 11, 13 Pac. Rep. 643; State v. Mason, 112 Mo. 380, 20 S. W. Rep. 629; Van Raalte v. Harrington, 101 Mo. 610, 14 S. W. Rep. 710; State v. Merritt, 70 Mo. 275; Knower v. Cadden Clothing Co., 57 Conn. 221, 17 Atl. Rep. 580; Seavy v. Dearborn, 19 N. H. 351; Sammons v. O'Neill, 60 Mo. App. 536; Wilson v. Marion, 147 N. Y. 596; 42 N. E. Rep. 190.

[4] Wilson v. Marion, 147 N. Y. 596, 42 N. E. Rep. 190; Jacobs v. Morrison, 136 N. Y. 105, 32 N. Rep. 552.

[5] 2 R. S. N. Y. 137, § 5.

[6] Compare Anderson v. Blood, 152 N. Y. 285, 46 N. E. Rep. 493.

for a valuable consideration, without previous notice, is chargeable with constructive notice of the fraudulent intent of his grantor; and such a rule would carry the doctrine of constructive notice to an extent beyond any principle which has been sanctioned by the courts and cannot be upheld."

It must be noted that the word "actual" is not embodied in the statute, but has been, in effect, interpolated by this construction. We dissent decidedly from the statement that the statute "plainly means that actual notice shall be given of the fraudulent intent." Such a construction violates the settled rule that statutes of this character shall be liberally construed for the suppression of fraud.[1] It is to be regretted that the utterances quoted occur in a case in which no facts sufficient to put a purchaser on inquiry, or to constitute what is often called and sometimes miscalled, constructive notice of fraud, were found or were actually present. Had the court been confronted with such facts and compelled to squarely state the rule in the presence of such facts, these remarks, which we consider unfortunate, might never have been made. It is idle to assail the arguments of the case with violent language, as has more than once been done, but we should rather view the objectionable sentences as unguarded utterances, and entertain the hope that the questionable features of the opinion will be limited and distinguished, and perhaps ultimately overturned. "Knowledge of circumstances which are equivalent to" actual notice are regarded in the opinion as sufficient evidence of notice. This plainly implies that the court does not mean to require proof that, as a matter of fact, the purchaser was informed personally of the debtor's or vendor's fraudulent intention, but leaves open the wide field of circumstances by which actual notice may be inferred,

[1] See § 20.

implied and fastened upon him. In other words, "circumstantial evidence" will suffice.[1] In Farley v. Carpenter,[2] which follows and adopts Stearns v. Gage,[3] the court at General Term says: "A person may be chargeable with constructive notice and still have no actual notice. Fraud implies an evil or illegal intent. Such intent can only exist in case of knowledge. Under this statute fraud is not a question of negligence, it is a question of knowledge and intent; a party may be negligent in not examining the records for liens and incumbrances on real estate before effecting a purchase, and still be strictly honest, and innocent of fraud."

We deny that fraud necessarily "implies an evil or illegal intent." The transaction may be pure and honest as regards the debtor's mental emotions, or his belief, or when measured by his standard of morality, and yet be pronounced by the courts fraudulent and void in law. Nor is fraud always "a question of knowledge and intent," because, by a fiction of law, knowledge is constantly imputed by statutes, and by the courts, in cases where it did not in fact exist, and no evil intent considered as a mental emotion was present.

§ 376. — It seems startling if not preposterous to say that circumstances which ought to "put the purchaser on inquiry" are "not sufficient" to taint a transaction with fraud, or to warrant the conclusion that a vendee is not a *bona fide* purchaser. We submit that this statement is inaccurate and misleading. The confusion undoubtedly results in part from a failure to distinguish between circumstantial evidence sufficient to establish or justify a finding of actual notice of fraud and facts which raise the presumption of constructive notice.[4] The facts and

[1] Farley v. Carpenter, 27 Hun (N. Y.) 362.

[2] 27 Hun (N. Y.) 362.

[3] 79 N. Y. 102

[4] In Garesché v. MacDonald, 103 Mo. 10, 15 S. W. Rep. 379, the court

circumstances sufficient in either phase of the question to establish notice or bad faith in the vendee bear a close resemblance, if indeed they are not often identical; hence the doctrine of Stearns v. Gage, if it is effectual for any purpose, is to be regarded as seriously impeding, if not breaking the force of *indicia* and circumstances as evidence of guilty knowledge. What object is to be subserved in endeavoring to establish knowledge or notice of a fraudulent intent by proof of surrounding circumstances, if facts sufficient to put an honest man "on inquiry" count for nothing? Are not facts manifestly sufficient to excite grave suspicions of good faith, at least evidence tending to prove actual notice?[1] Is not a court or jury justified in finding actual notice from facts which should excite inquiry or raise a presumption of constructive notice? In short, is a court or jury justified in finding, as matter of fact, absence of actual notice in cases where facts sufficient to create a clear presumption of constructive notice are in evidence? Can such a verdict or finding be said to honestly reflect the evidence? It seems incredible that a party whose suspicions concerning the fairness and good faith of a transaction must have been excited by the exceptional and peculiar conduct of the parties, can preserve the character of a *bona fide* purchaser, either by listless inattention and indifference concerning the *indicia* of fraud, or by active and positive efforts to avoid all knowledge of the true motive or design of the debtor.

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says: "While fraud may be inferred when it is a legitimite deduction from all the facts and circumstances in evidence in a given case, it is never to be presumed."

[1] In Sammons v. O'Neill, 60 Mo. App. 536, the court says: "It is not sufficient that he may have had knowledge of such facts as would have put a prudent man on inquiry, which inquiry would have discovered the fraud, but the fact that he had such knowledge may be given in evidence and may be considered by the jury, with the other facts and circumstances in the case, in determining the question whether he really had actual knowledge of the fraud." See H. T. Simon-Gregory Dry Goods Co. v. Schooley, 66 Mo. App. 413.

This would be offering a premium to vendees who masqueraded as mutes, or who declined to use their eyes and ears to discover the fraud, the evidence of which surrounded them on every side. Is not such a vendee guilty of a "fraudulent turning away from knowledge?" Must not a person who willfully closes his eyes to avoid seeing what he believes he would have discovered had he kept them open, be considered as having perceived or detected "what any man with his eyes open would have seen?"[1] Is a party who has eyes to be permitted to say that he saw not, and who has ears to be permitted to say that he heard not? When the warning signal has been sounded, and the attention of a party has been aroused, is it not incumbent on such party to *stay his hand*, until he shall ascertain by the requisite inquiries the facts foreshadowed by the suspicious circumstances?[2] In Farley v. Carpenter[3] the purchaser testified that he thought something was up from the way the debtor talked: "He sent for me; he wanted to sell me his farm; I said, 'What is up?' he said, 'You need not ask any questions nor say anything for two or three days.'" The court said it did "not necessarily follow that he should infer" that the debtor "was designing to cheat and defraud his creditors and flee from the State." This case, it seems to us, is squarely opposed to Baker v. Bliss,[4] and can scarcely be reconciled with the views of Rapallo, J., in a case to be presently noticed, in which he entertains "no doubt that it is legitimate for the jury in such cases to consider whether the vendee *had knowledge of facts pointing to a fraudulent intent or calculated to awaken suspicion, and*

[1] De Witt v. Van Sickle, 29 N. J. Eq. 214. A party "has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice." Burwell v. Fauber, 21 Gratt. (Va.) 463.

[2] Compare Pinckard v. Woods, 8 Gratt. (Va.) 140.

[3] 27 Hun (N. Y.) 361.

[4] 39 N. Y. 70.

that actual notice of a fraudulent intent on the part of the vendor need not be established by direct proof. The fact of notice or knowledge may be inferred from circumstances." [1]

Let the reader briefly consider this subject in its practical application and bearing. A debtor contemplating flight, suddenly offers to sell his tangible property at a sacrifice for cash to a vendee who sees in the transaction the usual *indicia* surrounding fraudulent alienations, sufficient to put a purchaser "on inquiry." No inquiry is made, the vendee takes title to the debtor's property, or to what is sometimes called the creditors' trust fund,[2] and provides the debtor with its equivalent in money, which has no earmarks and is easily secreted or dissipated, and the latter absconds. Here the vendee has actually facilitated the consummation of the fraud by furnishing the debtor with a portion of its value in cash in consideration of receiving the property at a sacrifice.[3] Is not the purchaser at least a *quasi* conspirator in such a case, even though the debtor did not openly avow his fraudulent purpose? Imprudence or inattention to the suspicious circumstances may possibly be overlooked, but can willful blindness be pardoned?[4]

Again, suppose a deed is made for full value by A. to B., containing recitals or provisions which render it void-

[1] Parker v. Conner, 93 N. Y. 124; S. P. Carroll v. Hayward, 124 Mass. 122; Moore v. Williamson, 44 N. J. Eq. 504, 15 Atl. Rep. 587; Bush v. Roberts, 111 N. Y. 282, 18 N. E. Rep. 732; Lyons v. Leahy, 15 Ore. 8, 13 Pac. Rep. 643; Knower v. Cadden Clothing Co., 57 Conn. 202, 17 Atl. Rep. 580.

[2] See § 14; Egery v. Johnson, 70 Me. 261.

[3] Compare Singer v. Jacobs, 11 Fed. Rep. 561; Clements v. Moore, 6 Wall. 299.

[4] "If the facts and circumstances are such as ought to have excited suspicion and led to inquiry, the purchaser is regarded as having received notice of a fraudulent intent and required to investigate, and on the trial to explain or in some way overcome the effect of the notice thus given. Purchasers, under the circumstances suggested, cannot shut their eyes and shield themselves by proof of the payment of a consideration. They further and perfect the wrongful intent of the debtor when they assist him to dispose of his property." Herrlich v. Brennan, 11 Hun (N. Y.) 195.

able as to creditors provided A. is not solvent. In other words, its provisions stamp it as fraudulent in law or void against creditors upon its face if A. is insolvent.[1] The instrument is effectual between the parties,[2] and is good against all the world if A. was solvent; it is voidable as matter of law if A. was insolvent. Do not these recitals cast upon B. the duty of investigating and inquiring as to the solvency of A.? If no inquiry is made, and, as matter of fact A. is insolvent, do not the recitals of the instrument then constitute *constructive notice* to B. of the fraud intended by A.? The whole supposition of the case is that B. had no *actual* knowledge or notice of the intended fraud.

It is difficult to assign any reason why the doctrine of constructive notice, if it has any application to our subject at all, should not be applied in a case in which adequate consideration has been given. Where the fraudulent intent is present, proof of consideration will not save the transaction; it is merely a fact, a piece of evidence, tending among other things to establish want of notice; but it clearly has no such controlling or overshadowing effect, and bears no such strong relation to the transaction as to justify the court in disregarding, as the basis of a finding of notice, proof of facts sufficient to excite inquiry or suspicion, or to constitute constructive notice. Indeed actual or pretended payment of consideration is almost a necessary incident of a covinous transaction, and often serves as a convenient cover for fraud.

§ 376a. **Anderson v. Blood.**— The proposition as to what constitutes sufficient notice to a party to deprive him of the character of a *bona fide* purchaser was re-discussed by Gray, J., in the recent case of Anderson v. Blood.[3]

[1] See §§ 9, 10, 322.

[2] See Chap. XXVI.

[3] 152 N. Y. 285, 293, 46 N. E. Rep. 493.

Evidently conflicting opinions prevailed in the deliberations of the court, as three judges dissent from the prevailing conclusions. In the course of the opinion Gray, J., says: "The rule, as it was early laid down in the case of Williamson v. Brown,[1] has not been departed from in any subsequent case, of which I am aware. That was that, where a purchaser of land has knowledge of any facts sufficient to put him upon inquiry as to the existence of some right, or some title, in conflict with that he is about to acquire, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser. Many subsequent cases in this court have rested upon the rule in Williamson v. Brown. But all are to the point that a purchaser for a valuable consideration is entitled to be protected in his title and, in the absence of actual notice of fraud, it is necessary that the facts and circumstances, relied upon to charge him with knowledge of the fraud, should be of a character equivalent to notice. If the facts within the knowledge of the purchaser are of such a nature, as, in reason, to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts would have revealed.[2] I will assume in the present case, for the purpose of the discussion, that the beneficiaries of this estate might be regarded as having such equitable interests in the property as to impose a stricter duty of vigilance in the case of an intending purchaser, than would be required

[1] 15 N. Y. 354.

[2] See Le Neve v. Le Neve, Amb. 436, 2 Lead. Cas. Eq. (6th ed.) 26; Williamson v. Brown, 15 N. Y. 354; Stearns v. Gage, 79 N. Y. 102; Parker v. Conner, 93 N. Y. 118; Bush v. Roberts, 111 N. Y. 278, 18 N. E. Rep. 732; Jacobs v. Morrison, 136 N. Y. 101, 32 N. E. Rep. 552.

where the parties interested were the general creditors of the grantor, and with that assumption, which perhaps is barely justified in this case, I still am unable to perceive in what way Mrs. Blood was chargeable with the neglect of any duty of inquiry resting upon her by reason of the circumstances. . . . . The question is not whether Mrs. Blood *could* have discovered the existence of any fraud by an inquiry; but it is whether, acting as an ordinarily prudent person would have done, she was called upon, under the circumstances, to make inquiry. Were the circumstances such as to necessitate the making of some inquiry, at the peril of being charged with the knowledge of some then unperceived fact? However strong the circumstances may have seemed to militate against the good faith of Hernz and Melhado in the transaction, I do not think they would have warranted Mrs. Blood in then declaring that some collusion existed to defraud the beneficiaries of the trust estate."

It will be noticed that in this case the court intimate a distinction between a *bona fide* purchaser claiming against the beneficiaries of a trust estate, and parties who are merely the general creditors of the grantor. Certainly the tendency of this decision is to establish, at least as regards the argument of the court and the words employed in reaching its conclusion, a result somewhat more favorable to creditors than the expressions employed in Stearns v. Gage[1] and Parker v. Conner,[2] where the duty of the purchaser to make inquiry in the presence of suspicious facts and circumstances was in effect denied.[3]

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[1] 79 N. Y. 102.

[2] 93 N. Y. 118.

[3] In Higgins v. Crouse, 147 N. Y. 415, 42 N. E. Rep. 6, the question arose as to whether a party had such knowledge of a fraud as would cause the Statute of Limitations to bar him, Finch, J., said: "Let us suppose that the injured party does not know all the facts, is not aware of enough of them to justify a decided inference of fraud, but does know sufficient to

§ 377. **Carroll v. Hayward — Actual belief.**—This question of notice, as applied to our subject, has frequently been up for adjudication in Massachusetts. "Reasonable cause to know," said Ames, J., "is evidence having a tendency, and generally a strong tendency, to prove that the party in question did know, but it is a mistake to say that it is the same thing as knowledge. What might convince one man might be insufficient to satisfy the mind of another."[1] Thus in an action for deceit by false representations the *scienter* must be proved and found as matter of fact, and it is not enough merely to prove that the party had reasonable cause to believe the representation untrue, and from that infer *scienter* as a question of law.[2] The distinction between reasonable cause to believe and actual belief is pointed out in Coburn v. Proctor.[3]

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fairly arouse suspicion, to create a probability, to suggest the need of an inquiry. Can a party so situated omit all investigation, remain purposely blind, neglect the duty of inquiry, when reasonable and natural action would reveal the truth and disclose the fraud? I think not. In such a case, it seems to me, that we are bound to impute to the party the knowledge which he ought to have had and would have had if he had done his duty, and say for the purposes of the Statute of Limitations that there was in law a discovery of the facts which constitute the fraud. . . . . I think the true rule is that, where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him." The facts, however, in this case were held not to bring it within the rule as stated.

[1] Carroll v. Hayward, 127 Mass. 122; State v. Mason, 112 Mo. 380, 20 S. W. Rep. 629. Compare Bicknell v. Mellett, 160 Mass. 328, 35 N. E. Rep. 1130.

[2] Pearson v. Howe, 1 Allen (Mass.) 207; Tryon v. Whitmarsh, 1 Met. (Mass.) 1.

[3] 15 Gray (Mass.) 38. The statute provided (Laws Mass. 1856, chap. 284, § 27) that preferential conveyances made to any person who had "reasonable cause to believe such debtor insolvent," might be avoided by the assignee. In a suit brought to avoid such a transfer, testimony that the defendants believed the debtor perfectly solvent was declared incompetent. It was considered that the only inquiry which under the statute was relevant to the issue was whether the

§ 378. **Parker v. Conner.** — The New York Court of Appeals again reverted to this general subject in Parker v. Conner.[1] Baker v. Bliss,[2] and Reed v. Gannon,[3] are there emasculated so that creditors can draw little aid or comfort from them, and Stearns v. Gage[4] is considered "sufficient to dispose of the present controversy." Rapallo, J., one of the ablest judges and clearest writers in the court, said: "We think that in cases like the present, where an intent to defraud creditors is alleged, the question to be submitted to the jury should be whether the vendee did in fact know or believe that the vendor intended to defraud his creditors, not whether he was negligent in failing to discover the fraudulent intent. . . . . The vendor's title and legal right of disposition are unquestioned, and the ground upon which the transfer is impeached is not any defect in the chain of title, but that the vendor's motive in selling was to hinder, delay or defraud his own

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defendants had reasonable cause to believe the debtor insolvent; that is whether, in view of all the facts and circumstances which were known to the defendants concerning the business and pecuniary condition of the debtor in connection with the time and mode of transfer of the property taken, they as reasonable men, acting with ordinary prudence, sagacity and discretion, had good ground to believe that the debtor was insolvent. "It was not intended by the statute," said Bigelow, J., "to make the actual belief of the party concerning the solvency of the debtor one of the standards by which to test the validity of the transfer of property to him. *Such belief might or might not be well founded. It would be an uncertain and fluctuating standard.* That which would satisfy the mind of one man would be wholly insufficient to convince another; and those facts which would fall far short of producing a belief in a person who was disinterested and impartial might have a very different effect upon the same person when acting under the strong influence of self-interest." Coburn v. Proctor, 15 Gray (Mass.) 38.

[1] 93 N. Y. 118, 45 Am. Rep. 178. See especially the learned note by Irving Browne, Esq., in which many of the cases here cited are discussed. See 29 Alb. L. J. 244; Bush v. Roberts, 111 N. Y. 282, 18 N. E. Rep. 732; Van Raalte v. Harrington, 101 Mo. 610, 14 S. W. Rep. 710; Knower v. Cadden Clothing Co., 57 Conn. 202, 221, 17 Atl. Rep. 580; Seavy v. Dearborn, 19 N. H. 351; Wilson v. Marion, 147 N. Y. 596, 42 N. E. Rep. 190; Jacobs v. Morrison, 136 N. Y. 105, 32 N. E. Rep. 552.

[2] 39 N. Y. 70.

[3] 50 N. Y. 345.

[4] 79 N. Y. 102.

creditors. In such a case there is no duty of active vigilance cast upon the purchaser, for the benefit of creditors of the vendor, which should require him to suspect and investigate the motives of the vendor. If he knows or believes them to be fraudulent, he has no right to aid the vendor in his fraudulent scheme, and by so doing he makes himself a party to the fraud. But fraud should not be imputed by the application of the strict rules of constructive notice in such a case, and actual good faith should be sufficient to protect the purchaser." It will thus be seen that the *dictum* of Stearns v. Gage is adopted in a qualified sense. We respectfully urge that the proposed test, Did the vendee "*in fact know or believe* that the vendor intended to defraud his creditors?" is loose, uncertain and unsatisfactory. The court proceed to state that on general principles, independent of the statute, the same rules are applicable in such cases as govern in determining the *bona fides* of commercial paper, viz.: not whether the holder took the bill or note without exercising sufficient prudence and care, but whether it came into his hands under such circumstances as to charge him with receiving it *mala fide*, and that unless he is fairly chargeable with notice of the fraud, even negligence will not defeat his title.[1] There certainly is novelty in the idea of invoking the rule governing commercial paper for the protection of the alienees of fraudulent debtors.

It is foreign to our plan to further trace this line of cases. While conceding that there is plausibility in the reasons assigned for the non-application of the doctrine pure and simple of constructive notice to fraudulent trans-

[1] See this rule applied to commercial paper. Cook v. Jadis, 5 Barn. & Adol. 909; Blackhouse v. Harrison, 5 Barn. & Adol. 1098; Goodman v. Harvey, 4 Adol. & El. 870; Magee v. Badger, 34 N. Y. 247; Belmont Branch Bank v. Hoge, 35 N. Y. 65, overruling Pringle v. Phillips, 5 Sandf. (N. Y.) 157; Danforth v. Dart, 4 Duer (N. Y.) 101. See Parker v. Conner, 93 N. Y. 128.

fers, we bow to some of these decisions of the highest court of a great State with hesitation and reluctance. The great embarrassments under which creditors labor in overcoming the presumptions of legality and good faith which ordinarily inhere in all alienations and transactions of the debtor have already been considered.[1] Proof of fraud is usually an herculean task, and creditors should not consent without a struggle to be divested of so important and useful a factor in their litigations as the doctrine of constructive notice of fraud, at least considered as a circumstance, would be likely to prove. Before further discussing in the abstract what we consider the objections to the principles embodied in some of these cases we will glance at the many authorities which tend at least to establish a more favorable rule for the creditor class.

§ 379. **Facts sufficient to excite inquiry.**— Let us notice the cases. In Bartles v. Gibson,[2] Bunn, J., with whom Harlan, J., of the United States Supreme Court concurred, said: "The defendant testified that he knew that his brother was in some difficulty, and that the trouble was of a financial character. Whether he knew all or not, he knew enough to put him upon inquiry. . . . . If he had knowledge of facts sufficient to excite the suspicions of a prudent man and put him on inquiry, *he made himself a party to the fraud.*"[3] This is a wholesome and

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[1] See §§ 5, 6, 7, 8, 244, 271.

[2] 17 Fed. Rep. 297; Bedford v. Penny, 58 Mich. 424, 25 N. W. Rep. 381; Brittain v. Crowther, 54 Fed. Rep. 295; Redhead v. Pratt, 72 Iowa 103, 33 N. W. Rep. 382; Hasie v. Connor, 53 Kan. 721, 37 Pac. Rep. 128; Dodd v. Gaines, 82 Tex. 429, 18 S. W. Rep. 618; Martin v. Marshall, 54 Kan. 148, 37 Pac. Rep. 977; Walker v. Collins, 4 U. S. App. 415, 50 Fed. Rep. 737, 1 C. C. A. 642; Singer v. Jacobs, 11 Fed. Rep. 559; Hadock v. Hill, 75 Tex. 193, 12 S. W. Rep. 974; Richolson v. Freeman, 56 Kan. 464, 43 Pac. Rep. 772; Jerome v. Carbonate Nat. Bank, 22 Col. 42, 47 Pac. Rep. 215.

[3] Citing Atwood v. Impson, 20 N. J. Eq. 156; Baker v. Bliss, 39 N. Y. 70; Avery v. Johann, 27 Wis. 251; Kerr on Fraud, 236; David v. Birchard, 53 Wis. 492, 10 N. W. Rep.

refreshing statement. Chancellor Zabriskie, after observing that if the object of a debtor in making an alienation is to hinder and delay any of his creditors, the transaction may be avoided, if made to any one having knowledge of the intent, continues: "This knowledge need not be by actual positive information or notice, but will be inferred from the knowledge by the purchaser of facts and circumstances sufficient to raise such suspicions as to put him upon inquiry."[1] In Singer v. Jacobs,[2] the court adopt the summary of Mr. Bigelow,[3] as follows: "If facts are brought to the knowledge of a party which would put him as a man of common sagacity upon inquiry, he is bound to inquire,[4] and if he neglects to do so, he will be chargeable with notice of what he might

557. See Zimmerman v. Heinrichs, 43 Iowa 260; Coolidge v. Heneky, 11 Ore. 327, 8 Pac. Rep. 281. In Williamson v. Brown, 15 N. Y. 362, an important and leading case, Selden, J., lays down the rule that "where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser." See Hinde v. Vattier, 1 McLean 110; Nantz v. McPherson, 7 Mon. (Ky.) 599; Cotton v. Hart, 1 A. K. Marsh. (Ky.) 56; Hawley v. Cramer, 4 Cow. (N. Y.) 718; Morrow Shoe Mfg. Co. v. New England Shoe Co., 6 C. C. A. 508, 57 Fed. Rep. 693; Dyer v. Taylor, 50 Ark. 320, 7 S. W. Rep. 258. Knowledge that the debtor is selling goods below cost is not notice of fraud to a vendee. Hinds v. Keith, 57 Fed. Rep. 10. But guilty knowledge of an agent may be imputed to his principal. Morris v. Lindauer, 54 Fed. Rep. 23.

[1] Atwood v. Impson, 20 N. J. Eq. 156. See De Witt v. Van Sickle, 29 N. J. Eq. 214; Magniac v. Thompson, 7 Pet. 393; Millholland v. Tiffany, 4 East. Rep. 214; The Holladay Case, 27 Fed. Rep. 830; Clements v. Moore, 6 Wall. 312; Kitch v. St. Louis K. C. & N. Ry. Co., 69 Mo. 224: Gollober v. Martin, 33 Kan. 255, 6 Pac. Rep. 267; Walker v. Collins, 1 C. C. A. 642, 4 U. S. App. 415, 50 Fed. Rep. 737; Haskett v. Auhl, 3 Kan. App. 744, 45 Pac. Rep. 608; Richolson v. Freeman, 56 Kan. 463, 43 Pac. Rep. 772; Hooser v. Hunt, 65 Wis. 71, 26 N. W. Rep. 442. Where the vendee stated that there were no claims against him, the mere fact that the purchaser knew that there was a small claim is not enough to put such purchaser on inquiry. B. C. Evans Co. v. Reeves, 6 Tex. Civ. App. 254, 26 S. W. Rep. 219.

[2] 11 Fed. Rep. 361.

[3] Bigelow on Frauds, pp. 288–9.

[4] Compare Cowling v. Estes, 15, Ill. App. 260.

have learned upon examination.[1] . . . . If, however, there be no fraudulent turning away from knowledge which the *res gestæ* would suggest to a prudent mind; if mere want of caution, *as distinguished* from fraudulent or willful blindness, is all that can be imputed to a purchaser of property, the doctrine of constructive notice will not apply to him." In Wilson v. Prewit,[2] a suit brought to annul an ante-nuptial settlement, Woods, J., said: "Actual knowledge of the fraudulent intent is not necessary. A knowledge of facts sufficient to excite the suspicions of a prudent man or woman, and to put him or her on inquiry, amounts to notice, and is equivalent to actual knowledge in contemplation of law.[3] It has even been held that the means of knowledge, by the use of ordinary diligence, amounts to notice."[4] The judgment in this case was reversed,[5] but upon the very excellent ground that the knowledge of the facts which the wife possessed "rather dispelled than created any suspicion that the husband had a design to defraud his creditors." In Shauer v. Alterton,[6] the court says: "While the plaintiff was not bound to act upon mere suspicion as to the intent with which his brother made the sale in question, if he had knowledge or actual notice of circumstances sufficient to put him, as a prudent man, upon inquiry as to whether his

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[1] See Walker v. Collins, 4 U. S. App. 415, 50 Fed. Rep. 737, 1 C. C. A. 642; Shauer v. Alterton, 151 U. S. 607, 622, 14 S. C. Rep. 442.

[2] 3 Woods 641.

[3] Citing Atwood v. Impson, 20 N. J. Eq. 150; Tantum v. Green, 20 N. J. Eq. 364; Jackson v. Mather, 7 Cow. (N. Y.) 301; Smith v. Henry, 2 Bailey's (S. C.) Law 118; Mills v. Howeth, 19 Tex. 257. See also Blum v. Simpson, 71 Tex. 628, 9 S. W. Rep. 662; Nicholson v. Condon, 71 Md. 621, 18 Atl. Rep. 812; Godfrey v. Miller, 80 Cal. 421, 22 Pac. Rep. 290; Dyer v. Taylor, 50 Ark. 314, 7 S. W. Rep. 258; Rugan v. Sabin, 53 Fed. Rep. 415; Bland v. Fleeman, 58 Ark. 84, 23 S. W. Rep. 4; Percy v. Cockrill, 53 Fed. Rep. 872; De Mares v. Gilpin, 15 Col. 84, 24 Pac. Rep. 568; Norris v. Haggin, 136 U. S. 386, 10 S. C. Rep. 942.

[4] Citing Farmers' Bank v. Douglass, 19 Miss. 469.

[5] Prewit v. Wilson, 103 U. S. 22.

[6] 151 U. S. 621, 14 S. C. Rep. 442.

brother intended to delay or defraud his creditors, and he omitted to make such inquiry with reasonable diligence, he should have been deemed to have notice of such fact, and, therefore, such notice as would invalidate the sale to him." This utterance certainly puts the Supreme Court in line with our contention. In Kansas the court says: "If the facts brought to his attention are such as to awaken suspicion, and lead a man of ordinary prudence to make inquiry, he is chargeable with notice of the fraudulent intent, and with participation in the fraud."[1] In Bush v. Roberts,[2] Gray, J., observed: "The action could only prevail by proof" that the purchaser "had actual notice of a fraudulent motive" on the part of the seller "or knowledge of circumstances which was equivalent to such notice. If he knew, or had believed the motives of his vendor to be fraudulent, then, by aiding him in his scheme, he made himself a party to the fraud.[3] But no evidence is competent proof to affect him, or his right to the possession of his property, which falls short of proving the nature of the transaction, and of illustrating the guilty participation of the vendee."

In some of the States the doctrine of the cases is that knowledge of the existence of suspicious circumstances is merely evidence from which actual knowledge of fraudulent designs may be inferred by the jury.[4]

§ 380. — Swayne, J., in delivering the opinion of the United States Supreme Court, said: "A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his

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[1] Gollober v. Martin, 33 Kan. 255.

[2] 111 N. Y. 282, 18 N. E. Rep. 732.

[3] Citing Parker v. Conner, 93 N. Y. 118.

[4] State v. Mason, 112 Mo. 374, 20 S. W. Rep. 629; State v. Purcell, 131 Mo. 312; Van Raalte v. Harrington, 101 Mo. 602, 14 S. W. Rep. 710. See also Knower v. Cadden Clothing Co., 57 Conn. 202, 17 Atl. Rep. 580.

creditors, and where he buys recklessly with guilty knowledge."[1] In a controversy in Alabama[2] it is said that "participation by the grantee may be proved by any circumstances sufficient to charge his conscience with knowledge or notice of the fraudulent designs of the grantor."[3] In a Maryland case this language occurs: "All that was necessary to make him take subject to the fraud was sufficient knowledge of the suspicious circumstances to put him on inquiry."[4] In David v. Birchard,[5] where a mortgage was attacked, the court says that "this knowledge need not be actual positive information or notice, but may be inferred from the knowledge of the mortgagee of facts and circumstances sufficient to raise such suspicions as should put him on inquiry." In De Witt v. Van Sickle[6] the court observed: "A person who deals in the avails of a scheme to defraud creditors, to keep what he gets, must not only pay for it, but he must be innocent of any purpose to further the fraud, even to protect himself. Actual notice need not be shown. If the purchaser has before him, at the time of his purchase, facts and circumstances from which a fraudulent intent, either past or present, on the part of the vendor, is a natural and legal inference, or such facts or circumstances of suspicion as would naturally prompt a prudent mind to further inquiry and examina-

[1] Clements v. Moore, 6 Wall. 312. Compare Howe Machine Co. v. Claybourn, 6 Fed. Rep. 442.

[2] Hoyt & Bros. Manuf. Co. v. Turner, 84 Ala. 528, 4 So. Rep. 658.

[3] See Hooser v. Hunt, 65 Wis. 71, 79, 26 N. W. Rep. 442, declining to follow Stearn v. Gage, 79 N. Y. 102, and Parker v. Conner, 93 N. Y. 118. It is said in a Missouri case that courts of equity, since their earliest foundation, have always recognized the fact that the still small voice of suggestion, emanating as it will from contiguous facts and surrounding circumstances, pregnant with inference and provocative of inquiry, is as potent to impart notice as a public proclamation or an army with banners. Conn. Mut. Life Ins. Co. v. Smith, 117 Mo. 292, 22 S. W. Rep. 623.

[4] Biddinger v. Wiland, 67 Md. 362, 10 Atl. Rep. 202.

[5] 53 Wis. 495, 10 N. W. Rep. 557. See Millholand v. Tiffany, 4 East. Rep. 214; Green v. Early, 39 Md. 225; Thompson v. Duff, 19 Ill. App. 78.

[6] 29 N. J. Eq. 215.

tion, which, if pursued, would lead necessarily to a discovery of the corrupting facts, he is chargeable with notice."[1] In Prewit v. Wilson[2] the court observed that the grantee to lose the benefit of the transfer "must be *chargeable with knowledge* of the intention of the grantor," not that explicit and direct proof of actual knowledge must be adduced. In Hopkins v. Langton,[3] Chief-Justice Dixon said: "Knowledge by the vendee of the fraudulent intent, or the existence within his knowledge of other facts and circumstances naturally and justly calculated to awaken suspicion of it in the mind of a man of ordinary care and prudence, thus making it his duty to pause and inquire, and a wrong on his part not to do so, before consummating the purchase, is essential in order to charge the vendee. . . . . The vendee cannot shut his eyes, but must look about him and inquire."[4] "Whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led.[5] When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it."[6] There must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. That is what is meant by

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[1] Citing Tantum v. Green, 21 N. J. Eq. 364.

[2] 103 U. S. 24.

[3] 30 Wis. 381.

[4] In this same case the court had instructed the jury that in order to affect the parties with notice of a fraudulent intent, so as to avoid the sale, they must have "*had before them*," at the time the goods were purchased, "*good and substantial evidence of it, such as sends conviction home to the mind and establishes a well-founded belief; nothing short of this would be sufficient to charge them with knowledge.*" The court above said: "A proposition so wide from the true rule of law governing in such case requires no argument to elucidate its error." Hopkins v. Langton, 30 Wis. 382, 383.

[5] See Shauer v. Alterton, 151 U. S. 607, 622, 14 S. C. Rep. 442.

[6] Kennedy v. Green, 3 Myl. & K. 719; adopted in Wood v. Carpenter, 101 U. S. 141; Shauer v. Alterton, 151 U. S. 607, 622, 14 S. C. Rep. 442.

reasonable diligence.[1] "The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."[2]

§ 381. — "Means of knowledge are the same thing in effect as knowledge itself,"[3] and "are equivalent to actual knowledge,"[4] is the language employed in some of the cases. As applied to our subject at least, it is conceded that these statements are inaccurate, for guilty knowledge would of course defeat the purchaser's title, while the means of knowledge would not have that effect unless the duty to inquire was cast upon him. Again, while a preference would not be avoided under the late bankrupt act, by reason of a mere suspicion of the debtor's insolvency in the mind of the creditor, yet knowledge of facts calculated to produce such a belief in the mind of an ordinarily intelligent man would avoid the security.[5]

It may be urged that some of the citations given are from cases in other branches of the law than that governing fraudulent transfers. This may be true as to a few of the citations, but the mass of the authorities collated directly involved the question of notice of a fraud in an alienation made to defeat creditors. It is submitted that in no department of the law is there greater need for

[1] Maule v. Rider, 59 Pa. St. 171. See Wilson v. Hunter, 30 Ind. 472; Cambridge Valley Bank v. Delano, 48 N. Y. 336, 339, 340.

[2] Angell on Limitations, § 187, and note.

[3] Wood v. Carpenter, 101 U. S. 135, 143. See Kurtz v. Miller, 26 Kan. 319; Lady Washington Consol. Co. v. Wood, 113 Cal. 487, 45 Pac. Rep. 809.

[4] Dannmeyer v. Coleman, 8 Sawyer 51, 58. Citing Mannng v. San Jacinto Tin Co., 7 Sawyer 418; New Albany v. Burke, 11 Wall. 107; Broderick's Will, 21 Wall. 518, 519; Ashhurst's Appeal, 60 Pa. St. 290; Wood v. Carpenter, 101 U. S. 141.

