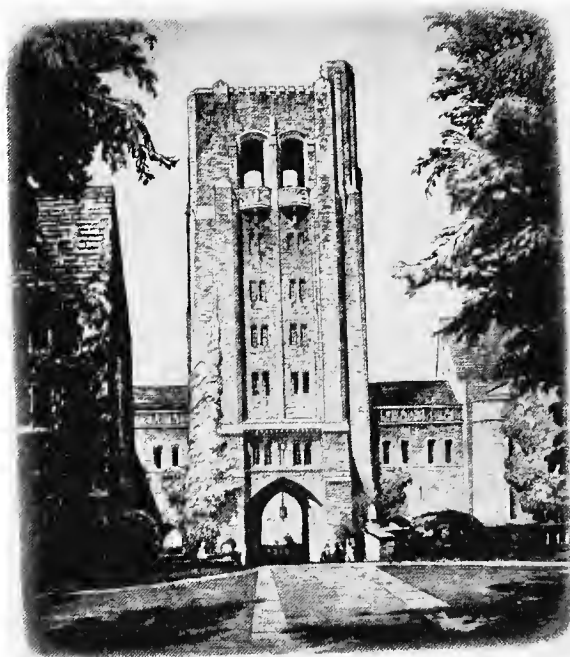




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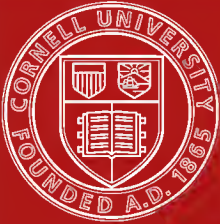
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THE  
LAW AND PRACTICE  
IN  
BANKRUPTCY

UNDER  
The National Bankruptcy Act of 1898,  
WITH  
CITATIONS TO THE DECISIONS TO DATE.

By  
WM. MILLER COLLIER.

---

THIRD EDITION  
REVISED AND ENLARGED.

By  
JAMES W. EATON,  
OF THE ALBANY, N. Y., BAR, INSTRUCTOR IN THE LAW OF CONTRACTS AND OF  
EVIDENCE, LECTURER ON BANKRUPTCY IN THE ALBANY LAW SCHOOL,  
AND EDITOR OF THE AMERICAN BANKRUPTCY REPORTS.

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ALBANY, N. Y.  
MATTHEW BENDER,  
1900.

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## PREFACE TO THIRD EDITION

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In his modest preface to the first edition of this book the author stated that his work was in the nature of a pioneer undertaking intended to "blaze the way" and aid in answering the questions which might arise before adjudications became plentiful. It is pleasant to know that Mr. Collier's scholarly and exhaustive book has not only assisted the practitioner to understand a complicated statute, the subject matter of which is new to most of the present generation, but has also helped greatly in the judicial construction and interpretation of that statute. It is gratifying, too, that the author's answers to many of the numerous questions which he foresaw would arise under this Act have proved to be correct.

In the two and a half years during which the Act has been in force and since the publication of the first edition of this book, most of the sections of the Act have been judicially construed. This fact alone makes a new edition at this time imperative. The bankruptcy decisions, under the law of 1898, have been collated in the present edition and their results set forth in rules of construction. The editor has quoted largely from the more important opinions because he believes that the bar will find it desirable to have the exact language of the court deciding the questions arising under the Act. It is not claimed that the book dispenses with the use of the reported cases but merely that this method guides the practitioner most surely and quickly to an intelligent knowledge of the effect of such decisions and where they may be found. All of Mr. Collier's work which has a permanent and historical value has been retained, while, at the same time, no effort has

been spared to make the revision complete and to make the book a thoroughly up-to-date treatise on the principles of the bankruptcy law and guide to bankruptcy practice.

With the hope that this purpose has been fairly realized, the editor submits his work to the kindly indulgence of his professional co-laborers.

JAMES W. EATON.

ALBANY, N. Y., November 17, 1900.

# PREFACE

TO THE

## ENLARGED EDITION.

---

In presenting to the profession and to the public, an enlarged edition of my work on bankruptcy, it is but proper that the character and extent of the additions be explained. In this edition the forms which appeared in the original edition have been superseded by the official forms just promulgated by the Supreme Court; and the rules and orders in bankruptcy prescribed by the same court have been inserted. Not only is the full text of these rules and forms given, but an exhaustive index of them has been made, and they have been annotated and cross-referenced as far as their nature permits. The fact that by rule XXXVII it is provided that in proceedings in equity instituted for the purpose of carrying into effect the provisions of the bankruptcy act, or for enforcing the rights and remedies given by it, the rules of equity practice prescribed by the U. S. Supreme Court shall be followed, has led me to insert these rules; and a detailed index accompanies them.

A list of the judges of the U. S. District Courts and of the clerks thereof, and the addresses of the clerks, has been inserted for the convenience of attorneys.

The almost universal tendency on the part of practitioners, — in some cases enforced by local rulings of district courts —

to withhold proceedings in bankruptcy until the promulgation of the official rules, has resulted in an almost complete absence of adjudications under the new law. Consequently the enlarged edition contains, besides the additions above mentioned, no changes in the text of the original edition except the correction of a few typographical errors, and the changing of the abstract of the exemption laws of Louisiana to correspond with a new statute of that state recently passed and to go into effect upon January first, 1899. It is believed, however, that everything affecting the law and practice of bankruptcy is embodied in the book.

The marked favor shown to the work, — the original edition of which was exhausted on the day of issue and of which there have been already four reprints, — is a matter for which the author tenders his sincerest thanks. That the book, — now more full and complete than ever before and embracing, in one volume, the statute itself, the official rules, forms and orders, the exemption laws of all the states, the equity rules, exhaustive comment, and full citation of all authorities now applicable, — may be of further aid to the members of the profession and may assist them in the construction and application of the law and in practice under its provisions, is the wish of

THE AUTHOR.

AUBURN, N. Y., *November 29th, 1898.*



## PREFACE.

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The Law of Bankruptcy is purely statutory both in its origin and in its development. Underneath it lies the one great fundamental principle that when a person's property is insufficient to pay in full all of his creditors, it shall be equitably divided *pro rata* among them; but there is probably no other principle which can be said to be fixed and permanent and fundamental. Even in England, where there has been a continuous system of bankruptcy for over three hundred years, that system has been developed rather by parliamentary legislation than by judicial decision; while in the United States so infrequent and spasmodic has been the exercise by Congress of its constitutional powers upon the subject that we can hardly claim that bankruptcy is a part of our system of jurisprudence. It has been, in the past, rather in the nature of fragmentary statutory legislation, the various enactments on the subject being separated by intervals of decades, and each presenting important features not appearing in those preceding it, and often the later acts containing provisions which evidenced a different purpose and policy than those of the earlier acts. So entirely unstable and unfixd is bankruptcy as a system of law that under the last two statutes, as will be seen by reference to the notes under section 12 of the present work, the courts have very frequently been called upon to determine what is a bankruptcy law, and what the "subject of bankruptcy" includes. The successive statutes have affected different classes of persons, have materially changed the manner of procedure, have differed radically as to the acts to be regarded as acts of bankruptcy and have at times enlarged and at other times restricted the rights of creditors, or the benefits conferred and the duties imposed upon bankrupts. Not only have there been changes, but the changes

have not always tended toward any one end or indicated any fixed purpose. Like all laws of statutory creation the development of the American bankruptcy system has not been harmonious and symmetrical.

The study of bankruptcy, then, is a matter of statutory construction. The law must be considered and applied and enforced as it appears enacted, not as general notions of equity may seem to indicate as proper. The aim of the author of this book has been to study the bankruptcy act of 1898, to analyze its provisions and terms; in fine to ascertain the expressed will and intention of Congress. Following the general principle of the law of construction that each part of a statute or document is to be construed with reference to the whole, each section has been considered in connection with all others on the same or kindred topics, and copious cross-references have been given under the various sections.

But it is not to be denied that the present bankruptcy act, though presenting many points of dissimilarity, is substantially like that passed in 1867, and also bears many resemblances to those passed in 1800 and 1841. The fact has not been overlooked that the adjudicated cases decided under those acts not only shed light on the meaning of terms and provisions of the present act, but that in very many cases they are indisputably clear authorities. In so far as these cases are applicable we have cited them, and for every legal proposition unqualifiedly stated, judicial authority is given. Many of the cases cited are now analogous rather than decisive; but it is believed they sustain the points made. The reader will, of course, bear in mind that when a case is cited upon a given point, it is by us claimed to be applicable or analogous only as to that particular point. Upon other matters, by reason of differences between the present and former acts, it may be entirely inapplicable and incorrect as an exposition of the present law. While an attempt has been made to give all applicable decisions, we have also endeavored to omit all that would mislead and confuse. To show to what extent the cases may still be considered authorities, special pains have been taken to point out the differences between the statutes, and with this aim in view under each section we give the analogous provisions in all

the former acts, and as an appendix have inserted, for purposes of comparison, the full text of the act of 1867 with all amendments up to the time of its repeal.

While the authority of decided cases is cited for every legal proposition which is stated without qualification, we have felt that we would fail in properly performing the work undertaken if, because of the lack of adjudicated cases, no study should be given to and no comment made upon the great number of questions which spring up from the new and changed provisions of the act. In considering these we have not, however, always felt called upon to answer them dogmatically; but they have all been discussed and treated, and everything bearing upon them laid fully and fairly before the reader.

We take this opportunity of publicly extending our thanks to H. Noyes Greene, Esq., of the Troy, N. Y., bar, for assistance in preparing the index to this book and the table of cases; also to William H. Hotchkiss, Esq., of Buffalo, N. Y., referee in bankruptcy for Erie county, for his assistance in the preparation of the forms.

In presenting the work to the profession we do so with hesitancy. Of its shortcomings and failings few will be more keenly conscious than ourselves, but we ask that those who use it will bear in mind that the book is in the nature of a pioneer undertaking. It could without question be made more accurate, full and complete if its publication could be delayed until the courts should have construed the provisions of the statute and judicially answered all the questions that might arise, and if then it were made a mere digest of their decisions. But the demand of the bar is for a work that will to some extent, at least, aid them in the solution of the questions that will arise in the early months of practice under the act, before adjudications are plentiful. This task of "blazing the way" is here undertaken, and in proportion to the difficulty of the task we ask the leniency of the critic.

WM. MILLER COLLIER.

AUBURN, N. Y., *Sept.* 10, 1898.



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# THE NATIONAL BANKRUPTCY LAW.

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## CHAPTER I.

### DEFINITIONS.

SECTION I. **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 revoke 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) "courts" 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 of 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"

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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.

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Analogous Provisions of Former Acts.—R. S. § 5013; act of 1867, § 48.

**The Definitions.**—The definitions of the words and phrases used in the bankruptcy act given in section 1, are best discussed in connection with the subsequent sections in which such words occur and demand only brief notice here. Many of them embody decisions of the courts as to the construction of the same words as used in previous acts, while others give the words a meaning different from that which they formerly had. These definitions in reality largely determine the scope of the whole act. In some cases words are used in a manner at variance with their ordinary meaning. Thus "a person *against* whom a petition is filed" includes one who files a voluntary petition, which becomes very important in the construction of section 67f. *post* relating to the dissolution of liens.

The fact that such expressions as "date of bankruptcy," "time of bankruptcy," and "bankruptcy," when used with reference to time, mean the time of the filing of the petition, and not the time of the adjudication, should never be overlooked. So a "bankrupt" is one against, or by whom a petition is filed, as well as one who has been adjudged a bankrupt; also, one as to whom an application to set aside a composition or to revoke a discharge

has been filed. One must also always bear in mind the limited meaning given to the words "creditor" and "debt." It should be noted, too, that one is not a "secured creditor," unless the security held by him is property assignable under this act and belonging to the bankrupt; or unless some person secondarily liable to him, holds as security, property of the bankrupt. If the security is the property of another, or if it is exempt property of the bankrupt, it does not fall within the terms of the words "security" as used in the act. This definition simply declares a well-established principle of the law of bankruptcy, but it must be borne in mind in considering the rights of that class of creditors. So the fact that "transfer" includes the sale and every mode of disposing of, or parting with property, or the possession of property, either absolutely or conditionally, as payment, pledge, mortgage, gift, or security, is of importance in construing the many sections of the act as to preferential transfers, and especially those relating to acts of bankruptcy. The present act in the form in which it passed the House of Representatives, included in "transfer," the "creation of a lien by any means other than by compulsory process prosecuted in good faith;" but in the conference between the House and Senate arising on account of the opposition of the latter body to many of the provisions as to involuntary bankruptcy, the words quoted were stricken out and the bill passed as here stated.

Most important of all the definitions is number (15) on insolvency, because that definition makes the present law radically different from the former act as to cases when one can be put into bankruptcy involuntarily. The judicial definition of the word "insolvency" as established by the decisions under the former act was, "an inability to pay debts as they mature and become due and payable in the ordinary course of business, as persons carrying on that business usually do, in that which is made, by the laws of the United States, lawful money or legal tender to be used in the payment of debts, without reference to the amount of the debtor's property and without reference to the possibility or even certainty, that at a future time, on the settlement and



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winding up of all his affairs, his debts will be paid in full out of his property." It was also held that "the amount of the trader's property was of no consequence, if he was unable to pay his debts in lawful money as they matured." But under the present act the value of the property must be considered. If at a fair valuation, it equals the debtor's debts, he is not insolvent. This provision was one of the concessions made in the passing of the bill to those who first opposed it on the ground that its provisions would make a debtor liable unnecessarily to have his property taken from him, because of a mere temporary embarrassment. See further *sub nom.* "ACTS OF BANKRUPTCY" section 3 *post*.

## CHAPTER II.

### CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

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; (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; (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 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.

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#### Analogous Provisions of Former Acts.—

As to courts of bankruptcy: R. S. §§ 563, 711, 4972, 4973, 4974, 4975, 4977, 4978, 4978A, 4978B; act of 1867, §§ 1, 49; act of 1841, §§ 6, 16.

As to specific powers: compare Analogous Provisions of Former Acts, given under the several sections of this act, cited in the cross-references given in the notes to this section.

**Courts of Bankruptcy.**—In providing for the administration of a system of bankruptcy Congress has invariably availed itself of an existing organization, namely, the district courts of the United States. These courts are denominated and constituted courts of bankruptcy, but it has been held that although the same persons hold relatively the same offices, and the territorial jurisdiction of the courts as courts of bankruptcy is co-extensive with their jurisdiction as United States district courts, they are nevertheless, distinct and separate courts with powers and jurisdiction distinct and separate. As bankruptcy courts, they are statutory in their origin, and have no powers, authority or jurisdiction except that which is expressly conferred upon them by the statute, or that which is necessarily implied. (Clark *v.* Binninger, 1 Abb. N. C. 421; 38 How. Pr. 341; s. c. 3 N. B. R. 518; *in re* Norris, 18 Fed. Cas. 317; 4 N. B. R. 35; Jobbins *v.* Montague, 6 N. B. R. 509; Fed. Cas. 7330.)

But the courts of bankruptcy are not inferior courts in the sense that their jurisdiction must necessarily appear upon the face of the papers. An adjudication in bankruptcy is a proceeding *in rem* and the jurisdiction of the court over the person will be presumed if it does not appear upon the record. (Hayes *v.* Ford, 55 Ind. 52; 15 N. B. R. 509, citing Ruckman *v.* Cowell, 1 N. Y. 505. See also Chemung Bank *v.* Judson, 8 N. Y. 254; Reed *v.* Vaughn, 10 Mo. 447 and *in re* Columbia Real Estate Co. 4 Am. B. R. 411; 101 Fed. 965.)

**Construction of the Section. Jurisdiction of Bankruptcy Courts.**—This section, first, confers upon courts of bankruptcy, jurisdiction at law and in equity, in chambers and at regular terms, of all proceedings in bankruptcy. This is a general vesting of jurisdiction. After that the section goes on and enumerates certain specific classes of cases to which the jurisdiction shall be deemed to extend, and which are generally explained in subsequent sections.

The question of the extent of the jurisdiction of the District Courts conferred by the terms of this section, especially by subd.

7, giving jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto except as herein otherwise provided," has troubled the courts more than any other question arising in the administration of the Act of 1898. Finally, however, the question has been definitely settled (unless Congress amends the law) by the tribunal whose decrees are theoretically infallible in *Bardes v. First Nat. Bank of Hawarden*, 4 Am. B. R. 163; 178 U. S. 524; 44 L. Ed. 1001. No better statement of the limitation upon jurisdiction can be given than by quoting from Mr. Justice Gray's opinion in that case. After quoting section 2 of the Act of 1898, he proceeds to construe it by comparison with the Act of 1867 as follows:

"In the Act of 1867, the provisions as to the jurisdiction of proceedings in bankruptcy, and as to the original jurisdiction of actions at law and suits in equity, were as follows:

'Sec. 1. 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.' 14 Stat. 517; Rev. Stat. §§ 563, 711, 4972, 4973.

'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 have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made,

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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 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.' 14 Stat. 518; Rev. Stat. §§ 4979, 4986.

In *Lathrop v. Drake* (1875), 91 U. S. 516, the jurisdiction conferred on the District Courts and the Circuit Courts of the United States by the Bankrupt Act of 1867 was defined by this court, speaking by Mr. Justice Bradley, as consisting of 'two distinct classes: first, jurisdiction, as a court of bankruptcy, over the proceedings in bankruptcy, initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, 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,' and the jurisdiction of the District and Circuit 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, not under the provisions of section 1 of that act, giving to the District Court original jurisdiction of proceedings in bankruptcy, and of section 2, giving to the Circuit Court supervisory jurisdiction over such proceedings; but wholly under the distinct clause of section 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity, 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.'

\* \* \* \* \*

The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But it was well settled that the jurisdiction of such suits, conferred by the second section of the Act of 1867 upon the Circuit and District Courts of the United States for the benefit of an assignee in bankruptcy, was concurrent with that of the State courts. In *Eyster v. Gaff* (91 U. S. 521), this court, speaking by Mr. Justice Miller, said: 'The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concur-

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rent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent with and does not divest that of the State courts.'

Under the Act of 1867, then, the distinction between proceedings in bankruptcy, properly so called, and independent suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the District Courts and Circuit Courts of the United States by the express provision to that effect in section 2 of that act, and was not derived from the other provisions of sections 1 and 2, conferring jurisdiction of proceedings in bankruptcy. And the jurisdiction of suits between assignees and adverse claimants, so conferred on the Circuit and District Courts of the United States, did not divest or impair the jurisdiction of the State courts over like cases.

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We now recur to the provisions of the Act of 1898. This act has the somewhat unusual feature of inserting at the head of each section a separate title indicating its subject-matter.

Section 2 of this act, entitled 'Creation of Courts of Bankruptcy and their Jurisdiction,' takes the place of section 1 of the Act of 1867, and hardly differs from that section, except in the following particulars:

First. It begins by describing the jurisdiction conferred on 'the courts of bankruptcy' as 'such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings;' and it ends by declaring that '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.'

Second. It specifies in greater detail matters which are, in the strictest sense, proceedings in bankruptcy.

Third. It includes, among the powers specifically conferred on the courts of bankruptcy, those to '(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; ' (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;' and ' (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.'

The general provisions at the beginning and end of this section mention ' courts of bankruptcy ' and ' bankruptcy proceedings.'

Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words ' at law,' in the opening sentence conferring on the courts of bankruptcy ' such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law and not in equity.

The section nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to bring in and substitute additional parties ' in proceedings in bankruptcy,' and in clause 15, to make orders, issue process and enter judgments, ' necessary for the enforcement of the provisions of this act.'

The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money and distribution of the bankrupt's estate, is no broader than the corresponding provisions of section 1 of the Act of 1867; and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to ' determine controversies in relation thereto,' it is controlled and limited by the concluding words of the clause, ' except as herein otherwise provided.'

These words, ' herein otherwise provided,' evidently refer to section 23 of the act, the general scope and object of which, as indicated by its title, are to define the ' Jurisdiction of United States and State Courts ' in the premises. The first and second clauses are the only ones relating to civil actions and suits at law or in equity.

The first clause provides that ' the United States Circuit 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 Dis-



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trict 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 national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.

But the second clause applies both to the District Courts and to the Circuit Courts of the United States, as well as to the State courts. This appears, not only by the clear 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 in the third clauses.

The second clause 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. Act of August 13, 1888, ch. 866; 25 Stat. 434. He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by 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.

It was argued for the appellant that the clause cannot apply to a case like the present one, because the bankrupt could not have brought a suit to set aside a conveyance made by himself in fraud of his creditors. But the clause concerns the jurisdiction only, and not the merits, of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property, which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it.

The Bankrupt Acts of 1867 and 1841, as has been seen, each contained a provision conferring in the clearest terms on the Circuit and District Courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt. We find it impossible to infer that when Congress, in framing the Act of 1898, entirely omitted any similar provision, and submitted the restricted provisions of section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts.

On the contrary, Congress, by the second clause of section 23 of the present Bankrupt Act, appears to this court 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,' of which there is no pretence in this case.

One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses. See *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 511, 513."

It will thus be seen that the District Courts of bankruptcy have no jurisdiction (unless conferred by consent) except exclusive jurisdiction in matters which belong to "Proceedings in Bankruptcy" beginning with the petition and ending with the discharge or non-discharge of the bankrupt and the distribution of assets. What this jurisdiction includes will best be discovered by studying the act in detail. For further discussion as to general limits of jurisdiction, see section 23 *post*. We will now consider the general provisions of this section separately :

**Territorial Extent of Jurisdiction.** Section 2 (1) (19)—The act provides that the courts of bankruptcy are vested with jurisdiction "within their respective territorial limits." Under the former act, the equivalent words "in their respective districts" were construed differently by the different courts. The question arose most frequently in cases where assignees brought suits to recover assets of the bankrupt in district courts other than those by which they were appointed. The Supreme Court of the United States held that the jurisdiction of the bankruptcy court was confined to its respective district only in so far as the exercise of it was concerned. Each court could exercise its jurisdiction and powers only within its own district, but its powers extended to all matters of bankruptcy without limitation.

It was held that the jurisdiction over bankruptcy proceedings as such was necessarily limited to the court of the district which acquired jurisdiction over the person of the bankrupt, pursuant

to the statute; but the exclusion of other district courts from jurisdiction over bankruptcy proceedings as such, did not prevent the courts of bankruptcy of other districts from exercising jurisdiction in matters growing out of, or connected with that identical bankruptcy, so far as it did not conflict with or trench upon the jurisdiction of the court in which the case was pending. That the courts of other districts might exercise jurisdiction in such cases, was held by the Supreme Court to be a necessary result of the general jurisdiction conferred upon bankruptcy courts, and was in harmony with the scope and design of the act. (*Lathrop v. Drake*, 91 U. S. 516.) It is, however, to be noted in connection with this case that by the present statute the trustee can bring suits only where the bankrupt might have brought them, had not bankruptcy occurred. See *Bardes v. Bank*, 4 Am. B. R. 163; 178 U. S. 524. Moreover the limitation that bankruptcy courts shall exercise their powers only within their own districts prevents them from summoning parties from without their districts. It does not limit their power over the subject-matter of which they are given jurisdiction. Thus when they make an adjudication of bankruptcy, and a trustee is chosen, the bankrupt's property wherever situated passes to him, and all his debts wherever the creditors reside are affected by the orders and decrees of the bankruptcy court. The property passes to the trustee who is the officer of the bankruptcy court appointing him, and it is thus in the custody of that court, so that all creditors holding claims are affected by all of its decrees, whether they come into the proceeding voluntarily or involuntarily, or fail to enter any appearance whatever. (*Markson v. Heaney*, 1 Dill. 497; Fed. Cas. 9098; 3 Chi. Leg. News, 153; 4 N. B. R. 510; *Paine v. Caldwell*, Fed. Cas. 10,674; 6 N. B. R. 558, citing *Picquet v. Swan*, Fed. Cas. 11,134; 5 Mason, 35; *Toland v. Sprague*, 12 Pet. 327; *Herndon v. Ridgeway*, 17 How. 424; *in re Hirsch*, 2 N. B. R. 3; Fed. Cas. 6,529; 2 Ben. 493; *Jobbins v. Montague*, 6 N. B. R. 509; Fed. Cas. 7,330.)

It may often happen that petitions may be properly filed in either of two districts. Hence section 32 *post* provides that

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In the event petitions are filed against the same persons in different courts of bankruptcy each of which has jurisdiction, the case shall be transferred to the court which can proceed for the greatest convenience of parties in interest.

And General Order 6 provides “that if 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 domicile,” although the case may be transferred by one court to the other, “if that is for the greatest convenience of the parties in interest.”

And see subd. 19 of this section giving jurisdiction “to transfer cases to other courts of bankruptcy.”

**Courts Always Open.** Section 2 (1) (2) (8) (12)—The proceedings in bankruptcy from the time of filing the petition to the final order of distribution or the settlement of the trustee’s accounts, is one continuous, entire proceeding. Whether the matters are heard at chambers during vacation or in court during term time, the court is always open and the proceedings may be re-opened and re-examined at any time during their pendency, unless rights have become vested. Such application for re-examination is only a part of the original proceedings. (*Sandusky v. Bank*, 23 Wall. 289; s. c. 12 N. B. R. 176.) By subdivision (2) of this section, express authority is given to the court to reconsider allowed or disallowed claims, and by subdivision (8) they may re-open closed estates, whenever it appears that they were closed before being fully administered; they may also set aside compositions and re-instate the cases (9), and may set aside discharges and re-instate the cases (12).

As to reconsideration of claims see section 57k; as to setting aside composition see section 13; as to revocation of discharges and re-opening of estates see sections 15, 70d. *post*.

**Jurisdiction to Adjudge Persons Bankrupt.** Section 2 (1)—Many differences are to be noted between the provisions of (1) of this section, and the corresponding provisions under former acts as to the facts giving the bankruptcy court jurisdiction to adjudicate one bankrupt. Under the act of 1867, it was provided

that the courts might adjudge as bankrupt persons who "had resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months." There was nothing in the act in regard to domicil, and consequently frequent questions arose as to place of residence, when the place of residence differed from the place of domicil. The present act by inserting the word "domicil," sets those questions at rest. Domicil and residence are distinct terms. Residence may involve the intent to leave when the purpose for which it has been taken ceases; domicil implies no such intent. The abiding is *animo manendi*. One is a resident of a place from which his departure is indefinite as to purpose; and for this purpose he has made the place his temporary home, while if his intent be to remain permanently, it becomes his domicil. Residence for voting purposes, or for the benefit of the poor laws is not necessarily the same as residence in cases involving jurisdiction for judicial purposes. Where it is sought to be proved that there has been an abandonment of the old domicil in the establishment of a new one, the burden of proof lies upon those asserting such change. (*In re Berner*, 3 Am. B. R. 325; *in re Cisdell*, 2 Am. B. R. 424; both of which are referees' decisions. See also *In re Grimes*, D. C. 2 Am. B. R. 160; 96 Fed. 529 and cases cited in the opinions.)

The words "principal place of business" instead of the words "carried on business" also prevents the arising of many questions which frequently sprang up under the former act, where persons conducted a business in a certain place and in connection with it had agencies or branches in other places. The expression "for the preceding six months or the greater portion thereof," should also be noted. The words "for the six months next preceding or for the longest period during such six months," in the former act, were construed as giving the court jurisdiction to adjudge one bankrupt if he had resided only one day in the district, provided he had not resided a longer period in any other district; but the words "for the preceding six months or the greater portion thereof," imply that unless a debtor has

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resided within the district for at least three months, the court has no jurisdiction to adjudge him bankrupt. But by the better opinion any residence of three months' duration during the six months' period is sufficient to give the court jurisdiction. It need not be at the beginning or end of such period. (*In re Ray*, 2 Am. B. R. 159; *in re Berner*, *supra*, disapproving of *in re Stokes*, 1 Am. B. R. 35.)

Aliens whether resident or non-resident, may be adjudged bankrupt, the only requirement being that they shall either have property within the jurisdiction of the court, and have neither a residence, domicil, nor principal place of business in the United States, or else that they shall have such property within the jurisdiction of the court, and shall have theretofore been adjudged bankrupt by a foreign court, and regardless of whether they do reside or have a domicil, or a principal place of business in the United States. Under the former act only resident aliens could take the benefit of it.

As to effect of foreign bankruptcies see note under section 17 on that subject.

**Allowing Claims.** Section 2 (2)—Compare, as to proof of claims, section 57; as to provable debts, section 63.

**Power to Take Charge of Property.** Section 2 (3) (5)—The right of the court to appoint receivers or marshals to preserve the estate of the bankrupt and to take charge of the property between the filing of the petition and the adjudication upon it, or the qualification of the trustee, relates to the same subject as section 69, except that section 69 relates only to involuntary bankruptcy while the grant of power under this section is broader. Such an order should never be made without requiring the bond in that section provided for. This subdivision (3) did not appear in the bankruptcy bill until after the conference between the House and the Senate. It was doubtless inserted for the purpose of clearing up any questions that might arise as to the jurisdiction of the bankruptcy court over the property before adjudication.

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**§ 2.] Power to Make and Enforce Orders by Proceedings for Contempt.**

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It is to be borne in mind that under the present act, the title to the property which is vested in the trustee, does not relate back to the time of the filing of the petition, but only to the time of adjudication; but from the time of the filing of the petition in bankruptcy, the property of the bankrupt, the subject-matter of the proceeding comes into the prehensory power of the court as fully as if it were in the actual and visible presence of the court, and consequently it is under its protection and control.

Courts of bankruptcy have undoubted authority not only by the special provisions of this section but by virtue of their general equity powers to appoint receivers and to preserve the property by taking it into their legal custody, through receivers and into their manual control through their marshals. (*Cox v. Wall*, 3 Am. B. R. 664; 99 Fed. 546; *In re Fixen & Co.* 2 Am. B. R. 822; 96 Fed. 748 and cases cited.) The compensation to be allowed to the receiver and the marshal in this respect rests in the sound discretion of the Court. (*In re Scott*, 3 Am. B. R. 625; 96 Fed. 607; *In re Adams Sartorial Co.* 4 Am. B. R. 107; 101 Fed. 215.)

**Power to Make and Enforce Orders by Proceedings for Contempt.**  
Section 2 (13) (15) (16)—The power to make all necessary orders and to enforce obedience thereto is inherent in every court. See further in this connection section 7 as to the Duties of Bankrupts. The power of a court to punish summarily for contempt is as old as the law itself. Such a proceeding is in the nature of a *quasi*-criminal proceeding, but it is not a criminal proceeding within the meaning of the Constitution, guaranteeing a jury trial. This has been uniformly held throughout the Union. *In re Debs* (158 U. S. 564) the Supreme Court held that the court enforcing obedience to its orders by proceedings of contempt is not executing the criminal law of the land nor invading any constitutional right; but it has been as uniformly held that the respondent in proceedings for contempt should always have an opportunity to be heard in his defense before final order punishing him is made. A valuable discussion of the general law of contempt will be found in the case of *State v. Matthews* (37 N. H. 453). In a

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late case decided by the Circuit Court of Appeals of the 8th Circuit (*In re Rosser*, 4 Am. B. R. 153; 101 Fed. 562), the Court, while upholding the right to punish a bankrupt for failure to turn over property to his trustee, and holding that the exercise of such power is in no sense a violation of the Statute against imprisonment for debt, held that before a bankrupt or other person can be punished for contempt for failure to obey an order to turn over property, he must have notice and an opportunity to show cause why he should not comply with the order. Where such notice was not given before the order was made, the fact that he is allowed upon the proceedings for contempt to be cross-examined does not cure the defect involved in the order of the referee in failing to give him such notice. (See also, *Ripon Knitting Works v. Schreiber*, 4 Am. B. R. 299; 101 Fed. 810; *In re Schlesinger*, 4 Am. B. R. 361; 102 Fed. 117.)

As to the practice in punishing contempts committed before a referee see section 41.

**Cross References—Subdivisions not Heretofore Discussed.**—Subdivisions 6 and 7 have already been considered under head of "Construction of the Section" *ante*. Subdivision 5 relates to the same subject as subdivision 3. The following are the cross references to the other subdivisions which are discussed at length in subsequent sections of the Law.

(4) As to offenses, compare section 29; as to the right to a jury trial, compare section 19 (*c*).

(8) As to accounts of trustees, compare section 47.

(9) As to compositions, compare sections 12 and 13. As to the title vesting in trustee appointed after a composition is set aside, see section 70 (*d*); as to the election of a trustee after a composition is set aside, see section 44.

(10) As to referee's powers, duties and records, see sections 38, 39, 41 and 42.

(11) As to exemptions, see section 6; as to bankrupt's duty to claim exemptions, see section 7 (8); as to trustee's duty to set apart exemptions, see section 47.



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§ 2.] Cross References — Subdivisions not Heretofore Discussed.

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(12) As to discharge, the granting of it, revocation, and effect, see sections 14, 15, 16 and 17. As to the title of a trustee appointed after a discharge is set aside, see section 70 *d*; as to the appointment of a trustee after a discharge is set aside, see section 44.

(14) As to extraditions, see section 10.

(19) Transfer of cases. Compare section 32.

## CHAPTER III.

### BANKRUPTS.

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 (4) made a general assignment for the benefit of his creditors; 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.

*e* 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.

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Analogous Provisions of Former Acts.—

R. S., § 5021 (amended by act of June 22, 1874, ch. 390, § 12, and by act of July 26, 1876, ch. 234, § 1); act of 1867, § 39 (amended by act of July 27, 1868, § 2); act of 1841, § 7; act of 1800, §§ 1, 2.

**Construction of the Section.**—This section relates to involuntary bankruptcy. There was some conflict of authority as to the proper construction to be given to similar provisions in former bankruptcy acts. On principle and highest authority, though, we should say that as the section sets forth acts which justify a court in depriving one of his property, being in derogation of common-law rights, it should be construed strictly. Though the

general purpose of the act is remedial, this section is almost penal in character. It ought not to be enlarged by construction to include acts that may be within the reason of the law, but which are not within the words of the statute according to a reasonable construction. The facts and circumstances justifying one person in instituting a proceeding to take from another all possession and control of his property and to stop him in the pursuit of his business, ought to be defined by law with exactness, and the law should not be construed to include cases not clearly within its scope. (*Wilson v. City Bank*, 17 Wall. 473; 9 N. B. R. 97; s. c. below, 1 Dill. 476; Fed. Cas. 17,797; 5 N. B. R. 270; *Jones v. Sleeper*, Fed. Cas. 7,496; 2 N. Y. Leg. Obs. 131; Act of 1841.)

And this seems to be the construction which has been placed upon the present law. In the case of the Empire Metallic Bedstead Co. C. C. A. 2d Circuit (3 Am. B. R. 575; 39 C. C. A. 372; 98 Fed. 981), the question was whether an application under the New York Statute for a dissolution of a corporation and the appointment of a receiver was an act of bankruptcy. The petition of the creditors in bankruptcy alleged that the statutory procedure was equivalent to a general assignment and hence an act of bankruptcy. But the Circuit Court of Appeals refused to recognize "equivalency" of result and said that it was not the province of a court to "enlarge the classification because the omitted class seems to partake of the sin of the named class."

Many courts, however, have favored a liberal construction. In the case of *In re Muller* (Deady, 519; Fed. Cas. No. 9,912), the Court says: "Counsel have insisted that this is a special proceeding, purely statutory, and that the bankruptcy act is to be construed most strictly against the petitioning creditor and in favor of the bankrupt. In the opinion of the court this view of the matter is not supported by reason or authority. The act does not attempt to punish the bankrupt, but to distribute his property fairly and impartially among his creditors, to whom in justice it belongs. It is remedial and seeks to protect the honest creditor from being over-reached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the

## § 3.] Acts of Bankruptcy — Fraudulent Transfers, Concealments, etc.

burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. Such a statute is not to be construed strictly, but according to the fair import of its terms with a view to effect its objects and to promote justice." (See also favoring a liberal construction, *In re Silverman*, 4 N. B. R. 523; s. c. 2 Abb. C. C. 243.)

**Acts of Bankruptcy.**—It is to be first observed in the analysis of this section that the insolvency of the debtor is an essential concomitant in the act of bankruptcy only in subdivisions 2 and 3 relating to transfers with an intent to give preferences to creditors over other creditors and the suffering or permitting a creditor to obtain a preference by legal proceedings. But by paragraph (c) it is provided that solvency at the *date of the filing of the petition* in bankruptcy against him shall be a complete defense to proceedings instituted under subdivision 1, which relates to fraudulent conveyances made with intent to hinder, delay or defraud the bankrupt's creditors or any of them. In subdivisions 4 and 5 it is immaterial whether insolvency exists at the time of the act of bankruptcy or of the filing of the petition or not. This is an important distinction which will be referred to hereafter under the head of general assignments as acts of bankruptcy. (See, for analysis of this section, *West Co. v. Lea*, U. S. Supreme Court [1899] 2 Am. B. R. 463; 174 U. S. 590.) It is to be remembered in this connection that insolvency as defined by the Bankruptcy Act, Section 1 (15) is as follows: "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." See discussion as to the meaning of this definition under section 1 *ante*.

**First Class of Acts of Bankruptcy—Fraudulent Transfers, Concealments, etc., with Intent to Hinder, Delay or Defraud.** Section 3a (1)—By Section 1 (25) "transfer" is defined to include "the

sale and every other mode of disposing of or parting with property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security." Such transfers are declared void if made within four months of bankruptcy by Section 67e *post* (*q. v.*). Even if made sooner than four months prior to bankruptcy, they may be avoided by the trustee suing in equity as the representative of creditors (section 70e *post*).

The acts referred to in this subdivision are: those transfers or conveyances made with intent to defraud, delay or hinder creditors which under the statute of 13 Eliz. ch. 5 (and the common law), were declared void, which statute has been adopted with few changes in nearly every state of the Union. They include all those transfers in which the lack of a change of possession or of delivery, or the want of consideration, as well as other facts, prove or tend to prove an intent to defraud, delay or hinder creditors. Just what acts and circumstances attending the transactions will furnish a legal presumption of the existence of this fraudulent intent, is largely a question, not of the law of bankruptcy, but of the law of fraudulent assignments, and the decisions upon cases of that character will be applicable.

Such acts must be accompanied by an intent to hinder, delay, or to defraud. Intent is a fact to be proven (*In re Cowles*, 1 N. B. R. 280; Fed. Cas. 3,297; *In re Goldschmidt*, Fed. Cas. 5,520; 3 N. B. R. 165; s. c. 3 Ben. 379; *Ecfort v. Greely*, 6 N. B. R. 433; Fed. Cas. 4,260; *Perry v. Langley*, 2 N. B. R. 596; s. c. 8 A. L. Reg. 427); but it need not be established by direct proof; in fact, it is hardly susceptible of direct proof. As the mind manifests itself only by outward acts, intent must be inferred from other facts which are proven. (*Van Wyck v. Seward*, 18 Wend. 374, 395; *Newman v. Cordell*, 43 Barb. 456.) Intent can be evidenced only by one's acts or admissions. Oral or written admissions that an intent exists, are almost conclusive evidence. All the circumstances accompanying the act and tending to explain the intent, are admissible in evidence. The intention may be inferred from the act itself as a necessary consequence of it, or it may be established by admissions and dec-

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larations of the actor, and such admissions and declarations, although not contemporaneous with the commission of the act, if they are so connected with it as to form part of the *res gestae*, are admissible. (Roach *v.* Great Western R. R. 1 Q. B. 51; Bateman *v.* Bailey, 5 T. R. 512; Newman *v.* Stretch, M. & M. 388.) Compare what is said *post* upon *intent* in connection with subdivision 2 on the subject of preferences.

**Voluntary Transfers**—Voluntary conveyances, that is, conveyances made where good will and friendship are the only considerations, are generally held to be *prima facie* fraudulent and void, and throw the burden of proof upon the transferrer, to overcome the legal presumption of a fraudulent intent thus raised. (Van Wyck *v.* Seward, 18 Wend. 374, 395; Wood *v.* Hunt, 38 Barb. 302; Babcock *v.* Echler, 24 N. Y. 623.) When a voluntary transfer of property is attacked by creditors, it is not always sufficient for the donor to show that at the time of making it he retained sufficient property to pay his debts. It must also be shown that he made it without intent to defraud creditors. Such transfers are peculiarly suspicious where one is engaged in business involving great risks, or which is in a failing condition. (Beecher *v.* Clark, 10 N. B. R. 385; Fed. Cas 1,223, citing Fox *v.* Mayer, 54 N. Y. 125, at 133.)

**Delay**.—A transfer which will merely delay a creditor in enforcing his rights, if made with that intent, is void and is an act of bankruptcy. Thus it has been held that a sale of all one's property for a very small sum in cash and the balance on a very long credit, made with intent to delay creditors, is an act of bankruptcy; that such a sale inevitably delaying creditors, the intent to delay may be presumed. (*In re* Goldschmidt, Fed. Cas. 5,520; 3 N. B. R. 165; s. c. 3 Ben. 379.)

**Creditors**.—“Any One of Them.”—The word “creditor” includes any one who owns a demand or claim provable in bankruptcy. (Section 1 [9].) As to what are claims provable in bankruptcy see section 63 *post*. An unliquidated claim is not a

provable debt in bankruptcy, and when arising out of a tort must be reduced to judgment or be liquidated as the court may direct in order to be provable. Therefore where the only alleged creditor is one who has an unliquidated claim for tort unreduced to judgment at the time of an alleged preferential transfer, he is not a creditor who can insist that such transfer is an act of bankruptcy. (See *Beers v. Hanlin*, 3 Am. B. R. 745; 99 Fed. 695.)

**Concealment.**—This word is defined by Section 1 (22) as including secreting, falsifying and mutilating. Concealment of assets is a ground for refusing discharge by Section 14b, and an offense punishable by imprisonment by Section 29, which see for more detailed discussion.

The *permitting* of a removal or concealment of his property by a debtor is of course equally obnoxious to the law, when made with intent to hinder, delay, etc., and does not need discussion *Qui non prohibet id quod prohibere potest, assentire videtur.* (2 Coke Inst. 305.)

For further consideration of Fraudulent Transfers see Section 67e *post*.

**Transfer With Intent to Prefer.** Section 3a (2)—The acts, by subdivision 2 declared to be acts of bankruptcy, are not in themselves illegal or fraudulent. The common law, which throughout this country is on this point generally unchanged, does not deem it wrong for a debtor, although he is in failing circumstances, to pay one creditor in full, notwithstanding the result may be that other creditors go unpaid. But it is to avoid this partiality in paying creditors that a bankruptcy law is enacted. Its fundamental purpose is to secure the equal or *pro rata* distribution among creditors of the property of one who is unable to pay all in full. This subdivision is to be considered in connection with section 60b which defines “preferences,” and declares the circumstances under which they will be invalidated. But, although that section and this subdivision are *in pari materia*, in determining what is an act of bankruptcy, this subdivision



is to be considered independently of section 60, except in so far as that section defines "preference."

Section 60 declares what is a preference and under what circumstances it can be invalidated, but it is to be noted that although it may not be voidable, a preference may yet be an act of bankruptcy. To make it such, although intent on the part of the transferrer is an essential element, the intent or motive of the transferee is absolutely immaterial.

In other words any preference made with intent to prefer is an act of bankruptcy, but in order to make such a preference voidable, there must exist, in addition to the elements constituting it an act of bankruptcy, the additional element of reasonable cause on the part of the transferee to believe that it was given as a preference, and this reasonable cause must have existed at the time of the transfer. (*Crooks v. Bank*, 3 Am. B. R. 238; 46 N. Y. App. Div. 335.) The analysis of Section 3a, Subd. 2 is made in a recent decision in the District Court for the Northern District of N. Y. (*In re Rome Planing Mills*, 3 Am. B. R. 123; 96 Fed. 812.) In passing upon the question of the sufficiency of a petition Coxe, J., says:

"In order to succeed under this subdivision the petitioners must prove: First. A transfer of the debtor's property to a creditor. Second. The debtor's intent to prefer such creditor. Third. The insolvency of the debtor at the date of the transfer. The burden of proof is upon the petitioners except in the contingency provided for in paragraph d of section 3, where a presumption of insolvency is raised against a debtor who refuses to produce his books and papers and submit to an examination. In the present case the debtor has complied with the requirements of the law in this regard, and no presumption of insolvency exists.

The meaning of the word 'transferred' is defined in section 1, subd. 25, of the act as follows:

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

The intent which it is necessary to establish is that of the debtor. It is not important that the intent of the creditor to whom the preference is given should be shown; whether or not he had reasonable cause to believe that a preference was intended is immaterial. The debtor's intent to give a preference may be presumed from a transfer, while insolvent, of a large portion of

his property to a single creditor. When this is proved the burden is upon him to show that he was ignorant of his insolvency and had reason to believe that he could pay his debts in full. *Toof v. Martin*, 13 Wall. 10. The debtor's insolvency must be shown at the date of the transfer. The provisions of paragraph c (section 3) relate only to subdivision 1 of paragraph a. It is not a defense, therefore, to a petition alleging acts of bankruptcy under subdivisions 2, 3, 4 and 5, to prove solvency at the date of filing the petition. *George M. West Co. v. Lea* (2 Am. B. R. 463), 174 U. S. 590, 19 Sup. Ct. 836."

**Intent Must be Proved.**—As in cases of fraudulent transfers, intent must be proved. But it is a fact which may be inferred from other proven facts. In law one is presumed to intend to do that which is the necessary consequence of his acts, both the natural and the legal consequence. The presumption may be conclusive or disputable, depending upon the nature of the act and the character of the intention. When by law the consequence must necessarily follow the act done, the presumption is ordinarily conclusive, and generally cannot be rebutted by any evidence of a want of any such intention. As one is presumed to know the law, he is presumed to know the legal results of his acts and there is a consequent presumption that he intends the legal results of those acts. (*Morse v. Godfrey*, Fed. Cas. 9,856; 3 Story, 391; *Traders' Bank v. Campbell*, 14 Wall. 87.) So there is a presumption that one intends the probable consequences of his acts, that is, those consequences which would naturally follow, and which a person of ordinary intelligence would expect as the natural results. (*In re Dibblee*, 3 Ben. 354; Fed. Cas. 3,885; s. c. 2 N. B. R. 617; *in re Drummond*, 1 N. B. R. 231; Fed. Cas. 4,093; *Curran v. Munger*, Fed. Cas. 3,487; 6 N. B. R. 33.) The principles just stated are general rules of the law of evidence. Applying these principles in bankruptcy cases, it has been held that payments by one knowing himself to be insolvent raise a conclusive presumption of an intent to prefer if they are in excess of the *pro rata* share of the payee. (*In re Silverman*, Fed. Cas. 12,885; 4 N. B. R. 523; 1 Saw. 410; *Driggs v. Moore*, 3 N. B. R. 602; Fed. Cas. 4,083; 1 Abb. C. C. 440; *Farren v. Crawford*, Fed. Cas. 4,686; 2 N. B. R. 602; *Rison v. Knapp*, 1 Dill 187; Fed. Cas. 11,861; 4 N. B. R. 349; *Toof v. Martin*, 4 N. B. R.

488; s. c. 1 Dill 203; *in re* Oregon Printing Co. 13 N. B. R. 503; Fed. Cas. 10,559; *in re* Smith, Fed. Cas. 12,974; 3 N. B. R. 377; *in re* Batchelder, Fed. Cas. 1,098; 3 N. B. R. 150.) Further a debtor is presumed to know his financial condition, and if he is in fact insolvent, the burden of proof is upon him to establish his want of knowledge. (*In re* Silverman, *supra*; *in re* House, 1 N. Y. Leg. Obs. 348.) But if a debtor honestly believes himself to be solvent, if he establishes his want of knowledge as to his financial condition, he then rebuts the presumption of an intent to prefer which arises from the fact of actual insolvency. This doctrine was applied in a bankruptcy case by the U. S. Supreme Court, in the case of *Toof v. Martin* (13 Wall. 40). In its opinion that court said:

“It is a general principle that every one must be presumed to intend the necessary consequences of his act. The transfer in any case by the debtor of a large part of all his property while he is insolvent, to one creditor without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case and not upon the assignee in bankruptcy.”

These cases cited, as to the presumption of law that a person has knowledge as to his own solvency are, still applicable notwithstanding the new and changed definition of insolvency. It will, of course, be conceded that one may not always in fact know the fair valuation of his property, and whether or not it equals the amount of his debts, which is necessary, in order to know whether insolvency exists as the word is now used. When insolvency meant inability to pay debts as they matured, it was, of course, difficult to conceive of one being an insolvent and not knowing it, but the presumption which the law indulges in is not so much a presumption of actual knowledge of insolvency as it is a general arbitrary rule that a person is chargeable with knowledge of his financial condition. (*In re* Silverman, *supra*; *Wager v. Hall*, 16 Wall. 599.)

Under the Act of 1898 it has been held that where an insolvent debtor has conveyed personal property to a creditor in payment of an indebtedness, an intent to prefer such creditor will be inferred since a preference is a natural result of such a transfer and one must be presumed to intend the natural result of his own acts. (*Johnson v. Wald, et al.* U. S. C. C. A. 5th Circuit [1899] 2 Am. B. R. 84; 35 C. C. A. 522; 93 Fed. 640. Compare *In re McLam*, D. C. 3 Am. B. R. 245; 97 Fed. 922.)

Any fact which tends to establish the existence or non-existence of intent is admissible evidence. Thus it may be shown that the transferrer has made other preferential transfers at about the same time (*Atkinson v. Bank, Crabbe*, 529); and intent may be inferred from any conduct of the debtor or any circumstance connected with the transaction, provided the facts are sufficient to justify the inference. (*Linkman v. Wilcox*, Fed. Cas. 8,374; 1 Dill. 161; *Beattie v. Gardner*, 4 N. B. R. 323; Fed. Cas. 1,195; 4 Ben. 479; *Giddings v. Dodd*, 4 N. B. R. 657; Fed. Cas. 5,405; 1 Dill. 115.) The testimony of a party himself that he had not a preferential intent is entitled to very little weight. (*Oxford Iron Co. v. Slafter*, 13 Blatch. 455; Fed. Cas. 10,637; 14 N. B. R. 380.) Such testimony alone cannot overcome the strong proof which the transaction itself affords. Actions in this case speak louder than words. (*Trader's Bank v. Campbell*, 14 Wall. 87; 6 N. B. R. 353; s. c. below, 2 Biss. 423; 3 N. B. R. 498.) The fact that there are no other debts then due and payable does not conclusively negative an intent to prefer. (*Warren v. Bank*, 10 Blatch. 493; Fed. Cas. 17,202; 7 N. B. R. 481.) It would be useless to cite any further cases showing facts which have led courts to infer from them the existence of an intent to prefer. All the circumstances in connection with a transaction, the declarations and statements of the parties, their situation and the relation which they bear to each other,—all these go towards the forming of a proper inference as to the intent. Transfers of all one's property afford a violent, almost conclusive presumption of an intent to prefer, if there are creditors unprovided for. (*In re Waite*, 1 Lowell, 207; Fed. Cas. 17,044.)

**Intent to be Distinguished from Motive.**—Whatever may have been the motive of the debtor in making a transfer, is immaterial. Motive is not to be confounded with intent. However honest or proper may be the motive, yet if the intent to prefer exists, and is coupled with the other essential elements, an act of bankruptcy is the result. (*Hardy v. Binninger*, 7 Blatch. 262; Fed. Cas. 1,420; 4 N. B. R. 262; *in re Silverman*, 4 N. B. R. 523; Fed. Cas. 12,885; 2 Abb. C. C. 243; 1 Saw. 410; *Farren v. Crawford*, Fed. Cas. 4,686; 2 N. B. R. 602; *Warren v. Bank*, 10 Blatch. 493; Fed. Cas. 17,202; 7 N. B. R. 481; *Webb v. Sachs*, 15 N. B. R. 168; Fed. Cas. 17,325.) Accordingly a transfer is not the less a preference because given in answer to a request, or in fulfillment of a prior promise made at the time of contracting the debt. (*Arnold v. Maynard*, Fed. Cas. 561; 2 Story, 349.) An agreement to give security is a mere executory contract, and not a conveyance. Such an agreement creates no higher legal obligation than the promise of payment implies in contracting the debt. (*Forbes v. Howe*, 102 Mass. 427; *Sawyer v. Turpin*, 91 U. S. 114; 13 N. B. R. 271; *Nat. Bank v. Hunt*, 11 Wall. 391. These cases must be considered as overruling to the contrary, *Burdick v. Jackson*, 7 Hun, 488; s. c. 15 N. B. R. 318; *in re Wood*, 5 N. B. R. 421; Fed. Cas. 17,937, and others.)

And it has been held under the Act of 1898, where an insolvent person, prior to legal bankruptcy, in making efforts to extricate himself from his embarrassments, has borrowed money and given security therefor at the same time and the advances are made in good faith upon such security to enable the insolvent debtor to carry on his business, there is no violation of the terms or policy of the Bankruptcy Act. (*In re Wolf*, 3 Am. B. R. 555; 98 Fed. 84.) And when in pursuance of a contract, valid and equitable, theretofore executed, the creditor exercised his rights in possessing himself of the bankrupt's property and making sale of it under such contract, he was held not to have been guilty of securing preferences. (*Sabin v. Camp*, 3 Am. B. R. 578; 98 Fed. 974.) In the *Wolf* case, *supra*, the court quotes with approval

the language of Judge Dillon in *Darby v. Institution* (1 Dill. 144; Fed. Cas. No. 3,571), wherein it is said that:

“An insolvent person may properly make efforts to extricate himself from his embarrassments, and therefore he may borrow money, and give at the time security therefor, provided, always, the transaction be free from fraud in fact, and upon the Bankrupt Act. And hence it is a settled principle of bankrupt law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon security taken at the time, do not violate either the terms or policy of the Bankrupt Act.”

And a distinction has been taken between an agreement to give security generally and an agreement for the delivery of certain specific property; a conveyance in fulfillment of an agreement of the latter character having been held not a preference if only a reasonable time has elapsed. (*Gattman v. Honea*, Fed. Cas. 5,271; 12 N. B. R. 493. Compare *in re Jackson Iron Co.* 15 N. B. R. 438; Fed. Cas. 7,153.) And when the period which has elapsed between the promise to give the security (if made at the time of the loan), and the giving of it, is so short that the two acts can be regarded as one transaction, then in determining the intent with which it was made, the whole thing is to be considered as if it were transacted at one time, and as if the security were for a present, not for an antecedent consideration. The intent is to be inferred from the circumstances attending the whole transaction, not from the mere giving of the security itself. (*Sparhawk v. Richards*, Fed. Cas. 13,205; 12 N. B. R. 74; *Gattman v. Honea*, Fed. Cas. 5,271; 12 N. B. R. 493; *in re McKay*, 7 N. B. R. 230; 1 Lowell, 561; *in re Perrin*, Fed. Cas. 10,995; 7 N. B. R. 283; *in re Connor*, 1 Lowell, 532; Fed. Cas. 3,118.) A transfer is no less a preference, if made with intent to prefer, simply because the transferrer yielded to coercion. (*Arnold v. Maynard*, Fed. Cas. 561; 2 Story, 349.) It is wholly immaterial whether the preference is made willingly, or by reason of threats. The intent to prefer may concur with pressure on the part of a creditor. (*Clarion Bank v. Jones*, 21 Wall. 325; 11 N. B. R. 381; *Sawyer v. Turpin*, 91 U. S. 114; 13 N. B. R. 271; *Giddings v. Dodd*, 1 Dill. 115; Fed. Cas. 5,405; 4 N. B. R. 657.) Even

although the transferrer made the transfer because advised that he would be liable to a criminal prosecution if he did not do so, the transfer is an act of bankruptcy. (*Strain v. Gourdin*, 2 Woods, 380; Fed. Cas. 13,521; 11 N. B. R. 156.) A transfer to a creditor in payment of a fiduciary claim which cannot be proved in bankruptcy, may yet be a preference. (*In re Dibblee*, 2 N. B. R. 617; Fed. Cas. 3,884; 3 Ben. 354.)

**Intentions of Agents.**—The intention of an agent to make a preferential transfer or payment is in law imputed to the principal. (*Beattie v. Gardner*, Fed. Cas. 1,195; 4 N. B. R. 323; 4 Ben. 479; *Graham v. Stark*, 3 N. B. R. 357; Fed. Cas. 5,676; 3 Ben. 520.)

**Even Exchange.**—The exchange of one set of securities by an insolvent, or of one article of property for another of equal value is not a preference. An even exchange is no robbery. If the result of a transfer is, that the one making it gets back property of equal value so that the creditors of his estate are not injured, there is no preferential intent. A debtor may properly give security for a loan if given at the time the debt is created, and if the transaction be free from fraud, and the value which the debtor obtains is equal to that with which he parts, and if the security is not disproportionate to the loan. In general it may be said that a preference can arise only in cases of transfers to pay or to secure an antecedent debt. (*Burnhisel v. Firman*, 22 Wall. 170; 11 N. B. R. 505; *Clark v. Iselin*, 21 Wall. 360; 11 N. B. R. 337; *Tiffany v. Boatman's Sav. Inst.* 18 Wall. 376; *Cook v. Tulliss*, 18 Wall. 332; 9 N. B. R. 433; *Sawyer v. Turpin*, 91 U. S. 114; 13 N. B. R. 271, and see cases cited *supra*.) There is no preference if no harm is done creditors (*Winter v. R. R. Co.* 2 Dill. 487; Fed. Cas. 17,890; 7 N. B. R. 289); as, for instance, when property is transferred by a debtor to a creditor having a mortgage upon it for an amount greater than its value. (*Livingston v. Bruce*, 1 Blatch. 318; Fed. Cas. 8,410; *Coxe v. Hale*, 10 Blatch. 56; Fed. Cas. 3,310; 8 N. B. R. 562; *Catlin v. Hoff-*

man, 9 N. B. R. 342; Fed. Cas. 2,521.) (Compare also cases cited under section 60.)

**Manner of Transfer.**—If a transfer is actually made with intent to prefer creditors, it is immaterial in what way it is made, or whether it is directly or indirectly made to the preferred creditor. Thus a transfer of firm property by one partner to the other, made for the purpose of enabling the individual creditors of the transferee to secure a preference, is an act of bankruptcy (*Collins v. Hood*, Fed. Cas. 3,015; 4 McLean, 186); and if one who is insolvent conveys his property to another who executes a mortgage thereon in favor of a creditor of an insolvent, it may be shown to be a preference. (*Gibson v. Dobie*, 5 Biss. 198; Fed. Cas. 5,394; 14 N. B. R. 157.)

So where a defendant in an involuntary bankruptcy proceeding under the act of 1898, contended that the alleged act of bankruptcy was not made out; that he had merely transferred his property to a person partly in consideration of payment of checks issued by the defendant which checks were an overdraft of the defendant's account at his bank for which the transferee had agreed to be responsible, it was held that whether the creditor in the case was the bank or the transferee, since the transfer secured the payment of one particular debt of the defendant over other debts, such transfer was a preference, and being made with intent to prefer was an act of bankruptcy. (*Goldman, etc. Co. v. Smith*, 1 Am. B. R. 266; 93 Fed. 182.)

**"His" Property.**—The bankruptcy act gives no heed to any payments or transfers which may be made by a third party as payments to creditors of an insolvent. As such a payment does not take away anything from the fund to which creditors of the insolvent may look, they cannot complain if a friend of the insolvent pays in full certain of his debts. (*Winslow v. Clark*, 47 N. Y. 261; *Windsor v. Kendall*, 3 Story, 507.) Transfers in order to be preferences must convey property liable to be administered in bankruptcy. A transfer by an insolvent of exempt property, though made with intent to prefer, is not an act of bank-



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ruptcy. (*Rix v. Bank*, 2 Dill. 367; Fed. Cas. 11,869; *Schlitz v. Schatz*, Fed. Cas. 12,459; 2 Biss. 248.)

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—Section 3a (3). The most important fact to be noticed in connection with this subdivision 3 is that intent is not expressly made an essential element to the commission of the act of bankruptcy herein defined. Next to that, it should be noted that the words used are “suffered or permitted,” not “procured”—the word which was used in the act of 1841. By section 39 of the bankruptcy act of 1867, it was provided, among other things, that “a person who being bankrupt or insolvent, or in contemplation of insolvency, should permit or suffer his property to be taken on legal process *with intent to give a preference* to one or more of his creditors, or with intent to defeat or delay the operation of the act” was guilty of an act of bankruptcy; and by the thirty-fifth section of the same statute providing for the invalidating of preferential transfers, it was declared that any attachment or seizure under execution of such person’s property, “procured by him,” with a view to give a preference, should be void. Under that act it was at first held by many of the district courts, that when an insolvent debtor was sued by one creditor whose action would necessarily result in his securing judgment and subsequently levying upon and obtaining all the property of the insolvent debtor to the exclusion of other creditors, if the debtor did not take steps to go into voluntary bankruptcy and thereby prevent the prosecuting creditor from obtaining the preference which his action would give him, then the debtor must be presumed to have intended that a preference be secured. But the Supreme Court of the United States in *Wilson v. City Bank*, 17 Wall. 473, finally held that no intent whatever could be inferred from the mere neglect of the defendant, properly sued upon a just claim, to interpose a defense when there was no valid defense; that while, when a person does a positive act, the consequences of which he knows beforehand, he must be deemed to intend those consequences, it cannot be inferred that a man intends the conse-

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quences of other persons' acts (for instance, the act of the plaintiff). when he contributes nothing to their success. But a study of *Wilson v. City Bank* shows most clearly that it turned upon the fact that intent under that statute was an essential element. Not any of the reasoning of the court in the decision in that case justifies the conclusion that under the present statute of 1898, mere suffering or permitting by an insolvent of the obtaining of a preference by a creditor through legal proceedings is not an act of bankruptcy. And with this view accords the general tenor of decisions under the new act. The following excellent summary of the act is taken from the opinion of Judge Coxe *In re Rome Planing Mills* (3 Am. B. R. 123; 96 Fed. 812):

“Section 3, subd. 3, provides that an act of bankruptcy by a person shall consist of 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.’

In order to succeed under this subdivision the petitioners must prove: First. That a preference was obtained by a creditor through legal proceedings. Second. That the debtor suffered or permitted the preference and did not vacate or discharge the preference at least five days before a sale or final disposition of the property affected. Third. That the debtor was insolvent at the time the preference was obtained. The burden of proof is upon the petitioners precisely as under the preceding subdivision. The debtor's intent is not made an ingredient. It is enough that the creditor has obtained a preference and that the debtor has permitted it to remain undischarged. What was the debtor's intent regarding the matter is wholly immaterial. It is not necessary that he should do any affirmative act. If he remains passive and supine and permits his property to be taken by one creditor at the expense of the others he has ‘suffered or permitted’ a preference to be obtained; this is enough. The present act differs from the act of 1867, where the language used (section 39), is ‘procure or suffer.’ The same words ‘procured or suffered’ are found in section 60, par. a, of the present act, relating to preferred creditors, and it may be that a preference obtained through legal proceedings described in subdivision 3 of section 3 cannot be voided by the trustee pursuant to section 60; but that permitting such a preference constitutes an act of bankruptcy, there can be little doubt. *In re Reichman*, 91 Fed. 624; 1 Am. B. R. 17. The words ‘legal proceedings’ used in subdivision 3 of section 3 have reference to any proceedings in a court of justice. interlocutory or final, by which the property of the debtor is seized and diverted from his general creditors. The observations regarding proof of insolvency under subdivision 2 are equally ap-

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plicable to subdivision 3. It is not necessary that the creditor should wait until a sale has actually taken place. It would be a strange construction of an act designed to save and protect the debtor's estate, to hold that it can only be set in operation after the estate has been plundered and dissipated. The debtor has until five days before the day the sale is legally noticed in which to vacate or discharge the preference. If he has not done so at that time the creditor may proceed and file a petition and, upon a proper showing, may enjoin the sale. The act of bankruptcy is not consummated until the expiration of the time in which the debtor may vacate or discharge the lien, and the last day for doing this is five days before the day a sale of the property is advertised. In the case of a judgment, therefore, the petitioners must prove the entry of the judgment, the issue of an execution, the levy thereunder and the debtor's insolvency at the time of the judgment and levy. They must also prove that the property was actually sold at execution sale or that the sale was advertised for a day certain, and that the debtor had permitted the levy to stand until the sale was but five days distant."

And see to same effect *In re Meyers* (1 Am. B. R. 1, referee's decision); *In re Moyer* (1 Am. B. R. 577; 93 Fed. 188); *In re Collins* (2 Am. B. R. 1, referee's decision). *In re Rome Mills, supra*, was a case where there was a levy under a judgment. It was sent back to the referee to take further proof on question of insolvency and finally the respondent was adjudged a bankrupt upon the further report of the referee. (3 Am. B. R. 766.) *In re Moyer* arose in the Eastern District of Pennsylvania, and was a case where the debtor while insolvent having borrowed money of relatives gave notes containing warrants of attorney to confess judgment, and subsequently and within four months before the filing of an involuntary petition, the debtor being insolvent, the holder of the notes entered judgment and levied on the debtor's goods. It was held that the debtor "suffered" the taking of the judgment and the levy, and by not paying the same, committed an act of bankruptcy. The Court (per McPherson, J.) observed:

"The question presented by these facts is important. If the Bankrupt Act of March 2, 1867, were still in force, the construction announced by the Supreme Court in *Wilson v. Bank*, 17 Wall. 473, and in *Clark v. Iselin*, 21 Wall. 360, would probably require us to decide that Moyer did not commit an act of bankruptcy. He was passive during the proceedings in November, and did not in any degree procure the entry of the judgments or the issue of

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execution with intent to secure a preference to the creditors controlling this process. But, as we understand the Bankrupt Act of 1898, its provisions are essentially different from the earlier act, and require the court to come now to a different conclusion. Clause 3 of section 3 declares that it shall be an act of bankruptcy if a person has '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.' It will be observed that this clause says nothing about the bankrupt's intent to enable the creditor to secure a preference; neither does it use the word 'procure' which might seem to imply that the debtor must take some part in bringing the preference about. The dominant fact seems to be the actual result that has been attained by the creditor. If, through legal proceedings, he has succeeded in obtaining a preference,—that is (referring to section 60 for a description of preferred creditors), if the debtor is insolvent, and has either 'procured or suffered a judgment to be entered against himself, . . . and the effect of the enforcement of such judgment . . . 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,'—if this is the actual result of legal proceedings taken against an insolvent debtor, the clause in question requires the debtor to vacate or discharge such preference within a specified time, and, if he fails so to do, declares that he has committed an act of bankruptcy. How he is to vacate or discharge the preference is not specified; but the silence of the clause upon this point presents no difficulty. Legal proceedings are of many kinds, differing in the different States; but, whatever kind may be employed by the creditor, if the result of the proceedings gives him a preference over other creditors of the same class, the insolvent debtor is thereupon charged with a clearly implied duty to vacate or discharge the preference within the time allowed him by the act. For example, if he has a defence to the debt he may set it up; or, if he can overthrow the preference because the creditor's procedure has been defective, he may choose that method of attack. If neither of these weapons is available, he has still at command one sufficient weapon, of which he cannot be deprived,—he can apply promptly to the court in bankruptcy, and ask that his property should be ratably divided among his creditors. If he fails to move his inaction is properly regarded as a confession that he is hopelessly insolvent, and as conclusive proof that he consents to the preference that he has declined to strike down. This construction of the statute seems to us to be the natural meaning of the clause in question, and to be in harmony with the general purpose of the act. A similar conclusion was reached a month or two ago in the District Court for the Eastern District of Missouri in *in re Reichman*, 91 Fed. 624; 1 Am. B. R. 17."

On the other hand the District Court for the Western District of Wisconsin has followed *Wilson v. Bank* and held that to make the entry of judgment an act of bankruptcy there must be some

fault on the part of the judgment debtor by way of procuring or suffering the act to be done. *In re Nelson*, 1 Am. B. R. 63; 98 Fed. 76. The facts in this case were very similar to those in that of *In re Moyer* except that in the case of *In re Nelson* no execution was issued and there was no threatened sale. It is therefore distinguishable from the other cases though the opinion seems to proceed upon the grounds above stated. See *In re Thomas*, 103 Fed. 272; 4 Am. B. R. 571.)

**Assignments for Benefit of Creditors.** Section 3a (4).—The provisions contained in subdivision (4) settle a question as to which there was great conflict of authority under the former act which contained no express enactment upon the subject. Although late in the history of that act the majority of the courts were inclined to hold any assignment for the benefit of creditors an act of bankruptcy, whether such assignment created preferences or not, yet for a long period there was an array of authority of almost equal number and weight which held a contrary opinion, and the question could hardly be considered a settled one under that act.

Under the present act it is very clear that 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. (*In re Gutwillig*, 1 Am. B. R. 388; 34 C. C. A. 377; 92 Fed. 337; *West Co. v. Lea*, 2 Am. B. R. 463; 174 U. S. 594; 19 Sup. Ct. 836.) But such an assignment is voidable and not void and is good except as against proceedings instituted in bankruptcy. (*Patty-Joiner & Eubank Co. v. Cummins*, Texas Sup. Ct. June 1900; 4 Am. B. R. 269; 57 S. W. 566.) There is a very clear distinction between a voluntary common law general assignment which is what is meant by this section (though in many of the States the method of making such assignment is regulated by statute), by which all the debtor's property is absolutely assigned by him in trust for his creditors, and a state insolvency law which provides for the discharge of the debtor. Proceedings under state insolvency laws, since the pas-

sage of the general Bankruptcy Act, are void whether or not bankruptcy proceedings follow. General assignments are valid unless invalidated by subsequent bankruptcy proceedings. The adjudication of bankruptcy at the instance of the bankrupt's creditors on the ground of a general assignment avoids such assignment and subjects the property assigned to the jurisdiction of the bankruptcy court to be administered under the Bankruptcy Act which the creditors have invoked. (*In re Sievers*, D. C. Mo. 1 Am. B. R. 117; 91 Fed. 366; *In re Romanow*, D. C. Mass. 1 Am. B. R. 461; 174 U. S. 594; *In re Meyer*, C. C. A. 2nd C. 3 Am. B. R. 559; 39 C. C. A. 368; 98 Fed. 976; *West Co. v. Lea Bros.* U. S. Sup. Court, 2 Am. B. R. 463; 174 U. S. 594; *In re Gray*, N. Y. Sup. Ct. 3 Am. B. R. 647; 47 App. Div. 554.)

But it has been decided under the present act that a proceeding to wind up a corporation and have a receiver appointed is not a general assignment within the meaning of this section of the Bankruptcy Act (*In re Empire Metallic Bedstead Co.* C. C. A. 2nd C. 3 Am. B. R. 575; 39 C. C. A. 372; 98 Fed. 981.) And where a partnership has been dissolved by the death of one of the partners the appointment of a receiver in a suit brought in equity by the administrator of the deceased partner for the purpose of liquidating the affairs of the partnership so dissolved, is not a general assignment within the meaning of the Bankruptcy Act. (*Vaccaro v. Security Bank*, C. C. A. 6th C. 4 Am. B. R. 474.) In a rather peculiar case (*Rumsey, etc. Co. v. Novelty & Mfg. Co.* 3 Am. B. R. 704; 99 Fed. 699) defendant made a deed of trust of all its property, providing that said property should be sold, and after first deducting the costs and expenses of the trust, and the debts of a preferential character under the State law, the proceeds should be distributed ratably among all its creditors, the balance, if any, to be repaid to the defendant. *Held*, that though this deed did not work a preference and was not a voluntary general assignment, because containing a condition of defeasance and an equity reserved to grantor after satisfaction of claims of creditors, it was, notwithstanding, constructively fraudulent as to creditors as tending to hinder, delay and defraud them in the

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§ 3.] Admission of Willingness to be Adjudged Bankrupt.

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sense used in the Bankruptcy Act, and as tending to defeat the scheme and purpose of that act.

It made no difference in this case what the learned judge called the instrument. But it is submitted that his definition of what constitutes a voluntary general assignment within the purview of the Bankruptcy law, and at common law, is too narrow when applied to the facts in this case *as stated by him*. It is unquestionably true that a deed of trust in the nature of a mortgage containing a power of sale, but reserving an equity to the mortgagor or pledgor, is not, technically speaking, an assignment, because the entire title to the property does not pass to the trustee. (*Dunham v. Whitehead*, 21 N. Y. 131, and see *Bishop on Insolvent Debtors*, 3rd ed. p. 110 *et seq.*) But where (as appears in this case from the judge's statement of facts) there is an absolute conveyance of the title to the trustee for the benefit of all the creditors, the instrument is none the less an assignment because it provides that a possible surplus shall revert to the grantor, inasmuch as that is implied in law. See cases collected in *Bishop*, p. 250.

To avoid the conflict under the Act of 1867, as to whether a general assignment non-preferential in its terms was a conveyance "to hinder, delay or defraud" creditors, presumably, the present law was intended to put an end to all doubt, and to cover *any* instrument in the nature of a general assignment which tends to impede the orderly and prompt scheme of the Bankruptcy Act in securing an absolutely equitable distribution for all the creditors. Compare *West Co. v. Lea*, 174 U. S. 594; 2 Am. B. R. 463; *In re Gutwillig* (C. C. A. 2nd Circuit), 1 Am. B. R. 388; 34 C. C. A. 377; 92 Fed. 337; *In re Meyer* (C. C. A. 2nd Circuit), 3 Am. B. R. 559; 98 Fed. 976; 39 C. C. A. 368. (But see *In re Empire Metallic Bedstead Co. supra.*) Such an assignment, though as a matter of fact untainted with fraud, is, if made within four months of the filing of the petition, a fraud *as a matter of law* upon the act. (See *In re Gray, supra.*)

**Admission of Willingness to be Adjudged Bankrupt.** Section 3a (5)—In the case of a natural person such a proceeding is merely

voluntary bankruptcy. Probably it was not expected by the law-makers that this provision would be extended to corporations. Indeed, in the District Court of Massachusetts (*In re Bates Machine Co.* 1 Am. B. R. 129; 91 Fed. 625) it was gravely questioned as to whether a petition could be filed by a corporation under this subdivision as such petition would be in effect a voluntary one and hence an evasion of the terms of section 4, forbidding corporations from becoming voluntary bankrupts. But *In re Marine Machine Co.* (1 Am. B. R. 421; 91 Fed. 630), a written admission of a corporation's inability to pay its debts in full and its willingness to be adjudged a bankrupt, signed by the president of the corporation and authorized by a majority of the board of directors was held to be an act of bankruptcy, and when given to its creditors was sufficient to support an involuntary petition in bankruptcy. (Compare to same effect *In re Humbert Co.* 4 Am. B. R. 76; 100 Fed. 439.)

**Allegation of Insolvency.** Section 3b.—By paragraph *b*, it is requisite that at the time the petition is filed the debtor shall be an insolvent. The fact that insolvency exists at the time of the petition must then be alleged and established. Insolvency at the time of the commission of the act must also be alleged in those cases where insolvency at that time is essential to the commission of the act of bankruptcy. See subdivisions 2 and 3 referring to fraudulent transfers and preferences, as to which see *ante* in this chapter.

As to limitation of time (four months) within which the petition may be filed, compare section 60b, as to creation of voidable preference.

The "notorious, exclusive or continuous possession" mentioned in this subdivision depends upon the character of the property transferred and the usual and customary method of dealing with such property. In order to be "notorious," the possession need not be advertised to the public. All that the statute requires is that there shall be no attempt at concealment of the possession,



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 § 4.] Solvency as Defense — The Bond — Who May Become Bankrupts.
 

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no effort to prevent its becoming known. (See opinion of Dilard, Referee, *In re* Woodward, 2 Am. B. R. 233.)

**Solvency as Defense.** Section 3c.—The provisions of this subdivision, confining the defense of solvency at the time of the filing of the petition to paragraph “a” subdivision 1, do not, of course exclude the defense of solvency at the time of the alleged act of bankruptcy, which may be made under subdivisions 2 and 3.

**Burden of Proving Solvency.** Section 3d.—Compare what has been said *In re* Rome Planing Mills (3 Am B. R. 123), quoted *ante* under subdivision 2.

**The Bond.** Section 3e.—The provision requiring the filing of a bond is new. Such a bond is necessary only when an application is made to take charge of and hold the property of an alleged bankrupt, prior to the adjudication, and pending a hearing on the petition. (Compare section 69.) There is no authority anywhere under this act, for a surety company acting as surety on this bond. Section 50 (g) authorizes it only in the cases of bonds of referees and trustees. Doubtless the execution of a bond by a surety would make him a party to the proceedings, subject to the jurisdiction of the bankruptcy court. If such is the case, the court can summarily hear and determine as to the damages which the alleged bankrupt may have sustained by the taking of his property in case the petition against him is dismissed, and such court may make a summary order requiring the sureties to pay the same. This, at any rate, was the express provision of this paragraph of this section in the bankruptcy bill as it first passed the House and until it came out of the hands of the Conference Committee.

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**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.

*b* Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincor-

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As to Who May Become Bankrupts — Debts — Infants. [Ch. III,

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porated 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.

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Analogous Provisions of Former Acts:—

As to Voluntary Bankruptcy: R. S., § 5014; act of 1867, § 11; act of 1841, § 7.

As to Involuntary Bankruptcy: See Analogous Provisions given under section 3 of this act.

**As to Who May Become Bankrupts.**—Any person owing debts as defined in section 1 (11) may file a voluntary petition. The present act does not in express terms require that the person shall be insolvent or unable to pay all his debts in full, as did the act of 1867; and there seems to be no reason why, if a solvent person cares to have his property distributed among his creditors in bankruptcy, he should not be allowed to do so. It will not be necessary to allege insolvency in the petition, nor to prove it to procure an adjudication.

**Debts.**—A debt absolutely owing as a fixed liability, though not yet payable, evidenced by a judgment or instrument in writing may be the foundation of a petition, section 63a (1). As to time when it must have accrued see section 59b.

**Infants.**—Under the act of 1841 it was held that infants were entitled to the benefits of the act, and that the proceedings might be had in their own name without the appointment of a next friend. This decision was made on the ground that the act did not exempt infants from its operation. (*In re Book*, Fed. Cas. 1,637; 3 McLean, 317; *in re Cotton*, 2 N. Y. Leg. Obs. 370. See also *in re Smedley*, 10 L. T. N. S. 432.) On the other hand,

the District Court for the Southern District of New York held that, under the act of 1867, infants were not the subjects of either involuntary or voluntary bankruptcy in respect to their general contracts, because the terms of the act did not embrace them. (*In re Derby*, Fed. Cas. 3,815; 8 N. B. R. 106; 6 Ben. 232.)

So under the act of 1898. (*In re Duguid*, 3 Am. B. R. 794; 100 Fed. 274.)

With reference to contracts for necessities the court in these cases expressly declined to give any opinion. But general contracts of an infant, having no force or validity if disaffirmed by the infant on coming of age, it would be a frivolous act for courts to permit the institution and prosecution of proceedings which might afterwards be practically annulled by such disaffirmance. As to bankruptcy of an infant liable upon contracts for necessities, there is no known adjudication expressly passing upon that particular question. *In re Derby* and *in re Cotton* and *in Farris v. Richardson* (6 Allen, 118), the question was referred to, but not decided. But where the infant is forbidden by statute to disaffirm a contract which has been made by him in a business in which he engages as an adult and the other contracting party had good reason to believe him adult, he may become an involuntary bankrupt for goods sold him on credit under such circumstances. (*In re Brice*, D. C. Iowa, 2 Am. B. R. 197; 93 Fed. 942, in which cases are cited.) But except under such circumstances it is doubtful if an infant can commit any act of bankruptcy which involves a transfer of property, his transfers being voidable; also doubtful if a general contract creditor of his can prove a debt in bankruptcy. If a transfer is made by an infant which would be an act of bankruptcy if committed by an adult, and the transfer is affirmed upon his attaining his majority, then a liability exists and proceedings in bankruptcy voluntary or involuntary may be instituted. But if the transfer is not affirmed, then it seems that it is no act of bankruptcy and no proceedings can be instituted by or against the person who did it, even after he becomes of age. If proceedings are instituted upon it during the infancy of the alleged bankrupt, no affirmance of the act after coming of age

will give the court jurisdiction of the proceeding; but the proceeding must be instituted *de novo*. (*In re Derby, supra*; *Belton v. Hodges*, 2 M. & Scott, 496; *Ex p. Watson*, 16 Ves. 265; *Ex p. Moule*, 14 Ves. 603; *Ex p. Barwise*, 6 Ves. 601; *Rex v. Cole*, 1 Ld. Raymond, 443; *Ex p. Barrow*, 34 Ves. 554; *Ex p. Henderson*, 34 Ves. 163; *Ex p. Adam*, 1 Ves. & B. 494.)

**Insane Persons.**—A person incapable of managing his own affairs or judicially declared insane cannot commit an act of bankruptcy. (*In re Funk*, 4 Am. B. R. 96; 101 Fed. 244.) But section 8 provides that the death or insanity of a bankrupt shall not abate the proceedings, and provides for their continuance. And under the law of 1867 it was held that if an act of bankruptcy has been committed by a person while sane, who afterwards becomes insane, he may be adjudged a bankrupt in involuntary proceedings. (*In re Pratt*, Fed. Cas. 11,371; 6 N. B. R. 276, citing *Robson on Bankruptcy*, 84; *Anon.* 13 Ves. 590; Sumner's note to *in re Stamp*, DeGex, 345; *in re Marvin*, 1 Dillon, 178; *Ex p. Layton*, 6 Ves. 440.) In the matter of *Pratt*, a guardian had been appointed for the insane person. (Compare *in re Murphy*, Fed. Cas. 9,946; 10 N. B. R. 48.)

**Married Women.**—May become bankrupts either in voluntary or involuntary proceedings where the laws of the states of their residence have so far changed the common-law rule as to make them liable upon their contracts or where they trade as *femes sole*. (*Ex p. Mear*, 2 Bro. 266; *in re Kinkeade*, 3 Biss. 405; Fed. Cas. 7,824; 7 N. B. R. 439.) But wherever her coverture would be a good defense to an action upon a debt, such debt cannot be made the basis of a proceeding in bankruptcy (*in re Schlichter*, 2 N. B. R. 336); and where she is liable only when she expressly charges her own separate estate, or where the indebtedness is incurred in relation to her own separate estate,—then it must clearly appear in the petition that such debts were so charged or were for such estate, else the petition will be dismissed. (*In re Howland*, Fed. Cas. 6,791; 2 N. B. R. 357; *in re Goodman*, 8 N. B. R. 380; Fed. Cas. 5,540; 5 Biss. 401.)

## § 4.] Aliens—"Wage Earners"—"Farmers"—Executors.

**Aliens.**—Aliens may be adjudged bankrupts, either voluntary or involuntary, whether resident or not in the United States, if they have property therein, and otherwise come within the terms of section 2 (1). In this respect the present act differs from the act of 1867. See section 65d of this act. If the court cannot get jurisdiction of the person of a non-resident alien, it can at least get jurisdiction of the property within its district.

**"Wage Earners"—"Farmers,"** etc.—The term "wage earner" is defined in section 1 (27) as meaning "an individual who works for wages, salary or hire at a rate of compensation not exceeding one thousand five hundred dollars per year" who with "farmers" and "tillers of the soil" may not be forced into bankruptcy. But the fact that one changes his occupation to one of the exempted class within four months after an act of bankruptcy will not save him. (*In re Luckhardt*, 4 Am. B. R. 307; 101 Fed. 807.) In the phrase used in section 4b, providing that persons engaged "chiefly in farming or the tillage of the soil" may not be adjudicated involuntary bankrupts, the words "tillage of the soil" do not limit the remainder of the phrase nor prevent the person who is engaged in raising live stock from coming within the exemption. (*In re Thomson*, 4 Am. B. R. 340; 102 Fed. 287.)

The defense to proceedings to involuntary bankruptcy that the person sought to be declared a bankrupt is within these exceptions is not simply personal to the bankrupt—it goes to the jurisdiction of the court, and may be raised by any creditor. The fact that the bankrupt does not appear does not change the proceedings from an involuntary to a voluntary proceeding so as to affect interests in property attached before proceedings in bankruptcy are commenced. (*In re Taylor*, 4 Am. B. R. 515; 102 Fed. 728; C. C. A. 7th Circ.)

**Executors.**—An executor who as such has carried on business and incurred debts pursuant to the will of his testator may in England be adjudged a bankrupt, or may voluntarily petition. (*Ex p. Garland*, 10 Ves. 110; *Ex p. Richardson*, Madd. 138.)

But in America the bankruptcy law does not extend to executors and trustees, and persons acting in a fiduciary capacity, and although such persons are authorized by a will or otherwise to carry on a business as a part of the administration of an estate, they are not liable to be adjudged bankrupt as such. (*Graves v. Winter*, 7 Pac. L. R. 165; s. c. 9 N. B. R. 357.)

**Corporations.**—Under the bankruptcy law of 1867, any business, moneyed, or commercial corporation might become bankrupt voluntarily as well as involuntarily. Under the present act it cannot become a voluntary bankrupt, and in order that a corporation may be involuntarily adjudged bankrupt it is necessary that it be actually and principally engaged in one of the lines of business mentioned in the section. The fact that by its charter it may engage in that business, is not sufficient. (*In re N. Y. & Westchester Water Co.* 3 Am. B. R. 509; 98 Fed. 711.)

The corporation itself may be adjudged bankrupt, but not its directors and stockholders, even though by statute they are jointly and severally liable for its debts. (*James v. Atlantic Delaine Co.* Fed. Cas. 7,179; 11 N. B. R. 390.) Notwithstanding its dissolution in an action in a state court, if there are undistributed assets or unpaid debts, a corporation may be put into bankruptcy. Like a partnership, a corporation, even after dissolution, exists for the purpose of paying debts and distributing the surplus among the persons entitled thereto. (*In re Merchants' Ins. Co.* 3 Biss. 162; Fed. Cas. 9,441; 6 N. B. R. 43; *in re Independent Ins. Co.* 6 N. B. R. 169; Fed. Cas. 7,018; s. c. 6 N. B. R. 260; Fed. Cas. 7,017; *in re Washington Ins. Co.* 2 Ben. 292; s. c. 2 N. B. R. 648.)

In a recent case in the Circuit Court of Appeals for the 1st Circuit (*In re Marshall Paper Co.* also reported as *Marshall Paper Co. v. Train*, 4 Am. B. R. 468; 102 Fed. 872), it is held that the discharge of a corporation does not prevent creditors from taking judgment in a State court against the corporation in such limited form as may enable them to reap the benefit of the stockholders' or directors' liability. The rendering of such judg-

ment depends upon the authority of the State court under the local law and there is nothing in the Bankruptcy Act to prevent it. 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. See for further discussion, subject of "Discharge," *post*.

**Manufacturing Corporations.**—The meaning of the word "manufacturing" has been considerably discussed, particularly in connection with the internal revenue laws that formerly existed and also in connection with the corporation tax laws of the various States. Presumably the use of the word in this statute is the popular use, that is to say, manufacturing is to make by hand or machinery. (*Carlan v. Western Assur. Co. of Toronto*, 57 Md. 526; *Lawrence v. Allen*, 7 How. U. S. 794.)

The Century Dictionary, page 3,620, is authority for saying that "manufacture" means "The operation of making goods or wares of any kind; the production of articles for use from raw or prepared materials, by giving to these materials new forms, qualities, properties or combinations, *whether by* hand labor or by machinery used more especially of production in a large way by machinery or by many hands working co-operatively."

The N. Y. Court of Appeals, quoting Webster, defines manufacture to be "anything made from raw materials by hand, by machinery or by art, as cloths, iron utensils, shoes, machinery, saddlery, etc. The process of manufacture is supposed to produce some new article by the application of skill and labor to the raw materials." (*People ex rel. U. P. P. Co. v. Roberts*, 145 N. Y. 377.)

As a general rule a natural product, substance or element rendered more suitable for use by an artificial process or mere manipulation is not a manufactured article. Thus hay pressed in bales ready for market is not a manufactured article. (*Frazer v. Moffit*, 22 Blatch. 267.) The mining of coal is not a manufacture although it is a preparation of a natural substance for use. (*Byers v. Franklin Coal Co.* 106 Mass. 131.) It has been held

under the present Bankruptcy Act that the mining of gold and silver is not manufacturing. (*In re Elk Park M. & M. Co.* 4 Am. B. R. 131; 101 Fed. 422.) It has been held that one is a manufacturer who works up lumber into timber although he purchases the land as well as the standing timber. (*In re Cowles*, Fed. Cas. 3,297; 1 N. B. R. 280; *Hankey v. Jones*, Cowp. 745; *in re Chandler*, 4 N. B. R. 213; Fed. Cas. 2,591; 1 Lowell, 478; *Hall v. Cooley*, 2 N. Y. Leg. Obs. 282.) It was also held under the last act that one engaged in printing and publishing a newspaper is a manufacturer (*in re Kenyon*, 6 N. B. R. 238; s. c. 1 Utah Ter. 47); but corporations engaged in printing and publishing, are by the present statute expressly made liable to be adjudged involuntary bankrupts.

For a discussion as to what constitutes manufacturing see *People ex rel. New England Dressed Meat, etc. Co. v. Roberts* (155 N. Y. 408), in which it was held that a company engaged in slaughtering and refrigerating mutton was not engaged in manufacturing.

**Trading Corporations.**—Most cases as to who are traders have arisen in the English courts. Until the act of 24 and 25 Vict. ch. 134, no person but a trader could be made bankrupt. The question occasionally arose under the last American Bankruptcy Act, and also under the act of 1841. An elaborate note in *Parsons on Contracts*, 7th ed. volume 3, chapter on Insolvency and Bankruptcy collates all the English cases. The question is not so likely to be a puzzling one when it arises in the case of a corporation as in the case of an individual, since the latter may pursue many occupations, while corporations are by their charter given a more limited range of powers; but it is thought the following cases may be of service. To constitute trading, the transaction must not be isolated; there must be an intention to carry on the particular pursuit as a livelihood or as a regular business; one single act of trading is not sufficient; but nevertheless the intention to trade, rather than the quantity or frequency, is the test. (*Heanny v. Birch*, 3 Camp. 233; *Ex p. Moule*, 14 Ves. 602; *Ex p. Wilkes*,



2 Mont. & Ayr. 667.) But a single act may be enough if done with the intention of making a business of trading. (*Gimingham v. Laing*, 1 Rose, 472; *Ex p. Lavender*, 4 Deac. & C. H. 487; 2 Mont. & Ayr. 11; *Newland v. Bell*, Holt, 221; *Gale v. Halfknight*, 3 Starke, 56; *Patman v. Vaughan*, 17 R. 572.)

In the case of the New York and Westchester Water Co. (District Court, S. D. N. Y., reported in 3 Am. B. R. 508; 98 Fed. 711) it was held that a company incorporated to buy and sell water for power, manufacturing and hydraulic purposes which had confined itself entirely to obtaining and furnishing water for certain customers, cities and commercial boroughs, was not engaged principally in either trading or mercantile pursuits, under section 4b, on the ground that the furnishing of water was not the direct sale of any specific amount of water, but was in the nature of a use of the company's transportation service in return for fixed sums in the form of rentals. This case has been affirmed, upon opinion of the District Court, by the Circuit Court of Appeals of the Second Circuit, on May 5th, 1900. The opinion of the District Court contains a very valuable discussion of the authorities.

The following extract from the opinion of Judge Brown is instructive:

"I am of opinion that this water company is not within the provisions of the Bankrupt Act, because not 'engaged principally in either trading or mercantile pursuits,' in the sense in which I think those words are used. The question depends entirely upon the proper construction to be given to those words, since there are plainly no other words in the present act that could include an incorporated water company like this.

The Act of 1898 is much more limited in its application to corporations than the Act of 1867. By the latter act it was declared (sec. 5122, Rev. St.) to 'apply to all moneyed, business or commercial corporations and joint stock companies.' The present act is restricted to corporations 'engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits.'

The intention of Congress greatly to restrict the application of the present act appears manifest, not only from comparison of the phraseology of the two acts, but also from the report of the Congressional conference committee upon this point, showing that at least railroad and transportation corporations and banks were intended to be omitted and left to be dealt with under the State laws. 31 Con. Rec. p. 6247, June 28, 1898. In the recent case of *In re Cameron*

Town Mut. Fire, Lightning & Windstorm Ins. Co. (D. C.), 96 Fed. 756, 2 Am. B. R. 372, it was accordingly held, that the present act does not apply to a mutual insurance company, and the petition in that case was dismissed. On the point here considered, Phillips, J., observes:

'Can it be said that a company "organized for the sole purpose of mutually insuring the property of the members, and for the purpose of paying any loss incurred by any member thereof by assessment," is principally engaged in a mercantile pursuit? When the Legislature changed the statute from "moneyed, business or commercial corporations" to the language "principally engaged in mercantile pursuits," it is to be presumed it was done for a purpose. The word "mercantile," in its ordinary acceptation, pertains to the business of merchants, and has "to do with trade, or the buying and selling of commodities." A merchant is one who traffics, or who buys and sells goods or commodities. . . . The term "mercantile pursuit" necessarily carries with it the idea of traffic, the buying of something from another or the selling of something to another, and is allied to trade. This concern has nothing in its business of the character of mercantile pursuit.' 96 Fed. 757, 758, 2 Am. B. R. 374, 375.

The case of a water company like this, obtaining by purchase about two-fifths of the supply which it furnishes to its customers, is not so clearly excluded as a mutual insurance company. But in each case as it arises the limitations imposed by the act must be carefully observed. No such corporation can be subjected to the operation of the Bankrupt Law, nor can the court acquire jurisdiction over it, unless it is found to be 'engaged principally in trading or mercantile pursuits.' These words must be interpreted in the sense in which they are commonly used and received, and not in any strained or unnatural sense for the purpose of including or of excluding particular corporations.

In Bouv. Law Dict. a trader is defined as 'one who makes it his business to buy merchandise or goods and chattels and to sell the same for the purpose of making a profit.' Black, Law Dict. says: 'One whose business is to buy and sell merchandise or any class of goods, deriving a profit from his dealings;' and the weight of authority seems to be that the proper description of the business of a trader includes both buying and selling, either goods or merchandise, or other goods ordinarily the subject of traffic. Per Lord Ellenborough in *Sutton v. Weeley*, 7 East, 442; Thompson, C. J., in *Wakeman v. Hoyt*, 28 Fed. Cas. 1,351; Lowell, J., *In re Chandler*, 4 N. B. R. 213, 5 Fed. Cas. 447; *In re Smith*, 2 Low. 69, 22 Fed. Cas. 395; *Love v. Love*. 15 Fed. Cas. 999.

The words 'mercantile pursuits' may have a little broader signification than 'trading.' 'Mercantile' is defined by the Century Dictionary as 'having to do with trade or commerce; of or pertaining to merchants, or the traffic carried on by merchants; trading; commercial.' It signifies for the most part the same thing as the word 'trading;' and by 'mercantile pursuits' is meant the buying and selling of goods or merchandise or dealing in the purchase and

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sale of commodities, and that too not occasionally or incidentally, but habitually as a business. *Norris v. Com.* 27 Pa. St. 494; *Com. v. Natural Gas Co.* 32 Pittsb. Leg. J. 310.

Selling merely the natural products of one's own land, it has been held, does not constitute trading, or a mercantile pursuit, even though some yearly purchases may be made by the seller in order to keep up his regular supply. *In re Woods*, 7 N. B. R. 128, Fed. Cas. No. 17,990; *Port v. Turton*, 2 Wils. 169; *In re Cleland*, 2 Ch. App. 466; *Ex parte Gallimore*, 2 Rose, 424. These terms are restricted also to dealings in merchandize, goods or chattels, the ordinary subjects of commerce; so that a railroad contractor, or a speculator in stocks, whether on his own account, or as broker, is not deemed a trader or merchant. *In re Smith*, 2 Low. 69, 22 Fed. Cas. 395; *In re Marston*, 5 Ben, 313, 16 Fed. Cas. 857; *In re Woodward*, 8 Ben. 563, 30 Fed. Cas. 542; *In re Moss*, 19 N. B. R. 132, 17 Fed. Cas. 901, per Choate, J. It has also been held that incidental purchases or sales by a person not otherwise a trader, will not make him such. Lord Eldon, *Ex parte Gallimore*, 2 Rose, 424; *Patten v. Browne*, 7 Taunt. 409; *In re Duff* (D. C.), 4 Fed. 519, per Choate, J.; *In re Kimball* (C. C.), 7 Fed. 461, per Lowell, J.

No doubt the powers of a corporation are to be determined by its charter and by the statutes applicable to it. The amendment of the charter of this corporation authorized it 'to buy, sell, use and deal in water for power, manufacturing and hydraulic purposes.' As above stated, however, the evidence is that it did not furnish water for these purposes; and under the Bankrupt Act the question is, not how extensive the company's powers may be, but in what pursuits the corporation is in fact principally engaged, and whether these pursuits are principally trading or mercantile."

In the case of *In re San Gabriel Sanitorium Co.* (2 Am. B. R. 408; 95 Fed. 271) it was decided that a sanitorium which charged fees and did business as a private hospital was a trading corporation. This decision does not commend itself to us as authoritative.

As to other corporations becoming bankrupts under the provisions of section 3a (5), see that section, *ante*.

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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.

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Analogous Provisions of Former Acts.—

R. S. § 5121; act of 1867, § 36; act of 1841, § 14.

**Definitions.**—By section 1 (19), the word “persons” is made to include partnerships; by (6) all “limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association” are included in the definition of “corporations,” so that this section applies to general partnerships only, and only to partnerships which are such as between the parties. It does not extend to partnerships

by estoppel or such as are partnerships as to creditors only. (*In re Kenney*, 3 Am. B. R. 353; 97 Fed. 554.)

**Construction of the Section.**—In the case of *In re Henry L. Meyer, et al.* also reported as *Chemical Bank v. Meyer et al.* (3 Am. B. R. 559; 39 C. C. A. 368; 98 Fed. 976) where the act of bankruptcy alleged was an assignment for the benefit of creditors purporting to transfer all the property of the partnership, and made by one partner, Wallace, C. J., gives the following general construction of this section :

“By the provisions of section 5 of the Bankrupt Act, ‘a partnership,’ during the continuance of the business or after its dissolution and before the final settlement of its business may be adjudged a bankrupt, and jurisdiction of all the partners and the administration of the partnership and individual property is conferred upon any Court of Bankruptcy having jurisdiction of one of the partners. The section provides that the creditors of the partnership shall appoint the trustee; that the trustee shall keep separate accounts of the partnership property and of the individual property; that the expenses shall be paid from the partnership property and the individual property as the court may determine; and that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and any surplus added to the assets of the individual partners, and the net proceeds of the individual estate of each partner shall be appropriated to the payment of his individual debts, and any surplus to the payment of the partnership debts. It authorizes the partnership estate to prove against the individual estates, and *vice versa* and directs the assets of the partnership estate and the individual estates to be marshaled so as to prevent preferences, and secure the equitable distribution of the property of the several estates. It further provides that the property of a partnership shall not be administered in bankruptcy when less than all the members are adjudged bankrupt; and in that event the partner not adjudged bankrupt is to settle the partnership business expeditiously, and account for the interests of the adjudged bankrupt. The last 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 settling the partnership business, and, like those immediately preceding it, is merely declaratory of a recognized equitable principle of administration in bankruptcy. *Amsinck v. Bean*, 22 Wall. 403, 22 L. Ed. 801; *Murray v. Murray*, 5 Johns. Ch. 60; *Colly. Partn.* 854.

We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual partners as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and

marshal and distribute them according to equity. The assets of the individual estates and the debts provable against them can be ascertained without adjudicating the individual partners bankrupt. The language does not require such an adjudication. The section is silent respecting a discharge of the partners individually. It does not, by terms or by implication, preclude an adjudication of the individual partners as bankrupt in the partnership proceeding; and, if there is such an adjudication, there is nothing to prevent the partners from receiving a discharge individually, if they are otherwise entitled to it under the act. But, as the commission of an act of bankruptcy is indispensable to jurisdiction in an involuntary proceeding, the individual members cannot be adjudged bankrupts in such a proceeding who have not committed, or been participants in committing, one of the enumerated acts.

Section 5 differs significantly in its phraseology from that of the former acts in regard to the bankruptcy of partners. It takes the place of section 14 of the Bankruptcy Act of 1841, and of section 36 of the Bankruptcy Act of 1867. These sections of the earlier acts authorized an adjudication of bankruptcy of 'persons who are partners in trade,' instead of 'a partnership;' and, while providing for the administration of the joint and separate estates substantially like section 5, provided, as section 5 does not, for granting or refusing a discharge to each partner. By the language of these acts, it was a prerequisite that all the persons comprising the partnership should be adjudged bankrupt before the warrant could issue entitling the assignee to administer the joint estate, and the provisions respecting a discharge show that such an adjudication was contemplated.

**When a Partnership is Insolvent.**—It has been held in a recent case in the Circuit Court of Appeals for the 6th Circuit (*Vaccaro v. Security Bank*, 4 Am. B. R. 474) that where the joint assets of a partnership are not sufficient to pay the liabilities of the firm, but the individual property of all the members of the firm, including the deceased partner, after deducting individual debts and exemptions and the dower of the widow of the deceased partner, are, added to the partnership assets, much more than sufficient to pay the debts of the firm, the partnership is not insolvent within the meaning of section 3 of the Bankruptcy Act. (*In re Blair*, 3 Am. B. R. 588; 96 Fed. 76.) This proceeds from the general principle of the liability of the partners' individual estates for the debts of the firm.

The differences indicate that Congress intended that a partnership should be, for the purpose of the Bankrupt Act, in all respects 'a person,' as defined by section 1, entitled to a discharge under section 14, and subject to be adjudged a bankrupt in involuntary proceedings if it has committed any of the

acts of bankruptcy specified in section 3. There are many provisions in the act which refer to the personal immunities and duties of bankrupts, and are not applicable to an entity like a partnership, but these are equally inapplicable to a corporation.

Under the former acts, there could not be an adjudication of all the partners unless a joint act of bankruptcy had been committed, and consequently there could be no administration of the joint effects (see *Redmond v. Martin*, 9. N. B. R 408, Fed. Cas. No. 11,632); and cases arose in which creditors were without an adequate remedy. It may have been the purpose of Congress in the present act to cure the defect."

**Who Must Petition.**—The section contains no express provision as to who may become petitioners in proceedings to adjudge the parties bankrupt, but under G. O. 8 and under the cases decided, it is held in analogy to the Act of 1867 that co-partners may be adjudged bankrupt, 1st, where all unite in a voluntary petition; 2nd, where a creditor files an involuntary petition; 3rd, where one or more but not all the co-partners petition. The last case is provided for in G. O. 8, which is as follows:

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 petitioner 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 the 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.

When a petition on behalf of part of the members of the firm is filed in the clerk's office it is to be classed as a voluntary proceeding, and in the absence of the judge from the district or division, the clerk must refer the case to the proper referee. If, however, the non-joining partner or partners upon notification should make defense to the petition then the proceeding would become as to them an involuntary one and the rules prescribed for

involuntary proceedings followed. (See *In re Murray et al.* 3 Am. B. R. 601; 96 Fed. 600; compare *in re Russell*, 3 Am. B. R. 91; 97 Fed. 32.) It is very clear where one of the members of the firm desires a discharge from the firm as well as from individual debts he must set up in his petition that he is a member of the firm and that he seeks such discharge. (*In re Russell, supra.*)

Where one of the partners is an infant an adjudication should be made against the partner who is of age and against the firm, but as to the minor partner the petition should be dismissed on the ground of minority. (*In re Dunnigan Bros.* 2 Am. B. R. 628; 95 Fed. 428; compare *in re Duguid*, 3 Am. B. R. 794; 100 Fed. 274.)

**The Act of Bankruptcy.**—To what extent an act of one partner which is an act of bankruptcy may be imputed to the whole firm has been somewhat questioned by the authorities. It would seem that for any act done by one member which is within any possible scope of delegated authority, the firm and all its members would be liable in all civil proceedings, including bankruptcy proceedings; but if an act of any one member of the firm, although it is an act of bankruptcy, is not within the scope of his authority, and has not been sanctioned or ratified by his co-partners, and was not done by their direction or authority, then it cannot be considered a firm act, and they cannot all be put into bankruptcy because of it. (*In re Meyer*, 3 Am. B. R. 559; 39 C. A. 368; 98 Fed. 976.)

Generally it will be found that the members of the firm can all be charged with knowledge, or at least with a tacit sanction of the act of the offending member. The circumstances attending the transaction may be such that the law will presume that it was authorized or ratified by all the members of the firm. But if there has been no firm act of bankruptcy and no individual act ratified by the other members of the firm, and no act of any one member which was within the scope of a partner's authority, still all the members of the firm may be adjudged bankrupt, if each



of them individually has committed an act of bankruptcy. Compare *in re Penn*, 5 N. B. R. 30; Fed. Cas. 10,927; 5 Ben. 89.)

**Who May be Adjudged.**—As has been pointed out (*In re Meyer*, 3 Am. B. R. 559; 39 C. C. A. 368; 98 Fed. 976) it has been held that the individual partners may be adjudged as bankrupt in the partnership proceeding.

In the Eastern District of North Carolina Judge Purnell has recently held (*In re Barden*, 4 Am. B. R. 51; 101 Fed. 553) that where a petition is filed by a partnership to have the firm adjudged bankrupt, and also petitions by the individual members of the firm, each petition and the accompanying schedules constitutes separate and distinct cases, and the referee and trustee are entitled to separate fees in each case—one on the partnership petition and one on the petition of each individual member.

But in the District of New Hampshire, Aldrich, J. held (*In re Gay*, 3 Am. B. R. 529; 98 Fed. 870) separate petitions necessary and further held that where a firm and the individual partners become petitioners and set out the various accounts of indebtedness and the assets and various interests, and ask to be adjudged bankrupts, the practice adopted in New Hampshire is to discharge from both partnership and individual indebtedness in one proceeding, upon one petition, and only one filing fee is necessary.

The learned Judge says that this is the practice in Maine and Massachusetts and further says:

“ Paragraph ‘c’ of section 5 of the Bankrupt Law contemplates that the Bankruptcy 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. Paragraph ‘d’ provides that the trustee shall keep separate accounts of partnership property and property belonging to the individual partners; and paragraph ‘e’ that the expenses shall be paid from the partnership property and the individual property in such proportion as the court shall determine. So it would seem that in a proper case (and I mean by that upon sufficiently comprehensive papers, and conditions warranting it) the court may wind up the affairs and relieve from the indebtedness of the partnership and the individual partners in one proceeding, and apportion the expenses as equity may require. Furthermore, it may be said that Congress, for the purpose of making the law a practical, working law, authorized and

called upon the Supreme Court to promulgate necessary rules and forms to be used in its administration. Form 2 of the rules prescribed by the Supreme Court (18 Sup. Ct. xviii.) is entitled 'Partnership Petition;' and I assume that it was intended to provide a form for putting the provisions of section 5 of the Bankrupt Law into practical operation, and that it was formulated in accordance with the view of the Supreme Court as to what section 5 contemplated should or might be done. That form, which was strictly followed by the petitioners in this case, clearly contemplates that not only the partnership assets may be inquired into, but the assets and liabilities of the individual partners may be inquired into and wound up in one proceeding. Aside from what seems fairly to follow from the different paragraphs of section 5, and the form promulgated by the Supreme Court, it may be observed that the different results may be more easily, conveniently and inexpensively reached in one proceeding, upon proper papers, than upon several separate and distinct proceedings, involving different hearings, and what might be called circuitry of legal process."

To the same effect is *In re Langslow*. (No. District of N. Y. 1 Am. B. R. 258; 98 Fed. 869). It seems to be the better rule that in order to secure a discharge from firm debts by a member thereof, there must be an adjudication of the firm as bankrupt (see *In re Meyers*, 2 Am. B. R. 707; 96 Fed. 408; s. c. 3 Am. B. R. 260; 97 Fed. 757.) But this rule is not without doubt. It is held in England that if one member of a firm becomes bankrupt and obtains a discharge he is relieved from all debts joint and separate. (*Ex parte Yale*, 3 P. Wms. 24, note A; *Thomas v. Harding*, 3 C. B. [N. S.] 254.)

**After Dissolution.**—The express provision in this section that a partnership may be adjudged bankrupt even after its dissolution and before the final settlement thereof, although it is simply declaratory of a general principle of law that a partnership continues as to creditors until all its assets are applied to the payment of any existing debts, yet settles a much mooted question which arose under the former act.

In a recent case, *Brown, J. (In re Hirsch*, 3 Am. B. R. 344) of the Southern District of New York says:

"Finding that there were no assets of the firm, the question is presented whether the adjudication and discharge of the bankrupts in a joint proceeding by them as partners can be sustained under the Act of 1898. Under the

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former Act of 1867, it was ruled in this district that a firm proceeding should not be sustained where there were no assets at the time of the petition. This was based in part on the peculiar wording of the Act of 1867. *In re Crockett*, 2 Ben. 514, Fed. Cas. No. 3,402; *In re Hartough*, 3 N. B. R. 422, Fed. Cas. No. 6,164; *Hopkins v. Carpenter*, 18 N. B. R. 339, Fed. Cas. No. 6,686. In other districts there were divers adjudications, the majority being in favor of upholding the joint proceedings. *In re Williams*, 1 Low. 406, Fed. Cas. No. 17,703; *Hunt v. Pooke*, 5 N. B. R. 161, Fed. Cas. No. 6,896; *In re Noonan*, 10 N. B. R. 330, Fed. Cas. No. 10,292.

The language used in the present act seems to me to have been designed to put an end to this doubt, since it authorizes a partnership to be adjudged bankrupt 'after its dissolution and before the final settlement thereof.' Section 5a. The petition alleges the fact of dissolution, and that there has been no final settlement of the firm affairs. The proof shows the existence of debts to a considerable amount unpaid; and incontestably, it seems to me, there is no 'final settlement' of the business of a firm, until its debts are paid or in some way extinguished, by the Statute of Limitations, or otherwise. The decisions to this effect under the present law seem to be fully justified by the terms of the Act of 1898 (*In re Levy* [D. C.], 95 Fed. 812 (2 Am. B. R. 21), *In re Altman*, [D. C.], 95 Fed. 263, 264, last sentence (2 Am. B. R. 407), *In re Freund*, 1 Am. B. R. 25; although, in my own judgment a partner may at his option proceed upon his individual petition for his own adjudication and discharge without reference to the other partners, as under the Act of 1867 (*In re Abbe*, 2 N. B. R. 75, Fed. Cas. No. 4; *In re Marks*, Fed. Cas. No. 9,094; *Crompton v. Conkling*, 15 N. B. R. 417, 420, Fed. Cas. No. 3,408; *Id.* 9 Ben. 225, Fed. Cas. No. 3,407), where all are insolvent and there are no firm assets whatever, inasmuch as partnership debts are all several, as well as joint. *In re Meyers* (D. C.), 96 Fed. 408, 2 Am. B. R. 707; *In re Laughlin*, 96 Fed. 589, 3 Am. B. R. 1; *In re Winkins*, 2 N. B. R. 349, Fed. Cas. No. 17,875; *In re Downing*, 3 N. B. R. 748, Fed. Cas. No. 4,044. There is nothing in the present act or rules necessarily excluding this course in such a case; it prejudices no one; and it is recommended by its simplicity and convenience in often avoiding the useless burden of proceeding adversely and by publication against an insolvent partner who may be inimical, or whose whereabouts may be unknown, and whose presence in the cause, real or constructive, would not be of the least benefit to creditors.

The specifications are not sustained, and the discharge of the bankrupts should be granted."

**Jurisdiction of Bankruptcy Court Over Partnership Estate in Case of Deceased Partner.**—Where the bankrupt is a member of a firm, the other member of which is deceased, and where his estate is in course of administration, the bankruptcy court may obtain jurisdiction over the partnership estate provided possession of the

assets can be obtained by the referee without forcible interference with property in the legal custody of the administrator of the deceased partner. (*In re Pierce*, 4 Am. B. R. 489; 102 Fed. 977.)

**Rights of Trustee.**—Independently of the express provision contained in subdivision *h* of this section, where only one member of the firm has become bankrupt, the solvent partner has the control and custody of the assets of the firm for the purpose of winding up the business. The trustee has no right to change the possession or to make any specific division of the joint effects. The only interest which he has in the property is an interest in the surplus which may exist after the payment of all debts and expenses. This interest is subject to all the rights and liens of the other partners. (Story on Partnership, section 375.) The bankruptcy works a dissolution of the firm, and the bankrupt member is *civilliter mortuus*, and the solvent partners have the same right to close up the business as if the firm had been dissolved by actual death of the bankrupt. The only way in which the assets of the firm can be administered in bankruptcy by the trustee is by putting all the members into bankruptcy. (*Amsinck v. Bean*, 22 Wall. 395.) But where a petition is filed against a partnership one of whose members is an infant, the provision of section 5h that the partnership property shall not be administered in bankruptcy except by the non-bankrupt partner does not apply. (*In re Dunnigan Bros.* 2 Am. B. R. 628; 95 Fed. 428.) Ruling in this case was that the adjudication should be alone against the firm and the adult partner. In the North Carolina District it has been held that where a partnership is composed of an adult and a minor, it may be adjudged bankrupt upon the petition of the adult partner and the assets will pass into the hands of the adult's trustee. (*In re Duguid*, 3 Am. B. R. 794; 100 Fed. 274.) Of course if the non-bankrupt partner consents the partnership assets may be administered as a partnership estate by the individual trustee of the bankrupt partner. This has been held in a case where after adjudication of the bankrupt as an individual a

secret partnership was discovered to have existed between the bankrupt and another and the consent of the bankrupt partner was implied from his standing by without protest. (See decision of Remington, referee, *In re Harris*, 4 Am. B. R. 132, which has since been affirmed by the Judge of the District Court of that district.)

If one member of the firm has been so adjudged, the other member may thereafter become bankrupt. (*Hunt v. Pooke*, 5 N. B. R. 161.) The solvent partner and the trustee are tenants in common of the firm assets; but the courts deem the solvent partner's equities the stronger, and will not disturb him in his possession, nor prevent him from retaining or distributing the funds, collecting the firm accounts and paying the firm debts, or selling the firm assets, if he does so without fraud. (*Murray v. Murray*, 5 Johns. Ch. 60; *Ayr v. Brastow*, 5 Law Rep. 498; *Talcott v. Dudley*, 5 Ill. 427.) If the solvent partner is obliged to institute a suit at law and the trustee is a necessary party to the record, he may be made such. In fact, the action should be so brought. (*Thompson v. Frere*, 10 East, 418; *Burt v. Mould*, 3 Tyr. 569; *Cannon v. Wellford*, 22 Gratt, 195; *Coe v. Whitbeck*, 11 P. 42; *Halsey v. Norton*, 45 Miss. 703; *Peel v. Ringgold*, 6 Ark. 546.) While the right of a solvent partner to administer the firm assets in cases where only one member is adjudged bankrupt is generally recognized, yet, the court of bankruptcy will give its equitable aid by its usual remedies in cases where he does not promptly and faithfully administer the same. (*McLean v. Ihmsen*, 1 West. L. J. 189; *Parker v. Muggridge*, Fed. Cas. 10,743; 2 Story, 334; *Ayr v. Brastow*, 5 Law Rep. 498.)

**Choice of Trustee.**—If a firm is adjudged bankrupt, the creditors of the individual members have no vote whatever in the election of a trustee. This matter is by statute left entirely to the firm creditors. This is true although there may be no firm assets. (*In re Phelps, Caldwell & Co.* Fed. Cas. 11,071; 1 N. B. R. 525; *in re Scheiffer & Garrett*, Fed. Cas. 12,445; 2 N. B. R. 591.)

**Jurisdiction.**—Although the section provides that 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, this it seems is only true when the proceeding is to adjudge all the members as a firm bankrupt. G. O. 6 provides that where petitions are filed in different districts against the same partnership or by different members thereof, if the court in which the petition is first filed has jurisdiction, it retains such jurisdiction to the end, except that for the greater convenience of parties such court may order the case transferred.

**Marshaling Assets.**—The provisions of this section as they appeared in former acts, were held to be merely declaratory of the general equitable principle upon which courts distribute the assets of bankrupt partnerships. The object of the enactment according to this decision was to settle a disputed question as to the right of a bankruptcy court (which is a court of special statutory creation), to exercise the general powers of a court of equity in regard to marshaling assets. (*In re Collier*, Taylor & Co. 12 N. B. R. 266; Fed. Cas. 3,002; *in re Melick*, Fed. Cas. 9,399; 4 N. B. R. 97.) Hence, in distributing the assets of bankrupt partnerships, the general rule of equity that partnership creditors have priority of payment from partnership assets and individual creditors priority of payment from individual assets, is to be followed; and it is equally true that all of the established exceptions to that rule apply in bankruptcy as well as in equity.

An interesting qualification to the general rule arises in cases in which there are no firm assets and no solvent living partner. In such case it has been held both by the English and American courts, that the firm creditors share *pari passu* with the individual creditors. By the English rule, to give firm creditors this right, two things are requisite, viz. an entire lack of firm assets, second, no living solvent partner. If there is a solvent partner who is dead, the exception nevertheless exists. (Story on Part. § 380; *Ex p. Sadler*, 15 Ves. 52; *Ex p. Kensington*, 14 Ves. 447.) The

rule has been followed in America, although some of the courts seem inclined to overlook the necessity of the existence of a living solvent partner. (*In re Mills*, Fed. Cas. 9,611; 11 N. B. R. 74; *in re Downing*, Fed. Cas. 4,044; 3 N. B. R. 748; 1 Dill. 33; *in re Goedde*, Fed. Cas. 5,500; 6 N. B. R. 295; *in re Knight*, 8 N. B. R. 436; Fed. Cas. 7,880; 2 Biss. 518, disapproving *Somerset Pottery Co. v. Minot*, 10 Cush. 592; *in re McEwan*, Fed. Cas. 8,783; 12 N. B. R. 11.) There is some conflict among the authorities as to whether there must be absolutely no assets belonging to the partnership or whether the fact that the assets of the partnership are insufficient to pay expenses of administration is sufficient. Both on authority and principle, it would seem that, where the firm assets are not of sufficient value to leave any fund whatever for distribution after the expense of their reduction to cash, it should be deemed that there are no partnership assets. In other words, after the payment of the expenses there must be some net proceeds from the partnership assets. (*In re Goedde*, *supra*; *in re McEwan*, *supra*; Story on Part. § 380; *in re Marwick*, 8 Law Rep. 169; s. c. 2 Ware, 233; s. c. 3 N. Y. Leg. Obs. 286; Collyer on Part. B. 4, ch. 2, § 3, pp. 626 and 627, 2d ed.; *Ex p. Leaf*, 1 Deacon R. 176; *in re Lee & Armstrong*, 2 Rose, 54; *Ex p. Peake*, 2 Rose, 54; *Ex p. Hill*, 5 Bos. & Pull. 191, A; *Ex p. Janson*, 3 Madd. R. 229; *Ex p. Kensington*, 14 Ves. 447.) The burden of proving that there are partnership assets rests upon the individual creditors who claim a right of priority in the individual assets. (*In re Rice*, Fed. Cas. 11,750; 9 N. B. R. 373; *in re Jewett*, 1 N. B. R. 491; Fed. Cas. 7,304.)

There have been two District Court decisions under the Act of 1898 dissenting from the English rule. (*In re Wilcox*, D. C. Mass. 2 Am. B. R. 117; 94 Fed. 84 and *in re Mills*, D. C. Indiana, 2 Am. B. R. 667; 95 Fed. 269.) In the last mentioned case Baker, J. held that where a partnership has been dissolved by a suit in a State court, and partnership creditors have received from partnership assets a dividend of 55 per cent, they cannot thereafter share *pari passu* with individual creditors in individual assets, which are being distributed in bankruptcy. Unless they

first surrender the dividend received in the dissolution proceeding, it would be inequitable for them to share with individual creditors who in that proceeding had obtained nothing and it is queried whether the exceptions frequently recognized by the courts is well-founded law—viz. that in marshaling and distributing partnership and individual assets, if there is no *living solvent* partner, joint creditors are entitled to share *pari passu* with individual creditors in individual assets. The Indiana rule is declared to be opposed to the recognition of the exception.

The grounds upon which Judge Baker renders his decision in this case seem to be the precise grounds upon which the decision turned in the English case of *Lodge v. Richard* (1 DeGex. J. & S. 610, discussed at length in *In re Wilcox*, 2 Am. B. R. 117 at 139), namely, the inequity of permitting the joint creditors to first exhaust the joint assets, and then claim a right to share in another fund (the individual assets) *pari passu* with individual creditors. Yet it is to be noted that the exception that where there is no living solvent partner and no joint assets, joint and individual creditors share *pari passu*, was recognized by the judges in that case as being a fixed rule of distribution even though possibly it was a rule hard to satisfactorily explain.

The opinion in *In re Wilcox* (94 Fed. 84; 2 Am. B. R. 117) is a most scholarly review of all the leading decisions on the point, both English and American, for the last two hundred years. It is admitted in it that there has been not only much conflict between these decisions, but that there has been a wavering or variance in the several decisions of the same forums. The learned judge in that opinion reaches the conclusion that at least, under the present Bankruptcy Law, the former well-recognized exception to the general rule as to marshaling and distributing the property of insolvent partnership, viz. that in case of no joint assets and no living solvent partner, joint and individual creditors should share *pari passu* in individual assets, is no longer to be recognized.

The decision of the judge in *In re Wilcox* seems to be a courageous and independent determination to declare as no longer



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good law an exception to a general rule, which exception always proved one difficult for courts and judges to justify upon principle or reason. But a review of the cases nevertheless seems to show that a large majority of them—even those considered in *In re Wilcox*—regarded the exception as a fixed and well-recognized one, and as a rule of law so long settled, that, upon principles of public policy and upon the presumption that contracts are entered into and transactions are undertaken with reference to it, it should not be disturbed.

The language of the Statute of 1867 upon the subject of marshaling and distributing partnership estates seems to have been without material difference from that of the present act; yet under that act many of the courts, as will be seen by a review of the cases cited above and also those discussed in *In re Wilcox*, held that the exception above mentioned still existed.

**What are Firm Assets and What are Individual Assets?**—Questions as to whether assets are partnership or individual frequently arise, sometimes from the nature of the property or more often from transactions between the several partners or between the firm and one partner.

Both personal property and real property may be held by the partnership.

Real estate purchased by a partnership for partnership purposes, with partnership funds, is regarded in equity, so far as the firm and its creditors are concerned, as personal property. (*Greenwood v. Marvin*, 111 N. Y. 423; 19 St. Rep. 612.)

The English doctrine is that partnership realty is *ipso facto* converted into personalty, not only between the parties, but also as affecting the rights of the heirs, administrators, etc. of a deceased partner, unless the partners especially express their intention that it be otherwise.

The New York rule, which is the American rule, holds, in the absence of any agreement to the contrary, that it retains the character of realty until the occasion arises for a conversion, and then becomes personalty only to the extent required. The portion not

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required for partnership equities retains its character as realty, and the rule leaves the laws of descent to their ordinary operation. (*Darrow v. Calkins*, 154 N. Y. 503; 61 Am. St. Rep. 637.)

The good-will of a partnership business is treated as a firm asset. No matter how valuable or valueless it may be, it is subject to sale with the other partnership assets upon the winding up of the firm business. (*Vonderbank v. Schmitt*, 44 La. Ann. 264; 15 L. R. A. 462; 32 Am. St. Rep. 336.)

Questions as to what are partnership and what are individual assets more frequently arise where there have been transfers of property once belonging to the firm to one member thereof. If a firm is solvent, it is perfectly legal and proper for one member to purchase the firm assets upon an agreement to pay the firm debts, or for other valuable consideration. If such a transfer is made in good faith by a solvent firm, the property becomes, both in law and equity, the individual property of the purchasing member. Firm creditors may still look to all of the members for payment of their claims; or, if they choose, they may accept the assuming member as their sole debtor. (*In re Collier*, Taylor & Co. Fed. Cas. 3,002, 12 N. B. R. 266; *in re Long*, Fed. Cas. 8,476; 7 Ben. 141; s. c. 9 N. B. R. 227; *in re Downing*, Fed. Cas. 4,044; 1 Dill. 33; s. c. 3 N. B. R. 748; *in re Wiley*, Fed. Cas. 17,656; 4 Biss. 214; *in re Mills*, Fed. Cas. 9,611; 11 N. B. R. 74.) But if a firm is insolvent and if a sale to one partner is made with the intention of enabling the individual creditors of the purchasing partner to obtain payment from a larger fund, thereby giving them a preference; or, if for any other reason, the transfer is inequitable, it will be treated by the court of bankruptcy as null and void, and the property will be disposed of as if it were still partnership assets. (*In re Cook & Gleason*, Fed. Cas. 3,151; 3 Biss. 116; *in re Byrne*, Fed. Cas. 2,270; 1 N. B. R. 464; s. c. 7 A. L. Reg. 499.) This, in fact, is nothing more than the invalidating of a preferential transfer, and distribution accordingly. (See *post* under this section *sub nom.* PROVING CLAIMS OF PARTNERSHIP ESTATE AGAINST INDIVIDUAL ESTATES, ETC.)

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It is very clear, as already pointed out, that any scheme or device resorted to by persons in contemplation of bankruptcy for the purpose of charging the partnership assets with the individual liabilities of the partners is violative of the provisions of the act. In a recent case (*In re Jones et al.* D. C. Mo. 4 Am. B. R. 141; 100 Fed. 781) this rule was laid down where firm indorsements were made at a time when the firm was in an embarrassed financial condition without any new consideration moving from the individual creditor to the firm and within four months prior to the involuntary firm petition in bankruptcy. In this case, Adams, J. says:

“ It seems to me that a statement of this case is enough to dispose of it. Section 5, subd. ‘g,’ of the Bankruptcy Act provides that the court shall marshal the assets of the partnership estate and individual assets so as to prevent preferences, and secure the equitable distribution of the property of the several estates. The same section provides that the net proceeds of the partnership property should be appropriated to the payment of partnership debts, and the net proceeds of the individual estates of each partner to the payment of his individual debts. Any surplus of either after the satisfaction of the claims of its appropriate class (and not until then) may be employed for the satisfaction of the claims of the other class. Section 60 of the act provides that any such transfer of property, or the effect of the enforcement of such transfer, as will enable any one of the bankrupt’s creditors to obtain a greater percentage of his debt than any other of such creditors of the same class, shall constitute a preference, and any such preference given within four months before the filing of the petition for adjudication of bankruptcy shall be voidable by the trustee. From these excerpts out of the Bankruptcy Act, as well as from others, which are not necessarily here mentioned, it is perfectly apparent what the general scheme of the Bankruptcy Act contemplates with regard to partnership assets, namely, that they shall be in good faith applied first to the payment of partnership debts; therefore any scheme or device resorted to by persons in contemplation of bankruptcy for the purpose of charging partnership assets with the individual liabilities of the partners is, in substance and effect, violative of the provisions of the act, and, inasmuch as the court is required to so marshal partnership assets as to secure the equitable distribution of the property of the several estates, it is clear that the court must brush away all these attempts at evasion and hold the parties to the requirements of the Bankruptcy Act administered broadly and equitably to accomplish the objects intended by it. The scheme resorted to, as shown in the statement of this case, by the bankrupts to foist upon the partnership assets the payment of their individual liabilities, was at least devised for an inequitable purpose within the purview of the Bankruptcy Act. The physical

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and undisputed facts surrounding the case are also, in my opinion, sufficient to stamp the transaction as fraudulent within the meaning of the Bankruptcy Act."

