THE

LAW OF BANKRUPTCY

INCLUDING THE

NATIONAL BANKRUPTCY LAW OF 1898

AS AMENDED

THE

RULES, FORMS AND ORDERS OF THE UNITED STATES SUPREME COURT, THE ACT OF 1867, ETC., ETC.

WITH

CITATIONS TO ALL RELEVANT DECISIONS

THIRD EDITION

BY

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PREFACE TO THE THIRD EDITION

Such radical changes have been made in the Federal Bankruptcy Law by the act approved February 5, 1903, that no treatise on the statute as originally enacted is a safe guide in the interpretation of the law as it now exists. A new edition of this work is therefore indispensable. For the purpose of aiding in the interpretation of the text and avoiding the necessity for frequent cross references, the method pursued in the earlier editions of this work has been followed by treating throughout the text, whenever applicable, the rules and orders of the Supreme Court, as well as each section and subdivision of the law separately, and accompanying them with similar provisions of the act of 1867. The decisions rendered since the prior edition of this work have been incorporated wherever applicable, while owing to the great value of many of the cases under the act of 1867, frequent citations thereto are found in the foot-notes. Much of the work has been entirely rewritten, while other portions have been rearranged so as to make it more lucid and easier of reference.

E. C. B.

Washington, D. C., May, 1903.

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LAW OF BANKRUPTCY

TITLE I.

IN GENERAL.

§ 1. With hardly an exception, bankruptcy laws form a part of the administrative systems of all civilized nations. Great Britain, Germany, Russia, France, Italy, Norway, Sweden, Spain, Mexico and many other nations have responded to the needs of their people and wisely provided laws governing bankruptcy. One of the earliest systems is found in the statutes of England of 1542, which has from time to time been revised and perfected, the most comprehensive statute on the subject being that of August 1, 1849.

§ 2. The systems in vogue in the several nations show much diversity, varying from that which is found in Russia—where the right of the debtor to resume business is dependent upon the good will of his creditors, and where a single dissatisfied creditor can, upon making a paltry monthly payment, keep the bankrupt a prisoner until the debt is paid—to the highly advanced system which prevails in England and the United States.

§ 3. As the idea of a National bankruptcy system may be said to have become a part of the Federal constitution by a process of evolution from the English statutory law, it is interesting to note as a matter of history that the earliest statute on the subject of bankruptcy is found in 34 and 35 Henry VIII (chapter 4), which was primarily provided as a protection against the Lombards and fraudulent traders, who, like the dishonest debtors of to-day, incurred obligations and liabilities and then surreptitiously removed themselves beyond the jurisdiction, without having been first discharged therefrom. It was without limit as to the persons who could be-

come recipients of its provisions, the restriction as to traders first appearing in the statute of Elizabeth, while the right of a trader to become a voluntary bankrupt first appears in the statute of 6 George IV (chapter 16).[1]

§ 4. Among the earliest laws affecting insolvents, we find applicants for relief referred to as "persons craftily obtaining into their hands great substance of other men's goods, who suddenly flee to parts unknown or keep their houses, not minding to pay or restore to their creditors their debts and duties, but at their own will and pleasure consume the substance obtained by credit of other men, for their own pleasure and delicate living against all reason, equity and good conscience."[2]

While these early bankruptcy laws went upon the hypothesis that one guilty of bankruptcy was a criminal,[3] this view certainly does not now prevail, and in fact did not at the time of Lord Loughborough, who remarked, with reference to bankrupts, "the law, upon the act of bankruptcy being committed, vests his property upon a just consideration; not as a forfeiture; not on a supposition of a crime committed; not as a penalty."[4]

§ 5. Chief Justice Shaw, in describing the English system, says it is "an adversary proceeding against a defaulting trader, upon doing certain acts indicative of present or impending insolvency. These (bankrupt) laws provide, generally, that upon a trader's doing certain acts considered acts of bankruptcy, a creditor may apply for and obtain a commission (out of chancery), under which the whole of the trader's property is sequestered and taken into the custody of the law, to be administered by officers appointed for that purpose, the proceeds of which, with some slight exceptions, are appropriated to the payment of all the bankrupt's debts, if sufficient therefor; otherwise to pay them in equal proportions, as far as is sufficient for that purpose. The same law further provides that, if the bankrupt will honestly and faithfully cooperate in the proceeding, if he will disclose all his property and effects, and aid the officers appointed for that purpose by information and by all means in his power, and do all the duties required of him in the premises, he shall be absolved and

[1] Kunzler v. Kohaus, 5 Hill, 322.
[2] 34 and 35 Henry VIII, ch. 4.
[3] 3 Pars. on Contracts, 425.
[4] Sill v. Worswick, 1 H. Bl. 665; In re De Forrest, 9 N. B. R. 278, F. C. 3745.

discharged of all his debts, and receive a certificate as the authoritative evidence of his right to such discharge."[5]

§ 6. The oppressor's hand resting heavily upon our forefathers in the old world, and causing them to migrate to new and untried fields, naturally inclined them to incorporate liberal and wise provisions for the protection of all classes in the Federal constitution. Among them is one evidently suggested by the English bankruptcy statutes, and it is found in section 8 of article 1 of that instrument, which authorizes Congress "to establish . . . uniform laws on the subject of bankruptcy throughout the United States." This section, together with section 10 of the same article, providing that "no state shall . . . pass any laws impairing the obligation of contracts," are most important factors in the legal and commercial world. Pursuant to the authority contained in section 8, Congress has on three different occasions previous to the present one, enacted laws providing a uniform system of bankruptcy, which for evident reasons failed of their purpose and early expired.

§ 7. The first was the act of April 4, 1800,[6] and was limited to five years; but it was repealed by the act of December 19, 1803.[7] The fact that it was intended chiefly for the protection of creditors, the sparseness of the settlements, the scarcity of Federal courts, and the difficulty and slowness of travel, contributed mainly to its failure. The distance between places where courts were held, by reason of the method of locomotion, made ready relief almost impossible and soon brought about a demand for the repeal of the law.

The second act was approved August 19, 1841,[8] but like its predecessor was short lived, being repealed March 3, 1843.[9] In addition to some of the causes that contributed to the failure of the prior law, this one was framed so as to greatly favor the debtor; it also became the subject of political contention; and, under the combined influence, naturally failed.

The next bankruptcy law was approved March 2, 1867,[10] and after an existence of eleven years was repealed by the act of June 7, 1878,[11] to take effect September 1, 1878. The

[5] May v. Breed, 7 Cush. 28.
[6] 2 Stat. L. 19.
[7] 2 Stat. L. 248.
[8] 5 Stat. L. 440.
[9] 5 Stat. L. 614.
[10] 14 Stat. L. 517.
[11] 20 Stat. L. 99.

law was several times amended, the most important modification being that made by the act of June 22, 1874.[12] While this law of 1867 had many imperfections, its provisions were more equitable as between creditor and debtor; but the expenses attending litigation and its administration, together with the lack of uniform rules and regulations governing assignees and registers, more than all else, contributed to its failure and induced its repeal.

The law now in force in the United States was enacted on July 1, 1898, and amended in various respects on February 5, 1903.

§ 8. Every business transaction involving the giving of credit necessarily implies two classes—a debtor and a creditor. Bankruptcy laws are not designed for one but for both classes, and are beneficial to all but the dishonest debtor. The policy and aim of bankrupt laws are to compel an equal distribution of the assets of the bankrupt among all his creditors. Hence, when a merchant or trader, by any of the tests of insolvency, has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference to the injury of others.[13]

§ 9. In the absence of a bankruptcy law, the least suspicion of the insolvency of a debtor, his inability to meet financial obligations or the like, naturally cause the zealous creditor to institute attachment proceedings and perhaps cause liquidation of his debtor, who, left to his own resources and given reasonable time, would be able to avoid a suspension and perhaps ruin. The sole gainer through the absence of such a law, outside of the dishonest debtor, is he who is first on the ground with his attachment process and whose lien operates to defeat other creditors with equally just claims, but who are perhaps more merciful and less anxious to cause the creditor's liquidation.

§ 10. In addition to the value of a bankruptcy law in conducing to a better business understanding between the debtor and creditor, it acts as a preventive and check to overtrading, by largely preventing the giving of preferences by the insolvent. In this connection Cadwalader, J., said: "In this

[12] 18 Stat. L. 178.

[13] Shawhan v. Wherritt, 7 How. 627.

respect its operation will be gradual, but must be highly beneficial. When relations and friends of a debtor, and when capitalists, who without affection or friendship would make profit from his embarrassments, learn that they cannot be secured by a preference out of the wreck of his affairs, they will not furnish him the means of overtrading. So long as he could, by securing advances and accommodations, obtain them, the temptation to attempt to retrieve his losses, by doubling his investments, was before the enactment of the bankrupt law, irresistible; and the system of business was that of mere gambling adventure. But when a debtor who suffers losses knows that he cannot prefer his relations and friends, and when capitalists know that they cannot, without risk, assist him to the injury of other creditors, he will stop his business in season, to give a fair dividend to all his creditors, and thus make a fair settlement with them in the court of bankruptcy, or, much oftener, out of it. Then, in the course of time, few judicial bankruptcies will occur."[14]

§ 11. The purpose of a bankrupt law is to place within the possession of the creditor that to which he may be entitled, within the shortest reasonable time, and at the same time, if the bankrupt has made a fair and honest surrender, and complied with the requisites made of him, to give him a speedy release, and let him begin anew to provide an honest living for himself and those dependent upon him and again become a useful and active member of society.[15]

§ 12. A bankrupt or insolvent law, viewed as operating on the rights of creditors, is a system of remedy. It takes out of the hands of the creditors the ordinary remedial processes, and suspends the ordinary rights which by law belong to creditors, and substitutes in their place a new and comprehensive remedy designed for the common benefit of all. The rights with which the trustee is clothed as the representative of creditors are to render this great and common remedy effectual.[16]

§ 13. Bankruptcy is an ancient English word which has come down to us at least from the time of Elizabeth, bearing all the way a meaning co-extensive with insolvency, and it

[14] In re Woods, 7 N. B. R. 126.

[15] In re Witkowski, 10 N. B. R. 209, F. C. 17920.

[16] Curtis, J., in Betton v. Valentine, 1 Curt. 176.

was especially equivalent to that word when the constitution was adopted.[17]

§ 14. There is no substantial difference between a strictly bankrupt law and an insolvent law except possibly theoretically, and that is in the circumstances that the former affords relief upon the application of the creditor, and the latter upon the application of the debtor. In the general character of the remedy there is no difference, however much the modes by which the remedy may be administered may vary. But, even in the respect named, there is no difference in this instance. The present law is both a bankrupt law and an insolvent law by definition, for it affords relief upon the application of either the debtor or creditor under the heads of voluntary and involuntary bankruptcy.[18] Hence a bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law.[19]

§ 15. In the absence of a Federal bankruptcy law, each state has full authority to enact insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts;[20] 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 such a law, unless they voluntarily become parties to the proceedings in insolvency. While this is true, each state has the power by general law, so long as it does not impair the obligation of any contract, to regulate the conveyance and disposition of all property, real or personal, within its limits and jurisdiction. Accordingly a discharge under a state insolvency law has no extra-territorial force or effect.[21]

§ 16. When Congress exercises its constitutional power to establish uniform laws on the subject of bankruptcy, the law passed under such power is paramount and exclusive of all state insolvent laws inconsistent therewith,[22] and the state

[17] Kunzler v. Kohaus, 5 Hill, 320.

[18] Martin v. Berry, 37 Cal. 222.

[19] Sturges v. Crowinshield, 4 Wheat. 196; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1.

[20] Brown v. Smart, 145 U. S. 454; Hanover Nat. Bank v. Moyses, supra; Baldwin v. Hale, 1 Wall. 223; Sturges v. Crowninshield, 4 Wheat. 122; Denny v. Bennett, 128 U. S. 489, 497; In re Reynolds, 9 N. B. R. 52; F. C. 11723.

[21] Denny v. Bennett, supra.

[22] Parmenter Mfg. Co. v. Hamilton, 1 N. B. N. 8, 1 A. B. R. 39; In

laws relating to the subject matter are suspended or superseded during the existence of the Federal law,[23] even as between citizens of the same state,[24] but can in no sense be said to be repealed by it,[25] the same being true of territorial laws of like nature.[26] Hence an insolvent law may be amended, repealed or enacted by a state during the existence of the bankrupt law, and such amendment, repeal and enactment will be valid legislative acts, though the operation of these acts in so far as they conflict with the Federal law are suspended while it continues in force. When the bankrupt law is repealed, the insolvent laws of the states again become operative without re-enactment; and if amended during the exist-

re Bruss-Ritter Co. 1 N. B. N. 39, 1 A. B. R. 58, 90 F. R. 651; In re Rouse, Hazard & Co., 1 N. B. N. 75, 91 F. R. 96, 1 A. B. R. 234, 1 N. B. N. 231, 91 F. R. 514; Blake v. Francis-Valentine Co., 1 N. B. N. 47, 1 A. B. R. 372, 89 F. R. 691; In re Curtis, 1 N. B. N. 163, 1 A. B. R. 440, 91 F. R. 737; In re Sievers, 1 N. B. N. 68, 1 A. B. R. 117, 91 F. R. 366; s. c. as Davis v. Bohle, 1 N. B. N. 216, 1 A. B. R. 412, 92 F. R. 325; In re Etheridge Furn. Co., 1 N. B. N. 139, 1 A. B. R. 112, 92 F. R. 329; In re McKee, 1 N. B. N. 139, 1 A. B. R. 311; In re Rennie, 1 N. B. N. 335, 2 A. B. R. 182; In re Dept. Store, 1 N. B. N. 300; In re Fellerath, 1 N. B. N. 292, 2 A. B. R. 40, 95 F. R. 121; In re Langley, 1 N. B. R. 155; VanNostrand v. Barr, 2 N. B. R. 154; Thornhill v. Bk., 5 N. B. R. 367, 1 Woods 1, F. C. 13992; In re Merchants' Ins. Co., 6 N. B. R. 43, 3 Biss. 162, F. C. 9441; In re Ind. Ins. Co., 6 N. B. R. 260, Holmes 103, F. C. 1017; In re Safe Dep. & Sav. Inst., 7 N. B. R. 392, F. C. 12211; In re Citizens' Sav. Bk., 9 N. B. R. 152, F. C. 2735; Schryock v. Bashore, 13 N. B. R. 481, F. C. 12820; contra, Sedgwick v. Place, 1 N. B. R. 204, 34 Conn. 552, F. C. 12622; Maltbie v Hotchkiss, 5 N. B. R. 485; Chandler v. Siddle, 10 N. B. R. 236, F. C. 2594.

[23] Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178; 1 A. B. R. 39; In re Bruss-Ritter Co., 90 F. R. 651, 1 A. B. R. 58; In re Anderson, 110 F. R. 141, 6 A. B. R. 555; In re Mason Sash, Door & Lumber Co., 112 F. R. 323, 7 A. B. R. 66; In re Storck Lumber Co., 114 F. R. 360, 8 A. B. R. 86; Carling v. Seymour Lumber Co., 8 A. B. R. 29; Littlefield v. Gray, 8 A. B. R. 409; In re Richard, 2 A. B. R. 506; see Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1; Herron Co. v. Superior Court, 8 A. B. R. 492; Sturgis v. Crowninshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606; Perry v. Langley, 1 N. B. R. 559; Griswold v. Pratt, 9 Metc. 16; In re Reynolds, 9 N. B. R. 50, F. C. 11723; Thornhill et al. v. Bank, 5 N. B. R. 367, 1 Woods 1, F. C. 13992; Shryrock et al. v. Bashore, 13 N. B. R. 481.

[24] Kassard v. Kroner, 4 N. B. R. 569.

[25] Lavender v. Gosnell, 12 N. B. R. 282; In re Everitt, 9 N. B. R. 90. F. C. 4579; In re McKee, 1 N. B. N. 139, 1 A. B. R. 311.

[26] In re Renic, 1 N. B. N. 335, 2 A. B. R. 182.

ence of the bankrupt law, they will become operative in their amended form.[27]

§ 17. It is only, however, to the extent that Congress has legislated upon the subject that the statutes of the several states are suspended by its legislation. As stated by Chief Justice Marshall in Sturgis v. Crowninshield,[28] with reference to the power given Congress: "This establishment of uniformity is perhaps incompatible with state legislation on that part of the subject to which the act of Congress may extend. . . It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach; but, be this as it may, the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states." If, therefore, the bankruptcy law excepts from its operation either in express terms or by necessary implication a class of cases, it must be considered that it was the intention of Congress not to interfere in that class of cases with the laws of the several states in reference thereto. The state laws will remain operative in all cases which are not within the provisions of the bankruptcy law. Therefore, any class of persons or corporations not covered by the bankruptcy law are subject to the laws of the several states governing insolvency and the states are authorized to legislate with reference thereto. In such cases there is no conflict of jurisdiction between the state and Federal law but each statute is operative within its own jurisdiction and may be enforced without in any respect infringing upon the jurisdiction of the other.[29]

[27] In re Wright, 1 N. B. N. 428, 95 F. R. 807, 2 A. B. R. 592; In re Worcester Co., 102 F. R. 808, 4 A. B. R. 496; Ex p. Eames, 2 Story, 322, F. C. 4237; see Butler v. Coreley, 146 U. S. 303, 314.

[28] 4 Wheat. 122.

[29] Herron v. Superior Court, 68 Pac. Rep. (Calif.) 814, 8 A. B. R. 492; In re Winternitz, 4 B. R. 127, Clarke v. Ray, 1 Har. J. 318; In re Shepardson, 36 Conn. 23; In re Geery, 43 Conn. 289; see Simpson v. Bank, 56 N. H. 466; Steelman v. Mattix, 36 N. J. L. 344; Martin v. Berry, 37 Calif. 208.

§ 18. To whatever extent Congress has undertaken to provide remedies and prescribe procedure, its authority being unquestionably paramount, state statutes designed for the same or similar purposes must give way.[30] The bankrupt law does not suspend an ordinary law for the collection of debts,[31] or for the arrest of fraudulent or absconding debtors[32] or to prevent fraudulent assignments in trust for creditors and other fraudulent conveyances[33] or laws relating to the insolvent estates of persons under legal disability, as lunatics or spendthrifts,[34] or a law merely protecting the debtor from imprisonment.[35]

§ 19. Since the time of George II and even prior, the current of English adjudications, followed by our own, has been that a voluntary assignment of a debtor to an assignee of his own choosing, though without preference, is itself an act of bankruptcy, a fraud upon the act and hence a fraud upon creditors as respects their rights in bankruptcy and voidable at the trustee's option, even without any express provision to that effect in the statute, on the principle that it defeats the rights of creditors secured by the bankrupt law to the choice of a trustee, to the summary jurisdiction of the bankruptcy court, and to the ample control which the law intended to give them over the estate of their insolvent debtors.[36] While the assignment is void there would seem to be no reason why it would not be of full force and effect between the parties thereto where it is not followed by the bankruptcy of the assignor.[37]

§ 20. So far as state laws attempt to discharge the contract as against citizens of other states, they are unconstitutional,[38] and so a discharge under a foreign bankrupt law

[30] In re McKee, 1 N. B. N. 139, 1 A. B. R. 311.

[31] Chandler v. Siddle, 10 N. B. R. 236, 3 Dill. 477, F. C. 2594.

[32] In re Scott, 1 N. B. N. 265, 1 A. B. R. 650; McCollough v. Goodhart, 1 N. B. N. 512, 3 A. B. R. 85.

[33] Ebersole v. Adams, 13 N. B. R. 141.

[34] Mayer v. Hellman, 91 U. S. 496; Hawkins v. Learned, 54 N. H. 333.

[35] Sullivan v. Heiskell, Crabbe, U. S. Dist. Ct. 525.

[36] In re Gutwillig, 90 F. R. 475, affirmed 92 F. R. 337; West v. Lea, 174 U. S. 590, 2 A. B. R. 463.

[37] See State ex rel. Strohl v. Superior Court of King's Co., 1 N. B. N. 309, 1 A. B. R. 92.

[38] Sturges v. Crowninshield, 4 Wheat. 122.

cannot be pleaded in a bar to an action on a contract made in this country,[39] A state law discharging the person or the property of the debtor, and thereby terminating the legal obligation of the debt, cannot constitutionally be made to apply to debts contracted prior to the passage of the law; but the law may be made to apply to such future contracts as can be considered as having been made in reference to the law.[40] Statutes of this class must be construed to be parts of all contracts made when they are in existence, and therefore cannot be held to impair their obligation.[41] In fact, the inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effects.[42]

In fine, insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation,[43] and consequently the tribunal sitting under them, unless in cases where the citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case.[44] Legal notice cannot be given, and as a result there can be no obligation to appear, and, of course, there can be no legal default.[45]

§ 21. Congress is given plenary power over the subject of bankruptcy, under one limitation only, that the law passed upon that subject shall be uniform throughout the United States,[46] and this power carries with it a right to establish the details of the system if it shall think proper.[47] Congress cannot, however, impose upon state courts any duties in connection with the enforcement of a bankrupt law,[48] though by

[39] McMillan v. McNeill, 4 Wheat. 209.

[40] Ogden v. Saunders, 12 Wheat. 213; Baldwin v. Hale, 1 Wall. 223.

[41] Denny v. Bennett, 128 U. S. 489.

[42] Edwards v. Kearzey, 96 U. S. 395, 603; Denny v. Bennett, 128 U. S. 489, 495.

[43] Baldwin v. Hale, 1 Wall. 223; Gilman v. Lockwood, 4 id. 409; Boyle v. Zacharie, 6 Pet. 635.

[44] Clay v. Smith, 3 Pet. 411; Denny v. Bennett, 128 U. S. 489.

[45] Baldwin v. Hale, 1 Wall. 223; Ogden v. Saunders, 12 Wheat. 213.

[46] In re Silverman, 4 N. B. R. 173, F. C. 12855; In re Duerson, 13 N. B. R. 183, F. C. 4117.

[47] Six Penny Savings Bank v. Stuyvesant Bank, 10 N. B. R. 399, F. C. 12919; In re Deckert, 10 N. B. R. 1, F. C. 3728.

[48] Goodall v. Tuttle, 7 N. B. R. 193, 3 Biss. 219, F. C. 5533.

comity the state courts recognize and enforce the provisions of such a law so far as is within their power.

§ 22. The constitutionality of the bankruptcy law has been frequently attacked on the ground that by adopting the various state exemption laws,[49] or making a distinction between natural and artificial persons, and between classes of artificial persons,[50] it lacked uniformity. But the courts have almost invariably held that the uniformity required is geographical and not personal in the sense of being alike applicable to all members of the community, no limitation being placed upon Congress, as to the classification of persons, who are to be affected by such laws, and that the constitution contemplated uniformity of administration only,[51] and since so far as the distribution of the assets are concerned, the law is uniform.[52] The recognition of the local law in the matter of exemptions, dower, priority of payments and the like, is not an attempt by Congress to unlawfully delegate its legislative power, and would not be for that reason void.[53] It has been attacked on the ground that in voluntary proceedings it violated the Fifth Amendment because it deprives creditors of their property without due process of law in failing to provide for notice, but the Supreme Court held the contention as untenable.[54]

§ 23. The retrospective effect of the bankrupt law, by impairing the obligation of contracts, does not render it unconstitutional as the inhibition to the impairment of contracts does not apply to the Federal government.[55]

§ 24. Proceedings instituted under state insolvency laws prior to the passage of the national bankruptcy law, are not affected by it,[56] though the mere fact that a state court has

[49] In re Beckerford, 4 N. B. R. 203, 1 Dill. 45, F. C. 1209; In re Deckert, 2 Hughes 183; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1.

[50] Leidigh Carriage Co. v. Stengel, 1 N. B. N. 387, 95 F. R. 637, 2 A. B. R. 383.

[51] Hanover Nat. Bank v. Moyses, supra; In re Jordan, 8 N. B. R. 180, F. C. 7514.

[52] In re Beckerford, supra.

[53] Hanover Nat. Bank v. Moyses, supra; In re Rahrer, 140 U. S. 545, 560.

[54] Hanover Nat. Bank v. Moyses, supra.

[55] In re Jordan, 8 N. B. R. 180, F. C. 7514; In re Smith, 14 N. B. R. 295, 2 Woods 458, F. C. 12996; In re Everett, 9 N. B. R. 90, F. C. 4579.

[56] See last paragraph of act, also Longis v. Creditors, 20 La. Ann.

taken possession of the property of an insolvent, thereby first gaining jurisdiction, cannot be allowed to defeat the proper execution of the latter law.[57]

15; Martin v. Berry, 37 Cal. 208, where the same is held to be the effect of the act of 1867; Muslin v. Creditors, 3 N. B. R. 126.

[57] Geo. M. West Co. v. Lea Bros., 174 N. S. 590, 1 N. B. N. 409, 2 A. B. R. 483; In re Safe Dep. & Ins., 7 N. B. R. 392, F. C. 12211.

TITLE II.

THE NATIONAL BANKRUPTCY LAW.

CHAPTER I.

DEFINITIONS.

§ 25. '**(Sec. 1a) Meaning of words and phrases.**—The 'words and phrases used in this Act and in proceedings pur-'suant hereto shall, unless the same be inconsistent with the 'context, be construed as follows:

'**(1)** "**A person against whom a petition has been filed**"[1] 'shall include a person who has filed a voluntary petition;

'**(2)** "**Adjudication**" shall mean the date of the entry of a 'decree that the defendant, in a bankruptcy proceeding, is a 'bankrupt, or if such decree is appealed from, then the date 'when such decree is finally confirmed;[2]

'**(3)** "**Appellate courts**" shall include the circuit courts of 'appeals of the United States, the supreme courts of the Ter-'ritories, and the Supreme Court of the United States;

'**(4)** "**Bankrupt**" shall include a person against whom an 'involuntary petition or an application to set a composition 'aside or to revoke a discharge has been filed, or who has filed 'a voluntary petition, or who has been adjudged a bankrupt;[3]

[1] "*A person against whom a petition is filed.*" See cases cited under § 1113, post.

[2] *Adjudication.*—An adjudication on a petition in bankruptcy is a final judgment which it is beyond the power of Congress to annul or set aside (In re Comstock & Co., 10 N. B. R. 451, F. C. 3077), the rights of the parties being fixed at such date (In re Kerr & Roach, 9 N. B. R. 566, F. C. 7729).

[3] *Bankrupt.*—This term is defined by Lord Coke as "a sign or mark, as we say a cart-rout, which is the sign or mark where the cart has gone; so, metaphorically, it is taken for him that hath wasted his estate and removed his banque, so that there is left but a mention thereof" (4 Inst. 277). Blackstone defines a "bankrupt" as "a trader who secretes himself or does certain other acts, tending to defraud his creditors" (2 Bl. Com. 471). The word "bankruptcy" under the act of 1841 meant a particular status, to be ascertained and de-

'(5) "**Clerk**" shall mean the clerk of a court of bankruptcy;

'(6) "**Corporations**" shall mean all bodies having any of the 'powers and privileges of private corporations not possessed 'by individuals or partnerships, and shall include limited or 'other partnership associations organized under laws making 'the capital subscribed alone responsible for the debts of the 'association;[4]

'(7) "**Court**" shall mean the court of bankruptcy in which 'the proceedings are pending, and may include the referee;

'(8) "**Courts of bankruptcy**" shall include the district 'courts of the United States and of the Territories, the Supreme 'Court of the District of Columbia, and the United States 'court of the Indian Territory, and of Alaska;

'(9) "**Creditor**" shall include anyone who owns a demand 'or claim provable in bankruptcy, and may include his duly 'authorized agent, attorney, or proxy;[5]

'(10) "**Date of bankruptcy,**" or "time of bankruptcy," or '"commencement of proceedings," or "bankruptcy," with 'reference to time, shall mean the date when the petition was 'filed;[6]

'(11) "**Debt**" shall include any debt, demand, or claim 'provable in bankruptcy;[7]

clared by judicial decree (In re Black et al., 1 N. B. R. 81, 2 Ben. 196, F. C. 1457).

[4] *Corporations.*—See "Corporations," post, §§ 102, 113.

[5] *Creditor.*—This term includes any one having a provable claim (In re Leigh Bros., 1 N. B. N. 425, 2 A. B. R. 606); and may include his "duly authorized agent, attorney, or proxy."

[6] *"Date of bankruptcy," "Time of bankruptcy," "Commencement of proceedings," or "bankruptcy."* —Either of the foregoing expressions in reference to time means the date when the petition was filed (In re Romanow, 1 N. B. N. 213, 1 A. B. R. 461, 92 F. R. 510; In re Harris, 1 N. B. N. 384, 2 A. B. R. 359; In re Gerson, 1 N. B. N. 315, 2 A. B. R. 170; In re Appel, 2 N. B. N. R. 907, 4 A. B. R. 722; In re Lewis, 1 N. B. N. 556, 91 F. R. 632, 1 A. B. R. 458); but it is not the filing of every petition in bankruptcy, but only such as may be filed by a debtor in his own behalf, or by a creditor against a debtor (In re Litchfield, 9 N. B. R. 506, 7 Ben. 259, F. C. 8385) upon which an adjudication can be made that is meant. In re Rogers, 10 N. B. R. 444, F. C. 12003.)

[7] *Debts.*—The word "debt" is used in its legal or limited sense, and not in its popular and enlarged signification, and does not include all of the bankrupt's debts, such as, for instance, a claim against him for alimony, or for the support of a bastard child, or

'(12) "**Discharge**" shall mean the release of a bankrupt 'from all of his debts which are provable in bankruptcy, ex-'cept such as are excepted by this Act;

'(13) "**Document**" shall include any book, deed, or instru-'ment in writing;

'(14) "**Holiday**" shall include Christmas, the Fourth of 'July, the Twenty-second of February, and any day appointed 'by the President of the United States or the Congress of the 'United States as a holiday or as a day of public fasting or 'thanksgiving;

'(15) **A person shall be deemed insolvent** within the provis-'ions of this Act whenever the aggregate of his property, 'exclusive of any property which he may have conveyed, trans-'ferred, concealed, or removed, or permitted to be concealed 'or removed, with intent to defraud, hinder or delay his credit-'ors, shall not, at a fair valuation, be sufficient in amount to 'pay his debts;[8]

'(16) "**Judge**" shall mean a judge of a court of bankruptcy, 'not including the referee;[9]

'(17) "**Oath**" shall include affirmation;

'(18) "**Officer**" shall include clerk, marshal, receiver, 'referee, and trustee, and the imposing of a duty upon or the 'forbidding of an act by any officer shall include his successor 'and any person authorized by law to perform the duties of 'such officer;

'(19) "**Persons**" shall include corporations, except where 'otherwise specified, and officers, partnerships, and women, 'and when used with reference to the commission of acts which 'are herein forbidden shall include persons who are partici-'pants in the forbidden acts, and the agents, officers, and

a speculative option, commonly called a "put," where the object of the parties is not a sale and delivery of the goods, but a settlement in money on differences (In re Baker, 1 N. B. N. 547; 3 A. B. R. 101, 96 F. R. 954; Stokes v. Mason, 12 N. B. R. 498; In re Chandler, 9 N. B. R. 514, F. C. 2590).

[8] *Insolvency.* — See Determination of Insolvency, post, § 67.

[9] *Judge.*—The word "judge" in the present act expressly excludes the referee and is confined to the judge of a court of bankruptcy (In re Hare, 119 F. R. 246); hence the decisions construing the word "judge" as used in section 23 of the act of 1867 to mean or include the register would not be applicable now (In re Bininger et al., 9 N. B. R. 568, F. C. 1421).

'members of the board of directors or trustees, or other simi-'lar controlling bodies of corporations;[10]

'(20) "**Petition**" shall mean a paper filed in a court of bank-'ruptcy or with a clerk or deputy clerk by a debtor praying 'for the benefits of this Act, or by creditors alleging the com-'mission of an act of bankruptcy by a debtor therein named;[11]

'(21) "**Referee**" shall mean the referee who has jurisdiction 'of the case or to whom the case has been referred, or anyone 'acting in his stead;

'(22) "**Conceal**" shall include secrete, falsify, and mutilate;

'(23) "**Secured creditor**" shall include a creditor who has 'security for his debt upon the property of the bankrupt of a 'nature to be assignable under this Act, or who owns such a 'debt for which some indorser, surety, or other persons second-'arily liable for the bankrupt has such security upon the bank-'rupt's assets;

'(24) "**States**" shall include the Territories, the Indian Ter-'ritory, Alaska, and the District of Columbia;

'(25) "**Transfer**" shall include the sale and every other and 'different mode of disposing of or parting with property, or 'the possession of property, absolutely or conditionally, as a 'payment, pledge, mortgage, gift, or security;

'(26) "**Trustee**" shall include all of the trustees of an 'estate;

'(27) "**Wage-earner**" shall mean an individual who works 'for wages, salary or hire, at a rate of compensation not ex-'ceeding one thousand five hundred dollars per year;

'(28) **Words importing the masculine gender** may be ap-'plied to and include corporations, partnerships, and women;

'(29) **Words importing the plural number** may be applied to 'and mean only a single person or thing;

[10] *Person.*—The word "person" includes a minor (In re Brice, 1 N. B. N. 310, 2 A. B. R. 197, 93 F. R. 942), also corporations, except where otherwise specified, and hence renders unnecessary the decision under the act of 1867 that, in absence of statute definition to that effect, the word "person" would include a corporation, unless used in a more limited sense (In re Ore. Pub. & Pr. Co., 13 N. B. R. 199, F. C. 10588; In re Cal. Pac. R. R. Co., 11 N. B. R. 193, 3 Sawy. 240, F. C. 2315).

[11] *Petition.*—A petition in bankruptcy is an action or suit (In re Comstock, etc., Co., 10 N. B. R. 451, F. C. 3077).

'**(30) Words importing the singular number** may be applied 'to and mean several persons or things.'[12]

[12] Act of 1867. Sec. 38. *And be it further enacted*, That the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor; upon which an order may be issued by the court, or by a register in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act; . . .

Sec. 48. *And be it further enacted*, That the word "assignee" and the word "creditor" shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation"; and the word "oath" shall include "affirmation." . . .

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

§26. (2a) Courts created—jurisdiction in general.
Unspecified powers.
27. Courts Federal—Revenue law.
28. Courts always open—Terms.
29. —— Judge, qualifications, duty, etc.
30. Place of business, residence or domicile.
31. —— Distinction between "residence" and "domicile."
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36. Jurisdiction of courts of bankruptcy.
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45. —— Receiver for preserving estate.
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47. —— Bringing in additional parties.
48. —— Administration of estates. Suits — Controversies.
49. —— Suits against adverse claimants.
50. —— Closing and reopening estates.
51. —— Certification of findings by referees.
52. —— Exemptions.
53. —— Issuance of orders.
54. —— Punishment for failure to obey orders.
55. Contempt of witness, etc.
56. —— Power to punish.
57. —— Review of order of commitment.
58. —— Classes of contempts.
59. —— Nature of offence.
60. —— Pardon of.
61. —— Nature of punishment.
62. —— Punishment not imprisment for debt.
63. —— Defence to order committing for contempt.

§ 26. '(Sec. 2a) **District Courts, Supreme Court, D. C., Territorial Courts—jurisdiction.**—That the courts of bankruptcy 'as hereinbefore defined, viz., the district courts of the United 'States in the several States, the Supreme Court of the Dis- 'trict of Columbia, the district courts of the several Terri- 'tories, and the United States courts in the Indian Territory 'and the District of Alaska, are hereby made courts of bank-

'ruptcy, and are hereby invested, within their respective ter-'ritorial limits as now established, or as they may be hereafter 'changed, with such jurisdiction at law and in equity as will 'enable them to exercise original jurisdiction in bankruptcy 'proceedings, in vacation in chambers and during their re-'spective terms, as they are now or may be hereafter held, to

'**(1) To adjudicate bankrupt.**—Adjudge persons bankrupt 'who have had their principal place of business, resided or 'had their domicile within their respective territorial jurisdic-'tions for the preceding six months, or the greater portion 'thereof, or who do not have their principal place of business, 'reside, or have their domicile within the United States, but 'have property within their jurisdictions, or who have been 'adjudged bankrupts by courts of competent jurisdiction with-'out the United States and have property within their juris-'dictions;

'**(2) Allowance of claims.**—Allow claims, disallow claims, 'reconsider allowed or disallowed claims, and allow or disal-'low them against bankrupt estates;

'**(3) Appoint receivers or marshal.**—Appoint receivers or the 'marshals, upon application of parties in interest, in case the 'courts shall find it absolutely necessary, for the preservation 'of estates, to take charge of the property of bankrupts after 'the filing of the petition and until it is dismissed or the 'trustee is qualified;

'**(4) Trial of offenses.**—Arraign, try, and punish bankrupts, 'officers, and other persons, and the agents, officers, members 'of the board of directors or trustees, or other similar controll-'ing bodies, of corporations for violations of this Act, in ac-'cordance with the laws of procedure of the United States now 'in force, or such as may be hereafter enacted, regulating trials 'for the alleged violation of laws of the United States;

'**(5) Temporary transaction of business.**—Authorize the 'business of bankrupts to be conducted for limited periods by 'receivers, the marshals, or trustees, if necessary in the best 'interests of the estates; and allow such officers additional 'compensation for such services,[1] but not at a greater rate than 'in this Act allowed trustees for similar services.

[1] Subdivision 5 of section 2 was amended by the Act of February 5, 1903, by the addition at the end thereof of the words "and allow such officers additional compensation for such services, but not at

'(6) **Substitution of parties.**—Bring in and substitute addi-'tional persons or parties in proceedings in bankruptcy when 'necessary for the complete determination of a matter in con-'troversy;

'(7) **To collect and distribute assets.**—Cause the estates of 'bankrupts to be collected, reduced to money and distributed, 'and determine controversies in relation thereto, except as 'herein otherwise provided;

'(8) **To close estates.**—Close estates, whenever it appears 'that they have been fully administered, by approving the final 'accounts and discharging the trustees, and reopen them when-'ever it appears they were closed before being fully adminis-'tered;

'(9) **To confirm or reject compositions.**—Confirm or reject 'compositions between debtors and their creditors, and set 'aside compositions and reinstate the cases;

'(10) **To consider referee's findings.**—Consider and confirm, 'modify or overrule, or return, with instructions for further 'proceedings, records and findings certified to them by 'referees;

'(11) **To determine exemptions.**—Determine all claims of 'bankrupts to their exemptions;

'(12) **To grant discharges, etc.**—Discharge or refuse to dis-'charge bankrupts and set aside discharges and reinstate the 'cases;

'(13) **To enforce orders.**—Enforce obedience by bankrupts, 'officers, and other persons to all lawful orders, by fine or im-'prisonment or fine and imprisonment.

'(14) **To extradite bankrupts.**—Extradite bankrupts from 'their respective districts to other districts;

'(15) **To make orders.**—Make such orders, issue such proc-'ess, and enter such judgments in addition to those specifically 'provided for as may be necessary for the enforcement of the 'provisions of this Act;

'(16) **To punish contempts.**—Punish persons for contempts 'committed before referees;

'(17) **To appoint or remove trustees.**—Pursuant to the rec-

a greater rate than in the Act allowed trustees for similar services," as found in the text.

'ommendation of creditors, or when they neglect to recommend 'the appointment of trustees, appoint trustees, and upon com- 'plaints of creditors, remove trustees for cause upon hearings 'and after notices to them;

'**(18) To tax costs.**—Tax costs, whenever they are allowed by 'law, and render judgments therefor against the unsuccessful 'party, or the successful party for cause, or in part against 'each of the parties, and against estates, in proceedings in 'bankruptcy; and

'**(19) To transfer cases.**—Transfer cases to other courts of 'bankruptcy.

'**Unspecified powers.**—Nothing in this section contained shall 'be construed to deprive a court of bankruptcy of any power it 'would possess were certain specific powers not herein enu- 'merated.'[2]

[2] Act of 1867. Sec. 1. *Be it enacted* . . . That the several District Courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in Court. And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of, the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity. Said courts may sit, for the transaction of business in bankruptcy, at any place in the district, of which place and the time of holding court, they shall have given

§ 27. **Court federal—revenue law.**—The court of bankruptcy is essentially a federal institution; and the war revenue law of 1898, itself essentially federal, declaring what may or may not be competent evidence "in any court" must, in the nature of things, be peculiarly applicable to the court of bankruptcy. The decision of a state court, therefore, under the former revenue laws that they could have no force or effect in declaring a rule of evidence in that state, would not be authority in bankruptcy proceedings, but a paper declared incompetent for want of conformance to the revenue law, should be so held in such proceedings in a Federal Court.[3]

§ 28. **Court always open—term.**—The court of bankruptcy having no regular terms, is always open, and its adjudications, orders and decrees remain, at all times, subject to re-examination and correction upon application made in an appropriate form when discovered to be erroneous, provided rights have not become vested under them which such correction will disturb;[4] and, in the exercise of its exclusive original jurisdiction it may act in administrative matters or matters of mere discretion as well in vacation as in term time, and a judge sitting in chambers in such matters has the same power and jurisdiction as when sitting in court.[5] The proceedings in a pending suit are therefore continuous from the filing of the petition to the closing of the estate.[6]

§ 29. **Judge, qualification, duty and conduct.**—The same requirements as to qualification, duty and conduct of Federal

notice, as well as at the places designated by law for holding such courts.

Sec. 49. *And be it further enacted*, That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases of bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia, and in and upon the supreme courts of the several Territories of the United States, when the bankrupt resides in the said District of Columbia or in either of the said Territories. And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

[3] In re Dobson, 2 N. B. N. R. 514; In re Watson, 2 N. B. N. R. 308.

[4] Mahoney v. Ward, 100 F. R. 278, 2 N. B. N. R. 558, 3 A. B. R. 770; Sandusky v. Bk., 12 N. B. R. 176, 23 Wall. 289; 23 L. Ed. 155.

[5] Shearman v. Bingham, 7 N. B. R. 490.

[6] In re Ives, 113 F. R. 911, 7 A. B. R. 692; reversing 111 F. R.

judges in the courts, apply with equal force to courts of bankruptcy. Thus a judge, who has been a depositor in an insolvent banking institution but who has sold his claim, is not thereby disqualified from sitting in the matter, although the motive on the part of the purchaser of his claim may have been to remove the disqualification,[7] though he would be disqualified from acting as the general adviser of trustees as to their acts.[8] In the discharge of his functions, as a Federal judge, his conduct and administration need not conform to the practice in the state courts.[9]

§ 30. Place of business, residence or domicile.—Place of business, residence and domicile are three distinct alternative jurisdictional requisites under the present law,[10] so that if the alleged bankrupt does not have either his principal place of business, his residence or domicile within the district, a court of bankruptcy has no power to obtain jurisdiction over him by any service of process otherwise than in accordance with the rule,[11] and, though the alleged bankrupt appear on the return day and consent to the adjudication, the court will nevertheless dismiss the proceedings on objections from other creditors that he never resided or carried on business in the state.[12] In the case of voluntary proceedings, it has been held that if objection be made to the adjudication because of lack of these jurisdictional requisites, the burden of showing their existence rests on the bankrupt.[13] If, however, the respondent in bankruptcy proceedings consents to a reference to take proof, he thereby gives the court jurisdiction over his person, and can not impeach its decrees in a collateral action;[14] but, in a dispute over the ownership of a fund controlled by a trustee in bankruptcy, the court has jurisdiction without reference to the residence of the parties.[15]

495, 6 A. B. R. 653; In re Jemison Mercantile Co., 112 F. R. 966, 7 A. B. R. 588.

[7] In re Sime, 7 N. B. R. 407, 2 Sawy. 320, F. C. 12860.

[8] In re Sturgeon, 1 N. B. R. 131, F. C. 1356.

[9] Nudd v. Burrows, 13 N. B. R. 289, 91 U. S. 426.

[10] In re Clisdell, 2 A. B. R. 424.

[11] Hyslop v. Hoppock, 6 N. B. R. 557, 5 Ben. 533, F. C. 6989.

[12] In re Fogerty, 4 N. B. R. 143, 1 Sawy. 233, F. C. 4895.

[13] In re Scott, 111 F. R. 144, 7 A. B. R. 39. See In re Waxelbaum, 97 F. R. 562, 3 A. B. R. 392.

[14] People ex rel. Jennys v. Brennan, 12 N. B. R. 567.

[15] In re Sabin, 18 N. B. R. 157, F. C. 12195; Markson & Spaulding v. Meany, 4 N. B. R. 165, F. C. 9098; Payson v. Dietz, 8 N. B. R. 193, F. C. 10861.

In the case of a corporation, its principal place of abode should be construed to mean its principal office.[16] A court would have jurisdiction of a petition in case of a foreign corporation, if it has its principal place of business as distinct from its residence or domicile within the district where filed,[17] and this has been held to be true although its articles of association provide that its principal office shall be at a place in the state of incorporation.[18]

§ 31. —— Distinction between "residence" and "domicile."—There is a clear difference intended to be made by the law between "residence" and "domicile;" the essential distinction being that the first involves the intent to leave when the purpose for which one has taken up his abode is accomplished; the other has no such intent, the abiding is *animo manendi*. Thus one may seek a place for the purpose of health, business or pleasure; and if his intent be to remain, it becomes his domicile; if it be to leave as soon as his purpose is accomplished, it is his residence. Perhaps the most satisfactory definition is that one is a resident of a place from which his departure is indefinite as to time, but definite as to purpose, and for this purpose he has made the place his temporary home; so one can have but one domicile but many residences, and cannot be without a legal domicile somewhere;[19] a temporary absence will not destroy either residence or domicile, though an absence that would suffice to destroy a residence might not affect a domicile. Bodily presence is necessary to residence while it is not to domicile: for instance, a New Yorker may spend years in Europe retaining his domicile in New York while his residence might be, in the spring, in London; in the summer, in Paris; in the winter, on the Riviera.[20] A domicile once acquired is presumed to continue until it is

[16] In re Cal. Pac. R. R. Co., 11 N. B. R. 193, 3 Sawy. 24, F. C. 2315; see In re Elmira Steel Co., 109 F. R. 456, 5 A. B. R. 484.

[17] In re Magid v. Hope Silk Mfg. Co., 110 F. R. 352, 6 A. B. R. 610; In re Marine Machine & Conveyor Co., 91 F. R. 630, 1 A. B. R. 421.

[18] Dressel v. Lumber Co., 107 F. R. 255, 5 A. B. R. 744.

[19] In re Williams, 99 F. R. 544, 3 A. B. R. 677; In re Grimes, 94 F. R. 300, 2 A. B. R. 160.

[20] In re Berner, 2 N. B. N. R. 330, 3 A. B. R. 325; In re Clisdell, 2 N. B. N. 638, 2 A. B. R. 424, 101 F. R. 246; In re Grimes, 1 N. B. N. 339, 2 A. B. R. 160, 95 F. R. 800; Brisenden v. Chamberlain, 53 F. R. 311; In re Watson, 4 N. B. R. 197, F. C. 12272.

shown to have changed, and where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation.[21] Thus where a bankrupt, before the filing of the petition, absconds for the purpose of avoiding arrest, his domicile is not thereby changed unless an intent to change is shown by the party making such allegation.[22]

§ 32. **——Length of, required.**—The act provides that "the courts of bankruptcy * * are hereby invested * * with such jurisdiction * * as will enable them to exercise original jurisdiction * * to (1) adjudge persons bankrupt who have * * resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof." The corresponding provision in the act of 1867 was "resided or carried on business for the six months next immediately preceding the time of filing the petition, or for the longest period during such six months." The phraseology of the two provisions is plainly different. Under the act of 1867, it was properly held that a debtor might file his petition in the district in which he had resided or carried on business for the six months next immediately preceding the filing of the petition, or for the longest period during or within such six months that he had resided or carried on business in any district.[23]

An interpretation of the expression "the preceding six months or the greater portion thereof" is not altogether free from doubt. A construction that the word "greater" is synonymous with the word "longest" used in the Act of 1867[24] is contrary to the express language of the statute; while the contention that bankrupt must have established his residence or domicile within the territorial jurisdiction at least six months preceding the filing of his petition, and not absented himself during said period for one-half of the time, and that although he may have resided in the district for the three and a half months immediately preceding the filing of the petition, but for a number of months or years previously in another

[21] Mitchell v. U. S., 21 Wall. 350, 353; In re Waxelbaum, 97 F. R. 562, 3 A. B. R. 267.

[22] In re Filer, 108 F. R. 209, 5 A. B. R. 332, 3 N. B. N. R. 366.

[23] In re Foster, 3 N. B. R. 57, 3 Ben. 386, F. C. 4962; In re Leighton, 5 N. B. R. 95, 4 Ben. 457, F. C. 8221; In re Goodfellow, 1 Saw. 510, F. C. 5536.

[24] In re Ray, 1 N. B. R. 336, 2 A. B. R. 158.

state, the court would not have jurisdiction, is not tenable.[25] Such a construction fails to sufficiently consider the language. The use of the disjunctive "or" shows that the two portions of the provision are alternative. To give jurisdiction the prospective bankrupt must have his principal place of business, resided or be domiciled in the district for more than three months of the preceding six months, the residence of the creditors being immaterial. So that in order for jurisdiction to exist in bankruptcy, there must have been a residence or domicile for at least three months, and this three months need not be the three months immediately preceding the filing of the petition, but may be any three months of actual legal residence or domicile within the six months preceding the institution of bankruptcy proceedings.[26]

There is no provision in the statute for the case of an astute debtor, who, in his effort to defeat jurisdiction, changes his residence or domicile from one district to another before the three months' jurisdictional period is established, though the domicile will be presumed to continue at one place until it is shown to have changed.[27] If the residence, domicile or place of business is less than three months, it is not sufficient to make the jurisdictional period, to allege that the business was being conducted during the additional period by an assignee under a general assignment, where there is no evidence that he actually conducted business, or did anything more than close it out.[28] A bankrupt may reside and have his domicile in one state and have his principal place of business in another, and the court in either would have jurisdiction if the time be of sufficient length.[29] And it has been held that although out of the country for six years his domicile might be in the United States and he could institute proceedings without an actual residence of three months or more before filing the petition.[30]

§ 33. —— must be alleged.—Having a principal place of

[25] In re Stokes, 1 N. B. N. 106, 1 A. B. R. 35.

[26] In re Berner, 2 N. B. N. R. 330, 3 A. B. R. 325; In re Plotke, 3 N. B. N. R. 122, 104 F. R. 964; 5 A. B. R. 171; In re Appel, 2 N. B. N. R. 907, 103 F. R. 931.

[27] Mitchell v. U. S., 21 Wall. 350.

[28] In re Plotke, supra.

[29] See in re Mackey, 110 F. R. 355, 6 A. B. R. 577; In re Brice 93 F. R. 942, 2 A. B. R. 197; In re Watson, 4 N. B. R. 197, F. C. 12, 272.

[30] In re Williams, 99 F. R. 544, 3 A. B. R. 677.

business, residence or domicile[31] within the territorial jurisdiction of the particular court of bankruptcy in which the petition is filed is jurisdictional and must be alleged in the petition and proved. It is not sufficient to allege these facts disjunctively in a petition because in such case it states neither one fact nor the other, but a positive statement of any one of these facts, or a conjunctive statement of any two or all three would be sufficient; and, it has been held that if upon examination of the petition and schedules,[32] the referee finds them insufficient, he should return them to the clerk with a statement of the defects noted thereon.[33]

§ 34. —— burden of proof as to.—The burden of proof is upon the person making the allegation,[34] and change of domicile can only be proved by showing the acquisition of a new one and it is not sufficient to show residence in another place, which is not inconsistent with an intention to return to the place of domicile.[35]

§ 35. —— alien or non-resident.—A person without a principal place of business, residence or domicile within the United States, or who has been adjudged bankrupt by a foreign court of competent jurisdiction is within the jurisdiction

[31] *Under the act of* 1867. A petitioner in bankruptcy carried on business for many years in one city and then retired and moved to another, but was employed in the former place, his petition was properly filed in the district where his business was conducted (In re Belcher, 1 N. B. R. 202, 2 Ben. 463, F. C. 1237). A clerk employed in one state and residing in another was held not to have carried on business in the former (In re Magie, 1 N. B. R. 153). The fact that a person has an office at which he receives mail and settles up the old business of an insolvent firm of which he was a member, and which had gone out of business, was not sufficient to sustain an allegation of carrying on business within the jurisdiction (In re Little, 2 N. B. R. 97, 3 Ben. 25, F. C. 8391); and, where a person acted as agent and attorney in buying and selling merchandise, at an office with a sign having his brother's name on it, and was well known by those dealing with him to be doing such business at that office, he carried on business within the meaning of the term used (In re Bailey, 1 N. B. R. 177, 2 Ben. 437, F. C. 753). As to office of a corporation, see In re Cal. Pac. R. R. Co., 11 N. B. R. 193, 3 Sawy. 240, F. C., 2315.

[32] Sec. 39a (2), act of July 1, 1898.

[33] In re Laskaris, 1 N. B. N. 209, 1 A. B. R. 480; In re Clisdell, 2 A. B. R. 24; In re Beals, 17 N. B. R. 108, 9 Ben. 223, F. C. 1165.

[34] Mitchell v. U. S., 21 Wall. 350, 353; In re Waxelbaum, 97 F. R. 562, 3 A. B. R. 267.

[35] In re Clisdell, 2 A. B. R. 424.

of the Federal court of bankruptcy if he has property within the district of such court.

§ 36. **Courts of bankruptcy, jurisdiction in general.**—A district court of the United States, as a court of bankruptcy, is a court of record, and, although its jurisdiction is limited, it is not an inferior court in such a sense that all facts essential to its jurisdiction must affirmatively appear on the face of its record in order to sustain its judgments.[36] Its jurisdiction is absolute, paramount and exclusive to adjudicate the question of bankruptcy, to settle and liquidate the estate of the bankrupt and as to all matters and questions arising in bankruptcy proceedings touching the persons and property of the bankrupts, their relations to their creditors, and the rights of creditors in and to the bankrupt's estate,[37] from the commencement of the proceedings[38] to their close.[39]

Its jurisdiction operates as a supersedeas of the process in the hands of a sheriff, and an injunction against all other proceedings than such as might thereupon be had under the authority of the court until the bankruptcy shall have been closed.[40] After jurisdiction has been acquired of the property, the court of bankruptcy will by summary proceedings stop any interference with it, and if it has been seized, will cause its return.[41]

Whenever such jurisdiction is properly and in good faith

[36] In re Columbia Real Estate Co., 101 F. R. 965, 4 A. B. R. 411.

[37] Hall v. Kinsell, 2 N. B. N. R. 745, 102 F. R. 301; In re Gutwillig, 1 N. B. N. 40, 1 A. B. R. 78, 90 F. R. 47-5; s. c. 1 N. B. N. 554, 92 F. R. 337, 1 A. B. R. 388; In re Bruss Ritter Co., 1 N. B. N. 39, 1 A. B. R. 58, 90 F. R. 651; In re Etheridge Furn. Co., 1 N. B. N. 139, 1 A. B. R. 112, 92 F. R. 329; In re Huddleston, 1 N. B. N. 214, 1 A. B. R. 572; Carpenter Bros. v. O'Connor, 1 N. B. N. 132, 1 A. B. R. 381; Keegan v. King, 3 A. B. R. 79, 96 F. R. 758; Allen v. Montgomery, 10 N. B. R. 503; In re Archenbrown, 11 N. B. R. 149, F. C 504; In re Barrow, 1 N. B. R. 125, F. C. 1057; Walker v. Seigel & Bott, 12 N. B. R. 394, F. C. 17085.

[38] In re Carow, 4 N. B. R. 178, F. C. 2426.

[39] Bucknam v. Dunn, 16 N. B. R. 470, 2 Hask. 215, F. C. 2096; Penny v. Taylor, 10 N. B. R. 200, F. C. 10957.

[40] Jones v. Leach, 1 N. B. R. 165, F. C. 7475.

[41] In re Schloerb, 2 N. B. N. R. 721, 178 U. S. 542; In re Russell, 101 F. R. 248, 3 A. B. R. 658; In re Murphy, 2 N. B. N. R. 393, 3 A. B. R. 499; Byrd v. Harrold, 18 N. B. R. 433, F. C. 229; Carter v. Hobbs, 1 N. B. N. 191, 1 A. B. R. 215, 92 F. R. 594; In re Huddleston, 1 A. B. R. 572, 1 N. B. N. 214.

invoked the courts are bound to assume and exercise it, there being no discretion in the matter,[42] this jurisdiction vesting from the filing of the petition. The fact that the bankrupt's attorneys had not been admitted to practice in the Federal courts would not invalidate proceedings already had, for the provision[43] that the bankrupt may conduct his case by an attorney authorized to practice in the Federal courts, is not the source of jurisdiction.[44] There seems to be nothing to prevent a creditor from attacking the jurisdiction without first filing formal proof of his claim, which would import a recognition of the jurisdiction, but he must show he is a creditor and has an interest to protect.[45]

If the court has no jurisdiction of the subject matter, it cannot be conferred by the voluntary act of the defendant and the point can be raised at any time.[46] If want of jurisdiction appears upon the face of the petition and respondent consents to it, the court may take notice of the point on its own motion;[47] but, if it is merely want of jurisdiction over the person, the objection may be waived expressly or by implication.[48]

§ 37. In law and equity.—Under the bankrupt law the district courts have jurisdiction both at law and in equity,[49] and will protect infants, lunatics and other incompetents and appoint a guardian ad litem for them.[50] It will deal with the rights of the parties upon their merits, rather than be controlled by strict legal forms,[51] and will restrain the enforcement of a legal right so that it shall not cause unnecessary

[42] In re Keiler, 18 N. B. R. 10, F. C. 7647; Cook v. Waters, 9 N. B. R. 155, but see Avery v. Johnson, 3 N. B. R. 36; 4 Id., 143, F. C. 675.

[43] G. O. IV.

[44] In re Kindt, 2 N. B. N. R. 373, 98 F. R. 867, 3 A. B. R. 546.

[45] In re Boston H. & E. R. R. Co., 6 N. B. R. 209, 9 Blatch. 101, F. C. 1678.

[46] Jobbins v. Montague, 6 N. B. R. 509, F. C. 7330.

[47] In re Hopkins, 18 N. B. R. 339, F. C. 6686.

[48] Shutts v. Bk., 2 N. B. N. R. 320, 98 F. R. 705, 3 A. B. R. 492; Hall v. Kincell, 2 N. B. N. R. 745, 102 F. R. 301; People v. Brennan, 12 N. B. R. 567.

[49] In re Fendley, 10 N. B. R. 250, F. C. 4728; In re Salkey, 11 N. B. R. 423, 6 Biss. 269, F. C. 12253; In re Bowie, 1 N. B. R. 185, F. C. 1725; In re Ind. Cin. & Laf. R. R. Co., 8 N. B. R. 302, F. C. 7023.

[50] In re O'Brian, 2 N. B. N. R. 312.

[51] In re Byrne, 2 N. B. N. R. 246, 3 A. B. R. 268, 97 F. R. 762.

loss or embarrassment to the estate.[52] As between contending creditors, in the interest of fair dealing and good conscience, it will postpone the claim of one where there is evidence of a fraudulent combination and scheme in favor of others,[53] and the mere fact that there is a remedy at law will not oust the jurisdiction of equity if the remedy at law is not as prompt, practical and efficient to the ends of justice and its prompt administration as the equitable remedy.[54]

§ 38. **Over corporations.**—A decree adjudging a corporation bankrupt is in the nature of a decree in rem, and if the court rendering it had jurisdiction it can only be assailed by a direct proceeding in a competent court, unless due notice of the petition was never given or the decree is void in form.[55] The "dissolution" of a corporation by a state court does not end its existence so as to prevent the jurisdiction of the bankruptcy courts from attaching,[56] nor will it deprive the bankruptcy court of jurisdiction, or abate the proceedings.[57] Service of the rule to show cause on the cashier of a corporation which has passed into the hands of a receiver is sufficient to enable the court to proceed to adjudication.[58]

§ 39. **Judgment of state court.**—The court of bankruptcy has no jurisdiction to annul or correct, upon appeal or petition, a judgment rendered in a state court; nor can it question allegations made in pleadings in a state court prior to the filing of the judgment in the court of bankruptcy with a petition for injunction.[59]

§ 40. **Liens.**—Whatever priorities, liens or rights a creditor has he must submit to the bankruptcy court, as after adjudication it takes jurisdiction of the estate and will administer the same to a final settlement,[60] since it has jurisdiction to hear and determine all questions of liens invoking rights of

[52] In re Chambers, Calder & Co., 2 N. B. N. R. 388, 98 F. R. 865, 3 A. B. R. 537.

[53] In re Headley, 2 N. B. N. R. 250, 3 A. B. R. 272, 97 F. R. 765.

[54] Cox v. Wall, 2 N. B. N. R. 572, 99 F. R. 546, 3 A. B. R. 664.

[55] New Lamp Chimney Co. v. Ansonia Brass and Copper Co., 13 N. B. R. 385, 91 U. S. 656.

[56] In re Independent Ins. Co., 6 N. B. R. 260, F. C. 7017; Id., 6 N. B. R. 169, 2 Lowell 97, F. C. 7018.

[57] Platt v. Archer, 6 N. B. R. 465, 9 Blatch. 559, F. C. 11213.

[58] Platt v. Archer, ante.

[59] In re Dunn, 11 N. B. R. 270, 2 Hughes 169, F. C. 4172; McKinsey v. Harding, 4 N. B. R. 10, F. C. 8866.

[60] In re Cobb, 3 A. B. R. 129, 1 N. B. N. 557, 96 F. R. 821.

property claimed by the estate,[61] and parties who claim such liens may appear and be heard without first resorting to the state court, for their establishment.[62] The court may order the property to be sold free of liens and marshal and distribute the proceeds so as to protect the rights and interests of all;[63] or it may enforce a lien against the purchaser of property sold by an assignee subject to such lien;[64] but a judgment creditor cannot claim the jurisdiction of the court for the collection of a debt which is fully secured by the only lien on real estate.[65] A prior lien gives a prior claim, and the district court may ascertain and liquidate it.[66]

§ 41. **Receivers in state courts.**—Proceedings under the state insolvency laws being void, a receiver appointed pursuant thereto for the purpose of taking charge of the insolvent's property will be required to turn the custody of the same over to the receiver or trustee in the bankruptcy proceedings subsequently instituted against the same insolvent, whose power and authority become paramount by virtue of the latter proceedings. In this connection the word "judgment" as used in section 67 of the law has been held to be sufficiently broad to apply to a judgment of a state court appointing a receiver which is avoided by the adjudication.[67] In view of the comity existing between the Federal and state courts, application should first be made to the state court of which the receiver is an officer.[68] The fact that such property is in the hands of a receiver is no ground for dismissing the petition.[69]

As to expenses and allowances of receivers, see post § —807.

§ 42. **Collateral attack of decisions.**—A bankruptcy proceeding is a proceeding in rem and all persons interested in the res are regarded as parties to such proceedings, including

[61] In re High et al., 3 N. B. R. 46, F. C. 6473.

[62] In re Byrne, 2 N. B. N. R. 246, 3 A B. R. 268, 97 F. R. 762.

[63] In re Worland, 1 A. B. R. 450, 1 N. B. N. 316, 92 F. R. 893; In re Pittelkow, 1 A. B. R. 472, see post, §1195.

[64] Bucknam v. Dunn et al., 16 N. B. R. 470, 2 Hask. 215, F. C. 2096.

[65] In re Johann, 4 N. B. R. 143, F. C. 7331.

[66] In re Winn, 1 N. B. R. 131.

[67] Mauran v. Carpet Lining Co., 6 A. B. R. 734.

[68] In re Lengert Wagon Co., 110 F. R. 927, 6 A. B. R. 535; Wilson v. Parr, 8 A. B. R. 230; In re Lesser, 110 F. R. 433, 3 A. B. R 815; In re Price, 92 F. R. 987, 1 A. B. R. 606; see Tua v. Carriere, 117 U. S. 201.

[69] In re Green Pond R. R. Co., 13 N. B. R. 118, F. C. 5786.

not only the bankrupt and trustee but all the creditors of the bankrupt;[70] and a decree therein is notice to all the world and cannot be attacked collaterally, but is conclusive as to the jurisdiction of the court and the regularity of the proceedings.[71] Hence in a collateral proceeding objection cannot be raised to the court's jurisdiction,[72] the adjudication,[73] the discharge,[74] the acts of the trustee[75] or his title for purposes of sale,[76] or the like.

§ 43. **Want of sufficient jurisdiction, when raised.**—Objections to the jurisdiction must be made as speedily as possible; and where a creditor was notified of the first meeting of creditors, appeared thereat, nominated the trustee, and exhaustively examined the bankrupt, it is too late for him to raise an objection as to the jurisdiction of the person or thing for the first time on the application for discharge,[77] or on appeal;[78] but as jurisdiction over the subject matter must be given by law, and cannot be given by consent, or be waived, the question may be raised at any time, or made by the court on its own motion.[79] Where a petition is filed to set aside an adjudication on the ground of want of jurisdiction in the court to make it, although the petitioner may be a stranger to the proceedings and therefore not entitled to make it, it is in the discretion of the court to hear him as *amicus curiae*.[80]

§ 44. **Commencement of proceedings.**—For jurisdictional purposes, so far as applying to periods of limitation, bank-

[70] Carter v. Hobbs, 92 F. R. 594, 1 A. B. R. 215; Southern L. & T. Co. v. Benbow, 96 F. R. 514, 3 A. B. R. 9.

[71] Shawhan v. Wherritt, 7 How. 627; Michaels v. Post, 21 Wall. 398; Morse v. Godfrey, 3 Story, 364; In re Columbia Real Estate Co., 101 F. R. 965, 4 A. B. R. 411.

[72] In re Clisdell, 101 F. R. 246, 4 A. B. R. 95; In re Mason, 99 F. R. 256, 3 A. B. R. 599; In re Columbia Real Estate Co., supra; New Lamp Chimney Co. v. Brass & Copper Co., 13 N. B. R. 385, 91 U. S. 656.

[73] Wilson v. Parr, 8 A. B. R. 230; see Chapman v. Brewer, 114 U. S. 158, 29 L. Ed. 83.

[74] Black v. Blayo, 13 N. B. R. 195; Alston v. Robinett, 9 N. B. R. 74; Corey v. Ripley, 4 N. B. R. 163.

[75] Morris v. Swartz, 10 N. B. R. 305.

[76] Steele v. Moody, 16 N. B. R. 558.

[77] Hall v. Kinsell, 2 N. B. N. R. 745; In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358.

[78] In re Emrich, 2 N. B. N. R. 656, 101 F. R. 231, 4 A. B. R. 89.

[79] In re Mason, 2 N. B. N. R. 425, 99 F. R. 256, 3 A. B. R. 599; Hall, 2 N. B. N. R. 785, 102 F. R. 201; Shutts v. Bank, 2 N. B. N. R. 320, 98 F. R. 705, 3 A. B. R. 492.

[80] In re Columbia Real Estate Co., 101 F. R. 965, 4 A. B. R. 411.

ruptcy proceedings are commenced by the filing of the original petition, and the fact that the service of the subpoena, or other further proceedings, were delayed, is immaterial. If counting from the day the petition is filed the act of bankruptcy was within the four months and the bankrupt has resided, had his domicile or principal place of business the requisite time in the district[81] the bankruptcy court has full jurisdiction.[82]

§ 45. —— **receiver for preserving estate.**—Upon proper application showing the liability of the estate to deterioration or waste pending action upon the petition and appointment of a trustee, this provision authorizes the court of bankruptcy to appoint a receiver or the marshal to take immediate possession of bankrupt's property.[83] Upon the filing of a petition, the bankrupt's estate is *in custodia legis* and the court of bankruptcy has the power, and it is its duty, upon its own motion, in a proper case, to take actual possession of his estate through a receiver, or by a direction to the marshal;[84] as where the bankrupt confesses judgment upon an agreement and makes a general assignment for the benefit of creditors;[85] or where he makes a general assignment within four months prior to the filing of the petition;[86] or is secretly disposing or removing his property, and the like. Since the estate is *in custodia legis,* the officer appointed to manage it is accountable to the court appointing him and to that court alone.[87] The court will not appoint a provisional receiver to receive the surrender of a preference,[88] or upon the ground that the debtor removed goods in fulfilment of an existing contract made long before the commencement of the bankruptcy proceedings, as such act is not fraudulent.[89]

[81] In re Appel, 2 N. B. N. R. 907, 103 F. R. 931; In re Lewis, 1 N. B. N. 556, 91 F. R. 532, 1 A. B. R. 458; In re Kinott, 2 N. B. N. R. 373, 98 F. R. 867, 3 A. B. R. 546.

[82] In re Schloerb, 2 N. B. N. R. 234, 97 F. R. 326.

[83] See Lansing v. Manton, 14 N. B. R. 127, F. C. 8077.

[84] In re Abrahamson & Bretstein, 1 N. B. N. 23, 1 A. B. R. 44.

[85] Rautman v. Hopkins, 1 N. B. N. 41.

[86] In re Gutwillig, 1 N. B. N. 18; In re Etheridge Fur. Co., 1 N. B. N. 139, 92 F. R. 329, 1 A. B. R. 112; Sedgwick v. Place, 3 N. B. R. 35, 2 Ben. 360, F. C. 12619.

[87] In re Carow, 4 N. B. R. 178, F. C. 2426.

[88] In re Thompson, 2 N. B. N. R. 1016.

[89] Bk. v. Brady's Bend Iron Co., 5 N. B. R. 491, F. C. 9018.

In case of an examination of bankrupt at the application of creditors before a trustee is elected, the provisionally appointed receiver should intervene, as if any property is discovered and recovered he would be entitled to its possession;[90] and he is not limited merely to the care and preservation of the property, but where it is necessary to protect the interests of the estate he may sell the same under order of the court, or subject to its confirmation.[91] Prior to adjudication, the court will not authorize or direct such a receiver to bring suit in another state to obtain property of the bankrupt there situated, but the petitioning creditors should apply to the proper court in such state, setting up the pending bankruptcy proceedings as the basis of the action and ask protection for their rights, by injunction, receiver, or other appropriate remedy, in which proceeding the trustee, when appointed, can appear.[92] A marshal has no authority under a warrant issued under a petition asking that the debtor's property be seized provisionally to seize property outside of his district,[93] and, if in executing a warrant for the seizure of property, he seize that of a stranger, he becomes liable to an action for trespass in a state court.[94]

§ 46. —— **business continued temporarily.**—Upon a proper showing the court is endowed by this provision with authority to prevent the loss of good will, trade and depreciation, which follows the closing of a business, as well as to prevent a sacrifice of the estate at times of money depression, absence of a market, and the like, by permitting its continuance for a limited period.

§ 47. **Bringing in additional parties.**—The court has power to bring in and substitute additional persons or parties when necessary for the complete determination of a matter in controversy. Thus it may issue an order to a non-joining partner requiring him to show cause why the petitioning partner should not be discharged from the liability incurred as a

[90] In re Franklin Syndicate, 2 N. B. N. R. 522, 101 F. R. 402, 4 A. B. R. 511.

[91] In re Becker, 2 N. B. N. R. 245, 98 F. R. 407, 3 A. B. R. 412.

[92] In re Schrom, 97 F. R. 760, 3 A. B. R. 352.

[93] Carr v. Phillips, 18 N. B. R. 527.

[94] Marsh v. Armstrong, 11 N. B. R. 125.

member of the firm,[95] even though such non-joining partner be *non compos*;[96] but it is questionable whether a corporation in which the bankrupt was for years a stockholder, can be brought in so as to enable its books to be examined.[97] This power to bring in parties would not authorize the court to direct a creditor to join in a petition for the purpose of making the requisite number or amount of claims to give the court jurisdiction. Under the act of 1867, it was held where there appeared to be an adverse interest in any one not before the court, that it could not adjudicate on the same without that person being properly before it, and without setting in motion its machinery for the purpose of litigating any supposed rights;[98] and strangers to the bankruptcy proceedings, not served with process, and who had not voluntarily appeared and become parties to such litigation, could not be compelled to come into court under a petition for a rule to show cause.[1]

§ 48. **Administration of estates.—Suits.—Controversies.**—A trustee may be ordered by the court to enter his appearance and defend any pending suit against a bankrupt,[2] and with the approval of the court be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.[3]

The jurisdiction to collect and distribute estates and determine controversies in relation thereto, depends, first, on whether the controversy has reference to property actually in the possession of the bankruptcy court or belonging to the bankrupt estate; second, whether it arises in the bankruptcy proceedings and the property becomes therefore subject to distribution; or third, whether by the nature of the controversy power is conferred on the court to determine conflicting liens and apportion assets.[4] Thus a claim to priority of payment or superior right to a fund in the trustee's hands to be distributed, should be asserted in the bankruptcy court.[5]

[95] In re Elliot, 2 N. B. N. R. 350.

[96] In re O'Brien, 2 N. B. N. R. 312.

[97] See In re Post, 1 N. B. N. 294.

[98] In re Pierce, 15 N. B. R. 449, 7 Biss. 426, F. C. 11139.

[1] Smith v. Mason, 6 N. B. R. 1, 14 Wall. 419.

[2] Sec. 11 (b) of act of 1898.

[3] Sec. 11 (c) of act of 1898.

[4] In re Kellogg, 113 F. R. 120, 7 A. B. R. 623.

[5] In re McCallum, 113 F. R. 393, 7 A. B. R. 596.

§ 49. **Suits against adverse claimants.**[6]—The bankruptcy court controls the trustee, supervises the administration of his trust, settles his accounts and orders the distribution of the moneys in his hands, but is not required to assume the burden of the litigation necessary for the collection of the assets. If there are no assets to pay the cost of litigation, or the outcome is speculative or doubtful, or only one creditor is interested, it has been held that on notice to creditors that a single creditor, or class of creditors, desire to conduct such litigation through the trustee and that only such creditors as share in the expense will share in the recovery, to order a suit to be brought for the benefit of subscribing creditors.[7] When the bankruptcy court in a controversy between the trustee and a creditor has rendered a decision adverse to the trustee and he has lost his right of appeal without culpable neglect, the court may grant a rehearing for the purpose of reviving such right.[8] Creditors desiring to recover property and include the same in the assets of the bankrupt must institute their action through the trustee; and suits by or against the bankrupt must proceed through the same channel;[9] and, when a trustee applies for instructions relative to a suit the creditors wish him to bring, it is sufficient to show that he will probably succeed; as certainty of success need not be demonstrated. If a proposition of settlement has been offered, the moving creditors should show that they are likely to secure a better result by suit than by accepting the proposed settlement.[10]

§ 50. **Closing and reopening estates.**—A trustee is required to close the estate as expeditiously as is compatible with the best interests of the parties in interest,[11] and will prepare for the final meeting of the creditors a detailed statement of the administration of the estate,[12] and make final reports and file final accounts with the court fifteen days before the day fixed for the final meeting of the creditors.[13]

The court has the power to reopen an estate whenever it

[6] See for discussion of this matter Chap. XXIII, post.

[7] In re McNamara, 2 N. B. N. R. 341.

[8] In re Wright, 96 F. R. 820, 3 A. B. R. 184.

[9] In re Carter, 1 N. B. N. 162, 1 A. B. R. 160; In re Pearson, 1 N. B. N. 474.

[10] In re Phelps, 2 N. B. N. R. 484, 3 A. B. R. 396.

[11] Sec. 47 (2) of act of 1898.

[12] Sec. 47 (7) of act of 1898.

[13] Sec. 47 (8) of act of 1898.

appears that it was closed before being fully administered, and while in such case it is unnecessary that the petition therefor be of any technical or formal character, it should be either in itself or in connection with supporting affidavits of such persuasive character as to satisfy the court of the existence of assets unadministered.[14] While the law is silent as to the time within which an estate may be reopened, this right would doubtless exist at any time when unadministered assets are discovered. Under subdivision 8, a court of bankruptcy has jurisdiction to entertain a supplemental petition filed by a voluntary bankrupt after the estate has been closed and the bankrupt discharged, setting out additional schedules of property, with the reasons for their former omission, and the court may reopen the proceedings for the purpose of administering the new assets for the benefit of creditors who proved their claims in accordance with the statute in the original proceedings. But such supplementary proceedings cannot affect the discharge of the bankrupt, where more than a year has elapsed since it was granted, nor has a creditor who failed to prove his claim in the original proceedings any standing in such supplementary proceedings, or the right to examine the bankrupt therein.[15]

§ 51. **Certification of findings by referees.**—Referees are required to make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit the same to the judges.[16]

§ 52. **Exemptions.**—The court of bankruptcy has exclusive jurisdiction to determine the claims of a bankrupt to his exemptions.[17] While it is the duty of the trustee to set apart the bankrupt's exemption, his action is not final, but the court of bankruptcy is expressly empowered to determine all claims to exemptions; nor does the limitation of twenty days for filing exceptions to such setting apart[18] apply to the bankrupt, who may petition the court in relation to his claim to exemp-

[14] In re Newton, 107 F. R. 429, 6 A. B. R. 52.

[15] In re Shaffer, 104 F. R. 982, 3 N. B. N. R. 54.

[16] Sec. 39a (5) act of 1898.

[17] McGahan v. Anderson, 113 F. R. 115, 7 A. B. R. 641; In re Mayer, 108 F. R. 602, 6 A. B. R. 117. See also Chap. VI, post.

[18] G. O., XVII.

tion at any time while the property is still unadministered.[19]

§ 53. **Issuance of orders.**—The court has power to issue an injunction to restrain any one from removing, disposing of or otherwise interfering with bankrupt's property;[20] to appoint receivers whose duty it is to care for and protect the assets;[21] to issue orders requiring persons to surrender for cancellation instruments purporting to convey property of the bankrupt, which it is alleged never became effective,[22] or property of the bankrupt,[23] or property in the hands of an assignee under a general assignment;[24] and to issue a writ in the nature of a ne exeat and arrest the bankrupt whenever the facts warrant the belief that he is about to abscond, either with or without his property, to the embarrassment of the bankruptcy proceedings.[25] It has no power to summon before it by a rule to show cause third persons who are not parties to the record and who reside without the district and state;[26] nor to issue a warrant for the arrest of the bankrupt under subdivision 9b of the law where the purpose is that the warrant shall serve as a basis of extradition, when he resides in another state.[27] While the courts have no power to make general rules in bankruptcy,[28] they are not hampered by such technicalities as to prevent doing what is just and for the protection of the estate, even if it requires the revocation of an order already made.[29] They also have power and authority to order a bankrupt to deliver to the trustee any money or other property in his possession or under his control, but as the enforcing of such order may lead to the bankrupt's imprisonment for contempt, it should not issue if there be any doubt of his ability to comply therewith,[30] and persons holding bank-

[19] In re White, 3 N. B. N. R. 27, 103 F. R. 774, 4 A. B. R. 613.

[20] In re Pruschen, 1 N. B. N. 526. See also cases under Sec. 11. post, p. 175.

[21] In re Fixen & Co., 1 N. B. N. 568, 2 A. B. R. 822, 96 F. R. 748.

[22] In re Waukesha Water Co., 116 F. R. 1009, 8 A. B. R. 715.

[23] Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224.

[24] Bryan v. Bernheimer, 181 U. S. 188, 5 A. B. R. 623.

[25] In re Lipke, 2 N. B. N. R. 347, 98 F. R. 970, 3 A. B. R. 569.

[26] In re Waukesha Water Co. 116 F. R. 1009, 8 A. B. R. 715.

[27] In re Ketchum, 108 F. R. 35. 5 A. B. R. 532.

[28] In re Kennedy, 7 N. B. R. 337, F. C. 7699.

[29] Samson v. Burton, 6 N. B. R. 403.

[30] In re Purvine, 1 N. B. N. 326, 96 F. R. 192, 2 A. B. R. 787; In re Rosser, Id. 469, 96 F. R. 305, 2 A.

rupt's property without claim of title will be guilty of contempt on withholding it from the trustee and may be summarily proceeded against for its recovery.[31]

§ 54. Punishment for failure to obey order.—A court of bankruptcy has power to order the bankrupt to pay over to his trustee money or other property belonging to his estate and found in his possession or control,[32] or in the possession of a third person holding as a mere bailee, or agent, of bankrupt,[33] while the amendment to the law extends this power even to the case of a third party holding property under an adverse claim. If he fails to obey such order, the court will punish him as for a contempt, but since the failure to obey may be followed by imprisonment, the power should be exercised with great caution, and before an order is made evidence should be required such as would convince an unprejudiced mind beyond a reasonable doubt that the bankrupt is able to comply therewith if made.[34] It has also been held that where it is doubtful whether the bankrupt actually has property under his control which he has been ordered

B. R. 755; In re Tudor, Id. 476, 96 F. R. 943, 2 A. B. R. 808; In re McCormick, 2 Id. 104, 97 F. R. 566, 3 A. B. R. 340; In re Schlesinger, Id. 169, 97 F. R. 930, 3 A. B. R. 342; In re Mayer, Id. 257, 98 F. R. 839, 3 A. B. R. 533; In re Deuell, Id. 597, 100 F. R. 633, 4 A. B. R. 60; In re Thiessen, Id. 625.

[31] In re Moore, 104 F. R. 869.

[32] In re Schlesinger, 102 F. R. 117, 4 A. B. R. 361; Ripon Knitting Wks. v. Schreiber, 2 N. B. N. R. 899, 101 F. R. 810, 4 A. B. R. 299; In re Deuell, 100 F. R. 633, 2 N. B. N. 597, 4 A. B. R. 60; In re Rosser, 101 F. R. 562, 4 A. B. R. 153; In re McCormick, 2 N. B. N. R. 104, 3 A. B. R. 340, 97 F. R. 566; In re Tischler, 2 N. B. N. R. 549; In re Anderson, 103 F. R. 354; In re Wilson, 116 F. R. 419, 8 A. B. R. 612; In re Levin, 113 F. R. 498, 6 A. B. R. 743; In re Greenberg, 106 F. R. 496, 5 A. B. R. 840; In re Hempner, 6 N. B. R. 521, F. C. 7689; In re Salkey, 11 N. B. R. 423, 6 Biss. 269, F. C. 12253; In re Dresser, 3 N. B. R. 138, F. C. 4077.

[33] Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224; reversing 5 A. B. R. 176, which reversed 3 N. B. N. R. 32, 104 F. R. 530, 4 A. B. R. 747; In re Macon Sash, Door & Lumber Co., 112 F. R. 323, 7 A. B. R. 66.

[34] In re Anderson, 103 F. R. 854; In re Tischler, 2 N. B. N. R. 549; In re Mayer, 2 N. B. N. R. 257, 98 F. R. 839, 3 A. B. R. 533; In re Friedman, 1 N. B. N. 332; 2 A. B. R. 301; In re DeGottardi, 114 F. R. 328, 7 A. B. R. 723. See also In re Purvine, 1 N. B. N. 326, 96 F. R. 192, 2 A. B. R. 787; In re Kuntz, Id. 256; In re Tudor, Id. 476, 96 F. R. 942, 2 N. B. R. 808, 96 F. R. 85; In re Oliver, Id. 329, 96 F. R. 85; 2 A. B. R. 783; In re Ogles, Id. 400; In re Pearson, Id. 474; In re Mooney, 15 N. B. R. 456

to surrender, he should not be imprisoned indefinitely.[35] This power will not be used to punish for frauds committed by bankrupt against the law nor to coerce him or transferees to make restitution of money or property previously transferred in fraud of the law,[36] nor without notice of the charge, claim or proposed judgment or order, and an opportunity to be heard thereon, and the want of these essentials cannot be supplied by merely giving the bankrupt an opportunity of being cross-examined as to his examination before the referee, or any matter tending to show what had become of the property.[37] The court also has power to compel the production of the bankrupt's books,[38] or those of third parties where there is reason to believe that they will show the disposition of the bankrupt's property and affect the right of the bankrupt to a discharge which involves the exercise of a wide discretion and should not be interfered with by the appellate court unless manifestly abused, and to punish failure to obey as a contempt.[39]

§ 55. **Contempt of witness, etc.**—The refusal of a witness ordered to appear and be examined concerning the acts, conduct and property of the bankrupt is a contempt and may be punished;[40] so where bankrupt was summoned to appear in supplementary proceedings and filed his petition and was adjudged a bankrupt between the service of the summons and the day fixed for his examination, he was held in contempt and fined, the bankruptcy proceedings not ousting the state court.[41] Where there was simply a threat but no levy under a judgment of a state court nor other interference with the property, the sheriff would not be guilty of contempt.[42]

For Contempts before referee, see chap. XLI, post.

[35] In re Taylor, 114 F. R. 607, 7 A. B. R. 410.

[36] In re Mayer, supra.

[37] In re Rosser, 101 F. R. 562, 4 A. B. R. 153; Boyd v. Glucklich, 116 F. R. 131, 8 A. B. R. 393. See In re Pearson, 1 N. B. N. 474, 2 A. B. R. 819.

[38] In re Wilson, 116 F. R. 419, 8 A. B. R. 612.

[39] In re Morgan et al., 2 N. B. N. R. 233, 3 A. B. R. 253, 98 F. R. 414.

[40] In re Howard, 1 N. B. N. 488, 2 A. B. R. 582, 95 F. R. 415, citing In re Feinberg, 2 B. R. 425; In re Fay, 3 B. R. 860; In re Pioneer Paper Co., 7 N. B. R. 250; Garrison v. Markley, 7 N. B. R. 246; In re Comstock, 13 N. B. R. 193; In re Fredenberg, 1 B. R. 268.

[41] Bk. v. Graham, 1 N. B. N. 59.

[42] In re McBride, 2 N. B. R. 345.

§ 56. **Contempts, power to punish.**—The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.[43] The authority, however, to inflict summary punishment for contempts was subsequently limited[44] to the cases of misbehavior in the presence of the courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the court in their official transactions and the disobedience or resistance by any such officer or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the courts.[45]

The provision in the present law specifically empowering courts of bankruptcy to "enforce obedience by the bankrupts, officers and other persons to all lawful orders, by a fine or imprisonment, or fine and imprisonment,"[46] may be regarded as merely declaratory of the necessarily inherent powers already possessed by them.[47] This power to punish has been extended to "contempts committed before referees."[48]

§ 57. **Review of order of commitment.**—While the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, was formerly not subject to review,[49] in some jurisdictions the power to punish has been much restricted and the right of review and appeal from such proceedings is allowed. Nor was there, in the system of federal jurisprudence, any relief against such orders, when the court had authority to make them, except through the court making the order, or by the exercise of the pardoning power. When, however, a court undertakes by its process of contempt, to impose punishment for refusal to comply with an order which it had no authority to make, the order itself, being

[43] Judiciary Act of 1789, 1 Stat. L. 83.

[44] Act March 2, 1831, 4 Stat. L. 487.

[45] R. S. Sec. 725; Ex parte Robinson, 19 Wall. 505.

[46] Sec. 2 (13) of act of 1898.

[47] U. S. v. Hudson, 7 Cranch. 32.

[48] Sec. 2 (16) of act of 1898; Mueller v. Nugent, post,

[49] Hays v. Fischer, 102 U. S. 121; Ex parte Kearney, 7 Wheat. 38.

without jurisdiction, is void, and the order of punishment is equally void. When the proceeding for contempt in such a case results in imprisonment, the proper course is to sue out a writ of habeas corpus for the discharge of the prisoner.[50] A party failing to obey an order of the court to disclose the whereabouts of assets or to turn over to a trustee money or property of the estate, is guilty of contempt, and may be imprisoned, in which event such order is reviewable as to matters of law by the Court of Appeals.[51]

§ 58. **Classes of contempts.**—Contempt may be said to be of two classes—civil and criminal. Civil contempts are those quasi contempts which consist in failing to do that which the contemnor is ordered by the court to do for the advantage or benefit of another party to the proceeding before the court; while criminal contempts are all those acts in disrespect of the court, or of its process, or which disturb the administration of justice, or tend to bring the court in disrepute, such as disorderly conduct, insulting behavior in the presence, or immediate vicinity, of the court, or acts of violence which interrupt its proceedings, also disobedience or resistance of the process of the court, the interference with property in the custody of the law, misconduct of officers of the court, and the like.[52]

As was said in the case of Indianapolis Water Company v. American Strawboard Company,[53] broadly considered, contempts may be classified as "direct" and "constructive." Those which are committed within the presence of the court, while sitting judicially, or so near as to interfere with or interrupt its orderly course of procedure, are direct contempts, which are usually punished in a summary manner, without evidence, upon view and personal knowledge of the deciding judge.[54] Contempts are constructive when they are committed not in the presence of the court, but tend by their operation to interrupt, obstruct, embarrass, or prevent the due and

[50] Ex parte Fisk, 113 U. S. 713, 718; Ex parte Rowland, 104 U. S. 604.

[51] Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224; Boyd v. Glucklich, 116 F. R. 131, 8 A. B. R. 393.

[52] Rapalje on Contempt, Sec. 21; Ex parte Edwards, 11 Fla. 184; In re Watson, 3 Lans., N. Y., 408; Phillips v. Welch, 11 Nev. 187, 190.

[53] 75 F. R. 972, 975.

[54] Whitten v. State, 36 Ind. 196; Ex parte Wright, 65 Ind. 504; People v. Wilson, 64 Ill. 195.

orderly administration of justice. Constructive contempts may be distributed into two general classes, namely: First, those wherein the contemptuous acts primarily affect public rights or the due administration of public justice; and, second, those which primarily affect private rights, and only remotely and incidentally affect public rights or public justice. When the contempt consists in the failure or refusal of the party to do or refrain from doing something which he is ordered to do, or refrain from doing for the benefit or advantage of the opposite party, the proceeding is not criminal, but is civil and remedial in its nature. And in this sort of contempt the intention with which the act is committed is immaterial, except in fixing the proper nature of the punishment. The injury suffered by the complaining party is neither increased nor diminished, nor in anywise affected by the state of mind towards the court of the party doing the forbidden act. The breach consists in doing or failing to do the thing commanded, and not in the intention with which the act was done.[55] The exercise, therefore, of this power to punish for contempt, has a two-fold aspect, namely: First, the proper punishment of the guilty party for his disrespect to the court or its order; and second, to compel his performance of some act or duty required of him by the court which he refuses to perform.[56]

§ 59. **Nature of offense of contempt.**—It has been uniformly held that a contempt of court or its orders is an offense against the United States[57] within no limited or restricted sense, but in the general sense of a crime.[58]

[55] Refrigerating Co. v. Gillett, 30 Fed. 683; Toledo A. A. and N. M. Ry. Co. v. Pa. Co., 54 F. R. 746; Peo. v. Court of Oyer and Terminer, 101 N. Y. 245, 4 N. E. 259; Thompson v. Railroad Co. (N. J. Ch.), 21 Atl. 182; Railroad Co. v. Thompson (N. J. Err. and App.), 24 Atl. 544.

[56] In re Chiles, 22 Wall. 157, 168.

[57] In re Mulee, 7 Blatchf. 24; Ex parte Kearney, 7 Wheat. 38; Dixon's Case, 3 Op. Atty. Genl. 623; Rowan's Case, 4 Id. 58; Drayton & Sear's Case, 5 Id. 579; Ex parte Fisk, 113 U. S. 713, 718. Goodrich v. U. S., 42 F. R. 392. See Boyd v. Glucklich, 116 F. R. 131, 8 A. B. R. 393.

[58] United States v. Jacobi, 4 Amer. Law T. R. U. S. Cts. 148; 4 Blackstone 124, 279; In re Brass Crosby, 3 Wilson 188; In re Williamson, 26 Pa. St. R. 18. New Orleans v. Steamship Co., 20 Wall. 387; Worden v. Searles, 121 U. S. 14; In re Swan, 150 Id. 652; In re Acker, 66 F. R. 290.

§ 60. **Pardon of contempts.**—"When a court commits a party for a contempt, their adjudication is a conviction and their commitment in consequence is execution. After a conviction and a commitment for a contempt, the court has no more power to discharge or remit the sentence than it has in the case of a conviction and commitment for any other crime or offense against the United States."[59] Under the Constitution the President is invested with power "to grant reprieves and pardons for offenses against the United States," and the exercise of this prerogative extends as well to cases of punishment of contempt for disobedience of lawful process of a Federal court as to misbehavior in its presence.[60] It has been held further that a "contempt of court is an offense against the state, and not an offense against the judge personally. In such a case the state is the offended party, and it belongs to the state, acting through another department of its government, to pardon or not to pardon at its discretion the offender."[61] These observations apply only where the term at which the conviction was had has expired and by reason thereof the case has passed beyond the jurisdiction of the court. The term of the court of bankruptcy being considered as continuous from the commencement of a proceeding to the closing of an estate,[62] the court would have power and control over such matters during the pendency of the proceeding, the rule being that during the existence of the term, the court has general and full power over this as over any other kind of judgment, order or decree in either civil or criminal cases.[63]

The fact that a fine has been imposed as a punishment for a contempt, does not remove the case beyond the pardoning power of the President, because the amount of the fine is directed in the order imposing it to be paid to the plaintiff in the suit, towards the reimbursement of his expenses in the attachment proceedings in respect of such contempt.[64] If the

[59] Ex parte Kearney, 7 Wheat. 38, 43. See Fisher v. Hayes, 6 F. R. 63.

[60] In re Mulee, 7 Blatchf. 23; Ex parte Kearney, 7 Wheat. 38, 42; 3 Op. Atty. Genl. 622, 4 Id. 458, 5 Id. 579; Ex parte Fisk, 113 U. S. 713, 718.

[61] State v. Sauvinet, 24 La. Ann. 119.

[62] In re Ives, 113 F. R. 911, 7 A. B. R. 692; Jemison Mercantile Co., 112 F. R. 966, 7 A. B. R. 588.

[63] Fischer v. Hayes, 6 F. R. 63; Ex p. Lange, 18 Wall. 167; Bank of U. S. v. Moss, 6 How. 31.

[64] In re Mulee, 7 Blatchf. 24.

right to the fine could be regarded as a vested private right of the plaintiff in the suit, existing in the shape of a judgment, the President might still pardon the offense and imprisonment, with the exception or saving as to the fine, in which case the fine would remain as a debt recoverable according to the appropriate legal remedies.[65]

§ 61. **Nature of punishment for contempt.**—When the contempt consists of a violation of the order of the court, and is not committed in its presence, and the statute does not prescribe the form of the order of commitment, the defendant may be imprisoned until he be discharged by order of court, or until further order of court;[66] the defendant being committed to the custody of the marshal until the fine has been paid, or the order obeyed.[67] The certified copy of the proceedings of contempt and of the attachment is sufficient to justify not only the United States Attorney in making the necessary complaint, but to authorize the issuance of a warrant of arrest by the proper officer, precisely as a certified copy of an indictment would be in any other case of crime.[68]

§ 62. **Punishment not imprisonment for debt.**—The Constitutions of most of the states contain limitations forbidding imprisonment for debt. While the Federal Constitution contains no such provision, Section 990 of the Revised Statutes provides that there shall be no imprisonment for debt in any state on process issuing from a court of the United States, where, by the laws of such state imprisonment for debt has been or shall be abolished. Imprisonment for the violation of an order of a court to turn over money to a trustee, or to disclose the whereabouts of concealed property, can not be considered as imprisonment for debt.[69]

§ 63. **Defense to order committing for contempt.**—It has been held that irrespective of a constitutional prohibition against imprisonment for debt and of the fact that statutory methods for enforcing decrees for the payment of money have been provided, a failure to pay through absolute inability

[65] Drayton and Sear's Case, 5 Op. Atty. Genl. 579.

[66] In re Allen, 13 Blatchf. 272; Green v. Elgie, 8 Jurist, Part I, 187; In re Yates, 4 Johns. 317, 9 Johns. 395.

[67] In re Chiles, 22 Wall. 157, 169.

[68] U. S. v. Jacobi, 4 Amer. Law T. Rep., U. S. Cts., 148, 151.

[69] Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224; In re Schlesinger, 102 F. R. 117, 4 A. B. R. 361;

lacks the essential element of a contempt.[70] But the fact that the party is disabled from obeying the order is no defense, where such disability is the result of some voluntary act of his own.[71]

Ripon Knitting Wks. v. Schreiber, 101 F. R. 810, 2 N. B. N. R. 899. 4 A. B. R. 299. See Boyd v. Glucklich, 116 F. R. 131, 8 A. B. R. 393.

[70] In re Ockershausen, 59 Hun. 200; Walton v. Walton, 54 N. J. Eq. 607; Register v. State, 8 Minn. 214.

[71] Rapalje on Contempts, Sec. 18; Galland v. Galland, 44 Cal. 475; Peo. v. Salomon, 54 Ill. 40; Snowman v. Harford, 57 Me. 397.

CHAPTER III.

ACTS OF BANKRUPTCY—INSOLVENCY.

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§ 64. '**(Sec. 3a) Acts of bankruptcy defined.**—Acts of 'bankruptcy by a person shall consist of his having

'(1) conveyed, transferred, concealed, or removed, or per-'mitted to be concealed or removed, any part of his property 'with intent to hinder, delay, or defraud his creditors, or any 'of them; or

'(2) transferred, while insolvent, any portion of his prop-'erty to one or more of his creditors with intent to prefer such 'creditors over his other creditors; or

'(3) suffered or permitted, while insolvent, any creditor to 'obtain a preference through legal proceedings, and not hav-'ing at least five days before a sale or final disposition of any 'property affected by such preference vacated or discharged 'such preference; or

'(4) made a general assignment for the benefit of his cred-'itors, or, being insolvent, applied for a receiver or trustee for

'his property or because of insolvency a receiver or trustee has 'been put in charge of his property under the laws of a state, 'of a territory, or of the United States.[1]

'(5) admitted in writing his inability to pay his debts and 'his willingness to be adjudged a bankrupt on that ground.'[2]

§ 65. **Classes.**—Acts of bankruptcy may, in general, be considered under two classes, i. e., those resulting from insolvency and those which are dishonest or fraudulent.

The first three definitions of the acts of bankruptcy speci-

[1] Subdivision 4 was amended by the act of February 5, 1903, by the enactment of the matter in the text in lieu of the following: "(4) Made a general assignment for the benefit of his creditors."

[2] Analogous provision in Act of 1867. Sec. 39. *And be it further enacted*, That any person residing and owing debts as aforesaid, who, after the passage of this act, shall depart from the State, district, or Territory of which he is an inhabitant, with intent to defraud his creditors, or, being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, sale, conveyance or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, district, or Territory, within which such debtor resides or has property founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days; or has been actually imprisoned for more than seven days in a civil action, founded on contract, for the sum of one hundred dollars or upwards, or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or give any warrant to confess judgment; or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who, being a banker, merchant or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy.

fied in the present law, follow closely those given in section 39 of the act of 1867, while the fourth and fifth definitions have no counterpart in that act. The law of 1867 specified three acts of bankruptcy which are omitted from the present statute, namely, the absconding or avoiding the service of process on part of the debtor, the arrest and holding in custody of a debtor, under process of execution for a period of seven days; and the fraudulent suspension of payment of commercial paper by a banker, merchant or trader for a period of fourteen days.

§ 66. **Estoppel.**—Any person conniving in the alleged act of bankruptcy whether it be actually fraudulent or only constructively so should be denied the relief asked if based on the ground of such act.[3]

§ 67. **Determination of insolvency.**—As the law expressly defines insolvency, all that is necessary in any particular case is to determine whether the aggregate of the alleged insolvent's property, exclusive of any he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, is, at a fair valuation, sufficient in amount to pay his debts; if not, he is insolvent. Hence on the trial of a contested involuntary petition, in determining the issue of the solvency or insolvency of respondent, all the property which he owns is to be reckoned in computing the amount of his assets, including property exempt from execution by the laws of the state, but excluding such as he may have transferred or concealed in fraud of creditors,[4] or conveyed without consideration immediately preceding his bankruptcy, and money upon his person.[5]

A fair valuation of the goods levied on should be taken, with reference to their actual situation and liability to sale on execution, and, if such sale is in all respects a fair and reasonable one, the debtor is bound by the result as to the

[3] In re Miner, 2 N. B. N. R. 1073, 104 F. R. 520; Simonson v. Sinsheimer, 95 F. R. 948; In re Romanow, 92 F. R. 510, 1 N. B. N. 213, 1 A. B. R. 461; Massachusetts Brick Co., 5 N. B. R. 408, F. C. 9259; Perry v. Langley, 1 N. B. R. 559, F. C. 11006; In re Williams, 4 N. B. R. 132, F. C. 17706. See General Assignments, post §82.

[4] In re Baumann, 96 F. R. 946, 3 A. B. R. 196.

[5] In re Tudor, 1 N. B. N. 339.

valuation and can not prove his solvency by a higher estimate based on their being free and sold at retail in the usual course of business.[6] The term "fair valuation" is the equivalent of the present market value, and not what the debtor would have been able to realize therefor considering his situation, the number and amount of his obligations, and the like.[7] In making such estimate there should not be included prospective profits upon goods ordered but not paid for or delivered,[8] and in case of credits due the bankrupt on accounts, the estimate should be on their actual and not their nominal value.[9] Where a referee has twice examined the question and finds that the debtor's property at a fair valuation was insufficient to pay his debts the finding of insolvency should not be disturbed.[10]

A corporation which has sufficient property to pay its debts

[6] In re Martin, 1 N. B. N. 301.

[7] Duncan v. Landis, 106 F. R. 839, 5 A. B. R. 649.

[8] In re Bloch, 109 F. R. 790, 6 A. B. R. 300.

[9] In re Coddington, 118 F. R. 281, 9 A. B. R. 243.

[10] In re Rome Planing Mill, 2 N B. N. R. 531, 99 F. R. 937, 3 A. B. R. 766.

Under the act of 1867 it was held that insolvency consisted in the inability to pay debts according to the custom of the place of business, although the assets might be largely in excess of liabilities; that it was no excuse that he might have paid them if time was given, and that the words "insolvent" and "insolvency" were not synonymous with the words "bankrupt" and "bankruptcy," but less restricted (Ecfort v. Greely, 6 N. B. R. 433, Fed. Cas. 4260; Toof v. Martin, 6 N. B. R. 49, 13 Wall. 40; Martin v. Toof, 4 N. B. R. 158, Fed. Cas. 9164; Stranahan v. Gregory, 4 N. B. R. 142, Fed. Cas. 13522; In re Lewis, 2 N. B. R. 145; In re Kingsbury, 3 N. B. R. 84, Fed. Cas. 7816; Merchants' Nat. Bk. v. Truax, 1 N. B. R. 146, Fed. Cas. 9451; Warren v. Bk., 7 N. B. R. 481, 10 Blatch. 493, Fed. Cas. 17202; Jackson v. McCulloch, 13 N. B. R. 283, 1 Woods 433, Fed Cas. 7140; Sawyer v. Turpin, 5 N. B. R. 339, 2 Lowell 29, Fed. Cas. 12410; In re Woods, 7 N. B. R. 126, Fed. Cas. 17990; Webb v. Sachs, 15 N. B. R. 168, 4 Sawy. 158, Fed. Cas. 17325; Hall v. Wager, 5 N. B. R. 181, 3 Biss. 28, Fed. Cas. 5951; In re Black, 1 N. B. R. 81, 2 Ben. 196, Fed. Cas. 1457; Rison v. Knapp, 4 N. B. R. 114, Fed. Cas. 11861); that debts could not be made in full out of debtor's property by levy and sale on execution (In re Wells, 3 N. B. R. 95, Fed. Cas. 17388; in re Oregon Bull. etc. Co., 13 N. B. R. 503, Fed. Cas. 10559; but see Harrison v. McLaren, 10 N. B. R. 244, Fed. Cas. 6139); failure to keep promises to pay at a specific time made repeatedly to demands of payment (In re Armstrong, 16 N. B. R. 275, 9 Ben. 212, Fed. Cas. 539); being required by a banker to give collateral security

does not become insolvent within the meaning of the law upon the appointment of a receiver in a state court.[11]

§ 68. **When partnership insolvent.**—Under the act of 1867 a partnership was held insolvent if unable to pay its debts in the ordinary course of business. Under the present act all the property which may be made liable for the firm debts must be considered in determining whether or not the co-partnership is solvent. Partners are liable *in solido*, and in order that a firm may be adjudged a bankrupt it must be shown not only that the co-partnership is insolvent, but that every one of its members is individually insolvent.[12] The inability of a partnership to meet its matured obligations, together with its dissolution, and the transfer of practically all of its property to creditors, either by way of payment or security, leaving other debts unpaid, are facts sufficient to establish its insolvency.[13]

§ 69. **Acts of bankruptcy, conveyances and transfers with intent to prefer.**—It should be noted that all preferences given by an insolvent within four months prior to the filing of the petition are acts of bankruptcy if given with an intent to prefer, whether they can or can not be set aside by the trustee; and in order that they may be set aside, the creditor benefited must have had reasonable cause to believe that it was intended to give a preference. Payments, sales, or transfers of any character, declared void by the bankrupt law, are only void against persons claiming under proceedings in bankruptcy or in the course of administration of a bankrupt's estate in a court of bankruptcy;[14] but if made by a person so unsound in mind as to be wholly incapable of managing his affairs they can not be made the basis of proceedings in bankruptcy, against the objections of his guardian.[15] The purpose

for a draft cashed the day before (Merchants' Bk. v. Cook, 16 N. B. R. 391, 95 U. S. 342). The foregoing do not define insolvency under the present law, but the acts named may tend to show that the debtor's property, at a fair valuation, is insufficient to pay his debts.

[11] In re Henry Zeltner Brewing Co., 117 F. R. 799.

[12] Davis v. Stevens, 104 F. R. 235, 3 N. B. N. R. 131; In re Blair, 99 F. R. 76, 2 N. B. N. R. 364, 3 A. B. R. 588; Vaccaro v. Bank, 103 F. R. 436, 2 N. B. N. R. 1037, 4 A. B. R. 474; see In re Bennett, 12 N. B. R. 181, 2 Low. 400.

[13] In re Miller, 104 F. R. 764.

[14] Berryman v. Allen, 15 N. B. R. 113.

[15] In re Funk, 101 F. R. 244, 4 A. B. R. 96.

of the bankrupt act being to secure the equal distribution of the bankrupt's estate among his creditors, every act of an insolvent which tends to defeat that purpose should be construed strictly against him.[16]

The word "transfer" is used in its most comprehensive sense and is intended to include every means and manner by which property can pass from the possession and ownership of another,[17] and includes sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.[18] Hence the payment of money,[19] the transfer of valuable accounts,[20] or of property by an insolvent to a creditor with intent to prefer him over other creditors is an act of bankruptcy, and it is immaterial whether the transfer is made directly or indirectly to the creditor, or whose claim is preferentially paid;[21] and the same is true of a transfer to several creditors under an agreement that they should surrender the notes they held and have the property fairly appraised, and, if its value exceeded the aggregate of their debts, the debtor was to receive the excess;[22] or any act by which some creditors are intentionally preferred over others.[23] The transfer of all of one's property affords a violent, if not a conclusive presumption of an intent to prefer, where there are other creditors unprovided for,[24] or under certain circumstances the transfer of a large part of one's property.[25]

§ 70. **Transfers with intent to defraud.—Concealment.**—If, while insolvent, one conveys, transfers, conceals or removes, or permits to be concealed or removed any part of his property, with the intent to hinder, delay or defraud his creditors, or to give a preference to any of them, or to defeat or delay the operation of the bankrupt law, he commits an act

[16] Hall v. Wager, 5 N. B. R. 181, 3 Biss. 28, F. C. 5951.

[17] Carson et al. v. Trust Co., 182 U. S. 438, 45 L. Ed. 1171, A. B. R.

[18] Sec. 1a (25) act of 1898.

[19] Boyd v. Lemon & Gale Co., 114 F. R. 647, 8 A. B. R. 81.

[20] In re McGee, 105 F. R. 895, 5 A. B. R. 262.

[21] Goldman v. Smith, 1 A. B. R. 266, 1 N. B. N. 160, 93 F. R. 182; In re Grant, 106 F. R. 496, 5 A. B. R. 837.

[22] In re Norcross, 1 N. B. N. 257, 1 A. B. R. 644.

[23] In re Edelstein, 1 N. B. N. 168.

[24] In re Gilbert, 112 F. R. 951, 8 A. B. R. 101; In re Waite, 1 Law. 207, F. C. 17044.

[25] Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481.

of bankruptcy, however innocent the act of the preferred creditor or the person to whom the transfer is made;[26] and the conveyance of his property affords a very violent presumption of a fraudulent intent so far as existent creditors are concerned.[27] The following have been held to be acts of bankruptcy and accordingly void: transfers made to defeat the operation of the bankrupt law so far as they stand in the way of enforcing its provisions, where the proceedings are instituted within the prescribed time;[28] or the transfer of property for an inadequate consideration;[29] or any act the effect of which is to evade the provisions of the law;[30] or the absconding of an insolvent, carrying with him money or property not exempt, which constitutes both a concealment as well as a removal of property with intent to defraud;[31] conveyances not made in the usual and ordinary course of business of the debtor,[32] and in determining whether a transaction is so made the question is not whether it is usual in the general conduct of business throughout the community, but whether it is according to the usual course of business of the particular person whose conveyance is in question.[33]

The fraudulent concealment of property which is an act of bankruptcy may be shown as well by circumstantial as by direct evidence, and where the evidence is wholly circumstantial, it is impossible and unreasonable and therefore unnecessary to aver in the petition the precise details of the act of concealment.[34]

The conveyance of all of one's property in trust to sell the same and pay first the expenses, second the debts of a preferential character under the state laws, third the creditors, all of whom, with the respective amounts due each, were set out in the conveyance, and fourth to pay any balance to the

[26] In re Drummond, 1 N. B. R. 10, F. C. 4093.

[27] In re Alexander, 4 N. B. R. 45, F. C. 161; In re Gilbert, supra.

[28] Stevenson v. McLaren, 14 N. B. R. 403; Beattie v. Gardner, 4 N. B. R. 106, F. C. 1195; In re Cowles, 1 N. B. R. 42, F. C. 3927.

[29] See Citizens Bank of Salem v. DePauw Co., 105 F. R. 926, 5 A. B. R. 345.

[30] Webb v. Sachs, 15 N. B. R. 168, 4 Sawy. 158, F. C. 17325.

[31] In re Filer, 108 F. R. 209, 5 A. B. R. 332.

[32] Rison v. Knapp, 4 N. B. R. 114, F. C. 11861; Babbitt v. Walbran & Co., 4 N. B. R. 30, F. C. 694.

[33] Rison v. Knapp, supra.

[34] In re Bellah, 116 F. R. 69, 8 A. B. R. 310.

grantor, has been held not to work a preference and upon that ground not an act of bankruptcy; nor, if the defeasance and reservation to the grantor after satisfaction of the beneficiaries is bona fide, is it a general assignment under the bankruptcy act; but it must be regarded as a deed given with intent to hinder, delay and defraud creditors within the meaning of the law and so an act of bankruptcy, because it puts the administration of an estate in the hands of a person chosen by the debtor instead of his creditors, as directed by the bankrupt law, though there is no fraud of the kind requisite to avoid conveyances at common law, or under the statute of frauds.[35]

For discussion of question of concealment, see chap. XXIX, post.

§ 71. Acts of bankruptcy, transfers or conveyances not.—An insolvent debtor may sell or incumber his estate for a present and sufficient consideration, if the transaction is bona fide[36] without committing an act of bankruptcy,[37] and no concealment can be implied where he shows good faith in respect to the care of the money received.[38] The following transfers have been held not to operate as a preference and, therefore do not constitute acts of bankruptcy: a transfer of property by an insolvent, when there is no other creditor having a provable debt against such debtor;[39] the payment by an insolvent of the back rent, water charges and other incidental expenses necessary to effect the sale of a leasehold;[40] the conveyances of one's property, which exceeds in value his debts to another who agrees to pay all the debts and support the grantor during the rest of his life;[41] an unexecuted agreement by a railroad company to transfer certificates of stock;[42] the assignment of book accounts as collateral security for the payment of present loans and advances to the bankrupt;[43] or any transfer of one's property when entirely solvent.

[35] In re Rumsey & Sikemier Co., 2 N. B. N. R. 128, 99 F. R. 699, 3 A. B. R. 704.

[36] Gattman & Co. v. Honea, 12 N. B. R. 493, F. C. 5271.

[37] Githens v. Shiffler, 112 F. R. 505, 7 A. B. R. 453.

[38] Fox v. Eckstein, 4 N. B. R. 123, F. C. 5009.

[39] Beers v. Hanlin, 99 F. R. 695; In re Johann, 4 N. B. R. 143, F. C. 7331.

[40] In re Pearson, 1 N. B. N. 402. 2 A. B. R. 482, 95 F. R. 425.

[41] In re Cornwell, 6 N. B. R. 305, F. C. 3250.

[42] Winter v. I. M. & N. P. Ry. Co., 7 N. B. R. 289, 2 Dill. 287, F. C. 17390.

[43] Young v. Upson, 8 A. B. R. 377.

§ 72. —— **Conveyances of partnership property.**—A transfer of firm property from one member to another is not ordinarily a fraud on creditors, nor does it hinder or delay them, nor constitute a fraudulent preference, and is not an act of bankruptcy,[44] but if made to enable the individual creditors of the transferee to secure a preference, it is.[45] Nor does it constitute an act of bankruptcy to transfer the whole stock of a dissolved partnership to the one solvent partner to settle the affairs, even though a sale is made by such partner in gross.[46]

§ 73. —— **Conveyances to relatives.**—A voluntary conveyance made by a person not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors on the ground of its being voluntary; but must be shown to be fraudulent or made with a view to future debts;[47] but it will be fraudulent as to creditors and an act of bankruptcy if the grantor be indebted at the time to such extent that the settlement will embarrass him in the payment of his debts, although the debts due may be subsequently paid in the course of business.[48] A conveyance by a father to his son in consideration of support by the son, has been held to be fraudulent as to creditors and an act of bankruptcy;[49] so is any transfer on the part of an insolvent, to a relative, which results in a concealment of assets or a fraud on the creditors;[50] or where an insolvent father lends money to his son, who makes a gift of the amount of the loan to his mother by purchasing a house in her name;[51] or the transfer of property to a relative in payment of an antecedent debt.[52]

§ 74. —— **Chattel mortgages.**—The giving of a chattel mortgage is a disposition of property out of the usual course of business,[53] and when given by an insolvent upon all his personal property, authorizing the mortgagee to sell the same

[44] In re Munn, 7 N. B. R. 468, 3 Biss. 442, F. C. 9925.

[45] Collins v. Hood, 4 McLean 186.

[46] In re Weaver, 9 N. B. R. 132, F. C. 17307.

[47] Barker v. Smith, 12 N. B. R. 474, 2 Woods 87.

[48] Antrines v. Kelly, 4 N. B. R. 189.

[49] In re Johann, 4 N. B. R. 143, F. C. 7331.

[50] In re Rathbone, 2 N. B. R. 89, 3 Ben. 50, F. C. 11581.

[51] In re Eldred, 3 N. B. R. 61, F. C. 4328.

[52] In re Grant, 106 F. R. 496, 5 A. B. R. 837.

[53] U. S. v. Bayer, 13 N. B. R. 88. F. C. 14548.

at private sale, it creates a preference and is an act of bankruptcy.[54] When given on bankrupt's stock of goods to secure an alleged debt, the purpose being to hinder, delay, or defraud the creditors, it is an act of bankruptcy;[55] as is a chattel mortgage which permits the mortgagor to dispose of the goods in due course of trade, without reference to the good faith of the mortgage debt, or the intention of the mortgagor as to fraud;[56] or where one gives a bill of sale of personalty in which there is no change in the possession of the property, the first owner taking back a writing in the nature of a lease.[57] The giving of a chattel mortgage for a present bona fide consideration is not forbidden by the law nor is it an act of bankruptcy.

§ 75. —— **Mortgages.**—A debtor may give a mortgage for a present consideration to enable him to carry on his business, if there is no intent to delay creditors,[58] and the sale of a mortgage for its cash value is a transfer in the usual and ordinary course of business and not an act of bankruptcy.[59] The giving by a debtor knowing himself to be insolvent of a mortgage or deed of trust to secure a creditor on a pre-existing debt, is a preference, and therefore an act of bankruptcy, irrespective of whether the creditor knew or had reasonable ground to believe that a preference was intended.[60]

§ 76. —— **Pledge.**—It is not a fraud upon creditors and therefore not an act of bankruptcy for a debtor to receive collateral from his pledgee for collection,[61] nor to pledge one's property for a present fair consideration, when the purpose is not to hinder, delay or defraud creditors.

§ 77. —— **Sales.**—The law does not contemplate that all sales or transfers of goods by an insolvent shall constitute preferences and therefore be deemed acts of bankruptcy, but

[54] The Griffin Pants Factory v. Nelms Racket Store Co., 2 N. B. N. R. 630.

[55] In re McKibben, 12 N. B. R. 97, F. C. 3859.

[56] In re Foster, 18 N. B. R. 64, F. C. 4964.

[57] In re Gurney, 15 N. B. R. 373, 7 Biss. 414, F. C. 5873.

[58] In re Sanford, 7 N. B. R. 352, F. C. 12310.

[59] Judson v. Kelty, 6 N. B. R. 165, 5 Ben. 348, F. C. 7567.

[60] In re Ed. W. Wright Lumber Co., 114 F. R. 1011, 8 A. B. R. 345.

[61] Clark v. Iselin, 11 N. B. R. 337, 21 Wall. 360.

only such as are made within four months of the filing of the petition, with the ulterior purpose of hindering, delaying, or defrauding some or all of his creditors, or while insolvent making a transfer to a creditor with the intent to prefer such creditor. Although a sale is made in contemplation of bankruptcy, it is not prima facie fraudulent, and an act of bankruptcy, unless surrounded by unusual circumstances, and is not then void as to purchasers in good faith,[62] since the law does not forbid an insolvent from selling, exchanging or otherwise disposing of his property at any time prior to the filing of the petition, provided such action leaves his estate in as good condition as formerly.[63] A merchant in embarrassed circumstances may sell his goods at less than cost price to raise money to pay debts, the purchaser knowing of his insolvency;[64] or he may continue to sell his stock at retail while endeavoring to compromise with his creditors, in the absence of a fraudulent intent;[65] or raise money to defray expenses in contemplated bankruptcy proceedings, provided he does not sell at a sacrifice and the sum raised is reasonable;[66] or he may exchange goods covered by a warehouse receipt in a warehouse for others of less or equal value.[67] An adjudication will not be made where debtor sells his stock for the purpose of going into a new business, although to prevent seizure of the proceeds on state process, he does not put them into tangible shape,[68] there being no evidence of vendor's insolvency.[69]

A sale will be held to be an act of bankruptcy where the purpose is to hinder, delay or defraud the creditors, as where household furniture in a dwelling inhabited by the owner and another person is transferred to such other person by a bill of sale without any other circumstances to indicate the actual

[62] In re Hunt, 2 N. B. R. 166, F. C. 6881.

[63] Cook v. Tullis, 9 N. B. R. 433, 18 Wall. 332; Clark v. Iselin, 11 N. B. R. 337, 21 Wall. 360. See Githens v. Shiffler, 112 F. R. 505, 7 A. B. R. 453.

[64] Sedgwick v. Lynch, 8 N. B. R. 289, F. C. 12615.

[65] In re Munger v. Champlin, 4 N. B. R. 90, F. C. 9923.

[66] In re Keefer, 4 N. B. R. 126, F. C. 7636.

[67] Sharp v. Phila. Warehouse Co., 19 N. B. R. 378.

[68] Fox v. Eckstein, 4 N. B. R. 123, F. C. 5009.

[69] In re Valliquette, 4 N. B. R. 92, F. C. 16823.

possession;[70] or a sale by an insolvent of his stock with intent to prefer some of his creditors;[71] or a conveyance, absolute on its face, in which the grantor secretly reserves the right to retain possession for a limited period, under a parol agreement, as part of the consideration;[72] or a sale of a stock of goods in gross, out of the usual and ordinary course of business of a retail dealer;[73] or a sale shortly before bankruptcy where vendor and vendee conspired to defraud creditors;[74] or a sale of an entire stock below cost, the purchaser selling it at an advance and the last purchaser being informed at the time of the circumstances of the first purchase;[75] or where a purchaser of goods assumes debts of the vendor as part consideration, and sells the goods leaving the debts unpaid, which the vendor is obliged to discharge, commits an act of bankruptcy, and is liable to the vendor for the amount of such debts.[76]

§ 78.— **Legal proceedings.**—Where an insolvent suffers or permits any creditor to obtain a preference through legal proceedings and does not at least five days before a sale or final disposition of any property affected thereby, vacate or discharge such preference, he will be deemed to have committed an act of bankruptcy. The words "before a sale," as here used, means "before the time fixed for sale." The essential elements of this act of bankruptcy are first, insolvency, second, a judgment, levy and threatened sale thereunder, not more than five days distant, and, third, that such a sale would effect a preference. It is immaterial that the debt on which the judgment rests is valid, due at the time the action was commenced and that the judgment was entered and levy made without any collusion between the bankrupt and the creditor, or without the former having intended to give a preference, the effect of the act rather than the intent of the parties

[70] Allen v. Massey, 4 N. B. R. 75, F. C. 231.

[71] In re Morgan, 101 F. R. 982, 2 N. B. N. R. 846, 4 A. B. R. 402.

[72] Lukins v. Aird, 2 N. B. R. 2, 24 Wall. 78.

[73] In re Deane & Garret, 2 N. B. R. 29, F. C. 3700.

[74] Dickinson v. Adams, 17 N. B. R. 380, 4 Sawy. 257, F. C. 3896.

[75] Walbrun v. Babbitt, 9 N. B. R. 1, 16 Wall. 577.

[76] Phelps v. Clasen, 3 N. B. R. 22, F. C. 11074.

being regarded, insolvency being admitted.[77] This provision is limited to such acts as by construction of law and in view of the bankruptcy law work an injury to other creditors by securing to them a preference which the law is designed to prevent. This would not apply therefore to such levies and liens as are acquired long before the passage of the act and more than four months prior to the petition, which it is not the purpose of the law to affect or disallow.[78]

The failure of an insolvent to discharge an attachment levied by a creditor five days before the day of sale thereunder, although he may not actively procure or participate in the bringing of the attachment suit,[79] or the sale under a judgment execution, is an act of bankruptcy;[80] this is also true of a corporation, although it cannot file a petition in voluntary bankruptcy.[81] The creditors need not wait until an actual levy is made before filing a petition, but if money is paid by the bankrupt or another by his direction, or other property is transferred to the sheriff holding an execution its application on the execution completes the preference.[82] Nor need they wait until a sale has taken place, but if five days before the day advertised the debtor has not discharged the preference, they may file a petition against him.[83]

Where a debtor, while solvent, gives judgment notes or a warrant of attorney and subsequently when he has become insolvent, judgment is entered and execution is levied pursuant thereto, the debtor commits an act of bankruptcy, since the preference complained of is obtained by issuing the execution and the subsequent sale, and not by giving the

[77] Wilson Bros. v. Nelson, 183 U. S., 191, 7 A. B. R. 142; In re Meyers, 1 N. B. N. 207, 1 A. B. R. 1; Wilson v. Bank, 17 Wall. 473, distinguished and held no longer controlling. See In re Bamberger, 2 N. B. N. R. 95.

[78] In re Ferguson, 95 F. R. 429, 2 A. B. R. 586.

[79] In re Reichman, 1 N. B. N. 556, 1 A. B. R. 17, 91 F. R. 624; In re Ferguson, 95 F. R. 429, 2 A. B. R. 586; In re Francis-Valentine Co., 1 N. B. N. 529, 2 A. B. R. 523, 94 F. R. 793; s. c. 1 N. B. N. 532, 2 A. B. R. 188, 93 F. R. 953, 89 F. R. 691.

[80] In re Moyer, 93 F. R. 188, 1 N. B. N. 260, 1 A. B. R. 577; In re Whalen, 1 N. B. N. 228.

[81] Parmenter Mfg. Co. v. Stoever, 2 N. B. N. R. 174, 3 A. B. R. 220, 97 F. R. 330; In re Storm, 103 F. R. 618, 4 A. B. R. 601.

[82] In re Miller, 104 F. R. 764, 5 A. B. R. 140.

[83] In re Rome Planing Mill Co.,

judgment notes.[84] The entry of judgment on a warrant of attorney, or otherwise, there being no actual execution thereon or sale thereunder, would possibly not constitute an act of bankruptcy[85] under the third subdivision of the law, but would constitute acts of bankruptcy either as an illegal preference on the part of the insolvent, or as hindering and delaying other creditors;[86] or if the property is actually taken, though there be no sale, it would come within the spirit of subdivision 3 of the law,[87] as would also be the case where money due the bankrupt is turned over to the sheriff by the party from whom it is due to be applied on the execution although there is no actual levy or sale.[88] The same is true where executions on confessed judgments were levied but subsequently at the instance of creditors' attorney withdrawn to await further orders, and a year later but within four months of the bankruptcy proceedings other executions on the same judgments were levied on the same property, the first judgments were held to be dormant and only the lien under the latter executions was valid, which, not having been discharged within five days before sale, was an act of bankruptcy.[89]

This provision does not apply to a judgment for the foreclosure of a lien in the nature of a mortgage to secure a note, and a levy on the land conveyed, where the note and mortgage were given before the enactment of the bankruptcy law and for a valid debt, although a creditor may recover a general judgment as well as the judgment of foreclosure, yet if the levy made affects only the property bound by the lien, the debtors' failure to release such levy is not an act of bankruptcy.[90]

3 A. B. R. 123, 96 F. R. 812; In re Elmira Steel Co., 109 F. R. 456, 5 A. B. R. 484.

[84] Wilson v. Nelson, 183 U. S. 191, 7 A. B. R. 142; reversing 98 F. R. 76, 1 N. B. N. 567, 1 A. B. R. 63; In re Moyer, 93 F. R. 188, 1 N. B. N. 260, 1 A. B. R. 577; In re Thomas, 103 F. R. 272, 2 N. B. N. R. 1021, 4 A. B. R. 571; In re Reichman, 91 F R. 624, 1 A. B. R. 17; In re American Brewing Co., 112 F. R. 752, 7 A. B. R. 463; contra, Duncan v. Landis, 106 F. R. 839, 5 A. B. R. 649.

[85] In re Anderson, 2 N. B. N. R. 1000.

[86] Scheuer v. Smith & Montgomery Book & Stationery Co., 112 F. R. 407, 7 A. B. R. 384.

[87] In re Harper, 105 F. R 900, 5 A. B. R. 567.

[88] In re Miller, 5 A. B. R. 140.

[89] In re Ferguson, 95 F. R. 429, 2 A. B. R. 586.

[90] In re Chapman, 99 F. R. 395, 3 A. B. R. 607.

§ 79. —— **Inability to defeat.—Preference.**—The dominant fact in this provision of the law is the actual result that has been attained by the creditor. If through legal proceedings he has succeeded in obtaining a preference the debtor is required to vacate or discharge it within the specified time, and if he fails so to do he commits an act of bankruptcy. How he is to vacate or discharge a preference is not specified, but whatever the nature of the legal proceedings employed by the creditor may be, if the result thereof gives such creditor a preference over others, it must be discharged by the debtor within the time alloted. It has been held that if he has a defense to the debt he must set it up; or, if he can overthrow the preference because of defects in creditors' procedure he should pursue that method, and if neither of these weapons is available he may file his petition in voluntary bankruptcy. His failure to move may be regarded as a confession that he is hopelessly insolvent and is conclusive proof that he consents to the preference that he declines to strike down.[91]

§ 80. —— **Receiver or Trusteeship.**—The appointment of a receiver or trustee to take charge of one's property, whether voluntarily and at the instance of the insolvent, or involuntarily and at the instance of others, constitutes an act of bankruptcy, but in either case the insolvency of the debtor is a prerequisite. In the case of a party who is solvent, such appointment would not be an act of bankruptcy under the fourth subdivision of section 3(a) of the law, but might be held to be a transfer with intent to hinder, delay or defraud creditors through the substitution of the procedure of the state court for the more expeditious and economic method provided by the bankruptcy law,[92] or result in a preference through the payment on certain claims entitled to priority under the state law, an amount greater than would be allowed under the bankruptcy law.[93] Under that provision of the act

[91] In re Moyer, 1 N. B. N. 260, 1 A. B. R. 577, 93 F. R. 188; In re Reichman, 91 F. R. 624, 1 N. B. N. 556, 1 A. B. R. 17.

[92] See In re Metallic Bedstead Co., supra; In re Harper Bros., 2 N. B. N. R. 605, 100 F. R. 266, 3 A. B. R. 804; In re Henry Zeltner Brewing Co., 117 F. R. 799, 9 A. B. R. 63; contra In re Burrell et al., 9 A. B. R. 178.

[93] See Mather v. Coe, 1 N. B. N. 554, 92 F. R. 333, 1 A. B. R. 504.

of 1867 which provided that to "procure or suffer his property to be taken on legal process with intent to defeat or delay the operation of this act" the procurement of a receivership was held to be an act of bankruptcy.[94] In the absence of an equivalent provision under the act of 1898, it was held that the failure to resist a bill for receivership was neither a conveyance, transfer, concealment or removal of property by the respondent, and if it should be held to be a transfer, it was a transfer permitted rather than made, on failing to oppose the bill therefor, which was not forbidden; nor was it a general assignment for the benefit of creditors,[95] nor such an admission as would bring it within the purview of subdivision 5 of this section, although it might be the unanimous and voluntary act of the members of the corporation.[96] Although a corporation has been dissolved and a receiver appointed, it might nevertheless be adjudged bankrupt if the petition is filed within four months after the act of bankruptcy.[97]

§ 81. —— **Intent—allegation and proof.**—In the first and second acts of bankruptcy set forth in the law, an intent on the part of the bankrupt, either to hinder, delay or defraud his creditors, or to prefer over other creditors, is necessary to constitute the act of bankruptcy.[98] The petition must allege issuable facts with reasonable and sufficient certainty, as it is not sufficient to allege merely that the debtor had, within four months last past, paid or transferred, while insolvent, large amounts and values of his property to creditors without averring that it was done with intent to prefer them over other creditors.[99] The rule is that the specific fact relied on as an act of bankruptcy should be alleged with time, place, person and circumstances,[1] but where it is a case of fraudu-

[94] Sec. 39, act of 1898; In re Bininger, F. C. 1420.

[95] In re Baker-Ricketson Co., 2 N. B. N. R. 133, 97 F. R. 489, 4 A. B. R. 605; Empire Metallic Bedstead Co., 2 N. B. N. R. 304, 98 F. R. 981; Vaccaro v. Bk., 2 N. B. N. R. 1037, 103 F. R. 436, 4 A. B. R. 474; Davis v. Stevens, 104 F. R. 235; In re Henry Zeltner Brewing Co., supra; In re Gilbert, 112 F. R. 951, 8 A. B. R. 101.

[96] In re Baker Ricketson Co., supra.

[97] In re Storck Lumber Co., 114 F. R. 360, 8 A. B. R. 86.

[98] Wilson v. Nelson, 183 U. S. 191, 7 A. B. R. 142; but see The Griffin Pants Factory v. The Nelms Racket Store Co., 2 N. B. N. R. 630; Johnson v. Wald, 2 A. B. R. 84, 93 F. R. 640.

[99] In re Ewing, 115 F. R. 707.

[1] In re Nelson, 98 F. R. 76, 1 N. B. N. 567, 1 A. B. R. 63.

lent concealment, and the evidence is wholly circumstantial, it is impossible and unreasonable, and therefore unnecessary, to aver in the petition the precise details of the act of concealment.[2] Where on a hearing before a referee on the issues joined on a petition in involuntary bankruptcy the testimony of the alleged bankrupts discloses an additional act of bankruptcy, not specified in the petition, an amendment may be permitted to include such act,[3] if four months have not elapsed since the commission of such act.

The petitioner in an involuntary proceeding which alleges that the debtor transferred, while insolvent, a portion of his property to one or more of his creditors with intent to prefer such creditor, has the burden of proving the insolvency of the debtor as well as the intent to create the preference. The intent sufficiently appears from the insolvency and the preference, if no attempt is made by the defendant to show an absence of intent, but he has a right to show such absence by reason of his entire ignorance of insolvency and a reasonable expectation of ability to pay his debts.[4]

Upon an involuntary petition, alleging as an act of bankruptcy, that the debtor has transferred property with intent to give a preference, or that he has suffered or permitted a preference to be obtained through legal proceedings and has not within five days of the final disposition of the affected property vacated such preference, the petitioning creditors must assume the burden of proving, in the former case, the transfer, the debtor's intent to prefer a creditor—the creditor's intent in receiving it, or that he had reasonable cause to believe a preference was intended being immaterial—and the debtor's insolvency at the date of transfer, and, in the latter case, that a preference was obtained by a creditor through legal proceedings, by which are meant any proceeding in a court of justice, interlocutory or final, resulting in the seizure of the debtor's property and its diversion from his general creditors, that the debtor suffered or permitted the preference, which does not require any affirmative act on the debtor's part but that he remain passive, and did not

[2] In re Bellah, 116 F. R. 69, 8 A. B. R. 310.

[3] In re Miller, 104 F. R. 764.

[4] In re Bloch, 109 F. R. 790, 6 A. B. R. 300; Wager v. Hall, 16 Wall. 584; see Toof v. Martin, 13 Wall. 40; Parsons v. Topliff, 119 Mass. 243, 249; In re Gilbert, 112 F. R. 951, 8 A. B. R. 101.

vacate or discharge it at least five days before the sale or final disposition of the property affected, and that he was insolvent at the time the preference was obtained, it not being sufficient that he was insolvent when the petition was filed. If the debtor fails to produce his books and papers and submit to an examination, he incurs the obligation of proving his own solvency and the creditors are relieved of the burden of proving his insolvency.[5]

[5] In re Rome Planing Mill Co., 3 A. B. R. 123, 96 F. R. 812.

INTENT NECESSARY UNDER THE ACT OF 1867.—That act provided that a person should be deemed to have committed an act of bankruptcy who had "procured or suffered his property to be taken on legal process, with intent to give a preference to one or more of his creditors," thus making the "intent" an essential element. The act of 1898 provides that the act of bankruptcy shall consist in his having "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference," making the effect of the act without regard to the intention of the parties the test. Hence the decisions under the act of 1867 are not controlling nor even very valuable under the present act; though some (In re Black, 1 N. B. R. 81, 2 Ben. 196, Fed. Cas. 1457; In re Wells, 3 N. B. R. 95, Fed. Cas. 17388; Warren v. Bk., 7 N. B. R. 481, 10 Blatch. 493, Fed. Cas. 17202, 96 U. S. 539; Wilson v. Bk., 5 N. B. R. 270, 17 Wall. 473; In re Craft, 1 N. B. R. 89, 2 Ben. 214, Fed. Cas. 3316; Vogel v. Lathrop, 4 N. B. R. 146, Fed. Cas. 16985; Bk. v. Campbell, 6 N. B. R. 353, 14 Wall. 87; Webb v. Sachs, 15 N. B. R. 168, 4 Sawy. 158, Fed. Cas. 17325; In re Dibble, 2 N. B. R. 185, 3 Ben. 203, Fed. Cas. 3884; Haughey v. Albin, 2 N. B. R. 129, 2 Bond 244, Fed. Cas. 6222; In re Leeds, 1 N. B. R. 138, Fed. Cas. 8205; In re Woods, 7 N. B. R. 126, Fed. Cas. 17990), may be usefully consulted, in so far as they hold that the facts imply intent; but others (Wright v. Filley, 4 N. B. R. 197, Fed. Cas. 18077; Wilson v. Bk., 9 N. B. R. 97, 17 Wall. 473; Rankin v. Florida R. R. Co., 1 N. B. R. 196, Fed. Cas. 11567; Louchheim Bros. v. Henzey, 18 N. B. R. 173; Bk. v. Warren, 17 N. B. R. 75, 96 U. S. 539; Shimer v. Huber, 19 N. B. R. 414, Fed. Cas. 12787; In re King, 10 N. B. R. 103, Fed. Cas. 7783), so far as they hold that mere passivity on the debtor's part is not sufficient, do not state the law under the present act, which is just the reverse, that passive non-resistance to proceedings which will work a preference is sufficient (In re Meyers, 1 N. B. N. 207, 1 Am. B. R. 1). Under the former act the entry of a judgment upon a warrant of attorney was held to constitute an act of bankruptcy where the creditors had reasonable cause to believe the debtor insolvent, even though at the time of the execution of the bond there was no reason to so believe (In re Lord, 5 N. B. R. 318, Fed. Cas. 8503); and, where

§ 82. —— General assignment for the benefit of creditors.— A general assignment for the benefit of creditors is an act of bankruptcy, although made without preferences, without actually intending to defraud creditors, and without insolvency.[6] It is not necessary to aver or prove that the debtor was insolvent at the time of the assignment or at the time of filing the petition,[7] nor is it a defense to deny the insolvency where an assignment is the act charged.[8] Where one of the members of a firm, who was insolvent, as liquidating partner, makes a general assignment for the benefit of creditors, which purported to convey all the firm's property, the question of the validity of such assignment as to the partners not joining is immaterial, for the language of the act applies to any instrument which is or purports to be a general assignment and such assignment is an act of bankruptcy by the firm and the executing partner, but not of the other partner, though he knew of and made no attempt to prevent such assignment;[9] and if made by the partnership and the individuals composing

a debtor had committed no act of bankruptcy and would not voluntarily petition, a creditor might sue him so as to force him to commit an act of bankruptcy and then himself proceed against him in involuntary bankruptcy (Warren v. Bk., 7 N. B. R. 481, 10 Blatch. 493, Fed. Cas. 17202; Coxe v. Hale, 8 N. B. R. 562, Fed. Cas. 3310); but the confession of a judgment as security for a loan of mony made cotemporaneously with such confession was held not to be an act of bankruptcy (Clark v. Iselin, 9 N. B. R. 19, 10 Blatch. 204, Fed. Cas. 2825; In re Leeds, 1 N. B. R. 138, Fed. Cas. 8205).

[6] In re Meyer, 98 F. R. 976, 3 A. B. R. 559; In re Sievers, 1 N. B. N. 68, 1 A. B. R. 117, 91 F. R. 366; s. c. as Davis v. Bohle, 1 N. B. N. 216, 1 A. B. R. 412, 92 F. R. 325; Lea Bros. v. Geo. M. West Co., 1 N. B. N. 79, 1 A. B. R. 261, 91 F. R. 237; s. c. 1 N. B. N. 409, 2 A. B. R. 463, 174 U. S. 590; Leidigh Car Co. v. Stengel, 1 N. B. N. 387, 2 A. B. R. 383, 95 F. R. 637; In re Gutwillig, 1 N. B. N. 40, 1 A. B. R. 8, 90 F. R. 475, s. c. 1 N. B. N. 554, 1 A. B. R. 388, 92 F. R. 337; In re Simonson, Whiteson & Co., 1 N. B. N. 230, 1 A. B. R. 197, 92 F. R. 904; Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102; In re Smith, 1 N. B. N. 356, 2 A. B. R. 9, 92 F. R. 135; In re Mercur, 1 N. B. N. 527, 2 A. B. R. 626, 95 F. R. 634; Day v. Beck & Gregg Hardware Co., 114 F. R. 834; Green River Deposit Bank v. Craig, 110 F. R. 137, 6 A. B. R. 381.

[7] Leidigh Car Co. v. Stengel, supra; Lea Bros. v. Geo. M. West Co., supra; Simonson v. Sinsheimer et al., 100 F. R. 426, 3 A. B. R. 824.

[8] Lea Bros. v. Geo. M. West Co., supra; Bray v. Cobb, supra.

[9] In re Meyer, 1 A. B. R. 565, 98 F. R. 976.

it, the act of bankruptcy is committed by all;[10] but, if one of two persons jointly and severally liable for a debt, who are not partners, does an act which would subject him to adjudication in bankruptcy, such act does not affect his associate.[11] The confession of judgment to a trustee for the benefit of all creditors, has been held in Pennsylvania to be the equivalent of a general assignment.[12] An application by a corporation to a state court for its dissolution and the appointment of a receiver upon the ground of its insolvency is not equivalent to a general assignment, and hence is not an act of bankruptcy upon that ground.[13] But where the officers of a corporation, acting under authority of a resolution of the board of directors, and in pursuance of a vote taken at a meeting of the stockholders, though against the objection of a minority of the stockholders make a general assignment, it is an act of bankruptcy on which a petition

[10] In re Green, 106 F. R. 313, 5 A. B. R. 848.

[11] James v. Atlantic Delaine Co., 11 N. B. R. 390, F. C. 7179.

[12] Green River Deposit Bank v. Craig, 110 F. R. 137, 6 A. B. R. 381.

[13] In re Empire Metallic Bedstead Co., 1 N. B. N. 386, 2 A. B. R. 329, 2 N. B. N. R. 304, 95 F. R. 957, 98 F. R. 981, reversing 1 N. B. N. 301; In re Harper Bros., 2 N. B. N. R. 605, 100 F. R. 266, 3 A. B. R. 804; In re Baker-Ricketson Co., 2 N. B. N. R. 133, 97 F. R. 489, 4 A. B. R. 605.

The making of a general assignment for the benefit of creditors being expressly made an act of bankruptcy by the act of 1898, the decisions under the act of 1867, which did not contain this express provision, are rendered useless, though, under the provisions of that act, such assignments were held acts of bankruptcy as being intended to interfere with the operation of the bankrupt law (In re Kasson, 18 N. B. R. 379, Fed. Cas. 7617; Rowe v. Page, 13 N. B. R. 366; In re Langley, 1 N. B. R. 155; In re Mandelsohn, 12 N. B. R. 533, 3 Sawy. 342, Fed. Cas. 9420; Ins. Co. v. Ins. Co., 14 N. B. R. 311, Fed. Cas. 5486; McDonald v. Moore, 15 N. B. R. 26, 8 Ben. 579, Fed. Cas. 8763; Platt v. Preston, 19 N. B. R. 241, Fed. Cas. 11219, 5046; Pool v. McDonald, 15 N. B. R. 560, Fed. Cas. 11268; Cragin v. Thompson, 12 N. B. R. 81, 2 Dill. 513, Fed. Cas. 3320; In re Smith, 3 N. B. R. 98, 4 Ben. 1, Fed. Cas. 12974; In re Crofts Bros., 17 N. B. R. 324, 8 Biss. 188, Fed. Cas. 3404; Jones v. Clifton, 18 N. B. R. 125, Fed. Cas. 7453; In re Lawrence, 18 N. B. R. 516, Fed. Cas. 8133; Jackson v. McCullough, 13 N. B. R. 283, 1 Woods 433, Fed. Cas. 7140; Contra, In re Hawkins, 2 N. B. R. 122; Farrin v. Crawford, 2 N. B. R. 181, Fed. Cas. 4686; Sedgwick v. Place, 1 N. B. R. 204, Fed. Cas. 12622; Langley v. Perry, 2 N. B. R. 180, Fed. Cas. 8067; In re Marter, 12 N. B. R. 185, Fed. Cas. 9143; In re Kimball, 16 N. B. R. 188, Fed. Cas. 7770).

in involuntary bankruptcy against the corporation may be maintained.[14]

Creditors on being made parties to proceedings in a state court under a general assignment who do not repudiate the assignment, nor begin proceedings in bankruptcy, but file their claims and participate in the administration of the estate, suffering the assignee to sell property and collect the proceeds, involving a delay of several months and the incurring of costs and expenses, are estopped thereafter from filing a petition in involuntary bankruptcy against the assignor, based solely on such assignment,[15] though, if they had merely filed their claims and nothing had been done to affect the status of any of the parties, it has been held that this would not be so.[16] Where pending a proposition for compromise, the petitioning creditors sold to the assignee small bills of goods to replenish the stock and make it more salable, and received from him the price thereof, they would not be estopped.[17]

§ 83. —— Admitting in writing inability to pay debts and willingness to be adjudged bankrupt on that ground.—Three things are essential to constitute this act of bankruptcy: first, it must be written; second, it must contain an admission either expressly or of so strong an implication as to leave no question of doubt; and, third, a willingness to be adjudged bankrupt. The force of such statement is in no wise impaired by setting forth the reasons for such inability.[18]

The law requires no technical form of proof of assent by a corporation any more than by an individual, but only that the admission and consent be in writing. Such an admission is within the authority of the directors of a corporation charged with the management of its affairs and is not a corporate function to be exercised only by the whole body of

[14] Clark v. Mfg. Co., 101 F. R. 962, 4 A. B. R. 351.

[15] In re Simonson v. Sinsheimer, 95 F. R. 948; Leidigh Carriage Co. v. Stengel, 1 N. B. N. 387, 95 F. R. 637, 2 A. B. R. 383; Massachusetts Brick Co., 5 N. B. R. 408, F. C. 9259; Perry v. Langley, 1 N. B. R. 559, F. C. 11006; In re Romanow, 92 F. R. 510, 1 N. B. N. 213, 1 A. B. R. 461; but see Spicer v. Ward, 3 N. B. R. 127, F. C. 13241.

[16] In re Curtis, 1 N. B. N. 163, 1 A. B. R. 440, 91 F. R. 737, Id. 94, F. R. 630.

[17] Simonson v. Sinsheimer, 100 F. R. 426, 3 A. B. R. 824.

[18] In re Kersten, 110 F. R. 929, 6 A. B. R. 516.

corporate members, but a vote of the majority of the board of directors will suffice, where the method of voting is in accordance with the custom and not contrary to any specific provision with reference thereto.[19]

Where a resolution is unanimously passed by stockholders authorizing one of its officers to appear in court in event of a petition being filed against it and to admit in writing its inability to pay its debts and willingness to be adjudged a bankrupt on that ground, it is not an act of bankruptcy since it is merely a qualified authority to admit, and, if after such petition has been filed, such officer appears and makes the admission, the petitioner cannot avail himself of it since it was not executed until after the petition was filed.[20] A statement signed by one of two partners, which purports to be made in behalf of both is undoubtedly binding in case of express authority, and the authority may be presumed from acquiescence or failure to disaffirm when the opportunity for such issue is presented.[21]

The application in a state court by a corporation for its dissolution and the appointment of a receiver of its property, though a written admission of its inability to pay its debts, does not also amount to a willingness to be adjudged bankrupt on that ground and is not an act of bankruptcy;[22] but where by the laws of the state under which the corporation is formed, defining and limiting the power of the officers and directors, a written admission of the corporation's inability to pay its debts and willingness to be adjudged bankrupt on that ground is in excess of their authority, such an act does not constitute an act of bankruptcy, nor will a subsequent ratification by the stockholders have a retroactive effect to sustain the petition and cut off the rights of creditors who opposed the adjudication.[23]

[19] In re Marine Machine & Conveyor Co., 91 F. R. 630, 1 A. B. R. 91; Rollins Gold & Silver Mining Co., 102 F. R. 982, 2 N. B. N. R. 988, 4 A. B. R. 327; In re Mutual Mercantile Agency, 111 F. R. 152, 6 A. B. R. 607; In re Kelly Dry Goods Co., 102 F. R. 748, 4 A. B. R. 528; In re Peter Paul Book Co., 104 F. R. 786, 5 A. B. R. 105.

[20] In re Baker Ricketson Co., 2 N. B. N. R. 133, 97 F. R. 489, 4 A. B. R. 605.

[21] In re Kersten, supra.

[22] In re Empire Bedstead Co., 1 N. B. N. 386, 2 A. B. R. 329, 95 F. R. 957, 2 N. B. N. R. 304, 98 F. R. 981, rev'g 1 N. B. N. 301; In re Baker-Ricketson Co., supra.

[23] In re Bates Mach. Co., 1 N. B. N. 135, 1 A. B. R. 129, 91 F. R. 625.

§ 84. 'b. **Time for filing petition.**—A petition may be filed 'against a person who is insolvent and who has committed an 'act of bankruptcy within four months after the commission 'of such act. Such time shall not expire until four months 'after (1) the date of the recording or registering of the trans- 'fer or assignment when the act consists in having made a 'transfer of any of his property with intent to hinder, delay, 'or defraud his creditors or for the purpose of giving a prefer- 'ence as hereinbefore provided, or a general assignment for 'the benefit of his creditors, if by law such recording or regis- 'tering is required or permitted, or, if it is not, from the date 'when the beneficiary takes notorious, exclusive, or continuous 'possession of the property unless the petitioning creditors 'have received actual notice of such transfer or assignment.'[24]

§ 85. **Four Months' Period.**—The purpose of this section is to remove all incentive to the dishonest debtor of secretly committing acts of bankruptcy in the hope that the time within which proceedings might be instituted will elapse before the creditors obtain knowledge thereof, and extends the time for instituting proceedings four months from the date the creditor obtains knowledge of the offense.

The bankruptcy proceedings are commenced and jurisdiction acquired by the filing of the petition[25] within four months of the act of bankruptcy relied on, and the delay until the expiration of this time in issuing the subpoena does not validate the act of bankruptcy or vitiate the proceedings.[26] The four months within which the petition must be filed are computed by excluding the day the petition is filed, and including the day on which the act of bankruptcy was committed.[26a] A failure to file a duplicate petition within such four months is fatal and the error can not be corrected.[27] Thus a petition filed February 20, 1899, based on a confession of judg-

[24] Analogous provision in act of 1867. Sec. 39. . . . he . . . shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

[25] In re Appel, 2 N. B. N. R. 907, 103 F. R. 931.

[26] In re Lewis, 1 N. B. N. 135, 556, 1 A. B. R. 458, 91 F. R. 632,

[26a] See Dutcher v. Wright, 94 U. S. 553.

[27] In re Stevenson, 1 N. B. N. 313, 2 A. B. R. 66, 94 F. R. 111; In re Dupree, 1 N. B. N. 513, 97 F. R. 28.

ment October 20, 1898, is in time;[28] or a petition filed December 30 based on a preference effected by a debtor discounting his own notes at his own bank with his individual checks and thereby paying certain creditors, the checks being dated August 27 and 29 but charged, when paid, September 1,[29] or a petition filed February 1, 1899, based on a failure to vacate an execution, the sale having been fixed for October 27, though the attachment was made July 5, judgment entered September 21 and execution levied October 15.[30] In the last case the failure to vacate the execution before sale was the act of bankruptcy, and hence the four months' period ran not from the attachment, but from a date connected with the proceedings after judgment.[31] The time of beginning the proceedings for a lien on bankrupt's property, as an attachment, and not the beginning of the action in which the lien proceedings were had and which may have been long pending, fixes the time when the four months begin,[32] or the execution and delivery of a deed, and not the date named therein.[33] Acts which took place more than four months before the petition was filed are not acts of bankruptcy,[34] consequently where prior to that period bankrupt transfers property, the possession of the party to whom it was transferred being as notorious as it was susceptible or as notorious, exclusive and continuous as the nature of the property permitted, the transfer is not an act of bankruptcy.[35] An insolvent corporation sold its real estate and used the proceeds in paying some of its creditors to the exclusion of others, such payments being set up as transfers with intent to prefer and that the conveyance was with the intent to delay and defraud, the petition being filed more than four months after the payment, though within four months of the record of the deed, it was held not to be within the required time.[36]

[28] In re Stevenson, supra.

[29] In re Edelstein, 1 N. B. N. 168.

[30] Parmenter Mfg. Co. v. Stoever, 2 N. B. N. R. 174, 3 A. B. R. 220, 97 F. R. 330.

[31] See also In re Fellerath, 1 N. B. N. 292, 2 A. B. R. 40, 95 F. R. 121.

[32] In re Higgins, 2 N. B. N. R. 115, 3 A. B. R. 364, 97 F. R. 775.

[33] In re Rodney, 6 N. B. R. 165, F. C. 12032.

[34] In re Richards, 2 N. B. N. R. 38, 96 F. R. 935, 3 A. B. R. 145.

[35] In re Woodward, 1 N. B. N. 352, 2 A. B. R. 233.

[36] In re Mingo Val. Creamery Ass'n, 2 N. B. N. R. 679, 100 F. R. 282.

§ 86. **'c. Defense of solvency.**—It shall be a complete de-'fense to any proceedings in bankruptcy instituted under the 'first subdivision of this section to allege and prove that the 'party proceeded against was not insolvent as defined in this 'Act at the time of the filing the petition against him, and if 'solvency at such date is proved by the alleged bankrupt the 'proceedings shall be dismissed, and under said subdivision one 'the burden of proving solvency shall be on the alleged bank-'rupt.'[37]

§ 87. **Who may defend.**—The bankrupt or any creditor may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow. Under this provision the creditor may appear and assist in the defense of the case, if he so desires.[38]

§ 88. **When defense of solvency may be made.**—This paragraph places the burden upon the debtor to prove his solvency in case the act of bankruptcy charged is that he has conveyed, transferred, concealed or removed any part of his property with intent to hinder, delay or defraud his creditors, and if successful in such proof, the petition will be dismissed.[39] The making of a general assignment for the benefit of creditors is an act of bankruptcy or insolvency in fact, and hence a denial of insolvency is not a good plea in bar in such case.[40] Ordinarily an answer to a petition is sufficient which contains a general denial, and states that the respondent has not committed the acts of bankruptcy set forth and avers that he should not be declared bankrupt for any cause alleged.[41] Where it is shown that bankrupt's assets, at a fair valuation,

[37] Analogous provision of act of 1867. Sec. 41. . . . and if upon such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.

[38] Secs. 18b, 59f of act of 1898.

[39] Lea Bros. v. West Co., 1 N. B. N. 79, 1 A. B. R. 261, 91 F. R. 237, s. c. 1 N. B. N. 298, 2 A. B. R. 463. 174 U. S. 590; In re Schenkein, 113 F. R. 421; In re West, 108 F. R. 940, 5 A. B. R. 734.

[40] Lea Bros. v. West Co., supra; Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102.

[41] In re Hawkeye Smelting Co., 8 N. B. R. 385.

exceed his liabilities, the petition must be dismissed,[42] but where the valuation is greatly inflated, as demonstrated by subsequent appraisal and sale, the total value being less than the liabilities, the finding of insolvency will not be disturbed.[43] In the case of one adjudged bankrupt upon his own petition, the adjudication can not be assailed by proof that he was not, in fact, insolvent; nor can the question of solvency be examined on a motion to set aside an adjudication of bankruptcy against a corporation procured by petition of a trustee.[44]

§ 89. **Defense generally.**—Under the former act it was held that in order to authorize the making of an order to show cause, the deposition of acts of bankruptcy should be such as constitute legal testimony,[45] the omission to file the same being held a substantial defect which could not be remedied.[46] Each distinct charge may be denied in a general manner where several distinct allegations of bankruptcy are set forth in the petition, if an answer of denial in the nature of a special plea to each allegation is not filed;[47] and as many defenses as there are may be set up to the petition, but each defense must be pleaded separately.[48]

The burden of refuting the allegations contained in the petition is on the respondent,[49] and if no evidence is introduced the petitioning creditor is entitled to an adjudication.[50]

§ 90. **'d. Testimony on denial of insolvency.**—Whenever 'a person against whom a petition has been filed as hereinbe-'fore provided under the second and third subdivisions of this 'section takes issue with and denies the allegation of his in-'solvency, it shall be his duty to appear in court on the hearing, 'with his books, papers, and accounts, and submit to an ex-'amination, and give testimony as to all matters tending to 'establish solvency or insolvency, and in case of his failure to

[42] In re Rogers Milling Co., 2 N. B. N. R. 973, 102 F. R. 687, 4 A. B. R. 540.

[43] In re Rome Planing Mill Co., 2 N. B. N. R. 531, 99 F. R. 937, 3 A. B. R. 766.

[44] In re Ins. Co., 16 N. B. R. 541, 9 Ben. 270, F. C. 628.

[45] In re Rosenfields, 11 N. B. R. 86, F. C. 12061.

[46] In re Brown, 15 N. B. R. 416, F. C. 1981.

[47] In re Hawkeye Smelting Co., 3 N. B. R. 385.

[48] In re Quimette, 3 N. B. R. 140, 1 Sawy. 47, F. C. 10622.

[49] In re Price & Miller, 8 N. B. R. 514, F. C. 11411.

[50] In re Jelsh et al., 9 N. B. R. 412, F. C. 7257.

'so attend and submit to examination the burden of proving 'his solvency shall rest upon him.'

§ 91. **Practice.**—This paragraph is restricted to the second and third acts of bankruptcy specified in Sec. 3a, and places the burden of proof upon the creditors unless the bankrupt fails to submit to examination, when it is shifted to him.[51] Under this provision the bankrupt may be called and cross-examined for the purpose of establishing his insolvency.[52] The bankrupt or any creditor may appear and plead to the petition within ten days after the return day or within such further time as the court may allow,[53] and if they appear and controvert the facts alleged in the petition, the judge must determine the issues presented by the pleadings and make the adjudication or dismiss the petition.[54] A person against whom an involuntary petition has been filed is entitled to have a trial by jury in respect to the question of his insolvency, upon the filing of a written application therefor, at or before the time in which an answer may be filed,[55] and if not filed within such time a jury trial will be deemed to have been waived.[56] The respondent's default puts the burden of proving his solvency on him; but does not convert the proceeding into one of voluntary bankruptcy.[57]

Upon the question of the examination of the bankrupt, see Chap. XXI, post.

§ 92. **'e. Provisional seizure of property—bond.**—When- 'ever a petition is filed by any person for the purpose of hav- 'ing another adjudged a bankrupt, and an application is made 'to take charge of and hold the property of the alleged bank- 'rupt, or any part of the same, prior to the adjudication and 'pending a hearing on the petition, the petitioner or applicant 'shall file in the same court a bond with at least two good and 'sufficient sureties who shall reside within the jurisdiction of 'said court, to be approved by the court or a judge thereof, in 'such sum as the court shall direct, conditioned for the pay- 'ment, in case such petition is dismissed, to the respondent, his

[51] Street Co. v. Lea Bros., supra.

[52] In re Coddington, 118 F. R. 281, 9 A. B. R. 243.

[53] Sec. 18b of act of 1898.

[54] Sec. 18d of act of 1898.

[55] Sec. 19a of act of 1898.

[56] Sec. 19; Bray v. Cobb, 91 F. R. 102, 1 N. B. N. 209, 1 A. B. R. 153.

[57] In re Taylor, 2 N. B. N. R. 929, 102 F. R. 728, 4 A. B. R. 515.

'or her personal representatives, all costs, expenses, and dam-'ages occasioned by such seizure, taking, and detention of the 'property of the alleged bankrupt.'

§ 93. —— **Practice.**—During the pendency of proceedings and until adjudication of bankruptcy, the defendant retains control and title to the property,[58] unless the petitioner file with his petition an application to take charge of and hold the property pending the adjudication, in which event he must accompany it by a bond; or if upon satisfactory proof it is shown that the bankrupt, against whom an involuntary petition has been filed and is pending, has committed an act of bankruptcy, or is neglecting, or permitting his property to deteriorate in value, the judge may issue a warrant under which the marshal may seize and hold such property subject to further orders. Before such warrant is issued, however, the petitioner applying therefor must enter into a bond conditioned to indemnify the bankrupt for any damages that may result by reason of such seizure if wrongfully obtained.[59] Courts are to appoint receivers or the marshals, upon application of parties in interest, where they find it absolutely necessary for the preservation of estates, to take charge of the property or bankrupts after filing of the petition, and until it is dismissed or the trustee has qualified.[60]

§ 94. —— **Costs.**—In involuntary cases, where the debtor resists the adjudication and the court, after hearing, adjudges him bankrupt, the petitioning creditor may recover and be paid out of the estate, similar costs as are now allowed to a party recovering in a suit in equity; and, if the petition be dismissed, the debtor recovers like costs against the petitioning creditor,[61] but not counsel fees[62] or damages.[63]

§ 95. '**Costs on dismissal of petition.**—If such petition be 'dismissed by the court or withdrawn by the petitioner, the 'respondent or respondents shall be allowed all costs, coun-'sel fees, expenses, and damages occasioned by such seizure,

[58] Sec. 70a act of 1898.

[59] See Secs. 50 and 69, act of 1898; see Beach v. Macon Grocery Co., 116 F. R. 143.

[60] Sec. 2 (3), act of 1898.

[61] G. O., XXXIV.

[62] In re Ghiglione, 1 N. B. N. 351, 1 A. B. R. 580, 93 F. R. 186; Dundon v. Coats, 6 N. B. R. 304, F. C. 4142; In re Sheehan, 8 N. B. R. 353, F. C. 12738.

[63] In re Morris, 115 F. R. 591, 7 A. B. R. 709.

'taking, or detention of such property. Counsel fees, costs, 'expenses and damages shall be fixed and allowed by the 'court, and paid by the obligors in such bond.'[64]

[64] Analogous provision of act of 1867. Sec. 41. . . . If, upon such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceedings, the proceedings shall be dismissed and the respondent shall recover costs. See In re Nixon, 110 F. R. 633, 6 A. B. R. 693.

CHAPTER IV.

WHO MAY BECOME BANKRUPTS.

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§ 96. **'(Sec. 4a) Who may become voluntary bankrupts.—** 'Any person who owes debts, except a corporation, shall be en- 'titled to the benefits of this Act as a voluntary bankrupt.'[1]

[1] Act of 1867. Sec. 11. And be it further enacted, That if any person residing within the jurisdiction of the United States, owing debts provable under this act exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of the filing of such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors and his desire to obtain the benefit of this act, and shall annex to his petition a schedule . . . (here follows contents of schedule) the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt. Sec. 37. And be it further enacted, That the provisions of this act shall apply to all moneyed business or commercial corpora-

§ 97. **Who may file petition.**—Under this section, any person except a corporation may become a voluntary bankrupt, provided he owes debts; that is, any debt, demand or claim, provable in bankruptcy;[2] and a state court has no authority to abridge this right by proceedings to enjoin one from applying for its benefits.[3] If the bankrupt owes no debt, or the only debt scheduled is one that is not released by a discharge, the court would have no right to entertain the petition, or if such fact is discovered by a creditor after the adjudication, on proper motion it will be set aside and the petition dismissed.[4] If he is unable to pay the necessary filing fees, he may be relieved therefrom, upon submitting an affidavit with his petition stating that he is without and cannot obtain the money with which to pay such fees.[5] If, however, it subsequently develops during the pendency of proceedings that the bankrupt has or can obtain the money to pay these fees, or money comes to the estate, the court will order them paid, and, on default, dismiss the petition.[6]

§ 98. **The petition.**—Provision for filing the petition is made under § § 912-914.

§ 99. **Classes of persons.**—The uniformity required in bankrupt laws is geographical, not personal, and the question of the classes of persons to be affected is one largely, if not wholly, within the discretion of Congress;[7] and the operation of the act of 1898 being uniform throughout the United States and the classification imposed by Congress reasonable, having regard to the proper objects of such law, the act is constitutional.[8]

tions and joint-stock companies, and that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors.

[2] Sec. 1 (11), act of 1898.

[3] Fillingen v. Thornton, 12 N. B. R. 92.

[4] In re Yates, 114 F. R. 365, 8 A. B. R. 69; In re Maples, 105 F. R. 919, 5 A. B. R. 426.

[5] Sec. 51 (2), act of 1898.

[6] G. O. XXXIV.

[7] Sturgis v. Crowninshield, 4 Wheat. 122, 194.

[8] Leidigh Car Co. v. Stengel, 1 N. B. N. 387, 2 A. B. R. 383, 95 F. R. 637; In re Cal. Pac. R. R. Co., 11 N. B. R. 193, 3 Sawy. 240, F. C.

§ 100. **Aliens.**—See this head post § 111.

§ 101. **Chinese.**—The Chinese Exclusion Act does not prevent a Chinaman from taking advantage of the bankruptcy law.[9]

§ 102. **Corporations.**—Corporations cannot become voluntary bankrupts, but there is nothing to prevent them from authorizing their officers to admit their inability to pay their debts and willingness to be adjudged involuntary bankrupts. See "Corporations," post 6, § 113.

§ 103. **Farmers.**—A person engaged chiefly in farming or the tillage of the soil may become a voluntary bankrupt, but cannot be adjudicated an involuntary bankrupt. See "Farmers," post § 123.

§ 104. **Indians.**—Citizenship is not a prerequisite to the adjudication of one a bankrupt, but merely that he should be a person with the necessary residence or domicile. While an Indian is a person within the meaning of the constitution and laws of the United States[10] a court of bankruptcy would certainly have no jurisdiction over one who retained his nomadic life and tribal relations. Furthermore, all agreements or contracts for the payment or delivery of money or other thing of value made by an Indian, without compliance with the statute as to approval by the Secretary of the Interior and Commissioner of Indian Affairs, are absolutely null and void,[11] and subject the other party to a severe penalty.[12] Hence, a claim against an Indian for a debt contracted in contravention of this statute could not support an involuntary petition and would not be the basis of a voluntary petition. But an Indian who has become a citizen is equally liable as any other person to the provision of the law. Where, however, an Indian has not become a citizen but has adopted the habits and manners of civilized people, and such an agreement has been approved in conformity with the statute, a court of bankruptcy would have jurisdiction so far as such claim or claims only are

2315; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1; In re Smoke, 2 N. B. N. R. 831, 4 A. B. R. 477.

[9] In re Kai Y. Chung, 1 N. B. N. 33.

[10] U. S. v. Crook, 5 Dill. 453, Art. 1, Const. Sec. 2; Elk v. Wilkins, 112 U. S. 112.

[11] U. S., R. S. Sec. 210.

[12] U. S., R. S. Sec. 2105.

concerned, and which would support a voluntary petition, or an involuntary petition if sufficient in amount, but to that extent only,[13] as the weight of authority supports the right of an Indian off his reservation to institute proceedings in the United States courts.[14]

§ 105. **Infants.**—If a minor is liable for his contracts, or for what are commonly understood to be his debts, as for necessaries, and the like, he is included within the provisions of the bankrupt act,[15] at least as to voluntary bankruptcy. A debt contracted by him during infancy may be acknowledged on reaching his majority when it would support a petition in bankruptcy.

§ 106. **Lunatics.**—As a lunatic, or person non compos mentis, is unable to perform the duties and assume the burden and obligations imposed, which accompany the benefits to be derived from the law, neither he nor his committee or guardian would be authorized to file a voluntary petition.[16] But if the bankrupt becomes non compos mentis after the filing of the petition, the proceedings are conducted and concluded the same as though he had not become insane. See this head, post § 127.

§ 107. **Married women.**—Formerly married women were only in a very restricted way capable of contracting debts and so were not included within the bankruptcy laws, but the married women acts have now generally emancipated them from such restrictions. Wherever and to whatever extent they may contract debts, there and to that extent they are within the present act, and may become voluntary bankrupts or be made involuntary bankrupts.[17]

§ 108. **'(b) Who may become involuntary bankrupts.**—'Any natural person, except a wage-earner or a person engaged 'chiefly in farming or the tillage of the soil, any unincor-'porated company, and any corporation engaged principally

[13] See in re Rennie, 1 N. B. N. 335, 2 A. B. R. 182; In re Russie, 96 F. R. 608, 3 A. B. R. 6.

[14] Fellows v. Blacksmith, 19 Howard, 366; Elk v. Wilkins, 112 U. S. 112.

[15] In re Brice, 1 N. B. N. 310, 2 A. B. R. 197, 93 F. R. 942; In re Duguid, 100 F. R. 274, 2 N. B. N. R. 607, 3 A. B. R. 794; see In re Penzansky, 8 A. B. R. 99.

[16] In re Eisenberg, 117 F. R. 786, 8 A. B. R. 551.

[17] See cases under the head "Married women," post §128.

'in manufacturing, trading, printing, publishing, mining or 'mercantile pursuits, owing debts to the amount of one thou-'sand dollars or over, may be adjudged an involuntary bank-'rupt upon default or an impartial trial, and shall be subject to 'the provisions and entitled to the benefits of this act. Private 'bankers, but not national banks or banks incorporated under 'State or Territorial laws, may be adjudged involuntary bank-'rupts.'[18]

§ 109. **Liability of stockholders, etc.**—'The bankruptcy of a 'corporation shall not release its officers, directors, or stock-'holders, as such, from any liability under the laws of a State 'or Territory or of the United States.'

§ 110. **Determining character of proceedings.**—The distinction between voluntary and involuntary bankruptcy is determined by the person filing the petition; if by the debtor, it is voluntary, and if by the creditor it is involuntary, and respondent's failure to appear in an involuntary proceeding will not convert it into a voluntary one;[19] but once there is an adjudication all distinction ceases, and the rights and responsibilities of all bankrupts and their creditors become identical.

§ 111. **Aliens.**—Citizenship is not a prerequisite to jurisdiction by courts of bankruptcy, hence an alien may become either a voluntary or involuntary bankrupt;[20] if residing within the United States in order to become a voluntary bank-

[18] The first paragraph of Subdivision "b" was amended by the act of February 5, 1903, by including "mining" corporations as a class that may become involuntary bankrupt. The second paragraph with reference to the effect of the bankruptcy of a corporation on the liability of the stockholders is new, being inserted by the amendment.

Act of 1867. (See sec. 37, ante p. 76.) Sec. 39. . . . Any person residing and owing debts as aforesaid, who (is guilty of certain named acts) . . . or who being a banker, merchant or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

[19] In re Taylor, 2 N. B. N. R. 929, 102 F. R. 728, 4 A. B. R. 515.

[20] In re Goodfellow, 2 N. B. R. 114, 1 Low 510, F. C. 5536.

rupt he must have had the same length of residence, domicile or principal place of business as any other resident of the United States. But if residing abroad, a voluntary petition may be filed in his behalf with the single requirement that he have property within the jurisdiction of the United States. To give jurisdiction in an involuntary proceeding there need be neither residence, domicile nor place of business, but merely that the debtor has committed an act of bankruptcy and has property within the jurisdiction of the court of bankruptcy or that he has been adjudged bankrupt by a court of competent jurisdiction without the United States and has property within the United States.

§ 112. **Banks.**—National banks and banks incorporated under the state and territorial laws cannot be adjudged involuntary bankrupts under this law, but their liquidation when insolvent is expressly provided for by the United States, state and territorial laws.

The laws of the United States provide that, when any national banking association shall be dissolved, and its rights, privileges and franchises declared forfeited, as prescribed in section 5239 of the Revised Statutes of the United States, and when any creditor of any national banking association shall have obtained a judgment against it in any court of record, on proper showing, or whenever the comptroller of currency shall become satisfied of the insolvency of a national banking association, he may, after due examination of the affairs, in either case, appoint a receiver, who shall proceed to close up such association and enforce the personal liability of the stockholders, as provided for in section 5234 of the Revised Statutes of the United States.[21]

The various states and territories wherein state and territorial banks have been organized have prescribed special provisions of law applicable to such institutions on becoming insolvent, and providing for their liquidation.[22]

[21] See Act of June 30, 1876, 1 Supp. R. S. 107, ch. 156, as amended by Act of August 3, 1892, 2 Supp. R. S. 63, ch. 360, and by Act of March 2, 1897, 2 Id. 565, ch. 354.

[22] Under the act of 1867 it was held that the court had no jurisdiction to adjudge a national bank bankrupt for suspension of payments (Smith v. Mfr. Nat. Bk., 9 N. B. R. 122, F. C. 13076); but that it might adjudge private bankers involuntary bankrupts, the

A "private banker" is a person or firm, engaged in banking without having special privileges or authority from the state,[23] and may be adjudged involuntary bankrupt. The term has a definite signification and has been held to apply to individuals or to a firm only, and not to comprehend a corporation. Accordingly a corporation could not be adjudged a bankrupt as a "private banker."[24]

§ 113 **Corporations.**—Under the present law a corporation cannot become a voluntary bankrupt, but if engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, it may be adjudged an involuntary bankrupt. The term corporation as here used comprehends all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and includes limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association.[25] In determining what classes of corporations are included, it becomes necessary to ascertain the meaning of several of the terms used.

§ 114. —— **Admission of insolvency by corporation.**—Like an individual, a corporation may admit its insolvency and a willingness to be adjudged bankrupt, but such act will not make the proceedings in effect voluntary,[26] although it is questionable whether an adjudication should be made on an involuntary petition alleging such facts on the admission of the directors where the petition, for instance, was filed by three creditors, one being the president of the corporation and the others acting under his direction, since it would in effect be

bank being a private corporation, though its object was of a public nature and the government shares with the corporators in the stock. (Sweatt v. Boston, etc., R. R., 5 N. B. R. 234, 3 Cliff. 339, F. C. 13684). An incorporated society doing a general banking business, which had ceased in 1862 on account of the war and resumed in 1865 for the purpose of liquidation only, but was hampered by stay laws and adjudged a bankrupt in 1872, was not to be regarded as a bank or trader as against persons with whom settlements were made within four months of bankruptcy. (Harmanson, Ass. v. Bain et al., 15 N. B. R. 173, 1 Hughes, 188, F. C. 6072.)

[23] People v. Doty, 80 N. Y., 225, 228; Perkins v. Smith, 116 N. Y. 441, 448.

[24] In re Surety & Guarantee Co. Trust Co., 9 A. B. R. 129; See Davis v. Stevens, 104 F. R. 235, 4 A. B. R. 763.

[25] 1 (6), Act of 1898.

[26] In re Kelly Dry Goods Co., 102 F. R. 747, 4 A. B. R. 528.

the voluntary act of the corporation and appear to be an attempt to evade the law.[27] An admission of insolvency and willingness to be adjudged bankrupt, as stated in letters to creditors signed by the president and authorized by a meeting of the majority of directors, will support a petition although some of the directors may not have had notice of the meeting.[28]

§ 115. —— **Trader.**—A "trader" is defined as one who makes it his business to buy merchandise or goods and chattels, and to sell the same again for the purpose of making a profit, the quantum of dealing being immaterial when the intention to deal generally exists,[29] as a baker, who buys flour and makes it into bread for sale,[30] a butcher,[31] a stair-builder,[32] one engaged in the manufacture of lumber,[33] and the

[27] In re Bates Mach. Co., 1 N. B. N. 135, 91 F. R. 625, 1 A. B. R. 129.

[28] In re Marine Mach. & Conveyor Co., 91 F. R. 630, 1 N. B. N. 135, 1 A. B. R. 421. See also Receiver, ante, p. 19.

[29] 3 Camp. 233, Bouv. Law Dict.; In re New York & Westchester Water Co., 98 F. R. 711, 3 A. B. R. 508; In re Surety & Guaranty Co., 9 A. B. R. 129; In re Cowles, 1 N. B. R. 42, F. C. 3297, 3 Starkie, 56, 2 Car. & P. 135, 1 Term R. 572.

[30] In re Cocks, 3 Ben. 260, F. C. 2933; In re Anketell, 19 N. B. R. 268, F. C. 394.

[31] In re Bassett, 8 F. R. 266.

[32] In re Garrison, 7 N. B. R. 287, 5 Ben. 430, F. C. 5254.

[33] In re Cowles, 1 N. B. R. 42, F. C. 3297. The following were held under the act of 1867 not to be included within the term "tradesmen" or "merchants": One who merely makes up the product of his own land (In re Chandler, 4 N. B. R. 213, 1 Lowell, 478, F. C. 2591); a firm owning and operating a farm, the members of which owned stock in and were officers of a solvent manufacturing corporation (In re Stickney, 17 N. B. R. 305, F. C. 13439); a person who owns oil lands which he divides into leaseholds and receives rent in oil, however extensive his transactions and credits (In re Woods, 7 N. B. R. 126, F. C. 17990); one who sold a carriage, a slave, two pairs of horses, a piano, a lot of cigars, and some harness, for which he had contracted debts, in the absence of a showing that they had been bought for the purpose of sale (In re Rogers, 3 N. B. R. 139, 1 Lowell, 423, F. C. 12001); a debtor who conducted a business on a cash basis and a considerable time prior to filing his petition had given it up, leaving nothing outstanding either as assets or debts (In re Keach, 3 N. B. R. 3, 1 Lowell, 335, F. C. 7629); a stock and gold broker who was not a member of the stock exchange, but conducted his business through other brokers who were and who kept no books (In re Moss, 19 N. B. R. 132, F. C. 9877); or a common carrier (In re Union R. R. Co., 10 N. B. R. 178, F. C. 14376).

like. The buying and selling of stock, bonds and other securities[34] or the engaging in the insurance,[35] or theatrical[36] business and the like, are not trading pursuits within the meaning of the law.

§ 116. —— **Mercantile.**—"Mercantile" is defined as pertaining to merchants, or the business of merchants,[37] a merchant being one whose business it is to buy and sell merchandise, including all those things merchants sell, either wholesale or retail, as dry goods, hardware, groceries, drugs, etc.,[38] or a hotelkeeper,[39] or one who keeps a livery, or boards horses belonging to other persons;[40] a saloon-keeper who buys cigars and liquors in quantities and sells them at retail;[41] or one whose business was the gathering of information and printing and publishing a book of ratings with reference to the standing of merchants.[42]

The terms "trading" or "mercantile pursuits" are restricted to dealing in the ordinary subjects of commerce, and incidental purchases or sales by a person not otherwise so engaged do not constitute such dealing. Since the powers of a corporation are to be determined by its charter and the statute applicable thereto, a water company, for instance, empowered "to buy, sell, use and deal in water for power, manufacturing and hydraulic purposes" where it confined itself entirely to obtaining and furnishing water for cities and municipal boroughs and their inhabitants, was held not to be engaged principally in trading or mercantile pursuits, as the question is not how extensive are such a company's powers, but in what pursuits is it principally engaged.[43] While the charter of a corporation gives it authority to engage in a business which would bring it within the terms of the statute, unless it has in fact so engaged in business, the court would have

[34] In re Surety & Guaranty Co., supra; In re Cleland, L. R. 2, Ch. App. 465.

[35] In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co., 96 F. R. 756, 2 A. B. R. 372.

[36] In re Oriental Society, 104 F. R. 975, 5 A. B. R. 219.

[37] Webst. Dict.

[38] Bouv. Law Dict.

[39] Campbell v. Finck, 2 Duv. 107.

[40] In re Morton Boarding Stables, 108 F. R. 791, 5 A. B. R. 736; In re Odell, 9 Ben. 209, F. C. 10426.

[41] In re Sherwood, 17 N. B. R 112, 9 Ben. 66, F. C. 12773.

[42] In re Mutual Mercantile Agency, 111 F. R. 152, 6 A. B. R. 607.

[43] In re N. Y. & Westchester Water Co., 2 N. B. N. R. 414, 98 F. R. 711, 3 A. B. R. 508.

no jurisdiction;[44] nor would it have of a corporation organized for the purpose of giving theatrical performances, and engaged solely in such business;[45] nor a club organized principally for social intercourse;[46] a laundry;[47] a saloon or restaurant;[48] a corporation authorized to buy, own and deliver merchandise, but which it never did own in fact;[49] or one engaged in the carriage by water of passengers,[50] a broker engaged in buying and selling stock, bonds and securities;[51] or a company organized for the sole purpose of insuring the property of its members and paying losses by assessment upon such members,[52] though an ordinary stock insurance company probably would be.[53] It has been held, however, that an incorporated sanatorium company conducting its business for profit, and not on charitable lines, is a corporation engaged principally in trading or mercantile pursuits and may be proceeded against in involuntary bankruptcy.[54]

§ 117. —— **Mining.**—By the amendatory act of February 5, 1903, corporations engaged in mining are included in the class of those who may be adjudged involuntary bankrupts. Prior to that date it was generally held that since they were not engaged in manufacturing, trading or mercantile pursuits they were excepted from the provisions of the law.[55]

[44] In re Tontine Surety Co., 116 F. R. 401, 8 A. B. R. 421.

[45] In re Oriental Society, 104 F. R. 975, 5 A. B. R. 219.

[46] In re Fulton Club, 113 F. 997, 7 A. B. R. 670.

[47] In re White Star Laundry Co., 117 F. R. 570, 9 A. B. R. 30.

[48] In re Chesapeake Oyster & Fish Co., 112 F. R. 960, 7 A. B. R. 173.

[49] In re Tontine Surety Co., supra.

[50] In re Phila. & Lewes. Transp. Co., 114 F. R. 403.

[51] In re Surety & Guaranty Trust Co., 9 A. B. R. 129; See In re Moss, 19 N. B. R. 132, F. C. 9877.

[52] In re Cameron Town Mut. F. L. & W. Ins. Co., 1 N. B. N. 383, 2 A. B. R. 373, 96 F. R. 756.

[53] In re Merchants' Ins. Co., 6 N. B. R. 43, 3 Biss. 162, F. C. 9441.

[54] In re San Gabriel Sanatorium Co., 1 N. B. N. 390, 2 A. B. R. 408, 95 F. R. 271.

[55] In re Keystone Coal Co., 109 F. R. 872, 6 A. B. R. 377, reversing 3 N. B. N. R. 349; In re Woodside Coal Co., 105 F. R. 56, 5 A. B. R. 186; In re Elk Park Mining and Milling Co., 101 F. R. 422, 4 A. B. R. 131; In re Rollins Gold & Silver Mining Co., 102 F. R. 982, 4 A. B. R. 327; In re Chicago Joplin Lead & Zinc Co., 104 F. R. 67; McNamara v. Helena Coal Co., 5 A. B. R. 48; In re Tecopa Mining & Smelting Co., 110 F. R. 120, 6 A. B. R. 250; Herron Co. v. Superior Court, 8 A. B. R. 492.

§ 118. —— **Railroads.**—Railroads and transportation companies do not come within any of the classes specified in the law and accordingly cannot be adjudicated involuntary bankrupts.[56] In view of the difference in phraseology between the acts of 1867 and 1898, the decisions under the former that incorporated steamship and steamboat companies and canal corporations, not of a public character, and railroads, came within the act as "moneyed, business or commercial" corporations, no longer apply.[57]

§ 119. —— **Printers and publishers.**—The decisions that the publishers of a daily paper and the proprietors of a book and job printing office were not manufacturers within the meaning of the act of 1867[58] are no longer of value, since such corporations are now specifically included within the law and may now be proceeded against in involuntary bankruptcy.[59]

§ 120. —— **Failure to allege class.**—A court of bankruptcy is a court of record, and, although its jurisdiction is limited, it is not an inferior court in the sense that all facts essential to its jurisdiction must affirmatively appear on the face of the record, and a decree cannot be impeached collaterally, as for want of jurisdiction, merely because the petition omitted to allege that the corporation belonged to one of the classes that might be adjudged involuntary bankrupt.[60] While there is some diversity of opinion as to whether the petition should aver the bankrupt's business or that he does not come within the excepted classes, the better practice is to set forth such information, though its omission would not be fatal if the

[56] In re Philadelphia & Lewes Transp. Co., 114 F. R. 403; N. Y. & Westchester Water Co., 2 N. B. N. R. 414, 98 F. R. 711, 3 A. B. R. 508; Cong. Rec., Vol. 31, p. 6247.

[57] Sweatt v. Boston, etc., Co., 5 N. B. R. 234, 3 Cliff. 339, F. C. 13684; In re Cal. Pac. R. R. Co., 11 N. B. R. 193, 3 Sawy. 240, F. C. 2315; Winter v. I. M. & N. Ry. Co., 7 N. B. R. 289, 2 Dill. 487, F. C. 17890; In re Southern Minn. Ry. Co., 10 N. B. R. 86, F. C. 13138; In re Opelousas & Great West. R. R. Co., 3 N. B. R. 31, F. C. 10547; In re Ala. & Chatt. R. R. Co., 6 N. B. R. 107, 5 Blatch. 390, F. C. 124; Rankin v. Florida, etc., R. R. Co., 1 N. B. R. 196, F. C. 11567; Ala. & Chatt. R. R. Co. v. Jones, 5 N. B. R. 97, F. C. 126.

[58] In re Kenyon et al., 6 N. B. R. 238; In re The Capital Pub. Co., 18 N. B. R. 319.

[59] See In re Mutual Mercantile Agency, 111 F. R. 152, 6 A. B. R. 607.

[60] In re Columbia Real Estate Co., 101 F. R. 965, 4 A. B. R. 411; In re Elmira Steel Co., 109 F. R. 456, 5 A. B. R. 484; In re Stern, 116 F. R. 604, 8 A. B. R. 569.

form[61] for a creditor's petition prescribed by the United States Supreme Court is otherwise followed, since that makes no provision for such information.[62]

§ 121. —— **Consent order—adjudication.**—On a petition in involuntary bankruptcy against a corporation, there can be no adjudication or reference of the case by the clerk to the referee, on a written admission by the respondent of the acts of bankruptcy charged and a waiver of service and of the time for appearance, because creditors as well as the alleged bankrupt have the right to appear and plead to the petition within ten days after the return day, and hence that day must be fixed by the issuance of a subpoena and the case must remain in the clerk's office until the ten days have passed;[63] nor in any involuntary proceeding is a consent order sufficient to warrant adjudication of the debtor, nor will other parties than the one against whom the petition is filed be adjudicated unless included in the petition, though they are connected with him as partners, parties in interest or otherwise.[64] That a person or corporation comes within an excepted class under the statute, is not a personal privilege which can be waived or only be set up by the bankrupt in person, but the question is jurisdictional and may be raised by any creditor.[65]

§ 122. **Executors and administrators.**—Except in pending cases[66] the act of 1898 does not appear to have contemplated the administration of decedents' estates in bankruptcy, but seems to have left their administration to the proper state tribunals. No provision appears to have been made for proceedings in bankruptcy, in the case of an executor, or like officer, authorized by the court appointing him to carry on decedent's business temporarily, becoming as to such business bankrupt. If the debtor died after committing the act of bankruptcy, proceedings cannot be instituted against the executor, or administrator, and his estate cannot be administered

[61] Form 3.

[62] In re Columbia Real Estate Co., supra; Green River Deposit Bank v. Craig, 3 N. B. N. R. 897, 110 F. R. 137, 6 A. B. R. 381; Contra In re Taylor, 102 F. R. 728, 2 N. B. N. R. 929, 4 A. B. R. 515; In re Pilger, 118 F. R. 206, 9 A. B. R. 244.

[63] In re L. Humbert Co., 100 F. R. 439.

[64] Mahoney v. Ward, 2 N. B. N. R. 538, 100 F. R. 278, 3 A. B. R. 770.

[65] In re Taylor, supra.

[66] Sec. 8, act of 1898.

in bankruptcy;[67] but in a pending case, they may appear or be made parties to represent a deceased bankrupt. Executors appointed by will for the limited purpose of adjusting the testator's banking business would not come within the class of executorships designed to be administered under the bankrupt act.[68]

§ 123. **Farmers and tillers of the soil.**—Such may partake of the benefit of the act by becoming voluntary bankrupts, but cannot be made involuntary bankrupts. The business in which the person was engaged at the time of the commission of the act of bankruptcy determines his status, and not that in which he was engaged when the petition was filed.[69]

A person engaged chiefly in farming is one whose chief occupation or business is farming, and one's chief occupation or business, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature and which he deems of paramount importance to his welfare and on which he chiefly relies for his livelihood or as the means of acquiring wealth, great or small.[70] In the expression "persons engaged chiefly in farming or the tillage of the soil," the latter phrase does not limit the former; and hence a person whose principal occupation is raising cattle and hogs for the market, his farm being chiefly devoted to pasture, and for raising grass, hay and corn to feed and fatten the stock, is not subject to be adjudged a bankrupt upon the petition of his creditors, being a farmer, though not a tiller of the soil;[71] but a merchant, who commits an act of bankruptcy, may be adjudged a bankrupt on a petition duly filed by his creditors within the statutory period thereafter, notwithstanding the fact that, after the act of bankruptcy, he abandoned the business in which he had been engaged, and became chiefly occupied in farming and so continued to the filing of the petition.[72]

[67] In re Pierce, 2 N. B. N. R. 979, 102 F. R. 977.

[68] Graves et al. v. Winter et al., 9 N. B. R. 357, F. C. 5710.

[69] In re Lockhardt, 101 F. R. 807, 4 A. B. R. 307; See In re Taylor, 2 N. B. N. R. 929, 102 F. R. 728, 4 A. B. R. 515.

[70] In re Mackey, 110 F. R. 355, 6 A. B. R. 577; In re Drake, 114 F. R. 229, 8 A. B. R. 137.

[71] In re Rugsdale, 16 N. B. R. 215, F. C. 12123.

[72] In re Lockhardt, 101 F. R. 807, 4 A. B. R. 307; In re Mackey, supra.

§ 124. **Indians.**—See Indians, ante § 104.

§ 125. **Infants.**—An infant cannot be adjudged bankrupt in an involuntary proceeding,[73] and where one member of a partnership in such proceedings is an infant, an adjudication should be made against the partner, or partners, who are of age, and against the firm, and the petition dismissed without costs to the infant, with a specific statement that it is dismissed because of his infancy; nor can an infant member of a partnership join in a voluntary petition by the firm, or be included in an adjudication thereon.[74] In the case of a debt incurred by an infant which could not be repudiated upon reaching his majority, it would be such a debt as would support an involuntary petition after he becomes of age, but it is doubtful whether it would before that period.

§ 126. **Endorsers.**—An endorser's liability on a note constitutes a debt which may be made the foundation of either voluntary or involuntary proceedings in bankruptcy;[75] but it has been held that a mere accommodation endorser cannot be adjudged bankrupt for failure to pay such paper,[76] though this seems questionable.

§ 127. **Lunatics.**—A court of bankruptcy will not take jurisdiction of a petition in involuntary bankruptcy against a person who is insane, or who prior to the filing of the petition, has been formally so adjudged by a competent court and for whose person and estate a guardian has been appointed. A transfer of property by such person, if at the time wholly incapable of managing his business affairs, cannot be held an act of bankruptcy on which a petition in involuntary bankruptcy may be maintained by his creditors against such guardian's objections.[77] If, however, the bankrupt does not

[73] In re Eidemiller, 105 F. R. 595, 5 A. B. R. 570.

[74] In re Dunnigan, 1 N. B. N. 528, 2 A. B. R. 628, 95 F. R. 428; In re Duguid, 100 F. R. 274, 2 N. B. N. R. 607, 3 A. B. R. 794; Consult In re Derby, 8 N. B. R. 106, 6 Ben. 232, F. C. 3815; Farris v. Richardson, 6 Allen, 118; In re Smedley, 10 L. T. N. S. 432; In re Cotton, 2 N. Y. Leg. Obs. 370; In re Book, 3 McLean, 317.

[75] In re Nicodemus, 3 N. B. R. 55, F. C. 10254.

[76] In re Clemens, 9 N. B. R. 57, 2 Dill, 533, F. C. 2877.

[77] In re Funk, 101 F. R. 244, 4 A. B. R. 96; comp. In re Weitzel, 14 N. B. R. 466, 7 Biss. 289, F. C. 17365; In re Pratt, 6 N. B. R. 276, 2 Lowell, 96, F. C. 11371; In re Murphy, 10 N. B. R. 48, F. C. 9946; In re Eisenberg, 117 F. R. 786, 8 A. B. R. 551.

become insane until after the filing of the petition, it will have no effect upon the proceeding.[78]

§ 128. **Married women.**—A married woman cannot be adjudged a bankrupt where by the law of her domicile she is incapable of making a contract,[79] though in those states where she is authorized to contract, she may be, and there appears to be no reason why a partnership between a man and his wife may not be so adjudged.[80] She may avail herself of her coverture to defeat debts in bankruptcy,[81] and a petition founded upon a debt evidenced by notes which do not show on their face an intention to bind her separate estate must allege that the notes were given for the benefit of her separate estate or else were given by her in the course of business if she be a trader.[82]

§ 129. **Wage earner.**—This term comprehends any one who works for wages, salary, or hire, at a rate not to exceed $1,500 per annum,[83] and while such a person may become a voluntary bankrupt, he cannot be adjudicated an involuntary bankrupt.[84]

[78] Sec. 8, act of 1898.

[79] In re Goodman, 8 N. B. R. 380, 5 Biss. 401, F. C. 5540.

[80] In re Kinkead, 7 N. B. R. 439, 3 Biss. 405, F. C. 7824.

[81] In re Slichter et al., 2 N. B. R. 107, F. C. 12943.

[82] In re Howland, 2 N. B. R. 114, F. C. 6791; In re Collins, 10 N. B. R. 325, 3 Biss. 415.

[83] Sec. 1 (27), act of 1898.

[84] In re Pilger, 118 F. R. 206.

CHAPTER V.

PARTNERS.

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§ 130. '(Sec. 5a) **Partners.**—A partnership, during the 'continuation of the partnership business, or after its disso-

'lution and before the final settlement thereof, may be ad-'judged a bankrupt.'

§ 131. **What is a partnership.**—A partnership is usually defined to be a voluntary contract between two or more competent persons, to place their money, effects, labor and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. But partnership and community of interest, independently considered, are not always the same thing; for the first as between the partners themselves, is founded upon the copartnership agreement which prescribes the relation they bear to each other, and of itself creates the community of interest; but the last may exist, notwithstanding there has been no agreement between the parties. Part owners of a ship, for example, are uniformly treated as tenants in common, and not as partners, although it cannot be denied that there is a community of interest between them in every part of the vessel, and each is entitled to a share of her earnings in proportion to his individual interest, and must also share the loss. Joint owners of merchandise may consign it for sale abroad to the same consignee; and if each gives separate instructions for his own share, it is well settled law that these interests are several, and that they are not to be treated as partners in the adventure.[1]

While every partnership is founded on a community of interest, it is, nevertheless, incorrect to suppose that every community of interest necessarily constitutes the relation of partnership within the meaning of the commercial law. Whenever it appears that there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then it is clear that the case is one of actual partnership between the parties themselves, and of course it is so as to third parties. The authorities are uniform, however, that it is seldom or never essential that both of these ingredients should concur in the case in order to establish that relation. Cases occur, undoubtedly, where a community of interest in the property, without any regard to the profits, will almost necessarily lead to the conclusion that the relation between the parties was that of partnership; and, under some circumstances, that conclusion will follow, although the sale of the

[1] Berthold v. Goldsmith, 24 How. 536.

property for the joint interest may not be contemplated by the parties. Participation in the profits, however, will not alone create a partnership between the parties themselves as to the property, contrary to their intention.[2] It has also been held that where it is known that a person augments the capital of a partnership and enhances its credit he cannot be exempted from liability for its debts.[3]

Actual participation in the profits as principal creates a partnership as between the parties and third persons,[4] whatever may be the intention in that behalf, and that is so although the dormant partner is not liable for the loss beyond the amount of the profits. Every man who has a share of the profits of a trade or business ought also to bear his share of the loss, for the reason that in taking a part of the profits, he takes a part of the fund of the trade on which the creditor relies for payment.[5] Actual partnership, as between a creditor and the dormant partner, is considered by the law to exist where there has been a participation in the profits, although the participant may have expressly stipulated with his associates against all the usual incidents to the partnership relation.[6] Where the ultra vires acts of a corporation in entering into and executing the contract of partnership induced general creditors to extend credit to a firm, the corporation cannot repudiate such acts, and transform itself into a general creditor.[7]

The mere possession by a person, without consideration, of goods sold a firm, does not prove him a partner.[8]

§ 132. **Determination of existence of partnership.**—In the absence of a written agreement of partnership, if the fact of partnership be denied, the court will, on demand, submit to

[2] Berthold v. Goldsmith, supra.

[3] Wallerstein v. Ervin, 112 F. R. 124, 7 A. B. R. 256, citing Ex parte Sillitoe, 1 Glyn & J. 374, Ex parte Hargreaves, 1 Cox. Ch. 440, In re Mason (1899), 1 Q. B. 810, Stratton v. Tabb., 8 Ill. App. 225, and others.

[4] In re Francis, 7 N. B. R. 359, 2 Sawy. 286; In re Blumenthal, 18 N. B. R. 555; see Moore v. Walton, 9 N. B. R. 402, F. C. 9779.

[5] Grace v. Smith, 2 W. Black. 998; Waugh v. Carver, H. Black. 235.

[6] Pond v. Pittard, 3 Mees. and Wels. 357; Berthold v. Goldsmith, 24 How. 536.

[7] In re Ervin, 109 F. R. 135, 6 A. B. R. 356, 3 N. 763, affirmed in Wallerstein v. Ervin, 112 F. R. 124, 7 A. B. R. 256, and cases cited.

[8] Lott v. Young, 109 F. R. 798, 6 A. B. R. 436.

the jury the finding of the facts[9] necessary to establish the relation, under instructions from the court as to what in law[10] will constitute a partnership; but if the facts be undisputed, whether the members are in fact partners, is a question of law for the court.

§ 133. Period in which partnership may be adjudged bankrupt.—Bankruptcy proceedings may be instituted by or against a partnership as long as any party has a right to sue for a settlement or to enforce an executory agreement or to recover reimbursement for moneys paid on a partnership debt, or unadministered partnership assets remain, or partnership debts enforceable against any partner anywhere within the territorial jurisdiction of the United States exist,[11] notwithstanding the fact that the partnership may have been dissolved. Under the act of 1867, it was held that a partnership, though dissolved, might be adjudged a bankrupt, if it had assets,[12] but not if the contrary was shown,[13] though there were certain cases which held that while there might be no assets, but there were debts, it could be,[14] which last ruling seems to have proceeded on the theory that since there were possible assets, a partnership bankruptcy might be necessary after all and it might as well be granted at once. The insertion of the

[9] McDonald v. Matney, 82 Mo. 358; Meridian Nat. Bank v. Gallaudet, 120 N. Y. 298.

[10] Chisholm v. Cowles, 42 Ala. 179; Kingsbury v. Thorp, 61 Mich. 216.

[11] In re Webster, 2 N. B. N. R. 54; In re Levy, 2 A. B. R. 21, 95 F. R. 812, ref. dec. 1 N. B. N. 287; In re Meyers, 1 N. B. N. 515, 96 F. R. 408; In re Hirsch, 2 N. B. N. R. 137, 3 A. B. R. 344, 97 F. R. 571; In re Elliott, 2 N. B. N. R. 350; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25; Contra, when only debts exist; In re Altman, 1 N. B. N. 358, 1 A. B. R. 689.

[12] In re Greenfield, 5 Ben. 552, F. C. 5772; In re Marks, F. C. 9094, In re Gorham, 18 N. B. R. 419, 9 Biss. 23, F. C. 5624; In re Crockett, 2 N. B. R. 75, 2 Ben. 514, F. C. 3402; In re Bidwell, 2 N. B. R. 78, F. C. 1392; In re Mitchell, 3 N. B. R. 111, F. C. 9656; Ex p. Hall, F. C. 5919; In re Hartough, 3 N. B. R. 107, F. C. 6164. See also In re Hathorn, 2 Woods, 73, F. C. 6214; In re McFarland, 10 N. B. R. 381, F. C. 8788.

[13] In re Winkens, 2 N. B. R. 113. F. C. 17875; In re Abbe, 2 N. B. R. 26, F. C. 4; Hopkins v. Carpenter, 18 N. B. R. 339, F. C. 6686; In re Work, F. C. 18044; In re Daggett, 8 N. B. R. 433, F. C. 3536; In re Temple, 17 N. B. R. 345, 4 Sawy. 92, F. C. 13825.

[14] In re Noonan, 10 N. B. R. 330, 3 Biss. 491, F. C. 10292; In re Williams, 3 N. B. R. 74, 1 Lowell, 406, F. C. 17703; Hunt v. Pooke, 5 N. B.

words "before final settlement" in the present act was probably done to remove the doubt which existed under the former act.

§ 134. Bankruptcy works dissolution.—A partnership is dissolved immediately on the adjudication of bankruptcy of the firm, or any of its members; but, the assets of the firm can be administered in bankruptcy only when the partnership is so adjudged,[15] or by consent of the partner or partners not adjudged bankrupt.[16] The rights of the firm creditors are not affected by a dissolution of the firm,[17] and where one partner only is bankrupt, the settlement of the joint affairs is intrusted to the solvent partner.[18] A proceeding instituted by one partner for the purpose of vexing and harassing his copartner[19] or merely to dissolve the partnership[20] will be dismissed.

§ 135. What partners may be adjudged involuntary bankrupt.—All the members of a firm may be adjudged bankrupts, though one has assumed the firm debts and purchased the assets;[21] or where a special partner contributes a certain sum in cash and a certain amount in goods;[22] and the firm creditors may prove against the assuming member as if they were his individual creditors.[23]

If a liquidating partner makes a general assignment of the firm's property, he, together with the partnership, should be

R. 161, F. C. 6896; Hudgins v. Lane, 11 N. B. R. 462, 2 Hughes, 361, F. C. 6827.

[15] In re Lentz, 2 N. B. N. R. 190, 97 F. R. 486; In re Shepard, 3 N. B. R. 172, 3 Ben. 347, F. C. 12754; Amsinck v. Bean, 22 Wall. 395, 11 N. B. R. 495, 10 Blatch. 361, 8 N. B. R. 228; Forsith v. Merritt, 3 N. B. R. 48, 1 Lowell, 336.

[16] Sec. 5h of act of 1898.

[17] Hudgins v. Lane, 11 N. B. R. 462, 2 Hughes, 361, F. C. 6827; In re McFarland, 10 N. B. R. 381, F. C. 8788.

[18] Sec. 5h, act of 1898; Wilkins v. Davis, 15 N. B. R. 60, 2 Lowell, 511, F. C. 17664; Blackwell v. Claywell, 15 N. B. R. 300.

[19] In re Hamlin, 16 N. B. R. 522, 8 Biss. 122, Fed. Cas. 5994.

[20] Amsinck v. Bean, 11 N. B. R. 496, 22 Wall. 395.

[21] In re Shepard, 3 B. R. 42, 3 Ben. 347, F. C. 12754; In re Stowers, 1 Lowell, 528, F. C. 13516.

[22] In re Merrill, 13 N. B. R. 91, 12 Blatchf. 221, F. C. 9467.

[23] In re Long, 9 N. B. R. 227, 7 Ben. 141, F. C. 8476; In re Downing, 3 B. R. 182, 1 Dill. 33, F. C. 4044; In re Collier, 12 B. R. 266, F. C. 3002; In re Rice, 9 B. R. 373, F. C. 11750.

adjudged;[24] or persons doing business without authority under a corporate name, may be proceeded against as a partnership, or individually;[25] and although one of the members has already been adjudicated, the firm may still be declared bankrupt.[26] The partners cannot put an end to the power of the bankruptcy court to administer the partnership estate by a mere dissolution of the firm.[27]

§ 136. —— What partners may not.—On a petition filed against a partnership and its members, a partner who has not committed or participated in committing the act of bankruptcy cannot be adjudged bankrupt,[28] and where there has been no settlement, after dissolution of a firm, one partner is not entitled to an adjudication against his former partner on account of money or assets that have come into his hands over and above his share, or on account of obligations entered into during the continuation of the partnership, for which both are jointly liable.[29] As a minor cannot generally be made an involuntary bankrupt,[30] if one member of a firm be such, the petition should be dismissed as to him without costs, with a specific statement that the dismissal is on account of his minority, and continued against the adult partners and against the firm, clause "h" of this section not applying in this instance.[31] If there are distinct firms of A and B and A and C, the three persons cannot be joined in one proceeding, though the latter firm has assumed the debts of the former.[32]

[24] In re Meyer, 98 F. R. 976, aff'g 1 N. B. N. 304, 92 F. R. 896, 1 A. B. R. 565.

[25] Davis v. Stevens, 104 F. R. 235; In re Mandenhall, 9 N. B. R. 497, F. C. 9425.

[26] Hunt v. Pooke, 5 N. B. R. 161, F. C. 6896.

[27] In re Noonan, 10 N. B. R. 330, F. C. 10292.

[28] In re Meyer, 98 F. R. 976; aff'g 1 N. B. N. 304, 1 A. B. R. 565, 92 F. R. 896.

[29] Sigsby v. Willis, 3 N. B. R. 51, 3 Ben. 371, F. C. 12849.

[30] In re Duguid, 2 N. B. N. R. 607, 100 F. R. 274, 3 A. B. R. 794; In re Darby, 8 N. B. R. 61, 6 Ben. 232, F. C. 3815; Farris v. Richardson, 6 All. 118; but see In re Brice, 1 N. B. N. 310, 2 A. B. R. 197, 93 F. R. 942; In re Book, 3 McLean, 317, F. C. 1637.

[31] In re Duguid, 2 N. B. N. R. 607, 100 F. R. 274, 3 A. B. R. 794; In re Dunnigan, 1 N. B. N. 528, 2 A. B. R. 628, 95 F. R. 428; In re Derby, 8 N. B. R. 106, 6 Ben. 232, F. C. 3815; Farris v. Richardson, 6 All. 118; Lovell v. Beauchamp (1894), A. C. 607; but see In re Brice, 1 N. B. N. 310, 2 A. B. R. 197, 93 F. R. 942.

[32] In re Wallace, 12 N. B. R. 191, F. C. 17095.

§ 137. Who may file a voluntary petition—in general.—The general form of the creditor's petition,[33] adapted to the particular case, should be used in partnership proceedings, and the answer in the form prescribed.[34] All the partners should join in the petition in voluntary proceedings, though it may be filed by one or more of the partners, in which case it is, in its initiation, voluntary, and will remain so in its entirety if, on notice, the other partner, or partners, actively join with the petitioners, or by acquiescence consent to the adjudication of the partnership, but, if the non-petitioning partner, or partners, refuse to join in the proceedings and contest the adjudication, it becomes as to him, or them, involuntary.[35] A creditor cannot compel a debtor to go into voluntary bankruptcy, or partners to petition for the adjudication of copartners.[36] In involuntary proceedings, the same rule prevails as in other cases.[37] An order by consent will not authorize the adjudication of other parties than those against whom the petition is filed, though they be connected with the latter as partners.[38]

A voluntary petition, presented in the names of a partnership and the individual partners, and accompanied by schedules setting forth the debts and assets of the firm and also

[33] Form 3.

[34] Form 6.

[35] G. O. VIII; Form 2; In re Borden, 2 N. B. N. R. 741, 4 A. B. R. 31, 101 F. R. 553; In re Meyers, 2 N. B. N. R. 111, 3 A. B. R. 260, 97 F. R. 757; In re Webster, 2 N. B. N. R. 54; In re Murray, 1 N. B. N. 570, 96 F. R. 600, s. c. 1 N. B. N. 532, 3 A. B. R. 90; In re Russell, 1 N. B. N. 532, 3 A. B. R. 91, 97 F. R. 32; In re Altman, 1 N. B. N. 358, 1 A. B. R. 689, s. c. 1 N. B. N. 407, 2 A. B. R. 407, 95 F. R. 263; In re Meyer, 98 F. R. 976; aff'g 1 N. B. N. 304, 1 A. B. R. 565, 92 F. R. 896; In re Wilson, 13 N. B. R. 253, 2 Lowell, 453, F. C. 17784; Medsker v. Bonebrake, 108 U. S. 66; In re Henry, 17 N. B. R. 463, 9 Ben. 449, F. C. 6370; In re Pierce, 2 N. B. N. R. 979; In re Noonan, 10 N. B. R. 330, F. C. 10297; In re Daggett, 8 N. B. R. 433, F. C. 3536.

[36] In re Harbaugh, 15 N. B. R. 246, F. C. 6045.

[37] In re Malot, 16 N. B. R. 485, F. C. 9282.

[38] In re Elliott, 2 N. B. N. R. 350; Mahoney v. Ward, 2 N. B. N. R. 538, 100 F. R. 278, 3 A. B. R. 770; In re Kruegar, 5 N. B. R. 539, 2 Lowell, 66, F. C. 7941; In re Prankard, 1 N. B. R. 51, F. C. 11366; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25; In re O'Brian, 2 N. B. N. R. 312; but see as to secret partners, In re Mandenhall, 9 N. B. R. 497, F. C. 9425; In re Harris, 2 N. B. N. R. 868, 4 A. B. R. 132.

of the partners, is sufficient without individual petitions, and the court of bankruptcy may administer upon the separate estates of the partners as well as upon the estate of the firm in a single proceeding, and grant discharges from separate and joint debts, and apportion the costs equitably between the individual and joint estates, and it has been held that but one filing fee of $30 is necessary.[39]

§ 138. —— Petition by individual partners.—Two or more persons cannot apply for bankruptcy in the same petition, except as incidental to a partnership; so that joint contractors, not partners, must file separate petitions and the creditors can prove against each estate separately;[40] but, where community rights exist, it has been held that husband and wife may unite in a joint petition.[41] An individual petition for the separate discharge of a partner after an adjudication of the firm may be maintained, even though the firm, as such, may not have been discharged; but, in such case, the petition and the notice to creditors must state an adjudication of the firm as bankrupt, show its members, and pray for the discharge of the petitioner from both firm and individual debts, in order that the creditors may have full notice of all the facts they may be required to answer,[42] but it has been held that a prayer for discharge from "provable debts" is equivalent to an application for discharge from partnership debts.[43]

§ 139. Proceedings against firm by member thereof.—If a petition is filed to have a partnership declared bankrupt, and all the partners do not join in or assent thereto, notice must be given the non-petitioning partners the same as in involuntary proceedings,[44] and if personal service cannot be had

[39] In re Gay, 3 A. B. R. 529, 98 F. R. 870; In re Langslow, 1 N. B. N. 232, 1 A. B. R. 258, 98 F. R. 869; but see Mahoney v. Ward, 2 N. B. N. R. 538, 100 F. R. 278, 3 A. B. R. 770; In re Barden, 2 N. B. N. R. 741, 4 A. B. R. 31, 101 F. R. 553; In re Farley, 115 F. R. 359, 8 A. B. R. 266.

[40] In re Altman, 1 N. B. N. 358, 1 A. B. R. 689; In re Moore, 5 Biss. 79, F. C. 9750; ex p. Weston, 12 Met. 1; Harmon v. Clark, 13 Gray. 114, 122; Forsyth v. Woods, F. C. 17992, 11 Wall. 484, 486; In re Nuns, 16 Blatch. 439, F. C. 10269; In re Roddin, 6 Biss. 377, F. C. 11989; Buffum v. Seaver, 16 N. H. 160; Mack v. Woodruff, 87 Ill. 570.

[41] In re Ray, 1 N. B. N. 276.

[42] In re Meyers, 2 N. B. N. R. 111, 97 F. R. 757, 3 A. B. R. 260.

[43] In re Pierson, 10 N. B. R. 107. F. C. 11153.

[44] G. O. VIII; In re Laughlin, 96 F. R. 589; In re McFaun, 96 F. R.

notice should be given by publication.[45] If due notice be served on a non-petitioning partner and he enters no appearance and is defaulted, further proceedings will be deemed voluntary on the part of all partners.[46] If one or more of the members of a firm are not made parties, the adjudication will not be made,[47] and such jurisdictional defect is not cured by a consent signed for the non-joining partners filed after the adjudication.[48] It has been held that where partners are not named in the petition, the court will not order their joinder on a bill filed by the creditors, but the creditors may have the same remedy against them as they would have had before the petition was filed.[49]

Any member of a partnership refusing to join in a petition to have the firm adjudicated bankrupt, is entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and he has the right to appear at the time fixed by the court for the hearing, and to make proof if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to make; and in case an adjudication of bankruptcy is made upon the petition such partner must file a schedule of his debts and an inventory of his property in the same manner as is required in case of debtors against whom adjudication of bankruptcy is made.[50] In the case of the partner filing the petition, the proceedings are voluntary, but as to the dissent-

592; In re Meyers, 1 N. B. N. 515, 96 F. R. 408; In re Lewis, 1 N. B. R. 19, 2 Ben. 96, F. C. 8311; In re Penn, 5 N. B. R. 30, 5 Ben. 89, F. C. 10927; In re Noonan, 10 N. B. R. 330, 3 Biss. 491, F. C. 10292; In re Prinkard, 1 N. B. R. 51, F. C. 11366; In re Moore, 5 Biss. 79, F. C. 9750; In re Hartman, 96 F. R. 593.

[45] In re Murray, 1 N. B. N. 532, 3 A. B. R. 90; In re Russell, 1 N. B. N. 532, 97 F. R. 32, 3 A. B. R. 91; In re Temple, 17 N. B. R. 345, 4 Saw. 62, F. C. 13825.

[46] In re Carleton, 115 F. R. 246, 8 A. B. R. 270.

[47] In re Altman, 1 N. B. N. 358, 1 A. B. R. 689; In re Pitt, 14 N. B. R. 59, 8 Ben. 389, F. C. 11188; In re Lewis, 1 N. B. R. 19, 2 Ben. 96, F. C. 8311; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25; In re Elliott, 2 N. B. N. R. 350; Citizens' Nat. Bk. v. Cass, 18 N. B. R. 279, F. C. 2732.

[48] In re Altman, 1 N. B. N. 358, 1 A. B. R. 689; s. c. 1 N. B. N. 407, 95 F. R. 263, 2 A. B. R. 407.

[49] Bank v. Cass, 18 N. B. R. 279, F. C. 2732.

[50] G. O. VIII.

ing partners they are involuntary and subject to the rules governing involuntary bankruptcy.[51] In involuntary bankruptcy, an objection that the petitioner and the alleged bankrupt are partners is not determinable on a preliminary objection to the jurisdiction, where the arrangements between the parties is one going to the merits of the controversy.[52]

§ 140. Effect of proceedings on nominal and secret or dormant partners.—A secret partner whose firm commits an act of bankruptcy may be adjudged bankrupt although individually entirely solvent,[53] and it has been held that the law is restricted to the case of an actual partnership between the parties and not to a partnership as to creditors only where there is no joint estate.[54] It is not essential to the validity of an adjudication against a partnership that a secret or dormant partner should be made a defendant, since the firm property is bound by an adjudication made against the ostensible partners.[55] There is no reason why a dormant partner may not be either included in an adjudication against the firm, or be adjudged bankrupt on a petition against him separately,[56] which rule would doubtless be true of nominal partners,[57] since one who permits himself to be held out as a partner may be adjudged a bankrupt as a member of the firm, at the suit of the creditors.[58] In the event of the after discovery of a dormant partner, an adjudication against the nominal firm will permit the opening of the proceedings and bringing in the dormant partner without requiring a new petition to be filed.[59] To charge a person as a silent partner, and thus debar him from his claims as a creditor, an actual and definite agreement, binding on all parties, must be proved.[60]

§ 141. Effect of the death or insanity of a partner.—After the filing of a petition the death or insanity of a partner will not abate the proceedings, but they are continued in the same

[51] Medsker v. Bonebrake, 108 U. S. 66.

[52] In re Schenklin, 113 F. R. 421.

[53] In re Ess., 7 N. B. R. 133, 3 Biss. 301, F. C. 4530.

[54] In re Kenney, 97 F. R. 554, 3 A. B. R. 353; see also In re Downing, 3 N. B. R. 748; Lott v. Young, 109 F. R. 798, 6 A. B. R. 436.

[55] Metcalf v. Officer, Dillons C. C. Rep. 565; In re Harris, 2 N. B. N. R. 868.

[56] Ex p. Hamper, 17 Ves. 403.

[57] Lindley on Part., p. 650.

[58] In re Krueger, 5 N. B. R. 439, 2 Low. 66, F. C. 7941.

[59] In re Scott, 1 N. B. N. 327.

[60] In re Clark, 111 F. R. 893, 7 A. B. R. 96; In re Harris, 108 F. R. 517.

manner, so far as possible, as though he had not died or become insane.[61] A surviving partner who commits an act of bankruptcy with respect to the joint property can be adjudged bankrupt individually,[62] and it has been held that where the firm is dissolved by the death of one partner, the firm cannot be adjudicated,[63] though the survivor may be individually and as surviving member of the firm,[64] and the individual estate of the deceased would still be liable for the partnership debts.[65] It has been held that the guardian of a partner who becomes insane before adjudication, may consent to the administration of the estate in bankruptcy,[66] though this position does not seem tenable, if the party became insane before the petition was filed.

§ 142. **Proceedings against solvent partner.**—If a firm be insolvent, but one partner thereof solvent, the creditors may proceed against both the firm and the solvent partner, but the latter may clear himself by paying all the debts.[67]

§ 143. **Proceedings in case of defunct firms and retired partners.**—A member of a defunct partnership, desiring adjudication and discharge from partnership debts, must make the other members parties, and the fact that partnership creditors have filed their claims against his estate does not remove the necessity. A petition may be amended to include the firm and its other members,[68] even after adjudication,[69] since for the purposes of the law a partnership is in existence so long as there are outstanding assets or liabilities and the joint affairs are unsettled, and just so long will a retired partner remain subject to proceedings in bankruptcy.[70]

§ 144. **Necessary averments of petition.**—A voluntary proceeding by partners requires no act of bankruptcy to be

[61] Sec. 8, act of 1898; Hunt v. Pooke, 5 N. B. R. 161, F. C. 6896.

[62] In re Meyer, 98 F. R. 976; aff'g 1 N. B. N. 304, 1 A. B. R. 565, 92 F. R. 896; In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, F. C. 13393.

[63] In re Temple, 17 N. B. R. 345, 4 Sawy. 92, F. C. 13825.

[64] In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, F. C. 13393.

[65] Vaccaro Bank, 2 N. B. N. R. 1037, 103 F. R. 436.

[66] In re O'Brien, 2 N. B. N. R. 212.

[67] In re Bennett, 12 N. B. R. 181, 2 Lowell, 400, F. C. 1314.

[68] In re Elliott, 2 N. B. N. R. 350; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25.

[69] In re McFaun, 3 A. B. R. 66, 96 F. R. 592.

[70] In re Grady, 3 N. B. R. 227, F. C. 5654; Parker v. Phillips, 2 Cush. 175; In re Crockett, 2 Ben. 514, F. C. 3402.

alleged, but merely an averment that they owe debts and are willing to surrender their estate.[71] If one partner files the petition and it is not proposed to adjudicate the firm bankrupt, it must show that the petitioner was a member of the firm, and must aver that he asks a discharge against firm creditors, as well as individual creditors.[72] If the adjudication be against the firm and administration of its assets in bankruptcy are sought, the petition should so state.[73] Where insolvency is an essential part of the act of bankruptcy, the insolvency of the firm and every member must be averred, since a partnership is not insolvent so long as the joint, together with the separate property of the partners liable for the joint debts is sufficient to pay its debts, and this is true though the only partner whose individual estate is sufficient to render the partnership solvent is dead.[74] A partnership is a distinct entity requiring a petition specifically directed against it, alleging an act of bankruptcy in which it is expressly involved, and resulting in an adjudication of the partnership itself, in addition to any that may be made against the individual members.[75] The converse of this is equally true.[76]

All the members of a firm petitioning for the benefit of the act are jointly and severally bound to make statements of their assets and debts, whether partnership or individual, or due by them jointly with other persons not parties to the petition,[77] but the fact that one member does not file a schedule of debts or inventory of effects, nor deliver his property into the hands of the trustee, does not affect the right of the other members to receive a discharge.[78]

[71] In re Penn, 5 N. B. R. 30, 5 Ben. 89, F. C. 10927.

[72] In re Russell, 1 N. B. N. 532, 3 A. B. R. 91, 97 F. R. 32; In re Laughlin, 96 F. R. 589; In re Hartman, 96 F. R. 593.

[73] In re Miller, 104 F. R. 764; Davis v. Stevens, 3 N. R. N. R. 131, 104 F. R. 235; In re Blair, 2 N. B. N. R. 364, 99 F. R. 76, 3 A. B. R. 588; In re Meyer, 98 F. R. 976, 3 A. B. R. 559; aff'g 1 N. B. N. 304, 1 A. B. R. 565, 92 F. R. 896; In re Bennett, 12 N. B. R. 181, 2 Lowell, 400, F. C. 1314.

[74] Vaccaro v. Bk., 2 N. B. N. R. 1037, 103 F. R. 436; In re Blair, 2 N. B. N. R. 364, 99 F. R. 76, 3 A. B. R. 588; Davis v. Stevens, 104 F. R. 235; Hanson v. Paige, 3 Gray, 239.

[75] In re Mercur, 115 F. R. 655, 8 A. B. R. 275, and cases cited.

[76] In re Hale, 107 F. R. 432, 6 A. B. R. 35.

[77] In re Leland, 5 N. B. R. 222, 5 Ben. 168, F. C. 8288.

[78] In re Schofield, 3 N. B. R. 137, F. C. 12509.

§ 145. **Acts of bankruptcy.**—Under the former Acts, there could not be an adjudication of all the partners, which was necessary in order to adjudge the firm bankrupt, unless a joint act of bankruptcy had been committed, or each had individually committed an act of bankruptcy,[79] but, under the present law a partnership is considered an "entity" and may commit an act of bankruptcy, and be adjudged bankrupt, though neither partner can be so adjudged,[80] or the individual partners may each commit an act of bankruptcy, as to the partnership assets, as by conveying their individual property in fraud of firm creditors[81] or otherwise, though the partnership, as such, has committed none,[82] or where a general assignment is made although executed by one partner only,[83] or where a receiver or trustee is appointed to take charge of the property[84] although on the application of some members of the firm only.[85]

It is an act of bankruptcy to take the property of an insolvent firm to pay a debt which is not a partnership debt, but for which one of the partners is liable;[86] and the same is true if one partner transfers his interest to the other[87] or firm assets to a third person[88] with the object of hindering or defeating creditors. It has been held not to be an act of bankruptcy for a firm to give a chattel mortgage to secure a debt incurred by an individual member of the firm, for the firm's benefit,[89] or for a solvent partner, to whom the whole

[79] In re Redmond, 9 N. B. R. 408, F. C. 11632; In re Penn, 5 N. B. R. 30, 5 Ben. 89; In re Noonan, 10 N. B. R. 331, 3 Biss. 491; Doan v. Compton, 2 N. B. R. 607; James v. Atlantic Delaine Co., 11 N. B. R. 390, F. C. 7179.

[80] In re Meyer, 98 F. R. 976, 3 A. B. R. 559; aff'g 1 N. B. N. 304, 1 A. B. R. 565, 92 F. R. 896; In re Barden, 4 A. B. R. 31; Strauss v. Hooper, 5 A. B. R. 225, 105 F. R. 590.

[81] In re Redmond, 9 N. B. R. 408, F. C. 11632.

[82] In re Rosenbaum, 1 N. B. N. 541.

[83] In re Meyer, 98 F. R. 976, 3 A. B. R. 559; aff'g 1 N. B. N. 304, 1 A. B. R. 565, 92 F. R. 896; In re Rosenbaum, 1 N. B. N. 541.

[84] Sec. 3, act of 1903.

[85] Mather v. Coe, 92 F. R. 333, 1 A. B. R. 504.

[86] In re Malot, 16 N. B. R. 485, F. C. 9282.

[87] In re Bergman, 2 N. B. N. R. 806; Burrill v. Lawry, 18 N. B. R. 387, 2 Hask. 228; but see In re Redmond, 2 N. B. N. R. 3975, 102 F. R. 750, 4 A. B. R. 531, 2 N. B. N. R. 769; In re Lockerby, 3 N. B. N. R. 7, F. C. 2199.

[88] In re Shapiro, 106 F. R. 495, 5 A. B. R. 839.

[89] Wait v. Bk., 19 N. B. R. 500, F. C. 17043.

stock has been transferred upon dissolution of the partnership, to make a sale in gross of such stock;[90] or to transfer in good faith, his interest in the firm, prior to bankruptcy.[91]

§ 146. **Insolvency of a partnership.**—To constitute insolvency on the part of a partnership the property of the firm, together with that of all the partners applicable to the partnership debts, must be insufficient to pay such debts.[92]

§ 147. **Discharge of partnership and members of a firm.**—A discharge is granted to a partnership upon the same terms and under the same conditions as to any other persons and therefore the general discussion of discharges and grounds of opposition thereto which is given elsewhere[93] will apply equally here.

§ 148. **Effect of dealing between partners.**—One member of a firm cannot estop himself as between himself and the firm's creditors, by any dealings with a partner, from any duty that he owes such creditors, or deprive such creditors of any rights or remedies;[94] as by transferring his interest in the firm to the other partner to enable the latter to claim exemptions out of the firm's assets.[1] If a partner has an enforceable claim against his partner, not connected with the partnership, or if a balance has been struck and acknowledged, he may prove his claim against his partner's estate, but can receive no dividend until all joint debts are paid.[2]

§ 149. **Composition.**—Partnerships may enter into compositions with their creditors, the same as individuals. When one partner proposes a composition, the majority in number and amount of creditors, whose acceptance in writing is required, may be composed of individual and partnership creditors,

[90] In re Weaver, 9 N. B. R. 132, F. C. 17307.

[91] Shiner v. Huber, 19 N. B. R. 414, F. C. 12787; Russell v. McCord, 17 N. B. R. 508, 2 Flip. 139, F. C. 157.

[92] Davis v. Stevens, 104 F. R. 235, 3 N. B. N. R. 131; Vaccaro v. Bk., 2 N. B. N. R. 1037, 103 F. R. 436, 4 A. B. R. 474; In re Blair, 2 N. B. N. R. 364, 99 F. R. 76, 3 A. B. R. 588; Hanson v. Paige, 3 Gray, 239.

[93] See post, §§ 373, 374.

[94] In re Polidori, 2 N. B. N. R 945; In re Gorman, 18 N. B. R. 419, 9 Biss. 23, F. C. 5624.

[1] In re Rosenbaum, 1 N. B. N. 541; In re Bergman, 2 N. B. N. R. 806; but see In re Rudnick, 2 N. B. N. R. 975, 102 F. R. 750, 4 A. B. R. 531; rev'g 2 N. B. N. R. 769; In re Lockerby, 3 N. B. N. R. 7.

[2] Ex p. Richardson, 3 Dea. & Ch. 244; Ex p. Briggs, Id. 367.

whose claims have been allowed,[3] but a special partner would seem to have no right to take part in composition proceedings by a firm.[4] An individual member may properly propose a composition to his and firm creditors, and such composition will be valid if accepted by the requisite number.[5] A partner cannot have a composition set aside and his firm put into bankruptcy by setting up his own fraud in effecting the composition.[6]

§ 150. **'b. Administration of estate.**—The creditors of the 'partnership shall appoint the trustee; in other respects so 'far as possible the estate shall be administered as herein 'provided for other estates.'

§ 151. **Choice of trustee.**—Upon the adjudication of a firm in bankruptcy, whether there are firm assets or not, the creditors of the individual members have no voice whatever in the election of a trustee, this being by statute left entirely to the firm creditors;[7] and the choice must be by a majority in number and amount of creditors whose claims have been proved and allowed,[8] but if the creditors fail to elect,[9] or if a majority in number vote for one person and a majority in amount for another, the judge or referee may appoint.[10] In the case of the separate bankruptcy of one member of a firm, both joint and separate creditors may prove their debts and vote for trustee,[11] though all the assets are partnership assets.[12]

§ 152. **'c. Jurisdiction over partners.**—The court of bank-

[3] In re Spades, 13 N. B. R. 72, 6 Biss. 448, F. C. 13196.

[4] In re Henry, 17 N. B. R. 463, 9 Ben. 449, F. C. 6730.

[5] Pool v. McDonald, 15 N. B. R. 560, F. C. 11368.

[6] In re Hamlin, 16 N. B. R. 522, 8 Biss. 122, F. C. 5994.

[7] In re Eagles & Crisp, 99 F. R. 696, 3 A. B. R. 733, 2 N. B. N. R. 462; In re Phelps, 1 N. B. R. 139, F. C. 11071; In re Scheiffer, 2 N. B. R. 179, F. C. 12445; Amsink v. Bean, 11 N. B. R. 495, 22 Wall. 395; s. c. 8 N. B. R. 228, 10 Blatch. 361, F. C. 1167; Atkinson v. Kellogg, 10 N. B. R. 535, F. C. 613.

[8] Sec. 56, act of 1898; In re Brown, 2 N. B. R. 590; In re Lewinsohn, 2 N. B. N. R. 315, 3 A. B. R. 299, 98 F. R. 576; In re Scheiffer, 2 N. B. R. 179, F. C. 12445.

[9] Sec. 44, act of 1898; In re Brooke, 2 N. B. N. R. 680, 100 F. R. 432, 4 A. B. R. 50.

[10] In re Richards, 2 N. B. N. R. 1024.

[11] In re Webb, 16 N. B. R. 253, 4 Sawy. 326, F. C. 17317; In re Falkner, 16 N. B. R. 503, F. C. 4624; Wilkins v. Davis, 2 Lowell, 511, F. C. 17664.

[12] In re Beck, 110 F. R. 140, 6 A. B. R. 554.

'ruptcy which has jurisdiction of one of the partners may 'have jurisdiction of all the partners and of the administra-'tion of the partnership and individual property.'[13]

§ 153. **Jurisdiction in general.**—This clause assumes that the proceeding is for the adjudication of the firm. In case two or more petitions are filed against the same partnership in different courts, each having jurisdiction over the case, the petition first filed must be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions must be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions are filed in different districts by different members of the same partnership for an adjudication of bankruptcy of said partnership, the court in which the petition is first filed having jurisdiction should take and retain jurisdiction over all proceedings in such bankruptcy until the same are closed; and if such petitions are filed in the same district action must be first had upon the one first filed. But the court so retaining jurisdiction must, if satisfied that it is for the greatest convenience of parties in interest that another of said courts proceed with the cases, order them to be transferred to that court.[14] Although if the second petition is not filed until after the selection of the trustee and he has started to administer the estate, unless very good reasons should be shown therefor, the case would not be transferred. A transfer will not be ordered upon the petition of creditors who have received preferences which they do not offer to surrender.[15]

So long as there is either partnership property to be administered, or partnership debts to be paid, everybody, whether creditors or partners, having an interest in the fund or liability existing, should be before the court and within its

[13] Analogous provision of Act of 1867. Sec. 36. . . . If such co-partners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

[14] Gen. Orders, VI; In re Sears, 112 F. R. 58, 7 A. B. R. 279.