[5] Grant v. National Bank, 97 U. S. 82; Barbour v. Priest, 103 U. S. 297. See Stucky v. Masonic Sav. Bank, 108 U. S. 75; Swan v. Robinson, 5 Fed. Rep. 294; Reber v. Gundy, 13 Fed. Rep. 56; May v. Le Claire, 18 Fed. Rep. 164.

increased facilities to detect and unearth fraud than in that regulating covinous alienations, and therefore the cases illustrating other branches of the law are not irrelevant. Clearly the *dictum* of Miller, J., already quoted, that "circumstances to put the purchaser on inquiry where full value has been paid are not sufficient" notice of fraud, cannot be supported or recognized as against this multitude of authorities.

If the creditor is to be divested of the benefits of the doctrine of constructive notice in and by itself, or as a circumstance, as some of the cases cited seem to indicate, then we contend that facts sufficient to excite inquiry or to put a prudent man upon his guard should raise a presumption of guilty knowledge or constitute *prima facie* proof of actual notice of the fraudulent design or of participation therein, which, in the absence of satisfactory explanation, should be conclusive. Constructive notice in this connection may be likened to the rule still prevailing in some States to the effect that a failure to effect a change of possession on a sale of personalty is conclusively presumed to be fraudulent as to creditors. The doctrine which we advance is akin to the common and generally prevalent doctrine that continued possession on the part of the vendor is *prima facie* fraudulent, that is, it raises a presumption which may be explained or rebutted.[1]

§ 382. **Actual belief.** — There is another view already outlined in part to be taken of this question. In New York fraud, in cases of alienations to defeat creditors, is "deemed a question of fact and not of law."[2] In Coleman v. Burr,[3] the claim was made that there was no finding by the referee of a fraudulent intent; but that, on the contrary, *he had found the whole transaction to be fair*

[1] See Chap. XVII.

[2] 2 N. Y. R. S. 137, § 4.

[3] 93 N. Y. 31.

and honest. The court, however, observed that as the referee has "found facts from which the inference of fraud is inevitable, and although he has characterized the transactions as honest and fair, that does not make them innocent nor change their essential character in the eye of the law." The assignor "must be deemed to have intended the natural and inevitable consequences of his acts, and that was to hinder, delay, and defraud his creditors." There is nothing novel or unusual in this case. The principle it enforces is founded in public policy, and is very frequently applied.[1] It will be seen at a glance that under this rule a fraudulent intention can be conclusively fastened upon the debtor when no such wrongful motive was present in his mind, and he was as free from the design to defraud as our first parents were of knowledge of sin before tasting the forbidden fruit. From the necessity of the case the substituted fraudulent intent prevails, because experience, from which the rule springs, has shown that transactions, where this presumption obtains, hinder and defraud creditors in enforcing payment of their claims. The difficulty of proving, other than by circumstantial evidence, that a vendee had actual knowledge of the vendor's fraud, or participated therein, is manifest.[2] The law labels certain facts and combinations of circumstances as being sufficient to excite inquiry and suspicion on the part of a purchaser, and supplements this by asserting that in certain cases, means of knowledge are the same thing as knowledge itself.[3] The principle of imputing a fraudulent intent to an innocent debtor is frequently invoked. Is there any legal absurdity or moral wrong in imputing it to a vendee? Do not the necessities of the case often demand it?[4] It is

[1] See §§ 8, 9.

[2] See §§ 5, 6.

[3] Wood v. Carpenter, 101 U. S. 135, 143.

[4] See §§ 9, 10.

respectfully contended that the test, "whether the vendee did in fact know or believe that the vendor intended to defraud his creditors," [1] would furnish a very uncertain and fluctuating standard, and would not in fact constitute a general rule of any utility. The intellectual and moral perceptions are stronger or weaker in different men, according to their natures and education, and a man morally obtuse might look upon a transaction as honest which to the average person would appear to be manifestly unfair or fraudulent. We have seen that a man may commit a fraud without believing it to be a fraud.[2]

§ 383. **Purchaser with notice.** — It is manifest that one purchasing of the fraudulent grantee, with notice of the prior fraud, takes the title subject to all the infirmities with which it was affected in the hands of his grantor. To hold otherwise would be equivalent to saying that *three* conspiring together might accomplish a fraud which would be impossible to two.[3] Purchasers *pendente lite* are bound by the result of the litigation.[4]

§ 384. **Purchaser with notice from bona fide purchaser.** — It is a well-settled rule in equity that a purchaser with notice himself from a *bona fide* purchaser for a valuable consideration, who bought without notice, may protect himself under the first purchaser.[5] The only exception to this rule is where the estate becomes revested in the original party to the fraud, in which case the original equity will re-attach to it in his hands.[6] A volunteer

[1] Parker v. Conner, 93 N. Y. 118, 126.

[2] See § 8.

[3] Wilcoxen v. Morgan, 2 Col. 478.

[4] Tilton v. Cofield, 93 U. S. 168; Allen v. Halliday, 28 Fed. Rep. 263.

[5] Allison v. Hagan, 12 Nev. 55, 2 Fonb. Eq. 149, 1 Story's Eq. Jur. 409.

[6] 1 Story's Eq. Jur. § 410; Church v. Church, 25 Pa. St. 278. See Oliver v. Piatt, 3 How. 401; Johnson v. Gibson, 116 Ill. 294, 6 N. E. Rep. 205. In Ryan v. Staples, 40 U. S. App. 749, the court says: "One who buys property from an innocent *bona fide* purchaser is protected by the good faith and innocence of his grantor, although he may himself have notice

with notice, who derives his title from a *bona fide* purchaser for value without notice, is unaffected by the fraudulent character of the original transaction. This is necessarily the case; otherwise the party holding the perfect title might be unable to dispose of it, and its value would be greatly impaired. The party purchasing with notice recovers in the right of his vendor.[1]

§ 384a. **Possession as notice.** — Naturally where persons are in actual occupation of real estate as a home a person proposing to purchase is bound to make inquiry as to the title of the possessors.[2]

§ 385. **Fraudulent grantee as trustee.**— Elliott, J., observed in a recent case in the Supreme Court of Indiana, that "where property is fraudulently conveyed, the grantee holds it as trustee for the creditors of the grantor."[3] In Blair v. Smith[4] the court said: "Mrs. Smith received the money as trustee, and as such must account for it. If she had received a stock of goods from her husband pursuant to a corrupt scheme to defraud his creditors, she certainly could have been charged as trustee. The fact that she received one species of property rather than another can make no difference. The governing principle is the same, no matter what kind of property the fraudulent participant in the positive wrong receives. Mr. Pomeroy asserts, what is well-known to be the law, that a fraudulent grantee

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of antecedent defects or equities that would have defeated his title if he had been the first purchaser. Trull v. Bigelow, 16 Mass. 406; Glidden v. Hunt, 24 Pick. (Mass.) 221, 225; Boynton v. Rees, 8 Pick. (Mass.) 329; Funkhouser v. Lay, 78 Mo. 465; Wood v. Chapin, 13 N. Y. 509."

[1] See Fulton v. Woodman, 54 Miss. 158; Goshorn v. Snodgrass, 17 W. Va. 717.

[2] Kirby v. Tallmadge, 160 U. S. 379, 16 S. C. Rep. 349; Landes v. Brant, 10 How 348, 375; McLean v. Clapp, 141 U. S. 429, 436, 12 S. C. Rep. 29; Noyes v. Hall, 97 U. S 34.

[3] Buck v. Voreis, 89 Ind. 117; Blair v. Smith, 114 Ind. 125, 15 N. E. Rep. 817; Chamberlain v. O'Brien, 46 Minn. 80, 48 N. W. Rep. 447.

[4] 114 Ind. 114, 125, 15 N. E. Rep. 817.

takes as trustee, and says: 'The lien upon the original articles will extend to the resulting fund or the substituted goods.'"[1]

§ 386. Title from fraudulent vendee. — It was at one time sought to establish the rule, at least in some of the authorities, that a *bona fide* purchaser from a fraudulent grantee was not entitled to protection against the claims of the creditors of the fraudulent grantor.[2] The argument in support of this docrine was to the effect that by the very terms of the statute against fraudulent transfers, the conveyance was pronounced utterly void, frustrate and of no effect, and consequently a subsequent conveyance from the fraudulent grantee could have no foundation on which to rest. So also it was contended that it was against the policy of the statute to afford protection to a subsequent purchaser from the fraudulent grantee, though he parted with value, in ignorance of any infirmity in the title he was acquiring. Quoting the words of Chancellor Kent: "Though the debtor himself may fraudulently, on his own part, convey to a *bona fide* purchaser, for a valuable consideration, yet his fraudulent grantee cannot; for it is understood that the proviso in the 13 Eliz. does not extend to such subsequent conveyance. The policy of that act would be defeated by such extension. Its object was to secure creditors from being defrauded by the debtor; and the danger was, not that he would honestly sell for a fair price, but that he would fraudulently convey, upon a secret trust between him and the grantee, at the expense of the creditors. If the debtor sells, himself, in a case where the creditor has no lien, and sells for a valuable consideration, he acquires

[1] Citing Pomeroy's Eq. Jur., vol. 3, § 1291.

[2] Roberts v. Anderson, 3 Johns. Ch. (N. Y.) 371; Preston v. Crofut, 1 Conn. 527, note; Hoke v. Henderson, 3 Dev. (N. C.) Law 12; Thames v. Rembert, 63 Ala. 570. A judgment-creditor of a fraudulent grantee is not a purchaser within the meaning of the statute. Couse v. Columbia Powder Mfg. Co. (N. J. Ch.), 33 Atl. Rep. 299; Devoe v. Brandt, 53 N. Y. 463.

means to discharge his debts; and it may be presumed he will so apply them. If his fraudulent grantee be enabled to sell, the grantor cannot call those proceeds out of his hands, and the grantee can either appropriate them to his own use, or to the secret trusts upon which the frandulent conveyance was made. There is more danger of abuse, and that the object of the statute would be defeated, in the one case than in the other."[1] The decree of Chancellor Kent was reversed on error;[2] and it was dissented from and the contrary doctrine held by Judge Story, in Bean v. Smith,[3] and now in nearly if not all the States, the doctrine is settled, that a fraudulent conveyance will not, at the instance of the creditors, be vacated to the prejudice of an innocent purchaser from the fraudulent grantee.[4] Of course one who purchases from a fraudulent grantee, with notice of the fraud and of the invalidity of his title, can acquire no better right than the fraudulent grantee has.[5]

§ 387. **Creditors of fraudulent grantee.**— In Susong v. Williams[6] the court held that where a conveyance was made by a mother to her son upon a secret trust, to reconvey to the grantor when peace should be re-established, the motive of the grantor in making the conveyance being fear of confiscation, the conveyance was valid between the parties, and the reconveyance, being without consideration, was void as to the creditors of the son. This is

[1] Roberts v. Anderson, 3 Johns. Ch. (N. Y.) 371, 378.

[2] Anderson v. Roberts, 18 Johns. (N. Y.) 515.

[3] 2 Mason 252; Sawyer v. Almand, 89 Ga. 314, 15 S E. Rep. 315.

[4] See note to Basset v. Nosworthy, 2 Lea. Cas. in Eq. (4th Am. Ed.) 42; Schaible v. Ardner, 98 Mich. 73, 56 N. W. Rep. 1105; Sawyer v. Almand, 89 Ga. 314, 15 S. E. Rep. 315; 4 Kent 464; Young v. Lathrop, 67 N. C. 63, 12 Am. Rep. 603; Gordon v. Ritenour, 87 Mo. 61. It is held in Michigan that the burden to prove good faith and payment of consideration rests on the purchaser from the fraudulent grantee. Schaible v. Ardner, 98 Mich. 70, 56 N. W. Rep. 1105.

[5] Spence v. Smith, 34 W. Va. 706, 12 S. E. Rep. 828; Goshorn's Ex'r v. Snodgrass, 17 W. Va. 717.

[6] 1 Heisk. (Tenn.) 625.

based upon the principle that the grantor, by making this conveyance to her son, valid and effectual on its face, and permitting it to be recorded, thereby held her son out to the world as the owner of the property whereby he was enabled to obtain credit. The principles of this case would seem to render it unsafe for any owner of property to allow the title of it for any cause to rest in another person. Certainly it behooves the fraudulent debtor to exercise care and good judgment in selecting a vendee who not only will consummate the secret trust, but who will not be frustrated in so doing by his own creditors. This doctrine of apparent ownership may be variously illustrated. In Budd v. Atkinson [1] it appeared that a father bought a farm and caused it to be conveyed to his son by a deed which was recorded. The son entered into possession of the property and lived upon it. Subsequently he contracted debts on the credit of his ownership of the farm. Then at his father's request he conveyed the property to the father, without consideration, and upon the ground that the latter had never intended to give the farm to him, and that the son was not aware that the conveyance had been made to him. The court held that the deed to the father was fraudulent as against the son's creditors.[2] Where, however, a fraudulent mortgagee reconveys the land to the fraudulent mortgagor, before any lien attaches in favor of the creditors of the former, they cannot subject the land to the payment of their debts.[3] In Springfield Homestead Association v. Roll [4] it was held that where a grantor in a fraudulent

[1] 30 N. J. Eq. 530

[2] Where a fund arising from property fraudulently assigned has been brought into court at the instance of creditors of the vendor, creditors of the fraudulent vendee will not be permitted to have satisfaction of their claims out of it until all the creditors of the vendor who have come in (although after the creditors of the fraudulent vendee) are fully paid. Mullanphy Sav. Bank v. Lyle, 7 Lea (Tenn.) 431.

[3] Powell v. Ivey, 88 N. C. 256. See § 398.

[4] 137 Ill. 205, 27 N. E. Rep. 184.

conveyance, which was duly recorded remained in open possession and received a reconveyance from the fraudulent grantee, which was not recorded, a subsequent mortgagee of the fraudulent grantee will be deemed to have had notice of the title of the original grantor, arising out of his possession, and the mortgage will be declared void at the instance of such grantor.

§ 388. **Liability between fraudulent grantees.**—In Riddle v. Lewis[1] the court decided that fraudulent grantees, as between themselves, incur no responsibility to one another by permitting the grantor to have or dispose of any part of the property conveyed.

§ 389. **Fraudulent grantee sharing in recovery.**— Where a fraudulent scheme or purchase, under which a creditor obtained property of an insolvent debtor, is set aside in a suit brought by another creditor against the fraudulent vendee, the latter will not be allowed to share with the complainant in the proceeds of the property.[2] But, as we have shown, where an illegal preference is set aside, the creditor who attempted to secure such preference is not necessarily thereby debarred from participating in a distribution of the debtor's property under a voluntary assignment act, including the property thus illegally conveyed to him.[3]

§ 389a. **Purchaser pendente lite.**— Purchasers *pendente lite* are chargeable with notice[4] of all the facts of which the record of the suit would inform them. This rule relates only to parties to the suit, and does not apply to other separate suits or parties.[5]

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[1] 7 Bush (Ky.) 193.

[2] Smith v. Craft, 11 Biss. 351; Wilson v. Horr, 15 Iowa 493. See Riggs v. Murray, 2 Johns. Ch. (N. Y.) 582; Murray v. Riggs, 15 Johns. (N. Y.) 571; Harris v. Summer, 2 Pick. (Mass.) 129.

[3] White v. Cotzhausen, 129 U. S. 329, 9 S. C. Rep. 309.

[4] See Tilton v. Cofield, 93 U. S. 168; Allen v. Halliday, 28 Fed. Rep. 263.

[5] Stout v. Phillippi Mfg. & M. Co., 41 W. Va. 339, 26 S. E. Rep. 571.

CHAPTER XXV.

PREFERENCES.

§ 390. Preferences legal.
391. Must represent actual debt.
391*a*. Preference on the eve of a general assignment.
392. Vigilant creditors.
392*a*. Preferences in New York for wages.
§ 393. Compromises—Secret preferential agreements.
393*a*. Illegal composition preference.
394. Secret antecedent agreement to prefer.
394*a*. Rights of attaching creditor.

"Equity delights in equality."

§ 390. Preferences legal. — In the absence of a bankrupt act, the principle prevails in most of the States that an insolvent debtor may make preferences[1] among his creditors,[2] even to the extent of transferring all his

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[1] The debtor cannot delegate the power to make preferences. Seger's Sons v. Thomas Bros., 107 Mo. 643, 18 S. W. Rep. 33; Barnum v. Hempstead, 7 Paige (N. Y.) 568.

[2] Smith v. Craft, 11 Biss. 347; Swift v. Hart, 35 Hun (N. Y.) 130, citing this section; Sweetser v. Smith, 22 Abb. N. C. (N. Y.) 320 and note, 5 N. Y. Supp. 378; Leavitt v. Blatchford, 17 N. Y. 537; Warren v. Jones, 68 Ala. 449; Crawford v. Kirksey, 55 Ala. 282 Shealy v. Edwards, 75 Ala. 418; Bishop v. Stebbins, 41 Hun (N. Y.) 246; Osgood v. Thorne, 63 N. H. 375; Low v. Wortman, 44 N. J. Eq. 202, 7 Atl. Rep. 654, 14 Id. 586; Walden v. Murdock, 23 Cal. 550; Giddings v. Sears, 115 Mass. 505; Ferguson v. Spear, 65 Me. 279; French v. Motley, 63 Me. 328; Forrester v. Moore, 77 Mo. 651; Gomez v. Hagaman, 84 Hun (N. Y.) 148, 32 N. Y. Supp. 453: Cutter v. Pollock, 4 N. Dak. 205, 59 N. W. Rep. 1062; Drury v. Wilson, 4 App. Div. (N. Y.) 232, 38 N. Y. Supp. 538; Sweet v. Scherber, 42 Ill. App. 237; Jewell v. Knight, 123 U. S. 426, 434, 8 S. C. Rep. 193; People's Savings Bank v. Bates, 120 U. S. 556, 7 S. C. Rep. 679; Huntley v. Kingman, 152 U. S. 532, 14 S. C. Rep. 688; Sawyer v. Levy, 162 Mass. 190, 38 N. E. Rep. 365; Warner Glove Co. v. Jennings, 58 Conn. 74, 19 Atl. Rep. 239; Hasie v. Connor, 53 Kans. 713, 37 Pac. Rep. 128; Vietor v. Levy, 72 Hun (N. Y.) 263, 25 N. Y. Supp. 644, aff'd 148 N. Y. 739, 42 N. E. Rep. 726; Schroeder v. Bobbitt, 108 Mo. 289, 18 S. W. Rep. 1093; Alberger v. National Bank of Commerce, 123 Mo. 313, 27 S. W. Rep. 657; Hoffman v. Susemihl, 15 App. Div. (N. Y.) 405; Warner v. Littlefield, 89 Mich. 329, 50 N. W. Rep. 721; Talcott v. Harder,

property to one creditor to the exclusion of the others[1] The common law favors and rewards the vigilant and active creditor. The right of a debtor under the rules of the common law to devote his whole estate to the satisfaction of the claims of particular creditors, by confession of judgment or otherwise,[2] results as Chief-Justice Marshall declares, "from that absolute ownership which every man claims over that which is his own."[3] If, while a man

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119 N. Y. 536, 23 N. E. Rep. 1056; Glover v. Lee, 140 Ill. 102, 29 N. E. Rep. 680; Clark v. Krause, 2 Mackey (D. C.) 567; Richardson v. Marqueze, 59 Miss. 80; Eldridge v. Phillipson, 58 Miss. 270; Jewett v. Noteware, 30 Hun (N. Y.) 194; Totten v. Brady, 54 Md. 170; Preusser v. Henshaw, 49 Iowa 41; Atlantic Nat. Bank v. Tavener, 130 Mass. 407; Savage v. Dowd, 54 Miss. 728; Shelley v. Boothe, 73 Mo. 74; Spaulding v. Strang, 37 N. Y. 135; Auburn Exchange Bank v. Fitch, 48 Barb. (N. Y.) 344; Allen v. Kennedy, 49 Wis. 549, 5 N. W. Rep. 906; Keen v. Kleckner, 42 Pa. St. 529; Jordan v. White, 38 Mich. 253; Murphy v. Briggs, 89 N. Y. 451; Hill v. Bowman, 35 Mich. 191; Smith v. Skeary, 47 Conn. 47; Frazer v. Thatcher, 49 Tex. 26; Holbird v. Anderson, 5 T. R. 235; Estwick v. Caillaud, 5 T. R. 420; Goss v. Neale, 5 Moore 19. By statute in New York a preference is prohibited except as regards wages and salaries of employees, beyond one-third of the assigned estate, and if that amount is exceeded, the penalty is not the annihilation of the assignment, but the reduction of the preference to the prescribed limit; Maass v. Falk, 146 N. Y. 40, 40 N. E. Rep. 504; Central Nat. Bk. v. Seligman, 138 N. Y. 435, 34 N. E. Rep. 196, or as to the excess, Cutter v. Hume, 62 Hun (N. Y.) 622, 17 N. Y. Supp. 255. The law tolerates preferences. Burr v. Clement, 9 Col. 1, 9 Pac. Rep. 633. A copartnership may create preferences. Richards v. Leveille, 44 Neb. 38, 62 N. W. Rep. 304; Deitrich v. Hutchinson, 20 Neb. 52, 29 N. W. Rep. 247.

[1] Richardson v. Marqueze, 59 Miss. 80; Drake v. Paulhamus, 29 U. S. App. 522.

Purpose of bankrupt act.—The great object of the late Bankrupt Act, so far as creditors were concerned, was to secure equality of distribution of the bankrupt's property among them. It set aside transactions had within four or six months prior to the bankruptcy, depending upon their character, defeating or tending to defeat such distribution. See Mayer v. Hellman, 91 U. S. 501. The fact that an insolvent debtor after the commencement of bankruptcy proceedings against him, conveyed property by way of preference in violation of the bankrupt act, is not under the state law evidence of fraud. Talcott v. Harder, 119 N. Y. 536, 23 N. E. Rep. 1056.

[2] Vietor v. Levy, 72 Hun (N. Y.) 263, 25 N. Y. Supp. 644; affi'd 148 N. Y. 738, 42 N. E. Rep. 726.

[3] Brashear v. West, 7 Pet. 608, 614; Reed v. McIntyre, 98 U. S. 510; Mayer v. Hellman, 91 U. S. 500; Campbell v. Colorado Coal & Iron Co., 9 Col. 65, 10 Pac. Rep. 248; Citizens' Bank v. Williams, 128 N. Y. 77, 28

retains his property in his own hands, the right of giving preferences should be denied, he would so far lose the dominion over his own that he could not pay *anybody*, because whoever he paid would receive a preference.[1] It makes no difference that the creditor and debtor both knew that the effect of the application of the insolvent's estate to the satisfaction of the particular claim would be to deprive other creditors of the power to reach the debtor's property by legal process or enforce satisfaction of their claims.[2] If there is no secret trust agreed upon or understood between the debtor and creditor in favor of the former, but the sole object of a transfer of property is to pay or secure the payment of a debt, the transaction is a valid one at common law.[3] It is no evidence of fraud that a debtor against whom bankruptcy proceedings were pending made a preferential transfer of property.[4] The distinction is between a transfer of property made solely by way of preference of one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage from it to the debtor.[5] It is an absurdity to say that a conveyance of property which

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N. E. Rep. 33; Tompkins v. Hunter, 149 N. Y. 117, 43 N. E. Rep. 532; Robinson Notion Co. v. Foot, 42 Neb. 156, 60 N. W. Rep. 316.

[1] Tillou v. Britton, 9 N. J. Law 120, cited in Campbell v. Colorado Coal & Iron Co., 9 Col. 65, 10 Pac. Rep. 248.

[2] Wood v. Dixie, 7 Q. B. 892. In Hodges v. Coleman, 76 Ala. 103, 119, the court says: "What injury can such secret motive do to a non-preferred creditor? The act, as we have seen, is lawful. Can human tribunals set aside a transaction, lawful in itself, because the actors had an evil mind in doing it? Can there be fraud in doing a lawful act, even though it be prompted by an evil motive or badges of fraud?" Cited in Bamberger v. Schoolfield, 160 U. S. 160, 16 S. C. Rep. 225.

[3] In Smith v. Craft, 123 U. S. 436, 8 S. C. Rep. 196, it was held that a bill of sale of a stock of goods in a shop, by way of preference of a *bona fide* creditor, was not rendered fraudulent against other creditors as matter of law by containing a stipulation that the purchaser should employ the debtor at a reasonable salary to wind up the business.

[4] Talcott v. Harder. 119 N. Y. 536, 23 N. E. Rep. 1056.

[5] Banfield v. Whipple, 14 Allen (Mass.) 13; Giddings v. Sears, 115 Mass. 507.

pays one creditor a just debt and nothing more, is fraudulent as against other creditors of the common debtor.[1] "The mere preference in payment of one honest creditor over another was never at common law evidence of a fraudulent intent."[2] In a fair race for preference if a creditor by diligence secures an advantage, it may be maintained; but if his purpose is not to collect the claim, but to help the debtor cover up his property, he cannot shield himself by showing that his debt was *bona fide*.[3] Relationship will not take away the right to make a preference. We may here observe that an insolvent debtor may prefer his daughters to the extent that they are his creditors as his wards, although such preference may leave the debtor without the means of paying his other debts.[4] The same rule applies to a wife,[5] and between father and son,[6] and daughter.[7] In a controversy recently before the Supreme Court of the United States,[8] construing the statute of Illinois, it was decided that a preferential disposition of all the assets of an insolvent debtor operated as a general assignment. The decree appealed from entirely excluded the preferred creditors from participating in the fund. In modifying this decree Mr. Justice Harlan said: "The mother, sisters, and brother of Alexander White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over other creditors. But their attempt to obtain such illegal preference ought not

[1] Auburn Exchange Bank v. Fitch, 48 Barb. (N. Y.) 354.

[2] Abegg v. Bishop, 142 N. Y. 289, 36 N. E. Rep. 1058.

[3] Smith v. Schwed, 9 Fed. Rep. 483. See David v. Birchard, 53 Wis. 494, 10 N. W. Rep. 557; Menton v. Adams, 49 Cal. 620.

[4] Micou v. National Bank, 104 U. S. 543.

[5] Laird v. Davidson, 124 Ind. 412, 25 N. E. Rep. 7; Winfield Nat. Bank v. Croco, 46 Kan. 629, 26 Pac. Rep. 942; Rockford Boot & Shoe Mfg. Co. v. Mastin, 75 Iowa 112, 39 N. W. Rep. 219.

[6] Rockland Co. v. Summerville, 139 Ind. 69?, 39 N. E. Rep. 307; Barr v. Church, 82 Wis. 382, 52 N. W. Rep. 591.

[7] Nelson v. Kinney, 93 Tenn. 428, 25 S. W. Rep. 100.

[8] White v. Cotzhausen, 129 U. S. 345, 9 S. C. Rep. 309.

to have the effect of depriving them of their interest, under the statute, in the proceeds of the property in question, or justify a decree giving a prior right to the appellee. It was not intended, by the statute, to give priority of right to the creditors who are not preferred. All that the appellee can claim is to participate in such proceeds upon terms of equality with other creditors." A preference will not be overturned because the creditor on receiving payment illegally promises as a part of the transaction to compound a felony of which the debtor is guilty.[1]

§ 391. **Must represent actual debt.** — The preferred creditor must have a valid subsisting claim against the debtor which the transfer was given to satisfy or secure. In Union National Bank v. Warner[2] the conveyance was made by a father to his sons, who were, however, not creditors. The mutual fraudulent intent being shown, the conveyance was annulled, their agreement to pay some of his debts being deemed a part of the fraudulent scheme which fell with it. So in Davis v. Leopold,[3] the conveyance by a husband through a third person to his wife was set aside, the wife not being a creditor;[4] while in Crowninshield v. Kittridge[5] a mortgage was annulled because it was given for a fictitious or excessive amount, and executed for the double purpose of securing a *bona fide* debt and preventing creditors from attaching the property. This does not contradict the general rule that debtors may prefer the genuine claims of relatives.[6]

§ 391a. **Preferences on the eve of a general assignment.** — The fact that a preference is given on the eve of making

[1] Traders' Nat. Bank v. Steere, 165 Mass. 393, 43 N. E. Rep. 187.

[2] 12 Hun (N. Y.) 306.

[3] 87 N. Y. 620.

[4] Compare Jewett v. Noteware, 30 Hun (N. Y.) 194.

[5] 7 Met. (Mass.) 522.

[6] Rockland Co. v. Summerville, 139 Ind. 700, 39 N. E. Rep. 307.

a general assignment, as already shown, does not render it fraudulent.[1] In New York, where preferences in excess of a certain proportion of the assets are prohibited in general assignments,[2] it has been held that where, shortly before the assignment was executed, assets in excess of such proportions have been transferred to a *bona fide* creditor, who was ignorant of the intention to make an assignment, the transfer would be upheld.[3] It would be different if the assignee knew of such intention.[4]

§ 392. **Vigilant creditors.**—The general rule in equity only requires that the fund acquired by a creditor's proceeding should be distributed among the creditors *pro rata*.[5] And where a creditor has not obtained any lien at law, not having obtained any judgment, he is not entitled to a priority over the other creditors.[6] The commencement of a creditor's suit in chancery by a judgment-creditor, with execution returned unsatisfied, gives him a lien upon all the equitable assets of the debtor,[7] and the same general rule is applied to supplementary proceedings.[8] An equitable *lis pendens* is acquired by filing the bill.[9] The first party to move is rewarded as a vigilant creditor, the commencement of his suit being regarded as an actual levy upon the equitable assets of his debtor,[10]

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[1] Dalton v. Stiles, 74 Mich. 726, 42 N. W. Rep. 169.

[2] Ch. 503, Laws of 1887.

[3] Manning v. Beck, 129 N. Y. 1, 29 N. E. Rep. 90; Maass v. Falk, 146 N. Y. 34, 40 N. E. Rep. 504.

[4] Berger v. Varrelmann, 127 N. Y. 286, 27 N. E. Rep. 1065.

[5] Robinson v. Stewart, 10 N. Y. 196.

[6] Ibid.

[7] Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494; Brown v. Nichols, 42 N. Y. 26; Werborn v. Kahn, 93 Ala. 201, 9 So. Rep. 729; Wallace v. Treakle, 27 Gratt. (Va.) 479; Davis v. Bonney, 89 Va. 755, 17 S. E. Rep. 229. Examine Freedman's Savings & Trust Co. v. Earle, 110 U. S. 710, 4 S. C. Rep. 226; Safford v. Douglass, 4 Edw. Ch. (N. Y.) 538; Boynton v. Rawson, 1 Clarke Ch. (N. Y.) 592; Hone v. Henriquez, 13 Wend. (N. Y.) 244; Voorhees v. Seymour, 26 Barb. (N. Y.) 580.

[8] Edmondston v. McLoud, 16 N. Y. 544. See § 61.

[9] Rothschild v. Kohn, 93 Ky. 107, 19 S. W. Rep. 180.

[10] Lynch v. Johnson, 48 N. Y. 33; The Deposit Nat. Bank v. Wickham,

and entitles him to a priority,[1] unless he elects to bring the action for the benefit of himself and others similarly situated.[2] A purchaser *pendente lite* with notice, will take subject to the rights of the complainant.[3] "The vigilant creditor, pursuing his claim, acquires a preferable equity, which attaches and becomes a specific lien by the filing of his bill."[4] But it has been held in other cases that all creditors who make reasonable and appropriate application will be let in,[5] and that all creditors should be permitted to participate upon due application in the proceeds of property fraudulently conveyed.[6] This preferential right is said in some cases to be as well defined and as exclusive of the claims of other creditors as is the right secured by a judgment lien upon the debtor's property,[7] but the cases are not uniform. Where a party purchased lands pending a suit to reach the judgment-debtor's interest therein, and entered into possession and made improvements, such a grantee is not entitled to have his improvements discharged from the lien of the decree rendered against the lands.[8] Equity will not relieve a party from a risk which he voluntarily assumes.

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44 How. Pr. (N. Y.) 422; Roberts v. Albany & W. S. R. R. Co., 25 Barb. (N. Y.) 662; Field v. Sands, 8 Bosw. (N. Y.) 685.

[1] George v. Williamson, 26 Mo. 190; 2 Hoffman's Ch. Pr. 114; Corning v. White, 2 Paige (N. Y.) 567; Neal v. Foster, 13 Sawyer 237. As between various creditors who bring suit, their priority is determined by the date of their suit. Baer v. Wilkinson, 35 W. Va. 422, 14 S. E. Rep. 1; Stamper v. Hibbs, 94 Ky. 358, 22 S. W. Rep. 607; Fordyce v. Hicks, 76 Iowa 41, 40 N. W. Rep. 79.

[2] Claflin v. Gordon, 39 Hun (N. Y.) 56.

[3] Jeffres v. Cochrane, 47 Barb. (N. Y.) 557.

[4] Burt v. Keyes, 1 Flippin 72. See Douglass v. Huston, 6 Ohio 156; Miers v. Zanesville & M. Turnpike Co., 13 Ohio 197; Corning v. White, 2 Paige (N. Y.) 567; George v. Williamson, 26 Mo. 190; Albany City Bank v. Schermerhorn, 1 Clarke's Ch. (N. Y.) 297; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494.

[5] Pendleton v. Perkins, 49 Mo. 565; Doherty v. Holliday, 137 Ind. 282, 32 N. E. Rep. 315, 36 Id. 907.

[6] Voorhees v. Carpenter, 127 Ind. 300, 26 N. E. Rep. 838; Doherty v. Holliday, 137 Ind. 282, 32 N. E. Rep. 315, 36 Id. 907.

[7] Burt v. Keyes, 1 Flippin 72.

[8] Patterson v. Brown, 32 N. Y. 81.

This is a phase of the general rule that no allowance will be made for improvements placed upon land after suit brought.[1] The Court of Chancery does not, however, give any specific lien to a creditor at large against his debtor, further than he has acquired at law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired which a Court of Chancery will enforce.[2] In New York "the law gives no preference to a vigilant creditor in the estate of a decedent."[3]

§ 392a. **Preferences in New York for wages.**—By statute in New York[4] it is provided that, in all assignments made pursuant to the act, the wages or salaries of employes shall be preferred before any other debt. The money must be actually due for wages and not for money loaned.[5] The Court of Appeals held that an assignment was not rendered void by reason of the omission to insert therein a clause giving such preference, as the instrument would be read in connection with the statute with the same effect as though the provisions formed a part of it.[6]

§ 393. **Compromises—Secret preferential agreements.**—The law has ever scrupulously guarded the integrity and good faith required in the general compromises of creditors with their debtors. From considerations of public policy and sound morals, transactions of this character should be conducted with truth and fairness, lest any undue secret advantage be secured to one creditor at the expense of

[1] Sedgwick & Wait on Trial of Title to Land, 2d ed., § 705.

[2] Day v. Washburn, 24 How. 355.

[3] Lichtenberg v. Herdtfelder, 103 N. Y. 306, 8 N. E. Rep. 526.

[4] Laws of 1877, Ch. 466, § 29, as amended by Laws of 1884, Ch. 328.

[5] Clark v. Andrews, 19 N. Y. Supp. 211.

[6] Richardson v. Thurber, 104 N. Y. 606, 11 N. E. Rep. 133.

another.[1] Attempts to thwart the application of these salutary principles are common and when detected will be overthrown.[2] In Cockshot v. Bennet,[3] the defendants being indebted to plaintiffs and other creditors, a compromise was effected at 11*s.* in the pound as to all creditors except plaintiffs, who refused to sign the deed unless the defendants gave them a note for the remaining 9*s.* in the pound. The note was accordingly given, and defendants made a subsequent promise to pay it. Lord Kenyon, in defeating a recovery, placed his opinion upon the foundation that the note was a fraud upon the creditors who were parties to the deed by which their debts were to be cancelled in consideration of receiving 11*s.* in the pound, and observed that "all the creditors being assembled for the purpose of arranging the defendants' affairs, they all undertook and mutually contracted with each other that the defendants should be discharged from their debts after the execution of the deed." Upon the point, as to the revival of the debt by a subsequent promise, the learned Chief-Justice said · "Contracts not founded on immoral considerations may be revived. . . . . But this transaction is bottomed in fraud, which is a species of immorality, and not being available as such, cannot be revived by a subsequent promise." Mr. Justice Ashurst remarked in the same case that the creditors "were induced to enter into the agreement on principles of humanity in order to discharge the defendants from their incumbrances; and if they had not thought that such would have been the effect, they would not probably have agreed to sign the deed, but each would have

[1] Fenner v. Dickey, 1 Flippin 36. See White v. Kuntz, 107 N. Y. 518, 14 N. E. Rep. 423; Hanover Nat. Bank v. Blake, 142 N. Y. 404, 37 N. E. Rep. 519. The debtor seeking a composition is not bound unless requested to make disclosures concerning his property. Graham v. Meyer, 99 N. Y. 611, 1 N. E. Rep. 143.