**What are Partnership and What are Individual Debts?**—This question arises frequently under two different sets of circumstances: first, where a member of a firm has assumed the firm indebtedness. Where such has been the transaction, firm creditors, according to the well-established rule in the United States, may avail themselves of the promise of the assuming member, and treat him as their individual debtor. If the transaction is by a solvent firm and is not tainted with fraud, then just as the purchase of firm assets by one member is valid, as set forth in the foregoing paragraph, so the assuming of the firm debts is equally valid and the firm creditors may elect to become individual creditors; and in this case they share equally with the other individual creditors in the distribution of the individual assets. (See *in re Downing, supra*; *in re Collier, Taylor & Co. supra*; *in re Long, supra*.) The question whether an indebtedness is a firm or individual indebtedness also often arises in cases where all the members of a firm have incurred a written obligation by signing their respective individual names, instead of the firm name. Where this is the case, the weight of authority is, that it is an individual indebtedness of each of the members of the firm, not a partnership indebtedness. (*In re Webb*, Fed. Cas. 17,313; 2 N. B. R. 614; *in re Bucyrus Machine Co.* 5 N. B. R. 303; Fed. Cas. 2,100; *in re Miller*, 1 N. Y. Leg. Obs. 38; *in re Herrick*, Fed. Cas. 6,420, 13 N. B. R. 312; *in re Roddin*, Fed. Cas. 11,989; 6 Biss. 377; *contra*, holding that in such cases there is merely a presumption that the obligation is individual rather than firm, but that the presumption may be rebutted, if in fact, it is a firm obligation; *in re Warren*, Fed. Cas. 17,191; 2 Ware, 322.) The decision of these questions is important in bankruptcy as it affects the question of the marshaling of assets and the priority of creditors of the different classes.

In a recent case, D. C. Pa. *In re Lehigh Lumber Co.* (4 Am. B. R. 221; 101 Fed. 216) where more than four months prior to

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bankruptcy a creditor of the bankrupt firm surrendered a claim against the firm and took the note of one of the partners in lieu thereof, which was renewed from time to time and judgment finally entered thereon, within four months of the bankruptcy of the firm, it was held that such creditor ceased to be a creditor of the firm upon taking the individual note, and the giving of such note and the judgment thereon did not constitute a voidable preference within the meaning of the Bankruptcy Act as against the firm, although there was evidence that interest on the note had been paid by the firm.

**Rights of Firm Creditors in the Individual Assets.**—We have already seen that a firm creditor may elect to become the individual creditor of one member of the firm who purchases the property and assumes the firm debts. We have also seen in this section that one member of the firm may be adjudged bankrupt involuntarily upon the petition of a creditor whose sole claim against him is one incurred by the firm. This rests upon the general principle of the law of partnership that each individual member is severally liable for all the debts of the firm. In England, when a firm creditor has thus instituted proceedings in bankruptcy against one member of the firm, based upon the latter's individual liability, there is a well-established exception to the general rule that partnership creditors are to be paid from partnership assets, and that individual creditors are to have a priority of payment out of individual assets. This exception is that the petitioning partnership creditor may share *pari passu* with the individual creditor. This right is limited to the petitioning creditor and does not extend to all the firm creditors. The exception is an arbitrary one, difficult to justify. It has been criticized even by English judges, but is regarded as a fixed rule. (*Twiss v. Massey*, 1 Atk. 67; *Ex p. Crispe*, 1 Atk. R. 133; *Collyer on Part. B.* 4, ch. 2, § 3, pp. 625 and 626, 2d ed.; *Ex p. Hodgson*, 2 Bro. Ch. R. 5; *Dutton v. Morrison*, 17 Ves. 207; *Ex p. Bolton*, 2 Rose R. 389.) We know of no American cases following it and its limitations, but it is regarded by Judge Story in his work on Partnership as law even here. Al-

though the rule above given does not seem to have been adopted in the United States in any adjudicated case, it has been held that the general rule as to marshaling assets applies only to cases where the joint estate, as well as the separate estate, is before the court for distribution; and where there are joint creditors as well as separate creditors. If only the separate estate is being administered in bankruptcy, then a partnership creditor may still prove against the individual estate, inasmuch as each member is individually liable to him for the debt; and therefore, as by coming into the proceeding in individual bankruptcy he makes himself an individual creditor, he shares *pari passu* with all the other individual creditors. (*In re Pease*, Fed. Cas. 10,881; 13 N. B. R. 168; *Lewis v. U. S.* 92 U. S. 618; s. c. Fed. Cas. 15,595; 14 N. B. R. 64.)

But this must be taken subject to the rule that in proceedings affecting the individual member of the partnership alone the individual assets must first go to the individual creditors. This however does not render the claim of the non-partnership creditor non-provable. Whether a debt is provable depends upon the nature of the liability, not upon whether there are any assets applicable thereto. (*In re Bates*, 4 Am. B. R. 56; 100 Fed. 263.)

**Rights of Creditors Holding Joint and Several Obligations.**—In England the rule was formerly established that a creditor holding the joint obligation of a firm secured by the individual obligation of one or more members thereof, could not avail himself in bankruptcy of his double security, but must elect which of the two he would hold. According to this rule when creditors have once elected they are excluded from any dividend from the other fund, unless there remains a surplus after the discharge of all the debts having preference therefrom; but such a creditor is entitled to a reasonable time to examine into and ascertain the true state of each fund, and even after he has made an election, will sometimes be allowed to recall it under equitable circumstances, when it will not interfere with the positive rights actually acquired by others. (Story on Part. § 384; Gow. on Part. ch. 5, § 3, p. 286, 3d ed.;

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Cooke's Bankrupt Law, 259, 4th ed.; *Ex p.* Rowlandson, 3 P. Will. 405; *Ex p.* Bond, 1 Atk. 98; Collyer on Part. B. 4 ch. 2, § 8, p. 651, 2d ed.; *Id.* B. 4, ch. 2, § 4, p. 630, etc.; Watson on Part. ch. 5, p. 289; *Ex p.* Edwards, 1 Mont. & McArth. 116.) This rule has long been followed by the English courts and applies not only to creditors holding partnership claims secured by the individual obligation of the members thereof, but to any joint creditor who takes the separate security of one of the debtors as a collateral to the joint obligation. (*Ex p.* Roxby, 1 Mont. on Part. 124; Collyer on Part. *supra*; Gow. on Part. *supra*.) But this rule even in England has always been subject to the exception that if a partnership creditor takes out a commission in bankruptcy against one of the members and receives the dividend under that commission out of the joint estate, he may bring an action for the residue against the other partner. (Young *v.* Hunter, 16 East, 258; Heath *v.* Hall, 4 Taunt. 326; Gow. on Part. *supra*; Collyer on Part. *supra*; Story on Part. § 387.) It is to be noticed that Judge Story cites no American cases following this rule; we know of none. The weight of American authority favors the right of a creditor who has a contract joint as to the firm and several as to one or more partners to prove against the firm and the individual partners or partner, and to receive dividends from the joint and individual assets (*in re* Bigelow & Kellogg, Fed. Cas. 1,397, 2 N. B. R. 371, citing *in re* Farnum, 6 Law Rep. 21), holding that "a party who has demanded and obtained two obligations, one joint and one several, has the right to enforce both, and that that right should not be denied on account of an arbitrary English rule reprobated by the most eminent judges and jurists in England, and never recognized in this country." In Massachusetts, after considerable discussion, the question has been settled in favor of double proof and double dividends. (*Bank v. Hall*, 160 Mass. 171 [1893]. Compare *Borden v. Cuyler*, 10 Cush. 478. See also *Mead v. Bank*, Fed. Cas. 9,366; 2 N. B. R. 178; s. c. 6 Blatch. 180.) It is a daily occurrence that creditors before making loans or entering into contracts, require firm contracts to be secured by the endorsement of

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individual members of the firm, for the very purpose of having the individual security of the individual property in addition to the security of the firm property. Since such endorsers could be sued upon their liability if they were not bankrupt, and the firm could also be sued, there seems no reason why in bankruptcy proceedings the creditor should not prove his claim and receive a dividend from both the partnership and the individual assets. (*In re Stephenson*, Fed. Cas. 13,374; 9 N. B. R. 256.) Such a creditor is entitled to the advantage gained by his caution and diligence, and can receive dividends from both funds. (*Emery v. Canal Bank*, Fed. Cas. 4,446; 7 N. B. R. 217, holding that the English rule as stated by Judge Story was exploded even in that country. See also *in re Howard, Cole & Co.* Fed. Cas. 6,750; 4 N. B. R. 571.) A joint creditor having security upon the separate estate of individual members, is entitled to prove against the joint estate without giving up his security upon the separate estate, and *vice versa*. He may prove against each for the full amount of the claim and receive a dividend from each, provided he does not receive from both in the aggregate more than the full amount of his claim. (*In re Howard, Cole & Co. supra*; *in re Bradley*, Fed. Cas. 1,772; 2 Biss. 515; *Stephenson v. Jackson*, Fed. Cas. 13,374; 9 N. B. R. 255.)

**Proving Claims of the Partnership Estate Against the Individual Estates and Vice Versa.**—Any claim which one member of the firm has against it may be proven in bankruptcy and *vice versa*. In the case of *Mead v. Bank* (Fed. Cas. 9,366; 2 N. B. R. 173; s. c. 6 Blatch. 180, see above), it was queried by the court whether in a case, where a creditor has a firm obligation secured by the endorsement of the individual partners which he proves against the individual estates and secures a dividend from, the trustee as representing the estate of the endorsing members could not prove the payment of that dividend as a claim against the partnership estate and recover for the benefit of the individual estate a dividend from the partnership estate.

It is now well established that the right of subrogation exists



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between a partnership estate and the estate of a member thereof. In the case *In re May et al.* (Fed. Cas. 9,327), it was decided by Lowell, J., that

“Partners and their estates come under the rule, for the reason that, in bankruptcy, estates are settled separately; the joint creditors are to have the joint estates, and *vice versa*, and although there is no contribution between joint and separate estates, unless there should be a surplus of one over the other, yet when the property of one is pledged for the debt of the other, a court of equity will apply the right of subrogation precisely as it would if the contracting parties were not partners, and thus do justice to the different creditors.”

And see to same effect *In re Foote* (Fed. Cas. 4,906, 12 N. B. R. 337). And under the present act Judge Lowell has held (*In re Dillon*, 4 Am. B. R. 63; 100 Fed. 627) that where upon the dissolution of a firm one partner agrees with his retiring co-partners to become responsible for the payment of all firm debts and liabilities, the retiring partners become in equity sureties for the remaining partner, and this relationship is recognized in bankruptcy. Hence where the retiring partner is compelled to pay a debt of a firm in whole or in part he becomes subrogated to the claim of the creditor, *pro tanto*. Where the original creditor has not proved his claim the surety seeking to prove it must be required to prove it in the creditor's name. See further section 57i, *post*, on the rights of sureties.

**Marshaling of Assets Where one is a Member of Two Firms.**—In such cases the assets of the bankrupt will be so marshaled that the creditors of each firm will have priority in the distribution of the assets of the firms of which they are respectively creditors. It would seem that if there is any surplus after paying the creditors of one firm, it should go to the individual creditors of the bankrupt, rather than to the creditors of the other partnership. (Compare *in re Leland*, Fed. Cas. 8,228; 5 Ben. 168; s. c. 5 N. B. R. 222; *in re Hinds*, Fed. Cas. 6,516; 3 N. B. R. 351.) If there is a surplus of individual assets it should be distributed *pro rata* among the creditors of both firms. (*In re Dunkerson*, 12 N. B. R. 391; Fed. Cas. 4,159.)

**Cross References.—**

**Transferring of Cases From One Jurisdiction to Another.—**(Compare section 32.)

**As to Effect of Discharge of one Partner on Copartners.—**(Compare section 16.)

**As to Effect of Discharge Where One Partner Only is Adjudged Bankrupt.—**(Compare sections 14 and 17.)

**Rights of Partners to Exemption from Firm Assets.—**(Compare section 6.)

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**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.

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**Analogous Provisions of Former Acts.—**

R. S. § 5045; act of 1867, § 14 (amended by act of June 8th, 1872, ch. 330, and by act of March 23, 1873, ch. 235); act of 1841, § 3; act of 1800, §§ 18, 34, 35, 53.

**Exemptions.—**The act of 1867 was more liberal than the present act in the exemptions allowed a bankrupt, for it gave him, first, certain specific articles necessary for a householder, such as are usually declared exempt by the laws of all States; second, such other property as is exempt by the laws of the U. S. from levy and sale upon execution; and, thirdly, such other property not included in the foregoing as was exempted from levy and sale upon execution by the laws of the state in which the bankrupt had his domicile. The present act allows only those exemptions to which the bankrupt would be entitled by the laws of the State wherein he has had his domicile for the six months, or the greater portion thereof, preceding the filing of the petition, which it will be re-

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§ 6.] Constitutionality — The Trustee's Rights in Exempt Property.

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membered is the necessary period of residence or domicile to give the court jurisdiction over the bankruptcy proceedings. Section 2 (1).

**Constitutionality.**—The provisions of the former bankruptcy act as to exemptions were assailed upon the ground of being unconstitutional, because of a lack of uniformity. The Constitution of the United States gives to Congress the power to establish a uniform system of bankruptcy. As the exemptions prescribed by the various State laws differ greatly in their character, value and requirements, it was frequently contended that this occasioned a lack of uniformity in the bankruptcy law, and that therefore it was unconstitutional. The decisions of the courts all uphold the constitutionality of such provision. The leading case upon the subject is *in re* Beckerford (Fed. Cas. 1,209; 1 Dill. 45; s. c. 4 N. B. R. 203) a decision by the United States Circuit Court, Judge Krekel, and sitting with him Justice Miller of the Supreme Court. These cases hold that the "uniformity" required applies to National laws alone.

**The Trustee's Rights in Exempt Property.**—Section 70 (a) expressly excepts exempt property from that, the title to which passes to the trustee. That officer is charged by law with the duty of designating or setting apart the exempt property for the bankrupt (section 47a [11]) and the bankrupt is required by section 7 (8) to make a claim in his schedule for the exemptions to which he may be entitled. By section 2 (11), the court of bankruptcy is given jurisdiction to determine all claims of a bankrupt to exemptions. The proper practice then, in designating and securing exempt property, is clearly indicated in the statute, and if followed there can be no question as to the rights therein of the trustee and of the bankrupt.

While the voluntary bankrupt must file with his petition a claim for his exemptions, and in case of involuntary bankruptcy the claim must be preferred by him after adjudication, the severance in fact of exempted property from the general estate must be made by the trustee and its value is to be determined by the trus-

tee, not by the debtor. (*In re Friedrich* [C. C. A.], 3 Am. B. R. 801; 100 Fed. 284.) The method of setting apart the exemption is prescribed in General Order 17, which requires the trustee to make a complete inventory of the property of the bankrupt immediately upon entering upon his duties and to make a report to the court within twenty days after receiving the notice of his appointment of the articles set off to the bankrupt by him, with the estimated value of each article (Form No. 47) and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report, whereupon 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. It seems to have been held by a number of writers on the subject of bankruptcy that appraisers may be selected to value the exemptions to be set apart to the bankrupt, but this view has no support in the statute according to the decision of the District Court of the Western District of North Carolina (*In re Grimes*, 2 Am. B. R. 730; 96 Fed. 529.) In his opinion in that case Judge Ewart says,

“The law as to the duties of trustees in setting apart the exemptions in bankruptcy is mandatory. Bankruptcy Act 1898, sec. 47, subsecs. 10, 11, prescribe that the trustees shall—

‘(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; . . . (11) set apart the bankrupt’s exemption and report the items and estimated value thereof to the court as soon as practicable after their appointment.’

Exceptions to such allotment may be filed by the bankrupt, or by any creditor, within twenty days after the same has been made and filed with the clerk or referee. This duty cannot be performed by any other party. It is wholly and entirely the duty of the trustee, and any agreement on the part of the bankrupt or the creditors that the exemptions shall be allotted 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. An impression seems to prevail that appraisers may be selected to value the exemptions to be set apart to the bankrupt, and even so careful a writer as Mr. Loveland, in his most excellent work on the Law and Proceedings in Bankruptcy, in his comments on the subject of exemptions, seems to have fallen into this error. On page 348 he says: ‘If it becomes necessary to appraise exempt property

for the purpose of setting it off, it may be appraised, like other property of the bankrupt, by three disinterested appraisers appointed by the court;' and he cites, in his notes on the same page, Bankruptcy Act 1898, § 70, subsec. b. On examination of this section, the only reference to the appointment of appraisers is found in § 70, subsec. b. This prescribes that '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.' It will be observed that this subsection in no wise authorizes and empowers appraisers to either value or set apart the bankrupt's exemptions. As a matter of course, in many cases in bankruptcy where the assets are nominal, and do not exceed the exemptions allotted, this appraisal is not necessary; but, where the assets are in excess of exemptions, the statute clearly requires that the property should be appraised. This inventory filed by appraisers may aid the trustee in making his allotment, but he is not in any wise concluded by it, nor has he any right to adopt it as his own. The object of the statute in requiring an appraisal of the estate of a bankrupt is evidenced by the last clause of this subsection, to wit: 'The real and personal property shall not be sold . . . for less than seventy-five per centum of its appraised value.' There were other exceptions to the allotment made by the appraisers of the bankrupts' exemptions, consideration of which is not necessary, as the allotment was fatal, for the reason above shown."

**Waiver of Exemptions.**—The right of a debtor to specifically waive exemptions must, of course, depend upon the law of the State, but the bankrupt may waive his right to have exemptions set apart by not claiming them (*In re Nunn*, D. C. Ga. 2 Am. B. R. 664), and it is held in the same district (Georgia) that a bankrupt claiming an exemption must make a full and fair disclosure of his property and he forfeits his claim where he has been guilty of fraud in withholding his assets. (*In re Waxelbaum*, 4 Am. B. R. 120; 101 Fed. 228.)

If the exemption is of property of a certain kind which the bankrupt is entitled to specifically, regardless of the amount of it, or of its value, or of his own circumstances, then it has been held that his failure to claim it will not deprive him of his right to it. But the general principle applicable to such cases is that he is bound to claim his rights, and if he does not do so he will be deemed to have waived them. (*Green v. Blunt*, 59 Iowa, 79; *Wicker v. Comstock*, 52 Wis. 315; *Pond v. Kimball*, 101 Mass. 105; *Spitley v.*

## Jurisdiction of Bankruptcy Court over Exempt Property. [Ch. III.]

Frost, 15 Fed. Rep. 299; *People v. Palmer*, 46 Ill. 398; s. c. 95 Am. Dec. 418. Compare *Vanderhorst v. Bacon*, 38 Mich. 669; s. c. 31 Am. Rep. 328; *Clapp v. Thomas*, 5 Allen [Mass.] 158.) Although a law allowing exemptions is always to be construed liberally and in favor of the debtor, yet, the burden of proving that property comes within the list of exemptions rests upon the claimant. He must bring himself and his property clearly within the statute. (*Guise v. State*, 41 Ark. 249; *Briggs v. McCullough*, 36 Cal. 542; *Swan v. Stephens*, 97 Mass. 7; *Griffin v. Sutherland*, 14 Barb. [N. Y.] 456.)

But an exemption is a matter of right and does not rest in the discretion of the trustee, who must allow it unconditionally. (*In re Brown*, 4 Am. B. R. 46; 100 Fed. 441.)

**Jurisdiction of Bankruptcy Court over Exempt Property.**—EX-empt property never becomes assets in the bankruptcy court for administration. The trustee has no title to it and has only a qualified right of possession in it. The title to exempt property remains in the bankrupt and the trustee can exercise no right and owes no duty concerning it other than to set it apart to the bankrupt. (*In re Camp*, 1 Am. B. R. 165; 91 Fed. 745; *In re Hill*, 2 Am. B. R. 798; 96 Fed. 185, and cases cited.) The better opinion is that the bankruptcy court has no jurisdiction either to enforce a lien upon such exempt property, nor to determine the rights of creditors asserting waiver against the property. (See *In re Grimes*, 2 Am. B. R. 730; 96 Fed. 529; *In re Camp*, 1 Am. B. R. 165; 91 Fed. 745; *in re Hatch*, 4 Am. B. R. 349; 102 Fed. 280, and cases cited.) There have been decisions the other way under the present act. (See *In re Garden*, 1 Am. B. R. 582; 93 Fed. 423; *in re Woodruff*, 2 Am. B. R. 678; 96 Fed. 317; *in re Sisler*, 2 Am. B. R. 760; 96 Fed. 402.) But under the recent decision of the U. S. Supreme Court in *Bardes v. Bank* (4 Am. B. R. 163; 178 U. S. 524) it is doubtful whether these last mentioned decisions are good law. Under the Act of 1867 it was held that the bankruptcy court can not properly entertain a proceeding to enforce a lien upon such property. (*In re*

Bass, Fed. Cas. 1,091; 15 N. B. R. 453.) But it has been held that where a creditor holds two liens, one on exempt property and the other on non-exempt property, a court of bankruptcy might enforce the general equitable rule that where one creditor has a security upon two funds, he can be compelled first to exhaust his remedy against the fund upon which other creditors have no lien. It is doubtful if a court would exercise a power so oppressive to a debtor; and at any rate this would hardly be an exercise of jurisdiction over the property. It is rather a jurisdiction over the person of the lienor. (*In re Sauthoff*, 14 N. B. R. 364; Fed. Cas. 12,379.)

It has been held in the District Court of Vermont that pension money which is exempt by statute is still subject to payment of statutory fees in bankruptcy on the ground that such fees are primarily for the benefit of the bankrupt, and do not depend upon property not exempt but upon absolute inability. (See *In re Bean*, 4 Am. B. R. 53; 100 Fed. 262; and see *in re Collier*, 1 Am. B. R. 182; 93 Fed. 191.) But the Circuit Court of Appeals of the 5th Circuit has held *contra*, and is undoubtedly controlling authority. (*Sellers v. Bell*, 2 Am. B. R. 529; 36 C. C. A. 513; 94 Fed. 811.)

**Liens on Exempt Property.**—From the fact that a court of bankruptcy has no jurisdiction whatever over the exempt property (other than to hear and determine the claims of the bankrupt, if disputed) and that such property is not within the contemplation of the act or affected by any of the proceedings pursuant thereto, it follows that all liens upon exempt property remain unimpaired and unaffected; that transfers of such property though made with an intent to give one creditor an advantage over others are not “preferences;” in short, that all interests in, and title to, the property remain unchanged and undisturbed. The right of a lienor upon exempt articles is a special property right which Congress does not intend to confiscate. (*In re Garrett*, 11 N. B. R. 493; Fed. Cas. 5,252; *Jackson v. Allen*, 30 Ark. 110; *in re Preston*, Fed. Cas. 11,394; 6 N. B. R. 545; *in re Lambert*, Fed.

## Exemption from Partnership Assets.

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Cas. 8,026; 2 N. B. R. 426; *in re* Dillard, 9 N. B. R. 8; Fed. Cas. 3,912; *in re* Whitehead, Fed. Cas. 17,562; 2 N. B. R. 599; *in re* Hutto, 3 N. B. R. 787; Fed. Cas. 6,960; *in re* Bass, Fed. Cas. 1,091; 15 N. B. R. 453; *in re* Deckert, Fed. Cas. 3,728; 10 N. B. R. 1; s. c. 9 Alb. L. J. 390; s. c. 1 A. L. T. [N. S.] 336; *in re* Broome, Fed. Cas. 1,966; 3 N. B. R. 343; s. c. 3 Ben. 488.) But there are decisions to the contrary, holding that the securing of an exemption is in the nature of a purchase by the bankrupt of the exempt property, the consideration being the surrender of all the rest of his estate, and that the supreme law of the land gives him this exempt property by a title, free and clear of the claims of all creditors, even though the claims be perfected liens. This can hardly be true under the present statute; it was questionable under the act of 1867. (See *in re* Hambright, Fed. Cas. 5,973; 2 N. B. R. 498; *in re* Griffin, Fed. Cas. 5,813; 2 N. B. R. 254; *in re* Owens, 12 N. B. R. 518; s. c. 6 Biss. 432; Fed. Cas. 10,632; *in re* Stevens, 2 Biss. 373; Fed. Cas. 13,392; s. c. 5 N. B. R. 298; *in re* Smith, Fed. Cas. 12,986; 8 N. B. R. 401, citing *in re* Kean, 8 N. B. R. 367; Fed. Cas. 7,630; *in re* Jordan, Fed. Cas. 7,514; 8 N. B. R. 180.)

**Exemption from Partnership Assets.**—There is a good deal of conflict as to the right of the partner to be allowed exemptions out of the partnership assets. This conflict arises mainly from the differences in the State statutes and the different methods of construing them. A few decisions under the present Bankruptcy Law by the federal courts are all that can be profitably referred to here. The case of *In re* Camp, D. C. Georgia, (1 Am. B. R. 165; 91 Fed. 745) after laying down the rule that where the courts of the State allow exemption from partnership assets, the courts of bankruptcy are in duty bound to allow a bankrupt residing in that State such an exemption, holds that no exemption from partnership assets will be allowed to a partner unless his interest in the firm property is equal in value to the exemption claim. This case contains a valuable collection of authorities on this subject. (See *In re* Grimes, D. C. North Carolina, 2 Am. B. R. 160; 96 Fed.



## § 6.] Right of Exemption in Property Fraudulently Conveyed.

529, which holds that where each member of a partnership has consented to the claims of the others for exemptions from partnership assets each partner is entitled to the exemptions allowed by the laws of the State in which he is domiciled, such consent being required by the State law. Compare also *in re* Stevenson, D. C. North Carolina, 2 Am. B. R. 230; 93 Fed. 789.) In Wisconsin individual members of a partnership may each with the consent of the other claim and receive from the partnership property the exemption allowed them by law if they have no individual property from which the exemptions may be secured. (*In re* Nelson, D. C. Wisconsin, 2 Am. B. R. 556.) And under a law of the same State the co-partners may sever their joint interest in the co-partnership property by common consent so as to permit each of them to claim their exemption. (*In re* Friedrich, 3 Am. B. R. 801; 100 Fed. 284.) But in Maryland such exemption is not allowed. (*In re* Beauchamp, 4 Am. B. R. 151; 101 Fed. 106.) The following cases decided by the highest State courts on this subject are taken from *In re* Camp, *supra*. In favor of such exemption see, *Stewart v. Brown* (37 N. Y. 350); *Newton v. Howe* (29 Wis. 531); *Worman v. Giddey* (30 Mich. 151); *Burns v. Harris* (67 N. C. 140); *Farmers, etc. Bank v. Franklin* (1 La. Ann. 393); *Harrison v. Mitchell* (13 La. Ann. 260); *Russell v. McLennon* (39 Wis. 570).

*Contra*: *Pond v. Kimball* (101 Mass. 105); *Guptil v. McFee* (9 Kan. 35); *Wright v. Pratt* (31 Wis. 99); *Kingsley v. Kingsley* (39 Cal. 665); *Gaylord v. Imhoff* (26 Ohio St. 317); *Rhodes v. Williams* (12 Nev. 20); *Hewitt v. Rankin* (41 Iowa, 35).

**Right of Exemption in Property Fraudulently Conveyed.**—On this subject there is also conflict of authority. Two principles of law here clash: first, that the trustee has no title to exempt property; second, that a conveyance fraudulent as to creditors is nevertheless valid between the parties thereto, and that by such a conveyance the fraudulent grantor loses all his title and interest in the property, although the trustee representing creditors may bring an action to invalidate the transfer. If property is not

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specially exempt, the trustee may, perhaps, bring suit. As the trustee in bringing such suit represents not the bankrupt, who has lost all his title, but represents the creditors, who by law are vested through the trustee with such property, we should say on principle that a bankrupt cannot claim any of such property as exempt in case the trustee should invalidate the fraudulent transfer. (Authorities for this proposition are: *Keating v. Keefer*, Fed. Cas. 7,635; 5 N. B. R. 133; *in re Dillard*, Fed. Cas. 3,912; 9 N. B. R. 8; *in re Graham*, Fed. Cas. 5,660; 2 Biss. 449; *in re Everett*, 9 N. B. R. 90; Fed. Cas. 4,579. The contrary has been held in *Penny v. Taylor*, 10 N. B. R. 200; Fed. Cas. 10,957; *Smith v. Kehr*, Fed. Cas. 13,071; 7 N. B. R. 97; *Cox v. Wilder*, 2 Dill. 132; s. c. 7 N. B. R. 241; Fed. Cas. 3,308; *in re Detert*, Fed. Cas. 3,829; 11 N. B. R. 293; *Bartholomew v. West*, 2 Dill. 290. Fed. Cas. 1,071; s. c. 8 N. B. R. 12; *McFarland v. Goodman*, Fed. Cas. 8,789; 11 N. B. R. 134; s. c. 6 Biss. 111.)

In *Comstock v. Bechtel*, 63 Wis. 656, the court held that the exempt property purchased with the proceeds of non-exempt property was nevertheless exempt. See *Wilcox v. Hawley*, 31 N. Y. 648, in which the court held that though the debtor had other property which he had disposed of, transferring the avails to his wife, that the property exempt by law was not to be withheld from those who had committed crimes or frauds, or from those who had participated therein. And see also opinion of Jones, Referee, *In re Peterson* (1 Am. B. R. 254).

**Purchasing Exempt Property on the Eve of Bankruptcy.**—Here again we find a conflict of authority. On the one hand, it has been held that if a bankrupt purchases exempt property on the eve of bankruptcy, so as to secure the exemption, he commits a fraud upon his creditors which will give to the trustee a right to take the property from him, free from any claim of exemption; that is, the transfer of the assets, given in exchange for the exempt property, will be voidable as being made with intent to defraud creditors. (*In re Boothroyd*, Fed. Cas. 1,652; 14 N. B. R. 223, citing *Brackett v. Watkins*, 21 Wend. 68; *Grimes v. Byrne*,

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Exempting Encumbered Articles.

2 Minn. 89; *in re* Wright, Fed. Cas. 18,067; 8 N. B. R. 430; to the contrary, *O'Donnell v. Segar*, 25 Mich. 367; *in re* Henkel, 2 N. B. R. 546; Fed. Cas. 6,361; s. c. 2 Saw. 305; *Randall v. Buffington*, 10 Cal. 491, and see *Comstock v. Bechtel*, *supra*.)

**Exemption of Property Subject to a Lien Dissolved by Adjudication of Bankruptcy.**—It has been held that where property of a bankrupt has been made subject to a lien obtained pursuant to an action, which lien is dissolved by the adjudication of bankruptcy, and such property has been sold before the dissolution of the lien, the bankrupt is entitled to the same exemption out of the proceeds as he would have had in the property. (*In re* Ellis, Fed. Cas. 4,400; 1 N. B. R. 154.) But the adjudication of bankruptcy ought in no way to affect the lien if it was on exempt property only.

**Rights Fixed by Petition.**—Under the Act of 1867 the rights of a bankrupt as to exemptions are fixed by the laws existing at the time of the filing of the petition. Any change in the laws, or even a change of residence, will in no way affect his rights. (Compare *in re* Kerr, 9 N. B. R. 566; Fed. Cas. 7,729; *in re* Dillard, 9 N. B. R. 8; Fed. Cas. 3,912.) The exemptions must thus be allowed by the laws of the State of his residence (if he has been a resident the greater part of six months), not by the laws of the State where the property is located. (*In re* Stevens, 5 N. B. R. 298; Fed. Cas. 13,392; s. c. 2 Biss. 373.) But as the title to a bankrupt's property does not now vest in the trustee till adjudication, it would seem as if, in case the bankrupt had in good faith acquired exempt property between the filing of the petition and the adjudication, he might claim it as exempt. The filing of the petition determines merely what law shall apply; it does not affect the title. (Compare section 70a.)

**Exempting Encumbered Articles.**—As it is universally admitted that exemption laws should be liberally construed so as to make generous provision for the unfortunate debtor, if a bankrupt owns

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property which is unencumbered and which may be exempt by the laws of his State, then such property should be set apart to him. Encumbered property may be set apart, but only when there is no other, and the exemption of the latter class of property does not destroy liens; the bankrupt merely receives the articles so set apart, subject to the liens. (*In re Rupp*, Fed. Cas. 12,141; 4 N. B. R. 95.)

**Right of Exemption is Personal to Bankrupts.**—The bankrupt or his family alone can claim the right of exemption. If they do not claim it, a mortgagee of exempt property cannot assert it, unless the exemption is waived in or by the mortgage. (*Edmondson v. Hyde*, Fed. Cas. 4,285; 7 N. B. R. 1; s. c. 2 Saw. 205.) The wife and children of a bankrupt may claim the exemption, the law being intended as much to protect them as the husband; thus the husband cannot deprive the family of the right to an exempt homestead merely by absconding, so long as he leaves his family in it. (*In re Pratt*, 7 Pac. L. R. 202.) The bankrupt may claim his exemption through his attorney or agent. (*Wilson v. McElroy*, 32 Pa. St. 82; *Regan v. Zeeb*, 28 Ohio St. 483.)

**The State Laws.**—As has been said the bankruptcy act does not enact that any new exemption shall be allowed a bankrupt. It merely provides that the allowance of those prescribed by State laws shall not be affected, hence the statutes of the State of residence of a bankrupt must be studied in each case and followed; and not only is the statutory law of the State to be recognized and followed, by the courts of bankruptcy and the trustee in bankruptcy in setting apart such exemptions, but the decisions of the courts of those States as to the meaning and construction of their respective laws are also to be followed. (*Goodall v. Tuttle*, Fed. Cas. 5,533; 7 N. B. R. 193.) It is an established and well-recognized principle that when a legislature adopts a statute of another State, it is presumed to have adopted the judicial construction given thereto. (*Sedgwick on Stat. and Con. Law*. 428-431; *Goodall v. Tuttle*, *supra*.)

**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.

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Analogous Provisions of Former Acts,—As to duty to obey orders and execute necessary papers: R. S. section 5104; act of 1867, section 26; act of 1800, (12)

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**Duty to Attend Meetings, etc.—Executing Necessary Papers.** [Ch. III.]

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sections 21, 33. As to executing transfers: R. S. section 5051; act of 1867, section 14. As to voluntary bankrupt's duty to file schedule: R. S. section 5014; act of 1867, section 11. As to involuntary bankrupt's duty to file schedule: R. S. section 5030; act of 1867, section 42; amended, act of July 27, 1868, ch. 258; section 2. As to contents of schedule: R. S. section 5015; act of 1867, section 11; act of 1841, section 1; also, R. S. section 5016; act of 1867, section 11. As to verification: R. S. section 5017; act of 1867; section 11. As to amendment of schedules: R. S. section 5020; act of 1867, section 26. As to examination of bankrupt: R. S. section 5086; act of 1867, section 26; act of 1841, section 4; act of 1800, sections 18, 23, 52. As to provisions analogous to the matters mentioned in the other subdivisions, consult "Analogous Provisions," under the sections cross-referenced to those subdivisions.

**Duty to Attend Meetings.** Section 7a (1)—Compare section 55 as to Meetings of Creditors.

**Duty to Obey Orders of the Court.** Section 7a (2)—The moment a person voluntarily files a petition in bankruptcy he submits himself personally to the jurisdiction of the court and becomes bound to obey its orders and directions, even before adjudication. (*In re Harris*, 3 N. Y. Leg. Obs. 152.) By section 1 (4) the term "bankrupt" includes a person against whom an involuntary petition has been filed, and a bankrupt, even before adjudication, is subject to the orders of the court. (*In re Bromley*, 3 N. B. R. 686.) Disobedience to the order of the court is punishable as a contempt. For the practice in punishing contempts before referees, see section 41, and see as to general power to punish for contempt, section 2 *ante*, and note on that subject.

**Duty to Examine Claims.** Section 7a (3)—Compare section 57 on Proof and Allowance of Claims and G. O. 21.

**Executing Necessary Papers.** Section 7a (4)—Although the trustee becomes vested by law, without any formal assignment, with title to the bankrupt's property including his rights of action, frequently it is necessary or advisable that there should be a record for filing. Any paper which the court thus deems necessary or advisable, it may order the bankrupt to execute; for instance, he may be required to execute such papers as will enable the trustee to be admitted to prosecute in his own name a suit pend-

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§ 7.] Informing Trustee of Evasions, etc.—Filing Schedules.

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ing in a State court, under the power conferred on him by section 11; and the court may enjoin the bankrupt from prosecuting such action or taking any steps therein. (*Samson v. Burton*, 5 Ben. 325; Fed. Cas. 12,285; s. c. 4 N. B. R. 1; *in re Clark*, 4 Ben. 88; Fed. Cas. 2,798; s. c. 3 N. B. R. 491.)

So the court may order the bankrupt to execute an assignment of a license (*In re Fisher*, 3 Am. B. R. 406; 98 Fed. 89), or to assign his interest in an insurance policy. (*In re Diack*, 3 Am. B. R. 723; 100 Fed. 770.)

**Executing Transfers.** Section 7a (5)—Compare “Foreign Bankruptcies,” section 17, as to title of the trustee to property in foreign countries.

**Duty to Inform Trustee of Evasion of Act or Proof of False Claim.** Section 7a (6) (7)—Compare section 29 *post* as to Crimes Against the Act.

**Schedule to be Filed.** Section 7a (8).—The filing of a schedule, if neglected, may be ordered by the court; and disobedience to the order will be punished as a contempt. The provisions of section 39 (6), that the referee shall prepare and file the schedules when the bankrupt neglects to do so, imposes upon that officer that duty, only in those cases where the bankrupt cannot be compelled personally to do it. The Supreme Court of the United States, pursuant to section 30, has prepared a form for schedules which is very complete and which renders it unnecessary to dwell upon the details, (see Form No. 1). G. O. 5 provides that all petitions and schedules shall be written or printed plainly without interlineation or abbreviation, except for purpose of reference. G. O. 9 provides that in case 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 of the date of adjudication a schedule giving names and places of residence of all creditors of the bankrupt according to the best information of such creditor. If the debtor is found and is served with notice to furnish a schedule of creditors and fails to do so, the petition-

ing creditor may apply for an attachment against the debtor or may himself furnish such schedule as aforesaid.

If these rules and the very complete form are followed so far as the circumstances of each case will permit, there will be little trouble arising in the making of schedules. A few points should be emphasized. Ditto marks should not be used and the names of creditors should in every case be written in full if possible. (*In re Mackey*, Opinion of referee Collier, 1 Am. B. R. 593.) It will be noticed that schedule "A" in the form has reference to debts and includes all kinds of debts, secured and otherwise. In this connection it is well to remember that where an individual member of a firm petitions for a discharge he should petition specifically for the discharge from firm debts as well as of individual debts and his firm as well as individual debts should be scheduled. (*In re Laughlin*, 3 Am. B. R. 1; 96 Fed. 589.)

The purpose of inserting names of creditors is to give to creditors and the trustee full, accurate and early information as to the condition of the estate. With regard to debts, although the act only requires that the residence of the creditor shall be stated, it will be advisable to state the post-office address as well. If the residence cannot be ascertained, that fact must be stated, and the proper practice requires that the bankrupt shall state what efforts he has made to ascertain the fact. (*In re Pulver*, Fed. Cas. 11,466; 1 Ben. 381; s. c. 1 N. B. R. 46.) The insertion of the name of a creditor is not an admission of his claim, which in any way binds the trustee or the other creditors. The creditor must still prove his claim and have it allowed, in order to secure a dividend. In inserting debts due to a firm, they should be stated as due to the firm and not to the individual partners (Anon. 1 N. B. R. 123); but it would be well to give the names of the individual members of the firm. Whether debts barred by the statute of limitations are provable in bankruptcy or not, see notes to sections 63 and 17. It has been held, however, that such debts should be inserted in the schedule. Even creditors whose claims are outlawed are entitled to notice of the bankruptcy proceedings, and for this reason their claims should appear in the schedule.



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 § 7.] Omission of Creditors from Schedule — Inventory of Property.
 

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Placing such claims upon the schedule does not revive the obligations so as to take them out of the statute of limitations; but in order that in no way may it appear to be in the nature of a promise to pay, or an admission of an existing indebtedness, it will be proper for the bankrupt in his schedules to mention that these claims are barred by limitation. (*In re Kingsley*, Fed. Cas. 7,819; 1 N. B. R. 329.) Under the statute of 1841 it was held that a judgment previously confessed though without consideration was proper to be inserted in the schedule, though not binding on the assignee. (*In re Robertson*, 1 N. Y. Leg. Obs. 20.)

It is proper for a bankrupt to schedule a claim which has been reduced to judgment by the creditor and appears by the records to be an unsatisfied judgment owing to such judgment creditor even if the judgment has been assigned and the bankrupt has knowledge of such assignment. (*Sellers v. Bell*, 2 Am. B. R. 529; 36 C. C. A. 513; 94 Fed. 811.)

**Omission of Creditors From the Schedule.**—As to its effect upon their claims, see section 17 (3) and notes. Whether it is an offense when willfully done, see section 29 (2); if an offense, then it bars a discharge, section 14*b* (1).

**The Inventory of the Property.**—The schedule of the bankrupt's property should be an itemized list of all the articles, title to which vests in the trustee under section 70; and it has been held that it is the bankrupt's duty to insert not only that to which he himself might claim title, but also all his property which might come into the hands of his trustee as the representative of creditors, although the bankrupt theretofore has conveyed that property in trust for the benefit of creditors, if the trust is one which would be voidable under the Bankruptcy Act (*in re Pierce & Holbrook*, Fed. Cas. 11,141; 3 N. B. R. 258; *Ashley v. Robinson*, 29 Ala. 112); also property fraudulently conveyed. (*In re O'Bannon*, Fed. Cas. 10,394; 2 N. B. R. 15; *in re Hussman*, Fed. Cas. 6,951; 2 N. B. R. 437.) But under the act of 1841 it was held that the bankrupt is bound to set forth in his schedules only such property as he has a right and interest in at the time of

petitioning, and if prior to that time he has lost his property rights in it, though by negligence, gaming, donation, extravagance or even fraud, it need not be set forth in the schedule. (*In re Robertson*, 1 N. Y. Leg. Obs. 20.) Vested interests in remainder should be included (*In re Wood*, 3 Am. B. R. 572; 95 Fed. 946); and all contingent interests. (*In re Connell*, 3 N. B. R. 443; Fed. Cas. 3,110.) All rights of action which are assignable, even though the damages are unliquidated, should be inserted in the schedules (*In re Orne*, 1 Ben. 361; Fed. Cas. 10,581; s. c. 1 N. B. R. 57), but not rights of action which die with the person. (*Crockett v. Jewett*, Fed. Cas. 3,402; 2 Ben. 514; s. c. 2 N. B. R. 208.) It seems that the bankrupt should include all property as to which he has or claims title, even though another may adversely claim it. (Compare *in re Beal*, 2 N. B. R. 587; Fed. Cas. 1,156; s. c. 1 Lowell, 323.) Property which one owns should be included in the schedules, even though it has been levied upon, as there is still a property right in it. The interest which one has in a firm should be stated, but not any of the specific articles, unless they are held in such a way as to show that the property right in them has been transferred from the firm to the partner. (*In re Norcross*, 1 N. Y. Leg. Obs. 100; *in re Beal*, Fed. Cas. 1,156; 2 N. B. R. 587; s. c. 1 Lowell, 323.)

**Verification of Schedules.**—The schedule may be verified before any officer mentioned in section 20.

**Amendment of Schedules.**—G. O. 11 provides that the court may allow amendments to the petition and schedules on application of the petitioner and that such amendments shall be printed, written, signed and verified like the original. In the application for leave to amend the petitioner must state the cause for the error in the original paper.

Amended schedules should be filed whenever there have been material errors or omissions. It may be done voluntarily or it may be required. Section 39 (2) makes it the duty of the referee to examine all schedules of property and lists of creditors filed

by the bankrupts, and cause such as are incomplete or defective to be amended. This power should be exercised, even although creditors or the trustee do not seek the aid of the referee. (*In re Orne*, 1 Ben. 420; Fed. Cas. 10,582; s. c. 1 N. B. R. 79.) Omissions are no longer a ground for refusing a discharge to the bankrupt unless the circumstances are such that the act becomes an offense under section 29. The schedules must be verified, and by the second subdivision of that section one may be punished by imprisonment if he has made a false oath or account in or in relation to any proceeding in bankruptcy. It follows that a verification of a schedule known to be incorrect or false constitutes an offense under this clause and is a ground for refusing a discharge. The bankrupt should promptly correct such errors and supply such omissions. If he does not do so as soon as they come to his knowledge it will be strong evidence of an intent to falsify. Amendments may be made before the bankrupt's discharge, even after objections to his discharge have been filed by creditors. (*In re Heller*, Fed. Cas. 6,339; 5 N. B. R. 46; *in re Connell*, Fed. Cas. 3,110; 3 N. B. R. 443; *in re Preston*, Fed. Cas. 11,392; 3 N. B. R. 103.) It seems that the bankrupt can amend his schedules without an order from the referee or the judge permitting it, and that the application is *ex parte*, and that no notice is necessary to creditors, and that no creditor has a right to oppose the application to amend. (G. O. 11.)

**Examination of Bankrupt.** Section 7a (9)—Under the Act of 1898 the examination of the bankrupt may be had at any time within the discretion of the court. In addition to this section, section 21 *post* under the head of "Evidence" gives the right to compel any person (including the bankrupt), who is a competent witness under the laws of the State to be examined concerning the acts, conduct or property of the bankrupt, under which heading the rules of evidence relative to the examination of bankrupts and other persons will be discussed. The intent of this section seems to be that the bankrupt shall be subject at the request of his creditors to at least one thorough, complete and exhaustive ex-

amination. In the case of *In re Mellen* (3 Am. B. R. 226; 97 Fed. 326), Brown, J., said:

“The practice hitherto followed, which I have no doubt is the correct practice, is to require the bankrupt to attend for examination whenever reasonably required by creditors for the purpose of establishing their objections to his discharge. The bankrupt must plead his privilege, if any privilege legally exists, to the particular questions propounded, and the proper rulings can then be made. The attendance of the bankrupt on the return day of the order to show cause is required for the purpose of enabling creditors to form specifications against his discharge. If an examination be then had, it may be used in the subsequent proceedings in support of the specifications before the referee; but this does not necessarily supersede a further examination of the bankrupt if on application by objecting creditors, the referee shall deem a further examination reasonable and necessary.”

In another case decided by the same judge, (*In re Price et al*, 1 Am. B. R. 419; 91 Fed. 635), the question arose as to the right of creditors to have an examination of the bankrupt to see if there were sufficient grounds for opposing his application for a discharge. The following opinion is instructive in this respect.

“Certain creditors of the bankrupts not having attended at the first meeting when the bankrupts were present and ready for examination, but having afterwards been admitted to prove their claim, applied to the referee to order an examination of the bankrupts in their behalf after the bankrupts had filed their application for discharge. The referee declined to order the examination until specifications in opposition to the discharge should be filed. The question has been certified to me.

I do not find anything in the Bankrupt Act or the rules which limits the examination of the bankrupt to any particular time or occasion. Under subd. 9 of section 7 it would seem that such an examination may be ordered at any time during the pendency of the proceedings. It is not unreasonable, I think, to allow creditors to examine the bankrupt concerning the mode of conducting his business for the purpose of ascertaining whether there had been any such offense committed, or failure to keep books, as would furnish a just ground for refusing a discharge; and therefore I think such applications should be allowed before specifications are filed, if applied for on the return day of the notice of the debtor's application for discharge, and no prior examination of that kind has been had. *In re Baum*, 1 N. B. R. 7; s. c. Fed. Cas. 1016; *in re Brandt*, 2 N. B. R. 215; s. c. Fed. Cas. 1813; *in re Mawson*, 1 N. B. R. 271; s. c. Fed. Cas. 9320; *in re Seckendorf*, 1 N. B. R. 626; s. c. Fed. Cas. 12,600; *In re Vogel*, 5 N. B. R. 396; s. c. Fed. Cas. 16,984.

Section 58, however, requires that creditors shall have at least ten days' notice by mail of 'all examinations of the bankrupt,' so that such an ex-

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Subject-matter of the Examination.

amination cannot proceed until after ten days' notice to all creditors, unless the notice of application for the bankrupt's discharge mailed to the creditors contained also a notice of the bankrupt's examination. Hereafter the published and mailed notices of application for a discharge should contain a notice of examination of the debtor to avoid the necessity of further notice to all creditors in case such an examination is allowed. Only one such examination as respects the discharge should ordinarily be had; since the statute in requiring that all creditors shall have notice of it, presumably intends that all should be equally allowed to participate in it, once for all, and not further harass the bankrupt. *In re Vogel*, 5 N. B. R. 396; s. c. Fed. Cas. 16,984."

The bankrupt is entitled to a reasonable time to prepare for examination if he is to be examined upon complicated matters, but not to time to consult counsel if the questions to be asked him do not require anything more than a knowledge of affairs. Reasonable time will be allowed him to shape his affairs so as to attend the examination. If he is present in court, the court may, upon request of a creditor or on its own motion, require him forthwith to answer any pertinent questions. (*In re Bromley & Co.* 3 N. B. R. 686.) Even before adjudication it is within the power of the court to require one against whom a petition has been filed to appear for examination. A proper case for such an examination might arise where the bankrupt has refused to deliver over property (which it is claimed he possesses) to a marshal holding a warrant issued pursuant to section 69.

In a recent case in the Eastern District of New York, *In re Franklin Syndicate* (4 Am. B. R. 224; 101 Fed. 402), it was held a bankrupt could be required to attend an examination prior to the appointment of a trustee for the purpose of enabling the referee to prepare schedules. And after the discharge of the bankrupt and within a year therefrom a creditor may petition a court of bankruptcy for an order to examine such discharged bankrupt to ascertain whether he has concealed after his discharge any property from his trustee. See opinion of Referee Olmstead, *In re Peters* (1 Am. B. R. 248), construing section 7 and section 15 of this Act.

**Subject-matter of the Examination.**—The matters as to which the bankrupt may be examined are set forth in detail in this sec-

tion. Very little need be added. While he cannot be asked as to property acquired after the adjudication, that being his own free from the claims of the creditors; nor as to business done after that time; and while he cannot be examined as to property which he does not own; yet questions upon these matters are proper when they will tend to shed light upon the bankrupt's own property rights or his business dealings, or if it is probable that he has any interest in such property which by law vests in the trustee, or when there is a connection between his ownership of the property mentioned and of the property passing to the trustee. (*In re Clark*, Fed. Cas. 2,805; 4 N. B. R. 237; *in re McBrien*, Fed. Cas. 8,666; 3 N. B. R. 345.) As the referee in bankruptcy under the present act has all the powers vested in a court of bankruptcy with respect to examination of persons as witnesses, except the power of commitment, (section 38 [2]) it follows that when the examination is before him he may pass upon the materiality, relevancy and propriety of any question asked. Refusal to answer any proper question, as well as leaving the examination before its conclusion, will be a contempt of the referee. (Section 41.) The bankrupt may undoubtedly be attended by counsel. His counsel, after the examination on the part of the creditors has been concluded, may undoubtedly ask him any questions tending to explain his answers or to give further information explanatory of his acts. Under the former act the register could not pass upon the materiality or propriety of questions asked, and if there was an issue raised, he was obliged to adjourn the matter into court for the decision of the judge. The examined party under that practice frequently felt a desire to consult with his counsel, and the existence and the extent of the right of consultation was a subject of dispute. It was generally held that whether or not he should be permitted to consult his counsel was entirely within the discretion of the register. Under the present act, as the referee can pass upon the propriety of questions, it would seem as if there were very few cases when it would be proper to allow any consultation. If the question is improper the bankrupt's attorney may state his objections. While in attendance upon his examination the bankrupt

is performing one of the duties which entitle him to protection under section 9, but he is not a witness in the technical sense of the word. He may be entitled to his expenses as set forth in the proviso to this section, but he cannot exact witness fees under the proviso to section 41. He does not fall within the class of persons mentioned in that proviso. Section 38 (5), authorizing the referee, upon the application of the trustee to order the employment of a stenographer, shows that the examination should be reduced to writing.

**Refusal to Answer.—Unsatisfactory Answers.**—A refusal to answer lawful questions is a contempt, and is punishable accordingly. So, also, is a false answer. The court has a right to demand a complete and satisfactory answer if it is within the power of the examined party to give it. If a fact is necessarily within the knowledge of the bankrupt, his statement that he cannot recollect it may in some cases be a contempt. (Compare *Ex p. Legge*, 22 L. J. Q. B. 345; s. c. 17 Jur. 415; *in re Bradbury*, 25 Eng. Law & Eq. Rep. 252.) The cases last cited were decided in the English courts and lay down the rule that when a bankrupt says, in answer to a question, that "he does not remember," or "does not recollect," he must give some reason for not remembering, else, if all the circumstances tend to contradict his statement as to his lack of memory, he may be punished for contempt, as if he had given a false answer; but no commitment can be made in such cases unless the examination has been full, fair and searching. (*In re Bradbury*, 18 Jur. 189.) In England it has also been held that a bankrupt may be committed by the court for answers upon his examination, which, on the whole, are unsatisfactory, and which do not truly impart information the bankrupt must possess; as where his answers are so clearly of an improbable character that they cannot be believed. (*In re Martin*, 11 Jurist, 461; *Ex p. Lord*, 11 Jurist, 186; 10 Mees & W. 462; 16 L. J. Exc. 118.) There are few American cases upon the extent of the power of the court to punish one for contempt because his answers are unsatisfactory. The English cases

are reviewed *in re* Salkey & Gerson (11 N. B. R. 423; Fed. Cas. 12,253). In that case it was shown that there was in the possession of the bankrupts at a certain time property worth twenty thousand dollars which was not contained in their schedule, and of which they gave no account. It appeared that the parties had concealed the twenty thousand dollars' worth of property so as to defraud their creditors and had refused to account for the same. Upon examination the parties said that "they had no account to render," that they "had told all that they knew upon the subject," and refused to answer any further because they "knew no more about the matter." The district court punished them for contempt, and the circuit court, before whom the matter was brought on a writ of *habeas corpus*, upheld the district court.

But the punishment for contempt can as a rule only be imposed after the most careful investigation and for disobedience to turn over property upon order. In the case of *In re* Schlesinger (3 Am. B. R. 342; 97 Fed. 930), arising under the Act of 1898, it was shown that the bankrupt had received considerable sums of money during the seven or eight months preceding the filing of his petition. No account could be extracted from him as to what was done with this money except that it was all paid out. To all inquiries for particulars his answer was, "I don't know" or "I don't remember". The trustee applied for an order directing him to pay over these sums of money. The referee denied the application except as to a certain sum admitted in the schedules to be in the bankrupt's possession. In the review of the referee's decision Judge Brown said:

"It is seldom, I think, that so open a defiance of the requirements of the Bankruptcy Law is met with. The examination of the bankrupt was begun on May 9th, while his business transactions were yet recent. The ignorance he professed in regard to the disposition of his money, is altogether incredible. I cannot regard his testimony on this subject as other than a tissue of perjuries. The destruction of vouchers while his papers in bankruptcy were preparing, is not consistent with any other inference than the intent to conceal the facts and defraud his creditors. *In re* Salkey, Fed. Cas. No. 12,253. It is no doubt correct, as the referee observes, that no order for the payment of money 'should be made unless the testimony in the case is such as to satisfy one beyond a reasonable doubt that the same is in fact in the possession or



under the control of the bankrupt;' and great caution should no doubt be observed in applying this remedy. *In re McCormick* (D. C. Nov. 17, 1899), 97 Fed. 566; 3 Am. B. R. 340. A debtor, however, is not to go scot-free because the precise amount of his frauds and concealments is not ascertainable; nor should the Bankrupt Act be suffered to be paralyzed, as respects the interests of creditors, by such means. An order may be entered accordingly."

In the case of *In re McCormick*, referred to above, application had been made to punish the bankrupt for not complying with the orders of the referee made on the examination of the bankrupt before him, directing him to pay the sums of \$1,500 and \$450 respectively to his trustee. Judge Brown in this case said:

"There can be no doubt of the authority of the court to enforce obedience to all 'lawful orders' and to punish contempts by virtue of the provisions above referred to. As such punishment may involve imprisonment, however, this power should be cautiously exercised, and in cases only where willful disobedience by the bankrupt is proved beyond reasonable doubt, as in a criminal case."

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So it was held in *In re Deuell*, D. C. Mo. (4 Am. B. R. 60; 100 Fed. 633) that where the bankrupt, a woman, fails to account for a relatively large amount of goods which she had purchased prior to her bankruptcy, and fails to keep any book accounts, and fails to make any explanation of the great discrepancies in the amount turned over to the trustee and the amount which she should have had on hand, and where the husband and son who carried on business for her have testified that they did not appropriate or have the goods or the money, she must either account for this money or pay the penalty by being committed for contempt until she accounts for and turns over to the trustee the sum which, after making all possible allowances in her favor, represents the amount unaccounted for.

See for further discussion of this question the subject of concealment of assets under the head of "Discharge."

**Criminating Questions.** Section 7a (9)—It is very doubtful whether the provision of the section gives the witness the privilege against self-crimination which is contemplated by the federal constitution. And so it has been held in three District Court

cases. (*In re Scott*, 1 Am. B. R. 49; 95 Fed. 816; *in re Rosser*, 2 Am. B. R. 755; 96 Fed. 305; *in re Feldstein*, 4 Am. B. R. 321; 103 Fed. 269.) On the other hand the Circuit Court of Appeals of the 9th Circuit, in *Mackel v. Rochester* (4 Am. B. R. 1; 102 Fed. 314), has held that the provision that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding, grants him constitutional immunity against prosecution and penalty, and hence compels him to give any testimony relevant and material to the inquiry. But the opinion of Judge Morrow in this case is not satisfactory in that it does not pass upon the real question.

It will be noticed that this section 7a (9), after requiring the bankrupt to submit to an examination concerning his business, etc. provides that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." In this respect it is similar to section 860, U. S. R. S. which provides that "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or his estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

It was held in the celebrated case of *Counselman v. Hitchcock*, (142 U. S. 547), that the last quoted section does not take away the privilege given by the Fifth Amendment of the United States Constitution, which declares that "No person . . . shall be compelled in any criminal case to be a witness against himself." It is true the constitution speaks of a "criminal case," but it was distinctly held in *Counselman v. Hitchcock*, which was a proceeding before a grand jury engaged in investigating and inquiring generally into certain alleged violations of the interstate commerce law, and in the language of Mr. Justice Blatchford, that "It is impossible that the meaning of the constitutional pro-

vision can only be, that a person shall not be compelled to be a witness against himself in a prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness *in any investigation, to give testimony which might tend to show that he himself had committed a crime.* The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

By reason of the decision of the court in *Counselman v. Hitchcock*, Congress amended the Interstate Commerce Act in 1893, so as to make it provide that the witness shall have absolute immunity from prosecution regarding the subject-matter as to which he testifies or produces documentary evidence (27 Stat. at L. 443). It was under this amended statute that the case of *Brown v. Walker* (161 U. S. 591), upon which Judge Morrow relies in *Mackel v. Rochester*, was decided. It will be observed that the amended statute secures absolute immunity from prosecution, instead of merely providing that the testimony shall not be offered against witness in evidence.

It is an ancient principle of the law of evidence that a witness shall not be compelled in any proceeding to make declarations or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures. (*Rex v. Slaney*, 5 Carr. & P. 213; 1 Greenlf. Ev. section 451; Wharton Crim. Ev. 9th ed. 461; *Southard v. Rexford*, 6 Cow. 254; *People v. Maher*, 4 Wend. 229.)

In a comparatively recent case in New York (*People ex rel. Taylor v. Forbes*, 143 N. Y. 219) the relator was adjudged guilty of contempt by the judge presiding at the trial term, for refusing to answer questions asked him before the grand jury held in conjunction with that court. The grand jury had been instructed by the court to institute an inquiry with the view of ascertaining who were guilty of the death of a certain person arising out of a "hazing" affair at Cornell University. The relator refused to tell who his room-mate was on the ground that it might tend to criminate him. The provision of the New

York Constitution is the same as that of the United States Constitution (N. Y. Const. article 1, section 6). In overruling the conviction of the relator, O'Brien, J. in the Court of Appeals, after referring to the constitutional provision in question, says:

"These constitutional and statutory provisions have long been regarded as safeguards of civil liberty, quite as sacred and important as the privileges of the writ of habeas corpus or any of the other fundamental guaranties for the protection of personal rights. When a proper case arises they should be applied in a broad and liberal spirit in order to secure to the citizen that immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed. . . . The right of a witness to claim the benefit of those provisions has frequently been the subject of adjudication in both the Federal and State courts. The principle established by these decisions is that no one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions to prove his guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained. . . . The question was fully discussed at an early day by Chief Justice Marshall on the trial of Aaron Burr, and every phase of it so completely explained and exhausted, that his views were followed in the subsequent decisions. A single quotation from the language used will illustrate the scope and extent of the immunity which the witness can lawfully claim. 'Many links frequently compose that chain of testimony which is necessary to convict an individual of a crime. It appears to the court to be the true sense of the rule that no witness is compelled to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness by disclosing a single fact may complete the testimony against himself, and to a very effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself would be unavailing, but all other facts without it would be insufficient. While that remains concealed in his own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule that declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose an act of this description.' All the leading authorities were elaborately reviewed in the recent case of *Counselman v. Hitchcock* (142 U. S. 547) in the Supreme Court of the United States. In that case the grand jury was engaged in the investigation of certain alleged offenses by railroad companies against the recent act of Congress for the regulation of interstate commerce, and the witness, a commission merchant and dealer in grain, refused to answer certain questions as to the tariff of rates allowed to him by some of the railroads, on the ground that it might tend to criminate him. The case in all its essential features was similar to this, and the court, sustaining the privilege contended for on behalf of the witness,

held that the object of the constitutional provision was to insure that a person should not be compelled, *when acting as a witness in any investigation*, to give testimony which may tend to show that he himself has committed a crime, and that its meaning was that a witness is protected from any compulsory disclosure of the circumstances of his offense, or the source from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. This conclusion was reached, although there is a general Federal statute providing that in such cases the testimony given by the witness at the investigation shall not be given in evidence against him, subsequently, in any civil or criminal proceeding (U. S. R. S. § 860). It seems that in such cases *nothing short of absolute immunity from prosecution can take the place of the privilege by which the law affords protection to the witness.*"

In the constitutions of many of the States of the Union, such as Virginia, Massachusetts and New Hampshire, it is broadly provided that a witness shall not be compelled to accuse himself or to furnish evidence against himself, with no limitation to "criminal cases," as in New York and under the Federal Constitution. In speaking of this distinction, Mr. Justice Blatchford says, in *Counselman v. Hitchcock*, *supra*, page 602: "It is contended on the part of the appellee that the reason why the courts in Virginia, Massachusetts and New Hampshire have held that the exonerating statute must be so broad as to give the witness complete amnesty, is that the constitutions of those States give to the witness a broader privilege and exemption than is granted by the constitution of the United States, in that their language is that the witness shall not be compelled to accuse himself, or furnish evidence against himself, or give evidence against himself; and it is contended that the terms of the constitution of the United States, and the constitutions of Georgia, California and New York are more restricted. But we are of opinion that, however this difference may have been commented on in some of the decisions, there is really in spirit and principle, no distinction arising out of such difference of language."

For decisions in these States, see *Emery case* (107 Mass. 172); *State v. Nowell* (58 N. H. 314); *Temple v. Commonwealth* (75 Va. 892); and cases cited in *Counselman v. Hitchcock*. If, then, the constitutional provision is broad enough to apply to proceed-

ing in bankruptcy, section 7 (9) fails to afford the requisite constitutional protection in all cases. (But see *In re Franklin Syndicate*, 4 Am. B. R. 511; 103 Fed —, *apparently* following Mackel case.) But where the bankrupt files a voluntary petition and invokes the benefits of the bankruptcy law, he may not withhold his books of account upon the assertion that they contain criminating evidence or matter. So held by the District Court for the Eastern District of Wisconsin, *In re Sapiro* (1 Am. B. R. 296; 92 Fed. 340). This latter decision is analogous to the general rule that where one has voluntarily offered testimony upon a given point, he may not thereafter on cross-examination refuse to answer questions which are relevant to the testimony which he himself has offered.

The modern rule as to whether a question is incriminating or not seems to be that if to the witness' mind the answer sought may constitute a link in the chain of evidence sufficient to convict him, or put him in jeopardy, if other facts are shown, he may remain silent, unless it be perfectly clear that he is mistaken and that the answer cannot possibly injure him or subject him to the peril of prosecution. See *People ex rel. Taylor v. Forbes*, *supra*.

It is quite possible that Congress will amend the Act so as to give complete immunity.

The executive committee of the National Association of Referees in Bankruptcy, in their report of March, 1900, recommend that a bankrupt refusing to answer any question approved by the court shall be denied his discharge. But this remedy seems to be of doubtful constitutionality, as it would tend to punish one who simply insists upon a constitutional right, and so become an indirect violation of the constitution

**Examinations of Third Parties.**—Compare section 21 (a).

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**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

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 § 8.] Can a Discharge be Granted After the Death of a Bankrupt?
 

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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.

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 Analogous Provisions of Former Acts.—

R. S., section 5090; act of 1867, section 12; act of 1800, section 45.

**No Abatement.**—The former act provided that the proceedings should not be abated by the death of the bankrupt after the issuing of the warrant which followed the adjudication. Under the present act, proceedings do not abate if they have been commenced, that is, if the petition has been filed. Proceedings against a partnership do not abate by reason of the death of one partner, and it was held under the former act that they did not, even if the death occurred before the adjudication. (Hunt v. Pooke, Fed. Cas. 6,896; 5 N. B. R. 161. Compare *Ex p. Hall*, 1 De Gex, 332.)

**Can a Discharge be Granted After the Death of a Bankrupt?—**

By the former act it was provided that one could not obtain a discharge without taking certain oaths. It was held that the word "proceedings," in the section providing that proceedings should not be abated by the death of the bankrupt, did not include a discharge, that is, that it did not include any proceeding unless there could be a compliance with the requirements of the act, and that as a deceased bankrupt could not take the oaths which entitled him to a discharge, his personal representatives could not continue that special proceeding and obtain a discharge.

But even under the Act of 1867 it was held that if the bankrupt died after his uncontested application for discharge had been submitted to the court a discharge might be entered *nunc pro tunc* as of the date when the report of the register was filed. (Young v. Ridenbaugh, 11 N. B. R. 563; 2 Dill. 239; Fed Cas. 18,173.)

Under the present Act as there are no statutory provisions requiring that an application for discharge shall be verified, there

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is no obstacle in the way of personal representatives procuring a discharge of the estate of the bankrupt if they so desire, unless objections thereto are sustained.

**Rights of Dower and Allowance.**—The provision in this section is a new enactment. But apart from statute, the wife's common law inchoate right of dower is no part of the estate of the husband and is not affected by proceedings in bankruptcy against him. (*Porter v. Lazear*, 109 U. S. 84.) There seems to be as yet no discussion on the rights of the surviving wife to any allowances which she may take under a State statute and which are not inchoate before the death of her husband. Where property of the husband has been disposed of by the trustee to purchasers during the lifetime of the husband it is presumable that no rights of the wife will attach except such as were inchoate prior to the husband's death. (Compare *Hawk v. Hawk*, 102 Fed. 679; 4 Am. B. R. 463.)

The last mentioned case holds the principle by analogy. In that case a wife who had begun proceedings for divorce but not yet obtained such divorce, it was held, could not enjoin the distribution of one-third of her husband's property as against his trustee in bankruptcy under a statute of the State of Arkansas providing that the wife when granted a divorce against her husband should be entitled to one-third of her husband's property.

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**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.

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Analogous Provisions of Former Acts—As to protection from arrest: R. S. § 5107; act of 1867, § 26; act of 1800, §§ 22, 38, 60.

As to arrest of bankrupt: R. S. § 5024; act of 1867, § 40.

**Purpose and Character of the Protection.**—An examination of the section shows that one purpose of the protection afforded is to preserve unimpaired the authority of the bankrupt court over the subject-matter and also over the persons of the parties to the proceeding. This is shown by the exemption which allows an arrest under process from that court. It is further shown by the fact that an arrest founded upon a debt which would be released by a discharge cannot be made at any time; and still further shown by the fact that an arrest in an action whether founded upon a debt which would be released or not released by a discharge, cannot be made at times when it would interfere with proceedings in bankruptcy; that is, while the bankrupt is in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed upon him by the bankruptcy law or by an order of the bankruptcy court. Protection from arrest in actions founded upon dischargeable debts is simply in accordance with the general scope and purpose of the Bankruptcy Act. Protection from arrest while performing duties required by the act or by orders of the court, is in accordance with the

general principle that courts will protect witnesses who come in obedience to their subpoena, and parties to actions pending before them, and officers who are obeying or serving their mandates, from arrest and from service upon them of summons or other process. The provisions of the Bankruptcy Act as to the protection of witnesses do not restrict the common-law rule. (*Lamkin v. Starkey*, 7 Hun, 479.) This right to protection extends not only to witnesses, but to persons appearing as parties, especially if they are parties defendant. It includes also the attorneys in fact for such parties. (*Matthews v. Tufts*, 87 N. Y. 568, citing *Person v. Grier*, 66 N. Y. 124; also *Van Lieu v. Johnson*, decided by the New York Court of Appeals, March, 1871; *Cole v. Hawkins*, Andr. 275; s. c. 2 Str. 1094; *Arding v. Flower*, 8 T. R. 534; *Miles v. McCullough*, 1 Binn. 77; *Hayes v. Shields*, 2 Yeates, 222; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Halsey v. Stewart*, 1 South [N. J.], 366; *Miller v. Dungan*, 8 Vr. [N. J.] 182; *in re Healey*, 53 Vt. 694.) It includes parties attending bankruptcy proceedings simply as creditors. (*Ex p. List*, 2 Ves. & B. 373; *Ex p. King*, 7 Ves. Jr. 312; *Selby v. Hills*, 8 Bing. 166; *Arding v. Flower*, 8 T. R. 534; *Matthew v. Tufts*, 87 N. Y. 568.)

We have then two different kinds of protection from arrest: First, the protection from arrest while in attendance upon court, which we have seen is a common law right. And, second, the protection from arrest upon civil process from any State court upon a debt or claim from which a discharge in bankruptcy would be a release. It will be noticed upon examination that General Order 30 is apparently much broader than the statute in that it provides that a bankrupt may be released from any arrest in a civil action for the collection of a claim provable in bankruptcy. The apparent inconsistency between the Section and the General Order is perhaps best discussed in a quotation from the opinion of Judge Hook in the case of *In re Baker* (3 Am. B. R. 101; 96 Fed. 954), which is as follows:

"Secs. 752 and 753 of the Revised Statutes authorize the granting of the writ of *habeas corpus* where the prisoner in jail is in custody on violation of

the Constitution or of a law of the United States. General Order in Bankruptcy No. 30 supplements the statute, and among other things provides:

'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.'

Sec. 9 of the Bankruptcy Act, in providing for exemption of the bankrupt from arrest upon civil process, makes an exemption when the process is '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.'

It will be observed that the language of the order is more comprehensive than the terms of the statute. The former provides for the bankrupt's release upon *habeas corpus* if the arrest or imprisonment complained of is upon a claim provable in bankruptcy, while sec. 9 of the act permits of his arrest if it is based upon a debt or claim from which his discharge in bankruptcy would not be a release. A similar variance in phraseology existed between sec. 26 of the Bankruptcy Act of 1867 and No. 27 of the General Orders made pursuant to that act.

The concluding clause of sec. 26 of the Act of 1867 is as follows:

'No bankrupt shall be liable to arrest during the pendency of 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.'

General Order No. 30 under the Act of 1898 and No. 27 under the Act of 1867 are identical except in a single instance where the word 'referee' in the former replaces the word 'register' in the latter.

The order must yield to the terms of the statute and the test of the legality of the bankrupt's imprisonment is not whether the claim or demand upon which it is based is provable against the bankrupt's estate, but it is whether his discharge in bankruptcy would operate as a release of the claim or demand. The decision of the courts under the Act of 1867 fully sustain this view. *In re Robinson*, 6 Blatch. 253; *In re Patterson*, 2 Ben. 155; *In re Whitehouse*, 1 Lowell, 429."

In a later case, (*In re Lewensohn*, 3 Am. B. R. 594; 98 Fed. 576,) Judge Brown of the Southern District of New York in discussing the question attempts to reconcile these provisions and also holds as will be seen from the following quotation that the protection may be granted upon terms.

"By section 9a, subd. 2, the bankrupt is declared entitled to be exempt from arrest on civil process, except upon a debt or claim from which his discharge would not be a release. This imports that the bankrupt shall not be exempt from arrest where the debt or claim would not be released by his dis-

charge, except to the limited extent provided; namely, when the bankrupt is 'in attendance upon a Court of Bankruptcy or engaged in the performance of a duty imposed by the act.'

This latter exception is new; there was no similar provision in the Act of 1867. How far does this exception extend? Is it to be construed as applying to the whole period during which the bankrupt has duties to perform, or only to the particular occasions when he is actually performing them? Section 7 imposes numerous duties upon the bankrupt which continue at least up to the time of the hearing on his discharge. In most important cases his attendance for examination is required on numerous occasions from time to time, not merely upon his original examination, and on his examination upon the application for a discharge, but on many other questions that frequently arise with reference to his assets or to disputed or doubtful liens or claims against the estate.

For the bankrupt it is contended that a liberal construction should be given to this exemption, in order to avoid the perpetual embarrassments in the bankruptcy proceedings which would be caused by his incarceration under State process. Opposed to this it is urged, that the exemption should be limited to the particular occasions when the bankrupt is actually in attendance in court, or actually performing a required duty, differing little from the ordinary right of a witness to exemption while in attendance on the court, to which exemption he was held entitled under the Act of 1867 without any express provision. *In re Kimball*, 1 N. B. R. 193, 14 Fed. Cas. 474.

In General Order 12 (18 Sup. Ct. vi.) the Supreme Court, in prescribing the precise extent of the bankrupt's protection from arrest, seems virtually to have given its own construction to this section, by providing that the bankrupt shall attend before the referee on a day named; 'and from that day 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.'

General Orders 30 (18 Sup. Ct. viii.), being presumably limited in its operation to the same period of time (*Loveland, Bankr.* 514), becomes thereby practically compatible with section 9a, subd. 2. In the case of *In re Baker* (D. C.), 96 Fed. 954; 3 Am. B. R. 101; the exception in section 9a, subd. 2, is not considered.

The construction apparently given to that section by General Order 12 does not seriously interfere with the creditors' right to arrest in cases where the discharge is not a bar. It merely suspends the exercise of that right for a certain limited period. The bankrupt is not entitled to postpone his application for a discharge beyond a year from the adjudication, and no extension of time would be granted by the court merely to prolong his freedom from arrest.

As this court may suspend or vacate the protection from arrest provided by rule 12, the court may grant it on terms, and hence under section 2, subd. 15, may require security that the bankrupt during its continuance will obey all

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orders of the court and not meanwhile depart from its jurisdiction. Upon the bankrupt's giving a bond to that effect, with approved security, the stay should be continued for a period not exceeding twelve months from the date of adjudication, unless an application for discharge be then pending, and in that case, until the final determination of that application."

**When the Right of Protection Begins.**—The section states that "a bankrupt shall be exempt from arrest" etc. The word "bankrupt" means, (section 1[4]), a person against whom an involuntary petition, or an application to set aside a composition, or to revoke a discharge has been filed or who has filed a voluntary petition or who has been adjudged a bankrupt. Consequently from the time of the filing of the petition the bankrupt is protected from arrest.

**How the Right of Protection is Enforced.**—The State court will, in the exercise of comity, order the release of the bankrupt on motion, but if it refuses to grant such relief the duty of ordering the release is imposed on the bankruptcy court. The practice is prescribed by General Order 30, which provides that

"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 proceeding in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court upon 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."

It will be noticed that this order seems to have reference simply to voluntary proceedings, but the power of the court extends to any case. (*In re Wiggers*, 2 Biss. 71; Fed. Cas. 17,623; *in re Williams & McPheeters*, 11 N. B. R. 145; Fed. Cas. 17,700).

**Determination Whether the Debt is Dischargeable.**—There has been a conflict of authority upon the question whether courts of bankruptcy in considering applications of bankrupts for release from arrest will go behind the face of the papers and consider disputed questions of fact. Most of the cases decided under the act of 1867 hold that the bankruptcy court will not try such disputed questions of fact; and if it appears upon the face of the papers, that a debt is not dischargeable, the bankruptcy court will not pass upon the question of fact and decide to the contrary. This is in accordance with the general principle that while courts of bankruptcy determine whether or not a bankrupt is entitled to a discharge, all questions as to whether any particular debt is released by that discharge are left to be determined by the State courts in which thereafter an action upon the debt may be brought. In examining the papers to see whether or not they state all the facts showing that a debt is not dischargeable, the court will look not only at the order of arrest, but at the affidavit used on the motion, and at the complaint in the action if it is in any way connected with the other papers or referred to in them. According to the rule mentioned the bankruptcy court examines the papers, not to see if the order was granted, in an action founded on a debt which is in fact dischargeable, but to see if the State court in granting the order of arrest, intended to found it on a debt which was not dischargeable. (*In re Robinson*, 2 N. B. R. 342; Fed. Cas. 11,939; s. c. 36 How. Pr. 176; s. c. 6 Blatch. 253; *in re Valk*, 3 N. B. R. 278; s. c. Fed. Cas. 16,814; 3 Ben. 431; *in re J. H. Kimball*, Fed. Cas. 7,769; 2 N. B. R. 354; s. c. 6 Blatch. 292; s. c. below, Fed. Cas. 7,768; 2 N. B. R. 204; s. c. 2 Ben. 554 [in which case Judge Blatchford disapproved of his own previous decisions, *in re Glaser*, 1 N. B. R. 336; Fed. Cas. 5,474; s. c. 2 Ben. 180; and also *in re George W. Kimball*, 1 N. B. R. 193; Fed. Cas. 7,767]. See also *in re Devoe*, Fed. Cas. 3,843; 2 N. B. R. 27; *in re Migel*, Fed. Cas. 9,538; 2 N. B. R. 481.) The authorities holding the contrary doctrine, viz., that the bankruptcy court may examine into the merits of the arrest and hear the disputed facts which will de-

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termine whether or not the debt is one which would be released by the discharge are, *in re* Williams & McPheeters (11 N. B. R. 145; s. c. 6 Biss. 233); *in re* Glaser, *supra*; *in re* George W. Kimball, *supra* (the latter two afterwards disapproved by the same judge who rendered the decisions); and *in re* Alsberg (Fed. Cas. 261; 16 N. B. R. 116). In the last case all the others were reviewed and it was held that: It was the duty of the court to examine diligently all legal evidence brought before it from any quarter whatever, tending to show that a debt not dischargeable by the discharge of the bankrupt had been contracted; that the question whether one was properly under arrest was a question of fact; that the liability to imprisonment or the immunity from imprisonment depended upon the fact whether the debt for which he was arrested was released by the discharge of the bankrupt; that Congress intended to prevent the arrest of the bankrupt where a debt was dischargeable, and the bankruptcy courts who were charged with the duty of protecting the bankrupt, were in duty bound to inquire into all the facts; and that no *ex parte* evidence made in the State courts as to the character of the debt contracted would be permitted to interfere with the full examination of all sources of evidence on the simple fact, whether the debt was dischargeable under the bankruptcy act; that it was the character of the debt which was the subject of investigation and not the grounds of arrest which were stated in the order of arrest and the other papers; that the provisions of law in reference to the writ of *habeas corpus* contained in the U. S. Revised Statutes were conclusive on the judge or court hearing the case, to determine all legal evidence touching the right to retain in custody, whenever the petitioner claimed the protection.

And this latter view seems to be in accordance with the provisions of G. O. 30 quoted in the last preceding paragraph. For further discussion see section 11 as to what actions will be stayed by the bankruptcy court.

**In What Actions is One Exempt From Arrest?**—Compare section 17 as to debts not released by discharge. Compare the cases

under section 17 (4) as to debts created by fraud and debts created by one acting in a fiduciary capacity.

**Detention of the Bankrupt.**—The bankrupt's sole purpose in leaving the district must be to avoid examination. In presenting its report on the bankruptcy bill to the 55th Congress, on December 16, 1897, the judiciary committee of the House said, with reference to this section (then section 8), which had been amended in committee so that this provision with reference to the motives of the bankrupt in leaving the district read exactly as it here appears: "In the section where provisions are made for taking into custody the bankrupt when he is about to leave the district and where his departure would tend to delay the proceedings in bankruptcy, an amendment has been made limiting the departure to cases in which the bankrupt was leaving for the sole purpose of avoiding the examination. If he left for other purposes, such as to better his condition, the provisions of the law will not apply to him." Every particular fact required in order to give one a right to move for the arrest of the bankrupt must be clearly shown to exist. The language of the section implies that before the court can issue a warrant it must not only find it to be true that the bankrupt leaves to avoid examination, but that it is necessary that he be detained, that it is necessary that he be examined, and that in no other way than by detention by the marshal can his presence be secured.

But it has been recently held (*In re Lipke*, 3 Am. B. R. 569; 98 Fed. 970) by the District Court of the Southern District of New York that the court in its efforts to prevent the bankrupt from departing from its jurisdiction is not necessarily confined to the provisions of section 9b, but may resort to a writ of *ne exeat* under the broad provisions of section 2 (15) giving the courts of bankruptcy jurisdiction to make all orders in addition to those specifically provided for which may be necessary for the enforcement of the provisions of the act. A quotation from the opinion of Brown, J., on this subject follows.



“ I think the better practice, however, would be to conform to the provisions of section 9b as respects all the matters and objects covered by it. But under the broad powers at law and in equity conferred upon the District Courts in bankruptcy proceedings by section 2 and subdivision 15 of that section, it is competent, I think, for the court to issue an order in the nature of a writ of *ne exeat* as broad as that provided by section 717 of the Revised Statutes, whenever such process is ‘ necessary for the enforcement of the provisions ’ of the Bankrupt Act. By section 2 the District Courts are expressly invested ‘ with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, . . . (15) to make such orders and issue such process . . . in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act.’

The writ of *ne exeat* is one of the orders or writs in familiar use in equity against one who ‘ designing to avoid the justice and equity of the court, is about to go beyond the sea, so that the duty will be endangered if he goes.’ Wyatt, Prac. Reg. 289; 2 Story, Eq. Jur. p. 800, sec. 1470, note; 3 Daniell, Ch. Prac. (2d Am. ed.) p. 1925.

The necessity of the occasional exercise of this power for the efficient administration of the Bankrupt Law is evident. Without it the bankrupt might easily defy, and largely nullify, all adverse proceedings against him, by absconding with his assets.

Under the fortieth section of the Act of 1867 (Rev. St. sec. 5024) it was held by Gray, C. J., in *Usher v. Pease*, 116 Mass. 440; 12 N. B. R. 305, that the warrant of arrest did not extend beyond the hearing and adjudication upon the petition, and was for the purpose of securing the bankrupt’s attendance thereon, and to prevent his absconding meanwhile or putting his property out of reach. The scope of section 9b of the present act is somewhat broader; but it seems still to be limited to a detention of the bankrupt for the purpose of examination after adjudication, and for his appearance from time to time for that purpose, not exceeding in all ten days, and for his obedience to all lawful orders made in reference to his examination. The issue of the warrant is further limited to a period of one month after the qualification of the trustee. In the present act there is no express authority to issue a warrant in order to prevent the bankrupt from absconding with assets, except incidentally and under the above limitations of section 9b; and considering the manifest insufficiency of that section to secure an effective administration of the act, I cannot doubt that it was intended by the compact and broad language of section 2, subd. 15, to authorize the court to make all orders and to issue any other process, agreeable to the recognized principles of law, that might be found necessary for that purpose. The Act of 1867 contains no such general grant of power as is found in section 2 above quoted. See Rev. St. secs. 4972, 4976, 5024. The limitations of that act, therefore, are not applicable to the present act.

The writ of *ne exeat* under section 717 is not to be issued ‘ unless a suit in

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equity is commenced.' This was the existing rule of law as to the issuance of writs of *ne exeat*. Beames, *Ne Exeat*, 26; 3 P. Wms. 312; *Mattocks v. Tre-main*, 3 Johns. Ch. 75. Section 2 of the Act of 1898, in giving the District Courts equitable jurisdiction 'in bankruptcy proceedings,' would seem to make the commencement of such proceedings the equivalent of a suit in equity for the purpose of the issuance of such a writ. *Mackintosh v. Ogilvie*, 1 Dickens, 119. In view of the broad provisions of section 2, subd. 15, however, it seems quite unnecessary to resort to section 717 for authority to prevent bankrupts from absconding, either with or without their assets, when their detention is necessary for the proper enforcement of the act."

**Seizing Possession of Property of Bankrupt.**—Compare section 69; also section 2 (3).

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**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.

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No Analogous Provisions in Former Acts.

The power of removal referred to is contained in section 1,014 U. S. R. S., which is as follows:

"For any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be for trial before such court of the United States as by law has cognizance of the offence. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

**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.

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**Analogous Provisions of Former Acts.—**

As to right to maintain an action against a bankrupt: R. S. section 5105; act of 1867, section 21; act of 1841, section 5. As to stay of suits against a bankrupt: R. S. section 5106; act of 1867, section 21. As to trustees' continuance of pending suits against a bankrupt: R. S. section 5047; act of 1867, sections 14 and 16; act of 1841, section 3; act of 1800, section 13. As to limitations of actions against the trustee: R. S. section 5057; act of 1867, section 2; act of 1841, section 8. Also R. S. section 5056; act of 1867 section 14.

**Statutory Provisions, Old and New.—**There are marked differences between the provisions of the former and the present act with regard both to the maintenance and continuance of actions against a bankrupt. The former act as it appeared in the Revised Statutes contained two provisions. Section 5105 in substance enacted that the proving of a debt was a waiver of all right of action, and that thereafter the creditor should not be allowed to maintain any suit at law or in equity. This, it will be seen, prevented the institution of new actions as well as the continuance of pending actions, provided the debt was proved. Section 5106 of the Revised Statutes declared that no creditor whose

debt was provable should be allowed to prosecute to final judgment any suit at law or in equity therefor, against the bankrupt until the question of his discharge should have been determined, and that all such suits must be stayed until the question of discharge was considered by the court, provided there was no unreasonable delay on the part of the bankrupt in attempting to obtain his discharge, and provided also that, if there was a dispute as to the amount of the debt, a court of bankruptcy might allow the action to proceed to judgment for the purpose of ascertaining the amount due, which amount might be proved in bankruptcy, but execution was to be stayed. Comparing those provisions (which appear more fully in the copy of the act printed as an appendix to this book) with the provisions of the section under consideration, it will be seen that the present act expressly provides only for the stay of pending actions; that it makes no reference to the institution of new actions; that a suit will not be stayed simply because it is founded upon a debt which is provable, but the debt must be one which would be released by a discharge. It will be further seen that the present statute makes a stay from the time of filing the petition until an adjudication or the dismissal of the petition, compulsory; but that after that time it is discretionary. Moreover there are no express grounds required for the court to give as its reason for permitting the continuance of the action. It will be further seen that the old act, in cases where creditors did not prove their claims and thereby waive all right of action, only required that the action should not be allowed to be prosecuted to final judgment, and that even to this there were some express exceptions; but under the present act, if a stay is granted no further proceedings whatever can be taken.

The general purpose and object of these laws authorizing the stay of actions against a bankrupt are to prevent his being harassed with suits, while he is proceeding in good faith to obtain his discharge, and until the question of his discharge is determined and it is either granted or refused. Another purpose is to prevent a race of diligence between creditors.

The law intends that creditors having provable claims shall

secure their remedy in bankruptcy proceedings, and that if the claim is dischargeable the bankrupt shall not be annoyed by proceedings in any other court pending the application for a discharge. If he receives the discharge he may of course plead it as a defense. If he is refused a discharge, the right of a creditor to sue for his debt or the balance of it over and above any dividend received, remains unimpaired. But still the question remains: Has a creditor, between the time of the filing of the petition and the granting of the discharge, a right to institute a new suit upon his claim against the bankrupt, simply because the act does not in terms provide that new suits shall not be instituted, nor that a new suit if instituted shall be stayed? When will the courts allow such suits? If such a suit were instituted and prosecuted to judgment, it would in no way give the creditor any right or lien upon the property with which the trustee becomes vested by law. If prosecuted to judgment, and a discharge is thereafter granted, the discharge may be pleaded as a defense to any further action on the judgment or any proceedings to enforce it. (*McDonald v. Davis*, 105 N. Y. 508.) If a discharge is granted, there is then no advantage accruing to the creditor by reason of the institution of his action, unless it be to liquidate his claim so that the amount may be proven under section 63 (5). He will have incurred the expense of his litigation to reap only this advantage, because under the provision of section 63, his costs incurred in the suit will not be a provable debt. But if the discharge is refused, then any judgment which he recovers will be a prior lien upon the subsequently acquired property of the bankrupt.

Under the act of 1867, which provided in the case of creditors who did not prove their claims, only, that the courts should not allow the prosecuting of suits to judgment, it was held that the act did not in terms prohibit the commencement of a suit to enforce provable debts, and that therefore a court of bankruptcy might in its discretion refuse to enjoin the commencement or the prosecution of such action. (*In re Ghiradelli*, Fed. Cas. 5,376; 4 N. B. R. 164; s. c. 1 Saw. 343; and see *Eyster v. Gaff*, 91 U. S. 521.)

The true rule seems to be that where the bankruptcy court has taken into its possession the custody and control of the bankrupt's estate, it will enjoin any person from bringing any action which would interfere with that possession or embarrass its administration of the estate. In the case of *In re Chambers, Calder & Co.* (3 Am. B. R. 537; 98 Fed. 865) the District Court for the District of Rhode Island passed upon this question under the present act. That was a case on the petition of the trustee (who was also the receiver) of the bankrupt for an injunction against proceedings in the State court, which relief was granted. The facts and the conclusions drawn therefrom appear in the following extracts from Judge Brown's opinion.

"This petition seeks to enjoin the Industrial Trust Company from proceeding by action of ejectment in the State court to recover possession of real estate leased to the bankrupts, Chambers, Calder & Co. who were in possession at the date of the adjudication of bankruptcy. In the leased building was a large stock of goods appropriate to the business of wholesale druggists. Though the rent was overdue for more than fifteen days, and under General Laws R. I. c. 269, sec. 7, the landlord was thereby authorized to re-enter or recover possession discharged from the lease, no action amounting to an election to discharge the lease had been taken prior to November 25, 1899, the date of the adjudication of bankruptcy and the appointment of a receiver. W. B. Persons was appointed receiver of the estate of the bankrupts, and was authorized to continue the business until further order of the court. He duly qualified, entered upon the premises, and carried on the business. Afterwards, on December 4th, the trust company brought its action of ejectment against Persons and the bankrupts in the State court. On December 6th the trust company made proof of claim before the referee for the full amount of rent overdue. On December 7th, Persons was elected trustee by the creditors, and duly qualified. It thus appears that this court had taken into its custody and control the entire estate of the bankrupts, including the leased building, before the beginning of any proceedings in the State court. It is a firmly established rule that, where property is in the possession of one court of competent jurisdiction, such possession cannot be disturbed by process issued out of another court. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; *Ex parte Johnson*, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103; *Jordan v. Taylor* (Cir. Ct. Dist. Mass. Dec. 29, 1899), 98 Fed. 643; *Keegan v. King* (D. C.), 96 Fed. 758; 3 Am. B. R. 79; *Chapin v. James*, 11 R. I. 87. Execution in ejectment would, in the present case, interfere with the possession of this court, and on that ground alone might be enjoined. It is furthermore apparent that it would most seriously embarrass this court in the administration of the bankrupt's estate, and result in unnecessary loss to the creditors.

§ 11.]

Suits by and Against Bankrupts.

\* \* \* Whatever may be the right of the landlord, process or judicial authority for its enforcement must now be sought in this court, upon which the Bankruptcy Act has conferred equity powers adequate to meet a situation in which the strict and immediate enforcement of a legal right would lead to unnecessary and disproportionate loss to others, or would result collaterally in conferring an inequitable advantage. A court of equity, while giving the fullest recognition to a legal right, may so regulate the time and manner of its enforcement as not to cause unnecessary loss to others. *Deweese v. Reinhard*, 165 U. S. 386, 390, 17 Sup. Ct. 340, 41 L. Ed. 757. The jurisdiction of this court having attached to the exclusion of jurisdiction at law, the right of the landlord can be enforced only upon equitable terms. Neither receiver nor trustee in bankruptcy is bound to accept property of an onerous or unprofitable character, or to assume a lease of the bankrupts, unless for the benefit of the creditors. *File Co. v. Garrett*, 110 U. S. 288, 4 Sup. Ct. 90, 28 L. Ed. 149. If they are confronted with the alternative of an immediate ejection from the premises, with the consequent depreciation of the personal estate, or the assumption of an undesirable lease and the payment of a large sum for unsecured rent, whereby an unsecured creditor will secure a preference, a court of equity should relieve them from the coercion of the situation. If time is essential for an equitable adjustment of the various rights, the court may impose such delay as is reasonably necessary upon the enforcement of any particular right, making pecuniary compensation therefor whenever that is adequate. \* \* \* As it appears that at the time of bringing the action of ejectment the receiver was in possession, and carrying on the business under the orders of this court, he is entitled to the protection of an injunction as prayed in his petition. The draft decree may be presented accordingly."

And the Circuit Court of Appeals of the Second Circuit has recently laid down very much the same doctrine (*In re Russell et al.* 3 Am. B. R. 658; 101 Fed. 248) as will be seen from the following extract from the opinion of Wallace, C. J.:

"April 15, 1899, the United States District Court for the Northern District of New York adjudged *Russell & Birkett* bankrupts. and appointed *Wise* trustee in bankruptcy. The trustee duly qualified and entered upon the discharge of his duties, and took into his custody certain property in the possession of the bankrupts claimed to belong to the *Machinists' Supply Company*. June 10, 1899, the *Machinists' Supply Company* brought an action of replevin against the trustee in the Supreme Court of the State of New York to recover possession of such property. Thereupon the trustee applied to the District Court for the Northern District of New York, as a court of bankruptcy, for an order enjoining the *Machinists' Supply Company* from prosecuting its action of replevin, and for such other relief as the court might deem proper to grant. The application was based upon a petition by the trustee, and an order by the court to show cause, both of which were personally served upon the Ma-

chinists' Supply Company. Upon the return day the Machinists' Supply Company resisted the application, but an order was made by the court enjoining the prosecution of the action, and as a preliminary to a final adjudication of the rights of the parties, referring 'the claim of said Machinists' Supply Company' to a referee in bankruptcy to take proofs and report. It is now insisted by the Machinists' Supply Company that it was entitled to bring and prosecute its action in the State court; that the stay of its proceedings by the Bankruptcy Court was an erroneous exercise of power; and that the Bankruptcy Court was without jurisdiction to compel it to litigate its title to the property in question in that court in a summary proceeding upon a petition. \* \* \*

Under the Bankrupt Act of 1867 the State courts had cognizance of such actions, not by express grant, but because the act did not divest them of jurisdiction. As was said in *Eyster v. Gaff*, 91 U. S. 521: 'The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the Circuit or District Courts of the United States, it is concurrent with, and does not divest them of, the State courts.' This doctrine was approved in *Clafin v. Housman*, 95 U. S. 130, where many decisions of other tribunals to the same effect are cited. Upon the same considerations the State courts have cognizance since the present act, not being divested of jurisdiction by any of its provisions.

We should entertain no doubt that the Machinists' Supply Company was entitled to bring an action of trespass or trover for the recovery of the value of the property against the trustee in the State court. But the action brought, being replevin, is one for the seizure of property in the custody of the Bankruptcy Court, because in the custody of its officer, which, upon the principle decided in *Freeman v. Howe*, 24 How. 450, it is protected from any interference by the State process or by the process of any other court not exercising supervisory jurisdiction. When property is in the actual possession of a court this draws to it the right to decide upon conflicting claims to its ultimate possession and control (*Rouse v. Letcher*, 156 U. S. 47, 49), and as between two courts exercising concurrent jurisdiction, the court which first acquires possession will maintain its possession intact. In *Taylor v. Carroll*, 20 How. 594, it was said: 'The Court of Chancery does not allow the possession of its receiver, sequestrator, committee, or custodee, to be disturbed by a party, whether claiming by title paramount, or under the right which they were appointed to protect, as their possession is the possession of the court.' The power of protecting itself from such a disturbance is co-extensive with the right of self-preservation, and if not inherent in every tribunal, is in all having the powers of courts of equity. A Federal court will neither interfere with property in the lawful custody of a State court, nor tolerate interference by a State court with property in its custody. *Sumner v. White*, 36 U. S. App. 395; *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36. Authority to Courts of Bankruptcy to protect the property in their custody from such inter-



ference would seem to be specifically conferred by that provision of section 2 of the act permitting them to make such orders and issue such processes as may be necessary for enforcing their jurisdiction. The prohibition of section 720 of the Revised Statutes against enjoining the proceedings of a State court does not apply when any law relating to bankruptcy authorizes an injunction, nor does it where the proceedings sought to be enforced have been commenced after the jurisdiction of the Federal court has attached. *Fish v. Union Pacific R. R.* 10 Blatch. 518; *French v. Hay*, 22 Wall. 250; *Dietsch v. Heydekooper*, 103 U. S. 494.

We conclude that the order under review, so far as it stayed the prosecution of the replevin action, was properly made, and that unless leave is obtained of the Court of Bankruptcy the Machinists' Supply Company must bring its action in that court."

And compare *In re Cobb* (3 Am. B. R. 129; 96 Fed. 821); *Kee-gan v. King* (3 Am. B. R. 79; 96 Fed. 758); *in re Endl* (3 Am. B. R. 813; 98 Fed. 915). From this it will be seen that the better opinion is that the jurisdiction of the bankruptcy court to stay any proceedings not within the terms of this section must come from priority in its possession and control of the subject matter, and its right to prevent interference therewith, and to that extent only.

**Effect of Proof of Claim on Right of Action.**—Where a creditor proves his debt, all the authority of decided cases is that by such a proceeding he has made an election of remedies by choosing to enforce his debt through the bankruptcy proceedings, and that he thereby waives his right to enforce his claim by any other legal proceedings unless a discharge is refused to the bankrupt. These decisions do not all appear to be based upon statutory provisions; they seem rather in many cases to rest upon a general principle, that if the creditor elects to pursue one of two remedies he thereby waives the right to pursue the other. Thus, in England, it has been held that the proof of a debt is to be considered an election not to proceed against the bankrupt, by action; such proof operates as a statutory discontinuance of all other legal and equitable remedies in respect to the debt proven; and the courts of that country will enjoin the proving creditor from any other legal proceedings, or require him to expunge his proof (*Ex p. Diack*, 2 Mont. & Ayr. 675; *Ex p. Bernasconi*, 2 Glyn. & J. 381); and the

same was the decision of the United States courts even under the bankruptcy act of 1841. Thus, in *Haxtun v. Corse*, 4 Edw. Ch. 585; s. c. affirmed 2 Barb. Ch. 506, at 531, and in *Stewart v. Isidor*, 5 Abb. Pr. (N. S.) 68, it was held that a creditor who proved his debt, elected to become a party to the proceedings in bankruptcy, and although he had a judgment previously recovered, he could not institute a judgment creditor's action. Under the act of 1867, there were numerous decisions to the same effect; but these, it is to be noted, were required by the express terms of the act, the only question under that act being whether the proof of a debt was an absolute waiver of the claim which would by the terms of the statute prevent the creditor from instituting any further proceedings, even in cases where a discharge was refused. The weight of authority was that it was only a suspension of action until the time of discharge, and if a discharge was refused, then the creditor might institute legal proceedings to collect the balance of his claim over and above dividends received.

This construction of the statute was afterwards embodied in an amendment of the section, passed in 1874, which appears in the Revised Statutes. Under the act of 1841, it was likewise held that a creditor who took a dividend under the estate of a bankrupt was not thereby estopped from collecting the remainder of his debt if the bankrupt was refused a discharge. (*Haxtun v. Corse*, 4 Edw. Ch. 582; s. c. on appeal, 2 Barb. Ch. 506; *Hamlin v. Hamlin*, 3 Jones Eq. Rep. [N. C.] 191.)

And it would seem to be a general principle that if two or more forums are open to a suitor, he is bound by his election. See *In re Chambers*, etc., cited to preceding section; *Re Vogel*, Fed. Cas. 16,982; 3 N. B. R. 198; 7 Blatch. 19; *Moran v. Sturges*, 154 U. S. 256; *Bear v. Chase*, 3 Am. B. R. 746 and note; s. c. 99 Fed. 920; 40 C. C. A. 182.

**What Suits May be Stayed.** Section 11A.—The intent of the act seems to entitle the bankrupt to a stay of actions at law, actions in equity, and in fact any legal proceedings, whatever their nature, if they were instituted to recover upon a claim which would be

released by a discharge. The word "suit" is wide enough in its scope to embrace all forms of procedure. The act of 1867 authorized a stay of suits at law or in equity. It was held that it applied to all cases where the personal liability of the debtor was sought to be fixed or determined by a final judgment, pending the determination of the question of discharge. (*In re Rosenberg*, 2 N. B. R. 236; Fed. Cas. 12,054; s. c. 3 Ben. 14.) But where an action by a creditor did not tend to enforce any claim against the debtor, and did not deprive the trustee of any right or control over the property, proceedings taken after the injunction order were not a disobedience to it. (*In re Hirsch*, 2 N. B. R. 3; Fed. Cas. 6,529; compare *McKay v. Funk*, 13 N. B. R. 334; s. c. 37 Iowa, 661.) But even an action to foreclose a mortgage may be stayed in so far as the aim is to enforce a personal liability of the mortgagor, as for instance, for a deficiency. (*McKay v. Funk*, *supra*.) As to continuance of actions to enforce liens, compare next paragraph. An action cannot be stayed unless it is founded upon a claim which would be released by a discharge. The mere fact that the claim is provable is not sufficient as under the former act. Proceedings supplementary to execution may be stayed. (*Zimmer v. Schleeauf*, 115 Mass. 52; *In re Delong* [Ref. Dec.], 1 Am. B. R. 66.) And it would seem that appeals might be stayed. Under the former act, there was some conflict of authority as to this class of cases, but it arose over the question whether a judgment by a subordinate court from which an appeal had been taken should be considered "a final judgment," the law requiring courts of bankruptcy not to allow the prosecution of suits to final judgment. It was held that such appeals might be stayed if the bankrupt was the appellant; and that motions for further security on such appeals were proceedings which could be stayed. (*In re Metcalf & Duncan*, 2 Ben. 78; Fed. Cas. 9,494; s. c. 1 N. B. R. 201.) *Contra*, holding that "it is not the purpose of the statute to suspend the right of the plaintiff to maintain in the appellate court the correctness and validity of a judgment from which a bankrupt might choose to take an appeal, until the determination of the question of his discharge," and the proceedings on appeal will not

be stayed when the bankrupt is the appellant. (*Merritt v. Glidden*, 39 Cal. 559; s. c. 5 N. B. R. 157; s. c. 2 Am. Rep. 479, with notes.) A suit in the nature of a judgment creditor's bill may also be enjoined. (*In re Whipple*, 13 N. B. R. 373; Fed. Cas. 17,512.) The fact that the creditor who is bringing the action has been omitted from the list of creditors on the bankrupt's schedule, does not necessarily prevent his action from being stayed, for his claim is still released by discharge, if he has notice or knowledge of the bankruptcy proceedings.

It must be remembered, however, that under section 67 all levies, judgments, attachments, or other liens obtained through legal proceedings against an insolvent person within four months of the filing of the petition in bankruptcy are annulled. And this is true irrespective of the character of the claim under which such lien is obtained.

**Staying Proceedings to Enforce Lien.**—Where a lien against a debtor's property, which is acquired more than four months before bankruptcy and which is otherwise valid, is sought to be foreclosed, such foreclosure cannot as a rule be stayed by the federal court. The trustee takes the property of the bankrupt subject to all valid liens, and while unsecured creditors having claims are parties to the proceeding, it must be remembered that the secured creditor, *as such*, is not a party to the bankruptcy proceedings, because if his security is valid the court has no control over him, nor can he share in the assets without surrendering his security. But sec. 57h, providing for the determination of the value of the security held by secured creditors, and for the payment of a dividend upon the unpaid excess of the debt over the value of the securities, would, it seems, bring a secured creditor in such case within the jurisdiction of the bankruptcy court to the extent that perhaps it might restrain proceedings to collect the lien until the validity and value of such lien could be determined. But as presumably the determination as against an adverse claimant must be had in the State court, it would seem to be correct practice for the

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trustee to go by permission into that court and there obtain a stay.

An interesting discussion of this question will be found in a recent case *Taylor v. Taylor*, N. J. Ch. (45 Atl. 440; 4 Am. B. R. 211, with note). See also *In re San Gabriel Sanatorium Co.* as reported in 4 Am. B. R. 197 with note, and *In re Gerdes* (4 Am. B. R. 346; 102 Fed. 318).

Where the bankrupt made a valid sale of property before the proceedings in bankruptcy were instituted, and part of the purchase money was retained by the vendee to discharge any liens which might be established against the property sold, and subsequent to the sale various persons filed mechanics' liens against the buildings sold and brought suits against the vendee and the bankrupt to enforce the same in a State court, the trustee of the bankrupt, though interested in the result of the litigation, was held not to be entitled to have the proceedings in the action in the State court stayed, or to have the controversy transferred to the bankruptcy court for adjudication. (*In re Greater American Exposition [In re Horton]*, C. C. A. 8th Circ.; 4 Am. B. R. 486; 102 Fed. 986.)

As to power of the court to order a sale of the bankrupt's property free of liens and incumbrances, see commentary under section 70 on this subject.

**To What Court is the Application for a Stay to be Made?**—The bankruptcy law is binding upon State courts as well as federal courts and it is to be applied by both in all matters coming before them; hence a State court should stay the action if application is made to it to do so.

Indeed it has been directly held under the present act that a bankrupt who is defendant in a suit pending in a State court and who desires to procure a stay in said court should file in such court a proper pleading setting forth the pendency of the proceedings in bankruptcy, and thereupon should ask for a stay as provided for in section 11. This is the proper procedure for the reason

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To What Court is the Application for a Stay to be Made? [Ch. III.]

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that the creditors who are the plaintiffs in the suit sought to be stayed are parties to the action in the State court and are subject to its jurisdiction and will be bound by its action in the premises. Of course if the State court does not grant the stay an application may then be made to the bankruptcy court. Compare *In re Geister* (3 Am. B. R. 228; 97 Fed. 322). The U. S. Revised Statutes, section 720, provide that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy, so that it is clear that the stay under the Bankruptcy Statute must be strictly construed. Therefore it follows that the application should be made to the State court always in the first instance. The application for a stay may be by the affidavit of the bankrupt and when presented to the court in which the action is pending ought to entitle him to a stay until his application for a discharge is determined, unless there are good reasons for the discontinuance of the suit. (*In re Frostman & Hicks*, 15 N. B. R. 41.) The application may also be made by the trustee, but it has been held that it cannot be made by the plaintiff in the action. If the bankrupt declines to avail himself of the privilege granted to him, the cause must proceed to trial or be dismissed, with like effect as if the bankrupt had not been so adjudged, the plaintiff has no more right to suggest the bankruptcy of the defendant as a reason for staying the suit than he would have to plead the bankrupt's certificate of discharge. If an action is not stayed, but proceeds to judgment and a discharge is granted before judgment, the bankrupt cannot afterwards set it up as a release from the judgment. If the discharge be granted after the judgment, he may use it as a defense. (*McDonald v. Davis*, 105 N. Y. 508.) Furthermore, it is not the duty of the State court to stay the proceeding merely because the bankruptcy of the defendant has been suggested to it (*Eyster v. Gaff*, *supra*; *Stone v. Bank*, 39 Ind. 284); and the court is under no duty to take judicial notice of the bankruptcy of any of the parties to proceedings before it. It must be informed of the facts by proper pleadings, and if the allegations

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of bankruptcy are denied, they must be proven by the record. (*Johnson v. Bishop*, 8 N. B. R. 533; Fed. Cas. 7,373.)

It should not be forgotten, however, that as between courts of concurrent jurisdiction, the court first acquiring jurisdiction will not be interfered with by another court and a stay of proceedings will then be proper if addressed not to the court but to the suitor. See *Ward v. Todd* (103 U. S. 327).

**State Courts do Not Lose Jurisdiction Even if Action is Stayed.—**

The injunction is addressed to the suitor, not to the court. If the suitor disobeys it he may be punished for contempt, but the State court does not lose jurisdiction to proceed. It has been held that the court in which the action was pending was not bound to take notice of the fact that the suitor had been enjoined and that in prosecuting the action he was in contempt of the bankruptcy court, but that if he moved the cause, it must proceed to judgment, and the only effect would be that the suitor was liable to punishment. (*Ewart v. Schwarz*, 48 N. Y. Super. 390.) Failure to obtain a stay or the setting aside of a stay, once secured, with permission to plaintiff to proceed with his action as if never restrained, and in case he obtains judgment permitting him to take any other proceedings that the law and practice of the State courts allow, does not prevent the defendant, who, after the judgment has been obtained, is discharged in bankruptcy, from setting up the discharge for the purpose of stopping supplementary proceedings on the judgment, or other proceedings to enforce it. (*McDonald v. Davis*, 105 N. Y. 508.) The rule that the court does not lose jurisdiction over the pending proceeding and that the suit will proceed unless the bankruptcy of the defendant is brought to its notice, applies equally to appeals. If a defendant is adjudged bankrupt after he has taken an appeal, an affirmance of the judgment in the absence of a suggestion of his bankruptcy is not a nullity. (*Flanagan v. Pearson*, 14 N. B. R. 37; s. c. 42 Tex. 1.)

**Stay is Discretionary.—**With the exception of the period intervening between the filing of the petition and the adjudication it is

discretionary with the court whether or not to grant a stay. In general, suits should not be allowed to be prosecuted. A good reason must be shown before an exception will be made. The fact that the amount of the debt is in dispute would be such a reason.

As a rule the exercise of this discretion will not be interfered with unless it has been abused and therefore it has been held that where the only effect of the staying order upon the proceedings in the State court will be to prevent examination of the bankrupt in supplementary proceedings for the purpose of obtaining information which might be useful in the prosecution of a creditor's bill and where such information can be easily obtained in the bankruptcy court, there is no reason for reviewing the exercise of discretion on the part of the last named court. (See *In re Lesser*, Court of Appeals, 2d Circuit, 3 Am. B. R. 758; 40 C. C. A. 177; 99 Fed. 913.)

**The Duration of the Stay.**—Proceedings must be stayed from the time of the filing of the petition until the adjudication. "Adjudication" means the time of the entry of the decree that the defendant in a bankruptcy proceeding is a bankrupt, or if such decree is appealed from, then the time when such decree is finally affirmed. (Section 1 [2].) The filing of a petition against one includes the filing of a petition by him. (Section 1 [1].) The language of the injunction should be in accordance with the statute, that is, it seems it should be in the alternative; viz., a stay of twelve months from the time of the adjudication "or if within that time such person applies for a discharge, then until the question of such discharge is determined." The injunction only continues in force as long as the question of discharge is undetermined. The granting of a discharge gives to the bankrupt an absolute defense. The refusal to grant him a discharge terminates the stay. It has been held that no motion for a dissolution of the injunction is necessary after the application for a discharge has been passed upon; that no order is required to show that the stay is terminated. (*In re Rosenberg*, 2 N. B. R. 236; Fed. Cas.



## § 11.] Debts Released by Discharge—Continuance of Pending Suits.

12,054; s. c. 3 Ben. 14; *in re* V. Thomas, Fed. Cas. 13,890; 3 N. B. R. 38; *in re* Belden, Fed. Cas. 1,239; 6 N. B. R. 443; *Dingee v. Becker*, Fed. Cas. 3,919; 9 N. B. R. 508.) The right of a creditor of a bankrupt to maintain an action against him revives immediately upon the rendition of a judgment by the court of bankruptcy passing upon the bankrupt's application for a discharge, and the right to bring and maintain such action is not restricted by the fact that the bankrupt has filed a petition to review the judgment refusing him a discharge and that the proceedings for such review are still pending. (*Storrs v. Plumb*, 30 Hun, 319, citing as to judgments being final though appealed from, *Fisher v. Hepborn*, 48 N. Y. 41; *Sixth Ave. R. R. v. Gilbert*, 71 N. Y. 430, and distinguishing *Musgrave v. Sherwood*, 76 N. Y. 194.) A stay of proceedings "until the further order of the court," is vacated by the bankrupt's subsequent discharge *per se*; and a creditor whose action has been stayed thereby, may proceed. (*Cox v. Dorwin*, 29 Hun, 293.)

**Inquiry as to Whether Debts are Released by Discharge.**—The existing act makes it necessary for the bankruptcy court, when an application for a stay is made, to inquire whether the claim on which the suit is founded, is dischargeable or not.

The better authority seems to be that the court will examine into the matter to determine whether the action is one which is dischargeable or not, and not be bound by the face of the pleadings. (Compare *In re Basch*, 3 Am. B. R. 235; 97 Fed. 761; *Bear v. Chase*, 3 Am. B. R. 746; 40 C. C. A. 182; 99 Fed. 920.)

**Continuance of Pending Suits.**—Unless ordered by the court the trustee is not bound to enter appearance and defend a pending suit; without its approval he will not be permitted to prosecute any pending suit. Unless ordered, he must exercise his own discretion as to the wisdom of defending any pending suit. He is not obliged to seek his remedy in these actions. (*Trader's Bank v. Campbell*, 14 Wall. 87; s. c. 6 N. B. R. 353; s. c. below, 2 Biss. 423; s. c. 3 N. B. R. 498.) The language of the present

act differs in some details from the act of 1867, but it would seem that the words were still permissive rather than mandatory, and that a trustee, unless ordered, is not obliged to either prosecute or defend an action unless it is for the interest of the estate. (Reade *v.* Waterhouse, 10 N. B. R. 277; s. c. 52 N. Y. 587; s. c. below, 28 Hun, 78.) It would seem that the trustee could not be made a party against his will except by order of the court; but if a suit is pending against a party at the time he is adjudged a bankrupt, notice may be given to the trustee that it will be prosecuted against him in his representative capacity, and if he makes no objection to the jurisdiction and the bankruptcy court does not arrest the proceedings, the case may be prosecuted to judgment. Compare *Bear v. Chase*, *supra*. Such a judgment may be filed with the trustee as an ascertainment of the amount due to the creditor by the bankrupt, and as a basis of dividends, but it is effectual and operative for that purpose only. (Norton *v.* Switzer, 93 U. S. 355.) If the action which has been instituted is one affecting property which vests in the trustee, and he does not make himself a party thereto, he is affected by the judgment in the same way as any purchaser *pendente lite*. The State court will not stay a foreclosure already commenced against the owner of the equity of redemption, who is thereafter adjudged a bankrupt, unless the bankruptcy court actually issues an injunction order. The suit does not become defective for lack of parties, even though the trustee is not made a party. (Lenihan *v.* Haman, 55 N. Y. 652; Cleveland *v.* Boerum, 24 N. Y. 613.)

**In What Suits Can Trustee Intervene?** Section 11b, c.—It has been held the trustee may intervene in any pending legal proceeding affecting the property of the bankrupt or the rights of creditors. If a fund is in the hands of a receiver appointed by a State court, he may as the representative of the bankrupt and his creditors make himself a party to the proceedings, and contest any claim against the fund. (Louden *v.* Blanford, 56 Ga. 150.) He may bring a writ of error to review a judgment which was entered against the bankrupt before the adjudication, and he alone

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can bring such writ; he may also take an appeal from such judgment. (*Knox v. Bank*, 12 Wall. 379; *Sandford v. Sandford*, 58 N. Y. 67; s. c. 17 Am. Rep. 206, with notes.)

**Rights of Bankrupt to Maintain Pending Actions.**—There is some conflict of authority as to the right of the bankrupt to continue pending actions brought by or against him. All his rights of action except those causes of action which are for personal injuries and which die with the person pass to the trustee. From the time that the latter acquires them the bankrupt has no further interest in them. It has been accordingly held that after that time neither the bankrupt nor his attorney has any authority to settle a suit which is then pending in his name; that if such a suit is dismissed after the title vests in the trustee in bankruptcy, the trustee may move to have the same reinstated, and need show only that the settlement was made without his authority. (*Home Ins. Co. v. Hollis*, 53 Ga. 659.) On the other hand, just as the trustee may abandon worthless property or may refuse to accept a lease which would prove unprofitable, he may decline to continue the prosecution of a worthless cause of action. Further than this it has been held that until the appointment of a trustee the title to all the property, including rights of action, remains in the bankrupt, notwithstanding it may afterwards relate back to the adjudication, and that until some one with a better right to prosecute appears, he may continue the prosecution. (*Gilmore v. Bangs*, 55 Ga. 403; *Sutherland v. Davis*, 42 Ind. 26.)

**In Whose Name is the Action Continued?**—If the trustee intervenes, the suit will be continued in his name, and this seems to be the rule even where the common-law doctrine prevails, that an assignee must sue in the name of the assignor. (*Ames v. Gilman*, 51 Mass. 239.)

**Liability of the Substituted Trustee for Costs.**—Costs cannot properly be taxed to the trustee before he becomes a party to the suit. After that time he is liable for the costs. (*Norton v. Switzer*, 93 U. S. 355; citing *Reade v. Waterhouse*, 12 Abb. Pr.

[N. S.] 255; s. c. 52 N. Y. 588; s. c. 10 N. B. R. 277; *Holland v. Seaver*, 1 Fost. 387; *Penniman v. Norton*, 1 Barb. Ch. 248, and *Smith v. Gordon*, 6 Law Rep. 314.) But he is not personally liable unless the court shall direct the same to be personally paid by him because of his mismanagement or bad faith in the action. (*Reade v. Waterhouse*, *supra*.) As to his personal liability for the amount of a judgment, see *Norton v. Switzer* (93 U. S. 355).

**Limitation of Actions.** Section 11d.—The provisions of the present act as to the limitation of actions against or by a trustee are totally different from those of the act of 1867. This section is an absolute, arbitrary rule, forbidding the commencement of any suit or action after two years from the time of the closing of the estate. It is immaterial when the right of action accrued, or whether it sprang from the fraud of another, or is founded on contract. The maxim, *interest rei publicae sit finis litium*, is here embodied in this section; and no exceptions are allowed. It is within the power of Congress to pass such a statute of limitations and it necessarily supersedes all State laws of limitations which would otherwise affect the same actions. (*Peiper v. Harmer*, 5 N. B. R. 252.) It has been held that this statute is an independent provision having no connection with any State statute on the subject; that regardless of the time when an action would be barred by a State statute, it extends until two years after the estate is closed whether the State statute would terminate the right to bring suit at an earlier or later date. (*Frelander & Gerson v. Holloman*, Fed. Cas. 5,081; 9 N. B. R. 331.) Suits in State and Federal courts both fall within the terms of the statute. In the term "suit" as used in the bankruptcy act are included all prosecutions of a demand in courts of justice whether the proceedings be at law or in equity (*Bailey v. Weir*, 21 Wall. 342); and regardless of the nature of the proceedings or the character of the tribunal. Thus a *venire* to assess damages for land taken under the right of eminent domain is a proceeding which will be barred by this statute. (*Union Canal Co. v. Woodside*, 11 Penn. 176.) The limitation exists notwithstanding

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§ 12.] Assignment of Cause of Action — Closing Estate — Compositions.

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action is brought in the name of the trustee for the use of a third person. (*Ames v. Gilman*, 51 Mass. 239.) It applies also to writs of error sued out to review a State judgment, as well as to suits originally commenced. (*Jenkins v. Bank*, 106 U. S. 571; *Walker v. Towner*, Fed. Cas. 17,089; 4 Dill. 165; *Payson v. Coffin*, Fed. Cas. 10,858; 4 Dill. 386.)

**Does Not Affect Jurisdiction.**—Failure to bring the suit within the time herein prescribed is a good defense to an action when brought, if pleaded; but it does not affect the jurisdiction of the court. (*Chemung Bank v. Judson*, 8 N. Y. 254.)

**Assignment of Causes of Action.**—Where the trustee has a claim against which the statute of limitations has run, he cannot by assignment confer a right of action upon another and thus avoid the statute. (*Cleveland v. Boerum*, 24 N. Y. 613.)

**When is the Estate Closed.**—The only provision of the statute as to when an estate is closed is that in section 2 (8), which implies that the estate is closed when an order is made approving the final account of the trustee and discharging him. But perhaps in view of the context the “closing of the estate” in this section refers to the time when the question of discharge is determined.

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**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.

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*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.

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 Analogous Provisions of Former Acts.—

R. S. section 5103 A. (Passed June 22, 1874.)

**History of Composition as an Incident of Bankruptcy Proceedings.**

—The Bankruptcy Acts of 1800 and 1841 and the original act of 1867 contained no provision for a composition by a bankrupt with his creditors. The first United States statute on the subject was section 5103 A, Revised Statutes, passed in 1874. The first English statute permitting an arrangement with creditors was that of 6 Geo. IV. ch. 16, passed in 1825, but that did not release the compounding party from the debts due creditors who dissented. The first English statute permitting a composition which would act as a discharge of all debts, those of dissenting as well as assenting creditors, was that of 12 & 13 Vict. ch. 106, passed in 1849. That act required, however, that the compounding bankrupt must make a *cessio bonorum*—that is, must turn over all his property to his creditors, in order to make the composition valid in case there were dissenting creditors. The act of 1861, 24 & 25 Vict. 134, permitted a composition without a *cessio bonorum*. Our act of June 22, 1874, was modeled on the 126th section of the English Bankruptcy Act of 1869 (32 & 33 Vict. ch. 71), which authorized such a composition without the institution of a bank-

ruptcy proceeding, but which in all other respects was substantially adopted in the U. S. act. The section of the present act differs in many details, especially in regard to procedure, from the act of 1874. In particular the present act permits a composition only after adjudication of bankruptcy, while the act of 1867 permitted it after petition and before or after adjudication. (Compare *in re* Reiman, Fed. Cas. 11,673; 11 N. B. R. 21; s. c. 7 Ben. 455; s. c. on appeal, 12 Blatch. 562; Fed. Cas. 11,675; 13 N. B. R. 128.) The sections of the English act as to composition and those of the U. S. act of 1874 appear in parallel columns in the opinion *in re* Scott, Collins & Co. (Fed. Cas. 12,519; 15 N. B. R. 73).

**Constitutionality of the Section.**—The analogous section of the former act (section 5103 A, R. S.) was assailed as unconstitutional on the ground that the power given to Congress to establish a uniform system of bankruptcy was a power to enact laws of bankruptcy as the word “bankruptcy” was understood at the time of the adoption of the Constitution. It was urged that a bankruptcy law necessarily required that all the property of the bankrupt should be turned over for distribution in some uniform manner among his creditors, and that an act which discharged a person from his debts without the consent of his creditors, when the debtor was not required to make a *cessio bonorum*, was not a “bankruptcy” law, and that Congress had no power to enact such a law. But the constitutionality of the law was upheld by the District Court for the Southern District of N. Y. which held that the power of Congress to legislate on the subject of bankruptcy was not limited to passing only such laws of bankruptcy as had been passed by the British Parliament at the time we adopted our Constitution, and that a law authorizing one’s release from all his debts if a composition agreement is made with a majority of his creditors, is valid if by the provisions of the composition and of the proceedings under which it is conducted the property of the debtor is substantially appropriated to his creditors, and if each creditor obtains substantially as great a *pro rata* share of

such property as it can pay or can reasonably be expected to pay. If there is such a *cessio bonorum* as the practical result of the composition, although there is no intervention of an assignee or trustee, and even though such *cessio bonorum* is the result only of a provision requiring that the composition is not binding until ratified, and that it shall not be ratified by the court unless it appears for the interest of all the creditors, then the law is constitutional, because unless the composition does substantially appropriate all the debtor's property to the payments of his debts, the court will be obliged to refuse to confirm it.

The fact that the determination of the question whether the bankrupt shall be released from his debts is left to the majority of his creditors does not make the law unconstitutional. Congress has plenary power to legislate on the subject of bankruptcy. The "subject of bankruptcy" is not, properly, anything less than the subject of the relations between an insolvent or non-paying debtor and his creditors. "It is a well-established principle that in making laws necessary and proper to carry into execution the powers vested by the Constitution, Congress possesses the choice of means, and may use any means which are in fact conducive to the exercise of a power granted by the Constitution." (United States *v. Fisher*, 2 Cranch 358, 396; *McCulloch v. Maryland*, 4 Wheat. 316, 321; the *Legal Tender Cases*, 12 Wallace, 457, 539.) The subject of bankruptcy includes the distribution of the property of the insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends. Congress has full power over this subject, with the one qualification that its laws must be uniform throughout the United States.

**Construction.**—This section which compels the dissenting creditors in composition to be bound by the action of the majority in number and amount and to accept the discharge of their claims which the majority of the creditors see fit to accept, being in derogation of common law rights, should be strictly construed.



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§ 12.] Compositions—How Consent of Creditors is to be Obtained.

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(See valuable discussion on this subject *In re Rider*, 3 Am. B. R. 178; 96 Fed. 808, which is one of the few cases decided under the Act of 1898.)

**What Bankrupts May Make Compositions With Creditors.**—The act restricts the right to no particular class. Corporations and partnerships as well as individuals may make such arrangements with creditors. A corporation under this law may apply for and secure a discharge, a right not accorded under the act of 1867. (*In re Weber Furniture Co.* Fed. Cas. 17,330; 13 N. B. R. 529; s. c. on appeal, Fed. Cas. 17,331; 13 N. B. R. 559.) In the case of partnerships or other joint debtors the composition and application for its confirmation may be made by any one of the several joint debtors; it is not necessary that it be made by the entire firm. (*Pool v. McDonald*, Fed. Cas. 11,268; 15 N. B. R. 560.)

**When May a Composition be Made.** Section 12a.—Under the present act a composition can be made only after the filing of the schedules, and after examination of the bankrupt, and after the claims of at least some of his creditors have been allowed; hence, not till after adjudication of bankruptcy, in this respect differing from the former act.

**How Consent of Creditors is to be Obtained.** Section 12b.—The present act provides no special manner in which the consent of the creditors is to be obtained. As the purposes for which a meeting was called under the provisions of the act of 1874, viz. the examination of the bankrupt and the filing of a schedule of assets, must, under the terms of the present act, be accomplished before even the offer to make a composition is made, there would be no advantage in a meeting, unless for the purpose of conference. Under the Act of 1874, which required first a meeting of creditors and thereafter a confirmation of the action of the meeting, evidenced by the signatures of a certain number of creditors, it was held that such confirmation need not be obtained at a meeting, but the debtor might procure it within any reasonable time

thereafter. (*In re Spillman*, Fed. Cas. 13,242; 13 N. B. R. 214; *in re Scott, Collins & Co.* Fed. Cas. 12,519; 15 N. B. R. 73.) The consent, it would seem, might now be obtained by personally and privately circulating the paper among creditors. The rights of those who are not called upon or who choose to dissent will be fully protected at the hearing which must be appointed by the judge, to hear objections to the confirmation of the composition.

No construction will be adopted, however, which would permit the bankrupt to select a time when but few creditors have proved and then to present his terms only to creditors friendly to his interests, keeping others in the dark. (See *In re Rider*, *supra*.) And the Supreme Court in adopting Form No. 60 covering a petition for meeting to consider composition, has evidently intended to provide for a proceeding analogous to that under the Act of 1874.

**What Consent Must be Obtained.** Section 12b.—The debtor's offer of composition must be accepted by a majority both in number and in amount of all creditors whose claims have been allowed. There are no restrictions whatever upon any class of creditors; however large or small their claims, they will be entitled to vote and to be counted both in considering the number of creditors and the amount of allowed claims. In this respect the present act differs from the former one. But only creditors whose claims are allowed can join in the composition, and the majority must be of all which have been allowed, not of those assembled at any particular meeting as under the former act.