[15] In re Sears, supra.

jurisdiction, that its decision may be final.[16] If a firm does business and one of its members lives in the United States, the court has jurisdiction as to him and the firm in involuntary proceedings, although another member lives abroad.[17] If a firm has its only place of business within a given district for more than three months before the petition is filed against it in such district, the court therein will have jurisdiction, although during part of the time the only business carried on was to wind up the affairs of the firm by several of the partners, the others having retired.[18] The question as to the jurisdiction of the bankruptcy court over the assets of an alleged bankrupt, held by a receiver under a state court, does not affect the jurisdiction of the court to proceed to an adjudication, and cannot be raised at the filing of the petition.[19]

§ 154. 'd. **Accounts.**—The trustees shall keep separate 'accounts of the partnership property and of the property 'belonging to the individual partners.'[20]

§ 155. 'e. **Payment of expenses.**—The expenses shall be 'paid from the partnership property and the individual prop-'erty in such proportions as the court shall determine.'

§ 156. **Expenses of administration.**—Where there are assets of the firm and of one or more individual members, the joint estate and the individual estates must each pay its proportion of the expenses of administration.[21] Except in the matter of expense, it is of no consequence whether there are two proceedings or only one by or against partners, for the rights of creditors and others are the same.[22] The expenses of administration must be reported in detail under oath, and be examined and approved or disapproved by the court of bankruptcy or referee.[23]

§ 157. 'f. **Distribution of proceeds.**—The net proceeds of

[16] In re Freund, 1 N. B. N. 105, 1 A. B. R. 25.

[17] In re Burton, 17 N. B. R. 212, 9 Ben. 324, F. C. 2214.

[18] In re Blair, 2 N. B. N. R. 364, 99 F. R. 76, 3 A. B. R. 588.

[19] In re Kersten, 110 F. R. 929, 6 A. B. R. 516.

[20] Analogous provision of Act of 1867. Sec. 36. . . . The assignee . . . shall also keep separate accounts of the joint stock or property in such proportions as the court shall determine.

[21] In re Smith, 13 N. B. R. 500, F. C. 12987; Atkinson v. Kellogg, 10 N. B. R. 535, F. C. 613.

[22] In re Morse, 13 N. B. R. 376, F. C. 9854.

[23] Sec. 62, Act of 1898.

'the partnership property shall be appropriated to the payment 'of the partnership debts, and the net proceeds of the indi- 'vidual estate of each partner to the payment of his individual 'debts. Should any surplus remain of the property of any 'partner after paying his individual debts, such surplus shall 'be added to the partnership assets and be applied to the 'payment of the partnership debts. Should any surplus of 'the partnership property remain after paying the partner- 'ship debts, such surplus shall be added to the assets of the 'individual partners in the proportion of their respective 'interests in the partnership.'

§ 158. **Rule of distribution.**—This subdivision prescribes the rule for the distribution of assets between individual and firm creditors of bankrupt partners, and applies not only to the case of the adjudication of the partnership as such, but also where a member of the firm is adjudged bankrupt in his individual capacity.[24] It is but a reaffirmance of the equity rule which remits joint creditors primarily to the joint fund and the individual creditors to the individual fund.[25]

[24] In re Wilcox, 94 F. R. 84, 1 N. B. N. 494, 2 A. B. R. 117; In re Denning, 114 F. R. 219.

[25] A similar rule existed under the former acts. In re Jewett, 1 N. B. R. 131; In re Byrne, 1 N. B. R. 122; Collins v. Hood, 4 McLean, 186, F. C. 3015; In re Williams, F. C. 17702; In re Warren, F. C. 17191; In re Lowe, 11 N. B. R. 221, F. C. 8564; In re Ingalls, F. C. 7032; In re Smith, 13 N. B. R. 500, F. C. 12987; In re Marwick, F. C. 9181; In re Dunham, 1 Hask. 495, F. C. 4144; In re Morse, 13 N. B. R. 376, F. C. 9854; In re McLean, 15 N. B. R. 333, F. C. 8879; See Amsink v. Bean, 11 N. B. R. 495, 22 Wall. 395; but this rule only applied where both estates were before the court for distribution; In re Downing, 3 N. B. R. 182, 1 Dill. 33, F. C. 4044; U. S. v. Lewis, 13 N. B. R. 33, F. C. 15595; In re Pease, 13 N. B. R. 168, F. C. 10881, and it held that where there was no joint estate the joint creditors could receive no dividends until the individual creditors were fully paid; In re Byrne, 1 N. B. R. 122, F. C. 2270, though the later cases deny this doctrine; In re Knight, 8 N. B. R. 436, F. C. 7880, 2 Biss. 518; In re McEwen, 12 N. B. R. 11, 6 Biss. 294, F. C. 8783; In re Slocum, F. C. 12951; aff'g 12950; In re Jewett, 1 N. B. R. 130, F. C. 7304. It was also held that the rule preferring partnership property to the payment of partnership debts was for the benefit of the partners and that they might waive it. In re Kahley, 4 N. B. R. 124, 2 Biss. 383, F. C. 7593; and that subject to this rule, the assets of the separate estates of partners as well as that of the partnership might be resorted to for payment of a partnership debt; Mead v. Bk., 2 N. B. R. 65, 6

The same rule applies whether the proceeding is on behalf of a partnership or an individual, and partnership creditors cannot resort to the individual assets until the individual creditors have been paid in full, and vice versa,[26] and this rule prevails notwithstanding the fact that there are no partnership assets and is still true where a member of a copartnership is adjudged bankrupt in his individual capacity.[27] The adjudication of the firm will subject the separate estates of the partners, as well as the firm property, to administration in bankruptcy, if an act of bankruptcy has been committed by the firm, as such, although the partners or some of them individually have not committed nor participated in committing any act upon which as individuals they could be adjudged bankrupts.[28] The only way in which the assets of a firm can be administered in bankruptcy (except by consent of the solvent partners) is by putting the firm into bankruptcy; and if a sole surviving or liquidating partner commits an act of bankruptcy he in his individual capacity and as surviving partner may be adjudged bankrupt and the partnership assets and his separate estate may be administered under the act.[29] Real estate held by a firm is generally held by the members as tenants in common, but when it is firm property firm creditors are entitled to payment from the proceeds thereof before a judgment of an individual partner.[30]

§ 159. Absence of firm assets and solvent partner.—The

Blatch. 180, F. C. 9366; and even that joint creditors of partners might share equally with the partnership creditors in the partnership assets. In re Nims, 18 N. B. R. 91, 10 Ben. 53, F. C. 10268.

[26] In re Smith, 13 N. B. R. 500, F. C. 12987; In re Morse, 13 N. B. R. 376, F. C. 9854; In re Byrne, 1 N. B. R. 122, F. C. 2270; In re Williams, F. C. 17702; In re Ingalls, F. C. 7032; In re Lane, 10 N. B. R. 135, F. C. 8044.

[27] In re Wilcox, supra; In re Mills, 95 F. R. 269, 2 A. B. R. 667; In re Jones, 2 N. B. N. R. 193, 100 F. R. 781, 4 A. B. R. 141, 2 id. 191.

[28] In re Meyer, 98 F. R. 976, 3 A. B. R. 559; aff'g 1 N. B. N. 304, 1 A. B. R. 565, 92 F. R. 896; In re Rosenbaum, 1 N. B. N. 541; In re Blair, 2 N. B. N. R. 364, 99 F. R. 76; In re Williams, 3 N. B. R. 74, 1 Lowell, 406, F. C. 17703.

[29] In re Meyer, supra; In re Murray, 1 N. B. N. 570, 96 F. R. 600, 3 A. B. R. 601, 1 N. B. N. 532, 3 A. B. R. 90; In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, F. C. 13393; In re Meyers, 1 N. B. N. 515, 2 A. B. R. 707, 96 F. R. 408; In re Altman, 1 N. B. N. 358, 4 A. B. R. 689, 95 F. R. 263.

[30] Marrett v. Murphy, 11 N. B. R. 131, F. C. 9103.

exception to the general rule that the individual creditors must resort to the individual assets and the joint creditors to the partnership assets, and that when there are no firm assets and no solvent living partner, the creditors of the firm might share pari passu with the individual creditors, is no longer applicable,[31] and partnership creditors must look to the partnership assets and can only resort to the individual assets after the individual debts are paid, without regard to whether there are partnership assets or a solvent partner amenable to the court's jurisdiction.[32]

§ 160. Assumption of firm assets and debts by one member thereof.—After a firm is actually insolvent, a partner cannot by the transfer of his interest to his copartner constitute the assets of the firm the individual property of the latter as against firm creditors,[33] but a firm while solvent may in good

[31] In re Wilcox, supra; In re Bates, 100 F. R. 263; In re Mills, 95 F. R. 269, 2 A. B. R. 667; *contra* In re Conrader, 118 F. R. 676.

[32] It was held under the act of 1867 that if a partnership was dissolved and one of the partners purchased all the assets of the firm, agreeing to pay all the debts; and both partners are individually adjudged bankrupt, so that there is no solvent partner and no firm property, the firm and individual creditors of the partner who assumed to pay the firm debts are entitled to share *pari passu* in the estate of such partner. (In re Downing, 3 N. B. R. 182, 1 Dill. 39, F. C. 4044; In re Collier, 12 N. B. R. 266, F. C. 3002; In re Rice, 9 N. B. R. 373, F. C. 11750.) The individual and partnership creditors share equally in the distribution of assets where both classes of debts are incurred upon the credit of the property owned by a member of the firm (In re Goedde, 6 N. B. R., F. C. 5500); where the individual assets consisting of goods purchased by the bankrupt from the partnership on its dissolution prior to bankruptcy being the same goods in the purchase of which the partnership debts originated. (In re Jewett, 1 N. B. R. 130, F. C. 7309.) If all the assets of a bankrupt firm were expended in the payment of costs, and there was no fund to be divided among the firm creditors, the firm and individual creditors must be paid *pari passu* out of the separate estate of each partner. (In re McEwen, 12 N. B. R. 11, 6 Biss. 294, F. C. 8783; but under the present Act there is no provision allowing joint and separate creditors to share *pari passu* in the separate estates. In the cases cited, if the property could not be held to be partnership assets because the transfer was preferential or fraudulent, or on some other ground, the partnership creditors could not resort to it.

[33] Earle v. Library Pub. Co., 95 F. R. 544; In re Rudnick, 2 N. B. N. R. 769; In re Cook, 3 Biss. 116, F. C. 3151; In re Byrns, 1 N. B. R. 464.

faith dissolve, the retiring partner transferring the joint property to the remaining partner, who may assume the joint debts, and the joint creditors will share equally with individual creditors in the individual assets, upon the remaining partner becoming bankrupt.[34] A promise by one partner to pay all the firm debts is enforceable by the firm creditors, though they were not cognizant of the promise when made, and though the consideration did not move from them.[35] A mortgage given by a partnership on its property is not affected by bankruptcy proceedings against one partner, though after the mortgage is given, the firm was dissolved and such partner took the assets and assumed its liabilities.[36] If a firm expires by limitation and the interests of all the partners are transferred to one of them, who agrees to apply firm assets to the payment of firm debts, and he afterwards files a voluntary petition in bankruptcy, and includes the firm assets and debts in his schedule, the other members should intervene and have the firm adjudicated bankrupt, that the firm assets may be applied to the firm debts.[37] If one partner sells his interest to another member, pending the insolvency of the firm, receiving notes in payment, he cannot prove such notes in bankruptcy against the purchasing partner.[38]

§ 161. Individual debts not allowable out of firm assets.— Since the law contemplates that partnership assets shall be in good faith applied first to the payment of partnership debts, any scheme resorted to by a person in contemplation of bankruptcy for the purpose of charging partnership assets with the individual liabilities of the partners, is violative of the law and should not be permitted,[39] as where the firm's en-

[34] In re Green, 116 F. R. 118, 8 A. B. R. 553; In re Keller, 109 F. R. 118, 6 A. B. R. 337; See also Fitzpatrick v. Flannagan, 106 U. S. 648, 27 L. Ed. 211; In re Collier, 12 B. R. 266, F. C. 3002; In re Long, 9 B. R. 227, 7 Ben. 141, F. C. 8476; In re Downing, 3 B. R. 182, 1 Dill. 33, F. C. 4044; In re Wiley, 4 Biss. 214, F. C. 17656; In re Mills, 11 B. R. 74, F. C. 9611; Ex p. Ruffin, 6 Ves. 119; In re Keller, 109 F. R. 118, 6 A. B. R. 334.

[35] In re Collier, 12 N. B. R. 266, F. C. 3002.

[36] In re Sanderlin, 109 F. R. 857, 6 A. B. R. 384; McDaniel v. Stroud, 106 F. R. 486, 5 A. B. R. 685; McNair v. McIntyre, 113 F. R. 113, 7 A. B. R. 638.

[37] In re Gorham, 18 N. B. R. 419, 9 Biss. 23, F. C. 5624.

[38] In re Denning, 114 F. R. 219, 8 A. B. R. 133.

[39] In re Bates, 100 F. R. 263, 4 A. B. R. 56; In re Leigh Lumber

dorsement is placed upon the individual notes of its members to certain relatives,[40] or a note is given in an individual transaction, though signed in the firm name,[41] or is merely signed in the name of the individual giving it,[42] or an accommodation note is endorsed by one member without the knowledge or consent of the others,[43] or a firm note is issued to a partner for his share of the capital stock and by him transferred to his wife by whom the capital was advanced,[44] or notes are signed by both members, which do not purport to be obligations of the firm.[45] Although real estate stands in the name of a member, if it be in fact firm property, the unsecured individual creditors of such member have no claim upon the proceeds.[46]

§ 162. **Firm debts.**—Notes drawn by one partner in the firm name in the course of partnership business without mala fides, or actual knowledge by the holder of want of authority or intended misapplication, entitles the holder to their allowance out of the firm estate;[47] the same is true where one holds a note on which the firm is an accommodation endorser, though collateral security is held therefor;[48] or a note given by each of the members of a firm individually, the consideration of which went into the firm's business;[49] or where with knowledge of the existence of a dormant partner, the paper of the active members is discounted, or money loaned them, although the money was borrowed for the partnership.[50] Where all the members of a firm have signed, instead of the firm name, their respective names to a written obligation,

Co., 101 F. R. 216, 4 A. B. R. 221; In re Denning, supra.

[40] In re Jones, 2 N. B. N. R. 193, 100 F. R. 781, 4 A. B. R. 141; but see Ex p. Russell, 16 N. B. R. 476, F. C. 12148.

[41] In re Forsyth, 7 N. B. R. 174, F. C. 4948.

[42] In re Dobson, 2 N. B. N. R. 514.

[43] In re Irving, 17 N. B. R. 22, F. C. 7074.

[44] In re Frost, 3 N. B. R. 180, F. C. 5135.

[45] Strause et al. v. Hooper et al., 105 F. R. 590, 5 A. B. R. 225; In re Jones, 116 F. R. 431, 8 A. B. R. 626.

[46] In re Groetzinger, 110 F. R. 366, 6 A. B. R. 399.

[47] Bush v. Crawford, 7 N. B. R. 299, F. C. 2224; overruling In re Dunkle, 7 N. B. R. 107, F. C. 4161.

[48] In re Dunkerson, 12 N. B. R. 413, 4 Biss. 253, F. C. 4157; Ex p. Whiting, 14 N. B. R. 307, 2 Lowell, 472, F. C. 17573.

[49] In re Thomas, 17 N. B. R. 54, 8 Biss. 139, F. C. 13886; see in Herrick, 13 N. B. R. 312, F. C. 6420.

[50] Amly v. Lyle, 15 East; Ex p. Emly, 1 Rose, 61.

whether the indebtedness is individual or that of the firm depends upon whether it was given for a firm obligation, whether the consideration went to the firm, whether it is joint or several, or joint and several, and whether others besides the members of the firm are on it.[51] That the obligation is that of the firm may be proved notwithstanding the failure to enter the transaction at large on the firm's books.[52]

Whether a claim is against a firm and hence provable in bankruptcy against it, or a claim against the individuals, or some one of them, composing such firm, is to be determined on general principles and the bankrupt law makes no special provision on the subject. If a firm obligation be taken for the debt of a partner, the creditor must show that the partner is entitled to give it and he may then prove against the joint assets, and the firm assets must be applied without reference to any disproportion of the individual partners' interests, as between themselves,[53] so with the amount paid for firm debts purchased by friends for two partners, the third partner not contributing, even though the third partner objects.[54] One does not become a firm creditor by reason of holding a right of action for the misrepresentation of a firm's condition by one of its members;[55] or by purchasing the partner's interest in a firm pending their adjudication as a bankrupt individually and as a firm;[56] or where by the partnership contract it is agreed that the firm should assume the individual debts if it becomes bankrupt, the creditor failing to consent to the conversion of liabilities before bankruptcy;[57] nor can a firm, all of whose members are partners in another firm, prove its debts against the latter firm.[58]

[51] In re Webb, 2 B. R. 183, F. C. 17313; In re Bucyrus Mach. Co., 5 N. B. R. 303, F. C. 2100; In re Miller, F. C. 9550; In re Herrick, 13 N. B. R. 312, F. C. 6420; In re Roddin, 6 Biss. 377, F. C. 11989; In re Holbrook, 2 Lowell, 259, F. C. 6588; In re Thomas, 17 N. B. R. 54, 8 Biss. 139, F. C. 13886.

[52] In re Stevens, 104 F. R. 323; In re Warren, 2 Ware, 322, F. C. 17191.

[53] In re Lowe, 11 N. B. R. 221, F. C. 8564.

[54] In re Lathrop, 5 N. B. R. 43. 5 Ben. 199, F. C. 8104; see In re Carmichael, 96 F. R. 594, 2 A. B. R. 815.

[55] In re Schuchart, 15 N. B. R. 161, 8 Ben. 585, F. C. 12483.

[56] Osborne v. McBride, 16 N. B. R. 22, 3 Sawy. 590, F. C. 10593.

[57] In re Isaacs, 6 N. B. R. 92, 3 Sawy. 35, F. C. 7093.

[58] In re Savage, 16 N. B. R. 368, F. C. 12381.

§ 163. Joint and individual debts.—The holder of a note given by a firm and also by an individual member of the firm is entitled to dividend from both estates.[59] And it has been held that a creditor holding a firm note endorsed by one of its members may resort to either estate.[60] If one partner endorses firm paper and pledges securities belonging to himself, after the firm's bankruptcy, the holder of the notes may sell the security and yet receive from the joint fund a dividend on the notes.[61] If the holders of a note endorsed by a firm and one partner accept a percentage from the makers, their dividends from the partnership and individual partner's estates are confined to the difference between the face of the note and the percentage received.[62] A former partner may be held liable on a firm note, where, after retirement, he permits his name to be used, although notice of his withdrawal is published, and the firm exchanges notes with a third party, who sells for value before maturity, the firm becoming bankrupt.[63] If a partner uses funds of an estate in his hands for his firm, keeping an account on the firm's books, a claim arises against his individual estate, as well as against the firm estate.[64]

Where an execution lien has been obtained in good faith more than four months before bankruptcy on the property of one of the individual members of the firm under a judgment against the firm, it has been held that the statutory lien will not yield to the equity of the separate creditors of that partner,[65] but such partner has a lien on the firm real estate until the debts are paid to indemnify him in the event of his having to pay them.[66]

§ 164. Firm debts provable against individual estate.—If,

[59] Emery v. Bank, 7 N. B. R. 217, 3 Cliff. 507, F. C. 4446; In re Long, 9 N. B. R. 237, 7 Ben. 141, F. C. 8476; In re Bigelow, 2 N. B. R. 121, 3 Ben. 146, F. C. 1397.

[60] Stephenson v. Jackson, 9 N. B. R. 255, 2 Hughes, 204, F. C. 13374.

[61] In re Foot, 12 N. B. R. 337, 8 Ben. 228, F. C. 4906.

[62] In re Howard, 4 N. B. R. 185, F. C. 6750.

[63] In re Kreuger, 5 N. B. R. 439, 2 Lowell, 66, F. C. 7941; In re Morse, 13 N. B. R. 376, F. C. 9854.

[64] In re Jordan, 19 N. B. R. 465; In re Tesson, 9 N. B. R. 378, F. C. 13844; In re Baxter, 18 N. B. R. 62, F. C. 1119.

[65] In re Sandusky, 17 N. B. R. 542, F. C. 12308; In re Lewis, 8 N. B. R. 546, 2 Hughes, 320, F. C. 8313.

[66] Thrall v. Crampton, 16 N. B. R. 261, 9 Ben. 218, F. C. 14008.

on dissolution by consent, one partner takes the assets and assumes the debts from which he agrees to hold the other harmless, the relation of the former partners becomes that of principal and surety and if the retiring partner on the other's bankruptcy is called on to pay a firm debt, he may prove such claim in the creditor's name against bankrupt's estate;[67] but if an agreement to pay the firm's debts is with the consent of creditors, firm creditors are entitled to share pari passu with the individual creditors.[68]

If one partner files a voluntary petition, seeking a discharge from both individual and firm debts, and is adjudged bankrupt, but no adjudication is made against the firm, the firm creditors may prove their debts and subject bankrupt's interest in the firm property to the payment thereof.[69] If the firm is not brought into bankruptcy and there are no firm assets, it has been held that a partnership creditor may share with the individual creditors in the estate of a bankrupt individual partner.[70] A firm creditor may prove against a partner's separate estate such partner's individual notes, received and credited by him on a firm note held by him;[71] or, if he holds individual property as security for partnership debts he may prove his whole debt against the joint estate and the deficiency after disposing of the security against an individual partner's separate estate.[72] A bond binding several members of a firm jointly and severally may be proved against the individual estate of such member of the firm.[73] If a partner purchases judgments against his firm, in favor of certain of its creditors, he becomes a creditor of his partners for their respective shares of the money so advanced, and may prove a claim for such share against a partner's individual estate.[74]

If there is a dormant partner, the firm creditors, having no notice of him, may prove against the separate estate of the

[67] In re Dillon, 100 F. R. 627; In re Pease, 13 N. B. R. 168, F. C. 10881.

[68] In re Long, 9 N. B. R. 227, 7 Ben. 141, F. C. 8476; see In re Keller, 109 F. R. 118, 6 A. B. R. 334.

[69] In re Laughlin, 96 F. R. 589.

[70] In re Green, 116 F. R. 118, 8 A. B. R. 553.

[71] In re Stevens, 104 F. R. 323.

[72] In re May, 17 N. B. R. 102, F. C. 9327.

[73] In re Bigelow, 2 N. B. R. 121, 3 Ben. 146, F. C. 1397.

[74] In re Carmichael, 96 F. R. 594, 2 A. B. R. 815.

ostensible partner,[75] and in the case of a merely nominal partner, the same course may be taken;[76] and, by proving as separate debts, the separate creditors of the ostensible partner are entitled to payment from the surplus of the joint estate before the separate creditors of the dormant partner.

A claim of the United States against a firm some of whose members are non-residents, was held to be entitled to priority of payment out of the individual estates of the resident partners;[77] or debts arising out of internal revenue bonds, signed by the members of a firm, as sureties, were entitled to priority out of the individual assets.[78] The Act of 1898 does not expressly give priority to debts due the United States, but inasmuch as there is no express repeal of Section 3466 R. S., giving this right, it doubtless still exists by implication.[79]

§ 165. Firm debts not provable against individual estates.— The following firm debts have been held not to be provable against a partner's separate estate; where a judgment against a bankrupt firm is paid out of real property belonging to a partner who was not served with process;[80] or a partner seeking payment before all the partnership debts have been paid, where he sells his interest to his partner, taking his notes therefor, and the partner became bankrupt, leaving some of the notes unpaid;[81] or creditors of an old insolvent firm, to the prejudice of the creditors whose claims arose in connection with a new business, in which he is adjudged bankrupt upon the petition of the new creditors;[82] or firm creditors who received a dividend in dissolution proceedings in a state court, but decline to surrender the same, before proving for the balance on the subsequent adjudication of a member of the firm;[83] or the firm trustee against the separate estate of a partner who withdraws firm money for his private purposes, the withdrawal not being fraudulent as against his partners, even if

[75] Ex p. Hodgkinson, 19 Ves. 291; Ex p. Norfolk, Id. 455; Ex p. Law, 3 Dea. 541.

[76] Ex p. Reid, 2 Rose, 84.

[77] U. S. v. Lewis, 13 N. B. R. 33, F. C. 15595; s. c. on appeal, Lewis v. U. S., 14 N. B. R. 64, 92 U. S. 618.

[78] In re Webb, 2 N. B. R. 214, F. C. 17313.

[79] See Sec. 64, Act of 1898, post, § 1011.

[80] In re Hinds, 3 N. B. R. 91, F. C. 6516.

[81] In re Jewett, 1 N. B. R. 131, F. C. 7309.

[82] In re Bates, 2 N. B. N. R. 208.

[83] In re Mills, 95 F. R. 269, 2 A. B. R. 667.

the firm estate was known to be insolvent at the time;[84] or a claim of one firm of which the bankrupt is a partner, against another firm of which he is a partner cannot be proved against him;[85] or where a creditor gets judgment against the solvent partner, he cannot waive his rights under such judgment and resort to the bankrupt partner's separate estate.[86] Costs incurred in an action under a state insolvency law against a firm, although a preferred claim thereunder, are not entitled to priority of payment out of the individual estate of one of the partners,[87] nor joint and several notes given by partners for partnership liabilities,[88] nor a note made payable to a firm and subsequently endorsed by a member in the firm name.[89]

§ 166. Effect of proving firm debt against individual estate.—A firm creditor does not lose his right against the firm or the assets of the firm by proving his debt against a single partner;[90] but if a firm creditor has received payment out of an individual partner's property, such partner's creditors will be subrogated to his rights.[91]

§ 167. Effect of payment of solvent partner's liability.—Although a partner, afterward becoming bankrupt, had assumed the partnership debts, a solvent partner can not share in the joint assets, if any of the partnership debts are outstanding, since if he did so he would compete with his own creditors; nor can he prove against the separate assets, since the surplus therefrom increases the joint assets; but, if he has paid the joint debts, he is entitled to prove against the separate estate. A bankrupt partner, though liable to the joint creditors for the whole debt, is entitled to the benefit of the payment by the solvent partner of his liability.[92]

§ 168. Individual property.—By individual property or estate, or separate estate, is meant that property in which each partner is separately interested to the exclusion of the

[84] In re May, 19 N. B. R. 101, F. C. 9328.

[85] In re Lloyd, 15 N. B. R. 257, F. C. 8429.

[86] In re Polidori, 2 N. B. N. R. 922.

[87] In re Daniels, 110 F. R. 745, 6 A. B. R. 699.

[88] In re Mosier, 112 F. R. 138, 7 A. B. R. 268.

[89] Lamoille County Nat. Bank v. Stevens Estate, 107 F. R. 245, 6 A. B. R. 164.

[90] Hudgins v. Lane, 11 N. B. R. 462, 2 Hughes 361, F. C. 6827.

[91] In re May, 17 N. B. R. 192, F. C. 9327; In re Foote, 12 N. B. R. 337, 8 Ben. 228, F. C. 4906.

[92] In re Jay Cooke, 12 N. B. R. 30, F. C. 3170.

other partners at the time of the bankruptcy.[93] The first source to be resorted to for determining what is partnership and what is individual property is from the agreement between the partners themselves. In the absence of express agreement, attention must be paid to the "source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with."[94]

Where, upon the dissolution of a partnership, one partner takes the accounts and notes of the firm and the other the stock in trade, to which he adds, and with which he continues the business, the stock in the hands of the latter, upon the subsequent bankruptcy of the former, will be held primarily liable for his individual debts.[95] The classification in the schedule as partnership assets of real estate held by partners as tenants in common, will not convert the individual partner's separate property into firm property, in derogation of the rights of separate creditors, but the real estate is an asset of the individual partners.[96] Buildings built with partnership funds by one partner on his own property becomes part of the realty and such partner's separate property.[97]

§ 169. **Partnership property.**—The determination of what is partnership and what is individual property is one of some difficulty. The rule stated by Lindley in his work on partnership, is that it is for the partners to determine by agreement amongst themselves what shall be the property of them all, and what shall be the separate property of some one or more of them, and by agreement they may convert what is the joint property of all into the separate property of some one or more of them and vice versa, though this would not be true if made within four months of the bankruptcy of the firm or one of its members, and it was shown that the purpose was to hinder, delay, defraud or prefer one class of creditors over another. Whatever, at the commencement of a partnership is thrown into the common stock, and whatever has, from time to time during the continuance of a partnership been added thereto, or obtained by means thereof, whether directly by purchase, or circuitously by employment in trade, belongs

[93] In re Lowe, 11 N. B. R. 221, F. C. 8564.

[94] Lindley on Part., 329.

[95] In re Montgomery, 3 N. B. R. 109, 3 Ben. 567, F. C. 9727.

[96] In re Zugg, 16 N. B. R. 280, F. C. 18222.

[97] In re Parks, 9 N. B. R. 270, F. C. 10765.

to the firm and in case of bankruptcy its status could not be changed.[98] Property originally owned by one partner and used in the business of the partnership, may be joint or separate as the partners agree, in writing or by parole, and the general intent of the partnership will be carried out.[99]

In law, real estate owned by members of a firm is held as tenants in common, but it is presumptively firm property if purchased with partnership funds,[1] although the title stands in the name of a member,[2] and the intent to consider it a partnership asset may be shown by evidence[3] or implied from the fact that the losses are to be sustained by the firm assets, and the profits are to augment the capital,[4] and out of which firm creditors are entitled to priority of payment even against individual creditors having judgments operating as liens upon the individual partners' interests.[5]

An insolvent firm's property is a trust fund for the payment of the firm's creditors, and the rule, supported by the weight of authority is that individual partners cannot claim individual exemptions out of it.[6] A partnership is not entitled to retain toward the payment of its debts, the surplus arising from securities held by one partner for his debt.[7]

§ 170. Conversion of joint estate into separate estate and vice versa.—It may be generally stated that partners may convert that which was partnership into the separate property of an individual partner, or vice versa, by agreement amongst themselves.[8] "The nature of the property may be thus altered by any agreement to that effect, for neither a deed nor even

[98] In re Swift, 118 F. R. 348.

[99] Lindley on Part., 323.

[1] Osborn v. McBride, 16 N. B. R. 22, 3 Saw. 590, F. C. 10593.

[2] In re Groetzinger, 110 F. R. 366, 6 A. B. R. 399.

[3] In re Farmer, 18 N. B. R. 207, F. C. 4650.

[4] Hiscock v. Jaycox, 12 N. B. R. 507, F. C. 6531.

[5] Marrett v. Murphy, 11 B. R. 131, F. C. 9103.

[6] In re Lentz, 2 N. B. N. R. 190, 97 F. R. 486; In re Stevenson, 1 N. B. N. 531, 2 A. B. R. 230, 93 F. R. 789; In re Camp, 1 N. B. R. 142, 1 A. B. R. 165, 91 F. R. 745; In re Grimes, 1 N. B. N. 339, 2 A. B. R. 160, 94 F. R. 800, 1 N. B. N. 426, 2 A. B. R. 611, 1 N. B. N. 516, 2 A. B. R. 730, 96 F. R. 529; In re Duguid, 2 N. B. N. R. 607, 100 F. R. 274, 3 A. B. R. 794; In re Friedrich, 100 F. R. 284, 3 A. B. R. 801; In re Wilson, 101 F. R. 571, 4 A. B. R. 260.

[7] Sparhawk v. Drexel, 12 N. B. R. 450, F. C. 13204.

[8] Lindley on Part., p. 334; ex parte Ruffin, 6 Ves. 119; ex parte Williams, 11 id. 3; ex parte Fell, 10 id. 348.

a writing is absolutely necessary."[9] But so long as the agreement is dependent upon an unperformed condition, so long will the ownership of the property remain unchanged.[10] Since the creditors of an individual have no lien on his property and can not prevent him from disposing of it as he pleases, so the ordinary creditors of a firm have no lien on the firm property to enable them to prevent it from disposing of it to whomsoever it chooses.[11] Accordingly it has frequently been held that agreements made between partners converting firm property into the separate estate of one or more of its members, and vice versa are, unless fraudulent, binding, not only as between the partners themselves, but also on their joint and on their respective several creditors, and that in the event of bankruptcy the trustee must give effect to such agreement.[12] In case of the bankruptcy of the firm or an individual member thereof, since the act confines each class of creditors to the corresponding estate, separate creditors to the separate estate and joint creditors to the joint estate, any agreement changing the situation of property, if within four months of the bankruptcy, would be regarded as a transfer to hinder, delay and defraud, or prefer one class of creditors over the other. For this reason the foregoing rule stated would probably fall in a proceeding under the present law.

§ 171. **Disposition of assets on death of partner.**—Upon the death of a partner, the surviving member takes the property of the firm for the purpose of closing the estate,[13] and the assets are to be marshalled as if all the partners were living;[14] the joint assets going to partnership creditors and the separate assets to separate creditors,[15] though in some states the debts are severed upon the death of the partner.[16]

[9] Pilling v. Pilling, 3 De G. J. and Sm. 162; ex parte Williams, 11 Ves. 3.

[10] Ex parte Wheeler, Buck. 25.

[11] Wilcox v. Kell, 11 Ohio 394; White v. Parish, 20 Tex. 688.

[12] Lindley on Part. 335; ex parte Ruffin, 6 Ves. 119; ex parte Williams, 11 Ves. 3.

[13] In re Stevens, 5 N. B. R. 112, 1 Sawyer 397, F. C. 13393.

[14] Ex parte Leaf, 4 Dea. 287; ex p. Morley, L. R. 8 Ch. 1026; ex p. Dea. 1 Ch. D. 514; ex p. Manchester Bk., 12 Ch. D. 917; In re Clap. 2 Lowell 168, F. C. 2783; Farley v. Moog, 79 Ala. 148; Tellinghast v. Champlin, 4 R. I. 173.

[15] Craft v. Pyke, 3 P. Williams, 180; Addis v. Knight, 2 Mer. 117; Lodge v. Prichard, 1 D. G. J. & S. 610; Gray v. Chiswell, 9 Ves. 118; Hills v. McRae, 9 Hare 297; In re Gray, 111 N. Y. 404.

[16] Pearce v. Cooke, B. R. I. 184; Sparhawk v. Russell, 10 Met. 305;

§ 172. Trustee's right to partnership property.—The trustee has the same right to the property of a bankrupt partner as in the case of any individual, and may recover from a solvent partner, what is due under the articles of copartnership.[17] But a trustee for individual members of a firm cannot interfere with the firm assets.[18]

The trustee of a bankrupt firm takes all the firm's property with like right, title, power and authority as the firm had, but subject to any lien existing thereon and to every equity which would affect the firm.[19] The actual interest of the trustee of a bankrupt partner is the bankrupt's proportion of the surplus, which may be either sold to the other partner, or an accounting be had,[20] or if the remaining partner continues the business without a settlement the trustee may take an interest.[21] The trustee of one partner will be subrogated to the rights of the creditors of another partner to the extent that their claims against the latter have been satisfied by the sale of the property of the former.[22] If prior to the adjudication of a partnership as a bankrupt, one of the individual partners makes an assignment for the benefit of his creditors, the assignee may be required by summary order to transfer to the trustee all the property so coming to him.[23]

§ 173. 'g. Marshalling of assets.—The court may permit 'the proof of the claim of the partnership estate against the 'individual estates, and vice versa, and may marshal the assets 'of the partnership estate and individual estates so as to pre-'vent preferences and secure the equitable distribution of the 'property of the several estates.'

§ 174. Claims between the estates.—Where all the partners become bankrupt, the general rule is that a separate estate shall not claim against the joint estate in competition with the joint creditors, nor shall the joint estate claim against a

changed by Statute in Mass.; Jewett v. Phillips, 5 Allen 150.

[17] Wilkins v. Davis, 15 N. B. R. 60, 2 Lowell 511, F. C. 17664.

[18] Ludowici Roofing Tile Co. v. Pa. Inst. for Inst. for Blind, 116 F. R. 661; 8 A. B. R. 739; In re Mercur, 116 F. R. 655, 8 A. B. R. 275.

[19] In re Leland, 5 N. B. R. 222, 5 Ben. 168, F. C. 8228; In re Temple, 17 N. B. R. 345, 4 Sawy. 62, F. C. 13825.

[20] Ex Motion, L. R. 9 Ch. 192.

[21] Ex Finch, 1 Dea. & Ch. 274; Ex Freeman, Id. 464.

[22] In re Mason, 1 N. B. N. 331, 2 A. B. R. 60.

[23] In re Stokes, 106 F. R. 312, 6 A. B. R. 262.

separate estate in competition with the separate creditors,[24] unless there be a surplus of the joint estate to be divided among the individual creditors and vice versa.[25] It is equally clear that a solvent partner cannot prove his own separate debt against the separate estate of the bankrupt partner, so as to come in competition with the joint creditors of the partnership, for the reason that he is himself liable to all the joint creditors, which is sufficient to show that in equity he cannot be permitted to claim any part of the funds of the bankrupt before all the creditors to whom he is liable are fully paid.[26] Neither can a solvent partner prove against the separate estate of the bankrupt partner in competition with the separate creditors of the bankrupt until all the joint creditors of the partnership are paid or fully indemnified, for if a dividend were reserved to such a party on such proof the joint creditors might be injured by such solvent partner stopping the surplus of the separate estate, which would otherwise be carried over to the joint estate, or the separate creditors might be injured by the funds being stopped and the transmission of the same be delayed.[27] The exceptions to this rule are (1) where the property of a partner has been fraudulently applied for the purpose of a partnership; (2) where a distinct trade is prosecuted by one or more of the members of the firm.[28]

§ 175. **Where one is a member of two firms.**—Where a bankrupt is a member of two firms, the assets should be so marshalled that the creditors of each firm may have priority in the distribution of the assets of the firms of which they are creditors. If a surplus remains after paying the creditors of one firm, it is subject to the claims of the individual creditors and not to the creditors of the other firm. If, however, there is a surplus of individual assets, it should be apportioned pro rata among creditors of both firms according to the partner's respective interests,[29] and where the partnership estate

[24] Amsink v. Bean, 11 N. B. R. 495, 22 Wall. 395; In re McEwen, 12 N. B. R. 11, 6 Biss. 294, F. C. 8783.

[25] In re Lane, 10 N. B. R. 135, 2 Lowell 333, F. C. 8044.

[26] Emery v. Bank, 7 N. B. R. 217.

[27] Exp. Lodge, 1 Ves. Jr. 166.

[28] Amsink v. Bean, 11 N. B. R. 495, 22 Wall. 395.

[29] In re Leland, 5 B. R. 222, 5 Ben. 168, F. C. 8228; In re Hinds, 3 B. R. 91, F. C. 6516; In re Dunkerson, 12 B. R. 391, 4 Ben. 423, F. C. 4159; Ex parte Franklyn, Buck, 332.

is indebted to another firm, one of the members of which is also a member of the bankrupt firm, the court will deduct from the payment due the creditor firm the amount to which the bankrupt member is entitled.[30]

§ 176. Claim of partner against bankrupt partner.—A bankrupt creditor of his bankrupt copartner has the residuum of the estates, separate and joint, belonging to the latter after all the bankrupt debtor's separate creditors and the firm debts are paid, but not until then,[31] and a solvent partner can not prove against the separate estate of the bankrupt partner in competition with the bankrupt partner's separate creditors until all the partnership creditors are paid or fully indemnified,[32] nor for interest on the balances in his favor shown by the firm's books, unless by express agreement.[33] A partner who has had to pay all the firm debts can prove against his bankrupt partner his proportion of such debts,[34] so a former partner, or a joint covenantor with bankrupts, who is liable for joint debts and pays them, may prove the amount against the assets of his former partners or of his co-contractors.[35]

§ 177. 'h. Settling business where all not adjudged bankrupt.—In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless 'by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt 'shall settle the partnership business as expeditiously as its 'nature will permit, and account for the interest of the partner 'or partners adjudged bankrupt.'

§ 178. Proceedings where all members are not adjudicated.—This provision applies to a proceeding by or against one partner, or any number less than all, and means that the bankruptcy of one partner shall not preclude the other from set-

[30] In re Ellis, 5 Ben. 421, F. C. 4399.

[31] In re McLean, 15 N. B. R. 333. F. C. 8879.

[32] Amsink v. Bean, 11 N. B. R. 495, 22 Wall. 395; In re Dunning, 8 A. B. R. 133.

[33] In re Stevens, 104 F. R. 323; 5 A. B. R. 9.

[34] In re Stevens, 104 F. R. 323; In re Stephens, 6 N. B. R. 533, 3 Biss. 187, F. C. 13365.

[35] Ex p. Lake, 16 N. B. R. 497, 2 Lowell 544, F. C. 7991.

tling the partnership business,[36] but does not give authority for the administration of the firm assets in individual proceedings against all the parties.[37] One or more of the partners may be adjudged bankrupt without the others, or the partnership being so adjudged; but, in such case, if a discharge from firm as well as individual debts is sought, the petition should aver individual and firm indebtedness, giving the firm name and the names of the partners, and should ask for a discharge from both firm and individual debts, and be accompanied by schedules, setting out firm debts and property, and other matters required in case all the partners join, and the notices and application for discharge should specifically state that a discharge is asked from both firm and individual debts, and be given to firm creditors and non-joining partners,[38] though, when all are insolvent and there are no firm assets whatever, the proceeding may be without reference to the other partners.[39] The creditors of a firm being by law also creditors of each member of the firm may join in a petition to have the members of the firm individually adjudged bankrupt.[40]

When all are not adjudicated the trustee is elected by joint and separate creditors and takes the bankrupt partners' individual assets and their proportionate share of the surplus of the firm's assets, but has nothing to do with the partnership estate unless by consent of the partners not adjudged bankrupt,[41] although the bankruptcy court will require the partners not adjudged bankrupt to settle the business expedi-

[36] In re Meyer, 98 F. R. 976, 3 A. B. R. 550.

[37] In re Mercur, 116 F. R. 655, 8 A. B. R. 275.

[38] In re Laughlin, 96 F. R. 589, 3 A. B. R. 1; In re McFaun, 96 F. R. 592, 3 A. B. R. 66; In re Russell, 1 N. B. N. 532, 3 A. B. R. 91, 97 F. R. 32; Amsink v. Bean, 11 N. B. R. 495, 22 Wall. 395; G. O. VIII.

[39] In re Hirsch, 2 N. B. N. R. 137, 3 A. B. R. 344, 97 F. R. 571; In re Abbe, 2 N. B. R. 26, F. C. 4; In re Marks, F. C. 9094; Crompton v. Conkling, 15 N. B. R. 417, 420, 9 Ben. 225, F. C. 3407-8; In re Meyers, 1 N. B. N. 515, 96 F. R. 408, 2 A. B. R. 707; In re Winkens, 2 N. B. R. 113, F. C. 17875; In re Downing, 3 N. B. R. 182, 1 Dill. 33, F. C. 4044.

[40] In re Melick, 4 N. B. R. 26, F. C. 9399; In re Mercur, 1 N. B. N. 527, 2 A. B. R. 626, 95 F. R. 634.

[41] In re Polidori, 2 N. B. N. R. 945; In re Wilcox, 1 N. B. N. 286, 494, 2 A. B. R. 117, 94 F. R. 84; In re Blair, 2 N. B. N. R. 364, 99 F. R. 76, 3 A. B. R. 588; In re Meyer, 98 F. R. 976, 3 A. B. R. 559; aff'g 1 N. B. N. 304, 1 A. B. R. 565, 92 F. R. 896.

tiously, or consent to the administration of the partnership assets in bankruptcy.[42]

If a secret partner keeps silent and allows the partnership assets to be administered in bankruptcy, he will be held to have consented.[43] A creditor of a partner may proceed against him individually, though the partnership estate is being administered by a probate court, and it has been held in such case that the court of bankruptcy has complete jurisdiction over the case, and jurisdiction over the partnership estate, provided such court will surrender possession of the assets to the trustee.[44]

[42] In re O'Brien, 2 N. B. N. R. 312.

[43] In re Harris, 2 N. B. N. R. 868, 4 A. B. R. 132.

[44] See In re Pierce, 2 N. B. N. R. 979, 102 F. R. 977, 4 A. B. R. 489; In re Daggett, 8 N. B. R. 433, F. C. 3536.

CHAPTER VI.

EXEMPTIONS.

§179 (6a) Bankrupts, exemptions fixed by law of domicile.
180. Constitutionality.
181. Jurisdiction over exemptions.
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183. Bankrupt should claim.
184. Trustees' duty — appraisement.
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198. Personal property.
199. Successive exemptions.
200. Partnership property, firm exemptions.
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202. Taxes on exempt property.
203. Sale and proceeds of exempt property.
204. Indian allotments exempt.
205. Pension money exempt.
206. Costs payable from exemptions.
207. Insurance policies.
208. Rule governing construction of State laws.

§ 179. '(Sec. 6a) Bankrupt's exemptions fixed by law of 'domicile.—This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.'[1]

[1] Analogous provisions of Act of 1867. Sec. 14. . . . That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children, and the uniform, arms and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property

§ 180. **Constitutionality.**—Upon the enactment of the federal bankruptcy law, all state statutes on the subject so far as they were in conflict, except exemption laws, were superseded, or suspended.[2] With the power to pass a uniform bankruptcy law is linked authority to define what and how much of a debtor's property shall be exempt,[3] and in the exercise of this power Congress may even pass exemption laws impairing the obligation of contracts.[4] But laws exempting reasonable portions of the debtor's property relate to the remedy, and are, therefore, not liable to a constitutional objection.[5] So long, therefore, as the trustee takes in each state whatever would have been available to the creditors if the bankrupt law had not been passed, the system is uniform in the Constitutional sense.[6]

In enacting a uniform bankruptcy law, Congress may properly provide that the exemptions given by the several state statutes shall be allowed to the bankrupt, and this is true without respect to the validity or invalidity of the state law,[7] that question being left for the highest court of the state to

not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year eighteen hundred and sixty-four: *Provided*, That the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees; and in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court. As this act does not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws, the exemption laws of all the states and territories are set forth at length under Title IV.

[2] Richard, 1 N. B. N. 487, 94 F. R. 633, 2 A. B. R. 506.

[3] In re Reiman et al., 13 N. B. R. 128, 12 Blatchf. 562, F. C. 11675.

[4] In re Owens, 12 N. B. R. 518, 6 Biss. 432.

[5] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1; In re Beckerford, 1 Dill. 45; In re Owens, 12 N. B. R. 518, 6 Biss. 432, F. C. 10632.

[6] Hanover Nat. Bank v. Moyses, supra; In re Deckert, 2 Hughes 183.

[7] In re Smith, 14 N. B. R. 295, 2 Woods 458, F. C. 12996; In re Smith, 8 N. B. R. 401, F. C. 12986; In re Kean et al. 8 N. B. R. 367, F. C. 7630.

determine,[8] though the bankruptcy court may look to the state constitution, and if the exemption statute is unconstitutional, it will refuse to allow the exemption.[9] When the state exemption laws are adopted as a part of a federal bankruptcy system, they must be taken as they are found upon the statute books of the states, as interpreted by the highest courts of such states;[10] but the incorporation of these statutes into the bankruptcy law will not make valid provisions in them which, under the state constitutions are invalid.[11] The adoption of the different statutes of exemptions is not in contravention of the constitutional requirement that the law must be "uniform," since that provision contemplates only uniformity of administration,[12] and upon this ground of supposed lack of uniformity the act of 1867 was frequently unsuccessfully attacked.[13] This word "uniform" is only a limitation upon the power of Congress in enacting bankruptcy legislation,[14] and means uniformity among the states, and, so far as the distribution of the assets are concerned, the law is uniform.[15]

§ 181. Jurisdiction over exemptions.—Subdivision 11 of Section 2 of the Act expressly confers upon courts of bankruptcy jurisdiction to "determine all claims of bankrupts to their exemptions," and this jurisdiction is exclusive, as to questions concerning the right of the bankrupt[16] or his wife and children to their exemptions.[17] This jurisdiction would

[8] Bush v. Lester et al., 15 N. B. R. 36; see also post, § 208; but see In re Petrim, 1 N. B. R. 264.

[9] In re Buelow, 2 N. B. N. R. 26, on appeal, id. 230, 98 F. R. 286.

[10] In re Manning, 112 F. R. 948, 7 A. B. R. 571; In re Staunton, 117 F. R. 507; In re Duerson, 13 N. B. R. 183, F. C. 4117.

[11] In re Deckert, 10 N. B. R. 1; In re Dillard, 9 N. B. R. 8.

[12] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1; see also In re Rohrer, 140 U. S. 545, 560; In re Jordan, 8 N. B. R. 180, F. C. 7514.

[13] In re Beckerford, 1 Dill. 45, 4 N. B. R. 203; In re Smith, 8 N. B. R. 401; Kean v. White, 8 N. B. R. 367; In re Deckert, supra.

[14] In re Smith, 8 N. B. R. 401; citing Evans v. Eaton, Peters, C. C. R. 323; Bloomer v. Stately, 5 McLean, 158; Satterlee v. Matthewson, 2 Pet. 330; Hepburn v. Griswold, 8 Wall. 603; In re Everett, 9 N. B. R. 90; In re Smith, 14 N. B. R. 295; In re Vogler, 8 N. B. R. 132; In re Jordan, 8 N. B. R. 180; Legal Tender Cases, 12 Wall. 457.

[15] In re Beckerford, 4 N. B. R. 59, 1 Dill. 45; Hanover Nat. Bank v. Moyses, supra.

[16] In re Overstreet, 1 N. B. N. 408, 2 A. B. R. 486; In re Bragg, 2 N. B. N. R. 82.

[17] Lumpkin et al. v. Eason, 10 N. B. R. 549.

also extend to a case where it is sought to correct an error in the description of bankrupt's homestead, as a result of which it was sold in bankruptcy proceedings;[18] but not to a proceeding to enforce a lien upon property that is exempt.[19]

The extent of the jurisdiction of the bankruptcy courts, in determining claims of creditors against the exempt property, where there is a waiver, is discussed elsewhere.[20]

§ 182. Rule governing allowance of exemptions.—Section 6 of the law establishes the rule governing exemptions which pervades the entire act and must be read into every other section thereof when not clearly in conflict.[21] The right is fixed by the law of the state in which bankrupt has had his domicile for six months or the greater portion thereof immediately preceding the filing of his petition, but the method of ascertaining the value of the property claimed as exempt or of setting part of the property, is governed by the bankruptcy law.[22]

The word "exemptions" as used in the bankruptcy act is not limited to real estate and chattels. It includes all classes of property and would cover a trust-income,[23] and property of any kind which is covered by the local statutes,[24] though it would not cover allowances which are clearly a part of a state insolvency law, the operation of which is suspended by the bankruptcy act.[25] But the right to the exemption must exist at the date of the institution of proceedings in the bankruptcy court.[26] Where debtor receives his exemptions and shortly thereafter bankruptcy proceedings are instituted, he cannot claim further exemptions.[27]

For a discussion of the length of domicile see § 32, ante.

§ 183. Bankrupt should claim.—The bankrupt should file

[18] Steele v. Moody, 16 N. B. R. 558.

[19] In re Everett, 9 N. B. R. 90, F. C. 4579; In re Preston, 6 N. B. R. 545; Darling v. Berry, 13 F. R. 659; In re Betts, 15 N. B. R. 536, 4 Dill. 93, F. C. 1371.

[20] See post, §189.

[21] Steele v. Buel, 104 F. R. 968, 5 A. B. R. 165.

[22] In re Lynch, 101 F. R. 579; In re Friederich, 100 F. R. 284, 3 A. B. R. 801.

[23] In re Baudouine, 1 N. B. N. 506, 3 A. B. R. 55, 96 F. R. 536.

[24] In re Erben, 2 N. B. R. 66, F. C. 1315.

[25] In re Anderson, 110 F. R. 141, 6 A. B. R. 555.

[26] In re Duerson, 13 N. B. 183, F. C. 4117.

[27] In re Miller, 1 N. B. N. 263, 1 A. B. R. 647; In re Buckingham, 2 N. B. N. R. 617.

in triplicate, with the schedule of his property, a claim for such exemptions as he may be entitled to, one copy to be for the clerk, one for the referee, and one for the trustee;[28] and if he does not, there appears no reason why the title thereto would not vest in the trustee.[29] The claim for the exemptions must be specific and not in general.[30] The trustee is required to set apart the exemptions and report the items and estimated value thereof to the court as soon as practicable after his appointment,[31] which is authorized to determine all such claims.[32] He may select such property in conformance to the state statute,[33] and it is then the duty of the court to see that it is secured to him,[34] but a severance of exempted articles or property from the rest of his estate is not to be made by the debtor.[35] Where it appears that the claim for exemptions was fraudulently omitted from the schedules they cannot be amended for the purpose of claiming them,[36] though the fact that bankrupt fails to make claim in his schedules will not necessarily bar him from making a subsequent claim therefor, provided rights have not intervened or injury will not be worked by the allowance,[37] but the application must be made before the discharge.[38]

§ 184. **Trustee's duty—appraisement.**—After the bankrupt in his schedule has selected his exemptions, the trustee must set them aside and in this he has no discretion, the law being

[28] Sec. 7 (8), act of 1898; In re Jackson, 2 N. B. R. 158, F. C. 7127; In re Friederich, 100 F. R. 284, 3 A. B. R. 801; In re Rodenhagen, 2 N. B. N. R. 674; In re Duffy, 118 F. R. 926.

[29] In re Moran, 105 F. R. 901, 5 A. B. R. 472, aff'd in Moraw v. King, 111 F. R. 730, 7 A. B. R. 176.

[30] In re Groves, 6 A. B. R. 728.

[31] Sec. 47 (11), act of 1898.

[32] Sec. 2 (11), act of 1898.

[33] In re Grimes, 1 N. B. N. 516, 96 F. R. 529, 2 A. B. R. 730; In re Solomon, 10 N. B. R. 9, F. C. 13166; In re Smith, 8 N. B. R. 401, F. C. 12986; In re Tobias, 103 F. R. 68, 3 N. B. N. R. 23, 4 A. B. R. 555; In re Wilson, 108 F. R. 197, 6 A. B R. 287; In re Garner, 115 F. R. 200.

[34] In re Stevens, 5 N. B. R. 298, 2 Biss. 373, F. C. 13392.

[35] In re Friederich, supra.

[36] In re Nunn, 1 N. B. N. 427, 2 A. B. R. 664; In re Garden, 93 F. R. 423, 1 N. B. N. 189, 1 A. B. R. 582; Steele v. Moody, 16 N. B. R. 558.

[37] In re Williams, 2 N. B. N. R. 419; In re Harrington, 1 N. B. N. 513; In re Osborn, 104 F. R. 780; Bartholomew v. West, 8 N. B. R. 12, F. C. 1071; In re Moran, 105 F. R. 901, 5 A. B. R. 472.

[38] In re Kean et al. 8 N. B. R. 367, F. C. 7630.

mandatory. It is solely his duty, and any agreement on his part or the creditor's that they shall be alloted in any other manner than that prescribed by the bankruptcy law, or through other agencies than that of the trustee of the bankrupt, is a nullity. Where appraisers set apart or value the exemptions pursuant to an agreement to that effect, exceptions to such allotments may be filed by bankrupt or any creditor within 20 days after the same has been made and filed with the clerk or referee, when such allotment will be set aside. Where, however, the assets are in excess of the exemptions, the property must be appraised by three appraisers when their inventory may aid the trustee in making his allotment, but he is in no wise concluded by it nor has he any right to adopt it as his own;[39] even where another method is prescribed by the state law.[40] The bankrupt law allows to debtors the exemptions provided by the state statutes, but the manner in which they are to be claimed, set apart and awarded is regulated by the law.[41] The trustee cannot impose conditions upon his allowanee nor demand indemnity from the bankrupt before surrendering his exemptions;[42] nor divest himself of any part of the estate except for full consideration when the exemptions are not properly claimed, nor will the action of a state court adjudging property to be exempt, confer any authority on the trustee to transfer the title to such property.[43] It has been held that where exemptions had been set apart by a state court and bankruptcy proceedings were shortly thereafter instituted that such setting apart cannot be reviewed or set aside by the bankruptcy court,[44] but this seems questionable.

[39] In re Grimes, 1 N. B. N. 516, 96 F. R. 529, 2 A. B. R. 730; In re Smith, 1 N. B. N. 532, 93 F. R. 791, 2 A. B. R. 190; contra In re McCutchen, 2 N. B. N. R. 636, 100 F. R. 779, 4 A. B. R. 81; see In re Wilson, 101 F. R. 571, 4 A. B. R. 260; In re Peabody, 16 N. B. R. 248, F. C. 10866.

[40] In re Camp, 1 N. B. N. 142, 91 F. R. 745, 1 A. B. R. 165; In re Bass, 15 N. B. R. 453, 3 Woods, 382, F. C. 1091; In re Stevens, 5 N. B. R. 298, 2 Biss. 373, F. C. 13392; In re Preston, 6 N. B. R. 545, F. C. 11394; In re Richard, 1 N. B. N. 487, 2 A. B. R. 506, 94 F. R. 635.

[41] In re Friederich, 100 F. R. 284, 2 A. B. R. 801.

[42] In re Brown, 1 N. B. N. 511, 100 F. R. 441, 4 A. B. R. 46.

[43] In re Nunn, 1 N. B. N. 427, 2 A. B. R. 664.

[44] In re Rhodes, 109 F. R. 117, 6 A. B. R. 173.

As to what constitutes the setting aside of the exemption, it seems clear that some affirmative act to that end is required of the trustee. A mere report by him that the bankrupt has claimed his exemptions will not amount to a setting aside,[45] but there must be a specification of the items with an appraisal of the property set apart.[46] With this single exception of setting aside the exemptions, the trustee bears no relation to the bankrupt.[47]

Within 20 days after receiving notice of his appointment, the trustee must make report to the court of the articles set off to the bankrupt with the estimated value of each article, unless they do not come into his possession and his right to them is contested, in which case the time should be computed from the final decision thereon;[48] and exceptions to the determinations of the trustee may be taken within 20 days after the filing of the report by any creditor, but this provision does not apply to the bankrupt.[49] Where a party is guilty of laches in failing to contest the bankrupt's claim the court will not reopen the matter.[50] The referee may require the exceptions to be argued before him and at the request of either party must certify them to the court for final determination,[51] and an objection made at the first meeting will preserve the right to object at a subsequent stage of the proceedings.[52]

§ 185. **Title to exemptions.**—The title to exempt property does not pass to the trustee,[53] but remains in the bankrupt, who has the same rights as others before a state tribunal, where his exempt property has been wrongfully seized on execution.[54] Beyond setting it aside, the trustee has no connection with it.[55] The bankrupt may convey, mortgage, or make such

[45] In re Harber, 2 N. B. N. R. 449; Darsey v. Mumford, 17 N. B. R. 181.

[46] In re Manning, 112 F. R. 948, 7 A. B. R. 571.

[47] Aiken v. Edrington et al. 15 N. B. R. 271, F. C. 111.

[48] In re Shields, I N. B. R. 170, F. C. 12785.

[49] In re White, 3 N. B. N. R. 27, 103 F. R. 774, 4 A. B. R. 613.

[50] In re Reese, 8 A. B. R. 411.

[51] G. O. XVII; In re Smith, 1 N. B. N. 532, 93 F. R. 791, 2 A. B. R. 190.

[52] In re Harber, 2 N. B. N. R. 449.

[53] Sec. 70a, act of 1898; In re Seabolt, 113 F. R. 766; In re Wells, 105 F. R. 762, 5 A. B. R. 308.

[54] In re Everett, 9 N. B. R. 90, F. C. 4579.

[55] In re Hill, 2 A. B. R. 798, 97 F. R. 185; In re Bass, 15 N. B. R.

disposition of it as he sees fit; he may maintain and defend suits with reference thereto,[56] dispose or rent it,[57] and upon his death, it descends to his heirs.[58] After it has been designated and set apart by the trustee, it has passed out of the possession and control of the bankruptcy court, and neither it nor the trustee has any further interest in it,[59] and the court of bankruptcy will not, on the petition of a chattel mortgagee of such property, order the bankrupt to restore such property to the trustee to be sold by him for such mortgagee's benefit.[60] As the trustee has title to the assets of the bankrupt estate only in a representative capacity, he cannot transfer title to the bankrupt by setting aside to him property which the statute does not make exempt, as such an act would be void and he would be held accountable;[61] nor make an allowance from the general fund for articles sold under distress for rent, which would have been exempt.[62]

There is, however, a class of property which is closely akin to exempt property to which the trustee takes title for the benefit of creditors. Such is the reversionary interest in land alloted to bankrupt as a homestead after the termination of the exempt estate or interest.[63] So the trustee has a claim for the excess upon a piece of bankrupt's real estate which exceeds in value the exemption allowed by law, and to that extent the bankrupt's title to such real estate is qualified.[64]

453, 3 Woods, 382, F. C. 1091; Durant v. Ins. Co. 16 N. B. R. 324, F. C. 4188; In re Baker, 1 N. B. N. 212, 1 A. B. R. 526; In re Grimes, 96 F. R. 528, 1 N. B. N. 516, 2 A. B. R. 730; In re Hester, 5 N. B. R. 285; In re Lambert, 2 N. B. R. 426; In re Everett, 9 N. B. R. 90; In re Hunt, 5 N. B. R. 493; Henly v. Lanier, 15 N. B. R. 280.

[56] Henly v. Lanier, 15 N. B. R. 280; In re Hunt, 5 N. B. R. 493, F. C. 6883.

[57] In re Oleson, 110 F. R. 796, 7 A. B. R. 22.

[58] In re Hester, 5 N. B. R. 285, F. C. 6437; Farmer v. Taylor, 15 N. B. R. 515; In re Seabolt, 113 F. R. 766.

[59] In re Grimes, supra.

[60] In re Hatch, 102 F. R. 280, 4 A. B. R. 349.

[61] In re Gainey, 2 N. B. R. 163, F. C. 5181; In re Farish, 2 N. B. R. 168, F. C. 4647; In re Jackson & Pearce, 2 N. B. R. 158, F. C. 7127; In re Perdue, 2 N. B. R. 67, F. C. 10975.

[62] In re Lawson, 2 N. B. R. 19, F. C. 8149.

[63] In re Woodard, 1 N. B. N. 385, 2 A. B. R. 339, 95 F. R. 260; In re Watson, 2 N. B. R. 174, F. C. 17271; Rix v. Bank, 2 Dill. 367.

[64] In re Parks, 9 N. B. R. 270, F. C. 10765; Johnson v. May, 16 N. B. R. 425, F. C. 7397.

§ 186. **Property concealed or fraudulently transferred.**—The authorities are not in harmony upon the right of a bankrupt to exemptions where he has failed to account for all his assets, or has fraudulently transferred or concealed his property, many courts holding that exemptions should be allowed since a remedy is afforded by which they may be recovered;[65] but the better rule would seem to be opposed to such doctrine,[66] and certainly in those states where the exemption law requires the bankrupt to come into court with clean hands, there can be no question that such acts will operate as a bar to the right to have property set aside as exempt[67] even though the evidence may not make out a case of fraudulent concealment in every detail as indicated and defined by the statute.[68] It has been held that property or the proceeds thereof constituting a preference which is surrendered to the trustee by the preferred creditor, can be applied in the setting off of exemptions.[69] Where bankrupt disposes of property not exempt a few days before filing his petition, and applies the proceeds in partial payment of an incumbrance upon property which was exempt, the transaction was held to be in fraud of the law and the creditors were entitled to be subrogated to

[65] In re Noell, 2 N. B. N. R. 789; In re Park, 2 N. B. N. R. 981, 102 F. R. 602, 4 A. B. R. 432; In re Detert, 11 N. B. R. 293, F. C. 3829; Cox v. Wilder, 7 N. B. R. 241; 2 Dill. 45, F. C. 3308; Penny v. Taylor, 10 N. B. R. 200, F. C. 10957; McFarland v. Goodman, 11 N. B. R. 134, 6 Biss. 111, F. C. 8789; Bartholomew v. West, 8 N. B. R. 12, F. C. 1071; Smith v. Kehr, 7 N. B. R. 97, 2 Dill. 50, F. C. 13071; In re Peterson, 1 N. B. N. 215, 1 A. B. R. 254; Comstock v. Bechtel, 63 Wis. 656; Wilcox v. Hawley, 31 N. Y. 648; In re Talbott, 116 F. R. 417, 8 A. B. R. 427; In re Falconer, 110 F. R. 111, 6 A. B. R. 557.

[66] In re Long, 116 F. R. 113; In re White, 109 F. R. 635, 6 A. B. R. 451; In re Evans, 116 F. R. 909; In re Duffy, 118 F. R. 926; In re Yost, 117 F. R. 792; In re Evans, 8 A. B. R. 730.

[67] In re Magata, 2 N. B. R. 456; McNally v. Mulherin et al., 79 Ga. 614; In re Waxelbaum, 101 F. R. 228, 4 A. B. R. 120; In re Tollett, 2 N. B. N. R. 1096, 105 F. R. 425, 5 A. B. R. 305; reversed on ground that conveyance was only constructively fraudulent, in 106 F. R. 866, 5 A. B. R. 404; In re Williamson, 114 F. R. 190, 8 A. B. R. 42; 114 F. R. 192, 8 A. B. R. 53; In re Taylor, 114 F. R. 607, 7 A. B. R. 410; In re Boorstin, 114 F. R. 696, 8 A. B. R. 89; In re West, 116 F. R. 767, 8 A. B. R. 564.

[68] In re Morris, 2 N. B. N. R. 260.

[69] In re Talbott, 116 F. R. 417, 8 A. B. R. 427; In re Falconer, 110 F. R. 111, 6 A. B. R. 557; contra, In re Long, 8 A. B. R. 591.

the mortgage creditors upon the homestead to the extent of such payment.[70]

§ 187. **Property assigned.**—Upon the filing of a petition in bankruptcy within four months of a general assignment for the benefit of creditors, the latter is void and the trustee in bankruptcy takes the property as though such assignment had never been made; and may, by proper proceedings, recover the same if not voluntarily surrendered to him. While the making of such an assignment is not actually fraudulent but only fraudulent in law, and, since the exemption laws are given for the protection of the family and not the benefit of the individual and are to be liberally construed,[71] the assignor in such assignment is entitled to his exemptions out of the assigned property in case of subsequent bankruptcy proceedings,[72] or out of the proceeds if the same has been sold.[73]

§ 188. **Purchase price not paid.**—By statute in many states it is specifically provided that property or the proceeds thereof when sold, cannot be set apart as exempt where the purchase price has not been paid.[74] Even in the absence of a statute to hold to the contrary would be unconscionable and operate as a great hardship.

§ 189. **Waiver.**—There is much diversity of opinion with reference to the power of the Court of Bankruptcy in cases where there is a waiver of the exemptions either generally as to all creditors or specially as to a particular creditor. Some courts have taken the position that since the title to exempt property does not pass to or vest in the trustee, the Federal

[70] In re Boston, 2 N. B. N. R. 19, 98 F. R. 587, 3 A. B. R. 388.

[71] In re Tilden, 1 N. B. N. 134, 91 F. R. 500, 1 A. B. R. 300; In re Buckingham, 2 N. B. N. R. 617; Sears v. Hanks, 14 O. S. 298, 301.

[72] In re Noell, 2 N. B. N. R. 789; In re Talbott, 116 F. R. 417, 8 A. B. R. 427; Rex v. Capitol Bk., 2 Dill. 367, F. C. 11869; In re Poleman, 9 N. B. R. 376, 5 Biss. 526, F. C. 11247; In re Griffin, 2 N. B. R. 85, F. C. 5813; In re Stevens, 2 Biss. 373, F. C. 13392; Bashinski v. Talbott, 119 F. R. 337.

[73] In re Noell, supra; In re Jones, 2 Dill. 343, F. C. 7445; In re Welch, 5 N. B. R. 348, 5 Ben. 230, F. C. 17366; In re Ellis, 1 N. B. R. 154, F. C. 4400; Vaughan v. Thompson, 17 Ill. 78; Berry v. Hanks, 28 Ill. App. 57.

[74] In re Anderson, 103 F. R. 854, 4 A. B. R. 640; McGahan v. Anderson, 113 F. R. 115, 7 A. B. R. 641; In re Durham, 104 F. R. 231, 4 A. B. R. 760; In re Seydel, 118 F. R. 207; In re Wells, 105 F. R. 762, 5 A. B. R. 308.

Court has absolutely no control or jurisdiction over the same other than to set it apart leaving the person holding such waiver to resort to the state court to enforce this right, if any he has.[75] Serious objection exists as to this position for the reason that if the property has once been set apart as exempt, before the party holding such waiver can enforce his claim, the bankrupt will have received his discharge and the same may be pleaded in bar to an action thereon. To say that a debtor may indiscriminately waive his exemptions and then claim them on subsequently taking advantage of the bankruptcy law would certainly be inequitable.

The right to have property set apart as exempt is a personal privilege, which a bankrupt may claim or waive. While a creditor holding a note or an obligation containing a waiver of exemption does not have a specific lien on the exempt property it does create an incumbrance upon it. Thus, in passing upon a note under the act of 1867, containing a waiver of exemption, Chief Justice Waite said[76] that the owner of a homestead has the absolute control over it and may deal with it in such manner as he sees fit, and has the right to sell or incumber it as suits his convenience, and adds: "If he sells or incumbers before he selects, his power of selection as against such sale or incumbrance is gone. No particular form of incumbrance is specified; that is left to the discretion of the legislature. Now, a waiver of the right to sell is, in effect, an incumbrance on the property which may be selected." Hence, while there is no lien on the property designated, it comes into the bankruptcy court incumbered by a waiver of the right of the bankrupt to claim the property as exempt.

Accordingly, where a bankrupt claims his exemption in property surrendered and debts are proved as to which the benefit of the exemption has been waived, it is the duty of the trustee to sell the property claimed as a homestead, or so much thereof as may be necessary, to pay the debts proved as to which the

[75] In re Camp, 1 N. B. N. 142, 91 F. R. 745, 1 A. B. R. 365; In re Jackson, 116 F. R. 46, 8 A. B. R. 594; In re Hill, 96 F. R. 185, 2 A. B. R. 798; In re Bass, 3 Woods 382, F. C. 1064; In re Stevens, 5 N. B. R. 298; In re Preston, 6 N. B. R. 545; In re Little, 110 F. R. 621, 6 A. B. R. 681; In re Wells, 105 F. R. 762, 5 A. B. R. 296; Woodruff v. Cheeves, 105 F. R. 601, 5 A. B. R. 296, reversing 96 F. R. 317, 2 A. B. R. 679.

[76] In re Solomon, 2 Hughes, 164, F. C. 13166.

benefit of the exemption has been waived, since the claim of such creditor must be paid out of the fund as to which he can alone resort. The residue of the exempt property, if any, or the proceeds of the sale thereof, should then be allowed the bankrupt under his claim.[77]

Furthermore, while objection has been made to the jurisdiction of the bankruptcy court on the ground that the title to the property claimed as exempt does not pass to the trustee, such decisions fail to recognize the fact that where by the laws of the state such waiver is recognized, the property is not absolutely exempt from the payment of the debts.

§ 190. **Homestead, right to.**—The right to a homestead exemption is not given by the Bankrupt Act, but exists by virtue of some state law, if at all, and therefore if the latter makes provision for an exempt homestead, it will be allowed by the bankruptcy courts, otherwise not,[78] but in order to obtain the same the debtor must comply with the provisions of the state law under which he makes claim.[79]

The chief essential to the debtor's right to a homestead is, as a rule, actual selection of the property and its occupancy as such,[80] at the time he makes claim,[81] a mere present intention to make it his homestead being usually held insufficient,[82] as will any selection or occupancy that is not bona fide.[83] In some states he may change his homestead, removing to one more valuable, although but shortly before the proceedings, where it is done in good faith.[84] So it has been held that, in

[77] In re Sisler, 1 N. B. N. 472, 96 F. R. 402, 2 A. B. R. 760; In re Graves, 2 N. B. N. R. 469; Reed v. Union Bk., 29 Gratt. 719; Linkenbroker v. Detrick, 81 Va. 44; In re Solomon, 3 Hughes, 164; In re Harber, 2 N. B. N. R. 449; In re Nunn, 1 N. B. N. 427, 2 A. B. R. 664. See In re Bragg, 2 N. B. N. R. 82; In re Harber, 2 N. B. N. R. 449; In re Becker, 2 N. B. N. R. 202; In re Ross, 2 N. B. N. R. 218; In re Garden, 1 N. B. N. 189, 93 F. R. 423, 1 A. B. R. 582; In re Hoover, 113 F. R. 136; In re Garner, 8 A. B. R. 263; In re Hopkins, 1 A. B. R. 209.

[78] In re Kerr, 9 N. B. R. 566, F. C. 7729.

[79] In re Farish, 2 N. B. R. 62, F. C. 4647.

[80] In re Dawley, 1 N. B. N. 482, and cases cited; In re Gibbs, 103 F. R. 782, 4 A. B. R. 619.

[81] In re Buelow, 2 N. B. N. R. 26, on appeal 230, 98 F. R. 86, 3 A. B. R. 389.

[82] In re Hatch, 1 N. B. N. 293, 2 A. B. R. 36.

[83] In re Wright, 8 N. B. R. 430, F. C. 1806.

[84] Hunergardt v. Dry Goods Co., 116 F. R. 31, 8 A. B. R. 341; In re Stone, 116 F. R. 35, 8 A. B. R. 416;

a state where a husband entitled to curtesy becomes vested with a life estate in his wife's property, he is entitled to a homestead exemption out of the estate he holds in the property occupied by him and his family as a homestead, without regard to the value of the fee where his interest is less.[85]

Where the property claimed by the bankrupt as a homestead appears to be worth more than the homestead exemption, the same may be appraised and assigned as a homestead on payment of the excess over the exemption;[86] or, if the bankrupt makes no application to retain it and pay such excess and it is indivisible, the trustee may apply to the referee for an order of sale, and the validity of such sale does not depend on the filing of the proceedings with the clerk of the bankruptcy court; and the bankrupt, not having objected to such order of sale, can not thereafter attack its validity nor object to the deduction of the value of other assets from his share of the proceeds, which, though not exempt, he received without objection from the trustee.[87]

Where bankrupt has remainder after a life estate, there is not such a possession that he could, either by intent or actual occupancy, claim a homestead.[88] It has been held further that after the death of the father and mother, the homestead character of property continues with the children.[89]

In the absence of a statutory provision to that effect, there can be no homestead exemption in unimproved property;[90] nor where one reserves a room in a building in which he stored some articles, while he boarded at a restaurant and lodged elsewhere;[91] nor where the premises are permanently rented and not occupied by the owner.[92]

§ 191. **Abandonment.**—Homestead rights may be lost by abandonment, but mere physical absence without the intent

contra, In re Wright, 8 N. B. R. 430, F. C. 18067; In re Lammer, 14 N. B. R. 460, 7 Biss. 289, F. C. 8031.

[85] In re Marquette, 103 F. R. 777, 4 A. B. R. 623.

[86] In re Anderson, 103 F. R. 854; In re Carmichael, 108 F. R. 789, 5 A. B. R. 551.

[87] In re Oderkirk, 103 F. R. 779, 4 A. B. R. 617.

[88] In re Fitzsimmons, 2 N. B. N. R. 453.

[89] In re Rafferty, 112 F. R. 512. 7 A. B. R. 415.

[90] In re Duerson, 13 N. B. R. 183, F. C. 4117.

[91] In re Dawley, 1 N. B. N. 528, 94 F. R. 795, 2 A. B. R. 496.

[92] In re Vincent, 115 F. R. 236.

to abandon will not generally destroy the right,[93] nor the use of part of the premises for another purpose, or the renting of part.[94] A temporary removal, even for a long time, or the renting of the property will not suffice to work an abandonment, if the animus revertendi remains,[95] and this is true, although bankrupt, by his attorney's direction, closed and locked his business homestead on filing his petition, intending, however, to resume business, the building and contents passing into the trustee's possession.[96] There can be no intention to return to a state without a former or actual bona fide residence within it.[97]

§ 192. In property mortgaged or transferred.—Questions frequently arise as to the right of the bankrupt to have a homestead exemption where he has transferred or mortgaged the property out of which he would be entitled. Under the act of 1867 the rule was that where a conveyance fraudulent as to creditors was set aside by a bankrupt court, at the instance of the assignee, the parties were restored to the status occupied prior to such conveyance, and a homestead exemption was allowed,[1] and a similar doctrine under the present law was announced under the laws of Tennessee, where a bankrupt husband fraudulently conveyed property to his wife,[2] though, if the wife joined in the fraudulent conveyance, it would not be so.[3] It was also held that a bankrupt who mortgaged the only real estate he possessed, might nevertheless claim a homestead exemption out of it,[4] but that he would not be

[93] In re Pope, 2 N. B. N. R. 427, 98 F. R. 722, 3 A. B. R. 525.

[94] In re Parker, 1 N. B. N. 262, 1 A. B. R. 708; In re Mayer, 108 F. R. 599, 6 A. B. R. 117.

[95] In re Lynch, 1 N. B. N. 182, 1 A. B. R. 245; In re Ross, 2 N. B. N. R. 218; Duddy v. Willis, 99 Mo. 132; Leach v. King, 85 Mo. 413; Bailey Ass. v. Comings, 16 N. B. R. 382, F. C. 733.

[96] In re Harrington, 1 N. B. N. 513, 99 F. R. 390, 3 A. B. R. 639.

[97] In re Dinglehoef, 109 F. R. 866, 6 A. B. R. 242.

[1] In re Detert, 11 N. B. R. 293, F. C. 3829; Cox v. Wilder, 7 N. B. R. 241, 2 Dill. 45, F. C. 3308; Penny v. Taylor, 10 N. B. R. 200, F. C. 10957; McFarland v. Goodman, 11 N. B. R. 134, 6 Biss. 111, F. C. 8789; Bartholomew v. West, 8 N. B. R. 12, F. C. 1071; Smith v. Kehr, 7 N. B. R. 97, 2 Dill. 50, F. C. 13071; contra, Keating v. Keefer 5 N. B. R. 133; In re Dillard, 9 N B. R. 8; In re Graham, 2 Biss. 449; In re Everett, 9 N. B. R. 90.

[2] In re Griffith, 1 N. B. N. 546.

[3] In re Tollett, 2 N. B. N. R. 1096, 105 F. R. 425, 5 A. B. R. 305.

[4] In re Brown, 3 N. B. R. 60, F. C. 1980.

entitled thereto out of lands subject to purchase money mortgage,[5] although without such mortgage, a discharge may be pleaded in bar in an action for the purchase money.[6] So, the cestui que trust under a trust to secure present loans and future advances will be protected against the borrower, who declared the land a homestead, and subsequently obtained such advances, fraudulently concealing his declaration of homestead.[7]

§ 193. —— **When subject to liens.**—The trustee, in alloting exemptions, is not obliged to designate articles free from liens,[8] while such action, when taken, in no wise impairs the right of lien holders whose liens were valid against the property before it was set apart,[9] but when it is subject to debts, so as to render a sale necessary, the cost of converting it into money should be borne by the trustee and the entire proceeds in excess of the debt paid to the bankrupt.[10] They need not come into the bankruptcy court for relief, but may proceed without regard to the bankruptcy proceedings. A mortgagee may enforce his lien in a state court against property that has been set aside as exempt in the bankruptcy court,[11] and a vendor's lien against land may be enforced by sale,[12] but property exempt from levy and sale cannot be sold even to satisfy a prior levy, after bankrupt has filed a petition in bankruptcy,[13] although, while the lien may not prevail against

[5] In re Whitehead, 2 N. B. R. 180, F. C. 17562.

[6] Hoskins v. Wall, 17 N. B. R. 314.

[7] In re Haake, 7 N. B. R. 61, 2 Sawy. 231, F. C. 5883.

[8] In re Preston, 6 N. B. R. 545, F. C. 1394; In re Thomas, 1 N. B. N. 551, 96 F. R. 828, 3 A. B. R. 78.

[9] Haworth v. Travis, 13 N. B. R. 145; Robinson v. Wilson, 14 N. B. R. 565; In re Haake, 7 N. B. R. 61, 2 Sawy. 231, F. C. 5883; In re Preston, 6 N. B. R. 545, F. C. 1394; In re Lambert, 2 N. B. R. 426; In re Garrett, 11 N. B. R. 493; In re Dillard, 9 N. B. R. 8; In re Hutton, 3 N. B. R. 787; In re Whitehead, 2 N. B. R. 599; In re Deckert, 10 N. B. R. 1; In re Bass, 15 N. B. R. 453; In re Broome, 3 N. B. R. 343, 3 Ben. 488.

[10] In re Hopkins, 103 F. R. 781, 4 A. B. R. 619.

[11] Cumming v. Clegg, 14 N. B. R. 49; Bush v. Lester, 15 N. B. R. 36; In re Bass, 15 N. B. R. 453; In re Everett, 9 N. B. R. 90; In re Hunt, 5 N. B. R. 493; Hatcher v. Jones, 14 N. B. R. 387, 53 Geo. 208.

[12] In re Perdue, 2 N. B. R. 67, F. C. 10975; see also In re Martin, 13 N. B. R. 397, 2 Hughes, 418, F. C. 9152; In re Owens, 12 N. B. R. 518, 6 Biss. 432, F. C. 10632; In re Ellis, 1 N. B. R. 154, F. C. 4400.

[13] In re Griffin, 2 N. B. R. 85, F. C. 5813.

property actually exempt, if it has value in excess of the amount of the statutory exemption, the lien will hold upon the excess.[14] The court of bankruptcy has no power to partition property, on a portion of which there is a valid mortgage executed by the bankrupt and his wife, so as to set off a homestead free from liens, or otherwise impair the security, or discharge any part of the property until the debt is paid, or to substitute other security for the mortgage.[15]

§ 194. **Growing crops.**—In the absence of an express provision of law the general rule is that growing crops do not constitute a part of the homestead, but are a part of the assets of the estate;[16] this, however, is a matter governed entirely by the state law.[17]

§ 195. **Head of family.**—As bearing upon the right of a bankrupt to a homestead, or other exemption, it is of importance to determine whether under the law he is the head of a family. This, however, is a question that is generally well settled by the state courts, construing the various exemption statutes, and reference should be had to them.[18] The question most frequently arises where the bankrupt is not married or is divorced and has others dependent upon him.[19]

[14] Haworth v. Travis, 13 N. B. R. 145.

[15] In re Thomas, 1 N. B. N. 551, 96 F. R. 828, 3 A. B. R. 99.

[16] In re Coffman, 1 N. B. N. 402, 93 F. R. 422, 1 A. B. R. 530; In re Daubner, 1 N. B. N. 520, 96 F. R. 855, 3 A. B. R. 368; In re Hoag, 97 F. R. 543, 3 A. B. R. 290; contra In re Eastman, 2 N. B. N. R. 86.

[17] In re Hoag, 3 A. B. R. 290, 97 F. R. 543.

[18] Whitmer v. Field, 53 Vt. 556; Rice v. Rudd, 57 Id. 6; Woodbury v. Warren, 67 Id. 261; Thorp v. Thorp, 70 Id. 49; In re Dawley, 1 N. B. N. 482, Id. 528, 94 F. R. 795, 2 A. B. R. 496; In re McCutchen, 100 F. R. 779, 4 A. B. R. 81, 2 N. B. N. R. 636.

[19] An unmarried bankrupt whose domestic affairs are in charge of a sister, who receives no pay for her services and pays no board, but considers her brother's home her home, has been held to be the head of a family, and entitled as such to a homestead exemption. (Bailey v. Comings, 16 N. B. R. 382, F. C. 733.) So has an unmarried man who supports his widowed mother and minor brothers; In re Morrison, 110 F. R. 734, 6 A. B. R. 488. Owing to peculiar provisions of a state law, an unmarried man who had a household under his supervision, with minor children awarded him as apprentices by orphans' court, was held not to be the head of a family (In re Summers, 3 N. B. R. 21, F. C. 13604), and the same was true of a husband, his minor children living with his divorced wife, and he contributed nothing to their support (In re Tillman, 2 N. B. N. R. 611),

§ 196. **Wife's right.**—Where a husband abandoned his wife, and she obtained a divorce, she has a right to have the premises set apart to her as a homestead, especially when she holds and has held the title in her own right, and continuous actual occupancy is not necessary;[20] and it has been held that she is entitled to a homestead out of lands fraudulently conveyed to her by her husband, a bankrupt, although the conveyance was made to hinder creditors.[21] In Virginia a married woman who holds the title to the property, although living with her husband, is entitled to claim the exemption, as against her own creditors, where she had been trading as a feme sole. She is the head of a family, either alone or jointly with her husband, for homestead purposes.[23] The bankrupt's wife having a separate estate cannot affect his right to a homestead, unless he occupies her property instead of his own.[24]

§ 197. **Re-allotment of.**—Where the homestead set apart in a state court some years prior to the bankruptcy has enhanced in value beyond the amounts prescribed by the statute, bankrupt should only be allowed the statutory value,[25] although it was held under the act of 1867 that where there was no irregularity a re-assessment would not be ordered for mere excess of value.[26] The latter view, however, would probably only hold good in case of recent allotments.[27]

§ 198. **Personal property.**—Since the exemption laws are

while in another case an unmarried man residing in a house of which he was proprietor, and which had no other inmates than hired servants or persons living on his bounty, was held to be the head of a family, and, as such, entitled to a homestead exemption, but not to additional allowances for inmates for whose maintenance he was legally bound (In re Taylor, 3 N. B. R. 38, F. C. 13775). In Virginia a married woman holding title to property, although living with her husband, is entitled to the exemption where she traded as a feme sole, and is held to be the head of a family, either alone or jointly with her husband for homestead purposes. (Richardson v. Woodward, 104 F. R. 873.)

[20] In re Pope, 2 N. B. N. R. 427, 98 F. R. 722, 3 A. B. R. 525.

[21] Roughs v. Hooke, 3 Lea. 302; In re Griffith, 1 N. B. N. 546.

[23] Richardson v. Woodward, 104 F. R. 873.

[24] In re Tonne, 13 N. B. R. 170, F. C. 14095.

[25] In re McBride, 2 N. B. N. R. 345, 99 F. R. 686, 3 A. B. R. 729.

[26] In re Hall, 9 N. B. R. 366, 2 Hughes, 411, F. C. 5921.

[27] In re Rhodes, 109 F. R. 117, 6 A. B. R. 173.

peculiar to the various states and in their interpretation the federal courts consider themselves controlled by the decisions of the highest state courts, recourse must necessarily be had to such decisions interpreting the state statutes as to what personal property is exempt.[28]

[28] "*Wearing Apparel*" as generally used in exemption laws includes all the articles of dress usually worn by persons in the calling and condition of life and in the locality of the residence of the persons claiming the exemption (Sellers v. Bell, 94 F. R. 801, 2 A. B. R. 529). Accordingly there has been set aside as exempt a gold watch (Sellers v. Bell, supra; in re Freeman, 2 N. B. N. R. 569; in re Jones, 2 N. B. N. R. 296; 97 F. R. 773, 3 A. B. R. 259; in re Headley, 2 N. B. N. R. 684; in re Steele, 2 Flip, 324, F. C. 13346; Stewart v. McClung, 12 Ore. 431; Contra, In re Turnbull, 106 F. R. 667, 5 A. B. R. 549; In re Graham, 2 Biss. 449); a diamond stud worth $250 habitually worn to fasten bankrupt's shirt, in the absence of circumstances connected with its acquisition or use tending to show fraud or bad faith toward his creditors (In re Smith, 96 F. R. 832, 3 A. B. R. 140); and a Masonic uniform for occasional wear (Frazier v. Barnum, 19 N. J. Eq. 316).

"*Tools and implements of trade*" have been set apart for a baker (In re Petersen, 1 N. B. N. 430, 95 F. R. 417, 2 A. B. R. 630; In re Osborn, 104 F. R. 780, 5 A. B. R. 111); a carpenter and embalmer (In re Harrington, 1 N. B. N. 513); but they have been refused in case of a merchant (In re Peabody, 16 N. B. R. 243, F. C. 10866; In re Schwartz, 4 N. B. R. 189, F. C. 12503). A watch may be set aside when necessary for a man's business; In re Coller, 111 F. R. 503, 7 A. B. R. 131; contra, In re Turnbull, supra.

"*Domestic animals*" when necessary, as two horses used for team work, have been set apart as exempt (Rowell v. Powell, 53 Vt. 302; Steel v. Lyford, 59 Vt. 230), but they must be capable of such use (Sullivan v. Davis, 50 Vt. 648), an unbroken colt intended for such work (In re Alfred, 1 N. B. N. 136, 1 A. B. R. 243), but not a race horse, though he has been occasionally used for work (In re Libby, 103 F. R. 776, 4 A. B. R. 615), and working animals generally (In re Peabody, 16 N. B. R. 243, F. C. 10866); but unless a bankrupt personally follows some trade, occupation or profession which necessitates the ownership of a wagon and team, and earns his living by such trade, etc., he is not entitled to such property as exempt under the law. (In re Parker, 18 N. B. R. 43, F. C. 10724); as a whitewasher, kalsominer, paperhanger and repairer of plastering (In re Hindman, 104 F. R. 331). The fact that the bankrupt has part of the meat of a swine does not prevent his having his best remaining swine as exempt under a statute exempting his best swine or meat of a swine (In re Libby, 103 F. R. 776, 4 A. B. R. 615). Money claimed in lieu of domestic animals, but which were never owned, cannot be allowed (In re Williams, 2 N. B. N. R. 419).

"*Necessaries*" have been set apart in the way of provisions and fuel (In re Bulow, 2 N. B. N. R.

§ 199. **Successive exemptions.**—While successive allowances will not be made within short periods of time or out of the same property, the debtor may use the exemption allowed him by statute to acquire other property out of which he would be entitled to the same amount of allowance exempt from levy and sale, for it is not contemplated that a debtor having once received his exemptions can never receive them again.[29]

230, 98 F. R. 86, 3 A. B. R. 389), but real estate will not be set aside to cover a deficiency in the value of articles and necessaries (In re Thornton, 2 N. B. R. 68, F. C. 13994), nor money as an exemption, except when it is the proceeds of articles which ought to be set aside under the head of "other articles and necessaries" (In re Welch, 5 N. B. R. 248, 5 Ben. 230, F. C. 17366).

Where a bankrupt executed a mortgage two days before adjudication, he was permitted to retain sufficient for the support of himself and family (In re Thompson, 13 N. B. R. 300, 4 F. C. 13938). Whether the circumstances of the bankrupt require the setting apart of necessaries is a question for the trustees to determine, subject to the approval of the court (In re Hay et al., 7 N. B. R. 344, 2 Lowell, 180, F. C. 6253).

In Arkansas there is no exemption against a judgment or other process for the purchase price while the property remains in the vendee's possession, the possession of which the trustee holds (Fellheimer v. Durham, 3 N. B. N. R. 30). In Pennsylvania a bankrupt may select a portion of his exemptions from personal property and the balance from the proceeds of the sale of real estate (In re Harber, 2 N. B. N. R. 449), and must be claimed in specie and not as cash out of proceeds (In re Sternberg, 3 N. B. N. R. 79; see In re Sunseri, 3 id. 65), but a liquor license not being subject to execution, he has no claim to exemption out of the proceeds of its sale (In re Myers, 2 N. B. N. R. 860, 1049, 102 F. R. 869, 4 A. B. R. 536).

In Washington a bankrupt's claim for exemptions out of a stock of merchandise, some of which had been paid for in full, and all of which had been paid for in part, was allowed, notwithstanding the provision of the statute that no property should be exempt against a claim for the purchase price. (In re Petrini, 1 N. B. N. 264).

In Virginia it was held that where the goods surrendered by a bankrupt were honestly acquired in the regular course of business, he is entitled to a homestead exemption in same, although they were paid for out of the proceeds of goods not paid for. (In re Tobias, 103 F. R. 68, 3 N. B. N. R. 23, 4 A. B. R. 555.)

Change of occupation. It has been held that where one merely temporarily changes his pursuit, he is entitled to the exemptions allowed in his former occupation, provided there was no intention of making a permanent change. (In re Fly, 110 F. R. 141, 6 A. B. R. 550.)

[29] In re Buckingham, 2 N. B. N. R. 617.

§ 200. **Partnership property—firm exemptions.**—There can be no exemption to a co-partnership as such, since it is a personal privilege, in addition to which the adjudication works an absolute dissolution of the firm, and its existence is terminated, so that there is no firm to claim or receive exemptions.[30]

§ 201. **Individual exemptions out of a firm's assets.**—Upon this question the authorities are irreconcilable. The most logical conclusion, however, and that which is supported by the weight of authority, is that the individual members of a firm are not entitled to have any portion of the firm property set apart as exempt unless there should remain a surplus of such property after the payment of all firm debts;[31] this conclusion being based upon the theory that the partnership assets are a trust fund for the payment of firm creditors, the interest of the partners being an interest in the surplus only. The authorities taking the opposite view generally agree, however, that to entitle the individual partners to an allowance out of the firm assets, the other partners must consent thereto and the claim must be seasonably and properly asserted, the signing of the petition by all the partners being prima facie evidence of such consent.[32] Where partners purchase lots,

[30] In re Lentz, 2 N. B. N. R. 190, 97 F. R. 486; In re Friederich, 100 F. R. 284, 3 A. B. R. 801; In re Blodgett, 10 N. B. R. 145, F. C. 1555.

[31] In re Beauchamp, 101 F. R. 106; In re Lentz, 2 N. B. N. R. 190, 97 F. R. 486; In re Hafer, 1 N. B. R. 147, F. C. 5896; In re Handlin, 12 N. B. R. 49, 3 Dill. 290, F. C. 6018; In re Tonne, 13 N. B. R. 170, F. C. 14095; In re Boothroyd, 14 N. B. R. 223, F. C. 1652; In re Hughes, 16 N. B. R. 464, 8 Biss. 107, F. C. 6842; In re Croft Brothers, 17 N. B. R. 324, 8 Biss. 188, F. C. 3404; In re Stewart, 13 N. B. R. 295, F. C. 13420; In re Blodgett, 10 N. B. R. 145, F. C. 1555; In re Demarest, 110 F. R. 638, 6 A. B. R. 232; In re Meriweather, 107 F. R. 102, 5 A. B. R. 435; In re Mosier, 112 F. R. 138, 7 A. B. R. 268; Contra, In re Wilson, 101 F. R. 572; In re Friederich, 95 F. R. 282, affirmed 100 F. R. 284, 3 A. B. R. 801; In re Young, 3 N. B. R. 111, F. C. 18148; In re Rupp, 4 N. B. R. 25, F. C. 12141; In re Richardson, 11 N. B. R. 114, F. C. 11776; Radcliff v. Woods, 25 Barb. 52; In re Camp, 1 N. B. N. 142, 91 F. R. 745, 1 A. B. R. 165; In re Steed, 107 F. R. 682, 6 A. B. R. 73, but in this case it was held that exemptions should not be allowed out of the firm assets unless there are no individual assets. It has been held that where a business is conducted as a partnership but in fact is not, the sale owner is entitled to exemptions. (In re Carpenter, 109 F. R. 558, 6 A. B. R. 465.)

[32] In re Wilson, 101 F. R. 571, 4 A. B. R. 260; In re Friedrich, 100 F. R. 284, 3 A. B. R. 801; In re

taking the title in the firm name, and erect buildings thereon with the understanding that each should own in severalty the lot on which he built, it was held that the interest of each was sufficient to entitle him to a homestead.[33] And where one partner buys out the other members of his firm, he has been held to be entitled to have his exemption set apart, since the firm has been dissolved and he is in the same position as if no firm had ever existed,[34] but where the partners while insolvent agree to dissolve exemptions should not be allowed.[35] Where one partner abandons his interest to his partner just before the latter files a petition, no consideration being given, no exemption should be allowed.[36] Such transmutation of partnership assets into individual property shortly before bankruptcy may be permitted when no fraud is shown or presumable from the facts, and the remaining partner retains his right to claim exemptions out of such property.[37] Where, however, there is a surplus after paying all partnership claims, exemptions may properly be allowed to the individual partners,[38] since such surplus would then become a part of their personal estate.

§ 202. **Taxes on exempt property.**—By section 64 of the law the trustee is required to pay from the general assets "all taxes legally due and owing by the bankrupt," even though they are assessed against property which is set off to the bankrupt as exempt, or are a lien upon and enforceable against such property. This is true, although the effect of such payment is to exhaust the fund which would otherwise be distributed among the general creditors.[39] While such an interpretation of the law may work an injustice to the cred-

Stevenson, 1 N. B. N. 531, 93 F. R. 789, 2 A. B. R. 230; In re Nelson, 2 A. B. R. 556; In re Grimes, 1 N. B. N. 339, 94 F. R. 800, 2 A. B. R. 160; In re Seabolt, 113 F. R. 766, 8 A. B. R. 57.

[33] Bartholomew v. West, 8 N. B. R. 12, F. C. 1071.

[34] In re Bjournstad, 18 N. B. R. 282.

[35] In re Head, 114 F. R. 489, 7 A. B. R. 556.

[36] In re Bergman, 2 N. B. N. R. 806; Contra, In re Rudnick, 2 N. B. N. R. 975, 102 F. R. 750, 4 A. B. R. 531.

[37] In re Lockerby, 3 N. B. N. R. 7.

[38] In re Beauchamp, 101 F. R. 106, 4 A. B. R. 151; In re Tonne, 13 N. B. R. 170; In re Stewart, 13 N. B. R. 295; In re Price, 6 N. B R. 400, F. C. 11410.

[39] In re Tilden, 1 N. B. N. 134, 91

itors the doctrine is doubtless founded upon that liberality of construction of exemption laws which is necessary for the protection of the family in the vicissitudes of financial distress.

§ 203. **Sale and proceeds of exempt property.**—Where property claimed by a bankrupt as exempt has been sold by the trustee, the exemption should be set apart out of the proceeds of the sale,[40] but in this case, the distribution of the money will be regulated by the state laws.[41] In some states it is held that exemptions claimed out of personal property, must be claimed in specie and not out of the proceeds of the sale.[42]

It frequently happens that the bankrupt is entitled to a homestead exemption of a specified amount and the property occupied by him is of greater value and incapable of partition. In such case the property will be sold and the amount of the exemption paid from the proceeds;[43] also where the property is incapable of division without injury and where the interest of the estate and all the parties will be best subserved by its sale as a whole;[44] or where the estate in question is only an estate for years;[45] or out of the equity of redemption, where property is sold under a mortgage by the bankruptcy court;[46] or where the bankrupt consents to the sale upon condition of receiving a share of the proceeds,[47] and where the trustee has, without just cause, refused to set his exemptions aside upon due claim, he may receive his exemptions from the

F. R. 500, 1 A. B. R. 300; In re Baker, 1 N. B. N. 212, 1 A. B. R. 526.

[40] In re Clark, 102 F. R. 602; In re Rodenhagen, 2 N. B. N. R. 674; In re Buckingham, 2 N. B. N. R. 617; In re Beckerford, 4 N. B. R. 59, F. C. 1209; In re Bolinger, 108 F. R. 374, 6 A. B. R. 171; In re Wilson, 108 F. R. 197, 6 A. B. R. 287. In some states this rule does not hold good. See In re Haskin, 109 F. R. 789, 6 A. B. R. 485; In re Manning, 112 F. R. 948, 7 A. B. R. 571.

[41] In re Park, 2 N. B. N. R. 981, 102 F. R. 602, 4 A. B. R. 432; In re Buckingham, 2 N. B. N. R. 617; In re Staunton, 117 F. R. 507.

[42] In re Sunseri, 3 N. B. N. R. 65; see In re Sternberg, 3 id. 79.

[43] In re Lynch, 2 N. B. R. 374, 101 F. R. 579.

[44] In re Edwards, 2 N. B. R. 109; In re Brown, 3 N. B. R. 250; In re Poleman, F. C. 11247; In re Grimes Bros., 1 N. B. N. 426, 2 A. B. R. 610; In re Richard, 1 N. B. N. 487, 94 F. R. 633, 2 A. B. R. 506; In re Diller, 100 F. R. 931.

[45] In re Beckerford, 4 N. B. R. 59, F. C. 12091.

[46] In re Beede, 19 N. B. R. 68, F. C. 1226.

[47] In re Woodard, 1 N. B. N. 430, 95 F. R. 955, 2 A. B. R. 692.

proceeds.[48] It has been held that if he fails to select his exemptions, before the estate is sold, he loses his right thereto.[49] Of a different nature from these sales is the case where articles which would have been exempt are seized and sold under distress for rent; under such circumstances, the bankrupt could not be allowed their value from the general fund, for the proceeds of the sale did not go to swell such fund.[50]

§ 204. **Indian allotments exempt.**—The various treaties with the Indian tribes setting apart portions of the public domain for their use, as a rule contain restrictions either prohibitive or only after a long period of years, upon the alienation of lands alloted in severalty or otherwise. The bankruptcy law recognize all exemptions whether state or federal, and also vests the trustee with title only of such property which, prior to the filing of the petition, bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. Accordingly, since neither of these provisions applies to allotments to Indians, such lands as here indicated would not form a part of the assets of an Indian adjudicated bankrupt.[51]

§ 205. **Pension money exempt.**—All money due or to become due to any person as pension is exempt from attachment, levy or seizure, and is to inure wholly to his benefit,[52] and will be set apart to him in bankruptcy proceedings, provided it is in his hands at the time of filing the petition as it was received, and not loaned, invested or changed in its nature so as to become intermingled with other property interests, thus rendering the pension funds incapable of identification.[53] While such money need not be turned over to the trustee, it should be scheduled by the bankrupt as money on hand with the statement of the exemption.[54]

§ 206. **Costs payable from exemptions.**—The exemptions

[48] In re Brown, 1 N. B. N. 511.

[49] In re Solomon, 10 N. B. R. 9, F. C. 13166.

[50] In re Lawson, 2 N. B. R. 19, F. C. 8149.

[51] In re Russie, 96 F. R. 601, 3 A. B. R. 6; In re Rennie, 2 A. B. R. 182, 1 N. B. N. 335.

[52] U. S. R. S., Sec. 4747.

[53] In re Ellithorpe, 111 F. R. 163, 7 A. B. R. 18, aff'g 5 A. B. R. 681; In re Stout, 109 F. R. 794, 6 A. B. R. 505; Martin v. Bank, 14 Atl. 649; Bank v. Carpenter, 119 N. Y. 550.

[54] In re Bean, 100 F. R. 262, 4 A. B. R. 53.

allowed by the law do not excuse the payment from them of the fees of the bankruptcy court, so as to permit the suit to proceed on an affidavit of inability to advance the costs, as required.[55] Rent for the time the trustee is compelled to occupy premises after adjudication, is a proper charge against the estate and must be paid before bankrupt's exemption can be set apart.[56]

§ 207. **Insurance policies.**—An express exception to the general provisions of section 6 of the law is found in section 70a, in regard to life insurance policies having a cash surrender value. Such policies become a part of the assets to be turned over to the trustee, unless the bankrupt pays or secures to him the amount of such cash surrender value within thirty days after such value has been ascertained. This is the single instance in which the bankruptcy law alters or supersedes the provisions of state exemption laws.[57]

§ 208. **Rule governing construction of state laws.**—The bankruptcy law adopts the exemptions allowed by the state statutes, and the federal court, in allowing exemptions thereunder, is governed by the interpretation of the highest court of the state,[58] so far as construed, and beyond that will apply to them the general established rules of construction.[59] But the bankruptcy court may look to the state constitution, and if the exemption statute is unconstitutional, an exemption claimed thereunder will not be allowed.[60]

[55] In re Hines, 117 F. R. 790, 9 A. B. R. 27; In re Collier, 93 F. R. 191, 1 N. B. N. 257, 1 A. B. R, 182; In re Bean, 100 F. R. 262, 4 A. B. R. 53; Contra, Sellers v. Bell, 94 F. R. 801, 2 A. B. R. 529.

[56] In re Grimes, 1 N. B. N. 516, 96 F. R. 528, 2 A. B. R. 730.

[57] In re Lange, 1 N. B. N. 60, 1 A. B. R. 189, 91 F. R. 361; In re Steele & Co. et al. 2 N. B. N. R. 281, 98 F. R. 78, 3 A. B. R. 549; In re Buelow et al. 2 N. B. N. R. 26.

[58] In re Jones, 2 N. B. N. R. 296, 97 F. R. 773, 3 A. B. R. 259; Richardson v. Woodward, 104 F. R. 873; In re Eggert, 2 N. B. N. R. 44; In re Beauchamp, 101 F. R. 106; In re Morris, 2 N. B. N. R. 260; In re Lentz et al. 2 N. B. N. R. 190, 97 F. R. 486, 93 F. R. 789, 2 A. B. R. 230; In re Stevenson et al. 1 N. B. N. 531; In re Camp, 1 N. B. N. 142, 91 F. R. 745, 1 A. B. R. 165; In re Stone, 116 F. R. 35, 8 A. B. R. 416.

[59] Richardson v. Woodward, supra.

[60] In re Buelow, 2 N. B. N. R. 26; on appeal, Id. 230, 98 F. R. 86, 3 A. B. R. 389.

CHAPTER VII.

DUTIES OF BANKRUPTS.

§209. (7a) Duties of bankrupts.
210. —— Attendance of bankrupts at meetings.
211. —— Compliance with orders.
212. —— Concealment of property.
213. —— Duty on presentation of false claims.
214. Schedule, filing of.
215. —— What property to be included.
216. —— Creditors to be included.
217. —— Claim for exemptions to be included.
218. —— Amendment of.
219. —— Effect of including claim.
220. —— Effect of omission from.
221. —— False oath in.
222. —— Relation of schedule to composition proceedings.
223. Payment of money or surrender of property.
224. Waiver of protest.
225. Examination of bankrupt.

§ 209. '**(Sec. 7a) Duties of bankrupts.**—The bankrupt 'shall (1) attend the first meeting of his creditors, if directed 'by the court or a judge thereof to do so, and the hearing 'upon his application for a discharge, if filed;

'(2) Comply with all lawful orders of the court;

'(3) Examine the correctness of all proofs of claims filed 'against his estate;

'(4) Execute and deliver such papers as shall be ordered 'by the court;

'(5) Execute to his trustee transfers of all his property in 'foreign countries;

'(6) Immediately inform his trustee of any attempt, by his 'creditors or other persons, to evade the provisions of this 'Act, coming to his knowledge;

'(7) In case of any person having to his knowledge proved 'a false claim against his estate, disclose that fact immedi-'ately to his trustee;

'(8) Prepare, make oath to, and file in court within ten 'days, unless further time is granted, after the adjudication, 'if an involuntary bankrupt, and with the petition if a vol-'untary bankrupt, a schedule of his property, showing the 'amount and kind of property, the location thereof, its money 'value in detail, and a list of his creditors, showing their

'residences, if known, if unknown, that fact to be stated, the 'amounts due each of them, the consideration thereof, the 'security held by them, if any, and a claim for such exemp- 'tions as he may be entitled to, all in triplicate, one copy of 'each for the clerk, one for the referee, and one for the 'trustee; and

'(9) When present at the first meeting of his creditors, and 'at such other times as the court shall order, submit to an 'examination concerning the conducting of his business, the 'cause of his bankruptcy, his dealings with his creditors and 'other persons, the amount, kind, and whereabouts of his 'property, and, in addition, all matters which may affect the 'administration and settlement of his estate; but no testimony 'given by him shall be offered in evidence against him in any 'criminal proceeding.

'Provided, however, That he shall not be required to attend 'a meeting of his creditors, or at or for an examination at a 'place more than one hundred and fifty miles distant from 'his home or principal place of business, or to examine claims 'except when presented to him, unless ordered by the court, 'or a judge thereof, for cause shown, and the bankrupt shall 'be paid his actual expenses from the estate when examined 'or required to attend at any place other than the city, town 'or village of his residence.'[1]

[1] Analogous provision, Act of 1867, Sec. 11 makes provision for the schedule of property.

Sec. 14. . . . The debtor shall also, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt. . . .

Sec. 26. . . . and he shall execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court. [Provision is here made for bankrupt's absence.] He shall also be at liberty, from time to time, upon oath to amend and correct his schedule of creditors and property, so that the same shall conform to the facts. For good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined as a witness; and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he shall prove to the satisfaction of the court that he was

§ 210. **Attendance of bankrupt at meetings.**—At the first meeting of the creditors, the judge or referee shall preside and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor, but the place of such meeting should be one most convenient for the parties in interest; and it must be held not less than ten nor more than thirty days after the adjudication.[2] The bankrupt is required to be and should be actually present at the first meeting,[3] and, if called upon, testify fully, fairly and truthfully, and, if he fails to do so, only so much of his testimony as is corroborated will be accepted, or it may be rejected in toto if it appears unworthy of credit.[4] His inability to attend the meeting due to sickness may be a sufficient excuse,[5] though as to the sufficiency of which the creditors are to determine and the court will not disturb their decision without good cause shown.[6] Since where bankrupt is dead it is impossible to comply with the requirement as to his personal attendance at a hearing of an application for discharge, or objections thereto, a court of bankruptcy, or the referee to whom such application is referred, has the right to proceed with such hearing notwithstanding such absence.[7] If in involuntary proceedings against the bankrupt he neither enters appearance nor denies by answer the allegations of the petition, he may be ordered to state in writing the number of his creditors and the amount due them,[8] and a failure to comply with such order renders him liable to proceedings in contempt. He must appear in person or by representative at the creditors' meeting in composition,[9] if required so to do.

unable to procure the attendance of his wife. . . .

Sec. 42. . . . The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors and an inventory of his estate in the form and verified in the manner required of a petitioning debtor by section thirteen.

[2] Sec. 55a, act of 1898.

[3] Eagles & Crisp, 2 N. B. N. R. 62, 99 F. R. 695, 3 A. B. R. 733.

[4] In re Tudor, 2 N. B. N. R. 168, 100 F. R. 796, 4 A. B. R. 78.

[5] In re Carpenter, 1 N. B. R. 51, F. C. 2427.

[6] In re Wronkow, 18 N. B. R. 81, F. C. 18105.

[7] In re Parker, 1 N. B. N. 261, 1 A. B. R. 615.

[8] Clinton v. Mayo, 12 N. B. R. 39, F. C. 2899; see also Meetings of Creditors, post, § 817.

[9] In re Scott, 15 N. B. R. 73, F. C. 12519.

§ 211. **Compliance with orders.**—Courts of bankruptcy may enforce obedience by bankrupts and other persons to all lawful orders by fine or imprisonment, or both;[10] and, if the contempt is committed before the referee, he certifies the facts to the judge,[11] and, after a hearing, the latter is authorized to impose punishment.[12]

§ 212. **Concealment of property.**—Should the bankrupt, while such, or after his discharge, conceal from his trustee any property belonging to his estate in bankruptcy, he is liable to imprisonment.[13]

§ 213. **Duty on presentation of false claim.**—Any person presenting under oath, a false claim for proof against the estate of a bankrupt, or using any such claim in composition, personally or by agent, is liable to imprisonment,[14] and if knowledge thereof comes to the bankrupt it is his duty to disclose the fact immediately to his trustee, and if no trustee has been appointed, it becomes not only the right but the duty of the bankrupt to move to set aside and expunge the proof and to object to the allowance of such claim.[15] If a claim omits one of the essential facts required by good pleading, but complies apparently with the forms, orders and statute, a referee can only allow it as requested since he is required merely to see that the formal requisites are complied with, but it is the bankrupt's duty or the trustee's, if one is appointed, in such case to file objection to the claim, or petition for a re-examination.[16]

§ 214. **Filing schedule.**—If the bankrupt fails to file the schedule of property and list of creditors required, the referee must do so;[17] but, if the debtor is notified to furnish the schedule and fails, the creditor may apply for an attachment against him.[18] Such schedule must be printed or typewritten, or written plainly, without abbreviation, or interlineation, except such be for the purpose of reference.[19] Schedules

[10] Sec. 2 (13), act of 1898.
[11] Sec. 41b, act of 1898.
[12] Sec. 2 (16), act of 1898; see Contempts, sec. 2 (13), ante, p. 43.
[13] Sec. 29b, act of 1898.
[14] Sec. 29b, act of 1898.
[15] In re Ankeny, 2 N. B. N. R. 349, 100 F. R. 614, 4 A. B. R. 72.
[16] In re Ankeny, 1 N. B. N. 511.
[17] Sec. 39 (6), act of 1898.
[18] G. O. IX.
[19] G. O. V.

conforming in all respects with the act are sufficient, though not containing all the allegations and statements required by the forms.[20] It has been held, however, that a petition, or other pleading, neither typewritten[21] nor on the prescribed printed[22] form, should be dismissed by the court on its own motion.

§ 215. **What property should be included in the schedule.**—The schedule should include all property which, prior to the filing of the petition, the bankrupt could have transferred, or which might have been levied upon and sold on judicial process; but not property acquired after such filing.[23] See also Title of Trustee, post § 1146.

§ 216. **Creditors to be included in the schedule.**—A debtor is required to file a list of his creditors and the amount of their respective claims,[24] including his wife if a creditor;[25] and he should set down in such schedule all the papers upon which he may be liable, with proper explanations in regard thereto.[26] When all the members of a firm file a petition, they are jointly and severally bound to make the required statements of their debts, whether copartnership or individual, or due them jointly with other persons not parties to the petition;[27] and the existence of a difference between the list of creditors filed by the debtor and the list filed by the petitioning creditors constitutes an issue to be tried and determined as a result of evidence.[28] The legal names of creditors, that is, the Christian name as well as the surname, should appear in the schedule; and in giving the addresses of creditors, while the ordinary and common abbreviations for the names of states may be used, the abbreviations of the names of cities and villages, not being in common use, should not, nor is the use of ditto marks to be encouraged; and wherever possible

[20] In re Soper, 1 A. B. R. 193.

[21] Mahoney v. Ward, 2 N. B. N. R. 538, 100 F. R. 278, 3 A. B. R. 770.

[22] Anon. 1 N. B. N. 239.

[23] Sec. 70a, act of 1898, post, p. 691; In re Harris, 1 N. B. N. 384. 2 A. B. R. 359.

[24] Sav. Bk. v. Palmer, 10 N. B. R. 239, F. C. 17207.

[25] In re Rosenfield, 2 N. B. R. 49, F. C. 12057.

[26] In re Henry, 17 N. B. R. 463, 9 Ben. 449, F. C. 6370.

[27] In re Leland, 5 N. B. R. 222, 5 Ben. 168, F. C. 8228.

[28] In re Hymes, 10 N. B. R. 433, 7 Ben. 427, F. C. 6986.

the street number should be given in large cities.[29] And any debt which was not duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had actual notice or knowledge of the proceedings, will not be affected by a discharge.[30]

§ 217. Claim for exemptions to be included in schedule.—See Exemptions, ante, § 183.

§ 218. Amendment of schedule.—In case the schedule and list are defective, it is the duty of the referee to see that they are amended;[31] but this only refers to defects in complying with the formal requisites of the forms, orders and statute, as the referee's duty to examine the schedule and list extends only to such matters.[32] Schedules filed prior to the promulgation of the general orders by the Supreme Court should be allowed to be amended and supplemented to conform to the requirements of such rules, and such amended schedules should be filed as of the date of the filing of the original schedules.[33] In case of ignorance or mistake, either of fact or law, the court has power in its discretion and, in a proper case, to allow amendments and will in general exercise that power in the absence of fraud and when all the parties can be placed in the same situation they would have occupied if the error had not occurred and where justice seems to demand such amendment;[34] which may be done on application of the petitioner. The amendments should be written or printed, signed and verified, like the originals, and, if made to separate schedules, must be made separately, with proper references; and the application must state the cause of the error in the paper originally filed.[35] The failure to file a complete schedule originally is not fatal provided it is afterwards corrected by an amended schedule, and, if the bankrupt has filed such amended schedule and it is accepted both by the court and by the

[29] In re Mackey, 1 A. B. R. 593; In re Brumelkamp, 1 N. B. R. 360, 2 A. B. R. 318, 95 F. R. 814.

[30] Sec. 17a, act of 1898; Barnes v. Moore, 2 N. B. R. 174; Lamb v. Brown, 12 N. B. R. 522, F. C. 8011.

[31] Sec. 39 (2), act of 1898; In re Mackey, 1 A. B. R. 593; In re Brumelkamp, 1 N. B. N. 360, 2 A. B. R. 318, 95 F. R. 814.

[32] In re Ankeny, 1 N. B. N. 511.

[33] In re Harris, 1 N. B. N. 384, 2 A. B. R. 359.

[34] In re Bean, 100 F. R. 262, 4 A. B. R. 53; In re Myers, 3 A. B. R. 760; In re Wilder, 2 N. B. N. R. 629, 101 F. R. 104, 3 A. B. R. 761.

[35] G. O. XI.

objecting creditors, neither having objected to it at the time it was filed or to the manner of its filing, it is sufficient.[36] Where the case has been referred to the referee, he may pass upon the application to amend, his action being subject to review by the judge.[37] In either case the power exists but its exercise rests in the sound judicial discretion of the court.

The application to amend may be made ex parte, and unless good reasons are shown, the bankrupt may be allowed to amend his schedule to include additional property;[38] and to correct material mistakes, as the entire omission of a debt, or the name of a creditor,[39] in which event it has been held that the amendment would relate back to the time of the filing of the petition.[40]

Amendments should not be allowed, except upon such conditions as to prevent injustice, and hence, if new creditors are introduced, or application to amend is made after adverse parties have appeared in the case, notice should be given to all interested parties and, in proper cases, conditions should be imposed on the allowance of the amendment.[41] A bankrupt may, even after consideration of specifications in opposition to discharge, amend his schedule, by order of the court,[42] or before the distribution of the estate where the purpose is to claim further exemptions.[43]

§ 219. **Effect of including claim in schedule.**—Including a claim in his schedule is not equivalent to a new promise by the bankrupt or sufficient to revive a debt already barred by the statute of limitations;[44] but wherever any doubt exists as to whether a claim is barred in any jurisdiction other than the one in which proceeding is pending, it should be included in order that it may be discharged. The classification in the schedule as partnership assets of real estate held by the

[36] In re Mudd, 2 N. B. N. R. 710.

[37] G. O. XXVII.

[38] In re Watts, 2 N. B. R. 145, 3 Ben. 166, F. C. 17293.

[39] Beebe v. Pyle, 18 N. B. R. 162; In re Heller, 5 N. B. R. 46, F. C. 6339.

[40] In re Beerman, 112 F. R. 662, 7 A. B. R. 434.

[41] In re Perry, 1 N. B. R. 2, F. C. 10998; In re Ratcliff, 1 N. B. R. 98, F. C. 11578; In re Morganthal, 1 N. B. R. 98, F. C. 9813.

[42] In re Preston, 3 N. B. R. 27, F. C. 11392.

[43] In re Moran, 105 F. R. 901, 5 A. B. R. 472.

[44] In re Lipman, 1 N. B. N. 310, 94 F. R. 353, 2 A. B. R. 46; In re Resler, 1 N. B. N. 280, 95 F. R. 804, 2 A. B. R. 166, 602. See Statute of Limitations, § 995.

partners as tenants in common will not convert the separate property of the individual partners into firm property in derogation of the rights of the separate creditors.[45]

§ 220. **Effect of omission from schedule.**—Whenever a claim is not duly scheduled in time for proof and allowance, it is not released by the discharge unless such creditor had notice or actual knowledge of the proceedings. It is the province of the court to pass on all questions of concealment of assets and failure to name creditors.[46] The correctness of the schedule, or whether a creditor received notice of the proceedings by creditors, does not determine the question of jurisdiction either of the proceedings or to grant a discharge.[47] The omission to place a claim on the list of creditors is merely a circumstance of suspicion;[48] and the omission of a debt contracted with a creditor in his individual capacity, and subsequent to the date of the partnership, under which partnership name he claimed notice as a creditor, was held not to be a fraudulent or wilful omission;[49] and, where an involuntary bankrupt omitted a certain claim from his schedule, his trustee cannot be said to have elected to abandon it, in the absence of any evidence of his knowledge or sufficient means of knowledge of its existence.[50] A deposition of a creditor setting forth a claim against the bankrupt for unliquidated damages for breach of a contract, omitted from the schedule, is not proof thereof, unless the amount is liquidated in the manner prescribed, application for which must have been made by the creditor.[51]

For further discussion under this head see Discharge, post §§ 360, 446, and Offenses, post §§ 637, 638.

§ 221. **False oath to schedule.**—The making of a false oath to a schedule constitutes an offense under the law which would operate as a bar to a discharge.

See Offenses, Chap. XXIX, post § 638.

§ 222. **Relation of schedule to composition proceedings.**—

[45] In re Zug, 16 N. B. R. 280, F. C. 18222.

[46] In re Scott, 15 N. B. R. 73, F. C. 12519.

[47] In re Archenbrown, 11 N. B. R. 149, F. C. 504.

[48] In re Mendelsohn, 12 N. B. R. 533, 3 Sawy. 342, F. C. 9420.

[49] In re Pierson, 10 N. B. R. 107, F. C. 11153.

[50] Dushane v. Beall, 161 U. S. 513.

[51] In re Clough, 2 N. B. R. 59, 2 Ben. 508, F. C. 2905.

In cases of composition the statement should conform to the schedule;[52] but a mistake without fraud, made by the debtor in his statement of the amount due to the creditor, will not vitiate the composition.[53] Where the facts relating thereto are brought out and considered by the creditors in coming to a conclusion as to the composition, it is not a good objection that property standing in bankrupt's wife's name was omitted from the schedule: nor that the schedules stated the debtor's real estate as of unknown or uncertain value.[54]

§ 223. **Payment of money or surrender of property.**—The bankrupt will not be permitted to pay money which he has collected and which belongs to his estate after the petition was filed, as for interest on mortgages, unless such payment is beneficial to the estate.[55] On being adjudicated bankrupt, it is his duty to surrender all his assets, notwithstanding there may be a prospect of settlement with his creditors.[56]

§ 224. **Waiver of protest.**—Where bankrupt is endorser on a note which falls due after adjudication and before the trustee is appointed, it has been held that he may waive demand and notice.[57]

§ 225. **Examination of bankrupt.**—See Chap. XXI, post § 523.

[52] In re Haskell, 11 N. B. R. 164, F. C. 6192.

[53] In re Trafton, 14 N. B. R. 507, 2 Lowell 505, F. C. 14133; Beebe v. Pyle, 18 N. B. R. 162.

[54] In re Welles, 18 N. B. R. 525, F. C. 17377.

[55] In re Ellinger, 18 N. B. R. 222, F. C. 4543.

[56] In re Shaffer, 2 N. B. R. 178, F. C. 12694.

[57] In re Battey, 16 N. B. R. 397, 2 Lowell 409, F. C. 14, 169.

CHAPTER VIII.

DEATH OR INSANITY OF BANKRUPT.

§226. (8a) Effect of death or insanity of bankrupt.
227. Comparison of acts of 1867 and 1898.
228. ——— Bankrupt's death.
229. ——— Bankrupt's insanity.
230. Right of dower on husband's bankruptcy.

§ 226. '(Sec. 8a) Effect of death or insanity of bankrupt. '—The death or insanity of a bankrupt shall not abate the 'proceedings, but the same shall be conducted and concluded 'in the same manner, so far as possible, as though he had not 'died or become insane: *Provided,* That in case of death the 'widow and children shall be entitled to all rights of dower 'and allowance fixed by the laws of the state of the bank-'rupt's residence.'[1]

§ 227. Comparison of acts of 1867 and 1898.—Unless a petition has been filed against the insolvent during his lifetime, the Court of Bankruptcy has no jurisdiction to administer or settle his estate upon a petition filed against his representatives for an act of bankruptcy committed by the deceased, nor has it jurisdiction to entertain a petition filed in his behalf by his representative after his decease for the purpose of having the estate adjudged bankrupt.[2] In comparing the section under the present act with that under the former, it will be observed that the first covers death at any stage of the proceedings, as immediately after the filing of the petition, while the second fixes the time as after the issuing of the warrant. Hence the decisions that the death of the bankrupt prior to the adjudication,[3] or between the entry of the order of adjudication and the physical issuing of the warrant,[4] or of one partner prior to the adjudication,[5] would

[1] Analogous provision of act of 1867. Sec. 12. . . . . If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

[2] See In re Funk, 4 A. B. R. 96.

[3] Frazier v. McDonald, 8 N. B. R. 237, F. C. 5073.

[4] In re Litchfield, 9 N. B. R. 506, 7 Ben. 259, F. C. 8385; Adams v. Terrell, 4 F. R. 796.

[5] Hunt v. Pooke, 5 N. B. R. 161, F. C. 6896.

not abate the proceedings, become immaterial. Since the present act has no similar provision to that found in section 29 of the act of 1867, with reference to bankrupt's oath before discharge, the decisions that a discharge could not be granted where the bankrupt had died before doing what he was personally required to do, do not now apply.[6]

§ 228. **Bankrupt's death.**—As illustrative of the effect of the difference between the former and the present section, the English decisions under their Act of 1869 (sec. 80) that death between the filing of the petition and the adjudication would abate[7] and under the Act of 1883 (sec. 108) which is similar to section 8 of the law in force in this country that it would not,[8] are valuable. The death of the bankrupt after the filing of the petition, although prior to the adjudication,[9] will have no effect upon the proceedings, but they will be conducted and concluded so far as possible as though he had not died. Hence, a court of bankruptcy, or the referee to whom an application for discharge is referred, has the right to proceed with the hearing upon objections thereto and to conduct and conclude the same, although by reason of bankrupt's death it is impossible to comply with the provision requiring his presence at the hearing upon such application.[10]

A brother is not a party in interest and is not entitled to file a petition for leave to dispose of the bankrupt's property in case of his death.[11] Where the debtor appears and confesses the acts of bankruptcy charged in a creditor's petition and a trustee is appointed, a creditor who has proved his debt can not have the adjudication set aside after the death of the bankrupt and after the right of third parties have intervened.[12]

§ 229. **Bankrupt's insanity.**—The Court of Bankruptcy has no jurisdiction to entertain the petition of a lunatic, or of his committee,[13] nor of a petition filed against either,[14] and it has

[6] In re O'Farrell, 2 N. B. R. 484, F. C. 10, 446, 3 Ben. 191; In re Gunike, 4 N. B. R. 92, 2 Biss. 354, F. C. 5868; Contra, Young v. Ridenbaugh, 11 B. R. 563, 3 Dill. 239, F. C. 18, 173.

[7] Ex p. Obbard, 24 L. T. n. s. 145.

[8] In re Walker, 54 L. T. n. s. 682.

[9] In re Hicks, 107 F. R. 910, 6 A. B. R. 182.

[10] In re Parker, 1 N. B. N. 261, 1 A. B. R. 615.

[11] Karr v. Whittaker, 5 N. B. R. 123, F. C. 7613.

[12] In re Thomas, 11 N. B. R. 330, F. C. 13, 891.

[13] In re Eisenberg, 117 F. R. 786, 8 A. B. R. 551; Compare In re Burke, 107 F. R. 674, 5 A. B. R. 843.

[14] In re Funk, 4 A. B. R. 96.

been held that a person so unsound of mind as to be wholly incapable of managing his affairs cannot in that condition commit an act for which he can be forced into bankruptcy.[15] A bankrupt becoming insane after the filing of the petition will have no effect upon the proceedings, but they will be conducted and concluded as far as possible as though he had not become insane.

An idiot or lunatic must in equity, as well as at law, be made a defendant to a suit against him. He must defend by his committee who is also a necessary party to the suit, and it is the duty of the committee to apply for appointment as guardian ad litem for the purpose of making the defense. If there be no committee, or if the committee be antagonistic, a guardian ad litem should be appointed on the application of either the plaintiff or defendant.[16] Accordingly a guardian ad litem should be appointed to defend an involuntary petition against a lunatic when he has no regular guardian or committee appointed for him or for his estate by competent authority of the state having control of his affairs. If he have such committee or guardian he must be brought in by process as well as the lunatic to defend the petition in behalf of the lunatic.[17]

A court of bankruptcy has the same power and duty that a court of equity has ever had toward incompetents who are interested in proceedings pending before it and such duty is to be exercised by the appointment of a guardian ad litem.[18] In a case where a partner not adjudged bankrupt becomes insane and thereafter cannot himself speak or act in the proceedings, he can do so through a guardian appointed for him, and it has been held that by such guardian he may give consent to the administration of the partnership property in bankruptcy.[19]

§ 230. Right of dower on husband's bankruptcy.—The proviso preserves the rights of the wife and children in case of bankrupt's death but leaves the dower and allowances to be

[15] In re Marvin, 1 Dill. 178, F. C. 9178.

[16] 1 Daniell Ch. Pr. 219, 600; 2 id. 287, 302, 403.

[17] In re Burke, supra; Equity Rule, 87.

[18] In re O'Brian, 2 N. B. N. R. 312; In re Burke, 107 F. R. 674, 5 A. B. R. 843; 1 Daniell Ch. Pr. 8.

[19] In re O'Brian, supra.

determined by the laws of the state of bankrupt's residence. It does not establish a new rule but is declaratory of the existing law. The trustee takes the bankrupt's property subject to the same burdens it bore in the bankrupt's hands, one of which is the wife's right to dower, and such right will not be divested by a sale under order of the court of bankruptcy;[20] and, where the wife joins in a deed to release dower and the deed is avoided as made to hinder, delay and defraud creditors, her right thereto is not lost.[21] It has been held that she is not entitled to dower in real estate held as partnership assets.[22] Under a statute providing that a wife divorced from her husband shall be entitled to one-third of his personal property absolutely, her interest after the commencement of a divorce suit but before decree is not such as is provable against the husband's estate nor as will authorize the enjoining of the distribution of one-third of the proceeds of such property.[23]

[20] Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 865; In re Shaeffer, 5 A. B. R. 248; In re Slack, 111 F. R. 523, 7 A. B. R. 121; In re Forbes, 7 A. B. R. 42; see In re Seabolt, 113 F. R. 766, 8 A. B. R. 57.

[21] Cox v. Wilder, 7 N. B. R. 241, 2 Dill. 45, F. C. 3308, rev'g 5 N. B. R. 443, F. C. 3309.

[22] Hiscock v. Jaycox & Green, 12 N. B. R. 507, F. C. 6531.

[23] Hawk v. Hawk, 102 F. R. 679, 2 N. B. N. R. 940, 4 A. B. R. 463.

CHAPTER IX.

PROTECTION AND DETENTION OF BANKRUPTS.

§231. (9a) Protection of bankrupts from arrest.
232. ——— In what cases.
233. Scope of inquiry into state court proceedings.
234. How released from arrest.
235. Protection against arrest—Purpose of.
236. ——— To whom given.
237. ——— When given
238. ——— How given.
239. Liability to arrest.
240. b. Detention of bankrupt for examination.
241. ——— In general—Writ of ne exeat.

§ 231. **'(Sec. 9a) Protection of bankrupt from arrest.**—A 'bankrupt shall be exempt from arrest upon civil process ex-'cept in the following cases: (1) When issued from a court 'of bankruptcy for contempt or disobedience of its lawful 'orders; (2) when issued from a state court having jurisdic-'tion, and served within such state, upon a debt or claim from 'which his discharge in bankruptcy would not be a release, 'and in such case he shall be exempt from such arrest when 'in attendance upon a court of bankruptcy or engaged in the 'performance of a duty imposed by this Act.'[1]

§ 232. **Exemption from arrest, in what cases granted.**—A bankrupt is entitled to exemption from arrest on civil process for a claim from which his discharge in bankruptcy would release him;[2] as in contempt proceedings for failure to obey a state court's order to pay costs;[3] but not in the case of costs adjudged against him after adjudication;[4] or in proceedings in certain states on a judgment for a labor claim;[5] or under a state statute for failure to pay the balance due on

[1] Act of 1867, Sec. 26. . . . . No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

[2] In re Baker, 1 N. B. N. 547, 3 A. B. R. 101, 96 F. R. 954; In re Fife, 109 F. R. 880, 6 A. B. R. 258; Knott v. Putnam, 107 F. 907, 6 A. B. R. 80; see also debts dischargeable, Ch. XVII, post, §§ 418-448.

[3] In re Summers, 1 N. B. N. 60; In re Borst, 2 N. B. R. 62, F. C. 1665.

[4] In re Marcus, 104 F. R. 331, 5 A. B. R. 19; id. 105 F. R. 907, 5 A. B. R. 365.

[5] In re Grist, 1 A. B. R. 89.

goods sold on commission, the balance of sales being payable monthly;[6] or on a judgment in trespass;[7] or for a fraudulent conveyance of property prior to the bankruptcy act;[8] or on attachment in proceedings in a state court to discover assets to satisfy a lien established prior to bankruptcy;[9] and the nature of the process does not affect the question whether mesne or final.[10] Considerable question arose prior to the amendment of 1903, whether a bankrupt would be exempt from arrest upon a claim for alimony, and while it was held that if under the state law the judgment awarding the alimony, created a debt, as to the accrued instalments the discharge would be a release,[11] in view of the law which now specifically exempts alimony, the bankrupt would be liable to arrest. If the court of bankruptcy has for any reason stayed proceedings in such suit the bankrupt will be released from arrest without regard to whether the claim would be released.[12] A bankrupt may commit a contempt against a state court with which the court of bankruptcy would have no power to interfere, as a positive indignity offered to that court in its presence, and in other ways.[13]

The bankrupt is also expressly exempted from arrest on civil process issued by a state court even in cases on claims from which his discharge would not be a release when in attendance on the bankruptcy court or in the performance of a duty imposed by the act, to continue until final adjudication on the application for discharge,[14] and all courts insist upon this right as to parties and witnesses before them, since it is

[6] Grover v. Clinton, 8 N. B. R. 312, F. C. 5845. Contra, In re Kimball, 2 N. B. R. 114, 6 Blatch. 292, F. C. 7769; aff'g 2 N. B. R. 74, 2 Ben. 554, F. C. 7768.

[7] In re Simpson, 2 N. B. R. 17, F. C. 12879.

[8] Goodwin v. Sharkey, 3 N. B. R. 138.

[9] Ex p. Taylor, 16 N. B. R. 40, 1 Hughes, 617, F. C. 13773.

[10] In re Wiggers, 2 Biss. 71; In re Mifflin, 1 Penn. L. J. 146.

[11] Sec. 63, act of 1898, post, p. 579; In re Houston, 1 N. B. N. 305, 2 A. B. R. 107, 94 F. R. 119; In re Van Orden, 1 N. B. N. 475, 2 A. B. R. 801, 96 F. R. 86; In re Shufeldt, 2 N. B. N. R. 517; In re Nowell, 99 F. R. 931, 3 A. B. R. 837; In re Smith, 1 N. B. N. 471, 3 A. B. R. 67; In re Shepard, 97 F. R. 187; Barclay v. Barclay, 2 N. B. N. R. 552; but see In re Challoner, 2 N. B. N. R. 105, 98 F. R. 82, 3 A. B. R. 442.

[12] Wagner v. U. S. 2 N. B. N. R. 1116, 104 F. R. 133, 4 A. B. R. 596.

[13] In re Houston, supra.

[14] G. O. XII (1).

necessary to the orderly conduct of business.[15] But as the court may suspend or vacate the protection from arrest, it may grant it on terms, and hence may require the bankrupt to furnish a bond with sureties conditioned that during its continuance he will obey all orders of the court, and not meanwhile depart from its jurisdiction.[16]

§ 233. **Scope of inquiry into state court proceedings.**—The exemption is conferred because the party becomes amenable to the court of bankruptcy the moment the petition is filed against him, and the enforcing of the exemption by affirmative action is an act "to be done under and in virtue of the bankruptcy." The court of bankruptcy will not go behind the face of the papers in the case in the state court but will release the bankrupt if on their face it appears that the order was made on a claim that is dischargeable; or remand him if the contrary appears,[17] although the right to go behind the face of the papers is maintained in certain cases.[18]

§ 234. **How released from arrest.**—If at the time of filing his petition, a debtor is imprisoned, the court, on application, will order him to be produced on habeas corpus for the purpose of examination but will not order his release.[19] If during the pendency of the proceedings petitioner is arrested or imprisoned on process in any civil action, a habeas corpus will issue on his application to ascertain if the basis of the arrest is a provable debt and, if it is, he will be discharged, otherwise he will be remanded.[20] The use of the term "provable" claim in the general orders is in evident conflict with

[15] See Matthews v. Tufts, 87 N. Y. 568; s. c. 62 How. Pr. 508; and cases cited.

[16] In re Lewensohn, 2 N. B. N. R. 381, 99 F. R. 73, sec. 2 (15), act of 1898.

[17] In re Robinson, 2 N. B. R. 108, 6 Blatch. 253, F. C. 11939; In re Devoe, 2 B. R. 27, 1 Lowell, 251, F. C. 3843; In re Migel, 2 N. B. R. 153, F. C. 9538; In re Valk, 3 N. B. R. 73, 3 Ben. 431, F. C. 16814; In re Kimball, 2 N. B. R. 114, 6 Blatch. 292, F. C. 7769; s. c. 2 N. B. R. 204, 2 Ben. 554, F. C. 7768, disapproving In re Glaser, 1 N. B. R. 73, 2 Ben. 180, F. C. 5474, and In re Kimball, 1 N. B. R. 193, 2 Ben. 38, F. C. 7767.

[18] Electoral College Case, 1 Hughes, 571, F. C. 4336; In re Alsberg, 16 N. B. R. 116, F. C. 261; In re Williams, 11 N. B. R. 145, 6 Biss. 233, F. C. 17, 700; In re Glaser, supra; In re Kimball, supra; In re Smith, 18 N. B. R. 24, F. C. 12976.

[19] In re Claiborne, 109 F. R. 74, 5 A. B. R. 812.

[20] G. O. XXX; In re Fife, 109, F. R. 880, 6 A. B. R. 258.

the act which says "dischargeable" debt and must accordingly yield thereto. If the cause of action is dischargeable, an injunction after adjudication is discretionary and should be granted (1) if the bankrupt is threatened with arrest; (2) if the suit is not yet in judgment, and, even after judgment, if the rights of the general creditors, not parties to the suit, will be jeopardized by further proceedings; or (3) if the judgment is founded on a transaction which is an act of bankruptcy, or a fraud on creditors or the law; but it should never be granted after the judgment has ripened into an execution sale provided the state court has or can be given jurisdiction of all interested parties.[21]

Application is usually made to the bankruptcy court for a writ of habeas corpus and if on the hearing bankrupt appears entitled an order for his release will be made. The motion may be addressed to the state court issuing the process whose duty it is to order the bankrupt's release in a proper case, but a failure or refusal to perform such duty does not deprive the bankruptcy court of its power to release him;[22] but the consideration of such application may properly be postponed until the state court has had an opportunity to pass on the federal question.[23] The bankruptcy court of one district has the power to order the release of a bankrupt from arrest in another district, if the jailor is within its jurisdiction,[24] and such order fully protects the officer holding him and he will not thereafter be liable to punishment by the state court nor to an action for an escape.[25]

§ 235. **Protection against arrest—purpose of.**—This exemption is given to protect a bankrupt from arrest on claims

[21] S. L. & T. Co. v. Benbow, 1 N. B. N. 499, 3 A. B. R. 9, 96 F. R. 514.

[22] In re Williams, 11 N. B. R. 145, 6 Biss. 233, F. C. 17700; In re Glaser, 1 N. B. R. 73, 2 Ben. 180, F. C. 5474; In re Simpson, 2 N. B. R. 17, F. C. 12879; In re Taylor, 16 N. B. R. 40, 1 Hughes, 617, F. C. 13773; In re Migel, 2 N. B. R. 153, F. C. 9538; In re Wiggers, 2 Biss. 71, F. C. 17623; In re O'Mara, 4 Biss. 506, F. C. 10509.

[23] Scott v. McAleese, 1 N. B. N. 265, 1 A. B. R. 650; Ex p. Royall, 117 U. S. 254; Whitten v. Tomlinson, 160 U. S. 241; Ex p. Fonda, 117 U. S. 516; In re Duncan, 139 U. S. 449; N. Y. v. Eno, 155 U. S. 89.

[24] In re Seymour, 1 N. B. R. 29, 1 Ben. 348, F. C. 12694; Hazelton v. Valentine, 2 N. B. R. 12, 1 Lowell, 270, F. C. 6287; Lathrop v. Drake, 13 N. B. R. 472, F. C. 8109, 91 U. S. 516.

[25] In re Kimball, 1 N. B. R. 193, 2 Ben. 38, F. C. 7767.

from which his discharge will be a release and to prevent interference with the bankruptcy proceedings and render them effectual

§ 236. —— **to whom given.**—This exemption is given only to "a bankrupt," which includes any person against whom an involuntary petition or an application to set aside or revoke a discharge has been filed or who has filed a voluntary petition.[26]

§ 237. —— **when given and for what period.**—It begins with the filing of the petition and may exist where there is no adjudication of bankruptcy, and where there may never be, the filing of the petition fixing the time;[27] and applies to arrest after the institution of bankruptcy proceedings only, but does not render the institution of such proceedings a cause for release from prior arrest.[28] The term "when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act," is not to be restricted to the particular occasions when the bankrupt is physically present in attendance in court, or actually engaged in performing a required duty, but is extended[29] to the whole period of time during which his performance of the duties imposed by the act may be ordered, that is, until the final adjudication on his application for discharge, or until the time limited for such application has expired.[30]

§ 238. —— **how given.**—The order referring a case to a referee is required to name a day for the attendance of a bankrupt before the referee, and from that day he may receive protection against arrest to continue until the final adjudication on his application for discharge, unless suspended or vacated by order of the court.[31] The court may therefore prescribe terms, as the giving of security to obey the court's orders and not to depart from its jurisdiction;[32] but when a court of bankruptcy has no power to discharge a judgment, it cannot interfere to prevent its enforcement by

[26] Sec. 1 (4), act of 1898.

[27] State v. Rollins, 13 Mo. 179.

[28] In re Walker, 1 N. B. R. 60, 1 Lowell, 222, F. C. 17060; In re Hazelton, 2 N. B. R. 12, 1 Lowell, 270, F. C. 6287; In re Claiborne, 109 F. R. 74, 5 A. B. R. 812, 3 N. B. A. R. 622; but see Brandon Nat. Bk. v. Hatch, 16 N. B. R. 468.

[29] G. O. XII.

[30] In re Lewensohn, 99 F. R. 73, 2 N. B. N. 381.

[31] G. O. XII (1).

[32] In re Lewensohn, 2 N. B. N. R. 381, 99 F. R. 73.

imprisonment, unless necessary to the exercise of its jurisdiction.[33] A composition satisfies the debt, though based on a sale procured through false representations, and avoids an arrest on civil process.[34]

§ 239. **Liability to arrest.**—A bankrupt is liable to arrest where the proceeding is based on a claim which would not be released by his discharge, except when in attendance on the bankruptcy court or in the performance of a duty imposed by the act which is construed to be from the day his attendance before the referee is required until the final adjudication on his application for discharge;[35] as in the case of a judgment for the support of a bastard child,[36] or for alimony,[37] or where the bankruptcy proceedings were instituted between the service of summons and time of appearance and he failed to appear,[38] or where after being sent to jail bankrupt applied for the poor debtor's oath and on the last day of the examination filed a petition in bankruptcy,[39] or in an action for fraud,[40] or if surrendered in discharge of bail, it being then as if he had never been bailed;[41] or if recaptured after an escape;[42] but a civil action for fraud will be stayed until the determination of the bankruptcy proceedings,[43] though the

[33] In re Pettis, 2 N. B. R. 17, F. C. 11076.

[34] Bamberg v. Stern, 18 N. B. R. 74.

[35] G. O. XII (1); In re Lewensohn, 2 N. B. N. R. 381, 99 F. R. 73; In re Valk, 3 N. B. R. 73, 3 Ben. 431, F. C. 16814; In re Alsberg, 16 N. B. R. 116, F. C. 261; In re Walker, 1 N. B. R. 60, 1 Lowell, 222, F. C. 17060; In re Robinson, 2 N. B. R. 108, 6 Blatch. 253, F. C. 11939; In re Patterson, 1 N. B. R. 58, 2 Ben. 155, F. C. 10817; In re Whitehouse, 4 N. B. R. 15, 1 Lowell, 429, F. C. 17564.

[36] In re Baker, 1 N. B. N. 547, 3 A. B. R. 101, 96 F. R. 954.

[37] In re Nowell, 3 A. B. R. 837, 99 F. R. 931; In re Smith, 1 N. B. N. 471, 3 A. B. R. 67; In re Shepard, 97 F. R. 187; Barclay v. Barclay, 2 N. B. N. R. 552; but see In re Challoner, 2 N. B. N. R. 105, 98 F. R. 82, 3 A. B. R. 442; In re Shufeldt, 2 N. B. N. R. 517; In re Houston, 1 N. B. N. 305, 2 A. B. R. 107, 94 F. R. 119; In re Van Orden, 1 N. B. N. 475, 2 A. B. R. 801, 96 F. R. 86.

[38] In re Graham, 1 N. B. N. 59.

[39] In re Casey, 1 N. B. N. 166.

[40] In re Devoe, 2 N. B. R. 11, 1 Lowell, 251, F. C. 3843.

[41] In re Hazelton, 2 N. B. R. 12, 1 Lowell, 270, F. C. 6287; In re Cheney, 5 Law, Rep. 19, F. C. 2636; In re Rank, Crabbe, 493, F. C. 11566; Foxall v. Levi, 1 Cranch C. C. 139, F. C. 5015; Lingan v. Bayley, 1 id. 112, F. C. 8370.

[42] Anderson v. Hampton, 1 B. & A. 308.

[43] In re Migel, 2 N. B. R. 153, F.

mere filing charges of fraud in a pending civil suit does not act as such stay.[44]

Imprisonment for debt being generally abolished in this country, neither the bankruptcy nor state courts can order one confined therefor, but there are many circumstances arising in the prosecution of cases in which imprisonment is authorized, generally in the nature of contempts for failure to comply with the court's orders, or for fraud.

§ 240. **'b. Detention of bankrupt for examination.**—The 'judge may, at any time after the filing of a petition by or 'against a person, and before the expiration of one month after 'the qualification of the trustee, upon satisfactory proof by 'the affidavits of at least two persons that such bankrupt is 'about to leave the district in which he resides or has his 'principal place of business to avoid examination, and that his 'departure will defeat the proceedings in bankruptcy, issue a 'warrant to the marshal, directing him to bring such bank-'rupt forthwith before the court for examination. If upon 'hearing the evidence of the parties it shall appear to the 'court or a judge thereof that the allegations are true and 'that it is necessary, he shall order such marshal to keep such 'bankrupt in custody not exceeding ten days, but not im-'prison him, until he shall be examined and released, or give 'bail conditioned for his appearance for examination, from 'time to time, not exceeding in all ten days, as required by 'the court, and for his obedience to all lawful orders made in 'reference thereto.'[45]

§ 241. **Detention of bankrupt—Writ of ne exeat.**—The

C. 9538; In re Lewensohn, 2 N. B. N. R. 381, 99 F. R. 73.

[44] Minon v. Van Nostrand, 4 N. B. R. 28, 1 Lowell, 458, F. C. 9642.

[45] Analogous provision of Act of 1867, Sec. 40. . . . . If it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged (bankrupt) and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition or the further order of the court, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

present law gives the court greater power than that under the Act of 1867, but the time within which the debtor may be detained is limited to ten days. The marshal should be directed simply to bring the debtor before the court as the power to hold him ten days depends on the necessary facts being established by evidence at the hearing. The affidavits should state facts as distinguished from conclusions. Under its broad law and equity powers[46] the bankruptcy court may issue an order in the nature of a ne exeat as broad as that provided by sections 717 and 5024 of the Revised Statutes of the United States, whenever necessary for the enforcement of the provisions of the law, and may thereunder arrest the bankrupt whenever the facts warrant the belief that he is about to abscond with or without his property to the embarrassment of the bankruptcy proceedings, and the fact that such order is not in the form provided in this subdivision, requiring the bankrupt to be brought before the court for examination, but in the form usually employed under section 717 of the Revised Statutes does not make the writ void, especially where the arrested parties are immediately brought before the judge and do not ask for an examination or object that none was given, but offer bail which is accepted.[47] The right of arrest given by this provision of the law confers no authority upon the court of bankruptcy to issue a warrant for the arrest of a bankrupt who is not within the district at the time, but who removed therefrom prior to the commencement of the bankruptcy proceedings.[48]

A defendant arrested upon a writ of ne exeat may obtain a discharge of the writ upon giving bond with surety to answer and be amenable to the process of the court.[49]

[46] Sec. 2 (15), act of 1898; In re Schenkein et al., 113 F. R. 421, 7 A. B. R. 162.

[47] In re Lipke, 2 N. B. N. R. 347. 98 F. R. 970, 3 A. B. R. 569; Comp. Usher v. Pease, 12 N. B. R. 305, 116 Mass. 440; In re McKibben, 12 N. B. R. 97, F. C. 8859; In re Hale, 18 N. B. R. 335, F. C. 5911.

[48] In re Ketchum, 108 F. R. 35, 5 A. B. R. 532.

[49] Griswold v. Hazard, 141 U. S. 260.

CHAPTER X.

EXTRADITION OF BANKRUPTS.

§242. (10a) Extradition of bankrupt.
243. —— When extradited.
244. —— How extradited.

§ 242. **'(Sec. 10a) Extradition of bankrupts.**—Whenever 'a warrant for the apprehension of a bankrupt shall have been 'issued, and he shall have been found within the jurisdiction 'of a court other than the one issuing the warrant, he may 'be extradited in the same manner in which persons under 'indictment are now extradited from one district within which 'a district court has jurisdiction to another.'

§ 243. **When bankrupt may be extradited.**—After a warrant, or order, of arrest has been issued for a bankrupt for the commission of an offense under the bankrupt law,[1] or on a charge of contempt,[2] he may be extradited if found within the jurisdiction of a court other than the one issuing the warrant, or order. This provision does not deal with or concern the jurisdiction or power of the court in which the bankruptcy case is pending to issue a warrant for the apprehension of the bankrupt for the purpose of examination, but only confers power on a court other than the one issuing the warrant to extradite the bankrupt.[3]

§ 244. **How bankrupt may be extradited.**—He is to be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another. The statute[4] provides that for any offense against the United States, the offender may be arrested and imprisoned, or bailed, as the case may be, for trial before the court having cognizance of the offense; by any United States judge, United States commissioner, chancellor, judge of the supreme, superior or common pleas court, mayor of a city, justice of the peace or other magistrate, of any state where he may be found, and

[1] Sec. 29b, act of 1898.
[2] Sec. 2 (14), and 41a, act of 1898.
[3] In re Ketchum, 108 F. R. 35, 5 A. B. R. 532.
[4] Rev. Stat. U. S., Sec. 1014.

agreeably to the usual mode of process in such state, and at the expense of the United States; and, where any offender is committed in any district other than the one where the offense is triable, the judge of the district where the offender is imprisoned shall seasonably issue, and the marshal execute, a warrant for his removal to the trial district. Though there may be slight differences in the mode of procedure in different states, the usual course is to present a sworn complaint to a United States commissioner, or other committing magistrate, who thereupon issues a warrant to the marshal to arrest and bring the bankrupt before him. When brought before such officer, the bankrupt makes his plea, and, if it be guilty, he is bailed to appear for trial in the proper court, or committed to await the order of removal, as the case may be. Otherwise he waives examination or demands a hearing. In the former case, the same disposition is made of him as on a plea of guilty. At the examination evidence is introduced for and against, counsel heard and the identity of the offender and his probable guilt must be established. If this is done he is bailed or committed as before stated. Thereupon the district attorney, accompanied by the marshal and the prisoner, go before the judge and apply for an order of removal, and the judge after satisfying himself of the prisoner's identity, his probable guilt, and that he is charged with an offense within the jurisdiction of the trial court, should issue an order directing the marshal to remove the prisoner to the trial district, or may admit him to bail; or, if it appears the removal should not be made, discharge him.[5]

When a bankrupt has once been extradited, he may be detained[6] and obedience to all lawful orders enforced by fine or imprisonment, or both.[7]

[5] In re Dana, 68 F. R. 886; Horner v. U. S. 143 U. S. 207.

[6] Sec. 9, act of 1898.

[7] Sec. 2 (13), act of 1898.

CHAPTER XI.

SUITS BY AND AGAINST BANKRUPTS.

§245. (11a) Stay of suits against bankrupt.
246. Distinction between suits on claims discharged and not.
247. Stay compulsory—Voluntary and Involuntary proceedings.
248. Jurisdiction over applications to stay proceedings.
249. —— Of referees.
250. Proceedings in rem, effect of.
251. State courts not to administer bankrupt's estate.
252. Class of suits stayed—in general.
253. —— Proceedings to enforce valid liens.
254. —— Where decree procured by fraud.
255. —— To administer assignments.
256. —— Proceedings on judgments.
257. —— Contempt proceedings.
258. ——Stay where more than one petition filed.
259. —— Ejectment.
260. —— Fraudulent preferences.
261. Suits not stayed.
262. —— To foreclose liens.
263. —— Mechanics' liens.
264. —— Proceedings to enforce judgment for alimony.
265. —— In which there are receivers.
266. Nature of stay.
267. Permission to sue.
268. Application for a stay—form —service.
269. —— Where made.
270. Time proceedings will be stayed.
271. When stay dissolved.
272. Revival of right to sue after bankruptcy proceedings.
273. Grounds must be pleaded.
274. Review of stay.
275. (11b) Trustee to defend pending suits.
276. When trustee may become a party.
277. How he should become a party.
278. Effect of trustee's appearance.
279. What trustee may plead.
280. Necessary parties.
281. (11c) Trustee to prosecute suits.
282. Suits of bankrupt prosecuted by trustee.
283. What the trustee may do.
284. (11d) Time for bringing suits against trustee.
285. When limitation begins to run.
286. —— When may be pleaded.

§ 245. '**(Sec. 11a) Stay of suits against bankrupt.**—A suit 'which is founded upon a claim from which a discharge would 'be a release, and which is pending against a person at the 'time of the filing of a petition against him, shall be stayed 'until after an adjudication or the dismissal of the petition; 'if such person is adjudged a bankrupt, such action may be

'further stayed until twelve months after the date of such 'adjudication, or, if within that time such person applies for 'a discharge, then until the question of such discharge is 'determined.'[1]

§ 246. Distinction between suits on claims discharged and not.—This section makes a distinction between suits upon claims from which a discharge would be a release and those from which it would not. The logic of this provision is plain. To prosecute to judgment a suit pending against a person at the time the petition is filed is useless, if it is based upon a claim from which a discharge would be a release, unless necessary to settle disputed questions, establish the plaintiff's right, or, under the direction of the court of bankruptcy, liquidate a provable claim,[2] as under any circumstance each creditor would share equally with the others in the distribution of the estate and his rights would be fully preserved by proving his claim against the estate. If, however, the bankrupt is not discharged, the suit may then be prosecuted to judgment. The stay must be until after an "adjudication," which means the date of the entry of a decree that the defendant in a bankruptcy proceeding is a bankrupt, or, if such decree is appealed from, then the date when such a decree is finally confirmed.[3]

§ 247. Stay compulsory—Voluntary and involuntary pro-

[1] Analogous provision of Act of 1867. "Sec. 21. . . . .That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; and no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit of proceedings shall upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid."

[2] 63b, act of 1898.

[3] Sec. 1 (2), act of 1898.

ceedings.—It should be observed that the first three subdivisions of this section deal with suits pending when the petition is filed, that subdivision "a" makes the stay of all suits founded on dischargeable claims and pending when the petition is filed compulsory until an adjudication is made or the petition is dismissed; and leaves the further stay only to the court to determine, and also that though the phrase is "petition against him," voluntary proceedings are included.[4]

§ 248. Jurisdiction over application to stay proceedings.—Application for injunction to stay proceedings in a state court should be made to the court of bankruptcy,[5] who may hear and decide the question, though he may refer such application, or any specified issue arising thereon, to the referee to ascertain and report the facts.[6] The jurisdiction of the bankruptcy court to determine, for the purpose of such application, whether the claim on which the proceedings in the state court are founded is one from which a discharge would be a release, is exclusive and its determination conclusive until revised,[7] and its power to enjoin proceedings in a state court on a dischargeable debt is plenary but its exercise is discretionary. An injunction will usually issue (1) if the bankrupt is threatened with arrest or needless annoyance, (2) if the suit is not yet in judgment, and (3) even after judgment if (a) the rights of general creditors, not parties to such proceedings, will be jeopardized, or (b) the judgment is based on an act of bankruptcy or a fraud on creditors or the law; but in the absence of (a) and (b) it should never issue after execution sale provided the state court has or can be given jurisdiction of all the interested parties.[8] Thus it will restrain a third

[4] Sec. 1, act of 1898; In re Geister, 2 N. B. N. R. 297, 97 F. R. 322, 3 A. B. R. 228.

[5] In re Bolinger, 1 N. B. N. 254; In re Klein, 1 N. B. N. 486, 97 F. R. 31; Contra, In re Geister, 2 N. B. N. R. 297, 97 F. R. 322, 3 A. B. R. 228.

[6] G. O. XII.

[7] Wagner v. U. S., 2 N. B. N. R. 1116, 104 F. R. 133, 4 A. B. R. 596.

[8] In re Southern L. & T. Co. v. Benbow, 1 N. B. N. 499, 96 F. R. 514, 3 A. B. R. 9; Globe Cycle Wks., 1 N. B. N. 421, 2 A. B. R. 447, in which the cases are collated and distinguished; In re Sabine, 1 N. B. N. 45, 1 A. B. R. 315; In re Northrop, 1 A. B. R. 427; Bear v. Chase, 3 A. B. R. 746, 99 F. R. 920, citing Ex p. Christy, 3 How. 292; Chapman v. Brewer, 114 U. S. 158, 173; Moran v. Sturges, 154 U. S. 256, 269, 270, 274; In re Bruss-Ritter, 90 F. R. 651, 1 N. B. N. 39; Lea v. Geo. M. West Co., 1 N. B. N. 79,

person from selling or incumbering property of the bankrupt;[9] or to restrain action against the trustee, if the continuance of the action will embarrass the administration of the estate.[10] The jurisdiction to issue an injunction in certain cases exists notwithstanding the fact that a discharge has been granted.[11] The court of bankruptcy has not authority to withdraw from the state court suits pending therein between the bankrupt and other parties and compel their trial in the district court.[12]

§ 249. —— of referees.—Wherever the court has jurisdiction the referee also has jurisdiction, except where the case is referred to him for a special purpose, or it is a question arising out of applications of a bankrupt for composition or discharge; even though it be a case where the premises affected are in another county of the same Federal judicial district. While this is true, applications for an injunction to stay proceedings of a court or officer must be heard and decided by the judge unless he refers the application in any specified issue arising thereon to the referee to ascertain and report the facts, in which case the referee also has like power with the court to stay suits in the state courts.[13]

1 A. B. R. 261, 91 F. R. 237; In re Smith, 92 F. R. 135, 1 N. B. N. 356, 2 A. B. R. 9; In re Kenney, 1 N. B. N. 401, 2 A. B. R. 494, 95 F. R. 427, s. c. 2 N. B. N. R. 141, 3 A. B. R. 353, 97 F. R. 557, 558; In re Clark, 9 Blachf. 372, F. C. 2801; Watson v. Bk., 2 Hughes, 200, F. C. 17279; In re Whipple, 6 Biss. 516, F. C. 17512; In re Merchants' Ins. Co., 3 Biss. 162, F. C. 9441; In re Miller, 6 Biss. 30, F. C. 9551; In re Kimball, 1 N. B. N. 515, 97 F. R. 29, 3 A. B. R. 161; In re Seebold, 105 F. R. 910, 5 A. B. R. 358.

[9] In re Smith, 8 A. B. R. 55, 113 F. R. 993; Beach v. Macon Grocery Co., 116 F. R. 143, 8 A. B. R. 751; In re Gutman & Wenk, 8 A. B. R. 252; Dietzsch v. Huidekoper, 103 U. S. 494; Chapman v. Brewer, 114 U. S. 158; Garner v. Second Nat. Bk. of Providence, 87 F. R. 833; James v. Central Trust Co. 98 F. R. 489; Mueller v. Nugent, 7 A. B. R. 224.

[10] In re Gutman, 114 F. R. 1009.

[11] Southern L. & T. Co. v. Benbow, 1 N. B. N. 499, 96 F. R. 514, 3 A. B. R. 9.

[12] Samson v. Burton, 4 N. B. R. 1, 5 Ben. 343, F. C. 12285.

[13] In re Mussey, 2 N. B. N. R. 113, 99 F. R. 71, 3 A. B. R. 592; In re Adams, 1 N. B. N. 167, 1 A. B. R. 94; In re Sabine, 1 N. B. N. 45, 1 A. B. R. 315; In re Northrop, 1 A. B. R. 427; In re Huddleston, 1 N. B. N. 214, 1 A. B. R. 572; In re Adams, 1 N. B. N. 167, 1 A. B. R. 94; In re Bolinger, 1 N. B. N. 254; In re Rogers, 1 A. B. R. 541, 1 N. B. N. 211.

§ 250. **Proceedings in rem—Effect of.**—An adjudication of bankruptcy operates in rem, and from the moment of the adjudication the bankrupt's estate is under the jurisdiction of the bankruptcy court, which will not permit any interference with its possession even though it be by an officer of a state court acting under its process.[14] The assertion of any right against or to participate in the res so in custodia legis must be sought in the court in whose custody it is. An attempt to assert such right elsewhere would be a contempt. All persons interested in the res are regarded as parties to the bankruptcy proceedings, including not only the bankrupt and trustee but all the creditors, including lienors. Hence the district court has full jurisdiction over the liens and mortgages upon the bankrupt's property and may inquire into their validity and extent and grant the same relief as could the state courts but for the bankruptcy, without regard to the consent of the lienor.[15] Property in its possession cannot be interfered with by a sheriff under a writ of replevin issued out of a state court, and such proceeding will be stayed;[16] nor can a suit be maintained in a state court by one claiming to be owner to determine title and enjoin the officers of the bankruptcy court from proceeding;[17] nor to restrain a trustee from paying out to creditors a fund in his hands, pending the determination of a suit to establish a lien on such fund; but application must be made to the court of bankruptcy;[18] nor to prevent a trustee from collecting a note payable to the bankrupt;[19] nor will a state court interfere by injunction with a party applying for the benefit of the bankrupt law;[20] nor by an injunction restraining the collection of taxes, prevent a Federal court proceeding to judgment in an action of which it has jurisdic-

[14] In re Chambers, 2 N. B. N. R. 388, 98 F. R. 865, 3 A. B. R. 537; Byers v. McAuley, 149 U. S. 608; Ex p. Johnson, 167 U. S. 120; Jordan v. Taylor, 98 F. R. 643; Keegan v. King, 96 F. R. 758, 3 A. B. R. 79; Chapin v. James, 11 R. I. 87; In re True, 8 A. B. R. 285.

[15] Carter v. Hobbs, 1 N. B. N. 191, 1 A. B. R. 215, 92 F. R. 594.

[16] In re Russell, 101 F. R. 248, 2 A. B. R. 658; In re Schloerb et al., 2 N. B. N. R. 234, 3 A. B. R. 224, 97 F. R. 326; In re Gutwillig. 1 N. B. N. 19; In re Agins, 1 N. B. N. 180.

[17] Keegan v. King, 3 A. B. R. 79, 96 F. R. 758.

[18] Chatt. Nat. Bk. v. Rome Iron Co., 99 F. R. 82, 3 A. B. R. 582.

[19] Southern v. Fisher, 16 N. B. R. 414.

[20] Fillingin v. Thornton, 12 N. B. R. 92.

tion, nor from enforcing its judgment by mandamus to compel the levy and collecting of taxes to pay it.[21]

In order to preserve the property and protect the rights of all the creditors, a court of bankruptcy in which the bankruptcy proceedings are pending has the unquestionable jurisdiction and power to enjoin any disposition thereof which would be in violation of the spirit, intent and purpose of the act[22] and may fine and imprison any of said creditors for attempting to interfere without leave through proceedings in the state court.[23]

§ 251. State courts not to administer bankrupt's estate.— The jurisdiction of a state court does not extend to the administration of a bankrupt's estate,[24] so that an attempt on its part to collect and distribute the assets of an insolvent is in contravention of the bankruptcy law, although the law under which the state court proceeds does not provide for or purport to discharge the debtor from his liabilities.[25] When the right of the state court is to be questioned, it can only be done by the intervention of the trustee.[26]

In order that the state court may have proper notice of the bankruptcy proceedings, the bankrupt, who is defendant in such court, should file there a proper pleading setting up such proceedings.[27] After it is shown that the defendant has been adjudged a bankrupt, the court is bound to take judicial notice that all his property is vested in the trustee, and in the

[21] Clapp v. Otoe County, Neb., 104 F. R. 473.

[22] In re Nathan, 1 N. B. N. 326, 563, 92 F. R. 590; In re Calendar, F. C. 2308; In re Camp, Id. 2346; In re Holland, 12 N. B. R. 403, F. C. 6605; In re Smith, F. C. 12993, 12994; In re Francis-Valentine Co, 1 N. B. N. 104, 529, 2 A. B. R. 522, 94 F. R. 793; In re Murphy, 2 N. B. N. R. 393, 3 A. B. R. 499; In re Russell, 101 F. R. 248, 3 A. B. R. 658; In re Chambers, 2 N. B. N. R. 388, 98 F. R. 865, 3 A. B. R. 537.

[23] In re Winn, 1 N. B. R. 131, F. C. 17876; Markson v. Heaney, 4 N. B. R. 165, F. C. 9098; Irving v. Hughes, 2 N. B. R. 20, F. C. 7076; In re Whipple, 13 N. B. R. 373, 6 Biss. 516, F. C. 17512.

[24] Thornhill v. Bk., 3 N. B. R. 110, F. C. 13990; In re Independent Ins. Co., 6 N. B. R. 260 Holmes, 103, F. C. 7011; In re Merchants Ins. Co., 6 N. B. R. 43, 3 Biss. 162, F. C. 9441; Carling v. Seymour Lumber Co., 8 A. B. R. 29; In re Rogers, 8 A. B. R. 723.

[25] In re Merchants' Ins. Co., supra.

[26] Valliant v. Childress, 11 N. B. R. 317; see Bear v. Chase, 99 F. R. 920, 3 A. B. R. 746.

[27] In re Geister, 2 N. B. N. R. 297, 3 A. B. R. 228, 97 F. R. 322.

case of proceeds of mortgaged property in its possession, not brought there by final process to enforce the mortgage lien, such proceeds must be paid to such trustee and the mortgagee remitted to the bankruptcy court to assert his lien.[28]

§ 252. **Class of suits stayed—in general.**—Any suit interfering with the control of the court of bankruptcy over the bankrupt or his property, or with the due and complete administration of his estate, pursuant to the provisions of the bankrupt law will be stayed.[29] To determine whether a suit is stayed under this subdivision, it is necessary to ascertain if the cause of action in the case is one from which a discharge would be a release, and if it is,[30] the stay will be granted.[31] But it is not confined to technical debts or fixed liabilities.[32] Upon a petition for an injunction to restrain the enforcement of an execution from a state court, the court of bankruptcy is not bound by the finding of the state court that the debt is one not released by the discharge.[33]

§ 253. —— **Proceedings to enforce valid liens.**—Proceedings to enforce valid liens against the bankrupt's property may be stayed until the trustee can look into the matter and decide if any benefit can be secured from the encumbered property for the estate; and may be stayed permanently as far as any personal judgment against the bankrupt is concerned.[34]

§ 254. —— **Where decree procured by fraud.**—A bankruptcy court, notwithstanding bankrupt has received his dis-

[28] Morris v. Davidson, 11 N. B. R. 454.

[29] Booth v. Nickerson, 1 N. B. N. 476, 96 F. R. 943, 2 A. B. R. 770; In re Spencer, 1 N. B. N. 154; In re Gutman, 114 F. R. 1009.

[30] In re Katz, 1 N. B. N. 165, 1 A. B. R. 19; Reid v. Cross, 1 N. B. N. 165, 1 A. B. R. 34; In re Winn. 1 N. B. R. 131, F. C. 17876; In re Van Buren, 19 N. B. R. 149, F. C. 16833; In re Belden, 6 N. B. R. 443, 5 Ben. 476, F. C. 1239; McGehee v. Hentz, 19 N. B. R. 136, F. C. 8794; Penny v. Taylor, 10 N. B. R. 200, F. C. 10957; Boynton v. Ball, 121 U. S. 457; Scott v. Ellery, 142 U. S. 381.

[31] See In re Rogers, 1 N. B. N. 211, 1 A. B. R. 541; see also Chap. XVII.

[32] In re Hilton, 3 N. B. N. R. 105, 104 F. R. 981.

[33] Knott v. Putnam, 107 F. R. 907, 6 A. B. R. 80.

[34] Porter v. Cummings, 1 N. B. N. 520; In re Ball, 118 F. R. 672; McKay v. Funk, 13 N. B. R. 334; Markson v. Heaney, 12 N. B. R. 484; In re Snedaker, 3 N. B. R. 155; In re Migell, 2 N. B. R. 153, F. C. 9538.

charge, will enjoin an officer of a state court and all others from selling bankrupt's property under a decree procured by fraud, and direct its sale by the trustee in bankruptcy free of all liens, transferring to the proceeds of the sale all valid liens on the property.[35]

§ 255. —— **To administer assignments.**—A suit in a state court for the administration of an estate under a general assignment for the benefit of creditors should be stayed by the court of bankruptcy when an adjudication has been made within four months of such assignment, notwithstanding the state court had prior to the filing of the petition secured possession of the corpus of the estate;[36] and service of a copy of the injunction issued by the court of bankruptcy against the assignee is unnecessary, in order to put him in contempt for a violation thereof.[37] Where after such an assignment a vendor of goods alleged to have been fraudulently obtained assigned his claim and the assignee replevied the goods, a miscellaneous seizure being made thereunder prior to the bankruptcy, proceedings under said replevin should be enjoined on account of the abuse of the replevin writ and the proper protection of bankrupt's other creditors.[38] A protest by creditors, made in a state court, against further proceedings under a general assignment executed by the debtor before their petition in bankruptcy, does not have the effect of a writ of injunction from the Federal court.[39]

§ 256. —— **Proceedings on judgments.**—A court of bankruptcy has jurisdiction over a judgment creditor of the bankrupt for the purpose of enjoining him from proceeding in a state court for the enforcement of his judgment against property of the debtor, where the judgment was rendered null or inoperative by the adjudication of the debtor as a bankrupt within four months after its rendition, because all creditors are parties to the proceedings in bankruptcy, and

[35] Southern L. & T. Co. v. Benbow, 1 N. B. N. 499, 96 F. R. 514, 3 A. B. R. 9.

[36] Lea v. Geo. M. West Co., 1 N. B. N. 79, 1 A. B. R. 261, 91 F. R. 237; In re McKee, 1 A. B. R. 311; In re Solomon, 2 N. B. N. R. 460; In re Gutwillig, 1 N. B. N. 554, 92 F. R. 337, 1 A. B. R. 388.

[37] In re Krinsky, 112 F. R. 972, 7 A. B. R. 535.

[38] In re Gutwillig, 1 N. B. N. 19, 166, 90 F. R. 481.

[39] In re Scholtz, 106 F. R. 834, 5 A. B. R. 782.

also because the court has power to restrain any person from illegally possessing himself of assets of the estate.[40] Where the proceedings are against the bankrupt and another, it will enjoin them as to the bankrupt but not as to the other judgment debtor;[41] or will enjoin an action to revive a judgment so that it will operate as a lien on real estate;[42] or an action to enforce a lien when the trustee has appeared therein and the stay of execution is asked that parties may apply to the Federal court.[43] The bankruptcy court will also restrain a threatened levy by a sheriff to satisfy a judgment against the trustee.[44] If a levy be made upon the bankrupt's property upon an attachment granted within four months of the filing of the petition, the sheriff is not required to assume the responsibility of releasing the levy, but the trustee should apply to the court granting the attachment, for an order releasing the same.[45] If the judgment was recovered more than four months prior to the filing of the petition in bankruptcy, the creditor may be permitted to enforce his judgment by execution against real property of the bankrupt on which it is a legal lien. In case the suit is stayed the trustee will be

[40] In re Lesser, 3 A. B. R. 815, 2 N. B. N. R. 599, 100 F. R. 433, s. c. 99, F. R. 913, 3 A. B. R. 758; In re Kletchka, 1 N. B. N. 160, 92 F. R. 901, 1 A. B. R. 479; Johnson v. Rogers, 15 N. B. R. 1, F. C. 7408; In re Pitts, 9 F. R. 542; Olney v. Tanner, 10 F. R. 101, 113; Becker v. Torrance, 31 N. Y. 631; First Nat. v. Shuler, 153 N. Y. 172; Kitchen v. Lowry, 127 N. Y. 53; In re Spencer, 1 N. B. N. 154; In re Globe Cycle Wks., 1 N. B. N. 421, 2 A. B. R. 447; In re Kenney, 1 N. B. N. 401, 2 A. B. R. 494, 95 F. R. 427; Booth v. Nickerson, 1 N. B. N. 476, 96 F. R. 943, 2 A. B. R. 770; In re Francis-Valentine Co., 1 N. B. N. 529, 94 F. R. 793, 2 A. B. R. 522, aff'g 1 N. B. N. 532, 93 F. R. 953, 2 A. B. R. 188; In re Pruschen, 1 N. B. N. 526.

This is contradicted In re Easley, 1 N. B. N. 230, 1 A. B. R. 715, 93 F. R. 419, but as that was decided on the theory that sec. 67f only applied to involuntary proceedings, which position is now held to be erroneous, it is of no force. See also Jones v. Leach, 1 N. B. R. 165, F. C. 7475; In re Tifft, 19 N. B. R. 201, F. C. 14034; but the rule which obtained under the act of 1867 that an honest execution levied prior to the petition was not void, no longer obtains; Goddard v. Weaver, 6 N. B. R. 440, F. C. 5495; Beattie v. Gardner, 4 N. B. R. 106, F. C. 1195; In re Shuey, 9 N. B. R. 526, F. C. 12821.

[41] In re De Long, 1 N. B. N. 26, 1 A. B. R. 66.

[42] Bratton v. Anderson, 14 N. B. R. 99.

[43] Rowe v. Page, 13 N. B. R. 366.

[44] In re Neely, 108 F. R. 371, 5 A. B. R. 836.

[45] Hardt v. Schuylkill Plush & Silk Co., 8 A. B. R. 479.

subrogated to the rights of such plaintiffs and may continue it for the benefit of all the creditors.[46] After the bankrupt's discharge, execution of a judgment upon a debt within the operation of the discharge, will be perpetually stayed.[47]

§ 257. —— **Contempt proceedings.**—A bankrupt should at all times from his adjudication in bankruptcy until the hearing on his application for discharge be at the disposal of the referee and the court, and any proceeding which may or will result in his arrest and imprisonment during the pendency of bankruptcy proceedings, even though such arrest and imprisonment might be contempt of court and habeas corpus would lie, will be stayed.[48]

§ 258. —— **Stay where more than one petition filed.**—In case two or more petitions are filed against the same individual in different districts, the first hearing should be had in the district in which the debtor has his domicile or if against the same partnership or corporation in different courts, each having jurisdiction over the case, the petition first filed should be first heard; and, in either case, the proceedings upon the other petitions should be stayed until an adjudication is made upon the petition first heard, and the court making the first adjudication will retain jurisdiction over all proceedings therein until the same are closed.[49]

§ 259. —— **Ejectment.**—Where a receiver or trustee appointed by the bankruptcy court, has taken possession of a building containing bankrupt's stock in trade or property, he cannot be ousted by proceedings in ejectment brought by the landlord in the state court, but such proceeding will be enjoined especially where it appears that the enforcement of judgment therein would seriously interfere with the administration of the estate and cause loss to creditors. In such

[46] In re Lesser, supra; In re Adams, 1 N. B. N. 167, 1 A. B. R. 94; Smith v. Meisenhemier, 1 N. B. N. 19; Goodwin v. Starkey, 3 N. B. R. 138; In re Hufnagel, 12 N. B. R. 554, F. C. 6837; In re McNamara, 2 N. B. N. R. 341.

[47] Barnes Mfg. Co. v. Norden, 7 A. B. R. 553.

[48] In re Summers, 1 N. B. N. 60; Wagner v. U. S., 2 N. B. N. R. 1116, 104 F. R. 133, 4 A. B. R. 596; In re Grist, 1 A. B. R. 89; In re Migel, 2 N. B. R. 153, F. C. 9538; In re Patterson, 1 N. B. R. 58, 2 Ben. 155, F. C. 10817; In re Williams, 11 N. B. R. 145, 6 Biss. 233, F. C. 17700; but see In re Graham, 1 N. B. N. 59; In re Baker, 1 N. B. N. 325.

[49] G. O. VI; In re Boston H. & E. R. R. Co., 6 N. B. R. 209, 9 Blatch. 101, F. C. 1678.

case the landlord must seek his remedy in the bankruptcy court which, in the exercise of its equitable powers, while giving the fullest recognition to the landlord's legal right, will regulate the time and manner of its exercise so as to cause no unnecessary loss to others[50] and will direct the receiver to surrender the premises at the expiration of such time as may be reasonably necessary for the execution of his trust, (unless it is the purpose to assume the lease as an asset,) awarding the landlord suitable compensation for such occupation.[51]

§ 260. —— **Fraudulent preferences.**—Creditors who have received preference with reasonable cause to believe a preference was intended should be enjoined from disposing of the property transferred pending the adjudication in bankruptcy and the appointment of a trustee;[52] and it is immaterial that the debt which is preferred was contracted in good faith before the passage of the bankrupt law, or that the preferred creditor claims to have disposed of the property when it is found such disposition was merely similated;[53] or in any way proceeding to carry such preference into effect, as by collecting accounts transferred by bankrupt.[54]

§ 261. **Suits not stayed.**—It will be observed that two principles underlie the bankrupt act, (1) the bankrupt's discharge from his provable debts and (2) the equitable and ratable distribution of his collectible assets among his creditors. Wherever these principles are involved the district court has exclusive jurisdiction and pending suits in state courts may be stayed until the bankruptcy proceedings are closed; but, if the cause of action pending in the state court is not dischargeable in bankruptcy or for some other reason the pending suit does not violate the spirit, intent and purpose of the act, it should not be enjoined. Therefore, since subject to certain stated exceptions prior liens upon the bankrupt's assets are not divested by bankruptcy proceedings, only the residue going to the trustee, a judgment creditor's bill seeking

[50] Deweese v. Reinhard, 165 U. S. 386, 390.

[51] In re Chambers, 2 N. B. N. R. 388, 98 F. R. 865, 3 A. B. R. 537.

[52] In re Rockwood, 1 N. B. N. 134, 91 F. R. 363, 1 A. B. R. 272; Sedgwick v. Menck, 1 N. B. R. 108, F. C. 12167; see In re Brown, 91 F. R. 358, 1 A. B. R. 107.

[53] In re Nathan, 1 N. B. N. 326, 563, 92 F. R. 590.

[54] In re Kerski, 1 N. B. N. 328, 2 A. B. R. 79.

to subject specific assets to the payment of the judgment, filed more than four months before the bankruptcy proceedings, should not be stayed, but the trustee may intervene for the protection of the estate.[55]

The granting of a stay after adjudication is always discretionary, but this will not be exercised unless the suit to be stayed is founded upon a claim from which a discharge would be a release;[56] consequently on a motion for a stay for the purpose of determining if a debt is dischargeable, a claim sounding in tort on which a verdict assessing the damages has been rendered, but which is not yet in judgment, will be considered so far liquidated as to come within "judgments in actions."[57] Where a state court has acquired jurisdiction by levy of an execution on a judgment prior to the filing of the petition, a court of bankruptcy will not enjoin the sale of property under the execution upon petition of the bankrupt.[58] Neither will it enjoin the enforcement of judgment and execution against the surety on a bail bond taken in a state court suit pending at the date of the adjudication in bankruptcy.[59] Where an action is commenced long prior to bankruptcy proceedings, the bankruptcy court has not jurisdiction to enjoin such action, or to order the property turned over to the trustee in bankruptcy.[60]

The court of bankruptcy cannot enjoin the bankrupt's colicensee in a liquor license from applying for a renewal, nor require him to join in transferring it to a prospective purchaser, though such license, as far as bankrupt's interest is concerned, passes to the trustee;[61] nor can it enjoint attaching creditors, and a state court receiver appointed at their instance, because they do not become amenable to its jurisdiction by the filing of a petition against the debtor, though they are therein charged with having received an unlawful preference,

[55] Continental Bk. v. Katz, 1 N. B. N. 165, 1 A. B. R. 19; Reid v. Cross, 1 N. B. N. 165, 1 A. B. R. 34; Treadwell v. Halloway, 12 N. B. R. 61; In re Pitts, 19 N. B. R. 63, F. C. 11190; Mason v. Warthen, 14 N. B. R. 346.

[56] In re Cole, 106 F. R. 837, 5 A. B. R. 780.

[57] In re Sullivan, 1 N. B. N. 380, 2 A. B. R. 30.

[58] In re Shoemaker, 112 F. R. 648, 7 A. B. R. 437.

[59] In re Franklin, 106 F. R. 666, 5 A. B. R. 284.

[60] Pickens v. Dent, 9 A. B. R. 47; Metcalf v. Barker, 9 A. B. R. 37.

[61] In re Brodbine, 1 N. B. N. 325, 279, 93 F. R. 643, 2 A. B. R. 53.

unless they are made parties and served with process or voluntarily appear;[62] nor, where a creditor undertaking to reach assets, held in alleged fiduciary capacity, by trustee process in a state court, stipulates to discontinue such suit, and if carried out will avoid the necessity of any injunction, since such questions relate to the discharge and not to the assets or the trustee's right thereto, which is what the court seeks to protect;[63] nor proceedings on appeal taken by the bankrupt before bankruptcy.[64]

§ 262. —— **To foreclose liens.**—Since the stay is purely discretionary with the bankruptcy court, unless it appears that a larger sum would be realized from a sale by the trustee in bankruptcy than under authority of the state court, and the general creditors would be the beneficiaries of this increased price, the proceedings in the state court to foreclose a mortgage should not be stayed,[65] but the trustee should be permitted to intervene or otherwise keep himself informed so as to protect the interest of the estate should a surplus be unexpectedly realized.[66] The same is true where the trustee claims that the amounts claimed by the mortgagees are subject to credits and set-offs;[67] nor will it be stayed where the holder of a chattel mortgage took possession of the mortgaged property long prior to the filing of the petition and brought suit to foreclose such mortgage in a state court, that being the only court in which he could bring it;[68] but it will be stayed if such suit is commenced after the filing of the petition and the validity of the mortgage lien or some part of it is involved in the bankruptcy proceedings.[69] The filing of a petition by the defendant in a state court proceeding to foreclose a lien

[62] In re Ogles, 1 N. B. N. 326, 93 F. R. 426, 1 A. B. R. 671.

[63] In re Jackson, 1 N. B. N. 531, 94 F. R. 797, 2 A. B. R. 501.

[64] O'Neil v. Dougherty, 10 N. B. R. 294; Flanagan v. Pearson, 14 N. B. R. 37.

[65] In re Sabine, 1 N. B. R. 45, 1 A. B. R. 315; In re Pittelkow, 1 N. B. N. 234, 92 F. R. 901, 1 A. B. R. 472; see Kerosene Oil Co., 2 N. B. R. 529; In re Duryea, 17 N. B. R. 495; Augustine v. McFarland, F. C. 648; Eyster v. Gaff, 91 U. S. 521.

[66] In re Holloway, 1 N. B. N. 264, 1 A. B. R. 659, 93 F. R. 638; In re Tait, 1 N. B. N. 140.

[67] In re Porter, 109 F. R. 111, 6 A. B. R. 259.

[68] Heath v. Shaffer, 1 N. B. N. 326, 399, 93 F. R. 647, 2 A. B. R. 98.

[69] In re San Gabriel Sanatorium Co., 2 N. B. N. R. 827, 102 F. R. 310, 4 A. B. R. 197.

on realty created more than four months before the filing of the petition, does not affect the right of the plaintiff to proceed, unless he prove his demand in the bankruptcy court.[70]

If the trustee takes no steps to redeem mortgaged property, the mortgagee may institute foreclosure proceedings in a state court;[71] after first obtaining leave of the court of bankruptcy;[72] and a decree made and a sale had thereafter are valid and a good title passes;[73] and in like manner proceedings may be taken to subject encumbered property to secured creditors' claims where the general creditors and trustee have voluntarily abandoned claim to it.[74]

Though the bankrupt may apply for a stay at any time, it has been held that the trustee's application will be denied and he will be charged with costs where he waited until all the costs except those attending the sale had been incurred in a foreclosure suit.[75]

§ 263. **Mechanics' Liens.**—It is abundantly established by the courts of last resort, Federal and state, that when the jurisdiction of a state court to enforce the liens of a mechanic or material man has attached, that jurisdiction will not be divested by proceedings in bankruptcy instituted subsequently thereto.[76] After the adjudication in bankruptcy, proceedings may be taken to enforce the liens[77] thus obtained, though the better practice is to first obtain leave of the bankruptcy court to enforce the same.

§ 264. **—— Alimony, proceedings to enforce judgments for.** —As has been said, the claim on which the judgment is founded must be one which is released by a discharge, to authorize the court of bankruptcy to stay further proceedings. Since Congress has by its amendment of February 5, 1903,

[70] Reed v. Equitable Trust Co., 8 A. B. R. 242.

[71] McKay v. Funk, 13 N. B. R. 334.

[72] In re Brinkman, 7 N. B. R. 421, F. C. 1884; In re Duryea, 17 N. B. R. 495, F. C. 1196; In re Kerosene Oil Co., 2 N. B. R. 164, 3 Ben. 35, F. C. 7725.

[73] Eyster v. Gaff, 13 N. B. R. 546, 91 U. S. 521; Cutter v. Dingee, 14 N. B. R. 294, 8 Ben. 469, F. C. 3518; In re Wynne, 4 N. B. R. 5, F. C. 18117; Jerome v. McCarter, 15 N. B. R. 546.

[74] Bk. v. Bk., 11 N. B. R. 49.

[75] In re Brinkman, 6 N. B. R. 541, F. C. 1883; The World Co. v Brooks, 3 N. B. R. 146.

[76] Seibel v. Simeon, 62 Mo. 255; see also post § 1094.

[77] In re Emslie, 2 N. B. N. R. 992, 102 F. R. 291, 4 A. B. R. 126, rev'g 2 N. B. N. R. 324, 98 F. R. 716, 3 A. B. R. 516; In re Beck Provision Co., 2 N. B. N. R. 532; In re

specifically excepted alimony from the effects of a discharge, the court of bankruptcy will not stay proceedings to enforce payment of the same.

§ 265. —— **In which there are receivers.**—A stay should not be granted in an interlocutory proceeding for the appointment of a receiver to take charge of realty claimed by the plaintiff, in which the order was framed to avoid conflict between the state and Federal courts as to the final disposition of the realty and the rents and profits which might accrue therefrom in the receiver's hands, further than to enjoin the granting of any money judgment against the defendant;[78] nor where a receiver, appointed in proceedings supplementary to execution had more than a year before the bankruptcy proceedings, secured a judgment setting aside certain transfers by bankrupt as fraudulent, but he should be allowed to administer the property recovered for the benefit of the creditor he represents;[79] nor will a receiver appointed by a state court or attaching creditors be stayed, merely on a prayer in a petition in involuntary bankruptcy, from disposing of the property in his hands.[80]

§ 266. **Nature of stay.**—A restraining order, under section 11, granted ex parte, with permission therein to move to vacate at any time, is in the nature of an order to show cause, and the party restrained thereby becomes a party to the proceeding in bankruptcy, even before adjudication, for the purpose of moving to vacate the order;[81] but not to make a motion to declare a preference in his favor in the proceeds of property attached by him in the state court, if he has not filed his claim in the bankruptcy court.[82] Such an order is in its nature temporary only, and should ordinarily be vacated as a matter of course on application of the creditor, after the bankrupt has been discharged.[83]

§ 267. **Permission to sue.**—The bankruptcy court may re-

Drolesbaugh, 2 N. B. N. R. 1079; Clifton v. Foster, 3 N. B. R. 162.

[78] Porter v. Cummings, 1 N. B. N. 520.

[79] In re Meyers, 1 N. B. N. 293, 1 A. B. R. 347.

[80] Mather v. Coe, 1 N. B. N. 554, 92 F. R. 333, 1 A. B. R. 504; In re Ogles, 1 N. B. N. 326, 1 A. B. R. 671, 93 F. R. 426.

[81] In re Globe Cycle Wks., 1 N. B. N. 421, 2 A. B. R. 447.

[82] In re Ogles, 1 N. B. N. 400, 2 A. B. R. 514.

[83] In re Rosenthal, 108 F. R. 368, 5 A. B. R. 799.

strain a secured creditor from enforcing his claim in any other court or it may authorize him to litigate his claim in a state court;[84] and this will be done as the justice of the case seems to require.[85] It may be permitted for the purpose of ascertaining the amount due, which amount shall be proved in the bankruptcy proceedings, but execution will be stayed;[86] or to liquidate a claim in composition cases;[87] or to prevent the running of the statute of limitations against it, or to make service, or that testimony may not be lost, in the case of a debt from which a discharge would not be a release;[88] or it may permit a sale under execution, where an injunction has been granted restraining such sale, and the judgment creditors are bound by the order of the bankruptcy court and cannot recover the proceeds of the sale from the sheriff;[89] or a sale upon executions issued, on judgment notes dated six months previous and payable one day after date, no resistance being made to the judgments, the liens to remain on the proceeds which were held subject to the court's order;[90] or to bring an action of detinue;[91] but leave is not necessary to enable a landlord to sue a receiver in bankruptcy for fixtures removed from the premises during such receiver's occupancy.[92]

§ 268. **Application for stay—Form—Service.**—The application for stay when addressed to a court of bankruptcy, should be in the form of a motion or petition, setting forth the necessary facts as to the nature of the debt and grounds for relief, supported by affidavits. When the application is made to a state court direct, in addition to the foregoing, the better rule requires that it should be accompanied by a certified copy

[84] Carter v. Hobbs, 1 N. B. N. 191, 1 A. B. R. 215, 92 F. R. 594; In re Brinkman, 7 N. B. R. 421, F. C. 1884; In re Duryea, 17 N. B. R. 495, F. C. 1196; In re Kerosene Oil Co., 2 N. B. R. 164, 3 Ben. 35, F. C. 7725; In re Holloway, 1 N. B. N. 264, 1 A. B. R. 659, 93 F. R. 638.

[85] In re Pittelkow, 1 N. B. R. 234, 1 A. B. R. 472, 92 F. R. 901.

[86] Allen v. Montgomery, 10 N. B. R. 503; In re Rundle, 2 N. B. R. 49, F. C. 12138; In re Winn, 1 N. B. R. 132, F. C. 17876.

[87] Ex p. Trafton, 14 N. B. R. 507, 2 Lowell, 505, F. C. 14133; In re Wehe, 1 N. B. N. 267.

[88] In re Ghirardelli, 4 N. B. R. 42.

[89] O'Brien v. Weld, 15 N. B. R. 405; Samson v. Burt, 6 N. B. R. 403; Markson v. Heaney, 4 N. B. R. 165, 1 Dill. 497, F. C. 9098.

[90] In re Meyer, 1 N. B. N. 99.

[91] In re Huddleston, 1 N. B. N. 214, 1 A. B. R. 572.

[92] In re Kelly Dry Goods Co., 102 F. R. 7474, 4 A. B. R. 528.

of the petition in bankruptcy, and a copy of the motion should be served upon the party to be restrained. As a foundation for enforcing the order by proceedings in contempt, a copy should be served upon the parties against whom it runs. It has been held, however, that a stay directed to the debtor and "all other persons" if served upon the persons to be restrained, need not contain their names.[93] Injunctions in bankruptcy, at least when issued in the primary stage of the proceedings, may be allowed and issued without notice,[94] and when issued on a creditor's petition, the order should conform to the language of the statute;[95] but an injunction will not be granted where the grounds are alleged in the petition on information and belief merely, and the petition is not accompanied by affidavits sustaining the allegations.[96] If the papers disclose that the moving creditor lives at a distance, the application may be made by his attorney in his behalf. It should be apparent from the application papers, in which court the bankruptcy proceedings are pending.[97]

§ 269. ——**Where made.**—The application for stay may be made either to the state court direct or to the court of bankruptcy. If the purpose is to enjoin the action of some person not a party to the proceeding, he should be named in the petition and brought in by subpoena. Thus a bankrupt who is defendant in a state court should file in that court proper pleadings setting up the pendency of the bankruptcy proceedings and ask for a stay; as otherwise the court is without proper notice upon which to act; and it is also the necessary procedure because the creditors, who are plaintiffs in the suit to be stayed, being parties to such action are within the state court's jurisdiction, and will be bound accordingly, while they are not subject to the jurisdiction of the bankruptcy court, and otherwise have not had proper notice of the petition, nor in any way been brought within its actual jurisdiction.[1]

§ 270. **Time when proceedings will be stayed.**—Courts of bankruptcy will only interfere by summary order to avoid a

[93] In re Lady Bryan Min. Co., 6 N. B. R. 252, F. C. 7980.

[94] In re Muller, 3 N. B. R. 86; Deady, 513, F. C. 9912.

[95] In re Keiler, 18 N. B. R. 10. F. C. 7647.

[96] In re Bloss, 4 N. B. R. 37, F. C. 1562.

[97] In re Goldberg, 117 F. R. 692. 9 A. B. R. 156.

[1] In re Geister, 2 N. B. N. R. 297. 3 A. B. R. 228, 97 F. R. 322; Hill

conflict of jurisdiction between the officers of state courts and those of the court of bankruptcy when such conflict clearly appears to exist,[2] and their jurisdiction extends to the enjoining of state court bankruptcy proceedings, though the latter were commenced prior to the filing of the petition in the bankrupt court.[3] They will not restrain proceedings against a bankrupt in a state court unless bankruptcy proceedings are pending;[4] but as soon as they are commenced, the court of bankruptcy acquires sole jurisdiction and may enjoin further proceedings in other courts.[5]

§ 271. **When stay dissolved.**—The general rule is that if the discharge is granted, it may be pleaded in the state court, but if refused, the injunction will be dissolved. If the judgment creditor seeks to have it dismissed, it must be by motion to dissolve and not by petition to dismiss;[6] and, if it restrained a suit pending adjudication, it is dissolved by a discharge in bankruptcy.[7] The fact that the bankrupt had given bond in an action to release an attachment prior to his bankruptcy, and the effect of his discharge on the liabilities of the sureties under the state statute, are matters which cannot be taken into consideration by the court on a motion to vacate the stay, but both parties should be remitted to their rights in the court where the action is pending.[8]

§ 272. **Revival of right to sue after bankruptcy proceedings.**—Since the stay of a suit does not operate as a dismissal but merely suspends the proceedings, if the time within which a discharge may be granted expires without action, it has been held that the right of action revives, since bankruptcy proceedings are not terminated without a discharge.[9] The right of a bankrupt who, prior to the bankruptcy proceedings,

v. Harding, 107 U. S. 631; Boynton v. Ball, 121 U. S. 457; Eyster v. Gaff, 91 U. S. 521.

[2] In re Davidson, 2 N. B. R. 49, 2 Ben. 506, F. C. 3598.

[3] In re Citizens' Sav. Bk., 9 N. B. R. 152, F. C. 2735.

[4] In re Richardson, 2 N. B. R. 74, 2 Ben. 517, F. C. 11774.

[5] In re Vogel, 2 N. B. R. 138, F. C. 16983; Zahm v. Fry, 9 N. B. R. 546, F. C. 18198; In re Ulrich, 8 N. B. R. 15, F. C. 14328; In re Wallace, 2 N. B. R. 52, F. C. 17094; Keenan v. Shannon, 9 N. B. R. 441, F. C. 7640.

[6] In re Mallory, 6 N. B. R. 22, 1 Sawy. 88, F. C. 8991.

[7] In re Thomas, 3 N. B. R. 7, F. C. 13890.

[8] In re Rosenthal, 108 F. R. 368, 5 A. B. R. 799.

[9] Wood v. Hazen, 15 N. B. R. 491.

had brought suit, reverts to him to commence such action after the trustees in bankruptcy have been discharged upon completion of their trusts, if they have done nothing in the original suit in the interval.[10]

§ 273. **Ground must be pleaded.**—The mere filing of a petition in bankruptcy does not divest the jurisdiction of a state court over an action;[11] but to affect such jurisdiction over pending actions, the adjudication or discharge must be pleaded,[12] which may be done at any time after the institution of bankruptcy proceedings, but, if the bankrupt does neither, a judgment rendered against him is lawful and valid.[13] A plaintiff will be estopped from proceeding further with his suit without an order authorizing it where the pendency of the bankruptcy proceedings has been suggested and not denied,[14] or where an affidavit of defense, setting up the adjudication, is filed and the time has not arrived for discharge.[15] If a discharge would be a bar to a suit restrained, the creditor's remedy is to oppose the discharge in the manner provided by the act.[16]

§ 274. **Review of stay.**—The power of the bankruptcy court to stay pending suits after adjudication being purely discretionary, the appellate court will not interfere with its action in the matter on petition for review unless such discretion has been abused.[17] An order staying an action of replevin brought in a state court against a trustee in bankruptcy by a third party, is not a final decision or appealable, but may be brought before the appellate court for review by petition invoking the supervisory power of that court.[18]

[10] Connor v. Southern Exp. Co., 9 N. B. R. 138.

[11] In re Irving, 14 N. B. R. 289, 8 Ben. 463, F. C. 7073; Murphy v. Young, 18 N. B. R. 505.

[12] In re Wesson, 88 F. R. 855; Serra e Hijo v. Hoffman, 17 N. B. R. 124; Haber v. Klauberg, 15 N. B. R. 377; Holden v. Sherwood, 18 N. B. R. 111; Bracken v. Johnson, 15 N. B. R. 106, 4 Dill. 518, F. C. 1761; Revere Copper Co. v. Dimock, 19 N. B. R. 372; Smith v. Engle, 14 N. B. R. 489; Hubert v. Horter, 14 N. B. R. 430.

[13] Cutter v. Evans, 11 N. B. R. 448; Flanagan v. Pearson, 14 N. B. R. 37.

[14] Penny v. Taylor, 10 N. B. R. 200, F. C. 10957.

[15] Frostman v. Hicks, 15 N. B. R. 41.

[16] In re Archenbrown, 11 N. B. R. 149, F. C. 504.

[17] In re Lesser, 2 N. B. N. R. 599, 100 F. R. 433, 3 A. B. R. 815.

[18] Sec. 24 b, act of 1898; In re Russell, 101 F. R. 248, 3 A. B. R. 658.

§ 275. **'b. Trustee to defend pending suits.**—The court 'may order the trustee to enter his appearance and defend 'any pending suit against the bankrupt.'[19]

§ 276. **When trustee may become a party.**—Suits begun against a bankrupt before the latter's bankruptcy may be defended or stayed, in the discretion of the court of bankruptcy, according as the interests of the bankrupt's creditors shall require;[20] and, if it is decided to defend them, the trustee is entitled to be made a party, and the bankrupt will be enjoined from interfering.[21] The court in which an action is pending against the bankrupt will not compel the trustee to become a party,[22] and if he be appointed during the pendency of an action, the other defendants cannot make him a party defendant. If they have a claim for contribution against the bankrupt, their remedy is by intervention in the bankruptcy proceedings.[23]

§ 277. **How he should become a party.**—The trustee in bankruptcy should appear in the state court and, by pleading the adjudication of bankruptcy and his appointment as trustee, lay the foundation for the protection of his rights. If he questions the jurisdiction of the state court, he can plead thereto in proper form. If the case be one that is removable under the provisions of the Judiciary Act, he can make the requisite showing. If he does not dispute the validity of any lien asserted by the plaintiff, he can set up his title and rights as trustee, subject to the admitted lien, and the state court will protect his rights in the premises. If he wishes to contest the validity or extent of the adverse claim asserted by the plaintiff in the state court, he can do so by answer or cross-bill.[24] It has been held that upon an application to intervene by a trustee, the statutes of the state and the rules and practice of its courts, govern as to whether or not the intervention will be permitted, the same as when any other party invokes such court's jurisdiction.[25]

[19] For corresponding feature of act of 1867, *vide* notes under "c," this section.

[20] In re St. Albans Foundry Co., 2 N. B. N. R. 1093, 4 A. B. R. 594.

[21] Samson v. Burton, 4 N. B. R. 1, F. C. 12285; In re O'Connor, 1 N. B. N. 132, 1 A. B. R. 381.

[22] Serra e Hijo v. Hoffman, 17 N. B. R. 124.

[23] Oliver v. Cunningham, 19 N. B. R. 400, F. C. 10493.

[24] Heath v. Shaffer, 1 N. B. N. 399, 93 F. R. 647, 2 A. B. R. 98.

[25] Bank of Commerce v. Elliott, 6 A. B. R. 409.

§ 278. **Effect of trustee's appearance.**—If the trustee appears and pleads in an action he waives want of notice before the bringing of the suit[26] and, should he be substituted for the bankrupt, he is bound by the judgment and the bankruptcy court will not interfere to prevent its execution, nor will he be allowed to attack such judgment any more than any other party.[27]

§ 279. **What trustee may plead.**—A trustee may plead any defense which the bankrupt may plead, unless it is purely personal to the bankrupt, as is a plea of discharge,[28] which must be pleaded affirmatively in a proceeding by scire facias to revive a judgment as well as in an original suit.[29] Where, with the consent of the referee, a scire facias is issued after the adjudication and before the appointment of a trustee upon a mortgage given by the bankrupt, he will not be allowed to have such judgment opened, the testimony showing the claim to be valid and his bankruptcy not relieving the defendant of the duty of filing an affidavit of defense; but the court will permit the trustee, after his appointment, to set up any meritorious defense and open the judgment for that purpose, except when it appears that the claim is valid and permission had been given to enforce it, in which latter case, however, the trustee should be permitted to intervene to be heard on any question arising upon subsequent proceedings.[30]

§ 280. **Necessary parties.**—A bankrupt before bankruptcy, or his trustee thereafter, is a necessary party to suits concerning the bankrupt's property, as a suit in equity or an action at law.[31]

§ 281. **'c. Trustee to prosecute suits.**—A trustee may, with 'the approval of the court, be permitted to prosecute as trustee 'any suit commenced by the bankrupt prior to the adjudica- 'tion, with like force and effect as though it had been com- 'menced by him.'[32]

[26] Rowe v. Page, 13 N. B. R. 366.

[27] In re Van Alstine, 100 F. R. 929, 2 N. B. N. R. 642, 4 A. B. R. 42; In re Skinner, 3 A. B. R. 163, 97 F. R. 190.

[28] Serra e Hijo v. Hoffman, 17 N. B. R. 124; In re Kitzinger, 19 N. B. R. 152, F. C. 7861.

[29] In re Wesson, 88 F. R. 855, 4 Hughes 522.

[30] Neiman v. Shoolbraid, 2 N. B. N. R. 668.

[31] Walker v. Seigel, 12 N. B. R. 394, F. C. 17085; In re Carow, 4 N. B. R. 178, F. C. 2426.

[32] Analogous provision in act of

§ 282. **Suits of bankrupt prosecuted by trustee.**—The suits commenced by the bankrupt prior to the adjudication which the trustee may, with the approval of the court, be permitted to prosecute, are only those in which the estate of the bankrupt has an interest, or which may be prosecuted by the trustee for the benefit of all the creditors, and not one that is personal to the bankrupt.[33] Upon the question as to the effect of the trustee's refusal to prosecute a suit in which he is entitled to enter his appearance, the decisions are conflicting, it being held on the one hand that such suit must be dismissed,[34] and on the other that it might be prosecuted in the name of the bankrupt;[35] or more properly by creditors.[36] There seems to be no good reason why the bankrupt should not be permitted to prosecute such suit where the trustee declines to do so. The trustee may be made a party by supplemental bill to a suit in equity as the bankruptcy of the plaintiff merely makes such suit defective;[37] and it is not necessary to allege his representative character;[38] or be substituted on motion as appellant in a case before the U. S. Supreme Court on appeal where the appellant becomes bankrupt after appeal.[39] Where the trustee brings suit he may be required under state laws to give security for costs.[40]

§ 283. **What the trustee may do.**—Wherever it is for the

1867. "Sec. 14. . . . he may sue for and recover the said estate debts and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been presented or defended by such bankrupt. . . .

Sec. 16. . . . If, at the time of the commencement of proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him."

[33] In re Haensell, 1 A. B. R. 286, 91 F. R. 355, 1 N. B. R. 340 (note); Towle v. Davenport, 16 N. B. R. 478; Noonan v. Orton, 12 N. B. R. 405; In re Franks, 2 A. B. R. 634, 95 F. R. 635; In re Price, 92 F. R. 987, 1 A. B. R. 606.

[34] Towle v. Davenport, supra.

[35] Noonan v. Orton, supra.

[36] In re Groves, 2 N. B. N. R. 466.

[37] Bk. v. Fowler, 12 N. B. R. 289.

[38] Dambmann v. White, 12 N. B. R. 438.

[39] Herndon v. Howard, 4 N. B. R. 61, 9 Wall. 664.

[40] Joseph v. Raff, 9 A. B. R. 227; Joseph v. Makley, 8 A. B. R. 18.

best interest of the estate, the trustee will be authorized to institute suit; thus he may have a partner enjoined in an action for an accounting by one partner against another, which was pending at the time the firm was adjudged bankrupt,[41] or have reinstated, on motion, a case which has been compromised and dismissed by the bankrupt's counsel before the trustee's appointment, but after the adjudication, although the bankrupt had assigned the subject matter of the action to the counsel for his fees;[42] or may enforce a judgment which was recovered in a suit instituted in the name of the husband and wife on the wife's choses in action, to which suit the trustee was made party plaintiff with the bankrupt's wife, and distribute the proceeds among the creditors;[43] or, upon petition in a state court, have a judgment which was obtained within four months of the bankruptcy, set aside.[44]

§ 284. **'d. Time for bringing suits against trustee.**—Suits 'shall not be brought by or against a trustee of a bankrupt 'estate subsequent to two years after the estate has been 'closed.'[45]

§ 285. **When limitation begins to run.**—Courts of bankruptcy may close estates whenever they have been fully administered, though they may be re-opened whenever it appears that they were closed before being fully administered; in which event it would seem that, although the two years had commenced to run, the fact that an estate was re-opened would cause the two-year period to run from the time it was last closed. Under the act of 1867 the limitation began to run when the estate vested in the assignee as such;[46] but under the present act it does not begin to run until the estate has been closed. The limitation here is a statutory limitation as to suits by or against a trustee in bankruptcy in his capacity as such;

[41] In re Clark, 3 N. B. R. 123, 4 Ben. 88, F. C. 2798.

[42] Home Ins. Co. v. Hollis, 14 N. B. R. 337.

[43] In re Boyd, 5 N. B. R. 199, 2 Hughes, 349, F. C. 1745.

[44] Jordan v. Downey, 12 N. B. R. 427.

[45] Analogous provision of act of 1867. "Sec. 14. . . . No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so."

[46] Foreman v. Bigelow, 18 N. B. R. 457, F. C. 9434.

but, even if the action be commenced within two years after the estate has been closed, there is another limitation growing out of the nature of the action or the character of the other parties to the suit, established by the lex fori, which must also be considered. An action may be barred by the one and not by the other.

§ 286. **When limitation may be pleaded.**—The two years' limitation can not be pleaded in an action by the purchaser at a trustee's sale to recover possession;[47] nor where the defendant files a bill of review four years after a judgment declaring a mortgage on the bankrupt's real estate void in a suit in equity brought by the trustee, for a bill of review is not a suit within the meaning of the limitation of the act.[48]

[47] Steele v. Moody, 16 N. B. R. 558.

[48] Wilt v. Stickney, 15 N. B. R. 23, F. C. 17854.

Effect of limitation.—It was held, under the act of 1867, that this limitation applied only to cases brought in regard to property held adversely to the bankrupt and assignee, or cases where suit was brought to recover a debt due bankrupt; and, in other cases, that the limitation was a bar to recovery by the assignee although he had no notice of the existence of the property sought to be recovered. (Freelander v. Holloman, 9 N. B. R. 331, F. C. 5081; Bean v. Brookmire, 4 N. B. R. 57, F. C. 1168; Norton v. De La Villeburn, 13 N. B. R. 304, 1 Woods, 163, F. C. 10350.) Where more than two years after his appointment an assignee was substituted as plaintiff in an action commenced in the name of the bankrupt and a recovery had, the bankrupt could not claim the amount recovered on the ground that the limitation of the act barred his remedy at time of substitution. Maybin v. Raymond, 15 N. B. R. 353, F. C. 9338.

CHAPTER XII.

WHEN COMPOSITIONS CONFIRMED.

§287. (12a) When compositions may be offered.
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§ 287. '(Sec. 12 a) When composition may be offered.— 'A bankrupt may offer terms of composition to his creditors 'after, but not before, he has been examined in open court or at 'a meeting of his creditors and filed in court the schedule of his 'property and list of his creditors, required to be filed by 'bankrupts.'[1]

[1] Act of 1867 contained no analogous provision to this, but by the amendment of June 22, 1874 (18 St. L. 182, par. 17) terms of composition might be offered either before or after adjudication, following largely the provision in the 126th section of the English Act of 1869, which, however, was open to serious objection. The provisions of the two acts may be found in In re Scott, 15 N. B. R. 73, F. C. 12519.

§ 288. **Procedure.**—The calling of a special meeting of creditors to receive an offer of composition is not required, and a submission of such offer to the creditors at their first meeting after an examination of the bankrupt is competent and sufficient; such submission being within the terms of the notice prescribed, which states that the purpose of the meeting embraces the transaction of "such other business as may properly come before said meeting."[2]

Unless waived, at least ten days' notice by mail must be given of all hearings upon applications for the confirmation of compositions.[3] The effect of this confirmation is to discharge a bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge,[4] and revests him with the title to his property.[5] Questions arising out of the applications of bankrupts for the confirmation of compositions must be heard by the courts of bankruptcy and not by the referees.[6]

§ 289. **Petition for composition.**—The petition for a composition should set forth the number of creditors to whom presented, the proposed percentage of payment, and conclude with a prayer for a meeting of creditors to consider its terms.[7] Under the act of 1867 it was held that on filing a petition for a composition, the court would call a meeting of creditors.[8] Any one adjudged bankrupt may offer terms of composition.[9] These provisions as to compositions are to be strictly con-

Under the amendment of 1874, a composition might be confirmed before an examination of the bankrupt, although a petition for a composition might be included in the petition for adjudication, or presented at any time before, in which event a meeting of the creditors was necessary for the examination of the debtor and the filing of a schedule of assets (In re Spades, 13 N. B. R. 72, 6 Biss. 448, F. C. 13196). If a resolution of composition was adopted, a reasonable time might be allowed to secure the additional signatures necessary to confirm it (Idem; In re Spillman, 13 N. B. R. 214, F. C. 13242); but the delay in obtaining them, unaccompanied by laches, would not defeat it (In re Cavan, 19 N. B. R. 303, F. C. 2528); and the creditors affixing signatures to the resolution need not have been present at the meeting, but their names must have been attached at or before the hearing (In re Scott, supra).

[2] In re Hilborn, 104 F. R. 866; 4 A. B. R. 741.

[3] Sec. 58a, act of 1898.

[4] Sec. 14c, act of 1898.

[5] Sec. 70f, act of 1898.

[6] Sec. 38 (4), act of 1898.

[7] Form 60.

[8] In re Spades, 13 N. B. R. 72, 6 Biss. 448, F. C. 13196.

[9] In re Weber Furniture Co., 13

strued and an offer of composition must be presented to all of the creditors of the bankrupt, either separately or collectively, whether they have proved their claims or not, though they will not be permitted to vote on it until they have done so, and all must have a reasonable opportunity to consider it and it must be accepted thereafter by a majority in number and amount of those whose claims have then been allowed.[10] It is not essential that proofs of claims shall be made before, or at, the first meeting, but may be made at any time within a year after the adjudication.[11]

§ 290. **The statements or schedules.**—The schedules the bankrupt is required to file are the same as those prescribed when filing a voluntary petition. If the bankrupt in composition understates a debt unintentionally,[12] or omits a claim which he believes, on the advice of counsel, to be worthless, or omits an asset from the statement without fraud and with knowledge of the creditors,[13] or makes a mistake without fraud in the statement of the amount due a creditor,[14] or states the value of his real estate as unknown,[15] such defects will not vitiate the composition. The statement of composition should conform to the schedule in bankruptcy,[16] and debtor's testimony under oath at meeting of creditors may be considered as part of his statement.[17]

§ 291. **Rights of litigating creditors.**—Attaching creditors have no right to participate in a composition meeting[18] unless they first relinquish their security.[19] Under the act of 1874, it was held that when the debtor filed a petition in bankruptcy and also for composition and was not adjudicated, and a creditor began suit before composition approved, the debtor was not entitled to restrain creditor.[20]

N. B. R. 529; s. c. on appeal, Id. 559, F. C. 17330; Pool v. McDonald, 15 N. B. R. 560, F. C. 11268.

[10] In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 F. R. 808; see also In re Shields, 15 N. B. R. 532, 4 Dill. 588, F. C. 12784.

[11] Sec. 57n, act of 1898.

[12] Beebe v. Pyle, 18 N. B. R. 162.

[13] In re Reiman, 13 N. B. R. 128, 12 Blatch. 562, F. C. 11675.

[14] Ex p. Trafton, 14 N. B. R. 507, 2 Lowell, 505, F. C. 14133.

[15] In re Welles, 18 N. B. R. 525, F. C. 17377.

[16] In re Haskell, 11 N. B. R. 164, F. C. 6192.

[17] In re Reiman, supra.

[18] In re Shields, 15 N. B. R. 532, 5 Dill. 588, F. C. 12784.

[19] In re Scott, 15 N. B. R. 73, F. C. 12519; Sec. 57e, act of 1898.

[20] In re Tifft, 18 N. B. R. 78, F. C. 14031.

§ 292. 'b. When application for confirmation may be 'filed.—An application for the confirmation of a composition 'may be filed in the court of bankruptcy after, but not before, 'it has been accepted in writing by a majority in number of all 'creditors whose claims have been allowed, which number must 'represent a majority in amount of such claims, and the con- 'sideration to be paid by the bankrupt to his creditors, and the 'money necessary to pay all debts which have priority and 'the cost of the proceedings, have been deposited in such place 'as shall be designated by and subject to the order of the 'judge.'

§ 293. **Composition meetings.**—A submission of an offer of composition may be made at the first meeting of creditors after the examination of the bankrupt.[21] Since the bankrupt's examination and the filing of his schedule must now precede the offer of composition, no necessity exists for a subsequent meeting of creditors, unless for conference, though Form 60 evidently contemplates one after the offer of composition has been presented to the creditors. The rules, forms and orders can not add to or subtract from the act and must yield when any inconsistency appears as here.[22] But, if upon presentation of such an offer to all the creditors collectively, or separately, a majority in number of those whose claims have been allowed and a majority in amount of such claims accept the offer, no reason would exist for the meeting. In such case as soon as the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the costs, have been properly deposited, an application for confirmation, alleging such facts, may be presented to the Judge, by whom it must be "heard and decided," though he may refer the application or any issue arising thereon to the referee,[23] and set a time for a hearing thereon. But a composition cannot be confirmed until after it has been presented to all of the creditors of the bankrupt, whether they have proved their debts or not, and has been accepted in writing by the requisite majority in number and amount of those whose claims have been allowed.[24] Under the act of 1874, it

[21] In re Hilborn, 104 F. R. 866, 4 A. B. R. 741.

[22] In re Slade, 1 N. B. N. 182, 1 A. B. R. 193.

[23] G. O. XII (3).

[24] In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 F. R. 808; In re Walker, 1 N. B. N. 510, 96 F. R. 550, 3 A. B. R. 35.

was held that a composition which provided that the payment should be guaranteed by a satisfactory bond to a committee of creditors might be confirmed,[25] which would also probably now suffice.

§ 294. **Minority of creditors.**—A creditor is not bound to accede to a composition,[26] nor is he legally or morally censurable because he refuses to unite with others, if his refusal proceeds from want of confidence in the debtor;[27] but a minority of creditors will not be permitted to defeat a proposed composition because, if defeated, some special benefit will accrue to them,[28] but they may examine the bankrupt before the composition is confirmed.[29] It must appear that wrong has been done such minority by the vote of the majority on the composition before the court will interfere;[30] and the determination that a proper proportion of the creditors have agreed to the composition cannot be impeached in a collateral action.[31]

§ 295. **Voting at composition meetings.**—A submission of an offer of composition at the first meeting of creditors after the examination of the bankrupt is sufficient and is in law a submission to all the creditors[32] and they may pass a resolution as part of the proceedings that in their opinion such composition is desirable and in the interests of creditors.[33] It has been held that a creditor who was present at such meeting and filed his proof of claim, but was not present at the session when the vote was taken on the composition,[34] or failed to act thereon,[35] should be counted as voting against it, but such is not true under the present law. Only creditors present in person or represented by proper proxy, or who have signified their acceptance or rejection in writing, should be counted. An objection to a claim and the right to vote thereon made

[25] In re Lewis, 14 N. B. R. 144; F. C. 8314.

[26] In re Rider, supra.

[27] Bean v. Brookmire, 7 N. B. R. 568, 2 Dill. 108, F. C. 1170.

[28] In re Scott, 15 N. B. R. 73, F. C. 12519.

[29] In re Little, 19 N. B. R. 234, F. C. 8392.

[30] In re Wronkow, 18 N. B. R. 81, 15 Blatch. 38, F. C. 18105.

[31] Smith v. Engle, 14 N. B. R. 481.

[32] Secs. 12 and 56, act of 1898.

[33] In re Hilborn, 104 F. R. 866, 3 N. B. N. R. 62.

[34] In re Richmond, 18 N. B. R. 362, F. C. 11798.

[35] In re Lissberger, 18 N. B. R. 230, F. C. 6632a.

for the first time at a composition meeting, has been held to be too late.[36]

Only those who prove and have their claims allowed[37] can vote at a composition meeting.[38] The fact that a creditor[39] has bought a debt to prevent a composition will not prevent him from voting on it, if he have no fraudulent motive.[40] In voting, a creditor to whom a number of claims have been assigned, will have but one vote.[41]

Creditors who have signed an acceptance of an offer of composition and procured the court to act thereon will not be permitted to withdraw their signatures; unless it appears that they were procured by fraud or misrepresentation.[42]

§ 296. Consideration, nature of.—The consideration is not limited to money but must be something equivalent thereto which may ultimately be convertible into money and extends to reasonably safe securities or promises to pay, such as a good business man would naturally accept in payment of merchandise sold.[43] A composition providing for deferred payments or promises to pay,[44] evidenced by time notes or other negotiable paper,[45] is not inconsistent with a statute requiring payment "in money," but a composition deed that provides for preferred payments evidenced by notes, "to be satisfactorily endorsed," is too indefinite and void.[46] Delay in paying notes occasioned by legal difficulties will not prejudice bankrupt's right as to creditors who have been paid;[47] and a composition will not be deemed uncertain because payment is not secured.[48]

[36] In re Block, 18 N. B. R. 328, F. C. 1551.

[37] See 56a, act of 1898.

[38] In re Scott, 15 N. B. R. 73, F. C. 12519; In re Keller, 18 N. B. R. 331, F. C. 7654; In re Mathers, 17 N. B. R. 225, F. C. 9274; In re Rider, 1 N. B. N. 483, 3 A. B. R. 178; In re Bruce, 19 N. B. R. 287, F. C. 2069.

[39] In re Trafton, 14 N. B. R. 507, 2 Lowell, 509, F. C. 14133; see also sec. 1 (9), act of 1898.

[40] Ex p. Morris, 12 N. B. R. 170.

[41] In re Messengill, 113 F. R. 366, 7 A. B. R. 699.

[42] In re Levy, 110 F. R. 744, 6 A. B. R. 299.

[43] In re Rider, 1 N. B. N. 483, 3 A. B. R. 178.

[44] In re Reiman, 11 N. B. R. 21, 7 Ben. 455, F. C. 11673, s. c. 13 N. B. R. 128, 12 Blatch. 562, F. C. 11675; In re Langdon, 13 N. B. R. 60, 2 Lowell, 387, F. C. 8058; In re Lewis, 14 N. B. R. 144, F. C. 8314.

[45] In re McNab, 18 N. B. R. 388, F. C. 8906; In re Hurst, 13 N. B. R. 455, 1 Flip. 462, F. C. 6925.

[46] In re Reiman, supra.

[47] In re Kohlsaat, 18 N. B. R. 570, F. C. 7918.

[48] In re Wilson, 18 N. B. R. 300, F. C. 17785.

A proposed composition, payable in thirty days, on condition that bankrupt's property be surrendered and all suits discontinued, is not improper.[49]

§ 297. **Amount of.**—The amount of the consideration must be at least as much as the creditors could reasonably expect to receive if the estate was administered in bankruptcy;[50] and since it is to be presumed that the owner of a business can make more out of it than another who is a stranger, though possibly of greater business capacity, a bankrupt can afford to offer his creditors more than they could obtain by the administration of the estate in bankruptcy and yet have a margin left for himself.[51] In accordance with the general rule in composition proceedings, the consideration must be pro rata on all the debts[52] scheduled by the bankrupt. In addition there must be sufficient deposited to pay all costs,[53] expenses and claims entitled to priority.[54]

§ 298. **Deposit of.**—Before the application to confirm is made, "the consideration and the money necessary to pay all debts which have priority and the costs of the proceedings" must be deposited in a designated depository.[55] The amendment of 1874 provided that "the composition should, subject to the priorities declared in the act, provide for a pro rata payment, etc." It was held under that provision that priority of payment out of the assets of the debtor was meant and, where there were no assets, there could be no priority and therefore, the means of making the composition being derived from other sources, debts having priority under the act stood no higher than the claims of general creditors.[56] In view of

[49] In re Cavan, 19 N. B. R. 303, F. C. 2528.

[50] In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 F. R. 808; In re Reiman, 11 N. B. R. 21, 7 Ben. 455, F. C. 11673, s. c. 13 N. B. R. 128, 12 Blatch. 562, F. C. 11675; In re Wells, 18 N. B. R. 525, F. C. 17377; In re Snelling, 19 N. B. R. 120, F. C. 13140; see In re Arrington Co., 113 F. R. 498, 8 A. B. R. 64.

[51] In re Morris, 11 N. B. R. 443; In re Whipple, 11 N. B. R. 524, 2 Lowell, 404, F. C. 17513; see also In re Weber Furniture Co., 13 N. B. R. 529, F. C. 17330, s. c. on appeal, 13 N. B. R. 559, F. C. 17331.

[52] In re Trafton, 14 N. B. R. 507, 2 Lowell, 505, F. C. 14133; Drake v. McQuade, 66 N. H. 303.

[53] In re Harris, 117 F. R. 575, 9 A. B. R. 20.

[54] In re Fox et al., 6 A. B. R. 525.

[55] In re Mayer, 2 N. B. N. R. 527.

[56] In re Chamberlin, 17 N. B. R. 49, 9 Ben. 149, F. C. 2580.

the change of phraseology, and that the law must be strictly construed,[57] the application to confirm can be made only under the circumstances stated in the act, including the deposit of the money necessary to pay debts having priority and the costs; and the position taken under the former act would not apply.

§ 299. **Effect of failure to perform composition.**—The failure of the bankrupt to perform a composition according to its terms does not empower a creditor to disregard the proceedings and sue for his debt;[58] but if fraud was practiced in securing it, there seems to be no reason why it might not be set aside. An offer to compromise is not a defense to an involuntary petition.[59]

§ 300. **Secured creditors in case of compositions.**—Under the act of 1898, secured creditors may vote and their claims will be counted in computing the number and amount but only for the excess over the security,[60] but where one considers himself fully secured, but is not, he cannot be counted to make a majority.[61] A secured creditor taking no part in composition proceedings though present, is entitled to the agreed percentage on his unpaid balance after exhausting his security;[62] or may have his security valued and come in for the difference.[63] If a creditor holds a bond, mortgage or other security for his debt, where no present liability has arisen, and the value of the security is not capable of present determination, because the debt is subject solely to the contingency of a deficiency arising upon foreclosure, such deficiency being merely contingent and not provable, the holder of such security is neither necessary nor a proper party to a composition.[64] A composition is not uncertain because payment is not secured.[65]

§ 301. **Liens and attachments.**—After filing a petition a

[57] In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 F. R. 808; In re Shields, 15 N. B. R. 532, 5 Dill. 588, F. C. 12784.

[58] In re Bayly, 19 N. B. R. 73, F. C. 1144.

[59] Simonson v. Sinsheimer, 95 F. R. 948, 37 C. C. A. 337, 3 A. B. R. 824, reversing 1 N. B. N. 230, 92 F. R. 904, 1 A. B. R. 197.

[60] Secs. 56 b, 57 c, h, act of 1898.

[61] In re Snelling, 19 N. B. R. 120, F. C. 13140.

[62] Paret v. Ticknor, 16 N. B. R. 315, 4 Dill. 111, F. C. 10711.

[63] The "Home," 18 N. B. R. 557, F. C. 6657.

[64] In re Kahn, 9 A. B. R. 107.

[65] In re Wilson, 18 N. B. R. 300, F. C. 17785.

creditor cannot acquire a lien and this is not affected by composition proceedings.[66] An attachment within four months before proceedings in bankruptcy will fail where a composition has been proposed, adopted and confirmed, destroying the debt.[68]

§ 302. **Trustee and set-off.**—Under the act of 1867 it was held that the Bankruptcy Act, in authorizing a composition before adjudication, contemplated that it be made without appointment of an assignee, and without requiring debtor to surrender his assets,[70] which is practically the rule adopted under the present act.[71] The bankrupt in a composition stands, as to set-off, in the position of a trustee, if none has been appointed,[72] but a creditor who receives a composition payment from his bankrupt debtor, with knowledge of all the facts, is not entitled to have a set-off enforced which he neglected to assert when the composition was made.[73]

§ 303. **Double security.**—Holders of a note who take no part in composition proceedings of indorsers are not bound, and can recover from them, the maker not paying, where the note did not become due until after the bankruptcy of the indorsers.[74]

§ 304. **'c. Hearings upon confirmation of compositions.**—A 'date and place, with reference to the convenience of the par-'ties in interest, shall be fixed for the hearing upon each appli-'cation for the confirmation of a composition, and such objec-'tions as may be made to its confirmation.'

§ 305. **Practice upon hearings.**—Unless waived in writing at least ten days' notice must be given to creditors, by mail, of all hearings upon applications for confirmation of compositions;[75] and where objection is made to the confirmation, the creditor is required to appear on the day of the return of the order to show cause and within ten days thereafter, unless the

[66] In re Tifft, 19 N. B. R. 201, F. C. 14034.

[68] Miller v. Mackenzie, 13 N. B. R. 496.

[70] In re Van Auken, 14 N. B. R. 425, F. C. 16828.

[71] In re Rung, 1 N. B. N. 406, 2 A. B. R. 620.

[72] Ex p. Howard Nat. Bk., 16 N. B. R. 420, 2 Lowell, 487, F. C. 6764.

[73] Hunt v. Holmes, 16 N. B. R. 101, F. C. 6890.

[74] Smith v. Krauskopf, 18 N. B. R. 6.

[75] Sec. 58a, act of 1898.

time is enlarged by special order of the judge, file a specification in writing of the ground of his opposition.[76] A "party in interest," being any one affected, is entitled to be heard so that any one having a provable claim, although it has not been proven and allowed,[77] or a partially secured creditor,[78] but not one fully secured[79] should be heard.

The confirmation need not be made at a meeting[80] and it is only necessary to record the decree containing the resolution.[81]

§ 306. **Power of referee at meetings.**—The law expressly excepts from the duties of the referee all connection with bankrupt's application for approval of composition, but such applications or any specified issue arising thereon may be referred to the referee to ascertain and report the facts,[82] and upon questions arising, the referee, when requested, should appoint a day for bringing the composition before the court, and to issue the required notices to creditors, suggesting in his report any legal questions arising upon the composition papers.[83] He has, however, power to conduct inquiries and adjourn meetings,[84] and examine disputed claims and report thereon;[85] but the court may re-open questions in regard to his rulings on all points.[86]

§ 307. **'d. Confirmation of compositions.**—The judge shall 'confirm a composition if satisfied that (1) it is for the best 'interests of the creditors; (2) the bankrupt has not been 'guilty of any of the acts or failed to perform any of the duties 'which would be a bar to his discharge; and (3) the offer and 'its acceptance are in good faith and have not been made or 'procured except as herein provided, or by any means, prom-'ises, or acts herein forbidden.'

§ 308. **Objections to confirmation.**—It is the duty of the

[76] G. O. XXXII; City Nat. Bank of Dallas v. Doolittle, 107 F. R. 236, 5 A. B. R. 736.

[77] In re Walker, 1 N. B. N. 510, 96 F. R. 550, 3 A. B. R. 35.

[78] Sec. 56b and 57e, h, act of 1898.

[79] In re Scott, 15 N. B. R. 73, F. C. 12519.

[80] In re Spillman, 13 N. B. R. 214, F. C. 13242.

[81] Smith v. Barnhard, 14 N. B. R. 41.