[2] Bliss v. Matteson, 45 N. Y. 22.

[3] 2 T. R. 763.

endeavored to obtain payment of his whole debt. Therefore I think that this security is not merely voidable, but absolutely void. . . . . The note was void on the ground of *fraud*, and any subsequent promise must be *nudum pactum*." So in Jackson v. Lomas,[1] a secret agreement was made by a debtor with a creditor to pay an additional sum, the consideration of which agreement was that the creditor should sign a composition deed with the other creditors. Mr. Justice Buller declared the secret agreement absolutely void, and refused to enforce it.[2] The principle of these English cases is upheld in the early case of Payne v. Eden,[3] in New York, where a note given in consideration of the creditors signing the insolvent's petition to make up the statutory proportion was adjudged void. And in Wiggin v. Bush,[4] a note executed by a debtor to his creditor, to induce him to withdraw his opposition to the debtor's discharge under an insolvent law was adjudged void. So a note given by a third person to a creditor in consideration of his withdrawing all opposition to the discharge of his debtor as a bankrupt, even though without the knowledge of the debtor, is void.[5] In Case v. Gerrish,[6] Chief-Justice Shaw, in deciding upon an agreement of this character where a note had been given, said: "This was an unwarrantable coercion upon the debtor, and a fraud upon the other creditors, which renders the note void."

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[1] 4 T. R. 166.

[2] See Jones v. Barkley, 2 Doug. 696; Sumner v. Brady, 1 H. Bla. 647; Jackson v. Duchaire, 3 T. R. 551; Feise v. Randall, 6 T. R. 146; Leicester v. Rose, 4 East 372; Holmer v. Viner, 1 Esp. 131; Knight v. Hunt, 5 Bing. 432; Howson v. Hancock, 8 T. R. 575; Solinger v. Earle, 82 N. Y. 393.

[3] 3 Caines (N. Y.) 213.

[4] 12 Johns. (N. Y.) 306.

[5] Bell v. Leggett, 7 N. Y. 176. See Waite v. Harper, 2 Johns. (N. Y.) 386; Tuxbury v. Miller, 19 Johns. (N. Y.) 311; Drexler v. Tyrrell, 15 Nev. 132; York v. Merritt, 77 N. C. 214; Sharp v. Teese, 9 N. J. Law 352.

[6] 15 Pick. (Mass.) 49.

§ 393a. **Illegal composition preference.** — When a creditor signs a composition agreement under a secret agreement with the debtor, giving him a preference or some undue advantage over other creditors, this does not as to such creditor nullify the composition agreement. The secret agreement to prefer is fraudulent and void and the composition agreement stands.[1]

Gray, J., said: "It seems wiser simply to regard the secret agreement as one which the law avoids for its fraud. The creditor makes it with the risk of its worthlessness, if repudiated, and the debtor makes it with the peril that its discovery will furnish cause for his other creditors to avoid the composition agreement."[2]

§ 394. **Secret antecedent agreement to prefer.** — An agreement between a debtor and creditor that, in consideration of receiving a loan, the debtor will prefer such creditor in the event of insolvency, has been considered to be in the nature of a secret lien, which is a fraud upon subsequent creditors of the debtor who are ignorant of the arrangement, and a subsequent disposition of the property in accordance with such an arrangement can be avoided by such subsequent creditors.[3] We doubted the soundness of this conclusion in our first edition, and the case cited has since been overturned[4] and its conclusions departed from.[5] In National Park Bank v. Whitmore,[6] Earl, J., said: "A debtor may obtain credit by a promise to pay in the future, either in cash or in property, or by promising to give his check or an indorsed note, or a confession of judgment.

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[1] Hanover Nat. Bank v. Blake, 142 N. Y. 404, 37 N. E. Rep. 519.

[2] Hanover Nat. Bank v. Blake, 142 N. Y. 404, 415, 37 N. E. Rep. 519. See White v. Kuntz, 107 N. Y. 518, 14 N. E. Rep. 423.

[3] See Smith v. Craft, 11 Biss. 340, 123 U. S. 441, 8 S. C. Rep. 196.

[4] 17 Fed. Rep. 705.

[5] See National Park Bank v. Whitmore, 104 N. Y. 304, 10 N. E. Rep. 524, and cases cited. Compare Clark v. Andrews, 19 N. Y. Supp. 211; Pierce Steam Heating Co. v. Ransom, 16 App. Div. (N. Y.) 260.

[6] 104 N. Y. 303, 10 N. E. Rep. 524.

Neither such a promise, nor its performance, is a legal fraud upon any one; and why may he not promise to give security upon the property purchased, or other property? Such a promise, honest in fact, has never been held to be a fraud or to work a fraud upon creditors. Security honestly given in pursuance of such a promise relates back to the date of the promise, and, except as to intervening rights, is just as good and effectual as if given at the date of the promise; and it has generally been so held, even in bankruptcy proceedings.[1] But here the agreement was to make the preferential assignment in case it became necessary to protect the creditor; and it is further claimed that such a conditional agreement is a fraud upon other creditors. A failing debtor may make an assignment preferring one or more creditors because he is under a legal, equitable, or moral obligation to do so, or he may do it from mere caprice or fancy, and the law will uphold such an assignment honestly made. If he may make such an assignment without any antecedent promise, why may he not make it after and in pursuance of such a promise? How can an act otherwise legal be invalidated because made in pursuance of a valid or invalid agreement honestly made? In Smith v. Craft,[2] Judge Gresham held that such a conditional agreement for a future preference was a fraud upon creditors. But in the same case,[3] upon a rehearing, Judge Woods held that the same agreement was not fraudulent, and in a very satisfactory opinion showed that such an agreement as we have here, for a future preference in case of insolvency, is not a legal fraud upon creditors.[4] This agreement did not create

[1] Citing Bump's Bankruptcy [10th ed.] 821; Forbes v. Howe, 102 Mass. 427; Bank of Leavenworth v. Hunt, 11 Wall. 391; Burdick v. Jackson, 7 Hun (N. Y.) 488; *Ex parte* Ames, 1 Lowell's Dec. 561; *Ex parte* Fisher, L. R. 7 Ch. App. 636; *Ex parte* Kilner, L. R. 13 Ch. Div. 245; Mercer v. Peterson, L. R. 2 Ex. 304, L. R. 3 Ex. 104.

[2] 11 Biss. 340.

[3] 17 Fed. Rep. 705.

[4] Citing Walker v. Adair, 1 Bond 158; Anderson v. Lachs, 59 Miss. 111;

any lien, legal or equitable, upon the property of the defendants. It was not an agreement for a future lien upon the specific property, which is sometimes held to create an equitable lien which may be enforced in equity. It was not an agreement for any lien at all. It was simply an agreement, in case of an assignment by the defendants, to prefer Whiting. The agreement did not bind defendants' property, nor encumber it, but left it subject to all the remedies of their creditors, and it neither hindered nor delayed those creditors. They could have made the same assignment without a previous agreement, and it is impossible to perceive how the agreement worked any legal harm to any one. It is not important to determine whether this was an agreement of which a court of equity would enforce specific performance, but we do not believe it was, and think it must stand both in law and equity like an agreement to pay at a future day."

§ 394a. **Rights of attaching creditor.** — A preference given by an insolvent debtor to a *bona fide* creditor cannot be avoided by an attaching creditor in Massachusetts, whether the form of preference which is adopted is a general assignment for the benefit of such creditors as should assent thereto, or an assignment for the benefit of certain specified creditors, or an assignment directly to a single creditor. Otherwise it would simply amount to giving a preference to an attaching creditor, instead of to the creditor or creditors selected by the debtor.[1]

Spaulding v. Strang, 37 N. Y. 135, 38 N. Y. 9; Haydock v. Coope, 53 N. Y. 68.

[1] Sawyer v. Levy, 162 Mass. 190, 38 N E. Rep. 365, and cases cited.

CHAPTER XXVI.

CONVEYANCES VALID BETWEEN THE PARTIES — RELIEF TO DEFRAUDED GRANTORS.

§ 395. Conveyances binding between the parties.
396. The theory — No reconveyance.
397. Massachusetts cases.
398. General rule and policy.
399. When aid will be extended to grantors.
400. Cases and illustrations.
401. The cases just considered exceptional.
§ 402. Grantee enforcing fraudulent deed.
403. Fraud upon debtor as distinguished from fraud upon creditors.
404. Declaring deed a mortgage.
404*a*. Redeeming mortgaged property.

"That court is not a divider of the inheritance of iniquity between . . . . two confederates in fraud." Mr. Justice Lamar in Deat v. Ferguson, 132 U. S. 50, 66, 10 S. C. Rep. 13.

§ 395. Conveyances binding between the parties. — The statute under which fraudulent and voluntary conveyances may be set aside, 13 Eliz. c. 5, ordinarily has no application to the parties to such instruments or their representatives. In Jackson v. Garnsey,[1] Spencer, C. J., in referring to this subject, used these words: "As between the parties they are expressly excluded from its operation, and are left as they stood at the common law; and before the statute the heir could never set up his title against the voluntary alienee of his ancestor, nor call upon him for contribution, where both were amenable to the creditors of the ancestor as ter-tenants; nor will courts of equity assist the party making a voluntary conveyance or his representative claiming as such by

[1] 16 Johns. (N. Y.) 189. See Harvey v. Varney, 98 Mass. 118; Hudson v. White, 17 R. I. 528, 23 Atl. Rep. 57; Knower v. Central Nat. Bk., 124 N. Y. 552, 27 N. E. Rep. 247; Farrar v. Bernheim, 41 U. S. App. 172, 21 C. C. A. 264. See §§ 112, 113, 121.

setting them aside." The cases holding such conveyances binding between the parties are numerous.[1] The same rule appertains to general assignments which, though voidable by creditors, are always valid between the immediate parties.[2] The conveyance as between the parties stands upon the same ground as if a full and adequate consideration had been paid.[3] In conformity with this rule

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[1] See Mercer v. Mercer, 29 Iowa 557; Tantum v. Miller, 11 N. J. Eq. 551; Bonesteel v. Sullivan, 104 Pa. St. 9; Lerow v. Wilmarth, 9 Allen (Mass.) 386; Bullitt v. Taylor 34 Miss. 708, 737; Armington v. Rau, 100 Pa. St. 168; Haak's Appeal, 100 Pa. St. 62; Doe *d.* Abbott v. Hurd, 7 Blackf. (Ind.) 510; McGuire v. Miller, 15 Ala. 394, 397; Williams v. Higgins, 69 Ala. 523; Dyer v. Homer, 22 Pick. (Mass.) 253; Keel v. Larkin, 83 Ala. 142, 3 So. Rep. 296; Songer v. Partridge, 107 Ill. 529; Barrow v. Barrow, 108 Ind. 345, 9 N. E. Rep. 371; Reichart v. Castator, 5 Binn. (Pa.) 109, 6 Am. Dec. 402, and note; Newell v. Newell, 34 Miss. 385; Shaw v. Millsaps, 50 Miss. 380; Davis v. Swanson, 54 Ala. 277; Noble v. Noble, 26 Ark. 317; Lloyd v. Foley, 6 Sawyer 426; Van Wy v. Clark, 50 Ind. 259; Crawford v. Lehr, 20 Kans. 509; Peterson v. Brown, 17 Nev. 173, 30 Pac. Rep. 697; Allison v. Hagan, 12 Nev. 38; Stewart v. Platt, 101 U. S. 738; Harmon v. Harmon, 63 Ill. 512; Graham v. Railroad Co., 102 U. S. 148; George v. Williamson, 26 Mo. 190; Sharpe v. Davis, 76 Ind. 17; Nichols v. Patten, 18 Me. 231; Ellis v. Higgins, 32 Me. 34; Bush v. Rogan, 65 Ga. 321; Goodwyn v. Goodwyn, 20 Ga. 600; McCleskey v. Leadbetter, 1 Ga. 551; Muller v. Balke, 154 Ill. 110, 39 N. E. Rep. 658; Francisco v. Aguirre, 94 Cal. 181, 29 Pac. Rep. 495: Springfield Homestead Assoc. v. Roll, 137 Ill. 205, 27 N. E. Rep. 184; Dent v. Ferguson, 132 U. S. 50, 10 S. C. Rep. 13; Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. Rep. 71; Hudson v. White, 17 R. I. 519, 23 Atl. Rep. 57; Kitts v. Willson, 130 Ind. 492, 29 N. E. Rep. 401; Phenix Ins. Co. v. Fielder, 133 Ind. 557, 33 N. E. Rep. 270; Weatherbee v. Cockrell, 44 Kan. 380, 24 Pac. Rep. 417; Doughty v. Miller, 50 N. J. Eq. 529, 25 Atl. Rep. 153; Stephens v. Adair, 82 Tex. 214, 18 S. W. Rep. 102. In Barrow v. Barrow, 108 Ind 345, 9 N. E. Rep. 371, it was held that where a wife joined her husband in conveying his land in fraud of creditors, she could not, after obtaining a divorce, have the conveyance set aside, and the land subjected to the payment of her judgment for alimony.

[2] Ames v. Blunt, 5 Paige (N. Y.) 13; Mills v. Argall, 6 Paige (N. Y.) 577; Smith v. Howard, 20 How. Pr. (N. Y.) 121, 126; Bradford v. Tappan, 11 Pick. (Mass.) 76; Van Winkle v. McKee, 7 Mo. 435; Bellamy v. Bellamy, 6 Fla. 62; Rumery v. McCulloch, 54 Wis. 565, 12 N. W. Rep. 65. See Chap. XXI.

[3] Chapin v. Pease, 10 Conn. 73.

Relaxation of the rule. — Bowes v. Foster, 2 H. & N. 779. seems to evidence an intention to relax this salutary rule. Plaintiff being in financial difficulties, and fearing proceedings on the part of his creditors, made an agreement with defendant, who was

it is held that a debtor who has conveyed his property in order to defraud his creditors has no standing in a court of equity to question the fairness or adequacy of price obtained at the public sale of the premises under a creditor's bill to reach such property.[1] It is not material whether the party is alleging the fraud as matter of defense, or as a ground of action,[2] for, as was said by Lord Mansfield,[3] "no man shall set up his own iniquity as a *defense*, any more than a cause of action."[4] The same rule applies between the heirs of the original parties.[5] The grantor cannot avoid the application of this rule by purchasing through another, under a subsequent

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also a creditor, that a pretended sale of a stock of goods should be made to defendant. An invoice was prepared, a receipt given for the purchase-money, and possession delivered to the defendant. The latter sold the goods as his own. Plaintiff brought trover and was permitted to recover upon the theory that the transaction never was in reality a sale. Pollock, C. B., said: "I am by no means sure that a man who, under the pressure of distress and misfortune, lends himself to such a transaction, is in the same *delictum* as a man who does so without such motive." Still more remarkable is the statement of Martin, B., who observed: "It is said that a person ought not to be allowed to set up his own fraud. But here there was no fraud; it was only intended to give the defendant the power to pretend that he was the owner of the goods." If observations such as these are to pass unchallenged the principle of law for which we are contending would be practically nullified.

[1] Guest v. Barton, 32 N. J. Eq. 120.

[2] Williams v. Higgins, 69 Ala. 523.

[3] Montefiori v. Montefiori, 1 W. Bla. 364.

[4] "As between the grantor and grantees the conveyances made were good and passed title to the property. And as to the creditors of the grantor they were not void, but merely voidable at their option; they, by proper proceedings, could have them set aside, but if no steps were taken by them for such purpose, then undoubtedly the title of the grantees would be and remain indisputable." McMaster v. Campbell, 41 Mich. 516, 2 N. W. Rep. 836. Whenever it appears that the object of a suitor in filing a creditor's bill is to aid a person who has placed his property in the name of another to hinder creditors to regain control of it, equity will refuse assistance. Ruckman v. Conover, 37 N. J. Eq. 583; Hamilton Nat. Bank v. Halsted, 56 Hun (N. Y.) 533, 9 N. Y. Supp. 852; affi'd 134 N. Y. 520, 31 N. E. Rep. 900; Winans v. Graves, 43 N. J. Eq. 263, 275, 11 Atl. Rep. 25.

[5] McClintock v. Loisseau, 31 W. Va. 865, 8 S. E. Rep. 612.

judgment against him.[1] As to every one but creditors the deed fraudulently made is good,[2] and it will be set aside only in so far as is necessary to satisfy the claim of the attacking creditor; any surplus remaining will be returned to the grantee.[3] In some States, however, the deed if made for an inadequate consideration, the grantee remaining in possession, is void not only as to creditors, but also as to subsequent purchasers for value, whether they had notice of the deed or not.[4]

§ 396. **The theory — No reconveyance.** — Lord Chancellor Thurlow[5] declared his opinion to be that in all cases where money was paid for an unlawful purpose the party, though *particeps criminis*, might recover at law; and the reason was that if courts of justice meant to prevent the perpetration of crimes it must be, not by allowing a man who has possession to hold it, but by putting the parties back in the condition in which they were before entering into the transaction. The doctrine of the learned Lord Chancellor would seem to be sufficiently broad to cover the cases of conveyances made in fraud of creditors. Yet the authorities, as a general rule, reveal a singular absence of any disposition on the part of the courts to extend relief to fraudulent grantors.[6] A fraudulent vendee is under no legal obligation to reconvey, though morally bound to do so; and a court of equity will give no aid where both the vendor and vendee participate in the illegal transaction.[7] It is familiar learning that

[1] Eisner v. Heileman, 52 N. J. Law 378, 20 Atl. Rep. 46.

[2] Kitts v. Wilson, 140 Ind. 604, 39 N. E. Rep. 313.

[3] Comyns v. Riker, 83 Hun 471, 31 N. Y. Supp. 1042.

[4] Jones v. Light, 86 Me. 437, 30 Atl. Rep. 71.

[5] See Neville v. Wilkinson, 1 Bro. C. C. 547.

[6] Farrar v. Bernheim, 41 U. S. App. 172, 21 C. C. A. 264.

[7] Powell v. Ivey, 88 N. C. 256, 28 Alb. L. J. 254; Farrar v. Bernheim, 41 U. S. App. 172, 21 C. C. A. 264. In Carll v. Emery, 148 Mass. 32, 34, 18 N. E. Rep. 574, the court says: "It would seem equally clear, that, when a party who has transferred property to delay or defraud

equity will not decree a specific performance of an agreement by the fraudulent grantee to reconvey the property to the debtor,[1] and will not interfere to correct a mistake in a deed that was executed for a fraudulent purpose.[2] "This rule is a penalty imposed by the law for the prevention of frauds."[3] And if a party obtains a deed without consideration upon a parol agreement that he will hold the land in trust for the grantor, there is authority to the effect that such trust will not be enforced, as it would violate the statute of frauds, and also the general rule that parol evidence cannot be admitted to vary, add to, or contradict a written instrument.[4] In a New Jersey case[5] it was decided that a note which was given for property transferred to the maker for the purpose of defrauding the creditors of the payee could not

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creditors abandons his fraudulent purpose, apprising the other party thereof, and seeks to reinstate himself in the possession of his property in order to pay his creditors, he may do so. It cannot be that the other party, who has been a participant in the fraudulent transaction, by reason of such participation should be able to hold the property the possession of which he had so acquired, and thus prevent it from being devoted to its legitimate uses."

[1] Walton v. Tusten, 49 Miss. 577; Sweet v. Tinslar, 52 Barb. (N. Y.) 271; Canton v. Dorchester, 8 Cush. (Mass.) 525; Grider v. Graham, 4 Bibb (Ky.) 70; Baldwin v. Cawthorne, 19 Ves. 166; Ellington v. Currie, 5 Ired. (N. C.) Eq. 21; St. John v. Benedict, 6 Johns. Ch. (N. Y.) 111; Waterman on Specific Performance (ed. 1881), § 340; Chapin v. Pease, 10 Conn 72; Tyler v. Tyler, 25 Ill. App. 343. Even if the conveyance contained an express agreement to reconvey on demand, it is competent for the party especially bound by the contract to go behind the language of the writing and show that its real purpose was to defraud creditors. Tyler v. Tyler, 126 Ill. 525, 21 N. E. Rep. 616. If, however, a distinct and independent contract is entered into, subsequent to the conveyance, for a fair and valuable consideration, it will not be tainted by the fraud of the main transaction. Dent v. Ferguson, 132 U. S. 50, 10 S. C. Rep. 13. So an agreement to account for the profits made while the property was in the grantee's hands, was enforced in Stillings v. Turner, 153 Mass. 534, 27 N. E. Rep. 671. See § 429.

[2] Gebhard v. Sattler, 40 Iowa 152.

[3] Robertson v. Sayre, 134 N. Y. 99.

[4] Pusey v. Gardner, 21 W. Va. 474, 31 N. E. Rep. 250; Troll v. Carter, 15 W. Va. 567; Zane v. Fink, 18 W. Va. 755. See Cutler v. Tuttle, 19 N. J. Eq. 549.

[5] Church v. Muir, 33 N. J. Law 319.

be enforced in the hands of the payee against the maker. In the course of the opinion Chief-Justice Beasley indulged in the following refreshing observations: "It was urged that the statute for the prevention of frauds and perjuries does not invalidate transactions the end of which is to prevent or make difficult the collection of just claims, except so far as concerns creditors, and that, *inter partes*, such transactions, if containing no other infirmity, will be effectuated at law. It is certainly true, the statute referred to does not, *proprio vigore*, annul beyond the extent thus defined, the conveyances and contracts at which it is levelled. Nothing more than this was necessary to effect its purpose, which was the relief and protection of creditors against this class of frauds. But it is also clear, that it has no tendency to legalize any act which was not legal at the time of its enactment. . . . . A contract, the purpose of which is to protect a debtor against the just claims of creditors, is an immoral act. Such an affair is inimical to social policy. It is in direct opposition both to the letter and spirit of the statute for the prevention of frauds. . . . . In their essence and in their effects such contracts are as immoral and pernicious as many of those which the law has declared to be utterly void. In these respects how are they to be distinguished from contracts to indemnify persons against the consequences of their illegal acts; against liability for the publication of a libel; from promises by uninterested parties to furnish money for the prosecution of law-suits; from agreements in contravention of the bankrupt or insolvent acts, or in general restraint of trade; or from that host of other conventions, which have been so often judicially condemned, not on account of any enormous immorality, but on the score of their inconsistency with public interest and good government? I can see no reason why contracts to defraud

creditors should stand on a different footing from the rest of those embraced in the class to which they evidently belong. They are hostile to fair dealing and commercial honesty, and, on this account, should be subjected to the ban of outlawry."[1] As long as an agreement of this kind remains executory the court will allow a party to it to set up his own fraud, in an action brought to enforce it.[2] It has been held that in an action to foreclose a mortgage the fact that it was given in fraud of creditors may be interposed as a defense.[3]

§ 397. **Massachusetts cases.** — In Massachusetts a long series of cases has established the rule that a transfer either of real or personal property, made with a view to defraud the creditors of the grantor, although the grantee has participated in this intention, is good between the parties, and void only in favor of creditors; or to speak accurately, is voidable by creditors at their election. If no creditors intervene, the conveyance stands; if creditors elect to affirm the transfer and receive the consideration, it is thereby ratified and confirmed. Payment of the grantor's debts to the full value of the property purges the fraud.[4] This doctrine extends to executory contracts.[5] In Freeland v. Freeland,[6] the court says: "A conveyance made in fraud of creditors is valid as between the parties, and can be avoided only by creditors, or by the assignee in insolvency, representing them;

[1] Compare Nellis v. Clark, 20 Wend. (N. Y.) 37, and dissenting opinion of Chief-Justice Nelson; Briggs v. Merrill, 58 Barb. (N. Y.) 389; Ager v. Duncan, 50 Cal. 325; Goudy v. Gebhart, 1 Ohio St. 262; Hamilton v. Scull, 25 Mo. 165; Andruss v. Doolittle, 11 Conn. 283; Merrick v. Butler, 2 Lans. (N. Y.) 103; Dent v. Ferguson, 132 U. S. 64, 10 S. C. Rep. 13.

[2] Galpin v. Galpin, 74 Iowa 454, 38 N. W. Rep. 156.

[3] Williams v. Clink, 90 Mich. 297, 51 N. W. Rep. 453.

[4] Drinkwater v. Drinkwater, 4 Mass. 354; Oriental Bank v. Haskins, 3 Met. (Mass.) 332; Crowninshield v. Kitridge, 7 Met. (Mass.) 520.

[5] Knapp v. Lee, 3 Pick. (Mass.) 452; Dyer v. Homer, 22 Pick. (Mass.) 253. See The Lion, 1 Sprague 40; Harvey v. Varney, 98 Mass. 120.

[6] 102 Mass. 477.

and, if he affirms it, it stands good."[1] But where the action is brought by the grantor, not in his own behalf, but for the purpose of having the grantee account for the proceeds of the property conveyed for the benefit of the grantee's creditors, the action can be maintained.[2] In Traders' National Bank v. Steere,[3] the court says: "The conveyance of property by a contract which is void as being against public policy in a particular which has no reference to creditors does not necessarily give creditors a right to pursue the property after the contract has been fully executed. Such a contract may or may not be fraudulent as against creditors. If it is, they may set it aside; if it is not, they cannot." In *In re* Mapleback,[4] cited in the last case, it appeared that the debtor owed one of his creditors one hundred pounds, and forged his name upon a bill of exchange for one hundred pounds more, which was discounted at a bank. Just before the bill of exchange became due, the debtor wrote to the creditor confessing his crime, and entreating him to furnish the money to enable the debtor to take up the bill and conceal the crime, and offering security. The creditor furnished the money and took the conveyance as security for the amount and also for his former debt. The Lord Justices, without expressly deciding that the transaction was illegal, held, that, if it was, the assignee could not take advantage of it, because it was not a fraud upon creditors nor a fraud against the bankrupt act.

§ 398. **General rule and policy.** — These covinous conveyances are binding upon heirs,[5] legatees,[6] and, as is

[1] Citing Butler v. Hildreth, 5 Met. (Mass.) 49; Snow v. Lang, 2 Allen (Mass.) 18; Harvey v. Varney, 98 Mass. 118; Morgan v. Abbott, 148 Mass. 507, 20 N. E. Rep. 165. See § 107.

[2] Carll v. Emery, 148 Mass. 32, 18 N. E. Rep. 574.

[3] 165 Mass. 393, 43 N. E. Rep. 187.

[4] 4 Ch. D. 150.

[5] Moseley v. Moseley, 15 N. Y. 334; Dent v. Ferguson, 132 U. S. 50, 10 S. C. Rep. 13; Robertson v. Sayre, 134 N. Y. 99, 31 N. E. Rep. 250. See § 121.

[6] Guidry v. Grivot, 2 Martin, N. S. (La.) 13, 14 Am. Dec. 193. See § 121, n.

elsewhere shown,[1] in certain cases upon personal representatives [2] and assignees.[3] The fraudulent conveyance is treated as so far valid that creditors of the vendee may seize upon the property and may even cancel a reconveyance of it to the grantor.[4] A court of equity will not intervene to give relief to either party from the consequences of a fraudulent conveyance. The maxim "*in pari delicto potior est conditio defendentis*" must prevail.[5]

Though a reconveyance cannot be enforced,[6] the fraudulent vendee is said, in some of the cases, to be under a high moral and equitable obligation to restore the property.[7] The law is not so unjust as to deny to men the right, while it is in their power to do so, to recognize and fulfill their obligations of honor and good faith. And until the creditors of the vendee acquire actual liens upon the property, they have no legal or equitable claims in respect to it, higher than or superior

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[1] See §§ 112, 113.

[2] Blake v. Blake, 53 Miss. 193; Merry v. Fremon, 44 Mo. 522; Davis v. Swanson, 54 Ala. 277; Loomis v. Tifft, 16 Barb. (N. Y.) 545.

[3] See § 115; also Chap. XXI.

[4] Chapin v. Pease, 10 Conn. 69. See § 387. In Allison v. Hagan, 12 Nev. 46, the court said: "Nor will the courts, as between the parties to a fraudulent conveyance, or between a fraudulent grantee and his creditors, permit either the fraudulent grantor or grantee to be heard in avoidance of the fraudulent act."

[5] Randall v. Howard, 2 Black, 588; Dent v. Ferguson, 132 U. S. 64, 10 S. C. Rep. 13; Wheeler v. Sage, 1 Wall. 518; Bartle v. Nutt, 4 Pet. 184, 189; Schermerhorn v. De Chambrun, 64 Fed. Rep. 206; Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. Rep. 71; Bishop v. American Preservers' Co., 157 Ill. 316, 41 N. E. Rep. 765.

[6] Where a person fraudulently and collusively accepts a conveyance of land from another, to aid the grantor in defrauding creditors, the wife and children of the grantee after his death are mere volunteers, and take no greater rights than the grantee had in his lifetime. Farrar v. Bernheim, 41 U. S. App. 172, 21 C. C. A. 264.

[7] In Fargo v. Ladd, 6 Wis. 106, it was held that where the grantee of property fraudulently conveyed had voluntarily reconveyed to the grantor, in apparent execution of his trust, he could not thereafter make a valid claim to the property, or its proceeds, on the ground of the original fraudulent conveyance. See Second National Bank v. Brady, 96 Ind. 505.

to, those of the grantor.[1] It has been contended that the transfer only made visible an ownership which already existed, though secretly.[2] While the fact that title to real estate was put in one to hold for another with intent to defraud creditors, might be a defense by the trustee in an action to establish the trust, yet where the trust has been completed by a conveyance to the equitable owner the principle has no application.[3]

The boundaries of these rules as to the conclusiveness of voluntary or covinous conveyances between the parties have, however, been broken over in some instances. And the rule itself has been questioned upon the theory that both parties are seldom equally to blame in a transaction tinctured with fraud in each, and if they are, the doctrine seems to encourage a double fraud on the one side to punish the single fraud on the other.[4]

§ 399. When aid will be extended to grantors. — This rule, it has been said, did not in the nature of things apply where the grantor was not in *pari delicto*[5] with the grantee, as where a creditor availed himself of his power over a debtor and induced him by misrepresentation to

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[1] Davis v. Graves, 29 Barb. (N. Y.) 485; Stanton v. Shaw, 3 Baxt. (Tenn.) 12; Dunn v. Whalen, 21 N. Y. Supp. 869. Mr. Roberts says (Roberts' Fraudulent Conveyances, p. 641), that "voluntary conveyances were always binding upon the party, and all claiming voluntarily under him; and the statutes of Elizabeth against fraudulent conveyances have expressly guarded against a construction in derogation of this rule." Thus in the statute 13 Elizabeth, c. 5, it was provided that the fraudulent gifts and grants therein denounced should be void *only* against those persons whose actions, debts, and accounts are hindered and delayed; and in 27 Eliz. it was with similar caution provided that the voluntary conveyances in the contemplation of that act should be void *only* as against those who should thereafter purchase upon *good*, *i. e.* valuable, consideration.

[2] See Keel v. Larkin, 83 Ala. 146, 3 So. Rep. 296, and cases cited; Lillis v. Gallagher, 39 N. J. Eq. 94.

[3] Campbell v. First Nat. Bk. 22 Col. 177, 43 Pac. Rep. 1007; Ownes v. Ownes, 23 N. J. Eq. 60.

[4] Gowan v. Gowan, 30 Mo. 476. Compare Nichols v. McCarthy, 53 Conn. 299.

[5] Melbye v. Melbye, 15 Wash. 650, 47 Pac. Rep. 16; Place v. Hayward, 117 N. Y. 487, 23 N. E. Rep. 25.

make a fraudulent conveyance to him.[1] Thus in Roman v. Mali,[2] the doctrine is asserted that there may be different degrees of guilt as between the parties to a fraudulent or illegal transaction, and if one party act under circumstances of oppression, imposition, undue influence, or at a great disadvantage, with the other party concerned, so that it appears his guilt is subordinate to that of the defendant, the court in such case will extend relief. Parker, J., said in James v. Bird :[3] "There is no case in equity where any relief has been given to a fraudulent grantor of property, the conveyance being made to protect it against his creditors, except that of Austin v. Winston,[4] decided by a divided court, and perhaps, *under the circumstances*, properly decided." The authority of the case, however, has been in some measure acknowledged in several States.[5] The court in Fletcher v. Fletcher,[6] concedes that it would assist the grantor in cases where circumstances were shown which warranted its interposition on recognized and settled grounds of equity jurisprudence, "such as fraud in procuring the deed, imposition by the grantee in violation of some fiduciary relation, delusion, or the like, on the part of the grantor, at the time of executing the deed." In Pinckston v. Brown,[7] it appeared that at the time the deed was

[1] Austin v. Winston, 1 Hen. & M. (Va.) 33; Holliway v. Holliway, 77 Mo. 396. In Mississippi it is held that a defendant cannot resist payment of the purchase-price of goods sold and delivered to him, on the ground that the sale was in fraud of the creditors of the seller. Gary v. Jacobson, 55 Miss. 204. But see, *contra*, Church v. Muir, 33 N. J. Law 318; Nellis v. Clark, 4 Hill (N. Y.) 424; Walton v. Bonham, 24 Ala. 513. See Moseley v. Mosely, 15 N. Y. 334.

[2] 42 Md. 513.

[3] 8 Leigh (Va.) 510.

[4] 1 Hen. & M. (Va.) 33.

[5] See Bellamy v. Bellamy, 6 Fla. 104; Freeman v. Sedwick, 6 Gill (Md.) 41; Cushwa v. Cushwa, 5 Md. 53; Quirk v. Thomas, 6 Mich. 111. But compare Clay v. Williams, 2 Munf. (Va.) 121; Starke v. Littlepage, 4 Rand. (Va.) 371; Jones v. Comer, 5 Leigh (Va.) 357; Griffin v. Macaulay, 7 Gratt. (Va.) 564.

[6] 2 MacAr. (D. C.) 39, 40.

[7] 3 Jones' Eq. (N. C.) 496. See Nichols v. McCarthy, 53 Conn. 299, 23 Atl. Rep. 93.

executed the plaintiff was old, infirm, weak of mind, and much diseased and distressed in body. The deed was made with a view to hinder and delay the collection of a debt. The party benefited was the plaintiff's oldest son, in whose ability and integrity she had the greatest confidence. The transfer had undoubtedly been consummated by means of the undue influence and deceit practiced upon and exercised over the aged and confiding mother by the son. The court held that the mother and son were *in delicto*, but not *in pari delicto*, and at the suit of the mother set the transaction aside.[1] In a case which came before the Supreme Court of New York,[2] A. sued B. for slander. B., to protect himself, conveyed property to C., who agreed to reconvey. B. defeated the slander suit. It was held that C. must reconvey. Johnson, J., said: "Gilman had at the time no other creditors, and his sole design was to get his property out of the way of any judgments which might possibly be recovered in those actions, and not to hinder, delay, or defraud any other person whatever. It turned out that the several plaintiffs in those actions had no 'lawful' claim against Gilman. They were not creditors, and, as to them, the conveyance was valid, as it was, also, between the grantor and grantee. It was not designed to defraud the plaintiff of his claim, as the referee expressly finds. As this conveyance was not made with intent to hinder, delay, or defraud any existing creditor, or any person having a lawful claim, but only a person making an unlawful and unfounded claim, which the defendant Gilman disputed and denied, and ultimately defeated, it may present a grave question, whether it falls at all within the condem-

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[1] See Osborne v. Williams, 18 Ves. 382, Story's Equity Jur. § 300.