But it is very clear that the offer should be made to all his creditors whether they have proved all their debts or not. It is not essential that proofs shall be made before or at the first meeting. They may be made at any time within a year after adjudication. It is not necessary that they should be filed in the first instance with the referee. (Section 57c. n; *In re Rider*, *supra*.) And by section 58 creditors should receive at least ten days' notice of all examinations and meetings of creditors. Creditors may

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§ 12.] Proceedings Preliminary to Application and Confirmation.

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act through their duly appointed attorneys in fact; see section 1 (9); section 56a; G. O. 21, subdiv. 5.

**Proceedings Preliminary to Application and Confirmation.**—After requiring that the consent of the majority in number and amount of the creditors shall have been obtained in writing, the Act requires that the consideration to be paid by the bankrupt to his creditors as well as the money necessary to pay all costs and all debts having priority, shall first be deposited. The use of the word “money” with reference to the deposit for claims having priority and for costs may imply that something other than money can be deposited as the consideration for compounding creditors. The use of the word “paid” and the use of the word “deposit” would seem, however, to exclude the idea of a consideration being anything else than money or negotiable instruments—orders for the payment of money. The Act further requires that the consideration shall be distributed by the judge, and that as soon as distributed the case is to be dismissed. As the composition cannot be made before adjudication, and examination, and the filing of the schedules and the allowance of some claims, it will in practice, at least, rarely be made before the appointment of a trustee, by which time all the property of the bankrupt will have become vested in the trustee. As this title remains in the trustee until after the composition is confirmed, and as a composition cannot be confirmed until the property has been deposited for distribution, it would seem that the “consideration” to be paid to compounding creditors could not be the property of the bankrupt *in specie*. This inference is further required by the provision that the consideration shall be distributed. The Act permits the composition to be effected before the trustee has converted the bankrupt’s property into cash; indeed, the very purpose of a composition is to save the expense of the administration of the estate in bankruptcy, to prevent a sacrifice sale, and to save that margin which can usually be saved by the management of a business by one familiar with it instead of by one a stranger to it, even though the latter may possess, in general, greater capacity. If,

then, the debtor's property is not to be the consideration to be distributed among his creditors, the consideration must be either after acquired property, which in the ordinary case will be a mere pittance; exempt property, which will rarely be of greater value, or money borrowed by the bankrupt from some friend; or else the bankrupt's own notes. Under the Act of 1874, which required a payment in money, it was held that the money might be paid in installments, and that notes might be accepted as promises to pay in money, but not as an absolute payment (*in re Hurst*, Fed. Cas. 6,925; 13 N. B. R. 455); but under that act the proceeding was not dismissed as soon as the composition was confirmed. The court retained jurisdiction to enforce the provisions of the composition. The present act makes the confirmation of the composition operate as a dismissal of the proceeding; it is at an end, although the court may, under certain circumstances, set aside the composition and reinstate the case just as courts in general may open judgments. It cannot, however, enforce promises to pay. But that promises to pay may constitute the consideration is implied by the provision in 14 (c) to the effect that the confirmation of the composition shall discharge the bankrupt from his debts other than those agreed to be paid by the terms of a composition and those not affected by a discharge. As to the effect of non-payment of such notes, see below, paragraph on Effect of a Composition.

**Amount of the Consideration.**—Whatever is the nature of the consideration, it must, in value, be substantially as much as the property of the bankrupt can reasonably be expected to yield to the creditors; else the court will be in duty bound to refuse to confirm the composition on the ground that it is not for the interest of creditors. If the consideration offered does equal the amount which the bankrupt's property will probably yield when administered by the trustee in bankruptcy, then, in the absence of fraud, the judge should not refuse to confirm the composition simply because the bankrupt might have offered more. "As it is established by all experience that a man can make more out of his

## § 12.] Deposit of Money to Pay Debts Having Priority.

own assets than assignees of more general capacity than he, and entirely honest can realize, there is an undoubted margin in many cases which the debtor may save by offering less than he might offer, but more than his creditors could obtain by process of law." (*In re Morris*, Fed. Cas. 17,513; 11 N. B. R. 443; *in re Whipple*, Fed. Cas. 17,330; 11 N. B. R. 524. As to the amount of margin, see *In re Weber Furniture Co.* Fed. Cas. 17,331; 13 N. B. R. 529; s. c. on appeal, Fed. Cas. 17,331.; 13 N. B. R. 559.)

**Deposit of Money to Pay Debts Having Priority.**—The present act provides that before the application for the confirmation of the composition shall be filed in a court, the money necessary to pay all debts which have priority and the cost of the proceedings shall have been deposited pursuant to the order of the judge. What sum must be deposited before a composition can be made, if the assets of the estate are insufficient to pay in full the creditors having priority? Is one prevented from making a composition in such cases unless he procures from some source, by borrowing or otherwise, enough money to pay in full these claims having priority and these costs? The former act provided that "the composition should, subject to the priorities declared in said Act, provide for a *pro rata* payment, etc." *In re Chamberlain*, decided in the southern district of N. Y. in 1876, and reported in Fed. Cas. 2,580; 17 N. B. R. 49, it was held by Judge Blatchford, that all that was meant by this provision of the Revised Statutes, and all that was preserved by the composition law, was a priority of payment out of the assets of the debtor. Further than that there was no priority, and when there were no assets and the composition money was to be advanced by other parties and from other sources than the property of the bankrupt, the preferred debt under the statute had no higher claim than that of general creditors. In this case the State of New York, as a creditor, contended that the composition could not be confirmed without first paying it in full, whether the assets were sufficient or not for that purpose. The differences

between the two statutes render it doubtful if the case cited is any longer applicable. Compare, however, section 65*e*.

**"Parties in Interest."**—This is a broader term than "creditors" but probably in this section does not mean any more than the creditors who have proved their claims. After the terms have been made known to all the creditors they should have a reasonable time to decide whether they will accept the offer or not but in order to qualify themselves to vote upon the proposition they are required to prove their claims. (*In re Rider, supra.*) The creditors who are secured do not come under the section because the bankruptcy court has nothing to do with them except so far as their claims may exceed their security, or they may elect to surrender their security.

**Proceedings on Application.** Section 12*d*, *e*.—The proceedings on the application for the confirmation of the composition are quite similar to proceedings for discharge (*q. v.*). The bankrupt makes a petition (Form No. 60,) in which, having stated that a composition of a given percentage of all secured debts not entitled to priority and in satisfaction of such debts has been proposed by him to creditors and that he verily believes that the composition will be accepted by a majority, in number and amount, of the creditors, he prays that a meeting of the creditors may be called to consider the composition. An order is then entered calling a meeting and notice is sent to all creditors in accordance with section 58, and also published under said section as the court may direct. This meeting, as has been pointed out above, does not seem to be imperatively demanded by the statute but is customary and the better practice as prescribed by the forms. The terms are either agreed to or discarded by the requisite vote. If they are accepted the bankrupt makes a further application (Form No. 61) reciting the acceptance in writing by a majority, in number and amount, of the creditors, the deposit of the money required by the statute in a depository designated by the judge for such purpose, and prays confirmation. This application or peti-

tion is filed with the clerk. An order to show cause why the composition should not be confirmed is then entered by the clerk which states the time and place of the hearing and directs that a designated referee give notice to all creditors or other persons in interest, as provided in section 58. The notice must be mailed and published at least once within ten days prior to said hearing, and proof of mailing and publication must be presented on the return day of the order. The application for the confirmation of the composition must be made to the judge, section 38 (4), but the issues arising thereon may be referred to a referee to ascertain and report the facts, which is ordinarily done (G. O. 12). By G. O. 32 a creditor opposing the application for the confirmation of the composition must enter his appearance on the day when the creditors are required to show cause and must file a specification in writing of the grounds of his opposition within ten days after unless the time is enlarged. This specification must be of the same character and nature as the specification in opposition to discharge (q. v. *post*). After the hearing has been had and the report of the referee made the court then confirms or rejects the composition. Form of order confirming the composition will be found in Form No. 62. Subsequent to its confirmation an order decreeing distribution is made. (Form No. 63.)

Where no evidence *aliunde* the offer and the acceptance of the offer is presented, the composition, as a nearly universal rule, should be confirmed. The only exception is where it manifestly appears there was some fraud, accident or mistake—such a contingency as would incline the court, in any other case of ordinary practice *ex mero motu*, to refuse to proceed, and upon notice to all parties concerned require the exceptional and suspicious circumstances to be explained. Unless such fraud appears it is the duty of the objecting creditors to show by evidence sufficient grounds why the court should refuse to confirm. The presumption exists that the action of the majority is for the interests of all the creditors until it is attacked by those who are interested in showing it to be erroneous. (So held *in re Weber Furniture Co.* Fed. Cas. 17,331; 13 N. B. R. 559.)

**Specific Grounds for Refusing to Confirm.**—(1) NOT FOR THE INTEREST OF CREDITORS. The composition should not be confirmed if the amount offered does not equal that which is likely to be yielded to creditors if the proceeding in bankruptcy is carried through and the property administered in it, taking into consideration the fact that at a forced sale it will probably bring less than at a private sale, and also taking into consideration the delay which will ensue.

The statute clearly imposes upon the judge the duty of examining the offer and acceptance, and ascertaining whether the composition will be beneficial to the parties. As was said by Judge Lowell (*In re Morris*, 11 N. B. R. 443): "A burden is cast upon the court that is not easily sustained of instructing parties concerning their own interests. In the absence of fraud and concealment the question for the court seems to be, not whether the debtor might have offered more, but whether his estate would pay more in bankruptcy. The English statute makes the determination of the creditors final on that point in the absence of fraud, and I dare say it will be found that the practical application of our law must be very similar." This judge intimated that a gross difference between the probable value of the assets and the consideration offered in composition would require the court of its own motion to refuse to confirm the composition. (*In re Whipple*, Fed. Cas. 17,513; 11 N. B. R. 524; compare *in re Reiman & Friedlander*, 11 N. B. R. 21, at page 40; s. c. 7 Ben. 455; Fed. Cas. 11,673.) *In re Weber Furniture Co.* (Fed. Cas. 17,330; 13 N. B. R. 529), which arose in the bankruptcy court for the eastern district of Michigan, it was held that a composition which is palpably opposed to the best interests of the creditors as a body will not be confirmed. The court cited *Latham v. Lafone*, L. R. 2 Exch. 115, and other English cases, laying down the rule that where the composition offered was so unreasonable as to be evidence that the creditors who signed it were induced, by reason of their friendliness towards the debtor, to accept a composition greatly disproportionate to the assets, the court was bound to reject it. In the case of *The Weber Furniture Co. supra*, it was



held, in the decision given in the district court, that while it is sufficient *prima facie* evidence that the composition was for the best interests of all, to show that the requisite majority of creditors have accepted, and that the burden of proof is then thrown upon the dissenting creditors, still where the record (the schedules) shows upon its face that an estate is able to pay a much larger dividend, the dissenting creditors may rely upon this statement and are not bound to prove the facts by affidavit; while they are not bound by the debtor's statements, yet if they desire they may accept them as true. But in the decision of the Circuit Court, to which this case was appealed, it was held that the mere fact that there is a discrepancy between the estimated value of the assets as appearing in the schedules and the terms of composition offered, even if that discrepancy is so great as to make the composition appear unreasonable, does not justify the court in refusing absolutely to confirm. It would be in the last degree inconvenient if whenever an apparent discrepancy existed between the stated value of the assets and the terms of the composition, the court was required to examine into the matter and inquire as to the reasonableness of the offer, and act as the guardian of the interests of creditors, who, as a rule, must be capable of taking care of themselves.

2. PERFORMANCE OF ACTS OR FAILURE TO PERFORM DUTIES WHICH WOULD BAR A DISCHARGE. The provision that a composition by a bankrupt, who has done acts or failed to perform duties which would be a bar to a discharge, shall not be confirmed, is new. As to what will be a bar to a discharge, see section 14 (b). There does not seem to be anything to prevent one making a composition merely because the statutory time within which he must apply for a discharge has expired, provided he has done nothing which would prevent his getting a discharge if applied for, and has not failed to perform any of the duties, failure to perform which would be a bar to securing a discharge. The evident intent of the act is to prevent one from making a composition with creditors, and thereby gaining a discharge by virtue of the action of a majority of his creditors, if he has done any-

thing which would prevent his getting it in court. The statute fixes no time within which a composition must be made, other than the provision that it cannot be till after examination, etc. The refusal to confirm a composition must be because of acts done or failure to perform duties, which would be a bar to a discharge, not because a discharge cannot be applied for.

3. GOOD FAITH—NO IMPROPER INFLUENCES.—Fraud is made a sufficient cause for the revocation of a composition which has been confirmed; *a fortiori*, is it a cause for refusing to confirm a composition. The knowledge of the debtor that the composition is procured by fraud is not always necessary, in order to induce the court to refuse to confirm. Compositions are agreements not only between the debtor and the creditors, but between the several creditors, each with the others. Fraud on the part of any one of them or improper means, acts, or promises by any of them, or want of good faith by any of them, vitiates the composition, at least so far as injured creditors are concerned. (*In re Sawyer*, Fed. Cas. 12,395; 14 N. B. R. 241; s. c. 4 Cent. L. J. 470; *in re Whitney*, Fed. Cas. 17,580; 14 N. B. R. 1.) The courts require very slight evidence to induce them to impute to the debtor a fraud perpetrated by another when the fraud works to the interest of the debtor. (*In re Sawyer*, *supra*; *in re Whitney*, *supra*; *Robson v. Calze*, Doug. 228; *Holland v. Palmer*, 1 Bos. & P. 95; *Ex p. Butt*, 10 Ves. 359; *Ex p. Hall*, 17 Ves. 62.) In such cases, if it is shown that the bankrupt is absolutely innocent, the courts will sometimes permit him to make a new offer of composition and file a new acceptance. (*Ex p. Harrison*, 2 Buck. 247 n.) Independently of any statute and without regard to who makes the payment, the giving of money to one creditor to induce him to sign the composition vitiates it. (*Jackson v. Lomas*, 4 Term R. 166; *Leicester v. Rose*, 4 East 372; *Dauglish v. Tennent*, L. R. 2 Q. B. 49; *Phillips v. Dicas*, 15 East 248.) Whether or not our present Bankruptcy Act, in subdivision 3 of paragraph *d* of this section, changes these general principles of law as to composition, and authorizes the court to refuse to confirm them only when the bad faith or the improper conduct is directly im-

putable to the bankrupt may be a question. (Compare *in re Whitney*, Fed. Cas. 17,580; 14 N. B. R. 1.) But it seems doubtful if the act intends in any way to alter the fact that a composition is an agreement between the several creditors themselves as well as between the creditors and the debtor, or whether there is anything in it intended to disturb the fundamental principle that fraud by any party to a contract makes it voidable by any of the defrauded parties. The good faith required of the debtor is of the highest order. Misrepresentations as to the amount of his debts or the value of his assets, or as to the willingness of other creditors to enter into the composition, or as to any matter which would influence their action, vitiate the composition and render it liable to be rejected by the court. (See *Almon v. Hamilton*, 100 N. Y. 527; *Irving v. Humphrey*, Hopk. Ch. [N. Y.] 284; *Graham v. Meyer*, 99 N. Y. 611; *Whiteside v. Hyman*, 10 Hun, 218; *Coolong v. Noyes*, 6 T. R. 263; *Seving v. Gale*, 28 Ind. 486.) Any secret advantage given to one creditor to induce him to assent to the composition vitiates it and a court is justified in presuming if such action was for the benefit of the bankrupt that it was done by him or through his agency. (*In re Sawyer*, Fed. Cas. 12,395; 14 N. B. R. 241; s. c. 4 Cent. L. J. 470; *in re Whitney*, Fed. Cas. 17,580; 14 N. B. R. 1; *Bean v. Amsinck*, Fed. Cas. 1,167; 8 N. B. R. 228; *Knight v. Hunt*, 5 Bing. 432; *Anshall v. Denby*, 6 Hurl & N. 788; *Bean v. Brookmire*, Fed. Cas. 1,170; 7 N. B. R. 568.) Improperly inducing one to withdraw opposition is equally as fraudulent as to induce one to assent. (*In re Sawyer*, *supra*; citing *Browne v. Carr*, 7 Bing. 508, 516; *Hall v. Dyson*, 17 Q. B. 785; *Dexter v. Snow*, 66 Mass. 594.) Purchasing claims for the purpose of using them in favor of a composition may or may not be fraudulent according to the circumstances of the case, there being a strong tendency to regard it as fraudulent, or at least to require very little evidence to establish the fact. Unless there is clear proof that the motive was proper, there will always exist a presumption that it was done in behalf of the debtor and for improper purposes. (*In re Whitney*, *supra*;

*in re Sawyer, supra.*) A mere omission of assets or the names of creditors from the schedules or the insertion of debts which in reality do not exist is no ground for refusing to confirm a composition, if the errors are not in amount so great as to require an alteration in the terms of the composition and provided that there was no fraudulent intention, especially if the creditors knew of the error at the time of the composition. (*In re Reiman & Friedlander*, Fed. Cas. 11,673; 11 N. B. R. 21; s. c. 7 Ben. 155; s. c. affirmed, 12 Blatch. 562; s. c. Fed. Cas. 11, 675; 13 N. B. R. 128; *in re Scott, Collins & Co.* 15 N. B. R. 73.) But it has been held that where an insolvent has been legally released from his obligations by a composition with his creditors, the debt of one of such creditors, who accepted the composition on the express condition that none of the other creditors should receive a larger sum, is not revived by the payment by the insolvent after such release of additional sums to other creditors, there being no previous agreement to make the additional payments. (*In re Sturgis*, Fed. Cas. 13,565; 16 N. B. R. 304.) For one creditor to secure fifty per cent. in cash at once, instead of seventy per cent. on time, is a fraud which will void the composition. (*Bean v. Amsinck*, 10 Blatch. 361; s. c. below, Fed. Cas. 1,167; 8 N. B. R. 228.) Such fraudulent agreements not only vitiate the composition, but the agreements themselves are unenforceable. On grounds of public policy the courts will give no aid to the suitor. (*Bean v. Amsinck, supra*, citing 1 Story's Eq. Juris. sections 378 and 379; *Clark v. White*, 12 Peters, 178 and 199; *Russell v. Rogers*, 10 Wendell, 473 and 479; *Wiggin v. Bush*, 12 Johns. 306 and 309; *Bean v. Brookmier*, Fed. Cas. 1,170; 4 N. B. R. 196; s. c. 1 Dill. 151; *Daughlish v. Tennent*, Law Rep. 2 Q. B. 48 and 54; *Breck v. Cole*, 4 Sandf. 79; *Carroll v. Shields*, 4 E. D. Smith, 466; *Pinneo v. Higgins*, 12 Abb. Pr. 334.) And the consideration of the fraudulent agreement may be recovered even by the debtor who paid it (*Bean v. Amsinck, supra*, citing *Smith v. Bromley*, Doug. R. 696; *Jackman v. Mitchell*, 13 Ves. 581; *Wood v. Barker*, Law Rep. 1 Eq. Cases, 139), or by the trustee in bankruptcy. (*Bean v. Amsinck, supra*, citing *Bean v. Brook-*

mier, 4 N. B. R. 196; s. c. 1 Dill. 151; Fed. Cas. 1,170; also Knowlton v. Moseby, 105 Mass. 136.) Such is the common-law rule, and such were the adjudications under the Act of 1874. Whether that rule is altered by section 13, which provides the cases in which compositions may be set aside, and which prevents them being collaterally attacked; and whether it is in any way affected by section 21 (f), which provides that a certified copy of an order confirming or setting aside a 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 the fact that the order was made, *quaere*. It would seem that under section 13 the composition could be attacked, even for fraud, only in the bankruptcy court and only in the time and manner specified therein. Compare notes to section 15.

**Good Faith by the Creditors.**—Good faith on the part of those who accept the composition implies that their motive shall be to do that which is for the best interests of the creditors. If they are actuated by motives inconsistent with this, for instance, if they, through friendship for or sympathy with the bankrupt, and to enable him to procure a discharge, consent to take less than the creditors would probably receive if the estate is administered in bankruptcy, or to take that which would not be for the interests of all the creditors, bearing in mind the expense and the delay of administration in the regular way, then they are guilty of bad faith to the dissenting creditors, and the court is bound to refuse to confirm the composition. The chief duty of the creditors in this respect is towards each other, not towards the debtor. In the leading case (*Ex p.* Williams L. R. 10 Eq. 55), it was said: "Benevolence, generosity and forbearance may well be exercised, but not at the expense of other people;" and in that case it was decided that as the composition provided for the acceptance of a shilling to the pound when the assets were worth seven shillings to the pound, either the debtor must have fraudulently concealed the true state of his affairs, or else the assenting creditors knowing the value of the assets, must have been guilty of bad faith to-

wards the other creditors. (Compare *Ex p.* Russell, 10 Chan. App. 255; *Ex p.* Cowen, L. R. 2 Ch. 563; *Hart v. Smith*, 4 Q. B. 61; *Ex p.* Cobb, L. R. 8 Ch. App. 727.)

**Dismissal of the Case.** Section 12e.—The composition being confirmed and the consideration distributed, the case is to be dismissed. All proceedings are then at an end, unless the composition thereafter is set aside under the provisions of section 13. The trustee's office expires; the title of the bankrupt's property reverts in the bankrupt. (Section 70 [f].)

**Effect of Composition.**—The confirmation of the composition releases the bankrupt from all his debts other than those agreed to be paid by the composition and those not released by a discharge. (Section 14 [c].) No other discharge is needed than the order confirming the composition. (*In re* Bechet, 12 N. B. R. 201; s. c. 2 Woods, 173.) As to what debts are not released by a discharge, see section 17. Although creditors' names do not appear in the schedules, and are not included in the composition, their claims are barred if they had notice or actual knowledge of the proceedings in bankruptcy. But if fraudulently omitted, the composition may be set aside under section 13. Under the Act of 1874 creditors omitted from the composition were not affected by it. Partners, sureties and guarantors are not released because their joint debtor or principal has made a composition which has been confirmed. (Section 16, *post*; *Mason & Hamlin Organ Co. v. Bancroft*, 1 Abb. N. C. 415; s. c. 4 Cent. L. J. 295; *Ex p.* Jacobs, 44 L. J. B. 34.) The general rule of law that a creditor who by a composition releases the principal debtor also releases the surety, unless he expressly reserves his rights against the latter, is thus modified in bankruptcy. If the principal is discharged by operation of law by becoming bankrupt, the liability of the surety is not affected. A discharge of a debtor under a composition is a discharge by operation of law. (*Ex p.* Jacobs, 44 L. J. B. 34.) Debts are not unaffected by the composition simply because the amount of the debt is incorrectly stated in the schedule; the error must have been substantial or intentional.

## § 12.] Pleading the Composition — Conclusiveness of Decree of Confirmation.

(*Beebe v. Pyle*, 1 Abb. N. C. 412; *in re Trafton*, Fed. Cas. 14,133; 14 N. B. R. 507.) The composition is not effective to discharge the debtor from the debts agreed to be paid, unless the amount is actually paid. In all cases, deeds of composition or accord and satisfaction must be completely executed to be operative. The delivery of notes pursuant to a composition does not of itself cancel the debt. The effect and meaning that must be given to the language in section 14 (c) that "a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition" is that those which are agreed to be paid, if not paid according to the terms of the composition are payable in their original amount. (*In re Hurst*, Fed. Cas. 6,925; 13 N. B. R. 455 at 465; *in re Reiman & Friedlander*, Fed. Cas. 11,673; 11 N. B. R. 21; s. c. 7 Ben. 455; s. c. affirmed, Fed. Cas. 11,675; 13 N. B. R. 128; s. c. 12 Blatch. 562; *Edwards v. Coombe*, 7 L. R. Com. Pleas. Div. 519; *in re Hatton*, L. R. 7 Ch. App. 723; *Newall v. Van Praagh*, 9 L. R. Com. Pleas Div. 96; *Goldney v. Lording*, L. R. 8 Q. B. 182.)

**Pleading the Composition.**—The composition, like a discharge, is a defense that may be waived. If not pleaded, when one is sued upon a debt after it is confirmed, it is deemed to be waived. The court will not thereafter relieve the party from the result of his *laches*. (*In re Tooker*, Fed. Cas. 14,096; 14 N. B. R. 35; compare *McDonald v. Davis*, 105 N. Y. 508; *Dimock v. Revere Copper Co.* 117 U. S. 559; *Revere Copper Co. v. Dimock*, 90 N. Y. 33.)

**Conclusiveness of Decree of Confirmation.**—The confirmation cannot be impeached collaterally, if the decree was made by a court having jurisdiction of the subject-matter and of the persons. Where jurisdiction is shown to have attached all the subsequent proceedings are presumed to be regular, as much as those of a court of general jurisdiction, and its decision as to whether or not the sufficient number of signatures have been obtained, and upon every other question that properly arises in the proceeding is valid and binding in all courts till reversed by an appellate court.

Every presumption is in favor of the regularity of the proceedings. Such questions conclusively settled by the order of confirmation are that the proper number of consents have been obtained, that proper and sufficient notice has been given, that the consideration deposited is valid, that the papers are properly executed and that every act required by the statute has been duly and properly done. (*Smith v. Engle*, 14 N. B. R. 481.)

**Finality of Refusal to Confirm.**—The District Court has held in Tennessee (*In re Adler*, 103 Fed. 444; 4 Am. B. R. 583) that whether it be to the interest of creditors to confirm a composition is purely a question of fact and consequently there is no appeal nor right to supervision of the decision of the District Court refusing to confirm such composition. The following quotation from the opinion of Hammond, J., gives the general reasoning of the decision.

“The proceeding by composition proceeds solely on the theory of promoting the interest of the creditors, and not that of the bankrupt. It is a controversy really between creditors, and not with him, and that is the controversy the bankrupt seeks to carry into the court of appeals. And, unless he has some ulterior motive, like that of protecting the alleged fraudulent vendees under the disguise of this appeal, for example, he has no concern in the question. His discharge is not involved; for, if the composition be not approved by the court, he may be discharged, nevertheless, in the regular way, and just as certainly released of his debts. It is true that, if the composition be confirmed, he has, by operation of the agreement in writing required to accomplish it, a release from his debts, and he does not need a discharge in the regular way; nor can he get it, for the bankruptcy proceedings are to be dismissed. Act 1898, section 12a. But this is only an incidental, or at most a secondary, result, and the composition is not projected for that purpose or in that interest. So, again, it may be for the best interest of the bankrupt and those who hold disputed titles from him that the bankruptcy proceedings should be dismissed and the composition approved; but, again, this is only incidental, and not at all an object to be promoted by or with which the bankruptcy statute is concerned. Neither he nor they have a right to demand this benefit to them, nor the benefit of a release by this method to him; the theory of the statute being that this is all a matter solely pertaining to the creditors and their interest. And yet by this proposed appeal he and they are demanding the incidental benefits not within the care of the statute,—all in his name, and upon the strained construction that by the nonapproval of his offer his discharge is denied. This cannot be the purpose of the appeal pro-



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 § 13.] Compositions, When Set Aside — Fraud the Sole Ground.
 

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vided for by section 25a, cl. 3. He might as well claim that the refusal of his creditors to approve his offer of a composition is a denial of his discharge. It so operates just as much as the disapproval of the court. It requires the combined action of court and creditors in the process. As well might any other disputed question of fact be carried to the court of appeals, among the vast interests involved in the proceedings in bankruptcy. All he has a right to demand is his discharge in the regular way, and, if that be denied him, he may appeal under this section; but he cannot have two appeals under it,—one on the disapproval of the composition, and the other on the denial of his certificate of discharge. If the appeal on this controversy is permissible, it should be taken by the parties to the controversy, namely, the assenting creditors as against the opposing creditors, who are to determine whether there ought to be a composition or proceedings in the ordinary way. The court has determined that it is better for the creditors that they shall proceed in the regular way. If there be an appeal, it is theirs, but the statute has not given the bankrupt an appeal from that decision, neither by direction nor indirection. The bankrupt has not lost anything which he has a right to claim, and has no grievance to be redressed by appeal. Having gone into voluntary bankruptcy, he has only the right to proceed in the regular way. He may offer to proceed in another way, but he has not at all been given by the statute any right to demand that the case shall be dismissed and a composition substituted, because, forsooth, if a composition be adopted he would be released of his debts. That important right has not been indicated by apt language, but is claimed as an inference only upon a right to offer. If it be not adopted, he may still be released. Therefore his discharge has not been affected by the failure of his offer of composition. Not having a right to demand a composition, he has not the right to an appeal if it fail. In other words, it is optional, wholly, with the creditors and the court whether he shall be discharged by a composition. He has only a bare right to offer. This seems to me the plain meaning of the statute.”

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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.

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Analogous Provisions of Former Acts.—  
R. S., section 5103 A.

**Fraud the Sole Ground.**—The sole ground upon which, under the present statute, a composition may be set aside, is fraud in

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 Proceedings After Re-instatement — Discharges, When Granted. [Ch. III.
 

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procuring it, unknown to the petitioner at the time of the continuation. See notes to section 12 as to what constitutes fraud in such cases and also what acts, means and promises are forbidden. The Act of 1874 authorized the court to set aside a reposition if it was shown that the agreement could not be carried out without injustice or delay to the creditors, but now, fraud is the only ground for revoking. Section 2 (9), which in general terms gives courts of bankruptcy jurisdiction to set aside repositions is limited by the terms of section 13 (*In re Rudwick*, 2 Am. B. R. 114; 93 Fed. 787.) Where there has been a reposition in a bankruptcy proceeding it will not be set aside on the ground that a creditor has failed to get notice of the proceedings because his address was by mistake incorrectly given in the schedules. *In re Rudwick, supra*, holding *in re Dupee* (22 W. 18; Fed. Cas. 4,183) inapplicable under the present Act. The practice is the same as upon revocation of discharges. (Section 15.)

**Proceedings After Re-instatement.**—Compare sections 2 (9), 44, and 45.

**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 discharge in the court of bankruptcy in which the proceedings were 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 twelve months.

The judge shall hear the application for a discharge, and such objections 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; (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.

## § 14.] Application for Discharge and Proceedings Thereon.

*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.

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Analogous Provisions of Former Acts. —

As to application for discharge: R. S. section 5108 (amended act of July 26th, 1876, ch. 234, section 1), act of 1867, section 29; act of 1841, section 4. As to the hearing upon application: R. S. section 5109; act of 1867, section 29; act of 1841, section 4. As to grounds for refusing a discharge: R. S. section 5110; act of 1867, section 29; act of 1841, section 4; act of 1800, sections 36 and 37. As to proofs and pleadings in opposition, R. S. section 5111; act of 1867, section 21; act of 1841, section 4. Compare, also, as to assets of one asking for a discharge, R. S. section 5112; act of 1867, section 33; act of 1868, ch 258, section 1. Also R. S. section 5112 A. As to oaths and verification: R. S. section 5113; act of 1867, section 29. As to proceedings, certificate of discharge and second applications: R. S. sections 5114, 5115, 5116; act of 1867, sections 30 and 32; act of 1841, section 12; act of 1800, section 57.

**Discharges.—When Granted.**—The time is fixed by the adjudication. The application cannot be filed until one month has expired; it may be made as of course within the next twelve months subsequent to the adjudication. The statute contemplates that when a petition for discharge is not filed within twelve months after the adjudication the same may be thereafter filed within the next six months upon the order of the judge, based upon satisfactory evidence that the bankrupt was unavoidably prevented from filing the application within the twelve months after adjudication. The express and positive statement in the section as to the time when the application can be made seems to take it out of the power of the court to extend such time except, perhaps, when the delay is the fault of the court, when in accordance with the general rules of practice an order *nunc pro tunc* may be granted. (See for construction of this part of the section *In re Wolff*, 4 Am. B. R. 74; 100 Fed. 430.) As to method of computing time under this Act see section 31.

**Application for Discharge and Proceedings Thereon.** Section 14b. —The statute says that the judge shall hear the application for

discharge and by section 38 (4) questions arising on the bankrupt's application for such discharge are expressly beyond the jurisdiction of the referee to determine, but by G. O. 12 (3) any specified issue of fact arising upon such application may be sent to the referee to ascertain and report upon. The first step in the application is the petition for the discharge which by G. O. 31 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. The petition for the discharge is to be filed with the clerk. Thereupon an order to show cause why the discharge should not be granted is entered by the clerk or deputy clerk which states the time and place of the hearing and directs that the referee give notice, as provided in section 58, to all creditors and persons having any interest in the application, which notice must be given and published at least ten days before the hearing. A form of the bankrupt's application and the order of notice thereon to show cause is given in Form No. 57. By G. O. 2 a creditor opposing the application for discharge must enter his appearance in opposition thereto on the day on which the creditors are required to show cause and file a written specification of the grounds of his opposition within ten days thereafter unless the time is further enlarged. The form of such specification is given in Form No. 58. See as to cases when notices are to be published under order of the court, section 28 and G. O. 32. The specifications to be filed by the creditors must be clear and specific. It is uniformly held that specifications of objections to discharge must contain a distinct averment of the facts bringing the case within the denunciation of the statute. Mere conclusions of law or alternative averments will not suffice; the specifications are to be tested by the general rules applying to criminal pleadings. (See especially *In re Hirsch*, 2 Am. B. R. 715; 96 Fed. 471; *in re Kaiser*, 3 Am. B. R. 767; 99 Fed. 689; *in re Wolman*, 1 Am. B. R. 600; 92 Fed. 512; *in re Quackenbush*, 4 Am. B. R. 274; 102 Fed. 282; *in re Morgan*, 4 Am. B. R. 402; 101 Fed. 982; *in re McGurn*, 4 Am. B. R. 459; 102 Fed. 43.) A valuable collection of authorities on this subject

## § 14.] Application for Discharge and Proceedings Thereon.

will be found to the report, in 4 Am. B. R. 274, of *In re Quackenbush*, which report also includes the referee's opinion. It is there held that sufficiency of specifications in opposition to the discharge may be attacked before the referee to whom the issue is referred. Where fraud is alleged, *scienter* must be alleged, *id.*

It is discretionary with the court to allow an extension of time to file specifications and amendments to such specifications are liberally allowed. (See *In re Frice*, 2 Am. B. R. 674; 96 Fed. 611; *in re Quackenbush*, 4 Am. B. R. 274; 102 Fed. 282.) As the statute says "parties in interest" are to have an opportunity to be heard, the right to object to discharge is not restricted to creditors who have proven up their claims. Any persons having a pecuniary interest in resisting the discharge of the bankrupt from his debts even though they have not proved their claims, are entitled to go into court and object. (See *In re Frice*, *supra.*)

If a party in interest who files objections to the granting of the discharge, afterwards declines to prove them, other creditors may be allowed to do so. (*In re S. S. Houghton*, Fed. Cas. 6,730; 10 N. B. R. 337, citing *Foster v. Goulding*, 9 Gray, 50; *contra, in re D. A. McDonald*, Fed. Cas. 8,753; 14 N. B. R. 477.) Compare section 59 (f) as to the right of creditors other than original petitioners to join in the petition to have one adjudged a bankrupt involuntarily. While the objections are not to be pleaded with the strictness of an indictment perhaps, it is necessary that the facts be alleged, and that such allegations be distinct, specific, and definite so as to clearly inform the bankrupt what he is to disprove. See *ante* under this section. If they are vague and general, the court will dismiss them or compel the objecting party to be more definite. (*In re Hill*, Fed. Cas. 6,482; 1 N. B. R. 275; s. c. 2 Ben. 136; *in re Burk*, Fed. Cas. 2,156; 3 N. B. R. 296; *in re Bellis & Milligan*, Fed. Cas. 1,275; 3 N. B. R. 496; *in re Waggoner*, Fed. Cas. 17,037; 1 Ben. 532; *in re Tyrrel*, Fed. Cas. 14,314; 2 N. B. R. 200.) The bankrupt may answer or demur, or may move for a dismissal of the objections for insufficiency appearing

the face of the papers. (*In re Burk, supra; in re Rosenfeld, d. Cas. 12,057; 8 A. L. Reg. 44; s. c. 2 N. B. R. 117.*)

But he is not required to answer or demur to raise an issue upon specifications. In the case of *In re Logan, 4 Am. B. R. 525; 2 Fed. 876*, passing upon this point, Evans, J., said:

It is insisted by the creditor, inasmuch as the bankrupt made no response to the specifications of objections to the discharge, that the charges made by the creditor therein should be taken as confessed; and we are cited to *Weland, Bankr. sec. 281*, in support of this view. We cannot agree with the learned author in the proposition that further pleading was necessary. There is no rule in bankruptcy which requires in such cases any further pleading by a bankrupt. By the mode of procedure, uniform in this district, at the time, the bankrupt files a petition for a discharge, in which he avers that he has complied with all the provisions of the Bankrupt Act. This is his pleading, and upon it the proper notice is served upon all creditors. The prayer of the petition will be granted as of course, unless some creditor objects, and specifies his grounds of objection. If the grounds are specified, the case goes to the referee as the next step to ascertain and report the facts. Unless the specified grounds are established by the proof, the discharge is granted. Nothing is taken for granted, and the onus is on the creditor. Failure to establish the objections by evidence cannot be a ground for refusing the discharge, and it follows logically and inevitably from this fact that no further pleading is necessary upon the part of the bankrupt. The proof must be made in any event, and without proof the creditor fails. The bankrupt may succeed upon the presumption of innocence. This no doubt explains why no general rule has been made by the Supreme Court requiring further pleading in such cases. The issues are made by the bankrupt's petition for a discharge and the creditors' specifications of objections thereto, and the only thing the rules require after this in order to a settlement of the question is a reference to ascertain and report the facts, unless the court itself does that, in which event the same rules would apply. And it may add stress to this view that, excepting one not alleged in this case, all the specifications of objections, to be sufficient in law, must charge what is a criminal act upon the part of the bankrupt, and the law in such cases itself enters a plea of not guilty, unless in cases where there is a voluntary and express plea of guilty."

**Jury Trials.**—As to jury trials see section 19 *post*.

**Grounds for Refusing a Discharge.—In General.**—It was said in the prior edition of this work that a discharge would be refused when it was shown that the court had no jurisdiction. If the court has no jurisdiction of the subject-matter, this is probably true because that question of jurisdiction may be raised at any time, and clearly where the objection goes only to the jurisdiction over

the person it is the better opinion that such an objection must be taken promptly and it will be too late to raise it upon the bankrupt's application for discharge. (Compare *In re Mason*, 3 Am. B. R. 599; 99 Fed. 256; *in re Clisdell*, 4 Am. B. R. 95; 101 Fed. 246 and cases cited.)

Moreover the fact that the bankrupt owes debts which a discharge would not bar or release is no ground for refusing him a discharge, the right to a discharge being one thing, the effect of it when granted quite another. (*In re Rhutassel*, 2 Am. B. R. 697; 96 Fed. 597; *in re Thomas*, 1 Am. B. R. 515; 92 Fed. 912.)

**Specific Grounds for Refusing a Discharge.**—It follows then that the only grounds for refusing a discharge are those contained in the statute.

Under the Bankruptcy Act of 1867, there were ten distinct grounds for refusing a discharge. In the bankruptcy bill which was afterwards enacted as the Bankruptcy Law of 1898 (the present law), during all the legislation on the subject down to the time of the report of the conferees, there were also nine or ten grounds for a refusal of a discharge. In fact in the original bill, the failure by the bankrupt to perform almost any of the several duties imposed upon him by section 7 was a sufficient ground for denying a discharge. The reduction of this number to the grounds specified in the section under consideration was one of the many concessions made by those advocating the bill to those who at first opposed it upon the ground that it was oppressive towards the unfortunate debtor.

The first ground is that the bankrupt has committed an offence punishable by imprisonment which is provided in the Act which has reference to section 29b. It is not necessary that there should be conviction for such an offence. Section 14 makes the mere commission of the offence a ground for refusing a discharge.

The remaining ground for refusing discharge is, as stated in section 14b, the destruction, concealment or failure to keep books or records with fraudulent intent to conceal the bankrupt's true financial condition and in contemplation of bankruptcy.

It will be noticed that the commission of any of the offences mentioned in 29b as grounds for refusing a discharge must be made "fraudulently and knowingly." (*In re Pierce*, 4 Am. B. R. 554; 103 Fed. 64.) It is also to be noted that the fraud must have been committed prior to the law making it a crime in order to bar a discharge. (See *In re Webb*, 3 Am. B. R. 204; 98 Fed. 404.) As a rule, the burden of proof rests upon those opposing the discharge to establish the grounds of opposition. (See *In re Boasberg*, 1 Am. B. R. 353; *in re Hixon*, 1 Am. B. R. 610; 93 Fed. 440; *in re Thomas*, 1 Am. B. R. 515; 92 Fed. 912; *in re Idzall*, 2 Am. B. R. 741; 96 Fed. 314; *in re Cornell*, 3 Am. B. R. 172; 97 Fed. 29; *in re Philips*, 3 Am. B. R. 2; 98 Fed. 844.) There may be cases, however, where the proof of the existence of assets and their sudden disappearance within a short time prior to bankruptcy, or the suspicious destruction of, or failure to keep, books of account will transfer to the bankrupt the burden of proof on the question of concealment of assets. (See *In re Meyers*, 2 Am. B. R. 707; 96 Fed. 408; *in re Rosser*, 2 Am. B. R. 746; 96 Fed. 305; *in re Purvine*, 2 Am. B. R. 787; 96 Fed. 192; *in re Tudor*, 2 Am. B. R. 808; 96 Fed. 2; *in re Dews*, 3 Am. B. R. 691; 101 Fed. 549; *in re Finkelin*, 3 Am. B. R. 800; 101 Fed. 418; *in re Mendelsohn*, 4 Am. B. R. 103; 102 Fed. 119; *in re Cashman*, 4 Am. B. R. 326; 103 Fed. 67; *in re Hoffman*, 4 Am. B. R. 331; 102 Fed. 979.)

The offences thus punishable under section 29b, are when the bankrupt has "knowingly and fraudulently," (1) concealed while bankrupt or after his discharge from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath in relation to any proceedings in bankruptcy; or (3), presented under oath any false claim or proof against his estate, or used any such claim in composition, personally or by, or as agent, proxy or attorney; or (4), received any material amount of property from his bankrupt estate, 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 the bankruptcy proceedings.



## § 14.] Concealment of Property from Trustee During Bankruptcy.

In addition to these enumerated offences, perhaps, should be added contempt of court, which is made a punishable offence by section 2 (13) (16).

We will now consider these various grounds for refusing a discharge in detail.

1. **Concealment of Property from Trustee During Bankruptcy.**—The word “conceal” is defined in section 1 (22) as including “secrete, falsify and mutilate.”

In order to warrant the refusal of a discharge under this subdivision it is necessary that the creditors shall establish the following propositions beyond a reasonable doubt:

First. That the bankrupt has concealed property from his trustee in bankruptcy.

Second. That the property so concealed belongs to the bankrupt's estate.

Third. That the concealment occurred while he was a bankrupt or after his discharge.

Fourth. That the concealment was made knowingly and fraudulently.

In other words, it is necessary to show that the bankrupt, since he has been adjudicated a bankrupt, has knowingly and fraudulently concealed from his trustee property which belongs to his estate and should be divided by the trustee among his creditors.

(See opinion of Coxe, J., *In re Quackenbush*, 4 Am. B. R. 271; 102 Fed. 282.)

The fraudulent intent that would bar a discharge must be proved, but that, of course, is to be gathered from all the circumstances. Compare section 3 *ante*, *sub nom.* INTENT MUST BE PROVED. An omission to include property in the schedules under an honest mistake as to law or fact will not bar a discharge. (*In re Wetmore*, 3 Am. B. R. 700; 99 Fed. 703; *in re Crenshaw*, 2 Am. B. R. 623; 95 Fed. 632; *in re Hirsch*, 2 Am. B. R. 715; 96 Fed. 471, and cases cited.) Indeed the mere omission of property from the schedules is not *ipso facto* a fraudulent concealment. (Cases *supra*.)

Where the bankrupt has conveyed property in fraud of his creditors it has been held in many cases that the omission of such property from his schedules constitutes fraudulent concealment as well as false oath. (See *In re Hussman*, 2 N. B. R. 437; Fed. Cas. No. 6,951; *in re Rathbone*, 1 N. B. R. 536; 2 N. B. R. 260; Fed. Cas. No. 11,583; *in re Hill*, 1 N. B. R. 431; Fed. Cas. No. 483, which are collected in the opinion of Referee Wise in *in re McNamara*, 2 Am. B. R. 566, subsequently aff'd by District Judge).

See on the other hand opinion of Referee Hotchkiss *In re Breck* (1 Am. B. R. 366), following *in re McCarthy* (Fed. Cas. No. 8,684), and *in re Robertson* (Fed. Cas. No. 11,921), in which it was held that the verification of a schedule by a bankrupt from which he has omitted property which he has theretofore fraudulently conveyed, is not the making of a false oath under sections 9 and 14; and further held that the mere fact of omission of the fraudulently conveyed property was not in itself sufficient to justify the refusal of an application for a discharge. While it is clear that any fraudulent transfer consummated before the bankruptcy Act is not a ground for refusing a discharge, it has been held under the present Act that where a transfer made by the bankrupt before bankruptcy is a mere subterfuge which leaves him in control of the property such transfer will constitute a continuing concealment which will bar discharge. (*In re Hoffman*, Am. B. R. 331; 102 Fed. 979.) In a case decided by the District Court for the Northern District of New York (*In re Quackenbush*, 4 Am. B. R. 274; 102 Fed. 282), the objectionable transfers were made long before the Bankruptcy Act, but the bankrupt continued to manage the business connected with the property which was the subject of the transfer, although not in his own name. He set up the facts in his schedules. This was held by Coxe, J., to be a continuing concealment. This case, however, is an extreme one and seems to be of doubtful authority.

2. **False Oath by Bankrupt.**—This offence is covered generally by what has been said in the preceding paragraph on concealment

of property. There can be no false oath unless it be taken with full knowledge and intent to deceive and the rules which govern prosecutions for perjury presumably control in this respect. Thus in a recent case decided by the District Court of the Eastern District of Pennsylvania (*In re Goldsmith*, 4 Am. B. R. 234; 101 Fed. 570), it was held that where, upon objections to discharge, stenographer's notes of the bankrupt's former testimony at the creditors' meeting are introduced by stipulation between counsel, "to have same force and effect as if the said testimony was originally taken before the referee in this proceeding," statements contained in such notes cannot be used to base a charge of false oath under section 29, because the bankrupt took no oath before the referee that his former testimony was true, and he cannot be bound by his counsel's stipulation so far as to base a prosecution for perjury against him.

A false oath cannot be predicated upon an examination taken under section 7 prior to specifications in opposition to discharge being filed. Inasmuch as what the bankrupt then swore cannot be introduced in evidence against him in any criminal proceeding (section 7 [9]), it is, in legal contemplation, impossible for him to be punished for having committed such an offense, and such testimony cannot be used against the bankrupt either under indictment or in opposing a discharge, to prove a criminal act on his part. Or in other words the false oath which will warrant refusal of discharge must be one taken in the *proceeding to discharge*. (*In re Marx*, 4 Am. B. R. 521; 102 Fed. 676; *in re Logan*, 4 Am. B. R. 525; 102 Fed. 876; *Fellows v. Freudenthal*, C. C. A. 7th Circ.; 4 Am. B. R. 490; 102 Fed. 731.)

The offence being usually committed either in connection with the verification of the schedules or in false statements to the trustee, it must appear that the bankrupt has intentionally omitted to include in his schedules the sum of his assets or has knowingly testified falsely as to the ownership of such assets. (See *In re Lowenstein*, 2 Am. B. R. 193.) Where a bankrupt clearly had a vested interest in remainder under his father's will and with full knowledge of the facts omitted to state such remainder as assets,

it was held he was guilty of fraudulent concealment and false oath and his discharge was denied. (*In re Wood*, 3 Am. B. R. 572; 98 Fed. 972.) For full discussion of this question see *In re Hirsch*, 2 Am. B. R. 715; 96 Fed. 471.

The remaining grounds under section 29b, viz: the presenting of false claims, the receiving of any material amount of property from the bankrupt estate, and the extortion of money from any person as a consideration for acting or forbearing to act in the bankruptcy proceedings are seldom applicable to a bankrupt and do not need discussion. Such acts must be done "knowingly and fraudulently."

**3. Failure to Keep Books of Account in Contemplation of Bankruptcy.**—Under the act of 1867 the failure to keep books of account by a merchant or tradesman after the passage of that act was a bar to discharge independently of intent. But under the present act the failure to keep such books of account must be in contemplation of bankruptcy and with fraudulent intent, which intent is to be gathered from all the circumstances. (Compare *Sellers v. Bell*, 2 Am. B. R. 529; 36 C. C. A. 513; 94 Fed. 811; *In re Shertzer*, 3 Am. B. R. 699; 99 Fed. 706.) But it is the intent of the Bankruptcy Act that every trader should keep honest books of account and record, and the court will take judicial notice of the custom of traders to keep such accounts. (Opinion of Wise, referee, concurred in by Brown, J., *In re Berkowitz*, 4 Am. B. R. 37.) And where a person of intelligence keeps books in such a condition as to be suspicious on their face a discharge will be denied. (*In re Dews*, 3 Am. B. R. 691; 101 Fed. 549. Compare *In re O'Gara*, 3 Am. B. R. 349; 97 Fed. 932.)

Under the act of 1867, which required that a tradesman or merchant should keep proper books of account, it was held that it was unnecessary that the books be of any prescribed form. If from them, a competent person was able to ascertain the true condition of the bankrupt's affairs, they were sufficient, even though the accounts had been kept upon detached sheets, but such accounts should show receipts, payments, assets, and liabilities, as well as

stock on hand. (*In re Mackay*, 4 N. B. R. 66; *in re Solomon*, Fed. Cas. 13,167; 2 N. B. R. 285; *in re Newman*, Fed. Cas. 10,175; 2 N. B. R. 302; s. c. 3 Ben. 20; *in re Bellis & Milligan*, Fed. Cas. 1,275; 3 N. B. R. 496; s. c. 4 Ben. 53.)

It has been held in a number of cases under the present act that the words "in contemplation of bankruptcy" mean not merely contemplation of insolvency but bankruptcy under the present act. (*In re Holman* [D. C.], 1 Am. B. R. 600; 92 Fed. 512; *in re Dews*, 2 Am. B. R. 483; 96 Fed. 181; *in re Shorer* [D. C.], 2 Am. B. R. 165; 96 Fed. 90; *in re Hirsch*, 2 Am. B. R. 715; 96 Fed. 741; *in re Carmichael*, 2 Am. B. R. 815; 96 Fed. 594; *in re Morgan*, 4 Am. B. R. 402; 101 Fed. 982.)

The cases under the act of 1867 also hold that it is not sufficient that the debtor shall have contemplated a state of insolvency; he must have contemplated an act of bankruptcy, or an application by himself to be declared a bankrupt. (*Buckingham v. McLean*, 13 How. 151, overruling the following cases, so far as they hold to the contrary: *Arnold v. Maynard*, 2 Story, C. Ct. 349; Fed. Cas. 561; *Hutchins v. Taylor*, Fed. Cas. 6,953; 5 Law Rep. 289; *Wakeman v. Hoyte*, 5 Law Rep. 310; Fed. Cas. 17,051; *Morse v. Godfrey*, Fed. Cas. 9,856; 3 Story C. Ct. 364; *Everett v. Stone*, 3 Story, 446; Fed. Cas. 4,577; *Ashby v. Steere*, Fed. Cas. 576; 2 Woodb. & M. 347; *Collins v. Hood*, Fed. Cas. 3,015; 4 McLean, 186; *Ex p. Beeneman*, Crabbe, 456; *Atkinson v. The Farmers' Bank*, Crabbe, 529; *Dennett v. Mitchell*, Fed. Cas. 3,789; 1 N. Y. Leg. Obs. 356; *Jones v. Sleeper*, Fed. Cas. 7,496; 2 N. Y. Leg. Obs. 132.) The expression "in contemplation of bankruptcy," means in contemplation of committing an act of bankruptcy. The act of bankruptcy, the commission of which must be contemplated, is such an act as the statute declares an act of bankruptcy. A debtor may become a bankrupt or commit an act of bankruptcy by filing a petition or by doing some act which is declared by the statute to be the commission of an act of bankruptcy. It is not necessary in order that one should have contemplated becoming a bankrupt, that he should have contemplated having a petition filed against him, and being adjudged a bank-

rupt thereon, provided he contemplated committing an act which is defined as an act of bankruptcy, or contemplated filing a petition voluntarily. (*In re Goldschmidt*, Fed. Cas. 5,520; 3 N. B. R. 165; 3 Ben. 379, followed *in re Freeman*, Fed. Cas. 5,082; 4 N. B. R. 64; s. c. 4 Ben. 245.)

**Effect of No Objections Upon Discharge.**—Under the act of 1867 it was held that if creditors do not raise objections to discharge they will be deemed to have assented to the discharge and the court will hold that no grounds exist for opposing such discharge. In a very well considered opinion of Judge Lowell, *In re Marshall Paper Co.* (2 Am. B. R. 653; 95 Fed. 419), it was held that under the existing Bankruptcy Act the duties of the judge are more onerous than those under the act of 1867. He is directed to “investigate the merits of the application” and hence is not confined to the consideration of those objections to discharge which are properly set forth by the creditors.

But the decision of Judge Lowell in this case was reversed on another point by the Court of Appeals of the First Circuit (4 Am. B. R. 468; 102 Fed. 872, and see paragraph *post, sub nom.* DISCHARGE IN PARTNERSHIP CASES, ETC.) In the course of the opinion the court uses the following language in regard to the judge’s duties on an application for discharge:

“By this provision (§ 14b) the judge shall hear the application and discharge the applicant unless he is found guilty of some one of the prescribed offenses. The court is not authorized to deny the application for discharge upon a ground not set forth in this section. *In re Black* (D. C.), 97 Fed. 493, 4 Am. B. R. 471, a refusal to grant a discharge cannot be said to rest in the discretion of the judge. The words, “investigate the merits of the application,” must be taken in connection with the context. To construe these words as if they stood alone and disconnected from what follows would be to leave the whole question of discharge to the discretion of the court. Looking at the entire section, we do not think these words will bear such a construction, however desirable it may seem to the court in a particular case to so interpret them. It seems to us that Congress in this section clearly specifies the only causes for which a discharge can be denied, and leaves to the court the sole duty of deciding, after due hearing, whether such cause exists.

“When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provisions

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§ 14.] Discharge in Partnership Cases and of Corporations.

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of section 14, he is not entitled to a discharge. In other words, it must be shown that he has committed some one of the offenses described; otherwise, the judge 'shall' discharge the applicant."

and see *In re Logan* (4 Am. B. R. 525; 102 Fed. 876).

**Effect of Discharge.**—See section 17 *post*.

**Discharge in Partnership Cases and of Corporations.**—The questions peculiar to partnership proceedings have already been discussed under section 5.

In the case of *In re Marshall Paper Co.* (2 Am. B. R. 653; 95 Fed. 419), it was seriously doubted by the District Court of Massachusetts whether a corporation was entitled under the act to a discharge. In that case Judge Lowell quoted as follows from Mr. Justice Clifford in *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.* (91 U. S. 656, 666):

"Good and sufficient reasons may be given for granting a discharge from prior indebtedness to individual bankrupts which do not exist in the case of corporations, and equally good and sufficient reasons may be given for withholding such a discharge from corporations which do not in any sense apply to individual bankrupts. Certificates of discharge are granted to the individual bankrupt 'to free his faculties from the clog of his indebtedness,' and to encourage him to start again in the business pursuits of life with fresh hope and energy, unfettered with past misfortunes, or with the consequences of antecedent improvidence, mismanagement, or rashness. Many corporations, it is known, are formed under laws which affix to the several stockholders an individual liability to a greater or less extent for the debts of the corporation, which, in case certain steps are taken by the creditors, become in the end the debts of the stockholders. Such a liability does not, in most cases, attach to the stockholder until the corporation fails to fulfil its contract, nor in some cases until judgment is recovered against the corporation, and execution issued, and return made of *nulla bona*. Stockholders could not be held liable in such a case if the corporation is discharged, nor could the creditor recover judgment against the corporation as a necessary preliminary step to the stockholder's individual liability. Consequences such as these were never contemplated by Congress; and the fact that they would flow from the theory of the defendants, if adopted, goes very far to show that the theory itself is unfounded and unsound."

But the case of the Marshall Paper Co. having been appealed to the Circuit Court of Appeals of the 1st Circuit (102 Fed. 872; 4 Am. B. R. 468), it was definitely held that a corporation was enti-

tled to a discharge under the express provisions of the statute. In the case of *Hill v. Harding*, 130 U. S. 699, the unqualified statement of Mr. Justice Clifford above quoted that stockholders could not be held liable in such case of the corporation's discharge was practically repudiated and in the *Marshall Paper Co.* case in the Circuit Court of Appeals it is expressly laid down that a discharge of a corporation does not prevent creditors from taking judgment in the State court against the corporation in such limited form as may enable them to reap the benefit of the director's or stockholder's secondary liability, under a state statute. Judge Lowell in the court below doubted the right of the creditors of the corporation to reach the secondary liability of stockholders and directors unless a judgment was first obtained against the corporation. The decision of the Circuit Court of Appeals settles this question.

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**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.

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Analogous Provisions of Former Acts.—

R. S. section 5120; act of 1867, section 34; act of 1841, section 4; act of 1800, section 34.

**History.**—In its general provisions as to the grounds upon which a decree of discharge may be impeached and the courts in which impeachable, the act of 1898 is similar to the act of 1867, but both differ materially from the acts of 1841 and 1800. The act of 1841 provided that a discharge might be impeached "in all courts of justice" for certain causes and in a manner in the act stated. The act of 1800 in effect provided that a discharge might



be impeached when pleaded as defense, by proving the same facts as would have prevented the granting of it, had they been shown in a court of bankruptcy. Neither act contained any provision for a direct proceeding to annul the discharge in the court of bankruptcy.

The only ground for revocation of discharge under the present act is fraud. But few cases have been decided under this section. In the case of *In re Meyers* (3 Am. B. R. 722; 100 Fed. 775), an application was made within the year based upon the testimony of the bankrupt in subsequent proceedings, tending to show that he had considerable property at the time of his bankruptcy and application for discharge, which was concealed. His verified schedules stated no assets and therefore no trustee was appointed. The court granted a petition for revocation of discharge, laying stress upon the fact that the application made within the year showed that a knowledge of the facts indicating fraud was first acquired by the petitioner long after the discharge, and that no evidence of laches was attributed to the petitioner. The practice on an application for revocation of discharge, which is nowhere outlined in the statute or general orders, is indicated by this case. A petition is filed with the clerk of the court and a reference is thereupon ordered to ascertain and report upon the facts alleged in the petition upon due notice to the bankrupt to take such evidence as may be offered by the parties. Presumably the practice is analogous to that upon applications for discharge (*q. v.*). Another case arising in the same district (the Southern District of New York) was *In re Dietz* (3 Am. B. R. 316; 97 Fed. 563), where the fraud alleged was the buying off through the procurement or privity of the bankrupt of the opposition of the creditor, which was held *prima facie* evidence that the bankrupt was not entitled to discharge.

It must not be forgotten that though this is the only section in the Bankruptcy Act which directly bears upon the question of revocation there is nothing to negative the right of courts to recall their own decrees and vary or annul them as justice may require if the application is promptly made. This power however only

extends to cases of actual default under circumstances which render the exercise of such power equitable. See *In re Dupee* (6 N. B. R. 89; 8 Fed. Cas. 108).

*As to jury trials under this section see section 19, post.*

**Discharge Cannot be Collaterally Attacked.**—Although the decisions of the courts under the act of 1867 were not all in harmony, the weight of authority was that a discharge once granted by a court having jurisdiction was unassailable in any court except the court of bankruptcy, for any cause which would have prevented the granting of it, or which would have been sufficient ground for annulling it. That a discharge shall not be collaterally impeached for any cause which might have been urged against granting it, is but an application of the general principle of law that a judgment of a court of competent jurisdiction is conclusive of all matters adjudged, as between the parties thereto, and cannot be collaterally attacked or questioned before any tribunal. A discharge in bankruptcy is an adjudication between the bankrupt and all the defendants, his creditors, a decree binding and conclusive on all who are made parties in accordance with the provisions of the act. The creditors having had notice of the proceedings must be treated as also having had opportunity to make objections; and having neglected to do so, they ought not to be allowed to impeach the adjudication collaterally. Bankruptcy proceedings are in the nature of proceedings *in rem* before a court of record having jurisdiction, and it is well settled that in proceedings *in rem* a decree is conclusive against all parties having the right under the proceedings to control the decree. Jurisdiction confers the power to render the judgment and it is binding (even if irregularities or errors exist), until set aside by the court in which it was rendered, or some court of appeal or review, in an action for that purpose. (*Hudson v. Bingham* [Sup. Ct. Tenn.], 8 N. B. R. 494, citing *Shawhan v. Wherritt*, 7 How. 627; *Dolson v. Pierce*, 12 N. Y. 156, and *Kinnier v. Kinnier*, 45 N. Y. 535; *Reed v. Bullington*, 11 N. B. R. 408; s. c. 49 Miss. 223, citing *Voorhees v.*

## § 15.] Impeaching the Discharge by One Creditor, for Fraud.

U. S. Bank, 10 Pet. 449; *Sturges v. Crowninshield*, 4 Wheat. 122; *in re Winn*, Fed. Cas. 17,876; 1 N. B. R. 499; *Pennington v. Sale, et al.* Fed. Cas. 10,939; 1 N. B. R. 572; *in re Barrow, et al.* Fed. Cas. 1,057; 1 N. B. R. 481; *Cassard, et al. v. Kroner*, 4 N. B. R. 569; *Markson, et al. v. Heany*, Fed. Cas. 9,098; 4 N. B. R. 510; *in re Snedaker*, 3 N. B. R. 629; *in re Salmons*, Fed. Cas. 12,268; 2 N. B. R. 56; *in re Brinkman*, Fed. Cas. 1,884; 7 N. B. R. 421; *in re Sacchi*, Fed. Cas. 12,200; 6 N. B. R. 497; *Stevens v. Brown*, 11 N. B. R. 568, citing *Ocean National Bank v. Olcott*, 46 N. Y. 15; *Alston v. Robinett*, 9 N. B. R. 74; s. c. 37 Tex. 56; *Stetson v. The City of Bangor*, 56 Me. 286.)

Not only is the discharge a conclusive judgment as to all matters which might have been urged as an objection to granting it, but by the better opinion the jurisdiction conferred by the bankruptcy act upon courts of bankruptcy to revoke a discharge, prevents any other court from revoking it upon any of the grounds upon which it may be revoked by the bankruptcy court. The mode of impeaching the validity of a discharge, prescribed by the statute excludes all other modes. The impeaching tribunal being specified, this designation, according to well-established principles of interpretation, forms a part of the remedy and excludes all others. (*Corey v. Ripley*, 4 N. B. R. 503; s. c. 57 Me. 69, citing *Dudley v. Mayhew*, 3 N. Y. 10; *Stevens v. Evans*, 2 Barr. 1,157; *City of Boston v. Shaw*, 1 Met. 130.) Congress under the power conferred upon it to establish a uniform system of bankruptcy, may prescribe not only the conditions on which a discharge may be granted, but the effect of it. (*Way v. Howe*, 4 N. B. R. 677 s. c. 108 Mass. 502, citing *Payson v. Payson*, 1 Mass. 283; *Burnside v. Brigham*, 8 Met. 75.)

**Impeaching the Discharge by One Creditor, for Fraud.**—It is to be noted, however, that under the act of 1867 the discharge was revocable for what were termed fraudulent acts, but which were in fact acts done, not in procuring the discharge, but done prior to it, and made by law grounds for refusing a discharge. While the law said that the discharge could be revoked “if fraudulently ob-

tained," it limited the right of revocation to one of the acts specified as grounds for refusing a discharge. In other words the effect of that section was to permit a proceeding to reopen the judgment of discharge if new evidence was discovered, which tended to establish any ground for refusing a discharge; rather than a proceeding to revoke the decree because of fraud in its procurement. These fraudulent acts, considered with reference to the proceeding to secure a discharge, were fraudulent only in so far as the applicant had to swear in his application for a discharge that he was guilty of none of them. It was said in the case of *Poillon v. Lawrence* (77 N. Y. 207, at 214), "There is no provision authorizing (under the act of 1867) an application to annul a discharge on the general ground that the discharge was fraudulently obtained." And in this case it was held that the remedy by an application to the bankruptcy court for a revocation of the discharge was exclusive only when the invalidity of the discharge was based upon some of the grounds upon which a discharge could have been refused, but that where the fraud was of a peculiar and exceptional nature, not one of those specified in the act as a ground upon which the bankruptcy court could revoke the discharge, and not one which necessarily affected the validity of the discharge except as to the creditor upon whom the fraud was specially practiced, then it was competent for the defrauded party to impeach the discharge for such fraud. And following *Batchelder v. Low* (43 Vt. 662; s. c. 8 N. B. R. 571), a distinction was taken between a proceeding in the bankruptcy court to set aside the discharge *in toto*, and an impeaching of the discharge by one individual creditor, when the discharge was pleaded as a defense to his action.

This case seems to have been opposed to the weight of authority even under the old law. (See cases cited, *supra*.) And it is very doubtful whether it applies at all under this law, which makes the fact that a discharge was obtained through the fraud of the bankrupt the sole ground for revocation.

The intention of Congress in giving a proceeding by which any creditor, whose debt was proved or provable, may upon proving a

## § 15.] Impeaching the Discharge by One Creditor, for Fraud.

fraudulent act of the bankrupt, have the discharge set aside or annulled, if that act was unknown to him before the discharge was granted, but not otherwise, appears to have been, that the question of the discharge of the bankrupt from all debts and claims whatever (except of those classes which are declared not to be affected by any certificate of discharge) shall be finally and conclusively settled by the court of bankruptcy within a moderate time, leaving the bankrupt, if he prevail in such trial of that issue, free from future suit, molestation, or embarrassment on account thereof; and that every creditor shall be obliged to try the question of the validity of the discharge, if at all, while the facts upon which it depends are comparatively recent, and in such manner as to inure to the benefit of all the creditors if the discharge is annulled, and shall not be allowed to wait until the period prescribed by the general statutes of limitations has nearly expired, and the bankrupt has perhaps established himself anew in business and suffered the means of disproving the charges against him to pass beyond his reach, and then bring a suit to which the other creditors are not parties, and thus harass him on account of his old debts and obtain an inequitable advantage over him. It follows that the remedy given by application to a bankruptcy court to revoke the discharge is exclusive of any other mode of impeaching the validity of a discharge, either in the Federal or in the State courts. (*Way v. Howe*, 4 N. B. R. 677; s. c. 108 Mass. 502.) It will undoubtedly be conceded by all that nowhere is there any authority or principle of law permitting a proceeding to revoke the discharge *in toto* except under the terms of this section. That one creditor should not be allowed in any other court to show that it is inoperative as to him; in other words, that the law will not allow a piecemeal revocation, will, we think, also be conceded when the effect of such a practice is considered. To allow such individual attempts to impeach the judgment, will be to destroy all uniformity. With reference to this right of the individual creditor to impeach the decree in an action in a State court, it was said by the court in the opinion in *Hudson v. Bingham* (8 N. B. R. 494; s. c. 12 A. L. Reg. 637) :

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Effect of Revocation of Discharge—Co-Debtors of Bankrupt. Ch. III.

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“The bankrupt may have had the very same grounds urged against the granting of his discharge by one creditor and the matter have been decided in his favor, or there may have been an attempt by another creditor to annul his discharge within the statutory period, and the court may have decided that issue again in his favor; yet if the discharge is assailable in a State court, another creditor may still require him to try the same question over again. Further than this, his discharge may have been, under this view of the law, contested and declared void by a State court within the year, and yet on proceedings instituted under the statute by other creditors in the bankruptcy court having full jurisdiction over the whole question, it may have been adjudged valid and not subject to be annulled for the causes stated. Which judgment is to be held correct, and which shall relieve him from his embarrassments? This view of the law enables the State courts, having no jurisdiction over the original question, to practically nullify the effect of the adjudication of the courts of the United States, having exclusive jurisdiction over the whole subject, and is incompatible with the powers granted to the federal government to grant a discharge in bankruptcy. No such construction ought to be given to the act of Congress unless its terms imperatively demand it.”

**Effect of Revocation of Discharge.**—See section 64c, providing that “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.”

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**SEC. 16. Co-Debtors of Bankrupts.**—a 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.

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Analogous Provisions of Former Acts.—

R. S. section 5118; act of 1867, section 33; act of 1841, section 4; act of 1800, section 34.

**Scope of Section.**—In a recent case decided in the District of Massachusetts (*In re Marshall Paper Co.* 2 Am. B. R. 653; 95

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Scope of Section.

Fed. 419), reversed on another point, holding *inter al.* that the secondary liability of the directors of a corporation is not discharged by the discharge of the principal, the following quotation from Judge Lowell is a good statement of the intention of the section :

“ It would seem that, when one is liable to a creditor for the debts of another, he must be either co-debtor with or else surety for that other (*Bank v. Warren*, 52 Mich. 557, 561; 18 N. W. 356) ; but in any case it is plain that sec. 16 was intended to include not only co-debtors, guarantors, and sureties, using those words in a narrow and technical sense, but to declare a general intention and to indicate a general proposition applicable to all persons in like situation. The directors in this bankrupt corporation are in some manner a surety for it, even if they are not its sureties in the narrowest sense. See *Willis v. Mabon*, 48 Minn. 140, 155; 50 N. W. 1110. As the existing Bankrupt Act, then, has in substance provided that the statutory liability of the directors of a corporation shall not be altered by the discharge of a bankrupt, this court is bound to abstain from doing anything which shall hinder the enforcement of that liability.”

Indeed the section is merely declaratory of general legal principles.

The contract of suretyship as it is understood in the commercial world is always conditioned that the surety shall not be discharged by the bankruptcy of his principal.

So as to joint liability the discharge does not affect the liability of others who are jointly or as sureties liable with the bankrupt. Legal proceedings against the former need not be discontinued because of the bankruptcy. Judgments obtained against them or security received from them or liens on their property by way of mortgage or otherwise may be enforced. (*In re Levy & Levy*, Fed. Cas. 8,297; 1 N. B. R. 327; s. c. 2 Ben. 169; *Payne v. Able*, 4 N. B. R. 220; s. c. 7 Bush. [Ky.] 344.)

A discharge releases only the personal liability of the bankrupt; it does not affect the debt as to other persons. No one else can plead it. So purely personal is the privilege that it is not available to a grantee to whom the bankrupt has fraudulently conveyed property, to defeat a judgment creditor's suit brought against the debtor and the transferee, where the judgment debtor

(the bankrupt) fails to appear and plead his discharge. (*Moyer v. Dewey*, 103 U. S. 301.) Even if a creditor assents to the discharge of his debtor in a case where he might have urged an objection which would have induced the court to refuse a discharge, and even though the creditor is requested by the surety of the bankrupt to oppose the discharge, the creditor, loses only his rights against the principal, not against the surety, because the discharge is deemed to be by operation of law, and not of the debtor's own volition. (*Ex p. Jacobs*, 44 L. J. B. 34; *Mason & Hamlin v. Bancroft*, 1 Abb. N. C. 415; s. c. 4 Cent. L. J. 295; *contra*, *in re McDonald*, Fed. Cas. 8,753; 14 N. B. R. 477.) Where a discharge of the principal is entirely independent of any judicial proceeding, the well-established principle of law is that the surety will be discharged. (*Ex p. Jacobs*, 44 L. J. Bank. 34; *Brown v. Carr*, 7 Bing. 508; s. c. 5 M. & P. 497; *Sigourney v. Williams*, 1 Gray, 623; *Mason & Hamlin v. Bancroft*, 1 Abb. N. C. 415; s. c. 4 Cent. L. J. 295.) Compare commentaries on section 12.

**Creditor's Failure to Prove.**—The creditor's failure to prove his claim does not release the joint obligor or surety. There is no obligation resting on the creditor to make himself a party to the bankruptcy proceeding and to collect what he can from the estate. (*Clopton v. Spratt*, 52 Miss. 251.) The surety may protect himself under the provisions of section 57 (*i*), (*q. v.*).

**Attachment Bonds.**—The question of the effect of a discharge on the liability of sureties on bonds given by the bankrupt to release property of his which has been attached, where the suit is pending at the time of the bankruptcy, was one which was variously decided under the Act of 1867. The decisions of the State courts and the courts of bankruptcy were almost equally divided. As the condition of a bond to dissolve an attachment is to pay any judgment that may be rendered against the principal, there can be no liability until a judgment is secured. The variance between the courts arose over this question: When a



discharge has been granted to a bankrupt pending a suit in which an attachment on his property has previously been dissolved by the giving of a bond, can a judgment be subsequently entered up against him or his sureties, so that the latter may be holden on the bond; or must the bankrupt be permitted to plead his discharge by supplemental answer so that no judgment can be entered up against him, and no liability accrue against the sureties? The Supreme Court of New York, in the case of *Holyoke v. Adams* (10 N. B. R. 270; s. c. 1 Hun [N. Y.] 223; affirmed in 59 N. Y. 233), took the ground that as the attachment was valid under its laws and was not invalidated by the bankruptcy law, the bond given to dissolve it was in the nature of a substituted security; that a perpetual stay of the action pending proceedings in bankruptcy would not be allowed, as it would work injustice to the creditors, the obligees in the bond; and also that it would not allow a subsequently granted discharge to be set up in a supplemental answer, as the effect would be to prevent the judgment from being entered. The court further held that upon motions for leave to interpose a supplemental answer, the court should exercise its discretion, and deny the motion whenever it would work an injustice, and that to permit the pleading of discharge which would prevent the accruing of the liability of the sureties on a bond given to dissolve a valid lien, and which would deprive the lienor of all rights, would be an act of injustice. On this latter ground the case was affirmed in the Court of Appeals; followed in *McCombs v. Allen* (18 Hun 190; affirmed 82 N. Y. 114); to same effect, *Bond v. Gardner* (4 Binn. 269). The U. S. District Court for the eastern district of Michigan (*in re Albrecht*, Fed. Cas. 145; 17 N. B. R. 287), held that inasmuch as a plaintiff in an action in which there had been garnishment proceedings (which had been discontinued by the giving of a bond) would, under the bankruptcy law, have had a right to prosecute his suit, at least so far as to protect his lien upon the property which has been taken in garnishment, a fair construction of the statute demanded that he should be allowed to prosecute his action to judgment, so as to hold the sureties upon the bond

which he had taken in lieu of his security. (Compare *Zoller v. Janvrin*, 49 N. H. 114.) On the other hand, the courts of Massachusetts repeatedly laid down a different rule. By them it was held that the bond was a mere personal obligation; it was not substituted property subject to a lien. If the debtor obtained a discharge in bankruptcy he had a right to plead it, and as no final judgment could be entered against him the bond was discharged by the determination of the contingency upon which it was made to depend. The liability of the surety was not avoided by it; no liability ever accrued. "The bond does not restore the property to the possession of the debtor subject to the attachment; it dissolves the attachment utterly. It is not given for the property itself nor as security for its value, but for the payment absolutely of the judgment when recovered in the suit, whatever may be the amount of the judgment. The bond does not become of the nature of a debt until the contingency arises on which it is to be made operative, to wit: a judgment against the principal which he is bound to pay. A final judgment against the defendant is necessary in order that the bond may be enforced, and that judgment the court cannot enter if a discharge is pleaded." The Massachusetts courts (unlike the courts of New York and Michigan) never appear to have felt justified in refusing to the bankrupt the right to plead such discharge by supplemental or amended answer. Such was the Massachusetts rule as laid down, first in the case of *Carpenter v. Terrill* (100 Mass. 450), and followed by the same court in *Hamilton v. Bryant* (14 N. B. R. 479; s. c. 114 Mass. 543), *Braley v. Boomer* (12 N. B. R. 303; s. c. 116 Mass. 527), and *Johnson v. Collins* (12 N. B. R. 70; s. c. 117 Mass. 343), the last three cases even holding that if the bond to dissolve the attachment was not given till after adjudication of bankruptcy, still the sureties could not be held to have incurred liability. If, however, it was not given till after judgment was rendered, then the liability had been incurred and could not be divested by a discharge of the principal. (Compare also to the same effect *Payne v. Able*, 4 N. B. R. 220; s. c. 7 Bush [Ky.] 344; *Williams v. Atkinson*, 36 Tex. 16; *Bates v. Tappan*, 3

N. B. R. 647; s. c. 99 Mass. 376.) There was no express adjudication on this question by the U. S. Supreme Court, but there are two *dicta* apparently contradictory of each other. In *Wolf v. Stix* (99 U. S. 1), it was said: "The cases are numerous in which it has been held, and we believe correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was made to depend. Of this class of obligations are the ordinary bonds in attachment suits, to dissolve an attachment, appeal bonds, and the like."

In the case of *Hill v. Harding* (107 U. S. 631), the Supreme Court of the United States held that under section 5,106 R. S. which prohibited the prosecution of a suit to judgment against a bankrupt, pending his application for a discharge, a State court in which an action against the bankrupt upon a debt provable in bankruptcy was pending, must, on the bankrupt's application, stay all proceedings to await the determination of the bankruptcy court upon his application for a discharge, even if an attachment had been made in the action more than four months before the commencement of the proceedings in bankruptcy, and had been dissolved by giving a bond with sureties to pay the amount of the judgment to be recovered. But the court said (*obiter*): "If a discharge is granted, the court in which the suit is pending may then determine whether the plaintiff is entitled to a special judgment for the purpose of enforcing an attachment made more than four months before the commencement of the proceedings in bankruptcy, or for the purpose of charging the sureties upon a bond given to dissolve such an attachment."

The whole force of the argument of the New York and Michigan and kindred cases is that, as the Bankruptcy Act does not invalidate the lien of the attachment if that lien *bona fide* exists, the courts ought not to prevent a creditor from enforcing the personal obligation of others, given to release the property from

the attachment. They seem to regard the bond as a substitute security. The complete answer to their proposition is that the bankruptcy law protects certain *bona fide* liens created pursuant to State laws, but that these State laws, so far as attachment proceedings are concerned, usually provide that the lien may be destroyed if one gives a personal obligation. After the bond is given there is no lien in existence; nothing but a contingent personal liability.

**Sureties on Appeal Bonds.**—As in the case of attachment bonds the question here is not whether a discharge of the principal releases the liability of the sureties, but whether the discharge prevents the happening of the contingency upon which the liability of the sureties is to arise. If a discharge can be pleaded in the appellate court and is so pleaded, so that no judgment can be rendered against the defendant, then no liability ever exists on the part of the surety. The discharge of the bankrupt principal prevents the surety from incurring liability rather than releases him. (*Odell v. Wootten*, 4 N. B. R. 183; s. c. 38 Ga. 225.) But, on the other hand, in those States where the practice is such that the discharge does not affect the appeal, or stay proceedings upon it, or prevent a judgment of affirmance,—where the appellant cannot set up any matters in the appellate court other than those set up in the case in the court of original jurisdiction, as, for instance, in New York, there the liability attaches, and the discharge of the principal does not prevent the sureties incurring liability. (*Knapp v. Anderson*, 15 N. B. R. 316; s. c. 7 Hun, 295; affirmed 71 N. Y. 466; citing *Cornell v. Dakin*, 38 N. Y. 253; *Poppenhausen v. Seely*, 3 Abb. Ct. of App. Dec. 615; *Hall v. Fowler*, 6 Hill [N. Y.] 630; *Flagg v. Tyler*, 6 Mass. 33; *Burr v. Carr*, 7 Bing. 508; *Southcote v. Braithwaite*, 1 T. R. 624.)

**Replevin Bonds.**—The discharge of the principal in a replevin bond, where the replevied articles have passed into the hands of his trustee, does not prevent his sureties from becoming liable, nor in any way release them when that liability has been incurred,

because a judgment may still be obtained determining the title to the property and the determination of that question, is what fixes the liability. (*Flagg v. Tyler*, 6 Mass. 33.)

**Bonds to Release One from Arrest—"Jail Liberty Bonds"—"Poor Debtors' Bonds."**—In all these bonds one condition, express or implied, is that the sureties may be released by a surrender of the principal before there has been a breach of the other conditions of the bond. The question which arises is, whether the discharge in bankruptcy of the principal makes a surrender unnecessary. As in the case of attachment bonds and appeal bonds, the discharge will not release the sureties from any liability which they may have actually incurred, but it may in some cases prevent the contingency which is to fix that liability. If there has been a breach of the conditions of these bonds before a discharge of the bankrupt principal has been granted, the liability of the sureties has become fixed and is unaffected by the subsequent discharge in bankruptcy of the debtor (*Dyer v. Cleveland*, 18 Vermont, 241), notwithstanding the breach did not occur till after bankruptcy proceedings had begun. The correct rule is that if the discharge in bankruptcy is received before there has been a breach of the terms of the bond, the sureties may be released on motion because they may at any time terminate their liability by surrendering their principal; and inasmuch as he, upon his surrender by them, would be entitled to an immediate release because of his discharge in bankruptcy, courts to avoid circuity of action release such sureties on motion without requiring the formality of a surrender which is useless. But after the liability has become fixed they are not released by the discharge of their debtor. (*Knapp v. Anderson*, 71 N. Y. 466; same case in lower court, 7 Hun, 295; s. c. 15 N. B. R. 316. See also *Kirby v. Garrison*, 21 N. J. 176, holding that if the bankrupt leaves jail limits after his discharge, the discharge is a good defense to an action against the sureties.) Thus it will be seen that the general rule is that the discharge of the principal in bankruptcy acts as an *exoneretur*, if the liability of the surety has

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**Partners—Endorsers—Discharge of One of Several Co-sureties.** [Ch. III.]

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not become fixed, and the surety (bail) may plead such a discharge of the principal during the time in which he has the right to surrender the principal. (*Richardson v McIntyre*, 4 Wash. C. C. 412; *Kane v. Ingraham*, 2 John. Cas. 403; *Hayton v. Wilkinson*, 1 Hall's Am. L. J. 260; *Olcott v. Lilly*, 4 Johns. 407; *Thorne v. Brown*, 9 Watts. 288.) But if the liability has become fixed, as for instance, if the time allowed for a surrender has expired before the discharge is granted, then the discharge will not release the sureties from their liability. (*Woolley v. Cobbe*, 1 Barr. 244; *Olcott v. Lilly*, 4 Johns. 409; *Bennett v. Alexander*, 1 Cranch C. C. 90.)

**Partners.**—This section in itself alone is an implied provision that one member of a firm may obtain a discharge, although a discharge is refused his co-partner. See what is said under section 5 *ante*.

**Endorsers.**—The discharge of the maker in no way affects the endorsers. (*Clopton v. Spratt*, 52 Miss. 251; *King v. Central Bank*, 6 Ga. 257.)

**Joint Debtors as Necessary Parties.**—One of the several joint debtors discharged in bankruptcy may still be made a party. The discharge is a privilege that may be pleaded; if not pleaded, there is nothing to prevent the entry of judgment. No court takes judicial notice of a discharge. The discharged debtor is as necessary a party as if he had not been discharged. His discharge simply gives him an additional defense. (*Jenks v. Opp*, 12 N. B. R. 19; s. c. 43 Ind. 108; *Camp v. Gifford*, 7 Hill, 169.)

**Discharge of One of Several Co-sureties.**—If one of several co-sureties is himself discharged in bankruptcy so that he is released from his liability as such, he is also released from the duty of contribution to his co-surety, for the right to contribution in the absence of express agreement depends upon the payment by one of the sureties of a demand against the principal which all the co-sureties were equally under legal obligation to pay. (*Tobias*

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§ 17.] Debts Not Affected by Discharge— Debts Dischargeable.

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*v. Rogers*, 13 N. Y. 59. Compare, however, apparently to the contrary, *Miller v. Gillespie*, 59 Mo. 220.)

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**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 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.

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**Analogous Provisions of Former Acts.**—

As to the discharge as a release: R. S. section 5119; act of 1867, section 34; act of 1841, section 4; act of 1800, section 34. As to debts not affected by a discharge: R. S. section 5117; act of 1867, section 33; act of 1841, section 1. As to taxes: R. S. section 5101; act of 1867, section 28; act of 1800, section 62.

**Debts Dischargeable.**—As all provable debts, other than those explicitly excepted, are dischargeable it becomes important to collate with this section; section 63 which is as follows:

**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

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**Discharge no Extinguishment — No Release Unless a Discharge.** [Ch. III.]

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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.

**The Discharge Not an Extinguishment of the Debt.**—The discharge is not *per se* an extinguishment even of the bankrupt's liability. It is a release which may be pleaded. No court other than the court of bankruptcy is bound to take judicial notice of the discharge. When the bankrupt is sued upon a debt if he fails to plead and prove his discharge, he thereby waives it as a defense, and a valid and unimpeachable judgment may be entered against him. Compare DISCHARGE WAIVED UNLESS PLEADED and PLEADING THE DISCHARGE, *post*, this section.

**No Release Unless There is a Discharge.**—The present law contains no provision, as did certain former laws that the proving of a claim in bankruptcy, shall be a waiver of all other suits and proceedings to enforce it. Unless there has been a discharge which is thereafter pleaded and proved, a creditor who has proved his claim in bankruptcy and taken a dividend may still obtain judgment in an action, upon the balance due him and enforce the same. Nothing arising in the proceedings can protect the bankrupt from subsequent suit except a discharge. The payment of a dividend on a proved claim is merely equivalent to a payment in part. The taking of the debtor's property in bankruptcy and applying it *pro rata* on the claims of creditors have no greater effect than the taking of property on execution and applying the proceeds on a judgment. It is a satisfaction *pro tanto*, not a discharge. Consequently a plea of an adjudication in bankruptcy is not a good defense to an action. The proving of the debt is neither an absolute extinguishment nor a satisfaction. If the discharge is refused the creditor is remitted to all his former rights and remedies. (*Dingee v. Becker*, Fed. Cas. 3,919; 9 N. B. R. 508; *Whitney v. Crafts*, 10 Mass. 23.)



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§ 17.] Discharge Releases Only the Personal Liability—Debts Due to Aliens.

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**Discharge Releases Only the Personal Liability.**—Nothing but the bankrupt's personal liability is released by the discharge. Specific liens upon his property are in no way affected. Whatever their character if they are valid by the laws of the State, and not rendered void by the provisions of section 67 or other sections of the Bankruptcy Act, the bankrupt's discharge will not prevent their enforcement. Any proceeding to enforce a right against the bankrupt's property may be maintained which does not seek to enforce the personal liability of the debtor. Compare section 67 as to the effect of bankruptcy upon liens, and section 70 as to the trustee taking title subject to liens.

**Provable Debts are Released Even if Not Proved.**—The failure of the creditor to prove his debt, if it is provable, does not prevent it from being released by the discharge; not even in those cases where it was omitted from the schedules of debts and where the creditor was not served with a notice of the proceedings; unless the creditor can bring himself within the provisions of exception (3) of this section, which is new. (Compare *In re Stansfield*, Fed. Cas. 13,294; 16 N. B. R. 268; s. c. 4 Sawyer, 234; *in re Archenbrow*, Fed. Cas. 504; 11 N. B. R. 149; *Lamb v. Brown*, Fed. Cas. 8,011; 12 N. B. R. 522.)

**Debts Due to Aliens.**—A discharge in bankruptcy is as much a release of a debt due to an alien as of one due to a citizen of the United States. The purpose of the statute is to relieve the unfortunate bankrupt of all his provable debts upon his complying with the terms of the act, and as the alien may if he desires prove his claim, it is discharged whether or not he proves it. There is no need of any express provision extending the Act to debts due to aliens. (*Ring v. Eickerson*, 2 McCrary, 259; *Murray v. De Rottenham*, 6 Johns. Ch. 52; *Ruiz v. Eickerman*, 12 Cent. L. J. 60; *Pattison v. Wilbur*, 12 N. B. R. 193; s. c. 10 R. I. 448. Compare *McDougal v. Carpenter*, 17 Cent. L. J. 476.) And the discharge is a bar to the debt due an alien even though he was not a party to the proceeding, refused to consent to a discharge, and

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Effect of Foreign Discharge — Debts of Married Women. [Ch. III.]

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in the courts of his own country prosecuted his claim to judgment and even though in that action in the foreign country the bankrupt failed to plead his discharge as a defense, which, in fact, he could not do. (*Moore v. Horton*, 32 Hun, 393.) And in a suit brought in the United States on the foreign judgment the discharge may be pleaded and will be a bar to a further recovery.

**Effect of Foreign Discharge.**—But a foreign discharge is no defense in an American court to the claim of a creditor who resides in one of the States and who was not a party and did not appear in the foreign proceedings. (*Phelps v. Borland*, 103 N. Y. 406.) The discharge is considered as local, and although an assignee of an individual who has become a bankrupt in a foreign country will, in most of the courts of this country, be allowed to maintain an action in his own name as assignee, yet our courts will not recognize the discharge as a bar to debts contracted in this country or due to citizens of this country. But a discharge under our laws operates on debts due to citizens of another country, to this extent that such aliens will not be permitted to sue therefor in the courts of our country. (*In re Zarega*, 1 N. Y. Leg. Obs. 40.) If a debt due from an alien is released by a foreign discharge, it may nevertheless be proved against him, if thereafter he is adjudged a bankrupt by an American court.

But this is not the English rule which proceeds on principles of international comity. See Story on Conflict of Laws, chapter IX; Parsons on Contracts, chapter XII; Bankruptcy, and Insolvency; for further discussion of these principles.

**Debts of Married Women.**—Probably there are few States where the common-law rule as to the husband's liability for his wife's debts incurred by her *dum sola* has not been altered by statute. But wherever that rule exists, it may be said that a discharge granted to the husband releases him from the debts of his wife, incurred by her before marriage; and as long as he lives and his liability to pay those debts continues, not only is he dis-

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§ 17.]      Effect of Discharge — Debts to the United States, etc.

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charged, but the wife's separate estate cannot be taken in payment of them. The marriage suspends her liability; the discharge releases him from his liability. (*Vanderhayden v. Mallory*, 1 N. Y. 452.) So if a woman marries after filing a petition in bankruptcy and thereafter procures a discharge, such discharge will not only release her but also her husband. The status of the claim is fixed at the time of the petition. (*Chadwick v. Starrett*, 27 Me. 138.)

**Effect of Discharge Granted to Members of a Firm.**—This subject has been sufficiently discussed under section 5 *ante* relating to proceedings peculiar to partnerships.

**Effect of Statute of Limitations on Debts.**—While the general tenor of the decisions is that debts barred by the statute of limitations are not provable, there is some conflict of authority. The question will be discussed under section 63.

**Effect of a Discharge Determined by the Court in Which Subsequent Action is Brought.**—Although a discharge can no more be impeached in a collateral proceeding than any other judgment of a court of competent jurisdiction, yet the extent of its operation, that is, the question whether or not any particular debt is released by it, is left to be determined by the court in which an action is brought to enforce that particular claim. Such court will pass upon the question, if the discharge is pleaded, and its determination will be binding as between the parties thereto. "The issue upon the effect of a discharge will arise when a creditor seeks to enforce a judgment or claim and the debtor pleads his discharge in bar thereof." (*In re Rhutassel*, 2 Am. B. R. 697; 96 Fed. 597; *in re Thomas*, 1 Am. B. R. 515; 92 Fed. 912; *in re Mussey*, 3 Am. B. R. 592; 99 Fed. 71.)

**Debts to the United States, etc.** Section 17a (1)—Under the act of 1867 it was finally decided by the Supreme Court, in *U. S. v. Herron* (20 Wall. 251), that debts due the U. S. were not provable in bankruptcy and consequently not released by a dis-

charge. This decision was put upon various grounds, among them that many of the provisions of the statute describing the rights, duties, and obligations of creditors were inapplicable in their nature to the United States, and that if held to include the United States, could not fail to become a constant and irremediable source of inconvenience and embarrassment. It was also held that the United States, not being named in any of the provisions of the Act (except in one which provided that all debts due the United States and all taxes and assessments under the laws thereof should be entitled to priority or preference) under a generally recognized principle of construction the United States, as the sovereign power enacting the law, could not be held to be bound by it; citing as to this last proposition: 1 Deacon on Bankruptcy (3d ed.), 784; Shelford on Bankruptcy, 303; Crawford v. Atty. Gen. 7 Price, 5; Robson on Bankruptcy (2d ed.), 553; Eden on Bankruptcy, 143; Woods v. DeMattos, 3 Hurlst. & Colt. 995; U. S. v. King, Wall. Circ. Ct. 18; People v. Herkimer, 4 Cow. 348; Com. v. Hutchinson, 10 Barr. 406; Hilliard on Bank. (2d ed.), 295; U. S. v. Knight, 14 Pet. 315; U. S. v. Hoar, 2 Mass. 311; Com. v. Baldwin, Watts. 54; Regina v. Edwards, 9 Exch. 50; Dollar Sav. Bank v. U. S. 19 Wall. 227.

It has been believed by some that section 17 of the Act of 1898, providing that debts due as taxes levied by the United States, etc., shall not be released by a discharge, would on the principle of *expressio unius exclusio alterius* be fairly construed as a provision that, as to debts other than taxes, the United States and other political divisions therein mentioned are in the position of other creditors, and that all debts due to the United States, etc. except taxes, are discharged. But the weakness of this view is that there was substantially the same provision in regard to the non-dischargeability of taxes contained in the Act of 1867. (See section 28, L. 1867.) On the whole it is believed that U. S. v. Herron governs under the act of 1898. The best reasoning on the subject in this act is to be found in the case of *In re Baker* (D. C. Kansas), 3 Am. B. R. 101; 96 Fed. 964. That was a case in which it was held that a judgment against a father for the sup-

port of a bastard child was not a civil debt but one in the nature of a police regulation which was not released by a discharge in bankruptcy. In the course of his opinion Hook, J., says:

“It is familiar doctrine in England that where an Act of Parliament is general and thereby any prerogative, right, title or interest is divested or taken from the king he shall not be bound thereby unless there are express words extending the provisions of the statute to him. Thus it is held that the ordinary statutes of limitation do not apply to the government unless made so by express terms; and it has frequently been decided that debts due the crown are not released by a discharge in bankruptcy under the English Bankruptcy Acts. It is said that ‘the most general words that can be devised do not effect the King in the least, if they may tend to restrain or diminish any of his rights and interests.’ (Magdalen College case, 11 Reports, 74.) And the Supreme Court in *Savings Bank v. United States*, 19 Wall. 239, holds that ‘the rule thus settled respecting the British crown is equally applicable to this government and it has been applied frequently in the different States and practically in the Federal courts.’

Various State courts have held that this exemption from general terms of legislative enactments applies to the States not only in their united but also in their separate sovereignties, and that the claims of a State are not within the provisions for the release of debts owing by the bankrupt upon his discharge in bankruptcy unless expressly made so. The legislature will not be taken to have postponed the public right to that of an individual except in cases where such purpose has been most plainly manifested. *Commonwealth v. Hutchinson*, 10 Pa. St. 466; *Saunders v. Commonwealth*, 10 Grat. (Va.) 494; *Conn. v. Shelton*, 47 Conn. 400; *Johnson v. The Auditor*, 78 Ky. 282.

So far as concerns this question, there are two points of difference between the Act of 1867 and the one now in force. Sec. 57, clause j, of the present act, provides that debts owing to the United States or a State or some subdivision thereof as a penalty or forfeiture shall not be provable except for the amount of the pecuniary loss sustained with costs and interest. No such provision appears in the Act of 1867. Sec. 17 of the present act exempts from release of provable debts such as are due as a tax levied by the United States, the State or some subdivision thereof. Language of the same import appears the Act of 1867 and the one now in force. Sec. 57, clause j, of the present bankrupt's debts. These differences are insufficient to indicate an express intention on the part of Congress in the passage of the present Act to establish a different rule as to the divesting of the government, National or State, of its rights or remedies than that which obtained under the Act of 1867, as construed by the Supreme Court in *United States v. Herron*, *supra*. If Congress had intended that the bankrupt's discharge should operate as a release of his debts owing to the government it would undoubtedly have so provided in unmistakable terms, especially in view of the rule of construction which has been established and so uniformly followed for so many years.”

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Effect of a Discharge upon Judgments Against the Bankrupt. [Ch. III.]

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But in a case arising in the District of West Virginia, *In re Alderson* (3 Am. B. R. 544; 98 Fed. 588), it was held that a judgment obtained in a State court against a bankrupt for fines upon indictment for unlawful retailing was a dischargeable judgment. It does not seem that this case is authoritative because it would result in a pardon of a criminal offense which cannot be considered to be the legislative intent. On the whole *In re Baker* must be considered to govern. See further what is said under section 63 as to what are provable debts.

“Assessments” are presumably included in the word “taxes”. At all events, as the indebtedness, due to a municipality is not released by a discharge, under the view we have taken of the statute, this question becomes immaterial. (As to payment of taxes, see section 64a.) Moreover taxes, including assessments, are liens upon the property which cannot be affected by bankruptcy.

**Effect of a Discharge upon Judgments Against the Bankrupt.** Section 17a (2).—In considering the provisions of this section, providing for exemption from release by a discharge of the bankrupt of judgments against him in actions for fraud or obtaining property by false pretenses, or for wilful and malicious injury to person or property, it is necessary to collate with it the provisions of subdivision 4 of the same section exempting from release such provable debts as are created by fraud, embezzlement, misappropriation or defalcation while acting in an official or in a fiduciary capacity. It is necessary also to keep in mind that by section 63, subdivisions 1 and 5, any fixed liability evidenced by a judgment absolutely owing at the time of the petition or founded upon a provable debt reduced to judgment after the filing of the petition and before the consideration of the discharge, is a provable debt. Under the act of 1867 it was somewhat doubtful as to whether a judgment for fraud by merger of the original debt made the discharge operative upon it. These subdivisions were probably enacted to clear up this doubt. (See *In re Rhutassel*, 2 Am. B. R. 697; 96 Fed. 597; *in re Thomas*, 1 Am. B. R. 515; 92 Fed. 912.) It follows that any judgment

## § 17.] Effect of a Discharge upon Judgments Against the Bankrupt.

obtained prior to the filing of the petition, and, if on a provable debt, obtained prior to consideration of discharge, is dischargeable unless it falls within the exceptions of subdivision 2. That is to say, under this subdivision the question of the form of the debt, as well as of its original nature, is an essential in determining whether the particular debt will be barred by a discharge. That clause does not except from the effect of the discharge, claims created by fraud or by obtaining property by false statements or by wilful and malicious injury to the person or property of another, but does except judgments rendered upon causes of action of this nature. The judgment read in connection with the pleadings upon which it is based must establish the fact that the claim sued on and merged in the judgment was created through fraud, or by false pretenses, or by wilful and malicious injury to the person or property of another. (See *In re Rhutassel*, *supra*.)

This is the better opinion although the construction of the section is not free from doubt. In the case of *In re Lewensohn* (3 Am. B. R. 596; 98 Fed. 576), Judge Brown of the Southern District of New York, passing upon the question of a stay asked for by the bankrupt of an action in a State court based upon fraud, said:

“Nor is there any doubt that if the charges of false representations are sustained, these debts would be barred from the operation of the discharge by subdivision 2 of section 17, or by subdivision 4, of the Bankruptcy Act. Different views have been entertained of the scope of these paragraphs. Paragraph 4 may be regarded as merely a brief substitute for section 5117, Rev. St., and thus applicable to frauds generally; and section 2, as respects frauds, to be designed merely to remove the doubts which arose under the Act of 1867, whether a judgment for such frauds, by merger of the original debt, did not make the discharge operative upon it. On the other hand, subdivision 2 might be construed as requiring that for all frauds other than official or fiduciary ones, judgments should be obtained in order to prevent their being barred; and the frauds referred to in subdivision 4 deemed limited to those committed by a person acting in an official or in a fiduciary capacity. *Loveland*, Bankr. 625; *Coll. Bankr.* 135, 172; *Low*, Bankr. 307, 308; *in re Thomas* (D. C.). 92 Fed. 912; 1 Am. B. R. 515; *In re Rhutassel* (D. C.), 96 Fed. 597, 2 Am. B. R. 697; *Howland v. Carson*, 16 N. B. R. 372, 28 Ohio St. 625.”

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Effect of a Discharge upon Judgments Against the Bankrupt. [Ch. III]

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Of course judgments obtained after the discharge cannot be affected except that the discharge may be pleaded against them in case they fall within the classes of dischargeable debts. In this connection it is important to point out that section 67, annulling liens obtained by legal proceedings within the four months of bankruptcy, while it prevents a judgment obtained during that period from becoming a lien, does not necessarily thereby affect its provability as a claim.

Section 33 of the Act of 1867 was as follows. "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged under this Act." Under that Act the question as to whether a debt was dischargeable or not turned entirely upon the act of fraud. The words "wilful and malicious injury to the person or property of another" in the Act of 1898 are new. They enlarge the meaning of section 33 of the former law. "Malicious" means something more than "wilful" and holds within it the ideas of illwill, hatred and absence of just cause. It applies, therefore, to judgments for libel, slander, malicious prosecution, etc. In a learned opinion by Referee Hotchkiss of the Northern District of New York, *In re Sullivan* (2 Am. B. R. 30), from which the above statements have been taken, it was held that a claim based upon a verdict assessing damages for seduction was not within the meaning of "wilful and malicious injury." In like manner a judgment for breach of promise to marry has been held to be dischargeable under the present Act. (*In re McCauley*, 4 Am. B. R. 122; 101 Fed. 223.)

As the subdivision tends to limit the right of a bankrupt to a discharge and thus to impair the remedy, the statute being highly remedial, the exception should be so construed as to impair the remedy as little as required by its express terms. The division of torts made by Mr. Bigelow in his work on that subject is worthy of consideration in this connection. His division of the subject is as follows: "Looking to one class of cases, a tort is a breach of duty committed by fraud or by malice. Looking to a second, a tort is a breach of duty absolute, regardless of fraud,



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**§ 17.] Character of Debt Determined by Record — Omitted Claims.**

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malice, intention, or negligence (in other words, these elements may or may not exist). Looking to a third class, a tort is a breach of duty committed by negligence." (Bigelow on Torts, 6th Stud. ed. p. 15.) As to judgments in the second class of torts, the circumstances of each case will have to be considered, in determining whether they are released by a discharge. And it must be borne in mind that by the better opinion unless a judgment rendered before the petition is filed, comes within the exceptions of subdivision (2) it is provable even though for tort, and is dischargeable.

There are other judgments as for fines, penalties, alimony, etc., which are not properly considered debts at all and hence are not dischargeable. On the question of alimony, however, there is a division of opinion under the present Act. For further discussion of this subject see section 63 on "provable" debts.

**Character of the Debt to be Determined by the Record.**—The fact that the judgment was in an action for fraud or wilful or malicious injury may, perhaps, not appear by the judgment itself. That is not necessary; it is sufficient if it appear from the record of the case. If the record show that the action was for any of the causes specified, then the judgment is not barred by a discharge. (Compare *In re Patterson*, Fed. Cas. 10,817; 1 N. B. R. 307; *in re Whitehouse*, Fed. Cas. 17,564; 1 Lowell, 429; *Warner v. Cronkhite*, Fed. Cas. 17,180; 13 N. B. R. 52; s. c. 6 Biss. 453.) The action must have been based on the fraud or the wilful or malicious injury. It is not enough that there may have been incidental or immaterial, false and fraudulent representations in connection with the transaction, if the action is not based on them.

**Omitted Claims.** Section 17a (3)—The provisions of subdivision (3), are new and form one of the most important changes made by the present law. To fully appreciate their extent and application it will be well first to consider the general rule as to the necessity of notice to creditors in order that the court may acquire jurisdiction over them. The preponderance of authority

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**Debts Created by the Bankrupt's Fraud, in Official, etc., Capacity. [Ch. III.]**

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under the Act of 1867 was that jurisdiction in bankruptcy proceedings, and in the special proceeding to grant a discharge, did not depend on the correctness of the schedules, nor even on the giving of notice to the creditors, but on the petition and adjudication. If the court acquired jurisdiction of the bankrupt, and had jurisdiction of the subject-matter, then its decrees were binding on all creditors whether or not they had actual notice, the proceeding in bankruptcy being in the nature of a proceeding *in rem*. (Ryal *v.* Lapham, 27 Ohio St. 452; Thurmond *v.* Andrews, 13 N. B. R. 157; s. c. 10 Bush. 400; Platt *v.* Parker, 13 N. B. R. 14; s. c. 11 N. Y. Supreme, 135; s. c. 6 N. Y. Supr. 377; Lamb *v.* Brown, Fed. Cas. 8,011; 12 N. B. R. 522; s. c. 7 C. L. N. 363; Black *v.* Blazo, 117 Mass. 17; s. c. 13 N. B. R. 195.) Hence, according to these cases just cited, under the Act of 1867 a discharge duly granted by a court having jurisdiction of the bankrupt, was a release of all provable debts (other than the excepted ones), whether or not they appeared on the schedules and whether or not the creditors received personal notice of the proceedings in bankruptcy or of the application for a discharge. In so far as the cases just cited laid down the rule that the court has jurisdiction to grant a discharge which would be a release of omitted claims held by creditors who do not have personal notice of the proceedings in bankruptcy, they apply equally by the present law, for though these creditors have not been served with notice, yet if they have actual knowledge of the proceedings, their claims are released by the discharge. But unless they do have actual notice or personal knowledge, then their claims, if omitted from the schedules, are, by the present law, unaffected. In this latter respect the act is diametrically opposed to the act of 1867.

**Debts Created by the Bankrupt's Fraud, Embezzlement, Misappropriation or Defalcation While Acting in an Official or Fiduciary Capacity.** Section 17a (4)—It will be noted that if any of these debts be reduced to judgment prior to the filing of the petition, they will become dischargeable, except in the case of fraud which is covered by subdivision 2, above. In most respects this pro-

vision is similar to the provision under the Act of 1867 with the exception of the use of the word "misappropriation" which does not appear in any former act. "Misappropriation" means wrongful appropriation and does not differ materially from embezzlement. While we are unaware of any decision bearing directly upon the subject, under the principle of *noscitur a sociis* it will be presumably construed to mean substantially the same as embezzlement. The following are the parallel sections under the prior Act.

The act of 1867 (§ 33, R. S. § 5,117), was as follows: "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 by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt." It will be noticed that debts created by misappropriation were not mentioned. The Act of 1841 provided that "debts created in consequence of a defalcation as a public officer or executor, administrator, guardian, or trustee, or while acting in any fiduciary capacity," should not be released by a discharge. These terms have already been defined under prior acts and the decisions are applicable under the present Act.

**Debts Created by Fraud.**—The word fraud as used in this section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law which may exist without the imputation of bad faith or immorality. Thus, where an executor sold at a discount certain bonds which he had received as part of the property belonging to the estate of his decedent, and which the will directed him to distribute in a certain way, the sale of the bonds was held by the State court to have been a misappropriation of them amounting to a *devastavit*, in which the purchaser was held to be a participant and liable to account for the value of the bonds purchased, not because he was guilty of any actual fraud, but because in view of the circumstances attending his purchase he had committed constructive

fraud. The U. S. Supreme Court held that he was released, by his subsequent discharge in bankruptcy, from such liability. The debt or liability was not created by such fraud as the act contemplated. (*Neal v. Clark*, 95 U. S. 704; s. c. *sub nom.* *Neal v. Scruggs*, 17 N. B. R. 102, reversing same case, *sub nom.* *Jones v. Clark*, 25 Gratt. 642.)

Neither does the term "fraud" as here used include such fraud as is implied by law from the purchase of property from a debtor with the intent thereby to hinder and delay his creditors. (*Wolf v. Stix*, 99 U. S. 1.)

See *Forsyth v. Vehmeyer*, decided by the Supreme Court, April, 1900, 3 Am. B. R. 807; 177 U. S. 177, which, while having reference to the statute of 1867, is also equally applicable to the present statute. In that case it was held that a representation as to an act made knowingly, falsely and fraudulently for the purpose of obtaining money from another and by means of which such money is obtained creates a debt by means of a fraud involving moral turpitude and intentional wrong, and is non-dischargeable.

**Fraud Must Exist at the Inception of the Debt.**—The statute expressly says that the debt must have been created by fraud. Subsequent fraudulent conduct in connection with it, or immaterial fraudulent representations at the time of the creation are insufficient to take the debt out of the statute and to prevent its being discharged. Thus it has been held in a case where a claimant of a ship, against which the U. S. has filed a libel and which has been seized as liable to forfeiture for violation of the rules of war, has given a bond to procure its release, and his defense was unsuccessful, that the debt on the bond was not created by fraud; nor did the fact that in his defense he introduced the evidence of false witnesses make the debt upon the bond one created by fraud. On other grounds it was decided that, under the statute of 1867, the debt was not released by a discharge, but it was expressly held that the subsequent fraud did not affect it. (*In re Rob Roy*, 13 N. B. R. 235; s. c. 1 Woods, 42.)

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§ 17.] Fraud of One Partner—Actions for Debts Created by Fraud.

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So, too, it has been held that where the bankrupt has bought the business of another in consideration of his paying the debts of the seller, his discharge in bankruptcy thereafter releases him from his debt to the seller, even though he falsely stated to him that the debt had been paid, and thereby dissuaded the seller from proving his claim. The fraud did not exist at the inception of the debt. The debt was not created by fraud. (*Brown v. Broach*, 52 Miss. 536.)

**Partnership Debts Created by the Fraud of One Member.**—If in the conduct of partnership business, and with reference thereto, one partner makes false and fraudulent misrepresentations of fact to the injury of innocent persons who deal with him as representing the firm and without notice of any limitations upon his general authority, his partners cannot escape pecuniary responsibility therefor on the ground that such misrepresentations were made without their knowledge; especially if the partnership has had the benefit of the fraudulent act, although the other partners were all innocent of any wrong in the matter. The debt being one created by fraud and by actual fraud, even the innocent partners are not released from it by a discharge in bankruptcy. (*Strange v. Bradner*, 114 U. S. 555, affirming s. c. *sub nom.* *Bradner v. Strang*, 89 N. Y. 299; *Schroeder v. Fry*, 60 Hun, 58; s. c. 37 N. Y. St. Reporter, 945; s. c. 35 N. Y. St. Reporter, 987; s. c. affirmed, 114 N. Y. 265.)

**Actions in Assumpsit for Debts Created by Fraud.**—The action on a debt created by fraud need not be in tort, in order to prevent a discharge from being a release. The plaintiff need not base his action upon the fraud or set up the fraud in his complaint. He may sue on the debt or upon notes given therefor, and if a discharge is set up as a defense, he may meet it by proof of the fraud. A claim arising from fraud may be prosecuted in any proper form of suit. While it is a general rule of law that where the party has an election between two inconsistent rights or remedies (for instance where he can rely upon a contract, or can renounce

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**Burden of Proof—Judgment for a Debt Created by Fraud. [Ch. III.]**

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the contract and bring action for the fraud), and knowing his rights chooses one of the remedies, he renounces the other; yet as under the provisions of section 17, subdivision (4), a debt created by fraud is not released, the plaintiff may sue on the contract, and if the discharge is pleaded as a defense, may reply that the debt was created by the fraud, because he sets up the fraud, not for the purpose of renouncing the contract, but as a reason why his action upon the debt is not barred by a discharge. He sues to recover his damages upon the breach of the contract, not to recover the damages occasioned by the defendant's fraud, and only alleges the fraud in his replication as a ground for showing that the defendant's defense is not good. He asserts not that the debt was void for fraud, but that because of the fraud the defendant is not discharged from the debt by a discharge in bankruptcy. He asserts the fraud, not for the purpose of rescinding the contract, but to show that the defendant has not been relieved from his obligation to perform his part of the contract; not to show that by reason of the fraud no debt was created; but that being created by fraud, it was not discharged by the bankruptcy act. There is thus no inconsistency between the replication and the declaration. (*Stewart v. Emerson*, 8 N. B. R. 462; s. c. 51 N. H. 301.) See paragraph HOW PLEADED AND EVIDENCED, *post* this section.

**Burden of Proof.**—After a discharge in bankruptcy the burden of proving that the debt was created by fraud, or by one acting in a fiduciary capacity, is on the plaintiff. (*Sherwood v. Mitchell*, 4 Den. 435.) If he fails to make proof, judgment must go against him.

**Judgment for a Debt Created by Fraud.**—The debt as we have seen under subdivision 2, is not released by a discharge, although in the form of a judgment. But the record must show that the debt is so created. If a judgment is rendered in an action, the record of which shows material traversable allegations of fraud which were necessarily determined, then the judgment is conclusive. (*Flanagan v. Pearson*, 14 N. B. R. 37; s. c. 42 Tex. 1.)

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§ 17.] Conversion is not a Fraud—“Fiduciary Capacity.”

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And where a State court has decided that the action was for fraud and deceit and has held that in order to have maintained such action the fraud must have been proved as laid in the declaration, it must be assumed (by the U. S. Supreme Court on a Writ of Error) that the verdict and judgment in that action were obtained only upon proof and a finding by the jury of the *fact* of fraud. (*Forsyth v. Vehmeyer*, 3 Am. B. R. 807; 177 U. S. 177.)

**Conversion is not a Fraud—“Fiduciary Capacity.”**—Although there has been much conflict of judicial opinion as to whether the conversion of property, held by pledgees and other persons in similar capacities, creates a debt which should be considered “a debt created by fraud or by one acting in a fiduciary capacity,” yet the decisions of the courts of last resort under the act of 1867, as well as under the act of 1841, hold that such conversions do not fall within the term “fraud” as used in those acts; and that they are to be considered breaches of contract rather than violations of trust. Consequently, under those statutes the damages springing from such acts constitute debts not only provable in bankruptcy but released by discharge. In so far as the question of conversion being a fraud is concerned, the law must be considered to be settled by the decisions of the U. S. Supreme Court rendered under the act of 1867. The leading case decided under that act was *Hennequin v. Clews* (111 U. S. 676, affirming 77 N. Y. 427; s. c. 84 N. Y. 676). It is decisive not only of what constitutes “fraud” as the word is used in the act, but also of what is meant by the expression “a fiduciary capacity.” The precise question determined in that case was whether a discharge in bankruptcy operated to release a bankrupt from a debt or obligation which arose from his appropriating to his own use certain bonds left with him as collateral security for the payment of money or the discharge of a duty, and subsequently failing or refusing to return the same after the money had been paid or the duty performed, or whether it was a debt “created by fraud or while acting in a fiduciary capacity.” The New York Court of Appeals had decided that the

giving of the bonds as collateral was an ordinary commercial transaction, and inasmuch as it did not appear that there had been any misrepresentation or deceit used to obtain possession of the property afterwards converted, the only fraud was such as was implied by the violation of the duty to return the property when the debt for which it was collateral was paid. The relation between the pledgor and the pledgee of the security rested entirely in contract, and the breach of duty was to be considered as a breach of contract rather than a breach of trust.

The case was taken on a writ of error to the U. S. Supreme Court, which affirmed the decision of the New York Court of Appeals, basing its own decision to a great extent upon cases decided under the act of 1841, especially upon *Chapman v. Forsyth* (2 How. 202). The latter was a case in which a cotton factor had received cotton on commission to sell the same as property of the consignor and remit the proceeds. He sold it and converted the proceeds to his own use; failed to make any remittance; afterwards went into bankruptcy and procured a discharge and pleaded it in answer to an action brought against him on the debt. The contention of the plaintiff in the case was that the debt, being created by fraud and while the debtor was acting in a fiduciary capacity, was not released by a discharge, the bankruptcy act of 1841 providing that "debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in a fiduciary capacity," were not released by a discharge; and further providing that "no person should be entitled to a discharge who should apply trust funds to his own use." In the Circuit Court the judges were equally divided in opinion as to whether a commission merchant or factor who sells for others is indebted in a fiduciary capacity within the terms of the act, if he sells the property, receives the money on the owner's account, but fails to pay it over. But the Supreme Court in rendering its decision in this case (*Chapman v. Forsyth*) declared that such debts were not created by one acting in a fiduciary capacity, saying: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from



## § 17.] Character of the Debt Not Determined by State Law.

agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. In almost all the commercial transactions of this country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the act. (Act of 1841.) The cases enumerated, viz., 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied trusts, but of special trusts, and the 'other fiduciary capacity' mentioned must mean the same class. The act speaks of technical trusts, not those which the law implies from the contract." Such was the authoritative decision of the highest court of the land under the act of 1841; and it was followed in *Hayman v. Pond* (7 Met. 328); *Austill v. Crawford* (7 Ala. 333); *Commercial Bank v. Buckner* (2 La. Ann. 1023); and must be considered as overruling *Matteson v. Kellogg* (15 Ill. 547), and *Flagg v. Ely* (1 Edm. Sel. Cas. 206).

So under the present act it has been held by the District Court for the Southern District of New York, citing the cases above referred to, that subdivision 4 does not embrace debts arising in commercial dealings between principal, agent or factor for the sale of goods on commission. (*In re Basch*, 3 Am. B. R. 235; 97 Fed. 761.)

**Character of the Debt Not Determined by State Law.**—The character of the debt is to be determined in accordance with the construction to be given to the words and terms used in the bankrupt law, and that law, applying to the whole country the construction of it, as well as the operation of it, should be the same all over the country and not varied by local laws of the several States.

The mere fact that the law of the State where the contract was made and where it was to be performed, and where the parties resided, punishes criminally the conversion by a factor of the moneys of his principal, does not fix the character of the debt incurred by the factor, nor determine the relation he bears to his principal. (*Woolsey v. Cade*, 15 N. B. R. 238; s. c. 4 Cent. L. J. 202.)

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Course of Dealing as Determining Fiduciary Capacity—Agents. [Ch. III.]

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**Course of Dealing as Determining Fiduciary Capacity.**—The courts have at times endeavored to show the peculiar circumstances which make factors occupy a position different from other trustees. In *Woolsey v. Cade* (*supra*), which was a case of cotton factors, the court said: “The business of a factor is not confined to a single transaction with a single individual. It extends to a number of persons and to varied transactions. A cotton factor seldom sells and seldom can in one sale dispose of the cotton of one person only. In the ordinary course of business he sells the cotton of several persons at certain prices varying according to the quality, and the aggregate proceeds of the sale are paid to him. The cotton is the property of the several persons to whom he must, after the sale, separately account, in proportion to their several interests when it is ascertained how much of the differing qualities of cotton each owned. Until then he must deposit the funds in his own name. If lost because of such deposit it cannot be properly said that he is guilty of defalcation which imports a breach of duty, legal or moral. (*Vail v. Durant*, 7 Allen, 408.) In the usual course of business factors make advances on consignments; oftentimes these advances are in amount so great that the forwarder is indebted to them; hence the course of dealings is one in which mutual debts are incurred; one of them may be the debtor at one time, the other at another time.”

This explanation may perhaps not be satisfactory, but it is evidently an aim to show that the course of business affects and determines the relation of factors to their principals, and that the course of business is such that their liability is one of contract merely, not of trust.

**Agents.**—If factors are not fiduciary debtors, agents clothed with similar powers cannot be regarded as fiduciary debtors. Thus agents authorized by agreement to make sales and to collect moneys and carry them into account and pay over monthly or at other regular intervals, are to be treated as debtors, not as trustees. They do not occupy a fiduciary capacity. (*Grover v. Clinton*, Fed. Cas. 5,845; 8 N. B. R. 312; s. c. 5 Biss. 324;

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Agents.

Kaufman *v.* Alexander, 53 Texas, 562; Guilfoyle *v.* Anderson, 9 Daly [N. Y.], 64.) And persons who were made the agents of others to procure the discount of certain notes and then to pay the proceeds over have been held not to act in a fiduciary capacity, and their act of converting the proceeds to their own use is not a "fraud." (Compare Lawrence *v.* Harrington, 122 N. Y. 408; Green *v.* Chilton, 57 Miss. 598; Noble *v.* Hammond, 129 U. S. 65.)

And a deposit of bills of exchange, with instructions to collect, apply the proceeds upon certain indebtedness, and remit the balance, does not create a fiduciary relation between the depositor and the bailee. (Cronan *v.* Cotting, 4 N. B. R. 667; s. c. 104 Mass. 245, holding that the fiduciary relation must have existed prior to and independently of the particular transaction from which the debt arose, in order to fall within the term as here used.) It has further been held that if a maker of a promissory note gives money to his surety to pay the note and the latter does not so apply it, this does not create a fiduciary debt. (Bissell *v.* Couchane, 15 Ohio 58.) *Contra* to this last case, Matteson *v.* Kellogg (15 Ill. 547); Kingsland *v.* Spalding (3 Barb. Ch. 341), holding that where one receives money to be used in a particular way or for a particular purpose for the use of the principal, then the money is held in a fiduciary capacity; as, for instance, where he receives money for the purpose of investment or for the purpose of paying the debt of another. But the rule laid down in the two cases last cited cannot be considered as correct, if the agent or bailee, by agreement of the parties or by the usual course of dealing, is allowed to handle the property and deal with it as his own, subject only to the duty of returning it on demand. And even when applied to other cases the rule would seem to be opposed to that established by the weight of authority. Both of the cases mentioned have been criticised or disapproved in many of the cases cited in this paragraph and in the paragraph on Conversion is Not a Fraud. See in particular, Chapman *v.* Forsyth (2 How. 202), and Hennequin *v.* Clews (111 U. S. 676).

In general, the relation between a banker and his depositor is

that of debtor and creditor, and is not fiduciary (Bank of Madison, Fed. Cas. 890; 9 N. B. R. 184); and this rule applies to any bailee with whom money is deposited to be mixed with his own and to be used by him till asked for by the depositor. Such a deposit creates merely an ordinary indebtedness.

**Auctioneers.**—Where such persons receive goods to be sold by them at auction, the proceeds to be remitted, though they may be called auctioneers, it is difficult to see how they sustain towards the persons whose goods they sell any relation different than commissionmen would. Their liability would seem to be the same,—a mere indebtedness dischargeable in bankruptcy. The case of *Mayor v. Walker* (11 N. B. R. 478; s. c. *sub nom.* *Jones v. Russell*), holding a contrary doctrine, was a case in which the auctioneer was a city officer; and though the decision was not expressly based on that ground, in so far as it is an authority for the statement that auctioneers act in a fiduciary capacity, it seems to be opposed to the reasoning of the opinion in *Hennequin v. Clews* (111 U. S. 676), and the other cases cited in the notes above as to liability of factors and commissionmen and as to conversion not being a “fraud.” Expressly opposed to *Mayor v. Walker*, is *Gibson v. Gorman* (44 N. J. 325).

**Attorneys.**—An attorney, who in his professional character collects a debt for his client, acts in a fiduciary capacity. (*White v. Platt*, 5 Denio, 274; *Flanagan v. Pearson*, 14 N. B. R. 37; s. c. 42 Tex. 1. *Contra*, *Wolcott v. Hodge*, 81 Mass. 547.) But if the attorney is not employed in a professional capacity, then he incurs only the liability of an ordinary agent or bailee. (*McAdoo v. Lumiss*, 43 Tex. 227.) In *Flanagan v. Pearson*, the court declared that the relation of attorney and client was similar to the express trusts mentioned in the act of 1841, viz., those of executor, administrator, guardian and trustee.

**Officers.**—The term officer does not include those who are sureties for officers. Sureties are not officers, neither do they act in a fiduciary capacity even though their principals are persons filling

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**§ 17.] Testamentary Trustees—Discharge as Defense Must be Pleaded.**

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public offices or occupying technical trusts. A discharge granted to the surety releases him from any liability actually incurred upon his bond, even though his principal is guilty of a defalcation. (*Jones v. Knox*, 46 Ala. 53; *Fowler v. Kendall*, 44 Me. 448; *Reitz v. People*, 72 Ill. 435; *Steele v. Graves*, 68 Ala. 21.) Mere negligence of a public officer in collecting moneys which it is his duty to collect is not a defalcation. (*Courtney v. Beale*, 84 Va. 692.)

**Testamentary Trustees, Guardians.**—Whenever a debt is due by a testamentary trustee, executor, administrator or guardian, as such, it is not released by a discharge. These are the “technical trusts” referred to in the act of 1841, and uniformly held to create obligations not affected by a discharge. But the debt must be one due from the trustee as such, not an individual indebtedness of his, even though connected with the trust estate. Thus a sum of money due from an executor to a legatee is a fiduciary debt, and is not released by his discharge in bankruptcy. (*In re Crisfield*, 55 Md. 192.) Where an executor gave his personal guarantee of a claim of a creditor against his testate’s estate, the guarantee was rightly held to be an ordinary debt, not one created while acting in a fiduciary capacity. (*Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312.) And where an accounting trustee gave his note under seal (importing a consideration) which was accepted in satisfaction, and a release given, it was held that the note was not a fiduciary debt. (*Coleman v. Davis*, 45 Ga. 489; compare *Elliot v. Higgins*, 83 N. C. 459.) If the note had not been accepted in satisfaction and a release given, it would seem that the note would constitute simply a new evidence of the old debt and would not be released by the discharge. (*Madison v. Dunkle*, 114 Ind. 262.)

**The Discharge as a Defense Must be Pleaded.**—A court does not lose jurisdiction of an action pending before it because the defendant has been discharged in bankruptcy. It may, unless the suit is stayed, proceed to final judgment. The discharge must be pleaded if the defendant would avail himself of it. No court will

take judicial notice of it and protect his rights because he has this defense, any more than they will protect him because he may have some other valid defense. (*Horner v. Spellman*, 78 Ill. 206, 410; *McDonald v. Davis*, 105 N. Y. 508; *Revere v. Dimock*, 90 N. Y. 33; s. c. affirmed as *Dimock v. Revere*, 117 U. S. 559; *Monroe v. Upton*, 50 N. Y. 593; *Manwarring v. Kouns*, 35 Tex. 171.) See also cases cited heretofore in notes to this section, paragraphs on The Discharge not an Extinguishment of the Debt, Judgments Entered after Granting of the Discharge, Remedies against Judgments, and Effect of a Discharge to be Determined by Court in which the Action is Brought.

**Right to Plead a Discharge Received Pendente Lite.**—If the bankrupt receives a discharge pending a suit against him, and the discharge might be a defense to such suit, in general he will be allowed to plead it. (*National Bank v. Taylor*, 120 Mass. 124.) Where there is a system of Code Pleading he must apply for leave to set it up by a supplemental answer and generally will be permitted to do so. (*Lyon v. Isett*, 34 N. Y. Supr. 41; *Holyoke v. Adams*, 59 N. Y. 233; s. c. 13 N. B. R. 413.) And if the defendant would avail himself of this defense, it must be pleaded in actions in equity as well as those at law. It cannot be taken advantage of by motion. (*Fellows v. Hall*, Fed. Cas. 4,722; 3 *MacLean*, 281.) But the permission to set up the defense by a supplemental answer will be denied if there has been great and inexcusable delay; and the court may in its discretion impose terms as a condition of allowing one to plead it. (*Medbury v. Swan*, 8 N. B. R. 537; s. c. 46 N. Y. 200; *Barstow v. Hansen*, 2 Hun, 333.) In *Medbury v. Swan*, a delay of fifteen months was held sufficient to justify a court in refusing permission to plead a discharge by supplemental answer. The application for leave to plead a discharge by means of a supplemental answer like all other applications for leave to put in a supplemental answer is addressed to the discretion of the court. On motions for such leave the court has the same discretion as under the former practice a court had upon a motion to strike from the file of a court a plea *puis*

*darrein continuance.* Leave may be denied, although the defense sought to be interposed is strictly legal, where in the judgment of the court, laches or fraud is shown, or it appears that injustice will be wrought by allowing the defense. Thus in New York, where in an action, an attachment, had been issued and levied upon property of defendants, which attachment had been released by the giving of an undertaking by sureties, conditioned for the payment of any judgment recovered therein against the defendant, the court denied a subsequent motion of the defendant to be allowed to plead by supplemental answer a subsequent discharge in bankruptcy, since the effect would be to prevent a judgment being entered against him, and as the recovery of a judgment was the contingency on which the sureties were to become liable to the plaintiff upon the bond given to dissolve the attachment, to prevent the entry of such judgment would be to work an injustice against the plaintiff, and to deprive him of a proper advantage lawfully obtained by his attachment. (*Holyoke v. Adams*, 59 N. Y. 233; s. c. 13 N. B. R. 413. Compare the notes to section 16, showing that the course of practice in Massachusetts is different.) Where a defendant, prior to bankruptcy, has suffered judgment by default to be taken against him, and such judgment is a valid lien on his land, if afterwards he institutes proceedings in bankruptcy and procures a discharge he will not be allowed to set up the discharge by a supplemental answer, the court in the meantime having opened the default and given him leave to answer, but having directed the judgment to stand as security; for to order that leave be given to plead the discharge by supplemental answer would be to destroy the lien, and this the plaintiff was entitled to under the provisions of the bankrupt act. (*Barstow v. Hansen*, 2 Hun, 333.)