[82] G. O. XII. (3).

[83] In re Hilborn, 104 F. R. 866, 3 N. B. N. R. 62, 4 A. B. R. 741.

[84] In re Proby, 17 N. B. R. 175, F. C. 11439.

[85] In re Keller, 18 N. B. R. 331 F. C. 7654.

[86] In re Spencer, 18 N. B. R. 199, F. C. 13229.

court to examine objections of a minority fully as to requisite number;[87] and the composition cannot be confirmed if the statement of assets and debts shows that the requisite proportion have not accepted it;[88] but it is too late to raise an objection to the right of a creditor to vote for the first time at the confirmation hearing.[89] Objections to the confirmation of the composition have been overruled where it was contended, for instance, that a corporation was not entitled to the privileges of composition;[90] that property in name of bankrupt's wife should have been included in the schedules;[91] or that the estate could pay more than the composition;[92] or that debtor paid more in composition than his estate would pay in bankruptcy;[93] or that he was exeused from examination on account of illness.[94]

Objections to the confirmation of a composition have been sustained where the trustees were to leave the estate in the hands of the president of a corporation who was a defaulter and not trustworthy;[95] or where deferred payments were provided and the property was to be returned to bankrupt, he not being trustworthy.[96] Objections as to regularity of a composition and as to what is for the best interest of the parties can be presented at the hearing of confirmation.[97]

§ 309. **Power of court over.**—The court has no power to confirm or reject a composition except pursuant to section 12 of the law.[98] If the papers presented to the judge on the hearing of the application to confirm show that, after his examination and the filing of his schedule of property and list of creditors, the bankrupt offered a composition which was presented to all his creditors; that a majority in number and amount of those whose claims have been allowed, agreed to accept such com-

[87] In re Keiler, 18 N. B. R. 36, F. C. 7648.

[88] In re Asten, 14 N. B. R. 7, 8 Ben. 350, F. C. 594.

[89] In re Bloch, 18 N. B. R. 328, F. C. 1551.

[90] In re Weber Furn. Co., 13 N. B. R. 529, F. C. 17330.

[91] In re Welles, 18 N. B. R. 525, F. C. 17377.

[92] Id.; In re Arrington Co., 113 F. R. 498, 8 A. B. R. 64.

[93] In re Snelling, 19 N. B. R. 120, F. C. 140.

[94] In re Wilson, 18 N. B. R. 300, F. C. 17785.

[95] In re Scott, 15 N. B. R. 73, F. C. 12519.

[96] In re Bloch, 18 N. B. R. 328, F. C. 1551.

[97] In re Scott, supra.

[98] In re Rudnick, 1 N. B. N. 531, 2 A. B. R. 174, 93 F. R. 787.

position; that the consideration agreed to be paid and the money necessary to pay all debts which have priority and the costs of the proceedings have been deposited in the designated depository; and it does not appear on the face of the papers that the amount the creditors will receive by such composition is less than they would receive by the administration of the estate in bankruptcy or that there is any fraud or other valid grounds for refusing to confirm such composition, it should be confirmed, as of course, that is, if a prima facie case is made, unless the dissenting creditors have filed proper objections and support them by satisfactory evidence. The burden of proving the existence of valid grounds for refusing to confirm the composition is on the dissenting creditors[99] and the decision of the majority in number and amount accepting the composition will not be disturbed except on sufficient evidence unless manifest fraud, accident or mistake is shown. The offer and its acceptance by the majority of the creditors indicate that it is for the interest of the creditors until attacked by the dissentients who may rely on the record and need not always produce extrinsic proof.[1] While, in England, the court will closely scrutinize a composition and must be first satisfied that it is for the creditor's benefit;[2] here a composition will not be confirmed if it appears not to be for the interest of the creditors, no matter how small a proportion dissent;[3] or where the money deposited is not sufficient to pay the costs, or notice of the proceedings has not been given the creditors, although a majority of those who had notice and proved their claims had accepted.[4] How far the court should go into the merits of the composition to determine its advisability for the creditors as between themselves and reject it against the wish of the majority as not for the interest of the creditors is an open question.

§ 310. Best interests of the creditors.—Scotland adopted the French cession, the Roman cessio bonorum, and, while her courts passed on the reasonableness of a composition, the

[99] City Nat. Bank of Dallas v. Doolittle, 107 F. R. 236, 5 A. B. R. 736.

[1] In re Weber Furn. Co., 13 N. B. R. 59, F. C. 17330.

[2] In re Burr, 9 Morrell, 133.

[3] In re Whipple, 11 N. B. R. 524, 2 Low. 404, S. C. 17531; In re Reinheimer, 1 N. B. N. 361.

[4] In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 F. R. 808.

tendency was to uphold it if fairly adopted. England introduced insolvent laws later and there the decision of the creditors was accepted, unless fraudulently procured, though, if grossly unreasonable, it was presumptively fraudulent.[5] The present act expressly requires the judge to be satisfied that the composition is for the best interests of the creditors, thus laying on the court the difficult burden of instructing parties as to their own interests, which practically will usually be discharged by adopting the creditors' view, in the absence of fraud or collusion and when the offered composition is equally or more advantageous pecuniarily to the creditors than the administration of the estate in bankruptcy would be;[6] but if the offered composition would not yield the creditors as much as the administration of the estate in bankruptcy, the composition should not be confirmed. A great variance between the probable value of the assets and the composition would justify the court in acting on its own motion, though an apparent discrepancy between the estimated value of the assets and the composition is not sufficient,[7] and it has been held, that a discrepancy of as much as 15 per cent would not warrant the court in overruling the discretion of the creditors.[8] The consideration must be prorated among creditors and the interest to be considered is that of the creditors at the time of acceptance[9] and of all of them because the fact that one might be specially benefited by the refusal to confirm the composition would not justify such refusal.[10]

In determining whether the composition will yield the creditors more, or less, than the administration of the estate in bankruptcy, the costs of such administration, the fact that no one can ordinarily administer a man's affairs as well as

[5] In re Whipple, 11 N. B. R. 524, 2 Lowell, 404, F. C. 17513.

[6] In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 F. R. 808; In re Morris, 11 N. B. R. 443; In re Weber Furniture Co., F. C. 17331; In re Kahn, 9 A. B. R. 107.

[7] In re Reiman, 11 N. B. R. 21, 7 Ben. 455, F. C. 11673, s. c. 13 N. B. R., 12 Blatch. 562, F. C. 11675; In re Whipple, 11 N. B. R. 524, 2 Lowell. 404, F. C. 17513; In re Weber Furn. Co., 13 N. B. R. 529, F. C. 17330; In re Reinheimer, 1 N. B. N. 361; See In re Criterion Watch Case Mfg. Co., 8 A. B. R. 206.

[8] In re Arrington Co., 113 F. R. 498, 8 A. B. R. 64; In re Weber Furniture Co., F. C. 17331; Adler v. Jones, 109 F. R. 967, 6 A. B. R. 245, 48 C. C. A. 763.

[9] In re Haskell, 11 N. B. R. 164, F. C. 6192.

[10] In re Scott, 15 N. B. R. 73, F. C. 12519.

himself, the delay caused thereby, and the fact that a forced sale brings less than a private sale must all be taken into consideration.

In ascertaining if the composition is for the best interests of the creditors the fact that there is no security for the payment of the composition notes should be considered;[11] or that the debtor proposes advance in per cent of composition;[12] or that the consideration which is offered is satisfactory to the requisite majority of creditors.[13] Either party may furnish evidence on the question whether the composition is for the best interests of the creditors,[14] and unless specific errors can be pointed out on the confirmation of a composition, whether it is for the best interests of the creditors will not be inquired into by the appellate court.[15]

§ 311. **Acts in bar of confirmation.**—Guilt of any of the acts or failure to perform any of the duties which would be a bar to discharge are expressly made a bar also to the confirmation of a composition. Those acts are the concealment of property from the trustee, making a false oath or presentation or use in composition of a false claim,[16] and fraudulently, and in contemplation of bankruptcy, destroying, concealing, or failing to keep books of account.[17] If the bankrupt has been guilty of any of the acts or failed to perform any of the duties named the judge must reject the composition. The fact that a discharge was barred by failure to apply for it in time would seem not to be one of the acts, if a discharge could have been obtained if applied for in time, since the purpose is to prevent a bankrupt obtaining at his creditor's hands a discharge which his conduct prohibited his getting otherwise. Until there is an authoritative decision on the latter point, it is safer to apply for the confirmation of a composition before the expiration of such period; but the filing of an application within the period would suffice, the hearing and decision being held after its expiration.

[11] In re Wilson, 18 N. B. R. 300, F. C. 17785.

[12] In re Scott, 15 N. B. R. 73, F. C. 12519.

[13] In re Purcell, 18 N. B. R. 447, F. C. 11470.

[14] In re Keller, 18 N. B. R. 331, F. C. 7654.

[15] In re Wronkow, 18 N. B. R. 81, 15 Blatch. 38, F. C. 18105.

[16] See 29b, act of 1898.

[17] See 14b, act of 1898; In re Wilson, 107 F. R. 83, 5 A. B. R. 849.

§ 312. **Good faith.**—Absolute good faith is required of the bankrupt and all those connected with a composition, and, if the bankrupt has made false statements about his debts, or assets, or other creditors, or anything which may have influenced the making of the composition, or creditors have used improper means to induce others to accept or refrain from opposing a composition, it will not be confirmed.[18] As the court has no power to confirm or reject a composition, except pursuant to this section, and no power to set one aside unless fraud was practiced in securing it and knowledge of such fraud has come to the petitioners since such confirmation,[19] any objections consistent with this section, except those based on after discovered fraud, should be presented on the hearing to confirm and not on a hearing to set aside. Where there is a discrepancy between the composition and the apparent value of bankrupt's property and other evidence of fraud, the composition should not be rejected without notice to the parties interested and taking into account the relations and relative number of creditors favoring the composition;[20] or if, without fraudulent intent, assets were omitted, or non-existent debts inserted in the schedule, such errors not requiring a change in the terms of the composition, especially if the creditors knew of them when they accepted the composition;[21] or because bankrupt is related to some of the accepted creditors.[22]

Confirmation should be refused if lack of good faith appears; as the giving of money to one creditor to induce him to sign;[23] on the purchase of claims to be used in favor of a composition unless there is clear proof that the motive was proper; or improperly inducing the withdrawal of opposition; or expectation of an advantage from accepting without any positive promise, or giving one creditor a secret benefit or advantage[24]

[18] In re Sawyer, 14 N. B. R. 241, 2 Lowell, 475, F. C. 12395; In re Whitney, 14 N. B. R. 1, 2 Lowell, 455, F. C. 17580; Bean v. Amsinck, 8 N. B. R. 228, 10 Blatch. 361, F. C. 1167; Bean v. Brookmire, 7 N. B. R. 568, 2 Dill. 108, F. C. 1170.

[19] Sec. 13, act of 1898.

[20] In re Weber Furn. Co., 13 N. B. R. 529, F. C. 17330.

[21] In re Scott, 15 N. B. R. 73, F. C. 12519; In re Reiman, 11 N. B. R. 21, 7 Ben. 455, F. C. 11673, s. c. 13 N. B. R. 128, 12 Blatch. 562, F. C. 11675.

[22] In re Rider, 1 N. B. N. 483, 3 A. B. R. 178, 96 F. R. 808.

[23] Dauglish v. Tennent, L. R. 2 Q. B. 49.

[24] In re Sawyer, supra; In re

or secret preference;[25] or promise to settle, accepting creditors' claims at expense of others;[26] or agreeing through sympathy or friendship for the bankrupt to take that which would not be for the interest of all the creditors.[27]

§ 313. —— **Frauds and omission preventing confirmation.**— The court, on application to confirm should correct mistakes and expose and punish fraud and improper practices,[28] as where a creditor after receiving payment in full signs an agreement with other creditors to take seventy cents in the future; or where one creditor exacts an advantage not known or enjoyed by the others for uniting in the composition;[29] or where an agent in composition obtains the same by false representations;[30] or if a partner after composition, procures assignment of claims to a relative and then institutes proceedings to set aside composition and put the firm in bankruptcy;[31] but a preferred creditor is liable for amount of the advantage over others; and, if he pays, his original claim can be proved.[32]

§ 314. —— **Fraud in creation of debt.**—A composition includes and binds debts created by fraud,[33] and a debt so created is discharged by a composition in which the creditor participates.[34]

§ 315. **Certified copy as evidence.**—A certified copy of an order confirming a composition is evidence of the jurisdiction of the court, the regularity of the proceedings and the fact that the order was made,[35] and constitutes evidence of the revesting of the title of his property in the bankrupt, and, if recorded, will impart the same notice that a deed from the trustee to the bankrupt, if recorded, would impart.[36]

Morris, 12 N. B. R. 170; See In re Chaplin, 115 F. R. 162, 8 A. B. R. 121.

[25] In re Jacobs, 18 N. B. R. 48, F. C. 7159; In re Knox, 98 F. R. 585.

[26] In re Vetterlein, 6 N. B. R. 518, 5 Ben. 571, F. C. 16928.

[27] Ex p. Williams, L. R. 10, Eq. 55.

[28] In re Spencer, 18 N. B. R. 199, F. C. 13229.

[29] Bean v. Brookmire, 7 N. B. R. 568, 2 Dill. 108, F. C. 1170.

[30] Elfeldt v. Snow, 6 N. B. R. 57, 2 Sawy. 94, F. C. 4342.

[31] In re Hamlin, 16 N. B. R. 522, 8 Biss. 122, F. C. 5994.

[32] Brookmier v. Bean, 12 N. B. R. 217, 3 Dill. 136, F. C. 1942; See In re Chaplin, 115 F. R. 162, 8 A. B. R. 121.

[33] In re Shafer, 17 N. B. R. 116, F. C. 12695.

[34] Wells v. Lamprey, 16 N. B. R. 205.

[35] Sec. 21f, act of 1898.

[36] Sec. 21g, act of 1898; 2 Lowell, 505, F. C. 14133; Drake v. McQuade, 66 N. H. 303.

§ 316. **'e. Distribution of consideration on confirmation.**—'Upon the confirmation of a composition, the consideration 'shall be distributed as the judge shall direct, and the case dis-'missed. Whenever a composition is not confirmed, the estate 'shall be administered in bankruptcy as herein provided.'

§ 317. **Distribution of consideration.**—The Act provides that the consideration shall be distributed as the judge shall direct. As the amount is fixed by the composition and as it must be paid to all the creditors pro rata,[37] this provision can only mean that, upon the confirmation of the composition, the judge shall direct or order the distribution of the deposit, including debts having priority and costs, to be made and, in case no trustee has been appointed, by whom it shall be made. In Form 63 the Clerk is ordered to do it but there is nothing in the Act which would prevent the judge selecting some one else, or appointing a person specially for the purpose,[38] although in view of the small fees provided by the Act such appointments might be deemed the perquisites of the Clerk.

§ 318. **Dismissal of the proceedings.**—After the confirmation of the composition and the distribution of the consideration, the case is to be dismissed. Before dismissal the necessary orders should be made to authorize the proper disposition of any property held subject to the court's orders as money belonging to the estate held by the sheriff which, without a proper order of the court, would not be at bankrupt's disposal.[39] When the order of dismissal is made, all proceedings are then at an end unless subsequent steps should be taken to set aside the composition.[40]

§ 319. **Effect of composition.—On the bankrupt's debts.**—The confirmation of a composition discharges a bankrupt from his debts other than those agreed to be paid by its terms and those not affected by a discharge.[41] Debts are released by the confirmation although they may be incorrectly stated in the schedules, unless such errors were substantial or intentional,[42] and the same is true of a claim which is not proven,

[37] In re Trafton, 14 N. B. R. 507.

[38] Ex p. Hamlin, 16 N. B. R. 320, 323, 2 Lowell, 571, F. C. 5993.

[39] In re Mickel, 19 N. B. R. 374, F. C. 9529.

[40] Sec. 13, act of 1898.

[41] Secs. 14c, 17, act of 1898.

[42] In re Trafton, 14 N. B. R. 507, 2 Lowell, 505, F. C. 14133.

the creditor failing or refusing to participate with the other creditors when the composition is offered.[43]

§ 320. —— **As a discharge.**—The order of the confirmation serves as a discharge by operation of law[44] and no further discharge is required.[45] The fact that a discharge has been refused is not an absolute bar to composition.[46]

§ 321. —— **As to its terms.**—A composition must be carried out according to its terms and can not be added to by demanding a discontinuance and surrender of property before the per cent is paid;[47] nor will the mere delivery of the notes provided for in it cancel the debt;[48] and if the debts are not paid according to the terms of the composition they are payable in their original amount;[49] but the tender of money according to the terms of the composition is equivalent to payment.[50]

§ 322. —— **On after litigation.**—Creditors have a right to receive their quota under the composition and its payment to them can not be suspended by injunction unless there is a lien upon the fund;[51] nor will an injunction be allowed because the debtor fails to plead the composition.[52] A creditor, seeking to liquidate his claim in a replevin suit in a state court, has no standing to ask that other creditors wait for their dividends under a composition until he can get judgment, when the bankruptcy court finds the evidence does not sustain the charge of fraud on which the replevin suit is based;[53] but, where a composition has been complied with, an injunction restraining a suit in a state court is proper.[54]

§ 323. —— **On bankrupt's co-debtors.**—The present Act expressly provides that the liability of a person who is a co-

[43] Glover Grocery Co. v. Dorne, 8 A. B. R. 702.

[44] In re Merriman, 18 N. B. R. 411, F. C. 9479.

[45] In re Becket, 12 N. B. R. 201, 2 Woods, 173, F. C. 1210.

[46] In re Odell, 16 N. B. R. 501, 9 Ben. 247. F. C. 10427.

[47] In re McKeon, 11 N. B. R. 182, 7 Ben. 513, F. C. 8858.

[48] In re Reiman, 13 N. B. R. 128, 12 Blatch. 562, F. C. 11675; see also In re Hurst, 13 N. B. R. 455, 1 Flip. 462, F. C. 6925.

[49] In re Leipziger, 18 N. B. R. 264; In re Hurst, supra; In re Reiman, supra, s. c. 11 N. B. R. 21, 7 Ben. 455, F. C. 11673.

[50] In re Hinsdale, 16 N. B. R. 550, 9 Ben. 91, F. C. 6526.

[51] In re Kohlsaat, 18 N. B. R. 570, F. C. 7918.

[52] In re Tooker, 14 N. B. R. 35, 8 Ben. 390, F. C. 14096.

[53] In re Heinsfurter, 1 N. B. N. 510, 3 A. B. R. 9.

[54] In re Shafer, 17 N. B. R. 116, F. C. 12695.

debtor with, or guarantor or in any manner surety for, a bankrupt shall not be altered by the discharge of such bankrupt.[55] A composition is a substitute for a discharge and the bankrupt's discharge from his debts under a composition is a discharge by operation of law which does not release his partners, sureties or guarantors; though the usual rule is that a creditor releasing the principal debtor on a composition releases the surety.[56]

§ 324. —— **On attachments.**—An attachment made within four months of the commencement of proceedings will be dissolved by a composition;[57] but not by a prematurely initiated composition;[58] nor can confirmation give validity to such illegal composition.[59]

§ 325. —— **On bankrupt's property.**—The confirmation of the composition revests the title to the property in the bankrupt.[60] The creditors cease to have any interest in it and any money on hand should be paid to the bankrupt,[61] who is at liberty to deal with it as he wishes if no fraud has been practiced.[62] If there is no provision for the dispossession of property, the bankrupt retains the same subject to the summary order of the court,[63] and where the composition gives his property and books back to the bankrupt, the creditors will not be permitted to undo what they consented to.[64] The bankrupt's receiver has no claim on the rents and profits of the bankrupt's land, it being after acquired property under the composition.[65]

§ 326. **Must be pleaded.**—The composition is a defense that may be waived and, if a suit is brought on a debt after confirmation, it must be pleaded or it is deemed to be waived and the court will not thereafter relieve the party from the result of his laches.[66]

[55] Sec. 16, act of 1898.

[56] See Mason & Hamlin Organ Co. v. Bancroft, 1 Abb. N. C. 415; Ex p. Jacobs, 44 L. J. 34.

[57] Smith v. Engle, 14 N. B. R. 481.

[58] In re Clapp, 14 N. B. R. 191, 2 Lowell, 468, F. C. 2785.

[59] In re Hyman, 18 N. B. R. 299, F. C. 6985.

[60] Sec. 70f, act of 1898.

[61] In re August, 19 N. B. R. 161, F. C. 645.

[62] In re Shaw, 9 N. B. R. 495, F. C. 12716.

[63] In re Reiman, 11 N. B. R. 21, 7 Ben. 455, F. C. 11673.

[64] In re Rodger, 18 N. B. R. 381, F. C. 11992.

[65] Conover v. Dumahaut, 17 N. B. R. 558.

[66] In re Tooker, 14 N. B. R. 35,

§ 327. **Refusal to receive share.**—The court has no power to imprison a creditor for refusing to receive money on finality of a composition,[67] nor will such refusal in any way affect the validity of the proceedings.

§ 328. **Conclusiveness.**—If the court had jurisdiction of the subject matter and the persons, and jurisdiction is shown to have attached, all the subsequent proceedings are presumed to be regular and its decision upon every question properly arising in the proceeding is binding on all courts till reversed on appeal. The order of confirmation is conclusive that the proper number of consents have been obtained; that proper and sufficient notice was given; that the consideration deposited is valid; that the papers are properly executed; that every act required by the law was duly and properly done;[68] and that the court had jurisdiction and the proceedings were regular.[69]

§ 329. **Appeal.**—The act gives the effect of a discharge to an order confirming a composition and thus makes it the equivalent to an order granting a discharge, so either the bankrupt or a creditor, if aggrieved by the granting or refusing of an order confirming a composition, may appeal to the Circuit Court of Appeals.[70]

8 Ben. 390, F. C. 14096; Dimock v Revere Copper Co., 117 U. S. 559.

[67] In re Hinsdale, 16 N. B. R. 550, 6 Ben. 91, F. C. 6526.

[68] Smith v. Engle, 14 N. B. R. 481.

[69] Sec. 21f, act of 1898.

[70] Sec. 25a, act of 1898; U. S. ex rel. Adler v. Hammond, 3 N. B. R. 58, 104 F. R. 862, rev'g 3 N. B. N. R. 15, 103 F. R. 444, 4 A. B. R. 583; see City Nat. Bank of Dallas v. Doolittle, 107 F. R. 236, 5 A. B. R. 736.

CHAPTER XIII.

WHEN COMPOSITIONS SET ASIDE.

§330. (13a) Compositions — When set aside.
331. Comparison of acts.
332. Jurisdiction.
333. Power over.
334. Ground for.
335. Parties in interest.
336. Notice.
337. Jury trial.
338. Pending application.
339. Effect of setting aside.
340. Order setting aside.

§ 330. '(Sec. 13a) **When compositions set aside.**—The 'judge may, upon the application of parties in interest filed at 'any time within six months after a composition has been con- 'firmed, set the same aside and reinstate the case if it shall be 'made to appear upon a trial that fraud was practiced in the 'procuring of such composition, and that the knowledge thereof 'has come to the petitioners since the confirmation of such 'composition.'

§ 331. **Comparison of Acts.**—There was no analogous provision in the Act of 1867, but by the amendment of 1874[1] it was provided that "If it shall at any time appear to the court, on notice, satisfactory evidence and hearing, that a composition, under this section, can not, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may * * * set it aside." The difference in the provisions of the two Acts is accordingly great. Under the former, if at any time the court found the composition could not proceed "without injustice or delay," it might be set aside. Under the Act of 1898, a composition can only be set aside upon an application filed within six months after confirmation and for fraud in procuring it, which the applicants—who need only be "parties in interest"—must have been ignorant at the time of the confirmation.[2]

[1] 18 U. S. Stat. 184.

[2] The difference in the two acts renders many of the decisions under the earlier act inapplicable to the present, as for instance, that the court might, two years after the final order, set aside a composition, though in that case it did not on account of *laches* (In re Herman, 17 N. B. R. 440, 8 Ben. 436, F. C. 6405); that it could be set aside if not of benefit to cred-

The provisions for the setting aside of a composition and of a discharge[3] are alike and hence what is said as to the latter should be considered as also Section 12 of the act. The burden rests upon the creditor seeking to have a composition set aside, to show by proper averments and evidence, sufficient grounds why this should be done.[4]

§ 332. **Jurisdiction.**—A composition can only be attacked in the bankruptcy court and there only within six months after the order of confirmation. After that, and elsewhere at all times, it is unimpeachable.

§ 333. **Power over.**—The court of bankruptcy has no power to set aside a composition except as given in section 13, which limits section 2 (9) of the act.[5]

§ 334. **Ground for.**—The sole ground for setting aside a composition is fraud, and it must have been unknown to the applicants at the time of confirmation. The want of knowledge must not only be actual but legal. If on proper inquiry they might have known or if facts existed which would have caused a reasonable man to make such inquiry they will be charged with knowledge. A fraudulently procured composition will be set aside,[6] but the voluntary payment in full of other debts after bankrupt's release by composition does not render fraudulent a promise to a creditor to induce him to sign composition "that no other creditor should receive better terms,"[7] nor is the failure of a creditor to get notice because his address was misstated in the schedule through mistake sufficient.[8]

§ 335. **Parties in interest.**—See definition of, ante, § 305.

itors as well as bankrupt (In re Allen, 17 N. B. R. 157, F. C. 210); that creditors who have not proved their debts can not take part (In re Bryce, 19 N. B. R. 287, F. C. 2069); and that creditors who accepted the compromise can not vote for assignee (Ex p. Hamlin, 16 N. B. R. 320, 2 Lowell, 571, F. C. 5993; In re Herman, 17 N. B. R. 440, 9 Ben. 436, F. C. 6405).

[3] Sec. 15, act of 1898.

[4] City Nat. Bank of Dallas v. Doolittle, 107 F. R. 236, 5 A. B. R. 736.

[5] In re Rudnick, 1 N. B. N. 531, 93 F. R. 787, 2 A. B. R. 114; City Nat. Bank of Dallas v. Doolittle, supra.

[6] Elfeldt v. Snow, 6 N. B. R. 57, 2 Sawy. 94, F. C. 4352.

[7] In re Sturgis, 16 N. B. R. 304, 8 Biss. 79, F. C. 13565.

[8] In re Rudnick, supra.

§ 336. **Notice.**—Though no provision is expressly made for notice of the hearing on the application to set a composition aside the better practice is to give notice to the parties interested,[9] especially to any creditor charged with being a party to the fraud.

§ 337. **Jury trial.**—Section 13 provides that "if it shall be made to appear upon a trial," thus clearly distinguishing the mode to be adopted here from that in section 12, which provides (par. c) for a "hearing" and (par. d) that the "judge" should be satisfied. The question of fraud is to be tried by a jury. For further discussion of this point see post §§ 500-510.

§ 338. **Pending application.**—If a note given to applicant under a composition falls due while his application to set such composition aside is pending, the amount thereof should be paid into court by the bankrupt;[10] but, if the applicant in such circumstances does not appear to receive payment after notice, he is entitled, upon subsequent refusal, to a summary order.

§ 339. **Effect of setting aside.**—While a composition induced by fraud may be set aside, the property acquired by the bankrupt, in addition to his estate at the time the composition was confirmed, must be applied to the payment in full of claims of creditors for property sold to him on credit in good faith while such composition was in force, and the residue, if any, added to his estate in bankruptcy[11] to be applied to the payment of debts arising at the time of adjudication. Whenever a composition is set aside the court must reinstate the case[12] and the trustee, upon his appointment and qualification, is vested with the title to all of the bankrupt's property as of the date of the final decree setting aside the composition.[13] It has been held that where payments have been made under a composition which is afterwards set aside, such payments are not affected.[14]

§ 340. **Order setting aside.**—A certified copy of the order setting a composition aside, not revoked, is evidence of the jurisdiction of the court, the regularity of the proceedings and of the fact that the order was made.[15]

[9] Ex p. Hamlin, 16 N. B. R. 320, F. C. 5993; Re Dunn, 53 F. R. 341.

[10] In re Reynolds, 16 N. B. R. 176, F. C. 11725.

[11] Sec. 64c, act of 1898.

[12] Sec. 2 (9), act of 1898.

[13] Sec. 70d, act of 1898.

[14] Ex p. Hamlin, 16 N. B. R. 320, 2 Lowell, 571, F. C. 5993.

[15] Sec. 21f, act of 1898.

CHAPTER XIV.

WHEN DISCHARGE GRANTED.

§341. (14a) Application for discharge.
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343. —— Form of application.
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345. Adjournment of hearing.
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392. Application for rehearing.
393. (c) Confirmation of composition operates as a discharge.
394. Composition, time of offering, etc.
395. Discharge through composition.

§ 341. '(Sec. 14a) **Application for discharge.**—Any person 'may, after the expiration of one month and within the next

'twelve months subsequent to being adjudged a bankrupt, file 'an application for a discharge in the court of bankruptcy in 'which the proceedings are pending; if it shall be made to 'appear to the judge that the bankrupt was unavoidably pre-'vented from filing it within such time, it may be filed within 'but not after the expiration of the next six months.'[1]

§ 342. **Who is entitled to discharge.**—This is the correlative of "Who may be a bankrupt,"[2] for the law does not offer a meaningless and useless proceeding, but says that certain persons may become bankrupt through voluntary or involuntary proceedings and to such gives the discharge provided for in this section as of right, unless the bankrupt is guilty of one of the offenses prescribed in the act. The fact that a bankrupt is a non-resident of the district does not affect his right to a discharge.[3] A corporation or partnership which has been adjudged bankrupt is entitled to a discharge in all respects as an individual would be;[4] and a bankrupt who was refused a discharge under the act of 1867 is not estopped from applying for a discharge under the present act for the same debts and on the same facts.[5]

§ 343. **Form of application for discharge.**—The application for a discharge should be substantially in the prescribed form,[6] and as soon as it is filed an order of notice thereon[7] issues, compliance with which is shown by the certificate of the clerk and the affidavit of the newspaper publisher or other person cognizable of the fact. Personal notice of the application is not essential to the binding force of the decree granting a discharge.[8]

§ 344. **Time for making application.**—After the expiration

[1] Analogous provision of Act of 1867. "Sec. 29. . . . That at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts. . . ."

[2] See Sec. 4, act of 1898, ante.

[3] In re Goodale, 109 F. R. 783, 6 A. B. R. 493.

[4] In re Marshall Paper Co., 2 N. B. N. R. 1053, 102 F. R. 872, 4 A. B. R. 468.

[5] In re Herrman, 2 N. B. N. R. 905, 102 F. R. 753, 4 A. B. R. 139.

[6] Form 57.

[7] Form 57.

[8] National Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1.

of one month and within twelve months of his adjudication, a bankrupt has an absolute right to apply for a discharge, and after that, and within the next six months, it may be filed by leave of court,[9] if it shall be made to appear to the judge that he was unavoidably prevented from making his application within the year. Where the application is filed more than twelve months after an adjudication, but without leave and without a showing of unavoidable delay, leave will not be granted nunc pro tunc, if prayed for after the expiration of the period of eighteen months fixed by law.[10] The refusal of an application for discharge on the ground that it is not made within this prescribed period is not a bar to the filing of a new petition,[11] and the filing of a new petition under such circumstances constitutes an abandonment of the first petition, so that the court will have jurisdiction, which is also conferred where the first petition is withdrawn.[12] Under the act of 1867 it was held that whatever be the showing of unavoidable delay in the filing of the application for discharge, it had to be made before the administration of the estate was completed and the trustee discharged,[13] though in view of the clear terms of the present statute that would not now be true. The provisions of this clause apply both to involuntary and voluntary bankrupts.[14]

§ 345. **Adjournment of hearing.**—The proceedings upon the order to show cause why the discharge shall not be granted can, on the return day of the order, be postponed by reason of the adjournment of the examination of the bankrupt, or for other good reason,[15] but should not be adjourned to await the result of protracted litigation, a speedy hearing and decision being desirable.

[9] In re Fahy, 8 A. B. R. 354, 116 F. R. 239.

[10] In re Wolff, 100 F. R. 430, 4 A. B. R. 74.

[11] In re Wolff, supra; In re Farrell, 5 N. B. R. 125, F. C. 4680; In re Royal, 113 F. R. 140, 7 A. B. R. 636.

[12] In re White, 18 N. B. R. 106, F. C. 17, 533; In re Svenson, 19 N. B. R. 229, 9 Biss. 69, F. C. 13, 659.

[13] In re Brightman, 15 N. B. R. 213, 14 Blatch. 130, F. C. 1878; In re Cross, 16 N. B. R. 294, F. C. 3427.

[14] In re Clark, 3 N. B. R. 3, 2 Biss. 73, F. C. 2800; In re Bunster, 5 N. B. R. 82, 5 Ben. 242, F. C. 2136.

[15] In re Mawson, 1 N. B. R. 41, F. C. 9320; In re Thompson, 1 N. B. N. 65, 2 Ben. 166, F. C. 13, 935.

§ 346. 'b. **Hearing and grounds for refusing discharge.**— 'The judge shall hear the application for a discharge, and such 'proofs and pleas as may be made in opposition thereto by 'parties in interest, at such time as will give parties in interest 'a reasonable opportunity to be fully heard, and investigate 'the merits of the application and discharge the applicant 'unless he has

'(1) Committed an offense punishable by imprisonment as 'herein provided; or

'(2) With intent to conceal his financial condition, de- 'stroyed, concealed, or failed to keep books of account or 'records from which such condition might be ascertained; or

'(3) Obtained property on credit from any person upon a 'materially false statement in writing made to such person 'for the purpose of obtaining such property on credit; or

'(4) At any time subsequent to the first day of the four 'months immediately preceding the filing of the petition trans- 'ferred, removed, destroyed, or concealed, or permitted to be 'removed, destroyed, or concealed any of his property with 'intent to hinder, delay, or defraud his creditors; or

'(5) In voluntary proceedings been granted a discharge in bankruptcy within six years; or

'(6) In the course of the proceedings in bankruptcy re- 'fused to obey any lawful order of or to answer any material 'question approved by the court.[16]

[16] Prior to the act of February 5, 1903, subdivision "b" provided as follows: 'b. The judge shall 'hear the application for a dis- 'charge, and such proofs and pleas 'as may be made in opposition 'thereto by parties in interest, at 'such time as will give parties in 'interest a reasonable opportunity 'to be fully heard, and investigate 'the merits of the application and 'discharge the applicant unless he 'has (1) committed an offense 'punishable by imprisonment as 'herein provided; or (2) with 'fraudulent intent to conceal his 'true financial condition and in 'contemplation of bankruptcy, de- 'stroyed, concealed, or failed to 'keep books of account or records 'from which his true condition 'might be ascertained.'

Analogous provision of Act of 1867. "Sec. 29. . . . the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and by publication, . . . to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt. No discharge shall be granted, or, if granted, be valid, if the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bank-

ruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact; or if he has concealed any part of his estate or effects, or any books or writing relating thereto, or if he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof; or if, within four months before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution; or if, since the passage of this act, he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors; or if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate; or if, having acknowledged that any person has proved such false and fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account, or if he, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation; or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or if he has been convicted of any misdemeanor under this act, or has been guilty of any fraud whatever contrary to the true intent of this act.

"Sec. 30. . . . That no person who shall have been discharged under this act, and shall afterwards become bankrupt, on his own application shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who shall prove to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and

§ 347. **Who may oppose a discharge.**—"Parties in interest," which would include creditors scheduled by the bankrupt, without regard to whether, or not, they had proved their claims, may oppose a discharge.[18] This is unlike the Act of 1867, under which it was a disputed point whether a creditor who had not proved his debt could be heard in opposition to the discharge of the bankrupt,[19] but is in accord with the Act of 1841, which was, in this respect, worded similarly to that of the Act of 1898, since it referred to "other parties in interest," and under which it was held that creditors who had not proved their debts might oppose the discharge,[20] and even persons having contingent claims incapable of proof. It would seem that if such party in interest neglected to prove his objections, other creditors might do so.[21] An objection that a creditor is not entitled to oppose bankrupt's discharge because of acquiescence is immaterial, if the facts sustain such ground.[22] An attorney at law admitted to practice in the United States District Court who enters his appearance and files objections

with the same effect as if he had not previously been bankrupt.

"Sec. 31. . . . That any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.

"Sec. 32. . . . That if it shall appear to the court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court [here follows certificate].

"Sec. 33. . . . And in all proceedings in bankruptcy . . . no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge."

[18] In re Frice, 1 N. B. N. 432, 2 A. B. R. 674, 96 F. R. 611.

[19] In re Murdock, 3 N. B. R. 36, 1 Lowell, 362, F. C. 9939; In re Sheppard, 1 N. B. R. 115, F. C. 12, 753; In re Boutelle, 2 N. B. R. 51, F. C. 1705; In re Stansfield, 16 N. B. R. 268, 4 Sawy. 334, F. C. 13294; In re Burk, 3 N. B. R. 76, Deady, 425, F. C. 2156; In re Palmer, 3 N. B. R. 77, F. C. 10, 682; In re Borst, 11 N. B. R. 96, F. C. 1666.

[20] In re Book, 3 McLean, 317, F. C. 1637.

[21] In re Houghton, 10 N. B. R. 337, 2 Lowell, 328, F. C. 6730; contra, In re McDonald, 14 N. B. R. 477, F. C. 4753.

[22] In re Hoffman, 2 N. B. N. R. 969, 102 F. R. 979, 4 A. B. R. 331.

to the discharge, on behalf of a creditor, must be presumed to have authority to do so without any special written power of attorney to take such action.[23]

§ 348. **Specification of objections.**—Whenever the objections to the granting of a discharge rest on facts, there must be a specification in order that the bankrupt may be advised of what he is accused, the judge or referee know to what the testimony is to be directed and a trial of the fact be had.[24] Such specification must contain a distinct, specific and unequivocal allegation that the offense complained of has been committed by the bankrupt knowingly and with fraudulent intent,[25] in or subsequent to the verification of the petition or schedules, and also a full statement of the essential facts, as distinguished from conclusions of law,[26] necessary to establish the commission of the offense, though not necessarily with the technical certainty required in an indictment, and should be verified like any other pleading. If signed by counsel the reason should be stated.[27] The right to object to a defective specification is waived if the objection is not raised at the proper time.[28] The bankrupt may file exceptions to insufficient specifications, or he may demur, or he may rely upon his defence at the time of hearing, for vague and general specifications will be disregarded.[29] While the allegation need not be in the phraseology or words of the statute, it must be in such equivalent language as conveys the full sense of the statute, and leaves nothing to inference or construction, for each specification must be complete in itself and independent of support from any other source.[30] A specification in vague,

[23] In re Gasser, 5 A. B. R. 32; but see Creditors v. Williams, 4 N. B. R. 187, F. C. 3379, Contra; In re Glass, 119 F. R. 509.

[24] In re White, 18 N. B. R. 106, F. C. 17533.

[25] In re Beebe, 116 F. R. 48; 8 A. B. R. 597; In re Mudd, 105 F. R. 348, 5 A. B. R. 242; In re Blalock, 118 F. R. 679; In re Crist, 9 A. B. R. 1; In re Bemis, 5 A. B. R. 36; In re Pierce, 103 F. R. 64, 4 A. B. R. 554.

[26] In re Goodale, 109 F. R. 783, 6 A. B. R. 493.

[27] In re Baerncopf, 117 F. R. 975, 9 A. B. R. 133.

[28] In re Osborne, 115 F. R. 1, 8 A. B. R. 165.

[29] In re Crist, 9 A. B. R. 1, 116 F. R. 1007.

[30] In re Mudd, 2 N. B. N. R. 1112; In re Pierce, 102 F. R. 977, 4 A. B. R. 489; In re Hunter, 2 N. B. N. R. 490; In re Marsh, 2 N. B. N. R. 649; In re Kaiser, Id. 123, 99 F. R. 689, 3 A. B. R.

indefinite or general terms is insufficient,[31] as that the bankrupt has offered to surrender all his property and that he is withholding property from his creditors;[32] or that he has concealed part of his effects from the court, or has in contemplation of bankruptcy made payments, transfers and assignments preferring a creditor;[33] or that he has omitted property from his schedule willfully,[34] or with fraudulent intent;[35] or that he swore falsely that he was indebted to a creditor named in his schedule and did not disclose to his trustee that the claim was false and fictitious, without alleging that he knew the claim was false;[36] or charging concealment of assets and concealment, removal, alteration and destruction of books and papers without averring fraudulent intent;[37] or that the bankrupt swore that the schedules contained a full and true list of the creditors and assets and that it appears bankrupt did not know whether the schedule was complete or not.[38] If the objections to the specification be insufficient in law, they will be overruled.[39]

767; In re Headley, 2 N. B. N. R. 684; In re Peacock, 2 N. B. N. R. 758, 101 F. R. 560, 4 A. B. R. 136; In re Hirsch, 96 F. R. 468, 2 A. B. R. 715; In re Holman, 1 N. B. N. 552, 1 A. B. R. 600, 92 F. R. 512; In re McGurn, 2 N. B. N. R. 877, 4 A. B. R. 459, 102 F. R. 743; In re Thomas, 1 N. B. N. 329, 1 A. B. R. 515, 92 F. R. 912; In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358; In re Butterfield, 14 N. B. R. 147, 5 Biss. 120, F. C. 2247; In re Hill, 1 N. B. R. 42, 2 Ben. 136, F. C. 6482; In re Freeman, 4 N. B. R. 17, 4 Ben. 245, F. C. 5082; In re Graves, 24 F. R. 550; In re Hixon, 1 N. B. N. 326, 566, 93 F. R. 440, 1 A. B. R. 610; In re Rathbone, 1 N. B. R. 50, 2 Ben. 138, F. C. 11580; In re Eidom, 3 N. B. R. 27, F. C. 4314.

[31] In re Shepherd, 2 N. B. N. R. 1020; In re Holman, 1 N. B. N. 552, 1 A. B. R. 600, 92 F. R. 512; In re Hixon, 1 N. B. N. 326, 556, 1 A. B. R. 610, 93 F. R. 440; In re Tyrrel, 2 N. B. R. 73, F. C. 14314; In re Hill, 1 N. B. R. 42, 2 Ben. 136, F. C. 6482; In re Beardsley, 1 N. B. R. 52, F. C. 1183; In re Hansen, 2 N. B. R. 75, F. C. 6039; In re Dreyer, 2 N. B. R. 76, F. C. 4082; In re McVey, 2 N. B. R. 85, F. C. 8932; In re Rosenfield, 1 N. B. R. 161, F. C. 12058; In re Smith, 5 N. B. R. 20, F. C. 12985; In re Blalock, 118 F. R. 679; In re Crist, 106 F. R. 1007, 9 A. B. R. 1.

[32] In re Hirsch, supra.

[33] In re Butterfield, supra; In re Hill, supra; In re Freeman, supra; In re Graves, supra; In re Hixon, supra.

[34] In re Keefer, 4 N. B. R. 126, F. C. 7636; In re Hummitsch, 2 N. B. R. 3, F. C. 6866.

[35] In re Adams, 2 N. B. N. R. 1034, 104 F. R. 72.

[36] In re Blumenthal, 18 N. B. R. 575, F. C. 1576.

[37] In re Condict, 19 N. B. R. 142, F. C. 3094.

[38] In re White, 1 N. B. N. 202.

[39] In re Howell, 105 F. R. 594; In re Crist, 9 A. B. R. 1.

If the specification be insufficient they may be amended,[40] provided there be no laches,[41] notwithstanding that the time for original filing specifications has expired;[42] though not after the evidence has been taken to include a new charge,[43] nor unless the party can specify facts, and his failure to be specific is excusable.[44] The application for leave to amend must be made to the judge and not to the referee,[45] and its grant rests in his sound discretion.[46] The want of verification being a mere irregularity may be supplied nunc pro tunc,[47] and cannot be objected to after the testimony has been taken.[48] Until the bankrupt has made a full and sufficient disclosure, the trustee or creditors cannot be required to specify objections or definitely abide by objections which have been specified.[49]

§ 349. **Time of filing specification of objections.**—A creditor opposing the discharge of a bankrupt must enter his appearance on the return day of the order to show cause, and file his specifications of objections within ten days thereafter,[50] though the court may, in its discretion and in a proper case, relieve a person from default if no laches appear,[51] or permit amended[52] specifications to be pleaded after the expiration of that time.[53] On motion, specifications will be stricken out, if no appearance is made on the order to show

[40] In re Pierce, supra; In re Quackenbush, 2 N. B. N. R. 964, 4 A. B. R. 274, 102 F. R. 282; In re Hirsch, 96, F. R. 468, 2 A. B. R. 715; In re Kaiser, 2 N. B. N. R. 123, 99 F. R. 689; In re Glass, 119 F. R. 509; In re McIntire, 1 N. B. R. 115, 2 Ben. 345, F. C. 8823, 3 A. B. R. 767.

[41] Patten v. Carley, 117 F. R. 130, 8 A. B. R. 720; In re Mudd, 105 F. R. 348, 5 A. B. R. 242.

[42] In re Morgan, 2 N. B. N. R. 846 101 F. R. 982, 4 A. B. R. 402.

[43] In re Pierce, supra.

[44] In re Hixon, 1 N. B. N. 326, 556, 1 A. B. R. 610, 93 F. R. 440.

[45] In re Headley, 2 N. B. N. R. 684; In re Kaiser, 2 N. B. N. R. 123, 99 F. R. 689; In re Leszynsky, 2 N. B. N. R. 738, 3 A. B. R. 767.

[46] In re Mudd, 105 F. R. 348, 5 A. B. R. 242.

[47] In re Wolfstein, 1 N. B. N. 202.

[48] In re Baerncopf, 117 F. R. 975, 9 A. B. R. 133.

[49] In re Long, 3 N. B. R. 66, F. C. 8477.

[50] G. O. XXXII; In re Marsh, 2 N. B. N. R. 649; In re Albrecht, 3 N. B. N. R. 335, 5 A. B. R. 223; In re McVey, 2 N. B. R. 85, F. C. 8932.

[51] In re Frice, 1 N. B. N. 432, 2 A. B. R. 674, 96 F. R. 611.

[52] In re Mudd, 2 N. B. N. R. 1112, 5 A. B. R. 242, 105 F. R. 348; In re Osborne, 115 F. R. 1, 8 A. B. R. 165.

[53] In re Morgan, 2 N. B. N. R. 846, 101 F. R. 982, 4 A. B. R. 402.

cause,[54] or if filed or amended[55] after the prescribed time without leave of court, or no valid excuse is given for the delay.[56] The failure to file the specification within ten days after the return day of the order to show cause would probably be cured by filing the same nunc pro tunc, provided notice of opposition to the discharge had been duly filed,[57] or even where it has not been,[58] especially in view of the power of the court to enlarge the time; and, if proceedings in opposition to discharge are adjourned, this would seem to give other creditors the right to file specifications during the period of adjournment.[59] Additional time in which to oppose a discharge may be procured by creditors, when specifications of another creditor have been overruled on grounds applying to him alone.[60] A creditor cannot, as of right, appear and oppose a discharge after the return day, though there be an adjournment for some other purpose, but the court may permit opposition at any time prior to discharge;[61] nor can a creditor who has without fraud assented in writing to the discharge of a bankrupt, and thereby influenced others to assent, withdraw such assent, especially upon the day fixed for the hearing.[62]

§ 350. Bankrupt need not plead to specification.—No pleading by the bankrupt is necessary when specifications in opposition to his discharge are filed, the specifications not being confessed by failure to answer[63] but requiring to be proved.[64] If there is reason to do so, the bankrupt may demur, seek by motion or exception the relief desired, or answer.[65]

§ 351. Burden of proof.—The filing of specifications in opposition to a bankrupt's application for discharge does not make out a prima facie case against the bankrupt which he is bound to disprove, but the burden of proof is upon the cred-

[54] In re Smith, 5 N. B. R. 20, F. C. 12985.

[55] In re Clothier, 108 F. R. 199, 6 A. B. R. 203.

[56] In re Albrecht, 104 F. R. 974.

[57] In re Marsh, 2 N. B. N. R. 649; In re Frice, 1 N. B. N. 432, 2 A. B. R. 674; In re Grefe, 2 N. B. R. 106, F. C. 5794.

[58] In re Levin, 14 N. B. R. 385, 7 Biss. 231, F. C. 8291.

[59] In re Tallman, 1 N. B. R. 145, 2 Ben. 404, F. C. 13740.

[60] In re Antisdel, 18 N. B. R. 289, F. C. 490.

[61] In re Houghton, 10 N. B. R. 337, F. C. 6730; In re Olmstead, 4 N. B. R. 71, F. C. 10505.

[62] In re Brent, 8 N. B. R. 444, 2 Dill. 129, F. C. 1832.

[63] In re Crist, 116 F. R. 1007, 9 A. B. R. 1.

[64] In re Logan, 102 F. R. 876, 2 N. B. N. R. 1056, 4 A. B. R. 525.

[65] In re Marsh, 2 N. B. N. R. 649; In re McNamara, 1 N. B. N. 326, 2 A. B. R. 576.

itors[66] and if the specifications are not sustained by proper proof, they will be dismissed.[67] The testimony of witnesses other than the bankrupt taken at the first meeting of creditors under Section 21, is inadmissible in support of the specifications in opposition.[68] To prove concealment of property from the trustee, it is not sufficient to show merely bankrupt's former ownership of certain goods and that he is not now able to account for them, but there must be evidence of his present possession or control of such property, or of a secret trust for his benefit in such property.[69] If the evidence leaves in doubt the existence of a fraudulent intent,[70] it is not to be presumed, but must be proved, not necessarily by direct testimony, but it may be proved convincingly by circumstantial evidence.[72]

If the creditors have shown the existence of assets and their disappearance or large shrinkage within a short time before the bankruptcy, the burden[71] is then on the bankrupt

[66] In re Corn, 106 F. R. 143, 5 A. B. R. 478; In re Conn, 108 F. R. 525, 6 A. B. R. 217.

[67] In re Fitchard, 103 F. R. 742, 2 N. B. N. R. 1075, 4 A. B. R. 609; In re Penny, 2 N. B. N. R. 1001; In re McGurn, 2 N. B. N. R. 877, 4 A. B. R. 459, 102 F. R. 743; In re Finan, 2 N. B. N. R. 872; In re Marsh, Id. 649; In re Phillips, Id. 424, 98 F. R. 844, 3 A. B. R. 542; In re Berner, 2 N. B. N. R. 268, 3 A. B. R. 325; In re Wetmore, 2 A. B. R. 700, 99 F. R. 703; In re Idzall, 96 F. R. 314, 2 A. B. R. 741; In re Okell, 2 N. B. R. 35, F. C. 10475; In re Herdic, 19 N. B. R. 385, 1 F. R. 242, F. C. 6403; In re May, 2 N. B. N. R. 93; In re Holman, 1 N. B. N. 552, 1 A. B. R. 600, 92 F. R. 512; In re Schreck, 1 Id. 334, 1 A. B. R. 366; In re Hixon, 1 Id. 326, 556, 1 A. B. R. 610, 93 F. R. 440; In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358; In re Boasberg, 1 N. B. N. 133, 1 A. B. R. 353; In re Baerncopf, 117 F. R. 975.

[68] In re Wilcox, 109 F. R. 628, 6 A. B. R. 362.

[69] In re Hoffman, 2 N. B. N. R. 969, 102 F. R. 979, 4 A. B. R. 331; In re Penny, 2 N. B. N. R. 1001; In re Berher, 2 N. B. N. R. 268, 3 A. B. R. 325; In re Cornell, 97 F. R. 29, 3 A. B. R. 172; In re Idzall, 96 F. R. 314, 2 A. B. R. 741; In re Crist, 9 A. B. R. 1; Hudson v. Mercantile Nat. Bank of Pueblo, Colo., 119 F. R. 346.

[70] In re Pierce, 103 F. R. 64, 4 A. B. R. 554; In re McGurn, 2 N. B. N. R. 877, 102 F. R. 743, 4 A. B. R. 493; In re Wetmore, A. B. R. 700, 99 F. R. 703; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366; In re Sidle, 2 N. B. R. 77, F. C. 12844; In re Plager, 2 N. B. R. 10; In re Hill, 1 N. B. R. 42, 2 Ben. 136, F. C. 6482; In re Orcutt, 4 N. B. R. 176, 5 Ben. 19, F. C. 10550; In re Herdic, 1 F. R. 242, F. C. 6403.

[71] In re Finkelstein, 101 F. R. 418, 2 N. B. N. R. 839, 3 A. B. R. 800; In re Leslie, 119 F. R. 406.

[72] In re Slekter, 2 N. B. N. R. 951.

to account for the diminution of his estate; and a fraudulent concealment may be inferred, if the bankrupt does not satisfactorily explain.[73] The burden of proof does not shift merely because creditors show that, as between themselves and the bankrupt, there is property not scheduled.[74] The degree of proof required to establish objections which would prevent the granting of a discharge need not be beyond a reasonable doubt,[75] but there should be a fair preponderance of the credible evidence,[76] and sufficient to establish each element by clear and satisfying evidence to a high degree of certainty.[77]

§ 352. Referee to rule on evidence.—In matters arising on an application for discharge, the judge only has power to determine them finally, but he may refer the application, or any issue thereon, on his own motion or upon the petition of the bankrupt, trustee, or creditors,[78] to the referee to ascertain and report the facts, and state his conclusions of law,[79] and before doing so, should dispose of any technical objections. A referee is authorized to rule upon the sufficiency of the specifications of objections and will not take evidence upon such as are clearly insufficient; but the application for discharge must be heard and finally determined by the court of bankruptcy,[80] which will not set aside a referee's report unless it be clearly erroneous.[81] If exceptions thereto be filed, the errors must be specifically pointed out.[82] If no objections are filed to the referee's finding as to facts, and the court refuses

[73] In re Slekter, 2 N. B. N. R. 951; In re Cashman, 2 N. B. N. R. 980, 103 F. R. 67, 4 A. B. R. 326; In re Meyers, 1 N. B. N. 515, 2 A. B. R. 707, 96 F. R. 408; In re Wood, 98 F. R. 972, 3 A. B. R. 572; In re Mendelsohn, 102 F. R. 119; In re Morgan, 101 F. R. 982, 2 N. B. N. R. 846, 4 A. B. R. 402.

[74] In re Boasberg, 1 N. B. N. 133, 1 A. B. R. 353.

[75] In re Finan, 2 N. B. N. R. 872; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366; In re Greenberg, 114 F. R. 773, 8 A. B. R. 94; In re Marsh, 2 N. B. N. R. 593; In re Slingluff, 2 id. 1115, 105 F. R. 833.

[76] In re Leslie, 119 F. R. 406.

[77] In re Berner, 2 N. B. N. R. 268; In re Salsbury, 113 F. R. 833, 7 A. B. R. 771; In re Miner, 117 F. R. 953, 8 A. B. R. 248; In re Gaylord, 112 F. R. 668, 7 A. B. R. 1, affirming 106 F. R. 833, 5 A. B. R. 410.

[78] In re Sykes, 106 F. R. 669, 6 A. B. R. 264.

[79] In re Steed, 107 F. R. 682, 6 A. B. R. 73.

[80] In re Kaiser, 2 N. B. N. R. 123, 99 F. R. 689, 3 A. B. R. 767; Fellows v. Freudenthal, 102 F. R. 731, 4 A. B. R. 490; In re Liszynsky, 2 N. B. N. R. 738; In re McDuff, 1 A. B. R. 110, 101 F. R. 241.

[81] In re Lafleche, 109 F. R. 307, 6 A. B. R. 483; In re Covington, 110 F. R. 143, 6 A. B. R. 143.

[82] In re Covington, supra.

a discharge, it will not grant a rehearing.[83] Although questions may arise upon the consideration of the application for discharge which are beyond the jurisdiction of the referee, he may issue an order fixing the time when creditors should appear before the court to show cause why a discharge should not be granted; and, if the objections to a discharge are frivolous and vexatious, the costs may be taxed against the objecting creditor.[84] If the discharge be refused, the fees of the referee may be taxed to the bankrupt.[85]

§ 353. **Fraudulent conveyance as showing concealment of assets.**—A judgment by a state court in a suit to which the bankrupt, his wife and the trustee were parties, finding that a conveyance of property by the bankrupt to the wife was fraudulent as to creditors, is conclusive evidence, on the bankrupt's subsequent application for discharge which is opposed by creditors upon the ground of concealment of property.[86] A decision by a bankruptcy court upon an application for discharge will not be stayed to await the result of a pending action in a state court by which creditors seek to set aside as fraudulent a transfer made before the adjudication of bankruptcy, although the same plaintiffs oppose the bankrupt's discharge on the same ground, since the decree of the state court would not necessarily determine the right of the bankrupt to be discharged.[87] While the right of creditors to oppose a bankrupt's discharge on the ground of an alleged fraudulent transaction does not depend on their having taken legal action to recover the property affected, if the evidence, on the application for discharge, is conflicting, the fact that no such effort has been made may be taken into consideration, and if the proof is evenly balanced, will warrant a decision in favor of the bankrupt.[88] The fraudulent nature of the conveyance must be affirmatively shown,[89] but when it exists it defeats his right to a discharge.[90]

[83] In re Royal, 113 F. R. 140, 7 A. B. R. 636.

[84] In re Wolpert, 1 N. B. N. 238, 1 A. B. R. 436.

[85] Bragassa v. St. Louis Cycle, 107 F. R. 77, 5 A. B. R. 700.

[86] In re Skinner, 3 A. B. R. 163, 97 F. R. 190; In re McGurn, 2 N. B. N. R. 877, 4 A. B. R. 459, 102 F. R. 743.

[87] In re Cornell, 97 F. R. 29, 3 A. B. R. 172.

[88] In re Hirsch, 96 F. R. 468, 2 A. B. R. 715.

[89] In re Ferris, 105 F. R. 356, 5 A. B. R. 246.

[90] In re Wilcox, 109 F. R. 628, 6 A. B. R. 362; In re Schenck, 116 F. R. 554.

§ 354. **When evidence admissible.**—Evidence cannot be introduced by objecting creditors without first having filed a specification of objections as required by law.[91] If filed, the referee should not disregard a specification, but should confine the evidence to the material facts alleged in them.[92] The testimony of the bankrupt given in his examination under section 21 of the statute, is admissible in support of the specifications in opposition to the discharge, but that of other witnesses is not, since as a rule no issues have been framed and it cannot always be perceived what inferences may be drawn from the testimony and therefore will not produce rebutting facts.[93] Such evidence may be admitted, however, where there is an express stipulation in writing signed by the parties.[94]

§ 355. **Buying off opposition to discharge.**—Under the act of 1867, it was held that if the opposition of a creditor to the discharge of a bankrupt was bought off through the procurement or privity of the bankrupt, it was such fraud upon the law as would warrant the setting aside of the discharge, the fact itself being prima facie evidence that the bankrupt was not entitled to it,[95] though if the negotiations for the withdrawal of opposition were consummated without the actual or constructive knowledge of the bankrupt, it would not vitiate the discharge,[96] it being held that the suppression of such opposition should be condemned as at variance with the policy of a bankruptcy law, whether expressly prohibited or not.[97] Under the law now in force the buying off of opposition not being one of the grounds for opposing a discharge, the rule prevailing under the act of 1867 would not now be a valid objection.

[91] In re Adams, 2 N. B. N. R. 1034, 104 F. R. 72.

[92] In re Kaiser, 2 N. B. N. R. 123, 99 F. R. 689.

[93] In re Wilcox, 109 F. R. 628, 6 A. B. R. 362; In re Penny, 2 N. B. N. R. 1001; In re Krueger, 2 Lowell, 182; In re Gaylord, 112 F. R. 668, 7 A. B. R. 1; In re Cooke, 109 F. R. 631, 5 A. B. R. 434.

[94] In re Penny, supra.

[95] In re Dietz, 2 N. B. N. R. 125, 3 A. B. R. 316, 97 F. R. 563; In re Guardener, 2 N. B. N. R. 924; In re Steindler, 3 N. B. N. R. 81, 5 A. B. R. 63; In re Mawson, 1 N. B. R. 115, 2 Ben. 332, F. C. 9318; Tuzbury v. Miller, 19 John. 311; In re Douglass, 14 F. R. 403, 406; In re Palmer, 14 N. B. R. 437; Blasdel v. Fowle, 120 Mass. 447; Bell v. Leggett, 7 N. Y. 176.

[96] In re Dietz, supra; Ex p. Driggs, 2 Low. 389.

[97] Smith v. Bromley, Doug. Rep. 696.

§ 356. **Grounds for refusing discharge.**—The Supreme Court has held[98] that Congress may prescribe any regulations concerning discharges in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental laws, and that there is nothing in the Act of 1898 on that subject that would justify an overthrow of its action. A discharge will be refused the bankrupt, if, upon examination, it appears that the requirements of the law entitling him thereto have not been complied with, or he has failed to do what he was required to do;[1] or has committed an offense punishable by imprisonment, that is, with unlawful intent,[2] has knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy, or made a false oath or account in, or in relation to, any proceeding in bankruptcy; or if he has, with intent to conceal his true financial condition, destroyed, concealed, or failed to keep books of account, or records from which his true condition might be ascertained,[3] obtained property on false representations, concealed or removed property with intent to prefer, been granted a discharge in voluntary proceedings within six years, or refused to obey a lawful order of the court or answer a material question. The decision of a court refusing a discharge on an issue of fraud, being essentially one of fact, will not be reversed on appeal unless manifest error appears.[4]

§ 357. **—— Must have arisen subsequent to enactment of law.**—To constitute a valid objection to a discharge, the acts complained of must have taken place after the passage of the law and within the period prescribed by it, and the same principle applies to alleged dishonest disposition of assets;[5] or of a fraudulent conveyance or preference.[6]

[98] National Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1.

[1] In re Palmer, 14 N. B. R. 437, 2 Hughes, 177, F. C. 10678.

[2] In re Smith v. Keegan, 111 F. R. 157, 7 A. B. R. 4.

[3] Secs. 14b and 29b, act of 1898; Strause et al. v. Hooper et al., 105 F. R. 590, 5 A. B. R. 225.

[4] Osborne v. Perkins, 112 F. R. 127, 7 A. B. R. 250.

[5] In re Webb, 2 N. B. N. R. 11, 3 A. B. R. 204, s. c. 2 N. B. N. R. 289, 3 A. B. R. 386, 98 F. R. 404; In re Lieber, 2 N. B. N. R. 21, 3 A. B. R. 217; In re Moore, 1 Hask. 134, F. C. 9751; In re Quackenbush, 2 N. B. N. R. 964, 102 F. R. 282, 4 A. B. R. 274; In re Shorer, 1 N. B. N. 331, 2 A. B. R. 165, 96 F. R. 90; In re Stark, 1 N. B. N. 232, 1 A. B. R. 180; In re Holtz, 1 N. B. N. 204.

[6] In re House, 2 N. B. N. R. 1099, 103 F. R. 616, 4 A. B. R. 603; In re Fitchard, 2 N. B. N. R. 1075, 103 F. R. 742, 4 A. B. R. 609; In re

§ 358. **Transfer, destruction or concealment of assets.**— By the amendment of February 5, 1903, Congress has definitely enacted that a discharge will be refused if the bankrupt has "at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors." Prior to this amendment a concealment of assets has been held to be a sufficient ground for refusing a discharge. What amounts to a concealment of assets has been frequently passed upon by the courts to the following effect, and is held to include a transfer with intent to defraud creditors. The separation of some tangible thing, money or chose in action, from the body of an insolvent debtor's estate and its secretion from those who have a right to seize upon it for the payment of their debts, is, within the law, a concealment and continues such as long as the secretion remains. In such a case the property opened to creditors is decreased by just the amount thus secreted. On every occasion when it is properly the bankrupt's duty to disclose his assets, a failure knowingly to do so will be a concealment of them,[7] and this would be true whether the property was conveyed prior to the passage of the law or subsequent, if the bankrupt still retained a beneficial interest therein at the time of filing his petition, the concealment of title to property being as much a concealment of assets under the law as would be the actual hiding of the same.[8]

The concealment of property may occur by leaving out of the schedule that which was conveyed in fraud of creditors, the act of concealment being committed at the time of omission.[9] A fraudulent omission and concealment may consist of the failure to include as assets the stock of goods, fixtures and materials in a store, or money derived from an accident insurance policy, or money received from cash sales and unaccounted for, or money withdrawn from the business just previous to bankruptcy, or a valuable estate in remainder

Rosenfield, 1 N. B. R. 161, F. C. 12058.

[7] In re Lesser, 108 F. R. 205, 5 A. B. R. 331.

[8] Citizens Bank of Salem v. De Paw Co., 3 N. B. N. R. 244, C. C. A.; In re Berner, 2 N. B. N. R. 268; In re Quackenbush, supra; In re Fitchard, 2 N. B. N. R. 1075, 103 F. R. 742, 4 A. B. R. 609.

[9] In re Steed, 107 F. R. 682, 6 A. B. R. 73.

under a will, or assets concealed by the mode of accounting adopted, or real and personal property transferred within four months prior to the filing of the petition, without consideration and with intent to defraud creditors, or property conveyed reserving a secret trust to bankrupt;[10] or if bankrupt, after failing, organized a corporation, and then filed an individual petition, the court may be justified in treating the corporation as a fiction, and the sums due to it as the assets of the bankrupt;[11] and, if there is a disappearance of substantial assets, which are unlisted and unaccounted for, the burden of proof devolves upon the bankrupt to account for their disappearance;[12] a discharge will be refused, if the bankrupt puts into his schedule as due a debt which is false or fictitious.[13]

An honest, unintentional mistake of a bankrupt in failing to schedule certain creditors and debts will not preclude his discharge against scheduled creditors and debts,[14] but will preclude his discharge against the omitted ones;[15] or mere omissions and inaccuracies, which may be corrected by amendment;[16] or if the omission or inaccuracy is not caused by a fraudulent intent to conceal the property from his trustee, but is the result of a mistake of law or of fact,[17] or of an honest.

[10] In re Penny, 2 N. B. N. R. 1001; In re Bernes, 3 N. B. N. R. 49, 104 F. R. 672; In re Lowenstein, 1 N. B. N. 329, 2 A. B. R. 193; In re Roy, 1 N. B. N. 526, 3 A. B. R. 37, 96 F. R. 400; In re O'Gara, 97 F. R. 932, 3 A. B. R. 349; In re Mendelsohn, 1 N. B. N. 391; In re Woods, 98 F. R. 972, 3 A. B. R. 572; In re McNamara, 1 N. B. N. 326, 1 A. B. R. 566; In re Dews, 2 N. B. N. R. 437, 101 F. R. 549, 3 A. B. R. 691; In re Skinner, 97 F. R. 190, 3 A. B. R. 163; In re Welch, 1 N. B. N. 533, 3 A. B. R. 93, 100 F. R. 65; In re Berner, 2 N. B. N. R. 268; In re Connell, 3 N. B. R. 113, F. C. 3110; In re Rathbone, 1 N. B. R. 145, F. C. 11583; In re Hussman, 2 N. B. R. 140, F. C. 6951; In re Quackenbush, 102 F. R. 282, 2 N. B. N. R. 964, 4 A. B. R. 274; In re Lowenstein, 106 F. R. 51, 7 A. B. R. 193; In re Becker, 106 F. R. 54, 5 A. B. R. 438; In re Holstein, 114 F. R. 794, 8 A. B. R. 147; In re DeGottardi, 114 F. R. 328; In re Grossman, 111 F. R. 507, 6 A. B. R. 510; In re Otto, 115 F. R. 860, 8 A. B. R. 305; In re Otto, 8 A. B. R. 305, 753; In re Bullwinkle, 111 F. R. 364, 6 A. B. R. 756; Osborne v. Perkins, 112 F. R. 127, 7 A. B. R. 250; In re Schenck, 8 A. B. R. 727; In re Leslie, 111 F. R. 406.

[11] In re Horgan, 2 N. B. N. R. 53, 97 F. R. 319.

[12] In re Finkelstein, 101 F. R. 418, 2 N. B. N. R. 839, 3 A. B. R. 800.

[13] In re Heyman, 104 F. R. 677, 4 A. B. R. 735.

[14] In re Slingluff, 105 F. R. 502, 2 N. B. N. R. 1115.

[15] In re Huber, 1 N. B. N. 431.

[16] In re Slingluff, supra.

[17] In re Blalock, 118 F. R. 679; In re Conn, 108 F. R. 525, 6 A. B.

though erroneous, belief that he had no available interest in the property;[18] or unless bankrupt's contention that the property omitted was not his is proven false and that he knew it was false,[19] and this is true of an omission to include an advance of a sum of money by a bankrupt to his wife, when enjoying good credit, and the return of which he never exacted.[20]

It is no ground for refusing a discharge if it appear that the omission complained of is of property not belonging to the bankrupt;[21] or a pledge turned over to the creditor, holding it, long before the bankruptcy in payment of his debt;[22] or a gift to one's wife made years before;[23] or property purchased with money obtained by surrendering insurance policies payable to one's wife;[24] or property transferred to his wife long before the act and purchased largely on credit and paid for with the proceeds of a business conducted as his wife's agent.[25] Whether stock purchased in the wife's name with money borrowed on the joint note of husband and wife is an asset of the bankrupt husband's estate can only be determined by a direct proceeding between the proper parties, and its omission from the schedules will not bar a discharge;[26] nor is the omission of money borrowed to pay the fees and costs of filing the petition;[27] nor of a trust fund in which it is doubtful if, at the time of filing the petition, the bankrupt had a vested

R. 217; In re Lesser, 114 F. R. 83, 8 A. B. R. 15; In re Miner, 114 F. R. 998.

[18] In re Finan, 2 N. B. N. R. 872; In re Morrow, 97 F. R. 574, 3 A. B. R. 263; In re Crenshaw, 2 A. B. R. 623, 95 F. R. 632; In re Hirsch, 96 F. R. 468, 2 A. B. R. 715; In re Bryant, 2 N. B. N. R. 1061; In re Marsh, 109 F. R. 602, 6 A. B. R. 537.

[19] In re Shepherd, 2 N. B. N. R. 1070.

[20] Sellers v. Bell, 94 F. R. 801, 2 A. B. R. 529.

[21] In re Locks, 104 F. R. 783; In re Bryant, 104 F. R. 282, 2 N. B. N. R. 1061; In re Adams, 2 N. B. N. R. 1034, 104 F. R. 72; In re Fitchard, 2 N. B. N. R. 1075, 103 F. R. 742, 4 A. B. R. 609; In re Freund, 2 N. B. N. R. 236, 98 F. R. 81, 3 A. B. R. 418; In re Hirsch, 2 N. B. N. R. 137, 97 F. R. 571, 3 A. B. R. 344.

[22] In re Webb, 2 N. B. N. R. 289, 98 F. R. 404, 3 A. B. R. 386, s. c. 2 N. B. N. R. 11, 3 A. B. R. 204.

[23] In re Fitchard, supra; In re Freund, supra; In re House, 2 N. B. N. R. 1099, 103 F. R. 616, 4 A. B. R. 603.

[24] In re Dews, 1 N. B. N. 411, 96 F. R. 181, 2 A. B. R. 483.

[25] In re Locks, supra; In re Fitchard, supra.

[26] Fellows v. Freudenthal, 102 F. R. 731, 4 A. B. R. 490.

[27] Sellers v. Bell, 94 F. R. 801, 2 A. B. R. 529.

interest;[28] but the contrary would be true if it was a vested interest;[29] nor of a lease, concerning which there is no evidence to show that the premises are worth more than the rent;[30] nor a watch and chain of small value, omitted by attorney's advice, and worn openly during the proceedings;[31] nor of an attorney's contingent fee contract[32] (though this would seem questionable); or of property transferred more than a year before the bankruptcy;[33] nor is it a good objection that the bankrupt alleged certain assets scheduled to be worthless, for such statement does not affect their real value, and bankrupt's discharge would not prevent his trustee recovering such assets.[34]

The omission from the schedule of a complete statement of the property owned by the bankrupt is not in itself ground for refusing a discharge;[35] nor is the omission of names of creditors with their knowledge and consent;[36] nor the name of a creditor,[37] unless the omission is wilful and fraudulent;[38] and if the grounds are false swearing, attempting to conceal property, and transferring a portion with intent to prefer, a discharge will be granted if the bankrupt had no interest therein and the transfer was without fraud.[39] Where there has been concealment of assets, the discharge may be made conditional upon the bankrupt using all reasonable means to discover the concealed assets,[40] and a discharge will not be granted where bankrupt acted as administratrix of her husband and mingled his property with hers, until she has prop-

[28] In re Wetmore, 102 F. R. 290, 3 N. B. N. R. 143, 4 A. B. R. 335, s. c. 99, F. R. 703, 3 A. B. R. 700; In re Hoadley, 2 N. B. N. R. 704, 101 F. R. 233, 3 A. B. R. 780.

[29] In re Wood, 98 F. R. 972, 3 N. B. N. R. 141, 3 A. B. R. 572; In re St. John, 3 N. B. N. R. 114.

[30] In re Hirsch, supra.

[31] In re Bryant, 2 N. B. N. R. 1061, 104 F. R. 789.

[32] In re McAdam, 2 N. B. N. R. 256, 98 F. R. 409, 3 A. B. R. 417.

[33] In re Bushnell, 1 N. B. N. 528; In re Webb, 2 N. B. N. R. 11, 3 A. B. R. 204; Fields v. Harter, 8 A. B. R. 351; In re Goodale, 109 F. R. 783, 6 A. B. R. 493; In re Howell, 105 F. R. 594.

[34] In re Mudd, 2 N. B. N. R. 1112, 105 F. R. 348, 5 A. B. R. 242.

[35] In re Smith, 13 N. B. R. 256, 1 Woods, 478, F. C. 12995; In re Blalock, 118 F. R. 679; In re Slingluff, 105 F. R. 502; In re Miner, 114 F. R. 998.

[36] In re Needham, 2 N. B. R. 124, 1 Lowell, 309, F. C. 10081.

[37] In re Blalock, 118 F. R. 679.

[38] Payne v. Able, 4 N. B. R. 67, F. C. 10854.

[39] In re Penn, 5 N. B. R. 288, F. C. 10929; In re Smith, 13 N. B. R. 256, 1 Woods, 478, F. C. 12995.

[40] In re Hyman, 97 F. R. 195, 3 A. B. R. 169.

erly accounted for hers;[41] or where trustee accepts a homestead allotment made years before and the property has enhanced in value in excess of the amount allowed, until there is a re-allotment;[42] but a wife will not be refused a discharge because her husband, to whom she left the entire conduct of the business, has committed one of the acts preventing his discharge.[43]

§ 359. —— —— **On advice of counsel.**—If a bankrupt fairly presents a matter to his attorney relative to the scheduling of property and is advised that it is not such property as should properly be scheduled in bankruptcy, such advice, where honestly given, however erroneous, tends to deprive the false oath of its element of wilfulness and fraud, and the conviction of the bankrupt of the crime of perjury under such circumstances, could not be maintained.[44] Hence unless it is shown that bankrupt knowingly made a false oath, the discharge will not be denied.

§ 360. —— **Omission of non-dischargeable debts.**—The fact that a debt which is not released by a discharge is not scheduled, would not operate as a bar to a discharge, as the right to a discharge and its effect when granted are different things.[45]

[41] In re Walther, 2 A. B. R. 702, 95 F. R. 941.

[42] In re McBryde, 3 A. B. R. 729, 2 N. B. N. R. 345, 99 F. R. 686.

[43] In re Hyman, 97 F. R. 195; In re Meyers, 3 N. B. N. R. 120; In re Meyers, 105 F. R. 353, 5 A. B. R. 4; see "Concealment of Assets," § 637.

[44] In re Headley, 2 N. B. N. R. 684; In re Shenberger, 2 N. B. N. R. 783, 102 F. R. 978, 4 A. B. R. 489; In re Berner, 2 N. B. N. R. 268; U. S. v. Connor, 3 McLean, 573; In re Hirsch, 96 F. R. 468, 2 A. B. R. 715; In re Cohn, 1 N. B. N. 330, 1 A. B. R. 655; In re De-Leeuw, 2 N. B. N. R. 267, 3 A. B. R. 418, 98 F. R. 408; In re Bushnell, 1 N. B. N. 528; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366; In re Bryant, 2 N. B. N. R. 1061; In re Hussman, 2 N. B. R. 140, F. C. 6951; In re Rathbone, 1 N. B. R. 145, F. C. 11583; In re Goodfellow, 3 N. B. R. 114, 1 Lowell, 510, F. C. 5336; In re Rainsford, 5 N. B. R. 381, 1 N. B. R. 114, 2 Ben. 349, contra; In re Stoddard, 114 F. R. 486, 7 A. B. R. 762.

[45] In re Carmichael, 96 F. R. 594, 2 A. B. R. 815; In re Lieber, 2 N. B. N. R. 31, 3 A. B. R. 217; In re Thomas, 1 N. B. N. 329, 1 A. B. R. 515, 92 F. R. 912; In re Black, 97 F. R. 493, 4 A. B. R. 471 in note; In re Peacock, 2 N. B. N. R. 758, 4 A. B. R. 136, 101 F. R. 560; In re Bashford, 2 N. B. R. 26, F. C. 1090; In re Rosenfield, 1 N. B. R. 161, F. C. 12058; In re Clark, 2 N. B. R. 44, F. C. 2844; In re Elliott, 2 N. B. R. 44, F. C. 4391; In re Wright, 2 N. B. R. 57, 2 Ben. 509, F. C.

§ 361. —— **False oath.** — Unless there is a specification charging the making of a false oath, that question will not be considered.[46] To sustain an objection to a discharge on that ground, the test is whether or not an indictment for perjury could be sustained on the alleged facts, which requires the false oath to be on a material matter[47] pertinent to the question pending,[48] as bankrupt's swearing falsely as to his inability to pay the court fees,[49] or of the submission of an intentionally fraudulent "statement of expenditures,"[50] or that all his property had gone into the possession of a state receiver, when it had not;[51] or that he was indebted to a creditor when he was not;[52] but if it consists in swearing to a schedule from which it is alleged assets were omitted and the omission is not proved, there is no false oath.[53] The false oath may be given at any time during the proceedings, and must be wilfully and knowingly false,[54] and this fact should be established clearly and to a high degree of certainty,[55] but it is not necessary that it be proved beyond a reasonable doubt.[56] If the bankrupt just before his bankruptcy makes a voluntary conveyance of property and fails to include it in his schedule, he does not make a false oath, even though such conveyance may be void as to creditors;[57] or includes in his

18065; In re Doody, 2 N. B. R. 74, F. C. 3995; In re Stokes, 2 N. B. R. 76, F. C. 13476; In re Tracy, 2 N. B. R. 98, F. C. 14124; In re Rhutassel, 1 N. B. N. 572, 2 A. B. R. 697, 96 F. R. 597; In re Tinker, 2 N. B. N. R. 391, 99 F. R. 79, 3 A. B. R. 580.

[46] In re Adams, 2 N. B. N. R. 1034, 104 F. R. 72.

[47] In re Miner, 114 F. R. 998; Bauman v. Feist, 107 F. R. 83, 5 A. B. R. 703.

[48] In re Lewin, 103 F. R. 852; In re Freund, 2 N. B. N. R. 236, 98 F. R. 81, 3 A. B. R. 418; In re Strouse, 2 N. B. N. R. 64; In re Bullwinkle, 111 F. R. 364, 6 A. B. R. 756; In re Wilcox, 109 F. R. 628, 6 A. B. R. 362.

[49] In re Williams, 2 N. B. N. R. 206.

[50] In re Dews, 2 N. B. N. R. 437, 3 A. B. R. 691, 101 F. R. 549.

[51] In re Lesser, 108 F. R. 205, 5 A. B. R. 331.

[52] In re Blumenthal, 18 N. B. R. 555, F. C. 1576.

[53] In re Penny, 2 N. B. N. R. 1001.

[54] In re Slingluff, 105 F. R. 502.

[55] In re Salsbury, 113 F. R. 833, 7 A. B. R. 771; In re Gaylord, 106 F. R. 833; In re Miner, 117 F. R. 953.

[56] In re Marsh, 2 N. B. N. R. 593; In re Slingluff, 2 N. B. N. R. 1115, 105 F. R. 502; see ante, § 351.

[57] In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366; In re Crenshaw, 2 A. B. R. 623, 95 F. R. 632; In re McCarthy, F. C. 8684; In re Robertson, F. C. 11921; Contra, In re

schedule property by advice of counsel which he afterwards swears was not his, and says that, though in his name, he considers it his wife's, who advanced the money for it and receives the profits, he having been her agent;[58] or if it does not clearly appear that the oath to schedules containing property not his was wilfully and fraudulently false;[59] or omits stock in his wife's name, purchased with money borrowed on their joint note,[60] or omits property transferred by the bankrupt, and to which a receiver was appointed by a state court before the petition was filed.[61] The making of a false oath by a bankrupt in a proceeding in bankruptcy, not against him, but against the corporation with which he was connected, is not ground for refusing his discharge.[62] The provision[63] that no testimony given by bankrupt on his examination shall be offered in evidence against him in any criminal proceeding[64] does not prevent his being denied a discharge for making a false oath on such examination.[65] Where a bankrupt makes a statement not under oath, and afterwards contradicts that statement under oath, his statement under oath is not proved to be false by proof that he made the contradictory statement not under oath.[66]

§ 362. **Schedules.**—See duties of bankrupts, ante, §§ 214-221.

§ 363. **Books of account.**—This section prior to the amendment of February 5, 1903, provided that a discharge should be refused any bankrupt who (1), with fraudulent intent to conceal his true financial condition, and (2) in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.[67] Prior to said amendment it was necessary to

Gammon, 109 F. R. 312, 6 A. B. R. 482.

[58] In re Finan, 2 N. B. N. R. 872.

[59] In re Bushnell, 1 N. B. N. 528; In re Bryant, 2 N. B. N. R. 1061.

[60] Fellows v. Freudenthal, 102 F. R. 231, 4 A. B. R. 490.

[61] In re Freeman, 4 N. B. R. 17, F. C. 5082.

[62] In re Blalock, 118 F. R. 679, 9 A. B. R. 266.

[63] Sec. 7, act of 1898.

[64] In re Marx, 102 F. R. 676, 4 A. B. R. 521; but see In re McGuire, 1 N. B. N. 279.

[65] See "False Oath," post, § 638.

[66] Bauman v. Feist, 107 F. R. 83, 5 A. B. R. 703.

[67] In re Shepherd, 2 N. B. N. R. 1070; In re Bemis, 3 N. B. N. R. 49, 104 F. R. 672; In re Shertzer, 2 N. B. N. R. 520, 99 F. R. 706, 3 A. B. R. 699; In re Idzall, 96 F. R. 314, 2 A. B. R. 741; In re Hirsch,

prove both the intent and contemplation of bankruptcy. By the amendment the words "in contemplation of bankruptcy" were omitted. The effect of this is that the only point now to be passed upon by the court is whether the books were destroyed or concealed or were not kept "with intent to conceal his financial condition." This avoids any possible question as to whether the term "in contemplation of bankruptcy" included involuntary proceedings and generally renders this regulation more easy of construction. The omission of the word "fraudulent" as qualifying the word "intent" does not vary the force of this regulation, since the destruction or concealment of books to conceal the financial condition exhibited by them, must of necessity be fraudulent. It is immaterial that the bankrupt is or is not a merchant or trader, but a man's occupation and condition are to be considered in determining whether his failure to keep books should bar a discharge,[68] as his being a farmer.[69] Since such books or records must be kept as will give a true condition of the bankrupt's affairs, a false entry or wilful omission with intent to conceal will bar a discharge.[70] The fact that loans made to a bankrupt and not entered in his regular account book, were made before the bankrupt act was passed, did not excuse his failure to enter them as required by the act.[71] The provisions of this section do not include false and fraudulent reports to commercial agencies.[72]

96 F. R. 468, 2 A. B. R. 715; In re Cohn, 1 N. B. N. 330, 1 A. B. R. 655. This provision differs from the Act of 1867, which refused a discharge to (1) a merchant or tradesman who failed to keep proper books of account, regardless of his intent (In re Bound, 4 N. B. R. 164, F. C. 1697; In re Odell, 17 N. B. R. 73, 9 Ben. 209, F. C. 10426; In re O'Bannon, 2 N. B. R. 6, F. C. 10394; In re Tyler, 4 N. B. R. 27, F. C. 14305; In re Moss, 19 N. B. R. 132, F. C. 9877; In re Cote, 14 N. B. R. 503, 2 Lowell, 374, F. C. 3267; In re Archenbrown, 12 N. B. R. 17, F. C. 505; In re Solomon, 2 N. B. R. 94, F. C. 13167; In re Newman, 2 N. B. R. 99, 3 Ben. 20, F. C. 10175), and (2) to all debtors who destroyed, mutilated, altered or falsified books of account with intent to defraud creditors. Under this first provision the lack of intent is immaterial and under the second provision the act need not have been in contemplation of bankruptcy.

[68] In re Corn, 106 F. R. 143, 5 A. B. R. 478.

[69] In re Marsh, 2 N. B. N. R. 593.

[70] In re Greenberg, 114 F. R. 773, 8 A. B. R. 94; In re McBachron, 116 F. R. 783.

[71] In re Feldstein, 115 F. R. 259.

[72] In re Steed, 107 F. R. 682, 6 A. B. R. 73.

§ 364. —— Failure to keep after passage of act.—The term "in contemplation of bankruptcy" used in this section prior to the amendment meant either in contemplation of a voluntary application or of the commission of an act upon which an adjudication of the bankrupt in involuntary proceedings might be had; in other words, it meant in contemplation of proceedings in bankruptcy, and did not apply to something done long prior to the passage of a law not in existence, or to a condition of insolvency.[73] Consequently, if prior to the passage of the act of 1898, a bankrupt, with fraudulent intent to conceal his financial condition, destroyed, concealed or failed to keep books of account, his discharge could not be refused,[74] but if continued subsequent to its passage, it would bar a discharge[75] and it had to be so alleged.[76] Where for a year prior to his failure his condition was one of hopeless insolvency, his failure to keep requisite books of account will be deemed to have been in contemplation of bankruptcy.[77] In view of the amendment, whether the failure to keep books was in contemplation of bankruptcy, is immaterial, so far as cases instituted since such amendment are concerned.

§ 365. —— Intent to conceal financial condition necessary.—Prior to the amendment of February 5, 1903, the Bankruptcy Law specified that the act in question must be done with fraudulent intent[78] and if this were not established the dis-

[73] In re McGurn, 2 N. B. N. R. 877, 102 F. R. 743, 4 A. B. R. 459; In re Marx, 102 F. R. 676, 4 A. B. R. 521; In re Brice, 102 F. R. 114, 4 A. B. R. 355; In re Hirsch, 96 F. R. 468, 2 A. B. R. 715; In re Stark, 1 N. B. N. 232, 1 A. B. R. 180, 96 F. R. 88; In re Carmichael, 96 F. R. 594, 2 A. B. R. 815; In re Bamberger, 2 N. B. N. R. 95; In re Shertzer, 2 N. B. N. R. 520, 99 F. R. 706, 3 A. B. R. 699; In re Lieber, 2 N. B. N. R. 21, 3 A. B. R. 217; In re Kamsler, 2 N. B. N. R. 97, 97 F. R. 194; Buckingham v. McLain, 13 How. 151; In re Craft, 2 N. B. R. 44, 6 Blatch. 177, F. C. 3217; In re Goldschmidt, 3 N. B. R. 41, 3 Ben. 379, F. C. 5520; In re Lieber, 2 N. B. N. R. 21, 3 A. B. R. 217; In re Holman, 1 N. B. N. 552, 1 A. B. R. 600, 92 F. R. 512; In re Holtz, 1 Id. 204; In re Shorer, 1 Id. 331, 2 A. B. R. 165, 96 F. R. 90; In re Polakoff, 1 Id. 232, 1 A. B. R. 358; In re Boasberg, 1 N. B. N. 133, 1 A. B. R. 353.

[74] In re Stark, 1 N. B. N. 232, 1 A. B. R. 180, 96 F. R. 88; In re Holtz, 1 N. B. N. 204; In re Shorer, 1 N. B. N. 331, 96 F. R. 90, 2 A. B. R. 165; In re Sellers v. Bell, 94 F. R. 801, 2 A. B. R. 529.

[75] In re Bragassa, 2 N. B. N. R. 837, 103 F. R. 936, 4 A. B. R. 519; In re Holstein, 8 A. B. R. 147.

[76] In re Holtz, 1 N. B. N. 204.

[77] In re Feldstein, 115 F. R. 259, 8 A. B. R. 160.

[78] In re Blalock, 118 F. R. 679; In re Corn, 106 F. R. 143, 5 A. B.

charge would be granted.[79] The fraudulent intent must have been that of the bankrupt, so that, where the business of a married woman was conducted wholly by her husband and he, without her knowledge, failed to keep true books of account, with fraudulent intent, her discharge was not barred;[80] nor is the discharge of a member of a firm barred, if the failure to keep true books of account be entirely the fault of his partner;[81] and, on the same principle, such an act by an agent would not bar a principal's discharge, since such act of the agent is in excess of his authority. The fraudulent intent will be inferred, if it appear that the bankrupt knew that he was insolvent and yet failed to keep books of account.[82] As already stated the word "fraudulent" has been omitted from before the word "intent," though the scope of the section does not seem to be thereby varied. If, therefore, the failure to keep books was with the intent to conceal his condition, the discharge will be refused.

§ 366. —— **Concealment, etc., of books.**—Concealment of books of account, as an objection to discharge, required three things to be proven prior to the amendment of 1903; (1) concealment of the books, (2) fraudulent intent to conceal bankrupt's condition, and (3) that the concealment was in contemplation of an act of bankruptcy or a voluntary application in bankruptcy, and not merely a state of insolvency. Since the passage of said amendment, it is not necessary to show fraudulent intent, nor that the concealment was committed in

R. 478; Bauman v. Feist, 107 F. R. 83, 5 A. B. R. 703.

[79] In re Spear, 103 F. R. 779, 4 A. B. R. 617; In re Cashman, 2 N. B. N. R. 980, 103 F. R. 67, 4 A. B. R. 326; In re Mendelsohn, 102 F. R. 119, 4 A. B. R. 103; In re Morgan, 101 F. R. 982, 4 A. B. R. 402, 2 N. B. N. R. 846; In re Brice, 102 F. R. 114; In re Marx, 102 F. R. 676, 4 A. B. R. 521, 4 A. B. R. 355; In re Wetmore, 3 A. B. R. 700, 99 F. R. 703; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366; In re DeLeeuw, 2 N. B. N. R. 267, 3 A. B. R. 418, 98 F. R. 408; In re Freund, 2 N. B. N. R. 236, 3 A. B. R. 418, 98 F. R. 81; In re Sidle, 2 N. B. R. 77, F. C. 12844; In re Plager, 2 N. B. R. 10; In re Hill, 1 N. B. R. 42, 2 Ben. 136, F. C. 6482; In re Orcutt, 4 N. B. R. 176, 5 Ben. 19, F. C. 10550; In re Herdic, 1 F. R. 242, F. C. 6403; In re Lafleche, 109 F. R. 307, 6 A. B. R. 483.

[80] In re Hyman, 97 F. R. 195, 3 A. B. R. 169; In re Meyers, 105 F. R. 353, 5 A. B. R. 4.

[81] In re Schultz, 107 F. R. 264, 6 A. B. R. 91.

[82] In re Feldstein, 108 F. R. 794, 6 A. B. R. 458; In re Feldstein, 115 F. R. 259; Bragassa v. St. Louis Cycle, 107 F. R. 77, 5 A. B. R. 700; In re Kenyon, 112 F. R. 658, 7 A. B. R. 527.

contemplation of an act of bankruptcy. The burden of proof is upon the attacking creditor, and he must make out a prima facie case before the burden shifts to the bankrupt.[83]

An intent exists and a discharge will be refused where a bankrupt destroys vouchers while the papers in bankruptcy are being prepared, so that the disposition of his funds in bank cannot be shown, especially if no books of account are kept;[84] or if an original book be concealed and a copy is substituted from which certain entries are omitted;[85] or if books were kept prior to the passage of the act, and were concealed or destroyed after its passage;[86] or where he swears falsely that the books are correct, or that he does not know where they are.[87]

A fraudulent failure to keep books with intent to conceal his true condition would not exist when he is not a business man and is willing to give evidence as to the unrecorded transactions;[88] or where he had no business transactions;[89] or as to property of his wife;[90] or if there is a discrepancy or even a contradiction between his testimony and the facts as shown on the books where he alludes to them in his testimony and expresses a willingness to produce them.[91] No person is required to keep or have kept books of account, and the omission to do so will not prevent a discharge, unless done subsequent to the Act to conceal his true condition;[92] nor will it if the books were partially destroyed by fire without the bankrupt's fault or connivance;[93] or if his ledger is mutilated, if not done by him or with his knowledge, and the entries on the missing pages are to be found repeated in other parts of the book.[94]

[83] In re Boasberg, 1 N. B. N. 133, 1 A. B. R. 353; In re Carmichael, 96 F. R. 594, 2 A. B. R. 815; In re Ablowich, 2 N. B. N. R. 386, 99 F. R. 81, 3 A. B. R. 586.

[84] In re Schlesinger, 2 N. B. N. R. 169, 3 A. B. R. 342, 97 F. R. 930; In re Salkey, 11 N. B. R. 423.

[85] In re McBachron, 8 A. B. R. 732.

[86] In re Hirsch, 96 F. R. 468, 2 A. B. R. 715; In re Slekter, 2 N. B. N. R. 951; Ablowich et al. v. Stursburg et al., 105 F. R. 751, 5 A. B. R. 403.

[87] In re McGuire, 1 N. B. N. 279; In re Kamsler, 2 N. B. N. R. 97, 97 F. R. 194.

[88] In re Marsh, 2 N. B. N. R. 593.

[89] In re Penny, 2 N. B. N. R. 1001; Sellers v. Bell, 2 A. B. R. 529, 94 F. R. 801.

[90] In re Dews, 1 N. B. N. 411, 2 A. B. R. 483, 96 F. R. 181.

[91] In re Strouse, 2 N. B. N. R. 64.

[92] In re Finan, 2 N. B. N. R. 872.

[93] In re Guardineer, 2 N. B. N. R. 924.

[94] In re Brice, 102 F. R. 114, 4 A. B. R. 355.

To sustain a charge of concealment of books, it must appear that the bankrupt, at or about the time of the filing of the petition, knew or might have ascertained where the old books were, and that he was, therefore, privy to their non-production, and the burden of proof falls upon the creditors.[95] The failure of a bankrupt to deliver his books to the trustee, make return of them in his schedules, or otherwise account for them, creates the presumption that he has them and is guilty of concealing them.[96]

The right of the court to compel the production of the books of third persons involves the exercise of a wide discretion and will not be interfered with by an appellate court, except when there has been manifest abuse.[97]

It is not a valid objection to the production of books of account that their inspection may disclose concealed assets or supply evidence to enable the trustee to maintain a civil action to recover the value.[98]

§ 367. **Proper books of account.**—Books of account must be such as will, at all times, exhibit the condition of the debtor, so that when placed before creditors for investigation they may at once ascertain his standing and property, and the result of his business, and whether everything has been fair and honest on his part,[1] but may be of any form, provided a true condition of the bankrupt's affairs can be gathered from them, that is, they must show receipts, payments, assets, liabilities and the stock on hand.[2] It is sufficient if a stock book, day book and ledger were kept,[3] or if the invoices were kept carefully together, without an invoice book, the other customary books being kept;[4] or if bank books were kept showing the amount received and books showing amounts and to whom paid, but no cash book;[5] or if a chattel mortgage or a promis-

[95] In re Phillips, 2 N. B. N. R. 424, 98 F. R. 844, 3 A. B. R. 542.

[96] In re Beale, 2 N. B. R. 178, F. C. 1151.

[97] In re Horgan, 2 N. B. N. R. 233, 98 F. R. 414, 3 A. B. R. 253.

[98] In re Horgan, supra.

[1] In re Brockway, 7 N. B. R. 575, 6 Ben. 326, F. C. 1917; In re Garrison, 7 N. B. R. 287, F. C. 5254.

[2] In re Bellis, 3 N. B. R. 124, 4 Ben. 53, F. C. 1275; In re Solomon, 2 N. B. R. 94, F. C. 13167; In re Newman, 2 N. B. R. 99, 3 Ben. 20, F. C. 10175; In re Mackay, 4 N. B. R. 17, F. C. 8837; In re Antisdel, 18 N. B. R. 289, F. C. 490.

[3] In re Phinney, 2 N. B. N. R. 1001.

[4] In re Reed, 12 N. B. R. 390, F. C. 11639.

[5] In re Marsh et al., 19 N. B. R. 297, F. C. 9109.

sory note, or a real estate transaction as entered in a blotter kept by a bankrupt as a trader, fully disclosing his indebtedness;[6] or a detached check may be admissible, together with the stub-book;[7] or a pass book is a necessary book of account.[8] Books of account in another business need not be kept.[9] Neither the accidental omission of entries in a trader's books of account,[10] nor the mutilation of such books, if satisfactorily explained,[11] nor even material erasures and alterations in the books, unless made with intent to conceal[12] the financial condition, would be ground for withholding a discharge. The books of account need not contain entries of debts previously contracted and owed at the time the bankrupt went into trade.[13]

§ 368. **Improper books of account.**—In the following cases, it has been held that the true condition of affairs could not be determined by a competent person, and, therefore, a proper keeping of books of account did not exist. Where accounts are kept on slips which are destroyed each month;[14] where neither an invoice book, cash book, blotter, day book, journal or ledger is kept, but only books containing memoranda of business transactions from which no correct estimate of the condition can be made;[15] where no cash book is kept,[16] or if kept is unintelligible;[17] or the books do not show what moneys were expended in carrying on business and what sums were taken out for family expenses;[18] where the invoices of purchases, receipts or payments, bank books and canceled checks are kept, but the cash receipts are kept on a slate and

[6] In re Winsor, 16 N. B. R. 152, F. C. 17885.

[7] In re Brockway, 7 N. B. R. 595, 16 Ben. 326, F. C. 1917.

[8] In re Blumenthal, 18 N. B. R. 575, F. C. 1576.

[9] In re Friedberg, 19 N. B. R. 302, F. C. 5116; In re Herdic, 19 N. B. R. 385, F. C. 6403.

[10] In re Burgess, 3 N. B. R. 47, F. C. 2153.

[11] In re Noonan, 3 N. B. R. 63, F. C. 10291.

[12] In re Antisdel, 18 N. B. R. 289, F. C. 490.

[13] In re Winsor, 16 N. B. R. 152, F. C. 17885.

[14] Hammond v. Coolidge, 3 N. B. R. 71, Lowell, 371, F. C. 5999.

[15] In re Schumpert, 8 N. B. R. 415, F. C. 12491.

[16] In re Gay, 2 N. B. R. 114, 1 Hask. 108, F. C. 5279; In re Bellis, 3 N. B. R. 124, 4 Ben. 53, F. C. 1275; In re Littlefield, 3 N. B. R. 13, 1 Lowell, 331, F. C. 8398.

[17] In re Mackay, 4 N. B. R. 17, F. C. 8838.

[18] In re Anketell, 19 N. B. R. 268, F. C. 394.

daily erased;[19] where invoice or stock books are not kept;[20] where only a small memorandum book of sales is incompletely kept;[21] or where no record of transaction between partners, but only with customers is kept;[22] where merely a blotter and memorandum book are kept,[23] or where loans made to the bankrupt are kept only in personal memorandum books, concealed from every one.[24]

§ 369. **The impeachment of a discharge.**—Courts of bankruptcy are not deprived of their usual control of their judgments by the provision[25] as to the revocation of a discharge, but may still correct their records to make them conform to the facts,[26] and recall a discharge granted by accident or mistake, or obtained by a fraud in the court, though such relief should be sought promptly and before other's right intervene,[27] but a discharge cannot be attacked collaterally. See Revocation of Discharge, post, §§ 396-410.

§ 370. **Obtaining property on credit—when a bar.**—By the amendment of February 5, 1903, Congress provided that a discharge shall be refused where the bankrupt has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." While no specific time is fixed by the statute within which such statement must have been made, by analogy to other provisions of the law it is evident that Congress intended that the statement must have been made within four months of the institution of the bankruptcy proceedings. The false statement must have been either to the creditor from whom the property was obtained or to his agent or to some person with the intent, purpose and expectation of its communication to the creditor from whom the property was obtained and with the purpose of acquiring the same. A statement made generally where it was not expected or was not the purpose that it should be communicated

[19] In re Solomon, 2 N. B. R. 94, F. C. 13167.

[20] In re White, 2 N. B. R. 179, F. C. 17532.

[21] In re Newman, 2 N. B. R. 99, 3 Ben. 20, F. C. 10175.

[22] In re Blumenthal, 18 N. B. R. 555, F. C. 1575.

[23] In re Bamberger, 2 N. B. N. R. 95.

[24] In re Feldstein, 115 F. R. 259.

[25] Sec. 15, act of 1898.

[26] In re Dupee, 6 N. B. R. 89, 2 Lowell, 18, F. C. 4183.

[27] Ex p. Buchstein, 17 N. B. R. 1, 9 Ben. 215, F. C. 2076.

to the creditor would not be such as would operate as to defeat the discharge. A statement made verbally would not suffice, but it must be in writing and must be materially false.

§ 371. **A former discharge—when a bar.**—By the amendment of February 5, 1903, a discharge will be refused if the bankrupt has in a voluntary proceeding been granted a discharge in bankruptcy within six years. The fact that a bankrupt has been adjudged such on an involuntary petition would not prevent the bankrupt from subsequently filing a voluntary petition and obtaining a discharge within the six years. The fact that the bankrupt has been adjudged a voluntary bankrupt will not prevent involuntary proceedings from being instituted at any time, though the discharge on the involuntary petition would not be granted within the six years. The purpose of the statute is simply to prevent the frequent filing of voluntary petitions. This six-year period runs from the date of the discharge in the voluntary proceeding to the date of judicial action upon the application for the next discharge. There must accordingly be a full period of six years between the granting of the discharge in the voluntary proceeding and the date of the second discharge, whether in a voluntary or involuntary proceeding. The fact that the petition in bankruptcy in the second proceedings has been filed prior to the expiration of the six years would not bar the granting of the discharge if six years had elapsed at the time judicial action is taken on the discharge in the subsequent proceedings.

§ 372. **Contumacy—when a bar.**—By the amendment of February 5, 1903, a discharge will be refused if "in the course of the proceedings in bankruptcy, the bankrupt refuses to obey any lawful order of or to answer any material question approved by the court." Section 7 defines the duties of the bankrupt. The purpose of this provision is intended to effect a compliance with the requirements and duties imposed upon him, and where he has been guilty of disobedience, a discharge will be refused. His refusal must, however, have been either to obey a direct order of the court or to answer a material question approved by the court; that is, the order must emanate from the court and the materiality of the question he refuses to answer must have been passed upon and approved by the court.[28] This of course would apply to an

[28] In re Levin, 113 F. R. 498, 6 A. B. R. 743.

order of the referee as well as of the court of bankruptcy itself. While it is true that the bankrupt may decline to answer any lawful question which may have a tendency to incriminate him, without subjecting himself to punishment, Congress doubtless intended by this provision to provide for such contingency. In order, therefore, to avail himself of the privileges of a discharge as given by the statute, the bankrupt must have answered any material question propounded and if he claims his constitutional privilege to decline to answer because it might have a tendency to incriminate him, it would nevertheless operate as a bar to his discharge.

§ 373. **Discharge of a partnership.**—A discharge is granted to a partnership upon the same terms and under the same conditions as to any other person, and therefore the general discussion of discharges which is given with reference to an individual will apply equally here. The grounds of opposition to a discharge in the case of a partnership are the same as in the case of individuals and are confined to those named in the act.[29]

§ 374. **—— of member of firm.**—An individual seeking a discharge from both individual and partnership liabilities cannot obtain a discharge from the latter unless proceedings are had on behalf of the partnership itself, or unless he makes his partners parties to the individual proceedings.[30] Where the firm has been adjudicated bankrupt on the voluntary petition of the partners composing the firm, either partner without reference to the other, may present his individual petition for a discharge, in which event the petition therefor

[29] See In re Peacock, 101 F. R. 560, 4 A. B. R. 136; In re Clisdell, 101 F. R. 246, 2 N. B. R. 638.

[30] In re Elliott, 2 N. B. N. R. 350; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25; In re Laughlin, 96 F. R. 589, 3 A. B. R. 1; In re McFaun, 96 F. R. 592, 3 A. B. R. 66; In re Meyers, 1 N. B. N. 575, 2 A. B. R. 707, 96 F. R. 408; In re Meyers, 2 N. B. N. R. 111, 97 F. R. 753, 3 A. B. R. 260; Amsinck v. Bean, 22 Wall. 395, 405; and see Hudgins v. Lane et al., 11 N. B. R. 462, 2 Hughes, 361, F. C. 6827; Corey v. Perry, 17 N. B. R. 147; In re Noonan, 10 N. B. R., F. C. 10292; In re Wilkins, 2 N. B. R. 113, F. C. 17875; Crompton v. Conklin, 15 N. B. R. 417, F. C. 3408; In re Brick, 19 N. B. R. 508; Contra, Jarecki Mfg. Co. v. McElwaine, 118 F. R. 249; In re Abbe, 2 N. B. R. 26, F. C. 4; In re Bidwell, F. C. 1392; In re Frear, 1 N. B. R. 201, 2 Ben. 467, F. C. 5074; In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, F. C. 13393.

should recite the adjudication of the firm and of the petitioners as a member of the firm, and should pray for a discharge from both firm and individual debts, and the notice to creditors should advise them of the same facts.[31] If the adjudication relates solely to the partnership as a legal entity, a discharge cannot be granted to the partners as individuals.[32] A partner is not, however, prevented from filing his individual petition in bankruptcy after a discharge has been denied in the partnership proceedings, although he sets forth the same debts and the same assets.[33]

§ 375. **Court will not look for fraud or irregularity.**—When the objection to a discharge is based on questions of law, or arising in the record, it has been held that no specification is necessary. A court will refuse a discharge where it appears, upon an inspection of the record, that the bankrupt is not entitled thereto, although there are no objections interposed by creditors,[34] but if all the modal prerequisites to a discharge have been complied with, a court will not seek out of its own motion grounds to refuse it.[35] If the entire proceedings be irregular and defective,[36] and if a prima facie case of fraud is made out, the discharge will be withheld until the prima facie case is overthrown.[37]

§ 376. **Discharge not refused for failure to pay costs.**—If a bankrupt files an affidavit of inability to make a deposit on filing his petition in involuntary bankruptcy, there is no authority for withholding the discharge until the fees of the clerk and referee have been paid.[38] The law is clear and

[31] In re Meyers, 2 N. B. N. R. 111, 97 F. R. 757, 3 A. B. R. 260; In re Gay, 98 F. R. 870, 3 A. B. R. 529; see also Wilkin v. Davis, 15 N. B. R. 60, 2 Low. 511, F. C. 17664.

[32] In re Hale, 107 F. R. 432, 6 A. B. R. 35.

[33] In re Feigenbaum, 7 A. B. R. 339.

[34] In re Wilkinson, 3 N. B. R. 74, F. C. 17667; In re Sohoo, 3 N. B. R. 52, F. C. 13162.

[35] In re Hixon, 1 N. B. N. 556, 1 A. B. R. 610, 93 F. R. 440; In re Royal, 113 F. R. 140, 7 A. B. R. 636.

[36] In re Doyle, 3 N. B. R. 190, F. C. 4052.

[37] Mahoney v. Ward, 2 N. B. N. R. 538, 3 A. B. R. 770, 100 F. R. 278.

[38] See G. O. XXXV (4); In re Plimpton, 3 N. B. N. R. 14, 103 F. R. 775, 4 A. B. R. 614; In re Collins, 1 N. B. N. 132; In the matter of Fees payable by voluntary bankrupts, 1 N. B. N. 376, 95 F. R. 120.

explicit as to the grounds for refusing a discharge and there is no authority for adding to their provisions.

§ 377. **Acts not barring discharge.**—The only grounds upon which a discharge can be refused are those specified in this section,[40] hence a discharge cannot be refused because of the pendency of an application for discharge under the act of 1867;[41] or the omission of a debtor to have himself adjudged a voluntary bankrupt, when his property is attached at the suit of a hostile creditor;[42] or because of an adjudication of bankruptcy suffered by default;[43] or that money is offered certain creditors to vote for a composition;[44] or that the original adjudication resulted from collusion, in the absence of fraud;[45] or failure to publish notice of the trustee's appointment;[46] or of a trustee to act after qualifying;[47] or because it is alleged that the court which made the adjudication had no jurisdiction on account of the lack of residence, where the objecting creditor was a party to the proceedings at the time of adjudication;[48] or because the bankrupt has an interest in property which can neither be transferred or levied upon and which would not pass to the trustee.[49]

§ 378. **Fraudulent conveyance not bar.**—A fraudulent conveyance by a bankrupt is not in itself a bar to his discharge,[50] unless it amounts to a fraudulent concealment of assets;[51] nor is the fact that the bankrupt caused and permitted loss, waste

[40] In re Peacock, 2 N. B. N. R. 758, 101 F. R. 560, 4 A. B. R. 136; In re Clisdell, 2 N. B. N. R. 638, 101 F. R. 246, 4 A. B. R. 95.

[41] In re Herrman, 102 F. R. 753, 2 N. B. N. R. 905, 4 A. B. R. 139.

[42] In re Belden, 2 N. B. R. 14, F. C. 1240.

[43] In re Lathrop, 3 N. B. R. 11, F. C. 8105.

[44] In re Morris, 19 N. B. R. 111, F. C. 9824.

[45] In re Ordway, 19 N. B. R. 171, F. C. 10552.

[46] In re Strachen, 3 N. B. R. 148; In re Litchfield, 3 N. B. R. 13, 1 Low. 331, F. C. 8398.

[47] In re Pierson, 10 N. B. R. 107, F. C. 11153.

[48] In re Buck, 3 N. B. R. 76, Deady, 425, F. C. 2156; In re Ives, 19 N. B. R. 97, 5 Dill. 146, F. C. 7115; In re Clisdell, 2 N. B. N. R. 638, 4 A. B. R. 96, 101 F. R. 246; In re Williams, 99 F. R. 544, 3 A. B. R. 677.

[49] In re Rennie, 1 N. B. N. 335, 2 A. B. R. 182.

[50] In re Steed, 107 F. R. 682, 6 A. B. R. 73; In re Crist, 9 A. B. R. 1, and cases cited.

[51] In re Penny, 2 N. B. N. R. 1001; In re Pierce, 102 F. R. 977, 4 A. B. R. 489; In re Berner, 2 N. B. N. R. 268.

and destruction of his estate and effects, and misspent and misused the same, prior to filing the petition.[52]

§ 379. **General assignment no bar.**—A general assignment made prior to proceedings in bankruptcy, is not a bar to a discharge.[53]

§ 380. **Failure to oppose after notice equivalent to consent.**—When proper notice has been given to creditors, they are regarded as consenting to a discharge, if they make no opposition. Similarly, where it appears that the bankrupt has committed an act that, if properly pleaded, will bar a discharge, it has been held the court will not of its own motion refuse it.[54]

§ 381. **Refusal of discharge not discretionary.**—A refusal to grant a discharge does not rest in the discretion of the judge; but the applicant is entitled as matter of right, unless proved guilty of one of the prescribed offenses, the sole duty of the judge being to decide after a due hearing if he is guilty.[55]

§ 382. **How discharge proved.**—A certified copy of the order granting a discharge is evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[56]

§ 383. **Discharge must be pleaded.**—A discharge must be pleaded,[57] and a failure so to do operates as a waiver of its benefits and renders any property in the bankrupt's possession liable to a judgment, since a court will not take judicial knowledge of a discharge, whether in a proceeding by scire facias to revive a judgment, or in an original suit.[58] A delay of a year in asking for leave to plead a discharge in bar of an action commenced prior to the adjudication is sufficient cause to refuse the request, since the plea is a legal and not an equitable one.[59] A widow of a bankrupt to whom his property has

[52] In re Rogers, 3 N. B. R. 139, 1 Lowell, 423, F. C. 12001.

[53] In re Pierce, 3 N. B. R. 61, F. C. 11141.

[54] In re Antisdel, 18 N. B. R. 289, F. C. 490; In re Clark, 19 N. B. R. 301, F. C. 2812; Contra, In re Sohoo, 3 N. B. R. 52, F. C. 13162.

[55] In re Marshall Paper Co., 2 N. B. N. R. 1053, 102 F. R. 872, 4 A. B. R. 468.

[56] Sec. 21f. act of 1898.

[57] In re Rhutassel, 1 N. B. N. 572, 2 A. B. R. 697, 96 F. R. 597.

[58] Revere Copper Co. v. Dimock, 19 N. B. R. 372, Dewey, 16 N. B. R. 1; Jenks v. Opp, 12 N. B. R. 19; In re Wesson, 88 F. R. 855; Cutter v. Evans, 11 N. B. R. 448.

[59] Medberg v. Swan, 8 N. B. R. 537.

been transferred may avail herself of his discharge and plead it in her own defense.[60]

§ 384. **Discharge not pleadable.**—Contrasted with those cases, wherein a failure to plead a discharge waives the benefits, are those where the discharge cannot be pleaded, as where it is obtained pending an appeal, and the appellate court will consider nothing but the record;[61] neither can it be set up by supplemental answer where an attachment issued more than four months prior to the institution of bankruptcy proceedings was dissolved by filing a bond.[62]

§ 385. **Replication to plea of discharge.**—A special provision having been made[63] for the revocation of a discharge, the form, the mode of attack, and the ground of fraud coming to petitioner's knowledge after the discharge was granted and that the discharge was not warranted, are exclusive; and, on a plea of a discharge in bankruptcy in bar of an action, the replication can only deny the existence of such discharge, or the identity of the person, or one of the other grounds pleadable against the judgment of a court of record.

§ 386. **Effect of a discharge.**—The summary jurisdiction of the bankrupt court over the bankrupt continues during the pendency of the proceedings, and during the year in which a discharge may be revoked, and he may be examined, notwithstanding the discharge.[64] The certified copy of the order granting the discharge is the means by which the bankrupt is to prove and have the benefit of his discharge; and is conclusive evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made, but, being personal to the bankrupt, is not conclusive evidence in favor of other parties seeking to use it;[65] but such certified

[60] Upshur v. Briscoe, 138 U. S. 365.

[61] Serra e Hijo v. Hoffman, 17 N. B. R. 124; Knapp v. Anderson, 15 N. B. R. 316; Treadwell v. Holloway, 12 N. B. R. 61.

[62] Holyoke v. Adams, 13 N. B. R. 413.

[63] Sec. 15, act of 1898.

[64] In re Price, 1 N. B. N. 131, 91 F. R. 635, 1 A. B. R. 419; In re Peters, Id. 165, 1 A. B. R. 248; In re Heath, 7 N. B. R. 448, F. C. 8304.

[65] In re Dole, 9 N. B. R. 193, 11 Blatchf. 499, F. C. 3964; Miller v. Chandler, 17 N. B. R. 251; Dewey v. Moyer, 18 N. B. R. 114; In re Jones, 6 N. B. R. 386, F. C. 7449; In re Dean, 3 N. B. R. 188, F. C. 3701. Contra, In re Heath, 7 N. B. R. 448, F. C. 6304.

copy will not be issued until the time granted for appeal has expired.[66] The granting of the discharge does not, however, oust the referee of his jurisdiction of the cause, it being a mere incident in the proceedings; and the cause proceeds before him until the court finally discharges the trustee.[67]

The right of a bankrupt to a discharge, and its effect are wholly distinct questions, and the latter question cannot properly arise on an application for a discharge.[68] The bankrupt law discharges the contract, as distinguished from insolvent laws, which only liberate the person; but, while it discharges him from certain pecuniary liabilities, it does not assume to relieve him of contractual relations as such. There is nothing in the letter or policy of the law which gives to an adjudication in bankruptcy the effect of discharging executory contracts, which have not resulted in the creation of any present pecuniary liability on the part of the bankrupt.[69] The bankrupt's discharge in a foreign country does not discharge a debt made in and with reference to the laws of this country.[70] The original cause of action is not merged in the judgment in a state court, so as to preclude the plaintiff from showing that the original cause of action was founded upon fraud and not released by discharge.[71] The operation of a discharge cannot be avoided on the ground that the debt due the creditor was not proved in the bankruptcy proceedings, but was proved in previous insolvency proceedings, where a discharge was refused.[72] The discharge of a bankrupt has the same effect as the return of an execution wholly or partly unsatisfied.[73] Although a discharge is a complete bar to a suit on a claim provable in bankruptcy, the dismissal of the suit does not prejudice proceedings on it under the bankrupt law.[74] If a discharge be refused, and a second petition be filed and a dis-

[66] In re Hirsch, 96 F. R. 468, 2 A. B. R. 715.

[67] In re Dole, 7 N. B. R. 538, F. C. 3965.

[68] In re McCarty, 111 F. R. 151, 7 A. B. R. 40.

[69] In re Schiermann, 2 N. B. N. R. 118; In re Hufnagel, 12 N. B. R. 554, F. C. 6837; Deford v. Hewlet, 18 N. B. R. 518.

[70] In re Sheppard, 1 N. B. R. 115, F. C. 12753.

[71] Packer v. Whittier, 1 N. B. N. 240, 91 F. R. 511, 1 A. B. R. 621, overruling 81 F. R. 335.

[72] Dean v. Justices, 1 N. B. N. 336, 2 A. B. R. 163.

[73] In re Martin, 105 F. R. 753, 5 A. B. R. 423; Shellington v. Howland, 53 N. Y. 374, and cases cited; People v. Bartlett, 3 Hill, 570.

[74] Humble v. Carson, 6 N. B. R. 84.

charge thereunder be obtained, the latter will be made general, leaving its effect as to debts proved under the first petition, but not under the second, to be determined as occasion may arise.[75]

§ 387. **Effect of discharge on collateral proceedings.**—A plea in abatement setting up a discharge must be sworn to, and must set forth a copy, but, if defective, may be amended; and, if the plea is in bar, it is insufficient when the notes and bonds sued upon were given after bankruptcy.[76]

A suit to collect a debt, claim or liability from a bankrupt may be restrained until the application for a discharge has been determined, if made and prosecuted with reasonable diligence, and where the discharge would be a bar to such a suit, the creditor must go into the bankruptcy court and oppose the discharge,[77] and, on the application for stay, based upon the discharge, jurisdiction will be presumed, though the record is silent in this respect.[78] A bankrupt defendant may file a bond to dissolve an attachment, though issued more than four months before bankruptcy, and have the case continued to await his discharge.[79] It is obvious, however, that where a judgment is not such an one as is affected by discharge in bankruptcy, no satisfaction of the judgment will be entered on the production of the discharge, an instance of this being an attachment upon exempt property.[80] A state court has jurisdiction to decide whether or not the debt is released by the discharge.[81]

A debtor arrested in a civil action prior to commencement of proceedings in bankruptcy is not entitled to be released from such arrest, upon being adjudged a bankrupt, but if the debt in which he is arrested is one affected by a discharge, he is entitled to a release from arrest.[82]

[75] In re Claff, 111 F. R. 506, 7 A. B. R. 128.

[76] Beeson v. Howard, 11 N. B. R. 486; Stoll v. Wilson, 14 N. B. R. 571; Contra, see Hayes v. Ford, 15 N. B. R. 569.

[77] In re Archenbrown, 11 N. B. R. 149, F. C. 504; In re Rosenberg, 2 N. B. R. 81, 3 Ben. 14, F. C. 12054.

[78] Hayes v. Ford, 15 N. B. R. 569; Frostman v. Hicks, 15 N. B. R. 41; Todd v. Barton, 13 N. B. R. 197.

[79] Braley v. Boomer, 12 N. B. R. 303; In re Belden, 6 N. B. R. 443, 5 Ben. 476, F. C. 1239; Wood v. Hazen, 15 N. B. R. 491; Dingee v. Becker, 9 N. B. R. 508, F. C. 3919.

[80] Robinson v. Wilson, 14 N. B. R. 565.

[81] Stevens v. Brown, 11 N. B. R. 568.

[82] Brandon Nat. Bk. v. Hatch, 16 N. B. R. 468.

§ 388. **Effect of husband's discharge on wife's debts.**—At common law the wife's antenuptial debts are released by the husband's discharge, since he becomes liable for them on marriage; but it has been suggested that the remedy is only suspended and would revive if the wife should outlive the husband. Under the modern legislation making a married woman liable for her debts, either absolutely or in certain cases, or under the equity rule subjecting her separate property to her debts under certain conditions, she remains liable notwithstanding her husband's discharge. If she and her husband are authorized to contract directly with each other the discharge of either would release the debt due from that one to the other.

§ 389. **Time and place to determine effect.**—The proper time and place for the determination of the effect of a discharge upon a claim alleged to have been founded on fraud of the bankrupt is when the discharge is pleaded or relied upon as a defense to the enforcement of the particular claim and will not be heard even upon the hearing of the application for discharge.[83]

§ 390. **Discharge is personal.**—A discharge is a personal privilege given the bankrupt in consideration of his surrendering his property; a bankruptcy proceeding is a proceeding in rem and all persons interested are regarded as parties to the proceedings, including the bankrupt and trustee, as well as the creditors, secured and unsecured, and an injunction may issue after discharge.[84] While the discharge is personal, a widow of a bankrupt to whom his property has been transferred may avail herself of his discharge and plead it in her own defense.[85]

§ 391. **—— New promise to pay debt.**—Since the discharge is personal to the bankrupt he may waive it and, since it does

[83] In re Marshall Paper Co., 2 N. B. N. R. 1053, 102 F. R. 872, 4 A. B. R. 468; In re Shepherd, 2 N. B. N. R. 1070; In re White, 2 N. B. N. R. 536; In re Mussey, 99 F. R. 71, 2 N. B. N. R. 113, 3 A. B. R. 592; In re Tinker, 2 N. B. N. R. 391, 99 F. R. 79, 3 A. B. R. 580; In re Rhutassel, 1 N. B. N. 572, 2 A. B. R. 697, 96 F. R. 597, but see Audubon v. Shufelt, 181 U. S. 188, 5 A. B. R. 623.

[84] Carter v. Hobbs, 1 N. B. N. 191, 1 A. B. R. 215, 92 F. R. 594; Southern Loan & Trust Company v. Benbow, 1 N. B. N. 499, 96 F. R. 514, 3 A. B. R. 9; In re Marshall Paper Co., 102 F. R. 872, 2 N. B. N. R. 1053, 4 A. B. R. 468.

[85] Upshur v. Briscoe, 138 U. S. 365.

not destroy the debt but merely releases him from liability, that is, removes the legal obligation to pay the debt, leaving the moral obligation unaffected, such moral obligation is a sufficient consideration to support a new promise and, if the debtor makes such promise, it may be made the foundation of a suit and the plaintiff should declare on the original promise, or debt, the new promise being a defense to a plea of discharge; otherwise, there would be no consideration to support the new promise, if the original debt was destroyed by the discharge.[86] A new promise is said to revive the debt,[87] though judgments confessed by bankrupt subsequent to his discharge for debts owing prior to the discharge have been held sufficiently supported by the old debts not to revive them but to create new ones.[88] The new promise need not be in writing unless required by state law,[89] but it must be clear, distinct, express and unequivocal;[90] and not in consideration of the creditor's withdrawing his opposition to the discharge.[91] If the promise is based upon a condition it must be shown that the condition has been complied with.[92] It may be made any time after bankruptcy before or after discharge.[93] Unlike debts barred by the statute of limitations, debts discharged in bankruptcy are not revived by a new promise which amounts merely to an acknowledgment, but it must be an express statement of intention to pay;[94] though it may be conditional;[95] and the following have been held sufficient: "I will pay;" "I will settle;" "I will see that you are no loser by me;" "She shall have her pay;" "I am able and willing to pay."[96] Though the new

[86] In re Shaffer, 3 N. B. N. R. 54; Mutual Res. Life Ass'n v. Beatty, 2 A. B. R. 244; Dusenbury v. Hoyt, 10 N. B. R. 313; In re Merriman, 18 N. B. R. 411, F. C. 9479.

[87] Clausen v. Schoeneman, 16 N. B. R. 98.

[88] Dewey v. Moyer, 18 N. B. R. 114.

[89] Mutual Res. Life Ass'n v. Beatty, supra; Henley v. Lanier, 15 N. B. R. 280, 281; Tompkins v. Hazen, 5 A. B. R. 62.

[90] St. John v. Stephenson, 19 N. B. R. 227; Smith v. Stanchfield, 7 A. B. R. 498.

[91] Austin v. Markham, 10 N. B. R. 548.

[92] Smith v. Stanchfield, 7 A. B. R. 498, and cases cited.

[93] Knapp v. Hoyt, 57 Iowa, 591; but see Ogden v. Redd, 18 N. B. R. 318.

[94] Allen v. Ferguson, 18 Wall. 1.

[95] Randidge v. Lyman, 124 Mass. 361; Yates, Adm'r. v. Hollingsworth, 5 Har. & J. 216.

[96] Cook v. Shearman, 103 Mass. 21; Stillwell v. Coope, 4 Denio, 225; Evans v. Carey, 29 Ala. 99.

promise be void a judgment submitted to pursuant thereto will not be set aside nor a voluntary payment be recoverable;[97] and as the new promise revives the debt it enures to the benefit of an endorsee as well as the payee or holder, to whom it was made.[98]

§ 392. **Application for rehearing.**—In view of the provisions of the act[99] for the revocation of a discharge, it is questionable if any other attack can be made on it, if once granted; but, in case of refusal to grant a discharge, an application to rehear may be made, but, if no new questions of fact or law be presented, and it appears the refusal was justified by the showing of concealment of assets, the application will be denied,[1] while a discharge once granted cannot be surrendered or vacated by the bankrupt, he can revive the debt by a new promise, or waive the discharge by failing to plead it.[2]

§ 393. **'c. Confirmation of composition operates as discharge.**—The confirmation of a composition shall discharge 'the bankrupt from his debts, other than those agreed to be 'paid by the terms of the composition and those not affected by 'a discharge.'

§ 394. **Composition, time of offering, etc.**—After a bankrupt has been examined in open court or at a meeting of his creditors, and filed the schedule of his property and list of his creditors, he may offer terms of composition,[3] which the judge may confirm if satisfied that it is for the best interests of his creditors, that it is made in good faith, and that the bankrupt has not been guilty of any act which would bar a discharge,[4] when the consideration must be distributed as the judge directs and the case dismissed,[5] the title of his property thereupon revesting in the bankrupt.[6]

§ 395. **Discharge through composition.**—See Composition, ante, § 320.

[97] Sweenie v. Sharp, 4 Bing. 37.
[98] Way v. Sperry, 6 Cush. 238.
[99] Sec. 15a, act of 1898.
[1] In re Quackenbush, 2 N. B. N. R. 1020.
[2] In re Shaffer. 3 N. B. N. R. 54.
[3] Sec. 12a, act of 1898.
[4] Sec. 12d, act of 1898.
[5] Sec. 12e, act of 1898.
[6] Sec. 70f, act of 1898.

CHAPTER XV.

DISCHARGES, WHEN REVOKED.

§396. (15a) Discharges, when revoked.
397. —— Jurisdiction to revoke.
398. —— Not impeachable collaterally.
399. —— Revokable within a year.
400. —— Who may apply.
401. —— What constitutes undue laches.
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405. Reference to ascertain and report facts.
406. Notice.
407. Evidence.
408. Examination of bankrupt.
409. Effect of revocation.
410. Assets discovered after the expiration of the year.

§ 396. '(Sec. 15a) **Discharges, when revoked.**—The judge 'may, upon the application of parties in interest who have not 'been guilty of undue laches, filed at any time within one year 'after a discharge shall have been granted, revoke it upon a 'trial if it shall be made to appear that it was obtained through 'the fraud of the bankrupt, and that the knowledge of the 'fraud has come to the petitioners since the granting of the 'discharge, and that the actual facts did not warrant the dis-'charge.'[1]

[1] Analogous provision of Act of 1867. "Sec. 34. . . . That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other of the said acts; but said application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of said application to be given to said bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper. If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after the granting of said discharge,

§ 397. **Jurisdiction to revoke a discharge.**—The power to set aside a discharge is limited to the courts of bankruptcy, and their jurisdiction in this respect is exclusive.[2] The effect of this is to prevent the validity of a discharge being called into question in suits brought against the bankrupt, causing unnecessary labor and offering opportunity for different decisions on the same point. If the court overlooks specifications properly filed and grants a discharge, a motion to recall the discharge and consider the specifications may be made, and, if denied, a review may be had in the appellate court;[3] and, if a creditor wishes to attack a discharge, because of the frauduient omission of his claim, he must do so on the ground of fraud in the court of bankruptcy.[4]

§ 398. **Discharge not impeachable collaterally.**—The judgment of a court of competent jurisdiction cannot be collaterally attacked, but is conclusive between the parties; so a discharge in bankruptcy, until set aside or reversed, in a direct proceeding, is conclusive upon all parties to the proceeding, and cannot be attacked collaterally;[5] and cannot therefore be impeached, if pleaded in bar in an action for a dischargeable debt in a state court.[6] Opportunity is offered to contest the discharge, and, if not availed of in the mode and within the time allowed, all remedy to annul it is cut off;[7] but the distinction between attacking the discharge and showing that it does not affect the debt sued on, or other matter, in bar of which

judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if the court shall find that said fraudulent acts and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt and the validity of his discharge shall not be affected by said proceedings."

[2] Commercial Bk. of Manchester v. Bachner, 20 How. 108; Corey v. Ripley, 4 N. B. R. 163; Alston v. Robinett, 9 N. B. R. 74; Nicholas v. Murray, 18 N. B. R. 469, 5 Sawy. 320, F. C. 10223; these cases being equally applicable to the present as to the former acts.

[3] In re Buchstein, 17 N. B. R. 1, 9 Ben. 215, F. C. 2076.

[4] Lymond v. Barnes, 6 N. B. R. 377; In re Roosa, 119 F. R. 542.

[5] Rayl v. Lapham, 15 N. B. R. 508.

[6] In re Witkowski, 10 N. B. R. 209, F. C. 17920; Alston v. Robinett, 9 N. B. R. 74; Corey v. Ripley, 4 N. B. R. 163; Howland v Carson, 16 N. B. R. 372.

[7] Stevens v. Brown, 11 N. B. R. 568.

it is pleaded, must be kept in mind, as the latter can always be done.[8]

§ 399. **Discharge revokable within year.**—The court of bankruptcy has power to recall a final decree granting a discharge on application,[9] and will do so if it appears that an opposing creditor had been prevented by a sudden and overpowering accident from attending the hearing;[10] but a motion to vacate a discharge as inadvertently granted after the time allowed by rule of court for such motion, will be denied.[11] A discharge cannot be revoked after one year, which year begins to run from the date of the discharge and not from the discovery of the fraud upon which the revocation is sought, and it is immaterial that the fraud is not discovered until after the expiration of that period. Furthermore, although the year has not expired, if the creditor has been guilty of undue laches, the discharge will not be revoked. The court cannot set aside a discharge, in order to permit an addition of a creditor to the bankrupt's schedule, more than a year after the adjudication.[12] After a year has elapsed from the date of the discharge, a bankrupt cannot be compelled to submit to an examination for the purpose of instituting or aiding a proceeding to vacate it, nor can the application be amended to add new grounds or acts.[13]

§ 400. **Who may apply.**—The expression "parties in interest" employed in this section includes all persons whose interests are affected by the discharge. One who acquires rights after the discharge would not be included, nor would a creditor fraudulently omitted from the schedule, since his debt is

[8] In re Mussey, 99 F. R. 71, 2 N. B. N. R. 113, 3 A. B. R. 592; In re White, 2 N. B. N. R. 536; In re Tinker, 2 N. B. N. R. 391, 99 F. R. 79, 3 A. B. R. 580; In re Rhutassel, 1 N. B. R. 572, 2 A. B. R. 697, 97 F. R. 597.

[9] In re Ives, 111 F. R. 495, 7 A. B. R. 692.

[10] In re Dupre, 6 N. B. R. 89, 2 Lowell, 18, F. C. 4183.

[11] In re Buchstein, 17 N. B. R. 1, 9 Ben. 215, F. C. 2076.

[12] In re Hawk, 114 F. R. 916, 8 A. B. R. 71.

[13] In re Shaffer, 3 N. B. N. R. 54, 104 F. R. 982, 4 A. B. R. 728; Mall. v. Ullrich, 37 F. R. 653; In re Buchstein, 17 N. B. R. 1, 9 Ben. 215, F. C. 2076; In re Brown, 19 N. B. R. 312, F. C. 1983; In re Dole, 7 N. B. R. 538, F. C. 3965; Pickett v. McGavick, 14 N. B. R. 236; F. C. 11126; Corey v. Ripley, 4 N. B. R. 503; Way v. Howe, 4 N. B. R. 677; Alston v. Robinett, 9 N. B. R. 74; In re Witkowski, 10 N. B. R. 209, F. C. 17920; In re Sims, 9 F. R. 440.

not released by the discharge. It was held under the former law that a creditor, who neglected to file objections in due time and subsequently discovered fraud, might require bankrupt to take his discharge and then apply to set it aside; the knowledge of the fraud barring the right to make such application must have been available in time to present objections to the discharge.[14]

§ 401. **What constitutes undue laches.**—As to what constitutes laches depends upon the circumstances of each case, and it has been held in one case that one month constituted laches;[15] and in another five months,[16] where the court overlooked specifications filed in opposition to the discharge and no proceedings for a review were taken within the time prescribed, the bankrupt having in the meantime acted upon his discharge.[17] It must be made clear that there has been no laches, and this cannot be done by general averments.[18]

§ 402. **Grounds of revocation.**—Notwithstanding the difference in the phraseology of the present act and that of 1867, the meaning of the two are practically the same and the grounds on which a discharge will now be revoked, as under that of 1867, are the same as would have originally prevented the granting of the discharge had they been known and presented in time in the form of objections to its allowance.[19] Thus in bankrupt's application for discharge [20] he is required to state that he has wholly surrendered all his property and rights of property and fully complied with all the requirements of the act, which, if not true and there are grounds for refusing him a discharge, constitute a fraud in obtaining his discharge.

If it is made to appear to the court of bankruptcy that testimony of the bankrupt in subsequent proceedings tends to show that, at the time of the bankruptcy, he had considerable property, though his verified petition stated no assets and no

[14] In re Fowler, 2 Lowell, 122, F. C. 4999.

[15] In re McIntire, 1 N. B. R. 115, 2 Ben. 345, F. C. 8823.

[16] In re Murray, 14 Blatch. 43, F. C. 9953.

[17] In re Buchstein, 17 N. B. R. 1, 9 Ben. 215, F. C. 2076; see also In re Hunter, 3 McLean, 297, F. C. 3902; In re Beck, 31 F. R. 554.

[18] In re Oleson, 110 F. R. 796, 7 A. B. R. 22.

[19] In re Rainsford, 5 N. B. R. 381, F. C. 11537; In re Meyers, 2 N. B. N. R. 669, 100 F. R. 775, 3 A. B. R. 772; In re Dietz, 2 N. B. N. R. 125, 3 A. B. R. 316, 97 F. R. 563; Ex p. Briggs, 2 Lowell, 389, F. C. 1868.

[20] Form 57.

trustee was appointed, a hearing should be had on the question whether the discharge should not be revoked;[21] or if the opposition of a creditor was bought off through the procurement or privity of the bankrupt;[22] or, if by wilfully and fraudulently making a false schedule or affidavit, the bankrupt prevented notice to a creditor and such creditor had no actual knowledge of the proceedings;[23] or if credit was procured on the faith of bankrupt's ownership of property, deeds of which, through a third person to bankrupt's wife without consideration were alleged to have been burned, such deeds being afterwards recorded and the property omitted from the schedules.[24]

§ 403. Grounds for refusing revocation.—A discharge will not be set aside on motion made after bankrupt has acted on the faith of it, and after the time allowed by rule of court for such motion, on the ground that the court had overlooked certain specifications;[25] or in regard to a matter not barred by the discharge;[26] or if the requirements of the act were honestly complied with by the bankrupt, though the creditors did not have actual notice;[27] or merely because the creditors can produce new facts as to matters heard before the discharge was granted; or where the fraud was committed years before the bankruptcy;[28] or if the evidence fails to sustain charges that the creditor had no notice, that the bankrupt fraudulently omitted assets,[29] and admitted a false claim;[30] or if the trustee had knowledge of all the facts prior to the discharge, though the petitioner for revocation had not;[31] or if the only

[21] In re Meyers, supra; In re Augenstein, 16 N. B. R. 252.

[22] In re Dietz, 2 N. B. N. R. 125, 3 A. B. R. 316, 97 F. R. 563; Tuzbury v. Miller, 19 John. 311; In re Douglas, 11 F. R. 403, 406; In re Palmer, 14 N. B. R. 437, 2 Hughes, 177, F. C. 10678; Blasdel v. Fowle, 120 Mass. 447; Bell v. Leggett. 7 N. Y. 176.

[23] In re Roosa, 119 F. R. 542; Rayl v. Lapham, 15 N. B. R. 508; In re Herrick, 7 N. B. R. 341, F. C. 6419; In re Carrier, 13 N. B. R. 208, F. C. 2443.

[24] In re Rainsford, 5 N. B. R. 381, F. C. 11537.

[25] In re Buchstein, 17 N. B. R. 1, 9 Ben. 215, F. C. 2076.

[26] In re Mansfield, 6 N. B. R. 388, F. C. 9049; In re Monroe, 114 F. R. 398, 7 A. B. R. 706.

[27] Rayl v. Lapham, 15 N. B. R. 508.

[28] In re Corwin, 19 N. B. R. 422, F. C. 3259, 1 F. R. 847; In re Hoover, 3 N. B. N. R. 327; In re Hoover, 105 F. R. 354, 5 A. B. R. 247.

[29] In re Hansen, 107 F. R. 252.

[30] In re Stetson, 3 N. B. R. 179, 4 Ben. 147, F. C. 13381.

[31] In re Hansen, supra.

evidence offered is incompetent and inadmissible, having been known to the creditor before the discharge was granted;[32] or if the bankrupt failed to schedule a lease which was subject to forfeiture for his failure to perform its conditions, subsequently making a new contract with reference thereto, the property proving valuable after his discharge and being sold to third parties;[33] or on general averments or after bankrupt's death to allow creditors to prove their claims.[34]

§ 404. **How application made.**—If the application is addressed to the court of bankruptcy in the exercise of its general powers as a court to control its own records and make them conform to the facts, or correct anything done through inadvertence or mistake or procured through fraud practiced on the court, it may usually be by motion, supported, in case facts outside of the record are relied on, by affidavits. Such motion must be made within the time prescribed by the rules of court and otherwise conform thereto.

If the application is made under this section, it should be by a verified petition setting out in detail the facts constituting the alleged fraud and those showing that the actual facts did not warrant a discharge; that the knowledge of such fraud has come to the petitioners since the discharge was granted and that there has been no undue laches on their part in presenting the matter to the court; and such petition must be presented within one year after the granting of the discharge.

§ 405. **Reference to ascertain and report facts.**—If such petition makes out a prima facie case, and is filed in due time by competent parties, it should be referred to a special master, the referee usually, to ascertain and report upon the facts, alleged in the petition, on due notice to the bankrupt, and on hearing such evidence as may be offered by the parties.[35]

§ 406. **Notice.**—Notice of the hearing should be given the bankrupt and any other persons interested, and such notice should be reasonable though there is no definite time specified, unless by analogy the ten days' notice to creditors[36] be a guide. If a discharge obtained by fraud is set aside and the case

[32] In re Marrionneaux, 13 N. B. R. 222, 1 Woods, 37, F. C. 9088.

[33] In re Oliver, 2 N. B. N. R. 212.

[34] In re McIntire, 1 N. B. R. 115, 2 Ben. 345, F. C. 8823; Young v. Ridenbaugh, 11 N. B. R. 563, 3 Dill. 239, F. C. 18173.

[35] In re Meyers, 2 N. B. N. R. 669, 100 F. R. 775, 3 A. B. R. 772.

[36] Sec. 58, act of 1898.

referred to the referee before whom the bankrupt offers testimony to which the petitioner excepts and such exception is taken before the court, which, without any additional testimony, and without notice to counsel, passes an order vacating the decree and annulling the discharge, notice should be given to all persons affected.[37]

§ 407. **Evidence.**—Conveyances made by a bankrupt and alleged to be fraudulent, or any other acts of bankrupt, can not be shown in evidence, unless charged in the petition to set aside the discharge, except to show the intent of certain acts specified in such petition.[38]

§ 408. **Examination of bankrupt.**—The bankrupt may be examined after a discharge and at any time within a year of its granting for the purpose of discovering if there is reason to apply to have such discharge revoked under this section,[39] not after the year has expired.[40]

§ 409. **Effect of revocation.**—The object of this section is to secure the utmost good faith in the procuring of a discharge. Persons acting on the faith of a discharge are protected, in case of its revocation, by applying the property acquired by the bankrupt, in addition to his estate at the time of adjudication, to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such discharge was in force, and the residue, if any, to the payment of the debts owing at the time of adjudication.[41] A trustee, on his appointment and qualification after a discharge is revoked, is vested with the title to all of the bankrupt's property as of the date of the final decree revoking the discharge.[42]

§ 410. **When assets discovered after the expiration of the year.**—Where, after his discharge and after the period when a petition to reopen or revoke the discharge had elapsed, the bankrupt discovered assets that should have been scheduled and petitions to be allowed to schedule them, only creditors who proved their claims according to the act can participate in such assets.[43]

[37] In re Augenstein, 16 N. B. R. 252.

[38] Tenny v. Collins, 4 N. B. R. 156, F. C. 13833.

[39] In re Peters, 1 N. B. N. 165, 1 A. B. R. 248; In re Heath, 7 N. B. R. 448, F. C. 6304.

[40] In re Dole, 7 N. B. R. 538, F. C. 3965.

[41] Sec. 64c, act of 1898.

[42] Sec. 70d, act of 1898.

[43] In re Shaffer, 3 N. B. N. R. 54, 104 F. R. 982, 4 A. B. R. 728.

CHAPTER XVI.

CO-DEBTORS OF BANKRUPTS.

§411. (16a) Liability of co-debtors.
412. Effect of discharge.
413. Endorsers.
414. Partners.
415. Sureties.
416. —— On bonds of public officers.
417. Discharge of corporation, director's liability.

§ 411. '(Sec. 16a) Liability of co-debtors of bankrupt.—'The liability of a person who is a co-debtor with, or guarantor 'or in any manner a surety for, a bankrupt shall not be altered 'by the discharge of such bankrupt.'[1]

§ 412. Effect of discharge.—This section is merely declaratory of existing law, it being a general rule that, while a voluntary release of one co-debtor releases the other, a release by operation of law does not do so.

A discharge in bankruptcy releases the bankrupt but does not release, discharge or affect any person liable for the same debt, or with the bankrupt, as partner, joint contractor, indorser, surety or otherwise;[2] but the bankrupt continues to be a necessary party in legal proceedings to enforce the liability of such others, because, unless he pleads the discharge, judgment can be taken against him.[3] The bankrupt's wife can not plead it in an action for her half of community debts, where she has accepted the community;[4] nor his grantee in a judgment creditor's suit to set aside a conveyance.[5] A creditor is not required to collect what he can from bankrupt's estate, nor urge objections to discharge, although he may not assent to it.[6]

[1] Analogous provision of Act of 1867. "Sec. 33. . . . and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise."

[2] In re DeLong, 1 N. B. N. 26, 1 A. B. R. 66; The Home, 18 N. B. R. 557, F. C. 6657; In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, F. C. 13393; In re Levy, 1 N. B. N. 66, 2 Ben. 169, F. C. 8297; Abendroth v. Van Dolsen, 131 U. S. 66.

[3] Fellows v. Hall, 3 McLean, 281, F. C. 4722; Doggett v. Emerson, 1 Woodb. & M. 195, F. C. 3962; Goodrich v. Hunton, 2 Woods, 137, F. C. 5544; In re Ferguson, 16 N. B. R. 530, 2 Hughs. 286, F. C. 4738.

[4] Ludeling v. Felton, 17 N. B. R. 310.

[5] Moyer v. Dewey, 103 U. S. 301.

[6] In re McDonald, 14 N. B. R. 477, F. C. 8753.

The liability of such co-debtor, surety or guarantor, while it is not released by the discharge of the principal, will be released in proceedings in bankruptcy instituted by such co-debtor, surety or guarantor.

For general subject of discharges, see ante, §§ 341-395.

§ 413. **Endorsers.**—An endorser is not affected by the discharge, even if the holder of the note has proved his debt in bankruptcy against the maker for the full amount as an unsecured claim, though the holder, by so doing, releases all his right to a mortgage indemnifying the endorser;[7] or if the holder of an accommodation note, knowing it to be such, signs a composition;[8] or if the holder fails to prove the note of his own motion;[9] but the endorser is released if the holder of a note gives an extension of time to the principal for a valuable consideration without the endorser's assent;[10] or if a demand note is not presented for payment for several years.[11]

§ 414. **Partners.**—This provision evidently contemplates the discharge of one partner without the others, in other words, the separate discharge of one partner from partnership debts. But notwithstanding this, it seems that a partner may proceed on his individual petition for his own adjudication and discharge without reference to the other partners only in case all are insolvent and there are no partnership assets whatever;[12] otherwise the petition should aver individual indebtedness, if any, and also firm indebtedness, naming the firm and

[7] Merchants' Nat. Bk. of Syracuse v. Comstock, 11 N. B. R. 235.

[8] Guild v. Butler, 16 N. B. R. 347.

[9] Nat. Bank of So. Reading v. Sawyer, 3 N. B. N. R. 266; Watertown Bank v. Simmons, 131 Mass. 85.

[10] Valley Nat. Bk. v. Meyers Ass. 17 N. B. R. 257, F. C. 5549.

[11] In re Crawford, 5 N. B. R. 301, F. C. 3364.

[12] In re Hirsch, 2 N. B. N. R. 137, 3 A. B. R. 344, 97 F. R. 571; In re Meyers, 1 N. B. N. 515, 96 F. R. 408, 2 A. B. R. 707; In re Altman, 1 N. B. N. 358, 1 A. B. R. 689; In re Abbe, 1 N. B. R. 26, F. C. 4; In re Marks, F. C. 9094; Crompton v. Conkling, 15 N. B. R. 417, F. C. 3408, s. c. F. C. 3407; In re Winkens, 2 N. B. R. 113, F. C. 17875; In re Downing, 3 N. B. R. 182, 1 Dill. 33, F. C. 4044; In re Laughlin, 96 F. R. 589, 3 A. B. R. 1; Wilkins v. Davis, 15 N. B. R. 60, 2 Lowell, 511, F. C. 17664; West Phil. Bk. v. Gerry, 106 N. Y. 467; In re Bidwell, 2 N. B. R. 78, F. C. 1392; In re Leland, 5 N. B. R. 222, 5 Ben. 168, F. C. 8228; In re Frear, 1 N. B. R. 201, 2 Ben. 467, F. C. 5074; but see Jerecki Mfg. Co. v. McElwaine, 107 F. R. 249, 5 A. B. R. 751.

the several partners, and specifically pray for discharge from firm as well as individual debts; and be accompanied by schedules setting forth the firm debts, firm property and all other matters, required in partnership proceedings, as well as schedules of the individual property and debts. The notices of the first meeting in such case should state that firm, as well as individual creditors are notified because a discharge is sought from both classes of claims. Notice of the filing of the petition and of the creditors' meetings should be given the nonjoining partners.[13]

§ 415. Sureties on appeal, attachment and other bonds.—A surety who discharges the principal's debt, does not thereby relieve the principal from liability to pay it, but he thereby becomes subrogated to the rights of the former owner of the claim.[14] A discharge in bankruptcy of the principal does not release, discharge or affect a surety,[15] unless it prevents the happening of the event on which the surety's liability depends, in which case he would never become liable rather than be released; as in bonds in attachment suits begun within four months of the bankruptcy;[16] but if the attachment was begun more than four months prior to bankruptcy, suit may be prosecuted to a special judgment to charge the sureties.[17] A surety on an appeal bond will be released if the bankrupt's discharge can be brought to the attention of the appellate court and prevent judgment,[18] but not after the judgment, or if only what

[13] In re Laughlin, 96 F. R. 589, 3 A. B. R. 1; In re Freund, 1 N. B. N. 105, 1 A. B. R. 25; In re Elliott, 2 N. B. N. R. 350; Hudgins v. Lane, 11 N. B. R. 462, 2 Hughes, 361, F. C. 6827; In re Little, 1 N. B. R. 74, 2 Ben. 136, F. C. 8390; Corey v. Perry, 17 N. B. R. 147; In re Noonan, 10 N. B. R. 330, 3 Biss. 491, F. C. 10292; In re Brick, 19 N. B. R. 508.

[14] Swarts v. Siegel, 8 A. B. R. 690.

[15] In re Stevens, 5 N. B. R. 112, 1 Sawy. 397, F. C. 13393; In re Levy, 1 N. B. R. 66, 2 Ben. 169, F. C. 8297; Abendroth v. Van Dolsen, 131 U. S. 66; The "Home," 18 N. B. R. 557, F. C. 6657; In re De-Long, 1 N. B. N. 26, 1 A. B. R. 66; but see U. S. v. Throckmorton, 8 N. B. R. 309, F. C. 16516.

[16] Smith v. Steinberg, 1 N. B. N. 240; Johnson v. Collins, 12 N. B. R. 70; Braley v. Boomer, Id. 303; Wolf v. Stix, 99 U. S. 1; Hamilton v. Bryant, 14 N. B. R. 479; Bryant v. Kenyon, 6 A. B. R. 237.

[17] Hill v. Harding, 107 U. S. 631; Id. 130 U. S. 690; In re Albrecht, 17 N. B. R. 287, F. C. 145; Holyoke v. Adams, 10 N. B. R. 270; see In re Rosenthal, 108 F. R. 368, 5 A. B. R. 799.

[18] Goyer v. Jones, 8 A. B. R. 437; Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309; see Haggerty v. Morrison, 59

was before the lower court is cognizable above.[19] A surety on a bond conditioned on a surrender of the principal before a breach, will be released if no breach has occurred, though not after breach;[20] or on bonds in replevin when the trustee has the replevied articles, judgment being still obtainable to fix the sureties' liability.[21] If prior to the adjudication in bankruptcy a judgment has been rendered against a garnishee, a subsequent discharge of the principal debtor does not operate to discharge the garnishee.[22]

§ 416. Sureties on bonds of officers, co-debtors, etc.—A discharge in bankruptcy releases a surety on a guardian's bond from liability for defaults of the guardian which occurred prior to the commencement of proceedings against the surety;[23] and the discharge of a co-surety releases him from the liability to contribute to his co-sureties. The discharge of a joint debtor does not prevent judgment for the full amount being taken against his joint debtor;[24] nor of a joint judgment debtor prevent execution against the other judgment debtor;[25] nor interfere with the prosecution of proceedings supplementary to execution against such other.[26] In the absence of specific provision to the contrary, it has been uniformly held that debts due the sovereign are not released by a discharge in bankruptcy;[27] nor is it in any wise affected by a bankruptcy law;[28] consequently sureties on the bonds of public officers or other bonds to the United States are not released.[29]

§ 417. Discharge of corporation as to directors' liability.—

Mo. 324; Jones v. Coper, 16 N. B. R. 343; Odell v. Wootten, 4 N. B. R. 46.

[19] Knapp v. Anderson, 15 N. B. R. 316.

[20] Richardson v. McIntyre, 4 Wash. C. C. 412; Bennett v. Alexander, 1 Cranch, C. C. 90.

[21] See Clemmons v. Brinn, 7 A. B. R. 714.

[22] Marx v. Hart, 166 Mo. 503, 66 S. W. 260, 8 A. B. R. 438, note.

[23] Jones v. Knox, 8 N. B. R. 559; Reitz v. People, 16 N. B. R. 96; Ex p. Taylor, 16 N. B. R. 40, 1 Hughes, 617, F. C. 13773; Halliburten v. Carke, 10 N. B. R. 359.

[24] Lewis Tr. v. U. S., 14 N B. R. 64, 92 U. S. 618.

[25] Penny v. Taylor, 10 N. B. R. 200, F. C. 10957.

[26] In re DeLong, 1 N. B. N. 26, 1 A. B. R. 66.

[27] U. S. v. Herron, 20 Wall.. 251; Attorney-General v. Alston, 2 Mod. 248; U. S. v. King, Wall. C. C. R. 18; U. S. v. Knight, 14 Pet. 315; Bank v. U. S., 19 Wall. 239; U. S. v. Hoar, 2 Mason, 311.

[28] Lewis v. U. S., 92 U. S. 618.

[29] U. S. v. Herron, supra; but see U. S. v. Throckmorton, 8 N. B. R. 309, F. C. 16516.

By the amendatory act of February 5, 1903, it is provided that the bankruptcy of a corporation does not release its officers, directors or stockholders, as such, from any liability under the laws of a State or Territory of the United States.[30] Notwithstanding the discharge of the corporation, a creditor may take judgment in a state court against it, in such limited form as will enable him to reap the benefit of the directors' liability, the rendering of such a judgment depending upon the authority of the state court under the local law. In such case the judgment will not be against the person or property of the bankrupt and has no other effect than to enable the plaintiff to charge the directors in accordance with the state statute.[31]

[30] Sec. 4b; see also In re Marshall Paper Co., 2 N. B. N. R. 1058, 102 F. R. 872, 4 A. B. R. 468; s. c. 1 N. B. N. 407, 2 A. B. R. 653, 95 F. R. 419; Elsbree v. Bart, 9 A. B. R. 87.

[31] In re Marshall Paper Co., supra; Hill v. Harding, 130 U. S. 699, 32 L. Ed. 1083.

CHAPTER XVII.

DEBTS NOT AFFECTED BY DISCHARGE.

§418 (17a) Debts not affected by discharge.
419. Provable debts generally released, unprovable not.
420. Taxes due the United States, State, etc.
421. Debts due the Goverment, released.
422. Alimony not released.
423. Attachment for contempt for failing to pay dischargeable debt.
424. Bonds.
425. Costs, etc.
426. Effect of proof of claims.
427. Executory contracts.—Covenants.
428. Exemption personal to creditor.
429. Fiduciary.
430. Fines.
431. Foreign discharge.
432. Determination of character of debt.
433. Form of action.
434. Obtaining property by false pretenses or representation.
435. Fraud while acting as fiduciary.
436. Willful and malicious injury to person or property.
437. For support, seduction, etc.
438. —— To effectuate valid liens. —Keeping alive old debts.
439. —— Judgments pending proceedings.
440. Liens.
441. Limitations.
442. Rent.
443. Statutory liability.
444. Sureties.
445. Unliquidated damages.
446. Unproved and unscheduled claims.
447. Waiver.
448. Wife's debts.

§ 418. '(Sec. 17a) Debts not affected by a discharge.—A 'discharge in bankruptcy shall release a bankrupt from all of 'his provable debts, except such as

'(1) Are due as a tax levied by the United States, the State, 'county, district, or municipality in which he resides;

'(2) Are liabilities for obtaining property by false pre-'tenses or false representations, or for willful and malicious 'injuries to the person or property of another, or for alimony 'due or to become due, or for maintenance or support of wife 'or child, or for seduction of an unmarried female, or for crim-'inal conversation;

'(3) Have not been duly scheduled in time for proof and 'allowance, with the name of the creditor if known to the bank-'rupt, unless such creditor had notice or actual knowledge of 'the proceedings in bankruptcy; or

'(4) Were created by his fraud, embezzlement, misappro-

'priation, or defalcation while acting as an officer or in any 'fiduciary capacity.'[1]

§ 419. **Provable debts generally released, unprovable debts not.**—Debts which by their nature are provable, with the exceptions noted in this section, are released by a discharge in bankruptcy, without regard to whether they could in fact be proved or not, or whether by reason of the inadvertent giving of wrong addresses, the creditors received no notice and had no knowledge of the proceedings;[2] and a discharge is a complete bar to suit thereon, though the dismissal of such suit will not prejudice proof of the claim under the bankrupt law.[3] Debts not provable are in no wise affected by the discharge.[4] Debts

[1] Section 17a was amended by the Act of February 5, 1903, by the substitution of the matter in the text for the following:

'A discharge in bankruptcy shall 'release a bankrupt from all of his 'provable debts, except such as

'(1) Are due as a tax levied by 'the United States, the State, 'county, district, or municipality 'in which he resides;

'(2) Are judgments in actions 'for frauds, or obtaining property 'by false pretenses or false repre-'sentations, or for willful and ma-'licious injuries to the person or 'property of another;

'(3) Have not been duly sched-'uled in time for proof and allow-'ance, with the name of the cred-'itor if known to the bankrupt, 'unless such creditor had notice or 'actual knowledge of the proceed-'ings in bankruptcy; or

'(4) Were created by his fraud, 'embezzlement, misappropriation, 'or defalcation while acting as an 'officer or in any fiduciary capac-'ity.'

Analogous provision of Act of 1867. "Sec. 33. That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; . . .

"Sec. 34. That a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in hæc verba, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and [the] regularity of such discharge."

[2] In re Kingsley, 1 N. B. R. 66, 1 Lowell 216, F. C. 7819; Pattison v. Wilbur, 12 N. B. R. 193.

[3] Humble v. Carson, 6 N. B. R. 84; Dusenbury v. Hoyt, 10 N. B. R. 313.

[4] See Clemmons v. Brinn, 7 A. B. R. 714.

which may be proved are elsewhere discussed,[5] to which reference should be made. After it is determined whether the debt is provable, it should be ascertained if it comes within either of the exceptions mentioned in this section; and, if it does not, it is released. The exceptions are therefore to be carefully examined and their scope noted.

The right to a discharge and the effect of a discharge on a claim are wholly distinct propositions. The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied upon by the debtor as a defense to the enforcement of a particular claim. The issue upon the effect of a discharge cannot properly arise or be considered in determining the right to a discharge.[6]

§ 420. **Taxes due the United States, etc.**—Taxes due the United States, state, county, district or municipality in which the bankrupt resides are not released, but must be paid in advance of dividends to creditors.[7] This accords with the general rule that governmental revenues are not allowed to be tampered with lest it interfere with the performance of the important public duties with which such governing body is charged; but it should be noted that the taxes included within the exception of this section are confined to the state, county, district and municipality in which bankrupt resides. This is not to be considered, however, as limiting the general lien for taxes on property wherever situated, and which is borne out by section 64a, which makes all taxes payable in advance of dividends. Whether or not any tax or assessment in the nature of a tax is within the meaning of the word "taxes" as used in this section is to be determined by the laws imposing the same, and where, for instance, the highest court in a state has held that the "mulet tax" is not a tax though the legislature called it so in the statute, such decision must be followed.[8]

§ 421. **Debts due the government.**—In the absence of specific

[5] Sec. 63 of act of 1898, post, § 977.

[6] In re McCarthy, 111 F. R. 151, 7 A. B. R. 40; In re Marshall Paper Co., 102 F. R. 872, 4 A. B. R. 468; In re Rhutassel, 96 F. R. 597, 2 A. B. R. 697; In re Thomas, 92 F. R. 912, 1 A. B. R. 515. This distinction seems to have been overlooked by the Supreme Court in the case of Audubon v. Shufelt, 181 U. S. 575, 5 A. B. R. 829.

[7] Sec. 64a, act of 1898.

[8] In re Ott, 1 N. B. N. 571, 2 A. B. R. 637, 95 F. R. 274.

provision to the contrary, it has been uniformly held that debts due the sovereign are not released by a discharge in bankruptcy;[9] nor is it in anywise bound by a bankruptcy law.[10] It is a general rule of interpretation that if the legislature intends to divest the sovereign power of any right, privilege, title or interest, it should so appear in express words, and where an act contains no words to express such an intent, it will be presumed that the intent does not exist.[11] Under the act of 1867, a claimant who gave bond for the delivery to him of property seized by the Government and, on a decree in favor of the Government, set up a discharge in bankruptcy, was held not released;[12] but under the act of 1841 a discharge was held to release a debt due the United States for customs dues.[13]

While there is some dissimilarity between the act of 1867 and the present one with reference to the debts not affected by a discharge, and it might be argued under this general rule of interpretation, and following the decisions under the act of 1867, that debts due the United States are not released by the discharge, although the same may only be a liability as surety for the faithful performance of duty by a public officer,[14] yet under that equally well known maxim expressio unius est exclusio alterius, the fact that Congress specifically provided that debts due the United States as a tax only, would not be discharged, would indicate that debts of all other character are released by the discharge.[15]

§ 422. **Alimony, not released.**—Prior to the amendment of February 5, 1903, much diversity of opinion existed with relation to the dischargeability of alimony which had accrued prior to the filing of the petition. Some courts held that where the liability might be modified by the court which decreed the alimony, it was not released,[16] while others took the position

[9] U. S. v. Herron, 20 Wall. 251; Attorney General v. Alston, 2 Modern 248; U. S. v. King, Wall., C. C. R. 18, F. C. 15536.

[10] Lewis v. United States, 92 U. S. 618.

[11] United States v. Herron, supra; United States v Knight, 14 Pet. 315; Bank v. United States, 19 Wall. 239; United States v. Hoar, 2 Mason 311.

[12] United States v. Rob Roy, 13 N. B. R. 235, 1 Woods 42, F. C. 16179.

[13] Zaugas Case, F. C. 16786.

[14] United States v. Herron, supra.

[15] In re Alderson, 3 A. B. R. 544, 98 F. R. 588.

[16] In re Nowell, 3 A. B. R. 837, 99 F. R. 931; In re Smith, 1 N. B. N. 471, 3 A. B. R. 67; In re Shep-

that where it was fixed, certain and determined and in the nature of a judgment, it would be released.[17] The amendment settles all doubt and provides that alimony whether due or to become due is not released by the discharge.[18]

§ 423. **Attachment for contempt for failing to pay dischargeable debt.**—Contempt proceedings may be taken to punish the willful disobedience of a lawful order of the court or to secure the result that obedience of the order would have brought but for the bankrupt's disobedience, or both;[19] and, if they are for the failure to obey an order requiring the payment of money and the discharge will release the liability to pay the money, the bankrupt is entitled to be released.[20] The same rule applies in the case of fines and costs inuring to the benefit of the prosecutor;[21] but, if for the enforcement of an order requiring the performance of some act or duty, not affected by the discharge, he is not entitled to release;[22] and, of course, not, if it is to punish him, a pardon being the only relief in that case, unless release is secured under the provision as to poor debtors, the state laws relating thereto being adopted by the United States.[23]

§ 424. **Bonds.**—A bond given by bankrupt to secure the release of a lien which is valid under the bankrupt act, takes the place of such lien and is not released by the discharge, as where to dissolve an attachment against him, issued more than

ard, 97 F. R. 187, 5 A. B. R. 857; In re Anderson, 97 F. R. 321, 5 A. B. R. 858; Audubon v. Shufeldt, 181 U. S. 575, 5 A. B. R. 829; Maisner v. Maisner, 6 A. B. R. 295; Turner v. Turner, 108 F. R. 785, 6 A. B. R. 289; Young v. Young, 7 A. B. R. 171; In re Lachemeyer, 18 N. B. R. 270, F. C. 7966; In re Garrett, 11 N. B. R. 483, 2 Hughes 235, F. C. 5252; Barclay v. Barclay, 2 N. B. N. R. 552; but see In re Challon, 2 N. B. N. R. 105, 3 A. B. R. 442, 98 F. R. 82.

[17] In re Houston, 1 N. B. N. 305, 2 A. B. R. 107, 94 F. R. 119; In re Van Orden, 1 N. B. N. 475, 2 A. B. R. 801, 96 F. R. 86; Fite v. Fite, 61 S. W. 26, 5 A. B. R. 461.

[18] In re Hubbard, 98 F. R. 710, 3 A. B. R. 528; In re Baker, 1 N. B. N. 547, 3 A. B. R. 101, 96 F. R. 954; In re Cotton, F. C. 3269; Hawes v. Cooksey, 13 Ohio 242.

[19] McCann v. Randall, 146 Mass. 181.

[20] See Wagner v. U. S., 104, F. R. 133, 4 A. B. R. 596.

[21] Hendryx v. Fitzpatrick, 19 F. R. 810, and cases; Jackson v. Billings, 1 Caines 252; Buffum's Case, 13 N. H. 14; People v. Craft, 7 Paige 325.

[22] Spalding v. New York, 4 Hun. 21.

[23] Sec. 991, U. S. Rev. Stat.

four months before the bankruptcy proceedings, the bankrupt gives a bond;[24] nor if the bankrupt's liability on such bond does not become fixed by the happening of the contingency named until after the filing of the petition.[25] Nor does a discharge release the bankrupt from liability as surety for the faithful performance of duty by a public officer;[26] nor if given to secure the delivery of goods seized by the Government;[27] but where a principal is released from a debt by his discharge in bankruptcy, he will also be released from his contingent liability to his surety for the same debt;[28] or a bond given on the arrest of a debtor, and conditioned that he will apply for the benefit of the state insolvent laws, unless the debt is one not released by a discharge.[29]

§ 425. **Costs, etc.**—Costs taxable against an involuntary bankrupt who was at the time the petition was filed against him plaintiff in an action which passes to the trustee and which, after notice, he declines to prosecute, and taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt,[30] are provable claims and released by a discharge; as must be any costs or expenses connected with a provable debt since the incident falls with the principal. Costs incurred by a surety for bankrupt in attempting to resist payment can not be recovered against the discharged principal though the surety could only prove for the original amount in the creditor's name.[31] In an action which was commenced prior to the filing of the petition in bankruptcy, the costs taxed against a bankrupt after the filing of the petition, not being provable are not discharged.[32]

§ 426. **Effect of proof of claim.**—Until a discharge is granted, the fact that a claim is provable, or has been proved,

[24] Holyoke v. Adams, 10 N. B. R. 270; In re Albrecht, 17 N. B. R. 287, F. C. 145; Hill v. Harding, 130 U. S. 699, 9 S. Ct. 725; Contra, Hamilton v. Bryant, 14 N. B. R. 479.

[25] Eastman v. Hibbard, 13 N. B. R. 360.

[26] U. S. v. Herron, 9 N. B. R. 535, 20 Wall. 251; but see U. S. v. Throckmorton, 8 N. B. R. 309, F. C. 16516.

[27] U. S. v. Rob Roy, 13 N. B. R. 235, 1 Woods 42, F. C. 16179.

[28] Halliburton v. Carter, 10 N. B. R. 359.

[29] Hubert v. Horter, 14 N. B. R. 430.

[30] Sec. 63a, act of 1898.

[31] Sec. 57i, act of 1898; Fisher v. Tifft, 127 Mass. 313; see Aiken, Lambert v. Haskins, 6 A. B. R. 46.

[32] In re Marcus, 5 A. B. R. 19; Aiken, Lambert v. Haskins, supra,

does not prevent its enforcement by other means and a suit may be brought on a provable claim, or prosecuted to judgment, notwithstanding the pendency of bankruptcy proceedings, in which a discharge may be granted which will release it, unless stayed by the court of bankruptcy, or the court in which it is brought; and, if no discharge is granted, a suit may be brought for the balance after the distribution of the bankrupt's estate pro rata.[33] A creditor is not estopped from prosecuting an action on a claim not discharged in bankruptcy, by electing to prove his claim in bankruptcy, but may receive a dividend and then sue for so much as remains unsatisfied.[34]

§ 427. **Executory contracts.—Covenants.**—A discharge in bankruptcy does not affect the bankrupt's contractual liabilities beyond releasing him from personal liability for such as had accrued prior to the bankruptcy, or if the trustee deems such contract to be beneficial to the estate and assumes it, in which cases he assumes liability and the bankrupt is released, but otherwise not;[35] thus counsel employed by the bankrupt prior to the bankruptcy to carry on a suit at their own expense for a contingent fee of one-half are entitled to such one-half though the recovery is after the bankrupt's discharge;[36] or a landlord to collect rent from the bankrupt under a lease accruing after the adjudication.[37] The bankrupt is released by his discharge from the breach of a covenant which occurred prior to his discharge, if the same result in a provable liability,[38] but if he sells land prior to his bankruptcy with a covenant of title, he remains liable therein after the discharge,[39] but in the case

[33] Holland v. Martin, 18 N. B. R. 359; Frey v. Torrey, 8 A. B. R. 196; Whitney v. Crafts, 10 Mass. 23; Dingee v. Becker, F. C. 3919; Lewensohn, 2 N. B. N. R. 381, 99 F. R. 73; Robinson, 2 N. B. R. 341, F. C. 11939.

[34] Frey v. Torrey, supra; see In re Rundle, 2 N. B. R. 49, F. C. 12138.

[35] In re Schiermann, 2 N. B. N. R. 188; Contra, In re Jefferson, 1 N. B. N. 288, 2 A. B. R. 206, 93 F. R. 948.

[36] Maybin v. Raymond, 15 N. B. R. 353, F. C. 9338.

[37] In re Ells, 2 N. B. N. R. 360, 3 A. B. R. 564, 98 F. R. 967; In re Frankel, 2 N. B. N. R. 840; In re Mahler, 3 N. B. N. R. 39, aff'g 2 Id. 70; Bray v. Cobb, 2 N. B. N. R. 586, 100 F. R. 270, 3 A. B. R. 788; In re Arnstein, 101 F. R. 706, 4 A. B. R. 246, aff'g 2 N. B. N. R. 106; Contra, In re Jefferson, supra; see In re Webb, 6 N. B. R. 302, F. C. 739; Bailey v. Lock, 11 N. B. R. 271, 2 Woods 578, F. C. 739; In re Bleek, 12 N. B. R. 215, 8 Ben. 93, F. C. 1822.

[38] Williams v. Harkins, 15 N. B. R. 34.

[39] In re Burton, 29 F. R. 637.

where there is an unrelinquished dower right, and the husband of the person having the inchoate right of dower is living, there is no provable claim and it is not released.[40]

§ 428. **Exemption personal to creditor.**—By proving his claim a creditor waives any personal exemption he may have, as being out of the jurisdiction, omitted from the proceedings and without knowledge thereof or the like.[41]

§ 429. **Fiduciary.**—The exemption of debts created by bankrupt's fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity applies only to a person who was already an officer or a fiduciary when the debt was created, and not to one created under circumstances in which trust or confidence is reposed in the debtor in the popular sense of those terms;[42] that is, only technical or special trusts, as contradistinguished from those which the law implies from the contract, are within the exception.[43]

The terms "fraud," "embezzlement," "misappropriation," or "defalcation," relate and are limited to one acting as an officer or holding a fiduciary position, and it is not the defalcation only of such a person that is referred to, but it is any act of fraud, embezzlement or misappropriation as well as defalcation on his part that is not released.[44] A debt due by a bankrupt in the character of a commission merchant, arising out of his failure to account for the value of goods consigned to him for sale on commission is not within the exception but will be released by a discharge;[45] and if such debtor is arrested under a state statute

[40] Riggin v. Maguire, 8 N. B. R. 484, 15 Wall. 549.

[41] Clay v. Smith, 3 Pet. 411; Jones v. Horsey, 4 Md. 306; Murray v. Roberts, 150 Mass. 599.

[42] In re Rogers, 1 N. B. N. 211, 1 A. B. R. 541; Claflin v. Eason, 1 N. B. N. 360, 2 A. B. R. 263; Upshur v. Briscoe, 138 U. S. 365; Bryant v. Kinyon, 6 A. B. R. 237.

[43] Bracken v. Milner, 104 F. R. 522, 5 A. B. R. 23; Gee v. Gee, 7 A. B. R. 500; Neal v. Clark, 95 U. S. 704, 24 L. Ed. 586; Hennequin v. Clews, 111 U. S. 676, 28 L. Ed. 565; In re Benedict, 8 A. B. R. 463; Noble v. Hammond, 129 U. S. 65, 32 L. Ed. 621; Keim v. Graff, 17 N. B. R. 319, F. C. 7650.

[44] In re Bullis, 7 A. B. R. 238; Morse et al. v. Kaufman, 7 A. B. R. 549; but see Frey v. Torrey, 6 A. B. R. 448; Western Union Cold Storage Co. v. Hurd, 116 F. R. 442, 8 A. B. R. 633; Contra, Frey v. Torrey, 8 A. B. R. 196.

[45] In re Basch, 2 N. B. N. R. 122, 3 A. B. R. 235, 97 F. R. 761; Zeperink v. Card, 11 F. R. 295; Woolsey v. Cade, 15 N. B. R. 238; Keime

he will be released on application to the court of bankruptcy;[46] so a creditor who holds collateral for his own security, is not a trustee, and, a failure to deliver it up being a breach of contract and not a breach of trust, a discharge releases the claim arising from his appropriation to his own use of such securities.[47] Where a produce dealer, as an accommodation, collects moneys and without fraudulent intent deposits the proceeds with his own funds and before payment is thrown into bankruptcy, such debt is not within the exception;[48] nor is a debt created by an agent's failure to pay over moneys entrusted to him to loan and to receive the interest and principal of such loans and remit the same to the lender;[49] though if he takes mortgages to himself or his partner, in which latter case he caused foreclosure proceedings and purchases the property himself, it would be;[50] nor is a husband's liability to his wife for her paraphernal property under the law of Louisiana.[51] The implied trust relation existing between partners, under which their liabilities to each other must be determined, does not bring their affairs within the definition of the exeepted term "fiduciary,"[52] nor the relation between a stock broker and a customer on an open account.[53]

Debts of the bankrupt, while register of a land office, in converting to his own use money deposited by private parties to purchase public lands,[54] or a defalcation by a guardian,[55] executor or administrator would not be released;[56] while the obligation of the surety on a guardian's bond would be. A

v. Graff, supra; Owsley v. Cobin, 15 N. B. R.. 489, 2 Hughes 433, F. C. 10636; Chapman v. Forsyth, 2 How. 202; Knott v. Putnam, 107 F. R. 907, 6 A. B. R. 80; In re Benedict, 8 A. B. R. 463; Contra, Lenke v. Booth, 5 N. B. R. 351; Meador v. Sharpe, 4 N. B. 492; Treadwell v. Holloway, 12 N. B. R. 61; In re Seymour, 1 N. B. R. 29, 1 Ben. 348, F. C. 12684.

[46] In re Smith, 18 N. B. R. 24, F. C. 12976; Grover v. Clinton, 8 N. B. R. 312, 5 Biss. 324, F. C. 5845.

[47] Hennequin v. Clews, 111 U. S. 676; Palmer v. Hussey, 119 U. S. 96.

[48] Noble v. Hammond, 129 U. S. 65.

[49] Bracken v. Milner, 104 F. R. 522; Upshur v. Briscoe, 138 U. S. 365; and see In re Shepperd, 2 N. B. N. R. 1070.

[50] Bracken v. Milner, supra.

[51] Fleitas v. Richardson, 147 U. S. 550.

[52] Gee v. Gee, 7 A. B. R. 500.

[53] In re Gaylord, 113 F. R. 131, 7 A. B. R. 577.

[54] Ex p. Wright, F. C. 18064.

[55] Halliburton v. Carter, 10 N. B. R. 359; In re Maybin, 15 N. B. R, 458, F. C. 9337.

[56] Ex p. Taylor, 16 N. B. R. 40, 1 Hughes 617, F. C. 13773.

debt is within the exception where the bankrupt while acting as agent for the creditor converted to his own use money of the creditor received as agent;[57] and it has been held that a city auctioneer acts in a fiduciary capacity, though in this case it should be observed that he is an officer.[58] An attorney who professionally collects a debt for his client is undoubtedly acting in a fiduciary capacity;[59] but, if he does not act in his professional capacity, it is otherwise.[60] The fiduciary relation does not exist where the agent is to share in the profits, acting with the knowledge of the principal and more as a partner than an agent; or where a limited partnership is formed and one member becomes indebted to another.[61]

§ 430. **Fines.**—Upon the question whether or not a fine is provable and consequently affected by a discharge,[62] see Debts provable, post § 993.

§ 431. **Foreign discharge.**—While a discharge is as much a release of a debt due an alien as of one due a citizen of the United States whether the alien was a party to the proceedings or not,[63] a bankrupt's discharge in a foreign country under a foreign bankrupt law does not discharge a debt made in, and with reference to the laws of this country, nor bar an action on a contract made in this country.[64]

§ 432. **Determination of character of debt.**—Prior to the amendment the question frequently arose as to the nature of the debt as evidenced by the judgment, and while it was frequently held that the nature of the action whether for fraud or not was determined by the record, and not by any allegation or proof outside of it,[65] and would be conclusive as to matters

[57] Fulton v. Hammond, 11 F. R. 291.

[58] Mayor v. Walker, 11 N. B. R. 478; Comp. In re Lord, F. C. 8501.

[59] Flanagan v. Pearson, 14 N. B. R. 37.

[60] McAdoo v. Loomis, 43 Tex. 227.

[61] Pierce v. Shipper, 19 N. B. R. 221.

[62] In re Anderson, 3 A. B. R. 544, 98 F. R. 588; but see In re O'Donnell, 1 N. B. N. 59. See attachment for contempt, ante, § 423.

[63] Pattison v. Wilbur, 12 N. B. R. 193; Moore v. Horton, 32 Hun. 393.

[64] In re Sheppard, 1 N. B. R. 116, F. C. 12753; McMillan v. McNeil, 4 Wheat. 209; Green v. Sarmiento, Pet. C. C. 74, 3 Wash. C. C. 17, F. C. 5760; Zarega's Case, F. C. 18204.

[65] Burnham v. Pidcock, 5 A. B. R. 590; In re Whitney, 18 N. B. R. 563, F. C. 17581; In re Patterson, 1 N. B. R. 307, F. C. 10817; but see Forsyth v. Vehmeyer, 177 U. S. 177, 44 L. Ed. 723, 3 A. B. R. 807; In re Bullis, 7 A. B. R. 238.

before the state court for decision,[66] yet if it did not appear from the judgment itself, it would be sufficient if it appeared from the record of the case, and it has been held that a judgment may always be examined into to see if the fraud is such as is mentioned.[67] The cause of action does not become merged in the judgment thereon, to the extent of precluding the plaintiff from showing the nature of the original debt.[68]

§ 433. **Form of action.**—The form of action, tort or contract, is now immaterial and the court will look behind the form to the substance and if the debt is not within the exceptions a discharge will bar the action.[69] It is not necessary that an action of tort be brought on a debt created by fraud, for an action of assumpsit may be brought on the debt and if the discharge be pleaded the plaintiff may reply that the debt mentioned in the judgment was created by fraud, misrepresentation, false pretenses or the like and was therefore not released, and thus show the existence of the fraud.[70] The burden of proving that the debt was created by false pretenses or false representations, would be on the plaintiff in such case.[71]

§ 434. **Obtaining property by false pretenses or false representations.**—A liability growing out of the obtaining of property by false representations or false pretenses is released by a discharge, though prior to the amendment of 1903 this was only true when such liability had been reduced to judgment. The representation must have been as to a fact made know-

[66] Knott v. Putnam, 107 F. R. 907, 6 A. B. R. 80.

[67] In re Rhutassel, 96 F. R. 297, 2 A. B. R. 697; Flanagan v. Pearson, 14 N. B. R. 37; Palmer v. Hussey, 87 N. Y. 303.

[68] Packer v. Whittier, 91 F. R. 511; In re Pettis, 2 N. B. R. 17, F. C. 11046; Warner v. Cronkhite, 13 N. B. R. 52, F. C. 17180.

[69] In re Kimball, 1 N. B. R. 193, 2 Ben. 38, F. C. 776; Hayes v. Nash, 129 Mass. 62; Brown v. Treat, 1 Hill 225; Bickford v. Barnard, 8 Allen 314; Merrill v. Schwartz, 68 Me. 514; In re Lewensohn, 99 F. R. 73, 2 N. B. N. R. 381.

[70] Stewart v. Emerson, 8 N. B. R. 462; Forsyth v. Vehemeyer, 177 U. S. 177, 3 A. B. R. 807, 44 L. Ed. 723; In re Patterson, 1 N. B. R. 307, F. C. 10817; In re Bullis, 7 A. B. R. 238; In re Thomas, 92 F. R. 912, 1 A. B. R. 515; Stokes v. Mason, 12 N. B. R. 498; but see Hagardine-McKitrick Dry Goods Co. v. Hudson, 111 F. R. 361, 6 A. B. R. 657; In re Rhutassel, 96 F. R. 597, 2 A. B. R. 697; Burnham v. Pidcock, 5 A. B. R. 42, aff'd 5 id. 590.

[71] Sherwood v. Mitchell, 4 Den. 435.

ingly, falsely and fraudulently, for the purpose of obtaining money or property from another and by means of which such money or property is obtained; in which event the debt is created by means of a fraud involving moral turpitude and intentional wrong. Thus, where one obtains goods, money or property from another with a preconceived intent of not paying for them according to the terms of the agreement, and ships them at once beyond the state or transfers them beyond his control, with the intent to defraud, the liability is one which will not be discharged,[73] and the same is true where one obtains advances of money or goods by false and fraudulent representations, such representations not being the sole consideration, but being material and the credit not otherwise obtained.[74]

Where the representation or statement is made direct to the creditor or his agent, with the purpose and intent of influencing the creditor in extending credit, which representation or statement proves to be false, the debt is not released, though it is a doubtful question whether a statement made to a commercial agency for use of its subscribers, which is acted upon by the creditor as a basis for extending credit, would be such a representation if proven false as would warrant the court in holding that the debt was not released. While Congress may have intended this to be the case, in the absence of an express statement to that effect, it is not believed that the debt would come within the exception, if the false representation consists merely that made to the agency, unless it be shown that the representation was with the purpose of obtaining the property out of which the liability grows.

§ 435. **Fraud while acting as a fiduciary.**—By the Act of 1898 judgments in actions for fraud or obtaining property by false pretenses or false representations were not released by the discharge. By the amendment of 1903 both the terms "judgment" and "fraud" are omitted so that unless the fraudulently contracted liability grows out of a fraud committed by the bankrupt while acting as an officer or as a fiduciary, or is a liability for obtaining property by false pretenses or false representation, it is discharged whether reduced to judgment

[73] Ames v. Moir, 138 U. S. 306; In re Alsberg, 16 N. B. R. 166, F. C. 261; Classen v. Schoenemaw, 16 N. B. R. 98.

[74] In re Gany, 103 F. R. 930, 2 N. B. N. R. 1082, 4 A. B. R. 576; In re Wright, 2 N. B. R. 14, F. C.

or not. To bring a debt within the exception as to debts created by the bankrupt's fraud, embezzlement or defalcation while acting as an officer or in any fiduciary capacity, the fraud must be positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without bad faith or immorality;[75] and must exist in the creation of the debt, as subsequent fraudulent conduct is insufficient.[76] If the debt be created in fraud, it is immaterial, for instance, that the fraud consists in false statements by only one member of a firm, especially if the firm reaps the benefit.[77] If the original debt arose in contract and the fraud was but an incident of the debt and not its creative power, the debt is merged in the judgment and the bankrupt released thereafter.[78]

The good of the community and public policy forbid the discharge of the bankrupt from a debt incurred through fraud while acting as an officer or in a fiduciary capacity, and a debt so created, whether reduced to judgment or not, is not to be discharged in bankruptcy;[79] but it may be proved and dividends received on it.[80]

§ 436. Willful and malicious injury to person or property.— Under the Act of 1898, judgments in actions for willful and

18070; Forsyth v. Vehneyer, 177 U. S. 177.

[75] Strang v. Bradner, 144 U. S. 555; Noble v. Hammond, 129 U. S. 65; Upshur v. Briscoe, 138 U. S. 365; Ames v. Moir, 138 U. S. 306, 34 L. Ed. 951; Forsyth v. Vehmeyer, 179 U. S. 177, 3 A. B. R. 807.

[76] U. S. v. Rob Roy, 13 N. B. R. 235, 1 Woods 42, F. C. 16179.

[77] Strang v. Brandon, 114 U. S. 555.

[78] Sherman v. Straus, 10 N. B. R. 300.

[79] In re Thomas, 1 N. B. N. 329, 1 A. B. R. 515, 92 F. R. 912; In re Lieber, 2 N. B. N. R. 21, 3 A. B. R. 217; In re Bradford, 2 N. B. R. 26, F. C. 1090; In re Clarke, 2 N. B. R. 44, F. C. 2844; In re Doody, 2 N. B. R. 74, F. C. 3995; In re Rathbone, F. C. 11580; In re Rosenfield, 1 N. B. R. 161, F. C. 12058; In re Stokes, 2 N. B. R. 76, F. C. 13476; In re Talman, 1 N. B. R. 122, 2 Ben. 348, F. C. 13739; In re Wright, 2 N. B. R. 14, F. C. 18070; Neal v. Clarke, 95 U. S. 704; Howland v. Carson, 16 N. B. R. 372; In re Patterson, 1 N. B. R. 58, 2 Ben. 155, F. C. 10817; In re Pettis, 2 N. B. R. 16, F. C. 11046; In re Robinson, 2 N. B. R. 108, 6 Blatch. 253, F. C. 11939; In re Stokes, 2 N. B. R. 76, F. R. 13476; In re Wright, 2 N. B. R. 14, F. C. 18070; Libbey v. Strasburger, 17 N. B. R. 468.

[80] Strang v. Bradner, 144 U. S. 555; Wilmot v. Mudge, 103 U. S. 217; In re Wright, 2 N. B. R. 14, F. C. 18070; In re Robinson, supra; In re Rosenberg, 2 N. B. R. 81, 3 Ben. 14, F. C. 12054; In re Nigel, 2 N. B. R. 481, F. C. 9536.

malicious injuries to the person or property of another were not released by a discharge,[81] but in such cases the ground of the action and basis of the recovery was the willful and malicious injury to the person or property of the creditor. By the amendment of 1903, the mere liability for such injuries, whether reduced to judgment or not, are excepted. A liability growing out of a breach of contract to marry does not come within the excepted class of "willful and malicious injuries to the person or property to another," but is released by the discharge, although seduction may be pleaded and proven.[82] It has also been held that a judgment for alienation of affections would not be released.[82a]

§ 437. For support, seduction or criminal conversation.—Under the Act of 1898, considerable question arose as to whether claims of this character came within the excepted class, but in no case was it excepted unless reduced to judgment. Thus it was held that a judgment recovered by an unmarried woman for her own seduction,[83] or by a father for the seduction of his child,[84] was one for a willful and malicious injury and not discharged, while a judgment for criminal conversation was held to be neither an injury to the person or property of the husband, and would therefore be discharged.[85]

By the amendment of February 5, 1903, all liabilities for maintenance or support of wife or child, or for the seduction of an unmarried female or for criminal conversation, whether reduced to judgment or not, are now excepted from the effects of the discharge.[86]

§ 438. Judgments to effectuate valid liens.—Keeping alive old debts.—A creditor, who brought an action and issued an attachment more than four months before the bankruptcy may

[81] In re Carmichael, 2 A. B. R. 815, 96 F. R. 594.

[82] Disler v. McCauley, 7 A. B. R. 138, reversing 6 A. B. R. 491; Finnegan v. Hall, 6 A B. R. 648; In re Fife, 109 F. R. 880, 6 A. B. R. 258; In re McCauley, 101 F. R. 223; In re Sidle, 2 N. B. R. 77, F. C. 12844.

[82a] Leicester v. Hoadley, 9 A. B. R. 318.

[83] In re Maples, 105 F. R. 919, 5 A. B. R. 426.

[84] In re Freche, 109 F. R. 620, 6 A. B. R. 479; Contra, In re Sullivan, 1 N. B. N. 380, 2 A. B. R. 30.

[85] In re Tinker, 2 N. B. N. R. 391, 3 A. B. R. 580, 99 F. R. 79, citing In re Haensell, 1 N. B. N. 240, 1 A. B. R. 286, 91 F. R. 355; Livergood v. Greer, 43 Ill. 213; Anderson v. How, 116 N. Y. 342; Com. v. Williams, 110 Mass. 401; Contra, Colwell v. Tinker, 6 A. B. R. 434, aff'd 169 N. Y. 537, 7 A. B. R. 334.

[86] In re Hubbard, 98 F. R. 710, 3 A. B. R. 528; In re Baker, 96 F. R.

have a special judgment against the property notwithstanding the discharge.[87] Debts existing under the Act of 1867 and kept alive by subsequent judgments, or in fact any existing judgment, are not excepted from the operation of the present act,[88] but will be discharged.

§ 439. **Judgments pending proceedings.**—A judgment recovered between the adjudication and the discharge in a suit begun before the bankruptcy is released by the discharge and bankrupt is entitled, on filing a certified copy of the discharge, to a perpetual stay of execution;[89] and a suit brought after bankruptcy by an execution creditor to establish a lien on equitable assets of bankrupt is founded on the judgment which is a claim released by discharge and hence the suit is properly stayed.[90]

§ 440. **Liens.**—A discharge in bankruptcy releases the bankrupt from a provable debt not within the excepted classes and takes away the creditor's right to proceed against him in personam, but it does not affect a lien on his property acquired more than four months before the filing of the petition provided it is otherwise valid;[91] or liens excepted from the operation of the act,[92] as a lien for wages created and preserved according to statute;[93] or where bank stock is delivered as security for a loan, the only thing remaining to be done being the transfer of the stock on the books of the bank issuing the stock;[94] or a vendor's lien where such lien is recognized by state laws;[95] or a mortgage lien, if the trustee fails to redeem the property, or agree with the creditors as to its value, or have it ascertained by a sale under direction of the court of bankruptcy;[96] or if the incumbered property does not form

954, 3 A. B. R. 101; In re Coton, F. C. 3269.

[87] Ray v. Wright, 14 N. B. R. 563; Stoddard v. Locke, 9 N. B. R. 73; Deighton v. Kelsey, 4 N. B. R. 155.

[88] In re Herrman, 102 F. R. 753, 2 N. B. N. R. 905, 4 A. B. R. 139.

[89] Boynton v. Ball, 121 U. S. 457; Braman v. Snider, 21 F. R. 871; In re Stansfield, 16 N. B. R. 268, 4 Sawy. 334, F. C. 13294.

[90] In re McNamara, 2 N. B. N. R. 341.

[91] In re Blumberg, 1 N. B. N. 259, 1 A. B. R. 633, 94 F. R. 476; Evans v. Rounsaville, 8 A. B. R. 236.

[92] Sec. 67 of act of 1898.

[93] In re Kerby-Denis Co., 1 N. B. N. 399, 2 A. B. R. 402, 95 F. R. 116, aff'g 1 N. B. N. 337, 2 A. B. R. 218, 94 F. R. 8181.

[94] Bk. v. Bk., 11 N. B. R. 49.

[95] Lewis v. Hawkins, 23 Wall. 119.

[96] Reed v. Bullington, 11 N. B. R. 408; Brown v. Gibbons, 13 N. B R. 407.

part of the assets in bankruptcy, though, if it afterwards comes into the possession of bankrupt, the court of bankruptcy may enforce the lien;[97] but the lien of a mortgage given his wife for money forming part of her paraphernal estate, which mortgage was recorded prior to the husband's discharge as a bankrupt, is released by the discharge as far as concerns his after acquired property and the discharge can be urged by a mortgagee of such property;[98] or where the lien is acquired within the prohibited four months.[99]

§ 441. **Limitation.**—Since all debts provable by nature, not within the excepted classes, are released by a discharge in bankruptcy, the fact that such a debt can not in fact be proved because barred by the statutes of limitation does not affect the question of its release.[1] See New promise to pay debt, ante, § 391.

§ 442. **Rent.**—Each sum of rent is a distinct debt, there being no provision in the present act for the apportionment of rent, so that, no matter how large a portion of the installment period has transpired when the petition in bankruptcy is filed, only those installments which have become due and payable at the time of such filing are provable and released by the discharge.[2] But rent as such is an incident to and grows out of the use and occupation, and is the consideration thereof, and unaccrued rent can not be said to be a fixed liability absolutely owing when the petition is filed, payable in the future, or indeed a debt of any kind, as the word is used in the act, being only an unmatured obligation to pay in the future (a consideration for future enjoyment and occupancy), and therefore not provable or released by a discharge.[3] The same is true of

[97] Dixon v. Barnum, 3 Hughes 207, F. C. 3928.

[98] Fleitas v. Richardson, 147 U. S. 550, aff'g same v. Mellen, 39 F. R. 129.

[99] Ex p. Foster, 2 Story 131, F. C. 4960.

[1] In re Kingsley, 1 N. B. R. 66, 1 Lowell 216, F. C. 7819.

[2] Reed v. Phinney, 2 N. B. N. R. 1009; In re Frankel, 2 N. B. N. R. 840; In re Collignon, 2 N. B. N. R. 660, 4 A. B. R. 250; Bray v. Cobb, 2 N. B. N. R. 586, 100 F. R. 270, 3 A. B. R. 788; In re Ells, 2 N. B. N. R. 360, 3 A. B. R. 564, 98 F. R. 967; In re Shilladay, 1 N. B. N. 475; In re Cronson, 1 N. B. N. 474; In re Goldstein, 1 N. B. N. 422, 2 A. B. R. 603; In re Gerson, 1 N. B. N. 315, 2 A. B. R. 170; In re Jefferson, 1 N. B. N. 288, 2 A. B. R. 206, 93 F. R. 948.

[3] In re Frankel, and cases above cited; In re Arnstein, 101 F. R. 706, 4 A. B. R. 246, aff'g 2 N. B. N. R. 106; In re Mahler, Id. 70; Treadwell v. Marden, 18 N. B. R.

warehouse charges accruing after the filing of the petition, which are not released by the discharge.[4]

§ 443. **Statutory liability.**—A stock subscriber's liability to calls on the bankruptcy of a corporation becomes a contingent liability of undetermined amount, payable when a call is made, and if such subscriber subsequently becomes bankrupt and receives a discharge he is released from such liability though the call is not made until after the discharge;[5] and so a shareholder in a national bank is released from his statutory individual liability to the bank's creditors, if, at the time of his discharge, their claims were provable and not merely contingent;[6] but a discharge of the corporation will not release its directors and stockholders from a liability for its debts and contracts imposed on them personally by statute.[7]

§ 444. **Sureties.**—The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for a bankrupt will not be altered by the discharge,[8] whether as partner, joint contractor, indorser, surety or otherwise;[9] nor will a discharge release a bankrupt from liability as surety where no cause of action arose until after such discharge;[10] nor as surety for the faithful performance of a duty as a public officer;[11] but, where a surety on a guardian's bond receives a discharge in bankruptcy, he is released from liability for defaults of the guardian prior to his bankruptcy;[12] or if one enters an appeal and becomes a bankrupt and is discharged prior to the affirmance of the judgment, his surety on the appeal is discharged[13] in

353; Contra, In re Goldstein, 1 N. B. N. 422, 2 A. B. R. 603; Bray v. Cobb, 2 N. B. N. R. 586, 100 F. R. 270, 3 A. B. R. 788.

[4] Robinson v. Pesant, 8 N. B. R. 426.

[5] Carey v. Mayer, 79 F. R. 926, 25 C. C. A. 239.

[6] Richmond v. Irons, 121 U. S. 27, rev'g Irons v. Bk., 27 F. R. 591.

[7] In re Marshall Paper Co., 2 N. B. N. R. 656, 95 F. R. 419, 2 A. B. R. 656; ante, § 109.

[8] Sec. 16, of act of 1898.

[9] In re Levy, 1 N. B. R. 66, 2 Ben. 169, F. C. 8297; Abendroth v. Dolsen, 131 U. S. 66; In re Albrecht, 17 N. B. R. 287, F. C. 145; Knapp v. Anderson, 15 N. B. R. 316; but see In re Perkins, 10 N. B. R. 529, F. C. 10983.

[10] Eastman v. Hibbard, 13 N. B. R. 360.

[11] U. S. v. Herron, 9 N. B. R. 535, 20 Wall. 251; but see U. S. v. Throckmorton, 8 N. B. R. 309, F. C. 16516.

[12] Jones v. Knox, 8 N. B. R. 559; Reitz v. People, 16 N. B. R. 96; Ex p. Taylor, 16 N. B. R. 40; 1 Hughes 617, F. C. 13773.

[13] Odell v. Wooten, 4 N. B. R. 46.

those states where the discharge can be called to the attention of the appellate court. See also post § 987.

§ 445. **Unliquidated damages.**—The act expressly provides that unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate,[14] and accordingly would be released by a discharge. For full discussion see Debts which may be proved, Sec. 63b, of law, post §§ 979-1005.

§ 446. **Unproved and unscheduled claims.**—Under the Act of 1867, if the court of bankruptcy had jurisdiction of the bankrupt and the subject matter, in the absence of fraud, the omission of a claim from the schedule, if not willful, and the consequent lack of notice to the creditor would not prevent the discharge barring such claim.[15] The present act expressly excepts from the discharge debts which have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy, whether the omission be fraudulent or otherwise.[16] If the bankrupt had knowledge of the proceedings although not scheduled, the debt will be discharged, though if such knowledge did not come to the creditor until too late to prove his claim and thus receive a dividend equal to other creditors of a like class, he need take no part in the proceedings but may make the amount of his claim out of any property acquired by the bankrupt subsequent to the filing of the petition.[17] A bankrupt who schedules the name of the original payee of a note, but fails to list the name of the transferee notwithstanding he had knowledge of the fact after transfer and knew the name of the holder, would still be liable on the note, if such transferee had no knowledge of the proceedings.[18]

§ 447. **Waiver.**—The discharge, as stated, merely releases

[14] Sec. 63b of act of 1898.

[15] Lamb v. Brown, 12 N. B. R. 522, F. C. 8011; Pattison v. Wilbur, 12 N. B. R. 193; Heard v. Arnold, 15 N. B. R. 543; Thurmond v. Andrews, 13 N. B. R. 157; Platt v. Parker, 13 N. B. R. 14; Symonds v. Barnes, 6 N. B. R. 377; Barnes v. Moore, 2 N. B. R. 174; Batchelder v. Low, 8 N. B. R. 571.

[16] Tyrrel v. Hammerstein, 6 A. B. R. 430; In re Beerman, 112 F. R. 662, 7 A. B. R. 434.

[17] In re Monroe, 114 F. R. 398, 7 A. B. R. 706.

[18] Columbia Bank v. Birkett, 7 A. B. R. 222.

the bankrupt from personal liability and must be pleaded and consequently may be waived and, if waived, can not afterwards be relied on.[19]

§ 448. **Wife's debts.**—The question of the effect of the husband's discharge on the wife's debts is an interesting one and turns on the point whether he is liable for them individually, or jointly with her, or whether she alone is liable. This is a question of local law. At common law the husband, at marriage, became liable for the wife's ante-nuptial debts and such as she might contract for necessaries, etc., and in such case his discharge would release such debts,[20] but the question was raised if they were not merely suspended and would revive on her surviving him.[21] Where the wife has been made responsible for her debts, she remains equally so after his discharge;[22] and, if they can contract directly with each other, a discharge of the husband releases debts due from him to his wife, and *vice versa*.[23] The husband's discharge will not affect the wife's liability, to have her separate estate charged in equity;[24] and, if the wife have separate property, a court will not release her if charged in execution because of the husband's discharge.[25]

[19] Dewey v. Moyer, 16 N. B. R. 1.

[20] Lockwood v. Salter, 5 B. & Ad. 303.

[21] Vanderheyden v. Mallory, 1 N. Y. 452.

[22] Mobley v. Cureton, 6 So. Car. 49.

[23] Alling v. Eagan, 11 Rob. (La.) 244.

[24] Hamlin v. Bridge, 24 Me. 145.

[25] Bonner v. Bonner, 17 Beav. 86.

CHAPTER XVIII.

PROCESS, PLEADINGS AND ADJUDICATIONS.

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§ 449. '(Sec. 18a.) **Process and petition.**—Upon the filing 'of a petition for involuntary bankruptcy, service thereof, with 'a writ of subpoena, shall be made upon the person therein 'named as defendant in the same manner that service of such 'process is now had upon the commencement of a suit in equity 'in the courts of the United States, except that it shall be re- 'turnable within fifteen days, unless the judge shall for cause 'fix a longer time; but in case personal service can not be made, 'then notice shall be given by publication in the same man- 'ner and for the same time as provided by law for notice by

'publication in suits to enforce a legal or equitable lien in 'courts of the United States, except that, unless the judge 'shall otherwise direct, the order shall be published not more 'than once a week for two consecutive weeks, and the return 'day shall be ten days after the last publication unless the 'judge shall for cause fix a longer time.'[1]

§ 450. **Process, form of.**—All process, summons and subpoenas shall issue out of the court, under its seal, and be tested by the clerk; and upon application, blanks with the signature of the clerk and seal of the court, may be furnished to the referees.[3] The referee has no power to issue a subpoena.[4]

[1] By the act of February 5, 1903, section 18a, was amended by the substitution of the matter in the text for the following:

'Upon the filing of a petition for 'involuntary bankruptcy, service 'thereof, with a writ of subpœna, 'shall be made upon the person 'therein named as defendant in the 'same manner that service of such 'process is now had upon the com-'mencement of a suit in equity in 'the courts of the United States, 'except that it shall be returnable 'within fifteen days, unless the 'judge shall for cause fix a longer 'time; but in case personal service 'cannot be made, then notice shall 'be given by publication in the 'same manner and for the same 'time as provided by law for no-'tice by publication in suits in 'equity in courts of the United 'States.'

Analogous provision of Act of 1867. "Sec. 40. . . . That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted; and may also, by its injunctions, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any part of the debtor's property not excepted by this act from the operation thereof and from any interference therewith. . . . A copy of the petition and of such order to show cause shall be served upon such debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appear and consent thereto, shall be had until proof shall have been given, to the satisfaction of the court, of such service or publication; and if such proof be not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published."

[3] G. O. III; Forms 4 and 5.

[4] In re Pierce, 111 F. R. 516, 6 A. B. R. 747.

§ 451. —— **When issued and when returnable.**—No process of subpoena will issue from the clerk's office in any suit in equity until the bill is filed in the office,[5] that is, in bankruptcy proceedings until the petition is filed; and, whenever a bill or petition is filed, the clerk must issue the process of subpoena thereon, as of course, upon the application of the plaintiff or petitioner,[6] which must be returnable within fifteen days, unless the judge for cause fixes a longer time.[7] Where there is more than one defendant or respondent, a writ of subpoena may, at the election of the plaintiff or petitioner, be issued out separately for each defendant or respondent, except in the case of husband and wife defendants, or a joint subpoena against all the defendants or respondents.[8]

§ 452. —— **Service of—Personal.**—Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, toties quoties, against such defendant if he shall require it, until the due service is made;[9] and the service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process must make affidavit thereof. Upon the return of the subpoena as served and executed upon any defendant, the clerk must enter the suit upon his docket as pending in the court, and state the time of the entry.[10]

The duplicate petition with a writ of subpoena must be served upon the alleged bankrupt. An order to show cause why the prayer of the petition should not be granted is provided,[11] which also orders a copy of the petition with a subpoena to be served[12] upon the alleged bankrupt by delivering to him personally or "by leaving the same at his last usual place of abode in said district" at least five days before the time fixed for the hearing. The mode of service directed in the order to show cause[13] must be construed to mean "last" in time, that is, the existing, present, dwelling-house, or the existing, present, usual, customary place of abode,[14] and if he has

[5] Equity Rule 11.
[6] Equity Rule 12.
[7] Sec. 18a, act of 1898.
[8] Equity Rule 12.
[9] Equity Rule 14.
[10] Equity Rule 15.
[11] Form 4.
[12] See Equity Rule 13.
[13] Form 4.
[14] Hyslop v. Hoppock, 6 N. B. R. 552, 5 Ben. 447, F. C. 6988.

had more than one place of abode in the district, it would be the last, in common parlance, though correctly used "last" signifies past and done with. However, if inquiry at the "last" and usual abode of an alleged bankrupt elicits no information as to his present whereabouts beyond the fact that he is not in, service is sufficiently made by leaving the papers with some adult person who is a member of or resident in the family, stating that they are for the bankrupt.[15] Service on the cashier of a corporation which has passed into the hands of a receiver,[16] or upon the agent or attorney appointed to receive service of process within the state, in case of a foreign corporation, is sufficient.[17]

Where service of the order on a petition in involuntary bankruptcy is made upon the defendant outside the district, without an appearance on his part, no order can be made which will apply to him in person, but the proceeding will affect only property which can come into possession of the trustee.[18] The court does not lose jurisdiction by reason of the fact that the subpoena accompanying the original petition is returned with the endorsement that the debtor cannot be found, and nothing further is done.[19]

§ 453. —— **By publication.**—In case personal service cannot be made, notice must be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien, in the courts of the United States, except that unless the judge shall otherwise direct, the order need not be published more than once a week for two consecutive weeks.[20] Service by publication is only authorized where the party to be served cannot be found or his place of residence ascertained.[21] Notwithstanding the fact that a lunatic has been personally served, the better practice is to supplement it by the usual publica-

[15] In re Derby, 8 N. B. R. 106, F. C. 3815; Ala. & Chatt. R. R. Co. v. Jones, 5 N. B. R. 97, F. C. 126.

[16] Platt v. Archer, 6 N. B. R. 465, 9 Blatch. 559, F. C. 11213; Ala. & Chatt. R. R. Co. v. Jones, 5 N. B. R. 97, F. C. 126; Isett v. Stewart, 16 N. B. R. 191; Stuart v. Hines, 6 N. B. R. 416.

[17] Magid Hope Silk Mfg. Co., 110 F. R. 352, 6 A. B. R. 610.

[18] In re Appel, 103 F. R. 931, 2 N. B. N. R. 907.

[19] In re Stein, 105 F. R. 749, 5 A. B. R. 288.

[20] Sec. 18a, act of 1903.

[21] Stuart v. Hines, 6 N. B. R. 416.

tion.[22] If a member or members of a firm file a petition asking that the firm be adjudged bankrupt and the non-joining members can be found in the district or out of it, personal service must be made; but, if personal service cannot be had, then, upon filing before the judge, or referee, if the case has been referred by the clerk, an affidavit stating the facts why personal service cannot be made, an order of publication will be made according to the provision of the above act.[23]

§ 454. —— **Voluntary appearance.**—The voluntary appearance of the alleged bankrupt, either in person or by attorney, will give the court jurisdiction[24] if it has jurisdiction of the subject matter which latter must be conferred by statutory authority and cannot be given by consent of the parties and may be questioned by the court sua sponte, or on motion, at any time or collaterally.[25] If he once appears generally, such appearance cannot be withdrawn so as to divest the court of jurisdiction,[26] as any irregularity in the service is thereby waived.[27] Objections going to the jurisdiction must be raised at the first or at least an early opportunity or they will be deemed to have been waived and a creditor, who appeared at the first meeting, nominated the trustee and examined the bankrupt, cannot, on application for discharge, for the first time urge that the court is without jurisdiction on the ground that the adjudication was made by the referee and not by the judge.[28]

§ 455. **Collateral attack.**—See Collateral Attack, ante § 42.

§ 456. **The petition—form of.**—All petitions and schedules filed therewith must be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference[29] and

[22] In re Burka, 107 F. R. 674, 5 A. B. R. 843.

[23] In re Murray, 1 N. B. N. 570, 96 F. R. 600, 3 A. B. R. 601.

[24] In re Frischberg, 8 A. B. R. 607.

[25] Shutts v. Bk., 2 N. B. N. R. 320, 98 F. R. 705, 3 A. B. R. 492; In re Mason, 2 N. B. N. R. 425, 99 F. R. 256, 3 A. B. R. 599; In re Penn, 3 N. B. R. 582, 4 Ben. 99; In re Little, 2 N. B. R. 294, 3 Ben. 25; In re Leighton, 5 N. B. R. 95; Jobbins v. Montag, 6 N. B. R. 509; In re Weyhausen, 1 Ben. 397.

[26] In re Frischberg, supra; In re Ulrich, 3 Ben. 355.

[27] In re McNaughten, 8 N. B. R. 44.

[28] In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358; In re Mason, 2 N. B. N. R. 425, 99 F. R. 256, 3 A. B. R. 599.

[29] G. O., V.; Forms 1, 2 and 3.

must be in duplicate, one copy for the clerk and the other for service on the bankrupt.[30] It has been held that petitions in bankruptcy will not be filed or considered unless they are the prescribed printed forms, and that written or typewritten petitions and schedules will be returned to the parties without action;[31] but such requirement is governed entirely by rule of court and not by any provision of the law.

§ 457. —— **Parties to.**—See Petitions, Chap. LIX, post.

§ 458. —— **Allegations of—generally.**—A petition in involuntary bankruptcy is in the nature of a pleading and should set forth all the facts material to the claim of the petitioner for an adjudication so that the alleged bankrupt may be distinctly apprised of what he is required to answer;[32] though the allegations may be made upon information and belief especially if the sources of information and the grounds of belief are given.[33] Facts, not conclusions of law, must be alleged, so that it is not sufficient to allege that petitioner has a "provable claim" but the facts showing that it is one must be alleged,[34] and a petition is insufficient if it states disjunctively, or in the alternative several facts, any one of which would be sufficient if alleged unqualifiedly.[35]

The intent to defraud should be alleged as a fact and not as a matter of information and belief in a petition setting up a fraudulent conveyance as an act of bankruptcy.[36] It is preferable that the petition show the business of the defendant, or that he does not come within the expected classes,[37] though the form prescribed by the Supreme Court makes no provision for such information. The authority under which he acts need not be set forth by the agent of a petitioner in bankruptcy,[39] nor that the notes were given for the pur-

[30] Sec. 59c, act of 1898; In re Stevenson, 1 N. B. N. 313, 2 A. B. R. 66, 94 F. R. 110; In re Dupree, 1 N. B. N. 513, 97 F. R. 28.

[31] Mahoney v. Ward, 2 N. B. N. R. 538, 3 A. B. R. 770, 100 F. R. 278; see also 1 N. B. N. 239, 396.

[32] In re Raynor, 7 N. B. R. 527, 11 Blatch. 43, F. C. 11597; In re Randall, 3 N. B. R. 4, Deady 557, F. C. 11551; In re Chappel, 4 N. B. R. 176, F. C. 2612.

[33] Orem v. Harley, 3 N. B. R. 62, F. C. 10567; In re Scammon, 10 N. B. R. 66, 6 Biss. 130; Mueller v. Brentano, 3 N. B. R. 329; In re Scull, 7 Ben. 371.

[34] In re Hadley, 12 N. B. R. 366, F. C. 5894.

[35] In re Laskaris, 1 N. B. N. 209, 1 A. B. R. 480; In re Hannibal, 15 N. B. R. 233, F. C. 6023; Arnat v. Wright, 55 Hun. 561.

[36] Orem v. Harley, 3 N. B. R. 62, F. C. 10567.

[37] In re Taylor, 102 F. R. 728, 2 N. B. N. R. 929, 4 A. B. R. 515.

[39] In re Taylor, supra; In re

poses of their business in a petition averring that a firm were manufacturers and had made and delivered certain notes which were negotiated but not paid.[40] In other words the statute contemplates that a trial by jury may be had upon the allegations of the petition in case the alleged bankrupt so chooses and therefore the allegations must be of issuable facts, made with reasonable and sufficient certainty.[41] The allegation that the debtor, within four months last past, transferred property to creditors with intent to prefer such creditors is insufficient but the specific fact relied on must be alleged with time, place, person and circumstance as in any other allegation of fraud in a pleading either at law or in equity;[42] as also where the act relied on is the suffering creditors to obtain a preference through legal proceedings.[43] A creditor other than the original petitioner may enter his appearance by a petition alleging that he is a creditor, stating the purpose of his petition and nothing more, and thereby acquire all the rights of the original petitioner even though the original petitioner prove to have no claim; and the bankrupt may answer denying that such person is a creditor, but need answer for no other purpose; and no process issues if process issued on the original petition.[44] A false statement of a jurisdictional fact for the purpose of making bankrupt file a statement of his creditors constitutes a fraud upon the court which should set aside any process obtained by such deception, as where a petition in involuntary bankruptcy was signed by six creditors, the first five of whom verified it, alleging that they believed they were one-fourth of the creditors when they knew it was untrue.[45]

§ 459. —— Against partnership.—The general form of peti-

Oregon Bull. Pr. and Pub. Co., 14 N. B. R. 405, 3 Sawy. 614, F. C. 10561, s. c. 13 N. B. R. 503, F. C. 10550; Ala. and Chatt. R. R. Co. v. Jones, 5 N. B. R. 97, F. C. 126.

[40] In re Kenyon, 6 N. B. R. 238; Contra, In re Cap. Pub. Co., 18 N. B. R. 319.

[41] In re Butterfield, 5 Biss. 120, F. C. 2247; In re Rathbone, 1 N. B. R. 50, 65 F. C. 11580; In re Beardsley, 1 N. B. R. 52, F. C. 1183; In re Mawson, 1 N. B. R. 115, F. C. 9318; Ex p. Potts, F. C. 11344.

[42] In re Nelson, 98 F. R. 76.

[43] In re Cliffe, 1 N. B. N. 509, 2 A. B. R. 317, 94 F. R. 354.

[44] In re Taylor, 1 N. B. N. 412; In re Lacey, 10 N. B. R. 477, 483, 492.

[45] In re Keiler, 18 N. B. R. 10, F. C. 7647; In re Scammon, 11 N. B. R. 280, 6 Biss. 195, F. C. 12429.

tion in involuntary bankruptcy[46] should be used as the form of an involuntary petition against a partnership with the necessary adaptations to meet the particular case, no special form being prescribed, and the bankrupt's answer should also be in the form prescribed.[47] If it is not proposed to adjudicate the firm, the petition must show that the petitioner was a member of the firm and ask a discharge from firm as well as individual debts, and this fact must be set forth in the notice given creditors of the first meeting, also in the petition for discharge and in the notice to creditors thereof.[48] A petition against a partnership must show whether any of the individual partners are solvent, and the averment that "the partnership is insolvent," where it seems to be meant thereby that the joint assets are not sufficient to pay the joint obligations, is ambiguous and insufficient, for, as each partner is liable for all of the debts, a partnership cannot, with strictness, be said to be insolvent while any one of the partners is able to pay all of the firm's liabilities, and the Supreme Court rules and forms contemplate that an adjudication of the firm imports an adjudication of all its members as well; so the insolvency of each member of the firm should be alleged if an adjudication against the firm and an administration of its assets are sought.[49]

§ 460. —— **When multifarious.**—Multifariousness consists in the inclusion in one bill of several matters perfectly distinct and independent and is generally forbidden.[50] A petition in involuntary bankruptcy which unites with a prayer for the adjudication against the debtor a prayer for the provisional seizure of his property by the marshal and a prayer for an injunction against attaching creditors and a receiver of a state court forbidding them to dispose of certain property in their hands, is multifarious;[51] but a petition charging different acts of fraud, connected with different parts of the estate, but done with a common fraudulent purpose,[52] or different acts of bankruptcy, is not.

[46] Form 3.

[47] Form 6; Mather v. Coe, 1 N. B. N. 554, 1 A. B. R. 504, 92 F. R. 333.

[48] In re Russell, 1 N. B. N. 532, 3 A. B. R. 91, 97 F. R. 32.

[49] In re Blair, 2 N. B. N. R. 364, 99 F. R. 76, 3 A. B. R. 588.

[50] Cooper, Eq. Pl. 182, 18 Ves. 80. 2 Mass. 201, 4 Cow. 682, 2 Gray, 467.

[51] Mather v. Coe, 1 N. B. N. 554, 1 A. B. R. 504, 92 F. R. 333.

[52] Norcross v. Nathan, 2 N. B. N. R. 405, 99 F. R. 414, 3 A. B. R. 613; Carter v. Hobbs, 1 N. B. N. 191, 1

§ 461. —— **Filing of petition.**—A petition in bankruptcy is filed within the meaning of the bankruptcy law when it is delivered in duplicate to the Clerk of the Bankruptcy Court and by him marked "Filed," though it is done outside of his office and after office hours,[53] but if the duplicate is not filed until after the expiration of four months from the act of bankruptcy, it will be fatal and incurable, consequently the clerk's docket should show the filing of both copies.[54] The petition should be filed with the clerk direct and not with the judge.[55] If the issuing of the subpoena is delayed until after the expiration of the four months, though the petition was filed within that time, the proceeding will nevertheless be valid.[56]

A petition signed, verified and presented by all the members of a firm and accompanied by schedules of firm creditors and firm assets, no adjudication being made thereon, which is subsequently in part withdrawn, and a new petition filed, with certain parts of the old petition pasted thereon accompanied by the individual schedules of all the partners by way of amendment, and an adjudication made, within the meaning of the act the petition was filed on the later, and not the earlier date.[57] The pendency of an involuntary petition before adjudication does not necessarily invalidate a subsequent voluntary petition or vice versa, filed in the same or another district, as the former may be invalid for want of jurisdiction, or other creditors may justify, or even make desirable a subsequent petition, and the question of jurisdiction will arise on each petition and be determined according to the circumstances and this is true both as to individual bankruptcy and as to partnership cases.[58] In such case it would seem advisable to give creditors filing the involuntary petition notice, before any

A. B. R. 215, 92 F. R. 594; Robinson v. White, 1 N. B. N. 513, 97 F. R. 333, A. B. R. 88.

[53] In re Stevenson, 1 N. B. N. 313, 2 A. B. R. 66, 94 F. R. 110; In re Von Borcke, 1 N. B. N. 505, 2 A. B. R. 322, 94 F. R. 352.

[54] In re Stevenson, supra; In re Dupre, 1 N. B. N. 513, 97 F. R. 28; see In re Bellah, 116 F. R. 69, 8 A. B. R. 310.

[55] In re Sykes, 106 F. R. 669, 6 A. B. R. 264.

[56] In re Appel, 103 F. R. 931, 2 N. B. N. R. 907; In re Lewis, 1 N. B. N. 135, 556, 1 A. B. R. 458, 91 F. R. 632, citing In re Bear, 5, F. R. 53.

[57] In re Washburn, 99 F. R. 84, 3 A. B. R. 585.

[58] In re Waxelbaum, 2 N. B. N. R. 228, 98 F. R. 589, 3 A. B. R. 392; In re Steger, 113 F. R. 978, 7 A. B. R. 665; In re Dwyer, 112 F. R. 777, 7 A. B. R. 532; In re Canfield, F. C. 2380; In re Willarski, 4 N. B. R.

adjudication is made on the voluntary petition, and then such action should be taken as appears for the best interests of the estate. In any event the voluntary petition should be received and filed.[59] A voluntary bankrupt, who has contracted new debts since filing a petition on which a discharge was refused, may file a new petition;[60] and, where two creditors each file a petition against their debtor, who, pending such proceedings, files a petition and is adjudged bankrupt, and the petitioning creditors prove their claims under the voluntary petition, they waive their right to continue the involuntary proceedings.[61]

§ 462. **Amendment of petition—by whom allowed.**—The court, or referee, may allow amendments to the petition and schedules; but such amendments must be printed or written, signed and verified, like the original petitions and schedules, and, if made to separate schedules, must be made separately, with proper references; and, if made on application of the petitioner, the cause of error in the paper originally filed must be stated.[62]

§ 463. —— **Requires special showing.**—Special reasons are required for amendments to sworn petitions or other pleadings required to be verified by the oath of the party; and, where the object is to introduce new facts or to change essentially the grounds of the prosecution or defense, the courts are disinclined to allow such amendments except for very special reasons, and in cases where they are clearly required in the furtherance of justice, and are applied for without unreasonable delay.[63]

§ 464. —— **Objections to.**—Objections can only be made to defects which have not been waived, expressly or by proceeding regardless of them, and by persons who have not acted so as to estop themselves. A creditor who joined in an involuntary petition in good faith, cannot afterwards object to an

390, F. C. 17619; In re Stewart, 3 N. B. R. 28, F. C. 13419; In re Flanagan, 18 N. B. R. 439, F. C. 4850, 5 Sawy. 312.

[59] In re Dwyer, 112 F. R. 777, 7 A. B. R. 532.

[60] In re Driske, 13 N. B. R. 112, 2 Lowell, 430, F. C. 4090; In re Drisco, 14 N. B. R. 551, F. C. 4086.

[61] In re Noonan, 6 N. B. R. 579.

[62] G. O. XI; In re Brumelkamp, 1 N. B. N. 360, 2 A. B. R. 318, 95 F. R. 814; In re Harris, 1 N. B. N. 384, 2 A. B. R. 359; In re Strait, 2 A. B. R. 308, 1 N. B. N. 354.

[63] In re Reed, 1 N. B. R. 137, F. C. 11644; In re Keiler, 18 N. B. R. 10, F. C. 7647; In re Wood, 13 N.

amendment which is necessary to its prosecution,[64] but, although no objection was made to a fault contained in the original petition, it may be objected to in an amended petition.[65]

§ 465. —— **Allowed when.**—The general orders in bankruptcy with reference to amendments were not intended to abrogate or restrict the general power of amendment in other respects vested in courts.[66] Where two or more petitions are filed against the same individual, the petition in the district in which the debtor has his domicile may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than the first alleged, if such earlier act is charged in either of the other petitions, and the same is true with reference to proceedings against a partnership, except that in such a case the petition first filed may be amended.[67] In view of General Orders VI, the power of amendment is limited to the case where an earlier act of bankruptcy is sought to be incorporated.[68] The right to amend exists at any stage of the proceeding, if otherwise authorized, regardless of the time that has elapsed, but this right cannot go further than to bring forward and make effective that which is in some shape already in the record.[69]

The granting or not granting of an application to file an amendment to the pleadings of a case in equity or at law, rests largely within the judicial discretion of the court, and the exercise of that discretion will not be interfered with by a reviewing court, unless it appears to have been practically abused. Where the facts are such as to make it apparent to the revising court that the right to amend could not have been denied by the court below except upon such a mistaken view of the facts disclosed by the record as would amount to an abuse of the discretion exercised by the court, its action in that regard should be reversed and the amendment allowed.[70]

B. R. 96, 6 Ben. 339, F. C. 17935; White v. Bradley Timber Co., 116 F. R. 768.

[64] In re Sargent, 13 N. B. R. 144, F. C. 12361.

[65] In re W. S. Tr. Co., 17 N. B. R. 413, 4 Sawy. 190, F. C. 17442.

[66] In re Bellah, 116 F. R. 69, 8 A. B. R. 310.

[67] G. O. VI.

[68] In re Sears, 117 F. R., 8 A. B. R. 713, reversing 112 F. R. 58, 7 A. B. R. 279.

[69] In re Mercur, 116 F. R. 655, 8 A. B. R. 275.

[70] In re Carley, 8 A. B. R. 720.

The referee may require a petition to be amended because the verification failed to show that it was made within the jurisdiction of the notary taking it, was indefinite in that it stated that the petitioner was "duly sworn or affirmed" and was defective and unavailing because of the disqualification of the notary, or for other good and sufficient reasons, and the judge will not interfere with his order;[71] or on motion he may require schedules filed prior to the promulgation of the rules, forms and orders to be amended and supplemented to conform thereto.[72] Where certain persons executed a petition as an amended petition and as auxiliary to pending proceedings which were dismissed, it cannot be filed as an amended petition because there is nothing to amend nor as an original petition because not executed as such.[73]

The petition may be amended to specify the details of the alleged act, as where the act of bankruptcy relied on is the suffering creditors to obtain a preference be legal proceedings;[74] or, if it sets forth facts which, if properly alleged and proved, would justify an adjudication, but the allegations are not sufficiently specific, and such petition is verified by the attorney instead of the creditors;[75] or with respect to jurisdictional averments as to the residence or place of business of the bankrupt, and an averment as to residence within the judicial district for a period of more than six months prior to the filing of the petition substituted for one inadvertently, but erroneously, made, setting forth a conduct of business;[76] or nunc pro tunc by inserting a prayer for the adjudication of the firm in a petition filed by all the members in the form prescribed for partnership cases except that it does not ask for the adjudication of the firm but only of the members;[77] or where the petition and schedules filed by one member of a firm seeking to be discharged from both firm and individual

[71] In re Brumelkamp, 1 N. B. N. 360, 2 A. B. R. 318, 95 F. R. 814.

[72] In re Ogles, 1 N. B. N. 326, 93 F. R. 426, 1 A. B. R. 671; In re Harris, 1 N. B. N. 384, 2 A. B. R. 359.

[73] In re Hyde & Gload Mfg. Co., 2 N. B. N. R. 1122, 102 F. R. 617, 4 A. B. R. 602.

[74] In re Cliffe, 1 N. B. N. 509, 2 A. B. R. 317, 94 F. R. 354.

[75] In re Nelson, 98 F. R. 76, 1 N. B. N. 567, 1 A. B. R. 63.

[76] In re Weinman, 2 N. B. N. R. 51; In re Blair, 2 N. B. N. R. 364, 99 F. R. 76, 3 A. B. R. 588; In re Vanderhoff, 18 N. B. R. 543, F. C. 16841.

[77] In re Meyers, 2 N. B. N. R. 111, 3 A. B. R. 260, 97 F. R. 757; see In re McFaun, 96 F. R. 592, 3 A. B. R. 66.

debts did not originally include them, to include petitioner's firm as well as individual indebtedness, the names of the members of the firm, and a prayer for discharge from partnership debts, the schedules to contain a list of the firm's property and debts;[78] or to insert an act of bankruptcy before the expiration of the four months' period or a more particular description of the claims;[79] or to insert allegations of other preferential payments. An amendment has been deemed to have been made in several cases as where respondent's testimony upon the trial of the petition disclosed the essential facts

[78] In re Laughlin, 96 F. R. 589, 3 A. B. R. 1; In re Hartman, 96 F. R. 593, 3 A. B. R. 65.

[79] In re Mercur, 1 N. B. N. 527, 2 A. B. R. 626, 95 F. R. 634; see White v. Bradley Timber Co., 8 A. B. R. 671: Under the act of 1867 the following amendments were allowed and would doubtless be allowed now: Supplying the residence of his co-partner omitted in a petition by one partner against his co-partner (In re Vanderhoof, 18 N. B. R. 543, F. C. 16841; In re Jersey City Window Glass Co., 1 N. B. R. 113, F. C. 7292); to conform to proof which differed from the allegations of the petition (In re Houghton, 1 N. B. R. 121, F. C. 6223); to supply an allegation that suffering property to be taken on legal process with intent to give a preference was done when the debtor was insolvent or in contemplation of insolvency (In re Craft, 1 N. B. R. 89, 2 Ben. 214, F. C. 3316); to supply the amount where the name of a creditor is stated in a petition asserting a claim by a proper averment but the amount is omitted, if done in good faith (In re Blair, 17 N. B. R. 492, F. C. 1481); to supply the formal assertion of an averment which appeared in substance in the petition and of which evidence was received at the trial without objection (In re Craft, 2 N. B. R. 44, 6 Blatch. 177, F. C. 3317; In re McKibben, 12 N. B. R. 97, F. C. 8859); after adjudication to bring in his co-partner so as to effect a discharge of partnership debts (In re Little, 1 N. B. R. 74, 2 Ben. 86, F. C. 6390); after the first meeting of creditors to bring in certain judgment creditors (In re Ratcliffe, 1 N. B. R. 98, F. C. 11578). In general, petitioning creditors may amend their petition on the trial (Hardy v. Bininger, 4 N. B. R. 77, F. C. 6057); or those whose rights accrue after admitted proof of claim (In re Jones, 2 N. B. R. 20, F. C. 7447); or after argument and before judgment (In re Waite, 1 N. B. R. 84, 1 Lowell, 207, F. C. 17044); or where a jury has been called but not sworn (May v. Harper, 4 N. B. R. 156, 4 Brewst. 253, F. C. 9333). The court may allow supplemental affidavits or proofs to be filed, if the affidavits to the petition or the depositions as to indebtedness and acts of bankruptcy are not sufficient (In re Hanibel, 15 N. B. R. 233, F. C. 6023). That justice might be done to all parties, great latitude of amendment was allowed up to a discharge in bankruptcy (In re Pierson, 10 N. B. R. 193, F. C. 11154); but a new cause of action would not be per-

as to other preferential payments,[80] or to include an act of bankruptcy testified to by bankrupt,[81] but not if four months have expired since the commission of such act.

§ 466. —— **Denied when.**—The same principles which govern the allowance of amendments in similar cases in other courts control the matter of amendment in bankruptcy cases; and consequently amendments will not be permitted for the purpose of introducing new acts of bankruptcy into the petition after the four months' period has expired;[82] or a new cause of action;[83] nor can an involuntary petition be amended by adding a new party after all the testimony has been taken and the case is on hearing before the court;[84] nor will creditors, who have recklessly and falsely made and sworn to a petition, knowing it to be false, be permitted to have others join in and carry it on.[85]

§ 467. 'b. **Appearance and plea.**—The bankrupt, or any 'creditor, may appear and plead to the petition within five days 'after the return day, or within such further time as the court 'may allow.'[85a]

§ 468. **Parties.**—The bankrupt or any creditor,[86] that is one having a provable claim which may be established at this stage by affidavit or verified pleadings may appear and plead; and there is nothing in the act to prevent him though he may be secured or have been given a preference which could be avoided by the adjudication.[87] Anyone whose interests may be affected should be allowed to do so, though it would seem only a "creditor" may be heard, though he need not be the original petitioner.[88] But a creditor cannot oppose

mitted under guise of amendment (In re Leonard, 4 N. B. R. 182, F. C. 8255; In re Gallinger, 4 B. R. 729.)