[2] Baker v. Gilman, 52 Barb. (N. Y.) 36. See Kain v. Larkin, 4 App. Div. 209, 38 N. Y. Supp. 546; Block v. Darling, 140 U. S. 239, 11 S. C. Rep. 832.

nation of the statute. . . . . The sole object of the statute here, in declaring conveyances void, is to protect, and prevent the defeat of *lawful* debts, claims, or demands, and not those which are unlawful, or trumped up, and which have no foundation in law or justice, and the verity of which is never established by any judgment, or by the assent of the person against whom they are made. As against claims and demands of the latter class, the statute does not forbid conveyances or assignments, nor declare them void." It may well be seriously questioned, however, whether this contention can be uniformly upheld. The courts would be justified in refusing to inquire whether the grantor's apprehensions as to the recovery of a judgment against him were well or ill founded, and might well incline to leave the parties in the position in which it found them.[1] In a Massachusetts case property fraudulently conveyed had been retransferred to the grantor the grantee agreeing to account for the profits. It was decided that this agreement was valid and binding upon him.[2]

§ 400. **Cases and illustrations.**— In Boyd v. De La Montagnie [3] it appeared that a husband had secured a gratuitious transfer of property from his wife by means of false representations on his part, that she was liable for a debt, when in fact no such liability existed. Though the transaction was consummated in the belief that the effect of the transfer would be to hinder and delay the creditors, or in some way to save the property, it was held to be no answer that the wife consented to the act with a view to defraud creditors. Chief-Justice Church said: "The parties do not stand on equal terms, and the husband

[1] Compare Tantum v. Miller, 11 N. J. Eq. 551; Harris v. Harris, 23 Gratt. (Va.) 737, 764. and see *contra*, Fletcher v. Fletcher, 2 MacAr. (D. C.) 38.

[2] Stillings v. Turner, 153 Mass. 534, 27 N. E. Rep. 671.

[3] 73 N. Y. 498; Haack v. Weicken, 118 N. Y. 74, 23 N. E. Rep. 133.

cannot avail himself of the plea of *particeps criminis* on the part of the wife." A court of equity will interpose its jurisdiction to set aside instruments between persons occupying relations in which one party may naturally exercise an influence over the conduct of another. A husband is held to occupy such a relation to his wife, and those equitable principles apply to them in respect to gratuitious transfers by the wife to the husband.[1] So in Freelove v. Cole [2] it was decided that as there are degrees of crime and of wrong, the courts can and will give relief in many cases as against the more guilty. "To exclude relief in such cases," said Smith, J., "the parties must not only be *in delicto* but *in pari delicto*." Applying this doctrine it was held that where the plaintiff was infirm of mind and incompetent to manage and conduct his business affairs with ordinary prudence and discretion, and the defendant was his son-in-law, confidential friend, and legal adviser, and had procured a conveyance to himself of the property in order to place it beyond the reach of the plaintiff's creditors, relief might still be accorded the plaintiff.[3] Ford v. Harrington,[4] an important and leading case in the New York Court of Appeals, in which judges of the eminence of Denio, Johnson, Comstock,

[1] See Barnes v. Brown, 32 Mich. 146.

[2] 41 Barb. (N. Y.) 326; affirmed, 41 N. Y. 619, without an opinion.

[3] In O'Conner v. Ward, 60 Miss. 1025–1035 (decided in April, 1883), the Supreme Court of Mississippi said: "We do not agree with the proposition announced by Mr. Bump in his work on Fraudulent Conveyances, that where a person has sufficient capacity to contract, and makes a conveyance with intent to hinder, delay, or defraud his creditors, a court of equity will not inquire into the degrees of guilt between the grantor and the grantee. The rule is not universal, and, as stated, is not supported by the authorities." Cited and quoted are Osborne v. Williams, 18 Ves. 382; Pinckston v. Brown, 3 Jones' Eq. (N. C.) 494; Smith v. Bromley, 2 Doug. 696; Browning v. Morris, Cowp. 790; Boyd v. De La Montagnie, 73 N. Y. 498; W. v. B. 32 Beav. 574; Ford v. Harrington, 16 N. Y. 285.

[4] 16 N. Y. 285. See Freelove v. Cole, 41 Barb. (N. Y.) 318; Gibson v. Jeyes, 6 Ves. 266; Smith v. Kay, 7 H. L. Cas. 771; Place v. Hayward, 117 N. Y. 496, 23 N. E. Rep. 25.

Selden, and Brown participated, seems clearly to establish the same general principle. It was there expressly held that where an attorney procured from a client a conveyance of a valuable interest in land for a manifestly inadequate consideration, the conveyance being advised by the attorney with a view to defeat a creditor of the grantor, though the agreement was illegal, yet the rule prohibiting the attorney from obtaining any unconscionable advantage in dealing with his client must prevail, and the attorney could be compelled to convey the land.[1] And where the parties to a conveyance are brothers, the grantor being crippled and diseased in body, weak in mind, and easily influenced, and under the control of the grantee, who was a person vigorous in both body and mind, the conveyance was set aside at the suit of the grantor, it appearing that no consideration was paid, that a reconveyance was promised, and that the transfer was induced by operating upon the grantor's fears that he was in danger of losing the property by reason of a breach of promise suit which had no foundation in fact.[2]

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[1] See Boyd v. De La Montagnie, 4 T. & C. (N. Y.) 153; Place v. Hayward, 117 N. Y. 496, 23 N. E. Rep. 25; Moore v. Jordan, 65 Miss. 232, 3 So. Rep. 737; Block v. Darling, 140 U. S. 239, 11 S. C. Rep. 832.

[2] Holliway v. Holliway, 77 Mo. 396, See Cadwallader v. West, 48 Mo. 483; Bradshaw v. Yates, 67 Mo. 221; Ford v. Hennessy, 70 Mo. 581; Ranken v. Patton, 65 Mo. 378; Garvin v. Williams, 44 Mo. 465; Watkins v. Jones, 78 Hun (N. Y.) 496, 29 N. Y. Supp. 557; Place v. Hayward, 117 N. Y. 496, 23 N. E. Rep. 25. In Fisher v. Bishop, 108 N. Y. 25, 29, 15 N. E. Rep. 331, it appeared that plaintiff, who was much advanced in years, became involved as indorser for his son, who failed and absconded. Just prior to leaving the son gave the father scant security for the liability. W., a justice of the peace, was employed to draw the papers. Thereafter W., by threats to the effect that the conveyance was fraudulent and could be set aside, persuaded plaintiff to give defendants a mortgage to secure a debt of the son which the father was under no obligations to assume. Ruger, Ch. J., said: "The extent to which the plaintiff confided in the defendant Wattles is clearly shown by the fact that he had frequently employed him in business transactions, and that the conveyances which he then threatened to annul and overthrow were drawn by him, and accepted under his advise and co-operation. It was a gross breach of good faith for a

§ 401. **The cases just considered exceptional.**—The practitioner, however, must be careful to remember that the cases just considered are exceptions to a well-defined rule. While it is possible to deduce from them a general principle that degrees of guilt will be recognized in such transactions, and that grantors may, in certain cases, reclaim the property fraudulently alienated where the transaction was superinduced by the unfair action of a vendee who occupied some relation of confidence which enabled him

person thus trusted, and who had by conducting the business, vouched for its validity and lawfulness, to turn around for the purpose of gaining a personal advantage, and assert that he had been engaged in an illegal transaction, which he could at his own option annul and destroy. The case shows that by these means the defendants have obtained security for a large amount, from an old man who was under no legal or moral obligation to give it, and without any consideration to support it except the nominal one of a dollar, and that this was extorted at a time when he was laboring under much distress and anxiety of mind, on account of the trouble that encompassed him. The parties in this case did not meet on equal terms, and the defendant took an unfair advantage of the position in which they had been placed, and of the confidence reposed in them by the plaintiff, to procure from him a valuable security to which they had no legal right." In Block v. Darling, 140 U. S. 239, 11 S C. Rep. 832, the court says: "Nor did the court below err in excluding evidence offered by the defendants conducing to show that the money claimed by the plaintiff to have been deposited with them to be paid to him on his order was so deposited with the intent to cheat and defraud his creditors. The evidence, if admitted, would not have relieved the defendants from responsibility to account for it. The plaintiff's suit to compel the return of the money may be regarded as one in disaffirmance of the arrangement under which the defendants claimed to have received it; and, if successful, would tend to defeat the alleged purpose of defrauding his creditors by having it kept upon secret deposit with the defendants. It is not a suit to recover money received and paid out under an illegal or immoral contract which has been fully executed. The suit is necessarily a disavowal upon the part of the plaintiff of any purpose to hide this money from his creditors. To allow the defendants to retain it upon the ground that he had originally the purpose to conceal it from his creditors. would be inconsistent with the spirit and policy of the law. (Spring Co. v. Knowlton, 103 U. S. 49, 58, and authorities there cited.) Besides, the deposit was good as between the parties. The defendants do not represent the plaintiff's creditors, and the latter are not suing." It is submitted that a tendency is reflected in this opinion which is opposed to the general current of decisions and that recoveries upon the theory indicated by the court in the case cited should not be encouraged.

to unduly influence the vendor, yet a very clear case with well-defined reasons for excepting it from the general rule must be presented. Debtors contemplating fraudulent alienations should draw little encouragement from these exceptional cases, for, as a general rule, after passing through the troubled waters of insolvency, they will find themselves stripped of the power to reach or recover the secreted property in the hands of their fraudulent grantees. The ancient rule, *in pari delicto melior est conditio possidentis*,[1] is not to be easily uprooted, and must not be considered as overthrown or abrogated by these cases.[2] The great effort has been, in at least a portion if not all of the cases just considered, to show that the parties were *not in pari delicto* because of the reliance and confidence placed in the grantee, especially when he assumed to advise or act in a professional capacity, or occupied a position where he could exercise undue influence over the vendor. In Renfrew v. McDonald,[3] the fraudulent grantor, seeking to set aside a conveyance made to hinder creditors, was summarily dismissed on the opening oral statement of his counsel. The plaintiff alleged great intimacy with and confidence in the defendant, and charged that it was through his influence and procurement that the fraudulent conveyance had been made, and that defendant had knowingly advised plaintiff that he had no defense to certain notes, the collection of which plaintiff sought to hinder and delay by the conveyance in question, when in fact a defense did exist. The court said: "Nothing is alleged by way of excuse for the attempted fraud, except what might be with more or less truth alleged in every case. The recipient of property with intent to defraud creditors,

[1] Kirkpatrick v. Clark, 132 Ill. 347, 24 N. E. Rep. 71; Smith v. Hubbs, 10 Me. 71.

[2] Cited in Pride v. Andrew, 51 Ohio St. 405, 38 N. E. Rep. 84.

[3] 11 Hun (N. Y.) 255.

possesses the intimacy and confidence of the fraudulent debtor, and advises the attempted fraud and consents to be made the instrument thereof. To allow the grantor in such a case to set aside the grant and be restored to all he has parted with for the illegal purpose, would be to afford great encouragement to future attempts of that character." In Fredericks v. Davis,[1] the doctrine is asserted that the grantor in an alleged fraudulent conveyance, made with full knowledge of the facts, is estopped by his own warranty of title from testifying that the conveyance is fraudulent.[2] This doctrine is supported by the case of Phillips v. Wooster,[3] wherein the court says: "The position which the plaintiff occupies in relation to the transaction complained of as fraudulent, excludes him from alleging the fraud, or claiming any benefit against it. The conveyance against which he now seeks to derive advantage from the property, was made by himself, with a full knowledge of all the facts as they existed at the time, as we are bound to presume since he has shown nothing to the contrary.[4] So that if the money paid was the debtor's, as he now insists it was, and the conveyance to the wife therefore fraudulent as against creditors, it was not fraudulent as against him, for he was not only consenting to the act, but himself performed it."

§ 402. **Grantee enforcing fraudulent deed.**—The rule being established that the courts will not interfere to set aside a fraudulent executed contract as between the parties, it has

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[1] 3 Mont. 251.

[2] Compare Dodge v. Freedman's Sav. & Trust Co., 93 U. S. 383; Pitts v. Wilder, 1 N. Y. 525; Gates v. Mowry, 15 Gray (Mass.) 564; Harvey v. Varney, 98 Mass. 118; Watkins v. Jones, 78 Hun (N. Y.) 496, 29 N. Y. Supp. 557; Wiley v. Carter, 77 Iowa 751, 42 N. W. Rep. 566; Rozell v. Vansyckle, 11 Wash. 79, 39 Pac. Rep. 270; Harper v. Harper, 85 Ky. 160, 3 S. W. Rep. 5.

[3] 36 N. Y. 414.

[4] Citing Grant v. Morse, 22 N. Y. 323.

been contended that the same principle would preclude the grantee both from enforcing his apparent right to the possession of the land under the deed, and from collecting the rents or damages.[1] A consideration of the reason and policy of the rule, however, led the courts to hold otherwise. It is considered a mistake to suppose that the parties being *in pari delicto*, the court would refuse the grantee all remedy. The deed as between the parties is perfectly good. The grantor, by a stern but necessary policy of the law, is excluded from presenting the proof which would show the fraud. He is in this respect the actor; his fraud silences and estops him from averring against his deed.[2] The rule operates only in cases where the refusal of the court to aid either party *frustrates* the object of the transaction, and destroys one of the temptations to enter into contracts violating the policy of the law.[3] To permit the grantor, when sued by the grantee, to plead the mutual fraud of the parties, in order to enable him to avoid the effect of the deed by being permitted to remain in possession of the property without the payment of rent or damages, would virtually be permitting him to reap the reward of his own iniquity since he was the real actor in the fraud, and would tend to encourage others to violate the law, with the hope of profiting by committing frauds upon their creditors. It would nullify the rule.[4] There is a distinction between an executed and an executory fraudulent contract. As to the latter the court, where the parties are equally participants in the fraud, *in pari delicto*, will leave them

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[1] Peterson v. Brown, 17 Nev. 176, 30 Pac. Rep. 697.

[2] Broughton v. Broughton, 4 Rich. Law (S. C.) 497. See Bonesteel v. Sullivan, 104 Pa. St, 9.

[3] Peterson v. Brown, 17 Nev. 177, 30 Pac. Rep. 697; Starke v. Littlepage, 4 Rand. (Va.) 372. See Cushwa v. Cushwa, 5 Md. 52; Murphy v. Hubert, 16 Pa. St. 57.

[4] Murphy v. Hubert, 16 Pa. St. 57; Peterson v. Brown, 17 Nev. 177-179, 30 Pac. Rep. 697.

in the predicament where they place themselves, refusing any relief or interference. And where the contract is executed, as by a deed transferring the title, the court acts upon the same principle, declining either to cancel the deed or restore the title. But the effect is very different; in one case a specific performance will be refused; in the other the fraudulent grantee remains owner of the estate as against the grantor, and all the world, except the defrauded creditors.[1] In Stillwell v. Stillwell,[2] the court said: "Whether the appellant's title was fraudulent or not, was of no consequence in the present case. Admitting, as has been admitted, that the appellant's title, as derived from her husband, was void at the instance of creditors, that fact did not prevent her from setting up in a court of equity, that either her husband or some one else had, by fraud, got the title from her. To hold otherwise would be to lay down the doctrine that the holder of one of these surreptitious titles was, with respect to it, put out of the protection of the law. There is no such principle of law or equity."

§ 403. **Fraud upon a debtor as distinguished from fraud upon creditors.**— Fraud practiced by a third party upon a debtor is manifestly a different thing from fraud upon creditors, and it may well be doubted whether a creditor can seize property the title to which has passed to a third party, or attack such a conveyance where the creditor proceeds upon the ground that the purchaser committed a fraud upon the seller which entitled the latter to avoid the sale. In Garretson v. Kane,[3] the court used these words: "A creditor cannot redress all the wrongs done to his debtor. He cannot claim damages for a trespass or for a deceit. A fraud like that offered to be proved in this case would entitle the seller to relief in a court of

[1] Walton v. Tusten, 49 Miss. 576.
[2] 47 N. J. Eq. 278, 20 Atl. Rep. 960.
[3] 27 N. J. Law 211.

equity upon proper terms, and possibly a creditor may have relief there; but he cannot step in and claim that such a sale was absolutely void at law. If he can interfere at all his rights will be the same as those of his debtor. . . . . A creditor who seeks to avoid a sale as fraudulent against him, does not represent his debtor, but exercises rights paramount to his. There is in truth, no similarity between [the] two kinds of fraud. In the one case it is, either in fact or in law, the fraud of the debtor himself, while in the other the debtor is the victim, and guilty of no wrong. A case may occur combining both descriptions of fraud."[1] It will be at once apparent that this element of the law enters largely into the cases in which the debtor or grantor has a standing to attack or avoid his own transfer.

§ 404. **Declaring deed a mortgage.** — As is elsewhere stated, an absolute conveyance may be shown to be a mortgage.[2] The theory of the decisions is that dealings between the borrower and the lender of money, or debtor and creditor, conducted by requiring an absolute deed for security, and a renunciation of all legal right of redemption are so significant of oppression, and so calculated to invite to or result in wrong and injustice on the part of the stronger toward the weaker party in the transaction, as in themselves to constitute a *quasi* fraud against which equity ought to relieve, as it does against the strict letter of an express condition of forfeiture. The grounds of relief being purely equitable, it may and should be refused if the equitable considerations upon which it rests are want-

[1] See Graham v. Railroad Co., 102 U. S. 148. Compare Eaton v. Perry, 29 Mo. 96; Prosser v. Edmonds, 1 Y. & C. 481; French v. Shotwell, 5 Johns. Ch. (N. Y.) 555; Crocker v. Bellangee, 6 Wis. 645; Hovey v. Holcomb, 11 Ill. 660; McAlpine v. Sweetzer, 76 Ind. 78.

[2] Campbell v. Dearborn, 109 Mass. 130; Carr v. Carr, 52 N. Y. 251; Stevens v. Wiley, 165 Mass. 406, 43 N. E. Rep. 177; Minchin v. Minchin, 157 Mass. 265, 32 N. E. Rep. 164. See § 238.

ing. Therefore an absolute deed made by a debtor to one creditor, with the intention to defraud other creditors, will not be adjudged an equitable mortgage at the solicitation of the debtor. Fraud against creditors cannot be set up, it is true, by any one not standing upon the rights of a defrauded creditor to defeat any legal claim or interest which the fraudulent debtor may seek to enforce. But such a party is in no condition to ask a court of equity to interfere actively in his behalf, to secure to him the fruits of his fraudulent devices. One who comes for relief into a court whose proceedings are intended to reach the conscience of the parties, must first have that standard applied to his own conduct in the transactions out of which his grievance arises. If that condemns him he cannot insist upon applying it to the other party.[1]

§ 404a. **Redeeming mortgaged property.** — The courts will not seek to enlarge the scope or legal effect of a transaction that is tainted with a design to defraud creditors. Hence where property is pledged or mortgaged by a debtor the pledgor or mortgagor will be permitted to redeem it though the design to defraud creditors may have been present in his mind when the pledge was made or the loan procured. Such a transaction does not in itself purport to vest an absolute title in the pledgee or mortgagee, and the courts will not strive to enlarge or vary its operation merely to inflict punishment upon a fraudulent debtor by cutting off the right to redeem.[2] Another illustration may be cited. In Gowan v. Gowan[3] it was expressly decided that where a debtor deposits personal property with a bailee to protect it from creditors, the bailee cannot defeat the debtor's action to recover the property by setting up the fraud.

[1] Hassam v. Barrett, 115 Mass. 256, 258; Brown v. Reilly, 72 Md. 489, 20 Atl. Rep. 239; but see Halloran v. Halloran, 137 Ill. 100, 27 N. E. Rep. 82.

[2] See Smith v. Quartz Mining Co., 14 Cal., 242; Taylor v. Weld, 5 Mass. 109, 116; Jones v. Rahilly, 16 Minn. 320.

[3] 30 Mo. 472.

CHAPTER XXVII.

JURISDICTIONAL QUESTIONS — CONCLUSION.

§ 405. Jurisdiction beyond State boundaries.
406. Outside county of defendant's residence.
§ 407. Appeal to United States Supreme Court—Uniting claims.
407*a*. Certificate of division.

§ 405. Jurisdiction beyond State boundaries.— A few general observations will bring the discussion to a close.

Parties conducting litigations for creditors may be reminded that the courts of one State cannot entertain jurisdiction of an action to recover lands lying in another State, where the proceeding is *in rem*,[1] for actions for the recovery of real property, or for the determination of an interest therein, are local and must be brought in the State and county where the premises are situated.[2] But where the court has jurisdiction of the proper parties, it may, by its judgment or decree, as we have seen, compel them to do equity in relation to lands located without its jurisdiction. The court in such case acts *in personam*,[3] and may compel a specific performance of a contract for the sale of land beyond the borders of the State,[4] or a conveyance of lands outside the State jurisdiction when

[1] Gardner v. Ogden, 22 N. Y. 333.

[2] Sedgwick & Wait on Trial of Title to Land 2d, ed., § 465, and cases cited. See American Union Tel. Co. v. Middleton, 80 N. Y. 408; Blake v. Freeman, 13 Me. 130. Foreign statutes have no force *ex proprio vigore*, but the title of a foreign assignee may be recognized by comity if this can be done without injustice to home citizens. Matter of Waite, 99 N. Y. 433.

[3] Gardner v. Ogden, 22 N. Y. 333; Arglasse v. Muschamp, 1 Vern. 75; Penn v. Lord Baltimore, 1 Ves. Sr. 444; Paschal v. Acklin, 27 Tex. 173; Dale v. Roosevelt, 5 Johns. Ch. (N. Y.) 174; Newton v. Bronson, 13 N. Y. 587; Sutphen v. Fowler, 9 Paige's Ch. (N. Y.) 280; Great Falls Mfg. Co. v. Worster, 23 N. H. 462.

[4] Newton v. Bronson, 13 N. Y. 587.

the title has been fraudulently obtained by a defendant;[1] and a debtor may be compelled to convey lands in another State for the benefit of creditors, so as to vest in the grantee the legal title.[2] So the court has power to decree the cancellation of a void mortgage which is an apparent lien and cloud upon property beyond the jurisdiction of the court. "This power," says Johnson, J., "has been frequently exercised to compel parties to perform their contracts specifically, and execute conveyances of lands in other States, and also to set aside fraudulent conveyances of lands in other States."[3] "Where the necessary parties are before a court of equity," said Swayne, J., "it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him."[4] Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and enforce obedience to their decrees by process *in personam*.[5]

The law of the domicile of the owner governs the validity of a transfer of personal property.[6]

§ 406. Outside county of defendant's residence.— In a case which arose in Georgia,[7] it appeared that the constitution and laws of that State required that suits must be brought in the county in which the defendant resided, and it was

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[1] Gardner v. Ogden, 22 N. Y. 327.

[2] Bailey v. Ryder, 10 N. Y. 363.

[3] Williams v. Ayrault, 31 Barb. (N. Y.) 364, 368.

[4] Phelps v. McDonald, 99 U. S. 308; Municipal Investment Co. v. Gardiner, 62 Fed. Rep. 956; Hart v. Sansom, 110 U. S. 151, 3 S. C. Rep. 586.

[5] Miller v. Sherry, 2 Wall. 249; Mitchell v. Bunch, 2 Paige (N. Y.) 606.

[6] Barth v. Backus, 140 N. Y. 230, 35 N. E. Rep. 425.

[7] Taylor v. Cloud, 40 Ga. 288. See Johnson v. Griffin, 80 Ga. 553, 7 S. E. Rep. 94.

held that it was good ground of demurrer to a bill in equity to set aside a fraudulent conveyance of land that it was not filed in the county of the defendant's residence. The defect was held not to be cured by the fact that the bill was filed in the county where the land was situated, or because a lessee of the defendant in possession of the property was a party to the bill, when no substantial relief was sought against such tenant.[1] This is exceptional practice, for, at least so far as realty is concerned, the action to set aside a conveyance would be local, and local actions should be brought in the county where the land lies.[2]

In Missouri a judgment-creditor who acquires title to land situated in different counties, by purchase at sheriff's sale, may bring a single action to set aside conveyances made by the debtor to a single person. Separate suits in each county need not be brought.[3]

§ 407. **Appeal to United States Supreme Court — Uniting claims.** — When judgment-creditors join in a suit to set aside a fraudulent conveyance by their debtor, and the amounts found due to the creditors respectively are less than the jurisdictional limit of the United States Supreme Court, the several claims cannot be united to give jurisdiction on appeal.[4] In Seaver v. Bigelows,[5] Nelson, J., said: "The judgment-creditors who have joined in this

[1] See Smith v. Bryan, 34 Ga. 53. See Caswell v. Bunch, 77 Ga. 505.

[2] Sedgwick & Wait on Trial of Title to Land, 2d ed., § 465; Augusta Sav. Bank v. Stelling, 31 S. C. 360, 9 S. E. Rep. 1028.

[3] Lindell Real Estate Co. v. Lindell, 133 Mo. 394, 33 S. W. Rep. 466.

[4] Schwed v. Smith, 106 U. S. 188; Gibson v. Shufeldt, 122 U. S. 27, 7 S. C. Rep. 1066; Davis v. Schwartz, 155 U. S. 647, 15 S. C. Rep. 237; New Orleans Pac. Ry. Co. v. Parker, 143 U. S. 42, 12 S. C. Rep. 364; Busey v. Smith, 67 Fed. Rep. 13; Putney v. Whitmire, 66 Fed. Rep. 386. See Fourth National Bank v. Stout, 113 U. S. 684, 5 S. C. Rep. 695; Hawley v. Fairbanks, 108 U. S. 548, 2 S. C. Rep. 846; *Ex parte* Phœnix Ins. Co., 117 U. S. 369, 6 S. C. Rep. 772; Tupper v. Wise, 110 U. S. 398, 4 S. C. Rep. 26; Stewart v. Dunham, 115 U. S. 61, 5 S. C. Rep. 1163.

[5] 5 Wall. 208; Hunt v. Bender, 154 U. S. 556, 14 S. C. Rep. 1163.

bill have separate and distinct interests depending upon separate and distinct judgments. In no event could the sum in dispute of either party exceed the amount of their judgment. . . . . The bill being dismissed each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each." In Schwed v. Smith [1] the same court held that if the decree was several as to creditors it was difficult to see why it was not also several as to their adversaries, the theory being that although the proceeding was in form but one suit, its legal effect was the same as though separate suits had been instituted on each of the separate causes of action.[2]

§ 407a. Certificate of division.—Whether a sale and delivery of a debtor's stock of goods, by way of preference of a *bona fide* creditor, is fraudulent against other creditors, involves a question of fact, depending upon all the circumstances and cannot be referred to the United States Supreme Court by certificate of division of opinion.[3]

This closes the discussion. We have traced the famous statute of Elizabeth from its enactment to the present time, and have seen how important the place it fills has become in our jurisprudence. Twyne's case is still a great land-mark in this branch of the law. The volume of litigation engendered by covinous alienations is scarcely creditable to the integrity of our people. The ability of the courts to successfully grapple with fraudulent debtors and purchasers in bad faith, without the coercive aid of imprisonment, in view of the growth of statutory exemptions and spendthrift trusts, frequently becomes a matter

[1] 106 U. S. 188, 1 S. C. Rep. 221.

[2] See *Ex parte* Baltimore & O. R. R. Co., 106 U. S. 5, 1 S. C. Rep. 35.

[3] Jewell v. Knight, 123 U. S. 426, 8 S. C. Rep. 193. Compare Graver v. Faurot, 162 U. S. 435, 16 S. C. Rep. 136.

of grave doubt. Hence it is that the existence of cases accomplishing results like those of Cutting v. Cutting,[1] and Broadway Bank v. Adams,[2] is to be so deeply deplored. That the law formulating the rights and regulating the remedies of creditors against covinous conveyances and for the conversion of equitable assets is developing in the right direction, and becoming more effectual against the debtor class is claimed in some directions. It is still, however, in an unsatisfactory condition. The many forms in which a debtor's assets can be secreted or spirited away, and his income protected, and the endless varieties of fraudulent devices, render the solution of the problem a matter of extreme difficulty. Time and experience alone can work out a satisfactory conclusion. The development must of necessity be in the courts, and there is need that the pendulum should swing to the creditor's side; we doubt the ability of the legislative power to further materially progress this branch of our law.

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[1] See § 40.

[2] See § 367.

INDEX.

[*References are to sections.*]

ABANDONED exemptions, 50.
creditors may seize, 50.
rule applies to homestead, 50.
ABOLITION of imprisonment, 2.
cause of fraudulent transfers, 2.
effect upon remedies, 2.
restricts creditors' rights, 2, 407*a*.
ABSCONDING and non-resident debtors, 84.
remedies against, 84.
policy of the different States, 84.
ABSENCE of means in vendee, 241, 274.
effect of proof of, 241, 274.
general reputation as to means, admissible, 274.
of presumptions of fraud, 5, 6, 224.
ACCOUNT BOOKS, as evidence, 271*a*.
ACCOUNTING, by fraudulent vendee to debtor, 176.
effect of, 176.
vendee need not account second time, 176.
for rents, 26, 176.
for improvements, 26.
judgment on, 51, 176.
ACCUSED person, may testify as to intent, 205 *n*.
ACQUIESCENCE. *See* RATIFICATION.
by laches, 148, 287.
estoppel by, 91.
ACTION, alienation pending, 157.
ACTION AT LAW. *See* CREDITORS' REMEDIES — COMPLAINANTS.
creditors may proceed by execution, 59.
treat transfer as nullity, 59.
does not interfere with remedy in equity, 60.
advantages of suit in equity over, 60.
ACTIONS, *ex delicto*, bill of particulars allowed by grace, 162*a*.

ACTS speak louder than words, 8, 196.
done or omitted, 8, 8 *n.*
ACTUAL motive or intent, when unimportant, 9, 10, 197, 322, 382.
ACTUAL AND CONSTRUCTIVE FRAUD, 60, 192.
distinction between, as regards reimbursement, 192.
fraud in fact defeats reimbursement, 192.
the principle discussed, 192.
change of possession required, 253.
intent not decisive, 10, 197, 322, 382.
ACTUAL NOTICE, 372, 389.
See NOTICE.
ADJUDICATION, of debt, 74, 74 *n.*
ADMEASUREMENT, dower before, available to creditors, 33.
reached in supplementary proceedings, 61.
ADMINISTRATORS, as complainants, 112, 113.
as defendants, 136, 136 *n.*
conveyance binding upon, 112, 113, 398.
rule in New York, 112.
may sue for cancelled debt, 42.
ADMITTED facts in pleading, 285.
cannot be contradicted, 285.
ADVANCES, future, 217.
ADVERSE POSSESSION, as defense to suit, 292.
AFFIRMANCE, of common law, statute of Elizabeth, 16.
AFFIRMATIVE, relief, rule as to, 166.
statute does not repeal common law, 16.
proof of deceit, 5.
AGENT, husband as, for wife, 303.
fraud of, affects principal, 198.
knowledge and notice must be clear, 198.
AGREEMENT to prefer, validity of, 390, 394.
AID, when extended to grantors, 399, 400.
See EXISTING CREDITORS, SUBSEQUENT CREDITORS.
AIDING DESCRIPTION, by evidence, 157.
attachment by injunction, 53.
ALABAMA, creditor without judgment may file bill, 73 *n*, 85.
joinder of claims, 85, 108.
debt must be due, 73 *n.*
as to change of possession, 250.
spendthrift trusts, 367*a.*
personal representative may file bill, 113 *n.*
ALIENATION, restraints upon, 14, 361, 362.
See SPENDTHRIFT TRUSTS.

ALIENATION — *continued.*
property susceptible of fraudulent, 23.
aversion to restraints upon, 360, 362.
English and American cases concerning, 361 *n.*
claims prior and subsequent to, 105.
pending suit, 157.
doctrine of *lis pendens*, 157.
ALIMONY, conveyance to defeat, 110 *n.*
may be avoided, 110 *n.*
receiver for collection of, 188.
reaching trust income, 45.
no injunction to hold land subject to, 52.
ALIUNDE evidence of fraud, 236.
ALLEGING insolvency, 143.
fraud, 141.
conspiracy generally, insufficient, 141.
consideration, 144.
See COMPLAINT.
ALLOWANCE, for improvements, 192 *n*, 193 *n.*
for wife, may be reached by her creditors, 22.
to fraudulent vendee, 176.
ALTERING MORTGAGE, effect of, 347.
ALTERNATIVE RELIEF, when extended, 153.
cumulative remedies, 65.
AMENDMENT OF COMPLAINT, 83, 156.
as to description, 156.
as to statement of value, 156.
rule as to permitting, 156.
of pleading, discretionary, 156.
AMERICAN, devise, assignments claimed to be, 316.
AMOUNT, of settlement, 306.
of consideration, 207, 223.
ANCESTOR'S DEED, not impeached by heir, 121.
ANCIENT LAWS, against insolvents, 1, 1 *n.*
ANCIENT POWER, of creditors, 1, 1 *n.*
ANCIENT PRACTICE, as to necessity of judgment, 85.
ANCILLARY RELIEF, by equity, 60.
collateral to maintain action, 63.
discovery as, 147.
ANDERSON *v.* BLOOD, change in the law, 376*a.*
"AND OTHERS," meaning of, 110.
who embraced in, 110.
claimant of alimony, 110 *n.*

ANNUITIES may be reached, 24, 45.
ANOTHER ACTION, pending, 286*a*.
ANSWER OR PLEA, 158–167.
(1.) *Generally*, 158.
accepted as true, when, 158, 159, 160.
fraud not presumed, 5, 6, 158.
affirmative defense, 158.
inconsistent defenses, 158.
facts attacking title, 158.
allegations of knowledge or notice, 158.
bill of particulars, 162*a*.
denying fraud or notice, 163.
overcoming denial in, 159.
as evidence, 159, 159 *n*, 160.
admission and avoidance, 164.
evidence of witness against, 160.
receiver before, 184.
(2.) *Pleading to discovery and relief*, 161.
rules as to, 161.
particularity of denial in, 162.
avoiding discovery, 165.
(3.) *Affirmative relief*, 166.
must be claimed in answer, 166.
what accomplished by, 166.
(4.) *Verification*, 167.
pleadings usually verified, 167.
waiver of verification, 167.
sworn answer taken as true, 160.
ANTECEDENT agreement to prefer, 342*a*, 394.
creditors, sharing with subsequent, 104.
ANTEDATING instrument, badge of fraud, 229.
ANTE-NUPTIAL SETTLEMENT, marriage as consideration, 212, 306.
fraud in, 302.
ANTICIPATING income by assignment, 367.
APPARENT FAIRNESS, will not save transaction, 241.
APPARENT LACHES, excusing, 148.
APPARENT OWNERSHIP, rights acquired, 287.
APPELLATE TRIBUNAL, objection to jurisdiction in, 88, 88 *n*.
APPOINTMENT of receiver, in judgment, 170.
in supplementary proceedings, 61, 116.
of corporation, 117.
contests over realty, 187.

APPOINTMENT — *continued.*
to collect alimony, 188.
of various interests, 188.
when matter of course, 184.
in foreclosure, 187 *n.*
See RECEIVER.
ARKANSAS, change of possession, 250.
trust income, 367*a*.
ARREST OF DEFENDANT, 191.
rule in New York, 191.
actual intent to defraud must be shown, 191.
constructive fraud insufficient, 191.
of partner, 191.
lex fori governs right to, 64, 191.
ARTICLES OF SEPARATION, 310.
become voluntary settlement upon reconciliation, 310.
ASSAULT, claims for, cannot be reached, 34.
claims do not pass to assignee, 316*a*.
alienations to avoid demands for, 22.
ASSENT, of assignee, 316*b*.
ASSERTIONS OF GOOD FAITH, inconclusive, 8.
See BONA FIDE PURCHASERS.
ASSETS, available to creditors, 23–42.
membership of stock exchange constitutes, 35.
tangible property may be reached, 24.
expectant estate, 24, 29.
products of land, 24.
promissory notes, 24.
bank bills, 24.
money, 24.
improvements, rents, and profits are, 26.
crops constitute, 27.
exceeding liabilities in assignments, 340.
property substituted or mingled, 28.
estates in remainder or reversion, 29.
equitable interests, 30.
equity of redemption, 31.
reservations, 32, 272.
of corporation, trust fund, 117, 119, 139.
choses in action, 33.
trade-marks, 36.
book royalties, 37.
patent rights, 24, 38.