**How Pleaded and Evidenced.**—The present act provides for a discharge which is evidenced only by the record of a decree to that effect. There is no provision for any instrument in the nature of a certificate of discharge. The decree is the discharge, and it may be evidenced by the record or by a certified copy. By section 21

(f) such certified copy is made evidence not only of the fact that such order was made, but of the regularity of the proceedings and of the jurisdiction of the court. The act contains no express provision as to the manner in which the discharge may be pleaded. The provision just referred to establishes only the evidentiary value of the certified copy. Section 5,119 of the R. S. contained a provision as to the manner of pleading the discharge under that law, and further provided that the certificate should be conclusive evidence of the fact and regularity of such discharge. Under that act it was held that the plea should set forth facts showing that the court had jurisdiction, but need not set forth facts showing the regularity of the proceedings. Regularity was presumed when jurisdiction was proven. (*Stoll v. Wilson*, 14 N. B. R. 571; s. c. 38 N. J. 198; see also, as to practice under act of 1841, *McCormick v. Pickering*, 4 N. Y. 276; *Varnum v. Wheeler*, 1 Denio, 331.)

**Replication.**—Under the old system of pleading if the debt is excepted from the operation of a discharge, the plaintiff need not set up that fact in his declaration. The proper practice is to declare as if there were no discharge, and when the discharge has been set up in the plea, to set forth in a replication the facts to avoid the discharge. (*Brown v. Broach*, 52 Miss. 536; *Johnson v. Ball*, 15 N. H. 407.) If the plaintiff seeks to avoid the discharge on the ground that the debt was created by fraud, or while the defendant was acting in a fiduciary capacity, he must set up the fact in his replication. (*Cutter v. Folsom*, 17 N. H. 139.) But under the Code, in New York, and, presumably, in most Code States, a reply is never necessary to the allegations in an answer, unless directed by the court or unless a counterclaim has been set up in the answer. The plaintiff need not allege that the debt which is his cause of action was created by fraud and need not reply to an answer setting up a discharge; and yet may show that his debt was one created by fraud. (*Argall v. Jacobs*, 87 N. Y. 110.)



## § 17. Proceedings in Appellate Courts After a Discharge.

**Proceedings in Appellate Courts After a Discharge.**—If a discharge has been granted to a person after the entry of judgment against him but while the case is in the appellate court, the enforcement of his remedies depends on the practice of the State where the suit is brought. In New York the mere suggestion of the discharge of the defendant while his appeal is pending can have no effect. The appellate court will proceed as if no discharge had been granted; and if the judgment is affirmed, the defendant may then apply to the proper court for a perpetual stay of execution. (*Cornell v. Dakin*, 38 N. Y. 253, citing *Palmer v. Hutchins*, 1 Cow. 42; *Baker v. Taylor*, 1 Cow. 165.) In Tennessee, it seems that the proper remedy for enforcing the right to a discharge as against a judgment entered before the discharge was granted but which at that time was on appeal, is by an equitable action instituted after the appellate court has pronounced its judgment of affirmance. There is no way in which the matter can be brought before the appellate court. (*Wolf v. Stix*, 99 U. S. 1; *Wolf v. Stix*, 96 U. S. 541; *Longley v. Swayne*, 4 Heisk. [Tenn.] 506; *Riggs v. White*, 4 Heisk. 503; *Ward v. Tunstall*, 58 Tenn. 319.) The rule in that State is: "On the record when presented, to which alone the appellate court can look, a judgment can be rendered and then if the debtor desires to be relieved he will find no difficulty in being protected from payment of improper judgments, either in the bankruptcy court or by an original proceeding in the State court where he can make such issues as will raise the question. As he is precluded from interposing in the appellate court his defense arising out of his discharge in bankruptcy, the judgment of affirmance will not interfere in any way with his subsequent action for relief from it." In that State, as in New York, there is no authority for the appellate court to entertain a petition to set aside a judgment entered by it after the granting of the discharge. If the court were to receive a petition the opposite party ought to have the right to controvert the facts stated in the petition and to show that the discharge was not operative upon the judgment, and thus issues

would be raised which would constitute a new lawsuit. Neither in the States mentioned and in others whose practice is similar, can the discharge be made available in the appellate court by a plea in abatement, though it was granted after the original judgment. But in several States a discharge may be used in proceedings on appeal. Thus, in Vermont, if a discharge is obtained after the granting of the original judgment, the appellate court may, in its discretion, reverse the judgment *pro forma*, if the discharge is suggested to it, and will do so in order to enable the defendant to plead his discharge. (*Bank v. Onion*, 16 Vt. 470.) In Missouri it is within the power of the appellate court to order that the appellant be discharged from the judgment. (*Haggerty v. Morrison*, 59 Mo. 324.) In other States the appellate court will either order a perpetual stay or dismiss the appeal.

**Revival of Discharged Debt by a New Promise.**—The moral obligation to pay a discharged debt is a good consideration for a new promise to pay it. The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor to enforce payment of it by suit is barred. But the debt is not paid, the moral obligation to pay remains, and a promise based on it is upon sufficient consideration. (*Dusenbury v. Hoyt*, 10 N. B. R. 313; s. c. 53 N. Y. 521; s. c. 14 Abb. Pr. [N. S.] 132; *Gardner v. Bowen*, 23 Weekly Digest, 252.) This is an application of the general rule that if a debtor is released from his debt by provisions of positive law, his subsequent express promise to pay the debt will be enforced, but where the subsequent promise is to pay a debt released by the voluntary act of the creditor, the promise will not be enforced. A discharge under a composition made and confirmed under the provisions of the bankruptcy act is a discharge by operation of law, and not a voluntary discharge; and this is as true of the claim of a creditor voluntarily signing the composition as of the claim of one who dissented. An indebtedness thus discharged is a good consideration for a subsequent promise to pay the original debt. (*In re Merriman*, 44 Conn. 587; s. c. 18 N. B. R. 411; *Mason & Hamlin Organ Co. v. Ban-*

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 § 17.] New Promise Must be Definite—Expressions of Intention to Pay.
 

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croft, 1 Abb. N. C. 415; s. c. 4 Cent. L. J. 295; *Ex p.* Jacobs, 44 L. J. Bank. 34.)

**New Promise Must be Express, Definite, Unambiguous.**—The promise must be definite, express, distinct, unambiguous. (Stern *v.* Nussbaum, 5 Daly [N. Y.] 382; s. c. 47 Howard Pr. 489; Allen *v.* Ferguson, 9 N. B. R. 481; s. c. 18 Wall. 1.) The mere subsequent acknowledgment of the justice of the debt or of its existence cannot be considered a promise to pay. It is nothing but a recognition of that which does in fact exist, viz., the moral obligation to pay. (Porter *v.* Porter, 31 Me. 169; Murphy *v.* Crawford, 114 Pa. St. 496; Brewer *v.* Boynton, 71 Mich. 254.)

**Expressions of an Intention to Pay.**—A mere expression of an intention to pay is not a promise to that effect. In the case of Allen *v.* Ferguson, the U. S. Supreme Court held (9 N. B. R. 481; s. c. 18 Wall. 1), that where a discharged bankrupt had written to his creditor "Be satisfied; all will be right. I intend to pay my just debts if money can be made from hired labor. All will be right between me and my just creditors,"—this language could not be considered a promise to pay the debts. The promise by which a discharged debt may be revived must be clear and unequivocal. The rule is different in regard to the defense of the statute of limitations against a debt barred by lapse of time. In that case acts or declarations recognizing the existence of the debt as still an obligation, have often been held to take a case out of the statute; not so in the case of debts discharged in bankruptcy. Nothing is sufficient to revive such debts unless the jury is authorized by it to say that there was an expression by the debtor of the intention to bind himself to the payment of the debt. Thus partial payments do not operate as a new promise to pay the residue of the debt; nor is the payment of interest a promise to pay the principal. The mere expression of an intention to pay is not sufficient. And in the same case the court said, with reference to an expression of intention to do "what was right" and to pay "just debts," that the determination of what was "right" or "just" in such cases was so impracticable that courts of law

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Payments upon Discharged Debts — Action on New Promise? [Ch. III.]

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could not undertake to ascertain the rights of parties under such an expression. But it is not necessary that the word "promise" be used to create an obligation. It has been said the true test is: Did the party mean that he would pay the debt? If he did and his words are susceptible of no other construction, then in law his words amount to an express promise to pay. The question would seem to be one of fact for the jury, whether from the words used, considered in the light of all the circumstances of the case, there was, as was said in *Allen v. Ferguson* (9 N. B. R. 481; s. c. 18 Wall. 1), "the expression by the debtor of a clear intention to bind himself to the payment of the debt." The inquiry is: "Did the party express his intention to reassume his legal obligation." (*Harris v. Peck*, 1 R. I. 262; *Craig v. Seitz*, 63 Mich. 727.) In deciding this question not only the words used may be considered but all the attendant circumstances, such as whether they were addressed to the debtor or to third persons, and also the cause and occasion of the use of the words. (*Evans v. Carey*, 29 Ala. 99; *Horner v. Speed*, 2 Pat. & H. 616.)

**Subsequent Payments upon Discharged Debts.**—Subsequent payments do not revive the debt so as to make the debtor liable for the residue, nor does the payment of interest make one liable for the principal. Neither will such payments be evidence which alone will justify a jury in finding that a new promise was made to pay the debt. (*Allen v. Ferguson*, 9 N. B. R. 481; s. c. 18 Wall. 1; *Lawrence v. Harrington*, 122 N. Y. 408; *Wheeler v. Simmons*, 60 Hun, 404; s. c. 39 N. Y. St. Rep. 797; *Cambridge Institution v. Littlefield*, 60 Mass. 210.)

**Must the Action be on the Original Debt or the New Promise?**—There is much conflict of authority on this point. One line of cases holds that the discharge bars the debt *sub modo* only, and the new promise operates merely as a waiver of the defense which the discharge gave, and that when the bankrupt has made a subsequent promise to pay the debt, the creditor may bring the action upon the original demand and may set up in his reply (if a reply is necessary) the new promise in avoidance of the discharge set

out in the answer or plea. This is the rule in New York. (*Dusenbury v. Hoyt*, 10 N. B. R. 313; s. c. 53 N. Y. 521; s. c. 14 Abb. Pr. [N. S.] 132. To same effect, *Maxim v. Morse*, 8 Mass. 127; *Riggs v. Roberts*, 85 N. C. 151; *Graham v. O'Hern*, 24 Hun, 221; *Marshall v. Tray*, 74 Ill. 379; *Hopkins v. Ward*, 67 Barb. 452; *Badger v. Gilmore*, 33 N. H. 361; *Otis v. Glazen*, 31 Me. 567; *Apperson v. Stewart*, 27 Ark. 619.) Considering the new promise merely as a waiver of the defense of a release by the discharge, the rule as laid down by the New York courts is that a subsequent promise to pay, made any time before the rendering of a verdict, even after the commencement of an action on the old debt, and even though the discharge may have been previously pleaded, is good as a waiver. (*Decker v. Kitchen*, 33 Hun, 268; s. c. 19 Weekly Dig. 379, citing *Rucker v. Hanna*, 4 East, 604; *Yea v. Fouraker*, 2 Burrows, 1099; *Wright v. Steele*, 2 N. H. 53. See also *Clark v. Atkinson*, 2 E. D. Smith, 112; *Shipping v. Henderson*, 14 J. R. 178; *McNair v. Gilbert*, 3 Wend. 344; *Wait v. Morris*, 6 Wend. 394; *Fitzgerald v. Alexander*, 19 Wend. 402.) But in many States the original debt is considered as wholly extinguished; an action, if brought, must be on the subsequent promise. (*Eckler v. Galbraith*, 12 Bush. 71; *Carson v. Osborn*, 10 B. Mon. 155; *Murphy v. Crawford*, 114 Pa. St. 496; *Egbert v. McMichael*, 9 B. Mon. 44; *Fleming v. Lullman*, 11 Mo. App. 104; *Ross v. Jordan*, 62 Ga. 298.) In *Horner v. Speed* (2 Pat. & H. 616), it was held that the creditor might elect to sue on the new promise or on the original debt.

**Parol Promise.**—Unless required by the statute of the State where the action is brought on the new promise, there is no law requiring that such promise shall be in writing in order to be valid. It may be by parol and be binding. (*Henly v. Lanier*, 10 N. B. R. 280; s. c. 75 N. C. 172; *Apperson v. Stewart*, 27 Ark. 619; *Mut. Reserve Assn. v. Beatty*, 2 Am. B. R. 244; 35 C. C. A. 513; 93 Fed. 747.) But if a State law does require such promise to be in writing in order that the promise may be proved, the law is governing even though the promise was in fact made before the pas-

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Date of Promise — New Promise to Pay a Discharged Judgment. [Ch. III.]

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sage of the law requiring a written promise, as the law prescribes merely the kind of evidence necessary to establish a fact and regulates only the remedy. (*Kingsley v. Cousins*, 47 Me. 91.)

In New York the promise must be in writing (N. Y. Pers. Prop. L.).

**Date of the Promise.**—It is immaterial whether the promise be made between the filing of the petition and the granting of the discharge, or after the discharge. A promissory note, given in payment of an old debt, after the petition is filed, and before the discharge, is not affected by the discharge. The discharge relates back to the filing of the petition, but the moral obligation to pay exists at all times, and before the discharge as well as after it forms a sufficient consideration for the new promise. It is not necessary that the bankrupt receive his discharge before his new promise, in order that it be based on a good consideration. (*Jersey City Ins. Co v. Archer*, 122 N. Y. 376 [citing *Fraley v. Kelly*, 67 N. C. 78; *Hornthal v. McRae*, 67 N. C. 21; *Kirkpatrick v. Tattersall*, 13 M. & W. 766; *Brix v. Braham*, 1 Bing. 281; *Knapp v. Hoyt*, 57 Iowa, 591; *Lerow v. Wilmarth*, 7 Allen, 463; *Stillwell v. Coope*, 4 Den. 225; *Geery v. Bucknor*, 4 N. Y. Leg. Obs. 344; *Allen v. Ferguson*, 9 N. B. R. 481; s. c. 18 Wall. 1]. See also *Otis v. Gazlin*, 31 Me. 567; *Griel v. Solomon*, 82 Ala. 85; *Corliss v. Shepherd*, 38 Miss. 550; *Roberts v. Morgan*, 2 Esp. 736; *Tooker v. Doane*, 2 Hall, 538; *Donnell v. Swaim*, 3 Penn. L. J. 393; *Wheeler v. Wheeler*, 28 Ill. App. 385.)

**New Promise to Pay a Discharged Judgment.**—It may well be doubted if a new promise would give a right to a judgment creditor to issue execution on a judgment released by a discharge. It would seem that the plaintiff should sue on the judgment. The court cannot, however, on a motion for leave to issue execution, hear and determine whether or not there has been a new promise, the evidence being conflicting. (*Shuman v. Strauss*, 10 N. B. R. 300; s. c. 52 N. Y. 404.)

## CHAPTER IV.

### COURTS AND PROCEDURE THEREIN.

SEC. 18. **Process, Pleadings, and Adjudications.**—*a* 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 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 notice by publication in suits in equity in courts of the United States.

*b* 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.

*c* All pleadings setting up matters of fact shall be verified under oath.

*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 make 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

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in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

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Analogous Provisions of Former Acts.—

As to service of process: R. S., section 5024; act of 1867, section 40; also R. S., section 5025; act of 1867, section 40; act of 1841 section 1; act of 1800, section 3. As to appearances, pleadings, trial, and adjudication; R. S., section 5026; act of 1867, sections 41 and 42; act of 1841, section 1; act of 1800, section 3; also R. S., section 5028; act of 1867 section 42.

**Equity Rules as to Process.**—Rule 7. The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Rule 11. No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

Rule 12. Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately, for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

Rule 13. The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

Rule 14. 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 due service is made.

Rule 15. 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 shall make affidavit thereof.

Rule 16. Upon the return of the subpoena as served and executed upon any



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Procedure in Involuntary Cases.

defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

**Procedure in Involuntary Cases.**—It will be noticed that the above section with the exception of subdivision “g” applies exclusively to involuntary proceedings and treats of the provisions peculiar to such proceedings. After adjudication the procedure is substantially the same in both classes of petitions. The petition is filed by a creditor which (Section 1 [9]) may include any one who has a claim provable in bankruptcy, and also includes his duly authorized agent, attorney or proxy. As to the creditors, in number and amount, who may file an involuntary petition see section 59b. Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt. (Section 59c.) As to the method of computing the number of creditors see section 59d and e. The word “creditors,” it must be remembered, does not apply to secured creditors except so far as they own debts in excess of their security, or voluntarily waive their security. (See section 57g.) As to what are provable debts see section 63. The petition (Form No. 3) must be printed or written out plainly without abbreviation or interlineation. (G. O. 5.) It must show the jurisdictional facts, viz.: that the debtor is one who may be declared an involuntary bankrupt under section 4, and that he has committed an act of bankruptcy under the provisions of section 3. It must also show the jurisdictional facts with reference to venue. The form of the verification will be found attached to the form of the petition. (Form No. 3.) It must be verified by three of the petitioners named if there is more than one, under the provisions of section 59. Under the act of 1867 it seems that the verification of the petition might have been made by an agent or an attorney in fact, but it has been declared in a case under the present statute and rules that section 1 (9) does not authorize the verification of a petition by the attorney of the petitioning creditors, although such defect in verification may be waived by the defendant by a failure to make an objection within the time allowed for pleading. Lack of verification is not a jurisdictional defect. (See *in re Simonson et al.* 1 Am. B. R. 197;

92 Fed. 904; *In re Soper et al.* 1 Am. B. R. 193, referee's opinion.) As to the person before whom the verification may be made see section 20. The petition must be filed within four months after the commission of the act of bankruptcy. (Section 3b.)

Upon the filing of such petition the clerk enters an order requiring that a copy of the petition with the writ of subpoena be served upon the said bankrupt, that he appear and show cause upon the return day why the prayer of the petitioner should not be granted. This order and writ of subpoena must be served upon him personally or by leaving the same at his last place of abode within five days before the return day. (See Form No. 4.) Upon this order a writ of subpoena is issued by the clerk (Form No. 5) which is to be served as prescribed in the section.

As to the time when the petition is returnable see section 18a, which also fixes the time and manner of service. And see further Equity Rules with reference thereto quoted at the beginning of the notes to this section, particularly Equity Rule 15. There is nothing to prevent an appearance and waiver of service. (See *In re Columbia Real Estate Co.* [C. C. A.] 4 Am. B. R. 411; 101 Fed. 965; and see *Leidigh Carriage Co. v. Stengel*, 2 Am. B. R. 383; 37 C. C. A. 210; 95 Fed. 637.) As to service by publication provided for in section 18a, see 18 U. S. Stats. at L. 472; 1 Sup. Rev. Stat. 176; Rev. Stat. sec. 738, providing in substance that where a defendant is absent from the district in which the proceeding is brought the court may make an order directing such defendant to appear to plead, answer or demur at a day to be designated, and if such defendant cannot be served, such order shall be published as the court directs for at least once a week for six consecutive weeks, and upon proof of the due publication the court obtains jurisdiction over the property which is within the territorial jurisdiction of the court.

Upon the return day the bankrupt or any creditor may plead to the petition. The pleading may consist of a demurrer or a denial. The form of the denial is given in Form No. 6. If he demurs and the court overrules the demurrer, an absolute adjudication in bankruptcy may be entered up, but he may be allowed to

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**§ 18.] Proceedings in Voluntary Bankruptcy—Amendment of Petition.**

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answer over, and usually is, in the discretion of the court. If the allegations of the petitions are indefinite and uncertain, the defendant may decline to plead, and may move the court to dismiss the petition. The court in its discretion may dismiss or may enter an order requiring the petitioner to file a more definite petition. See what is said under the subject of Acts of Bankruptcy, section 4. The burden of proof always rests upon the petitioner.

In pleading, the bankrupt is not confined to the forms and orders of the Supreme Court but may set up any defense or counter-claim which will show him to have been solvent at the time the act of bankruptcy was committed. (*In re Paige*, 3 Am. B. R. 679; 99 Fed. 538.) As to the preparation of the schedules in involuntary proceedings see section 7 (8). As to order of proceeding where petitions are filed in different districts see section 32; G. O. 6. As to amendment of pleadings including petition see G. O. 11. In the application for leave to amend the cause of error should be stated. As to designation of newspapers in which the notice shall be published see section 28. Upon the return day as pointed out in the section, the determination is to be had. Either the debtor is adjudicated a bankrupt or else the petition is dismissed as pointed out in the section. Subsequent proceedings are treated of in other parts of the statute.

**Proceedings in Voluntary Bankruptcy.**—As to who may file a voluntary petition see section 59a and section 4. As to matters of jurisdiction see section 2 (1). As to form of petition and schedules see Form No. 1. As to amendments see G. O. 11. After the adjudication the proceedings in voluntary bankruptcy are the same as in involuntary bankruptcy.

**Amendment of Petition.**—Bankruptcy courts have the usual power of courts of justice upon motion and for good cause, to authorize amendments of pleadings, including petitions. They will rarely do so if the purpose of the amendment is to introduce allegations setting up an additional or new act of bankruptcy. But even such an amendment will be allowed if clearly in furtherance

of justice, and if its omission from the original petition is properly excused. (*In re Craft*, Fed. Cas. 3,317; 6 Blatch. 177; s. c below, 2 N. B. R. 111; *in re Gallinger*, Fed. Cas. 5,202; 4 N. B. R. 729; *in re Leonard*, Fed. Cas. 8,255; 4 N. B. R. 563.)

**Cross References.**—As to who may be petitioners, as to the amount and character of their claims, as to the right of other creditors than the petitioners to intervene and support the petition, as to the duty of the court to refuse to permit the withdrawal of a petition without notice to creditors and as to estoppel of petitioners, see section 59. As to the designation of newspapers in which notices shall be published, see section 28. As to the districts in which the petition may be filed, see section 2 (1)

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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.

**Analogous Provisions of Former Acts.**—

As to jury trials in involuntary proceedings: R. S. section 5026; act of 1867 sections 41 and 42; act of 1841, section 1. As to jury trials upon specification:

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Statutory Provisions as to Jury Trials.

filed against the granting of a discharge: R. S. section 5111; act of 1867, section 31; act of 1841, section 4.

**The Issue of Insolvency.**—Compare section 3 (c) and (d).

**Statutory Provisions as to Jury Trials.**—U. S. Revised Statutes, section 566, provides that “the trial of issues of fact in the district courts in all causes (except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy), shall be by jury.” Section 648 provides that “the trial of issues of fact in the Circuit Court shall be by jury (except in cases of equity and of admiralty and of maritime jurisdiction), and except as otherwise provided in proceedings in bankruptcy and by the next section.” Section 649 provides that “issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.”

But it seems to be very clear that inasmuch as a bankruptcy proceeding is a proceeding in equity the only issues to be submitted as of right to the jury are those referred to in section 19a, and then only upon demand by the defendant. (Compare *Simonson v. Sinsheimer*, 3 Am. B. R. 824; 40 C. C. A. 474; 100 Fed. 426; *in re Christensen*, 4 Am. B. R. 99; 101 Fed. 802.)

There seems to be no provision for the impaneling of a jury to pass upon questions of fact arising in a bankruptcy proceeding, except by virtue of the provisions of section 19 of the bankruptcy law; but, as in all other equity cases, it is presumable that a specific issue of fact may be framed and sent to a jury, but the court is not bound by the findings of the jury upon the facts, and may adopt or reject them altogether. (See *McNaughton v. Osgood*, 114 N. Y. 574; *McClave v. Gibbs*, 157 id. 413, and cases cited.) Speaking of this question, the United States Supreme Court, per Woods, J., in *Barton v. Barbour* (104 U. S. 126), said: “The

bankruptcy court may and, in cases peculiarly requiring such a course, will direct an action or an issue at law to aid it in arriving at a right conclusion. But this rests in its sound discretion." It would seem to follow from this that the bankruptcy court, like any other court of equity, may frame issues for submission to a jury, and the method of sending it to a jury would doubtless be that prescribed in section 19b, which provides that the question of fact may be certified for trial to a District Court or a Circuit Court in the same district which has or is to have a jury first in attendance.

What has been said does not of course apply to any collateral proceedings of either civil or criminal nature arising out of bankruptcy in which the right of jury trial is constitutional.

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**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.

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**Analogous Provisions of Former Acts.**—

As to verification of schedules and inventory: R. S. section 5017; act of 1867, section 11. As to oaths and proof of claims: R. S. section 5079; act of 1867, section 22; act of July 27, 1868, ch. 258, section 3; also R. S. section 5076; act of 1867, section 22; act of July 27th, 1868, ch. 258 section 3; act of 1841 sections 5 and 7; also R. S. section 5076a.

**Taking Oaths under the Former Act.**—The liberal provisions of this act as to taking oaths did not prevail under the Act of 1867. Not until that act was amended by section 5,076a, Revised Statutes (passed June 22, 1874), could notaries public take proof of claims. Before that time oaths in proof of claims by residents

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**§ 21.] Proof of Claim not to be Made Before Attorney—Evidence.**

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of the United States were required to be taken before the district judges, the registers or commissioners of the Circuit Court; and only those officers could take the verification of the schedule or inventory.

**Proof of Claim Not to be Made Before the Attorney of the Claimant.**—Under the former act it was held that the proof of a claim in bankruptcy should not be taken before the claimant's attorney in that matter, because under that act a proof of a claim was something more than a mere affidavit. It was a judicial proceeding, and it was expressly required that the proof should be "satisfactory" to the officer taking it. (*In re Nebe*, Fed. Cas. 10,073; 11 N. B. R. 289.) Although under the present act proof is little more than an affidavit, it should not be taken by one's own attorney, it being a general rule in the United States, that an affidavit should not be taken before one's own attorney even though he be authorized *ex officio* to take it. But the fact that the attorney for a party takes the oath of his client for the proof of a debt in bankruptcy does not justify its dissolution. (*In re Kimball*, 4 Am. B. R. 144; 100 Fed. 777.) In the case of *In re Kindt* (3 Am. B. R. 443; 98 Fed. 403), it was held that the verification of the petition of the bankrupt before one not then an attorney of record of such bankrupt but who subsequently became such attorney was not invalid on that account.

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**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, 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 property of a bankrupt whose estate is in process of administration under this act.

*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 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.

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#### Analogous Provisions of Former Acts.—

As to depositions and the taking of evidence by commission: R. S. sections 5003, 5004, 5005 and 5006; act of 1867, sections 5, 7, and 38; act of 1841, section 7; act of 1800, sections 14, 15. As to examination of third parties: R. S. section 5087; act of 1867, section 26; act of 1800, sections 14, 15. As to certified copies of proceedings, being evidence: R. S. section 4992; act of 1867, section 38. As to nature of evidence, of certified copy of order of discharge: R. S. section 5119; act of 1867, section 34. As to purpose of recording certified copy of bond: R. S. section 5054; act of 1867, section 14; act of 1800, section 11.

"To be Examined." Section 21a.—The act of 1867 contained two provisions somewhat analogous to paragraphs *a* and *b* of the section under consideration. Sections 5,003 to 5,006, R. S. both inclusive, provided that evidence or examination in any pro-



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ceeding might 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 might direct a reference to a register in bankruptcy or other suitable person to take and certify such examination, and might compel the attendance of witnesses and the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the Circuit Court. The section under consideration, in paragraphs *b* and *c*, manifestly permits the taking of evidence before the officers named therein, in practically the same manner. The other provision of the Act of 1867 was contained in Revised Statutes, section 5,087, which provided that the bankruptcy court might require the attendance of any person as a witness to be examined in the same way in which the bankrupt might be examined pursuant to section 5086 of the Revised Statutes, the latter being the provision corresponding to section 7 (9) of the present act. It is clear that paragraph *a* of the section of the present act under consideration intends to provide a proceeding for such an examination of third parties, similar to the examination of the bankrupt. It expressly enacts that any person who is a competent witness may be examined "concerning the acts, conduct or property of the bankrupt." It does not say that such person may be subpoenaed as a witness and be compelled to give his testimony only where there is a trial of issues, but evidently contemplates an examination independent of and perhaps preliminary to any trial. (See *In re Fixen*, 2 Am. B. R. 822; 96 Fed. 784.) In the case of *In re Howard* (2 Am. B. R. 582; 95 Fed. 415), arising under the present act, the referee had made an order upon the application of the trustee requiring a third party to be examined before him concerning the acts, conduct and property of the bankrupt. The witness appeared before the referee in obedience to a subpoena issued upon such order and by counsel objected to being examined. The referee overruled the objection. The court sustained the referee and quoted the following language from the referee's decision.

## "To be Examined."

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"The examination of this witness is made upon the authority of sec. 21 of the Bankruptcy Act. of July 1, 1898. It has been decided by the Federal courts in many cases, under a similar provision of the Act of 1867, that all parties who are competent witnesses are liable to undergo such an examination, 'though they may be parties to proceedings which the trustee in bankruptcy has instituted or intends to institute for the purpose of setting aside liens procured by them, or preferential transfers made to them.' So it is held *In re Feinberg*, 2 N. B. R. 425; Fed. Cas. No. 4716. It has been further held that such parties will be obliged to answer any and all questions relating to the acts, conduct, or property of the bankrupt, and their dealings with him, even though their answers will give to the trustee evidence which he may use in a subsequent civil action against the examined party. It has been so decided by the Federal courts in the cases of *In re Fay*, 3 N. B. R. 660; Fed. Cas. No. 4708; *In re Pioneer Paper Co.* 7 N. B. R. 250; Fed. Cas. No. 11178; *Garrison v. Markley*, 7 N. B. R. 246; Fed. Cas. No. 5256; and in many other cases, which it is unnecessary for the court to cite. In the cases of *In re Comstock*, 13 N. B. R. 193; Fed. Cas. No. 3080, and *In re Fredenburg*, 1 N. B. R. 268; Fed. Cas. No. 5075, the court decided that the person undergoing this examination is a mere witness, and is not entitled to counsel. He is not a party to the proceedings, and has no rights at stake."

In a well-considered case in the Circuit Court of Appeals of the 2nd Circuit, *In re Horgan v. Slattery* (3 Am. B. R. 253; 39 C. C. A. 118; 98 Fed. 414), it was held that a large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings for the purpose of discovering the assets and unearthing frauds and upon any reasonable surmise that they have the assets of the debtor. And the mere fact that the witness is a creditor between whom and the bankrupt's trustee a controversy is pending in a State court cannot excuse him from testifying concerning the acts etc. of the bankrupt on the ground that his answers may furnish evidence against him in the civil suit or the federal court is not a proper forum. (*In re Cliffe*, 2 Am. B. R. 317; 94 Fed. 354.) But the question as to whether one is a competent witness is to be determined with reference to the laws of the State in which the proceeding is pending, provided those laws are not repugnant to the Constitution of the United States. Thus in the case of *In re Jefferson* (3 Am. B. R. 174; 96 Fed. 826), it was held that where a State statute declares that a wife is not a witness to confidential

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communications between her and her husband, she cannot be compelled in her husband's voluntary proceeding to reveal such confidential matters. (And see *In re Mayer*, 3 Am. B. R. 222; 97 Fed. 328.) And a witness cannot be compelled to answer any questions which would tend to criminate him. (*In re Feldstein*, 4 Am. B. R. 321. See EXAMINATIONS OF BANKRUPT, section 7 [9].)

Under the former act there were several decisions as to the extent of the privilege of a witness to refuse to answer questions, upon the ground that his answers would disclose matters revealed to him in professional confidence. While the courts protect a lawyer in refusing to answer questions as to matters which he ascertains in his capacity as counsel, and which are of a confidential nature, they nevertheless will compel him to testify as to dealings with the bankrupt as a purchaser and in any other than a strictly professional capacity. Thus where an attorney took a conveyance of land from the bankrupt and afterwards re-conveyed to the wife of the bankrupt, and also, where he acted as agent in receiving and disbursing moneys of the bankrupt, he was compelled to answer fully concerning all such matters. (*In re Aspinwall*, Fed. Cas. 591; 10 N. B. R. 448; *in re Bellis & Milligan*, 3 N. B. R. 199; s. c. 38 How. Pr. 79.) In the first of the cases above cited it was held that an attorney might be compelled to state whether or not he had drawn a certain deed for the bankrupt. Compare the following English decisions in which the extent to which communications made by a bankrupt to his attorney are privileged as confidential, was discussed and considered: *in re Phillips*, 20 L. J. 16; *Russell v. Jackson*, 21 L. J. Chan. 146; *Turquand v. Knight*, 2 Mees. & W. 98; *Ex p. Lord, Buck*, 110; *Bramwell v. Lucas*, 2 B. & C. 743. A witness on an examination of this nature may be asked as to the name and residence of any other person who can give the desired testimony with regard to the bankrupt's property. (*Ex p. Campbell*, L. R. 5 Ch. App. 703.) See as to method of taking testimony before the referee, G. O. 22 and Forms 29 and 30.

**Subpoena Runs into Other Districts.**—U. S. Revised Statutes, section 876, provides: "Subpœnas for witnesses who are required to attend a court of the United States, in any district, may run into any other district; *Provided*, that in civil cases the witnesses living out of the district in which the court is held do not live at a grater distance than one hundred miles from the place of holding the same." The above section applies to a subpœna issued in a bankruptcy proceeding as well as in an ordinary civil case. (*In re Woodward*, Fed. Cas. 18,000; 8 Ben. 112; s. c. 12 N. B. R. 297.) Subpœnas form an exception to the general rule. Other process of the district court does not run beyond the limits of the judicial district.

**Depositions.** Section 21b, c.—What is referred to here are the U. S. Revised Statutes, section 858, *et seq.* respecting the taking of testimony by deposition. (See *In re Fisk*, 113 U. S. 713; 28 L. Ed. 1,117.)

**Copies of Proceedings as Evidence.** Section 21d-g.—It has been held that the record of proceedings in bankruptcy is not one integral record, but that a duly certified copy of any portion thereof may be introduced in evidence, (*Michener v. Payson*, Fed. Cas. 9,524; 13 N. B. R. 49; compare, however, *Shomo v. Zeigler*, 78 Penn. 357), but where one desires to introduce a portion of the record, for instance, an order made during the proceedings, it is necessary to introduce the whole record of all the proceedings with reference to the particular order. The schedule and inventory may be introduced in evidence separate from the record of the rest of the proceedings. (*Dupuy v. Harris*, 6 B. Mon. 534.) As against persons who were not parties to the proceedings, it seems that a copy of the record is not admissible unless it is a copy of the complete record, except in cases especially prescribed in paragraphs *e*, *f* and *g* of this section. The schedule of debts and assets filed in bankruptcy proceedings in which a defendant and his partner were discharged individually and as partners, was, however, held to be receivable in evidence against the de-

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§ 22.] Certified Copy of Discharge—Reference of Cases after Adjudication.

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fendant, although signed only by the partner. (*Sheldon v. Clews*, 13 Abb. N. C. 40.) The schedule cannot be introduced to prove anything therein stated unless it can be considered as an admission by the party against whom it is offered. It may be received as against a partner, in cases like the one just cited, because by taking a discharge in the proceedings in which it is filed, the partner thereby makes the statements contained in it his own. But a copy of the bankrupt's schedule admitting a liability cannot be introduced in evidence against a joint obligor. (*Wilson v. Harper*, 5 Rich. [N. S.] 294.) The introduction of the petition and schedules in evidence for the purpose of proving the bankruptcy does not make them evidence against the party producing them, of the facts therein stated. (*Pringle v. Leverich*, 97 N. Y. 181.)

**Certified Copy of Order Granting a Discharge.**—The former act required that the court should issue a written certificate of discharge, and that this certificate should be conclusive evidence in favor of the bankrupt of the fact, and regularity of the discharge. Nothing, under the present act, is needed beyond the order of discharge itself. The provision that a copy of the order shall be evidence saves the trouble of proving the entire proceedings. (*Pennell v. Percival*, 13 Penn. 197; *Morse v. Gloyes*, 11 Barb. 100.) The discharge cannot be impeached collaterally for any error or irregularity. Every presumption exists that the proceeding was regular. Compare notes to sections 13 and 15. (*Morrison v. Woolson*, 29 N. H. 11; *Shawhan v. Wherritt*, 7 How. 627; *McNulty v. Frame*, 1 Sandf. 128; *Campbell v. Perkins*, 8 N. Y. 430; *Lathrop v. Stuart*, 5 McLean, 167; *Richards v. Nixon*, 20 Penn. 19.)

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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.

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**Analogous Provisions of Former Acts.—**

As to one referee acting in the place of another: R. S. § 5007; act of 1867, § 4. As to powers, jurisdiction and duties of a referee, compare "Analogous Provisions of Former Acts," given under the sections of this act, cross-referenced in the note below.

**Cross-References.—**As to the jurisdiction and powers and duties of a referee see sections 34 to 43, both inclusive; also section 58 (*c*). As to the power of the court to consider and confirm, modify or overrule or return with instructions for further proceedings, all records and findings certified to them by referees, see section 2 (10); and compare section 38 (*a*). As to a referee's power to hear and pass upon contested matters, compare section 39 (5).

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**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* 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.

*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.

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**Analogous Provisions of Former Acts.—**

As to the jurisdiction of Circuit Courts: R. S. section 4079; act of 1867, section 2; act of 1841, section 8; act of June 8th, 1872, ch. 340.

**Scope of Section.**—The question of jurisdiction has already been quite exhaustively discussed under chapter 2. It remains merely to point out the specific application of the various provisions of section 23, under the late decisions of the Supreme Court. The phrase "all proceedings in bankruptcy" used in subdivision "a" merely refers to bankruptcy proceedings strictly so-called initiated by the petition and ending with the distribution of assets among the creditors and the discharge or refusal of discharge to the bankrupt. This is the only jurisdiction now conferred upon the federal courts by the Bankruptcy Act *proprio vigore*. Any other jurisdiction which they may have arises not from the provisions of the Act but from other statutory provisions. This jurisdiction however is exclusive. It includes everything which is necessary to its exercise, as for instance all summary proceedings to recover the property of a bankrupt when the bankruptcy court has once gained jurisdiction of it, measures for the preservation of the property, proceedings for contempt arising out of disobedience of its orders in the bankruptcy proceedings, and generally those incidental powers which are covered by sec. 2. The other jurisdiction over "adverse claimants" in suits brought by a trustee refers to jurisdiction in plenary suits which the federal courts may gain by reason of the diverse citizenship of the parties. The phrase "adverse claimants" has received a good deal of attention. It may be briefly defined as covering all those persons who have a color of title adverse to the trustee in bankruptcy of such a nature that under the rules of equity they are entitled to have that title adjudicated in a plenary suit and not disposed of summarily. An illustration of this kind of adverse title is contained in the case of *In re Baudouine* (3 Am. B. R. 651; 101 Fed. 574). In this case there was an attempt made by the trustee to reach the surplus income of the bankrupt under a testamentary trust created under the statutes of New York. The District Court decided that such income could be reached summarily. The Circuit Court of Appeals, on the other hand, held that a testamentary trustee of such a trust had an interest adverse to the trustee in bankruptcy and was entitled to be heard

in a plenary suit. In defending his trust duties the testamentary trustee was necessarily hostile to the trustee in bankruptcy and was entitled to contest his title as fully as if he were the equitable owner of the fund. The court cites with approval as covering this question, *Smith v. Mason* (14 Wall. 419), and *Marshall v. Knox* (16 Wall. 551). In *Smith v. Mason* a party claimed absolute title to a fund which was also claimed by the assignee in bankruptcy, and the court held that beyond all doubt the case was one falling within the jurisdiction of the circuit court under the Act of 1867, as being a case between adverse claimants. This case was followed in *Marshall v. Knox* (cited above), and a further definition of “adverse interest” was given. The court said in this case: “The adverse claim is not to the absolute property of the fund in dispute as was the case in *Smith v. Mason*, but related to a mere lien and to possession by way of pledge under the lien. In *Smith v. Mason*, it was held that the bankruptcy court could not by a mere rule make the adverse claimant a party to the bankruptcy proceedings and adjudge his rights in a summary way, but that the assignee must litigate the claim in a plenary suit either at law or in equity.” Further commenting on the difference between the case before them and the case of *Smith v. Mason*, the court said:

“It may, with some plausibility, be said that as the property in the case is conceded to be in the bankrupt, and the question has respect on to the right of possession under the lien, the district court, which has express jurisdiction of the ‘ascertainment and liquidation of the liens, and other specific claims,’ on the bankrupt’s property, might assume control of the property itself. The claim, however, is to the right of the possessor and that right may be just as absolute and just as essential to the interest of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing, just as much the subject of litigation as the thing itself. It is the opinion of the court, therefore, that the case is not substantially different from that of *Smith v. Mason*.”

In the case of *Burbank v. Bigelow* (92 U. S. 179), a party claimed a right to the proceeds of a judgment, and the assignee denied the claim. The Supreme Court of the United States held



that this was a controversy over which the circuit court had jurisdiction under the Act of 1867. The language of the court in substance was: "That this is a case of controversy between adverse claimants does not seem to be at all in doubt. A right of property is controverted, the complainant contending that the funds of the judgment recovered by the bankrupt against a third party belonged to the firm of which complainant's intestate was a partner. If the bankrupt and his assignee deny this, it is a controversy the determination of which is clearly embraced within the jurisdiction conferred upon the circuit courts by the second clause of section 2 of the original Bankrupt Act of 1867."

Under the present act see the case of *In re Cohn* (3 Am. B. R. 421), where a daughter of a bankrupt carried on a business claimed by the creditors to have been the business of the bankrupt in her own name and kept the bank account as her own, it was held that she was in the position of a third person not only claiming title but in possession and the question of alleged fraud between her and the bankrupt could not be inquired into in summary manner. (See also *In re Russell, et al.* 3 Am. B. R. 658; 41 C. C. A. —; 101 Fed. 248.)

On the other hand as an illustration of the summary jurisdiction which is incidental to bankruptcy courts, the Supreme Court has decided in the case of *White v. Schloerb*, 4 Am. B. R. 178; 178 U. S. 542, that when at the date of adjudication in bankruptcy the goods are in the actual possession of the bankrupts as their property and the referee takes them into his possession they are in the custody of the District Court and when so held in the custody of the District Court they have been seized by a writ of replevin by the State court the District Court may compel their return by summary proceedings. This is one of many cases holding that the court which first rightfully obtains jurisdiction over the *res* retains that jurisdiction to the end. (Compare *In re Chambers, Calder & Co.* 3 Am. B. R. 537; 98 Fed. 865; *Southern Loan Co. v. Benbow*, 3 Am. B. R. 9; 96 Fed. 514; *Keegan v. King*, 3 Am. B. R. 79; 96 Fed. 758.)

Jurisdiction of Circuit Court—Of State Courts in Other Matters. [Ch. ]

**Jurisdiction of Circuit Court.**—It follows from what has been said above that under the Act of 1898, unlike the Act of 1861 the Circuit Court has no original jurisdiction in bankruptcy. What is here conferred is only such jurisdiction as such court would have had between the bankrupt and the adverse claimant which jurisdiction is conferred by the Act of March 3, 1881 amended August 13, 1888, contained in 25 U. S. Stat. 433 follows:

“The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arises under the constitution or laws of the United States, or treaties made, which shall be made, under their authority or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum of value aforesaid.”

**Jurisdiction of State Courts in Other Matters.** Section 23b.—The effect of this section as it now stands is best given by quoting the head note in *Bardes v. Bank*, U. S. Supreme Court, May 2 1900 (4 Am. B. R. 163; 178 U. S. 524):

“1st. The provisions of the second clause of section 23 of the Bankruptcy Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent against creditors, including payments in money or property to preferred creditors.

“2nd. The District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy.”

Until the effect of this decision has been changed by an act of Congress it will of course be absolutely controlling. It compels the trustee to go into the State court in all suits except where diverse citizenship of the parties allows him to go into the Circuit Court, and overrules the great majority of cases decided before

it. Among others it overrules the following cases in the Circuit Courts of Appeals, viz. *Davis v. Bohle*, 8th Circuit, 34 C. C. A. 37; 92 Fed. 325; 1 Am. B. R. 412; (where the question is impliedly passed upon in holding that the District Court has jurisdiction of a suit or controversy between the creditors of a respondent in an involuntary petition and his common law assignee, as to which see, also, *In re Gutwillig* [2nd Circuit], 34 C. C. A. 377; 92 Fed. 337; 1 Am. B. R. 388, and *Carriage Co. v. Stengel* [6th Circuit], 37 C. C. A. 210; 95 Fed. 637; 2 Am. B. R. 383; *in re Francis-Valentine Co.* (9th Circuit), 36 C. C. A. 499; 94 Fed. 793; 2 Am. B. R. 522; *in re Baudouine* (2nd Circuit), 3 Am. B. R. 651; 101 Fed. 574; *Wall v. Cox* (4th Circuit), 101 Fed. 403; *Hall v. Kincell* and *Perkins v. Markham* (San Gabriel Co.) (9th Circuit), May, 1900, reported in 102 Fed. 310.)

The decisions of the various District Courts by a considerable majority also sustain their own jurisdiction, and are hence overruled by the Supreme Court in this respect. [See *In re Brooks* (D. C. Vt.), 91 Fed. 508; 2 Am. B. R. 531; *in re Smith* (D. C. Ind.), 92 Fed. 135, 139; 1 Am. B. R. 266; *Robinson v. White* (D. C.), 97 Fed. 33; 3 Am. B. R. 88; *Carter v. Hobbs* (D. C.), 92 Fed. 594; *id.* 94 Fed. 108; 2 Am. B. R. 224; *Keegan v. King* (D. C. Ind.), 96 Fed. 758; 3 Am. B. R. 79; *in re Pittelkow* (D. C. Wis.), 92 Fed. 901; 1 Am. B. R. 472; *in re Kletchka* (D. C. N. Y.), 92 Fed. 901; 1 Am. B. R. 479; *in re Baudouine* (D. C. N. Y.), 96 Fed. 536; 3 Am. B. R. 59; *in re Kenney* (D. C. N. Y.), 95 Fed. 427; 2 Am. B. R. 494; *in re Nathan* (D. C. Nev.), 92 Fed. 590; *in re Fellerath* (D. C. Ohio), 95 Fed. 121; 2 Am. B. R. 40; *in re Booth* (D. C. Ga.), 96 Fed. 943; 2 Am. B. R. 770; *in re Kimball* (D. C. Pa.), 97 Fed. 29; 3 Am. B. R. 161; *Trust Co. v. Benbow* (D. C. N. C.), 96 Fed. 514; 3 Am. B. R. 9; *in re Fixen* (D. C. Cal.), 96 Fed. 748; 2 Am. B. R. 822; *in re Newberry* (D. C. Mich.), 97 Fed. 24; 3 Am. B. R. 158; *Murray v. Beale* (D. C. Utah), 97 Fed. 567; 3 Am. B. R. 284; *Lehman v. Crosby* (D. C. N. Y.), 99 Fed. 543; 3 Am. B. R. 662; *Louisville Trust Co. v. Marx* (D. C. Ky.), 98 Fed. 456; 3 Am. B. R. 450; *in re Hammond* (D. C. Mass.), 98 Fed. 845; 3 Am. B. R. 466;

*Shutts v. Bank* (D. C. Ind.), 98 Fed. 705; 3 Am. B. R. 492; *in Woodbury* (D. C. No. Dak.), 98 Fed. 833; 3 Am. B. R. 45; *Norcross v. Nathan* (D. C. Nev.), 99 Fed. 414; 3 Am. B. R. 613; *Pepperdine v. Headley* (D. C. Mo.), 98 Fed. 863; 3 Am. B. R. 455.]

These cases either directly or impliedly held that the District Court has jurisdiction to entertain such suits, though they differ widely as to the grounds. Some, like *In re Woodbury*, hold that the limitation in section 23b has reference only to venue; others, like *Louisville Trust Co. v. Marx*, that it is a limitation on the jurisdiction of the Circuit Courts alone, while others, of which *In re Baudouine* is a type, confine the jurisdiction of the District Court to suits by the trustee to set aside fraudulent transfers of the bankrupt—suits which they say the bankrupt could not himself have brought. All this reasoning is now swept away by the very comprehensive opinion of Mr. Justice Gray, in *Bardes Bank* (4 Am. B. R. 163; 178 U. S. 524).

On the other hand, early in the history of the Bankruptcy Act the Circuit Court of Appeals of the Fifth Circuit, in April, 1856 (*In re Abraham*, 35 C. C. A. 592; 93 Fed. 767; 2 Am. B. R. 266), held that a trustee cannot by summary proceedings in the District Court recover from the bankrupt's general assignee property covered by the assignment, but must proceed in a State court, unless the Circuit Court is open by reason of diverse citizenship. [Following *In re Abraham*, and, in some cases, defining more broadly the jurisdiction of the District Court, are: *In re Kelly* (D. C. Tenn.), 91 Fed. 504; 1 Am. B. R. 306; *in re Rowland* (D. C. Iowa), 91 Fed. 363; 1 Am. B. R. 272; *in re Burrock Clothing Co.* (D. C. Iowa), 92 Fed. 886; 1 Am. B. R. 4; *Hicks v. Knost* [D. C. Ohio], 94 Fed. 625; 2 Am. B. R. 1; *Mitchell v. McClure* (D. C. Pa.), 91 Fed. 621; 1 Am. B. R. 3; *Burnett v. Mercantile Co.* (D. C. Ore.), 91 Fed. 365; 1 Am. B. R. 229; *in re Franks* (D. C. Ala.), 95 Fed. 635; 2 Am. B. R. 632; *Perkins v. McCauley* (D. C. Cal.), 98 Fed. 287; 3 Am. B. R. 445; *Camp v. Zellars* (C. C. A. 5th Circuit), reported in note to *Perkins v. McCauley*, 3 Am. B. R. 445, and following *In*

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 § 24.] Jurisdiction of Circuit Courts over Crimes — Appellate Courts.
 

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Abraham (Bernheimer *v.* Bryan.)] These cases must be assumed to be affirmed by the Supreme Court, as indeed Hicks *v.* Knost and Mitchell *v.* McClure are specifically (4 Am. B. R. 178; 178 U. S. 539, 541). *In re* Abraham, *sub nom.*, Bryan *v.* Bernheimer, is still on the calendar of the Supreme Court unargued.

(As to gaining jurisdiction, by consent, see *In re* Connolly [D. C. Pa.], 3 Am. B. R. 842, and Hicks *v.* Knost, 4 Am. B. R. 178; 178 U. S. 541.)

**Jurisdiction of Circuit Court over Crimes.** Section 23c.—The concurrent jurisdiction of the Circuit Court given over the crimes mentioned in the Act (see section 29) is in line with the general provision of the federal statute that the Circuit Court has exclusive criminal jurisdiction except where such jurisdiction is specifically given to the District Court. (See U. S. R. S. section 629.)

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**SEC. 24. Jurisdiction of Appellate Courts.**—*a* 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 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.

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**Analogous Provisions of Former Acts.**—

As to appeals; R. S. section 4980; act of 1867, section 8. As to supervisory jurisdiction of circuit courts of appeal; R. S. section 4,986; act of 1867, section

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2; act of June 8th, 1872, ch. 340; act of 1841, section 6; also R. S. sects 4,987 and 4,988; act of 1867, section 49; act of June 30th, 1870, ch. 177, section 1.

**Appellate Jurisdiction of the Supreme Court in Matters of Bankruptcy—Writ of Error.**—The appellate jurisdiction of the Supreme Court with reference to a final decision of the Court of Appeals allowing or rejecting a claim; where controversies are certified to the Supreme Court from other federal courts, and where a review is had by virtue of a writ of *certiorari*, are best treated under section 25b, c and d, where such methods of review are specifically referred to. The appellate jurisdiction referred to in the foregoing section, to wit: "appellate jurisdiction of controversies arising in bankruptcy proceedings" refers to the broad jurisdiction which is analogous to that exercised in other cases. The first and most important branch of appellate jurisdiction in this respect arises under writs of error to the highest courts of the States. The right of the Supreme Court to review the judgment of the highest court of a State by writ of error is set forth in section 709 of the U. S. R. S. which is as follows:

"A 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 authority exercised under, the United States, and the decision is against the validity, or where is drawn in question the validity, of a statute of, 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, 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 apart or claimed by either party, under such Constitution, treaty, statute, commission or authority—may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered and passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, at its discretion, award execution or remand the same to the court from which it was removed by the writ."

It will be seen upon study of this section that a review of a decision of a State court may be had with respect to bankrupt

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First, where there had been a decision against the validity of any portion of the Bankruptcy Act; second, where a decision had been had by the State court sustaining a statute of the State claimed to be repugnant to the Bankruptcy Act; or third, where the right, title, privilege or immunity of any person claimed under the Bankruptcy Statute has been denied by a State court. Cases reviewing the decisions of State courts under the third classification are quite numerous, particularly where the effect of a discharge of a bankrupt has been brought in question. Such are *Forsyth v. Vehmeyer* (3 Am. B. R. 807; 177 U. S. 177); *Hennequin v. Clews* (111 U. S. 677); *Strang v. Bradner* (114 U. S. 555). It must be remembered in such cases that the federal question must be raised in the court below. (See *Columbia Waterpower Co. v. Street Railway Co.* 172 U. S. 475.) For the practice on a writ of error see *Foster's Federal Practice*.

While the power of the Supreme Court to review a final decision of a lower federal court conferred by the Act of March, 1891, commonly called the Evarts Act, is probably intended to be covered by section 25d, it is to be noted at this point that section 24a gives the Supreme Court appellate jurisdiction in bankruptcy proceedings "from the courts of bankruptcy" from which they have appellate jurisdiction in other cases.

**General Appellate Jurisdiction of Circuit Court of Appeals.**—Subdivision "a" of this section gives to the Circuit Courts of Appeals jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The appellate jurisdiction referred to here arises from section 6 of the Act of March, 1891, 20 U. S. Stat. 828, by which it is provided that the Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District Court and the existing Circuit Courts in all cases other than those provided for in section 5 of the same act, viz: (1) where the jurisdiction of the court is in issue; (2) from final judgments in a prize case; (3) in cases of conviction of a capital crime; (4) in cases which

involve the construction or application of the Constitution; (4) in cases where the constitutionality of a law of the United States or treaty is drawn in question; (5) in any case in which the constitution or law of a State is claimed to be in contravention of the federal constitution, all of which are cases in which an appeal may be certified directly to the Supreme Court. This general jurisdiction on appeal would include a writ of error to the Circuit or District Court on a judgment rendered by such court upon "a controversy" arising out of bankruptcy but will be seldom applied on account of the specific provision contained in sections 2 and 25a respecting appellate jurisdiction in strict bankruptcy proceedings. It may, however, be applicable in the case where the reason of diverse citizenship an action is brought by or against a trustee in the Circuit Court, or is brought by consent in the District Court.

**Revisory Powers of the Circuit Court; History.** Section 24b of the former Bankruptcy Acts of 1841 and 1867, provided that the Circuit Courts should have certain revisory powers over the proceedings of the courts of bankruptcy. Under the Act of 1867 that revisory power could be exercised whenever the court of bankruptcy itself cared to adjourn any point or objection into the Circuit Court to be there heard and determined. (*In re Christy*, 3 How. 292; *Clark v. Binniger*, Fed. Cas. 2,815; 7 Blatch. 15; s. c. 3 N. B. R. 487.)

The Act of 1867, by section 2 (R. S. section 4,986), gave the Circuit Court for each district "general superintendence over all cases and questions arising in the District Court for such district when sitting as a court of bankruptcy," and further provided that "except when special provision was otherwise made by such circuit courts might, upon bill, petition or other proper process presented by any party aggrieved, hear and determine the case as in a court of equity." During the pendency of the legislation in Congress which resulted in the present bankruptcy provisions giving Circuit Courts of Appeals this revisory power were incorporated and adopted, only to be stricken out, and the



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to be re-incorporated in the law as finally adopted. The objection to giving these courts this power was that it would tend to delay proceedings in bankruptcy and to increase expense.

The revisory power given to the Circuit Court of Appeals under this section must be carefully distinguished from the appeal which is authorized by the Act of 1891 and section 25. In case of appeals in equity the facts as well as the law are before the court for review. But under this section all that is contemplated is a summary review of any erroneous holding upon a question of law and it does not in any sense contemplate a review of the facts. (See *In re Rouse, Hazard & Co.* 1 Am. B. R. 234; 33 C. C. A. 356; 91 Fed. 96; *in re Purvine*, 2 Am. B. R. 787; 37 C. C. A. 446; 96 Fed. 192; *in re Richard*, 3 Am. B. R. 145; 37 C. C. A. 634; 96 Fed. 935; *Courier Journal etc. Printing Co. v. Brewing Co.* [C. C. A.] 4 Am. B. R. 183; 101 Fed. 699; *in re Abraham*, 2 Am. B. R. 266; 35 C. C. A. 592; 93 Fed. 767.) The petition under section 24b should state specifically the question of law which was involved and 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. (*In re Richards, supra.*) No official form of petition has been prescribed. Section 25a on the other hand contemplates an appeal in equity on the three subjects therein stated, to wit: (1) an adjudication on the question of bankruptcy; (2) on the question of discharge; (3) on the debt or claim of \$500 and upwards. It has been held that it was the intention of Congress in prescribing the method in which a judgment adjudicating a person a bankrupt may be reviewed, to make it impossible to review such a judgment on an original petition in the mode prescribed in section 24b. (*In re Good*, 3 Am. B. R. 605; 39 C. C. A. 581; 99 Fed. 389.) Such supervisory jurisdiction extends only over strict bankruptcy proceedings. (*In re Jacobs*, 3 Am. B. R. 671; 39 C. C. A. 647; 99 Fed. 539.) There seems to be no time specified within which such petition can be reviewed. Neither the statute nor the rules appear to fix the time within which such petition should be taken. G. O. 36 refers to the al-

lowance of appeals. But in this connection the following statement of Mr. Justice Strong in *Bank v. Cooper* (20 Wall. 171) construing a similar provision of the Act of 1867, is very instructive:

“It is true their bill was not filed in the Circuit Court until about four months and a half after the order complained of was made. But the Act of Congress prescribes no time within which the application for a review must be presented. An appeal is required to be taken within ten days. Not so with a petition for a review. Undoubtedly the application should be made within a reasonable time, in order that the proceedings to settle the bankrupt’s estate may not be delayed, but neither the act of Congress nor any rule of this court determines what that time is. At present, therefore, it must be left to depend upon the circumstances of each case. Perhaps, generally, it should be fixed by analogy to the period designated within which appeals must be taken. (*Littlefield v. Del. & Hud. Can. Co.* 4 N. B. R. 77; 1 F. Cas. 8,400.)”

In the case of *In re Worcester County* (4 Am. B. R. 496; Fed. 808), it was held that as there is no statutory limitation defining the time for review of matters arising on the face of record, a petition for review is limited by analogy to the time allowed by statute for taking appeals generally to the Circuit Court of Appeals. But this seems to be an erroneous decision because the time for taking the appeal in *bankruptcy* is limited by section 25 to ten days. (See *In re Good, supra.*)

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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 a debtor 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.

ment 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.

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#### Analogous Provisions of Former Acts.—

As to appeals to the circuit courts: R. S., sections 4980, 4981, 4982, 4983 and 4984; act of 1867, sections 8 and 24. As to appeals to the Supreme Court from the circuit courts of appeal: R. S., section 4985; act of 1867, section 24; also R. S., section 4989; act of 1867, section 9.

**Appeals to Court of Appeals.** Section 25a.—As to general power of appeal from the District Court to the Circuit Court of Appeals see what has been said under the last section. As there pointed out the appeal contemplated within section 25 is an appeal in equity which brings up for consideration in the appellate court both questions of fact and of law. It seems to be exclusive so far as the subjects mentioned in subdivision "a" are concerned of any other appellate jurisdiction in the Circuit Court of Appeals. (See *In re Good*, 3 Am. B. R. 605; 39 C. C. A. 581; 99

Fed. 389.) A recent decision of the Court of Appeals of the 6th circuit [Courier Journal, etc. Printing Co. v. Schaefer-Meyer [(C. C. A.), 4 Am. B. R. 183; 101 Fed. 699], in the opinion of Lurton, C. J., gives a very complete statement of the jurisdiction of the Court of Appeals under this section.

Two modes of reviewing the decisions and orders of the District Court in bankrupt proceedings are provided by the Bankrupt Act. The first is that found in section 24b of the act, which provides that:

"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."

Section 25a of the same act provides:

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Courts 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."

The superintending and revising authority granted by the twenty-fourth section was evidently intended to provide a summary way for reviewing the orders and decisions of the bankrupt courts upon questions of law, and does not contemplate any review of the facts. Under section 25, a review of both questions of fact and law is contemplated. Under section 24, the jurisdiction is not exercised under an appeal, but upon an original petition filed in the court by any person aggrieved by the decision or order complained of. This differentiation of the modes of redress provided by the two sections seem altogether conformable to the language employed, and is the interpretation announced by the Circuit Court of Appeals for the Seventh Circuit *In Re Rouse, Hazard & Co.* (1 Am. B. R. 234, 63 U. S. App. 570, 33 C. C. A. 35, 91 Fed. 96, and *In Re Richards* (3 Am. B. R. 145), 37 C. C. A. 634, 96 Fed. 93. The same interpretation is announced in the Fifth Circuit Court of Appeal *In re Abraham* (2 Am. B. R. 266), 35 C. C. A. 592, 93 Fed. 767, and *In re Purvine* (2 Am. B. R. 787), 37 C. C. A. 446, 96 Fed. 192. It was also the view taken by this court in *Cunningham v. Bank* (decided at this term) (4 Am. B. R. 192), 101 Fed. 977. If the petitioner had desired a review of the question of the allowance of his claim upon both law and fact, he should have appealed. In *Cunningham v. Bank*, cited above, we held that the question of the rank or lien of a claim was an incident to the allowance or rejection of the debt for which a lien was allowed or denied, and might therefore be reviewed under an appeal from an order allowing or rejecting the debt, and that under such an appeal questions of both law and fact might be reviewed. Nevertheless an order allowing or denying a lien claimed may be reviewed

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upon petition, as to any matter of law. *In re Rouse, Hazard & Co.* (1 Am. B. R. 234, 33 C. C. A. 356, 91 Fed. 96). *In re Richards* (3 Am. B. R. 145 37 C. C. A. 634, 96 Fed. 935.) No rule or order has been made by the Supreme Court regulating the practice under the twenty-fourth section, and none has been prescribed by this court. *In re Richards*, cited above, the Court of Appeals for the Seventh Circuit, speaking of the mode in which the jurisdiction of the court might be invoked under that section, said:

"In the case of an appeal, the facts as well as the law are before this court for review. In the case of original petition, this court has authority to review merely a matter of law arising in the course of the proceeding below. The latter is intended as a summary mode of reviewing any supposed erroneous holding upon a question of law, and does not contemplate a review of the facts. A similar conclusion was reached by the Court of Appeals of the Fifth Circuit *In re Purvine* (2 Am. B. R. 787, 37 C. C. A. 446, 96 Fed. 192.) The petition in such case 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. Such question of law so presented is the question, and the only question, that can be properly ruled upon by this court upon an original petition."

This meets with our approval, and properly indicates the character of question which may be thus reviewed, and a proper mode of presenting it. The facts as they appear from the order sought to be reviewed, as stated in the opinion of the court, or in the summary of evidence certified by the referee, where it appears that the order of the referee was reviewed by the district judge only upon such summary certified to him, must be treated as settling the facts upon which the "matter of law" arises which is sought to be reviewed.

In a recent case in the Circuit Court of Appeals for the 1st Circuit, *In re Worcester County*; *s. c. Derby v. Worcester County* (4 Am. B. R. 496; 102 Fed. 808), it was held that if one doubtful whether his remedy is under section 24 or section 25 undertakes to avail himself of both, one does not necessarily neutralize the other, because in contemplation of law no substantial injury is thereby done to the party appealed against.

It has been recently held by the Circuit Court of Appeals of the 8th circuit in *Chatfield v. O'Dwyer* (4 Am. B. R. 313; 101 Fed. 797), that an appeal from the allowance of a claim by the District Court can be taken by the trustee alone as the representative of all the creditors but that where the trustee upon the request of the creditor has declined to appeal the District Court has power either to direct an appeal by the trustee or make an order permitting the

creditor to appeal in the name of the trustee. The case follows the decisions under the Act of 1867 holding that only the assignee had the right to appeal from the allowance of a claim. On the other hand the Court of Appeals of the 5th circuit, *In re Rock* (4 Am. B. R. 369; 101 Fed. 956), has held that any party injured or affected by the decree or judgment may appeal—a rule which is applied to a creditor dissatisfied with the allowance of another claim. The first case seems to have the better authority. So what is said as to actions to set aside preferences under section 6

**Time for Taking an Appeal.**—The time for taking the appeal is in accordance with what is probably a universal rule of practice cannot be enlarged when it is statutory. (*Wood v. Bailey*, 10 Wall. 640.)

Where one omitted to take an appeal within the statutory time and the omission resulted from a mistake in the choice of remedies, the United States Supreme Court held that the District Court might grant a review of the decree so as to enable the party to take an appeal in time. (*Stickney v. Wilt*, 11 N. B. R. 97; c. 23 Wall. 150.)

The practice on the appeal is very simple. It is the same in all equity cases. A short petition for appeal accompanied by an assignment of errors and a bond to cover costs must be filed with the clerk and the appeal allowed either by the District Judge or a Judge of the Appellate Court. This allowance is usually indorsed upon the petition or it may be inferred from the acceptance of the bond and a citation to the appellees in their issue. As to when appeal is taken the following opinion of Caldwell, C. J., in *Norcross v. Nave* (C. C. A., 4 Am. B. R. 317; 101 Fed. 796), is instructive.

“On the 20th day of April, 1899, John R. Norcross, the appellant, was adjudged a bankrupt by the District Court of the United States for the Western District of Missouri, St. Joseph Division. On the 29th of April, 1899, he prayed, and was allowed by the district judge, an appeal to this court from the decree adjudging him a bankrupt; but the prayer for the appeal, and the allowance, and the citation and service thereon were not filed in the District Court until the 2nd day of May, 1899. Section 25a of the Bankruptcy Act

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## Appeals to Supreme Court.

which allows an appeal from the court of bankruptcy to the Circuit Court of Appeals from a judgment adjudging the defendant a bankrupt, provides that "such appeal shall be taken within ten days after the judgment appealed from has been rendered." *In re Good* (3 Am. B. R. 605), 39 C. C. A. 581, 99 Fed. 389. Under the decisions of the Supreme Court of the United States an appeal is not taken within the meaning of the section quoted until the petition and allowance of appeal (where there is such a petition and allowance) and the appeal bond and the citation are presented to and filed in the court which made the decree appealed from. In this case these papers, save the bond, were not filed in the District Court until the 2nd day of May, 1899, more than ten days after the judgment was entered adjudging the appellant a bankrupt. From the indorsements on the bond it sufficiently appears that it was filed within the ten days, but that is only one step towards perfecting the appeal. The presumption that might arise from the filing and approval of the bond (*Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989) does not obtain when the record affirmatively discloses that there was a prayer for the appeal, and its allowance, and a citation, none of which were filed in the court until after the expiration of the ten days allowed to perfect the appeal. The case of *Credit Co. v. Arkansas Cent. Ry. Co.* 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448, is directly in point, and concludes the question; and to the same effect are *Fowler v. Hamill*, 139 U. S. 549, 11 Sup. Ct. 663, 35 L. Ed. 266; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246. The appeal is dismissed."

Where there has been an application for a rehearing and an order entered upon such application the time for appeal runs from the entry of the last mentioned order. (See *In re Worcester County*, 4 Am. B. R. 496; 102 Fed. 808.)

**Appeals to Supreme Court.** Section 25b (1).—The use of the words "on appeal" in this statute is misleading because there is no such thing as an appeal technically speaking from the highest court of the State to the United States Supreme Court. A final judgment is reviewed upon a writ of error. As to when a writ of error will lie see what is said on this subject under section 24.

SEC. 25b (2) d. The provision under subdivision "b" is undoubtedly intended to be supplementary to the the general right of appeal to the Supreme Court upon certification provided for by section 5 of the act of March, 1891, commonly known as the Evarts Act. That section is as follows:

"Appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

## Appeals to Supreme Court — Review on Certiorari. [Ch. IV.]

(1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. (2) From the final sentences and decrees in prize causes. (3) In cases of conviction of a capital crime. (4) In any case that involves the construction or application of the Constitution of the United States. (5) In any case 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. (6) In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases."

Recent cases which have been decided by the Supreme Court on the question of jurisdiction have been brought up under this section of the Evarts Act. When the case of *Bardes v. Bank* first reached the United States Supreme Court on direct certification from the District Court, it was rejected because no final judgment had at that time been made in the District Court. (See *Bardes v. Hawarden Bank*, 3 Am. B. R. 680; 175 U. S. 526.) In that case it was held that under section 25d a certificate presenting the question of the jurisdiction of the District Court is subject to the provisions of the 5th section of the Judiciary Act of 1891 in which the appeal upon the question of jurisdiction can only be taken directly to the Supreme Court after final judgment.

It will be seen from an inspection of section 5 of the Act of 1891 that in addition to the question of jurisdiction the Supreme Court may review in bankruptcy proceedings on certificate the cases referred to in subdivisions 4, 5, and 6 above.

**Review on Certiorari.** Section 25d.—What is referred to in the grant of power to review by *certiorari* is the general jurisdiction conferred by section 6 of the act of March, 1891 (26 Stat. at L. 826), where it is provided that "in any such case as is hereinbefore made final in the Circuit Court of Appeals" (such cases being other than those mentioned in section 5) "it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as



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 § 26.] Appeal to Supreme Court of Territory—Arbitration of Controversies.
 

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if it had been carried by appeal or writ of error to the Supreme Court." The writ of *certiorari* is a high prerogative writ and will seldom be used. (See *Forsyth v. Hammond*, 166 U. S. 506.)

The following G. O. 36 is to be noted in connection with what has been said on the subject of appeals.

### XXXVI. 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.

**Appeal to Supreme Court of Territory.**—It has been held by the Oklahoma Supreme Court that an appeal does not lie to the Supreme Court of a territory under section 25 from a judgment allowing or rejecting a claim of less than \$500, and that section 24b has no application to territorial courts. (*In re Stumpff*, [Okl. Sup. Ct.] 4 Am. B. R. 267.)

**No Appeal or Right of Revision from Refusal to Confirm a Composition.**—See *In re Adler* (103 Fed. 444; 4 Am. B. R. ), cited and commented on under section 12 *ante*, *sub nom.* FINALITY OF REFUSAL TO CONFIRM.

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**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.

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Analogous Provisions of Former Acts,—

R. S., section 5061; act of 1867, section 14; act of 1841, section 11; act of 1800, section 43.

The provisions of section 26, to the effect that the findings of the arbitrator shall have the force and effect of the verdict of a jury, make such findings reviewable by the court to the same extent that a verdict would be. (See *In re McLam*, 3 Am. B. R. 245; 97 Fed. 922.) The arbitrators must be chosen in strict accordance with the provisions of the statute. *Id.* See also G. O. 33 which follows:

**XXXIII. 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.

Compare section 58 *post* on notice to creditors of proposed compromise.

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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.

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Analogous Provisions of Former Acts.—

R. S. section 5061; act of 1867, section 14; act of 1800, section 43.

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§§ 28, 29.] Approval of Court — Designation of Newspapers — Offenses.

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**Approval of the Court Necessary in Each Case.**—Under the analogous provisions of the former act, it was held that this section did not authorize the court to make an order permitting the assignee, with the approval of a committee of creditors duly appointed, to compromise any and all debts that to him seemed best. Each case should be brought before the court by the trustee and the special facts which make it proper to compromise, should be set forth. (*In re Dibblee*, Fed. Cas. 3,885; 3 Ben. 354.)

And this rule has been practically adopted by the Supreme Court in G. O. 33 quoted under the preceding section (26).

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**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.

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Analogous Provisions of Former Acts.—

As to publication of notices: act of 1867, section 11, amended by R. S. section 5019; act of 1841, section 7.

**Cross-reference.**—As to publication of notice to creditors, of the first meeting, see section 58 (*f*).

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**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.

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#### Analogous Provisions of Former Acts.—

As to offenses of the bankrupt: R. S. section 5132; act of 1867, section 44.  
As to offenses of officers of the court: R. S. section 5012; act of 1867, section 45.

**Cross-references.**—The word “document” is defined in section 1 (13). As to what courts have jurisdiction to try offenses, compare sections 2 (4) and 23c. “Concealed” is defined in section 1 (22). As to the effect of the commission of an offense upon an application for a discharge, see section 14b (1).

**Offenses.**—The present act makes not only the bankrupt and the officers of the court punishable for certain offenses, but also makes criminal various acts of third parties, in this latter respect

differing from the Act of 1867. In all of the offenses mentioned in paragraph *b*, essential elements, which must be stated in the indictment and found upon the trial, are that the act is done knowingly and fraudulently. Inasmuch as the schedules required by section 7 (8) must be verified, a wilful and fraudulent omission of a material asset or a material debt, would seem to be an offense punishable by imprisonment. (Compare *U. S. v. Nichols*, 4 McLean, 23.) A bankrupt who submits the facts in regard to his property fairly to the advice of his counsel, and who, acting under the advice thus given, withholds certain items from his schedule, is not guilty of perjury, the fraudulent intent being wanting. (*U. S. v. Conner*, 3 McLean, 573.) But if he makes false statements in regard to it, in answer to interrogatories proposed to him in his examination, it is perjury. (*U. S. v. Dickey*, 1 Morris, 412.) False swearing to a fact, to the best of the opinion of the witness, which the witness, though without any reasonable cause, believes to be true, is not perjury. (*Commonwealth v. Brady*, 5 Gray [Mass.] 78.) But perjury cannot be predicated of a witness where the false testimony was on a prior proceeding and incorporated by consent. (*In re Goldsmith*, 4 Am. B. R. 234; 101 Fed. 570.)

**Conspirators.**—U. S. Revised Statutes, section 5,440, provide: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment of not more than two years, or to both fine and imprisonment in the discretion of the court." Under this section it was held that a person who conspired with another to commit an offense against the Bankruptcy Act of 1867 was liable to prosecution. (*U. S. v. Bayer*, Fed. Cas. 14,547; 4 Dill. 407.)

**Defendant May Be a Witness.**—The Act of March 16, 1878, chapter 37 (20 Stat. L. 30), provides that

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Proceeding by Indictment — Inspection of Accounts — Rules, etc. [Ch. IV.]

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“In the trial of all indictments, information, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.”

This statute must be considered as overruling various decisions to the contrary rendered before its enactment.

**Proceeding by Indictment.**—Under the former act which made the wilful and fraudulent omission of assets from the schedule a misdemeanor, it was held that such an offense was not an infamous crime, and that a proceeding against the offender might be by information and not indictment. (*U. S. v. Block*, Fed. Cas. 14,609; 15 N. B. R. 325.)

But as to all offenses referred to in subdivisions “a” and “b” it must be assumed since the decisions of *In re Wilson* (114 U. S. 422) and *Mackin v. U. S.* (117 U. S. 348) that all offenses which are punishable by imprisonment for more than one year must be presented by indictment.

**Inspection of Accounts.**—As to what is a reasonable opportunity of inspecting accounts, compare *In re Brewer*; *Ex p. Runel* (1 DeGex, M. & G. 491.)

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**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.

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**Analogous Provisions of Former Acts.**—  
Act of 1867, section 10.

The General Orders of the Supreme Court are obligatory and binding on courts of bankruptcy. They confer rights as well as

§ 31.]

Computation of Time—Time by Months and Years.

prescribe rules of practice and must be followed. (*In re Scott*, 3 Am. B. R. 625; 99 Fed. 404.) But the forms and orders indicate only the substance and are not necessarily exclusive as to cases not falling strictly within their terms. (See *In re Paige*, 3 Am. B. R. 679; 99 Fed. 538. See also *In re Soper*, 1 Am. B. R. 193.)

**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.

Analogous Provisions of Former Acts.—

R. S. section 5013; act of 1867, section 48.

**Time by Months and Years.**—Although the statute expressly provides only for a method of computing time when the enumeration is by days, it was held under the former act which was substantially similar in its provisions, that a fair construction of it required that the same rule should be applied when the time was enumerated by months or years. Under that statute, which permitted one to apply for a discharge within a year from the adjudication, it was held that where one had been adjudicated bankrupt on the 26th of November of a certain year, and the 26th of November of the following year came upon Thanksgiving Day, it being a legal holiday, the application could be filed on the 27th of November. (*In re J. B. Lang*, Fed. Cas. 8,056; 2 N. B. R. 480.) To same effect: *Cooley v. Cook* (125 Mass. 406). But the general rule of law is that when a thing must be done within a certain number of months or years, if the last day falls on Sunday or a holiday, it cannot be done on the next day. (Compare Amer. and Eng. Ency. of Law [1st ed.], title, Time.) In another case in bankruptcy it was held that an attachment

made on the 8th of March, at seven o'clock in the afternoon was voidable, if the petition in bankruptcy was filed on the 8th of July at two o'clock in the afternoon, the court in that case not applying the rule which requires that the last day should be included, but holding that the general common-law rule that fractions of a day are not to be considered did not apply, and that in ascertaining whether or not a petition in bankruptcy had been filed within four months from the time of securing such an attachment, hours and minutes might be counted to see whether the time had expired. (*Westbrook Mfg. Co. v. Grant*, 60 Me. 88.) In a similar case it was held that the day on which the petition was filed must be excluded. (*Dutcher v. Wright*, 16 Albany Law Journal, 100; s. c. 94 U. S. 553.) When Sunday or a holiday is one of the intervening days, it is to be counted. (*In re York v. Hoover*, Fed. Cas. 18,139; 4 N. B. R. 479.) The filing of a petition which will establish the date from which is to be determined the validity of liens and preferential transfers, which are in some cases voidable under this act, must be the filing of a petition which alleges the necessary jurisdictional facts. If no adjudication can be made on it, it will not mark the date from which time is to be measured. (*In re Rogers*, Fed. Cas. 12,003; 10 N. B. R. 444.) A petition is filed at the time when presented to the clerk for action by the court, not at the time when the clerk presents it to the judge to obtain a subpoena or a show cause order thereon.

**Cross-reference.**—Compare notes to section 60, paragraph on When Do the Four Months Expire.

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**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.



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§ 32.]      Transfer of Cases — Where May the Petition be Filed.

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Analogous Provisions of Former Acts.—

As to transfers in cases of two petitions being filed against one partnership: Rule XVI. of Orders in Bankruptcy, under the act of 1867.

And see following G. O. 6 as to effect of filing petitions in different districts.

#### VI. 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.

(And see *In re Waxelbaum*, 3 Am. B. R. 392; 101 Fed. 228.)

**Where May the Petition be Filed.**—The petition may be filed at the option of the petitioner in any one of three districts, viz., the district in which the bankrupt for the greater portion of the six months previous to the filing of the petition has resided, or has his domicil or has had his principal place of business. In the case of non-resident aliens having no principal place of business in the United States, or in the case of persons who have been adjudged bankrupt by courts of competent jurisdiction without the United States, it may be in any district in which they have property. (Section 2 [1].) Jurisdiction over one partner

gives the court a right to adjudge all the members of the firm bankrupts (section 5c); but does not give it jurisdiction to adjudge each member of the firm individually a bankrupt, unless it has jurisdiction over him personally.

## CHAPTER V.

### OFFICERS, THEIR DUTIES AND COMPENSATION.

**SEC. 33. Creation of Two Officers.**—*a* The offices of referee and trustee are hereby created.

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#### Analogous Provisions of Former Acts.—

Compare “Analogous Provisions of Former Acts” given under sections 34 to 49, both inclusive.

**Under the Former Act.**—Duties corresponding to those by this statute imposed upon the referee and the trustee, were under the former act imposed upon officers known respectively as register, and assignee.

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**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.

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#### Analogous Provisions of Former Acts.—

As to appointment: R. S. section 4993; act of 1867, section 3; act of 1841, section 5; act of 1800, section 2. As to removal: R. S. section 4997; act of 1867, section 5.

**Appointment.**—The law clearly intends that there shall be at least one referee for each county, more if necessary. The fixing of

definite limits for the districts of referees seems to be necessary; otherwise serious jurisdictional questions may arise, inasmuch as the act provides that the referee must reside or have an office in the territorial district for which appointed. (Section 35.) Further, numerous provisions of the statute provide that various matters may be referred to "the" referee.

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**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.

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**Analogous Provisions of Former Acts.**—

As to qualifications: R. S. sections 4994 and 4995; act of 1867, section 3.

**Degree of Relationship.**—"Affinity" means relationship by marriage, viz: the tie between the respective kindred of a married couple. "Consanguinity" is the connection or relation of persons to a common ancestor, viz: blood relationship. (See Auderson's Law Dictionary.)

In determining degrees of relationship the rule of the common law, as well as the civil law, is to count up from either of the persons related to the common ancestor, and then down to the other person related, reckoning a degree to each person ascending and descending. (Redfield's Surrogate's Practice, 5th ed. p. 669.) In computing, the common ancestor is counted but once, and one of the persons related is excluded and the other included.

§§ 36, 37, 38.] Oaths of Office of Referees — Number of — Jurisdiction of.

**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.

Analogous Provisions of Former Acts.—

R. S. section 4995; act of 1867, section 3.

**Oath of Office.**—U. S. Revised Statutes, section 712, provides: “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.’”

**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.

Analogous Provisions of Former Acts.—

R. S. section 4993; act of 1867, section 3.

**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.

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**Analogous Provisions of Former Acts.—**

R. S. section 4908; act of 1867, section 4; also R. S. sections 5009 and 5010; act of 1867, sections 4 and 6.

Together with this section should be considered G. O. 12, which is as follows:

**XII. 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.

**Jurisdiction of Referee.**—After adjudication the judge may refer the case either generally to the referee or specifically with

only limited authority in the premises. (See section 22.) The adjudication must be by the judge unless he is absent from the district or division, in which contingency the clerk sends the case to a referee. The object of the bankruptcy statute is as far as possible to establish local courts which will deal promptly and easily with the matters that come before them. So that it follows that the referee's powers in general, subject to review by the judge, and after reference of the case to him by order of the judge, cover nearly all the powers which are conferred by statute upon bankruptcy courts.

Although in general the territorial jurisdiction of referees under the present act is less extensive than that of registers under the former act, as to subject-matter their jurisdiction greatly exceeds that of the former register, for a referee may, generally speaking, hear and determine contested matters, while the registers, when issues of fact or of law arose before them, were compelled to certify them to the court for determination. In considering the authority, jurisdiction, powers and duties of a referee it must be borne in mind that wherever in the bankruptcy act the word "court" is used, the word means the court of bankruptcy in which the proceedings are pending, and may include the referee. (Section 1 [7].) And it is the duty of the court to consider, and to confirm, or modify or overrule, or return with instructions for further proceedings, any records or findings certified to it by the referee. (Section 2 [10].) The only petitions in bankruptcy which can be determined by a referee are voluntary petitions and involuntary petitions in cases in which no other pleadings have been filed by the bankrupt or by his creditors. (Section 18f and g.) In no case can he pass upon a petition to adjudge one bankrupt unless the judge is absent from the district at the time the matter is referred. As to referee's jurisdiction to take the examination of witnesses, compare section 21a, b, and c. As to the taking of possession of the bankrupt's property, compare section 69. The powers and duties of a referee may be restricted by rules or orders of the courts of bankruptcy prescribed for the district. Except for these restric-

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Application for Discharge — Review by Judge — Duties of Referees. [Ch. V.]

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tions upon his jurisdiction, and the statutory restrictions set forth in this section he may, in general, perform all the duties conferred on courts of bankruptcy. His authority to pass upon issues of fact arising in the proceedings is clear. (Section 39a [5].)

**Jurisdiction Upon Application for Discharge.**—Although, as has been seen, the referee may not finally determine the question of discharge or non-discharge, by G. O. 12 he may report upon any issue arising thereon which is referred to him. His duties in this respect have been lately passed upon by the District Court of Iowa, *In re Kaiser*, 3 Am. B. R. 767; 99 Fed. 689. In that case, upon a contested application for discharge, it was held:

(1) That authority of referee extends beyond taking, ruling upon, and reporting evidence, and includes making findings and recommendations thereon. (2) Specifications of opposition to discharge intended to show that bankrupt has been guilty of criminal concealment, must aver scienter and all essential facts necessary to establish the commission of the offense. (3) Such specification is prerequisite to the introduction of any evidence, and defines the issues to which the inquiry should be confined, and (4) may not be amended by the referee, but may be amended by the court.

**Review by the Judge.**—The review of the referee's decision is provided for in G. O. 27, which is as follows:

#### XXVII. 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.

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**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 counsellors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

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Analogous Provisions of Former Acts.—

R. S. sections 4998, 5000 and 5001; act of 1867, sections 4 and 5.

**Duties of Referees.** Section 39 (a).—The duties referred to in this section are mainly administrative. As to other duties of referees see G. O. 12 quoted under the preceding section.

(1) As to the time when the dividend shall be declared see section 65b; as to the form of a dividend sheet, see form No. 40.

(2) The examination of the schedules it would seem should be made by the referee personally.

This section not only authorizes but requires a referee to order an amendment of schedules when the same are defective, whether or not the bankrupt or any creditor makes application for an amendment. Although the bankrupt is required to file these schedules with his petition, the schedules are not a part of the petition, and the fact that they are defective is no reason for postponing an adjudication of bankruptcy. (*In re Patterson*, Fed. Cas. 10,815; 1 Ben. 517; s. c. 1 N. B. R. 125.) Compare section 7 (8). Although the referee is required to prepare and file the schedules, in case a bankrupt does not do so, this provision does not compel him to act until all proceedings have been taken to compel the bankrupt to file them. If the latter neglects to file them within the time mentioned in section 7 (8), the court may direct them to be filed, and may punish the bankrupt for contempt if he thereafter fails to obey the order. It is the referee's duty to prepare them only where the order above mentioned cannot be enforced.

(3) As to the furnishing of information concerning the estate compare section 29c (3); also section 4.

(4) As to giving ten days' notice to creditors compare section 58c.

(5) As to making up records and the transmission of the same compare sections 42, 2 (10), and 51a (3).

(6) As to preparation of schedules see what is said under (2).

(7, 8) See what is said under (5) *ante*.

(9) As to the employment of a stenographer compare section 38a (5). It would seem that a stenographer or other assistant should not be employed except at the request of the trustee or upon the order of the judge *In re Carolina Cooperage Co.* (3 Am. B. R. 154; 96 Fed. 950), and see G. O. 35 (2).

Besides transmitting the records the referee should file all claims against the estate. See G. O. 24, which is as follows:

#### XXIV. 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.

## § 39.] Duties of Referees — Care of Property — Restrictions.

The method of taking testimony by the referee is set forth in G. O. 22, which follows :

**XXII. 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.

As to orders made by the referee see G. O. 23, as follows :

**XXIII. 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.

**Care of Property.**—The present statute contains no provision authorizing or requiring a referee to accept the surrender of the property of a bankrupt after adjudication, a power conferred upon the register under the old practice. It seems to be contemplated now that the bankrupt is to retain the custody and control of the property until the trustee takes possession. The court of bankruptcy may, if it is absolutely necessary, appoint a receiver or marshal to take charge of it until the trustee is qualified. (Section 2 [3].) Whatever duties the referee may now have concerning it, would seem to be judicial in their character.

**Restrictions.** Section 39 (b)—The provisions of the statute forbidding the referee from acting in any case in which he is directly or indirectly interested, and from practicing as attorney and counsellor at law in any bankruptcy proceeding whatever, restrict him in this respect more than the former act restricted

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 Notice to Trustee of His Appointment — Compensation of Referees. [Ch. V]
 

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the register. A violation of either of the matters mentioned in *b* (1) or (3), is an offense under section 29.

But the mere fact that the referee is a debtor of the alleged bankrupt does not disqualify him to act as referee in proceeding against his creditor. (*Bray v. Cobb*, 1 Am. B. R. 153; 91 Fed 102.)

**Notice to Trustee of His Appointment.**—It is the referee's duty to notify the trustee of his appointment. See G. O. 16, which is as follows:

**XVI. 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.

**Expenses of Referee.**—The referee must keep an accurate account of his expenses. This subject is covered by G. O. 26 which is as follows:

**XXVI. ACCOUNTS OF REFEREE.**

Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or any 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.

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**SEC. 40. Compensation of Referees.**—*a* Referees shall receive a 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 sum 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.

*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.

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On Dividends and Commissions.

*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.

Analogous Provisions of Former Acts.—

R. S. sections 5008 and 5125; act of 1867, sections 4 and 5.

**On Dividends and Commissions.**—The basis of commissions is not receipts and disbursements, but the sum left for distribution as dividends and as commissions. The commissions and the fee are not payable to the referee until the estate is closed; that is, not until he has sent all the records to the clerk. (Compare sections 51 [4] and 39 [7].) The purpose of these provisions, according to the report of the judiciary committee of the House, is to induce officers to expedite the administration of estates in their charge and to keep down expenses. As to cases in which a voluntary bankrupt is excused from paying a fee, compare section 51 [2].

The term dividend has been judicially defined under the present act as a parcel of the funds arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors, or in different proportion. (*In re Barber*, 3 Am. B. R. 306; 97 Fed. 547.) In that case it was held that where a secured creditor does not invoke the aid of the Court of Bankruptcy to enable him to turn his securities into cash, then, although the court in the exercise of its equitable power for the benefit of the unsecured creditors, may order the incumbered property sold free and discharged of the incumbrance, assuming the conservation of the equitable rights of the secured creditor in the disposition of the proceeds of the sale, it *seems* that the moneys coming to the secured creditor under such circumstances come into the case incidentally and are not to be regarded as any dividend, and should not be charged with any commissions. But where the secured creditors in their own interests invoke the aid of the Court of Bankruptcy to make

such a sale, and realize thereby upon their security more than they could have expected through foreclosure, and without the expense and delay of that remedy, thereby preserving their own equities and at the same time realizing the claims of the unsecured creditors, the amount paid to them must be properly considered as a dividend, and hence is properly chargeable with commissions, and this is so even though the secured creditors stipulate that the whole of the fund realized should be paid to an agency of their own selection for division and apportionment among them.

In this case (distinguishing *In re Slevin*, 4 Dill. 131; Fed. Cas. No. 12,942) Judge Lochren says:

“The case of *In re Slevin*, 4 Dill. 131, Fed. Cas. No. 12,942, has no bearing. There the sale was made by the trustee named in the mortgage, and the assignee in bankruptcy, who would have been entitled to receive only any surplus after the payment of the mortgage debt, joined in the deed. But there was no surplus, no money whatever to be administered by the Court of Bankruptcy, and he was properly held entitled to no commission. Here the entire fund was obtained through the action of the Court of Bankruptcy, whose officers alone made the sale and administered the fund; paying the avails of the security directly to the bondholders, and entirely disregarding the trustee named in the mortgage. The mortgage was functionless in the proceeding, except as it showed the extent of the rights and equities of the bondholders which were entitled to the protection of the court. The payments to the bondholders were of their dividends or allotments of the fund produced in the Court of Bankruptcy through the execution of its orders by its officers upon the motion or request of the secured creditors, and the referee and trustee are entitled to commissions on such dividends. Such sale, when agreed to by all the parties, was doubtless within the equity powers of the Court of Bankruptcy. *Ex parte Christy*, 3 How. 292, 315. It enabled the mortgagees or bondholders to realize with greater speed the avails of the security than could have been done by foreclosure under the terms of the mortgage, and of the law under which the creditors might have acted. But there is nothing in the law which excludes the referee from commissions upon dividends to any class of creditors from a fund obtained through the action of the court alone, and the services of its officers, when such action and services have been invoked by such creditors.”

On the other hand a referee recently held (*In re Gardner*, 4 Am. B. R. 420), that this portion of the statute relating to commissions on dividends, etc., is unconstitutional on the ground that the judiciary article of the Constitution of the United States is impliedly subject to the general common law rule that

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no one shall be a judge in a matter in which he is interested, and that the referee is interested within the meaning of that maxim, when he passes upon the question of dividends, and therefore such a matter if passed upon at all must be passed upon by the judge. It is probable that the referee has taken too narrow a view of the subject. In the first place, his statement of the common law rule being incorporated by implication in the Constitution of the United States is open to question; and secondly he has undoubtedly given the rule a too narrow interpretation. The "interest" which will disqualify a judicial officer means an interest in the cause of action itself, something more than such interest as may result incidentally by reason of fees, etc. So held in New York where a judge passed upon the constitutionality of a statute which increased his compensation when acting in a certain capacity as well as the compensation of other judges. (*People ex rel. Morris v. Edmonds*, 15 Barb. 529.) It is probable that the decision of *In re Gardner* will not be followed. But commission cannot be collected upon claims entitled to priority. (*In re Fielding*, 3 Am. B. R. 135; 96 Fed. 800.)

It has been held in the case of *Fellows v. Freudenthal*, C. C. A. 7th C. (4 Am. B. R. 490; 102 Fed. 731), that where issues arising upon an application for discharge are sent to a referee to ascertain and report upon, the reference is made to him in the capacity of special master in chancery and not as referee in bankruptcy, and the duty is independent of the latter office and in no sense incompatible. A reasonable allowance may therefore be taxed for the referee's compensation outside and apart from the provisions of section 40. It must be remembered, however, in this connection that the reference of specified issues arising in the administration of the estate is within the direct contemplation of the Bankruptcy Law. (Section 22 *ante*.)

On the subject of the compensation of the referee it is important to keep in mind G. O. 35, as follows:

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

## On Dividends and Commissions — Contempts before Referees. [C

general orders; but shall not include expenses necessarily incurred by the publishing or mailing notices, in traveling, or in perpetuating testimony other expenses necessarily incurred in the performance of their duties u the act and allowed by special order of the judge.

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4. In any case in which the fees of the clerk, referee and trustee are required by the act to be paid by a debtor before filing his petition to be judged a bankrupt, the judge, at any time during the pendency of the ceedings in bankruptcy, may order those fees to be paid out of the estate may, after notice to the bankrupt, and satisfactory proof that he then or can obtain the money with which to pay those fees, order him to pay t within a time specified, and, if he fails to do so, may order his petition t dismissed.

On the subject of accounts of the referee see G. O. 26, quo under preceding section.

G. O. 10 gives the referee with other officers the right to quire from the bankrupt or other person in whose behalf expen are to be incurred indemnity for such expenses.

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SEC. 41. **Contempts before Referees.**—*a* A person shall not, proceedings before a referee, (1) disobey or resist any law order, process or writ; (2) misbehave during a hearing or near the place thereof as to obstruct the same; (3) neglect produce, after having been ordered to do so, any pertinent do ment; or (4) refuse to appear after having been subpoenaed, upon appearing, refuse to take the oath as a witness, or, after h ing taken the oath, refuse to be examined according to law. *P vided*, That no person shall be required to attend as a witn before a referee at a place outside of the State of his residen and more than one hundred miles from such place of residen and only in case his lawful mileage and fee for one day's atten ance shall be first paid or tendered to him.

*b* The referee shall certify the facts to the judge, if any pers shall do any of the things forbidden in this section. The ju shall thereupon, in a summary manner, hear the evidence as the acts complained of, and, if it is such as to warrant him in doing, punish such person in the same manner and to the sa extent as for a contempt committed before the court of bar ruptcy, or commit such person upon the same conditions as if t



## § 41.] Disobedience to Subpœna—Contempt Proceedings—Witness Fees.

doing of the forbidden act had occurred with reference to the process of, or in the presence of the court.

Analogous Provisions of Former Acts.—

R. S. sections 5002, 5005 and 5006; act of 1867, sections 5 and 7; act of 1800, sections 14 and 15; also R. S. section 4999; act of 1867, section 4.

**Disobedience to Subpœna.**—To justify a person who is properly subpœnaed and to whom has been paid the required mileage and fees, in refusing to attend, it would seem from this section that he must show that he not only lives outside of the State, but more than one hundred miles from the place where he is required to attend. (Compare, however, U. S. R. S., section 876.) The fact that he lives in a different judicial district will not excuse him. A referee's subpœna reaches beyond the limits of the judicial district. In this respect it differs from other process. The referee to whom a case is referred has all the powers of the court which appoints him for the purpose of summoning and examining witnesses, except the power of commitment. (*In re* W. S. Woodward, 10 Pac. L. R. 214; s. c. 8 Ben. 112; Fed. Cas. 18,000; s. c. 12 N. B. R. 297.)

**Contempt Proceedings.**—Although a register (like a referee) could not punish for contempt, yet in the case of Speyer (Fed. Cas. 13,239; 6 N. B. R. 255), arising under the act of 1867, where a party moved the court before the judge for an order to punish a bankrupt for contempt for disobeying an order of the register, the court referred the matter back to the register to take such testimony as the bankrupt might offer in order to purge himself of the contempt. And this seems to be the practice under the present statute, *In re* McCormick, 3 Am. B. R. 340; 97 Fed. 566.

**Witness Fees.**—U. S. Revised Statutes, section 848, provides: "For each day's attendance in court, or before any officer pursuant to law, 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. When a witness is subpœ-

naed in more than one cause between the same parties, at the same court, only one travel fee and one *per diem* compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the *per diem* attendance fee alone shall be taxed in the other cases in the order in which they are disposed of. When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day." U. S. Revised Statutes, section 849, provide: "No officer of the United States courts, in any State or Territory, or in the District of Columbia, shall be entitled to witness fees for attending before any court or commissioner where he is officiating."

As to practice in punishing for contempt by the district judge, see Chapter II, *ante*, *sub nom.* CONTEMPTS.

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**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.

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Analogous Provisions of Former Acts.—

R. S. section 5000; act of 1867, section 4.

**Records as Evidence.**—As to a certified copy of any of the records being admissible in evidence, compare section 21d.

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**SEC. 43. Referee's Absence or Disability.**—*a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to

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 § 44.] Appointment of Trustees—The Right of Appointment.
 

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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.

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Analogous Provisions of Former Acts.—  
R. S. section 5007; act of 1867, section 4.

**Transfer of Cases for Cause.**—As to the power of the judge to transfer a case from one referee to another for convenience of parties or for cause, see section 22 *b* and G. O. 6.

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**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.

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Analogous Provisions of Former Acts.—  
R. S. section 5034; act of 1867, section 13. As to appointment of an assignee to fill a vacancy: R. S. section 5041; act of 1867, section 18.

**The Right of Appointment.**—This section gives to creditors in the first instance an absolute right to appoint a trustee.

The matter has recently been very thoroughly discussed in an opinion by Judge Brown of the Southern District of New York *in re* Lewensohn, 3 Am. B. R. 299; 98 Fed. 576. The doctrine laid down in that case is that the referee should not disapprove of the choice of the trustee by the creditors, nor should he interfere with or obstruct such choice except upon clear proof of incompetence for duty or non-residence. The opinion states the facts as here presented. So far as it bears upon the question of choice of the trustee it will be found to be a complete discussion of that subject.

“Opinion of Brown, Judge: At the first meeting of creditors in the above proceeding, on December 5th, all who had proved their claims, being thirty-eight in number and representing debts to the amount of about \$150,000, voted for Francis M. Bacon, Jr., of this city, as trustee. His firm of Bacon & Co. was one of the four largest creditors, having a claim of \$11,450. On December 12th, to which day the meeting was adjourned, objections were for the first time made on behalf of the bankrupt, and the referee was asked to disapprove of the trustee elected on the ground that he was not competent, impartial and unbiased. The matter was taken under consideration by the referee, and the meeting adjourned without day. On the next day the referee disapproved of the trustee elected, on the ground above stated, and appointed another trustee. A motion is now made to set aside this appointment. The subject has been argued at length, both as respects the right of the referee to appoint a trustee upon such a disapproval, as well as upon the sufficiency of the objections raised against the confirmation of the trustee chosen by the creditors. Substantially the same question has been presented to me as to the referee's power to appoint when an elected trustee declines to serve or fails to qualify. The same considerations apply to all these cases, and I shall treat them as one.

1. Section 44 of the Bankrupt Act provides that the creditors shall appoint one or more trustees ‘at their first meeting after the adjudication or after a *vacancy* has occurred in the office of trustee \* \* \* or if there is a *vacancy* in the office of trustee,’ and that if the creditors do not appoint the court shall do so.

Whatever may be the reserved or implied power of courts of bankruptcy under the last paragraph of section 2 to appoint a trustee when necessary, resort to such an implied power cannot ordinarily be had in cases where the statute itself designates a different mode of appointment; and in doubtful cases the general intent of the law, as gathered from its express provisions, should be observed so far as possible.

If, upon the referee's disapproval of an elected trustee, or upon the trustee's refusal to accept, or failure to qualify, ‘there is a *vacancy* in the office of trustee,’ the case falls within one of the clauses of section 44 above cited, and a further election by creditors must be had where, as in this case, such an election is practicable; and, in my opinion, these cases do fall within both the letter and the spirit of section 44 (see Collier on Bankruptcy, 246; Loveland, Bankr. 204, sec. 270, sec. 142).

In the case of *In re Smith*, 1 N. B. R. 243, 247; 2 Ben. 113, 22 Fed. Cas. 261, Blatchford, J. says of the Act of 1867:

‘The policy of the Bankrupt Act, as clearly shown in its provisions, is to give to the creditors of the bankrupt the free, deliberate, unbiased choice in the first instance of the person who is to take the assets and manage them. The importance of this policy has been uniformly recognized by this court. It is especially incumbent upon registers in no manner to interfere with or influence, either directly or indirectly, the choice of an assignee by creditors.’

This general intent is still more strongly manifested by the Act of 1898, since the latter act has largely curtailed the former power of the court to

appoint, and correspondingly extended the right of creditors. Section 13 of the Act of 1867 (sec. 5034, Rev. St.) provides for an election by creditors at the first meeting only, and authorizes the court to fill all vacancies; at the same time it expressly treats a failure to qualify as a case of 'vacancy.' The Act of 1898, however, provides for an election by creditors, not only at their first meeting, but in five other contingencies, viz.: (1) After a vacancy has occurred in the office of trustee; (2) after an estate has been re-opened; (3) after a composition has been set aside (4) or a discharge revoked, or (5) 'if there is a vacancy in the office of trustee.' These clauses seem designed to cover all situations.

The authority of the court to fill vacancies, given by the Act of 1867, is wholly omitted; no such authority is anywhere to be found in the Act of 1898; while section 2, paragraph 17, in defining the jurisdiction of the court in this regard, authorizes it to appoint trustees only

'Pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees . . . and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them.'

From what the act provides, as well as from what it omits, therefore, the necessary inference is that it designs to give creditors in all cases an opportunity to choose the trustee, and to authorize the court to appoint only where they neglect or fail to do so. This was one of the merits of the act that was urged upon its passage (Collier, Bankr. 33). The general orders are framed on this view: No. 14 forbidding any official trustee, or trustee for any class of cases, and No. 25 authorizing a meeting of creditors to be called whenever there is a 'vacancy in the office of trustee.' The particular language of the two clauses of section 44 as respects 'vacancies' shows the same intent. The first clause, 'after a vacancy has *occurred*,' imports that the office was previously filled; but, the revisers apparently not being satisfied with this limitation, the second clause was added in order to secure an opportunity of choice to creditors in every case 'where there *is* a vacancy,' *i. e.* where the office, from whatever cause, is unfilled. For the word 'vacancy' alone does not import that the office has been previously filled. Bouvier's Law Dictionary defines the word as 'place which is empty. The term is principally applied to cases where the office is not filled.' In the Century Dictionary it is defined: '(d) An unoccupied or unfilled post, position or office.'

So long as the office is unfilled, therefore, 'there is a vacancy,' whether previously filled or not, and this second clause, as respects vacancies, therefore, applies. If this clause were not broader than the first, it would be mere surplusage. The two clauses indicate the composite origin of the text; and the latter in effect supersedes the former. That the word vacancy is used in the broad sense above stated is further shown, not only by the Act of 1867 (sec. 5034), which provides that if the assignee chosen fails to accept the trust the judge or register may fill the *vacancy* (that is, a 'vacancy,' though the office had not been previously filled), but section 50 of the present act, after requiring a bond from the trustee before entering upon the performance of his official

duties (subd. b), provides (subd. k) that 'If any trustee fail to give bond he shall be deemed to have declined his appointment, and such failure shall *create a vacancy* in his office.'

'There is a vacancy,' therefore, within the second clause of section 44 relating to vacancies whenever the trustee chosen refuses to accept or fails to qualify or is disapproved by the court, whether the office has been previously filled or not; and in such cases the court cannot appoint until after opportunity is afforded creditors for a new election, where that is practicable.

In order to prevent the delay incident to the call of a new meeting of creditors, under General Order 25, it is advisable that the consent of the proposed trustee should be obtained if practicable before his election; and if objections to a trustee elected are reserved by the referee, the meeting should be adjourned to a future day, when a new election can be had, in case the previous choice is disapproved."

It is very clear that where the creditors fail to select, the referee as well as the judge may appoint a trustee inasmuch as the word "court" in the Bankruptcy Act includes the referee as well as the judge. (Section 1 [7].) (See *In re Kuffler*, 3 Am. B. R. 162; 97 Fed. 187; *in re Brooke*, 4 Am. B. R. 50; 100 Fed. 432.) G. O. 13 provides that the appointment of a trustee shall be subject to be approved or disapproved by the referee or judge but that he shall be removable by the judge alone.

**Number to be Chosen.**—The act authorizes creditors to choose one or three trustees. There is no authority given them to choose two or more than three. The act evidently contemplates that such a number shall be chosen as will prevent any possible deadlock. If three are chosen, the assent of at least two of them is necessary to the validity of any act concerning the administration of the estate. (Section 47b.) Whether when one of three trustees has died, it may be said that a vacancy has occurred which should be filled, *quaere*. Section 46 authorizes the survivor to continue the prosecution or defense of any pending action and would seem to imply that the vacancy need not be filled.

**Cross-references.**—As to time and manner of election, as to all proceedings at the first meeting of creditors, as to the number necessary to constitute a quorum and as to adjournments of the meeting, compare section 55. As to voters and their qualifications,

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 § 45.] Qualifications of Trustees — Who May be Trustee.
 

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as to the mode of voting and the right of creditors to appear by proxy or by agents or attorneys in fact, compare section 56.

In connection with the appointment of the trustee, G. O. 14 and G. O. 15 should be read. They are as follows :

**XIV. 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. 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.

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**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.

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Analogous Provisions of Former Acts.—

R. S. section 5035; act of 1867, section 18.

**Who May Be Trustee.**—The present act, in making one eligible to election as trustee, even though he does not reside within the judicial district in which he is appointed, provided he has an office therein, differs from the former law. There are no express statutory restrictions as to who may be trustee, other than those herein given. Any person of sufficient capacity and residing in or having an office in the judicial district may be chosen. A creditor may be appointed, but when he has received a preference which is or might be voidable, he should not be chosen as his

duties as trustee are incompatible with his interests as preferred creditor. And the director of a corporation which has received a preference should not be chosen. (*In re Powell*, Fed. Cas. 11,354; 2 N. B. R. 45.) An attorney for a creditor may be chosen. (*In re Barrett*, Fed. Cas. 1,043; 2 N. B. R. 533.) An attorney of the bankrupt may be chosen, but in that case he cannot be permitted to continue to act as attorney for the bankrupt; his duties in the two positions might become inconsistent. (*In re Clairmont*, 1 Lowell, 230; s. c. Fed. Cas. 2,781; 1 N. B. R. 276.)

In the case of *In re Lewensohn* (3 Am. B. R. 299; 98 Fed. 576), the charges under which the trustee selected by the creditors was sought to be removed, was that he had a hostile animus against the bankrupt and had caused him to be dogged by private detectives. In holding that the trustee should not be removed for this reason Judge Brown says:

"If it is theoretically possible that such a state of hostility might exist between the bankrupt and the person elected as to make him an improper person to act as trustee (*In re McGlynn*, 2 Low. 127, 16 Fed. Cas. 122), it should be at least clear that this bias was not through the bankrupt's own fault. Under the statute (sec. 45), incompetency for the performance of their duties, and non-residence, are the only grounds of disapproval, and with these mere bias or hostility to the bankrupt, except in extreme cases, can have little to do. The choice of creditors ought not to be interfered with on slight grounds (*Robinson on Bankruptcy*, 395; *Collier on Bankruptcy*, 247). In the case of *In re Funkenstein*, 9 Fed. Cas. 1004, Hoffman, Justice, says: 'Until the court has before it clear and positive evidence that the parties nominated are commercially dishonest or disreputable in the commercial community, it seems to me it would be my duty to recommend their approval.' In the case of *In re Barrett*, 2 N. B. R. 533, 2 Fed. Cas. 909, Jackson, J. observes: 'What, then, is cause sufficient to justify the judge in withholding his assent? Manifestly, it must be for want of capacity or integrity in the party selected.' To the same effect are *In re Grant*, 2 N. B. R. 106, 10 Fed. Cas. 973; *In re Clairmont*, 1 N. B. R. 276, 5 Fed. Cas. 810.

The cases cited as to the desirableness of amicable relations (*McPherson v. Cox*, 96 U. S. 404; *May v. May*, 167 id. 310) refer to the relations between the trustee and his beneficiaries. In bankruptcy, however, the beneficiaries are not the bankrupt, but the creditors. For that reason the law gives to them alone the choice of trustee. The bankrupt has no part in it, because, presumably, he has no interest in it, and it is scarcely consistent with that situation that the bankrupt, who has no voice in the election, and whose business dealings



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 § 46.] Death or Removal of Trustees — Death of One of Three Trustees.
 

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may have been most reprehensible, should be allowed to defeat the creditors' unanimous choice on the ground that the trustee elected was unfriendly to himself—an objection which would naturally be strongest when the bankrupt's own demerits were greatest.

The trustee's duties are administrative, not judicial. It is not his special duty 'to hold an even hand or an unbiased mind' towards the bankrupt, but to make the most possible out of the assets, and in the performance of this duty mere bias or unfriendliness toward the bankrupt must be rarely, if ever, material. Considering the number and frequency of fraudulent bankruptcies in the past, a zealous watch and scrutiny of an insolvent's transactions cannot be looked upon as a demerit, or as indicative of a lack of 'competency' in a trustee. And unfounded suspicions and prejudices even may be met by the honest merchant without fear."

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**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.

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**Analogous Provisions of Former Acts.**—

R. S., section 5042; act of 1867, section 18. As to removal of the assignee by the court: R. S., section 5036; act of 1867, section 13; also R. S., section 5039; act of 1867, section 18. As to removal of assignee by vote of the creditors in meeting assembled; R. S., section 5039; act of 1867, section 18.

**Death of One of Three Trustees.**—Compare section 44 and section 47b as to whether the death or removal of one of three trustees creates a vacancy which must be filled.

**Removal of Trustees.**—The power to remove a trustee is given by section 2 (17), which provides that the courts may, "upon complaints of creditors, remove trustees for cause, upon hearings and after notices to them." The matter is left to the discretion of the judge; his action cannot be reviewed and reversed by the Circuit Court. (*In re Adler Brothers*, Fed. Cas. 82; 2 Woods, 571; compare *in re Perkins*, 5 Biss. 254; s. c. Fed. Cas. 10,982;

## Resignation—Removal by Vote of Creditors—Duties of Trustees. [Ch. V.]

8 N. B. R. 56.) So in England it has been held that the exercise of this discretion will not be interfered with upon appeal, unless it is perfectly clear that there has been an abuse of discretion (*Ex p. Bates*, 21 L. J. Bank, 20; 16 Jurist, 459); but the discretion is a judicial discretion, to be exercised only when there is sufficient cause. (*In re Mallory*, Fed. Cas. 8,990; 4 N. B. R. 153.) It must be shown that the removal is expedient or necessary. The statute does not say that a bankrupt may ask for the removal of his trustee. There is little possibility of there being any surplus in such proceedings, and he can have little interest in the matter; yet in England his petition for the removal of the assignee will be entertained (*Ex p. Baker*, 2 Mont. D. & D. 60); and there would seem to be no reason under our statute why he should not have a similar right. Indeed this right seems to be recognized in the case of *In re Lewensohn*. For a discussion as to what reasons will warrant the removal of a trustee see that case as quoted at length under sections 44 and 45.

**Resignation.**—This statute nowhere gives the trustee the right to resign. After he once accepts the office, he cannot do so without the consent of the court; if he is permitted to resign as a favor to himself, he must pay the costs of the proceedings, but where he is removed by the court for the benefit of the estate without any fault or dereliction of his own, he is entitled to have all his costs and all the expenses which he may have incurred, paid to him out of the estate. (*Ex p. Watts*, 1 Deac. & Chitt. 22; *Ex p. James*, 1 Deac. & Chitt. 372.)

**Removal by Vote of Creditors.**—The present statute does not give to creditors the right by vote to remove a trustee with the approval of the court; in this respect the statute differs from the former act.

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**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 estate; (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.

#### Analogous Provisions of Former Acts.—

As to setting apart bankrupt's exemptions: Rule XIX. of Orders in Bankruptcy under the act of 1867. As to deposits of money: R. S. section 5059; act of 1867, section 17; act of 1841, section 9; act of 1800, section 54. As to submission of accounts to court, preparatory to the final dividends: R. S. section 5096; act of 1867, section 28. As to the other duties of trustees, compare "Analogous Provisions of Former Acts," given under the other sections of this act relating to such duties. As to assignee's duty to account for all interest: R. S. section 5062 B.

In addition to this section compare G. O. 17, which is as follows:

#### **XVII. 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 posses-

sion. The trustee shall make report to the court, within twenty days after receiving 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.

**Interest.** Section 47a (1)—The requirement that the trustee shall keep account of and pay over all interest received by him; doubtless has reference to temporary investments of funds in his hands made pursuant to the order of the court. Although the present act contains no express provision authorizing, in any case, such temporary investment, but does, on the other hand, require that the trustee shall deposit the money in one of the designated depositories, yet, whenever by reason of litigation or other cause, the distribution of the estate will be delayed, it is the duty of the trustee to bring the matter before the attention of the court and procure an order authorizing him to temporarily invest or at least to deposit upon interest. Such was the express provision of the former statute. Failure of the trustee to deposit with reasonable promptness will be a cause for removal and will further subject him to the payment of such interest as would have been secured. Like all trustees, if he uses the money in his own business, he will be liable for interest at the legal rate; or in excess of that, if he has made a greater profit from it.

**Collection of Assets.** Section 47a (2).—All the property of the bankrupt which is of an assignable nature (except exempt property) vests, by virtue of the adjudication, in the trustee; this

includes all rights of action other than those which die with the person, such as claims for damages in tort for purely personal injuries. Whenever a cause of action would pass to an executor it passes to the trustee. Thus he may sue and recover for trespass to the property of the bankrupt, even though the offense occurred before the adjudication (*Seiling v. Gunderman*, 35 Tex. 345); or for the negligence of any person affecting the property rights of the bankrupt, as where the negligence consisted in the failure of a sheriff to return an execution within the statutory time, and notwithstanding the execution was issued in the name of the bankrupt and not of the trustee. (*Gary v. Bates*, 12 Ala. 544.)

Further, the trustee acquires certain rights which the bankrupt does not have. Thus, as the representative of creditors, he may sue to set aside transfers and conveyances and incumbrances made in fraud of creditors, except as to purchasers in good faith and for a present fair consideration; and by section 67 (*e*) (*q. v.*) all property so conveyed by the bankrupt in fraud of his creditors becomes, by virtue of the adjudication, a part of the assets of the bankrupt and passes to the trustee, whose duty it is to recover and reclaim the same by legal proceedings if necessary for the benefit of the creditors. So all levies, judgments, or other liens obtained in violation of the Bankruptcy Act as specified in section 67 (*f*), are invalidated by an adjudication in bankruptcy and the property affected by them passes to the trustee free and clear from the liens. Subject to the exceptions, just mentioned, in which the trustee as the representative of creditors has rights of property in addition to those of the bankrupt, he acquires no better title than that person had at the time of the adjudication. If he acquires title *pendente lite*, the trustee stands in the same position as any other purchaser *pendente lite*. He is affected by the judgment which may be recovered, whether or not notice is given to him. (*Eyster v. Gaff*, 91 U. S. 521.) The trustee, except in the cases of the fraudulent transfers above mentioned, will be estopped, if the bankrupt would be estopped. (*In re Rockford*, R. I. & St.

L. R. Co. Fed. Cas. 11,978; 1 Low, 345.) Compare section 70 as to the property, title to which is vested in the trustee and for further discussion of this subject. The trustee must use due diligence in collecting and disposing of the property of the bankrupt and in distributing its proceeds among the creditors. If he is guilty of gross negligence of duty he may be removed (*In re Morse*, Fed. Cas. 9,852; 7 N. B. R. 56), and he will be personally chargeable with any loss which the estate suffers by his negligence.

**Legal Remedies.**—If the trustee cannot collect the assets by demand he may institute legal proceedings therefor or may avail himself of any remedy given him by the statute. Thus, he may, with the approval of the court, compromise (section 27) or submit to arbitration (section 26). He may institute new suits when necessary, and may continue the prosecution or defense of pending actions. (Compare section 11.)

**When Should He Sue.**—The trustee should neither institute an original suit nor continue a pending one unless in his judgment it is for the interests of the estate, or unless he has been ordered by the court so to do. He is in the first instance the judge of the wisdom of pursuing remedies in this manner. If the cause of action be one not worth the expense of litigation, it is his duty to abandon it. (*Mutual Bldg. Fund v. Boussieux*, 4 Hughes, 387; *Traders' Bank v. Campbell*, 14 Wall. 87.) The trustee need not sue if he has not money on hand sufficient to meet all the expenses of the suit. (*Reade v. Waterhouse*, 52 N. Y. 587; s. c. 10 N. B. R. 277; s. c. 12 Abb. Pr. [N. S.] 255.) He is never obliged to sue unless the property to be recovered would be assets of the estate. Thus, it has been held it is not his duty to institute a suit upon the individual liability of the stockholders of the bankrupt corporation of which he is the trustee. The liability of the stockholders is to the creditors, not to the bank. (*Dutcher v. Bank*, Fed. Cas. 4,203; 12 Blatch. 435; s. c. 11 N. B. R. 457; distinguishing *Sawyer v. Hoag*, 9 N. B. R. 145; s. c. 17 Wall. 610; s. c. below, Fed. Cas. 12,400; 3 Biss. 293.)

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§ 47.] Reduction to Money: Sales—Depositories—Furnish Information.

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For further discussion as to how the trustee should sue, what suits should be brought and where, see section 70 and section 67e and *f post*.

**Reduction to Money: Sales.**—As to power to sell, what title passes, sales of incumbered property, who may purchase, etc., see section 70 *post* and G. O. 18.

**Depositories.** Section 47a (3), etc.—Compare section 61, as to the duty of the court to designate. Compare notes to subdivision (1), *supra*, as to interest.

As to trustee's accounting, see G. O. 17, also quoted under this section, *ante*.

**Duty to Furnish Information.** Section 47a (5)—*In re Perkins*, Fed. Cas. 10,982; 8 N. B. R. 56; s. c. 5 Biss. 254, it was said by the U. S. Circuit Court for the Northern District of Illinois:

“It is the duty of an assignee to disclose to the creditors, upon inquiry, and where it appears they are ignorant thereof, the main facts known to him relating to the condition and assets of the bankrupt estate. Where he knows there is a large sum of money on deposit in a bank, belonging to the estate, against which the bank claimed and were purchasing set-offs, it is his imperative duty to state these facts to creditors inquiring concerning the value of their claims. It is not sufficient excuse that he could not give definite estimates as to what the estate would pay, or that he says he did not intend to mislead any one. He is presumed to intend the necessary consequences of his own acts, and the suppression of the existence of this large deposit must mislead creditors and affect their action. Nor is it a sufficient answer or excuse that the books of the bankrupt could be examined by the creditors. The assignee should also make, in season, the reports prescribed by the rules in bankruptcy. When an assignee has failed in properly informing creditors in regard to their rights and the value of the assets, and the information has been suppressed in the interest of one class of creditors, it is the duty of the court to remove him. On a revisory petition to the Circuit Court, the proper practice is to direct the District Court to remove the assignee and to appoint some other competent person in his place.”

As to failure to permit an opportunity to inspect accounts being an offense, compare section 29 (c).

**Dividends.** Section 47a (9)—Compare sections 64, 65 and 66.

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Exemptions—Concurrence of Two Trustees—Compensation. [Ch. V.]

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**Exemptions.** Section 47a (11)—As to the bankrupt's duty to make claim therefor in his schedule, compare section 7 (8). As to the effect of failure by the trustee to designate and set apart the exemptions, compare section 6, paragraph on Trustee's Rights in Exempt Property.

**Concurrence of Two Trustees.** Section 47b.—The requirement that at least two of the trustees must concur to make any act valid, is but one of the many facts which imply that where one or more of the trustees die, a vacancy will be considered as occurring, which will make it the duty of the creditors to elect a successor. Compare commentaries on sections 44 and 46.

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**SEC. 48. Compensation of Trustees.**—*a* 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.

*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.

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Analogous Provisions of Former Acts.—

R. S. section 5099; act of 1867, section 28; act of 1800, section 29; also R. S. section 5127; act of 1867, section 47; also R. S. section 5127A; also R. S. section 5124; act of 1867, section 47, amended by act of July 27th, 1868, ch. 258, section 2; act of 1800, section 47.



§ 48.]

After Services are Rendered.

**After Services Are Rendered.**—As in the case of referees, the law provides that the trustees shall receive no compensation until their services are rendered, and that then the amount paid them as commissions shall be upon the sums paid out as dividends and commissions, not upon the amount of their receipts and disbursements. As to cases in which a voluntary bankrupt is excused from paying a fee, compare section 51 *a* (2).

Compare G. O. 35 (3, 4,) as follows :

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.

An interesting case (*In re Plummer*, 3 Am. B. R. 320) Referee Hotchkiss of New York held that where a trustee does more than merely collect the assets, and disburse the money so collected, and in addition to the services required of him by law, performs extra services for the beneficiaries of the trust, particularly where he is directed so to do by the creditors themselves, he should be allowed a reasonable extra compensation, in analogy to the case of a railway receiver.

In that case, at the request of the creditors, a trustee continued running a manufacturing plant, buying new material, and making necessary repairs to machinery, and giving his personal attention to the business with a profit to the creditors. But the referee also held that the better practice requires the trustee under such circumstances, in his notice of final meeting, to notify creditors of his intention to present such a bill, but where three-fourths of the creditors were represented at the meeting, and all asked that the bill should be allowed, it was *held* that such claim should

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**Accounts and Papers of Trustees — Bonds of Referees and Trustees.** [Ch. V.]

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be ordered and allowed and included in the expenses of the administration of the estate.

It has also been held under the present Act that where a trustee, himself an attorney-at-law, rendered professional services necessary to the proper administration of the trust, he was entitled to such reasonable compensation as he would have been obliged to pay had he employed other competent counsel. (*In re Mitchell*, 1 Am. B. R. 687; referee's opinion.) There was a decision to the same effect under the Bankruptcy Law of 1867. (*In re Welge*, 1 Fed. 216.) But see, *contra*, *In re Meldaur* (17 Fed. Cas. 958.) It seems that the opinion of the learned referee in the Plummer case is based on principles of abstract equity. It is a little doubtful, however, in the light of section 48a of the Bankruptcy Law, providing that the filing fee and the commissions shall be the only compensation of trustee, whether it will be sustained.

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**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.

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Analogous Provisions of Former Acts.—

R. S. section 5062B.

**Reasonable Opportunity for Inspection.**—Compare notes to section 29c (3), as to failure to permit a reasonable inspection of accounts being an offense punishable by imprisonment, and Form 40 showing what such account should be. See G. O. 17.

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**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.

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Bonds Under the Acts of 1867 and 1898 — Duties of Clerks. [Ch. V.]

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Analogous Provisions of Former Acts.—

. As to the right of a creditor to demand that the assignee give a bond: R. S. section 5036; act of 1867, section 13; act of 1841, section 9. As to duty of the register to give a bond: R. S. section 4995; act of 1867, section 3.

**Bonds Under the Acts of 1867 and 1898.**—Under the Act of 1867, registers were always required to give bonds, but assignees were not obliged to do so, unless the court on motion of a creditor expressly ordered it.

For form of bond of referees under present law see Form No. 17; for bond of trustees see Form No. 25; and for order approving bond of trustees see Form No. 26.

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**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 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.

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Analogous Provisions of Former Acts.—

As to duty to account for moneys received: Rule XXVIII of General Orders in Bankruptcy, under the act of 1867. As to general duties of the clerk: Rule I of Orders in Bankruptcy, under the act of 1867.

In addition to the duties of the clerks set forth in this section see G. O. 1, 2 and 3, as follows:

## § 52.] Close of the Case—Compensation of Clerks and Marshals.

**I. 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. 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. PROCESS.**

All process, summons and subpoenas 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.

**Close of the Case.**—It would seem that a case is not closed so as to justify the clerk in paying the referee his fees until the latter has transmitted to the clerk all the records required to be kept by him. (Compare section 39*a* [7].)

**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 service 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.

Analogous Provisions of Former Acts.—

R. S. sections 5124, 5125, 5127, 5127A, 5127B; act of 1867, sections 5 and 47; act of 1841, section 13; act of 1800, sections 46, 47; act of July 27th, 1868, ch.

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**Compensation of Clerks and Marshals — Payment in Advance.** [Ch. V.]

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258, section 2. As to deposit of guarantee of amount of fees: R. S. section 5124.

Compare also G. O. 35, partially quoted heretofore, which in full is as follows:

**XXXV. 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.

See as to right to require indemnity G. O. 10. And as to accounts of marshals, see G. O. 19.

The statutory marshals' fees will be found in U. S. R. S. sec. 829.

But the marshal's compensation in the care of property is, like the receiver's, in the discretion of the court. See under section 2 "POWER TO TAKE CHARGE OF PROPERTY," and cases cited.

**Payment in Advance.**—The marshal has a right to demand in advance the payment of his fees for the service of process. (Ray

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**§§ 53, 54.] Duties of Attorney-General — Statistics.**

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*v. Knowlton*, 11 Biss. C. C. 360; *Duy v. Knowlton*, 14 Fed. 107.)

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**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.

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No Analogous Provisions in Former Acts.

**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.

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No Analogous Provisions in Former Acts. /

## CHAPTER VI.

### CREDITORS.

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 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 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.

*f* Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.