[80] In re Lange, 2 N. B. N. R. 85, 3 A. B. R. 231, 97 F. R. 197.

[81] In re Miller, 104 F. R. 764.

[82] White v. Bradley Timber Co., 116 F. R. 768; In re Reed, 1 N. B. R. 137, F. C. 11164; see In re Bellah, 116 F. R. 69, 8 A. B. R. 310.

[83] In re Leonard, 4 N. B. R. 182, F. C. 8255.

[84] In re Pitt, 14 N. B. R. 59, 8 Ben. 389, F. C. 11188.

[85] In re Keiler, 10 N. B. R. 10, F. C. 7647.

[85a] Subdivision "b" was amended by the act of February 5, 1903, by changing the time for pleading from 10 to 5 days.

[86] In re Ives, 113 F. R. 911, 7 A. B. R. 692.

[87] In re Jack, 13 N. B. R. 296, 1 Woods 549, F. C. 7119.

[88] In re Williams, 3 N. B. R. 74, 1 Lowell 406, F. C. 17703; In re Scrafford, 14 N. B. R. 184, F. C. 12557; In re Derby, 8 N. B. R. 106, 6 Ben. 232; In re Mendelsohn, 12 N. B. R. 533, 3 Sawy. 342.

an adjudication under an ordinary voluntary petition.[89]

An attaching creditor may contest an adjudication[90] on the ground that, though not a party to bankruptcy proceedings, the requisite number and amount of creditors did not join in the petition;[91] and another creditor may intervene and be permitted to prosecute the original petition where the court is satisfied that the original petitioning creditor does not intend to prosecute further, and the pending application of the original creditor to discontinue the proceedings is sufficient evidence in that regard.[92]

§ 469. **Appearance, mode of—personally.**—In bankruptcy proceedings the general rule that a party may appear personally prevails and provision is expressly[93] made for their conduct by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. In the case of proceedings against a lunatic, if there be no regular guardian or committee, a guardian ad litem should be appointed to protect his interests.[94]

§ 470. **—— By attorney or agent.**—Every party may appear and conduct the proceedings by attorney,[95] who must be an attorney or counsel authorized to practice in the Federal courts, and the right and power of an attorney in good standing to make a reasonable request or motion will be presumed.[96] The fact that the bankrupt's attorneys had not been admitted to practice in the Federal courts would not invalidate the proceedings when the petition and schedules had been duly signed and verified and filed in the clerk's office, the court thereby acquiring jurisdiction over the case and person of the bankrupt.[97] The name of the attorney with his place of business must be entered upon the docket, which the clerk is required to keep,[1] with the date of entry, and all papers and

[89] In re Carleton, 115 F. R. 246; In re Ives, supra.

[90] In re Jack, 13 N. B. R. 296, 1 Woods 549, F. C. 7119.

[91] In re Hatje, 12 N. B. R. 548, 6 Biss. 436, F. C. 6215.

[92] In re Buchanan, 10 N. B. R. 97, F. C. 2073.

[93] G. O. IV.

[94] In re Burke, 107 F. R. 674, 5 A. B. R. 843.

[95] Leiter v. Payson, 9 N. B. R. 205, F. C. 8226.

[96] In re Pauly, 1 N. B. N. 405, 2 A. B. R. 333; In re Herzikopf, 118 F. R. 101; In re Goldenberg, 117 F. R. 692, 9 A. B. R. 156; G. O. IV; see In re Gasser, 5 A. B. R. 32.

[97] In re Kindt, 2 N. B. N. R. 373, 98 F. R. 867, 3 A. B. R. 546.

[1] G. O. I.

proceedings offered by an attorney to be filed, must be endorsed with the day and hour of filing and a brief statement of their contents.[2] Orders granted on motion must contain the name of party or attorney making the motion; and notices and orders, not required by the act or the orders to be served on the party personally, may be served on the attorney.[3]

The petition and other pleadings may be signed and verified by the attorney in proper cases,[4] and if duly authorized by power of attorney, he may prove his client's claim[5] and vote in his behalf.[6] Ordinarily corporations may appear by attorney, who is supposed to have his client's confidence, and who is presumed to act within the scope of his authority; so that it is not necessary to give him authority to appear and admit the alleged acts of bankruptcy or that the corporators or shareholders should previously by vote authorize or direct him to do so;[8] and a duly appointed receiver of a corporation is its proper representative in bankruptcy proceedings.[9] It is competent for a corporation or an individual against whom a petition was filed, whose attorney appeared and gave any waiver of time or other right and admitted the charge brought against it, to appear within a reasonable time and move the court to have the proceedings set aside, provided there has been no unreasonable delay, an attorney's authority not extending to a waiver of his client's right.[10]

§ 471. —— **Time of.**—The requirement of five days as the time within which parties may appear and plead is mandatory,[11] though it might be proper to waive it if all the creditors of the bankrupt consented; but a creditor cannot be deprived of the right to appear and plead by the act of the bankrupt in admitting the act of bankruptcy and consenting to the adjudication.[12] Nor can the attorneys for the petitioning creditors and for the bankrupt, by agreement between themselves, without the consent of other creditors or the leave of court,

[2] G. O. II.

[3] G. O. IV.

[4] Sec. 18c, act of 1898; § 479, post.

[5] Sec. 57, act of 1898.

[6] Sec. 56, act of 1898.

[8] Leiter v. Payson, 9 N. B. R. 205, F. C. 8226.

[9] In re Republic Mfg. Co., 8 N. B. R. 197, F. C. 11705.

[10] In re Republic Ins. Co., 8 N. B. R. 317, F. C. 11706.

[11] Day v. Beck & Gregg Hardware Co., 114 F. R. 834, 8 A. B. R. 175.

[12] In re Elmira Steel Co., 109 F. R. 546, 5 A. B. R. 484.

extend the time for two months or similar period, from the return day, especially where the allegations of the petition are few and simple and easily answered and the court, if applied to, would not have extended the time. Where the pleading, technically considered, is offered too late, as during an extension of the time to plead, which extension the court found unauthorized, it is within the sound discretion of the court to allow, or not to allow, its filing; but, if it contain any defense whatever, that discretion should be exercised toward permitting such defense to be made.[13] If the five days has expired and the time has not been extended, a creditor would not be authorized to appear and file an answer raising new issues, especially if the matter has already been heard on the issues already framed.[14] Since creditors as well as the bankrupt have the right to appear and plead to the petition within five days after the return day, that day must be fixed by the issuance of a subpoena;[15] so where a subpoena was made returnable and served December 1, that was the return day and an answer and demand for a jury trial filed December 17 were too late and the adjudication should have been made as on a default.[16] Good reasons should be presented in order to justify the granting of a request for the delay of bankruptcy proceedings.[17]

§ 472. **Demurrer to.**—As when the proceedings are equitable, the rules of equity practice established by the Supreme Court of the United States are to be followed as near as may be, and, when they are legal, the practice and procedure in cases at law,[18] the same considerations must govern the pleader as in other law and equity cases. A petition which fails to show any of the material allegations required by law is demurrable.[19] The sufficiency of an answer cannot be raised by a demurrer; but only by setting the case for hearing on bill and answer, as where the answer admitted the transfer alleged in the petition as preferential, but set up facts to show

[13] G. O. XXXVII.

[14] In re Mutual Mercantile Agency, 111 F. R. 152, 6 A. B. R. 607.

[15] In re Humbert, 100 F. R. 439, 4 A. B. R. 76.

[16] Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102.

[17] In re Heinsfurter, 1 N. B. N. 510, 3 A. B. R. 109.

[18] G. O. XXXVII.

[19] See In re Taylor, 102 F. R. 728, 2 N. B. N. R. 929, 4 A. B. R. 515.

it was not preferential,[20] though if a demurrer is filed and no objection is raised, it should be treated as an application to set the case for hearing on bill and answer.[21] A demurrer admits the facts and if overruled it is discretionary with the court whether to allow a demurrant to plead over.

§ 473. **Plea or answer.**—The forms and orders prescribed by the Supreme Court[22] indicate the form, in substance, of the answer to be filed by the alleged bankrupt, but the respondent is not confined to that particular form and is not limited in the facts he may set out in his answer to those suggested by the order, but may set out all the available facts with all necessary particularity.[23] The answer should not be limited to a general denial but should reply to each allegation of the petitioner; or set up a special and sufficient defense to one or more of the material facts alleged in the petition; nor should it be a simple denial of "insolvency" based solely on opinion as to the value of the estate and not a bona fide issue of fact as to solvency;[24] nor an averment of solvency on July 12, 1898, in an answer to a petition based on a general assignment on July 13, 1898;[25] nor an averment of an agreement to compromise which had not been carried out;[26] nor that the notes evidencing the petitioner's claim were given on a wagering contract, in the purchase of stocks, when the contract and rules of the board of trade contradicted respondent.[27] But the allegation by intervening creditors that the respondent is engaged "chiefly in farming and tillage of the soil" sets up a good defense to a petition which fails to show respondent's

[20] Goldman v. Smith, 1 N. B. N. 160, 1 A. B. R. 266, 93 F. R. 182, citing Genther v. Wright, 23 C. C. A. 500; Crouch v. Kerr, 38 F. R. 549; Banks v. Manchester, 128 U. S. 244; Travers v. Ross, 14 N. J. Eq. 254; Winter v. Claiter, 54 Miss. 341; Edwards v. Drake, 15 Florida 666; Barry v. Abbott, 100 Mass. 396; Brown v. Mortgage Co., 110 Ill. 235; Stone v. Moore, 36 Ill. 165.

[21] Goldman v. Smith, 1 N. B. N. 160, 1 A. B. R. 266, 93 F. R. 132; Barry v. Abbott, 100 Mass. 396.

[22] Form No. 6.

[23] In re Paige, 2 N. B. N. R. 110, 99 F. R. 538, 3 A. B. R. 678.

[24] Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102.

[25] Leidigh Car Co. v. Stengel, 1 N. B. N. 387, 2 A. B. R. 383, 95 F. R. 637.

[26] In re Simonson, 95 F. R. 948, s. c. 1 N. B. N. 230, 1 A. B. R. 197, 92 F. R. 904.

[27] Hill v. Levy, 2 N. B. N. R. 180, 98 F. R. 94, 3 A. B. R. 374.

business or that he was not within the excepted classes.[28] If the case is heard on the petition and answer, the statements in the answer must be taken as true.[29]

An informal and improper answer filed before the promulgation of the General Orders will not be dismissed but will be retained and amended to conform.[30] The sufficiency of the answer cannot be raised by a demurrer but must be by setting the case for hearing upon the petition and answer.[31] If any allegation is to be taken as true simply because it is not denied, it is only an allegation of some fact which is presumed to be within the knowledge of the party answering.[32] There is no provision in the law authorizing a creditor to file an answer to a petition in voluntary bankruptcy.[33] If, on the return day of the rule to show cause why a person should not be adjudged a bankrupt, he appears and obtains a continuance but does not file either demurrer, plea or demand for jury trial, he is not entitled on the day to which the case is continued to demand such trial but may be allowed to file a plea and have the issues tried by the court.[34] The default of the respondent to a petition in involuntary bankruptcy, through failure to appear, does not convert the proceeding into a voluntary one.[35] A motion to set aside a default should be made within a reasonable time;[36] and, in order that a hearing may be had and an opportunity given to determine whether there has been inexcusable laches, or whether reasons appear which are recognized as giving authority for refusing the motion, the respondent should apply by motion for leave to file a supplemental answer, and such leave must be granted unless the papers present a case in which the court may exercise a discretion as to granting or withholding it.[37]

§ 474. **Replication.**—If the petitioning creditors wish to con-

[28] In re Taylor, 2 N. B. N. R. 929, 102 F. R. 728, 4 A. B. R. 515.

[29] Jordan v. Downey, 12 N. B. R. 427; Hill v. Levy, 2 N. B. N. R. 180, 98 F. R. 94, 3 A. B. R. 374.

[30] In re Ogles, 1 A. B. R. 671, 93 F. R. 426, 1 N. B. N. 326; see In re Kelly, 1 A. B. R. 306, 91 F. R. 504.

[31] Goldman v. Smith, 1 N. B. N. 160, 1 A. B. R. 266, 93 F. R. 182.

[32] White v. Jones, 6 N. B. R. 175, F. C. 17550.

[33] In re Jehu, 1 N. B. N. 509, 2 A. B. R. 498, 94 F. R. 638.

[34] In re Sherry, 8 N. B. R. 142.

[35] In re Taylor, 2 N. B. N. R. 929, 102 F. R. 728, 4 A. B. R. 515.

[36] In re Neilson, 7 N. B. R. 505, F. C. 10090.

[37] Holyoke v. Adams, 13 N. B. R. 413.

test the questions raised by the answer they should file a replication denying the allegations of the answer, and have a trial before an adjudication is made.[38]

§ 475. **Defenses.**—The bankrupt or any creditor, and probably anyone who may be affected may interpose any defense that exists but if more than one each must be set forth separately;[39] and any defense available to the bankrupt is equally available to the others, and it may be shown either that the petitioners are not creditors or that they do not possess provable claims to the amount required;[40] which latter might be done by showing that the debtor was entitled to set-offs;[41] that the court has no jurisdiction;[42] that no act of bankruptcy has been committed;[43] that payments, though made since the proceedings began, have reduced the claims below the necessary amount, or that bankrupt's debts do not amount to the required sum;[44] but not that tender of payment of the petitioning creditors' debts has been made, as an insolvent has no right to make such tender.[45]

As to the plea of discharge, see Discharge, ante §§ 386-387.

§ 476. **'c. Matters of fact to be verified.**—All pleadings set-'ting up matters of fact shall be verified under oath.'

§ 477. **Verification necessary.**—The provisions of the act as to the verification of all pleadings setting up matters of fact must be strictly followed. It is matter of substance and right and is not to be dispensed with under cover of an apparent compliance with the act;[46] and when several join in a petition in separate and distinct rights, each stands individually,

[38] In re Taylor, 102 F. R. 728, 2 N. B. N. R. 929, 4 A. B. R. 515, citing Geo. M. West Co. v. Lea Bros., 1 N. B. N. 409, 2 A. B. R. 463, 178 U. S. 590; Leidigh Car Co. v. Stengel, 1 N. B. N. 387, 2 A. B. R. 383, 95 F. R. 637; Simpson v. Ready, 12 Mees. & W. 740; Grant Co. v. Dawson, 151 U. S. 586; Sturges v. Crowninshield, 4 Wheat. 122.

[39] In re Quimette, 3 N. B. R. 140, 1 Sawy. 47, F. C. 10622.

[40] In re Cornwall, 6 N. B. R. 305, 9 Blatch. 114, F. C. 3250; In re Williams, 14 N. B. R. 132, F. C. 17706; In re Quimette, supra; In re Scrafford, 14 N. B. R. 184.

[41] In re Osage R. R. Co., 9 N. B. R. 281.

[42] In re Williams, 14 N. B. R. 132, F. C. 17706.

[43] In re Skelley, 5 N. B. R. 214, 3 Biss. 260.

[44] In re Skelley, supra; In re Quimette, 3 N. B. R. 140, 1 Sawy. 47, F. C. 10622.

[45] In re Williams, 3 B. R. 74, 1 Lowell 406, F. C. 17703.

[46] In re Keiler, 18 N. B. R. 10, F. C. 7647; see In re Bellah, 116 F. R. 69, 8 A. B. R. 310.

and a verification by each is required;[47] and the petition is imperfect if the name of a petitioner which appears in the petition is omitted from the verification.[48] Where the petition is verified by only two out of three creditors, a motion should be made for a rule to require a proper verification, and if it is not complied with, a motion to dismiss would doubtless lie.[49] The specifications of objections to a discharge should be verified as to facts alleged.[50]

§ 478. —— **Of corporations.**—The verifications, like proof of claim, should be made by the treasurer, or, if there be no treasurer, by the officer whose duties most nearly correspond to those of treasurer;[51] though, as under the act of 1867, such verification may be by an agent,[52] not an officer of the corporation, or by an attorney personally acquainted with the facts,[53] but his authority must be set forth in the affidavit or be otherwise established.

§ 479. —— **By agent or attorney.**—An agent or attorney if duly authorized and the facts are within his knowledge may verify pleadings, though if the allegations are those of the petitioning creditors and are in positive form, the presumption is that the truth of the allegations is within their knowledge and they should verify the petition in person; but the rule is different when the facts are within the attorney's knowledge and he was authorized by them to make it.[54] Hence while it may be preferable that a petition be verified by the creditors personally, neither the statute nor the general orders makes this obligatory, consequently the verification may be by an agent or attorney having knowledge of the facts.[55] No other evidence of the attorney's authority need appear than the fact

[47] In re Simmons, 10 N. B. R. 253, F. C. 12864; In re Scull, 10 N. B. R. 165, 7 Ben. 371.

[48] In re Rosenfield, 11 N. B. R. 86, F. C. 12061.

[49] Green River Deposit Bank v. Craig, 110 F. R. 137, 6 A. B. R. 381.

[50] In re Brown, 112 F. R. 49, 7 A. B. R. 252; see In re Baerncopf, 117 F. R. 975, 9 A. B. R. 133; In re Glass, 119 F. R. 509.

[51] G. O. XXI (1).

[52] In re Hannibal, 15 N. B. R. 233, F. C. 6023; In re Bellah, 116 F. R. 69, 8 A. B. R. 310.

[53] In re Chequasset Lumber Co., 112 F. R. 56, 7 A. B. R. 87.

[54] In re Neilson, 1 N. B. N. 577, 1 A. B. R. 63, 98 F. R. 76; In re Chequasset Lumber Co., supra; see In re Goldberg, 117 F. R. 692, 9 A. B. R. 156, where an application for an injunction was verified by an attorney.

[55] In re Herzikopf, 118 F. R. 101, 9 A. B. R. 90; Chequasset Lumber Co., supra; In re Hunt, 118 F. R. 282, 9 A. B. R. 251; see In re Simonson, 1 A. B. R. 197, 92 F. R. 904.

that he is admitted to practice in the Federal court.[56] Where the verification to a petition by an agent or attorney at law is good upon its face, but in fact was without authority, objection should be made before answering to the merits, as otherwise it will be waived.[57] Such verification may be made before one of the attorneys for the petitioning creditors as notary[58] and a petition signed by the creditor's attorney and not verified is demurrable.[59]

§ 480. —— **Defect in—cure of.**—A defect in the verification is a mere irregularity and may be cured by amendment;[60] and the failure to verify pleadings may be supplied nunc pro tunc.[61]

§ 481. —— **Waiver of.**—Objection to the form of the verification must be seasonably made and if it is not raised until after an answer on the merits it is too late and the defect is thereby waived.[62] A case is pending so as to admit of the offer of composition notwithstanding a defect in the verification, such defect not being jurisdictional.[63]

§ 482. **'d. Decision of issue with or without jury.**—If the 'bankrupt, or any of his creditors, shall appear, within the time 'limited, and controvert the facts alleged in the petition, the 'judge shall determine, as soon as may be, the issues presented 'by the pleadings, without the intervention of a jury, except in 'cases where a jury trial is given by this act, and makes the 'adjudication or dismiss the petition.'[64]

[56] In re Herzikopf, supra; G. O. IV; see In re Gasser, 5 A. B. R. 32.

[57] In re Herzikopf, supra; In re Simonson, supra.

[58] In re Kindt, 2 N. B. N. R. 339.

[59] In re Carter, 1 N. B. N. 162, 1 A. B. R. 160.

[60] In re Brumelkamp, 1 N. B. N. 360, 2 A. B. R. 318, 95 F. R. 814; In re Simonson et al., 1 A. B. R. 197; Green River Deposit Bank v. Craig Bros., 110 F. R. 137, 6 A. B. R. 381; In re Sargent, 13 N. B. R. 144, F. C. 12361.

[61] In re Wolfstein, 1 N. B. N. 202.

[62] Leidigh Car Co. v. Stengel, 1 N. B. N. 296, 387, 2 A. B. R. 383, 95 F. R. 637; In re Herzikopf, supra; In re Baerncopf, 117 F. R. 975; In re Simonson, 1 N. B. N. 230, 1 A. B. R. 197, 92 F. R. 904; s. c. 95 F. R. 948; following In re Raynor, 7 N. B. R. 527, 11 Blatch. 43, F. C. 11597; In re McNaughton, 8 N. B. R. 44, F. C. 8912; In re Simmons, 10 N. B. R. 254, F. C. 12864; and disapproving Hunt v. Pooke, 5 N. B. R. 161, F. C. 6896; In re Butterfield, 6 N. B. R. 257; and Moore v. Harley, 4 N. B. R. 71, F. C. 9764.

[63] Ex p. Jewett, 11 N. B. R. 443, 2 Low 393, F. C. 7303.

[64] Analogous provision of Act of 1867. "Sec. 41. *And be it further*

§ 483. **Trial—Effect of appearance and plea.**—Entering a general appearance and joining issue on the merits waives all formal or modal defects, and all questions which might have been raised by demurrer or plea in abatement. Thereafter it is too late to raise the objection that the petition does not state the special facts constituting an alleged preference since such defect might have been raised by motion to dismiss or answer and is amendable;[65] or to object to the petition for any irregularity.[66]

§ 484. **When trial by jury desired.**—If a jury trial is desired a written application therefor must be filed at or before the time within which an answer may be filed; otherwise it is waived.[67] Under the act of 1867 if the respondent desired to controvert the petition on the return day of the order to show cause, he had to appear and deny the facts set forth in the petition and demand a hearing by the court, or a trial by jury, and it was held that the court should make a record of such appearance, allegation and demand; but no portion of this previous to the making of the record by the clerk was required to be in writing, except the demand for a trial by jury,[68] which is equally true under the act of 1898 except that he must appear and plead within five days after the return day. Where the parties to bankruptcy proceedings appeared on the return day, or the adjourned day, and joined issue, and no further proceedings or adjournment was had, the case was considered as pending from day to day until disposed of.[69] The adjourned day, on which, if the petitioning creditor does not appear and proceed to an adjudication, another creditor may appear and prosecute, is any day to which the proceedings on the order to

enacted, That on such return day or adjourned day, if the notice has been duly served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy."

[65] In re Cliffe, 1 N. B. N. 509, 2 A. B. R. 317, 94 F. R. 354.

[66] In re McNaughton, 8 N. B. R. 44, F. C. 8912.

[67] Sec. 19a, act of 1898.

[68] In re Heydette, 8 N. B. R. 332, F. C. 6444.

[69] In re Buchanan, 10 N. B. R. 97, F. C. 2073.

show cause may be adjourned for the purpose of inquiring into the facts as to the acts of bankruptcy.[70]

§ 485. **Jurisdiction over creditors.**—Unless regularly made parties to the proceedings and given proper notice, persons are not subject to the jurisdiction of the bankruptcy court, and will not therefore be deemed guilty of contempt of its orders unless it be shown that they have notice of such proceedings.[71] This is particularly true of parties in proceedings in a state court.

§ 486. **Burden of proof.**—In answer to an order to show cause the burden is on the respondent to prove that the facts set forth in the petition are not true, in order to defeat an adjudication.[72] On a motion to vacate an adjudication in a voluntary proceedings because of want of residence, while the moving creditor is required to introduce evidence, after that is in, the burden of proof is upon the bankrupt.[73] Under the former act the petitioning creditor was not required to make full proof of insolvency but might offer proof tending to show it, and the debtor was obliged to explain it as being best acquainted with his own affairs.[74]

§ 487. **Dismissal of petition.**—After a petition in involuntary bankruptcy has been filed and the court has acquired jurisdiction of the case, it should not be permitted to be made either inept or inoperative by an agreement between the bankrupt and the attorneys for the petitioning creditors, or by dismissing the action on motion of the petitioners, unless all the creditors agree or, after due notice, fail to object.[75] If one of the petitioning creditors insists upon an adjudication where the statutory grounds therefor exist and there is no fraud, oppression or mistake, the court cannot dismiss the petition although it would be for the best interests of the

[70] In re Lacey, 10 N. B. R. 477, F. C. 7965.

[71] In re Ogles, 1 N. B. N. 326, 93 F. R. 426, 1 A. B. R. 671.

[72] In re Peirce, 8 N. B. R. 514, F. C. 11411.

[73] In re Scott, 111 F. R. 144, 7 A. B. R. 39; Waxelbaum, 97 F. R. 562, 3 A. B. R. 392.

[74] In re Ore. Bul. & Pub. Co., 13 N. B. R. 503, F. C. 10559. See also Sec. 3, act of 1898, ante, §§ 86-91.

[75] In re Simonson, 1 N. B. N. 230, 1 A. B. R. 197, 92 F. R. 904; In re Sheehan, 8 N. B. R. 353, F. C. 12738; In re Williams, 3 N. B. R. 285; In re Quimette, 3 N. B. R. 140, F. C. 10622; In re Ind. Cin. and LaFay. R. R. Co., 8 N. B. R. 302, F. C. 7023.

creditors that the bankrupt should be allowed to settle with them out of court.[76] When there are no creditors who have proved their claims or who object, a voluntary bankrupt may withdraw his petition, and cannot be prevented by subsequent creditors who wish to prevent new proceedings.[77] A petition otherwise sufficient confers jurisdiction and will not be dismissed on the ground that it was filed by attorneys who had not been admitted to practice in the United States courts;[78] nor is the pendency of proceedings in insolvency under a state law, on the debtor's voluntary petition, begun before the passage of the bankruptcy act, ground for dismissing the debtor's subsequent voluntary petition in bankruptcy, although he has contracted no new debts, and it appears that one or more of the creditors scheduled by the bankrupt are citizens of states other than that in which the insolvency proceedings were instituted.[79]

Where it appears by affidavit or otherwise that at the time the petition was filed the creditors who filed it knew they did not constitute the requisite number, the court must dismiss the petition.[80] An amended petition, executed as such by a creditor to be filed in proceedings previously instituted, cannot, after such execution, and after the proceedings have been dismissed by the court, be converted into an original petition by striking out the word "amended," and be made the basis of a new and independent proceeding; and where it has been so filed it will be dismissed on the facts being made to appear to the court.[81] An order dismissing a petition because it stated no act of bankruptcy, will not be set aside and the filing of an amended petition be permitted setting up other acts of bankruptcy, unless good excuse be shown for the omission to assign them in the original petition.[82]

§ 488. 'e. Adjudication or dismissal on failure to plead.—

[76] In re Cronin, 98 F. R. 584, 3 A. B. R. 552; In re Heffron, 10 N. B. R. 213, F. C. 6321; In re Sargent, 13 N. B. R. 144, F. C. 12361; see In re Ind. C. and L. R. Co., 5 Biss. 287, F. C. 7023; contra, In re Miller, 1 N. B. R. 105, F. C. 9553.

[77] In re Hebbert, 104 F. R. 322.

[78] In re Kindt, 2 N. B. N. R. 373, 98 F. R. 867, 3 A. B. R. 546.

[79] In re Mussey, 2 N. B. N. R. 113, affmd. 99 F. R. 71, 3 A. B. R. 592.

[80] In re Scammon, 11 N. B. R. 280, 6 Biss. 195, F. C. 12429.

[81] In re Hyde v. Gload Mfg. Co., 103 F. R. 617, 2 N. B. N. R. 1122, 4 A. B. R. 602.

[82] White v. Timber Co., 116 F. R. 768.

'If on the last day within which pleadings may be filed none 'are filed by the bankrupt or any of his creditors, the judge 'shall on the next day, if present, or as soon thereafter as 'practicable, make the adjudication or dismiss the petition.'

§ 489. —— **Failure to plead.**—In a case of failure to plead, or of a plea made improperly or out of time, it is the imperative duty of the court to make the adjudication as soon as practicable after five days from the return day, but an adjudication before the expiration of this time is premature.[83] This time cannot be extended by agreement between counsel for the petitioning creditors and the bankrupt without leave of the court and without the consent of other creditors, especially in a case where the allegations of the petition are simple and easily answered, and the court, if applied to for that purpose, would not have extended the time,[84] and where the answer is filed after the time specified, the case should be adjudicated as in case of a failure to plead.[85] The fact that the subpoena is not served until long after the five days, but an answer is made within the time by a creditor, the jurisdiction is not lost by reason of the delay in the service or in the adjudication.[86]

A judgment by default is as conclusive an adjudication between parties of whatever is essential to support the judgment, as one rendered after answer and contest, and in such case facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings.[87]

§ 490. 'f. **When clerk to refer involuntary petition.**—If 'the judge is absent from the district, or the division of the 'district in which the petition is pending, on the next day 'after the last day on which pleadings may be filed, and none 'have been filed by the bankrupt or any of his creditors, the 'clerk shall forthwith refer the case to the referee.'

§ 491. 'g. **Action on voluntary petition.**—Upon the filing

[83] Day v. Beck & Gregg Hardware Co., 114 F. R. 834, 8 A. B. R. 175.

[84] In re Simonson, 1 N. B. N. 230, 92 F. R. 904, 1 A. B. R. 197.

[85] Bray v. Cobb, 1 N. B. N. 153, 91 F. R. 102, 1 A. B. R. 153.

[86] In re Freischberg, 8 A. B. R. 607; In re Stein, 105 F. R. 749, 5 A. B. R. 288.

[87] In re American Brewing Co., 112 F. R. 752, 7 A. B. R. 463; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683.

'of a voluntary petition the judge shall hear the petition and 'make the adjudication or dismiss the petition. If the judge 'is absent from the district, or the division of the district in 'which the petition is filed at the time of the filing, the clerk 'shall forthwith refer the case to the referee.'[88]

§ 492. **When clerk to refer.**—A reference to the referee may be made by the clerk only when the judge is absent from the division of the district within which the petition is filed, and then only in case of default in involuntary cases. The reference cannot be made by the deputy clerk, nor by the clerk on the written admission by the respondent of the acts of bankruptcy charged and a waiver of service and of the time of appearance,[89] but an order made by the judge and attested by the deputy clerk is valid.

Sometimes it is necessary for the court to refer the case to the referee to take and report testimony, as where answers are filed to a petition in involuntary bankruptcy, and it is no objection to such a course that questions of law are involved, as the action of the referee is in all respects subject to the control of the court.[90]

§ 493. **Order of reference.**—The order referring a case to a referee, a copy of which must be forthwith sent by mail, or delivered personally, to the referee, must name a day on which the bankrupt shall attend before the referee and from that day the bankrupt shall be subject to the order of the court in all matters relating to the bankruptcy proceedings, and thereafter all proceedings, except those required to be had before the judge, must be had before the referee; and the

[88] Analogous provision of Act of 1867. "Sec. 42. . . . That if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt, and, as such, subject to the provisions of this act, and shall forthwith issue a warrant to take possession of the estate of the debtor. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition."

[89] Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102; In re L. Humbert Co., 100 F. R. 439, 4 A. B. R. 76.

[90] Clark v. Am. Man'g. Co., 101 F. R. 962, 4 A. B. R. 351.

referee must perform his duties at such times and in such places as shall be fixed by special order of the judge or referee.[91]

§ 494. **Adjudication — in general.** — Upon adjudication whether in voluntary or involuntary cases, the court acquires complete jurisdiction for all purposes;[92] and an adjudication on default is as conclusive as one entered upon a hearing.[93] The only issues upon which a bankruptcy case can be tried and an adjudication had are those presented by the pleadings; and the petitioner cannot be permitted to prove any other act of bankruptcy than that set up in the petition.[94] This is the general rule and applies almost, if not, universally, being based on the principle that the opposite party is entitled to know what he has to meet.[95]

If upon the hearing of a petition by some of the members of a firm, the non-joining partners appear and consent, or default, the adjudication will be proceeded with as in other cases of voluntary bankruptcy: but, if they appear and plead proper defenses, the adjudication will be proceeded with as in other involuntary proceedings.[96] A general assignment for the benefit of creditors justifies an adjudication of bankruptcy without averment or proof that the assignor was insolvent at the time of the assignment or of filing the petition.[97]

§ 495. **—— Effect of.**—An adjudication of bankruptcy is not a conclusive finding of a fact which tends to defeat the jurisdiction of the court over the alleged bankrupt;[98] but it is in the nature of a statutory execution, for all the creditors and the trustee, as their representative, may enforce against the debtor every right a judgment creditor could enforce,[99] and it terminates the right of the bankrupt to dispose of his

[91] G. O. XII.

[92] In re Archenbrown, 11 N. B. R. 149, F. C. 504.

[93] In re American Brewing Co., 112 F. R. 752, 7 A. B. R. 463; In re Hatcher, 1 N. B. R. 91, F. C. 6210.

[94] In re Sykes, 5 Biss. 113.

[95] Doan v. Compton, 2 B. R. 607; James v. Alt. Delaine Co., 11 N. B. R. 390.

[96] In re Murray, 1 N. B. N. 570, 96 F. R. 600, 3 A. B. R. 601.

[97] Lea v. West, 174 U. S. 590, 1 N. B. N. 409, 2 A. B. R. 463, aff'g 1 N. B. N. 79, 1 A. B. R. 261, 91 F. R. 237; Leidigh Car Co. v. Stengel, 1 N. B. N. 387, 2 A. B. R. 383, 95 F. R. 637.

[98] In re Goodfellow, 3 N. B. R. 114, 1 Lowell 510, F. C. 5536.

[99] Barnwell v. Jones, 14 N. B. R. 278, F. C. 1027.

property.[1] In the absence of fraud or mistake the adjudication is conclusive on all creditors, and cannot be disputed upon the application for a discharge;[2] nor can it be assailed in a collateral action.[3]

A bankruptcy proceeding is a proceeding in rem and all persons interested in the res are regarded as parties thereto, including the bankrupt and trustee as well as the creditors, secured and unsecured,[4] and an adjudication which is necessarily an implied judgment that the court has jurisdiction, follows upon the filing of the petition. No notice is necessary that an adjudication will be made, but afterward by notice creditors become parties and if they do not they are precluded from thereafter objecting for the first time to the jurisdiction over the person.[5] The adjudication vests in the trustee, or temporary receiver, the title of the bankrupt's property and stays all seizures made within four months. Where the respondent in a petition in involuntary bankruptcy takes issue to the validity and consideration of a note set forth in a petition and the court makes an adjudication it is conclusive evidence of the validity of the claim when the note is presented for allowance, but if the issue was on a collateral question the adjudication would not be conclusive as to its validity.[6] Where the answer filed by a corporation to an involuntary petition which waives process, admits the allegations of the petition, and declares its willingness to be adjudged bankrupt, is signed in the name of the corporation by its president, an objection that he was acting beyond his power is waived by the acquiescence of the bankrupt and its creditors in the adjudication, and, as against strangers, is concluded by the adjudication.[7]

§ 496. —— **When not set aside.**—The bankrupt and his creditors who have provable claims against his estate are the only persons who can make an application to set aside an

[1] In re Dillard, 9 N. B. R. 8, 2 Hughes 190, F. C. 3912; Maxwell v. Faxton, 4 N. B. R. 60.

[2] In re Ordway Bros., 19 N. B. R. 171, F. C. 10552.

[3] Sloan v. Lewis, 12 N. B. R. 173, 22 Wall. 150; Wilson v. Parr, 8 A. B. R. 230.

[4] Carter v. Hobbs, 1 N. B. N. 191, 1 A. B. R. 215, 92 F. R. 594.

[5] In re Mason, 2 N. B. N. R. 425, 99 F. R. 256, 3 A. B. R. 599.

[6] In re Ulfelder Clothing Co., 98 F. R. 409, 3 A. B. R. 425.

[7] In re Columbia Real Estate Co., 101 F. R. 965, 4 A. B. R. 411.

adjudication,[8] while any person affected by an adjudication and interested in sustaining it may oppose such application, as the receiver of a corporation adjudged bankrupt on a trustee's petition,[9] and it will be so set aside on grounds similar to those which authorize the review or vacation of a judgment; though if the ground is want of jurisdiction it is in the court's discretion to allow a stranger to be heard as amicus curiae.[10] The petition of a creditor to set aside an adjudication on a voluntary petition, will not be entertained.[11] An adjudication made where respondent waived process, entered appearance and admitted the alleged acts of bankruptcy will not be set aside for want of jurisdiction on the application of a stranger when neither the bankrupt nor any of his creditors object to the decree;[12] nor on the ground that the petition and schedule were not filed for two months after verification;[13] nor on the application of one guilty of laches;[14] nor on the ground that the proper proportion of creditors did not unite in the petition, unless there be fraud, bad faith or collusion in obtaining it;[15] nor because of the co-operation of the debtor in securing creditors, by lawful means, to unite in an involuntary petition;[16] nor for the reason that, on the filing of an involuntary petition, debtor defaulted;[17] but, upon the after discovery of a dormant partner, an adjudication against the nominal firm would permit the opening of the proceedings and bringing in the dormant partner without requiring a new petition to be filed.[18]

§ 497. —— **When set aside.**—The court has jurisdiction to consider an application to set aside an adjudication at any time until the estate is closed, although the actual term of the

[8] In re Columbia Real Estate Co., 112 F. R. 643, 7 A. B. R. 441.

[9] In re Atlantic Mutual Ins. Co., 16 N. B. R. 541, 9 Ben. 280, F. C. 628.

[10] In re Columbia Real Estate Co., 101 F. R. 965, 4 A. B. R. 411.

[11] In re Ives, 113 F. R. 911, 7 A. B. R. 692; In re Carleton, 115 F. R. 246, 8 A. B. R. 270.

[12] In re Columbia Real Estate Co., 101 F. R. 965, 4 A. B. R. 411.

[13] In re Berner, 2 N. B. N. R. 330, 3 A. B. R. 325.

[14] In re Ives, 113 F. R. 911, 7 A. B. R. 692; In re Balt. Co. Dairy Ass'n, 11 N. B. R. 253, 2 Hughes 250, F. C. 8281; In re Griffith, 18 N. B. R. 510, F. C. 5820.

[15] In re Funkenstein, 14 N. B. R. 213, 3 Sawy. 605, F. C. 5158.

[16] In re Duncan, 14 N. B. R. 18, 8 Ben. 365, F. C. 4131.

[17] In re Hopkins, 18 N. B. R. 396, F. C. 6684.

[18] In re Scott, 1 N. B. N. 327.

court has passed.[19] Where two of four members of a firm file a petition for the adjudication of the firm bankrupt and no notice is given the other partners and they do not appear, the adjudication should be set aside, notwithstanding a consent signed by such other partners' attorneys and filed after the adjudication;[20] or if made against an infant who did not appear by guardian ad litem;[21] or where a proceeding is reinstated without notice to or appearance of the debtor;[22] or where the debtor failed to comply with the requirements of an act passed the day the petition was filed;[23] or where it subsequently develops in a voluntary proceedings that there are no dischargeable debts.[24]

§ 498. —— **Appeal.**—The general rule that every one, who may be a party to the proceedings or whose rights may be affected by the decision, may appeal, applies to an adjudication in bankruptcy; and creditors who appear in opposition to a petition in involuntary bankruptcy against their debtor, and contest the adjudication thereon, as authorized by the bankruptcy act, have therefore the right to appeal from a decree making the adjudication.[25] There would be no appeal, however, from an order dismissing a petition for intervention, in view of the fact that it is not such a final order as is contemplated by the law.[26]

§ 499. **Change of venue.**—In courts of bankruptcy as in other courts the facts may be such as to make a change of venue desirable and proper, and in such cases it lies within the sound discretion of the court to allow or refuse the request, and to warrant its allowance the same showing would have to be made as in other cases.[27] Where several petitions are filed in courts in different districts against the same partnership, each of whom having jurisdiction, the court in which the petition is first filed will retain jurisdiction, but if such

[19] In re Ives, supra; reversing 111 F. R. 495, 6 A. B. R. 653.

[20] In re Altman, 1 N. B. N. 358, 1 A. B. R. 689.

[21] In re Derby, 8 N. B. R. 106, F. C. 3815.

[22] Gage v. Gage, 15 N. B. R. 145.

[23] In re Carrier, 13 N. B. R. 208, F. C. 2443.

[24] In re Maples, 105 F. R. 919, 5 A. B. R. 426.

[25] In re Meyer, 98 F. R. 976, 3 A. B. R. 559.

[26] In re Columbia Real Estate Co., 112 F. R. 643, 7 A. B. R. 441.

[27] See Bray v. Cobb, 1 N. B. N. 209, 91 F. R. 102, 1 A. B. R. 153.

court is satisfied that it is for the greatest convenience of the parties in interest that another of said courts should proceed with the case, it will order it to be transferred to such other court.[28]

[28] G. O. VI.

CHAPTER XIX.

JURY TRIALS.

§500. (19a) Jury trials.
501. —— When allowable.
502. —— Time of making application mandatory.
503. —— On insufficient petition.
504. Conduct of the trial.
505. b. When jury not in attendance.
506. Early trial.
507. c. Rule governing submission to jury.
508. Difference between sub-divisions "a" and "c."
509. Issues of fact generally triable by jury.
510. In what cases jury trial allowed.
511. Contempt.

§ 500. '(Sec. 19a) **Jury trials.**—A person against whom 'an involuntary petition has been filed shall be entitled to 'have a trial by jury in respect to the question of his in-'solvency, except as herein otherwise provided, and any act 'of bankruptcy alleged in such petition to have been commit-'ted, upon filing a written application therefor at or before 'the time within which an answer may be filed. If such 'application is not filed within such time, a trial by jury shall 'be deemed to have been waived.'[1]

§ 501. **When allowable.**—In a case of involuntary bankruptcy, a jury trial may be had as to the commission of the acts of bankruptcy alleged and the fact of insolvency,[2] as a matter of right and cannot be denied if seasonably demanded.[3]

In this respect it differs from the trial of an issue out of chancery which the court of equity is not bound to grant nor bound by the verdict if such trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common law cases.[3a]

§ 502. **Time of making application mandatory.**—In a case of involuntary bankruptcy, a demand for a trial by jury, as

[1] Analogous provision of Act of 1867. "Sec. 41. . . . The court shall proceed summarily to hear the allegation of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy."

[2] Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102; Day v. Beck & Gregg Hardware Co., 114 F. R. 834, 8 A. B. R. 175; but see Sub. c, this chapter, post, § 507.

[3] Duncan v. Landis, 106 F. R. 839, 5 A. B. R. 649.

[3a] Elliott v. Toeppner, 187 U. S. 327, 9 A. B. R. 50.

to the commission of the alleged acts of bankruptcy and the fact of insolvency, must be in writing and made by the debtor at or before the expiration of the time allowed for answer, which is five days after the return day, or within such further time as the court may allow,[4] the subpoena which is issued at the time the petition is filed being returnable in fifteen days, unless the time is extended by the judge.[5] This provision is mandatory and must be strictly observed and, if the demand is not made within such time, it is deemed to be waived;[6] or if the debtor fails to appear on the return day he cannot afterwards demand a jury trial;[7] nor, if he appear by attorney but neither files an answer or other plea nor demands trial by jury, and secures a continuance, can he demand a trial by jury[8] on the adjourned day, the continuance being general and no enlargement of the time for filing the demand having been granted. Where a petition is filed by some of the members of a firm and referred by the clerk to a referee, thus being in its inception a voluntary proceeding, but the non-petitioning partners contest the adjudication,[9] the case must be certified to the judge for hearing and a jury trial will be had if a written demand therefor was filed with the referee at or before the time fixed for the hearing.[10]

§ 503. **On insufficient petition.**—The insufficiency of a petition may be taken advantage of by motion to dismiss or answer; but, if the defect is amendable, it is waived by demanding an issue on the merits and requiring the petitioner to prepare for trial on the disputed facts, and objection is too late at the trial, or later, so that a debtor may waive such defect and demand a jury trial on such petition.[11]

§ 504. **Conduct of the trial.**—The trial by jury of an issue as to the existence of grounds for adjudication, must be according to the course of the common law. In case a debtor denies

[4] Forms 6 and 7, sec. 18b, act of 1898; Day v. Beck & Gregg Hardware Co., supra; Duncan v. Landis, supra.

[5] Sec. 18a, act of 1898.

[6] Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102; In re Heydette, 8 N. B. R. 332, F. C. 6444; In re Sherry, 8 N. B. R. 142; Clinton v. Mayo, 12 N. B. R. 39, F. C. 2899.

[7] In re Gebhardt, 3 N. B. R. 63, F. C. 5294.

[8] In re Sherry, 8 N. B. R. 142.

[9] G. O. VIII.

[10] In re Murray, 1 N. B. N. 570, 96 F. R. 600, 3 A. B. R. 601.

[11] In re Cliffe, 1 N. B. N. 509, 2 A. B. R. 317, 94 F. R. 354.

the allegation of insolvency, he must appear and submit to examination, and, if he fails to do so, the burden of proving his solvency rests on him.[12] The court's instructions are entitled to a reasonable construction, and, if correct, when applied to the facts submitted to the jury, will be sustained in an appellate court, though, if standing alone, they would be incomplete in respect to some matter sufficiently explained in the evidence;[13] and it is not error to direct the jury's attention to the distinction between reasonable cause to believe and actual belief.[14] If the nature of the debt is set forth in the petition with the averment that it is provable under the act, the question whether it is so provable is a question of law and not of fact.[15] The court has the same power over verdicts rendered in bankruptcy cases, whether for or against the debtor, as courts of common law, and may, on proper cause shown, set them aside and order a new trial.[16]

§ 505. 'b. **When jury not in attendance.**—If a jury is not 'in attendance upon the court, one may be specially sum-'moned for the trial, or the case may be postponed, or, if the 'case is pending in one of the district courts within the 'jurisdiction of a circuit court of the United States, it may be 'certified for trial to the circuit court sitting at the same 'place, or by consent of parties when sitting at any other 'place in the same district, if such circuit court has or is to 'have a jury first in attendance.'

§ 506. **Early trial.**—This provision is in line with the general purpose of the act which is to secure a prompt settlement of a bankrupt's estate. It provides for a special venire, if necessary, or in case no advantage is to be gained by postponement until there is a jury in attendance, or for trial in the circuit court sitting at the same place on certificate, or by consent of parties sitting at another place in the district, if such circuit court has a jury in attendance, so that the earliest possible trial may be had. So great is the desire for promptness in these proceedings that, though the act of 1867 made no express provision therefor, the courts nevertheless

[12] Sec. 3d, act of 1898; Elliott v. Toeppner, 187 U. S. 327, 9 A. B. R. 50.

[13] Willis v. Carpenter, 14 N. B. R. 521, F. C. 17770.

[14] Lawrence v. Graves, 5 N. B. R. 279, F. C. 8138.

[15] Sigsby v. Willis, 3 N. B. R. 51, 3 Ben. 371, F. C. 12849.

[16] In re Corse, F. C. 3254; In re Deforrest, 9 N. B. R. 278, F. C. 3745.

held that a special venire might issue at any date to try an issue,[17] even during the vacation of the district court proper.[18]

§ 507. **'c. Rule governing submission to jury.**—The right 'to submit matters in controversy, or an alleged offense under 'this Act, to a jury shall be determined and enjoyed, except 'as provided by this Act, according to the United States laws 'now in force or such as may be hereafter enacted in relation 'to trials by jury.'

§ 508. **Difference between subdivisions a and c.**—It should be observed that subdivision "a" provides for a jury trial as to the commission of the alleged acts of bankruptcy, or the fact of insolvency, if a demand therefor is made in writing within the time for filing an answer; but this subdivision, "c," provides that the right to submit matters in controversy or offenses under the act to a jury shall be determined, except as provided in the act, by the laws of the United States.

§ 509. **Issues of fact generally triable by jury.**—All issues of fact, in cases in the circuit and district courts, except as otherwise provided in bankruptcy proceedings, must be tried by jury,[19] but issues of fact in civil cases in a circuit court may be tried by the court without a jury, whenever the parties file a stipulation in writing waiving the jury. In such case the finding of the court, which may be either general or special, will have the same effect as the verdict of a jury,[20] the appellate court being confined in the latter case to questions of law, except that, on a special finding, the sufficiency of the facts to support the judgment may be inquired into. There is no similar provision as to waiver in the district court;[21] but, if the parties agree on a statement of facts, they can together waive a jury;[22] and judgment in either event may be reviewed by writ of error.[23]

§ 510. **In what cases jury trial allowed.**—The district courts, as courts of bankruptcy, have jurisdiction both at law

[17] In re Findlay, 9 N. B. R. 83, 5 Biss. 480, F. C. 4789; In re Hawkeye Smelting Co., 8 N. B. R. 385.

[18] Lehman v. Strassberger, 2 Woods, 554, F. C. 8216.

[19] U. S. Rev. Stat., secs. 648, 649, 566.

[20] U. S. Rev. Stat., sec. 649; Packer v. Whittier, 1 A. B. R. 621.

[21] Blair v. Allen, 3 Dill. 101, F. C. 1483; Kearney v. Case, 12 Wall. 275, R. S. sec. 700.

[22] Supervisors v. Kennicott, 103 U. S. 554.

[23] Campbell v. Boyreau, 21 How. 223; Rogers v. U. S., 141 U. S. 548, 556; Perego v. Dodge, 163 U. S. 160.

and in equity;[24] and so it would seem that, under the present act, if the matter in controversy is of legal cognizance, the fact that it is in a bankruptcy proceeding will not prevent the rule as to a jury trial from applying, and that the holding under the former act that bankruptcy proceedings were of equitable cognizance and a jury trial not allowable[25] does not now apply unless the matter in controversy is of equitable cognizance. This distinction seems to have been overlooked in one case.[26] Unless the act otherwise provides, therefore, all questions of fact of legal cognizance are triable by jury. The act itself in some parts seems to require this, as in the provision that a composition may be set aside "if upon a trial,"[27] and that the judge may revoke a discharge "upon a trial if it shall appear,"[28] the use of the word "trial" implying a jury.

A stranger to the bankruptcy proceeding asserting an adverse title to property claimed by the trustee is entitled, if the matter is of legal cognizance, to a jury trial,[29] though, if the property is in the trustee's possession, the proceeding may be in the court of bankruptcy before a jury;[30] and a jury trial is proper to try issues of fact raised in summary proceedings[31] to determine the amount of rent due which accrued while the assignee occupied the premises;[32] or whether a partnership existed which might be submitted instead of charged as matter of law;[33] to determine if a creditor took an assignment of property from the debtor with knowledge or reason to know of latter's insolvency;[34] to weigh inadequacy of price as an evidence of fraud in a sale by an insolvent vendor;[35] and, in the court's discretion, but not as matter of right, to determine the amount to be allowed as a fee to the attorney of a creditor out of such creditor's distributive share,[36] or any question of fact arising on specifications in opposition to discharge;[37] or if a creditor's claim

[24] Sec. 2, act of 1898.

[25] Barton v. Barbour, 104 U.S. 126.

[26] In re Christensen, 101 F. R. 243, 4 A. B. R. 99.

[27] Sec. 13, act of 1898.

[28] Sec. 15, act of 1898.

[29] In re Baudouine, 101 F. R. 574, 3 A. B. R. 65.

[30] In re Russell, 101 F. R. 248, 3 A. B. R. 658.

[31] Bill v. Beckwith, 2 N. B. R. 82, F. C. 1406.

[32] Buckner v. Jewell, 14 N. B. R. 286, 2 Woods 220, F. C. 3060.

[33] In re Jelsh, 9 N. B. R. 412, F. C. 7257.

[34] Ecker v. McAllister, 17 N. B. R. 42.

[35] Rhoads v. Blatt, 16 N. B. R. 32.

[36] In re Rude, 101 F. R. 805, 4 A. B. R. 319.

[37] Morgan v. Thornhill, 5 N. B. R. 1, 11 Wall. 65.

is contested.[38] It would seem that a jury trial should be allowed to decide if debts included in the petition to make up the requisite number and amount of creditors are fraudulent, since it is a question of fact, and on it depends the important question whether the debtor is to be ruined by a petition filed by trumped up creditors; and this is especially true if the question of insolvency is involved, as a man is only insolvent when the aggregate value of his property is not equal to his bona fide debts.[39] The right of trial by jury extends to cases in which the defendant is charged with committing an offense in violation of the act,[40] but not to contempts.[41]

A jury trial should not be allowed to try the issues, raised by a general answer and a denial of all the acts of bankruptcy alleged, on defendant's demand, after a demurrer filed by such defendant to the whole petition is overruled;[42] nor to try the question of preference where a bankrupt had allowed creditors to take goods from his store and had made a general assignment for the benefit of creditors just preceding his bankruptcy and no explanations of such acts were offered, the preference being conclusively presumed;[43] nor the question whether a judgment is or is not rendered for fraud, that being a question to be determined by an inspection of the record.[44]

§ 511. **Contempt.**—The constitutional guaranty of the right to a trial by jury in all common law actions is not applicable to statutory proceedings in which the court exercises the powers of a special tribunal, as when acting as a court of bankruptcy, and such court has power and jurisdiction, on the petition of the trustee without a jury trial, to punish a bankrupt or others for failure to obey an order requiring him to surrender property in his possession belonging to his estate in bankruptcy,[45] and the like. Punishment for contempt is a summary proceeding to be dealt with by the court in the first instance without the intervention of a jury.[46]

[38] Ex p. Foster, F. C. 4959.

[39] Consult In re Rogers, 10 N. B. R. 444, F. C. 12003.

[40] Sec. 29, act of 1898; Boyd v. Glucklich, 116 F. R. 131, 8 A. B. R. 393.

[41] See heading Contempt, post, § 511.

[42] In re Benham, 8 N. B. R. 94.

[43] In re Seeley, 19 N. B. R. 1, F. C. 12628.

[44] Flanagan v. Pearson, 14 N. B. R. 37.

[45] Ripon Knitting Wks. v. Schreiber, 2 N. B. N. R. 899, 101 F. R. 810, 4 A. B. R. 299.

[46] Hendricks v. Fitzpatrick, 19 F. R. 810; Cooley's Const. Lim. 6th Ed. 389.

CHAPTER XX.

OATHS AND AFFIRMATIONS.

§512. (20a) Who may administer oaths.
513. In general.
514. Seal.
515. Form of oath.
516. Administration of oath by counsel.
517. b. Affirmations.

§ 512. '(Sec. 20a) Who may administer oaths.—Oaths 'required by this Act, except upon hearings in court, may be 'administered by (1) referees; (2) officers authorized to ad- 'minister oaths in proceedings before the courts of the United 'States or under the laws of the state where the same are to 'be taken; and (3) diplomatic or consular officers of the 'United States in any foreign country.'[1]

§ 513. Who may administer oaths—in general.—In addition to the referees, and officers specified, the federal courts, their clerks,[2] United States Commissioners[3] and Justices of the Peace, and Notaries Public[4] of the various states and territories and of the District of Columbia[5] are authorized to administer oaths, take affidavits and depositions. Acknowledgments or depositions abroad should be taken before diplomatic or consular officers of the United States, although no provision is made therefor in the general orders prescribed by the Supreme Court.[6] In the case of proof of debt where it appears on its face to have been taken by a proper officer and

[1] Analogous provision, Act of 1867. "Sec. 11. . . . And shall annex to his petition a schedule, verified by oath before the court, or before a register in bankruptcy or before one of the commissioners of the circuit court. . . .

"Sec. 22. . . . To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath or solemn affirmation, before the proper register or commissioner. . . ."

[2] U. S. Rev. Stat., Sec. 725, Act of May 28, 1896, 2 Supp. R. S. 486.

[3] In re Sheppard, 1 N. B. R. 115; F. C. 53, Act of May 28, 1896, 2 Supp. R. S. 486.

[4] In re Bailey, 15 N. B. R. 48, F. C 727.

[5] U. S. Rev. Stat., Sec. 1778; 1 Supp. R. S. 123.

[6] In re Sugenheimer, 1 N. B. N. 59, 135, 1 A. B. R. 425, 91 F. R. 744.

to be correct in form and substance the court has no discretion as to receiving and filing it.[7]

§ 514. **Seal.**—When a deposition or proof of debt is taken before an officer authorized to administer oaths, he must authenticate the same by his seal as well as his signature, provided he is required to have one by law, and a seal used in common with others will not answer.[8] In those cases where the party administering the oath is not required by law to have a seal, his signature should be certified to by the proper officer. The requisites of the seal are fixed by the laws of the power making the appointment and unless expressly required his name need not appear on it since it is the seal and not its composition or character of words and devices which raises the presumption of the official character of which the courts take notice, the presumption being that it is the seal of the person it purports to be and who signed the jurat.[9]

§ 515. **Form of oath—Venue.**—The form of oath or acknowledgment prescribed by the general orders and forms should be carefully followed, and under the former law provisions as to the verification of the petition were held to be matters of substance to be strictly followed and could not be dispensed with,[10] though the form of oath prescribed for proving debts need not be followed in voting upon resolutions for compositions.[11]

A notary's certificate of acknowledgment is sufficient although it contains no venue where his official character appears in his certificate, and this is specially true in the case of a power of attorney to vote as a proxy at a creditor's meeting, where it follows the form prescribed by the Supreme Court.[12]

§ 516. **Administration of oath by counsel.**—While in the strict equity practice the general rule is that affidavits taken before an attorney of record will be deemed defective, in the majority of cases it is held to apply only to attorneys of record, that is, the person who at the time the affidavit was

[7] In re Merrick, 7 N. B. R. 459.

[8] In re Nebe, 11 N. B. R. 289, F. C. 10073.

[9] In re Phillips, 14 N. B. R. 219, F. C. 11098.

[10] In re Keeler, 18 N. B. R. 10, F. C. 7647.

[11] Ex p. Morris, 12 N. B. R. 170.

[12] In re Henschel, 113 F. R. 443, 7 A. B. R. 662, reversing 109 F. R. 861, 6 A. B. R. 305; Carpenter v. Dexter, 8 Wall. 513.

taken before him then appeared as attorney of record for the litigant in whose interest the affidavit was made, and, therefore, would not be applicable to an affidavit taken preparatory to the commencement of proceedings, as in the swearing to a bankrupt's petition and schedules;[13] nor does it apply to the case of proof of debt sworn to before the creditor's attorney.[14] A letter of attorney appointing three substitutes acknowledged before one of them would be irregular as to the one taking the acknowledgment, but would doubtless be valid as to the other two.[15]

§ 517. 'b. **Affirmations.**—Any person conscientiously op-'posed to taking an oath may, in lieu thereof, affirm. Any 'person who shall affirm falsely shall be punished as for the 'making of a false oath.'[16]

[13] In re Kindt, 2 N. B. N. R. 306, 339, 98 F. R. 403, 3 A. B. R. 443; contra, In re Brumelkamp, 1 N. B. N. 360, 2 A. B. R. 318, 95 F. R. 814.

[14] In re Kimball, 2 N. B. N. R. 46, 100 F. R. 777, 4 A. B. R. 144; McDonald v. Willis, 143 Mass. 542; contra, In re Nebe, 11 N. B. R. 289, F. C. 10073; In re Keyser, 9 Ben. 224, F. C. 7748.

[15] In re Sugenheimer, 1 N. B. N. 59, 135, 1 A. B. R. 425, 91 F. R. 744.

[16] Analogous provision, Act of 1867. "Sec. 48. . . . The word 'oath' shall include 'affirmation.'"

CHAPTER XXI.

EVIDENCE.

§518. (21a) Compulsory attendance of witnesses.
519. Application for examination; who may make.
520. —— When and how made.
521. Scope of examination.
522. Competency of witnesses.
523. Bankrupt may be examined; nature of examination.
524. —— Notice and summons.
525. —— Attendance of imprisoned.
526 —— Time of examination.
527. —— Manner of examination.
528. —— Subject of examination.
529. —— Answers compulsory.
530. —— When not subject of.
531. —— Competent witness.
532. —— Admissibility of evidence.
533. —— Second examination.
534. —— Effect of incomplete examination.
535. Bankrupt's wife—When examined.
536. —— Subject of examination.
537. Trustee or assignee, examination of.
538. —— Other persons.
539. —— Subject of.
540. Refusal to appear, be sworn or testify—Penalty.
541. Right to counsel.
542. Fees and compensation.
543. Evidence—Rule as to.
544. —— In opposition to discharge.
545. —— Of fraud.
546. Books of account.
547. Privileged communications.
548. Power of referee.
549. Revenue law establishes rule of evidence.
550. b. Rules governing taking of depositions.
551. —— Federal law governs.
552. —— Depositions de bene esse.
553. —— Irregularity or defect in taking.
554. —— Original exhibits.
555. c. Notice of taking depositions.
556. —— By attorneys.
557. d. Certified copies of records.
558. Practice.
559. e. Copy of order approving trustee's bond.
560. Evidence of title.
561. f. Copy of order of composition or discharge.
562. Certificate of discharge as evidence.
563. g. Order confirming composition—Evidence of title.

§ 518. '(Sec. 21a) **Compulsory attendance of witnesses.**—'A court of bankruptcy may, upon application of any officer, 'bankrupt, or creditor, by order require any designated person, 'including the bankrupt and his wife, to appear in court or 'before a referee or the judge of any State court, to be ex-'amined concerning the acts, conduct, or property of a bank-'rupt whose estate is in process of administration under this 'Act: Provided, That the wife may be examined only touching

'business transacted by her or to which she is a party, and 'to determine the fact whether she has transacted or been a 'party to any business of the bankrupt.'[1]

[1] By the act of February 5, 1903, section 21a of the act of 1898 was amended by the insertion of the matter in the text for the following: 'A court of bankruptcy may, 'upon application of any officer, 'bankrupt, or creditor, by order re-'quire any designated person, in-'cluding the bankrupt, who is a 'competent witness under the laws 'of the state in which the proceed-'ings are pending, to appear in 'court or before a referee or the 'judge of any state court, to be 'examined concerning the acts, 'conduct, or property of a bank-'rupt whose estate is in process of 'administration under this Act.'

Analogous provision of Act of 1867. "Sec. 7. . . . Parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto, in case of default in attendance under any writ of subpœna. . . .

"Sec. 22. . . . The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt to be proved. . . .

"Sec. 26. . . . That the court may, on the application of the assignee in bankruptcy, or of any creditor or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claims from him, and to all other matters concerning his property and estate and the due settlement thereof according to law, which examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings; and the court may, in like manner, require the attendance of any other person as a witness, and if such person shall fail to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as such witness. If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailor, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court. The bankrupt shall at all times, until his discharge, be subject to the order of the court.

"Sec. 38. . . . Evidence or examinations in any of the proceedings under this act may be

§ 519. **Application for examination—who may make.**—This subdivision expressly provides that the application for the examination of persons in bankruptcy proceedings may be made by the bankrupt, a creditor or any officer, the latter term including the clerk, marshal, receiver, referee and trustee,[2] and also gives full opportunity to all parties concerned in bankruptcy proceedings to obtain desired testimony. If the witnesses cannot appear before the court or referee having jurisdiction of the case, they may be required to appear before a referee or judge of a state court where they may for the time be residing. During the examination of the bankrupt or other proceedings, the referee may authorize the employment of stenographers, upon the application of the trustee, at the expense of the estate, at a compensation not to exceed ten cents per folio for reporting and transcribing the testimony.[3] The examination of a witness by the trustee under this provision is taken solely for his information to enable him to act intelligently in the premises and to take such steps as may be necessary for the protection and preservation of the estate, and the bankrupt's attorney has no right to take part therein.[4]

A receiver, whether appointed under the express grant of authority contained in the bankrupt law[5] or in the exercise of the general equity powers possessed by the court of bankruptcy[6] to take charge of the property of a person against whom a petition in bankruptcy has been filed,[7] or any person who shows that he is actually a creditor of the bankrupt, as by being so named in the schedule, or by any other satisfac-

taken before the court, or a register in bankruptcy, viva voce or in writing, before a commissioner of the circuit court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court."

[2] Sec. 1 (18), act of 1898.

[3] Sec. 38, act of 1898.

[4] In re Cobb, 7 A. B. R. 104; see In re Fixar, 1 N. B. N. 568, 2 A. B. R. 822.

[5] In re Etheridge Fur. Co., 92 F. R. 329, 1 N. B. N. 139, 1 A. B. R. 112; In re Sievers, 91 F. R. .366, 1 N. B. N. 68, 1 A. B. R. 117; affd. in Davis v. Bohle, 34 C. C. A. 372, 92 F. R. 325.

[6] Blake v. Francis-Valentine Co., 89 F. R. 691, 1 N. B. N. 47, 1 A. B. R. 372; see Keenan v. Shannon, F. C. 7640; Lansing v. Manton, Id. 8077.

[7] In re Fixen & Co., 1 N. B. N. 568, 2 A. B. R. 822, 96 F. R. 748.

tory evidence is entitled to an order for the examination of the bankrupt, although he has not formally proved his claim,[8] or one creditor has already examined him;[9] or objection has been made to the claim;[10] or that bankrupt claims an offset thereto.[11]

A creditor's right to an examination is suspended when opposed on the ground that a resolution of composition has been confirmed after adoption by the requisite number of creditors.[12] A party in interest, objecting to a composition[13] or to a claim proved against a bankrupt's estate, is entitled in support of his objection to examine claimant and other witnesses if their attendance can be procured without embarrassing delay, but the proceeding should not be suspended to obtain the evidence of witnesses beyond the court's jurisdiction, unless it is satisfied that the objection is interposed in good faith and that the evidence desired is of substantial value and necessary to a just determination of the case.[14]

§ 520. —— **When and how made.**—The application for an order of examination should be addressed to the court of bankruptcy or to the referee, and as a rule to the latter after the case has been referred,[15] and no notice thereof need be given.[16] It is usually made by petition or motion, no particular form being prescribed therefor, and need not be in writing or under oath, nor show the questions to be asked, or the particular facts to be proven, nor any cause whatever,[17] nor be supported by the referee's certificate as to the propriety

[8] In re Jehu, 1 N. B. N. 509, 2 A. B. R. 498, 94 F. R. 638; In re Walker, 1 N. B. N. 510, 3 A. B. R. 35, 96 F. R. 550; see also In re Smith, F. C. 12977; In re Murdock, Id. 9939; In re Price, 91 F. R. 635, 1 A. B. R. 419.

[9] In re Lanier, 2 N. B. R. 59, F. C. 8070.

[10] In re Belden, 4 N. B. R. 57, F. C. 1241; In re Ray, 1 N. B. R. 203, 2 Ben. 53, F. C. 11589; see also In re Schwab, 8 Ben. 353, F. C. 12499.

[11] In re Kingsley, 7 N. B. R. 558, 6 Ben. 300, F. C. 7818.

[12] In re Tifft, 18 N. B. R. 177, F. C. 14032; s. c. 17 N. B. R. 550, F. C. 14030.

[13] In re Ash, 17 N. B. R. 19, F. C. 571.

[14] In re Sumner, 101 F. R. 224, 2 N. B. N. R. 681, 4 A. B. R. 123.

[15] Sec. 38, act of 1898; Form No. 28.

[16] In re McIntyre, 1 N. B. R. 11, 1 Ben. 277, F. C. 8811.

[17] In re Fixen, 1 N. B. N. 568, 96 F. R. 748, 2 A. B. R. 822; In re Howard, 1 N. B. N. 488, 95 F. R. 415, 2 A. B. R. 582; In re McBrien, 2 N. B. R. 73, 2 Ben. 513, F. C. 8665; In re Lanier, 2 N. B. R. 59, F. C. 8070; In re Solis, 4 N. B. R.

therefor where made to the judge.[18] It may be granted although the bankrupt has applied for his discharge,[19] or has already obtained his discharge,[20] since the right of examination continues for one year thereafter,[21] but not after the expiration of that period,[22] although this right may be lost by laches.[23]

An order of the referee for the examination, reciting that it is made on the application of a party claiming to be interested in the estate, is in correct form;[24] and is in the nature of a summons.[25]

§ 521. **Scope of examination.**—The examinations provided for in this subdivision are intended as means of obtaining full information[26] touching the bankrupt's estate, in order that necessary steps may be taken for its possession and preservation.[27] A large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings, or otherwise, for the purpose of discovering assets and unearthing frauds, upon any reasonable surmise that they have property of the bankrupt. The examination is largely for the purpose of discovery, and its extent must be determined by the sound judgment of the officer before whom it is taken, and the exercise of such court's discretion is not to be interfered with in an appellate court unless clearly abused. Unreasonable discursiveness may be checked by making the examining party pay for it; and, if plainly frivolous, prolix, to gratify malice or mere curiosity,[28] it should

18, F. C. 13165; contra, In re Adams, 2 N. B. R. 33, 2 Ben. 503, F. C. 39.

[18] In re Brands, 2 N. B. R. 109, F. C. 1813.

[19] In re Solis, 4 N. B. R. 18, F. C. 13165.

[20] In re Westfall Bros. & Co., 8 A. B. R. 431.

[21] In re Peters, 1 N. B. N. 165, 1 A. B. R. 248; In re Heath, 7 N. B. R. 448, F. C. 6304; In re Westfall, supra; see In re Dean, 3 N. B. R. 188, F. C. 3701.

[22] In re Dole, 7 N. B. R. 538, F. C. 3965.

[23] In re Isador, 1 N. B. R. 33, 2 Ben. 123, F. C. 7105.

[24] Vetterlein, 4 N. B. R. 194, F. C. 16926.

[25] In re Bellamy, 1 N. B. R. 64, 1 Ben. 390, F. C. 1266.

[26] In re Carley, 106 F. R. 862, 5 A. B. R. 554.

[27] In re Horgan, 2 N. B. N. R. 233, 3 A. B. R. 253, 98 F. R. 414; affg. 2 N. B. N. R. 53, 97 F. R. 319; In re Fixen & Co., 1 N. B. N. 568, 2 A. B. R. 822, 96 F. R. 748; In re Earle, F. C. 4244; In re Kreuger, Id. 7942; In re Lathrop, Id. 8106; In re Stuyvesant Bk., Id. 13582; In re Mendenhall, Id. 9423.

[28] In re Salkey, 9 N. B. R. 107, 5 Biss. 486, F. C. 12252.

be stopped. Where questionable proceedings are disclosed, greater latitude should be allowed.[29] Unless a foundation is laid for the belief that property of the bankrupt was withheld by him at the time of making an assignment long before the bankruptcy proceedings, and was still held by him at the time of the enactment of the bankruptcy law, an inquiry into the circumstances under which such assignment was made is not material or proper;[30] but the inquiry is not limited to facts and transactions occurring within four months prior to the bankruptcy and may be directed to matters anterior to that if so doing will throw light on the issues involved.[31] He may be thoroughly examined as to property acquired during the pendency of the bankruptcy proceedings and cannot refuse to give information as to such suddenly acquired wealth.[32]

§ 522. **Competency of witnesses.**—Before the amendment the competency of witnesses, other than the bankrupt who was required[33] to submit to examination, was determined by the laws of the state in which the proceedings were pending, provided the state laws were not repugnant to the constitution of the United States,[34] but now any officer, bankrupt or creditor, including the bankrupt's wife, are made competent witnesses.

§ 523. **Bankrupt's examination—Incriminating Evidence.**—As under this subdivision the bankrupt is a competent witness, it becomes necessary to determine how far he may be compelled to testify. Lord Eldon tersely said: "It is one of the most sacred principles in the law of this country that no man can be called on to criminate himself, if he choose to object to it; but I have always understood that proposition to admit of a qualification with respect to the jurisdiction in bankruptcy, because a bankrupt cannot refuse to discover his estate and effects, and the particulars relating to them, though in the course of giving information to his creditors or assignees of what his property consists, that information may tend to

[29] In re Foerst, 1 N. B. N. 258, 1 A. B. R. 259; In re Horgan, 2 N. B. N. R. 233, 3 A. B. R. 253, 98 F. R. 414; In re Pittner, 2 N. B. N. R. 915.

[30] In re Hayden, 1 N. B. N. 265, 1 A. B. R. 670, 96 F. R. 199.

[31] In re Brundage, 100 F. R. 613, 4 A. B. R. 47; In re Pursell, 114 F. R. 371, 8 A. B. R. 96.

[32] In re Walton, 1 N. B. N. 533.

[33] Sec. 7 (9), act of 1898.

[34] In re Jefferson, 1 N. B. N. 558, 3 A. B. R. 174, 96 F. R. 826.

show he has property which he has not got according to law; as in the case of smuggling and the case of a clergyman carrying on a farm, and the case of persons having the possession of gunpowder in unlicensed places."[35] On the same subject, Erskine, C. J., said: "You could not ask a man whether he had not robbed another of a sum of money, because, if he had so robbed, the money would not be the property of the assignees but of the party robbed; it would be, in fact, no discovery of the estate of the bankrupt. But I can see no objection to this question (unless it might be regarded as a chain in evidence to convict the party of robbery), namely, Had you not, on such a day and at such a place, one hundred pounds? and, according to the answer, you might then interrogate what he had done with it."[36] That was the rule under the act of 1867.[37]

Although the present law expressly provides[38] that "no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding," he cannot be compelled to answer any question propounded on such examination where his answer would tend to criminate him, for the statutory provision is not so broad as the constitutional privilege,[39] unless the question asked is clearly cross-examination on matter volunteered in his petition or schedules or in his previous testimony.[40] Accordingly as this statute does not afford complete immunity from prosecution it does not take away the witness' privilege of refusing to answer a question having a tendency to expose him to a penal liability.[41] While

[35] Cossens, Buck's Cas. 531; Archb. Bank. 277.

[36] Heath, 2 Dea. & Ch. 214.

[37] In re Browley, 3 N. B. R. 169; In re Richards, 4 N. B. R. 25, F. C. 11769; In re Koch, 1 N. B. R. 153, F. C. 7916.

[38] Sec. 7, act of 1898.

[39] Thorington v. Montgomery, 147 U. S. 490; In re Roser, 1 N. B. N. 469, 2 A. B. R. 755, 96 F. R. 305; In re Scott, 1 N. B. N. 265, 95 F. R. 815, 1 A. B. R. 49; In re Gilbert, 2 N. B. N. R. 378; Counselman v. Hitchcock, 142 U. S. 547; comp. In re Hathorn, 1 N. B. N. 361, 2 A. B. R. 298; In re Sapiro, 1 N. B. N. 136, 92 F. R. 340, 1 A. B. R. 296; In re Shera, 114 F. R. 207, 7 A. B. R. 552; In re Henschel, 7 A. B. R. 207; contra Mackel v. Rochester, 2 N. B. N. R. 880, 4 A. B. R. 1, 102 F. R. 314, In re Sapiro, 1 A. B. R. 296.

[40] In re Walsh, 2 N. B. N. R. 1031, 104 F. R. 518.

[41] In re Henschel, supra; In re Feltstein, 4 A. B. R. 321; In re Nachman, 114 F. R. 995, 8 A. B. R. 180; In re Shera, 114 F. R. 297; 7 A. B. R. 552; In re Glassner, 8 A. B. R. 184.

this right to decline to testify is conceded, yet in a case where it clearly appears to the court that a party from whom evidence is sought contumaciously or mistakenly refuses to testify or furnish documents and papers which cannot possibly injure him, he will not be permitted to shield himself behind the privilege.[42] While this privilege might under circumstances possibly extend to the bankrupt's books and papers, yet the courts will scrutinize with great care the objection to their production and only in the most extreme cases will the bankrupt be excused from turning the same over to the trustee.[43]

A bankrupt may be ordered before a referee for examination whenever reasonably required by creditors to establish their objections to his discharge; and his attendance and examination on the return of the order to show cause, which is required to enable creditors to form their specifications, will not excuse him from undergoing a further examination, on the application of objecting creditors, if the referee shall deem it reasonable and necessary.[44] The bankrupt must plead his privilege, if any privilege legally exist to the particular questions propounded, and the proper rulings can then be made.[45]

§ 524. —— **Notice and summons.**—At least ten days' notice by mail must be given to creditors of the bankrupt's examination,[46] though this is not necessary if the purpose is limited to obtaining information to make up the schedules.[47]

In lieu of the subpoena or summons an order of examination signed by the referee[48] should be delivered forthwith to the bankrupt, proof of service being made by affidavit or written acceptance of the bankrupt.

§ 525. —— **Attendance of imprisoned bankrupt.**—An imprisoned bankrupt may be produced for examination on a writ of habeas corpus ad testificandum made by a judge, possibly by a referee.[49]

[42] In re Kanter, 117 F. R. 356, 9 A. B. R. 104.

[43] In re Franklin Syndicate, 114 F. R. 205; In re Kanter, supra; see People v. Swartz, 8 A. B. R. 487.

[44] In re Kingsley, 16 N. B. R. 301, F. C. 7820.

[45] In re Mellen, 2 N. B. N. R. 69, 3 A. B. R. 226, 97 F. R. 326.

[46] Sec. 58a, act of 1898.

[47] In re Franklin Syndicate, 2 N. B. N. R. 522, 101 F. R. 402, 4 A. B. R. 511; In re Bromley, 3 N. B. R. 169; In re Salkey, 9 N. B. R. 107, 5 Biss. 486, F. C. 12252; In re Patterson, 1 N. B. R. 100, 1 Ben. 448, F. C. 10814.

[48] Form No. 28.

[49] In re Gilbert, 2 N. B. N. R. 378.

§ 526. —— **Time of examination.**—A person duly adjudged bankrupt may be ordered before the referee for examination before the first meeting of creditors in order to obtain information to make up the schedules,[50] or at the first meeting of creditors[51] or at any time during the pendency of the proceedings. If the application therefor is made on the return day of the notice of the debtor's application for discharge, and no such examination has been previously had, to avoid delay, notice of the application for discharge should contain notice of the examination, and only one such examination, as regards discharge, should ordinarily be had; though if necessary such examination may be adjourned from time to time.[52] While bankrupt may be examined when[53] in attendance at a meeting to show cause against his discharge, a new examination will not be allowed on the filing of amended specifications when abundant opportunity has been previously had.[54] This right to examine bankrupt extends for a year after his discharge for the purpose of ascertaining whether he has concealed any of his property from his trustee.[55]

The bankrupt may be examined on an adjourned day, notwithstanding the creditor failed to appear on the day originally fixed for the examination,[56] and, if he has been examined at several adjourned meetings, further examination may be refused.[57] The register was not allowed under the former act to fix beforehand the time within which the examination of the

[50] In re Franklin Syndicate, 2 N. B. N. R. 522, 101 F. R. 402, 4 A. B. R. 511; In re Bromley, 3 N. B. R. 169; In re Salkey, 9 N. B. R. 107, 5 Biss. 486, F. C. 12252; In re Patterson, 1 N. B. R. 100, 1 Ben. 448, F. C. 10814.

[51] Sec. 55b, act of 1898.

[52] In re Price, 1 N. B. N. 131, 91 F. R. 635, 4 A. B. R. 419; In re Baum, 1 N. B. R. 7, 1 Ben. 274, F. C. 1116; In re Brandt, 2 N. B. R. 109, F. C. 1813; In re Mawson, 1 N. B. R. 271, F. C. 9320; In re Seckendorf, 1 N. B. R. 185, 2 Ben. 462, F. C. 12, 600; In re Vogel, 5 N. B. R. 396, F. C. 16984; In re Sherwood, 1 N. B. R. 74, F. C. 12774.

[53] In re Brandt, 2 N. B. R. 76, F. C. 1812.

[54] In re Isador, 1 N. B. R. 33, 2 Ben. 123, F. C. 7105.

[55] In re Westfall Bros. & Co., 8 A. B. R. 431; In re Peters, 1 N. B. N. 165, 1 A. B. R. 248, citing In re Heath, 7 N. B. R. 448, F. C. 6304; In re Solis, 3 N. B. R. 186, 4 Ben. 143, F. C. 13165; and holding In re Dole, 7 N. B. R. 538, F. C. 39645; In re Jones, 6 N. B. R. 386, F. C. 7449; In re Dean, 3 N. B. R. 188, F. C. 3701; In re Witkowski, 10 N. B. R. 209, F. C. 17290, inapplicable.

[56] In re Robinson, 2 N. B. R. 162, F. C. 11942.

[57] In re Proby, 17 N. B. R. 175, F. C. 11439.

debtor must be concluded without regard to the nature of the questions or the interest in which they were propounded,[58] which is doubtless true under the present law. If the bankrupt is in court there seems to be no reason why he may not be examined without further notice,[59] or if in attendance at a meeting to show cause against his discharge,[60] or upon summons as a witness in respect to the hearing of a motion to expunge proof of claim,[61] or where it is desired to discover his estate in proceedings to satisfy a lien established prior to bankruptcy.[62] There is no reason why a witness may not be examined prior to the bankrupt.[63]

§ 527. —— **Manner of examination.**—The examination before the referee may be conducted by the party in person or his attorney, by direct and cross-examination according to the mode adopted in courts of law, and be taken down in writing by him, or under his direction, in narrative form, unless he decides it shall be by question and answer; and, when completed, shall be read over to and signed by the witness in the referee's presence, who shall note on the deposition any question objected to, with his decision thereon. The court has power to deal with the costs of incompetent, immaterial or irrelevant testimony.[64] The referee may authorize the employment of a stenographer for the purpose of taking testimony[65] and depositions so taken and afterwards transcribed may be suppressed when not read to and signed by the witness.[66] As to whether or not the bankrupt should be permitted to consult his attorney during the examination rests in the referee's discretion.[67] It has been held that one creditor has no right to intervene and interpose objections to questions put in the course of the examination by another creditor.[68]

See also Referee's powers over examination, post § 679.

§ 528. —— **Subject of examination.**—The escape of the

[58] In re Tifft, 17 N. B. R. 421, F. C. 14036.

[59] In re Bromley, supra.

[60] In re Brandt, 2 N. B. R. 76, F. C. 1812.

[61] Canby v. McLear, 13 N. B. R. 22, F. C. 2378.

[62] Ex p. Tayler, 16 N. B. R. 40, 1 Hughes 617, F. C. 13773.

[63] In re Fredenberg, 1 N. B. R. 34, 2 Ben. 133, F. C. 5075.

[64] G. O. XVII; In re Proby, 17 N. B. R. 175, F. C. 11439.

[65] Sec. 38 (5), act of 1898.

[66] In re Cary, 9 F. R. 754.

[67] In re Lord, 3 N. B. R. 58, F. C. 8502.

[68] In re Stuyvesant Bk., 7 N. B. R. 445, 6 Ben. 33, F. C. 13582.

bankrupt's examination is the same as that with reference to witnesses generally in bankruptcy proceedings.[69] He may be examined as to a transaction which may vest in him an equitable interest in property or the like for the purpose of establishing such interest;[70] or as to valuable property acquired pending the bankruptcy proceedings; or where he evidences the possession of money, he may be examined fully as to it, though generally property acquired or business done after the filing of the petition in bankruptcy is not a proper subject for examination, provided the bankrupt states that the same has no connection with or reference to his estate or business prior to such filing.[71] The examination of the bankrupt is not limited to facts and transactions occurring within four months of the bankruptcy, but may be directed to matters anterior to that time if the circumstances in question will throw any light upon the facts or issues pertinent to the proceedings.[72]

§ 529. —— **Answers compulsory.**—The bankrupt must answer all proper questions on his examination,[73] even though they were asked at his previous examination by another creditor;[74] or if asked by the referee;[75] or as to whatever may concern parties interested, in reference to his debts, business or estate,[76] but he need not answer questions that on their face relate to property that does not belong to him,[77] though he should those relating to his wife's property.[78] He need not answer when his response might be incriminating, though in such case, his discharge may be denied for such refusal. While the referee cannot compel a witness to answer, he can report his refusal to the judge, who will punish for contempt.[79]

[69] See ante, § 521.

[70] In re Bonesteel, 2 N. B. R. 106, F. C. 1628.

[71] In re Walton, 1 N. B. N. 533; In re McBrien, 3 N. B. R. 90, 3 Ben. 481, F. C. 8666; In re Rosenfield, 1 N. B. R. 60, F. C. 12059.

[72] In re Brundage, 100 F. R. 613; 4 A. B. R. 47; see also In re Hayden, 1 N. B. N. 265, 1 A. B. R. 670, 96 F. R. 199; In re Headley, 2 N. B. N. R. 250, 3 A. B. R. 272, 97 F. R. 765; contra, In re Barker, 2 N. B. N. R. 353.

[73] In re Holt, 3 N. B. R. 58, F. C. 6646.

[74] In re Vogel, 5 N. B. R. 393, F. C. 13984.

[75] In re Brundage, 100 F. R. 613, 4 A. B. R. 47.

[76] In re Jay Cooke, 10 N. B. R. 126, F. C. 3168.

[77] In re Van Seryl, 1 N. B. R. 193, F. C. 16880.

[78] In re Craig, 4 N. B. R. 50, F. C. 3323; In re Clark, 4 N. B. R. 70, F. C. 2805.

[79] Sec. 41b, act of 1898; In re Koch, 1 N. B. R. 153, F. C. 4916.

§ 530. —— **When not subject of.**—An examination of bankrupt should not be allowed when it is sought for the purpose of gratifying curiosity, or prying into the business of the debtor, or any purpose other than the furtherance of justice and the protection of the rights of creditors;[80] nor on the application of creditors opposing a discharge, after previous full examination, unless the first examination was elusive or deficient in material and specified particulars.[81]

§ 531. —— **Competent witness.**—The bankrupt is a competent witness as to all matters relating to his estate, and no objection can lie to his testimony save as to its credibility,[82] and if disposed to comply with the law and candidly account for his property he should have fair consideration; but, if he is contumacious and fails to testify fully, fairly and truthfully, his testimony should only be accepted when corroborated by other evidence, and, if at any point found unworthy of credit, may be rejected altogether.[83] The bankrupt is not, however, a competent witness in a criminal proceeding against himself.[84]

§ 532. —— **Admissibility of evidence of.**—A letter from debtor admitting his inability to pay his debts,[85] or his letters written to third parties admitting payment of certain claims to the prejudice of others,[86] or his admission before bankruptcy in support of a set-off pleaded by defendant in an action by a trustee to foreclose a mortgage given to the bankrupt,[87] has been held admissible. But a copy of bankrupt's statement to a commercial agency cannot be admitted to prove concealment of assets,[88] nor will his statement as to his condition at the time of borrowing money be admissible to show that his creditors had reasonable cause to believe him insolvent on a

[80] In re Salkey, 9 N. B. R. 107, 5 Biss. 486, F. C. 12252.

[81] In re Frisbie, 13 N. B. R. 349, F. C. 5131; In re Frizzelle, 5 N. B. R. 119, F. C. 5132; In re Isador, 1 N. B. R. 33, 2 Ben. 123, F. C. 7105.

[82] In re Campbell, 17 N. B. R. 4, 3 Hughes 276, F. C. 2348.

[83] In re Tudor, 2 N. B. N. R. 168, 100 F. R. 796, 4 A. B. R. 78; In re Kamsler, 2 N. B. N. R. 97, 97 F. R. 194.

[84] U. S. v. Black, 12 N. B. R. 340, 1 Hask. 570, F. C. 14602.

[85] In re Lange, 2 N. B. N. R. 85, 97 F. R. 197, 3 A. B. R. 231.

[86] In re Hatje, 12 N. B. R. 548, 6 Biss. 436, F. C. 6215.

[87] Von Sachs v. Kretz, 19 B. R. 83.

[88] In re Hunter, 2 N. B. N. R. 490.

subsequent day.[89] The testimony of bankrupt as to the number of his creditors will be accepted.[90] It has been held that testimony taken at any time during the proceedings may be admitted in subsequent proceedings,[91] but this would not be true where the proceedings in which the testimony was taken were dismissed, unless it be by stipulation of the parties.[92]

§ 533. —— **Second examination.**—Since the law places no limit upon the number of times a witness or the bankrupt may be examined, the frequency rests in the discretion of the officer to whom application is made, so that although a witness may be examined by one creditor, he may still be examined by another.[93] Where an examination has terminated, there would seem to be no reason why a new application might not be made,[94] though cause therefor would have to be shown.[95]

§ 534. —— **Effect of incomplete examination.**—Whether an incomplete examination of bankrupt can be used against him is not a question arising in the course of his examination, and must be decided by the judge before whom the examination may be offered.[96] No vote can be taken on a composition, if a creditor objects, until bankrupt's examination is complete, and which should be confined to a true exhibit of his affairs.[97]

§ 535. **Bankrupt's wife — When examined.** — Under the amendment of 1903, the wife may be examined only touching business transacted by her or to which she is a party, and also for the purpose of determining the fact whether she has transacted or been a party to any business of the bankrupt. Under the act of 1867, for good cause shown, the wife of any bankrupt might be examined as a witness and, if she failed to attend when ordered, he was refused a discharge, unless he proved his inability to secure her attendance, while she was liable to punishment for contempt. In the event she did ap-

[89] Goodrich v. Wilson, 14 N. B. R. 555.

[90] Clinton v. Mayo, 12 N. B. R. 30, F. C. 2899.

[91] In re Bard, 108 F. R. 208, 5 A. B. R. 810.

[92] In re Rosenberg, 116 F. R. 402.

[93] In re Adams, 2 N. B. R. 92, 3 Ben. 7, F. C. 40; In re Vogel, 5 N. B. R. 393, F. C. 16984.

[94] In re Van Tuyl, 2 N. B. R. 35, F. C. 16881.

[95] In re Gilbert, 3 N. B. R. 37, 1 Lowell 340, F. C. 5410; In re Isador, 1 N. B. R. 33, 2 Ben. 123, F. C. 7105.

[96] In re Noyes, 11 N. B. R. 111, 2 Lowell 352, F. C. 10370.

[97] In re Holmes, 12 N. B. R. 86, 8 Ben. 74, F. C. 6632.

pear and was examined, she was not at liberty to decline to answer because the matters inquired of were her private business.[1] Prior to the amendment of 1903 there was no specific provision requiring or permitting a wife to attend as a witness either for or against her husband in any bankruptcy proceeding, but the matter was to be determined by the laws of the state in which the proceedings were pending,[2] thus in Wisconsin,[3] Washington,[4] Tennessee[5] and Missouri,[6] among other states, she was held in contempt for refusing to testify.[7]

§ 536. —— **Subject of—Examination.**—The evident intent of the amendment of 1903, is to restrict the scope of the examination to business relations of the wife with the bankrupt, though the law as worded is not clear upon this point.

§ 537. **Examination of trustee or assignee.**—Under the act of 1867, an assignee might be subpoenaed and required to testify in the same manner as any other witness, but he was not subject, as of course, to an examination by any creditor whenever the latter might desire it, but was protected from unnecessary annoyance by the refusal of an application for his examination, unless upon some issue regularly referred to the

[1] In re Anderson, 23 F. R. 482, s. c. 9 N. B. R. 360, 2 Hughes 378, F. C. 351; In re Campbell, 17 N. B. R. 4, 3 Hughes 276, F. C. 2348; In re Woodford, 3 N. B. R. 113, 4 Ben. 9, F. C. 18029; In re Bellis, 3 N. B. R. 65, F. C. 1276; In re Craig, 4 N. B. R. 50, F. C. 3323; In re Van Tuyl, 2 N. B. R. 177, 3 Ben. 237, F. C. 16879.

[2] In re Jefferson, 1 N. B. N. 558, 3 A. B. R. 174, 96 F. R. 826.

[3] In re Fowler, 1 N. B. N. 265, 93 F. R. 417, A. B. R. 555; In re Mayer, 3 A. B. R. 222, 97 F. R. 328.

[4] In re Jefferson, 1 N. B. N. 558, 3 A. B. R. 174, 96 F. R. 826.

[5] In re Griffith, 1 N. B. N. 546.

[6] In re Cohn, 104 F. R. 328, contra, In re Lynch, 1 N. B. N. 182, 1 A. B. R. 245; citing, Steffen v. Bower, 70 Mo. 399; Landy v. Kansas City, 58 Mo. App. 141; Brownlee v. Fenwick, 103 Mo. 420; McKee v. Spiro, 107 Mo. 452.

[7] Under the act before the amendment of 1903, it was held that where the wife was a creditor of the bankrupt and a party to the proceedings, though she might not be compelled as the wife of the bankrupt to testify as to the property obtained directly or indirectly from her husband, as a creditor she could be fully examined as to her claim (In re Post, 1 N. B. N. 527; In re Gilbert, 3 N. B. R. 37, 1 Lowell 340, F. C. 5410; In re Richards, 17 N. B. R. 562, F. C. 11770). If she were not a creditor or did not file any claim against the estate or was not competent as a witness under the laws of the state, the proper proceeding was for the trustee to file a bill of discovery, under which she could be com-

register.[8] The trustee is a competent witness under the present law and the foregoing rule with reference to the course of the register's examination would doubtless now apply to the trustee with equal propriety. A trustee might decline to answer with reference to a bankrupt's estate where his answer may tend to incriminate him.[9]

§ 538. **Other persons examined.**—Under the law as enacted in 1898, any person who was a competent witness under the laws of the state in which the petition was pending might be examined in the bankruptcy proceedings; and an order made by a referee requiring such person to appear and be examined as a witness concerning the acts, conduct and property of the bankrupt, was valid without a formal application showing what questions were to be asked upon the examination, or as to what particular facts the witness was to be interrogated, the simple application or demand for such an order being all that was required to support it.[10] The trustee may examine a receiver appointed by a state court,[11] a trustee in insolvency appointed more than four months prior to bankruptcy[12] or any competent witness concerning the bankrupt's acts, conduct or property,[13] although he may be a party to the proceedings instituted or to be instituted by the trustee to set aside liens procured by him, or preferential transfers made to him.[14]

§ 539. **Subject of examination.**—The trustee may examine a creditor, whose claim he disputes, concerning the extent and nature of the bankrupt's indebtedness to him;[15] or as to the location, situation and condition of the bankrupt's property, and its fraudulent disposition;[16] and, if he has purchased

pelled to testify when the purpose was to secure her evidence as to property fraudulently conveyed to her (In re Fowler, 1 N. B. N. 265, 93 F. R. 417, 1 A. B. R. 555; In re Post, 1 N. B. N. 527).

[8] In re Smith, 14 N. B. R. 432, F. C. 12988; contra, In re Hicks, 19 N. B. R. 449, F. C. 6457.

[9] In re Smith, 112 F. R. 509, 7 A. B. R. 213.

[10] In re Howard, 1 N. B. N. 488, 2 A. B. R. 582, 95 F. R. 415; In re Blake, 2 N. B. R. 10, F. C. 1492.

[11] In re Hulse, 7 Ben. 40, F. C. 9864.

[12] In re Pursell, 114 F. R. 371, 8 A. B. R. 96.

[13] In re Cliffe, 97 F. R. 540, 3 A. B. R. 257.

[14] In re Feinberg, 2 N. B. R. 137, 3 Ben. 162, F. C. 4716.

[15] In re Cliffe, 97 F. R. 540, 3 A. B. R. 257.

[16] In re Blake, 2 N. B. R. 2, F. C. 1492.

claims against the bankrupt's estate, he is bound on pain of contempt to state where he obtained the money paid therefor, though he may say it did not come from the bankrupt.[17] He may be examined as to bankrupt's right and possible interest in property at the time of filing his petition in bankruptcy;[18] but he is not compelled to testify for his surety on a note in a suit by an administrator against him as principal and his surety,[19] nor can he be compelled to testify as to his private affairs which have no relation to the acts, conduct or property of the bankrupt.[20]

§ 540. Refusal to appear, be sworn or testify—Penalty.—The refusal of one to appear after being subpoenaed, to be sworn after appearing,[21] or to testify after being sworn renders such an one liable to contempt proceedings and punishment;[22] since courts of bankruptcy may punish contempts whether committed by failing to obey their lawful orders or those of referees;[23] but a witness cannot be required to attend at a place outside of the state of his residence or more than a hundred miles therefrom. The failure of a party to produce a witness within his power raises a presumption that the testimony would be unfavorable.[24] See also Contempts, post, §§ 712-720.

§ 541. Right to counsel.—The bankrupt, or a creditor, is entitled to be represented by an attorney, but not a mere witness undergoing examination unless he is made a party to a new collateral proceeding by being cited to answer for an alleged contempt.[25] An attorney at law appearing before a referee is to be recognized unless put to the proof by a rule therefor; all others must produce formal powers of attorney;[26]

[17] In re Lathrop, 4 N. B. R. 93, F. C. 8106.

[18] In re Dole, 7 N. B. R. 538, F. C. 3965.

[19] Jenks v. Opp, 12 N. B. R. 19.

[20] In re Carley, 106 F. R. 862, 5 A. B. R. 554.

[21] In re Scott, 1 N. B. N. 161, 1 A. B. R. 49, 95 F. R. 815.

[22] Sec. 41, act of 1898.

[23] Secs. 2 (13), 2 (16), act of 1898; In re Howard, 1 N. B. N. 488, 2 A. B. R. 582, 95 F. R. 415.

[24] In re Kellogg, 113 F. R. 120, 7 A. B. R. 623; Graves v. U. S., 150 U. S. 118; Runkle v. Burnham, 153 U. S. 217.

[25] In re Howard, 1 N. B. N. 488, 2 A. B. R. 582, 95 F. R. 415; In re Comstock, 13 N. B. R. 193, 3 Sawy. 517, F. C. 3080; In re Stuyvesant Bk., 6 Ben. 33, F. C. 13582; In re Cobb, 7 A. B. R. 104; In re Fredenburg, 1 N. B. R. 268.

[26] In re Scott, 15 N. B. R. 73, F. C. 12519.

but which need not be acknowledged.[27] Whether the bankrupt shall be allowed, during his examination, to consult with his counsel must be determined by the referee according to the circumstances of the case,[28] and of which the referee should be the judge.[29] He may be cross-examined by his own counsel;[30] or may appear as a witness in his own behalf and be so examined.[31]

§ 542. **Fees and compensation.**—A bankrupt when ordered to appear for examination in reference to his bankruptcy is not entitled to any fees or compensation therefor;[32] nor will petitioning creditors be reimbursed for attorneys' fees on such examinations after the trustee is appointed, such services being either for the trustee or the creditors individually.[33] Where an examination is unreasonably discursive, the party making it may be required to pay the expense of the same.[34]

When the wife of a bankrupt is a competent witness in bankruptcy proceedings, she is entitled to mileage and witness fees the same as any other witness, payment thereof for at least one day's attendance being necessary at the time of service of the order for her examination to insure her attendance.[35]

See also as to fees, post, § 717.

§ 543. **Evidence—Rule as to.**—The general rule applies with reference to the weight to be given to the evidence of the bankrupt and others, and a witness may be as thoroughly discredited by the inherent improbability of his testimony as by the direct testimony of other witnesses.[36] The general rule that the proofs must agree with the allegations applies equally to proceedings in bankruptcy.[37]

[27] In re Powell, 2 N. B. R. 17, F. C. 11354.

[28] In re Lord, 3 N. B. R. 58, F. C. 8502; In re Collins, 1 N. B. R. 153, F. C. 3008.

[29] In re Tanner, 1 N. B. R. 59, 1 Lowell 215, F. C. 13745.

[30] In re Leachman, 1 N. B. R. 91, F. C. 8157.

[31] In re Witkowski, 10 N. B. R. 209, F. C. 17920.

[32] In re McNair, 2 N. B. R. 77, F. C. 8907; In re O'Kell, 1 N. B. R. 52, F. C. 10474.

[33] In re Silverman, 2 N. B. N. R. 18, 3 A. B. R. 97, F. R. 325.

[34] In re Foerst, 1 N. B. N. 258, 1 A. B. R. 259, 93 F. R. 190.

[35] In re Post, 1 N. B. N. 527; In re Griffin, 1 N. B. R. 83, 2 Ben. 209, F. C. 5810.

[36] In re Leslie, 119 F. R. 406.

[37] In re Musto, 2 N. B. N. R. 577; In re Devoe, 2 N. B. R. 27, 1 Lowell 251, F. C. 3843.

§ 544. —— In opposition to discharge.—While the testimony of the bankrupt cannot be offered against him in a criminal proceeding, yet if intentionally false it would be grounds for refusing a discharge.[38] Evidence cannot be introduced by objecting creditors without first having filed a specification of objections, which must charge a scienter and all the essential facts though not necessarily with the technical certainty required in an indictment. The referee should not disregard such specification but should confine the evidence to the material facts alleged therein.[39] The evidence of creditors and others taken at examinations restricted to no issues and governed by no precise rules of evidence cannot be applied as proof to the exceedingly definite issues presented by specifications in opposition to a discharge, such examinations being largely for purpose of discovery, while the filing of specifications in opposition to a discharge is equivalent to the commencement of an action against the bankrupt by the objectors, and the principles of procedure must be logically applied to that fact.[40]

It has been held that testimony given by the bankrupt on a hearing under a state insolvency law cannot be offered to prove that he swore falsely though his counsel had agreed that it might be used before the referee with the same force and effect as if taken before him, on the ground that the bankrupt took no oath before the referee that his former testimony was true, and that therefore he was not bound by his counsel's stipulation.[42] The affidavit of a former partner of the bankrupt, contradicting the recitals in an agreement signed by the affiant, may be used to show that the recitals are designed to cover a fraudulent concealment by the

[38] In re Leslie, 119 F. R. 406; In re Gaylord, 112 F. R. 668, 7 A. B. R. 1.

[39] In re McGivin, 2 N. B. N. R. 877, 4 A. B. R. 459, 102 F. R. 743; In re Frice, 96 F. R. 611; In re Adams, 2 N. B. N. R. 1034, 104 F. R. 72; In re Marsh, 2 N. B. N. R. 649; In re Hirsh, 96 F. R. 468. 2 A. B. R. 715; In re Smith, 16 F. R. 465; In re Fry, 9 F. R. 376; In re Hixen, 1 N. B. N. 326, 556; 1 A. B. R. 610, 93 F. R. 440; In re Holman, 1 N. B. N. 552, 1 A. B. R. 600, 92 F. R. 512; In re Kaiser, 2 N. B. N. R. 123, 99 F. R. 689.

[40] See in re Penney, 2 N. B. N. R. 1001; In re Marsh. 2 N. B. N. R. 649; Creditors v. Williams, 4 N. B. R. 187, F. C. 3379.

[42] In re Goldsmith, 2 N. B. N. R. 1013, 101 F. R. 570, 4 A. B. R. 234.

bankrupt of an interest in his former business.[43] While evasive and disingenuous testimony by a bankrupt is not ground for refusing a discharge, it is a material consideration in determining his credibility when testifying as to what became of certain property.[44]

See also When Evidence Admissible in opposition to a discharge, ante § 354.

§ 545. —— Of fraud.—A charge of fraud in the concealment of a bankrupt's estate from which the badges and indicia of fraud are deducible must be overborne by positive testimony;[45] and to defeat a conveyance for a present consideration the proof must show that the party to whom or for whose benefit it was made knew or had reasonable cause to believe the grantor insolvent and a fraud on the act intended, which knowledge may be established by circumstantial evidence.[46] Alleged fraudulent conveyances cannot be shown in evidence, unless charged in the specifications, except so far as that might be used to show the intent of certain acts specified in the petition.[47] It is prima facie evidence of fraud for an insolvent debtor to make a transfer of property outside of the usual course of business;[48] but this presumption may be rebutted by evidence aliunde to be produced by the vendee.[49]

It is inadmissible to introduce in opposition to a discharge as evidence of fraud the dying declarations of a fraudulent grantee in a proceeding to set aside a bankrupt's discharge;[51] to use the answer to the petition as evidence at a hearing on a petition to expunge proof of claim;[52] or to introduce the evidence of misrepresentations made to a stockholder, when he subscribed for stock, by an agent of the corporation, in an action by the trustee to collect an assessment made on unpaid subscriptions.[53]

[43] In re Plager, 2 N. B. N. R. 10.

[44] In re Leslie, 119 F. R. 406.

[45] In re Goodridge, 2 N. B. R. 105, F. C. 5547.

[46] Gattman v. Honea, 12 N. B. R. 493, F. C. 5271.

[47] Tenney v. Collins, 4 N. B. R. 156, F. C. 13833.

[48] Webb v. Sachs, 15 N. B. R. 168, 4 Sawy. 158, F. C. 17325.

[49] Babbitt v. Walbrun, 4 N. B. R. 30, F. C. 694.

[51] In re Marrioneaux, 13 N. B. R. 222, 1 Woods, 37, F. C. 9088.

[52] Canby v. McLear, 13 N. B. R. 22, F. C. 2378.

[53] Michener v. Payson, 13 N. B. R. 49, F. C. 9524.

§ 546. **Books of account.**—It has been held that by filing a voluntary petition the bankrupt elects to place his books of account, at the disposal of the court, and such petition operates as a waiver of any privilege he would otherwise have to withhold them on the ground that they contain incriminating evidence,[54] but this does not seem tenable. The court will not, however, permit him to shield himself behind the privilege when it is clear that the party mistakenly or contumaciously refuses to furnish that which cannot possibly injure him,[54a] or because they may disclose concealed assets to supply evidence in a civil suit by the trustee.[55] An application for a subpoena duces tecum, based on an affidavit of counsel that he expects to show facts pertinent to the hearing by the books asked for, should be granted and if they are the property of a person or corporation within the jurisdiction of the court, the fact that the books are beyond the jurisdiction is immaterial and they should nevertheless be produced.[56] The exercise of this power of compelling the production of books necessarily involves a wide discretion which should not be interfered with by an appellate court unless manifestly abused.[57]

Where fraud is charged against the purchaser from the bankrupt, any books or documents of such purchaser showing or tending to show the receipt and disposition of the property purchased, or in any other way relating thereto, are subject to examination; and the custodian of such books and documents cannot refuse to produce them, or to answer questions relating thereto, on the ground that they contain nothing relating to the bankrupt's property, since that is not left to the opinion of the witness but is to be determined by the court.[58] But the assignee under a general assignment made more than four months before the bankruptcy should not be required to produce bankrupt's books unless a foundation is laid for the belief that the latter withheld property at the time of the

[54] In re Sapiro, 1 N. B. N. 136, 1 A. B. R. 296, 92 F. R. 340.

[54a] In re Kanter, 117 F. R. 356, 9 A. B. R. 104.

[55] In re Horgan, 1 N. B. N. 233, 3 A. B. R. 253, 98 F. R. 414; affg. s. c. 2 N. B. N. R. 53, 97 F. R. 319.

[56] In re Dews, 1 N. B. N. 140.

[57] In re Horgan, supra.

[58] In re Fixen, 1 N. B. N. 568, 2 A. B. R. 822, 96 F. R. 748.

assignment and still had it long subsequently,[59] though this should not be confounded with the case where an assignment is made within the four months, which is subsequently avoided, in which event the books should be produced.

§ 547. **Privileged communications.**—While a bankrupt's communications to his attorney are privileged and cannot be brought out in evidence, counsel may be required to testify as to acts and things which have come to his knowledge by reason of his position as counsel, which were not communicated to him by the bankrupt or by some one through his direction.[60] An attorney cannot decline to testify concerning his own acts done in behalf of his client,[61] nor refuse to be sworn on the ground that he had acted as counsel for the bankrupt and is still his legal advisor;[62] hence he may be compelled to answer questions concerning a conveyance to him by the bankrupt of land and a subsequent conveyance by the former of the same land to the wife of the latter.[63]

§ 548. **Power of referee.**—The referee has authority to make an order, requiring any designated person, including the bankrupt, to appear and be examined[65] and must note upon the deposition any question objected to, with his decision thereon.[66] This clearly implies that he must pass upon any objections that may be made on an examination before him, and a witness would have no right to refuse to answer a question on the ground of irrelevancy, since the question of relevancy and materiality are for the court.[67] Furthermore, his authority is not limited to the taking and reporting of the testimony and ruling as to its admissibility, but he has authority to rule upon the sufficiency of specifications of objections and should not take evidence on such as are clearly insufficient.[68]

[59] In re Hayden, 1 N. B. N. 265, 1 A. B. R. 670, 96 F. R. 199.

[60] In re Aspinwall, 10 N. B. N. 448, F. C. 591.

[61] In re O'Donohoe, 3 N. B. R. 59, F. C. 10435.

[62] In re Woodward, 3 N. B. R. 477, 4 Ben. 102, F. C. 17999.

[63] In re Bellis, 3 N. B. R. 49, 3 Ben. 386, F. C. 1274.

[65] In re Lanier, 2 N. B. R. 59, F. C. 8070; In re Pioneer Paper Co., 7 N. B. R. 250, F. C. 17178.

[66] G. O. XXII; In re DeGottardi, 114 F. R. 328.

[67] Peoples Bank of Buffalo v. Brown, 112 F. R. 652, 7 A. B. R. 475.

[68] In re Kaiser, 2 N. B. N. R. 123, 99 F. R. 689, 3 A. B. R. 1767; see also In re Lyon, 1 N. B. R. 111, F. C. 8643.

See also post, § 679 for referee's power over examinations.

§ 549. **Revenue law of 1898 establishes rule of evidence.**—The court of bankruptcy is essentially a federal institution. The revenue law of 1898 is essentially federal also. The laws laid down by Congress regarding what may or may not be evidence "in any court" must, in the nature of things, be peculiarly applicable to courts existing under federal statutes. Hence unstamped notes while that law was in force will not be received in bankruptcy proceedings.[69]

§ 550. **'b. Rules governing taking of depositions.**—The 'right to take depositions in proceedings under this act shall 'be determined and enjoyed according to the United States 'laws now in force, or such as may be hereafter enacted relat-'ing to the taking of depositions, except as herein provided.'

§ 551. —— **Federal law governs.**—Very detailed provisions are made in the laws of the United States for taking testimony,[70] which, in addition to the other provisions, authorize the taking of depositions of witnesses in cases pending at law or in equity in the district or circuit courts of the United States, in the mode prescribed by the laws of the state in which the court is held.[71] If a non-resident creditor, whose claim is contested, cannot personally appear, without hardship, an order will be made to take his testimony before one of the officers authorized to do so in his neighborhood.[72]

§ 552. —— **Depositions de bene esse.**—Testimony of any witness may be taken in any civil cause pending in a district or circuit court of the United States by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of deposition, before the time of trial or when he is ancient and infirm. The deposition may be taken before any judge, United States commissioner, clerk of a district or circuit court, or any chancellor, justice or judge of a supreme court or superior court, mayor, or chief magistrate of a city, judge of a county court

[69] In re Dobson, 2 N. B. N. R. 514.

[70] Secs. 858-879, 1778 U. S. Rev. Stat., 1 Supp. Rev. Stat. 123.

[71] 2 Supp. Rev. Stat. 4.

[72] In re Kyler, 2 N. B. R. 649, 2 Ben. 414, F. C. 7956.

or court of common pleas of any of the United States, or any notary public not being of counsel or attorney to either of the parties, nor interested in the event of the cause.[73]

§ 553. ——**Irregularity or defects in taking.**—A deposition taken before a referee authorized to administer oaths, no objection being made, and the witness being examined and cross-examined, is properly taken and, the deposition being subsequently placed on file, the party at whose instance it was taken cannot object to its being read by the opposite party, on the ground of irregularity or informality.[74] If the officer, administering the oath, fails to sign the jurat in a deposition, the omission may be supplied if he recollects the fact of the creditor signing and verifying in his presence, otherwise the party may be sworn and the deposition filed nunc pro tunc;[75] and the jurat need not contain a venue when it appears from the deposition that the oath was administered where the officer resides.[76] A deposition which has been altered to correct an error must be resworn before it can be filed.[77]

§ 554. —— **Original exhibits.**—Original papers exhibited to the court and annexed to depositions, and marked and referred to therein as exhibits, become a part of the depositions, and cannot be withdrawn and a copy substituted therefor, except upon the application of a party who can show a proper use therefor.[78]

§ 555. **'c. Notice of taking depositions.**—Notice of the 'taking of depositions shall be filed with the referee in every 'case. When depositions are to be taken in opposition to the 'allowance of a claim notice shall also be served upon the 'claimant, and when in opposition to a discharge notice shall 'also be served upon the bankrupt.'

§ 556. —— **By attorneys.**—The requirement that all notices be given by the referee unless otherwise ordered by the judge, does not seem to comprehend notices for the taking of depositions, but such notices should be given by the attorney.

[73] U. S. Rev. Stat., Sec. 863.

[74] Lawrence v. Graves, 5 N. B. R. 279, F. C. 8138.

[75] In re McKibben, 12 N. B. R. 97, F. C. 8859.

[76] In re Hill, F. C. 6485; see also § 21.

[77] Walther v. Walther, 14 N. B. R. 273, F. C. 17126.

[78] In re McNair, 2 N. B. R. 109, F. C. 8908.

§ 557. 'd. **Certified copies of records.**—Certified copies of 'proceedings before a referee, or of papers, when issued by the 'clerk or referee, shall be admitted as evidence with like force 'and effect as certified copies of the records of district courts 'of the United States are now or may hereafter be admitted as 'evidence.'[79]

§ 558. **Practice.**—A record cannot be impeached without previous notice by proper form of pleading.[80] The referee is an officer of the court and will take judicial notice of its judgments and decrees;[81] and to prove what proceedings have taken place before him, his entries may be used as evidence; but as to the number of days that a witness was in attendance before him the clerk's certificate would be prima facie evidence.[82]

§ 559. 'e. **Copy of order approving trustee's bond.**—A cer- 'tified copy of the order approving the bond of a trustee shall 'constitute conclusive evidence of the vesting in him of the 'title to the property of the bankrupt, and if recorded shall 'impart the same notice that a deed from the bankrupt to the 'trustee if recorded would have imparted had not bankruptcy 'proceedings intervened.'[83]

§ 560. **Evidence of title.**—A trustee's representative character need not be averred in the pleadings, and it is not necessary to prove all the steps in the proceedings if a duly certified copy of the order approving the bond, which is the equivalent of "assignment" under former act, be put in evidence,[84] as the court is bound to take judicial notice that all the bankrupt's property and effects are vested, by operation of law, in

[79] Analogous provision of Act of 1867. "Sec. 14. . . . And a copy duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for, and recover the property of the bankrupt, as hereinbefore mentioned.

"Sec. 38. . . . Copies of such records, duly certified under the seal of the court, shall in all cases be prima facie evidence of the facts therein stated."

[80] Sloan v. Lewis, 12 N. B. R. 173, 22 Wall. 150.

[81] In re Scott, 15 N. B. R. 73, F. C. 12519.

[82] In re Crane, 15 N. B. R. 120, F. C. 3352.

[83] See analogous provisions of Act of 1867 under subd. d.

[84] Dambmann v. White, 12 N. B. R. 438.

the trustee, after it is shown that the defendant has been declared a bankrupt.[85] A certified copy of the order approving the bond of the trustee, no one opposing, must be recorded when presented;[86] but a record is not necessary to give force or validity to the transfer to the trustee, [87] though since the amendment of 1903 the trustee is required to file a copy of the decree of adjudication in the proper record office of the county where the bankrupt owned real estate.[87a]

§ 561. **'f. Copy of order of composition or discharge.**—A 'certified copy of an order confirming or setting aside a com-'position, or granting or setting aside a discharge, not revoked, 'shall be evidence of the jurisdiction of the court, the regu-'larity of the proceedings, and of the fact that the order was 'made.'[88]

§ 562. **Certificate of discharge as evidence.**—A certificate of discharge in bankruptcy, signed by the judge, and attested by the clerk under the seal of the court, is the means by which the bankrupt is to prove and have the benefit of his discharge;[89] and is conclusive evidence of the jurisdiction of the court and of the fact and the regularity of the discharge, but is not conclusive evidence in favor of other parties seeking to use it.[90] Since it is conclusive of the regularity of the proceedings, it can only be attacked in the court granting it upon proper proceedings.[91]

§ 563. **'g. Order confirming composition evidence of 'title.**—A certified copy of an order confirming a composition 'shall constitute evidence of the revesting of the title of his 'property in the bankrupt, and if recorded shall impart the 'same notice that a deed from the trustee to the bankrupt if 'recorded would impart.'

[85] Morris v. Davidson, 11 N. B. R. 454.

[86] In re Neale, 3 N. B. R. 43, F. C. 10066.

[87] Davis v. Anderson, 6 N. B. R. 146, F. C. 3623.

[87a] Post, § 769.

[88] Analogous provision, Act of 1867. "Sec. 34. . . . A discharge duly granted . . . may be pleaded . . . as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and [the] regularity of such discharge."

[89] Miller v. Chandler. 17 N. B. R. 251.

[90] Dewey v. Meyer, 18 N. B. R. 114; Palmer v. Hussy, 119 U. S. 96.

[91] In re Witkowski, 10 N. B. R. 209; F. C. 17920.

CHAPTER XXII.

REFERENCE OF CASES AFTER ADJUDICATION.

§564. (22a) Reference of case to referee.
565. —— Practice.
566. b. Transfer of case from one referee to another.
567. —— Practice.

§ 564. '(Sec. 22a) **Reference of case to referee.**—After a 'person has been adjudged a bankrupt the judge may cause the 'trustee to proceed with the administration of the estate, or 'refer it

'(1) Generally to the referee or specially with only limited 'authority to act in the premises or to consider and report 'upon specified issues; or

'(2) to any referee within the territorial jurisdiction of the 'court, if the convenience of parties in interest will be served 'thereby, or for cause, or if the bankrupt does not do business, 'reside, or have his domicile in the district.'

§ 565. **Practice.**—Under this section the trustee is required to proceed with the administration by collecting and reducing to money the property of the estate under the direction of the court, and close it up as expeditiously as compatible with the best interests of the parties in interest,[1] or the case may be referred to the referee for his action. The convenience of the parties in interest may be consulted and the case referred to any referee in the judicial district of the court, although there may be another referee in the bankruptcy district in which the petition was filed, and for cause, or at the instance of parties, may change the reference from one referee to another.[2] The record and findings of the referee may be modified, overruled or returned by the court with instructions for further proceedings by the referee.[3]

The order of reference should name a day on which the bankrupt is to appear before the referee, after which he is subject to the referee's order.[4] Where answers are filed to a petition in involuntary bankruptcy, the case may be referred to a

[1] Sec. 47, act of 1898.
[2] Sec. 22, b, act of 1898.
[3] Sec. 2 (10), act of 1898.
[4] G. O. XII (1); Form No. 14 gives the terms of reference.

referee to take and return the evidence and report on the questions raised, though the only questions involved are questions of law, the action of the referee being always subject to the control of the court.[5]

§ 566. **'b. Transfer of case from one referee to another.**—'The judge may, at any time, for the convenience of parties or 'for cause, transfer a case from one referee to another.'

§ 567. **Practice.**—In case of the transfer from one referee to another, the judge is to determine the proportion in which the fee and commissions therefor shall be divided between the referees.[6] A case may be removed where it is shown that the referee has attempted to influence the choice of a trustee,[7] or otherwise conducted himself in a manner unbecoming a judicial officer, though the fact that a referee is indebted to the bankrupt is not such a disqualification as will be grounds for removing the case to another referee.[8]

[5] Clark v. Mfg. & Enameling Co., 101 F. R. 962, 4 A. B. R. 351.

[6] Sec. 40, b, act of 1898.

[7] In re Smith, 1 N. B. R. 25, 2 Ben. 113, F. C. 12971.

[8] Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102.

CHAPTER XXIII.

JURISDICTION OF UNITED STATES AND STATE COURTS.

§ 568. (23a) Jurisdiction of Circuit Courts.
569. —— In general.
570. Comparison of Acts of 1898 and 1867.
571. b. Jurisdiction over suits of trustee—Where brought.
572. Jurisdiction of Court of Bankruptcy under Act of 1903.
573. —— Different constructions.
574. Supreme Court decision—Bardes v. Bank.
575. —— Early decisions; favoring District Court jurisdiction.
576. —— Against jurisdiction of District Courts.
577. Summary jurisdiction.
578. Consent.
579. Decisions under act of 1867.
580. State Courts jurisdiction under acts 1867 and 1898.
581. —— Illustrative cases.
582. —— When without jurisdiction.
583. —— Rule governing State Courts.
584. —— Acts of, binding Federal Courts.
585. Determining existence of adverse claim.
586. c. Concurrent jurisdiction over offenses.
587. —— Practice.

§ 568. '(Sec. 23a) Jurisdiction of Circuit Courts.—The 'United States circuit courts shall have jurisdiction of all con-'troversies at law and in equity, as distinguished from proceed-'ings in bankruptcy, between trustees as such and adverse 'claimants concerning the property acquired or claimed by the 'trustees, in the same manner and to the same extent only as 'though bankruptcy proceedings had not been instituted and 'such controversies had been between the bankrupts and such 'adverse claimants.'[1]

[1] Analogous provision of Act of 1867. "Sec. 2. . . . That the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending . . . shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

For provisions with reference to proceedings in law and equity, see G. O. XXXVII. The jurisdiction of circuit courts of the United States is set forth in U. S. Rev. Stat., §§ 629-657, as amended by the act of August 13, 1888 (1 Supp. U. S. Rev. Stat. 611), and the acts specified in note 1 thereto.

§ 569. **Jurisdiction of Circuit Court in general.**—This subdivision deals with the jurisdiction of the United States circuit courts, and provides that "such courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy," (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity on the other), "between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees," restricting that jurisdiction, however, by the further words, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." This clause, while relating to the circuit courts only, and not to the district courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the circuit court solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy. While the evident purpose of the act of 1898 was that the circuit court should be prohibited from entertaining jurisdiction of suits between the trustee and an adverse claimant to property which the creditors claimed belonged to the estate of the bankrupt, unless the bankrupt himself could have resorted to the circuit court for the assertion of such claim against the adverse claimant,[2] the act of February 5, 1903, amending subdivision "b" of this section, expressly excepts actions to recover property, the transfer of which is voidable as a preference, or where such transfer was with the intent and purpose to hinder, delay or defraud his creditors. In view of the fact that the supreme court in the case of Bardes v. Bank held that subdivision "b" applied to the circuit as

[2] Bardes v. Bank, 178 U. S. 524, 2 N. B. N. R. 725, 4 A. B. R. 163; Hicks v. Knost, 2 N. B. N. R. 734, 178 U. S. 541; Mitchell v. McClure, 2 N. B. N. R. 735, 178 U. S. 539; Norcross v. Nathan, 2 N. B. N. R. 405, 99 F. R. 14, 3 A. B. R. 613; In re Murphy, 2 N. B. N. R. 393, 3 A. B. R. 499.

well as the district courts, it seems that the circuit courts also have jurisdiction over suits of this class by the trustee.

Where the amount in controversy exceeds $2,000 and there is diverse citizenship the circuit courts have jurisdiction irrespective of the bankruptcy law.[3]

If the judge of the district court, in which bankruptcy proceedings are pending, is disabled, or in any way concerned in interest therein, or has been of counsel for any party therein, or is so related or connected with any of the parties as to make it improper for him to sit in the matter, the proceedings should be certified to the circuit court, which shall have the same cognizance thereof as the district court had and shall proceed to hear and determine the same.[4] A claimant cannot be constrained to go into the district court to litigate his claim against the trustee, by the refusal of the circuit court to act, where such court has jurisdiction by reason of the amount involved and the citizenship of the parties.[5]

§ 570. **Comparison of Acts of 1898 and 1867.**—Under the act of 1898, four things are necessary to give the circuit court jurisdiction: (1) it must be a controversy at law or in equity, as distinguished from proceedings in bankruptcy; (2) between a trustee in bankruptcy as such and adverse claimants; (3) concerning property acquired or claimed by such trustee; and (4) such as the bankrupt himself might have brought in such circuit court if the bankruptcy proceedings had not intervened. By the amendatory act of 1903, this jurisdiction is doubtless extended to include the recovery of property under sections 60b and 67e. No general rule can be given for determining what is a controversy at law or in equity as distinguished from proceedings in bankruptcy, but considerable assistance may be had by consulting the cases,[6] in which the United States Supreme Court has considered the question. They held that adverse claimants were those who claimed some prop-

[3] See act March 3, 1887, 25 Stat. L. 433.

[4] U. S. Rev. Stat., Secs. 601, 637; Spencer v. Lapsle, 20 How. 264; Ex p. U. S., F. C. 14411, 1 Gall. 338; The Richmond, 9 F. R. 863; Wallace v. Loomis, 97 U. S. 146, 156.

[5] J. B. McFarlan Carriage Co. v. Solanas, 106 F. R. 145, 5 A. B. R. 442.

[6] Morgan v. Thornhill, 11 Wall. 65, 75; Marshall v. Knox, 16 Wall. 551; Smith v. Mason, 14 Wall. 419, 430; Burbank v. Bigelow, 92 U. S. 179.

erty, or right of property, as a fund, or lien upon a fund, or a right to proceeds of a judgment, which it was also claimed had belonged to the bankrupt and been transferred to his assignee in bankruptcy. Under the act of 1867 the circuit courts had concurrent jurisdiction with the district courts of all suits at law or in equity between the assignee in bankruptcy and persons claiming an adverse interest touching any property or rights of property of said bankrupt transferable to or vested in such assignee. This practically coincides with the first three requisites under the present law and hence the decisions under the act of 1867 may be consulted to ascertain what are "suits at law or in equity" and "persons claiming an adverse interest touching property or rights of property of bankrupt transferable to assignee" as they will aid in determining what is "a controversy at law or in equity, as distinguished from proceedings in bankruptcy" and an "adverse claimant;" but, owing to the restriction imposed by the present act as to such controversies being such as the bankrupt might himself have been a party to if there had been no bankruptcy proceedings, few of those cases would now be within the jurisdiction of the circuit court.[7]

§ 571. **'b. Jurisdiction over suits of trustees.**—Suits by the 'trustee shall only be brought or prosecuted in the courts 'where the bankrupt, whose estate is being administered by 'such trustee, might have brought or prosecuted them if pro-'ceedings in bankruptcy had not been instituted, unless by

[7] Consult Payson v. Dietz, 8 N. B. R. 193; 2 Dill. 504; F. C. 10861, an action by assignee to recover a debt in a state other than that where bankruptcy proceedings were pending; (In re Ballou, 3 N. B. R. 177; 4 Ben. 135; F. C. 818) to procure delivery of property suffered to be taken through legal proceedings with intent to prefer; (Lewis v. U. S., 14 N. B. R. 64, 92 U. S. 618) a bill filed by the U. S. to obtain payment out of a trust fund, held by a trustee appointed in bankruptcy proceedings; (Sutherland v. L. S. S. C. R. & I. Co., 9 N. B. R. 298; F. C. 13643) a bill by an assignee against lien holders to ascertain the amount due and sell the property free from incumbrances; (Hudson v. Schwab, 18 N. B. R. 480; F. C. 6835) restraining an action of trover against a marshal for taking possession, under a warrant in bankruptcy, of certain goods claimed by the plaintiff in trover; (Markson v. Heaney, 4 N. B. R. 165; F. C. 9098) refusing to enjoin a foreclosure suit by a district court in another state; (N. C. v. University, 5 N. B. R. 466; 1 Hughes, 133, F. C. 10318) holding that it had no jurisdiction of a suit by a

'consent of the proposed defendant,[8] except suits for the re-'covery of property under section sixty, subdivision b, and sec-'tion sixty-seven, subdivision e.'

§ 572. Jurisdiction of court of bankruptcy under act of 1903.—The act of 1898 limited the jurisdiction of the Federal courts to those cases which the bankrupt might have brought in the absence of a bankruptcy law, unless by consent of the proposed defendant. This necessarily excluded that large class of cases for the recovery of property in the hands of a third person or stranger to the bankruptcy proceedings under a conveyance either voidable as a preference or null and void as given with intent to hinder, delay or defraud creditors. The court of bankruptcy had no power by summary order to direct the surrender of such property to the trustee in bankruptcy nor to restrain its disposition, but resort must have been to the forum having jurisdiction over the person or property of the proposed defendant.[9] To meet the difficulty incident to such restricted jurisdiction, Congress by the act of February 5, 1903, specifically gave the Federal courts jurisdiction over actions (1) to recover property transferred to a creditor who had reasonable cause to believe that a preference was thereby intended, as defined by the law, (2) to recover property conveyed, transferred, assigned or incumbered within four months of the filing of the petition in bankruptcy, with the intent and purpose on the bankrupt's part to hinder, delay and defraud his creditors.

It should be observed, however, that this extension of jurisdiction to the Federal courts, applies only to suits by the trustee, and not by an adverse claimant, as to whom the jurisdiction remains the same as prior to the amendment.

state against its citizens, neither the construction nor act of congress conferring such jurisdiction.

[8] The amendment to this subdivision by the act of 1903 consists in the addition of the words at the end thereof, "except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e."

[9] Bardes v. Hawarden Bk., 178 U. S. 524, 2 N. B. N. R. 725, 4 A. B. R. 163; Hicks v. Knost, 178 U. S. 542, 4 A. B. R. 178, 2 N. B. N. R. 734; Mitchell v. McClure, 178 U. S. 539, 2 N. B. N. R. 735, 4 A. B. R. 177; Wall v. Cox, 181 U. S. 244, 5 A. B. R. 727; Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224; Louisville Trust Co. v. Cominger, 184 U. S. 18, 7 A. B. R. 421; Pickens v. Roy, 187 U. S. 177; Jaquith v. Rowley, 187 U. S. —; Bryan v. Bernheimer, 181 U. S. 188, 5 A. B.

Suits of the character indicated may now be brought in either the circuit or district courts, since under the decision of the Supreme Court subdivision "b" of this section applies equally to both courts, but by an amendment to sections "60b" and "67e," it is provided that for the purpose of the recovery of such property "any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." Accordingly the court of bankruptcy is now given jurisdiction over actions for the recovery of such property, irrespective of the amount involved, which is concurrent with the state courts, while the circuit court has a like jurisdiction where the amount exceeds $2,000.

While the amendment to section "23b" covers but the two classes of actions referred to, by an amendment enacted at the same time to section 70e the court of bankruptcy is given concurrent jurisdiction with the state courts to avoid any transfer of property which any creditor of such bankrupt might have avoided. As to this particular case the circuit court has no jurisdiction unless by reason of diverse citizenship or consent of the proposed defendant.

§ 573. **Different constructions.**—This subdivision as it appeared in the act of 1898 was the source of much difference of opinion, but the amendment of 1903 largely removes the difficulty. Three constructions were put upon the limitations imposed by this subdivision as it appeared before the amendment. The first confined its operation to the circuit courts;[10] the second gave to the state courts exclusive jurisdiction, except with the defendant's consent, of all suits concerning the bankrupt's estate brought by the trustee against any person other than the bankrupt; [11] and the third gave the state courts

R. 623; In re Baird, 116 F. R. 765, 8 A. B. R. 649; In re Silberhorn, 105 F. R. 899, 5 A. B. R. 568; In re Gerdes, 4 A. B. R. 346; In re San Gabriel Sanatorium Co., 111 F. R. 892, 7 A. B. R. 206; In re Sheinbaum, 107 F. R. 247, 5 A. B. R. 187; In re Tollett, 105 F. R. 425, 5 A. B. R. 305; Woodruff v. Cheeves et al., 105 F. R. 601, 5 A. B. R. 296; Real Estate Trust Co. v. Thompson, 112 F. R. 945, 7 A. B. R. 520; In re Ward, 5 A. B. R. 215; In re Michie, 8 A. B. R. 734, 116 F. R. 749; In re Steed, 107 F. R. 682, 6 A. B. R. 73.

[10] In re Sievers, 1 N. B. N. 168, 1 A. B. R. 117, 91 F. R. 366.

[11] Perkins v. McCauley, 98 F. R. 286; Shoshone Mining Co. v. Rutter, 177 U. S. 505, 511, 513.

exclusive jurisdiction, except with the defendant's consent, of suits concerning the bankrupt's estate, if they were such as bankrupt himself could have brought had he not been a bankrupt, but reserved to the district court, at least concurrent jurisdiction, of those suits by the trustee against a stranger, which bankrupt himself could not have brought; as suits to set aside an assignment or restrain the sale of property held under an attachment avoided by the bankrupt act, or, as otherwise expressed, suits original with the trustee and not derived by him through those whom he represents.[12]

§ 574. **Supreme court decision—Bardes v. Bank.**—Notwithstanding the amendment which entirely changes the jurisdiction, the decision of the Supreme Court of the United States in the leading case of Bardes v. Hawarden Bank, is interesting as a treatment of the jurisdiction of the courts, although the amendment of 1903 is designed to meet the obstacles presented by that decision. In that case the court stated that subdivision "b" applied to the district courts and to the circuit courts of the United States, as well as to the state courts, this appearing not only by the words of the title of the section, but also by the use, in this clause, of the general words, "the courts," as contrasted with the specific words, "the United States Circuit Courts," in the first and third clauses. It positively directs that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws or treaties of the United States, he could have brought suit in the circuit court of the United States.[13] He could not have sued in a District Court of the United States,[14] because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by

[12] In re Hammond, 98 F. R. 845, 3 A. B. R. 466.

[13] Act of Aug. 13, 1888, chap. 866, 25 Stat. L. 434.

[14] Changed by the amendment of Feb. 5, 1903

special provision of an act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits. Congress appeared by this subdivision to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, "unless by consent of the proposed defendant."[15] In other words the question of the forum in these cases was to be determined as if there were no bankruptcy.

Since Congress has no constitutional power to impose upon the state courts the duty of administering any part of the bankrupt act, and since the performance of such duty by such state courts is purely discretionary and they might at any time wholly renounce it or impose onerous conditions,[16] the question is suggested whether the foregoing decision of the Supreme Court[17] did not leave all actions by the trustees against adverse parties where the cause of action arose under the bankrupt act at the discretion of the state courts; and is not that fact a strong argument in favor of the construction contended for by those who held this subdivision applied if the cause of action existed in the bankrupt—that is, independently of the bankrupt law—but not if the cause of action was created in the trustee by the law, and are not both constructions equally consonant with the language of the subdivision? This view is strongly supported by a recent well considered opinion of a state supreme court which holds that bills by the trustee to reach property transferred in fraud of the bankruptcy act should not be brought in a state court.[18]

[15] Bardes v. Hawarden Bk., 178 U. S. 524, 2 N. B. N. R. 725, 4 A. B. R. 163; Hicks v. Knost, 178 U. S. 541, 2 N. B. N. R. 734, 4 A. B. R. 178; Mitchell v. McClure, 178 U. S. 539, 2 N. B. N. R. 735, 4 A. B. R. 177; Wall v. Cox, 181 U. S. 244, 5 A. B. R. 727; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 511, 513.

[16] In re Woodbury, 2 N. B. N. R. 284, 98 F. R. 833, 837, 3 A. B. R. 457, citing Sherman v. Bingham, F. C. 12762; Goodall v. Tuttle, 7 N. B. R. 193, 3 Biss. 219, F. C. 5533; Martin v. Hunter's Lessee, 1 Wheat. 304, 330; Robertson v. Baldwin, 165 U. S. 275; see also Claflin v. Houseman, 93 U. S. 130; Alleman v. Booth, 21 How. 506; The Moses Taylor, 4 Wall. 429; Ex p. McNeil, 13 Wall. 236.

[17] Bardes v. Hawarden Bk., supra.

[18] Lyon v. Clark, 2 N. B. N. R.

§ 575. **Decisions prior to that of Bardes v. Bank—Favoring jurisdiction of district court.**—Prior to the decision of the United States Supreme Court in Bardes v. Bank, the Circuit Courts of Appeals in four circuits in passing upon various phases of the question, sustained in general the jurisdiction of Courts of Bankruptcy over controversies arising in bankruptcy proceedings,[19] in addition to which there are a number of similar decisions by other federal courts.[20] A careful examination of the decisions, however, shows much purely obiter discussion of this subdivision. In those cases of general assignments and legal proceedings rendered void by the bankruptcy proceedings, the persons claiming under them did not claim adversely, but by right of the bankrupt's title and their right ceased. The appointment of the receiver is specifically provided for,[21] and the enjoining of the others was a necessary incident to the execution of other powers of the court. In none is there a plenary suit by the trustee.

It was held, however, that actions by trustees in bankruptcy to set aside fraudulent conveyances as void at common law, or as preferences, or because in fraud of the bankruptcy law, could be brought in the district courts as courts of bankruptcy,[22] because, as said in one, this subdivision did not impair the jurisdiction conferred by Sec. 2, of the law, but re-

792, revd., 2 N. B. N. R. 1100, in deference to Bardes v. Bk., 178 U. S. 524, 2 N. B. N. R. 725, 4 A. B. R. 163; see also Mueller v. Bruss, 8 A. B. R. 442.

[19] In re Gutwillig, 1 N. B. N. 554, 1 A. B. R. 388, 34 C. C. A. 377, 92 F. R. 337; s. c. below 1 N. B. N. 40, 1 A. B. R. 78, 90 F. R. 475; Carriage Co. v. Stengel, 1 N. B. N. 387, 37 C. C. A. 210, 95 F. R. 637, 2 A. B. R. 383; Davis v. Bohle, 1 N. B. N. 216, 34 C. C. A. 37, 92 F. R. 325, 1 A. B. R. 412, s. c. below, In re Sievers, 1 N. B. N. 168, 91 F. R. 366, 1 A. B. R. 117; In re Francis-Valentine Co., 1 N. B. N. 529, 2 A. B. R. 522, 36 C. C. A. 499, 94 F. R. 793.

[20] In re Smith, 1 N. B. N. 356, 2 A. B. R. 9, 92 F. R. 135; In re Hammond, 98 F. R. 845, 3 A. B. R. 466; In re Fellerath, 1 N. B. N. 292, 2 A. B. R. 40, 95 F. R. 121; In re Kenney, 1 N. B. N. 401, 2 A. B. R. 494, 95 F. R. 427; In re Kletchka, 1 N. B. N. 160, 92 F. R. 901, 1 A. B. R. 479; In re Richards, 1 N. B. N. 487, 2 A. B. R. 506, 94 F. R. 633; In re Pittelkow, 1 N. B. N. 234, 1 A. B. R. 472, 92 F. R. 901; In re Booth, 1 N. B. N. 476, 2 A. B. R. 770, 96 F. R. 943; In re Nathan, 1 N. B. N. 563, 92 F. R. 590; In re Kimball, 1 N. B. N. 515, 3 A. B. R. 161, 97 F. R. 29; Keegan v. King, 96 F. R. 758, 3 A. B. R. 79; Trust Co. v. Benbow, 1 N. B. N. 499, 3 A. B. R. 9, 96 F. R. 514; In re Fixen, 1 N. B. N. 568, 2 A. B. R. 822, 96 F. R. 748.

[21] Sec. 2 (3), act of 1898.

[22] Robinson v. White, 1 N. B. N. 513, 3 A. B. R. 88, 97 F. R. 33; In

lated to the venue; and, in another, only when the cause of action existed originally in the bankrupt. For the last reason, an action by the trustee to subject to creditors an income held in trust for the bankrupt was cognizable in the bankruptcy court;[23] so also an action to quiet title,[24] or to determine the rights of the joint holders of a liquor license;[25] or an action to enforce the liability of stockholders for the unpaid subscription to stock upon call by trustee;[26] or by consent to set aside a bill of sale made within four months.[27]

§ 576. Early decisions against jurisdiction of district court.—In a number of cases the opposite view was taken, and the district court sitting in bankruptcy was held not to have jurisdiction to determine by summary proceeding a controversy between the trustee as such and an adverse claimant concerning property claimed by the trustee, or by a trustee against a creditor of the bankrupt to recover money alleged to have been paid as a preference or in fraud of other creditors,[28] or the like, nor did it make any difference whether the cause of action existed in the bankrupt prior to the bankruptcy, or had arisen since.[29]

§ 577. Summary Proceedings.—Neither the act of 1898 or

re Newberry, 2 N. B. N. R. 56, 3 A. B. R. 158, 97 F. R. 24; Carter v. Hobbs, 1 N. B. N. 529, 2 A. B. R. 224, 94 F. R. 108; s. c. 1 N. B. N. 191, 1 A. B. R. 215, 92 F. R. 594; Norcross v. Nathan, 2 N. B. N. R. 405, 99 F. R. 14, 3 A. B. R. 613; Cox v. Wall., 2 N. B. N. R. 572, 99 F. R. 546, 3 A. B. R. 664; Trust Co. v. Marx, 98 F. R. 456; In re Woodbury, 2 N. B. N. R. 284, 98 F. R. 83, 3 A. B. R. 457; Lehman v. Crosby, 99 F. R. 542, 2 N. B. N. R. 451, 3 A. B. R. 662; In re Kerske Bros., 1 N. B. N. 328, 2 A. B. R. 79; Shutts v. Bk., 2 N. B. N. R. 320, 98 F. R. 705, 3 A. B. R. 492; Hall v. Kincell, 102 F. R. 301, 2 N. B. N. R. 745; In re San Gabriel Sanatorium Co., Id. 310, 2 N. B. N. R. 827, 4 A. B. R. 197.

[23] In re Baudouine, 1 N. B. N. 506, 3 A. B. R. 55, 96 F. R. 536, 101 F. R. 574, 3 A. B. R. 651.

[24] Murray v. Beal, 2 N. B. N. R. 164, 3 A. B. R. 284, 97 F. R. 567.

[25] In re Brodbine, 1 N. B. N. 279, 326, 93 F. R. 643, 2 A. B. R. 53.

[26] In re Crystal Spring Bottling Co., 96 F. R. 945, 3 A. B. R. 194.

[27] In re Connolly, 2 N. B. N. R. 564, 100 F. R. 620, 3 A. B. R. 842, Affg. 2 N. B. N. R. 557.

[28] Hicks v. Knost, 178 U. S. 541, 2 N. B. N. R. 734, s. c. 1 N. B. N. 336, 2 A. B. R. 153, 94 F. R. 625; Camp v. Zellars, 94 F. R. 799; Contra, see cases under previous subhead, ante p. 355.

[29] Perkins v. McCauley, 98 F. R. 286; Burnett v. Mercantile Co., 1 N. B. N. 138, 91 F. R. 365, 1 A. B. R. 229; In re Abraham, 1 N. B. N. 281, 2 A. B. R. 266, 93 F. R. 767; Contra, Pepperdine v. Headley, 98 F. R. 863, 3 A. B. R. 455; Lehman

the amendment of 1903, authorizes the court of bankruptcy by summary process to disturb the possession of property held adversely at the time of the institution of bankruptcy proceedings; and while such party is entitled to his day in court, the mere assertion of title is not a bar to the exercise of jurisdiction, as the court may examine into such claim.[29a] Hence, where one holds property as a general assignee, or the vendee of such property, or while making claim to property merely has a colorable title to the same, the property really being that of the bankrupt, and the like, the court of bankruptcy may by summary proceedings order that such property be turned over to the bankrupt.[29b]

§ 578. **Consent of defendant.**—The act of February 5, 1903, extending the jurisdiction of the Federal courts to cases for the recovery of property transferred as a preference, as well as transfers made with the intent to hinder, delay and defraud creditors, still leaves certain causes of action where the jurisdiction of such courts is dependent upon the consent of the proposed defendant. Thus in addition to the case of an explicit consent on the part of the defendant, a person will be deemed to have consented who, when proceedings are instituted against him by the trustee, appears and maintains the bona fides of the transfer[30] or answers on the merits, gives a

v. Crosby, 2 N. B. N. R. 451, 99 F. R. 542, 3 A. B. R. 662.

See generally, as opposed to the jurisdiction of the Federal Courts in suits of this character unless diverse citizenship existed: In re Abraham, 93 F. R. 767, 35 C. C. A. 592, 2 A. B. R. 266; Heath v. Shaffer, 1 N. B. N. 399, 2 A. B. R. 98, 93 F. R. 647; comp. In re Brooks, 1 N. B. N. 240, 1 A. B. R. 606, 91 F. R. 508; In re Buntrock Clothing Co., 1 N. B. N. 291, 1 A. B. R. 454, 92 F. R. 886; In re Franks, 95 F. R. 635, 2 A. B. R. 634; In re Blair, 102 F. R. 987, 2 N. B. N. R. 890, 4 A. B. R. 220; Mitchell v. McClure, 178 U. S. 539, 2 N. B. N. R. 735, s. c. 1 N. B. N. 138, 1 A. B. R. 53, 91 F. R. 621; s. c. under title In re Scott, 1 N. B. N. 327; In re Goldberg, 1 A. B. R. 385; Chattanooga Nat. Bank v. Rome Iron Co., 99 F. R. 82; In re Rockwood, 1 N. B. N. 134, 1 A. B. R. 272, 91 F. R. 363; In re Fowler, 1 N. B. N. 215, 1 A. B. R. 637; In re Carter, 1 N. B. N. 162, 1 A. B. R. 160; In re Cohn, 98 F. R. 75, 2 N. B. N. R. 299, 3 A. B. R. 421.

[29a] Metcalf v. Barker, 187 U. S. 165; Peck v. Jenness, 7 How. 611; Eyster v. Goff, 91 U. S. 521; Marshall v. Knox, 16 Wall. 551; In re Tune, 115 F. R. 906, 8 A. B. R. 285; In re Baird, 116 F. R. 765, 8 A. B. R. 645.

[29b] Bryan v. Bernheimer, 181 U. S. 188, 5 A. B. R. 623; Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224.

[30] Philips v. Turner, 114 F. R. 726, 8 A. B. R. 171.

bond for the delivery of the property, and proceeds to a hearing without objection.[31] In such cases he will not be permitted to raise the question of jurisdiction for the first time on exceptions to a decision of the referee adverse to him,[32] or on appeal.[33] The consent will also be implied where he submits his claim to such court in response to a petition for an order requiring the property in his possession to be turned over to the custody of the court,[34] or, if he enters his appearance and obtains an order assenting to the sale of property,[35] or, where a petition is filed to declare a chattel mortgage null and void and the case is submitted on the merits without objection.[36]

The consent necessary to give the court jurisdiction is to the tribunal and not to the mode of procedure and if that be unlawful, the appearance of the defendant and his contesting the proceedings do not confer jurisdiction, notwithstanding the fact that he answers to a rule to show cause.[38] A general appearance by a defendant to a rule to show cause does not constitute consent,[39] nor does the filing by a general assignee of accounts for allowance and settlement, where objection is made to the jurisdiction before the final order on the merits,[40] nor an appearance in response to an order to turn over property alleged to belong to the estate, if during such proceedings, he raises the question of jurisdiction.[41] Consent is not to be assumed where an adverse claimant is made a party defendant to a petition for adjudication, although he participates in the proceedings before the referee, if objection is made to the exercise of jurisdiction;[42] nor is the mere proving

[31] In re Steuer, 104 F. R. 976; Bryan v. Bernheimer, 181 U. S. 188, 5 A. B. R. 623.

[32] Hicks v. Knost, 178 U. S. 241, 2 N. B. N. R. 734, 4 A. B. R. 178; In re Connolly, 2 N. B. N. R. 564, 100 F. R. 620, 3 A. B. R. 842; In re Adams, 1 N. B. N. 503, 2 A. B. R. 415, 97 F. R. 188; In re Durham, 114 F. R. 750, 8 A. B. R. 115.

[33] Boonville Nat. Bank v. Blakey, 107 F. R. 891, 6 A. B. R. 13.

[34] In re Klein, 116 F. R. 523, 8 A. B. R. 559.

[35] Bryan v. Bernheimer, supra.

[36] In re Riker, 109 F. R. 63, 5 A. B. R. 724; s. c. 107 F. R. 96, 5 A. B. R. 720.

[38] Sinsheimer v. Simonson, 107 F. R. 898, 5 A. B. R. 537; Louisville Trust Co. v. Comingor, 7 A B. R. 421, 184 U. S. 18.

[39] In re Hemby-Hutchinson Pub. Co., 105 F. R. 909, 5 A. B. R. 569.

[40] In re Klein, 116 F. R. 523, 8 A. B. R. 559.

[41] Sinsheimer v. Simonson, 107 F. R. 898, 5 A. B. R. 537; In re Michie, 116 F. R. 749, 8 A. B. R. 734.

[42] Louisville Trust Co. v. Cominger, 184 U. S. 18, 7 A. B. R. 421.

of a claim in the bankruptcy proceedings evidence of assent.[43]

§ 579. **Decisions under the Act of 1867.**—The decisions under the former act upon the question of suits by assignees against adverse parties in the district courts are generally inapplicable now.[44]

§ 580. **State courts—Jurisdiction under Acts of 1867 and 1898, compared.**—Under sections one and two of the Act of 1867, two distinct classes of jurisdiction were conferred on the District and Circuit Courts of the United States; by the first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy, initiated by the petition, and ending in the distribution of the assets amongst the creditors, and a discharge or refusal of a discharge of the bankrupt, and by the second, jurisdiction as an ordinary court, of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. The jurisdiction of these courts over suits to recover assets of the bankrupt from a stranger to the proceedings in bankruptcy, brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld under a special clause in section two which gave those two courts concurrent jurisdiction of all suits at law or in equity, brought by the assignee against any person claiming an adverse interest, or by such person against the assignee, touching any property or rights of property of the bankrupt transferable to or vested in such assignee.[45] The Supreme Court in the case of Bardes v. Hawarden Bank points out that Mr. Justice Clifford in an earlier case had called attention to

[43] Jaquith v. Rowley, 187 U. S. —; see Pickens v. Roy, 187 U. S. 177.

[44] Sherman v. Bingham, 7 N. B. R. 490, F. C. 12762; Goodall v. Tuttle, 7 N. B. R. 193, 3 Biss. 219, F. C. 5533; Jobbins v. Montague, 6 N. B. R. 509, F. C. 7330; In re Fendley, 10 N. B. R. 250, F. C. 4728; Smith v. Mason, 6 N. B. R. 1, 14 Wall. 419; In re Marter, 12 N. B. R. 185, F. C. 9143; In re Bonesteel, 3 N. B. R. 127, 7 Blatch. 175, F. C. 1627; Harmanson v. Bain, 15 N. B. R. 173, 1 Hughes, 188, F. C. 6072; In re Krogman, 5 N. B. R. 116, F. C. 7936; In re Oregon Iron Wks., 17 N. B. R. 404, 4 Sawy. 168, F. C. 10562; In re Campbell, 17 N. B. R. 4, 3 Hughes, 276, F. C. 2348; Bill v. Beckwith, 2 N. B. R. 82, F. C. 1406; Stores v. Engel, 19 N. B. R. 90, F. C. 13494; Sanger v. Upton, 13 N. B. R. 226, 91 U. S. 56.

[45] Bardes v. Hawarden Bk., 178 U. S. 524, 2 N. B. N. R. 725, 4 A B. R. 163; See also Lathrop v. Drake, 91 U. S. 516.

the fact that the jurisdiction conferred by the Act of 1867 was the regular jurisdiction between party and party as described in the Judiciary Act and the third article of the Constitution.[46] That court repeatedly held under that act the right of an assignee to assert a title in property transferred by the bankrupt before bankruptcy and claimed by a third person adversely could only be enforced by a plenary suit, at law or in equity, under such second section, notwithstanding the broad terms used in the first;[47] and that the jurisdiction of the United States Courts over all matters of bankruptcy as distinguished from suits at law or in equity was exclusive and as to such suits they had concurrent jurisdiction with the state courts. The similarity of section two of the Act of 1898 to section one of the Act of 1867 and the omission of any provision like that in section two of the Act of 1867 was then noted and the court reached the conclusion that, under the Act of 1898, there was no such concurrent jurisdiction as there was under the former act between the United States and state courts of suits between the trustee and adverse claimants of property alleged to belong to the bankrupt. This decision necessarily overruled the decisions under the Act of 1898[48] holding the contrary, and

[46] Morgan v. Thornhill, 11 Wall. 65, 76, 80.

[47] Smith v. Mason, 14 Wall. 419; Marshall v. Knox, 16 Wall. 551, 557; Eyster v. Gaff, 91 U. S. 521, 525.

[48] Leidigh Car Co. v. Stengel, 1 N. B. N. 387, 95 F. R. 637, 2 A. B. R. 383; In re Russell, 101 F. R. 248, 3 A. B. R. 658; In re Francis-Valentine Co., 1 N. B. N. 529, 94 F. R. 793, 2 A. B. R. 522; Affg. 1 N. B. N. 532, 93 F. R. 953, 2 A. B. R. 188; In re Baudouine, 101 F. R. 574, 3 A. B. R. 651, overruling 1 N. B. N. 506, 96 F. R. 536, 3 A. B. R. 55; In re Corbett, 1 N. B. N. 326; Carter v. Hobbs, 1 N. B. N. 191, 1 A. B. R. 215, 92 F. R. 594; s. c. 1 N. B. N. 529, 94 F. R. 108, 2 A. B. R. 224; Wall v. Cox, 101 F. R. 403; Hall v. Kincell, 2 N. B. N. R. 745, 102 F. R. 301; Robinson v. White, 1 N. B. N. 513, 97 F. R. 33, 3 A. B. R. 88; In re Murphy, 2 N. B. N. R. 393, 3 A. B. R. 499; In re Woodbury, 2 N. B. N. R. 284, 98 F. R. 833, 3 A. B. R. 457; In re Cobb, 1 N. B. N. 557, 96 F. R. 821, 3 A. B. R. 129; In re Booth, 1 N. B. N. 476, 96 F. R. 843, 2 A. B. R. 770; In re Smith, 1 N. B. N. 356, 92 F. R. 135, 2 A. B. R. 9; Keegan v. King, 96 F. R. 758, 3 A. B. R. 79; In re Kletchka, 92 F. R. 901, 1 A. B. R. 479, 1. N. B. N. 160; In re Kenney, 2 N. B. N. R. 140, 97 F. R. 554, 3 A. B. R. 353; s. c. 1 N. B. N. 401, 95 F. R. 427, 2 A. B. R. 494; In re Nathan, 1 N. B. N. 563, 92 F. R. 590; In re Fellerath, 1 N. B. N. 292, 95 F. R. 121, 2 A. B. R. 40; In re Crystal Springs Bottling Co., 3 A. B. R. 194, 96 F. R. 945; In re Fixen, 2 N. B. N. R. 885, 102 F. R. 295, 4 A. B. R. 10; s. c. 1 N. B. N. 568, 96 F. R. 748, 2 A. B. R. 822; Lehman v. Crosby, 2 N. B. N. R.

made inapplicable a number of decisions under the former act.[49] This decision of the Supreme Court determined that the district court as a court of bankruptcy had no jurisdiction of any suits, at law or in equity, independent of the proceedings in bankruptcy as such; but that all such suits should be brought in the proper court, which is ordinarily a state court, unless the jurisdictional requirements exist outside of the bankrupt law for suing in a federal court; or it may inquire in a summary way as to an adverse claim made by a stranger, to the property, and if the claim be without foundation, order the property turned over to the trustee.[50] Property in the actual possession of a state court, draws to it the right to decide upon conflicting claims to its ultimate possession and control.[51]

§ 581. Illustrative cases.—The state courts have jurisdiction, though not exclusive in all cases, of actions by trustees in bankruptcy to set aside fraudulent conveyances, assignments or transfers by the bankrupt on the ground of their

451, 99 F. R. 542, 3 A. B. R. 662; Louisville Tr. Co. v. Marx, 98 F. R. 456, 3 A. B. R. 450; In re Hammond, 98 F. R. 845, 3 A. B. R. 466; Shutts v. Bk., 2 N. B. N. R. 320, 98 F. R. 705, 3 A. B. R. 492; Pepperdine v. Headley, 98 F. R. 863, 3 A. B. R. 455; In re Newberry, 2 N. B. N. R. 56, 97 F. R. 24, 3 A. B. R. 158; In re Kimball, 1 N. B. N. 515, 97 F. R. 29, 3 A. B. R. 161; In re Schloerb, 2 N. B. N. R. 234, 97 F. R. 326, 3 A. B. R. 224; Murray v. Beal, 2 N. B. N. R. 164, 97 F. R. 567, 3 A. B. R. 284; In re Richard, 1 N. B. N. 487, 94 F. R. 633, 2 A. B. R. 506; In re Siever, 1 N. B. N. 68, 1 A. B. R. 117, 91 F. R. 366; s. c. as Davis v. Bohle, 1 N. B. N. 216, 92 F. R. 325, 1 A. B. R. 412; In re Brooks, 1 N. B. N. 240, 91 F. R. 508, 2 A. B. R. 531; In re Gutwillig, 1 N. B. N. 554, 92 F. R. 337, 1 A. B. R. 388, Affg. 1 N. B. N. 40, 90 F. R. 475, 1 A. B. R. 78; Southern L. & T. Co. v. Benbow, 1 N. B. N. 499, 96 F. R. 514, 3 A. B. R. 9; In re Etheridge Furn. Co., 1 N. B. N. 139, 92 F. R. 329, 1 A. B. R. 112; In re Pittelkow, 1 N. B. N. 234, 92 F. R. 901, 1 A. B. R. 472; In re Norcross v. Nathan, 2 N. B. N. R. 405, 99 F. R. 414, 3 A. B. R. 613; and see In re San Gabriel Sanatorium Co., 2 N. B. N. R. 827, 102 F. R. 310, 4 A. B. R. 197.

[49] Claflin v. Houseman, 15 N. B. R. 50; Samson v. Burton, 4 N. B. R. 1, 5 Ben. 343, F. C. 12285; Payson v. Dietz, 8 N. B. R. 193, 2 Dill. 504, F. C. 10861; Gilbert v. Priest, 8 N. B. R. 159; Kidder v. Hornbin, 18 N. B. R. 146; Wente v. Young, 17 N. B. R. 90; Goodrich v. Wilson, 14 N. B. R. 555; Blake v. Ala. & Chatt. R. R. Co., 6 N. B. R. 331, F. C. 1493.

[50] In re Tune, 8 A. B. R. 285; Wall v. Cox, 181 U. S. 244, 5 A. B. R. 727.

[51] Metcalf Bros. v. Barker, 187 U. S. 165; in re Lemmon & Gale Co., 112 F. R. 292, 7 A. B. R. 291; In re Shoemaker, 7 A. B. R. 437.

being void at common law, or as a preference, or as being in contravention of the bankruptcy act,[52] which jurisdiction is by the amendment of February 5, 1903, shared by the bankruptcy court; to foreclose mortgages after leave had from the bankruptcy court, the trustee being a party,[53] but it is discretionary with the bankruptcy court whether to grant such leave or have the property sold under its direction by the trustee;[54] of the trustee against adverse claimant of bankrupt's property;[55] to quiet title; [56] to reduce choses in action to money or to recover possession of the property of the bankrupt and to sell such property to satisfy a judgment rendered in favor of the trustee, or to set aside fraudulent convey-

[52] Robinson v. White, 1 N. B. N. 513, 3 A. B. R. 88, 97 F. R. 33; Hicks v. Knost, 178 U. S. 541, 2 N. B. N. R. 734; s. c. 1 N. B. N. 336, 2 A. B. R. 153, 94 F. R. 625; Carter v. Hobbs, 1 N. B. N. 191, 1 A. B. R. 215, 92 F. R. 594; Norcross v. Nathan, 2 N. B. N. R. 405, 99 F. R. 414, 3 A. B. R. 613; Cox v. Wall., 2 N. B. N. R. 572, 99 F. R. 546, 3 A. B. R. 664; Perkins v. McCauley, 98 F. R. 286, 3 A. B. R. 445; Burnett v. Mercantile Co., 1 N. B. N. 138, 91 F. R. 365, 1 A. B. R. 221; In re Abraham, 1 N. B. N. 281, 2 A. B. R. 266, 93 F. R. 767, 779; In re Corbett, 1 N. B. N. 326; In re Murphy, 2 N. B. N. R. 393, 3 A. B. R. 499; In re Woodbury, 2 N. B. N. R. 284, 98 F. R. 833, 3 A. B. R. 457; In re Cobb, 1 N. B. N. 557, 3 A. B. R. 129, 96 F. R. 821; In re Newberry, 2 N. B. N. R. 56, 3 A. B. R. 158, 97 F. R. 24; Isett v. Stuart, 16 N. B. R. 191, Gilbert v. Priest, 8 N. B. R. 159; but see Voorhees v. Frisbie, 8 N. B. R. 152; Claflin v. Houseman, 15 N. B. R. 49, 93 U. S. 130; Kemmemer v. Tool, 12 N. B. R. 334; Jordan v. Downey, 12 N. B. R. 427; Goodrich v. Wilson, 14 N. B R. 555; Peiper v. Harmer, 5 N. B. R. 252; State v. Dewey, 5 N. B. R. 466; In re Cent. Nat. Bk., 6 N. B. R. 207, F. C. 2547; Dambmann v. White, 12 N. B. R. 438; but see Bingham v. Claflin, 7 N. B. R. 412; Bromley v. Goodrich, 15 N. B. R. 289; McKenna v. Simpson, 129 U. S. 506.

[53] In re Pittelkow, 1 N. B. N. 234, 1 A. B. R. 472, 92 F. R. 901; In re Brooks, 1 N. B. N. 240, 91 F. R. 508, 2 A. B. R. 531; Heath v. Shaffer, 1 N. B. N. 399, 2 A. B. R. 98, 93 F. R. 647; In re Booth, 1 N. B. N. 476, 2 A. B. R. 770, 96 F. R. 943; Burlingame v. Parce, 17 N. B. R. 246; McHenry v. La Societe Francaise, 16 N. B. R. 385, 95 U. S. 581; Brown v. Gibbons, 13 N. B. R. 407; Reed v. Bullington, 11 N. B. R. 408.

[54] In re Pittelkow, supra; In re Booth, supra; In re Brooks, supra; In re Devore, 16 N. B. R. 56, F. C. 3847.

[55] Mitchell v. McClure, 178 U. S. 539, 2 N. B. N. R. 735; s. c. 1 N. B. N. 138, 1 A. B. R. 53, 91 F. R. 621; Blumberg v. Bryan, 107 F. R. 673, 6 A. B. R. 20.

[56] Murray v. Beal, 2 N. B. N. R. 164, 3 A. B. R. 284, 97 F. R. 567.

[57] In re Gerdes, 2 N. B. N. R. 131, 102 F. R. 318, 4 A. B. R. 346; Heath v. Shaffer, 1 N. B. N. 399, 2 A. B. R. 98, 93 F. R. 647.

ances;[57] to collect a debt due the estate;[58] to enforce a valid lien by a qualified judgment limited to the property encumbered.[59] As further illustrative of the jurisdiction of the state courts there are a number of cases decided under the Act of 1867, which may be consulted, but in so doing it should be borne in mind that the state courts now have jurisdiction of many cases that, under the Act of 1867, were tried in the United States district courts.[60]

§ 582. **When state courts do not have jurisdiction.**—Immediately upon the commencement of proceedings in bankruptcy, if the bankrupt's estate is in process of settlement by the state courts, further proceedings should be stayed,[61] as, in proceedings in bankruptcy as distinguished from controversies "arising in bankruptcy proceedings," the courts of bankruptcy have exclusive jurisdiction,[62] and obtain complete control over the property in the possession of the bankrupt and scheduled as owned by him from the filing of the petition, while it is brought in custodia legis from the date of adjudication. It is not, therefore, subject to interference by any other court until such jurisdiction is divested,[63] even though a state court may have obtained possession of the property under a voluntary general assignment, or otherwise, and be administering it thereunder, as its jurisdiction to proceed will at once cease.[64] Accordingly when the bankruptcy jurisdiction becomes vested, a state court has no authority to

[58] In re Goldberg, 1 A. B. R. 385; Russell v. Owen, 15 N. B. R. 322.

[59] Stoddard v. Locke, 9 N. B. R. 73.

[60] In re Davis, 8 N. B. R. 167, F. C. 3619; Stevens v. Brown, 11 N. B. R. 568; Johnson v. Bishop, 8 N. B. R. 533, F. C. 7373; In re Mannheim, 7 N. B. R. 342, 6 Ben. 270, F. C. 9038; Mason v. Warthen, 14 N. B. R. 346.

[61] In re McKee, 1 N. B. N. 139, 1 A. B. R. 311; see also Watson v. Bk., 11 N. B. R. 161, 2 Hughes, 200, F. C. 17279; In re Noonan, 10 N. B. R. 330, F. C. 10292; contra, Appleton v. Bowles, 9 N. B. R. 354.

[62] Bardes v. Hawarden Bk., 178 U. S. 524, 2 N. B. N. R. 725, 4 A. B. R. 163; In re Murphy, 2 N. B. N. R. 393, 3 A. B. R. 499; Thornhill v. Bk., 3 N. B. R. 110, F. C. 13990.

[63] In re Schloerb, 2 N. B. N. R. 234, 3 A. B. R. 224, 97 F. R. 326; White v. Schloerb, 178 U. S. 542, 4 A. B. R. 178; In re Emslie, 102 F. R. 290, 2 N. B. N. R. 992; In re Murphy, 2 N. B. N. R. 393, 3 A. B. R. 499; In re Horgan, 2 N. B. N. R. 233, 2 A. B. R. 253, 98 F. R. 414; In re Barrow, 1 N. B. R. 125, F. C. 1057; In re Solomon, 2 N. B. N. R. 460; In re Gerdes, 2 N. B. N. R. 131, 102 F. R. 318, 4 A. B. R. 346; Smith v. Buchanan, 4 N. B. R. 133, F. C. 13016; Hewett v. Norton, 13 N. B. R. 276, 1 Woods, 68 F. C. 644; see also cases cited sec. 11a of act of 1898, ante.

[64] Lea v. Geo. M. West Co., 174

issue a writ of replevin against property in the trustee's possession,[65] nor punish a bankrupt for contempt for failing to obey an order to pay costs pending the bankruptcy proceedings,[66] but this is not so if he were summoned to appear and filed a petition in bankruptcy between the time of the service and the date fixed for his examination.[67]

§ 583. —— **Rule governing state courts.**—While it is true that Congress cannot require state courts to administer the bankrupt law or enforce rights and duties created by any other federal law,[68] it is equally true that the state courts must obey the bankrupt law, as any other constitutional law, and hence, while not administering federal laws except by comity, if it appears that by virtue of the bankrupt law the state court has no jurisdiction of an action pending therein, it will so decide upon proper plea.[69] But in the suits brought by or against a trustee in bankruptcy, a state court is not acting under the bankruptcy law, but merely recognizes it as the source of its title.[70] An attachment issued by a state court more than four months before the commencement of proceedings in bankruptcy will not be dismissed;[71] but, if issued within that period, it will be dissolved, though judgment has been entered, sale made and proceeds paid to attaching creditor.[72]

§ 584. —— **Acts of, which bind federal courts.**—Acts done

U. S. 590, 1 N. B. N. 409, 2 A. B. R. 463; s. c. 1 N. B. N. 79, 1 A. B. R. 261, 91 F. R. 237; Bryan v. Bernheimer, 181 U. S. 188, 5 A. B. R. 623; Leidigh Car Co. v. Stengel, 1 N. B. N. 387, 2 A. B. R. 383, 95 F. R. 637; In re Gutwillig, 1 N. B. N. 40, 1 A. B. R. 78, 90 F. R. 475; s. c. 1 N. B. N. 554, 92 F. R. 337; In re Sievers, 1 N. B. N. 68, 1 A. B. R. 117, 91 F. R. 366; s. c. as Davis v. Bohle, 1 N. B. N. 216, 1 A. B. R. 412, 92 F. R. 329; S. L. & T. Co. v. Benbow, 1 N. B. N. 499, 3 A. B. R. 9, 96 F. R. 514; In re Merchants Ins. Co., 6 N. B. R. 43, 3 Biss. 162; In re Bousfield, 17 N. B. R. 153, F. C. 1704.

[65] In re Russell, 101 F. R. 248, 3 A. B. R. 658; In re Schloerb, 178 U. S. 542, 2 N. B. N. R. 234, 3 A. B. R. 224, 97 F. R. 326.

[66] In re Summers, 1 N. B. N. 60.

[67] Cent. Nat. Bk. v. Graham, 1 N. B. N. 59.

[68] In re Woodbury, 2 N. B. N. R. 284, 98 F. R. 833, 837, 3 A. B. R. 457; citing Sherman v. Bingham, F. C. 12762; Goodall v. Tuttle, Id. 5533, 7 N. B. R. 193, 3 Biss. 219; Martin v. Hunter's Lessee, 1 Wheat. 304, 330; Robertson v. Baldwin, 165 U. S. 275.

[69] In re Cent. Bk., 6 N. B. R. 207, F. C. 2547.

[70] Cook v. Waters, 9 N. B. R. 155.

[71] Munson v. R. R. Co., 14 N. B. R. 173.

[72] Dickerson v. Spaulding, 15 N. B. R. 213.

by state courts in the proper exercise of their jurisdiction and not in conflict with the decrees or jurisdiction of federal courts, are valid and bind such federal courts.[74] Whenever a trustee in bankruptcy voluntarily submits himself to the jurisdiction of a state court, he cannot, after judgment, object to the power of such court, and a federal court cannot assume jurisdiction.[75] In general, decisions of state courts are not binding on the bankruptcy court, although provisions in the state insolvent laws may be similar to those of the bankrupt act.[76]

§ 585. Determination of existence of adverse claim.—The mere refusal to surrender property, or the assertion by a person that he holds an adverse claim thereto, does not constitute an adverse holding and will not oust the summary jurisdiction of the bankruptcy court to ascertain whether any basis for such claim actually exists. The court of bankruptcy or referee has, therefore, the undoubted power to examine into the claim and determine whether it is merely colorable or not.[77]

§ 586. 'c. Concurrent jurisdiction over offenses. — The 'United States circuit courts shall have concurrent jurisdic-'tion with the courts of bankruptcy, within their respective 'territorial limits, of the offenses enumerated in this Act.'

§ 587. Practice.—Courts of bankruptcy are invested, within their territorial limits, with jurisdiction to arraign, try and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may hereafter be enacted, regulating trials for the alleged violation of laws of the United States.[78] This subdivision has no applicability to civil actions; the "offenses enumerated" meaning the crimes described in section 29 of the law.[79]

[74] Robinson v. White, 97 F. R. 33, 1 N. B. N. 513, 3 A. B. R. 88; In re Keiler, 18 N. B. R. 10, F. C. 7647.

[75] Scott v. Kelly, 12 N. B. R. 96, 22 Wall. 57; Winchester v. Heiskell, 119 U. S. 450, 120 U. S. 273; Ludeling v. Chaffee, 143 U. S. 301.

[76] In re Knight, 8 N. B. R. 436, F. C. 7880.

[77] Mueller v. Nugent, 183 U. S. 1, 7 A. B. R. 224; In re Tune, 8 A. B. R. 285; Jaquith v. Rowley, 187 U. S. —; In re Waukesha Water Co., 116 F. R. 1009, 8 A. B. R. 715.

[78] Sec. 2 (4), act of 1898.

[79] Goodier v. Barnes, 1 N. B. N. 383, 2 A. B. R. 328, 94 F. R. 798.

CHAPTER XXIV.

JURISDICTION OF APPELLATE COURTS.

§588. (24a) Appellate Courts.
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§ 588. '(Sec. 24a) **Appellate courts.**—The Supreme Court 'of the United States, the circuit courts of appeals of the 'United States, and the supreme courts of the Territories, in 'vacation in chambers and during their respective terms, as 'now or as they may be hereafter held, are hereby invested 'with appellate jurisdiction of controversies arising in bank-'ruptcy proceedings from the courts of bankruptcy from 'which they have appellate jurisdiction in other cases. The 'Supreme Court of the United States shall exercise a like 'jurisdiction from courts of bankruptcy not within any or-'ganized circuit of the United States and from the Supreme 'Court of the District of Columbia."[1]

§ 589. **Appellate courts for controversies arising in bankruptcy proceedings.**—To all intents and purposes the session of the appellate courts is continuous throughout the year, as they are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings, in vacation in chambers and during their respective terms. The right of appeal is limited to controversies arising in bankruptcy proceedings, that is suits by or against the trustee in cases of persons claiming an adverse interest, or owing debts to the bankrupt,[2]

[1] Act of 1867. For analogous provisions see secs. 8 and 24, which follow section 25 of this act.

[2] In re Adler, 3 N. B. N. R. 15, 103 F. R. 444, 4 A. B. R. 583.

in the courts of bankruptcy, which here means only the district courts, and not to the rulings or action of either referee or trustee. Under this section appeals from the Supreme Court of the District of Columbia are taken immediately to the Supreme Court of the United States instead of through the Court of Appeals of the District. Section 25 provides for the class of cases that may be reviewed, and fixes the time for the same. A comparison of sections 23, 24 and 25 will show that section 23 clearly indicates a distinction between "controversies arising in bankruptcy proceedings," and "proceedings in bankruptcy;" that section 24a provides for appeals in the former and section 25a in the latter. Section 25a leaves appeals in "controversies arising in bankruptcy proceedings" to be determined by the general provisions of the statutes, under this section.[3]

§ 590. Statutory provisions as to appeals generally—to Supreme Court.[4]—The Act of March 3, 1891,[5] establishing the

[3] Shutts, Tr. v. 1st Nat. Bk., 2 N. B. N. R. 320, 323, 98 F. R. 705, 3 A. B. R. 492; First Nat. Bk. of Denver v. Klug, 186 U. S. 202, 8 A. B. R. 12; compare Walter Scott & Co. v. Wilson, 115 F. R. 284.

[4] The following statutory provisions have particular reference to the jurisdiction of the Supreme Court:

U. S. Rev. Stat., secs. 687-710, 5261.

The act of April 7, 1874, ch. 80 (1 Supp. R. S. 7), which provides that the appellate jurisdiction of the Supreme Court over judgments and decrees of territorial courts, in cases of trial by jury, shall be by writ of error, and in other cases by appeal, etc.

The act of Feb. 16, 1875, ch. 77, sec. 1 (1 Supp. R. S. 62, 63), limits the review of the Supreme Court of decrees of circuit courts in admiralty cases to questions of law arising on findings of fact to be made in such cases by circuit courts.

The act of March 3, 1885, ch. 353 (1 Supp. R. S. 485), provides for an appeal to the Supreme Court in cases of habeas corpus.

The act of March 3, 1885, ch. 353 (1 Supp. R. S. 485), regulates appeals from the Supreme Court of the District of Columbia and the territories.

The act of Aug. 13, 1888, ch. 866, secs. 1, 6 (1 Supp. R. S. 613, 614), takes away the right of review by the Supreme Court of orders of circuit courts remanding causes to state courts.

The act of Feb. 25, 1889, ch. 266 (1 Supp. R. S. 650), provides for writs of error or appeals to the Supreme Court in cases involving the question of the jurisdiction of circuit courts.

The act of March 3, 1891 (1 Supp. R. S. 901), creating the Circuit Courts of Appeals.

[5] 1 Supp. R. S. 901, 26 U. S. Stat. 826; commonly called the Evarts Act.

circuit courts of appeals, fixes the appellate jurisdiction of the United States courts. Appeals or writs of error may be taken from the circuit or district courts direct to the Supreme Court in any case in which the jurisdiction of the court is in issue, in which case only the question of jurisdiction shall be certified;[6] in any case that involves the construction or application of the Constitution of the United States;[7] or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; or in which the constitution or a law of a state is claimed to be in contravention of the Constitution of the United States,[8] in which three latter cases the Supreme Court passes on the whole case,[9] and under any of which a controversy in bankruptcy proceedings may arise.

In all cases not made final in the Circuit Court of Appeals, an appeal or writ of error lies to the Supreme Court if the amount involved exceeds one thousand dollars besides costs, and in such case the record must show that the question on which the appeal is based was brought to the attention of the lower court.[10]

§ 591. Appeals to circuit courts of appeals.—Except in the cases above mentioned the circuit courts of appeals review on appeal or writ of error the final decisions of the circuit and district courts and their judgment is final in all cases depending on diversity of citizenship and in all cases arising under the patent, revenue or criminal laws and in admiralty cases.[11] Where the jurisdiction of the circuit or district court is in issue, an appeal may be taken to the Supreme Court on the question of jurisdiction or to the circuit court of appeals on the merits, but appellant will be bound by his election,[12] but after an appeal to the circuit court of appeals in a case involving the construction of the Constitution of the United States, the case may be taken to the Supreme Court.[13]

[6] Bldg. & Loan Ass'n v. Price, 169 U. S. 45; First Nat. Bk. of Denver et al. v. Klug et al., 186 U. S. 202, 8 A. B. R. 12.

[7] Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

[8] Penn. Ins. Co. v. Austin, 168 U. S. 685.

[9] Carey v. Houston & T. Ry., 150 U. S. 170.

[10] Muse v. Hotel Co., 168 U. S. 430.

[11] Ex p. Jones, 164 U. S. 691; Carey v. H. & T. Ry., 161 U. S. 115; Sonnentheil v. Moerlein Brewing Co., 172 U. S. 401.

[12] Benjamin v. New Orleans, 169 U. S. 161.

[13] Pullman Car Co. v. Central Transportation Co., 171 U. S. 138.

The Circuit Court of Appeals has power to review on appeal the action of a circuit or district court granting or refusing an interlocutory injunction in a hearing in equity, but not appointing a receiver unless an injunction issues also;[14] and, as a bankruptcy proceeding may be equitable, this would probably apply to an injunction granted in bankruptcy proceedings. An appeal to the circuit court of appeals may also be taken in all prosecutions for offenses in bankruptcy. The decision of the district court in "controversies" between the trustee and a stranger to the bankruptcy proceedings, at law or in equity, may be reviewed;[15] as a final decree of a district court taking jurisdiction of a bill in equity by a trustee against a stranger, a citizen of the same state as the bankrupt, to set aside an alleged fraudulent conveyance;[16] or an independent suit in the nature of an equitable replevin;[17] or a decision of a circuit court failing to find on the question of fraud and ruling that the cause of action was merged in the judgment and fraud could not be inquired into;[18] or in a case involving a copyright.[19] In those cases in which the amount to authorize an appeal is in controversy, it may be shown by affidavit and need not appear in the pleadings.[20] The denial of a right to intervene in a bankruptcy proceeding, not being a final order or decree, is not appealable.[21]

§ 592. **Appeals from highest court of a state.**—As the trustee is authorized to sue in the state courts and must do so in many cases, the provisions as to the review of such cases by the Supreme Court of the United States[22] are important. The Supreme Court may re-examine on writ of error the final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an author-

[14] Highland Ave. R. R. v. Equipment Co., 168 U. S. 27; In re Tampa R. R., 168 U. S. 583.

[15] Shutts v. Bk., 2 N. B. N. R. 320, 3 A. B. R. 492, 98 F. R. 705; see Boonville Nat. Bk. v. Blakey, 107 F. R. 891, 6 A. B. R. 13.

[16] In re Jacobs, 99 F. R. 593, 3 A. B. R. 671.

[17] Stelling & Jones Lumber Co., 116 F. R. 261, 8 A. B. R. 521; compare Walter Scott & Co. v. Wilson, 8 A. B. R. 349.

[18] Packer v. Whittier, 1 N. B. N. 99, 1 A. B. R. 621.

[19] Press Pub. Co. v. Monroe, 164 U. S. 105.

[20] U. S. v. Freight Ass'n, 166 U. S. 290.

[21] In re Columbia Real Estate Co., 112 F. R. 643, 7 A. B. R. 441.

[22] Sec. 709 U. S. Rev. Stat.

ity exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity: or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority.

Only questions of law can be examined;[23] and the amount involved is immaterial, but there must have been a final judgment or decree in the lower court:[24] that is, there must not be any judicial question undetermined.[25] The record on such appeal includes the pleadings and judgment in an action at law and the bill of exceptions; or the pleadings, evidence and decree in equity; and if the local practice makes it part of the record, the opinion of the court may be considered.[26] The record must show on its face that the federal question was presented to the state court;[27] and, if either party claims a right, title, privilege or immunity under the United States or the Constitution, laws or treaties thereof, he must plead it;[28] and the attention of the state court must have been directed to it in time for consideration before deciding the case.[29] It is not sufficient to raise such question first on a motion for a new trial or petition for rehearing,[30] except in a statutory proceeding requiring no answer and where the defense could not be made earlier,[31] but the points may be made on trial.[32]

[23] Egan v. Hart, 165 U. S. 188.

[24] Clark v. Kansas City, 172 U. S. 334.

[25] California Bk. v. Stateler, 171 U. S. 447.

[26] Thompson v. Maxwell Land Co., 168 U. S. 451.

[27] Columbia Water Power Co. v. Railway Co., 172 U. S. 475.

[28] Chi. & N. W. R. v. Chicago, 164 U. S. 454; Pitts., etc., Ry. v. L. & T. Co., 172 U. S. 493.

[29] Bellingham Bay v. New Whatcom, 172 U. S. 314; Capital Bk. v. Cadiz Bk., 172 U. S. 425.

[30] Pim v. St. Louis, 165 U. S. 273; L. & N. R. R. v. Louisville, 166 U. S. 709; comp. Meyer v. Richmond, 172 U. S. 82, in which, however, the state court may have decided on a non-federal question, see dissenting opinion.

[31] C. B. & Q. R. R. v. Chi., 166 U. S. 226.

[32] Backus v. Fort Street Co., 169 U. S. 557.

The decision of the state court will not be reviewed if it can be supported on some other ground, though a federal question was passed upon;[33] nor unless there was an adverse decision on the federal question;[34] or the federal question was directly involved.[35] If there are several federal questions and the state court considered only one, the Supreme Court will not consider the others,[36] but will affirm the judgment unless the question was decided erroneously.[37] In case the question at issue is as to the validity of a transfer by a trustee and whether the suit is barred by the limitation of the bankrupt act, an appeal lies to the Supreme Court from a state court.[38]

§ 593. **When and how appeals allowed.**—Appeals to the Circuit Courts of Appeals and to the Supreme Court of the United States must be allowed by the judge of the court appealed from or a judge of the court appealed to, those to the Circuit Court of Appeals within six months, the period of limitation fixed for appeals by the act creating that court,[39] and those to the Supreme Court within thirty days and in such the lower court must make a finding of facts and conclusions of law, and the record consists only of these findings and the pleadings with the judgment or decree.[40] The appellant, except when it is the trustee, must file a bond to prosecute his appeal or writ of error, whether from state or federal courts.

§ 594. **Certification of questions to Supreme Court by Circuit Courts of Appeals.**—The Circuit Court of Appeals may at any time within its discretion certify to the Supreme Court of the United States any questions or proposition of law whether its decision would be final or not, concerning which it desires the instruction of that court for its proper decision. The Supreme Court may either give its opinion which shall bind the Circuit Court of Appeals or require the whole record and

[33] McQuade v. Trenton, 172 U. S. 636; Bausman v. Dixon, 173 U. S. 113.

[34] Castillo v. McConnico, 168 U. S. 674.

[35] Leyson v. Davis, 170 U. S. 36; Briggs v. Walker, 171 U. S. 466.

[36] Dewey v. Des Moines, 170 U. S. 193.

[37] Laclede Gas Co. v. Murphy, 170 U. S. 78.

[38] Traer v. Clews, 115 U. S. 528.

[39] Boonvill Nat. Bk. v. Blakey, 107, F. R. 891, 8 A. B. R. 13; Steele v. Buel, 104 F. R. 968, 5 A. B. R. 165; 1 Supp. R. S. U. S. 904, § 11.

[40] G. O. XXXVI; sec. 25a, Act of 1898.

then decide it as if on appeal or writ of error.[41] While the certification is made by the Circuit Court of Appeals of its own motion, the advisability therefor may be suggested by counsel though not by formal motion. The certification should be restricted to questions of law and not seek a decision of the whole case,[42] nor comprehend mixed questions of law and fact.[43]

§ 595. **Certiorari.**—In any case in which the judgment of the Circuit Court of Appeals is final, the Supreme Court may by certiorari or otherwise require it to be certified for its review and determination as if it had been carried to it by appeal or writ of error.[44] Application for the issuance of this writ should be addressed to the Supreme Court and will not be granted except in its discretion and then only in matters of gravity and general importance.[45] While no time limit is fixed by law or the rules of the Supreme Court for making this application, by analogy it would seem to be limited to the period of one year fixed generally by law for the review of decisions of the Circuit Court of Appeals.

The application must be made by petition, in which the title is A. B., petitioner, vs. C. D., respondent, and which must be filed in the office of the Clerk of the Supreme Court together with a certified copy of the entire record, including the proceedings in the Circuit Court of Appeals, an entry of appearance for the petitioner, signed by a member of the bar of the Supreme Court, a deposit of twenty-five dollars on account of costs, and between fifteen and twenty printed copies of such certified copy of the record. It is well to have printed fifty copies for use on the final hearing, in case the application, which must be presented in open court, is granted.

§ 596. 'b. **Circuit Courts of Appeals, jurisdiction.**—The 'several circuit courts of appeal shall have jurisdiction in 'equity, either interlocutory or final, to superintend and revise 'in matter of law the proceedings of the several inferior courts

[41] Act of March 3, 1891, par. 6, 1 Supp. R. S. 901, 26 Stat. L. 826.

[42] Warner v. New Orleans, 167 U. S. 467.

[43] McHenry v. Alford, 168 U. S. 651.

[44] Act of March 3, 1891, 1 Supp. R. S. 903, 26 Stat. L. 826, sec. 6; see First Nat. Bk. v. Klug, 186 U. S. 202, 8 A. B. R. 12.

[45] In re Woods, 143 U. S. 202; Forsyth v. Hammond, 166 U. S. 506.

'of bankruptcy within their jurisdiction. Such power shall 'be exercised on due notice and petition by any party ag- 'grieved.'[46]

§ 597. **Jurisdiction in general.**—By this provision, the jurisdiction of the circuit courts of appeals is limited to the review in matters of law of some action taken or order made in the course of a bankruptcy proceeding for which an appeal is not provided, and, if an appeal is provided, that is exclusive, but then both law and fact are reviewed.[47] A similar view prevailed under the former act.[48] To have a referee's decision reviewed, it should be certified to a judge of the district court, and his decision first taken.

§ 598. **What may be reviewed.**—This provision is limited to proceedings already had and contemplates a summary review of the orders of the bankruptcy courts in matters of law, whether the proceedings be at law or in equity, but does not contemplate any review of the facts, and is exercised on an original petition filed in the circuit court of appeals by any person aggrieved. Thus there may be reviewed an order confirming or refusing to confirm, or setting aside a composition;[49] or revoking a discharge; or allowing or rejecting a lien claimed as incident to a debt sought to be proved;[50] or a

[46] Analogous provision of act of 1867. "Sec. 2. . . . That the several Circuit Courts . . . shall have a general superintendence and jurisdiction of all cases and questions . . . and, except when special provision is otherwise made, may . . . hear and determine the case."

It has been held that the Circuit Court of Appeals of the 8th Circuit has no revising jurisdiction over courts of bankruptcy in the Indian Territory, but the court of appeals of that territory alone has appellate jurisdiction (In re Blair, 106 F. R. 662, 5 A. B. R. 793); and that this subdivision has no application to territorial courts (In re Stumpff, 4 A. B. R. 267).

[47] Elliott & Co. v. Toeppner, 187 U. S. 327, 9 A. B. R. 50, sec. 25a, act of 1898; In re Jacobs, 99 F. R. 539, 3 A. B. R. 671; In re Good, 99 F. R. 389, 3. A. B. R. 605; In re Richards, 2 N. B. N. R. 38, 3 A. B. R. 145, 96 F. R. 935; In re Rusch, 8 A. B. R. 518, 116 F. R. 270; Mueller v. Nugent, 184 U. S. 1, 9, 7 A. B. R. 224.

[48] Bk. v. Slagle, 106 U. S. 558; Bk. v. Cooper, 20 Wall. 171; Sandusky v. Bk., 23 Wall 289; Leggett v. Allen, 10 Wall. 741.

In the case of Meyers (105 F. R. 353, 5 A. B. R. 4) it was held that there is nothing in the law which requires the court of bankruptcy to make findings of fact for the purposes of an appeal from its decision.

[49] In re Adler, 3 N. B. N. R. 15, 103 F. R. 444, 4 A. B. R. 583; In re Joseph, 24 F. R. 137.

[50] Courier Journal Co. v. Schae-

decision as to the priority of a claim not amounting to $500, the validity not being disputed;[51] or an order enjoining replevin by a third person against a trustee claiming property in such trustee's possession;[52] or enjoining an assignee under a voluntary general assignment avoided by the bankruptcy and directing the marshal to take the assigned property;[53] or directing a trustee to take possession of property held by a sheriff under attachment at the time of adjudication;[54] or enjoining a sheriff from paying over money to an execution creditor and directing him to pay it to a trustee;[55] or imprisoning bankrupt for contempt in failing to obey an order requiring him to pay over money to a trustee;[56] or to produce books;[57] or requiring a bankrupt to indorse a liquor license for sale;[58] or setting off a usury judgment against claims;[59] or removing or refusing to remove a trustee;[60] or a sale of property by a trustee on exception to the report;[61] or an order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication;[62] or for the review of an order denying a petition for the reinstatement of proceedings, where the adjudication has been refused and the petition dismissed;[63] or where a court abused its discretion in denying a creditor the right to amend his specifications in opposition to a discharge;[64] or a petition claiming ownership of funds in the hands of a bankrupt's trustee, where the facts are undisputed,[65] though such orders be made in chambers.[66]

fer Co., 101 F. R. 699, 4 A. B. R. 183.

[51] In re Rouse, Hazard & Co., 1 N. B. N. 75, 1 A. B. R. 234, 91 F. R. 96; In re Worcester County, 102 F. R. 808, 4 A. B. R. 496.

[52] In re Russell, 101 F. R. 248, 3 A. B. R. 658.

[53] Davis v. Bohle, 1 N. B. N. 216, 1 A. B. R. 412, 92 F. R. 325.

[54] In re Francis-Valentine Co., 1 N. B. N. 529, 2 A. B. R. 522, 94 F. R. 793.

[55] In re Kenney, 2 N. B. N. R. 140, 3 A. B. R. 353, 97 F. R. 554.

[56] In re Purvine, 2 A. B. R. 787, 1 N. B. N. 326, 96 F. R. 192.

[57] In re Horgan, 98 F. R. 414, 2 N. B. N. 233, 3 A. B. R. 253; Aff'g 97 F. R. 319, 2 N. B. N. 53.

[58] In re Fisher, 103 F. R. 860.

[59] Wilson v. Bk., 3 F. R. 91.

[60] Hutchins v. Briggs, 61 F. R. 498; In re Prouty, 24 F. R. 554.

[61] Bk. v. Slagle, 106 U. S. 558; Nimick v. Coleman, 95 U. S. 266.

[62] In re Ives, 113 F. R. 911, 7 A. B. R. 692.

[63] In re Jamison Mercantile Co., 112 F. R. 966, 7 A. B. R. 558.

[64] In re Carley, 117 F. R. 130, 8 A. B. R. 720.

[65] In re Hutchinson, 113 F. R. 202.

[66] Hall v. Allen, 9 N. B. R. 6, 12 Wall. 452; Morgan v. Thornhill, 5 N. B. R. 1, 11 Wall. 65.

It should be borne in mind that this power to review does not confer original jurisdiction over bankruptcy proceedings as such and the decree, if affirmed, remains the decree of the lower court, to be carried out by it.[67] Ordinarily a case erroneously brought up should be dismissed unless such action would leave a decree entered in a case over which the court had no jurisdiction, when it may be remanded with directions to dismiss.[68]

§ 599. **What may not be reviewed.**—On a petition to the circuit court of appeals under this provision, an objection of the petitioner that the evidence in the case did not warrant the order complained of will not be considered;[69] or a finding that a creditor did not have reasonable cause to believe his debtor insolvent when he obtained security for his debt;[70] or an error in entertaining a bill in equity by the trustee against a stranger, a citizen of the same state, to set aside a fraudulent conveyance;[71] or where the record presents only questions of fact;[72] or questions not raised and considered by the court below;[73] or that do not appear on the record;[74] or matters committed to the discretion of the lower court unless there was a manifest abuse of such discretion,[75] as an order to produce bonds and papers and regarding examination of witnesses;[76] or mere irregularities;[77] or to review an order allowing or rejecting a claim exceeding $500, since the proper procedure is by appeal.[78]

A specific provision[79] having been made for appeal from a

[67] Clark v. Bininger, 3 N. B. R. 489, 7 Blatch. 165; F. C. 2815.

[68] Stickney v. Wilt, 11 N. B. R. 97, 23 Wall. 150.

[69] In re Rosser, 101 F. R. 562, 4 A. B. R. 153; Babbitt v. Burgess, 7 N. B. R. 561, 2 Dill. 169, F. C. 693.

[70] In re Eggert, 102 F. R. 735, 4 A. B. R. 449.

[71] In re Jacobs, 99 F. R. 539, 3 A. B. R. 671; In re Abraham, 1 N. B. N. 281, 2 A. B. R. 266, 93 F. R. 767; Stickney v. Wilt, 23 Wall. 150; Milner v. Meek, 95 U. S. 252.

[72] Ruddick v. Billings, 3 N. B. R. 14, Woolw. 330, F. C. 12110.

[73] In re Jaycox, 13 N. B. R. 122, F. C. 7244.

[74] Serra e Hijo v. Hoffman, 17 N. B. R. 124.

[75] In re Lesser, 99 F. R. 913, 3 A. B. R. 758; In re Marsh, F. C. 9108; In re Adler, 2 Woods, 511, F. C. 82; In re Perkins, 8 N. B. R. 56, 5 Biss. 254, F. C. 10982; Morgan v. Thornhill, 5 N. B. R. 1, 11 Wall. 65; Woods v. Buckewell, 7 N. B. R. 405, 2 Dill. 38, F. C. 17991.

[76] In re Horgan, 98 F. R. 414.

[77] Huntington v. Saunders, 64 F. R. 476, 92 F. R. 10.

[78] In re Dickson, 111 F. R. 726, 7 A. B. R. 186.

[79] Sec. 25a, act of 1898.

judgment adjudging or refusing to adjudge a bankrupt, granting or denying a discharge or allowing or rejecting a debt or claim of $500 or over, the courts are not at liberty to disregard the distinction and only non-appealable orders can be reviewed under this provision;[80] which was also the view under the former act;[81] but the present act is mandatory as to the revision while the former was permissive.[82] If the claim is less than $500 it is not within the provision as to appeals and an order allowing or rejecting it is final on the facts but may be reviewed under this provision as to any question of law.

§ 600. **The petition for review.**—It is expressly provided that the power of revision shall be exercised "on due notice and petition by the party aggrieved." While it has been held that the petition may be presented and allowed by a judge of a court of bankruptcy,[83] or any one of the judges of the circuit courts of appeals, the better practice is to present it to the latter.[84] It should state specifically the question of law which was involved and was ruled upon by the court below, and should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose and its determination;[85] and the question of law so presented is the only question which will be decided. Reasonable notice thereof should be given to the adverse party; but where the record contains everything that was done it may contain more than is necessary, but is certainly sufficient, and notice given in open court in the presence of all the parties and their attorneys at the very instant the judgment sought to be revised was announced is due notice.[86]

While neither the statute nor the rules limit the time within which a petition for review should be filed,[87] it should be

[80] In re Worcester County, 102 F. R. 808, 4 A. B. R. 496; In re Good, 99 F. R. 389, 3 A. B. R. 605.

[81] Smith v. Mason, 6 N. B. R. 1, 14 Wall. 419; In re Alexander, 3 N. B. R. 6. Chase, 295, F. C. 160.

[82] Bk. v. Cooper, 20 Wall. 171.

[83] In re Abraham, post.

[84] In re Williams, 105 F. R. 906, 5 A. B. R. 198.

[85] In re Baker, 3 N. B. N. R. 104, 104 F. R. 287; In re Richards, 2 N. B. N. R. 38, 3 A. B. R. 145, 96 F. R. 937; In re Abraham, 2 A B. R. 266, 1 N. B. N. 28, 93 F. R. 767; Courier Journal Co. v. Schaefer Br'g Co., 101 F. R. 699; see also In re Casey, 8 N. B. R. 71, 10 Blatch. 376, F. C. 2495; A. & C. R. R. Co. v. Jones, 5 N. B. R. 97, F. C. 126.

[86] In re Abraham, supra.

[87] In re New York Economical Printing Co., 106 F. R. 839, 5 A. B. R. 697.

within a reasonable time, depending upon the circumstance of each case. The better practice is to fix it at six months, by analogy to the time allowed by the statute for taking appeals to the circuit court of appeals in other cases;[88] and it may be filed, nothwithstanding an appeal has been sued out, as both can be taken at the same time.[89]

§ 601. Who may present petition.—The circuit court of appeals cannot revise the proceedings of the district court in bankruptcy without an issue made and presented by parties who have a substantial interest in the controversy, and who can suitably represent it, or at least without a proper opportunity being given therefor, and where the creditor against whom the petition for review was filed has been paid, and has therefore no longer any interest in the controversy, the court will not proceed further until other creditors, having an interest, are brought in or given an opportunity to come in by notice properly served.[90] A petition for revision should not be dismissed for lack of proper parties, where the parties referred to were not parties to the proceedings below.[91]

§ 602. Finality of decision.—The decision of a circuit court of appeals, in the exercise of its supervisory jurisdiction over proceedings in bankruptcy, is final and no appeal will lie.[92]

[88] In re Worcester County, 102 F. R. 808, 4 A. B. R. 496; Comp. Bk. v. Cooper, 20 Wall. 171; In re Casey, supra; compare In re Good, 3 A. B. R. 605.

[89] In re Fisher, 103 F. R. 860; In re Worcester Co., 102 F. R. 808, 4 A B. R. 496; Imp. Co. v. Bradbury, 132 U. S. 509, 515.

[90] In re Baker, 3 N. B. N. R. 104, 104 F. R. 287.

[91] In re Utt, 105 F. R. 754, 5 A. B. R. 383.

[92] Hall v. Allen, 9 N. B. R. 6, 12 Wall. 452; Wiswall v. Campbell, 15 N. B. R. 421; Bk. v. Cooper, 9 N. B. R. 529, 20 Wall. 171.

CHAPTER XXV.

APPEALS AND WRITS OF ERROR.

§603. (25a) Appealable cases and time of appeal.
604. Subject of provision.
605. Appealable cases.
606. Non appealable cases.
607. Who may appeal.
608. From whose decisions.
609. Time of appeal.
610. How appeal taken.
611. Appeal and petition for review at same time.
612. Effect of appeal.
613. b. Appeal to Supreme Court from Circuit Courts of Appeals. (1) Where amount exceeds $2,000. (2) On certificate of Justice.
614. How and from what appeal taken.
615. What constitutes matter or amount in controversy.
616. c. No bond required of trustees.
617. d. Certification of cases and certiorari.
618. Requisites for certiorari.

§ 603. '(Sec. 25a) **Appealable cases and time of appeal.**—'That appeals, as in equity cases, may be taken in bankruptcy 'proceedings from the courts of bankruptcy to the circuit 'court of appeals of the United States, and to the supreme 'court of the Territories, in the following cases, to wit, (1) 'from a judgment adjudging or refusing to adjudge the defend-'ant a bankrupt; (2) from a judgment granting or denying a 'discharge, and (3) from a judgment allowing or rejecting a 'debt or claim of five hundred dollars or over. Such appeal 'shall be taken within ten days after the judgment appealed 'from has been rendered, and may be heard and determined 'by the appellate court in term or vacation, as the case may 'be.'[1]

[1] Analogous provisions of Act of 1867. "Sec. 8. . . . That appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error may be allowed to said circuit courts from said district courts in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than five hundred dollars, and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim may appeal from a decision of the district court to the circuit court from the same district, but no appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also

§ 604. **Subject of provision.**—This section applies to "bankruptcy proceedings" as such,[2] as appears from the specification of the cases from which it provides an appeal, and supplements the preceding provision,[3] which provides for the summary review in the matter of law of all other orders of the district courts in "bankruptcy proceedings" as such; while section 25 is confined to "appeals as in equity cases" and covers both fact and law.[4] "Controversies arising in bankruptcy proceedings," that is, between the trustee on one side and a stranger to the proceedings on the other, are to be reviewed in the same manner and under the same rules as other cases in the United States courts.[5] Thus three methods are provided, (1) a review in matter of law of all orders in bankruptcy except those provided for in the second method; (2) an appeal in case of orders adjudging or refusing to

to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from. The appeal shall be entered at the term of the circuit court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same. But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken; and no appeal shall be allowed unless the appellant at the time of claiming the same shall give bond in man[ner] now required by law in cases of such appeals. No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs. . . . .

Sec. 24. That a supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in action at law commenced and prosecuted in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court shall be conclusive."

[2] Shutts v. Bk., 2 N. B. N. R. 320, 3 A. B. R. 492, 98 F. R. 705, 709.

[3] Sec. 34b, act of 1898.

[4] In re Worcester Co., 102 F. R. 808, 4 A. B. R. 496; Courier Journal Co. v. Schaefer Brewing Co., 101 F. R. 699, 4 A. B. R. 183; In re Richards, 2 N. B. R. 38, 3. A. B. R. 145, 96 F. R. 935.

[5] Sec. 24a, act of 1898.

adjudge bankrupt; granting or denying a discharge, which is held to include granting or refusing an order confirming a composition;[6] the same reasoning allowing or rejecting a claim of $500 or over; and (3) an appeal in the usual way in controversies arising in bankruptcy proceedings.

§ 605. **Appealable cases.**—Hence an appeal under this provision lies from the district court to the circuit courts of appeal from orders adjudging a person a bankrupt;[7] or allowing a claim of $500;[8] notwithstanding it also settles the priority of such claim, which latter could be the subject of review;[9] and includes as an incident the question as to the rank or lien of such claim in the distribution of the estate, at least where such question is one of controverted fact and law;[10] or the allowance of an attorney's fee included in the claim of a mortgaged creditor, who proves his claim as a secured one;[11] or to petitioning creditors in an involuntary case;[12] or from an order refusing or confirming a composition, since it is the equivalent of an order of discharge.[13]

In an appeal from a judgment adjudging or refusing to adjudge the defendant a bankrupt in which a jury trial was not had or demanded, but the court of bankruptcy proceeds on its own findings of fact, both the facts and law are reexaminable on appeal, while if the judgment is entered on the verdict of a jury, the issue of facts is concluded and the judgment is reviewable for errors of law only; in the latter case errors in instructions given or refused or in the admission or rejection of evidence must appear by exceptions duly taken

[6] Adler v. Hammond, 3 N. B. N. R. 58, rev'g 3 N. B. N. R. 15, 103 F. R. 444, 4 A. B. R. 583.

[7] Elliott & Co. v. Toeppner, 187 U. S. 327, 9 A. B. R. 50; In re Good, 99 F. R. 389, 3 A. B. R. 605; Parmenter Mfg. Co. v. Stoever, 2 N. B. N. R. 174, 3 A. B. R. 220, 97 F. R. 330; Simonson v. Sinsheimer, 100 F. R. 426, 3 A. B. R. 824.

[8] In re Eagle v. Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 F. R. 695.

[9] In re Worcester Co., 102 F. R. 808, 4 A. B. R. 496.

[10] Cunningham v. Bk., 103 F. R. 932, 2 N. B. N. R. 689, 4 A. B. R. 192; Courier Journal Co. v. Schaefer Br'g Co., 101 F. R. 699, 4 A. B. R. 183.

[11] In re Roche, 101 F. R. 956, 4 A. B. R. 369.

[12] In re Curtis, 100 F. R. 784, 4 A. B. R. 17.

[13] United States v. Hammond, 104 F. R. 862, 4 A. B. R. 736, overruling In re Adler, 3 N. B. N. R. 15, 103 F. R. 444, 4 A. B. R. 583; compare Ross v. Saunders, 105 F. R. 915, 5 A. B. R. 350.

and preserved by bill of exceptions.[14] The finding of the court below, whether through a verdict or through a decision by the judge or chancellor, where the issue is peculiarly one of fact, as whether there was fraud, will not be disturbed unless the appellate court is clearly convinced that it is opposed to the weight of evidence, or plain and manifest error appears.[15]

§ 606. **Non-appealable cases.**—This section has no reference to independent suits to assert title to property or money as assets of the bankrupt against strangers to the proceedings.[16] It has been held that an appeal would not lie from an order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication;[17] or from an interlocutory order reversing a ruling of the referee made during the bankrupt's examination, refusing to require him to produce his books;[18] or from an order requiring the bankrupt summarily to do certain acts, his remedy seeming to have been to refuse to do the acts and, on contempt proceedings against him, to take proper steps for their review;[19] or from any judgment rendered or order made by a court of bankruptcy in the administration of an estate, except the particular judgments enumerated in this section, and would not lie from a judgment entered on a petition of intervention filed by a claimant of property in the hands of a trustee declaring the ownership of the intervener, and ordering restitution of the property, such judgment not being one allowing a claim within the meaning of the statutes; the "debt or claim of $500 or over" would seem to mean a moneyed demand, the same as debt, and was used not to enlarge but to render certain;[20] nor would objections to the sufficiency of specifications in opposition to a discharge be considered, where they were not presented or passed upon by the court below.[21]

§ 607. **Who may appeal.**—The general rule that any party

[14] Elliott & Co. v. Toeppner, 187 U. S. 327, 9 A. B. R. 50; Insurance Co. v. Comstock, 16 Wall. 258; Duncan v. Landis, 106 F. R. 839, 5 A. B. R. 649.

[15] Osborne v. Perkins, 112 F. R. 127, 7 A. B. R. 250.

[16] Boonville Nat. Bk. v. Blakey, 107 F. R. 891, 6 A. B. R. 13.

[17] Goodman v. Brenner, 109 F. R. 481.

[18] In re Ives, 113 F. R. 911, 7 A. B. R. 692.

[19] In re Fisher, 103 F. R. 860.

[20] In re Whitener, 105 F. R. 180.

[21] Osborne v. Perkins, 112 F. R. 127, 7 A. B. R. 250.

in interest adversely affected by an appealable decision may appeal applies, but, in its application, it must be remembered that the trustee represents the bankrupt, the estate and the creditors—the bankrupt to see that his estate is administered so as to pay his creditors as far as possible; the estate to see that it is all realized and administered to the best advantage and the creditors to enforce their rights. In the adjudication, the bankrupt and the creditors are the interested parties and creditors appearing in opposition to an involuntary petition as well as the bankrupt and petitioning creditors may appeal if the decision is adverse to their interests. If the act of bankruptcy alleged is a voluntary general assignment, the assignee may intervene and, if necessary, appeal.[22] In the granting or denying of a discharge the trustee is not interested, it being a personal privilege of the bankrupt, and so the parties in interest are the opposing creditors and the bankrupt. In the allowance of claims, all, trustee, bankrupt and creditors, are interested, though to allow each if dissatisfied to appeal, would be to multiply appeals and allow fractious creditors to delay the proceedings, and the appeal must be taken in such case by the trustee, or, if he refuses, or fails to act, the bankruptcy court may, on its own motion, if doubtful of its decision, order him to appeal, or may make such order on application of a dissatisfied party, or, in its discretion, allow such party to appeal in the name of the trustee.[23] In rejecting a claim only the particular creditor whose claim it is can appeal. It should be observed that to be appealable the order must be one allowing or rejecting a claim of $500 or over; so that, if the claim amounts to as much as $500, the order allowing or rejecting it will be appealable irrespective of the fact that it may be partially allowed. Such a case would be appealable by those entitled to appeal from an allowance and the party entitled to appeal from a rejection.

§ 608. **From whose decisions.**—It should be observed that

[22] In re Meyer, 98 F. R. 976.

[23] Chatfield v. O'Dwyer, 101 F. R. 797, 4 A. B. R. 313; Foreman v. Burleigh, 109 F. R. 313, 6 A. B. R. 230; McDaniel v. Stroud, 106 F. R. 486; 5 A. B. R. 685; In re Troy Woolen Co., 1 Blatch. 191, F. C. 14204; In re Joseph, 2 Woods, 390, F. C. 7532; In re Place, 4 N. B. R. 178, 8 Blatch. 302, F. C. 11200; In re Randall, 1 Sawy. 56, F. C. 11552; In re Curtis, 100 F. R. 784, 4 A. B. R. 17, rev'g 91 Id. 737; In re Roche, 101 F. R. 956, 4 A. B. R. 369.

an appeal is confined to the decisions of the courts of bankruptcy. If the purpose is to secure a review of a referee's decision, the question must be certified to the judge and the appeal taken from the latter's action.

§ 609. **Time of appeal.**—An appeal under this section must be taken within ten days. Unless so taken and all the statutory requirements complied with, the appellate court will be without jurisdiction;[24] but it has been held that a court may, in its discretion, overlook a breach of its own rules;[25] and, where the failure to appeal in time was due to a mistake of the remedy, the lower court may grant a review of the decision, from which an appeal is desired, so that an appeal may be in time,[26] even though the lower court is satisfied with its original decision on the merits and is unwilling to grant a rehearing in order to give these merits further consideration.[27] But the court cannot extend the time for appeal.[28] The time fixed by this subdivision has no application to appeals in independent proceedings instituted for the recovery of assets of the estate or to set aside alleged preferences, which are governed by the general provisions regulating appeals to the circuit courts of appeals.[29]

While it has been held that if a circuit or district court permits the filing of a petition for rehearing during the term at which the order sought to be reviewed was entered,[30] it retains jurisdiction to act on it at the succeeding term, and the time for appeal does not begin to run until action is taken on the petition,[31] such decisions seem to overlook the fact that in the bankruptcy court the term is continuous from the commencing of a proceeding to the closing of an estate.[32] Where

[24] Benjamin v. Hart, 4 N. B. R. 138, 4 Ben. 454, F. C. 1302; Wood v. Bailey 12 N. B. R. 132, 21 Wall. 640; Sedgwick v. Fridenberg, 11 Blatch. 77, F. C. 12611; In re York, 4 N. B. R. 156, F. C. 18139; Hawkins v. Bk., 1 Dill, 453, F. C. 6245.

[25] Barron v. Morris, 14 N. B. R. 371, F. C. 9828.

[26] Stickney v. Wilt, 11 N. B. R. 97, 23 Wall. 150, 164.

[27] In re Wright, 3 A. B. R. 184, 96 F. R. 820.

[28] Judson v. Courier Co., 25 F. R. 705.

[29] Booneville Nat. Bk. v. Blakey, 107 F. R. 891, 6 A. B. R. 13.

[30] In re Anderson, 23 F. R. 482.

[31] In re Worcester Co., 102 F. R. 808, 4 A. B. R. 496; Andrews v. Thum, 64 F. R. 149; Kingman & Co. v. Western Mfg. Co., 170 U. S. 675, 679.

[32] See § 28, ante.

appellant, within ten days after the adjudication, prayed an appeal, which was allowed, and filed a bond, but the petition for the appeal, its allowance, and the citation and service thereon were not filed in the district court until after the expiration of the ten days, the appeal was not in time and should be dismissed.[33] A judgment allowing or rejecting a claim is presumptively rendered at the date of its filing with the clerk, and the ten days would begin to run from that time.[34]

§ 610. **Appeal, how taken.**—The appellant must present a petition praying the appeal accompanied by an assignment of errors, without which the judgment will be affirmed,[35] and, if by others than the trustee, an appeal bond, to the judge of the court of bankruptcy or circuit court of appeals. It should be presented to the judge of the court of bankruptcy first, and, in case of his refusal to allow it, to the judge of the circuit court of appeals. This is the usual course and the higher judge, unless there was reason for not having presented it to the lower, would exact this requirement. Upon the allowance of the appeal and the approval of the bond, indorsed on it usually, the papers with the citation, with evidence of service on the adverse party,[36] should be filed in the clerk's office of the court of bankruptcy, which must be done within ten days after the order appealed from or the appeal will be dismissed.[37] If the papers are regular and the judge applied to refuses to allow the appeal, he may be compelled to do so by mandamus.[38] On notice of an appeal, the citation must be given.[39]

§ 611. **Appeal and petition for review.**—A petition for review may be made notwithstanding that an appeal has been taken.[40]

§ 612. **Effect of appeal.**—An appeal cannot be used to give

[33] Norcross v. Mercantile Co., 101 F. R. 796, 4 A. B. R. 317.

[34] Peterson v. Nash Bros. 112 F. R. 311.

[35] Lloyd v. Chapman, 93 F. R. 599; In re Dunning, 94 F. R. 709.

[36] Mead v. Platt, 17 F. R. 509; Ex. p. Mead, 109 U. S. 230.

[37] G. O. XXXVI (1); Norcross v. Mercantile Co., 101 F. R. 796, 4 A. B. R. 317.

[38] Ins. Co. v. Comstock, 8 N. B. R. 145, 16 Wall. 258.

[39] Wear v. Mayer, 6 F. R. 658.

[40] In re Fisher, 103 F. R. 860; In re Worcester Co., 102 F. R. 808, 4 A. B. R. 496; In re Jourdan, 111 F. R. 726, 7 A. B. R. 186.

a party a second trial; but only to re-examine and revise the rulings and decree;[41] and, under the Act of 1867, where a party appealed from the circuit court to the Supreme Court, it was held that the allowance of the appeal related back to the time when the original application was made for appeal to the circuit court and entitled the party to a stay of proceedings, which would be true of an appeal hereunder.[42] The appellate court will construe instructions reasonably and, if they are correct when applied to the facts submitted to the jury, will sustain them, though, if standing alone, they would be incomplete.[43]

§ 613. 'b. **Appeal to Supreme Court from Circuit Court 'of Appeals.**—From any final decision of a court of appeals, 'allowing or rejecting a claim under this act, an appeal may 'be had under such rules and within such time as may be 'prescribed by the Supreme Court of the United States, in 'the following cases and no other:

'1. **When amount exceeds $2,000.**—Where the amount in 'controversy[44] exceeds the sum of two thousand dollars, and 'the question involved is one which might have been taken on 'appeal[45] or writ of error from the highest court of a state to 'the Supreme Court of the United States; or

'2. **On certificate of Justice.**—Where some Justice of the 'Supreme Court of the United States shall certify that in his 'opinion the determination of the question or questions in-'volved in the allowance or rejection of such claim is essential 'to a uniform construction of this act throughout the United 'States.'[46]

[41] In re Dow, 6 N. B. R. 10, F. C. 4036.

[42] Thornhill v. Bk., 5 N. B. R. 377, F. C. 13991.

[43] Willis v. Carpenter, 14 N. B. R. 521, F. C. 17770.

[44] Note the different phraseology here: "exceeds the sum of two thousand dollars." The amount in controversy would not, under this provision, suffice if just $2,000.

[45] The use of the word "appeal" in reference to the removal of cases from the highest court of a State to the Supreme Court was probably a slip, as such cases are taken to the Supreme Court by writ of error only. (U. S. Rev. Stat., Sec. 109; Egan v. Hart, 165 U. S. 188), and only when there is an adverse decision on a federal question on which the decision rests.

[46] It will be observed that if the case comes under this subdivision, there is no specified amount required.

Analogous provision of Act of

§ 614. **How and from what appeal taken.**—The Supreme Court provides in its General Orders that the lower court, when rendering judgment or decree, must make and file a finding of the facts and its conclusions of law thereon, stated separately, and the record to be transmitted to the Supreme Court is to contain only the pleadings, the judgment or decree, the finding of facts and the conclusions of law. Under this subdivision an appeal to the Supreme Court must be taken within thirty days after judgment,[47] and is allowed only in cases coming under clause 3 of section 25a, and then only from the final decision, i. e., one that cannot be further affected by action in the circuit court of appeals.[48]

§ 615. **What constitutes matter or amount in controversy.**—As to what constitutes "matter in controversy" or "matter in dispute," the Supreme Court has long since definitely stated the law. Chief Justice Taney, in Barry v. Barry,[49] states that matter in controversy, under section 22 of the Judiciary Act, must be "money or some right, the value of which, in money, can be calculated and ascertained. * * * The words of the act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of business transactions. * * * It is the same in judgments in criminal cases, although the liberty or life of the party may depend on the decision of the circuit court." Chief Justice Marshall, in passing upon this same question in Gordon v. Ogden,[50] said: "The jurisdiction of the court has been supposed to depend on the sum or the value of the matter in dispute in this court, not on that which was in dispute in the circuit court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and consequently

1867. "Sec. 9. . . . That in cases arising under this act no appeal or writ of error shall be allowed in any case from the circuit courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed two thousand dollars."

[47] G. O. XXXVI, 2 and 3.

[48] See Duff v. Carrier, 55 F. R. 433; Aff'g 51 F. R. 906.

[49] 5 How. 103.

[50] 3 Pet. 33.

the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties." The same view is laid down in Kanouse v. Martin,[51] wherein it is held that: "The settled rule is, that until some further judicial proceedings have taken place, showing upon the record that the sum demanded in the declaration is not the matter in dispute, that sum is the matter in dispute."

§ 616. **'c. No bond required of trustees.**—Trustees shall 'not be required to give bond when they take appeals or sue 'out writs of error.'

§ 617. **'d. Certification of cases and certiorari.**—Contro- 'versies may be certified to the Supreme Court of the United 'States from other courts of the United States, and the former 'court may exercise jurisdiction thereof and issue writs of 'certiorari pursuant to the provisions of the United States 'laws now in force or such as may be hereafter enacted.'

§ 618. **Requisites for certiorari.**—No certiorari for diminution of the record will be awarded by the Supreme Court in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court accounting satisfactorily for the delay.[52]

By the act of March 3, 1891,[53] it is provided that the Supreme Court may require by certiorari or otherwise certain cases made final in the circuit courts of appeals to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court. Apart from section 25 of the law, the circuit courts of appeals have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings and also jurisdiction

[51] 15 How. 198.
[52] Sup. Ct. Rule 14.
[53] 1 Supp. R. S. 903, Sec. 6.

of controversies over which they would have appellate jurisdiction in other cases. The decisions of those courts may be reviewed in the Supreme Court on certiorari or in certain cases by appeal, under section 6 of the act of 1891.[54] The writ of certiorari may also be allowed by the supreme court in aid of the writ of habeas corpus and for the purpose of enlarging the scope of that writ.[55]

See discussion of the certification of cases and the use of certiorari under Sec. 24 of the law, ante § 598.

[54] First Nat. Bk. of Denver v. Klug, 186 U. S. 202; 8 A. B. R. 12; Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224.

[55] Ex. p. Lange, 18 Wall. 163; In re Chetwood, 165 U. S. 443; R. S. U. S., § 716.

CHAPTER XXVI.

ARBITRATION OF CONTROVERSIES.

§619. (26a) Arbitration of controversies.
620. b. Arbitrators, mode of choosing.
621. c. Effect of findings.
622. Application for.
623. To whom addressed.
624. Selection and finding of arbitrators.

§ 619. '(Sec. 26a) **Arbitration of controversies.**—The trus-'tee may, pursuant to the direction of the court, submit to arbi-'tration any controversy arising in the settlement of the es-'tate.'

§ 620. 'b. **Arbitrators, mode of choosing.**—Three arbitra-'tors shall be chosen by mutual consent, or one by the trustee, 'one by the other party to the controversy, and the third by 'the two so chosen, or if they fail to agree in five days after 'their appointment the court shall appoint the third arbitra-'tor.'

§ 621. 'c. **Effect of findings.**—The written finding of the ar-'bitrators, or a majority of them, as to the issues presented, 'may be filed in court and shall have like force and effect as 'the verdict of a jury.'[1]

§ 622. **Application for.**—This provision affords an expeditious and inexpensive mode of adjusting, without litigation, many of the contested claims arising in the settlement of an estate. The application of the trustee to submit a controversy to the determination of arbitrators must clearly and distinctly set forth the subject-matter of the controversy and the reasons why he thinks it proper and for the best interests of the estate to have the controversy so settled.[2] The court may hear testimony and arguments of counsel upon the application, though

[1] Analogous provision of Act of 1867. "Sec. 17. . . . He may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due it, to the determination of arbitrators, to be chosen by him, and the other party to the controversy, and may, under such direction, compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors."

[2] G. O. XXXIII.

there is no provision for notice to creditors of such hearings or proceedings, the better practice, however, is to give notice.

§ 623. **To whom addressed.**—This application may be addressed to the Court of Bankruptcy or to the referee, since he is required generally to perform the duties of such court[3] and is comprehended within the definition of the term court.[4] Under the Act of 1867 the application had to be made to a judge.[5]

§ 624. **Selection and finding of arbitrators.**—As all three of the arbitrators are to be mutually chosen or one by the trustee and one by the other party, and the third by the two thus chosen, or on their failure, by the court, it is unlawful for the third arbitrator to be selected by the two contending parties.[6]

When one becomes a party to a submission to arbitration he is bound by the decision in a collateral action.[7] As the finding of the arbitrators is to have like force and effect as the verdict of a jury, such finding when so filed is necessarily reviewable and liable to be set aside or adjudged upon by the court as a verdict would be. Consequently in a case where a few days before filing his petition a bankrupt gave a mortgage to one of his creditors which on being submitted to arbitrators was held not given with intent to hinder, delay or defraud creditors, such finding was held unwarranted and set aside as its necessary effect was to prefer the mortgagee and to hinder and delay others, and such must be presumed to have been his intent.[8]

[3] Sec. 38a (4), act of 1898.

[4] Sec. 1 (7), act of 1898.

[5] In re Graves, 1 N. B. R. 237, F. C. 5709.

[6] In re McLam, 97 F. R. 922, 3 A. B. R. 245.

[7] Johnson v. Worden, 13 N. B. R 335.

[8] In re McLam, supra.

CHAPTER XXVII.

COMPROMISES.

§625. (27a) Compromise of controversies.
626. Application.
627. When to be granted.
628. Compounding claims.
629. Plan of settlement not authorized.

§ 625. '(Sec. 27a) **Compromise of controversies.**—The trus-'tee may, with the approval of the court, compromise any con-'troversy arising in the administration of the estate upon 'such terms as he may deem for the best interests of the es-'tate.'[1]

§ 626. **Application.**—To be obliged to litigate all of the contested claims arising in the settlement of an estate would prove a source of great expense and delay, which this section seeks to avoid by providing an economic and speedy mode by which the trustee may dispose of the same as advantageously as possible to the estate. Creditors, however, must have at least ten days' notice by mail of the proposed compromise of any controversy.[2] The trustee must clearly and distinctly set forth in his application, which may be made to the court of bankruptcy or the referee,[3] the subject-matter of the controversy and the reason why he thinks it proper and most for the interest of the estate to compromise.[4]

§ 627. **When to be granted.**—This provision authorizes the compromise of claims of trustees against third persons to recover moneys due bankrupt or controversies between such trustees and persons holding or claiming adversely to them, as a claim by a trustee to an accounting by a preferential transferee and fraudulent grantee of bankrupt;[5] or of contro-

[1] Analogous provision of Act of 1867. "Sec. 17. . . . The assignee . . . may, under such direction [i. e. of the court], compound and settle any such controversy by agreement with the other party, as he thinks proper and most for the interest of the creditors."

[2] Sec. 58a (7), act of 1898; In re Heyman, 108 F. R. 207, 5 A. B. R. 808.

[3] Sec. 1 (7), act of 1898.

[4] G. O. XXXIII.

[5] Hicks v. Knost, 1 N. B. N. 336, 2 A. B. R. 153, 94 F. R. 625; citing In re Sievers, 1 A. B. R. 117, 1 N. B. N. 68, 91 F. R. 366, and Car-

versies between trustee and a stranger to the bankruptcy proceedings;[6] or at law or in equity, as distinguished from proceedings in bankruptcy, between trustee as such and adverse claimants concerning the property acquired or claimed by the trustee.[7] Notwithstanding the fact that the creditors may by vote approve a proposed compromise submitted by a debtor of the estate, such action is not conclusive, for the court may for good cause disallow it.[8]

§ 628. **Compounding claims.**—Whenever it may be deemed for the benefit of the estate to compound and settle any debts or other claims due or belonging to the bankrupt, the trustee or bankrupt or any creditor who has proved his debt may file his petition therefor addressed to the judge or referee and thereupon he will appoint a suitable time and place for the hearing thereof, notice of which must be given as the court may direct, presumably at least ten days, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustees.[9]

Under the Act of 1867, it was held that an assignee could not be authorized to compound debts for the purpose of compromising the same under direction of a committee of creditors, where all creditors did not vote when such committee was appointed, but that each case must be presented separately and the facts making the compromise properly stated.[10]

If after a proposition of settlement has been made a trustee applies for instructions as to a suit the creditors wish brought, he must show that a better result is likely to be obtained by suit than by accepting the proposed settlement and that he will probably succeed, though he is not expected to demonstrate that he will certainly do so.[11]

ter v. Hobbs, 1 A. B. R. 215, 1 N. B. N. 191, 92 F. R. 594, with disapproval; and Burnett v. Morris Mercantile Co., 1 A. B. R. 229, 91 F. R. 365, 1 N. B. N. 138; Mitchell v. McClure, 1 A. B. R. 53, 1 N. B. N. 138, 91 F. R. 621, and In re Abraham, 1 A. B. R. 266, 93 F. R. 767, 1 N. B. N. 281, with approval.

[6] Shutts, tr. v. Bk., 2 N. B. N. R. 320, 3 A. B. R. 492, 98 F. R. 705.

[7] In re Abraham, 2 A. B. R. 266, 93 F. R. 767, 1 N. B. N. 281.

[8] In re Heyman, 108 F. R. 207, 5 A. B. R. 808.

[9] G. O. XXVIII.

[10] In re Dibblee, 3 N. B. R. 17, 3 Ben. 354, F. C. 3885.

[11] In re Phelps, 2 N. B. N. R. 484, 3 A. B. R. 396.

§ 629. **Plan of settlement not authorized.**—Where a plan for the settlement and distribution of the bankrupt's estate not within the provisions of the act is proposed, it is only justifiable if all known creditors consent; and is liable to be interfered with if other creditors appear within the year, for such creditors are entitled to their day in court and to their ratable share of the undistributed assets; and, on a motion by such creditors to set aside an order authorizing the execution of such plan, the distribution of the estate must be arrested until their claims can be liquidated or found invalid, but their merits are not to be passed upon on such motion but in the regular course of the proceedings.[12]

[12] In re Lockwood, 3 N. B. N. R. 57, 104 F. R. 794, 4 A. B. R. 731.

CHAPTER XXVIII.

DESIGNATION OF NEWSPAPERS.

§ 630. '(Sec. 28a) **Court to designate newspapers.**—Courts 'of bankruptcy shall by order designate a newspaper published 'within their respective territorial districts, and in the county 'in which the bankrupt resides or the major part of his prop-'erty is situated, in which notices required to be published by 'this Act and orders which the court may direct to be published 'shall be inserted. Any court may in a particular case, for the 'convenience of parties in interest, designate some additional 'newspaper in which notices and orders in such case shall be 'published.'[1]

§ 631. This provides in effect that the district court shall, by standing order, designate one paper in each county for the publication of notices; and that, in a particular case, the judge, or the referee, may order the publication of notices in an additional paper. For the publication of notices to creditors of the first meeting, etc., see section 58b, of the law, post.

[1] Analogous provision of Act of 1867. "Sec. 11. . . . And the judge of the district court, or if there be no opposing party, any register of said court, to be designated by the judge, shall forthwith, if he be satisfied that the debts due from the petitioner exceed $300, issue a warrant . . . . directed to the marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies, etc."

CHAPTER XXIX.

OFFENSES.

§632. (29a) By trustee.
633. Jurisdiction of courts over offenses.
634. —— Practice.
635. —— Of trustee.
636. b. By bankrupt, or others.
637. Concealment of assets.
638. False oath.
639. Advice of counsel.
640. Receiving property from bankrupt.
641. c. By referee.
642. d. Indictment must be found within a year.
643. Limitation upon prosecutions.
644. Habeas corpus.

§ 632. '(Sec. 29a) **Offense as trustee.**—A person shall be 'punished, by imprisonment for a period not to exceed five 'years, upon conviction of the offense of having knowingly and 'fraudulently appropriated to his own use, embezzled, spent, or 'unlawfully transferred any property or secreted or destroyed 'any document belonging to a bankrupt estate which came into 'his charge as trustee.'

§ 633. **Jurisdiction of courts over offenses.**—Courts of bankruptcy with which the circuit courts have concurrent jurisdiction[1] within their respective territorial limits, have jurisdiction to arraign, try and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the procedure of the United States now in force, or such as may hereafter be enacted, regulating trials for the alleged violation of the laws of the United States.[2] Alleged offenses under this act may be submitted to a jury according to the laws of the United States now in force, or such as may hereafter be enacted in relation to trials by jury.[3]

§ 634. ——**Practice.**—Offenses under the act may be prosecuted on information or indictment;[4] and, if the bankruptcy court obtains jurisdiction over violators of the act, it may enforce the provisions against them though they may be

[1] Sec. 23c, act of 1898.
[2] Sec. 2 (4), act of 1898.
[3] Sec. 19c, act of 1898.
[4] U. S. v. Block, 15 N. B. R. 325, 4 Sawy. 211, F. C. 14609.

aliens.[5] The indictments should aver scienter and all essential facts necessary to constitute the offense as defined in the act.[6]

§ 635. —— **Of trustee.**—This provision is for the punishment of the trustee if he knowingly and fraudulently appropriates to his own use, embezzles, spends or unlawfully transfers any property or secretes or destroys any document belonging to a bankrupt estate which comes into his charge as such trustee, and has no reference to the bankrupt nor to anyone else.[7] In the event the trustee misappropriates funds, he cannot be compelled to testify, if he refuses to answer upon the ground that his answer may incriminate him.[8]

§ 636. 'b. **By bankrupts, or others.**—A person shall be pun-'ished, by imprisonment for a period not to exceed two years, 'upon conviction of the offense of having knowingly and fraud-'ulently

'(1) Concealed while a bankrupt, or after his discharge, from 'his trustee any of the property belonging to his estate in 'bankruptcy; or

'(2) Made a false oath or account in, or in relation to, any 'proceeding in bankruptcy;

'(3) Presented under oath any false claim for proof against 'the estate of a bankrupt, or used any such claim in composi-'tion personally or by agent, proxy, or attorney, or as agent, 'proxy, or attorney; or

'(4) Received any material amount of property from a bank-'rupt after the filing of the petition, with intent to defeat this 'Act; or

'(5) Extorted or attempted to extort any money or property 'from any person as a consideration for acting or forbearing to 'act in bankruptcy proceedings.'[9]

§ 637. **Concealment of assets.**—This offense would occur

[5] Olcott v. McLean, 14 N. B. R. 379.