ASSETS — *continued.*
powers, 39, 40.
promises of third parties, 43.
income of trust estate, 45, 360, 364, 366.
intentional omission of, 345.
pursuit of, when corporation changes name, 119.
squandering, by directors, 119.
What are not assets.
exempt property, 46–50, 365.
gifts of small value, 41.
powers, in New York, 40, 368*a*.
powers, in Pennsylvania, 368*a*.
claims for torts, 34.
income of trust estate, 360–368.
talents or industry, 50*a*.
payments made to a debtor, 50*b*.
ASSIGNED PROPERTY, value as affecting, 23.
ASSIGNEE. *See* FRAUDULENT GENERAL ASSIGNMENTS.
gets title to trade-marks, 36.
property transferred to, 316*a*.
may sue in replevin, 316*a*.
not an officer of the court, 316.
control of courts over, 316.
general, rights of, as complainant, 92, 115.
attacks fraudulent conveyances in New York, 115.
in bankruptcy, as complainant, 114.
title of, 35, 36, 114, 115, 364.
may sue carrier, 316*a*.
exempting from liability, 334.
authority of, to compromise, 336.
fraud of, 337.
innocent, rights of, 319.
ignorance or incompetency of, as badge of fraud, 338.
as defendant, 133.
assignor cannot substitute successor for assignee, 316.
rights and duties of, 319*a*.
not personally liable, 319*a*.
must exercise ordinary prudence, 319*a*.
in bankruptcy, as complainant, 114.
represents creditors, 114, 115.
property reverts after discharge, 114.
discharge of, 114.
reaching fund in hands of, 44.

ASSIGNEE — *continued.*
no attachment of funds in hands of, 77 *n.*
estoppel of creditor by accepting benefits, 115.
effect of neglect to sue, 115 *n.*
ASSIGNMENT, 316–346.
See FRAUDULENT GENERAL ASSIGNMENTS.
what constitutes, 316.
construed like other contracts, 20 *n*, 343.
action in aid of, 109.
creditors may overturn, 108.
bill of particulars as to fraud in, 162*a*.
creditors, when estopped to attack, 115.
assailing and claiming under, 316 *n.*
debtor defendant in suit to cancel, 128.
takes effect from delivery, 316*a*.
ASSIGNOR, must not withhold assets, 316*a*.
See FRAUDULENT GENERAL ASSIGNMENTS.
ASSUMPSIT, remedy by, 62.
will not lie against fraudulent vendee, 62.
damages in, 62.
ASSUMPTION, of liability as consideration, 209.
by surety of principal's debt, 209.
ATROCIOUS frauds, under forms of law, 5 *n.*
ATTACHMENT, against property in name of third party, 57.
specific lien by, 81.
New York rule, 81, 81 *n.*
not usually sufficient to support creditors' bill, 81.
judgment in suit by, 77.
conveyance to defeat,void, 11.
injunction in aid of, 53, 73, 185.
not good against assignee, 77 *n.*
rights of creditors, 394*a*.
simple contract creditors may have, 73 *n.*
ATTACKING CREDITORS, status of, 73–88.
See STATUS OF ATTACKING CREDITORS.
ATTACKING, different conveyances, 154.
title on ground of fraud, 158.
judgments, 286*b*.
consideration, 297*b*.
ATTORNEY, authorized to take supplementary proceedings, 61 *n.*
provision for fees of, 335.
renders assignment fraudulent, 335.

ATTORNEY — *continued.*
as fraudulent vendee, 62.
conspiring with debtor, 62.
AUTHORITY, to compromise debts, 336.
effect of, in assignment, 336.
AVAILABLE assets for creditors, 23–50, 50*a*.
what interests may be reached, 23–45.
not exempt property, 46–50, 365.
what cannot be reached, 50*a*.
AVERMENTS of complaint, 140–157.
of delivery of deed, 140 *n*.
of answer, 158–167.
of fraud, 141.
AVERSION to exemptions not statutory, 360.
AVOIDING, denial in answer, 159.
must be overcome by competent proof, 159.
discovery, 165.
AWAKENING SUSPICION, is notice, 379.
BADGES OF FRAUD, 224–244.
(1.) *Indicia or badges of fraud*, 6, 224, 225.
what constitute, 224, 225.
suspicious circumstances, 225.
in Twyne's case, 22.
theory of the law, 224.
"a fact calculated to throw suspicion on the transaction," 225.
not conclusive evidence, 225.
strong and slight badges, 225.
burden of proof changed by, 225.
must be passed upon by jury, 226.
(2.) *Recital of fictitious consideration*, 228.
how considered, 228.
important badge of fraud, 228.
exaggerated indebtedness, 228.
misleading statement, 228.
excessive mortgage, 228.
must be intentional, not accidental, 228.
(3.) *Antedating instrument*, 229.
is an *indicium* of fraud, 229.
date not essential part of instrument, 229.
(4.) *Vague description as badge of fraud*, 230.
submitted to jury as a circumstance, 230.
how explained, 230.

BADGES OF FRAUD — *continued.*
(5.) *Generality of the conveyance*, 22, 231.
raises presumption of fraud, 231.
different views of the courts, 231.
regarded as unusual, 231.
was one of the badges in Twyne's case, 22, 231.
various illustrations, 231.
continued possession, 231*a*, 245–267.
(6.) *Inadequacy of purchase price*, 232.
effect of, as evidence, 232.
does not prove fraud, 232.
unless extremely gross, 6, 232.
only a circumstance, 232.
(7.) *Transfer pending suit*, 22, 157, 233.
how regarded, 233.
scanned with much suspicion, 233.
(8.) *Secrecy, evidence of*, 234, 272.
is fact from which fraud may be inferred, 234.
is not fraud by itself, 234 *n.*
secret trust, 234*a*.
(9.) *Suppression or concealment*, 235, 236.
subsequent acts of fraud avoiding transfer, 235.
failure to record instrument, 234 *n*, 235.
excusing failure to record, 235, 235 *n.*
(10.) *Concealment in fraud of bankrupt act*, 237.
the test applied, 237.
(11.) *Absolute conveyance by way of security*, 238.
proving absolute conveyance a mortgage, 238.
valid if no fraud intended, 238.
effect of secret reservation, 238.
convenient cover for fraud, 238.
excess of property mortgaged, 238*a*.
(12.) *Sales upon credit*, 240, 332, 333.
not necessarily fraudulent, 240.
is a circumstance, 240.
when considered fraudulent, 240.
(13.) *Unusual acts and transactions*, 241.
many illustrations, 241.
partial explanations, 241.
neglect to offer explanations, 241.
non-attendance of defendant, 241 *n.*
unusual particularity, 241.
absence of memoranda, 241.

BADGES OF FRAUD — *unusual acts and transactions — continued.*
false receipt, 241.
exceptional and peculiar conduct, 241.
absence of means in the vendee, 241, 274.
painstaking legal formalities, 241.
(14.) *Effect of relationship*, 242.
calculated to awaken suspicion, 242.
transaction will be closely scrutinized, 242.
not necessarily evidence of fraud, 242.
when coupled with other badge, 242.
mother and son, 242.
(15.) *Prima facie cases of fraud*, 243.
comments, 244.
BAILEE, cannot set up fraudulent title, 107 *n.*
BANK BILLS, may be reached, 24.
BANKRUPT ACT, concealment in fraud of, 237.
purpose of, to defeat preference, 390 *n.*
assignee under, 114.
BANKRUPTCY, bond payable on, when void, 364 *n.*
assignee in, as complainant, 114.
discharges as a defense, 294.
and insolvency discharges, 294.
property reverts after, 114.
dower not barred by, 315.
BEGIN AND REPLY, right to, 271 *n.*
BENEFICIARIES, as defendants, 128.
BENEFITS, estoppel by accepting, 115.
BILL IN EQUITY, 68.
See CREDITORS' BILLS — COMPLAINT.
merits of relief by, discussed, 51, 60, 68.
forms of relief, 4, 51–72.
offer to repay purchase price, 192.
BILL OF PARTICULARS, discretionary, 162*a*, 341*d*.
actions, *ex delicto*, allowed by grace, 162*a*.
when granted or refused, 162*a*.
BISPHAM, definition of creditors' bills by, 68.
BLACK, J., views as to presumptions, 7.
BLATCHFORD, J., views of, 291.
as to ignorance of fraud, 291.
limitations in equity, 291.
BLINDNESS of assignee, badge of fraud, 338.
BONA FIDE purchasers, 21, 369–384.
See NOTICE.

BONA FIDE — *continued.*
rights of, superior to creditors, 369.
theory of the law, 369.
payment of consideration constitutes substitution of property, 369.
statute 27 Eliz., 21.
plea of, 163.
(1.) *Title of purchaser, how protected*, 369.
three things must concur, 369.
must buy without notice, 369.
must be purchaser for value, 369.
burden of proof, 158.
(2.) *Generality of the rule*, 370.
when equities are equal the law prevails, 370.
(3.) *Mortgagee as bona fide purchaser*, 371.
rule in New York, 371.
pre-existing indebtedness as consideration, 371.
(4.) *Without notice*, 372.
kinds of notice, 373.
constructive notice of fraud, 374–382.
rule in Stearns *v.* Gage, 375, 376.
Parker v. Connor, 378.
facts sufficient to excite inquiry, 378, 380, 381.
actual belief, 382.
purchaser with notice, 383, 384.
BONA, *sed impossibilia non cogit lex*, 83.
BOND OF GUARDIAN, surety on, 90 *n.*
BOOK ENTRIES, proof of against debtor, 271*a*.
BOOK ROYALTIES, may be recovered, 24, 37.
remedy to recover, 37.
BOOKS OF ACCOUNT, as evidence, 271*a*.
BOTH PARTIES, must be implicated in fraud, 183.
BRANDING CATTLE, sufficient delivery, 262
BRETT v. CARTER, rule embraced in, 353.
BROADWAY NATIONAL BANK v. ADAMS, 367.
the case criticised, 367.
BROTHER, conveyance by sister to, not fraudulent, 5.
BURDEN OF PROOF, 158, 208, 271.
conveyances by husband to wife, 301.
rests on party asserting affirmative of the issue, 271.
generally rests on creditor, 271.
shifting, by showing fraudulent intent, 271.
as to explanations, 271.

BURDEN OF PROOF — *continued.*
as to consideration, 201.
to repel presumption, 225.
right to begin and reply, 271 *n.*
as to trust income, 45.
to secure parties, on plaintiff, 128.
BUSINESS, authorizing trustee to continue, 330.
continuance by insolvent, 143 *n.*
BUSINESS TRANSACTIONS, presumed to be honest, 5.

CALIFORNIA, fraudulent sale absolutely void, 16 *n.*
proceedings against debtor's estate, 112.
voluntary conveyance not presumptively fraudulent, 208.
CAMPBELL v. FOSTER, relied on in Nichols v. Eaton, 365.
discarded in Williams v. Thorn, 45, 365.
not the law of New York, 45, 365.
CANCELLING worthless debt, not a fraudulent alienation, 23.
debts, when fraudulent, 42.
by testator, not good against creditors, 42.
CAPITAL STOCK, a trust fund, 117, 119, 68 *n.*
See CORPORATION.
CARELESS EXPRESSIONS, not poof of fraud, 5.
CARELESSNESS, not proof of fraud, 5.
CASE, action on the, 62.
not appropriate against vendee, 62.
damages too remote, 62.
CASE v. BEAUREGARD, discussed, 83.
CATTLE roaming over plains, delivery of, 262.
requisites of the change of possession, 262.
branding cattle, sufficient delivery, 262.
CAUFFMAN v. VAN BUREN, explained, 81.
re-explained, 86 *n.*
CAUSE, of fraudulent transfers, 2.
CAUSES OF ACTION, misjoinder of, 135.
uniting, 55, 154.
CERTIFICATE of division, 407*a*.
CESTUI QUE TRUST, and trustee, 137.
need not have judgment, 127*a*.
decree, when binding on, 137.
suits in furtherance of, and opposition to trust, 137.
when to be joined, 137.
may trace insurance money, 44.
CHAIN of evidence, 224.

CHANGE IN ASSIGNMENT, parties cannot make, 316.
CHANGING SECURITIES, existing creditor, 89.
CHANGE OF POSSESSION, delivery, 245, 246–267.
concerning possession, 245.
defined, 245, 253, 257, 259.
feature of Twyne's case, 22, 245.
changes in the law, 245.
undue prominence of the subject, 245.
cases of bailments, 245.
excusing want of change of possession, 263.
on judicial sale, 265.
of growing crops, 266.
under general assignment, 316.
as regards chattel mortgage, 356*b*.
(1.) *Possession as proof of fraud*, 247.
prima facie evidence, 247, 248.
criticisms of the doctrine, 247.
statutory policy, 247.
New England cases, 249.
rule in New York and various other States, 250, 251.
repelling inference of fraud, 250.
rule in Federal tribunals, 250.
between husband and wife, 253.
(2.) *Conclusive evidence, when*, 251.
theory of the cases, 251.
results of the conflicting policies, 252.
the principle discussed, 252.
(3.) *Actual change of possession required*, 253.
change cannot be effected by words, 253.
must be by outward and visible signs, 253.
assumption of ownership by vendee, 253.
questions for the jury, 254.
overcoming the presumption, 255.
(4.) *Requisites of the change*, 253, 256, 257, 258, 259.
possession within a reasonable time, 256.
change must be continuous, 257.
separating stock, 253.
temporary resumption of possession, 258.
concurrent possession insufficient, 259.
possession of bailee, 260.
no delivery where purchaser has possession, 261.
overcoming presumption, 255.

CHANGE OF POSSESSION — *continued.*
(5.) *When technical delivery is not essential*, 262.
cattle roaming over plains, 262.
delivery of logs, 262.
vessel at sea, 262.
squared timber, 262.
(6.) *Change of possession of realty*, 264.
rules as to, stated, 264.
CHANGE OF VENUE, territorial jurisdiction, 157*a*.
CHARACTERISTICS of fraudulent conveyances, 15.
made to avoid a debt or duty, 15.
mutual fraud and injury, 15.
CHARITY, gifts to, 217*a*.
CHATTEL MORTGAGES, questions affecting, 347.
rights of purchaser of, 168.
when fraudulent, 347–359.
can be used only as security, 347.
fraud in vitiates, 357 *n*.
of perishable property, 359.
higher security than land mortgage, 347.
in excess of debt, 347.
overstatement of debt, 347.
altering mortgage, 347.
creditor at large cannot assail, 347.
(1.) *Questions affecting, regulated by statute*, 347.
effect of record of, 347.
repels presumption of fraud, 347.
(2.) *Mortgage with power of sale*, 267, 348–355.
rule in Robinson v. Elliott, 348–351, 354.
the case stated, 348.
similar cases, 349.
proof extrinsic to the instrument, 350.
comments in the cases, 351.
(3.) *Rule opposed to Robinson* v. *Elliott*, 352.
Brett v. Carter, and similar cases, 353.
recent opinion of Supreme Court, 353.
discussion of the principle involved, 354.
(4.) *Sales for mortgagee's benefit*, 355.
considered legal, 355.
New York cases, 355.
mortgagor acts as agent, 355.
(5.) *Sales upon credit*, 240, 332, 333, 356.
not tolerated, 356.

CHATTEL MORTGAGES — *sales upon credit — continued.*
tend to hinder and delay creditors, 356.
(6.) *Possession, independent valid transaction*, 357.
void mortgage cannot be transmuted into valid pledge, 357.
pledge, independent of fraudulent mortgage, sustained, 357.
(7.) *Right of revocation; reservations*, 358.
when inconsistent with transfer may be avoided, 358.
(8.) *Rule as to consumable property*, 359.
mortgage upon, fraudulent, 359.
when valid, 359.
intent in such cases, 359.
(9.) *Generally*, 356*a*, 356*b*.
secret trust, 356*a*.
change of possession, 356*b*.
distinct claims, 359*a*.
CHOSES IN ACTION, covinous transfers of, voidable, 17, 22, 33.
conflict in the cases, 33.
true rule applicable to, 33.
what included in, 33 *n*.
CIRCUMSTANCES, proof of fraud from, 5, 13, 224, 225, 227, 281.
evidence of, 281.
must be persuasive, 5, 6.
intent inferred from, 8, 206.
great latitude in admission of evidence of, 281.
suspicious, as proof of fraud, 225.
evidence of, wide range given, 281.
proof of fraud from, must be strong, 281.
test as to admission of, 281.
direct proof of fraud not attainable, 13.
CIRCUMSTANTIAL and direct evidence, 5, 5 *n*, 6, 227.
CLAIMS, for pure torts not assignable, 34, 316*a*.
injury to property may be reached, 34.
joinder of, 54, 55.
prior and subsequent to alienation, 105.
CLASSES of fraudulent conveyances, 15.
three elements must concur, 15.
of creditors, existing and subsequent, 89.
of creditors' suits, 68, 68 *n*.
CLASSIFIED demand, sustains bill, 76.
CO-CONSPIRATORS, declarations of, 280.
when admissible, 280.
must relate to transaction under investigation, 280.
purpose of the rule, 280.

COLLATERAL ATTACK of transfers, rule as to, 69.
exceptional practice in Louisiana, 69.
COLLATERAL, relief to main action, 63.
facts as evidence of fraud, 281, 282.
attack on judgment, 270.
COLLATERALS, not considered in proving claim, 51 *n.*
COMBINATIONS, in equity, allowed, 108 *n.*
COMITY, between States, 64, 346.
the principle applied, 64, 346.
yields in favor of residents, 64, 46.
recognition of receivers by, 118.
COMMON FUND, when liable for expenses, 109.
COMMON LAW, suspension of alienation void at, 362.
statute of Elizabeth declaratory of, 16.
enjoins integrity, 16.
rule as to presumption of its existence, 64 *n.*
rule as to competency of party, 269.
maxims of, 20 *n.*
fraudulent conveyances at, 16.
affirmative statute does not repeal, 16.
how far statute abrogates, 20 *n.*
COMPETENCY, of party as witness, 269.
defendant may be compelled to testify, 269.
rule of the common law, 269.
of wife as witness, 313.
COMPLAINANTS, who may be, 107–127, 127*a*, 89–106.
(1.) *Who may assail fraudulent conveyances*, 73, 107.
status of complainants, 73–88, 107.
conveyances voidable only as to creditors, 107, 395–404.
question of parties difficult, 107.
interested parties *in esse* must be joined, 107.
sequestrator as, 116.
(2.) *Joinder of complainants*, 108, 108 *n.*
creditors by several judgments, 108.
judgment-creditors cannot unite at law, 108*n.*
creditors by judgment and decree, 108.
theory as to joinder, 108.
motion to intervene discretionary, 108 *n.*
laches in application, 109.
combinations allowed, 108, 108 *n.*
hostile claimants cannot join, 108.
(3.) *Suing for others*, 109, 110.
rules regulating, 109.

COMPLAINANTS — *suing for others — continued.*
"and others" interpreted, 110.
equity of a creditor, 110.
in aid of assignment, 109.
stockholders suing for corporation, 109.
wife as creditor, 110 *n.*
(4.) *Surety, subrogation of*, 111.
entitled to stand in place of principal, 111.
(5.) *Executors and administrators*, 112, 113.
ordinarily bound by decedent's act, 112, 398.
statutory changes, 112.
rule in New York, 112.
may now impeach fraudulent transfers, 112, 113.
importance of the change, 113.
liability of representative, 113, 113*n.*
(6.) *Assignees*, 114, 115.
assignee in bankruptcy, 114.
title of, 114.
title of general assignee, 115.
when creditor may sue, 115.
(7.) *Receivers*, 116.
rights of, as complainants, 116.
disaffirm fraudulent dealings, 116.
of corporations, 117.
who represented by, 117.
foreign receivers, 118.
rule of comity, 118.
creditors of corporations, 119.
(8.) *Rights of various complainants*, 120–127.
sheriff, 81, 120.
heirs, 121.
legatee, 121*n.*
when heirs cannot sue, 121.
husband and wife, 122, 298–315.
widow, when not proper complainant, 121.
tort creditor, 123.
conveyance to avoid fine, 123*n.*
overseer of the poor, 124.
creditors having liens, 125.
purchasers removing incumbrances, 126.
cestui que trust, 127 *a.*
creditors opposing will, 127.
wife, when creditor, 122.

COMPLAINT, requisites of, 140–157*a*.
(1.) *Recitals of the complaint*, 140.
complainants must be creditors, 140.
indebtedness must be shown, 140.
alternative relief, 153.
in double aspect, 155.
remedy at law exhausted, 140.
alleging insolvency, 143.
concerning consideration, 144.
general averments, 140, 140 *n*, 141.
(2.) *Pleading fraud*, 141, 141 *n*.
fraud defined, 13, 141.
alleging fraud, 141, 141*n*.
word "fraud" need not be used, 141.
material facts must be alleged, 141.
charging knowledge, 141.
fraud in subsequent creditors, 141.
complaint by executor, 143.
(3.) *Evidence not to be pleaded*, 142.
general certainty sufficient, 142.
circumstances not to be minutely charged, 142.
circumstances applied in law, 142.
(4.) *Pleading in equity*, 60, 146.
more liberal than at law, 146.
seeking discovery, 147.
excusing laches, 148.
New York rule, 149.
explaining delay; discovery of fraud, 149, 149 *n*.
allegations concerning consideration, 144.
concerning intent, 145.
(5.) *Multifariousness*, 150, 151, 152.
complaints bad for, 150.
pleadings held not to be, 151, 152.
(6.) *Details of complaint*, 155–157.
prayer and verification, 155.
amendment of, 156.
description in, 157.
variance, 155.
seeking discovery, 147.
attacking different conveyances, 154.
lis pendens, 157.
COMPOSITION WITH CREDITORS, must be fair, 393.
illegal preference, 393*a*.

COPMROMISE, power in assignee to, 336.
how construed, 336.
with creditors, must be honest, 393.
effect of secret preferential agreement, 393.
when a fraud upon other creditors, 393.
antecedent agreement to prefer, 394.
CONCEALMENT OF FRAUD, 148, 234, 235.
pleading concerning, 148.
in fraud of bankrupt act, 237.
CONCLUSIVENESS of judgments, 74, 168, 270.
of transfers between parties, 395–401.
CONCURRENT remedies, legal and equitable, 51, 60.
cumulative remedies, 65.
possession insufficient, 259.
CONDITIONS treated as void, 361.
repugnant, are void, 362.
what are, 363 *n.*
CONDONATION of fraud, perfects title, 370.
CONDUCT that is fraudulent, 13.
CONFESSIONS, of different judgments, 54.
may be attacked in one suit, 54.
set aside in equity, 60.
collusive confessions avoided, 74 *n*, 174.
by administrator, 74 *n.*
sufficient to uphold creditors' bill, 76.
transfer by confessed judgment, 174.
ratification of, by creditor, 174.
CONFORMING testimony to pleadings, 285.
CONFUSION, of goods, does not destroy equity, 44, 44 *n.*
CONNECTICUT, change of possession, 251.
spendthrift trusts in, 367*a.*
CONSIDERATION, inadequacy of as evidence of fraud, 6.
disparity must be great, 6, 232.
allegations of complaint concerning, 144.
general subject, 207–223.
need not be in money, 207, 209.
promise to pay, 209.
pre-existing debt, 2.
assumption of liability, 209.
assumption by surety, 209.
paid by debtor for third party, 57, 57 *n.*
burden of proof, 208.
rule in New York, 208.

CONSIDERATION — *continued.*
in California, 208.
insignificant, 209.
(1.) *Concerning consideration and good faith*, 207–223.
defined, 207, 209.
moral obligations, 215.
individual and firm debts, 216.
when important as affecting alienations, 207.
what is valuable consideration, 209.
services by member of family, 218.
husband and wife, 210, 218.
sufficient consideration, 222.
insufficient consideration, 223.
exchange of property, 211*a*.
future services, 223.
alleging, 144.
(2.) *Voluntary conveyance*, 208.
implies total want of substantial consideration, 208.
(3.) *Good and valuable consideration*, 210 *n*.
Judge Story's views, 210 *n*.
(4.) *Marriage as consideration*, 212, 306.
the cases reviewed, 212.
when part of fraudulent scheme, 306.
no other consideration so highly respected, 212.
(5.) *Illegal consideration*, 214.
illicit intercourse, 213.
(6.) *Proofs of consideration*, 219.
future advances, 217.
gifts to charity, 217*a*.
means of vendee, 219.
recitals as evidence, 220.
explaining recitals, 221.
attacking, 297*b*.
may be varied by parol, 221.
CONSPIRACY, remedy by action of, 62.
damages in action for, 62.
when not cause of action, 62 *n*.
CONSPIRATORS, declarations of, 280.
why admitted, 280.
statement of one witness, 280.
CONSTRUCTION, of instrument, intent gathered from, 10, 322.
rules of, same in equity as at law, 51.
of assignments, 20 *n*, 343, 316*a*.

CONSTRUCTION — *continued.*
assignments construed like other contracts, 20 *n.*
of bill, 54, 146.
statutes as to frauds, liberal, 19, 20.
rule in Twyne's case, 20, 22.
principle applying to construction, 20.
innocent, to be preferred, 20 *n.*
CONSTRUCTIVE FRAUD, does not justify arrest, 191.
reimbursement allowed in cases of, 192.
defined by Story, 323.
is a conclusion of law, 163.
CONSTRUCTIVE NOTICE OF FRAUD, 374, 382.
not applicable to creditor, 106.
See NOTICE.
CONTEMPLATION, of future indebtedness, 96, 97, 100, 202.
subsequent creditors must show, 96, 202.
of marriage, fraud in, 314.
CONTEMPORANEOUS TRANSACTIONS, evidence of, 276.
CONTEMPT, depends upon act done, 196 *n.*
CONTINGENT CREDITORS, entitled to protection, 90, 346*b*.
CONTINGENT REVERSIONARY INTEREST, recoverable, 29.
remainder not liable to execution, 29 *n.*
CONTINUED, indebtedness, 103.
possession as evidence of hidden interest, 231*a*, 245–267.
CONTINUOUS, change of possession must be, 257.
CONTRACT CREDITORS, rights of, 73, 73 *n.*
CONTRACTS, how interpreted, 268.
CONTRAVENING STATUTES, assignments, 324.
CONTRIVANCE, to cover up fraud, 149.
evidence of, 235.
CONTROVERSY, all parties interested should be joined, 128.
CONVERSION, claim passes to assignee, 316*a*.
CONVEYANCE, hindering creditors by its terms, voidable, 9.
fraudulent at common law, 16.
of whole estate, presumption of fraud, 22, 231.
valid between parties, 395–399.
the theory, 396.
fraudulent, defined, 15.
meaning of word, 14 *n.*
of choses in action, fraudulent, 17, 33.
avoided by subsequent creditors, 101.
to defeat attachment, void, 11.
avoided in ejectment, 69, 69 *n.*

COPARTNERS, and fraudulent alienees as defendants, 54.
may sue copartner and fraudulent alienee, 54.
special, cannnot be preferred, 329.
arrest of, 191.
debts of, 216.
preferring claims, 329.
rights of, limited, 329.
assignment by, 319*b*.
corporators, when liable as, 139.
limited partnership assets, trust fund, 329.
power to assign, 319*b*.
various forms of partnership, 319*b*.
CORPORATION, creditors of, may file bill, 33, 119.
may be joined in bill as defendant, 128.
receiver of, rights to bring suit, 117.
and individuals on same footing, 119.
no damages for procuring judgment against, 62 *n*.
organized for fraudulent design, 15.
assets a trust fund, 117, 119, 139.
like natural person, 117.
continuing business when insolvent, 143 *n*.
stockholders, suing in right of, 109.
stockholders of, suit against, 139.
when corporators liable as partners, 139.
unpaid subscriptions of, 117.
change of name to evade liability, 119.
rules relating to subsequent creditors, applied to, 100.
when insolvency not ground for receiver, 239 *n*.
no discharge granted to in bankruptcy, 294 *n*.
rules as to fraudulent conveyances apply to, 199 *n*.
assignments by, 346*a*.
COSTS, judgment for, rights of creditors, 90 *n*.
COUNSEL FEES, providing for in assignment, 335.
COUNTY, creditor's bill against, 139 *n*.
jurisdiction outside of, 406.
execution issued to, 68.
COUPONS, suit for judgment on and mandamus united, 85 *n*.
COVINOUS alienations of exemptions, 48.
COVINOUS TRANSFERS, 16–17.
of choses in action, 17, 33.
valid between the parties, 395–400.
CREDIT, sales upon, 11, 240, 332, 333.
sale on, to son, 11.

CREDIT — *continued.*
effect of, 332, 333.
CREDITORS, ancient, power of, 1, 1 *n.*
rights of in life insurance, 23, 23*a*.
rights to proceeds of power, 39.
lien on trust income, 45.
must prove trust income excessive, 45.
burden of proof, 158, 271.
when judgment unnecessary, 83.
must have clean hands, 91.
suing in place of assignee, 115.
status of. *See* STATUS OF ATTACKING CREDITORS.
of attacking creditors, 73–88.
who are not, 91.
when estopped, 91.
no right of, to oppose probate of will, 127.
when they may sue stockholders, 119.
when wife is creditor, 110 *n*, 122.
policy of the law to protect assets available to, 23–50.
existing and subsequent, 89–106.
must invoke process against debtor, 52.
recitals not binding on, 221.
See EXISTING CREDITORS; SUBSEQUENT CREDITORS.
CREDITORS' ACTIONS, purpose of, 4.
bill to reach surplus income, 360.
of corporations, relief to, 119.
who may be complainants, 107–127.
CREDITORS AT LARGE, rights of, 52, 73.
cannot assail debtors' transfers, 73.
cannot assail chattel mortgage, 347.
not entitled to injunction, 52, 73.
rights of, not favored in equity, 73.
of a decedent, 79.
CREDITORS' BILLS, 68.
See CREDITORS' REMEDIES; SUPPLEMENTARY PROCEEDINGS.
why preferable, 60.
merits of relief in equity discussed, 60.
object of, in New York, 68.
to reach equitable assets, 68.
execution must precede, 68.
when execution excused, 75.
filing of, creates lien, 61, 68, 392.
fraudulent conveyances annulled by, 68.

CREDITORS' BILLS — *continued.*
usually regulated by statute, 68.
distinguished from bill in equity, 68.
is in nature of a discovery, 68.
supplementary proceedings, substitute for, 61.
simple creditor cannot maintain, 71, 73.
two kinds of, 68, 68 *n.*
complainants in, 107–127.
defendants in, 128–139.
of fraudulent grantee, 387.
CREDITORS' PROCEEDINGS, assignment cases, 316*c*.
CREDITORS' REMEDIES, 51–72.
See REMEDIES OF CREDITORS.
legal and equitable, 51, 51 *n.*
injunction against debtor before judgment disallowed, 52.
exceptions to the rule, 53.
joinder of claims, 54, 55.
land in name of third party, 57.
relief before and after sale, 58.
at law and in equity, 59, 60.
aiding attachment, 53.
supplementary proceedings, 61, 61 *n.*
assumpsit, case, conspiracy, 62, 62 *n.*
reference not ordered, 62*a*.
relief collateral to main action, 63.
framing issues, 51 *n.*
action against rescuers, 62 *n.*
remedy governed by *lex fori*, 64.
cumulative remedies, 65.
various illustrations, 65.
imprisonment of debtor, 66.
election of remedies, 67.
creditors' bills, 68.
equity jurisdiction *in personam*, 60.
direct and collateral attack, 69.
in federal courts, 71.
recapitulation of, 72.
CRIME, fraud in light of, not considered, 3.
indictment changing fraud, 65 *n.*
CRIMINATING disclosure, party need not make, 165.
CROPS, rule as to, 27.
liable to creditors' remedies, 27.
on exempt land, 27.

CROPS — *continued.*
delivery of, 266.
CROSS-BILL, affirmative relief, 166.
homestead protected by, 166.
CROSS-EXAMINATION OF PARTY, 281.
great latitude allowed, 281.
CROSS-PETITION, relief by, 166.
CUMULATIVE REMEDIES, allowed and disallowed, 65.
civil and criminal jurisdiction, 65.
election of remedies, 67.
CURTESY, right of, available to creditors, 30.
reached by creditors' bill, 30.
initiate, cannot be reached, 50*a*.

DAMAGES, judgment for, not allowed in equity, 51.
decree must be for an accounting, 51.
too remote in action of case, 62.
exceptional cases, 62.
in action for conspiracy, allowed, 62.
in assumpsit, 62.
DATE OF AGREEMENT, governs creditors' rights, 90.
antedating instrument, 229.
DAUGHTER, claim for services, 218.
no promise to pay implied, 218.
DE MINIMUS NON CURAT LEX, 281.
DEATH, of receiver, title on, 189.
punishment of insolvent under Roman law, 1.
rule as to in England, 1 *n*.
of debtor, effect on lien in supplementary proceedings, 61 *n*.
DEBT, worthless, cancellation of, not fraudulent, 23.
foundation of the principle, 23.
forgiven or cancelled, when fraudulent, 42.
administrator may sue for, 42.
must be in judgment before filing bill, 73.
equity not forum to collect, 73.
property of debtor must be devoted to payment of, 14.
judgment conclusive as to, 74, 270.
must be adjudicated, 74, 74 *n*.
DEBTOR, reservation by, avoids conveyance, 10, 32, 272.
declarations by, 277, 278.
as defendant in creditors' suit, 128, 129.
absconding and non-resident, 84.
rule as to, 128.

DEBTOR — *continued.*
insolvency of, 273.
embarrassed, conveyance by, 99.
injunction against, before judgment, disallowed, 52.
theory of the law, 52.
exceptions to the rule, 53.
trust income for, 45, 360, 364.
may assign accrued income, 45 *n.*
payments made to, 50*b*.
effect of imprisonment of, 66.
secret trust for benefit of, 272.
punishment of, in early times. 1 *n.*
cannot secure delay, 11.
sale to son, 11.
DECEDENT, creditors of, 79.
when must have judgment, 79.
confusion in the cases, 79.
theory of the law, 79.
judgment necessary in New York, 79.
personal transactions with, 121.
DECEIT, action for, innocence presumed, 5.
DECEPTIVE ASSERTIONS, and incidents, proving fraud, 7.
DECLARATIONS before and after sale, 277.
as to realty and personalty, 277.
declarations after sale, 278.
in presence of vendee, 278.
of co-conspirators, 280.
must relate to act characterized, 276.
of past transactions, 276.
as to acts *sui generis* with those committed, 280.
not received to prove the conspiracy, 280.
admitted to show its scope and extent, 280.
of one witness as to the conspiracy, 280.
the test, 276.
DECLARATORY, of common law, statutes are, 16.
" DECLARE," word commented upon, 16.
DECREE, 168–183*a*.
See JUDGMENT.
when conclusive, 168.
appointing receiver, 170.
transferring title, 172.
against fraudulent vendee, 177.
against wife, 180.