**Analogous Provisions of Former Acts.—**

As to notice to creditors of the time and place of first meeting: R. S. section 5019; act of 1867, section 11; act of 1841, section 7; also R. S. section 5032; act of 1800, section 6. As to presiding officer: R. S. section 5033; act of 1867, section 12. As to choice of trustee at first meeting: compare Analogous Provisions of Former Acts, given under section 44 of this act. As to the second meeting specially provided for by the act of 1867, and the purpose thereof, and the proceedings thereat: R. S. section 5092; act of 1867, section 26; act of 1800, section 29. As to the third meeting specially provided for by the act of 1867: R. S. section 5093; act of 1867, section 28; act of 1800, section 30. As to the other meetings, and notice thereof: R. S. section 5094; act of 1867, section 17.

**Order and Notice.**—The usual practice is that after adjudication the matter is generally referred to the referee to take further proceedings therein, which includes everything which is not specifically reserved for the Judge by the provisions of this Act. (See section 38 *ante* on powers of referee.) The referee then sends a notice of the first meeting to creditors. (See Form No. 18 and sections 58a (3) and 58b and c.) The proceedings at the first meeting will be to prove debts and to elect a trustee. (See section 44.) A recent opinion of District Judge Purnell, *in re* Eagles and Crisp (3 Am. B. R. 733; 99 Fed. 695), contains a valuable outline of the practice at the first meetings and is quoted as follows:

“It would not be inappropriate for referees to follow the familiar practice of ‘explaining the object of the meeting’ to creditors and attorneys not familiar with the practice in the courts of bankruptcy. \* \* \* 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. Adjournments may be had if the business requires it, but all adjournments are the same meeting, in contemplation of law. If no creditor appears, the meeting is as effectual as if they were present or represented. The court, judge, or referee is not authorized or required to wait for or ‘count a quorum.’ If, in such case, the schedules disclose no assets, the court may order that no trustee be appointed. Rule 15.

The referee should be punctually present at the time and place specified in the notice. He or the judge presides, and his duties are judicial. He does not otherwise participate. The bankrupt is required and should be actually present at the first meeting. It is a creditors’ meeting, and they (the referee and the bankrupt) are there to assist the creditors—the first as an officer of the law, and the other to aid him in so doing. Thus aided, the referee should, in most

cases, be able to pass upon all claims which have been or may be presented at the meeting. Bankr. Act, sec. 55c. Having thus passed upon the claims presented, a creditor to participate in and vote at such meeting must own an unsecured claim, provable in bankruptcy, and must not only have proved such claim, but had it allowed. *Id.* secs. 56a, 56b, *in re Hill*, Fed. Cas. 6,481, 1 N. B. R. 16; *in re Altenheim*, Fed. Cas. 268, 1 N. B. R. 85. Secured creditors cannot vote at such meetings, unless their claims exceed the amount of the security held by them, and then only for such excess as shall be allowed by the court. Bankr. Act, sec. 56b. An attorney, agent or proxy can represent and vote for such creditors, but, before being permitted to do so, should be required to produce and file written authority from the creditor, which should be filed by the referee as a part of his record. *In re Sugenheimer* (D. C.) (1 Am. B. R. 425), 91 Fed. 744. Creditors holding claims which are secured or have priority are not, in respect to such claims, entitled to vote. To do so, such security or priority must be surrendered. *In re Saunders*, Fed. Cas. No. 12,371, 13 N. B. R. 164; Bankr. Act, sec. 57 g; *in re Conhaim* (D. C.) (3 Am. B. R. 249), 97 Fed. 924. This provision illustrates the homely maxim of Heywood, hoary with the age of over four centuries, that one cannot eat his cake and have his cake too. The creditor must decide. He can make a surrender, thus becoming an unsecured creditor, and participate with other creditors in the management of the estate, or he can stand on his security or priority. He cannot do both. He cannot run with the hare and hold with the hounds, as boys who run rabbits would express it, quoting a sixteenth century authority.

Assisted as indicated by the schedules, the bankrupt, and others interested, creditors present, it would seem the court could pass on all or most of the claims without difficulty or delay. If a particular claim is objected to, the question should be heard as soon as feasible, and, if the court (judge or referee) is not satisfied with the weight of evidence, the hearing may be postponed and heard at some subsequent time. The Act of 1867 provided expressly for such postponement, and the Act of 1898 does not prohibit, but, by lodging a large discretion in the court, warrants and contemplates it. On a decision, the allowance or rejection of a claim of \$500 or over, both may be reviewed by the Court of Appeals. Bankr. Act, sec. 25, subd. 3. The effect of allowing or postponing the hearing on a particular claim affects only the creditor's right to vote at the first meeting of creditors. If made to appear the result would be changed by such vote or votes, the judge or referee may set aside the result, and order a new vote to be taken. When it appears the right to vote would not affect the business of the estate, the proceedings would not be disturbed to allow a creditor to exercise the right to vote when it would be barren of results. A creditor who has received a preference must surrender such preference before he can participate in a meeting of creditors. By the adjudication, the estate of the bankrupt is in the custody of the court. If the preference is by the assignment of securities, the creditor cannot realize on such securities, or release the debtor of the bankrupt, except through the Bankrupt Court. See *In re Cobb* (D. C.) (3 Am. B. R. 129), 96 Fed. 821, and authorities cited. Such creditor should prove and file his claim, and his

preference, if valid, will be protected by the court, but he cannot participate in meetings as an unsecured creditor. In a proceeding like the one at bar, the creditors of the partnership elect the trustee, but an individual creditor of one of the partners cannot vote for a trustee of the partnership. Bankr. Act, sec. 5b."

The foregoing extract gives a very excellent *resumé* of the practice. It should be kept in mind that the creditors select the trustee. (Section 44.) See for further discussion of this subject section 57 on proof of claims.

Subsequent special meetings of creditors for any cause whatever are expressly provided for in G. O. 25, which is as follows:

#### XXV. 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.

And G. O. 4 is as follows:

#### IV. CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt 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 counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, 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.

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.

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 Analogous Provisions of Former Acts.—

As to voters in general: R. S. section 5034; act of 1867, section 13. As to preferred creditors being deprived of a vote under the act of 1867: R. S. section 5035; act of 1867, section 18.

See quotations from the case of *Eagles and Crisp* under the preceding section as to the method of voting.

**Vote Required.**—Only persons whose claims have been allowed and who are present may vote; mere proof of claims is not sufficient, as under the former act. The vote required under this act is the majority in number and amount of all whose claims have been allowed and who are present. Under the former act a majority of all who had proved their claims, whether present or not, was required. Secured creditors may now vote even at the first meeting; in this respect also, the present law differs from the former law. As to the manner of determining the excess of their claims over the value of their securities, compare section 57 (*e*).

By section 1, subdivision 9, it is declared that the term “creditor” shall include not only the owner of the demand himself, but “his duly authorized agent, attorney or proxy.” Any person, therefore, who assumes to represent a creditor in the functions referred to in section 56a must be a “duly authorized agent, attorney or proxy” of the creditor.

By General Order 21, subdivision 5, it is provided what such due authorization shall consist of, as follows:

“The execution of any letter of attorney to represent a creditor . . . 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, etc.”

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Proof and Allowance of Claims.

A letter of attorney executed on behalf of a partnership must contain the oath of the partner executing it that he is a member of the partnership even though on the same day he has made such oath in a deposition to prove the partnership claim against the bankrupt's estate. (*In re Finlay*, 3 Am. B. R. 738.)

**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 claimant will permit.

*g* The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.

*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 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 reallocated 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.

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**Analogous Provisions of Former Acts.—**

As to manner of proof: R. S. section 5077; act of 1867, section 22; act of 1841, sections 5 and 7. As to who may make proof: R. S. section 5078; act of 1867, section 22; act of 1841, section 5. As to who may take proof: R. S. section 5079; act of 1867, section 22; amended by act of July 27, 1868; ch. 258, section 3; act of 1841, section 5. As to assignee's right to inspect proof: R. S. section 5080; act of 1867, section 22. As to examination and allowance of claims: R. S. section 5081; act of 1867, section 22; act of 1841, sections 5 and 7; act of 1800, sections 16, 37, 39. As to proof of instruments in writing: R. S. section 5082; act of 1867, section 24. As to postponing allowance of claims to which objection is made: R. S. section 5083; act of 1867, section 23. As to proof by preferred creditors: R. S. section 5084; act of 1867, section 23. As to making a list of allowed claims: R. S. section 5085; act of 1867, section 23.

With section 57 must be read G. O. 21 which is as follows:

**XXI. 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.

The following quotation from the opinion of Judge Thomas, *In re Sumner* (4 Am. B. R. 123; 101 Fed. 224) is also valuable in this connection.

"The first question to be decided relates to the method that should be employed by a creditor for the purpose of presenting his claim to the referee for allowance, and to the evidence that should be furnished by him for that purpose.

Section 57a of the act provides:

'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.'

Section 57b provides:

'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



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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.'

This section provides both the method of presenting the claim and the evidence necessary, in the first instance, to sustain it. The 'statement under oath,' if it contain the matter pointed out, is at once the claimant's pleading and his evidence, and makes for him a *prima facie* case.

## Section 57d provides :

'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.'

The meaning of this subdivision is that, if objection be interposed, or the court be not satisfied with the *prima facie* case thus made, the claim shall not be accepted as proven, until disposition shall have been made of such objection, or, if the court continue the consideration, until the court shall be convinced of its validity.

Just here arises the second inquiry: If objection be made to the claim, must the claimant present evidence in addition to the statement provided for in sections 57a and 57b. or has he made such a *prima facie* case as to place the burden upon the objector of furnishing evidence that shall overcome the evidence conveyed to the court by the statement? It is apparent that, if the statement makes a *prima facie* case, the claimant may rest and await the introduction of evidence that shall be opposed to the sufficient evidence presented by the claimant.

## Section 57f provides :

'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.'

It is apparent from subdivision 'f' that the statute contemplates that, after the claimant has presented his claim in the prescribed manner, objection may be made and that thereafter the question of the objection shall be taken up and decided. This does not mean that the burden of proof is upon the objector to disprove the claim, but that he shall produce evidence whose probative force shall be equal to, or greater than, the evidence offered in the first instance by the claimant. The burden of proof is always upon the claimant, but the statute points out how he may meet it for the purpose of making a *prima facie* case; and further provides that a 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. Therefore, if the creditor shall have complied with section 57a, by filing with the referee a statement under oath, he shall be entitled to have his claim accepted, unless from some circumstance the referee demands further evidence from him, or unless an objection is interposed, and such objection is followed by evidence offered by the objector, which shall overthrow the presumptive case made by the claimant. It is proper to inquire, in this connection, whether the objector is entitled to examine the claimant. It is considered that an opportunity should be given to examine the claimant and other witnesses, if the attendance of the same can be procured seasonably and without embarrassing delay, and it may be that in suitable cases the referee should suspend a determination of the matter until evidence can be taken by deposition. But a suspension of the proceedings for the purpose of obtaining the evidence of witnesses not within the jurisdiction of the court should only be exercised where the referee is convinced that there is not only formal objection to the claim interposed in good faith, but also that there is substantial reason for believing that such evidence is necessary for the just administration of the estate. The proceeding before the referee at the first meeting of creditors, looking to the election of a trustee, is intended to be summary, the expeditious administration of the estate is of importance, and no considerable delay should be permitted for the purpose of obtaining evidence respecting claims, unless the court is satisfied that such evidence is of substantial value and necessary to just determination. Experience in this district under the present act illustrates that the provision of the statute committing the selection of the trustee to the creditors permits embarrassments which seriously tend to delay the speedy and proper distribution of the estate. It usually happens that, where there are assets, coteries of creditors are formed for the purpose of controlling the election of a trustee, either in the interest of particular creditors, or for the purpose of carrying to some particular lawyer the emoluments arising from the conduct of the business. As a result, the court has been compelled to appoint a receiver in almost every important proceeding pending the contest over the election of the trustee. Such receiver usually performs a considerable part of the duties that belong to the trustee, and the expense of the administration is largely increased. It is not within the power of the court to withdraw from the creditors their due right to select the trustee, but every effort should be made to put an end to the undue contention, and the consequent delay that accompanies the attempted exercise of that right."

The official forms are quite full respecting the proof of different kinds of debts and these forms should be followed as closely as possible. For proof of unsecured debts see Form No. 31; of secured debts, Form No. 32; of debt due corporation, Form No. 33; of debt due partnership, Form No. 34; proof by agent or by attorney, Form No. 35; proof of secured debt by agent, Form No. 36; affidavit of lost bill or note, Form No. 37. For an

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order reducing claim, see Form No. 38; an order expunging claim, Form No. 39.

As to debts which may be proved see section 63.

It is to be noted that it is not essential that proofs shall be made at or before the first meeting. They may be made at any time within a year after the adjudication and it is not necessary that they should be filed in the first instance with the referee. (See subdivisions c and n of this section and *in re Rider*, 3 Am. B. R. 178; 96 Fed. 808.)

**Questioning the Validity of Judgments Presented for Allowance.**

—The question as to how far a creditor may attack the validity of a judgment rendered against a bankrupt in behalf of another creditor prior to the proceedings, and which the judgment creditor attempts to prove, has been rendered somewhat confusing on account of the failure of some courts to recognize the true rule governing the conclusiveness of judgments. As a general rule a creditor is in a sense privy to his debtor and so is concluded by a judgment or decree obtained by a third person in a court of competent jurisdiction against the debtor without fraud or collusion to the extent that such judgment establishes (1) the relation of creditor and debtor and (2) the amount of the indebtedness recovered thereby. The leading case in this country is *Candee v. Lord et al.* 2 N. Y. 269.

That was a case where a bill had been filed in chancery based upon an unsatisfied judgment obtained by complainant against Russel Lord. The bill charged that the defendants, Henry Lord and William Champlin, had, by fraudulent judgments, sold the debtor Russel Lord's property, and received the proceeds, and prayed that they should account therefor to the creditors of Russel Lord. Defendants Henry Lord and Champlin answered and sought to assail complainant Candee's judgment on the ground that it had been obtained upon a forged endorsement. On an appeal from the chancellor's decision awarding a jury trial upon the issues of forgery (among other things), the Court of Appeals held that in the absence of allegations or proof of fraud or

collusion between the parties in the procuring of the Candee judgment, the defendants were bound and could not relitigate the question of forgery in the creditor's action. In several subsequent cases of the same general character, it was held that the defendants could not, in the absence of fraud or collusion, impeach the consideration of the judgment upon which the action was founded, or be permitted to show that the contract upon which it was rendered had, in fact, no existence or was not enforceable. (*Burgess v. Simonson*, 45 N. Y. 225; *Carpenter v. Osborn*, 102 id. 552; *Decker v. Decker*, 108 id. 128.) And a former judgment (or decree) establishing rights and relations between the parties thereto, while never admissible to defeat or divest any right existing in a person not a party or privy thereto, is admissible against such person for the purpose of proving that the plaintiff in the former judgment sustained to the defendant the *relation* established thereby and was clothed with whatever right the defendant had which was awarded to plaintiff thereby, saving always the right of the third person to impeach the former judgment for fraud or collusion. (*R'y Equipment Co. v. Blair*, 145 N. Y. 607; see, also, *Barr v. Gratz*, 4 Wheat. 213; Bigelow on Est. 149 *et seq.*)

But the courts have refused to extend this doctrine beyond personal judgments. Thus, in *Hassall v. Wilcox*, 130 U. S. 493, the question was as to the priority of liens. One party relied upon the judgment of a State court adjudging him such priority over all other claims, in an action to which the holder of a mortgage prior in time was not a party. *Held*, as against such mortgagee and bondholders, the judgment of the State court was not binding.

In *Brooks v. Wilson*, 125 N. Y. 256, it is held that a judgment between parties to a conveyance or mortgage which affirms the validity of a deed or mortgage, whether obtained by default or upon litigation, would, especially where the exact issue, whether or not it was a fraud upon creditors, was not presented by the pleadings and decided, does not preclude a creditor not a party

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to the action from subsequently assailing the original transaction as a fraud upon his rights as a creditor.

It consequently follows from what has been said that where a creditor offers a claim based upon a personal judgment in a State court other creditors whose dividends would be reduced were such claims allowed and who are not parties to the judgment are not precluded from showing in bankruptcy proceedings that the judgment was obtained by fraud or collusion. In England the principle seems to be somewhat broader and allows the bankruptcy court to go behind a judgment for other causes than alleged fraud or collusion. And the English rule seems to have been followed under the Act of 1867 in the case of *ex parte O'Neil, In re Fowler* (Fed. Cas. No. 10,527; 1 N. B. R. 677; 1 Low. 161), in which it was held that creditors interested in contesting a judgment might show that the judgment was void or voidable for fraud or *irregularity* because they had no right to have it reviewed directly. It seems doubtful however as to whether the American doctrine can be held to go as far as this. Indeed in many cases decided under the old Act it was held that a judgment *in personam* recovered in a State court could not be assailed in bankruptcy, but resort must be had in the State court to test its validity. (See Campbell's case, Fed. Cas. No. 2,349; 1 N. B. R. 165; McKinsey *v.* Harding, Fed. Cas. No. 8,866; 4 N. B. R. 38.) But this view goes too far the other way. The true rule would seem to be that any person who is injuriously effected by a judgment to which he is not a party may attack it in the bankruptcy court for fraud or collusion, but as to other matters it is conclusive. See thoughtful opinion on this subject by Referee Hotchkiss, *In re Phelps* (3 Am. B. R. 434).

In what is said above as to the conclusiveness of judgments it is always implied that a judgment must be regular on its face and the court which rendered it must have had jurisdiction of the subject-matter. It is never too late to raise the question of jurisdiction of the subject-matter; but this is met by another rule that if the court where the judgment was rendered be of general juris-

diction, or, as some cases say, of record, the jurisdiction need not affirmatively appear. (See *in re* Columbia Real Estate Co. 101 Fed. 965; 4 Am. B. R. 411.) It is conclusively presumed and the recitals of the judgment of a domestic court of general jurisdiction may not, as a rule, be contradicted by extrinsic evidence in a collateral proceeding. See cases above cited. The court of bankruptcy while a court of limited jurisdiction as to subject-matter does not need to recite the facts of jurisdiction in order to bring it within this rule. See *Columbia Real Estate Co. supra*.

**Secured and Preferential Creditors.** Section 57e, g, h.—The method of presenting and proving claims has been sufficiently considered in the preceding paragraph and it remains to consider the right of secured and preferential creditors.

Section 1 (23) declares that the term "secured creditors" shall include a creditor who has security for his debts 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 the bankrupt's assets. No matter how great may be the security which one may have, if it be property of another than the bankrupt, the creditor may prove his entire claim against the bankrupt estate, and receive a dividend thereupon, and thereafter institute proceedings to enforce his claim upon the security for the balance. (See *in re* Headley, 3 Am. B. R. 272; 97 Fed. 765.) And this rule applies even where the security that is held is security for a partnership debt but is property of individual members of the firm, the partnership and the individual estates being considered distinct and separate. (*Ex p.* Graves, 2 Jur. N. S. 651; *Ex p.* Peacock, 2 G. & J. 67; *in re* Howard, Cole & Co. 4 N. B. R. 571; Fed. Cas. 6,750; *in re* Coe *et al.* 1 Am. B. R. 275.) Under the Act of 1867 there was no method by which the secured creditor could prove his claim in time to take part in the proceedings at the first meeting.

The provisions of paragraph e were especially intended to save

to that class of creditors the right of participating in the election of a trustee and other business, to the extent of the sums only as seem to be owing over and above the value of their securities. But after their claims have been allowed by the courts at such sums that seem to be owing over and above the value of the securities they must still procure an exact determination of the security in a manner prescribed in paragraph *h* in order that their claims may be allowed, so as to entitle them to dividends. If they elect to rely upon their securities they are not parties to the bankruptcy proceedings at all. There is nothing compelling them to make proof and they may enforce their liens if otherwise valid, subject to the power of stay set forth in section 11 (*q. v.*).

If a creditor, in proving his debt, fails to make mention of his security, he will, as a general rule, be deemed to have elected to prove it as unsecured and to have surrendered his security. (*In re Bloss*, Fed. Cas. 1,562; 4 N. B. R. 147; *Heard v. Jones*, 15 N. B. R. 402; *Ex p. Solomon*, 1 G. & J. 25; *Stewart v. Isidor*, 1 N. B. R. 485; *Hatch v. Seely*, 13 N. B. R. 380; *Ex p. Downs*, 1 Rose, 96; *in re Brand*, Fed. Cas. 1,809; 3 N. B. R. 324; *in re Granger*, Fed. Cas. 5,684; 8 N. B. R. 30; *Ex p. Hornby*, Buch. 351.) But it has been held that proof without mention of the security does not of itself operate as a discharge of a mortgage security; that while the creditor was prevented from setting up the same against the assignee, no one but the assignee could avail himself of the fact. (*Cook v. Farrington*, 104 Mass. 212.) Where the security is the property of the bankrupt held by an indorser, or a person secondarily liable, it is not necessary that the creditor should prove as a secured creditor in order to retain his rights as against the indorser. (*Merchants' Bank v. Comstock*, 55 N. Y. 24.) Where, from ignorance or inadvertence, a claim has been proved as unsecured, the court, in the exercise of its discretion, may permit the creditor to have his proof expunged so that he may take steps to have the value of the security determined and to prove for the excess only. This right will generally be accorded to one asking it and excusing his mistake, if neither the bankrupt nor any other party will be injured;

that is, if their rights after the granting of an order to expunge the proof will not be less or different than they would have been had not the mistake been made of proving the claim as unsecured. (*In re Hubbard*, Fed. Cas. 6,813; 1 Low. 190; s. c. 1 N. B. R. 679.) The court may impose terms and conditions in granting an order permitting an amendment of proof. (*In re Parkes*, Fed. Cas. 10,754; 10 N. B. R. 82; compare also *in re Jaycox & Green*, 8 N. B. R. 241; *in re Clark & Bininger*, Fed. Cas. 2,815; 5 N. B. R. 255; *Greigson v. Girard*, 4 T. & C. [N. Y.] 419; *Ex p. Davenport*, M. D. & D. 313; *in re McConnell*, 9 N. B. R. 387; Fed. Cas. 8,712; *in re Friedman*, 1 Am. B. R. 510.)

The preference referred to in subdivision *g* of the foregoing section is the preference defined in section 60a as follows:

“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.”

Section 60b is as follows:

“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.”

It will be seen that there may be a distinction between the character of a preference which will act as a bar to the proof of creditors unless the preference is surrendered and a preference such as would authorize the trustee to recover the same back from the person receiving it. Under section 57g knowledge by a creditor that he is receiving a preference is not necessary to prevent the proof of the claim, though under section 60b no action will lie by the trustee for the recovery of such preference against the creditor unless the person receiving it, etc., had reasonable cause to believe that it was intended as such a preference. It has



been held that "preference" includes a payment of money and that hence where a bankrupt within four months of bankruptcy, and while insolvent, makes a payment on account to a creditor who is entirely innocent of the insolvency or of the intent to prefer, the creditor will still be put to his election as to whether he shall retain the payment and take no further dividend or whether he shall surrender it and take his dividend with the other unsecured and unpreferred creditors. This is the doctrine which is laid down by the Circuit Court of Appeals for the 7th and 9th Circuits. (See *Electric Co. v. Worden*, 3 Am. B. R. 634; 39 C. C. A. 582; 99 Fed. 400; *in re Fixen & Co.* (C. C. A. ) 4 Am. B. R. 10; 102 Fed. 295; see also District Court decisions *in re Conhaim*, 3 Am. B. R. 249; 97 Fed. 923; *Strobel & Wilkin Co. v. Knost*, 3 Am. B. R. 631; 99 Fed. 409; *in re Sloan*, 4 Am. B. R. 356; 102 Fed. 116.) But it is very clear that the payment to be a preference within the meaning of section 57g must have been made while the debtor was insolvent. (*In re Alexander*, 4 Am. B. R. 376; 102 Fed. 464.)

And the doctrine has been further distinguished, and the rule laid down that a payment is not a preference unless the creditor has knowledge of the intent to prefer. (See *in re Piper*, 2 N. B. N. 7; *in re Smoke*, D. C. N. Y. Aug. 1900, 4 Am. B. R. 434; and see also *Blaky v. Bank*, 2 Am. B. R. 459; 95 Fed. 267.) The decision of the district judge in the *Smoke* case, *supra*, does not go quite so far as to hold the above qualification. What that case actually holds is that a payment made on account in the regular course of business by the debtor who does not know or believe himself at the time insolvent, and who intends no preference by such payment, does not constitute a preference. But the referee's opinion is much broader in its scope. (See report of the case in the American Bankruptcy Reports as above cited.)

The question as to such payment on account being a preference cannot be considered to be settled. At the time of the present writing (Sept. 1900) there is pending in the Supreme Court of the United States an appeal from a judgment of the Circuit Court of Appeals for the 7th Circuit in the case of *Carson, Pirie, Scott*

*&Co. Appellants, v. Chicago Title and Trust Co. Trustee in bankruptcy of Frank Brothers, Appellee*, which the writer is informed is likely to be argued in the October term, 1900, and in which the Court of Appeals has followed its prior decision in the case of *Electric Co. v. Worden* and the question is squarely presented for decision in the court of last review. Most of the cases which hold that the innocent creditor is put to his election in the event of payment having been made on account seem to confine the rule to a payment made within four months of bankruptcy, but if their reasoning is correct a payment made prior to the four months, if made while the debtor is insolvent with intent to prefer, should come as well within the meaning of 60a and 57g. And so it has recently been held in the District of Massachusetts. (*In re Jones*, 4 Am. B. R. 563; 103 Fed. .) At the present time, however, it is unwise to attempt to anticipate the decision of the Supreme Court, but it seems as if the word "preference" in 60a should be confined to the meaning given in the other subdivisions of the same section. The rule making the payment on account by the bankrupt, while insolvent, to the innocent creditor a preference cannot fail to have an unsettling effect upon commercial relations, and even in the face of the weight of authority it is to be hoped that the courts will yet see their way clear to exempting the innocent creditor from the effects of the decision of *Electric Co. v. Worden* and cases following it.

**Two Preferences.**—Under the old law it was held if a creditor had two or more separate debts and received a fraudulent preference as to some one or more of them, but not as to all of them, he could, without surrendering the preference, prove as to those upon which no preference had been received; and also that he might surrender his preference as to certain claims and receive dividends upon them, though retaining it as to others. (*In re Richter*, 1 Dill. 544; s. c. 4 N. B. R. 221; compare *in re Jordan*, 9 N. B. R. 416.) The express terms of that act, required that construction.

But under the present act it has been held that a cred-

itor cannot prove *any* claim against the bankrupt until he has surrendered any preference which he may have obtained. (*In re Knost*, 2 Am. B. R. 471; affirmed in 3 Am. B. R. 631; 99 Fed. 409; *Electric Co. v. Worden*, 3 Am. B. R. 634; 39 C. C. A. 582; 99 Fed. 400; *In re Conhaim*, 3 Am. B. R. 249; 97 Fed. 924; *In re Rogers Milling Co.* 4 Am. B. R. 540; 102 Fed. 687.)

**What is a Surrender.**—The question, what constitutes a surrender, has received much discussion. It is admitted by all that if the assignee is compelled to bring an action to invalidate a transfer, and if he recovers and enters up judgment, no subsequent payment of that judgment by the preferred creditor and no subsequent compliance by him with its terms can be considered a surrender. By his judgment the trustee has “recovered” the property. In legal effect, the transferee no longer has anything to surrender. (*In re Tonkin*, 4 N. B. R. 52; Fed. Cas. 14,094; *in re Richter*, 4 N. B. R. 221; s. c. 1 Dill. 544; Fed. Cas. 11,803.) But how far the proceedings instituted to recover may proceed, and the right still be left in the transferee to surrender, is a point upon which the authorities are greatly at variance. Thus, *In re J. Lee* (Fed. Cas. 8,179; 14 N. B. R. 89), Judge Wallace of the Northern District of New York said: “I have repeatedly held that a voluntary surrender (by a preferred creditor) is a prerequisite to the right to prove, and that it is too late for the creditor to avail himself of the privilege after he has elected to contest the assignee’s title to the money or property preferentially received.” Judge Blatchford of the Southern District of New York, however, held, in many cases, views somewhat different from those of Judge Wallace. *In re J. Riordan* (Fed. Cas. 11,852; 14 N. B. R. 332), was a case which came before him, in which the preferred creditor surrendered his preferences pending the action. The court said:

“That surrender was accepted, and the assignee discontinued the suit voluntarily, and thereby is estopped from alleging that there was no surrender. The assignee might have refused to accept the surrender or to discontinue the suit, except on condition that he should have the same benefit of object-

ing to the proof of debts as if the money had been obtained as a result of recovery. But he imposed no such condition. If he had imposed it, and it had been refused, he might have gone on with the suit, in order, in case of his recovering it, to exclude the proof of the debt. Having waived a recovery, he thereby waived the right to exclude the proof of debt."

On the other hand, numerous decisions laid down the rule that a preferred creditor might surrender his preference at any time before the actual entry of judgment against him. (Compare the following cases cited in the brief by attorneys for preferred creditors: *In re J. Riorden, supra*; *in re H. B. Montgomery*, Fed. Cas. 9,727; 3 Ben. 565; s. c. 3 N. B. R. 137, 429; *in re Kipp*, 4 N. B. R. 593; *in re Tonkin, supra*; *in re C. A. Davidson*, Fed. Cas. 3,599; 3 N. B. R. 418; *in re Scott & McCarty*, 4 N. B. R. 414; Fed. Cas. 12,518; compare also *in re Richter, supra*; *in re Cramer*, 13 N. B. R. 225; Fed. Cas. 3,345; *in re Simeon Leland*, Fed. Cas. 8,230; 9 N. B. R. 209.) In the case of *Burr v. Hopkins* (Fed. Cas. 2,192; 12 N. B. R. 211), a preferred creditor surrendered his preference after an opinion had been given by the court and after findings of fact had been made, but before the actual entry of judgment. It was held by the United States Circuit Court for the Eastern District of Wisconsin, that this was a surrender authorizing the one making it to prove his claim. The extent to which courts have admitted the right of a preferred creditor to surrender may be seen by a consideration of the decisions in *Zahm v. Fry* (Fed. Cas. 18,198; 9 N. B. R. 546), and *Hood v. Karper* (Fed. Cas. 6,664; 5 N. B. R. 358), in which cases it was held that where there was no actual fraud on the part of the preferred creditor, he should in equity have an opportunity of considering whether he would surrender his preference and pay the costs and expenses of the suit, and that the court might properly suspend the entry of the decree to give him an opportunity to do so. The surrender must be to the trustee, not to the bankrupt. (*In re Currier*, Fed. Cas. 3,492; 13 N. B. R. 68.) It is not necessary to surrender a preference except in order to enable one to prove his claim against the party who made the preferential transfer. Thus, if a creditor has received a pref-

erence from a firm composed of two persons, but has an individual claim against one of them, he may prove the latter without surrendering his preference. (*In re Comstock & Co.* Fed. Cas. 3,079; 12 N. B. R. 110.)

The question does not seem to have been passed upon under the present act.

**Subrogation.** Section 57i.—The right of a surety of a debtor to prove the claim of a creditor when the latter neglects to do so, and to be subrogated to the rights of the creditor, if he discharges the indebtedness in whole or in part, is an equitable right. It exists only when the principal creditor could prove. If he, by accepting a preference and refusing to surrender it, cannot prove the claim, the sureties cannot prove it.

The relief is the same as the surety would have if the creditor should prove his claim. The creditor has no right to anything more than payment while the surety who has borne the burden is entitled to the benefit. These rights arise not from the original contract of suretyship but from the equities of the subsequent transactions. (*In re Bingham*, 2 Am. B. R. 223; 94 Fed. 796.) But it has clearly been held under the present act that a creditor of a bankrupt is entitled to prove his full claims against the bankrupt's estate in preference to a surety who has paid part of such indebtedness. This question was squarely presented in the case of *In re Heyman* (D. C. N. Y., 2 Am. B. R. 651; 95 Fed. 800), where the question for decision was whether the surety may discharge part of the debt due from the bankrupt and be at once subrogated *pro tanto* to the rights of a creditor and prove his claim against the estate. In dealing with the question Judge Thomas said:

Sec. 57, subd. 1, provides:

'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.'

Rev. St. sec. 5070 (Bankruptcy Act, sec. 19) provides as follows:

'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 the creditor has proved the same, although such payments 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 such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders.'

Sec. 57 of the Act of 1898 states that the surety may prove the claim in the name of the creditor in case the latter does not make such proof, and enables the surety, in case he discharge the debt in whole or in part, to be subrogated to the rights of the creditor. The construction would be permissible that the surety is subrogated to the rights of the creditor to the extent to which he has paid the debt, but, if he has paid nothing, he must await the action of the creditor; and, in default of such action, the surety may act for the creditor in the matter of proving the claim. The construction placed upon sec. 19 of the Act of 1867 leads to a contrary conclusion. That section states in terms that the surety who has discharged the debt in whole or in part shall be entitled to prove the debt, or, if the creditor has proved it, to stand in his place. That section further states, that, if the surety has not paid the whole of the debt, but is still liable for the same, or any part thereof, he may, if the creditor omits to prove the debt, prove the same, either in the name of the creditor or otherwise, as may be provided, etc. These two sentences of sec. 5070, Rev. St. on certain state of facts might not entirely accord, but it is considered that the section is the full equivalent, and no more than an equivalent, of subd. 1 of sec. 57 of the Act of 1898. In such case it seems suitable to follow the interpretation placed upon sec. 5070, Rev. St. From the decisions relating to the former act, it appears that the creditor is entitled to prove his full claim in preference to a surety, who has discharged a part of his indebtedness. The authorities tending to establish this holding are: *In re Ellerhorst*, 5 N. B. R. 144; Fed. Cas. 4381; *in re Hollister*, 3 Fed. 452; *Stewart v. Armstrong*, 56 Fed. 171; *in re Souther*, 2 Low. 322, Fed. Cas. 13184; 9 N. B. R. 502; *Bank v. Pierce*, 137 N. Y. 444; 33 N. E. 557. See *Downing v. Bank*, 11 N. B. R. 372; Fed. Cas. 4046.

But irrespective of the provisions of any particular statute a surety paying the debt of his principal after bankruptcy may set off the amount so paid against his debt to the bankrupt. See recent case of *In re Dillon* (4 Am. B. R. 63; 100 Fed. 931), in which it was held that where upon the dissolution of a firm one partner agrees with his retiring co-partners to become responsible for the payment of all firm debts and liabilities, the retiring partners become in equity sureties for the remaining partner, and

this relationship is recognized in bankruptcy. Hence where the retiring partner is compelled to pay a debt of a firm in whole or in part he becomes subrogated to the claim of the creditor, *pro tanto*. Where the original creditor has not proved his claim the surety seeking to prove it must be required to prove it in the creditor's name. As to whether, when the surety is unable to prove the creditor's claim which he has paid, on account of its being a preference, the surety may set it off against his debt due to the principal, *quaere*.

On the same general subject see G. O. 21 (4).

**Debts to the United States.** Section 57j.—Compare commentary under section 17 on this subject. As to the rights of the United States to a priority of payment, compare section 64.

**Reconsideration.** Section 57k.—The right given by this paragraph and also by G. O. 21 (6) quoted *ante* under this section to reconsider claims which have been allowed, and to reallow or reject them, is merely declaratory of the law. It is a matter within the discretion of the court, and the only limitation is that provided for in the statute itself, namely, that claims shall not be reconsidered after the estate has been closed. Up to that time the court has ample power to investigate a claim and to make any corrections which equity or justice demands. It may reduce the amount if it is too large, or may increase it, if by mistake it was proven for too small a sum, but the court will reconsider under this section only claims against the bankrupt that were in existence when the petition was filed and not claims for expenses of administration, such as a receiver's account. Such expenses should be promptly objected to and an exception filed when the question is raised before the referee. (*In re Reliance Co.* 4 Am. B. R. 49; 100 Fed. 619.) In a proceeding to reconsider, the burden of proof rests upon the petitioner. The original allowance establishes a *prima facie* case. It has been held that the bankruptcy court may expunge or dismiss a claim on account of matters occurring after the proof is made. (*In re J. C. Loring*, Fed. Cas. 8,512; 1 Holmes, 483.)

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Effect of Proving a Claim — Allowance, etc.— Notice to Creditors. [Ch. VI.]

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**Effect of Proving a Claim Upon a Continuance of Other Proceedings to Enforce It.** Section 571.—(Compare section 11, paragraph on EFFECT OF PROOF ON RIGHTS OF ACTION.)

**Appeals from the Allowance or Disallowance of Claims.**—Compare section 25 *a* (3), and section 25 *b*.

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**SEC. 58. Notice 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 hearing 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.

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**Analogous Provisions of Former Acts.**—

As to notices of first meeting: R. S. section 5019; act of 1867, section 11. As to notice of filing of trustee's account: R. S. 5096; act of 1867, section 28. As to notice of dividends: R. S. section 5102; act of 1867, section 27; act of 1841, section 9; act of 1800, section 20. As to notice of application for discharge: R. S. section 5109; act of 1867, section 29; act of 1841, section 4. As to notice of application for confirmation of composition: R. S. section 5103A. As to notice of meetings in general: R. S. section 5094; act of 1867, section 17.

The statute is so clear in its statement as to need very little commentary. A few matters, however, should be taken into ac-



count in connection with the section. Thus by G. O. 4 it is provided that notices and orders not required by the Act or by the General Orders to be served on the party personally may be served on his attorney. And by G. O. 21 (2) it is provided that any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at such place as he shall designate and until some other designation shall be made all notices shall be so addressed. As to notice of re-examination of claim see G. O. 21 (6). The notice of hearing on the bankrupt's petition for discharge is given by the clerk upon Form No. 57; other notices are given by the referee.

As notice by mail of all examinations of the bankrupt is required by this section it is important that where such examination is to take place upon his application for discharge, the notice of such application for discharge should contain a notice of the examination of the debtor to avoid the necessity of further notice (*In re Price*, 1 Am. B. R. 419; 91 Fed. 635.) But the court may, by section 7 (9), order an examination at any time during the pendency of proceedings upon ten days' notice. *Id.* The language of subdivision 4 respecting notice of proposed sales of property should be read in connection with section 70b. In this connection attention should be called to G. O. 18, subdivision 3 which provides as follows:

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, without notice to the creditors, and the proceeds to be deposited in court.

The provision in regard to the notice of declaration and time of payment of dividend is exemplified in Form No. 41, by which it will appear that notice is given by the trustee after the list of claims and dividends has been delivered to him by the referee and addressed to each creditor stating that such creditor may receive a warrant for the dividend due to him on the day named that if he cannot personally attend the warrant will be delivered

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Notice to Creditors—Necessity of Notice to Give Jurisdiction. [Ch. VI.]

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to his order upon his filling up and signing a form which is attached to the notice. The provision in regard to the notice to creditors of the first meeting implies that such notice shall be published as well as served. (Form No. 18.) Notice of the filing of the final accounts of the trustee, and the time and the place where they will be examined, is clearly a notice to be given after the filing of the account. Compare sec. 47(8); also R. S. sec. 5,096. Notice of the proposed compromise of the controversy must be notice of the application of the trustee for an order from the court permitting such compromise. Compare section 27. As to notice of the proposed dismissal of the proceedings, compare section 59 (g). As to the newspaper in which notice of the first meeting shall be published, compare section 28.

Except so far as additional notice may be required by the General Orders or by the practice of a particular district, or by the Rules of Equity, this section is practically exclusive and notice is not required in other cases. Thus it has been held that the Judge of the bankruptcy court may appoint a special as well as a general referee without any notice to any of the parties. (*Bray v. Cobb*, 1 Am. B. R. 153; 91 Fed. 102.) No notice is required to creditors before the referee may settle attorney's fees, and presumably costs of administration. (*In re Stotts*, 1 Am. B. R. 641; 93 Fed. 438.)

**Necessity of Notice to Give Jurisdiction.**—The courts hold that a proceeding in bankruptcy is in the nature of a proceeding *in rem*; that jurisdiction is obtained by the petition, adjudication, and the taking of the property into the custody of the court. Actual personal notice to the creditors, though required by the statute, is not necessary to give the court jurisdiction over the creditors. In *Rayl v. Lapham* (27 Ohio St. 452; s. c. 15 N. B. R. 508), it was said: "The statute directs certain acts to be done and publication to be made for the purpose of affording a reasonable opportunity of notice to the creditors, but the proceedings are so far *in rem* that *actual* notice to the creditors is not essential to the jurisdiction of the court, nor will the want of it invalidate

the discharge which the court is empowered to grant to a bankrupt.”

And see decided under the present Act, *Southern Loan and Trust Co. v. Benbow*, 3 Am. B. R. 9; 96 Fed. 514; *in re Ulfer Clothing Co.* 3 Am. B. R. 425; 98 Fed. 409.

The question as to the effect of want of notice has most frequently arisen in determining the effect of a discharge in bankruptcy upon the claims of creditors to whom no personal notice was given, and the rule enunciated in *Rayl v. Lapham* is in harmony with the decision of nearly all the courts under the former act. (*Thurmond v. Andrews*, 13 N. B. R. 157; s. c. 10 Bus [Ky.] 400; *Platt v. Parker*, 13 N. B. R. 14 [citing *Payne v. Albe*, 4 N. B. R. 220; s. c. 7 Bush (Ky.) 344]; *Heard v. Arnold*, 15 N. B. R. 543; s. c. 56 Ga. 570; *Pattison v. Wilbur*, 10 R. 448; s. c. 12 N. B. R. 193; *Williams v. Butcher*, 12 N. B. R. 143; *in re Archenbrowne*, Fed. Cas. 504; 11 N. B. R. 149 [citing *Hill v. Robbins*, 22 Mich. 475]; *Symonds v. Barnes*, 6 N. B. R. 377; *Corey v. Ripley*, 4 N. B. R. 503.)

But under the present act creditors whose claims have not been 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 bankruptcy proceedings, will not be discharged. (Section 17 [3].)

**SEC. 59. Who may File and Dismiss Petitions.**—*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 creditor

have joined 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 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.

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#### Analogous Provisions of Former Acts.—

As to voluntary petition: R. S. section 5044; act of 1867, section 11; act of 1841, section 7. As to involuntary petitions, and the necessary amount of petitioners' claims: R. S. section 5021; act of 1867, section 39; act of 1841, section 7; act of 1800, sections 1 and 2.

**Voluntary Petitioners.** Section 59a.—There is some conflict of authority as to the right of a person to file a voluntary petition after an involuntary petition has been filed against him. It was held that this could be done, *In re Canfield* (1 N. Y. Leg. Obs. 234; s. c. 5 Law Rep. 415), a case decided under the act of 1841. The contrary was held *in re R. Stewart* (Fed. Cas. 13,419; 3 N. B. R. 108), decided under the act of 1867. In this case an adjudication was made upon the voluntary petition by the register, but the same was set aside by the court on motion. The court, in granting the motion, said: "It was never intended by the Bankrupt Act, and

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**§ 59.] Who May Become Bankrupts — Petitioners in Involuntary Proceedings.**

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no correct rule of practice can tolerate, that when a creditor has instituted proceedings to force his debtor into bankruptcy, such debtor should be allowed to become a bankrupt, and be adjudicated as such on his own petition before the determination of the creditor's petition. To permit such a practice might work a most flagrant wrong upon the rights of the petitioning creditor." *In re C. A. Davidson* (Fed. Cas. 3,599; 3 N. B. R. 418), a case arising in the southern district of New York, it appears from the facts stated in the opinion that creditors filed an involuntary petition; that the debtor denied the facts of the petition, and upon a trial was adjudged a bankrupt upon the petition of the creditors; but in the meantime the bankrupt filed in the same court his voluntary petition to be adjudged a bankrupt, and was so adjudged prior to the adjudication upon the involuntary petition, and the usual proceedings subsequent to an adjudication followed the adjudication on the voluntary petition, and none of these proceedings were assailed or were questioned by the court.

But under the present act it has been held that the pendency of an involuntary petition before adjudication will not necessarily invalidate a subsequent voluntary petition filed in the same or in another district. The question of jurisdiction must be determined upon each petition and neither is necessarily conclusive of the other. (*In re Waxelbaum*, 3 Am. B. R. 392; 98 Fed. 589, So. Dist. of N. Y.)

**Who May Become Bankrupts.**—Compare notes to section 4. A State court has no right to enjoin a party from applying to the court of bankruptcy to be adjudged a voluntary bankrupt. (*Fillingin v. Thornton*, 49 Ga. 384; s. c. 12 N. B. R. 92.)

**Petitioners in Involuntary Proceedings.** Section 59b, *et seq.*—It has been held that a State court has the power to restrain, by injunction, a creditor from prosecuting a fraudulent and oppressive petition in bankruptcy against a debtor, especially in cases where the petitioning creditor has, prior to filing the petition, sought the aid of the State court with reference to the claim held by him. (*Pusey v. Bradley*, 46 How. Pr. 255; s. c. 1 N. Y. Supr. [T.

& C.] 661, citing 3 Edw. Ch. 203, 205; 17 How. Pr. 464; 6 Abb. Pr. 239.)

A person may request his creditors to institute proceedings in bankruptcy against him, and the adjudication will not be assailable as being fraudulently obtained. (*In re Bouton*. Fed. Cas. 1,706; 5 Saw. 427.)

A person may lawfully buy up claims so that he may enable himself to join in a petition in bankruptcy, and make up the necessary amount of claims. (*In re Shouse, Crabbe*, 482; *in re Woodford & Chamberlain*, Fed. Cas. 17,972; 13 N. B. R. 575.) It is not necessary that the debt of the petitioning creditor be one existing at the time of the act of bankruptcy which is alleged in the petition. (*Phelps v. Clasen*, 3 N. B. R. 87; Fed. Cas. 11,074; s. c. Wool. 204.) As to the right of a creditor holding a claim which is barred by the statute of limitations to file a petition based thereon compare section 63, paragraph on DEBTS BARRED BY THE STATUTE OF LIMITATIONS.

It seems to be the rule that where, upon the filing of an involuntary petition in bankruptcy there are not the proper number of petitioning creditors nor a sufficient amount of claims to support the petition but subsequently and before the adjudication other creditors enter their appearances and join in the petition, such creditors and the amounts of their claims will be reckoned in making up the number of the creditors and the amount of claims necessary to support an involuntary petition in bankruptcy. (*In re Romanow*, 1 Am. B. R. 461; 92 Fed. 510.) It was also held in this case that where there were not a proper number of petitioning creditors nor a sufficient amount of claims to support the petition but subsequently and before the adjudication but more than four months after the act of bankruptcy other creditors entered their appearances and joined in the petition, the petition is valid and an adjudication may be had upon it as it is immaterial when the other creditors join in the petition since it was filed within the four months after the commission of the act of bankruptcy by the insolvent debtor. But a later case, (*In re Bedding-*field, 2 Am. B. R. 355; 96 Fed. 190,) limits the practice to cases

where apparently the original petition represented a sufficient number of creditors and claims and conferred jurisdiction. In the case of *In re Mercur* (2 Am. B. R. 626; 95 Fed. 634), the rule was clearly laid down that where but one creditor has made a petition to his debtor to be adjudicated a bankrupt alleging that the creditors are less than twelve in number when in fact there are more than twelve, other creditors may be allowed to join in the petition and the original petition may be amended, even though the amended petition sets up an act of bankruptcy other than that alleged in the original petition. Where a creditor has joined in an involuntary petition and has subsequently obtained a settlement of his claims he cannot withdraw from the proceedings. (See *In re Beddingfield*, *supra*. and DISMISSAL OF PETITION, *post*, under this section.) Where the petition is filed by one creditor who alleges that all the creditors of the debtor are less than twelve in number and that with his own claim the amount of all equals or exceeds five hundred dollars, it is probable that such allegation may be made upon information or belief. (See *In re Scammon*, 10 N. B. R. 66; 6 Biss. 130; Fed. Cas. No. 12,427.)

Where a petition is filed against one who is a member of a partnership, his debts due as a member of the firm and those due individually are both to be taken into consideration in determining the number and amount. (*In re Lloyd*, Fed. Cas. 8,429; 15 N. B. R. 257.) In the same case it was held that a debt due by the partner to the firm could not be computed in ascertaining the number and amount of his debts, and that where he is a member of two firms, one of which owed the other, that debt could not be counted. In ascertaining whether the debt of the petitioning creditors equals the amount required by the statute, the interest as well as the principal of the indebtedness may be taken in consideration. (*Sloan v. Lewis*, 22 Wall. 150.) Debts not due, as well as those that are due, may be made the foundation of a petition in bankruptcy; they are provable claims, although not then payable. (*In re W. Alexander*, Fed. Cas. 161; 4 N. B. R. 178; s. c. 1 Low. 470; *Linn v. Smith*, Fed. Cas. 8,375; 4 N. B. R. 46.) If the

debt of the petitioning creditor is equal to the amount required by the statute, and his petition alleges the other material facts, he has an absolute right to have an adjudication upon it by the court. Although he may be the only creditor and may have ample remedies in courts of law or equity, that fact furnishes no ground for refusing to adjudicate (*in re W. Alexander, supra*) and this is true, even though it be shown that the proceedings in bankruptcy would be detrimental to the interests of the debtor. If the petitioner's debts really amount to the sum mentioned in the statute, the fact that the debtor has tendered payment is insufficient to prevent an adjudication. This results in part from the fact that if the debtor is insolvent, payment in full would be a preference. (*In re Ouimette*, Fed. Cas. 10,622; 3 N. B. R. 566; s. c. 1 Saw. 47; *in re Williams*, Fed. Cas. 17,703; 3 N. B. R. 286; s. c. 1 Low. 406.) But if a payment of the indebtedness is actually accepted after the filing of the petition, it may be set up and is a sufficient defense. If it is a preference accepted knowingly, it estops the petitioner.

**Counting Preferred Creditors in Computing the Number of Creditors.**—The question whether preferred creditors are to be counted in determining the number and amount of outstanding claims against the bankrupt differs somewhat from the question whether such creditors may be petitioners. The courts which hold that they may be petitioners have imposed as the condition of their doing so the surrender by them of the property preferentially transferred; and further hold that the filing of a petition by a preferred creditor is in itself a waiver of the preference. But until they do surrender their preference, under section 57 (g), their claims are not provable, and therefore, on principle and authority, and in accordance with the statutory definition in section 1 (9), they should not be regarded as creditors. (*In re Israel*, Fed. Cas. 7,111; 12 N. B. R. 204; s. c. 3 Dill. 511; *in re Currier*, Fed. Cas. 3,492; 13 N. B. R. 68; *Clinton v. Mayo*, Fed. Cas. 2,899; 12 N. B. R. 39.) And see under present act *In re Rogers Milling Co.* (4 Am. B. R. 540; 102 Fed. 687.)



**Attaching Creditors.**—Under the former act there was a conflict of authority as to whether creditors, who had secured attachments upon the bankrupt's property within four months prior to the filing of the petition, were to be counted in the number of creditors. It was held *in re* Scrafford (Fed. Cas. 12,556; 15 N. B. R. 104; s. c. reversing the same case, Fed. Cas. 12,557; 14 N. B. R. 184), that they could not be so reckoned; the contrary was held *in re* Broich (15 N. B. R. 11). In both of these cases the attaching creditors appeared in opposition to the petition and claimed the right to oppose the adjudication, even without a surrender of their liens. We consider the rule laid down *in re* Scrafford as more just. A creditor who has secured an attachment or other lien pursuant to legal proceedings is substantially a preferred creditor, if the proceedings were instituted within four months before the petition. It is true, such liens are made void by the adjudication of bankruptcy *per se* (section 67 [c]); but until that time, at least, they have all the elements of preferential transfers. Until there is a surrender of the property attached or subjected to the lien, the attaching creditor would probably not be allowed to prove his claim in bankruptcy. Until he could prove it, he would not be a "creditor," as that word is used in the Bankruptcy Act. (Compare section 1 [9].)

But under the present act Referee Eastman of the Northern District of Illinois, whose report in this respect has been approved by the district judge, without opinion has held, *In re* Cain, 2 Am. B. R. 378, that preferential payments made within four months of bankruptcy in violation of the Bankruptcy Act are to be counted in determining the amount of the debts of the bankrupt. The part of the opinion which passes on the law is here-with quoted.

"The point is made by the attorneys for the alleged bankrupt, that the statute implies the present debts, in speaking of the amount of indebtedness necessary to give jurisdiction in involuntary cases. It uses the word 'owing' debts to the amount of one thousand dollars, and, therefore, it is claimed that it means only those debts which exist at the time of the filing of the petition, irrespective of what creditors the debtor may have paid off in violation of the Bankruptcy Act, are to be counted.

Under the Bankruptcy Law of 1867, it was an important matter to determine the number and amount of the creditors, and contest arose as to whether creditors, who had commenced attachment proceedings, or who had received preferences by transfer or otherwise, should be counted in estimating the number of creditors, as in some instances bankruptcy proceedings would have been defeated if such parties were to be excluded.

*In re Scrafford*, 15 N. B. R. 104; 21 Fed Cas. 866, Judge Dillon held that where it was denied by the bankrupt that the petitioners constituted the requisite one-fourth in number and one-third in amount, and in support of that contention counted creditors who had levied attachments on the debtor's property within four months, it being contended by the petitioning creditors that all those who held such attachment should be excluded from the court, made use of the following language:

'One object of the Bankruptcy Law is to secure an equal distribution of the estate of the bankrupt amongst all of his unsecured creditors, and in order the more effectually to accomplish this, creditors who have obtained preferences are excluded from participation in the proceedings until after the election of an assignee. I can see no reason why attaching creditors should not be governed by the same rules which apply to other creditors, whose debts are secured by preferences which the adjudication will defeat. Indeed, as all attachments levied within four months between the filing of the petition in bankruptcy would be dissolved, *ipso facto*, by an assignment under the bankruptcy proceedings, persons holding liens by such attachments would seem to have a peculiar interest in defeating an adjudication, and for this reason should not be reckoned, for the purpose of those proceedings, as creditors of the alleged bankrupt. Of course they could not be counted if the attachments were sued out with a view of obtaining a preference over other creditors; and as, in most cases, a ground of attachment is also an act of bankruptcy, the presumption would be strong that such was the object of an attaching creditor. A person with a knowledge that his debtor has committed an act of bankruptcy, should not be permitted by attachment to hold a preference over the creditors. I do not think that creditors, any more than the debtor, should be permitted thus to defeat the object of the Bankruptcy Law. A secured creditor cannot vote for assignee, nor can he have his debtor adjudged a bankrupt. If he cannot be counted in favor of the proceedings to put the debtor into bankruptcy because he is secured, there is no principle upon which he could be counted against them.'

The reasoning of that case, if applied to the matter in hand would seem to suggest the converse, viz.: that in ascertaining the number of creditors which the bankrupt was owing at the time of the filing of the petition, the one who has secured a preference which it is assumed is voidable, would be counted. Otherwise, as suggested in the case cited, the object of the law in providing for an equal distribution of the estate of the bankrupt amongst all his creditors would be defeated. I do not think that the voidable transaction should be treated as valid whereby the bankrupt could prevent the adjudication."

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§ 59.] Secured Creditors — Exclusion of Employes — Dismissal of Petition.

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**Secured Creditors.**—By the express provision of the statute, secured creditors may now be petitioners; but only the excess of their claim over the value of the securities held by them is considered as the debt due to them.

**Exclusion of Employes.** Section 59e.—The statute provides that the claims of employes and of relatives within the third degree shall be excluded in computing the number of creditors. Under an analogous provision in the former act excluding creditors holding claims amounting to less than two hundred and fifty dollars, it was held by nearly all the courts that there was nothing in the language of the act excluding such persons from being counted in computations as to the amount of the bankrupt's debts. But under the present act the amount of the claims of creditors, other than the petitioners, is entirely immaterial. Only the number is considered; and even that is not material, if there are three petitioners with claims aggregating five hundred dollars. It will be noted that by the terms of the present statute such persons are excluded only in case they have not joined in the petition. The manifest purpose of the statute is to prevent an insolvent debtor from stopping an adjudication against himself by the creation of a number of small debts to persons related to or dependent upon him. As to the determination of degrees of relationship by the rule of the common law, compare notes to section 35.

**Dismissal of Petition.** Section 59g.—This subdivision as to the notice to the creditors is mandatory and the notice to be given is the notice provided in section 58. See *Neustadter v. Chicago Drygoods Co.* (3 Am. B. R. 96; 96 Fed. 830), which holds that the provisions of law contained in section 58 (8) and in section 59g mean dismissals which in effect withdraw the case without the decision of the court as to its merits and do not require notice to the creditors who have not appeared at trials or hearings in involuntary cases. But even where a majority of the petitioning creditors consent to the dismissal of the petition for involuntary bankruptcy the remaining minority have the right to insist upon

an adjudication if an act of bankruptcy has been committed. The leading case on this subject under the present act is *In re Cronin* (3 Am. B. R. 552; 98 Fed. 584). The following is from the opinion of Lowell, J., in that case:

“ If a respondent has committed an act of bankruptcy, and the statutory number of his creditors has duly petitioned for his adjudication as a bankrupt, the court must make the adjudication, even though it is satisfied that a compromise offered by the respondent would be for the best interest of the creditors. Bankruptcy is not a remedy like an injunction or the appointment of a receiver, granted in the discretion of a court of equity. The distribution of a debtor's assets is to be made in bankruptcy if he has committed an act of bankruptcy, and the other statutory requisites have been complied with. Fraud, oppression, or even mistake may, in some cases, be sufficient grounds for dismissal of the petition; but none of these grounds exist here. Lowell, Bankr. p. 39; *King v. Henderson* (1898), App. Cas. 720. Is the condition altered by the fact that the majority of the petitioners have come to desire a dismissal of the petition, which dismissal is resisted by the minority? Will the assent of a majority of the petitioners enable the court to act for the interest of the creditors by dismissing the petition, or has the minority the right to insist upon an adjudication, if an act of bankruptcy has been committed? I think that in this case the right of the minority is absolute. After petitioners have joined a petition, they cannot ordinarily withdraw against the wishes of their fellow petitioners. Lowell, Bankr. p. 34; *In re Heffron*, 10 N. B. R. 213, Fed. Cas. 6321; *In re Sargent*, 13 N. B. R. 144, Fed. Cas. 12361. *In re Indianapolis, C. & L. R. Co.* 5 Biss. 287, Fed. Cas. 7023, the court did, indeed, dismiss an involuntary petition, against the objection of two creditors, but only after payment in full had been secured to the objectors; and Judge Drummond said:

‘ I think that the Bankrupt Court, as a court of equity, has a full, equitable discretion upon this subject, and can allow a case to be withdrawn from it, provided it is done without prejudice to the interests of any of the parties, debtors or creditors, who are before it. And in this case I think it was competent for the Bankrupt Court to allow the case to be withdrawn from it, protecting the interests of the different non-assenting creditors.’ ”

**Estoppel of Creditors to Petition.**—Even creditors holding provable claims may not always be petitioners in bankruptcy. Like parties to legal proceedings in general, they are subject to the principles and doctrines of *estoppel*. Applying these principles, it has been generally held that a creditor who has given his consent to an act is estopped from thereafter urging it as an act of bankruptcy. (*In re Israel*, Fed. Cas. 7,111; 12 N. B. R. 204; s. c. 3 Dill. 511; *in re Schuyler*, Fed. Cas. 12,494; 2 N. B. R. 549; s. c. 3 Ben. 200; *in re Currier*, Fed. Cas. 3,492; 13 N. B. R. 68;

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Estoppel of Creditors to Petition.

s. c. 2 Lowell, 436; *Perry v. Langley*, Fed. Cas. 11,006; 1 N. B. R. 559; s. c. 7 A. L. Reg. 429; *Everett v. Derby*, 5 Law Rep. 225.) In general, a creditor who assents to a preferential transfer to himself, or who accepts the benefits of a general assignment for the benefit of creditors, is estopped from alleging it as an act of bankruptcy. (*In re E. G. Williams*, Fed. Cas. 17,703; 14 N. B. R. 132.) But the mere receiving of a preference, not being in itself a fraud, and not being even voidable at the time, and never voidable unless the petition in bankruptcy is filed within four months thereafter, does not estop one from filing a petition if he surrenders his preference. (*In re Hunt & Hornell*, Fed. Cas. 6,882; 5 N. B. R. 433; *in re Rado*, Fed. Cas. 6,230; 6 Ben. 230.) *In re Sheehan* (Fed. Cas. 12,737; 8 N. B. R. 345), it was held that the levy by a creditor of an execution on property of his debtor does not estop him from petitioning to have his debtor adjudged a bankrupt; but the filing of the petition in bankruptcy will be held to be a waiver of the levy and an election by the creditor to proceed in the bankruptcy court. In *Coxe v. Hale*, decided by the United States Circuit Court for the Northern District of New York (Fed. Cas. 3,310; 10 Blatch. 56; s. c. 8 N. B. R. 562), it was held that a creditor knowing his debtor to be insolvent might prosecute his debtor to judgment, issue execution, and levy on the property of his debtor, and afterwards have the debtor adjudicated bankrupt for allowing his property to be taken on the execution. The court in this case based its decision upon the fact that there was no evidence of an intent on the part of the judgment creditor to secure a preference; and held that one was not estopped from proceeding to put his debtor into bankruptcy by taking a transfer, unless he took it with an intention to secure a preference.

But under the present act a creditor receiving such a preference, even innocently, may have to surrender it before petitioning. (See discussion under section 57g.)

Under the present act it has been held that where a bankrupt made an assignment and various creditors filed their claims therein but no other proceedings were taken with reference thereto and

no dividends received, such creditors were not estopped from thereafter filing an involuntary petition in bankruptcy against their debtor. (See *Curtis*, 2 Am. B. R. 226; 36 C. C. A. 430; 94 Fed. 630.) This case which was decided by the Circuit Court of Appeals of the 7th Circuit contains a valuable discussion of the doctrine of estoppel. (See also decision of the Circuit Court of Appeals for the 6th Circuit in *Simonson v. Sinsheimer*, 3 Am. B. R. 824; 100 Fed. 426.) And even where in a general assignment under a State law creditors appear in a State court and attack the alleged preferences under such assignment, they are not thereby precluded from attacking such preferences against the assignor in the bankruptcy court. The bankruptcy proceedings and the assignment are not similar suits on the same cause of action. (See decision of the Circuit Court of Appeals for the 6th Circuit, *Leidigh Carriage Co. v. Stengle*, 2 Am. B. R. 383; 37 C. C. A. 210; 95 Fed. 637.) In order that a creditor may be estopped by any act of his from impeaching the validity of an assignment it must appear that he has accepted an actual benefit under it or that he has assumed such an attitude as would be inconsistent with his attacking it, as where he has recognized it for the purpose of gaining some advantage. In such cases he may not assert its validity whether he did or did not receive, in fact, the benefit supposed. (See *Groves v. Rice*, 148 N. Y. 227; *Haydock v. Coope*, 53 id. 68.)

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**SEC. 60. Preferred Creditors.**—*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

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give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

*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 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.

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**Analogous Provisions of Former Acts.—**

As to voidable preferences: R. S. section 5128; act of 1867, section 35; act of 1841, section 2; act of 1800, section 28; also, R. S. section 5129. As to transfers out of the ordinary course of business being presumptively fraudulent: R. S. section 5130; act of 1867, section 35.

**Construction of Section 60, Subdivisions a and b—What are preferences?—**Most of the preferences arising under this section fall under these two subdivisions. It will be seen by collating the subdivisions that the preferences may consist (1) in the bankruptcy suffering judgment to be entered against him, or (2) in making transfer of his property, with certain other characterizing circumstances to be discussed *post*.

**Suffering Judgments.—**The question as to what constitutes the "suffering" of a judgment has already been examined under section 3a (3), *sub nom.* SUFFERING OR PERMITTING PREFERENCES THROUGH LEGAL PROCEEDINGS. In the comments on the section we have seen that in the case of a preference obtained by legal proceedings the debtor's intent is immaterial and it is enough that the creditor has received a preference by such proceeding and the debtor has permitted it to remain undischarged. It is not

necessary as it was under the act of 1867, that the debtor should do any affirmative act. If he remains passive and allows his property to be taken by one creditor at the expense of another he has suffered a preference. It is true that the words used in section 3a (3) are "suffered or permitted," while the words used in section 60 are "procured or suffered." But as there is no distinguishable difference between the word "suffered" and the word "permit" except that perhaps that "suffered" implies a greater degree of passivity, and as the words "procured or suffered" are used in the disjunctive, there seems to be no reason for holding that there is any difference between the application of section 3a (3) and section 60 as to the effect of a judgment as an act of bankruptcy or as a preference. In respect to both judgments and transfers, intent on the part of the bankrupt is not made an essential element of a preference by section 60, although it is necessary in a transfer claimed to be an act of bankruptcy under section 3a (2).

The cases decided under the act of 1867 are not applicable because section 35 of that act relating to preferences and fraudulent conveyances declares "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, \* \* \* *procures* any part of his property to be attached, \* \* \* the person receiving such payment \* \* \* having reasonable cause to believe such person is insolvent," the preference is void.

The word "suffer" is not used in section 35 of the act of 1867. (See discussion of this question in the case of *In re Thomas*, 103 Fed. 272; 4 Am. B. R. 571.)

The present law seems to judge a preference by its effect. If a transfer of the bankrupt's property is made by him, or if he procures, or suffers a judgment against himself, and if 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, then the transferrer is deemed to have given preference.



**The Elements of a Preferential Transfer.**—There are many differences between the language of the present act and the former acts as to what are to be deemed preferences. The provisions of this section under consideration make insolvency an essential element. Contemplation of insolvency or contemplation of bankruptcy is not sufficient as under the former acts. The present statute, declaring (section 1 [15]) that insolvency means the state of one whose property is not sufficient in amount at a fair valuation to pay his debts, gives to the word a meaning different from that generally given to it by judicial definition in cases decided under the former act, where it was held to mean inability to pay debts in the ordinary course of business as they matured. Consequently the cases under that statute, deciding what acts are evidence of intent to give a preference, have only a modified applicability. It is apparent that an act done by one whose property is in reality insufficient in amount at a fair valuation to pay his just debts, may manifest a different intent from the same act done by one who cannot pay his bills as they mature. A person in the latter condition may make a transfer fully believing, and perhaps justified in the belief, that his property, when turned into money, will eventually pay all his debts. Under the former act many a person who was an insolvent as the word was then defined by the courts, would not be under the definition fixed by the present statute; and the reverse is equally true.

Moreover there is a marked difference between the arrangement of the act of 1867 and that of the present act. Under the act of 1867 many of the provisions contained in section 67e, of the present act, relating to fraudulent transfers, were consolidated with the provisions now contained in section 60 of the existing act. Some confusion has arisen because of the failure to distinguish between the provisions of section 60 of the present act and section 67, the first relating to preferences which are not necessarily voidable at common law or contrary to any rule of ethics, and the second relating to transfers which are as a rule voidable at common law irrespective of the Bankruptcy Statute.

Under the act of 1867, sec. 35, it was provided that,

“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 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 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 or delay the operation and effect of or evade any provision of this act, the sale, assignment, transfer or conveyance shall be void, and if any such sale, assignment, transfer or conveyance is not made in the usual or ordinary course of business of the debtor, the facts shall be *prima facie* evidence of fraud.”

The present act divides these provisions into several classes. The first class is provided for in sec. 60, which in substance provides that where a bankrupt shall have given preferences within four months before the filing of the petition or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby shall have had reasonable cause to believe that it was intended to be a preference, it is *voidable* by the trustee. It will be noticed that under this provision the question of intent is not important. The only two elements which are necessary are that the transferrer should be insolvent and the transferee should have reasonable cause to believe it to be intended as a preference. It must be further kept in mind that as to all persons but the trustee, such transfers are valid.

Another class is the class referred to in section 67e, in which the transfer or incumbrance which has been made *with the intent* to hinder, delay or defraud his creditors or any of them. Such transfers are *void* as to creditors if made within the prescribed time, except as to purchasers in good faith and for a present fair consideration.

Keeping these distinctions in mind it will be seen that a transfer cannot be invalidated under section 60 unless all the following elements concur.

First, there must have been a transfer made while the transferrer was insolvent, the effect of which was to enable one creditor to obtain a greater percentage of his debt than other creditors of

the same class. Secondly, the transferee must have had at the time of the transfer, reasonable cause to believe that the transferrer intended thereby to give a preference. This would involve that the transferee had reasonable cause to believe, (a) that at the time of the transfer the transferrer was insolvent; and (b) that the transferrer intended to create a preference. Third, the transfer must have been made within four months before the filing of the petition in bankruptcy. The insolvency must exist at the time of the transfer, so must the reasonable cause to believe that a preference was intended. Subsequent grounds for reasonable cause are not sufficient. (*In re Eggert*, 3 Am. B. R. 541; 98 Fed. 843; *Crooks v. Bank*, 3 Am. B. R. 242; 46 N. Y. App. Div. 335; *in re Conhaim*, 3 Am. B. R. 249; 97 Fed. 923; see also referee's opinion *in re Jacobs*, 1 Am. B. R. 518, with note.)

**Reasonable Cause.**—The present statute does not make any preferences voidable unless the transferee had reasonable cause *at the time of the transfer* to believe that a preference was intended. It is to be noted that the reasonable cause is cause to believe, not that the transferrer is insolvent, but cause to believe that a preference was intended. This would, however, seem to require reasonable cause to believe that insolvency existed, and also reasonable cause to believe there was a preferential intent. The former act as amended (R. S. §§ 5128, 5129), required that the transferee should have reasonable cause to believe the transferrer insolvent, and that he should also know that the transfer was made as a preference to defeat the object of the act. Now no positive knowledge of any fact is required, but simply a reasonable cause to believe that a preference was intended.

The expression "reasonable cause" is one difficult to explain. It is a question of degree rather than of quality; it admits more easily of determination by comparison than of exact definition. One may be said to have reasonable cause to believe a fact when he has such knowledge as would induce belief of the facts, in the mind of a man of ordinary intelligence and capacity.

The question for determination, if an action is brought to in

validate the transfer is not whether the transferee had actual knowledge or even actual belief of the intent to give a preference, but whether the transferee as a business man, acting with ordinary prudence, sagacity and discretion, had reasonable cause to believe that the debtor was insolvent, and that by the transfer he intended to give an advantage to one creditor over the others. (*Rice v. Melendy*, 41 Iowa, 399; *Toof v. Martin*, 13 Wall. 40; *Wager v. Hall*, 16 Wall. 584; *Buchanan v. Smith*, 16 Wall. 277; *Hill v. Simpson*, 7 Ves. 170.)

Whether or not there was reasonable cause to believe that a preference was intended, may be inferred from all the facts and circumstances of the case, but their determination must be something more than a guess, and the transferee must have had more than reasonable cause to suspect. (*Forbes v. Howe*, 102 Mass. 427.) In the case of *Wager v. Hall* (*supra*), it was said:

“All experience shows that positive proof of fraudulent acts between debtor and creditor is not generally to be expected, and it is for that reason, among others, that the law allows in such controversies a resort to circumstances as the means of ascertaining the truth; and the rule of evidence is well settled that circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.”

The case of *In re Eggert* (3 Am. B. R. 541; 98 Fed. 843), arising under the present act, contains a discussion of this subject; the opinion of Seaman, D. J., is as follows:

“The findings of fact certified in this matter are conclusive against the contention of a preference received by the creditor within the definitions of the statute. The transaction, as so found, was substantially this: The bankrupt was indebted to Rundle-Spence Manufacturing Company in the sum of \$1,373.04 for supplies sold between April 28 and June 5, 1899, on credit, and on July 1st the account was adjusted by giving the bankrupt ‘a discount of ten per cent. which is the usual discount for cash in that line of business,’ and ‘pursuant to the contract under which the goods were purchased,’ and by the acceptance of an order on the city of Milwaukee for \$1,241.10, due or to become due from said city on a contract with the bankrupt. The creditor ‘had no knowledge of the fact that the said’ bankrupt ‘was insolvent and had no reasonable cause to believe that it was intended by the transfer to give it a preference.’ The transaction thus stated is not prohibited by the act; and the further findings of knowledge that the bankrupt ‘was behind in his payments with his

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creditors,' and that no inquiries were made by the creditor to ascertain his solvency, do not affect the liability, when followed by the finding that the creditor 'practiced no fraud or deceit, nor did it act in collusion with the bankrupt.' To constitute a voidable preference, as defined in sections 60a, 60b, the creditor must have reasonable cause to believe the debtor to be insolvent in fact, as the foundation for reasonable cause to believe that an unlawful preference is intended; and on that inquiry the test of insolvency under the present act differs so materially from that established under the Act of 1867 that decisions under the earlier act are not applicable. As now defined (section 1, cl. 15), a person is to be deemed insolvent when the aggregate of his present property 'shall not, at a fair valuation, be sufficient in amount to pay his debts,' while insolvency was found to exist under the Act of 1867 when one 'was unable to pay his debts as they became due in the ordinary course of his daily transactions' (*Buchanan v. Smith*, 16 Wall. 277, 308, 21 L. Ed. 280), and the state of facts which would constitute notice must differ accordingly. Even under that act, however, mere grounds of suspicion were not sufficient notice, but the creditor must have a knowledge of facts calculated to produce a belief of insolvency in the mind of an ordinarily intelligent man. *Grant v. Bank*, 97 U. S. 80, 82, 24 L. Ed. 971. Both findings and testimony in this case disclose a fair business transaction, without taint or suspicion of fraudulent preference, and the conclusions of the referee in favor of the claimant are approved."

And in affirming this case the Circuit Court of Appeals for the 7th Circuit (4 Am. B. R. 449; 102 Fed. 735) reviews the authorities very exhaustively and comes to the following conclusion per Jenkins, J.:

"The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances, which give rise to mere suspicion in his mind of possible insolvency; that it is not 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; that 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, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose."

**Transfers Out of the Ordinary Course of Business.**—By the former bankruptcy act (§ 35 of act of 1867; § 5130, R. S.), the fact that a transfer was not made in the usual and ordinary course of business of the debtor, was made *prima facie* evidence of the fraud.

The present statute contains no such provision, but it has been

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said by very eminent authority: "Independent of the express provisions of the Bankrupt Act, the general rule of law is that the transfer or delivery of property will be considered fraudulent when it is not delivered in the usual course of trade or of the accustomed dealings between the parties." (*Rison v. Knapp*, 4 N. B. R. 349; s. c. 1 Dill. 186; Fed. Cas. No. 11,861; citing *Deacon on Bankruptcy*.)

It was held by the United States Supreme Court (*Walbrun v. Babbitt*, 16 Wall. 577; s. c. 9 N. B. R. 1): "The presumption of fraud arising from the unusual nature of the transaction can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means pursued in good faith must be used for this purpose." And this would be equally applicable under the present law whenever there was a presumption arising from the nature of the transaction, that the transferee had reasonable cause to believe a preference was intended. The degree of diligence required on the part of the transferee in making the inquiry depends upon the circumstances of the transaction; the more suspicious they are, the more diligent in his inquiries must the transferee be. (*Schulenberg v. Kabwreck*, Fed. Cas. 12,487; 2 Dill. 132.) This decision is, in fact, nothing more than an application of the rule above stated that where one has notice of facts tending to show fraud, he is chargeable with all knowledge which he might have obtained by reasonable inquiry, and such reasonable inquiry is that which an ordinary man would make under the circumstances.

**Reasonable Cause Must Have Existed at the Time of the Transfer.**

—The transfer is voidable only if the transferee had *at the time of the transfer* reasonable cause to believe that a preference was intended. It is absolutely necessary that this reasonable cause of belief must have existed at the time of the transfer. Unless there is then reasonable cause to believe that it is made with intent to prefer, no matter what may subsequently develop, the transfer cannot be avoided. Compare the following cases, bearing in mind

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that at the time they were decided, other facts than those now essential to the invalidating of a preference would make it voidable, and that, therefore, the cases are cited only as authorities for the statement that the reasonable cause to believe a preference was intended must be simultaneous with the transfer, in order to invalidate it: *Dow v. Sargent* (15 N. H. 115); *Toof v. Martin* (13 Wall. 40); *Clark v. Iselin* (21 Wall. 360).

In an action to invalidate the transfer, evidence is not even competent and admissible unless it tends to show that this cause for relief existed simultaneously with the transfer. And if the complaint or declaration does not contain a specific allegation that the reasonable cause existed at the time of the transfer, it is demurrable, or judgment may be asked for on the pleadings. (*In re J. D. Hunt*, Fed. Cas. 6,881; 2 N. B. R. 539; *Crump v. Chapman*, Fed. Cas. 3,455; 15 N. B. R. 571.) But evidence of the debtor's financial condition and reputation within a limited period previous to the transfer is competent as tending to show what means the creditor had to know, or what cause to believe that the debtor was insolvent. (*Forbes v. Howe*, 102 Mass. 427.) But it ought to be shown that such reputation was general, or else that it was brought actually or constructively to the notice of the transferee. In accordance with the rule above set forth, that the reasonable cause to believe that the transfer was made with preferential intent must exist at the time of the transfer, it has been held that where one gave to his creditor notes of a third party, which by the law as laid down by the courts of New York and most of the other States, and also by the Federal courts, are only a conditional payment—that is, a payment if the same shall be collected (unless the transfer has been made expressly as a payment), yet even in cases of such conditional payment to render them voidable the reasonable cause to believe that they were given with intent to prefer must exist at the time the notes were accepted, not at the time they were payable. (*In re Ouimette*, 3 N. B. R. 566; s. c. Fed. Cas. 10,622; 1 Saw. 47.)

And in the case of *Sabin v. Camp* (3 Am. B. R. 578; 98 Fed. 974), arising under the present act, the defendant vendor took

property theretofore sold by him to the bankrupt under a clause of defeasance in the contract of sale in the form of an option to repurchase, made more than four months prior to bankruptcy, though the taking of the property was within the four months. This was held not to be an unlawful preference. Judge Bellinger says:

“The transfer by the Colby Company (the bankrupt) to Camp was not a preference under the Bankruptcy Act. It is true, the transaction was consummated within the four months, but it originated in October, 1897. What was done was in pursuance of the pre-existing contract, to which no objection is made. Camp furnished the money out of which the property which is the subject of the sale to him was created. He had good right, in equity and in law, to make provisions for the security of the money so advanced, and the property purchased by his money is a legitimate security and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals. And so when, at a later date, but still prior to the filing of the petition in bankruptcy, Camp exercised his rights under this valid and equitable arrangement to possess himself of the property and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law. It is not pretended that the sale was for an inadequate price, or that there was any fraud, or that the interests of the creditors have been in any way injuriously affected, any further than it may be to the interests of the creditors to secure to their own benefit the property purchased with Camp's money.”

**Knowledge of the Agent.**—The statute makes preferences voidable if the agent of the transferee had reasonable cause to believe a preference was intended. Independently of any statute, the principal would be chargeable with all the knowledge that his agent had at the time of the transaction, which the latter might properly communicate to him. (*Rogers v. Palmer*, 102 U. S. 263; *Sage v. Wynkoop*, 104 U. S. 319; *Bank of U. S. v. Davis*, 2 Hill [N. Y.] 451; *Ingalls v. Morgan*, 10 N. Y. 178; *Fulton Bank v. N. Y. & S. C. Co.* 4 Paige, 127; *Griswold v. Haven*, 25 N. Y. 595; *North River Bank v. Aymar*, 3 Hill, 262; *David v. Bemis*, 4 N. Y. 453.)

**Sub-agents and Collection Agencies.**—Where an agent has power to employ a sub-agent, the latter's knowledge is deemed to be the



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knowledge of the original principal. (Story on Agency, §§ 452, 454; *Storrs v. City of Utica*, 17 N. Y. 104; *Boyd v. Vanderkamp*, 1 Barb. Ch. 273; *Rourke v. Story*, 4 E. D. Smith, 54; *Lincoln v. Batelle*, 6 Wend. 475.) But because of the legal principle that, although the acts of a sub-agent have the same effect as if done by the principal, the acts of the agent of an intermediate independent employer do not bind the original employer, it was held by the Court of Appeals of New York and by the Supreme Court of the United States, that where one gave a claim to a collection agency for collection, and the latter employed attorneys to collect the claim, and the attorneys with full knowledge of the debtor's insolvency induced him to make a preferential transfer by confessing a judgment in favor of the creditors (not in favor of the collection agency), the creditor was not chargeable with the knowledge of the debtor's insolvency which the attorneys had, the creditor never having received the proceeds of the judgment. It was further held that the attorneys were agents of the collection agency, and that the agency was not an agent of the creditor, but an independent contractor. (*Hoover v. Wise*, 91 U. S. 308, citing, as to the relations of commercial agencies to creditors whose claims they take for collection: *Reeves v. State Bank of Ohio*, 80 Ohio St. 465; *Mackersy v. Ramsay*, 9 Clark & Fin. 818; *Montgomery Co. Bank v. The Albany City Bank*, 7 N. Y. 459; *Com. Bank of Penn. v. Union Bank*, 11 N. Y. 203; *Allen v. Merchant's Bank*, 22 Wend. 215; *Bradstreet v. Everson*, 72 Penn. 124; *Lewis v. Peck*, 10 Ala. 142; *Cobb v. Becke*, 6 Ad. & Ellis, N. S. 930. As has been said in the case above discussed (*Hoover v. Wise*) the proceeds of the judgment had not been paid over to the creditors. Whether any moneys had, in fact, been collected does not appear, but the court decided the case on the ground that the collection agency was a debtor to the creditor, and added that whether a different conclusion would be reached if the money had come to the hands of the creditors was a question they were not called on to consider. It is interesting to note that this decision was rendered by a divided court, three of the justices dissenting from the opinion of the court, and in their dissenting opinion clearly

setting forth the dangers which would result from the rule laid down by the majority. It appears that the attorneys appeared as attorneys of record for the creditors; that the collection agency had no interest in the notes collected; that the notes were indorsed over to it; that it did not appear as a party to the action in which the judgment was confessed, and had no control over the proceedings of the attorneys, but that the creditors had full power to control the action. That in the face of all these facts the majority of the court should hold that the creditors were not chargeable with knowledge of the acts of the attorneys, is of the greatest importance. As was said in the dissenting opinion: "The effect of the decision is that a non-resident creditor, by sending his claim to a lawyer through some indirect agency, may secure all the advantages of priority and preference which the attorney can obtain from the debtor, well knowing his insolvency, without any responsibility under the bankrupt law. Very few creditors, when this becomes well known, will fail to act on this politic suggestion." The case was reported below in 61 N. Y. 305; *sub nom.* Hoover *v.* Greenbaum.

**Knowledge of an Attorney of the Creditor Derived as Attorney of the Debtor.**—It is a general rule of law that the knowledge of the agent to be imputed to the principal must be knowledge acquired in the transaction of the business of the principal, or else knowledge acquired in a prior transaction then present to his mind, and which can properly be communicated to his principal. Some question arises, then, as to when the knowledge of an attorney of a creditor, acquired when the attorney was the attorney of the debtor or of another, can be imputed to the creditor. The general rule that a principal is bound by the knowledge of his agent, is based on the principle of law that it is an agent's duty to communicate to the principal, the knowledge which he has respecting the subject-matter of negotiation. When it is not the agent's duty to communicate, when it would be unlawful for him to do so, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of

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the rule ceases, and as the agent would not be expected to do that which would involve a betrayal of his professional confidence, the principal is not bound by the agent's secret and confidential information. (The Distilled Spirits, 11 Wall. 356, [citing *Dresser v. Norwood*, 17 Common Bench, N. S. 466; *Warrick v. Warrick*, 3 Atkyns, 291; *Mountford v. Scott*, Turner & Russell, 274; *Hart v. Farmers' Bank*, 33 Vermont, 252; N. Y. C. Ins. Co. v. Nat. Prot. Co. 20 Barb. 468; *in re Ebert*, 1 Am. B. R. 340.]) But if a person retains one with knowledge that he is retained in the same transaction by another, then he cannot expect the attorney to treat his information as confidential. If knowing that the other party has a right to the full and complete services, knowledge, and skill of the attorney, he also retains him and imparts information to him, it must be considered as done with the understanding that the information imparted shall be imparted or used for the benefit of the other client also.

"Where the attorney of a creditor is prosecuting a debtor to enforce payment of a debt, and by reason thereof the debtor discloses to him that he is insolvent and asks his advice, although the attorney may possibly find himself involved in some conflict of duty, for he certainly has no right to accept in confidence from the adverse party information which his client ought to know, yet he cannot by accepting such retainer evade the operation of the rule. In every step of the prosecution of the claim to collection he is the agent of the creditor; the performance of his duty to that creditor involves the gaining of knowledge of the debtor's insolvency, and no proffered confidence put in him by the adverse party can make that information less his client's property or less information acquired in his agency and imputable to such client." Woodruff, J., in *Mayer v. Herrman*, Fed. Cas. 9,344, 10 Blatch. 256.

**Transfers Made Under Coercion.**—A preference being determined by the effect of the transfer, the fact that the transferrer yielded to coercion is immaterial. (*Clarion Bank v. Jones*, 21 Wall. 325; *Giddings v. Dodd*, 1 Dill. 115; Fed. Cas. 5,405; s. c. 4 N. B. R. 657; *in re Batchelder*, Fed. Cas. 1098; 1 Low. 373; compare notes to section 3, paragraph on INTENT TO BE DISTINGUISHED FROM MOTIVE.

**Transfers Not Giving Advantages to the Transferees.**—The law aims to prevent and it invalidates as preferences only those trans-

fers the effect of which is to enable one creditor to secure an advantage over others. By another section (67e), it avoids all transfers which are made with intent to hinder, delay, or defraud creditors; but these are invalidated, not as preferences, but as fraudulent conveyances. If a transfer does not lessen the fund distributable among creditors, it is not a preference. Sales made at a fair price (and not as a payment upon an antecedent indebtedness) or equal exchanges of property, if made fairly and in good faith, do not injure creditors, and are not prohibited by the bankruptcy law. So there is nothing in that act which restrains one from loaning money to an insolvent and from taking his notes in return, or from taking, in good faith, ample security for the payment of such notes. Such security is not invalidated by the Bankruptcy Act, if the effect of taking it is not to lessen the fund or to diminish the property which would otherwise go to creditors.

The question is very well presented in the case of *In re Wolf*, 3 Am. B. R. 555; 98 Fed. 84. That was a case where some time prior to an application in bankruptcy, the bankrupt borrowed in May a sum of \$200, payable in ninety days from date, and subsequently, in July, borrowed from the same person the sum of \$100 on a note for thirty days, and at the time of the execution of the last note gave a chattel mortgage to secure not only the \$100, but also the \$200, and subsequently went into bankruptcy.

In passing upon this question Judge Shiras said:

“Viewed as a security given to secure the payment of the pre-existing indebtedness evidenced by the note dated May 15th, the holding of the referee that the mortgage was invalid, because thereby a preference was intended to be created in favor of the creditor, is sustained. Viewed, however, as a security for the sum of \$100, money advanced to the bankrupt at the time of the execution of the mortgage, there is nothing shown in the evidence which requires the holding that the security given for this loan is not valid. As the security was given for a debt then created, it was a present security, and not a preference which was created by the mortgage; and the case comes within the rule announced by Judge Dillon, in *Darby v. Institution*, 1 Dill. 144; Fed. Cas. No. 3,571, wherein it is said that:

‘An insolvent person may properly make efforts to extricate himself from his embarrassments, and therefore he may borrow money, and give at the time

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security therefor, provided, always, the transaction be free from fraud in fact, and upon the Bankrupt Act. And hence it is a settled principle of bankrupt law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon security taken at the time, do not violate either the terms or policy of the Bankrupt Act.'

When the mortgage security was taken in this instance, it was shown on the face of the instrument that it was given in part to secure a pre-existing debt, and in part to secure a note of even date. The mortgage was duly recorded, and no other creditor could be misled by the provisions thereof. As between the bankrupt and the creditor the mortgage was valid, was not tainted with fraud in fact, and the only objection to be urged against the same is that if the trustee should pay the note for \$200 dated May 15th, it would be giving a preference to the mortgagee over the other creditors, as that was a debt created before the giving of the mortgage, whereas the bankrupt had full right to give security for the present loan of \$100. In other words, if the bankrupt had given on the 22d of July a chattel mortgage on his stock to secure the pre-existing debt, evidenced by the note dated May 15th, and on the same day had given a second mortgage to secure the loan of \$100 then advanced as a present consideration, the first mortgage might be non-enforceable against other creditors, under the provisions of the Bankrupt Act, but the second mortgage would be valid, being given for a present consideration advanced in good faith upon the faith of the security created by the second mortgage. In equity the rights of the parties are not affected by the fact that both the past and present debt are secured by one mortgage instead of two. As already said, there was no effort to mislead creditors by uniting the past debt with the present loan in one note, thus apparently making the past debt a present one, but the actual situation was made plain on the face of the mortgage. There being no actual fraud in the transaction, no provision of the Bankrupt Act is violated by holding that Arkin is entitled to the benefit of his security so far as the note for \$100 is involved, and it is so ordered."

(See also *Sabin v. Camp*, 3 Am. B. R. 578; 98 Fed. 974.) But in the case of *In re Sheridan* (3 Am. B. R. 554; 98 Fed. 406), where there was an agreement to pledge made more than four months prior to the petition in bankruptcy, but there was no pledge of the goods covered thereby until a few days before the petition was filed. The pledgee's title was pledged only on the last day and the transaction was in violation of the Act.

The foregoing general principles have been sustained in a number of cases under the old Act in the U. S. Supreme Court, which are applicable here. In *Clark v. Iselin* (21 Wall. 360), it was held that when a person borrowed money of another and

pledged with him as collateral for the loan, a number of bill receivable, and subsequently took them out for the purpose of collection and replaced them with other bills receivable, but not to such an amount as to impair the estate of the debtor, the transaction not being conducted with any purpose of delaying or defrauding the pledger's creditors or giving a preference to any one, the fact that the pledger was very shortly thereafter adjudged a bankrupt did not avoid the transaction. In the same case it appeared that a creditor had obtained by execution a valid lien on the debtor's stock of goods, which were in value much greater than the amount of the lien, and it was held that payment applied on the execution could not be considered preferential, as each payment released property of equivalent value. In *Sawye v. Turpin* (91 U. S. 114), the facts were that a chattel mortgage was taken by a creditor who knew of the insolvency of the mortgagor, but who took it in exchange for a prior valid bill of sale of the same property, executed more than four months prior to the filing of the petition. It was held not to be a preference voidable under the Act, since it was merely an exchange of one security for another of equal value; and this was held to be the result of the exchange notwithstanding the exchange itself was made within the four months prior to the filing of the petition. In *Burnhisel v. Firman* (22 Wall. 170), it was held that where a person owed money, principal and interest for some time overdue, but secured by mortgage, and afterwards had an accounting with the mortgagee and gave in place of the old mortgage a new mortgage for the sum found to be due as principal and interest, the new mortgage being upon the same property as the old mortgage, such a person could not be considered as creating by this transaction a preference, the old security being a valid and unimpeachable lien and being surrendered upon the execution of the new mortgage.

In *Cook v. Tullis* (18 Wall. 332; s. c. 9 N. B. R. 433), it appeared that a depositary of certain government bonds used some of them without the permission of the owner, and substituted in their place a bond and mortgage, and the owner of th

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bonds, upon hearing of the transaction, ratified it. The court held that the ratification by one of the unauthorized acts of another operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification; the retroactive efficacy of the ratification is only subject to this qualification; that intervening rights of third persons are not defeated by the ratification, and the court in the following language reiterated the doctrine that an even exchange of property by an insolvent debtor is no preference:

“A fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the bankrupt act either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud, or delay his creditors, or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate, or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously.”

It follows from what has been said that a payment to a secured creditor is not a preference. (*Halleck v. Tritch*, 17 N. B. R. 293; 11 Fed. Cas. 286.) Payment of rent for leased premises is therefore not usually a preference unless done as a means of carrying on business in fraud of creditors. (*In re Lange*, 3 Am. B. R. 231; 97 Fed. 197.)

**Preferences Arise Only in Cases of Antecedent Debts.**—As a corollary to the proposition that only transfers which diminish the estate of the bankrupt are preferences, it may be stated that preferences arise only in the case of antecedent debts. The distinction between a security and a preference is determined in accordance with that corollary. Property transferred by a borrower at the time of receiving the loan, and for the purpose of making the lender safe, is a security. Its validity, if accompanied by positive fraud, is recognized and enforced in bankruptcy. But a transfer intended to enable one to secure pay-

ment of antecedent debt is a preference, if its effect is to give the creditor an advantage over others. If that is not its effect, it is a valid payment. The difference between preferences in payment of antecedent debts, and securities given at the time of incurring liabilities was clearly stated by Justice Davis of the United States Supreme Court in *Tiffany v. Boatman's Savings Inst.* (18 Wall. 376), who said:

"Neither the terms or policy of the bankrupt act are violated if these collaterals be taken at the time the debt is incurred. His (the bankrupt's) estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the repayment of the money borrowed. Nor in doing this does he prefer one creditor over another, which is one of the great objects of the bankrupt law to prevent. The preference at which the law is directed can only arise in case of antecedent debts. To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property; and, therefore, the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred, if the creditor had good reason to believe the debtor to be insolvent. But the giving of securities when the debt is created is not within the law, as long as the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid. In the administration of the bankrupt law in England this subject has frequently come before the courts, who have uniformly held that advances may be made in good faith to a debtor to carry on his business, no matter what his condition may be, and that the party making these advances can lawfully take securities at the time for their repayment. And the decisions in this country are to the same effect. (Hilliard on Bankruptcy, 333, ch. 10 sec. 10; *Hutten v. Crutwell*, 1 El. & Bl. 15; *Harris v. Rice*, 4 Hurl. & N. 1; *Bruteston v. Cooke*, 6 E. & B. 296; *Lee v. Hart*, 34 Er. & B. 569; *Belle v. Simpson*, 2 H. & N. 410; *Hunt v. Mortimer*, 10 B. & C. 44; *Ex p. Shouse*, Crabbe R. 482; *Wadsworth v. Tyler*, Fed. Cas. 17,032 N. B. R. 101; quarto.)"

(See also *In re Cobb*, 3 Am. B. R. 129; 96 Fed. 821, as decided under the present Act; *in re Wolf*, 3 Am. B. R. 555; 98 Fed. 84; *in re Sheridan*, 3 Am. B. R. 554; 98 Fed. 406, and other cases cited hereinbefore.)

**Mode of Transfer Immaterial.**—If the transfer does diminish the assets of the bankrupt's estate, and does tend to give one creditor an advantage over another, then whatever may be the mode of transfer, or however indirect or circuitous the means by which it was carried into execution, it will constitute a preference; and



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if the transferee has reasonable cause to believe a preference was intended, it will be voidable unless the rights of third parties have intervened. Thus, where a debtor conveyed property to his wife without any consideration and she mortgaged it in favor of his creditors, it was held to be a preference by the debtor. (*Gibson v. Dobie*, 5 Biss. 198; 14 N. B. R. 156; Fed. Cas. 5,394.) So a transfer of the firm assets to one partner, for the purpose of enabling the individual creditors of the purchasing partner to obtain an advantage over firm creditors, constitutes a preference. (*In re Waite*, 1 Low. 207; Fed. Cas. No. 17,044.) And where a creditor through another person purchased certain property of his debtor, and through the purchaser gave notes of the debtor in payment, it was held to be a preference. And it must be remembered in this connection that "transfer" includes pledging or mortgaging or giving or any other mode of parting with property. (Section 1 [25].)

**Partnership Preferences.**—If preferential transfers are made by a firm, only one member of which is adjudged bankrupt, the transfers are not voidable. The transfer being a firm act, to invalidate it, the firm must be put into bankruptcy within four months. And if the transfer is of firm property, though made as a payment of an individual debt of one of the partners, the firm itself must be put into bankruptcy before the transfer can be invalidated. (*Withrow v. Fowler*. Fed. Cas. 17,919; 7 N. B. R. 339. Compare *Amsinck v. Bean*, 22 Wall. 395.)

**Date of the Transfer: Effect of Failure to Record Deeds, etc.**—Section 60 provides that preferential transfers may be avoided if "the bankrupt shall have *given* the preference within four months before the filing of the petition." Since by the common law and by the statutes of most States, the recording of an instrument of transfer is not essential to its validity, in all those States the transfer is complete upon delivery.

The date of delivery would seem therefore the date to be taken into account in determining whether a preference has been given under section 60. (See *In re Kindt*, 4 Am. B. R. 148; 101 Fed.

107.) And it must be remembered in addition that by section 67a claims which, for want of record or 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. By the same section, subdivision e, it is provided that 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, etc., in which such property is situated, shall be deemed null and void under the Act against the creditors of such debtor if he be adjudged bankrupt. It seems from a study of section 67 and its provisions that all rights which creditors can possibly have under State law with reference to the bankrupt's unrecorded conveyances or transfers are preserved and enforced by the Bankruptcy Act. Compare, however, section 3b as to the time within which the petition can be filed where the Act of Bankruptcy consists of fraudulent transfer or conveyance, where the time runs from the recording or registering of the instrument of transfer where that is permitted or required or from the date of open, notorious etc., possession.

But in a recent case decided in the Southern District of Iowa *In re Klingman* (4 Am. B. R. 254; 101 Fed. 691), the court seemed to hold that under section 60 the transfer is made effectual against creditors only at the time of recording or when in actual and open possession. The facts in that case were that within four months of bankruptcy but without notice of insolvency certain claimants shipped goods to the bankrupt, stipulating that the goods were "pledged and hypothecated" to them as security for the payment of the purchase price. Afterward learning of the insolvency of the vendee the claimants secured a return of part of the goods. Under these facts the court held that the act of taking possession of part of the goods constituted an unlawful preference and that the claimants must surrender their preference before being allowed their claim. In passing upon the question Judge Shiras said:

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“As I understand the facts of the case, at the time the twine was delivered back to Luthy & Co. (the claimants) Klingaman was then insolvent, and Luthy & Co. knew such to be the fact. By section 60 of the act it is declared that

‘A person shall be deemed to have given a preference, if, being insolvent, he had . . . made a transfer of any of his property, and the effect of . . . such 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.’

It cannot be questioned that if Luthy & Co. are permitted to retain the property delivered to them on August 1, 1898, and to prove up the balance of the debt due them, they will be enabled to secure a greater percentage of their debt than the general creditors; and therefore it is clear that the pivotal question is whether as between Luthy & Co. and the contesting creditors the transfer of the property in fact took place on the 1st day of August, 1898, or on the 17th day of June, 1898, the date of the contract of purchase—it not being shown that on that date Klingaman was insolvent. It will be kept in mind that Luthy & Co. by their own act, in seeking to prove up their claim, have invoked the aid of the court in bankruptcy for the enforcement of the provisions of the act; and they cannot insist upon their right to share in the dividends payable from the estate unless they meet the obligations imposed upon them by the provisions of the act, which are intended to enforce the equitable rule, established by the act, that among the creditors equality is equity.

On behalf of the contesting creditors it is claimed that, as against them, the transfer of the property must be deemed to have taken place on the 1st of August, 1898, whereas on behalf of Luthy & Co. it is claimed that the actual delivery then made to them of the property in question was in pursuance of the terms of the contract of purchase; that this contract gave them an equitable lien upon the goods then sold to the bankrupt, which they could enforce at any time; that, as it is not shown that Klingaman was insolvent when the contract of purchase was executed, giving the lien cannot be deemed to be a preference; and, therefore, they are not required to surrender the goods received by them, or account for the proceeds, as a condition precedent to the allowance of their claim. Under the provisions of the Bankrupt Act of 1867 it was held that a preference given by means of a chattel mortgage dated from the time of the delivery of the instrument, and not from the time when the same was recorded or possession thereunder was taken. *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235. In the act now in force it is enacted (in section 3) that a petition for adjudication may be filed against an insolvent debtor within four months after the commission of an act of bankruptcy, and that, when the act charged consists in having made a transfer of property with intent to defraud creditors, or for the purpose of giving a preference the four-months' period is to date from the recording or registering of the transfer, when that is done, or, if not, then from the time the beneficiary takes notorious, exclusive, and continuing possession of the property. Under this section it is clear that if the creditors of Klingaman had

filed a petition for adjudication against him, on the ground that, being insolvent, he had given a preference to Luthy & Co. by transferring to them the goods received on August 1, 1898, the act of preference would have been held to have been committed on the day the goods were delivered, and not upon the day the lien was contracted for. In other words, the commission of an act of bankruptcy, by transferring property while insolvent to one or more creditors with intent to prefer them, is declared to be committed when the instrument of transfer is recorded or registered or if not recorded or registered, then when the beneficiary takes open possession of the property, or when the creditors have received actual notice of the transfer.

Under the prior Act of 1867, the preference was held to have been given when a lien, valid between the parties thereto, was created, although no notice thereof was given to the other creditors. Under the present act a preference is not created until notice thereof is given to the other creditors, either by recording or registering the instrument of transfer, or by taking actual or open possession of the property by the creditor, or by giving actual notice of the transfer to the creditors. It does not seem possible that Congress did not intend this change in the rule to apply to questions arising between a creditor claiming the benefit of a preference and the other creditors. This would require the holding that upon a petition filed by creditors, based upon an act of bankruptcy in giving a preference when insolvent, the act of bankruptcy must be held to have been committed when the creditor recorded the instrument of transfer or took open possession of the property; but if the trustee or creditors, after the adjudication has been had, should seek to avoid the same transfer, it would be held that the transfer constituting the preference took place when the mortgage or contract was delivered to the creditor, although the same was not recorded, nor was possession then taken of the property intended to be transferred. In my judgment, it was the purpose of this enactment to declare generally that, with respect to acts of bankruptcy consisting of making transfers of property when insolvent with intent to give a preference, the act is to be held to have been committed when the transfer is made effectual as against other creditors by recording or registering the instrument of transfer, or by the beneficiary taking actual and open possession of the property, or by otherwise giving actual notice of the transfer to creditors. In other words, the intent of this section is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference does not begin to run until in some form they have received actual or constructive notice of the transfer to the preferred creditor; and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt.

The referee in this case correctly held that under the provisions of the Code of Iowa the failure to record the contract of purchase did not affect the validity of the equitable lien secured thereby as between the parties thereto, and that, as no subsequent lien had been obtained against the same up to the date when possession was taken on August 1, 1898, the lien was made effectual as against

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third parties by the act of taking possession; but the pivotal question under the Bankrupt Act is, when did this transfer take effect as against creditors, in the sense that thereby a preference was given to Luthy & Co.? If, as against creditors, it took effect on August 1, 1898, then it constituted a preference, as on that day Klingaman was insolvent, and Luthy & Co. knew it. If, however, the transfer, as against creditors, dates back to June 17, 1898, then it cannot be held to be a preference, as it is not shown that at that date Klingaman was insolvent. Under the provisions of the Bankrupt Act, it must be held, for the reasons already stated, that the transfer of the property to Luthy & Co. took effect on August 1st, and therefore this transfer constituted a preference to Luthy & Co.; and it follows that, under the provisions of section 57 of the Bankrupt Act, the claim of Luthy & Co. cannot be allowed, unless they surrender the preference they have received."

But the learned judge does not clearly point out how the provisions of section 3b can be "read into" section 60. Under the facts in the case the goods were not really "pledged," which was the agreement, until August when the delivery back took place, by reason of the familiar principle of the common law alluded to in the cases cited in Judge Shiras' opinion, that a pledge does not become effective as to third persons until a change of possession. On the whole the reasoning *In re Sheridan*, 3 Am. B. R. 554; 98 Fed. 406, is more satisfactory. In that case it was held that where the agreement to pledge was made more than four months prior to the petition in bankruptcy, but there was no pledge of the goods covered thereby until a few days before the petition was filed, the pledgee's title attached only upon that day, and the transaction created a preference in violation of the act.

Judge McPherson says in his opinion:

"The exceptant relies on *Ex parte Potts*, Fed. Cas. No. 11,344, but an examination of that case will show that the decision was upon a different state of facts. One question there was whether a pledge actually made was fraudulent; and it appeared that the alleged bankrupts, when they were admittedly solvent, had assigned to a creditor, as collateral security for advances, several policies of insurance and bills of lading upon a vessel and cargo then at sea. Under such circumstances it was correctly held that the transfer was not in fraud of creditors. The assignment of the policies was a completed transfer of the debtor's interest in those instruments, and the assignment of the bills of lading transferred the title to the property therein described, without any further act. As to almost all the property then under consideration, therefore, the transaction had been fully executed. One policy or one bill of lading was ap-

parently not transferred until May, when the alleged bankrupts had become involved; there was no averment of insolvency in the petition; but as last advance by the creditor had been made in March, in pursuance of an agreement made in February, the court was clearly right in holding that no part of the transaction was fraudulent. No question of preference arose, where here the question is one of preference simply. The goods here were never actually pledged until the exceptant, for the first time, took them into his possession a few days before the petition was filed. Before that time there was a mere agreement to pledge. The goods were never delivered to the exceptant, nor (assuming, for present purposes, that this would have been good against the other creditors) were they even set apart and continuously treated as his property. Under the facts proved, the pledge was not completed until the date of removal. *Lucketts v. Townsend*, 49 Am. Dec. 730, note. This being so, the exceptant's title attached upon that date, and the transfer created a preference in violation of the act."

It would seem that the reasoning in this case might be made applicable to the facts in the *Klingaman* case without resort to the doctrine of equitable lien, or necessity of record, etc.

**Ratification of Past Unauthorized Acts of Agents with Respect to Time of Receiving Preference.**—Since the date when the preferential transfer was made is of the highest importance as determining whether it may be invalidated or not and also as determining reasonable cause to believe, etc., on the part of the transferee, and moreover, since we have seen in many cases that the knowledge of the agent is the knowledge of his principal, it becomes important to discuss the question as to how far an unauthorized preference taken by the agent may be ratified by his principle. The rule in bankruptcy, it is believed, is the same as the general common law rule.

The doctrine of subsequent ratification of the unauthorized acts of agents received extended consideration *in re Kansas City* contains a review of many of the authorities, we here quote from it.

"It is the general doctrine that ratification relates back to the inception of the transaction, and has a complete retroactive efficacy, and that the ratified act is to be treated as if it were originally authorized by the principal. But this doctrine is a fiction of the law, for the act of one cannot be made the act of another, but by relation the law gives to the act of one the effect of the act of another; the law will not feign a fiction to do a wrong, to make val

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an invalid act, or to defeat the rights of others; hence this doctrine cannot be extended to the prejudice of strangers to the transaction. In *Fleckner v. Bank of the United States* (8 Wheat. 338), there had been a ratification, and Judge Story, delivering the opinion of the court, held the act binding upon the bank, and upon all other persons who had not an adverse interest; that no maxim is better settled, in reason and law, than *omnis ratihabitio retrotrahitur, etc.*, at all events, where it does not prejudice the rights of strangers. The language of Judge Story is adopted by Mr. Broom, in his *Legal Maxims*. *In re Stoddart*, 4th Ct. of Claims R. 511, it was held the law will not admit a ratification of the acts of an agent which will defeat the intervening rights of a third party. See *Wood v. McCain*, 7 Ala. 800; *Taylor v. Robinson*, 14 Cal. 396; *Parnedee v. Simpson*, 5 Wall 81. This must be the law, else that doctrine which has been built for the protection of those dealing with agents will be converted into an instrument of fraud to defeat the equities of others. The strangers and third parties in the present case are the other creditors of the bankrupt. Of these the assignee is the trustee, and for their benefit the ratification will not be permitted to relate back so as to bind him. As the doctrine of relation is a fiction of the law, and the law will not feign a fiction to make valid an invalid act, the act of ratification, to relate back, must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies. In *McCracken v. San Francisco*, 16 Cal. 624, Field, C. J., said: 'It follows also from the general doctrine that a ratification is equivalent to previous authority; that a ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able, at the time, to make the contract to which by his ratification he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similiar transaction himself; and the very forcible illustration is given that a contract made upon an assumed agency for a single woman cannot be ratified by her alone after marriage, for her power to contract alone ceases with her marriage. The doctrine here stated is fully discussed in *Bird v. Brown*, 4 Welsby, H. & G. 786.'

The principles just enunciated were applied in the case of *Strain v. Gourdin*, 11 N. B. R. 156; s. c. 2 Woods, 380; Fed. Cas. 13,521, decided by the United States Circuit Court for the Southern District of Georgia. The facts in that case were as follows: S. had a sum of money on deposit with K. & H. bankers, who, in April, 1873, became satisfied that they must stop payment, and took legal advice as to the propriety and duty of providing for the payment of their depositors, and were advised that they would be liable to a criminal prosecution if they failed to pay their depositors. K. & H. thereupon procured certificates

of deposit on a certain bank for the amount due S. The next day they telegraphed him that they had stopped payment, and wanted to know where to deposit his funds. He replied, and in accordance therewith his certificate was placed to his credit in another bank which he named. It was held by the court that the procuring by K. & H. of a certificate of deposit on the bank for the amount due to S. and payable to his order, was not a payment, and could not be made to relate back to the date of the certificate instead of the date of the ratification, so as to make it a payment before S. had notice of the failure of K. & H. In rendering its opinion the court quoted from *Cook v. Tullis*, 18 Wall. 332:

“The general rule as to the effect of a ratification by one of the unauthorized act of another respecting the property of the former is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except when the rights of third parties have intervened between them and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification.”

The facts in *Cook v. Tullis* were that a depositary of certain government bonds used some of them without the permission of the owner, and substituted in their place a bond and mortgage. It was held that the owner might lawfully ratify his act, and that even if the ratification were within four months before the filing of the petition in bankruptcy by the depositary, the ratification would relate back to the time of the substitution; but this was distinctly put upon the ground that no rights of creditors had intervened—that is, that no rights of creditors had been injured by the ratification; it was a case of mere exchange of securities.

**When Do the Four Months Expire.**—In computing the four months before filing the petition in bankruptcy within which time a preference is voidable, the day on which the petition was filed must be excluded. (*Dutcher v. Wright*, 94 U. S. 553.) In the case just cited the confusion that exists in regard to the computation of time, was commented upon at length, and the opin-



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ion quotes Lord Mansfield's statements that the cases for two hundred years had only served to embarrass a point which a plain man of common sense and understanding would find no difficulty in construing. The extent of the uncertainty of this point may be seen by reference to the closing sentence of the opinion in *Dutcher v. Wright*, which was: "It must be admitted as difficult, if not impossible, to deduce from the reported decisions any rule which will apply in all cases." Without attempting to lay down any rule, the court simply decided that in the case before them, the day on which the petition was filed must be excluded. In *Cooley v. Cook* (125 Mass. 406), it was held that the four months before the bankruptcy must be reckoned exclusive of the first day, and if the last day is Sunday, exclusive of that also. Further authorities for excluding the day of the filing of the petition are *Cowie v. Harris*, 1 Moody & N. 141; *Ex p. Farquhar*, 1 Mont. & McA. 7. Authorities for considering parts of a day are: *in re Richardson*, Fed. Cas. 11,777; 2 Story, 571; *Sadler v. Leigh*, 4 Camp. 197; *Ex p. Farquhar, supra*; *Ex p. D'Obree*, 8 Ves. 82; *in re Wydown*, 14 Ves. 87; *Thomas v. Desanges*, 2 B. & Ald. 586; *contra in re Howes*, 6 Law Rept. 297; *in re Wellman*, 7 Law Rep. 25. Compare notes to section 31, on Computation of Time.

**The Preference May Be Voidable—It is Not Void.**—The distinction between voidable and void acts is often overlooked, but is most important, as on it, to a great extent, depend the rights of innocent third parties, besides the rights of the parties themselves in case no proceedings are taken. The preferences which this section discountenances are voidable, not absolutely void. As against all persons but the trustee as representative of creditors, such transfers are valid. The preferential transfer or assignment being voidable only by the assignee or trustee, it has been held that after such assignment or transfer, no one can seize the property upon execution or attachment, or acquire a lien upon it by judgment or otherwise, or procure a good title thereto by subsequent purchase. (*Cook v. Rogers*, 13 N. B. R. 97; s. c. 31

Mich. 391 [citing *James v. Whitbread*, 11 C. B. 406; *Coale v. Williams*, 7 Exch. 205; and distinguishing and limiting *Buchanan v. Smith*, 7 N. B. R. 513; s. c. 16 Wall, 277; and *McLean v. Meline*, Fed. Cas. 8,890; 3 *McLean*, 199]; see also *Dodge v. Sheldon*, 6 Hill, 8.)

Under section 67c and f certain liens and fraudulent transfers are declared to be void, but such transfers are those which could be set aside in any ordinary creditor's suit and the declaration that the liens are void merely means that they may not be enforced. (See commentary on section 67 *post.*) But under section 60 as before pointed out the preferential transfers are not necessarily illegal except under the Bankruptcy Law, because the element of fraud is not an essential element.

It follows from what has been said above that a preferential transfer under section 60 may, as a general rule, be avoided by the trustee alone. (See *Glenny v. Langdon*, 98 U. S. 20; *Moyer v. Dewey*, 103 U. S. 301, overruling *Dewey v. Moyer*, 72 N. Y. 70.) In a case arising under the present Act (In *re* Little River Lumber Co. 3 Am. B. R. 682; 101 Fed. 568) it was held by the District Court in Arkansas that where the trustee who should have resisted a claim had removed from the State and declined to employ counsel for that purpose and one of the creditors resisted such claim and successfully defeated it, thus increasing the assets of the estate to the benefit of all the creditors, the attorney of such estate should be allowed a reasonable sum for his services. It is obvious, however, that the principle applied in this case must be limited to parallel cases. Generally speaking the power of the court over the trustee as its officer would seem to be sufficient to compel him upon the application of any creditor to take such steps as are necessary for the preservation of the estate. See, on the analogous question of who may appeal, the decision of the Court of Appeals of the 8th Circuit in *Chatfield v. O'Dwyer*, (4 Am. B. R. 313; 101 Fed. 797), which holds that while the trustee is the only person who may appeal from the allowance of a claim, if he refuses to do so the District Court upon application by a creditor may either direct an appeal by the trustee or

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§ 60.] Revival of Merged Liens by Annulment of Preferential Transfers.

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permit the creditor to appeal in the name of the trustee. This seems to be a correct statement of the law. See *contra in re Roche* (C. C. A. 4 Am. B. R. 369; 101 Fed. 956.)

The evil which would follow if every factious creditor was allowed to litigate individually and in his own name the claims of other creditors is obvious. Besides that there are three other reasons which are set forth in the opinion in *Glenny v. Langdon* as follows:

First, because all such property, by the express words of the Bankruptcy Act, vests in the assignee by virtue of the adjudication in bankruptcy and of his appointment; secondly, because creditors cannot sustain any suit against the bankrupt; and, thirdly, because their remedies are absorbed in the great and comprehensive remedy under the commission, by virtue of which the assignee is to collect and distribute among them the property of their debtor, to which they are justly and legally entitled.

**Revival of Merged Liens by Annulment of Preferential Transfers.**

—When one has a valid lien which is merged, or which is surrendered by him, when a transfer is made to him, if the transfer is thereafter declared void, his lien may be revived; and he will have a right to assert it, so far as it would have been valid had there been no transfer. It is manifest that if the transfer is declared invalid, the lien cannot be said to be merged, for merger only occurs when a lesser title and a greater are united in one and the same person, and if the greater title is void, it is precisely as if no transfer had ever taken place. The creditors through the trustee in bankruptcy electing to avoid the transfer, take the property as though no transfer had ever been made, and subject to all lawful liens upon it. (*Avery v. Hackley*, 20 Wall. 407.)

On the same principle, if old securities are given in exchange for new, if the new are adjudged invalid, the cancellation and surrender of the old ones having been without consideration, a court of equity will annul the cancellation and revive the old securities. Thus, it is well settled that if a security founded upon a prior one be fatally tainted with the vice of usury, and if the

prior one be given up and canceled, and the latter one be thereafter adjudged void, the prior one will be revived and may be enforced as if the latter had never been given. (*Burnhisel v. Firman*, 22 Wall. 170; [citing *Parker v. Cousins*, 2 Grattan, 389; *Farmers' and Merchants' Bank v. Joslyn*, 37 N. Y. 353; *Cook v. Barnes*, 36 N. Y. 521; *Rice v. Welling & Fake*, 5 Wendell, 595].) A vendor's lien may be revived under the same circumstances. (*Crippen v. Heermance*, 9 Paige, 211.)

**Recovery from the Party Benefited.**—The statute provides that the property or its value may be recovered from the person receiving it or to be benefited thereby. A study of paragraph *a* of this section will show that a transfer need not be made directly to the person to whom it is intended to give the advantage over others, in order to make it a preference in his favor. Thus, payments may be made by the maker of a note to the holder of it, and such payment may constitute a preference in favor of the surety. In fact, such a payment may be a practical advantage to the surety alone. Such will be the case where the surety is a person of ample means and ability to pay the note, and the maker of it is insolvent. In such cases the holder receives no practical benefit, inasmuch as he can collect the amount from the surety, but the surety is benefited by the payment made by the debtor to the holder, as it releases him from his liability. If the result of such a payment is to give the surety an advantage over other creditors, then it constitutes a preference, and if he has reasonable cause at the time to believe that a preference was intended, a recovery of the amount paid may be had from him, although the payment was made only to the holder. Under the former act there was some question as to the right of such recovery inasmuch as it permitted a recovery by the assignee only where a preference was given to a "creditor," or a person having a claim against the one making the transfer. The word creditor in that act had only its usual popular signification, but the courts held that a fair construction of all the provisions of the statute gave the trustee the right to recover from the preferred indorser or surety

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**§ 60.] Bona Fide Purchasers—Recovery of the Property or its Value.**

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in cases where the circumstances were of the character just mentioned; and the highest authority was to the effect that such payments were preferences to the holder of the note as well as to the indorser, and that it was a preference to both, regardless of the ability of the indorser to pay the note, and regardless of the fact that the holder on account of this ability to collect in full from the indorser really received no advantage. (*Bartholow v. Bean*, 18 Wall. 635.) Under the present act the word "creditor" includes anyone having a demand or claim provable in bankruptcy, and since the statute provides that where a person has a claim against the bankrupt for which another person is secondarily liable, and fails to prove the same, the latter may prove it and be subrogated to the rights of the creditor; indorsers and sureties may fairly be considered as creditors, and there can be no question of the applicability of the cases just cited.

**Subsequent Transferees—Bona Fide Purchasers.**—The title acquired by a preferred transferee being, at the most, voidable only, not void *per se*, if the preferred creditor transfer the property to a subsequent purchaser who takes the property in good faith and without notice and for a valuable consideration, the latter's title is not voidable. (*Rison v. Knapp*, 4 N. B. R. 349; s. c. 1 Dill. 186; Fed. Cas. 11,861; *in re Mullen*, 4 Am. B. R. 224; 101 Fed. 413.)

**Recovery of the Property or its Value.**—Although the Bankruptcy Act declares that the trustee may recover the property or its value, an action to recover the value of property can only be maintained when the property itself has been actually or constructively converted to the use of the defendant, and the complaint must allege a conversion in terms or its legal equivalent, a demand or refusal. A transfer of property as a preference being not void but voidable, the receipt of the property by the party taking the transfer is not tortious, and unless the subsequent detention became wrongful for some other reason, there must be a demand and refusal. Until such demand and refusal

the transferee cannot be considered a *tort feasor*. The right given to the trustee to recover, the property or its value is in effect a right to maintain replevin for the specific property or in trover to recover for the conversion of the same. The transferee coming into the possession of the property rightfully, a demand and refusal are necessary unless there has been an actual conversion. The demand must be for the goods and property transferred, not for the value of the goods. This necessity of a demand and refusal, if there has been no actual conversion, exists equally under the new code practice as under the old practice. The clause empowering the trustee "to recover the property or its value" is a mere legal conclusion or result from the annulment of the transfer. It neither restricts nor enlarges the remedy of the trustee. If action of replevin is brought, the trustee may also recover in the same action damages for injury to or for the detention of the goods. So held in *Schuman v. Flickenstein* (15 N. B. R. 224; Fed. Cas. 12,826).

This case, however, was not generally followed under the Act of 1867 because of the difference in the meaning of the word "preference" under that Act. It seems to be good authority under the present act. The question has been very ably passed upon by Referee Hotchkiss of Buffalo in the case of *In re Phelps* (3 Am. B. R. 396). He says on this point:

"The creditor, Fuller, insists that since he has tendered back the goods and the money, no suit can be maintained by the trustee because the action must necessarily be one of or in the nature of trover, and he, the trustee, cannot allege, much less prove, a demand and refusal to restore; he thus rests his case on *Shuman v. Flickenstein*, Fed. Cas. 12,826; 15 N. B. R., 224. This is unquestionably the English rule (Lowell on Bankruptcy, sec. 97, and cases cited), or, rather, was before a preference became an act of bankruptcy. (See English Act of 1883.) But, in spite of *Shuman v. Flickenstein*, the American rule, as interpreted by the majority of decisions under the Law of 1867, is that a preference, followed by an adjudication within four months being absolutely void, no title passes even between the original parties, and the transaction constituting an *inchoate* fraud, the assignee may maintain trover even without a demand. *Foster v. Hackley*, 2 N. B. R., 406; Fed. Cas. 4,971; *Tapley v. Forbes*, 2 Allen (Mass.). 21.

The serious question, however, is whether the fact that, unlike section 35 of the former law, section 60b of the present act makes preferences voidable

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 § 60.] Recovery of the Property or its Value — Measure of Damages.
 

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merely; in other words, seemingly recognizes that a valid title has passed to the transferee at the time of the preference has brought us within the rule of the English cases and *Shuman v. Flickenstein*, *supra*. After much hesitation, I have come to the conclusion that it has. The cases which held to the contrary doctrine under the Law of 1867 went on the theory that there was no title in the preferential transferee. See also *Gaytes v. American*, 14 N. B. R. 141; Fed. Cas. 5,286, which was a case of preference pure and simple, without the element of fraud. The present statute expressly recognizes that title. It is not likely that Congress foresaw this effect of the change. It was doubtless made, as was the provision vesting title as of the date of the adjudication (sec. 70a), instead of the time proceedings were commenced (sec. 14, Act of 1867) in the interest of intervening innocent purchasers. But the result seems inevitable, and it follows that, if the trustee here proposes to stand on the theory of preference only, he cannot sue for goods or value, as they have already been tendered to him."

See what was said in the beginning of the notes to this section *ante* on the difference between section 60 of the present Act and section 35 of the old Act. For trustee's rights to recover under section 67e where property has been fraudulently transferred, see that section.

**Measure of Damages.**—If the transferee has himself parted with title to the property, the true measure of damages recoverable by the trustee is the value of the property, and not the amount realized upon the sale by him, and this is so even though the property was taken on execution and sold at public sale and only the proceeds of it came to the person preferentially transferred. (*Cláirion Bank v. Jones*, 21 Wall. 325; [Citing *Conrad v. Ins. Co.* 6 Pet. 274; *Comly v. Fisher*, Taney's Decs. 121; *Marshall v. Knox*, 16 Wall. 559; *Eby v. Schumacker*, 29 Penn. St. 40; *Sedgw. on Dam.* (6th ed.) 634; *Mayne on Dam.* (2d ed.) 317].) But this does not prevent the plaintiff from adopting the sale; he may do so if he chooses and then sue for the proceeds as for money had and received to his use, but he is not limited to the amount of the proceeds unless he chooses to adopt the sale. (*Schuman v. Fleckenstein*, *supra*.) If the trustee adopts the sale and treats the proceeds as money had and received to his use, he is entitled to interest from the time of the receipt of the money by the transferee, or at least from the time of the trustee's de-

mand for it. He is further entitled to the gross proceeds. (*Cookingham v. Morgan*, 7 Blatch. 480; *Traders' Nat. Bank v. Campbell*, 14 Wall. 87; s. c. below, 2 Biss. 423.)

**Debtor's Collusion in Preferential Transfers.**—In the case of *Fox v. Gardner* (21 Wall. 475), the United States Supreme Court held that where a debtor, knowing that his creditor is insolvent, accepts a draft drawn on him by such creditor, the draft being drawn and accepted for the purpose of giving a preference, the transaction is a fraud on the Bankrupt Act, and the assignee in bankruptcy can recover from the acceptor the amount of the draft. In rendering its opinion the court said: "The language of the statute authorizing the assignee 'to recover the property or the value of it from the person receiving it or so to be benefited,' does not create a qualification or limitation of power. There is no implication that the party paying is not also liable. The words are those of caution merely, and give the assignee no power that he would not possess had they been omitted from the statute. In the present case the property or value attempted to be transferred belonged originally to the bankrupt. On the adjudication of bankruptcy the possession and ownership of the same were transferred to the assignee. The attempted transfer by the bankrupt was fraudulent and void. It follows logically that the debtor yet holds it for the assignee, and that the assignee may sue him for its recovery." (Citing *Bolander v. Gentry*, 36 Cal. 105; *Hanson v. Herrick*, 100 Mass. 323.) Though a valid agreement to substitute another person as creditor may be made and pleaded as a discharge of a debt in the nature of a payment, it is not payment in fact, and is binding only when the contract is fair and honest. If a debtor agree to pay not his creditor, but a creditor of his creditor, the consideration of his paying the substituted creditor is his release from the indebtedness due to his original creditor. If his promise to pay the substituted creditor is made knowing that it is to accomplish a purpose forbidden by law, the consideration for his release fails, it being an illegal consideration. It is an attempt to pay a debt in a manner the law forbids, and it is



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**§ 60.] Annulling Fraudulent Transfers — Set-off — Re-Examination of Fee.**

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therefore no payment. The debt still remains. The right of the assignee in bankruptcy to recover from the debtor in such case is a right to collect an indebtedness which is unpaid and still due and owing to the bankrupt.

**Annulling Fraudulent Transfers.**—It may not be improper to add by way of caution that the trustee may bring action as the representative of the creditors to annul any transfer, which, because of its being fraudulent as to creditors, may be annulled independently of the Bankruptcy Act. See sections 67 and 70 *post*; also *in re* Gray (3 Am. B. R. 647; 47 N. Y. App. Div. 554), in which Barrett, J., carefully discusses this question; and see *in re* Adams (1 Am. B. R. 94), and note.

**Set-off Against New Unsecured Credit Given in Good Faith.** Section 60c.—It has been recently held in very thoughtful opinions (*In re* Christensen, 4 Am. B. R. 202; 101 Fed. 802), both by Referee James and by Judge Shiras of the Northern District of Iowa, that this subdivision of the section applies only to cases where the preferred creditor is compelled against his will to return what he has received and is therefore limited to proceedings taken under subdivision "b" and does not apply to a case where he seeks to enforce a claim which the trustee resists under section 57g on the ground of preference. The opinions of both referee and judge are very conclusive on this subject.

**Re-examination of Fee Paid to Attorney, etc.** Section 60d.—Compare on this subject section 64b (3) on what are reasonable attorney's fees. It follows from this section that prior payment for attorney's services is authorized by the Act. In the case of *In re* Kross (3 Am. B. R. 187; 96 Fed. 816), Brown, J., used the following language:

"While by the general terms of the act, the debtor is required to turn over all his unexempt property to the trustee, an exception is here created in favor of an attorney, to a reasonable amount, for services to be rendered to the debtor in bankruptcy; although this is valid so far only as subsequently approved by the court. The charges to be "approved" are, I cannot doubt,

for the same services which the "fee" is designed to be allowed for under section 64, subd. b, par. 3. Both paragraphs are to be construed together, so that it becomes immaterial in the result whether the attorney obtains his compensation in the first instance from the bankrupt under section 60, refunding what, if anything, is disallowed by the court, or whether he waits for an allowance by the court under section 64. The latter is evidently the more convenient and desirable practice; and considering that prior payment for an attorney's services to the bankrupt is expressly allowed by section 60, I cannot agree to any such construction of the act as would deprive the attorney of a proper compensation for a necessary service, merely because he did not take it out of the estate at his own estimate in advance."