[6] U. S. v. Prescott, 4 N. B. R. 29, 2 Biss. 325, F. C. 16084.

[7] See In re Webb, 2 N. B. N. R. 11, 3 A. B. R. 204.

[8] In re Smith, 112 F. R. 509, 7 A. B. R. 213.

[9] Analogous provision of Act of 1867. "Sec. 7. . . . All persons wilfully and corruptly swearing or affirming falsely before a register shall be liable to all the penalties, punishments, and consequences of perjury.

"Sec. 44. . . . If any debtor or bankrupt shall, after the commencement of proceedings in bank-

ruptcy, secrete or conceal any property belonging to his estate, or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same or any part thereof out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same, or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent, or spends any part thereof in gaming; or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee or omit from his schedule any property or effects whatsoever; or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or shall attempt to account for any of his property by fictitious losses or expenses; or shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by bona fide transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for, he shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years.

"Sec. 45. . . . That if any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this act, or under color of doing anything thereunder, wilfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by this act, or which shall be allowed under the authority thereof, such person, when convicted thereof, shall forfeit and pay the sum of not less than three hundred dollars and not exceeding five hundred dollars, and be imprisoned not exceeding three years.

"Sec. 46. . . . That if any person shall forge the signature of a judge, register or other officer of the court, or shall forge or counterfeit the seal of the courts, or knowingly concur in using any such forged or counterfeit signature or seal for the purpose of authenticating any proceeding or document, or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any judge, register, or other officer, or a false

where assets are secreted, falsified or mutilated.[10] This is a penal provision and cannot therefore be given a retroactive effect so that to create an offense under it the act must have been committed since July 1, 1898, the date of the passage of the law.[11] The offense is concealing from the trustee so that, if no trustee has been appointed, there can be no offense;[12] but if property is afterwards discovered, the proper course is to have a trustee appointed,[13] and then, if the concealment continues, the offense will be committed. Demand by the trustee is not necessary, but the offense is complete when the schedule is filed.[14] It must be knowingly and fraudulently done;[15] and, if due to a mistake either in law or fact, it does not constitute the offense,[16] nor where property is omitted because deemed worthless or because after acquired,[17] or because it was not known at the time that a substantial interest existed

or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, any such person shall be guilty of felony, and upon conviction thereof shall be liable to a fine of not less than five hundred dollars, and not more than five thousand dollars, and to be imprisoned not exceeding five years, at the discretion of the court."

[10] Sec. 1 (22), act of 1898.

[11] In re Quackenbush, 2 N. B. N. R. 964, 4 A. B. R. 274, 102 F. R. 282; In re Webb, 2 N. B. N. R. 289, 3 A. B. R. 386, 98 F. R. 404, below 2 N. B. N. R. 11, 3 A. B. R. 204.

[12] In re Leszynsky, 2 N. B. N. R. 738.

[13] In re Smith, 1 N. B. N. 532, 2 A. B. R. 190, 93 F. R. 791.

[14] U. S. v. Smith, 13 N. B. R. 6, F. C. 16339; U. S. v. Clark, 4 N. B. R. 14.

[15] In re Lowenstein, 1 N. B. N. 329, 2 A. B. R. 193; In re Cohn, 1 N. B. N. 330, 1 A. B. R. 655; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366, 370; In re Mendelson, 1 N. B. N. 391; In re Roy, 1 N. B. N. 526, 3 A. B. R. 37, 96 F. R. 400; In re Skinner, 97 F. R. 190, 3 A. B. R. 163; In re Hyman, 3 A. B. R. 169, 171, 97 F. R. 195; In re Freund, 2 N. B. N. R. 236, 3 A. B. R. 418, 98 F. R. 81; In re Adams, 104 F. R. 72, 2 N. B. N. R. 1034; See also In re Hussman, 2 N. B. R. 437; In re Rathbone, 1 N. B. R. 145, F. C. 11583; In re Goodfellow, 3 N. B. R. 114, F. C. 5536; In re Rainsford, 5 N. B. R. 581, F. C. 11537; In re Hill, 1 N. B. R. 42, 2 Ben. 136, F. C. 6483.

[16] In re Morrow, 3 A. B. R. 263, 97 F. R. 574; In re Schreck, 1 N. B. N. 334, 1 A. B. R. 366, 370; Huber v. Huber, 1 N. B. N. 431; In re Wilson, F. C. 17783; In re Boynton, 10 F. R. 277; In re Warre, 10 F. R. 377; In re Freeman, 4 N. B. R. 17, 4 Ben. 245, F. C. 5082.

[17] In re Pearce, F. C. 10783; In re Winsor, 16 N. B. R. 152, F. C. 17885; In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358; In re Todd, 112 F. R. 315, 7 A. B. R. 770.

in the property concealed;[18] or where the property was incumbered for more than it was worth.[19]

To constitute the offense the bankrupt must have a present interest in the property, and, if previously to the bankruptcy proceedings he has actually conveyed it away so that between him and the grantee the title has actually passed, though the conveyance might be set aside by creditors or a trustee in bankruptcy, such transfer not being merely colorable or on a secret trust for bankrupt's benefit, his failure to include it would not constitute the offense.[20] The intentional and fraudulent omission of property previously conveyed in fraud of creditors, whether such conveyance was prior or subsequent to the bankruptcy act, where there is a secret trust for bankrupt's benefit, is a violation of the act, because the concealment is a continuing act and is perpetuated whenever the bankrupt's duty to reveal such assets exists and is knowingly disregarded and concealment may be effected by concealment of the title as well as by hiding the property, and it is not necessary that bankrupt himself should be able to recover it, if his creditors or trustee can do so.[21] Also where property was concealed from the receiver of a state court and was not subsequently turned over to the trustee in bankruptcy;[22] or where there is a large shortage in the bankrupt's assets, or a disappearance of some, which bankrupt fails to satisfactorily explain;[23] but mere

[18] In re Hirsch, 2 N. B. N. R. 137, 3 A. B. R. 344, 97 F. R. 571; In re Parker, F. C. 10720; In re Shoemaker, F. C. 12799.

[19] In re Townsend, 3 F. R. 559.

[20] In re Cornell, 3 A. B. R. 172, 97 F. R. 29; In re Quackenbush, 2 N. B. N. R. 964, 4 A. B. R. 274, 102 F. R. 282; In re Crenshaw, 2 A. B. R. 623, 625, 95 F. R. 632; In re Hirsch, 2 A. B. R. 715, 726, 96 F. R. 486; In re Headley, 3 A. B. R. 272, 1 N. B. N. 250, 97 F. R. 765, ref. dec. 2 N. B. N. R. 684; In re Webb, 2 N. B. N. R. 289, 3 A. B. R. 386, 98 F. R. 404, ref. dec. 2 N. B. N. R. 11, 3 A. B. R. 204; In re Freund, 2 N. B. N. R. 236, 3 A. B. R. 418, 98 F. R. 81.

[21] In re Berner, 2 N. B. N. R. 268; In re Quackenbush, 2 N. B. N. R. 964, 4 A. B. R. 274, 102 F. R. 282; Citizens Bank of Salem v. De Paw Co., 3 N. B. N. R. 244; In re McNamara, 2 A. B. R. 566, 579; In re Hussman, 2 N. B. R. 437; In re Rathbone, 1 N. B. R. 536, 2 N. B. R. 260, F. C. 11583; In re Hill, 1 N. B. R. 431, F. C. 6483; In re Goodridge, 2 N. B. R. 324.

[22] In re Lesser, 108 F. R. 205, 5 A. B. R. 331.

[23] In re Finkelstein, 2 N. B. N. R. 839, 101 F. R. 418, 3 A. B. R. 800; In re Ablowich, 2 N. B. N. R. 386, 3 A. B. R. 586, 98 F. R. 81; In re O'Gara, 3 A. B. R. 349, 97 F. R. 952; In re Schlesinger, 2 N. B. N. R. 169, 3 A. B. R. 342, 97 F. R. 930; In re Meyers, 2 A. B. R. 707, 1 N.

inability to give a satisfactory explanation will not make it so.[24] The omission of property conveyed by bankrupt to his wife for the purpose of covering it up is an offense under this provision;[25] but it is not for an attorney at law to omit listing contracts for contingent fees unearned;[26] and whether or not failure to list an interest in remainder under a will constitutes the offense depends upon whether the interest can be subjected to the claims of creditors in any way.[27] It is no excuse for the bankrupt to say that he omitted property from his schedules on the ground that he would be entitled to such property as an exemption.[28]

Fraudulent concealment may be shown as well by circumstantial as by direct evidence, and where the evidence is wholly circumstantial it has been held unnecessary to aver the precise details of the act of concealment;[29] a fair preponderance of the credible evidence being all that is necessary to show a fraudulent concealment.[30]

The bankrupt is none the less guilty of concealing assets because the facts and circumstances relating to the fraudulent transfer were made known to the trustee on bankrupt's examination, the essence of the offense being the placing of the property out of the trustee's reach by the bankrupt with intent to retain it for himself.[31]

The filing of amended schedules giving a full statement of property including that which was originally omitted, while

B. N. 515, 96 F. R. 408; In re Friedman, 1 N. B. N. 332, 2 A. B. R. 301; In re Purvine, 1 N. B. N. 326, 2 A. B. R. 787, 96 F. R. 192; In re Rosser, 1 N. B. N. 469, 2 A. B. R. 746, 96 F. R. 308; In re Tudor, 1 N. B. N. 476, 2 A. B. R. 808, 96 F. R. 942, Ripon Knitting Wks. v. Schreiber, 2 N. B. N. R. 545, 101 F. R. 810, 4 A. B. R. 299; In re Kuntz, 1 N. B. N. 256; In re Mendelsohn, 1 N. B. N. 391.

[24] In re Idzall, 2 A. B. R. 741, 96 F. R. 314.

[25] In re Skinner, 3 A. B. R. 163, 97 F. R. 190; In re Welch, 1 N. B. N. 533, 3 A. B. R. 93, 100 F. R. 65; but see In re De Leeuw, 2 N. B. N. R. 267, 3 A. B. R. 418, 98 F. R. 408; In re Freund, 2 N. B. N. R. 236, 3 A. B. R. 418, 98 F. R. 81.

[26] In re McAdam, 2 N. B. N. R. 256, 3 A. B. R. 417, 98 F. R. 409.

[27] In re Wetmore, 99 F. R. 703, 3 A. B. R. 700; In re Wood, 98 F. R. 972, 3 A. B. R. 572; In re Baudoine, 1 N. B. N. 506, 3 A. B. R. 55, 96 F. R. 536; In re Hoadley, 2 N. B. N. R. 704, 101 F. R. 233, 3 A. B. R. 780; In re St. John, 3 N. B. N. R. 114.

[28] In re Royal, 112 F. R. 135, 7 A. B. R. 106; see In re Lemmel, 118 F. R. 487.

[29] In re Bellah, 116 F. R. 69, 8 A. B. R. 310.

[30] In re Leslie, 119 F. R. 406.

[31] In re Quackenbush, supra.

evidence tending to show the absence of an unlawful intent, is not a conclusive answer to a charge of concealment, and should not be considered as avoiding the consequences of the unlawful act.[32] The wilful and fraudulent omission by bankrupt of part of his assets from his schedules may be cause for prosecution under the act, but it is not an infamous crime as the term is used at common law and in the 5th Amendment to the Constitution.[33]

§ 638. **False oath.**—The same rule as to the time of making the oath applies as was stated in the preceding paragraph as to the concealing of assets, that is, it must have been after the passage of the act of July 1, 1898. A false oath is a wilful, deliberate, intentional falsehood; or statement of something that the person making it knows or should know is untrue, or recklessly makes, without knowing whether it is true or not,[34] or without having reasonable grounds for believing it to be true, in regard to a material matter;[35] but it must be all material to the proceedings in bankruptcy, and have some relation to the bankrupt's estate or his acts affecting his estate and be knowingly and fraudulently made.[36] Thus making a pauper affidavit will be deemed a false oath when bankrupt lives in affluence and the entire circumstance shows that he has the control of money;[37] or states in his schedule that all of his property was turned over to a state receiver, which was not true.[38]

The verification of schedules from which valuable property is knowingly omitted or which contains a false statement constitutes a false oath, if the omission was with fraudulent intent;[39] thus it would constitute a false oath for the bankrupt to state in his schedules that he has paid nothing to his attorneys for their services and had assigned no property, when he had given them an order for money due for services, but not yet payable, in payment of a past indebtedness to such

[32] In re Eaton, post.

[33] U. S. v. Block, 15 N. B. R. 325, 4 Sawy. 211, F. C. 14609.

[34] In re White, 1 N. B. N. 202.

[35] In re Huber, 1 N. B. N. 431; In re Strouse, 2 N. B. N. R. 64; In re Bushnell, 1 N. B. N. 528; In re Lemmel, 118 F. R. 487.

[36] Bauman v. Feist, 107 F. R. 83, 5 A. B. R. 703.

[37] In re Williams, 2 N. B. N. R. 206, but see Sellers v. Bell, 94 F. R. 801, 2 A. B. R. 529.

[38] In re Lesser, 108 F. R. 205, 5 A. B. R. 331.

[39] In re Eaton, 110 F. R. 731, 6 A. B. R. 531; In re Becker, 5 A. B. R. 438; In re Lemmel, 118 F. R.

attorneys;[40] or when he states that an indebtedness is a bona fide loan when the facts and circumstances fail to carry it out;[41] or where he is called upon to explain the disposition of money drawn by him from his business and adopted a method of accounting which enabled him to avoid an explanation of what he did with a large sum;[42] or where he produces a false and inaccurate statement of expenditures for the purpose of making a good showing as to the disposition of a sum of money.[43]

Wherever the offense of concealing property from the trustee is committed by its omission from the schedules, or failure to disclose it on examination, there will also be a false oath; but there may be omissions from the schedules which will make the oath to them false but will not constitute knowingly and fraudulently concealing property from the trustee.[44] The omission from bankrupt's schedules of stock held by his wife which was purchased with money borrowed by her would not make the oath a false one, merely because he was employed as manager of the corporation whose stock she held;[45] and, where by agreement between counsel certain testimony given by bankrupt in another proceeding and claimed to be partly false was made part of the record, but bankrupt was not sworn, there is no false oath in relation to any proceeding in bankruptcy.[46]

A false oath is an offense under this provision, and it matters not whether the bankrupt can or cannot be prosecuted or convicted for it, thus while the testimony of a bankrupt given at creditors' meeting cannot be offered against him in a criminal proceeding, it is nevertheless an offense which would bar a discharge.[47]

§ 639. **Advice of counsel.**—To constitute the offense both in

487; Osborne v. Perkins, 112 F. R. 127, 7 A. B. R. 250.

[40] In re Lewin, 103 F. R. 852.

[41] In re Kamsler, 2 N. B. N. R. 97, 97 F. R. 194.

[42] In re Dews, 2 N. B. N. R. 437, 3 A. B. R. 691, 101 F. R. 549.

[43] In re Dews, supra.

[44] In re Hirsch, 2 A. B. R. 715.

[45] Fellows v. Freudenthal, 102 F. R. 731, 4 A. B. R. 490.

[46] In re Goldsmith, 101 F. R. 570, 4 A. B. R. 234, 2 N. B. N. R. 1013.

[47] In re Gaylord, 112 F. R. 668, 7 A. B. R. 1; In re Goodale, 109 F. R. 483, 6 A. B. R. 493; In re Dow, 105 F. R. 889, 5 A. B. R. 405; In re Leslie, 119 F. R. 406; Contra, In re Marx, 102 F. R. 676, 4 A. B. R. 521; In re Logan, 102 F. R. 876, 4 A. B. R. 525.

the case of "concealment of assets" and the "making of a false oath," it must be done knowingly and fraudulently. Hence where a bankrupt has fully and fairly laid all the facts in relation to scheduling certain property before his attorney, and received advice that it is not such an asset as should properly be scheduled in bankruptcy, such advice, however erroneous, tends to deprive a "concealment of assets" or a "false oath" of the elements of "wilfulness and fraud," and, in case of a false oath, a conviction of perjury could not be maintained, and the offense under this provision would not be committed; but such advice must have been given in good faith.[48]

§ 640. **Receiving property from bankrupt.**—The act expressly defines the offense to be "receiving any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act;" and hence the receipt of money from a bankrupt prior to the filing of the petition, no matter what the amount or how clear the intent to defeat the act, is not an offense under the act; though the trustee may recover it by proper proceedings.[49] Where a bankrupt transfers mortgaged property to a mortgagee after the filing of a petition and before control is taken for the benefit of the estate, both the bankrupt and the mortgagee would be liable to punishment.[50]

§ 641. **'c. Offense by referee.**—A person shall be punished 'by fine, not to exceed five hundred dollars, and forfeit his of-'fice, and the same shall thereupon become vacant, upon con-'viction of the offense of having knowingly

'(1) Acted as a referee in a case in which he is directly or 'indirectly interested; or

'(2) Purchased, while a referee, directly or indirectly, any 'property of the estate in bankruptcy of which he is referee; 'or

'(3) Refused, while a referee or trustee, to permit a reason-'able opportunity for the inspection of the accounts relating

[48] In re Shenberger, 2 N. B. N. R. 783, 102 F. R. 978, 4 A. B. R. 487; In re Headley, 2 N. B. N. R. 684; s. c. 3 A. B. R. 272, 1 N. B. N. 250, 97 F. R. 765; In re Schreck, 3 McLean, 573, F. C. 14847; In re Rainsford, 5 N. B. R. 531, F. C. 11537; Hall v. Suydam, 6 Barb. (N. Y.) 63; Sherman v. Kortright, 52 Barb. (N. Y.) 267; In re Wyatt, 2 N. B. R. 84, F. C. 18106.

[49] Wayne Knitting Mills v. Nugent, 3 N. B. N. R. 32, 104 F. R. 530.

[50] In re Arnett, 112 F. R. 770, 7 A. B. R. 522.

'to the affairs of, and the papers and records of, estates in his 'charge by parties in interest when directed by the court so 'to do.'

§ 642. **'d. Indictment must be within a year.**—A person 'shall not be prosecuted for any offense arising under this Act 'unless the indictment is found or the information is filed in 'court within one year after the commission of the offense.'

§ 643. **Limitation upon prosecutions.**—This provision is absolutely prohibitive to the prosecution for an offense arising under the law, unless the indictment is found within one year after its commission, and such time can under no condition be extended.[51]

An indictment charging the bankrupt with perjury under this section for having falsely omitted from his schedule certain of his property, must not alone allege that his deposition in that regard was false, but also that he had other property which was omitted, and which should be described, since the indictment should not alone set forth the substance of the offense, but there should be proper averments to falsify the matter wherein the perjury is assigned.[52]

§ 644. **Habeas Corpus.**—In any case in which the imprisonment is claimed to be in contravention of the act, the same remedy by habeas corpus may be pursued in addition to any other remedies, as in other cases of unlawful imprisonment, in which case the usual practice in habeas corpus cases will govern.

[51] See In re Webb, 2 N. B. N. R. 884, 5 A. B. R. 678; Markham v. 11, 3 A. B. R. 204. U. S., 160 U. S. 319; U. S. v. Mann,

[52] Bartlett v. U. S., 106 F. R. 95 U. S. 580.

CHAPTER XXX.

RULES, FORMS AND ORDERS.

§645. (30a) U. S. Supreme Court to make orders and forms.
646. To be followed.
647. Conflict between Law and Forms and Orders.
648. Prescribed Forms—Deficient.
649. Effect of delay in promulgating orders and forms.
650. Rules of procedure.

§ 645. '(Sec. 30a.) U. S. Supreme Court to make orders and 'forms.—All necessary rules, forms, and orders as to procedure 'and for carrying this Act into force and effect shall be pre-'scribed, and may be amended from time to time, by the Su-'preme Court of the United States.'[1]

§ 646. To be followed.—As one of the values of a federal bankruptcy law lies in its uniformity, the course of procedure and forms should conform, as nearly as possible, to the general orders and forms promulgated by the Supreme Court of the United States, since they are obligatory and binding upon courts of bankruptcy, in that they confer rights as well as prescribe rules of practice.[2]

[1] Analogous provision of Act of 1867. "Sec. 10. . . . That the Justices of the Supreme Court of the United States, subject to the provisions of this act, shall frame general orders for the following purposes:

"For regulating the practice and procedure of the district courts in bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in said courts in all matters under this act;

"For regulating the duties of the various officers of said courts;

"For regulating the fees payable and the charges and costs to be allowed, except such as are established by this act or by law, with respect to all proceedings in bankruptcy before said courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings;

"For regulating the practice and procedure upon appeals;

"For regulating the filing, custody, and inspection of records;

"And generally for carrying the provisions of this act into effect.

"After such general orders shall have been so framed, they or any of them may be rescinded or varied, and other general orders may be framed in manner aforesaid; and all such general orders so framed shall from time to time be reported to Congress, with such suggestions as said justices may think proper."

The rules and forms went into effect January 1, 1900.

[2] In re Scott, 99 F. R. 404, 2 N. B. N. R. 440, 3 A. B. R. 625; In re

The power to establish a system of bankruptcy carries with it the power to establish the details of the system if Congress shall think proper.[3]

§ 647. **Conflict between law and forms and orders.**—The forms prescribed by the Supreme Court are not intended to add to the provisions of the law,[4] and in case of conflict between the law and the general orders and forms, the rule is to follow the law first, the orders next and the forms last.[5]

§ 648. **Prescribed forms—Deficient.**—The official blank forms should be used as far as possible, since they facilitate the dispatch of business and lessen the labor of all connected with bankruptcy proceedings,[6] and it has been held that petitions will not be filed or considered unless they are on the prescribed printed forms and that written and typewritten petitions and schedules will be returned to the parties without action,[7] but this is a matter governed by the local practice entirely. Where no proper forms are provided either for a petition or other pleading, existing forms may be adopted as far as possible or others provided to meet the exigencies of the case.[8] It has been held that the law does not contemplate that the respondent shall be confined to the particular form prescribed for the answer and set out only such facts as suggested by the order, since the purpose was to indicate the form in substance only,[9] but as a rule, the forms prescribed should be used.

§ 649. **Effect of delay in promulgating orders and forms.** — The necessary delay in the preparation and promulgation of the rules, forms and orders did not prevent the act taking effect as provided upon its passage and the legal rights and obligations of all persons under it must be adjudged according to the provisions of the act at the time of its passage.[10]

§ 650. **Rules of procedure.**—Courts of bankruptcy are not

Cobb, 112 F. R. 655, 7 A. B. R. 655.

[3] Six Penny Savings Bank, et al. v. Bank, 10 N. B. R. 399, F. C. 12919.

[4] West Co. v. Lea, 1 N. B. N. 409, 174 U. S. 590, 2 A. B. R. 463.

[5] In re Soper, 1 N. B. N. 182, 1 A. B. R. 193.

[6] 1 N. B. N. 239, 396; In re Chasnoff, 3 N. B. N. R. 1.

[7] Mahoney v. Ward, 2 N. B. N. R. 538, 100 F. R. 278, 3 A. B. R. 770.

[8] Mather v. Coe, 1 N. B. N. 554, 1 A. B. R. 504, 92 F. R. 333.

[9] In re Paige, 2 N. B. N. R. 110, 99 F. R. 538, 3 A. B. R. 679.

[10] In re Lewis, 1 N. B. N. 556, 1 A. B. R. 458, 91 F. R. 632.

hampered by such technical rules as will prevent the doing of what is just, and for the protection of the estate, even if it requires the revocation of an order once made,[11] but they have no power to make general rules in bankruptcy.[12]

The general rules and orders made by the Supreme Court are not designed to create or declare, nor do they create and declare, the rights of creditors in the estate of the bankrupt; still less do they abrogate and annul those rights.[13]

[11] Samson v. Burton, 6 N. B. R. 403.

[12] In re Kennedy et al., 7 N. B. R. 337, F. C. 7699.

[13] In re Baxter et al., 18 N. B. R. 560, F. C. 1121.

CHAPTER XXXI.

COMPUTATION OF TIME.

§651. (31a) Rule for computing time.
652. Holidays.
653. Method of computing.
654. Time mandatory.
655. Fraction of a day.

§ 651. '(Sec. 31a) **Rule for computing time.**—Whenever 'time is enumerated by days in this Act, or in any proceeding 'in bankruptcy, the number of days shall be computed by ex- 'cluding the first and including the last, unless the last fall on 'a Sunday or holiday, in which event the day last included 'shall be the next day thereafter which is not a Sunday or a 'legal holiday.'[1]

§ 652. **Holidays.**—This term is meant to cover January first, February twenty-second, May thirtieth, July fourth, Labor day (being the first Monday in September), Christmas, Thanksgiving day and any other day appointed by the President or Congress as a holiday or as a day of public fasting.[2]

§ 653. **Method of computing.**—This provision, like the similar one in the Act of 1867, adopts the general rule followed in computing time. In the event the last day falls on Sunday or a holiday and is succeeded by a holiday or a Sunday, the next day thereafter which is not a legal holiday would be included.

In computing the time within which an act must be done, holidays or Sundays occurring within the term are to be counted, unless expressly excluded or the last day falls on

[1] Analogous provision of Act of 1867. "Sec. 48. . . . And in all cases in which any particular number of days is prescribed by this act, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first, and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the fourth of July, in which case the time shall be reckoned exclusive of that day also."

[2] Sec. 1 (14), act of 1898; act June 28, 1894, 2 Supp. R. S. 193.

Sunday or a holiday.[3] It has accordingly been held that an application for discharge might be filed on the 27th of November, the year within which it should have been filed expiring on the 26th, which was Thanksgiving day.[4] A petition is filed within the meaning of the bankruptcy law when delivered to the clerk personally and by him marked "Filed," though it be outside of his office and after office hours,[5] but in order to mark the date with reference to which the validity of liens and preferential transfers are to be determined, it must be sufficient to confer jurisdiction.[6]

The last day upon which a petition in involuntary bankruptcy may be filed is computed by excluding the day on which the act of bankruptcy was committed and including the day on which the petition is filed, provided the latter is not Sunday or a holiday; thus a petition filed February 20, 1899, the act of bankruptcy having been committed October 20, 1898, is within the four months but a failure to file the petition in duplicate would be fatal and could not be cured.[7] See Acts of Bankruptcy, sec. 3b of the law, "Four months' period," ante, § 85.

In determining whether a transfer of property by a bankrupt was made within four months next preceding the filing of the petition by or against him the time should be reckoned backward, the day on which the petition was filed being excluded and the date of the transfer included; thus a transfer made on December 8, 1902, would be within four months of a petition filed April 8, 1903. In such computation fractions of a day are not considered.[8]

§ 654. **Time mandatory.**—After the time within which an act is required to be done by parties to proceedings in bankruptcy has expired, rights are thereby conferred by law, and the courts will not ordinarily deprive of such rights the party who may be entitled thereto by reason of the neglect or omission on

[3] In re York, 4 N. B. R. 156, F. C. 18139.

[4] In re Lang, 2 N. B. R. 151, F. C. 8056.

[5] In re Von Boercke, 1 N. B. N. 505, 2 A. B. R. 322, 94 F. R. 382.

[6] In re Rogers, 10 N. B. R. 444.

[7] In re Stevenson, 1 N. B. N. 313, 2 A. B. R. 66, 94 F. R. 110; In re Dupre, 1 N. B. N. 513; see In re Tonawanda Street Planing Mill Co., 6 A. B. R. 38.

[8] Whitley Grocery Co. v. Roach, 8 A. B. R. 505; Dutcher v. Wright, 94 U. S. 553; see also Richards v. Clark, 124 Mass. 491; Cooley v. Cook, 125 Mass. 406.

the part of his adversary.[9] While the power of the court in this respect is quite broad,[10] delay in filing exceptions to a referee's rulings until after the expiration of ten days, unless the time is enlarged by the court, will prevent their consideration.

§ 655. **Fraction of a day.**—As a general rule, in the computation of time in judicial proceedings the law takes no notice of a fraction of a day, but such proceedings will be considered as taking effect from the first moment of the day on which the event occurred,[11] although a fraction of a day may be considered in order to prevent injustice,[12] or in certain cases to determine the priority of liens or conveyances.[13] It has also been considered in a case where a bankrupt's goods had been seized on execution or attachment and the question was whether more or less than a certain number of months had elapsed between the seizure and the time when he went into bankruptcy,[14] though such decision is contrary to the weight of authority.[15] A fraction of a day should properly be considered where it is a question whether property inherited or acquired on the date a petition in bankruptcy is filed, was before or after such filing.[16]

The cases in which it has been permitted to show by evidence and by records of which the court takes judicial notice, the exact hour and minute of the day when a bill was signed are those in which the ordinary presumption that an act is approved upon the first minute of the day that it becomes a law would result in making the legislation retroactive and therefore harsh and unjust.[17] Thus where the date at issue is the four months' period after the passage of the bankruptcy

[9] Scott, 99 F. R. 404, 2 N. B. N. R. 440, 3 A. B. R. 625.

[10] G. O. XXXVII.

[11] Revill v. Claxon, 12 Bush. (Ky.) 558; Neff v. Barr, 14 S. & R. 171.

[12] Blydenburgh v. Catheal, 4 N. Y. 418; Maine v. Gillman, 11 F. R. 214; In re Richardson, 2 Story (U. S.) 571; National Bank v. Burkhart, 100 U. S. 686; Taylor v. Brown, 147 U. S. 645.

[13] Hayden v. Buddensick, 49 How. Pr. (N. Y.) 246; Clute v. Clute, 4 Den. (N. Y.) 244; Duke v. Clark, 58 Miss. 465.

[14] Godsin v. Sanctuary, 4 B. & Ad. 255; Westbrook Mfg. Co. v. Grant, 60 Me. 88.

[15] Jones v. Stevens, 48 Atl. 170, 5 A. B. R. 570; In re Tonawanda Street Planing Mill Co., 6 A. B. R. 38.

[16] In re Stoner, 105 F. R. 752; In re Petit, 1 Ch. Div. 478.

[17] As a matter of fact no record

bill, the better rule is that evidence is inadmissible to show the exact hour and minute of approval, since no retroactive effect is possible; and the presumption that it was done on the first moment of the day should be conclusive; accordingly the four months from July 1, 1898, the day the present law was approved, were complete with the ending of October 31.[18]

is kept of the hour or minute of a day that a bill is signed by the President.

Arnold v. U. S., 9 Cranch 104; Lapeyre v. U. S., 17 Wall. 191-198; In re Wellman, 20 Vt. 653; U. S. v. Norton, 97 U. S. 164; Tomlinson v. Bullock, 42 B. Div. 2307.

[18] The Leidigh Car Co. v. Stengel, 1 N. B. N. 387, 2 A. B. R. 383, 95 F. R. 637.

CHAPTER XXXII.

TRANSFER OF CASES.

§656. (32a) Transfer of cases for convenience of parties.
657. Practice.
658. What petitions stayed.

§ 656. '(Sec. 32a) **Transfer of cases for convenience of par-**'**ties.**—In the event petitions are filed against the same person, 'or against different members of a partnership, in different 'courts of bankruptcy each of which has jurisdiction, the cases 'shall be transferred, by order of the courts relinquishing ju-'risdiction, to and be consolidated by the one of such courts 'which can proceed with the same for the greatest convenience 'of parties in interest.'

§ 657. **Practice.**—Where two petitions are filed against the same individual in different districts, the first hearing must be had in the district in which the debtor has his domicile; and where there are two or more petitions against or by different members of, the same partnership in different courts, each having jurisdiction, or the petitions by the different members shall be filed in the same court, the petition first filed shall be first heard, and in either case the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard, and the court which makes the first adjudication retains jurisdiction over all the proceedings until the same is closed. The court so retaining jurisdiction, if satisfied that it is for the greatest convenience of the parties in interest that another of said courts should proceed with the case, shall transfer it. Earlier petitions may be amended by inserting acts of bankruptcy in later ones.[1]

It is frequently the case that a person may reside in the jurisdiction of one court, do business in another, and have his domicile in still another; or, in the case of a partnership, each member of a firm may live in different judicial districts and transact business in still others, so that a number of courts may at the same time have jurisdiction to render an adjudication of bankruptcy. This section provides for such a contingency. The power of transfer is conferred by section 2 (19).

[1] G. O. VI.

A court which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property, but not to adjudge each member individually bankrupt, unless it has jurisdiction over him personally.[2]

§ 658. What petitions stayed.—Under the law of 1867 the court whose jurisdiction was first invoked had entire control, and proceedings in other courts were stayed or dismissed.[3] It will be noticed that the present law makes the "greatest convenience of parties" the ground for the transfer and relinquishment of jurisdiction, and, in view of that fact and the provision that the cases shall be transferred, General Order VI, which follows General Order XVI, under the Act of 1867, seems inconsistent, if not in conflict, with the present law.

Where an involuntary petition was filed against bankrupt as a member of a firm at the place where the firm business had been conducted and where the corporation which succeeded the firm conducted its business retaining the bankrupt in its employ, although he claimed to live in another jurisdiction where he afterwards filed a voluntary petition, the court held that the greatest convenience of all was subserved by hearing the case at the firm residence, where the debts were contracted and the facts might be most conveniently and effectively investigated, and stayed the bankrupt's voluntary petition until the question of the adjudication in the involuntary proceedings had been determined.[4]

[2] Sec. 5, c. act of 1898; In re Murray, 1 N. B. N. 570, 96 F. R. 600, 3 A. B. R. 601; see In re Sears, 112 F. R. 58, 7 A. B. R. 279.

[3] In re Boston, H. & E. R. R. Co., 6 N. B. R. 209; 9 Blatchf. 101, F. C. 1678; Shearman et al. v. Bingham et al., 5 N. B. R. 34, 1 Lowell, 575, F. C. 12733; In re Leland, 5 N. B. R. 222, 5 Ben. 168, F. C. 8228; vide especially as to partners, In re Smith, 3 N. B. R. 15.

[4] In re Waxelbaum, 2 N. B. N. R. 228, 98 F. R. 589, 3 A. B. R. 392; compare In re Elmira Steel Co., 109 F. R. 456, 5 A. B. R. 484.

CHAPTER XXXIII.

CREATION OF TWO OFFICES.

§659. (33a) Offices of referee and trustee.
660. Referee and trustee correspond to register and assignee.

§ 659. '(Sec. 33a) **Offices of referee and trustee.**—The 'offices of referee and trustee are hereby created.'

§ 660. **Referee and trustee correspond to register and assignee.**—The offices of referee and trustee created by this act correspond respectively to those of register and assignee under the act of 1867. While these are the only two offices specifically created, provision is also made for the appointment of receivers and the designation of marshals to take charge of the property of bankrupts after the petition has been filed and until dismissed, or the trustees have qualified, in case it becomes necessary for the preservation of the estate.[1]

[1] Sec. 2 (3), act of 1898.

CHAPTER XXXIV.

REFEREE'S APPOINTMENT, REMOVAL AND DISTRICTS.

§661. (34a) Referee's appointment —Term—District.
662. Abilities and disabilities.
663. Use of penalty envelope.
664. Number and district of referees.
665. Referee's absence or disqualification.
666. Tenure of office.
667. —— Removal of referee.

§ 661. '(Sec. 34a) Referee's appointment term—district.—'Courts of bankruptcy shall, within the territorial limits of 'which they respectively have jurisdiction,

'(1) Appoint referees, each for a term of two years, and 'may, in their discretion, remove them because their services 'are not needed or for other cause; and

'(2) Designate, and from time to time change, the limits of 'the districts of referees, so that each county, where the ser-'vices of a referee are needed, may constitute at least one 'district.'[1]

§ 662. Abilities and disabilities.—The referee under this act occupies an office corresponding to that of register under the act of 1867. He exercises much of the judicial authority of the courts of bankruptcy;[2] and is essentially an assistant to the judge in the district for which appointed. He must take the oath of office prescribed for judges of United States courts by section 712, U. S. Rev. Stat.[3] He is liable to punishment for conviction of the offense of acting as referee, when inter-

[1] Analogous provision of act of 1867. "Sec. 3. . . . That it shall be the duty of the judges of the district courts of the United States, within and for the several districts, to appoint in each congressional district in said districts upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the district court in the performance of his duties under this act.

Sec. 5. . . . Such registers shall be subject to removal by the judge of the district court. . . ."

[2] White v. Schloerb, 178 U. S. 542, 2 N. B. N. R. 721, 4 A. B. R. 178; Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224.

[3] Sec. 36, act of 1898.

ested, purchasing property of the bankrupt's estate, or refusing to permit an inspection of his accounts.[4]

§ 663. **Use of penalty envelopes.**—The referee is an officer of the United States, and, as such, is entitled to transmit through the mails, free, in penalty envelopes, exclusively official mail matter, in accordance with the provisions of the Postal Laws and Regulations.[5]

§ 664. **Number and district of referees.**—This section clearly contemplates that each county where the service of a referee is needed should constitute at least one district, and there should be at least one referee for each county, although, owing to the scarcity of business in some localities, many of the courts have appointed one referee for several counties. The number that may be appointed for each county is without limit, but there should be as many as are necessary to expeditiously transact the business.[6]

The district of each referee should be clearly defined, in order that there may be no conflict of jurisdiction. This requirement is emphasized by section 18 (f), (g), relative to the reference of cases "to the referee," as well as section 35, requiring a residence or office in the territorial district for which appointed, and the definition of the term "Referee,"[7] as meaning "the referee who has jurisdiction of the case," all of which would seem to indicate a purpose of limiting the appointments to a single referee for each district.

§ 665. **Referee's absence or disqualification.**—Whenever the office of referee is vacant, or its occupant is absent, or disqualified, the judge may act, or appoint another referee,[8] or another referee holding an appointment under the same court may be specifically designated.[9]

§ 666. **Tenure of office.**—Referees are appointed for a term of two years, unless sooner removed. While there is authority for the proposition that an officer's functions cease immediately at the expiration of his term of office[10] the rule supported by the weight of authority is, in the absence of any restrictive

[4] Sec. 29c, act of 1898.

[5] Sec. 368, p. 159, act of July 5, 1884.

[6] Sec. 37, act of 1898.

[7] Sec. 1 (20), act of 1898.

[8] Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102.

[9] Sec. 43, act of 1898.

[10] Badger v. United States, 93 U. S. 599; People v. Tillman, 3 Barb. 193; U. S. v. Green, 53 F. R. 771.

provision, that the officer is entitled to hold until his successor is duly chosen and qualified.[11] This rule conserves the public good by conserving the methods and instrumentalities by which alone public business can be transacted; while the opposite rule, when pushed to its consequences, might result in a suspension of business in every department of the public service. In the case of a United States attorney the law specifically provides that his commission shall cease and expire at the expiration of the term for which appointed,[12] but there is no such provision with reference to a referee. It is to be presumed, therefore, that Congress intended that the referee should hold his office until the appointment and qualification of his successor.

§ 667. **Removal of referee.**—The referee may be removed from office by the court either because his services are not needed, or for other cause; in other words, the power of removal rests in the discretion of the court. While the weight of authority sustains the proposition that the power to remove "for cause" can only be exercised after notice and a reasonable opportunity to make defense,[13] it is a corollary of this rule that the appointing power having authority to remove, is the sole judge of the existence of the cause.[14]

[11] State v. Harrison, 113 Ind. 440; Tuley v. State, 1 Id., 500; State v. Wells, 8 Nev. 105; Stratton v. Oulton, 28 Cal. 44, 382; State v. Fagan, 42 Conn. 32.

[12] U. S. Rev. Stat., Sec. 769.

[13] State v. St. Louis, 90 Mo. 19; Gaskins case, 8 Term Rep. 209; Field v. Com., 32 Pa. St. 478; State v. Brice, 8 Ohio St. 82; Com. v. Slifer, 1 Casey, 23; Haight v. Love, 39 N. J. L. 14.

[14] State v. Doherty, 25 La. Ann. 119; Patton v. Vaughan, 39 Ark. 211.

CHAPTER XXXV.

QUALIFICATIONS OF REFEREES.

§668. (35a) Qualifications of referees.
669. Computation of relationship.
670. What is disqualification.

§ 668. **'(Sec. 35a) Qualifications of referees.**—Individuals 'shall not be eligible to appointment as referees unless they 'are respectively

'(1) Competent to perform the duties of that office;

'(2) Not holding any office of profit or emolument under 'the laws of the United States or of any state other than com- 'missioners of deeds, justices of the peace, masters in chancery, 'or notaries public;

'(3) Not related by consanguinity or affinity, within the 'third degree as determined by the common law, to any of 'the judges of the courts of bankruptcy or circuit courts of the 'United States, or of the justices or judges of the appellate 'courts of the districts wherein they may be appointed; and

'(4) Residents of, or have their offices in, the territorial dis- 'tricts for which they are to be appointed.'[1]

§ 669. **Computation of relationship.**—Consanguinity is the relation existing between persons descending from a common ancestor; affinity is the connection existing in consequence of marriage between the husband or wife and the kindred of the other. The degrees in either case are computed alike, thus according to the canon law, which is adopted in the common law, the computation is made by beginning at the common ancestor and reckoning downward to the party related, and in whatever degree the most remote party is distant from the common ancestor that is the degree in which they are related, counting each person as one degree and excluding the common ancestor.

§ 670. **What is disqualification.**—A referee would not be qualified to act in a case in which he is directly or indirectly in-

[1] Analogous provision of act of 1867. "Sec. 3. . . . No person shall be eligible to such appointment unless he be a counselor of said court, or of some one of the courts of record of the state in which he resides."

terested,[2] although the fact that he owes a debt to the bankrupt would not operate as a disqualification. The interest here indicated must be either in the proceedings in bankruptcy or the estate of the bankrupt, but, on being apprised of the fact that the referee is indebted to the bankrupt a court in the exercise of its discretion would doubtless revoke the order of reference.[3]

The fact that the referee had been attorney or counsellor for any of the parties prior to the filing of the petition in matters not directly connected with the bankruptcy proceedings, would not necessarily disqualify him from acting as referee,[4] though if there is any doubt as to the existence of a bias or influence, the court should transfer the case to another referee.

[2] 39, b, act of 1898.

[3] Bray v. Cobb, 1 N. B. N. 209, 91 F. R. 102, 1 A. B. R. 153.

[4] Carr v. Fife, 156 U. S. 494.

CHAPTER XXXVI.

REFEREES' OATH OF OFFICE.

§671. (36a) Oath of office of referee.
672. Form of oath.

§ 671. **'(Sec. 36a) Oaths of office of referees.**—Referees 'shall take the same oath of office as that prescribed for judges 'of United States courts.'[1]

§ 672. **Form of oath.**—The Revised Statutes of the United States provide as follows: The justices of the Supreme Court, the circuit judges, and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I —— ——, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as ——, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States: So help me God."[2]

The form of the oath prescribed by the Supreme Court to be taken by a referee in bankruptcy would seem to indicate that it should be administered by the District Judge only.[3]

[1] Analogous provision of act of 1867. "Sec. 3. . . . And he shall, in open court, take and subscribe the oath prescribed in the act entitled 'An act to prescribe an oath of office, and for other purposes,' approved July second, eighteen hundred and sixty-two, and also that he will not, during his continuance in office be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district."

[2] U. S. Rev. Stat., Sec. 712; Form No. 16.

[3] Form No. 16.

CHAPTER XXXVII.

NUMBER OF REFEREES.

§ 673. '**(Sec. 37a) Number of referees.**—Such number of 'referees shall be appointed as may be necessary to assist in 'expeditiously transacting the bankruptcy business pending in 'the various courts of bankruptcy.'[1]

The number of referees for each district is to be determined by the amount of business, but each county must constitute at least one district and have at least one referee.[2]

[1] For analogous provision of act of 1867, see note to Sec. 34, of act of 1898, ante.

[2] See Sec. 34, act of 1898, and note.

CHAPTER XXXVIII.

JURISDICTION OF REFEREES.

§674. (38a) Jurisdiction in general.
675. —— Limitation of.
676. —— Over petitions for adjudications.
677. —— To dismiss petitions.
678. —— Of discharges and compositions.
679. —— Over examinations.
680. —— To administer oaths.
681. —— As to seizure and possession of property; receivers.
682. —— As to sale and appraisal of property.
683. —— To grant injunctions.
684. —— To employ stenographic and clerical help.
685. —— Power to tax costs.

§ 674. '(Sec. 38a) Jurisdiction of referees—in general.— 'Referees respectively are hereby invested, subject always to a 'review by the judge, within the limits of their districts as es- 'tablished from time to time, with jurisdiction to

'(1) Consider all petitions referred to them by the clerks 'and make the adjudications or dismiss the petitions;

'(2) Exercise the powers vested in courts of bankruptcy for 'the administering of oaths to and the examination of persons 'as witnesses and for requiring the production of documents 'in proceedings before them, except the power of commitment;

'(3) Exercise the powers of the judge for the taking posses- 'sion and releasing of the property of the bankrupt in the event 'of the issuance by the clerk of a certificate showing the ab- 'sence of a judge from the judicial district, or the division of 'the district, or his sickness, or inability to act;

'(4) Perform such part of the duties, except as to questions 'arising out of the applications of bankrupts for compositions 'or discharges, as are by this Act conferred on courts of bank- 'ruptcy and as shall be prescribed by rules or orders of the 'courts of bankruptcy of their respective districts, except as 'herein otherwise provided; and

'(5) Upon the application of the trustee during the exami- 'nation of the bankrupts, or other proceedings, authorize the 'employment of stenographers at the expense of the estates 'at a compensation not to exceed ten cents per folio for report- 'ing and transcribing the proceedings.'[1]

[1] Analogous provision of act of 1867. "Sec. 4. . . . That nothing in this section contained shall empower a register to commit for

§ 675. **Jurisdiction—limitation of.**—This section limits the jurisdiction of the referee and nothing here stated can be construed to enlarge his power or to give any authority to hear and determine any question which the court of bankruptcy appointing him could not determine. He is a part of such court and performs all of its functions except as to questions arising out of application for compositions or discharges;[2] and interlocutory motions, affecting such proceedings except when related to these two specified exceptions, should be addressed to him.[3] Issues of fact are to be determined by him without the intervention of a jury, and his order, if affirmed on review, is enforceable, not after the manner of courts of law, but by the process of commitment.[4] The bankrupt is subject to the order of the court or referee from the day he is required to attend before the referee, and he may receive from the latter a protection against arrest. After the petition has been referred, all proceedings except such as are specifically required to be had before the judge, must be had before the referee.[5]

The referee is an officer of the court and takes judicial notice of its judgment and decrees,[6] and exercises much of the judicial authority of that court.[7] With the exercise of legal discretion, he has entire control over proceedings pending before him,[8] but he has no power to vacate, modify or set aside any order duly made by the court of bankruptcy, or to deny himself

contempt or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge; but in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before him, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

"Sec. 5. . . . and such register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers and documents."

[2] In re Carter, 1 N. B. N. 162, 1 A. B. R. 160; In re Huddleston, 1 N. B. N. 214, 1 A. B. R. 572.

[3] In re Huddleston, supra; Anon. 1 N. B. N. 252.

[4] In re Gottardi, 114 F. R. 328, 341.

[5] G. O. XII (1).

[6] In re Scott, 15 N. B. R. 73, F. C. 12519.

[7] White v. Schloerb, 178 U. S. 542, 4 A. B. R. 178; Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224.

[8] Hyman, 2 N. B. R. 107, 3 Ben. 28, F. C. 6984.

of the jurisdiction granted by such orders.[9] The validity of any order made by the referee, except such as the judge alone has power to make, cannot be collaterally attacked in the absence of a showing that it was disproved by the court.[10] The referee is required[11] to furnish interested parties with any desired information as to proceedings before him, but not copies of such proceedings, and his refusal to furnish a copy of a petition and order of reference will not affect his jurisdiction to proceed under such order.[12] The referee having no authority to handle the money of an estate administered before him, a preference cannot be surrendered to him by a creditor in order that such creditor may prove his claim.[13]

§ 676. **Jurisdiction over petitions for adjudication.**—If the judge is absent from the district or the division of the district in which an involuntary petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk must forthwith refer the case to the referee,[14] who must make the adjudication or dismiss the petition. The absence here referred to means from the judicial district or division of such district as established by law, and not the county or bankruptcy division of a district.

Upon the filing of a voluntary petition, if the judge is absent from the district or the division of the district in which the petition is filed, at the time of the filing, the clerk must forthwith refer the case to the referee,[15] who must make the adjudication or dismiss the petition.

§ 677. **Power to dismiss petitions.**—Under this section, the referee clearly has power to dismiss a petition in bankruptcy, though a petitioner cannot, either for want of prosecution or by consent of parties, until after notice to the creditors.[16]

Unless objections are raised to the jurisdiction at an early stage of the proceedings, they will be considered as having

[9] In re Franklin Syndicate, 2 N. B. N. R. 522, 101 F. R. 402, 4 A. B. R. 511.

[10] Geisreiter v. Sevier, 33 Ark. 522.

[11] Sec. 39 a (3), act of 1898.

[12] In re Lewin, 103 F. R. 850.

[13] In re Thompson, 2 N. B. N. R. 1016.

[14] 18 b, act of 1898.

[15] 18 g, act of 1898.

[16] 59 g, act of 1898; In re Mussey, 2 N. B. N. R. 113; 99 F. R. 71, 3 A. B. R. 592; In re Scott, 7 A. B. R. 35; see 111 F. R. 144, 7 A. B. R. 39.

been waived and cannot be raised for the first time on the application to grant the discharge,[17] although it has been held that entire want of jurisdiction over the subject-matter may be taken advantage of at any time.[18]

§ 678. Jurisdiction as to discharges and composition.—Though questions arising out of applications for compositions or discharges are expressly excepted from a referee's jurisdiction, nevertheless the judge may refer such application, or any specified issue arising thereon, to the referee to ascertain and report the facts,[19] but such reference is made to him in the capacity of special master, not as referee in bankruptcy, and for duties independent of the latter office, and in no sense incompatible; in such a case his report is only advisory, the final hearing being before the judge.[20] Whenever legal questions arise in considering composition before a referee, the better practice is for him to appoint a day for bringing the composition before the court and issue the required notices to creditors, if requested to do so, suggesting in his report to the judge any questions arising or doubts as to the procedure adopted.[21] He may rule upon the sufficiency of specification of objections and should not take evidence on such as are clearly insufficient.[22] It is his duty to pass upon the truth or falsity of evidence on hearings in opposition to the discharge and, if a specification discloses valid objections to the discharge, prima facie, the case will be referred back to the referee for rehearing.[23]

§ 679. Power over examinations.—The authority of a referee is not limited to the taking and reporting of the evidence and ruling as to its admissibility, but he should, also, report findings and recommendations. As a judicial officer, he is not required by custom, the act or the rules, to take notes of testi-

[17] In re Mason, 2 N. B. N. R. 425, 99 F. R. 256, 3 A. B. R. 599; In re Polakoff, 1 N. B. N. 232, 1 A. B. R. 358; In re Clisdell, 2 N. B. N. R. 638, 101 F. R. 246, 4 A. B. R. 95; Allen v. Thompson, 10 F. R. 116; In re Thomas, 11 N. B. R. 330; See apparently contra, In re Little, 2 B. R. 298; In re Penn, 3 B. R. 582.

[18] In re Mason, supra.

[19] G. O. XII.

[20] Fellows v. Freudenthal, 102 F. R. 731, 4 A. B. R. 490; In McDuff, 101 F. R. 241, 4 A. B. R. 110.

[21] In re Hilborn, 3 N. B. N. R. 62, 104 F. R. 866.

[22] In re Kaiser, 2 N. B. N. R. 123, 3 A. B. R. 767, 99 F. R. 689; contra, In re Leszynsky, 2 N. B. N. R. 738.

[23] In re Wolfstein, 1 N. B. N. 202.

mony personally, or to incur the expense of clerical or stenographic aid without indemnity therefor; but he should supervise the taking at the expense of the interested parties, or allow them to take it themselves.[24]

A referee is authorized to pass on objections made to a question, but such question must be answered and incorporated in the deposition, although the decision may be against its admissibility; in such case the exception and ruling of the referee are to be preserved for the ultimate decision of the court,[25] the equity rules of the Supreme Court of the United States being followed as nearly as may be in matters of this nature.[26] The extent to which an examination will be permitted to go, for the purpose of ascertaining the assets of the estate, must be determined by the sound judgment of the officer before whom it was taken.[27] A referee may refuse to suspend an examination until the questions certified by him are decided.[28] While he cannot compel a witness to answer, if he refuses,[29] nor commit him for derelictions, he does have the power to certify the facts of such offense to the judge, who may proceed in a summary manner and inflict such punishment as if the contempt had been committed before the court itself,[30] or if the question be material and approved by the court, he may be refused a discharge.[31]

In case an application for discharge, with the specification in opposition thereto, is referred to the referee, his authority is not limited to the taking and reporting of the evidence adduced on the hearing and ruling as to its admissibility, but he should, also, report findings and recommendations. In such a case, a sufficient specification of objection is a necessary prerequisite to the introduction of any evidence by the objecting creditors on a hearing, and the evidence should be confined to the material facts alleged in the specification.[32]

[24] In re Warszawiak, 1 N. B. N. 135.

[25] G. O. XXII; In re DeGottardi, 114 F. R. 328, 395, 7 A. B. R. 723; In re Lipset, 119 F. R. 379, 9 A. B. R. 32; Dressel v. Lumber Co., 119 F. R. 531; see In re Rosenfield, 1 N. B. R. 60, F. C. 12059; In re Bond, 3 N. B. R. 2, F. C. 1618.

[26] In re Lipsert, supra.

[27] In re Foerst, 1 N. B. N. 258, 93 F. R. 190, 1 A. B. R. 259.

[28] In re Tiff, 17 N. B. R. 550, F. C. 14030.

[29] In re Koch, 1 N. B. R. 153, F. C. 7916.

[30] Sec. 41 b, act of 1898.

[31] Sec. 14 b (6), ante §§ 346, 372.

[32] In re Kaiser, 2 N. B. N. R. 123, 99 F. R. 689, 3 A. B. R. 767.

The referee is required to make up a record embodying the evidence or the substance thereof as agreed upon by the parties in all contested matters arising before him, whenever requested by either of the parties, which must be transmitted to the judge, together with the findings made therein.[33]

§ 680. To administer oaths.—Referees are also authorized to administer such oaths as are required by this act, except upon "hearings in court." The power to administer oaths by referees is, therefore, restricted to proceedings in bankruptcy. The adjudication made by a referee upon a petition duly referred to him is in no sense a "hearing in court," but is purely an ex parte proceeding.[34]

§ 681. Referee's duties as to seizure and possession of property—receivers.—This power of taking possession and releasing property of the bankrupt can only be exercised, in case of the absence of the judge from the judicial district, or the division of the district, or his sickness or inability to act.[35] This was obviously intended to cover cases of the taking possession of property where the bankrupt is permitting it to deteriorate in value, as provided in section 69,[36] or where application is made to take charge of and hold the property of a bankrupt prior to the adjudication under section 3e of the law.[37]

As distinct and independent of the power referred to above courts of bankruptcy may appoint receivers to take charge of a bankrupt's property whenever the exigencies of the case demand, and after the petition has been referred to the referee, he has the like power.[38]

A referee has jurisdiction of an application by a trustee in bankruptcy for an order requiring the bankrupt to surrender money or property alleged to be in his possession or control, and withheld or concealed from the trustee, although belonging to the estate, or to appear before him and show cause why he should not be ordered to surrender such property;[39]

[33] Sec. 39 (5), act of 1898.

[34] In re Kindt, 2 N. B. N. R. 339.

[35] Subd. 3, ante § 674.

[36] In re Florcken, 107 F. R. 241, 5 A. B. R. 802; In re Carter, 1 A. B. R. 160, 1 N. B. N. 162.

[37] Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224.

[38] In re Florcken, 107 F. R. 241, 5 A. B. R. 802; see In re Scott, 7 A. B. R. 710.

[39] Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224; In re Oliver, 1 N. B. N. 329, 96 F. R. 85, 2 A. B. R. 783; In re Miller, 105 F. R. 57; In re Speyer, 6 N. B. R. 255, F. C. 13239; but see In re Green, 108 F. R. 616, 6 A. B. R. 270.

and to make an order in accordance with his findings on such application, but the enforcement of the order devolves upon the reviewing court.[40] The court, upon review, will not set aside such order where it is not plain that the referee was mistaken in his judgment, or that the testimony was insufficient to support the order.[41]

§ 682. **Jurisdiction as to sale and appraisal of property.**—Since the word "court," as used in the act, means the court of bankruptcy in which the proceedings are pending and may include the referee[42] the latter has authority to appoint appraisers to value the estate of the bankrupt, but if the property is in the hands of a receiver before adjudication, appraisement or sale can be ordered only by the court of bankruptcy.[43] Although a sale should not be ordered before the adjudication unless it is necessary to preserve the value of the property, an order of sale made by a referee before the adjudication, while exercising the powers of the judge, will not be disturbed, where it was by consent and no prejudice is shown.[44] A referee, sitting as a court of bankruptcy, has power to order and to approve a sale of property free of liens or incumbrance,[45] in possession of the trustee, on notice to the incumbrancer, if in his judgment it is desirable, which would be the case where there was doubt as to the property covered by the mortgage.[46]

§ 683. **To grant injunctions.**—By section 720 of the Revised Statutes of the United States, federal courts can only grant the writ of injunction to stay proceedings in a state court, when such an injunction is authorized by any law relating to proceedings in bankruptcy. This section remains still in force notwithstanding the act repealing the federal bankruptcy law of 1867 and its amendments. In view of which, together with the fact that courts of bankruptcy have such jurisdiction at

[40] In Mayer, 2 N. B. N. R. 257, 98 F. R. 839; In re Rosser, 1 N. B. N. 469, 96 F. R. 305, 2 A. B. R. 755, 3 A. B. R. 533.

[41] In re Tudor, 2 N. B. N. R. 168, 96 F. R. 942, 2 A. B. R. 808.

[42] Sec. 1 (7), act of 1898.

[43] In re Styer, 2 N. B. N. R. 205, 98 F. R. 290, 3 A. B. R. 424.

[44] In re Kelly Dry Goods Co., 102 F. R. 747, 4 A. B. R. 528.

[45] In re Sanborn, 96 F. R. 551, 3 A. B. R. 54; In re Worland, 92 F. R. 893, 1 A. B. R. 450; In re Styer, 98 F. R. 290, 3 A. B. R. 424; In re Matthews, 109 F. R. 603, 6 A. B. R. 96; In re Kellogg, 113 F. R. 120, 122, 7 A. B. R. 623.

[46] In re Sanborn, supra; see also In re Christy, 3 How. 292; Houston v. Bk., 6 How. 486; Ray v. Norseworthy, 23 Wall. 128.

law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,[47] the power to grant injunctions under the present law is indisputable. As the word "court," when used in the law, is defined as meaning "the court of bankruptcy in which the proceedings are pending and may include the referee,"[48] and, as by subdivision 4 of section 38, in addition to the specifically enumerated duties of the referee within the limits of their district, and subject to review, they are invested with jurisdiction "to perform such part of the duties except as to questions arising out of applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy," the conclusion is irresistible that a referee may also grant an injunction.[49] This has been held to be true, although the object of the injunction was to restrain foreclosure proceedings affecting property outside of the referee's district.[50]

After adjudication, the injunction is discretionary, provided the cause of action is one dischargeable in bankruptcy and may be granted: (1), if the bankrupt is threatened with an arrest, or will be needlessly harassed; (2), if the suit is not yet in judgment, and (3), even after judgment, if the rights of the general creditors, not parties to the suit, will be jeopardized by further proceedings in the state court, or the judgment is founded on a transaction which is an act of bankruptcy, or a fraud on the creditors or the law, and it has been held that, in the absence of either or both of the latter elements, it should never be granted after the judgment has ripened into an execution sale, provided the state court has or can be given jurisdiction of all parties interested in the distribution, including the general creditors represented by the trustee in bankruptcy.[51]

This power of the referee to grant an injunction is considered true notwithstanding the evident conflict between the act

[47] Sec. 2, act of 1898.

[48] Sec. 1 (7), act of 1898.

[49] In re Northrop, 1 A. B. R. 427; In re Adams, 1 N. B. N. 167, 1 A. B. R. 94; In re Rogers, 1 A. B. R. 541, 1 N. B. N. 211; In re Killian, 1 N. B. N. 267; In re Kerski, 2 A. B. R. 79; In re Mussey, 2 N. B. N. R. 213; In re Matthews, 109 F. R. 603, 6 A. B. R. 96; Keegan v. King, 96 F. R. 758, 3 A. B. R. 79; In re Booth, 96 F. R. 943, 2 A. B. R. 770; In re Steuer, 104 F. R. 976, 980, 5 A. B. R. 209; In re Martin, 105 F. R. 753, 5 A. B. R. 423; In re Wilkes, 112 F. R. 975, 7 A. B. R. 574.

[50] In re Sabine, 1 N. B. N. 45, 1 A. B. R. 315.

[51] In re Globe Cycle Wks., 1 N. B. N. 421, 2 A. B. R. 447.

giving the referee concurrent jurisdiction with courts of bankruptcy, except as to questions affecting discharges and compositions, and General Orders XII-3, which provides that "application for an injunction to stay proceedings of a court or officer of the United States, or of a state, shall be heard and decided by the judge, but he may refer such an application or any specified issue arising thereon to the referee to ascertain and report the facts."

§ 684. **To employ stenographic and clerical help.**—A referee has authority, upon the application of the trustee, during the examination of the bankrupt, or other proceedings, to authorize the employment of a stenographer at the expense of the estate at ten cents a folio.[52] In the absence of any other provision with reference to the employment of a stenographer than as thus provided,[53] no further charge for such fees can be imposed even though it be for a copy of the deposition for use of the court, except it be in pursuance of some stipulation by the parties to the cause.[54] This provision had been held inapplicable where the expenses were incurred at the instance of counsel, for the purpose of taking testimony necessary because of his negligence, which invited inquiry concerning the accuracy of his accounts;[55] or where an examination is undertaken, at the suggestion of trustee's attorney, to discover concealed assets, against the objection of labor claimants, whose claims would absorb the admitted assets, and which resulted in no benefit to the estate, the expense, including stenographer's charges should not be paid out of the estate.[56]

A referee is required to keep an accurate account of his incidental and traveling expenses, and those of any clerk or other officer attending him in the performance of his duties,[57] and it has been held that he is not required to take notes of testimony personally or incur the expense of clerical or stenographic aid, but should supervise the taking of testimony at the expense of the parties, or permit them to take it.[58] His

[52] In re Todd, 109 F. R. 265, 6 A. B. R. 88; see also In re Mammoth Pine Lumber Co., 116 F. R. 731, 8 A. B. R. 651.

[53] Sec. 38a (5).

[54] In re Todd, supra.

[55] In re Gerson, 2 N. B. N. R. 493, 1 A. B. R. 251.

[56] In re Rozinsky, 2 N. B. N. R. 787, 101 F. R. 229, 3 A. B. R. 830.

[57] G. O. XXVI.

[58] In re Warszawiak, 1 N. B. N. 135.

compensation does not include expenses incurred in publishing or mailing notices, traveling, perpetuating testimony or other expenses incurred and allowed by the judge;[59] from all of which his authority to employ a clerk at the expense of the estate may fairly be deduced.[60]

§ 685. **Power to tax costs.**—The statute is silent upon the right of a referee to tax costs in proceedings before him, but in explicit terms authorizes the court of bankruptcy "to tax costs whenever they are allowed by law, and render judgment therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy."[61] In view of the fact that the referee exercises much of the judicial authority of that court[62] there is a clear implication that he exercises a like power to make a taxation of costs, or to order the taxation to be made by the clerk of the court of bankruptcy.[63]

[59] G. O. XXXV (2).

[60] In re Tebo, 101 F. R. 119, 4 A. B. R. 235; In re Price, 91 F. R. 635, 1 A. B. R. 419; Contra, In re Carolina Cooperage Co., 2 N. B. N. R. 23, 3 A. B. R. 154, 96 F. R. 950.

[61] Sec. 2a (18), act of 1898.

[62] Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224; White v. Schloerb, 178 U. S. 542, 4 A. B. R. 178.

[63] In re Scott, 7 A. B. R. 710; In re Todd, 109 F. R. 265, 6 A. B. R. 88; see In re Ott, 95 F. R. 274, 2 A. B. R. 637.

CHAPTER XXXIX.

DUTIES OF REFEREES.

§686. (39a) Referee's duties detailed.
687. Preside at first meeting of creditors.
688. Declaration of dividends.
689. Notices.
690. Examination and amendments of schedules and lists.
691. Preparation of schedules.
692. Records of referees.
693. To furnish information.
694. Surrender of preferences.
695. Review of referee's decisions or rulings.
696. —— Time for making application.
697. Hypothetical questions.
698. Taking of testimony.
699. Orders of referees.
700. b. Referee not to act if interested; practice, etc.
701. Effect of violation; and disqualification.

§ 686. **(Sec. 39a) Referees' duties detailed.**—Referees shall

'(1) Declare dividends and prepare and deliver to trus-'tees dividend sheets showing the dividends declared and to 'whom payable;

'(2) Examine all schedules of property and lists of credi-'tors filed by bankrupts and cause such as are incomplete or 'defective to be amended;

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

'(4) Give notices to creditors as herein provided;

'(5) Make up records embodying the evidence, or the sub-'stance thereof, as agreed upon by the parties in all contested 'matters arising before them, whenever requested to do so by 'either of the parties thereto, together with their findings 'therein, and transmit them to the judges;

'(6) Prepare and file the schedules of property and lists of 'creditors required to be filed by the bankrupts, or cause the 'same to be done, when the bankrupts fail, refuse, or neglect 'to do so;

'(7) Safely keep, perfect, and transmit to the clerks the 'records, herein required to be kept by them, when the cases 'are concluded;

'(8) Transmit to the clerks such papers as may be on file 'before them whenever the same are needed in any proceedings

'in courts, and in like manner secure the return of such papers 'after they have been used, or, if it be impracticable to transmit 'the original papers, transmit certified copies thereof by mail;

'(9) Upon application of any party in interest, preserve the 'evidence taken or the substance thereof as agreed upon by the 'parties before them when a stenographer is not in attendance; 'and

'(10) Whenever their respective offices are in the same 'cities or towns where the courts of bankruptcy convene, call 'upon and receive from the clerks all papers filed in courts of 'bankruptcy which have been referred to them.'[1]

§ 687. Preside at first meeting of creditors.—At the first

[1] Analogous provision of act of 1867. "Sec. 4. . . . That every register in bankruptcy, so appointed and qualified, shall have power, and it shall be his duty, to make adjudication of bankruptcy, to receive the surrender of any bankrupt, to administer oaths in all proceedings before him, to hold and preside at meetings of creditors, to take proof of debts, to make all computations of dividends, and all orders of distribution, and to furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case, to audit and pass accounts of assignees, to grant protection, to pass the last examination of any bankrupt in case whenever the assignee or a creditor do not oppose, and to sit in chambers and despatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct; and he shall also make short memoranda of his proceedings in each case in which he shall act, in a docket to be kept by him for that purpose, and he shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of said memoranda, which shall be entered by said clerk in the proper minute-book to be kept in his office, and any register of the court may act for any other register thereof. . . .

"Sec. 6. . . . That any party shall during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge.

"Sec. 27. . . . In case a dividend is ordered, the register shall, within ten days after such meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward by mail to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct."

meeting of creditors, the judge or referee must preside.[2] If the referee presides he acts instead of the judge, and accordingly must pass upon judicial questions arising at the meeting, included within which is the power to determine the qualifications and right to vote.[3] He should be punctually present at the time and place specified in the notice. Since his duties are judicial, he does not otherwise participate.[4]

§ 688. **Declaration of dividends.**—The referee must declare the first dividend within thirty days after the adjudication, if there is money sufficient to pay the debts entitled to priority and five per centum on claims which probably will be allowed. Subsequent dividends may be declared as often as the amount equals ten per cent. or more and upon closing the estate.[5] He must in all cases ascertain the dividends to be paid to creditors entitled to priority, as well as to others, and place them all upon the dividend sheets,[6] which must be delivered to the trustee,[7] and which services involve a computation of the percentage to which creditors are entitled, as well as the amount to which each is entitled, according to such percentage.[8] He may be required to countersign all checks for dividends and other payments by the trustee,[9] which duty is judicial in its character and not ministerial.[10]

§ 689. **Notices.**—Referees are required to give creditors at least ten days' notice, by mail, of all examinations of the bankrupt, applications for compositions or discharges, creditors' meetings, proposed sales, dividends, filing of final accounts, compromises, and proposed dismissal of proceedings.[11] These notices must be addressed to such places as are designated by the creditors, otherwise they should be addressed as specified in the proof of debt,[12] and where proof has not been made, then as they appear in the list of creditors filed with the papers in the case.[13] He is, also, required to notify trustees of their

[2] Sec. 55 b, act of 1898.

[3] In re McGill, 106 F. R. 57, 5 A. B. R. 155.

[4] Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 9 F. R. 696.

[5] Sec. 65 b, act of 1898.

[6] Form No. 40.

[7] In re Barber, 1 N. B. N. 559, 97 F. R. 547, 2 A. B. R. 307.

[8] In re Fort Wayne Electric Corporation, 1 N. B. N. 356, 94 F. R. 109, 1 A. B. R. 706.

[9] G. O. XXIX.

[10] In re Clark, 9 N. B. R. 67, F. C. 2810.

[11] Sec. 58 a, act of 1898.

[12] G. O. XVI-2.

[13] Sec. 58 a, act of 1898.

appointment.[14] Before incurring any expense in giving notices, the referee may require of the person in whose behalf the duty is performed indemnity for such expense.[15]

§ 690. **Examination and amendments of schedules and lists.**—The provision requiring the referee to examine schedules and lists of creditors and cause such as are incomplete or defective to be amended is mandatory, and this seems to be true, although no interested party moves in the matter.[16] In particulars in which he finds them defective, it is within his discretion to order them to be amended and to refuse to call the first meeting of creditors until such amendments are made;[17] and he may allow the petition to be amended so as to allege additional acts of bankruptcy, originally omitted upon reasonably fair excuse; though it might be improper to abandon the original allegations and substitute entirely new ones.[18]

§ 691. **Preparation of schedules.**—It is the duty of the bankrupt, in the first instance, to prepare and file, within ten days after an adjudication, in case of involuntary bankruptcy, and with the petition if voluntary, a correct schedule of his property,[19] and should an involuntary bankrupt fail to do so, the referee is required by the law to prepare and file the same, or cause it to be done,[20] though the Supreme Court, by its General Orders, places this duty upon the petitioning creditor, who is required to file the same within five days after the adjudication.[21] In order that this duty may be properly performed, the referee should be required to give creditors access to the records of the bankrupt, or furnish them with the necessary information to enable the preparation of the schedules and lists, as it is not to be presumed that this information is otherwise within their cognizance. The preparation of the schedules and lists by others than the debtor is not required until all necessary steps to compel the performance of this duty have proven futile, for which purpose an attachment may issue against the debtor, in case of his failure, after proper notice.[22]

§ 692. **Records of referees.**—The records of all proceedings

[14] G. O. XVI.
[15] G. O. X.
[16] In re Mackey, 1 A. B. R. 593.
[17] In re Brumelkamp, 1 N. B. N. 360, 95 F. R. 814, 2 A. B. R. 318.
[18] In re Strait, 1 N. B. N. 354, 2 A. B. R. 308.
[19] Sec. 7 (8), act of 1898.
[20] Sec. 39 (6), act of 1898.
[21] G. O. IX.
[22] G. O. IX.

in a case before a referee should be kept as nearly as may be in the same manner as records are now kept in equity cases in the Circuit Courts of the United States. They should be kept in a book or books, and, when the case is concluded before the referee, it must be certified to by him, and, with such papers as are on file before him, be transmitted to the court of bankruptcy and there remain a part of the records of the court.[23] This record comprises all the papers pertaining to the proceedings, including the orders made by the referee and a transcript of the evidence. All papers filed either with the clerk or the referee must have indorsed thereon the day and hour of filing and a brief statement of their character.[24] On the closing of an estate the records should be sufficiently full and complete, to enable one to ascertain the full facts in regard to any given transaction without recourse to extrinsic explanation.[25]

§ 693. **To furnish information.**—The referee is required to furnish interested parties any desired information as to proceedings before him, but not copies of the proceedings,[26] though there appears to be no reason why copies should not be furnished upon suitable reimbursement to cover the expense incident thereto.

§ 694. **Surrender of preference and collection of assets.**—The referee has no authority whatever in respect to the collection of an estate administered before him, nor to handle the money thereof;[27] accordingly a creditor cannot surrender a preference to him in order to enable such creditor to prove his claim.[28]

§ 695. **Review of referee's decisions or rulings.**—When a bankrupt, creditor, trustee, or other person desires a review by the judge of any order made by the referee, he must file with the referee his petition therefor setting out the error complained of. The referee must forthwith certify to the judge the question presented, a summary of the evidence relating thereto and his finding and order thereon,[29] whose duty it is to consider, confirm, modify, overrule or return with instruction for

[23] Sec. 42, act of 1898.

[24] G. O. II.

[25] In re Carr, 116 F. R. 556, 8 A. B. R. 635.

[26] In re Lewin, 103 F. R. 850, 4 A. B. R. 632.

[27] In re Pierce, 111 F. R. 516, 6 A. B. R. 747.

[28] In re Thompson, 2 N. B. N. R. 1016; see In re Pierce, 111 F. R. 516, 6 A. B. R. 747.

[29] G. O. XXVII.

further proceedings such records and findings.[30] Where the specific question of the correctness of a referee's findings is certified to the court for decision on petition of a party, no formal exceptions to such findings are required to render them reviewable.[31] The power of review being unlimited,[32] questions of fact as well as of law may be considered.[33]

The provision as to the petition is mandatory, and, consequently, on a review of the referee's decision, the court will not consider exceptions not duly filed with the referee.[34] In default of the petition, the application for review will be dismissed.[35] It has been held, however, that a court will notice manifest errors in a record that is certified to it, although not raised by counsel;[36] but it will not look through voluminous depositions and records for errors which are not plainly pointed out.[37] Irrelevant issues raised by a party not in court should be returned without decision.[38] Merely filing exceptions to a referee's rulings in the court of bankruptcy does not properly bring before the court for review such rulings, but the requirements of the law must be complied with.[39]

A general review of the proceedings before the referee, or rulings not directly affecting an order made, is not intended; but specific questions arising in a proceeding, may be presented for review of the court, on certificate setting forth the question involved, which should be signed by the referee, or in case of orders entered, on petition for review, and not in the form of assignment of errors. Exceptions to a determination by the referee may be taken by any person in interest.[40]

Upon an application to review an order made by a referee, the court will neither vacate nor modify it, where it rests upon

[30] Sec. 2 (10), act of 1898.

[31] In re Miner, 117 F. R. 953; but see In re Carver, 113 F. R. 138, 7 A. B. R. 539.

[32] Sec. 38a.

[33] In re Gottardi, post.

[34] In re Scott et al., 99 F. R. 404, 2 N. B. N. R. 440, 3 A. B. R. 625; In re Gottardi, 114 F. R. 328, 333; In re Carver, 113 F. R. 138, 7 A. B. R. 539.

[35] In re Schiller, 96 F. R. 400, 2 A. B. R. 704; In re Russell, 105 F. R. 501, 5 A. B. R. 566.

[36] In re Woodard, 95 F. R. 955, 1 N. B. N. 430, 2 A. B. R. 692.

[37] In re Richard, 1 N. B. N. 487, 94 F. R. 643, 2 A. B. R. 506; In re Carver, 113 F. R. 138, 7 A. B. R. 539.

[38] Haskell v. Jones, 4 N. B. R. 481, F. C. 6191.

[39] In re Hawley, 116 F. R. 429, 8 A. B. R. 631; Dressel v. North State Lumber Co., 119 F. R. 531.

[40] See In re Kelly Dry Goods Co., 102 F. R. 747, 4 A. B. R. 528; In re Reliance Storage and Warehouse

a matter within the referee's discretion,[41] unless abused, nor will it interfere with his decision upon questions of fact, unless convinced that it is manifestly against the weight of evidence,[42] or there is clear error.[43] The proceedings will not be stayed merely because an appeal has been taken from a referee's decision, but the estate will be protected and the administration proceeded with.[44] Where the referee takes jurisdiction of the subject matter, a party, submitting his person thereto and inviting action on his rights, cannot for the first time object to the jurisdiction and the way he was brought into court, on appeal and after an adverse decision;[45] and an order granting a discharge is proper, notwithstanding a creditor objected to the reference of the case to a referee to report the facts, which objection was renewed before the judge, if no legal grounds appear for opposing the discharge and the creditor had an opportunity to present such grounds.[46]

§ 696. **Time for applying for review.**—While neither the statute nor General Orders contain any provision fixing the time within which an application for a review of the referee's decisions must be made, if exceptions are not promptly taken, but there is an apparent acquiescence in a decision, some good reason should appear for permitting objections to be made that are out of season. The circumstances in each case must therefore determine whether the right to review is deemed to have been waived.[47]

§ 697. **Hypothetical questions.**—A question, in order to be certified to the judge, must arise in the course of the proceedings before the referee and between parties having a right to

Co., 100 F. R. 619, 4 A. B. R. 49.

[41] In re Brumelkamp, 1 N. B. N. 360, 95 F. R. 814, 2 A. B. R. 318.

[42] In re Waxelbaum, 101 F. R. 228, 4 A. B. R. 120; In re Ryder, 96 F. R. 811, 3 A. B. R. 193; In re Richard, 1 N. B. N. 487, 94 F. R. 633, 2 A. B. R. 506; In re Miner, 117 F. R. 953, 9 A. B. R. 100.

[43] In re West, 116 F. R. 767, 8 A. B. R. 564; In re Stephens, 114 N. R. 192, 8 A. B. R. 153; In re Boorstin, 114 F. R. 696, 8 A. B. R. 89; In re Stout, 109 F. R. 794, 6 A. B. R. 505; In re Covington, 110 F. R. 143, 6 A. B. R. 373; In re Miner, supra; see In re Swift, 118 F. R. 348.

[44] In re Brown, 2 N. B. N. R. 590.

[45] In re Emrich, 2 N. B. N. R. 656, 4 A. B. R. 89, 101 F. R. 231; Muller v. Nugent, 184 U. S. 1; 7 A. B. R. 224; In re Matthews, 109 F. R. 603, 6 A. B. R. 96.

[46] In re McDuff, 101 F. R. 241, 4 A. B. R. 110.

[47] In re Chambers, Calder & Co., 6 A. B. R. 709; In re Kelly Dry Goods Co., 102 F. R. 747, 4 A. B.

raise it,[48] as an opinion will not be given on an abstract question.[49]

§ 698. **Taking of testimony.**—A deposition in an examination before a referee must be taken down in writing by him or under his direction in the form of narrative, unless, in his judgment, it should be by question and answer, and when completed, it must be read over to the witness and signed by him in the presence of the referee.[50] For this purpose, he is authorized to administer oaths or affirmations,[51] and, upon request of the trustee, may authorize the employment of a stenographer, at the expense of the estate, to report and transcribe the proceedings.[52]

§ 699. **Orders of referees.**—In all orders made by a referee, it must be recited, according as the fact may be, that notice was given, together with the manner thereof, or that the order was made by consent, or that no adverse opinion was represented at the hearing or that the order was made after hearing adverse opinion.[53]

§ 700. **'b. Referees not to act if interested—Practice, etc.—** 'Referees shall not (1) act in cases in which they are directly or 'indirectly interested; (2) practice as attorneys and counselors 'at law in any bankruptcy proceedings; or (3) purchase, di- 'rectly or indirectly, any property of an estate in bank- 'ruptcy.'[54]

R. 528; In re Reliance Storage & Warehouse Co., 100 F. R. 619, 4 A. B. R. 49.

[48] In re Wright, 1 N. B. R. 191, F. C. 18069; In re Bray, 2 N. B. R. 53, F. C. 1818; In re Freedenburg, 1 N. B. R. 34, 2 Ben. 133, F. C. 5075.

[49] In re Sturgeon, 1 N. B. R. 131, F. C. 13564.

[50] G. O. XXII.

[51] Sec. 20, act of 1898.

[52] Sec. 38 (5), act of 1898; see also as to referee's power of over examination, ante § 679.

[53] G. O. XXIII.

[54] Analogous provision of act of 1867. "Sec. 3. . . . That he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

"Sec. 4. . . . No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, nor in an appeal therefrom, nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emolu-

§ 701. **Effect of violation and disqualification.**—Violations of any of these provisions, or a refusal to permit a reasonable opportunity for an inspection of the accounts and papers relating to estates by parties in interest may be tried by either the Circuit or District Courts,[55] and, upon conviction, the referee becomes liable to a fine and the forfeiture of his office.[56]

The fact that a referee owes bankrupt a debt is not such an interest as will disqualify him; but he must be directly or indirectly interested in the proceedings in bankruptcy or the estate of the bankrupt, which owing the debt does not make him.[57]

ments arising from either of said trusts."

[55] Sec. 23c, act of 1898.

[56] Sec. 29c, act of 1898.

[57] Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102.

CHAPTER XL.

COMPENSATION OF REFEREES.

§702. (40a) Compensation of referees.
703. Fees of referees.
704. Fee for filing proof of claim.
705. Expenses of referees.
706. Compensation in pauper cases.
707. Commission on secured claims.
708. —— On priority claims.
709. Rate and basis of commissions.
710. b. Fee where case transferred.
711. c. —— Where reference revoked.

§ 702. (Sec. 40a) Compensation of referees.—'Referees 'shall receive as full compensation for their services, payable 'after they are rendered, a fee of fifteen dollars deposited with 'the clerk at the time the petition is filed in each case, except 'when a fee is not required from a voluntary bankrupt, and 'twenty-five cents for every proof of claim filed for allowance, 'to be paid from the estate, if any, as a part of the cost of 'administration, and from estates which have been admin- 'istered before them one per centum commissions on all moneys 'disbursed to creditors by the trustee, or one-half of one per 'centum on the amount to be paid to creditors upon the con- 'firmation of a composition.'[1]

[1] Prior to the enactment of the matter in the text, by the amendatory act of February 5, 1903, Section 40a provided as follows: 'Referees shall receive as full 'compensation for their services, 'payable after they are rendered, 'a fee of ten dollars deposited with 'the clerk at the time the petition 'is filed in each case, except when 'a fee is not required from a vol- 'untary bankrupt, and from es- 'tates which have been adminis- 'tered before them one per centum 'commissions on sums to be paid 'as dividends and commissions, or 'one-half of one per centum on the 'amount to be paid to creditors 'upon the confirmation of a com- 'position.'

Analogous provision of act of 1867. "Sec. 4. . . . The fee of said registers, as established by this act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by this act.

"Sec. 5. . . . That the judge of the district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applica-

§ 703. **Fees for referees.**—The clerk is required to collect the referee's fee of $15 in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt accompanied by a pauper affidavit,[2] such fee to be in full for all services performed by the referee under the act, or general orders.[3] In any case in which such fee is not required to be paid, before filing the petition, the judge may at any subsequent time order it paid out of the estate, or, after notice and proof of bankrupt's ability, require him to pay it.[4] A special allowance to a referee for services performed, in addition to the fees fixed by law, cannot be made, even with the consent of the attorneys for the parties in interest.[5]

If objections are filed to bankrupt's discharge, the court may refer the case to the referee as special master, not as referee, for a duty independent of the latter office, but not incompatible; for the necessary services under this reference the ap-

tions under this act as may not be opposed, of attending any meeting of creditors, or receiving any proofs of debts, and, generally, for the prosecution of any bankruptcy or other proceedings under this act; and the traveling and incidental expenses of such register, and of any clerk or other officer attending him, incurred in so acting, shall be set[lled] by said court in accordance with the rules prescribed under the tenth section of this act, and paid out of the assets of the estate in respect of which such register has so acted; or if there be no such assets, or if the assets shall be insufficient, then such expenses shall form a part of the costs in the case or cases in which the register shall have acted in such journey, to be apportioned by the judge.

"Sec. 47. . . . That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the registers. (Here follows an enumeration of the fees.) . . .

"Such fees shall have priority of payment over all other claims out of the estate, and before a warrant issues, the petitioner shall deposit with the senior register of the court, or with the clerk, to be delivered to the register, fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued, shall pay the same, and the court may issue an execution against him to compel payment to the register."

[2] Sec. 51a (2), act of 1898, § 795.

[3] Sec. 72, act of February 5, 1903; In re Barker, 111 F. R. 501, 7 A. B. R. 132.

[4] G. O. XXXV.

[5] Dressel v. North State Lumber Co., 119 F. R. 531.

pointee is entitled to a reasonable allowance, in addition to the statutory fee, unaffected by the fact that he is a referee.[6]

§ 704. **Fee for filing proof of claim.**—Prior to the amendatory act of February 5, 1903, the practice with reference to the fee charged by referees for this service varied, in some states no fee was allowable, while in others it was permitted by rule of court. Referees are now entitled to charge for every proof of claim filed for allowance twenty-five cents, though there appears to be no warrant for exacting an additional fee on filing an amended or substituted proof of claim. This fee is not to be paid by the creditor on filing the proof, but the referee is entitled to charge it against the estate, if any there be, as with other expenses incurred, as part of the cost of administration.

§ 705. **Expenses of referees.**—The $15 fee does not include expenses of publishing, or mailing, notices, traveling, or perpetuating testimony, or other expenses necessarily incurred and allowed by the judge;[7] and, before incurring any of these expenses, the referee may require indemnity from the person for whom the service is to be rendered.[8] Money advanced for this purpose will be repaid out of the estate as a part of the cost of administering the same.[9] A referee may employ a clerk for the performance of these services and the expense so incurred is properly allowable.[10]

Exceptions to the referee's charges against an estate in bankruptcy for his expenses therein will not be heard by the court, when his account therefor has been duly kept and returned to the court, under oath, with vouchers,[11] and approved; especially when distribution has been made before such exceptions were presented.[12] He must keep an accurate account of his

[6] Fellows v. Freudenthal, 102 F. R. 731, 4 A. B. R. 490; In re Grossman, 111 F. R. 507, 6 A. B. R. 510; In re Steed, 107 F. R. 682, 6 A. B. R. 73; Contra, In re Troth, 3 N. B. N. R. 104, F. R. 291; Bragassa v. St. Louis Cycle Co., 107 F. R. 77, 5 A. B. R. 700.

[7] G. O. XXXV; In re Dixon, 114 F. R. 675, 8 A. B. R. 145; In re Pierce, 111 F. R. 516, 6 A. B. R. 747.

[8] G. O. X.

[9] G. O. IV.

[10] In re Warszawiak, 1 N. B. N. 135; In re Price, 91 F. R. 635, 1 A. B. R. 419; In re Tebo, 101 F. R. 419, 4 A. B. R. 235; Contra, In re Carolina Cooperage Co., 2 N. B. N. R. 23, 3 A. B. R. 154, 96 F. R. (50).

[11] G. O. XXVI.

[12] In re Tebo, 101 F. R. 419, 4 A. B. R. 235, but see In re Mammoth Pine Lumber Co., 116 F. R. 731, 8 A. B. R. 651.

traveling and incidental expenses and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him and must make return of the same, under oath, to the judge with proper vouchers, when they can be procured, on the first Tuesday in each month,[13] and, if approved, they will be paid or allowed out of the estates in which they were incurred.[14]

§ 706. **Compensation in pauper cases.**—No provision is made for the payment of compensation or necessary expenses in cases where the bankrupt files his petition in forma pauperis,[15] but if, at any time during the pendency of the proceedings, assets should be developed, the court may order those fees to be paid out of the estate, or may, after notice to the bankrupt and satisfactory proof that he has or can obtain the money order him to pay such fees, and, on default, dismiss the petition.[16]

§ 707. **Commission on secured claims.**—The present act establishes a new rule for the determination of the compensation due to officers charged with the administration of bankrupt estates, differing from the preceding acts, and, consequently, there is an absence of precedent touching the right of commissions upon secured claims. While it was held prior to the amendatory act that the use of the term "dividend" in this section limited the commission to unsecured claims and those not entitled to priority of payment,[17] there seems now to be no question in view of the change of phraseology which authorizes a commission "on all moneys disbursed to creditors by the trustees," which would comprehend the case of a secured creditor who submitted his securities to the federal jurisdiction, the avails of the property being disbursed by the trustee in bankruptcy, in which event a commission should be allowed thereon.[18]

[13] G. O. XXVI.

[14] Sec. 62, act of 1898.

[15] Sec. 51, act of 1898.

[16] G. O. XXXV-4; see also Sec. 51, act of 1898.

[17] In re Fort Wayne Electric Corporation, 1 N. B. N. 356, 94 F. R. 109, 1 A. B. R. 706; In re Fielding, 2 N. B. N. R. 735, 96 F. R. 800, 3 A. B. R. 135; In re Utt, 105 F. R. 754, 5 A. B. R. 383; In re Mammoth Pine Lumber Co., ante; see In re Smith, 108 F. R. 39, 5 A. B. R. 559; In re Barker, 111 F. R. 501, 7 A. B. R. 132.

[18] See In re Barber et al., 1 N. B. N. 559, 97 F. R. 547, 3 A. B. R. 307; In re Sabine, 1 N. B. N. 312, 1 A. B. R. 322; In re Coffin, 1 N. B. N. 507, 2 A. B. R. 344; see In re Muhlhauser Co., 9 A. B. R. 80.

A dividend in bankruptcy is a parcel of the fund arising from the assets of an estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors, or in a different proportion. A misconstruction of this word seems to have arisen from the mistaken idea that, instead of relating to a division of the fund, according to the rights of the several creditors of different classes, it has some fanciful relation to such of the debts as are not paid in full. The fund is the thing which is divided, and the dividends are the parcelings to the creditors from that fund.[19] There is absolutely no warrant for saying that section 65a is a definition of what shall constitute a dividend; it is merely a rule declaratory of the method of payment. The setting apart to the bankrupt of a homestead exemption from proceeds of property sold by the trustee is not the making of a dividend nor such a disbursement as would entitle the referee to a commission upon the same.[20]

§ 708. —— **On priority claims.**—Prior to the amendment it was held that priority claims with reference to commissions, stood on a different footing from secured claims, and that the term "dividends," as used in section 65a, could have no application to the former for the reason that the statute directed them to be paid out of the estate in full, seriatim, before the matter of declaring and paying dividends arose and the referee was denied a commission thereon.[21] The amendment, however, removes all doubt, and the referee is now clearly entitled to commissions on moneys disbursed for the purpose of paying priority claims.

§ 709. —— **Rate and basis of commission.**—The referee is entitled to one per centum on all moneys disbursed by the trustee in the bankruptcy proceedings, and to one-half of one per centum on the amount paid under a composition. The commission with the filing fee is to be in full compensation for all services rendered.

§ 710. 'b. **Fee when case transferred.**—Whenever a case is 'transferred from one referee to another the judge shall deter-

[19] In re Barber et al., supra.

[20] In re Gardner, 2 N. B. N. R. 796, 103 F. R. 932, 4 A. B. R. 420.

[21] In re Fielding, 2 N. B. N. R. 735, 96 F. R. 800, 3 A. B. R. 135; In re Sabine, supra; Contra, In re Gerson, 1 N. B. N. 384, 2 A. B. R. 352; In re Muhlhauser Co., 9 A. B. R. 80.

'mine the proportion in which the fee and commissions therefor 'shall be divided between the referees.'

§ 711. '**c. Fee where reference revoked.**—In the event of 'the reference of a case being revoked before it is concluded, 'and when the case is specially referred, the judge shall deter- 'mine what part of the fee and commissions shall be paid to the 'referee.'

CHAPTER XLI.

CONTEMPTS BEFORE REFEREES.

§712. (41a) Contempts defined.
713. When witness required to attend.
714. Power of referee.
715. What constitutes a contempt.
716. —— Of bankrupt.
717. —— Of witness.
718. b. Proceedings on contempt.
719. Referee cannot punish.
720. Judge to punish.

§ 712. '**(Sec. 41a) Contempts defined.**—A person shall not, 'in proceedings before a referee,

'(1) Disobey or resist any lawful order, process, or writ;

'(2) Misbehave during a hearing or so near the place thereof 'as to obstruct the same;

'(3) Neglect to produce, after having been ordered to do so, 'any pertinent document; or

'(4) Refuse to appear after having been subpoenaed, or, 'upon appearing, refuse to take the oath as a witness, or, after 'having taken the oath, refuse to be examined according to 'law:

§ 713. '**When witness required to attend.**—Provided, That 'no person shall be required to attend as a witness before a 'referee at a place outside of the state of his residence, and 'more than one hundred miles from such place of residence, 'and only in case his lawful mileage and fee for one day's 'attendance shall be first paid or tendered to him.'[1]

[1] Analogous provision of act of 1867. "Sec. 7. And be it further enacted, That parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpœna, and all persons wilfully and corruptly swearing or affirming falsely before a register shall be liable to all the penalties, punishments, and consequences of perjury. If any person examined before a register shall refuse or decline to answer, or to swear to or to sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such question or to sign such ex-

§ 714. **Power of referee.**—The referee is included within the meaning of the word "court" as used in the act[2] and exercises the same power in a case before him as a court of bankruptcy except in matters relating to compositions and discharges[3] as to which he has authority to do only what the order referring the matter to him prescribes.[4] As has been well said, referees, within the scope of their authority, act in lieu of the court of bankruptcy and their orders are in effect the orders of the court and a violation of such orders will subject the offender to punishment as for a violation of an order of the court of bankruptcy.[5]

§ 715. **What constitutes a contempt.**—It is a contempt not to obey an order of the referee relating to the investigation of a bankrupt's affairs or business;[6] but before making such order evidence should be produced which shows not only inferentially and possibly but so as to convince an unprejudiced mind beyond a reasonable doubt that the person to whom the order is issued is able to obey it.[7] This section does not create a new or enlarged jurisdiction over contempts, nor does it confer a power to impose a punishment which might not rightly and lawfully be imposed on a similar state of facts by any other United States Court.[8]

While it is generally true that one accused of constructive contempt, by fully answering all the charges on his oath, is purged thereof, such answers can not be considered conclusive evidence in case of disobedience of orders in bankruptcy, but they may be contradicted or supported by other testimony, in which event the question whether the party has purged him-

amination, and such person shall also be liable to be punished for contempt.

"Sec. 26. . . . The bankrupt shall at all times, until his discharge, be subject to the order of the court . . . and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of the court."

[2] Sec. 1 (7), act of 1898.

[3] Sec. 38a (4), act of 1898; In re Mussey, 2 N. B. N. R. 113, 99 F. R. 71, 3 A. B. R. 592.

[4] G. O. XII (3).

[5] In re Allen, 13 Blatch. 272; Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224; In re Gettleston, 1 N. B. R. 604; In re Speyer, 6 N. B. R. 255, F. C. 13239.

[6] In re Tudor, 1 N. B. N. 476, 2 A. B. R. 808, 96 F. R. 942.

[7] In re Tischler, 2 N. B. N. R. 549.

[8] Boyd v. Glucklich, 116 F. R. 131, 8 A. B. R. 393.

self is to be decided upon a careful consideration of all the evidence.[9]

§ 716. **Contempt of bankrupt.**—It is a contempt for a bankrupt to wilfully disobey an order of the referee requiring him to turn over to his trustee money or other property, proved by evidence beyond a reasonable doubt to be a part of his estate in bankruptcy, which he has not surrendered or accounted for, and to be actually in his present possession or control, or that any alleged transfer or other disposition of it is a mere subterfuge which does not prevent his producing it. While proceedings in bankruptcy may be summary, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right after being so advised to have a reasonable time to prepare his defense and produce his witnesses; a failure to give such notice and opportunity, cannot be cured by subsequently permitting the bankrupt to introduce evidence.[10] It has been held that it is a contempt for an involuntary bankrupt to neglect to pay the trustee a sum in his inventory as "cash on hand;"[11] but where the bankrupt was prevented by sickness from attending as required by the referee, he was not in contempt.[12]

§ 717. **Contempt of witness.**—Witnesses cannot be required

[9] See Boyd v. Glucklich, supra, opinion of Sanborn, J.; In re Gottardi, 114 F. R. 328, 7 A. B. R. 723.

[10] Boyd v. Glucklich, supra; Ex p. Robinson, 19 Wall. 505; In re Levin, 6 A. B. R. 743; In re Gottardi, 7 A. B. R. 723; Ripon Knitting Wks. v. Schreiber, 2 N. B. N. R. 899, 4 A. B. R. 299, 101 F. R. 810; In re Rosser, 101 F. R. 562, 41 C. C. A. 497, 4 A. B. R. 153; s. c. below 1 N. B. N. 469; 2 A. B. R. 746, 96 F. R. 305, 308; In re Tischler, 2 N. B. N. R. 549; In re Purvine, 1 N. B. N. 326, 2 A. B. R. 787, 96 F. R. 192; In re Tudor, 1 N. B. N. 476, 2 A. B. R. 808, 96 F. R. 942; In re McCormick, 2 N. B. N. R. 104, 3 A. B. R. 340, 97 F. R. 566; In re Schlesiger, 2 N. B. N. R. 169, 3 A. B. R. 342, 97 F. R. 930; In re Mayer, 2 N. B. N. R. 257, 98 F. R. 839, 3 A. B. R. 533; In re Deuell, 100 F. R. 633, 2 N. B. N. R. 597, 4 A. B. R. 60; In re Oliver, 1 N. B. N. 329, 2 A. B. R. 783, 96 F. R. 85; In re Friedman, 1 N. B. N. 332, 2 A. B. R. 301; In re Kuntz, 1 N. B. N. 256; In re Pearson, 1 N. B. N. 474, 2 A. B. R. 819; Wayne Knitting Mills v. Nugent, 2 N. B. N. R. 714; but see In re Ogles, 1 N. B. N. 400, 2 A. B. R. 514; In re Salkey, 11 N. B. R. 423, 516, 521, F. C. 12253; In re Speyer, 6 N. B. R. 255, F. C. 13239.

[11] In re Dresser, 3 N. B. R. 138, F. C. 4077.

[12] In re Carpenter, 1 N. B. R. 51, F. C. 2427.

to attend before a referee outside the state of their residence, nor more than a hundred miles from their residence, nor until their lawful mileage and fee for one day's attendance have been paid. The power here conferred to compel the attendance of witnesses is not to be considered as changing or enlarging the power of the federal courts to compel their attendance as defined in section 876 of the Revised Statutes of the United States, but is a limitation upon pre-existing rights, so that one cannot be compelled to attend a reference in bankruptcy within the state of his residence, if at a distance of more than one hundred miles therefrom. If the testimony of such witnesses is desired it must be pursuant to section 21 of the law.[13]

A witness is entitled[14] for each day's attendance in court, or before any officer pursuant to law, to one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. By the act of August 3, 1892,[15] witnesses in courts in Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, New Mexico, Arizona and Utah are entitled to receive fifteen cents for each mile necessarily traveled over any stage line or by private conveyance and five cents for each mile over any railroad in going to and returning from said court. But no officer of a United States court is entitled to witness fees for attending before any court or commissioner where he is officiating.[16]

No extra allowance can be made to an expert witness, but it is a matter for private contract between the witness and the party summoning him, and such contract will not bind the court nor will it be regarded under any circumstances unless in writing and signed by the parties.[17] If the referee is in the state of witness' residence within a hundred miles thereof and witness has been paid his mileage and fee as stated, he will be guilty of contempt if he wilfully disobeys any lawful order, misbehaves so as to obstruct the hearing, fails to produce any pertinent document which he has been ordered to produce or refuses to appear after being subpoenaed or to take the oath after appearing or to testify after being sworn. The

[13] In re Hemstreet, 117 F. R. 568, 8 A. B. R. 760.

[14] Sec. 848, U. S. Rev. Stat.

[15] 1 Supp. Rev. Stat. 165.

[16] Sec. 849. U. S. Rev. Stat.

[17] In re Carolina Cooperage Co., 1 N. B. N. 534, 3 A. B. R. 154, 96 F. R. 604.

examinations[18] are for the purpose of furnishing creditors and the officers administering the estate full information as to bankrupt's assets. A witness is guilty of contempt if he refuses to attend or obey an order made on the application of a receiver, for his examination or to produce books or documents tending to show the disposition of property purchased from the bankrupt when fraud against the purchaser is alleged;[19] or to attend a hearing in one city in opposition to a discharge when summoned from another;[20] or, on being examined as to where he obtained the money with which he purchased claims against the bankrupt and answering on cross-examination that he did not get it from the bankrupt, if he does not state where he did get it;[21] but he has been held not in contempt where he did not appear but filed objections declining to submit to examination until the question raised had been decided.[22] See Evidence, Sec. 21, of the law, ante, § 518.

§ 718. 'b. **Proceedings on contempt.**—The referee shall cer-'tify the facts to the judge, if any person shall do any of the 'things forbidden in this section. The judge shall thereupon, 'in a summary manner, hear the evidence as to the acts com-'plained of, and, if it is such as to warrant him in so doing, 'punish such person in the same manner and to the same extent 'as for a contempt committed before the court of bankruptcy, 'or commit such person upon the same conditions as if the 'doing of the forbidden act had occurred with reference to the 'process of, or in the presence of, the court.'[23]

§ 719. **Referee cannot punish.**—The referee cannot punish for contempt, but when committed before him, he should enter the fact on the record and then certify the facts to the judge, who is authorized to impose punishment as for similar offenses committed before a court of bankruptcy.[24]

[18] Sec. 7g, and 21a, act of 1898.

[19] In re Fixen & Co., 1 N. B. N. 568, 2 A. B. R. 822, 96 F. R. 748.

[20] In re Woodward, 12 N. B. R. 297, 8 Ben. 112.

[21] In re Lathrop, 4 N. B. R. 93, F. C. 8106.

[22] In re Dole, 7 N. B. R. 538, F. C. 3965.

[23] Analogous provision of act of 1867. "Sec. 4. . . . Provided, however, That nothing in this section contained shall empower a register to commit for contempt, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge."

[24] Secs. 2 (13) and 2 (16), act of 1898; In re Miller, 105 F. R.

The court of bankruptcy has no authority to refer the question of the commitment of a person guilty of contempt to the discretion of the referee, since the court alone is authorized to exercise the power of commitment.[25]

See Contempt, Sec. 2, of the law, ante, §§ 55-63.

§ 720. **Judge to punish.**—It is not to be inferred that for a wilful disobedience of a lawful order of a referee, there is no power of punishment, and that the only course is to obtain a re-enactment of the order from the judge, for a violation of which second order, a punishment may be inflicted. The statute, which places so large a part of the details of settlement of estates in the referee's hands, evidently intended his lawful orders to have the force of orders of the judge; and the courts will enforce such orders by contempt proceedings instituted directly on failure to obey them.[26] Under the general rules of law and the specific provisions of the bankrupt act, the court of bankruptcy has power to imprison a person for contumacy and compel obedience to a referee's order, where complete jurisdiction of the bankrupt and his estate exists. The criminality of his conduct and his liability to criminal prosecution will not prevent the court from dealing with him summarily for contempt, but the ability to comply with the order must be shown by evidence beyond a reasonable doubt and that he wilfully disobeyed the order. This power cannot be invoked to reach property beyond the present control of the bankrupt and in the hands of third persons claiming title derived prior to the bankruptcy proceedings, although the transaction is manifestly fraudulent; nor to punish for frauds committed by bankrupt against the act nor to coerce him or transferees to make restitution.[27]

Imprisonment as a means of compelling a person over whom the court has jurisdiction to surrender the possession of money or other property he has no right to keep is not imprisonment for debt; nor does the constitutional guaranty of the right to

57, 5 A. B. R. 154; Boyd v. Glucklich, 116 F. R. 131, 8 A. B. R. 393; In re Taylor, 5 A. B. R. 184, 105 F. R. 509.

[25] Smith v. Belford, 106 F. R. 658, 5 A. B. R. 291.

[26] In re Allen, 3 Blatch. 272; In re Gettleston, 1 N. B. R. 604; In re Speyer, 6 N. B. R. 255, F. C. 13239.

[27] In re Mayer, 2 N. B. N. R. 257, 98 F. R. 839, 3 A. B. R. 533; Boyd v. Glucklich, supra; In re Wilson, 116 F. R. 419, 8 A. B. R. 612.

a trial by jury apply to statutory proceedings of this character in which the court exercises the powers of a special tribunal, as where acting as a court of bankruptcy.[28] The referee cannot compel a witness to answer if he refuses,[29] but he can certify the matter to the judge for punishment as for a contempt.[30]

[28] Muller v. Nugent, 184 U. S. 1, 7 A. B. R. 224; see Smith v. Belford, supra.

[29] In re Koch, 1 N. B. R. 153.

[30] In re Rosenfield, 1 N. B. R. 60, F. C. 12059.

CHAPTER XLII.

RECORDS OF REFEREES.

§721. (42a) Manner of keeping referee's records.
722. Weight given referee's records.
723. Statistical information required.
724. b. Case to be kept in separate book.
725. Record of case.
726. c. Record books to be returned to the clerk's office.
727. Record to be transmitted.

§ 721. '(Sec. 42a) Manner of keeping referees' records.—'The records of all proceedings in each case before a referee 'shall be kept as nearly as may be in the same manner as rec-'ords are now kept in equity cases in circuit courts of the 'United States.'[1]

§ 722. Weight given referees' records.—A certified copy of the proceedings before a referee, or of papers when issued by the clerk or referee, will be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted.[2] The referee's record must be taken as a true report of the proceedings and on an application to confirm a composition, notwithstanding that opposing creditors offer affidavits to show that he omitted to record objections and other proceedings and misstated what took place.[3] A certified copy of the adjudication is the best evidence of the fact of bankruptcy.[4]

§ 723. Statistical information required.—In order to enable the Attorney General to report annually to Congress as required by section 53 the referees are required to furnish him semi-annually statistics as to the business transacted by them.[5]

[1] Analogous provision of act of 1867. "Sec. 4. . . . and he shall also make a short memoranda of his proceedings in each case in which he shall act, in a docket to be kept by him for that purpose, and he shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of said memoranda, which shall be entered by said clerk in the proper minute book to be kept in his office. . . ."

[2] Sec. 21d, act of 1898.

[3] In re Spencer, 18 N. B. R. 199, F. C. 13229.

[4] Buck v. Winters, 15 N. B. R. 140.

[5] Sec. 54, act of 1898.

§ 724. 'b. **Cases to be kept in separate book.**—A record of 'the proceedings in each case shall be kept in a separate book 'or books, and shall, together with the papers on file, constitute 'the records of the case.'

§ 725. **Record of a case.**—The referee is required to indorse on each paper filed the day and hour of filing, and a brief statement of its character,[6] and should file it with the written authority from a creditor to an attorney, agent or proxy to represent and vote for him.[7] Upon application of any party in interest, he is required to preserve the evidence taken before him or the substance thereof as agreed upon by the parties when a stenographer is not in attendance;[8] or if in attendance a transcript of his notes;[9] and these, with any orders or notices, made by the referee, constitute the record of the proceedings, and should be neatly bound together as the record when the case is closed. The referee's entries will as a rule prove what proceedings have taken place before him.[10] If a review of any order made by the referee is desired, a petition should be filed with him, when he is required to certify to the judge the question presented, a summary of the evidence relating thereto and his finding and order thereon.[11] Whenever papers on file before him are needed in any proceeding in court he should transmit them to the clerk and secure their return after they have been used, or transmit certified copies by mail when necessary.[12]

§ 726. 'c. **Record books to be returned to clerk's office.**— 'The book or books containing a record of the proceedings 'shall, when the case is concluded before the referee, be cer- 'tified to by him, and, together with such papers as are on file 'before him, be transmitted to the court of bankruptcy and 'shall there remain as a part of the records of the court.'[13]

§ 727. **Record to be transmitted.**—When a case is closed the

[6] G. O. II.

[7] In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 F. R. 696.

[8] Sec. 39 (9), act of 1898; G. O. 22.

[9] Sec. 38 (5), act of 1898.

[10] In re Crane, 15 N. B. R. 120, F. C. 3352.

[11] Sec. 39 (5), act of 1898; G. O. XXVII.

[12] Sec. 39 (8), act of 1898.

[13] Analogous provision of act of 1867. "Sec. 5. . . . Provided, always, That all depositions of persons and witnesses taken before said register, and all acts done by him, shall be reduced to writing,

referee should bind the loose sheets neatly together if he has so kept the record, attach his certificate thereto, or to the book as the case may be, and send them with the papers in the case to the clerk. Papers exhibited become a part of the depositions and cannot be withdrawn and a copy substituted therefor except upon application of one able to show a proper use.[14]

and be signed by him, and shall be filed in the clerk's office as a part of the proceedings. . . .

"Sec. 38. . . . the proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection."

[14] In re McNair, 2 N. B. R. 109, F. C. 8908.

CHAPTER XLIII.

REFEREE'S ABSENCE OR LIABILITY.

§728. (43a) Referee's absence or disability.
729. Fees.
730. Special referee.

§ 728. '(Sec. 43a) **Referee's absence or disability.**—Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.'[1]

§ 729. **Fees.**—The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another,[2] and when so transferred the judge determines the proportion in which the fee and commissions are to be divided,[3] or, in case the reference of a case is revoked, he determines what part of the fee and commissions shall be paid to the referee.[4]

§ 730. **Special referee.**—When the referee to whom a case would regularly be referred is absent or disqualified, the court may act or appoint a special referee and refer the case to him. This may be done before the answer of the bankrupt is filed and does not require the consent or approval of the respondent or his attorney.[5]

[1] Analogous provision of act of 1867. "Sec. 5. . . . Such register shall be subject to removal by the judge of the district court, and all vacancies occurring by such removal, or by resignation, change of residence, death or disability, shall be promptly filled by other fit persons, unless said court shall deem the continuance of the particular office unnecessary."

[2] Sec. 22b, act of 1898.

[3] Sec. 40b, act of 1898.

[4] Sec. 40c, act of 1898.

[5] Bray v. Cobb, 1 N. B. N. 209, 91 F. R. 102, 1 A. B. R. 153.

CHAPTER XLIV.

APPOINTMENT OF TRUSTEES.

§731. (44a) Appointment.
732. Official or general trustee.
733. Creditors entitled to vote.
734. Election of trustee in bankrupt's interest.
735. Majority, number and amount required.
736. To be chosen at first meeting.
737. Attorney for trustee chosen at same time.
738. Appointment by judge or referee.
739. Approval or disapproval of trustee.
740. Vacancy in office of trustee.
741. No trustee to be appointed in certain cases.
742. Attorneys may vote for creditors.
743. Additional trustees.
744. Removal of trustees.
745. Proceedings for removal.

§ 731. **'(Sec. 44a) Trustees' appointment.**—The creditors 'of a bankrupt estate shall, at their first meeting after the 'adjudication or after a vacancy has occurred in the office of 'trustee, or after an estate has been reopened, or after a com-'position has been set aside or a discharge revoked, or if there 'is a vacancy in the office of trustee, appoint one trustee or 'three trustees of such estate. If the creditors do not appoint 'a trustee or trustees as herein provided, the court shall do so.'[1]

[1] Analogous provision of act of 1867. Sec. 13. And be it further enacted, That the creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debt. If no choice is made by the creditors at said meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

Sec. 18. . . . That the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient. At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the

§ 732. **Official or general trustee.**—No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.[2]

§ 733. **Creditors entitled to vote.**—A creditor to participate in and vote at the first meeting for a trustee must own an unsecured claim, provable in bankruptcy, and must not only have proved such claim, but have had it allowed and be in actual attendance.[3] A creditor whose claim is secured or has priority cannot vote unless such claim exceeds the security,[4] and then only for the excess, unless the security is on a third person's property, or exempt property, when he may vote the whole;[5] or for so much of his debt as is unsecured, when the security applies only to a specific portion of the debt;[6] and a preferred

creditors may, with consent of [the] court, remove any assignee by such a vote as is hereinbefore provided for the choice of assignee. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the manner hereinbefore provided, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person as the court shall direct. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen. Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

"Sec. 13. . . . If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place."

[2] G. O. XIV.

[3] In re Richards, 2 N. B. N. R. 1027, 103 F. R. 849, 4 A. B. R. 631.

[4] Sec. 56b, act of 1898.

[5] In re Stillwell, 7 N. B. R. 226, F. C. 13448.

[6] In re Parker, 10 N. B. R. 82, F. C. 10754.

creditor can only vote by surrendering such preference.[7] A creditor inhibited from proving his debt cannot vote for the trustee,[8] nor a secured creditor who sold his security, bid it in himself and proved his claim for the difference between the face of the claim and the amount bid at the sale.[9] Firm creditors only can vote for a trustee for the firm.[10] The mere filing of objections to a claim should not exclude a creditor from voting, if he is qualified, but the action of the referee so excluding him will not be reviewed when no objection is made to the election and no facts presented raising the question of the rights of creditors in such cases.[11]

§ 734. **Election of trustee in bankrupt's interest.**—The trustee is the representative of the creditors and in his capacity as such he is frequently required to act in opposition to the bankrupt. The authorities under the present law, as well as under the act of 1867, are uniform in maintaining the proposition that the bankrupt has no right to influence nor has he a voice in the choice of a trustee. Accordingly interference by the bankrupt, the voting of claims in his interest or at his direction should be discountenanced and held to invalidate a choice of trustee thus secured.[12] The referee is warranted, therefore, when presiding at the first meeting of creditors to determine whether one holding a proxy obtained in the interest of the bankrupt should be permitted to vote for a trustee of his choice, and if convinced that the party offering to qualify as a voter does so in the interest of the bankrupt, he may be refused permission to vote, and should not be counted as present and necessary for a choice of trustee.[13] Where a vote is

[7] Secs. 56, 57, act of 1898; In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 F. R. 696; In re Richards, 2 N. B. N. R. 1027, 103 F. R. 849, 4 A. B. R. 631; In re Malino, 118 F. R. 368, 8 A. B. R. 205.

[8] In re Stevens, 4 N. B. R. 122, 4 Ben. 513, F. C. 13391.

[9] In re Hunt, 17 N. B. R. 17205, F. C. 6881.

[10] In re Scheiffer, 2 N. B. R. 179, F. C. 12445; see In re Beck, 110 F. R. 140, 6 A. B. R. 554.

[11] In re Kelly Dry Goods Co., 102 F. R. 747, 4 A. B. R. 528.

[12] In re McGill, 106 F. R. 57, 5 A. B. R. 155, aff'g 104 F. R. 292, 4 A. B. R. 782; In re Wooten, 118 F. R. 670; In re Lewensohn, 98 F. R. 576, 3 A. B. R. 299; In re Lemont, 2 N. B. N. R. 291; In re Wetmore, F. C. 17466; In re Bliss, F. C. 1543; In re Dayville Woolen Co., 114 F. R. 674, 8 A. B. R. 85; In re Rekersdres, 108 F. R. 206, 5 A. B. R. 811; In re Henschel, 109 F. R. 865, 6 A. B. R. 305; In re Morton, 118 F. R. 908; but see In re Noble, F. C. 10282.

[13] In re McGill, supra; In re Dayville Woolen Co., supra.

cast by a relative of the bankrupt, the court should convince itself before approving the election, that the trustee so elected is not in the interest of the bankrupt, but will perform his duties without fear or favor.

§ 735. Majority in number and amount required.—A majority vote in number and amount of claims of all creditors whose claims have been allowed and are present is required;[14] so that if there is a majority in number voting for one person and a majority in amount for another there is no election,[15] as where fifty creditors representing about $1,000.of claims vote for one and twenty creditors representing about $10,000 voted for another.[16] If only one creditor prove his debt, he has the right to choose the trustee.[17]

§ 736. To be chosen at the first meeting.—The trustee is to be chosen at the first meeting of creditors;[18] and the vote should be taken at the earliest moment practicable.[19] The referee will not be held to have abused his discretion in declining to postpone the election, on holding proxies disqualified, in order that new proxies may be obtained.[20] Where an adjudication has been made and notice of the first meeting given and the bankrupt files a second petition in which the same debts are set out, the trustee should be chosen in the first proceeding.[21] The creditors' powers are limited to voting for the trustee;[22] and, after the adjournment of the meeting, a creditor will not be permitted to change his vote, on the ground of his own mistake so as to give the referee an opportunity to appoint the trustee.[23]

It is the duty of the referee to notify the trustee of his appointment.[24]

§ 737. Attorney for trustee selected at same time.—While there is no warrant in the law or orders, it has been held on

[14] Sec. 56a, act of 1898; In re Mackellar, 116 F. R. 547, 8 A. B. R. 669; In re Henschel, 113 F. R. 443, 7 A. B. R. 662.

[15] In re Richards, 2 N. B. N. R. 1027, 103 F. R. 849, 4 A. B. R. 631.

[16] In re Pearson, 2 N. B. R. 151, F. C. 10878.

[17] In re Haynes, 2 N. B. R. 78, F. C. 6269.

[18] In re Jones, 2 N. B. R. 20, F. C. 7447.

[19] In re Lake Superior Ship Canal, R. R. & Iron Co., 7 N. B. R. 376, F. C. 7997.

[20] In re McGill, supra.

[21] In re Wielarskie, 4 N. B. R. 130, 4 Ben. 468, F. C. 17619.

[22] In re Campbell, 17 N. B. R. 4, 3 Hughes, 276. F. C. 2348.

[23] In re Scheiffer, 2 N. B. R. 179, F. C. 12445.

[24] G. O. XVI.

several occasions that the selection of an attorney for the trustee by the creditors will be approved.[25] The custom followed as a rule, however, is for the trustee to select his own counsel.

§ 738. **Appointment of trustee by judge or referee.**—Where the creditors fail to appoint at the first meeting,[26] or where the referee's time is consumed in maneuvering to elect a special favorite, or to elect a particular trustee for merely personal objects,[27] or there is not a majority in number and amount of claims for a candidate,[28] or where the trustee offers to pay certain creditors in full for their support,[29] the judge or referee may appoint the trustee. If there is a vacancy in the office of trustee on account of the disapproval of the election by the referee, the court or referee can appoint another only after the failure by the creditors to appoint after a full opportunity.[30]

§ 739. **Approval or disapproval of trustee.**—The creditor's selection of a trustee is subject to the approval or disapproval of the judge or referee,[31] and when they fail to approve, they have no power to appoint a trustee, but another creditors' meeting must be called to make the selection, the same as in the case of a vacancy.[32] Those seeking confirmation of trustees appointed by creditors in case of a contest are the moving parties and should file such papers as they see fit in support of the motion.[33]

§ 740. **Vacancy in office of trustee.**—It is evidently the intent of the act to give the creditors the control of the selection of the trustee not only in the original election at the first meeting, but (1) after a vacancy has occurred in the office of trustee; (2) after an estate has been reopened; (3) after a

[25] In re Smith, 1 N. B. N. 136, 1 A. B. R. 37; In re Little River Lumber Co., 101 F. R. 558, 3 A. B. R. 682; but see In re Abram, 103 F. R. 272, 3 N. B. N. R. 28, 4 A. B. R. 575.

[26] Anon. 1 N. B. N. 2; In re Brooke, 2 N. B. N. R. 680, 4 A. B. R. 50, 100 F. R. 32; In re MacKellar, 116 F. R. 547, 8 A. B. R. 669; In re Newton, 107 F. R. 429, 6 A. B. R. 52; see In re Sumner, 4 A. B. R. 123.

[27] In re Kuffler, 2 N. B. N. R. 29, 3 A. B. R. 162.

[28] In re Henschel, 109 F. R. 861, 6 A. B. R. 305.

[29] In re Haas, 8 N. B. R. 189, F. C. 5884.

[30] In re Hare, 119 F. R. 246.

[31] G. O. XIII; Morris v. Swartz, 10 N. B. R. 305.

[32] In re MacKellar, supra; In re Lewensohn, 98 F. R. 576, 3 A. B. R. 299; In re Hare, 119 F. R. 246.

[33] In re Am. Waterproof Cloth Co., 3 N. B. R. 74, 1 Ben. 526, F. C. 318.

composition has been set aside; (4) or a discharge revoked, or (5) "if there is a vacancy in the office of trustee;" which seems to provide for all possible cases. There is a vacancy in the office of trustee whenever that office is unoccupied or unfilled, as when the trustee chosen refuses the office or fails to qualify, or is disapproved by the court, whether the office has been previously filled or not, and in such case the judge or referee cannot appoint until an opportunity has been given the creditors for a new election if practicable.[34] After an estate once closed has been reopened, the creditors have the same power and authority with respect to the appointment of a trustee as is conferred upon them at the first meeting after the adjudication.[35] Where a trustee dies before qualifying and while the first meeting of creditors is still open, having been adjourned for the bankrupt's examination, it is as though no trustee had been chosen and the creditor who chose him may choose another.[36]

In the case of the vacancy in the position of one of three trustees, a third should be appointed, since there must be either one or three trustees.

§ 741. **No trustee to be appointed.**—If the schedules of a voluntary bankrupt disclose no assets and if no creditor appears at the first meeting, no trustee should be appointed;[37] but, if assets are subsequently discovered one should be appointed. If at the first meeting bankrupt announces his purpose to offer a composition, the appointment of a trustee may be postponed to give an opportunity to file such composition, and, when filed, the appointment may be further postponed until the composition is refused;[38] or if approved, the necessity for a trustee, of course, ceases to exist.

§ 742. **Attorneys may vote for creditors.**—Creditors may be represented by their attorneys in the voting for trustees; but such attorneys should produce and file with the referee to be made part of the record in the case, a written authority from their principals.[39]

[34] In re Lewensohn, 2 N. B. N. R. 315, 3 A. B. R. 299, 98 F. R. 576; In re MacKellar, 116 F. R. 547, 8 A. B. R. 669.

[35] In re Newton, 107 F. R. 429, 6 A. B. R. 52.

[36] In re Wright, 1 N. B. N. 405, 2 A. B. R. 497.

[37] G. O. XV; In re Levy, 101 F. R. 247.

[38] In re Rung Bros., 1 N. B. N. 406, 2 A. B. R. 620.

[39] In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 F. R. 696; In re Blankfein, 2 N. B. N. R.

§ 743. **Additional trustees.**—The act authorizes the appointment of one or three trustees; and, if it should be found that one cannot properly attend to the affairs of the estate, there is no reason why additional trustees should not be chosen subsequently, but, in that case, a majority would be required to perform any act required of them as trustees. Under the act of 1867, an additional trustee was obtainable upon a petition to the court showing cause for his appointment,[40] and the same course would be proper now; but a resolution of creditors nominating a committee to supervise the trustee will not be approved.[41]

§ 744. **Removal of trustee.**—Courts of bankruptcy have jurisdiction upon complaints of creditors, to remove trustees for cause upon hearings and after notice to them,[42] the power being vested in the judge alone and not in the referee.[43] If the creditors at their first meeting do not choose a trustee, nor request that an election be had, nor nominate a candidate for the office, and the referee, presiding at the meeting, appoints one, his appointment will not be set aside merely because the creditors desire a different person.[44] The removal of a trustee rests in the discretion of the court, but it is a legal discretion and cause must be shown, as gross neglect, mismanagement, fraud, or concealment of material facts, incompetency or want of integrity,[45] and the election of a trustee will not be set aside on account of any irregularity in a claim when its exclusion would not have affected the result;[46] nor will a trustee be removed in the absence of imputation upon his capacity or integrity.[47] See post, § 750.

49, 3 A. B. R. 165, 97 F. R. 191; In re Richards, 2 N. B. N. R. 1027, 103 F. R. 849; but see In re Pauly, 1 N. B. N. 405, 2 A. B. R. 334; In re Brown, 2 N. B. N. R. 590.

[40] In re Overton, 5 N. B. R. 366, F. C. 10625.

[41] In re Stillwell, 2 N. B. R. 104, F. C. 13447.

[42] Sec. 2 (17), act of 1898.

[43] G. O. XIII; In re Stokes, 1 N. B. R. 130, F. C. 13475.

[44] In re Brooke, 2 N. B. N. R. 680, 4 A. B. R. 50, 100 F. R. 432; In re Kuffler, 2 N. B. N. R. 29, 3 A. B. R. 162, 97 F. R. 187; Falter v. Reinhard, 2 N. B. N. R. 1119, 104 F. R. 292.

[45] In re Blodgett, 5 N. B. R. 472, F. C. 1552; In re Mallery, 4 N. B. R. 38, F. C. 8990; In re Morse, 7 N. B. R. 56, F. C. 9852; In re Price, 4 N. B. R. 137, F. C. 11409; In re Sacchi, 6 N. B. R. 398, F. C. 12200; In re Perkins, 8 N. B. R. 56, F. C. 10982.

[46] In re Jackson, 14 N. B. R. 449, 7 Biss. 280, F. C. 7123.

[47] In re Lewensohn, 2 N. B. N. R. 315, 3 A. B. R. 299, 98 F. R. 576;

While the statute is silent upon the point as to whether a trustee may resign his office after qualifying, no objection appears to exist to granting such request, unless the interests of the estate would be injuriously affected, in which event the court would undoubtedly have the power to compel the trustee to proceed with its administration. In any event the resignation would not be complete until acceptance.

§ 745. **Proceedings for removal.**—If it is desired to have a trustee removed, a petition should be presented setting forth the grounds on which it is sought to have him removed.[48]

In re McGlynn, 2 Lowell 127, 16 F. C. 122; In re Funkenstein, 9 F. C. 1004; In re Barrett, 2 N. B. R. 533, 2 F. C. 909; In re Grant, 2 N. B. R. 35, F. C. 5292; In re Clairmont, 1 N. B. R. 276, 5 F. C. 810; In re Dewey, 4 N. B. R. 139, F. C. 3849.

[48] In re Hicks, 19 N. B. R. 449, F. C. 6457.

CHAPTER XLV.

QUALIFICATIONS OF TRUSTEES.

§746. (45a) Qualifications.
747. Residence or citizenship.
748. Relationship not a disqualification.
749. Grounds of disqualification.

§ 746. **'(Sec. 45a) Qualifications of trustees.**—Trustees 'may be (1) individuals who are respectively competent to 'perform the duties of that office, and reside or have an office in 'the judicial district within which they are appointed, or (2) 'corporations authorized by their charters or by law to act in 'such capacity and having an office in the judicial district 'within which they are appointed.'[1]

§ 747. **Residence or citizenship.**—Neither residence nor citizenship is required, but merely that the proposed trustee have an office within the judicial district of which his bankruptcy district is a part.[2]

§ 748. **Relationship not a disqualification.**—The mere fact of relationship on the part of the proposed trustee to the bankrupt or a creditor will not necessarily disqualify him,[3] if he is otherwise qualified and satisfactory to the creditors, and the court is satisfied that he will perform the duties without fear or favor, though as a rule such selections should be discountenanced.[4] A son of one member of a bankrupt firm, who, with the other members of bankrupt's family, have presented claims against the estate, would be disqualified.[5] The fact that the trustee chosen by a majority of the creditors has business relations with or is a blood relation of the referee, would not dis-

[1] Analogous provision of act of 1867. "Sec. 18. . . . No person who has received any preference contrary to the provisions of this act shall vote for or be eligible as assignee. . . ."

[2] In re Woodbury, 2 N. B. N. R. 284, 98 F. R. 833, 3 A. B. R. 457; see In re Havens, 1 N. B. R. 126, F. C. 6231; In re Loder, 2 N. B. R. 161, F. C. 8459.

[3] In re Zinn, 4 N. B. R. 145, 4 Ben. 500, F. C. 18215; s. c. 4 N. B. R. 123, F. C. 18216; In re Powell, 2 N. B. R. 17, F. C. 11354.

[4] See § 734, ante.

[5] In re Bogert, 3 N. B. R. 161, F. C. 1600.

qualify him;[6] nor that he is attorney for the creditors, if otherwise unobjectionable.[7]

§ 749. Grounds of disqualification.—The choice of the creditors should not be interfered with on slight grounds and, unless incompetency, want of capacity or integrity or lack of an office or residence within the judicial district is shown, the appointment should be approved.[8] The fact that one solicits the appointment will not necessarily operate as a disqualification;[9] but where proxies to vote are obtained in the bankrupt's interest or at his solicitation and for the purpose of electing a trustee who is the bankrupt's choice upon objection to such votes, the proxies should be rejected;[10] nor should one bankrupt be appointed trustee of the estate of another bankrupt;[11] or a director of a bank in whose favor bankrupt confessed judgment;[12] or one who was for years bankrupt's bookkeeper and voted under powers of attorney from different creditors,[13] or one whose interest is antagonistic to that of the creditors.

[6] In re Brown, 2 N. B. N. R. 590.

[7] In re Barrett, 2 N. B. R. 165, 2 Hughes, 44, F. C. 1043; In re Clairmont, 1 N. B. R. 42, 1 Lowell 230, F. C. 2781; In re Lawson, 2 N. B. R. 44, F. C. 8150.

[8] In re Lewensohn, 2 N. B. N. R. 315, 3 A. B. R. 299, 98 F. R. 576; In re McGlynn, 2 Lowell 127, 16 F. C. 122; In re Funkenstein, F. C. 1004; In re Barrett, 2 N. B. R. 533, 2 F. C. 909; In re Grant, 2 N. B. R. 35, F. C. 5292; In re Clairmont, 1 N. B. R. 276, 5 F. C. 810.

[9] In re Brown, 2 N. B. N. R. 590; but see In re "a bankrupt," 2 N. B. R. 100; In re Smith, 1 N. B. R. 25, 2 Ben. 133, F. C. 12971; In re Haas, 8 N. B. R. 189, F. C. 5884.

[10] Falter v. Reinhard, 104 F. R. 292, 2 N. B. N. R. 1119.

[11] In re Smith, 1 N. B. N. 136, 1 A. B. R. 37.

[12] In re Powell, 2 N. B. R. 17, F. C. 11354.

[13] In re Wetmore, 16 N. B. R. 514, F. C. 17466.

CHAPTER XLVI.

DEATH OR REMOVAL OF TRUSTEES.

§750. (46a) Death or removal of trustee.
751. Effect of death or removal of trustees.

§ 750. '(Sec. 46a) **Death or removal of trustees.**—The 'death or removal of a trustee shall not abate any suit or pro-'ceeding which he is prosecuting or defending at the time of his 'death or removal, but the same may be proceeded with or 'defended by his joint trustee or successor in the same manner 'as though the same had been commenced or was being de-'fended by such joint trustee alone or by such successor.'[1]

§ 751. **Effect of death or removal of trustee.**—This provision prevents the death or removal of a trustee from interfering with the progress of the administration of the estate and avoids delay and additional expense, which would be incurred if his successor had to institute new suits, or proceedings, besides the possible interposition of the bar of the statute of limitation.

[1] Analogous provision of act of 1867. "Sec. 14. . . . and no suit in which the assignee is a party shall be abated by his death or removal from office; but the same may be prosecuted and defended by his successor, or by the surviving or remaining assignee, as the case may be.

"Sec. 15. . . . No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him."

CHAPTER XLVII.

DUTIES OF TRUSTEES.

§752. (47a) Duties in general.
753. Acceptance or rejection of trust.
754. Preparation of inventory.
755. Accounts and reports.
756. To furnish information.
757. Deposit and payment of money.
758. Dividends.
759. Exemptions.
760. Collect and reduce estate to money.
761. Employment of attorney.
762. Trustee may sue.
763. Property and estates.
764. Creditors must act through trustee.
765. What the trustee should not do.
766. Power of trustee.
767. b. Concurrence of majority necessary.
768. Concurrence of two out of three trustees.
769. c. Record of trustee's title.
770. When record to be made.

§ 752. '(Sec. 47a) **Trustees' duties in general.**—Trustees 'shall respectively

'(1) Account for and pay over to the estates under their con-'trol all interest received by them upon property of such 'estates;

'(2) Collect and reduce to money the property of the estates 'for which they are trustees, under the direction of the court, 'and close up the estate as expeditiously as is compatible with 'the best interests of the parties in interest;

'(3) Deposit all money received by them in one of the desig-'nated depositories;

'(4) Disburse money only by check or draft on the deposi-'tories in which it has been deposited;

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

'(6) Keep regular accounts showing all amounts received 'and from what sources and all amounts expended and on what 'accounts;

'(7) Lay before the final meeting of the creditors detailed 'statements of the administration of the estates;

'(8) Make final reports and file final accounts with the 'courts fifteen days before the days fixed for the final meet-'ings of the creditors;

'(9) Pay dividends within ten days after they are declared 'by the referees;

'(10) Report to the courts, in writing, the condition of the 'estates and the amounts of money on hand, and such other 'details as may be required by the courts, within the first 'month after their appointment and every two months there-'after, unless otherwise ordered by the courts; and

'(11) Set apart the bankrupt's exemptions and report the 'items and estimated value thereof to the court as soon as 'practicable after their appointment.'[1]

[1] Analogous provision of act of 1867. "Sec. 14. . . . The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien or other encumbrances. The assignee shall immediately give notice of his appointment, by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded; and the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.

"Sec. 15. . . . That the assignee shall demand and receive, from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of this act; and he shall sell all such unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in its opinion, prove to the interest of the creditors; and the assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort. . . .

"Sec. 16. . . . That the assignee shall have the like remedy to recover all said estate, debts and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. . . .

"Sec. 17. . . . That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate and apart from

§ 753. **Acceptance or rejection of trust.**—The trustee is required forthwith, on receipt of notice of his appointment, to notify the referee of his acceptance or rejection of the trust.[2]

§ 754. **Preparation of inventory.**—Immediately on entering upon his duties he should prepare a complete inventory of all the property of the bankrupt that comes into his possession.[3]

§ 755. **Accounts and reports.**—He is required to keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; to report to the court, in writing, the condition of the estate and the amounts of money on hand, and such other details as may be required by the court, within the first month after his appointment and every two months thereafter, unless otherwise ordered by the court; to keep separate accounts of partnership property and of the property belonging to the individual partners; to lay before the final meeting of the creditors detailed statements of the administration of the estate; and to make final report and file final account with the court fifteen days before the day fixed for the final meeting of the creditors. All his accounts must be referred as of course to the referee for audit, unless otherwise specially ordered by the court.[4] In

all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property or for the payment of his debts. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or a register of said court, or may authorize the same to be deposited in any convenient bank upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon. He shall give written notice to all known creditors, by mail or otherwise, of all dividends, and such notice of meetings, after the first, as may be ordered by the court.

"Sec. 28. . . . If at any time there shall be in the hands of the assignee any outstanding debts or other property, due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under direction of the court, sell and assign such debts or other property in such manner as the court shall order."

[2] G. O. XVI.

[3] G. O. XVII.

[4] G. O. XVII, Form 49 and 50; In re Bazinsky, Mitchell & Co., 1 N. B. N. 360, 2 A. B. R. 243; In re Carr, 116 F. R. 556, 8 A. B. R. 635; but see In re Hicks, 19 N. B. R. 449, F. C. 6457; In re Hubbel, 9 N. B. R. 523, F. C. 6820; In re Clark,

case he neglects to file any report or statement required by the act, or by any general rule in bankruptcy, within five days after the same shall be due, the referee must make an order requiring him to show cause before the judge, at a time specified in the order, why he should not be removed from office, and cause a copy of such order to be served on him at least seven days before the time fixed for the hearing, and proof of service to be delivered to the clerk.[5] He is also required to account for and pay over to the estate under his control all interest received upon property of such estates, implying that such property may be temporarily, at least, invested so as to produce interest, as was expressly authorized by the former act.[6]

§ 756. **To furnish information.**—It is his duty to furnish such information concerning the estates of which he is trustee and their administration as may be requested by parties in interest; and his refusal to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do will subject him to a fine and the loss of his office.[7] The unlawfully secreting or destroying any document belonging to a bankrupt estate which came into his hands as trustee will subject him to imprisonment,[8] in either case both the court of bankruptcy and the circuit court having jurisdiction to try him.[9]

§ 757. **Deposit and payment of money.**—He is required to deposit without delay all money received by him in one of the depositories, designated by the bankruptcy court;[10] and to disburse money only by check or draft on such depositories, which check or draft is to be signed by him and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or draft, with the date thereof, the sum drawn for, and the

9 N. B. R. 67, F. C. 2810; In re Peabody, 16 N. B. R. 243, F. C. 10866.

5 G. O. XVII.

6 Act of 1867, Sec. 17.

7 Sec. 29c, act of 1898; In re Blaisdell, 6 N. B. R. 78, 5 Ben. 420, F. C. 1488.

8 Sec. 29a, act of 1898.

9 Secs. 2 (4) and 23c, act of 1898.

10 Sec. 61, act of 1898; In re Cobb, 112 F. R. 655, 7 A. B. R. 202.

account for which it is drawn, must be forthwith made in a book kept for that purpose by the trustee; and all checks and drafts must be entered in the order of time in which they are drawn, and must be numbered in the case of each estate.[11]

§ 758. **Dividends.**—He is required to pay dividends within ten days after they are declared by the referees, of which notice[12] should be given; and, if they remain unclaimed for six months after the final dividend has been declared, he should pay them into court.[13] Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.[14]

§ 759. **Exemptions.**—It is the trustee's duty to set apart the bankrupt's exemptions and to report to the court, within twenty days after receiving notice of his appointment, the articles set off to the bankrupt with the estimated value of each, when any creditor may except to the same within twenty days after the report is filed, and the referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party.[15] For the discussion and authorities on this subject, see Exemptions, Sec. 6, of law, ante, § 185.

§ 760. **Collect and reduce estate to money.**—The principal duty of the trustee is to collect and reduce to money the property of the estates in his charge, under the direction of the court, and close them up as expeditiously as is compatible with the best interests of the parties concerned.[16] For this purpose he takes not only all the rights and title of the bankrupt, but he takes also all the rights of creditors as against adverse claimants to the estate. He takes the estate free from all claims that are not valid against creditors or any one of them;[17] and

[11] G. O. XXIX; In re Rude, 4 A. B. R. 319; In re Carr, 116 F. R. 556, 8 A. B. R. 635.

[12] Form No. 41.

[13] Sec. 66a, act of 1898.

[14] Sec. 57c, act of 1898; see Declaration and Payment of Dividends, Sec. 65 of act of 1898.

[15] G. O. XVII; McGahan v. Anderson, 113 F. R. 115, 7 A. B. R. 641.

[16] In re Stein, 1 N. B. N. 337, 1 A. B. R. 662, 94 F. R. 124.

[17] Sec. 67a, act of 1898; In re Kindt, 2 N. B. N. R. 369; In re Booth, 2 N. B. N. R. 377, 98 F. R. 975, 3 A. B. R. 574.

he may set aside fraudulent preferences, or fraudulent conveyances;[18] though the bankrupt himself might not be able to do so. He will be subrogated to and may enforce the rights of any creditor who is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt;[19] reclaim and recover by legal proceedings or otherwise any property, not exempt, transferred within four months of the bankruptcy with intent to hinder, delay or defraud creditors, except as to purchasers in good faith and for a present fair consideration, and any such property transferred within such four months and while the debtor was insolvent when such transfer is void as to creditors by the state law.[20] He takes the property unaffected by any lien obtained through legal proceedings against an insolvent within four months of bankruptcy, except as against a bona fide purchaser for value without notice or reasonable cause for inquiry, or be subrogated to the rights of the lienor;[21] and recover the excess over a reasonable amount where a debtor in contemplation of bankruptcy has paid money or transferred property to an attorney for services to be rendered.[22]

He may also do whatever the bankrupt could to make the estate available for the benefit of creditors, as prove a claim against another estate in bankruptcy and have it allowed in the same manner and upon like terms as other creditors.[23] Under the order of the court, he should pay all taxes legally due the United States, state, county, district, or municipality in advance of dividends, and, in case the amount or legality of such tax is questioned, have it determined in the court of bankruptcy;[24] pursuant to the court's direction, submit any controversy arising during the settlement of the estate to arbitra-

[18] Sec. 60b, and 70e, act of 1898; In re Griffith, 1 N. B. N. 546; In re Gray, 3 A. B. R. 647; In re McNamara, 2 N. B. N. R. 341; Upton v. Jackson, F. C. 16802; In re Leland, 9 N. B. R. 209, 7 Ben. 156, F. C. 8230; Bradshaw v. Klein, F. C. 1790; In re Metzer, 2 N. B. R. 114, F. C. 9510; In re Duncan, 14 N. B. R. 18, 8 Ben. 365, F. C. 4131; Barker v. Barker's Ass., 12 N. B. R. 474, 2 Woods, 87, F. C. 986; In re Adams, 1 N. B. N. 167, 1 A. B. R. 94; Aiken v. Edrington, 15 N. B. R. 271, F. C. 111; In re Wynne, 4 N. B. R. 5, F. C. 18117; Allen v. Mussey, 4 N. B. R. 75, F. C. 231; Thurmond v. Andrews, 13 N. B. R. 157.

[19] Sec. 67b, act of 1898.

[20] Sec. 67e, act of 1898; In re Gray, 3 A. B. R. 647.

[21] Sec. 67f, act of 1898.

[22] Sec. 60d, act of 1898.

[23] Sec. 57m, act of 1898.

[24] Sec. 64a, act of 1898.

tion;[25] and, with the approval of the court, compromise any controversy upon such terms as he deems for the best interests of the estate.[26]

§ 761. **Employment of an attorney.**—The trustee may employ legal assistance when necessary, and he must decide in the first instance himself whether it is necessary, as a court will not give him directions in advance,[27] though if he desires he may submit the question of such employment to the creditors at the first meeting.[28] Attorney's fees to a reasonable amount may be allowed as part of the cost of administration;[29] and it has been held that if he is a lawyer, he may perform the services himself and be allowed such reasonable compensation as he would have paid had he been obliged to employ counsel.[30] The court of bankruptcy has jurisdiction to pass on the reasonableness of a contingent fee retained by an attorney under an agreement with the trustee for conducting a suit, and, if found excessive, to require the excess to be refunded;[31] and, where the trustee obtained authority to employ an attorney on a contingent fee but suppressed facts, knowledge of which would have prevented the giving of such authority, the contract may be set aside and reasonable compensation awarded.[32]

One who acted as bankrupt's attorney in the preparation of the case cannot subsequently act as attorney for the trustee on being relieved by the bankrupt, since the rule with reference to the confidential nature of communications between attorney and client apply with equal force in proceedings in bankruptcy.[33]

[25] Sec. 26, act of 1898; G. O. XXXIII.

[26] Sec. 27, act of 1898.

[27] In re Abram, 3 N. B. N. R. 28, 103 F. R. 272, 4 A. B. R. 475; In re Baber, 119 F. R. 520; In re Baxter, 19 N. B. R. 295, F. C. 1122.

[28] In re Little River Lumber Co., 101 F. R. 558, 3 A. B. R. 682; In re Smith, 1 N. B. N. 136, 1 A. B. R. 37.

[29] In re Stotts, 1 N. B. N. 326, 93 F. R. 438, 1 A. B. R. 641; In re Pauly, 1 N. B. N. 405, 2 A. B. R. 333; In re Davenport, 3 N. B. R. 18, F. C. 3587; In re Colwell, 15 N. B. R. 93; In re Pegues, 3 N. B. R. 9; In re Tully, 3 N. B. R. 19, F. C. 3587; In re Noyes, 6 N. B. R. 277.

[30] In re Mitchell, 1 N. B. N. 264, 1 A. B. R. 687, citing Perkin's Appeal, 108 Pa. St. 319; and Lowrie's Appeal, 1 Grant 373; In re Welge, 1 F. R. 216; but see In re Meldaur, 17 F. C. 958.

[31] In re Brinker, 19 N. B. R. 195, F. C. 1882.

[32] Maybin v. Raymond, 15 N. B. R. 353, F. C. 9338.

[33] In re Tenthorn, 5 A. B. R. 767.

§ 762. **Trustee may sue.**—It is not the duty of the trustee to litigate every question that may be called to his notice by the creditors, however frivolous or apparently lacking in support it may be, and on the other hand he should not, by requiring indemnity in every instance against the costs and expenses of suit, cast the risk of controversy upon the particular creditor who may request that it be undertaken.[34] The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided;[35] enter his appearance and defend any pending suit against the bankrupt, by order of the court;[36] or, with the approval of the court, prosecute any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though commenced by him.[37] He may institute suits for the purpose of reducing choses in action to money or recover property from third persons, or to set aside transfers of property to third persons alleged to be fraudulent as to creditors, including payments in money or property to preferred creditors, or to foreclose a mortgage,[38] and in such case it is not necessary for him first to obtain an order of the bankruptcy court to justify him in maintaining such suit.[39] He may prosecute suits to recover assets in a district other than that in which the decree of bankruptcy is entered.[40]

It is sufficient to show that he will probably succeed, certainty not being required, when he applies for instructions relative to a suit the creditors wish him to bring, but, if an offer of settlement has been made, it must appear that the suit will probably realize more.[41]

§ 763. **Property and estates.**—These terms are used in the

[34] In re Baird, 112 F. R. 960, 7 A. B. R. 448.

[35] Sec. 70e, act of 1898.

[36] Sec. 11b, act of 1898; In re Klein, 1 N. B. N. 486, 3 A. B. R. 174, 97 F. R. 31.

[37] Sec. 11c, act of 1898.

[38] Bardes v. Bk., 2 N. B. N. R. 725, 3 A. B. R. 680, 178 U. S. 524; In re Gerdes, 102 F. R. 318, 4 A. B. R. 346, rev'g 2 N. B. N. R. 131, Hicks v. Knost, 2 N. B. N. R. 734, 178 U. S. 541, 4 A. B. R. 178; In re Cohn, 2 N. B. N. R. 299, 3 A. B. R. 421, 98 F. R. 75; Mather v. Coe, 1 N. B. N. 554, 92 F. R. 333, 1 A. B. R. 504; In re Fowler, 1 N. B. N. 215, 1 A. B. R. 637; In re Brodbine, 1 N. B. N. 279, 326, 2 A. B. R. 53, 93 F. R. 643; Burlingame v. Parce, 17 N. B. R. 246; Russell v. Owen, 15 N. B. R. 322.

[39] Chism v. Bank of Friars Point, 5 A. B. R. 56.

[40] In re Phelps, 2 N. B. N. R. 484, 3 A. B. R. 396.

[41] Dutcher v. Wright, 16 N. B. R. 331, 94 U. S. 553.

broadest sense and include every species of property, not legally exempt, that can be made available for the benefit of creditors, and would include an interest under a will;[42] unpaid subscriptions to corporations;[43] the excess in value of property over the amount secured on it; besides the usual visible forms of property. It is the trustee's duty to investigate the securities held by creditors to determine their value, how and by what right they are held, and whether anything may be obtained from them for the general creditors; and take proper steps to have the securities declared invalid if they are so; or, if they are valid, redeem the property from the lien if, after application to the court,[44] that seems desirable, in which case he may be subrogated to the rights of the lienor if necessary,[45] or if there is likely to be a surplus and a foreclosure suit is pending, intervene in such suit;[46] but, unless the estate will be benefited, he need not move in the matter.[47] It is the trustee's duty to decide, within a reasonable time, whether a lease is beneficial to the estate and he will therefore accept it or not.[48] He should sell bankrupt's property under the order of the court and subject to its approval, or, if sold otherwise than subject to the approval of the court, it should be for not less than seventy-five per centum of its appraised value; such sales to be at public auction unless for good cause shown the court may authorize a private sale,[49] after at least ten days' notice by mail to creditors,[50] or an immediate sale is ordered by the court on account of the perishable nature of the property without notice.[51] After the sale is confirmed by the court the trustee should convey the property to the purchaser.[52]

§ 764. Creditors must act through trustee.—The trustee is

[42] See Suits by and against bankrupts, Sec. 11 of the law, and Jurisdiction of United States and State Courts, Sec. 23.

In re Baudouine, 1 N. B. N. 506, 3 A. B. R. 55, 96 F. R. 536; In re Wood, 3 A. B. R. 572, 98 F. R. 972; In re Wetmore, 3 A. B. R. 700, 99 F. R. 703.

[43] In re Crystal Springs Bottling Co., 3 A. B. R. 194, 96 F. R. 945; Michener v. Payson, 13 N. B. R. 49, F. C. 9524; Myers v. Seeley, 10 N. B. R. 411, F. C. 9994.

[44] G. O. XXVIII; Form No. 43.

[45] McLean v. Cadwalader, 15 N. B. R. 383.

[46] In re Holloway, 1 N. B. N. 264, 1 A. B. R. 659, 93 F. R. 638; Heath v. Shaffer, 1 N. B. N. 399, 2 A. B. R. 98, 93 F. R. 647.

[47] In re Lambert, 2 N. B. R. 138. F. C. 8026.

[48] In re Schierman, 2 N. B. N. R. 118; In re Laurie, 4 N. B. R. 7.

[49] G. O. XVIII.

[50] Sec. 58a, act of 1898.

[51] G. O. XVIII.

[52] Sec. 70c, act of 1898.

the representative of all the creditors and[53] is the proper person to take any steps that become necessary in the course of administration of a bankrupt's estate. Proceedings by creditors after the appointment of a trustee are irregular;[54] and, if he refuses to act, a petition to compel him to act should be filed.[55] In the discharge of his quasi official duties, the court will protect him.[56]

§ 765. **What the trustee should not do.**—It is not the trustee's duty to do anything towards perfecting an imperfect lien, or asserting a perfect one in behalf of creditors;[57] nor to do anything if bankrupt states at the first meeting of creditors his intention of offering a composition, until the refusal to confirm such composition.[58] The trustee cannot purchase at his own sale,[59] nor can his solicitor bid at such sale;[60] nor can he attack the trust he assumed to execute and defend,[61] nor should he refuse to contest a debt which he knows or believes to have been fraudulently proved.[62] He is not required to amend his report when it is not shown to be proper or that it will affect the bankrupt either way.[63] He has no relation whatever to the bankrupt except to set apart his exemption.[64]

§ 766. **Power of trustee.**—The trustee has no judicial authority, and where such is needed, he must resort to the court, as the bankrupt would have been compelled to do, had no proceedings been instituted;[65] and any power the trustee has must be found in the bankrupt law itself.[66] He is an officer of the court, and is strictly limited to powers conferred by the act and orders of the court.[67]

[53] Atkins v. Wilcox, 105 F. R. 595, 5 A. B. R. 313; In re McLean v. Mayo, 7 A. B. R. 115.

[54] In re Carter, 1 N. B. N. 162, 1 A. B. R. 160; In re Pearson, 1 N. B. N. 474, 2 A. B. R. 819; In re Adams, 1 A. B. R. 94, 1 N. B. N. 167.

[55] Glenny v. Langdon, 19 N. B. R. 24, 98 U. S. 20.

[56] McLean v. Mayo, supra.

[57] Goldman v. Smith, 1 N. B. N. 291, 2 A. B. R. 104.

[58] In re Rung Bros., 2 A. B. R. 80.

[59] Lockett v. Hoge, 9 N. B. R. 167, F. C. 8444.

[60] Bk. v. Ober, 13 N. B. R. 328, 1 Woods, 80, F. C. 2731.

[61] John v. Rogers, 15 N. B. R. 1, F. C. 7408.

[62] Bk. v. Cooper, 9 N. B. R. 529, 20 Wall. 171.

[63] In re Kingon, 3 N. B. R. 446, F. C. 7815.

[64] Aiken v. Edrington, 15 N. B. R. 271, F. C. 111.

[65] In re Darby, 4 N. B. R. 98, F. C. 70.

[66] Dutcher v. Bk., 11 N. B. R. 457, 12 Blatch. 436, 435, F. C. 423.

[67] In re Ryan & Griffin, 6 N. B. R. 235, F. C. 12182; see McLean v. Mayo, 7 A. B. R. 115; U. S., ex rel. Schauffler v. Union Surety & Guaranty Co., 9 A. B. R. 114.

§ 767. 'b. **Concurrence of majority necessary.**—Whenever 'three trustees have been appointed for an estate, the concur- 'rence of at least two of them shall be necessary to the validity 'of their every act concerning the administration of the es- 'tate.'

§ 768. **Three trustees appointed.**—There must be appointed at least one or three trustees;[68] and the death or removal of one shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.[69]

§ 769. 'c. **Record of trustee's title.**—The trustee shall, with- 'in thirty days after the adjudication, file a certified copy of 'the decree of adjudication in the office where conveyances of 'real estate are recorded in every county where the bankrupt 'owns real estate not exempt from execution, and pay the fee 'for such filing, and he shall receive a compensation of fifty 'cents for each copy so filed, which, together with the filing 'fee, shall be paid out of the estate of the bankrupt as a part 'of the cost and disbursements of the proceedings.'[70]

§ 770. **When record to be made.**—The trustee becomes vested by operation of law with the title to all of bankrupt's property, real, personal or mixed, except such as is exempt, that may be situated within the United States or its territories, as of the date he was adjudged a bankrupt. While this is true, if bankrupt owns real estate out of the jurisdiction of the court where the proceedings have been instituted, the record title to such property is defective without some such notice as here provided, showing that the title has passed from the bankrupt. In the case of property located in a foreign country the filing of such decree is unnecessary, since in the absence of a treaty our insolvency laws are not recognized abroad, and the only method of obtaining title to bankrupt's property located beyond the jurisdiction of the United States is through a proper conveyance from the bankrupt.[71]

This record need only be made in cases instituted on and subsequent to February 5, 1903.

[68] Sec. 44, act of 1898.

[69] Sec. 46, act of 1898.

[70] Subdivision "C" was not a part of the act of July 1, 1898, but was inserted by the amendatory act of February 5, 1903.

[71] Sec. 7a (5), act of 1898.

CHAPTER XLVIII.

COMPENSATION OF TRUSTEES.

§771. (48a) Compensation.
772. Fees.
773. Commissions.
774. Trustee's compensation.
775. b. Compensation apportioned when several trustees.
776. c. When compensation withheld.

§ 771. '(Sec. 48a) **Compensation of trustees.**—Trustees 'shall receive for their services, payable after they are ren- 'dered, a fee of five dollars deposited with the clerk at the time 'the petition is filed in each case, except when a fee is not re- 'quired from a voluntary bankrupt, and from estates which 'they have administered such commissions on all moneys dis- 'bursed by them as may be allowed by the courts, not to ex- 'ceed six per centum on the first five hundred dollars or less, 'four per centum on moneys in excess of five hundred dollars 'and less than fifteen hundred dollars, two per centum on 'moneys in excess of fifteen hundred dollars and less than ten 'thousand dollars, and one per centum on moneys in excess of 'ten thousand dollars. And in case of the confirmation of a 'composition after the trustee has qualified the court may allow 'him, as compensation, not to exceed one-half of one per cent- 'um of the amount to be paid the creditors on such composi- 'tion.'[1]

§ 772. **Fees.**—The clerk is required to collect the fee of $5 for the trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt, which

[1] Section 48a is substituted by the act of February 5, 1903, for the matter following, which appeared in the act of July 1, 1898: "Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars."

Analogous provision of act of

is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fee.[2]

§ 773. **Commissions.**—The commission is now computed and allowed on all moneys disbursed by the trustee, whether on claims which are secured or which are entitled to priority of payment under the law, and thus removes the doubt which existed prior to the amendment upon this point. The trustee is also entitled to a commission in the case of a confirmation of a composition after his appointment. This computation is on the same identical sums as those of the referee and hence the discussion and cases cited as to the referee's commission apply equally here.[3]

§ 774. **Trustee's compensation.**—The compensation provided for trustees is in full for the services performed by them, but does not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts. In any case in which the trustee's fee is not required to be paid before filing the petition, the judge may order it paid at any time out of the estate, or, after notice and proof of bankrupt's ability to pay it, require him to do so;[4] and, before incurring any expense in publishing and mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, indemnity may be required from the person for whom such service is to be rendered.[5] A trustee

1867. "Sec. 17. . . . He shall be allowed, and may retain out of the money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

"Sec. 28. . . . In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars, and if, at any time, there shall not be in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him."

[2] Sec. 51, act of 1898.

[3] Sec. 40, act of 1898.

[4] G. O. XXXV; Sec. [73], act of 1903.

[5] G. O. X.

is not required to serve without compensation and, if no assets are disclosed and creditors insist upon the appointment of a trustee, they must provide for his compensation.[6] While Section [73] of the amendatory act limits the compensation of trustees, it would seem that it is only the services trustees are required to perform as such under the act, for which the compensation prescribed is in full; and, if they go outside of such duties and perform services which are not within the scope of the duties of a trustee, a reasonable allowance should be made under "expenses necessarily incurred in the performance of their duties."[7]

§ 775. **'b. Compensation apportioned when several trustees.** '—In the event of an estate being administered by three trus-'tees instead of one trustee or by successive trustees, the court 'shall apportion the fees and commissions between them accord-'ing to the services actually rendered, so that there shall not 'be paid to trustees, for the administering of any estate a greater 'amount than one trustee would be entitled to.'

§ 776. '**c. Compensation withheld.**—The court may, in its 'discretion, withhold all compensation from any trustee who 'has been removed for cause.'

[6] In re Levy, 101 F. R. 247, 4 A. B. R. 108.

[7] See In re Mitchell, 1 N. B. N. 264, 1 A. B. R. 687; In re Plummer, 2 N. B. N. R. 292, 3 A. B. R. 320; In re Welge, 1 F. R. 216; Contra, In re Meldaur, 17 F. C. 958; In re Epstein, 109 F. R. 878.

CHAPTER XLIX.

ACCOUNTS AND PAPERS OF TRUSTEES.

§777. (49a) Inspection of trustees' papers and accounts. 778 Accounts.

§ 777. '**(Sec. 49a) Inspection of trustees' accounts and pa-pers.**—The accounts and papers of trustees shall be open to 'the inspection of officers and all parties in interest.'[1]

§ 778. **Accounts.**—The trustee is required to keep regular accounts showing all amounts received and from what sources, and all amounts expended and on what accounts,[2] which are referred to the referee for audit unless otherwise specially ordered by the court,[3] when it is his duty to approve them if correct, which discharges the trustee.[4] In case of a partnership he must keep separate accounts of the partnership property and of the property belonging to the individual partners.[5] He must make final reports and file final accounts fifteen days before the day fixed for the final meeting,[6] at which meeting he is required to present a detailed statement of the administration of the estate.[7] The failure of the trustee to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of the estate and the papers and records in his charge, by parties in interest, when directed by the court so to do, works a forfeiture of his office and renders him liable to punishment.[8]

[1] Analogous provision of act of 1867. "Sec. 15. . . . The assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort."

[2] Sec. 47a (6), act of 1898.

[3] G. O. XVII.

[4] Form No. 5.

[5] Sec. 5d, act of 1898.

[6] Sec. 47e (8), act of 1898.

[7] Sec. 47a (8), act of 1898.

[8] Sec. 29c, act of 1898; G. O. XVII.

CHAPTER L.

BONDS OF REFEREES AND TRUSTEES.

§779. (50a) Referees' bonds.
780. b. Trustees' bonds.
781. c. —— Amount to be fixed.
782. d. Value of sureties' property.
783. e. Number of sureties.
784. f. Property required in sureties.
785. g. Corporation as surety.
786. Corporation may be sole surety.
787. h. Bonds to be filed.
788. i. Trustees not liable for bankrupt's acts.
789. j. Joint and several bonds.
790. k. Failure to give bond.
791. Time of giving and effect of failure to give.
792. l. Limitation of suits on referees' bonds.
793. m. —— On trustees' bonds.
794. Where suit to be brought.

§ 779. '(Sec. 50a) **Referees' bonds.**—Referees, before as-'suming the duties of their offices, and within such time as the 'district courts of the United States having jurisdiction shall 'prescribe, shall respectively qualify by entering into bond to 'the United States in such sum as shall be fixed by such courts, 'not to exceed five thousand dollars, with such sureties as shall 'be approved by such courts, conditioned for the faithful per-'formance of their official duties.'[1]

§ 780. '**b. Trustees' bonds.**—Trustees, before entering upon 'the performance of their official duties, and within ten days 'after their appointment, or within such further time, not to 'exceed five days, as the court may permit, shall respectively 'qualify by entering into bond to the United States, with such 'sureties as shall be approved by the courts, conditioned for 'the faithful performance of their official duties.'[2]

[1] Analogous provision of act of 1867. "Sec. 3. . . . Before entering upon the duties of his office, every person so appointed a register in bankruptcy shall give a bond to the United States, with condition that he will faithfully discharge the duties of his office, in a sum not less than one thousand dollars, to be fixed by said court, with sureties satisfactory to said court, or to either of the said justices thereof."

[2] Analogous provision of act of 1867. "Sec. 13. . . . The judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and

§ 781. 'c. **Amount of bond to be fixed.**—The creditors of a 'bankrupt estate, at their first meeting after the adjudication, 'or after a vacancy has occurred in the office of a trustee, or 'after an estate has been reopened, or after a composition has 'been set aside or a discharge revoked, if there is a vacancy in 'the office of trustee, shall fix the amount of the bond of the 'trustee; they may at any time increase the amount of the bond. 'If the creditors do not fix the amount of the bond of the trus- 'tee as herein provided the court shall do so.'

§ 782. 'd. **Value of sureties' property.**—The court shall re- 'quire evidence as to the actual value of the property of sure- 'ties.'

§ 783. 'e. **Number of sureties.**—There shall be at least two 'sureties upon each bond.'

§ 784. 'f. **Property required in sureties.**—The actual value 'of the property of the sureties, over and above their liabilities 'and exemptions, on each bond, shall equal at least the amount 'of such bond.'

§ 785. 'g. **Corporations as sureties.**—Corporations organ- 'ized for the purpose of becoming sureties upon bonds, or au- 'thorized by law to do so, may be accepted as sureties upon 'the bonds of referees and trustees whenever the courts are 'satisfied that the rights of all parties in interest will be there- 'by amply protected.'

§ 786. **Corporation may be sole surety.**—Congress has provided that, whenever a bond is required with one or more sureties, a corporation, organized under the laws of the United States or of any state, having power to execute similar bonds, may be the sole surety, provided the court approves the same;[3] and it has been held that statutes not inconsistent with each other and relating to the same subject matter should be construed together and effect given to all, though they contain

inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place."

The notice to be sent to the trustee of his appointment should contain a statement of the penal sum of his bond. (G. O. XVI.)

[3] Act of August 13, 1894, 28 U. S. Stat., 2 Supp. R. S. 237.

no reference to each other and were passed at different times;[4] accordingly the requirement[5] that the actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond, and[6] that corporations may be accepted whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected, differentiates corporate security from personal. Hence two sureties are required if they are individuals but one if a surety company.[7]

§ 787. 'h. **Bonds to be filed.**—Bonds of referees, trustees, 'and designated depositories shall be filed of record in the 'office of the clerk of the court and may be sued upon in the 'name of the United States for the use of any person injured 'by a breach of their conditions.'

§ 788. 'i. **Trustees not liable for bankrupt's acts.**—Trus-'tees shall not be liable, personally or on their bonds, to the 'United States, for any penalties of forfeitures incurred by the 'bankrupts under this act, of whose estates they are respect-'ively trustees.'

§ 789. 'j. **Joint and several bonds.**—Joint trustees may 'give joint or several bonds.'

§ 790. 'k. **Failure to give bond.**—If any referee or trustee 'shall fail to give bond, as herein provided and within the 'time limited, he shall be deemed to have declined his appoint-'ment, and such failure shall create a vacancy in his office.'[8]

§ 791. **Time within which bonds must be given and effect of not giving.**—The bond of the referee must be given before he assumes the duties of the office and within such time as the district court shall prescribe, while a trustee must give it before entering upon the performance of his duties and within ten days after his appointment.[9] Failure to give bond creates a vacancy, to be filled in the case of the referee by the court of bankruptcy,[10] and in the case of the trustee primarily

[4] In re Kalter, 1 N. B. N. 384; 2 A. B. R. 590, citing A. & Eng. Ency. of Law, v. 23, p. 311.

[5] Sec. 50f, act of 1898.

[6] Sec. 50g, act of 1898.

[7] In re Kalter, 1 N. B. N. 384, 2 A. B. R. 590.

[8] Analogous provision of act of 1867. "Sec. 13. . . . If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

[9] Sec. 50a, b, act of 1898.

[10] Sec. 34, act of 1898.

by the creditors, or if they fail to appoint one, or it is impracticable for them to elect, by the judge or referee.[11]

§ 792. **'l. Limitation of suits on referees' bonds.**—Suits 'upon referees' bonds shall not be brought subsequent to two 'years after the alleged breach of the bond.'

§ 793. **'m. Limitation of suits on trustees' bonds.**—Suits 'upon trustees' bonds shall not be brought subsequent to two 'years after the estate has been closed.'

§ 794. **Where suit to be brought.**—A trustee in bankruptcy may institute suit in the district court in the name of the United States on the bond of a former trustee to recover the value of property for which he has failed to account.[12]

[11] Sec. 44, act of 1898; In re Lewensohn, 2 N. B. N. R. 315, 3 A. B. R. 299, 98 F. R. 576.

[12] U. S. v. Union Surety & Guaranty Co., 9 A. B. R. 114, 118 F. R. 482; see Platt, Rec. v. Beach, 2 Ben. 303.

CHAPTER LI.

DUTIES OF CLERKS.

§795. (51a) Duties.
796. —— In general.
797. —— To collect fees.
798. Inability or pauper affidavit.
799. Custody of papers.

§ 795. '(Sec. 51a) **Clerk's duties.**—Clerks shall respectively

'(1) Account for, as for other fees received by them, the 'clerk's fee paid in each case and such other fees as may be 'received for certified copies of records which may be prepared 'for persons other than officers;

'(2) Collect the fees of the clerk, referee, and trustee in 'each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied 'by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees;

'(3) Deliver to the referees upon application all papers 'which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such 'clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they 'have been used;

'(4) And within ten days after each case has been closed 'pay to the referee, if the case was referred, the fee collected 'for him, and to the trustee the fee collected for him at the 'time of filing the petition.'

§ 796. **Duties in general.**—The clerk is required to keep a docket containing certain prescribed entries; to indorse on each paper filed with him the day and hour of filing, and a brief statement of its character;[1] to attest all process, summons and subpoenas issued out of the court, under the seal thereof, and, on application, to furnish the referees blanks, with the signature of the clerk and seal of the court.[2] The fees allowed by the act do not include copies furnished to persons other than officers, or expenses necessarily incurred in publishing and mailing notices or other papers;[3] and, before

[1] G. O. III.
[2] G. O. III.
[3] G. O. XXXV.

incurring any expense of this nature or in traveling, or in procuring the attendance of witnesses or in perpetuating testimony, the clerk may require from the person, for whom the service is to be rendered, indemnity for such expense, and the money so advanced shall be repaid as part of the cost of administration.[4] Clerks of United States courts are entitled to charge[5] ten cents a folio of one hundred words for making copies of papers on file, or of any entry or record; fifteen cents for each certificate and twenty cents for affixing the seal of the court.

In case the judge is absent from the district, the clerk has authority to make the order of reference,[6] a copy of which he should mail forthwith or deliver personally, or through some other officer of the court, to the referee.[7] It is also his duty to issue a certificate showing the absence of the judge, or his sickness or inability to act as authority for the referee to take possession or release bankrupt's property.[8] He has no judicial powers, but is a ministerial officer, subject to the orders of the judge.

While a deputy clerk is not mentioned in the act, his authority and power being confined to those conferred by statute,[9] an order signed by the judge and attested by the deputy clerk with the seal of the court is valid, but alone a deputy clerk cannot make an order of reference in bankruptcy. The fact that bankrupt was a brother-in-law of the deputy clerk in whose office a petition was filed, has been held sufficient cause for transferring the case and record to another seat of the court in the same district, though this position seems questionable.[10]

§ 797. **To collect fees.**—The clerk is required to collect the fees of the clerk, $10,[11] referee $15[12] and trustee $5[13] in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees. A deposit of the statutory filing fee by a proposed voluntary bankrupt, not within the exception in favor of paupers, is a condition precedent to the fil-

[4] G. O. X.
[5] Sec. 828, U. S. Rev. Stat.
[6] Sec. 18f & g, act of 1898.
[7] G. O. XII.
[8] Sec. 38a (3), act of 1898.
[9] Sec. 558, U. S. Rev. Stat.
[10] Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102.
[11] Sec. 52a, act of 1898.
[12] Sec. 40a, act of 1898.
[13] Sec. 48a, act of 1898.

ing of the petition. In the case of a firm the fee must be collected from each member, as well as the firm where the partnership applies as such and separate petitions with separate schedules are filed for the several partners;[14] but it has been held that only one petition in the name of both the partnership and the individual partners, accompanied by schedule setting out the debts and assets of the firm and also of the partners is necessary and both the joint and separate estates may be administered upon such petition; and it is but one proceeding requiring only one filing fee,[15] though on this point the courts do not agree.[16] Upon a petition in involuntary bankruptcy against one person as an individual, no adjudication can be made against other persons who were in partnership with him, even though the latter come in voluntarily and consent to be adjudged bankrupt; but they must file their individual petitions, deposit the fees required and proceed strictly according to law.[17]

The provision for the repayment of money advanced for expenses incurred in publishing or mailing notices, etc.,[18] does not apply to the filing fee of $30 in voluntary cases, which is not returned to the bankrupt;[19] but, in involuntary cases, the filing fee of $30, the marshal's charges and the indemnity deposit are all returned to the petitioning creditors.[20]

§ 798. **Inability or pauper affidavit.**—A petitioner who has no means is exempt from paying the filing fee of $30 and the statutory affidavit of a voluntary bankrupt is prima facie evidence of petitioner's inability, subject, however, to investigation; and, if the inquiry is fairly answered respecting available means, and none appear to be held by petitioner when the proceedings were instituted, nor to be obtainable through his individual earnings or efforts, the exemption from such payment must be allowed.[21] It has been held, however, that if upon a

[14] In re Barden, 2 N. B. N. R. 741, 101 F. R. 553, 4 A. B. R. 51.

[15] In re Gay, 98 F. R. 870, 3 A. B. R. 529; In re Langslow et al., 1 N. B. N. 232, 1 A. B. R. 258, 98 F. R. 869.

[16] In re Farley & Co., 115 F. R. 359, 8 A. B. R. 266; In re Barden, 101 F. R. 555, 4 A. B. R. 31.

[17] Mahoney v. Ward, 100 F. R. 278, 2 N. B. N. R. 538, 3 A. B. R. 77.

[18] G. O. X.

[19] In re Matthews, 97 F. R. 772, 3 A. B. R. 265.

[20] Sec. 64b (2), act of 1898; In re Silverman et al., 2 N. B. N. R. 18, 3 A. B. R. 227, 97 F. R. 325.

[21] In re Levy, 101 F. R. 247, 4 A. B. R. 108.

reference to the referee to take proof, and report the facts showing whether bankrupt is unable to obtain the money, it appears that he is employed at a monthly salary though as low as $30, he must pay the $30,[22] for the liability of petitioner to pay the filing fee does not depend upon his having property not exempt but on actual inability. He may be ordered to pay such fees out of pension money received from the United States and remaining unchanged in his hands at the time of filing the petition;[23] though on the other hand it has been held that he is not required to use his earnings after filing the petition, or exempt property for the purpose, nor to solicit or accept the amount from kindred or friends;[24] but this position does not seem tenable.[25] Where the petitioner's family lived in affluence in a house belonging to his wife, and it was evident that he had more or less control over her property, he was held not to be excused from paying the filing fee, since that privilege is granted only to paupers in fact.[26]

In any case in which the clerk's fees are not required by the act to be paid before filing the petition, the judge, at any time during the pendency of the proceedings, may order them paid out of the estate, or, after notice and proof of petitioner's ability, require him to pay them.[27] The petitioner must pay the necessary expenses as the case progresses, and, if he declines when able to pay, his discharge may be refused and his petition be dismissed or his discharge may be postponed until he pays the compensation allowed the clerk, referee and trustee, or else satisfy the court that, by reason of ill health, or peculiar misfortune, he is a worthy object of charity;[28] but there is no rule or law authorizing the referee to make such order.[29]

§ 799. **Custody of papers.**—The clerk is entitled to one copy of the petition[30] and of the schedule,[31] and is required to deliver to the referees, upon application[32] all papers which may

[22] In re Collier, 1 N. B. N. 257, 1 A. B. R. 182, 93 F. R. 191.

[23] In re Bean, 100 F. R. 262, 4 A. B. R. 53.

[24] Sellers v. Bell, 2 A. B. R. 529, 94 F. R. 802.

[25] In re Hines, 117 F. R. 790, 9 A. B. R. 27.

[26] In re Williams, 2 N. B. N. R. 206.

[27] G. O. XXXV.

[28] Anon. 1 N. B. N. 376, 2 A. B. R. 527, 95 F. R. 120; In re Collins, 1 N. B. N. 132; In re Fininger, Id.

[29] In re Plimpton, 3 N. B. N. R. 14, 103 F. R. 775, 4 A. B. R. 614.

[30] Sec. 59c, act of 1898.

[31] Sec. 7 (8), act of 1898.

[32] Sec. 39 (10), act of 1898.

be referred to him, or, if the officers of such referees are not in the same city or town as the office of the clerk, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used.[33] He must also receive and file the records and papers of each case after it is concluded,[34] together with the bonds of trustees, referees and designated depositories.[35]

[33] Sec. 39 (8), act of 1898.
[34] Sec. 39 (7), act of 1898.
[35] Sec. 50h, act of 1898.

CHAPTER LII.

COMPENSATION OF CLERKS AND MARSHALS.

§800. (52a) Clerk's compensation.
801. What ten dollar fee covers.
802. Marshal's fee.
803. Fees of marshal.
804. Fees of deputy marshals.
805. Fees when acting as keeper.
806. Fees, disposition of—rate.
807. Fees of receivers.

§ 800. '(Sec. 52a) Clerk's compensation.—Clerks shall re-'spectively receive as full compensation for their service to 'each estate, a filing fee of ten dollars, except when a fee is 'not required from a voluntary bankrupt.'[1]

§ 801. What ten-dollar fee covers.—The filing fee of $10 is in full compensation of all services in filing petitions or other papers required to be filed with the clerk, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money or otherwise, unless the clerk is able to specifically point out an exception; the allowance or disallowance of costs and fees is not a matter of equity or supposed hardship, but purely a matter of statutory provision.[2] This filing fee does not include the charge for copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers; and it has been held that the clerk is entitled to charge an additional fee for each notice of bankrupt's application for discharge sent to creditors and such fee is chargeable against the estate.[3]

In any case in which the fee is not required by the act to be paid before filing the petition, the judge may, at any time, order it paid out of the estate, or, after notice and proof of bankrupt's ability to pay it, require him to do so.[4] Before

[1] Analogous provision of act of 1867. "Sec. 47. . . . That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the registers." (Here follows the specification of fees.)

[2] In re Durham, 2 N. B. N. R. 1104.

[3] In re Durham, supra.

[4] G. O. XXXV.

incurring any expense for copies to be furnished others than to the officers or in publishing or mailing notice, the clerk may require from the person, in whose behalf the duty is to be performed, indemnity for such expense, and if it is for the advantage of the estate the money so advanced will be repaid out of the estate as a cost of administration.[5] Though a voluntary bankrupt might furnish the filing fee, if there are no assets and he can truthfully swear he is unable to pay for the required notices to creditors, he is entitled to have that service performed by the clerk on the same conditions as a suit conducted in forma pauperis.[6]

§ 802. **'Marshal's fees.**—Marshals shall respectively receive 'from the estate where an adjudication in bankruptcy is made, 'except as herein otherwise provided, for the performance of 'their services in proceedings in bankruptcy, the same fees, 'and account for them in the same way, as they are entitled to 'receive for the performance of the same or similar services in 'other cases in accordance with laws now in force, or such as 'may be hereafter enacted, fixing the compensation of mar-'shals.'[7]

§ 803. **Fees of marshals.**—Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the marshal may require from the person in whose behalf the service is to be rendered indemnity for such expense; and the money so advanced shall be repaid to the per-

[5] G. O. X.

[6] In re Durham, 2 N. B. N. R. 1104.

[7] Analogous provision of act of 1867. "Sec. 47. . . . Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more: (Here follows specification of fees.)

"For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

"The enumeration of the foregoing fees shall not prevent the judges, who shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders."

As under the act of 1867 marshals received compensation as such and also as messengers, the provision as to messengers' fees in the earlier act is inserted, although under the present law no provision is made for the service of messengers.

son advancing it out of the estate as part of the cost of administering the same.[8] He is required to make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of the property, and other services, and other actual and necessary expenses incurred, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.[9]

By the Act of May 28, 1896,[10] the marshals were put upon a salary and required to account for and turn into the Treasury of the United States all fees taxable under the law. The Bankruptcy Law and the General Orders put whatever the marshal may earn or receive for services rendered in a bankruptcy proceeding upon the same plane as such other fees. Hence it becomes necessary to examine the law as to such fees. On a petition setting forth the facts under oath, a court is vested with discretion to allow such compensation as it may deem proper for the keeping of personal property attached on mesne process,[11] and the Comptroller has held that in litigation between private individuals, where property has been seized by the marshal (treating the word "seized" as equivalent to "attached"), he should charge himself in his account for fees under the appropriation "salaries, fees and expenses of marshals," with all the expenses allowed him by the court for the keeping of said property under said paragraph, that are not as reimbursement for expenses paid to outsiders for such keeping, and as to expenses of the latter character, he should not charge himself or pay them to the clerk.[12]

§ 804. **Fees of deputy marshals.**—A deputy marshal, when "engaged in service or attempted service of any writ, process, subpoena, or other order of the court, or when necessarily absent from the place of his regular employment, on official business, will be allowed his actual traveling expenses only, and his necessary and actual expenses for lodging and subsistence not to exceed $2 per day and the necessary actual expenses in transporting prisoners;"[13] and a field deputy marshal "as

[8] G. O. X.

[9] G. O. XIX.

[10] Act of May 28, 1896, 29 Stat. L. 140; 2 Supp. R. S. 479; In re Comstock, 9 N. B. R. 88, F. C. 3075; In re Lowenstein, 3 N. B. R. 65, 3 Ben. 422, F. C. 3572.

[11] 2d par. Sec. 829 U. S. Rev. Stat.

[12] 5 Comp. Dec. 871.

[13] Sec. 10 of the act of May 28, 1896, 29 Stat. L. 140, 2 Supp. R. S. 483.

compensation, three-fourths of the gross fees, including mileage as provided by law, earned by him, not to exceed one thousand five hundred dollars per fiscal year, or at that rate for any part of a fiscal year; and in addition, shall be allowed his actual necessary expenses, not exceeding $2 a day while endeavoring to arrest, under process, a person charged with or convicted of crime; provided, that a field deputy marshal may elect to receive actual expenses on any trip in lieu of mileage."[14] The law[15] seems to require that, if the marshal or his office deputy takes charge of property[16] they can be personally allowed only their actual expenses and any compensation that might be taxed by the court for such services must be turned into the Treasury, since their compensation is restricted to their salary, and in addition only actual expenses while engaged in service. A field deputy marshal can receive nothing for this work, except what can be allowed under the law mentioned.[17] There is no precedent for the allowance by a judge under this paragraph and section to a marshal of anything but a lump sum for compensation, three-fourths of which the accounting officers allow the field deputy to retain if he performed the services.[18]

If a court should allow compensation consisting of a per diem or sum as a fee and a schedule of actual expenses, a question would arise for the consideration of the Comptroller of the Treasury as to whether the expenses would be allowed in toto as in other expense accounts, or whether the allowance would be lumped and three-fourths of it only paid over to the deputy marshal. The marshal himself, and his office deputies, being salaried officers, are not entitled to compensation under paragraph 2, of Section 829, U. S. Revised Statutes, but it has been held that, where the petition and affidavits for an order to show cause are required by rule of court to be served with the order and such service is made by a marshal, he is entitled to a reasonable fee in addition to his fee for serving the order under this subdivision, although the petition is not a writ;[19] and the fee fixed by the latter section for serving a writ is reasonable for the service.[20]

[14] Sec. 11, act of May 28, 1896, supra.

[15] Act of May 28, 1896.

[16] Par. 2, Sec. 829, U. S. Rev. Stat.

[17] Par. 2, Sec. 829, U. S. Rev. Stat.

[18] Sec. 11, act of May 28, 1896, supra.

[19] Sec. 829, U. S. Rev. Stat.

[20] In re Damon, 104 F. R. 775, 5 A. B. R. 133.

§ 805. **Fees when acting as keeper.**—When the marshal himself or an office deputy acts as keeper, the keeper's fees allowed by the court should be collected by the marshal and turned over to the clerk of the court for deposit in the United States Treasury. On the other hand, when a field deputy marshal acts as keeper or custodian, the marshal should pay the deputy three-fourths of the compensation allowed by the court, the difference being profit made by the Government. The entire amount allowed by the court is collected and turned over to the clerk of the court for deposit, and the field deputy marshal is paid his share—(three-fourths) of the fees from the appropriation "Salaries, fees and expenses of marshals," as in other cases. If the keeper is not a marshal or deputy marshal, the transaction does not enter into any Government account; but payment should be made by the litigants to the keeper or custodian direct.[21]

§ 806. **Fee—Disposition of—Rate.**—The fact that the marshal is not personally benefited by the compensation allowed does not prevent his having it. He does get personal compensation for all services rendered by him in the way of salary; as does his office deputy; and the fees formerly allowed him as compensation are still collected in suits of all kinds as a fund out of which salaries shall be paid, and the three-fourths of the fees earned by the field deputies, so the fact that there is a salary is immaterial. He should be allowed pay the same as a receiver would have been, had one been appointed. It has been held in a case where he took possession of property and held it 17 days that $20 was reasonable, in addition to actual expenses;[22] and where the marshal was in charge of the property for a month an allowance for the deputies, actually in charge, of $2.50 per day was made in addition to actual expenses;[23] and for taking an inventory and otherwise assisting, $3 a day and actual expenses was allowed.[24] When a taxation is made it is conclusive and the marshal is entitled to the fees taxed unless there is fraud or bad faith on his part.[25] If he has two or more processes in his hands at the

[21] 4 Comp. Dec. 637.

[22] In re Adams Sartorial Art Co., 2 N. B. N. R. 535, 101 F. R. 215, 4 A. B. R. 107.

[23] In re Scott, 2 N. B. N. R. 440, 3 A. B. R. 625, 99 F. R. 404.

[24] In re Woodard, 1 N. B. N. 430, 2 A. B. R. 692, 95 F. R. 955.

[25] In re Rein, 13 N. B. R. 551, 8 Ben. 384, F. C. 11678.

same time in the same proceeding, which may be served at the same time and place, mileage can be charged only once, but if additional travel is necessary such additional mileage may be charged.[26] It has been held that he is entitled to make a reasonable charge for the service of a petition upon which has been granted an order to show cause, in addition to the statutory fee for the service of the order, though the papers are bound together and served at the same time.[27]

§ 807. **Fees of receivers.**—The court is authorized to appoint receivers or the marshal to take charge of the property of the bankrupt between the filing of the petition and the appointment of the trustee, in which case the law is silent as to the rate of compensation. The court should, however, in its discretion, allow for such services a just and reasonable compensation payable out of the estate, which need not necessarily be a per diem allowance, but should be governed by the surrounding circumstances.[28] It has been held that as such receivers are appointed only under special circumstances, an unvarying rate of compensation cannot be equitably applied, but it should be left to the court's discretion.[29] If a creditor desires to object to a receiver's account he should promptly file exceptions thereto with the referee.[30]

A receiver is also authorized to conduct the business of the bankrupt for a limited period, if necessary, in the interest of the estate. For such services these officers are entitled to compensation, but the statute provides that the rate must not exceed that allowed trustees for similar services. As there is nothing in the law which provides compensation to a trustee other than the usual fees and commissions for taking charge of and conducting the affairs of the bankrupt, the evident intention of Congress was that the fee of the receiver or marshal should not exceed that allowed to the trustee in representing the estate, to which they would be entitled in addition to actual expenses.

[26] In re Donohoe, 8 N. B. R. 453, F. C. 3979.

[27] In re Damon, 5 A. B. R. 133.

[28] In re Scott, 99 F. R. 404, 3 A. B. R. 625.

[29] In re Gerson, 1 A. B. R. 251, 2 N. B. N. R. 483.

[30] In re Reliance Storage & Warehouse Co., 100 F. R. 619, 4 A. B. R. 49.

CHAPTER LIII.

DUTIES OF ATTORNEY-GENERAL.

§ 808. (Sec. 53a) 'Statistics of bankruptcy proceedings 'for Congress.—The Attorney General shall annually lay 'before Congress statistical tables showing for the whole coun- 'try, and by states, the number of cases during the year of 'voluntary and involuntary bankruptcy; the amount of the 'property of the estates; the dividends paid and the expenses 'of administering such estates; and such other like informa- 'tion as he may deem important.'

CHAPTER LIV.

STATISTICS OF BANKRUPTCY PROCEEDINGS.

§809. (54a) Officers to furnish attorney-general information.
810. Failure to report.

§ 809. (Sec. 54a) 'Officers to furnish Attorney General 'Information.—Officers shall furnish in writing and transmit 'by mail such information as is within their knowledge, and 'as may be shown by the records and papers in their posses- 'sion, to the Attorney General, for statistical purposes, within 'ten days after being requested by him to do so.'

§ 810. Failure to report.—The neglect of either the referee, trustee, receiver, marshal or clerk of court[1] to furnish such information as may be called for, renders such officer liable to removal.[2] These reports are called for by the Attorney General, for which purpose the Department of Justice furnishes the necessary blanks. It is entirely within his discretion as to when and what reports are called for.

[1] Sec. 1 (18), act of 1898.

[2] Sec. 34a, act of 1898.

CHAPTER LV.

MEETINGS OF CREDITORS.

§811. (55a) Time and place of creditors' meetings.
812. Practice.
813. First meeting.
814. —— Adjournments.
815. —— Business transacted.
816. —— Judge or referee to preside.
817. —— Bankrupt's attendance.
818. —— Allowance or disallowance of claims.
819. —— Appointment of trustee.
820. Duties of creditors at meetings.
821. Subsequent meetings.
822. Practice.
823. Called meetings.
824. Final meetings.
825. Practice.
826. —— Dividend.

§ 811. '(Sec. 55a) Time and place of creditors' meetings.—'The court shall cause the first meeting of the creditors of a 'bankrupt to be held, not less than ten nor more than thirty 'days after the adjudication, at the county seat of the county 'in which the bankrupt has had his principal place of business, 'resided, or had his domicile; or if that place would be mani-'festly inconvenient as a place of meeting for the parties in 'interest, or if the bankrupt is one who does not do business, 'reside, or have his domicile within the United States, the court 'shall fix a place for the meeting which is the most convenient 'for parties in interest. If such meeting should by any mis-'chance not be held within such time, the court shall fix the 'date, as soon as may be thereafter, when it shall be held.'

§ 812. Practice.—After adjudication the judge may refer the case either generally or specially to any referee in his district;[1] or the clerk will refer the case in the judge's absence, on the next day after the last day on which pleadings may be filed in involuntary cases; and when the petitions in voluntary cases are filed.[2] The order of reference should name a day for the bankrupt to attend before the referee, after which he will be subject to the orders of the court, and the time when and place where the referee will act upon the matters arising in the cases before him shall be fixed by order of the judge or referee.[3]

[1] Sec. 22, act of 1898.
[2] Secs. 18e, f and g, act of 1898.
[3] G. O. XII.

At the first meeting of the creditors after the adjudication or after a vacancy has occurred in the office of trustee, or after the estate has been reopened, a composition set aside or discharge revoked, they should appoint one or three trustees of such estate,[4] and fix the amount of their bond, which may at any time be increased.[5] Creditors are entitled to at least ten days' notice by mail, from the referee to their respective addresses, of all meetings of creditors, in addition to which notice of the first meeting must be published at least once, and as many times additional as the court may direct, the last publication to be at least one week prior to the date fixed for the meeting.[6] Failure to give such notice as required, would render all subsequent proceedings void.[7]

§ 813. **First meeting.**—The term "first meeting" does not necessarily mean the first assembling of the creditors, but refers to the meeting called to choose a trustee; for there may be adjournments if required as may readily happen where the creditors are numerous and the interests involved large, but all adjournments are the same meeting in contemplation of law; and an objection to the appointment of a particular trustee made at that stage is considered as continuing unless it appears to have been withdrawn. The meeting is for business and must be held in strict accordance with the notice, at the time and place specified, not at some other time, sooner or later, or another place, though near by; and, if no creditors appear, the meeting is as effectual as if they were present or represented, the judge or referee not being authorized or required to wait for or "count a quorum;" and, in such case, if the schedules disclose no assets, the court may order that no trustee be appointed.[8]

§ 814. **Adjournments.**—With the exercise of proper legal discretion a referee has entire control over proceedings pending before him, including the power to grant or refuse adjournments and postponements;[9] but it has been held that he could

[4] Sec. 44, act of 1898.
[5] Sec. 50c, act of 1898.
[6] Sec. 58, act of 1898.
[7] In re Hall, 2 N. B. R. 68, F. C. 5922.
[8] G. O. XV; In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 96 F. R. 696; In re Phelps, 1 N. B. R. 139, F. C. 11071; In re Norton, 6 N. B. R. 297, F. C. 10348.
[9] In re Hyman, 2 N. B. R. 107, 3 Ben. 28, F. C. 6984; In re Chemy, 19 N. B. R. 16, F. C. 2637.

not adjourn a meeting fixed for a certain day, on which he was prevented from attending, by orders of adjournment sent his assistant, while he remained absent.[10] An adjournment will not be granted on the ground of surprise where the surprise relied upon is not as to a fact, but arises from an oversight of a provision of law.[11]

§ 815. **b. 'Business at first meeting.**—At the first meeting of 'creditors the judge or referee shall preside, and, before pro-'ceeding with the other business, may allow or disallow the 'claims of creditors there presented, and may publicly examine 'the bankrupt, or cause him to be examined at the instance of 'any creditor.'[12]

§ 816. **Judge or referee to preside.**—Either the judge or referee presides and should be punctually present at the time and place specified in the notice. The referee's duties being judicial, he does not otherwise participate in the meetings, but should conduct himself with dignity and impartiality as most familiar with the matters in question.

§ 817. **Bankrupt's attendance.**—A bankrupt should attend the first meeting, if required by the court to do so, and when present at such meeting and at such other time as the court shall order, he must submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters affecting the administration and settlement of his estate.[13]

§ 818. **Allowance or disallowance of claims.**—The court should be able without difficulty or delay to pass on all or most of the claims with the assistance of the schedules, the bankrupt, creditors and others interested. Claims of secured creditors and of those who have priority, may be allowed to enable such creditors to participate in the proceedings at the meetings held prior to the determination of the value of their securities or priorities.[14] If a particular claim is objected to, the question

[10] In re Dickinson, 18 N. B. R. 514, F. C. 3895.

[11] In re Finlay, 104 F. R. 675, 3 A. B. R. 738, 3 N. B. N. R. 78; see In re Blankfein, 2 N. B. N. R. 49, 97 F. R. 91, 3 A. B. R. 165.

[12] Analogous provision of act of 1867. "Sec. 4. . . . Every register in bankruptcy shall . . . hold and preside at meetings of creditors."

[13] Sec. 7a, act of 1898.

[14] Sec. 57e, act of 1898.

should be heard as soon as feasible, and, if the judge or referee is not satisfied with the weight of evidence, the hearing may be postponed and heard at some subsequent time and, if the creditor objects to such postponement, he should have the objection entered and the question certified to the judge in case the postponement was by the referee;[15] or if claims are presented which do not appear on the bankrupt's schedules in an involuntary proceeding action on them may be postponed until after the election of the trustee.[16] It has been held that the refusal of a referee to postpone the first meeting, after holding certain proxies invalid, is not an abuse of his discretion.[17] See also proof and allowance of claims, § 839 et seq.

§ 819. **Appointment of trustee.**—See Chap. 44, ante, §§ 731-744.

§ 820. **c. 'Duties of creditors at meetings.**—The creditors 'shall at each meeting take such steps as may be pertinent and 'necessary for the promotion of the best interests of the estate 'and the enforcement of this act.'

§ 821. **d. 'Subsequent meetings.**—A meeting of creditors, 'subsequent to the first one, may be held at any time and place 'when all of the creditors who have secured the allowance of 'their claims sign a written consent to hold a meeting at such 'time and place.'[18]

[15] In re Jackson, 14 N. B. R. 449, 7 Biss. 280, F. C. 7123; see In re Stevens, 4 N. B. R. 122, F. C. 13391.

[16] In re Milwain, 12 N. B. R. 358, F. C. 9623.

[17] In re McGill, 106 F. R. 57, 5 A. B. R. 155.

[18] Analogous provision of act of 1867. "Sec. 27. . . . At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers shall be required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands. At such meeting the majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a

§ 822. **Practice.**—In the event that no trustee is appointed by reason of the fact that the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may order that no meetings other than the first meeting shall be called.[19] Whenever by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting, the court may call such meeting.[20]

§ 823. **e. 'Called meetings.**—The court shall call a meeting of 'creditors whenever one-fourth or more in number of those 'who have proven their claims shall file a written request to 'that effect; if such request is signed by a majority of such 'creditors, which number represents a majority in amount of 'such claims, and contains a request for such meeting to be held 'at a designated place, the court shall call such meeting at such 'place within thirty days after the date of the filing of the 'request.'

§ 824. **f. 'Final meetings.**—Whenever the affairs of the 'estate are ready to be closed a final meeting of creditors shall 'be ordered.'[21]

sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine. . . .

"Sec. 28. . . . If by accident, mistake, or other cause, without default of the assignee, either or both of the said second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held."

[19] G. O. XV.

[20] G. O. XXV.

[21] Analogous provision of act of 1867. "Sec. 28. . . . That the like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of the creditors shall then be called by the court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted, the same shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires; and after the third meet-

§ 825. **Practice.**—The trustee must lay before the final meeting a detailed statement of the administration of the estate; and make final reports and file final accounts with the court fifteen days before the day fixed for such meeting,[22] of which ten days' notice must be given all creditors.[23]

§ 826. **Dividend and final meetings.**—The meeting for the declaration of a dividend may properly and conveniently be combined ordinarily with the meeting for the payment of such dividend; and, where there is but one dividend, there can be no objection to a further consolidation in the interest of economy, both of time and expense, proper notice being given.[24]

ing of creditors no further meeting shall be called, unless ordered by the court."

[22] Sec. 47a, act of 1898.

[23] Sec. 58a, act of 1898.

[24] In re Smith, 1 N. B. N. 404, 2 A. B. R. 648.

CHAPTER LVI.

VOTERS AT MEETINGS OF CREDITORS.

§827. (56a) Voters at meetings of creditors.
828. Who entitled to vote.
829. Powers of creditors.
830. Proof as to voter's qualification.
831. Creditors, individual and partnership.
832. What claims are present.
833. Postponement of claims as affecting election.
834. Objections to claims.
835. Attorney, creditor may act by.
836. b. When secured creditors can vote.
837. Secured, meaning of.
838. Extent of voting power.

§ 827. '(Sec. 56a) **Voters at meetings of creditors.**—Cred-'itors shall pass upon matters submitted to them at their 'meetings by a majority vote in number and amount of claims 'of all creditors whose claims have been allowed and are 'present, except as herein otherwise provided.'[1]

§ 828. **Who entitled to vote.**—To entitle creditors to participate in and vote at meetings of creditors, they must own claims, provable in bankruptcy, which are neither secured, entitled to priority of payment, nor preferred, and must not only have proved such claims but have had them allowed.[2] Such creditors as are prohibited from proving their debts will not be allowed to vote.[3] The mere filing of objections to a claim should not exclude a creditor from voting, if he is otherwise qualified.[4]

§ 829. **Powers of creditors.**—The general creditors in the election of the trustee have power only to vote for him.[5] A creditor has a right to change his mind after voting provided

[1] Analogous provision of act of 1867. "Sec. 23. . . . And any creditor may act at all meetings by his duly constituted attorney the same as though personally present."

For the time and place for holding meetings see Sec. 55 of the law.

[2] In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 F. R. 696; In re Walker, 1 N. B. N. 510, 3 A. B. R. 35, 96 F. R. 550; In re Richards, 2 N. B. N. R. 1027, 103 F. R. 849; In re Brown, 2 N. B. N. R. 590; In re Brisco, 2 N. B. R. 78, F. C. 1886; In re Hill, F. C. 6481; In re Altenheim, F. C. 268.

[3] In re Stevens, 4 N. B. R. 122, F. C. 13391.

[4] In re Kelly Dry Goods Co., 102 F. R. 747, 4 A. B. R. 528.

[5] In re Campbell, 17 N. B. R. 4, 3 Hughes, 276, F. C. 2348.

he does so in time; and a corrupt vote should be rejected; and if the result is not affected by such rejection, a new election need not be ordered.[6] A creditor cannot change his vote on the ground of his own mistake, after the meeting has adjourned, and thereby give the court of bankruptcy the power to appoint a trustee; but such creditor may explain his mistake, or make other objection as to the choice of trustee to the court having to approve the selection.[7] The fact that bankrupt's friends have endeavored to buy up the debts against him and stop the bankruptcy proceedings constitutes no reason for not voting upon the debts.[8]

§ 830. **Proof as to voter's qualification.**—A referee should require satisfactory evidence of a creditor's right to vote for a trustee;[9] and, when a party is aggrieved by the ruling on his application for an opportunity to prove his right to vote, the meeting may be adjourned, and provision made for the determination of his right before the final vote is taken.[10] The referee is not required, as was the register under the act of 1867, to certify all questions of fact and law to the judge for decision and hence the holding that a register could not, without special order, hear testimony as to creditor's right to vote, no longer applies.[11]

§ 831. **Creditors, individual and partnership.**—Creditors who have proved a debt against a partner of a firm in bankruptcy have no right to vote for a trustee for the firm, only partnership creditors being so entitled;[12] though, in case of the separate bankruptcy of one member of a firm, both individual and joint creditors are entitled to prove their claims and vote for the trustee, but the joint creditors do not compete in the separate assets.[13] A letter of attorney executed on behalf of

[6] In re Pfromm, 8 N. B. R. 357, F. C. 11061.

[7] In re Scheiffer, 2 N. B. N. R. 179, F. C. 12445.

[8] In re Frank, 5 N. B. R. 194, 5 Ben. 164, F. C. 5050.

[9] In re Northern Iron Co., 14 N. B. R. 356, F. C. 10322.

[10] In re Spencer, 18 N. B. R. 199, F. C. 13229.

[11] In re Noble, 3 N. B. R. 25, 3 Ben. 332, F. C. 10282.

[12] In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 F. R. 696; In re Phelps, 1 N. B. R. 139, F. C. 11071; Sec. 5b, act of 1898.

[13] In re Falkner, 16 N. B. R. 503, F. C. 4624; In re Webb, 16 N. B. R. 258, 4 Sawy. 326, F. C. 17317; Wilkins v. Davis, 15 N. B. R. 60, 2 Lowell, 511, F. C. 17664; see Partnership, ante, § 130, et seq.

a partnership must contain the oath of the person executing it showing that he is a member of the partnership.[14]

§ 832. **What claims are present.**—For voting purposes a majority in number and amount of claims of all creditors whose claims have been allowed and "are present" controls. The purpose of this clause is to vest the power of voting in those creditors who are present and not to allow a delay of the proceedings by those who are not sufficiently interested to participate or attend. If a claim is allowed, but not represented by proxy or by the creditor in person, or if allowed, but excluded from voting because of defective proxies, they are not to be treated as present, in computing the number and amount of claims for voting purposes.[15]

§ 833. **Postponement of claim as affecting election.**—The effect of allowing or postponing the hearing on a particular claim affects only the creditor's right to vote at the first meeting, and, if it appears that his vote would not have affected the result, the proceedings will not be disturbed to permit him to exercise a barren right; but, if the result would have been affected by his vote, the judge or referee may set aside the result, and order a new vote to be taken.[16] Claims proved after the election of a trustee will not entitle claimant to vote thereon to change the result though an appeal has been taken from the election;[17] and claims proved before the election and sold and assigned after proof must be voted upon by the owner and not by the original creditor, the owner being entitled to one vote.[18] If a claim is split up for the purpose of increasing the number of creditors, either before or after proof, they should be counted as but one, or the better rule would be to deny them the privilege of voting. Claims proved and filed with the referee may be postponed for investigation by the trustee, and not allowed to be voted,[19] and such course, for instance, should be taken where the officers of a bankrupt

[14] In re Finlay, 3 A. B. R. 738.

[15] In re Henschel, 113 F. R. 443, 7 A. B. R. 662; In re McGill, 106 F. R. 57, 45 C. C. A. 218, 5 A. B. R. 155; In re Mackellar, 116 F. R. 547, 8 A. B. R. 669.

[16] In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 F. R. 696; In re Lake Superior Ship Canal, R. R. & Iron Co., 7 N. B. R. 376, F. C. 7997.

[17] In re Lake Superior, etc., supra.

[18] In re Frank, 5 N. B. R. 194, 5 Ben. 164, F. C. 5050.

[19] In re Frank, supra; but see In re Barbusch, 9 N. B. R. 478, F. C. 1086.

corporation present large claims against it.[20] The vote for trustee should be taken at the earliest practicable moment, but creditors who have proved their claims may, if they choose, postpone action until others have proved, though they are not compelled to do so.[21]

§ 834. **Objections to claims.**—When objection is made to the proof of a claim, it should be heard in order to determine if made in good faith, and if well founded, the claim should not be allowed for voting purposes. It does not rest in the discretion of the referee to allow claims as voting bases when an apparently genuine objection is made, though in proper cases a provisional allowance or disallowance may be made in order that a trustee may be expeditiously elected, but the proceedings should not be so summary as to exclude consideration of all objections.[22] The court should not permit the selection of a trustee to be indefinitely tied up by obstructive tactics, and which are obviously for purpose of delay.[23] Creditors cannot by merely filing objections to a claim exclude a bona fide claimant from voting on the election of a trustee, though such action by a referee will not be reviewed when no objection is made to the election nor facts presented on which to raise the question of the rights of creditors in the case.[24]

For a discussion of objections to the election of a trustee in bankrupt's interest, see ante, § 734.

§ 835. **Attorney, creditors may act by.**—While this section does not in so many words provide for representation at creditors' meetings otherwise than in the person of the creditor, yet in view of the fact that the term "creditor" comprehends any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy,[25] it is clear that the law-makers intended to sanction a mode of representation through a duly authorized agent, attorney or proxy and this was so understood by the Supreme Court.[26] This is further borne out by the fact that

[20] In re Lake Superior, supra; see In re Herman, 3 N. B. R. 153, F. C. 6425; In re Chamberlain, 3 N. B. R. 173, F. C. 2574.

[21] In re Lake Superior, etc., supra.

[22] In re Malino, 118 F. R. 368, 8 A. B. R. 205.

[23] In re Malino, supra; In re Sumner, 4 A. B. R. 123, 101 F. R. 224.

[24] In re Kelly Dry Goods Co., 102 F. R. 747, 4 A. B. R. 528.

[25] Sec. 1 (9), act of 1898.

[26] G. O. IV.

a penalty is provided for any person presenting under oath any false claim for proof against the estate of a bankrupt, or using any such claim in composition, personally or by agent, proxy or attorney, or as agent, proxy or attorney.[27]

An attorney, agent or proxy should be required, before being permitted to vote, to produce and file written authority from the creditor, which should be filed by the referee as part of his record. While the authority of an attorney in good standing to appear and act for a client, whom he assumes to represent, is presumed and may be presumed in the ordinary matters arising in bankruptcy proceedings,[28] this presumption is limited to an attorney's ordinary duties, and voting for a trustee in bankruptcy is an act so essentially different in its nature and character from an attorney's ordinary duties and the considerations entering into the choice of a trustee are so foreign to a lawyer's ordinary functions or presumed knowledge or skill, that the right to vote cannot be deemed to be a part of his implied authority nor presumed to be conferred upon him from his mere retainer.[29] It has been held that such power of attorney should be acknowledged;[30] that execution by one member of a firm for the firm was sufficient;[31] and that power to attend and vote did not authorize the filing of objections to a discharge.[32]

The general rule is that a creditor whose claim has been allowed should be permitted to vote for trustee in person or by proxy, and any question as to whether his vote was improperly influenced should be reserved until the referee is called upon to approve the election, though he will not be held to have abused his discretion in refusing to allow one offering to qualify to vote, where he is convinced that the claims are

[27] Sec. 29b (3), act of 1898.

[28] In re Pauly, 1 N. B. N. 405, 2 A. B. R. 333.

[29] In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 F. R. 696; In re Suganheimer, 1 N. B. N. 59, 1 A. B. R. 425, 91 F. R. 744; In re Blankfein, 2 N. B. N. R. 49, 3 A. B. R. 165, 97 F. R. 191; In re Richards, 2 N. B. N. R. 1027, 103 F. R. 849, 4 A. B. R. 631; In re Scully, 108 F. R. 372, 5 A. B. R. 717; In re Finlay, 3 N. B. N. R. 78; In re Purvis, 1 N. B. R. 163, F. C. 11476; In re Knoepfel, 1 N. B. R. 23, 1 Ben. 330, F. C. 7891; s. c. 1 N. B. R. 70, F. C. 7892; Contra, In re Brown, 2 N. B. N. R. 590.

[30] In re Christley, 10 N. B. R. 268, F. C. 272; Contra, In re Powell, 2 N. B. R. 17, F. C. 11351.

[31] In re Barrett, 2 N. B. R. 165, 2 Hughes, 444, F. C. 1043; see In re Finlay, 3 A. B. R. 78.

[32] Creditors v. Williams, 4 N. B. R. 187, F. C. 3379.

not proven in good faith, or when the votes are in the interest of the bankrupt.[33]

§ 836. 'b. When secured creditors can vote.—Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.'[34]

§ 837. **Secured, meaning of.**—The term "secured creditors" in the bankruptcy act is confined to creditors holding securities on the bankrupt's property and does not include such as hold securities on the property of third persons, so that, when it comes to voting in cases in which a partnership primarily is in bankruptcy (though the individual partners may be also), the bankrupt is the partnership and only such securities as are upon the partnership assets are to be considered in reducing the voting powers of the creditors holding securities.[35]

§ 838. **Extent of voting power.**—Creditors having claims which are secured or entitled to priority may, if they so desire, under the terms of the act, prove and have their claims allowed for the amount of the estimated excess over the security or priority and to that extent vote for the trustee,[36] or in case of preferred creditors, they may surrender the preference, prove their debts and participate to the full amount.[37] A creditor, who received a payment under an assignment more than a year before the bankruptcy proceedings, is entitled to have his claim counted and to vote on it in the amount less the credit.[38]

[33] Falter v. Reinhard, 2 N. B. N. R. 1119, 104 F. R. 292; In re Henschel, 109 F. R. 861, 6 A. B. R. 305.

[34] Analogous provision of act of 1867. "Sec. 18. . . . No person who has received any preference contrary to the provisions of this act shall vote for or be eligible as assignee."

[35] In re Coe, Powers & Co., 1 N. B. N. 294, 1 A. B. R. 275; In re Thomas & Sivyer, 8 Biss. 139.

[36] Sec. 57e, act of 1898.

[37] Sec. 57g, act of 1898; In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 F. R. 695; In re Parkes, 10 N. B. R. 82, F. C. 10754; In re Bolton, 1 N. B. R. 83, 2 Ben. 189, F. C. 1614; In re Parham, 17 N. B. R. 300, F. C. 10712; Contra, In re Stillwell, 7 N. B. R. 226, F. C. 13448.

[38] In re Folb, 1 N. B. N. 134, 1 A. B. R. 22, 91 F. R. 107.

CHAPTER LVII.

PROOF AND ALLOWANCE OF CLAIMS.

§839. (57a) What constitutes proof.
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858. —— Instrument in writing.
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865. Secured creditors, allowance.
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894. n. Claims to be proved within year.
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§ 839. '(Sec. 57a) **What constitutes proof of claims.**—'Proof of claims shall consist of a statement under oath, in 'writing, signed by a creditor setting forth the claim, the 'consideration therefor, and whether any, and if so, what 'securities are held therefor, and whether any, and if so, what 'payments have been made thereon, and that the sum claimed 'is justly owing from the bankrupt to the creditor.'[1]

§ 840. **Nature of proof.**—The proof and allowance of claims are distinct, the former being the sworn statement by which a creditor presents his claim, the latter the judicial action by which it is established in the proceeding and permitted to participate in the distribution. Claims may be allowed conditionally or temporarily for such purposes as participating in the choice of a trustee or where some question may remain to be determined before they would be allowed for the purpose of distribution.[2] The creditor's statement under oath, in writing, as to the proof of his claim, if it contains the matter pointed out in this section, is at once the claimant's pleading

[1] Analogous provision of act of 1867. "Sec. 22. . . . That all proofs of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident debtors before any register in bankruptcy in the judicial district where such creditors or either of them reside, or before any commissioner of the circuit court authorized to administer oaths in any district. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath or solemn affirmation before the proper register or commissioner setting forth the demand, the consideration thereof (Here follows requirement as to contents of oath.) . . . Such oath or solemn affirmation shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which cases the demand may be verified in like manner by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge; or if in a foreign country, the oath of the creditor may be taken before any minister, consul, or vice-consul of the United States; and the court may, if it shall see fit, require or receive further pertinent evidence either for or against the admission of the claim. Corporations may verify their claims by the oath or solemn affirmation of their president, cashier, or treasurer."

[2] In re Wise, 2 N. B. N. R. 151.

and his evidence, and makes for him a prima facie case[3] and is a part of the proceeding in bankruptcy.[4] It is not the duty of a referee to examine claims further than to discover whether or not the deposition contains the formal requisites prescribed by the law, orders and forms,[5] and questions as to the origin of a debt are immaterial.[6] A debt is to be considered as proved when it is duly authenticated and sent to the referee or clerk.[7] The court has no discretion as to receiving and filing a proof which appears on its face to have been taken by a proper officer and to be correct in form and substance;[8] nor are informalities in the proofs material where the creditor, as a witness, has sworn positively of his own knowledge.[9] The fact that the petitioning creditor and the bankrupt or the bankrupt and the party offering to prove a claim are relatives, warrants the court in scrutinizing the claim closely but not in inferring fraud from it alone.[10]

§ 841. **Manner of making proof—in general.**—A deposition to prove a claim against a bankrupt's estate must be correctly entitled in the court and in the cause. It should give in full at least one Christian name of the affiant and of the bankrupt, in addition to the surname,[11] the address of the party making proof, and be specific in the statement of the consideration, and the account should be itemized,[12] even though it be for legal services. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition must be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove

[3] In re Sumner, 2 N. B. N. R. 681, 101 F. R. 224, 4 A. B. R. 123.

[4] Wiswell v. Campbell, 15 N. B. R. 421, 93 U. S. 347.

[5] In re Ankeny, 1 N. B. N. 511.

[6] In re Lazarovic, 1 A. B. R. 476.

[7] Ex p. Harris, 16 N. B. R. 432, F. C. 6109.

[8] In re Merrick, 7 N. B. R. 459, F. C. 9463.

[9] McKinsey v. Harding, 4 N. B. R. 10, F. C. 8866.

[10] In re Mendelsohn, 12 N. B. R. 533, 3 Sawy. 342, F. C. 9420; In re Wooten, 118 F. R. 670, 9 A. B. R. 247.

[11] In re Valentine, 12 N. B. R. 389, 4 Biss. 417, F. C. 16812.

[12] In re Scott, 1 N. B. N. 402, 1 A. B. R. 553, 93 F. R. 418; In re Chasnoff, 3 N. B. N. R. 1.

debts existing in open account, must state when the debt became or will become due; and if it consists of items maturing at different dates, the average date due in default of which it will not be necessary to compute interest upon it. If on notes some of which are payable so many days after date, and others so many days after discount, the proof should show the date of the discounts, the amount advanced as consideration for each, and should state explicitly the action taken to fix the liability of the bankrupt on those upon which he was indorser only.[13] All such depositions must contain an averment whether notes have been received for such account, or judgment rendered thereon. Proofs of debt received by a trustee must be delivered to the referee to whom the cause is referred.[14] A material fact which cannot be conclusively implied from the statements of the proof of a claim, must be found upon a trial thereof.[15]

§ 842. **Proof of secured claims.**—The proof must show whether the claim is secured or unsecured.[16] Unless a secured creditor surrenders his security and proves his debt as unsecured[17] he is required to make proof of the whole debt[18] as in the case of an unsecured debt, except that a statement of all securities should be included in the proof. The referee has power to pass upon the question whether a claim is secured or unsecured, but his determination will in no wise divest the claimant of his title to property so secured.[19]

A creditor holding a secured claim has three alternatives with reference to the proof of his claim. First,[20] he may prove for the full amount of his claim, specifying the securities held for the debt,[21] in which event he will participate in the dividends to the extent that his claim is greater than the value of the security,[22] and such act will in no wise be deemed an abandonment of the security.[23] If the security is of a third

[13] In re Stevens, 104 F. R. 325, 5 A. B. R. 11.

[14] G. O. XXI (1).

[15] In re Stevens, 107 F. R. 243, 5 A. B. R. 806.

[16] Cunningham v. Cady, 13 N. B. R. 525, F. C. 3480.

[17] Sec. 57e, act of 1898.

[18] Form 32.

[19] In re Harrison, 2 N. B. N. R. 541.

[20] In re Bridgman, 1 N. B. R. 59, F. C. 1866.

[21] Form No. 32.

[22] In re Rhoads, 2 N. B. N. R. 178; Stewart v. Isador, 1 N. B. R. 129; In re Stewart, 1 N. B. R. 42, F. C. 13418; In re Winn, 1 N. B. R. 131, F. C. 17876; In re Baldwin, 19 N. B. R. 52, F. C. 796.

[23] In re Bolton, 1 N. B. R. 83, 2 Ben. 189, F. C. 1614.

person, the creditor can prove for the whole debt and enforce the security against such third person at the same time, provided he does not take from both sources more than the full amount of the debt.[24] The value of the securities is determined by converting them into money as provided,[25] their value to be credited upon such claims and the dividend paid only on the unpaid balance.[26] It is not necessary if he has recovered a judgment after the adjudication of the debtor to vacate it before he can prove the claim on which such judgment is based, provided the claim be otherwise valid and properly provable.[27] Second. If the security is ample, the creditor may rest upon the lien thus created and not prove his claim. In such case, however, before enforcing his lien, authority should first be obtained of the court of bankruptcy.[28] Third. The creditor may either directly or indirectly waive his security and prove his claim as unsecured. Thus, one having a lien upon bankrupt's estate by judgment, execution, attachment, creditor's suit, or otherwise, who proves the claim without disclosing the lien, cannot subsequently enforce it,[29] but will be deemed to have surrendered his security,[30] and which may ripen into a conclusive extinguishment.[31] Where a judgment creditor proved his claim in bankruptcy, but finding no assets to pay it, his lien will be deemed to have been waived and he cannot enforce payment by means of a fi. fa.[32] So where a party who took a bill of sale as security

[24] In re Cram, 1 N. B. R. 133, 1 Hask. 189, F. C. 3343; In re Forsythe et al., 7 N. B. R. 174, F. C. 4948; In re Babcock, F. C. 696; In re Headley, 2 N. B. N. R. 259, 97 F. R. 765, 3 A. B. R. 272.

[25] Sec. 5h, act of 1898.

[26] In re Morrison, 10 N. B. R. 105, F. C. 9839; In re Winn, 1 N. B. R. 131, F. C. 17876.

[27] In re Stevens, 4 N. B. R. 122, F. C. 13391.

[28] In re Sink, 2 N. B. N. R. 645; In re Frick, 1 N. B. N. 214, 1 A. B. R. 719; In re Brown, 104 F. R. 762. See "Enforcement of Mortgage Rights," post, § 1092.

[29] White v. Crawford, 9 F. R. 371; In re Bear, 5 F. R. 53, aff'd 7 F. R. 583.

[30] In re Spring, 2 N. B. N. R. 509; In re Moyer, 97 F. R. 324; Stewart v. Isador, 1 N. B. R. 129; In re Granger, 8 N. B. R. 30, F. C. 5684; In re McConnell, 9 N. B. R. 387, F. C. 8712; In re Jaycox et al., 8 N. B. R. 241, F. C. 7242; In re Walker, 2 N. B. N. R. 1014; In re Bloss, 4 N. B. R. 147, F. C. 1562; In re Brand, 3 N. B. R. 85, F. C. 1809; Franklin Co. Nat. Bk., 138 Mass. 515; In re Anson, 101 F. R. 698, 2 N. B. N. R. 567, 4 A. B. R. 231.

[31] In re Parkes, 10 N. B. R. 82, F. C. 10754.

[32] Heard v. Jones, 15 N. B. R. 402.

deliberately proved his debt, which assumes that he is the absolute owner of the goods, and persisted in such false claim in an action by the trustee to recover the goods, and attempted to support it by his own oath, he was held to be estopped from claiming them as security.[33]

§ 843. Proof of claim as unsecured through ignorance.—Notwithstanding the foregoing rule, where a creditor without any fraudulent intent, in ignorance of his rights, has proved a secured claim as unsecured, he will be allowed to withdraw his proof or amend by setting up his security,[34] provided no injury has resulted to the unsecured creditors as a result of such proof,[35] and all parties can be placed in statu quo.[36] This will not be allowed, however, where there is no perfected lien or established security, but only a contingent and inchoate lien in the effort to secure a preference by litigation.[37]

§ 844. Security on property of third person—Waiver.—If the security is on the property of a third party and the holder proves as unsecured, he only forfeits his lien in case those interested in the estate would be benefited thereby;[38] or by voluntarily disclaiming any interest under a preferential deed of trust;[39] or where judgment is recovered against two co-defendants, and execution thereon is levied upon the property of one of them, and the other is adjudged bankrupt, the claim may be proved against the bankrupt as unsecured.[40] Where execution had issued and levy made on property sufficient to satisfy the judgment, the creditor not having been estopped thereby from proceeding in bankruptcy it would operate as a waiver;[41] but a mortgage is not extinguished by such waiver, the trustee in bankruptcy being subrogated to the rights of the holder.[42] An indorser would not be released

[33] Willis v. Carpenter, 14 N. B. R. 521, F. C. 17770.

[34] Ex p. Harwood, F. C. 6185; In re Brand, supra; Ex p. Lapsley, F. C. 8083.

[35] In re Friedman, 1 N. B. N. 208, 1 A. B. R. 510; In re Jaycox et al., 8 N. B. R. 241, F. C. 7242; In re Clark et al., 5 N. B. R. 255, F. C. 2806.

[36] In re Parkes, 10 N. B. R. 82, F. C. 10754.

[37] In re Wilder, 2 N. B. N. R. 629, 101 F. R. 104, 3 A. B. R. R. 761.

[38] Bassett v. Baird, 17 N. B. R. 177.

[39] In re Saunders, 13 N. B. R. 164, 2 Lowell 444, F. C. 12371.

[40] In re Headley, 2 N. B. N. R. 250, 3 A. B. R. 272, 97 F. R. 765.

[41] In re Sheehan, 8 N. B. R. 345, F. C. 12737; In re Bloss, 4 N. B. R. 37, F. C. 1562.

[42] Hiscock v. Jaycox, 12 N. B. R. 507, F. C. 6531.

though all the creditor's rights and claim as well at law as in equity to a mortgage given for the purpose of indemnifying the indorser would be.[43]

§ 845. **Proof of assigned claims.**—A claim which has been assigned before proof must be supported by deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Thus a receiver of a creditor's property,[44] or one who has purchased claims against bankrupt in an endeavor to settle the matter out of court,[45] or one who holds a note as trustee for another,[46] or who holds an account for goods, assigned before bankruptcy,[47] may make proof of the claim so held. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, he must immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within such further time as is allowed by the referee, he must make an order subrogating the assignee to the original claimant. If objection be made, he should proceed to hear and determine the matter.[48] The form by which a claim against a bankrupt was transferred is immaterial, and cannot affect the right of the transferee to prove the claim, where it is sufficient to estop the original holder from asserting a right to it.[49]

§ 846. **Proof of claims of persons contingently liable.**—The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend will be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt.[50] The fact that the claim was

[43] Bk. v. Comstock, 11 N. B. R. 235.

[44] In re Mills, 17 N. B. R. 472, F. C. 9612.

[45] In re Pease, 6 N. B. R. 73, F. C. 10880.

[46] Ex p. Dreyfus, 13 N. B. R. 43, 2 Lowell, 305, F. C. 8043.

[47] In re Fortune, 3 N. B. R. 83.

[48] G. O. XXI (3).

[49] In re Miner, 117 F. R. 953, 9 A. B. R. 100; s. c. 114 F. R. 998, 8 A. B. R. 248.

[50] G. O. XXI (4); In re Dillon, 100 F. R. 627, 4 A. B. R. 63; In re Christensen, 2 N. B. N. R. 1094.

not paid by a surety until after the date of the adjudication, will not prevent its proof and allowance as a claim against the bankrupt;[51] but if for any reason the creditor could not have proved the claim, as because he had received a preference, it cannot be proved by the person contingently liable. A creditor is entitled to prove his full claim in preference to the person contingently liable, who has discharged a part of his indebtedness.[52] On the failure of the holder of a promissory note transferred to him by endorsement to prove his claim therefor on the bankruptcy of the maker, the surety must himself move in the matter or require the holder to act on furnishing him with suitable indemnity against risk and expense.[53]

§ 847. **The consideration.**—The proof should show the consideration for the claim,[54] and where the consideration for a note presented for proof is set forth in the creditor's deposition as goods, wares, merchandise, etc., there should be stated the kind of goods, the quantity, the price, the date of the transaction and time of delivery, if delivered at one time, or, if delivered continuously through a period of time, that period should be stated.[55] In the case of the holder of bankrupt's paper, he must show that he paid value when he took it, or incurred some responsibility, or relinquished some right, or granted some indulgence, or discharged a precedent debt, upon the faith and credit of the paper.[56]

§ 848. **By whom proof made.**—While generally speaking only the holder and owner of a claim should make proof,[57] the law contemplates that it may be made by an agent, attorney or proxy,[58] upon good and sufficient reasons. Under the former act it might be made by an agent in case the owner

[51] In re Christensen, supra.

[52] In re Dillon, supra; In re Schmeckel Cloak & Suit Co., 3 N. B. N. R. 110, 104 F. R. 64; In re Heyman, 95 F. R. 800, 2 A. B. R. 651, citing In re Ellerhorst, 5 N. B. R. 144, F. C. 4381; In re Hollister, 3 F. R. 452; Stewart v. Armstrong, 56 F. R. 171; In re Souther, 2 Low. 322, F. C. 13184; Bk. v. Pierce, 137 N. Y. 444; see Downing v. Bk., 11 N. B. R. 372, F. C. 4046.

[53] Natl. Bk. of So. Reading v. Sawyer, 3 N. B. N. R. 266, 6 A. B. R. 154.

[54] In re Stevens, 104 F. R. 325, 5 A. B. R. 11.

[55] In re Elder, 3 N. B. R. 165, 1 Sawy. 73, F. C. 4326.

[56] In re Howard, Cole & Co., 6 N. B. R. 372, F. C. 6751.

[57] In re Ford, 18 N. B. R. 426, F. C. 4932.

[58] Sec. 1 (9), act of 1898; G. O. XXI (1).

was not within the United States,[59] though the mere absence from the State was insufficient.[60] Thus a mere agent holding negotiable paper was not permitted to make proof when the owner was in a situation to do so himself, but if not, then the agent might prove in the name and for the benefit of the real owner.[61] The agent might prove where he was cognizant of all the facts, the creditor having no personal knowledge;[62] though it has been held that the agent's oath that he is better acquainted with the facts than his principal would not necessarily render the agent's deposition alone admissible as proof.[63]

When the deposition is made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the firm; when made by an agent the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition must be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer,[64] and if verified by the manager instead of the treasurer, it is objectionable, though amendable.[65]

§ 849. Before whom made—Verification.—The proof of a claim must be sworn to, and the oath thereto may be administered by a referee, United States Commissioner, Notary Public, or other officer authorized to administer oaths in proceedings before the United States courts or under the laws of the States, and diplomatic and consular officers in a foreign country.[66] If made abroad it must be in accordance with the requirements of the Federal laws.[67] The attorney of a creditor may take the oath of his client as a notary,[68] though the contrary was held under the Act of 1867.[69] A notary public, before whom

[59] In re Whyte, 9 N. B. R. 267, F. C. 17606.

[60] In re Jackson, 14 N. B. R. 449, F. C. 7123, 7 Biss. 280.

[61] In re Saunders, 13 N. B. R. 164, F. C. 12371, 2 Low. 444.

[62] In re Watrous, 14 N. B. R. 258, F. C. 17270.

[63] In re Whyte, 9 N. B. R. 267, F. C. 17606.

[64] G. O. XII (1).

[65] In re Rude, 2 N. B. N. R. 498.

[66] Sec. 20, act of 1898; G. O. XXI (5); In re Sugenheimer, 1 N. B. N. 59, 1 A. B. R. 425, 91 F. R. 744.

[67] Robert v. Lynch, 16 N. B. R. 38, F. C. 8635.

[68] In re Kimball, 2 N. B. N. R. 46, 4 A. B. R. 144, 100 F. R. 177; McDonald v. Willis, 143 Mass. 542.

[69] In re Nebe, 1 N. B. R. 289, F. C. 10073; In re Keyser, 9 Ben.

proof is made, must authenticate the same by his official seal as well as his signature.[70] In the case of any defect in the verification, it may be amended.[71]

§ 850. When action on proof postponed.—As between contending creditors, the court or referee in the interest of fair dealing and good conscience, has the unquestioned power to postpone the claim of a creditor, and should do so whenever the circumstances are such as to arouse suspicion or to throw doubt upon the validity of the claim. Thus a claim may be postponed, although a just one, as where there is evidence of a fraudulent combination and scheme of such creditor to defeat the claim of others;[72] or where the officers of a bankrupt corporation present large claims;[73] or where the names of certain creditors, by whom claims against the estate are presented, do not appear upon the schedule;[74] or where a prima facie case is made out that certain creditors have received preferences, or that their claims have been purchased with money belonging to the bankrupt and in collusion with him;[75] or where the claim is founded on a large open account between the parties, and which is in dispute between them.[76] Proof of a claim may be postponed until after the choice of trustee,[77] and, if so, it may be treated in all respects as if it had not been tendered and postponed.[78]

§ 851. When proof may be amended.—A judge or referee may in his discretion allow a proof of debt[79] or the verification of a claim to be amended, and, in case of inadvertence, mistake or ignorance, whether of fact or law, will generally exercise that power, in the absence of fraud, when justice seems to require that the amendment be made and when all

224, F. C. 7748; see also In re Brumelkamp, 1 N. B. N. 360, 95 F. R. 814, 2 A. B. R. 318.

[70] In re Nebe, supra; but see In re Strauss, 2 N. B. R. 18, F. C. 13532; In re Haley, 2 N. B. R. 13, F. C. 5918.

[71] In re Stevens, 107 F. R. 243, 5 A. B. R. 806.

[72] In re Headley, 2 N. B. N. R. 250, 3 A. B. R. 272, 97 F. R. 765; State v. Hope, 102 Mo. 431.

[73] In re Lake Sup. Ship Canal, R. R. & Iron Co., 7 N. B. R. 376, F. C. 7997.

[74] In re Milwain, 12 N. B. R. 358, F. C. 9623.

[75] In re Herrman, 3 N. B. R. 153, F. C. 6426.

[76] In re Jones, 2 N. B. R. 20, F. C. 7447.

[77] In re Smith, 1 N. B. R. 25, 2 Ben. 113, F. C. 12971.

[78] In re Herrman, 3 N. B. R. 161, 4 Ben. 126, F. C. 6425.

[79] In re Stevens, 107 F. R. 243, 5 A. B. R. 806.

parties can be placed in the same situation they would have occupied if the error had not occurred.[80] This right extends to all matters forming a part of the proof and will generally be permitted so long as proof of a debt may be made,[81] provided the claim has not been settled or dividend received on account, in which event the holder would probably be estopped unless good and sufficient reasons are shown. It has been held, however, that the amendment may be permitted, even after the expiration of the time for proving claims, if there be enough on the original proof by which to amend.[82] The sufficiency of the amended proof is to be determined on its face, irrespective of prior proofs, except as to whether it is substantially the same claim.[83] If the proof is insufficient and is not amended upon leave, it will be expunged.[84]

In the administration of the law, its fundamental principle of equal distribution among the creditors, would seem to forbid the exercise of this discretion in the interest of one creditor to the prejudice of others, as where a claim is proved as unsecured, and subsequently an endeavor is made to set up the claim as an equitable lien when there is no perfected security in the creditor's favor, but only a contingent and inchoate lien in the effort to secure a preference by litigation.[85]

A creditor, after examination before the referee touching his claim, has been allowed to file supplemental proof corresponding with the facts shown by his testimony;[86] but where proof is made on an old promissory note, an amendment should not be permitted to show that a new note was given, for which the old note was part consideration, but such new note should be proved independently.[87]

[80] In re Myers, 99 F. R. 691; In re Wilder, 2 N. B. N. R. 629, 101 F. R. 104, 3 A. B. R. 761; In re Parkes, 10 N. B. R. 82, F. C. 10754; In re Friedman, 1 N. B. N. 208, 1 A. B. R. 510; In re Clark & Beninger, 5 N. B. R. 255, F. C. 2806; In re Jaycox & Green, 8 N. B. R. 241, F. C. 7242; In re McConnell, 9 N. B. R. 387, F. C. 8712.

[81] In re Moebius, 116 F. R. 47, 8 A. B. R. 590; In re Stevens et al., 107 F. R. 243, 5 A. B. R. 806.