DECREE — *continued.*
affecting foreign land, 157*a*.
must accord with relief demanded, 181.
conform to complaint, 182.
personal against vendee, 177, 178.
DEDUCTION OF FRAUD from facts and incidents, 224, 281, 282.
DEED, fraudulent, mistake in not corrected, 396 .
evidence sufficient to overturn, 6.
fraud shown by separate instrument, 6.
not avoided by loose evidence, 6.
delivery of should be averred, 140.
recitals in, 284*a*.
DEFECTIVE, complaint, 140.
DEFENDANT, parties, 128–139.
(1.) *Debtor as defendant in creditors' actions*, 128, 129, 132.
general rule stated, 128.
finality to litigation the object, 128.
conflict in the cases, 128, 129.
when debtor not necessary defendant, 129.
result of the cases, 129.
defendants need not be equally guilty, 130.
plaintiffs' duty to secure parties, 128.
(2.) *Fraudulent grantee must be joined*, 131.
the reason, 131.
New York cases, 131.
parties to intermediate conveyances, 131.
(3.) *Assignee and receiver*, 133.
assignee of a firm a defendant, 133.
raising objection to non-joinder, 133, 134.
(4.) *Executors, administrators, heirs, and legatees*, 136.
rule as to joinder of, as defendants, 136.
Cornell v. Radway, 136 *n*.
result of the cases, 136.
(5.) *Trustee and cestui que trust*, 137.
distinction in the cases, 137.
affirmance and disaffirmance of the trust, 137.
(6.) *Generally*, 132, 136, 138, 139.
stockholders, 139.
corporation as party with stockholders, 128.
beneficiaries as defendants, 128.
conveyance pending suit, 132*a*.
bringing in representatives, 132*b*.
suing directors, 132*a*.

DEFENDANT — *generally — continued.*
cestui que trust, 137.
parties having liens, 138.
arrest of, 191.
DEFENSES, as to, 286–297.
See EVIDENCE — INTENTION — CONSIDERATION — BADGES OF FRAUD.
" forms " no protection, 286.
transaction judged by real character, 286.
principal defenses, 286, 369–371.
rebutting fraud, 158.
of discharge in bankruptcy, 294 *n.*
imprisonment of debtor, 66.
against attachment, 81.
another action pending, 286*a*.
attacking judgment, 286*b*.
set off, 297*a*.
attacking consideration, 297*b*.
controversies not separable, 297*c*.
statute of frauds, 293*a*.
(1.) *Laches as a defense*, 287.
excusing apparent, 148, 149.
equity will not aid party guilty of, 287.
stale demands disallowed, 287, 289.
(2.) *Lapse of time*, 109, 288, 289.
constitutes a defense, 288.
various illustrations, 288, 289.
(3.) *Discovery of the fraud*, 290.
statute does not begin to run until, 290.
effect of a different rule, 290.
Judge Blatchford's views, 291.
(4.) *Statute of limitations*, 292, 293.
runs from notice of fraud, 292.
must be pleaded as defense, 292.
limitations in equity, 293.
(5.) *Insolvency or bankruptcy discharges*, 294.
have no extra-territorial force, 294.
not conclusive on non-residents, 294.
the reasons stated, 294.
pleading discharge, 294 *n.*
(6.) *Generally*, 295.
existing and subsequent creditors, 96–101, 295.
fraud upon subsequent creditors, 100, 295.
what sheriff must show against stranger, 297.

DEFENSES — *generally — continued.*
by bailee, 107 *n.*
DEFINITION of fraud, none possible, 13.
judgment of law on facts and intents, 13.
undue influence, 13 *n.*
of insolvency, 273.
of badge of fraud, 225.
of general assignment, 316.
of fraudulent conveyances, 15.
of creditors' bill, 68.
DEFRAUDED VENDOR, tracing fund, 44.
relief to, 399.
DEGREES of guilt, 399, 400.
DELAWARE, spendthrift trusts, 367*a*.
change of possession, 251.
DELAY, sales upon credit, 240, 332, 333.
exceptional rule, 333*a*.
and hindrance, 11, 318.
applied to general assignments, 318, 333.
defraud, and hinder, 11.
refers to time, 318.
hindrance to obstacles, 318.
debtor cannot secure, 318.
DELAY OF CREDITORS, 11, 318.
and hinder, 11.
explaining, in pleading, 149.
refers to time, 318.
hindrance to obstacles, 318.
debtor cannot secure, 11.
DELIVERY, 245–267.
See CHANGE OF POSSESSION.
essential to validity of sale as against creditors, 245–267.
failure to effect, presumption of fraud, 248.
conflicting policies as to, 252.
must be actual, 253.
must be continuous, 257, 258.
of growing crops, 266.
of possession of realty, 264.
when not essential, 261, 262.
symbolical, 262.
of deed should be averred, 140 *n.*
assignment takes effect from, 316*a*.
DENIAL IN ANSWER, 158–162.

DENIAL IN ANSWER — *continued.*
particularity of, 162.
of fraud or notice, 163.
DENYING FRAUD or notice, 163.
DESCRIPTION in complaint, 157.
assets need not be specifically disclosed, 157.
sufficient to operate as *lis pendens*, 157.
discovery may be called for, 157.
in marriage settlement, 157 *n.*
vague, as badge of fraud, 230.
amendment of complaint, 156.
DEVICES, ineffectual against creditors, 15.
DEVISE OF PROFITS is devise of land, 362.
DIRECTORS, suits against, 133*a*.
rule of liability, 133*a*.
DIRECT AND COLLATERAL ATTACK, 69.
necessity for, 69.
exceptional doctrine in Louisiana, 69.
merits of rule, discussed, 69.
DISBURSEMENTS, of assignee, 319*a*.
DISCHARGE, in insolvency or bankruptcy, 294.
DISCOVERY, seeking, 147.
of fraud, statute begins to run, 290, 291.
New York rule, 149.
creditors' bill is in nature of, 68, 68 *n.*
advantages of, 68 *n.*
pleading to the discovery and the relief, 161.
avoiding discovery, 159, 165.
of lands, inherited or devised, 157.
and knowledge, not convertible, 148 *n.*
DISCRETION, granting bill of particulars rests in, 162*a*.
removal of receiver is matter of, 190.
DISHONEST PURPOSE not presumed, 5.
not necessary to defeat conveyance, 8, 9, 10, 382.
secret removal of property, 234.
DISJUNCTIVE, words hinder, delay or defraud used in, 11.
DISMISSAL of receiver, 190.
of assignee, 337.
DISPARITY, as to consideration, 6, 232.
must be glaring, 6, 232.
DISPOSED, word construed, 12.
DISSOLUTE man, conveyance by, 213 *n.*
DISSOLUTION, appointment of receiver does not effect, 134.

DISSOLUTION — *continued.*
of firm, exemptions, 48.
DISTINCT, claims united, 54.
defenses, 158.
claims under chattel mortgage, 359*a*.
DISTINCTION, existing and subsequent creditors, 89.
fraud in fact and fraud in law, 9, 10, 322, 382.
DISTRIBUTEES, reaching money of, 33.
DISTRICT OF COLUMBIA, statute of Elizabeth in, 19 *n*.
change of possession, 250.
DIVIDEND, to defeated creditor, 345*b*.
collaterals not considered, 51 *n*.
DIVISION, certificate of, review, 407*a*.
DIVORCE, after, when wife cannot overturn conveyance, 395 *n*.
conveyance to defeat alimony, 110 *n*.
right of wife against trust income, 45.
DOMICIL, law of, governs, 64.
when law of, yields, 65.
DOWER RIGHT, creditors may reach, 30.
before admeasurement, 33.
in supplementary proceedings, 61.
relief in cases of fraud on, 70.
relinquishment as consideration for settlement, 299.
DURESS, obtaining instrument under, 347.
DUTIES, of assignee, 319*a*.

EARLY STATUTES avoiding fraudulent conveyances, 18.
declaratory of common law, 16.
object of statutes, 18.
13 Eliz.,c. 5, and its object, 19.
its interpretation and construction, 20.
27 Eliz., c. 4, and its object, 21.
EARNINGS, not liable in supplementary proceedings, 61 *n*.
exempt for sixty days, 61 *n*.
of daughter, 218.
of wife, 218.
of members of family, 218.
EDUCATION of debtor, as regards income, 45.
EJECTMENT and equitable relief united, 51, 51 *n*, 54.
conflict in the cases, 54.
no receiver in, 187.
theory of the law, 187.
rule as to receiver in New York, 187.

EJECTMENT — *continued.*
conveyance avoided in, 51.
by execution purchaser, 57.
when purchaser may defend in, 69.
what may be shown, 69 *n.*
question of fraud tested by jury in, 123.
ELDON, LORD, views of, as to restrictions on life estate, 364.
ELECTION OF REMEDIES, 67, 316 *n.*
debtor or alienee cannot compel, 67.
creditor bound by, 67.
ELIZABETH, statutes of, 19–21.
object of, 11, 19.
to prevent deeds fraudulent in their concoction, 19.
interpretation and construction of, 20.
interpretation refers to legal intent, 8.
bottomed on immoral intention, 9 *n.*
merely declaratory of common law, 16.
universally adopted, 19, 22.
Mr. Reeves' comments upon, 19.
preamble to, 25.
subsequent creditors not mentioned, 98.
EMBARRASSED DEBTOR, conveyance by, 99, 273.
conveyance to defeat attachment, 11.
when considered valid, 99.
the cases criticised, 99.
the conclusion drawn from them, 99.
EMOTION, intent is, 8, 196, 196 *n.*
not conclusive, 197, 322, 382.
fraud without evil emotion, 8, 382.
EMPLOYMENT, of husband by wife, 303.
of assignors, 345, 390 *n.*
ENFORCING promises of third parties, 43.
judgment at law, 170*a.*
ENGLAND, Twyne's case in, 22.
statute of Elizabeth, 19, 21.
statute of Victoria, 93.
ENGLISH STATUTES as to property recoverable, 25.
concerning fraudulent conveyances, 16, 18, 19–22.
ENTIRETY, estate in, husband's interest liable, 29.
EQUALLY GUILTY, defendants need not be, 130.
EQUILIBRIUM, of evidence, does not prove fraud, 5
EQUITABLE fraud, meaning of, 51.
subrogation, when not applied, 195 *n.*

EQUITABLE — *continued.*
estoppel, 287.
EQUITABLE INTERESTS, 30.
frequent subject-matter of creditors' suits, 30.
action, judgment in, 80.
suit, 60.
jurisdiction, 4, 51, 56, 60.
levy, 68, 392.
in real property, *situs* governs, 24.
EQUITABLE, *lis pendens*, 392.
EQUITIES are equal, law prevails, 370.
applied to *bona fide* purchasers, 370.
EQUITY, invoked in two cases, 51.
See CREDITORS' REMEDIES.
in furtherance of remedy at law, 51.
to reach equitable rights, 51, 60.
jurisdiction more extensive than at law, 51, 51 *n.*
reasons for resort to, 51, 60, 176 *n.*
purchase at law either valid or void, 51.
different rule in equity, 51.
when jurisdiction exclusive, 56.
relief before and after sale, 58.
the jurisdiction explained, 58, 60.
jurisdiction, its great importance, 60.
proceeds without regard to forms, 60, 60 *n.*
jurisdiction once acquired holds throughout, 63.
jurisdiction of trusts, 56.
will restrain fictitious demand, 74 *n.*
objection to jurisdiction, 88, 88 *n.*
power of, to protect right of dower, 70.
not remedy to collect debts, 73.
of a creditor, 110.
pleadings in, rules of, 146.
limitations in, 293.
procedure in federal courts, 71.
cannot create a title, 60 *n.*
EQUITY OF REDEMPTION, available to creditors, 31.
transaction to conceal, 31.
ERRONEOUS, judgment, correction of, 172.
ESTATES, in remainder and reversion, 29, 30.
vested remainder liable for debts, 29.
attempted exemption of, 29, 360–368.
contingent reversionary interest, 29.

ESTATES — *continued.*
creditors' bills against, 68.
no preference to vigilant creditors, 392.
expectant, may be reached, 24.
ESTOPPEL, equitable, 287.
to attack, 316 *n.*
notice of alienation, 106.
judgment is, 168.
EVIDENCE, 268–285.
See BADGES OF FRAUD — CONSIDERATION — DEFENSES — INTENTION.
to prove fraud, 5, 6.
of solvency, 95.
creating equilibrium insufficient, 5.
to annual instrument in writing, 6.
not to be pleaded, 142.
to vary recital of consideration, 221.
recitals in deed, 284*a*.
(1.) *Concerning evidence*, 268.
burden of proof, 268, 271.
how changed, 271.
answer as, 160.
personal transactions with decedent, 121.
omnia præsumunter contra spoliatorem, 281.
books of account, 271*a*.
professions of good faith, 279*a*.
intention, knowledge, 279*b*.
takes a wide range, 268.
secret trust, 272.
interpretation of contracts, 268.
acts and statements of debtor, 268.
objections must be specified, 269.
schedules as evidence, 274.
(2.) *Proof and conclusiveness of judgment*, 270.
judgment essential to creditor's proceeding, 74–77, 270
evidence until impeached, 270.
attacking for collusion, 270, 74 *n.*
(3.) *Insolvency of debtor*, 273.
application of the term, 273
who considered solvent, 273.
evidence of insolvency, 87, 87 *n*, 273.
illustrations, 273.
general repute as to, 273.

EVIDENCE — *insolvency of debtor — continued.*
opinion as to, 273, 273 *n.*
(4.) *Insolvency of vendee*, 274.
effect of proof of, 274.
shown by general repute, 274.
insolvency of corporation, 273, 273 *n.*
(5.) *General reputation*, 275.
evidence of, admitted, 275.
tendency and effect of proof of, 275.
(6.) *Concerning res gestæ*, 276.
declarations admissible, 276.
duty of jury to weigh, 276.
importance of the doctrine, 276.
(7.) *Declarations, rule as to*, 277, 278.
before sale, admissible, 277.
theory governing their admission, 277.
concerning personality, excluded, 277.
declarations after sale, 277.
excluded as mere hearsay, 278.
illustrations, 278.
(8.) *Possession after conveyance*, 279.
effect of proof of, 279.
declarations characterizing, 279.
constitute part of *res gestæ*, 279.
(9.) *Declarations of co-conspirators*, 280.
in execution of common purpose, 280.
proposed acts must be *sui juris* with those committed, 280.
foundation for, 280.
prima facie case must be shown, 280.
admissions of declarations, 280.
as to past transactions, incompetent, 280.
not admissible to prove the conspiracy, 280.
received to show its scope, 280.
(10.) *Proof of circumstances*, 281.
must be persuasive, 5, 6.
great latitude permitted, 281.
objections for irrelevancy, not favored, 281.
wide range of inquiry, 281.
must be strong and cogent, 281.
the test given, 281.
latitude of the inquiry, 281 *n.*
collateral facts, proof of, 281.
(11.) *Other frauds*, 282.

EVIDENCE — *other frauds — continued.*
proof of commission of, 282.
intent the object of inquiry, 282.
other similar acts show it, 282.
independent acts and declarations, 282.
scope of the inquiry, 282.
exception to the rule, 282.
(12.) *Suspicions insufficient*, 3, 5, 6, 283.
tangible facts must be shown, 283.
of fraud, not notice of it, 283.
(13.) *Generally*, 284, 285.
proving value by experts, 284.
testimony must conform to pleading, 285.
consideration, 279*c*, 207–223.
EVIDENCE OF FRAUD, generally circumstantial, 13.
proof of circumstances as, 281.
great latitude allowed, 281.
direct proof not attainable, 13.
the test, 281.
proof of collateral facts, 281.
other frauds, 282.
declarations, 280.
EVIDENCE OF INTENTION, when cannot change presumption, 9, 322, 382.
when not necessary to establish frauds, 8–10, 382.
of solvency, 95.
not to be pleaded, 142.
answer as, 160.
of secrecy, 234.
of wife, 313.
See INTENTION.
EXAGGERATED, indebtedness badge of fraud, 228.
EXCEPTIONS to rule concerning injunction against debtor, 53.
receivership, when allowed before judgment, 53.
EXCESS, of property mortgaged, 238*a*.
of debt, taking mortgage in, 347.
EXCHANGE, of property, 211*a*.
EXCLUSIVE jurisdiction in equity, 56.
property not subject to legal process, 56.
as to choses in action, 22, 33, 56.
supplementary proceedings not, 61.
suits by personal representatives not, 112.
EXCUSING want of change of possession, 263.

EXCUSING — *continued.*
rebutting presumptions of fraud, 263.
laches, 148.
EXECUTION, contingent remainder not liable to, 29 *n.*
seat in stock exchange not liable to, 35 *n.*
property purchased in name of third party, 57.
remedy by, 59.
to county of debtor's residence, 68.
must precede creditor's bill, 68.
return of, unsatisfied, 74, 68, 86, 86 *n.*
return of officer conclusive, 74.
when execution excused, 75.
New York rule explained, 86 *n.*
conflict in New York, 86.
Supreme Court rule, 86 *n.*
distinction between realty and personalty as to, 87.
raising the objection, 88.
what bill should allege as to, 88.
where jurisdiction is concurrent, 51.
selling land under, 72.
in State where land lies, 83.
what bill should show as to, 88.
not reach proceeds of power, 40 *n.*
return of, evidence of insolvency, 273.
purchaser, may bring suit to set aside deed, 371*a*.
EXECUTORS AND ADMINISTRATORS, as complainants, 112, 113.
New York legislation, 112.
as defendants, 136.
as fraudulent grantees, 77.
conveyance binding upon, 112, 113, 398.
may sue for canceled debt, 42.
complaint by, 143.
judgment against, 77.
EXEMPTING assignee from liability, 334.
renders assignment void, 334.
theory of the law, 334.
EXEMPTIONS, rule as to, 46–50, 50*a*.
policy of the law, 365.
no restriction on legislation, 46 *n.*
reservation of, in assignments, 326.
does not render assignment void, 326.
do not pass by assignment, 316*a*.

EXEMPTIONS — *continued.*
receiver gets no title to, 46.
endure for life-time, 46.
aversion to exemptions not statutory, 360.
fraudulent purchase of, 47.
purchase on eve of insolvency, 47.
covinous alienations of, 48.
conflicting cases, 49.
forfeited by fraud, 49.
equivocation as to, 49, 49 *n.*
what cannot be reached, 50*a.*
crops on exempt lands, reached, 27.
pension money in lands, 46.
must exist at date of transfer, 46.
partnership property not exempt, 48.
on dissolution of firm, 48.
EXHAUSTING LEGAL REMEDY, 73, 86.
object of, 73.
establishes claim, 73.
saves debtor from interference, 52, 73.
EXISTING CREDITORS, 89–95.
See SUBSEQUENT CREDITORS.
(1.) *Classes of creditors, existing and subsequent*, 89.
who are existing creditors, 89.
renewal creditor, 89.
change of securities, 89.
subsequent creditors, 89, 96, 97.
their respective rights, 89, 96.
may join in Alabama, 108 *n.*
decree when not binding, on, 168.
(2.) *Contingent creditors*, 90.
wife and surety as creditors, 90.
indorser and warrantor, 90.
municipal corporation, 90.
date of agreement governs, 90.
tort claimant, 90.
remainderman, 90.
who are not creditors, 91.
acquiescence, 91.
transfer of right to sue, 92.
(3.) *Voluntary alienations as to*, 93, 94.
presumptively fraudulent, 94.
New York rule, 93.

EXISTING CREDITORS — *voluntary alienations — continued.*
modern English rule, 93.
early conflict as to, 93.
recent cases, 94.
EXPECTANT ESTATE, may be reached, 24.
assignment of, vacated, 29.
EXPENSES, when chargeable to common fund, 109.
of rescuing property, 109.
EXPERTS, proving value by, 284.
illustrations, 284.
EXPLAINING delay, discovery of fraud, 149.
judgment, 270.
recitals of consideration, 221.
contradicting allegations of deed, 221.
substituting valuable for good consideration, 221.
EXPLICIT PROOF, not exacted, 5.
EXTENDING UNUSUAL CREDIT, as evidence of fraud, 241.

FACTS, sufficient to excite inquiry, 379, 380, 381.
as notice of fraud, 379–381.
may be implied, 142.
means of knowledge, 381.
the test, 380, 381.
admitted in pleading, 285.
equity deals with, 60.
to establish fraud, 5.
must be substantial, 5.
FAILURE, to record, 101, 235, 236, 237.
FAIR PREPONDERANCE, fraud must be shown by, 271.
FAMILY, services by members of, 218.
by daughter to debtor, 218.
no promise to pay implied, 218.
wife to husband, 218.
when claim of cannot be collected, 218.
insurance for, 23.
FATHER, gift by, improvements, 296.
to son, sale by, 242.
FEDERAL COURTS, rules of procedure in, 61 *n*, 71.
supplementary proceedings in, 61 *n*.
not allowed in State court on federal judgment, 61 *n*, 78, 78 *n*.
rules of property in, 20, 71.
local rules govern in, 20.

FEDERAL COURTS — *continued.*
State decisions followed, 71.
as to fraudulent and voluntary assignments, 71.
pauper litigants in, 71.
chancery practice prevails, 51, 71.
suit against stockholder in, 139.
judgment in, 78, 78 *n.*
bill in equity in, 68 *n.*
no bill by simple contract creditor, 71.
not interefere with State receiver, 117.
as to change of possession, 250.
FEDERAL TRIBUNALS, procedure in, 71, 407, 407*a.*
heirs and devisees as parties, 136.
local rule governs in, 20.
FICTITIOUS CONSIDERATION, recital of, badge of fraud, 228.
either in mortgage or conveyance, 228.
to be considered by jury, 228.
not fraud *per se*, 228.
immaterial mis-recital, 228.
to be fraudulent must be intentional, 228.
FICTITIOUS, grantee, setting aside deed, 131.
claim may avoid assignment, 320.
debt, avoids assignment, 345.
FIELD OF INQUIRY, must be broad, 6.
FILING chattel mortgage, 347 *n.*
FINES, conveyance to defeat, attached by State, 123 *n.*
FIRM, judgment creditor of, suit by, 108.
exemptions of, 48.
assignments by, 319*b.*
fraud in firm creditors, 216.
assets of, how distributed, 216.
FLEXIBLE JURISDICTION OF EQUITY, 60, 193 *n.*
FORECLOSURE, proceedings attacking fraudulent conveyance, 63.
in surplus-money proceedings, 63.
receiver in foreclosure, 187 *n.*
FOREIGN JUDGMENT, does not have the force of domestic judgment, 78.
rule as to, stated, 78.
federal court judgment, 78, 78 *n.*
government, claims against, pass to asignee, 114.
assignments, 346.
statutes, no force *ex proprio vigore*, 405 *n.*
receiver as complainant, 118.

FOREIGN RECEIVERS, recognized by comity, 118.
FORMS, equity looks beyond, 60.
FORMS OF LAW, observance of, will not save transaction, 5, 5 *n.*
FORMS OF RELIEF, 4, 51–72.
See CREDITORS' REMEDIES.
not regarded in equity, 60.
in cases of fraud on wife, 70.
FRAMING ISSUES, for jury, 51, 51 *n.*
FRAUD, divisions of, 10.
never presumed, 5, 5 *n*, 6.
under forms of law, 5 *n.*
not proved positively, 7.
tested by human nature, 7.
more extensive signification in equity than at law, 60.
compounded of law and fact, 13 *n.*
equitable, 51.
rule as to pleading, 141.
fraud in law and fraud in fact, 10.
no definition of, 13.
proof of, 5, 6.
evidence must be persuasive, 5.
loves darkness, 6.
under bankrupt act, 13 *n.*
as to existing creditors, 89–95.
as to subsequent creditors, 96–106.
lies in intent to deceive, 141.
general charge of, insufficient, 141.
indicia or badges of, 224–244.
FRAUD INFERRED FROM TRUST, an inference of law, 10 *n.*
FRAUD IN LAW and fraud in fact, 9, 9 *n*, 10, 382.
distinction discussed, 9, 9 *n*, 10, 382.
different intent cannot be shown, 9.
cases explained, 9, 9 *n*, 10.
FRAUD, MUST BE PROVED, 5, 5 *n*, 283.
one of recognized heads of equity jurisdiction, 60.
is intention carried out by hurtful acts, 13, 196.
as a legal deduction, 10.
to annul written instrument, 6.
possession as proof of, 247.
character of, 6.
perpetrated in secret, 6.
may be unintentionally committed, 8.
pleading fraud, 141.

FRAUD, MUST BE PROVED — *continued.*
word need not be used, 141.
cannot be defined, 13.
nature and effect of, considered, 13.
constructive, 323.
suspicions as to, insufficient, 5, 283.
shown from circumstances, 281.
the test, 281.
equilibrium will not establish, 5.
disconnected acts as evidence, 280, 282.
in conveyances, characteristics, 15.
badges of, 224–244.
in fact and in law, 8, 9, 10, 322, 382.
as to existing creditors, 82–95.
as to subsequent creditors, 96–106.
irregularities and carelessness, 5.
FRAUDS, statute of, agreement out of, 296.
FRAUDULENT, conveyance of equity of redemption, 31.
purpose, when harmless, 107.
FRAUDULENT CHATTEL MORTGAGES, 347–359*a*.
See CHATTEL MORTGAGES.
FRAUDULENT CONVEYANCES, defined, 15.
classes of, 15.
necessary elements of, 15.
at common law, 16.
statutes declaratory, 16.
early statutes avoiding, 18.
property that may be reached, 23–50.
grantee, creditors of, 387.
liability between, 388.
grantees sharing in recovery, 389.
valid between the parties, 395–400.
FRAUDULENT GENERAL ASSIGNMENTS, 316–346.
(1.) *Voluntary assignments*, 316.
general comments, 316.
claimed to be American devise, 316.
defined, 316.
made in absence of statute, 316.
right exists at common law, 316.
change of possession, 316.
property transferred, 316*a*.
property that does not pass, 316*a*.

FRAUDULENT GENERAL ASSIGNMENTS—*voluntary—cont'd.*
delivery of assignment essential, 316*a*, 316*a*, *n.*
assent of assignee, 316*b*.
rights of assignee, 319*a*.
trust fund in assignee's hands, 319*a*.
antecedent agreement to prefer, 342*a*.
property not in *custodia legis*, 316.
assignee quasi-public officer, 316.
assignee not officer of court, 316.
must obey provisions of assignment, 316.
derives authority from instrument, 316.
control of court over, 316.
parties cannot change character of, 316.
assignor cannot substitute successor to assignee, 316.
assent of assignee, 316*b*.
creditors' proceedings, 316*c*.
word void construed, 317.
(2.) *Delay and hindrance*, 318.
meaning of delay, 318.
of hindrance, 318.
instances, 318.
(3.) *Intent affecting assignment*, 319.
actual intent not exclusive test, 319.
of assignor generally governs, 319.
conflict in the cases, 319.
drift of the cases, 319.
suggestions as to correct procedure, 319.
(4.) *Partnership assignments*, 319*b*.
courts protect from creditors, 319*b*.
all partners must join, 319*b*.
special partner need not join, 319*b*.
limited partnership, cannot prefer, 319*b*.
acknowledgment of instrument, 319*b*.
preferring a partner, 329.
(5.) *Fraud must relate to instrument itself*, 320.
subequent illegal acts immaterial, 320.
independent acts not considered, 320.
preferring fictitious claim, 320.
effect of omission from schedules, 320.
(6.) *Good faith*, 321.
means "sincerity or honesty of purpose," 321.
presumption of, appertains to asignments, 321.
mistake not fatal, 321.

FRAUDULENT GENERAL ASSIGNMENTS — *continued.*
(7.) *Void on its face*, 9, 10, 322.
instances given, 322.
actual motive or belief immaterial, 322.
power to reform, 322*a*.
purchaser under void assignment, 322*a*.
(8.) *Contravening statutes*, 324.
burden on creditor, 324.
may be avoided, 324.
an illustration, 324.
(9.) *Transfers to prevent sacrifice*, 325.
will be set aside, 325.
(10.) *Reservations*, 326.
when fatal to instrument, 272, 326.
for debtor's benefit, 326.
of exempt property not fraudulent, 326.
reserving surplus, 327.
apparent conflict in the cases, 327.
preferring claims in which assignor is partner, 329.
(11.) *Releases exacted in assignments*, 328.
looked upon with disfavor, 328.
render assignments fraudulent, when, 328.
different cases considered, 328.
(12.) *Authorizing trustee to continue business*, 330, 331.
when such provisions permissible, 331.
power to continue a school illegal, 331.
(13.) *Delay sales upon credit*, 332, 333.
creditors' right of immediate payment, 332.
holding realty two years void, 332.
the cases reviewed, 332, 333.
exceptional rule, 333*a*.
(14.) *Exempting assignee from liability*, 334.
renders assignment void, 334.
(15.) *Other features*, 335, 337.
authority to compromise, 336.
fraud of assignee, 337.
providing for counsel fees, 335.
assets exceeding liabilities, 340.
excessive preferences, 341*a*.
preferences to laborers, 341*b*.
notice to preferred creditors, 341*c*.
bill of particulars, 341*d*.
assignments to prevent preference, 341.
threatening to make assignment, 342.

FRAUDULENT GENERAL ASSIGNMENTS — *continued.*
(16.) *Transfers inuring as assignments*, 339.
White v. Cotzhausen, 339*a*.
conflict in the cases, 339*a*.
(17.) *Incompetency and removal of assignee*, 337, 338.
badge of fraud, 338.
word "incompetency" construed, 338.
conflicting interests, 337.
selection of blind assignee, 338.
(18.) *Construction of assignment*, 20 *n*, 343.
rules applicable to, 20 *n*, 343.
explaining obnoxious provisions, 344.
assignments held void, 345.
insufficient grounds of attack, 345*a*.
(19.) *Foreign assignments*, 346.
operate as matter of comity, 346.
(20.) *Generally*, defeated creditor entitled to dividend, 345*b*.
assignments by corporations, 346*a*.
contingent creditors, 346*b*.
preference on eve of, 391*a*.
FRAUDULENT GRANTEES, valid title from, 386.
as defendants, 131.
proceedings futile, if omitted, 131.
intermediate grantees, 131.
as trustees, 385.
creditors of, 387.
liability between, 388.
sharing in recovery, 389.
FRAUDULENT INTENT, fact for jury, 9, 204.
allegations concerning, 145.
when *res adjudicata*, 203.
where consideration is adequate, 201.
proving intent, 206.
of agent binding on principal, 198.
actual, not decisive, 197, 382.
mutuality of participation in, 199, 302, 319.
See INTENTION.
FRAUDULENT JUDGMENTS, removed, 51 *n*
set aside in equity, 60.
FRAUDULENT PARTY, not protected from loss, 195.
FRAUDULENT PURCHASES OF EXEMPTIONS, 47.
legality of, 47.
conflicting cases as to, 49, 50.
FRAUDULENT transferee, judgment against, 3 *n*, 176–180.

FRAUDULENT TRANSFERS, prevalence of, 2.
cause of, 2.
of choses in action, 17, 33.
of exemptions, 47.
early statutes avoiding, 18.
characteristics and classes of, 15.
FRAUDULENT vendee, liability of, 176, 178, 195.
FUND may be traced by creditors, 44.
followed, in new investment, 44.
the rule illustrated, 44.
lien on the mass, 44 *n.*
FUTURE ADVANCES, rule as to, 217.
judgment or mortgage for, 217.
should be shown on face of lien, 217.
FUTURE INCOME, creditor may reach, 45.
FUTURE, schemes of fraud, 96, 202.
creditors, intent to defraud, 98, 202.
FUTURE SERVICES, as consideration, 223.

GENERAL ALLEGATIONS of fraud of no value, 141.
GENERAL ASSIGNMENT, 316–346.
See FRAUDULENT GENERAL ASSIGNMENT.
will supplant suit, when, 23.
character of, 316.
property transferred by, 316*a*.
surviving partner may make, 319*b*, 329.
all partners must join, 319*b*.
when void, 345.
by corporation, 346*a*.
specific assignment is not, 339.
threatening to make, 342, 342 *n.*
construction of, 343.
assignee under, as complainant, 115.
GENERAL DENIAL, evidence under, 158.
valid title may be shown under, 158.
GENERAL REPUTATION, evidence of, allowed, 275.
as to absence of means in vendee, 274.
as to want of credit, 275.
is competent, 275.
GENERALITY of gift or conveyance, 22, 231.
evidence or badge of fraud, 231.
commented on in Twyne's case, 22.
views of Lowell, J., 231.
creating violent presumption of fraud, 231.

GENERALITY — *continued.*
considered unusual and extraordinary, 231.
various comments, 231.
GENEROSITY, when not evidence of fraud, 5.
GEORGIA, spendthrift trusts in, 367*a*.
GIFT, condition repugnant to, void, 362.
oral, title by, 296.
of small value not fraudulent, 41.
from husband to wife, 309.
of labor, valid, 50*a*.
as badge of fraud, 309.
generality of, as evidence of fraud, 22, 231.
to charity, 217*a*.
GOOD and valuable consideration, 210.
defined by Story, 210 *n*.
See BONA FIDE PURCHASER.
GOOD CHARACTER, evidence of, 275.
GOOD FAITH, settled presumption of law, 6.
the vital question in these suits, 196.
and consideration, 207.
defined, 321.
relating to fraudulent assignments, 321.
protecting purchasers, 369, 372.
professions of, 279*a*.
GRANT, conditions repugnant to void, 362, 363, 367.
of entire estate, evidence of fraud, 231.
GRANTEE, fraudulent, as trustee, 385.
creditors of, 387.
when they may seize the property, 387.
doctrine of apparent ownership, 387.
liability between, 388.
sharing in recovery, 389.
enforcing fraudulent deed, 402.
GRANTING AMENDMENTS, discretionary, 156.
GRANTOR'S BENEFIT, transfer invalid, 211.
secret trust for, 272.
conveyances fraudulent, 272.
GRANTORS, defrauded of property, 399, 400.
aid extended to, 399, 400.
degrees of guilt, 399.
GRATUITY, cannot be transformed into a debt, 209.
GRAY, PROFESSOR, views as to spendthrift trusts, 364 *n*, 366.
GROSSLY inadequate consideration, 207, 232.
will overturn transfer, 6, 232.

GROWING CROPS, change of possession of, 266.
impossible to deliver, 266.
conflicting views, 266.
available to creditors, 27.
when subject to execution, 27.
GUILTY KNOWLEDGE, of debtor's fraud, 380.

HEARSAY, declarations after sale excluded as, 278.
"HEARTY CONVICTION," not test of fraud, 224.
HEIRS, as complainants, 121.
when not proper parties, 121.
cannot impeach ancestor's deed, 121, 398.
statutes construed as to, 121.
testimony by, 121.
reaching money due to, 33.
suit by one of several, 121.
HINDER, delay or defraud, words construed, 11, 11 *n.*
not synonymous, 11.
intent to do either, sufficient, 11.
object of the statute, 11.
legal hindrance, 11, 390.
sales upon credit, 240, 332, 333, 356.
delay refers to time, 318.
hindrance relates to obstacles, 318.
HINDRANCE AND DELAY, instances of, 11.
no distinction between, 11 *n.*
meaning of terms, 318.
sales upon credit, 240, 332, 333, 356.
HOMESTEAD, abandoned, 50.
right to claim, 46.
may be changed, 46.
exemption must be pleaded, 166 *n.*
liable to creditors, 50.
protected by cross-bill, 166.
HONEST PURPOSE, presumed, 5, 6.
HONESTY, presumption of, prevails, 5, 6.
the law loves, 20.
good motives to be imputed, 5, 6.
appearance of, preserved by debtor, 224.
HOSTILE claimants cannot join, 108.
demurrer for joinder of, 108.
the test, 108.
HUMAN NATURE, knowledge of as test of fraud, 7.

HUSBAND AND WIFE, 122, 298–315.
prominence of the subject, 122.
when husband not proper party, 132 *n.*
articles of separation, 310.
enforcing alimony, 45.
husband as creditor of wife, 122.
wife as complainant, 122, 314.
separate property of wife, 304.
need not work in her separate business, 218.
book entries of transactions, 305*a*.
judgment against wife, 315*a*.
(1.) *The marriage relationship*, 298.
confidence reposed in, 298.
frauds in the relationship, 298.
(2.) *Wife as husband's creditor*, 299.
husband may pay her honest debt, 299.
when conveyance not upheld, 210.
claim for support, 299*a*
not bound to plead defenses, 299.
common-law rule abrogated, 299.
(3.) *Transaction between, how regarded*, 300.
closely scanned, 300.
facilities for fraud, 300.
onus in transactions between, 300.
improvements by husband on wife's land, 26, 26 *n.*
(4.) *Burden of proof*, 301.
burden rests upon wife, 301.
must show value, 301.
presumptions in favor of creditors, 301.
presumption of ownership by wife, 301.
(5.) *Mutuality of fraudulent design*, 199, 200, 302.
to render settlement fraudulent, 302.
fraud, how proved, 302.
(6.) *Husband as wife's agent*, 303.
husband may act as, 303.
knowledge imputed, 198 *n.*
injustice of denying such right, 303.
(7.) *Mingling property of husband and wife*, 305.
wife may lose title thereby, 305.
not where agreement to pay exists, 305.
fictitious credit, 305.
(8.) *Marriage settlements*, 306, 307.
amount of settlement, 306.