## CHAPTER VII.

### ESTATES.

**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.

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No Analogous Provisions in Former Acts.

**Cross-reference.**—As to the duty of the trustee to deposit all funds in the designated depositories, and as to the requirement that all disbursements shall be made only by check or draft on the designated depositories, compare section 47a (3 & 4).

See G. O. 29 which is as follows:

#### **XXIX. 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.

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**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.

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Analogous Provisions of Former Acts.—

R. S. § 5099; act of 1867, § 28; act of 1800, § 29; also R. S. §§ 5127A, 5127B.

**Cross References.**—For provisions of the Act and of the General Orders providing for compensation and disbursements of referee and trustee, see chapter 5, sections 40-48. By G. O. 35 the expenses incurred by referees in the performance of their duties must be allowed by special order of the judge.

It is difficult to lay down any general rule as to how far the trustee or referee should incur expenses in the administration of the estate.

The circumstances of each particular case must be considered, and it is then in the sound discretion of the court to allow a reasonable sum to be paid for such services as were needed and were properly rendered. In *in re Noyes* (6 N. B. R. 277; Fed. Cas. 10,371), Judge Longyear of the U. S. District Court for the Eastern District of Michigan said :

“It would be difficult, and I think impracticable, to prescribe any general rule defining the circumstances under which, and the extent to which, an assignee is at liberty to charge the assets of the estate in his hands for professional and clerical services in the execution of his trust. This must be left to be decided in each individual case according to its peculiar exigencies. The assignee is not at liberty to charge the assets of the estate in his hands for professional or clerical services rendered him in the execution of his trust, until the same shall have been first duly allowed by the court. The assignee may, of course, apply to the court in the first instance for authority to employ professional or clerical assistance, but in such case the court could do but little more than grant such authority in general terms, leaving the instances in and to which such assistance may be employed, largely to the discretion of the assignee, as emergencies shall arise, making such assistance necessary.

Such authority the assignee already possesses under his general powers, subject, however, to the control of the court; such power must be used by him cautiously, and in the exercise of a sound discretion, and with the understanding that any abuse of it will be corrected by the court when applied to for authority to charge the estate for such assistance.”

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**§ 62.] Auctioneer's Services — Sums Paid for the Preservation of Property.**

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Courts require satisfactory evidence going to show the necessity of legal aid on the part of the assignee. *In re Davenport* (3 N. B. R. 77; Fed. Cas. 3,587), Judge Duval of the U. S. District Court for the Western District of Texas said that while in prosecuting or defending suits the assignee had the right to employ counsel, and also had the right to obtain legal advice whenever really necessary to enable him to act for the interests of the estate or of creditors, still an allowance to an assignee for the services of counsel in connection with the compromise of an ordinary claim could not be allowed, it being a proceeding of such a character that an assignee of ordinary intelligence would be able to act for himself and without the aid of an attorney. But *in re Colwell* (15 N. B. R. 92), the U. S. District Court for Massachusetts held that an allowance was proper to the trustee for procuring the services of counsel to investigate as to the affairs of the estate, although no litigation resulted.

See section 64b on the subject of attorney's fees.

**Auctioneer's Services.**—The courts are reluctant to allow a trustee any sum in payment of the fees of an auctioneer. *In re Pegues* (3 N. B. R. 80; Fed. Cas. 10,907), it was said: "The law contemplates that the assignee shall himself sell the property of the estate. There may be cases in which it will be proper to employ an auctioneer, but the necessity for so doing should be first shown to the court and leave obtained." This language was quoted with approval by Judge Longyear of the U. S. District Court for the Eastern District of Michigan *in re Sweet* (Fed. Cas. 13,688; 9 N. B. R. 48).

**Sums Paid for the Preservation of Property.**—The trustee may be allowed for all sums necessarily paid for the preservation of the property. If such sums have been paid by other parties, he may, with approval of the court, repay them, especially if they had an interest in the preservation of the property, and if there were circumstances which necessitated prompt action on their part. Thus, if creditors, prior to the appointment of a trustee,

should pay off liens which were being enforced, in order to save the property for the estate, they would be subrogated to the rights of the lienors. (*In re* T. Gregg, Fed. Cas. 5,976; 3 N. B. R. 529.)

And in the case of *In re* Lesser (3 Am. B. R. 815; 100 Fed. 433), it was held that where creditors have secured a lien of which they are deprived by the operation of the Bankruptcy Law and the full benefit of their litigation accrues to others, the bankruptcy court may make a reasonable allowance as an indemnity for the costs and expenses through which such benefit has been obtained. See also *In re* Little River Lumber Co. (3 Am. B. R. 682; 101 Fed. 558).

The compensation of a receiver in bankruptcy lies in the sound discretion of the court. This rule also applies to marshals in taking care of property where the allowance is not given for the time of employment but in consideration of the surrounding circumstances. (See *in re* Scott, 3 Am. B. R. 625; 99 Fed. 404.)

**Allowances to Assignees for the Benefit of Creditors.**—Where a general assignment for the benefit of creditors is set aside, the weight of authority is that the trustee in bankruptcy may properly allow to the assignee for the benefit of his creditors, his expenses in converting the property into money, but to the extent only to which his conversion of it into money has saved the estate in bankruptcy similar expenditure. (*MacDonald v. Moore*, 15 N. B. R. 26; s. c. 1 Abb. N. C. 53; *Burkholder v. Stump*, 4 N. B. R. 597; Fed. Cas. 2,165; *in re* J. Cohn, 6 N. B. R. 379; Fed. Cas. 2,966.) The money paid by an assignee for the benefit of creditors to discharge valid liens upon the property may certainly be allowed him. (*Livingston v. Bruce*, 1 Blatch. 318.) And it has further been held that the assignee for the benefit of creditors may be allowed sums which, pursuant to the terms of the assignment, he has paid over to the creditors. (*Cragin v. Thompson*, 2 Dill. 513; s. c. 12 N. B. R. 81; Fed. Cas. 3,320; *Jones v. Kinney*, 5 Ben. 259; s. c. 4 N. B. R. 649; Fed. Cas. 7,473.)

And see opinion of Referee Hotchkiss, *in re* Pauley (2 Am. B.

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§ 63.] Examination of Accounts Under this Section—Provable Debts.

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R. 333), which holds that a general assignee in possession prior to bankruptcy will be allowed, out of the estate, his disbursements in preserving the same, and that he will also be allowed reasonable fees as custodian of the estate, but he cannot be given fees as assignee, and that the attorneys of such assignee should not be allowed, except in unusual circumstances, anything out of the estate.

**Examination of Accounts Under this Section.**—Upon the accounting by the trustee the account must be examined by the court (which means the referee) while creditors have the right to examine the trustee's account and urge any objection and be heard upon the same, the duty of examining in detail the items of the account devolves upon the referee. (See opinion of Gurley, Ref. *in re* Baginsky, 2 Am. B. R. 243.)

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**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.

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**Analogous Provisions of Former Acts.**

As to provable debts in general: R. S., § 5067; act of 1867, § 19; act of 1841, § 5; act of 1800, § 39. As to proof of contingent claims: R. S. § 5068; act of 1867, § 19; act of 1841, § 5; act of 1800, § 39. As to proof of bankrupt's liability as a surety: R. S., § 5069; act of 1867 § 19; act of 1841, § 5. As to proof of claim of a surety of a bankrupt: R. S., § 5070; act of 1867 § 19; act of 1841, § 5.

**Differences Between the Old and New Law.**—The provisions of the present Bankruptcy Act as to provable debts differ materially from those of preceding acts. The following are the most important differences; first, omission from the present act of any express provision authorizing the proving of contingent debts and liabilities, or the liability of the bankrupt as surety, indorser or guarantor; second, omission of any express provision as to the proving of damages resulting from a conversion or trespass by the bankrupt; third, omission of any express provision as to apportionment of rent and proving for the same; fourth, the embodiment in the present act of an express provision as to proving a judgment recovered after the commencement of proceedings in bankruptcy upon a debt at that time provable; fifth, the embodiment of express provisions making costs incurred by the bankrupt in certain suits by and against him provable debts; sixth, the embodiment of a provision that unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such a manner as it shall direct, and may thereafter be proved and allowed against the bankrupt's estate; seventh, the lack of any *general provision* as to the time when a debt must have become fixed and owing in order to be provable. It is not meant, however, by the statement that the present statute contains no express provision for the proof of debts of the classes mentioned in the first three points of difference, that such debts are in no cases provable under the present law. The language of this entire section is materially different from that used in the analogous sections of previous laws, and in certain cases the construction demanded by the act makes some of the debts mentioned in the first three points of difference given above, provable notwithstanding the lack of



express provisions. These cases will be considered below in the notes to the several subdivisions of the section.

**Time When the Debt Must Have Come Into Existence in Order to be Provable.**—It will be noted that nowhere in the section is there any express provision as to the time when a debt must have come into existence in order to be provable. The former act provided (R. S. § 5067, act of 1867, § 19), that all debts due and payable by the bankrupt at the time of the commencement of the proceedings in bankruptcy, and all debts then existing, but not payable until a future day, were provable; but under this act, while four of the subdivisions contain provisions as to the time when the debts therein mentioned must have come into existence in order to be provable, there is no express provision as to the time when debts founded upon an open contract or upon a contract express or implied, must have come into existence. But the manifest intent and policy of the act must be held in this case as in the cases mentioned in the other subdivisions, to limit provable debts to those existing at the time of the petition.

Indeed it is clear that the only debts which can be proved under the present Bankruptcy Act are those which were in existence at the time of the filing of the petition, although it is also clear that, under subdivision *b*, where such a debt is in existence at the time of the filing of the petition unliquidated but otherwise provable, it may be liquidated under the direction of the court, subsequent to the petition. (*In re Bingham*, 2 Am. B. R. 223; 94 Fed. 796; *in re McBryde*, 3 Am. B. R. 729; 99 Fed. 686; *in re Silverman*, 4 Am. B. R. 89; 101 Fed. 219.)

**Contingent Liabilities.**—It follows from what has been said that while contingent liabilities in certain cases were provable under U. S. R. S. section 5069 (act of 1867, section 19), they are presumably not in general provable under the present Bankruptcy Act. The provisions of the act of 1898 concerning the proof of contingent claims differ materially from those contained in the acts of 1841 and 1867. Section 63a (1) provides for fixed

liabilities absolutely owing at the time of the petition but not then payable. Section 571 provides for the proof of contingent claims of the surety of the bankrupt where the creditor has not proved his claim. G. O. 21 (4) has only to do with the claims of a surety. Apart from these provisions there is nothing in the act of 1898 or the General Orders which refers expressly to contingent claims. It must therefore be assumed that Congress did not intend to include such claims among provable debts. (See cases cited under the preceding paragraph.) This will be seen by a comparison with the terms of the preceding act.

Revised Statutes, section 5069 (section 19 of the act of 1867) reads:

“When the bankrupt is 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, but his *liability does not become absolute* until after the adjudication of bankruptcy, the creditor may prove the same *after such liability becomes fixed* and before final dividend is declared.”

Clearly, then, in enacting this paragraph (subdivision 1), Congress must have had in mind this liability of sureties and other persons in similar relations, as well as other contingent liabilities, and under the present law such claims or debts cannot be proved unless the liability has become fixed and absolutely owing before the commencement of the proceedings in bankruptcy. Subdivision 4 provides that “debts are provable which are founded upon an open account or upon a contract express or implied.” But contingent liabilities are not in any proper sense debts; they are mere contracts, and do not become debts until the contingencies happen on which demand for payment can be made. Those contingencies may indeed happen pending proceedings in bankruptcy, but there is no provision in the present act for the proof of such a debt if the liability becomes fixed after the commencement of proceedings but before final dividend. The statute of 1867 did permit proof in such cases, but it is believed that under the present statute it cannot be done. Inasmuch as in all previous bankruptcy acts legislators have thought it necessary to

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insert an express provision in order to give to one the right to prove such contingent debts and contingent liabilities, the omission of such provisions from the present act seems to show an intention on the part of Congress to leave the liability of the bankrupt on such contracts unaffected. Such construction of the statute cannot be assailed as not in conformity with the spirit and tendency of bankruptcy legislation. It is true that such liabilities, if not provable, are not in any way affected by a discharge. And there may be many liabilities which, in consequence, will remain outstanding against the bankrupt after the proceedings in bankruptcy. But to a certain extent that was true under the former act. Under all bankruptcy laws there is a certain date fixed after which debts which come into existence may be collected from the after-acquired property of the bankrupt. That time, under the present act, is the date of filing the petition. The bankrupt's property at that time (§ 70 [5]), is applied by the officers of the law to pay certain liabilities owing by him at that time.

**Proof by a Surety of the Bankrupt.**—What has been said about the liability of sureties not being provable until it has become fixed and absolute has reference only to those cases where the surety is himself the bankrupt. Where the bankrupt is the principal debtor, and there is a fixed liability on his part, even though the liability of his surety to the creditor is not fixed, and though, as a consequence, the liability of the bankrupt principal to the surety is not fixed, yet the surety by the provisions of section 57 (*i*) (*q. v.*) may prove the claim if the creditor does not do so. But in this case it is the fixed liability of the bankrupt to the creditor which is proved, not the contingent liability of the bankrupt to the surety. The surety proves not his contingent claim, but the claim of the creditor, and he must prove it in the creditor's name. If he makes such proof and discharges such undertaking in whole or in part, he is to that extent subrogated to the rights of the creditor.

**Judgments as Provable Debts.**—It seems to be clear from the language of subdivision 1 that all judgments, except perhaps such as are imposed in the nature of punishments and which are not therefore dischargeable (as to which see *post*), are provable. It is true that no judgment recovered within four months of bankruptcy becomes a lien under section 67f, but that presumably does not render the judgment as a debt non-provable, though perhaps there is some doubt about that where the judgment is not founded upon a provable debt. If it be founded upon a provable debt there can be no doubt that the debt itself may be proven notwithstanding the judgment.

On the other hand where a provable debt is reduced to judgment after the filing of the petition and before the discharge, less costs incurred and interest accrued, after the filing of the petition, under subdivision 5, the better opinion is that the claim is not merged in the judgment so far as to change the indebtedness out of which it arose, but is merely liquidated. Under the act of 1867 there was a good deal of confusion upon this subject. Many of the District Courts applied the old doctrine of merger and held that upon the entry of judgment the debt was merged in the judgment which thereby became a new debt and could not be proven and was not dischargeable, but after a long time the question came to the U. S. Supreme Court after the repeal of the act of 1867 in the case of *Boynton v. Ball* (121 U. S. 457), which held that the doctrine of merger did not apply and that the debt still remained the same. (See under the present act *In re McBryde*, 3 Am. B. R. 729; 99 Fed. 686; *Beers v. Hanlin*, 3 Am. B. R. 745; 99 Fed. 695; and a very able opinion by Referee Hotchkiss of Buffalo, *In re Pinkel*, 1 Am. B. R. 333.)

**Unliquidated Claims.** Section 63b.—The provisions of paragraph *b* differ considerably from those of the former act. Section 5067 of the Revised Statutes (act of 1867, § 19), provided: "When the bankrupt is 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 a mode as it may deem best, and the sum so assessed may be proved against the estate." Whether, indeed, this new provision in paragraph *b* of the present statute is intended to permit the proving of claims in contradistinction to or in addition to the debts mentioned in the various subdivisions in paragraph *a* of the section, or whether, on the other hand, it is a mere rule of procedure, enacted for the purpose of defining the mode in which the amount of certain debts, the right to prove which is given by paragraph *a*, shall be ascertained, is not altogether free from question.

The language of paragraph "b" taken by itself is broad enough to justify the conclusion that Congress intended to allow claims arising out of torts as well as out of contracts to be proved. But as we have seen under the preceding paragraph as to judgments obtained after the petition is filed the general tendency is to hold that the debt retains its original status and character and is not merged in the judgment. Consequently it is difficult to believe, if the rule laid down in the preceding paragraph is correct, that there was any intention by Congress to include any debts under paragraph "b" which could not be provable by the operation of paragraph "a" (5). The specific cases of torts which might be proved under the act of 1867, to wit.: conversion, etc., of property, are probably still provable if the tort be abandoned and the action be brought as upon an implied contract. But as to the mere torts arising out of the injuries to persons and the like the construction of paragraph "b," which would allow such claims to be liquidated subsequently to the filing of the petition, would result in much practical inconvenience, and while, as has been pointed out, the question is not yet free from doubt, the more reasonable conclusion is that paragraph "b" is governed and limited by the provisions of paragraph "a." (See cases cited under preceding paragraph herein. But see the language of Judge Bellinger in *Beers v. Hanlin*, 3 Am. B. R. 745; 99 Fed. 695.)

**Impeaching Judgments.**—As to impeaching judgments offered for proof for fraud or collusion see section 57 and commentaries

thereon, *sub nom.* QUESTIONING THE VALIDITY OF JUDGMENTS PRESENTED FOR ALLOWANCE.

**Judgments Imposing Fines.**—Such judgments entered before commencement of proceedings in bankruptcy do indeed evidence a fixed liability absolutely owing at the time, but we feel confident that they are not provable. They may be within the letter of the law, but not within the spirit of it. Under all former acts they have been considered as not provable. Such fines imposed as a punishment are not to be considered debts. (*In re Sutherland*, 3 N. B. R. 314; Fed. Cas. 13,639; s. c. Deady, 416; *People v. Spalding*, 10 Paige, 284; affirmed by Court of Errors, 7 Hill, 301; affirmed by the United States Supreme Court, 4 How. 21.) The first case cited was one in which a fine was imposed as a penalty; the second, one in which a fine was imposed for a contempt of an injunction order, the fine being a punishment for the contempt, though payable to the party who sued out the injunction and who was damaged by the violation of it. It would thus seem that a fine imposed by a judgment is not a provable debt if imposed nominally as a punishment, although in reality as a compensation to the creditor for the pecuniary injury he has sustained by reason of the commission of the act constituting the offense. To hold that fines imposed as punishment are provable and consequently dischargeable, would be in effect to make the discharge a pardon of the offense punished. Such debts are not among the classes which by section 17 are declared as not released by a discharge. Consequently, if provable, they would be dischargeable, and a person guilty of a felony or a gross misdemeanor, and fined therefor, would be released from punishment, while those who had incurred debts by fraud or in manners certainly more venial, would still be holden under the provisions of section 17. It can hardly be supposed that any such result was intended by the law-makers.

But in the case of *In re Alderson* (3 Am. B. R. 544; 98 Fed. 588) it was held that a judgment obtained in a State court against a bankrupt for fines upon indictments was a dischargeable judg-

ment. This does not seem to be good law. This question is thoroughly discussed under section 17a (1) *sub nom.* DEBTS TO THE UNITED STATES, ETC., and, see the case of *Re Baker* (3 Am. B. R. 101; 96 Fed. 964), discussed and quoted from under that section, holding that a judgment against a father for the support of a bastard child was not a civil debt but one in the nature of police regulation which is not released by a discharge in bankruptcy. But a judgment for breach of promise to marry is a provable and dischargeable debt. (See *In re McCauley*, 4 Am. B. R. 122; 101 Fed. 223; *in re Sidle*, 2 N. B. R. 220; Fed. Cas. No. 12,844.) As this is a judgment upon a contract there seems to be no reason why it should not be discharged under any view. As to penalties and forfeitures see what is said under section 17a (1) *sub nom* DEBTS TO THE UNITED STATES, ETC.

**Alimony.**—The general tendency under this law as under the previous law is to hold arrears of alimony not a provable debt, and to hold future alimony not a fixed liability, absolutely owing and hence impossible of valuation. A very recent case on that subject, *In re Nowell*, decided in the District of Massachusetts, March, 1900, 3 Am. B. R. 837; 99 Fed. 931, discusses the question very thoroughly and the following quotation from the opinion of Judge Lowell gives a very admirable review of the cases.

“The bankrupt here seeks an injunction to restrain his wife from prosecuting in the State court contempt proceedings against him to obtain alimony granted her by a decree of that court. This court has, therefore, to determine the effect of bankruptcy upon alimony. If a discharge in bankruptcy will bar the wife’s claim for alimony, she may be enjoined from seeking to collect it by contempt proceedings or otherwise.

Section 17 of the Bankrupt Act provides that a discharge in bankruptcy shall release the bankrupt from all his provable debts, with certain inapplicable exceptions. This court has here to consider, therefore, if alimony be a provable debt. Section 63 defines those debts which may be proved. The only clause in the section supposed to be applicable to alimony is the first: “A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition.” The nature of alimony is not precisely the same in all jurisdictions, and this case is concerned only with alimony allowed by virtue of the laws of Massachusetts.

\* \* \* \* \*

Is a claim for arrears of alimony, which has been decreed by a court of

Massachusetts, released by a discharge in bankruptcy? As has been said, these arrears are not, prior to the issue of an execution to collect them, a fixed liability, absolutely owing; for the amount of the liability may be modified by the court which has decreed the alimony and issues the execution. Even arrears of alimony, therefore, are not a provable debt, within the letter of the present bankrupt law, and upon the whole, the decisions concerning alimony and bankrupt laws in general hold alimony not to be provable.

In *Kerr v. Kerr* (1897), 2 Q. B. 439, it was held, by two able judges against the dissent of one, that arrears of alimony were not a provable debt, under the present English Bankrupt Act. The dissent was founded altogether upon the case of *Hardy v. Fothergill*, 13 App. Cas. 351, which permitted the proof of contingent debts, under the English Bankrupt Act, to an extent outside the utmost possibility of the construction of the present Bankrupt Act of the United States. No judge treated arrears of alimony as a fixed liability. The analogy of the English law is, therefore, strongly against the contention of the bankrupt in this case.

In *re Cotton*, Fed. Cas. No. 3,269, it was held that a payment ordered by a State court to be made for the maintenance of a bastard child was not provable under the Bankrupt Act of 1841; and a similar decision was reached by the Supreme Court of Ohio in *Hawes v. Cooksey*, 13 Ohio, 242. The Act of 1841 permitted the proof of "debts," which, as applied to alimony, does not seem a more restricted term than that of the present act, a "fixed liability absolutely owing." Generally speaking, that which is owed is a debt. See, further, *In re Baker* (D. C.) (3 Am. B. R. 101), 96 Fed. 954.

In *re Lachemeyer*, 18 N. B. R. 270; Fed. Cas. No. 7,966, Judge Choate held, in an able and careful opinion, that arrears of alimony were not barred by a discharge granted under the Bankrupt Act of 1867. The decision was based principally upon the fact that the order to pay alimony was at all times subject to modification, and that, moreover, the wife ought not to be allowed to prove what is essentially a claim for support in competition with her husband's creditors. The reasoning of Judge Choate is as applicable to the present act as to the act of 1867. The act of 1867 permitted the proof of "debts due and payable."

Under the Act of 1898 have been made several decisions supposed to favor the bankrupt's contention in this case.

In *re Houston* (D. C.) (2 Am. B. R. 107), 94 Fed. 119, the District Court of Kentucky discharged a bankrupt from an arrest made by order of the State court to enforce the payment of arrears of alimony. Most of the opinion is devoted to a vindication of the unquestionable authority of the District Court, under proper conditions, to release a bankrupt from arrest by a State court, but incidentally the court decided that alimony was a provable debt. Apparently the decision was based upon the authority of *Tyler v. Tyler*, 99 Ky. 34, 34 S. W. 898, where it was said that a judgment for alimony "makes him (the husband) an ordinary debtor to the wife for a fixed sum of money that his estate is liable for, in the same manner that it would be for a debt due upon any contract." If this is the nature of alimony in Kentucky, a claim for arrears of alimony there may well be barred by a discharge in bankruptcy; but,



as this is not the nature of alimony in Massachusetts, *In re Houston* is here inapplicable.

*In re Van Orden* (D. C.) (2 Am. B. R. 801), 96 Fed. 86, the bankrupt sought to enjoin his wife from prosecuting in New Jersey a suit in equity to recover arrears of alimony decreed by a State court of New York, and the District Court of New Jersey granted an injunction. In that case the liability was apparently fixed, inasmuch as its enforcement was sought in an independent suit, in which no modification of the original decree could be obtained. The decision has, therefore, no bearing on the present case, although the learned judge doubtless expressed his opinion that arrears of alimony in general are a provable debt.

*In re Challoner* (3 Am. B. R. 442), 98 Fed. 82, the District Court for the Northern District of Illinois enjoined the bankrupt's wife from attempting to collect alimony. The judge briefly said that, "under the decisions of the courts of Illinois, I am satisfied that money due under the decree, prior to the adjudication as a bankrupt in this court, is a debt under the bankruptcy law." By the law of Illinois, it seems that arrears of alimony cannot be reduced by the court which made the original decree, but that they constitute a fixed debt. *Craig v. Craig*, 163 Ill. 176, 45 N. E. 153. This difference between the nature of alimony in Massachusetts and in Illinois renders the decision *in re Challoner* inapplicable to this case. That alimony is not a provable debt, under the existing bankrupt law, was decided *in re Shepard*, 97 Fed. 187, by the District Court for the Southern District of New York, and it does not appear that, by the laws of New York, alimony is any the less a fixed liability absolutely owing than it is in Massachusetts. The difficulties that may arise in applying the ordinary statutory exemptions of the bankrupt to a liability for alimony are somewhat illustrated by *in re Garrett*, Fed. Cas. No. 5,252. Upon the whole, I hold that arrears of alimony in Massachusetts are not in general a provable debt, but I do not pass upon the effect of a discharge in bankruptcy upon an execution for alimony issued by the State court before the filing of the petition in bankruptcy. If that execution be held to create an absolute liability in favor of the wife, it may be that a levy of the execution upon the after-acquired property of the bankrupt will be stayed by the Court of Bankruptcy.

As to future alimony, there is no difficulty. It certainly is not a fixed liability, absolutely owing. On the contrary, it is contingent upon many circumstances—upon the life of both husband and wife, as well as upon a modification of the original decree by reason of the future-acquired property and earning capacity of the husband, of the future needs, and, it may be, the health of the wife, of her remarriage, and her receipt of property from other sources. Even if the present act permits the valuation and proof of contingent liabilities generally, yet this contingent claim is impossible of valuation. As to future alimony, I must think that the decree made *in re Challoner*, *supra* and naturally followed by the referee in this case, was made hastily. The learned judge there refused to pass upon "the status of the money which may become due thereunder after such adjudication." yet restrained suit for it for twelve months. But the bankrupt is not exempt from suit generally, but only from

suit upon provable debts. To deprive the wife of alimony altogether for twelve months seems to me unwarrantable, inasmuch as future alimony is not a provable debt. The injunction granted by the referee is vacated, and the petition for the injunction denied."

And see very excellent discussion on this subject by Referee Hotchkiss (*In re* Emil J. Smith, 3 Am. B. R. 67), in which the cases are carefully collated and it is held that alimony is not a debt but an obligation depending upon natural duty.

**Debts Not Yet Due.**—A debt is provable if absolutely owing at the time of filing the petition, though not then payable. The use of the term "at the time of the filing of the petition," instead of "the time of adjudication," clears up a point as to which in the early cases under the act of 1867 there was much conflict of authority. When that act was amended and incorporated in the Revised Statutes, it was provided as in this subdivision that the time of the filing of the petition was to be the date when the liabilities and debts must exist in order to be provable. The liability must be fixed or the debt must be owing at the time of the petition, otherwise it is not provable. If then owing, but not due, a rebate of interest must be allowed from the time of the petition to the time of maturity of the debt. As to interest-bearing debts, the provision of the statute is that principal and interest thereon, which would have been recoverable at that date, shall be provable. While this is not a definite statement that accrued interest not due shall be provable, yet it is manifest that the intent of the act is that such interest which has accrued up to the time of the petition is provable. An interest-bearing debt not due is a debt to become due at some future time for the amount of the principal plus the interest. Rebating the unearned interest produces the same result as allowing the accrued interest. (*Sloan v. Lewis*, 22 Wall. 150.) The provision that any interest which would have been recoverable at the time of the petition is provable must then be construed as meaning the interest that would have been recoverable if at that time there had been a right of action. As a matter of fact, if the claim is not due, no right of action exists for either

the principal or the interest, but if owing the principal is provable, and if the principal, then also the accrued interest. Interest may be proved as a claim whenever the party is entitled to demand it, whether or not there is an express agreement to pay it. After maturity of the contract, it will be at the legal rate, rather than the agreed rate. (*In re Bartenbach*, 11 N. B. R. 61; Fed. Cas. 1,068.) As against the bankrupt's general estate interest can be allowed only to the date of filing the petition. (*In re Haake*, 7 N. B. R. 61; s. c. 2 Saw. 231; Fed. Cas. 5,883; *in re Orne*, 1 N. B. R. 57; s. c. 1 Ben. 361; Fed. Cas. 10,581; Robson on Bankruptcy, 106.) But where a creditor holds property of the bankrupt as security for a debt due him, which by the terms of the contract he is authorized to appropriate to the satisfaction of the debt with interest till payment, the property passes to the trustee subject to the lien, and this being intended to secure interest as well as principal, it would seem the lienor is entitled out of the proceeds of the sale to the amount due as principal and as interest to the date of the payment of the principal. If the trustee should sell the property subject to the lien, it is clear that the vendee would take it subject to the lien for the interest till the time of payment of principal; and there seems to be no valid reason for holding that where the sale is made free of incumbrances there should be any different rule. In so far as the property is security for a sum of money, the secured creditor is entitled to the whole sum secured, to be paid out of the proceeds of the property, if they are sufficient for the purpose. (*In re Newland*, Fed. Cas. 10,171; 7 Ben. 63; *in re Haake*, 7 N. B. R. 61; s. c. 2 Saw. 231; Fed. Cas. 5,883.)

The propositions just stated with reference to a lienor's right as against the property, subject to his lien, to interest on his claim till time of payment, were applied in the case last cited, though the court, in so doing, intimated that it was departing from the English rule. In the opinion it was said: "The rule in England as to stoppage of interest at the time of the adjudication applies, says Mr. Robson [in his work on Bankruptcy], to mortgagees who come to the court for assistance, but if the mortgagee relies

on his security, the trustee cannot redeem without paying the interest then due.' " But if a mortgagee who relies on his security is entitled to interest until payment, it would seem that in every case in bankruptcy he would be entitled to it unless he proved his claim as unsecured. A mortgagee cannot be said to waive his security by delivering the property over to the trustee in accordance with the mandate of a law which requires him to do so, but which at the same time recognizes the existence of his lien. If he proves only for the amount of his debt in excess of the value of the security, instead of waiving the security, he certainly relies on it. If he makes no proof he certainly must be deemed to be content to seek his recovery out of the mortgaged property—a most perfect and absolute reliance on the security. Even if upon his motion, the court directs a sale of the property free from incumbrances, with a direction that his lien be transferred to the proceeds, he can hardly be said to seek the assistance of the court; he merely sets in motion the very court which would otherwise have to act upon the motion of some other interested party, and make that or a similar order, and which in making any order in the matter would have to recognize his right as a lienor. The lienor in these cases certainly does not fail to rely upon his security; on the contrary, the very proceeding is in reliance upon it. It is only when he waives his security, and proves as if unsecured, and takes his place among the general creditors that he can truly be said to seek the assistance of a court of bankruptcy.

A deficiency existing after applying proceeds of the sale of mortgaged property may be proved and is an allowable claim, even, it seems, where the deficiency is less in amount than the interest on the principal indebtedness from the time of the petition to the sale and subsequent payment. If it could be said that such deficiency was interest, then it would follow that not being a debt existing at the time of the petition, it was not provable, but the deficiency may be treated as an unpaid portion of principal rather than as unpaid interest. Where a party has a security covering debts in general, some of which are provable and some are not, the security may be applied by him in payment of the debts not

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provable. Thus, in *Ex p. Kensington* (2 M. & A. 362), quoted in *re Haake* (*supra*), a party having a lien on merchandise, delayed at the instance of the assignee, a sale of it, by means whereof a greatly enhanced price was realized. He was allowed to apply the proceeds first to the payment of the interest which had accrued since the *fiat*. In that case it was said: "The petitioner may be considered as having a security for a debt, part of which, viz., the principal and interest before the *fiat* is provable, and part, viz., the interest since the *fiat*, is not provable, and he applies the security to the part not provable. There is nothing in this which disturbs the rule that interest stops at the bankruptcy; the circumstances take it out of that rule."

**Provability of Claims for Rent.**—The former act contained a provision for the apportionment of rent and for proving the claim for such amount as was thus found to be earned. It was as follows: "Where the bankrupt is liable to pay rent or other debt falling due at stated and fixed 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." (Section 5071 of the Revised Statutes; § 16 of the act of 1867.) The present act contains no such provision.

The question has been raised as to rent coming due under a subsisting lease after the adjudication in bankruptcy. It seems to be pretty clearly settled by all the cases that such rent is not provable. But if the trustee elects to use the leasehold the rent becomes part of the costs of administration. But some of the cases hold that the adjudication in bankruptcy severs the relation of landlord and tenant and abrogates the contract by operation of law. (*In re Jefferson*, 2 Am. B. R. 206; 93 Fed. 848; *Bray v. Cobb*, 3 Am. B. R. 788; 100 Fed. 270.) In the case of *In re Ells* (3 Am. B. R. 564; 98 Fed. 967), there is a disapproval of the doctrine laid down in the case of *In re Jefferson* to this extent, and it is held that while if the trustee takes the lease with the consent of the landlord the liability of the bankrupt is ended, if he does not do so the bankrupt is still liable, the theory being that unless

the landlord terminates the lease the bankrupt is still held on the ground that he is not discharged from his covenants, citing *Ex parte Houghton*, 1 Low. 554; Fed. Cas. 6,725. Compare also cases cited in *In re Arnstein*, 4 Am. B. R. 246; 101 Fed. 706, and *in re Collignon*, 4 Am. B. R. 250.

If the landlord re-enters, the lease is ended in accordance with the well-known principle of the law of landlord and tenant. (*In re Ells*, *supra*.)

**Costs.** Section 63a (2) (3)—If a judgment for costs has been entered before the filing of the petition, it is a provable debt, though the action may not have been upon a provable debt; and where judgment is recovered before the filing of the petition, the costs are part of the debt. (*Graham v. Pierson*, 6 Hill, 247; *in re O'Neil*, Fed. Cas. 10,527; 1 Lowell, 162.) The provisions of subdivisions 2 and 3 of this section provide, however, for the proving and allowing of costs incurred in certain cases, though not at the time of the petition, reduced to the form of a judgment. Although in subdivision 2 they are spoken of as "due," the word "due" must be construed as permitting the proof not only of such costs as were then actually due, but also of such costs as had been incurred prior to the filing of the petition and which would then have been taxable if the suit had been discontinued upon a stipulation that each party would pay the usual taxable costs; but there is no provision for proof and allowance in favor of a defendant of any costs where the plaintiff afterward goes into voluntary bankruptcy, if the trustee declines to prosecute the suit. In such case the costs not being provable are not dischargeable. If after the petition the plaintiff's (bankrupt's) action is dismissed and a judgment for costs entered against him, his liability to pay it remains unaffected by his bankruptcy. If the bankrupt was the plaintiff in the action, it is immaterial whether or not the cause of action was a provable debt or otherwise. But if the creditor was the plaintiff, he can recover his taxable costs up to the time of the petition, only if the action was brought on a provable debt. If a provable debt is reduced to judgment after the petition, and

before the consideration of the bankrupt's application for a discharge, the judgment may be proved, less interest from the time of the petition and less costs incurred since the filing of the petition. (Compare subdivision 5.)

The costs and disbursements in an attachment suit pending against a bankrupt at the time of the filing of the petition, the attachment lien being dissolved by the adjudication, are not a claim which should be paid by the trustee out of the bankrupt's estate. The costs and disbursements are a mere incident of the lien and fail with the lien. (*In re Young*, 2 Am. B. R. 673; 96 Fed. 606.) But see *In re Allen* (3 Am. B. R. 38; 96 Fed. 512), in which it is held that such a claim incurred in good faith by a creditor though within four months of bankruptcy, is a provable claim against the estate though the lien is dissolved. But such a claim is not entitled to priority.

That the costs and disbursements in an attachment suit cannot be proven as a debt against the bankrupt and that the lien for the costs fails with the attachment lien, see the following cases under the act of 1867: *In re Fortune*, 2 N. B. R. 662; s. c. 1 Low, 306; Fed. Cas. 4,955; *Gardner v. Cook*, 7 N. B. R. 346; Fed. Cas. 5,226; *in re Geo. S. Ward*, 9 N. B. R. 349; Fed. Cas. 17,145; *in re Hatje*, 12 N. B. R. 548; s. c. 6 Biss. 436; Fed. Cas. 6,215; *in re C. H. Preston*, 6 N. B. R. 545; Fed. Cas. 11,394; see, however, apparently *contra*, *In re John S. Foster*, 2 Story, 131; Fed. Cas. 4,960; *in re Housberger*, 2 Ben. 504; s. c. 2 N. B. R. 92; *London v. King*, 50 Ga. 302; *in re C. H. Preston*, 5 N. B. R. 293. An examination of the above cases shows, however, that in many of them, although it was held that the lien for costs failed with the attachment lien, and although there was no claim therefor against the bankrupt, still the bankrupt court may, in the exercise of its equitable jurisdiction, require the trustee to pay such charges as have benefited the estate in his hands, though incurred before the bankruptcy; if he received the benefit of the costs of an attachment he was obliged to sustain the burden. (See *In re Fortune*, *Gardner v. Cook*, and *in re Geo. S. Ward*, *supra*; also *in re H. E. P. Jenks*, Fed. Cas. 7,276; 15 N.

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Debts Founded on Contract, Express or Implied or Open Account. [Ch. VII.]

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B. R. 301; *Zeiber v. Hill*, Fed. Cas. 18,206; 1 Sawyer, 268; s. c. 8 N. B. R. 239; and *in re Holmes*, Fed. Cas. 6,631; 14 N. B. R. 493.)

It would seem that under the act of 1898 the case of *Allen*, *supra*, is the better authority.

**Debts Founded on Contract, Express or Implied or on Open Account.**

—No debt can be proved unless it exists at the time of the filing of the petition. It is true that under this subdivision there is no requirement that the debt must be owing at the time of the petition, but that is the manifest intent of the act. Such debts need not, however, be payable at that time. (*In re Orne*, Fed. Cas. 10,581; 1 N. B. R. 57; s. c. 1 Ben. 361.) That which is provable is the debt founded on the contract, not the contract liability. There is no method of proving a mere contract liability unless there is something owing, either because of a breach of the contract before the petition was filed, or because of performance. The Bankruptcy Act does not intend to release one from his contracts and obligations. See as to claim for rent, preceding paragraph on that subject under this section. In a case arising under the present law (*In re Silverman*, 4 Am. B. R. 83; 101 Fed. 219) it was held by the District Court in Missouri that where prior to bankruptcy, the bankrupts made a deed of trust in favor of creditors, this constituted a breach of a subsisting contract of employment with the claimant, as it operated to terminate such contract by rendering performance on their part impossible, and, upon this breach a cause of action immediately arose in favor of claimant for damages therefor which was not affected by the subsequent adjudication in bankruptcy, and which constituted a provable claim in bankruptcy, to be computed upon the basis of the salary which he would have received during the period over which the contract was to extend, less such amount as he had earned elsewhere.

This is in accordance with the principle of the law of contracts in most common law jurisdictions, that where there is a renunciation of the contract or an impossibility created by one party be-



fore performance is due, or during course of performance, the innocent party may treat the rescission as conclusive, and begin his action straightway. (*Hochster v. Delatour*, 23 E. & B. 678; *Windmuller v. Pope*, 107 N. Y. 674; *Chicago v. Tilley*, 103 U. S. 146.) Such a claim would therefore fall under 63 (4), as being founded upon a contract, and, being immediately payable upon breach, undoubtedly constitutes a provable debt. (As to rule of damages, compare *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285.)

**Continuing Contracts.**—The bankrupt's liability to fulfill his contract is not released by the discharge. It is only the debt which may have been incurred by him by reason of the contract which is affected. If there are covenants in the contract which are of a continuing character, he remains liable to fulfill those covenants; if the covenants are of such a continuing character that there may be successive breaches of the covenants, then the discharge simply releases the bankrupt from his indebtedness upon the breaches which have occurred prior to the petition in bankruptcy. A discharge does not operate upon a contract of a continuing character in such a manner as to permit the bankrupt to enjoy the benefits arising therefrom after the filing of the petition, and at the same time exempt him from liability to pay for such subsequent enjoyment. (*Robinson v. Pesant*, 8 N. B. R. 426; s. c. 53 N. Y. 419, citing *Stienmetz v. Ainslie*, 4 Denio, 573.) As to claims for rent see paragraph *ante* under this section, *sub. nom.* PROVABILITY OF CLAIMS FOR RENT. There is no doubt about the bankrupt's liability if he continues to use the premises. Of course it would be different, if by the terms of the contract the rent was all payable in advance and had become due before the petition, although the term extended beyond that time. So a continuing covenant to pay taxes as they might be assessed throughout a period of years to come, would not be provable in bankruptcy. Failure to pay instalments prior to the petition would give rise to a debt which would be provable, but it would not release the covenantor from liability to pay subse-

quent assessments. (*Murray v. DeRottenham*, 6 Johns. Ch. 52.) So since covenants that one will warrant and defend a title are not broken until a paramount title is asserted and established, there is no provable debt until that time, notwithstanding there may be adverse claimants; and there being no provable debt, the covenantor is not released from the obligation. But if the covenant has been broken, then the party may prove his claim in bankruptcy. A covenant against incumbrances being broken at the time of the conveyance, if an incumbrance did then exist, is a debt provable in bankruptcy. The bankruptcy court has ample power to liquidate the damages. (*Parker v. Bradford*, 45 Iowa, 311.) Bonds to secure the faithful performance of the duties of another, an officer, are of a continuing nature. There is a cause of action for each breach. The liability, because of those breaches which have occurred before the filing of the petition, is provable and is released, but this does not destroy the continuing obligation of the bond. (*Fowler v. Kendall* 44 Me. 448.)

**Claims Against More Than One Person.**—If the debt is of such a nature that an action upon contract to collect it could be brought against the bankrupt, it is provable, although it might be collected from others. Thus, a party dealing with an agent has a right to hold the principal liable for the agent's acts within the scope of his authority. This rule of law also applies, although the agent contracts in his own name without disclosing his principal, and the other party supposes the agent to be contracting for himself. In such a case the party contracting may sue either the agent or the principal. If the principal has become bankrupt, then the claim may be proved in bankruptcy against him. (*In re Troy Woolen Co.* Fed. Cas. 14,203; 8 N. B. R. 412.) So the holder of a joint obligation can prove his claim against any and every person whom he could have sued. A holder of a note which has become due and has been protested, if protest were necessary, may prove against the maker or any indorser. (*Downing v. Trader's Bank*, 2 Dill. 136; s. c. 11 N. B. R. 371.) If one holds a firm obligation indorsed by one or more of the individual members,

## § 63.] Claims Against More Than One Person — Implied Contracts.

all of whom as a firm and as individuals afterwards go into bankruptcy, he may prove his entire claim against the partnership estate, and the estate of each individual indorser; but in the aggregate can recover no more than his full claim. (*In re Howard, Cole & Co.* Fed. Cas. 6,750; 4 N. B. R. 571; *Mead v. Bank*, Fed. Cas. 9,366; 6 Blatch. 185; s. c. 2 N. B. R. 173; *Emery v. Bank*, Fed. Cas. 4,446; 7 N. B. R. 217; s. c. 3 Cliff. 507.) Compare commentaries on section 5.

(See also on Claims against Partnerships, Debts of one Partner to Another, etc., section 5, *sub. nom.* RIGHTS OF CREDITORS HOLDING JOINT AND SEVERAL OBLIGATIONS, PROVING CLAIMS OF THE PARTNERSHIP ESTATE AGAINST INDIVIDUAL ESTATE AND VICE VERSA, *et id. omne.*)

**Implied Contracts.**—It is a well-recognized rule of law that one whose property has been converted by another, or wrongfully taken or used, has in many cases the privilege of waiving his right to sue for damages in tort and of suing the tortfeasor for the value of the property which the latter has wrongfully acquired, as upon a promise to pay for the same. If such property has been sold and the proceeds have come into the hands of the tortfeasor, it is universally admitted that an action for money had and received will lie. The right to this latter remedy is based on the fact that the tortfeasor has acquired something which he cannot rightfully retain, and the right is limited to those cases of tortious injuries to property where the tortfeasor has enriched himself. It should be firmly borne in mind that one can sue as upon an implied contract only when the defendant has unjustly enriched himself; the mere fact that the other party has been impoverished by the tort is insufficient. Thus, where one by his fraud has induced another to part with his money to a third person, there is no implied promise of the defrauding party to pay therefor, and no action as for money had and received will lie. These principles will most frequently have to be applied in bankruptcy to cases of conversion and trespass. But there is a question whether in all cases of conversion a party has a remedy upon

implied contract. When money has been received by the tortfeasor, it is universally admitted that an action as for money had and received will lie; but where the property is wrongfully retained or consumed, there is conflict of authority as to the right to sue as for goods sold and delivered. If the defendant has converted the plaintiff's property and in the act of conversion sells the same, or thereafter sells the same, the plaintiff may waive his right to sue in tort and sue in assumpsit, using the count for money had and received to recover proceeds of the sale. Having the right to sue in assumpsit, he may, under this subdivision of this section of the Bankruptcy Act, prove his claim for the proceeds. Further, it is laid down by writers on the subject of Implied Contract that since the right to recover money which has been stolen, fraudulently obtained, or wrongfully converted to another's use rests on the equitable principle of unjust enrichment, the claim may be asserted not only against the immediate tortfeasor, but against any one into whose possession the money may be traced, until it reaches the hands of a holder without notice. (Keener on Quasi-Contracts, 1st ed. chapter on "Waiver of Tort.") And in Keener's treatise it is stated that as the claim is maintained only on strict equitable principles, it cannot be asserted against a holder for value without notice. So, if the property has been wrongfully taken and used, though afterwards returned, one may waive his action for a trespass and sue on a count for use and hire. Thus, if a servant of one is enticed away by another and the latter makes use of his services, the facts existing which would sustain an action in tort, the tort may be waived and the injured party sue for the value of the services; but no action will lie for the wrongful use and occupation of real property. The lack of this remedy in cases of the wrongful use of land is due to purely historical reasons. Further, it is said that logically it would seem that where one has tortiously taken or retained the goods of another and has not disposed of them, an action as for goods sold and delivered should lie against him to recover their value. But in many jurisdictions this remedy as against the tortfeasor is denied, but is allowed in others. Thus,

## § 63.] Claims for Damages for Conversion Have no Right of Priority.

in Keener on Quasi-Contracts, chapter on "Waiver of Tort," page 194, of first edition, it is stated that such an action has been allowed in California, Georgia, Illinois, Indiana, Kansas, Michigan, Mississippi, New York, North Carolina, Tennessee, Texas, West Virginia, Wisconsin; but has been disallowed in Alabama, Arkansas, Delaware, Maine, Massachusetts, Missouri, New Hampshire, Pennsylvania, South Carolina, Vermont. Under the Act of 1867, section 19, section 5067 of the R. S., it was provided: "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 it be held that the terms of paragraph *b* of this section permit the liquidation of damages arising from torts of any and every kind, then the question as to what torts may be waived, and action brought as upon implied contracts, loses its practical importance. But if the paragraph is not so construed, the determination of that question is of vital importance, because in that case only those torts which may be waived and for which actions as upon implied contracts may be brought would be provable. Those actions, do not, at least in some jurisdictions, embrace all actions for trespass and conversion, and hence many claims arising from such torts will have to be proved, if proved at all, under the terms of paragraph *b*, and not under subdivision 4 of paragraph *a*.

**Creditors Whose Claims are for Damages for Conversion Have no Right of Priority.**—If the bankrupt has converted another's property, and the latter elects to prove his claim for damages as if it were upon contract, he is not preferred over the creditors. Thus where one had advanced money to another, who afterwards became bankrupt, to buy stock for him which was purchased by the bankrupt, and wrongfully taken in his own name, and by him hypothecated for money loaned to him, as against other creditors, the one whose property has been converted has merely a provable debt to the amount of the value of the stock so directed to be purchased. Not being able to receive his money *in specie*,

he has now merely a claim for damages. (*Ungewitter v. Von Sachs*, Fed. Cas. 14,343; 4 Ben. 167; s. c. 3 N. B. R. 723.) And a creditor whose claim consists of liquidated damages for any other tortious injury is not entitled to a right of priority. He receives merely a *pro rata* share, although in many instances his claim will not be released by a discharge under section 17.

**Open Accounts.**—Compare section 68 as to mutual debts and mutual credits and set-off.

**Changes in the Form of the Debt After Filing the Petition.**—Somewhat analogous to the question of the provability of a debt existing at the time of the petition, but afterwards reduced to the form of a judgment, is the question of the provability of a debt evidenced by a note made prior to the filing of a petition, but taken up thereafter by the giving of a new note. Under the former act it was held *In re Montgomery* (3 N. B. R. 426; Fed. Cas. 9,730) that a new note thus given in the place of an old one was a new debt or obligation, and therefore not provable in bankruptcy. This decision was based on the decision *in re Williams*, (Fed. Cas. 17,705; 2 N. B. R. 229), which held that a debt existing at the time of filing the petition and thereafter reduced to a judgment, was merged in the judgment and could not be proved, and that the judgment could not be proved, inasmuch as it was not a debt owing at the time of the petition. That decision was of doubtful correctness under the old act, and would be at variance with the statutory rule laid down in subdivision 5 of this section. The weight of authority before there was any statutory provision was that a change in the form did not extinguish the debt, but left it provable, and this, as has been seen, applied to a debt merged into a judgment. So, as to a debt for which a note was given after the filing of the petition, or to a debt evidenced by a note taken up by a new note. According to the rule laid down by our Federal courts, and most of our State courts, a promissory note of the debtor or of a stranger, does not discharge the precedent debt for which it is given unless such be the agreement of the parties to it. The note only extends the

time of payment of the debt. If the note is given contemporaneously with the debt, and is the note of a third party, it is presumptively in payment of the indebtedness; if the note of the debtor, it is presumptively not a payment. ("Anson on Contracts," Huffcuts' ed. 346 n.)

But the giving of a new note in place of a note existing at the time of the filing of a petition presents another question, and that is the question of the reviving of an indebtedness by a new promise. There are numerous decisions to the effect that a new note, although given between the time of filing the petition and the time of the discharge, is a new promise reviving the discharged debt, since the discharge, although it may be granted later, relates back to the time of the filing of the petition. (Compare *Jersey City v. Archer*, 122 N. Y. 376.)

Compare cases cited under section 17 REVIVAL OF A DISCHARGED DEBT BY A NEW PROMISE.

**Provable Debts in General.**—In general every existing claim upon which an action at law or in equity could be maintained at the time of the filing of the petition, is provable in bankruptcy, and any defense which might have been urged had action been brought on the claim, may be urged against its allowance in bankruptcy. (*In re Prescott*, 5 Biss. 523; Fed. Cas. 11,389; s. c. 9 N. B. R. 385.) Thus, a *feme covert* may set up her coverture as a defense to a claim made against her estate. (*In re Rachel Goodman*, Fed. Cas. 5,540; 5 Biss. 401; s. c. 8 N. B. R. 380.) And if a corporation enters into a contract *ultra vires*, upon which it could not bring an action, it cannot prove a claim arising thereon in bankruptcy. (*In re Jaycox & Greene*, 12 Blatch. 209; Fed. Cas. 7,244.) So contracts void because of the consideration being illegal, or because the contract is against public policy, cannot be the foundation of a debt provable, or at least allowable, in bankruptcy. (*Ex p. Jones*, 17 Ves. 332; *Lowe v. Waller*, Doug. 736; *in re Chandler*, 6 Biss. 53; s. c. Fed. Cas. 2,590; 9 N. B. R. 514; *in re Young*, Fed. Cas. 18,145; 6 Biss. 53; *ex p. Mumford*, 15 Ves. 289; *Lehman v. Strassberg*, 2 Woods, 554; *in re Green*,

Fed. Cas. 5,751; 15 N. B. R. 198; *ex p.* Cottrell, Cowp. 742; *ex p.* Daniels, 14 Ves. 191.) So as to "Stock Gambling" transactions. But the burden of proof rests upon those disputing a contract apparently valid. (Compare *Hill v. Levy*, 3 Am. B. R. 374 and *note*; 98 Fed. 94.) So, if the statute of frauds would be a defense to an action it may be set up as an objection to the allowance of a claim. (*Capell v. Trinity Church*, Fed. Cas. 2,392; 11 N. B. R. 536.) In addition to claims upon which actions could be brought, debts existing at the time of the filing of the petition, but not then payable, are provable in bankruptcy, and being provable, the holder of such debts may be a petitioner to have the debtor involuntarily adjudged a bankrupt. (*In re Alexander*, Fed. Cas. 161; 4 N. B. R. 178; s. c. 1 Low. 470.)

**Claims Cognizable Only in Equity.**—Not only may debts which are cognizable in courts of law be proven in bankruptcy, but also those which are cognizable only in courts of equity. *In re Blandin* (5 N. B. R. 39; Fed. Cas. 1,527; s. c. 1 Low, 543), Judge Lowell of the District of Massachusetts decided that the wife of a bankrupt might prove in bankruptcy as a creditor of the estate of her husband, for money realized by him out of property which she held as her separate estate, under the statutes of Massachusetts, the evidence clearly showing that the transaction between her and her husband was intended to be a loan and not a gift. In rendering his opinion the judge said: "It seems to be the intent of the statute to give all creditors an equal share of the assets without regard to the mode in which their rights might have been enforced if there had been no bankruptcy. In respect to both debtors and creditors the act is highly remedial, and the district court is vested with most ample equitable powers to enable it to work out full remedies to all persons. It has always been the law of England that equitable demands may be proved in bankruptcy. (*Ex p.* Williamson, 2 Ves. [Sen.] 252; *ex p.* Taylor, 1 Rose, 175.) 'A commission in bankruptcy,' said Lord Eldon, 'is nothing more than a substitution of the authority of the Lord Chancellor, enabling him to work out the payment of those cred-



itors who could by legal action or equitable suit have compelled payment.' (*Ex p. Dewdney*, 15 Ves. 498.) Our statute makes provable all debts and liabilities, in language broad enough certainly to cover such as a trustee owes to his *cestui que trust*, or a partner to his copartner; and so of demands which, but for the bankruptcy, would be properly cognizable in a court of admiralty. If this be not so, I do not see how the law can be uniform; for proof of debts will depend on the remedies given in the several States, in one of which the very same debt might be sued at law which in another must be prosecuted in equity, and in some of which there is no distinction between law and equity." There is probably no doubt now at least in most of the States, that a wife may be the creditor of her husband and so initiate proceedings against him. (*In re Novak*, 4 Am. B. R. 311; 101 Fed. 800.)

**Debts Due to Aliens and Effect of Foreign Discharges.**—See section 17, *ante*.

**Claims Affected by the Statute of Limitations.**—A conflict of opinion is found in the decisions under the Act of 1867 on the question whether after a debtor has been adjudged a bankrupt, a claim to which the statute of limitations would have been a good defense had an action been brought thereon in a State court, is provable in bankruptcy. The bankruptcy courts for both the Northern and Southern Districts of New York held, under the last act, that such debts were provable unless they were debts payable in States where the statute of limitations was an absolute bar to the claim and a complete extinguishment of the indebtedness, so that nowhere could an action be maintained upon it. Where the statute of limitations merely affected the remedy in one particular jurisdiction, but did not prevent a suit thereupon in other jurisdictions, the debt, being still in existence, was held by these courts to be provable in bankruptcy, and the creditor was considered entitled to a dividend upon it. The leading case stating this doctrine was *In re Ray* (1 N. B. R. 203; Fed. Cas. 11,589; s. c. 2 Ben. 53), Judge Blatchford writing the opinion.

To the same effect as the decision just cited was *in re Shepard* (Fed. Cas. 12,753; 1 N. B. R. 439; s. c. 7 A. L. Reg. 484), which was decided by the District Court for the Northern District of New York. But the weight of authority is clearly opposed to the rule laid down in these cases. (See *in re D. Kingsley*, 1 N. B. R. 329; Fed. Cas. 7,819; s. c. 1 Low. 216; followed *in re Hardin*, Fed. Cas. 6,048; 1 N. B. R. 395; and also *in re Noeson*, Fed. Cas. 10,288; 12 N. B. R. 422; s. c. 6 Biss. 443; *in re C. Reed*, Fed. Cas. 11,635; 11 N. B. R. 94; s. c. 6 Biss. 250; *in re Cornwall*, Fed. Cas. 3,250; 6 N. B. R. 305; s. c. 9 Blatch. 114.) These latter cases hold that a debt barred by the statute of limitations where the bankrupt resides, cannot be proved against his estate in bankruptcy; and *in re Kingsley*, the court went so far as to hold that if the claim was barred by the laws of the State of the debtor's residence, it could not be proved in bankruptcy, even if not barred by the laws of the State of residence of the creditor, notwithstanding at the time of the creation of the debt both parties resided therein. The decisions in the cases last cited are based upon the fact that by the statutes and rules of practice of the United States courts, when an action against a resident of a particular State is brought in a Federal court, embracing that State within its jurisdiction, the Federal court is governed by the statute of limitations of that particular State.

And the cases under the Act of 1898 generally follow the last cited cases. (*In re Lipman*, 2 Am. B. R. 46; 94 Fed. 353; *in re Resler*, 2 Am. B. R. 602; 95 Fed. 804.)

If a debt is not barred by the statute of limitations at the time of the filing of the petition, the weight of authority is that it may be proved against the estate at any time within the period allowed for proving claims, even though the time within which an action could be brought thereon would have expired earlier. The statute of limitations ceases to run against the creditor of a bankrupt from the commencement of the proceedings in bankruptcy. (*In re Eldridge*, Fed. Cas. 4,331; 12 N. B. R. 540; *in re Wright*, Fed. Cas. 18,068; 6 Biss. 317; compare, however, to the

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contrary, *Nicholas v. Murray*, Fed. Cas. 10,223; 5 Saw. 320; s. c. 18 N. B. R. 469.)

**Proving Debts Which Are Not Actionable in State Courts.**—Somewhat analogous to the question of the right to prove claims as to which the statute of limitations could be pleaded as a defense, is the question of the right to prove claims which by positive provisions of statutory laws are not enforceable in the State courts. Such a claim may be proved if the State statute affects only the remedy and not the validity of the contract. Thus if two persons enter into a contract of sale, valid by the laws of the State where the contract is made, but which cannot be enforced as against the purchaser in the courts of the State of his residence, yet the contractual liability existing and the person being liable to be sued thereon if jurisdiction is obtained over him elsewhere, there is such a debt as is provable in bankruptcy. The mere fact that the courts of the State will not give a seller the right to sue, goes only to the remedy, not to the existence of the contractual obligation. So held where a resident of the State of Maine bought liquors in another State by a contract valid in the State of purchase, but which the court of Maine would not enforce because of their prohibitory laws. (*In re Murray*, Fed. Cas. 9,954; 3 N. B. R. 765.)

**Debts Not Provable, Unaffected by Bankruptcy Proceedings.**—“The provisions in regard to what debts may be proved are arbitrary, but do not affect the existence or validity of such debts as are not provable, nor does a discharge release them. If a debt is provable, it comes in for a dividend, and can, unless it is an excepted debt, be discharged. If it is not provable, it does not come in for a dividend, but it will not be discharged.” (*In re May & Merwin*, 9 N. B. R. 419; s. c. 47 How. Pr. 37; s. c. 7 Ben. 238.) Compare section 17a.

**Proof of Claim Subjects the Creditor to All Orders of the Court.**—The creditor, wherever he may reside, by proving his debts, submits himself personally to the jurisdiction of the court of bank-

ruptcy, and becomes subject to all its orders in so far as they affect his claim, and the bankruptcy court may deprive him of all the benefits which otherwise he would have, and may expunge his proof as a punishment for offenses of which he may be guilty. (*In re Kyler*, Fed. Cas. 7,956; 2 Ben. 414.) A creditor proving his debt makes himself a party to an equitable proceeding, and the court may deny him relief, in cases where a court of equity would be justified in so doing. Thus, if knowingly and with intentional fraud, a creditor includes in his claim a claim which is invalid and illegal, and not owing to him, it has been held that the court may refuse to give him any relief whatever; it may even refuse to allow the valid portion. (*Marrett v. Atterbury*, Fed. Cas. 9,102; 11 N. B. R. 225; s. c. 3 Dill. 444.)

**Cross references.**—As to claims against partnerships, compare section 5. As to manner of proof, compare section 57. As to provable debts which are not released by a discharge, compare section 17. As to dividends on proved claims, compare section 65. As to set-off of mutual debts and credits, compare section 68.

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**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; (2) the filing fees paid by creditors in involuntary cases; (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 petition-

ing 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 (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.

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Analogous Provisions of Former Acts.

R. S., § 5101; act of 1867, § 28; act of 1841, § 5; act of 1800, § 62.

**Priority of the United States.**—Section 3,466 of the U. S. Revised Statutes provides:

“Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is sufficient to pay all the debts due from the deceased the debts due to the United States shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, 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 well-recognized principle that a statute is not to be construed as limiting the prerogative of the sovereign and that the sovereign is not affected by the provisions of a statute, unless expressly so declared, necessitates the belief that the section of the Revised Statutes above quoted is still in force, and that debts due to the United States have a priority over all claims other than taxes.

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 Priority of the United States—Payment of Taxes by Trustee. [Ch. VII.]
 

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Section 3,466 was construed by the United States Supreme Court in the case of the *U. S. v. Lewis* (92 U. S. 618; s. c. below, 13 N. B. R. 33), and it was there said:

“The language of that section is general, and it is without qualification. The form of the indebtedness is immaterial. It may be by simple contract, speciality, judgment, decree, or otherwise by record. The debt may be legal or equitable, and may have been incurred in this country or abroad. A valid indebtedness is as effectual in one form as in another. No discrimination is made by the statute.”

In that case it was held that the United States was not in any wise bound by the Bankruptcy Act of 1867, and the fact that it did not prove its claim in bankruptcy proceedings was immaterial and did not affect its right to a priority.

And see what is said under section 17 as to the non-dischargeability of claims of the United States and the various States, *sub nom.* DEBTS TO THE UNITED STATES, ETC.

It will be noted that the statute gives precedence expressly only to taxes so far as the State or municipal division is concerned, except so far as such priority may arise out of subdivision b (5).

In the district of Massachusetts it has lately been held that a county is a *quasi*-municipal corporation, and a claim held by it arising out of services of convicts in a county house of correction is entitled to priority. (*In re Worcester County*, s. c. *In re Derby*, 4 Am. B. R. 496; 102 Fed. 808.)

**Payment of Taxes by Trustee.** Section 64a.—It has been held that the trustee must at the request of the bankrupt pay the taxes legally owing by such bankrupt even though assessed against property which is set off as exempt and though the said taxes are a lien upon and enforceable against the exempt property and their payment would exhaust the fund otherwise going to the general creditors. (*In re Tilden* [D. C. Iowa], 1 Am. B. R. 300; 91 Fed. 500.) But in the District Court of Connecticut it was held that where, under the statute of a State, taxes are a prior secured lien upon real estate, and the result of their payment would be to

give a secured mortgagee an additional advantage over the general creditors, their payment by the trustee will not be ordered. The following extract from the opinion of Townsend, J., gives the reasoning in that case:

"That the practical result of payment of these taxes on real estate by the trustee would be to take the amount from the general creditors and give it to the mortgagee must, of course, be conceded. If the tax collector is obliged to enforce his lien, there are legal fees compensating him for his trouble. The municipalities to which the tax is due have no real interest in the controversy. The only precedent under the law of 1867, so far as I am aware is *Foster v. Inglec*, 13 N. B. R. 239, Fed Cas. 4,973. In this case an execution had been levied upon real estate subject to taxes. It was held that if the taxes had been deducted in estimating the value of the real estate the rules of equity would forbid their payment by the trustee. It follows then, that, upon precedent, taxes should not be paid by the trustee, when such payment would operate to the advantage of a third party against another; the taxes being, in any event, secured. Under the law of 1898, *in re Tilden*, 1 Am. B. R. 300, 91 Fed. 500, the taxes were assessed against an exempt homestead of the bankrupt. The referee refused to order the taxes paid by the trustee. The attention of the court was not called to any decision under former bankruptcy statutes throwing light on the question. Held "the exemption laws are to be liberally construed to accomplish the purpose of the exemption," and ordered the taxes paid. The contest in that case was apparently between the bankrupt and the general creditors, the tax collector taking no part; and the decision does not indicate that the tax collector was considered as having any interest therein. John C. Hurley, referee for the Eastern District of Texas, made the same decision in a similar case. *In re Baker*, 1 Am. B. R. 526. In that case the taxes were a lien upon the person as well as upon the real property. No precedent under bankruptcy laws was cited by counsel, and no case similar to the present has been found by me. Under section 64b, taxes seem to come fifth in order among the debts which have priority. It has always been recognized that the general rules of equity are to govern the administration of bankruptcy laws. These rules include the marshaling of assets, where necessary to do justice between the parties. I ought not to be construed to be the intent of the law that taxes should be paid where it is not questioned but that they are otherwise secured, and when such payment would work *supra*, and so far as is shown, has not been held otherwise."

(Compare *In re Veitch*, 4 Am. B. R. 112; 101 Fed. 251.)

It was further held, *in re Conhaim* (4 Am. B. R. 58; 100 Fed. 268), that where goods have been sold by the trustee and the vendees resist the payment of the taxes thereon on the ground that

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such taxes accrued before the sale the trustee will not be ordered to pay such taxes upon their petition but will be ordered to have the goods assessed at a fair valuation in his name as trustee and pay the legal assessment thereon. As to right of subrogation of remainderman who has paid the taxes on the life estate of the bankrupt as against the trustee, see *In re Force* (referee's opinion, 4 Am. B. R. 114).

**Cost of Preserving the Estate.** Section 64b. (1).—See commentary under section 62 *ante*, *sub nom.* SUMS PAID FOR THE PRESERVATION OF PROPERTY.

SEC. 64b (2). Compare the provisions of G. O. 10 which are intended to cover money which the bankrupt, or some third party, may be called upon to furnish after the initiation of the proceedings in order to meet the expenses for the purposes cited in that order, but which do not, however, include the money deposited with the clerk to meet the fees of such clerk, the trustee and the referee. Money advanced under G. O. 10, if the bankrupt has met with all the requirements of the law, is to be repaid out of the estate. (See *In re Matthews*, 3 Am. B. R. 265; 97 Fed. 772.)

**Costs of Administration.** Section 64b (3).—The costs of administration are a prior lien upon the assets of the bankrupt's estate, and take precedence of specific liens thereon.

The expenses of a referee, including a reasonable allowance for clerk hire, fall within section 64b (3). (*In re Tebo*, 4 Am. B. R. 235; 101 Fed. 419.) See section 62 *ante*.

**Attorney's Fees.** Section 64b (3).—The attorney's fees provided for in this section rest in the sound legal and judicial discretion of the court to be determined from the circumstances of each case upon evidence of the service performed and its value or from knowledge of its worth. But such fees do not rest in unrestrained discretion, and the Circuit Court of Appeals has the right to review the allowance of an attorney's fee which exceeds the sum of \$500 under section 25a, subdivision 3. See very ex-



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Attorney's Fees — Wages, etc.

haustive opinion on this subject *in re* Curtis, (Bank of Waverly C. C. A. 4 Am. B. R. 17; 100 Fed. 784). See also *In re* Burrus (3 Am. B. R. 296; 97 Fed. 926). Where assets are recovered from fraudulent transfers of the bankrupt they should not be made subject to an allowance for his attorney, especially where it appears that such attorney has been paid in advance under the provisions of section 60d. (See *in re* O'Connell, 3 Am. B. R. 422; 98 Fed. 83. Compare also *in re* Kross (3 Am. B. R. 187; 96 Fed. 816).

**Wages, etc.** Section 64b (4).—This priority has been held to be personal and where an assignment of the wages took place prior to the filing of the petition no priority was allowed. (*In re* Westlund, 3 Am. B. R. 646; 99 Fed. 399.) But where the assignment took place after the bankruptcy proceedings were commenced it was held that the claims for wages are entitled to priority in the hands of the assignee. (*In re* Campbell, 4 Am. B. R. 535; 102 Fed. 686.) Although under section 38 (5) an examination of the bankrupt and the employment of a stenographer may as a general rule be allowed at the expense of the estate it should not be allowed for the benefit of the general creditor out of the wages claims of the workmen objecting thereto when the funds in hand are only sufficient to pay the preferred claims. But this fact should be brought to the attention of the court (*In re* Rozinsky, 3 Am. B. R. 830; 101 Fed. 229.)

It follows from what has been said under section 63 in regard to reducing claims to judgment that a wages claim reduced to judgment does not thereby lose its priority. (*In re* Anson, 3 Am. B. R. 231, and note; 101 Fed. 698.)

The meaning of the words "workmen, clerks or servants" under this section has been held not to be synonymous with the definition of wage earners under section 1 (27) and the definitions generally confine the application of the words to their ordinary significance. Thus it has been held that a person engaged in merely an incidental agency in procuring customers with no obligation to serve does not thereby obtain a priority. (*In re*

Mayer, 4 Am. B. R. 119; 101 Fed 695.) And it has been held that traveling salesmen are not "workmen, clerks or servants". (*In re Greenwald*, 3 Am. B. R. 696; 99 Fed. 705; *in re Scanlon*, 3 Am. B. R. 202; 97 Fed. 26.) The question being an important one quotations are made from these opinions. In the case of *in re Scanlon*, Judge Evans said:

"C. A. Weaver proved his claim in this case for \$300 for services rendered as a 'traveling salesman' for the bankrupts within three months before the filing of the petition, and claimed a priority for the amount under section 64b (4) of the Bankruptcy Act. Weaver was employed by the bankrupt company as a traveling salesman at a salary of \$5,000 per annum, and, the referee having refused to allow the priority claimed by him, he has petitioned the court to review that decision. The clause of the bankruptcy law referred to is in the following language: 'The debts to have priority . . . shall be; . . . (4) Wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of the proceedings, not to exceed three hundred dollars to each claimant.' The determination of the question involved depends upon what is the correct meaning of the words 'workmen, clerks or servants,' and whether a traveling salesman is such an employe as would come within the proper definition of any one of these words. It is argued that the definition should be controlled by the definition in the Bankruptcy Act of the phrase 'wage earner.' While the court thinks it possible that that definition may throw some light upon the question, yet it is not at all clear that Congress had in mind wage earners merely as defined by the act when it used the language in section 64 which has just been quoted. The Bankruptcy Act in express terms excluded wage earners from the list of those against whom an involuntary petition of bankruptcy might be filed, and, in order that there might be no doubt as to what persons should be included in that term, defined it in the first section to mean an individual who works for wages, salary, or hire at a rate of compensation not to exceed \$1,500 per year. If the same thing had been intended by Congress in section 64, doubtless it would have used the words 'wage earner' there instead of the language actually employed. This makes it necessary to endeavor to ascertain their meaning from other sources, and there would seem to be nothing to indicate that Congress used the words 'workmen, servants and clerks' in any other than their ordinary signification. Taking up each of them separately, we find that Webster defines a clerk to be one who is employed to keep records or accounts; a scribe; an accountant. And the Century Dictionary defines a clerk to be one who is employed in a shop or warehouse to keep records or accounts; one who is employed by another as a writer or amanuensis. The court can not resist the conclusion that these definitions describe the intention of Congress in its use of the word 'clerk.' Webster defines 'servant' as being, among other things, a person who is employed by another for menial offices, or for

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other labor, and is subject to command; a subordinate helper. The Century Dictionary says that a servant is one who exerts himself or labors for the benefit of a master or employer; an attendant; a subordinate assistant. Bouvier's Law Dictionary adopts Webster's definition of this word, and it is also approved in the case of *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907. Bouvier adds to this definition that they are called menial servants from living *infra mœnia*—within the walls of the house—and also says that persons that are laborers hired by the day's work or any longer time are not considered servants. While in general terms, therefore, any one is a servant who serves another, still the court is of opinion that Congress used the word 'servant' in section 64 of the Bankruptcy Act in the general sense given in the definitions above. Webster defines a workman to be a man employed in labor, whether in tillage or manufacture; a worker; hence, especially, a skillful artificer or laborer. The Century Dictionary gives the definition as a man who is employed in menial labor, whether skilled or unskilled; a worker; a toiler; specifically, an artificer, a mechanic or artisan, a handicraftsman. While Bouvier defines a workman generally as one who labors, one who is employed to do business for another, the court is of opinion that Congress used the word 'workman' in the section referred to, in the general sense covered by the definition of the lexicographers above given. It seems to the court that none of these definitions cover such a 'traveling salesman' as the creditor in this case describes himself to be. It might be difficult, and possibly undesirable, to attempt to define with too much precision the exact character of employe who would come within the language of section 64, but it seems to the court to be very clear that the claimant in this case is not a 'workman,' a 'servant,' or a 'clerk,' within the contemplation of that clause of the Bankruptcy Law. For these reasons, the decision of the referee is approved."

In the case of *in re Greenewald*, Judge McPherson said:

"The question for decision certified to the court by the referee is whether a traveling salesman is a workman, clerk or servant, within the meaning of section 64b, par. 4, of the Bankrupt Act, and is therefore entitled to priority of payment to the extent of \$300. The referee followed *in re Scanlon* (D. C.) 3 Am. B. R. 202, 97 Fed. 26, and rejected the claim of priority. I agree with the result reached by Judge Evans in that case, although I incline to believe that the meaning of 'workmen, clerks or servants' may perhaps be somewhat more extensive than his opinion seems to allow. The scope of these words is to be determined, I think, not exclusively by the lexicographers, but in part at least, by modern usage, which is continually modifying the content of words and phrases. 'Clerk,' for example, has come to include, not only a subordinate who writes letters or keeps books, but also a salesman in a retail store. Mr. Justice Fell, in *Mulholland v. Wood*, 166 Pa. St. 486, 31 Atl. 248, recognizes this enlargement of meaning, while declining to regard the phrase 'clerk employed in a store or elsewhere,' as broad enough to include a traveling

salesman. The Pennsylvania statute which he was then considering is broader than the Bankrupt Act. The Federal statute says 'clerk,' without more; and no one, I think, would understand that word, standing by itself, to include an employe whose duties call him habitually away from his employer's store or factory, and require him to travel frequently for the purpose of selling goods.

"Nor would such an employe be ordinarily thought of as included in the word 'workman.' The essential idea conveyed by this word, as commonly used, is the idea of a subordinate, whose occupation has nothing to do with correspondence or books of account, but requires him to use his hands to a considerable degree in manufacturing or building, or in similar pursuits. He may be skilled or unskilled; he may, or may not be, aided by tools or machinery; but he does not belong to the same class as the man that is neither making goods nor erecting buildings, nor accomplishing similar results but is exclusively engaged in the sale of a finished product.

"'Servants' is a more indeterminate word. It includes, I think, other than domestic servants, or those who receive small wages for doing work of an inferior grade; for the act contemplates that 'servants' may be receiving at least \$100 a month, and this sum of itself shows that the word is not narrowly restricted in its meaning. Where the line is to be drawn, I am unable to say. A particular context might indicate a very broad meaning indeed; for example, if one should speak of 'an employer and all his servants,' the sense there might well be, all who serve the employer in any capacity. But this cannot be the meaning in the paragraph under consideration. If it were, 'clerks' and 'workmen' would be superfluous, and therefore the use of the three words in one phrase seems to indicate that Congress had in mind three classes of employes, substantially distinct, although here and there a particular employe might perhaps be properly included in more classes than one. A farm laborer might, I think, be indifferently regarded as a servant or a workman, and other examples will readily present themselves. Taking 'servants,' then, as used in the act, to refer to a restricted class of subordinates, I am of opinion that the common usage of the word does not permit the inclusion of a traveling salesman.

"There is some hardship in this result, for the act apparently gives priority to a salesman or clerk who sells at retail in a store, but does not give priority to a salesman who sells in large quantities to customers elsewhere. The conclusion seems inevitable, however, if the ordinary meaning of the words is to prevail."

It necessarily follows that the officers of corporations are in no sense "workmen, clerks or servants" and are not entitled to priority thereby. (See *in re Grubbs*, Wiley Co. 2 Am. B. R. 442; 96 Fed. 183; *in re Carolina Cooperage Co.* 3 Am. B. R. 154; 96 Fed. 950.)

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**§ 65.] Priorities under Federal and State Laws — Dividends.**

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**Priorities Under the Laws of States or United States.** Section 64b (5).—Where a priority is sought under a statute of a State it must be determined under the laws of that State. (*In re* Byrne, 3 Am. B. R. 268; 97 Fed. 762.) Under this section it was the intention of Congress to recognize liens in priority precisely as the State laws had fixed them, and the fact that the language of the section groups such debts as are entitled to priority under the laws of the State together, does not mean that these liens are to be leveled to a common plane. But when an adjudication is made in bankruptcy, the rules of State practice, regarding the acts to be done within a specified time, yield to the rules of the Federal court. So held in construing the effect of the Kentucky statute respecting the time of assertion of a landlord's lien. (*In re* Falls City Shirt Manufacturing Co. 3 Am. B. R. 437; 98 Fed. 592.)

**Disposition of Property Upon Revocation of Discharge or Composition.** Section 64c.—Compare sections 13 and 15 with commentaries thereon. Presumably this section does not affect the right of the bankrupt to all property which he acquires after adjudication. (See section 70.)

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**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.

*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, equal 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.

*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 cred-

itors 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 within 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 court 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.

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Analogous Provisions of former Acts.—

As to first dividend: R. S. § 5092; act of 1867, § 27; act of 1841, § 10; act of 1800, § 29. As to subsequent dividend: R. S. § 5093; act of 1867, § 28; act of 1841, § 10; act of 1800, § 30. As to filing of accounts preparatory to final dividend: R. S. § 5096; act of 1867, § 28. As to rights of creditors whose claims are allowed after first dividend: R. S. § 5097; act of 1867, § 28; act of 1841, § 10.

Section 39a (1) provides that the referee shall declare the dividends and prepare and deliver to the trustees dividend sheets showing the dividends declared and to whom payable.

Section 58a (5) provides that the creditors shall have ten days' notice of the declaration and time of the payment of dividends.

For list of claims and dividends to be recorded by the referee and by him delivered to the trustee, see Form No. 40. Notice of dividend is thereupon given by the trustee. (Form No. 41.) A dividend in bankruptcy has been defined as a parcel of fund arising from the assets of the estate rightfully allotted to the creditor entitled to share in the fund whether in the same proportion with the other creditors or in a different proportion. *In re Barber* (3 Am. B. R. 306; 97 Fed. 547), in which it was held that the referee was entitled to charge commissions upon the gross proceeds of the property which by the consent of the secured creditors had been sold free from liens. Compare *in re Coffin* (referee's decision, 2 Am. B. R. 344). But in the case of the Fort Wayne Electric Corporation it was held that when

a payment is made by the trustee upon secured claims such payment is not a dividend within the meaning of the Bankruptcy Act and the referee is not entitled to a commission thereon. See also *In re Sabine* (1 Am. B. R. 322, referee's decision), and *In re Fielding* (3 Am. B. R. 135; 96 Fed. 800), in which it was held that commissions of the referee and trustee could not be based upon the disbursements made in payment of claims entitled to priority but must be limited to dividends and commissions on the residue of the estate. See sections 40 and 48 as to compensation of referees and trustees.

When the assets of the estate have all been converted into cash and the accounts of the trustee are ready for a complete and final judicial settlement, such settlement should not be delayed because certain creditors whose claims are included in the schedules have not proved their claims. The money ready for distribution should be paid out on allowed claims and the referee should not retain money for the payment of claims of negligent creditors who have delayed proving their claims. (*In re Stein*, 1 Am. B. R. 662; 94 Fed. 124.) In declaring the first dividend the referee should hold from distribution sufficient funds to cover expenses of all administration and priorities. He is required to hold back only sufficient funds to cover claims that will probably be allowed. (*In re Scott*, 2 Am. B. R. 324; 96 Fed. 607.) But where money has been held back by the referee on account of defective proof of claims such claimants do not thereby obtain a lien upon such amount. *Id.* As to claims of persons contingently liable see G. O. 21 (4).

Under the former act it was held that at the second meeting of the creditors (the first meeting at which dividends were declared), the creditors might vote in favor of the disposition of all the funds as dividends other than those needed for the payment of expenses and those needed for claims then undetermined, which by reason of the distant residence of the creditor, or for other sufficient reason, had not been proved; but they were not obliged to leave any funds in the hands of the assignee to pay claims of creditors whose names appeared upon the schedule, but for whose

failure to prove, there appeared no sufficient excuse. Comparing the words "such claims as have not been, but probably will be allowed," in paragraph *b*, with the provisions of paragraph *a*, it would seem as if a similar construction of the present act would not be improper. If the dividend has been declared, the court has power in a proper case to restrain the payment of it by the trustee in order to give to parties in interest an opportunity to move to have the order of dividend vacated. (*In re N. Y. M. & E. S. S. Co.* Fed. Cas. 10,212; 3 N. B. R. 280.) But a dividend so declared cannot be disturbed except for some error or other cause. It cannot be opened for the purpose of paying an expense which would have been allowed, had it been brought to the attention of the court before the declaration of the dividend. (*In re B. K. Smith*, Fed. Cas. 12,989; 15 N. B. R. 97.) Neither can a State court in any way interfere with the bankruptcy court in the distribution of the assets of the bankrupt. (*In re Bridgman*, Fed. Cas. 1,867; 2 N. B. R. 252.) Where the assets are more than sufficient to pay all the claims which have been allowed, interest upon them may be allowed. (*In re Hagan*, Fed. Cas. 5,898; 10 N. B. R. 383.)

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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.

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No Analogous Provisions in Former Acts.—

**Unclaimed Dividends Not Subject to Attachment.**—In *Jackson Miller* (9 N. B. R. 143), it was held (following *in re Bridgman*, Fed. Cas. 1,867; 2 N. B. R. 252), that dividends in the hands



the trustee were not subject to attachment by a creditor of the dividend creditor. To the same effect, *Gilbert v. Lynch*, 17 Blatch. 402, holding that when a dividend is declared in favor of a creditor it is not property, but a right to secure property. The former act contained no express provision as to the method of disposing of unclaimed dividends, but the decisions of the court established substantially the same rules which now appear in statutory form.

See as applicable to this section *in re Stein* and *in re Fielding* cited under preceding section.

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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 there 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 of the 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 by the law of the State, Territory, or District in which such property is situated, 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.

*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 the trustee as shall be preserved by the trustee for the benefit of the estate aforesaid. And the court may order such conveyance as shall

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.

Analogous Provisions of former Acts.—

As to liens being unaffected: R. S. § 5075; act of 1867, § 20; act of 1841, § 2; act of 1800, § 63. As to dissolution of attachment liens: R. S. § 5044; act of 1867, § 14. And see sec. 60, *ante*, as to Preferences.

**Liens in General Unaffected.**—In general the trustee in bankruptcy becomes vested only with the title, which the bankrupt himself has. With the exceptions referred to in this section he takes the property subject to all existing liens, claims charges, and equitable rights. He is not a purchaser for value, but stands in the shoes of the bankrupt himself except in so far as the statute has given to him, as the representative of creditors, the right to avoid fraudulent and preferential transfers and the liens voidable under the provisions of this section. Unless liens are voidable under the provisions mentioned, the persons possessing them retain all their rights against the property, after it passes to the trustee. Courts of bankruptcy may in certain cases compel the lienors to enforce their rights in these courts, but the rights themselves continue unimpaired and unaffected. (*Ex p.* Christy, 3 How. 292; *in re* Stuyvesant Bank, 12 Blatch. 179; s. c. 10 N. B. R. 399; s. c. 49 How. Pr. 133.) The general doctrine on this subject was laid down by the United States Supreme Court, in *Yeatman v. Savings Inst.* (95 U. S. 764), in which the court said:

“The established rule is that [except in certain cases] the assignee takes the title subject to all the equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. (*Brown v. Heathcote*, 1 Atk. 160; *Mitchell v. Winslow*, 2 Story, 630; *Gibson v. Warder*, 14 Wall. 244; *Cook v. Tullis* 18 id. 332; *Donaldson v. Farwell*, 93 U. S. 631; *Jerome v. McCarter*, 94 id. 734.) He takes the property in the same ‘plight and condition’ that the bankrupt held it. (*Winsor v. McLellan*, Fed. Cas. 17,887; 2 Story, 492.) In *Goddard v. Weaver*, Fed. Cas. 5495; 1 Woods, 260. it was well said that the as-

signee takes only the bankrupt's interest in property. He has no right or title to the interest which other parties have therein or any control over same, further than is expressly given to him by the bankrupt act as auxiliary to the preservation of the bankrupt estate for the benefit of the creditors. It would be absurd to contend that the assignee in bankruptcy becomes *ipso facto* seized and possessed in entirety, as trustee, of every article of property in which the bankrupt has any interest or share."

Applying that doctrine to the case before it, the court, in *Yeatman v. Savings Inst.* held that a pledgee is entitled to the possession of the property which he holds under a valid pledge as the security for his claim against the pledger, notwithstanding a subsequent adjudication of bankruptcy against the latter; and the refusal of the pledgee to surrender the pledged property to the assignee in bankruptcy is not a conversion of it.

Under the present act there is a dictum in the case of *In re Booth* (3 Am. B. R. 574; 98 Fed. 975), in which it is said without citing authority that the trustee in bankruptcy stands in the position of an innocent purchaser without notice. But this is clearly erroneous and the general doctrine is as set forth above. (See *Chattanooga National Bank v. Rome Iron Co.* 4 Am. B. R. 441; 102 Fed. 755, and cases cited.)

The liens that are preserved unaffected by the bankruptcy proceedings include all which are recognized by State laws. It is immaterial whether they be statutory or be based on usage and custom, or whether they be legal or equitable. Whatever the character or description or name of the lien, provided it is a privilege or charge upon property, recognized by the statutes or usages of the State or by common law principles as a security for a means of enforcing the payment of a debt or the fulfillment of a duty, it is a "lien" affecting the property after it passes to the trustee, to the same extent as it affected it while in the hands of the bankrupt himself. (*In re Davis*, Fed. Cas. 3,618; 2 N. B. R. 391; *in re Waddell*, 1 N. Y. Leg. Obs. 53; *Peck v. Jenness*, 7 How. 612; *Downer v. Brackett*, 21 Vt. 599.)

**Mechanics' Liens.**—And it has been held under the present act that a mechanic's lien obtained within four months of bankruptcy,

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Mortgages to Secure Future Advances, etc.

if perfected according to the State statute, is not invalidated under section 67f because it is not created or obtained through legal proceedings in strict definition or in the ordinary meaning of the term nor is such lien an encumbrance created by the debtor. (So held by the Circuit Court of Appeals for the 2d and 7th Circuits, *in re Kerby-Denis Co.* 2 Am. B. R. 402; 95 Fed. 116; *in re Emslie*, 4 Am. B. R. 126; 102 Fed. 291).

**Mortgages to Secure Future Advances—Liens on Rents and Profits—Mortgages of Property to be Acquired.**—So, where a mortgage is given to secure future sales of goods to the mortgagor and is shown to be executed in good faith it is protected by the Bankrupt Law, and to the extent of the advances actually made is valid as against the trustee in bankruptcy. (*Marvin v. Chambers*, Fed. Cas. 9,179; 12 Blatch. 495; s. c. 13 N. B. R. 77.) So the equitable right of the mortgagee to obtain the rents and profits of the mortgaged property when the property itself is insufficient security is recognized by the courts of bankruptcy when such right exists. There is no dispute about this right in cases where prior to the bankruptcy proceedings the mortgagee has a receiver appointed in order to obtain such rents and profits. That is recognized by all courts as giving to him a valid and enforceable lien but the weight of authority is that until such a receiver is appointed there is no lien upon the rents and profits. (*In re Bennett*, Fed. Cas. 1,313; 12 N. B. R. 257; *in re Snedaker*, 4 N. B. R. 168.) In the latter case the authorities as to the nature of the right of a mortgagee over the rents and profits of the mortgaged property were exhaustively reviewed, and it was held that where a mortgagee fails to secure the appointment of a receiver and thereby neglects to acquire a lien on the products or rents of the mortgaged premises, before the petition in bankruptcy is filed, even though the premises sell for less than his claim at a sale by the mortgagor's assignee in bankruptcy, he will only be entitled out of the bankrupt's assets to a *pro rata* share on the deficiency of his claim; if the trustee in bankruptcy reduces to possession the products of the mortgaged estate prior to the

sale of the mortgaged estate, such products are to be treated as assets to be distributed under the Bankrupt Act, and the mortgagee cannot claim that a deficiency after sale on his mortgage shall be paid therefrom in preference to the claims of other creditors. But other courts of bankruptcy have recognized the equitable right of the mortgagee to take the rents and profits in case the security is insufficient, as a right which may ripen into specific lien by proceedings instituted even after bankruptcy. Thus *In re Sacchi* (6 N. B. R. 497; s. c. 43 How. Pr. 250), it was said:

“If there be doubt whether the mortgaged premises are adequate security for the payment of the debt and interest (when finally adjudged due upon valid mortgage) the court will recognize the prior lien of the mortgage upon the land and the equitable right of the mortgagee to have the rents separated from the general estate of the bankrupt by a receivership or otherwise, and not permit them to be applied to the payment of other debts or even to the expenses of the assignee or his fees; and on the obvious ground that he is only entitled to the interest which the bankrupt has in the premises. Nor will any delay be permitted without just reference to the interest of all who are concerned, the mortgagees as well as other creditors.”

**Mortgages of Property to be Acquired.**—As to the nature and character of the lien obtained by a mortgage of property to be subsequently acquired, and as to whether or not it is an equitable lien which may be enforced against the trustee, compare *Brett v. Carter* (Fed. Cas. 1,844; 14 N. B. R. 301), citing and reviewing numerous authorities and distinguishing *Moody v. Wright* (5 Mass. 17) from *Mitchell v. Winslow* (Fed. Cas. 9,673; 2 Story 630). The weight of modern authority is, that a mortgage of property to be subsequently acquired gives to the mortgagee an equitable title to the property, which may be enforced against the assignee. In the case of *Barnard v. Norwich & Worcester R. R. Co.* (Fed. Cas. 1,007; 14 N. B. R. 469), decided in the United States Circuit Court for Massachusetts, Justice Clifford in delivering the opinion of the court, said: “Assignees in bankruptcy, except in cases of fraud, take only such rights and interests in the property of the bankrupt as he himself had, an

could himself have claimed and asserted at the time of his bankruptcy, and they are affected with all the equities which would affect the bankrupt himself if he were asserting those rights and interests. No person can sell a thing which he does not own unless as the duly authorized agent of the owner. *Nemo dat quod non habet*. Nor can he convey *in praesenti* property not in existence, the rule being that every such deed or mortgage is inoperative and void. Authorities to support those propositions are not wanting; but the law will permit the grant or conveyance to take effect upon property when it is brought into existence, and comes to belong to the grantor, in fulfilment of an express agreement, if the agreement is founded on good and valuable consideration, unless it infringes some rule of law, or will prejudice the rights of third persons. (*Pennock v. Coe*, 23 How. 117 and 138.) Whenever the parties, by their contract, intend to create a lien or charge, either upon real or personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and against all persons asserting a claim to the same under him, either voluntarily or with notice, or in bankruptcy. (*Mitchell v. Winslow*, Fed. Cas. 9,673; 2 Story, 630 and 644.)”

**Liens by Judgment and Execution.**—Liens obtained by judgment or execution, unless obtained within four months prior to the filing of the petition, and invalidated by some one of the provisions of this section, are enforceable in bankruptcy. If by the laws of the State in which the property is situated a judgment or an execution or a levy creates a valid and enforceable lien, the lienor's rights are not impaired by the subsequent bankruptcy of his debtor. (*Marshall v. Knox*, 16 Wall. 551; *Clark v. Iselin*, 21 Wall. 360; *Wilson v. City Bank*, 17 Wall. 473.) In cases where the State law makes the lien to attach from the time of the delivery of the writ of execution to the sheriff or other officer, the lien is recognized in the bankruptcy court as

existing from that date. Actual levy is not necessary in order to create a lien, unless made so by the laws of the State. (*In re Smith*, Fed. Cas. 12,973; 2 Ben. 432; *in re Weeks*, Fed. Cas. 17,350; 2 Biss. 259; s. c. 4 N. B. R. 364.) The first test in determining the validity of any lien under the Bankruptcy Act is the State law. Is there a lien recognized by the law of the State where the property is situated? If so, it is valid as against the trustee in bankruptcy unless he can procure its invalidation as a preferential transfer, or unless it has been secured within four months prior to the filing of the petition, and is invalidated by the provisions of this section.

**Miscellaneous Liens Enforcible in Bankruptcy.**—Whenever by State law the lien of a vendor upon the property sold for the purchase price thereof is recognized, there the court of bankruptcy will recognize and enforce such lien. (*In re Hutto*, Fed. Cas. 6,960; 3 N. B. R. 787.) So the lien of an attorney upon the papers of his client which he has prepared will be recognized and enforced in bankruptcy; and this notwithstanding the fact that by the terms of section 70 the books and papers and documents relating to a bankrupt's property pass to the trustee. (*In re N. Y. Mail Steamship Co.* Fed. Cas. 10,209; 2 N. B. R. 74; *Rogers v. Winsor*, Fed. Cas. 12,023; 6 N. B. R. 246.) So the lien of a pledgee is not only recognized, but is unimpaired, and he has the right to retain the property until it is released by a payment of his claim. (*Jerome v. McCarter*, 15 N. B. R. 546; *Yeatman v. Savings Inst.* 95 U. S. 764; *Clark v. Iselin*, 21 Wall 360.) So the lien of a partner upon the partnership property for the surplus which may be due to him after the partnership debts have been paid, will be recognized by the bankruptcy court; and if prior to the proceedings in bankruptcy a receiver has been appointed in an action to dissolve the partnership and procure an accounting, and has taken possession of the property, the possession of the State court through its officer will not be disturbed. (*Clark v. Binger*, 38 How. Pr. 341; s. c. 3 N. B. R. 518.) So the lien which a bank may have upon the shares of its stock-



holders for the payment of any indebtedness due by the stockholder is good as against the trustee in bankruptcy of the latter. A bank has the power to establish a rule providing that the shares of stockholders shall be considered as subject to a lien for the unpaid indebtedness to it, but unless there is such an express rule or statute, no such lien exists. (*In re Dunkerson*, Fed. Cas. 4,156; 4 Biss. 227.) So a lessor's right of distraint for rent may, by virtue of State statutes, be a lien enforceable in bankruptcy. (*Marshall v. Knox*, 16 Wall. 551.)

**Trustee Has No Interest in Lienors' Relative Rights of Priority.**—Inasmuch as the trustee takes subject to all liens (with exception of those voidable by this section) he cannot object to arrangements made between the various lienors as to their respective rights of priority. He cannot object that one of the lienors is entitled to payment in preference to the other, questions as to priorities being entirely and exclusively questions affecting the lienors themselves. (*Jerome v. McCarter*, 94 U. S. 734.)

**Liens Dissolvable and Liens Deemed Null and Void Under this Section.**

**Claims Void for Want of Record.** Section 67a.—This section is simply declaratory of the law. *In re Yukon Woolen Co.* (2 Am. B. R. 805; 96 Fed. 326), it was held that where goods are sold under a conditional bill of sale in a State where registration of such sale is not required, but, by the contract are to be delivered in another State where such registration is required, the law of the latter State prevails. This decision follows the general principle of law recognized by the federal courts that where a contract contemplates or provides that property is to be delivered or used in another State the *lex loci solutionis* governs. But in the case of *in re Wright* (2 Am. B. R. 364; 96 Fed. 187), it was held that where more than four months prior to the filing of the voluntary petition the insolvent debtor executed and delivered a mortgage not recorded within the statutory four months such mortgage was a valid and subsisting lien as against the trustee. This de

cision was based upon the law of the State which only necessitated the recording of a mortgage to make it good as against intervening liens and conveyances. In general it may be said the paragraph "a" gives merely such rights to the trustee as the State laws provide for the protection of the creditors to whose rights the trustee is subrogated.

**Subrogation of Trustee to Rights of Creditors.** Section 67b—This paragraph is merely declaratory of the general principles of the Bankruptcy Act. (See *in re Yukon Woolen Co.* cited *supra*.)

**Liens Dissolved by Adjudication in Bankruptcy.** Section 67c, f.—The provisions of paragraphs *c* and *f* of this section make the statute very different from the former statute as to liens obtained in or pursuant to legal proceedings. Under the former statute (R. S. § 5044, act of 1867, § 14), it was provided that the assignment in bankruptcy should vest in the assignee the title to all the bankrupt's property and estate, both real and personal although the same was then attached on *mesne* process, as the property of the debtor, and that such assignment should dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings. All liens other than attachments and those which could be avoided as preferential transfers were valid under the former act, even though the lienor in obtaining his lien knew of the insolvency of his debtor. But the present act declares that the proceedings in bankruptcy shall affect not only attachments, but judgments, levies and all other liens created by or obtained pursuant to legal proceedings. Considered separately, either of the paragraphs *c* and *f* though presenting many serious questions as to the right of such lienors, would not be impossible of construction; but it is difficult to construe the two together. Paragraph *f* seems to include, as a rule, nearly all cases which might arise under paragraph *c*. It is possible that there might be some cases arising under the third subdivision of the latter paragraph (*c*) which would not fall within the terms of paragraph *f*, but aside from

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these possible instances the liens which by paragraph *c* are declared to be dissolved by an adjudication in bankruptcy if certain facts appear, would seem to be absolutely void under the terms of paragraph *f* whether or not those facts existed. Both paragraphs relate to the same subject-matter. Each is an enactment concerning judgments, attachments, and, in general, all liens created by or obtained in or pursuant to legal proceedings. Paragraph *c* imposes certain limitations as to the liens which will be dissolved by its terms, which do not appear in the provisions of paragraph *f*. Thus, to dissolve a lien under the terms of paragraph *c* it is necessary that it be one created pursuant to a legal proceeding commenced within the four months prior to the filing of the petition. If the action is commenced earlier, although the lien is perfected within the four months, it is dissolved under the terms of paragraph *c*. But by paragraph *f*, if the lien itself is obtained within four months, it is deemed null and void. By paragraph *c* the liens which are dissolved are those existing on the property of one thereafter adjudged bankrupt. By paragraph *f* the lien which is to be deemed null and void must have been obtained against one who was insolvent at the time of the lien. This fact, that insolvency at the time of obtaining the lien is not in express terms required to exist in all cases in order that the subsequent adjudication may act as a dissolution, possibly makes certain liens liable to dissolution which could not be deemed null and void under the terms of paragraph *f*. But as two of the three subdivisions of paragraph *c*, declaring in what instances the dissolution may occur, require the existence of insolvency at the time of the creation of the lien, the possible instances in which a lien may be dissolved but not deemed null and void, are limited to those set up in subdivision three. If liens can be sought and permitted in fraud of the provisions of the present Bankruptcy Act, when the person upon whose property the lien is acquired is not insolvent, then such liens would fall within the terms of paragraph *c*, but not of paragraph *f*. With reference to the appearance in the present statute on bankruptcy of these two paragraphs, it may be noted that in the House bill which, with the changes made by the con-

ference committee, became the present bankruptcy law, paragraphs *e* and *f* of this section did not appear. Paragraph *c* was the only paragraph or provision in that bill invalidating liens contained through legal proceedings, other than the provisions of section 60 invalidating preferential transfers. The word "transfer" in that bill included "the creation of a lien on property in any means other than by compulsory process, prosecuted in good faith." Paragraphs *e* and *f* of the present law, in substance, were in section 7 of the Senate bill. It, therefore, appears that in the compromise between the House and Senate the provisions of both bills were incorporated into the present statute without any attempt to enact all the law upon the subject of the invalidation and dissolution of liens obtained by legal proceedings, in one concise and comprehensive paragraph.

It is to be noted also that in paragraph *c* the lien referred to is one obtained within four months prior to the filing of a petition "by or against" the bankrupt, while in paragraph *f* the words used are "within four months prior to the filing of a petition in bankruptcy against him."

On account of this disparity in the language of the two paragraphs some courts have endeavored to distinguish by holding that paragraph *c* refers to voluntary cases and that paragraph *f* to involuntary cases alone. Thus in the case of *In re De Lue* (1 Am. B. R. 387; 91 Fed. 510), it was held that where an attachment of the property of a voluntary bankrupt had been made by virtue of a precept issued within four months prior to the filing of the petition but in a suit that was commenced a year before the filing of the petition the lien of attachment was not destroyed by an adjudication of the petitioner in bankruptcy on the ground that the case falls within section 67c, and the provisions of section 67f being limited to involuntary bankruptcy, have no application. This case was followed by *In re Easley* (1 Am. B. R. 715; 93 Fed. 419), where property had been levied upon by an execution issued upon a judgment prior to the statutory four months but the sale had taken place within the four months, and also by the case of *In re O'Connor* (95 Fed. 943). But the weight of authority is that

other way. In the case of *In re Richards* (3 Am. B. R. 145; 37 C. C. A. 634; 96 Fed. 935), decided in the Circuit Court of Appeals for the 7th Circuit, it was held that paragraph *f* applies not only to involuntary cases but to voluntary proceedings as well in analogy to the definition in section 1, where it is stated that "a person against whom a petition has been filed" shall include a person who has filed a voluntary petition. In that case liens obtained by judgment notes which gave the holder the power of attorney to enter up judgment were considered to be annulled and rendered void by the adjudication where the notes had been given before the statutory period but the entry of the judgment had been made within that time. So in the case of *In re Higgins* (3 Am. B. R. 364; 97 Fed. 775), an attachment issued within four months though the case in which the attachment was issued was begun long before was annulled. See *In re Vaughn* (3 Am. B. R. 362; 97 Fed. 560), in which the cases are collected. (See also *In re Rhoades*, 3 Am. B. R. 380; 98 Fed. 399; *in re Dobson*, 3 Am. B. R. 420; 98 Fed. 86; *in re Lesser*, 3 Am. B. R. 815; 100 Fed. 433; *in re Kemp*, 4 Am. B. R. 242; 101 Fed. 689.) These cases hold that wherever there is an inconsistency between the provisions of paragraphs *c* and *f* the latter controls and supersedes the former under the well-known rule of statutory construction as the last statement of legislative will. Therefore the broad provisions of paragraph *f*, annulling and avoiding all liens obtained through legal proceedings against a person who is insolvent, upon his adjudication either in voluntary or involuntary bankruptcy, govern. The facts which must appear in order to make an adjudication of bankruptcy a dissolution of liens, are set forth in detail under paragraph *c*. In contrast with paragraph *c*, it is to be noted that under the terms of paragraph *f* nothing need be shown in order that the liens obtained through legal proceedings shall be deemed null and void except the fact of the insolvency, at the time of the creation of the lien, of the person on whose property the lien exists, and the subsequent adjudication in bankruptcy. The intentions of the debtor, the intentions and knowledge or the reasonable cause of belief of

the lienors, the effect of the enforcement of the lien, and the motives of the parties, are all alike immaterial. The rule is fixed and arbitrary that all liens obtained through legal proceedings against a person who is insolvent, if obtained 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. The only exception is that in the proviso at the end of the section saving the rights of *bona fide* purchasers for value, who have purchased without notice and without reasonable cause for inquiry. It might at first seem as if under paragraph *f* no fact other than the adjudication or those facts established by the adjudication need be shown in order to make certain liens deemed null and void. But it is not to be forgotten that paragraph *f* refers only to liens obtained against a person who is insolvent. Not all liens obtained against one afterwards and within four months adjudged bankrupt are deemed null and void. It may appear that the person whose property is subject to the lien was insolvent at the time of the creation of the lien. It is evident that a lien might be obtained against one who is adjudged bankrupt within four months thereafter, but who was not insolvent at the time the lien was obtained. The act of bankruptcy and the insolvency might have occurred at some period subsequent to the creation of the lien. If so, the adjudication of bankruptcy would in no way determine whether or not the party was insolvent at the time the lien was created.

But the provisions of section 67 *f* are not to be extended so as to affect a judgment obtained after the filing of a petition. (*K. mouth v. Braeutigam*, 46 Atl. 769; 4 Am. B. R. 344; N. Y. S. Ct. June, 1900.)

Inasmuch, however, as paragraph *c* may be applied in so many cases it becomes necessary to define the specific conditions there.

Nearly all of the words and phrases appearing in subdivisions 1, 2, and 3 of paragraph *c* have been defined or discussed in previous sections. Compare section 3, paragraph on SUFFERING AND PERMITTING PREFERENCES THROUGH LEGAL PROCEEDINGS, as the phrase "obtained and permitted." "Insolvency" has been

fined in section 1 (15). "Reasonable cause to believe that one is insolvent" was considered under paragraph 60. The expression "in contemplation of bankruptcy" was defined in section 14. The phrase "in fraud of the provisions of this act" should now be considered. That phrase appeared in section 5,128 of the Revised Statutes, transfers made "in fraud of the provisions of that act" being voidable in the same manner as preferences. The general purpose of the Bankruptcy Act is to insure the equitable *pro rata* distribution among creditors of the property of one unable to pay all creditors in full. Anything which is undertaken for the purpose of defeating this purpose must be considered as a fraud upon the act. Courts are invariably reluctant about giving any exact definition of the word "fraud," fearing that if a definition were framed it would give an opportunity to the unscrupulous to commit fraud and yet upon technicalities to escape punishment, enabling them to do acts which would be fraudulent in spirit, although perhaps not within the letter of the definition. Similarly the courts have been careful not to attempt to frame a comprehensive definition for the phrase "in fraud of the provisions of this act," but have contented themselves with determining for each particular case in which the question arose whether or not the fraud existed. The answer must always depend upon the special circumstances of each case. Compare the following cases decided under the former act in which the question arose whether or not certain acts constituted frauds upon the Bankruptcy Law. (*Wager v. Hall*, 16 Wall, 584; *Toof v. Martin*, 13 Wall. 40; *Buchanan v. Smith*, 16 Wall. 277.)

**Proceedings to Annul Liens.**—While under the provisions of this section, the adjudication in bankruptcy operates to dissolve or annul the prohibited liens, it will be necessary in many cases to take some action in order to establish the right to annul the lien as against a lien-holder defending. The question is, in what forum these proceedings to annul must take place. Prior to the decisions of the Supreme Court holding that the District Court had no jurisdiction except by consent of the defendant to enter-

tain suits by the trustee to set aside fraudulent or preferent transfers (see section 23 and section 2), many courts held that the District Court had jurisdiction to compel dissolution or annulments of liens by summary process. This they exercised on the theory that the trustee was immediately vested with the title to the property covered by the liens by the express provision of the section. (See *Bear Co. v. Chase*, 3 Am. B. R. 746; 40 C. A. 182; 99 Fed. 920; *in re Francis-Valentine Co.* (D. C.) Am. B. R. 188; 93 Fed. 953; same case on appeal, 2 Am. B. R. 522; 36 C. C. A. 499; 94 Fed. 793; *in re Kenney*, (D. C.) 2 Am. B. R. 494; 95 Fed. 427; and see cases collected in the note section 23b.) These cases seem to have overlooked the fact that the defending lien-holder, or the sheriff, or other official holding in his hands goods which have been levied upon and attached the proceeds thereof, is an "adverse" party within the meaning of the law and entitled to his "day in court." The rights of the trustee so far as the liens are concerned are no greater than as to property which is fraudulently transferred. Therefore it would seem to follow that in order to annul the liens a plenary action should be brought. Clearly this action cannot be brought in a bankruptcy court except by consent of the defendant but must be brought in a State court or, where there is "diversity of citizenship" and the requisite amount, in the Circuit Court of the United States. See discussion of this subject under sections 22 and 23. And so ran the better authority even prior to the decisions of the Supreme Court. (*In re Kelly*, 1 Am. B. R. 306; Fed. 504; *in re Franks*, 2 Am. B. R. 632; 95 Fed. 635; *in re Abraham*, 2 Am. B. R. 266; 35 C. C. A. 592; 93 Fed. 76; These cases are all collected and discussed in the case of *In re Hammond*, decided in the District Court of Massachusetts and reported in 3 Am. B. R. 466; 98 Fed. 845. It is absurd to say that the District Court can, for example, order the sheriff to surrender property or the proceeds thereof when he may properly defend by saying that he holds the property under an order of the court of which he is an officer. In case of his refusal the only remedy would be for the trustee to sue in the State court.



There may be some difference in the case of an assignment for the benefit of creditors which the trustee seeks to set aside. The assignee is not properly an adverse claimant. He holds in the right of a creditor and perhaps the summary jurisdiction of the District Court may be properly exercised to compel him to hand over the assigned property. But see *contra In re Abraham*, cited, *supra*, now on appeal in the Supreme Court *sub nom.* Bernheimer *v.* Bryan.

As bearing upon the question of the summary jurisdiction of the bankruptcy court it has been held by the Supreme Court in *White v. Schloerb*, 4 Am. B. R. 178; 178 U. S. 542, that where the goods are seized from the *actual* possession of the bankrupt after the date of adjudication and after they have been taken into possession by the referee, summary proceedings will lie. The opinion in this case seems to indicate that summary proceedings would not lie if the bankruptcy court had not first obtained actual manual possession.

**The Effect of Dissolving the Lien.**—Nothing but the lien is affected by the dissolution provided for by paragraph *c*. That paragraph provides that the lien shall be dissolved, but this does not affect the debt which the lien secures, nor does it annul the process or judgment, nor act as a dismissal of the cause. A judgment creditor may lose his lien upon the property passing to the trustee, but his judgment continues to be a judgment establishing the indebtedness due him and conclusive on all parties privy to it and their assigns; and it remains unaffected, except as a lien, until the bankrupt is released from it by a discharge. If not barred by a discharge there is no question but that the judgment creditor can enforce it from the after-acquired property of the debtor. (*Bracken v. Johnston*, Fed. Cas. 1,761; 15 N. B. R. 106.) The language of paragraph *f* would seem to indicate that all judgments recovered within the four months are null and void, but on the other hand it is clear that only liens are within the contemplation of the lawmakers. (See opinion of Hotchkiss, referee, *In re Pease*, 4 Am. B. R. 547.)

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 Liens Given in Good Faith — Conveyances in Fraud of Creditors [Ch. V]
 

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**Liens Given or Accepted in Good Faith and for Present Consideration.** Section 67d.—If this subdivision is to be preserved and applied notwithstanding the provisions of paragraph *f* it must be taken as limited strictly by the language “not in contemplation of or in fraud upon this act.” Such are the valid liens referred to at the beginning of the commentary on this section. That is to say while paragraph *d* does not cover all valid liens because there may be liens which are not referred to in the Bankruptcy Act at all, it does refer to all liens obtained within four months which are not obtained through legal proceedings such as mechanics’ liens, as to which see *ante* under this section. Compare also proviso at the end of paragraph *f* as to purchases for value. And in case the lien is foreclosed or enforced the purchaser for value is protected, the proceeds standing in lieu of the property. (See *In re Kenney*, cited *supra*.)

**Conveyances and Encumbrances in Fraud of Creditors.** Section 67e.—An examination of paragraph *e* shows that the transfers and incumbrances therein declared void are those made with intent to hinder, delay or defraud creditors. The provision that such transfers and incumbrances, if made within four months prior to the filing of the petition shall be null and void, does not mean that the trustee cannot bring action to invalidate any fraudulent transfers made earlier than that time. The right given him by section 70 (4) is co-extensive with the right which creditors prior to the bankruptcy proceedings had of invalidating fraudulent transfers.

There is no reason to believe that the *intent* to hinder, delay or defraud is in any respect different under this section from what it was at common law. In construing similar provisions under the Act of 1867, Mr. Justice Davis said (*Tiffany v. Lucas*, Wall. 410):

“There would seem to be no difficulty in ascertaining the meaning of Congress on the subject embraced in this section in its application to this case. Clearly all sales are not forbidden. It would be absurd to suppose that Congress intended to set the seal of condemnation on every transaction

the bankrupt which occurred within six months of bankruptcy, without regard to its character. A policy leading to such a result would be an excellent contrivance for paralyzing business, and cannot be imputed to Congress without an express declaration to that effect. The interdiction applies to sales for a fraudulent object, not to those with an honest purpose. The law does not recognize that every sale of property by an embarrassed person is necessarily in fraud of the Bankrupt Act. If it were so, no one would know with whom he could safely deal, and besides, a person in this condition would have no encouragement to make proper efforts to extricate himself from difficulty.

"It is for the interest of the community that everyone should continue his business, and avoid, if possible, going into bankruptcy; and yet how could this result be obtained if the privilege were denied a person who was unable to command ready money to meet his debts as they fell due, of making a fair disposition of his property in order to accomplish this object.

"It is true he may fail, notwithstanding all his efforts, in keeping out of bankruptcy, and in that case any sale he has made within six months of that event is subject to examination. If it shall turn out on that examination that it was made in good faith, for the honest purpose of discharging his indebtedness, and in the confident expectation that by so doing he could continue his business, it will be upheld. On the contrary, if he made it to evade the provisions of the Bankrupt Act, and to withdraw his property from its control, and the vendee either knew, or had reasonable cause to believe, that his intention was of that character, it will be avoided. Two things must concur to bring the sale within the prohibition of the law; the fraudulent design of the bankrupt and the knowledge of it on the part of the vendee, or reasonable cause to believe that it existed."

(See, however, *In re McLam*, 3 Am. B. R. 245; 97 Fed. 922, in which there seems to be a curious confusion of ideas as to the meaning of the various provisions of the Bankruptcy Act.)

**Cross-references.**—As to the trustee's title being subject to all liens, incumbrances and equities, compare section 70. As to the power of bankruptcy courts to enforce the rights of lienors and secured creditors, and to restrain lienors from enforcing their rights in other courts, compare section 2, paragraph on JURISDICTION TO DETERMINE THE RIGHTS OF LIENORS. Compare also section 57 (h), and notes thereto. As to sales of encumbered property free from liens, compare section 70 and commentary thereon.

**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 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 a 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 the bankrupt was insolvent, or had committed an act of bankruptcy

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Analogous Provisions of former Acts.—

R. S. § 5073; act of 1867, § 20; act of 1841, § 5; act of 1800, § 42.

**Section Declaratory of General Legal Principles.**—In *Sawyer Hoag*, 17 Wall. 610; s. c. 9 N. B. R. 145, it was said by the United States Supreme Court, with reference to Revised Statutes, section 5,073 (Act of 1867, sec. 20), the section analogous to the one now under consideration: "This section was not intended to enlarge the doctrine of set-off, or to enable the party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. The debts must be mutual; must be in the same right." It would be well, in considering this statement, to consider also the provision of this section which declares that claims which have been purchased within four months prior to the filing of the petition, if purchased with a view to use them as set-offs and with notice or knowledge of the insolvency of the debtor cannot be so used. That provision implicitly enacts that claims purchased more than four months before the filing of the petition may be used as set-offs, however much the use of the claims as a set-off may tend to give one creditor a preference over other creditors. It has been observed by the New York Court of Appeals that equity does not allow a set-off unless there is a recognized rule of law or a recognized equitable reason that requires it. It does not interfere to declare either a set-off or a stoppage unless there is one debt contracted on the faith of the other, or an agreement between the parties that one should be deducted from the other, or unless there is a rule of law on which

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Debts Which May be Set-off — Mutual Credits.

base its action, or unless some intervening equity that renders the interposition of the court necessary for the protection of the demand. Equity sometimes allows a set-off when law will not, because of the insolvency of one of the debtors and the willingness of the other to anticipate the time for the payment of the debt owing by him if the whole or a part of that owing to him may be applied as a set-off. (*Munger v. Albany Bank*, 85 N. Y. 580, citing with approval the above quotation from *Sawyer v. Hoag*.)

**Debts Which May Be Set-off.**—The term “debt” must be construed in accordance with the definition given in section 1 (11) as including any debt, demand or claim provable in bankruptcy. Any debt which may be proved, and to the owner of which a dividend must be paid, may be a set-off against a claim held by the bankrupt’s estate. Consequently, a debt payable *in futuro* may be a set-off against a debt payable *in praesenti*. (*Collins v. Jones*, 10 B. & C. 777; *Ex p. Wagstaff*, 13 Ves. 65; *Sheldon v. Rothschild*, 8 Taunt. 157; *Ex p. Prescott*, 1 Atk. 230; *Drake v. Rollo*, 3 Biss. 273; Fed. Cas. 4,066; s. c. 4 N. B. R. 689; *in re City Bank*, Fed. Cas. 2,742; 6 N. B. R. 71; *Bittlestone v. Temmis*, 1 C. B. 389.) If a debt payable *in futuro* be owing by the bankrupt, it is clear that it is a debt provable under the terms of the present statute, but it is no less a set-off if the debt payable *in futuro* be one owing by the creditor to the bankrupt. There is no set-off of unliquidated damages. (*Bell v. Carey*, 8 C. B. 887.) But where one who has been injured by a tort has a right to waive a tort and sue *in assumpsit*, the damages, if liquidated, may be set off against a debt due to the tortfeasor. And under the present act, which permits the liquidation of all unliquidated claims, probably damages for any tort could be set off against claims of the tortfeasor, even though it was not such a tort that one could sue upon an implied contract.

**Mutual Credits.**—It has been said: “The term ‘mutual credits’ in the Bankruptcy Act has a more comprehensive meaning than the term ‘mutual debts’ in the statutes of set-off. The term credit is synonymous with trust, and the trust need not be of

money on both sides, but if one party intrusts the other with goods or value, it will be a case of mutual credit." (*In re Catlin*, Fe Cas. 2,519; 3 N. B. R. 540, at 545; citing 7 Bac. Ab. 170; also citing *Rose v. Hart*, 8 Taunt. 499.) In *Rose v. Hart*, which is one of the leading cases on the law of set-off, it was ruled that where cloth was deposited with a fuller to dress, by a party who afterwards became a bankrupt, there was a case of mutual credit to the value of the service for dressing the cloth, but not for general balance due from the bankrupt, and in that case the general rule was laid down that the credits intended by the act were only such as must, in their very nature, terminate in cross debt. This rule has continued to be settled by law from the time of that decision. Applying this rule, it has been held that where a debt is due from one party and credit is given by him on the other for a sum of money payable at a future date, and which will then become a debt; or where there is a debt owing by one and a delivery of property by him to his creditor with directions to turn it into money; or a delivery of a chose in action with power to collect, in all these cases mutual credits spring up; but where there is a mere deposit of property without authority to turn it into money, no debt can ever arise out of it, and therefore it is not credit within the meaning of the statute. (Compare *Murray v. Riggs*, 15 Johns. Rep. 571. The subject of mutual credits was also exhaustively considered *in re Dow*, *Ex p. Whiting*, Fe Cas. 17,573; 14 N. B. R. 307, citing and reviewing the following cases: *Young v. Bank of Bengal*, 1 Moore P. C. 150; s. c. Deac. 622; *Naoroji v. Chartered Bank of India*, L. R. 3 C. 444; *Astley v. Gurney*, L. R. 4 C. P. 714; *American Notes v. Rose v. Hart*, 2 Smith's Lead. Cas.; *McLaren v. Pennington*, Paige, 102; *Receivers v. Paterson Gas Co.* 23 N. J. 283; *Aldrich v. Campbell*, 70 Mass. 284; *Clark v. Hawkins*, 5 R. I. 219; *Medmac Bank v. Curtis*, 24 Me. 36; *Phelps v. Rice*, 51 Mass. 12; *Myers v. Day*, 22 N. Y. 489; *Morrison's Assignee v. Bright*, 10 Mo. 298.) A study of these cases shows that the courts in the United States, following the English courts, liberally construe the laws on the subject of set-off in the matter of mutual credit

cases of bankruptcy and insolvency. The rule then, it is said, *in re Dow (supra)*, "is that a creditor, who at the time of bankruptcy has in his hands goods or chattels of the bankrupt with a power of sale, or chuses in action with a power of collection, may sell the goods or collect the claims and set them off against any debt which the bankrupt owes him (at time of bankruptcy), and this although the power to sell or collect would have been revocable by the bankrupt before his bankruptcy; in other words, the very fact of bankruptcy, in such cases, gives a sort of lien which did not exist before." Before the decision in *Rose v. Hart* (8 Taunt. 499), set-off was admitted even where there was no power of sale. Since that decision it has been settled law that set-off can be had only when the mutual credits are such as must terminate in debts. (*Groom v. West*, 8 Ad. & E. 758; *Russell v. Bell*, 8 Mees. & W. 277.) The case of *Young v. Bank of Bengal (supra)* established as a limitation to the rule that a mutual credit arises if a creditor is intrusted by his debtor with goods to sell, that if the right to sell does not arise until after the bankruptcy, then there is no set-off for the surplus, for the reason that the assignee in bankruptcy may redeem instantly and before any such power existed, and the creditors shall not be prejudiced by any failure on his part to redeem. The rights of the parties are fixed at the date of the bankruptcy; if the credit does not exist at that time, then there can be no set-off. Applying these principles, it was held *in re Dow (supra)*, that where securities have been deposited with one as collateral to a debt owing to him, with a power of sale existing at the time of the bankruptcy, notwithstanding there was a promise implied by law, if not express, to return the surplus, yet such surplus might be set off against a debt due by the person holding the collateral to the one depositing it; that a promise, even express, to return the surplus did not prevent the surplus from being held and used as a set-off unless the property had been intrusted to one for a particular purpose, inconsistent with such application of the surplus, so that to retain it would be a fraud or breach of trust. (*In re Dow, Ex. p. Whiting*, Fed. Cas. 17,573; 14 N. B. R. 307; see also cases cited

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**Entrusting Property to One does not Create a Mutual Credit. [Ch.**

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therein, viz. *Marks v. Barker*, 1 Wash. 178; *Eland v. Carl East*, 175; *Mayor v. Nias*, 8 Moore, 275; *Cornforth v. Riv* 2 M. & S. 510.) For an instance of a deposit creating a tr see *In re Troy Woolen Co.* (Fed. Cas. 14,203; 8 N. B. R. 41

**Entrusting Property to One for a Specific Purpose Does not Cr a Mutual Credit.**—To constitute mutual credits there must h actually been a credit given by one with an understanding tha could or might be used as an offset to a debt due by the giving the credit. If property is intrusted by one to another a specific purpose, not with an intent to create a debt, this is giving of a credit which can be set off. Compare *Alsager Currie*(12 Mees. & W. 758). The Bankruptcy Act being inten to prevent fraud, will not allow one to avail himself of an indebtedness created by his own wrongful conduct, and set it in reduction or as a payment of a claim due to him. Thus, England it has been held that an attorney with whom bills of change have been deposited for a specific purpose cannot c vert the proceeds to his own use and claim that he retains th as a payment on a debt due to him. *Buchanan v. Findley B. & C.* 738).

The matter of "mutual credit" was considered in the case *Libby v. Hopkins*, 104 U. S. 303. The facts in that case w that A being indebted to B upon a note secured by a mortga and also upon account, sent to B money with instructions to cre it upon the note. Afterwards A was adjudged a bankrupt. 7 U. S. Supreme Court in this case held that the money which received was received in trust by him to apply it pursuant to c tain instructions, and that having refused to make such appli tion of the funds, he could not set if off against the account, was liable to the assignee in bankruptcy for the amount recei by him. The money was sent by A to B in the form of dra and the contention of plaintiff was that this was a deposit of pr erty on one side with authority to turn it into money, and t that authority enabled him to retain the money and incur by doing an indebtedness, which could be off-set against his cla



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§ 68.] Knowledge of Intent to Give Credit — Debts Must be in Same Right.

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The court disapproving of this contention, laid down the rule that the term "mutual credit" includes only such where a debt might have been within the contemplation of the parties; citing and approving *Smith v. Hodson* (4 T. R. 211); *Esen v. Cato* (5 Barn. & Ald. 261); *Rose v. Hart* (*supra*); *Easman v. Cato* (5 Barn. & Ald. 861); *Ex p. Ockendon* (1 Atk. 235); and criticising the *dictum* of Lord Hardwick, in *Ex p. Deeze* (1 Atk. 228), to the effect that the words "mutual credit" have a larger meaning than "mutual debts."

**Knowledge of the Indebtedness and Intent to Give Credit Must Exist.**—Mutual credits do not exist where there is not a connection between the claims. A mutual credit is a knowledge on both sides of an existing debt due to one party and a credit by the other party founded on and trusting to that debt as a means of discharging it. (*Munger v. Albany Bank*, 85 N. Y. 580; *Ex p. Prescott*, 1 Atk. 231; *Key v. Flint*, 8 Taunt. 23.) Applying this principle, it has been held that where the same persons constituted separate firms doing business under different names, if a party has a credit with one firm and an indebtedness with the other, the indebtedness due to the latter cannot be set off against the credit with the former unless the party knew that both firms were composed of the same persons, and the course of business between him and them showed that his transactions with each firm were considered as having a connection. (*Sparhawk v. Drexel*, Fed. Cas. 13,204; 12 N. B. R. 450.)

**Debts Must Be in the Same Right.**—Mutual debts must be in the same right. To be mutual, debts between parties must be owing to and be due in the same rights and capacities. (*West v. Pryer*, 2 Bing. N. C. 455; *Ex p. Bailey*, 1 M. D. & D. 263.) Thus, a debt due one as a guardian or trustee cannot be set off against a debt due him individually. (*Bishop v. Church*, 3 Atk. 610.) And upon the principle that the capital of a corporation is a trust fund for the payment of the debts due to general creditors, it has been held that one could not set off an indebtedness due to

him personally against a claim for an unpaid subscription to stock. And where to evade this liability he had made a non-payment of his subscription, but at the same time had withdrawn an equivalent amount from the company's treasury loan and given his note therefor, the purpose being to turn stock liability into a contract liability, the whole transaction held to be fraudulent. (*Sawyer v. Hoag*, 17 Wall. 610; 9 N. B. R. 145; followed in *Jenkins v. Armour*, Fed. Cas. 7,26 Biss. 312; s. c. 14 N. B. R. 276; see also *Drake v. Rollo*, 1 Cas. 4,066; 3 Biss. 276; s. c. 4 N. B. R. 689; *Scammon v. Kimball*, Fed. Cas. 12,435; 5 Biss. 431; s. c. 8 N. B. R. 337; and under present act *in re Goodman Co.* 3 Am. B. R. 200.) Cases just cited not only authoritatively established the principle that trust debts cannot be set off against individual claims, also show that all debts incurred between parties in the same rights and capacities are subject to set-off. Thus, in *Drake v. Rollo*, and *Scammon v. Kimball*, while the court refused to allow a set-off of a personal claim against an indebtedness upon unpaid stock subscription, in each of these cases personal claims were set off against personal debts. Claims for indemnity under insurance policies were allowed as set-offs against debts for money borrowed in good faith. But where the money was loaned with the intent to change the liability of the stockholder as one of the trustees of the capital for the benefit of general creditors into mere contract liability, claims for indemnity under insurance policies were not allowed to be set off against notes given for the purpose stated. So where the ownership of a claim is merely nominal, and no more than a bare legal title, and not an actual interest, it cannot be set off against a debt due by the owner having this bare legal title. (*In re Lane*, 2 Low. 305; Fed. Cas. 8,04

**Set-off of Joint and Partnership Claims Against Individual indebtedness.**—One who has a claim against several persons jointly and owes one of them individually may set off his claim against his indebtedness against the estate of either of the joint debtors who may become bankrupt. The fact that it may be subject

be marshaled makes no difference. The joint debtors are liable *in solido* for the whole debt. (*Tucker v. Oxley*, 5 Cranch, 34.) But a joint claim, that is, a debt due to several joint creditors, cannot, it seems, be set off against a debt due by one of them. Thus, if the debt is due to A and B it cannot be appropriated to pay the indebtedness of A to the common debtor. The debtor who has incurred an indebtedness to several persons jointly cannot discharge it by setting up a claim which he has against one of those persons, if the others have no concern with his claim and cannot be affected by it. No more can one of several joint creditors, against whom an action is brought by the common debtor upon a claim which the latter has against him, use the joint claim as an offset to his own debt, for he has no right thus to appropriate it. Equity will not permit him to pay his individual debt out of the joint property, and if he had the assent of his co-obligees to do this, it would be unjust to the suing debtor because he has no reciprocal right to do the same thing. (So held in *Gray v. Rollo*, 18 Wall. 629; s. c. 9 N. B. R. 337, citing and distinguishing *Tucker v. Oxley*, 5 Cranch. 34.) The facts in the case of *Gray v. Rollo*, to which the doctrine just stated was applied, were as follows: A and B were joint makers of certain notes which were transferred to an insurance company. B and C held policies in the same company which became due in consequence of loss by fire. The company afterwards becoming bankrupt, its assignee claimed the full amount of the notes from A and B. B sought to set off against his half of the liability the claim due to him and C on the policies of insurance, the latter consenting thereto. But it was held in accordance with the principles above stated that the two obligations had not been contracted with reference to each other, and hence it was not a proper case for set-off. And see under present act *In re Crystal Spring &c. Co.* (4 Am. B. R. 55; 100 Fed. 265).