[82] Hutchinson v. Otis, 115 F. R. 937, 8 A. B. R. 382.

[83] In re Stevens et al., supra.

[84] In re Scott, 1 N. B. N. 402, 93 F. R. 418, 1 A. B. R. 553.

[85] In re Wilder, 2 N. B. N. R. 629, 101 F. R. 104, 3 A. B. R. 761; see In re Lesser, 99 F. R. 913, 3 A. B. R. 758.

[86] In re Montgomery, 3 N. B. R. 108, F. C. 9729.

[87] In re Montgomery, 3 N. B. R. 109, F. C. 9731.

§ 852. **The effect of proof—in general.**—When a creditor seeks to prove a claim against the estate of a bankrupt, he stands in the position of a plaintiff at law,[88] is a party to the suit and bound by the decision,[89] but in no sense a witness nor entitled to fees.[90] In the case of a foreign creditor his rights remain unaffected by the domestic proceedings, except that his remedy, when sought in the United States courts, must be in accordance with the bankruptcy act and laws of the United States.[91]

Proving a debt does not of itself operate as an absolute extinguishment or satisfaction of the debt, the creditor being remitted to his former rights and remedies if the bankrupt is refused a discharge;[92] the weight of authority holding that the right of action is merely suspended, pending the granting of the discharge.[93] Where proof has been duly presented a prima facie case is made, subject only to an order for further proof and the right of a creditor, or person interested, to offer counter proof;[94] and when such proof is admitted the rights of creditors accrue, and they may then ask for an amendment of the petition for any defect.[95]

§ 853. **—— on collateral proceedings.**—No creditor, who holds a claim which might be proven in bankruptcy, whether the debt is secured by lien or not, can enforce such debt in a state court against a debtor after his adjudication in bankruptcy, except by permission of the court of bankruptcy.[96] This inhibition would probably not extend to collateral remedies, and hence the right of action against a person as a stockholder of a corporation would not be affected.[97] A creditor secured by a mortgage on the bankrupt's estate,

[88] In re Prescott, 9 N. B. R. 385, 5 Biss. 523, F. C. 11389.

[89] Wiswall v. Campbell, 15 N. B. R. 421, 93 U. S. 347.

[90] In re Paddock, 6 N. B. R. 396, F. C. 10658.

[91] In re Bugbee, 9 N. B. R. 258, F. C. 2115.

[92] Dingee v. Becker, 9 N. B. R. 508, F. C. 3919; Miller v. O'Kain, 14 N. B. R. 145.

[93] Miller v. O'Kain, 14 N. B. R. 145; Dingee v. Becker, 9 N. B. R. 508; Davis v. Anderson, 6 N. B. R. 146, F. C. 3623.

[94] In re Sumner, 2 N. B. N. R. 681, 101 F. R. 224, 4 A. B. R. 123; In re Saunders, 13 N. B. R. 164, 2 Lowell, 444, F. C. 12371.

[95] In re Jones, 2 N. B. R. 20, F. C. 7447.

[96] In re Winn, 1 N. B. R. 131, F. C. 17876.

[97] Allen v. Ward, 10 N. B. R. 285.

having proved his claim, may, with leave of the court of bankruptcy, and in the absence of objection by the trustee, proceed to foreclose the mortgage in a State court;[1] but a creditor, who asserts his lien in the court of bankruptcy, is not entitled to resort to a State tribunal to enforce his lien against the same property which was the subject of adjudication in the bankruptcy court.[2]

§ 854. **—— may still oppose discharge.**—Whether he has proved his debt or not, any creditor may oppose bankrupt's discharge.[3] Under the former law it was held that a discharge would not be set aside after bankrupt's death in order that demands might be proved against his estate in the hands of his administrator.[4]

§ 855. **Effect of failure of.**—A creditor who has not proved his claim does not acquire any rights superior to those who do, but if the claim is scheduled it will be released by the discharge, and as a penalty he loses his dividend. Such creditor has no rights in composition proceedings;[5] nor can he proceed in an action against the bankrupt pending the determination as to his discharge.[6]

§ 856. **Right to prove not dependent on existence of assets.**—Whether a debt is provable depends upon the nature of the liability, and not upon whether there are assets, or there is any prospect of assets applicable to it.[7] Thus where a creditor holds the individual notes of a partner he may prove and have them allowed in the firm proceedings, though their payment will be postponed until the partnership debts have been paid.[8]

§ 857. **'b. Claim founded on instrument in writing.**—'Whenever a claim is founded upon an instrument of writing, 'such instrument, unless lost or destroyed, shall be filed with

[1] McHenry v. La Societe Francaise, 16 N. B. R. 385, 95 U. S. 581.

[2] Spilman v. Johnson, 16 N. B. R. 145.

[3] In re Sheppard, 1 N. B. R. 115, F. C. 12753; In re Boutelle, 2 N. B. R. 51, F. C. 1705, contra; In re Burke, 3 N. B. R. 76, Deady, 425, F. C. 2156; In re Levy, 1 N. B. R. 66, 2 Ben. 169, F. C. 8297.

[4] Young v. Ridenbaugh, 11 N. B. R. 563, 3 Dill, 239, F. C. 18173.

[5] In re Mathers, 17 N. B. R. 225, F. C. 9274.

[6] In re Schwartz, 15 N. B. R. 330, 14 Blatch. 196, F. C. 12502.

[7] In re Bates, 100 F. R. 263, 4 A. B. R. 56.

[8] In re Dobson, 2 N. B. N. R. 514.

'the proof of claim. If such instrument is lost or destroyed, 'a statement of such fact and of the circumstances of such 'loss or destruction shall be filed under oath with the claim. 'After the claim is allowed or disallowed, such instrument 'may be withdrawn by permission of the court, upon leaving 'a copy thereof on file with the claim.'[9]

§ 858. **Instrument in writing.**—The failure to file with the proof of notes the originals, is a sufficient bar to their allowance, and the filing of a list giving the date, amount, date of maturity and the names of the makers, will not answer in lieu thereof.[10] The holder of an indorsed note who does not himself prove it on the bankruptcy of the maker is not required to tender it to the indorser, in order that he may file it as required by this section, but the better practice is to obtain the note by furnishing indemnity to the holder, when it may be filed with proof of the claim, or have the holder prove the claim and file the note upon suitable indemnity against risk, loss or expense.[11]

A creditor may withdraw the written instrument after the claim has been passed upon, if a copy is left on file, but the trustee has the right to demand the production of the original when the dividends are paid, that they may be properly indorsed.[12] In proceedings against the estate of a deceased bankrupt a creditor is competent to prove the contract on which his claim is based,[13] and a written memorandum signed by the parties referring to and recognizing a previous oral agreement as an existing contract would suffice, if there was no fraud or mistake in its execution.[14]

[9] Analogous provision of act of 1867. "Sec. 24. . . . A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon."

[10] In re McCauley, 2 N. B. N. R. 1085.

[11] Nat. Bk. of So. Reading v. Sawyer, 3 N. B. N. R. 266, 6 A. B. R. 154.

[12] In re Emison, 2 N. B. R. 179, F. C. 4459.

[13] In re Merrill, 16 N. B. R. 35, 9 Ben. 165, F. C. 9466.

[14] In re Howard, 100 F. R. 630, 4 A. B. R. 69.

A general allegation of the consideration for claims founded upon instruments in writing is insufficient, but it should extend to the particulars, though it need not be beyond what relates to the claim as it accrued to the claimant.[15]

As the War Revenue law of 1898 declared a rule of evidence with reference to certain written instruments, notes and other papers drawn while such law was in force, and which were not stamped pursuant thereto, and which were filed in support of a proof of a claim, were disallowed.[16]

§ 859. **'c. Proved claims may be filed for allowance.**—'Claims after being proved may, for the purpose of allowance, 'be filed by the claimants in the court where the proceedings 'are pending or before the referee if the case has been 'referred.'[17]

§ 860. **Where proof of debt filed.**—The proof of debt should be filed with the clerk of court unless the petition has been referred, in which event it should be filed with the referee in charge of the case, and if any proofs have been received by the trustee, they must be delivered to said referee.[18] A creditor who retains possession of the proof of his claim and does not file it, has not proven his claim.[19]

§ 861. **'d. Allowance of claims.**—Claims which have been 'duly proved shall be allowed, upon receipt by or upon pres-'entation to the court, unless objection to their allowance 'shall be made by parties in interest, or their consideration 'be continued for cause by the court upon its own motion.'[20]

§ 862. **Allowance or rejection of claims.**—From a judgment

[15] In re Stevens, 107 F. R. 243, 5 A. B. R. 806.

[16] In re Dobson, 2 N. B. N. R. 514.

[17] Analogous provision of act of 1867. "Sec. 22. . . . If the proof is satisfactory to the register or the commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts, which books shall be opened to the inspection of all the creditors."

[18] G. O. XX; In re Ankeny, 1 N. B. N. 482.

[19] In re Sheppard, 1 N. B. R. 115, F. C. 12753.

[20] Analogous provision of act of

allowing or rejecting a claim or debt of $500 or over, an appeal may be taken to the circuit court of appeals;[21] and it may be taken from the circuit court of appeals to the Supreme Court, if the amount in controversy exceeds $2,000, or where a justice of the Supreme Court certifies that the determination of the questions involved is essential to a uniform construction of the act. The judgment of a court of bankruptcy allowing or rejecting a claim is presumptively rendered on the date of its filing with the clerk, and the ten days for taking an appeal begins to run from that time.[22]

The referee is vested[23] with a wide discretion in the allowance and disallowance of claims; and the judge, upon review, will not interfere with his decision upon questions of fact, unless convinced that it is manifestly against the weight of evidence. The fact of relationship between the debtor and creditor requires closer scrutiny on the part of the referee in the examination of a claim than is required in the case of ordinary claims, and where his decision is the result of such scrutiny, it will not be reversed except in a very clear case.[24] The proof and allowance are distinct, the former being a sworn statement by which the creditor presents a claim and the latter a judicial action by which such claim is established in the proceedings and permitted to participate in the management and distribution of the estate. Claims may also be allowed conditionally or temporarily for the purpose of participating in the choice of trustee or where some question may remain to be determined before they can be allowed for purposes of distribution.[25] A creditor who has filed a statement of his claim under oath, cannot sustain it by evidence of an indebtedness arising in a different manner from that stated.[26] It has been held that a creditor presenting a claim for proof and allowance, which is contested by the trustee, is not entitled to demand a trial by jury, because proceedings

1867. "Sec. 23. . . . The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers."

[21] Sec. 25a, act of 1898.

[22] Peterson v. Nash Bros., 112 F. R. 311, 7 A. B. R. 181.

[23] G. O. XXI.

[24] In re Rider, 3 A. B. R. 193, 96 F. R. 811; In re Mendelsohn, 12 N. B. R. 533, F. C. 9420.

[25] In re Wise, 2 N. B. N. R. 151.

[26] In re Lansaw, 118 F. R. 365, 9 A. B. R. 167.

in bankruptcy are of equitable cognizance and the seventh amendment to the Constitution of the United States does not apply thereto, and no act of Congress at present in force authorizes it.[27] If a creditor attempts to obtain an advantage over others by fraudulently including in his account fictitious items or incorrect amounts, he forfeits his right to have his claim allowed in any sum.[28]

A claim that has been duly proved[29] and filed for allowance with the referee[30] must be allowed, unless objections are made by parties in interest, or unless continued by the court for cause on its own motion.[31] If the proof fails to state an essential fact, but complies substantially with the forms, orders and the statute, it is the referee's duty to allow it as requested, since he is not required to examine claims further than to see that the proof contains the formal requisites prescribed by the law and General Orders, as parties in interest have the right to file objections or petition for a re-examination. If proof is made in the manner directed by the statute, the verified statement of the claim makes a prima facie case for its allowance.[32] If any party in interest objects he must assume the burden of producing evidence against it of at least equal probative force to that furnished by claimant's sworn statement, and he is entitled to examine the claimant and other witnesses, if their attendance can be secured without embarrassing delay, but the proceeding should not be suspended for purpose of obtaining the evidence of witnesses beyond the jurisdiction, unless the court is satisfied that the objection is interposed in good faith, and that the evidence desired is of substantial value and necessary to a just determination of the case. In such case, the claim should not be accepted until the objection is disposed of or the court is satisfied of the validity of the claim.[33]

Where the respondent, in a petition in involuntary bank-

[27] In re Christensen, 101 F. R. 243, 4 A. B. R. 99, citing Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672.

[28] In re Flick, 105 F. R. 503, 5 A. B. R. 465.

[29] Sec. 57a and b, act of 1898.

[30] Sec. 57c, act of 1898.

[31] In re Ankeny, 1 N. B. N. 482, 511, citing In re Cochran, 11 F. C. 606; In re Felter, 7 F. C. 904; In re Merrick, 17 F. C. 75; In re Patterson, 18 F. C. 1313; In re Trowbridge, 24 F. C. 218.

[32] In re Shaw, 109 F. R. 780, 6 A. B. R. 499.

[33] In re Sumner, 2 N. B. N. R. 681, 101 F. R. 224, 4 A. B. R. 123.

ruptcy, denies his alleged indebtedness to the petitioning creditor, and takes issue on the validity and consideration on which such creditor claims, and upon evidence offered on both sides, the court sustains the petitioner and adjudges respondent bankrupt, such adjudication is conclusive of petitioner's claim, when presented for allowance, as to the bankrupt, and any creditor who joined in the proceedings and opposed the adjudication. The adjudication is not conclusive, nor does it preclude the bankrupt from opposing the allowance of notes, made by the bankrupt to third parties and offered in evidence on the question of solvency, such notes not being directly in issue but only collaterally brought in question, the holders not being parties to the proceedings.[34] The fact that claims are purchased for the purpose of controlling the majority of the claims, does not necessarily prevent their allowance, though the transaction should be carefully scrutinized.[35] A State rule of law that a husband may not contract with his wife, is not construed to prevent the enforcement against his estate of all rights in their nature contractual, provided they did not originate in a contract made directly between the couple.[36]

The attorney for the bankrupt should not be permitted to appear in the proceedings as attorney for a creditor also, yet, in the absence of a rule of court on the subject, a claim thus duly proved against the bankrupt's estate has been allowed,[37] though such practice cannot be too severely condemned.

§ 863. **Effect of receipt and filing of proof—power of referee.**—By the receipt and filing of the proof of debt, the court obtains jurisdiction of the claim and of the creditor presenting it, and then only does its revising power over such proof commence, the receiving and filing concluding nothing but the court retaining full power to revise and correct, or reject altogether.[38] Where objections to a proof of debt are filed and a hearing is had before the referee, he may pass upon the same;[39] or upon request may certify the matter to

[34] In re Sheridan, 98 F. R. 406, 3 A. B. R. 554.

[35] In re Headley, 2 N. B. N. R. 250, 3 A. B. R. 272, 97 F. R. 765.

[36] In re Nickerson, 8 A. B. R. 707; Butler v. Ives, 139 Mass. 202.

[37] In re Kimball, 2 N. B. N. R. 46, 100 F. R. 777, 4 A. B. R. 144.

[38] In re Merrick, 7 N. B. R. 459, F. C. 9463.

[39] In re Keller, 18 N. B. R. 331, F. C. 7654.

the court.[40] Debts proved and filed with the referee may be postponed for investigation and not allowed to be voted upon.[41] It has been held that an existing adjudication in bankruptcy precludes all inquiry touching the existence or validity of the debt of a petitioning creditor,[42] though this seems questionable.

§ 864. **'e. Proportion of secured claims allowed.**—Claims 'of secured creditors and those who have priority may be 'allowed to enable such creditors to participate in the pro-'ceedings at creditors' meetings held prior to the determination 'of the value of their securities or priorities, but shall be 'allowed for such sums only as to the courts seem to be owing 'over and above the value of their securities or priorities.'

§ 865. **Secured creditors—allowance, voting, etc.**—A "secured creditor" includes a creditor who has a security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety or other person, secondarily liable for the bankrupt, has such security upon bankrupt's assets;[43] and so far as concerns voting, does not include creditors holding securities on the property of third persons. Secured claims are not to be counted in computing either the number or amount of claims, unless the amount of such claims exceeds the value of such securities or priorities and then only for such excess.[44] Firm creditors are entitled to vote the full amount of their claims if otherwise proper, except as for such securities as are held upon partnership assets, while the value of any securities upon property of individual members of the firm are not securities which need be deducted in order to ascertain the value of claims against the firm.[45]

A creditor whose claim consists of notes and drafts for which he has no security, and a debt secured by mortgages, may be admitted as a creditor for that part of his claim only which is unsecured, and the indebtedness for which he has security must rest in abeyance, until the value of the security

[40] In re Clark, 6 N. B. R. 202, F. C. 2808.

[41] In re Frank, 5 N. B. R. 194, 5 Ben. 164, F. C. 5050.

[42] In re Fallon, 2 N. B. R. 92, F. C. 4628.

[43] Sec. 1 (23), act of 1898.

[44] Sec. 56b, act of 1898.

[45] In re Coe et al., 1 N. B. N. 294, 1 A. B. R. 275.

is ascertained.[46] A creditor, who, at the time of the bankruptcy, has in hand goods or chattels of the bankrupt with a power of sale, or choses in action with power of collection, may sell the goods or collect the claims and set them off against the debt of the bankrupt, although the power to sell or collect was revocable by the bankrupt before his bankruptcy, or he may retain the surplus by way of set-off on another claim which he holds against the bankrupt.[47] The referee should, in a proper case, authorize the trustee to allow in reduction of a claim, the reasonable value of land belonging to the estate on which the claimant has security, and in that event, should order the land conveyed to the claimant.[48] Advances made on the faith of a security presently to be given should be allowed as a secured claim, notwithstanding changes in the condition of the borrower pending the consummation of the agreement, by the actual delivery of the security.[49] Where a bankrupt's mortgaged property is sold free of the incumbrance, the mortgagee is not bound to prove his claim as required by this section, but has only to plead and prove his debt and security as in an ordinary suit.[50]

§ 866. **What are not secured claims.**—A personal claim of indebtedness against a bankrupt does not constitute a secured claim upon property of the estate in the hands of one making such claim;[51] or the claim on a bond where the sureties are indemnified by a mortgage;[52] or the claim of a consignor whose property is sold prior to the bankruptcy and the proceeds mingled with the general assets;[53] or a bailor who allows the bailee to mix the property with his own so that it cannot be distinguished;[54] or a creditor who seizes property by attachment issued from a state court, within four months of the

[46] In re Hanna, 7 N. B. R. 502, 5 Ben. 5, F. C. 6027.

[47] Ex p. Whiting, 14 N. B. R. 307, 2 Lowell 472, F. C. 17573.

[48] In re Smith, 1 N. B. N. 404, 2 A. B. R. 648.

[49] Sparhawk v. Richards, 12 N. B. R. 74, F. C. 13205.

[50] In re Goldsmith, 118 F. R. 763.

[51] Sedgwick v. Casey, 4 N. B. R. 161, 4 Ben. 562, F. C. 12610; In re Krogman, 5 N. B. R. 116, F. C. 7936.

[52] In re Lloyd, 15 N. B. R. 257, F. C. 8429.

[53] In re Coan and Ten Broeke Car Mfg. Co., 12 N. B. R. 203, 6 Biss. 315, F. C. 2915; Ex p. Flanagan, 12 N. B. R. 230, 2 Hughes 264, F. C. 4855.

[54] Adams v. Myers, 8 N. B. R. 214, 1 Sawy. 306, F. C. 62.

bankruptcy proceeding;[55] or where persons place money in the hands of another to be invested in trust for their benefit which he fails to do, the property not remaining in specie;[56] or a depositor whose specie deposit has been appropriated by the depositee.[57]

§ 867. **Marshaling of assets.**—Where there are two classes of creditors having a common debtor, who has several funds, and one class can resort to all the funds and the other to but part, the former take payment out of the fund to which they can resort exclusively; if the former resort to the fund common to both classes, to the loss of the latter, the latter are subrogated to the extent of such loss to the place of the former.[58] As joint and separate estates are considered distinct, a joint creditor having security on the separate estate may prove against the joint estate without relinquishing his security, or prove his whole claim against both estates and receive a dividend from each, but so as not to receive more than the full amount of his debt from both sources.[59]

§ 868. 'f. **Early hearing of objections.**—Objections to 'claims shall be heard and determined as soon as the con-'venience of the court and the best interests of the estates 'and the claimants will permit.'

§ 869. **Who may make objections.**—The bankrupt not only has the right but it is his duty to examine and file objections to the proof and allowance of unjust or fictitious claims against his estate;[60] while either the trustee[61] or a creditor may also object. A disinterested party can only be heard by leave of the court.[62] If the trustee refuses or neglects to contest a fraudulently proved debt, any creditor who has proved his debt may do so, after obtaining authority from the court or referee.[63] But a trustee cannot object to a judgment

[55] In re Broich, 15 N. B. R. 11, 7 Biss. 303, F. C. 1921.

[56] In re Faneway, 4 N. B. R. 26; Ungewitter v. Von Sachs, 3 N. B. R. 178, 4 Ben. 167, F. C. 14343.

[57] In 're King, 9 N. B. R. 140; In re Hosie, 7 N. B. R. 601, F. C. 6711.

[58] In re Foot, 12 N. B. R. 337, 8 Ben. 228, F. C. 4906; In re Bugbee, 9 N. B. R. 258, F. C. 2115.

[59] In re Howard, 4 N. B. R. 185, F. C. 6750.

[60] Sec. 7 (3), act of 1898; In re Ankeny, 1 N. B. N. 511, 2 N. B. N. R. 349, 100 F. R. 614.

[61] Atkins v. Wilcox, 105 F. R. 595, 5 A. B. R. 313.

[62] Dressel v. North State Lumber Co., 119 F. R. 531.

[63] Bank v. Cooper, 9 N. B. R. 529, 20 Wall. 171; In re Little River

creditor's claim on the ground that the judgment was for a debt procured by fraud on the bankrupt, and was secured by default, as such defense should have been set up in the court rendering the judgment.[64] Objections to a claim should be specific and set forth in the form of a petition for review,[65] but they are not required to be under oath.[66]

§ 870. **Effect of making and before whom made.**—Objection interposed to a claim at a creditor's meeting should be heard and determined by the referee as early as possible, and if he is not satisfied with the prima facie case made by the claimant in his statement accompanying the claim, it should not be accepted as proven until disposition has been made of such objection or the court is convinced of its validity;[67] and in such case the hearing may be postponed and the question heard at some subsequent time.[68] If objection is made to a claim, although no proof is offered in opposition, there appears to be no reason why the referee upon request should not certify the question involved for the ruling of the court.[69]

§ 871. **Proof in case of objection.**—A creditor is not bound, upon a mere objection to his claim, to produce such evidence thereof as would be necessary at an ordinary trial,[70] nor does such objection transfer the burden of proof to the objector to disprove the claim; all he is required to do is to produce evidence the probative force of which is equal to or greater than that offered in the first instance by the claimant upon whom the burden of proof remains,[71] the statute merely pointing out how he may meet it, in making a prima facie case, or how the creditor, or other person entitled, may, by interposing objection, so relate himself to the record as to be able to give evidence in opposition to the claim.[72] An objecting creditor shall be heard[73] and given an opportunity to examine

Lumber Co., 101 F. R. 558, 3 A. B. R. 682.

[64] Stillwell v. Walker, 17 N. B. R. 569, F. C. 13451.

[65] In re Linton, 7 A. B. R. 676.

[66] In re Wooten, 118 F. R. 670, 9 A. B. R. 247.

[67] In re Sumner, 2 N. B. N. R. 681, 101 F. R. 224, 4 A. B. R. 123.

[68] In re Eagles & Crisp, 2 N. B. N. R. 462, 99 F. R. 695, 3 A. B. R. 733.

[69] In re Clark & Bininger, 6 N. B. R. 202, F. C. 2808.

[70] In re Saunders, 13 N. B. R. 164, 2 Lowell, 444, F. C. 371.

[71] In re Wooten, 118 F. R. 670, 9 A. B. R. 247.

[72] In re Sumner, 2 N. B. N. R. 681, 101 F. R. 224, 4 A. B. R. 123.

[73] In re Mendelsohn, 12 N. B. R. 533, 3 Sawy. 342, F. C. 9420.

the claimant and other witnesses, if their attendance can be procured without embarrassing delay, and, in a proper case, the determination of the matter may be suspended until evidence can be taken on deposition, but this is only where the referee is convinced that there is substantial reason for believing the evidence necessary for the just administration of the estate.[74]

§ 872. **Costs in case of objection.**—A creditor who contests the validity of the claim of another is liable, upon the decision being adverse to him, for the taxable costs and disbursements of the creditor whose claim was contested, and the fees, costs and expenses of the referee.[75] Where one of the creditors successfully objects to the allowance of a claim filed by another creditor, after the trustee declines to interfere, thereby saving a considerable sum for distribution among the creditors generally, his attorney contesting, such claim may be allowed a fee to be paid out of the estate.[76]

§ 873. **'g. Preferences must be surrendered.**—The claims 'of creditors who have received preferences, voidable under 'section 60, subdivision b, or to whom conveyances, transfers, 'assignments, or incumbrances, void or voidable under section '67, subdivision e, have been made or given, shall not be al-'lowed unless such creditors shall surrender such preferences, 'conveyances, transfers, assignments, or incumbrances.'[77]

§ 874. **What must be surrendered.**—The amendment of February 5, 1903, changes this provision in such material respects as to render many of the earlier decisions under the law as it now exists almost valueless as authority. The amendment requires that as a condition precedent to the proof of a

[74] In re Sumner, supra.

[75] In re Troy Woolen Co., 8 N. B. R. 412, F. C. 14203.

[76] In re Little River Lumber Co., 101 F. R. 558, 3 A. B. R. 682.

[77] By the amendment of February 5, 1903, the matter in the text was substituted for the following: 'The claims of creditors who have 'received preferences shall not be 'allowed unless such creditors shall 'surrender their preferences.'

Analogous provision of act of 1867. "Sec. 23. . . . Any person who, after approval of this act shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference."

claim, there must be first surrendered (1) a preference voidable under section 60b. As a preference is defined by section 60a as occurring where an insolvent within four months of bankruptcy procured or suffered a judgment to be entered against himself in favor of any person or made a transfer of any of his property, with the result that such creditor shall receive a greater proportion of his debt than other creditors, such transfer, whether of property or money, or the amount recovered by such judgment must be surrendered prior to proving the claim, if the person receiving the same or to be benefited thereby had reasonable cause to believe that a preference was thereby intended.

(2) The law also provides that there shall be surrendered all conveyances, transfers, assignments or incumbrances on the bankrupt's property, within four months of the filing of the petition, with the intent and purpose on the bankrupt's part to hinder, delay or defraud creditors, or any of them, or if made by the bankrupt while insolvent within the same period, and which conveyances, transfers or incumbrances are null and void as against the creditors of the debtor by the laws of the state.

It will be observed, therefore, that a surrender is only necessary where the creditor receiving the preference had reasonable cause to believe that a preference was intended, or where the transfer by the debtor was with the intent and purpose to hinder, delay or defraud creditors, or was voidable as against creditors under the laws of the state. The disqualifications of a claim because of a preference inheres in and follows every part of the claim, whether retained by the creditor or transferred to another.

§ 875. Surrender prior to amendment—Carson, Pirie, Scott v. Trust Co.—There is perhaps no provision of the law that was the subject of greater discussion or of such diversity of opinion as section "57g" as it appeared prior to the amendment. As originally enacted it provided "that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." This section was the subject of consideration by the Supreme Court of the United States in the famous case of Carson, Pirie, Scott & Co. v. The Chicago Title & Trust Co.,[77a] and by a decision of

[77a] 182 U. S. 438, 5 A. B. R. 814.

five to four that court held that payments made by an insolvent debtor to a creditor in the usual course of business, must be first surrendered as a condition of proving the balance of the debt or other claims of the creditor, notwithstanding the fact that the debtor had no intention of giving a preference and the creditor was without reasonable cause to believe that a preference was thereby intended. In answer to the contention that the term "transfer of any of his property," as used in section 60a, to which reference was necessarily made for a solution of what constituted a preference, the court held that the word "transfer" included not only the sale of property, but also every other mode of disposing or parting with property. The word was used in its most comprehensive sense, all technicality and narrowness of meaning being precluded, and accordingly included the transfer of money as well as of property.

The amendment enables a creditor to retain a preferential payment or transfer where there is lacking a reasonable cause to believe that a preference was intended or that the purpose was to hinder, delay or defraud creditors. Accordingly, this makes valueless those decisions which were rendered prior to the amendment, which held that payments received in the usual course of business, although the creditor had no reasonable cause to believe that a preference was intended, must nevertheless be surrendered prior to proving a claim for the balance: the surrender being necessary whether either or both the debtor and the creditor intended a preference and were innocent in the transaction.[78]

[78] In re Fixen & Co., 2 N. B. N. R. 885, 102 F. R. 295, 4 A. B. R. 10; In re Jourdan, 2 N. B. N. R. 581; In re Hoffman, 2 N. B. N. R. 554; In re Knost & Wilhelmy, 1 N. B. N. 403, 2 A. B. R. 471, F. R. 409; In re Scott, 1 N. B. N. 226; In re Fort Wayne Elec. Corp., 2 N. B. N. R. 434, 99 F. R. 400; s. c. below 3 A. B. R. 186, 96 F. R. 803; In re Wise, 2 N. B. N. R. 151; In re Kohn, 2 N. B. N. R. 367; In re Conhaim, 2 N. B. N. R. 148, 3 A. B. R. 249, 97 F. R. 923; In re Nathan, 2 N. B. N. R. 613; In re Christensen, 2 N. B. N. R. 695; In re Eagles & Crisp, 2 N. B. N. R. 462, 99 F. R. 695, 3 A. B. R. 733; In re Richard, 1 N. B. N. 487, 94 F. R. 633, 2 A. B. R. 506; In re Klingaman, 101 F. R. 691, 4 A. B. R. 254; In re Rogers Milling Co., 102 F. R. 687, 2 N. B. N. R. 973, 4 A. B. R. 540; In re Schmechel Cloak & Suit Co., 104 F. R. 64, 3 N. B. N. R. 110; In re Teslow, 2 N. B. N. R. 1024, 104 F. R. 229; In re Arndt, 104 F. R. 234, 3 N. B. N. R. 101; In re Siegel Hillman Dry Goods Co., 2 N. B. N. R. 933; In re Thompson, 2 N. B. N.

The amendment also renders inapplicable the decisions which held that a creditor could not avoid the operation of this provision requiring the surrender of preferences by showing that he received it in the ordinary course of business, and that he had no knowledge or reasonable cause to believe that the debtor was insolvent, or that a preference was intended,[79] or that the payment claimed as a preference was made upon a different debt than the one presented for allowance;[80] as the payment of one of several notes;[81] or that the payment was in full discharge of specific bills, while the creditor held an open account against the bankrupt;[82] or where vendors secure return of a portion of the goods sold by them under an agreement that the property was pledged and hypothecated to the vendors as collateral security for the payment of the

R. 1016; In re Beiber, 2 N. B. N. R. 943; Reed v. Phinney, 2 N. B. N. R. 1007; In re Castle, 2 N. B. N. R. 985; In re Jones, 2 N. B. N. R. 961, 4 A. B. R. 563; In re Beswick, 2 N. B. N. R. 808; In re Durham, 2 N. B. N. R. 1101; In re Sloan, 102 F. R. 116, 4 A. B. R. 356; In re Thompson, 2 N. B. N. R. 1016; contra, In re Piper, 2 N. B. N. R. 7; Blakely v. Bk., 1 N. B. N. 411, 2 A. B. R. 460, 95 F. R. 267; In re Ryan, 2 N. B. N. R. 693; In re Locke, 1 N. B. R. 123, 1 Lowell, 293; In re Hall, 2 N. B. N. R. 1126, 4 A. B. R. 671; In re Smoke, 2 N. B. N. R. 831, aff'd 2 N. B. N. R. 996, 4 A. B. R. 434, 104 F. R. 289; In re Alexander, 2 N. B. N. R. 997, 102 F. R. 464, 4 A. B. R. 376; In re Keller, 109 F. R. 306, 6 A. B. R. 487; In re Oliver, 109 F. R. 784, 6 A. B. R. 626; In re Keller, 109 F. R. 118, 6 A. B. R. 334.

[79] In re Fixen, 2 N. B. N. R. 885, 102 F. R. 295, 4 A. B. R. 10; In re Sloan, 102 F. R. 116, 4 A. B. R. 356; In re Arndt, 104 F. R. 234, 3 N. B. N. R. 101; In re Keller, 109 F. R. 118, 6 A. B. R. 334; In re Seckler, 106 F. R. 484, 5 A. B. R. 579; In re Waterbury Furniture Co., 114 F. R. 255, 8 A. B. R. 79; Mills v. Lewis, 110 F. R. 512, 6 A. B. R. 612; In re Lyon, 114 F. R. 326, 7 A. B. R. 412; In re Kellar, 110 F. R. 348, 6 A. B. R. 661; In re Bashline, 109 F. R. 965, 6 A. B. R. 194; In re Abraham Steers Lumber Co., 112 F. R. 406, 7 A. B. R. 332; In re Dickinson, 7 A. B. R. 679; Carson, Pirie, Scott v. Trust Co., 21 Sup. Ct. 906, 182 U. S. 428, 5 A. B. R. 814; In re Dickson, 111 F. R. 726, 7 A. B. R. 186; but see In re Ratliff, 107 F. R. 80, 5 A. B. R. 713.

[80] In re Beswick, 2 N. B. N. R. 808; In re Rogers Milling Co., 102 F. R. 687, 2 N. B. N. R. 973, 4 A. B. R. 540; contra, In re Hoffman, 2 N. B. N. R. 554; In re Wise, 2 N. B. N. R. 151.

[81] Reed v. Phinney, 2 N. B. N. R. 1007; In re Conhaim, 2 N. B. N. R. 148, 97 F. R. 923, 3 A. B. R. 249; see In re Myers, 2 N. B. N. R. 765; In re Castle, 2 N. B. N. R. 985.

[82] In re Siegel Hillman Dry Goods Co., 2 N. B. N. R. 933; In re Teslow, 2 N. B. N. R. 1024, aff'd 104 F. R. 229.

price with authority to take possession and dispose of the goods at their discretion;[83] a lien given within four months as security for an antecedent debt;[84] a loan repaid,[85] or that payment was made for the purpose of obtaining more goods on credit;[86] or where transactions are claimed to be for cash, but collections therefor are not made for some days subsequent to delivery of the goods;[87] or where a deed of trust[88] or mortgage is given to secure an antecedent debt;[89] or goods are replevined on the ground that the sale was rescinded because of bankrupt's fraud;[90] or that the claim was one entitled to priority of payment.[91]

Upon the surrender of his preference, the taint of fraud implied in the creditor's acceptance of it, is removed and he is immediately restored to all his rights.[92]

Prior to the amendment, it was held in a number of instances that a creditor holding distinct debts might prove them and have his claim allowed upon one upon which no payment had been received, without surrendering what he had received upon the other,[93] though it was also held that if a creditor had several claims of the same class upon one of which he received a payment, the same would have to be surrendered before any of his claims could be allowed.[94]

§ 876. Involuntary surrender of preference.—Under the Act of 1867,[95] a creditor might surrender a preference and

[83] In re Klingaman, 101 F. R. 691, 4 A. B. R. 254.

[84] In re Belding, 116 F. R. 1016, 8 A. B. R. 718.

[85] In re Flick, 105 F. R. 503, 5 A. B. R. 465; In re Cotton, 115 F. R. 158.

[86] In re Arndt, 104 F. R. 234, 3 N. B. N. R. 101.

[87] In re Durham, 2 N. B. N. R. 1101.

[88] In re Wright Lumber Co., 8 A. B. R. 345.

[89] In re Leeman, 1 N. B. N. 331, 2 A. B. R. 52.

[90] In re Heinsfurter, 1 N. B. N. 504, 3 A. B. R. 113, 97 F. R. 198.

[91] In re Jones, 2 N. B. N. R. 961, 4 A. B. R. 563; In re Kohn, 2 N. B. N. R. 367; but see In re Magnus, 3 N. B. N. R. 68; In re Flick, 3 N. B. N. R. 71.

[92] In re Nathan, 2 N. B. N. R. 611.

[93] In re Dickinson, 7 A. B. R. 679; In re Wise, 2 N. B. N. R. 151; In re Bullock, 8 A. B. R. 646; In re Abraham Steers Lumber Co., 6 A. B. R. 315, aff'd 7 id. 332; In re Weissner, 8 A. B. R. 177; In re Seay, 7 A. B. R. 700; In re Champion, 7 A. B. R. 560; contra, In re Meyer, 8 A. B. R. 598.

[94] Swartz v. Fourth Nat. Bank, 117 F. R. 1.

[95] Under sections 23 and 39 of the act of 1867, it was held that a creditor, having reasonable cause

prove his claim, though if the surrender was not voluntarily made he was prohibited from proving his claim.[96] While there is some diversity of opinion under the present law upon this point, the weight of authority upholds the proposition that a creditor who has received a preference with knowledge of the debtor's insolvency and that he was being preferred, will not be permitted to prove his claim after the preferential payment has been recovered through resort to the courts. If a creditor surrenders the preference before trial and judgment, the right would doubtless exist to prove his claim. The prohibition to prove his claim for the balance of the account

to believe, or knowing by his agent at the time, that the debtor was insolvent, or that a fraud was intended, who, within four months of the bankruptcy proceedings, obtained a preference, could not prove his claim, and, in addition, was liable to lose his preference. (In re Princeton, 1 N. B. R. 178, 2 Biss. 116, F. C. 11433; Bingham v. Richmond & Gibbs, 6 N. B. R. 127, F. C. 1415; Phelps v. Sterns, Id. v. Dudley, 4 N. B. R. 7, F. C. 11080; In re Kingsbury, 3 N. B. R. 84, F. C. 7816; In re Davidson, 3 N. B. R. 106, 4 Ben. 10, F. C. 3599; In re Walton, 4 N. B. R. 154, F. C. 17130; In re Stein, 16 N. B. R. 569, F. C. 13352; In re Coleman, 2 N. B. R. 172, 7 Blatch. 192, F. C. 2979; In re Cramer, 13 N. B. R. 225, F. C. 3345; In re Kaufman, 19 N. B. R. 283, F. C. 7627); but this prohibition only applied where the creditor refused upon demand to surrender his preference and compelled the assignee to recover the same by suit. (In re Hunt, 5 N. B. R. 433, F. C. 6882); and a creditor who resisted suit could not prove his claim, where he was defeated in the action, though he paid the judgment recovered against him therein, such payment not being a surrender (In re Richter's est., 4 N. B. R. 67, F. C. 11803; In re Cramer, 13 N. B. R. 225, F. C. 3345; In re Tonkin, 4 N. B. R. 13, F. C. 14094; In re Lee, 14 N. B. R. 89, F. C. 8179; Contra, In re Newcomber, 18 N. B. R. 85, F. C. 10148).

[96] *Surrender under act of 1867.*—Where a preference was knowingly received by a creditor he was debarred from proving the debt thereby sought to be secured unless, previous to suit brought by the assignee to set aside the preference, he surrendered the same (In re Leland, 9 N. B. R. 209, 7 Ben. 156, F. C. 8230; In re Scott, 4 N. B. R. 139, F. C. 12518; In re Montgomery, 3 N. B. R. 97, F. C. 9728; In re Hunt, 5 N. B. R. 433, F. C. 6882; Contra, In re Currier, 13 N. B. R. 68, 2 Lowell 436, F. C. 3492); and a full surrender was a complete condonation of the offense (In re Stephens, 6 N. B. R. 533, F. C. 13365; In re Leland, supra; In re Saunders, 13 N. B. R. 164, 2 Low. 444, F. C. 12371); but a repayment of a preference to the debtor did not take the place of a surrender to the assignee (In re Currier, supra). It was also held that a preference would not bar the proof of a claim unless it was given and received by the parties to the debt

rests upon the fact that the creditor was a party to an attempted fraud upon the law.[97]

§ 877. **Surrender of preference if given within four months.** —While prior to the amendment the statute specified no time limit within which preferences given to a creditor must be surrendered before proof could be made of the balance of the claim, by analogy to other provisions, the courts generally read into the law the period of four months prior to the filing of the petition,[1] though it was also held that this period applied only in case the creditor had knowledge or reasonable cause to believe that an interdicted act had been committed, but if he had no knowledge the day of cleavage was the day the petition was filed;[2] also that such payment must be surrendered, although received more than four months prior to bankruptcy.[3] By the amendment referred to, the four months period prior to the filing of the petition has been specified.

§ 878. **Surrender in case of new credit.**—The set-off authorized by section 60c in case new credit is given, is not restricted to the case in which the trustee brings an action against the creditor under subdivision b of the same section, to avoid the preference and recover the amount thereof, but is also applicable to the surrender required of a creditor who attempts to prove his claim for the balance of his account.[4]

(In re Comstock & Co., 12 N. B. R. 110, 3 Sawy. 320, F. C. 3079).

[97] In re Beiber, 2 N. B. N. R. 943; In re Owings, 109 F. R. 623, 6 A. B. R. 454; In re Keller, 6 A. B. R. 334; Strobel & Wilkins v. Knost, 3 A. B. R. 631; In re Schmeckel Cloak & Suit Co., 104 F. R. 64, 4 A. B. R. 719; In re Greth, 112 F. R. 978, 7 A. B. R. 598; Contra, In re Baker, 2 N. B. N. R. 195; In re Richard, 2 A. B. R. 512.

[1] In re Beswick, 2 N. B. N. R. 814; In re Fixen, 2 N. B. N. R. 885, 102 F. R. 295, 4 A. B. R. 10; In re Sloan, 102 F. R. 116, 4 A. B. R. 356; In re Arndt, 104 F. R. 234, 3 N. B. N. R. 101; In re Castle, 2 N. B. N. R. 985; In re Wise, 2. N. B. N. R. 151; In re Jourdan, 2 N. B. N. R. 581; In re Siegel-Hillman Dry Goods Co., 2 N. B. N. R. 933; In re Harry Dickinson, 7 A. B. R. 679; Contra, In re Jones, 110 F. R. 736, 4 A. B. R. 563; In re Abraham Steers Lumber Co., 110 F. R. 738, 6 A. B. R. 315.

[2] In re Hall, 2 N. B. N. R. 1126, 4 A. B. R. 671.

[3] In re Jones, 2 N. B. N. R. 961, aff'd 962, 4 A. B. R. 563.

[4] See also post, § 969. Dickson v. Wyman, 7 A. B. R. 186, 111 F. R. 726; In re Topliff, 114 F. R. 323, 8 A. B. R. 141; In re Jourdan, 7 A. B. R. 186, 111 F. R. 726; C. S. Morey Mercantile Co. v. Scheffer, 114 F. R. 447, 7 A. B. R. 670; Gans v. Ellison, 114 F. R. 734, 8 A. B. R. 153; McKey v. Lee, 5 A. B. R. 267, 45 C. C. A. 127, 105 F. R. 923; In re Seckler, 106 F. R. 484, 5 A. B.

§ 879. 'h. **Securities, determination of value of.**—The value 'of securities held by secured creditors shall be determined by 'converting the same into money according to the terms of 'the agreement pursuant to which such securities were deliv- 'ered to such creditors or by such creditors and the trustee, 'by agreement, arbitration, compromise, or litigation, as the 'court may direct, and the amount of such value shall be 'credited upon such claims, and a dividend shall be paid only 'on the unpaid balance.'

§ 880. **Securities—Trustee's duty with regard to.**—It is the duty of a trustee in bankruptcy to investigate securities held by the creditors of the bankrupt to determine their value, how and by what right they are held and whether, or not, anything can be obtained therefrom for the general creditors. The value is to be determined by conversion into money, by agreement, arbitration, compromise or litigation, and when determined the right and title of such creditors is fixed and the trustee should be ordered to execute a proper transfer and release to such creditors of all the rights, claims and equities of the bankrupt, or his creditors, in said securities.[5] A creditor holding security cannot receive dividends from the estate except for the unpaid balance of his claim after the value of the security has been deducted.[6]

§ 881. **—— value of.**—The value of secured property is to be determined by conversion into money, by agreement, arbitration, compromise or litigation,[7] but unless by agreement, it is doubtful whether it could be ascertained by the creditor's sending the security to an auctioneer and having it advertised and sold at public sale.[8] If after such value is agreed upon

R. 579; Peterson v. Nash Brothers, 7 A. B. R. 181, 112 F. R. 311. Kahn v. Cone Export & Commission Co., 115 F. R. 290; Contra, In re Abraham Steers Lumber Co., 110 F. R. 738, 6 A. B. R. 315; aff'd 7 id. 332, 112 F. R. 406; also In re Christensen, 2 N. B. N. R. 695, aff'd 101 F. R. 802; In re Thompson, 2 N. B. N. R. 1016; In re Jourdan, 2 N. B. N. R. 581; In re Ryan, 2 N. B. N. R. 693; In re Beswick, 2 N. B. N. R. 808; In re Hoffman, 2 N. B. N. R. 554; In re Siegel-Hillman Dry Goods Co., 2 N. B. N. R. 933; see also Pirie v. Trust Co., 182 U. S. 438, 5 A. B. R. 814.

[5] In re Coffin, 1 N. B. N. 507, 2 A. B. R. 344.

[6] In re Little, 110 F. R. 621, 6 A. B. R. 681.

[7] In re Coffin, supra; Stewart v. Isador, 1 N. B. R. 129; In re Stewart, 1 N. B. R. 42, F. C. 13418.

[8] In re Hunt, 17 N. B. R. 205, F. C. 6884.

between the trustee and a creditor, new facts are developed showing such valuation to be erroneous, a new valuation will be ordered. Any surplus over and above the amount necessary to liquidate the debt will be turned over to the trustee.[9] If a creditor claims a lien upon exempt property, the value of such property must be ascertained as just stated, and deducted from the amount of the claim, to ascertain the amount provable against the general estate.[10]

§ 882. —— **on whose property.**—The securities that must be liquidated before creditors can prove their claims in bankruptcy must be upon property, real or personal, of the bankrupt that may be surrendered to the trustee, and a claim secured by the guaranty of a third person may be proved as unsecured.[11]

§ 883. —— **sale of.**—Where it appears that, if mortgaged property is taken and sold by the trustee, an amount over and above the secured debt may be derived for the benefit of the general creditors, the court of bankruptcy may continue the trustee in possession of such property and administer the same.[12] Until a creditor has shown a right to sell securities conceded to be the property of the bankrupt and which he claims to hold as security for the indebtedness of the bankrupt to him, permission to sell them will not be granted;[13] and, if the debtor, though insolvent, acquiesce in a sale of the collateral by a secured creditor, his trustee is bound by such acquiescence, although they are sacrificed; but he is not bound by the bankrupt's ratification of a sale made after the commencement of the proceedings in bankruptcy.[14]

§ 884. **Purchase of security by creditor.**—Where secured creditors, on the sale of the assets of the estate, buy in those parcels on which they hold security, subject to their own

[9] In re Newland, 9 N. B. R. 62, 7 Ben. 63, F. C. 10171; s. c. 7 N. B. R. 477, 6 Ben. 342, F. C. 10170.

[10] In re Little, supra.

[11] In re Anderson, 12 N. B. R. 502, 7 Biss. 233, F. C. 350; Contra, In re Bigelow, 1 N. B. R. 186, 2 Ben. 480, F. C. 1396.

[12] In re Booth, 1 N. B. N. 476, 96 F. R. 943, 2 A. B. R. 770; The Skylark, 4 Biss. 383, F. C. 12929; Ex P. Christy, 3 How. 292; In re Fellerath, 1 N. B. N. 292, 2 A. B. R. 40, 95 F. R. 121.

[13] In re Bigelow, 1 N. B. R. 186, 2 Ben. 480, F. C. 1396.

[14] Sparhawk v. Drexel, 12 N. B. R. 450, F. C. 13204.

liens, thus merging the latter, they have received their due from the estate and their claims for any excess should be rejected.[15]

§ 885. 'i. Proof when claim is secured by individual undertaking.—Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.'

§ 886. Subrogation of surety; etc., to creditor's rights.—A person contingently liable for the bankrupt should prove his claim in the name of the creditor, when known, and when unknown, in the name of the party contingently liable, but no dividend will be paid upon such claim except upon satisfactory proof that it will diminish pro tanto the original debt.[16] A party is entitled to be subrogated to the rights of the creditor, without any agreement to that effect, where he has been compelled to pay the debt of a bankrupt to protect himself;[17] hence it has been held that sureties and indorsers are authorized to prove the debt for which they are liable, when not proven by the creditor, or without first paying it,[18] and such debts being provable are released by the discharge.[19] The indorser of a note is not released by the failure of the holder to prove his claim or to tender the note to the indorser.[20]

This right of subrogation arises from the equities of the subsequent transactions and not from the original contract of suretyship,[21] but the subrogation of the surety to the rights of the creditor neither enlarges nor reduces them.[22] The right of subrogation does not arise from contract. One surety is entitled to subrogation as against his co-surety even when they are not bound by the same instrument and are ignorant

[15] In re Pauly, 1 N. B. N. 405, 2 A. B. R. 333.

[16] G. O. XXI (4); In re Christensen, 2 N. B. N. R. 1094.

[17] Whithead v. Pillsbury, 13 N. B. R. 241, F. C. 17572.

[18] Phillips v. Dreher Shoe Co., 112 F. R. 404, 7 A. B. R. 326.

[19] In re Perkins, 10 N. B. R. 529, F. C. 10983.

[20] Nat. Bank of South Reading v. Sawyer, 6 A. B. R. 154.

[21] Courier Journal Job Printing Co. v. Schaefer-Meyer Co., 101 F. R. 699, 4 A. B. R. 183.

[22] In re Bingham, 1 N. B. N. 351, 94 F. R. 796, 2 A. B. R. 233; In re Schmechel Cloak & Suit Co., 104 F. R. 64, 3 N. B. N. R. 110.

of each other's existence.[23] Where a creditor cannot prove his claim without first surrendering a preference under section 57g, a guarantor who has paid the remainder of the debt since the adjudication is subject to the same condition, and can prove the claim only on returning to the estate the amount of such preference.[24] If a creditor receives partial payment of his debt from an accommodation maker, an indorser or a surety, he may prove his claim and have it allowed against the estate of the bankrupt for the full amount owing by the bankrupt upon the obligation, but if the dividends on the claim from the estate, plus the amount paid by the surety, aggregate more than the entire amount of the obligation and interest, he holds the surplus in trust for the surety.[25] The right to prove the claim in such case is in the creditor, in preference to the surety.[26] It seems that a surety who pays the debt of his bankrupt principal, after the adjudication in bankruptcy may prove his claim[27] or set off the amount so paid against his own debt to the bankrupt.[28]

A surety who has paid his principal's debt after the latter's bankruptcy is not required to surrender preferential payments received by the creditor as a condition to the proving of his claim which arises from the payment made by him and through subrogation.[29] If a bank in good faith discounts for a customer the note of a third party, indorsed by the customer, the bank may prove the debt against the estate of the maker, although the indorser had received preferences which he would have been required to surrender before he could prove the claim.[30] Accommodation makers, indorsers or sureties upon the obligations of an insolvent debtor are not discharged from liability to pay them because of the innocent acceptance by

[23] In re Nickerson, 8 A. B. R. 707, 116 F. R. 1003.

[24] In re Schmechel Cloak & Suit Co., 104 F. R. 64, 3 N. B. N. R. 110.

[25] Swartz v. Fourth Nat. Bank, 8 A. B. R. 673; In re Ellerhorst, F. C. 4381; In re Bingham, 94 F. R. 796, 2 A. B. R. 223; In re Heymann, 95 F. R. 800, 2 A. B. R. 651.

[26] Swarts v. Siegel, 8 A. B. R. 689, reversing In re Siegel-Hillman Dry Goods Co., 111 F. R. 980, 7 A. B. R. 351.

[27] In re Christensen, 2 N. B. N. R. 1094.

[28] In re Dillon, 100 F. R. 627, 4 A. B. R. 63.

[29] In re New, 116 F. R. 116, 8 A. B. R. 566.

[30] In re Wyley et al., 116 F. R. 38.

the creditor of preferences from the debtor, which he surrenders.[31]

Where a partnership is dissolved by consent, one partner buying the assets and assuming all the debts and liabilities of the firm, from which he agrees to save the other harmless, the relation of the former partners becomes that of principal and surety; and, if the retiring partner is called upon to pay a debt of the firm, after the continuing partner is adjudicated a bankrupt, he may prove the amount so paid against the bankrupt's estate, making such proof in the name of the creditor, or, if the creditor has already proved the debt, be subrogated to such creditor's rights.[32] The creditors of an individual partner will be subrogated to the rights of a creditor of the partnership who has received payment of his debt from property belonging to the individual partner; and the trustee of one partner will be subrogated to the rights of the creditors of another partner to the extent that their claims against the latter have been satisfied by the sale of the former's property.[33]

§ 887. **'j. Penalties, or forfeitures accrued to governments.** '—Debts owing to the United States, a state, a county, a 'district, or a municipality as a penalty or forfeiture shall not 'be allowed, except for the amount of the pecuniary loss sus- 'tained by the act, transaction, or proceeding out of which 'the penalty or forfeiture arose, with reasonable and actual 'costs occasioned thereby and such interest as may have 'accrued thereon according to law.'

See ante § —, and § — post, for a discussion of claims in which the United States is interested.

§ 888. **'k. Allowed claims reconsidered for causes.**— 'Claims which have been allowed may be reconsidered for 'cause and reallowed or rejected in whole or in part, accord- 'ing to the equities of the case, before but not after the estate 'has been closed.'

§ 889. **Reconsideration of allowed claims.**—The trustee or any creditor desiring the re-examination of any claim filed against a bankrupt's estate, which includes only those that

[31] Swarts v. Fourth Nat. Bank of St. Louis, 117 F. R. 1.

[32] In re Dillon, supra.

[33] In re Mason & Son, 1 N. B. N. 331, 2 A. B. R. 60.

were in existence at the commencement of the proceedings and not claims for expenses of administration,[34] may apply by petition to the referee to whom the case is referred for an order for such re-examination,[35] and he must thereupon make an order fixing a time for hearing the petition, of which due notice must be given by mail to the creditor. General Order XXI excludes action on the application of any one but the trustee or a creditor.[36] The former may institute a joint proceeding against several creditors.[37] The ruling of the referee upon a claim cannot be brought into the district court for review by merely filing exceptions thereto in that court.[38] At the time appointed the creditor or any witnesses that may be called by either party will be examined, and if it appears from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.[39]

When the application is for the purpose of increasing or decreasing the amount at which a claim has been allowed, the better practice is to vacate the former allowance and allow the claim at the new amount as if then moved for the first time.[40] If the petition for reconsideration or disallowance does not aver the essential facts with sufficient particularity, a motion should be made for a more specific statement and not to strike out parts of the petition. Such motion may be made by the bankrupt where no trustee has been appointed,[41] and the moving party is entitled to open and close at the hearing.[42] While there may be some question as to the right of a creditor whose claim has been disallowed to obtain a re-examination under this section in view of the General Orders,[43] the law being broader than the Orders would doubtless comprehend such an application, though if refused, a petition for review should be filed.[44] A referee's refusal to reopen a case to allow creditors who have been guilty of laches in presenting

[34] In re Reliance Storage and Warehouse Co., 100 F. R. 619, 4 A. B. R. 49.

[35] In re Tifft, 17 N. B. R. 502, F. C. 14029; In re Russell, 105 F. R. 501, 5 A. B. R. 566.

[36] In re Levy, 7 A. B. R. 56.

[37] In re Lyon, 7 A. B. R. 61.

[38] In re Hawley, 116 F. R. 428, 8 A. B. R. 632.

[39] G. O. XXI (6).

[40] In re Smith, 1 N. B. N. 404, 2 A. B. R. 648.

[41] In re Ankeny, 2 N. B. N. R. 349, 100 F. R. 614, 4 A. B. R. 72.

[42] Canby v. McLear, 13 N. B. R. 22, F. C. 2378.

[43] G. O. XXI (6).

[44] See In re Chambers, Calder & Co., 6 A. B. R. 707.

their claims, to be heard, will ordinarily be upheld by the judge unless manifestly in error.[45] A referee's finding upon a claim will usually be acepted, but a court may review his decision when asked to do so because of testimony claimed to have been overlooked.[46]

If a claim offered for proof is thoroughly investigated by the referee, and allowed, the judge will not expunge it on the application of other creditors, who contend that fraud is presumable from the relationship of the parties and attempt to support such presumption by unimportant variances in the evidence.[47] If through inadvertence a claim is proved without surrender of a voidable preference, it may be allowed to stand, treating it as a surrender, or, if that result be opposed by the creditor or he deny the preference and that fact be found against him so that opposition amounts to a fraud upon the act, or the proceedings by evincing an intention to obtain through them an advantage over other creditors, the entire claim will be expunged.[48]

The allowance of a claim against a bankrupt's estate in favor of an assignee thereof who acquired it after the adjudication, but from an innocent bona fide holder, in whose hands it was valid and provable, will not be set aside upon allegation that the claim was brought for the purpose of acquiring a majority interest in the estate, and of hindering and defrauding the other creditors, when it does not appear that such fraudulent purpose has actually been carried out.[49] In a proceeding to reconsider a claim which has been allowed, the burden of proof rests upon the petitioner,[50] so when a creditor appears and offers himself for examination, the burden of proof rests upon the trustee or contesting creditors.[51]

§ 890. Time for asking reconsideration.—Although no time is fixed by the statute within which an application for the reconsideration of a claim should be made, such application should be seasonable, and if one has been guilty of laches, or has permitted a claim to be allowed and paid without objec-

[45] In re Wood, 1 N. B. N. 430, 2 A. B. R. 695, 95 F. R. 946.

[46] In re Grand, 118 F. R. 73.

[47] In re Rider, 96 F. R. 811, 3 A. B. R. 192.

[48] In re Wise, 2 N. B. N. R. 151.

[49] In re Headley, 2 N. B. N. R. 250, 97 F. R. 765, 3 A. B. R. 272.

[50] In re Howard, 100 F. R. 630, 4 A. B. R. 69; In re Doty, 5 A. B. R. 58; See also In re Lount, F. C. 8543.

[51] In re Robinson, 14 N. B. R. 130, 8 Ben. 406, F. C. 11938.

tion, only on a proper showing should such application be considered.[52]

§ 891. 'l. **Recovery of dividend paid.**—Whenever a claim 'shall have been reconsidered and rejected, in whole or in part, 'upon which a dividend has been paid, the trustee may re- 'cover from the creditor the amount of the dividend received 'upon the claim if rejected in whole, or the proportional part 'thereof if rejected only in part.'[53]

§ 892. **'m. Proof of claim of one bankrupt estate against 'another.**—The claim of any estate which is being adminis- 'tered in bankruptcy against any like estate may be proved 'by the trustee and allowed by the court in the same manner 'and upon like terms as the claims of other creditors.'

§ 893. **Undischarged bankrupt's claim against another bankrupt.**—Where an undischarged bankrupt, after notice of protest, took up a promissory note on which he was indorser and which fell due after the filing of the petition in bankruptcy, he can prove his claim against the estate of the maker, also in bankruptcy, on the ground that it was after acquired property, and not affected by the claims of his creditors.[54] In the case of a controversy between the trustees of two estates as to the ownership of property, the court of bankruptcy has jurisdiction to pass upon the matter.[55]

§ 894. **'n. Claims to be proved within one year.**—Claims 'shall not be proved against a bankrupt estate subsequent to 'one year after the adjudication; or if they are liquidated by 'litigation and the final judgment therein is rendered within 'thirty days before or after the expiration of such time, then 'within sixty days after the rendition of such judgment: Pro- 'vided, That the right of infants and insane persons without 'guardians, without notice of the proceedings, may continue 'six months longer.'

§ 895. **Limitation for proving claims.**—This provision is an absolute prohibition against proof and allowance of claims

[52] See In re Chambers, Calder & Co., 6 A. B. R. 707; In re Reliance Storage Warehouse Co., 100 F. R. 619, 4 A. B. R. 49; In re Hamilton Furniture Co., 116 F. R. 116, 8 A. B. R. 588; In re Stein, 94 F. R. 124, 1 A. B. R. 662; In re Wood, 95 F. R. 946, 2 A. B. R. 695.

[53] See Sec. 65, act of 1898, for declaration and payment of dividends.

[54] In re Smith, 1 N. B. N. 136, 1 A. B. R. 37.

[55] In re Rosenberg, 116 F. R. 402.

when presented after the expiration of one year,[56] and, instead of being an enlargement of a creditor's rights, operates as a restriction, and does not authorize the withholding of dividends when ready, on proved and allowed claims; nor the delay of the final settlement and closing of an estate, when ready to be closed, nor the withholding from other creditors of money due them to give a negligent creditor further opportunity for the proof and allowance of his claim.[57] A referee's refusal to reopen a case to allow a creditor who has been guilty of laches in presenting his claim, will be upheld unless there is manifest error.[58] The fact that a creditor occupied a position where he could not prove his claim, as by asserting and litigating a hostile claim based on an alleged lawful preference, cannot be considered as equivalent of a proof of claim, and failure to make the necessary proof within the year fixed will bar the claim.[59]

Where a state law prescribes a limited time in which to file a lien claim, such limitation is the lex fori of the state courts, but is not binding upon the courts of bankruptcy, in which the limitation for filing all claims is one year; and, if a lien is perfected with the exception of filing it in court, it will hold, if filed within such time, provided other rights do not intervene through lack of notice of the lien.[60] Section 63 of the law permitting provable debts reduced to judgments after the filing of the petition and before the discharge, to be proved, does not enlarge the time for proving such debts beyond the year to which proof is limited by this section.[61]

[56] Bray v. Cobb, 2 N. B. N. R. 586, 100 F. R. 270, 3 A. B. R. 788; In re Shaffer, 3 N. B. N. R. 54, 104 F. R. 982; In re Hilton, 3 N. B. N. R. 105.

[57] In re Stein, 1 N. B. N. 339, 1 A. B. R. 662, 94 F. R. 124.

[58] In re Wood, 95 F. R. 946, 2 A. B. R. 695, 1 N. B. N. 430.

[59] In re Rhoades, 3 N. B. N. R. 112, 105 F. R. 231; In re Leibowitz, 108 F. R. 617, 6 A. B. R. 268.

[60] In re Rude, 2 N. B. N. R. 498; In re Ft. Wayne Elec. Corp., 2 N. B. N. R. 891; In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 F. R. 592, 3 A. B. R. 437; Contra, Goldman v. Smith, 1 N. B. N. 291, 2 A. B. R. 104; In re Brunquest, 14 N. B. R. 529, 7 Biss. 208, F. C. 2055.

[61] In re Leibowitz, 108 F. R. 617, 6 A. B. R. 268.

CHAPTER LVIII.

NOTICES TO CREDITORS.

§896. (58a) Steps requiring notice.
897. Notices to creditors.
898. Of examination of bankrupt.
899. Of hearing on composition.
900. Of application for discharge.
901. Of creditors' meetings.
902. Of sales.
903. Of dividends.
904. Of accounts.
905. Of schedules.
906. Of dismissals.
907. No notice required when.
908. b. Publication of notices.
909. Failure to publish notices.
910. c. Referee to give notices.
911. —— In what cases.

§ 896. '(Sec. 58a) **Steps requiring notice.**—Creditors shall 'have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the 'creditors, unless they waive notice in writing, of

'(1) All examinations of the bankrupt;

'(2) All hearings upon applications for the confirmation 'of compositions or the discharge of bankrupts;

'(3) All meetings of creditors;

'(4) All proposed sales of property;

'(5) The declaration and time of payment of dividends;

'(6) The filing of the final accounts of the trustee, and the 'time when and the place where they will be examined and 'passed upon;

'(7) The proposed compromise of any controversy, and

'(8) The proposed dismissal of the proceedings.'[1]

[1] Analogous provision of act of 1867. "Sec. 11. . . . The judge . . . . or register . . . shall issue a warrant to be signed by such judge or register, directed to the marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor, and to give such personal or other notice to any persons concerned as the warrant specifies, which notice shall state:

"First. That a warrant in bankruptcy has been issued against the estate of the debtor.

"Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

§ 897. **Notices to creditors.**—Notices and orders which are not by the act or by the General Orders required to be served on the party personally may be served upon his attorney. The creditor may request that all notices to which he is entitled be sent him at any designated place, and all notices shall be so addressed until otherwise directed;[2] but before incurring any expense in publishing or mailing notices, indemnity may be demanded therefor of the person for whom the service is rendered.[3] This section is mandatory and requires that creditors shall have at least ten days' notice by mail of certain steps in the bankruptcy proceedings unless waived in writing,[4] and, if such notice has not been given, the fact that they were represented on the occasion, or even personally present, would doubtless, as was held under the act of 1867,[5] do away with the necessity for notice. Where a creditor has received notice of the filing of the petition and that he is named in the schedule, he is charged with notice of whatever transpires in the further administration of the estate,[6] provided it is not one of the steps of which the law requires specific notice to be given. As official forms[7] are provided and the referee[8] required to

"Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

"Sec. 17. . . . The assignee . . . shall give written notice to all known creditors, by mail or otherwise, of all dividends, and such notice of meetings, after the first, as may be ordered by the court.

"Sec. 27. . . . In case a dividend is ordered, the register shall, within ten days after such meeting, . . . forward by mail to every creditor a statement of the dividend to which he is entitled.

"Sec. 28. . . . Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account and for a discharge from all liability as assignee. . . .

"Sec. 29. . . . The bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate. . . ."

[2] G. O. IV; XXI.

[3] G. O. X.

[4] In re Gilbert, 2 N. B. N. R. 378.

[5] In re Campbell, 17 N. B. R. 4, 3 Hughes, 276, F. C. 2348.

[6] In re Reese, 8 A. B. R. 411, 115 F. R. 993.

[7] Forms No. 18 and 41.

[8] Infra subd. c.

give the notices, the questions as to the sufficiency of the notices[9] or of their service[10] which arose under the act of 1867 are not likely to arise now, and the referee's official records will furnish evidence of service, of which the court takes judicial notice, and renders unnecessary the affidavit of service held sufficient ordinarily in case of service by mail under the act of 1867.[11] Of course, evidence of publication where publication is made is still required. Notice by publication alone is insufficient where the bankrupt states the addresses of the creditors are unknown, unless it be shown by satisfactory proof that the same cannot be ascertained after due search.[12]

If a bankrupt, against whom an involuntary petition is pending, files his voluntary petition, notice should be given to the creditors filing the involuntary petition, before the adjudication is made upon the voluntary petition.[13]

§ 898. —— **of examination of bankrupt.**—The provision that creditors shall have at least ten days' notice of all examinations of the bankrupt, unless they waive notice in writing, is mandatory;[14] but the examinations intended are those occurring in the regular courts of the proceeding. The bankrupt may be examined solely for the purpose of preparing the schedules,[15] or to furnish information to aid the court and its officer or the receiver, in the preservation of the estate for the benefit of the creditors,[16] without notice to the creditors.

§ 899. —— **of hearing on composition.**—Upon the filing of an application for the confirmation of a composition a time and place should be fixed for the hearing thereon and of any objections thereto and ten days' notice thereof given.[17] It should not be confirmed where there was no general notice to creditors of its terms and it had been offered by bankrupt at the first meeting to certain creditors whose claims had been

[9] In re Jones, 2 N. B. R. 20, F. C. 7447.

[10] In re Schepeler, 3 N. B. R. 43, 3 Ben. 346, F. C. 12452.

[11] In re Spencer, 18 N. B. R. 199, F. C. 13229.

[12] In re Dvorak, 107 F. R. 76, 6 A. B. R. 66.

[13] In re Dwyer, 112 R. 777, 7 A. B. R. 532.

[14] In re Gilbert, 2 N. B. N. R. 378.

[15] In re Franklin Syndicate, 2 N. B. N. R. 552, 101 F. R. 402, 4 A. B. R. 511; Sec. 7 (9), act of 1898.

[16] In re Abrahamson & Bretstein, 1 N. B. N. 23, 1 A. B. R. 44.

[17] Sec. 12 c, act of 1898; see in re Spades, 13 N. B. R. 72, 6 Biss. 448, F. C. 13196; Smith v. Engle, 14 N. B. R. 481.

allowed at that meeting and who accepted it, being at that time but not at the time of the hearing a majority in number and value of those whose claims had been allowed.[18] Notice should also be given of an application to set aside a composition.[19] A creditor's failure to get notice by reason of his address being by mistake given incorrectly in the bankrupt's schedules is no ground for setting aside a composition, no fraud being alleged.[20]

§ 900. —— of application for discharge.—Creditors are entitled to at least ten days' notice of the hearing upon the application for discharge. As they may examine the bankrupt to discover whether he has complied with the statute in order to entitle him to a discharge, to avoid extra expense and delay, the notice of application for discharge should contain a notice also of his examination, but only one such examination should be had.[21] While the official form[22] requires copies of the petition and order to accompany the notice of application for discharge, it is not to be treated as a "certified copy of the record" for the purpose of fees.[23] Where notice has been given to creditors they are regarded as consenting if they make no opposition.[24] It has been held that a court of bankruptcy has jurisdiction to grant a discharge, even though there may be creditors not regularly brought before it by the service of notice;[25] nor is it necessary to give jurisdiction to such court that creditors have actual notice, or personal service, and the lack of it will not vitiate a discharge, if the requirements of the act were honestly complied with.[26] When the bankrupt furnishes a list of creditors but states that their addresses are unknown, before the discharge is granted, satisfactory proof should be adduced to show that the same cannot be produced after due search has been made.[27] A discharge is conclusive in the absence of fraud, and cannot be impeached

[18] In re Rider, 96 F. R. 808, 3 A. B. R. 178, 192.

[19] Ex p. Hamlin, 16 N. B. R. 20, 2 Lowell 571, F. C. 5993.

[20] In re Rudnick, 1 N. B. N. 276, 531, 2 A. B. R. 114, 93 F. R. 787.

[21] In re Price, 1 N. B. N. 131. 1 A. B. R. 419, 91 F. R. 635.

[22] Form No. 57.

[23] Anon., 1 N. B. N. 239.

[24] In re Antisdel, 18 N. B. R. 289, F. C. 480.

[25] Thurmond v. Andrews, 13 N. B. R. 157.

[26] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1; Rayl v. Lapham, 15 N. B. R. 508.

[27] In re Dvorak, 107 F. R. 76, 6 A. B. R. 66.

collaterally by a creditor who had no notice.[28] Where a discharge has been revoked for fraud, the decree revoking such discharge will not be vacated without notice to all parties interested.[29]

Debts which have not been duly scheduled in time for proof and allowance, with the names of the creditors, if known to the bankrupt, are not affected by a discharge, unless such creditors had notice or actual knowledge of the proceedings in bankruptcy.[30]

§ 901. —— **of meetings of creditors.**—The form of notice for meetings of creditors is prescribed and they must be held in strict accordance with the notice given,[31] and it must be given of all meetings.[32] Where notice of the first meeting of creditors does not reach creditors, and the court is satisfied that their votes would have changed the result, and that they did not attend through failure to receive notice, on their application the meeting should be reopened and each vote received, but, if one waits until a later meeting, he cannot have the first reassembled without good cause for the delay.[33] The objection of bankrupt to the first meeting of creditors because the notice was mailed from a list prepared by the referee, the bankrupt failing to file a list within the time required and with the necessary data, as a result of which many creditors appearing on bankrupt's list failed to receive notice, will be overruled.[34] Notices of special meetings called upon the petition of creditors for the purpose of re-examining certain claims, should be sent out by the referee unless otherwise ordered by the judge.[35]

§ 902. —— **of sales.**—At least ten days' notice of sales is required to be given creditors, unless they waive such notice in writing;[36] but, if the court is satisfied that property is per-

[28] Williams v. Butcher, 12 N. B. R. 143; Rayl v. Lapham, 15 N. B. R. 508.

[29] In re Augenstein, 16 N. B. R. 252.

[30] Sec. 17 (3), act of 1898.

[31] Form 18; In re Eagles & Crisp, 2 N. B. N. R. 462, 3 A. B. R. 733, 99 F. R. 696.

[32] In re Stein, 1 N. B. N. 339, 1 A. B. R. 662, 94 F. R. 124.

[33] In re Spencer, 18 N. B. R. 199, F. C. 13229.

[34] In re Schiller, 2 A. B. R. 704, 96 F. R. 400.

[35] G. O. XXI (6); In re Stoever, 3 N. B. N. R. 314, 105 F. R. 355.

[36] In re Groves, 2 N. B. N. R. 30; In re Hunter, 18 N. B. R. 504, F. C. 6903.

ishable and an immediate sale required in the interest of the estate, such sale may be ordered without notice to creditors.[37] It has been held that perishability in bankruptcy involves physical deterioration of the property itself, not mere depreciation in value, and hence a stock of hardware cannot be sold as perishable without notice, though becoming unseasonable.[38] On the other hand it has been held that a horse comes within this provision since he consumes food and thus reduces his value;[39] and salt which could be sold for immediate delivery, but otherwise would be unsalable;[40] and, in fact, Christmas toys and the like, would be considered, immediately before the holidays, or fireworks before the Fourth of July. In other words if a thing became unseasonable after the lapse of a few days, there would be no physical deterioration but a serious depreciation in value which would warrant a sale without the required notice.

§ 903. —— **of dividends.**—At least ten days' notice must be given of the declaration and time of the payment of dividends. The form of such notice is prescribed by the Supreme Court.[41]

§ 904. —— **of accounts.**—The regular notice of ten days must be given of the filing and settlement of accounts,[42] and the time, when and place where they will be examined and passed upon.

§ 905. —— **of schedules.**—When bankrupt amends his schedules after a trustee has been chosen, so as to include an additional creditor, notice to creditors already named in his schedules or a call for a new meeting has been held unnecessary.[43] The correctness of the schedule of creditors, or whether a creditor received notice of the proceedings, does not determine the jurisdiction of the proceedings or of a discharge;[44] nor will a clerical mistake in the name of a creditor which prevented his receiving a notice invalidate the proceeding.[45]

§ 906. —— **of dismissal.**—A voluntary or involuntary peti-

[37] G. O. XVIII (3).

[38] In re Beutel's Sons, 2 N. B. N. R. 1011.

[39] In re Smith, 1 N. B. N. 180.

[40] Anon., 1 N. B. N. 204.

[41] Form No. 41.

[42] In re Stein, 1 N. B. N. 339, 1 A. B. R. 662, 94 F. R. 124; In re Bushey, 3 N. B. R. 167, F. C. 2227.

[43] In re Carson, 5 N. B. R. 290, 5 Ben. 277, F. C. 2460.

[44] In re Archenbrown, 11 N. B. R. 149, F. C. 505.

[45] Thornton v. Hogan, 17 N. B. R. 277.

tion must not be dismissed by the petitioner or for want of prosecution, or by consent of parties, until after notice to creditors.[46] The notice required of the proposed dismissal of the proceedings refers to a dismissal without submission to the court upon the merits. There does not appear, however, any requirement of notice to creditors, who have not appeared, of trials or hearings in involuntary cases, but, if the law does require notice to all creditors of hearings upon the merits, the rendering of a final judgment without such notice would be an irregularity, making such judgment voidable or reversible as to the parties to the record, and void as to others.[47] It has also been held that in the case of a dismissal on the request of all of the known creditors, the proceedings will be held valid although there are other creditors who were not known at the time and who did not receive notice.[48] Where a composition agreement provides that the proceedings may be discontinued without notice to creditors, the court is not bound to grant the application.[49]

§ 907. **No notice required when.**—No notice to creditors of the appointment of a receiver to take charge of bankrupt's property pending adjudication is required;[50] nor of the appointment of a special or general referee;[51] nor when costs of administration are to be settled and allowed.[52]

§ 908. 'b. **Publication of notices.**—Notice to creditors of 'the first meeting shall be published at least once and may be 'published such number of additional times as the court may 'direct; the last publication shall be at least one week prior 'to the date fixed for the meeting. Other notices may be pub-'lished as the court shall direct.'[53]

§ 909. **Failure to publish notice.**—Courts of bankruptcy are

[46] Sec. 59 g. act of 1898.

[47] Neustadter v. Chicago Dry Goods Co., 1 N. B. N. 552, 3 A. B. R. 96, 96 F. R. 830.

[48] In re Jenison Mercantile Co., 112 F. R. 966, 7 A. B. R. 588.

[49] In re McNat, etc., Mfg. Co., 18 N. B. R. 388.

[50] In re Abrahamson & Bretstein, 1 N. B. N. 23, 1 A. B. R. 44.

[51] Bray v. Cobb, 1 N. B. N. 209, 1 A. B. R. 153, 91 F. R. 102.

[52] In re Stotts, 1 N. B. N. 326, 1 A. B. R. 641, 93 F. R. 438.

[53] Analogous provision of act of 1867. "Sec 12. . . . That at the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant,

required to designate a newspaper published within their respective districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices and orders required to be published shall be inserted and for the convenience of parties in interest, additional newspapers may be designated.[54] Creditors are bound by the proceedings in distribution on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to make its decrees of discharge or otherwise, if sufficient opportunity to show cause to the contrary is afforded, or notice given in the same way.[55]

A failure to publish in one of such newspapers notice of the first meeting of creditors to prove their debts and choose a trustee, has been held to render all subsequent proceedings void.[56]

§ 910. **'c. Referee to give notice.**—All notices shall be 'given by the referee, unless otherwise ordered by the 'judge.'[57]

§ 911. **—— in what cases.**—The notices which the referee is required to give are not restricted to the particular cases enumerated in clause "a" of this section, but he is required to give all notices, unless the court should otherwise order.[58]

the meeting shall forthwith be adjourned, and a new notice given as required. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

"Sec 14. . . . The assignee shall immediately give notice of his appointment, by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside. . . ."

[54] Sec. 28, act of 1898.

[55] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1.

[56] In re Hall, 2 N. B. R. 68, F. C. 5922.

[57] Sec. 39 a (4), act of 1898.

[58] In re Stoever, 105 F. R. 355, 5 A. B. R. 250.

CHAPTER LIX.

WHO MAY FILE AND DISMISS PETITIONS.

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945. Withdrawal of a creditor.

§ 912. '(Sec. 59a) **Who may file a voluntary petition.**—'Any qualified person may file a petition to be adjudged a vol-'untary bankrupt.'[1]

§ 913. **Petition to be based on provable debt—Voluntary or involuntary.**—Any person who owes debts except a corporation may become a voluntary bankrupt. Where the petition schedules no debts or only such as are excepted from a dis-

[1] Analogous provision in act of 1867. "Sec. 11. . . . That if any person residing within the jurisdiction of the United States, owing debts provable under this act exceeding the amount of three hundred dollars, shall apply by petition. . . . the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt. . . ."

charge, the adjudication should not be made, or, if made, be set aside upon motion and the proceedings dismissed for want of jurisdiction, since a debt not affected by a discharge will not give jurisdiction.[2] Upon the filing of a petition, the judge must make the adjudication or dismiss the petition; if absent, the clerk must refer the case to the referee,[3] who should make the adjudication or dismiss the petition.[4]

See Section 4a, ante, § 96, for persons qualified to become bankrupt.

§ 914. **Filing must be voluntary.**—No one can be called on to show cause why he himself shall not go or put any one else into voluntary bankruptcy,[5] although, if a debtor has committed no act of bankruptcy, and will not voluntarily petition, a creditor may sue him, so as to force him to commit an act of bankruptcy, and may then institute involuntary proceedings against him.[6] The default of a defendant to a petition in involuntary bankruptcy, through failure to appear, does not convert the proceedings into one of voluntary bankruptcy;[7] nor is the court of bankruptcy vested with power to compel a creditor to become a petitioner in involuntary bankruptcy.[8]

§ 915. **'b. Who may file an involuntary petition.**—Three or 'more creditors who have provable claims against any person 'which amount in the aggregate, in excess of the value of se- 'curities held by them, if any, to five hundred dollars or over; 'or if all of the creditors of such person are less than twelve 'in number, then one of such creditors whose claim equals such 'amount may file a petition to have him adjudged a bankrupt.'

[2] Sec. 4a, act of 1898; In re Maples 105 F. R. 919, 5 A. B. R. 426; In re Yates 114 F. R. 365, 8 A. B. R. 69; In re Morales, 105 F. R. 761; In re Bellah, 116 F. R. 69, 8 A. B. R. 310; Elmira Steel Co., 109 F. R. 456, 5 A. B. R. 484; Contra. In re Tinker, 99 F. R. 79, 2 N. B. N. R. 39, 3 A. B. R. 580. But see Columbia Real Estate Co., 4 A. B. R. 411.

[3] Sec. 18g, act of 1898.

[4] Sec. 38a, act of 1898.

[5] In re Harbaugh, 15 N. B. R. 246, F. C. 6045.

[6] Warren v. Bk., 7 N. B. R. 481, 10 Blatch. 493, F. C. 17202; Coxe v. Hale, 8 N. B. R. 562, F. C. 3310.

[7] In re Taylor, 2 N. B. N. R. 926, 102 F. R. 728, 4 A. B. R. 515.

[8] In re Gillette, 104 F. R. 769.

[9] Analogous provision in act of 1867. "Sec. 39. . . . Any person . . . shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under the act amount to at least two hundred and fifty dol-

§ 916. **Cognate provisions.**—Section 4b of the law, ante, § 108, makes provision for the persons who may become involuntary bankrupts. A petition may be filed against a person who is insolvent; and who has committed an act of bankruptcy within four months after the commission of such act.[10] If in such a petition, a party holding an adverse claim is made a defendant, and it sets up no cause of action and prays no special relief against him, the purpose merely being to put an end to further action by him, he does not by such procedure continue to be subject to the orders of the bankruptcy court without further process.[11] Upon the filing of a petition, service thereof, with a writ of subpoena, must be made upon the person therein named as defendant, in the same manner that service of process is now had in suits in equity in United States courts, except that it is returnable within fifteen days, unless the time is extended. Where personal service cannot be had, notice must be given by publication.[12] Whenever a person against whom a petition has been filed, as hereinbefore provided, takes issue with and denies the allegation of his insolvency, he must appear in court and submit to an examination,[13] when he is entitled to a trial by jury in respect to the question of his insolvency or alleged acts of bankruptcy.[14] If, on the last day within which pleadings may be filed, none are filed by the bankrupt or any of his creditors, the judge shall, on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.[15] But if the judge is absent the case must be referred to the referee forthwith,[16] who must make the adjudication or dismiss the petition.[17]

§ 917. **Nature of proceeding.**—A proceeding in involuntary bankruptcy is not a mere suit inter parties, but partakes of the nature of a proceeding in rem, in which every creditor has a direct interest,[18] and cannot be converted into voluntary

lars, provided such petition is brought within six months after the act of bankruptcy shall have been committed."

[10] Sec. 3b, act of 1898.

[11] Louisville Trust Co. v Cominger, 184 U. S. 18, 7 A. B. R. 421, affirming 107 F. R. 898, 5 A. B. R. 537.

[12] Sec. 18a, act of 1898.

[13] Sec. 3d, act of 1898.

[14] Sec. 19a, act of 1898.

[15] Sec. 18e, act of 1898.

[16] Sec. 18f, act of 1898.

[17] Sec. 38a, act of 1898.

[18] In re Murphy, 2 N. B. N. R. 393, 3 A. B. R. 499; In re Boston, etc. R. R. Co., 6 N. B. R. 209, 9

bankruptcy by the default of defendant to appear.[19] If a creditor proves his claim in proceedings under a voluntary petition subsequent to the institution of involuntary proceedings by him, he will be deemed to have waived his right to continue the involuntary proceedings.[20] See also "Filing must be voluntary," ante, § 914.

§ 918. Creditors of what date included.—They must have been such at the time of filing the petition and this must appear in the petition[21] as also the fact that they are the requisite number under the law[22] and their claims are of the required amount; although there might be no objection to a person purchasing claims against the debtor, in good faith, in order to join in the petition to make the necessary number.[23]

§ 919. Creditors of what kind included.—There seems to be no reason why creditors of a corporation, who happen also to be stockholders might not join in a petition, but this would not be so if such creditors are its directors or officers, in which case they should be excluded on the ground of being employes.[24] The same number of creditors are required for proceedings against a corporation as in the case of an individual.[25] A married woman may commence or join in proceedings against her husband, where she is an actual creditor, and the law of the state permits the creation of enforceable debts as between husband and wife;[26] or creditors, otherwise competent to appear and join in a petition subsequent to its filing.[27] The creditors of a partnership are also the creditors of each individual member and may therefore petition against any one member as well as against the firm.[28] In the case of

Blatch. 101, F. C. 1678; In re Platt, 6 N. B. R. 465, F. C. 11213; In Hanover Nat. Bank v. Moyes, 186 U. S. 181, 8 A. B. R. 1.

[19] In re Taylor, 2 N. B. N. R. 926, 102 F. R. 728, 4 A. B. R. 515.

[20] In re Nounan & Co., 6 N. B. R. 579.

[21] In re Western Sav. & Tr. Co., 17 N. B. R. 413, 4 Sawy. 190, F. C. 17442.

[22] In re Scammon, 11 N. B. R. 280, 6 Biss. 195, F. C. 12429.

[23] In re Woodford, 13 N. B. R. 575, F. C. 17972.

[24] Barrett Pub. Co., 2 N. B. N. R. 80; Contra, In re Rollins Gold & Silver Min. Co., 2 N. B. N. R. 988, 102 F. R. 982, 4 A. B. R. 327.

[25] In re Leavenworth Savings Bank, 14 N. B. R. 92, 4 Dill. 363, F. C. 8165.

[26] In re Novak, 101 F. R. 800, 4 A. B. R. 311.

[27] In re Beddingfield, 1 N. B. N. 385, 2 A. B. R. 355, 96 F. R. 190; In re Romanow, 1 N. B. N. 213, 1 A. B. R. 461, 92 F. R. 510.

[28] In re Mercur, 1 N. B. N. 527, 2 A. B. R. 626, 95 F. R. 634; In re

a bond payable to the people of a state, the state is the creditor, although the money goes to the city treasurer,[29] and in the case of a surety on a defaulting contractor's bond the surety company becomes a creditor for the amount of the loss sustained and may file the petition.[30]

If a merchant fails to exhibit a statement of his accounts when demanded, he cannot complain of proceedings in bankruptcy commenced against him without the requisite number of creditors joining in the petition, provided a sufficient number join before the trial. The petition should contain the averment that the petitioners believe that they do constitute the requisite number and amount of provable debts which are unsecured. But that they should know such to be the fact cannot in the very nature of the case be required;[31] and when it alleges upon belief, without charging either information or knowledge, that the petitioners constitute the requisite proportion of creditors, it will be sufficient.[32]

§ 920. **Claims counted.**—All claims must be counted irrespective of amounts;[33] provided they are provable, although they may not be due[34] or for accrued interest,[35] an indorser's liability on a note, if fixed,[36] a claim for damages for a breach of contract,[37] a claim released without consideration upon the fraudulent representations of another creditor;[38] a claim based upon an alleged gaming contract where respondent's testimony is the only evidence against the express terms of the contract and rules of the exchange on which it was to be executed,[39] or the like.

Lloyd, 15 N. B. R. 257, F. C. 8429; In re Malot, 16 N. B. R. 485, F. C. 9282.

[29] In re Chamberlin, 17 N. B. R. 50, 9 Ben. 149, F. C. 2580.

[30] Boyce v. U. S. Fidelity & Guaranty Co., 111 F. R. 138, 7 A. B. R. 6.

[31] Perin & Gaff Mfg. Co. v Peale, 17 N. B. R. 377, F. C. 10981.

[32] In re Mann, 14 N. B. R. 572, 13 Blatchf. 401, F. C. 9033.

[33] In re Brown, 111 F. R. 979, 7 A. B. R. 102; In re Woodford, 13 N. B. R. 575, F. C. 17972.

[34] Linn v. Smith, 4 N. B. R. 12, F. C. 8375; In re Alexander, How. 470, F. C. 161.

[35] Sloan v. Lewis, 12 N. B. R. 173, 22 Wall. 150.

[36] In re Nickodemus, 3 N. B. R. 55, F. C. 10254.

[37] In re Stern, 116 F. R. 604, 8 A. B. R. 569; but see In re Big Meadow Gas Co., 113 F. R. 974, 7 A. B. R. 697.

[38] Michaels v. Post, 12 N. B. R. 152, 21 Wall. 398.

[39] Hill v. Levy, 2 N. B. N. R. 180, 98 F. R. 94, 3 A. B. R. 374.

A surety upon a note who has not paid the note could not file a petition against the maker, although the latter has committed an act of bankruptcy;[40] nor one holding an unliquidated claim for damages for a tort;[41] or claims for rent to accrue under a lease for breach of warranty, until liquidated;[42] or claims against an infant which may be repudiated on reaching majority;[43] or a creditor who has disposed of his claim;[44] or one whose claim is barred by the statute of limitations of the state where the proceedings are pending;[45] or an indorsee whose claim is paid by the indorser during the pendency of the proceedings.[46]

It is not necessary that the larger creditors should be requested to sign the petition for adjudication and refuse.[47]

Creditors who have assented to a general assignment made by their debtor and who therefore cannot join in a petition, are not to be counted;[48] or claims based on a note given in place of a lost note, if both are without consideration, though not necessarily a voluntary gift;[49] or where the respondent has a counter-claim provable in bankruptcy against the petitioning creditor which would reduce the claims below the requisite amount.[50] A corporation will not be permitted to have one of its creditors assign a portion of its claim, in order to make the number requisite for filing the petition.[51]

§ 921. Secured, priority and lien creditors counted.—Secured creditors may prove their claims;[52] but the court has authority to inquire into and determine the value of such securities, or priority claims, in order to ascertain whether the

[40] Phillips v. Dreher Shoe Co., 112 F. R. 404, 7 A. B. R. 326; In re Kiker, 18 N. B. R. 383, F. C. 11833.

[41] In re Brinckmann, 103 F. R. 65, 4 A. B. R. 551; Beers v. Hanlin, 99 F. R. 695, 3 A. B. R. 745; In re Heinsfurter, 97 F. R. 198, 3 A. B. R. 113.

[42] In re Mahler, 105 F. R. 428, 5 A. B. R. 453.

[43] In re Eidemiller, 105 F. R. 595, 5 A. B. R. 570.

[44] In re Burlington Malting Co., 109 F. R. 777, 6 A. B. R. 369.

[45] In re Noesen, 12 N. B. R. 422, 6 Biss. 443, F. C. 10238; In re Cromwell, 6 N. B. R. 305, F. C. 3250.

[46] In re Broich, 15 N. B. R. 11, 7 Biss. 303, F. C. 1921.

[47] In re Currier, 13 N. B. R. 68, 2 Lowell 436, F. C. 3492.

[48] In re Miner, 2 N. B. N. R. 1073, 104 F. R. 520.

[49] In re Cornwall, 4 N. B. R. 134, F. C. 3251.

[50] In re Osage Valley, etc., Co., 9 N. B. R. 281, F. C. 10592.

[51] In re Independent Thread Co., 113 F. R. 998, 7 A. B. R. 704.

[52] Sec. 57a, act of 1898, ante, p. 502.

claims of the petitioning creditors are of the amount required by law;[53] and only the excess over such securities or priorities are counted.[54] A creditor who holds a lien as by attachment or otherwise on the debtor's property and until vacated or it becomes null and void by the adjudication, such creditor cannot file a petition.[55]

§ 922. **Preferred creditors counted.**—Creditors holding claims unconditionally provable without any release or other preliminary action,[56] will be counted. The object of the bankrupt law is the equal distribution of an insolvent's property among his creditors; and to this end intentional preferences are forbidden and made acts of bankruptcy. Hence a conveyance of property,[57] or a transfer constituting a preference, void under the bankrupt law for any reason;[58] or which it is charged is a fraudulent preference,[59] cannot be considered as paying or satisfying the debts for which they are given. Otherwise an insolvent debtor and his preferred creditors could violate the law and, upon their very violation, base their claim to protection against its enforcement; which could not be allowed, since no one can base a right on an unlawful act. Such transactions are unlawful; they are prohibited by law; and are acts of bankruptcy. The debts attempted to be satisfied are still the debts of the debtor within the meaning of the law.

[53] In re Cal. Pac. R. R. Co., 11 N. B. R. 193, 3 Sawy. 240, F. C. 2315.

[54] Sec. 56b, act of 1898.

Under the act of 1867, it was held that secured or lien creditors could not be reckoned among creditors whose claims were unconditionally provable and hence entitled to sign the petition (In re Frost, 11 N. B. R. 69, 6 Biss. 213, F. C. 5134), which was especially true if they obtained their security or lien in fraud of the act or if it would be avoided if bankruptcy followed (In re Scrafford, 15 N. B. R. 104, 4 Dill. 376, F. C. 12556). A fully secured creditor might file his petition without expressly waiving his preference though the better practice was to do so (In re Stansell, 6 N. B. R. 183, F. C. 13293; In re Bloss, 4 N. B. R. 37, F. C. 1562; See In re Crossette, 17 N. B. R. 208, F. C. 3455); and in such a case the petition had the same effect as a waiver (In re Bloss, supra; In re Broich, 15 N. B. R. 11, 7 Biss. 303, F. C. 1921).

[55] In re Schenkein et al., 113 F. R. 421, reversing 7 A. B. R. 162; In re Burlington Malting Co., 109 F. R. 777, 6 A. B. R. 369.

[56] In re Frost, 11 N. B. R. 69, 6 Biss. 213, F. C. 5134; In re Hunt, 5 N. B. R. 433, F. C. 6882.

[57] In re Norcross, 1 N. B. N. 257, 1 A. B. R. 644.

[58] In re Tirre, 1 N. B. N. 402, 95 F. R. 425, 2 A. B. R. 493.

[59] In re Cain, 1 N. B. N. 389, 2 A. B. R. 378.

The same act cannot be at the same time an act of bankruptcy and a discharge therefrom. It cannot have the effect of making the debtor a bankrupt and protecting him from being adjudged a bankrupt.

The act of 1867 as amended by the Act of June 22, 1874,[60] provided that fraudulently preferred debts should not be proved until the preferences were surrendered; and, under that provision it was held that, where a creditor had two disconnected claims and received a fraudulent preference on one, he could prove on the other;[61] but, if he had but one and had received a preference, having at the time reasonable cause to believe his debtor insolvent, he could not prove it or be counted to make the requisite number.[62]

Under the present act the proof and allowance of claims are distinct[63] and there is no requirement that a preferred creditor shall surrender payments on account before proving his claim; or forbidding him to prove it,[64] but merely that it cannot be allowed unless the preference is surrendered.[65] There being no prohibition against his proving his claim and his claim not being satisfied by the preference, a preferred creditor has a provable claim[66] and should be counted to make the requisite number of creditors and may file a petition in involuntary bankruptcy.[67] This must be so since there is no provision of law enabling him to surrender his preference and fully qualify himself for an allowance until the trustee is appointed, since the referee cannot receive it and a receiver is

[60] 18 U. S. Statt. 178, Sec. 12.

[61] In re McVay, 13 F. R. 443; In re Holland, 8 N. B. R. 190, F. C. 6604; In re Aspinwall, 11 F. R. 146; In re Richter's Est, 4 N. B. R. 67, 1 Dill. 544, F. C. 11803.

[62] In re Israel, 12 N. B. R. 204, 3 Dill. 511, F. C. 7111; Clinton v. Mayo, 12 N. B. R. 39, F. C. 2899; In re Currier, 13 N. B. R. 68, 2 Lowell, 436, F. C. 3492; In re Rado, 6 Ben. 230, F. C. 11522; In re Hunt, 5 N. B. R. 433, F. C. 6882; In re Marcer, 6 N. B. R. 361, F. C. 9060; Ecker v. McAllister, 17 N. B. R. 42.

[63] In re Wise, 2 N. B. N. R. 151.

[64] Sec. 63a, act of 1898, post., p. 579; In re Folb, 1 N. B. N. 134, 91 F. R. 107, 1 A. B. R. 22.

[65] In re Knost & Wilhelmy, 1 N. B. N. 403, 2 A. B. R. 471; aff'd 99, F. R. 409; In re Ft. Wayne Elec. Corp., 2 N. B. N. R. 434, 99 F. R. 400, 3 A. B. R. 634; In re Conhaim, 2 N. B. N. R. 148, 97 F. R. 923, 3 A. B. R. 249.

[66] In re Norcross, supra.

[67] In re Cain, 1 N. B. N. 389, 2 A. B. R. 378; In re Hertzhkopf, 118 F. R. 101, 9 A. B. R. 90; In re Norcross, supra; See In re Bloss, F. C. 1562; In re Calif. Pac. R. R. Co., F. C. 2315; In re Stansell, F. C. 13293; In re Miller, 5 A. B. R. 140.

not to be appointed for that purpose,[68] and furthermore it does not remain for the bankrupt to say that the creditor has been preferred.[69] This is contrary to several decisions,[70] though even in this line of decisions his right is recognized if his preference is innocent and he offers to surrender it,[71] but they appear to rest on a failure to distinguish between the proof and allowance of claims, which is drawn in the present act, and follow the cases under the former act, the difference in which has been pointed out. So a creditor is entitled to prove for the balance of a claim on which a payment was made long prior to the filing of the petition.[72]

§ 923. **Creditors participating in act of bankruptcy not counted.**—The general rule is that where a creditor connives in the alleged act of bankruptcy, whether it be either actually or constructively fraudulent, he is precluded from proceeding against such debtor in involuntary bankruptcy, and should not therefore be counted;[73] as where a creditor on being made a party to a general assignment files his claim and participates in the administration of the estate under the assignment;[74] though if the creditor has done nothing more than file his claim with the assignee[75] or merely sells him small bills of goods to replace his stock;[76] he would not be estopped. The mere fact that the creditor is a trustee under a voluntary assignment would not exclude him from petitioning or being counted, unless there is some fraud connected with it;[77] nor

[68] In re Thompson, 2 N. B. N. R. 1016.

[69] In re Morton, 118 F. R. 908.

[70] In re Gillette, 104 F. R. 769, 5 A. B. R. 119; In re Miner, 2 N. B. N. R. 1073, 104 F. R. 520; In re Rogers Milling Co., 2 N. B. N. R. 973, 102 F. R. 687, 4 A. B. R. 540.

[71] In re Miller, 104 F. R. 764, 5 A. B. R. 140.

[72] In re Folb, 1 N. B. N. 134, 91 F. R. 107, 1 A. B. R. 22; In re Marcer, 6 N. B. R. 351, F. C. 9060.

[73] Simonson v. Sinsheimer, 95 F. R. 948; Leidigh Carriage Co. v. Stengel, 1 N. B. N. 387, 95 F. R. 637, 2 A. B. R. 383; In re Romanow, 1 N. B. N. 213, 1 A. B. R. 461, 92 F. R. 510; In re Gillette, 104 F. R. 769, 5 A. B. R. 119; Mass. Brick Co., 5 N. B. R. 408, F. C. 9259; Perry v. Langley, 1 N. B. R. 559, F. C. 11006; Contra, In re Curtis, 1 N. B. N. 357, 2 A. B. R. 226, 94 F. R. 630, aff'g 1 N. B. N. 163, 1 A. B. R. 440, 91 F. R. 737.

[74] In re Miner, 2 N. B. N. R. 1073, 104 F. R. 520.

[75] In re Curtis, 91 F. R. 737, 1 N. B. N. 163, 1 A. B. R. 440; In re Romanow, supra; Simonson v. Sinsheimer, supra.

[76] Simonson v. Sinsheimer, 100 F. R. 426, 3 A. B. R. 824.

[77] In re Lloyd, 15 N. B. R. 257, F. C. 8429.

if the creditor has only offered to assent to a general assignment for the benefit of creditors, upon condition that the assignee be changed;[78] nor advising the sale of a debtor's property for a certain sum and the distribution of the proceeds among his creditors pro rata, when such transfer is the alleged act of bankruptcy, if, after such transfer, the proceeds were diverted by the debtor to other purposes.[79]

§ 924. **Adjudication conclusive.**—A judgment on an involuntary petition is final and conclusive unless reversed for error or fraud, as against all persons who were before the court at the time;[80] and an application to hold such adjudication void on the ground that the requisite number and amount had not joined[81] should not be entertained.

§ 925. **Consent of bankrupt.**—Although the bankrupt has signed a written admission that the requisite quorum has united in the petition it has been held that the court must still "be satisfied that the admission is made in good faith,"[82] which probably means that the court is to ascertain that the admission is true, since there are others than the bankrupt interested and entitled to be heard. The adjudication being conclusive on the question of whether the requisite number join in the petition, the fact that less than the requisite number and value join is an irregularity which in one case has been held will be cured by a decree rendered with respondent's consent,[83] though this position seems hardly tenable since all creditors are entitled to an opportunity to contest the adjudication.

§ 926. **Good faith.**—The utmost good faith is required on the part of creditors filing a petition in involuntary bankruptcy and they should not be permitted to recklessly institute proceedings for the purpose of making the alleged bankrupt disclose a list of his creditors, his assets or liabilities.[84]

§ 927. **'c. Petitions to be in duplicate.**—Petitions shall be

[78] Spicer v. Ward, 3 N. B. R. 127, F. C. 13241.

[79] In re Gillette, 104 F. R. 769, 5 A. B. R. 119.

[80] Neustadter v. Dry Goods Co., 1 N. B. N. 552, 96 F. R. 830, 3 A. B. R. 96.

[81] In re Duncan, 14 N. B. R. 18, 8 Ben. 365, F. C. 4131.

[82] In re Flanagan, 18 N. B. R. 439, F. C. 4850.

[83] In re Williams, 11 N. B. R. 146, 6 Biss. 233, F. C. 17700.

[84] In re Scammon, 11 N. B. R. 280, 6 Biss. 195, F. C. 12429.

'filed in duplicate, one copy for the clerk and one for service 'on the bankrupt.'

§ 928. **Preparation.**—All petitions and the schedules filed therewith must be printed or written out plainly, without abbreviation or interlineation, except where such may be necessary for the purpose of reference,[85] and it has been held they will not be considered unless made on the prescribed printed forms.[86] See Amendments, ante, § 462.

§ 929. **Time of filing.**—This section provides that the petition shall be in duplicate but does not say when the duplicate must be filed; but elsewhere[87] it is provided that "upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made, etc.,"[88] that the prayer shall be for "service of this petition with a subpoena,"[89] that "a copy of said petition, together with a writ of subpoena, be served," and[90] that the clerk's docket shall contain a memorandum of the filing of the petition, but says nothing about the copy, while if the petition is to be filed in duplicate the docket should show it,[91] since the day and hour of filing must be endorsed on each paper filed with the clerk. The duplicate therefore should be filed with the original, or to speak more correctly duplicate originals should be filed within the four months, and failure to so file a duplicate petition is a fatal error which cannot be cured by amendment, or by a filing nunc pro tunc, and the filing of the duplicate must be entered by the clerk on his docket.[92] A mere clerical error in the jurat of one of the duplicate originals may be cured by amendment.[93]

§ 930. **Pendency of previous voluntary or involuntary petition.**—See "Filing of petition," ante, § 461.

§ 931. **'d. Number of creditors included.**—If it be averred 'in the petition that the creditors of the bankrupt are less than 'twelve in number, and less than three creditors have joined

[85] G. O. V.

[86] Mahoney v. Ward, 100 F. R. 278, 2 N. B. N. R. 538, 3 A. B. R. 770.

[87] Sec. 18, act of 1898.

[88] Form No. 3.

[89] Form No. 4.

[90] G. O. I.

[91] G. O. II.

[92] In re Stevenson, 1 N. B. N. 313, 2 A. B. R. 66, 94 F. R. 110; In re Dupree, 1 N. B. N. 513, 97 F. R. 28.

[93] In re Bellah, 116 F. R. 69, 8 A. B. R. 310.

'as petitioners therein, and the answer avers the existence of 'a larger number of creditors, there shall be filed with the 'answer a list under oath of all the creditors, with their ad- 'dresses, and thereupon the court shall cause all such creditors 'to be notified of the pendency of such petition and shall delay 'the hearing upon such petition for a reasonable time, to the 'end that parties in interest shall have an opportunity to be 'heard; if upon such hearing it shall appear that a sufficient 'number have joined in such petition, or if prior to or during 'such hearing a sufficient number shall join therein, the case 'may be proceeded with, but otherwise it shall be dismissed.'

§ 932. **Notices.**—The duty of sending out the notices to creditors prescribed in this subdivision is in the first instance on the respondent; but, on his default, the duty devolves on the petitioner. It is in the court's discretion to decide what effect failure to send out such notices in a reasonable time shall have.[94]

§ 933. **'e. Relatives and employes not counted as creditors.** '—In computing the number of creditors of a bankrupt for 'the purpose of determining how many creditors must join in 'the petition, such creditors as were employed by him at the 'time of the filing of the petition or are related to him by 'consanguinity or affinity within the third degree, as deter- 'mined by the common law, and have not joined in the petition, 'shall not be counted.'

§ 934. **Definition.**—Consanguinity is the relation existing between persons descending from a common ancestor; affinity is the connection existing, in consequence of marriage, between the husband or wife and the kindred of the other. For method of making computation, see ante, § 669. Creditors of a bankrupt corporation who are its officers or directors should not be counted because of their connection with respondent corporation, on the ground of its being in the case of a corporation the same as consanguinity and affinity in a natural person, or because they are employes.[95]

§ 935. **'f. Creditors may intervene.**—Creditors other than 'original petitioners may at any time enter their appearance

[94] In re Barrett Pub. Co., 2 N. B. N. R. 80.

[95] In re Barrett Pub. Co., 2 N. B. N. R. 80; Contra, In re Rollins Gold and Silver Min. Co., 2 id. 988, 4 A. B. R. 327.

'and join in the petition, or file an answer and be heard in 'opposition to the prayer of the petition.'

§ 936. **Time of intervening.**—Any creditor may appear and plead to the petition within five days after the return day or within such further time as the court may allow;[96] but one creditor after another will not be permitted to come in and contest the adjudication, especially after the five days have elapsed.[97] Where service of the petition was not had within the time limited, other creditors may subsequent thereto be permitted to join in the petition and contest the propriety of the adjudication.[98] There is nothing in the act which specifically gives a creditor appearing in opposition to the prayer of the petition the right to a jury trial as to matters of fact alleged in the petition, but it would seem that such right would not be denied.[99]

§ 937. **Attaching creditor.**—An attaching creditor may intervene to contest an adjudication on the merits as well as to claim lack of jurisdiction;[1] or that the requisite number and amount of creditors have not joined, as well as any other material fact in the case.[2] Such creditor may take advantage of any defense available to respondent;[3] but this would not be true where the attachment was obtained after the filing of the petition.[4]

§ 938. **Creditors generally.**—A creditor other than the original petitioner, although holding a claim for a mere nominal sum,[5] may enter his appearance by petition alleging that he is a creditor, stating the purpose of his petition and nothing more, and thereby acquire all the rights of the original petitioner, even though it be proven that the latter has no claim,[6] or the four months have expired since the commission

[96] Sec. 18b, act of 1898.

[97] In re Mutual Mercantile Agency, 111 F. R. 152, 6 A. B. R. 607; Neustadter v. Dry Goods Co., 1 N. B. N. 552, 3 A. B. R. 96, 96 F. R. 830.

[98] In re Stein, 105 F. R. 749, 5 A. B. R. 288.

[99] Sec. 19c, act of 1898.

[1] In re Williams, 14 N. B. R. 132, F. C. 17706; In re Mendelsohn, 12 N. B. R. 533, 3 Sawy. 342, F. C. 9420; In re Burton, 17 N. B. R. 212, 9 Ben. 324, F. C. 2214.

[2] In re Broich, 15 N. B. R. 11, 7 Biss. 303, F. C. 1921; Contra, In re Scrafford, 15 N. B. R. 104, F. R. 12556, reversing 14 N. B. R. 184, F. C. 12557.

[3] In re Williams, supra.

[4] In re Vogel, 18 N. B. R. 165, F. C. 1698.

[5] In re Brown, 111 F. R. 979, 7 A. B. R. 102.

[6] In re Taylor, 1 N. B. N. 412;

of the act of bankruptcy;[7] and where the requisite number does not join, and afterwards a supplemental petition is filed in which other creditors join, the total number being sufficient, the supplemental petition will not be dismissed because it did not alone contain the requisite number.[8] A person not a party to the petition but sustaining merely the relation of one who claims to be a creditor, cannot be permitted to intervene and defend against a petition filed by other creditors.[9] Where one who files a petition in bankruptcy against another is himself adjudged a bankrupt, his trustee is properly substituted as petitioner in his place.[10]

§ 939. **Partners.**—Where the act of bankruptcy charged in an involuntary petition against a partnership is the transfer of its property to an assignee for the benefit of creditors, such assignee is entitled to intervene and contest the petition, and, having been permitted to intervene and been heard, he has the right to appeal from a decree adjudging respondent bankrupt.[11] Where one member of a firm died and his administrators allowed the surviving partner (respondent) to continue the business without a new agreement, the administrators could only come in as any other creditors, in the absence of a new agreement, the surviving partner having converted his former partner's property to his own use with the knowledge and consent of the administrators.[12] See Partners, ante, § 130.

§ 940. **Time of intervention.**—Creditors who have become voluntary parties to a general assignment are estopped from filing a petition in involuntary bankruptcy against the assignor, but he may be adjudged bankrupt on a petition filed by them, creditors otherwise competent to appear and join in such petition subsequent to its filing being reckoned in computing the requisite number of creditors and amount of

In re Austin, 16 N. B. R. 518, F. C. 662; In re Mendenhall, 9 N. B. R. 380, F. C. 9424; In re Mammoth Lumber Co., 109 F. R. 308, 6 A. B. R. 84.

[7] In re Mackey, 110 F. R. 355, 6 A. B. R. 577; In re Stein, supra.

[8] In re Frisbie, 15 N. B. R. 522, 14 Blatch. 185, F. C. 5129.

[9] In re Boston, etc., R. R. Co., 5 N. B. R. 232, F. C. 1679; In re Columbia Real Estate Co., 112 F. R. 643, 7 A. B. R. 441.

[10] In re Jones, 7 N. B. R. 506, F. C. 7450.

[11] In re Meyer, 98 F. R. 976, 3 A. B. R. 550.

[12] In re Mills, 11 N. B. R. 74, F. C. 9611.

claims, though they did not join until more than four months after the alleged act of bankruptcy.[13] Such intervention must be made during the pendency of the proceedings, and as a rule will not be made after adjudication, since the successive retrial of decided issues will not be permitted,[14] though it is within the court's power to permit creditors other than original petitioners to intervene at any time.[15] Under the former act nearly two years after a firm filed a voluntary petition in bankruptcy on which it was adjudged bankrupt and its property conveyed to an assignee, a creditor filed a bill alleging that two persons not named in the petition were copartners in the firm and asked that they be joined in the bankruptcy proceedings, and it was held that the creditor could not supply the omission, but could have the same remedies against such parties as before the petition was filed.[16]

§ 941. On respondent's default or petitioner's failure to prosecute.—A creditor has the right to intervene after the default of the respondent and contest the adjudication,[17] or when a petitioning creditor abandons the proceeding, and such right cannot be defeated by any arrangement between the respondent and a creditor, and any action of the court defeating such right is in contravention of the statute.[18] On default of the bankrupt to defend, the court may hear a suggestion from any creditor, though it is one charged with having received a preference, that the number of creditors joining in the petition is insufficient.[19] If the petitioning creditor does not appear and proceed to adjudication on an adjourned day, another creditor may appear and prosecute.[20] The pendency of a petition to discontinue the proceedings instead of depriving creditors of the right to intervene, is

[13] In re Romanow, 1 N. B. N. 213, 1 A. B. R. 461, 92 F. R. 510.

[14] Neustadter v. Dry Goods Co., 1 N. B. N. 552, 3 A. B. R. 96, 96 F. R. 830; In re Bush, 6 N. B. R. 179, F. C. 222; In re Mutual Mercantile Agency, 111 F. R. 152, 6 A. B. R. 607.

[15] In re Stein, 105 F. R. 749; In re Houghton, 10 N. B. R. 337, F. C. 6730; In re Olmstead, 4 N. B. R. 71 F. C. 10505.

[16] Citizens' Nat. Bk. v. Cass, 18 N. B. R. 279, F. C. 2732.

[17] In re Jones, 16 N. B. R. 452, F. C. 7442.

[18] In re Lacy, 10 N. B. R. 477, F. C. 7965; In re Shaffer, 17 N. B. R. 369, 4 Sawy. 363, F. C. 12742.

[19] Clinton v. Mayo, 12 N. B. R. 39, F. C. 2899.

[20] In re Lacy, supra.

notice to them that the original creditor does not intend to prosecute further and confers on them the very right to intervene.[21]

§ 942. **Manner of intervention.**—A creditor other than the original petitioner may intervene by petition, simply alleging that he is a creditor and desires to intervene and thereby becomes entitled to all the rights of such original petitioner.[22] The service of an injunction on a person does not make him a party in interest in the bankruptcy proceedings, except to the extent that he may move to dissolve a wrongful injunction.[23]

§ 943. **'g. Dismissal of petition by petitioner.**—A voluntary or involuntary petition shall not be dismissed by the 'petitioner or petitioners or for want of prosecution or by 'consent of parties until after notice to the creditors.'

§ 944. **Notice.**—The notices here referred to relate to the withdrawal of cases without submission to the court.[24] Creditors must have at least ten days' notice by mail of the proposed dismissal of bankruptcy proceedings,[25] and the duty of sending out such notices in an involuntary proceeding devolves upon the referee.[26] Under the Act of 1867 it was held that a petitioning creditor might at any time before adjudication, discontinue the proceedings and have his petition dismissed without notice to the creditors, who, if they desired to continue the proceedings, should apply on the day to which the proceedings were adjourned, for leave to be substituted or file a new petition.[27]

§ 945. **Withdrawal of a creditor.**—Where a creditor joins in a proceeding in involuntary bankruptcy and allows the petition to be filed, and afterwards assigns his claim,[28] or

[21] In re Buchanan, 10 N. B. R. 97, F. C. 2073.

[22] In re Taylor, 1 N. B. N. 412; In re Austin, 16 N. B. R. 518, F. C. 662; In re Mendenhall, 9 N. B. R. 380, F. C. 9424.

[23] Karr v. Whittaker, 5 N. B. R. 123, F. C. 7612.

[24] Neustadter v. Dry Goods Co., 1 N. B. N. 552, 3 A. B. R. 96, 96 F. R. 830.

[25] Sec. 58a, act of 1898.

[26] Sec. 58b, act of 1898; but see In re Barrett Pub Co., 2 N. B. N. R. 80.

[27] In re Rolling Mill Co., 2 N. B. R. 146, F. C. 2338.

[28] But see In re Western Savings & Tr. Co., 17 N. B. R. 413, F. C. 17442.

obtains a settlement from the bankrupt,[29] or in some other way, it is too late to withdraw from the proceedings;[30] and permission to withdraw will be denied whenever necessary to further the purposes of the act.[31] When, however, a creditor's name has been signed to the petition without his knowledge he may repudiate the proceedings and the petition will be dismissed as to him;[32] or if he join therein through misrepresentation, he may be allowed to withdraw at any time before adjudication;[33] though not if the misrepresentation is not substantial and intentionally false.[34] A party having once appeared cannot withdraw his appearance on the ground that the court did not have jurisdiction, but must raise that question by demurrer.[35]

If all the creditors express a desire to dismiss the proceeding, they should, as a rule, be allowed to do so,[36] but a motion for leave to dismiss the proceedings and to settle with the debtor comes too late if filed after the debtor has been adjudged a bankrupt.[37] A voluntary bankrupt may withdraw his petition where there is no estate and no claims are proved and no trustee appointed.[38]

[29] In re Ryan, 114 F. R. 373, 7 A. B. R. 562.

[30] In re Beddingfield, 1 N. B. N. 385, 2 A. B. R. 355, 96 F. R. 190; In re Romanow, 92 F. R. 510, 1 N. B. N. 213, 1 A. B. R. 461; In re Sargent, 13 N. B. R. 144, F. C. 12361; In re Rosenfields, 11 N. B. R. 86, F. C. 12061.

[31] In re Sheffer, 17 N. B. R. 369, 4 Sawy. 363, F. C. 12742.

[32] In re Rosenfields, supra.

[33] In re Sargent, supra; In re Heffron, supra.

[34] In re Vogel, 18 N. B. R. 165, F. C. 16981.

[35] In re Ulrich, 3 N. B. R. 34, 3 Ben. 355, F. C. 14327.

[36] In re Jemison Mercantile Co., 112 F. R. 966, 7 A. B. R. 588; In re Salaberry, 107 F. R. 95, 5 A. B. R. 847; In re Heffron, 6 Biss. 156, F. C. 632.

[37] In re Sherburne, 1 N. B. R. 155, F. C. 12758.

[38] In re Hebbart, 5 A. B. R. 8.

CHAPTER LX.

PREFERRED CREDITORS.

§946. (60a) Preference.
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971. Attorney's fee.

§ 946. '(Sec. 60a) **Preference.**—A person shall be deemed 'to have given a preference if, being insolvent, he has, within 'four months before the filing of the petition, or after the 'filing of the petition and before the adjudication, procured 'or suffered a judgment to be entered against himself in favor 'of any person, or made a transfer of any of his property, and 'the effect of the enforcement of such judgment or transfer 'will be to enable any one of his creditors to obtain a greater 'percentage of his debt than any other of such creditors of 'the same class. Where the preference consists in a transfer, 'such period of four months shall not expire until four months 'after the date of the recording or registering of the transfer, 'if by law such recording or registering is required.'[1]

§ 947. **Definition of preference.**—This subdivision expressly defines a preference and provides that the existence of three

[1] Subdivision "a" was amended by the act of February 5, 1903, by the substitution of the matter in the text for the following:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

See subdivision b of this section for analogous provision in the act of 1867.

elements in any transaction shall make it a preference. These are "insolvency," "procuring or suffering a judgment or making a transfer," provided the preference occurred within four months before the filing of the petition, or after the filing of the petition and before the adjudication, and "that it result in one creditor receiving more than others of the same class." It constitutes a rule of evidence in bankruptcy proceedings and makes it a conclusive presumption that the debtor intended to give a preference if he does any one of the three and the result is as stated without reference to the intent.[2] It is the benefit or advantage which one creditor obtains over another and not the purpose or intent of the parties which determines the effect and constitutes the transaction a preference and means the same whether given or received.[3]

§ 948. **Definition of insolvency.**—Insolvency exists "whenever the aggregate of one's property, exclusive of any property conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay creditors, is not at a fair valuation sufficient to pay his debts."[4] This statutory definition of "insolvency" differs so widely from the judicial definition heretofore given to it, viz.: inability to pay one's debts in the ordinary course of business, that it will be readily seen that one may be insolvent under the judicial definition who would not be so under the statutory definition and vice versa. The allegation that the bankrupt was in failing circumstances and unable to meet his debts in full, is insufficient.[5] In the event that insolvency is denied by the creditor, the trustee must prove it.[6]

§ 949. **Preference from procuring or suffering a judgment.**—Intent and active agency on the part of the debtor are not necessary, but only a state of insolvency coupled with an act on the part of one creditor the effect of which will be a preference, even though the proceedings are regular judicial proceedings upon a debt which is due and to which there is no just defense.[7] The failure of the debtor to prevent the

[2] In re Piper, 2 N. B. N. R. 7.

[3] In re Conhaim, 2 N. B. N. R. 148, 3 A. B. R. 249, 97 F. R. 923; Swarts v. Fourth Nat. Bank of St. Louis, 117 F. R. 1, 8 A. B. R. 673.

[4] Sec. 1 (15), act of 1898.

[5] Martin v. Bigelow, 7 A. B. R. 218.

[6] In re Chappel, 113 F. R. 545, 7 A. B. R. 608.

[7] In re Meyer, 1 N. B. N. 207, 1 A. B. R. 1; Mather v. Coe, 1 N. B.

securing of such a preference as by filing a petition in voluntary bankruptcy is sufficient.[8] The several courts which have made an apparently contrary decision[9] merely hold that failure to prevent the entry of judgment on a warrant of attorney is not sufficient, but they do not go so far as to say that permitting such judgment to be enforced is not, which latter is held sufficient to create a preference.[10]

§ 950. —— transfer of property.—Transfer includes[11] "the sale[12] and every other and different mode of disposing of or parting with property,[13] or the possession of property, absolutely or conditionally, as payment, pledge, mortgage,[14] gift

N. 554, 1 A. B. R. 504, 92 F. R. 333.

[8] In re Reichman, 1 N. B. N. 556, 1 A. B. R. 17, 91 F. R. 624; In re Collins, 1 N. B. N. 290, 2 A. B. R. 1; In re Spacht, 2 N. B. N. R. 238; In re Richards, 2 A. B. R. 518, 95 F. R. 258; In re Huffman, 1 A. B. R. 587; In re Whalen, 1 N. B. N. 228; In re Rome Planing Mills, 3 A. B. R. 123, 96 F. R. 812; In re Moyer, 1 N. B. N. 260, 1 A. B. R. 577, 93 F. R. 188; In re Cliffe, 1 N. B. N. 510, 2 A. B. R. 317, 94 F. R. 354; In re Burrus, 97 F. R. 926, 3 A. B. R. 296; In re Arnold, 1 N. B. N. 334, 2 A. B. R. 180, 94 F. R. 1001; but see In re Ogles, 1 A. B. R. 671, 93 F. R. 426; see also In re Forsyth, 7 N. B. R. 174, F. C. 4948; In re Gallinger, 4 B. R. 729, 1 Sawy. 224, F. C. 5192; In re Craft, 1 N. B. R. 89, 2 Ben. 214, F. C. 3316; In re Black, 1 N. B. R. 81, 2 Ben. 196, F. C. 1457; In re Dibblee, 2 B. R. 617, 3 Ben. 283, F. C. 3885; Buchanan v. Smith, 4 B. R. 397, 8 Blatch. 153; In re Sutherland, 1 B. R. 531, 1 Deady 344, F. C. 13638; In re Houghton, 1 B. R. 460; In re Schick, 1 B. R. 177, F. C. 12455; Warren v. D. L. & W. Ry. Co., 7 N. B. R. 451, F. C. 17194; In re Lord, 5 N. B. R. 518, F. C. 8503; Vogle v. Lathrop, 4 N. B. R. 146, F. C. 16985; Hyde v. Corrigan, 9 N. B. R. 466, F. C. 6968; Beattie v. Gardner, 4 N. B. R. 106, F. C. 1195; Christman v. Haynes, 8 N. B. R. 528, F. C. 2703; Haskell v. Ingalls, 5 N. B. R. 200, 1 Hask. 341, F. C. 6193; In re Baker, 14 N. B. R. 433; In re Schick, 2 Ben. 5; In re Dibblee, 3 Ben. 283; Fitch v. McGill, 2 Biss. 163; In re Dunkle, 7 N. B. R. 72, F. C. 4160; In re Heller, 3 Biss. 153; In re Wells, 3 N. B. R. 95, F. C. 17388; Wilson v. Brinkman, 2 N. B. R. 149, F. C. 17794; Smith v. Buchanan, 8 Blatch. 153; Vanderhoof v. Bk., 1 Dill. 476; Anderson v. Strassberger, 6 Ben. 672; Warren v. Bk., 7 N. B. R. 481, 10 Blatch. 493, F. C. 17202.

[9] In re Nelson, 1 N. B. N. 567, 98 F. R. 76, 1 A. B. R. 63.

[10] In re Spacht, 2 N. B. N. R. 238; In re Richards, 2 A. B. R. 518, 95 F. R. 258; In re Huffman, 1 A. B. R. 587; See Wilson v. Bank, 17 Wall. 473; National Bank v. Warren, 95 U. S. 539.

[11] Sec. 1 (25), act of 1898.

[12] Stern v. Louisville Trust Co., 112 F. R. 501, 7 A. B. R. 305.

[13] Stern v. Louisville Trust Co., supra; Frank v. Musliner, 9 A. B. R. 229.

[14] In re Ed. W. Wright Lumber

or security." The word "transfer" is used in its most comprehensive sense and includes the transfer of money as well as property.[15] Any transfer of property by an insolvent, direct or indirect, by which one creditor obtains an advantage over others is a preference and it does not matter that the motive is commendable, as to save the property from attachment, or the like; as also any transfer by which the insolvent's estate is diminished, which includes those the consideration for which is a pre-existing debt.[16] Such transfer does not, however, include a mortgage given in part to secure an antecedent debt, collateral previously given being replaced by the mortgage;[17] nor the transfer of notes and accounts—choses in action—as collateral to secure the repayment of a present loan;[18] nor the transfer of fire insurance policies as collateral for an antecedent debt, the insured being solvent;[19] nor the performance of labor by an insolvent debtor for his creditor.[20] If insurance policies be assigned as collateral security, the lien dates from the assignment, and not from the actual delivery.[21] It has been held that the delivery to a bank of coin, legal tender notes, bank-bills, indorsed checks and drafts to be passed to the credit of the depositor, is a transfer of property.[22]

Co., 114 F. R. 1011, 8 A. B. R. 345; Sebring v. Wellington, 6 A. B. R. 671; In re Beerman, 112 F. R. 663, 7 A. B. R. 431; In re Jones, 118 F. R. 673, 9 A. B. R. 262.

[15] In re Rouk, 111 F. R. 154, 7 A. B. R. 31; Carson, Pirie, Scott & Co. v. Trust Co., 182 U. S. 438, 5 A. B. R. 814; Sherman v. Luckhardt, 9 A. B. R. 307; Laundry v. Andrews, 6 A. B. R. 281.

[16] See Sec. 67, act of 1898; In re Taylor, 1 N. B. N. 412; In re Woodward, 2 A. B. R. 233; Toof v. Martin, 6 N. B. R. 49, 13 Wall. 40; s. c. 4 N. B. R. 158, F. C. 9164; Foster v. Hackley, 2 N. B. R. 131, F. C. 497; In re Rogers, 2 N. B. R. 129, F. C. 12002; In re Pierson, 10 N. B. R. 107, F. C. 11153; Barker v. Smith, 12 N. B. R. 474, 2 Woods, 87, F. C. 986; Brock v. Terrell, 2 N. B. R. 190, F. C. 1914; In re Batchelder, 3 N. B. R. 37, 1 Lowell, 373, F. C. 1098; In re Lewis, 2 N. B. R. 145; Catlin v. Hoffman, 9 N. B. R. 342, 2 Sawy. 486, F. C. 2521; Smith v. Little, 9 N. B. R. 11, 5 Ben. 490, F. C. 13072; Pirie v. Chicago Title & Trust Co., 182 U. S. 444; 5 A. B. R. 814; Wilson Bros. v. Nelson, 183 U. S. 191, 7 A. B. R. 142.

[17] In re Davidson, 109 F. R. 882, 5 A. B. R. 528.

[18] Young v. Upson, 115 F. R. 192, 8 A. B. R. 377.

[19] In re Wittenberg Veneer & Panel Co., 108 F. R. 593, 6 A. B. R. 71.

[20] In re Abraham Steers Lumber Co., 110 F. R. 738, 6 A. B. R. 315.

[21] McDonald v. Daskam, 116 F. R. 276, 8 A. B. R. 543.

[22] In re Stege, 8 A. B. R. 515.

§ 951. —— exchange of property.—The bankruptcy law does not intend to interfere with or disturb the orderly business of the country.[23] Hence the substitution of one piece of property for another, the exchange of properties of equal value, the sale for a present consideration, the giving of security for a present advance or loan, the transfer of property in carrying out a prior valid contract, and generally transfers which do not give one creditor an advantage over others or diminish the estate, are not preferences.[24] Giving a deed of trust to secure a debt previously secured by mechanic's lien is merely a change of security and not a preference;[25] and so is the exchanging within four months of bankruptcy of new secured notes for old secured notes;[26] or the giving of a new mortgage, the old mortgage having been given more than four months before the bankruptcy, if no greater value is inserted;[27] or the transfer to a lessor, who held as security for the rent, chattel mortgages good between the parties but void as to creditors, of real estate in payment of the rent, such chattel mortgages being thereupon released;[28] or the substitution of a note and mortgage for bonds held as a special deposit for a customer;[29] but, if new securities of greater value are given, the rule that an exchange of securities is not a preference does not apply.[30]

§ 952. —— from judgments.—Attention is called to what has already been said in the discussion of this provision of the present act as to procuring or suffering a judgment.[31] A preference is not created, however, by a levy or sale under a judgment unless the judgment debtor at the time of the levy was insolvent, regardless of the fact that the sale rendered him so.[32] A preference is created where notes are given with

[23] Crook v. Bk., 1 N. B. N. 530, 3 A. B. R. 238.

[24] Darby v. Boatmans' Sav. Inst., 4 N. B. R. 195, F. C. 3571.

[25] In re Weaver, 9 N. B. R. 132, F. C. 17307.

[26] Bernhisel v. Firman, 11 N. B. R. 505, 22 Wall. 170.

[27] In re Shepherd, 6 A. B. R. 725; Brett v. Carter, 14 N. B. R. 301, 2 Lowell 458, F. C. 1844; Sawy. v. Turpin, 5 N. B. R. 339, 2 Lowell, 29, F. R. 12410; Contra, In re Jordan, 9 N. B. R. 16, F. C. 7529.

[28] Stewart v. Platt, 19 N. B. R. 347, 101 U. S. 731.

[29] Cook v. Tullis, 9 N. B. R. 433, 18 Wall. 322.

[30] Waring v. Buchanan, 19 N. B. R. 502, F. C. 17176.

[31] Ante, § 949.

[32] Chicago Title & Trust Co. v. John A. Roebling's Sons Co., 107 F. R. 71, 5 A. B. R. 368.

a cognovit to confess judgment thereon by an insolvent debtor to a creditor who a few days later entered up judgment and issued execution;[33] and it is immaterial whether such action was expected or not by the debtor;[34] or a judgment entered, upon a warrant of attorney attached to a note which the creditor had been renewing, and execution issued thereon just prior to the bankruptcy;[35] or the confession of judgment, the issuing of an execution and the seizure and sale of property under it,[36] or entering judgments on warrants held by near relatives of the bankrupt and issuing execution thereon immediately on learning that the creditors were pressing;[37] or giving a note by an insolvent and causing it to be sued upon to prevent an attachment;[38] or giving individual notes in exchange for notes secured by the signature and indorsement of others, resulting in an execution on the judgment of such notes;[39] or where a state ordinance gave new debts a preference over old, and a father gave his son a new note to take the place of the old one, judgment being entered thereon.[40] A preference is created if judgment be recovered and execution issue thereon, though the creditor had no knowledge of the debtor's insolvency.[41] The taking of property by a receiver appointed by a state court is a taking under legal process.[42]

§ 953. —— payment of money.—A payment of money to apply on a debt past due is a transfer of property[43] and, if

[33] Haughey v. Albin, 2 N. B. R. 129, 2 Bond 244, F. C. 6222; Fitch v. McGie, 2 N. B. R. 164, F. C. 4835; In re Terry & Cleaver, 4 N. B. R. 33, F. C. 13835; Vogel v. Lathrop, 4 N. B. R. 146, F. C. 16985.

[34] Bk. v. Jones, 11 N. B. R. 38, 21 Wall. 325.

[35] Golson v. Neihoff, 5 N. B. R. 56, 2 Biss. 434, F. C. 5524; In re Herpich, 15 N. B. R. 426, 7 Biss. 387, F. C. 6418.

[36] Zahn v. Fry, 9 N. B. R. 546, F. C. 18198; Catlin v. Hoffman, 9 N. B. R. 342, 2 Sawy. 486, F. C. 2521; Webb v. Sachs, 15 N. B. R. 168, 4 Sawy. 158, F. C. 17325; Bk. v. Campbell, 6 N. B. R. 352, 14 Wall. 87.

[37] Shimer v. Huber, 19 N. B. R. 414, F. C. 12787; Rogers v. Palmer, 19 N. B. R. 471, 102 U. S. 563; Zahm v. Fry, 9 N. B. R. 546, F. C. 18198; In re Dibble, 2 N. B. R. 185, 3 Ben. 203, F. C. 3884; In re Baker, 14 N. B. R. 433, F. C. 763; Shaffer v. Fritchery, 4 N. B. R. 179, F. C. 1269.

[38] In re Williams, 3 N. B. R. 74, 1 Lowell, 406, F. C. 17703.

[39] Sage, Jr., v. Wyncoop, 68 N. B. R. 63, F. C. 12215.

[40] Little v. Alexander, 12 N. B. R. 134, 21 Wall. 500.

[41] In re Metzger Toy & Novelty Co., 114 F. R. 957.

[42] Hardy v. Clark et al., 3 N. B. R. 99, 7 Blatch. 262, F. C. 6058.

[43] Carson, Pirie, Scott & Co. v. Trust Co., 182 U. S. 438, 5 A. B. R.

made by an insolvent debtor, with the effect of enabling the creditor to obtain a greater percentage of his debt than other creditors of like class, is a preference without regard to whether it was made innocently in the usual course of business or not;[44] whether on a running account with the creditor, so that the balance is to be considered one debt;[45] or if the different transactions constitute debts which should be stated as distinct causes of action in a complaint, as notes, and the payment is of one or more in full;[46] or the payment of wages, notwithstanding that part of them were entitled to priority,

814; Sherman v. Luckhart, 9 A. B. R. 307.

[44] In re Arndt, 3 N. B. N. R. 2, 104 F. R. 234; In re Christensen, 2 N. B. N. R. 695, 101 F. R. 802; In re Fixen, 2 N. B. N. R. 885, 102 F. R. 295, 4 A. B. R. 10; In re Sloan, 102 F. R. 116, 4 A. B. R. 356; Strobel v. Knost, 99 F. R. 409, 1 N. B. N. 403, 2 A. B. R. 471; In re Kamsler, 2 N. B. N. R. 97, 97 F. R. 194; In re Jourdan, 2 N. B. N. R. 581; In re Conhaim, 2 N. B. N. R. 148, 3 A. B. R. 249, 97 F. R. 923; In re Cain, 1 N. B. N. 389, 2 A. B. R. 378; In re Tirre, 2 A. B. R. 493, 1 N. B. N. 402, 95 F. R. 425; In re Wise, 2 N. B. N. R. 151; Shutts v. Bk., 2 N. B. N. R. 320, 3 A. B. R. 492, 98 F. R. 705; Blakey v. Bk., 1 N. B. N. 411, 2 A. B. R. 460, 95 F. R. 267; In re Hoffman, 2 N. B. N. R. 554; In re Thompson, 2 N. B. N. R. 1016; In re Fort Wayne Elec. Corp., 2 N. B. N. R. 434, 99 F. R. 400, s. c. 3 A. B. R. 186, 96 F. R. 803, citing and overruling In re Piper, 2 N. B. N. R. 7, but see In re Ryan, 2 N. B. N. R. 693; Contra, In re Smoke, 2 N. B. N. R. 996, 4 A. B. R. 434, 104 F. R. 289, aff'g 2 N. B. N. R. 831; In re Alexander, 2 N. B. N. R. 997, 4 A. B. R. 376, 102 F. R. 464; In re Piper, 2 N B. N. R. 7, 8; see also In re Baker, 2 N. B. N. R. 195; In re Nathan, 2 N. B. N. R. 613; In re Jones, 2 N. B. N. R. 961, 4 A. B. R. 563; In re Warner, 5 N. B. R. 414, F. C. 17177; Farrin v. Crawford, 2 N. B. R. 181, F. C. 4686; In re Dibble, 2 N. B. R. 185, 3 Ben. 283, F. C. 3884; Phelan v. Bk., 16 N. B. R. 308, 4 Dill. 88, F. C. 11069; Rison v. Knapp, 4 N. B. R. 114, 1 Dill. 186, F. C. 11861; In re Forsyth, 7 N. B. R. 174, F. C. 4948; Maurer v. Frantz, 4 N. B. R. 142, In re Ore. Bull. Pr. & Pub. Co., 13 N. B. R. 503; In re Doyle, 3 N. B. R. 158, F. C. 4051; In re Gay, 2 N. B. R. 114, 1 Hask. 108, F. C. 5279; In re Foster, 2 N. B. R. 81, F. C. 4961; In re Finn, 8 N. B. R. 525, F. C. 4795; In re Jones, 12 N. B. R. 48, F. C. 7452; In re Burgess, 3 N. B. R. 47, F. C. 2153; In re Clark, 19 N. B. R. 301, F. C. 2812; In re Edelstein, 1 N. B. N. 168.

[45] In re Wise, 2 N. B. N. R. 151; In re Teslow, 2 N. B. N. R. 1024.

[46] In re Wise, 2 N. B. N. R. 151; Reed v. Phinney, 2 N. B. N. R. 1007; In re Castle, 2 N. B. N. R. 985, 4 A. B. R. 357; In re Siegel-Hillman Dry Goods Co., 2 N. B. N. R. 933; In re Berwick, 2 N. B. N. R. 808; In re Rogers Milling Co., 2 N. B. N. R. 973, 102 F. R. 687, 4 A. B. R. 540; In re Myers v. Charni, 2 N. B. N. R. 765; Contra, In re Jourdan, 2 N. B. N. R. 581; In re Hoffman, 2 N. B. N. R. 554.

for that can only be settled in the bankruptcy proceedings;[47] or payment for goods delivered without the collection of the price, though the terms be cash, since the title passed on delivery, the payments not being for a present consideration.[48]

The payment of the rent of the premises in which the business is carried on is not necessarily a preference,[49] but if made with the purpose of carrying on the business in fraud of creditors, it should be so regarded.[50] Where an insolvent leaseholder with the proceeds of a sale of such lease pays debts charged thereon or necessarily payable to secure a fair price, such payments are not a preference; so payment of back rent on a lease non-assignable without the landlord's consent is proper because necessary to secure its value for creditors.[51] The payment of one of several notes held by a bank against an insolvent debtor out of the collateral security given to secure the note is not a preference; nor the payment of interest for the renewal of a note.[52] If a debtor entering into a composition with his creditors, secretly pays one of them more than the amount stated in the composition, the preference is fraudulent and voidable.[53]

§ 954. —— **stoppage in transitu.**—The right of stoppage in transitu is a legal right and exists in the vendor until delivery of the goods to the vendee, who though insolvent may consent to the vendor retaking the goods without giving him a preference.[54]

§ 955. —— **creditors of same class.**—Whether or not a transaction is a preference depends upon the result merely. If it will result in the benefit or advantage of one creditor

[47] In re Kohn, 2 N. B. N. R. 367, 7 A. B. R. 111, note; In re Jones, 2 N. B. N. R. 961, 4 A. B. R. 563; In re Proctor, 6 A. B. R. 660; In re Henry C. King Co., 116 F. R. 110, 7 A. B. R. 619; In re Kenyon, 6 N. B. R. 238; Contra, In re Feuerlicht, 8 A. B. R. 550; In re Read, 7 A. B. R. 111.

[48] In re Durham, 2 N. B. N. R. 1101; In re Arndt, 3 N. B. N. R. 101, 104 F. R. 234, 4 A. B. R. 773.

[49] Reed v. Pinney, 2 N. B. N. R. 1009; In re Barrett, 6 A. B. R. 199.

[50] In re Lange, 2 N. B. N. R. 85, 3 A. B. R. 231, 97 F. R. 197.

[51] In re Pearson, 1 N. B. N. 402, 2 A. B. R. 482, 95 F. R. 425; but see In re Merchants' Ins. Co., 6 N. B. R. 43, 3 Biss. 162, F. C. 9441.

[52] Reed v. Phinney, 2 N. B. N. R. 1007.

[53] In re Chaplin, 115 F. R. 162, 8 A. B. R. 121.

[54] See Stoppage in Transitu, under post, § 1219.

over any other of a like class it constitutes a preference.[55] The test of the classification of creditors is the percentage of their claims they are entitled to draw out of the bankrupt's estate, and not the relation of the creditors to parties other than the bankrupt. If entitled to the same percentage they are in the same class, even though certain of them are secured by indorsement or guaranty and others are not.[56] Workmen, clerks and servants constitute a distinct class, and if the assets are sufficient to pay them in full, payments on account before bankruptcy but during insolvency, are not preferential.[57]

§ 956. —— intent to prefer not necessary.—An intent to prefer is not required but is conclusively presumed from the effect of the transaction in giving one creditor a greater percentage of his debt than any other creditor of like class.[58]

§ 957. —— immaterial whether voluntary or involuntary.—Whether the preference given is voluntary or involuntary is immaterial, or whether done by reason of threats or coercion;[59] so an assignment to one creditor, though made under pressure, is a preference.[60] Compulsory legal proceedings also frequently result in preferences.

§ 958. —— effect of.—A preference voidable under subdivision "b" disqualifies the creditor receiving it from having his claim allowed unless and until he surrenders what he has received as a preference;[61] or from taking part in the management and administration of the estate.[62]

§ 959. Only creditors can be preferred.—Only a creditor can be preferred, and if the person who receives the benefit is not a creditor, the question of preference does not arise.[63] An

[55] In re Conhaim, 2 N. B. N. R. 148, 3 A. B. R. 249, 97 F. R. 923; In re Fixen, 2 N. B. N. R. 885, 102 F. R. 295, 4 A. B. R. 10; In re Read et al., 7 A. B. R. 111.

[56] Swaits v. Fourth Nat. Bank of St. Louis, 117 F. R. 1, 8 A. B. R. 673.

[57] In re Read & Knight, supra.

[58] In re Griffin Pants Factory v. Nelms Racket Store Co., 2 N. B. N. R. 630; In re Piper, 2 N. B. N. R. 7, 8; In re Conhaim, 2 N. B. N. R. 148, 3 A. B. R. 249, 97 F. R. 923; In re Bashline, 109 F. R. 965, 6 A. B. R. 194; Contra, In re Hall, 2 N. B. N. R. 1126.

[59] Strain v. Gourdin, 11 N. B. R. 156, 2 Woods, 380, F. C. 13521.

[60] In re Batchelder, 3 N. B. R. 37, 1 Lowell, 313, F. C. 1098; Grow v. Ballard, 2 N. B. R. 69, F. C. 5848.

[61] See § 873.

[62] In re Walker, 1 N. B. N. 510, 3 A. B. R. 35, 96 F. R. 550.

[63] In re Rudnick, 2 N. B. N. R. 975, 102 F. R. 750, 4 A. B. R. 531;

accommodation maker on a note executed by a bankrupt is not a creditor of the bankrupt, when not called on to pay the note or any part thereof, and hence cannot be considered to have received a preference.[64]

§ 960. **Within four months.**—A preference is only created if the act complained of was within four months before the filing of a petition, or after the filing of the petition and before the adjudication.[65] In computing the time the first day is excluded and the last included, unless it fall on a Sunday or a holiday, in which case it also is excluded;[66] and the same rule is applied in counting months or years.[67] The four months begin to run from the time the preference took effect; which depends on the state law as to what is required to render the judgment or transfer effective, as docketing, delivery, filing, acknowledging or recording as the case may be;[68] but it is the actual, not conditional or partial, taking effect.

Where the preference consists in a transfer, the time commences to run from the date of recording or registering of the transfer, if by law such recording or registering is required. A deed delivered with the understanding that it should not take effect until the grantee should so elect and he did not make such election until within the four months, is voidable;[69] or where a preferential deed was withheld from record until within four months;[70] or where the creditor takes possession of property just before the bankruptcy though the agreement to pledge it was made more than four months before that time;[71] and a deed executed without authority by an officer

Darby's Tr. v. Lucas, 5 N. B. R. 437, F. C. 3572.

[64] Swarts v. Siegel, 114 F. R. 1001, 8 A. B. R. 220.

[65] In re Siegel-Hillman Dry Goods Co., 2 N. B. N. R. 933; In re Kindt, 101 F. R. 107, 4 A. B. R. 148, rev'g 2 N. B. N. R. 369.

[66] Sec. 31, act of 1898; Whitley Grocery Co. v. Roach, 8 A. B. R. 505.

[67] In re Stevenson, 1 N. B. N. 313, 2 A. B. R. 66, 94 F. R. 110; In re Dupree, 1 N. B. N. 513, 97 F. R. 28; In re Lang, 2 N. B. R. 151, F. C. 8056.

[68] See Sawyer v. Turpin, 13 N. B. R. 371, 91 U. S. 114; Clark v. Iselin, 9 N. B. R. 19, 10 Blatch. 204, 11 N. B. R. 337, 21 Wall. 360; Wood v. Owings, 1 Cranch, 239; In re Wynne, 4 N. B. R. 5, F. C. 18117; Matthews v. Westphall, 1 McCrary, 446; Seaver v. Spink, 8 N. B. R. 218; under the act of 1867 as illustrative.

[69] Bk. v. Conway, 14 N. B. R. 175, 1 Hughes, 37, F. C. 1037.

[70] Bk. v. Harris, 14 N. B. R. 510, F. C. 4595.

[71] In re Sheridan, 95 F. R. 406, 3 A. B. 554.

of a corporation more than four months before the bankruptcy but ratified within that period must be considered in the light of the situation when ratified.[72]

If the transfer occurred more than four months prior to bankruptcy it ceases to be voidable, whether the creditor had reasonable cause to believe a preference was intended or not,[73] and may be retained, although he knew of debtor's insolvency. The act must have been complete,[74] since the law does not refer to preferences created long prior to its enactment, or more than four months before the petition was filed.[75]

§ 961. 'b. **Voidable preference.**—If a bankrupt shall have 'given a preference, and the person receiving it, or to be 'benefited thereby, or his agent acting therein, shall have had 'reasonable cause to believe that it was intended thereby to 'give a preference, it shall be voidable by the trustee, and 'he may recover the property or its value from such person. 'And, for the purpose of such recovery, any court of bank-'ruptcy, as hereinbefore defined, and any state court which 'would have had jurisdiction if bankruptcy had not intervened, 'shall have concurrent jurisdiction.'[76]

[72] In re Kansas City S. & Mfg. Co., 9 N. B. R. 76, F. C. 7610.

[73] In re Kindt, 101 F. R. 107. 4 A. B. R. 148; rev'g 2 N. B. N. R. 369; In re Woodward, 1 N. B. N. 352, 2 A. B. R. 233; In re Dow, 6 N. B. R. 10, F. C. 4036; Potter v. Coggeshall, 4 N. B. R. 19, F. C. 11322.

[74] In re Foster, 18 N. B. R. 64, F. C. 4964.

[75] In re Ferguson, 2 A. B. R. 586, 95 F. R. 429; In re Folb, 1 N. B. N. 134, 91 F. R. 107, 1 A. B. R. 122.

[76] Subdivision "b" was amended by the act of February 5, 1903, by the enactment of the matter in the text for the following: "b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Analogous provision of act of 1867. "Sec. 35. . . . That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally,

§ 962. **Constituents of voidable preferences.**—This subdivision must be construed in connection with subdivision "a," since the "preference" here mentioned is defined in that subdivision. To bring a transaction within its requirements (1) the debtor must have been insolvent at the time; (2) he must have procured or suffered the judgment, or made the transfer; (3) its result must be to give one creditor a greater percentage of his claim than others; (4) such creditor must have had reasonable cause to believe this result was intended; and (5) it must have been within four months of the filing

the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited; and if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud. Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and if any creditor shall obtain any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, every creditor so offending shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained to be recovered by the assignee for the benefit of the estate.

"Sec. 39. . . . And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property

of the petition, or between the filing and adjudication.[77] There is involved no element of moral or actual fraud. It is simply a constructive fraud established by law upon the existence of certain facts and prohibited by it. There is nothing dishonest or illegal in a creditor obtaining payment of a debt due him from a failing debtor; nor in his attempting by proper and ordinary effort to secure an honest debt, though such act may afterwards become a constructive fraud by reason of the filing of a petition and adjudication in bankruptcy.[78]

It will be observed that this subdivision makes preferences under the conditions named voidable by the trustee. Another provision of the act[79] provides that "a lien created by * * any proceeding at law * * including attachment on mesne process or a judgment by confession, which was begun within four months before the filing of a petition * * shall be dissolved by the adjudication * *" if (1) such lien was obtained while defendant was insolvent and will work a preference, or (2) the party benefited had reasonable cause to believe defendant was insolvent and in contemplation of bankruptcy, or (3) such lien is in fraud of the act; and still another provision provides that "all * * liens obtained through legal proceedings * * within four months prior to the filing of the petition * * shall be * * void:" and yet another,[80] that "all conveyances, transfers * * within four months prior to the filing of a petition, with intent * * to hinder, delay or defraud his creditors * * shall

so paid, conveyed, sold, assigned, or transferred contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy."

[77] In re Broich, 15 N. B. R. 11, 7 Biss. 303, F. C. 1921.

[78] In re Jacobs, 1 N. B. N. 183, 1 A. B. R. 518; In re Baker, 2 N. B. N. R. 195; Whithed v. Pillsbury, 13 N. B. R. 241, F. C. 17572; In re Riorden, 14 N. B. R. 332, F. C. 11852; In re Bousfield & Poole Mfg. Co., 16 N. B. R. 489, F. C. 1703; Kohlsaat v. Hoguet, 5 N. B. R. 159, 4 Ben. 565, F. C. 7919; In re Lewis, 2 N. B. R. 145; Sharpe v. Warehouse Co., 19 N. B. R. 378; Waring v. Buchanan, 19 N. B. R. 502, F. C. 17176; Sedgwick v. Place, 5 N. B. R. 168, 5 Ben. 184, F. C. 12620; In re Tonkin, 4 N. B. R. 13, F. C. 14094; In re Rosenfield, 1 N. B. R. 161, F. C. 12058.

[79] Sec. 67c, act of 1898.

[80] Sec. 67f and e, act of 1898.

be void." Thus a preference given by a bankrupt within four months of the filing of a petition is voidable by the trustee if the party benefited had reasonable cause to believe a preference was intended.[81] But a preference is the procuring or suffering a judgment the enforcement of which enables a creditor to get a greater percentage of his debt than any other creditor of like class,[82] which if the proceeding was begun within the four months would by the provision above[83] be rendered void by the adjudication and by the other provision[84] the same effect is produced by the adjudication without regard to the time the proceeding was commenced. So, too, if the preference is by "transfer of property" it would, in many cases, come within the provision[85] avoiding transfers which hinder, delay or defraud creditors.

As far as possible, however, the act should be construed so as to give effect to every part of it, and this to some extent may be accomplished by limiting section 60b to preferential judgments and transfers including payments of money, where the party benefited had reasonable cause to believe that a preference was thereby intended; section 67e to conveyances, transfers, assignments or incumbrances of property other than money which were not made in good faith and supported by a present consideration; section 67c to liens obtained through legal proceedings begun within four months of the filing of the petition; and section 67f to liens acquired within four months of the filing of the petition through legal proceedings without regard to when such proceedings were commenced.[86] The provisions overlap, but this may have been done for greater certainty; and since these inconsistencies cannot be reconciled, under the rule of construction that the last provision is to be preferred, the facts of each case should be tried by each of the provisions set forth, commencing at the last, which is also the broadest;[87] or the conflict between the provisions may be due to their being taken from different proposed bills and not having been examined as a whole.

§ 963. Reasonable cause to believe.—A preference, as here-

[81] Sec. 60b, act of 1898.
[82] Sec. 60a, act of 1898.
[83] Sec. 67c, act of 1898.
[84] Sec. 67f, act of 1898.
[85] Sec. 67e, act of 1898.
[86] Blakey v. Bk., 1 N. B. N. 411, 95 F. R. 267, 2 A. B. R. 459.
[87] In re Richards, 2 N. B. N. 38, 96 F. R. 935, 3 A. B. R. 145.

inbefore described, given within four months before the filing of a petition, or after the filing of the petition and before the adjudication, is voidable if the person receiving it, or to be benefited thereby, or his agent acting therein, had reasonable cause to believe a preference was intended.[88] The creditor is not charged with knowledge of his debtor's financial condition from the mere non-payment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; nor is it essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent. He has reasonable cause so to believe if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, for he is charged with knowledge of the facts which such inquiry should reasonably be expected to disclose; or if he has knowledge of facts and circumstances which would cause a reasonably prudent man so to believe.[89] While constructive notice is sufficient ground

[88] Levor v. Seiter et al., 8 A. B. R. 459; In re Ratliff, 107 F. R. 80, 5 A. B. R. 713.

[89] In re Eggert, 2 N. B. N. R. 185, s. c. 2 N. B. N. R. 390, 98 F. R. 843, aff'd 102 F. R. 735, 4 A. B. R. 449; In re Jacobs, 1 N. B. N. 183, 1 A. B. R. 518; Crittenden v. Barton, 5 A. B. R. 775; Grant v. Bank, 97 U. S. 80, 81; Barbour v. Priest, 103 U. S. 293, 296; Stucky v. Bk., 108 U. S. 74; Toof v. Martin, 13 Wall. 40, 6 N. B. R. 49; Buchanan v. Smith, 16 Wall. 277, 7 N. B. R. 513; Wager v. Hall, 16 Wall. 584, 600; s. c. 5 N. B. R. 131, 3 Biss. 28, F. C. 5951; Dutcher v. Wright, 94 U. S. 553, 557, 16 N. B. R. 331; Bank v. Cook, 95 U. S. 343, 346, 16 N. B. R. 391; In re Ft. Wayne Elec. Corp., 2 N. B. N. R. 434, 99 F. R. 400, 3 A. B. R. 634; Nat. Exch. Bk. v. Pepperdine, 2 N. B. N. R. 675; In re Rudnick, 2 N. B. N. R. 769; In re Blair, 2 N. B. N. R. 890, 102 F. R. 987, 4 A. B. R. 220; Taft v. 4th Nat. Bk., 2 N. B. N. R. 1145; Bk. v. Hunt, 4 N. B. R. 198; Lloyd v. Strobridge, 16 N. B. R. 197, F. C. 8435; In re Hauck, 17 N. B. R. 158, F. C. 6219; In re McDonough, 3 N. B. R. 53, F. C. 8775; Burfee v. Bk., 9 N. B. R. 314; Armstrong v. Rickey Bros., 2 N. B. R. 150, F. C. 546; Boothe v. Brooks, 12 N. B. R. 398, F. C. 1650; Singer v. Sloan, 12 N. B. R. 208, 3 Dill. 110, F. C. 12898; Loudon v. Bk., 15 N. B. R. 476, 2 Hughes, 420, F. C. 8525; Scammon v. Cole, 5 N. B. R. 257, 3 Cliff. 472, F. C. 12432; Webb v. Sachs, 15 N. B. R. 168, F. C. 17325; Rice v. Melendy, 41 Iowa, 399; Graham v. Stark, 3 B. R. 357, 3 Ben. 250; Otis v. Hadley, 112 Mass. 100; Alderdice v. Bk., 11 N. B. R. 398, 1 Hughes, 47, F. C. 154; In re Wright, 2 B. R. 490; Hill v. Simpson, 7 Ves. 170; Brooke v. McCraken, 10 N. B. R. 461, F. C. 1932; Grow v. Ballard, 2 N. B. R. 69, F.

for such belief, yet the circumstances upon which such notice is predicated must be of a character to induce belief as distinguished from mere suspicion.[90] What constitutes "reasonable cause to believe" is a question of fact, and each case depends upon its own peculiar circumstances, and no rigid rule can be established applicable to every case.[91] In an action to recover a preference the declaration must allege that there was reasonable cause to believe that a preference was intended.[92]

§ 964. **Knowledge of agent or attorney.**—The act expressly provides that it is sufficient if the agent, which would include the attorney, acting in the transaction, has reasonable cause to believe. This is merely an affirmance of the general rule that the principal is charged with the knowledge acquired, or possessed, by his agent within the scope of his employment;[93] but, if the knowledge of the agent has been acquired in such a way as to make it improper for him to communicate it to his principal, as if acquired in confidence as the attorney of another, the reason for the rule ceases and it does not apply.[94] The same rule applies to a corporation, and where it is governed by a board of managers or directors, the knowledge of the officer will be imputed to the corporation.[95] Where a creditor places his claim in the hands of a collection agent who forwards it to a firm who, knowing of the debtor's insolvency, induces him to confess judgment for the debt, and

C. 5848; Bucknam v. Goss, 13 N. B. R. 337, 1 Hask. 630, F. C. 2097; Stranahan v. Gregory, 4 N. B. R. 142, F. C. 13522; In re Ratliff, 107 F. R. 80, 5 A. B. R. 713; In re Dundas, 111 F. R. 500, 7 A. B. R. 129; Brown v. Guichard, 7 A. B. R. 515; McNair v. McIntyre, 113 F. R. 113, 7 A. B. R. 638; Pirie v. Trust Co., 182 U. S. 446, 5 A. B. R. 814.

[90] Taft v. Bank, 2 N. B. N. R. 1145.

[91] Crittenden v. Barton, 5 A. B. R. 775.

[92] Peck v. Connell, 8 A. B. R. 500; Hicks v. Longhorst, 6 A. B. R. 178.

[93] In re Dunavant, 1 N. B. N. 542, 3 A. B. R. 41, 96 F. R. 542; Babbit v. Kelly, 9 A. B. R. 335; Rogers v. Palmer, 19 N. B. R. 471, 102 U. S. 263; Sage v. Wynkoop, 16 N. B. R. 363, F. C. 12215; Vogle v. Lathrop, 4 N. B. R. 146, F. C. 16985; Mayer v. Hermann, 10 Blatch. 256, F. C. 9344; Graham v. Stark, 3 N. B. R. 93, 3 Ben. 520, F. C. 5676; Wight v. Muxlow, 8 Ben. 52, F. C. 17629; In re Graham, 110 F. R. 133, 6 A. B. R. 750.

[94] In re Egbert, 1 A. B. R. 340; see Crooks v. Bank, 5 A. B. R. 754.

[95] Crooks v. Bank, 5 A. B. R. 754; In re Gillette, 104 F. R. 769, 5 A. B. R. 119.

collects and forwards it to the collection agent, the amount would be recoverable on suit of the trustee.[96]

§ 965. **Transactions out of the usual course.**—Transactions not in the usual course of trade or of the accustomed dealings between the parties is notice of probable wrong, and the creditor is thereby put on inquiry and is chargeable with all such inquiry would have produced. Such a transaction is prima facie evidence of fraud,[1] and the presumption must be overcome by proof of proper inquiry into the seller's pecuniary condition.[2] In determining if it was unusual, regard must be had to the character of the business.[3] Thus it is unusual for a chair manufacturer to sell legs used in his business;[4] so is a sale of the entire stock in trade;[5] or a sale at night, without invoice, for cash;[6] or a mortgage of the entire stock in trade for a pre-existing debt;[7] or a confession of judgment enabling the creditor to seize the stock and close out the business.[8]

The knowledge that bankrupt was a little short of money and desired the creditor to substitute one security for another, is not sufficient to show the creditor had reasonable cause to believe the debtor insolvent;[10] nor is the giving of a mortgage, as it is only prima facie fraudulent and may be explained.[11] The diligence required in the inquiry is proportioned to the suspiciousness of the transaction.[12]

§ 966. **Fraudulent preferences voidable, not void.**—Fraudulent preferences, that is, any transaction which constitutes a

[96] Hoover v. Wise, 14 N. B. R. 264, 91 U. S. 308; see In re Flick, 3 N. B. N. R. 71.

[1] In re Hunt, 2 N. B. R. 166, F. C. 6881; In re Krum, 7 Ben. 5, F. C. 7943.

[2] Walbrun v. Babbitt, 9 N. B. R. 1, 16 Wall. 577; Brooks v. Davis, F. C. 1950.

[3] Judson v. Kelty, 6 N. B. R. 165, 5 Ben. 348, F. C. 7567.

[4] Schrenkeisen v. Miller, 9 Ben. 55, F. C. 12480.

[5] Main v. Glen, 7 Biss. 86, F. C. 8973; North v. House, 6 N. B. R. 365, F. C. 10310; In re Kahley, 4 N. B. R. 124, F. C. 7593, 2 Biss. 383.

[6] Davis v. Armstrong, 3 N. B. R. 7, F. C. 3624.

[7] Rison v. Knapp, 4 N. B. R. 114, 1 Dill. 187, F. C. 11861; Graham v. Stark, 3 N. B. R. 93, 3 Ben. 520, F. C. 5676; Hurley v. Smith, 1 Hask. 308, F. C. 6920.

[8] Webb v. Sachs, 15 N. B. R. 168, 4 Sawy. 158, F. C. 17325.

[10] Collins v. Bell, 3 N. B. R. 146, F. C. 3010.

[11] Steadman v. Bank of Monroe, 117 F. R. 237, 9 A. B. R. 4; Moore v. Young, 4 Biss. 128, F. C. 9782.

[12] Schulenberg v. Kabureck, 2

preference as hereinbefore described, given or received[13] within four months before the filing of a petition, or after the filing of the petition and before the adjudication, if the creditor had reasonable cause to believe a preference was intended, are voidable, not void.[14] This makes the English doctrine that a suit in the nature of trover cannot be brought by the trustee unless he alleges and proves a demand for restoration and a refusal to restore the property transferred applicable here.[15] While such a transfer is fraudulent and voidable, it is not so because morally wrong, but because the act says it is.[16]

A voidable preference is not a mere preference in fact, but the creditor must have reasonable cause to believe that he was obtaining the statutory preference, that is, a preference in law, the gist of which is the debtor's insolvency. If the creditor had reason to believe when property was transferred to him within four months of the filing of the petition that a preference was intended, it is immaterial whether it was taken as payment or as security, in either case it is voidable; but, in the absence of such knowledge it is not,[17] and the same is true of a payment in money.[18]

See also Fraudulent Transfers, post § 1104.

§ 967. Actions affecting preferences.—The distinction between a creditor who is innocently preferred and one who received his preference with reasonable cause to believe a preference was intended, is drawn in this section.[19] In the latter case[20] if the preference was given within the four months' period, the creditor has no option as to retaining or surrendering it, but it is discretionary with the trustee whether

Dill. 132, F. C. 12487; Wilson v. Stoddart, 4 N. B. R. 76, F. C. 17838.

[13] In re Conhaim, 2 N. B. N. R. 148, 3 A. B. R. 249, 97 F. R. 923.

[14] In re Ft. Wayne Elec. Corp., 2 N. B. N. R. 434, 99 F. R. 400, 3 A. B. R. 634; In re McLam, 1 N. B. N. 402, 3 A. B. R. 245; Stern v. Louisville Trust Co., Newborg v. Same, 112 F. R. 501, 7 A. B. R. 305.

[15] In re Phelps, 2 N. B. N. R. 484, 3 A. B. R. 396.

[16] In re Cobb, 1 N. B. N. 557, 3 A. B. R. 129, 96 F. R. 821.

[17] In re Eggert, 2 N. B. N. R. 185, 390, 98 F. R. 834, 102 F. R. 735; In re Baker, 2 N. B. N. R. 195.

[18] In re Wise, 2 N. B. N. R. 151; Blakey v. Bk., 1 N. B. N. 411, 2 A. B. R. 460, 95 F. R. 267.

[19] Sec. 60a and b, act of 1898.

[20] Sec. 60b, act of 1898.

he will avoid it,[21] and he is the proper person to bring suit.[22] The nature and situation of the property which is the subject of the preference will determine the course to be pursued. If the bankrupt has procured or suffered a judgment to be entered and nothing more than the entry, further proceedings may be stayed;[23] if an execution has been issued and levied, the same course may be pursued. If the money has been collected and is still in the sheriff's hands, the trustee may apply to the court in which the execution issued for an order directing the sheriff to turn it over to him, and if he refuses, sue him for money had and received, or proceed against him by attachment for contempt.[24] If the sheriff has turned the money over to the execution creditor, or the preference is by transfer to the creditor, or for his benefit, and the property is in the hands of a third person, claiming adversely, the trustee may bring suit either in a state court or the court of bankruptcy.[25] In case of money collected on execution and turned over to the execution creditor, recovery can only be had if the creditor had reasonable cause to believe a preference was intended.[26]

The fact that a trustee failed to contest the allowance of a claim because of a preferential payment, would not bar him from subsequently suing to recover the proceeds of such preferential transfer of property.[27] He may also bring such suits without an order of the bankruptcy court to justify him, as such action is incident to his duty and title to the bankrupt's property.[28]

An action to recover a voidable preference may now be brought in the court of bankruptcy or a state court.

§ 968. **'c. New credit after preference.**—If a creditor has 'been preferred, and afterwards in good faith gives the debtor 'further credit without security of any kind for property 'which becomes a part of the debtor's estates, the amount of 'such new credit remaining unpaid at the time of the adjudi-'cation in bankruptcy may be set off against the amount which 'would otherwise be recoverable from him.'

[21] In re Castle, 2 N. B. N. R. 985, 4 A. B. R. 357; In re Nathan, 2 N. B. N. R. 613.

[22] Sec. 67, act of 1898.

[23] Sec. 11, act of 1898.

[24] Sec. 70, act of 1898.

[25] Sec. 23b, act of 1898.

[26] In re Blair, 102 F. R. 987, 2 N. B. N. R. 890, 4 A. B. R. 220.

[27] Buder v. Columbia Distilling Co., 9 A. B. R. 331.

[28] Chism v. Bank, 5 A. B. R. 56.

§ 969. **Set-off.**—The recovery of what has been given as a preference is not for the bankrupt's benefit but for that of his creditors, and this provision treats it as a debt due as opposed to the debt owing on account of the new credit and the rule as to mutual debts is applied. The receipt by a creditor of payments upon an account current in the usual course of business, followed by new credits, does not constitute a preference under the law.[29]

This subdivision does not restrict the creditors to whom it applies to such as received preferences with reasonable cause to believe a preference was intended and the use of the term "good faith" seems to imply that an innocent preference was in the legislators' minds as much as the opposite.[30] In spite of the use of the word "recoverable," this subdivision is not limited in its application to cases where the trustee sues to recover the preferences.[31] Under the act the surrender cannot be said to be voluntary since it is required if the creditor would participate in the dividends;[32] though the contrary is held by the greater number of cases.[33] A creditor may under this provision set off his new credits although he did not have reasonable cause to believe a preference intended and though the property is not recoverable by the trustee,[34] but any excess of payments over the new credits must be surrendered before proof of the claim can be allowed.[35]

[29] Jacquith v. Alden, 188 U. S. —.

[30] In re Thompson, 112 F. R. 651, 7 A. B. R. 214.

[31] Sec. 60b, act of 1898; In re Ryan, 105 F. R. 760, 2 N. B. N. R. 693; Peterson v. Nash Bros., 112 F. R. 311, 7 A. B. R. 181; McKey v. Lee, 105 F. R. 923, 5 A. B. R. 267; In re Ryan, 105 F. R. 760, 5 A. B. R. 396; In re Bothwell, 8 A. B. R. 213, and cases cited; Kahn v. Cone Export & Commission Co., 115 F. R. 290; In re Seckler, 106 F. R. 484, 5 A. B. R. 579; In re Southern Overalls Mfg. Co., 111 F. R. 518, 6 A. B. R. 633; In re Soldosky, 111 F. R. 511, 7 A. B. R. 123; Contra, In re Keller, 109 F. R. 118, 6 A. B. R. 334; In re Abraham Steers Lumber Co., 110 F. R. 738, 6 A. B. R. 315, 112 F. R. 406, 7 A. B. R. 332.

[32] In re Beswick, 2 N. B. N. R. 808; In re Hoffman, 2 N. B. N. R. 554; McKee v. Lee, 3 N. B. N. R. 262, 105 F. R. 923, 5 A. B. R. 267.

[33] In re Christensen, 101 F. R. 802, 4 A. B. R. 202; aff'g 2 N. B. N. R. 695; In re Thompson, 2 N. B. N. R. 1016; and see In re Ryan, supra.

[34] C. S. Morey Mercantile Co. v. Scheffer, 114 F. R. 447, 7 A. B. R. 670.

[35] Gans v. Ellison, 8 A. B. R. 153, 114 F. R. 734; In re Thompson's Sons, 7 A. B. R. 214.

A creditor seeking to obtain the set-off of a credit must plead the essential facts entitling him thereto in the same manner as if he sought to maintain a separate action on such claim.[36] If a debtor give in payment a check which becomes protested, and afterwards more goods are ordered and a payment made on account, such payment cannot be applied to the check so as to make the date of the check the date of the preference and entitle the creditor to set off the new credit.[37] Where an account is paid in full more than four months prior to bankruptcy, although the debtor is insolvent, and later another debt is contracted, the payment cannot be treated as a set-off against the debt sought to be proved.[38]

§ 970. **'d. Court determines reasonableness of attorney's 'fee.**—If a debtor shall, directly or indirectly, in contemplation 'of the filing of a petition by or against him, pay money or 'transfer property to an attorney and counselor at law, solicitor 'in equity, or proctor in admiralty for services to be rendered, 'the transaction shall be re-examined by the court on petition 'of the trustee or any creditor and shall only be held valid to 'the extent of a reasonable amount to be determined by the 'court, and the excess may be recovered by the trustee for 'the benefit of the estate.'

§ 971. **Attorney's fee.**—The services of an attorney are necessary in a case of involuntary bankruptcy to enable a debtor to prepare the necessary papers, procure the adjudication and reference, bring the debtor before the referee, conduct examinations and otherwise perform the duties imposed upon the bankrupt in involuntary proceedings as well as to oppose the latter when improperly brought. This provision recognizes this fact and approves the payment by bankrupt to such attorney of reasonable compensation. The reasonableness of it may be inquired of by the court upon the petition of the trustee or any creditor. This proceeding is administrative in character, in which the jurisdiction of the court is not dependent on the service of process but is expressly given by statute and a notice of hearing therein given by mail a reasonable time before the hearing is sufficient.[39] The word "counselor"

[36] In re Oliver, 109 F. R. 784, 6 A. B. R. 626.

[37] In re Bartey, 110 F. R. 928, 7 A. B. R. 26.

[38] In re Abraham Steers Lumber Co., 112 F. R. 406, 7 A. B. R. 332.

[39] In re Lewin, 103 F. R. 850, 4 A. B. R. 632.

as here used is practically synonymous with the word "attorney," but is used doubtless to indicate that the services intended to be provided for are not limited to those of an attorney as such. The allowances for counsel's services should be confined to the bankruptcy proceeding itself, excluding previous consultations or advice, as also all unnecessary attendance as counsel in the course of the proceedings and excluding especially all claims for services in aiding the bankrupt to conceal, justify or extenuate questionable acts or transactions;[40] or to resist the distribution of his property under the law.[41]

Among the debts given priority is one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties prescribed, and to the bankrupt in voluntary cases, as the court may allow.[42] This limits the fee to services actually rendered, but not as to time of payment. The two provisions are to be construed together and their purpose is the same, that the attorney who serves a bankrupt client shall, even after the latter's estate has passed from his hands, be paid. Though contemplating bankruptcy, in fact, as a preparation therefor, a debtor may pay his attorney a reasonable fee for the work involved, but it must be confined to necessary work connected therewith.[43] If such fee is not paid in advance the attorney can ask for it out of the estate, or the bankrupt may himself pay it, as by an order for money due as wages though not yet payable;[44] or by the transfer of property, but any excess over what the court deems reasonable must be returned to the trustee.[45]

An agreement by an insolvent, made after the filing of a petition in involuntary bankruptcy against him and in contemplation of the filing of a voluntary petition, that his attorney should take certain goods in payment for his services, where there was no actual delivery or change of possession

[40] In re Kross, 1 N. B. N. 566, 3 A. B. R. 187, 96 F. R. 816.

[41] Goodrich v. Wilson, 14 N. B. R. 555.

[42] Sec. 64b (3), act of 1898.

[43] In re Goodwin, 2 N. B. N. R. 445.

[44] In re Lewin, 103 F. R. 852, 4 A. B. R. 632.

[45] In re Tollett, 2 N. B. N. R. 1096, 1099.

until after the adjudication upon the voluntary petition, does not constitute a transfer of the property, within the meaning of this section, and the goods, having been removed after such adjudication and while they were in custodia legis, must be restored to the trustee.[46] The payment of attorney's fees for services previously rendered and to be rendered does not constitute a preference, even as to the services to be rendered, if the amount is reasonable;[47] but a mortgage given after the commencement of proceedings, to secure payment for the services of the mortgagee in resisting the petition may be summarily set aside and a bill in equity is not necessary.[48]

[46] In re Corbett, 104 F. R. 872, 5 A. B. R. 224.

[47] In re Sidle, 2 N. B. R. 77, F. C. 12844.

[48] In re Sims, 16 N. B. R. 251, F. C. 12888.

CHAPTER LXI.

DEPOSITORIES FOR MONEY.

§972. (61a) Court to designate depositories.
973. Deposits and disbursements.

§ 972. '(Sec. 61a) Court to designate depositories.—Courts 'of bankruptcy shall designate, by order, banking institutions 'as depositories for the money of bankrupt estates, as con-'venient as may be to the residences of trustees, and shall 'require bonds to the United States, subject to their approval, 'to be given by such banking institutions, and may from time 'to time as occasion may require, by like order increase the 'number of depositories or the amount of any bond or change 'such depositories.'[1]

§ 973. Deposits and disbursements.—Trustees are required to deposit to their credit[2] all moneys received by them in one of the designated depositories and disburse the same only by check or draft on the same.[3] Under the Act of 1867, the banks were not required to keep a separate account with each bankrupt estate, in which the deposits were made in the name of the United States District Court, and the same rule would doubtless apply under the present law,[4] but this would not be true if deposited to the credit of the trustee. No moneys shall be drawn from the depository unless by check or warrant, signed by the clerk of the court or by a trustee, and countersigned by the judge of the court, or by a referee designated for the purpose, or by the clerk or his assistant, under an order from the judge. The name of any referee or judge authorized to countersign such checks must be furnished to the depository.[5]

[1] Analogous provision of act of 1867. "Sec. 17. . . . That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession."

[2] In re Carr, 117 F. R. 572, 8 A. B. R. 635.

[3] Sec. 47a, act of 1898.

[4] State Nat. Bk. v. Dodge, 124 U. S. 333.

[5] G. O. XXIX; In re Cobb, 112 F. R. 655, 7 A. B. R. 202.

A bank in which funds are deposited to the credit of a trustee in bankruptcy has no power to pay out any of said funds except upon proper warrant under the authority of the court of bankruptcy. A state court has no authority to order such a bank to pay out of such funds a judgment rendered against the trustee.[6]

[6] Havens v. Bank, 13 N. B. R. 95.

CHAPTER LXII.

EXPENSES OF ADMINISTERING ESTATES.

§974. (62a) Report and approval of expenses.
975. Compensation and expenses.
976. Accounts.

§ 974. '(Sec. 62a) Report and approval of expenses.—The 'actual and necessary expenses incurred by officers in the 'administration of estates shall, except where other provisions 'are made for their payment, be reported in detail, under oath, 'and examined and approved or disapproved by the court. If 'approved, they shall be paid or allowed out of the estates in 'which they were incurred.'[1]

§ 975. Compensation and expenses.—The compensation of referees,[2] trustees,[3] clerks, marshals,[4] and stenographers[5] is fixed by law and is in full for their services, but does not include certain expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts. Fees not required to be paid before filing the petition may be ordered by the judge at any time paid out of the estate, or, after notice and proof that bankrupt can pay them, require him to do so.[6] Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring witnesses, or perpetuating testimony, the clerk, marshal or referee may require from the person desiring the service indemnity for such expense, and money advanced for such purpose must be repaid as part of the costs of administering

[1] Analogous provision of act of 1867. "Sec. 28. . . . If at any time, there shall not be in his (assignee's) hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him. . . .

"Sec. 47. . . . The enumeration of the foregoing fees shall not prevent the judges, who shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in the section in classes of cases to be named in their rules and orders."

[2] Sec. 40, act of 1898.

[3] Sec. 48, act of 1898.

[4] Sec. 52, act of 1898.

[5] Sec. 38, act of 1898.

[6] G. O. XXXV.

the estate.[7] In involuntary cases, where the debtor resists the adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, similar costs as are allowed to a party recovering in a suit in equity; and, if the petition be dismissed, the debtor will recover like costs against the petitioner.[8] The cost of preserving the estate subsequent to filing the petition, the cost of administration, including witness fees and mileage according to the laws of the United States, and one reasonable attorney's fee, are debts entitled to priority of payment.[9]

§ 976. **Accounts.**—The marshal is required to make a verified return;[10] as is also the referee.[11] This section clearly makes it the duty of the officers to render itemized accounts under oath and that the court shall examine and approve or disapprove the same; in other words, that, upon an accounting by a trustee, while creditors have a right to examine and object to such account and be heard thereon, it is the duty of the referee to examine the items in detail.[12] Exceptions should be promptly filed if a receiver's account is objected to and after the questions thus raised are determined by the referee, any party in interest can bring the matter to the attention of the court; but, after an account has been approved by the referee without objection, and a further period of acquiescence has elapsed, good reasons should appear for permitting objections to be made.[13]

[7] G. O. IX.
[8] G. O. XXXIV.
[9] Sec. 64b, act of 1898.
[10] G. O. XIX.
[11] G. O. XXVI.
[12] In re Baginsky, Michel & Co., 1 N. B. N. 360, 2 A. B. R. 243; In re Carr, 116 F. R. 556, 8 A. B. R. 635.
[13] In re Reliance Storage and Warehouse Co., 100 F. R. 619, 4 A. B. R. 49; In re Tebo, 101 F. R. 419, 4 A. B. R. 235.

CHAPTER LXIII.

DEBTS WHICH MAY BE PROVED.

§977. (63a) Provable debts.
978. Test of provability.
979. What debts are provable—alimony.
980. —— Assignee or receiver.
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999. —— Rent.
1000. —— Secured claims.
1001. —— Stocks and stockholders.
1002. —— Debts due the United States or a State.
1003. Fraud or preference as affecting.
1004. b. Liquidation of claims.
1005. Unliquidated claims.

§ 977. '(Sec. 63a) **Provable debts.**—Debts of the bankrupt 'may be proved and allowed against his estate which are:

'(1) A fixed liability, as evidenced by a judgment or an 'instrument in writing, absolutely owing at the time of the 'filing of the petition against him, whether then payable or not, 'with any interest thereon which would have been recoverable 'at that date or with a rebate of interest upon such as were 'not then payable and did not bear interest;

'(2) Due as costs taxable against an involuntary bankrupt 'who was at the time of the filing of the petition against him 'plaintiff in a cause of action which would pass to the trustee 'and which the trustee declines to prosecute after notice;

'(3) Founded upon a claim for taxable costs incurred in 'good faith by a creditor before the filing of the petition in an 'action to recover a provable debt;

'(4) Founded upon an open account, or upon a contract 'express or implied; and

'(5) Founded upon provable debts reduced to judgments 'after the filing of the petition and before the consideration of 'the bankrupt's application for a discharge, less costs incurred

'and interests accrued after the filing of the petition and up 'to the time of the entry of such judgments.' [1]

§ 978. **Test of provability.**—Provable debts under the present act must have two characteristics. They must be fixed, that is "determined, settled," as opposed to "undetermined, unsettled, uncertain," and they must be absolutely owing, that is "completely, perfectly, finally, without any condition or encumbrance,"[2] as opposed to depending on some condition or the doing of some act, or happening of some event, at the time the petition is filed.[3]

§ 979. **What debts are provable—Alimony.**—The Supreme Court of the United States in considering the question of alimony held that it was neither released by a discharge, nor was it such a liability as was provable in bankruptcy, whether past due or to become due.[4] While its conclusions are sweep-

[1] Analogous provision of act of 1867. "Sec. 19. . . . That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend. . . . Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

[2] Bouvier's Law Dic.

[3] In re Burka, 104 F. R. 326, 5 A. B. R. 12; In re Chambers, Calder & Co., 2 N. B. N. R. 864; In re Arnstein, 101 F. R. 706, 4 A. B. R. 246, aff'g 2 N. B. N. R. 106; In re Scrafford, 14 N. B. R. 184, F. C. 12557; In re Frost, 11 N. B. R. 69, 6 Biss. 213, F. C. 5134.

[4] Audubon v. Shufeldt, 181 U. S. 575, 5 A. B. R. 829; In re Lochmeyer, 18 N. B. R. 270, 14 F. C.

ing they appear to have been based upon the fact that alimony is not founded upon a contract, but is rather in the nature of a penalty imposed for failure to perform a duty.

See also Alimony, not released, ante, § 422.

§ 980. —— **of assignee or receiver.**—Claims of an assignee under an assignment for the benefit of creditors for his compensation and expenditures in administering the estate prior to the filing of the petition are not provable, not being debts of the bankrupt, but debts incurred by the assignee himself in an attempt to prevent the administration of the estate in bankruptcy. It is immaterial that he acted in good faith and in conformity to the insolvency laws of the state.[5] The costs incurred by him in the care and preservation of the property, when they result in benefit to the estate generally and do not lead to a duplication of charges, and a reasonable sum as custodian, in the court's discretion, under its equity powers might be allowed to be proved, provided the utmost good faith has been shown throughout.[6] Thus a judgment creditor, who had set aside a fraudulent conveyance but lost his prior right to the fund by the adjudication of the bankrupt, is allowed reasonable indemnity for his expenses in securing such result.[7] If the assignee, pending an adjudication in bankruptcy, make a beneficial sale of the insolvent's estate, he is entitled to

914; In re Shepard, 97 F. R. 187, 5 A. B. R. 857; In re Anderson, 97 F. R. 321, 5 A. B. R. 858; In re Nowell, 99 F. R. 931, 3 A. B. R. 837; Barclay v. Barclay, 184 Ill. 375, 2 N. B. N. R. 552; In re Smith, 3 A. B. R. 67; Contra, In re Honestro, 94 F. R. 119, 2 A. B. R. 107; In re Van Orden, 96 F. R. 86, 2 A. B. R. 801; In re Challoner, 98 F. R. 82, 3 A. B. R. 442.

[5] Stearns v. Flick, 2 N. B. N. R. 1046, 103 F. R. 919; In re Gilblom & King, 2 N. B. N. R. 60; In re Solomon, 2 N. B. N. R. 460; see also In re Francis-Valentine Co., 1 N. B. N. 529, 94 F. R. 793, 2 A. B. R. 522, aff'g 1 N. B. N. 532. 93 F. R. 953, 2 A. B. R. 188; In re Kenney, 2 N. B. N. R. 140, 97 F. R. 554, 3 A. B. R. 353; Wilbur v. Watson, 111 F. R. 493, 7 A. B. R. 54; In re Busey, 6 A. B. R. 603; In re McCauley, 2 N. B. N. R. 1089; In re Peter Paul Book Co., 5 A. B. R. 105; see Louisville Trust Co. v. Cominger, 184 U. S. 18, 7 A. B. R. 421.

[6] In re Pauly, 1 N. B. N. 405, 2 A. B. R. 333; In re Kingman, 1 N. B. N. 518; In re Tatum, 112 F. R. 50, 7 A. B. R. 52; In re Mayo, 114 F. R. 600, 7 A. B. R. 764; In re Busey, 6 A. B. R. 603; In re Lock-Stub Check Co., 5 A. B. R. 106, note.

[7] In re Lesser, 2 N. B. N. R. 599, 100 F. R. 433, 3 A. B. R. 815.

retain a reasonable sum, allowed by the state court, for the services of himself and his attorneys.[8]

The assignment of a claim against a bankrupt gives the assignee a provable claim if the assignor be estopped from making the same claim.[9] See also post, § 1018.

Prior to the amendment of 1903, it was held that on the adjudication of an insolvent as a bankrupt, whose affairs were being administered by a receiver, the latter should first be paid for his services out of the estate, and whatever remained was to be turned over to the trustee.[10] As the appointment of a receiver or trustee is of itself an act of bankruptcy, the same rule with reference to the provability of a claim for compensation of these officers would apply as in the case of an assignee.

§ 981. —— attorney's fee.—A reasonable attorney's fee dependent on the services rendered and their value, to be determined on evidence or the court's knowledge,[11] including the services of counsel when really required, which must be confined to the bankruptcy proceedings, excluding previous consultations or advice, as well as all unnecessary attendance during the proceeding as counsel,[12] is provable and is entitled to priority in three cases (1) when the services were rendered the petitioning creditors in involuntary cases, (2) to the bankrupt in involuntary cases while performing the duties prescribed by the act and (3) to the bankrupt in voluntary cases.[13] An attorney's fee of a certain per cent of the amount of the debt, provided for in a mortgage in case of foreclosure, is not provable against the bankrupt mortgagor's estate, though the mortgagee has proved his claim as a secured claim and the property mortgaged has been sold by the trustee at private sale, the attorney's fee not having become due according to the contract.[14] Where a trustee is substituted for a bankrupt in a suit, but afterwards withdraws and assigns all interest

[8] In re Scholtz, 106 F. R. 834, 5 A. B. R. 782.

[9] In re Miner, 114 F. R. 998, 8 A. B. R. 248.

[10] Mauran v. Crown Carpet Lining Co., 6 A. B. R. 734; Wilson v. Parr, 8 A. B. R. 230.

[11] In re Curtis, 100 F. R. 784, 4 A. B. R. 17.

[12] In re Kross, 1 N. B. N. 566, 96 F. R. 816, 3 A. B. R. 187.

[13] Sec. 64b, post, §§ 1029-1035; see also Sec. 60d, ante, § 970.

[14] In re Roche, 101 F. R. 956, 4 A. B. R. 369; see Maybin v. Raymond, 15 N. B. R. 353, F. C. 9338.

to another, an attorney's fee is provable only for the period the trustee occupied the bankrupt's place.[15]

§ 982. —— **of bank.**—The claim of a bank holding bankrupt's note, payable after the filing of the petition, for the balance after applying bankrupt's deposit as a set-off against the amount of the note is provable;[16] but a note taken for money loaned by a savings bank prohibited by law from loaning money on personal security is not a provable debt.[17] Where a depositor gave a check for the full amount of his deposit and received the dividend thereon, which the bank offered, there is nothing to prove.[18]

§ 983. —— **commercial paper.**—A debt is provable if absolutely owing at the time of filing the petition, though not then payable.[19] The taking of a note does not discharge the original debt, and either is provable, and, if the original contract was in violation of statutory provisions regarding contracts by counties, the county may waive it and the other party cannot urge it;[20] nor does the giving of a renewal note to a bank, where it retains the original, discharge the precedent debt for which it was given, unless such is the arrangement.[21] Unstamped notes given during the operation of the War Revenue Law are not provable, though they may be allowed to be withdrawn to remedy the defect;[22] nor a non-negotiable note in the hands of an assignee unless his assignor could have done so;[23] nor notes purchased for less than their face by creditors at bankrupt's request to secure an extension of time, the creditors being unaware of bankrupt's insolvency and acting in perfect good faith, though the amount

[15] In re Litchfield, 18 N. B. R. 347, F. C. 8386.

[16] In re Kalter, 2 N. B. N. R. 264; Hough v. Bk., 4 Biss. 349, F. C. 6721; Ex p. Howard Nat. Bk., 16 N. B. R. 420, 2 Lowell, 487, F. C. 6764; In re Petrie, 7 N. B. R. 332, 5 Ben. 110, F. C. 11040.

[17] In re Jaycox & Green, 13 N. B. R. 122, F. C. 7244.

[18] Bk. v. Dewey, 19 N. B. R. 314, F. C. 897; Hodeman v. Dewey, 7 N. B. R. 269, 2 Hughes, 341, F. C. 6607.

[19] See In re McCauley & Sons, 2 N. B. N. R. 1085; In re Schaefer, 104 F. R. 973; In re Loder, F. C. 8457; In re Riker, F. C. 11833; see contra, In re Gerson, 3 N. B. N. R. 249, 5 A. B. R. 89, 105 F. R. 891.

[20] In re Worcester Co., 102 F. R. 808, 4 A. B. R. 496.

[21] Hadden v. Dooley, 92 F. R. 274.

[22] In re Dobson, 2 N. B. N. R. 514.

[23] In re Goodman Shoe Co., 96 F. R. 949, 3 A. B. R. 200.

paid is provable.[24] A note on which an undischarged bankrupt is endorser, maturing after the bankruptcy and paid by him after protest, is provable by him as after acquired property against the estate of the other bankrupt.[25] Notes claimed to have been given for a gaming contract, until the party attacking them shows by clear and conclusive evidence that they are invalid, are provable.[26]

A note for a subscription, partly paid and on the faith of which, together with other subscriptions, liabilities are incurred, is provable;[27] or a note assigned after the filing of the petition;[28] or a note on which the holder has received, or becomes entitled to receive, a dividend from one party to it, is provable against the other only for the difference.[29] Notes void between the original parties thereto, pledged as collateral security for an indebtedness, are provable by the pledgees for enough to secure dividends to the full amount of their claim.[30] A note is provable in full against the estate of the maker, though the endorser has paid part, the excess of the sum due the holder being payable to the endorser;[31] and so long as both payments do not exceed the face of the note, notwithstanding payments by the maker, a note is provable against an endorser.[32] If, after a composition the debtor gives new notes for notes held before the composition, and makes some payments, and again becomes bankrupt, the new notes are provable.[33] Notes are not provable if given for a claim upon which bankrupt is not legally liable;[34] or if based on a prior gift as consideration;[35] or if subject to off-set for an amount greater than the amount of the note;[36] or where in-

[24] In re Glassburner, 2 N. B. N. R. 634.

[25] In re Smith, 1 N. B. N. 136, 1 A. B. R. 37.

[26] Hill v. Levy, 2 N. B. N. R. 180, 98 F. R. 94, 3 A. B. R. 374.

[27] Sturgis v. Colby, 18 N. B. R. 168, F. C. 13566.

[28] In re Murdock, 3 N. B. R. 36, 1 Lowell, 362, F. C. 9939.

[29] Ex p. Talcott, 9 N. B. R. 502, 2 Lowell, 320, F. C. 13184.

[30] Bailey v. Nicholas, 2 N. B. R. 151, F. C. 741.

[31] Swarts v. Fourth Nat. Bank, 8 A. B. R. 673; In re Bingham. 94 F. R. 796, 2 A. B. R. 223; Ex p. Talcott, 9 N. B. R. 502, 2 Lowell, 320, F. C. 13184; In re Ellerhorst & Co., 5 N. B. R. 144, F. C. 4381.

[32] In re Weeks, 13 N. B. R. 263. 8 Ben. 265, F. C. 17349.

[33] In re Merriman's estate. 18 N. B. R. 411, 44 Conn. 587, F. C. 9497.

[34] In re Young, 15 N. B. R. 205, F. C. 18149.

[35] In re Cornwall, 6 N. B. R. 305, 9 Blatch. 114, F. C. 3250.

[36] In re Ford, 16 N. B. R. 426, F. C. 4932.

terest in advance has been put into a note, and the maker is adjudged a bankrupt before it becomes due for the interest yet to accrue;[37] or where the individual note of one joint maker is accepted in payment of the joint note, the old note is not provable against the estate of the other joint maker.[38]

See also Endorsers, post § 986.

§ 984. —— debts founded on contract.—If the liability arising under a contract is fixed and absolutely owing, when the petition is filed, it is provable; as a claim of a county for services performed by its convicts;[39] or the payments which had become due under an agreement to pay a certain sum monthly;[40] or a claim for spirituous liquors sold and delivered in the original imported packages, though in a state where the sale of such liquors is prohibited by law;[41] or a claim for wages held by an assignee in which the assignment was made subsequent to filing the petition.[42] A claim founded on the verbal promise of bankrupt to another to pay a certain sum, if such other would subscribe a portion of the church's debt to him, expenses having been incurred on the faith of the subscriptions generally;[43] is provable, though voluntary subscriptions are not generally provable.[44] A claim for the purchase price of goods left in a vendor's warehouse and marked with vendee's name and there destroyed by fire;[45] or the claim of a garnisheeing creditor for wages where bankrupt secures their release from garnishment by a new agreement, are provable.[46] If a contract to supply goods be broken, the loss to the purchaser may be proved for the entire term, though it had not elapsed at the time of filing the claim, if at the time of breaking the market price had increased.[47] If a

[37] In re Riggs, Lechtenberg & Co., 8 N. B. R. 90.

[38] In re Morrill, 8 N. B. R. 117, 2 Sawy. 356, F. C. 9821.

[39] In re Wright, 2 A. B. R. 592, 1 N. B. N. 428, 95 F. R. 807.

[40] Bray v. Cobb, 2 N. B. N. R. 586, 100 F. R. 270, 3 A. B. R. 788; In re Bartenbach, 11 N. B. R. 61, F. C. 1068; In re Haake, 7 N. B. R. 61, 2 Sawy. 231, F. C. 5883; In re New Brunswick Carpet Co., 4 F. R. 574.

[41] In re Town, 8 N. B. R. 38, F. C. 14111; In re Murray, 3 N. B. R. 187, 1 Hask. 267, F. C. 9954.

[42] In re Brown, 3 N. B. R. 177, 4 Ben. 142, F. C. 1974.

[43] Capelle v. Trinity M. E. Church, 11 N. B. R. 536, F. C. 2392.

[44] In re Ore. Bull. Pr. & Pub. Co., 13 N. B. R. 503, F. C. 10559.

[45] Ex p. Safford, 15 N. B. R. 564, 2 Lowell, 563, F. C. 12212.

[46] In re Bragg, 2 N. B. N. R. 82.

[47] In re Stern, 116 F. R. 604, 8 A. B. R. 569; In re Manhattan Ice

broker make a general assignment or be adjudged a bankrupt, a demand and tender are not necessary to enable the customer to assert a breach of contract.[48]

It has been held that a debt is not provable, if for money advanced a debtor to aid him in committing an act of bankruptcy;[49] or incurred as a speculative option, commonly called "a put;"[50] or a claim growing out of a slave contract;[51] or of a workman, thrown out of employment by the bankruptcy of his employer, for wages which would have accrued subsequent to the filing of the petition,[52] though, if thrown out by the voluntary act of the employer prior to the bankruptcy, whatever claim existed against the employer at the time the petition was filed would be provable.[53] A claim for damages for breach of warranty, though based on a contract, is not founded on a contract.[54]

§ 985. —— costs.—There are two classes of costs which are provable, (1) costs taxable against an involuntary bankrupt as plaintiff if the cause of action would pass to the trustee and he declines to prosecute, and (2) taxable costs incurred in good faith by a creditor in an action on a provable debt, but both must be prior to the filing of the petition. It was held under the act of 1867 that the debt or principal must be proved and allowed before the costs,[55] though there appears to be no reason under the present law why they may not be proved together. Costs incurred in an attachment proceeding, founded on a provable debt, prior to the filing of the petition, may be proved and allowed[56] and will be entitled to priority of payment if such is given by the state law, otherwise not,[57] though the contrary appears to have been the rule

Co., 114 F. R 399, 7 A. B. R. 408.

[48] In re Swift, 112 F. R. 315, 7 A. B. R. 374.

[49] In re Hatje, 12 N. B. R. 543, 6 Biss. 436, F. C. 6215.

[50] In re Chandler, 9 N. B. R. 514, F. C. 2590; see In re Green, 15 N. B. R. 198, 7 Biss. 338, F. C. 5751.

[51] Buckner v. Street, 7 N. B. R. 255, F. C. 2098.

[52] In re Pevear, 17 N. B. R. 461, F. C. 11053.

[53] In re Silverman, 101 F. R. 219, 4 A. B. R. 83.

[54] In re Morales, 105 F. R. 761, 5 A. B. R. 425.

[55] In re Preston, 5 N. B. R. 293, F. C. 11393.

[56] In re Lewis, 99 F. R. 935, 4 A. B. R. 51; In re Allen, 96 F. R. 512, 3 A. B. R. 38; but see In re Young, 2 A. B. R. 673, 1 N. B. N. 428, 96 F. R. 606.

[57] In re Lewis, supra; In re Allen, supra.

under the former law.[58] Costs awarded by a state court against the trustees of a bankrupt, as substituted defendants in an action of replevin, pending at the time of the bankruptcy, are provable.[59] Expenses, but not costs, defrayed by an attaching creditor after the dissolution of his lien by the adjudication in bankruptcy in the care and preservation of the property, may be allowed for such sum as was reasonably necessary for that purpose under that provision of the law authorizing the actual and necessary costs for preserving the estate subsequent to filing the petition.[60] Costs adjudged against bankrupt after his adjudication in a suit brought by him prior to the filing of the petition, are not provable.[61]

See also Judgments, post § 992.

§ 986. —— of endorser.—The liability of an endorser prior to the maturity of the obligation is not a fixed liability but a conditional one, and not a debt absolutely owing until the happening of the contingency of dishonor by the maker and notice to the endorser thereof. Where the obligation does not become due until after the filing of the petition, the endorser's liability is not a fixed one absolutely owing when the petition is filed and hence his claim is not provable under subdivision a, (1)[62] though it has been held that a claim upon a contract of endorsement of a promissory note is provable under clause 4 of subdivision "a" of this section, even if the note does not fall due and the liability become fixed until after the petition is filed.[63] Commercial paper acquired in good faith before maturity may be proved by the indorsee, upon showing

[58] In re Preston, 6 N. B. R. 545, F. C. 11394; In re Jenks, 15 N. B. R. 301, F. C. 7276.

[59] In re Neely, 108 F. R. 371, 5 A. B. R. 836.

[60] In re Allen, supra.

[61] In re Marcus, 104 F. R. 331, 5 A. B. R. 19, s. c. in C. C. A., 3 N. B. N. R. 407; In re Marcus et al., 105 F. R. 907, 5 A. B. R. 365; Sanford v. Sanford, 12 N. B. R. 565; In re Williams, 2 N. B. R. 79, F. C. 17705.

[62] In re Chambers, Calder & Co., 2 N. B. N. R. 864; In re Schafer, 104 F. R. 973, 3 N. B. N. R. 261; In re Loder, F. C. 8457; In re Riker, F. C. 11833; In re McCauley, 2 N. B. N. R. 1085; see In re Dunnigan, 2 N. B. N. R. 755; Hayes v. Comstock, 7 A. B. R. 493; Phillips v. Dreher Shoe Co., 112 F. R. 404, 7 A. B. R. 326; Contra, Smith v. Wheeler, 3 N. B. N. R. 337, 66 N. Y. Supp. 780.

[63] In re Gerson, 3 N. B. N. R. 249, 5 A. B. R. 89, 105 F. R. 891; Mock v. Market St. Nat. Bank, 107 F. R. 897, 6 A. B. R. 11; see In re Garlington, 8 A. B. R. 602; In re Marks, 6 A. B. R. 641.

a valuable consideration paid by him,[64] but not if without such consideration,[65] or on accommodation paper. Paper indorsed by the bankrupt can be proved only for the amounts actually paid by the holders with lawful interest;[66] or if a dividend has been received from the estate of the maker only for the balance due,[67] and the holder may prove against the estates of both maker and indorser.[68] The claim of the holder of an accommodation indorsement of bills of exchange against a bankrupt to secure the payment of which the drawers and acceptors have given collateral security, is provable as if unsecured,[69] but not that of a holder who has granted an extension of time to the maker against the estate of a bankrupt indorser.[70] An indorser who pays a note after the maker's bankruptcy holds a provable claim.[71] A claim against an indorser should not be rejected on its face because of a misstatement that all of certain notes were overdue, or because of a misstatement of the date of substitution of certain notes.[72]

See Commercial Paper, § 983, ante.

§ 987. —— of surety, guarantor, and persons secondarily liable.—The claim of any person as endorser, surety, guarantor, or otherwise, secondarily liable for a bankrupt is provable if the creditor fails to prove, in the creditor's name.[73] In the event he discharges the obligation in whole or in part he becomes entitled to that extent to the right of subrogation.[74] But, if a surety pays a claim against which there is a good defense, his claim for such payment is not provable.[75] Where one of three parties who have signed a note is adjudicated

[64] In re Lake Superior Ship Canal, R. R. & Canal Co., 10 N. B. R. 76, F. C. 7998.

[65] In re Hook, 11 N. B. R. 282, F. C. 6672.

[66] In re Many, 17 N. B. R. 514, F. C. 9054.

[67] In re Hicks, 19 N. B. R. 299, F. C. 6456.

[68] Bk. v. Porter, 17 N. B. R. 329.

[69] In re Dunkerson & Co., 12 N. B. R. 413, 4 Biss. 253, F. C. 4157.

[70] In re Granger & Sabin, 8 N. B. R. 30, F. C. 5684; see In re Ankeny, 1 N. B. N. 511, 2 N. B. N. R. 349, 100 F. R. 614, 4 A. B. R. 72.

[71] Smith v. Wheeler, 5 A. B. R. 46.

[72] In re Stevens, 107 F. R. 243, 5 A. B. R. 806.

[73] Sec. 57i, ante, § 885.

[74] Phillips v. Dreher Shoe Co., 112 F. R. 404, 7 A. B. R. 326; In re Bingham, 94 F. R. 796, 1 N. B. N. 351, 2 A. B. R. 223; Jervis v. Smith, 3 N. B. R. 147; Ex p. Talcott, 9 N. B. R. 502, 2 Lowell, 320, F. C. 13184; but see In re Kalter, 2 N. B. N. R. 264.

[75] In re Spring, 2 N. B. N. R. 509.

a bankrupt before the note becomes due, and it is paid in full at maturity by the third person, who is admittedly an accommodation party, and contingently liable, and bankrupt's liability to him was contingent upon his paying the note partly or wholly, such party has no provable claim.[76] The payment of a note by a surety relates back to the signing thereof, for the purpose of fixing the date when the indebtedness of the principal to him on account of overpayment had its inception.[78] When the surety having actual knowledge of the bankruptcy proceedings of the maker, pays the note, his claim is barred by the maker's discharge.[79]

See also Endorser, ante, § 986.

§ 988. —— of husband and wife.—In those states where a husband and wife may contract with each other, there is nothing to prevent the proof of a claim by either husband or wife against the estate of the other becoming bankrupt, if it is otherwise provable. Where a marriage portion is placed by the wife in her husband's hands in good faith and he uses it in his business a trust is created for her.[80] In states where such contracts are not enforceable, a claim may be proved by her because of her subrogation where she joins with her husband as maker of a note, but is in fact a surety and pays the note with her money.[81] When a wife deposits money with her husband and receives portions thereof, leaving a balance due at the time of his bankruptcy, such balance is provable against his estate, and cannot be offset by the value of reasonable gifts from him, or of an insurance policy on his life for the benefit of herself and children.[82] If a wife allows her husband to appropriate the income from her separate estate in support of the family, this does not create such a debt on his part as would be provable;[83] though it would be different if it were principal.[84] If a husband reduces a legacy to his wife

[76] In re Dunnigan, 2 N. B. N. R. 755.

[78] In re Stout, 109 F. R. 794, 6 A. B. R. 505.

[79] Hager v. Comstock, 7 A. B. R. 493.

[80] In re Neiman, 109 F. R. 113, 6 A. B. R. 329.

[81] In re Nickerson, 116 F. R. 1003, 8 A. B. R. 707.

[82] In re Bigelow, 2 N. B. R. 170, 3 Ben. 198, F. C. 1398; In re Blandin, 5 N. B. R. 39, 1 Lowell, 543, F. C. 1527.

[83] In re Talbot, 110 F. R. 924, 7 A. B. R. 29.

[84] In re Jones, 9 N. B. R. 556, 6 Biss. 68, F. C. 7444.

to possession and gives her a note for the proceeds, the note is not provable where it created no separate estate in the wife.[85] An intended gift of a husband is not consummated so as to become provable, where he loans the money to the firm of which he is a member and executes to her, firm notes for the amount, which he retains in his possession.[86] Unless there is a specific agreement on the part of a husband to compensate his wife for services rendered outside of her household duties, none can be implied, because he is entitled to the personal services and earnings of his wife, and no provable claim can arise in her behalf;[87] nor would such a specific agreement create a provable claim in certain states.[88] Under a law providing that a wife, who is granted a divorce, shall be entitled to one-third of his personal property absolutely, the interest of the wife in the husband's personal property after the commencement of an action for divorce but before decree is not a provable claim.[89]

§ 989. —— **insurance.**—A claim for the amount paid as premium on a fire insurance policy by a pledgee of such policy is provable against the estate of the bankrupt insured,[90] but a note given for the insurance premium on a vessel, providing if the note be not paid at maturity, the policy becomes void while it remains unpaid and after the note becomes due the vessel strands, whereupon the note is paid, and then a gale destroys the vessel, a claim for the premium is not provable against the estate of the bankrupt insurance company.[91] The claim of a holder of a fire insurance policy where he has not submitted proper proof of loss, nor made proof of debt in bankruptcy proceedings, nor commenced suit within the prescribed period, is not provable.[92] A debt secured by an insurance policy on the life of the bankrupt, is provable less the surrender value of the policy.[93] It has been held that policies reinsured in another company upon the bankruptcy of the

[85] Canby v. McLear, 13 N. B. R. 22, F. C. 2378.

[86] In re Chapman et al., 105 F. R. 901, 5 A. B. R. 570.

[87] In re Wolf, 2 N. B. N. R. 908.

[88] In re Kaufmann, 105 F. R. 768, 5 A. B. R. 104.

[89] Hawk v. Hawk, 2 N. B. N. R. 940, 102 F. R. 679, 4 A. B. R. 463.

[90] In re Hamilton, 102 F. R. 683, 2 N. B. N. R. 957, 4 A. B. R. 543.

[91] Cardwell v. Ins. Co., 12 N. B. R. 253, F. C. 2396.

[92] In re Ins. Co., 8 N. B. R. 123, F. C. 4796.

[93] In re Newland, 7 N. B. R. 477, 9 Ben. 342, F. C. 10170.

latter, are provable in full, without reference to the amount paid the holders.[94] Where there is an agreement between the insured and the various creditors as to the value of the property of each creditor, burned while in the bankrupt's possession, proof of a larger claim cannot be permitted because such creditor alleges his valuation did not include a lien upon his property.[95]

§ 990. —— **interest.**—A claim for accrued interest,[96] as well as interest up to the date of filing the petition in bankruptcy, is provable;[97] while, if there are sufficient funds in the hands of the trustee to do so, it should be paid up to the date of payment of dividends.[98]

Notes given for the excess over legal interest are not provable;[1] and, where a borrower gives his note for the loan, with legal interest, and pays for the accommodation, such contract is affected with usury, and if the lex loci provide for the forfeiture of the debt, it is not provable.[2] A secured creditor has been held to be entitled to interest after the time specified for payment of the principal.[3]

§ 991. —— **joint obligations.**—A joint indebtedness is provable against the estate of either of the joint debtors who may become bankrupt, without reference to the fact that it may be subject to be marshaled.[4]

§ 992. —— **judgments—seduction, fraud, etc.**—Judgment debts are, as a rule, provable in bankruptcy, though a court may look beyond the form of the judgment and consider the nature of the liability upon the original cause of action.[5] Where there has been merely a verdict and no judgment prior

[94] In re Republic Ins. Co., 8 N. B. R. 197, F. C. 11705.

[95] In re Reliable Storage & Warehouse Co., 105 F. R. 351, 5 A. B. R. 249.

[96] Sloan v. Lewis, 12 N. B. R. 173, 22 Wall. 150.

[97] In re Broich, 15 N. B. R. 11, 7 Biss. 303, F. C. 1921.

[98] In re Hagan, 10 N. B. R. 383, F. C. 5893; In re Bousfield & Poole Mfg. Co., 17 N. B. R. 153, F. C. 1704; In re Bk., 12 N. B. R. 130, F. C. 895; Wilson & Shafer v. Bk., 10 N. B. R. 289, F. C. 894.

[1] Shaffer v. Fritchery, 4 N. B. R. 179, F. C. 12697; In re Moore, 1 N. B. R. 123.

[2] In re Pittock, 8 N. B. R. 78, 2 Sawy. 416, F. C. 11189.

[3] In re Bartenbach, 11 N. B. R. 61, F. C. 1068.

[4] Gray v. Rollo, 9 N. B. R. 337, 18 Wall. 629.

[5] Turner v. Turner, 108 F. R. 785, 6 A. B. R. 289.

to bankruptcy, the debt is not provable as a judgment.[6] Although a judgment is rendered within four months of the bankruptcy and therefore void, as a preference, it might still be evidence of the debt, but the claim would have to be proved as unsecured.[7]

By the amendment of 1903, it is specifically provided that liabilities for alimony, maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation, shall not be discharged. Prior to the amendment it was held that a judgment was provable in a suit brought by a woman against her seducer for breach of contract to marry;[8] or for the seduction of one's daughter, though, if the action for seduction was brought by the woman under a statute giving her this right to sue, and in a state where the act is made a criminal offense, it was not provable, since it was the result of a willful and malicious injury to the person, the word "willful" meaning "intentional" or "deliberate," while "malice," in the legal acceptance of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another.[9]

A judgment in action for a tort may be provable;[10] or for fraud, conspiracy and deceit;[11] or against the principal's estate, notwithstanding a joint judgment has been recovered therefor against both principal and surety;[12] or a set-off which a defendant fails to prove in a suit brought by one who becomes bankrupt before trial and judgment is rendered against him.[13] A judgment from which an appeal is taken before bankruptcy has been held to be a provable debt; but no dividend will be paid until judgment on the writ of error;[14] and, on proof of claim, the judgment of the appellate court is not conclusive, where terms are imposed.[15] Where a judgment ceases to be

[6] Black v. McClelland, 12 N. B. R. 481, F. C. 1462; In re Williams, 2 N. B. R. 79, 2 Low. 72, F. C. 5203; see In re Sullivan, 1 N. B. N. 380, 2 A. B. R. 30.

[7] In re Richard, 1 N. B. N. 487, 94 F. R. 633, 2 A. B. R. 506.

[8] In re McCauley, 101 F. R. 223, 4 A. B. R. 122; In re Fife, 109 F. R. 880, 6 A. B. R. 258.

[9] In re Sullivan, 1 N. B. N. 380, 2 A. B. R. 30.

[10] Howland v. Carson, 16 N. B. R. 372.

[11] In re Van Buren, 19 N. B. R. 149, F. C. 16833.

[12] In re Kitzinger, 19 N. B. R. 152, F. C. 7861.

[13] In re Safe Dep. & Sav. Inst., 18 N. B. R. 493.

[14] In re Sheehan, 8 N. B. R. 345, F. C. 12737.

[15] In re Shelburne, 19 N. B. R. 359, F. C. 12745.

a lien by reason of lapse of time, unless renewed as provided by the laws of the state, it is not provable.[16]

An objection that the court was without jurisdiction of the subject-matter, or that the judgment was obtained by fraud, may be made to a claim based on a foreign judgment, since such a judgment is only prima facie evidence of the debt adjudged to be due to the plaintiff, and open to examination, but not as to a domestic judgment if rendered by a court of competent jurisdiction.[17]

§ 993. **Judgment for fine.**—A question not without serious doubt is as to the provability of a judgment imposing a fine as a penalty or punishment. While it has been held that a judgment obtained against bankrupt for fines, upon an indictment for unlawful retailing, is dischargeable, and, therefore, would be provable,[18] such decision seems hardly tenable in view of the fact that, if this be true, a discharge would operate substantially as a pardon, and which is not within the province of a bankruptcy law.[19] Under the former Acts, such fines were not considered debts,[20] while under the present law a judgment for the support of a bastard child, was considered in the nature of a police regulation and not a civil debt, and, therefore, not released by a discharge.[21] It may be safely said, therefore, that a judgment for a fine, as distinguished from a judgment on a contract express or implied, or for damages, is not provable, since provable debts include only civil liabilities.[22]

§ 994. **—— judgment after petition filed—merger.**—While a judgment of a state court, after or within four months prior to the filing of a petition in bankruptcy, occasions no lien and confers no additional rights, the bankruptcy act recognizes two classes of judgment debts which may be proved: 1st, a debt evidenced by a judgment obtained prior to the filing of the petition in bankruptcy; and 2d a debt founded on a

[16] In re Farmer, 116 F. R. 763, 9 A. B. R. 19.

[17] Michaels v. Post, 12 N. B. R. 152, 21 Wall. 398.

[18] In re Alderson, 98 F. R. 588, 3 A. B. R. 554.

[19] In re Moore, 111 F. R. 145, 6 A. B. R. 590.

[20] People v. Spalding, 4 How. 21, 10 Paige, Ch. R. 284; In re Sutherland, 3 N. B. R. 314, F. C. 13639; Macy v. Jordan, 2 Den. 570.

[21] In re Baker, 96 F. R. 964, 3 A. B. R. 101.

[22] In re Moore, 111 F. R. 145, 6 A. B. R. 590.

provable debt reduced to judgment pending bankruptcy proceedings, for this is not a new debt, created during the bankruptcy, but retains the character of the indebtedness out of which it arose and is provable less costs incurred and interest accrued after the filing of the petition and up to the time judgment was entered.[23] But the time for proving a debt of this class is not enlarged beyond the year to which proof is limited.[24] Where a creditor, between the filing of the petition and the discharge, entered judgment for an amount smaller than his debt in an action begun prior to the filing of the petition, the debt was held not merged in the judgment but still subsisted for the purpose of proof in bankruptcy and the creditor might prove his debt with interest and costs accrued in the action to the date of filing the petition.[25]

§ 995. Claims barred by statute of limitation.—Formerly statutes of limitations were strictly construed, but it has been the tendency of the courts in later years to consider them as statutes of repose; so that, if a claim be barred by the statute, it will not be revived unless the intent to revive it is so obvious that no other construction could be put upon the act which is claimed to be revived.[26] Whether a claim barred by the statute of limitations is provable unless the bar extends throughout the United States,[27] the statute being a law of the forum and not controlling proceedings in the federal courts though ordinarily applied by them in legal proceedings arising within the state,[28] is a question of some difficulty. The weight of authority, however, and sound reason seem to require that a claim barred by the statute of limitations of the state where the petition is filed should not be provable,[29]

[23] In re McBride, 2 N. B. N. R. 345, 3 A. B. R. 729, 99 F. R. 686; see Beers v. Hanlin, 99 F. R. 695, 3 A. B. R. 745; In re Fife, 109 F. R. 880, 6 A. B. R. 258.

[24] In re Leibowitz, 108 F. R. 617, 6 A. B. R. 268.

[25] In re Pinkel, 1 N. B. N. 138, 161, 1 A. B. R. 333. See Boynton v. Ball, 121 U. S. 457.

[26] In re Resler, 1 N. B. N. 280, 95 F. R. 804, 2 A. B. R. 602; In re Lorillard, 107 F. R. 677, 5 A. B. R. 62.

[27] In re Ray, 1 N. B. R. 203, 2 Ben. 53, F. C. 11589; In re Shepard, 1 N. B. R. 115, F. C. 12753; see also In re Levy, 95 F. R. 812, 2 A. B. R. 21; aff'g 1 N. B. N. 287.

[28] In re Lipman, 1 N. B. N. 310, 94 F. R. 353, 2 A. B. R. 46.

[29] In re Resler, 1 N. B. N. 280, 95 F. R. 804, 2 A. B. R. 166, 602; In re Lipman, 1 N. B. N. 310, 94 F. R. 353, 2 A. B. R. 46; In re Farmer, 116 F. R. 763, 9 A. B. R. 19; In re Graves, 9 F. R. 816; see also In re Doty, 16 N. B. R. 202,

whether the creditor resides in the same state or not,[30] or the claim is valid in the state of the creditor's residence.[31]

A state statute of limitations is suspended by the bankruptcy proceedings, and, if the debt is not barred when the petition is filed, it is provable, though at the time of proof it would otherwise be barred,[32] and such suspension continues as long as there is a fund to distribute.[33] An acknowledgment of the debt before the bar, if otherwise sufficient to take it out of the statute, will make the debt provable,[34] and the same is true if an insolvent, within four months of bankruptcy, gives a bond and mortgage to secure a barred claim, the bond revives the debt, though the mortgage is void as a preference;[35] or if, within four months of the filing of the petition and one day before the claim is barred judgment is obtained thereon, as this establishes the debt and stops the running of the statute.[36] A claim is not revived or made provable because a debtor includes it in his schedule of debts;[37] nor is it any ground for relief from the bar of the statute that the creditor was led to believe by an erroneous decision of a court that his claim was not enforceable and therefore did not present it until such decision was overruled after the bar had attached.[38] Where a note payable in one year is exchanged at maturity for a new and similar note, and this is repeated year after year, the statute runs from the date of the last

F. C. 4017; In re Noesen, 12 N. B. R. 422, 6 Biss. 443, F. C. 10288; In re Cornwall, 6 N. B. R. 305, 9 Blatch. 114, 126, 137, 138, F. C. 3250; In re Kingsley, 1 N. B. R. 5266, 1 Lowell, 216, F. C. 7819; In re Hardin, 1 N. B. R. 97, 1 Hask. 163, F. C. 6048; In re Reed, 11 N. B. R. 94, 6 Biss. 250, F. C. 11635; Contra, In re Ray, 1 N. B. R. 203, F. C. 11589; In re Shephard, 1 N. B. R. 115, F. C. 12753.

[30] In re Resler, supra.

[31] In re Hardin, supra.

[32] In re McKinney, 15 F. R. 912; In re Graves, 9 F. R. 816; In re Eldridge, 12 N. B. R.. 540, 2 Hughes, 256, F. C. 4331; In re Wright, 6 Biss. 317, F. C. 18068; Contra, Nicholas v. Murray, 18 N. B. R. 469, 5 Sawy. 320, F. C. 10223.

[33] In re Maybin, 15 N. B. R. 468, F. C. 9337.

[34] In re Reed, supra.

[35] In re Stendts, 1 N. B. N. 509.

[36] In re McBride, 2 N. B. N. R. 340, 99 F. R. 686, 3 A. B. R. 729; see also In re Woodard, 1 N. B. N. 385, 95 F. R. 260, 2 A. B. R. 339.

[37] In re Resler, supra; In re Hardin, supra; In re Kingsley, supra; In re Wooten, 118 F. R. 670, 9 A. B. R. 247; Contra, In re Hertzog, 18 N. B. R. 526, F. C. 6433.

[38] In re State Ins. Co., 15 F. R. 736.

note.[39] The decision by a bankruptcy court that a claim is barred by the statute renders the question res adjudicata between the parties.[40] A claim for sums of money lent at different times, no notes being taken, does not constitute a running account, and each item is unaffected by any other as far as the running of the statute is concerned.[41]

See Discharges, new promise, ante, § 391.

§ 996. Claim of mortgagee.—A claim for the deficiency upon the sale of mortgaged property between the amount due under the mortgage and the amount realized on the sale of the property, applicable to the mortgage debt, is provable;[42] but, where a mortgagee sells the mortgaged premises at auction for a small sum without notice to the trustee and without leave of the court, neither the balance nor any sum whatever is provable.[43] Where a mortgage is given to indemnify the mortgagee for his advances and he lends his acceptances to the mortgagor, and after the bankruptcy of the latter buys up the paper at a discount, only what he actually paid to take up his acceptance is provable.[44] If a mortgage is given on goods sold to secure the purchase money, with the understanding that the proceeds were to be applied on the mortgage, but were not, the proceeds of the unsold goods should go to the vendor, who should surrender the mortgage and prove his claim for the difference as unsecured.[45] A creditor will not be permitted to obtain a preference indirectly through a mortgage held by a third person to whom the creditor had given an indemnity bond, and the mortgagee will not be permitted to enforce the mortgage until he has exhausted his remedy on the bond.[46]

§ 997. —— on open account.—A creditor of a bankrupt, who is also his debtor in a larger amount, will not be permitted to prove his claim against the estate, so long as his own debt

[39] In re Schumpert, 8 N. B. R. 415, F. C. 12491.

[40] In re Hargadine-McKittrick Dry Goods Co. v. Hudson, 111 F. R. 361, 6 A. B. R. 657.

[41] In re Wooten, 118 F. R. 670, 9 A. B. R. 247.

[42] In re Veitch, 101 F. R. 251, 4 A. B. R. 112; In re Ruchle, 2 N. B. R. 175, F. C. 12113.

[43] In re Miller, 19 N. B. R. 78, F. C. 9555.

[44] Ex p. Ames, 7 N. B. R. 230, 1 Lowell, 561, F. C. 323.

[45] Overman v. Quick, 17 N. B. R. 235, 8 Biss. 134, F. C. 10624.

[46] In re Beerman, 112 F. R. 663, 7 A. B. R. 431.

remains unpaid.[47] See Debts founded on Contracts, ante, § 984.

§ 998. —— of partnership.—See Partnership, ante, §§ 163-166.

§ 999. —— for rent.—The rent accrued up to the date of the filing of a petition in bankruptcy is a provable debt.[48] Rent for the unexpired term of a lease though it provides that for such unexpired term it shall become due and payable upon lessee's becoming bankrupt, or upon default in the payment of rent, which occurs prior to the bankruptcy, is not provable;[49] nor is a penalty provided in the lease in case of lessee's bankruptcy, nor notes given for instalments of rent to accrue in the future, since such penalty or notes cannot be regarded as due and owing at the time of filing the petition, but accrued subsequently;[50] nor cost of restoring premises under covenant to do so at expiration of lease.[51] The rent to become due during the remainder of the term of the lease after the bankruptcy of the lessee cannot be said to be a "fixed liability then absolutely owing," payable in the future or a debt of any kind, but it is an unmatured obligation to pay in the future a consideration for the future enjoyment and occupancy of the premises, and is not, therefore, a provable debt;[52] nor is an indemnity provided for in the lease in case of lessee's bankruptcy against all loss of rent and other payments that may be incurred by reason thereof during the

[47] In re Gerson, 105 F. R. 893, 5 A. B. R. 850.

[48] Bray v. Cobb, 2 N. B. N. R. 586, 100 F. R. 270, 3 A. B. R. 788; In re Arnstein, 2 N. B. N. R. 106, 101 F. R. 706, 4 A. B. R. 246; In re Jefferson, 1 N. B. N. 288, 2 A. B. R. 206, 93 F. R. 948; In re Shilliday, 1 N. B. N. 475; In re Gerson, 1 N. B. N. 315, 2 A. B. R. 170.

[49] In re Cronson, 1 N. B. N. 474; In re Mahler, 3 N. B. N. R. 39, 105 F. R. 428, 5 A. B. R. 453; Atkins v. Wilcox, 105 F. R. 595, 5 A. B. R. 313; Contra, In re Goldstein, 1 N. B. N. 422, 2 A. B. R. 603.

[50] In re Rhoads, 2 N. B. N. R. 179; Atkins v. Wilcox, 105 F. R. 595, 5 A. B. R. 313.

[51] In re Arnstein, supra.

[52] In re Mahler, 3 N. B. N. R. 39; In re Arnstein, 2 N. B. N. R. 106, 101 F. R. 706; In re Frankel, 2 N. B. N. R. 840; In re Jefferson, supra; In re Shilliday, 1 N. B. N. 475; In re Collignon, 2 N. B. N. R. 660, 4 A. B. R. 250; Bray v. Cobb, supra; In re Mahler, 2 N. B. N. R. 76; s. c. 105 F. R. 428, 5 A. B. R. 453; In re Schierman, 2 N. B. N. R. 118; In re Ells, 2 N. B. N. R. 357; aff'd 2 N. B. N. R. 360, 98 F. R. 967, 3 A. B. R. 564; In re May & Merwin, 9 N. B. R. 419, 7 Ben. 238, F. C. 9325; Ex p. Lake, 16 N. B. R. 497, 2 Lowell, 544, F. C. 7991; Treadwell v. Marden, 18 N. B. R. 353; but see In re Wynne, 4

residue of the term.[53] Where premises under a lease are condemned for a public use, and damages are paid to the tenant therefor upon the basis that his obligation to pay rent during the remainder of the term will continue, upon the bankruptcy of the tenant, the unpaid instalments of rent, at their value at the time of bankruptcy, would doubtless be provable.[54] If a note given for rent is not paid at maturity the claim is provable as if the note had never been given.[55] The action of a lessor in reletting the building to another after the bankruptcy of the lessee, amounts to the eviction of the bankrupt and the termination of the lease.[56]

See also Leases, post, § 1171.

§ 1000. Secured claims.—The claim of a creditor who has collateral therefor is provable without applying such collateral;[57] and so is a mortgagee's claim though he has obtained leave to foreclose in a state court, provided he does not take a deficiency judgment, and he has not prosecuted such suit to judgment;[58] as is also the claim of a plaintiff in a suit pending when the petition is filed.[59]

See also Proof of Secured Claims, ante, § 842.

§ 1001. Stocks and stockholders.—The liability of the stockholders of a corporation for its debts is not only a debt created by statute, but is also founded upon an implied contract and provable in bankruptcy if the circumstances are such that the claimant could have maintained a suit to enforce the stockholder's liability. It is a collateral security for the benefit of the creditors and not a penalty for the misbehavior of the directors or stockholders, but rather in the nature of a contract of suretyship for corporate debts.[60] Where one owes an unpaid subscription to the capital stock, he cannot prove or set off against such subscription an individual claim.[61] The amount previously ascertained to be due for an assessment

N. B. R. 5, Chase, 227, F. C. 1817.

[53] In re Ells, 2 N. B. N. R. 360, 98 F. R. 967, 3 A. B. R. 564.

[54] In re Clancy, 10 N. B. R. 215, F. C. 2782.

[55] In re Bowne & Ten Eyck, 12 N. B. R. 529, F. C. 1741.

[56] In re Mahler, 105 F. R. 428, 5 A. B. R. 453.

[57] Lewis v. U. S., 14 N. B. R. 64, 92 U. S. 618.

[58] In re Linforth, 87 F. R. 386.

[59] Bucknam v. Dunn, 16 N. B. R. 470, 2 Hask. 215, F. C. 2096.

[60] In re Rouse, 1 A. B. R. 393; James v. Atl. Delaine Co., 11 N. B. R. 390, F. C. 7179.

[61] In re Albert Goodman Shoe Co., 96 F. R. 949, 3 A. B. R. 200.

is provable against a bankrupt stockholder where the charter of a corporation provides for the forfeiture of stock upon which an assessment remains unpaid.[62]

Where a broker holds stock on a margin an unreasonable length of time after the buyer's bankruptcy, and then sells without notice at a loss, the balance is not provable against the buyer's estate.[63] One who puts up margins with a broker on purchases of commodities for future delivery cannot prove his claim therefor against the estate of the broker, where there is no evidence to show the result of the transactions, or that any returns were received by the bankrupt broker therefrom.[64] A claim is provable against a bankrupt corporation, whose articles limit its indebtedness to one-half its paid-up capital, if it does not exceed one-half the original capital stock and the stock dividends duly authorized, though it does exceed one-half its available assets.[65]

See also post, § 1216.

§ 1002. Debts due the United States or State.—The United States may prove their claim in the bankruptcy proceedings,[66] but as they are in nowise bound by a bankruptcy act in the absence of a specific provision to that effect[67] they are under no obligation to do so, but are considered as standing in the category of creditors who are not affected by the proceedings except as otherwise provided.[68] It is the trustee's duty, however, to settle first the claims of the United States, and a failure so to do makes him personally liable.[69] While under clause "j" of section 57 debts of the United States will be allowed only for the amount of the pecuniary loss where they are due as a penalty or forfeiture, it cannot be deemed as in derogation of their general rights in the collection of claims, but is merely a limitation on the amount of recovery out of an estate.

It has been held that a state need not prove its claim in bankruptcy in order to recover taxes due it on bankrupt's

[62] Gibson v. Lewis, 11 N. B. R. 247, F. C. 5393.

[63] In re Daniels, 13 N. B. R. 46, 6 Biss. 405, F. C. 3566.

[64] In re Knott, 109 F. R. 626, 6 A. B. R. 749; see Knott v. Putnam, 107 F. R. 907, 6 A. B. R. 80.

[65] Cunningham v. German Ins. Bk., 101 F. R. 977, 4 A. B. R. 363.

[66] Bousfield & Poole Mfg. Co., 17 N. B. R. 153, F. C. 1704.

[67] Lewis v. U. S., 92 U. S. 619; U. S. v. Herron, 20 Wall. 251; Harrison v. Sterry, 5 C. R. 289.

[68] U. S. v. Barnes, 31 F. R. 705.

[69] U. S. Rev. Stat., §§ 3466, 3467.

property, nor could the Federal law compel the proof of such claim nor sell the property so subject, free from the tax lien.[70]

See Debts of United States or State entitled to Priority, post, § 1011; also Debts due the Government, ante, §§ 420, 421.

§ 1003. Fraud or preference, as affecting provability.—Whether a claim is created by fraud or not, or a preference be given on it, or a judgment be obtained which the bankruptcy proceedings annul, it is still provable in the bankruptcy proceedings.[71] The claim of a creditor, who, in ignorance of certain alleged fraudulent transactions, filed it under a general assignment, is provable;[72] and so is a claim which originated in contract, even though induced by fraud and prosecuted in an action for damages, although the fraud may have to be proved to entitle the plaintiff to recover.[73] Where a creditor demanded payment in full in advance as a condition for signing a composition, and is required to return the money to the trustee, and the composition fails,[74] such claim is provable; so is the claim of a creditor which he was induced to release by the fraudulent representations of another creditor;[75] but not if the debt was contracted, in whole or in part, in violation of a law of a state;[76] nor if for expenses incurred in trying to obtain a preference.[77] A creditor obtaining an attachment is deemed to have a preference, and therefore does not have a provable debt.[78]

§ 1004. 'b. Liquidation of claims.—Unliquidated claims 'against the bankrupt may, pursuant to application to the 'court, be liquidated in such manner as it shall direct, and 'may thereafter be proved and allowed against his estate.'[79]

[70] Stokes v. State of Ga., 9 N. B. R. 191.