HUSBAND AND WIFE — *marriage settlements — continued.*
when avoided, 306.
post-nuptial settlements, 307.
purchase after marriage, 308.
gift from husband to wife, 309.
(9.) *Fraudulent conveyances in contemplation of marriage*, 314.
illustrations of the enforcement of the rule, 314.
applies to both husband and wife, 314.
fraudulent transfers affecting dower, 315.
(10.) *Life insurance*, 23, 23 *n*, 312.
creditors' rights in, 23, 23 *n*.
(11.) *Estate in entirety*, 29.
husband's interest liable, 29.

ILLEGAL, consideration is no consideration, 214.
claim, insufficient, 77.
composition preference, 393*a*.
ILLICIT INTERCOURSE, illegal consideration, 213.
ILLINOIS, return of execution, 86 *n*.
trust income cases, 367*a*.
IMPEACHING, judgment, 78 *n*.
burden as to, 74.
IMPOSSIBLE, to secure judgment, 84.
IMPOUNDING, proceeds of fraudulent sale, 175.
IMPRISONMENT, of debtor, effect of, 66.
constitutes satisfaction of claim during its continuance, 66.
termination of revives remedy, 66.
IMPROVEMENTS, recovering, 26, 26 *n*, 192 *n*, 193 *n*.
on another's land, 26.
the law follows them, 26.
temporary or perishable, 26.
by husband on wife's land, 26.
to support gift, 296.
INADEQUACY of purchase price, 232.
as evidence of fraud, 6, 232.
not *per se* fraudulent, 232.
illustrations, 232.
does not *per se* prove fraud, 232.
unless extremely gross, 6, 232.
the test, 232.
is fact calling for explanation, 232.
INCEPTION OF TRANSACTION, fraud must be in, 227.
INCHOATE INTEREST may be reached, 30.

INCHOATE INTEREST — *continued.*
curtesy and dower, 30.
unassigned dower, 61.
INCOME, surplus may be reached, 45, 360.
See SPENDTHRIFT TRUSTS.
the rule applied, 45, 360.
exempt earnings for sixty days, 61 *n.*
creditors' lien on, 45.
burden of showing, 45.
interest of wife in, 45.
station in life of debtor, 45.
INCOMPETENCY of assignee, 338.
badge of fraud, 338.
ground of removal, 337.
INCONSISTENT DEFENSES, may be set up, 158.
INCORPOREAL RIGHT, membership of stock exchange is, 35.
INCUMBRANCES, purchaser removing, 126.
INDEFINITE TRUST, fraudulent, 11.
INDIAN TERRITORY, statute of Elizabeth in, 16 *n.*
INDIANA, creditor's bill against absconding debtor, 84.
exceptional practice in, as to joinder of claims, 85.
its features considered, 85.
suit by general creditor, 73 *n.*
as to change of possession, 250.
as to spendthrift trusts, 367*a*.
INDICIA OF FRAUD, 224–244.
See BADGES OF FRAUD.
are circumstances or elments of fraud, 224.
defined, 225, 225 *n.*
INDICTMENT, alleging fraudulent conveyance, when sufficient, 65 *n.*
INDIVIDUAL and copartnership debts, 216.
consideration as affecting, 216.
INDORSER as creditor, 90.
INDUSTRY AND TALENTS, cannot be reached, 50*a*.
INFANT, fraudulent intent applied to, 199 *n.*
no participation in fraudulent intent, 199 *n.*
interest in parents' trust income, 45.
INFERENCE, of fraud from circumstances, 7.
of fraud, despite honest intent, 197.
how justified, 281.
INJUNCTION against debtor before judgment, not allowed, 52, 185.
theory of the rule, 52.

INJUNCTION — *continued.*
exceptions to the rule, 53, 185.
vexation and hardship incident to any other rule, 52.
creditor must have certain claim, 52.
against debtor, 185, 186.
against sale, 185.
against encumbrancing stock, 185.
when allowed, 185.
when disallowed, 186.
not allowed to wife, when, 52.
in aid of attachement, 53, 185.
in cases of false credit and disaffirmance, 53.
INJURED PARTIES, only can assail fraudulent conveyances, 107.
INNOCENCE, presumed in actions for deceit, 5.
of assignee, does not save assignment, 319.
INNOCENT CONSTRUCTION, to be preferred, 20, 20 *n.*
INQUIRY, facts sufficient to excite, 379, 380.
facts that constitute notice of fraud, 380.
scope of, in this work, 3.
field of, broad, 6.
INSIGNIFICANT GIFTS, not avoided, 41.
INSOLVENCY, evidence of, 239, 273.
importance of proof of, 239.
as proof of fraud, 239.
considered a circumstance, 239.
seeking provisional relief, 184.
meaning of the term, 273.
opinions as to, 273.
of vendee, 274.
proof of, 271.
continuing business after, 143 *n.*
of debtor, evidence of, 273.
discharges as defense, 294.
rule as to, 294.
alleging in pleading, 143.
when must exist, 143.
defined, 143.
INSOLVENT, punished under early law, 1, 1 *n.*
proof that person is, 239.
station in life as regards income, 45.
INSOLVENT CORPORATION, capital stock of, 68 *n*, 117
evidence of insolvency, 273, 273 *n.*
See CORPORATION.
INSTRUMENT, fraud shown by separate, 6.

INSUFFICIENT CONSIDERATION, 223.
illustrations, 223, 232.
judgments, 77.
statement of confession, 174.
INSUFFICIENT, judgments, 77.
grounds to attack assignment, 345*a*.
INSURANCE, when not assignable, 23.
policies, rights of creditors, 23, 23 *n*, 312.
by married man, 23.
murder to secure, 20 *n*.
when not in fraud of creditors, 23 *n*.
annual premium limited, 23.
insurance money may be traced, 44.
IN PERSONAM, judgment to sustain supplementary proceedings, 61.
to uphold creditor's suit, 77.
primary jurisdiction of equity is, 60.
INTANGIBLE interests may be reached, 17, 27.
choses in action recoverable, 17, 24, 33.
stocks, patent rights, legacies, 24, 37, 38.
INTEGRITY, paramount to generosity, 16.
INTENT, is an emotion, 8.
See INTENTION.
essential element, 196.
inferred from circumstances, 8.
fraudulent pleading, 145.
as a conclusion of law, 9, 10, 197, 322.
cases considered, 10.
evil, not evidence by gifts of small value, 41.
not conclusive, 197, 382.
determined by act done, 8 *n*, 196.
seldom disclosed on face of transaction, 196.
INTENTION, may oppose legal conclusion, 8, 382.
when cannot change presumption, 9.
seldom disclosed on face of transaction, 196.
reached by construction of instrument, 10, 322.
as affecting subsequent creditors, 98, 202.
generally, 8, 9, 10, 41, 196–206, 279*b*.
must be found as a fact, 196.
discrimination in decree, 196.
(1.) *Defined or outlined*, 196.
is an emotion or operation of the mind, 196.
shown by acts or declarations, 196.
fraud as affected by, 8, 9, 10, 196.

INTENTION — *defined or outlined — continued.*
debtor's statements not conclusive, 196, 197.
insolvent's standard of morality not the test, 196.
hinder, delay *or* defraud, sufficient, 11, 196.
when question of *res adjudicata*, 203.
question for the jury, 204.
testifying to, 205.
as to another person's intent, 205.
proving it, 206.
intent of debtor the test, 196, 196 *n.*
gathered from circumstances, 206.
(2.) *Actual intent not decisive*, 197.
fraudulent purpose may be implied, 8, 9, 10, 197.
debtor's belief immaterial, 8, 9, 10, 196, 197, 322, 382.
professions of good faith, 279*a*.
(3.) *Fraud of agent binding on principal*, 198.
intent established by implication or substitution, 198.
(4.) *Mutuality of participation in fraudulent intent*, 199, 207.
the general rule, 199.
vendor's intent insufficient, 199.
fraudulent intent as applied to infant, 199 *n.*
(5.) *As affecting voluntary alienations*, 200, 319.
the cases reviewed, 200 *n.*
differs from cases where consideration is present, 200.
not essential to show mutual evil intent, 200.
relating to general assignments, 319.
(6.) *Where consideration is adequate*, 201.
the rule considered, 201.
(7.) *To defraud subsequent creditors*, 96, 97, 98, 100, 202.
applications of the rule, 96, 97, 98, 100, 202.
creditor must show, 98.
future schemes of fraud, 202.
INTENTIONAL FRAUD, under bankrupt act, 13 *n.*
INTENTIONAL OMISSION of assets, avoids assignment, 345.
INTERESTED parties, *in esse*, must be joined, 107.
INTERESTS that may be reached, 23–50.
tangible interests, 24.
intangible rights, 17, 24, 33, 37, 38.
rule in England, 25.
profits and improvements, 26.
crops, 27.
choses in action, 33.
powers, 39, 40.

INTERESTS — *continued.*
trust income, 45, 360.
INTERPRETATION and construction, 20, 20 *n.*
maxims of common law, 20 *n.*
of contracts, 268.
INTERVENTION, motion for in New York, 108 *n.*
creditor must not be guilty of laches, 109.
INTRODUCTORY observations, 1–22.
IRREGULARITIES, not proof of fraud, 5.
IRRESISTIBLE, evidence to establish fraud need not be, 7.
ISSUE OF FACT, referred to jury in equity, 51.
See JURY.
ITEMS, of evidence, jury to weigh, 281.

JOINDER OF CLAIMS, 54, 108.
rule in Ohio, 54.
uniting causes of action, 55, 108.
several grantees may be joined, 54.
although separate defenses exist, 54.
ejectment and equitable relief in one bill, 54.
conflict in the cases, 54.
exceptional practice in Indiana and North Carolina, 85.
for judgment on coupons and mandamus, 85 *n.*
JOINDER OF COMPLAINANTS, 108, 108 *n.*
creditors by distinct judgments, 108.
various illustrations, 108.
by judgment and decree, 108.
general theory, 108.
of hostile claimants, 108.
JOINING DEFENDANTS, the rule, 128, 132, 150, 151, 152.
the theory, 132.
objections to non-joinder, 134.
debtors, 128, 129.
stockholders, 128.
JUDGMENT-CREDITORS, may follow corporate assets, 119.
may attack fraudulent conveyance, 73–88.
See STATUS OF ATTACKING CREDITORS.
may attack other judgments, 74.
when execution excused, 75.
JUDGMENT OR DECREE, rules as to, 168–183, 183*a*.
status of attacking creditors, 73–88.
lien and order of payment, 170, 170 *n*, 171.
collateral attack on, 270.

JUDGMENT OR DECREE — *continued.*
confession, 270 *n.*
when judgment unnecessary, 83.
receiver before, 184.
on offer, valid, 76.
judgments sufficient, 76.
judgments insufficient, 77.
foreign judgment, 78.
when judgment unnecessary, 83, 83 *n.*
(1.) *Judgment conclusive*, 168, 169, 270, 286*b*.
attributes of the judgment, 168.
operates as an estoppel, 168.
conclusive, though form of action be changed, 169.
judgment transferring title, 172.
when not conclusive, 168.
(2.) *Judgment appointing receiver*, 170.
the pratice explained, 170.
appointing referee irregular, 170.
effect of, 170.
(3.) *Judgment avoids sale only as to creditor*, 171, 395–402.
the principle, 171, 395.
effect of action of chancery, 171.
(4.) *Impounding proceeds of fraudulent sale*, 175.
accounting by fraudulent vendee to debtor, 176.
(5.) *Relief at law and in equity*, 176 *n.*
equity more flexible, 176 *n.*
enforcing judgment at law, 170*a*.
(6.) *Personal judgment against fraudulent vendee*, 3 *n*, 177, 178.
the subject discussed, 177.
rule in various States, 3 *n*, 177, 178, 178 *n.*
allowances to vendee, 176.
money in place of land, 178 *n.*
money judgment, when disallowed, 179.
personal judgment against wife, 180.
(7.) *Must conform to relief sought*, 181, 182.
illustrations, 181, 182.
fraud must be found as stated, 168.
form in Louisiana, 171.
(8.) *Generally.*
no judgment in favor of unrepresented parties, 173.
enforcing judgment at law, 170*a*.
confession of judgment, 174.
contradictory verdicts, 183.

JUDGMENT OR DECREE — *generally — continued.*
status of attacking creditors, 73–88.
attaches to proceeds of power, 40 *n.*
as to trust, when binding on creditors, 45 *n.*
when fraudulent, removed, 51 *n.*
equity will restrain when demand fictitious, 74 *n.*
creditor attacking, burden as to, 74.
in supplementary proceedings, 77.
cestui que trust need not have, 127*a.*
statutory new trial, 183*a.*
case retained till disposed of, 168.
JUDGMENT, FOR DAMAGES, improper in equity, 51.
must be for accounting by fraudulent vendee, 51.
fraudulent confessions of, attacked in one suit, 54.
creditor must have, before filing bill, 71–88.
conclusive as to indebtedness, 74, 270.
proof of, 270.
attacking for collusion, 74 *n.*
sufficient to sustain a bill, 76, 80.
insufficient for that purpose, 77.
foreign, effect of, 78.
foreign, not sufficient, 78.
object of, 73.
establishes debt, 73.
exhausts legal remedy, 73.
lien by statute, 87.
JUDICIAL SALE, change of possession on, 265.
not necessary in Pennsylvania, 265.
considered essential in New York, 265.
JURISDICTION IN EQUITY, when exclusive, 56.
when property not subject to execution, 36.
limited in Massachusetts to property not subject to execution or attachment, 59 *n.*
united jurisdictions, effect of, 51.
JURISDICTIONAL QUESTIONS, 405–407.
beyond State boundaries, 405.
outside county, 406.
appeal to Supreme Court, 407.
JURY, issues of fact referred to in equity, 51.
framing issues, 51, 51 *n.*
to weigh items of testimony, 281.
to weigh declarations, 276.

JURY — *continued.*
consider badges of fraud, 228.
intent, questions for, 9, 204.
fraud on subsequent creditors, question for, 97, 97 *n.*
court cannot interfere, 204.
in conclusive cases verdict ordered, 204.
rule in New York as to, 204.
effect of badges of fraud submitted to, 226.
continued possession as evidence of fraud, question for, 254.
error by, how corrected, 254.

KANSAS, change of possession, 250.
KENTUCKY, rule as to absconding debtors, 84.
as to land bought with pension money, 46.
rule as to trust income, 367*a*.
as to change of possession, 251.
KNOWLEDGE, of facts sufficient to excite inquiry, 379, 380, 381.
See NOTICE.
of facts, as notice of fraud, 379–381.
buying with guilty knowledge, 380.

LABOR, debtor may give away, 50*a*.
debtor may bestow on wife, 50*a*.
preference for claim for, 341*b*.
LACHES, excusing apparent, 148.
not imputed by iron rule, 287.
circumstances govern each case, 287.
pleading as to, 148, 149.
as a defense, 287.
stale demands discouraged, 287.
lapse of time, 288, 289.
effect of, 287–289.
creditor applying to intervene, 109.
LAND, change of possession of, 264.
as distinguished from personalty, 264, 264 *n.*
possession evidence of ownership, 264.
purchased in name of third party, 57.
in name of third party, trust as to, 57 *n.*
LAPSE OF TIME, as a defense, 288, 289.
rests not alone on laches, 288.
peace of society, 288.
loss of witnesses, 288, 289.
LATITUDE ALLOWED, in proving circumstances, 281.

LATITUDE ALLOWED — *continued.*
in cross-examination, 281.
LAW, purchase either valid or void at, 51.
no reimbursement at law, 193.
remedy at, 59.
creditor may proceed by execution at, 59.
attempted transfer treated as nullity, 59.
and equity, distintion observed between, 51.
LAWRENCE v. FOX, rule in, applied, 43.
LEASE, liability on, creditor, 90.
LEGACIES, recovered by creditors, 24.
LEGAL AND EQUITABLE JURISDICTION, 4, 51, 59, 60.
changes in modern procedure, 51.
who responsible for decision in equity, 51.
judgment for damages not allowed in equity, 51.
reimbursement in equity, 192.
equity more flexible than law, 60.
LEGAL FRAUD, meaning of, 51.
LEGAL PRESUMPTIONS, 7.
Judge Black's views, 7.
LEGATEE, cannot avoid testator's transfer, 121 *n.*
LEGISLATION, tendency of, to protect honest debtors from punishment, 1 *n.*
to enlarge remedies against property, 3.
may exempt all property, 46 *n.*
as to creditors of decedent, 79.
LEVY, when excused, 75, 83.
cannot be made against receiver, 83.
LEX FORI, governs remedy, 64.
cases and illustrations, 64.
governs right to arrest, 64, 191.
matters of procedure, regulated by, 64.
LEX NEMINEM COGIT AD VANA SEU INUTILIA PERAGENDA, 73.
struggle for application of maxim, 73.
LIBEL, claimant for damages from, is creditor, 90.
LIEN, in supplementary proceedings, 61.
See STATUS OF ATTACKING CREDITORS.
creditors must have, to file bill, 73, 75, 76, 88.
created by creditor's bill, 68, 75, 392.
by attachment, not sufficient to support bill, 81, 81 *n.*
creditors having rights of, 125.
parties having, as defendants, 138.

LIEN — *continued.*
judgment sufficient, 76, 80.
judgment insufficient, 77, 78, 81.
when unnecessary, 83.
upon rents and profits, 26.
judgment by statute, 87.
order of payment, 170, 171.
LIFE INSURANCE, policies, may be reached, 23, 24.
when non-assignable, 23.
by married man, 23.
murder to secure, 20 *n.*
LIGHTLY IMPUTED, fraud is not, 5.
LIMITATIONS upon ownership not favored, 360–368.
inconsistent, are void, 362.
statute of, 292.
in equity, 293.
effects of discovery of fraud, 290, 291.
must be pleaded or raised, 202.
acknowledgment of debt, 215.
judgment barred by, 77.
rule in New York, 73.
LIMITED partnership, cannot assign with preference, 319*b*.
LIS PENDENS, rule as to, 157.
to create, must describe property, 157.
doctrine as to, very ancient, 157.
not applicable to bonds, 157.
or to negotiable securities, 157.
or personal property, 157.
LITIGATION engendered by fraudulent transfers, 2.
not creditable, 407.
LOCAL, penal statutes are, 139.
territorial jurisdiction, 157*a*.
LOCAL RULE, governs federal courts, 20.
LOGS, delivery of, 262.
symbolical delivery sufficient, 262.
illustrations, 262.
LONG CREDIT, sale on, 240.
LOUISIANA, doctrine as to collateral attacks, 69.
its features discussed, 69.
derived from civil law, 69.
not generally acknowledged, 69.
objections to rule, 69.
form of judgment, 171.

LOUISIANA — *continued.*
as to change of possession, 250.
LOVE AND AFFECTION as consideration, 210.
good between brother and sister, 216.
not good against existing creditors, 210.
explaining recitals in deed as to, 221.

MAINE, suit by general creditor, 73*n.*
spendthrift trusts, 367*a.*
MAINE'S ANCIENT LAW, punishment of debtors, 1 *n.*
MALICIOUS PROSECUTION, claims for, cannot be reached, 34.
do not pass by assignment, 34.
MANIFEST, fraud must be made, 5.
MARRIAGE, as consideration, 212.
the rule in the cases, 212.
public policy as to, 212.
relationship, 298.
settlement, rule as to, 306.
post-nuptial settlement, 307.
fraudulent conveyances in contemplation of, 314.
settlement, description in, 157 *n.*
statute of frauds, 311.
MARRIED MAN, may devote earnings to life insurance, 23.
See AGENT.
MARRIED WOMEN, rights of, 298.
claiming life insurance, 23.
assignments of policies by, 23.
See HUSBAND AND WIFE.
MARSHALL, Chief-Justice, views of, as to moral turpitude, 8.
MARSHALLING assets, 216.
MARYLAND, change of possession, 251.
spendthrift trusts in, 367*a.*
MASS, of property, charge upon in equity, 44, 44 *n.*
MASSACHUSETTS, rule as to spendthrift trusts, 367, 367*a.*
rule as to crops on lands fraudulently conveyed, 27.
jurisdiction of equity in, 49 *n.*
choses in action reached, 64.
remedies allowed, 65.
when receiver not appointed, 188 *n.*
no reconveyance, 397.
knowledge of intent, 196.
promises of third parties, 43.
MATERIAL FACTS, must be alleged in complaint, 141.

MAXIMS, of common law, control laws and contracts, 20 *n.*
MEMBER, suing in place of receiver, 73.
MEMBERSHIP of stock exchange is assets, 35.
not liable to execution, 35 *n.*
MENTAL OPERATION and legal conclusion opposed, 8.
illustrated in Coleman v. Burr, 382.
intent is, 196.
MESNE PROFITS recoverable, 26.
during period of redemption, 26.
when property is held under trust, 26.
METHODS of obtaining redress, 72.
annulling fraudulent deed, 72.
appointing referee or receiver, 72.
selling on execution, 72.
MICHIGAN, change of possession, 250.
MINGLED property, 28.
rule as to, 28.
of husband and wife, 305.
wife may lose it, 305.
conflicting views, 305.
rule in bankruptcy, 305 *n.*
MINNESOTA, proof of existing debt, 89 *n.*
suit by receiver in insolvency, 115.
dishonest design must be shown, 197.
change of possession, 250.
MISJOINDER of causes of action, 135.
hostile claimants cannot join, 108.
MISSISSIPPI, general creditor may sue, 73 *n.*
debt must be due, 107 *n.*
exemptions in, 365.
trust income cases, 367*a*.
MISSOURI, issuance of attachment in, 12.
creditor's bill against absconding debtor, 84.
trust income cases, 367*a*.
conveyance by embarrassed debtor, 99.
change of possession, 251.
MISTAKE, in fraudulent conveyance, not corrected, 396.
in assignment, not fatal, 321.
MIXED CLAIMS, prior and subsequent to alienation, 105.
MODERN CHANGES in the law, 1.
MONEY EARNED, but not due, available, 33.
MONEY JUDGMENT, when disallowed, 179.
alllowed against vendee, 177, 178.

MONEY JUDGMENT — *continued.*
in equity, 51.
MONEY, may be reached, 24.
consideration need not be in, 207.
MONOPOLY, which patent confers, is property, 38.
MORAL SENSE, weak in some men, 8, 382.
of debtor, not binding on creditor, 8.
MORAL TURPITUDE, proof of, 8, 382.
not exacted, 8.
under bankrupt act, 13 *n.*
obligations as to consideration, 215.
duty to pay debt barred by statute, 215.
obligation, statute of frauds, 215.
MORTGAGEE as *bona fide* purchaser, 371.
rule in New York, 371.
MORTGAGES, 347–359.
See CHATTEL MORTGAGES.
when fraudulent, 347–359.
promise not to disclose existence of, 281.
for just debt, may be overthrown, 207.
absolute conveyance as security, 238, 404.
pre-existing indebtedness as consideration, 371.
declaring deeds to be, 404.
future advances should be shown on mortgage, 217.
redeeming from, 404*a*.
assignee may set aside, 115.
MOTHER, and son, transactions between, 242.
MOTION, uncertainty in pleading reached by, 140 *n.*
MOTIVES, often unimportant, 8, 382.
not controlling, 187.
of transactions, 7.
latitude on question of, 224 *n.*
testifying to, 205, 205 *n.*
MULTIFARIOUS complaints, 150, 151, 152.
complaints bad for, 150.
pleadings held not to be, 151, 152.
rules applicable to, 150–152.
MUNICIPAL CORPORATION as creditor, 90.
from date of tax warrant, 90.
MURDER, not presumed, 5 *n.*
to secure proceeds of insurance, no recovery, 20 *n.*
MUTUALITY of participation in fraudulent intent, 199, 302, 319.
vendor's intent alone sufficient, 199.

MUTUALITY — *continued.*
participation by infant, 199 *n.*
as to voluntary alienations, 200, 200 *n.*
Laughton v. Harden, 200 *n.*

NATIONAL BANK, receiver of, 117.
not dissolved by receivership, 134.
NATURAL, presumptions, 7.
Judge Black's views, 7.
consequence of an act, presumption as to, 9, 10, 382.
person, corporation like, 117 *n.*
NEBRASKA, change of possession, 250.
NEGOTIABLE INSTRUMENTS, *lis pendens* doctrine not applicable, 157.
NEVADA, change of possession, 250.
NEW ENGLAND cases as to change of possession, 249.
transfers presumptively fraudulent, 249.
NEW APPOINTMENT of assignee made by court, 316.
NEW JERSEY, bill by creditor having lien, 81 *n.*
spendthrift trusts, 367*a*.
bill by receiver, 116.
receiver of jewelry, 188.
NEW TRIAL, not a matter of right, 183*a*.
NEW VENTURES, placing property beyond, 100.
NEW YORK, value as affecting right to bring bill, 23 *n.*
and Massachusetts, choses in action may be reached, 64.
creditor's bill and supplementary proceedings at the same time, 65.
no receiver in ejectment, 187.
rule as to change of possession, 250.
declarations as to personalty, 277.
sales by mortgagor for mortgagee valid, 355.
pension money in land, exempt, 46.
judgment by creditors of decedent, 79.
statutory policy, 79.
supplementary proceedings are special proceedings, 61.
assignee must attack fraudulent conveyance, 115.
title of receiver to real property, 116.
specific assignment not a general assignment, 339.
rule as to limitations, 73.
personal representative must sue, 77, 77 *n.*
suit in aid of attachment, 81, 81 *n.*
rule as to voluntary conveyances, 93, 208.

NEW YORK — *continued.*
fraud on subsequent creditors, 100 *n.*
intervention motion, 108 *n.*
executors may sue, 112.
rule as to discovery of fraud, 149.
rule as to *lis pendens*, 157.
spendthrift trusts, 367*a*, 367*b*.
NICHOLS v. EATON, the point actually decided, 364.
the case stated, 364.
the dictum, 365.
criticised, 365.
the true rule, 366.
re-stated, 361 *n.*
NON-ATTENDANCE, of defendant, 241, 241 *n.*
NON-FILING of deed, 234 *n*, 235.
NON-RESIDENT DEBTOR, jurisdiction over, 84.
NO REIMBURSEMENT at law, 193.
NO DEFINITION of fraud, 13.
NORTH CAROLINA, exceptional practice as to joinder of claims, 85.
the practice deprecated, 85.
spendthrift trusts, 367*a*.
inadequacy of consideration, 232.
NOTICE, actual and constructive, 372–389.
(1.) *Without notice*, 372.
Judge Story's rule, 372.
possession as notice, 384*a*.
creditors after notice, 106.
(2.) *Kinds of notice*, 373.
two kinds, actual and constructive, 373.
both defined, 373.
(3.) *Constructive notice of fraud*, 374–376, 378–382.
various definitions, 374.
rule in Stearns v. Gage, 375.
the doctrine discussed, 375, 376.
rule in Anderson v. Blood, 376*a*.
illustrations, 376.
actual belief, 377, 382.
rule in Parker v. Conner, 378.
comments, 382.
(4.) *Facts sufficient to excite inquiry*, 379–381.
many illustrations, 379–381.
means of knowledge equivalent to knowledge, 381.
notice to preferred creditors, 341*c*.

NOTICE — *facts sufficient to excite inquiry — continued.*
purchaser *pendente lite*, 389*a*.
NOTORIETY of change of possession, 253.
symbolical delivery insufficient, 253.
NULLA BONA, execution returned, 86, 87, 87 *n*.
NULLITIES, attempted transfers treated as, 59, 69.

OATH against oath, effect of, 159.
OBJECTIONS, as to non-joinder, how raised, 134.
to jurisdiction in equity, 88, 88 *n*.
OBSTACLES to development of the law, 5.
OFFER, judgment entered on valid, 76, 270.
judgment on, 270.
of reimbursement, 192.
OHIO, rule as to change of possession, 250.
as to spendthrift trusts, 367*a*.
OMISSION from schedules, when fraudulent, 320.
OMNIA PRAESUMUNTUR CONTRA SPOLIATOREM, 281.
OMNIBUS BILL, creditors' bill so called, 68.
ONUS, as to fraud, 5, 6, 224.
affecting marriage relationship, 300.
OPEN AND CONCLUDE, right to, 271, 271 *n*.
OPINION, evidence as to insolvency, 273, 273 *n*.
as to value, 284.
of the parties, accorded little weight, 8.
ORDER OF ARREST, when vacated, 191.
OTHER CONVEYANCES, evidence of, 382.
OTHER FRAUDS, as evidence, 282.
"OTHERS," meaning of, 110.
who included in, 110.
suing on behalf of, 110.
design of the statute as to, 110.
OVERCOMING presumption from failure to change possession, 255.
OVERSEER OF POOR, as claimant, 124.

PAINSTAKING formalities, badge of fraud, 241.
PARENT AND CHILD, daughter's services to father, 218
no implied promise to pay, 218.
PAROL EVIDENCE, to vary consideration, 221.
PARTICEPS CRIMINIS, no relief to, 192, 214.
PARTICULARITY of denial in answer, 162.
general answer operates against defendants, 162.
PARTICULARS, bill of, ordering, 162*a*.

PARTIES COMPLAINANT, 68, 73, 107–127.
See COMPLAINANTS.
joinder of complainants, 108.
when heirs cannot sue, 121.
when widow not entitled to proceed, 121.
PARTIES DEFENDANT, 128, 129.
See DEFENDANT.
joinder of defendants, 132, 133.
in forfeiture action, 132*a*.
question of, perplexing, 107.
competency of, as witnesses, 269.
cross-examination of, 281.
interested parties *in esse* must be joined, 107.
PARTY, as witness, 269.
competency of, 269.
PARTITION SUIT, mortgage assailed as fraudulent, 63.
the theory, 63.
PARTNERS, may sue copartners and fraudulent alienees, 54.
object of suit in such case, 54.
arrest of, 191.
preferring claims, 329.
no exemptions, 48.
special, cannot be preferred, 329.
survivor may make assignment, 329.
limited, assets are trust fund, 329.
corporators, when liable as, 139.
copartnership and individual debts, 216.
frauds on partnership creditors, 216.
partnership assignments, 319*b*.
power of to make assignments, 319*b*.
PAST TRANSACTIONS, declarations as to, 276.
PATENT RIGHTS, monopoly secured by, is property, 38.
may be assigned by operation of law, 38.
can be reached by creditors, 24, 38.
inchoate right to, non-assignable, 38.
receiver of, 38.
PAYMENTS, made to debtor, 50*b*.
PENALTY for non-payment of debts, 1.
inflicted upon stockholders, 139.
PENDENTE LITE, purchaser, 389*a*, 392.
PENDING the writ or suit, conveyance made, 22, 132*a*.
badge of fraud, 233.
purchaser bound, 132*a*.

PENNSYLVANIA, rights of administrators, 112.
change of possession, 251.
spendthrift trusts, 367*a*, 368.
powers not assets, 368*a*.
PENSION MONEY, in lands, 46.
PER SE FRAUDULENT, inadequacy of price is not, 232.
PERSONAL, judgment against fraudulent vendee, 177, 178, 178 *n.*
money judgment, when disallowed, 179.
against wife, 180.
to sustain bill, 77.
transaction with deceased, testifying to, 122.
PERSONAL liability, assignee protected against, 319*a*.
PERSONAL PROPERTY, mortgages upon, 347–359.
delivery of possession of, 245–267.
distinction between, and realty, 264.
as to return of execution, 87.
lis pendens inapplicable to, 157.
PERSONAL REPRESENTATIVES, as complainants, 112, 113.
rule in New York, 112, 113.
as defendants, 136.
conveyances binding upon, 112, 113, 398.
may sue for cancelled debt, 42.
claims of, pass by assignment, 316*a*.
PERSONAL TRANSACTIONS with deceased person, 121.
evidence of, 121, 205 *n.*
PERSONALTY, restraint upon, not allowed, 363 *n.*
in name of third party, liable to seizure, 57.
admissions concerning title to, excluded, 277.
PLAINTIFFS, in creditors' suits, 68, 73, 107–127.
See COMPLAINANTS.
PERSUASIVE, proof of fraud must be, 5.
PLEA, or answer, 158–167.
See ANSWER.
of *bona fide* purchaser, 163.
PLEADING, 141–167.
See COMPLAINT.
testimony must conform to, 285.
amendment of, 156.
bill of particulars, 162*a*.
charging fraud, 141.
general allegations insufficient, 141.

PLEADINGS IN EQUITY, not so strict as at law, 60, 146.
held not multifarious, 151, 152.
PLEDGE, void mortgage not basis of, 357.
PLEONASMS, in English statutes, 11 *n.*
POLICIES of insurance for wife's benefit, 23, 312.
when not assignable, 23.
POSITIVE TESTIMONY, not requisite, 5.
POSSESSION, change of, 245–267.
See CHANGE OF POSSESSION.
must be open and visible, 246, 253.
definition of, 245.
evidence of title, 245.
concerning possession, 245.
possession as proof of fraud, 247.
rebutting inference, 250.
transfers *prima facie* fraudulent, 248.
as evidence of fraud *per se*, 251.
rule in different states, 250, 251.
rule in federal tribunals, 250.
between husband and wife, 253.
replenishing stock, 253.
separating stock, 253.
overcoming presumption, 255.
result of the cases, 252.
change of, must be continuous, 257.
temporary resumption of, 258.
concurrent, 259.
excusing want of change of possession, 261, 263.
change of possession of realty, 265.
possession with power of sale, 267.
after conveyance, 279.
declarations characterizing, 277–279.
by wife, presumption of ownership, 301.
POSSIBILITY of judgment will not sustain bill, 73.
POST-NUPTIAL marriage settlement, 307, 308.
See HUSBAND AND WIFE.
upheld, if reasonable, 307.
presumed to be voluntary, 307.
POWER OF ATTORNEY, from wife to husband, 198.
POWER OF SALE, by mortgagor in mortgages, 347–359.
policy of the law considered, 347–359.
POWER, to reform assignment, 322*a*.
POWERS, when assets for creditors, 39, 39 *n*, 40.

POWERS — *continued.*
English rule as to, 39, 39 *n.*
rule in Supreme Court, 39 *n.*
views of Hardwicke and Somers, 39.
rule the same both as to realty and personalty, 39.
cannot be transferred, 39 *n.*
statutory changes as to, 40.
judgment attaches to proceeds of, 40 *n.*
Pennsylvania rule, 368*a*.
New York policy as to, deplored, 40, 368*a*.
of alienation, restraints upon, 360–368.
PRACTICE, 71.
See COMPLAINT; ANSWER; COMPLAINANTS; DEFENDANTS.
in federal courts, 71.
equity practice prevails, 71.
following State rules, 71.
PRAYER OF COMPLAINT, 155.
mistake as to, not fatal, 155, 181.
inapt and incongruous prayers, 155.
PREFERENCE, IS LEGAL, 390, 391.
must represent actual debt, 391.
excessive, 341*a*.
to laborers, 341*b*.
notice to preferred creditors, 341*c*.
on eve of general assignment, 391*a*.
illegal composition, 393*a*.
attaching creditor, 394*a*.
of vigilant creditors, 392.
why rewarded, 392.
of claim in which assignor is partner, 329.
of special partner, disallowed, 329.
assignments to prevent, 341.
purpose of bankrupt act to defeat, 390 *n.*
theory of, 390.
secret, when avoided, 393, 394.
for wages, 392*a*.
by supplementary proceedings, 61.
when upheld, 11.
by agreement with corporation, 185.
PRE-EXISTING debt, as consideration, 209.
PREMIUMS, suit to recover, proofs, 23 *n.*
PRESUMPTION, that natural consequence of an act was contemplated, 9, 10, 382.