(Compare on this subject of the offset of partnership debts against individual debts, *Ex p. Twogood*, 11 Ves. 517; *Ex p. Christie*, 10 Ves. 105; *Ex p. Hanson*, 12 Ves. 346; *Ex p. Stephens*, 11 Ves. 24.)

**Claims Purchased After the Filing of the Petition or Within Months Prior Thereto.**—Under the present act, if a claim has been purchased by the debtor of the bankrupt after the filing of the petition or within four months prior to that time, it cannot be used as a set-off if it was procured with a view to such use with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy. The intent or “view to such use” and the knowledge or notice of the act of bankruptcy or of the insolvency must concur or else the claim can be used as a set-off. Strictly construed, the language of the section would permit a debt purchased after the filing of a petition to be used as a set-off, unless purchased with the “view to such use,” but to allow such a set-off would certainly seem to be inconsistent with the purpose and policy of the Bankruptcy Act, and would open the gates to the obtaining of improper advantages. The commencement of the proceedings in bankruptcy is in law notice to all the world, and if all persons are chargeable with this notice, it would follow that any purchase of a claim made after that time must be admitted to have been made with a view to use it as a set-off. The rights of all parties, it must be conceded, are fixed at the time of the petition. (*In re Dow*; *Ex p. Whiting*, Fed. Rep. 17,573; 14 N. B. R. 307; *Young v. Bank of Bengal*, 1 M. & C. P. C. 150; s. c. 1 Deacon, 622; *Dickson v. Evans*, 6 T. R. 1; *Marsh v. Chambers*, Strange, 1,234.) Unless the credit exists there can be no set-off. After the filing of the petition the rights of creditors of the bankrupt cannot be enlarged. If a set-off then exists against a creditor’s claim, any subsequent assignment takes subject to that equity. This is true even if the assignee chose to be a negotiable instrument not yet due, and though it was taken in good faith and for value and without notice or knowledge of the set-off. The note is subject to the same offsets when in the hands of the indorsee, as existed against the one who made it at the time of the commencement of the proceedings, and cannot be set off by an indorsee who took it after the petition was filed, against a claim of the bankrupt against the indorsee. (*Smith v. Brinkerhoff*, 6 N. Y. 305; s. c. below, 18 Barb. 1

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Humphries *v.* Blight, 4 Dill. 370; s. c. 1 Wash. C. C. 44. To same effect, Dickson *v.* Evans, 6 T. R. 57.) But the indorsee is subrogated to the rights of the indorser, and can prove the claim in his name and be allowed what the indorser would have been allowed. (*Ex p.* Atkins, Buch. 479; *Ex p.* Rogers, Buch. 490.) In the original act of 1867, section 20, it was provided that no set-off should be allowed in favor of a creditor of the bankrupt of a claim in its nature not provable against the estate of the bankrupt or of a claim purchased by one or transferred to him after the filing of the petition. When this section was embodied in the Revised Statutes (section 5,073), there was added to it a clause that no set-off should be allowed in favor of a debtor upon a claim purchased by him or transferred to him in cases of compulsory bankruptcy after the act of bankruptcy upon or in respect to which the adjudication shall be made, and with a view of making such set-off. Before that amendment was made it was held *In re* City Bank (Fed. Cas. 2,742; 6 N. B. R. 71), and in *Hovey v.* Insurance Co. (Fed. Cas. 6,743; 10 N. B. R. 224), that a debt of one who was insolvent which was purchased by his debtor immediately prior to the filing of the petition in bankruptcy and purchased in order to use the same as an offset against his indebtedness, is protected by the Bankruptcy Act, inasmuch as that act (the original Act of 1867) only forbade the set-off of claims purchased after the petition was filed. Compare *Hawkins v.* Whittier (10 B. & P. 217); *Dickson v.* Cast (1 B. & Ad. 343); Contrary to *in re* City Bank and *Hovey v.* Ins. Co. was *Hitchcock v.* Rollo (Fed. Cas. 6,535; 4 N. B. R. 689; s. c. 3 Biss. 276), holding that where one purchased a claim with knowledge of the insolvency of the debtor, and with a view to use it as a set-off, it could not be considered a case of mutual credit, and that the allowance of such purchased claim as a set-off against a pre-existing indebtedness would be inequitable and would act in a manner contrary to the manifest spirit and intent of the Bankruptcy Act, and that set-off would be allowed in bankruptcy only where one had good grounds for equitable relief. It was further held that the Bankruptcy Act should be so construed as to further

its manifest purpose of an equitable *pro rata* distribution of the bankrupt's assets, and not in such a manner as to permit one creditor to obtain an advantage by purchasing a claim and using it as an offset. (See the following cases and authorities cited in *Hitchcock v. Rollo*; *Smith v. Hill*, 8 Gray, 572; *Hilliard on Bankruptcy*, 224; *Avery & Hobbs on Bankruptcy*, 157; *Waterman on Set-off*, 141. Compare the following cases under the English act: *Hawkins v. Whitten*, 10 Barn. & Cress. 217; 21 Eng. Com. Law, 10; *Fair v. McIver*, 16 East, 130; *Jakington v. Combes*, 6 Bing. 71; 37 Eng. Com. Law, 51; *Howe v. Stow*, 3 Allen, 113. See also *Ogden v. Coweley*, 2 Johns. 274; *Dickson v. Evans*, 6 Term Rep. 57; *Smith v. Brinkerhoff*, 8 Barb. 519.)

Under the present act a liability which has accrued to the trustee which had not accrued to bankrupt may be set off against the claim of a creditor when the claim and liability are mutual. (*In re Crystal Spring, etc. Co.* 4 Am. B. R. 55; 100 Fed. 265.)

**Banker's Right to Offset Loans Against Deposits.**—The relation between a banker and a depositor is that of debtor and creditor. Hence a banker may offset the debt due to him on loans, overdrafts, or otherwise against deposits which are made with him. (*In re Bank of Madison*, Fed. Cas. 890; 9 N. B. R. 184; *in re Petrie*, Fed. Cas. 11,040; 7 N. B. R. 332; *Denman v. Boylston*, 5 Cush. 194.) So if the banker has received drafts for collection the proceeds of which afterwards came into his hands, he may offset them against debts due to him. (*In re Farnsworth*, Fed. Cas. 4,673; 14 N. B. R. 148.) In *Traders' Bank v. Campbell* (14 Wall. 87; s. c. 6 N. B. R. 353), it appeared that insolvents upon the eve of bankruptcy gave to their banker a check upon funds to their credit in that bank to apply upon the indebtedness due to the bank, although the banker and the bankrupts knew of the insolvency of the latter. The Supreme Court held the transaction to be a preference and voidable by the assignee in bankruptcy and that he had the right to recover the amount so paid, and further held that although possibly had the bank stood upon its right of

offset, that right might have been available to them, yet when they treated the money as the bankrupt's own property, taking his check and crediting the amount as a payment on the indebtedness, the transaction became a voidable preference.

**Claims of a Provable Nature and Claims Which Can Be Proved.—**

There is a distinction between claims provable in their nature and claims which can be proved. A claim may be of the former character and yet because of lack of evidence not fall within the last category. (*In re Kingsley*, Fed. Cas. 7,819; 1 N. B. R. 329; s. c. 1 Low. 216.) Between the language of the old act and of the present this difference is to be noted: the former act provided that claims in their nature provable can be set off against a debt due the bankrupt. The present act says provable claims. Whether a provable claim is the same as a claim provable in its nature, *quaere*; we think the terms are synonymous. Under the former act it was held that where a debtor of the bankrupt was also a creditor holding a claim upon which he had attempted to obtain a preference, which, under that act, debarred him from proving his claim, he could, however, use it as a set-off because it was provable in its nature. (*Clark v. Iselin*, 21 Wall. 360; s. c. 11 N. B. R. 337; s. c. below, 10 Blatch. 204; s. c. 9 N. B. R. 19.)

**Waiver of Set-off.**—Under the former act, it was held that a creditor who, in making proof of his claim in bankruptcy, fails to show that the bankrupt has an unsatisfied claim against him, cannot when sued by the trustee in bankruptcy on the unsatisfied claim which he omitted to make mention of in his proof, plead as a set-off the amount at which his claim was allowed. (*Russell v. Owen*, 61 Mo. 185; s. c. 15 N. B. R. 322, citing *Brown v. Bank*, 6 Bush. [Ky.] 198.) The decision in that case was placed upon the provision of the statute prohibiting one who had proved a claim in bankruptcy from bringing any action or suit to enforce it; an express provision not contained in the present law. The court considered the pleading of an offset as a defense, the equivalent of bringing an action upon it.

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 Possession of Property — Marshal's Liability in Serving Warrant. [Ch. VI.
 

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**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.

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Analogous Provisions of former Acts.—

R. S. § 5024; act of 1867, § 40.

**Taking Possession of the Property.**—The remedy provided for in this section is provisional. It can be used only during the pendency of the petition, and it is limited to cases where there is a neglect by the alleged bankrupt of his property, causing a deterioration thereof. It does not in express terms authorize the seizure of property upon the ground that the bankrupt is about to remove the same, or to conceal it, or to preferentially transfer it; neither is there any authority under this act as under the former act for arresting one against whom a petition has been filed, because of attempts to remove, or conceal, or fraudulently dispose of his property. The provisions requiring the giving of a bond are new. The section should be read in connection with section 3 (*e*).

**Marshal's Liability in Serving the Warrant.**—If the warrant is in general terms to seize and take possession of the property of the bankrupt, it will be the duty of the marshal to take possession of all the assignable property and effects of the bankrupt. The



responsibility of determining the ownership of seized property rests upon him. He must determine for himself whether or not the property which he takes is the property of the bankrupt or of another. If he should seize the property of another, although he acts in good faith, he is liable to the injured party for any damages which the latter may sustain. The warrant is no protection to him in seizing the property of any person other than the bankrupt. (*Marsh v. Armstrong*, 11 N. B. R. 125; s. c. 20 Minn. 81; *in re Muller v. Brentano*, 3 N. B. R. 329; s. c. Deady, 513. Compare, however, *in re Vogel*, Fed. Cas. 16,982; 7 Blatch. 18; 3 N. B. R. 198; *in re Havens*, Fed. Cas. 6,230; 8 Ben. 309; *in re Marks*, Fed. Cas. 9,095; 2 N. B. R. 575.) He cannot seize property belonging to a person other than the debtor, even though the transfer to the latter by the bankrupt may be one voidable under the Bankruptcy Act. The bankruptcy court has no authority under such a provisional warrant to order the seizure of property from such transferee. Until the adjudication at least the title of the transferee will not be questioned.

See section 67 PROCEEDINGS TO ANNUL LIENS.

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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 trade-marks; (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.

*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.

*f* Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.

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Analogous Provisions of former Acts.—

As to property in general passing to trustee: R. S. section 5044; act of 1867, section 14; act of 1841, section 3; act of 1800, sections 10, 11, 17, 27, 50. As to rights of action, patent rights, copyrights, and kindred rights, and the right to recover property fraudulently conveyed: R. S. section 5046; act of 1867, section 14; act of 1841, section 3; act of 1800, sections 13, 17.

**Date as of Which the Trustee's Title Vests.**—The Act of 1867, section 14, R. S. section 5,044, provided that after the adjudica-

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tion the register should execute a written assignment of the estate of the bankrupt to the assignee and "such assignment should relate back to the commencement of the proceedings in bankruptcy and by operation of law should vest the title to all such property and estate, both real and personal, in the assignee." Under the Act of 1841, there was much conflict of authority as to whether the assignee's title related back earlier than the decree. The provisions of the present act as to time of the vesting of the title are somewhat peculiar, since the general provision is that the assignee shall be vested by operation of law with the title of the bankrupt as the date he was adjudged a bankrupt; and yet subdivision (5) provides that he shall be vested with title to all property which prior to the filing of the petition the bankrupt could by any means have transferred or which might have been levied upon or sold under judicial process against him. The two provisions, at first, seem difficult to reconcile. The statement of the framers of the bill may be of aid in ascertaining their intention. In submitting its report to the Fifty-fourth Congress (House Report, number 1,228), the judiciary committee said with reference to section 70 of House Bill, number 8,110, the provisions of which as to the trustee's title were the same as those of the present law: "

"Under section 70 an important change has been made from the former laws, as well as from proposed legislation. Under the act of 1867, as interpreted by the courts, it was held that the title to the bankrupt's property vested by operation of law as of the date of the filing of the petition. By the proposed bill it is provided that the trustee shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt. By this change the alleged bankrupt can sell and convey a perfect title up to the date of the adjudication, and the purchaser does not buy at his own risk and in danger of having secured an imperfect title by reason of an adjudication which may be made subsequent to the purchase. It does not follow that because a petition is filed against a person in a bankruptcy court he will be adjudged a bankrupt, and it seems but proper that the public in dealing with him until he is adjudged a bankrupt should deal without fear of loss or danger as to title. It may be suggested that this is too liberal a provision, and that the bankrupt may neglect his business or estate as soon as bankruptcy proceedings are commenced against him, and that he may allow it to deteriorate in value. But this is provided for in section 69, where it is provided that '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.'"

Whether, indeed, the provisions of section 69 are adequate to protect the bankrupt's estate, is a question as to which there may be some dispute; but to us they would seem to be totally inadequate. They may be sufficient to prevent a deterioration of the property while it remains in the hands of the bankrupt; it can hardly be said that they will restrain a conveyance which one may wish to make. Greater protection will, we think, be found in an application for a receivership under the provisions of section 2 (3). But whatever means are afforded by the statute for the preservation of the property it is clear that the bankrupt's title is divested as of the date of the adjudication; but only property owned at the time of the petition passes to the trustee.

That is to say the words "prior to the filing of the petition" refer to *what* passes, and the words "as of the date he was adjudged bankrupt" refer to the time *when* it passes. (See *In re Barrow*, 3 Am. B. R. 414; 98 Fed. 582.) A very recent opinion (Oct., 1900), by Referee Hotchkiss (*In re Pease*, 4 Am. B. R. 578) contains a very complete discussion of this question. Because of the clearness of the opinion and because of its author's knowledge of the bankruptcy law and legal scholarship the statement of fact and the opinion are here quoted at length.

"The bankrupt, up to November 22nd, 1899, was doing business at Buffalo, N. Y., under the name of the F. S. Pease Oil Co. On that day the sheriff took possession of her store on executions, and continued in possession until the appointment of a trustee in bankruptcy on February 16th, 1900. Certain creditors filed a petition in bankruptcy on December 15th, 1899. An adjudication of bankruptcy followed on January 8th, 1900. Delays incident to negotiations toward a settlement satisfactory to all creditors delayed the appointment of a trustee until February 16th, 1900.

"Meanwhile, the alleged bankrupt continued business as before, filling orders, as she claims, by purchase of goods outside, and receiving payments on account of goods sold previous to the filing of the petition as well as in the interval between that date and the dates of the adjudication and the appoint-

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ment of the trustee, all charges for goods sold and credits for moneys received being entered in her books without opening new accounts or in any other way recognizing the changed condition of affairs. She gave as a reason for this that she expected to settle with her creditors and to resume business through a composition or payment in full, and thus sought to keep the business alive.

"On this state of facts the trustee brings the bankrupt in on an order to show cause why she should not turn over the moneys collected by her subsequent to the date of filing the petition, December 15, 1899, for goods sold by her prior to January 8, 1900, the date of adjudication. The trustee concedes that he has no claim for moneys received for sales after the adjudication, the sheriff having been in possession until the trustee relieved him, and the stock thus continuing intact; the bankrupt admits that she must account for moneys received for sales prior to the filing of the petition, provided they were from her.

"Opinion by Hotchkiss, Referee: The only question of law to be determined here is: Under section 70a, what vested in the trustee in bankruptcy—that which the bankrupt had on the day the proceedings were begun by the filing of the petition, or that which she had on the day she was adjudged a bankrupt? Were this a voluntary case, the question would be unimportant. In involuntary cases, however, there is of necessity an interregnum of from three weeks upward; in this case, the two dates are December 15th, 1899, and January 8th, 1900. The bankrupt here also insists that even if the trustee's contention that his title relates back only to the adjudication is true, she is still entitled to retain her collections for goods sold since December 15th, 1899, nay, since November 22nd, 1899, the day the sheriff took possession, for the reason that she can show that all of such sales were of goods purchased from other dealers and not from her stock. But the legal question is raised preliminary to such proof, for the purpose of limiting the testimony if possible. It is also urged that, even if her sales subsequent to the sheriff's possession were of goods purchased elsewhere, her creditors are entitled to the profits thereon during the interregnum, that is, up to the date of the adjudication, and that for these she must be ordered to account.

"This question seems to have been up but once before, and then in a form not entirely alike or necessarily controlling on the decision here. *In re Harris*, 2 Am. B. R. 360. The trustee relies on several cases as supporting his contention that the date of adjudication, not the day when the proceedings were commenced, is the day of cleavage; *In re Gutwillig* 90 Fed. 481, 1 Am. B. R. 78; *Carter v. Hobbs*, 92 Fed. 599; 1 Am. B. R. 215; *In re Abraham*, 93 Fed. 779, 2 Am. B. R. 266. To these might be added *In re Clute*, 1 N. B. N. 386, 2 Am. B. R. 376; *In re Becker*, 2 N. B. N. 24, 3 Am. B. R. 412. In none of these cases, however, is the exact point at issue, nor do the opinions go further than quote one or both of the seemingly contradictory phrases in section 70a.

"In but two cases is there even a hint as to what the judge writing the opinion really thought: (1) Judge Baker, in *Keegan v. King*, 3 Am. B. R. 84, says: 'After an adjudication of bankruptcy has been made, the title

to all of the property of the bankrupt, *as of that date*, passes to the person who is subsequently chosen trustee,' thus seemingly hinting toward the contentions of the trustee here; (2) while in *In re Yukon Woolen Co.* 1 N. B. N. 420; Am. B. R. 805, Judge Townsend, in discussing section 70a, quite clearly implies that the words 'shall be vested by operation of law with the title of the bankrupt *as of the date of the adjudication*,' refer to time merely, while the apparently contradictory words in the subsequent clause, 'property which *prior to the filing of the petition* he could by any means have transferred, etc.' (see 70a [5]), refer to what title passes, rather than the time of vesting.

"There was no such difficulty under the law of 1867. By section 14 of the statute the assignee's title vested by relation as of the date the proceeding were commenced. As a result, a merchant against whom a petition in bankruptcy was pending could not do business—the title being in the aid until adjudication or dismissal. There seems little doubt that the insertion of the words 'as of the date of the adjudication' in the present law was intended to meet the difficulty; Collier on Bankruptcy, p. 405; Analysis of Torrey Bankrupt Bill, Senate Bill 1035, 55th Congress, p. 76. Two of the text book writers came to the belief that as to title a new day of cleavage has been established; compare Bush on Bankruptcy, p. 385; Loveland on Bankruptcy pp. 284, 327. Mr. Bradenburg is non-committal, merely quoting the law (p. 414); while Mr. Collier (pp. 405, 406) and Mr. Lowell (p. 508) incline to the belief, to put it tersely, that the words 'prior to the filing of the petition' refer to *what* passes, and the seemingly antagonistic words earlier in the section refer only to *when* it passes.

"This later view seems the more reasonable. It meets the difficulty complained of under the law of 1867, and applies to business the doctrine that the debtor is innocent of bankruptcy until proven guilty. It protects *ad interim* purchasers and keeps going concerns alive, for the benefit of the creditors, if adjudications follow, and the benefit of the debtors themselves, if dismissals result. Nor can it be said that, by recognizing a valid title in the bankrupt until adjudication, creditors may be at the mercy of a dishonest debtor; Congress, foreseeing that, also enacted section 69, by which creditors may take possession of the property of debtors likely to take advantage of the situation, a privilege emphasized by the almost identical words of section 3e.

"This view also comports with well-established principles of bankruptcy legislation in the United States. Our policy has been to establish a day of cleavage, that is, a day before which the relation of debtor and creditor exists, but after which, at the debtor's option, it ceases; a day before which all the debtor has become his creditors, but after which that which he acquires is his, subject only to his new trusteeship to new creditors. With us that day has always been the day proceedings are commenced, and the present law repeatedly recognizes it. Compare sections 1 (10), 3b, 6, 9b, 11a, 29b (4), 60b, 63a (1), (2), (3), (5), 64b (4), 67c-e-f, 68b. Where a point of time is indicated by the words 'the date of the adjudication,' the impracticability of using the other date is apparent; compare sections 7 (8), 14a, 55a, 65a, and even 70a, as previously explained.

## § 70.] Bankrupt's Title and Interest After the Adjudication.

“The English Bankruptcy Act distinguishes sharply between the time of vesting and the property which vests. Section 54 vests the title in the trustee, immediately on the debtor being adjudged a bankrupt. But, by section 44, the property divisible among the creditors is defined as ‘all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge;’ while by section 43, ‘the commencement of the bankruptcy’ is defined as the day on which the voluntary petition is filed, or, if involuntary, the day on which the first act of bankruptcy (not earlier than three months prior) relied on was committed. In other words, in England, while the title vests on the date of the adjudication, it may relate backward to three months before the petition, and may also include everything acquired before the discharge. It is a little difficult to understand the justice of this, especially as by sections 30 and 37 of the same act, a discharge, operates only on debts existent or obligations created prior to the date of the ‘receiving order,’ *i. e.*, in actual practice, the date of filing the petition. In other words, it would seem that in England creditors may share in after-acquisitions prior to the discharge, though their debts postdate the beginning of the proceeding, and yet, if not paid in full, still have undischarged debts for the deficit. But the point to which attention is called is that, in spite of this period of probation, during which the English bankrupt must continue to surrender all that he may acquire, the English law, like ours, and probably for the same reason, distinguishes between the time of vesting and the title which vests, and further fixes the time on the day we fix it.

“I am satisfied, therefore, that, though the words are confusing, Congress has accomplished what it intended, namely, that for the protection of those who deal with the bankrupt in the interval between the filing of the petition and the adjudication, he shall have a title capable of transfer, but that the day of cleavage, both as to provable and dischargeable debts and as to property with which to pay those debts, is the day when the petition is filed. The other view would mark an innovation contrary to settled principles in this country neither intended by Congress nor warranted by the words of the statute.

“It follows, therefore, that the bankrupt need account only for moneys received by her for goods sold from her stock as it existed on the day the petition was filed; that all collections for goods purchased by her elsewhere, whether received by her or by the trustee, are her property; that the profits on any such goods so purchased and sold before the petition should be turned over to the trustee; and that any subsequent profits are hers, and not her creditors.

“Evidence may be offered by both parties in accordance with the views here expressed, and the determination of the exact amount for which the bankrupt is accountable will be announced when the case is closed.”

**Bankrupt's Title and Interest After the Adjudication and Before the Appointment of the Trustee.**—The trustee's title, it thus appears, under the present act, does not relate back beyond the time of the

decree. But although his appointment may be some time subsequent to the adjudication, when once appointed his title does relate back to the time of the adjudication in such a manner as to make any transfer by the bankrupt after that date a nullity. Even after the adjudication until the appointment of the trustee, the title remains in the bankrupt. The decree itself does not, as under the act of 1841, divest the bankrupt's title. Its date, however, marks the point of time to which the title subsequently acquired by the assignee relates back. The title of the bankrupt in the interval between the adjudication and the appointment exists, but is defeasible; and when the appointment of the trustee is made it is divested as of the time of the adjudication. All titles derive under or through him subsequent to that date are by force of law and without regard to the knowledge or the motives of the one claiming title, overreached and defeated. (Compare *Connor v. Long*, 104 U. S. 228; citing *Bank v. Sherman*, 101 U. S. 403; also *Hampton v. Rouse*, 22 Wall. 263.) In the case last cited (*Hampton v. Rouse*), it was held that after the adjudication, but before the assignment, the bankrupt retained such title that he had authority to redeem real estate belonging to him, from a sale for taxes. This defeasible title which the bankrupt has between the adjudication and the appointment of the trustee exists in the case of personal property as well as of real estate, and likewise the trustee's title as to such property when acquired relates back to the date of the adjudication. Hence it has been held that if payments are made by a debtor of the bankrupt to the bankrupt personally after the adjudication, and before the appointment of the trustee, they become, upon the appointment of the trustee, mere nullities; and although they were made in good faith and without knowledge, the trustee may sue and compel the bankrupt's debtor to make payments again to him. (*Mays v. Manufacturers' National Bank*, 64 Penn. [14 Smith] 74; s. c. 4 N. B. R. 660.) The adjudication in bankruptcy is notice to all the world. (*Hitchcock v. Sedgwick*, 2 Vernon, 156; *Wickersham v. Nicholson*, 14 S. R. 118.) Hence, although the one making the payment may have no actual knowledge of the bankruptcy of his creditor, he has con-



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structive notice, and payments made by him after the date as of which the creditor's title is divested, are in law payments made not to the owner of the debt, and are also payments made with notice of the fact of the change of ownership of the claim. (Compare *Ex p. Foster*, 2 Story, 158; *Carr v. Gale*, 3 Woodb. & M. 67; *Bramwell v. Eglinton*, Law Rep. 1 Q. B. 494; *Exley v. Inglis*, Law Rep. 3 Exch. 247. Compare also the following American cases as to the invalidity of titles acquired from the bankrupt after the date to which the trustee's title when vested relates back: *Stevens v. Bank*, 101 Mass. 109; *Miller v. O'Brien*, 9 Blatch. 270; Fed. Cas. 9,586; s. c. 9 N. B. R. 26; *in re Lake*, Fed. Cas. 7,992; 3 Biss. 204; s. c. 6 B. R. 542; *Chapman v. Brewer*, 114 U. S. 158; *Morgan v. Campbell*, 22 Wall. 381; *McLean v. Rockey*, 3 McLean, 235; Fed. Cas. 8,891; *in re Pryor*, Fed. Cas. 11,457; 4 Biss. 262; *in re Randall*, Fed. Cas. 11,552; 1 Sawy. 56. It is apparent that the rule laid down in *Mays v. Manufacturers' Bank* (*supra*), is technical and liable to work injustice, but it seems to be required by the provisions of the law. In *Babbit v. Burgess* (Fed. Cas. 693; 2 Dill. 169; s. c. 7 N. B. R. 561), it was said:

"It is not necessary for this court to take the extreme position held by the Supreme Court of Pennsylvania (*Mays v. Manufacturers' Bank*), and rule that all payments made to a debtor after a petition is filed [the date as of which under the act of 1867 title vested in the assignee] against him in bankruptcy, are to be adjudged void, if the debtor is subsequently declared bankrupt. This court, however, holds that payments thus made *mala fide*, or with a view of defeating the bankruptcy act in any of its essential requirements, are void, and the person by whom such payment was made can be held to answer for the original demand of the assignee, whose title relates back to the day of commencing proceedings in bankruptcy."

Compare also *Howard v. Crompton* (Fed. Cas. 6,758; 14 Blatch. 328). In examining the cases above cited and applying them, it is to be borne in mind that the decisions were rendered under the act of 1867, which made the title of the assignee relate back to the time of the filing of the petition, and not merely to the time of the adjudication, as under the present act.

During the time between the adjudication and the appointment of the trustee, the bankrupt is a trustee of the property. The

property is in the custody of the court, although the officer who is to take charge of it may not have been designated. (*In re Rosenberg*, Fed. Cas. 12,055; 3 N. B. R. 130; s. c. 3 Ben. 366; *March v. Heaton*, Fed. Cas. 9,061; 2 N. B. R. 180; s. c. Lowell, 278.) In case the bankrupt attempts to remove or destroy or injure the property or neglects to preserve it, the court may exercise the usual powers of a court of equity for the preservation of the subject-matter of the action pending before it. Under the terms of section 2 (3) it may in such cases appoint a receiver to take charge of the property, and it may unquestionably enjoin the bankrupt from improper use of the property.

**Title Subject to all Equities.**—In the absence of any fraud given to the trustee as the representative of creditors the right to avoid transfers and incumbrances made by the bankrupt, the trustee takes only such rights and interest in the property as the bankrupt himself could have asserted at the time of the bankruptcy. The trustee is affected with every equity which would affect the bankrupt himself if he were asserting those rights and interests. (*In re Dow*, Fed. Cas. 4,036; 6 N. B. R. 10, quoting from *Bacon v. Heathcote*, 1 Atk. 160: "The ground that the court goes upon is this, that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could." See also *Stewart v. Platt*, 101 U. S. 731; *Yeatman v. Savings Inst.* 95 U. S. 764; *Montgomery v. Bucyrus Mach. Co.* 92 U. S. 257; *Strong v. Clawson*, 5 Gilman, 346; and cases cited under section 67; also *Jewson v. Moulson*, 2 Atk. 417; *Mitford v. Mitford*, 9 Ves. 87; *Worrall v. Marlur*, 1 P. Wms. 459; *Mitchell v. Winslow*, Fed. Cas. 9,673; 2 Story, 630; *Winson v. McLellan*, 2 Story, 495; *Ex p. Newhall*, Fed. Cas. 10,159; 2 Story, 363; *Fiske v. Hunt*, Fed. Cas. 4,831; 2 Story, 584.) Thus, where a party fraudulently induces an owner to part with his title to goods, the defrauded party having the right to disaffirm the contract and to recover the goods, may assert that right against the trustee in bankruptcy as well as against the bankrupt himself. (*Donaldson*

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*v. Farwell*, 15 N. B. R. 277; s. c. Fed. Cas. 3,983; 5 Biss. 451; s. c. affirmed 93 U. S. 631; *In re Gany*, So. Dist. of N. Y. Sept. 1900, 4 Am. B. R. 576.) So where there was an action to foreclose a mortgage, and proceedings for the appointment of a receiver of the rents and profits were instituted before the adjudication of the mortgagor as bankrupt, and there was a deficiency on the sale of the mortgaged premises, it was held that the assignee in bankruptcy could not claim the fund in the receiver's hands, as against the mortgagee. (*Hayes v. Dickinson*, 15 N. B. R. 350; s. c. 9 Hun, 277.) So where the bankrupts agreed to build a locomotive for certain parties and notified them that it was completed and had been shipped, and thereupon were paid the price, it appearing that no engine existed at the time it was represented as having been shipped, but that subsequently two were built, either of which would answer the contract, it was held that the bankrupt and his assignee were both estopped by the fraud of the bankrupt from denying that one of the engines then in their possession was the property of the parties who had thus been defrauded. (*In re McKay & Aldus*, 1 Lowell, 345; s. c. 3 N. B. R. 50.) Compare *Kelly v. Scott* (49 N. Y. 595), citing *Mitchell v. Winslow* (2 Story, 630). So where a right of action passes to the trustee any defense, legal or equitable, which might have been raised against the bankrupt's claim may be raised against the trustee. (*Jenkins v. Pierce*, 98 Ill. 646.) If property is impressed with a trust in the hands of the bankrupt it passes to the trustee subject to the same trust; thus, where a broker was intrusted with money to invest in exchequer bills for his principal, but misappropriated the money, and invested it in stock and thereafter, upon being detected, surrendered the stock to his principal, it was held that although he became bankrupt on the day of the misappropriation and although the title of his assignee related back to the time of the act of bankruptcy, yet the assignee could not recover the stock from the principal to whom it had been surrendered, since the property was affected by the trust. The original trust created by the delivery of the money for an express purpose was not divested by the change of the form of the

security. (Taylor v. Plumer, 3 Maule & Selw. 562; to the same effect, Cook v. Tullis, 18 Wall. 332; Hawkins v. Blake, 108 U. 422.) Except in so far as controversies among lienors may affect directly or indirectly the funds or property passing to him, the trustee has no interest in such controversies. He cannot object to the order in which the priorities of lienors are fixed by a decree (Jerome v. McCarter, 94 U. S. 734; Dudley v. Easton, 104 U. 99; McHenry v. Societe Francaise, 95 U. S. 58.)

SEC. 70a (1), (2), (3), (4). Subdivision 1 of this section requires no commentary. The bankrupt, as we have seen in section 7 and section 67, must make all conveyances ordered by the court, and it is necessary for him, section 7a (5), to execute his trustee transfers of all of his property in foreign countries.

Subdivision 2 referring to interest in patents, etc., it is held under the present act, does not include an application for a patent pending at the time of adjudication, and the trustee takes no interest in the patent issued after adjudication in such a case. (re McDonnell, 4 Am. B. R. 92; 101 Fed. 239.)

Subdivision 3 merely lays down the general principle which is further set forth in subdivision 5, that a power which is beneficial to the donee may be reached by the creditors while a power of appointment trust for the benefit of a person other than the donee is in no sense a property right which can be reached by his creditors. See also as to beneficial interests under trusts, subdivision 5.

Subdivision 4 relating to property transferred by the bankrupt in fraud of his creditors must be collated with paragraphs 1 and 2. These paragraphs read together give to the trustee not only the rights which any creditor might have had to set aside a fraudulent transfer by a bill in equity, but also the right to set aside a preferential transfer under section 60. In this respect alone, the trustee obtains a greater right than the bankrupt himself had if the bankrupt might not have brought an action to set aside his own fraudulent conveyances. The trustee is by no means confined to the four months antedating bankruptcy in the case of fraudulent conveyances. There is a very good discussion of the powers of the trustee in this respect in the case of *In re Gray*, c

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cided by the New York Supreme Court, App. Div. (3 Am. B. R. 647; 47 App. Div. 554).

As we have seen in prior discussions, sections 2 and 23, as to jurisdiction, and section 67 as to void liens and fraudulent transfers, the remedy of the trustee is to bring a plenary suit against the transferee, of which action the Bankruptcy Court has no jurisdiction.

**Property Transferable or Subject to Levy.** Section 70a (5)—In considering the property rights which become vested in the trustee by virtue of the provisions of subdivision 5 it is not advisable to attempt an enumeration. However exhaustive it might be, it would necessarily be incomplete. The subdivision is so general in its terms that it must be held to include every vested right and interest attaching to or growing out of property. It furnishes the test that must be applied in determining whether or not the property vests in the trustee. Could the property by any means have been transferred, or was it subject to levy? If it could have been transferred or levied upon, then it passes to the trustee. It is immaterial that the property may be considered as having no market value. (*Kinzie v. Winston*, Fed. Cas. 7,835; 4 N. B. R. 84.) If it is a property right it passes to the trustee; he may decline, however, to accept it if it would prove a burden to the estate.

This is the rule as we have seen in the case of leases (section 63 *sub nom.* PROVABILITY OF CLAIMS FOR RENT..

See as to burdensome property in general (*damnosa hereditas*), *McHenry v. Societe Francaise* (95 U. S. 58); *Traders' Bank v. Campbell* (14 Wall. 87). The trustee must exercise his option to accept within a reasonable time or he will be held to have waived his rights. (*Smith v. Gordon*, 6 Law Rep. 313.)

**Contingent Interests and Interests in Trust.**—The principal difficulty in applying the rule that leviable and transferrable property passes to the trustee arises in the case of contingent interests. Generally speaking the law of the State will have to be consulted

in each case, as the nature of contingent interests, particularly in realty, differs very greatly under American statutes. In New York, at least, an estate which is contingent not only as to the event upon which it will become vested in interest, but also contingent as to the person who will take, *e. g.*, when such person is the member of an unascertained class, the estate is inalienable and does not pass in bankruptcy. (*In re Hoadley*, 3 Am. B. R. 780; 101 Fed. 233.) But under the statutes of New York the remainder is vested when there is a person in being who will take the estate upon the determination of the life estate. (*Id.*) So it has been held in Pennsylvania that a bankrupt's interest in personalty where he is one of an unascertained class, which interest may be defeated by the exercise of a power, does not pass to his trustee. (*In re Wetmore*, 4 Am. B. R. 335; 102 Fed. 290.) As to when a contingent remainder in realty passes to the trustee, see *Belcher v. Bernard* (106 Mass. 230).

A beneficial interest under a trust created by will or deed for the support of the *cestui que trust* can be reached in equity so far as the surplus income is concerned. But this must be done by a plenary suit in equity. (*In re Baudouine*, 3 Am. B. R. 651; 41 C. C. A. ; 101 Fed. 574.) Property allotted to an Indian under an act of Congress to be held in trust for such Indian by the United States for twenty-five years, after which a conveyance is to be made by the government to the Indian free and clear from all charges and encumbrances, is not during the twenty-five years an alienable estate and does not pass to the trustee. (*In re Russie*, 3 Am. B. R. 6; 96 Fed. 609.) And generally speaking where property is devised in trust so that it is inalienable by the *cestui que trust* and explicitly made not subject to the claims of his creditors it will not pass to his trustee. (*Monroe v. Dewey*, Sup. Jud. Ct. Mass. May, 1900; 4 Am. B. R. 264.)

In the case of *Nicholas v. Eaton* (91 U. S. 716), it appeared that real estate was devised to trustees who were directed to pay the income to one who was afterwards adjudged a bankrupt, and the devise contained the condition and proviso that if the said beneficiary should become bankrupt, the trust should cease; and there-

after the trustees in their discretion were to apply the income to the support of the beneficiary and to his family, and the trustees were empowered in their discretion to transfer any portion of the trust fund to the beneficiary. The court held that the bankruptcy terminated all of the bankrupt's legal and vested rights in and to the estate and left nothing to which his assignee in bankruptcy could assert a claim, and that the discretionary power vested in the trustees to pay sums to the bankrupt could not be subjected to the control of the assignee in bankruptcy, the court saying: "No case is cited; none is known to us which goes so far as to hold that an absolute discretion in the trustee, a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt, confers such an interest on the latter that he or his assignee can successfully assert it in a court of equity or in any other court."

**Personal Privileges.**—There are many property rights which by the terms of their creation are expressly or impliedly restricted to the person originally acquiring them, or which are by an express provision made non-assignable without the consent of the other party to their creation. Thus, leases often contain a clause forbidding an assignment; and licenses are usually considered as personal privileges, even though not expressly so declared. Memberships in associations of various characters, and in particular in boards of exchange and business associations are often declared non-assignable without the consent of the other members of the exchange. Franchises are considered in many cases personal privileges non-assignable; and contracts from their nature or by the terms of the creation frequently call for personal services which cannot be rendered by an assignee. So insurance policies often contain conditions providing that an assignment of the property shall terminate all rights under the policy. With reference to leases, the general rule, both in America and England, is that an assignment in an involuntary proceeding in bankruptcy is not a breach of a covenant in a lease agreeing not to make an assignment thereof. Property may be limited or leased to be void or

revert back in the event of bankruptcy, and if a lease to a person contain such proviso the lease does not pass to his trustee in bankruptcy, but reverts back. But to prevent its passage to the trustee there must be an express proviso to that effect. The usual covenant or proviso not to let, assign, or transfer without consent, etc., will not be sufficient. If that is the only covenant restricting an assignment, the lease will, notwithstanding it, pass to the trustee without the lessor's consent. The distinction, however, is taken in England that, unlike bankruptcy, which is an involuntary proceeding, insolvency, being a voluntary proceeding on the part of the debtor himself, is a breach of the covenant against assignment, and works forfeiture. (Hilliard on Bankruptcy, page 141; see also *Doe v. Bevan*, 3 Maule & S. 353; *Doe v. Smith*, 5 Taunt. 795; s. c. 1 Marshall, 359; *Gorney v. Warren*, 2 Eq. Cas. Abs. 100; *Dommett v. Bedford*, 3 Ves. 149; *Wilkinson v. Wilkinson*, 10 Eng. Ch. 258; s. c. 2 Wils. Ch. 57; s. c. Cooper, 201; *Holyland v. De Mendez*, 3 Meriv. 184; and also *Starkweather v. Cleveland Ins. Co.* Fed. Cas. 13,308; 4 N. B. R. 341; s. c. 10 A. L. Reg. N. S. 333; s. c. 2 Abb. U. S. 67. Compare *Smith v. Putnam*, 3 Pick. 220; *Copeland v. Stevens*, 1 B. & Ald. 592.) But many American courts consider that an assignment of the lease, made in a proceeding in voluntary bankruptcy (inasmuch as the transfer is still by operation of law) is not such an assignment of the interest of the lessee as to be a breach of his covenant not to assign, and they hold that upon the bankruptcy of the lessee his leasehold interest passes to his assignee or trustee in bankruptcy notwithstanding there is a covenant in the lease not to assign. Compare *Starkweather v. Cleveland Ins. Co.* Fed. Cas. 13,308; 4 N. B. R. 341; s. c. 10 A. L. Reg. N. S. 333; s. c. 2 Abb. U. S. 67; *Perry v. Lorillard*, 61 N. Y. 214; *Brichta v. N. Y. Lafayette Ins. Co.* 2 Hall. 372; *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 76; *Parsons on Contracts*, Part II, chapter XII, section IX. An examination of the American cases cited in the treatise just mentioned shows that while the rule may not be settled, there is at least a tendency on the part of the American



courts to disregard the distinction taken by the English courts between the nature and effect of assignments in voluntary and involuntary proceedings. The question whether a franchise or license is assignable must depend greatly upon the nature of the franchise or the license, and also upon the express terms by which it was created. If it is of such a nature that it may be considered as calling for the exercise of personal skill or personal discretion, then it cannot be considered assignable. The same principles of law which prevent the assignment of contracts of that character will prevent the assignment of the franchise or the license. Thus, in *People v. Duncan* (41 Cal. 507), it was held that a franchise to construct a turnpike road, and to collect the tolls was a personal trust and did not pass to the assignee in bankruptcy since the person who had the franchise could not voluntarily assign it, the consent of the party conferring the franchise being necessary by reason of the personal character of the work to be performed. But in *Stewart v. Hargrove* (23 Ala. 429), it was held that a franchise which gave to one the right to take tolls from persons crossing a certain bridge was assignable property.

The question of the assignability of a seat in a stock exchange board has often arisen in bankruptcy. It is now clearly settled that such membership is property which passes subject to the rules of the association, as an asset of the bankrupt's estate. The latest decision on this subject is *In re Page*, 4 Am. B. R. 467; 102 Fed. 747, citing authorities. So a license to occupy a city market stall is property passing from the bankrupt licensee and the court will order an assignment to the trustee of such property. (*In re Emrich*, 4 Am. B. R. 89; 101 Fed. 231.) So liquor licenses assignable only with the consent of the public authorities are assets passing to the trustee. (*In re Baker*, 3 Am. B. R. 412; 98 Fed. 407; *in re Brodbine*, 2 Am. B. R. 53; 93 Fed. 643; *in re Fisher*, 3 Am. B. R. 406; 98 Fed. 89.) Contracts, which from their nature or terms call for personal skill or discretion are inalienable under the general rule of contracts and so do not pass to his trustee in bankruptcy. See *Parsons on Contracts*, Part 2, chap. 12, sec. 9.

**Insurance Policies.**—The proviso at the end of subdivision 5 has been construed in several cases. Thus in the case of *In re Steele*, 3 Am. B. R. 549; 98 Fed. 78, it was held that under section 70 all insurance policies, having a cash surrender value, payable to the bankrupt, his estate or personal representatives, form part of the assets falling to the trustee, subject to the right of the bankrupt to secure to himself the future benefits thereof by paying to the trustee a sum equal to the surrender value of the policy; and this is true notwithstanding the fact that a State statute may make such a policy exempt from the claims of creditors; but policies of insurance payable to the wife, children or other kin of the bankrupt are not part of the assets of the estate.

So where a bankrupt, before the adoption of the Bankruptcy Act, assigned a policy payable to his executors, administrators or assigns, to the woman to whom he was then engaged and who afterwards became his wife, the effect of this assignment was to make the policy payable to the wife of the insured, and to take it out of the assets of the bankrupt. *Id.*

And in the case of *In re Diack* (3 Am. B. R. 723; 100 Fed. 770) it appeared that in 1892 an endowment policy was issued to D., upon the application of D. and his wife, payable 15 years thereafter to D. should he then survive, or in case of his death to his wife, if surviving, and, if not, to D.'s personal representatives or assigns. D. paid the premiums until the latter part of 1896, when, becoming embarrassed, he ceased to pay them and they were thereafter paid by Mrs. D. D. was adjudicated a bankrupt March 24, 1899. *Held*, that under the law of New York, followed by the District Court in this respect, Mrs. D., from the time the policy had a surrender value, became entitled by its terms to a contingent legal interest therein, which entitled her to pay the premiums in order to prevent a lapse, and, on a surrender of the policy, such payments previously made by her created in her favor an equitable lien upon her husband's interest for the same proportion of her payments that her husband's interest in the surrender value of the policy bore to the whole surrender value.

*Held* further, that as the trustee cannot require the wife to

accept a paid-up policy or suffer it to lapse, and thus obtain an immediate payment of the surrender value, the bankrupt should be required, unless his wife elects to surrender, to execute an assignment to the trustee of his interest in the surrender value of the policy as of the date of adjudication, and that sum, with interest from such date, should be made payable out of the proceeds of the policy when it matures, or whenever sooner paid.

Where an insurance policy has no surrender value it does not pass to the trustee. (See *In re Buelow*, 3 Am. B. R. 389; 98 Fed. 86; *in re Lange*, 1 Am. B. R. 189; 91 Fed. 361; *in re McDonnell*, 4 Am. B. R. 92; 101 Fed. 239.)

**Rights of Action.** Section 70a (6)—Subdivision 6, limiting the rights of action which vest in the trustee to those arising upon contracts or from the unlawful taking or detention of, or injury to, the bankrupt's property, is simply declaratory of the general principle of law that assignees and trustees cannot enforce those rights of action which are of a peculiarly personal character—those which, to use the common expression, die with the person. Causes of action for personal injuries, such as assault and battery, slander, seduction, and the like, do not vest in the assignee. (*Beckham v. Drake*, 8 M. & W. 846; *Noonan v. Orton*, 12 N. B. R. 405; *Howard v. Crowther*, 8 M. & W. 601; *Brewer v. Dew*, 11 M. & W. 625.) Causes of action for deceit and fraud seem to occupy debatable ground. Thus, *In re Crockett* (2 Ben. 514), it was held that a suit brought for fraudulently recommending a person as worthy of trust and confidence is not a claim which vests as an asset in the assignee. But in *Hyde v. Tufts* (45 Sup. Ct. [N. Y.] 56), where one who afterwards became a bankrupt was induced by false representations, to engage in a business venture in which, by reason of the false representations, he incurred great loss, it was held that the cause of action for the fraud vested in his assignee in bankruptcy. The right to sue for penalties is analogous to the right to sue for damages for tort. In the absence of a statute authorizing it, a right to a penalty cannot be assigned. (*Wright v. First National Bank of Greensburg*, Fed.

Cas. 18,078; 18 N. B. R. 87; citing *Gardner v. Adams*, 12 Wend. 297.) But in that case it was held that the right of action given by the banking act of the United States to recover back usurious interest was a claim or debt passing to the assignee in bankruptcy; that while the right of action given by that act was penal, yet the exacting of the usurious interest was in its nature an injury to the property rights of the bankrupt, and that the sections of the bankrupt law must be construed as giving the trustee the right to sue for and recover such usurious interest. To the same effect was *Crocker v. First National Bank* (Fed. Cas. 3,397; 3 Cent. L. J. 527). But in *Bromley v. Smith* (Fed. Cas. 1,922; 5 N. B. R. 152; s. c. 2 Biss. 511), and in *Nichols v. Bellows* (22 Vt. 581), both commented upon in *Wright v. First Nat. Bank of Greensburg*, the right of a trustee in bankruptcy to recover usurious interests was denied upon the ground that the right given by the statute was in the nature of a right to redress a personal injury done to the borrower himself, and that, like rights of action for personal torts, it did not pass to the trustee. Other cases holding that a trustee can recover usurious interest are: *Moore v. Jones*, (23 Vt. 739), and *Tiffany v. Boatman's Sav. Inst.* (18 Wall. 276; s. c. below, 1 Dill. 141). In *Wheelock v. Lee* (64 N. Y. 242), the trustee in bankruptcy was held to have the right to recover money exacted usuriously, but the court based its decision upon the fact that independent of the statutory right of recovery there existed a right to recover upon principles of the common law, saying: "It is claimed by the defendant that the right of the borrower to recover back usurious interest paid by him is strictly a personal right, and did not pass by the assignment to the plaintiff. Interest paid by the borrower to the lender beyond the lawful rate is received by the latter without right, and in violation of the statute. It is regarded as having been exacted from the borrower by duress, and the payment is not voluntary, so as to bring the transaction within the principle which precludes a recovery back of money voluntarily paid. The borrower never parted with his title to the money which he seeks to recover. It belonged to him after the payment as before, and the lender wrongfully deprived

him of it. The law allows him to maintain the action to reclaim the money, not as a penalty against the usurer, but because the usurer never acquired any title to it. The right of the borrower to recover the excessive interest paid on a usurious loan is expressly affirmed by our (the New York) statute of usury. But this statute did not give the remedy. It existed before upon the principles of the common law. (Doug. 697, notes; *Briggs v. Thompson*, 20 J. R. 292; *Palen v. Johnson*, 50 N. Y. 49.) In *Palen v. Johnson* it was conceded that the principal, if not the only, change made by our statute, was to limit the time within which the borrower could bring the action. The cause of action in favor of the borrower is founded upon the unlawful possession by the lender of the borrower's money. The claim has relation to his property, and it is entirely unlike a strictly personal injury where the cause of action does not survive, and is not assignable. The language of the bankrupt act is broad enough to vest in the assignee a right of action of this character, and our statute was not intended to confine this remedy to the borrower alone and to exclude those who stood, in respect to the claim, in privity with him." (See also *Bosanquette v. Dashwood*, Cas. Temp. Talbot, 38; *Dey v. Dunham*, 2 J. Ch. 181; *Palmer v. Lord*, 6 J. Ch. 95.) Upon the same principle of a common-law right of recovery, it has been held that an assignee can maintain an action to recover money lost at faro, although there was also a statute which gave a right of action to the loser. (*Meech v. Stoner*, 19 N. Y. 26; *Carter v. Abbott*, 1 Barn. & Cress. 444; *Gray v. Bennett*, 3 Met. 522.)

**Choses in Action of the Bankrupt's Wife.**—There has always been much conflict of authority as to whether the trustee in bankruptcy took the husband's right to reduce to possession the wife's choses in action. In *Parsons on Contracts*, Part II, chapter XII, section IX, it was said: "Whether insolvency operated a reduction to possession or only transferred to the assignee the right to reduce was much disputed. But the better reason and the better authority favored the view that it gave only a right to reduce, and

therefore the assignee had no property in the thing until actually reduced." The authorities both English and American are colated in a note to the text of that work. The discussion seems to have turned around the point whether the husband's right is a right of property conditional upon a reduction of the choses in action to possession, or is a mere power. Those which regard it as a conditional title have held that it passed to the assignee in bankruptcy, but those which regard it as a mere power have held that the power did not pass to the assignee in bankruptcy. But as under the provisions of subdivision 3 of section 70 of the present bankruptcy act, powers which the bankrupt might have exercised for his own benefit pass to his trustee, there would now seem to be no principle upon which it could be held that the trustee was prevented from reducing to possession the wife's choses in action. Upon this subject compare the following cases, decided under former acts: *In re Brandt*, Fed. Cas. 1,811; 5 Biss. 217; *in re Boyd*, Fed. Cas. 1,745; 5 N. B. R. 199; *Wickham v. Valle*, Fed. Cas. 17,613; 11 N. B. R. 83; *Shay v. Sessaman*, 10 Pa. St. 432.

The question at the present time has but little practical importance, because under the modern statutes the husband has no further interest in the wife's choses in action.

**Sale of Property.** Section 70b.—Together with the provisions of this subdivision must be read G. O. 18, which is as follows:

#### XVIII. 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.

As to whether the Bankruptcy Court has the right to order a sale of property free from liens and incumbrances there may be some doubt under the present act, but there seems to have been no doubt under the acts of 1841 and 1867 of the power of the court to make such order. As to forms of petition and order for sales of property see Forms 42-46 inclusive. Form No. 44 seems to contemplate the sale of the property subject to the lien, but the majority of cases under the present act hold that the court including the referee has the power to order the sale of land free of the incumbrances thereon, and the proceeds are to stand as a substitute for the lands themselves, for the benefit of those holding liens to the extent of their interests therein, and the surplus goes to the general creditors. (See *Southern Loan & Trust Co. v. Benbow*, 3 Am. B. R. 9; 96 Fed. 514; *In re Sanborn*, 3 Am. B. R. 54; 96 Fed. 507; *in re Vorland*, 1 Am. B. R. 450; 92 Fed. 893; *in re Pittelkow*, 1 Am. B. R. 472; 92 Fed. 901; *in re Etheridge Furniture Co.* 1 Am. B. R. 112; 92 Fed. 329.) The opinion of Judge Wheeler, *In re Sanborn*, *supra*, is as follows:

“ This is a petition for review of the approval by the referee of a sale by the trustee of mortgaged personal property, free of incumbrance, for less than the amount of the mortgage debt, which was large in proportion to this property, and was further secured by a mortgage of real estate being foreclosed by possession under a judgment on a writ of entry. That the referee, sitting as a Court in Bankruptcy, has power to order and to approve a sale, free of incumbrance, of property in possession by the trustee, on notice to the incumbrancer, seems to be clear. This was deduced by the Supreme Court of the United States from similar provisions in this respect to the present act in the Act of 1841. *In re Christy*, 3 How. 292; *Houston v. Bank*, 6 How. 486. The same conclusion was announced on the corresponding provisions of the Act of 1867 in *Ray v. Norseworthy*, 23 Wall. 128. In the latter case Mr. Justice Clifford, in delivering the opinion of the court, said, ‘ Beyond all doubt the property of a bankrupt may, in a proper case, be sold, by order of the Bankrupt Court, free of incumbrance.’ What would be a proper case is a matter of discretion. *Loveland, Bankr.* 574. There appears to have been some confusion as to what property was covered by the mortgage, and a sale free of incumbrance might be advantageous as to that in question. The whole amount of the sales of that found to be covered by this mortgage is only \$65.40, which is found to be the fair cash value. Setting aside the sale would have required the trustee to gather back numerous articles and animals of small and changeable value, and to return the prices paid to the purchasers, and would give the mortgagee the right only to have them sold again in

the same way. The approval of the sale under these circumstances seems to be within the scope of the fair exercise of the discretion involved. Proceedings affirmed."

As to whether the decisions of the Supreme Court in regard to the jurisdiction of the Bankruptcy Court shall have any effect is a question. In the case of *In re Pittelkow*, *supra*, Seaman, J., said:

"Whatever may be the construction placed upon definitions of jurisdiction contained in section 23, I am of the opinion that the section is not applicable, in any view, to mortgages of real estate, where possession of the *res* is vested in the Bankruptcy Court, and is held in fact by the trustee; the distinctions being well stated by Judge Baker, *in re Goodykoontz* (1 Am. B. R. 215) in opinion of March 10, 1899. In section 57, jurisdiction over such claimants is clearly conferred, is necessarily complete; and, in accord with the uniform rule in such cases, there can be no interference with the possession, and no foreclosure proceedings, where the trustee is an indispensable party, except on leave of the Bankruptcy Court. See cases cited *supra*. It is however the duty of the court to consider the interests of mortgagees and other secured creditors; and unless it is apparent (1) that the mortgaged premises in the given case will probably realize upon a sale an amount substantially in excess of the mortgage, and (2) that there are no complications, by dower rights, conveyances, or other conditions which require foreclosure under the mortgage, the power to proceed summarily by sale, including the interest of the mortgagee, should not be exercised. *In re Taliafero*, 3 Hughes, 422; Fed. Cas. No. 13736; *in re Kahley*, 2 Biss. 383; Fed. Cas. 7593; *Foster v. Ames*, 1 Low. 313; Fed. Cas. 4965. Certainly, if foreclosure is necessary to bar rights which cannot be brought before the court in bankruptcy proceeding, the mortgagee should have leave to that end, on proper showing of cause; otherwise, he would be compelled to bid for the protection of his mortgage interest, without the benefits of complete foreclosure. On the other hand, in a simple case in which the mortgagee and the owner of the equity are before the court, or may be brought in, a sale by order of the Bankruptcy Court with provision saving the rights of the mortgagee to bid up to the ascertained amount of his mortgage without advancing the money, except for expenses, would be beneficial to all parties and effective. No sale can be made which affects the rights of mortgagees or other lien holders, without notice to them and due opportunity to defend their interests.' *Ray v. Norseworthy*, 23 Wall. 128; *Insurance Co v. Murphy*, 111 U. S. 738, 4 Sup. 679. The power to order a sale, free of encumbrances ought not to be exercised in any instance unless the court is 'accurately informed as to the facts' and all parties in interest have full opportunity to be heard, and the respective interests are ascertained. *In re Taliafero*, 3 Hughes, 422; Fed. Cas. No. 13736, opinion by the chief justice; *in re Sacchi*, 10 Blatchf. 29; Fed. Cas. No. 12200, on review by Woodruff. C. J."



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And see *In re Styer* (3 Am. B. R. 424; 98 Fed. 290), in which the power seems to be doubted and it is declared that it will not be exercised in any case unless the interests of the lien-holders would be clearly conserved, and those of the general creditors advanced. This case holds that a referee may ordinarily appoint appraisers and order a sale, but when the property is in the hands of a receiver the judge must make the order.

**CROSS REFERENCES TO REMAINING SUBDIVISION OF SECTION 70.**

As to subs. d and f relating to compositions compare sections 13, 14c, 64c. Compare subd. e with section 70a (5). Subd. c simply gives the court power to effectuate its own decrees.

**THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.**

The present Bankruptcy Law was approved by the President, July 1st, 1898.

*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.

**The Bankruptcy Law Suspends the Operation of State Insolvency Laws.**—The Constitution of the United States gives to Congress the power to establish a uniform system of bankruptcy, but since the adoption of the Constitution, Congress has only upon four occasions exercised that power, and the laws passed pursuant to it have been in force, in all, not more than twenty years. When Congress does not exercise that authority, the State legislatures are not restrained from passing laws upon the same subject, although the powers given to them are limited by the constitutional provision that they shall pass no law impairing the obligation of contracts. But when Congress does exercise its power of establishing a system of bankruptcy, then the law enacted by it is paramount and superior to other laws relating to the same subject-matter. The State laws upon the subject of insolvency are not repealed

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by the Bankruptcy Law, but their operation and effect is suspended as long as the national Bankruptcy Law remains a statute. This doctrine was clearly stated by Chief Justice Marshall in the following language in *Sturgis v. Crowninshield*, 4 Wheat. 122: "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. It is not the right to establish these uniform laws, but the actual establishment, which is inconsistent with the partial acts of the States. It has been said that Congress has exercised this power, and by doing so has extinguished the power of the States, which cannot be revived by repealing the law of Congress. We do not think so. If the right of the States to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished, it can only be suspended by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer that power upon the States; but it removes a disability to its exercise which was created by the Act of Congress."

And under the present act the State insolvency laws were suspended on the 1st day of July, 1898. (*Parmenter M'fg Co. v. Hamilton*, 1 Am. B. R. 39; 172 Mass. 178; *in re Bruss-Ritter Co.* 1 Am. B. R. 59; 90 Fed. 651; *in re Etheridge Co.* 1 Am. B. R. 112; 92 Fed. 329; *in re Gutwillig*, 1 Am. B. R. 78; 90 Fed. 475.)

While the Bankruptcy Act recognizes insolvency proceedings pending in the State courts begun before the passage of the Act, and provides for their continuance without interference, it has regard to what has been or may be done therein. So that where, in proceedings pending in the State court, there has been an adjudication of insolvency, but no discharge applied for, the Federal court will not wait for said discharge in the State court, before acting in bankruptcy proceeding brought in the Federal court affecting the same persons. (*In re Bates*, 4 Am. B. R. 56; 100 Fed. 263.)

As to the distinction between an insolvency law and a common law general assignment which is void as against proceedings instituted in bankruptcy see commentary to section 3a (4) *sub nom.*

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ASSIGNMENT FOR BENEFIT OF CREDITORS, and see same paragraph for effect of State laws for winding up corporation.

The provisions in the first paragraph of this section simply postpone the time when the right secured by it to both debtors and creditors may be exercised. The rights themselves accrued from the passage of the act. (See *Westcott Co. v. Berry* [N. H. Sup. Ct. March, 1899], 45 Atl. 352; 4 Am. B. R. 264.)

So where an attachment was levied upon the property of the bankrupt on August 24, 1898, and the petition of bankruptcy was filed on December 9, 1898, the attachment was held void as to the trustee of the bankrupt. (*Kosches v. Libowitz* [Tex. Civ. App. April, 1900], 56 S. W. 613; 4 Am. B. R. 265, in note.)



# GENERAL ORDERS IN BANKRUPTCY

OF THE

## Supreme Court of the United States.

ADOPTED IN OCTOBER TERM, 1898.\*

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### PREAMBLE.

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.

#### Power to Make Rules.

*Bankruptcy Act, section 30.*—The Supreme Court of the United States to prescribe rules, forms and orders in bankruptcy, and these rules are binding upon bankruptcy courts. Compare page 258, *ante*.

In every court there exists an inherent power, independently of any statute,

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\* These General Orders are referred to in the following notes as Bankruptcy Rules.

to prescribe rules as to procedure and practice in matters coming before it. (*Havemeyer v. Ingersoll*, 12 Abb. Pr. N. S. [N. Y.] 301; *Snyder v. Baughman*, 8 S. & R. [Pa.] 336; *Angel v. Plume*, 73 Ill. 412; *Fullerton v. U. S. Bank*, 1 Peters, 604; *Hill v. Barney*, 18 N. H. 607; *Thompson v. Pershing*, 86 Ind. 303; *Texas Land Co. v. Williams*, 48 Tex. 602; and see an exhaustive citation of authorities in Am. & Eng. Encyc. of Law [2d ed.], title, Courts, vol. 3, page 29.) To the Supreme Court of the United States has been given by section 30 of the bankruptcy act, power to prescribe necessary rules, forms and orders as to procedure, and for carrying this act into force and effect. It has been held that where a law is incomplete in its details and yet is possible of execution, a court may supply the incompleteness of detail, by prescribing rules. (*Cochran v. Loring*, 17 Ohio, 409.) Pursuant to this general principle, as well as to the authority expressly conferred upon it by the statute, the Supreme Court of the United States undoubtedly has the right by rules, not only to regulate matters that are strictly matters of procedure, but to provide a plan of executing the statute, if there is an incompleteness in its details. But the recognized limit to the powers of a court to prescribe rules, is that the rules prescribed shall not be inconsistent with the laws of the land. Rights acquired either under statutes, or by virtue of common-law principles universally recognized, cannot be divested or altered by rules prescribed by a court. (*Ward v. Chamberlin*, 2 Blackf. [U. S.] 437; *Saylor v. Taylor*, 77 Fed. 476; *Fisher v. Bank*, 73 Ill. 34; *Gormley v. McGlynn*, 84 N. Y. 284; *Atlantic Express Co. v. Wilmington*, 32 Am. St. Rep. 805; *in re Glaser*, 2 Ben. 180; s. c. 1 N. B. R. 236; *Patterson v. Winn*, 5 Peters, 233; *The Illinois*, 1 Brown, 13; *Gray v. Chicago*, 1 Woolworth, 63.)

#### Effect of Rules.

When a court prescribes rules pursuant either to its inherent powers or to powers conferred upon it by statute, the rules should be made to apply to all cases falling within their terms. The authorities, however, do not appear to be harmonious in their decisions as to the right of a court to suspend the operation of a rule in a particular case, when a discretionary power to suspend the rule has not by the rule been given to the courts. In Massachusetts, it was held that a rule once adopted has the force of law and is binding upon the courts as well as the parties, until rescinded, and should not be dispensed with to suit the circumstances of any particular case; and that a rule once made must be applied to every case until it is rescinded by the authority which made it. (*Thompson v. Hatch*, 3 Pick. [Mass.] 512.) This doctrine was laid down in a case in which it was conceded that obedience to the rule worked a hardship, if not an injustice; and that the circumstances of the case would have made it perfectly proper for the court to have suspended the operation of the rule, had it possessed the power to suspend the rules. This case was followed in *Tripp v. Brownell*, 2 Gray (Mass) 402. See also *Hughes v. Jackson*, 12 Md. 450; *Hanson v. McCue*, 43 Cal. 178. But the United States Supreme Court, in *U. S. v. Breitling*, 20 How. 254, held that it is always in the power of a court to suspend its own rules or to except a particular case from their operation whenever the purposes of justice require it. To the same effect is *Deming v. Foster*, 42 N. H. 165. See also Am. and Eng. Encyc. of Law as cited above. It

would seem that the doctrine laid down by the U. S. Supreme Court in *United States v. Breitling* must be conceded to be the correct statement of the principle, or else the inherent power of a court to make rules must be denied. If, as is admitted by all the authorities, a court may rescind or repeal its rules, it may do so at any time. The suspension of a rule, or the act of excepting a case from its operation, practically amounts merely to a repeal of the rule, followed by a subsequent re-enactment of it. The ruling in *Thompson v. Hatch* very clearly shows the necessity and propriety of a stringent application of rules; but to hold that the court prescribing them cannot suspend their operation is, we believe, a denial of the inherent powers of the court, and is opposed not only to the weight of authority, but to an equitable and fair administration of justice. Thus it has frequently been held that rules prescribing the time within which bills of exceptions must be presented or settled, are rules of procedure which may be dispensed with in the discretion of the trial judge and that such rules do not absolutely control the action of the judge, but that he is at liberty to depart from their terms to subserve the ends of justice. (*Southern Pacific Co. v. Johnson*, 69 Fed. 559, citing *U. S. v. Breitling*, 20 How. 254; *Dredge v. Forsyth*, 2 Black. 568; *Muller v. Ehlers*, 91 U. S. 249; *Hunnicut v. Peyton*, 102 U. S. 350; *Chateaugay Ore & Iron Co.*, 128 U. S. 544; 9 Sup. Ct. 150; *Hume v. Bowie*, 148 U. S. 245; 13 Sup. Ct. 582; *Southern Pac. Co. v. Hamilton*, 4 C. C. A. 441; 54 Fed. 468, 474; and also citing and distinguishing *Bank v. Eldred*, 143 U. S. 293; 12 Sup. Ct. 450; *U. S. v. Jones*, 149 U. S. 262; 13 Sup. Ct. 840; *Morse v. Anderson*, 150 U. S. 156; 14 Sup. Ct. 43; *Ward v. Cochran*, 150 U. S. 597; 14 Sup. Ct. 230; *Railway Co. v. Russell*, 9 C. C. A. 108; 60 Fed. 501; *Milner v. Morgan*, 14 C. C. A. 312; 67 Fed. 82.)

But the right to suspend the rules, like the right to repeal them, unless specially conferred, can exist only in the court which has authority to prescribe the rules. By the bankruptcy act this authority is conferred upon the Supreme Court of the United States. Therefore neither the courts of bankruptcy nor the judges or referees thereof have any authority for suspending the operation of the rules in bankruptcy. Unless somewhere in these rules that power is given to them, it does not exist. By Bankruptcy Rule XXXVII, which declares that in proceedings in equity instituted for the purpose of carrying into effect the provisions of the bankruptcy 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; and that 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; it is also provided that 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.

#### Scope of the Rules.

*Bankruptcy Rule, No. XXXVII.*—Proceedings at law instituted for the purpose of carrying the bankruptcy act into effect, to follow practice and procedure in cases at law. Proceedings in equity instituted for same purpose, to follow Equity Rules.

*Equity Rule, No. LXXXIX.*—Circuit Courts may prescribe additional rules for practice, etc., in their respective districts.

*Equity Rule, No. XC.*—Practice of the High Court of Chancery in England to regulate practice in equity in the absence of express rules.

See Equity Rules index, *post*, see *ante*.

#### **Practice in United States Courts.**

The practice, pleadings and forms and modes of procedure in civil causes, other than those in equity and admiralty, in the Circuit and District Courts, must conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in courts of record of the state within which such Circuit or District Courts are held. (Rev. Stat., section 914.) The jurisdiction and practice of these courts in equity is, however, the same in all the states, and the rule of decision is the same in all of them. As Courts of Equity, the United States Courts are not regulated by the law or practice of the states, but equitable procedure in them is according to the principles and usages which belong to courts of equity in the mother country, England, except when it is otherwise provided by statute, or rule of court made in pursuance thereof. The procedure is, however, always subject to alteration by the Supreme Court by rules prescribed from time to time, to any circuit or district court, not inconsistent with the laws of the United States. (Rev. Stat., section 913.)

### **I. 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.

[Latter part of Rule I, 1867, with changes specifying more fully the entries to be made in the docket.]

#### **The Docket, Its Contents.**

*Bankruptcy Act, section 1 (10).*—"Commencement of proceedings" defined.

*Equity Rule No. XVI.*—When clerk to enter a suit upon the docket.

*Bankruptcy Rule, No. IV.*—Name of attorney and place of business to be entered in docket.

#### **Records of Referees.**

*Bankruptcy Act, section 42.*—Records of referees to be kept, to be certified and to be transmitted to the clerk.



*Bankruptcy Act, section 39 (7).*—Duty of the referee to keep, perfect and transmit records to the clerk.

#### **Open to Public Inspection.**

*Bankruptcy Act, section 29 c (3).*—Duty of referee or trustee to permit inspection of records.

*Bankruptcy Act, section 49.*—Accounts and papers of trustees open to inspection.

Rule No. I, under the old Bankruptcy Act of 1867 required the clerk of the court to keep not only a docket similar to the one here required, but also a minute book in which was to be entered a minute of all proceedings either of the court or the register.

## **II. 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.

[Part of Rule I, 1867, but not so full.]

#### **Filing of Papers.**

*Bankruptcy Rule, No. XX.*—Filing of papers after a reference to the referee.

Compare pages 259 and 260, notes to section 31 of the Bankruptcy Act, as to when a petition is filed.

## **III. PROCESS.**

All process, summons and subpoenas 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.

[Rule II, 1867, except the word "referees" is substituted herein for the word "registers."]

Forms: Nos. 5, 30.

#### **Process and Service Thereof.**

*Bankruptcy Act, section 18 a.*—The petition in involuntary cases to be served, and also a writ of subpoena.

*Equity Rules, Nos. 7, 11-16.*—Process, how and by whom served. Compare pages 219-224 *ante*.

## **IV. CONDUCT OF PROCEEDINGS.**

Proceedings in bankruptcy may be conducted by the bankrupt 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 counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, 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.

[Rule III, 1867, without substantial change, except that the old rule required the entry of the attorney's place of residence as well as his place of business.]

#### **Parties Appearing in Person.**

*Bankruptcy Act, section 4.*—Who may become bankrupts. Compare pages 46-55, titles, Who May Become Bankrupts, Infants, Insane Persons, Married Women, Aliens, Wage Earners, Executors, Corporations, Trading, Who Are Manufacturers.

*Bankruptcy Act, section 5.*—Partners as bankrupts. Compare pages 55 and 60, title, Who Must Petition.

*Bankruptcy Act, section 18.*—Appearances in bankruptcy proceedings; right of the bankrupt or any creditor to appear and to oppose proceedings after appearance. Compare pages 220-224, title, Jurisdiction by Voluntary Appearance.

*Bankruptcy Act, section 59.*—Who may file and dismiss petitions. Compare pages 327-338, titles, Voluntary Petitioners, Who May Become Bankrupts, Petitioners in Involuntary Proceedings, Creditors Who Cannot Petition, Secured Creditors, Amount of Claims, Attaching Creditors, Preferred Creditors, etc.

#### **Appearance by Attorney.**

*Bankruptcy Act, section 64 b (3).*—One reasonable attorney's fee allowed 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 required by the bankruptcy act, and to the bankrupt in voluntary cases, as the court may allow.

#### **Admission to Practice in United States Courts.**

Each court of the United States is a separate and distinct organization in so far as admission to practice is concerned. Each district court and each circuit court as well as each circuit court of appeals may have its own peculiar rules as to the admission of attorneys, and may impose different conditions and requirements. Usually attorneys and counselors who are admitted to practice in the courts of the state and have been engaged in such practice for a limited time

are admitted to any of the district courts upon motion, and upon subscribing the roll and taking the proper oath of office, and usually upon the payment of a small fee which generally amounts to \$5.00. The rules of the respective districts with reference to this matter should be consulted by those seeking admission.

#### Notice.

*Bankruptcy Act, section 58.*—Notice of certain proceedings to be given by mail to creditors; may be published; by whom given. Compare pages 324-327.

*Bankruptcy Rule, No. XXIII.*—Order of referee, to recite the mode in which notice was given. Compare Equity Rule No. IV as to notice of motion in equity proceedings.

It is to be noted that the only express statutory provision as to notice in bankruptcy cases is that contained in section 58, and such notice is given only in certain specified proceedings. It does not provide a method of giving notice of motions in general, nor is there any bankruptcy rule as to that point of procedure other than the one under consideration and Equity Rule No. IV in so far as the latter rule may be deemed adopted by Bankruptcy Rule No. XXXVII.

### V. FRAME OF PETITIONS.

All petitions and the 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.

[First part of rule XIV, 1867, without change.]

Forms: Nos. 1, 2, 3.

#### The Petition and the Schedules.

*Bankruptcy Act, section 18.*—Process, pleading and adjudication. Compare pages 221-223.

*Bankruptcy Act, section 7 (8).*—Form and contents of the schedules. Compare pages 91-93, title, Schedule To Be Filed.

*Bankruptcy Act, section 39 (6).*—Duty of Referee in certain cases to make out the schedules

*Bankruptcy Rule, No. IX.*—Duty of the petitioning creditor in certain cases to file a schedule.

#### Plainly Written.

Under Rule XIV of 1867, which was like the one under consideration, it was held by the U. S. District Court for the Northern District of New York, in a case reported anonymously in 1 N. B. R. 215, that an illegible petition could not be filed; and *in re Orne*, 1 Ben. 420; s. c. 1 N. B. R. 79, it was held by Judge Blatchford of the Southern District of New York that dots or ditto marks could not, consistently with the rule, be used for the purpose of indicating anything necessary to be stated. Compare cases cited, page 92 *ante*.

## VI. 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 domicile, 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.

[Rule XVI, 1867, without change, except that the last sentence of Rule VI under consideration, is new.]

### Jurisdiction to Adjudge Individuals Bankrupt.

*Bankruptcy Act, section 2 (1).*—Jurisdiction of courts of bankruptcy to adjudge a person bankrupt either in the district in which he has for a certain time resided or had his domicile or had his principal place of business. Compare pages 16-18, title, Jurisdiction to Adjudge Persons Bankrupt; also pages 161-262, title, Where May the Petition Be Filed.

### Jurisdiction Over Partners.

*Bankruptcy Act, section 5. c.*—The court of bankruptcy which has jurisdiction of one partner has jurisdiction of all partners.

**Transfer of Cases.**

*Bankruptcy Act, section 2 (19).*—Power of one court of bankruptcy to transfer cases to another court of bankruptcy.

*Bankruptcy Act, section 32.*—In case of two or more petitions in different districts against the same person or partnership, the case to be transferred to the court which can administer the estate with the greatest convenience to the parties.

It is familiar practice in courts of equity acting under the same general jurisdiction, when their jurisdiction is invoked for the distribution of the same fund by different complainants, to permit the court first obtaining jurisdiction of the fund by the institution of a suit, to proceed therewith to its full and complete disposal. In the main, the new bankruptcy rules adhere to that general principle, there being, however, this exception, that in the case of two petitions filed against an individual the first hearing shall be by the court of the district where the bankrupt has his domicile. Compare page 261 *ante*.

**VII. 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.

[Rule XV, 1867, without change other than that "four months" appears in the new rule in place of "six months."]

**VIII. 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 defences 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.

[Rule XVIII, 1867, with no substantial changes.]

Form: No. 2.

#### **Bankruptcy Proceedings against Partners.**

*Bankruptcy Act, section 5.*—Proceedings against partners. Compare pages 59-60, titles, Who Must Petition, The Act of Bankruptcy.

#### **Proceedings upon Involuntary Petitions in Bankruptcy.**

*Bankruptcy Act, section 18.*—Service of Petition and writ of subpoena.

*Equity Rules, Nos. 7, 11-16.*—Process, how and by whom served.

*Bankruptcy Act, section 3.*—Acts of Bankruptcy. Compare pages 22-45.

#### **Defences.**

*Bankruptcy Act, section 3 c.*—Solvency at the time of filing the petition a defense, when. Compare pages 222-223.

*Bankruptcy Act, section 7 (8).*—Duty of bankrupt to make out and file schedule and inventory. Compare pages 91-93.

*Bankruptcy Act, section 39 a (6).*—Duty of the referee to compile schedules in certain cases.

*Bankruptcy Rule No. IX.*—Duty of petitioning creditor in certain cases to furnish schedule.

### **IX. 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.

[New.]

#### **Filing of Schedules.**

*Bankruptcy Act, section 7 (8).*—Duty of bankrupt to file schedules and inventory.

*Bankruptcy Act, section 39 a (6).*—Duty of the referee in certain cases to compile the schedules. Compare page 269, *ante*.

### **X. INDEMNITY FOR EXPENSES.**

Before incurring any expense in publishing or mailing notices, or in traveling, 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.

#### **Duties of the Referee Involving Expense.**

*Bankruptcy Act, section 58.*—Referee in certain cases to mail notices to creditors.

*Bankruptcy Act, section 65.*—Referee (or judge) to preside at first meeting of creditors, to be held at the county seat of the county in which the bankrupt has his domicil or residence or in which he did business.

*Bankruptcy Rule No. XXVI.*—Referees account of expenses.

#### **Fees and Services of Marshal.**

*Bankruptcy Act, section 52.*—Compensation of the marshal.

#### **Expenses of Officials in General.**

*Bankruptcy Rule, No. 35.*—Compensation of officers not to cover expenses.

*Bankruptcy Act, section 62.*—Expenses of officers to be reported to the court under oath.

*Bankruptcy Act, section 64 b.*—Necessary cost of preserving estate and costs of administration treated as debts having a priority.

### **XI. 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.

[The last sentence is new. The rest of the rule is substantially the same as a part of rule XIV, 1867.]

#### **Amendments.**

*Bankruptcy Act, section 39 a (2).*—Duty of the referee to examine and cause defective schedules to be amended. “Amendment of Schedules,” page 94, *ante*.

As to amendment of petitions, compare page 223, *ante*.

### **XII. 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 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.

[Paragraph 1, except the last sentence, is the second paragraph of Rule IV, 1867, with slight changes. Paragraph 2 is derived from Rule V, 1867. The changes are in accordance with the increased power given to referees, they having the power, subject to review by the court, to hear and determine con-



tested matters; while the registers, in cases in which issues arose, were compelled to certify the same to the court for determination. Paragraph 3 is new.]

#### Orders of Reference.

*Bankruptcy Act, sections 18 f and g.*—References by the clerk to the referee in case of absence of the judge.

*Bankruptcy Act, section 22 a.*—References by the judge to the referee after adjudication; what matters referable.

Forms: Nos. 14, 15.

#### Duties and Powers of Referees.

*Bankruptcy Act, section 39.*—Duties of referees enumerated, pages 268-272.

*Bankruptcy Act, section 55.*—Referee to preside at first meeting of creditors. Compare pages 301-303.

*Bankruptcy Act, section 38.*—Jurisdiction and powers of referees. Compare pages 265-268.

#### Bankrupt's Subjection to Orders of the Court.

*Bankruptcy Act, section 7 (2).*—Duty of bankrupt to comply with all lawful orders of the court. Compare "Examination of Bankrupt," page 95, *et seq.*

#### Arrest of the Bankrupt.

*Bankruptcy Act, section 9 a.*—Exemption of bankrupt from arrest in certain cases. Compare pages 109-113, titles, Purpose and Character of the Protection.

*Bankruptcy Rule No. XXX.*—Imprisoned debtor, when court will allow his release.

The term "bankrupt" includes one by or against whom a petition has been filed as well as one who has been adjudged a bankrupt and such a person from the time of the filing of the petition is entitled to protection from arrest, in the cases mentioned in the statute. Compare page 109, *ante*.

#### Time and Place of Performing Duties.

*Bankruptcy Act, section 55.*—First meeting of creditors to be held at the county seat of the county in which bankrupt resided or had his domicile or principal place of business.

#### Limitations on Powers of Referees.

*Bankruptcy Act, section 38 (4).*—Questions arising out of the applications of bankrupts for compositions or discharges not within the jurisdiction of referees.

*Bankruptcy Act, section 38 (4).*—Powers of referees as prescribed by rules or orders of the courts of bankruptcy of their respective districts.

*Bankruptcy Act, section 12 d.*—Confirmation of compositions to be by the judge.

*Bankruptcy Act, section 14 b.*—Applications for a discharge to be heard by the judge.

*Bankruptcy Act, section 22.*—Power of the court to refer a bankruptcy case to the referee, generally or specially, with only limited authority to act in the premises, or to consider and report upon specified issues.

An examination of the rule under consideration shows that the Supreme Court in prescribing it, has endeavored to carry out the intention of Congress to bring home the administration of the bankruptcy act close to the people, and has left with the referees, with one or two exceptions, all the power and authority which by the terms of the act could be conferred on them. One restriction upon their authority which is not expressly contained in the Bankruptcy Act itself, is a restriction of the right to grant injunctions. It is to be noted that the restrictions upon the powers of referees as to questions arising out of applications of bankrupts for compositions or discharges do not, as shown by paragraph 3 of the rule under consideration, prevent the judge from referring to referees such applications or specified issues arising thereon, to ascertain and report the facts. Compare page 268.

### XIII. 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.

[As a rule of bankruptcy, Rule XIII is new; but the former Bankruptcy Act itself contained similar provisions as to the approval of the choice of a trustee. (R. S., section 5034; Act of 1867, section 13.) Under that act a trustee could be removed not only by order of the court, but in some cases by a vote of the creditors with the approval of the court. (R. S., section 5039; Act of 1867, section 18.)]

#### Appointment of Trustees.

*Bankruptcy Act, section 2 (17).*—Courts of Bankruptcy have jurisdiction pursuant to the recommendation of creditors, or when they neglect to recommend appointments, to appoint trustees.

*Bankruptcy Act, section 44.*—Creditors' right to appoint trustees.

*Bankruptcy Act, section 45.*—Qualifications of trustees. Compare page 283, title, Who May be Trustee; also page 279, title, The Right of Appointment.

Forms: Nos. 22, 23.

#### Removal of Trustees.

*Bankruptcy Rule, No. XVII.*—Notice and practice upon proceedings to remove a trustee on complaint of creditors, for cause, after notice and hearing.

*Bankruptcy Act, section 46.*—Effect of removal of the trustee.

Compare pages 285-286, titles, Removal of Trustees, Removal by Vote of Creditors.

*Bankruptcy Rule, No. XVII.*—Notice and practice upon proceedings to remove a trustee.

### XIV. NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

[Part of Rule IX, as amended in 1874, without substantial change.]

**XV. 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.

[New.]

Form: No. 27.

**Appointment of Trustees.**

*Bankruptcy Act, section 2 (17).*—Jurisdiction of courts of bankruptcy to appoint trustees.

*Bankruptcy Act, section 44.*—Creditors' right to appoint trustees.

The rule under consideration introduces a new practice. Under the former laws it was held that a trustee should be chosen even if no creditors proved their claims and even though there were no known assets; it being further said that the purpose of the appointment of a trustee was to seek and discover assets.

**XVI. 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.

[Rule IX, 1867, with some slight additions as to the contents of the notice and with other minor changes.]

Form: No. 24.

**Bonds of Trustees.**

*Bankruptcy Act, section 50 a-j.*—Miscellaneous provisions as to bonds of referees and trustees.

*Bankruptcy Act, section 50 k.*—Failure of trustee to file bond within time limited, deemed to be a declination of appointment.

Form: No. 25.

**XVII. 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.

[Rule XIX as amended, with several slight changes.]

#### Duties of Trustees in General.

*Bankruptcy Act, section 47.*—Duties of trustees enumerated. Pages 286-292.

*Bankruptcy Act, section 70 b.*—Real and personal property to be appraised.

#### Duties as to Exemptions.

*Bankruptcy Act, section 7 (8).*—Duty of bankrupt in his schedules to claim exemptions.

*Bankruptcy Act, section 6.*—Exemptions allowed to bankrupts. Compare pages 78-88, in particular the title, The Trustee's Rights in Exempt Property.

*Bankruptcy Act, section 2 (11).*—Jurisdiction of bankruptcy courts to determine all claims of bankrupts to their exemptions.

*Bankruptcy Act, section 1 (7).*—The word "court" may include referee.

*Bankruptcy Act, section 38 a.*—Acts and orders of referees also subject to review by the judge.

*Bankruptcy Act, section 30 a (10).*—Duty of referee to preserve evidence in contested cases.

*Bankruptcy Rule, No. XXVII.*—Review of order of referee by the judge; referee's duty to certify the question.

Form: No. 47.

**Removal of Trustee.**

Compare cross-references and comments to Bankruptcy Rule No. XIII.

It is to be noted that the rules restrict the referee from entering an order removing the trustee. The extent of his power in this matter is to enter an order requiring the trustee to show cause before the judge why he should not be removed from office.

Forms: Nos. 52, 53, 54.

**Exceptions to Exemptions Set-off by the Trustee.**

A trustee's action in setting apart exemptions is not final, and G. O. 17 allowing twenty days for exceptions to such setting apart applies only to creditors and not to the bankrupt. (*In re White*, 103 Fed. 774; 4 Am. B. R. 613.)

**XVIII. 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.

[Paragraph 1, is new; paragraph 2 is part of Rule XXI, 1867, without change; paragraph 3 is Rule XXII, 1867, with various changes.]

**Sales.**

*Bankruptcy Act, section 70 b.*—Duty of the trustee to collect and reduce to money the property of the estate. Compare pages 474-476.

*Bankruptcy Act, section 58 a (4).*—Creditors to have ten (10) days' notice by mail of all proposed sales of property. Compare page 324, *et seq.*

Forms: Nos. 42, 43, 44, 45, 46.

**Is Notice of Sale Always Necessary.**

Whether the provisions of the second paragraph were intended to dispense with actual notice of the sale, in cases in which a private sale is ordered, may

be perhaps not altogether free from question, when the unqualified provision of section 58 a (4) of the bankruptcy act itself, is considered. But it would seem that this rule was intended to dispense with notice of the sale in certain cases. That notice of the application for authority to sell at private sale is to be given, is undoubtedly true and if such notice is given and an order is made directing a private sale, especially if the order fixes the terms upon and the price at which the sale is to be made, it would seem as if further notice of the sale itself would not only be unnecessary, but that it is inconsistent with the notion of a private sale. A notice of sale must be either for the purpose of giving the notified party an opportunity to attend the sale and to bid thereat,—a privilege which can hardly be held to exist in the case of private sales; or else it is for the purpose of enabling one to oppose the act of selling. But the order directing a private sale conclusively settles the right to sell.

Paragraph (3) shows that the court has with foresight, provided for sales of perishable property immediately; that is, without notice. Under the former bankruptcy system there was a provision of law to this effect as well as a rule. The rule authorized a sale of property liable to deterioration as well as of perishable property. Compare pages 325-326 *ante*.

### XIX. 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.

[Latter part of Rule XII, 1867, without any substantial change.]

#### Fees and Expenses of Marshal.

*Bankruptcy Act*, section 52 b.—Compensation of marshal.

*Bankruptcy Rule*, No. X.—Right of marshal and other officials to demand indemnity for expenses.

#### Services of the Marshal.

*Bankruptcy Act*, section 2 (3).—Power of courts of bankruptcy to appoint receivers and marshals to take charge of property of bankrupt. Compare page 18, title, Power to Take Charge of Property.

*Bankruptcy Act*, section 69.—Power of court to issue warrant to marshal to take bankrupt's property into custody.

*Bankruptcy Act*, section 2 (5).—Power of courts of bankruptcy to authorize marshal to conduct the business of the bankrupt.

Under the rule of 1867, similar to the one under consideration, it was held that if the marshal did not furnish vouchers he should state in his report why he failed to do so; and that if the court found that it was impracticable for him to obtain them at the time of his report, it might nevertheless pass and allow

his accounts, although the failure to get them was primarily due to ignorance of the rule requiring vouchers. *In re Comstock*, 9 N. B. R. 88.

## XX. 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.

[New.]

### Papers Filed with the Referee.

*Bankruptcy Act, section 30 a (7).*—Duty of referee to safely keep, perfect and transmit records to the clerk when the case is concluded.

*Bankruptcy Act, section 39 a (8).*—Duty of referee to transmit to clerk records or copies, whenever needed, for proceedings in court; and to secure their return.

*Bankruptcy Act, section 39 a (10).*—Duty of referee residing in same place as clerk to call and receive all papers filed.

*Bankruptcy Act, section 51 (3).*—Duty of clerk to deliver or transmit to referees all papers in matters referred to them.

*Bankruptcy Act, section 42 b.*—The records of referees and the papers on file constitute the records of the case.

## XXI. 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-exam-



ination 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.

[Rule XXXIV, 1874, with slight changes.]

#### **Proof of Debts.**

*Bankruptcy Act, section 63.*—Debts which may be proved. Compare pages 379-416, various titles.

*Bankruptcy Act, section 57 a.*—Proof and allowance of claims; of what is proof to consist.

*Bankruptcy Act, section 57 b.*—Proof of claims founded on instruments in writing.

*Bankruptcy Act, section 57 c-1.*—Allowance of claims.

*Bankruptcy Act, section 57 m.*—Proof of claim of one bankrupt estate against another bankrupt estate.

*Bankruptcy Act, section 57 n.*—Proof when to be made. Page 305 *et seq.*

Forms: Nos. 31-37.

#### **Notice.**

*Bankruptcy Act, section 58.*—Creditors to have notice by mail of various proceedings.

#### **Assigned Claims.**

*Bankruptcy Act, section 68.*—When a claim against a bankrupt purchased by or transferred to a debtor of the bankrupt, is not a proper set-off or counter-claim.

It should be borne in mind that this rule requires that proof of a claim which has been assigned before proof shall be supported by a deposition of the owner of the same at the time of the commencement of the proceedings. The phrase "commencement of the proceedings" by section 1 (10) of the bankruptcy act, refers to the time of the filing of the petition.

#### **Claims of One Contingently Liable for the Bankrupt.**

*Bankruptcy Act, section 57 i.*—Right of a surety of a bankrupt to prove a claim of the creditor when the creditor fails to make proof. Compare page 321, title, Subrogation.

#### **Letters of Attorney.**

The express terms of this rule (paragraph 5) seem to require not only an acknowledgment of the execution of powers of attorney, but also in the cases

of corporations and partnerships an oath as to the position therein or the connection therewith of the person executing the instrument. It is to be noted that any officer of a corporation may by the rule make this oath, while paragraph 1 limits proof by a corporation so that it can be made only by the treasurer thereof. There is some doubt whether the mode of acknowledging the execution of a power of attorney as outlined in this rule is compulsory or not; that is, whether it is exclusive of other modes or not. Under the authorities under Rule XXXIV of 1874 which, as to this point, provided that a letter of attorney might be acknowledged before a register in bankruptcy or a United States circuit court commissioner, but which did not provide that the execution might be before a notary public, it was held by the court *in re Butterfield*, 18 N. B. R. 195, that the mode of execution provided for by that rule was not exclusive and that an acknowledgment could be taken before a notary public. By the present rule, it is expressly provided that the acknowledgment may be before a notary public; but whether the reasoning *in re Butterfield* may be applied and it be held that a letter of attorney may be acknowledged before a judge of a state court or any other person by law of the state authorized to take acknowledgments, is perhaps open to question. *Contra* to *in re Butterfield* was *in re Christley*, 10 N. B. R. 268, decided by the United States District Court for Indiana, which held that a power of attorney was insufficient to authorize an agent to act for a creditor in proving a claim, unless acknowledged before the officers mentioned in Rule XXXIV of 1874. The fact that under the present rule certain State officers are mentioned as being authorized to take acknowledgments to powers of attorney furnishes a strong presumption that all others are without authority to take such acknowledgments. The principle of *expressio unius, exclusio alius* would seem applicable.

Forms: Nos. 20, 21.

### Re-examination of Claims.

*Bankruptcy Act*, section 57 k.—Claims which have been allowed may be reconsidered and re-allowed or rejected.

*Bankruptcy Act*, section 57 l.—If dividends have been paid upon claims which are afterwards rejected, they may be recovered.

*Bankruptcy Act*, section 2 (2).—Jurisdiction of Courts of Bankruptcy to reconsider allowed or disallowed claims. Compare, page 323, title, Reconsideration.

Forms: Nos. 38, 39.

## XXII. 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 direc-

tion, 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.

[Rule X, 1867, with changes, recognizing the right of the referee to decide objections raised as to the competency, relevancy and materiality of questions; and with other slight changes.]

#### **Referee's Power on Examinations.**

*Bankruptcy Act, section 38 a.*—Jurisdiction of referees to exercise powers vested in courts of bankruptcy for administering oaths, examining witnesses and requiring production of documents.

*Bankruptcy Act, section 21 a, b, c.*—Evidence in bankruptcy cases, how aduced; power to order persons to appear to be examined; manner of taking depositions. Compare, pages 228-231, title, To be Examined.

One of the most important respects in which referees have been given powers in excess of those formerly conferred on registers is in the right now given them to determine objections raised upon examinations, as to the materiality, competency, and relevancy of questions. Their powers upon the examination of witnesses are co-extensive with the powers of the court, except that they do not have the power of commitment. By section 39 a (5), in all contested matters they may be required to make up a record embodying the evidence and to transmit the same with their findings thereof to the judge. By section 41 refusal to appear, to be sworn, or to testify, is a contempt and upon certification of the facts to the court it may be punished by the judge as if it had occurred in the presence of the court.

#### **Costs.**

*Bankruptcy Act, section 2 (18).*—Power of courts of bankruptcy to tax costs.

*Equity Rule, No. 67.*—Power of courts of equity to deal with the costs of incompetent, immaterial or irrelevant depositions.

### **XXIII. 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.

[Rule VIII, 1867, with verbal changes.]

**Notice.**

As has been observed in the comments upon an earlier rule the only statutory provision of the bankruptcy system as to notice to creditors is that contained in section 58, providing that notice by mail shall be given in certain cases to creditors by the referee. It is not a general provision as to notice of motions or applications for orders or other relief.

**XXIV. TRANSMISSION OF PROVED CLAIMS TO CLERK.**

The referee shall forthwith transmit to the clerk a list of claims proved against an estate, with the names and addresses of the proving creditors.

[Compare Rule XI, 1867.]

Under the old system of bankruptcy, by Rule XI, the register was required to forward to the clerk a memorandum of every official act not later than the next day after it occurred.

**XXV. SPECIAL MEETING OF CREDITORS.**

Whenever, by reason of a vacancy in the office of trustee, or 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 clerk may call such a meeting, specifying in the notice the purpose for which it is called.

[New.]

**Choice of a New Trustee.**

*Bankruptcy Act, section 44.*—Creditors to choose a new trustee at the meeting after a vacancy has occurred and in certain other cases.

**Meeting of Creditors.**

*Bankruptcy Act, section 55 a-c.*—Meeting of creditors.

*Bankruptcy Act, section 55 d.*—Subsequent meetings held by consent of creditors.

*Bankruptcy Act, section 55e.*—Subsequent meetings when called by the clerk

*Bankruptcy Act, section 55 f.*—Final meeting of creditors.

**XXVI. ACCOUNTS OF REFEREE.**

Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or any 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

the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

[First part of Rule XII, 1867, with substantial change.]

#### **Expenses of Referee.**

*Bankruptcy Rule, No. X.*—Right of referee and other officers to demand indemnity before incurring expense.

*Bankruptcy Rule, No. XXXV (2).*—Compensation of referees as provided for in bankruptcy act does not cover all expenses.

The language of the rule under consideration seems to imply that the referee as such may employ a clerk. The statute makes no provision for this assistance, the necessity of which will be conceded by those familiar with the amount of business done by referees in large cities. While the rule does not expressly authorize the employment of a clerk and in fact goes no farther than to provide for payment of the expenses incurred by the clerk, yet the existence of the right of a referee to have a clerk being admitted, it must follow that in some way the clerk is to be paid. Although neither the statutes nor the rules provide for his compensation and although it may be difficult to apportion the expense among the estates administered, yet the payment of the clerk of the referee from the funds of administered estates would seem to be a difficulty of administration rather than something beyond the power of the court and the referee.

### **XXVII. 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.

[Rule VIII as amended, 1874, with changes.]

#### **Review by the Judge.**

*Bankruptcy Act, section 38 a.*—All proceedings by the referee subject to review by the judge.

*Bankruptcy Act, section 39 a (5).*—Referee to make up records embodying the evidence in contested matters, together with findings.

Although the referee is a subordinate judicial officer and although his proceedings are subject to review, none of his acts need confirmation in order to make them valid or final adjudications. If the parties do not petition for a review the acts of the referee are binding and conclusive as much as are the acts of any subordinate or inferior court.

Form: No. 56

(64)

It is to be noted that neither the bankruptcy act nor the rules fix a time within which a petition for review of proceedings by the referee must be filed, Rule VIII under the old system did provide a time limit.

## XXVIII. 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.

[Rule XVII, 1867, with slight changes.]

### Redemption of Property from Liens.

*Bankruptcy Act, section 2 (7).*—Jurisdiction of bankruptcy courts to cause estates of bankrupts to be collected, reduced to money and distributed and to determine controversies in relation thereto.

*Bankruptcy Act, section 67 d.*—Liens given in good faith, not in fraud of the bankruptcy act, for a present consideration, and duly recorded, not to be affected by the bankruptcy act.

Form: No. 43.

### Compounding Claims.

*Bankruptcy Act, section 27.*—Trustee's power, with approval of the court, to compromise debts or claims. Compare, page 255, title, Approval of Court is Necessary in Each case.

*Bankruptcy Act, section 58.*—Notice by mail to be given to each creditor of all proposed compromises.

*Bankruptcy Rule, No. XXXIII.*—Petition for authority to compound claims, what to state.

## XXIX. 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.

[Latter half of Rule XXVII, 1867, without material change.]

#### Deposits.

*Bankruptcy Act, section 61.*—Depositories of money to be designated by the court.

*Bankruptcy Act, section 47 a (3).*—Trustees to deposit all moneys in one of the designated depositories.

*Bankruptcy Act, section 47 a (4).*—Trustees to disburse moneys only by check or draft on the depository.

### XXX. 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.

[Rule XXVII, 1867, without substantial change.]

**Release from Arrest.**

*Bankruptcy Act, section 9 a (1) and (2).*—Cases in which bankrupt is exempt from arrest. Compare titles, Protection from Arrest Not a release, Purpose and Character of the Protection, When the Right of Protection Begins, How is the Right of Protection Enforced, Determination Whether the Debt is Dischargeable, In What Actions is One Exempt from Arrest.

*Bankruptcy Rule, No. XII (1).*—Power of the referee to furnish protection to the bankrupt.

As to apparent conflict between this rule and section 9a, see discussion on pages 110-113 *ante*.

**XXXI. 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.

[New.]

Form: No. 57.

**Discharges, when Granted.**

*Bankruptcy Act, section 14 a.*—Applications for discharge. Compare pages 159 *et seq.*

**XXXII. 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.

[Rule XXIV, 1867, in part.]

Form: No. 58.

**Opposition to Discharge or Composition.**

*Bankruptcy Act, section 12 c.*—A date and place for the hearing of applications for the confirmation of the composition to be fixed by the court. Compare page 148, Specific Grounds for Refusing to Confirm, etc.



*Bankruptcy Act, section 14 b.*—The judge to hear applications for a discharge and proofs and pleas made in opposition thereto at such time as will give parties in interest a reasonable opportunity to be fully heard. Compare, pages 162 *et seq.*

*Bankruptcy Act, section 58 a (2).*—Creditors to have ten days' notice by mail of all hearings upon applications for the confirmation of compositions or the discharge of bankrupts.

#### **Appearances.**

*Bankruptcy Rule, No. IV.*—Appearances may be in person or by attorney.

### **XXXIII. 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.

[Part of Rule XX, 1867.]

#### **Arbitration and Compromise.**

*Bankruptcy Act, section 26.*—Arbitration of controversies.

*Bankruptcy Act, section 27.*—Compromise of controversies.

*Bankruptcy Rule, No. XXVIII.*—Redemption of property and compounding of claims.

*Bankruptcy Act, section 58.*—Creditors entitled to ten days' notice by mail of every proposed compromise.

The old bankruptcy Rule No. XX, 1867, did not require that notice should be given in every case of a proposed compromise, as is now required by section 58 of the bankruptcy act.

### **XXXIV. 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.

[Part of Rule XXXI, 1867, without change.]

**Costs.**

*Bankruptcy Act, section 2 (18).*—Power of courts of bankruptcy to tax costs and render judgment therefor against the parties or the estate.

*Bankruptcy Act, section 3 e-f.*—Allowance to debtor, if the petition against him is dismissed, of all costs and expenses occasioned by the seizing of his property under a warrant issued from the court.

**XXXV. 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.

[New.]

**Expenses.**

*Bankruptcy Rule, No. X.*—Right of officers to demand indemnity for expenses.

**Clerks, Fees and Services.**

*Bankruptcy Act, section 52 a.*—Compensation of clerks.

*Bankruptcy Act, section 51 a (3).*—Duty of clerk to deliver or transmit to referees all papers referred to them.

*Bankruptcy Act, section 51 a (1).*—Duty of clerk to account for fees received by him including fees received for certified copies of records furnished for persons other than officers.

**Referee's Compensation.**

*Bankruptcy Act, section 40.*—Compensation of referees. Compare, page 273, title, On Dividends and Commissions.

**Trustee's Compensation.**

*Bankruptcy Act, section 48.*—Compensation of trustee, Compare, page 293, title, After Services are Rendered.

**Non-payment of Filing Fees.**

*Bankruptcy Act, section 51 a (2).*—Circumstances and conditions which excuse a bankrupt from depositing the official fees when filing his petition.

Three facts are to be borne in mind by those seeking to take advantage of the provisions of the statute which in certain cases permit the institution and prosecution of proceedings in bankruptcy without depositing the fees for the officers at the time of filing the petition. One of these facts is that an affidavit must be taken to the effect that the petitioner is not only without the moneys to pay the fees, but that he cannot obtain them; another is that the making of a false oath in or in relation to any proceeding in bankruptcy is not only made a criminal offense (section 29 b [2]) punishable by imprisonment for a period not to exceed two years, but that the commission of any offense punishable by the terms of the bankruptcy act by imprisonment, is a ground for refusing a discharge in bankruptcy. A third fact to be borne in mind by a debtor who would prosecute a bankruptcy proceeding *in forma pauperis* is that he can be compelled to submit to an examination under oath as to his affairs, his conduct of his business, his dealings with his creditors and other persons, and the amount, kind and whereabouts of his property; and such examination can be held at such time or times as the court may order.

**XXXVI. 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.

[Practically New. Compare, however, Rule XXVI, 1867.]

#### Appeals.

*Bankruptcy Act, section 24 a.*—Jurisdiction of appellate courts.

*Bankruptcy Act, section 24 b.*—Revisory powers of circuit courts of appeal. Compare, pages 244-246, titles, Revisory Powers of the Circuit Court, etc.

*Bankruptcy Act, section 25 a.*—Appeals from courts of bankruptcy to circuit courts of appeal.

*Bankruptcy Act, section 25 b.*—Appeals from circuit courts of appeal to the Supreme Court of the United States. Compare, pages 247-253.

### XXXVII. 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.

[Last half of Rule XXXII, 1867, without material change.]

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**XXXVIII. 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.

(65)



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PREFATORY NOTE

—TO—

ANNOTATED EDITION OF THE OFFICIAL  
FORMS IN BANKRUPTCY.

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The purpose of the Annotations to the Official Forms which are given in this edition, is to furnish to the practitioner a means of ready reference to the sections of the Bankruptcy Act and to the Rules or General Orders in Bankruptcy affecting the proceeding for which the form is prepared. As a rule no comment is made, the forms being self-explanatory. The two abbreviations used are : B. A. for Bankruptcy Act (July 1st, 1898) and B. R. for Bankruptcy Rules (a popular synonym for "The General Orders in Bankruptcy prescribed November 28th, 1898.") By turning to any of the sections of the act or to any of the rules to which reference is made, exhaustive discussion of the questions arising will be found, besides numerous cross-references.



# FORMS IN BANKRUPTCY.

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[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.]

### Debtor's Petition.<sup>1</sup>

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 domicile*] for the greater portion of six months next immediately preceding the filing of this petition at ..... , within said judicial district;<sup>2</sup> 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<sup>3</sup> 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 :

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<sup>1</sup> B. A. §§ 4, 59a; B. R. No. V.

<sup>2</sup> B. A. § 2 (1).

<sup>3</sup> B. A. § 7a (8).

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 :<sup>1</sup>

Wherefore your petitioner prays that he may be adjudged<sup>2</sup> 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.*)

<sup>1</sup> B. A. § 7a (8).

<sup>2</sup> B. A. § 18g.

SCHEDULE A. — STATEMENT OF ALL DEBTS OF BANKRUPT.<sup>1</sup>

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.<sup>2</sup>

Claims which have priority. (2)	Reference to ledger or voucher	Names of creditors. (3)	Residence (if unknown, that fact must be stated.) (3)	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom. (3)	Amount.
(3) Taxes and debts due and owing to the United States. (4)						\$
(3) Taxes due and owing to the State of _____ or to any county, district or municipality thereof. (4)						
(3) Wages due workmen, clerks, or servants, to an amount not exceeding \$300 each, earned within three months before filing the petition. (5)						
(4) Other debts having priority by law. (6)						
					Total.....	

\_\_\_\_\_, Petitioner.

<sup>1</sup> B. A. §§ 7a (3); 39a (2) and (6); B. R. No. IX. <sup>2</sup> B. A. § 64. <sup>3</sup> B. A. § 7a (3) <sup>4</sup> B. A. § 64a. <sup>5</sup> B. A. § 64b (4). <sup>6</sup> B. A.

§ 64b (5).



SCHEDULE A. (3)<sup>1</sup>

*Creditors whose claims are unsecured.*<sup>2</sup>

[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. (a)	Residence (if unknown, that fact must be stated). (a)	When and where contracted. (a)	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. (a)	Amount.
					\$
				Total.....	

\_\_\_\_\_, *Petitioner.*

<sup>1</sup> B. A. § 7a (8); B. R. No. V.      <sup>2</sup> B. A. § 7a (8).

SCHEDULE A. (4)<sup>1</sup>

*Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers.<sup>2</sup>*

[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. (3)	Residence (if unknown, that fact must be stated.) (3)	Place where contracted. (3)	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom. (3)	Amount.
					\$
					c
				Total.....	

\_\_\_\_\_, *Petitioner*

<sup>1</sup> B. A. § 7a (8); B. R. No. V.      <sup>2</sup> Compare page 321 *et seq.*      "Subrogation."  
<sup>3</sup> B. A. § 7a (8).



SCHEDULE A. (5)<sup>1</sup>

*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. (3)	Residences (if unknown that fact must be stated.) (3)	Names and residence of persons accommodated. (3)	Place where contracted. (3)	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom. (3)	Amount.
						\$
					Total.....	c.

\_\_\_\_\_, *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.]

<sup>1</sup> B. A. § 7a (8); B. R. No. V.      <sup>2</sup> Compare page 321 *et seq.* "Subrogation."      <sup>3</sup> B. A. § 7a (8).

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT. <sup>1</sup>

SCHEDULE B. (1)

*Real estate.*

Location and description of all real estate owned by debtor, or held by him. (a)	Incumbrances thereon, if any, and dates thereof. (a)	Statement of particulars relating thereto. (a)	Estimated value.
			<p>\$ _____</p> <p>c.</p>
Total.....			

\_\_\_\_\_, *Petitioner.*

<sup>1</sup> B. A. § 7a (8); B. R. No. V.      <sup>2</sup> B. A. § 7a (8).

**SCHEDULE B. (2)<sup>1</sup>**

*Personal property.<sup>2</sup>*

	§	¢
<i>a.</i> — Cash on hand.....		
<i>b.</i> — Bills of exchange, promissory notes, or securities of any description (each to be set out separately).....		
<i>c.</i> — Stock in trade, in — business of —, at — of the value of —.....		
<i>d.</i> — Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.....		
<i>e.</i> — Books, prints, and pictures, viz.....		
<i>f.</i> — Horses, cows, sheep, and other animals (with number of each), viz.....		
<i>g.</i> — Carriages and other vehicles, viz.....		
<i>h.</i> — Farming stock and implements of husbandry, viz.....		
<i>i.</i> — Shipping, and shares in vessels, viz.....		
<i>k.</i> — Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.....		
<i>l.</i> — Patents, copyrights, and trade-marks (3), viz.....		
<i>m.</i> — Goods or personal property (4) of any other description, with the place where each is situated, viz.....		
<b>Total.....</b>		

....., *Petitioner.*

<sup>1</sup> B. A. § 7a (9); B. R. No. V.

<sup>2</sup> B. A. § 70a.

<sup>3</sup> B. A. § 70a (9).

<sup>4</sup> B. A. § 7a (8).

**SCHEDULE B. (3)<sup>1</sup>**

*Choses in action.<sup>2</sup>*

	Dollars.	Cents.
<p>1. — Debts due petitioner on open account.....</p>		
<p>2. — Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds.....</p>		
<p>3. — Policies of insurance (3).....</p>		
<p>4. — Unliquidated claims of every nature, with their estimated value.....</p>		
<p>5. — Deposits of money in banking institutions and elsewhere.....</p>		
	<b>Total.....</b>	

....., *Petitioner.*

<sup>1</sup> B. A. § 7a (3); B. R. No. V.      <sup>2</sup> B. A. § 70a (6),      <sup>3</sup> B. A. § 70a (5).

**SCHEDULE B. (4)<sup>1</sup>**

*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.<sup>2</sup>*

[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.
Interest in land.....		\$ .....
Personal property.....		c. ....
Property in money, stock, shares, bonds, annuities, etc.....		
Rights and powers, legacies and bequests.....		
<i>Property heretofore conveyed for benefit of creditors.</i>		
What portion of debtor's property has been conveyed by deed of assignment (3) or otherwise, (4) 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.....	<b>Total.....</b>	Amount realized from proceeds of property conveyed. c. ....
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy (4).....	<b>Total.....</b>	

\_\_\_\_\_, *Petitioner.*

<sup>1</sup>B. A. § 7a (8); B. R. No. V. <sup>2</sup>B. A. § 70a (3). <sup>3</sup>B. A. § 3a (4). <sup>4</sup>B. A. § 3a (2); compare § 60a. <sup>5</sup>B. A. § 60d.

**SCHEDULE B. (5)<sup>1</sup>**

*A particular statement of the property claimed as exempted<sup>2</sup> 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.*

Military uniform, arms, and equipments.....  Property claimed to be exempted by State laws; (3) its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.....	Valuation. \$ _____ _____ _____ _____ Total.....
---	---

\_\_\_\_\_, Petitioner.

<sup>1</sup>B. A. § 7a (8); B. R. No. V.      <sup>2</sup>B. A. § 7a (8);      <sup>3</sup>B. A. § 6.

SCHEDULE B. (6)<sup>1</sup>

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE. (a)

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.*]

<sup>1</sup> B. A., § 7a (8); B. R. No. V.

<sup>2</sup> B. A., § 70a (1).

SUMMARY OF DEBTS AND ASSETS.

[From the statements of the bankrupt in Schedule 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.]

Partnership Petition.<sup>1</sup>

To the Honorable .....,

Judge of the District<sup>2</sup> 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;<sup>3</sup> 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

<sup>1</sup> B. A. §§ 5 and 59; B. R. Nos. VI and VIII.

<sup>2</sup> B. A. § 5c.

<sup>3</sup> B. A. § 2 (r).



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,<sup>1</sup> marked A, and verified by .... oath, contains a full and true statement of all the debts of said partners,<sup>2</sup> 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,<sup>2</sup> 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 con-

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<sup>1</sup> B. A., § 7a (8).

<sup>2</sup> Compare B. A., § 5b, c, d, e and f.

cerning 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.<sup>1</sup>

.....,  
.....,  
.....,

*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.]

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<sup>1</sup> B. R., Nos. VI, VII, VIII.

[Form No. 3.]

Creditors' Petition.<sup>1</sup>

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 domicile]<sup>2</sup> at ..... , in the county of ..... and State and district aforesaid, and owes debts to the amount of \$1,000.<sup>3</sup>

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.<sup>4</sup> That the nature and amount of your petitioners' claims are as follows:

.....  
 .....

And your petitioners further represent that said ..... is insolvent,<sup>5</sup> and that within four months next preceding the date of this petition the said ..... committed an act of bankruptcy,<sup>6</sup> in that he did heretofore, to wit, on the .... day of .....

.....

Wherefore your petitioners pray that service of this petition, with a subpoena,<sup>7</sup> 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.*

<sup>1</sup>B. A. § 59; compare §§ 3 and 4<sup>b</sup>; B. R. Nos. VI. and VII.

<sup>2</sup>B. R. § 2 (1).

<sup>3</sup>B. A. § 4<sup>b</sup>.

<sup>4</sup>B. A. § 59<sup>b</sup>.

<sup>5</sup>B. A. § 3<sup>b</sup>.

<sup>6</sup>B. A. § 3<sup>a</sup>.

<sup>7</sup>B. A. § 18<sup>a</sup>; Equity Rules 7, 11-16.

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 ....., 189—.

.....,  
.....  
(Official character.)

[Schedules to be annexed<sup>1</sup> corresponding with schedules under Form No. 1.]

[Form No. 4.]

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,<sup>2</sup> be served<sup>3</sup> 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<sup>4</sup> before the day aforesaid.

<sup>1</sup> B. A. § 7a (8); compare B. A. § 39a (2) and (6); and B. R. No. IX.  
<sup>2</sup> B. A. § 18a.  
<sup>3</sup> Equity Rules, 13-16.  
<sup>4</sup> B. R. No. XXXVII.

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 }

.....,<sup>1</sup>

*Clerk.*

[Form No. 5.]

**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 ....<sup>2</sup> 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 }<sup>3</sup>  
 { the Court. }

.....,

*Clerk.*

---

<sup>1</sup> B. R. No. III.

<sup>2</sup> B. A. § 18a.

<sup>3</sup> B. R. No. III.

## [Form No. 6.]

## 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<sup>1</sup> set forth in said petition, or that he is insolvent,<sup>2</sup> 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].<sup>3</sup>

.....

Subscribed and sworn to before me this .... day of ....., A. D.  
18...

.....

[*Official character.*]

<sup>1</sup> B. A. § 3a.

<sup>2</sup> B. A. § 3 b, c and d.

<sup>3</sup> B. A. § 19a.

[Form No. 7.]

**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<sup>1</sup> 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 }<sup>2</sup>  
{ the Court. }

.....,  
*Clerk.*

[Form No. 8.]

**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 peti-

<sup>1</sup>B. A. § 192.

<sup>2</sup>B. R. No. III.

tion is still pending;<sup>1</sup> 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<sup>2</sup>], 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 }<sup>3</sup>  
{ the Court. }

.....,<sup>3</sup>  
*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].*<sup>4</sup>

*Fees and Expenses.*<sup>5</sup>

- |  |  |  |
|--|--|--|
| 1. Service of warrant....  |  |  |
| 2. Necessary travel, at the rate of six cents a mile each way.....               |  |  |
| 3. Actual expenses (6) in custody of property and other services, as follows,... |  |  |

[Here state the particulars.]

.....,  
*Marshal [or Deputy Marshal].*

<sup>1</sup> B. A. § 2 (3) and (5).

<sup>2</sup> B. A. § 69; compare B. A. § 3e.

<sup>3</sup> B. R. No. III.

<sup>4</sup> Equity Rule No. 15.

<sup>5</sup> B. A. § 52;

<sup>6</sup> B. R. Nos. X and XIX.



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.*<sup>1</sup>

[Form No. 9.]

**Bond of Petitioning Creditor.**<sup>2</sup>

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 the said .....,<sup>3</sup> 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.*

<sup>1</sup> There is nothing in the Bankruptcy Act nor in the rules (see Rule XIX) that requires that this oath be taken only before the referee. Compare, B. A. § 20. The marshal should obtain vouchers whenever obtainable.

<sup>2</sup> B. A. §§ 3<sup>e</sup> and 69.

<sup>3</sup> The name of the person against whom the involuntary petition has been filed should be here inserted.

## [Form No. 10.]

Bond to Marshal.<sup>1</sup>

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<sup>1</sup> 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.*

---

<sup>1</sup> Compare B. A. § 69.

## [Form No. 11.]

Adjudication that Debtor is not Bankrupt.<sup>1</sup>

In the District Court<sup>2</sup> of the United States for the ..... District  
of .....

In matter of  .....  .....	}	In Bankruptcy.
--	---	----------------

At ....., in said district, on .... day of ....., A. D. 18.., 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<sup>3</sup> 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.<sup>4</sup>

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.

<sup>1</sup>B. A. §§ 3 and 4; B. A. § 18*d, e, f, g*; compare B. A. § 59*d*.

<sup>2</sup>B. A. § 2 (1); B. A. § 32; compare B. R. Nos. VI and VII.

<sup>3</sup>B. R. No. IV.

<sup>4</sup>B. A. § 2 (18); B. R. No. XXXIV.

[Form No. 12.]

Adjudication of Bankruptcy.<sup>1</sup>

In the District<sup>2</sup> Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt.</i></p>	}	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.*

---

<sup>1</sup> B. A. §§ 3 and 4; B. A. § 18*d, e, f, g*; compare B. A. § 59*d*.  
<sup>2</sup> B. A. § 2 (1); B. A. § 32; compare B. R. Nos. VI and VII.  
**As to costs see B. R. No. XXXIV.**

[Form No. 13.]

Appointment, Oath, and Report of Appraisers.<sup>1</sup>

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt.</i></p>	}	In Bankruptcy.
--	---	----------------

It is ordered that ..... of ....., ..... of ....., and ..... of ....., three disinterested persons, be, and they are hereby, appointed appraisers 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<sup>2</sup> 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.]

<sup>1</sup>B. A. § 706; B. R. No. XVII.

<sup>2</sup>B. A. § 20.

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.]

Order of Reference.<sup>1</sup>

In the District Court of the United States for the ..... District of .....

In the matter of  .....  <i>Bankrupt.</i>	}	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. 189-, according to the provisions of the acts of Congress relating to bankruptcy.

<sup>1</sup> B. A. § 22a.

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.<sup>1</sup>

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.]

Order of Reference in Judge's Absence.<sup>2</sup>

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 there-  
 upon ordered that the said matter be referred to ..... , one

<sup>1</sup> B. R. No. XII.

This order of reference is to be used only where an adjudication of bank-  
 ruptcy has been made by the judge.

<sup>2</sup> B. A. § 18 *f* and *g*.

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. 189., at .....<sup>1</sup>

Witness my hand and the seal of the said court, at ....., in said district, on the .... day of ....., A. D. 189..

{ Seal of  
the Court. }

.....,  
*Clerk.*

### [Form No. 16.]

#### Referee's Oath of Office.<sup>2</sup>

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.]

#### Bond of Referee.<sup>3</sup>

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. 189..

<sup>1</sup>B. R. No. XII.

<sup>2</sup>B. A. § 36.

<sup>3</sup>B. A. § 50.



The condition of this obligation is such 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. L.]  
..... [L. S.]

Approved this ..... day of ..... A. D. 189..

.....,  
*District Judge.*

[Form No. 18.]

Notice<sup>1</sup> of First Meeting of Creditors.<sup>2</sup>

In the District Court of the United States for the ..... District  
of ..... In Bankruptcy.

In the matter of ..... <p style="text-align: center;"><i>Bankrupt.</i></p>	}	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

<sup>1</sup> B. A. § 586; B. R. No. XXI (2).

<sup>2</sup> B. A. § 55a, b and c.

..... day of . . . . ., A. D. 18.., at .... o'clock in the ..... noon, at which time the said creditors may attend, prove their claims,<sup>1</sup> appoint a trustee,<sup>2</sup> examine the hankrupt,<sup>3</sup> and transact such other business as may properly come before said meeting.

..... ,

*Referee in Bankruptcy.*

..... , 18..

[Form No. 19.]

**List of Debts Proved at First Meeting.<sup>4</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of ..... <i>Bankrupt.</i>	}	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.*

<sup>1</sup> B. A. §§ 55<sup>b</sup>, 57.

<sup>2</sup> B. A. §§ 44, 2 (17); B. R. No. XIII.

<sup>3</sup> B. A. § 7<sup>a</sup> (1) and (9).

<sup>4</sup> Compare B. R. XXIV and B. A. § 42.

[Form No. 20.]

**General Letter of Attorney in Fact<sup>1</sup> when Creditor is not Represented by Attorney at Law.<sup>2</sup>**

In the District Court of the United States for the ..... District of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt</i> .</p>	}	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.

---

<sup>1</sup> B. A. § 1 (9); B. R. No. XXI (5).

<sup>2</sup> B. A. § 1 (9); B. R. No. IV.

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.]<sup>1</sup>

[Form No. 21.]

Special Letter of Attorney in Fact.<sup>2</sup>

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
---	---	----------------

To .....,

.....:

I hereby authorize you, o. 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. 18..

.....,  
[Official character.]<sup>1</sup>

<sup>1</sup> B. A. § 20.

<sup>2</sup> B. A. § 1 (9); B. R. No. XXI (5).

[Form No. 22.]

**Appointment of Trustee by Creditors.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of .....  <i>Bankrupt .</i>	}	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<sup>2</sup> 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*]<sup>3</sup>, we, whose names are hereunder written, being the majority 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,<sup>4</sup> do hereby appoint ..... of ....., in the county of ..... and State of .....,<sup>5</sup> to be the trustee.. of the said bankrupt's estate and effects.

Signatures of creditors.	Residence of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered that the above appointment of trustee.. be, and the same is hereby approved.<sup>6</sup>

.....,  
*Referee in Bankruptcy.*

<sup>1</sup> B. A. §§ 2 (17), 44; B. R. Nos. XIII, XIV and XV.

<sup>2</sup> B. A. § 55.

<sup>3</sup> B. A. § 58*b*.

<sup>4</sup> B. A. § 56.

<sup>5</sup> B. A. § 45.

<sup>6</sup> B. R. No. XIII; B. A. § 2 (17).

## [Form No. 23.]

**Appointment of Trustee by Referee.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt.</i></p>	}	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 name 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,<sup>2</sup> 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.*

---

<sup>1</sup> B. A. §§ 2 (17), 44.

<sup>2</sup> Compare B. R. No. XV.

[Form No. 24.]

**Notice to Trustee of His Appointment.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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 approved said appointment. The penal sum of your bond as such trustee has been fixed at ..... dollars.<sup>2</sup> You are required to notify me forthwith of your acceptance or rejection of the trust.<sup>3</sup>

Dated at ..... the .... day of ....., A. D. 18..

.....,  
*Referee in Bankruptcy.*

[Form No. 25.]

**Bond of Trustee.<sup>4</sup>**

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

<sup>1</sup> B. R. No. XVI.

<sup>2</sup> Compare B. A. § 50*b*, *c-m*.

<sup>3</sup> See B. A. § 50*b*.

<sup>4</sup> B. A. § 50*b*, *c-m*.

Although no form of acknowledgment or justification appears annexed to this form, the absence must be deemed an oversight. See the provisions of B. A. § 50*d, e, f, g*.

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.]

**Order Approving Trustee's Bond.<sup>1</sup>**

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 ..... <i>Bankrupt .</i>	}	In Bankruptcy.
--	---	----------------

It appearing to the Court ....., 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.]

**Order that No Trustee be Appointed.<sup>2</sup>**

In the District Court of the United States for the .... District of .....

In the matter of ..... <i>Bankrupt .</i>	}	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

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<sup>1</sup> B. A. § 50 *b, c, d, e, f, g.*

<sup>2</sup> B. R. No. XV.

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.]

**Order for Examination of Bankrupt.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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.*

---

<sup>1</sup> B. A. §§ 7a (1) and (9); 21a; compare 12a; B. R. No. XII (1).

[Form No. 29.]

**Examination of Bankrupt or Witness.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of ..... <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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<sup>2</sup> at the time and place above mentioned, upon his oath says: [*Here insert substance of examination of party.*]

.....,  
*Referee in Bankruptcy.*

[Form No. 30.]

**Summons to Witness.<sup>3</sup>**

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 of ....., at .. o'clock in the .... noon, then and there to be examined in relation to said bankruptcy.

<sup>1</sup> B. A. §§ 7a (1) and (9), 21a; B. R. No. XXII; B. A. § 21.

<sup>2</sup> Compare B. A. § 41a (1) and (4).

<sup>3</sup> B. A. § 21a; B. R. No. III.

Witness the Honorable ..... judge of said court, and the seal thereof at ....., this .... day of ....., A. D. 189-

.....,  
Clerk.<sup>1</sup>

**Return of Summons to Witness.**

In the District Court of the United States for the ..... District of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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 .....,<sup>2</sup> 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..

.....<sup>3</sup>

<sup>1</sup> The summons should not only be signed by the clerk, but the seal of the court should be affixed. See B. R. No. III.

<sup>2</sup> Compare page 232; title "Subpoena Runs into Other Districts."

<sup>3</sup> B. A. § 20.

[Form No. 31.]

**Proof of Unsecured Debt.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of .....  <i>Bankrupt .</i>	}	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 bank-  
ruptcy 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 counterclaims 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..

.....,<sup>2</sup>  
[*Official character.*]

<sup>1</sup> B. A. § 57a, b, c, etc.; B. R. No. XXI (1).

<sup>2</sup> B. A. § 20. If a claim is founded upon an instrument in writing, the original should be filed with the proof. B. A. § 57b. Depositions to prove debts existing in open account should contain an averment that no note has been received for such account, nor any judgment rendered thereon. Rule XXI (1).

[Form No. 32.]

Proof of Secured Debt.<sup>1</sup>

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt.</i></p>	}	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 counterclaims 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. ....

.....,<sup>2</sup>  
[Official character.]

---

<sup>1</sup> B. A. § 57; B. R. No. XXI (1).  
<sup>2</sup> B. A. § 20. See notes to Form 31.