[71] In re Lazarovic, 1 A. B. R. 476; In re Norcross, 1 A. B. R. 644; In re Richard, 2 A. B. R. 506, 1 N. B. N. 487, 94 F. R. 633; In re Black, 17 N. B. R. 399, F. C. 1459; In re Arnold, 2 N. B. R. 61, F. C. 551; In re Schoenenberger, 15 N. B. R. 305, F. C. 12473; In re Rundle & Jones, 2 N. B. R. 49, F. C. 12138; but see In re Knox, 98 F. R. 585.

In case of involuntary surrender of preference, see § 876, post.

[72] In re Curtis, 1 N. B. N. 357, 2 A. B. R. 226, 94 F. R. 630.

[73] In re Schwarz, 15 N. B. R. 330, 14 Blatch. 196, F. C. 12502.

[74] Brookmire v. Bean, 12 N. B. R. 217, 3 Dill. 136, F. C. 1942.

[75] Michaels v. Post, 12 N. B. R. 152, 21 Wall. 398.

[76] In re Paddock, 6 N. B. R. 132, F. C. 10657; In re Eady, 3 N. B. N. R. 434.

[77] In re Archenbrown, 8 N. B. R. 429, F. C. 503.

[78] In re Schenkein, 113 F. R. 421, 7 A. B. R. 162.

[79] Analogous provision of act of

§ 1005. **Unliquidated claims.**—This subdivision does not add to the debts provable under subdivision a, but merely provides for the liquidation of such as are unliquidated; and hence does not authorize the liquidation of claims arising ex delicto, unless they are of such a nature that the claimant may waive the tort and recover in quasi contract.[80] In order to be proved, a claim should be liquidated by being reduced to judgment,[81] and until so liquidated the holder does not become a creditor.[82] Where some of the elements of a single claim are confessedly unliquidated, the claim as a whole is an unliquidated one.[83] These should be liquidated as a stockholder's liability, which may be by a stockholder's liability suit, or, if the facts are all admitted, or are simple and free from complications, the court itself may make the computation and liquidate the claim;[84] or a claim for salary to accrue of a person under annual employment, discharged before the expiration of his term.[85] A creditor who has been permitted to rescind a sale on account of fraud on the part of the bankrupt in the purchase and has secured a return of the unsold goods from the trustee, may have his claim for the proceeds of the

1867. "Sec. 19. . . . In all cases of contingent debts and contingent liabilities contracted by the bankrupt and not herein otherwise provided for, the creditor . . . may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained. . . . If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate."

[80] In re Hirschman, 2 N. B. N. R. 1123, 104 F. R. 69, 4 A. B. R. 716; In re Yates, 114 F. R. 365, 8 A. B. R. 69.

[81] In re Hilton, 104 F. R. 981, 4 A. B. R. 774.

It has been held that an action for damages for an assault and battery should be reduced to judgment, where it would be provable. This seems to be contrary to the law. Beers v. Haulin, 99 F. R. 695, 3 A. B. R. 745.

[82] In re Big Meadows Gas Co., 113 F. R. 974, 7 A. B. R. 697.

[83] In re Big Meadows Gas Co., 113 F. R. 974, 7 A. B. R. 697.

[84] In re Rouse, 1 A. B. R. 393; In re Marshall Paper Co., 1 N. B. N. 407, 2 A. B. R. 656, 95 F. R. 419.

[85] In re Silverman Bros., 2 N. B.

goods sold liquidated under the court's direction, and prove the same as a debt against the estate.[86]

Unliquidated damages growing out of a contract when assessed are provable claims,[87] and such assessment may be by judgment of a state court,[88] and would include a claim for breach of covenant of warranty upon eviction;[89] or of title where there is an unrelinquished dower right and the person entitled survives and asserts the same,[90] or the like.

A claim cannot be liquidated and proved for rent to accrue under a lease after the filing of a petition in bankruptcy;[91] or as a penalty,[92] or for damages for breach,[93] or a right of action for misrepresentation of a firm's condition, afterward bankrupt,[94] or a claim for damages for an injury caused by the negligence of a special receiver or assignee while operating a railroad,[95] since they are debts not affected by a discharge. That the debts are contingent, or that it is difficult to assess damages for a breach of contract are not valid objections to the proof of a claim.[96]

A claim for damages for breach of warranty, in the absence of a contract, expressed or implied, fixing any amount of damages, has been held not to be founded on a contract within the provisions of section 63a (4) of the law, so as to make it the basis of an adjudication in bankruptcy, but is such an unliquidated claim, as after an adjudication may be liquidated as directed by the court under subdivision b of this section.[97]

N. 760, 101 F. R. 219, 4 A. B. R. 83, s. c. 1 N. B. N. 286, 2 A. B. R. 515; In re Hilton, 3 N. B. N. R. 105; see also Ex p. Pollard, 17 N. B. R. 228, 2 Lowell, 411, F. C. 11252.

[86] In re Hirschman, 2 N. B. N. R. 1123, 104 F. R. 69; In re Heinsfurter, 1 N. B. N. 504, 3 A. B. R. 113, 97 F. R. 198; see In re Wilcox & Wright, 1 N. B. N. 188, 1 A. B. R. 544.

[87] In re Osage Valley & S. Kan. R. R. Co., 9 N. B. R. 281, F. C. 10592; In re Claugh, 2 N. B. R. 59, 2 Ben. 508, F. C. 2905.

[88] In re Rundle & Jones, 2 N. B. R. 49, F. C. 12138.

[89] Williams v. Harkins, 15 N. B. R. 34; In re Morales et al., 105 F. R. 761, 5 A. B. R. 425.

[90] Riggin v. Maguire, 8 N. B. R. 484, 15 Wall. 549.

[91] In re Collignon, 2 N. B. N. R. 660, 4 A. B. R. 250.

[92] In re Rhoads, 2 N. B. N. R. 179.

[93] In re Arnstein, 101 F. R. 706, 4 A. B. R. 246, aff'g 2 N. B. N. R. 106.

[94] In re Schuchardt & Wells, 15 N. B. R. 161, 8 Ben. 585, F. C. 12483.

[95] Metz v. R. R. Co., 12 N. B. R. 559.

[96] Ex p. Pollard, 17 N. B. R. 228, 2 Lowell, 411, F. C. 11252.

[97] In re Morales, 105 F. R. 761, 5 A. B. R. 425.

CHAPTER LXIV.

DEBTS WHICH HAVE PRIORITY.

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§ 1006. '**(Sec. 64a) Taxes entitled to priority.**—The court 'shall order the trustee to pay all taxes legally due and owing

'by the bankrupt to the United States, state, county, district, 'or municipality in advance of the payment of dividends to 'creditors, and upon filing the receipts of the proper public 'officers for such payment he shall be credited with the amount 'thereof, and in case any question arises as to the amount or 'legality of any such tax the same shall be heard and deter- 'mined by the court.'

§ 1007. **To what subdivision "a" and "b" apply.**—The first two subdivisions (a and b) of this section direct the order of distribution of the bankrupt's property. Notwithstanding it has been held[1] that it is applicable only after the assets have been marshaled and the liens discharged and[2] that it does not affect liens which come within other provisions of the statute, the better opinion is that it applies to all of the bankrupt's property which may come under the control of the bankruptcy court and is administered in the bankruptcy proceedings. The law provides for a full and complete settlement of the bankrupt's affairs as of the date of the filing of the petition. To do this it is not sufficient to consider only the unsecured creditors and the property which remains after the liens are satisfied, but it is necessary to see that the liens are satisfied in their proper order and that the balance of the bankrupt's property is distributed among his other creditors in their order. That the act recognizes this fact is shown in the requirement that all the bankrupt's property, whether encumbered or not, and all his creditors, secured as well as unsecured, must be included in his schedules;[3] that the trustee is to examine into the securities and take proper steps to save any excess over the amount secured;[4] and that the court of bankruptcy may sell the property free of liens, transferring the liens to the proceeds, or subject to liens, or direct the trustee to appear in any proceeding to enforce the liens, whichever course will best subserve the interest of the bankrupt estate

[1] In re Kerby-Denis Co., 1 N. B. N. 399, 95 F. R. 116, 2 A. B. R. 402, aff'g 1 N. B. N. 337, 94 F. R. 818, 2 A. B. R. 218.

[2] In re Frick, 1 N. B. N. 214, 1 A. B. R. 719; In re Sunseri, 3 N. B. N. R. 61.

[3] Sec. 7 (8), act of 1898.

[4] In re Coffin, 1 N. B. N. 507, 2 A. B. R. 344; Heath v. Shaffer, 1 N. B. N. 399, 93 F. R. 647, 2 A. B. R. 98; In re Holloway, 1 N. B. N. 264, 93 F. R. 638, 1 A. B. R. 659; In re N. Y. Kerosene Oil Co., 3 N. B. R. 31, F. C. 7726; In re Metzger, 2 N. B. R. 114, F. C. 9510.

and also preserve the valid rights of the lienors;[5] at the same time the act recognizes as valid various liens.[6] To illustrate, suppose the bankrupt owned a recently improved residence lot, worth, with improvements, $16,000, on which there were taxes due, a vendor's lien for part of the purchase money of the lot, a mortgage for money borrowed to improve the property, a judgment subsequent to said mortgage which was a lien on the property, and labor and mechanics' liens, which by the law of the state took precedence of all other liens, while the bankrupt claimed his homestead exemption, which the state law limited in value, out of the property, and that, if sold free of liens, the property would sell for enough to pay all these claims and leave something for the other creditors. Clearly it would be the trustee's duty under the act to apply to the court to order such a sale and of the court to grant it, thus bringing the proceeds into the bankruptcy court, to be administered in the bankruptcy proceedings.[7] In many cases claims subsequent in point of time are prior liens, as a labor claim over a prior mortgage;[8] a mechanic's lien over a mortgage;[9] or a labor claim over a landlord's lien.[10]

§ 1008. **Order of priority.**—The order of priority, (1) taxes, (2) cost of preserving the estate, (3) costs of administration, (4) wages, and (5) liens in their order, prescribed (subdivisions a and b), is that usually followed in equity. That all bankrupt's property in the control of the court should be distributed according to this order is but reasonable and in accord with the course adopted in railroad receiverships, which go even farther and give priority over the mortgages to receiver's certificates issued for operating expenses and betterments. Taxes are prior in lien to all other liens except judicial costs,[11]

[5] In re San Gabriel Sanatorium Co., 2 N. B. N. R. 827, 102 F. R. 310, 4 A. B. R. 197.

[6] Sec. 67, act of 1898.

[7] In re Worland, 1 N. B. N. 316, 92 F. R. 893, 1 A. B. R. 450.

[8] Seventh Nat. Bk. v. Shenandoah Iron Co., 35 F. R. 436; Fidelity Ins. Trust & T. D. Co. v. Iron Co., 81 F. R. 439, 453.

[9] Central Trust Co. v. Wabash R. R. 30, F. R. 332; Carew v. Stubbs, 155 Mass. 459; Allen v. Oxnard, 152 Pa. 621; Lookout Lumber Co. v. Hotel, 109 N. C. 658; Erdman v. Moore & Co., 58 N. J. L. 445; Pacific Mutual L. I. Co. v. Fisher, 106 Cal. 224; Carriger v. Mackey, 15 Ind. App. 392.

[10] In re Byrne, 2 N. B. N. R. 247, 97 F. R. 762, 3 A. B. R. 266.

[11] State of Georgia v. Railroad, 3 Woods, 434; Central Trust Co. v. R. R., 110 N. Y. 250, 41 N. J. L. 235.

which costs usually include reasonable allowance to counsel and are paid before even exemptions are set aside.[12] Wages are almost universally given like priority over statutory and contractual liens.[13]

§ 1009. **Payment in case of incumbered property.**—Whether the incumbered property is brought in voluntarily or involuntarily would seem to make no difference, as the same reasons exist in either case for subjecting the security to the prior payments. No injustice is thereby done the secured creditor since it would not be brought into the bankruptcy proceedings unless there were other claims which the state or Federal laws gave priority over such lien, or it was believed that something could thereby be obtained over and above the secured debt.[14] Unless it forms practically all the bankrupt's property, in which case it would only bear the costs and expenses of realizing on it in the best and most economical manner, it only bears its proportion of the costs. Similarly it has been held that, where incumbered property was disposed of through the bankruptcy proceedings, the amount paid the secured creditors was a dividend.[15] If there is nothing apparently in the property over the security and it is not brought into the bankruptcy proceedings, no service is rendered the secured creditor, no benefit accrues to him from the proceedings, and no reason exists for charging him with any part of the expenses. There is no inequality, or lack of uniformity, in this; the one benefits and pays; the other receives nothing and is required to give nothing. The state insolvency or assignment laws are not to be compared with the bankrupt law in this respect, because the state constitutions prohibit laws impairing the obligations of contracts which the United States Constitution does not. A law, however, is not to be construed as impairing the obligations of contracts unless susceptible of no other construction. The year allowed in many states after a sale under a mortgage for the mortgagor to redeem, during which he retains possession, receives the rents and profits and may neglect and waste the property, is a practical illustration of

[12] In re Gardner, 2 N. B. N. R. 92 F. R. 901, 1 A. B. R. 472; In re Lambert, 2 N. B. R. 138, F. C. 806, 103 F. R. 922, 4 A. B. R. 420.

[13] In re Byrne, supra; In re Kerby-Denis Co., supra. 8026.

[14] In re Pittelkow, 1 N. B. N. 234, 97 F. R. 547, 3 A. B. R. 306.

[15] In re Barber, 1 N. B. N. 559,

where the contract does not result according to its terms. This is sustained as relating to the remedy. This very year of redemption has been used as a reason for bringing incumbered property into bankruptcy.[16]

§ 1010. **Order of payment where lack of funds.**—The debts entitled to priority are to be paid in full and in the order set forth in section 64 of the statute, and this is true although such payment may exhaust the fund and leave nothing for the satisfaction of subsequently enumerated priority claims. Any liens not enumerated in this section, follow in the order provided by the state law, and it has been held that although there may be specific liens on the estate sufficient in the aggregate to exhaust the entire assets, their payment must be postponed to the payment of wages or the cost and expenses of administration.[17] Furthermore, where there are only sufficient funds to pay priority claims, the trustee will not be permitted to expend the estate in litigation concerning the rights of general creditors.[18]

If both a state law and the bankruptcy act give priority to the same class of debts, the latter not alone controls the state law in case of absolute conflict between the two, but by its express regulation of these priorities, excludes the state law altogether.[19]

§ 1011. **United States entitled to priority.**—The present law as the Act of 1867, specifically provides that taxes due the Federal, state or municipal governments shall be entitled to priority of payment, but, unlike the former, the present law so far as the government is concerned provides for priority of taxes only. This provision, however, is not to be considered as superseding, or in anywise limiting, sections 3466 and 3467 of the Revised Statutes, but is to be construed as supplementary and in pari materia, doubtless being inserted in the present law merely to recognize and reaffirm the right which those sections gave to exclude the possibility of a different conclusion. Under the general rule of interpreting statutes

[16] In re Barber, 97 F. R. 547, 1 N. B. N. 559, 3 A. B. R. 306.

[17] In re Tebo, 101 F. R. 419, 4 A. B. R. 235; See also In re Byrne, 2 N. B. N. R. 246, 97 F. R. 762, 3 A. B. R. 268.

[18] In re Sawyer, 16 N. B. R. 460, 2 Low. 551, F. C. 12396.

[19] In re Lewis, 99 F. R. 935, 4 A. B. R. 51.

in derogation of public rights, a repeal will not be implied, but must be in express terms, hence the above-mentioned sections of the Revised Statutes cannot be considered to be affected by the present law, or by the act repealing the bankruptcy law of 1867. Consequently, while taxes only are mentioned in the present law, any debt, demand or claim which the United States may have against the insolvent, will be entitled to priority of payment under section 3466, which provides that the debts due the government must be first satisfied out of the estate of an insolvent, and this right of priority extends as well to the cases in which a debtor, not having sufficient property to pay all of his debts, makes a voluntary assignment, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The United States may prove their claim and assert their priority in the proceedings in the bankruptcy court, but as in the absence of a specific provision they are in nowise bound by a bankruptcy law,[20] it has been held that they are under no obligations to do so, and hence may be considered as standing in the category of creditors who are not affected by the proceedings unless specifically mentioned.[21]

§ 1012. —— Liability for ignoring priority of United States. —It is provided, however, that every trustee or other person, who pays any debt due by the person or estate from whom, or for which he acts, before he settles and pays the debts due the United States from such person or estate, becomes answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.[22] The assignee becomes a trustee for the United States, and is bound to pay its debt first out of the proceeds of the debtor's property. If, therefore, he has notice of the existence of the debt of the United States, he cannot escape personal liability for its amount, to the extent of the value of the assets that come to his hands, if he fails to provide for it before making distribution to other creditors. Such is the rigor of the statute that he cannot invoke the judgment of a

[20] Lewis v. United States, 92 U. S. 619.

[21] U. S. v. Barnes, 31 F. R. 705; In re Huddell, 47 F. R. 206.

[22] U. S. R. S. Sec. 3467.

court of competent jurisdiction directing him to distribute the assets to specified creditors as a justification, when it does not appear that the United States were a party to the proceedings, or that he took proper measures to secure the priority of the United States in the distribution.[23] Although it has been held that this right of priority must be asserted, and the failure of the government with full knowledge of the adjudication, to make claim before final settlement, waives such right and leaves no ground on which to hold the trustee responsible out of his own means;[24] this overlooks the fact that laches, however gross, cannot be imputed to the government.[25]

§ 1013. —— in what cases.—The provisions of the law giving priority to the United States in cases of insolvency, now embodied in sections 3466 and 3467 of the Revised Statutes, originated in the Act of Congress of 1797, as supplemented by the Act of March 2, 1799, and have frequently been considered by the courts. It is established by many adjudications, in which the meaning and effect of these provisions have been discussed, that such priority extends to all classes of debts, whether liquidated or unliquidated, joint or several, legal or equitable, whether payable at present or in the future; and when the insolvent debtor has made a voluntary general assignment, or committed an act of bankruptcy, that such priority extends to all his estate which comes to the hands of his trustee or assignee.[26] Thus they are entitled to priority of payment of penalties for violation of the revenue or other laws;[27] and the claim of the government against a firm is joint and several and is entitled to priority out of either the joint or several estates.[28] It has also been held that if a person purchases imported articles free of duty and is compelled to pay the duty, to get possession of the article, he is entitled to be subrogated to the priority of the United States,[29] which

[23] U. S. v. Barnes, 31 F. R. 705; Field v. U. S., 9 Pet. 182; U. S. v. Murphy, 15 F. R. 589.

[24] U. S. v. Murphy, 15 F. R. 589.

[25] U. S. v. Barnes, 31 F. R. 705; U. S. v. Kirkpatrick, 9 Wheat. 735; Cooke v. U. S., 91 U. S. 389; Harke v. U. S., 95 U. S. 316.

[26] U. S. v. Barnes, supra; Field v. U. S. 9 Pet. 182; Howe v. Sheppard, 2 Sumner 133; U. S. v. Bank of N. Carolina, 6 Pet. 29.

[27] In re Rosey, 8 N. B. R. 509, 6 Ben. 507, F. C. 12066; Barnes v. U. S., 12 N. B. R. 526, F. C. 1023.

[28] Betterlein, 20 F. R. 109; U. S. v. Lewis, F. C. 15595; see Strassburger, F. C. 13526; but see In re Webb, 2 N. B. R. 183, F. C. 17313.

[29] In re Kirkland, 14 N. B. R.

is also true where an official pays to the government the amount of a dishonored check received by him from a government debtor, he is entitled to be subrogated to the rights of the United States against such debtor.[30] Furthermore, this right of the United States to priority is independent of any securities which it may hold.[31]

Section 3466 R. S. does not give the United States a lien, but only a priority of payment out of the property or estate of its insolvent debtor, after it has passed by a voluntary assignment, or by operation of law, to a third person, for the benefit of creditors, or with the intent to defeat such priority, and this priority will attach and prevail against judgments, but subject to all prior valid liens thereon.[32]

§ 1014. Taxes due a state, county or municipality.—After payment of the debts due the United States, taxes legally due and owing by the bankrupt to a state, county, district or municipality, must next be paid, and the courts will not favor any evasion of the law by giving a too liberal construction to its words. The manifest intent of the law is that, while the estate is in the hands of the trustee, his custody will not constitute a barrier to prevent the collection of taxes which would be collectible under the law if the property had remained in the possession and control of the bankrupt himself.[33] Taxes that are due and owing should be paid before the secured creditors.[34]

In order to entitle a tax to priority, it should not be a mere claim clothed with the garb of a tax, but should be actually a tax, its character being determined by the laws of the state, so that if it is merely a charge or license exacted for the privilege of carrying on business, as the "mulct-tax" of Iowa, it will not be entitled to priority;[35] nor will it be paid as a priority claim out of bankrupt's estate, where he merely holds property under a lease in which he agreed to pay all taxes

139, 2 Hughes 208, F. C. 7843; but see Kerr v. Hamilton, F. C. 7731.

[30] In re McBride, F. C. 9682; but see Wilkinson v. Babbitt, F. C. 17668.

[31] Lewis v. U. S., 92 U. S. 618.

[32] U. S. v. Griswold, 8 F. R. 496; Cottrell v. Pierson, 12 F. R. 805.

[33] In re Conhaim, 2 N. B. N. R. 521, 100 F. R. 268, 4 A. B. R. 58; In re Frick, 1 N. B. N. 214, 1 A. B. R. 719; In re Sims, 118 F. R. 356, 9 A. B. R. 162; In re Baker, 1 A. B. R. 526; In re Tilden, 1 A. B. R. 300.

[34] In re Hilberg, 6 A. B. R. 714.

[35] In re Ott, 1 N. B. N. 571, 95 F. R. 274, 2 A. B. R. 637.

against the leased property.[36] Where personal property is yearly assessed as of a certain date, the trustee in selling should, for the protection of the purchaser, provide for the payment of the taxes to be subsequently levied on such property.[37] But in the case of taxes due a State, county or municipality, the claim therefor should be proved like that of any other creditor.

Under the former law it was held that the claim of lessors of a bankrupt lessee for the amount of taxes paid by them, which the lessee had covenanted to pay, was not entitled to priority,[38] nor was a debt due a foreign state for taxes.[39] A trustee should not pay taxes where such payment would operate to the advantage of a third party against another, they being in any event secure.[40] If under state laws a member of a partnership is liable for the taxes due from the firm, taxes levied against a firm must be paid as a preferred claim, from the estate in bankruptcy of a member thereof.[41] A license fee or franchise tax has been held to be entitled to priority of payment.[42]

Taxes due on exempt property at the time of bankruptcy should be paid by the trustee in bankruptcy out of the fund which would otherwise go to the general creditors, although such taxes are a lien upon and enforceable against such exempted property, since they are taxes legally due and owing as provided by this section, and the bankrupt is entitled to the full amount of exemption allowed by the state law.[43]

§ 1015. Taxation of funds in hands of trustee or receiver.— The power of a state with reference to the taxation of property within its jurisdiction extends to property in the hands of trustees, receivers and others acting in a fiduciary capacity, irrespective of the residence of the parties beneficially inter-

[36] In re Siegel-Hillman Dry Goods Co., 2 N. B. N. R. 856.

[37] In re Keller, 109 F. R. 131, 6 A. B. R. 334.

[38] In re Parker, F. C. 10719.

[39] In re Ambler, 8 Ben. 176, F. C. 271.

[40] In re Veitch, 101 F. R. 251, 4 A. B. R. 112; Foster v. Inglee, 13 N. B. R. 239, F. C. 4973.

[41] In re Green, 116 F. R. 118, 8 A. B. R. 553.

[42] In re Mutual Mercantile Agency, 8 A. B. R. 435; Hancock v. Singer Mfg. Co., 62 N. J. L. 289; Western Union Telegraph Co. v. Mass., 125 U. S. 530, 547.

[43] In re Tilden, 91 F. R. 500, 1 A. B. R. 300, 1 N. B. N. 134; In re Baker, 1 A. B. R. 526.

ested in the property.[44] Accordingly property in the hands of a trustee or receiver in bankruptcy is subject to taxation by the state the same as though in the hands of the bankrupt and proceedings in bankruptcy had not been instituted. Property in the hands of receiver or trustee is in the custody of the court, and is therefore not subject to seizure and levy under process issuing from a court of the state to enforce the collection of a tax assessed under the laws of a state. The proper course is for the collector to apply to the court or referee for the payment of the taxes due, in which event such claim when so presented will be entitled to priority of payment. As stated by the Supreme Court of the United States in the case of Tyler, property in the hands of a receiver is in custodia legis, but is "not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect of it."[45]

§ 1016. 'b. **Order of priority.**—The debts to have priority, 'except as herein provided, and to be paid in full out of 'bankrupt estates, and the order of payment shall be

'(1) The actual and necessary cost of preserving the estate 'subsequent to filing the petition;

'(2) The filing fees paid by creditors in involuntary cases;[46] 'and, where property of the bankrupt, transferred or con-'cealed by him either before or after the filing of the petition, 'shall have been recovered for the benefit of the estate of the 'bankrupt by the efforts and at the expense of one or more 'creditors, the reasonable expenses of such recovery.

'(3) The cost of administration, including the fees and 'mileage payable to witnesses as now or hereafter provided 'by the laws of the United States, and one reasonable attor-'ney's fee, for the professional services actually rendered,

[44] Judson, Tax. § 407.

[45] In re Tyler, 149 U. S. 164, 182; In re Sims, 118 F. R. 356, 9 A. B. R. 162; In re Conhaim, supra; In re Baker, supra; In re Frick, supra.

[46] Prior to the act of February 5, 1903, subdivision 2 merely provided that "the filing fees paid by creditors in involuntary cases" should be entitled to priority. The balance of this subdivision is added by the amendatory act.

'irrespective of the number of attorneys employed, to the 'petitioning creditors in involuntary cases, to the bankrupt in 'involuntary cases while performing the duties herein pre-'scribed, and to the bankrupt in voluntary cases, as the court 'may allow;

'(4) Wages due to workmen, clerks, or servants which have 'been earned within three months before the date of the com-'mencement of proceedings, not to exceed three hundred 'dollars to each claimant; and

'(5) Debts owing to any person who by the laws of the 'states or the United States is entitled to priority.'[47]

§ 1017. Care and preservation of property—time covered.—Clause (1) of this subdivision gives priority to the actual and necessary cost of preserving the estate subsequent to the filing of the petition, which would include any expense that might be proper for its care, preservation or protection. It would include the expense of cultivating and harvesting growing crops omitted without fraud and harvested before debtor was required to surrender them to the trustee;[48] or the care of the property pending the adjudication of the trustee's rights

[47] Analogous provision of act of 1867. "Sec. 27. . . . Except that wages due from him to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full.

"Sec. 28. . . . In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:

"First. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.

"Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

"Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State.

"Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

"Fifth. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed: Always provided That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State."

[48] In re Barrow, 3 N. B. N. R. 95, 98 F. R. 582, 3 A. B. R. 414.

where a judgment creditor contested the adjudication and claimed priority,[49] or the like. It is for the bankruptcy court to determine what is the actual and necessary cost regardless of what has been paid.[50]

§ 1018. — — Prior to filing petition.—An assignee in a voluntary assignment is not entitled under this provision to the cost of caring for the estate or compensation as custodian prior to the filing of the petition,[51] notwithstanding that such services appear to have been for the benefit of the general creditors, but is entitled to a reasonable allowance for such services rendered and disbursements made subsequent to the filing of the petition.[52] A plaintiff in an attachment within four months of bankruptcy is not entitled to priority of payment of the costs of caring for property prior to the petition, such claim being held "a claim for taxable costs," provable under section 63 (3) of the statute[53] unless given priority by the state law.

While costs for the care and preservation of property incurred prior to the filing of the petition are not within the express terms of this provision, when they result in benefit to the whole estate and not to any particular creditor or in the duplication of charges, they are in effect given practical priority under the equity powers of the bankruptcy courts and should be paid in full.[54] Thus a judgment creditor, who had set aside a fraudulent conveyance but lost his prior right to the fund by the adjudication of the debtor bankrupt, will be allowed reasonable indemnity for his expenses in securing such result;[55] and an assignee in a voluntary assignment,

[49] In re Carolina Cooperage Co., 1 N. B. N. 524, 96 F. R. 604; see also In re Gregg, 3 N. B. R. 131, F. C. 5796; Zeiber v. Hill, 8 N. B. R. 239, F. C. 18206.

[50] In re Allen, 96 F. R. 512, 3 A. B. R. 38.

[51] Stearns v. Flick, 2 N. B. N. R. 1046, 103 F. R. 919, 4 A. B. R. 723; In re McCauley, 2 N. B. N. R. 1089; Hunter v. Byng, 9 F. R. 277; In re Gilblom, 2 N. B. N. R. 60; see also In re Solomon, 2 N. B. N. R. 460; In re Kenney, Id. 143; In re Francis Valentine Co., 1 N. B. N. 529; s. c. 1 N. B. N. 532, 2 A. B. R. 522, 94 F. R. 793. Contra, In re Klein, 116 F. R. 523, 8 A. B. R. 559.

[52] In re Peter Paul Book Co., 104 F. R. 786, 5 A. B. R. 105; Abbott v. Summers, 116 F. R. 687.

[53] In re Allen, 96 F. R. 512, 3 A. B. R. 38; In re Lewis, 99 F. R. 935, 4 A. B. R. 51.

[54] In re Kurth, 17 N. B. R. 573; Berkholder v. Stump, 4 N. B. R. 597.

[55] In re Lesser, 2 N. B. N. R. 599, 100 F. R. 433, 3 A. B. R. 815.

made in good faith and who has acted likewise, has been allowed the money actually disbursed by him in preserving the estate and a reasonable sum as custodian.[56] This was the view taken under the Act of 1867, in which the provision was "costs * * for the custody of the property, as herein provided,"[57] implying clearly the custody after the commencement of the proceedings.[58] Under the present act, it has been held[59] that this provision relates to costs directly connected with the proceedings in bankruptcy and does not exclude, from the priority given them by the state law, fees and costs accruing, though prior to the petition, in legal proceedings not directly connected with the bankruptcy proceedings; and also includes expenses incurred by a receiver appointed to take charge of the property by the bankruptcy court.[60]

§ 1019. —— Property recovered for estate by creditor.— Whenever property of the bankrupt which is transferred or concealed by him either before or after the filing of the petition, is recovered for the benefit of the estate by the efforts and at the expense of one or more of the creditors, the reasonable expenses of such recovery is entitled to priority of payment. While the law does not specifically provide for the case where a fund belonging to the estate is rescued from destruction, expenses incurred therein would doubtless be entitled to a like priority.[61] It is not to be understood from this, however, that a creditor may indiscriminately institute proceedings for the recovery of property and thus burden the estate with costs or litigation, but the proper procedure is first to apply to the trustee, who is the logical representative of all the

[56] In re Pauly, 1 N. B. N. 405, 2 A. B. R. 334; In re Kingman, 1 N. B. N. 518.

[57] Sec. 28, act of 1898.

[58] In re Cohn, 6 N. B. R. 379, F. C. 2966; MacDonald v. Moore, 15 N. B. R. 26, 8 Ben. 579, F. C. 8763; Burkholder v. Stumph, 4 N. B. R. 191, 597, F. C. 2165; In re Ward, 9 N. B. R. 349, F. C. 17145; In re Irons & Coon, 18 N. B. R. 95, F. C. 7067; Hastings v. Spenser, 1 Curt. C. C. 504; Clark v. Marks, 6 Ben. 275; Platt v. Archer, 13 Blatch. 351; In re Lains, 16 N. B. R. 165, 168, F. C. 7985; In re Kurth, 17 N. B. R. 573, F. C. 7948; In re Stubbs, 4 B. R. 124, F. C. 13557; Hunter v. Byng, 9 F. R. 277; In re New Hope Mining Co., 7 N. B. R. 598; Webb v. Ward, 6 F. R. 163; Bartlett v. Bramhall, 3 Gray, 257; White v. Hill, 148 Mass. 396; Clark v. Sawyer, 151 Mass. 64. Contra, Catlin v. Foster, 3 B. R. 540; Bishop v. Hart, 28 Vt. 71.

[59] In re Lewis, 99 F. R. 935, 4 A. B. R. 51.

[60] Sec. 2 (3), act of 1898.

[61] In re Groves, 2 N. B. N. R. 466.

creditors, to bring the suit, and only if he declines would the creditors be authorized to proceed. If there be no trustee, the creditors may proceed. In any case unless there is a resulting benefit to the estate, the expenses incurred by a creditor would not be entitled to priority under this subdivision of the statute.

§ 1020. —— **includes rent.**—This provision includes rent from the time of filing the petition until the premises occupied can be surrendered with due regard to the best interests of all. Such rent is compensation for use and occupation and hence not necessarily determined by the terms of a previously existing lease or the amount the bankrupt had been previously paying, though such amounts may form the basis of its computation, nor is it a claim against the estate as such, but an expense incurred for its preservation and to be paid pro rata with other costs of administration.[62] The length of such occupation must be reasonable and the court will determine such fact and allow for such time only.[63] It has been held that the prevention of injury to the premises by failing to remove machinery and the like is not to be considered in determining such compensation.[64]

See Rent Prior to Petition, § 1045.

§ 1021. **Filing fees in involuntary cases.**—The present act[65] gives priority to the filing fees paid by creditors in involuntary cases,[66] and allows petitioning creditors in involuntary cases, if successful, the same costs as in an equity suit. This gives petitioning creditors practically all the former act did. Under the Act of 1867, notaries taking proofs of debt in bankruptcy

[62] In re Grimes Bros., 1 N. B. N. 516, 2 A. B. R. 730, 96 F. R. 529; In re Jefferson, 1 N. B. N. 288, 2 A. B. R. 206, 93 F. R. 948; In re Butler, 6 N. B. R. 501, F. C. 2236; In re Webb & Co., 6 N. B. R. 302, F. C. 17315; In re Lyon & Co., 3 N. B. R. 63, F. C. 12043; In re Hufnagel, 12 N. B. R. 554, F. C. 6837; In re Walton, 1 N. B. R. 154, F. C. 17131; In re Merrifield, 3 N. B. R. 1, F. C. 9465; In re Hamburger & Frankel, 12 N. B. R. 277, F. C. 5975; In re Ives, 8 N. B. R. 28, F. C. 7116; Buckner v. Jewell, 14 N. B. R. 286; In re Hoagland, 18 N. B. R. 530, F. C. 6545; In re Hart Mfg. Co., 17 N. B. R. 459, F. C. 8592; In re Mitchell, 8 N. B. R. 47, F. C. 9657; In re Peabody, 16 N. B. R. 243, F. C. 10866.

[63] In re McGrath & Hunt, 5 N. B. R. 254, 5 Ben. 183, F. C. 8808.

[64] In re Breck, 12 N. B. R. 215, 8 Ben. 93, F. C. 1822.

[65] Sec. 64b (2), act of 1898.

[66] G. O. XXXIV.

proceedings were held not entitled to priority in the payment of their fees.[67]

§ 1022. **Cost of administration.**—This expression[68] refers only to costs directly connected with the proceedings in bankruptcy but will not necessarily exclude, from the priority given them by state laws, fees and costs accruing in proceedings not directly connected with the bankruptcy proceedings.[69] The assets should be charged with the payment of the costs and expenses incurred in bringing the same into the state court.[70] The cost and expenses of administration are to be paid out of an estate before any distribution at all is made,[71] notwithstanding that there are specific liens sufficient to absorb all the assets of such estate,[72] and they have priority over dower.[73] The proceeds of a bankrupt's property subject to liens should be charged with the costs of sale before the liens are paid.[74]

§ 1023. —— **Auctioneer's fees.**—As unless otherwise ordered by the court,[75] all sales must be by public auction, the fees of the auctioneer are allowable and entitled to priority. It is not true now, as held under the Act of 1867, that, the trustee being expected to conduct the sales, the necessity of the auctioneer's employment must be affirmatively shown before his fees will be allowed.[76]

§ 1024. —— **Witness fees and mileage.**—The witness fees contemplated are those usually paid in United States courts, $1.50 per day for actual attendance and mileage.[77] No extra allowance can be made to an expert witness, in the absence of a contract between him and the party summoning him, and agreements of counsel cannot bind the court in matters such

[67] In re Nebe, 11 N. B. R. 289, F. C. 10073.

[68] Sec. 64b (3), act of 1898.

[69] In re Lewis, 99 F. R. 935, 4 A. B. R. 51.

[70] Wilson v. Parr, 8 A. B. R. 230.

[71] In re Whitehead, 2 N. B. R. 180, F. C. 17562; In re Lane, 2 N. B. R. 100, 3 Ben. 98, F. C. 8042; See In re Burke, 6 A. B. R. 502.

[72] In re Tebo, 101 F. R. 419, 4 A. B. R. 235; In re Sink, 2 N. B. N. R. 645; Contra, In re Frick, 1 N. B. N. 214, 1 A. B. R. 719.

[73] In re Forbes, 7 A. B. R. 42.

[74] McNair v. McIntyre, 113 F. A. 113, 7 A. B. R. 638.

[75] G. O. XVIII (1).

[76] In re Pegues, 3 N. B. R. 19, F. C. 10907; In re Sweet, 9 N. B. R. 48, F. C. 13688.

[77] R. S. 848; The William Branfoot, 3 C. C. A. 155, 52 F. R. 390, 8 U. S. App. 129; In re Rein, 3 N. B. N. R. 45.

as this, nor will they be regarded at all unless in writing and signed by the parties to be bound.[78]

§ 1025. **Attorney or counsel fees.**—When services of counsel are really required they will be allowed, but should be confined to such services during the bankruptcy proceedings, excluding previous consultations or advice, as well as all unnecessary attendance during the proceedings,[79] though they do not include services of counsel rendered in the matter of the bankrupt's application for a discharge.[80]

It will be observed that this section provides for the allowance of an attorney's fee in three cases, (1) to the petitioning creditors in involuntary cases; (2) to the bankrupt in involuntary cases while performing the duties prescribed; and (3) to the bankrupt in voluntary cases in the court's discretion, but in each it is required that the fee must be reasonable.

§ 1026. —— **Reasonable.**—The amount must always be reasonable and depends upon the services rendered and their value, to be determined on evidence or the court's knowledge[81] of the facts in each case, the reasonableness applying to the counsel as well as to the estate.[82] If an attorney has a choice of two courses which lead to the same result he will be allowed a reasonable sum for the least services actually necessary by the less expensive course.[83]

§ 1027. —— **Determinable by the court.**—The reasonableness of the fee is to be determined by the court or referee and may be done ex parte.[84] Action thereon may be suspended for a reasonable time to get testimony as to the amount allowable, but if it is then impossible to secure such testimony, the referee should decide the question on the evidence before him.[85] Whether any fee at all is to be allowed the attorney

[78] In re Carolina Cooperage Co., 1 N. B. N. 534, 96 F. R. 604.

[79] In re Kross, 1 N. B. N. 566, 3 A. B. R. 187, 96 F. R. 816; see generally In re Carr, 117 F. R. 572, 9 A. B. R. 58.

[80] In re Brundin, 112 F. R. 306, 7 A. B. R. 296.

[81] In re Curtis, 100 F. R. 784, 4 A. B. R. 17.

[82] In re Carolina Cooperage Co., 2 N. B. N. R. 23, 3 A. B. R. 154, 96 F. R. 950; In re Curtis, supra; In re O'Connell, 2 N. B. N. R. 237, 98 F. R. 83, 3 A. B. R. 422.

[83] In re Goodwin, 2 N. B. N. R. 445.

[84] In re Stotts, 93 F. R. 438, 1 N. B. N. 326.

[85] In re Dreeben, 101 F. R. 110, 4 A. B. R. 146.

of a voluntary bankrupt rests in the sound discretion of the court, and, in determining reasonableness, the character and condition of the estate, the orders necessary for its protection and the time and attention of the attorney required are to be considered, so that there can be no fixed fee.[86]

The judge will not disturb an allowance by the referee, where there is no evidence that it was unjust, excessive or exorbitant, especially if the referee gave creditors time to file such evidence; and, if distribution has been made and the attorney paid the allowance, the right to object will be waived.[87] But if the fee asked for be exorbitant, even though it be recommended by the referee, no fee will be allowed.[88] In involuntary cases, the petitioning creditors and the bankrupt are entitled of right to such fee, only its reasonableness is to be determined by the court;[89] such determination in neither case to be arbitrary but in the exercise of legal judgment and judicial discretion and subject to review by the appellate court.[90]

§ 1028. —— **For services actually rendered.**—The provision is for the professional services actually rendered and hence it must be shown that the services for which the allowance is asked were actually rendered, and that they were necessary and proper,[91] and unless it is so shown, no allowance will be made.[92]

§ 1029. —— **Petitioning creditors in involuntary cases.**—The attorney for such creditors is entitled to a reasonable fee as of right and its allowance or disallowance is not a matter of discretion with the court, but the amount is to be determined not arbitrarily, but in the exercise of legal judgment and judicial discretion,[93] which may be reviewed by the appellate court.[94] No allowance can be made from the estate of a bankrupt in voluntary proceedings, for the fees of the creditors' at-

[86] In re Burrus, 97 F. R. 926, 3 A. B. R. 296; In re Kross, 1 N. B. N. 566, 3 A. B. R. 187, 96 F. R. 816; In re Beck, 1 N. B. N. 564, 1 A. B. R. 535, 92 F. R. 889; In re Carr, 117 F. R. 572, 9 A. B. R. 58.

[87] In re Tebo, 101 F. R. 419, 4 A. B. R. 235.

[88] In re Carr, 116 F. R. 556, 8 A. B. R. 635.

[89] In re Curtis, 100 F. R. 784, 4 A. B. R. 17.

[90] In re Curtis, supra.

[91] In re Terrill, 103 F. R. 781, 4 A. B. R. 625.

[92] In re Woodard, 1 N. B. N. 430, 2 A. B. R. 692, 95 F. R. 955.

[93] In re Carr, 117 F. R. 572, 9 A. B. R. 58.

[94] In re Curtis, supra; see also

torneys.[95] The policy of the present act being to minimize the expense of administering estates the courts must so construe it.[96] It has been held that only "one reasonable attorney's fee" is allowable, which should be divided between the attorneys of the petitioning creditors, the bankrupt, and possibly the trustee.[97] While such construction is in harmony with the policy to minimize the expenses, the correct reading of the provision would seem to refer the word "one" to the words "irrespective of the number of attorneys employed," rather than to take it to mean that only one fee absolutely is to be allowed. The result in the case cited favors this view, since to divide the one fee will give but little to each, unless that one fee be made correspondingly large. The provision might reasonably be construed to mean that, notwithstanding the petitioning creditors may have many attorneys and the bankrupt likewise, only one fee is to be allowed to bankrupt's attorneys, and one fee to the creditor's attorneys.[98] By this means the ordinary meaning of the language is preserved and the result will be more reasonable. The compensation of the trustee's attorney is not embraced by this provision, but is simply one of the costs of administration, and will be so allowed.

§ 1030. —— Bankrupt in involuntary cases.—A fee is allowed the attorney for services to the bankrupt in involuntary cases while performing the duties prescribed by the act and, if he has not performed them but has been actively engaged in trying to defeat and delay the proceedings, no allowance will be made.[1] This allowance will not cover services in connection with the bankrupt's application for a discharge.[2] The fact

In re Waite, 2 N. B. R. 146; In re N. Y. Mail S. S. Co., 3 N. B. R. 155, 185, 7 Blatch. 178, F. C. 10208; s. c. 2 N. B. R. 170, F. C. 10211; In re Mitteldorp, 3 N. B. R. 1, Chan. 288, F. C. 9675; In re Andrews & Jones, 11 N. B. R. 59. F. C. 370; In re Comstock, 9 N. B. R. 88, F. C. 3075.

[95] In re Smith, 108 F. R. 39, 5 A. B. R. 559.

[96] In re Harrison Mercantile Co., 1 N. B. N. 382, 2 A. B. R. 419, 95 F. R. 123; In re Silverman, 2 N. B. N. R. 18, 3 A. B. R. 227, 97 F. R. 325; In re Woodard, 1 N. B. N. 430, 2 A. B. R. 642, 95 F. R. 955.

[97] In re Pauly, 1 N. B. N. 405, 2 A. B. R. 334.

[98] In re Eschwege, 8 A. B. R. 282.

[1] In re Woodard, 1 N. B. N. 430, 2 A. B. R. 955, 95 F. R. 955.

[2] In re Brundin, 42 F. R. 306, 7 A. B. R. 296; but see In re Kross, 96 F. R. 816, 3 A. B. R. 187.

that the bankrupt is guilty of a contempt will not prevent an allowance for services rendered prior to such contempt, such services being confined, in any event, to the preparation of schedules, attendance at examinations and other duties in aid of the estate and its administration, but will not include services in defending bankrupt against charges of fraud and concealment of assets and other matters involving personal liability. The amount of fee will be governed by the extent of the services,[3] and in matters of difficulty the allowance will be correspondingly increased.[4]

In case a partnership is adjudged a bankrupt but one allowance can be made to it for counsel fees, although each bankrupt appears by a different attorney.[5]

§ 1031. —— Bankrupt in voluntary cases.—The question of allowance in this case rests in the sound discretion of the court.[6] The amount of fee is to be determined by the character and condition of the case, the orders necessary for its protection and the time and care required of the attorney.[7] It should be for services necessary to enable the bankrupt to bring his case properly before the court, secure an adjudication and reference, surrender his estate and perform his duties for the benefit of creditors, and is not necessarily restricted to services beneficial to the estate, rendered primarily in its interest.[8] The statute presupposes the payment of fees for

[3] In re Mayer, 101 F. R. 695, 4 A. B. R. 238; In re Michel, 1 N. B. N. 265, 1 A. B. R. 665, 95 F. R. 803; In re Carolina Cooperage Co., 2 N. B. N. R. 23, 3 A. B. R. 154, 96 F. R. 950; see In re Sav. Fund Soc., 11 N. B. R. 303, 2 Hughes, 239, F. C. 11298.

[4] In re Anderson, 103 F. R. 854, 4 A. B. R. 640.

[5] In re Eschwege, 8 A. B. R. 282.

[6] In re Beck, 1 N. B. N. 564, 1 A. B. R. 535, 92 F. R. 889; In re Tebo, 101 F. R. 419, 4 A. B. R. 235; In re Burrus, 97 F. R. 926, 3 A. B. R. 296.

[7] In re Burrus, supra.

[8] In re Kross, 1 N. B. N. 566, 96 F. R. 816, 3 A. B. R. 187; In re Averill, 1 N. B. N. 544; In re Chasnoff, 3 N. B. N. R. 1; see also In re Mayer, 101 F. R. 695, 4 A. B. R. 238; In re Brundin, 112 F. R. 306, 7 A. B. R. 296. Contra, In re Beck, 1 N. B. N. 564; 1 A. B. R. 535, 92 F. R. 889, followed in In re Stotts, 1 N. B. N. 326, 93 F. R. 438, 1 A. B. R. 641; see also In re Gies, 12 N. B. R. 179, F. C. 5407; In re Heirschberg, 1 N. B. R. 195, 2 Ben. 466, F. C. 6329, 6530; In re Handell, 15 N. B. R. 72, F. C. 6017; In re Evans, 3 N. B. R. 62, F. C. 4552; In re Rosenfeld, F. C. 12057; In re Jaycox, 7 N. B. R. 140, F. C. 7239; In re Bigelow, F. C. 1397; In re Montgomery, 3 N. B. R. 35, 3 Ben. 364, F. C. 9726.

services rendered by counsel in the ordinary course of the proceedings, and § 64b, cl. 3, contemplates the allowance of additional fees for extraordinary services.[9] The bankrupt is not entitled to be reimbursed money paid to his attorney before the filing of the petition as a fee for professional services and in preparing the petition and schedules,[10] though if the fee has not been paid, the attorney will be entitled to an allowance therefor.[11]

Where the petition in an involuntary proceeding is dismissed, the alleged bankrupt is entitled to costs;[12] but he is not entitled, in addition, to counsel fees, unless an application "to take charge of and hold" his property prior to the adjudication has been granted and bond given.[13]

§ 1032. —— Attorney representing bankrupt and creditors.—The interests of the creditors and the bankrupt can in no sense be considered compatible, and therefore, under no condition should an attorney be permitted to represent the bankrupt and at the same time any of the creditors or the trustee. Irrespective of the fact that to represent both is to represent adverse interests, and is a violation of the ethics of the profession, and is opposed to public policy, the result is bound to affect injuriously the interests of the creditors. The bankrupt is required to make a disclosure of his assets, and if his attorney, as the representative of the creditors, is permitted either to have a voice in the selection of the trustee or the attorney to represent him, he may to a greater or less extent influence the efforts to obtain a disclosure of the assets of the estate, or to set aside conveyances made or liens created against the bankrupt. Accordingly a fee should not be allowed an attorney for representing both interests.[14]

§ 1033. —— To creditors' attorneys.—Whenever it is for the interest of the estate that rights should be litigated or any

[9] In re Smith, 108 F. R. 39, 5 A. B. R. 559.

[10] In re Matthews, 3 A. B. R. 265, 97 F. R. 772.

[11] In re Terrill, 103 F. R. 781, 3 A. B. R. 625; In re Kross, supra.

[12] G. O. XXXIV.

[13] Sec. 3e, act of 1898; In re Ghiglione, 1 N. B. N. 351, 1 A. B. R. 580, 93 F. R. 186; see also Dundore v. Coats, 6 N. B. R. 304, F. C. 4142; In re Sheehan, 8 N. B. R. 353, F. C. 12738.

[14] See generally Keyes v. McKirrow, 180 Mass. 261, 9 A. B. R. 322; In re Wooten, 118 F. R. 670, 9 A. B. R. 247; In re Kimball, 100 F. R. 777, 2 N. B. N. R. 46, 4 A. B. R. 144; In re Cobb, 7 A. B. R. 104.

steps taken to preserve or recover property belonging to it, and the trustee either arbitrarily or through caprice declines to employ counsel for such purpose, the creditors may apply to the referee for authority to employ counsel to conduct such litigation and his compensation will be paid out of the estate.[15] If one of the creditors of a bankrupt, by his attorney, objects to a claim made by another creditor the trustee having left the state and his counsel refuses to act, resulting in the saving of a considerable sum to the estate, the attorney for such contesting creditor should be paid out of the estate;[16] or where a trustee refuses to move to set aside a sale because of the stifling of competition and certain attorneys successfully resist the confirmation of such sale, thereby saving a large sum to the estate, they should be paid from the estate.[17]

§ 1034. —— To trustee's attorney.—The fee for the trustee's attorney is not embraced in the provision allowing one reasonable fee, etc., but, whenever it becomes necessary for an officer to have legal assistance, the cost is one of the expenses of administration. A trustee may employ legal assistance when necessary, and a court will not give him any direction in advance as to such employment, but he must decide in the first instance as to the necessity therefor.[18] Fees to a reasonable amount may be allowed him as part of the costs of administration by the referee ex parte;[19] though, as a general rule, no allowance will be made for services rendered prior to his appointment.[20] In special cases the court has selected counsel to represent the trustee,[21] though such a proceeding is very unusual.

The allowance of an attorney's fee is within the sound dis-

[15] Sec. 64a (2) of act of February 5, 1903.

[16] In re Little River Lumber Co., 101 F. R. 558, 3 A. B. R. 682.

[17] In re Groves, 2 N. B. N. R. 466; but see In re Archenbrown, 8 N. B. R. 429, F. C. 503; In re Eidom, 3 N. B. R. 39, F. C. 4315; In re Robinson, 3 N. B. R. 17, F. C. 11943; In re Forsyth, 2 N. B. R. 174, F. C. 4948; Freelander v. Holloman, 9 N. B. R. 331, F. C. 5081.

[18] In re Abram, 3 N. B. N. R. 28, 4 A. B. R. 575, 103 F. R. 272; but see In re Smith, 1 A. B. R. 37, 1 N. B. N. 136; In re Little River Lumber Co., 101 F. R. 558, 3 A. B. R. 682.

[19] In re Stotts, 1 N. B. N. 326, 1 A. B. R. 641, 93 F. R. 438; In re Pauly, 1 N. B. N. 405, 2 A. B. R. 334; In re Davenport, 3 N. B. R. 18, F. C. 3587; In re Colwell, 15 N. B. R. 92; In re Pegues, 3 N. B. R. 9; In re Tully, 3 N. B. R. 19, F. C. 3587.

[20] In re N. Y. Mail S. S. Co., 2 N. B. R. 137, F. C. 10210.

[21] In re Arnett, 112 F. R. 770, 7 A. B. R. 522.

cretion of the court, which should be exercised in accord with the spirit of the act, and hence, where there was no onerous duty, the referee's refusal to allow a fee to the trustee's attorney on the ground that he had received a fee as attorney for bankrupt will be sustained.[22] A trustee will not be allowed an attorney's fee for the performance of ordinary duties which he should as trustee have performed.[23] After the appointment of a trustee, no allowance to petitioning creditors can be made for attorney's fees on examinations of the bankrupt, such services being either for the trustee or the individual creditors.[24] The claim of trustee's attorney for a fee for services rendered on an examination undertaken at his suggestion in the hope of discovering concealed assets but without resulting benefit to the estate will not be allowable where there is evident lack of good faith of either attorney or trustee.[25] But an attorney selected by the creditors to represent the trustee, who traces and recovers concealed assets, will be allowed a reasonable fee by the court, where the creditors refuse to pay it.[26]

The question as to allowance of attorney's fees, like other contested questions, may be certified by the referee to the judge for his decision at the instance of interested parties.[27]

§ 1035. —— In case of lien creditor.—Where a lien creditor's claim to priority is opposed, his attorney is entitled to a lien on the proceeds for his fee in prosecuting such claim, and the court of bankruptcy has jurisdiction to pass on his right, fix the amount, with or without a jury, and enforce it in the distribution of the proceeds, notwithstanding that the trustee may have paid such lien creditor his distributive share, it having been paid without due authority.[28]

§ 1036. —— To general assignee's attorney.—The attorneys for an assignee under a voluntary general assignment, in pos-

[22] In re Carolina Cooperage Co., 2 N. B. N. R. 23, 3 A. B. R. 154, 96 F. R. 950.

[23] In re Averill, 1 N. B. N. 544; In re Smith, 2 A. B. R. 648.

[24] In re Silverman, 2 N. B. N. R. 18, 3 A. B. R. 227, 97 F. R. 325.

[25] In re Rozinsky, 101 F. R. 229, 2 N. B. N. R. 787, 3 A. B. R. 830.

[26] In re Evans, 117 F. R. 574, 8 A. B. R. 730, note.

[27] In re Warshing, 5 N. B. R. 350, F. C. 17209.

[28] In re Rude, 101 F. R. 805, 2 N. B. N. R. 498, 4 A. B. R. 319; and see Freelander v. Holloman, 9 N. B. R. 331, F. C. 5081; In re Devore, 16 N. B. R. 56, F. C. 3847; In re Eldridge, 4 N. B. R. 162, F. C. 4330; Cowlay v. Railroad Co., 159 U. S. 575.

session prior to the bankruptcy proceedings, should not be allowed any compensation out of the estate,[29] except upon a showing of absolute necessity for such employment and which resulted in benefit to the estate.[30] Nor should a trustee in a chattel deed of trust executed by an insolvent for the benefit of creditors, be allowed compensation for his services in executing his trust.[31]

§ 1037. —— **Receiver.**—As in bankruptcy matters litigation should not as a rule be conducted by a receiver, yet when services of an attorney or counsel are necessary to a proper care of the estate and the performance of his duties as receiver, he is entitled to an allowance for such services, to be charged and allowed as an expense of the receivership. In that case such expenses would be entitled to priority of payment.[32]

§ 1038. —— **Priority of.**—Priority of payment of the fee of bankrupt's attorney out of the funds on hand is not lost because a claim was not presented until after the declaration and payment of the first dividend;[33] nor because there is a claim for rent which became a lien upon the property more than four months before the filing of the petition, the order of payment as well as the priority being fixed by this subdivision;[34] nor because there are specific liens on the property.[35]

§ 1039. **Bankrupt's expenses.**—While the law makes no provision for the expenses of the bankrupt or his livelihood between the adjudication and his discharge, under the equity powers of the court there appears no reason why a reasonable allowance might not be made out of the estate for the actual necessities of the bankrupt, and if there are exemptions to be subsequently set apart to him, why he should not be required to reimburse the estate therefrom, but this allowance would not include indulgence in vices or extravagant habits of living or unnecessary expenditures.[36]

[29] In re Rogers, 116 F. R. 435; but see In re Pauly, 1 N. B. N. 405, 2 A. B. R. 333.

[30] In re Busey, 6 A. B. R. 603.

[31] Abbott v. Summers, 116 F. R. 687.

[32] In re Kelly Dry Goods Co., 102 F. R. 747, 4 A. B. R. 528.

[33] In re Scott, 1 N. B. N. 353, 2 A. B. R. 324, 96 F. R. 607.

[34] Sec. 64b, act of 1898; In re Duncan, 1 N. B. N. 340, 2 A. B. R. 321.

[35] In re Tebo, 101 F. R. 419, 4 A. B. R. 235; Contra, In re Frick, 1 N. B. N. 214, 1 A. B. R. 719.

[36] In re Tudor, 2 N. B. N. R. 168, 100 F. R. 796, 4 A. B. R. 78.

§ 1040. **Trustee, extra allowance; costs.**—If professional services, necessary to the proper administration of the trust, have been rendered by the trustee himself he is clearly entitled to such reasonable compensation as he would have paid had he employed other competent counsel.[37] A trustee who is charged with mismanagement and removed at the instance of creditors, will be protected against costs of administration where he acts in good faith and they will be paid out of the estate;[38] as in the case of a bill of complaint filed without sufficient cause, but where the want is not sufficiently clear to impeach his good faith.[39]

§ 1041. **Whose wages entitled to priority.**—Wages due to workmen, clerks or servants, which have been earned within three months before the date of filing the petition, not to exceed three hundred dollars to each claimant, are entitled to priority of payment. The words workmen, clerks or servants as here used are neither co-extensive nor limited by the word wage-earner as defined by the law,[40] but are to be understood in their ordinary signification. Thus a clerk is one employed to keep records or accounts, an amanuensis, a scribe, and accountant,[41] or a salesman in a store.[42] A servant is one employed by another for menial offices, or labors for the benefit of a master or employer and is subject to command, a subordinate helper or assistant,[43] but laborers hired by the day's work or any longer time, are not,[44] while it would include a salesman in a retail store.[45] A workman is one employed in labor, whether in tillage or manufacture, a worker, an artificer or laborer, skilled or unskilled, a mechanic or artisan, a handicraftsman.[46] The evident intent of Congress being meant to protect only persons in subordinate positions, it would not include within its provisions a traveling salesman employed at a

[37] In re Mitchell, 1 N. B. N. 264, 1 A. B. R. 687.

[38] In re Mallory, 4 N. B. R. 38, F. C. 890.

[39] Coxe v. Hale, 8 N. B. R. 562, F. C. 3310.

[40] Sec. 1 (27), act of 1898.

[41] Webster; Cent. Dic.

[42] In re Flick, 105 F. R. 503, 5 A. B. R. 465.

[43] Webster; Cent. Dic.; Flesh v. Lindsay, 115 Mo. 1.

[44] Bouvier.

[45] See In re Flick, 3 N. B. N. R. 71, 105 F. R. 503, 5 A. B. R. 465.

[46] Webster; Cent. Dic.; In re Scanlan, 2 N. B. N. R. 58, 97 F. R. 26, 3 A. B. R. 202; In re Greenwald, 2 N. B. N. R. 791, 99 F. R. 705, 3 A. B. R. 696.

salary of $5,000 per annum;[47] the president or managing officer of a corporation;[48] a contractor using his plant;[49] an agent selling goods on a stipulated commission;[50] or the like.

§ 1042. **Wages earned within three months.**—Subdivision 4 of section 64 of the statute limiting the amount of wages to that earned within three months is not to be considered as being affected or enlarged by any general prior or subsequent provision in the law, as subdivision 5, which accords priority of payment to "debts owing to any person who by laws of the states or United States is entitled to priority," but such latter provision is to be construed as applying to debts other and different from those specified in clause 4.[51] Hence, if under the laws of the state wages for a greater period than three months are entitled to priority, allowance can be made only for such as are earned within the three months.[52]

If a clerk permit his employer to retain a portion of his weekly wages, for a benefit fund, the clerk cannot claim priority for the sums so retained during the three months preceding bankruptcy, as wages.[53] If an employe under a contract for services for a fixed period is discharged, and before the expiration of such contract period the employer becomes bankrupt, the employe would be entitled to priority of payment for wages due within the three months prior to bankruptcy not to exceed $300, provided such employe would have a right of action and could recover such wages, since they would not be merged by any action that might be necessary in order to their liquidation or collection.[54] Wages earned subsequent to

[47] In re Scanlan, supra; In re Greenwald, supra.

[48] In re Carolina Cooperage Co., 2 N. B. N. R. 23, 96 F. R. 950, 3 A. B. R. 154; In re Grubbs Wiley Grocery Co., 1 N. B. N. 281, 96 F. R. 183, 2 A. B. R. 442; but see In re Silverman Bros., 2 N. B. N. R. 760, 101 F. R. 219, 4 A. B. R. 38.

[49] In re Rose, 1 N. B. N. 212, 1 A. B. R. 68.

[50] In re Mayer, 101 F. R. 227, 4 A. B. R. 119, aff'g 2 N. B. N. R. 719.

[51] In re Shaw, 109 F. R. 782, 6 A. B. R. 501.

[52] In re Rouse, Hazard & Co., 1 N. B. N. 75, 91 F. R. 96, 1 A. B. R. 234, rev'g 91 F. R. 514, 1 A. B. R. 231; In re Lewis, 99 F. R. 935, 4 A. B. R. 51; In re Union Planing Mill Co., 2 N. B. N. R. 384; In re Marshall Paper Co., 1 N. B. N. 294; In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 F. R. 592, 3 A. B. R. 437; Contra, In re Slomka, 117 F. R. 688, 9 A. B. R. 124.

[53] In re Flick, 105 F. R. 503, 5 A. B. R. 465.

[54] In re Silverman, 2 N. B. N. R. 760, 101 F. R. 219, 4 A. B. R. 83; In re Anson, 2 N. B. N. R. 567, 101 F. R. 698, 4 A. B. R. 231.

the filing of the petition would doubtless be entitled to priority under that subdivision providing for the care and preservation of the estate, if such employment was necessary and to its advantage.[55]

It may be generally stated that labor claims are entitled to priority and payment in full before the discharge of liens against the estate;[56] and there appears no reason why the trustee might not pay the same as soon as sufficient money for that purpose comes into his hands.[57]

§ 1043. Wages assigned or in judgment.—Debts of a bankrupt for labor and services which at the commencement of the proceedings in bankruptcy have been assigned, are not due to the workmen, clerks or servants, and therefore the assignee of such claims would not be entitled to priority of payment,[58] but if such assignment is made subsequent to the filing of the petition, the claims would doubtless be entitled to priority.[59] There is nothing to prevent a father from proving as entitled to priority, a claim for a minor son for labor as an operative.[60]

The general rule that a cause of action is merged in the judgment, does not apply to the case of an employe having a claim against bankrupt for wages earned within three months of the commencement of the proceedings upon which he recovers a judgment, but such claim for wages may be proved as an unsecured debt and will be entitled to priority of payment.[61]

§ 1044. Debts entitled to priority under state or federal laws.—Fifth in the order of payment of the debts entitled to priority under the present bankruptcy law are "debts owing to any person who by the laws of the states or of the United States is entitled to priority." As has been stated, this provision applies to debts other than and different from those specified in the previous clauses of the subdivision; and does not affect or enlarge such specific provision.[62] But it has been

[55] In re Gerson, 1 N. B. N. 190, 1 A. B. R. 251.

[56] In re Tebo, 101 F. R. 419, 4 A. B. R. 235; In re Byrne, 2 N. B. N. R. 246, 97 F. R. 262, 3 A. B. R. 268.

[57] In re Sawyer, 16 N. B. R. 460, 2 Low. 551, F. C. 12396; Ex p. Rockett, 15 N. B. R. 95, 2 Low. 522, F. C. 11977.

[58] In re Weslund, 99 F. R. 399, 3 A. B. R. 646.

[59] In re Campbell, 102 F. R. 686, 4 A. B. R. 535; In re Brown, 3 N B. R. 177, 4 Ben. 142, F. C. 1974.

[60] In re Harthorn, 4 N. B. R. 27, F. C. 6162.

[61] In re Anderson, 2 N. B. N. R. 567, 101 F. R. 698, 4 A. B. R. 231.

[62] Ante, § 1041.

held on the contrary that where wage claimants were entitled to liens by virtue of a state law, they are entitled to priority under subdivision 5 of this section, though the wages were not earned within three months before the date of the commencement of bankruptcy proceedings,[63] but this is contrary to the weight of authority.[64] Provision is made elsewhere for determining the validity of liens;[65] but, if found valid, this provision recognizes their right to priority according to the state or federal laws;[66] notwithstanding that the provision of the state law giving priority forms part of its insolvency law, the insolvency laws being suspended only so far as they come into conflict with the bankrupt law or intrude on its province.[67]

The bankrupt law makes no specific provision for debts due to states, counties or municipalities, other than as taxes, but any other debts, if entitled to priority under a state law, are entitled to like priority under the bankrupt law,[68] but not otherwise.[69] Fees of a sheriff, accruing on a writ of attachment on a provable debt, issued before the filing of the petition, and continuing in force until then, are entitled to priority under the bankruptcy act, where the law of the state gives them

[63] In re Slomka, 117 F. R. 688, 9 A. B. R. 124; In re Lawler, 110 F. R. 135, 6 A. B. R. 184.

[64] See Ante, § 1041.

[65] Sec. 67, act of 1898.

[66] In re Walker, 2 N. B. N. R. 1014; In re Collins, 1 N. B. N. 290, 2 A. B. R. 1; In re Goldstein, 1 N. B. N. 422, 2 A. B. R. 603; In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 F. R. 592, 3 A. B. R. 437; see also Reed v. Bullington, 11 N. B. R. 408; In re Grinnell, 9 N. B. R. 35, 7 Ben. 42, F. C. 5830; In re Scott, 3 N. B. R. 181, F. C. 12517.

[67] In re Wright, 1 N. B. N. 428, 95 F. R. 807, 2 A. B. R. 592; but see In re Rieser, 2 N. B. N. R. 859; In re West Norfolk Lumber Co., 112 F. R. 759, 7 A. B. R. 648; In re Oconee Milling Co., 109 F. R. 866, 6 A. B. R. 475; In re Daniels, 110 F. R. 745, 6 A. B. R. 699; In re Williams v. Crow, 116 F. R. 111, 7 A. B. R. 545; In re Hoover, 113 F. R. 136, 7 A. B. R. 330.

[68] In re Wright, supra; see also In re Dodge, 4 Dill. 532, F. C. 3949; In re Miller, 17 N. B. R. 402, 10 Ben. 58, F. C. 9401; In re Southwestern Car Co., 19 N. B. R. 404, F. C. 13192; In re Chamberlain, 17 N. B. R. 49, 9 Ben. 149, F. C. 2580; Contra, In re Corn Ex. Bk., 15 N. B. R. 431, 7 Biss. 400, F. C. 3242; rev'g 15 N. B. R. 212, F. C. 3243; Gardner v. Cook, 7 N. B. R. 346, F. C. 5226; In re Williams, 2 N. B. R. 79, F. C. 17705; see In re Jenks, 15 N. B. R. 301, F. C. 7276; Ex. p. Holmes, 14 N. B. R. 493, F. C. 6631.

[69] Six Penny Sav. Bk. v. Est. Stuyvesant Bk., 10 N. B. R. 142; 12 Blatch. 179, F. C. 12919; s. c. 9 N. B. R. 318.

priority;[70] or a judgment in favor of a state against a surety on a bail bond given for the appearance of a person indicted for a crime;[71] or the claim of a county for the labor of prisoners.[72]

§ 1045. **Labor liens.**—The statutory liens of laborers and material men are entitled under the bankruptcy law to the same priority as under the state law; but all the requirements of the statute to preserve or render them valid, must be complied with, though if bankruptcy intervene the limitation as to time is governed by the bankruptcy act.[73] The claimant may at once appear in the bankruptcy court and be heard as to his claim without first having it established in another tribunal;[74] but, if some claimants have complied with state statutes so as to give them valid liens while others have not, the former will be given priority over the latter.[75] So in Iowa a labor claim is entitled to priority over the landlord's lien for rent;[76] while in Kentucky the lien of material men is subject to the landlord's lien,[77] and in New Jersey landlords and factory operators have equal liens.[78] Where under a state law a lien for wages is given priority over all claims excepting taxes and costs of administration, and the lien has attached before the fund is turned over to the bankruptcy court, and it is not such an one as is avoided by the bankruptcy act, it will be respected.[79] An attorney employed at a yearly salary is held to be within a statute giving employes a first and prior lien for all work and labor done for a corporation, and when the lien is filed it relates back to the date of employment but fixes no time limit therefor, it is sufficient if filed during the

[70] In re Lewis, 99 F. R. 935, 4 A. B. R. 51; In re Jennings, 8 A. B. R. 358; In re Beaver Coal Co., 107 F. R. 5 A. B. R. 787.

[71] In re Chamberlain, 17 N. B. R. 50, 9 Ben. 149, F. C. 2580.

[72] In re Worcester County, 102 F. R. 808, 4 A. B. R. 497.

[73] In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 F. R. 582, 3 A. B. R. 437.

[74] In re Byrne, 2 N. B. N. R. 247, 97 F. R. 762, 3 A. B. R. 268; In re Emslie, 2 N. B. N. R. 992, 102 F. R. 291; rev'g 2 N. B. N. R. 324, 98 F. R. 716, 3 A. B. R. 516; s. c. 2 N. B. N. R. 171, 97 F. R. 929, 3 A. B. R. 282; In re Beck Provision Co., 2 N. B. N. R. 532.

[75] In re Kerby-Denis Co., 1 N. B. N. 399, 95 F. R. 116, 2 A. B. R. 402, aff'g 1 N. B. N. 337, 94 F. R. 818, 2 A. B. R. 218.

[76] In re Byrne, supra.

[77] In re Falls City Shirt Mfg. Co., supra.

[78] In re McConnell, 9 N. B. R. 387, F. C. 8712.

[79] In re Laird, 109 F. R. 550, 6 A. B. R. 1.

employment and, if bankruptcy intervenes during the six months after filing such lien within which suit may be brought, the bankruptcy limitation of one year supersedes the other.[80] Tailors making up garments by the piece, to be returned in whole or broken lots for examination, and to be paid for at stated intervals if approved, have a lien on all articles in their hands for the work done on them and on any portion of the same specific lot returned for examination; and though a whole lot had been returned for examination, it is not such a delivery as deprives the workmen of their lien, unless the delay in demanding payment amounts to a waiver.[81] A truckman and cartman cannot claim priority under a state statute relating to general assignments since such statute is incompatible with the bankrupt act.[82]

§ 1046. Rent prior to petition.—A claim for rent accruing prior to the filing of the petition is given priority by the bankruptcy act if entitled to such priority by the state law; but rent which will accrue after the filing of the petition is not a provable debt,[83] and not entitled to priority as such,[84] but may be allowed as compensation for use and occupation.[85] If a claim is not entitled under the state law to priority, neither is it entitled to priority under the bankrupt law[86] and though entitled to priority, it is subject to expenses of administering the

[80] In re Fort Wayne Elec. Corp., 2 N. B. N. R. 891.

[81] In re Lewensohn, 2 N. B. N. R. 871, 101 F. R. 776, 4 A. B. R. 79.

[82] In re Rieser, 2 N. B. N. R. 859.

[83] Wilson v. Penn. Trust Co., 114 F. R. 742, 8 A. B. R. 169.

[84] In re Jefferson, 1 N. B. N. 288, 93 F. R. 948, 2 A. B. R. 206; In re Gerson, 1 N. B. N. 315, 2 A. B. R. 170; In re Cronson, 1 N. B. N. 474; In re Shilladay, 1 N. B. N. 475; In re Byrne, 2 N. B. N. R. 247, 97 F. R. 762, 3 A. B. R. 268; In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 F. R. 592, 3 A. B. R. 437; Contra, as to after accruing rent, In re Goldstein, 1 N. B. N. 422, 2 A. B. R. 603; see also In re Ruppel, 2 N. B. N. R. 88, 97 F. R. 778, 3 A. B. R. 233; In re Butler, 6 N. B. R. 501, F. C. 2236; In re Merrifield, 3 N. B. R. 25, F. C. 9465; In re Hamburger, 12 N. B. R. 277, F. C. 5975; Austin v. O'Reilly, 12 N. B. R. 329, 2 Woods, 670, F. C. 665; s. c. 8 N. B. R. 129, F. C. 664; In re Hoagland, 18 N. B. R. 530, F. C. 6545; Longstreth v. Pennock, 12 N. B. R. 95, 20 Wall. 575; In re McConnell, 9 N. B. R. 387, F. C. 8712; Barnes' Appeal, 13 N. B. R. 543, 91 U. S. 521; but see In re Joslyn, 3 N. B. R. 118, 2 Biss. 235, F. C. 7550; In re Lucius Hart Mfg. Co., 17 N. B. R. 459, F. C. 8592.

[85] See ante 1020.

[86] In re Myers, 2 N. B. R. 860, 1049, 102 F. R. 869, 4 A. B. R. 536; In re Frankel, 2 N. B. N. R. 840.

estate.[87] If the landlord has a lien on the goods and chattels for rent, this will be enforced against the proceeds of the sale by the trustee,[88] though it has been held that this would not extend to the proceeds of a license to sell liquors on such premises.[89] During the time the premises are occupied by the receiver or trustee, the allowance is not rent, strictly speaking, but for use and occupation and is given priority as part of the "cost of administration" and not under this provision.[90]

§ 1047. **Claims of bank depositors.**—Ordinarily when funds are deposited in bank, the relation of debtor and creditor immediately arises between the banker and the depositor, and the money becomes the property of the former. He has the right to use it but must pay the debt of the depositor by cashing his checks. When the banker obtains the deposit by committing a fraud, as by receiving it after hopelessly insolvent, the relation between the parties is different, and the money does not become the property of the bank but becomes a trust fund in the banker's hands. In such case money and checks deposited are entitled to priority of payment over the general creditors, and an equal amount may be obtained from the receiver of the bank. Checks and drafts delivered to a bank for collection and deposit under like conditions, which had not been collected when the bank closed its doors, remain the property of the depositor, although indorsed to the bank without qualification and their proceeds upon collection may be recovered by him.[91] In the case of drafts purchased of a bank under like condition which are returned unpaid, the purchaser has the right in equity to reclaim the amount paid therefor.[92] A savings bank would be entitled to priority of payment out of the assets of an insolvent bank created under a statute providing that "upon it becoming insolvent, after paying its circulation, the assets should be first applied to paying deposits made with it by savings banks."[93]

[87] In re Sunseri, 3 N. B. N. R. 65.

[88] In re Mitchell, 8 A. B. R. 324, 116 F. R. 87.

[89] In re Myers, 2 N. B. N. R. 1049.

[90] Wilson v. Penn. Trust Co., 114 F. R. 742, 8 A. B. R. 169.

[91] Richardson v. N. O. Debenture Co., 102 F. R. 780; Bank v. Blackmore, 75 F. R. 771, 21 C. C. A. 516; Wasson v. Hawkins, 59 F. R. 233; Lake Erie & W. R. Co. v. Bank, 65 id. 690; Richardson v. Denegre, 93 id. 572, 35 C. C. A. 452.

[92] Richardson v. Coffee Co., 102 F. R. 785.

[93] In re Stuyvesant Bk., 9 N. B. R. 318, F. C. 13584.

§ 1048. **Claims on checks, or orders.**—Whether or not a claim founded on a check given by one, who becomes bankrupt before such check is presented for payment, is entitled to priority, depends on the construction placed on the contract evidenced by the check. In jurisdictions where it is held to be an equitable assignment of so much of the fund as the check calls for, it will be entitled to priority.[94] Where prior to bankruptcy the holder of a note deposited it with an attorney and subsequently drew orders requesting him to pay divers sums out of the proceeds, the holders of such orders have been held to be entitled to priority.[95]

§ 1049. **Judgments.**—The liens and priorities of judgments are to be determined as they existed under the state law at the time of the filing of the petition;[96] hence, where an execution has been properly levied, the execution creditors are entitled to priority of payment from the proceeds of the property levied on;[97] but a judgment of a minor court, which is not a lien on personal property until levied thereon, nor on real estate until docketed in a higher court, and from which when the petition is filed an appeal is pending, is not entitled to priority.[98] A judgment or levy must be one which is a valid lien under the bankruptcy act;[1] and it must not only be a valid lien but must be properly presented in the bankruptcy proceedings, so that attaching creditors, who have not proved their claims, cannot move that they be given priority in the proceeds of the attached goods;[2] and the claimant must show that he has done everything necessary to make his judgment a lien.[3] A judgment for damages for detention of property is not entitled to priority, where the trustees never had possession, and were not responsible for the detention.[4]

[94] 4th Nat. Bk. of Chicago v. Bk., 10 N. B. R. 44.

[95] In re Smith, 16 N. B. R. 399, F. C. 12992.

[96] In re Walker, 2 N. B. N. R. 1014.

[97] In re Hughes, 11 N. B. R. 452, F. C. 6843; Swope v. Arnold, 5 N. B. R. 148, F. C. 13702.

[98] In re Wood, 1 N. B. N. 430, 95 F. R. 846, 2 A. B. R. 695.

[1] Sec. 67 of the law, post; Phillips v. Bowdoin, 14 N. B. R. 43; Reed v. McIntyre, 19 N. B. R. 45, 98 F. R. 507; In re Steele, 16 N. B. R. 105, 7 Biss. 504, F. C. 13345.

[2] In re Ogles, 1 N. B. N. 400, 2 A. B. R. 514.

[3] In re Woods, supra.

[4] In re Neely, 108 F. R. 371, 5 A. B. R. 836.

A large judgment against a bankrupt, purchased by a national bank for much less than its face value and used to hinder and delay the debtor's creditors is not entitled to priority but should be postponed to the claims of the other creditors;[5] so where the judgment creditor failed for many years to make a levy[6] or to record his lien where the land was located.[7]

§ 1050. **Mortgages.**—A valid mortgage has the same priority under the bankruptcy law to which it was entitled before that law was passed;[8] so of two mortgages on the same property the senior will be entitled to priority of payment over the junior.[9] Where a mortgage junior to a mechanic's lien was given in part to pay off a mortgage senior to such lien, the mortgagee may be subrogated pro tanto to the lien of the original mortgage.[10] The right to priority extends only to the property against which the lien exists; so that after sale of the property, under the mortgage, a balance remaining unpaid is not entitled to priority of payment out of the balance of the estate.[11] Where first and second mortgages exist, the latter may be displaced in favor of costs incurred in selling the property, including compensation to the trustee.[12] When the priority to which a mortgage is entitled is claimed for a lease, or other contract, on the ground that by its terms, it is in the nature of a mortgage, it must appear that the requirements of the registration laws have been fulfilled as fully as if the instrument were a mortgage.[13] Where a claim of priority is based on a chattel mortgage withheld from record for an unreasonable time, the validity of the lien is to be interpreted by state statutes.[14]

§ 1051. **Waiver.**—The right of a creditor to priority of payment in the distribution of the estate may be waived by some

[5] In re Headley, 2 N. B. N. R. 250, 97 F. R. 765, 3 A. B. R. 272.

[6] In re Cozart, 3 N. B. R. 126, F. C. 3313.

[7] In re Dunn, 11 N. B. R. 270, 2 Hughes, 169, F. C. 4172.

[8] Schulze v. Bolting, 17 N. B. R. 167, 8 Biss. 174, F. C. 12489; In re Lacy, 4 N. B. R. 15, F. C. 7970.

[9] In re Bartenbach, 11 N. B. R. 61, F. C. 1068.

[10] In re Drolesbaugh, 2 N. B. N. R. 1079.

[11] In re Snedaker, 4 N. B. R. 43.

[12] In re Utt et al., 105 F. R. 754.

[13] In re Dyke, 9 N. B. R. 430, F. C. 4227.

[14] In re Andrae Co., 117 F. R. 561, 9 A. B. R. 135.

act inconsistent with the continuance of such right; as where creditors claiming money as the proceeds of collections made on their behalf stand silent while such money is paid out in dividends, of the payment of which they had notice;[15] or where a creditor, having a lien for goods sold the bankrupt, did not ask that the goods furnished be sold separately, when all the bankrupt's property was sold, although such creditor had notice of the sale, and where there was no evidence as to the price which such creditor's goods brought,[16] or if the creditor sues the trustees for damages.[17] But there is no waiver where the original pledgee has no knowledge that his stock has been repledged by the bankrupt, until after he had filed his claim as a preferred creditor.[18]

§ 1052. **'c. Disposition of property on setting aside com-'position or discharge.**—In the event of the confirmation of a 'composition being set aside, or a discharge revoked, the prop-'erty acquired by the bankrupt in addition to his estate at the 'time the composition was confirmed or the adjudication was 'made shall be applied to the payment in full of the claims of 'creditors for property sold to him on credit, in good faith, 'while such composition or discharge was in force, and the 'residue, if any, shall be applied to the payment of the debts 'which were owing at the time of the adjudication.'

§ 1053. **Distinction between ante and post creditors.**—Two classes of creditors arise where a confirmation of a composition is set aside or a discharge revoked, i. e., those whose claims accrued prior and those subsequent to the confirmation or discharge. The latter class, acting in good faith on the strength of the confirmation or discharge, give new credit to the debtor, and the purpose of this provision is to permit the application of the subsequently acquired property, together with the estate at the time the composition was confirmed or the adjudication was made, to the payment in full of such claims to the exclusion of those antedating such confirmation or discharge. The residue of the estate, if any, after the payment of such claims, should be applied to the payment of the debts which accrued

[15] Claflin v. Eason, 1 N. B. N. 360, 2 A. B. R. 263.

[16] In re Klapholz, 113 F. R. 1002, 7 A. B. R. 703.

[17] In re Oberhoffer, 17 N. B. R. 546, 9 Ben. 485, F. C. 10396.

[18] In re Hutchinson, 113 F. R. 202.

prior to the adjudication. The purpose of this provision is self-evident. It is only by placing this sanctity upon the adjudication that it will cause full faith and credit to be given it. It permits the transaction of business with persons who have been discharged or who have entered into a composition with creditors, without fear as to the title they may convey, and without fear of loss.

CHAPTER LXV.

DECLARATION AND PAYMENT OF DIVIDENDS.

§1054 (65a) Of equal per cent on general claims.
1055. Dividend, what is.
1056. —— What is not.
1057. —— Declaration and payment.
1058. —— Who entitled to.
1059. —— Who not entitled to.
1060. —— Suspension of payment.
1061. —— Interest.
1062. —— In general.
1063. b. Time of declaring dividends.
1064. c. Dividends received unaffected by subsequently allowed claims.
1065. —— Proof of claim after a dividend.
1066. d. Dividends in case of foreign bankrupt.
1067. Rule of distribution.
1068. e. Claimant's right to collect limited.

§ 1054. '(Sec. 65a) Dividends on unsecured claims.—'Dividends of an equal per centum shall be declared and paid 'on all allowed claims, except such as have priority or are 'secured.'[1]

§ 1055. Dividend, what is.—A dividend in bankruptcy is a parcel of the fund arising from the assets of the estate, rightfully alloted to a creditor entitled to share in the fund, whether in the same proportion with other creditors, or in a different proportion.[2]

[1] Analogous provision of act of 1867. "Sec. 27. . . . That all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate pro rata, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full: Provided, That any debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct."

[2] In re Barber. 1 N. B. N. 559, 1 A. B. R. 307, 97 F. R. 547.

§ 1056. —— what is not.—This section expressly excepts claims which have priority or are secured from those on which the dividends of an equal per centum are to be paid; that is, leaves them to be first paid in full. The debts entitled to priority of payment are defined,[3] as are also the secured claims which the law recognizes.[4] Provision is also[5] made for ascertaining the value of the security and that a dividend shall be paid only on the unpaid balance of the claim, as on other unsecured debts.[6] Hence a dividend, that is less than the whole, is not declared, or paid, on a secured claim,[7] nor on a claim entitled to priority,[8] unless the assets applicable to debts of one class entitled to equal priority are not sufficient to pay them in full, but only upon an unsecured claim.[9] If the security is enforced by the aid of the bankruptcy court, whether voluntarily or involuntarily, the amount paid the secured creditor would be considered a dividend.[10] This is the prevailing and apparently correct view since the act very clearly intends that, if the assets are sufficient, the secured claims and those entitled to priority shall be paid in full seriatim, before the question of a "dividend" of equal per centum can arise at all.[11]

It is maintained, however, that this section does not define dividend, but merely provides that an equal per centum except as to secured claims and those entitled to priority, which are elsewhere required to be paid in full if there are sufficient assets, shall be paid on all allowed claims. The exception refers to the equality, not to the dividend. By reference to the definition of dividend in Bouvier's Law Dictionary and the Act of 1867, the conclusion is reached that dividend refers to the portion of the estate assigned to a creditor, which is required by this section to be at an equal per centum on those claims not entitled to priority or secured, although the term

[3] Sec. 64, act of 1898.

[4] Sec. 67, act of 1898.

[5] Sec. 57h, act of 1898.

[6] In re Rhoads, 2 N. B. N. R. 178.

[7] In re Ft. Wayne Electric Corp., 1 N. B. N. 356, 1 A. B. R. 706, 94 F. R. 109.

[8] In re Sabine, 1 N. B. N. 312, 1 A. B. R. 322; In re Fielding, 2 N. B. N. R. 735, 3 A. B. R. 135, 96 F. R. 800; In re Muhlhauser Co., 9 A. B. R. 80.

[9] In re Ft. Wayne Electric Co., supra.

[10] In re Barber, 1 N. B. N. 569, 3 A. B. R. 307, 97 F. R. 547; In re Sabine, 1 N. B. N. 312, 1 A. B. R. 322; In re Coffin, 1 N. B. N. 507, 2 A. B. R. 344.

[11] In re Fielding, supra.

has been held to include also the portions assigned the secured creditor or the creditor entitled to priority.[12]

§ 1057. **Declaration and payment of dividends.**—Referees are required to declare dividends and prepare and deliver to the trustees dividend sheets showing the dividends declared and to whom payable, and they must be paid within ten days thereafter;[13] but in making such declaration they should withhold funds sufficient to pay all expenses and priorities. Creditors must have at least ten days' notice by mail of the declaration and time of payment of dividends,[14] and if, after such notice, they stand silently by and see money claimed to be theirs used to pay dividends, they will not be heard afterwards to claim it.[15] The meeting for the declaration of a dividend should be combined with that for its payment; and, if there is to be only one dividend, the final meeting can and should, in proper cases, be combined with such dividend meetings.[16]

§ 1058. **Who entitled to.**—Only those creditors whose claims have been proved and allowed before the dividend is declared can participate in the dividends derived from the bankrupt's estate,[17] and they will be permitted to participate as long as there is anything to distribute;[18] but where the claims have been withdrawn for amendment by permission, they are to be taken into account.[19] Plaintiffs in a replevin suit against an assignee under a voluntary assignment are entitled to a dividend from the estate of bankrupt assignor on the difference between their total demand and value of goods replevined;[20] and where A, between whom and bankrupt there were mutual debts paid, after the filing of petition, a note on which he and bankrupt were each liable for half, he cannot set off such payment, but should pay the trustee the difference on the mutual account, and receive a dividend on the payment of half of the

[12] In re Gerson, 1 N. B. N. 384, 2 A. B. R. 352.

[13] Sec. 39 (1), 47a (9), act of 1898.

[14] Sec. 58a, act of 1898.

[15] Claflin v. Eason, 1 N. B. N. 360, 2 A. B. R. 263.

[16] In re Smith, 2 A. B. R. 648, 1 N. B. N. 404.

[17] In re Walker, 1 N. B. N. 510, 3 A. B. R. 35, 96 F. R. 550.

[18] In re Maybin, 15 N. B. R. 468, F. C. 9337.

[19] In re Scott, 1 N. B. N. 353, 2 A. B. R. 324, 96 F. R. 607.

[20] In re Wilcox et al., 1 N. B. N. 188, 1 A. B. R. 554.

note.[21] If a bankrupt's estate is sufficient to pay the claims of all unpreferred creditors in full and leave a surplus, the preferred creditors are entitled to a dividend out of the surplus without surrendering their preference, as against the claim of the bankrupt to such surplus.[22]

The holder of a note given by a firm and also by an individual member of the firm is entitled to receive dividends from the estates of both, but not in the aggregate more than the amount of the note;[23] so it has been held that the trustee of a bankrupt corporation, who has proved his debt as a creditor against such corporation, is entitled to a dividend notwithstanding that he is liable individually for such corporation's debts;[24] and a creditor, who has proved a debt against bankrupt's estate on an indorsed note of bankrupt's and has afterwards received a portion thereof from the indorser and released him from further liability, is entitled to a dividend on the whole amount;[25] but, where the note was indorsed by the bankrupt and the partial payment made by the maker, the creditor is entitled to a dividend on the balance only;[26] and a foreign creditor, who had realized on a judgment and levy subsequent to the adjudication, must account to the trustee for the sum realized and can only have a dividend on the original debt.[27] Anything tending to defeat equality among the creditors is in fraud of the act.[28]

§ 1059. **Who not entitled to.**—Creditors who fail to present their claims on or before the day appointed for the declaration of a dividend are not entitled to a dividend to the prejudice of those who have had their claims allowed, but must look to other property of the bankrupt;[29] nor a creditor, who, without legal excuse, omits to prove and file his claim until after the declaration and order of payment of a final dividend, though his claim may be allowed;[30] and, if a creditor include in his

[21] In re Bingham, 1 N. B. N. 351, 2 A. B. R. 223, 94 F. R. 796.

[22] In re Morton, 118 F. R. 908.

[23] Emery v. Bk., 7 N. B. R. 217, 3 Cliff, 507, F. C. 4446.

[24] Bristol v. Sanford, 13 N. B. R. 78, 12 Blatch. 341, F. C. 1893.

[25] In re Ellerhorst & Co., 5 N. B. R. 144, F. C. 4381.

[26] In re Weeks, 13 N. B. R. 263, 8 Ben. 265, F. C. 17349.

[27] In re Bugbee, 9 N. B. R. 258, F. C. 2115.

[28] In re Palmer, 14 N. B. R. 437, 2 Hughes, 177, F. C. 10678.

[29] In re Hegerty, 2 N. B. N. R. 1083; In re Smith, 15 N. B. R. 97, F. C. 1298.

[30] In re Hegerty, supra.

claim valid items, and also known illegal items, supporting the whole by a false oath, he is debarred from any dividend;[31] and creditors of a partnership forced into insolvency under a state law cannot take dividends, to the prejudice of creditors whose claims arose after the commencement of such insolvency proceedings, against one of the partners who started a new business and was thrown into bankruptcy.[32]

§ 1060. **Suspension of payment.**—Where claims have been presented and permission obtained to amend the proofs, enough may be withheld to pay an equal dividend on such suspended claims, but no lien is thereby acquired on such retained funds, nor is the referee bound to apply them on such claims.[34] The trustee may withhold a dividend declared upon the property of a firm until settlement of a suit brought by such trustee against the dividend creditor to recover an amount due a member of said firm;[35] or on the claim of a judgment creditor from which an appeal has been taken before the bankruptcy proceedings until a decision on the appeal;[36] or payment may be withheld on a particular claim where its declaration was unauthorized;[37] or where a dividend is ordered on a claim for professional services rendered the bankrupt, until those interested have an opportunity to apply to vacate said order.[38] The declaration and payment of dividends, when ready, on proved and allowed claims, will not be delayed for unproved claims, nor will the final settlement and closing of an estate be delayed and other creditors kept waiting for their money, to give a negligent creditor further opportunity to get his claim allowed.[39]

§ 1061. **Interest.**—If a surplus remain after the payment of all claims at the amount computed to be due, creditors may be allowed interest from the date of adjudication to the payment of dividends.[40] Where a claim was sustained on re-ex-

[31] Marrett v. Atterbury, 11 N. B. R. 225, 3 Dill. 444, F. C. 9102.

[32] In re Bates, 2 N. B. N. R. 208.

[34] In re Scott, 1 N. B. N. 353, 2 A. B. R. 324, 96 F. R. 607.

[35] Atkinson v. Kellogg, 10 N. B. R. 535, F. C. 613.

[36] In re Sheehan, 8 N. B. R. 345, F. C. 12737.

[37] In re Herrick et al., 13 N. B. R. 312, F. C. 6420.

[38] In re N. Y. Mail S. S. Co., 3 N. B. R. 73, F. C. 10212.

[39] In re Stein, 1 N. B. N. 339, 1 A. B. R. 662, 94 F. R. 124.

[40] In re Hagan, 10 N. B. R. 383, 6 Ben. 407, F. C. 5898; In re Bank of North Carolina, 12 N. B. R. 130, F. C. 895; In re Town et al., 8 N. B. R. 40, F. C. 14112.

amination after objection by a trustee to its proof, the creditor was held entitled to interest on the withheld dividend.[41]

§ 1062. In general.—Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the dividend paid, if rejected in whole, or the proportional part, if rejected in part.[42]

The distribution of the assets of a bankrupt cannot be interfered with by the process of a state court;[43] nor will a dividend once declared be disturbed except for some error or other good cause.[44] When but a single creditor proves his claim, he is entitled to be paid in full, and, if there is a surplus, the same must be applied to the payment of creditors acknowledged by bankrupt to have valid claims,[45] and it has been held that this is true though the claims have not been proved.[46]

§ 1063. 'b. Time of declaring dividends.—The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided,* That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: *And provided further,* That the final dividend shall not be declared within three months after the first dividend shall be declared.'[47]

[41] In re Kitzinger et al., 19 N. B. R. 307, F. C. 7863.

[42] Sec. 571, act of 1898.

[43] In re Bridgeman, 2 N. B. R. 84, F. C. 1867.

[44] In re Smith, 15 N. B. R. 97, F. C. 12989.

[45] In re Haynes, 2 N. B. R. 78, F. C. 6269.

[46] In re James, 2 N. B. R. 78, F. C. 7175.

[47] Subdivision "b" of this section was amended by the act of February 5, 1903, by the substitution of the matter in the text for the following, which appeared in the act of 1898: "The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such

§ 1064. **'c. Dividends received unaffected by subsequently 'allowed claims.**—The rights of creditors who have received 'dividends, or in whose favor final dividends have been de-'clared, shall not be affected by the proof and allowance of 'claims subsequent to the date of such payment or declarations 'of dividends; but the creditors proving and securing the al-'lowance of such claims shall be paid dividends equal in amount 'to those already received by the other creditors if the estate 'equals so much before such other creditors are paid any 'further dividends.'[48]

§ 1065. **Proof of claims after a dividend.**—The object of this provision is to give each creditor who proves his claim and has it allowed within the year an equal proportion of his claim with those who have previously received dividends, provided that at the time of the declaration and payment of any dividend, there is enough to pay creditors, who have come in since the last preceding dividend, an amount equal to what the others have previously received; and, if there is not enough to do so, the whole is paid on account to the latter creditors; and this process is continued until each successive batch of creditors, who came in between dividends, are made equal with those preceding them; and, only when this has been done, is a further dividend paid to the first batch of creditors. Since the final dividend is not declared until the estate has been completely administered, as a rule, there is nothing out of which creditors whose claims have been proved and allowed subsequent to the declaration of such dividend can be paid, so that, as a penalty

claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order."

Analogous provision of act of 1867. "Sec. 28. . . . The court shall thereupon [on the discharge of the assignee] order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their said debts."

[48] Analogous provision of act of 1867. "Sec. 28. . . . No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other

for their laches, such dilatory creditors will receive nothing, unless further funds should come into the trustee's hands.[49]

§ 1066. 'd. **Dividends in case of foreign bankrupt.**—Whenever a person shall have been adjudged a bankrupt by a court 'without the United States and also by a court of bankruptcy, 'creditors residing within the United States shall first be paid 'a dividend equal to that received in the court without the 'United States by other creditors before creditors who have 'received a dividend in such courts shall be paid any amounts.'

§ 1067. **Rule of distribution.**—The object of this provision is to place creditors of a domestic bankruptcy proceeding upon an equal footing with creditors who have received dividends in a foreign proceeding; but in the event there are no assets in the latter, such creditors would be entitled to share equally with the domestic creditor. If the two proceedings are being conducted simultaneously, and assets are disclosed in the foreign proceeding, a non-resident creditor should be required to resort to the foreign estate first, and then, after the amount of his dividend is ascertained, should be permitted to share in the dividend of the domestic proceeding after the creditors in the latter have received a sum equal to that received by the former in the foreign proceeding.

§ 1068. 'e. **Claimant's right to collect limited.**—A claimant 'shall not be entitled to collect from a bankrupt estate any 'greater amount than shall accrue pursuant to the provisions 'of this Act.'

creditors before any further payment is made to the latter."

[49] In re Hegerty, 2 N. B. N. R. 1083; In re Miller, F. C. 9556; In re Hovey, 8 F. R. 314, aff'g 5 F. R. 356; In re Swift, 106 F. R. 65, 3 N. B. N. R. 271; 5 A. B. R. 415.

CHAPTER LXVI.

UNCLAIMED DIVIDENDS.

§1069. (66a) Dividends unclaimed for six months.
1070. Purpose.
1071. Return to bankrupt.
1072. b. Dividends unclaimed for a year.

§ 1069. '(Sec. 66a) **Dividends unclaimed for six months.**—'Dividends which remain unclaimed for six months after the 'final dividend has been declared shall be paid by the trustee 'into the court.'

§ 1070. **Purpose.**—Instead of permitting the unclaimed dividends to be indefinitely tied up, as was the case under the Act of 1867, and perhaps ultimately inuring to the benefit of the depository in which held, pending a claimant therefor, this section provides a determinate period for making claim, after which such dividends are to be distributed to the creditors who have not been paid in full, and the surplus given the bankrupt.[1]

§ 1071. **Return to bankrupt.**—Under the Act of 1867 it was held that amounts remaining in the hands of the assignee, after discharge of a bankrupt against whose estate no debts were proved and there was reasonable cause to believe none would be proved, upon proper petition would be paid to the bankrupt,[2] which would probably be the rule adopted now without reference to the next subdivision.

§ 1072. 'b. **Dividends unclaimed for a year.**—Dividends re-'maining unclaimed for one year shall, under the direction of 'the court, be distributed to the creditors whose claims have 'been allowed but not paid in full, and after such claims have 'been paid in full the balance shall be paid to the bankrupt; 'provided, that in case unclaimed dividends belong to minors 'such minors may have one year after arriving at majority to 'claim such dividends.'

[1] See In re Fielding, 2 N. B. N. R. 735, 3 A. B. R. 135, 96 F. R. 800.

[2] In re Hoyt, 3 N. B. R. 13, F. C. 6806; citing In re James, 2 N. B. R. 78, F. C. 7175; In re Haynes, 2 N. B. R. 78, F. C. 6269.

CHAPTER LXVII.

LIENS.

§1073. (67a) Unrecorded liens.
1074. Purpose.
1075. Trustee takes subject to liens.
1076. —— Does not represent lien claimants.
1077. What claims meant.
1078. Liens invalid for want of record.
1079. —— Chattel mortgage.
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1081. —— Judgments.
1082. b. Trustee to enforce creditors' rights.
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1084. Trustee represents judgment creditors.
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1089. Comparison of the acts of 1898 and 1867.
1090. Liens mortgage.
1091. —— Chattel mortgage.
1092. —— Enforcement of mortgagee's rights.
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1095. —— In general recognized.
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1098. Transfers must be subsequent to act.
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1100. General assignments.
1101. Property reached by summary proceedings.
1102. Pledge or pawn.
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1110. Comparison of the acts of 1898 and 1867.
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1120. Enforcement of valid liens.
1121. Filing petition fixes status of liens.
1122 Costs and fees.
1123. Practice.
1124. Trustee to give notice of discharge of lien.

§ 1073. '(Sec. 67a) Unrecorded liens.—Claims which for 'want of record or for other reasons would not have been valid

'liens as against the claims of the creditors of the bankrupt 'shall not be liens against his estate.'[1]

§ 1074. **Purpose.**—The object of this section is to carry out the main purpose of bankruptcy legislation, viz., the equal distribution of the bankrupt's property among his creditors, and supplements the provision as to voidable preferences,[2] which should be consulted in connection herewith. It provides that all liens acquired during the four months prior to the commencement of the bankruptcy proceedings whether by the act of the bankrupt or through legal proceedings against him except as against a purchaser in good faith for a valuable consideration shall be void or the trustee subrogated to the rights of the holder of the same, as may be most for the interest of the estate. All liens invalid for want of compliance with some prescribed requisite, as record or the like, by the state laws as against creditors, shall be void against the estate and the trustee is subrogated to the rights of the creditors to protect their rights against any lien created or attempted to be created by the debtor.

The provision that claims which for want of record or other reason are invalid against creditors are not valid against bankrupt's estate, implies that claims properly recorded will be. It is this implication with which the provision[3] from the former act corresponds. The provision made in the present act is new.

§ 1075. **Trustee takes subject to liens.**—The trustee cannot acquire a better title than the bankrupt had, except as to property which has been transferred contrary to the provisions of the law. He takes the estate subject to all liens, equitable assignments[4] and incumbrances other than such as are void for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt:[5]

[1] Analogous provision of act of 1867. "Sec. 20. . . . When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property."

[2] Sec. 60b, act of 1898.

[3] Sec. 20, act of 1898.

[4] In re Hanna et al., 105 F. R. 587, 5 A. B. R. 127.

[5] In re Emslie, 2 N. B. N. R. 992, 102 F. R. 291, 4 A. B. R. 126; In re Bozeman, 2 A. B. R. 809, 1 N. B.

and may dispute any that either the bankrupt or any of his creditors could have legally objected to.[6]

See also Trustee's title, post § 1148.

§ 1076. Lien claimants not represented by trustee.—The trustee does not represent lien claimants; nor can he do anything to preserve or protect a lien against the estate of the bankrupt, for if he did, it would violate the main purpose of the act, which is to distribute such estate equally among the creditors.[7]

§ 1077. What claims meant.—The words used are claims invalid for "want of record or for other reason." Provision is made elsewhere for preferences and transfers in fraud of creditors,[8] and besides, the words "for other reasons" refer to something similar to that which precedes it; as filing or recording a chattel mortgage or bill of sale,[9] filing of notice in the case of mechanic,[10] or labor liens,[11] or asserting a lien within the time prescribed.[12] The liens meant by this provision are those in which something required to be done before they are complete has been omitted. After the proceedings in bankruptcy are commenced a creditor can do nothing to perfect a lien. If it is not then perfect the creditor is prevented from obtaining it.[13] In other words, it is only valid existing liens which are preserved by the act.

N. 479; In re Legg, 1 N. B. N. 420, 2 A. B. R. 805, 96 F. R. 326; In re Booth, 2 N. B. N. R. 377, 98 F. R. 975, 3 A. B. R. 574; In re Burkle, 116 F. R. 766, 8 A. B. R. 542.

[6] In re Leigh Bros., 1 N. B. N. 425, 2 A. B. R. 606, s. c. 1 N. B. N. 526, 96 F. R. 806; In re Kindt, 2 N. B. N. R. 269; In re McNamara, 2 N. B. N. R. 341; Press Post Printing Co. v. London Printing and Pub. Co., 2 N. B. N. R. 774; Contra, In re McKay, 1 N. B. N. 133, 1 A. B. R. 292; In re Ohio Coop. Shear Co., 1 N. B. N. 477, 2 A. B. R. 775.

[7] Goldman v. Smith, 1 N. B. N. 291, 2 A. B. R. 104.

[8] Sec. 60, act of 1898.

[9] Sec. 67e, act of 1898.

[10] Press Post Printing Co. v. London Pr. & Pub. Co., 2 N. B. N. R. 774; In re Legg, 1 N. B. N. 420, 2 A. B. R. 805, 96 F. R. 326; In re Ohio Coop. Shear Co., 1 N. B. N. 477, 2 A. B. R. 775; In re Leigh Bros., 1 N. B. N. 526, 96 F. R. 806; In re Bozeman, 2 A. B. R. 809, 1 N. B. N. 479; In re McKay, 1 N. B. N. 133, 1 A. B. R. 292.

[11] In re Beck Provision Co., 2 N. B. N. R. 532; In re Emslie, 2 N. B. N. R. 992, rev'g 2 N. B. N. R. 324, 98 F. R. 716, 2 N. B. N. R. 171, 3 A. B. R. 282, 97 F. R. 924; In re Drolesbaugh, 2 N. B. N. R. 1079.

[12] In re Kerby Denis Co., 1 N. B. N. 337, 2 A. B. R. 218, 94 F. R. 818, aff'd 1 N. B. N. 399, 2 A. B. R. 402, 95 F. R. 116.

[13] Goldman v. Smith, 1 N. B. N. 291, 2 A. B. R. 104.

§ 1078. Liens invalid for want of record, etc.—The language used in the present act means that claims which for want of record, or for other reasons, are invalid under the laws of the state as construed by the state courts, shall not be liens against the bankrupt's estate.[14] Congress evidently intended to recognize all liens equitable and legal, created under the state laws and to leave them as it found them and not to level them to a common plane;[15] although the lien must be complete when the bankruptcy proceedings are commenced;[16] and, if the statutory requisites have not been complied with, it is invalid.[17] If the filing of suit or notice is merely to enforce a perfected lien, the limitation within which such filing must be done is governed by the lex fori in the state courts and does not apply to the bankruptcy court, which gives one year in which to file claims.[18] A personal claim of indebtedness against the bankrupt's estate does not constitute a lien upon property of the estate in the hands of one making such claim.[19]

§ 1079. Chattel mortgage.—The lien depends on the state law, as construed by the state courts.[20] In the following states it has been held that a chattel mortgage is void as a lien as against other creditors of a bankrupt, for want of record: Colorado,[21] Michigan,[22] New York,[23] Ohio,[24] Oregon,[25] Rhode

[14] Goldman v. Smith, 1 N. B. N. 291, 2 A. B. R. 104, citing Morgan v. Campbell, 2 Wall. 381.

[15] In re Harrison, 2 N. B. N. R. 541.

[16] In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 F. R. 592, 3 A. B. R. 437; Fletcher v. Money, 2 Story 555, F. C. 4864; Ex p. General Assignee, F. C. 5305.

[17] Goldman v. Smith, 1 N. B. N. 291, 2 A. B. R. 104.

[18] In re Sabin, 12 N. B. R. 142, F. C. 12194; In re Brunquest, 14 N. B. R. 529, 7 Biss. 208, F. C. 2055; In re Duke, 9 N. B. R. 430, F. C. 4227.

[19] Sec. 57n, act of 1898; In re Rude, 2 N. B. N. R. 498; Goldman v. Smith, 1 N. B. N. 291, 2 A. B. R. 104; In re Falls City Shirt Mfg. Co., 1 N. B. N. 565, 98 F. R. 592, 3 A. B. R. 437; In re Brunquest, 14 N. B. R. 529, 7 Ben. 208, F. C. 2055.

[20] In re Harrison, 2 N. B. N. R. 541; Etherbridge v. Sperry, 139 U. S. 266.

[21] In re Leigh Bros., 1 N. B. N. 425, 2 A. B. R. 606, s. c. 96 F. R. 806.

[22] In re Adams, 1 N. B. N. 503, 2 A. B. R. 415, 97 F. R. 188; In re Loud, 1 N. B. N. 502.

[23] Stephens v. Perrine, 143 N. Y. 476; Stephens v. Meridian Britannica Co., 160 N. Y. 178; Sheldon v. Wickham, 161 id. 500; In re Harrison, 2 N. B. N. R. 541.

[24] In re Ohio Coop. Shear Co., 1 N. B. N. 477, 2 A. B. R. 775.

[25] In re Booth, 2 N. B. N. R. 377, 98 F. R. 975, 3 A. B. R. 574.

Island,[26] North Carolina,[27] South Carolina,[28] Wisconsin,[29] Nebraska,[30] California,[31] and Missouri.[32]

A chattel mortgage may under a state law be void for insufficiency of description, [33] or for lack of refiling.[34] In Georgia recording is not essential to the validity of a chattel mortgage.[35]

§ 1080. **Conditional sales.**—A sale made by a debtor to a creditor, where no change of possession takes place, but the property is permitted to remain in the possession of the debtor and to be sold by him, is void as to other creditors.[36] A conditional sale in those states where the contract is not required to be recorded, which contemplates shipment to and use in another state, is controlled by the law of the latter state,[37] which if made invalid against execution creditors if not recorded,[38] would be invalid as against the trustee who would be entitled to the property as against the vendor, though the vendee would not have been.[39] In those states, therefore, where a record must be made of contracts of conditional sale of personal property, where the title thereto is to remain in the vendor until paid for, such contracts will be void as to subsequent purchases in good faith unless duly recorded. On the bankruptcy of the vendee in such case, the title to property covered by such contract passes to the trustee.[40]

[26] In re Wright, 107 F. R. 428.

[27] In re Tatem, 110 F. R. 519, 6 A. B. R. 426; In re Jones, 116 F. R. 431, 8 A. B. R. 626.

[28] Stroud v. McDaniel, 106 F. R. 493, 5 A. B. R. 695.

[29] In re Andrae Co., 117 F. R. 561, 9 A. B. R. 135.

[30] In re Perkins Plow Co., 112 F. R. 308, 7 A. B. R. 369.

[31] Guras v. Porter, 118 F. R. 668.

[32] In re Frazier, 117 F. R. 746.

[33] Stroud v. McDaniel, 106 F. R. 493, 5 A. B. R. 695; In re Durham, 114 F. R. 750, 8 A. B. R. 115.

[34] In re N. Y. Economical Printing Co., 110 F. R. 514, 6 A. B. R. 615.

[35] In re Josephson, 116 F. R. 404, 8 A. B. R. 423.

[36] Hadden v. Dooley, 92 F. R. 274; Barker v. Smith, 12 N. B. R. 474, 2 Wood 87, F. C. 986; but see In re Kindt, 101 F. R. 107, rev'g 2 N. B. N. R. 369.

[37] Hart v. Mfg. Co., 7 F. R. 543; Pittsburg L. & C. Wks. v. Bk., F. C. 11198; Heryford v. Davis, 102 U. S. 235; Chi. Ry. Equip. Co. v. Bk., 136 U. S. 268, 280; McGourney v. Ry. Co., 146 U. S. 536.

[38] In re Wilcox & Howe Co., 70 Conn. 224; Cash Register Co. v. Woodbury, 70 Conn. 321.

[39] In re Legg, 1 N. B. N. 420, 2 A. B. R. 805, 96 F. R. 326, citing and disapproving In re McKay, 1 N. B. N. 133, 1 A. B. R. 292; In re Rabenau, 9 A. B. R. 180.

[40] In re Frazier, 9 A. B. R. 21;

§ 1081. **Judgments.**—In certain states an execution placed in the sheriff's hands, but never levied, creates an inchoate lien although the judgment was not recorded, but it will not avail against the estate in bankruptcy[41] any more than in the case of one who takes an inchoate security, such as a judgment note, on which judgment has not been entered;[42] or a judgment docketed on a holiday, which by statute is dies non juridicus;[43] or where goods taken upon execution have been relinquished before the petition in bankruptcy is filed.[44]

§ 1082. **'b. Trustee to enforce creditors' rights.**—'Whenever a creditor is prevented from enforcing his rights as 'against a lien created, or attempted to be created, by his 'debtor, who afterwards becomes a bankrupt, the trustee of the 'estate of such bankrupt shall be subrogated to and may en-'force such rights of such creditor for the benefit of the estate.'

§ 1083. **Meaning of.**—This practically means that, if at the time the bankruptcy proceedings are commenced, there are any outstanding rights which the creditors of the bankrupt or any one of them might enforce, the trustee is subrogated to such rights and may enforce them for the benefit of the estate. It will be observed that such rights are thus preserved, but what was previously available to possibly but a limited number of the creditors, is by the act given for the benefit of all. While, as a rule, as to the bankrupt's property, the trustee stands only in the bankrupt's shoes, yet he so far represents the general creditors that, when they wish to set aside a fraudulent conveyance, he can attack the same though the bankrupt could not.[45]

§ 1084. **Trustee represents judgment creditors.**—Under the former act there was at first much doubt as to the power of a

In re Garcewick, 8 A. B. R. 149; In re Howland, 109 F. R. 869, 6 A. B. R. 495.

[41] In re Hopkins, 1 N. B. N. 71, 1 A. B. R. 209.

[42] Clark v. Iselin, 9 N. B. R. 19, 10 Blatch. 204, F. C. 2825.

[43] In re Worthington, 14 N. B. R. 488, F. C. 18052; s. c. 16 N. B. R. 52, 7 Biss. 455, F. C. 18051.

[44] Sage v. Wyncoop, 16 N. B. R. 363, F. C. 12215.

[45] Sec. 67e, act of 1898; Patten v. Carley, 8 A. B. R. 482; In re New York Economical Printing Co., 110 F. R. 514, 6 A. B. R. 615; In re Leland, 9 N. B. R. 209, 7 Ben. 156, F. C. 8230; Bradshaw v. Klein, 1 N. B. R. 146, 2 Biss. 20, F. C. 1790.

trustee to bring a judgment creditor's action,[46] but the authorities now generally recognize the trustee as so far a judgment creditor as to have a proper standing in an action to reach equities beyond the domain of legal remedies,[47] which right the present act[48] seems to have settled. The title to the bankrupt's property and to the rights of action to recover it are vested by the adjudication in the trustee, and thereafter he must bring the action. He may abide by the result of the adjudication dissolving an attachment or the like, or he may retain the benefit of the attachment if for the good of the estate.[49] Where an execution creditor seeks to subject equitable assets to his judgment and there are no assets to pay the costs of litigation, or the same is of doubtful outcome, or only one creditor is interested, it has been held proper, on notice to all the creditors that a single creditor or class of creditors desires to conduct such litigation through the trustee, to order a suit brought for the benefit of creditors so sharing in the expense.[50] A trustee can take advantage of the fact that a chattel mortgage is void for want of filing, by simply taking possession of the property, but if such chattel mortgage has been once filed and is claimed to be invalid for failure to refile, he must take proper proceedings to have such invalidity established by a competent court; since neither a creditor at large nor a judgment creditor can bring any action against the bankrupt, tending to individually benefit himself.[51]

§ 1085. **Trustee proper party to attack liens.**—The trustee is the proper person to attack chattel mortgages, bills of sale, contracts of conditional sale and bonds for the sale of real estate for want of record and other like grounds of avoidance;[52] to recover the property held under levy by the sheriff,

[46] In re Collins, 12 N. B. R. 379, 12 Blatch. 548, F. C. 3007; Cook v. Whipple, 55 N. Y. 150.

[47] Southard v. Benner, 72 N. Y. 424; In re Metzger, 2 N. B. R. 114, F. C. 9510; In re Duncan, 14 N. B. R. 18, 8 Ben. 365, F. C. 4131; Barker v. Barker's Ass., 12 N. B. R. 474, 2 Woods 87, F. C. 986.

[48] Sec. 70e, act of 1898; Patten v. Carley, 8 A. B. R. 482,

[49] Watschke v. Thompson, 7 A. B. R. 504.

[50] In re McNamara, 2 N. B. N. R. 341.

[51] In re Harrison, 2 N. B. N. R. 541.

[52] In re Adams, 1 N. B. N. 503, 2 A. B. R. 415, 97 F. R. 188; In re Loud, 1 N. B. N. 502; In re Wright, 1 N. B. N. 381, 96 F. R. 187, 2 A. B. R. 364; In re Booth, 2 N. B. N. R. 377, 98 F. R. 975.

the proceeds of property sold on execution and any rents collected by him in a case where the liens acquired by a creditor by judgment, judgment creditor's bill or execution are dissolved by an adjudication in bankruptcy,[53] or to recover property which was given as a voidable preference.[54]

Where a preference is obtained through a judgment and levy of execution, the trustee may proceed by suit in equity to set aside the lien, making the sheriff, as well as the creditor, a party if the money be still in the hands of the sheriff.[55] In proceeding to recover money or property obtained by way of preference, the act of the bankrupt complained of, that the transfer created a preference and that the creditor had reasonable cause to believe a preference was intended must be shown,[56] the burden of proof being on the trustee.[57] Where intent is the question all the circumstances should be considered.[58] If a lien be invalid as to one creditor but valid as to others, or only one may enforce his rights against it, the trustee can avoid it only to the extent of the claim of such creditor.[59] The trustee may oppose without pleading, the petition of a creditor to be awarded a lien.[60]

See also Preferences, ante, §§ 961-963.

§ 1086. 'c. Liens created by legal proceedings.—A lien 'created by or obtained in or pursuant to any suit or proceed-'ing at law or in equity, including an attachment upon mesne 'process or a judgment by confession, which was begun against 'a person within four months before the filing of a petition in 'bankruptcy by or against such person shall be dissolved by 'the adjudication of such person to be a bankrupt if (1) it ap-'pears that said lien was obtained and permitted while the de-'fendant was insolvent and that its existence and enforce-'ment will work a preference, or (2) the party or parties to be

[53] In re Fellerath, 1 N. B. N. 292, 2 A. B. R. 40, 95 F. R. 121; In re Kenney, 2 N. B. N. R. 141, 3 A. B. R. 353, 97 F. R. 554; In re Kenney, 105 F. R. 897, 5 A. B. R. 355.

[54] In re McLam, 97 F. R. 922, 3 A. B. R. 245; In re Burrus, 97 F. R. 926, 3 A. B. R. 296.

[55] Warren v. Bk., 7 N. B. R. 481, 10 Blatch. 493, F. C. 17202.

[56] Mays v. Fritton, 11 N. B. R. 229, 20 Wall. 414; In re Baker, 14 N. B. R. 433, F. C. 763.

[57] Parsons v. Topliff, 14 N. B. R. 547.

[58] Little v. Alexander, 12 N. B. R. 134, 21 Wall. 500.

[59] In re N. Y. Economical Printing Co., 110 F. R. 514, 6 A. B. R. 615.

[60] In re Mulligan, 116 F. R. 715, 9 A. B. R. 8.

'benefited thereby had reasonable cause to believe the defend-'ant was insolvent and in contemplation of bankruptcy, or (3) 'that such lien was sought and permitted in fraud of the pro-'visions of this Act; or if the dissolution of such lien would 'militate against the best interests of the estate of such person 'the same shall not be dissolved, but the trustee of the estate 'of such person, for the benefit of the estate, shall be subro-'gated to the rights of the holder of such lien and empowered 'to perfect and enforce the same in his name as trustee with 'like force and effect as such holder might have done had not 'bankruptcy proceedings intervened.'[61]

§ 1087. **Superseded by subdivision "f."**—This subdivision provides that liens obtained through judicial proceedings begun within four months of bankruptcy shall be dissolved by the adjudication provided either of three conditions exists, or for the subrogation in certain circumstances of the trustee to the rights of the lien-holder. Subdivision f provides for the unconditional dissolution by the adjudication of all liens obtained through legal proceedings within such four months with a similar reservation for the benefit of the state. The two subdivisions appear antagonistic and irreconcilable and under the well known rule of construction the latter subdivision must prevail.[62]

[61] Analogous provision of act of 1898. "Sec. 14. That as soon as said assignee is appointed and qualified, the judge . . . shall . . . assign . . . all the estate . . . of the bankrupt . . . and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate . . . shall vest in said assignee, although the same is then held attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings."

[62] See In re Richards, 2 N. B. N. R. 38, 3 A. B. R. 145, 96 F. R. 937; s. c. below, 2 A. B. R. 518, 95 F. R. 258, in which the origin of the conflict was explained by the fact that two bankruptcy bills were presented to Congress; one to the Senate and one to the House of Representatives, broadly divergent in spirit, the Senate bill supposed to be in the interest of the creditor while the House bill favored the debtor. Upon a disagreement between the two houses the matter was referred to a conference committee near the end of the session, resulting in the incorporation into the House bill of subdivision f, which was in the Senate bill, for the avowed purpose of strengthening it. See also In re Rhoads, 2 N. B. N. R. 301, 98 F. R. 399, 3 A. B. R. 380; In re Kemp, 2 N. B.

§ 1088. **'d. Bona fide liens for a present consideration.**—'Liens given or accepted in good faith and not in contempla-'tion of or in fraud upon this Act, and for a present considera-'tion, which have been recorded according to law, if record 'thereof was necessary in order to impart notice, shall not be 'affected by this Act.'[63]

§ 1089. **Comparison of Acts of 1898 and 1867.**—The present provision is much broader than that in the act of 1867, since that applied only to mortgages, while this applies to any liens. No distinction is made between the different kinds of liens, whether given by the laws of the United States or of the different states or by the act of the parties, but each is recognized and respected according to its dignity. Whenever the creditor has the right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, he has a lien on such property for the security of the debt.[64] All valid liens which exist on a bankrupt's property when the

N. R. 565, 101 F. R. 689, 4 A. B. R. 242. In order to reconcile the conflict between subdivisions "c" and "f," various interpretations have been given the former. In one case it was held to apply to liens acquired within four months in proceedings begun prior thereto and subdivision "c" to liens acquired within the period, which were avoided under certain conditions (In re Hopkins, 1 N. B. N. 71, 1 A. B. R. 209); in another, that both subdivisions would apply in most cases and if it came within the terms of either or both, either or both applied (In re Friedman, 1 N. B. N. 208, 1 A. B. R. 510; Peck Lumber Co. v. Mitchell, 1 N. B. N. 262, 1 A. B. R. 701); in another, that subdivision "c" applied to liens obtained by the acquiescence or connivance of the debtor, or in view of his known insolvency and contemplated bankruptcy (In re O'Connor, 2 N. B. N. R. 90. 95 F. R. 943). Notwithstanding the conflict, other courts have held this subdivision to be in full force being governed in such conclusion by the desire if possible to give every portion of the law effect. (See In re Arnold, 1 N. B. N. 334, 2 A. B. R. 180, 94 F. R. 1001; In re Burrus, 97 F. R. 926, 3 A. B. R. 296; In re Collins, 1 N. B. N. 290, 2 A. B. R. 1; In re Hammond, 98 F. R. 845, 3 A. B. R. 466; In re Rhoades, 2 N. B. N. R. 176; In re Kemp, 2 N. B. N. R. 565, 101 F. R. 689, 4 A. B. R. 242.

[63] Analogous provision of act of 1867. "Sec. 14. . . . That no mortgage of any vessel or any other goods or chattels, made as security for any debt or debts, in good faith and for present consideration and otherwise valid, and duly recorded, pursuant to any statute of the United States, or of any State, shall be invalidated or affected hereby."

[64] Meeks v. Whatley, 10 N. B. R. 498.

proceedings in bankruptcy are commenced are preserved and will be respected by the bankruptcy court, and enforced and allowed to be paid out of the proceeds of the property on which they are liens.[65]

§ 1090. **Mortgage liens.**—The bankruptcy law does not prohibit a person from loaning money at legal rates, or selling goods or other property to one whom he has reason to believe is insolvent, and taking security for the same, provided it be bona fide and without intent or participation in any intent to defraud or defeat the execution of the law.[66] Section 67 of the law contains several specific provisions under which a mortgage, although valid as between the mortgagor and mortgagee, would be avoided on the subsequent adjudication of the mortgagor as a bankrupt. Thus, under subdivision "a," if under the laws of the state, such mortgage must have been recorded in order to have been a valid lien as against the claims of the creditors of the bankrupt, such mortgage will not be a lien against his trustee unless a record was duly made.

Under subdivision "e," any mortgage or encumbrance on the property of a person adjudged a bankrupt within four months prior to the filing of the petition either by or against him, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, will be null and void as against the creditors of such debtor except as to purchases in good faith and for a present fair consideration, and such property will remain a part of the assets and estate of the bankrupt and passes to his trustee, whose duty it is to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. Hence, a mortgage made by the bankrupt within four months of the bankruptcy proceedings to secure an antecedent debt, is void if given with intent to

[65] In re Grinnell, 9 N. B. R. 35, 7 Ben. 42, F. C. 5830.

[66] Crook v. Bk., 1 N. B. N. 530; Darby v. Boatman's Sav. Inst., 4 N. B. R. 195, F. C. 3571; Barbour v. Priest, 19 N. B. R. 518, 103 U. S. 293; In re Morrison, 10 N. B. R. 106, F. C. 9839; Tiffany v. Boatman's Sav. Inst., 9 N. B. R. 245, 18 Wall. 325; Potter v. Coggeshall, 4 N. B. R. 19, F. C. 11322; Campbell v. Waite, 16 N. B. R. 93, 9 Ben. 166, F. C. 2374; Clark v. Iselin, 9 N. B. R. 19, 10 Blatch. 204, F. C. 2825; Gattman v. Honea, 12 N. B. R. 493, F. C. 5271; In re Soudans Mfg. Co., Stiles v. Dunnahoo, 113 F. R. 804; In re Davidson, 109 F. R. 882, 5 A. B. R. 528; McDaniel v. Stroud, 106 F. R. 486, 5 A. B. R. 685; In re Soudans Mfg. Co., Stiles v. Dunnahoo, 113 F. R. 804.

hinder, delay or defraud creditors, or with the intent to interfere with the operation of the bankruptcy law or to prefer the mortgagee.[67] A mortgage will also be void if given to secure one creditor and it covers all the property then available for the general creditors;[68] or if given for an amount much larger than the debt, the balance being intended to protect bankrupt or for his secret benefit;[69] or where the debtor transfers his property to a third person who executes a mortgage thereon to secure a creditor of the insolvent.[70]

Although a person may have been solvent, a mortgage made by him with intent to hinder, delay or defraud his creditors, will become null and void if bankruptcy proceedings are insituated against the mortgagor within four months thereafter. If a mortgage is given to cover a pre-existing debt as well as a new advance, it will be upheld to the extent of the advanee,[71] or if given to secure present and future advances, it will be upheld unless given with an intent to hinder, delay or defraud creditors.[72] The same is true where a mortgage is made shortly before bankruptcy in pursuance of a parole agreement made long before upon a valuable consideration,[73] but a general promise made at the time a debt is contracted to give security if required, cannot be executed after the debtor has become insolvent.[74]

Where sureties receive an indemnity mortgage from their principal, the bankrupt, to secure them against liability in-

[67] In re Glicman, 1 N. B. N. 58; In re Jacobs, 1 N. B. N. 183, 1 A. B. R. 518; In re Teague, 1 N. B. N. 310, 2 A. B. R. 168; In re Stendts, 1 N. B. N. 509; In re Tine, 1 N. B. N. 402, 95 F. R. 425, 2 A. B. R. 493; In re Durham, 114 F. R. 750, 8 A. B. R. 115; In re Eagan State Bank v. Rice, 119 F. R. 107; In re Barrett, 6 A. B. R. 48.

[68] In re McLane, 97 F. R. 922, 3 A. B. R. 245; In re Steininger Mercantile Co., 107 F. R. 669, 6 A. B. R. 68; In re Schuller, 108 F. R. 591, 6 A. B. R. 278.

[69] In re Hugill, 100 F. R. 616, 3 A. B. R. 686.

[70] Gibson v. Dabil, 14 N. B. R. 165, 5 Biss. 198, F. C. 5394.

[71] In re Rousseau, 2 N. B. N. R. 1066; City National Bank v. Bruce, 109 F. R. 69, 6 A. B. R. 311; In re Davidson, supra; In re Sanderlin, 109 F. R. 857, 6 A. B. R. 384; Steadman v. Bank of Monroe, 117 F. R. 237.

[72] Ex p. Ames, 7 N. B. R. 230, F. C. 332.

[73] Sabin v. Camp, 98 F. R. 974, 2 N. B. N. R. 375, 3 A. B. R. 578; Burdick v. Jackson, 15 N. B. R. 318; Post v. Corbin, 5 N. B. R. 11; In re Wood, 5 N. B. R. 421, F. C. 17937; but see Graham v. Stark, 3 N. B. R. 92, F. C. 5676.

[74] Lloyd v. Strobridge, 16 N. B. R. 197, F. C. 8435; Ex p. Ames, 7 N. B. R. 8435, F. C. 323.

curred in his behalf during a fixed period and to a limited amount, such security is not confined to the existing debts or mere renewals, but extends to new debts within the amount limited for which they become liable within the fixed period.[75] The validity of a mortgage given by a partnership is not affected by bankruptcy proceedings within four months thereafter against one of the partners alone.[76]

After the filing of a petition in bankruptcy either by or against the bankrupt, he is prohibited absolutely from giving a mortgage or any security on property to which he had title at the time of filing the petition and the same will be summarily set aside as void,[77] though there is nothing to prevent him giving the mortgage if on property acquired by him subsequent to the filing of the petition for a debt either due prior thereto or incurred subsequently.

A mortgage executed in blank and in which the blanks are subsequently filled takes effect from the latter date, and if within four months and for an antecedent debt will be void.[78]

§ 1091. Chattel mortgages.—A chattel mortgage made in good faith to secure a present advance either in money or property is valid though made within four months of the bankruptcy; but, if made within that time with intent to hinder, delay or defraud creditors and not for such present advance, or if for any reason void under the state law as to creditors, as for want of filing, it is avoided by the bankruptcy. If it shows on its face that it was given in part to secure a pre-existing debt, and in part a new advance of money made at the same time with the mortgage, in the absence of actual fraud it is good as to the new advance,[79] though the mortgagee knew the mortgagor was financially embarrassed.[80] The endorsement by the debtor upon the back of an otherwise valid chattel mortgage given by him, that such mortgage should cover property acquired after its execution, made with

[75] Courier Journal Job Printing Co. v. Brewing Co., 101 F. R. 699, 4 A. B. R. 183; Curry v. McCauley, 20 F. R. 583.

[76] McNair v. McIntyre, 113 F. R. 113, 7 A. B. R. 638; In re Sanderlin, 109 F. R. 857, 6 A. B. R. 384.

[77] In re Sims, 16 N. B. R. 251, F. C. 12888.

[78] In re Barrett, 6 A. B. R. 48.

[79] In re Wolf, 98 F. R. 84, 3 A. B. R. 555; In re Barman, 14 N. B. R. 125, F. C. 999; In re Stowe, 6 N. B. R. 429, F. C. 13513; In re Hull, 115 F. R. 858.

[80] In re Rousseau, 2 N. B. N. R. 1066.

the purpose of delaying creditors, is void.[81] Where one buys property subject to a chattel mortgage thereon and assumes its payment, the trustee cannot repudiate such mortgage.[82]

A chattel mortgage of a stock of goods which permits the mortgagor to retain possession and dispose of them in the ordinary course of trade, is fraudulent as to other creditors, but will be held to be good as against the bankrupt himself.[83] Such permission does not invalidate the mortgage as to other property to which such permission does not apply.[84] A chattel mortgage void as against creditors under a state law[85] under which the mortgagee had taken possession, having reasonable cause to believe the debtor insolvent, is void as to the trustee.[86] If on all the debtor's personalty given to secure a much larger sum than is due to protect the property from creditors, which the mortgagee with knowledge of the facts files with an affidavit that the whole amount is due, it is void,[87] as is one made for a present consideration though not recorded until within four months of the bankruptcy.[88]

§ 1092. **Enforcement of mortgagee's rights.**—Where there is no reason to question the validity of a mortgage, the court of bankruptcy will entertain the summary petition of the mortgagee for the sale of the property,[89] and upon request[90] may authorize its foreclosure in the usual way, making the

[81] Whithead v. Pillsbury, 13 N. B. R. 241, F. C. 17572.

[82] In re Standard Laundry Co., 112 F. R. 126, 7 A. B. R. 254.

[83] In re Leigh Bros., 1 N. B. N. 526, 96 F. R. 806, aff'g 1 N. B. N. 425, 2 A. B. R. 606; In re Ohio Coop. Shear Co., 1 N. B. N. 477, 2 A. B. R. 775; In re Foster, 18 N. B. R. 64, F. C. 4964; Bk. v. Hunt, 4 N. B. R. 198; Kane v. Rice, 10 N. B. R. 469, F. C. 7609; Robinson v. Elliott, 11 N. B. R. 553, 22 Wall. 513; Smith v. Ely, 10 N. B. R. 553, F. C. 1344; In re Gurney, 15 N. B. R. 373, 7 Biss. 414, F. C. 5873; but see Harvey v. Crane, 5 N. B. R. 218, 2 Biss. 496, F. C. 6178; In re Hull, 115 F. R. 858.

[84] In re Soudan Mfg. Co., 113 F. R. 804, 8 A. B. R. 45.

[85] Thornhill v. Link, 8 N. B. R. 521, F. C. 13993; Edmondson v. Hyde, 7 N. B. R. 1, 2 Sawy. 205, F. C. 6244.

[86] Harvey v. Crane, 5 N. B. R. 218, 2 Biss. 496, F. C. 6178; In re Griffiths, 3 N. B. R. 179.

[87] In re Hugill, 2 N. B. N. R. 433, 100 F. R. 616, aff'g 2 N. B. N. R. 429.

[88] In re Barman, 14 N. B. R. 125, F. C. 999.

[89] In re Sacchi, 6 N. B. R. 497, 43 How. Pr. 252, F. C. 12200.

[90] In re Davis, 2 N. B. R. 125, F. C. 3618; In re Sabin, 9 N. B. R. 383, F. C. 12193; Smith v. Kehr, 7 N. B. R. 97, 2 Dill. 50, F. C. 13071; Lockett v. Hodge, 9 N. B. R. 167, F. C. 8444.

trustee a party, or take upon itself the duty of ascertaining and liquidating the lien by its sale and applying the proceeds in payment, after first deducting the costs of court, and the care and preservation of the property, and of the sale and taxes.[91] It may sell the property free of encumbrances, remitting the lien-holders to the proceeds on the application of subsequent encumbrancers or other parties having a right in the equity of redemption;[92] but in such case the right of a mortgagee not a party to the proceedings is not affected.[93] The creditor may sell the property according to the terms of his contract where there is no claim that such power will be exercised in a fraudulent or oppressive manner.[94] It has been held that a petition for an order that the trustee make sale of simply the right of redemption will not be considered.[95]

It has been held that a creditor having a mortgage on the bankrupt's homestead may be required to exhaust that remedy before he can enforce his other remedies against the bankrupt's estate.[96] The filing of a petition in bankruptcy by the defendant in a state court in a proceeding to foreclose a lien on realty, created more than four months before the filing of the petition, does not affect the right of the plaintiff to proceed with the foreclosure, unless he proves his demand in bankruptcy.[97] If the mortgagee has relied upon his security and not proved his claim and the property has not been disposed of as above stated, he may enforce his lien by appropriate proceedings in the state court after the discharge of the bankrupt.[98] The taking possession of mortgaged property by the mortgagee and omission to sell within a reasonable time operates as a satisfaction of the debt to the extent of the value of the property when the mortgagee took possession.[99]

§ 1093. **Landlord's lien.**—Whether or not the landlord has a lien for the rent and, if so, to what extent, is to be deter-

[91] In re Sink, 2 N. B. N. R. 645; In re Ellerhorst, 7 N. B. R. 49, 2 Sawy. 218, F. C. 4380; In re Frick, 1 N. B. N. 214, 1 A. B. R. 719.

[92] Sutherland v. Lake Sup. Ship Canal, R. R. and Iron Co., 9 N. B. R. 298, F. C. 13643.

[93] Ray v. Brigham, 12 N. B. R. 145.

[94] In re Brown, 104 F. R. 762.

[95] Ferguson v. Peckham, 6 N. B. R. 569, F. C. 4741.

[96] In re Sautoff, 14 N. B. R. 364, 7 Biss. 167, F. C. 12379.

[97] Reed v. Equitable Trust Co., 8 A. B. R. 242.

[98] Wicks v. Perkins, 13 N. B. R. 208, 1 Woods, 383, F. C. 17615.

[99] In re Haake, 7 N. B. R. 61, 2 Sawy. 381, F. C. 5883.

mined by the lex loci and the bankruptcy court will recognize and enforce such lien.[1] If at the time the petition[2] is filed the landlord has no lien on a bankrupt tenant's goods as against the bankrupt, he has none subsequently against the trustee;[3] nor would the levying of a distress warrant give the landlord a lien on the property as against the trustee.[4]

§ 1094. **Lien of materialman or mechanic.**—A materialman or mechanic's lien is only equivalent to the additional value which the creditor has by his skill given the debtor's property, and does not diminish the assets applicable to the payment of his pre-existing debt, but stands on the same footing as mortgages, pledges, or any other security given on a new and full consideration, and are not preferences of antecedent debts. Being created by state statute and not the Federal law, the requirement to their validity varies with the provision of the several state laws with reference thereto, and if valid in accordance with such laws, will be so recognized by the court of bankruptcy, provided they are not in controvention to the bankruptcy law.[5]

A number of situations may arise in bankruptcy proceedings as regards the lien of a mechanic or materialman. (1) The mechanic or materialman may become bankrupt, or (2) the owner of the property on which the lien is filed may become bankrupt, or (3) the contractor employing the mechanic and

[1] In re Jefferson, 1 N. B. N. 288, 2 A. B. R. 206, 93 F. R. 948; In re Gerson, 1 N. B. N. 315, 2 A. B. R. 170; In re Goldstein, 1 N. B. N. 422, 2 A. B. R. 603; In re Cronson, 1 N. B. N. 474; In re Shilladay, 1 N. B. N. 475; In re Ruppel, 2 N. B. N. 88, 3 A. B. R. 233, 97 F. R. 778; In re Arnstein & Bonn, 2 N. B. N. R. 106; but see In re Sunseri, 3 N. B. N. R. 65.

[2] Under the act of 1867, it was held that the law made no provision for a landlord's lien, but that in its administration it was the court's duty to recognize and enforce any lien that he might have by virtue of the State law (In re McConnell, 9 N. B. R. 387, F. C. 6712); and that a lien for rent would accordingly be respected (In re Trim v. Wagner, 5 N. B. R. 23; 2 Hughes, 355, F. C. 14174; Bowne, 12 N. B. R. 529, F. C. 1741; Barne's Appeal, 13 N. B. R. 543, 91 U. S. 521; Trim v. Wagner, 5 N. B. R. 23, 2 Hughes, 355, F. C. 14174; Longstreth v. Pennock, 7 N. B. R. 449, F. C. 8488); but would not attach to the goods of a bankrupt found on the premises Bailey v. Loeb, 11 N. B. R. 271, 2 Woods, 578, F. C. 739.

[3] In re Butler, 6 N. B. R. 501, F. C. 2236.

[4] Morgan v. Campbell, 11 N. B. R. 529; Contra, In re Appold, 1 N. B. R. 178, F. C. 490.

[5] In re Coe Powers Co., 109 F. R. 550, 6 A. B. R. 1.

erecting the building for the owner may become bankrupt. These three situations may arise under two conditions connected with bankruptcy proceedings, that is, the notice of the lien may be filed within four months of the filing of the petition in bankruptcy, or it may be filed after the filing of such petition. If the lien be filed after the filing of the petition in bankruptcy by or against the owner of the property, it is clear that such lien is not effective for the reason that whatever is due in such case to the contractor, the materialman or the mechanic passes to the trustee by virtue of the adjudication in bankruptcy, as of the date of filing the petition. The title of the trustee can in no wise be affected by proceedings instituted thereafter. The property of the bankrupt being then in custodia legis, no lien of any character whatsoever can attach.[6] The same rule would apply on the bankruptcy of the contractor, and whatever may be due under his contract passes to his trustee for the benefit of his estate.

A more difficult question arises where the petition in bankruptcy is filed within four months of the filing of the lien of the laborer or materialman. The mere rendition of service or the furnishing of material does not create the lien but it is the step taken by the laborer or materialman in the filing of the notice of the lien or the like as required by the state law that originates the lien. If the lien of a mechanic or materialman is controlled by this section of the statute, it must be by virtue of subdivisions "e" or "f." The former relates to incumbrances created by the act of the bankrupt within four months prior to the filing of the petition when intended to defraud creditors. The latter relates to liens obtained through legal proceedings against an insolvent debtor within four months of the filing of a petition in bankruptcy. This section also preserves all liens given or accepted for a present consideration. It is obvious that a mechanic or a materialman's lien is not included within the scope of subdivision "e" because it is not an incumbrance created by the debtor, but is created by the statute or by the act of the lienor in filing the statutory notice. Neither is it included within the scope of subdivision "f" because the filing of such a lien is not a legal

[6] In re Roeber, 9 A. B. R. 303; Lazzari v. Havens, 39 Misc. 255, 79 N. Y. Supp. 375; see In re Huston, 7 A. B. R. 92; but see In re Georgia Handle Co., 109 F. R. 632, 6 A. B. R. 472.

proceeding, but is a proceeding of the same kind as the filing of a chattel mortgage or recording of a deed. The lien arises from the date of filing of the notice or the taking of such steps as are required by the state law to make it effective, and is in effect a contemporaneous lien upon a present consideration and valid, although filed within the four months.

A lien may be waived or be avoided, however, by the omission of any of the things directed by the state statute to be done or to be included in the notice which must be filed,[7] or if not filed within the time required by the statute, or by such delay in demanding payment as will amount to a waiver of the lien.[8] Neither would there be any right to a lien where the building contract expressly provided that there shall be no lien or right of lien thereunder, and such contract has been recorded in compliance with the provisions of a state law.[9]

§ 1095. Liens in general recognized.—Any lien valid under the state laws and not in contravention of the bankruptcy law will be recognized in the bankruptcy proceedings.[10] Where a creditor has a general lien, and the debtor, on receiving an advance or other accommodation from the creditor, deposits with him a particular security, specially intended or appropriated, or even pledged, to meet such advance or cover such accommodation, the security is subject not only to a particular lien for the advance or liability, but also to the creditor's general lien.[11] A creditor claiming a lien or equity in

[7] In re Emslie, 2 N. B. N. R. 992, 102 F. R. 291, 4 A. B. R. 126, rev'g 2 N. B. N. R. 324, 98 F. R. 716, 3 A. B. R. 516, 2 N. B. N. R. 171, 3 A. B. R. 282, 97 F. R. 929; In re Drolesbaugh, 2 N. B. N. R. 1079; In re Beck Provision Co., 2 N. B. N. R. 532; In re Kerby-Denis Co., 1 N. B. N. 399, 2 A. B. R. 402, 95 F. R. 116, aff'g 1 N. B. N. 337, 2 A. B. R. 218, 94 F. R. 818; In re Dey, 9 Blatch. 285, F. C. 3871; In re Coulter, 5 N. B. R. 64, 2 Sawy. 42, F. C. 3276; Sabin v. Connor, F. C. 12197; In re Cook, 3 Biss. 116, F. C. 3151.

[8] See In re Lewensohn, 2 N. B. N. R. 871, 100 F. R. 776, 4 A. B. R. 79; The Kimball, 3 Wall. 37, 43.

[9] Ludowici Roofing Tile Co. v. Penna Inst., 116 F. R. 661, 8 A. B. R. 739.

[10] Gardner v. Cook, 7 N. B. R. 346, F. C. 5226; In re Bigelow, 1 N. B. R. 202, 2 Ben. 469, F. C. 1395; In re Roseberry, 16 N. B. R. 340, 8 Biss. 112, F. C. 12052; In re Burt & Towne, 13 N. B. R. 137, 12 Blatch. 252, F. C. 2209; The "Home," 18 N. B. R. 557, F. C. 6657; Ex p. Tremont Nail Co., 16 N. B. R. 448, F. C. 14168; In re Coan Carriage Mfg. Co., 12 N. B. R. 203, 6 Biss. 315, F. C. 2915; In re Mitchell, 8 N. B. R. 47, F. C. 9657.

[11] Sparhawk v. Drexel, 12 N. B. R. 450, F. C. 13204; In re Peebles,

bankrupt's property may at once appear in the court of bankruptcy and be heard without first having his lien established in another tribunal.[12] After discharge, a creditor holding a valid lien, who has not proved his debt in bankruptcy, may enforce it against the property of the bankrupt in the state court.[13] See Liquidation, post, § 1197.

A sale by a creditor of property of a debtor, in his possession and on which he has a valid lien will not be disturbed by the fact that the debtor was insolvent and that the creditor knew that bankruptcy was imminent, provided there was no fraud and the property was sold at a fair price.[14] Homestead waiver notes held by creditors of a bankrupt do not constitute liens on the property surrendered by him,[15] though it is in the nature of an incumbrance. A state law giving the vendor of property otherwise exempt, the right to subject it to the payment of his debt due for the purchase money, gives no lien thereon.[16] If the property of a bankrupt is subject to valid liens which exceed in value the estate encumbered by them, there is no necessity for the exercise of the powers of the bankruptcy court.[17]

§ 1096. Priority of liens.—If liens have been acquired bona fide and are recognized by the state law, they have the same priorities and dignity as though no proceedings in bankruptcy had taken place,[18] provided the bankruptcy act has not provided differently on the same subject.[19] A prior lien gives a prior claim, and it may be ascertained and liquidated.[20] If there are two mortgages, and the proceeds of a sale in bankruptcy are sufficient to pay off the first as well as costs and

13 N. B. R. 149, 2 Hughes 394, F. C. 10902.

[12] In re Byrne, 2 N. B. N. R. 246, 3 A. B. R. 268, 97 F. R. 762.

[13] Evans v. Rounsaville, 8 A. B. R. 236; Stoddart v. Locke, 9 N. B. R. 71; Reed v. Bullington, 11 N. B. R. 408.

[14] In re Roseberry, 16 N. B. R. 340, 8 Biss. 112, F. C. 12052.

[15] In re Schuller, 108 F. R. 591, 6 A. B. R. 278; In re Moran, 105 F. R. 801, 5 A. B. R. 472.

[16] In re Wilkes, 112 F. R. 975, 7 A. B. R. 574.

[17] McKean v. Rackey, 3 McLean, 235, F. C. 8891; In re Dillard, 9 N. B. R. 8, 2 Hughes, 190, F. C. 3912; see also In re Lambert, 2 N. B. R. 138, F. C. 8026; Mattock v. Farrington, 2 Hask. 331, F. C. 9298.

[18] Sec. 64b, act of 1898; In re West Norfolk Lumber Co., 112 F. R. 759, 7 A. B. R. 648.

[19] In re Union Planing Mill Co., 2 N. B. N. R. 384.

[20] In re Winn, 1 N. B. R. 131, F. C. 17876; In re Scott, 3 N. B. R. 181, F. C. 12517; In re Lacy, 4 N. B. R. 15, F. C. 7970.

expenses, the senior mortgagee is entitled to be paid in full the same as he would in case of a sale by way of foreclosure.[21]

See also cases under subdivision "f" of this section.

§ 1097. **'e. Transfers within four months void—bona fide 'purchasers.**—That all conveyances, transfers, assignments, or 'incumbrances of his property, or any part thereof, made or 'given by a person adjudged a bankrupt under the provisions 'of this act subsequent to the passage of this act and within 'four months prior to the filing of the petition, with the intent 'and purpose on his part to hinder, delay, or defraud his 'creditors, or any of them, shall be null and void as against the 'creditors of such debtor, except as to purchasers in good faith 'and for a present fair consideration; and all property of the 'debtor conveyed, transferred, assigned, or incumbered as 'aforesaid shall, if he be adjudged a bankrupt, and the same 'is not exempt from execution and liability for debts by the 'law of his domicile, be and remain a part of the assets and 'estate of the bankrupt and shall pass to his said trustee, whose 'duty it shall be to recover and reclaim the same by legal pro-'ceedings or otherwise for the benefit of the creditors. And all 'conveyances, transfers, or incumbrances of his property made 'by a debtor at any time within four months prior to the 'filing of the petition against him, and while insolvent, which 'are held null and void as against the creditors of such debtor 'by the laws of the state, territory, or district in which such 'property is situate, shall be deemed null and void under this 'act against the creditors of such debtor if he be adjudged 'a bankrupt, and such property shall pass to the assignee and 'be by him reclaimed and recovered for the benefit of the 'creditors of the bankrupt. For the purpose of such recovery 'any court of bankruptcy as hereinbefore defined, and any 'state court which would have had jurisdiction if bankruptcy 'had not intervened, shall have concurrent jurisdiction.'[22]

[21] In re Bartenbach, 11 N. B. R. 61, F. C. 1068; In re Ship "Edith," 6 N. B. R. 449, 5 Ben. 432, F. C. 4282.

[22] By the act of February 5, 1903, this subdivision was amended by the insertion at the end thereof the words "For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Analogous provision of act of 1867. "Sec. 14. . . . That as soon as said assignee is appointed and qualified, the judge, or, where

§ 1098. **Transfers must be subsequent to act.**—It should be observed that the conveyances, transfers, assignments or incumbrances avoided by this subdivision must be subsequent to the passage of the bankruptcy law;[23] and hence if made prior to its enactment with intent to prefer, but in the absence of such knowledge on the part of the creditor they are not void under the bankruptcy law nor at common law. If they are not contrary to the state statutes or are not annulled by proceedings taken under a state law within the time limited thereby, the property cannot be recovered from the creditor by the debtor's trustee.[24] It by no means follows that, because a bona fide debt was created before the passage of the act, a mortgage or lien of any kind could be given after its passage to secure such debt, so as to avoid the effect of bankruptcy proceedings.[25]

there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title of all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings. . . . And all the property conveyed by the bankrupt in fraud of his creditors . . . shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee."

The act of 1867 provided that all property conveyed by the bankrupt in fraud of his creditors should, in virtue of the adjudication of bankruptcy and the appointment of an assignee, vest at once in such assignee. It will be observed therefore that the present act includes all the former act did and in addition makes null and void transfers made subsequent to the passage of the act and within four months of the filing of the petition with intent to defraud creditors and all transfers made within such four months and while insolvent which are held null and void by the laws of the locality in which the property transferred is situated. Thus there are three classes. Those that the trustee as representative of the creditors is entitled to have set aside and which are identical with those referred to in the former act and the two additional classes just named.

[23] In re Brown, 1 N. B. N. 240, 91 F. R. 358; In re Meyers, 1 N. B. N. 293, 1 A. B. R. 347.

[24] In re Terrill, 100 F. R. 778, 4 A. B. R. 145.

[25] In re Sievers, 91 F. R. 366, 369, 1 N. B. N. 68, 1 A. B. R. 117.

§ 1099. **The four months' period.**—This subdivision covers frauds upon the act, whether actual or constructive, committed within four months prior to the filing of the petition. It may be construed as the enactment of a federal statute of fraudulent conveyances with respect to proceedings in bankruptcy properly so called, that is, proceedings in the bankruptcy court.[26] But the trustee is not restricted to the four months' period in the case of property transferred in fraud of creditors whose claims existed at the time of the transfer, but he is subrogated to the rights of such creditors[27] and may institute proceedings to have the same set aside at any time within the period fixed by the statute of limitations of the state in which the property is situated.[28] The distinction is between those transfers made wrongful and void by this subdivision if within four months, but which are not forbidden by the state laws or at common law, and those generally fraudulent as to creditors, irrespective of a bankruptcy law. Thus he cannot impeach the title of one who purchased property of the bankrupt, on the ground that it enabled the latter to pay some of his creditors in preference to others, the entire transaction occurring prior to the four months' period;[29] or a transfer made on the payment of a bona fide debt, though intended as a preference, provided the transfer was recorded more than four months, or if not, that there had been continuous, notorious or exclusive possession for that period.[30]

Such provisions as that of the Civil Code of Louisiana "that a mortgage given and inscribed within three months previous to the failure of the debtor, shall be null and void, as presumed to be in fraud of creditors, unless the person to whom the mortgage is given shall prove that he paid, in obtaining it, a real and effective value at the moment of the contract," is in effect incorporated in the bankruptcy law, and such mortgages are void under it, as well as under the state statute.[31]

§ 1100. **General assignments.**—A voluntary general assignment for the benefit of creditors, with or without preferences,

[26] In re Adams, 1 N. B. N. 167, 1 A. B. R. 94.

[27] In re Adams, supra.

[28] In re Grahs, 1 N. B. N. 164, 1 A. B. R. 465; In re Taylor, 1 N. B. N. 480, 95 F. R. 956.

[29] In re Kindt, 101 F. R. 107, 4 A. B. R. 148, rev'g 2 N. B. N. R. 369.

[30] In re Woodward, 1 N. B. N. 352, 2 A. B. R. 233.

[31] In re Jacobs, 1 N. B. N. 183, 1 A. B. R. 518.

made within the prescribed four months, is constructively fraudulent and void, though innocent as a matter of fact. Its purpose is to "hinder, delay and defraud" creditors, within the meaning of this subdivision, because its necessary effect is to defeat the operation of the bankruptcy act, by depriving creditors of the choice of a trustee, of the summary jurisdiction of the bankruptcy court and of the ample control which the law intended to give them over the estate of their insolvent debtor.[32] Such assignment is voidable, not void, and will remain valid unless invalidated by subsequent bankruptcy proceedings, differing in this from proceedings under the state insolvency laws which are void.[33] In this case the assignee takes no title against the creditors,[34] but is a mere naked bailee for them without a shred of title or lawful authority to the possession of the bankrupt's estate,[35] the acts of the creditors under such an assignment being void.[36]

The application of a corporation for voluntary dissolution and the appointment of a temporary receiver is not the equivalent of a general assignment and upon that ground will not be avoided by bankruptcy proceedings;[37] but a general assign-

[32] Lea Bros. v. Geo. M. West Co., 174 U. S. 590, 1 N. B. N. 409, 2 A. B. R. 463; Davis v. Bohle, 1 N. B. N. 216, 1 A. B. R. 412, 92 F. R. 325, aff'g In re Sievers, 1 N. B. N. 68, 1 A. B. R. 117, 91 F. R. 366; In re Abraham, 1 N. B. N. 281, 2 A. B. R. 266, 93 F. R. 767; In re Gutwillig, 1 N. B. N. 40, 1 A. B. R. 78, 90 F. R. 475, aff'd 1 N. B. N. 554, 1 A. B. R. 388, 92 F. R. 337; In re Smith, 1 N. B. N. 356, 2 A. B. R. 9, 92 F. R. 135; Barnes v. Rattew, F. C. 1019; Globe Ins. Co. v. Ins. Co., 14 N. B. R. 311, F. C. 5486; In re Biesenthal, 15 N. B. R. 228, 3 F. C. 76; In re Galvin, 2 N. B. N. R. 146; In re Burt, 1 Dillon, 440, F. C. 2210; Hobson v. Markson, F. C. 6555; In re Smith, F. C. 12974; In re Goldschmidt, 3 N. B. R. 164; Boese v. King, 108 U. S. 385.

[33] Patty Joiner Co. v. Cummins, 4 A. B. R. 269; Mayer v. Hellman, 101 U. S. 496; In re Andrae & Co., 117 F. R. 561, 9 A. B. R. 135.

[34] In re Bruss-Ritter Co., 1 N. B. N. 39, 1 A. B. R. 58, 90 F. R. 651; Lea v. Geo. M. West Co., supra; In re Hathorn, F. C. 6214; In re Bininger, Id. 1420; In re Wallace, Id. 17094; In re Washington Marine Ins. Co., Id. 17246; In re Merchant's Ins. Co., Id. 9441; Thornhill v. Bk., Id. 13992; Mfg. Co. v. Hamilton (Mass.), 51 N. E. 529.

[35] In re Smith, 1 N. B. N. 536, 2 A. B. R. 9, 92 F. R. 135.

[36] In re Gutwillig, 91 F. R. 475, 1 N. B. N. 40, 1 A. B. R. 78.

[37] In re Harper, 2 N. B. N. R. 605, 100 F. R. 266, 3 A. B. R. 804; In re Empire Metallic Bedstead Co., 2 N. B. N. R. 304, 98 F. R. 981, aff'g 1 N. B. N. 386, 2 A. B. R. 329, 95 F. R. 957, rev'g s. c. 1 N. B. N. 301, 1 A. B. R. 136.

ment made by a corporation is equally with one made by an individual avoided by bankruptcy proceedings.[38]

§ 1101. **Property reached by summary proceedings.**—Transfers under this provision avoided by the law, may be reached by summary proceedings in the bankruptcy court, or the trustee may resort to the state court which would have had jurisdiction had bankruptcy not intervened. Under the act of 1898 resort must have been to the state court, but since the amendment of 1903, making the jurisdiction of the bankruptcy and state courts concurrent over actions of this character, the decisions prior thereto are now of but little value.

§ 1102. **Pledge or pawn.**—This being a bailment of personal property as security for some debt or engagement in which delivery of possession is generally essential, it may cover not only goods and chattels and money, but negotiable paper, choses in action, patent rights, bonds, policies of insurance, and other things of like nature. If made within or more than four months prior to bankruptcy[39] in fraud of creditors,[40] upon suit of the trustee it will be set aside. If made within four months for a present fair consideration and not with intent to give the pledgee or one creditor an advantage over another or in fraud of the law, it will be preserved and the trustee may either redeem the pledge or suffer its disposition and reclaim for the benefit of the estate the amount obtained therefor in excess of the pledgee's claim, which may include reasonable expenses incurred in keeping and caring for the pledged property.[41] The right of a pledgee to dispose of the property pledged will be stayed from the filing of the petition in bankruptcy against or by the pledgor, and until consent is obtained of the court of bankruptcy or the trustee signifies his purpose to abandon any claim thereto.[42] Where there has been a valid pledge of goods, the money paid to redeem them cannot be recovered.[43] A pledge of property to secure notes executed within four months of the bankruptcy is not a pref-

[38] Lea v. Geo. M. West Co., 174 U. S. 590, 1 N. B. N. 409, 2 A. B. R. 463, aff'g 1 N. B. N. 79, 1 A. B. R. 261, 91 F. R. 237.

[39] See in re Webb, 2 N. B. N. R. 289, 98 F. R. 404, 3 A. B. R. 386.

[40] See in re Woodward, 1 N. B. N. 352, 2 A. B. R. 233.

[41] 67 F. R. 837.

[42] In re Grinnell, 9 N. B. R. 29, 7 Ben. 42, F. C. 5830.

[43] Jenkins v. Mayer, 3 N. B. N. R. 189, 2 Biss. 303, F. C. 7272.

erence, such notes being renewals of notes given prior to the four months and secured by a pledge of the same property and, under the lex loci contractus, each original pledge being valid.[44]

The present law differs from the Act of 1867 in that it makes a distinction between the liens created by the pledge of property and those created by mortgage.[45] Hence a pledge of insurance policies by a solvent corporation to certain stockholders as collateral security for loans, are valid, although the policies expire and are renewed during the insolvency of the corporation and within four months of its bankruptcy;[46] or securities delivered by an insolvent bank to a creditor as collateral for a loan, though they must be surrendered to the trustee, who may reduce them to money when the court of bankruptcy will determine the right of the creditor to priority.[47]

§ 1103. Conveyances to relatives.—A husband out of debt may settle upon his wife or children such portion of his estate as he pleases, if done in good faith, and not to defraud subsequent creditors;[48] but when largely indebted he cannot make a voluntary donation, or even a voluntary conveyance, to them, to the prejudice of his creditors.[49] A conveyance by a husband, in embarrassed circumstances, of his real estate to trustees for the use of his wife, in consideration of property and money of hers which he had converted to his own use, the wife to have no power of disposition over the property during her life, and not by will without the consent, reserved

[44] Chattanooga Nat. Bk. v. Rome Iron Co., 102 F. R. 755, 4 A. B. R. 441.

[45] Under the act of 1867 the rights of a pledgee were not impaired or affected by any provision of the bankrupt law (Yeatman v. Sav. Inst., 17 N. B. R. 187; 95 U. S. 764); nor could proceedings in bankruptcy deprive creditors of their just possession of property held as security for a debt without discharging the debt (Davis v. R. R. Co., 12 N. B. R. 253, 1 Woods, 661, F. C. 3648) Where stock was pledged to secure call loans, leave of court was not necessary on the pledgor's bankruptcy, to sell the pledged stock and pay the surplus into court (In re Grinnell, 9 N. B. R. 137, F. C. 5829).

[46] In re Little River Lumber Co., 1 N. B. N. 307, 92 F. R. 585, 1 A. B. R. 483.

[47] In re Cobb, 1 N. B. N. 557, 96 F. R. 821, 3 A. B. R. 129.

[48] In re Jones, 9 N. B. R. 556, 6 Biss. 68, F. C. 7444; Sedgwick v. Place, 5 N. B. R. 168, 5 Ben. 184, F. C. 12620.

[49] Kehr v. Smith, 10 N. B. R. 49,

to the grantor and trustees, is void.[50] If one commences a settlement on his wife with an honest intent, as by buying a lot, but continues the same project with a fraudulent intent, as by building a house and furnishing it, the whole transaction will be set aside.[51] If a debtor mortgages his stock in trade to a relative who immediately forecloses, the property being bid in by a stranger, who transfers his bid to a friend of the debtor, and he ostensibly sells the property to debtor's wife, the transfer to the wife will be held to be merely colorable and void.[52] A loan by an insolvent father to his son, who makes a gift of the amount of the loan to his mother, by the purchase of a house in her name, is a fraud upon the father's creditors;[53] and so is a conveyance by a father to his sons, in consideration of his support.[54]

§ 1104. Fraudulent transfers or conveyances.—The term "transfer" includes the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.[55] A fraudulent transfer or conveyance as used in the law, is a transfer of title in fraud of creditors, the transferor usually retaining the beneficial interest.[56] When such transfers are made to defeat the operation of the law they are absolutely void so far as they in any manner stand in the way of enforcing its provisions, where proceedings are instituted within the prescribed time; although they may be valid between grantor and grantee.[57]

The present law is more prohibitive than the Act of 1867, for no reasonable belief of insolvency or fraud on the law by

20 Wall. 31; In re Welsh, 1 N. B. N. 533, 100 F. R. 65, 3 A. B. R. 93; Pratt v. Curtis, 6 N. B. R. 139, F. C. 11375; In re Grahs, 1 N. B. N. 164, 1 A. B. R. 4657; Antrim v. Kelly, 4 N. B. R. 189, F. C. 404; In re Antisdel, 18 N. B. R. 289, F. C. 490; In re Skinner, 97 F. R. 190, 3 A. B. R. 163.

[50] Fisher v. Henderson, 8 N. B. R. 175, F. C. 4820.

[51] Sedgwick v. Place, 10 N. B. R. 28, F. C. 12621.

[52] In re Smith, 100 F. R. 795, 1 N. B. N. 533, 3 A. B. R. 95.

[53] In re Aldred, 3 N. B. R. 61, F. C. 4328.

[54] In re Johann, 4 N. B. R. 143, 2 Biss. 139, F. C. 7331; but see In re Cornwell, 6 N. B. R. 305, F. C. 3250; Adam v. Riley, 122 U. S. 382.

[55] Sec. 1 (25), act of 1898.

[56] In re Musto, 2 N. B. N. R. 577.

[57] Stevenson v. McLaren, 14 N. B. R. 403; In re O'Bannon, 2 N. B. R. 6, F. C. 10394; In re Tomes, 19 N. B. R. 36, F. C. 1457; In re Byrne, 1 N. B. R. 122, F. C. 2270.

the person receiving the preferences is necessary to avoid it. The purpose and intent of the bankrupt alone governs, and if contrary to the act, is sufficient to defeat the transfer except as to purchasers in good faith and for a present fair consideration.[58] Thus where a debtor conveys property to his wife without consideration and with intent to defraud, it should be set aside;[59] or if by an insolvent to one creditor of property sufficient to pay his debt in full, and that there is an excess which the creditor pays in cash is immaterial;[60] or of his stock in trade to a creditor in consideration, inter alia, of the payment of an overdraft of insolvent for which the creditor had verbally become responsible;[61] or to insolvent's brother-in-law for a consideration accepted as equal dollar for dollar but including the payment of two notes indorsed by the father-in-law, being a preference of the latter;[62] or by securities by an insolvent bank as collateral for a loan consisting in part of the lender's deposit;[63] or of stock to an indorser to secure his indorsement on certain acceptances used to secure a creditor;[64] or of a claim against the debtor for a cash discount on an account for goods previously sold;[65] or where one buys commercial paper and within four months of the bankruptcy takes mortgage security therefor;[66] or a lease by an insolvent to a creditor as part of a scheme to give such creditor an advantage over others.[67]

A conveyance would be void if of the whole of a debtor's property;[68] or of the whole with a colorable exception, made

[58] In re McLam, 3 A. B. R. 245, 97 F. R. 922, 1 N. B. N. 402.

[59] In re Skinner, 97 F. R. 190, 3 A. B. R. 163.

[60] Johnson v. Wald, 1 N. B. N. 325, 2 A. B. R. 84, 93 F. R. 640.

[61] Goldman v. Smith, 1 N. B. N. 160, 1 A. B. R. 266, 93 F. R. 182.

[62] In re Taylor, 1 N. B. N. 412; citing Bartholow v. Bean, 10 N. B. R. 241, 18 Wall. 635; Ahl v. Thorne, 3 B. R. 118; Scammon v. Cole, 3 B. R. 393, 5 N. B. R. 257; Graham v. Stark, 3 B. R. 357; Cookingham v. Morgan, 5 N. B. R. 16; Bean v. Laflin, 10 N. B. R. 333.

[63] In re Cobb, 1 N. B. N. 557, 3 A. B. R. 129, 96 F. R. 821.

[64] Crooks v. Bk., 3 A. B. R. 238, rev'g 1 N. B. N. 530.

[65] In re Eggert, 2 N. B. N. R. 390, 98 F. R. 843, 3 A. B. R. 541.

[66] In re Glassburner, 2 N. B. N. R. 634.

[67] Carter v. Hobbs, 1 N. B. N. 529, 2 A. B. R. 224, 94 F. R. 108, s. c. 1 N. B. N. 191, 1 A. B. R. 215, 92 F. R. 594; see Robinson v. White, 1 N. B. N. 513, 97 F. R. 33, 3 A. B. R. 88.

[68] Norton v. Billings, 4 F. R. 623; Keating v. Keefer, 5 N. B. R. 133, F. C. 7635.

as a security for a pre-existing debt;[69] or a conveyance by one partner of his interest to the other, with intent to hinder and defeat creditors,[70] though the mere fact of such transfer would not necessarily imply such an intent,[71] and if the succeeding partner sells in good faith to a third person the firm's entire property it is not a preference, the third person not being a creditor.[72] If a dissolution of partnership is made within four months before the firm is adjudged bankrupt, it will be treated as a void transfer, and the property in the hands of both partners as firm property.[73]

A conveyance absolute on its face in which grantor secretly reserves the right to possess and occupy for a limited period under a parol agreement as part of the consideration is void;[74] or a sale of personalty in fraud of creditors, there being no change of possession;[75] or a bill of sale given as security for a loan to be used with the lender's knowledge in speculating in differences in the profits of which he was to share, and which was not recorded and no possession taken under it;[76] or a sale by an insolvent owner to a broker of goods placed with him for sale on commission;[77] or a conveyance prior to the four months' period but recorded within the period, the local law making such conveyance effective from the time of record as to subsequent purchasers and all creditors;[78] or a deed not at first fraudulent but which becomes so by being concealed;[79] or a deed of trust directing the trustee to sell the property and pay the debts according to the state law, as it takes from the creditors the right to have the estate settled in accordance with the bankruptcy law;[80] or a conveyance to one creditor of

[69] Rison v. Knapp, 4 N. B. R. 114, 1 Dill. 186, F. C. 11861.

[70] In re Rosenbaum, 1 N. B. N. 541; Burrill v. Lawry, 18 N. B. R. 367, F. C. 2199; In re Rudnick, 2 N. B. N. R. 975, 102 F. R. 750, 4 A. B. R. 531; In re Jones, 100 F. R. 781, 2 N. B. N. R. 193, 4 A. B. R. 141.

[71] In re Munn, 7 N. B. R. 468, 3 Biss. 442, F. C. 9925.

[72] In re Rudnick, 2 N. B. N. R. 975, 4 A. B. R. 531, 102 F. R. 750.

[73] In re Head, 114 F. R. 489, 7 A. B. R. 556.

[74] Lukins v. Aird, 2 N. B. N. R. 27, 24 Wall. 78.

[75] In re Taylor, 1 N. B. N. 480. 95 F. R. 956.

[76] Marden v. Phillips, 3 N. B. N. R. 46, 4 A. B. R. 566.

[77] Avery v. Hackley, 11 N. B. R. 241, 20 Wall. 407.

[78] Thornhill v. Link, 8 N. B. R. 521, F. C. 13993.

[79] Barker v. Smith, 12 N. B. R. 474, 2 Woods 87, F. C. 986.

[80] Rumsey & Sikemier Co. v. Novelty Mach. Co., 2 N. B. N. R. 128, 99 F. R. 699, 3 A. B. R. 704.

what would otherwise under the provisions of the act go to all;[81] or where a banker sells a sight draft and next day gives the holder collateral security for it;[82] or a voluntary conveyance as to subsequent creditors, although there are no existing debts if it be shown by facts and circumstances that it was made with an actual intent to defraud them.[83]

§ 1105. **Conveyances valid.**—The law does not prevent an insolvent from dealing with his property prior to the institution of bankruptcy proceedings, provided it is without any purpose to delay or defraud his creditors or to give a preference, and the value of the estate is not impaired.[84] Thus in case of a conveyance for a present fair consideration, or a grant or conveyance to take effect upon property when it is brought into existence and comes to the grantor in fulfillment of an express agreement which is founded on good and valuable consideration has been held valid,[85] as also a conveyance where the creditor has a lien of greater amount than the value of the property.[86] A conveyance, though fraudulent, is not made in contemplation of bankruptcy, where there are no other creditors and the debt is well secured.[87]

§ 1106. **Sales held valid.**—Sales of property in good faith for a present fair price, cannot be impeached for fraud;[88] or a sale merely on the ground of inadequacy of price;[89] or a sale of a portion of debtor's property made in good faith to raise money to discharge a debt, or to pay the costs of contemplated bankruptcy proceedings;[90] or if there be no fraudulent intention, the bankrupt's continuance, though insolvent, to sell at retail, and endeavor to effect, if possible, a compromise with his creditors.[91]

[81] In re McLam, 1 N. B. N. 402, 97 F. R. 922, 3 A. B. R. 245.

[82] Merchant's Nat. Bk. v. Cook, 16 N. B. R. 391, 95 U. S. 342.

[83] Smith v. Kehr, 7 N. B. R. 97, 2 Dill. 50, F. C. 13071; Beecher v. Clark, 10 N. B. R. 385, F. C. 1223.

[84] Clark v. Iselin, 11 N. B. R. 337, 21 Wall. 360.

[85] Barnard v. N. & W. R. R., 14 N. B. R. 469, 4 Cliff. 351, F. C. 1007.

[86] Catlin v. Hoffman, 9 N. B. R. 342, 2 Sawy. 486, F. C. 2521.

[87] In re Johann, 4 N. B. R. 143, 2 Biss. 139, F. C. 7331.

[88] In re Strenz, 8 F. R. 311; Sedgwick v. Wormser, 7 N. B. R. 186, F. C. 12636.

[89] In re Shaw, 19 N. B. R. 512, F. C. 12716.

[90] Tiffany v. Lucas, 8 N. B. R. 49, 15 Wall. 410; In re Keefer, 4 N. B. R. 126, F. C. 7636.

[91] In re Munger, 4 N. B. R. 90, F. C. 9923.

§ 1107. **Evidence of fraudulent intent.**—In an action to set aside a conveyance by an insolvent debtor, on the ground of fraud, such fraud must be proved, not assumed,[92] though cases may arise where the intent will be inferred from the circumstances of the transaction.[93] A sale or conveyance by a bankrupt out of the usual and ordinary course of business is presumptively fraudulent, but this presumption may be rebutted[94] by evidence aliunde to be produced by the vendee.[95] In determining whether a given transaction is made in the ordinary and usual course of business of a party, the question is not whether such transactions are usual in the general conduct of business throughout the community, but whether they are according to the usual course of business of the particular person whose conveyance is the subject of investigation.[96]

§ 1108. **Notice to transferee.**—The filing of a petition praying an adjudication in bankruptcy is notice to all the world and all persons dealing with the one so charged do so at their peril. Hence a transferee or a purchaser of negotiable paper, after such filing, is not a bona fide holder without notice;[97] as to be such he must be without notice of the rights and equities sought to be enforced at the time of payment of the consideration.[98] To constitute a bona fide purchaser for value, he must not only show that he had no notice, but he must have paid a consideration at the time of the transfer either in money or other property, or by a surrender of existing debts or securities, which would exclude a second purchaser knowing of bankrupt's failure and that seller held under mortgage from bankrupt.[99]

[92] Campbell v. Waite, 16 N. B. R. 93, 9 Ben. 166, F. C. 2374; Crump v. Chapman, 15 N. B. R. 571, 1 Hughes, 183, F. C. 3455.

[93] Gattman v. Honea, 12 N. B. R. 493, F. C. 5271.

[94] Sedgwick v. Place, 5 N. B. R. 168, 5 Ben. 184, F. C. 12620.

[95] Norton v. Billings, 4 F. R. 623; Babbitt v. Walbrun, 4 N. B. R. 30, 1 Dill. 19, F. C. 694; Rison v. Knapp, 4 N. B. R. 114, F. C. 11861; Collins v. Bell, 3 N. B. R. 46, F. C. 3010; U. S. v. Baker, 13 N. B. R. 88, F. C. 14584; In re Sims, 19 N. B. R. 57, F. C. 12889; Webb v. Sachs, 15 N. B. R. 168, 4 Sawy. 158, F. C. 17325; In re Deane, 2 N. B. R. 29, F. C. 3700; Walbrun v. Babbitt, 2 N. B. R. 1, 16 Wall. 577; In re Langley, 1 N. B. R. 155.

[96] Rison v. Knapp, 4 N. B. R. 114, F. C. 11861.

[97] In re Lake, 6 N. B. R. 542, 3 Biss. 304, F. C. 7992; Catlin v. Hoffman, 9 N. B. R. 342, 2 Sawy. 486, F. C. 2521.

[98] Marsh v. Armstrong, 11 N. B. R. 125.

[99] Rison v. Knapp, 4 N. B. R. 114, F. C. 11861.

§ 1109. 'f. **Liens obtained through legal proceedings.**— 'That all levies, judgments, attachments, or other liens, ob- 'tained through legal proceedings against a person who is 'insolvent, at any time within four months prior to the filing 'of a petition in bankruptcy against him, shall be deemed 'null and void in case he is adjudged a bankrupt, and the 'property affected by the levy, judgment, attachment, or other 'lien shall be deemed wholly discharged and released from the 'same, and shall pass to the trustee as a part of the estate of 'the bankrupt, unless the court shall, on due notice, order that 'the right under such levy, judgment, attachment, or other 'lien shall be preserved for the benefit of the estate; and there- 'upon the same may pass to and shall be preserved by the 'trustee for the benefit of the estate as aforesaid. And the 'court may order such conveyance as shall be necessary to 'carry the purposes of this section into effect: Provided, 'That nothing herein contained shall have the effect to destroy 'or impair the title obtained by such levy, judgment, attach- 'ment, or other lien, of a bona fide purchaser for value who 'shall have acquired the same without notice or reasonable 'cause for inquiry.'[1]

§ 1110. **Comparison of the Acts of 1867 and 1898.**—The provision in the Act of 1867 dissolved any attachment on mesne process provided it was made within four months of the bankruptcy proceedings. The provision of the present act dissolves any "lien" (a broader term) obtained through legal proceedings against a person who is insolvent,[2] at any time within four months prior to the filing of a petition in bankruptcy.

§ 1111. **Constitutionality.**—The fact that in voluntary proceeding liens acquired prior to the passage of the act are affected by it does not render it unconstitutional since it does not impair the obligation of existing contracts, and hence is

[1] Analogous provision of act of 1867. "Sec. 14. That as soon as said assignee is appointed and qualified, the judge . . . shall . . assign . . . all the estate . . . of the bankrupt . . . and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate . . . shall vest in the said assignee, although the same is then held attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings."

[2] Sec. 1 (15), act of 1898.

not open to constitutional objection on that ground, but simply affects the remedy to enforce such contracts. The difference between the obligation of a contract and the remedy given by the legislature to enforce that obligation, exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.[3] Irrespective of this, the inhibition to the impairment of contracts applies merely to the states and not to the Federal government, and although in this case a contract was impaired it would not be unconstitutional.[4]

§ 1112. Conflict between subdivisions "c" and "f."—While statutes should, if possible, be construed so as to give every part effect, it is sometimes impossible to harmonize them, as appears to be the case here. It is quite clear that Congress either inadvertently left subdivision "c" in the bill after adding subdivision "f," or intended to strengthen the act by the broader and more drastic provisions of the latter clause. Subdivision "c" provides that liens of a certain character shall be void under certain conditions, while subdivision "f" provides that all the liens embraced by subdivision "c" shall be void without reference to any conditions save the insolvency of the debtor and their being obtained within four months. Subdivision "f" is the latest expression of the legislative will and is in harmony with the general purpose of the act to avoid preferences obtained after insolvency and an express inhibition against, and a declaration of the unlawful character of, liens which subdivision "c," if it sustains, does so by implication only. Subdivision "f" is therefore the law governing liens obtained within four months prior to the filing of a petition in bankruptcy through legal proceedings against an insolvent debtor.[5]

[3] In re Rhoads, 2 N. B. N. R. 301, 98 F. R. 399, 3 A. B. R. 380; citing Sturgis v. Crowninshield, 4 Wheaton, 368. See Metcalf v. Barker, 187 U. S. 165, 9 A. B. R. 36.

[4] In re Jordan, 8 N. B. R. 180, F. C. 7514; In re Smith, 14 N. B. R. 295, F. C. 12996; In re Everett, 9 N. B. R. 90, F. C. 4579.

[5] In re Rhoads, 2 N. B. N. R. 301, 98 F. R. 399, 3 A. B. R. 380; s. c. 2 N. B. N. R. 176; citing The Attorney General v. Chelsea Water Wks., Fitzgibbon, 195, followed in Townsend v. Brown, 4 Zabriskie, 88, and Puffendorf's Rules, p. 132, Potter's Dwarris on Statutes; see also In re Richards, 2 N. B. N. R. 38, 3 A. B. R. 145, 96 F. R. 937; s. c. 2 A. B. R. 518, 95 F. R. 258; In re Peck Lumber Co., 1 N. B. N. 262, 1 A. B. R. 701; In re Moyer, 1 N. B. N. 270, 1 A. B. R. 577, 93 F. R. 188; In re Francis Valentine Co., 1 N. B. N. 529, 2 A. B. R. 522, 94 F. R. 793.

§ 1113. **Applies to voluntary and involuntary cases.**—The language, "filing of a petition in bankruptcy against him," taken literally means an involuntary proceeding; but "a person against whom a petition has been filed" is defined[6] to include "a person who has filed a voluntary petition," and therefore justifies the position that this subdivision applies to voluntary as well as involuntary proceedings. It is only in this way that a harmonious design can be evolved from the law. To restrict its application to involuntary proceedings would defeat the manifest purpose to secure equality in the treatment of creditors and to avoid all transactions within a limited time, which are in fraud of creditors. By a race of dilligence between debtor and creditor, the former might anticipate the action of the latter and, by voluntary bankruptcy legalize fraudulent transactions which the act would avoid upon involuntary proceedings. This could never have been intended and should be so interpreted only if the language were so clear and precise, as would admit of no other construction.[7]

§ 1114. **Attachments.**—Under both the present and the former acts attachments sued out and levied upon the property of an insolvent within four months of the filing of a petition in bankruptcy, whether voluntary or involuntary,[8] are dissolved by the adjudication thereon,[9] though the suit may

[6] Sec. 1 (1), act of 1898.

[7] In re Lesser, 2 N. B. N. R. 599, 100 F. R. 433, 3 A. B. R. 815; In re Rhoads, 2 N. B. N. R. 301, 98 F. R. 399, 3 A. B. R. 380; s. c. 1 N. B. N. 176; In re Richards, 2 N. B. N. R. 38, 3 A. B. R. 145, 96 F. R. 935; s. c. 2 A. B. R. 518, 95 F. R. 258; In re Specht, 2 N. B. N. R. 238; In re Higgins, 2 N. B. N. R. 115, 3 A. B. R. 364, 97 F. R. 775; In re Vaughan, 2 N. B. N. R. 101, 3 A. B. R. 362, 97 F. R. 560; In re Fellerath, 1 N. B. N. 292, 2 A. B. R. 40, 95 F. R. 121; In re Friedman, 1 N. B. N. 208, 1 A. B. R. 510; Peck v. Mitchell, 1 N. B. N. 262, 1 A. B. R. 701; In re Hopkins, 1 N. B. N. 71, 1 A. B. R. 209; In re Dobson, 98 F. R. 86, 3 A. B. R. 420; Contra, In re O'Connor, 2 N. B. N. R. 90, 95 F. R. 943; In re DeLue, 1 N. B. N. 555, 1 A. B. R. 387, 91 F. R. 510; In re Collins, 1 N. B. N. 290, 2 A. B. R. 1; In re Easley, 1 N. B. N. 230, 1 A. B. R. 715, 93 F. R. 419; In re Brown, 91 F. R. 358, 1 A. B. R. 107; In re Benedict, 8 A. B. R. 463; Brown v. Case, 6 A. B. R. 744.

[8] In re McCartney, 109 F. R. 621, 6 A. B. R. 367; In re Richards, 3 A. B. R. 145, 96 F. R. 935, 37 C. C. A. 634.

[9] Bear v. Chase, 99 F. R. 920, 3 A. B. R. 746; In re Francis-Valentine Co., 1 N. B. N. 529, 2 A. B. R. 522, 94 F. R. 793, aff'g 1 N. B. N. 532, 2 A. B. R. 188, 93 F. R. 953; In re Kemp, 2 N. B. N. R. 565, 101 F. R. 689, 4 A. B. R. 242; In re Arnold, 1 N. B. N. 334, 2 A.

have been pending several years;[10] and the money attached should pass to the trustee for the benefit of the estate.[11] This applies as well to a landlord's distress warrant.[12] A lien is not invalidated under this section, that is obtained by the levy of an attachment more than four months prior to the bankruptcy proceedings, though dependent for enforcement on a judgment obtained within four months.[13] It has been held that this provision avoiding liens does not apply to liens upon property upon which the court does not undertake to administer and over which it has no jurisdiction, as in the case of property set apart as exempt.[14]

§ 1115. **Creditors' suits.**—A creditor who files a bill to reach equitable assets or set aside a fraudulent conveyance or the like thereby acquires an equitable lien,[15] which although contingent in the sense that it may possibly be defeated by the event of the suit, yet so long as it exists it is a specific lien or charge on the assets, and if filed more than four months before the filing of the petition in bankruptcy, would not be defeated by the adjudication, although the judgment or decree in enforcement of such lien is rendered within the four months.[16]

B. R. 180, 94 F. R. 1001; In re Burns, 3 A. B. R. 296, 97 F. R. 926; In re Hammond, 98 F. R. 845, 3 A. B. R. 466; Duffield v. Horton, 16 N. B. R. 59, 19 N. B. R. 13; Bennington v. Lowenstein, 1 N. B. R. 157, F. C. 10938; Appleton v. Stevers, 10 N. B. R. 515; In re Ellis, 1 N. B. R. 154, F. C. 4400; Kaiser v. Richardson, 14 N. B. R. 391; Miller v. Bowles, 10 N. B. R. 515, 58 N. Y. 263; Bk. v. Overstreet, 13 N. B. R. 154; King v. Loudon, 14 N. B. R. 383; In re Kanpisch Creamery Co., 107 F. R. 93, 5 A. B. R. 790; see Metcalf v. Barker, 187 U. S. 165, 9 A. B. R. 36, 44; Hart v. Schuylkill Plush & Silk Co., 8 A. B. R. 479; In re Beals, 8 A. B. R. 639; Watschke v. Thompson, 7 A. B. R. 504.

[10] In re Higgins, 2 N. B. N. R. 115, 3 A. B. R. 364, 97 F. R. 775.

[11] Peck v. Mitchell, 1 N. B. N. 262, 1 A. B. R. 701, citing and criticising, In re Delue, 1 N. B. N. 555, 1 A. B. R. 387, 91 F. R. 510.

[12] In re Dougherty Co., 109 F. R. 480, 6 A. B. R. 457.

[13] In re Beaver Coal Co., 110 F. R. 630, 6 A. B. R. 404; In re Beaver Coal Co., 113 F. R. 889, 7 A. B. R. 542; In re Blair, 108 F. R. 529, 6 A. B. R. 206; Contra, In re Lesser, 108 F. R. 201, 5 A. B. R. 326, and In re Johnson, 108 F. R. 373, 6 A. B. R. 202.

[14] Powers Dry Goods Co. v. Nelson, 7 A. B. R. 506; In re Little, 110 F. R. 621, 6 A. B. R. 681.

[15] Metcalf v. Barker, 187 U. S. 165, 9 A. B. R. 36; Miller v. Sherry, 2 Wall. 237; Freedman's Trust Co. v. Earle, 110 U. S. 710.

[16] Metcalf v. Barker, supra; contra, In re Lesser, 3 N. B. N. R. 599, 100 F. R. 433, 3 A. B. R. 815; In re Fellerath, 1 N. B. N. 292, 2 A. B. R. 40, 95 F. R. 121.

If, however, in such suit a state court acquired jurisdiction of the subject matter and the property was in its actual possession, or that of its receiver more than four months before the adjudication in bankruptcy, the bankrupt act does not interfere with the state court's jurisdiction, possession or control of the property, without regard to whether the receiver had taken actual possession, or not, but the latter will be permitted to dispose of the same under its own decrees.[17] When property fraudulently conveyed before the passage of the bankruptcy act is in the hands of a receiver and beyond the reach of the bankruptcy court, but the fraudulent grantee subsequently voluntarily restores title to the grantor and the latter is afterwards adjudged bankrupt, the possession and administration of the property belong to the court of bankruptcy.[18] Where state laws confer on contract creditors the right to enforce their claims as against fraudulent transfers, no resort to legal remedies is necessary to establish such creditors' interests.[19]

§ 1116. Judgment and execution liens.—Congress made facts, not intentions, the test of the validity of execution liens attaching within four months of the adjudication in bankruptcy. These facts are the date of the lien and the then insolvency of the debtor. Execution liens attaching to an insolvent's property within four months of his bankruptcy are overthrown and made ineffectual for any purpose, unless preserved for the benefit of the estate, and the sheriff's lien incident thereto, also falls.[20] It is immaterial when the suit was begun or the judgment entered, or that the debt on which the judgment rests was valid, due when the action was commenced, or not released by a discharge,[21] and that the judgment was entered and levy made without collusion, or that the judgment was entered upon a judgment note given more than four months prior to the bankruptcy proceedings, or even prior to the passage of the act. The court will not consider the facts

[17] Metcalf v. Barker, 187 U. S. 165, 9 A. B. R. 36; Peck v. Jenness, 7 How. 612; Pickens v. Dent, 106 F. R. 653, 5 A. B. R. 644; Frazier v. Southern L. & T. Co., 99 F. R. 707, 3 A. B. R. 710; Eyster v. Gaff, 91 U. S. 521; See also Johnson v. Rogers, 15 N. B. R. 1, F. C. 7408; In re Kavanaugh, 2 N. B. N. R. 528, 99 F. R. 928, 3 A. B. R. 835.

[18] In re Brown, 1 N. B. N. 240, 1 A. B. R. 107, 91 F. R. 358.

[19] In re Andrae, 117 F. R. 561, 9 A. B. R. 135.

[20] In re Jennings, 8 A. B. R. 358.

[21] In re Benedict, 8 A. B. R. 463.

leading up to the creation of the lien complained of, but only the lien itself even though such facts took place more than four months before the bankruptcy and therefore would not themselves subject the debtor to proceedings in bankruptcy.[22] The provisions of this subdivision have no application to judgments entered after the proceeding in bankruptcy has begun.[23] If a sale has been made upon such an execution, the proceeds belong to the trustee when appointed,[24] and if he brings suit for the same he must allege that the execution debtor was insolvent when the execution was made.[25]

Subdivision "f" applies to the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed null and void on adjudication, but its validity is recognized. When it is obtained within four months, the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute. The judgment liens intended are such judgments as of themselves create liens.[26] It is not the judgment, that is, the determination of the controversy, but the judgment lien and proceedings tending to enforce the judgment which are annulled, and, if such a judgment is offered for proof, it can be attacked only on the ground of fraud, collusion or want of jurisdiction.[27] The act in deal-

[22] In re Rhoads, 2 N. B. N. R. 301, 98 F. R. 399, s. c. 2 N. B. N. R. 176; In re Richards, 2 N. B. N. R. 38, 3 A. B. R. 145, 96 F. R. 937, s. c. 2 A. B. R. 518, 95 F. R. 258; In re Richards, 1 N. B. N. 487, 2 A. B. R. 506, 94 F. R. 633; In re Spacht, 2 N. B. N. R. 238; In re Vaughan, 2 N. B. N. R. 101, 3 A. B. R. 362, 97 F. R. 560; In re Nelson, 1 N. B. N. 567, 1 A. B. R. 63, 98 F. R. 76; In re Whalen, 1 N. B. N. 228; In re Huffman, 1 N. B. N. 215, 1 A. B. R. 587; In re Myers, 1 N. B. N. 207, 1 A. B. R. 1; In re Wilson, 101 F. R. 571, 4 A. B. R. 260; In re Engle, 105 F. R. 893, 5 A. B. R. 372; In re Darwin, 117 F. R. 407, 8 A. B. R. 703; In re Ferguson, 95 F. R. 429, 2 A. B. R. 586; Levor v. Seiter, 5 A. B. R. 576.

[23] In re Engle, supra; citing Kinmouth v. Braentigam, 46 Atl. 769.

[24] In re Kenney, 105 F. R. 897, 5 A. B. R. 355.

[25] Simpson v. Van Etten, 108 F. R. 199, 6 A. B. R. 204.

[26] Metcalf v. Barker, 187 U. S. 165, 9 A. B. R. 36; In re Blair, 108 F. R. 529, 6 A. B. R. 206; In re Beaver Coal Co., 110 F. R. 630, 6 A. B. R. 404; In re Pease, 4 A. B. R. 547; Doyle v. Heath, 22 R. I. 213, 4 A. B. R. 705; Taylor v. Taylor, 59 N. J. Eq. 86, 4 A. B. R. 211; In re Kavanaugh, 2 N. B. N. R. 528, 99 F. R. 928, 3 A. B. R. 833.

[27] In re Pease, 2 N. B. N. R. 657,

ing with the property owned by the bankrupt at the time the petition is filed annuls judgment liens affecting it, but if the bankrupt fails to obtain a discharge, there seems no good reason why the judgment, which may have been entered long before bankruptcy proceedings, should not be valid as to after acquired property. To require the creditor to resort to his original cause of action would merely put him to additional cost and trouble without any compensating benefit to any one.[28] This provision does not apply to a case where money collected upon an execution issued upon a judgment obtained within four months, is paid over to the judgment creditor before filing the petition.[29] If a judgment creditor waives his execution as an unlawful preference and files his claim in bankruptcy, he cannot thereafter assert his preference.[30]

§ 1117. **Statutory liens.**—The expression "liens obtained through legal proceedings" is restricted to suits or proceedings at law or in equity. A legal proceeding is any proceeding in a court of justice by which a party pursues a remedy which the law affords him, and embraces any of the formal steps or measures employed in the prosecution or defense of a suit.[31]

4 A. B. R. 547; Contra, St. Cyr v. Diagnault, 103 F. R. 854.

[28] In general it was held under the Act of 1867 that the law did not affect the lien of a judgment or execution (Haworth v. Travis, 11 N. B. R. 145; In re Gold Mountain Min. Co., 15 N. B. R. 545; 3 Sawy. 601, F. C. 5515; In re Wimm, 1 N. B. R. 131, F. C. 17876); and consequently the decisions under that act on this point do not now apply. But some of the decisions being on general principles do; as that where a creditor advanced money to pay a valid execution and took judgment for his own claim and such advance it was good as to the advance (Lathrop v. Drake, 13 N. B. R. 472, 91 U. S. 516); that a judgment recovered after an assignment for the benefit of creditors created no lien though such assignment was afterwards set aside by assignee in bankruptcy (Belden v. Smith, 16 N. B. R. 302, F. C. 1242); that in an action by lien-holders a judgment, limited to the property subject to the lien, could be rendered notwithstanding the bankruptcy proceedings (Reed v. Bullington, 11 N. B. R. 408); that a judgment creditor whose judgment was a valid lien on such property could enforce his claim against it though the bankrupt had sold it before the commencement of the proceedings in bankruptcy (Phillips v. Bowdoin, 14 N. B. R. 43); or although he had levied on personalty but subsequently abandoned such levy permitting the personalty to return to defendant (Winship v. Phillips, 14 N. B. R. 50).

[29] Levor v. Seiter, 8 A. B. R. 459.

[30] In re Bolinger, 108 F. R. 374, 6 A. B. R. 171.

[31] See In re Drolesbaugh, 2 N. B. N. R. 1079.

§ 1118. **Four months' period.**—The four months run from the date of that step in the proceedings which creates the lien. In the case of a judgment creditor's bill, the filing of the same and service of process creates a lien in equity on the judgment debtor's equitable assets,[32] and while it may be defeated, so long as it exists, it is a charge or specific lien on the assets. Hence the four months' period begins to run from the filing of the bill and not from the date of the judgment or decree in enforcement of what is an otherwise valid pre-existing lien.[33] The computation is made by counting back the four months from the date of the filing of the petition, which latter date is excluded.[34]

Every one obtaining a lien through legal proceedings does so subject to the contingency that he may lose the advantage he would otherwise have by the institution of bankruptcy proceedings within four months thereafter and adjudication therein.[35] Liens obtained through legal proceedings more than four months before the filing of the petition in bankruptcy are not affected.[36]

§ 1119. **What liens valid.**—When not prohibited by the bankruptcy act, liens and preferences are entitled to the same protection from the bankruptcy courts as other legal rights;[37] and whatever is treated as a valid levy and a valid and subsisting lien by the state laws and courts will be so treated by the bankruptcy courts provided it is not in conflict with the provisions of the bankruptcy act[38] and vice versa.[39] A judgment obtained against an insolvent debtor without fraud or collusion would be as conclusive evidence of the claim and its amount as if given against a solvent debtor.[40]

§ 1120. **Enforcement of valid liens.**—As already pointed

[32] Miller v. Sherry, 2 Wall. 237; Freedmen's Savings & Trust Co. v. Earle, 110 U. S. 74.

[33] Metcalf v. Barker, 187 U. S. 165, 9 A. B. R. 36.

[34] Jones v. Stevens, 5 A. B. R. 571.

[35] In re Kenney, 2 N. B. N. R. 140, 3 A. B. R. 353, 97 F. R. 554; Corner v. Miller, 1 N. B. R. 98.

[36] In re Lesser, 2 N. B. N. R. 599, 100 F. R. 433; In re Dunavant, 1 N. B. N. 542, 3 A. B. R. 41, 96 F. R. 542; In re Ferguson, 95 F. R. 429; Hatch v. Seely, 13 N. B. R. 380; Batchelder v. Putnam, 13 N. B. R. 404; Smith v. Meisenheimer, 1 N. B. N. 19, 47 S. W. Rep. 1087.

[37] Barron v. Morris, 14 N. B. R. 371, F. C. 1055.

[38] Armstrong v. Rickey, 2 N. B. R. 150, F. C. 546.

[39] In re Cozart, 3 N. B. R. 126, F. C. 3313.

[40] Catlin v. Hoffman, 9 N. B. R. 342, 2 Sawy. 486, F. C. 2521.

out, valid existing liens may be enforced after the filing of the petition in bankruptcy. This does not give one creditor an advantage over another nor diminish the estate, except as always occurs in the recognition of different degrees among creditors. Where a creditor has secured a valid existing lien before the four months' period, the bankruptcy court may authorize him to proceed to have the same satisfied if convinced that full value will be obtained for the property on which his lien exists, or may direct the redemption of the property as seems most for the interest of the estate.[41]

See Sale of Incumbered Property, post §§ 1194, 1195.

§ 1121. Filing petition fixes status of liens.—The bankruptcy act in providing for the dissolution of liens, only operates on those created within four months and existing at the time the bankruptcy proceedings are commenced;[42] as none can be acquired subsequent to the filing of the petition,[43] a levy then made will give the petitioning creditors no greater or different rights from the creditors at large.[44]

§ 1122. Costs and fees.—As the costs and disbursements in a lien proceeding which is rendered void by the bankruptcy proceedings are an incident of the lien and fall with it,[45] the trustee is not called upon to pay them; nor can the officer in possession of such property retain it until his fees are paid, but he should have them taxed in the proper court as the basis for his claim against the estate in bankruptcy.[46] Where a judgment creditor, who has set aside a fraudulent conveyance, loses his prior right to the fund by the adjudication of the debtor a bankrupt within four months of the decree, the

[41] In re Hufnagel, 12 N. B. R. 554, F. C. 6837.

[42] Shelley v. Elliston, 18 N. B. R. 375, F. C. 12750.

[43] McLean v. Rackey, 3 McLean 235, F. C. 8891; Sicard v. R. R. Co., 15 Blatch. 525, F. C. 12831; In re Tifft, 19 N. B. R. 201, F. C. 14034; Stuart v. Hines, 6 N. B. R. 416; Winters v. Clayton, 18 N. B. R. 533.

[44] In re Lawrence, 18 N. B. R. 516, F. C. 8133.

[45] In re Jennings, 8 A. B. R. 358.

[46] In re Francis-Valentine Co., 1 N. B. N. 529, 532, 2 A. B. R. 522, 94 F. R. 793; In re Young, 1 N. B. N. 428, 2 A. B. R. 673, 96 F. R. 606; In re Stevens, 5 N. B. R. 298, 2 Biss. 373, F. C. 13392. The rule under the former act that costs were payable out of the estate if the lien proceedings were used in aid of the bankruptcy proceedings and for the benefit of creditors or if incurred at debtor's request would probably be adopted by the court now. (In re Irons, 18 N. B. R. 95, F. C. 7067; In re Preston, 6 N. B. R. 545, F. C. 11394.)

state court can make a reasonable allowance for costs and expenses before directing its receiver to turn over the property to the trustee.[47] This, in effect, pays out of the estate, where an attachment is dissolved, so much of the costs as was incurred prior to the filing of the petition.[48]

§ 1123. **Practice.**—A suit being brought in a state court within four months of the filing of the petition and all proceedings therein being null and void, the bankruptcy court has power to restrain all parties, including the officers of the state court, from interfering with the bankrupt's property, and whenever because of such interference the law cannot be properly administered, it should not hesitate to exercise its authority. It may restrain the prosecution of a replevin or attachment suit, or stay proceedings supplementary to execution, or permit such proceedings to continue, in which case upon the appointment therein of a receiver, the creditor acquires no lien upon or specific interest in the bankrupt's property, since the entire estate being under the control of the bankruptcy court when such receiver was appointed, he takes no title that could relate back to the commencement of the supplementary proceedings.[49] The court may receive from one indebted to the bankrupt, the amount of such debt, though garnisheed within four months of the bankruptcy proceedings, and judgment entered, and make an order protecting the garnishee.[50]

§ 1124. **Trustee to give notice of discharge of lien.**—Although by the express provision of the statute an attachment is made null and void and the property affected thereby is deemed wholly discharged and released from the same by the adjudication in bankruptcy within four months, the proper practice is for the trustee to apply to the state court for an order formally discharging the attachment and releasing the

[47] In re Lesser, 2 N. B. N. R. 599, 3 A. B. R. 815, 100 F. R. 433.

[48] In re Allen, 3 A. B. R. 38.

[49] Booth v. Nickerson, 1 N. B. N. 476, 2 A. B. R. 770, 96 F. R. 943; In re Kletchka, 1 N. B. N. 160, 1 A. B. R. 479, citing Johnson v. Rogers, 15 N. B. R. 1, 10, F. C. 7408; In re Pitts, 9 F. R. 542; Becker v. Torrance, 31 N. Y. 631; Bk. v. Shuler, 153 N. Y. 172; Olney v. Tanner, 10 F. R. 101, 113, aff'd 18 F. R. 636; Kitchen v. Lowery, 127 N. Y. 53; In re Agins, 1 N. B. N. 133, 180, 184; Bear v. Chase, 99 F. R. 920, 3 A. B. R. 746; In re O'Connor, 2 N. B. N. R. 90, 95 F. R. 943.

[50] In re McCartney, 109 F. R. 64, 6 A. B. R. 367.

property of the bankrupt from this levy. An order thus obtained would be authority for the sheriff to release the levy which might otherwise be valid but for the adjudication. It is the duty of the court, upon these facts being called to its attention, to vacate the attachment and remove the lien.[51] A similar application should be made by the trustee in the case of any other lien which it may be necessary to have released.

[51] Hardt v. Schuylkill Plush & Silk Co., 74 N. Y. Supp. 549, 8 A. B. R. 479.

CHAPTER LXVIII.

SET-OFFS AND COUNTERCLAIMS.

§1125. (68a) When set-off allowed.
1126. Mutual debts and mutual credits.
1127. Between estate and creditor.
1128. Must be in the same right.
1129. Need not be of same nature.
1130. Joint and separate debts.
1131. Between banker and depositor.
1132. Property in possession as collateral.
1133. By a married woman.
1134. Waiver of set-off.
1135. b. When set-off not allowed.
1136. A set-off must be provable.
1137. Must not be purchased in view of bankruptcy.
1138. Statute of limitations.
1139. Taxable costs.

§ 1125. '(Sec. 68a) When set-off allowed.—In all cases of 'mutual debts or mutual credits between the estate of a 'bankrupt and a creditor the account shall be stated and one 'debt shall be set off against the other, and the balance only 'shall be allowed or paid.'[1]

§ 1126. Mutual debts and mutual credits.—"Debt," as used in this section, obviously refers to such claim or demand as is provable in bankruptcy, while "mutual debts" are claims or demands of that nature, due and owing by the bankrupt to the creditor on the one hand and by the creditor to the bankrupt on the other. It is not believed the language of the act in reference to "mutual debts" was intended to qualify or restrict the general meaning of the expression, with its attendant incidents and legal requirements. It obviously does not refer to a debt due by one to another and payment on account of such debt,[2] for in the absence of the statute, a trustee in bankruptcy may show, in opposition to the allowance of a claim, that it has been paid, or that payment has been made on account, which reduces its amount. In such a case, it is the balance merely which is the debt. But where

[1] Analogous provisions of act of 1867. "Sec. 20. . . . That, in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate."

[2] In re Ryan, 105 F. R. 760, 5 A. B. R. 396.

the creditor owes a debt to the bankrupt, and the bankrupt owes such creditor a debt on account of some different, independent matter, not arising out of the same transaction, such debts are "mutual debts" within the act and may be set off one against the other, and "the balance only shall be allowed or paid."[3]

What is meant by "mutual credits" is not clear, however, unless it means substantially the same as "mutual debts," when the credit must ultimately terminate in a debt, because mutual credits necessarily imply mutual debts to the extent of such mutual credits, for a credit cannot exist in favor of one against another unless such other owes the creditor the amount of the credit.[4] It obviously cannot mean merely a payment on account, whether such payment be in cash, or its equivalent, for the balance only is the debt. Moreover, if it did mean a payment on account, it would follow in all cases wherein the trustee seeks to recover back preferences, consisting of payments received in violation of the act, that the recipient could set off the amount of the original debt due from the bankrupt and, in that manner, in every case, defeat the recovery of the preference.[5]

So that, while in the first clause of this section "mutual credits" are referred to, in the next clause they are treated as if "mutual debts" and "mutual credits" meant the same thing, the law providing "and one debt may be set off against the other," without repeating in that connection the word "credits." But the set off is allowable only in cases of "debt," that is to say, where the amount due from the one to the other is a specific liquidated sum of money, and not, for instance, an unliquidated claim for damages arising out of a breach of contract.[6]

In this connection an interesting discussion of this question appears in the leading English case of Rose v. Hart,[7] wherein the court said: "Something more is certainly meant here by mutual credits than the words mutual debts import; and yet, upon the final settlement, it is enacted merely that one debt

[3] In re Christensen, 101 F. R. 802, 2 N. B. N. R., 4 A. B. R. 202; In re Thompson. 2 N. B. N. R. 1016; Contra, In re Ryan, 2 N. B. N. R. 693.

[4] Libby v. Hopkins, 104 U. S. 303.

[5] In re Christensen, supra.

[6] Bell v. Carey, 8 C. B. 87.

[7] 8 Taunt. 499.

shall be set off against another. We think this shows that the legislature meant such credits only as must in their nature terminate in debts, as where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and, therefore, it is not a credit within the meaning of the statute."

§ 1127. **Between estate and creditor.**—The set-offs are of mutual debts or mutual credits between the estate of a bankrupt and the creditor, and would include a liability that has accrued to a trustee as such which had not accrued to the bankrupt, when the claim and liability are mutual.[8] Where no trustee has been appointed and a composition is made, the bankrupt has the same right of set-off as the trustee would have had if one had been appointed.[9]

§ 1128. **Must be in the same right.**—The debts and credits must be due in the same capacity;[10] thus a debt due an executor as such cannot be set off against a debt due from him personally, nor the claim of a stockholder against a corporation against his unpaid stock subscription;[11] nor can a bank collect money due bankrupt and set it off against a claim against him;[12] but a creditor may set off against a debt due him by a bankrupt the value of goods delivered by the latter, to one of the creditor's workmen on the latter's credit.[13]

[8] In re Crystal Spring Bottling Co., 104 F. R. 265, 4 A. B. R. 55; Moran v. Bogart, 14 N. B. R. 293.

[9] Ex parte Howard Nat. Bk., 16 N. B. R. 420, 2 Lowell, 487, F. C. 6764.

[10] Wright v. Rogers, 3 McLean, 229, F. C. 18090.

[11] In re Goodman Shoe Co., 96 F. R. 949, 3 A. B. R. 200; Sawyer v. Hoag, 9 N. B. R. 145, 17 Wall. 610; Wilbur v. Stockholders, 18 N. B. R. 178 F. C. 17636; Jenkins v. Armour, 14 N. B. R. 276, 6 Biss. 312, F. C. 7260; Scammon v. Kimbell, 13 N. B. R 445, 92 U. S. 362; Sanger v. Upton, 91 U. S. 56; Morgan v. Allen, 103 U. S. 498.

[12] Traders Bk. v. Campbell, 6 N. B. R. 353, 14 Wall. 87.

[13] Rice v. Grafton Mills, 13 N. B. R. 209.

because in that case it is the debt of the person to whom the credit was extended.

§ 1129. **Need not be of same nature.**—The debts and credits may be of different kinds, as money or securities deposited in a bank may be set off against notes or a protested draft due the bank by the debtor;[14] or the amount due for personal services may be set off against a mortgage;[15] or money on hand by an employe against salary due where he was in the habit of receiving and paying out money for his employer;[16] or the claim of the trustee in bankruptcy against a common law assignee.[17]

§ 1130. **Joint and separate debts.**—The Supreme Court[18] in citing with approval Justice Story in his treatise on Equity Jurisprudence, said: "Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights. But special circumstances may occur creating an equity, which will justify even such an interposition. Thus, for example, if a joint creditor fraudulently conducts himself in relation to the separate property of one of the debtors, and misapplies it, so that the latter is drawn in to act differently from what he would if he knew the facts, that will constitute, in a case of bankruptcy, a sufficient equity for a set-off of the separate debt created by such misapplication against the joint debt. So, if one of the joint debtors is only a surety for the other, he may, in equity, set off the separate debt due to his principal from the creditor; for in such a case the joint debt is nothing more than a security for the separate debt of the principal, and, upon equitable considerations, a creditor who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account

[14] In re Kalter, 2 N. B. N. R. 264; Ex parte Howard Nat. Bk., 16 N. B. R. 420, 2 Lowell, 487, F. C. 6764; City of Harrisburg v. Sherlock, 16 N. B. R. 62; In re Petrie, 7 N. B. R. 332, 5 Ben. 110, F. C. 11040; In re Peebles, 13 N. B. R. 149, 2 Hughes, 394, F. C. 10902.

[15] Von Sachs v. Kretz, 19 N. B. R. 63.

[16] Ex p. Pollard, 17 N. B. R. 228, 2 Lowell 411, F. C. 11252.

[17] Catlin v. Foster, 3 N. B. R. 134, 1 Sawy. 37, F. C. 2519.

[18] Gray v. Rolo, 18 Wall. 629.

for which the other was a security. Indeed, it may be generally stated that a joint debt may, in equity, be set off against a separate debt, where there is a clear series of transactions, establishing that there was a joint credit given on account of the separate debt."[19]

Where a bankrupt and another have accounts one against the other, and both are on a note held by a bank which is paid in full after the filing of a petition by that other, he can set off against the amount due from him to the bankrupt the amount due from bankrupt on the account, but not bankrupt's share of the note.[20]

§ 1131. **Between banker and depositor.**—The general rule of set-off applies between a banker and his customers, so that in case of mutual debts and credits, whether matured or not, they may be set off by the banker as against the liabilities of a bank depositor.[21]

§ 1132. **Property in possession as collateral, etc.**—The courts of the United States have generally followed the liberal construction of the English courts in the matter of mutual credits in bankruptcy and insolvency.[22] The result of them is, that the creditor who, at the time of the bankruptcy, has in his hands goods or chattels of the bankrupt as collateral security with a power of sale, or choses in action, with a power of collection, may sell the goods or collect the claims and set them off against the debt the bankrupt owes him; and this is true, although the power to sell or collect would have been revocable by the bankrupt before his bankruptcy. Or, in other words, the very fact of bankruptcy, in such cases, gives what is in the nature of a lien which did not exist before.[23]

[19] See In re Crystal Spring Bottling Co., 104 F. R. 265, 4 A. B. R. 55.

[20] In re Bingham, 94 F. R. 796, 1 N. B. N. 351, 2 A. B. R. 223.

[21] In re Little, 110 F. R. 621, 6 A. B. R. 681; In re Stege, 116 F. R. 342, 8 A. B. R. 515; In re Kalter, 2 N. B. N. R. 264; Traders Bk. v. Campbell, 14 Wall. 87, 6 N. B. R. 353; In re Farnsworth, 14 N. B. R. 148; In re Madison, 9 N. B. R. 184; Libby v. Hopkins, 104 U. S. 303; In re Meyer, 107 F. R. 86, 5 A. B. R. 593; In re Elsasser, 7 A. B. R. 215.

[22] Rose v. Hart, 2 Smith, Lead. Cases; McLaren v. Pennington, Paige, 102; Receivers, etc., v. Paterson Gas L. Co., 23 N. J. 283; Aldrich v. Campbell, 70 Mass. 284; Clarke v. Hawkins, 5 R. I. 219; Medomac Bank v. Curtis, 24 Me. 36; Phelps v. Rice, 51 Mass. 128; Myers v. Davis, 22 N. Y. 489; Morrison's Assig. v. Bright, 20 Mo. 298.

[23] Rose v. Hart, 8 Taunt. 499; In

When shares of stock are conveyed as collateral security, the law implies a promise to return them on the payment of the debt. In cases where there has been either an express or implied promise by the agent or other person having the property, that he will faithfully account for it and pay over its proceeds, such promise would not prevent a set-off in bankruptcy. The weight of authority is that a promise of this sort does not bar a set-off, either under the ordinary statutes, or under the law, unless the property has been entrusted to the agent for a particular purpose inconsistent with such an application of the surplus, so that this would be a fraud or breach of promise.[24]

§ 1133. **By a married woman.**—There is no reason why the claim of a married woman may not be used as a set-off as well as that of any individual. Hence, if under the law of the state she is authorized to enter into contracts, any claim that she may have against the debtor, if provable, may be used as a set-off. This is true although the debt may have been contracted during coverture without her having complied with the requirements of the statute.[25] But neither reasonable gifts from the husband nor an insurance policy on bankrupt's life for the benefit of his wife and children can be set off against a claim of a wife for money which she had received and deposited with her husband for safe keeping.[26]

§ 1134. **Waiver of set-off.**—Where, by reason of the silence or the conduct of the party claiming a right of set-off, the debtor or other creditors have taken such action as would make the enforcement of the set-off inequitable;[27] or the creditor deliberately proves his full claim without setting off the amount due from the bankrupt,[28] the right will be lost. In the absence of fraud, however, where either through ignorance or mistake, proof has been made for the full claim, the court will permit the creditor either to amend or withdraw

re Dow, 14 N. B. R. 307, 2 Law. 472, F. C. 17573; In re McKay, 13 F. R. 443; In re Tacoma Shoe & Leather Co., 3 N. B. N. R. 9.

[24] Marks v. Barber, 1 Wash. 178; Eland v. Karr, 1 East. 175; Mayer v. Nias, 8 Moore, 275; Cornforth v. Rivett, 2 M. & S. 510; Groom v. West, 8 A. & E. 758.

[25] In re Slichter, 2 N. B. R. 107, F. C. 12943.

[26] In re Bigelow, 2 N. B. R. 170, 2 Ben. 198, F. C. 1398.

[27] Higgs v. Tea Co., L. R. 4, Ex. 387.

[28] Hunt v. Holmes, 16 N. B. R. 101, F. C. 6890; Brown v. Bk., 6 Bush (Ky.) 198.

his proof.[29] And this has been permitted, notwithstanding the fact that through the mistake of the cashier of a bank the amount on deposit was transferred to the account of bankrupt's trustee, without deducting the value of bankrupt's note;[30] the rights of the parties not otherwise being affected, and no other steps being taken.

§ 1135. **'b. Where set-off not allowed.**—A set-off or counter-'claim shall not be allowed in favor of any debtor of the 'bankrupt which (1) is not provable against the estate; or '(2) was purchased by or transferred to him after the filing 'of the petition, or within four months before such filing, with 'a view to such use and with knowledge or notice that such 'bankrupt was insolvent, or had committed an act of bank-'ruptcy.'[31]

§ 1136. **A set-off must be provable.**—In order that a claim may be used as a set-off it must be one that is provable in bankruptcy.[32] A surety paying his principal's debt either before or after his bankruptcy, may set off the amount so paid against his debt to the bankrupt, provided the debt was provable,[33] and it has been held that a debt due before the adjudication and one not due until afterwards, but both being due at the time of the attempted set-off, may be set off against each other.[34] Unliquidated damages, when liquidated as directed by the court,[35] may be used as a set-off; or the holder of an insurance policy may set off the amount due thereon against the claim for the company's money deposited with him.[36] It has been frequently held that if a creditor has received a preference on account, he cannot use the balance of his claim as a set-off.[37]

[29] Bemis v. Smith, 10 Met. 194.

[30] Union Nat. Bk. v. McKey, 2 N. B. N. R. 913; Standard Oil Co. v. Hawkins, 74 F. R. 395.

[31] Analagous provisions of Act of 1867. "Sec. 20. . . . That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

[32] In re Bingham, 94 F. R. 796, 1 N. B. N. 351, 2 A. B. R. 223; Morgan v. Wordell, 8 A. B. R. 167.

[33] In re Dillon, 100 F. R. 627, 4 A. B. R. 63.

[34] In re City Bk., 6 N. B. R. 71, F. C. 2742; Marks v. Barker, F. C. 9096; Catlin v. Foster, 3 N. B. R. 134, 1 Sawy. 37, F. C. 2519; Drake v. Rollo, 3 Biss. 273, F. C. 4066.

[35] Sec. 63b, act of 1898.

[36] Scammon v. Kimball, 13 N. B. R. 445, 92 U. S. 362.

[37] In re Dillon, supra; see section 57g, act of 1898, ante.

§ 1137. **Must not be purchased in view of bankruptcy.**—The Act of 1867 forbade the allowance of set-offs only in case of the purchase or transfer of a claim after the petition was filed. The present act forbids the allowance of a set-off or counter-claim if purchased or transferred after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge of bankrupt's insolvency or commission of an act of bankruptcy;[38] but there seems to be no prohibition against such use of claims purchased more than four months before the bankruptcy, whether with or without knowledge or notice of bankrupt's insolvency.[39]

Creditors cannot purchase worthless claims, or such as are worth but a percentage of their face value, and use them as set-offs or counter-claims to pay what they owe the estate; nor can a debtor to bankrupt's estate set off against his debt bankrupt's notes bought on speculation as to probable dividends;[40] nor a protested draft after the commencement of the bankruptcy proceedings;[41] nor claims bought up by the debtor to set off against bankrupt's deposit.[42]

§ 1138. **Statute of limitations.**—A claim barred by the statute of limitations of the state in which the petition is filed, or by the limitation prescribed by the bankrupt act, is not provable and hence cannot be used as a set-off. See What Debts may be Proved, § 995.

§ 1139. **Taxable costs.**—Taxable costs being provable,[43] under the present act may be allowed as set-offs.

[38] In re Tacoma Shoe & Leather Co., 3 N. B. N. R. 9.

[39] Hovey v. Home Ins. Co., 10 N. B. R. 224, F. C. 6743.

[40] Hunt v. Holmes, 16 N. B. R. 101, F. C. 6890.

[41] Bashore v. Rhoads, 16 N. B. R. 72.

[42] In re Perkins, 8 N. B. R. 56, 5 Biss. 254, F. C. 10982.

[43] Sec. 63a, act of 1898.

CHAPTER LXIX.

POSSESSION OF PROPERTY.

§1140. (69a) Provisional Seizure of Property.
1141. Purpose.
1142. Petition.
1143. Affidavit in support of petition.
1144. Property subject to seizure.
1145. Liability for unlawful seizure.

§ 1140. '(Sec. 69a) **Provisional seizure of property.**—A 'judge may, upon satisfactory proof, by affidavit, that a bank- 'rupt against whom an involuntary petition has been filed and 'is pending has committed an act of bankruptcy, or has neg- 'lected or is neglecting, or is about to so neglect his property 'that it has thereby deteriorated or is thereby deteriorating 'or is about thereby to deteriorate in value, issue a warrant 'to the marshal to seize and hold it subject to further orders. 'Before such warrant is issued the petitioners applying there- 'for shall enter into a bond in such an amount as the judge 'shall fix, with such sureties as he shall approve, conditioned 'to indemnify such bankrupt for such damages as he shall 'sustain in the event such seizure shall prove to have been 'wrongfully obtained. Such property shall be released, if such 'bankrupt shall give bond in a sum which shall be fixed by 'the judge, with such sureties as he shall approve, conditioned 'to turn over such property, or pay the value thereof in money 'to the trustee, in the event he is adjudged a bankrupt 'pursuant to such petition.'[1]

§ 1141. **Purpose.**—The purpose of this section is to enable the creditors to have the bankrupt's property taken into custody by the United States marshal after the petition has

[1] Analogous provision of act of 1867.

"Sec. 40. . . . If it shall appear that there is probable cause 'for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district . . . and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court. . . ."

been filed, and prior to adjudication, where the bankrupt has committed an act of bankruptcy, and has neglected or is neglecting his property, so that it is deteriorating in value. While the section does not specifically provide for the seizure of property of a bankrupt who is wasting it, it is evidently the intention of Congress by this provision to prevent not only the deterioration in value but also the wastage and loss of property, pending the adjudication.[2]

In connection with this provision, §§ 92-93 should be considered, as their terms are broader and would seem also to comprehend proceedings under this provision of the law.[3] See also § 681 ante, for power of referee with reference to seizure of property.

§ 1142. Petition.—A petition for involuntary adjudication in bankruptcy should be confined to that purpose and should not also contain an application for a warrant of seizure, the act indicating by implication that the proceedings are distinct and separate; at any rate, the better practice is to make them such. Under this section a warrant of seizure can issue only after a petition has been filed by the creditors and, possibly, not until after notice of it has been given.[4]

§ 1143. Affidavit in support of petition.—The affidavit required to support a petition for seizure of property should specify all of the essential facts, and it has been held that it should be as fully satisfactory in exhibiting proof of the act of bankruptcy as the testimony to be produced at the hearing of the petition for adjudication in a contested case, in order that the court may be fully apprised of the facts in reaching a conclusion as to whether the alleged bankrupt has been neglecting his property as charged. Warrant for the seizure should not be made upon the mere opinions of witnesses that an act of bankruptcy has been committed, but only on a full showing of the facts of the case.[5]

§ 1144. Property subject to seizure.—Prior to the amendatory act of February 5, 1903, summary process for the seizure of property could be invoked only where the property was in the possession of the bankrupt or his agent, and never

[2] In re Rockwood, 1 N. B. N. 134. 91 F. R. 363, 1 A. B. R. 272.

[3] In re Kelly, 91 F. R. 504, 1 A. B. R. 306.

[4] In re Kelly, supra.

[5] In re Kelly, supra.

where it was in the control of a third party, holding it under an adverse claim of right or title prior to the filing of the petition,[6] but the mere refusal to surrender without other evidence was insufficient to constitute an adverse holding.[7] Hence the court would not order possession to be taken of property which may have been illegally transferred to another, nor issue a warrant commanding the marshal to take possession provisionally of goods and property so conveyed prior to the filing of the petition,[8] but where the conveyance was subsequently avoided by the adjudication, as in the case of a general assignment, the property would be restored upon summary petition in the court of bankruptcy.[9] Where property is held adversely a plenary suit would doubtless have to be resorted to. On a proper showing the court may issue an injunction or restraining order, upon an application making the third person a party, thereby restraining the sale or other disposition of the property until the hearing upon the petition for adjudication and the appointment of a trustee.[10]

Provision is elsewhere made for the recovery of property held in violation of the statute, through a voidable preference;[11] or fraudulent conveyance;[12] or otherwise.[13]

§ 1145. Liability for unlawful seizure.—In executing a warrant for the seizure of property, the responsibility rests upon the United States marshal of determining the ownership

[6] In re Kelly, supra; In re Rockwood, 1 N. B. N. 134, 91 F. R. 363.

[7] Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224, 1 A. B. R. 372; In re Griffith, 1 N. B. N. 546; Bardes v. Bank, 178 U. S. 524, 2 N. B. N. R. 725, 4 A. B. R. 163; In re Ward, 104 F. R. 985; In re Brodbine, 1 N. B. N. 279, 326, 93 F. R. 643, 2 A. B. R. 53; In re Buntrock Clothing Co., 1 N. B. N. 291, 92 F. R. 886, 1 A. B. R. 454; In re Pearson, 1 N. B. N. 474, 2 A. B. R. 819; In re Fowler, 1 N. B. N. 265, 93 F. R. 417, 1 A. B. R. 555; In re Bender, 106 F. R. 873, 5 A. B. R. 632, and cases cited under sec. 23b, act of 1898; but see Marshall v. Knox, 8 N. B. R. 97, 16 Wall. 551; In re Smith, 1 N. B. N. 61.

[8] Sec. 23b, act of 1898; In re Harthill, 4 N. B. R. 131, 4 Ben. 488, F. C. 6161; In re Holland, 12 N. B. R. 403, F. C. 6605.

[9] Bryan v. Bernheimer, 181 U. S. 188, 3 N. B. N. R. 482, 5 A. B. R. 623.

[10] Sec. 11, act of 1898 (In re Rockwood, 91 F. R. 363, 1 N. B. N. 134, 1 A. B. R. 272; In re Kelly, 91 F. R. 504, 1 A. B. R. 306; In re Holland, 12 N. B. R. 403, F. C. 6605.)

[11] Sec. 60b, ante, act of 1898.

[12] Sec. 67e, ante, act of 1898.

[13] Sec. 70e, post, act of 1898.

of the property seized, and if he take that of a stranger, he renders himself liable to an action for trespass.[14] He has no authority to seize property provisionally, outside of his district,[15] and where property is unlawfully taken by him its actual value may be recovered.[16]

[14] Marsh v. Armstrong, 11 N. B. R. 157, F. C. 1869; Vogel, 3 N. B. R. 125; In re Muller, 3 N. B. R. 198, 7 Blatchf. 18, F. C. 16982.
86; Deady, 513, F. C. 9912; In re Marks, 2 N. B. R. 175, F. C. 9095; but see Stevenson v. McLaren, 14 N. B. R. 403; In re Briggs, 3 N. B.

[15] Carr v. Phillips, 18 N. B. R. 527.

[16] Doll v. Harlow, 11 N. B. R. 350.

CHAPTER LXX.

TITLE TO PROPERTY.

§1146. (70a) Time title vests in trustee and property affected.
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1148. Trustee's title.
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1220. —— Claims against United States.
1221. f. Title on confirmation of composition.
1222. Effect of confirmation of composition.

§ 1146. '**(Sec. 70a) Time title vests in trustee and property affected.**—The trustee of the estate of a bankrupt, upon 'his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their 'appointment and qualification, shall in turn be vested by 'operation of law with the title of the bankrupt, as of the 'date he was adjudged a bankrupt, except in so far as it is to 'property which is exempt, to all

'(1) "**Documents:**"—Documents relating to his property;

'(2) "**Patents:**"—Interest in patents, patent rights, copy-'rights, and trade-marks;

'(3) "**Powers:**"—Powers which he might have exercised 'for his own benefit, but not those which he might have exer-'cised for some other person;

'(4) "**Property transferred:**"—Property transferred by 'him in fraud of his creditors;

'(5) "**Transferable property:**"—Property which prior to 'the filing of the petition he could by any means have trans-'ferred or which might have been levied upon and sold under 'judicial process against him:

' "**Insurance policies:**"—Provided, That when any bankrupt 'shall have any insurance policy which has a cash surrender 'value payable to himself, his estate, or personal representa-'tives, he may, within thirty days after the cash surrender 'value has been ascertained and stated to the trustee by the 'company issuing the same, pay or secure to the trustee the

'sum so ascertained and stated, and continue to hold, own, and 'carry such policy free from the claims of the creditors par- 'ticipating in the distribution of his estate under the bank- 'ruptcy proceedings, otherwise the policy shall pass to the 'trustee as assets; and

'(6) "**Rights of action:**"—Rights of action arising upon 'contracts or from the unlawful taking or detention of, or in- 'jury to, his property.'[1]

§ 1147. **Advantage of vesting title on adjudication.**—Much of the inconvenience incident to a transfer of title to be subsequently avoided upon a refusal to make an adjudication is obviated by the provision vesting title in the trustee as of the

[1] Analogous provision of act of 1867. "Sec. 14. . . . That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings: . . . and all the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patents and patent rights and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention, or of injury to the property of the bankrupt, and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee; and he may sue for and recover the said estate debts and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been presented or defended by such bankrupt. . . . No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon; . . . but no property held by the bankrupt in trust shall pass by such assignment."

date of adjudication, and business transactions may accordingly be had with the bankrupt without fear as to imperfections of title. Should this liberality conduce to improvident treatment of the estate by the bankrupt, the court, upon satisfactory proof that the property is being neglected, is deteriorating or about to deteriorate in value, may issue a warrant to the marshal to seize and hold it subject to further orders.[2]

§ 1148. **Trustee's title.**—If the trustee has any power over a subject, it must be found in the bankruptcy act.[3] The trustee takes title to all of bankrupt's property which prior to the filing of the petition he could have transferred or which might have been levied upon, wherever situated, whether within the district or state where the petition is filed or beyond it. In the case of property within the United States or any of its provinces, the title passes to the trustee by operation of law without any conveyance from the bankrupt,[4] while in case of property beyond the jurisdiction of the United States a conveyance by the bankrupt is necessary. He takes no better title than belonged to the bankrupt or to his creditors at the time when the trustee's title accrued,[5] and cannot therefore convey any better title.[6] While the trustee is not a purchaser from the bankrupt and does not occupy a relation similar to a judgment creditor, he has greater rights than the assignee had under the Act of 1867,[7] and represents the general creditors as well as the bankrupt.[8] He may proceed summarily against one hold-

[2] Sec. 69, act of 1898.

[3] Dutcher v. Bk., 11 N. B. R. 457, 12 Blatch. 435, F. C. 4203.

[4] See Markson & Spalding v. Heaney, 4 U. B. R. 165, F. C. 17980.

[5] In re New York Economical Printing Co., 110 F. R. 514, 6 A. B. R. 615.

[6] In re Kellogg, 112 F. R. 52, 7 A. B. R. 270, citing In re New York Economical Printing Co., 6 A. B. R. 615; Chattanooga Nat. Bank v. Rome Iron Co., 4 A. B. R. 441.

[7] Sec. 67a, act of 1898.

[8] In re Yukon Woolen Co., 1 N. B. N. 420, 2 A. B. R. 805, 96 F. R 326; In re Rudnick, 2 N. B. N. R. 975, 102 F. R. 750, 4. A. B. R. 531; In re McNamara, 2 N. B. N. R. 341; Upton v. Jackson, F. C. 16802; Contra, In re McKay, 1 N. B. N. 133, 1 A. B. R. 292; In re Ohio Co-op. Shear Co., 2 A. B. R. 775, 1 N. B. N. 477; In re Bozeman, 1 N. B. N. 479, 2 A. B. R. 809; In re Booth, 2 N. B. N. R. 377, 98 F. R. 975; comp. In re Griffith, 3 N. B. R. 179; Potter v. Cogswell, 4 N. B. R. 9; Bromley v. Smith, 5 N. B. R. 152, 2 Biss. 511, F. C. 1922; Wilkins v. Davis, 15 N. B. R. 60, 2 Lowell, 511, F. C. No. 17664; Allen v. Montgomery, 10 N. B. R. 503; In re Appold, 1 N. B. R. 178, F. C. 499; Rodgers v. Winsor, 6 N. B. R. 246, F. C. 12023; In re Dow, 6

ing the bankrupt's property without claim of title,[9] he may set aside a fraudulent conveyance though the bankrupt could not; or bring an action to reach equities beyond legal remedies. He may avoid any transfer by the bankrupt which any creditor might have avoided,[10] thus subrogating the trustee to the rights of creditors, as against liens and transfers, which exist at the time of the bankruptcy.[11] Under the Act of 1867,[12] in addition to the petition and the adjudication, as required now, an assignment was necessary to vest the assets in the assignee, such vesting creating a trust against which the statute of limitations ceased to run, as is the case now.[13]

See also ante, § 1097.