PRESUMPTION — *continued.*
does not obtain that common law prevails in Russia, 64 *n.*
against fraud, 5–7.
rule as to, 7.
of good faith, 5, 6.
of innocence, 5.
of fraud in equity, 60.
that assignee represents creditors, 115.
PRESUMPTIONS, legal and natural, 7.
PRESUMPTIVELY FRAUDULENT, conveyances, 94, 248.
PRETENDED CREDITOR has no status, 91.
PREVALENCE of fraudulent transfers, 2.
the cause, 2.
PRIMA FACIE, cases of fraud, 243.
numerous illustrations, 243.
evidence of fraud, 247, 248.
true, answer, 159.
failure to change possession, 248, 250, 252.
PRIMARY JURISDICTION, in equity, 60.
PRINCIPAL, knowledge sufficient to charge, 198.
PROCEDURE in federal courts, 71.
at law and in equity, 51, 59, 60.
PROCESS, service of, creates lien, 61, 68, 392.
PROCRUSTEAN FORMULA, statutes not limited by, 22.
PRODUCTS, of land, may be reached, 24.
PROFESSIONS, of good faith, 279*a*.
PROFITS, devise of, is devise of lands, 262.
debtor cannot give away, 26.
PROMISES, of third parties available, 43.
doctrine of Lawrence v. Fox, 43.
the rule not universal, 43.
not recognized in Massachusetts, 43.
nor in England, 43.
theory of the rule, 43.
avoids circuity of action, 43.
PROMISSORY NOTES, may be reached, 24.
PROOF of moral turpitude, 8, 382.
not essential to avoid transfer, 8.
intent to defraud subsequent creditors, 98.
judgment or lien, 270.
of consideration, 209, 222.
mutuality of intent, 199.
See INTENTION — EVIDENCE.

PROPER AND NECESSARY PARTIES, 68 *n.*
See PARTIES.
PROPERTY, susceptible of fraudulent alienation, 23–50.
the rule, 24, 25.
in name of third party, 57, 82.
of debtor, theory as to, 11.
subject to immediate process, 11.
value of, affecting question of fraud, 23, 41.
proving value of, 284.
substituted or mingled, 28.
of equitable character, 68 *n.*
stock exchange seat is, 35, 35 *n.*
trade mark, 36.
book royalty, 37.
patent right, 38.
powers, 39, 40.
insurance, 23.
exempt property, 46, 49.
property not reached, 50*a*.
PROTECTION OF CREDITORS is the policy of the law, 1.
PROVING intent, 206.
circumstances, 281.
consideration, 219.
recitals as evidence, 220.
explaining recitals, 221.
value, 284.
PROVISIONAL RELIEF, injunction, receiver, arrest, 184–191.
(1.) *Importance of prompt relief*, 184.
forms of relief, 184.
(2.) *Injunction as form of*, 185, 186.
when allowed, 184, 185.
misconduct and insolvency, 184.
when disallowed, 186.
when issued against sale, 185.
against incumbrancing shares, 185.
(3.) *Receiver in contest over real property*, 187.
disinclination of the courts to appoint, 187.
why provisional relief is discouraged, 187.
no receiver in ejectment in New York, 187.
(4.) *Receiver to collect alimony*, 188.
practice in Wisconsin, 188.
may attack fraudulent transfers, 188.
(5.) *Of various interests*, 188.

PROVISIONAL RELIEF — *of various interests — continued.*
allowed only in clear cases, 188.
to sell land, 188.
of stock exchange, 188.
removal of, 190.
title in death, 189.
(6.) *Arrest of defendant*, 191.
actual intent to defraud necessary, 191.
PUBLIC, fraud upon, not avoid conveyance, 107.
PUNISHMENT, power to inflict, abrogated, 2, 3, 3 *n*, 178.
PURCHASE PRICE, inadequacy of, 232.
offer to restore, 192.
PURCHASER, removing incumbrances, 126.
recovering in ejectment, 57.
bona fide, 369.
notice to, 369–389*a*.
with notice from *bona fide* purchaser, 384.
mortgagee as, 371.
of chattel mortgage, 168.
subrogation to creditor's lien, 195.
at execution sale may attack deed, 371*a*.
pending suit, 389*a*, 392.
See NOTICE; BONA FIDE PURCHASER.
PURPOSE of the inquiry, 3.

QUASI, public officer, assignee is, 316.
QUESTION FOR COURT, fraud in law, 9, 10, 382.
of equity, 51.
QUESTION FOR JURY, intent, 9, 204.
effect of badges of fraud, 226.
to weigh declarations, 276.
as to change of possession, 254.
QUI HÆRET IN LITERA HÆRET IN CORTICE, 20 *n*.
QUIA TIMET, bills, when maintainable, 59.

RATIFICATION, of assignment, 316 *n*.
of judgment and execution, 174.
REACHED, property that cannot be, 50, 50*a*.
REAL PROPERTY, receiver of, 187.
change of possession of, 264.
possession evidence of title, 264.
the cases considered, 264.
land in foreign state, 157*a*.

REAL PROPERTY — *continued.*
change of venue, 157*a*.
receivers, title to, 116 *n*.
situs of, governs, 24.
REALTY AND PERSONALTY, declarations, 277.
as to issuance of execution, 87.
REASONABLE TIME, possession within, 256.
RECAPITULATION of creditors' remedies, 72.
RECEIVER, has no title to tort claims, 34.
when cannot represent creditor, 117.
no claim to exemptions, 46.
in supplementary proceedings, 61, 116.
as complainant, 116, 188.
bill by, 116.
power to appoint over national bank, 117.
recognition of, by comity, 118.
appointed before answer, 184.
when denied, 184.
directing transfer to, 187.
of various interests, 188.
only allowed in clear cases, 188.
of annuity, 188.
to sell and convey land, 188.
of a living, 188.
of a patent, 38.
of a stock exchange seat, 188.
in action to foreclose contract, 187 *n*.
represents creditors, 116.
may disaffirm dealings of debtor, 116.
appointed for benefit of all parties, 188.
of corporation, rights of, 117.
when insolvency not ground for, 239 *n*.
judgment appointing, 170.
in contests over real property, 187.
title of, 117, 117 *n*.
title to realty, 116 *n*.
to collect alimony, 188.
of jewelry, 188.
title on death of, 189.
removal of receiver, 190.
entitled to notice, 190.
employment of debtor not ground of removal, 190.

RECEIVER — *continued.*
foreign, has no status, 118.
summary process not extended to, 116.
as defendant, 133.
reaching fund in hands of, 44.
when stockholder may sue, 73.
federal court not disturb State receiver, 117.
suing in place of, 73.
RECITALS, of consideration as evidence, 220.
of fictitious consideration, 228.
where fraud is present, 219.
of deed, avoiding transfer, 10, 322.
of complaint, 140–157.
of answer, 158–167.
in deed, 284*a*.
explaining, 221.
not binding on creditors, 221.
RECONVEYANCE cannot be enforced, 396.
theory of the law, 396.
when allowed, 399.
RECORD, of chattel mortgage, effect of, 347.
withholding instrument from, effect of, 101, 234 *n*, 235, 235 *n*, 236.
failure to record in fraud of bankrupt act, 237.
RECOVERING, improvements and rents, 26.
assets, 23–50.
RECOVERY, must conform to relief sought, 181.
must accord with complaint, 182.
REDEEMING mortgaged property, 404*a*.
REDEMPTION, recovering of mesne profits during period of, 26.
equity of, may be seized, 31.
REFEREE, judgment appointing irregular, 170.
assignee directed to account before, 316*c*.
REFERENCE, when not ordered, 62*a*.
views of Gilbert, J., as to, 62*a*.
REIMBURSEMENT, and subrogation, 192–195.
actual and constructive fraud, 192.
actual fraud defeats, 192.
constructive fraud does not defeat, 192, 194.
inequitable transactions set aside upon terms, 192.
when bill contains no offer of, 192.
when husband and wife are interested, 192.
outlay by creditor, 192.

REIMBURSEMENT — *continued.*
policy of the law, 192.
(1.) *No reimbursement at law*, 193.
transaction at law wholly valid or wholly void, 193.
constructive fraud, 194.
not so in equity, 192, 193.
(2.) *Subrogation of purchaser to creditors' lien*, 195.
when permitted, 195.
RELATIONSHIP, effect of, 93, 242.
calculated to awaken suspicion, 242.
transaction will be closely scrutinized, 242.
influence of Salmon v. Bennett, 242.
not necessarily evidence of fraud, 242.
when coupled with other badges, 242.
as regards preferences, 390.
RELEASES exacted in assignments, 328.
regraded with disfavor, 328.
in what form permitted, 328.
RELIEF before and after sale, 58.
at law and in equity, 59, 60, 176 *n.*
RELINQUISHMENT of dower, consideration for settlement, 299.
REMAINDER, estates in, recoverable, 29.
man, is creditor, 90.
REMEDIES OF CREDITORS, 51–72.
See CREDITORS' REMEDIES.
two-fold object, 360.
governed by *lex fori*, 64.
forms of relief, 4, 51.
reference not ordered, 62*a*.
REMEDY at law, 59.
by suit in equity, 60.
REMOVAL, or dismissal of receiver, 190.
similar to jurisdiction dissolving injunction, 190.
employment of debtor no ground of, 190.
to federal courts, 71.
RENEWAL CREDITOR, is existing creditor, 89.
RENTS, and profits recoverable, 26.
debtors cannot give away, 26.
REPAYMENT, of purchase price, 192.
REPELLING, inference of fraud, 250.
REPLEVIN, assignee may bring, 316*a*.
REPRESENTATIVES, as complainants, 112, 113.
bringing in as defendants, 132*b*.

REPRESENTATIVES — *continued.*
suits against, 136.
REPUGNANT CONDITIONS, void, 362, 363.
defined, 363 *n.*
theory of the law, 362.
REQUISITES of a fraudulent conveyance, 23.
characteristics and classes, 15.
RES ADJUDICATA, question of intent, when, 203.
judgment, when, 168.
conclusive in other forms of procedure, 169.
RESCUERS, judgment creditor's right against, 62.
RESERVATIONS, by debtor, creditors may reach, 32.
secret, effect of, 272.
avoid assignments, 326.
of exempt property, not fraudulent, 326.
of surplus, by assignor, 327.
RES GESTÆ, concerning, 276, 279.
importance of the rule, 276.
illustrations, 276.
must be concomitant with principal act, 279.
duty of the jury as to, 276.
RESTITUTION, reimbursement and subrogation, 192, 193, 195.
RESTRAINTS upon alienation, 14, 361.
by debtor in fraud of creditors, 14.
theory of the law, 361.
English and American cases, 361 *n.*
not favored, 362.
upon personalty, not allowed, 263 *n.*
RETURN of execution unsatisfied, 74, 86.
See STATUS OF ATTACKING CREDITORS.
distinction between realty and personalty, 87.
raising the objection, 88.
chancery rule, 75.
of officer, conclusive, 74.
REVERSION, estates in, may be reached, 29.
REVOCATION, reserving power of, 358.
RHODE ISLAND, practice as to absconding debtors, 84.
as to change of possession, 250.
as to spendthrift trusts, 367*a*.
RIGHT, to sue, transfer of, 92.
of creditors, existing and subsequent, 89, 97 *n.*
of creditors, protection of, 1.
of subrogation, not founded on contract, 195.

ROBINSON v. ELLIOTT, rule embraced in, 348.
discussed in later case, 348.
opposing rule and cases, 352, 353.
ROMANS, laws of, concerning insolvents, 1.
ROYALTIES on books, recoverable by creditors, 37.
RULE as to exempt property, 46.
fraudulent purchases of exemptions, 47.
covinous alienations of exemptions, 48.
conflicting cases, 49.
abandoned exemptions, 50.
of construction of statute of Elizabeth, 20.
same at law and in equity, 29.
of procedure in federal courts, 71, 407, 407*a*.
judgment in personal actions, 80.
of property, in federal courts, 20.

RUSSIA, no presumption that common law prevails in, 64 *n*.
SACRIFICE, transfer to prevent, 325.
to prevent surplus, 347.
SALARY, not reached in supplementary proceedings, 61 *n*.
exempt sixty days before proceedings, 61 *n*.
of municipal officer, exempt, 61 *n*.
SALE, possession with power of, 267.
doctrine of Robinson v. Elliott, 348–351.
relief before and after, 58.
judgment avoids, only as to creditors, 171, 395–401.
declarations before and after, 277, 278.
SALES UPON CREDIT, effect of, 240, 332, 333, 356.
hinder and delay creditors, 332, 333.
SCHEDULES, fraudulent omissions from, 320.
not evidence, 274.
unintentional omission, 320.
SCHEMES of fraud, future, 96.
SEATS in stock exchange are assets, 35.
the cases discussed, 35.
not liable to execution, 35 *n*.
SECRECY, evidence of, 234.
is badge of fraud, 234.
and concealment to be considered by jury, 234.
agreement to conceal not *per se* fraudulent, 234.
Mr. May's views as to, 234 *n*.
SECRET PREFERENCE, 393.

SECRET PREFERENCE — *continued.*
when avoided, 393, 394.
SECRET TRUST, 234*a*, 272.
common form of fraudulent conveyance, 272.
policy of the law, 272.
apparent on face of deed, 272.
implied from extrinsic circumstances, 272.
as regards chattel mortgage, 356*a*.
SECURITY, more than necessary, effect, 241.
permitting conveyance to stand as, 141.
corrupted with fraud, no relief, 238.
SELECTING transfers to attack, 67.
SEPARATE estate of wife, free from husband, 304.
SEQUESTRATOR, when entitled to sue, 116.
SERVICES by member of family, 218.
do not constitute valuable consideration, 218.
SET OFF, illustration of, 297*a*.
assignee takes property subject to, 319*a*.
SETTLEMENT, payable on bankruptcy, void, 364 *n*.
release of dower as basis of, 299.
See MARRIAGE SETTLEMENT.
SEVERITY of Roman law, 1.
SHAM contrivance a fraud, 15.
SHERIFF, money in hands of, reached, 33.
promise made to, available to creditor, 43 *n*.
as complainant, 81, 120.
what he must show against stranger, 297.
SHIFTING of burden, 271.
SHIP at sea, possession of, 256.
SILENCE, concealment of fraud by, not enough, 148, 148 *n*.
SIMPLE CREDITORS, cannot sue alienee in case, 62.
rights of, 73.
not entitled to injunction, 52.
rights of, 73.
remedies of, 73 *n*.
no bill by, in federal courts, 71.
cannot unite with judgment-creditors, 108.
SISTER, conveyance by, to brother, not fraudulent, 5.
preference to, dividend, 390.
SITUS, law of, governs in following real estate, 24.
SLANDER, claims for, cannot be reached, 34.
SLAVE, debtor sold as under early law, 1, 1 *n*.
SOLVENCY, evidence of, 95.

SOLVENCY — *continued.*
the cases considered, 95.
SON, to father, sale by, 242.
father may work for, 218.
sale to by debtor, 11.
services by, 218 *n.*
SMALL VALUE, gifts of, not avoided, 41.
SOUTH CAROLINA, creditor's bill against absconding debtor, 84.
trust income, 367*a.*
change of possession, 250.
SPECIFIC LIEN, by attachment, 81.
SPECIFICATION, of ground for removal of receiver, 190.
of particulars of action, 162*a.*
SPECULATION, placing property beyond risk of, 100.
such conveyances avoided by subsequent creditors, 100.
SPECULATIVE INFERENCE, not evidence of fraud, 5.
SPENDTHRIFT TRUSTS, 360–368.
policy of the law concerning, 360.
protests against, 360, 365.
Nichols v. Eaton, reviewed, 364, 365.
spread of the doctrine, 367*a.*
(1.) *Aversion to exemptions not statutory*, 360.
purpose of the law, 360.
creditor's property a trust fund, 360.
Williams v. Thorn, 360.
wife's interest in trust income, 45.
(2.) *Restraints upon alienations*, 361, 362.
theory of the law, 361.
treated as void, 361.
repugnant conditions, 362.
illustrations, 362.
(3.) *Nichols* v. *Eaton; the point actually decided*, 364.
the dictum, 365.
comments upon it, 365.
the correct rule, 366.
(4.) *Broadway National Bank* v. *Adams*, 367.
review of the case, 367.
doctrine dissented from, 367.
trend of the cases, 367*a.*
(5.) *Spendthrift trusts in Pennsylvania*, 368.
birth-place of the doctrine, 368.
dissent from it in that State, 368.
STAND by, doctrine of, 287.
STATE, may attack conveyance to defeat fines, 123 *n.*

STATE COURT, proceeding on judgment in Federal court, 78.
STATUS OF ATTACKING CREDITORS, 73–78, 106.
(1.) *Rights of creditors at large*, 52, 73.
cannot assail assignments, 73.
must have a lien, 73.
protecting attachment lien, 73.
equity not a remedy to collect debts, 73.
judgment and execution essential, 73.
remedy at law must be pursued, 73.
judgment conclusive as to indebtedness, 74.
adjudication of debt, 74 *n.*
rule as to necessity for judgment ancient, 75.
creditor must have lien, 75.
existed in England, 75.
recognized in chancery, 75.
statute of limitations, 73.
(2.) *Judgments sufficient*, 76.
ordinary money judgment, 76.
judgment in chancery sufficient, 76.
justice's judgment, when docketed, 76.
confession of judgment, 76.
judgment on offer, 76.
demand classified by probate court, 76.
in equitable actions, 80.
(3.) *Judgments insufficient*, 77.
barred by statute, 77.
judgment not personal, 77.
justice's judgment, 77.
foreign judgment, 78.
must bind all property, 77.
(4.) *Creditors of a decedent*, 79.
must have judgment in New York, 79.
statutory change, 79.
rule otherwise in other States, 79.
reasons of the rule, 79.
(5.) *Specific lien by attachment*, 81.
the cases reviewed, 81.
New York cases, 81, 81 *n.*
lien by attachment insufficient, 81.
(6.) *When judgment is unnecessary*, 83.
no remedy at law, 83.
creditor under an injunction, 83.
controversy in the cases, 83.
absconding and non-resident debtors, 84.

STATUS OF ATTACKING CREDITORS — *where judgment is unnecessary — continued.*
exceptional practice in several States, 85.
cestui que trust, need not have, 127*a*.
(7.) *As to execution*, 86, 87.
return of execution unsatisfied, 86.
property in name of third party, 82.
distinction between realty and personalty, 87.
raising the objection, 88, 88*n*.
STATUTE, 13 Eliz., c. 5, 19.
basis of all legislation, 19.
its object, 11, 19.
to prevent fraudulent deeds, 19.
universally adopted, 19, 19 *n*.
prevails in District of Columbia, 19 *n*.
bottomed on immoral intention, 9 *n*.
its interpretation and construction, 20.
merely declaratory of common law, 16 *n*.
27 Eliz., c. 4, 21.
of limitations, begins to run when, 292.
of limitations, in equity, 293.
of frauds, 311.
controlling in Federal courts, 71.
2 Rich. II, 18.
its purpose, 18.
3 Hen. VII, c. 4, 18.
50 Edw. III, c. 6, 18.
foreign statutes, effect of, 405 *n*.
STATUTE OF FRAUDS, debtor not bound to plead, 215.
contract to convey land within, 293*a*.
agreement outside of, 296.
STATUTES OF ELIZABETH, declaratory of common law, 16.
STATUTES OF LIMITATIONS, 292.
rule in New York, 73.
in equity, 293.
STATUTORY EXEMPTIONS, 46–50.
aversion to exemptions not statutory, 360.
covinous alienations of, 48.
conflicting cases, 49.
abandoned, 50.
STATUTORY liability of stockholders, 139.
STATUTORY PROCEEDINGS, changes as to executors and administrators, 112.

STEARNS v. GAGE, rule in, 375.
STOCK EXCHANGES, seats in, are property, 35.
may be reached by creditor, 35.
seats not liable to execution, 35 *n.*
character of, discussed, 35.
STOCKHOLDERS, as defendants, 119, 139.
when creditors may sue, 119.
statutory liability of, rests in contract, 139.
may be sued in foreign court, 139.
when not entitled to sue, 73.
suit when receiver is defendant, 73.
suit by, 109.
joining, 128.
STOCKS may be reached, 24.
lis pendens does not apply, 157.
STORY, J., constructive fraud defined by, 323.
STUDIED FORMALITY, will not save transaction, 241.
SUBROGATION, of surety, 111.
of purchaser to creditor's lien, 195.
the rule in New York, 195.
and reimbursement, 192, 193, 195.
of subsequent creditors, 103.
not founded on contract, 195.
no protection of fraudulent party, 195.
See REIMBURSEMENT AND SUBROGATION.
SUBSEQUENT ACTS, to prove original purpose, 227.
SUBSEQUENT CREDITORS, 96–106.
See EXISTING CREDITORS.
(1.) *Fraud upon subsequent creditors*, 96, 96 *n*, 97 *n*, 141.
the practical distinction, 96.
the cases considered, 96–106.
intent to defraud, 96, 97, 202.
question for the jury, 96 *n.*
rights of, considered, 97, 97 *n.*
statute of Elizabeth did not mention, 98.
(2.) *Intent as affecting*, 96, 202.
must be directly shown, 98.
may be inferred, 98.
no difference between existing and subsequent, 98.
alleging fraud on, 141.
(3.) *Placing property beyond risk of ventures or speculations*, 100, 101.
theory of the law, 96, 97, 100, 101.
rule restated, 100 *n.*

SUBSEQUENT CREDITORS—*placing property beyond risk of ventures or speculations.—continued.*
conveyances avoided, 101.
failure to record, 101.
transfers sutained, 102.
(4.) *Mixed claims*, 104, 105.
subsequent creditors sharing with antecedent creditors, 104.
accruing prior and subsequent, 104.
subrogation of subsequent creditors, 103.
(5.) *With notice*, 106.
constructive notice not sufficient, 106.
cannot generally avoid alienation, 106.
SUBSEQUENT PURCHASERS, attacking fraudulent conveyance, 21, 107.
SUBSTANTIAL FACTS, to prove fraud, 5.
SUBSTITUTED PROPERTY, rule as to, 28.
goods, lien extended to, 385.
SUFFICIENT CONSIDERATION, 222.
not sufficient, 223.
judgment to sustain bill, 76.
SUING on behalf of others, 109.
SUIT IN EQUITY, 51, 60.
advantages of, 60.
SUPPLEMENTARY PROCEEDINGS, nature of, 61, 61 *n*, 64.
remedy of, 61, 61 *n*.
a special proceeding in New York, 61, 116 *n*.
substitute for creditors' bills, 61, 61 *n*.
commencement of, confers lien, 61.
lien of, how defeated, 61.
lien, effect of death, 61 *n*.
what can be reached, 61, 64.
not exclusive, 61.
judgment to sustain, 76.
judgment must bind all property, 77.
creditors may abandon, 61.
claims of third party, 61.
must be based on judgment *in personam*, 61, 76.
receiver appointed in, 63, 188.
receiver represents creditors, 61.
title of receiver, 116, 116 *n*.
interests reached by, 61.
may be brought in federal courts, 61 *n*.
when not in State courts, 61 *n*.

SUPPLEMENTARY PROCEEDINGS — *continued.*
salary and earnings, 61 *n.*
SUPPORT, of debtor in early times, 1 *n.*
as consideration for transfer, 211.
attacking transfer to defeat, 122.
claim of wife to, 299*a*.
SUPPRESSION or concealment, subsequent fraud, 235.
of deed or mortgage, 235, 235 *n.*
in fraud of bankrupt act, 237.
SUPREME COURT, follows State rule, 71.
rule of property in, 20.
appeals to, 407, 407*a*.
certificate of division, 407*a*.
opinion about chattel mortgages, 348, 353.
SURETY, as creditor, 90, 111.
on guardian's bond, 90 *n.*
procedure by, 111 *n.*
assumption by as consideration, 209.
claim against misjoinder, 135.
on appeal bond, 111.
entitled to subrogation, 111.
as simple creditor, 111.
SURPLUS, income may be reached, 45, 360.
theory of the law, 45.
creditor's lien on, 45.
moneys reached, 63.
SURROGATE, cannot determine as to fraudulent transfer, 12 *n.*
SUSPICION, insufficient to establish fraud, 5, 228.
tangible facts must be shown, 283.
evidence must convince the understanding, 283.
SWORN ANSWER, taken as true when, 160.
SYMPATHY, with fraudulent debtors, 5.

TALENTS of debtor, creditor cannot command, 50*a*.
TANGIBLE FACTS, to establish fraud, 5.
suspicions insufficient, 5, 6, 283.
TANGIBLE PROPERTY may be reached, 23.
TEMPORARY resumption of possession, 258.
when does not render sale fraudulent, 258.
opposing illustration, 258.
improvements, 26.
TEMPTATION of debtors to commit fraud, 2.
TENANT IN FEE, condition not to alien, void, 362.

TENNESSEE, spendthrift trusts, 367*a*.
TERRITORIAL jurisdiction, change of venue, 157*a*.
TESTIFYING as to intent, 205.
as to value, 284.
See EVIDENCE.
TESTIMONY must conform to pleading, 285.
to overcome answer, 160.
as to intent, 205.
as to matters not in issue, excluded, 285.
TESTS, of fraudulent conveyances, 15, 15*a*.
TEXAS, joinder of claims, 85.
change of possession, 250.
THIRD PARTY, reaching property purchased in name of, 57, 82.
is it liable to execution, 57.
may be attached, 57.
consideration paid by debtor for, 57, 57 *n*.
enforcing promises of, 43.
doctrine of Lawrence v. Fox, 43.
conflict in the cases, 43.
promise to sheriff available to creditor, 43 *n*.
claiming property in supplementary proceedings, 61.
THREATENING to make assignment, 342.
not considered a ground of attachment, 342.
conflict in the cases, 342.
the safer rule, 342.
TITLE, on death of receiver, 189.
possession as evidence of, 245.
from fraudulent vendee, 386.
of personal representatives, 112 ,113.
of assignee in bankruptcy, 114.
of general assignee, 115.
of receiver, 116, 116 *n*.
of receiver of corporation, 117, 117 *n*.
judgment transferring, 172.
equity cannot create, 60 *n*.
TORT CLAIMS, cannot be reached, 34.
creditor, 123.
not transferred by assignment, 316*a*.
TORT, to property, is assignable, 34.
claimant is a creditor, 90, 123.
creditor as complainant, 123.
illustrations of rights of, 123.

TRACING, THE FUND, 44.
misapplied money, 44, 44 *n.*
following insurance money, 44.
goods in hands of sheriff, 44.
may be followed into any property, 44.
TRADE-MARKS, are assets, 36.
pass to assignee as property, 36.
under bankrupt law, 36.
personal, rule as to, 36.
TRANSACTIONS, palpably fraudulent, 10.
presumed to be honest, 5.
motives of, 7.
fraud must be inception of, 227.
with deceased, testimony concerning, 121.
between husband and wife, 300.
proof of, in separate instrument, 6.
TRANSFER pending suit, effect of, 22, 233.
is mark of fraud, 233.
of right to sue, 92.
to prevent sacrifice, 325.
of property by assignment, 316*a*.
TRANSFERS inuring as assignments, 339.
presumptively fraudulent, 248.
TRESPASS, judgment-creditor in, as complainant, 123.
TRIAL, framing issues for, 51, 51 *n.*
TRICK AND CONTRIVANCE to defraud creditors, 15.
TRIVIAL VALUE, property which is of, 23, 41.
not fraudulent to assign, 23.
TRUST, for debtor's benefit avoids conveyance, 10.
spendthrift, 360–368.
See SPENDTHRIFT TRUSTS.
for indefinite period, fraudulent, 11.
decree declaring binds creditors, 45 *n.*
fraud apparelled and clad with, 22.
enforcement of, without judgment, 84.
property in name of third party, 57, 57 *n.*
essential to create assignment, 316, 316 *n.*
matter of equity jurisdiction, 56.
TRUST FUND, creditor's property considered as, 360.
capital of corporation is, 117.
TRUST INCOME available to creditors, 45, 360.
above, what is needed for support, 45.
Williams v. Thorn considered, 45.

TRUST INCOME — *continued.*
interest of wife in, 45.
TRUST PROPERTY, does not pass by assignment, 316*a*.
TRUSTEE, and *cestui que trust* as defendants, 137.
when may sell on credit, 333 *n.*
fraudulent grantee as, 385.
ex maleficio, 300.
TURPITUDE, need not be shown, 8.
tendency of the cases, 8.
TWELVE TABLES, law as to insolvents, 1 *n.*
TWYNE'S CASE, stated and discussed, 22.
decided in 1601, 22.
its great importance, 22.
restated in Supreme Court, 22 *n.*
badges of fraud in, 22, 231.
rule as to change of possession in, 245.
its limited scope, 22.
growth of the law since, 22.
effect of secrecy as shown by, 22.
generality of gift, 22.
construed, use by vendor, 22.
expression of honesty in deed, 22.
rule in New York, 93.
in England, 93.

UNCERTAINTY IN PLEADING, reached by motion, 140 *n.*
UNDISCLOSED INTENT, evidence of inadmissible, 205 *n.*
UNDUE INFLUENCE, 13 *n.*
not defined by the courts, 13 *n.*
UNFINISHED WORK, finishing up by assignee, 330, 331, 331 *n.*
UNILATERAL evil intent will not overturn transaction, 207.
UNITED STATES courts, practice in, 71.
judgment in, 78, 78 *n.*
local rule governs in, 20.
not interfere with State receiver, 117.
UNITED STATES SUPREME COURT, appeal to, 407.
certificate of division, 407*a*.
UNITING causes of action, 55.
joinder of claims, 54.
various illustrations, 55.
ejectment and equitable relief, 55.
complainants, 107.
defendants, 132.

UNNECESSARY, judgment when, 83.
UNPAID SUBSCRIPTIONS, joinder of stockholders, 128.
trust fund, 117.
UNREASONABLE inadequacy of price, 209.
evidence of secret trust, 209.
UNRECORDED DEED or mortgage, 235, 235 *n.*
concealment in fraud of bankrupt act, 237.
UNREPRESENTED PARTIES, no judgment in favor of, 173.
UNSATISFIED EXECUTION, return of, 86, 86 *n.*
distinction between realty and personalty, 87.
when excused, 75.
UNUSUAL ACTS and transactions, 241.
constitute badges of fraud, 241.
various illustrations, 241.
USURY, claims not joined, 132 *n.*
debt, providing for, 286.

VALID or void at law, 51.
different rule in equity, 51.
title from fraudulent vendee, 386.
between the parties, fraudulent conveyances, 395–400.
VALUABLE CONSIDERATION, 207–223.
See CONSIDERATION.
what is, 209.
what may consist of, 209.
VALUE, as affecting fraudulent transfer, 23.
See CONSIDERATION.
property heavily encumbered, 23.
an important element, 23.
consideration anything of, 207.
former rule in New York, 23 *n.*
change of rule as to, 23 *n.*
Pennsylvania cases, as to, 23 *n.*
gifts of small value not fraudulent, 41.
proving it by experts, 284.
recovering judgment for, 177, 178, 178 *n.*
judgment cannot exceed, 3 *n*, 177, 178.
VARIANCE, rule as to, 155.
testimony must conform, 285.
judgment must be for relief demanded, 181.
must accord with complaint, 182.
VENDOR, recision for fraud, 53.
relief to, 399.

VENDOR — *continued.*
evidence of insolvency of, 273.
possession, 245–267.
change sufficient, 255–258.
resumption, 258.
VENDÉE, insolvency of, 274.
fraudulent, may create valid lien, 195.
judgment against, 192, 177, 180.
evidence of, 274.
title from fraudulent, 386.
allowance to fraudulent, 176.
extent of protection to, 207.
change of possession, 253.
marking with vendee's name, 253.
declarations in presence of, 278.
proof of ability to pay, 219.
power to confer preferences, 241.
testifying as to intent, 279*b*.
VENTURES, placing property beyond new, 100.
VENUE, change of, 157*a*.
land in foreign country, 157*a*.
VERDICTS, contradictory, 183.
when set aside, 204.
when given under misapprehension, 304.
VERIFICATION of pleading, 155, 167.
waiver of, 167.
defendant may verify, 167.
VERMONT, spendthrift trusts in, 367*a*.
change of possession, 249.
VESSEL AT SEA, delivery of, 262.
VICTORIA, statute of as to voluntary conveyances, 93.
VIGILANT CREDITORS, entitled to preference, 392.
no preference in estate of decedent, 392.
VIRGINIA, creditor's bill against absconding debtor, 84.
trust income, 367*a*.
as to change of possession, 250.
VOID, assignment, purchase under, 322*b*.
word construed, 317.
VOID AND VOIDABLE ACT, as to fraudulent conveyances, 73, 317.
Chief Justice Shaw's view, 317.
VOIDABLE ACTS, "void" means "voidable," in act of Elizabeth, 317.

VOID CONDITIONS, 361.
VOID IN PART, void *in toto*, 194.
when valid provisions upheld, 194.
illustrations of the rule, 194.
the word construed, 317.
VOLUNTARY CONVEYANCES, as to existing creditors, 92.
to relatives, 242.
confusion in the cases, 93.
rule in New York, 93, 208.
in California, 208.
statute 56 and 57 Victoria, 93.
assignment for benefit of creditors, 316.
only presumptively fraudulent, 94, 208.
intent as affecting, 200, 208, 319.
the cases as to intent affecting, 200.
need not be mutual, 200.
assignments, 316.
See FRAUDULENT GENERAL ASSIGNMENTS.
defined, 208.
what is consideration, 209.
by corporation, 119.
VOLUNTEER, from fraudulent grantee, 201.

WAGES, preference in New York, 392*a*.
WAIVER of verification, 167.
amendment of 41st rule, 167 *n*.
defendant may verify answer, 167.
of defect of parties, 133.
WARRANTOR as creditor, 89.
WEST VIRGINIA, general creditor may sue, 73 *n*.
as to change of possession, 250.
WHAT CANNOT BE REACHED, 50*a*.
WHITE v. COTZHAUSEN, and conflicting cases, 339*a*.
WHOLE ESTATE, conveyance of, 231.
WIDOW, as complainant, 121.
dower of, 30, 33, 61, 70, 299.
when cannot sue in chancery, 121.
when not entitled to annul transfer, 121.
WIFE, assignment of policy by, 23, 298–315.
See HUSBAND AND WIFE.
right to life insurance, 23, 23 *n*.
crops on land of, 27.
fraud upon, form of procedure, 70.

WIFE — *continued.*
as creditor, 90, 122.
when claim should be rejected, 300 *n.*
services by, to husband, 218.
husband may act as agent for, 303.
husband need not work for in separate business, 218.
proof of fraud against, 212.
advances by, defense, 222.
separate property of, 304.
transfers affecting dower, 315.
money judgment against, 180.
judgment where husband's interest is reached, 192.
interest in trust income, 45.
enforcing alimony, 45.
status of, against husband, 45.
surplus income of, 45 *n.*
when injunction not granted to, 52.
wife as creditor, 110 *n.*
knowledge imputed to, 198 *n*
claim to support, 299*a.*
WILL, no right of creditors to oppose, 127.
WILLIAMS v. THORN, its doctrine approved, 46, 360.
WISCONSIN, right of personal representatives, 112.
insufficiency of estate, how determined, 112.
change of possession, 250.
trust income, 367*a.*
WITNESS, competency of party as, 269.
competency of wife as, 313.
party as, 281.
cross-examination of, 281.
to overcome answer, 159.
WORD "disposed" construed, 12.
"fraud," use of in pleading, 141.
WORDS "hinder, delay, or defraud," 11.
discussed, 11.
intent to do either sufficient, 11.
not synonymous, 11.
WRITTEN INSTRUMENT, difficulty of proving fraudulent, 6.
WRONG, suspicion of, not sufficient to maintain suit, 5.
WRONGFUL EFFECT, must accompany wrongful purpose, 107.