§ 1149. —— **Subject to liens.**—Except in cases affected by fraud, illegal preferences, or liens avoided by the adjudication in bankruptcy, the trustee takes the bankrupt's property with like right, title, power and authority as the bankrupt had subject to any valid lien existing thereon.[14] He takes it subject to every equity which would affect the bankrupt himself, if he were asserting such rights and interests,[15] but the lien must be perfected before the commencement of the bankruptcy proceedings,[16] and not be one which the act itself avoids. Where under the state laws, the legal title to mortgage property remains in the mortgagor, such title vests in his trustee in bankruptcy, together with his statutory right of redemption from a

N. B. R. 10, F. C. 4036; White v. Jones, 6 N. B. R. 175, F. C. 17550.

[9] In re Moore, 104 F. R. 869.

[10] In re McNamara, 2 N. B. N. R. 341, citing In re Leland, F. C. 8230; Bradshaw v. Klein, F. C 1790; In re Collins, F. C. 3007; Cook v. Whipple, 55 N. Y. 150; Southard v. Benner, 72 N. Y. 424; In re Metzger, F. C. 9510; In re Duncan, F. C. 4131; Barker v. Barker, F. C. 986; In re Adams, 1 N. B. N. 167, 1 A. B. R. 94.

[11] In re New York Economical Printing Co., 110 F. R. 514, 6 A. B. R. 615.

[12] Sec. 14, act of 1867.

[13] In re Resler, 1 N. B. N. 280, 2 A. B. R. 166, 95 F. R. 804; In re Lipman, 1 N. B. N. 310, 2 A. B. R. 49, 94 F. R. 353; Sutherland v. Davis, 10 N. B. R. 424; In re Eldridge, 12 N. B. R. 540, 2 Hughes, 256, F. C. 4331; Starkweather v. Ins. Co., 4 N. B. R. 110, F. C. 13308.

[14] In re Winn, 1 N. B. R. 131, F. C. 17876; Courier Journal Co. v. Schaeffer-Myer Co., 101 F. R. 699, 4 A. B. R. 183; Donaldson v. Farwell, 15 N. B. R. 277; Bk. v. Rome Iron Co., 102 F. R. 755.

[15] In re Hanna, 3 N. B. N. R. 237; In re Dow, 6 N. B. R. 10, F. C. 4036; Bacon v. Heathcote, 1 A. B. R. 160.

[16] In re Smith, 1 N. B. R. 169, 2 Ben. 432, F. C. 12973.

foreclosure sale under a decree rendered after the adjudication.[17]

In accordance with equitable principles, a mortgage executed just prior to the bankruptcy in pursuance of a parol agreement for a present valuable consideration more than four months prior to the filing of the petition has been held valid as against the trustee, as relating back to such agreement,[18] but this position does not appear tenable in view of the drastic provisions of section 67 of the law, and if it were valid such transaction would be open to the closest scrutiny and would be sustained only in case of proof to a high degree of certainty. In those states where a pledge or mortgage is merely security for the debt, and the superior title remains in the pledgor or mortgagor, it passes to the trustee on the bankruptcy of the pledgor or mortgagor.[19]

No difference is made between the liens obtained by the pledge of property and those obtained in any other way, except that a pledge implies delivery, though delivery is not always necessary,[20] and does not require record. Otherwise the same rules apply to pledges as to mortgages.

Where a license owned by a bankrupt and converted into money by his trustee had previously been pledged by the bankrupt, the pledgee is entitled to intervene in the bankruptcy proceedings to assert his right to payment from the proceeds.[21] If an insurance policy had been given as security for the endorsement of a note, negotiated by bankrupt, the cash surrender value should be applied by the trustee first to the payment of such note;[22] and the same is true where moneys are advanced upon the pledge of such policies.[23]

The trustee is entitled to hold property of the bankrupt as against a chattel mortgage or a contract of conditional sale which is void as against general creditors for want of record.[24] If he sells property encumbered, he conveys only the bank-

[17] In re Novak, 111 F. R. 161, 7 A. B. R. 27.

[18] Burdick v. Jackson, 15 N. B. R. 318; but see Graham v. Stark, 3 N. B. R. 92, 3 Ben. 520, F. C. 5676.

[19] In re Coffin, 1 N. B. N. 507, 2 A. B. R. 344.

[20] Chatt. Nat. Bk. v. Rome Iron Co., 102 F. R. 755, 4 A. B. R. 441.

[21] In re Fisher, 103 F. R. 860, 4 A. B. R., 646.

[22] In re Weil, 2 N. B. N. R. 295.

[23] In re Little River Lumber Co., 1 A. B. R. 483, 1 N. B. N. 307, 92 F. R. 585; In re Sands Ale Brewing Co., 6 N. B. R. 101, 3 Biss. 175, F. C. 12307.

[24] In re Andrae & Co., 117 F. R., 561, 9 A. B. R., 135.

rupt's interest subject to the incumbrance,[25] and with no higher or better interest than the bankrupt could have conveyed.[26] He takes the bankrupt's property free of all liens avoided by the bankruptcy proceedings if created either before or after the filing of the petition.[27]

§ 1150. —— **Onerous or unprofitable property.**—Neither a receiver nor trustee is bound to accept property of an onerous or unprofitable character, or to assume an obligation of the bankrupt, unless for the benefit of the creditors;[28] and if the trustee refuses under such circumstances to take title, it remains in the bankrupt. In case the trustee refuses to assume the performance of a contract, the contractual rights and liabilities of the bankrupt remain unaffected by the bankruptcy.[29] This refers to all classes of contracts except for purely personal service or those involving trust or confidence, to which the trustee cannot take title.

§ 1151. —— **Extent.**—The trustee takes all of the bankrupt's right and title and all those of the creditors against adverse claimants to the estate, free of all claims not valid against the creditors and every one of them,[30] so that the bankrupt cannot maintain a suit in his own name in relation to property not exempt, after the appointment of a trustee.[31] But mere ability of the bankrupt, by deed or otherwise, to estop or preclude himself from claiming title to or enjoying property, acquired after the execution of such deed, does not constitute property which prior to the filing of the petition he could by any means have transferred.[32] A bare possibility or mere expectation of acquiring property does not constitute property or a title to property, nor can it be transferred or

[25] In re Cooper, 16 N. B. R. 178, F. C. 3190.

[26] Ray v. Brigham, 12 N. B. R. 145.

[27] In re Wells, 114 F. R. 222, 8 A. B. R 75; Rowe v. Page, 13 N. B. R. 366.

[28] In re Schierrmann, 2 N. B. N. R. 118; In re Ells, 2 N. B. N. R. 360, 98 F. R. 967, 3 A. B. R. 564; In re Chambers, 2 N. B. N. R. 388, 98 F R. 865, 3 A. B. R. 537; File Co. v. Barrett, 110 U. S. 288; Sessions v. Romadka, 145 U. S. 29; Sparhawk v. Yerkes, 142 U. S. 1.

[29] In re Schierrmann, 2 N. B. N. R. 118.

[30] In re Kindt, 2 N. B. N. R. 369, reversed 101 F. R. 107, 4 A. B. R. 48.

[31] Pickens v. Dent, 106 F. R. 653, 5 A B. R. 644, affd. 187 U. S. 177, 9 A. B. R. 47.

[32] In re Twaddell, 110 F. R. 145 6 A. B. R. 539.

levied upon.[33] The bankruptcy act cannot be construed so narrowly as to exclude any interest constituting an asset available to creditors merely on the ground that it is not expressly enumerated.[34]

§ 1152. Property which vests in trustee in general: prior to filing petition.—The distinction between the property which vests in the trustee and the time the title of the bankrupt to such property vests him in should be observed. The trustee is vested with the title of the bankrupt as of the date of the adjudication of bankruptcy,[35] but as to the class of property referred to in subdivision 5, only to that which "prior to the filing of the petition the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process." This limits the amount of that particular kind of property, but still as to this the trustee is vested with the title of the bankrupt as of the date of adjudication. The one refers to the time the title vests, the other to what title vests;[36] and, where bankrupt made a voluntary assignment prior to filing a petition in bankruptcy, the status of creditors, who did not consent to the assignment, is not affected by it, but is fixed by the filing of the petition.[37] To illustrate: suppose, prior to filing his petition, the bankrupt had a transferable interest in a business left by his father, who, to protect the business, had provided in his will that, in case of the bankruptcy of any one of his children, his interest should cease and there should be paid to whomever was entitled the value of such interest as of the day he filed the petition in bankruptcy. Suppose, further, that between the filing of the petition and the adjudication, events occurred which caused the business to increase largely in value, by the death of a brother, the bankrupt received an interest equal to the one he had formerly had. His trustee in bankruptcy would take the bankrupt's first interest as the bankrupt held it on the day of the adjudication, that is, its value on the day the petition was filed, while, as shown by the interest still held by the

[33] In re Wetmore, 108 F. R. 520, 6 A. B. R. 210.

[34] In re Baudouine, 1 N. B. N. 506, 3 A. B. R. 55, 96 F. R. 536.

[35] In re Kellogg, 113 F. R. 120, 7 A. B. R. 623.

[36] In re Pease, 2 N. B. N. R. 1108, 4 A. B. R. 578; In re Durka, 104 F. R. 326.

[37] In re Swift, 3 N. B. N. R. 52.

bankrupt, the property itself then was quite different both in form and value. The elimination of the part of the paragraph between the provisions will further emphasize what is meant. "The trustee * * * shall in turn be vested * * * with the title of the bankrupt, as of the date he was adjudged a bankrupt * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred. * * *"

If insolvency proceedings were pending when the bankruptcy act was passed and the bankrupt's assets were vested in the assignee appointed therein, the trustee is entitled only to property acquired between the institution of the insolvency proceedings and the filing of the petition.[38]

To summarize, it may be generally stated that the trustee becomes vested as of the date of the adjudication to all property of the bankrupt which at the time the petition was filed by or against him might in any way, by legal or equitable proceedings, be subjected to the claims of his creditors,[39] including such as may have been conveyed in fraud of the act or of creditors, or by any voidable transfers whatever. This transition of title is limited as to the class of property in subdivision 5 of this section, to such interests in property as the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise subjected to the claims of his creditors prior to the filing of the petition, or property into which such interests have been converted, including such as may have vested in him on the day but prior to the filing of the petition.[40] It would include the interest of a bankrupt in an estate, vested before the bankruptcy, although such interest is undetermined,[41] but would exclude all inchoate interests which he possessed at the time the petition was filed which could not be alienated or disposed of by him or levied on and sold or otherwise subjected to his debts,[42] as a grant of public lands

[38] In re Mussey, 2 N. B. N. R. 113, 99 F. R. 71, 3 A. B. R. 592.

[39] In re Elmira Steel Co., 5 A. B. R. 484; In re Louis & Bros., 1 A. B. R. 458; In re Appel, 4 A. B. R. 722.

[40] In re Pease, supra; In re Stoner, 105 F. R. 752, 5 A. B. R. 402.

[41] In re Mosier, 112 F. R. 138, 7 A. B. R. 268.

[42] In re Harris, 1 N. B. N. 384, 2 A. B. R. 359; In re Pease, 2 N. B. N. R. 1108, 4 A. B. R. 578; Keegan v. King, 96 F. R. 758, 3 A. B. R. 79; In re Legg, 1 N. B. N. 420, 2 A. B. R. 805, 96 F. R. 326; but

which had been declared forfeited, although subsequent to bankruptcy proceedings had been restored.[43] Thus the words "prior to the filing of the petition" as used in this subdivision, refer to what passes, while the apparently antagonistic words earlier in the section refer to when it passes.[44] No payment by or to a bankrupt subsequent to the bankruptcy in relation to transactions anterior thereto is valid, though made or received bona fide or without notice.[45]

§ 1153. —— Between filing petition and adjudication.—Since it is the purpose of the act to apply the property owned by the bankrupt at the time of filing the petition to the payment of the debts of bankrupt then owing, though the title thereto does not vest until the adjudication, all property acquired between the filing of the petition and adjudication, unless simply a substitute for property held before such filing, can be retained by bankrupt and does not became a part of his estate for the payment of debts, and need not therefore be scheduled.[46] If the interest is vested when the petition is filed, it would be otherwise.[47] Thus, an inheritance received during this period but over which bankrupt had no control at the time of filing the petition, remains his individual property.[48]

§ 1154. —— After adjudication.—All property acquired by bankrupt subsequent to his adjudication remains his individual property, and does not inure to the benefit of creditors. Thus a lease which proved valuable, after the adjudication

see Carter v. Hobbs, 1 N. B. N. 191, 92 F. R. 599, 1 A. B. R. 215; In re Gutwillig, 1 N. B. N. 40, 90 F. R. 481, 1 A. B. R. 78; In re Abraham, 1 N. B. N. 281, 93 F. R. 767, 779, 2 A. B. R. 266; In re Clute, 1 N. B. N. 386, 2 A. B. R. 376; In re Becker, 2 N. B. N. R. 245, 98 F. R. 407, 3 A. B. R. 412.

[43] In re Hansen, 107 F. R. 252.

[44] In re Pease, supra.

[45] Mays v. Bk., 4 N. B. R. 147; In re Hayden, 7 N. B. R. 192, F. C. 6257; Babbitt v. Burgess, 7 N. B. R. 561, 4 Dill. 169, F. C. 693; Duffield v. Horton, 16 N. B. R. 59; s. c. 19 N. B. R. 13; Booth v. Meyer, 14 N. B. R. 575.

[46] In re Gerdes, 2 N. B. N. R. 131, 102 F. R. 318, 4 A. B. R. 346; In re Harris, 1 N. B. N. 384, 2 A. B. R. 359; In re Freeman, 2 N. B. N. R. 569.

[47] In re Wood, 98 F. R. 972, 3 A. B. R. 572; In re Schenberger, 102 F. R. 978, 2 N. B. N. R. 783, 4 A. B. R. 487; Smith v. Schultz, 17 N B. R. 520; see also In re Baudouine, 1 N. B. N. 506, 3 A. B. R. 55, 96 F. R. 536.

[48] In re Freeman, 2 N. B. N. R. 569; In re Wetmore, 99 F. R. 703, 3 A. B. R. 700; s. c. 102 F. R. 290; In re Hoadley, 2 N. B. N. R. 704, 101 F. R. 233, 3 A. B. R. 780.

on a forfeited contract though it appeared not to be so at the time of filing the petition and was accordingly not scheduled, no creditor objecting to the omission, was held to be after-acquired property;[49] so a patent allowed after adjudication on application filed prior to the petition.[50]

§ 1155. —— **Under Act of 1867.**—Under the Act of 1867, it was held that all the rights and the duties of the bankrupt in respect to whatever property, not excluded from the operation of the bankruptcy act, he might hold under whatever title, legal or equitable, however incumbered, passed to the assignee upon the filing of the petition;[51] likewise all money and property on hand used and held as his own, notwithstanding an endeavor to set up title in a third person merely to hold it himself as against the assignee.[52]

§ 1156. —— **Choses in action.**—Any chose in action arising upon contracts or from the unlawful taking or detention of, or injury to the bankrupt's property, if beneficial to the estate, will pass to the trustee. It will not pass to the trustee if it be a right of action of a personal nature, such as for libel or slander, or for damages for a malicious prosecution and arrest suffered by the bankrupt prior to filing the petition;[53] or one held by the bankrupt in a fiduciary capacity;[54] or of a wife not reduced to possession by her husband, the bankrupt, which would not pass;[55] but, if reduced to possession, it does, and the question of survivorship is laid aside by the bankruptcy;[56]

[49] In re Oliver, 2 N. B. N. R. 212; to same effect, Norton v. Hood, 124 U. S. 20.

[50] In re McDonald, 101 F. R. 239, 4 A. B. R. 92.

[51] In re Wynne, 4 N. B. R. 5, F. C. 18117; In re Rosenberg, 3 N. B. R. 33, 3 Ben. 366, F. C. 12055; Smith v. Buchanan, 4 N. B. R. 133, F. C. 13016; Markson v. Heaney, 4 N. B. R. 165, 1 Dill. 497, F. C. 9098; Purviance v. Bk., 8 N. B. R. 447, F. C. 11475; Bk. v. Bk., 10 N. B. R. 44; Randolph v. Canby, 11 N. B. R. 296, F. C. 11559; Barnard v. R. R. Co., 14 N. B. R. 469, 4 Cliff. 351, F. C. 1007; Aiken v. Edrington, 15 N. B. R. 271, F. C. 111; Hayes v. Dickinson, 15 N. B. R. 350; Hersey v. Elliott, 18 N. B. R. 358.

[52] In re Moses, 1 F. R. 845, 19 N. B. R. 412, F. C. 9870.

[53] In re Haensell, 91 F. R. 355, 1 N. B. N. 340 (note), 1 A. B. R. 286; see also Tufts v. Matthews, 10 F. R. 609; Wright v. Bk., 18 N. B. R. 87, F. C. 18078; Noonan v. Orton, 12 N. B. R. 405.

[54] In re Bk. of Madison, 9 N. B. R. 184, 5 Biss. 515, F. C. 890.

[55] Wickham v. Valle's Ex'rs, 11 N. B. R. 83, F. C. 17613.

[56] In re Boyd, 15 N. B. R. 119, 2 Hughes, 349, F. C. 1745.

unless by the laws of the state he has no interest in her choses in action; or if non-negotiable and suable only in the name of the assignor so as to be a set-off as a mutual debt or credit;[57] or for the malicious abuse of the garnishee process;[58] or if ex delicto.[59] Where prior to bankruptcy the debtor turns a long-pending suit over to his son, without consideration, and then after his discharge takes a reassignment, the fund should go to the trustee.[60]

See Claims against the United States, post § 1220.

§ 1157. ——Title to bankrupt's contracts.—The trustee may assume all contracts of the bankrupt, or rights of action arising thereon, which have a transferable value, or which would be beneficial to the estate except those of a purely personal character or involving personal qualities or services. He is entitled to property in the possession of the bankrupt under a conditional contract of sale if such contract, by reason of not being recorded, or for want of a statement endorsed thereon, under oath, of the amount of the claim, or other similar reason, is not binding on every creditor,[61] and, even if such contract is valid as to creditors, he can take the property, paying what remains unpaid thereon.[62]

A trustee may sue on a written contract, entered into between the bankrupt and another to recover a debt alleged to be due the bankrupt thereunder,[63] and it has been held that he is entitled to have the compensation apportioned between himself and the bankrupt in proportion to the value of the services rendered before and after the bankruptcy, where the bankrupt, under a general contract, has rendered partial service, but has not completed the contract, prior to filing the peti-

[57] Rollins v. Twitchell, 14 N. B. R. 201, 2 Hask. 66, F. C. 12027.

[58] Noonan v. Orton, 2 N. B. R. 405.

[59] In re Brick, 19 N. B. R. 504.

[60] Scott v. Devlin, 1 N. B. N. 561, 89 F. R. 970.

[61] Press Post Printing Co. v. Landon Printing & Pub. Co., 2 N. B. N. R. 774; In re Leigh Bros., 1 N. B. N. 526, 96 F. R. 806; aff'g 1 N. B. N. 425, 2 A. B. R. 606; In re Legg, 1 N. B. N. 420, 2 A. B. R. 805, 96 F. R. 326; Contra, In re McKay, 1 N. B. N. 133, 2 A. B. R. 292; In re Ohio Co-op. Shear Co., 1 N. B. N. 477, 2 A. B. R. 775; In re Bozeman, 2 A. B. R. 809, 1 N. B. N. 479.

[62] In re Bozeman, 2 A. B. R. 809, 1 N. B. N. 479; In re Lyon, 7 N. B. R. 182, F. C. 8644; Sawyer v. Turpin, 5 N. B. R. 339, 2 Lowell 29, F. C. 12410.

[63] Babbit v. Burgess, 7 N. B. R. 561, 2 Dill. 169, F. C. 693.

tion, but subsequently fulfills the same; unless the contract is contingent upon full performance of the services.[64]

There are certain classes of property which may be in the bankrupt's possession, or under his control, by virtue of some contract, which should not be classed as an asset and would not pass to the trustee, as, for instance, where bankrupt has possession of property for certain purposes, the title to which is in another;[65] property in which the title, by written contract, remains in the vendor until the stipulated price is paid, all of the requirements of the law being fully complied with;[66] a business conducted in bankrupt's name, but which is the bona fide property of another;[67] or the earnings of a minor son who has been emancipated by his father,[68] or where goods are purchased on credit by an insolvent merchant who does not intend to pay for them, and they are re-taken by the vendor, the value thereof cannot be recovered by the trustee of the purchaser.[69]

§ 1158. **Property obtained through fraud.**—Where a party by fraudulently concealing his insolvency and his intent not to pay for goods or property, induces the owner to sell them to him on credit, the vendor, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and recover his property.[70] It is not necessary that the false representation should be the sole and exclusive consideration for the credit, only that it was the material consideration without which the credit would not have been given;[71] thus the representations made to a commercial agency of the financial standing of the purchaser, if false, would hardly by itself

[64] In re Jones, 4 N. B. R. 114, F. C. 7448.

[65] In re Noakes, 1 N. B. R. 164, F. C. 12281; In re Pusey, 7 N. B. R. 45, F. C. 11478; In re Cohn, 2 N. B. N. R. 299, 98 F. R. 75, 3 A. B. R 421.

[66] In re Lyon, 7 N. B. R. 182, F. C. 8644; Sawyer v. Turpin, 5 N. B. R. 339, 2 Low. 29, F. C. 12410.

[67] In re Beardsley, 1 N. B. R. 121, F. C. 1184.

[68] In re Dunavant, 1 N. B. N. 542, 96 F. R. 542, 3 A. B. R. 41.

[69] Donaldson v. Forwell, 15 N. B. R. 277.

[70] Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Turner v. Ward, 154 U. S. 618, 23 L. Ed. 391; In re Weil, 111 F. R. 897, 7 A. B. R. 90; In re Gany, 103 F. R. 930; In re Epstein, 109 F. R. 876; Bloomingdale v. Rubber Mfg. Co., 114 F. R. 1016, 8 A. B. R. 74; In re Hamilton Furniture & Carpet Co., 117 F. R. 774, 9 A. B. R. 65; Oil Co. v. Hawkins, 74 F. R. 395; In re O'Connor, 9 A. B. R. 18.

[71] In re Gany, supra.

be sufficient to warrant a rescission of the sale and a recovery of the property, but in connection with the representations made to the vendor or his agent, it would be.[72] In property thus obtained by the bankrupt, the trustee takes no better title than he did, accordingly the defeasible title of the bankrupt passes to the trustee which may be determined by a prompt disaffirmance of the contract by the vendor, in which event the goods will be returned to the creditor.[73] The subsequent discovery of the insolvency of the debtor through bankruptcy proceedings will not be permitted as an excuse for a creditor to rescind the sale, but actual fraudulent representation in obtaining the property must be shown by the creditor, and the disaffirmance of the contract must have been promptly made.

Where goods are obtained through misrepresentation by a firm, composed of several members, a return of the goods or their proceeds will be valid, as against the trustee of two of the creditors, if the goods have not lost their identity.[74] But it is not in harmony with the purpose of the bankruptcy act, which is to secure equality between creditors, to permit all creditors who sold goods to a bankrupt, which they can identify, to rescind the sales and reclaim the goods on the ground of fraud, where other creditors having an equal right to a rescission, cannot enforce it because their goods were disposed of. Clear proof of fraudulent representations is required.[75]

§ 1159. —— Title in case of confusion of goods.—Where a bailee, prior to his bankruptcy, mixes the property of another with his own so that the identical property cannot be distinguished, the whole passes to the trustee;[76] and the same is true where the bankrupt has money due from him as trustee but indistinguishable from any other moneys in his possession; it cannot be considered "property held in trust," but passes to the trustee.[77] If money is given another to invest which he uses in his speculations, so that it does not remain in specie,

[72] In re Hamilton Furniture & Carpet Co., supra; In re Weil, supra; In re Epstein.

[73] Donaldson v. Farwell, supra.

[74] Montgomery v. Bucyrus Mach. Wks., 14 N. B. R. 193, 92 U. S. 257.

[75] In re O'Connor, 112 F. R. 666, 7 A. B. R. 428.

[76] Adams v. Meyers, 8 N. B. R. 214, 1 Sawy. 306, F. C. 62.

[77] In re Richard, 2 N. B. N. R. 1029, 104 F. R. 792; Hosmer v. Jewett, 6 Ben. 208, F. C. 6713.

on his becoming bankrupt the cestuis que trustent cannot claim the money from the trustee and can only come in pari passu with the other creditors;[78] as must a depositor whose specie deposit has been appropriated by the depositee, a bankrupt.[79]

§ 1160. —— **Exempt property.**—See Exemptions, ante, § 185.

§ 1161. **Conveyances void under state statutes of Fraud.**—The bankruptcy act does not abrogate state statutes of fraud but, if under state laws a sale by the bankrupt is void for want of delivery followed by an actual and continuing change of possession, or of record, or other reason, and vests no title in the vendee, the trustee is entitled to the property.[80] If on the contrary an unrecorded mortgage, or unacknowledged deed, is valid as to general creditors, it is valid as to the trustee.[81] In certain states a chattel mortgage, executed long before the bankruptcy but not recorded until a month prior thereto, is void only as to creditors who became such between the execution and record by a new credit or by the extension of an old indebtedness existing at or prior to the execution of said mortgage.[82] The statutory trust of creditors in real estate held by the wife of a debtor, subsequently adjudged a bankrupt, inures as assets to the trustee when purchased by the bankrupt prior to the bankruptcy and paid for with his own money

[78] In re Faneway, 4 N. B. R. 26; Ungewitter v. Von Sachs, 3 N. B. R. 178, 4 Ben. 167, F. C. 14343; In re Swift et al., 5 A. B. R. 232; see In re Richard, 2 N. B. N. R. 1029, 104 F. R. 792.

[79] In re King, 9 N. B. R. 140; In re Hosie, 7 N. B. R. 601, F. C. 6711.

[80] In re Taylor, 1 N. B. N. 480, 95 F. R. 956; In re Leigh Bros., 1 N. B. N. 526, 425, 96 F. R. 806, 1 N. B. N. 420, 2 A. B. R. 805, 96 F. R. 326; Press Post Printing Co. v. Landon Printing & Pub. Co., 2 N. B. N. R. 774; In re Booth, 2 N. B. N. R. 377, 98 F. R. 975; In re Legg, 96 F. R. 326, 1 N. B. N. 420, 2 A. B. R. 805; Massey v. Allen, 7 N. B. R. 401, 17 Wall. 351; Edmondson v. Hyde, 7 N. B. R. 1, 2 Sawy. 205, F. C. II. 4285; In re Eldridge, 4 N. B. R. 162, F. C. 12610; Potter v. Coggeshall, 4 N. B. R. 19, F. C. 11322; In re Collins, 12 N. B. R. 379, 12 Blatch. 548, F. C. I. 3007; Schulze v. Boltins, 17 N. B. R. 167, 8 Biss. 174, F. C. 12489; but see In re Bozeman, 1 N. B. N. 479, 2 A. B. R. 809; In re Ohio Co-op. Shear Co., 1 N. B. N. 477, 2 A. B. R. 775; In re McKay, 1 N. B. N. 133, 1 A. B. R. 292.

[81] In re Wright, 1 N. B. N. 381, 2 A. B. R. 364, 96 F. R. 187; In re Kansas City S. & M. Mfg. Co., 9 N. B. R. 76, F. C. 7610; Duplan Silk Co. v. Spencer, 8 A. B. R. 367.

[82] In re Adams, 1 N. B. N. 503, 2 A. B. R. 415, 97 F. R. 188; and see In re Kaufmann, 2 N. B. N. R. 778.

in fraud of creditors.[83] If a purchaser of property, paying consideration therefor, causes it to be conveyed to another, that it may be held in trust for the benefit of third persons, and the trust fails because not in conformity to the Statute of Frauds, a trust results in favor of the purchaser.[84]

See Conveyances to Relatives, ante, § 1103.

§ 1162. Title to property affected by general assignment.— A general assignment for the equal benefit of all creditors is void as against the trustee, if made within four months of bankruptcy, as being opposed to the policy of the bankrupt law, and the property so assigned upon the subsequent bankruptcy of the assignor vests in the trustee.[85] If the assignment was made prior to such period the property would not pass to the trustee.[86] He takes title to property in the hands of a common law assignee although a replevin suit or other proceedings with reference thereto are pending.[87] It has been held that the title of a trustee who was also the assignee under a voluntary assignment relates back to such assignment, and his acts after receiving the property, if not inconsistent with his duty as trustee, will be ratified.[88] Where a receiver appointed under state laws is not invested with title until a certified copy of the order appointing him is filed with the clerk of the county, a receiver who has not complied with the law, has no title as against the subsequently appointed trustee in bankruptcy.[89] On application to the state court by the trustee in bankruptcy of an insolvent corporation, the funds in the hands of the receiver of the corporation, appointed shortly before the

[83] In re Mayers, 1 N. B. R. 162, 2 Ben. 424, F. C. 9518.

[84] In re Davis, 112 F. R. 129, 7 A. B. R. 258.

[85] West Co. v. Lea Bros., 174 U. S. 590, 1 N. B. N. 409, 2 A. B. R. 463; s. c. 1 N. B. N. 79, 1 A. B. R. 261, 91 F. R. 237; In re Gutwillig, 1 N. B. N. 40, 1 A. B. R. 78, 90 F. R. 475; s. c. 92 F. R. 337; In re Sievers, 91 F. R. 366, 1 N. B. N. 68, 1 A. B. R. 117; s. c., as Davis v. Bohle, 92 F. R. 325, 1 N. B. N. 216, 1 A. B. R. 412; Leidigh Co. v. Stengel, 95 F. R. 637, 1 N. B. N. 387, 2 A. B. R. 383; In re Curtis, 1 N. B. N. 41, 163, 91 F. R. 737, 1 A. B. R. 440; Ins. Co. v. Ins. Co., 14 N. B. R. 311, F. C. 5486.

[86] In re Arledge, 1 N. B. R. 195, F. C. 533.

[87] In re Solomon, 2 N. B. N. R. 460; In re Kenny, 2 N. B. N. R. 140, 97 F. R. 554, 3 A. B. R. 353; comp. Macdonald v. Moore, 15 N. B. R. 26, 8 Ben. 579, F. C. 8763.

[88] In re Walker, 18 N. B. R. 56, F. C. 17063.

[89] In re Tyler, 104 F. R. 778, 5 A. B. R. 152.

filing of the petition, should be turned over to him.[90] This is likewise true in the case of a partnership,[91] as well as in the case of an individual.

See General Assignments, ante, § 1100.

§ 1163. Title to property of husband and wife.—In bankruptcy proceedings the bankruptcy of the husband in no wise affects the wife or her property and vice versa, and the proper way of reaching property in the hands of the one not bankrupt, alleged to have been conveyed in fraud, in those states where the wife is not a competent witness, is by a bill of discovery,[92] if the examination afforded by the bankruptcy law is insufficient. Where a married woman engages in business on her own account in a state where she is required to file a certificate to make her a feme sole trader,[93] and neglects to do so, her property employed in such business, may be attached by her husband's creditors and, if so attached within four months of the bankruptcy proceedings, the trustee takes title thereto.[94] Where, however, through mistake or fraud the husband is vested with title to real estate inherited by the wife, he will be held to be trustee for his wife and it will not be liable for his debts.[95] In some states the products of a wife's land conveyed to her separate use by deed without limitation, and occupied by her husband according to his marital rights, are assets belonging to his estate in bankruptcy.[1]

Where there has been no consummated conversion of the wife's separate estate, the husband's trustee cannot get the legal title without a decree for its conveyance to him; and the same rule applies where the conversion has been consummated by fraud.[2] If a bankrupt, while insolvent, purchases articles of luxury for his wife, though they are not appropriated to her individual use, and she attempts to hold them against his trustee, the bankrupt must answer the trustee's petition.[3] The question whether stock purchased with money borrowed on the joint note of husband and wife and issued to her, can be impounded for the benefit of the husband's estate,

[90] Mauran v. Carpet Lining Co., 6 A. B. R. 734.

[91] Wilson v. Parr, 8 A. B. R. 230.

[92] In re Fowler, 1 N. B. N. 265, 1 A. B. R. 555, 93 F. R. 417.

[93] Pub. Stat. Mass. c. 147, par. 11.

[94] In re Hammond, 98 F. R. 845, 3 A. B. R. 466.

[95] In re Anderson, 23 F. R. 482.

[1] In re Rooney, 6 A. B. R. 478.

[2] In re Campbell, 17 N. B. R. 4, 3 Hughes 276, F. C. 2348.

[3] In re Pierce, 15 N. B. R. 449, 7 Biss. 426, F. C. 11139.

can be determined only in a direct proceeding between the proper parties.[4] Where a bankrupt, when solvent and not contemplating bankruptcy, conveys lands to his wife, reserving to himself a power of revocation and also power to appoint to other uses, and several years later is adjudged a bankrupt, it has been held that the trustee cannot recover such lands;[5] though the contrary has been held where the conveyance was not recorded until after the petition had been filed. The mere application of a trustee to have property of a wife delivered to him as her husband's trustee, alleging, but submitting no proof, that she holds the property in her name as a cloak against her husband's creditors, the application will be denied.[6] A wife, entitled on divorce to one-third of her husband's personal property, who has merely commenced an action for divorce, cannot enjoin his trustee as to the disposition of such one-third.[7]

§ 1164. —— **Joint estate.**—The fact that the bankrupt is jointly interested in an estate with another, will not defeat the title of his trustee in bankruptcy to such interest. The trustee becomes vested with the title of the husband on his bankruptcy where he invests his wife's money in realty in her name until he accumulates property by his skill and energy;[8] or a one-half interest less the amount of homestead right where husband and wife build jointly on land acquired by the wife with their joint funds;[9] or he may sue to recover the reversionary interest of the husband in property fraudulently conveyed to his wife.[10] A gift by bankrupt to his wife before adjudication, and not in contemplation of bankruptcy, of funds used in improving her separate estate, does not vest him with such an interest therein as would pass to the trustee.[11] Where bankrupt and his wife held real estate as an entirety and she ob-

[4] Fellows v. Freudenthal, 102 F. R. 731, 4 A. B. R. 490.

[5] Jones v. Clifton, 18 N. B. R. 125, F. C. 7453.

[6] Driggs v. Russell, 3 N. B. R. 39, F. C. 4084.

[7] Hawk v. Hawk, 102 F. R. 679, 2 N. B. N. R. 940, 4 A. B. R. 436.

[8] Muirhead v. Aldridge, 14 N. B. R. 249, F. C. 9904; Comp. In re Fitchard, 2 N. B. N. R. 1075, 103 F. R. 742, 4 A. B. R. 609.

[9] Johnson v. May, 16 N. B. R. 425, F. C. 7397.

[10] In re Peltasohn, 16 N. B. R. 265, 4 Dill. 107, F. C. 10912; In re Griffith, 1 N. B. N. 546, citing Howell v. Jones, 7 Pickle, 402; Flatt v. Stadler & Co., 16 Lea, 371; Rouhs v. Hooke, 3 Lea, 302.

[11] In re Wyatt, 2 A. B. R. 94, F. C. 18106.

tained a divorce subsequent to the bankruptcy, if the joint tenancy was thereby transformed into a tenancy in common, the bankrupt's interest has been held to be after acquired property and would not pass to the trustee.[12]

§ 1165. —— **By the curtesy.**—The interest of a husband as tenant by the curtesy in his wife's real estate during her life time, and after issue born, is not a power or such property as will pass to the husband's trustee in bankruptcy in the absence of a state law to the contrary,[13] as in Tennessee where it does pass to the trustee subject to the statutory right of the husband and wife to continue to hold the land during her life.[14] If a wife mortgages her realty to secure money to pay her husband's debts, in excess of his estate by the curtesy, and he and she unite in a general assignment of all his property, expressly reserving hers, on the death of the wife and the sale of her realty, if a sum is realized greater than the incumbrances, the wife's heirs or representatives are entitled to the fund.[15]

§ 1166. —— **Dower rights.**—The bankruptcy law provides that the death of the bankrupt pending the proceedings shall in no wise affect the right of dower and allowances fixed by the law of the state where the bankrupt resides.[16] Accordingly in case of the husband's death after filing the petition, lands owned by him at the time of filing will pass to the trustee subject to the wife's right of dower.[17] This right is not divested by proceedings in bankruptcy,[18] nor by a sale thereunder,[19] but she is entitled to her one-third of the real estate or of an equitable interest of her husband which passed to the trustee.[20] If she joins in a mortgage with him, her dower can be barred only by a sale under the power contained in the mortgage.[21]

[12] In re Benson, 16 N. B. R. 377, 8 Biss. 116, F. C. 1328.

[13] Hesseltine v. Prince, 1 N. B. N. 528, 2 A. B. R. 600, 95 F. R. 802, citing Lynde v. McGregor, 13 Allen, 182, 184; Walsh v. Young, 110 Mass. 396, 399.

[14] In re McKenna, 9 F. R. 27.

[15] Shippen v. Robbins' Appeal, 15 N. B. R. 533.

[16] Sec. 8, act of 1898.

[17] In re Hester, 5 N. B. R. 285, F. C. 6437.

[18] In re Angier, 4 N. B. R. 199, F. C. 388.

[19] In re Shaeffer, 105 F. R. 352; Porter v. Lazear, 109 U. S. 84; Contra, Kelly v. Strange, 3 N. B. R. 2, F. C. 7276; In re Shaeffer, 105 F. R. 352.

[20] Walford v. Noble, 19 N. B. R. 440; In re Slack, 111 F. R. 523, 7 A. B. R. 121.

[21] In re Bartenbach, 11 N. B. R. 61, F. C. 1068.

Where a conveyance is set aside as an unlawful preference or is surrendered by the creditor, the land becomes again subject to the wife's dower;[22] and she is not estopped from claiming it by having joined in the deed.[23] A reasonable support has been allowed a wife in preference to the husband's creditors, out of the rents and profits of realty conveyed to her by him through a third person without consideration, where they are her only means of support.[24]

§ 1167. Title to insurance policies payable to wife.—An insurance policy on a bankrupt's life payable to his wife is her separate property.[25] It cannot be assigned by him,[26] nor surrendered to his trustee with the purpose of cutting off his wife's interest.[27] Accordingly property bought with money obtained by surrendering such policy is hers.[28] A bankrupt, whose wife takes out an insurance policy on her own life for his benefit, pays the premiums out of her separate estate, and dies after the adjudication, is entitled to the proceeds of such policy as against his trustee.[29] Where a husband and a wife are each adjudged bankrupt, policies of insurance on the life of the husband, having a cash surrender value, and payable to the wife if she survive him, and to his personal representatives if he survive, pass to the trustee as assets of their respective estates.[30]

§ 1168. Life insurance policy, cash surrender value.—Any policy of insurance held by a bankrupt, having a cash surrender value payable to himself, his estate or personal representatives, passes to his trustee for the benefit of the estate, unless within thirty days after the ascertainment of its surrender value, the bankrupt pays or secures to the trustee the sum so ascertained, in which event he can continue to hold,

[22] In re Detert, 11 N. B. R. 293, F. C. 3929; McFarland v. Goodman, 11 N. B. R. 134.

[23] Coxe v. Wilder, 7 N. B. R. 241, 2 Dill. 45, F. C. 3308, rev'g 5 N. B. R. 443, F. C. 3309.

[24] Clark v. Hezediah, 24 F. R. 663; In re Brandt, 5 Biss. 217, F. C. 1811.

[25] In re Steele, 2 N. B. N. R. 281 3 A. B. R. 549, 98 F. R. 78; Atkins v. Equitable Life Assurance Society, 132 Mass. 395.

[26] In re Bear, 11 N. B. R. 46, F. C. 1178.

[27] Central Bank of Washington v. Hurne, 128 U. S. 195.

[28] In re Dews, 1 N. B. N. 411, 2 A. B. R. 283, 96 F. R. 181.

[29] In re Owen, 8 N. B. R. 6, F. C. 10627.

[30] In re Holden, 114 F. R. 650, 7 A. B. R. 615.

own and carry such policy free from the claims of his creditors. While the term "cash surrender value" is used in the statute, the evident intention of Congress was that any policy held by the bankrupt in which he had such an interest as could be converted into cash for his benefit, whether in the nature of a loan or in any other guise, should pass to the trustee.

Where an insurance policy is held by a bankrupt, payable to his wife only in case of his death prior to its maturity, such death not having occurred when the petition is filed, the cash surrender value of such policy passes to the trustee;[31] since such a policy is property.[32] Although by its terms the policy has no cash surrender value, if it has a large actual value, and is assignable or transferable by its terms, it will pass to the trustee who may hold it for the benefit of the estate if the bankrupt does not die within the period for which issued, or turn it over to the party to whom payable in case of death, if he does die.[33] If a policy with a paid up value has been given as security for the endorsement of a note, negotiated by the bankrupt, the surrender value should be applied by the trustee first to such note.[34] Policies of this character become part of the bankrupt's estate, unless he avails himself of the right to pay or secure the surrender value of the trustee,[35] and this is so notwithstanding the same may be exempt under the state laws.[36] Where an endowment policy payable to the wife if the bankrupt died during the term, or to himself if he survived it, was issued upon their joint application, and for several years the wife saved the policy, by paying the premiums,

[31] In re Grahs, 1 N. B. N. 164, 1 A. B. R. 465; In re Holden, 114 F. R. 650, 7 A. B. R. 615.

[32] Bassett v. Parsons, 140 Mass. 169; Brigham v. Home Life Ins. Co., 131 Mass. 319; New York Life Ins. Co. v. Armstrong, 117 U. S. 591; New York Life Ins. Co. v. Flack, 3 Md. 341; Williams v. Heard, 140 U. S. 529.

[33] In re Slingluff, 106 F. R. 154, 5 A. B. R. 76; In re Welling, 113 F. R. 189, 7 A. B. R. 340.

[34] In re Weil, 2 N. B. N. R. 295; see also In re Adams, 104 F. R. 72, 2 N. B. N. R. 1034; In re Fisher, 103 F. R. 860.

[35] In re Welling, 113 F. R. 189, 7 A. B. R. 340; In re Slingluff, 106 F. R. 154, 5 A. B. R. 76.

[36] In re Boardman, 103 F. R. 783, 2 N. B. N. R. 821, 4 A. B. R. 620; In re Lange, 1 N. B. N. 44, 60, 1 A. B. R. 186, 189, 91 F. R. 361; In re Steele, 2 N. B. N. R. 281, 3 A. B. R. 549, 98 F. R. 78; see reversal, 104 F. R. 968, 5 A. B. R. 165; In re Buelow, 2 N. B. N. R. 26, 3 A. B. R. 389, 98 F. R. 86; In re Scheld, 104 F. R. 870; In re Scheld, 5 A. B. R. 102.

she had an equitable lien upon the cash surrender value for the amount so paid, and the bankrupt should assign to the trustee his interest in the surrender value, after the premiums so paid by her were deducted; or the policy should be assigned to the wife, if desired, on payment of his interest therein.[37]

If the cash surrender value of the policy is payable to a beneficiary other than the bankrupt, who must execute any transfer assignment or surrender of said policy, it is not an asset of the bankrupt.[38] If the policy has no cash surrender value, and no value for any purpose except as it becomes valuable upon the death of the insured,[39] or if the bankrupt himself is not the contracting party with the insurance company and would not be entitled to receive the value of the policy if surrendered at the date of the adjudication,[40] it would not pass to the trustee.

§ 1169. Title to insurance policies for creditor's benefit.—When a debtor, at his own expense, insures his life as security to a creditor, he is entitled to have the policy, if he pays the debt during his life; and, if not, upon his death, his representative is entitled to any surplus over the debt. If the insurance is effected and the premiums paid by the creditor, who afterwards proves his debt in bankruptcy and receives dividends thereon, and then upon the death of the bankrupt prior to the last dividend receives the full amount from the insurance company, after deducting premiums paid with interest, the creditor must pay to the trustee all over an amount sufficient, with the dividends and payments previously made, to pay the debt in full.[41]

§ 1170. Title to fire insurance policies.—An adjudication terminates bankrupt's interest in his estate and his interest in insurance policies therein ceases. If at the time of his adjudication a building owned by him is covered by a policy of insurance, providing that transfer or change of title, or assignment without the company's written consent will avoid it, and the building is burned after adjudication, the transfer, being

[37] In re Diack, 2 N. B. N. R. 664, 100 F. R. 770, 3 A. B. R. 723.

[38] In re Steele, 2 N. B. N. R. 281, 3 A. B. R. 549, 98 F. R. 78; In re Hernich, 1 A. B. R. 713.

[39] In re Buelow, 2 N. B. N. R. 26, 3 A. B. R. 389, 98 F. R. 86; Morris v. Dodd, 2 N. B. N. R. 823.

[40] In re McDonald, 101 F. R. 239, 4 A. B. R. 92.

[41] In re Newland, 9 N. B. R. 62, 7 Ben. 63, F. C. 10171.

by operation of law, does not avoid the policy, and the trustee can recover.[42]

§ 1171. **Landlord and tenant; title to lease.**—A lessee's bankruptcy does not in and of itself terminate a lease, but it becomes an asset of his estate.[43]

While there has been some diversity of opinion as to effect of an adjudication of bankruptcy upon a lease the weight of authority sustains the proposition that the discharge in no wise releases the lessee from liability under the lease for rent accruing subsequent to the filing of the petition, but the lease remains a binding contract between the parties,[44] unless the landlord re-enters or the trustee assumes the lease,[45] in which event the adjudication operates like any other assignment and all liability of the tenant ceases. The trustee has a reasonable time within which to elect whether he will assume the lease, and the right to assume it exists although there is the ordinary covenant against subletting or assignment by the tenant; since the transfer to the trustee in case of the tenant's bankruptcy is by operation of law and not the act of the bankrupt against which the ordinary covenant in a lease is in restraint.[46] While there are eminent authorities which

[42] Starkweather v. Ins. Co., 4 N. B. R. 110, F. C. 13308; Comp. In re Carow, 4 N. B. R. 178, F. C. 2426; In re Hamilton, 2 N. B. N. R. 957, 102 F. R. 683, 4 A. B. R. 543.

[43] In re Ells, 2 N. B. N. R. 360, 98 F. R. 967, 3 A. B. R. 564; In re Thiessen, 2 N. B. N. R. 625; Wildman v. Taylor, F. C. 17654; Starkweather v. Ins. Co., 4 N. B. R. 110, F. C. 13308; In re Pennewell, 119 F. R. 139; but see In re Brick & Schermerhorn, 12 N. B. R. 215, 8 Ben. 93, F. C. 1822; and see also In re Hays, Foster and Ward Co., 117 F. R. 879.

[44] In re Ells, 2 N. B. N. R. 360, 98 F. R. 967, 3 A. B. R. 564; disagreeing with In re Jefferson, 1 N. B. N. 288, 2 A. B. R. 206, 93 F. R. 948, 951; In re Schierman, 2 N. B. N. R. 118; In re Rhoads, 2 N. B. N. R. 301, 98 F. R. 399, 3 A. B. R. 380; In re Gose, 3 N. B. N. R. 840; In re Washburn, 11 N. B. R. 66, F. C. 17211; In re Laurie, 4 N. B. R. 7; White v. Griffing, 18 N. B R. 399; In re Ten Eyck, 7 N. B. R. 26, F. C. 13829; In re Webb, 6 N. B. R. 302, F. C. 17315; Ex p. Houghton, 1 Low. 554, F. C. 6225.

[45] In re Houghton, 1 Lowell 554, 12 F. C. 584; Savory v. Stocking, 4 Cush. 667; Treadwell v. Marden, 123 Mass. 390; In re Mahler, 2 N. B. N. R. 70; In re Sallignon, 2 N. B. N. R. 660; In re Frankel, 2 N. B. N. R. 840; In re Curtis, 33 So. Rep. 125, 9 A. B. R. 286; Contra, In re Jefferson, 93 F. R. 951, 2 A. B. R. 206; Bray v. Cobb, 100 F. R. 270, 3 A. B. R. 788; In re Hays, 9 A. B. R. 144.

[46] In re Thiessen, 2 N. B. N. R. 625; In re Ells, supra; In re Gose,

sustain the position that if the lease specifically provides that the insolvency or bankruptcy of the tenant shall operate to cancel the lease, they are evidently under laws which materially differ from that in force in this country, for if that position be true, a tenant holding a valuable lease may be adjudged a bankrupt on the petition of his landlord, when the sole purpose of the proceedings may be to destroy the contract of lease and thereby result in profit to the bankrupt or the landlord. Having in view one of the main purposes of the bankruptcy law, which is the equitable distribution of the assets of an insolvent to his creditors, the true rule would seem to be that notwithstanding such a provision, the assignment being by operation of law, the trustee would assume the lease. Notwithstanding the fact that the trustee assumes the lease, he is not required to remain the tenant, but the covenant against assignment is relaxed in his favor, and he may dispose of the same for the best price obtainable, and thus be relieved from further liability thereunder.[47] A stipulation in a lease against subletting, in the absence of some provision requiring it, will not be construed as a condition but as a covenant, the breach of which does not work a forfeiture.[48]

Without assuming the lease, the trustee may occupy and use the leased premises for the estate, and, under such circumstances, compensation for such use and occupation will be chargeable to the estate, not as rent under the lease, but as costs and expenses of administration.[49] Where the trustee accepts a lease and sells the interest so acquired to the lessor, the guarantor of the lease is discharged from all liability accruing after the bankruptcy.[50]

Where a lease is made for a term of years and is transferred to a creditor to secure a debt, and the lessor becomes bankrupt, the trustee takes the estate subject to such lease,[51] and takes the movable property found upon such premises subject to the

3 N. B. N. R. 840; In re Mahler, 3 N. B. N. R. 39, 44; see Atkins v. Wilcox, 3 N. B. N. R. 497; Farnam v. Hefner, 79 Calif. 580, s. c. 92 id. 543; Smith v. Putnam, 3 Pick. 221; see In re Steedman, 8 N. B. R. 319, F. C. 13, 330; In re Pennewell, 119 F. R. 139.

[47] Dol v. Goodbehen, 3 M. & S. 353; Onslow v. Corrie, 2 Mad. 330.

[48] In re Pennewell, 119 F. R. 139.

[49] Bray v. Cobb, 2 N. B. N. R. 586, 100 F. R. 270, 3 A. B. R. 788; In re Jefferson, supra.

[50] White v. Griffin, 18 N. B. R. 399.

[51] Meador v. Everett, 10 N. B. R. 421, F. C. 9376.

rights of all other persons. Where rent is a lien upon bankrupt's personal property, it must be paid first out of the proceeds of the sale.[52]

§ 1172. **Title to property under judgments or attachment.**—Where a judgment is entered and an attachment or execution is levied on a debtor's property within four months of his being adjudicated bankrupt, the trustee in bankruptcy is entitled to the proceeds of a sale thereunder, less reasonable costs of sale, whether the proceeds be in the hands of the sheriff or of a state court;[53] and the sheriff may be enjoined from paying the proceeds to the judgment creditor, and may be required upon a summary petition to pay it over to the trustee.[54] After the period of redemption from an execution sale has expired before the appointment of a trustee, he takes nothing but the bankrupt's naked title, which is valueless, since the purchaser can, at any time, demand a deed from the sheriff.[55]

§ 1173. **Title to mortgaged or pledged property.**—The trustee takes property mortgaged or pledged, subject to the amount legally due thereon. It is his duty to investigate the liens claimed to be held against the property and the value of the property on which held; and in case of doubt test the validity of the liens by suit.[56] He should plead usury as long as any part of the debt on which usury was paid remains unpaid.[57] If he finds there is any interest in the property which might be obtained for the general creditors, he should intervene in the suit to foreclose the security, or take other steps to realize such interest.[58] Where a state court has rendered a decree fixing the mortgagor's liability and orders a sale prior to the bank-

[52] Longstreth v. Pennock, 12 N. B. R. 95.

[53] In re Moyer, 97 F. R. 324; Wallace v. Conrad, 3 N. B. R. 10; In re Duguid, 100 F. R. 274, 2 N. B. N. R. 607, 3 A. B. R. 794.

[54] In re Kenney, 2 N. B. N. R 140, 3 A. B. R. 353, 97 F. R. 554; s. c. 1 N. B. N. 401, 2 A. B. R. 494, 95 F. R. 427; In re Francis-Valentine Co., 1 N. B. N. 529, 2 A. B. R. 522, 94 F. R. 793; s. c. below 1 N. B. N. 532, 2 A. B. R. 188, 93 F. R. 953; Reese v. Vinton, 1 N. B. N. 544; In re Moyer, 1 N. B. N. 260, 1 A. B. R. 577, 93 F. R. 188; s. c. 97 F. R. 324; In re Fellerath, 1 N. B. N. 292, 2 A. B. R. 40, 95 F. R. 121; In re Frank, 95 F. R. 635, 2 A. B. R. 634. See Bryan v. Bernheimer, 181 U. S. 188, 5 A. B. R. 623.

[55] In re Goldman, 2 N. B. N. R. 818, 102 F. R. 122, 4 A. B. R. 100.

[56] In re N. Y. Kerosene Oil Co. 3 N. B. R. 31, F. C. 7726; In re Metzger, 2 N. B. R. 114, F. C. 9510.

[57] In re Prescott, 9 N. B. R. 385, 5 Biss. 523, F. C. 11389.

[58] In re Coffin, 1 N. B. N. 507, 2

ruptcy, he is entitled to any surplus proceeds and takes the title subject to such decree;[59] or to the proceeds of the sale of mortgaged property in the possession of a state court, not carried there by final process to enforce the mortgage, and the mortgagee must assert his claim in the bankruptcy court.[60]

Unless there is some benefit to be gained for the estate, it is not necessary for the trustee to move in the matter of a mortgage.[61] If it is deemed for the benefit of the estate to redeem property from any mortgage, or other pledge, or deposit, or lien, or a conditional contract, or to tender performance of the conditions of the last, or to compound or settle any debts, the trustee should petition the court, which will fix a time for a hearing thereon and direct how notice shall be given, and upon a hearing make such order as seems proper;[62] and, in case it is necessary, the trustee may be subrogated to the rights of the holder of such security until from the proceeds of the property, the fund is made good.[63] Where the legal title to a bankrupt's mortgaged property is held by the trustee, the federal court has jurisdiction to hear and determine a question as to the validity and amount of the mortgage lien.[64] After a petition in bankruptcy is filed the court will punish either the mortgagor or the mortgagee for interfering with the mortgaged property,[65] as the title to such property has then passed to the trustee.[66]

A creditor who relinquishes a security by mistake, either of law or fact, should be reinstated in his security by the court of bankruptcy, if the estate will be left by the reinstatement no worse off than if the security had been originally retained.[67]

A. B. R. 344; Heath v. Shaffer, 1 N. B. N. 399, 2 A. B. R. 98, 93 F. R. 647; In re Holloway, 1 N. B. N. 264, 1 A. B. R. 659, 93 F. R. 638.

[59] In re Gerdes, 102 F. R. 318, 4 A. B. R. 346, 2 N. B. N. R. 131.

[60] Morris v. Davidson, 11 N. B. R. 454.

[61] In re Lambert, 2 N. B. R. 138, F. C. 8026; In re Gibbs, 109 F. R. 627, 6 A. B. R. 485.

[62] G. O. XXVIII; Form 43; Reed v. Bullington, 11 N. B. R. 408.

[63] McLean v. Cadwalader, 15 N. B. R. 383.

[64] In re Kellogg, 113 F. R. 120, 7 A. B. R. 623.

[65] In re Arnett, 112 F. R. 770, 7 A. B. R. 522.

[66] In re Gutman, 114 F. R. 1009, 8 A. B. R. 252.

[67] In re Swift, 111 F. R. 503, 7 A. B. R. 117; In re Condon, 9 Ch. App. 609; Oil Co. v. Hawkins, 20 C. C. A. 468, 74 F. R. 395; Bank v. McKey, 42 C. C. A. 583, 102 F. R. 662; In re Parkes, 10 N. B. R. 82, F. C. 10754.

§ 1174. Title to chattel mortgage.—The provision vesting in the trustee title to property of the bankrupt which prior to the filing of the petition he could by any means have transferred, covers personal property which, although mortgaged, the bankrupt was authorized to sell by the terms of the mortgage,[68] but as the trustee takes no better title than the bankrupt, he would obtain no title as against subsequent purchasers, where the bankrupt was a conditional purchaser under an unrecorded contract, the state law requiring the recording thereof.[69] A chattel mortgage within four months of bankruptcy, made to hinder, delay and defraud creditors, or which is invalid under the state law for want of record, or because mortgagor retains possession, is void under the bankruptcy proceedings and may be set aside upon suit by the trustee, who becomes vested with the title thereto. Where, however, it is for a present bona fide valuable consideration, and valid under a state law, the mortgagee's title cannot be divested.

See also Chattel Mortgages, ante, §§ 1079, 1091.

§ 1175. Disposition of rents and profits—in case of mortgage.—Rents and profits arising from a bankrupt's estate after bankruptcy and collected by the trustee, belong to the general estate, and not to the mortgagee, notwithstanding the mortgagee's security is insufficient, the mortgage itself not pledging them by its terms, and no proceedings having been taken to sequestrate them as by obtaining the appointment of a receiver before bankruptcy or by direct application to the bankruptcy court afterward.[70] If the mortgagee purchases mortgaged property at a foreclosure sale subject to the taxes then due and the property remains in the possession of the trustee during the redemption period and the latter collects the rents, the mortgagee is not entitled to be reimbursed out of such rents, taxes due on the property when sold;[71] nor is a second mortgagee entitled, the first consenting, to take and

[68] In re Hull, 115 F. R. 858, 8 A. B. R. 302.

[69] In re Kellogg, 112 F. R. 52, 7 A. B. R. 270.

[70] In re Cass, 6 A. B. R. 721; In re Dole, 110 F. R. 926, 7 A. B. R. 21; but see In re Sink, 2 N. B. N. R. 645; Comp. In re Snedaker, 1 N. B. R. 43; In re Ellis, 107 Mass. 1; Foster v. Rhodes, 10 N. B. R. 533, F. C. 4981; Hays v. Dickinson, 15 Id. 350; In re Bennett, 12 Id. 257, 2 Hughes, 156, F. C. 1313.

[71] In re Hollenfeltz, 1 N. B. N. 503, 2 A. B. R. 499, 94 F. R. 629; In re Veitch, 101 F. R. 251, 4 A. B. R. 112.

hold the mortgaged property to foreclose his mortgage, as against the trustee, nor to appropriate the rents and profits to the payment of his debt;[72] but a mortgagee of real estate, with condition broken before the institution of bankruptcy proceedings, is entitled to all the product of the premises unharvested as against the trustee.[73] An agreement by a mortgagor to collect the rents from the mortgaged property, which was in his possession, and to pay the same to the mortgagee on the mortgage debt, does not make him the agent of the mortgagee to collect such rents, nor give to the mortgagee right to such as are uncollected or have not been paid over at the time the mortgagor is adjudged a bankrupt.[74]

§ 1176. Title to partnership property.—The same rule applies with reference to the title of the trustee to partnership property, as to that of individuals. Whether property is partnership or individual property is purely a question of intention of the partners, to be inferred from their actions and the surrounding circumstances,[75] and hence as between the creditors of a firm and a member thereof, real estate is assets of the firm, although the legal title was allowed to stand in the name of such member, where the consideration moved from the firm.[76] Where a firm after giving a mortgage is dissolved, one of the partners taking its assets and assuming its debts, and bankruptcy proceedings are instituted against him, in the course of which the property is sold, the balance, after paying the mortgage, should be retained by the trustee.[77]

See Partners, ante, § 172.

§ 1177. Title to patents, patent rights, copyrights and trademarks.—The trustee is vested with the interest owned by the bankrupt at the time of adjudication in patents already issued and in force, or allowed, whether as patentee, assignee of the patent or part thereof, or holder of rights acquired under a patent to a third person, such as licenses or manufacturing rights; but he does not take the interest of the bankrupt in a patentable invention, or in a pending application for a pat-

[72] Hutchins v. Iron Wks., 8 N. B. R. 458, F. C. 6952.

[73] In re Bruce, 16 N. B. R. 318, 9 Ben. 236, F. C. 2045.

[74] In re Dole, 110 F. R. 926, 7 A. B. R. 21.

[75] Art. on Part., 17 Am. & Eng. Enc. of Law, p. 945.

[76] In re Groetzinger, 110 F. R. 366, 6 A. B. R. 399.

[77] In re Sanderlin, 109 F. R. 857, 6 A. B. R. 384.

ent.[78] While the title to patents and the like vests in the trustee by operation of law without any order of court, a certified copy of the decree of adjudication,[79] together with a certified copy of the order approving the bond of the trustee, should be filed in the Patent or Copyright Office, as the case may be, as evidence of the title of the trustee to such patents or copyrights.[80] If one holds a lien on bankrupt's letters patent as security, the court may order them sold jointly by the trustee and the lien-holder, and the proceeds will be deposited pending settlement of the respective claims.[81]

§ 1178. **Secret trust.**—Any property, in which there is a secret trust for the bankrupt's benefit no matter how much covered up, passes to the trustee.[82] Hence where land is sold under a deed of trust and bid in by the secured creditor for enough to cover his debt and the amount of a superior lien, and conveyed to him without collecting the bid, there is a resulting trust in favor of the original owner which might be subjected in equity to his debts and therefore passes to his trustee in bankruptcy.[83]

§ 1179. **Transferable property; commercial paper.**—The trustee takes all interest that a bankrupt has in commercial paper, but the trustee of the payee of negotiable paper is not entitled to such paper, where such payee sold and delivered the same before bankruptcy, but without indorsement, and such payee may indorse it after bankruptcy to enable the holder to sue on it in his own name.[84] He is entitled to funds of the bankrupt held by the drawee of an ordinary commercial bill of exchange, which has merely been presented to such drawee, without his accepting it, such naked presentation not operating as an equitable assignment of such funds;[85] and he is entitled to demand the surrender of notes given for the excess over legal interest, such notes not being provable in bankruptcy.[86]

[78] In re McDonald, 101 F. R. 239, 4 A. B. R. 92.

[79] Sec. 47c, act of Feb. 5, 1903.

[80] Sec. 29e, act of July 1, 1898.

[81] In re Columbia Metal Works, 3 N. B. R. 18, F. C. 3039.

[82] In re Quackenbush, 102 F. R. 282, 2 N. B. N. R. 964, 4 A. B. R. 274; In re Berner, 2 N. B. N. R. 268; In re Hoffman, 2 N. B. N. R. 969, 102 F. R. 979, 4 A. B. R. 331.

[83] In re Dunavant, 1 N. B. N. 542, 3 A. B. R. 41, 96 F. R. 542.

[84] Percy v. Elliott, 18 N. B. R. 358.

[85] Randolph v. Candy, 11 N. B. R. 296, F. C. 11559.

[86] Shafer v. Fritchery, 4 N. B. R. 179, F. C. 12697.

He cannot compel an indorser of a note, who receives none of its proceeds and whose contingent liability never becomes absolute, to pay the amount of the note paid by the bankrupt to the holder;[87] nor can he maintain an action to set aside the bankrupt's subscription to an endowment fund, and for which the bankrupt gave his note.[88] Notes taken by a bankrupt after adjudication, for the future rental of land which is exempt, do not constitute assets of his estate in bankruptcy.[89]

§ 1180. —— **Funds in bank.**—Like any other assets of the bankrupt, funds deposited in bank or stock therein passes to the trustee on the adjudication. A banker's liability is not fiduciary, but that of an ordinary debtor, and his trustee will not pay out of the bank's funds a note and interest, because deposited for collection simply, the customer's account being overdrawn at the time the proceeds were credited on the bank's books,[90] but the banker is not entitled to a deposit, for which the depositor simultaneously draws a check in payment of a draft which the banker issued, though insolvent, and aware it would be dishonored, but such depositor is entitled to have the funds returned before the payment of other claims.[91] The bank is entitled to funds as against the purchaser from it of a check upon another bank, not presented until after the drawer's bankruptcy, when payment was refused, and such purchaser is not entitled to priority of payment;[92] or to the deposit with a bank, as agent for another for clearing house purposes, under an arrangement requiring the latter's deposit to be sufficient to meet its checks received at the clearing house.[93]

See also Funds in Bank, post, § 1215.

§ 1181. —— **Growing crops.**—The trustee of a bankrupt, who schedules a farm with growing crops, is vested with the title to the real estate, which carries the growing crops, unless exempt under the state law.[94] The rule is not changed be-

[87] Bean v. Laflin, 5 N. B. R. 333, F. C. 1172.

[88] Sturgis v. Colby, 18 N. B. R. 168, F. C. 13574.

[89] In re Oleson, 110 F. R. 796, D. C. Iowa, 7 A. B. R. 22.

[90] In re Bank of Madison, 9 N. B. R. 184, 5 Biss. 515, F. C. 890.

[91] Richardson v. Coffee Co., 102 F. R. 785.

[92] In re Smith, 12 N. B. R. 459, F. C. 12990.

[93] Phelan v. Bk., 16 N. B. R. 308, 4 Dill. 88, F. C. 11069.

[94] In re Eastman, 2 N. B. N. R. 86; In re Barrow, 3 N. B. N. R. 95, 98 F. R. 582, 3 A. B. R. 414; In re Daubner, 1 N. B. N. 520, 3 A. B. R. 368, 96 F. R. 805; In re Coffman, 1 N. B. N. 402, 1 A. B. R. 530, 93 F. R. 422.

cause bankrupt is only a tenant under a contract reserving to the landlord, as rent, a share of the crops raised on the land, and the crops were immature and unsevered when the petition was filed. But bankrupt may be allowed a reasonable compensation for the care and labor bestowed on them from the adjudication, and the proceeds of any part of such crops sold will take the place of such part.[95]

§ 1182. —— Personal privileges, licenses, memberships, etc. —A membership in a stock exchange,[96] or other corporation authorized for business purposes, or a license to sell liquors,[97] or any other license, right or privilege, which the bankrupt might have transferred by any means prior to filing his petition, is property of the bankrupt and passes to his trustee, who may sell the same. A performance by the bankrupt of the conditions or formalities necessary to the transfer will be ordered by the court.[98] In the case of a seat in a stock exchange where the articles of membership provide that it may be sold in case there is no unsettled contract or claim against him by any other member of the exchange, arising out of the business of the exchange, the seat will pass to the trustee after the satisfaction of such claim, or the court may order that the seat be sold by the trustee for the benefit of the estate, in which event the prior right of members of the exchange to any claim held by them will be passed upon by the court and first paid from the proceeds.[1] In the case of the expulsion of a member, the seat would pass to the trustee, where the consti-

[95] In re Barrow, 3 N. B. N. R. 95, 98 F. R. 582, 3 A. B. R. 414.

[96] Page v. Edmunds, 187 U. S. —, 9 A. B. R. 277; In re Gaylord, 111 F. R. 717, 7 A. B. R. 195; In re Hutchinson, 8 A. B. R. 382; see In re Swift, 118 F. R. 348.

[97] In re May, 5 A. B. R. 1.

[98] In re Page, 2 N. B. N. R. 1069, 102 F. R. 746, 4 A. B. R. 467; In re Becker, 2 N. B. N. R. 241, 245, 98 F. R. 407, 3 A. B. R. 412; In re May, 3 N. B. N. R. 128; In re Emrich, 2 N. B. N. R. 656, 101 F. R. 231, 4 A. B. R. 89; In re Brodbine, 1 N. B. N. 279; 326, 93 F. R. 643, 2 A. B. R. 53; Sparhawk v. Yerkes, 142 U. S. 1; Id. v. Ackley, Id.; In re Fisher, 1 N. B. N. 206, 1 A. B. R. 557; aff'd 2 N. B. N. R. 221, 98 F. R. 89; aff'd 103 F. R. 860; citing In re Ketchum, 51 F. R. 840; Hyde v. Woods, 94 U. S. 523; Fish v. Fiske, 154 Mass. 302; In re Warder, 10 F. R. 275; s. c. 15 F. R. 789; In re Gallagher, 19 N. B. R. 224, 16 Blatch. 410, F. C. 5197; Shearman v. Bingham, 3 Cliff. 552, F. C. 12672; Lathrop v. Drake, 91 U. S. 516; Goodall v. Tuttle, 7 N. B. R. 193; In re Sievers, 91 F. R. 366; Ex p. Butler, 1 Atk. 210.

[1] Page v. Edmunds, supra; In re Hutchinson, supra.

tution of the organization does not provide for the forfeiture of the money value of the membership in such case.[2] If the bankrupt and another hold a liquor license, the court of bankruptcy has no jurisdiction to pass on the rights of such other party in a summary proceeding, but the trustee may file a bill in equity, or take other steps, to realize the bankrupt's interest.[3]

§ 1183. Legacies—Wills—Inheritance.—Any interest which a bankrupt may have in a decedent's estate, whether as a legacy or otherwise, passes to the trustee for the benefit of the creditors. The unpaid balance of a legacy passes to the trustee, and the bankruptcy court may summarily order the bankrupt to execute a transfer of such legacy, or the executor may be ordered to pay it to the trustee.[4] Property inherited by the bankrupt prior to the filing of the petition, although on the same day, would pass to the trustee, notwithstanding the fact that fractions of a day are not ordinarily considered.[5] Property thus acquired after the filing of the petition, although prior to the adjudication, remains the bankrupt's.[6]

An adjudication in bankruptcy does not revoke the bankrupt's will, but if at the time of his death he has any assets upon which it would operate, it would be of as much force and effect as though bankruptcy had not intervened.[7]

§ 1184. Vested and contingent remainders—Powers.—The title of the bankrupt as of the date of the adjudication vests in the trustee to all property which he might have transferred or which might have been levied upon prior to the filing of the petition. A bare possibility or mere expectation of acquiring property does not constitute property or title to property; nor can it be transferred or levied upon. While the right of enjoyment may be uncertain and contingent, it is necessary that an interest or title of some kind be vested in the bankrupt in order that it may pass by operation of law to the trustee. If the uncertainty or contingency be such as relates to the person, and not merely to the event, and he who is to take remains unascertained by name, designation or description, no

[2] In re Gaylord, supra.

[3] In re Brodbine, 1 N. B. N. 279, 326, 93 F. R. 643, 2 A. B. R. 53.

[4] In re May, 3 N. B. N. R. 128, 5 A. B. R. 1.

[5] In re Stoner, 3 N. B. N. R. 423.

[6] In re Wetmore, 108 F. R. 520, 3 N. B. N. R. 143, 6 A. B. R. 210; In re Braentigan, 3 N. B. N. R. 461.

[7] Charman v. Charman, 14 Ves. 580.

given individual while so unascertained can be held to have a property right to or in the subject matter of the gift or limitation. But if he has no claim or title absolute or defeasible, vested or contingent, but merely an expectation of an estate or interest, in the future, then there is nothing in him to pass to the trustee. One may have a right in or to a future contingency. But it cannot be affirmed of any one that he has either a contingent right or a right in or to a contingency unless the person of whom the affirmation is made is ascertained by name, designation or description. Thus a fund left to bankrupt's mother in trust for her use during life with power of disposing the fund by will, and in the event she fails to exercise the power, then to the testators surviving next of kin, no interest of the bankrupt would pass to the trustee prior to her death.[8]

Where a bankrupt under a will takes merely a future contingent interest, which is not vested or alienable, it is not such an interest as would pass to the trustee,[9] nor where it is subject to be devested by the happening of a contingency mentioned in a will as by the death of the bankrupt before the property is divisible, he being merely one of a class to which he may or may not belong on the vesting of the gift.[10] If the interest which the bankrupt takes is vested or if it be such as would be alienable under the laws of the state, it would pass to the trustee.[11]

§ 1185. —— **Stocks, bonds or other securities.**—Any stock, bonds or other securities of the bankrupt having a transferable value upon his adjudication become a part of the assets of the estate for the benefit of creditors, title to which passes to the trustee without the necessity of transfer unless in a foreign corporation, in which event the necessary assignment must be made by the bankrupt.

The trustee is not bound by the bankrupt's ratification or acquiescence in a sale of collaterals made after the commence-

[8] In re Wetmore, 108 F. R. 520. 3 N. B. N. R. 143, 6 A. B. R. 210.

[9] In re Gardner, 3 N. B. N. R. 480, 5 A. B. R. 432.

[10] In re Hoadley, 2 N. B. N. R. 704, 101 F. R. 233, 3 A. B. R. 780; In re Ehle, 109 F. R. 625, 6 A. B. R. 476.

[11] In re Twaddle, 3 N. B. N. R. 752, 110 F. R. 145, 6 A. B. R. 539; In re St. John, 3 N. B. N. R. 114; 105 F. R. 234, 5 A. B. R. 190; In re Wood, 98 F. R. 972, 3 A. B. R. 572.

ment of bankruptcy proceedings;[12] and he is entitled to the surplus over and above the amount necessary to liquidate the debt, where the security of a creditor is reduced to money,[13] and to any and all securities held for the debt where a secured creditor proves his claim as unsecured and thereby relinquishes his right to the securities.[14] A trustee, who redeems pledges is subrogated to the rights of the pledgee until, from the proceeds of the pledges redeemed, the fund is made good.[15]

§ 1186. —— Goods delivered to be paid for when sold.— Where goods are sold to a bankrupt on credit, and with the understanding that the title to such as are not sold shall remain in the vendor until the payment of the purchase price, the title thereto vests in the trustee.[16] But a person selling a bankrupt goods on credit, owing to false statements, may rescind the sale and recover the goods, whether or not the false statements were made with fraudulent intent.[17] A trustee is entitled to the proceeds of goods sold by the bankrupt, where by agreement between the bankrupt and another the latter was to furnish the bankrupt goods at a fixed price, the bankrupt to pay all freight, storage and charges, and, at the expiration of each three months, to pay for all goods sold or shipped from the bankrupt's warehouse;[18] and to certain articles delivered under an arrangement whereby the bankrupt has the exclusive right to sell them, with the understanding that he is to pay for them if sold within a certain time, and, if not, he is "to take them for the next season," and the transaction appears on his books and upon the owner's invoices as a sale.[19]

§ 1187. —— Property held in trust.—The possession by a bankrupt of assets, though by a defeasible title, makes a suf-

[12] Sparhawk v. Drexel, 12 N. B. R. 450, F. C. 13204.

[13] In re Newland, 9 N. B. R. 62, 7 Ben. 63, F. C. 10171.

[14] In re Granger, 8 N. B. R. 30, F. C. 5684.

[15] McLean v. Cadwalader, 15 N. B. R. 383.

[16] In re Garcewich, 115 F. R. 87, 8 A. B. R. 149; In re McCallum, 113 F. R. 393, 7 A. B. R. 596.

[17] In re Epstein, 109 F. R. 874, 6 A. B. R. 60, and cases cited; In re O'Connor, 114 F. R. 777, 7 A. B. R. 428.

[18] In re Linforth, 16 N. B. R. 435, 4 Sawy. 370, F. C. 8369.

[19] Wood M. & R. Mach. Co. v. Brooke, 9 N. B. R. 395, 2 Sawy. 576, F. C. 17980.

ficient title for his trustee, until it shall be successfully disputed,[20] but a trustee takes no title to property held by a bankrupt merely in trust, although if the trust be coupled with an interest, he is vested with such interest.[21] One claiming the right to recover a sum from a trustee on the ground that it was a trust fund held by the bankrupt, has the burden of proving that such fund was in some form a part of the bankrupt's estate, when it passed into the hands of the trustee.[22] Where a trustee is presumed to have held money in trust for his wife, she is entitled to prove her claim against his estate.[23] The trustee has no title to an interest under a will, which gives the trustee absolute discretion which he is not obliged to exercise in favor of the bankrupt;[25] nor to the income, or any aliquot part thereof, derived from a sum deposited in trust, such income to be applied to the support of the cestui que trust and his wife, and for the maintenance and education of their children, the annuity and principal sum being declared to be inalienable by the grantees, and not subject to their debts or control.[26] Where property is left in trust to the use of a person with power of appointment, and even if the power of appointment be not exercised, the person who would take thereafter remained uncertain until the death of the former, the latter takes no estate during the life of the former that can pass to his trustee in bankruptcy.[27] But where there is a devise to one for life and at her decease to her surviving children, and after the death of the testator and before that of the beneficiary, one of such children was adjudged a bankrupt, his interest, being vested and alienable, passes to his trustee in bankruptcy.[28] Where the interest is contingent only, such beneficiary acquires no interest that will

[20] In re Cobb, 1 N. B. N. 557, 3 A. B. R. 129, 96 F. R. 821; In re Beal, 2 N. B. R. 178, 1 Lowell, 323, F. C. 1156.

[21] Walker v. Siegel, 12 N. B. R. 394, F. C. 17085.

[22] In re Marsh, 116 F. R. 396, 8 A. B. R. 576.

[23] In re Neiman, 109 F. R. 113, 6 A. B. R. 329.

[25] In re Wetmore, 102 F. R. 299, 4 A. B. R. 335, s. c. 99 F. R. 703, 3 A. B. R. 700; In re Hoadley, 2 N. B. N. R. 704, 100 F. R. 233, 3 A. B. R. 780; Nicholas v. Eaton, 13 N. B. R. 421, 91 U. S. 716.

[26] Durant v. Ins. Co., 16 N. B. R. 324, F. C. 4188.

[27] In re Wetmore, 108 F. R. 520, 6 A. B. R. 210.

[28] In re Twaddell, 110 F. R. 145, 6 A. B. R. 539; In re McHarry, 111 F. R. 498, 7 A. B. R. 83; In re Haslett, 116 F. R. 680.

vest in his trustee in bankruptcy.[29] The surplus income of a trust fund beyond the sum necessary for the support of the beneficiary passes to the trustee in bankruptcy of the beneficiary.[30]

Where a will bequeathed a sum to trustees, with directions to apply the income for the benefit of a daughter of the testator during her life, the principal on her death to be divided between the testator's two sons, who were named, the interest taken by the sons in the trust fund, under the statutes of certain states, is a vested remainder which is alienable; and, on the bankruptcy of one of the sons while the life estate is still outstanding, will pass to his trustee, as assets.[31] Where a bankrupt, having possession of another's property, with authority to sell and pay over the proceeds, sells, but uses the proceeds, either by depositing them to his own account or by dealings with a broker, the owner cannot establish a lien upon the bankrupt's account when less than the amount of such proceeds, nor upon stocks in the hands of the broker where there is no evidence that the same were purchased with the proceeds of the sale of his property.[32] Where a creditor has received from his debtor money, under circumstances which are entirely lawful, it is free from all trust and claim on behalf of the cestui que trust, unless it be shown that the creditor knew of the trust and passes to the creditor's trustee.[33]

§ 1188. Claims against property in trustee's hands.—A court of bankruptcy has no authority to deprive the trustee of the possession of the bankrupt's property without due process of law,[34] and where he asserts title in himself, as property of the bankrupt, the claimant cannot proceed by summary petition;[35] nor where property is in the possession of a third person claiming title.[36] The bankrupt's property is not subject to

[29] In re Gardner, 106 F. R. 670, 5 A. B. R. 432; In re Ehle, 109 F. R. 625, 6 A. B. R. 476.

[30] Brown v. Barker et al., 8 A. B. R. 450.

[31] In re St. John, 105 F. R. 234, 3 N. B. N. R. 120, 5 A. B. R. 190.

[32] In re Mulligan, 116 F. R. 715, 9 A. B. R. 8.

[33] White v. Jones, 6 N. B. R. 175, F. C. 17550.

[34] Wood M. & R. Mach. Co. v. Brooke, 9 N. B. R. 395, 2 Sawy. 576, F. C. 17980.

[35] Hurst v. Tefft, 13 N. B. R. 108, 12 Blatch. 217, F. C. 6939; In re Kleinhaus, 113 F. R. 107, 7 A. B. R. 604.

[36] In re Bryant, 2 N. B. N. R. 1058.

levy by a sheriff to satisfy a judgment against the trustee, who is entitled to an order restraining such a threatened levy.[37] The trustee cannot be required to surrender property where the equities are equal, as between creditors of a bankrupt, to whom property was fraudulently transferred before bankruptcy, and creditors of the transferrer.[38] He can plead the defense of usury so long as any part of the debt, for which the usury was to be paid, remains unpaid.[39] After the filing of the petition, no interest by a receivership created by a state court, or otherwise, can be acquired in the property of the bankrupt which will affect the trustee;[40] but there is nothing to prevent a state from taxing the funds in the hands of a trustee.[41] A trustee seeking by legal proceedings to enforce the bankrupt's title to personal property, will be subject to all legal and equitable claims of others to the property, which exist against the bankrupt, and which are not in fraud of the bankruptcy law or the rights of general creditors.[42] Where there has been an equitable assignment of part of a fund by a bankrupt, valid as between him and the assignee, the trustee takes the fund subject to the assignment, even though for reasons of public policy it could not have been enforced against the holder of the fund.[43]

§ 1189. 'b. **Appraisal—Sale of property.**—All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.'

§ 1190. **Appraisers.**—The referee has general authority to appoint appraisers and his action is subject to revision by the court of bankruptcy. The prevailing cost to the trade should

[37] In re Neely, 108 F. R. 371, 5 A. B. R. 836.

[38] Aiken v. Edrington, 15 N. B. R. 271, F. C. 111.

[39] In re Prescott, 9 N. B. R. 385, 5 Biss. 523, F. C. 11389; In re Kellogg, 113 F. R. 120, 7 A. B. R. 623.

[40] Smith v. Buchanan, 4 N. B. R. 133, F. C. 13016.

[41] In re Mitchell, 16 N. B. R. 535, F. C. 9658; Contra, In re Booth, 14 N. B. R. 232, F. C. 1645.

[42] Duplan Silk Co. v. Spencer, 115 F. R. 689, 8 A. B. R. 367.

[43] In re Hanna et al., 105 F. R. 587, 5 A. B. R. 127.

be adopted by the appraisers as the actual value, due allowance being made for any actual deterioration or depreciation in value.[45]

§ 1191. Sale of bankrupt's property, control of court over.—At least ten days' notice by mail of all sales must be given creditors, unless waived in writing,[46] or the court orders it without notice.[47] While it will not take possession of immoral places, to conduct a disreputable business there carried on, it will, under proper circumstances and at the proper time, take possession to sell bankrupt's interest therein.[48] A court will not summarily order the sale of property, real or personal, claimed by the trustee, even though the title be in dispute, if the estate be in a third person's actual possession holding as owner and claiming absolute title to it, whether derived from the debtor before he was adjudged bankrupt or from another.[49] The purchasers under a sale will be left to establish their title whenever the occasion may arise.[50] The form of the order is sufficient if it directs the sale of the right, title, etc., of the bankrupt, and it need not direct the sale of the right, title, etc., which the trustee acquired by the decree of bankruptcy.[51] A sale by the marshal under a special order, prior to the appointment of a trustee, is to be considered as in the nature of a sale made by a provisional trustee.[52]

§ 1192. Manner of making sales.—All sales are to be at public auction unless otherwise ordered by the court. For good reason shown a specified portion may be ordered sold at private sale, in which case an account of each article, the price brought and to whom sold must be kept and filed. Perishable property may be ordered sold immediately with or without notice.[53] Assuming that a sale of real estate by a trustee is to be assimilated to a sale under a decree in equity silent as to

[45] In re Prager, 8 A. B. R. 356.

[46] Sec. 58a (4), act of 1898.

[47] G. O. XVIII.

[48] In re Pittner, 2 N. B. R. 915.

[49] Gifford v. Helms, 19 N. B. R. 113, 98 U. S. 248; Beach v. Macon Grocery Co., 116 F. R. 143.

[50] In re Alden, 16 N. B. R. 39, F. C. 151.

[51] Smith v. Scholtz, 17 N. B. R. 520.

[52] In re Hitchings, 4 N. B. R. 125, F. C. 6542.

[53] G. O. XVIII; Forms 42, 45, and 46; In re Beutel's Sons, 2 N. B. N. R. 1011, 7 A. B. R. 768; see also ante, § 1189.

the manner of sale, it cannot be attacked collaterally and held void because not made in parcels.[54]

Where a prospective bidder and the trustee's solicitor agree that the bidder will let the solicitor have the property at a certain price without reference to the selling price, such agreement will not avoid the sale;[55] nor will the sale of a claim marked "worthless" in the schedule, which subsequently becomes valuable.[56] A creditor has the right to call for an investigation into the conduct of the trustee in selling the property, even after the latter's account has been filed and approved.[57] A purchaser at a sale by the trustee stands on the same footing with a purchaser at an execution sale and takes the estate of the bankrupt subject to all equities against it, whether he knows of them or not.[58]

§ 1193. **State court has no power over sales.**—The title to the bankrupt's property vests in the trustee as soon as the adjudication is made; any sale thereafter must be made by such trustee under the direction of the bankruptcy court. The state court has no jurisdiction to sell such property under such circumstances, but if it did make sale, the purchaser would take no title.[59] Where a federal court authorizes a sale and the deposit of the proceeds, such decision will control in spite of the fact that the action of a state court in which insolvency proceedings were brought prior to the bankruptcy proceedings, permitting a sale, was reversed on appeal.[60]

§ 1194. **Sale of incumbered property.**—A court of bankruptcy, as well as the referee, has power to order the sale of incumbered property and direct the money arising therefrom to be brought into court for distribution among those entitled to it.[61] Such sale should not be ordered unless it is satisfactorily shown that the interests of the general creditors will

[54] Smith v. Scholtz, 17 N. B. R. 520.

[55] Citizens' Bk. v. Ober, 13 N. B. R. 328, 1 Woods 80, F. C. 2731.

[56] Phelps v. McDonald, 16 N. B. R. 217.

[57] In re Peabody, 16 N. B. R. 243, F. C. 10866.

[58] Stedman v. Taylor, 17 N. B. R. 283.

[59] In re Azule Nat. Seltzer Water Co., 2 N. B. N. R. 639; In re Lyon, 7 N. B. R. 182, F. C. 8644.

[60] In re Riker, 107 F. R. 96, 5 A. B. R. 720.

[61] In re Salmons, 2 N. B. R. 19, F. C. 12268; In re Styer, 2 N. B. N. R. 205, 98 F. R. 290, 3 A. B. R. 424.

be thereby advanced,[62] and until the trustee's appointment, so as not to interfere with the exercise of his election to redeem the property pledged, to sell it subject to the lien, or to release the equity of redemption at an agreed price.[63] The trustee should not be required to take charge of or to sell any portion of an estate, where the appraiser's return shows it to be so heavily encumbered with valid liens that nothing can be realized therefrom for the unsecured creditors.[64] Where property is sold upon the petition of the trustee, under a mortgage, only the actual costs of sale are chargeable upon such proceeds and not any portion of the costs in bankruptcy.[65]

§ 1195. Sale of encumbered property—Free of liens.—A court of bankruptcy, including the referee, has authority to direct a sale of property by the trustee in bankruptcy free and clear of all liens and incumbrances, in which event the liens are transferred to the proceeds[66] according to their priority;[67] or it may direct a sale of the property and require the trustee in bankruptcy to institute suit to determine the validity of a lien.[68] Such an order of sale will not be made, however, where it is evident that there is no equity in the property,[69] but only where the interests of the general creditors will be advanced thereby.[70] Upon such a sale, interest has been allowed to the date of the report of distribution.[71] The same

[62] In re Styer, supra; In re Shaeffer, 105 F. R. 352, 5 A. B. R. 248.

[63] In re Grinnell, 9 N. B. R. 29, 7 Ben. 42, F. C. 5830; consult In re Kelly Dry Goods Co., 102 F. R. 747, 4 A. B. R. 528.

[64] In re Cogley, 107 F. R. 73, 5 A. B. R. 731.

[65] In re Blue Ridge R. R. Co., 13 N. B. R. 315, 2 Hughes 224, F. C. 1570.

[66] In re Worland, 1 A. B. R. 450, 92 F. R. 893; also see In re Pittelkow, 1 A. B. R. 472, 92 F. R. 903; Southern Loan & Trust Co. v. Benbow, 3 A. B. R. 9; 96 F. R. 514; In re Sanborn, 86 F. R. 551, 3 A. B. R. 54; In re Nat. Iron Co., 8 N. B. R. 422, F. C. 10, 45; In re Kahley, 4 N. B. R. 124, F. C. 7593; In re Barrow, 1 N. B. R. 125, F. C. 1057; Foster v. Ames, 2 N. B. R. 147, F. C. 4965; In re Christy, 3 How. 290; Houston v. Bk., 6 How. 486; Ray v. Norseworthy, 23 Wall. 128; In re Salmons, 2 N. B. R. 19, F. C. 12268; Markson v. Haney, 12 N. B. R. 484; In re Styer, 2 N. B. N. R. 205, 98 F. R. 290, 3 A. B. R. 424; In re Gerson, 4 A. B. R. 346, 102 F. R. 318; Forms 43, 44.

[67] McNair v. McIntyre, 113 F. R. 113, 7 A. B. R. 638; In re Riker, 107 F. R. 96, 5 A. B. R. 720.

[68] In re Reed, 117 F. R. 358.

[69] In re Cogley, 107 F. R. 73, 5 A. B. R. 731.

[70] In re Styer, 2 N. B. N. R. 205, 3 A. B. R. 425, 98 F. R. 290; In re Shaeffer, 105 F. R. 352; In re Waterlow Organ Co., 118 F. R. 904.

[71] In re Devore, 16 N. B. R. 56, F. C. 3847.

rule with reference to the sale free of liens would apply to perishable property.[72]

A sale free of liens does not, however, affect a lien in the nature of a tax assessment against the property sold, but in this case the trustee should protect the purchaser by providing for the payment of the taxes.[73] Where more than four months before the petition was filed, the bankrupt executed a real estate mortgage to one creditor, a chattel mortgage on fixtures to the real estate to another and suffered judgments to be taken by a third, the bankruptcy court will direct a sale clear of all liens, and out of the proceeds pay off the incumbrances or liens according to the priority to which they would be entitled under the said law.[74]

A judgment creditor who has not perfected his lien by execution and levy is not entitled to the proceeds of such sale as against a junior creditor whose lien was perfected prior to the commencement of the proceedings.[75]

A referee or court of bankruptcy may direct the trustee to sell free of incumbrances, personal property of the bankrupt in his possession, but covered by a chattel mortgage, on notice to the incumbrancers, and to approve the sale when made. It is within the fair exercise of his discretion to approve a sale found to be the fair cash value of the property, though less than the amount of the mortgage debt.[76]

§ 1196. **Effect of sale in case of liens.**—A sale of incumbered land by the trustee subject to the incumbrance does not divest the land of the incumbrance.[77] It will be taken for granted that the trustee sells such subject thereto, although the lien creditor, or creditors, must be notified before the sale takes place;[78] and the purchaser will be estopped from denying the validity of the lien.[79] The sale of a bankrupt's real

[72] In re San Gabriel Sanatorium Co., 2 N. B. N. R. 827, 102 F. R. 310, 4 A. B. R. 197.

[73] In re Keller, 109 F. R. 131, 6 A. B. R. 334; In re Keller, 6 A. B. R. 351.

[74] In re Worland, supra.

[75] In re Mebane, 3 N. B. R. 91, F. C. 9380.

[76] In re Sanborn, 3 A. B. R. 54, 96 F. R. 551.

[77] Wicks v. Perkins, 13 N. B. R. 280, 1 Woods 383, F. C. 17615; In re Gerry, 112 F. R. 957, 7 A. B. R. 459.

[78] Meeks v. Whatley, 10 N. B. R. 498; In re McGilton, 7 N. B. R. 294, 3 Biss. 144, F. C. 8798.

[79] Bucknam v. Dunn, 16 N. B. R. 470, 2 Hask. 215, F. C. 2096.

estate by his trustee does not bar his wife's right of dower therein.[80]

§ 1197. **Liquidation without sale.**—The trustee may, if to the interest of the estate, relieve the property from the lien by discharging the incumbrance, or he may agree with the creditors as to the value of the property,[81] or he may apply to have the lien ascertained and liquidated, or for an order directing the sale of the property held as security for any provable claim, as the most correct means of ascertaining its true value, and from the proceeds may pay the debts covered by the security.[82]

§ 1198. **Confirmation of sales.**—In judicial sales, that is, a sale of particular property specifically pointed out by the court and ordered during the pendency of proceedings concerning it, such as are sales by trustees, the court is the seller and the trustee its agent to get the highest bidder, the sale not being consummated nor any title passing until confirmation, the act of confirmation alone completing the passing of the title. In execution sales, that is, a sale of any property belonging to the judgment debtor that the sheriff may seize, the court has rendered its decision and is done with it, the sheriff being the real seller and the title passing at once to the highest bidder. In execution sales the purchaser immediately becomes vested with rights which can only be divested by showing that he himself or his agents have been guilty of fraud, whilst, in judicial sales, until confirmation, the so-called purchaser has no such rights, but is simply the preferred bidder awaiting the acceptance of his offer by the court. Gross inadequacy of price is sufficient ground for refusing to confirm a sale, and it is not necessary that there should be fraud or such gross inadequacy of price as to be evidence of fraud. No sale for less than seventy-five per cent of the appraised value ought to be confirmed, unless good reasons are shown why a better price would not be obtainable on a resale, and the burden of proof rests upon the trustee, who brings such report to the court for confirmation, to make such showing, rather than upon the creditors to make good their objections thereto. In a case where the inadequacy of price is insignificant, the sale should not be set aside on that ground when the objecting party was present

[80] In re Shaeffer, 105 F. R. 352.

[81] Reed v. Bullington, 11 N. B. R. 408.

[82] In re Stewart, 1 N. B. R. 42, F. C. 13418.

as a creditor at the sale.[83] Where before confirmation of a trustee's sale, it is alleged in opposition thereto that competition was stifled, it is not necessary to prove that the successful bidder was connected with the fraud.[84]

§ 1199. **Setting sale aside.**—Objection to a sale must be made in a court of bankruptcy and not in a collateral action; and where fraud by the trustee is alleged, every fact relied on to establish it should be distinctly stated, and the whole should be verified by some one cognizant of the facts.[85]

A sale will be set aside where the required notice is not given;[86] or where the trustee's solicitor bids at the sale;[87] or where the trustee purchases at his own sale;[88] or where property purchased from a trustee was held a few months later at a vastly increased price, where there is evidence of a lack of good faith;[89] or where a sale is made by order of court in which it develops the court had no authority over the property;[90] or where there is a gross inadequacy of price or circumstances impeaching the fairness of the sale (by which is not meant a subsequent offer of a better price);[91] or a sale without the approval of court for less than seventy-five per centum of its appraised value, unless of perishable property.

While the uniform practice is to make no order of sale until after adjudication, unless necessary to preserve the property, an order of sale made by a referee prior to the adjudication, while exercising the power of the district judge, will not be disturbed, when the sale was made by consent and no prejudice is shown.[92]

§ 1200. **'c. Conveyance of bankrupt's property.**—The title 'to property of a bankrupt estate which has been sold, as

[83] In re Groves, 2 N. B. N. R. 30, 466; In re O'Fallon, F. C. 10445; In re Thompson, 1 N. B. N. 355, 2 A. B. R. 216; In re Bousfield, 16 N. B. R. 481, F. C. 1703.

[84] In re Groves, 2 N. B. N. R. 30.

[85] In re Peabody, 16 N. B. R. 243, F. C. 10866.

[86] Ex p. Bryan, In re Major, 14 N. B. R. 71, 2 Hughes 273, F. C. 2061.

[87] Bk. v. Ober, 13 N. B. R. 328, 1 Woods 80, F. C. 2731.

[88] In re Hawley, 117 F. R. 364, 9 A. B. R. 63.

[89] In re Mott, 1 N. B. R. 9, F. C. 9879.

[90] Davis v. R. R. Co., 13 N. B. R. 258, 1 Woods 661, F. C. 3648.

[91] In re Ethier, 118 F. R. 107, 9 A. B. R. 160.

[92] In re Kelly Dry Goods Co., 102 F. R. 747, 4 A. B. R. 528; see In re Grinnell, 9 N. B. R. 29, 7 Ben. 42, F. C. 5830; but see March v. Heaton, 2 N. B. R. 66, 1 Lowell 278, F. C. 9061.

'herein provided, shall be conveyed to the purchaser by the 'trustee.'

§ 1201. **Trustee to make conveyances.**—The title to bankrupt's property vesting in the trustee by virtue of the adjudication, in case of a sale by him, he should transfer the same to the purchaser by such deed of conveyance as may be necessary to pass title under the laws of the state, the same as would be necessary in the case of any individual. Though, of course, the trustee transfers only such title as he has,[93] and if it be real property, he has no authority to warrant the title, other than his title to the same and in the condition in which he received it. In the case of securities held by any creditor the trustee should be ordered to execute a proper transfer to said creditors of all the rights and claims which the bankrupt, or his creditors, may have in the same,[94] provided if there is no equity in it for the estate. A trustee can transfer only such title as he may possess.[95] If the trustee sells property but refuses to deliver possession, he is liable to an action at law, or if ordered by the court and declined would be guilty of contempt.[96]

§ 1202. **'d. Title on setting aside composition or discharge.** '—Whenever a composition shall be set aside, or discharge 'revoked, the trustee shall, upon his appointment and qualifica-'tion, be vested as herein provided with the title to all of the 'property of the bankrupt as of the date of the final decree 'setting aside the composition or revoking the discharge.'

§ 1203. **Composition set aside.**—Upon application of parties in interest filed at any time within six months after a composition has been confirmed, the judge may set it aside and reinstate the case;[97] or he may revoke a discharge at any time within one year after it was granted.[98] In this event the title to all the property held by the bankrupt vests in the trustee, which would include not only such as was held at the time the petition was filed but also such as was acquired by him subsequent thereto. An assignment to a trustee after an incomplete composition must be without prejudice to lawful acts done or titles acquired under and by virtue of such composition.[1]

[93] Bk. v. Bk., 11 N. B. R. 49.

[94] In re Coffin, 1 N. B. N. 507, 2 A. B. R. 344.

[95]

[96] Ives v. Tregent, 14 N. B. R. 60.

[97] Sec. 13, act of 1898.

[98] Sec. 15, act of 1898.

[1] Ex Hamlin, 16 N. B. R. 320, 2 Lowell 571, F. C. 5993.

§ 1204. 'e. **Avoidance of transfers.**—The trustee may avoid 'any transfer by the bankrupt of his property which any cred-'itor of such bankrupt might have avoided, and may recover 'the property so transferred, or its value, from the person to 'whom it was transferred, unless he was a bona fide holder for 'value prior to the date of the adjudication. Such property 'may be recovered or its value collected from whoever may 'have received it, except a bona fide holder for value. For 'the purpose of such recovery any court of bankruptcy as here-'inbefore defined, and any state court which would have had 'jurisdiction if bankruptcy had not intervened, shall have con-'current jurisdiction.'[2]

§ 1205. **Preferences voidable.**—Any preference given by a bankrupt within four months before the filing of the petition and before the adjudication, where the person benefited had reasonable cause to believe it was intended as a preference, is voidable at the discretion of the trustee;[3] as is also any payment to counsel except to the extent of a reasonable amount.[4] A receiver appointed to preserve the estate until the trustee qualifies has no authority to maintain such a suit.[5] A creditor without notice may acquire rights in the property superior to those of the trustee.[6] Any lien created in pursuance of a suit in law or equity within four months before the filing of a petition will be dissolved, and any conveyance, transfer, assignment or incumbrance of the bankrupt's property, with intent to defraud or delay his creditors, is null and void as against the creditors, except as to purchasers in good faith and for present consideration,[7] and in case of a sale thereunder, the proceeds should be turned over to the trustee.[8]

See also ante, § 961, et seq.

[2] Subdivision "e" was amended by the act of February 5, 1903, by the addition at the end thereof, of the following: "For the purpose of such recovery any court of bankruptcy as hereinbefore defined and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

[3] Sec. 60b, act of 1898; In re Nathan, 2 N. B. N. R. 613; Colt v. Sears, 38 Atl. Rep. 1056.

[4] Sec. 60d, act of 1898.

[5] Boonville Nat'l Bank v. Blakey, 107 F. R. 891, 6 A. B. R. 13.

[6] In re Mullen, 101 F. R. 413, 4 A. B. R. 224; Phelps v. Curtis, 16 N. B. R. 85; see, generally, Barnes Mfg. Co. v. Norden, 7 A. B. R. 553.

[7] Sec. 67, act of 1898; Barker v. Franklin, 8 A. B. R. 468.

[8] In re Kenney, 105 F. R. 897, 5 A. B. R. 355.

§ 1206. Nature of proceeding when property under bankrupt's control.—A referee[9] or a court of bankruptcy has jurisdiction and power to order a bankrupt to pay over to his trustee money, or other property, found to be in his possession or control, and properly belonging to his estate in bankruptcy, and, if the bankrupt fails to obey such order, he may be committed as for a contempt until he complies upon motion of the trustee.[10] Thus where the court of bankruptcy finds a transfer of property by a bankrupt in fraud of creditors, the property still remaining in bankrupt's hands, it must be turned over to the trustee,[11] but no such order can be made until the issue is squarely raised between the trustee and the bankrupt, as to whether the bankrupt has in his possession or under his control such money or property;[12] nor unless the testimony proves beyond a reasonable doubt that the same is in fact in his possession or under his control.[13] If the bankrupt absolutely denies having it and the evidence to the contrary is only inferential, and there is any reasonable doubt as to bankrupt's ability to comply with the order, it should not be made.[14]

Where a bankrupt admits receiving a large sum of money just before his bankruptcy for which he fails to satisfactorily account, or there is an unexplained deficit in his stock, or in the proceeds of sales, he may be ordered to turn over to his trustee such goods or money, less reasonable cost of living;[15]

[9] In re Miller, 105 F. R. 57; Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224.

[10] In re Schlesinger, 102 F. R. 117, 4 A. B. R. 361; Ripon Knitting Wks. v. Schreiber, 2 N. B. N. R. 899, 101 F. R. 810, 4 A. B. R. 299; In re Purvine, 1 N. B. N. 326, 96 F. R. 192, 2 A. B. R. 787; In re Rosser, 1 N. B. N. 469, 2 A. B. R. 746, 96 F. R. 308, s. c. 101 F. R. 562; In re Oliver, 1 N. B. N. 329, 2 A. B. R. 783, 96 F. R. 95; In re Kuntz, 1 N. B. N. 256; In re Salkey, 11 N. B. R. 423, 516, F. C. 12253; In re Speyer, 6 N. B. R. 255, F. C. 13339.

[11] In re Smith, 1 N. B. N. 533, 100 F. R. 795, 3 A. B. R. 95.

[12] In re Pearson, 1 N. B. N. 474, 2 A. B. R. 819.

[13] In re McCormick, 2 N. B. N. R. 104, 3 A. B. R. 340, 97 F. R. 566; Ripon Knitting Wks. v. Schrieber, 2 N. B. N. R. 545, 899, 101 F. R. 810, 4 A. B. R. 299; In re Tischler, 2 N. B. N. R. 549; In re Mayer, 2 N. B. N. R. 257, 3 A. B. R. 533, 98 F. R. 839; In re Bryant, 2 N. B. N. R. 1058.

[14] In re Thiessen, 2 N. B. N. R. 625; In re Friedman, 1 N. B. N. 332, 2 A. B. R. 301; In re Ogles, 1 N. B. N. 400, 2 A. B. R. 514.

[15] In re Kuntz, 1 N. B. N. 256; In re Friedman, 1 N. B. N. 332, 2 A. B. R. 301; In re McCormick, 2 N. B. N. R. 104, 3 A. B. R. 340, 97 F. R. 566; In re Rosser, 1 N. B. N. 469, 2 A. B. R. 746, 96 F. R. 308; In re Purvine, 1 N. B. N. 326, 96 F. R. 192, 2 A. B. R. 787; In re

but, if the difference has been used in paying creditors, or business expenses or in any other similar manner or is claimed to be due to a defective appraisal and defects are shown in such appraisal, the order will not be made.[16] Where a trustee has peaceably secured personal property, it is in the custody of the court; and, if such property is subsequently seized under process from a state court, on petition of the trustee it will be forthwith restored to the latter's possession.[17] See also the section following.

§ 1207. —— When property claimed adversely by third persons.—Prior to the amendment of February 5, 1903, if the property in controversy at the adjudication was in a third person's actual possession, claiming absolute title, the ownership, if claimed by the trustee, had to be determined by an action at law or suit in equity in the same court as if there had been no bankruptcy and the bankrupt himself was the party instead of the trustee;[18] but now the court of bankruptcy is given concurrent jurisdiction with the state courts over actions of this character. In passing upon the trustee's claims in such cases, the state court does not proceed under the bankruptcy law, but simply recognizes it as the source of the trustee's title, in like manner as it would a contract or

Tudor, 2 N. B. N. R. 168, 100 F. R. 796, 4 A. B. R. 78; In re Deuell, 100 F. R. 633; In re Schlesinger, 2 N. B. N. R. 169, 3 A. B. R. 342, 97 F. R. 930, 102 Id. 117; In re Peltasohn, 16 N. B. R. 265, F. C. 10912; Ripon Knitting Wks. v. Schreiber, 2 N. B. N. R. 545, 899, 101 F. R. 810, 2 A. B. R. 299; In re De Gottardi, 114 F. R. 328, 7 A. B. R. 723.

[16] In re Tischler, 2 N. B. N. R. 549; In re Mayer, 2 N. B. N. R. 257, 3 A. B. R. 533, 98 F. R. 839.

[17] In re Endl. 99 F. R. 915, 3 A. B. R. 813.

[18] In re Baudouine, 101 F. R. 574, 3 A. B. R. 651; In re Bryant, 2 N. B. N. R. 1058; In re Griffith, 1 N. B. N. 546; In re Pearson, 1 Id. 474, 2 A. B. R. 819; In re Fowler, 1 Id. 215, 1 A. B. R. 637; In re Buntrock Clothing Co., 1 Id. 291, 92 F. R. 886, 1 A. B. R. 454; In re Brodbine, 1 N. B. N. 279, 93 F. R. 643, 2 A. B. R. 53; In re Cohn, 2 N. B. N. R. 299, 98 F. R. 75, 3 A. B. R. 421; Smith v. Mason, 6 N. B. R. 1, 14 Wall. 419; Bardes v. Hawarden Bk., 178 U. S. 524, 2 N. B. N. R. 725, 4 A. B. R. 163; Hicks v. Knost, 178 U. S. 541, 2 N. B. N. R. 734, 4 A. B. R. 178; Mitchell v. McClure, 178 U. S. 539, 2 N. B. N. R. 735, 4 A. B. R. 177; s. c. In re Scott, 1 N. B. N. 327; Knight v. Cheney, 5 N. B. R. 305, F. C. 7883; In re Marter, 12 N. B. R. 185, F. C. 9143; In re Bonesteel, 3 N. B. R. 127, 7 Blatch. 175, F. C. 1627; Rogers v. Winsor, 6 N. B. R. 246, F. C. 12023; Kidder v. Horrabin, 18 N. B. R. 146.

deed from which he derived his title.[19] While the court of bankruptcy now has jurisdiction, on a trustee's summary petition, to order a sheriff, or other person, to pay over to him moneys or property received as such officers as the result of a lien or conveyance avoided by the law, owing to the comity existing between the state and federal courts, the better practice is for the trustee first to apply for such order to the court whose officer he is;[20] and the same is true of property in the hands of an assignee under a general assignment, and would extend to the case of a transferee of the assignee who purchased for value but with notice that an adjudication in bankruptcy had been rendered.[21]

§ 1208. **Trustee represents creditors as well as bankrupt.**—This subdivision expressly provides that the trustee "may avoid any transfer by the bankrupt of his property which any creditor might have avoided." Whatever his relation to the bankrupt's property in other respects may be, for the purpose of attacking transfers of property by the bankrupt, the trustee stands in the shoes of judgment as well as general creditors besides succeeding to all the rights of the bankrupt, and may therefore maintain or defend proceedings in regard to the bankrupt's property, which the latter himself could not.[22]

§ 1209. **Failure to take possession or abandonment.**—The trustee is not bound to take all the bankrupt's property, but may reject such as will be more of a burden than a benefit to the estate.[23] His failure to record the evidence of his title in a county in which land of the bankrupt is situated is evidence of a disposition not to assert title to such land and after a

[19] Cook v. Waters, 9 N. B. R. 155.

[20] See as to decisions prior to amendment: In re Franks, Ex p. Sharpe, 95 F. R. 635, 2 A. B. R. 634; In re Abraham, 1 N. B. N. 281, 2 A. B. R. 266, 93 F. R. 767; In re Price, 1 N. B. N. 240, 92 F. R. 987, 1 A. B. R. 606; Connor v. Long, 104 U. S. 228; In re O'Conner, 1 N. B. N. 132, 1 A. B. R. 381; In re Lesser, 100 F. R. 433, 2 N. B. N. R. 599; see Metcalf v. Barker, 187 U. S. 165, 9 A. B. R. 36; Contra, In re Francis Valentine Co., 1 N. B. N. 529, 2 A. B. R. 522, 94 F. R. 793; aff'g 1 N. B. N. 532, 2 A. B. R. 532, 93 F. R. 953.

[21] Bryan v. Bernheimer, 181 U. S. 188, 5 A. B. R. 623.

[22] In re McNamara, 2 N. B. N. R. 341; and cases cited under "Nature of Trustee's title," ante, § 1148, see also In re Harrison, 2 N. B. N R. 541; In re St. Helen's Mill Co., 10 N. B. R. 411, 3 Sawy. 88, F. C. 12222; Barnewall v. Jones, 14 N. B. R. 278, F. C. 1027.

[23] In re Schiermann, 2 N. B. N. R. 118; Kimberling v. Hartley, 1 F. R. 571.

reasonable time, he will be estopped if the bankrupt in possession has sold it to an innocent purchaser for value.[24] Where the bankrupt omits from his schedules a patent or like interest owned by him and the trustee asserts no claim thereto and after the discharge of both, the bankrupt sells the same, the title of the purchaser is good;[25] or, if he refuses to pay the dues on seats in stock exchanges, license fees, and the like, and takes no steps to have them sold, he cannot years later compel their sale for the benefit of the estate, or make the bankrupt refund dividends paid his fellow members, both remedies having been lost through laches.[26] His failure for a number of years to prosecute a claim belonging to the bankrupt does not show an abandonment in the absence of evidence that he knew, or had means of knowing, of the existence of the claim.[27]

§ 1210. **Trustee's rights of action—Time.**—The trustee is not limited to recovering property transferred within four months of the filing of the petition in bankruptcy, but, if he discovers any that has been transferred by bankrupt at any time within the state statute of limitation in fraud of creditors,[28] whose claims existed at the time of such transfer, he may have them set aside, and, until they are so set aside, he has no title to such property.[29] If he files a petition in respect to property in which he is not interested, he must pay the costs himself.[30]

The trustee has the same rights, with respect to setting aside fraudulent conveyances by the bankrupt, as the bankrupt's creditors, or any of them, had by the common law or the statutory law of the particular state;[31] and it is not as a penalty, but has its operation in the vesting of the title in the trustee after the transfer is declared void.[32] After bank-

[24] Taylor v. Irwin, 20 F. R. 615.

[25] Sessions v. Romadka, 145 U. S. 29.

[26] Sparhawk v. Yerkes, 142 U. S. 1; Id. v. Ackley, Id.

[27] Dunshane v. Beall, 161 U. S. 513; Mabin v. Raymond, 15 N. B. R. 353, F. C. 9338.

[28] In re Chaplin, 115 F. R. 162, 8 A. B. R. 121; In re Schenck, 116 F. R. 554, 8 A. B. R. 727; Andrews v. Mather, 9 A. B. R. 296.

[29] In re Grahs, 1 N. B. N. 164, 1 A. B. R. 465; Pratt v. Curtis, 6 N. B. R. 139, 2 Lowell 87, F. C. 11375.

[30] In re Preston, 6 N. B. R. 545, F. C. 11394.

[31] In re Mullen, 101 F. R. 413, 4 A. B. R. 224; In re Harrison, 2 N. B. N. R. 541; In re McNamara, Id. 341.

[32] Cook v. Waters, 9 N. B. R. 155.

ruptcy proceedings are begun, the trustee, and not a creditor, must bring a suit to set aside a conveyance claimed to be void,[33] or in fraud of creditors or any one of them.[34]

See Suits By and Against Bankrupts, ante, § 275, et seq.

§ 1211. —To contest bankrupt's account as administrator.—The trustee of an heir may contest the account of an administrator or representative of the decedent's estate, in order to determine the bankrupt's interest therein, and he may do so, notwithstanding the bankrupt objects.[35]

§ 1212. —As to property in custody of the law.—The ultimate property in attached goods being in the debtor,[36] the net proceeds of a sale on legal process constitute part of bankrupt's estate and vest in his trustee, if within four months, bankruptcy proceedings are instituted.[37] If no sale has been made, the trustee is entitled to the property, or, if deemed for the best interests of the estate, he will be subrogated to the rights of the attaching creditors as respects the lien.[38] The trustee is entitled to property in the bankrupt's possession free of lien notwithstanding the sheriff, more than four months before bankruptcy, having attachments against him, took receipts for such property but left it in the bankrupt's posses-

[33] In re Carter, 1 N. B. N. 162, 1 A. B. R. 160; In re Pearson, 1 N. B. N. 474, 2 A. B. R. 819; In re Adams, 1 N. B. N. 167, 1 A. B. R. 94; In re Griffith, 1 N. B. N. 546; Thurmond v. Andrews et ux., 13 N. B. R. 157.

[34] In re Gurney, 15 N. B. R. 373, 7 Biss. 414, F. C. 5873.

[35] In re Clute, 1 N. B. N. 386, 2 A. B. R. 376.

[36] In re Hull, 18 N. B. R. 1, 14 Blatch. 257, F. C. 6857.

[37] Bear v. Chase, 99 F. R. 920, 3 A. B. R. 746; In re Franks, 2 A. B. R. 634, 95 F. R. 635; In re Kenney, 2 N. B. N. R. 140, 3 A. B. R. 353, 97 F. R. 554; In re Francis-Valentine Co., 1 N. B. N. 529, 2 A. B. R. 522, 94 F. R. 793; s. c. 1 N. B. N. 532, 2 A. B. R. 188, 93 F. R. 953; Reese v. Vinton, 1 N. B. N. 544; In re Moyer, 1 N. B. N. 260, 1 A. B. R. 577, 93 F. R. 188; In re Fellerath, 1 N. B. N. 292, 95 F. R. 121, 2 A. B. R. 40; In re Richards, 95 F. R. 258, 2 A. B. R. 518; see also In re Globe Cycle Works, 1 N. B. N. 570; In re Mullen, 101 F. R. 413, 4 A. B. R. 224; Long v. Conner, 17 N. B. R. 540, F. C. 8479; In re Black, 1 N. B. R. 81, 2 Ben. 196, F. C. 1457.

[38] In re Hammond, 98 F. R. 845; In re Francis-Valentine Co., 1 N. B. N. 529, 2 A. B. R. 522, 94 F. R. 793; s. c. 1 N. B. N. 532, 2 A. B. R. 188, 93 F. R. 953; Reed v. Bullington, 11 N. B. R. 408; Morris v. Davidson, 11 N. B. R. 454; In re Preston, 6 N. B. R. 545, F. C. 11394; In re Houseberger, 2 N. B. R. 33, 2 Ben. 504, F. C. 6734.

sion.[39] The court may receive from one indebted to the bankrupt the amount of such debt, although garnisheed within four months of the adjudication in bankruptcy, the judgment therefor being entered in a state court, and may make such order as may be necessary to protect the garnishee.[40]

The trustee can take advantage of any remedy open to a subsequent attaching creditor in an attachment suit, since he represents creditors as well as bankrupt;[41] but the trustee may intervene in such suit and apply to the state court for an order directing such officer or person to turn the property or its value over to him.[42] The state court may first, however, charge the assets with the payment of the costs and expenses incurred in bringing the same into the state court, before requiring the delivery to be made to the trustee.[43]

The trustee may summarily recover by proceedings in the bankruptcy court, goods replevied from the trustee.[44] While he cannot attack collaterally a sale under attachment of property in the sheriff's possession before the filing of the petition, he may intervene and claim the property;[45] or he may sue to enjoin the sheriff from paying over to a creditor the proceeds of a sale under the attachment and ask that they be paid to him,[46] or he may proceed in the bankruptcy court if the lien is avoided by the law.

§ 1213. —— As to collateral.—The trustee can recover pos-

[39] In re Ashley, 19 N. B. R. 237, F. C. 581.

[40] In re McCartney, 109 F. R. 621, 6 A. B. R. 367.

[41] Beers v. Place, 4 N. B. R. 150, F. C. 1233.

[42] In re Frank, 95 F. R. 635, 2 A. B. R. 634; In re Price, 1 N. B. N. 240, 92 F. R. 987, 1 A. B. R. 606; In re Lesser, 2 N. B. N. R. 599, 100 F. R. 433, 3 A. B. R. 815; In re Klein, 1 N. B. N. 486; 3 A. B. R. 174, 97 F. R. 31; Conor v. Long, 104 U. S. 288; Johnson v. Bishop, 8 N. B. R. 533, F. C. 7373; see Metcalf v. Barker, 187 U. S. 165, 9 A. B. R. 36; Contra, In re Francis-Valentine Co., 1 N. B. N. 532, 2 A. B. R. 188, 93 F. R. 953, aff'd 1 N. B. N. 529, 2 A. B. R. 522, 94 F. R. 793; In re Kenney, 2 N. B. N. R. 140, 3 A. B. R. 353, 97 F. R. 554; Richardson v. New Orleans Deb. Redemp. Co., 102 F. R. 781; same v. New Orleans Coffee Co., Id. 785; In re Tyler, 104 F. R. 778; In re Lengert Wagon Co., 110 F. R. 927, 6 A. B. R. 535; Wilson v. Parr, 8 A. B. R. 320.

[43] Wilson v. Parr, 8 A. B. R. 230.

[44] White v. Schloerb, 178 U. S. 542, 2 N. B. N. R. 721, 4 A. B. R. 178; In re Russell, 101 F. R. 248, 3 A. B. R. 658; In re Vogel, 3 N. B. R. 49, 7 Blatch. 18, F. C. 16982.

[45] Valliant v. Childress, 11 N. B. R. 217.

[46] Pennington v. Lowenstein, 1 N. B. R. 157, F. C. 10938.

session of property in the possession of any one as collateral subject to any valid lien such person might have on the proceeds of such property.[47]

§ 1214. —— As to fraudulent conveyances.—As all conveyances, or transfers, made by a debtor subsequent to the passage of the act, and within four months prior to the filing of the petition, with the intent and purpose to hinder, delay or defraud his creditors are null and void, except as to purchases in good faith, and for a present fair consideration, the property so affected becomes a part of the assets of the estate and the trustee may proceed to enforce his rights thereto, either in the court of bankruptcy or a state court. While the trustee stands in the bankrupt's shoes, and is not strictly a judgment creditor, he may, nevertheless, bring any action which a judgment creditor might have brought before bankruptcy, especially since the passage of this subdivision,[48] thus, where under the state law only judgment creditors could maintain an action to declare a creditor's chattel mortgage invalid for want of re-filing, the trustee may institute proceedings to have such mortgage so declared for the benefit of the estate.[49] A fraudulent transfer being absolutely void,[50] a suit in the nature of trover may be brought by the trustee without alleging and proving a demand for and refusal to restore the property transferred, notwithstanding bankrupt has been discharged.[51] Whether such suit should be for the goods or their value is optional, subject to the direction of the court, though, in a proper case, it should be for the value instead of for the goods, especially if the transferee were a party to the fraud. If the creditor benefited by such fraud agrees to restore to the trustee the money value of such property or to purchase any rights of action which may exist against him in favor of the trustee,

[47] In re Cobb, 1 N. B. N. 557, 3 A. B. R. 129, 96 F. R. 821.

[48] Sec. 70e, act of 1898; In re McNamara, 2 N. B. N. R. 341; In re Tollett, 2 N. B. N. R. 1096.

[49] In re Harrison, 2 N. B. N. R. 541; In re Booth, 2 N. B. N. R. 377, 98 F. R. 975; In re Leigh, 1 N. B. N. 526, 96 F. R 806, s. c. 1 N. B. N. 425, 2 A. B. R. 606; In re Yukon Woolen Co., 96 F. R. 326, 1 N. B. N. 420, 2 A. B. R. 805; Bostwick v. Foster, 18 N. B. R. 123, 14 Blatch. 436, F. C. 1682; Contra, In re Bozeman, 2 A. B. R. 809, 1 N. B. N. 479; In re Ohio Co-op. Shear Co., 2 A. B. R. 775, 1 N. B. N. 477; In re McKay, 1 A. B. R. 292, 1 N. B. N. 133.

[50] Sec. 67e, act of 1898.

[51] In re Pierce, 103 F. R. 64, 2 N. B. N. R. 984, 4 A. B. R. 554.

suit to recover the property fraudulently conveyed should not be brought, if, in the court's judgment, it is likely to net the estate less than the amount offered in settlement.[52]

A trustee seeking to set aside and annul a bill of sale and transfer of property, previously made by the bankrupt, alleged to have been fraudulent under the bankruptcy law and as against creditors, may appropriately proceed by bill in equity, and will not be required to seek his remedy at law.[53] Where an insolvent fraudulently assigned a lease, the trustee can enforce the resulting trust in creditors' favor in the hands of subsequent transferees with notice;[54] or may sue a debtor who pays money under his creditor's order to a third person, intending thereby to enable his creditor to prefer such third person, as such debtor will be deemed still to hold such money;[55] or for damages for injury or detention of goods by a party to whom the bankrupt transferred them contrary to the law.[56]

If, for any reason, title of property affected by a fraudulent conveyance revests in the bankrupt at the time of filing a petition, it will pass to the trustee;[57] or if such conveyance is declared fraudulent and void by a state court, he may claim the property subject to any valid liens against it.[58] The trustee cannot have a conveyance set aside as fraudulent against creditors, if it appears that there are no provable debts.[59]

See also Fraudulent Transfers or Conveyances, ante, § 1104.

§ 1215. —— As to funds in bank.—A trustee may have set aside any conveyance to a bank in fraud of creditors, and deposits made by one subsequently becoming bankrupt become a part of the assets of the estate and will be turned over to the trustee. Hence, where a sheriff having made a levy and sale of the bankrupt's property after the title had passed to the trustee, deposited the proceeds with the judgment

[52] In re Phelps, 2 N. B. N. R. 484, 3 A. B. R. 396; Southard v. Benner, 19 N. B. R. 124.

[53] Wall v. Coxe, 101 F. R. 403.

[54] Jones v. Lawson, 33 F. R. 632.

[55] Coxe v. Gardner, 12 N. B. R. 137, 21 Wall. 475.

[56] Shumann v. Fleckenstein, 15 N. B. R. 324, 4 Sawy. 174, F. C. 12826.

[57] In re Brown, 91 F. R. 358, 1 N. B. N. 240, 1 A. B. R. 107; see In re Tollett, 105 F. R. 425, 5 A. B. R. 305.

[58] In re Lesser, 100 F. R. 433, 2 N. B. N. R. 599, 3 A. B. R. 815.

[59] Nicholas v. Murray, 18 N. B. R. 469, F. C. 10223.

creditor, a bank, and received a certificate of deposit instead of a receipt, or where a bank as creditor, collects money due the bankrupt, and gives the same to the sheriff who applies it on the bank's judgment, it constitutes a fraudulent preference and may be recovered by the trustee.[60] Where a bank receives a deposit after it is insolvent, of which fact its officers have knowledge, the fraud avoids the implied contract and prevents the money becoming the bank's property and the trustee is entitled to it;[61] and the same is true of drafts and checks deposited for collection, but which had not been collected when the bank closed its doors, notwithstanding they were endorsed to the bank without qualification; or that on the day of such deposits drafts equal to the whole deposit were purchased, which were subsequently returned unpaid, as such purchase formed a separate transaction,[62] and the deposit might therefore he reclaimed. But the original pledgor of a certificate of stock, wrongfully deposited as collateral by a pledgee, may follow the fund received by the bank into the hands of the trustee of the pledgee, and recover the proceeds of his stock, less his indebtedness to the bankrupt.[63]

§ 1216. —— **Stockholders' liability.**—The extent of the stockholders' statutory liability and the character of that liability depend upon and are determined by the charter of the corporation or the statute of the state which created it.[64] The capital stock of the corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation.[65]

There are various methods by which stockholders may seek to avoid their liability to corporate creditors; as, first, by a cancellation or withdrawal from the contract; second, by a release from their obligation to pay the full par value of the stock; third, by a transfer of the stock. In each of these cases,

[60] Traders' Nat. Bk. v. Campbell, 6 N. B. R. 353, 14 Wall. 87.

[61] Richardson v. New Orleans Deb. Redemp. Co., 102 F. R. 780; same v. New Orleans Coffee Co., Id. 785.

[62] Richardson v. New Orleans Coffee Co., 102 F. R. 785.

[63] In re Hutchinson, 113 F. R. 202; In re Swift, 108 F. R. 212.

[64] Cook on Corp., § 223; Hale v. Hardon, 95 F. R. 747; Hale v. Taylor, 104 F. R. 757; Hale v. Allison, 102 F. R. 790.

[65] Cook on Corp., § 199; Sawyer v. Hoag, 17 Wall. 610-620; In re Miller Electrical Maintenance Co., 111 F. R. 515, 6 A. B. R. 701.

however, a court of equity does its utmost to protect the corporate creditors, and a rigid scrutiny will be made in the interest of creditors into every transaction of such a nature.[66] A stockholder cannot, after a company has become insolvent, avoid his liability on the ground that it was falsely represented to him that no assessment could be made on his stock.[67]

The court of bankruptcy may levy an assessment upon the stockholders of a bankrupt corporation as fully as the stockholders or directors could have done.[68] While the unpaid subscriptions constitute a trust fund for the benefit of creditors yet such unpaid balances are not the primary or regular fund for the payment of corporate debts.[69] Ordinarily corporate creditors' suit to enforce payment of unpaid subscriptions cannot be brought until after judgment at law has been obtained against the corporation and execution returned unsatisfied. This remedy against the corporation need not be first exhausted where it has been adjudged bankrupt and a dissolution has in this way been brought about, but the trustee may proceed directly against the stockholders.[70]

When the assets of a bankrupt corporation are insufficient to pay its debts, the trustee, under the direction of the court of bankruptcy, has authority to call upon its stockholders to pay enough of the unpaid balance of their stock subscriptions as will meet the deficiency of the other assets. The fact that its directors have incurred a statutory liability by contracting excessive debts or by paying dividends when the corporation was insolvent, or by which it became insolvent, will not prevent such call, as the original liability remains, the statutory liability being added thereto, and the creditor is not obliged to exhaust that remedy, nor has the corporation, or its trustee any right to pursue it. It is not an asset of the corporation, but security for the creditors, who may follow it or not, at their pleasure, with all other securities, till they are paid in full.[71]

[66] Cook on Corp., § 199.

[67] Upton v. Hansbrough, 10 N. B. R. 368, 3 Biss. 417, F. C. 16801; Farrar v. Walker, 13 N. B. R. 82, 3 Dill. 506, note, F. C. 4679.

[68] Upton v. Hansbrough, post.

[69] See Dutcher v. Bk., 11 N. B R. 457, 12 Blatchf. 435, F. C. 4203.

[70] Cook on Corp., § 200; States Savings Association v. Kellogg, 52 Mo. 583.

[71] In re Crystal Spring Bottling Co., 96 F. R. 945, 3 A. B. R. 194; citing Institution v. Sprague, 13 Vt. 502; Merrill, 173 U. S. 131; see Myers v. Leely, 10 N. B. R. 411.

The trustee may recover against a transferee of stock,[72] although record of the transfer was not made but waived,[73] the same as if an assessment had been ordered by the corporation before bankruptcy, and an order of the court requiring payment of such sum by a certain date is conclusive of the trustee's right to sue;[74] but he cannot recover from one who refused to accept. He may sue for the balance due on a stock subscription from one who has assigned shares not fully paid up, and concerning some of which the transfer has not been noted on the bank's books, where a by-law makes invalid a transfer of stock by one indebted to the bank;[75] or for the balance due upon stock-notes, as in the case of a mutual fire insurance company where the stockholders pay part cash and give their notes for the balance of the stock, and a portion remains unpaid on the company's bankruptcy and there are losses unsettled.[76]

§ 1217. —— **As to usury.**—Unless there is a law limiting the rate of interest that may be exacted for the use of money there can be no usury. If the parties had in contemplation a loan, it makes no difference however disguised, the contract will be usurious if it be so in other respects, and a note void for usury in its inception cannot be enforced by an innocent purchaser for value. The rate of interest to govern will be that of the state in which the contract is made, though it has been held that parties may contract for interest according to the place of performance.[77] Accordingly, the trustee in bankruptcy has the same right with reference to the recovery of usurious interest and the like, as is given by the state law to any other person.[78] In the case of a National bank the rate of interest is fixed by Federal law,[79] and if an excessive rate is charged it is subject to the penalty provided by the Federal

F. C. 9994; Michener v. Payson, 13 N. B. R. 49, F. C. 9524.

[72] Wilbur v. Stockholders, 18 N. B. R. 178, F. C. 17636; Pullman v. Upton, 17 N. B. R. 489, 96 U. S. 328.

[73] Upton v. Burnham, 8 N. B. R. 22, 3 Biss. 431, F. C. 16798.

[74] Sanger v. Upton, 13 N. B. R. 226, 91 U. S. 56.

[75] In re Bachman, 12 N. B. R. 223, F. C. 707.

[76] See Jenkins v. Armour, 14 N. B. R. 276, 6 Biss. 312, F. C. 7260.

[77] Miller v. Tiffany, 1 Wall. 298; Andrews v. Pond, 13 Pet. 77.

[78] Wheelock v. Lee, 10 N. B. R. 363, 17 Id. 563; In re Kellogg, 113 F. R. 120, 7 A. B. R. 623.

[79] U. S. Rev. Stat., §§ 5197, 5198.

law, which is exclusive of any state penalty,[80] and twice the amount of the interest may be recovered in an action in the nature of an action of debt, provided such action be commenced within two years of the time when such usurious transaction occurred.[81] Creditors who are given the right by statute to attack the validity of a mortgage given by their debtor to another creditor on the ground of usury are under no equity which requires them to pay the debt of such other creditor as a condition precedent to the existence of such right. The court may enjoin a sale of the property pending a determination of the validity of the mortgage.[82]

§ 1218. —— **As to bona fide purchasers.**—The filing of a petition is notice to all the world, and all persons dealing with the bankrupt thereafter do so at their peril, although it may be bona fide and without knowledge of the bankruptcy proceedings;[83] hence a purchaser of negotiable paper, after such filing, is not a bona fide holder without notice.[84] The purchaser from a first vendee must, in order to invalidate his title, be affected by notice of or participation in the original fraud; that is, must have been a purchaser without valuable consideration or mala fide;[85] and a purchaser with notice, who acquires title from a purchaser who formerly acquired the property by fraud, takes no better title than his vendor had.[86]

See also Bona Fide Liens for a Present Consideration, ante, § 1088.

§ 1219. —— **Stoppage in transitu.**—The right of stoppage in transitu which is an equitable extension of the seller's lien for the price of goods of which the buyer has acquired the property but not the possession, recognized by the courts of common law, is also recognized in the courts of bankruptcy. Hence, if a purchaser becomes bankrupt previous to the receipt of the goods, or is insolvent at the time of their purchase and has actually filed his petition prior to their receipt;[87] or while insolvent actually employed counsel in contemplation of bank-

[80] Farmers & Mechanics Nat. Bk. v. Dearing, 91 U. S. 29.

[81] U. S. Rev. Stat., § 5198; Darby v. Inst., 4 N. B. R. 195, F. C. 3571.

[82] In re Miller, 118 F. R. 360.

[83] Opin. Attorney-General, 9 N. B. R. 117.

[84] In re Lake, 6 N. B. R. 542, 3 Biss. 204, F. C. 7992.

[85] Babbitt v. Walbrum, 6 N. B. R. 359, F. C. 695.

[86] Harrell v. Beall, 9 N. B. R. 49, 17 Wall. 490; see Beall v. Harrell, 7 N. B. R. 400, F. C. 1163.

[87] In re Christensen, 2 N. B. N. R. 670; In re Foot, 11 N. B. R. 158, 11 Blatch. 530.

ruptcy proceedings, and then purchased and had delivered to him goods, no title can be considered to have passed and the seller may retake them;[88] or if goods are ordered upon false representations and are received shortly before the purchaser's bankruptcy, the sale may be rescinded as fraudulent.[89] Where a bankrupt bought wine (to arrive) and it was stored in bond in the seller's name, a part being withdrawn with the seller's consent prior to the bankruptcy, the remainder was held to be stored subject to the right of stoppage in transitu.[90] Materials brought by a contractor upon the owner's premises and appropriated to the building contracted for, are to be considered as so far delivered into the possession of the owner as to make them security for advances made by him on the contract, and to vest in him a qualified right of property in the same, consistent with the right of the owner to use them in the fulfillment of his contract.[91]

§ 1220. **Claims against the United States.**—There is considerable distinction between the character of the various claims which arise against the Government, which distinction necessarily determines whether they do or do not pass to the trustee in bankruptcy. In the first place, such claims as are choses in action upon which a suit can be maintained as a matter of legal right and which arise out of a contract, express or implied, and for which the Government is liable, if there be a jurisdiction to hear and determine the same, and in which there is no element of a donation in the payment ultimately made,[92] pass in bankruptcy and may be prosecuted by the trustee or by the purchaser in bankruptcy proceedings.[93]

Secondly, the title to what is known as abandoned and captured property not having been divested by capture, and being a claim for the proceeds in the treasury;[94] or a right to recover

[88] In re McPeck, 2 N. B. N. R. 172; Donaldson v. Farwell, 15 N. B. R. 277; Stewart v. Emerson, 8 N. B. R. 462; In re Alsberg, 16 N. B. R. 116, F. C. 261; In re Rogers, 3 N. B. R. 139, 1 Lowell 123, F. C. 12001.

[89] In re Weil, 111 F. R. 897, 7 A. B. R. 90, and cases there cited; Bloomingdale v. Empire Rubber Mfg. Co., 114 F. R. 1016, 8 A. B. R. 74.

[90] In re Bearns, 18 N. B. R. 500, F. C. 1191.

[91] Duplan Silk Co. v. Spencer, 115 F. R. 689, 8 A. B. R. 367.

[92] Phelps v. McDonald, 99 U. S. 298.

[93] McKay's Case, 27 C. Cls. R. 422; Burk's Case, 13 Id. 241; Campbell's Case, 28 Id. 512.

[94] Klein v. U. S., 13 Wall. 128; Erwin v. U. S., 97 U. S. 392.

a portion of the sum awarded by the tribunal of arbitration at Geneva when paid, which constituted a national fund, in which there was a moral obligation on the part of the Government to do justice to those who had suffered in property,[95] or a claim for a part of the award made by the Spanish and American Claims Commission, or for property taken by the army in states which had not seceded, but for which there would be a right of action, if brought within the statutory period, are causes of action which pass to the trustee, although no jurisdiction existed at the time in which such claims could be prosecuted.

Third. A mere expectancy, such as a claim founded on no legal right known to courts of law or equity, but which is an appeal to the clemency of Congress for the redress of an injury, where there is no obligation on the part of the Government, and the granting of relief is purely a matter of legislative discretion, cannot be regarded as property and does not pass in bankruptcy.[96]

By the Federal law all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and all powers of attorney, or orders, for receiving payment of any such claim or of any part or share thereof, are absolutely null and void, unless executed after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.[97] Although, therefore, a claim against the Government is not assignable, it will pass to the trustee, if of one of the classes indicated above, the bankruptcy proceedings constituting an assignment by law which is valid.[98].

§ 1221. 'f. **Title on confirmation of composition.**—Upon the 'confirmation of a composition offered by a bankrupt, the title 'to his property shall thereupon revest in him.'

[95] Williams v. Heard, 140 U. S. 529.

[96] Campbell's Case, 28 C. Cls. R. 512; Dockery's Case, 26 C. Cls. R. 148; Heard v. Sturgis, 146 Mass. 545; Taft v. Marisly, 120 N. Y. 474; Brooks v. Ahrens, 68 Md. 212; Kingsbury v. Mattocks, 81 Me. 310; Estate of Moore, 26 C. Cls. R. 254; Heirs of Emerson v. Hall, 13 Peters R. 409, 415.

[97] U. S. Rev. Stat. 3477.

[98] Phelps v. McDonald, 16 N. B. R. 217, 99 U. S. 298; s. c. 19 N. B. R. 187; Erwin v. U. S., 19 N. B. R. 172, 97 U. S. 392.

§ 1222. **Effect of confirmation of composition.**—After a composition is accepted and confirmed, creditors cease to have any interest in the estate, and it is the duty of the trustee to pay the balance in his hands to the bankrupt.[99] A certified copy of the order confirming a composition constitutes evidence of the revesting of bankrupt's title in his property, and if recorded imparts the same notice that a deed from the trustee to the bankrupt, if recorded, would impart.[1]

[99] In re August, 19 N. B. R. 161, F. C. 645.

[1] Sec. 21g, act of 1898.

CHAPTER LXXI.

TIME WHEN ACT WENT INTO EFFECT.

§1223. (71a) Time of taking effect—filing petitions.
1224. Act took effect July 1, 1898.
1225. Supersedes jurisdiction acquired by state courts.
1226. Effect on common-law assignments.
1227. b. Pending state insolvency proceedings.
1228. When proceedings under state insolvency laws paramount.

§ 1223. '(Sec. 71a) Time of taking effect—filing petitions. '—This act shall go into full force and effect upon its passage: 'Provided, however, That no petition for voluntary bankruptcy 'shall be filed within one month of the passage thereof, and no 'petition for involuntary bankruptcy shall be filed within four 'months of the passage thereof.'[1]

§ 1224. Act took effect July 1, 1898.—The present law went into effect with the first moment of the first day of July, 1898, the date it was signed by the President.[2] While it took effect from that time no proceedings thereunder for involuntary bankruptcy could by its terms be commenced for four months thereafter but the relation of debtor and creditor and those between creditors was governed by its provisions from that time. An act of bankruptcy committed after that date entitled every creditor to the rights given by the act, and to invoke the aid of the court in preserving such rights until enforceable.

[1] Analogous provision of Act of 1867. "Sec. 50. That this act shall commence and take effect as to the appointment of the officers created hereby, and the promulgation of rules and general orders, from and after the date of its approval; Provided, That no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, Anno Domini, eighteen hundred and sixty-seven."

[2] Leidigh Car Co. v. Stengel, 1 N. B. N. 296, 387, 2 A. B. R. 383, 95 F. R. 637; Parmenter Mfg. Co. v. Hamilton, 1 N. B. N. 8, 1 A. B. R. 39; In re Bruss-Ritter Co., 1 N. B. N. 39, 1 A. B. R. 58, 90 F. R. 651; In re Curtis, 1 N. B. N. 163, 1 A. B. R. 440, 91 F. R. 737; In re Rouse, Hazard & Co., 1 A. B. R. 234; Blake v. Francis-Valentine Co., 1 N. B. N. 47, 1 A. B. R. 372. 89 F. R. 691.

For date when amendments took effect see post, § 1233.

Since a petition in involuntary bankruptcy could not be filed until the expiration of four months from the passage of the act, and transfers and liens affected by an adjudication in bankruptcy are such only as were made or obtained within four months prior to the filing of the petition, no transfer of property, lien or incumbrance is avoided by an adjudication in involuntary bankruptcy, unless made or created subsequent to the passage of the act.[3]

§ 1225. **Supersedes prior acquired jurisdiction of state courts.**—The fact that a state court has taken possession of the property of an insolvent cannot defeat the execution of the bankruptcy law.[4]

§ 1226. **Effect on common-law assignments.**—A common-law assignment is not rendered void by the existence of a bankruptcy law, ipso facto;[5] upon the institution of bankruptcy proceedings, however, such assignments and all proceedings thereunder in the state court are rendered null and void.[6]

§ 1227. **'b. Pending state insolvency proceedings.**—Pro-'ceedings commenced under state insolvency laws before the 'passage of this act shall not be affected by it.'

§ 1228. **When proceedings under state insolvency laws paramount.**—Where insolvency proceedings were instituted under a state law prior to the passage of the bankrupt law and the bankrupt's assets had become vested in the assignee in insolvency, the trustee in bankruptcy is only entitled to such property as was acquired or owned by the bankrupt between the institution of the insolvency proceedings and the filing of

[3] Blake v. Francis-Valentine Co., 1 N. B. N. 47, 1 A. B. R. 372, 89 F. R. 691; In re Brown, 1 A. B. R. 107, 91 F. R. 358.

[4] Lea v. Geo. M. West Co., 1 N. B. N. 79, 409, 1 A. B. R. 261, 91 F. R. 237, 174 U. S. 590; In re Safe Dep. & Sav. Inst., 7 N. B. R. 392, F. C. 12211.

[5] Cook v. Rogers, 13 N. B. R. 97; see In re Scholtz, 106 F. R. 834, 5 A. B. R. 782.

[6] Lea v. Geo. M. West Co., 174 U. S. 590, 2 A. B. R. 463, aff'g 1 N. B. N. 79, 1 A. B. R. 261, 91 F. R. 237; In re Curtis, 1 N. B. N. 163, 1 A. B. R. 440, 91 F. R. 737; In re Etheridge Furn. Co., 1 N. B. N. 39, 1 A. B. R. 112, 92 F. R. 329; In re Gutwillig, 1 N. B. N. 554, 92 F. R. 337, 1 A. B. R. 388, 1 N. B. N. 40, 90 F. R. 475, 1 A. B. R. 78; In re Sievers, 1 N. B. N. 68, 91 F. R. 366, 1 A. B. R. 117, s. c. as Davis v. Bohle, 1 N. B. N. 216, 92 F. R. 325, 1 A. B. R. 412; Leidigh Car. Co. v. Stengel, 95 F. R. 637, 1 N. B. N. 367, 2 A. B. R. 263; In re Smith, 1 N. B. N. 356, 2 A. B. R. 9, 92 F. R. 135.

the petition in bankruptcy.[7] The state courts are not divested of jurisdiction over insolvent proceedings pending at the time of the adoption of the act of 1898;[8] nor does that act affect suits brought prior thereto; nor suspend proceedings under the state law in such cases.[9] Although proceedings begun in a state court prior to the passage of the bankruptcy law are unaffected, yet if they were begun long prior thereto and no discharge has been granted or applied for therein, and the parties consent to a settlement of the estate under a petition in bankruptcy, there is no reason why the estate may not be so administered.[10]

While the statute does not expressly say so, all state laws in regard to insolvency are nevertheless suspended or superseded by the present bankruptcy law which is paramount and exclusive of all other laws relating to the same subject matter.[11]

[7] In re Mussey, 2 N. B. N. R. 113, 99 F. R. 71, 3 A. B. R. 592.

[8] Lavender v. Gosnell, 12 N. B. R. 282.

[9] Snyder v. Simon, 1 N. B. N. 12.

[10] In re Bates, 100 F. R. 263, 4 A. B. R. 56.

[11] Parmenter Mfg. Co. v. Hamilton, 1 N. B. N. 8, 1 A. B. R. 39, 172 Mass. 178; In re Bruss Ritter Co., 90 F. R. 651, 1 N. B. N. 39, 1 A. B. R. 58; In re Anderson, 110 F. R. 141, 6 A. B. R. 555; Sturgis v. Crowninshield, 4 Wheat. 122; In re Macon Sash, Door & Lumber Co., 112 F. R. 323, 7 A. B. R. 66; In re Storck Lumber Co., 114 F. R. 360, 8 A. B. R. 86; Carling v. Seymour Lumber Co., 8 A. B. R. 29; Littlefield v. Gray, 8 A. B. R. 409; In re Richard, 2 A. B. R. 506; see Herron Co. v. Superior Court, 8 A. B. R. 492; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 A. B. R. 1; also ante, § 16.

CHAPTER LXXII.

CLERKS TO KEEP INDEXES.

§ 1229. '**(Sec. 71) Indexes to be kept.**—That the clerks of 'the several district courts of the United States shall prepare 'and keep in their respective offices complete and convenient 'indexes of all petitions and discharges in bankruptcy hereto- 'fore or hereafter filed in the said courts, and shall, when re- 'quested so to do, issue certificates of search certifying as to 'whether or not any such petitions or discharges have been 'filed; and said clerks shall be entitled to receive for such 'certificates the same fees as now allowed by law for certifi- 'cates as to judgments in said courts: Provided, That said 'bankruptcy indexes and dockets shall at all times be open to 'inspection and examination by all persons or corporations 'without any fee or charge therefor.'

§ 1230. The indexes to be prepared by the clerk are to cover all petitions in bankruptcy filed as well as all discharges granted since the enactment of the act of July 1, 1898. Petitions and discharges hereafter granted should likewise be regularly recorded.

CHAPTER LXXIII.

LIMIT TO COMPENSATION OF REFEREE AND TRUSTEE.

§ 1231. '(Sec. 72) **Compensation limited.**—That neither 'the referee nor the trustee shall in any form or guise receive, 'nor shall the court allow them, any other or further compen- 'sation for their services than that expressly authorized and 'prescribed in this act.'

§ 1232. This provision is a clear and explicit limitation upon the charges of the referee and trustee for services, and the charges allowed are in full for the services rendered. The use of the expression "for their services" is an evident indication that Congress meant services rendered by the referee or trustee as such. Accordingly services rendered by a referee when sitting as a special master in the hearing of objections to a discharge and the like, or services rendered by the trustee in the capacity of an attorney-at-law in connection with the bankruptcy proceedings, would not be comprehended by this provision and compensation may be allowed therefor, since in neither case is the service rendered in the capacity of referee or trustee.

CHAPTER LXXIV.

TIME WHEN AMENDMENTS TOOK EFFECT.

§ 1233. '(Sec. 19) When amendments take effect.—That 'the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such 'cases shall be adjudicated and disposed of conformably to 'the provisions of the said act of July first, eighteen hundred 'and ninety-eight.'

§ 1234. The amendments of the law took effect with the first moment of the fifth day of February, 1903, the date the amendatory act was signed by the President. All cases filed prior thereto are to be adjudicated and disposed of in accordance with the act of July 1, 1898, while all petitions filed on February 5, 1903, and thereafter, are to be disposed of in accordance with the amendments.

The fact that the statute uses the expression "bankruptcy cases pending" instead of "petitions which were filed when this act takes effect," would seem to indicate a purpose on the part of Congress to make a distinction between a pending and a closed case. Accordingly a case which was closed prior to the amendment, but reopened thereafter, not being a pending case on February 5, 1903, would be controlled by the act as amended.

TITLE III.

RULES, FORMS AND ORDERS PROMULGATED BY THE SUPREME COURT OF THE UNITED STATES, NOVEMBER 28, 1898.

§ 1235.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

I.

§ 1236. DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the

case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

II.

§ 1237. FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

III.

§ 1238. PROCESS.

All process, summons and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

IV.

§ 1239. CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the circuit or district court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

V.

§ 1240. FRAME OF PETITIONS.

All petitions and schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

VI.

§ 1241. PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicil, and the petition may be amended by

inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

VII.

§ 1242. PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

VIII.

§ 1243. PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been

filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

IX.

§ 1244. SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

X.

§ 1245. INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

XI.

§ 1246. AMENDMENTS.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

XII.

§ 1247. DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

XIII.

§ 1248. APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

XIV.

§ 1249. NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XV.

§ 1250. TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

XVI.

§ 1251. NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

XVII.

§ 1252. DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

XVIII.

§ 1253. SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss

if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

XIX.

§ 1254. ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

XX.

§ 1255. PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

XXI.

§ 1256. PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

XXII.

§ 1257. TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless

he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

XXIII.

§ 1258. ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

XXIV.

§ 1259. TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXV.

§ 1260. SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

XXVI.

§ 1261. ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

XXVII.

§ 1262. REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

XXVIII.

§ 1263. REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

XXIX.

§ 1264. PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

XXX.

§ 1265. IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus*

to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

XXXI.

§ 1266. PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

XXXII.

§ 1267. OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

XXXIII.

§ 1268. ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXIV.

§ 1269. COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

XXXV.

§ 1270. COMPENSATION OF CLERKS, REFEREES AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.

XXXVI.

§ 1271. APPEALS.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from

which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

XXXVII.

§ 1272. GENERAL PROVISIONS.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

XXXVIII.

§ 1273. FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

FORMS IN BANKRUPTCY.

[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.]

[Form No. 1.]

§ 1274. Debtor's Petition.

To the Honorable —— ——, Judge of the District Court of the United States for the —— District of ——:

The petition of —— ——, of ——, in the county of —— and district and State of ——, —— [*state occupation*], respectfully represents:

That he has had his principal place of business [*or* has resided, *or* has had his domicil] for the greater portion of six months next immediately preceding the filing of this petition at ——, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts. —— ——,

—— ——, *Attorney.*

United States of America, District of ——, ss:

I, —— ——, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief. —— ——, *Petitioner.*

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

——,

—— ——.

[*Official character.*]

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

§ 1275. SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

CLAIMS WHICH HAVE PRIORITY.	Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount.	
						$	c.
(1) Taxes and debts due and owing to the United States							
(2) Taxes due and owing to the State of ——, or to any county, district or, municipality thereof							
(3) Wages due workmen, clerks, or servants, to an amount not exceeding $300 each, earned within three months before filing the petition							
(4) Other debts having priority by law							
					Total		

—— ——, *Petitioner.*

§ 1276. SCHEDULE A. (2)

Creditors holding securities.

[N. B.— Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	Description of securities.	When and where debts were contracted.	Value of securities.	Amount of debts.
					$	c.
				Total		

—— ——, *Petitioner.*

§ 1277. SCHEDULE A. (3)

Creditors whose claims are unsecured.

[N. B.— When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount. $	Amount. c.
... .	.....	.....	.. ..	.....	.....	....
.....	.....	.....	.....	.....	.....	....
				Total.....	.....	....

—— ——, *Petitioner.*

§ 1278. SCHEDULE A. (4)

Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers.

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.]

Reference to ledger or voucher.	Names of holders as far as known.	Residence (if unknown, that fact must be stated).	Place where contracted.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount. $	Amount. c.
.....	.....	.....	.....	... ...	.....	....
.....	.....	.....	.....	.....	.....	....
				Total.....	.....	....

—— ——, *Petitioner.*

§ 1279. SCHEDULE A. (5)

Accommodation paper.

[N. B.— The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
						$	c.
.....	.....	.....	.....	.....	.....	.....	....
.....	.....	.....	.....	.....	.....	.....	....
					Total	.....	....

—— ——, *Petitioner.*

OATH TO SCHEDULE A.

UNITED STATES OF AMERICA, District of ——, ss:

On this —— day of ——, A. D. 18—, before me personally came —— ——, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——,

[*Official character.*]

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.

§ 1280. SCHEDULE B. (1)

Real estate.

LOCATION AND DESCRIPTION OF ALL REAL ESTATE OWNED BY DEBTOR OR HELD BY HIM.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value. $	c.
.....	.....	.....	.....	..
.....	.....	.....	.....	....
		Total	.....	....

—— ——, *Petitioner.*

§ 1281. SCHEDULE B. (2)

Personal property.

		$	c.
a. Cash on hand	....	.....	.....
b. Bills of exchange, promissory notes, or securities of any description (each to be set out separately)	.....	.....	.....
c. Stock in trade, in — business of —— ——, at ——, of the value of ——	.....	.....	.....
d. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.	....	.....	.....
e. Books, prints, and pictures, viz....	.....	.....	.....
f. Horses, cows, sheep, and other animals (with number of each), viz.....	.....	.....	.....
g. Carriages and other vehicles, viz...	.....	.....	.....
h. Farming stock and implements of husbandry, viz.	.....	.....	.....
i. Shipping, and shares in vessels, viz.....	.....	.....	.....
k. Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.....	....	.....	.....
l. Patents, copyrights, and trade-marks, viz.....	....	.....	.....
m. Goods or personal property of any other description, with the place where each is situated, viz..	.....	.....	.....
	Total	.....	.....

—— ——, *Petitioner.*

§ 1282. SCHEDULE B. (3)

Choses in action.

		Dollars.	Cents.
a. Debts due petitioner on open account			
b. Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds			
c. Policies of insurance			
d. Unliquidated claims of every nature, with their estimated value			
e. Deposits of money in banking institutions and elsewhere			
	Total		

—— ——, *Petitioner.*

§ 1283. SCHEDULE B. (4)

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

GENERAL INTEREST.	Particular description.	Supposed value of my interest.	
		$	c
Interest in land			
Personal property			
Property in money, stock, shares, bonds, annuities, etc.			
	Total		
Rights and powers, legacies and bequests			
Property heretofore conveyed for benefit of creditors.		Amount realized from proceeds of property conveyed.	
		$	c.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor			
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy			
	Total		

—— ——, *Petitioner.*

§ 1284. SCHEDULE B. (5)

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

		Valuation.	
		$	c.
Military uniform, arms, and equipments.	.....	.....	.....
Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption	.....	.....	.....
	Total	.....	

—— ——, *Petitioner.*

§ 1285. SCHEDULE B. (6)

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books	
Deeds.....	
Papers	

—— ——, *Petitioner.*

OATH TO SCHEDULE B.

UNITED STATES OF AMERICA, District of ——, ss:

On this —— day of ——, A. D. 18—, before me personally came —— ——, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

—— ——,

—— ——,

[*Official character.*]

§ 1286. Summary of Debts and Assets.

[From the statements of the bankrupt in Schedules A and B.]

Schedule A....	1 (1)	Taxes and debts due United States.....	.....	.....
" "	1 (2)	Taxes due States, counties, districts, and municipalities	.....	.....
" "	1 (3)	Wages..	.....	.....
" "	1 (4)	Other debts preferred by law.....	.....	.....
Schedule A....	2	Secured claims.....	.....	.....
Schedule A....	3	Unsecured claims	.....	.....
Schedule A....	4	Notes and bills which ought to be paid by other parties thereto.....	.....	.....
Schedule A....	5	Accommodation paper.....	.....	.....
		Schedule A, total.....	.....	.....
Schedule B	1	Real estate	.....	.....
Schedule B	2-a	Cash on hand.....	.....	.....
" "	2-b	Bills, promissory notes, and securities.....	.....	.....
" "	2-c	Stock in trade	.....	.....
" "	2-d	Household goods, etc.....	.....	.....
" "	2-e	Books, prints, and pictures.....	.....	.....
" "	2-f	Horses, cows, and other animals.....	.....	.....
" "	2-g	Carriages and other vehicles.....	.....	.....
" "	2-h	Farming stock and implements..	.....	.....
" "	2-i	Shipping and shares in vessels.....	.....	.....
" "	2-k	Machinery, tools, etc....	.....	.....
" "	2-l	Patents, copyrights, and trade-marks.....	.....	.....
" "	2-m	Other personal property	.....	.....
Schedule B	3-a	Debts due on open accounts.....	.....	.....
" "	3-b	Stocks, negotiable bonds, etc.....	.....	.....
" "	3-c	Policies of insurance.....	.....	.....
" "	3-d	Unliquidated claims.....	.....	.....
" "	3-e	Deposits of money in banks and elsewhere...	.....	.....
Schedule B	4	Property in reversion, remainder, trust, etc..	.....	.....
Schedule B	5	Property claimed to be excepted.....	.....	.....
Schedule B	6	Books, deeds, and papers	.....	.....
		Schedule B, total.....	.....	.....

[Form No. 2.]

§ 1287. Partnership Petition.

To the Honorable —— ——, Judge of the District Court of the United States for the —— District of ——:

The petition of —— —— respectfully represents:

That your petitioners and —— —— have been partners under the firm name of —— ——, having their principal place of business at ——, in the county of ——, and district and State of ——, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by —— oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said —— —— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said —— —— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said —— —— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said —— —— further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

—— ——,
—— ——,
—— ——,
Petitioners

—— ——, *Attorney.*

—— ——, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

—— ——,
—— ——,
—— ——,
Petitioners.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——,
—— ——,
[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[Form No. 3.]

§ 1288. Creditors' Petition.

To the Honorable —— ——, Judge of the District Court of the United States for the —— District of ——:

The petition of —— ——, of ——, and —— ——, of ——, and —— ——, of ——, respectfully shows:

That —— ——, of ——, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business [*or* resided, *or* had his domicil] at ——, in the county of ——, and State and district aforesaid, and owes debts to the amount of $1,000.

That your petitioners are creditors of said —— ——, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500. That the nature and amount of your petitioners' claims are as follows: ——.

And your petitioners further represent that said —— —— is insolvent, and that within four months next preceding the date of this petition the said —— —— committed an act of bankruptcy, in that he did heretofore, to wit, on the —— day of ——, ——.

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon —— ——, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

—— ——,
—— ——,
—— ——,
Petitioners.

—— ——, *Attorney.*

UNITED STATES OF AMERICA, District of ——, ss.:

—— ——, —— ——, —— ——, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, —— ——, this —— day of ——, 18—.

—— ——,

—— ——,

[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM NO. 4.]

§ 1289. ORDER TO SHOW CAUSE UPON CREDITORS' PETITION.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——. } In Bankruptcy.

Upon consideration of the petition of —— —— that —— —— be declared a bankrupt, it is ordered that the said —— —— do appear at this court, as a court of bankruptcy, to be holden at ——, in the district aforesaid, on the —— day of ——, at — o'clock in the ——noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said —— ——, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable —— ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 18—.

[*Seal of the court.*]

—— ——, *Clerk.*

[FORM NO. 5.]

§ 1290. SUBPŒNA TO ALLEGED BANKRUPT.

UNITED STATES OF AMERICA, —— District of ——.

To —— ——, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the —— district of ——, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at ——, in said district, on the —— day of ——, A. D. 189–, —— to answer to a petition filed by —— —— in our said court, praying that you may be adjudged a

bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable —— ——, judge of said court, and the seal thereof, at ——, this —— day of ——, A. D. 189-.

[*Seal of the court.*]

—— ——, *Clerk.*

[FORM No. 6.]

§ 1291. DENIAL OF BANKRUPTCY.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——. } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

And now the said —— —— appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or*, he demands that the same may be inquired of by a jury].

—— ——.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——,

[*Official character.*]

[FORM No. 7.]

§ 1292. ORDER FOR JURY TRIAL.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——. } In Bankruptcy.

At ——, in said district, on the —— day of ——, 18—.

Upon the demand in writing filed by —— ——, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.

[*Seal of the court.*]

—— ——, *Clerk.*

[FORM No. ?]

§ 1293. SPECIAL WARRANT TO MARSHAL.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——. } In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the —— day of ——, A. D. 18—, filed against —— ——, of the county of —— and

State of ——, in said district, and said petition is still pending; and whereas it satisfactorily appears that said —— —— has committed an act of bankruptcy [*or* has neglected *or* is neglecting, *or* is about to so neglect his property that it has thereby deteriorated *or* is thereby deteriorating *or* is about thereby to deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said —— ——, and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable —— ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— of ——, A. D. 189–.

[*Seal of the court.*] —— ——, *Clerk.*

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named —— ——, and of all his deeds, books of account, and papers which have come to my knowledge.

—— ——,

Marshal [or *Deputy Marshal*].

Fees and expenses.

1. Service of warrant.....	
2. Necessary travel, at the rate of six cents a mile each way.....	
3. Actual expenses in custody of property and other services as follows. [Here state the particulars.]	

—— ——,

Marshal [or *Deputy Marshal*].

District of ——, A. D. 18—.

Personally appeared before me the said —— ——, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable. —— ——,

Referee in Bankruptcy.

[Form No. 9.]

§ 1294. Bond of Petitioning Creditor.

Know all men by these presents: That we, —— ——, as principal, and —— ——, as sureties, are held and firmly bound unto —— ——, in the full and just sum of —— dollars, to be paid to said —— ——, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 189–.

The condition of this obligation is such that whereas a petition in

bankruptcy has been filed in the district court of the United States for the —— district of —— against the said —— ——, and the said —— —— has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said —— ——, subject to the further orders of said district court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said —— —— shall indemnify the said —— —— for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of —

—— —— —— —— [*Seal.*]
—— —— —— —— [*Seal.*]
—— —— [*Seal.*]

Approved this —— day of ——, A. D. 189-.
—— ——, *District Judge.*

[Form No. 10.]

§ 1295. Bond to Marshal.

Know all men by these presents that we, —— ——, as principal, and —— ——, as sureties, are held and firmly bound unto —— ——, marshal of the United States for the —— district of ——, in the full and just sum of —— dollars, to be paid to the said —— ——, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 189-.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the —— district of ——, against the said —— ——, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said —— ——, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court upon a petition of said —— —— has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said —— ——, and the said —— ——, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of —

—— —— —— —— [*Seal.*]
—— —— —— —— [*Seal.*]
—— —— —— —— [*Seal.*]

Approved this —— day of ——, A. D. 189-.
—— ——, *District Judge.*

[FORM No. 11.]

§ 1296. ADJUDICATION THAT DEBTOR IS NOT BANKRUPT.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——. } In Bankruptcy.

At ——, in said district, on —— day of ——, A. D. 189–, before the Honorable —— ——, judge of the —— district of ——.

This cause came on to be heard at ——, in said court, upon the petition of —— —— that —— —— be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.*]

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said —— —— was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable —— ——, judge of said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 18—.

[*Seal of the court.*]

—— ——, *Clerk.*

[FORM No. 12.]

§ 1297. ADJUDICATION OF BANKRUPTCY.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before the Honorable —— ——, judge of said court in bankruptcy, the petition of —— —— that —— —— be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said —— —— is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable —— ——, judge of said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 18—.

[*Seal of the court.*]

—— ——, *Clerk.*

[FORM No. 13.]

§ 1298. APPOINTMENT, OATH, AND REPORT OF APPRAISERS.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——, *Bankrupt.* } In Bankruptcy.

It is ordered that —— ——, of ——, —— ——, of ——, and —— ——, of ——, three disinterested persons, be, and they are hereby, appointed ap-

praisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this —— day of ——, A. D. 18—.

—— ——,

Referee in Bankruptcy.

—— District of ——, ss:

Personally appeared the within named —— —— and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

—— ——,
—— ——,
—— ——,

Subscribed and sworn to before me this —— day of ——, A. D. 189-.

—— ——,

[*Official character.*]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dollars.	Cents.
.....	.....	.....
.....	.....	.....

In witness whereof we hereunto set our hands, at ——, this —— day of ——, A. D. 18—.

—— ——,
—— ——,
—— ——,

[Form No. 14.]

§ 1299. Order of Reference.

In the District Court of the United States for the —— District of ——.

In the matter of ——, *Bankrupt.* } In Bankruptcy.

Whereas —— ——, of ——, in the county of ——, and district aforesaid, on the —— day of ——, A. D. 18—, was duly adjudged a bankrupt upon a petition filed in this court by [*or*, against] him on the —— day of ——, A. D. 18—, according to the provisions of the acts of Congress relating to bankruptcy,

It is thereupon ordered, that said matter be referred to —— ——, one

of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said —— —— shall attend before said referee on the —— day of ——, at ——, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said —— bankruptcy.

Witness the Honorable —— ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 18—.

[*Seal of the court.*]

—— ——, *Clerk.*

[Form No. 15.]

§ 1300. Order of Reference in Judge's Absence.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——. } In Bankruptcy.

Whereas on the —— day of ——, A. D. 18—, a petition was filed to have —— ——, of ——, in the county of ——, and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy,* on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to —— ——, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said —— —— shall attend before said referee on the —— day of ——, A. D. 18—, at ——.

Witness my hand and the seal of the said court, at ——, in said district, on the —— day of ——, A. D. 18—.

[*Seal of the court.*]

—— ——, *Clerk.*

[Form No. 16.]

§ 1301. Referee's Oath of Office.

I, —— ——, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God. —— ——.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——,

District Judge.

[Form No. 17.]

§ 1302. Bond of Referee.

Know all men by these presents: That we, —— —— of ——, as principal, and —— —— of —— and —— —— of ——, as sureties, are held and firmly bound to the United States of America in the sum of —— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 18—.

The condition of this obligation iss uch that whereas the said —— —— has been on the —— day of ——, A. D. 18—, appointed by the Honorable —— ——, judge of the district court of the United States for the —— district of ——, a referee in bankruptcy, in and for the county of ——, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said —— —— shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in the presence of

—— ——. —— ——, [*L. S.*]

—— ——. —— ——, [*L. S.*]

—— ——, [*L. S.*]

Approved this —— day of ——, A. D. 189—.

—— ——, *District Judge.*

[Form No. 18.]

§ 1303. Notice of First Meeting of Creditors.

In the District Court of the United States for the —— District of ——.

In Bankruptcy.

In the matter of —— ——, *Bankrupt.* } In Bankruptcy.

To the creditors of —— ——, of ——, in the county of ——, and district aforesaid, a bankrupt:

Notice is hereby given that on the —— day of ——, A. D. 18—, the said —— —— was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at —— in ——, on the —— day of ——, A. D. 18—, at —— o'clock in the ——noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

—— ——, 18—. —— ——,

Referee in Bankruptcy.

[FORM No. 19.]

§ 1304. LIST OF DEBTS PROVED AT FIRST MEETING.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before —— ——, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.
.....	....	.....	.....
.....	....	.....	.....

—— ——,
Referee in Bankruptcy.

§ 1305. [FORM No. 20.]

GENERAL LETTER OF ATTORNEY IN FACT WHEN CREDITOR IS NOT REPRESENTED BY ATTORNEY AT LAW.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——, *Bankrupt.* } In Bankruptcy.

To —— ——,
—— ——:

I, —— ——, of ——, in the county of —— and State of ——, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction

of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ——, A. D. 189–. —— ——. [*L. S.*]

Signed, sealed, and delivered in presence of —

—— ——.

Acknowledged before me this —— day of ——, A. D. 189–.

—— ——,

[*Official character.*]

[Form No. 21.]

§ 1306. Special Letter of Attorney in Fact.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

To —— ——,

—— ——:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ——, on the —— day of ——, before ——, or any adjournment thereof, and then and there —— for —— and in —— name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt. —— ——. [*L. S.*]

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ——, A. D. 189–.

Signed, sealed, and delivered in presence of —

—— ——.

Acknowledged before me this —— day of ——, A. D. 189–.

—— ——,

[*Official character.*]

[Form No. 22.]

§ 1307. Appointment of Trustee by Creditors.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before —— ——, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the ma

jority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint —— ——, of ——, in the county of —— and State of ——, to be the trustee of the said bankrupt's estate and effects.

Signatures of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.
.....	.....	.....	.....
.....	.....	.....	.....

Ordered that the above appointment of trustee be, and the same is hereby, approved.

—— ——,
Referee in Bankruptcy.

[Form No. 23.]

§ 1308. Appointment of Trustee by Referee.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before —— ——, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint —— ——, of ——, in the county of —— and State of ——, as trustee of the same.

—— ——,
Referee in Bankruptcy.

[Form No. 24.]

§ 1309. Notice to Trustee of his Appointment.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

To —— ——, of ——, in the county of ——, and district aforesaid:

I hereby notify you that you were duly appointed trustee [*or* one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the —— day of ——, A. D. 18—, and I have ap

proved said appointment. The penal sum of your bond as such trustee has been fixed at —— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at —— the —— day of ——, A. D. 18—.

—— ——,
Referee in Bankruptcy.

[FORM NO. 25.]

§ 1310. BOND OF TRUSTEE.

Know all men by these presents: That we, —— ——, of ——, as principal, and —— ——, of ——, and —— ——, of ——, as sureties, are held and firmly bound unto the United States of America in the sum of —— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 189–.

The condition of this obligation is such, that whereas the above named —— —— was, on the —— day of ——, A. D. 189–, appointed trustee in the case pending in bankruptcy in said court, wherein —— —— is the bankrupt, and he, the said —— ——, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said —— ——, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in presence of

—— —— —— ——, [*Seal.*]
—— —— —— ——, [*Seal.*]
—— ——, [*Seal.*]

[FORM NO. 26.]

§ 1311. ORDER APPROVING TRUSTEE'S BOND.

At a court of bankruptcy, held in and for the —— District of ——, at ——, ——, this —— day of ——, 189–.

Before —— ——, referee in bankruptcy, in the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

It appearing to the Court that —— ——, of ——, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt,

and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors [*or* by order of the court], to wit, in the sum of —— dollars, it is ordered that the said bond be, and the same is hereby, approved.

—— ——,
Referee in Bankruptcy.

[FORM No. 27.]

§ 1312. ORDER THAT NO TRUSTEE BE APPOINTED.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

—— ——,
Referee in Bankruptcy.

[FORM No. 28.]

§ 1313. ORDER FOR EXAMINATION OF BANKRUPT.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

Upon the application of —— ——, trustee of said bankrupt [*or* creditor of said bankrupt], it is ordered that said bankrupt attend before —— ——, one of the referees in bankruptcy of this court, at ——, on the —— day of ——, at — o'clock in the ——noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

—— ——,
Referee in Bankruptcy.

[FORM No. 29.]

§ 1314. EXAMINATION OF BANKRUPT OR WITNESS.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before —— ——, one of the referees in bankruptcy of said court.

—— ——, of ——, in the county of ——, and State of ——, being duly sworn and examined at the time and place above mentioned, upon his oath says: [*Here insert substance of examination of party.*]

—— ——,
Referee in Bankruptcy.

[FORM No. 30.]

§ 1315. SUMMONS TO WITNESS.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

To —— ——:

Whereas —— ——, of ——, in the county of ——, and State of ——, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the —— District of ——,

These are to require you, to whom this summons is directed, personally to be and appear before —— ——, one of the referees in bankruptcy of the said court, at ——, on the —— day ——, at — o'clock in the ——noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable —— ——, judge of said court, and the seal thereof, at ——, this —— day of ——, A. D. 189–. —— ——, *Clerk.*

§ 1316. RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

On this —— day of ——, A. D. 18—, before me came —— ——, of ——, in the county of —— and State of ——, and makes oath, and says that he did, on ——, the —— day of ——, A. D. 189–, personally serve —— ——, of ——, in the county of —— and State of ——, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons. —— ——.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——.

[FORM No. 31.]

§ 1317. PROOF OF UNSECURED DEBT.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189–, came —— ——, of ——, in the county of ——, in said district of ——, and made oath, and says that —— ——, the person by [*or* against] whom a

petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of —— dollars; that the consideration of said debt is as follows: ——; that no part of said debt has been paid [except ——]; that there are no set-offs or counter-claims to the same [except ——]; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

—— ——, *Creditor.*

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——,

[*Official character.*]

[Form No. 32.]

§ 1318. Proof of Secured Debt.

In the District Court of the United States for the —— District of ——.

In the matter of ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district of ——, on the day of ——, A. D. 189–, came —— ——, of ——, in the county of ——, in said district of ——, and made oath, and says that —— ——, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of —— dollars; that the consideration of said debt is as follows: ——; that no part of said debt has been paid [except ——]; that there are no set-offs or counter-claims to the same [except ——]; and that the only securities held by this deponent for said debt are the following: ——.

—— ——, *Creditor.*

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——,

[*Official character.*]

[Form No. 33.]

§ 1319. Proof of Debt Due Corporation.

In the District Court of the United States for the —— District of ——.

In the matter of ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189–, came —— ——, of ——, in the county of —— and State of ——, and made oath and says that he is —— of the ——, a corporation incorporated by and under the laws of the State of ——, and carrying on business at ——, in the county of —— and State of ——, and that he is duly authorized to make this proof, and says that the said —— ——, the person by [*or* against] whom a petition for adjudication of bankruptcy has

been filed, was at and before the filing of the said petition, and still is, justly and truly indebted to said corporation in the sum of —— dollars; that the consideration of said debt is as follows: ——; that no part of said debt has been paid [except ——]; that there are no set-offs or counter-claims to the same [except ——]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

—— ——,
—— *of said Corporation.*

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——,
[*Official character.*]

[Form No. 34.]

§ 1320. Proof of Debt by Partnership.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189–, came —— ——, of ——, in the county of ——, in said district of ——, and made oath and says that he is one of the firm of —— ——, consisting of himself and —— ——, of ——, in the county of —— and State of ——; that the said —— ——, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of —— dollars; that the consideration of said debt is as follows: ——; that no part of said debt has been paid [except ——]; that there are no set-offs or counter-claims to the same [except ——]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

—— ——, *Creditor.*

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——,
[*Official character.*]

[Form No. 35.]

§ 1321. Proof of Debt by Agent or Attorney.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189–, came —— ——, of ——, in the county of ——. and State of ——, attorney [*or*

authorized agent] of ——, in the county of ——, and State of ——, and made oath and says that —— ——, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said —— ——, in the sum of —— dollars; that the consideration of said debt is as follows: ——; that no part of said debt has been paid [except ——]; and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition can not be made by the claimant in person because ——; and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied. —— ——.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——,

[*Official character.*]

[Form No. 36.]

§ 1322. Proof of Secured Debt by Agent.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189–, came —— ——, of ——, in the county of ——, and State of ——, attorney [*or*, authorized agent] of ——, in the county of ——, and State of ——, and made oath, and says that —— ——, the person by [*or*, against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said —— —— in the sum of —— dollars; that the consideration of said debt is as follows: ——; that no part of said debt has been paid [except ——]: that there are no set-offs or counter-claims to the same [except ——]; and that the only securities held by said —— —— for said debt are the following: ——; and this deponent further says that this deposition cannot be made by the claimant in person because ——; and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated. —— ——.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——,

[*Official character.*]

[FORM No. 37.]

§ 1323. AFFIDAVIT OF LOST BILL, OR NOTE.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

On this —— day of ——, A. D. 18—, at ——, came —— ——, of ——, in the county of ——, and State of ——, and makes oath and says that the bill of exchange [*or* note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, ——; and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said —— ——, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or* note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.
.....	....	....	....
.....	.....	....	....

—— ——,

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——,

[*Official character.*]

[FORM No. 38.]

§ 1324. ORDER REDUCING CLAIM.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

Upon the evidence submitted to this court upon the claim of —— —— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of ——, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ——, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the —— day of ——, A. D. 18—].

—— ——,

Referee in Bankruptcy.

[FORM No. 39.]

§ 1325. ORDER EXPUNGING CLAIM.

In the District Court of the United States for the —— District of ——

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

Upon the evidence submitted to the court upon the claim of —— —— against said estate [and *if the fact be so*, upon hearing counsel thereon], it is ordered, that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

—— ——,
Referee in Bankruptcy.

§ 1326. [FORM No. 40.]

LIST OF CLAIMS AND DIVIDENDS TO BE RECORDED BY REFEREE AND BY HIM DELIVERED TO TRUSTEE.

In the District Court of the United States for the —— District of ——

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

A list of debts proved and claimed under the bankruptcy of —— ——, with —— dividend at the rate of —— per cent. this day declared thereon by —— ——, a referee in bankruptcy.

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.
....	.....	.....	.....	.....	.....
....	.....	.....	.....	.....	.....

—— ——,
Referee in Bankruptcy.

[FORM No. 41.]

§ 1327. NOTICE OF DIVIDEND.

In the District Court of the United States for the —— District of ——

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

To —— ——,

Creditor of —— ——, bankrupt:

I hereby inform you that you may, on application at my office, ——, on the —— day of ——, or on any day thereafter, between the hours of

——, receive a warrant for the —— dividend due to you out of the above estate. If you cannot personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

—— ——, *Trustee.*

CREDITOR'S LETTER TO TRUSTEE.

To —— ——, Trustee in bankruptcy of the estate of —— ——, bankrupt:

Please deliver to —— —— the warrant for dividend payable out of the said estate to me. —— ——, *Creditor.*

§ 1328. [FORM No. 42.]

PETITION AND ORDER FOR SALE BY AUCTION OF REAL ESTATE.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

Respectfully represents —— ——, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [*here describe it and its estimated value*] should be sold by auction, in lots or parcels, and upon terms and conditions, as follows: ——. Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this —— day of ——, A. D. 18—. —— ——, *Trustee.*

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing —— —— in favor of said petition and —— —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 189–.

—— ——,
Referee in Bankruptcy.

§ 1329. [FORM No. 43.]

PETITION AND ORDER FOR REDEMPTION OF PROPERTY FROM LIEN.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

Respectfully represents —— ——, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here de*

scribe the estate or property and its estimated value] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or, if the property be personal property*, has been pledged or deposited and is subject to a lien] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ——, being the amount of said lien, in order to redeem said property therefrom.

Dated this —— day of ——, A. D. 18—. —— ——, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing —— —— in favor of said petition and —— —— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ——, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this —— day of ——, A. D. 189-.

—— ——,
Referee in Bankruptcy.

[Form No. 44.]

§ 1330. Petition and Order for Sale Subject to Lien.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

Respectfully represents —— ——, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien, or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this —— day of ——, A. D. 189-. —— ——, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing —— —— in favor

of said petition and —— —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or*, at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 189–.

—— ——,
Referee in Bankruptcy.

[Form No. 45.]

§ 1331. Petition and Order for Private Sale.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

Respectfully represents —— ——, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit, ——, it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit: ——.

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this —— day of ——, A. D. 189–. —— ——, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing —— —— in favor of said petition and —— —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 189–.

—— ——,
Referee in Bankruptcy.

§ 1332. [Form No. 46.]

Petition and Order for Sale of Perishable Property.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

Respectfully represents —— ——, the said bankrupt [*or*, a creditor, *or* the receiver, *or* the trustee of the said bankrupt's estate].

That a part of the said estate, to wit, ——, now in ——, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore he prays the court to order that the same be sold immediately as aforesaid.

Dated this —— day of ——, A. D. 189–. —— ——.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt [*or*, without notice to the creditors], now, after due hearing, no adverse interest being represented thereat [*or* after hearing —— —— in favor of said petition and —— —— in opposition thereto], I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this —— day of ——, A. D. 189–.

—— ——,
Referee in Bankruptcy.

[FORM No. 47.]

§ 1333. TRUSTEE'S REPORT OF EXEMPTED PROPERTY.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——, *Bankrupt.* } In Bankruptcy.

At ——, on the —— day of ——, 18—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy:

GENERAL HEAD.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms, and equipments			
Property exempted by State laws			

—— ——, *Trustee.*

[FORM No. 48.]

§ 1334. TRUSTEE'S RETURN OF NO ASSETS.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——, *Bankrupt.* } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

On the day aforesaid, before me comes —— ——, of ——, in the county of —— and State of——, and makes oath, and says that he, as trustee of

the estate and effects of the above-named bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ——, this —— day of ——, A. D. 18—.

—— ——,
Referee in Bankruptcy.

[Form No. 49.]

§ 1335. Account of Trustee.

The estate of —— ——, *bankrupt, in account with* —— ——, *trustee.*

Dr. Cr.

		Dolls.	Cts.	Dolls.	Cts.			Dolls.	Cts.	Dolls.	Cts.
.....	.....	.....	....	.....	....	.....	.....	.....	...	.....	....
.....	.....	.....	...	.....	...	.....	.....	.....	....	.....	....

[Form No. 50.]

§ 1336. Oath to Final Account of Trustee.

In the District Court of the United States for the —— District of ——.

In the matter of ——, *Bankrupt.* } In Bankruptcy.

On this —— day of ——, A. D. 18—, before me comes —— ——, of ——, in the county of —— and State of ——, and makes oath, and says that he was, on the —— day of ——, A. D. 18—, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed containing —— sheets of paper, the first sheet whereof is marked with the letter —— [*reference may here also be made to any prior account filed by said trustee*], is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt, and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

—— ——, *Trustee.*

Subscribed and sworn to before me at ——, in said —— district of ——, this —— day of ——, A. D. 18—.

—— ——,
[*Official character.*]

§ 1337. [FORM No. 51.]

ORDER ALLOWING ACCOUNT AND DISCHARGING TRUSTEE.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered, that the same be allowed, and that the said trustee be discharged of his trust.

—— ——,
Referee in Bankruptcy.

[FORM No. 52.]

§ 1338. PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

To the Honorable —— ——, Judge of the District Court for the —— District of ——:

The petition of —— ——, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that —— ——, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [*Here set forth the particular cause or causes for which such removal is requested.*]

Wherefore —— —— pray that notice may be served upon said —— ——, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust. —— ——.

[FORM No. 53.]

§ 1339. NOTICE OF PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the —— District of ——.

In the matter of
—— ——, *Bankrupt.* } In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

To —— ——, Trustee of the estate of —— ——, bankrupt:

You are hereby notified to appear before this court, at ——, on the —— day of ——, A. D. 18—, at —— o'clock —. m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of —— ——, one of the

creditors of said bankrupt, filed in this court on the —— day of ——, A. D. 18—, in which it is alleged [*here insert the allegation of the petition*].

—— ——, *Clerk.*

[Form No. 54.]

§ 1340. Order for Removal of Trustee.

In the District Court of the United States for the —— District of ——.

In the matter of ——— ———, *Bankrupt,* } In Bankruptcy.

Whereas —— ——, of ——, did, on the —— day of ——, A. D. 18—, present his petition to this court, praying that for the reasons therein set forth, —— ——, the trustee of the estate of said —— ——, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said —— —— and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said —— —— be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said —— ——, trustee [*or*, out of the estate of the said —— ——, subject to prior charges].

Witness the Honorable —— ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 18—.

[*Seal of the court.*]

—— ——, *Clerk.*

[Form No. 55.]

§ 1341. Order for Choice of New Trustee.

In the District Court of the United States for the —— District of ——.

In the matter of ——— ———, *Bankrupt,* } In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

Whereas by reason of the removal [*or* the death *or* resignation] of —— ——, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held at ——, in ——, in said district, on the —— day of ——, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

—— ——,

Referee in Bankruptcy.

[Form No. 56.]

§ 1342. Certificate by Referee to Judge.

In the District Court of the United States for the —— District of ——.

In the matter of ——— ———, *Bankrupt.* } In Bankruptcy.

I, ——— ———, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at ——, the —— day of ——, A. D. 18—.

——— ———,
Referee in Bankruptcy.

[Form No. 57.]

§ 1343. Bankrupt's Petition for Discharge.

In the matter of ——— ———, *Bankrupt.* } In Bankruptcy.

To the Honorable ——— ———, Judge of the District Court of the United States for the District of ——:

——— ———, of ——, in the county of —— and State of ——, in said district, respectfully represents that on the —— day of ——, last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this —— day of ——, A. D. 189–.

——— ———, *Bankrupt.*

Order of Notice Thereon.

District of ——, ss:

On this —— day of ——, A. D. 189–, on reading the foregoing petition, it is—

Ordered by the court, that a hearing be had upon the same on the —— day of ——, A. D. 189–, before said court at ——, in the said district, at —— o'clock in the ——noon; and that notice thereof be published in ——— ———, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable —— ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 189–.

[*Seal of the court.*] —— ——, *Clerk.*

—— hereby depose, on oath, that the foregoing order was published in the —— —— on the following —— days, viz:

On the —— day of —— and on the —— day of ——, in the year 189–.

—— ——.

District of ——. —— ——, 189–.

Personally appeared —— ——, and made oath that the forgoing statement by him subscribed is true.

Before me, —— ——.

[*Official character.*]

I hereby certify that I have on this —— day of ——, A. D. 189–, sent by mail copies of the above order, as therein directed.

—— ——, *Clerk.*

§ 1344. [Form No. 58.]

Specification of Grounds of Opposition to Bankrupt's Discharge.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——, *Bankrupt.* } In Bankruptcy.

—— ——, of ——, in the county of —— and State of ——, a party interested in the estate of said —— ——, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition.*] —— ——, *Creditor.*

[Form No. 59.]

§ 1345. Discharge of Bankrupt.

District Court of the United States, —— District of ——.

Whereas, —— —— of —— in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said —— —— be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the —— day of ——, A. D. 189–, on which day the petition for adjudication was filed —— him; excepting

such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable —— ——, judge of said district court, and the seal thereof, this —— day of ——, A. D. 189-.

[*Seal of the court.*] —— ——, *Clerk.*

[Form No. 60.]

§ 1346. Petition for Meeting to Consider Composition.

District Court of the United States for the —— District of ——.

—— ——, *Bankrupt.* } In Bankruptcy.

To the Honorable —— ——, Judge of the District Court of the United States for the —— District of ——:

The above-named bankrupt respectfully represents that a composition of —— per cent. upon all unsecured debts, not entitled to a priority —— —— in satisfaction of —— debts has been proposed by —— to —— creditors, as provided by the acts of Congress relating to bankruptcy, and —— verily believe that the said composition will be accepted by a majority in number and in value of —— creditors whose claims are allowed.

Wherefore, he prays that a meeting of —— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court. —— ——, *Bankrupt.*

[Form No. 61.]

§ 1347. Application for Confirmation of Composition.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——, *Bankrupt.* } In Bankruptcy.

To the Honorable —— ——, Judge of the District Court of the United States for the —— District of ——:

At ——, in said district, on the —— day of ——, A. D. 189-, now comes —— ——, the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or* at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of —— dollars, has been deposited, subject to the order of the judge, in the —— National Bank of ——, a designated depository of money in bankruptcy cases.

Wherefore the said —— —— respectfully asks that the said composition may be confirmed by the court. —— ——, *Bankrupt.*

[Form No. 62.]

§ 1348. Order Confirming Composition.

In the District Court of the United States for the —— District of ——.

In the matter of —— ——. } In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable —— ——, judge of said court, and the seal thereof, this —— day of ——, A. D. 189.

[*Seal of the court.*] —— ——, *Clerk.*

[Form No. 63.]

§ 1349. Order of Distribution on Composition.

United States of America:

In the District Court of the United States for the —— District of ——.

In the matter of —— ——, *Bankrupt.* } In Bankruptcy.

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable —— ——, judge of said court, and the seal thereof, this —— day of ——, A. D. 18—.

[*Seal of the court.*] —— ——, *Clerk.*

TITLE IV.

BANKRUPTCY ACT OF 1898, AS AMENDED.

An Act To establish a uniform system of bankruptcy throughout the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Chapter I.

DEFINITIONS.

§ 1350. Section 1. Meaning of Words and Phrases.—a The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition;

(2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed;

(3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States;

(4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to evoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt;

(5) "clerk" shall mean the clerk of a court of bankruptcy;

(6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association;

(7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;

(8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court

of the District of Columbia, and the United States court of the Indian Territory, and of Alaska;

(9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

(10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed;

(11) "debt" shall include any debt, demand, or claim provable in bankruptcy;

(12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act;

(13) "document" shall include any book, deed, or instrument in writing;

(14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving;

(15) a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts;

(16) "judge" shall mean a judge of a court of bankruptcy, not including the referee;

(17) "oath" shall include affirmation;

(18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer;

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

(20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named;

(21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead;

(22) "conceal" shall include secrete, falsify, and mutilate;

(23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets;

(24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia;

(25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security;

(26) "trustee" shall include all of the trustees of an estate;

(27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year;

(28) words importing the masculine gender may be applied to and include corporations, partnerships, and women;

(29) words importing the plural number may be applied to and mean only a single person or thing;

(30) words importing the singular number may be applied to and mean several persons or things.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

§ 1351. SEC. 2. That the courts of bankruptcy as hereinbefore defined, viz,

the district courts of the United States in the several States,

the supreme court of the District of Columbia,

the district courts of the several Territories, and

the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

(1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;

(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

(4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

[a]*(5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this Act allowed trustees for similar services;*

(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

(8) close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;

(9) confirm or reject compositions between debtors and

[a] This subdivision was amended by the act of 1903 by the insertion of the words "and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services."

their creditors, and set aside compositions and reinstate the cases;

(10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;

(11) determine all claims of bankrupts to their exemptions;

(12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) extradite bankrupts from their respective districts to other districts;

(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act;

(16) punish persons for contempts committed before referees;

(17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;

(18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and

(19) transfer cases to other courts of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III.

BANKRUPTS.

§ 1352. SEC. 3. ACTS OF BANKRUPTCY.—a Acts of bankruptcy by a person shall consist of his having

(1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or

(2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or

[b]*(4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States; or*

(5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

[b] This subdivision was amended by the insertion of all the matter after the word "creditors."

c Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

§ 1353. SEC. 4. WHO MAY BECOME BANKRUPTS.—a Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

[a]*b Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.*

The bankruptcy of a corporation shall not release its officers,

[a] Before the amendment of subdivision b by the act of 1903, it read as follows:

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts."

The provision with reference to the release of liability of stockholders, etc., is new.

directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.

§ **1354.** SEC. 5. PARTNERS.—a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

§ **1355.** SEC. 6. EXEMPTIONS OF BANKRUPTS.—a This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of

the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

§ 1356. SEC. 7. DUTIES OF BANKRUPTS.—a The bankrupt shall

(1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed;

(2) comply with all lawful orders of the court;

(3) examine the correctness of all proofs of claims filed against his estate;

(4) execute and deliver such papers as shall be ordered by the court;

(5) execute to his trustee transfers of all his property in foreign countries;

(6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge;

(7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee;

(8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and

(9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when

presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

§ 1357. SEC. 8. DEATH OR INSANITY OF BANKRUPTS.—a The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: Provided, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

§ 1358. SEC. 9. PROTECTION AND DETENTION OF BANKRUPTS.—a A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

§ 1359. SEC. 10. EXTRADITION OF BANKRUPTS.—a Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

§ 1360. SEC. 11. SUITS BY AND AGAINST BANKRUPTS.—a A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

§ 1361. SEC. 12. COMPOSITIONS, WHEN CONFIRMED.—a A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e Upon the confirmation of a composition, the consideration

shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

§ 1362. Sec. 13. Compositions, when Set Aside.—a The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

§ 1363. Sec. 14. Discharges, when Granted.—a Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

[a]*b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed,*

[a] Prior to the amendment subdivision "b" provided as follows:

"The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained."

destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court.

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

§ **1364.** SEC. 15. DISCHARGES, WHEN REVOKED.—a The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

§ **1365.** SEC. 16. CO-DEBTORS OF BANKRUPTS.—a The liability of a person who is a co-debtor with, or guarantor or in manner surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

§ **1366.** [a]SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE. *—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as*

(1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides;

(2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;

(3) have not been duly scheduled in time for proof and al-

[a] Prior to the amendment of 1903, this section provided as follows: Debts not Affected by a Discharge.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

lowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

(4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

§ 1367. SEC. 18. PROCESS, PLEADINGS, AND ADJUDICATIONS.—[b]*a Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.*

[c]*b The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.*

c All pleadings setting up matters of fact shall be verified under oath.

[b] Prior to the amendment, this subdivision provided as follows:

Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States.

[c] The amendment to this subdivision consists in changing the time for pleading to the petition from ten to five days.

d If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes the adjudication or dismiss the petition.

e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed, at the time of the filing, the clerk shall forthwith refer the case to the referee.

§ 1368. SEC. 19. JURY TRIALS.—a A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

§ 1369. SEC. 20. OATHS, AFFIRMATIONS.—a Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United

States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

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

§ 1370. SEC. 21. EVIDENCE.—[a] *A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.*

b The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f A certified copy of an order confirming or setting aside a

[a] Prior to the amendment of 1903, the law provided as follows:

A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or porperty of a bankrupt whose estate is in process of administration under this Act.

composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

§ 1371. SEC. 22. REFERENCE OF CASES AFTER ADJUDICATION.—a After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

§ 1372. SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—a The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

[b]b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.*

c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

§ 1373. SEC. 24. JURISDICTION OF APPELLATE COURTS.—a The Supreme Court of the United States, the circuit courts

[b] The amendment to this subdivision consists in the addition of all after the word "defendant."

of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

§ 1374. SEC. 25. APPEALS AND WRITS OF ERROR.—a That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit,

(1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt;

(2) from a judgment granting or denying a discharge; and

(3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

§ 1375. SEC. 26. ARBITRATION OF CONTROVERSIES.—a The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

§ 1376. SEC. 27. COMPROMISES.—a The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

§ 1377. SEC. 28. DESIGNATION OF NEWSPAPERS.—a Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

§ 1378. SEC. 29. OFFENSES.—a A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently

(1) concealed while a bankrupt or after his discharge, from

his trustee any of the property belonging to his estate in bankruptcy; or

(2) made a false oath or account in, or in relation to, any proceeding in bankruptcy;

(3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

(4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or

(5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly

(1) acted as a referee in a case in which he is directly or indirectly interested; or

(2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

(3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

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

§ 1379. SEC. 30. RULES, FORMS, AND ORDERS.—a All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

§ 1380. SEC. 31. COMPUTATION OF TIME.—a Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

§ 1381. SEC. 32. TRANSFER OF CASES.—a In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy

each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

§ 1382. SEC. 33. CREATION OF TWO OFFICES.—a The offices of referee and trustee are hereby created.

§ 1383. SEC. 34. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.—a Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

§ 1384. SEC. 35. QUALIFICATIONS OF REFEREES.—a Individuals shall not be eligible to appointment as referees unless they are respectively

(1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public;

(3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and

(4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

§ 1385. SEC. 36. OATHS OF OFFICE OF REFEREES.—a Referees shall take the same oath of office as that prescribed for judges of United States courts.

§ 1386. SEC. 37. NUMBER OF REFEREES.—a Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

§ 1387. SEC. 38. JURISDICTION OF REFEREES.—a Referees respectively are hereby invested, subject always to a review by

the judge, within the limits of their districts as established from time to time, with jurisdiction to

(1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions;

(2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment;

(3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act;

(4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and

(5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

§ 1388. SEC. 39. DUTIES OF REFEREES.—a Referees shall

(1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable;

(2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended;

(3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest;

(4) give notices to creditors as herein provided;

(5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges;

(6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so;

(7) safely keep, perfect, and transmit to the clerks the

records, herein required to be kept by them, when the cases are concluded;

(8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail;

(9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and

(10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

§ 1389. SEC. 40. COMPENSATION OF REFEREES.—[a] *a Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.*

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

[a] Prior to the amendment of 1903, this subdivision provided as follows:

Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

c In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

§ 1390. SEC. 41. CONTEMPTS BEFORE REFEREES.—a A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law:

Provided, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

§ 1391. SEC. 42. RECORDS OF REFEREES.—a The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

§ 1392. SEC. 43. REFEREE'S ABSENCE OR DISABILITY.—a Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment

under the same court may, by order of the judge, temporarily fill the vacancy.

§ 1393. SEC. 44. APPOINTMENT OF TRUSTEES.—a The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

§ 1394. SEC. 45. QUALIFICATIONS OF TRUSTEES.—a Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

§ 1395. SEC. 46. DEATH OR REMOVAL OF TRUSTEES.—a The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

§ 1396. SEC. 47. DUTIES OF TRUSTEES.—a Trustees shall respectively

(1) account for and pay over to the estates under their control all interest received by them upon property of such estates;

(2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest;

(3) deposit all money received by them in one of the designated depositories;

(4) disburse money only by check or draft on the depositories in which it has been deposited;

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

(6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts;

(7) lay before the final meeting of the creditors detailed statements of the administration of the estates;

(8) make final reports and file final accounts with the courts

fifteen days before the days fixed for the final meetings of the creditors;

(9) pay dividends within ten days after they are declared by the referees;

(10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and

(11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

[a]*c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.*

§ 1397. SEC. 48. COMPENSATION OF TRUSTEES.—[b]*a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum*

[a] Subdivision "c" does not appear in the act of 1898, but was added by the amendatory act of 1903.

[b] The amendment to this subdivision consists in the substitution by the act of 1903 of the matter in the text for the following:

Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.

on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

§ 1398. SEC. 49. ACCOUNTS AND PAPERS OF TRUSTEES.—a The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

§ 1399. SEC. 50. BONDS OF REFEREES AND TRUSTEES.—a Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d The court shall require evidence as to the actual value of the property of sureties.

e There shall be at least two sureties upon each bond.

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

j Joint trustees may give joint or several bonds.

k If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

§ 1400. SEC. 51. DUTIES OF CLERKS.—a Clerks shall respectively

(1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers;

(2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees;

(3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;

(4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for

him, and to the trustee the fee collected for him at the time of filing the petition.

§ 1401. SEC. 52. COMPENSATION OF CLERKS AND MARSHALS.—a Clerks shall respectively receive as full compensation for their services to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted fixing the compensation of marshals.

§ 1402. SEC. 53. DUTIES OF ATTORNEY-GENERAL.—a The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

§ 1403. SEC. 54. STATISTICS OF BANKRUPTCY PROCEEDINGS.—a Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

§ 1404. SEC. 55. MEETINGS OF CREDITORS.—a The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be

held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

§ 1405. SEC. 56. VOTERS AT MEETINGS OF CREDITORS.—a Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

§ 1406. SEC. 57. PROOF AND ALLOWANCE OF CLAIMS.—a Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss

or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

[a]*g The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.*

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's

[a] Prior to the amendment of 1903, this subdivision provided as follows:

"The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

§ 1407. SEC. 58. NOTICES TO CREDITORS.—a Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of

(1) all examinations of the bankrupt;

(2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts;

(3) all meetings of creditors;

(4) all proposed sales of property;

(5) the declaration and time of payment of dividends;

(6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon;

(7) the proposed compromise of any controversy, and

(8) the proposed dismissal of the proceedings.

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c All notices shall be given by the referee, unless otherwise ordered by the judge.

§ 1408. SEC. 59. WHO MAY FILE AND DISMISS PETITION. —a Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answers a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g A voluntary or involuntary petition shall not be dismissed

by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

§ 1409. Sec. 60. Preferred Creditors.—[a]*a A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.*

[a]*b If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

d If a debtor shall, directly or indirectly, in contemplation

[a] Prior to the amendment of 1903, section 60a and b provided as follows:

a A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

b If a bankrupt shall have given a preference within four months, before the filing of a petition, or after the filing of the petition, and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

CHAPTER VII.

ESTATES.

§ 1410. SEC. 61. DEPOSITORIES FOR MONEY.—a Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

§ 1411. SEC. 62. EXPENSES OF ADMINISTERING ESTATES. —a The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

§ 1412. SEC. 63. DEBTS WHICH MAY BE PROVED.—a Debts of the bankrupt may be proved and allowed against his estate which are

(1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;

(2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;

(3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;

(4) founded upon an open account, or upon a contract express or implied; and

(5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

§ 1413. SEC. 64. DEBTS WHICH HAVE PRIORITY.—a The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be

(1) the actual and necessary cost of preserving the estate subsequent to filing the petition;

[a](2) *the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery;*

(3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;

(4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and

[a] Prior to the amendment of 1903, this subdivision merely provided "(2) the filing fees paid by creditors in involuntary cases."

(5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

§ **1414.** SEC. 65. DECLARATION AND PAYMENT OF DIVIDENDS.—a Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

[a]*b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.*

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the

[a] Prior to the amendment of this subdivision by the act of 1903 it provided as follows:

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order,

creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

§ 1415. SEC. 66. UNCLAIMED DIVIDENDS.—a Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: Provided, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

§ 1416. SEC. 67. LIENS.—a Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if

(1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or

(2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or

(3) that such lien was sought and permitted in fraud of the provisions of this Act;

or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act.

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. [a]*For the*

[a] Subdivision 67e is amended by the act of 1903, by the insertion at the end thereof of the following: "For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

§ 1417. SEC. 68. SET-OFFS AND COUNTERCLAIMS.—a In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

§ 1418. SEC. 69. POSSESSION OF PROPERTY.—a A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such

sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

§ 1419. SEC. 70. TITLE TO PROPERTY.—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all

(1) documents relating to his property;

(2) interests in patents, patent rights, copyrights, and trademarks;

(3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person;

(4) property transferred by him in fraud of his creditors;

(5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him:

Provided, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and

(6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

[a]e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*

f Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

§ **1420.** a This Act shall go into full force and effect upon its passage: *Provided, however,* That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.

§ **1421.** [a]SEC. 71. *That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts:*

[a] The act of 1903 amends the original law by adding at the end of section 70e the following: "For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Provided, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

§ 1422. [a]SEC. 72. *That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this Act.*

§ 1423. [a]SEC. 19. *That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said Act of July first, eighteen hundred and ninety-eight.*

Original Act approved July 1, 1898.

Amendment approved February 5, 1903.

[a] Sections 71, 72 and 73 were not in the act of 1898, but were added by the amendatory act of 1903.

TITLE V.

THE NATIONAL BANKRUPTCY LAW OF 1867 AND AMENDMENTS.

AN ACT to establish a uniform System of Bankruptcy throughout the United States.[1]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several District Courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court. And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all

[1] This act, together with the act of June 22, 1874, and all acts in amendment or supplementary thereto or in explanation thereof, were repealed by the act of June 7, 1878, to take effect September 1, 1878 (20 St. L. 99).

parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity. Said courts may sit, for the transaction of business in bankruptcy, at any place in the district, of which place and the time of holding court they shall have given notice, as well as at the places designated by law for holding such courts.[1]

SEC. 2. *And be it further enacted*, That the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time or vacation. Said circuit courts shall also have concurrent jurisdiction with the district courts of the[2] same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse inter-

[1] The act of June 22, 1874 (18 St. L. 178, § 2), amends this section by adding thereto the following words: "Provided, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides having jurisdiction of claims of such nature and amount."

[2] Section 3 of the above act of 1874 inserts the word "any" in lieu of the word "same."

est,[1] or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee; but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: *Provided*, That nothing herein contained shall revive a right of action barred at the time such assignee is appointed.

Of the Administration of the Law in Courts of Bankruptcy.

Sec. 3. *And be it further enacted*, That it shall be the duty of the judges of the district courts of the United States, within and for the several districts, to appoint in each Congressional district in said districts, upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the district court in the performance of his duties under this act. No person shall be eligible to such appointment unless he be a counsellor of said court, or of some one of the courts of record of the state in which he resides. Before entering upon the duties of his office, every person so appointed a register in bankruptcy shall give a bond to the United States, with condition that he will faithfully discharge the duties of his office, in a sum not less than one thousand dollars, to be fixed by said court, with sureties satisfactory to said court, or to either of the said justices thereof; and he shall, in open court, take and subscribe the oath prescribed in the act entitled "An act to prescribe an oath of office, and for other purposes," approved July second, eighteen hundred and sixty-two, and also that he will not,

[1] Section 3 of the act of June 22, 1874 (18 St. L. 178), here adds the words, "or owing any debt to such bankrupt."

during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

SEC. 4.[1] *And be it further enacted*, That every register in bankruptcy, so appointed and qualified, shall have power, and it shall be his duty, to make adjudication of bankruptcy, to receive the surrender of any bankrupt, to administer oaths in all proceedings before him, to hold and preside at meetings of creditors, to take proof of debts, to make all computations of dividends, and all orders of distribution, and to furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case, to audit and pass accounts of assignees, to grant protection, to pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose, and to sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct; and he shall also make short memoranda of his proceedings in each case in which he shall act, in a docket to be kept by him for that purpose, and he shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of said memoranda, which shall be entered by said clerk in the proper minute-book to be kept in his office, and any register of the court may act for any other register thereof: *Provided, however*, That nothing in this section contained shall empower a register to commit for contempt, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge; but in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before him, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing,

[1] The act of June 22, 1874 (18 St. L. 185, § 19), requires the register to make a report to the clerk of the court of the business transacted by him.

and he shall adjourn the same into court for decision by the judge.[1] No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, nor in an appeal therefrom; nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts. The fees of said registers, as established by this act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by this act.

SEC. 5. *And be it further enacted*, That the judge of the district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this act as may not be opposed, of attending any meeting of creditors, or receiving any proof of debts, and, generally, for the prosecution of any bankruptcy or other proceedings under this act; and the travelling and incidental expenses of such register, and of any clerk or other officer attending him, incurred in so acting, shall be set[tled] by said court in accordance with the rules prescribed under the tenth section of this act, and paid out of the assets of the estate in respect of which such register has so acted; or, if there be no such assets, or if the assets shall be insufficient,

[1] The act of June 22, 1874 (18 St. L. 184, § 18), makes the following amendment: And no register or clerk of court, or any partner or clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts.

then such expenses shall form a part of the costs in the case or cases in which the register shall have acted in such journey, to be apportioned by the judge, and such register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers and documents: *Provided, always*, That all depositions of persons and witnesses taken before said register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. Such register shall be subject to removal by the judge of the district court, and all vacancies occurring by such removal, or by resignation, change of residence, death or disability, shall be promptly filled by other fit persons, unless said court shall deem the continuance of the particular office unnecessary.

SEC. 6. *And be it further enacted*, That any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court. In any bankruptcy, or in any other proceedings within the jurisdiction of the court, under this act, the parties concerned, or submitting to such jurisdiction, may at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court, and the judgment of the court shall be final unless it be agreed and stated in such special case that either party may appeal, if, in such case, an appeal is allowed by this act. The parties may also, if they think fit, agree, that upon the question or questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the

court, or in such manner as the court may direct, or any property, or the amoumt of any disputed debt or claim, shall be paid, delivered or transferred by one of such parties to the other of them either with or without costs.

SEC. 7. *And be it further enacted*, That parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpœna, and all persons wilfully and corruptly swearing or affirming falsely before a register shall be liable to all the penalties, punishments, and consequences of perjury. If any person examined before a register shall refuse or decline to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such question or to sign such examination, and such person shall also be liable to be punished for contempt.

OF APPEALS AND PRACTICE.

SEC. 8. *And be it further enacted*, That appeals may be taken from the district to the circuit courts in all cases of equity, and writs of error may be allowed to said circuit courts from said district courts in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than five hundred dollars, and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim may appeal from the decision of the district court to the circuit court from the same district; but no appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the pro-

ceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from. The appeal shall be entered at the term of the circuit court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same. But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken; and no appeal shall be allowed unless the appellant at the time of claiming the same shall give bond in man[ner] now required by law in cases of such appeals. No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs.

SEC. 9. *And be it further enacted*, That in cases arising under this act no appeal or writ of error shall be allowed in any case from the circuit courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed two thousand dollars.

SEC. 10. *And be it further enacted*, That the Justices of the Supreme Court of the United States, subject to the provisions of this act, shall frame general orders for the following purposes:

For regulating the practice and procedure of the district courts in bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in said courts in all matters under this act;

For regulating the duties of the various officers of said courts;

For regulating the fees[1] payable and the charges and costs to be allowed, except such[2] as are established by this act or by law, with respect to all proceedings in bankruptcy before said courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings;

[1] See note 1 to sec. 47.

[2] The act of June 22, 1874 (18 St. L. 184, § 18), repeals the words "except such as are established by this act or by law."

For regulating the practice and procedure upon appeals;

For regulating the filing, custody, and inspection of records;

And generally for carrying the provisions of this act into effect.

After such general orders shall have been so framed, they or any of them may be rescinded or varied, and other general orders may be framed in manner aforesaid; and all such general orders so framed shall from time to time be reported to Congress, with such suggestions as said justices may think proper.

VOLUNTARY BANKRUPTCY — COMMENCEMENT OF PROCEEDINGS.

SEC. 11. *And be it further enacted*, That if any person residing within the jurisdiction of the United States, owing debts provable under this act exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing of such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors and his desire to obtain the benefit of this act, and shall annex to his petition a schedule, verified by oath before the court or before a register in bankruptcy, or before one of the commissioners of the circuit court of the United States, containing a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and if not known the fact to be so stated, and the sum due to each creditor; also, the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mort-

gage, pledge, lien, judgment, or collateral or other security given for the payment of the same; and shall also annex to his petition an accurate inventory,[1] verified in like manner, of all his estate, both real and personal, assignable under this act, describing the same and stating where it is situated, and whether there are any, and if so, what encumbrances thereon, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt: *Provided*, That all citizens of the United States petitioning to be declared bankrupt shall on filing such petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath shall be filed and recorded with the proceedings in bankruptcy. And the judge of the district court, or, if there be no opposing party, any register of said court, to be designated by the judge, shall forthwith, if he be satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the[2] marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies;[3] to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor, and to give such personal or other

[1] The act of June 22, 1874 (18 Stat. L. 182, § 15), adds the words "and valuation" after the word "inventory."

[2] The act of 1874, above, § 19, provides for the making of a report by the marshal to the clerk.

[3] Section 5 of the act of 1874, above referred to, makes the following amendment: That section 11 of said act be amended by striking out the words "as the warrant specifies," where they first occur, and inserting the words "as the marshal shall select, not exceeding two;" and inserting after the word "specifies," where it last occurs, the words "but whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper or newspapers, to all such creditors whose claims, as reported, do not exceed the sums, respectively, of fifty dollars."

notice to any persons concerned as the warrant specifies, which notice shall state:—

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

Of Assignments and Assignees.

Sec. 12. *And be it fnrther enacted*, That at the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

Sec. 13. *And be it further enacted*, That the creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at said meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All

elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election. The judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

SEC. 14. *And be it further enacted*, That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings: *Provided, however*, That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and

that of his wife and children, and the uniform, arms and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year[1] eighteen hundred and sixty-four: *Provided*, That the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees; and in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court: *And provided further*, That no mortgage of any vessel or of any other goods or chattels, made as security for any debt or debts, in good faith and for present considerations and otherwise valid, and duly recorded, pursuant to any statute of the United States, or of any State, shall be invalidated or affected hereby; and all the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patents and patent rights and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention, or of injury to the property of the bankrupt, and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dis-

[1] The act of June 8, 1872 (17 St. L. 334), changes this year from "1864" to "1871."

pose of, sue for and recover or defend the same as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee; and he may sue for and recover the said estate, debts and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been[1] presented or defended by such bankrupt; and a copy, duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for, and recover the property of the bankrupt, as hereinbefore mentioned; but no property held by the bankrupt in trust shall pass by such assignment. No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amend, should he see fit to do so. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon; and no suit in which the assignee is a party shall be abated by his death or removal from office; but the same may be prosecuted and defended by his successor, or by the surviving or remaining assignee, as the case may be. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien or other encumbrances. The debtor shall

[1] The act of July 27, 1868 (15 St. L. 228, § 2), changes the word "presented" to "prosecuted."

also, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt. The assignee shall immediately give notice of his appointment, by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded; and the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.

SEC. 15.[1] *And be it further enacted*, That the assignee shall demand and receive, from any and all persons holding the

[1] The act of June 22, 1874 (18 St. L. 178, § 1), provides: "That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when, in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt: Provided, that such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors."

Section 4 provides: That unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels and at such times and places as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court shall be published once a week for three consecutive weeks in the newspaper or newspapers, to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court, on the application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a resale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bank-

same, all the estate assigned, or intended to be assigned, under the provisions of this act; and he shall sell all such unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in its opinion, prove to the interest of the creditors; and the assignee shall keep a regular account[1] of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

SEC. 16. *And be it further enacted*, That the assignee shall have the like remedy to recover all said estate, debts and

rupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months in such instalments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. [Here follows the penalty for failure to properly discharge his duties, etc.] That the assignee shall report, under oath, to the court, at least as often as once in three months, the condition of the estate in his charge, and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the accounts of any assignee, he shall be required to account for all interest, benefit or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit or advantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall wilfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and on conviction thereof, be punished by imprisonment in the penitentiary not less than one and not more than five years.

[1] The act of June 22, 1874 (18 St. L. 185, § 19), requires the assignee to make a report of the business transacted by him, and of the fees received, etc.

effects in his own name, as the creditor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If, at the time of the commencement of proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him. In suits prosecuted by the assignee a certified copy of the assignment made to him by the judge or register shall be conclusive evidence of his authority to sue.

SEC. 17. *And be it further enacted*, That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate and apart from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property or for the payment of his debts. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or a register of said court, or may authorize the same to be deposited in any convenient bank upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon. He shall give written notice to all known creditors, by mail or otherwise, of all dividends, and such notice of meetings, after the first, as may be ordered by the

court. He shall be allowed, and may retain out of the money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court. He may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him, and the other party to the controversy, and may, under such direction, compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

SEC. 18. *And be it further enacted*, That the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient. At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with consent of [the] court, remove any assignee by such a vote as is herein, before provided for the choice of assignee. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors in the manner hereinbefore provided, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person, as the court shall direct. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were orig-

inally chosen. Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate. No person who has received any preference contrary to the provisions of this act shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility. An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

Of Debts and Proof of Claims.

Sec. 19. *And be it further enacted*, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared. In all cases of contingent

debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if he shall have proved the same, although such payment shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods. If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate.

Sec. 20. *And be it further enacted*, That, in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or

paid, but no set-off shall be allowed of a claim in its nature not provable against the estate:[1] *Provided*, That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

SEC. 21. *And be it further enacted*, That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby;[2] and no creditor

[1] The act of June 22, 1874 (18 St. L., § 6), amends this section by adding after the word "estate" the words "or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off."

[2] The act of June 22, 1874 (18 St. L. 179, § 7), amends this section by inserting, immediately after the word "thereby," "But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge."

whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid. If any bankrupt shall, at the time of adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also [as] a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

SEC. 22.[1] *And be it further enacted*, That all proofs of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident[2] debtors before any register in bankruptcy

[1] Section 20 of the act of June 22, 1874 (18 St. L. 186), provides "that in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof in the manner and under the regulations provided by law; such proof to be certified by the notary and attested by his signature and official seal." By the act of July 27, 1868 (15 St. L. 228, § 3), this right to take proof was extended to United States commissioners.

[2] The act of July 27, 1868 (15 St. L. 228, § 2), changes this word "debtors" to "creditors."

in the judicial district where such creditors or either of them reside, or before any commissioner of the circuit court authorized to administer oaths in any district. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath or solemn affirmation before the proper register or commissioner setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth, that the claim was not procured for the purpose of influencing the proceedings under this act, and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the said claim or any part thereof, against such bankrupt, or take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings under this act, is or shall be in any way affected, influenced, or controlled, and no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true. Such oath or solemn affirmation shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which cases the demand may be verified in like manner by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge; or if in a foreign country, the oath of the creditor may be taken before any minister, consul, or vice-consul of the United States; and the court may, if it shall see fit, require or receive further pertinent evidence either for or against the admission of the claim. Corporations may verify their claims by the oath or solemn affirma-

tion of their president, cashier, or treasurer. If the proof is satisfactory to the register or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts, which books shall be opened to the inspection of all the creditors. The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

SEC. 23. *And be it further enacted*, That when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen. Any person who, after the approval of this act shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference. The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers; and any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

SEC. 24. *And be it further enacted*, That a supposed cred-

itor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in action at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate. A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

Of Property Perishable and in Dispute.

Sec. 25. *And be it further enacted*, That when it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of; and whenever it appears to the satisfaction of

the court that the title of any portion of the estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

Examination of Bankrupts.

Sec. 26. *And be it further enacted*, That the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law, which examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings; and the court may, in like manner, require the attendance of any other person as a witness, and if such person shall fail to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as such witness. If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct

the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court. The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be specified or required pursuant to this section, and if it appears that such absence was not caused by wilful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default. He shall also be at liberty, from time to time, upon oath to attend and correct his schedule of creditors and property, so that the same shall conform to the facts. For good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined as a witness; and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he shall prove to the satisfaction of the court that he was unable to procure the attendance of his wife. No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.[1]

[1] This section is amended by the act of June 22, 1874, § 8 (18 St. L. 180), by adding the following words at the end thereof: "That in all causes and trials arising or ordered under this act, the alleged bankrupt, and any party thereto, shall be a competent witness."

Of the Distribution of the Bankrupt's Estate.

Sec. 27. *And be it further enacted*, That all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate *pro rata*, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full: *Provided*, That any debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers shall be required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands. At such meeting the majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the

distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine. In case a dividend is ordered, the register shall, within ten days after such meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward by mail to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

SEC. 28. *And be it further enacted*, That the like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of the creditors shall then be called by the court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted, the same shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires; and after the third meeting of creditors no further meeting shall be called, unless ordered by the court. If at any time there shall be in the hands of the assignee any outstanding debts or other property, due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under direction of the court, sell and assign such debts or other property in such manner as the court shall order. No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such

debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter. Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and such assignee shall, if required by the court, be examined as to the truth of such account, and if found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their said debts. In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereof; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars, and if, at any time, there shall not be in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him. If by accident, mistake, or other cause, without fault of the assignee, either or both of the said second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held. In the order for a dividend, under this section, the

following claims shall be entitled to priority or preference, and to be first paid in full in the following order: —

First. The fees, costs and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the state in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such state.

Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed: *Always provided*, That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

Of the Bankrupt's Discharge and Its Effect.

Sec. 29. *And be it further enacted*, That at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days,[1] and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court

[1] The act of July 26, 1876 (19 St. L. 102), amends this section by substituting in lieu of the words "and within one year from the adjudication of bankruptcy" the words "before the final disposition of the cause."

shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt. No discharge shall be granted, or, if granted, be valid, if the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact; or if he has concealed any part of his estate or effects, or any books or writings relating thereto, or if he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof; or if, within four months before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution; or if, since the passage of this act, he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors; or if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate; or if, having acknowledged that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if, being a merchant or tradesman, he has not, subsequently

to the passage of this act, kept proper books of account; or if he, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation; or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or it he has been convicted of any misdemeanor under this act, or has been guilty of any fraud whatever contrary to the true intent of this act; and before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted.

SEC. 30. *And be it further enacted*, That no person who shall have been discharged under this act, and shall afterwards become bankrupt, on his own application shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who shall prove to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

SEC. 31. *And be it further enacted*, That any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court

may in its discretion order any question of fact so presented to be tried at a stated session of the district court.

SEC. 32. *And be it further enacted*, That if it shall appear to the court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court, in substance as follows:

District Court of the United States, District of ——.

Whereas, —— —— has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said —— —— be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the —— day of ——, on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at ——, in the said district, this — day of ——, A. D. ——.

—— ——, Judge.

[*Seal.*]

SEC. 33. *And be it further enacted*, That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. And in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty [1]

[1] The act of June 22, 1874 (18 St. L. 180, § 9), amends this section as amended by the act of July 27, 1868 (15 St. L. 228, § 1), as follows: That in cases of compulsory or involuntary bankruptcy, the provisions of

per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge.

SEC. 34. *And be it further enacted*, That a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in hæc verba, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and [the] regularity of such discharge: *Always provided*, That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting

said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value; and the provision in section thirty-three of said act of March second, eighteen hundred and sixty-seven, requiring fifty per centum of such assets, is hereby repealed.

forth the grounds of avoidance, and no evidence shall be admitted as to any other of the said acts; but said application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of said application to be given to said bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper. If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after the granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if said court shall find that said fraudulent acts and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings.

Preferences and Fraudulent Conveyances Declared Void.

Sec. 35.[1] *And be it further enacted*, That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against

[1] The act of June 22, 1874 (18 St. L. 180, §§ 10, 11), makes the following change with reference to this section: "That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section thirty-five of the act to which this is an amendment, is hereby changed to two months; but this provision shall not take effect until two months after the passage of this act. And in the cases aforesaid, the period of six months mentioned in said section thirty-five is hereby changed to three months; but this provision shall not take effect until three months after the passage of this act."

It is further amended as follows:

"First. After the word 'and,' in line eleven, insert the word 'knowing.'

"Secondly. After the word 'attachment,' in the same line, insert the words 'sequestration, seizure.'

"Thirdly. After the word 'and,'

him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited; and if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud. Any contract, covenant, or security made or given by a bankrupt

in line twenty, insert the word 'knowing.' And nothing in said section thirty-five shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan."

or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and if any creditor shall obtain any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, every creditor so offending shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained to be recovered by the assignee for the benefit of the estate.

Bankruptcy of Partnerships and of Corporations.

Sec. 36. *And be it further enacted*, That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall

be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

SEC. 37. *And be it further enacted*, That the provisions of this act shall apply to all moneyed business or commercial corporations and joint stock companies, and that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors; and all the provisions of this act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company in relation to the same matters concerning the corporation or company, and the money and property thereof.

All payments, conveyances, and assignments declared fraudulent and void by this act when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. No allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof: *Provided*, That whenever any corporation by proceedings under this act shall be declared bankrupt, all its property and assets shall be distributed to the creditors of such corporations in the manner provided in this act in respect to natural persons.

Of Dates and Depositions.

Sec. 38. *And be it further enacted*, That the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor; upon which an order may be issued by the court, or by a register in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act; the proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be prima facie evidence of the facts therein stated. Evidence or examination in any of the proceedings under this act may be taken before the court, or a register in bankruptcy, viva voce or in writing, before a commissioner of the circuit court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

Involuntary Bankruptcy.

Sec. 39. *And be it further enacted*, That any person residing and owing debts as aforesaid, who, after the passage of this act, shall depart from the State, district, or Territory of which he is an inhabitant, with intent to defraud his creditors, or, being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court[1] of any State, district, or Territory, within which such debtor resides or has property founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law[1] of such State, district, or Territory applicable thereto, for a period of[2] seven days; or has been actually imprisoned for more than[2] seven days in a civil action, founded on contract, for the sum of one hundred dollars or upwards; or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits,[3] or give any warrant to confess judgment; or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person

[1] The act of June 22, 1874 (18 St. L. 180, § 12), amends this section by here inserting the words "of the United States or."

[2] Section 12 of the act of 1874, above, changes "seven" to "twenty."

[3] Section 12 of the act of 1874 here adds the words "or confess judgment."

or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act;[1] or who, being a banker,[2] merchant, or trader, has

[1] The act of June 22, 1874 (18 St. L. 180, § 12), amends this section by inserting the following in lieu of the balance of this paragraph: "Or who being a bank, banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended and not resumed payment, within a period of forty days, of his commercial paper (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days to pay any depositor upon demand of payment lawfully made, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable: *Provided*, That such petition is brought within six months after such act of bankruptcy shall have been committed." [The act of July 26, 1876 (19 St. L. 102), here inserts a provision to the effect that an assignment made by a debtor of all his property, in good faith, for the benefit of his creditors, without creating a preference and valid under the state laws, shall not be a bar to the discharge of such debtor.] "And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith) shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if

[2] The act of July 14, 1870 (16 St. L. 276, § 2), amends this clause by adding the words "broker, manufacturer or miner."

fraudulently stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed. And if such person shall be adjudged a bankrupt, the assignee may

it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and, in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid."

recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or[1] that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.

SEC. 40. *And be it further enacted*, That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted; and may also, by its injunctions, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any part of the debtor's property not excepted by this act from the operation thereof and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged [bankrupt] and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition or the further order of the court, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court. A copy of the petition and of such order to show cause shall be served on such debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication

[1] By the act of July 27, 1868 (15 St. L. 228, § 2), this word "or" is changed to "and."

in such manner as the judge may direct. No further proceedings, unless the debtor appear and consent thereto, shall be had until proof shall have been given, to the satisfaction of the court, of such service or publication; and if such proof be not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.[1]

SEC. 41. *And be it further enacted*, That on such return day or adjourned day, if the notice has been fully served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy;[2] and if upon such hearing or trial,

[1] The act of June 22, 1874 (18 St. L. 182, § 13), amends this section by adding at the end thereof the following words: "And if, on the return-day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of section thirty-nine of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in section thirty-nine of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

[2] The act of June 22, 1874 (18 St. L. 182, § 14), amends this section by striking out all of said section after the word "bankruptcy" and inserting the words, "Or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal of the district, returnable within ten days before him for the trial of the facts set forth in his petition, at which time the trial shall be had, unless adjourned for cause. And unless, upon such hearing or trial, it shall appear to the satisfaction of said court, or of the jury, as the case may be, that the facts set forth in said petition are true, or if it shall appear that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceeding shall be dismissed, and the respondent shall recover costs; and

the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.

SEC. 42. *And be it further enacted*, That if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt, and, as such, subject to the provisions of this act, and shall forthwith issue a warrant to take possession of the estate of the debtor. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition. The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors and an inventory[1] of his estate in the form and verified in the manner required of a petitioning debtor by section[2] thirteen. If the debtor has failed to

all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court, and upon the assent, in writing, of such debtor, and not less than one-half of his creditors in number and amount; or, in case all the creditors and such debtor assent thereto, such discontinuance shall be ordered and entered; and all parties shall be remitted, in either case, to the same rights and duties existing at the date of the filing of the petition for bankruptcy, except so far as such estate shall have been already administered and disposed of. And the court shall have power to make all needful orders and decrees to carry the foregoing provision into effect."

[1] The act of June 22, 1874 (18 St. L. 182, § 15), adds the words "and valuation," after the word "inventory."

[2] The act of July 27, 1868 (15 St. L. 228, § 2), changes the word "thirteen" to "eleven."

appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner hereinbefore provided for the service of the order to show cause; and if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain. If the petitioning creditor shall not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor, to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

Of Superseding the Bankrupt Proceedings by Arrangement.

Sec. 43. *And be it further enacted*, That if at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three fourths in value of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, it shall confirm the same; and upon the execution and filing, by or on behalf of three fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled

by said trustees according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed; and such consent and the proceedings thereunder shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it; and the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the said trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors, and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this act; and the said trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, *or* [on] oath or otherwise, the bankrupt and any creditor, and any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy under this act; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had con-

tinued in the manner provided in the preceding sections of this act. If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for assuming proceedings shall not be reckoned in calculating periods of time prescribed by this act.[1]

[1] The act of June 22, 1874 (18 St. L. 182, § 17), here adds the following provisions: That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor of the time, place and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding $50 shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or sign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court

Penalties Against Bankrupts.

Sec. 44. *And be it further enacted*, That from and after the passage of this act if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, secrete or conceal any property belonging to his estate, or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be

shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner, and proceeded with in the same way, and with the same consequences, as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the names of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice. and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction, in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in re-

concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same or any part thereof out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same, or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent, or spends any part thereof in gaming; or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee or omit from his schedule any property or effects whatsoever; or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or shall attempt to account for any of his property by fictitious losses or expenses; or shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in

spect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act.

the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by bona fide transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years.

Penalties Against Officers.

Sec. 45. *And be it further enacted*, That if any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this act, or under color of doing anything thereunder, wilfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by this act, or which shall be allowed under the authority thereof, such person, when convicted thereof, shall forfeit and pay the sum of not less than three hundred dollars and not exceeding five hundred dollars, and be imprisoned not exceeding three years.

Sec. 46. *And be it further enacted*, That if any person shall forge the signature of a judge, register, or other officer of the court, or shall forge or counterfeit the seal of the courts, or knowingly concur in using any such forged or counterfeit signature or seal for the purpose of authenticating any proceeding or document, or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, know-

ing such signature or seal to be false or counterfeit, any such person shall be guilty of felony, and upon conviction thereof shall be liable to a fine of not less than five hundred dollars, and not more than five thousand dollars, and to be imprisoned not exceeding five years, at the discretion of the court.

Fees and Costs.

Sec. 47.[1] *And be it further enacted*, That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the registers: —

For issuing every warrant, two dollars.

For each day in which a meeting is held, three dollars.

For each order for a dividend, three dollars.

For every order substituting an arrangement by trust deed for bankruptcy, two dollars.

For every bond with sureties, two dollars.

For every application for any meeting in any matter under this act, one dollar.

[1] The act of June 22, 1874 (18 St. L. 184, § 18), makes the following amendment of this section: "That from and after the passage of this act the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: *Provided*, That the preceding provision shall be and remain in force until the justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections ten and forty-seven of said act, and no longer, which duties they shall perform, as soon as may be. And said justices shall have power under said sections, by general regulations, to simplify and, so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided."

For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

For taking depositions the fees now allowed by law.

For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and, before a warrant issues, the petitioner shall deposit[1] with the senior register of the court, or with the clerk, to be delivered to the register, fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued, shall pay the same, and the court may issue an execution against him to compel payment to the register.

Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more: —

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of said expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

The enumeration of the foregoing fees shall not prevent

[1] The act of July 27, 1868, (15 St. L. 228, § 2), amends this section by omitting the words "with the senior register or" and "to be delivered to the register."

the judges, who shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders.

Of Meaning of Terms and Computation of Time.

Sec. 48. *And be it further enacted*, That the word "assignee" and the word "creditor" shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation;" and the word "oath" shall include "affirmation." And in all cases in which any particular number of days is prescribed by this act, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first, and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the fourth of July, in which case the time shall be reckoned exclusive of that day also.

Sec. 49. *And be it further enacted*, That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia, and in and upon the[1] supreme courts of the several Territories of the United States,[2] when the bankrupt resides in the said District of

[1] The act of June 22, 1874 (18 St. L. 182), § 16, amends this section by substituting the words "District Court" in lieu of "Supreme Courts."

[2] Section 16 of the above act of 1874 inserts here the words "subject to the general superintendence and jurisdiction conferred upon circuit courts by section two of said act."

Columbia or in either of the said Territories. And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

SEC. 50. *And be it further enacted*, That this act shall commence and take effect as to the appointment of the officers created hereby, and the promulgation of rules and general orders, from and after the date of its approval: *Provided*, That no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, Anno Domini, eighteen hundred and sixty-seven.

Approved, March 2, 1867.

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