[Form No. 33.]

**Proof of Debt Due Corporation.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of .....  <i>Bankrupt.</i>	}	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<sup>2</sup> ..... 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 counterclaims 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..

.....,<sup>3</sup>  
[Official character.]

<sup>1</sup> B. A. § 57; B. R. No. XXI (1).

<sup>2</sup> Rule XXI requires that proof of the claim of a corporation must be made by the treasurer, or if there is no treasurer, then by the person whose duties most nearly correspond to those of a treasurer.

<sup>3</sup> B. A. § 20. See notes to Form 31.

[Form No. 34.]

**Proof of Debt by Partnership.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of ..... <p style="text-align: center;"><i>Bankrupt.</i></p>	}	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 counterclaims 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 recived any manner of security for said debt whatever.

.....,  
*Creditor.*

Subscribed and sworn to before me this .... day of ....., A. D. 18..

.....,<sup>2</sup>  
[*Official character.*]

<sup>1</sup> B. A. § 57; B. R. No. XXI (1).  
<sup>2</sup> B. A. § 20. See notes to Form 31.



[Form No. 35.]

**Proof of Debt by Agent or Attorney.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of .....  <i>Bankrupt .</i>	}	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..

.....,<sup>2</sup>  
[Official character.]

<sup>1</sup> B. A. § 57; B. R. No. XXI (1) and (5).

<sup>2</sup> B. A. § 20. See notes to Form 31.

[Form No. 36.]

**Proof of Secured Debt by Agent.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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 counterclaims 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 can not 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.]

<sup>1</sup>B. A. § 57; B. R. No. XXI (1) and (5). See notes to Form 31.

[Form No. 37.]

**Affidavit of Lost Bill, or Note.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of .....  <i>Bankrupt .</i>	}	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 particu-  
 lars 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 per-  
 son 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..

.....,<sup>2</sup>  
[Official character.]

<sup>1</sup> B. A. § 57*b*.

<sup>2</sup> B. A. § 20. See notes to Form 31.

## [Form No. 38.]

Order Reducing Claim.<sup>1</sup>

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt</i> .</p>	}	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.*

---

<sup>1</sup> B. A. §§ 2 (2); 57*d*, *f*, *k* and *l*. B. R. No. XXI. (6).

[Form No. 39.]

Order Expunging Claim.<sup>1</sup>

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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.*

[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 .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
---	---	----------------

At ....., in said district, on the .... day of ....., A. D. 18..

---

<sup>1</sup> B. A. §§ 2 (2); 57d, f, k, and l; B. R. No. 21 (6).

*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.<sup>1</sup>*

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be care- fully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

.....,  
*Referee in Bankruptcy.*

<sup>1</sup>B. A. § 39a (1); compare § 65.

[Form No. 41.]

Notice<sup>1</sup> of Dividend.<sup>2</sup>

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt</i> .</p>	}	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 can not 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.*

<sup>1</sup> B. A. § 58a (5).

<sup>2</sup> B. A. §§ 39a (1), 47 (9); 65.

## [Form No. 42.]

**Petition and Order for Sale by Auction of Real Estate.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of ..... <i>Bankrupt .</i>	}	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.*

---

<sup>1</sup> B. R. No. XVIII; compare B. A. §§ 70b; 58a (4).



[Form No. 43.]

**Petition and Order for Redemption of Property from Lien.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of .....  <i>Bankrupt.</i>	}	In Bankruptcy.
---	---	----------------

Respectfully represents ..... trustee<sup>2</sup> 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 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<sup>3</sup> to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing ..... 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.*

<sup>1</sup> B. R. No. XXVIII.

<sup>2</sup> A creditor or the bankrupt as well as the trustee may make this petition.

<sup>3</sup> Neither the statute nor the rules require that this notice shall be by mail, nor that it shall be a ten days' notice.

## [Form No. 44.]

**Petition and Order for Sale<sup>1</sup> Subject to Lien.**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of ..... <i>Bankrupt</i> .</p>	}	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<sup>2</sup> 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.*

<sup>1</sup> B. R. No. XVIII, compare B. R. No. XXVIII.

<sup>2</sup> See notes to B. R. No. XVIII; compare B. A. § 706; B. A. § 58a (4).

[Form No. 45.]

Petition and Order for Private Sale.<sup>1</sup>

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt.</i></p>	}	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<sup>2</sup> 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.*

<sup>1</sup> B. R. XVIII (2).

<sup>2</sup> See notes to B. R. No. XVIII; compare B. A. § 70b; B. A. § 58a (4).

## [Form No. 46.]

**Petition and Order for Sale of Perishable Property.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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<sup>2</sup> 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.*

<sup>1</sup> B. R. No. XVIII (3).

<sup>2</sup> Compare B. A. §§ 70b and 58a (4).

[Form No. 47.]

**Trustee's Report of Exempted Property.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of .....  <i>Bankrupt .</i>	}	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 (2) .....			

.....,

*Trustee.*

<sup>1</sup> B. R. No. XVII; B. A. § 47 (11); Compare B. A. §§ 7a (8); 2 (11); 70b; and Form No. 13.

<sup>2</sup> B. A. § 6.

[Form No. 48.]

Trustee's Return of No Assets.<sup>1</sup>

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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.*

---

<sup>1</sup>B. A. § 706; B. R. No. XVII; B. A. § 47a (10). Compare B. R. No. XV.

[Form No. 49.]

Account of Trustee.<sup>1</sup>

Dr.	<i>The estate of .....</i>			<i>..... trustee.</i>			Cr.	
	Dolls.	Cts.	Dolls.	Cts.	Dolls.	Cts.	Dolls.	Cts.

<sup>1</sup> B. A. § 47<sup>a</sup> (1), (6), (7) and (8); B. A. §§ 49, and 29<sup>c</sup> (3). See note to Form No. 51.

[Form No. 50.]

Oath to Final Account of Trustee.<sup>1</sup>

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p style="text-align: center;">.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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  
 commission and expenses as charged in said accounts.<sup>2</sup>

.....  
*Trustee.*

Subscribed and sworn to before me at ....., in said .... district  
 of ....., this .... day of ....., A. D. 18..

.....,<sup>3</sup>  
 [*Official character.*]

<sup>1</sup> B. A. 47a (1), (6), (7) and )8); 49.  
<sup>2</sup> B. A. §§ 62, 64b (1).  
<sup>3</sup> B. A. § 20. See note to Form No. 51.



[Form No. 51.]

**Order Allowing Account<sup>1</sup> and Discharging Trustee.**

In the District Court of the United States for the ..... District  
of .....

In the matter of .....  <i>Bankrupt .</i>	}	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.*<sup>2</sup>

[Form No. 52.]

**Petition for Removal of Trustee.<sup>3</sup>**

In the District Court of the United States for the ..... District  
of .....

In the matter of .....  <i>Bankrupt .</i>	}	In Bankruptcy.
--	---	----------------

To the Honorable .....  
Judge<sup>4</sup> of the District Court for the .... District of .....:  
The petition of ..... one of the creditors of said bank-

<sup>1</sup> B. A. § 47a (1), (6), (7) and (8).

<sup>2</sup> B. R. No. XVII, last sentence.

As to notice of filing of trustees' accounts and the date and place of examination of the same, see B. A. § 58a (6).

<sup>3</sup> B. A. § 2 (17); compare B. R. No. XVII.

<sup>4</sup> B. R. No. XVII.

rupt, 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 <sup>1</sup> 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.]

Notice of Petition for Removal of Trustee.<sup>2</sup>

In the District Court of the United States for the . . . . . District of . . . . .

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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.*<sup>3</sup>

<sup>1</sup> See page 285 *ante*.

<sup>2</sup> B. R. No. XVII; compare B. A. § 2 (17).

<sup>3</sup> B. R. No. XIII, last clause.

[Form No. 54.]

Order for Removal of Trustee.<sup>1</sup>

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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].<sup>2</sup>

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.*<sup>3</sup>

<sup>1</sup> B. A. § 2 (17); compare B. R. No. XVII.

<sup>2</sup> B. A. § 2 (18).

<sup>3</sup> B. R. No. XIII, last clause.

## [Form No. 55.]

**Order for Choice of New Trustee.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p style="text-align: center;">.....</p> <p style="text-align: center;"><i>Bankrupt.</i></p>	}	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.<sup>2</sup>

.....,

*Referee in Bankruptcy.*<sup>3</sup>

<sup>1</sup> B. A. §§ 44 and 46.

<sup>2</sup> B. A. § 58a (3).

<sup>3</sup> B. A. § 58c.

[Form No. 56.]

**Certificate by Referee to Judge.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt.</i></p>	}	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.*

---

<sup>1</sup> Compare B. R. No. XXVII; B. A. § 39<sup>a</sup> (5). It is to be noted that under the present practice, when an issue arises before a referee he has power to determine the question, though his determination is subject to a review by the court. The certificate outlined in the above form is the means used for bringing the question up for review. Under the old bankruptcy law the register had no power to determine an issue, if one arose, but it was his duty to certify the facts and the question to the court, though in practice he also stated his opinion and what order he considered should be made.

## [Form No. 57.]

**Bankrupt's Petition for Discharge.<sup>1</sup>**

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt.</i></p>	}	In Bankruptcy.
--	---	----------------

To the Honorable .....  
 Judge<sup>2</sup> 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 .....,<sup>3</sup> 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.<sup>4</sup>

Dated this .... day of ....., A. D. 189-.

.....,  
*Bankrupt.*

**Order of Notice Thereon.<sup>5</sup>**

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

<sup>1</sup> B. A. § 14a; B. R. No. XXXI.

<sup>2</sup> B. A. § 14b; compare B. A. § 38a (4).

<sup>3</sup> B. A. § 14a.

<sup>4</sup> B. A. § 17.

<sup>5</sup> B. A. § 14b; 58a (2).

said district, at .... o'clock in the .....noon; and that notice thereof be published in<sup>1</sup> ..... , a newspaper printed in said district, and that all known creditors and other persons in interest<sup>2</sup> 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 foregoing statement by him subscribed is true.

Before me,

.....,<sup>3</sup>  
[*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.*

<sup>1</sup> B. A. § 58*b*; compare B. A. § 28.

<sup>2</sup> B. A. § 14*b*.

<sup>3</sup> B. A. § 20.

## [Form No. 58.]

**Specification of Grounds of Opposition to Bankrupt's Discharge.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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.]

**Discharge of Bankrupt.<sup>2</sup>**

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.<sup>3</sup>

<sup>1</sup> B. R. No. XXXII; B. A. § 14*b*.

<sup>2</sup> B. A. § 14*b*.

<sup>3</sup> B. A. § 17.

The discharge of the bankrupt, under the present law, is evidenced by the



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.]

**Petition for Meeting to Consider Composition.<sup>1</sup>**

District Court of the United States for the . . . . . District of . . . . .

. . . . .  <p style="text-align: center;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
---	---	----------------

To the Honorable . . . . ., Judge of the District Court of the  
United States for the . . . . District of . . . . .:

The above named bankrupt respectfully represent 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 pray 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.*

---

order of discharge, not as under the former law by a certificate issued in accordance with the order.

It is not proper to insert the itemized debts which it is supposed are released by the discharge. The question of the effect of the discharge upon any particular debt is determined, in any suit which may thereafter be brought on that debt.

<sup>1</sup> Compare B. A. § 12a and b. While the call of a meeting for the purpose of considering whether creditors will accept an offer of composition will doubtless greatly facilitate consideration of the question, such a meeting prior to the acceptance of the composition by a majority in number and amount of all creditors, is not required either by the statute or the rules. Query: Can it not

## [Form No. 61.]

**Application for Confirmation of Composition.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt</i> .</p>	}	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.*

---

be obtained, notwithstanding the implied rule in this form, by personal solicitation of individual creditors? Does not the notice thereafter given to creditors, of the application for a confirmation of the composition, fully protect their rights? Compare p. 141 *ante*.

<sup>1</sup> B. A. § 12 *a* and *b*. As to Notice, compare B. A. § 58*a* (2). As to Opposition, compare B. A. § 12*b*, *c*, *d*; and B. R. No. XXXII.

[Form No. 62.]

**Order Confirming Composition.<sup>1</sup>**

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.*

---

Query: Should not this order recite the giving of notice as required by B. A. § 58a (2)?

<sup>1</sup> B. A. § 12b and d.

[Form No. 63.]

Order of Distribution on Composition.<sup>1</sup>

UNITED STATES OF AMERICA :

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">In the matter of</p> <p style="text-align: center;">.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	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. 189-.

{ Seal of  
the court. }

.....,  
*Clerk.*

---

<sup>1</sup> B. A. § 12e.

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THE  
UNITED STATES BANKRUPTCY LAW.  
OF 1898.

---

AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY  
THROUGHOUT THE UNITED STATES.

[APPROVED JULY 1, 1898.]

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*Be it enacted by the Senate and House of Representatives of the  
United States of America, in Congress assembled :*

---

CHAPTER I.  
DEFINITIONS.

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 revoke 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 of 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.

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; (5) authorizes 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; (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 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.

**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 (4) made a general assignment for the benefit of his creditors; 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.

*e* 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.

**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.

*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, 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.

**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.

½ 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.

**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.

**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.

**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 conclude 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 an allowance fixed by the laws of the State of the bankrupt's residence.

**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.

**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.

**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.

**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.

**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.

**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.

*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 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.

*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.

**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.

**SEC. 16. Co-Debtors of Bankrupts.** — *a* 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.

**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 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.

## CHAPTER IV.

### COURTS AND PROCEDURE THEREIN.

**SEC. 18. Process, Pleadings, and Adjudications.** — *a* 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 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 notice by publication in suits in equity in courts of the United States.

*b* 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.

*c* All pleadings setting up matters of fact shall be verified under oath.

*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 make 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.

**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.

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.

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, 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 property of a bankrupt whose estate is in process of administration under this act.

*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 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 reversion 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.

**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.

**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* 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.

*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.

**SEC. 24. Jurisdiction of Appellate Courts.** — *a* 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 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.

**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 issues writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

**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.

**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.

**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.

**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 belong-

ing 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.

**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.

**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.

**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.

SEC. 33. **Creation of Two Officers.** — *a* The offices of referee and trustee are hereby created.

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.

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.

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.

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.

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.

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.

**SEC. 40. Compensation of Referees.** — *a* 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.

*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.

*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.

**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 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: 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.

**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.

**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.

**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.

**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.

**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.

**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 estate; (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.

**SEC. 48. Compensation of Trustees.** — *a* 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.

*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.

**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.

**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.

**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 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.

**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 service 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.

**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.

**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.

**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 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.

*f* Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

**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.

**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 state-

ment 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.

*g* The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.

*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 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.

**SEC. 58. Notice 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.

**SEC. 59. Who may File and Dismiss Petitions.** — *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 answer 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.

**SEC. 60. Preferred Creditors.** — *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.

*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 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 reexamined 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.

**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.

**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.

**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.

**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; (2) the filing fees paid by creditors in involuntary cases; (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 (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.

**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.

*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.

*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 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 court 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.

**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.

**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.

*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.

**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.

**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.

**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 opera-

tion 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 trade-marks; (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.

*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.

*f* Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.

**THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.**

*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.



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## THE BANKRUPTCY ACT OF 1867.

(WITH AMENDMENTS.)

## COURTS OF BANKRUPTCY.

*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 in 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.

*(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.)\*

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.

§ 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

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\* So amended by act of 22 June, 1874, ch. 390, § 2, 18 Stat. 178.

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 as 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 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;

(R. S., § 4979. — The several Circuit Courts shall have, within each district, concurrent jurisdiction with the district court of any district, whether the powers and jurisdiction of a Circuit Court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the 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.

§ 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 during his continuance in office be, directly or indirectly, interested in, or

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\* As amended by act of June 22, 1874, this paragraph appears in R. S., § 4979.



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.

§ 4. *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 does not oppose;

And to sit in chambers and dispatch there such part of the administrative business of the court with 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, and he shall adjourn the same into court for decision by the judge.

\* 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.

(R. S., Sec. 4996.\* 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

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\* So amended by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184.

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.)

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.

§ 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 settled 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; 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.

§ 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 ques-

tions 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 amount 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.

§ 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 subpoena;

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.

§ 8. *And be it further enacted*, 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 the decision of the District Court to the Circuit Court for 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 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 manner 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.

§ 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).

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\* Amended by act of Feb. 6th, 1875, ch. 77, sec. 3, to \$5,000.00.

§ 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 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 fees payable and the charges and costs to be allowed, with respect to all proceedings in bankruptcy before such 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.

(† 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.)

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, by the Justices of the Supreme Court, be reported to Congress, with such suggestions as said Justices may think proper.

#### VOLUNTARY BANKRUPTCY — COMMENCEMENT OF PROCEEDINGS.

§ 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 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 (words " and inventory and valuation " added by act of June 22, 1874), 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 cred-

\* Amended by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184, to read as in the following paragraph.

† So added by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184.

itor, 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 mortgage, 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,\* 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, in 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 Courts, 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 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.

*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.

(† 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.)

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\* "And valuation," so amended Act of June 22, 1874.

† So amended by act of 22 June, 1874, ch. 390, sec. 5, 18 Stat. 179.

## OF ASSIGNMENTS AND ASSIGNEES.

§ 12. *And be it further 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.

§ 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 endorsement 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.

§ 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 necessities 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 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 copy-rights;

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.

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 amends, 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 successors, 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 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 newspaper 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.

§ 15. *And be it further enacted*, 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;

(R. S. sec. 5062a (22 June, 1874, ch. 390, sec. 1, 18 Stat. 178.)— 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.)

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.

(R. S., sec. 5062b (22 June, 1874, ch. 390, sec. 4, 18 Stat. 178).)— 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 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 bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months, in such installments 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. If any assignee shall fail or neglect to well and faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell, or dispose of, or in any manner, fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell, or dispose of the property committed to his charge, he shall, upon proof thereof, be removed, and forfeit all fees or other compensation for any and all services, in connection with such bankrupt's estate, and upon conviction thereof, before any court of competent jurisdiction, shall be liable to a fine of not more than ten thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment, at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid, shall, upon conviction, be liable to a like punishment. 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 account 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.)

§ 16. *And be it further enacted*, 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.

If, at the time of the commencement of the 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.

§ 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 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 contro-

versy by agreement with the other party, as he thinks proper and most for the interest of the creditors.

§ 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 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.

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.

§ 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 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 payments 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.

§ 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: *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.

(\* Or in cases of compulsory bankruptcy, after the act of bankruptcy upon or

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\* So added by act of 22 June, 1874, ch. 390, sec. 6, 18 Stat. 179.

in respect of which the adjudication shall be made, and with a view of making such set-off.)

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.

§ 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.

(\* 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.)

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 or proceeding 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

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\* So added by act of 22 June, 1874, ch. 390, sec. 7, 18 Stat. 179.)

of such distinct contracts against the estates respectively liable upon such contracts.

§ 22. *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 debtors before any register in bankruptcy in the judicial districts where such creditors, or either of them, reside, or before any commissioner of the Circuit Court authorized to administer oaths in any district.

(Sec. 5076 a (22 June 1874, ch. 390, sec. 20, 18 Stat. 186). — 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.)

(Sec. 5076 b (Act of August 15, 1876, ch. 304, 19 Stat. 206). — *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do.)

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 testify-

ing 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.

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 and receipt of such proof, and the amount and nature of the debts, which books shall be open to the inspection of all the creditors.

The court may, on the application of the assignee, 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.

§ 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.

§ 24. *And be it further enacted*, 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 an 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 endorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

§ 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 to any portion of an 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.

§ 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 be 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 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 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 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 or bankruptcy would not release him.

§ 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 labors 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.

§ 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 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 the 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 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.

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.

§ 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 proven 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

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\* Amended so as to read "and before the final disposition of the cause."  
(Act of July 26, 1876, ch. 234, sec. 1.)

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 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 knowledge 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 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;

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.

§ 30. *And be 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.

§ 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.

§ 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 [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. —.

[Seal.]

—, Judge.

§ 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 per centum of the claims against his estate, ("upon which he is liable as the principal debtor." So amended, Act of July 27, 1868, ch. 258, sec. 1), 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.

(R. S., sec. 5112 *a* (22 June, 1874, ch. 390, sec. 9, 18 Stat. 180). — That in cases of compulsory or involuntary bankruptcy, the provisions of 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 five thousand one hundred and twelve (thirty-three of said act of March second, eighteen hundred and sixty-seven) requiring fifty per centum of such assets is hereby repealed.)

§ 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 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.

§ 35. *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 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,

\* Amended so as to read: "Knowing that such attachment, sequestration, seizure, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, 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 nothing in said section five thousand one hundred and twenty-eight (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."—Act of June 22, 1874. R. S. § 5128.

† (The word "knowing" inserted by act of June 22, 1874, ch. 390, sec. 11.)

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.

(R. S., sec. 5130 *u* (22 June, 1874, ch. 390, sec. 10, 18 Stat. 180). — That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section five thousand one hundred and twenty-eight (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 five thousand one hundred and twenty-nine (thirty-five) is hereby changed to three months, but this provision shall not take effect until three months after the passage of this act.)

#### BANKRUPTCY OF PARTNERSHIPS AND OF CORPORATIONS.

§ 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 sepa-



rate 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.

§ 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 present, 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 corporation in the manner provided in this Act in respect to natural persons.

#### OF DATES AND DEPOSITIONS.

§ 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 of 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.

§ 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 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;

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\* (Amended to "twenty." R. S., sec. 5021; Act of June 22, 1874).

† Amended so as to read, "Or transfer of money or other property, estate rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process."

\* (Or who, being a banker, merchant, or trader, has 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 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 that the debtor was insolvent;

And such creditor shall not be allowed to prove his debt in bankruptcy.

\* Words in parentheses amended so as to read, " or who, being a bank, banker, broker, merchant, trader, (j) 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. R. S., sec. 5021, Act of June 22, 1874.)

† Words in parentheses amended so as to read, " who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts (i) provable under this act amounts to at least one-third of the debts so provable. R. S. sec. 5021, Act of June 22, 1874.)

‡ In the Revised Statutes, section 5021, the following was inserted before and instead of this paragraph: *Provided*, also, That no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid, according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors. 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 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,

§ 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 injunction, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any 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 debt or, 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, in such manner as the judge may direct.

No further proceedings, unless the debtor appear and consent thereto, shall

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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 (m) 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 purpose aforesaid. So amended by act of July 26, 1876, ch. 234, sec. 1, 19 Stat. 102.

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.

§ 41. *And be it further 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;

† (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 the petition, at which time the trial shall be had, unless adjourned for cause.)

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 his costs.

§ 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 (See amendment, Act June 22, 1874), providing 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

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\* Amended by act of 22 June, 1874, ch. 390, sec. 13, 18 Stat. 182, to read:

" And if, on return day of the order to show cause as aforesaid the court shall be satisfied that the requirement of section five thousand and twenty-one (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 five thousand and twenty-one (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."

† So amended by act of 22 June, 1874, ch. 390, sec. 14, 18 Stat. 182.)

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.

If the debtor has failed to 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.

§ 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 pro-

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(\* Words " and valuation " added, Act of June 22, 1874.)

ceed 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, 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 continued 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 resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Act.

(R. S., sec. 5103 *a* (22 June, 1874, ch. 390, sec. 17, 18 Stat. 182). — 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 purpose of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars 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 assign 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 value 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 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 a resolution passed in the matter and under the circumstances aforesaid, add to or vary the provisions of, any composition previously accepted by them, without prejudice to any person taking interest 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 name 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 respect 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.)

## PENALTIES AGAINST BANKRUPTS.

§ 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 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 spend 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 assignees 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.

§ 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.

§ 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 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, 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.

#### FEEES AND COSTS.

§ 47. *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.

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 where 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 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 had 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 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.

(R. S., sec. 5127 *a* (22 June, 1874, ch. 390, sec. 18, 18 Stat. 184) — 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 four thousand nine hundred and ninety (ten) and five thousand one hundred and twenty-seven (forty-seven) of said act, and no longer, which duties they shall perform as soon as may be.

§ 5127 *b* (22 June, 1874, ch. 390, sec. 19, 18 Stat. 184). — That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the Supreme Court of the United States, as well as such other or further information as may be required by said justices.

First, the number of cases in bankruptcy in which the warrant prescribed in section five thousand and nineteen (eleven) of said act has come to his hands during the year ending June thirtieth, preceding;

Secondly, how many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately;

Thirdly, the total amount of all other fees, costs, expenses, and emoluments, respectively and separately, earned or received by him during such year, from or in respect of any matter in bankruptcy;

Fourthly, a summarized statement of such fees, costs, and emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year;

Fifthly, a summarized statement of all actual disbursements in such cases for such year.

And in like manner every register shall, in the same month, and for the same year, make a report to such clerk; of

First, the number of voluntary cases in bankruptcy coming before him during said year;

Secondly, the amount of assets and liabilities, as nearly as may be, of the bankrupt;

Thirdly, the amount and rate per centum of all dividends declared;

Fourthly, the disposition of all such cases;

Fifthly, the number of compulsory cases in bankruptcy coming before him, in the same way;

Sixthly, the amount of assets and liabilities, as nearly as may be, of such bankrupts;

Seventhly, the disposition of all such cases;

Eighthly, the amounts and rate per centum of all dividends declared in such cases;

Ninthly, the total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year, in each class of cases above stated.

And in like manner every assignee shall, during said month make like return to such clerk; of,

First, the number of voluntary and compulsory cases, respectively and separately, in his charge during said year;

Secondly, the amount of assets and liabilities therein, respectively and separately;

Thirdly, the total receipts and disbursements therein, respectively and separately;

Fourthly, the amount of dividends paid or declared, and the rate per centum thereof, in each class respectively and separately;

Fifthly, the total amount of all his fees, charges and emoluments of every kind therein, earned or received.

Sixthly, the total amount of expenses incurred by him for legal proceedings and counsel fees;

Seventhly, the disposition of the cases respectively;

Eighthly, a summarized statement of both classes as aforesaid;

And in like manner, the clerk of said court, in the month of August in each year, shall make up a statement for such year, ending June thirtieth, of,

First, all classes in bankruptcy pending at the beginning of the said year;

Secondly, all of such cases disposed of;

Thirdly, all dividends declared therein;

Fourthly, the number of reports made from each assignee therein;

Fifthly, the disposition of all such cases;

Sixthly, the number of assignees' accounts filed and settled;

Seventhly, whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and if any have failed to make such report, their respective names and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees,

charges, costs, and emoluments, respectively, earned or accrued during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall in said month of August, transmit every such statement and report so filed with him, together with his own statement and report as aforesaid, to the attorney-general of the United States.

Any person who shall violate the provisions of this section shall on motion made, under the direction of the attorney-general, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding one year.)

#### OF MEANING OF TERMS AND COMPUTATION OF TIME.

§ 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

§ 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 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.

§ 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.

## THE BANKRUPTCY ACT OF 1841.

*An Act to establish a uniform System of Bankruptcy throughout the United States.*

(Passed August 19th, 1841, repealed March 3rd, 1843.)

SECTION I. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, established throughout the United States a uniform system of bankruptcy, as follows: All persons whatsoever, residing in any State, District or Territory of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, who shall, by petition, setting forth to the best of his knowledge and belief a list of his or their creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of his or their property, rights and credits, of every name, kind and description, and the location and situation of each and every parcel and portion thereof, verified by oath, or, if conscientiously scrupulous of taking an oath, by solemn affirmation, apply to the proper court, as hereinafter mentioned, for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court. All persons, being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters or marine insurers, owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts within the true intent and meaning of this act, and may, upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, to wit: whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter, or marine insurer, shall depart from the State, District or Territory, of which he is an inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested, or shall willingly and fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution; or shall remove his goods, chattels and effects, or conceal them to prevent their being levied upon or taken in execution, or by other process; or make any fraudulent conveyance, assignment, sale, gift or other transfer of his lands, tenements, goods or chattels, credits or evidence of debt: Provided, however, That any person so declared a bankrupt, at the instance of a creditor, may, at his election, by petition to such court within ten days after its decree, be entitled to a trial by jury before such court, to ascertain the fact of such bankruptcy; or if such person shall reside at a great distance from the place of holding such court, the said judge, in his discretion, may direct such trial by jury to be had in the county of such person's residence, in such man-

ner and under such directions as the court may prescribe and give; and all such decrees passed by such court, and not so re-examined, shall be deemed final and conclusive as to the subject-matter thereof.

SEC. 2. And be it further enacted, that all future payments, securities, conveyances, or transfers of property, or agreement made or given by any bankrupt in contemplation of bankruptcy, to any person or persons whatever, not itor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupts; and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt in contemplation of bankruptcy, to any person or persons whatever, not being a bona-fide creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive, the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act: Provided, That all dealings and transactions by and with any bankrupt, bona-fide made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act: Provided, That the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignments or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred: And provided also, That nothing in this act contained shall be construed to annul, destroy or impair, any lawful rights of married women, or minors, or any liens, mortgages, or other securities, on property, real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.

SEC. 3. And be it further enacted, That all the property, and rights of property, of every name and nature, and whether real, personal or mixed, of every bankrupt, except as is hereinafter provided, who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose, which power of appointment and removal such court may exercise at its discretion, toties quoties; and the assignee so appointed shall be vested with all the rights, titles, powers and authorities to sell, manage and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully, to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy declared as aforesaid; and all suits in law or in equity

then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect as they might have been by such bankrupt; and no suit commenced by or against any assignee shall be abated by his death or removal from office, but the same may be prosecuted or defended by his successor in the same office: 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 three hundred dollars; and, also, the wearing apparel of such bankrupt, and that of his wife and children; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of said court.

SEC. 4. And be it further enacted, That every bankrupt who shall bona-fide surrender all his property, and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court, and shall otherwise conform to all the requisitions of this act, shall (unless a majority in number and value of his creditors who have proved their debts shall file their written dissent thereto) be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted him by such court accordingly, upon his petition filed for such purpose; such discharge and certificate not, however, to be granted until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place, to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors, or other persons in interest, may appear and contest the right of the bankrupt thereto: Provided, That in all cases where the residence of the creditor is known, a service on him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, as in their discretion shall seem proper, having regard to the distance at which the creditor resides from such court. And if any such bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors contrary to the provisions of this act, or shall wilfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisites of this act, or shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate; nor shall any person, being a merchant, banker, factor, underwriter, broker, or marine insurer, be entitled to any such discharge or certificate, who shall become bankrupt, and who shall not have kept proper books of account. after the passing of this act; nor any person who, after the passing of this act, shall apply trust funds to his own use: Provided, That no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, indorser, surety, or otherwise, for or with the bankrupt. And such bank-



rupt shall at all times be subject to examination, orally, or upon written interrogatories, in and before such court, or any commission appointed by the court therefor, on oath, or, if conscientiously scrupulous of taking an oath, upon his solemn affirmation, in all matters relating to such bankruptcy, and his acts and doings, and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice; and if, in any such examination, he shall wilfully and corruptly answer, or swear, or affirm, falsely, he shall be deemed guilty of perjury, and shall be punishable therefor in like manner as the crime of perjury is now punishable by the laws of the United States; and such discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property, as aforesaid, contrary to the provisions of this act, on prior reasonable notice specifying in writing such fraud or concealment; and if, in any case of bankruptcy, a majority in number and value of the creditors who shall have proved their debts at the time of hearing of the petition of the bankrupt for a discharge, as hereinbefore provided, shall at such hearing file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court, at such time and place and in such manner as the court may order; or he may appeal from that decision at any time within ten days thereafter to the circuit court next to be held for the same district, by simply entering in the district court, or with the clerk thereof, upon record, his prayer for an appeal. The appeal shall be tried at the first term of the circuit court after it be taken, unless, for sufficient reason, a continuance be granted; and it may be heard and determined by said court summarily, or by a jury, at the option of the bankrupt; and the creditors may appear and object against a decree of discharge and the allowance of the certificate, as hereinbefore provided. And if, upon a full hearing of the parties, it shall appear to the satisfaction of the court, or the jury shall find, that the bankrupt has made a full disclosure and surrender of all his estate, as by this act required, and has in all things conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate, as provided in this act.

Sec. 5. And be it further enacted, That all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona-fide debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid monies as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-

five dollars: Provided, That such labor shall have been performed within six months next before the bankruptcy of his employer; and all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in present; and no creditor or other person coming in and proving his debt or other claim shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby; and in all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off; all such proof of debts shall be made before the court decreeing the bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to disallow and set aside any debt, upon proof that such debt is founded in fraud, imposition, illegality, or mistake; and corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officer, who may be specially appointed for that purpose; and in appointing commissioners to receive proof of debts, and perform other duties under the provisions of this act, the said court shall appoint such persons as have their residence in the county in which such bankrupt lives.

SEC. 6. And be it further enacted, That the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed upon the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity; and for this purpose the said district court shall be deemed always open. And the district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined; and for this purpose the circuit court of such district shall also be deemed always open. And the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, 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. And the said courts shall have full authority and jurisdiction 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 the circuit courts may now do in any suit pending therein in equity. And it shall be the duty of the district court in each district, from time to time to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; which rules, regulations and forms, shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other rules and regulations and forms substituted therefore; and in all such rules, regulations and forms it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by the public at large. And the said courts shall, from time to time, prescribe a tariff or table of fees and charges to be taxed by the officers of the court or other persons for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable, with reference to the nature and character of such services.

SEC. 7. And be it further enacted, That all petitions by any bankrupt for the benefit of this act, and all petitions by a creditor against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district in which the person supposed to be a bankrupt shall reside, or have his place of business, at the time when such petition is filed, except where otherwise provided in this act. And upon every such petition, notice thereof shall be published in one or more public newspapers printed in such district, to be designated by such court, at least twenty days before the hearing thereof; and all persons interested may appear at the time and place where such hearing is thus to be had, and show cause, if any they have, why the prayer of the said petitioner should not be granted; all evidence by witnesses to be used in all hearings before such court shall be under oath, or solemn affirmation, when the party is conscientiously scrupulous of taking an oath, and may be oral or by deposition, taken before such court, or before any commissioner appointed by such court, or before any disinterested State judge of the State in which the deposition is taken; and all proof of debts or other claims, by creditors entitled to prove the same under this act shall be under oath or solemn affirmations, as aforesaid, before such court or commissioner appointed thereby, or before some disinterested State judge of the State where the creditors live, in such form as may be prescribed by the rules and regulations hereinbefore authorized to be made and established by the courts having jurisdiction in bankruptcy. But all such proofs of debts and other claims shall be open to contestation in the proper court having jurisdiction over the proceedings in the particular case in bankruptcy; and as well the assignee as the creditor shall have a right to a trial by jury upon an issue to be directed by such court, to ascertain the validity and amount of such debts or other claims; and the result therein, unless a new trial shall be granted, if in favor of the claims, shall be evidence of the validity and amount of such debts or other claims. And if any person or persons shall falsely and corruptly answer, swear or affirm, in any hearing or on trial of any matter, or in any proceeding in such court in bankruptcy, or before any commissioner, he and they shall be deemed guilty of perjury, and punishable therefor in the manner and to the extent provided by law for other cases.

SEC. 8. And be it further enacted, That the circuit court within and for the district where the decree of bankruptcy is passed shall have concurrent jurisdiction with the district court of the same district of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferrable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee or by or against any person or persons 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 after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

SEC. 9. And be it further enacted, That all sales, transfers and other conveyances of the assignee of the bankrupt's property and rights of property shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy; and all assets received by the assignee in money shall, within sixty days afterwards, be paid into the court, subject to its order respecting its future safe-keeping and disposition; and the court may require of such assignee a bond, with at least two sureties, in such sum as it may deem proper, conditioned for the due and faithful discharge of all his duties, and his compliance with the orders and directions of the court; which bond shall be taken in the name of the United States, and shall, if there be any breach thereof, be sued and suable, under the order of such court, for the benefit of the creditors and other persons in interest.

SEC. 10. And be it further enacted, That in order to ensure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors; and a dividend and distribution of such assets as shall be collected and reduced to money, or so much thereof as can be safely disposed of, consistently with the rights and interests of third persons having adverse claims thereto, shall be made among the creditors who have proved their debts, as often as once in six months from the time of the decree declaring the bankruptcy; notice of such dividends and distribution to be given in some newspaper or newspapers in the district, designated by the court, ten days at least before the order therefor is passed; and the pendency of any suit at law or in equity, by or against such third persons, shall not postpone such division and distribution, except so far as the assets may be necessary to satisfy the same; and in all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled and brought to a close by the court, within two years after the decree declaring the bankruptcy. And where any creditor shall not have proved his debt until a dividend or distribution shall have been made and declared, he shall be entitled to be paid the same amount, pro rata, out of the remaining dividends or distributions thereafter made, as the other creditors have already received, before the latter shall be entitled to any portion thereof.

SEC. 11. And be it further enacted, That the assignee shall have full authority, by and under the order and direction of the proper court in bank-

ruptcy, to redeem and discharge any mortgage or other pledge, or deposit, or lien upon any property, real or personal, whether payable in presenti or at a future day, and to tender a due performance of the conditions thereof. And such assignee shall also have authority, by and under the order and direction of the proper court in bankruptcy, to compound any debts or other claims, or securities due or belonging to the estate of the bankrupt; but no such order or direction shall be made until notice of the application is given in some public newspaper in the district, to be designated by the court, ten days at least before the hearing, so that all creditors and other persons in interest may appear and show cause, if any they have, at the hearing, why the order or direction should not be passed.

SEC. 12. And be it further enacted, That if any person who shall have been discharged under this act, shall afterward become bankrupt, he shall not again be entitled to a discharge under this act, unless his estate shall produce (after all charges) sufficient to pay every creditor seventy-five per cent. on the amount of the debt which shall have been allowed to each creditor.

SEC. 13. And be it further enacted, That the proceedings in all cases in 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 said court, and a docket only, or short memorandum thereof, with the numbers, kept in a book by the clerk of the court; and the clerk of the court, for affixing his name and the seal of the court to any form, or certifying a copy thereof, when required thereto, shall be entitled to receive, as compensation, the sum of twenty-five cents, and no more. And no officer of the court, or commissioner, shall be allowed by the court more than one dollar for taking the proof of any debt or other claim of any creditor or other person against the estate of the bankrupt; but he may be allowed, in addition, his actual travel expenses for that purposes.

SEC. 14. And be it further enacted, That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are herein exempted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignees the whole of the expenses and disbursements paid by them, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, 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 rights and in-

terests 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.

SEC. 15. And be it further enacted, That a copy of any decree of bankruptcy, and the appointment of assignees, as directed by the third section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignees under and by virtue of this act; and that such recital, together with certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt, of, in and to, the lands therein mentioned and described, to the purchaser, as fully to all intents and purposes, as if made by such bankrupt himself immediately before such order.

SEC. 16. And be it further enacted, That all 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 circuit court of the United States for the District of Columbia, and in and upon the supreme or superior courts of any of the Territories of the United States, in cases in bankruptcy, where the bankrupt resides in the said District of Columbia, or in either of the said Territories.

SEC. 17. And be it further enacted, That this act shall take effect from and after the first day of February next.

## THE BANKRUPTCY ACT OF 1800.

*An Act to establish a uniform System of Bankruptcy throughout the United States.*

(Passed April 4th, 1800; repealed December 19th, 1803.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of June next, if any merchant or other person residing within the United States, actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter or marine insurer, shall, with intent unlawfully to delay or defraud his or her creditors, depart from the State in which such person usually resides, or remain absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she cannot be taken, or served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered or taken in execution, or make or cause to be made any fraudulent conveyance of his or her lands, or chattels, or make or admit any false or fraudulent security or evidence of debt, or being arrested for debt, or having surrendered him or herself in discharge of bail, shall remain in prison two months or more, or escape therefrom, or whose lands or effects being attached by process issuing out of, or returnable to, any court of common law, shall not, within two months after written notice thereof, enter special bail and dissolve the same, or in districts in which attachments are not dissolved by the entry of special bail, being arrested for debt after his or her lands and effects, or any part thereof, have been attached for a debt or debts amounting to one thousand dollars or upwards, shall not, upon notice of such attachment, give sufficient security for the payment of what may be recovered in the suit in which he or she shall be arrested, at or before the return-day of the same, to be approved by the judge of the district, or some judge of the court out of which the process issued upon which he is arrested, or to which the same shall be returnable, every such person shall be deemed and adjudged a bankrupt: Provided, that no person shall be liable to a commission of bankruptcy if the petition be not preferred, in manner hereinafter directed, within six months after the act of bankruptcy committed.

SEC. 2. And be it further enacted, That the judge of the district court of the United States. for the district where the debtor resides, or usually resided at the time of committing the act of bankruptcy, upon petition in writing against such person or persons being bankrupt, to him to be exhibited by any one creditor; or by a greater number, being partners, whose single debt shall amount to one thousand dollars, or by two creditors whose debts shall amount to one thousand, five hundred dollars, or by more than two creditors whose debts shall amount to two thousand dollars, shall have power, by commission under his hand and seal, to appoint such good and substantial persons, being citizens of the United States, and resident in such district, as such judge shall

deem proper, not exceeding three, to be commissioners of the said bankrupt, and in case of vacancy or refusal to act, to appoint others from time to time as occasion may require: Provided always, that before any commission shall issue, the creditor or creditors petitioning shall make affidavit or solemn affirmation before the said judge of the truth of his, her or their debts, and give bond, to be taken by the said judge, in the name and for the benefit of the said party so charged as a bankrupt, and in such penalty, and with such surety, as he shall require, to be conditioned for the proving of his, her or their debts, as well before the commissioners as upon a trial at law, in case the due issuing forth of the said commission shall be contested, and also for proving the party a bankrupt, and to proceed on such commission in the manner herein prescribed. And if such debt shall not be really due, or after such commission taken out it cannot be proved that the party was a bankrupt, then the said judge shall upon the petition of the party aggrieved, in case there be occasion, deliver such bond to the said party, who may sue thereon, and recover such damages under the penalty of the same, as, upon trial at law, he shall make appear he has sustained, by reason of any breach of the condition thereof.

SEC. 3. And be it further enacted, That before the commissioners shall be capable of acting, they shall respectively take and subscribe the following oath or affirmation, which shall be administered by the judge issuing the commission, or by any of the judges of the Supreme Court of the United States, or any judge, justice or chancellor of any State court, and filed in the office of the clerk of the district court: "I, A. B., do swear, or affirm, that I will faithfully, impartially and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me, as a commissioner, in a commission of bankruptcy against \_\_\_\_\_, and that without favor or affection, prejudice or malice." And the commissioners, who shall be sworn, as aforesaid, shall proceed, as soon as may be, to execute the same; and upon due examination, and sufficient cause appearing against the party charged, shall and may declare him or her to be a bankrupt: Provided, that before such examination be had, reasonable notice thereof, in writing, shall be delivered to the person charged as a bankrupt; or if he or she be not found at his or her usual place of abode, to some person of the family above the age of twelve years, or if no such person appear, shall be fixed at the front or other public door of the house in which he or she usually resides, and thereupon it shall be in the power of such person, so charged as aforesaid, to demand before, or at the time appointed for such examination, that a jury be empanelled to inquire into the fact or facts alleged as the causes for issuing the commission, and on such demand being made the inquiry shall be had before the judge granting the commission, at such time as he may direct, and in that case such person shall not be declared bankrupt, unless, by the verdict of the jury, he or she shall be found to be within the description of this act, and shall be convicted of some one of the acts described in the first section of this act: Provided also, that any commission which shall be taken out as aforesaid, and which shall not be proceeded in as aforesaid, within thirty days thereafter, may be superseded by the said judge who shall have granted the same, upon the application of the party thereby charged as a bankrupt, or of



any creditor of such person, unless the delay shall have been unavoidable or upon a just occasion.

SEC. 4. And be it further enacted, That the commissioners so to be appointed shall have power forthwith, after they have declared such person a bankrupt, to cause to be apprehended, by warrant under their hands and seals, the body of such bankrupt, wheresoever to be found within the United States: Provided, they shall think that there is reason to apprehend that the said bankrupt intends to abscond or conceal him or herself, and in case it be necessary in order to take the body of said bankrupt, shall have power to cause the doors of the dwelling-house of such bankrupt to be broken, or the doors of any other house in which he or she shall be found.

SEC. 5. And be it further enacted, That it shall be the duty of the commissioners so to be appointed, forthwith, after they have declared such person a bankrupt, and they shall have power to take into their possession all the estate, real and personal, of every nature and description, to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value, (his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted) and also to take into their possession, and secure, all deeds and books of account, papers and writings belonging to such bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed, in manner hereafter provided.

SEC. 6. And be it further enacted, That the said commissioners shall forthwith, after they have declared such person a bankrupt, cause due and sufficient public notice thereof to be given, and in such notice shall appoint some convenient time and place for the creditors to meet, in order to choose an assignee or assignees of the said bankrupt's estate and effects; at which meeting the said commissioners shall admit the creditors of such bankrupt to prove their debts; and where any creditor shall reside at a distance from the place of such meeting, shall allow the debt of such creditor to be proved by oath or affirmation, made before some competent authority, and duly certified, and shall permit any person duly authorized by letter of attorney from such creditor, due proof of the execution of such letter of attorney being first made, to vote in the choice of an assignee or assignees of such bankrupt's estate and effects in the place and stead of such creditor: and the said commissioners shall assign, transfer or deliver over, all and singular, the said bankrupt's estate and effects, aforesaid, with all muniments and evidences thereof, to such person or persons as the major part in value of such creditors, according to the several debts then proved, shall choose as aforesaid: Provided always, That in such choice, no vote shall be given by, or in behalf of, any creditor whose debt shall not amount to two hundred dollars.

SEC. 7. Provided always, and be it further enacted, That it shall be lawful for the said commissioners, as often as they shall see cause, for the better preserving and securing of the bankrupt's estate, before assignees shall be chosen as aforesaid, immediately to appoint one or more assignee or assignees of the estate and effects aforesaid, or any part thereof; which assignee or assignees aforesaid, or any of them, may be removed at the meeting of the creditors, so to be appointed as aforesaid for the choice of assignees, is such credit-

ors, entitled to vote as aforesaid, or the major part in value of them, shall think fit; and such assignee or assignees as shall be so removed, shall deliver up all the estate and effects of such bankrupt which shall have come to his or their hands or possession, unto such other assignee or assignees as shall be chosen by the creditors as aforesaid; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners; and if such first assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing, from such new assignee or assignees of their appointment, as aforesaid, to deliver over as aforesaid, all the estate and effects as aforesaid, every such assignee or assignees shall, respectively, forfeit a sum not exceeding five thousand dollars, for the use of the creditors, and shall moreover be liable for the property so detained.

SEC. 8. And be it further enacted, That at any time previous to the closing of the accounts of the said assignee or assignees so chosen as aforesaid, it shall be lawful for such creditors of the bankrupt as are hereby authorized to vote in the choice of assignees, or the major part of them in value, at a regular meeting of the said creditors, to be called for that purpose by the said commissioners, or by one-fourth in value of such creditors, to remove all or any of the assignees chosen as aforesaid, and to choose one or more in his or their place and stead; and such assignee or assignees as shall be so removed shall deliver up all the estate and effects of such bankrupt which shall have come into his or their hands or possession, unto such new assignee or assignees as shall be chosen by the creditors at such meeting; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners: and if such former assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing from such new assignee or assignees of their appointment, as aforesaid, to deliver over, as aforesaid, all the estate and effects aforesaid, every such former assignee or assignees shall respectively forfeit a sum not exceeding five thousand dollars for the use of the creditors, and moreover shall be liable for the property so detained.

SEC. 9. And be it further enacted, That whenever a new assignee or assignees shall be chosen as aforesaid, no suit at law or in equity shall be thereby abated; but it shall and may be lawful for the court in which any suit may depend, upon the suggestion of the removal of a former assignee or assignees, and of the appointment of a new assignee or assignees, to allow the name of such new assignee or assignees, to be substituted in place of the name or names of the former assignee or assignees, and thereupon the suit shall be prosecuted in the name or names of the new assignee or assignees, in the same manner as if he or they had originally commenced the suit in his or their own names.

SEC. 10. And be it further enacted, That the assignment or assignments of the commissioners of the bankrupt's estate and effects as aforesaid, made as aforesaid, shall be good at law or in equity against the bankrupt, and all persons claiming by, from or under such bankrupt, by any act done at the time,

or after, he shall have committed the act of bankruptcy upon which the commission issued: Provided always, that in case of a bona-fide purchase made before the issuing of the commission from or under such bankrupt, for a valuable consideration, by any person having no knowledge, information or notice of any act of bankruptcy committed, such purchase shall not be invalidated or impeached.

SEC. 11. And be it further enacted, That the said commissioners shall have power, by deed or deeds, under their hands and seals, to assign and convey to the assignee or assignees to be appointed or chosen as aforesaid, any lands, tenements or hereditaments which such bankrupt shall be seized of or entitled to, in fee tail, at law, or in equity, in possession, remainder or reversion, for the benefit of the creditors; and all such deeds being duly executed and recorded, according to the laws of the State within which such lands, tenements or hereditaments may be situated, shall be good and effectual against all persons whom the said bankrupt, by common recovery, or other means, might or could bar of any estate, right, title of or in the said lands, tenements or hereditaments.

SEC. 12. And be it further enacted, That if any bankrupt shall have conveyed or assured any lands, goods or estate, unto any person, upon condition or power of redemption, by payment of money or otherwise, it shall be lawful for the commissioners, or for any person by them duly authorized for that purpose, by writing, under their hands and seals, to make tender of money or other performance according to the nature of such condition, as fully as the bankrupt might have done; and the commissioners, after such performance or tender, shall have power to assign such lands, goods and estate for the benefit of the creditors, as fully and effectually as any other part of the estate of such bankrupt.

SEC. 13. And be it further enacted, That the commissioners aforesaid shall have power to assign, for the use aforesaid, all the debts due to such bankrupt, or to any other person for his or her use or benefit; which assignment shall vest the property and right thereof in the assignee or assignees of such bankrupt, as fully as if the bond, judgment, contract or claim had originally belonged or been made to the said assignees; and after the said assignment, neither the said bankrupt nor any person acting as trustee for him or her, shall have power to recover or discharge the same, nor shall the same be attached as the debt of the said bankrupt; but the assignee or assignees aforesaid shall have such remedy to recover the same, in his or their own name or names, as such bankrupt might or could have had if no commission of bankruptcy had issued. And when any action in the name of such bankrupt shall have been commenced, and shall be pending for the recovery of any debt or effects of such bankrupt, which shall be assigned, or shall or might become vested in the assignee or assignees of such bankrupt as aforesaid, then such assignee or assignees may claim to be, and shall be thereupon, admitted to prosecute such action in his or their name, for the use and benefit of the creditors of such bankrupt; and the same judgment shall be rendered in such action, and all attachments and other security taken therein shall be in like manner holden and liable, as if the said action had been originally commenced in the name of said assignee or assignees, after the original plaintiff therein

had become a bankrupt as aforesaid: Provided, that where a debtor shall have, bona-fide, paid his debt to any bankrupt, without notice that such person was bankrupt, he or she shall not be liable to pay the same to the assignee or assignees.

SEC. 14. And be it further enacted, That if complaint shall be made or information given to the commissioners, or if they shall have good reason to believe or suspect, that any of the property, goods, chattels, or debts, of the bankrupt are in the possession of any other person, or that any person is indebted to or for the use of the bankrupt, then the said commissioners shall have power to summon, or to cause to be summoned, by their attorney or other person duly authorized by them, all such persons before them, or the judge of the district where such person shall reside, by such process, or other means, as they shall think convenient, and upon their appearance to examine them by parole or by interrogatories, in writing, on oath or affirmation, which oath or affirmation they are hereby empowered to administer, respecting the knowledge of all such property, goods, chattels and debts; and if such person shall refuse to be sworn or affirmed, and to make answer to such questions or interrogatories as shall be administered, and to subscribe the said answers, or upon examination shall not declare the whole truth, touching the subject-matter of such examination, then it shall be lawful for the commissioners or judge to commit such person to prison, there to be detained until they shall submit themselves to be examined in manner aforesaid, and they shall, moreover, forfeit double the value of all the property, goods, chattels and debts by them concealed.

SEC. 15. And be it further enacted, That if any of the aforesaid persons shall, after legal summons to appear before the commissioners or judge, to be examined, refuse to attend, or shall not attend at the time appointed, having no such impediment as shall be allowed of by the commissioners or judge it shall be lawful for the said commissioners or judge to direct their warrants to such person or persons as by them shall be thought proper, to apprehend such persons as shall refuse to appear, and to bring them before the commissioners or judge to be examined, and upon their refusal to come, to commit them to prison, until they shall submit themselves to be examined according to the directions of this act: Provided, that such witnesses as shall be so sent for shall be allowed such compensation as the commissioners or judge shall think fit, to be ratably borne by the creditors; and if any person, other than the bankrupt, either by subornation of others, or by his or her own act, shall wilfully or corruptly commit perjury, shall on conviction thereof be fined not exceeding four thousand dollars and imprisoned not exceeding two years, and moreover shall, in either case, be rendered incapable of being a witness in any court of record.

SEC. 16. And be it further enacted, That if any person or persons shall fraudulently or collusively claim any debts, or claim or detain any real or personal estate of the bankrupt, every such person shall forfeit double the value thereof, to and for the use of the creditors.

SEC. 17. And be it further enacted, That if any person, prior to his or her becoming a bankrupt, shall convey to any of his or her children, or other persons, any lands or goods, or transfer his or her debts or demands into other

persons' names, with intent to defraud his or her creditors, the commissioners shall have power to assign the same in as effectual a manner as if the bankrupt had been actually seized or possessed thereof.

SEC. 18. And be it further enacted, That if any person or persons who shall become bankrupt within the intent and meaning of this act, and against whom a commission of bankruptcy shall be duly issued, upon which commission such person or persons shall be declared bankrupt, shall not, within forty-two days after notice thereof, in writing, to be left at the usual place of abode of such person or persons, or personal notice in case such person or persons be then in prison, and notice given in some gazette, that such commission hath been issued, and of the time and place of meeting of the commissioners, surrender him or herself to the said commissioners, and sign or subscribe such surrender, and submit to be examined, from time to time, upon oath or solemn affirmation, by and before such commissioners, and in all things conform to the provisions of this act, and also upon such his or her examination fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times, he or she hath disposed of, assigned or transferred, any of his or her goods, wares or merchandise, monies or other effects and estate, and of all books, papers and writings relating thereunto of which he or she was possessed, or in or to which he or she was in any way interested or entitled, or which any person or persons shall then have, or shall have had in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission, or whereby such bankrupt, or his or her family then hath or may have or expect any profit, possibility of profit, benefit or advantage whatsoever, except only such part of his or her estate and effects as shall have been really and bona-fide before sold and disposed of in the way of his or her trade and dealings, and except such sums of money as shall have been laid out in the ordinary expenses of his or her family, and also upon such examination, execute in due form of law such conveyance, assurance and assignment of his or her estate, whatsoever and wheresoever, as shall be devised and directed by the commissioners, to vest the same in the assignees, their heirs, executors, administrators and assigns forever, in trust, for the use of all and every the creditors of such bankrupt, who shall come in and prove their debts under the commission; and deliver up unto the commissioners all such part of his or her, the said bankrupt's goods, wares, merchandise, money, effects and estate, and all books, papers and writing thereunto relating, as at the time of such examination shall be in his or her possession, custody or power, his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted, then he or she the said bankrupt, upon the conviction of any wilful default or omission in any of the matters or things aforesaid, shall be adjudged a fraudulent bankrupt, and shall suffer imprisonment for a term not less than twelve months, nor exceeding ten years, and shall not at any time after be entitled to the benefits of this act: Provided always, that in case any bankrupt shall be in prison or custody at the time of issuing such commission, and is willing to surrender and submit to be examined according to the directions of this act, and can be brought before the said commissioners

and creditors for that purpose, the expense thereof shall be paid out of the said bankrupt's effects, and in case such bankrupt is in execution, or cannot be brought before the commissioners, that then the said commissioners, or some one of them, shall from time to time attend the said bankrupt in prison or custody, and take his or her discovery as in other cases, and the assignees or one of them, or some person appointed by them, shall attend such bankrupt in prison or custody, and produce his or her books, papers and writings, in order to enable him or her to prepare his or her discovery; a copy whereof the said assignees shall apply for, and the said bankrupt shall deliver to them or their order within a reasonable time after the same shall have been required.

SEC. 19. And be it further enacted, That the said commissioners shall appoint, within the said forty-two days, so limited as aforesaid, for the bankrupt to surrender and conform as aforesaid, not less than three several meetings for the purposes aforesaid, the third of which meetings shall be on the last of the said forty-two days: Provided always, that the judge of the district within which such commission issues shall have power to enlarge the time so limited as aforesaid, for the purposes aforesaid, as he shall think fit, not exceeding fifty days, to be computed from the end of the said forty-two days, so as such order for enlarging the time be made at least six days before the expiration of said term.

SEC. 20. And be it further enacted, That it shall be lawful for the commissioners, or any other person or officers by them to be appointed, by their warrant, under their hands and seals, to break open in the day time the houses, chambers, shops, warehouses, doors, trunks or chests, of the bankrupt, where any of his or her goods or estate, deeds, books of account or writings, shall be, and to take possession of the goods, money and other estate, deeds, books of account or writings of such bankrupt.

SEC. 21. And be it further enacted, That if the bankrupt shall refuse to be examined, or to answer fully, or to subscribe his or her examination as aforesaid, it shall be lawful for the commissioners to commit the offender to close imprisonment until he or she shall conform him or herself; and if the said bankrupt shall submit to be examined, and upon his or her examination it shall appear that he or she hath committed wilful or corrupt perjury, he or she may be indicted therefor, and being thereof convicted shall suffer imprisonment for a term not less than two years, nor exceeding ten years.

SEC. 22. And be it further enacted, That every bankrupt having surrendered, shall, at all seasonable times before the expiration of the said forty-two days, as aforesaid, or of such further time as shall be allowed to finish his or her examination, be at liberty to inspect his or her books and writings, in the presence of some person to be appointed by the commissioners, and to bring with him or her, for his or her assistance, such persons as he or she shall think fit, not exceeding two at one time, and to make extracts and copies to enable him or her to make a full discovery of his or her effects; and the said bankrupt shall be free from arrests, in coming to surrender, and after having surrendered to the said commissioners for the said forty-two days, or such farther time as shall be allowed for the finishing his or her examination; and in case such bankrupt shall be arrested for debt, or taken on any escape war-

rant or execution, coming to surrender, or after his or her surrender within the time before mentioned, then on producing such summons or notice under the hands of the commissioners, and giving the officer a copy thereof, he or she shall be discharged; and in case any officer shall afterwards detain such bankrupt, such officer shall forfeit to such bankrupt, for his or her own use, ten dollars for every day he shall detain the bankrupt.

SEC. 23. And be it further enacted, That every person who shall knowingly or wilfully receive or keep concealed any bankrupt so as aforesaid summoned to appear, or who shall assist such bankrupt in concealing him or herself, or in absconding, shall suffer such imprisonment, not exceeding twelve months, or pay such fine to the United States, not exceeding one thousand dollars, as upon conviction thereof shall be adjudged.

SEC. 24. And be it further enacted, That the said commissioners shall have power to examine, upon oath or affirmation, the wife of any person lawfully declared a bankrupt, for the discovery of such part of his estate as may be concealed or disposed of by such wife, or by any other person; and the wife shall incur such penalties for not appearing before the said commissioners, or refusing to be sworn or affirmed or examined, and to subscribe her examination, or for not disclosing the truth, as by this act is provided against any other person in like cases.

SEC. 25. And be it further enacted, That in case any person shall be committed by the commissioners for refusing to answer, or for not fully answering any question, or for any other cause, the commissioners shall in their warrant specify such question or other cause of commitment.

SEC. 26. And be it further enacted, That if after the bankrupt shall have finished his or her final examination, any other person or persons shall voluntarily make discovery of any part of such bankrupt's estate, before unknown to the commissioners, such person or persons shall be entitled to five per cent. out of the effects so discovered, and such further reward as the commissioners shall think proper; and any trustee having notice of the bankruptcy, wilfully concealing the estate of any bankrupt for the space of ten days after the bankrupt shall have finished his final examination, as aforesaid, shall forfeit double the value of the estate so concealed, for the benefit of the creditors.

SEC. 27. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof such commission may and shall be superseded, and it shall and may be lawful for either of the judges having authority to grant the commission as aforesaid, to award any creditor petitioning another commission, and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission, in manner aforesaid, in trust for, and to be divided among, the other creditors of the said bankrupt, in proportion to their respective debts.

SEC. 28. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security, for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof, such commission shall and may be superseded, and it shall and may be lawful for either of the judges, having authority to grant the commission as aforesaid, to award any creditor petitioning another commission; and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back, or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission in manner aforesaid, in trust for, and to be divided amongst the other creditors of the said bankrupt, in proportion to their respective debts.

SEC. 29. And be it further enacted, That every person who shall be chosen assignee of the estate and effects of a bankrupt shall, at some time after the expiration of four months, and within twelve months from the time of issuing the commission, cause at least thirty days public notice to be given of the time and place the commissioners and assignees intend to meet, to make a dividend or distribution of the bankrupt's estate and effects; at which time the creditors who have not before proved their debts shall be at liberty to prove the same; and upon every such meeting the assignee or assignees shall produce to the commissioners and creditors then present fair and just accounts of all his or their receipts and payments, touching the bankrupt's estate and effects, and of what shall remain outstanding, and the particulars thereof, and shall, if the creditors then present, or a major part of them, require the same, be examined upon oath or solemn affirmation before the same commissioners, touching the truth of such accounts; and in such accounts the said assignee or assignees shall be allowed and retain all such sum and sums of money as they shall have paid or expended in suing out and prosecuting the commission, and all other just allowances on account of or by reason or means of their being assignee or assignees; and the said commissioners shall order such part of the net produce of the said bankrupt's estate as by such accounts or otherwise shall appear to be in the hands of the said assignees, as they shall think fit, to be forthwith divided among such of the bankrupt's creditors as have duly proved their debts under such commission, in proportion to their several and respective debts; and the commissioners shall make such their order for a dividend in writing, under their hands, and shall cause one part of such order to be filed amongst the proceedings under the said commission, and shall deliver to each of the assignees under such commission a duplicate of such their order, which order of distribution shall contain an account of the time and place of making such order, and the sum total or quantum of all the debts proved under the commission, and the sum total of the money remaining in the hands of the assignee or assignees to be divided, and how many per cent. in particular is there ordered to be paid to every creditor of his debt; and the said assignee or assignees, in pursuance of such order, and without any deed or deeds of distribution to be made for the purpose, shall forthwith



make such dividend and distribution accordingly, and shall take receipts in a book to be kept for the purpose, from each creditor, for the part or share of such dividend or distribution which he or they shall make and pay to each creditor respectively; and such order and receipt shall be a full and effectual discharge to such assignee for so much as he shall fairly pay, pursuant to such order as aforesaid.

SEC. 30. And be it further enacted, That within eighteen months next after the issuing of the commission the assignee or assignees shall make a second dividend of the bankrupt's estate and effects, in case the same were not wholly divided upon the first dividend, and shall cause due public notice to be given of the time and place the said commissioners intend to meet to make a second distribution of the bankrupt's estate and effects, and for the creditors who shall not before have proved their debts to come in and prove the same; and at said meeting the said assignees shall produce, on oath or solemn affirmation as aforesaid, their account of the bankrupt's estate and effects, and what upon the balance thereof shall appear to be in their hands shall, by like order of the commissioners, be forthwith divided amongst such of the bankrupt's creditors as shall have made due proof of their debts, in proportion to their several and respective debts, which second dividend shall be final, unless any suit at law or in equity be pending, or any part of the estate standing out that could not have been disposed of, or that the major part of the creditors shall not have agreed to be sold or disposed of, or unless some other or future estate or effects of the bankrupt shall afterwards come to or vest in the said assignees, in which cases the said assignees shall, as soon as may be, convert such future or other estate and effects into money, and shall within two months after the same be converted into money, by like order of the commissioners, divide the same among such bankrupt's creditors as shall have made due proof of their debt under such commission.

SEC. 31. And be it further enacted, That in the distribution of the bankrupt's effects there shall be paid to every one of the creditors a portion-rate according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or speciality, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bankrupt, (Provided, there be no execution executed upon any of the real or personal estate of such bankrupt before the time he or she became bankrupts) shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt.

SEC. 32. And be it further enacted, That the assignees shall keep one or more distinct book or books of account, wherein he or they shall duly enter all sums of money or effects which he or they shall have received or got into his or their possession, of the said bankrupt's estate, to which books of account every creditor who shall have proved his or her debt shall, at all reasonable times, have free resort and inspect the same as often as he or she shall think fit.

SEC. 33. And be it further enacted, That every bankrupt, not being in prison or custody, shall at all times after his surrender be bound to attend the assignees upon every reasonable notice, in writing, for that purpose, given or

left at the usual place of his or her abode, in order to assist in making out the accounts of the said bankrupt's estate and effects, and to attend any court of record, to be examined touching the same, or such other business as the said assignee shall judge necessary, for which he shall receive three dollars per day.

SEC. 34. And be it further enacted, That all and every person and persons who shall become bankrupt as aforesaid, and who shall within the time limited by this act surrender him or herself to the commissioners, and in all things conform as in and by this act is directed, shall be allowed five per cent. upon the net produce of all the estate that shall be recovered in and received, which shall be paid unto him or her by the assignee or assignees, in case the net produce, to be paid as aforesaid so as such ten per cent. shall not, in the whole, creditors of said bankrupt who shall have proved their debts under such commission the amount of fifty per cent. on their said debts, respectively, and so as the said five per cent. shall not exceed, in the whole, the sum of five hundred dollars; and in case the net produce of the said estate shall, over and above the allowance hereafter mentioned, be sufficient to pay the said creditors seventy-five per cent. on the amount of their said debts, respectively, that then the said bankrupt shall be allowed ten per cent. on the amount of such net produce, to be paid as aforesaid so as such ten per cent. shall not, in the whole, exceed the sum of eight hundred dollars; and every such bankrupt shall be discharged from all debts by him or her due or owing at the time he or she became bankrupt, and all which were or might have been proved under the said commission; and in case any such bankrupt shall afterwards be arrested or prosecuted or impleaded, for or on account of any of the said debts, such bankrupt may appear without bail, and may plead the general issue, and give this act and the special matter in evidence. And the certificate of such bankrupt's conforming, and the allowance thereof, according to the directions of this act, shall be, and shall be allowed to be, sufficient evidence, prima facie of the party's being a bankrupt within the meaning of this act, and of the commission and other proceedings precedent to the obtaining such certificate, and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action can prove the said certificate was obtained unfairly and by fraud, or unless he can make appear any concealment of estate or effects by such bankrupt to the value of one hundred dollars. Provided, That no such discharge of a bankrupt shall release or discharge any person who was a partner with such bankrupt at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts from which such bankrupt was discharged as aforesaid.

SEC. 35. Provided always, and be it further enacted, That if the net proceeds of the bankrupt's estate, so to be discovered, recovered and received, shall not amount to so much as will pay all and every of the creditors of the said bankrupt who shall have proved their debts under the said commission, the amount of fifty per cent. on their debts respectively, after all charges first deducted, that then and in such case the bankrupt shall not be allowed five per centum on such estate as shall be recovered in, but shall have and be paid by the assignees so much money as the commissioners shall think fit to allow, not more than three hundred dollars, nor exceeding three per centum on the net proceeds of the said bankrupt's estate.

SEC. 36. Provided also, and be it further enacted, That no person becoming a bankrupt according to the intent and provisions of this act shall be entitled to a certificate of discharge, or to any of the benefits of the act, unless the commissioners shall certify under their hands to the judge of the district within which such commission issues that such bankrupt hath made a full discovery of his or her estate and effects, and in all things conformed him or herself to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of the said bankrupt's estate and effects, and in all things conformed him or herself to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of the said bankrupt's estate and effects; or unless the said judge should be of opinion that the said certificate was unreasonably denied by the commissioners; and unless two-thirds, in number and in value, of the creditors of the bankrupt, who shall be creditors for not less than fifty dollars respectively, and who shall have duly proved their debts under the said commission, shall sign such certificate to the judge, and testify their consent to the allowance of a certificate of discharge in pursuance of this act; which signing and consent shall be also certified by the commissioners; but the said commissioners shall not certify the same till they have proof by affidavit or affirmation, in writing, of such creditors, or of the persons respectively authorized for that purpose signing the said certificate; which affidavit or affirmation, together with the letter or power of attorney to sign, shall be laid before the judge of the district within which such commission issues, in order for the allowing the certificate of discharge, and the said certificate shall not be allowed unless the bankrupt make oath or affirmation in writing that the certificate of the commissioners and consent of the creditors thereunto were obtained fairly and without fraud; and any of the creditors of the said bankrupt are allowed to be heard, if they shall think fit before the respective persons aforesaid, against the making or allowing of such certificates by the commissioners or judge.

SEC. 37. And be it further enacted, That if any creditor, or pretended creditor, of any bankrupt shall exhibit to the commissioners any fictitious or false debt or demand, with intent to defraud the real creditors of such bankrupt, and the bankrupt shall refuse to make discovery thereof and suffer the fair creditors to be imposed upon, he shall lose all title to the allowance upon the amount of his effects and to a certificate of discharge as aforesaid, nor shall he be entitled to the said allowance or certificate if he has lost at any one time fifty dollars, or in the whole three hundred dollars, after the passing of this act and within twelve months before he became a bankrupt, by any manner of gaming or wagering whatever.

SEC. 38. And be it further enacted, That if any bankrupt who shall have obtained his certificate shall be taken in execution or detained in prison on account of any debts owing before he became a bankrupt, by reason that judgment was obtained before such certificate was allowed, it shall be lawful for any of the judges of the court wherein judgment was so obtained, or for any court, judge or justice, within the district in which such bankrupt shall be detained, having powers to award or allow the writ of habeas corpus, on

such bankrupt producing his certificate so as aforesaid allowed, to order any sheriff or gaoler who shall have such bankrupt in custody to discharge such bankrupt without fee or charge, first giving reasonable notice to the plaintiff, or his attorney, of the motion for such discharge.

SEC. 39. And be it further enacted, That every person who shall have bona-fide given credit to or taken securities, payable at future days, from persons who are or shall become bankrupts, not due at the time of such persons becoming bankrupt, shall be admitted to prove their debts and contracts as if they were payable presently, and shall have a dividend in proportion to the other creditors, discounting, where no interest is payable, at the rate of so much per centum per annum, as is equal to the lawful interest of the State where the debt was payable, and the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities as if such money had been due and payable before the time of his or her becoming bankrupt; and such creditors may petition for a commission, or join in petitioning.

SEC. 40. And be it further enacted. That in case any person committed by the commissioners' warrant shall obtain a habeas corpus, in order to be discharged and there shall appear any insufficiency in the form of the warrant, it shall be lawful for the court or judge before whom such party shall be brought by habeas corpus, by rule or warrant, to commit such persons to the same prison, there to remain until he shall conform as aforesaid, unless it shall be made to appear that he had fully answered all lawful questions put to him by the commissioners; or in case such person was committed for not signing his examination, unless it shall appear that the party had good reason for refusing to sign the same or that the commissioners had exceeded their authority in making such commitment; and in case the gaoler to whom such person shall be committed shall wilfully or negligently suffer such person to escape, or go without the doors or walls of the prison, such gaoler shall for such offense, being convicted thereof, forfeit a sum not exceeding three thousand dollars, for the use of the creditors.

SEC. 41. And be it further enacted, That the gaoler shall, upon the request of any creditor having proved his debt and showing a certificate thereof under the hands of the commissioners, which the commissioners shall give without fee or reward, produce the person so committed; and in case such gaoler shall refuse to show such person to such creditor requesting the same, such person shall be considered as having escaped, and the gaoler or sheriff so refusing shall be liable as for a wilful escape.

SEC. 42. And be it further enacted, That where it shall appear to the said commissioners that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other, and what shall appear to be due on either side on the balance of such account after such set off, and no more, shall be claimed or paid on either side respectively.

SEC. 43. And be it further enacted, That it shall and may be lawful to and

for the assignee or assignees of any bankrupt's estate and effects, under the direction of the commissioners, and by and with the consent of the major part in value of such of the said bankrupt's creditors as shall have duly proved their debts under the commission, and shall be present at any meeting of the said creditors, to be held in pursuance of due and public notice for that purpose given, to submit any difference or dispute for, on account of, or by reason or means of, any matter, cause, or thing whatsoever, relating to such bankrupt, or to his or her estate or effects, to the final end and determination of arbitrators to be chosen by the said commissioners, and the major part in value of such creditors as shall be present at such meeting as aforesaid, in such manner as the said assignee or assignees, under the direction and with the consent aforesaid, shall think fit and can agree; and the same shall be binding on the several creditors of the said bankrupt, and the said assignee or assignees are hereby indemnified for what they shall fairly do, according to the directions aforesaid.

SEC. 44. And be it further enacted, That the assignees shall be, and hereby are, vested with full power to dispose of all the bankrupt's estate, real and personal, at public auction or vendue, without being subject to any tax, duty, imposition, or restriction, any law to the contrary notwithstanding.

SEC. 45. And be it further enacted, That if after any commission of bankruptcy sued forth, the bankrupt happen to die before the commissioners shall have distributed the effects, or any part thereof, the commissioners shall nevertheless proceed to execute the commission as fully as they might have done if the party were living.

SEC. 46. And be it further enacted, That where any commission of bankruptcy shall be delivered to the commissioners therein named, to be executed, it shall and may be lawful for them before they take the oath or affirmation of qualification, to demand and take from the creditor or creditors prosecuting such commission a bond with one good security, if required, in the penalty of one thousand dollars, conditioned for the payment of the costs, charges and expenses which shall arise and accrue upon the prosecution of the said commission: Provided always, that the expenses so as aforesaid to be secured and paid by the petitioning creditor or creditors shall be repaid to him or them by the commissioner or assignees out of the first monies arising from the bankrupt's estate or effects, if so much be received therefrom.

SEC. 47. And be it further enacted, That the district judges in each district respectively shall fix a rate of allowance to be made to the commissioners of bankruptcy, as compensation of services to be rendered under the commission, and it shall be lawful for any creditor, by petition to the district judge, to except to any charge contained in the account of the commissioners: and the said judge, after hearing the commissioners, may in a summary way decide upon the validity of such exception.

SEC. 48. And be it further enacted, That all penalties given by this act for the benefit of the creditors shall be recovered by the assignee or assignees by action of debt, and the money so recovered, the charges of suit being deducted, shall be distributed towards payment of the creditors.

SEC. 49. And be it further enacted, That if any action shall be brought against any commissioner, or assignee or other person, having authority under

the commission, for anything done and performed by force of this act, the defendant may plead the general issue, and give this act and the special matter in evidence; and in case of a non-suit, discontinuance, or verdict or judgment for him, he shall recover double costs.

SEC. 50. And be it further enacted, That if any estate, real or personal, shall descend, revert to, or become vested in any person after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate signed by the judge as aforesaid, all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignee or assignees in fee simple or otherwise, in like manner as above directed, with the estate of the said bankrupt, at the time of the bankruptcy, and the proceeds thereof shall be divided among the creditors.

SEC. 51. And be it further enacted, That the said commissioners shall, once in every year, carefully file in the clerk's office of the district court all the proceedings had in every case before them, and which shall have been finished, including the commissions, examinations, dividends, entries and other determinations of the said commissioners, in which office the final certificate of the said bankrupt may also be recorded; all which proceedings shall remain of record in the said office, and certified copies thereof shall be admitted as evidence in all courts, in like manner as the copies of the proceedings of the said district court are admitted in other cases.

SEC. 52. And be it further enacted, That it shall and may be lawful for any creditor of such bankrupt to attend all or any of the examinations of said bankrupt, and the allowance of the final certificate, if he shall think proper, and then and there to propose interrogatories to be put by the judge or commissioners to the said bankrupt and others, and also to produce and examine witnesses and documents before such judge or commissioners, relative to the subject-matter before them. And in case either the bankrupt or creditor shall think him or herself aggrieved by the determination of the said judge or commissioners, relative to any material fact in the commencement or progress of the said proceedings, or in the allowance of the certificate aforesaid, it shall and may be lawful for either party to petition the said judge, setting forth such facts and the determination thereon, with the complaint of the party, and a prayer for trial by jury to determine the same, and the said judge shall, in his discretion, make order thereon, and reward a venire facias to the marshal of the district, returnable within fifteen days before him, for the trial of the facts mentioned in the said petition, notice whereof shall be given to the commissioners and creditors concerned in the same; at which time the trial shall be had, unless, on good cause shown, the judge shall give farther time, and judgment being entered on the verdict of the jury shall be final on the said facts, and the judge or commissioners shall proceed agreeably thereto.

SEC. 53. And be it further enacted, That the commissioners before the appointment of assignees, and the assignees after such appointment, may from time to time make such allowance out of the bankrupt's estate until he shall have obtained his final discharge. as in their opinion may be requisite for the necessary support of the said bankrupt and his family.

SEC. 54. And be it further enacted, That it shall be lawful for the major

part in value of the creditors, before they proceed to the choice of assignees, to direct in what manner, with whom and where the monies arising by and to be received from time to time out of the bankrupt's estate shall be lodged, until the same shall be divided among the creditors, as herein provided; to which direction every such assignee and assignees shall conform as often as three hundred dollars shall be received.

SEC. 55. And be it further enacted, That every matter and thing by this act required to be done by the commissioners of any bankrupt shall be valid to all intents and purposes, if performed by a majority of them.

SEC. 56. And be it further enacted, That in all cases where the assignee shall prosecute any debtor of the bankrupt for any debt, duty or demand, the commission, or a certified copy thereof, and the assignment of the commissioners of the bankrupt's estate, shall be conclusive evidence of the issuing the commission and of the person named therein being a trader and bankrupt at the time mentioned therein.

SEC. 57. And be it further enacted, That every person obtaining a discharge from his debts, by certificate as aforesaid, granted under a commission of bankruptcy, shall not on any future commission be entitled to any other certificate than a discharge of his person only; unless the net proceeds of the estate and effects of such person so becoming bankrupt a second time shall be sufficient to pay seventy-five per cent. to his or her creditors on the amount of their debts respectively.

SEC. 58. And be it further enacted, That any creditor of a person against whom a commission of bankruptcy shall have been sued forth, and who shall lay his claim before the commissioners appointed in pursuance of this act, may at the same time declare his unwillingness to submit the same to the judgment of the said commissioners, and his wish that a jury may be impanelled to decide thereon: And in like manner the assignee or assignees of such bankrupt may object to the consideration of any particular claim by the commissioners, and require that the same should be referred to a jury. In either case such objection and request shall be entered on the books of the commissioners, and thereupon an issue shall be made up between the parties, and a jury shall be impanelled, as in other cases, to try the same in the circuit court for the district in which such bankrupt has usually resided. The verdict of such jury shall be subject to the control of the court, as in suits originally instituted in the said court, and when rendered, if not set aside by the said court, shall be certified to the commissioners, and shall ascertain the amount of any such claim, and such creditor or creditors shall be considered in all respects as having proved their debts under the commission.

SEC. 59. And be it further enacted, That the lands and effects of any person becoming bankrupt may be sold on such credit, and on such security, as a major part in value of the creditors may direct: Provided, nothing herein contained shall be allowed so to operate as to retard the granting the bankrupt's certificate.

SEC. 60. And be it further enacted, That if any person becoming bankrupt shall be in prison, it shall be lawful for any creditor or creditors, at whose suit he or she shall be in execution, to discharge him or her from custody, or if such creditor or creditors shall refuse to do so, the prisoner may petition

the commissioners to liberate him or her, and thereupon, if in the opinion of the commissioners the conduct of such bankrupt shall have been fair, so as to entitle him or her in their opinion to a certificate, when by law such certificate might be given, it shall be lawful for them to direct the discharge of such prisoner, and to enter the same in their books, which being notified to the keeper of the gaol in which such prisoner may be confined shall be a sufficient authority for his or her discharge: Provided, that in either case, such discharge shall be no bar to another execution, if a certificate shall be refused to such bankrupt: And provided also, that it shall be no bar to a subsequent imprisonment of such bankrupt by order of the commissioners, in conformity with the provisions of this act.

SEC. 61. And be it further enacted, That this act shall not repeal or annul, or be construed to repeal or annul, the laws of any State now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may respect persons who are or may be clearly within the purview of this act, and whose debts shall amount in the cases specified in the second section thereof to the sums herein mentioned. And if any person within the purview of this act shall be imprisoned for the space of three months, for any debt or upon any contract, unless the creditors of such prisoner shall proceed to prosecute a commission of bankruptcy against him or her, agreeably to the provisions of this act, such debtor may and shall be entitled to relief, under any such laws for the relief of insolvent debtors, this act notwithstanding.

SEC. 62. And be it further enacted, That nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them.

SEC. 63. And be it further enacted, That nothing contained in this act shall be taken or construed to invalidate or impair any lien existing at the date of this act upon the lands or chattels of any person who may have become a bankrupt.

SEC. 64. And be it further enacted, That this act shall continue in force during the term of five years, and from thence to the end of the next session of congress thereafter, and no longer: Provided, that the expiration of this act shall not prevent the complete execution of any commission which may have been previously thereto issued.

*An Act to provide for the more convenient organization of the Courts of the United States.*

(February 13, 1801.)

SEC. 12. The said circuit courts respectively shall have cognizance, concurrently with the district courts, of all cases which shall arise, within their respective circuits, under the act to establish an uniform system of bankruptcy throughout the United States; and each circuit judge, within his respective circuit, shall and may perform, all and singular, the duties enjoined by the said act upon a judge of a district court: and the proceedings under a com-



mission of bankruptcy which shall issue from a circuit judge shall, in all respects, be conformable to the proceedings under a commission of bankruptcy which shall issue from a district judge, mutatis mutandis.

*An Act to amend the judicial system of the United States.*

(April 29, 1802.)

SEC. 11. In all cases in which proceedings shall, on the said first day of July next, be pending under a commission of bankruptcy issued in pursuance of the aforesaid act, entitled "An act to provide for the more convenient organization of the courts of the United States," the cognizance of the same shall be, and hereby is, transferred to, and vested in, the district judge of the district within which such commission shall have issued, who is hereby empowered to proceed therein in the same manner and to the same effect as if such commission of bankruptcy had been issued by his order.



# RULES OF PRACTICE.

FOR THE

## COURTS OF EQUITY OF THE UNITED STATES.\*

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### PRELIMINARY REGULATIONS.

**Rule I.** — The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

**Rule II.** — The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course, and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

**Rule III.** — Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or, on the rule days, at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the

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\* "In proceedings in equity instituted for the purpose of carrying into effect the provisions of the [Bankruptcy] 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."

See General Order in Bankruptcy, No. XXXVII., November, 1898.

application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

**Rule IV.** — All motions, rules, orders, and other proceedings made and directed at chambers, or on rule days, at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open, at all office hours, to the free inspection of the parties in any suit in equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings, not requiring personal service on the parties, in their discretion.

**Rule V.** — All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the clerk's office, which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded, by any judge of the court, upon special cause shown.

**Rule VI.** — All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the

adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted as if not objected to, or refused, in his discretion.

### PROCESS.

**Rule VII.** — The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

**Rule VIII.** — Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds, or other documents, the decree shall in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.\*

**Rule IX.**—When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

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\* See Rule XCII.

**Rule X.** — Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

#### SERVICE OF PROCESS.

**Rule XI.** — No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

**Rule XII.** — Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

**Rule XIII.** — The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person, who is a member or resident in the family.

**Rule XIV.** — 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 due service is made.

**Rule XV.** — 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 other-

wise. In the latter case, the person serving the process shall make affidavit thereof.

**Rule XVI.** — Upon the return of the subpœna as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

#### APPEARANCE.

**Rule XVII.** — The appearance day of the defendant shall be the rule day to which the subpœna is made returnable, provided he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

#### BILLS TAKEN PRO CONFESSO.

**Rule XVIII.** — It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

**Rule XIX.** — When the bill is taken *pro confesso*, the court may proceed to a decree at any time after the expiration of thirty days

from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

#### FRAME OF BILLS.

**Rule XX.** — Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs and defendants by and against whom the bill is brought. The form, in substance, shall be as follows: “To the judges of the Circuit Court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says, that,” etc.

**Rule XXI.** — The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the plaintiff is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff himself supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit is required, it shall also be specially asked for.



**Rule XXII.** — If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

**Rule XXIII.** — The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

**Rule XXIV.** — Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

**Rule XXV.** — In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

#### SCANDAL AND IMPERTINENCE IN BILLS.

**Rule XXVI.** — Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recital of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred

to a master by any judge of the court for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

**Rule XXVII.** — No order shall be made by any judge for referring any bill, answer, or pleading, or other matter, or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

#### AMENDMENT OF BILLS.

**Rule XXVIII.** — The plaintiff shall be at liberty as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable reference to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

**Rule XXIX.** — After an answer, or plea, or demurrer is put in,

and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order, from any judge of the court, to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

**Rule XXX.** — If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

#### DEMURRERS AND PLEAS.

**Rule XXXI.** — No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay; and if a plea, that it is true in point of fact.

**Rule XXXII.** — The defendant may, and any time before the bill is taken for confessed, or afterwards, with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

**Rule XXXIII.** — The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.

**Rule XXXIV.** — If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

**Rule XXXV.** — If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

**Rule XXXVI.** — No demurrer or plea shall be held bad and be overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

**Rule XXXVII.** — No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter, as may be covered by such demurrer or plea.

**Rule XXXVIII.** — If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

#### ANSWERS.

**Rule XXXIX.** — The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases, by answer, to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters

of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defence. Thus, for example, a *bona fide* purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

**Rule XL.** — A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

Ordered (December term, 1850), that the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the Circuit Courts, be and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery.

**Rule XLI.** — The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say — “The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c.,” and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

If the complainant, in his bill, shall waive an answer under oath,

or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.\*

**Rule XLII.** — The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill; and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

**Rule XLIII.** — Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer; that is to say —

" 1. Whether, &c.

" 2. Whether, &c."

**Rule XLIV.** — A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

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\* See Rev. Stat. § 858.

**Rule XLV.** — No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

**Rule XLVI.** — In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer, on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

#### PARTIES TO BILLS.

**Rule XLVII.** — In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

**Rule XLVIII.** — Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

**Rule XLIX.** — In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors

or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

**Rule L.** — In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him.

**Rule LI.** — In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

**Rule LII.** — Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following, (that is to say:) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

**Rule LIII.** — If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.



**NOMINAL PARTIES TO BILLS.**

**Rule LIV.** — Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

**Rule LV.** — Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

**BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.**

**Rule LVI.** — Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

**Rule LVII.** — Whenever any suit in equity shall become defective, from any event happening after the filing of the bill, (as, for example, by change of interest in the parties,) or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

**Rule LVIII.** — It shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

#### ANSWERS.

**Rule LIX.** — Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a State or Territory, or before any notary public.

#### AMENDMENT OF ANSWERS.

**Rule LX.** — After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be re-sworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court, or the judge granting the same, may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

## EXCEPTIONS TO ANSWERS.

**Rule LXI.** — After an answer is filed on any rule day the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

**Rule LXII.** — When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

**Rule LXIII.** — Where exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court, and shall enter, as of course, in the order book, an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient: *Provided, however,* That the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

**Rule LXIV.** — If at the hearing the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise, the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his

putting in such answer and complying with such other terms as the court or judge may direct.

**Rule LXV.** — If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

#### REPLICATION AND ISSUE.

**Rule LXVI.** — Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

#### TESTIMONY—HOW TAKEN.

**Rule LXVII.** — After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court, or by a judge thereof; and the presiding judge of the court exercising jurisdiction may either in term time or vacation vest in the clerk of the court general power to name commissioners to take testimony. Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined

shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner, if he so request, to be furnished with a copy of the pleadings; such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; *provided*, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; *provided*, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; *provided*, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the records the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions, 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.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties of the time and place of the

examination for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defence and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.

**Rule LXVIII.** — Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

**Rule LXIX.** — Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court

or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions, containing the testimony, into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order books or indorsed upon the deposition or testimony.

#### TESTIMONY DE BENE ESSE.

**Rule LXX.** — After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any one of them is a single witness to a material fact the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

#### FORM OF THE LAST INTERROGATORY.

**Rule LXXI.** — The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated, in substance, thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

#### CROSS-BILL.

**Rule LXXII.** — Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by

the party filing the cross-bill, at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

#### REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

**Rule LXXIII.** — Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

**Rule LXXIV.** — Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the cost of the party procuring the reference.

**Rule LXXV.** — Upon every such reference it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reason for any delay.

**Rule LXXVI.** — In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to,



so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used.

**Rule LXXVII.** — The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause upon oath touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *vivâ voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

**Rule LXXVIII.** — Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon, by order of the court or any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *vivâ voce* when produced in open court, if the court shall in its discretion deem it advisable.

**Rule LXXIX.** — All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the accounts

so brought in, shall be at liberty to examine the accounting party *vivâ voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

**Rule LXXX.** — All affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

**Rule LXXXI.** — The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *vivâ voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

**Rule LXXXII.** — The Circuit Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the appointment); and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

#### EXCEPTIONS TO REPORT OF MASTER.

**Rule LXXXIII.** — The master as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for

hearing before the court if the court is then in session; or if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.

**Rule LXXXIV.** — And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs — the costs to be fixed in each case by the court, by a standing rule of the Circuit Court.

#### DECREES.

**Rule LXXXV.** — Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a re-hearing.

**Rule LXXXVI.** — In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: “ This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz: ” [Here insert the decree or order.]

#### GUARDIANS AND PROCHEIN AMIS.

**Rule LXXXVII.** — Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein amis*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

**Rule LXXXVIII.** — Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not appar-

ent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

**Rule LXXXIX.** — The Circuit Courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge of the district, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

**Rule XC.** — In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

**Rule XCI.** — Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.

**Rule XCII.** — *Ordered* (December Term, 1863), That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

#### INJUNCTIONS.

**Rule XCIII.** — When an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or

judge who took part in the decision of the cause, he may in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

#### **BILL BY STOCKHOLDER.**

**Rule XCIV.** — Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

See also the following sections of the act of June 1, 1872:

Sec. 7. That whenever notice is given of a motion for an injunction out of a Circuit or district court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: Provided, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit, or the district judge of the district.

Sec. 13. That when in any suit in equity, commenced in any court in the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an

inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found; or where such personal service is not practicable, such order shall be published in such a manner as the court shall direct; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.

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## THE EXEMPTION LAWS.

NOTE.—The author takes this occasion to extend his thanks publicly to the Mercantile Agency of Messrs. R. G. Dunn & Co., of New York City, for their kind permission given him to use the abstracts of the exemption laws of the several states and territories of the Union, which appear in their Reference Book of July 1, 1900.

## ALABAMA.

HOMESTEAD AND EXEMPTIONS.—Homestead of house and lot in city, town, etc., or one hundred and sixty acres in country, in either case not to exceed two thousand dollars in value. Personal property of one thousand dollars in value, and certain specified articles, and wages to the amount of twenty-five dollars per month. Waiver of exemptions of personalty may be included in any instrument of writing but intention to waive must be clearly expressed. Waiver of homestead must be by separate instrument, attested by one witness; if by a married man, waiver not valid without the voluntary signature and assent of the wife shown by separate acknowledgment. If by a married woman, executed by the husband, joining in the alienation, but separate acknowledgment of wife not necessary. Form of certificate of separate acknowledgment is as follows:

State of Alabama, }  
County of..... } ss.:

I (name and style of officer) do hereby certify that on the            day of  
19    came before me the within named            known (or made known) to  
me to be the wife of the within named            , who being examined sep-  
arate and apart from the husband touching her signature to the within            ,  
acknowledged that she signed the same of her own free will and accord, and  
without fear, constraints or threats on the part of the husband.

In witness hereof I hereunto set my hand, this            day of            , 19    .  
A. B.

Judge (or as the case may be).

An unmarried person is entitled to the same exemptions as if married.

## ARIZONA.

EXEMPTIONS.—The following property is exempt from execution: (1) There shall be reserved to every family exempt from attachment and execution, and every species of forced sale for the payment of debts, personal property not to exceed in value the sum of five hundred dollars. (2) Every person who is the head of a family, and whose family resides within the Territory, may hold as a homestead, exempt from attachment, execution and forced sale, real property to be selected by him or her, which said homestead shall be in one compact body, not to exceed in value the sum of \$2,500. (3) It shall not be necessary for any person entitled to any exemption to claim such exemption until requested by an officer holding an attachment or execution against the property of such person, and upon being requested by the officer to designate the property claimed under this act, the person entitled shall designate the property claimed or exempt; if the person fails or refuses to claim when requested, the officer holding attachment or execution shall proceed to designate and set aside real estate not to exceed in value the sum of \$2,500. (4) Property herein declared exempt shall not be

exempt from seizure and forced sale on attachment and execution, when the debt owing is for the purchase price or part of purchase price thereof, so long as such property or any part thereof shall be in the hands of the vendee. The earnings of the debtor for his personal services for thirty days next preceding the day of the levy, when it shall be made to appear by the debtor's affidavit or otherwise that such earnings are necessary for the use of a family, supported wholly or partly by his labor, shall be exempt. The property of counties, cities and towns owned and held only for public purposes, such as public buildings and sites therefor, fire engines and the furniture thereof, and all property used or intended for extinguishing fires, public grounds and other property devoted exclusively to the use and benefits of the public, shall also be exempted from forced sale, also all public libraries.

#### ARKANSAS.

**EXEMPTIONS.**—For single person, personal property, in addition to wearing apparel, \$200. For head of a family, personal property to the value of \$500. This, however, is only applicable to actions *ex contractu*. As to torts and frauds there are no personal exemptions.

**HOMESTEAD.**—For a head of a family outside of any town or city, 160 acres of land not to exceed \$2,500 in value, or not less than 80 acres without regard to value. In city or town, not exceeding one acre of the value of \$2,500, or not less than one-fourth of an acre without regard to value.—(Const. Art. ix. Secs. 1 to 5.)

#### CALIFORNIA.

**EXEMPTIONS.**—The homestead, not exceeding \$5,000 in value, if declaration of homestead is properly filed in the recorder's office of the county where situate, by a husband or wife, or other head of a family, is exempt from execution except in the following cases: first, where the judgment was obtained before the declaration of homestead; second, on judgment for liens of mechanics, laborers, or vendors of the land; third, on debts secured by mortgage on the land executed by husband and wife or an unmarried claimant; fourth, on debts secured by mortgage on the land before the declaration of homestead. The other exemptions are—except for the purchase price or a judgment of foreclosure of mortgage thereon; chairs, tables, desks and books, to the value of \$200, necessary household, table and kitchen furniture—including one sewing machine, stoves, stovepipes and stove furniture, wearing apparel, beds, bedding, and bedsteads, hanging pictures, oil paintings and drawings drawn or painted by any member of the family, and family portraits and their necessary frames, and provisions actually provided for individual or family use, sufficient for three months, and three cows and their sucking calves, four hogs with their sucking pigs, and food for such cows and hogs for one month; also one piano, one shot gun and one rifle, the farming utensils or implements of husbandry of the judgment debtor not exceeding the value of \$1,000; also two oxen, or two horses, or two mules, and their harness, one cart or wagon, and food for such oxen, horses, or mules, for one month; also, all seed grain, or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of \$200, and seventy-five beehives, and one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business; the tools and implements of a mechanic or artisan, necessary to carry on trade; the notarial seal, records and office furniture of a notary public, the instruments and chests of a surgeon, physician, surveyor, or dentist, necessary to the exercise of their profession, with their professional libraries and necessary office furniture; the professional libraries of attorneys,

judges, ministers of the gospel, editors, school teachers and music teachers, and their necessary office furniture; also, the musical instruments of music teachers actually used by them in giving instructions, and all the indexes, abstracts, books, papers, maps, and office furniture of a searcher of records, necessary to be used in his profession; also the typewriters or other mechanical contrivances employed for writing in type, actually used by the owner thereof for making his living; also one bicycle, when the same is used by its owner for the purpose of carrying on his regular business or when the same is used for the purpose of transporting the owner to and from his place of business; the cabin or dwelling of a miner, not exceeding in value the sum of \$500; also his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements, and appliances necessary for carrying on any mining operations, not exceeding in value the aggregate sum of \$500; and two horses, mules or oxen, with their harness, and food for such horses, mules, or oxen, for one month, when necessary to be used in any whim, windlass, derrick, car, pump, or hoisting gear; and also his mining claim actually worked by him, not exceeding in value the sum of \$1,000; two horses, two oxen, or two mules, and their harness and one cart or wagon, one dray or truck, one coupe, one hack or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living; and one horse, with vehicle and harness or other equipments, used by a physician, surgeon, constable, or minister of the gospel, in the legitimate practice of his profession or business, with food for such oxen, horses, or mules for one month; one fishing boat and net not exceeding total value \$500, the property of any fisherman by the lawful use of which he earns a living; poultry not exceeding in value \$25; seaman and sea-going fisherman's wages and earnings not exceeding \$100; the earnings of the judgment debtor for his personal services, rendered at any time within thirty days next preceding the levy of execution or levy of attachment, when it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family, residing in this state, supported in whole or in part by his labor; but where the debts are incurred by any such person or his wife or family for the common necessities of life, or having been incurred at a time when the debtor had no family residing in this state, supported in whole or in part by his labor, the one-half of such earnings above mentioned are, nevertheless, subject to execution, garnishment, or attachment, to satisfy debts so incurred; the shares held by a member of a homestead association duly incorporated, not exceeding in value \$1,000, if the person holding the shares is not the owner of a homestead under the laws of this state; all the nautical instruments and wearing apparel of any master, officer, or seaman of any steamer or other vessel; all moneys, benefits, privileges, or immunities accruing, or in any manner growing out of any life insurance on the life of the debtor, if the annual premiums paid do not exceed \$500; all fire engines, hooks and ladders, with the carts, trucks, and carriages, hose, buckets, implements, and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this state; all arms, uniforms, and accoutrements required by law to be kept by any person, and also one gun to be selected by the debtor; all courthouses, jails, public offices and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the courthouse, jail and public offices belonging to any county, or to any city and county of this state; and all cemeteries, public squares, parks, and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such

town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state; all material purchased in good faith for use in the construction, alteration or repair of any building, mining claim or other improvement, as long as in good faith the same is about to be applied to the construction, alteration or repair of such building, mining claim or other improvement.

#### COLORADO.

EXEMPTIONS.—The following property, when owned by any person being the head of a family and residing with the same, is exempt from levy and sale upon any execution of writ of attachment, and such articles continue exempt while the family of such person are removing from one place of residence to another within the state, namely; (1) family pictures, school books and library; (2) a seat or pew in any place of worship; (3) the sites of burial of the dead; (4) all wearing apparel of the debtor and his family; all beds, bedsteads and bedding, kept and used by the debtor and his family; all stoves and appendages, kept for the use of the debtor and his family; all cooking utensils and all household furniture not herein enumerated, not exceeding \$100 in value; (5) provisions for the debtor and his family, necessary for six months, and fuel necessary for six months; (6) tools and implements or stock in trade of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding \$200 in value; (7) the library and implements of any professional man, not exceeding \$300; (8) working animals of the value of \$200; (9) one cow and calf, ten sheep and the necessary food for all the animals herein mentioned for six months, one farm wagon, cart or dray, one plow, one harrow, and other farming implements, including harness and tackle for team, not exceeding \$50 in value; (10) tools, implements, working animals and stock in trade, not exceeding \$300 in value, of any mechanic, miner, or other person not being the head of a family used and kept for the purpose of carrying on his trade and business while such person is a *bona fide* resident of this state. Sixty dollars of the amount due for wages or earnings of any debtor at the time of the levy are also exempt; provided such debtor is at the time of the levy the head of a family or the wife of the head of a family, and such family is dependent in whole or in part upon such earnings for support. All money received by any person, resident of this state, as a pension from the United States government, whether the same be in his actual possession, or deposited or loaned, is also exempt from execution or attachment, whether such pensioner be the head of a family or not; when the debtor dies or absconds, and leaves his family, the money thus exempted is exempt to his wife and children, or either of them.

#### CONNECTICUT.

EXEMPTIONS.—Necessary apparel and bedding, household furniture necessary for supporting life, arms, military equipments, implements of the debtor's trade, one cow, ten sheep (not exceeding \$150) are protected, and certain specified amounts of family stores, one stove, the horse, saddle and bridle, buggy and harness (not exceeding in value \$250) of any practicing physician or surgeon, one sewing machine in use, one pew in church in use, and a library (not exceeding in value \$500), one boat used in fishing, not exceeding \$200 in value. A dwelling house and the land used in connection therewith while actually occupied by the owner to the extent of one thousand dollars in value, provided the purpose to use the same as a homestead appears either in a declaration to that effect made by the owner, and executed and recorded like a deed, or in the conveyance of such property. Such right of exemption may be released by the husband and wife

joining in a declaration of release, and the value of such property over the exemption can be reached by creditors.

#### DELAWARE.

EXEMPTIONS.—New Castle County—No real estate exemption; \$75 worth of personal property, consisting of the tools and fixtures is exempted, and the defendant being the head of a family shall have exempt in addition \$200. The above exemption does not affect a debt or contract incurred or made prior to July 4, 1873; wages are also exempt. Kent County—Same as New Castle County except \$50 worth of personalty and \$150 for heads of families is exempt. Sussex County—There is no exemption in this county except \$75 worth of personal property consisting of tools and fixtures. No exemption applicable to goods and chattels of a merchantable character bought to be sold and trafficked in.

#### DISTRICT OF COLUMBIA.

EXEMPTIONS.—The following property of a householder is exempt from distraint, attachment, or sale on execution, except for servants' or laborers' wages due: Wearing apparel; household furniture to the amount of \$300; provisions and fuel for three months; mechanics' tools or implements of any trade to the value of \$200, with stock to the same amount; the library and implements of a professional man or artist to the value of \$300; a farmer's team and other utensils to the value of \$100; family pictures and library, in value \$400.

#### FLORIDA.

EXEMPTIONS.—Homestead of one hundred and sixty acres of land and improvements if in the country, and which cannot be reduced in area without owner's consent, by reason of its being subsequently included in a city or town; one-half acre of ground if in an incorporated city or town, with improvements thereon, limited however to owner's residence and place of business, together with \$1,000 worth of personal property.

#### GEORGIA.

EXEMPTIONS.—Each head of a family, every aged or infirm person, or persons having care and support of dependent females of any age, who is not head of a family, or guardian, or trustee of a family of minor children, is entitled to a homestead of realty or personalty, or both, to the value in the aggregate of sixteen hundred dollars. The exemption may be waived in writing, except as to \$300 of wearing apparel and furniture, to be selected by the debtor and his wife, if he has a wife. The homestead cannot be claimed as against debts for (1) taxes, (2) purchase money, (3) labor done upon or material furnished for the property, (4) for removal of incumbrances thereon.—(Constitution of 1877.)

#### IDAHO.

EXEMPTIONS.—The following property belonging to an actual resident of the state is exempt from attachment or levy and sale on execution; first, chairs, tables, desks and books, to the value of two hundred dollars, belonging to the judgment debtor; second, necessary household, table and kitchen furniture belonging to judgment debtor, including one sewing machine in actual use in a family or belonging to a woman, stove, stovepipe and furniture, beds, bedding and bedsteads, not exceeding \$300 in value, wearing apparel,

hanging pictures, oil paintings and drawings, drawn or painted by any member of the family, and family portraits and their necessary frames, provisions actually provided for individual or family use sufficient for six months, two cows, with their sucking calves and two hogs with their sucking pigs; third, the farming utensils or implements of husbandry of a farmer not exceeding in value \$300, four oxen, or four horses, or four mules, to be selected by claimants, and their harness, one cart or wagon, and food for such oxen, horses or mules for six months, also a water right not to exceed 160 inches, used for the irrigation of land actually cultivated by him; also the crop or crops growing or grown on fifty acres of land, leased, owned or possessed by the person cultivating the same; fourth, tools or implements of a mechanic or artisan necessary to carry on his trade, not exceeding in value \$500; the notarial seal and records of a notary public; the instruments and chests of a surgeon, physician, surveyor and dentist, necessary to the exercise of their profession with their scientific and professional libraries; the law professional libraries and office furniture of attorneys, counsellors and judges and the libraries of ministers of the gospel; fifth, the cabin or dwelling of a miner, not exceeding in value \$500, also his sluices, pipehose, windlass, derrick, cars, pumps and tools, not exceeding in value \$200; also one saddle animal and one pack animal, together with their saddles and equipments belonging to a miner actually engaged in prospecting, not exceeding in value \$250; sixth, two oxen, two horses or two mules, and their harness, and one cart, wagon, dray or truck, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living; and one horse with vehicle and harness or other equipments used by a physician, surgeon or minister of the gospel in making his professional visits, with food for such oxen, horses or mules for six months; seventh, all fire engines, with carts, buckets, hose, and apparatus thereto appertaining, of any fire company or department organized under any law of this state; eighth, all arms, uniforms and accoutrements required by law to be kept by any person; ninth, all courthouses, jails, public offices and buildings, lots, ground and personal property, the fixtures, furniture, books, papers, and appurtenances, belonging to any county in this state, and all cemeteries, public squares, parks and public buildings, town halls, markets, buildings appertaining to the fire departments, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use; tenth, the homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the husband and wife, or either of them, or other head of family; eleventh, earnings of judgment debtor, for personal services rendered at any time within thirty days next preceding the levy of execution or levy of judgment, when it appears by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family residing in the state, supported wholly or in part by his labor. The usual declarations must be made, acknowledged, and recorded by person or persons claiming homestead. No article above mentioned shall be exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon. A single person not the head of a family may claim a homestead, not to exceed \$1,000 in value.

### ILLINOIS.

EXEMPTIONS.—Lot of ground and buildings thereon occupied as a residence by the debtor, and held by him by lease or otherwise, being a householder and having a family, to the value \$1,000. Exemption continues after the death of the



householder for the benefit of surviving wife or husband so long as she or he continues to occupy the homestead, and for the benefit of the children until youngest child shall become twenty-one years of age. No release or waiver of exemption is valid, unless in writing and subscribed by such householder and wife or husband (if he or she have one) and acknowledged as conveyances of real estate are required to be acknowledged or possession is abandoned or given pursuant to the conveyance, or if the exemption is continued to a child or children without an order of court directing a release thereof. The following articles of personal property owned by the debtor are exempt from execution, writ of attachment, and distress for rent, the necessary wearing apparel, bibles, school books and family pictures of every person, \$100 worth of other property to be selected by the debtor; and in addition, when the debtor is the head of a family and resides with the same, \$300 worth of other property, also to be selected by the debtor. To avail himself of exemptions, the debtor must present a sworn schedule of his personal property to the officer having the execution, attachment, writ, or distress warrant, within ten days after the officer notifies him in writing so to do. Provided, such selection shall not be made from money, salary, or wages due the debtor. Provided, however, that money due debtor from sale of personal property which was exempt at the time of such sale, shall be exempt to the same extent as the property would be if not sold. Except the wages of a defendant, the head of a family and residing with the same, to the amount of \$8 per week shall be exempt from garnishment.

#### INDIANA.

**EXEMPTIONS.**—Any resident householder has an exemption from levy and sale under execution or attachment of real or personal property, or both, as he may select, to the value of \$600, on demands on contracts. The law further provides that no property shall be sold by virtue of an execution for less than two-thirds of its appraised cash value. The provisions of this law as to valuation or appraisement can be waived in contracts. To do this the note or contract should read, "*Payable without relief from valuation or appraisement laws.*" But the right to exemption cannot be waived by contract.

#### INDIAN TERRITORY.

**EXEMPTIONS.**—Every unmarried person living in the Indian Territory, not the head of a family, is entitled to exemptions, in addition to his or her wearing apparel, to be selected by himself, to the value of \$200. Every married person, or the head of a family, is entitled to exemptions, to be selected by himself, in addition to the wearing apparel of himself and family, to the amount of \$500. This, however, is only applicable to actions *ex contractu*. As to frauds and torts there are no exemptions. There is no title to real estate, except in towns that have been platted and appraised under the Act of Congress, known as the Curtis Bill. The country is yet held by the Indian tribes in common. As to the towns where titles have been obtained, the exemptions are the same as in Arkansas, *i. e.*, not exceeding one acre of the value of \$2,500, or not less than one-quarter of an acre without regard to value. There are no exemptions from execution for purchase money as long as the property remains in the hands of the original vendee.

#### IOWA.

**EXEMPTIONS.**—The homestead must embrace the house used as a home by the owner thereof, and if he has two or more houses thus used by him at different

times and places, he may select which he will retain as his homestead. If within a city or town, it must not exceed one-half acre in extent; and if not in a city or town, it must not embrace in the aggregate more than forty acres. But if, when thus limited in either case, its value is less than \$500, it may be enlarged till its value reaches that amount. If the debtor is a resident of the state and head of a family, all wearing apparel kept for actual use, and suitable to the condition of the debtor and family, and trunks and other receptacles to contain the same; one musket or rifle and a shot gun; all private libraries, family bible, portraits, pictures, musical instruments, and paintings—not kept for sale; seat or pew in church, and interest in public or private burial grounds—not exceeding one acre; the proper tools, instruments, or books of any farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher or professor; the horse, or the team—consisting of not more than two horses or mules—or two yoke of cattle, and the wagon or other vehicle with the proper harness or tackle, by use of which any physician, public officer, farmer, teamster, or other laborer, habitually earns his living; two cows, two calves, one horse (unless a horse has been exempted under the preceding section), fifty sheep and the wool therefrom, five hogs and all pigs under six months, the necessary food for all animals exempt from execution for six months, one bedstead and the necessary bedding for every two in the family, all cloth manufactured by the defendant—not exceeding one hundred yards in quantity—household and kitchen furniture not exceeding \$200 in value, all spinning wheels and looms, one sewing machine, and other instruments of domestic labor kept for actual use, and the necessary provisions and fuel for the use of the family for six months, and to the debtor, if a printer, there shall also be exempt a printing press and the types, furniture, and material necessary for the use of such printing press and a newspaper office connected therewith, not to exceed in all the value of twelve hundred dollars; six stands of bees; poultry to the value of \$50, and the same to any woman, whether head of a family or not; and to a seamstress one sewing machine. The word family does not include strangers or boarders lodging with the family. The earnings of such debtor for the personal service or those of his family, at any time within ninety days next preceding the levy, are also exempt from attachment and execution. None of the foregoing exemptions are for the benefit of a single man not the head of a family, nor of nonresidents, nor of those who have started to leave this state; but their property is liable to execution, with the exemption in the two former cases of ordinary wearing apparel and trunks to contain the same, and in the latter case of such wearing apparel and such other property in addition as the defendant may select—not to exceed \$75—to be selected by the debtor and appraised; but any person coming to this state with the intention of remaining, is a resident. Pensions and investments of funds therefrom are also exempt. Property may still be exempt as a homestead, although the owner resides in other property or in some other locality, provided it is his intention in good faith not to abandon the homestead, but to return to it, or to sell it and invest the proceeds in another homestead. A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of a husband or wife and children of said individual independently of his creditors. The proceeds of an endowment policy payable to the assured on attaining a certain age shall be exempt from liability for any of his debts. Any benefit or indemnity paid under an accident policy shall be exempt to the assured, or in case of his death to the husband or wife and children of the assured from his debts. The avails of all life or accident insurance payable to the surviving widow shall be exempt from liability of all debts of such beneficiary contracted prior to the

death of the assured; but the amount thus exempt shall not exceed five thousand dollars.

#### KANSAS.

**EXEMPTIONS.**—A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempt from forced sale under any process of law, and shall not be alienated except by joint consent of husband and wife when that relation exists. Not exempt, however, for taxes or purchase money obligations or liens for improvements. No value is affixed to the homestead. It may be worth a million dollars. No personal property is exempt from execution for the wages of a servant, mechanic, laborer, or clerk. Every person residing in this state, and being the head of a family, shall have exempt from seizure upon attachment or execution or other process issued from any court in this state: Family bible, school books, and family library; family pictures and musical instruments used by the family; a seat or pew in any church or place of public worship, and a lot in any burial ground; all wearing apparel of the family, all beds, bedsteads, and bedding used by the debtor and his family, one cooking stove and appendages, and all other cooking utensils, and all other stoves and appendages necessary for the use of the debtor and his family, one sewing machine, spinning wheels and looms, and all other implements of industry, and all other household furniture not herein enumerated, not exceeding in value \$500, two cows, ten hogs, one yoke of oxen, and one horse or mule, or in lieu of one yoke of oxen and one horse or mule, a span of horses or mules; and twenty sheep and their wool, either in raw material or manufactured into cloth; necessary food for the support of the stock for one year, one wagon, cart, or dray, two plows, drag, and other farming utensils, not exceeding in value \$300; grain, meat, vegetables, groceries, etc., and fuel on hand necessary for the family for one year, the tools and implements of any mechanic, miner, or other person, kept and used for the purpose of carrying on his business, and in addition thereto stock in trade not exceeding \$400 in value, library, implements, and office furniture of any professional man. Any person *not* the head of a family may have exempt: The wearing apparel of the debtor, a seat or pew in any church or place of public worship, and a lot in any burial ground, the necessary tools and instruments of any mechanic, miner, or other person used and kept for the purpose of carrying on his trade or business, and in addition thereto stock in trade not exceeding \$400 in value, and the library, implements, and office furniture of any professional man. The earnings of a debtor, who is a resident of the state, for his personal services at any time within three months preceding the issuing of the execution, or attachment, or garnishment process, must be released from such process when it appears, from the debtor's affidavit or otherwise, that such earnings are necessary for the maintenance of a family supported wholly or partly by such debtor's labor. The claim of this exemption presents a question of fact which may be contested. So also the money received by any debtor as pensioner of the United States within three months preceding the issuing of execution, attachment, or garnishment process, must be released when it is shown in like manner that said money is necessary for the maintenance of a family supported wholly or in part by such pension.

#### KENTUCKY.

**EXEMPTIONS.**—The following personal property of persons with a family resident in this commonwealth is exempt from execution, attachment, distress, or fee bill: Two work beasts or one work beast, and one yoke of oxen; two plows

and gear, one wagon and set of gear or cart or dray, two axes, three hoes, one spade and one shovel, two cows and calves, beds, bedding and furniture sufficient for family use, one loom and spinning wheel and pair of cards, all the spun yarn and manufactured cloth manufactured by the family necessary for family use, carpeting for all family rooms in use, one table, all books not to exceed \$50 in value, two saddles and their appendages, two bridles, six chairs or so many as shall not exceed \$10 in value, one cradle, all the poultry on hand, ten head of sheep not to exceed \$25 in value, all wearing apparel, sufficient provisions, including bread stuff and animal food, to sustain the family for one year, if not on hand other personal property, wages, money, or growing crop not to exceed \$40 in value for each member of the family; provender suitable for live stock, if there be any such stock, not to exceed \$70 in value, and if such provender be not on hand such other property as shall not exceed such sum in value; all washing apparatus not to exceed \$50 in value, one sewing machine, all family portraits and pictures, one cooking stove and appendages, and other cooking utensils not to exceed in value \$25. The tools of mechanics not exceeding \$100 in value, libraries of ministers of the gospel and professional libraries of attorneys, and of physicians and surgeons and their instruments not exceeding \$500 in value. Ministers, lawyers, physicians and surgeons are entitled to only one work beast and to no wagon, cart or dray. Wages not to exceed \$50 of all persons who work for wages except for food, raiment, fuel, medicine or house rent for the family. To an actual *bona fide* resident housekeeper with a family against debts incurred or created after June 1st, 1866, there is also a homestead exemption of \$1,000, but not if the liability existed prior to the purchase of the land or the erection of improvements thereon.

#### LOUISIANA.

EXEMPTIONS.—The sheriff or constable cannot seize the linen or clothing belonging to the debtor or his wife; nor his bed, bedding, or bedstead, nor those of his family, or sewing machines; nor his arms and military accoutrements; nor the tools and instruments, and books necessary for the exercise of his or her calling, trade or profession, by which he or she makes a living; nor shall he in any case seize the rights of personal servitude, of use and habitation, of usufruct to the estate of a minor child, nor the income of dotal property; nor money due for the salary of an officer; nor laborers' wages; nor recompense for personal services, nor the cooking stove and utensils of said stove, nor the plates, dishes, knives and forks, and spoons, nor the dining table and dining chairs, nor wash tubs, nor smoothing irons and ironing furnaces, nor family portraits belonging to the debtor, nor the musical instruments played or practised on by any member of the family.

HOMESTEAD EXEMPTIONS.—There shall be exempt from January 1, 1899, from seizure by any process whatever, the homestead *bona fide* owned by the debtor and occupied by him, consisting of land not exceeding one hundred and sixty acres, buildings and appurtenances, rural or urban, of every head of a family, or person having a mother or father, or a person or persons dependent on him or her for support; also two work horses, one wagon or cart, one yoke of oxen, two cows and calves, twenty-five head of hogs, or one thousand pounds of bacon, or its equivalent in pork, whether these be attached to a homestead or not; and on a farm the necessary farming implements, to the value of \$2,000. The husband does not have the benefit of the exemption if his wife owns and is in actual enjoyment of property to the amount of \$2,000. The exemption does not apply to the following debts: For purchase price of any part thereof; to labor, money

and material furnished for improving homestead; to liability of any public officer, or fiduciary, or attorney-at-law, for money collected, or received, on deposit; to taxes or assessments; to rent which bears a privilege on the property. The owner may sell the property exempt as homestead, but not to the prejudice of creditors; and may waive his right by signing with his wife, not separated from bed and board, and registering in the office of the recorder of mortgages, a written waiver, in whole or in part, which may be general or special, and shall have effect from time of registering. The homestead must be registered in the Parish of Orleans, but need not be elsewhere.

#### MAINE.

EXEMPTIONS.—By complying with certain statutory provisions (not often taken advantage of), there is exempted a lot of land, dwelling house, etc., not exceeding \$500 in value. Necessary apparel; a bed, bedstead, and bedding for every two members of a family; a cooking stove, all stoves used for warming buildings, and other necessary furniture to the value of \$100; one sewing machine for use not exceeding \$100 in value; all tools necessary for the debtor's occupation; and materials and stock necessary to be used in his business to the value of \$50; all bibles and school books for use of the family, one copy of the statutes of the state, and a library not exceeding \$150 in value; one cow and one heifer, two swine, ten sheep and the wool and lambs from them, one pair of working cattle, or instead thereof one pair of mules or two horses, not exceeding \$300 in value; all produce of farms until harvested, corn and grain for use of debtor and family, not exceeding thirty bushels, all potatoes raised or purchased for use in family; one barrel of flour; a sufficient quantity of hay to winter all exempted stock; all flax raised for use on one half acre of land; lumber to the amount of \$10, twelve cords of fire wood, five tons of anthracite coal, fifty bushels of bituminous coal, and all charcoal for use in the family; one pew in meeting house where debtor worships; one horse sled or ox sled \$20 in value; one harness worth \$20, for each horse or mule; one cart or truck, or express wagon, one harrow, one plow, one yoke, two chains, and one mowing machine; for fisherman, one boat not exceeding two tons burthen, a lot in a cemetery.

#### MARYLAND.

EXEMPTIONS.—The constitution of the state directs the legislature to pass laws exempting from judicial sales, a reasonable amount of property not exceeding \$500. One hundred dollars is the amount fixed and exempted in pursuance of this constitutional requirement, and in addition thereto, "all wearing apparel, books, and the tools of mechanics, except books or tools kept for sale."

#### MASSACHUSETTS.

EXEMPTIONS.—Every householder, having a family, is entitled to an estate of homestead, to the extent in value of \$800, in the farm or lot of land and buildings thereon owned, or rightly possessed by lease or otherwise, and occupied by him as a residence. To constitute a homestead and entitle it to exemption, it must be set forth in the deed of conveyance by which the property is acquired, that it is designed to be held as a homestead; or after the title is acquired, such design must be declared in writing, and recorded in the registry of deeds for the county or district where the property is situated. The homestead estate may be conveyed or released by a deed duly acknowledged and recorded, in which the wife joins for the purpose of releasing the right of homestead. The estate or right of home-

stead of any householder existing at his death, continues for the benefit of his widow and minor children, and may be held and enjoyed by them, if some one of them occupies the premises, until the youngest child is twenty-one years of age, and until the death or marriage of the widow. All chattels, real or personal, and all other goods which by the common law are liable to be taken on execution may be taken and sold thereon, except the following articles of the debtor which are exempt: The necessary wearing apparel of himself and of his wife and children; one bedstead, bed, and the necessary bedding for every two persons of the family; one iron stove used for warming the dwelling house, and fuel not exceeding the value of \$20, procured and designed for the use of the family; one sewing machine, of a value not exceeding \$100, in actual use by each debtor, or the family of the debtor; other household furniture necessary for him and his family, not exceeding \$300 in value; the bibles, school books, and library used by him or his family, not exceeding \$50 in value; one cow, six sheep, one swine, and two tons of hay; the tools, implements, and fixtures, necessary for carrying on his trade or business, not exceeding \$100 in value; materials and stock designed and procured by him, and necessary for carrying on his trade or business, and intended to be used or wrought therein, not exceeding \$100 in value; provisions necessary and procured and intended for the use of the family, not exceeding \$50 in value; the boat, fishing tackle, and nets of fishermen, actually used by them in the prosecution of their business, to the value of \$100; the uniform of an officer or soldier in the militia, and the arms and accoutrements required by law to be kept by him; shares in certain co-operative associations to an amount not exceeding \$20.

#### MICHIGAN.

EXEMPTIONS.—Any quantity of land not exceeding forty acres, and the dwelling house thereon, with its appurtenances, to be selected by the owner thereof, and not included in any recorded town plat, city, or village, or instead thereof, at the option of the owner, a quantity of land not exceeding in amount one lot, being within a recorded town plat, or city, or village, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of the state, not exceeding in value \$1,500, is exempt from levy and sale on execution. Household furniture to the amount of \$250; stock in trade, a team or other things which may be necessary to carry on the pursuit of particular business, up to \$250; library and school books not exceeding \$150; to a householder, ten sheep, two cows, five swine, are also exempt from levy and sale on execution.

#### MINNESOTA.

EXEMPTIONS.—No property hereinafter mentioned or represented shall be liable to attachment or sale on any final process, issued from any court in this state: (1) the family bible (2) family pictures, school books or library, and musical instruments, for use of family; (3) a seat or pew in any house or place of public worship; (4) a lot in any burial ground; (5) all wearing apparel of the debtor and his family; all beds, bedsteads and bedding, kept and used by the debtor and his family; all stoves and appendages put up or kept for the use of the debtor and his family; all cooking utensils, and all other household furniture not herein enumerated, not exceeding \$500 in value; also all moneys arising from insurance of any property exempted from sale on execution, when such property has been destroyed by fire; (6) three cows, ten swine, one yoke of oxen and a horse, a span of horses or mules, twenty sheep and the wool from the same, either in the raw material or manufactured into yarn or cloth; the necessary food for all the

stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose; also one wagon, cart or dray, one sleigh, two plows, one drag, and other farming utensils, including tackle for teams, not exceeding \$300 in value; (7) the provisions for the debtor and his family necessary for one year's support, either provided or growing, or both, and fuel necessary for one year; (8) one watch, the tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade, and, in addition thereto, stock in trade, including articles of goods manufactured in whole or in part by him, not exceeding \$400 in value; the library and implements of any professional man; all of which articles hereinbefore intended to be exempt shall be chosen by the debtor, his agent, clerk, or legal representative, as the case may be. In addition to the articles enumerated in this section, all the presses, stones, type, cases, and other tools and implements used by any copartnership, or by any such printer, publisher or editor, or by any persons hired by him to use them, not to exceed in value the sum of \$2,000, together with stock in trade not exceeding \$400 in value, shall be exempt from attachment, or sale, on any final process issued from any court in this state; (9) one sewing machine, one bicycle, one typewriting machine; (10) necessary seed grain for the actual personal use of debtor, for one season, to be selected by him; not, however, in any case to exceed the following kinds and amounts, respectively, viz: one hundred bushels of wheat, fifty bushels of oats, one hundred bushels of potatoes, ten bushels of corn, and one hundred bushels of barley, and binding material sufficient for use in harvesting the crop raised from the seed grain above specified; (11) the wages of any person, or of his or her minor children, in any sum not exceeding \$25, due for services rendered by him or them, for any person, for and during thirty days preceding the issue of process of attachment, garnishment, or execution in any action against such person. (12a) all moneys derived or received by any surviving wife or child from any form of life insurance upon the life of any deceased husband or father not exceeding ten thousand dollars. (12b) the library, philosophical and chemical or other apparatus used in instruction belonging to and in use in any university, college, seminary of learning, or school for the instruction of youth open to the public. Whenever any proceedings are commenced in any court of this state to subject the wages due to any non-resident debtor to garnishment, if it shall appear that the wages earned by him were earned outside of this state, such debtor is allowed the same exemption as is at the time allowed to him by the law of the state in which he so resides. The exemptions provided for and embraced in subdivisions six, seven, eight, nine, ten and eleven, extend only to debtors having an actual residence in this state. The property enumerated is not exempt from process issued in an action for the purchase money of the same property. In addition to the above it is provided that when any benevolent association or fraternal co-operative society shall set apart or appropriate a beneficiary fund to be paid over to the families of deceased members, any such fund, not exceeding five thousand dollars shall be exempt from seizure for any debt of the deceased or beneficiary.

#### MISSISSIPPI.

**EXEMPTIONS.**—The following property is exempt from seizure under the execution or attachment, to wit: First—The tools of a mechanic necessary for carrying on his trade. Second—The agricultural implements of a farmer necessary for two male laborers. Third—The books of a student required for the completion of his education. Fourth—The wearing apparel of every person. Fifth—The libraries of all persons not exceeding two hundred and fifty dollars in value; also the instruments of surgeons and dentists used in their profession, not exceeding

two hundred and fifty dollars in value. Sixth—The arms and accoutrements of each person of the militia of the state. Seventh—All globes and maps used by the teachers of schools, academies and colleges. Eighth—The following property of each head of a family, to be selected by the debtor, to wit: (a) Two work horses or mules, and one yoke oxen; (b) two cows and calves; (c) twenty head of hogs; (d) twenty sheep or goats; (e) all poultry; (f) all colts under three years old raised in this state by the debtor; (g) two hundred and fifty bushels of corn; (h) ten bushels of wheat or rice; (i) five hundred pounds of pork, bacon or other meat; (j) one hundred bushels of cotton seed; (k) one wagon, and one buggy or cart, and one set of harness; (l) five hundred bundles of fodder, and one thousand pounds of hay; (m) forty gallons of sorghum or molasses; (n) one thousand stalks of sugar cane; (o) one sugar mill and equipments, not exceeding one hundred and fifty dollars in value; (p) one bridle and saddle and one side saddle; (q) one sewing machine; (r) household and kitchen furniture not exceeding in value two hundred dollars. Ninth—And all the following property shall be exempt from garnishment or other legal process, to wit: (a) The wages of every laborer or person working for wages, being the head of a family, one hundred dollars; every other person to the amount of twenty dollars; (b) the proceeds of insurance on property, real and personal, exempt from execution or attachment, and the proceeds of the sale of such property.

**HOMESTEAD EXEMPTION.**—Every citizen of this state, being a householder and having a family, shall be entitled to hold as exempt from execution or attachment the land and buildings owned and occupied as a residence by him or her, not to exceed one hundred and sixty acres in quantity or two thousand dollars in value. The exemptionist may, however, increase the value of his exemption to three thousand dollars by making what is called a "homestead declaration," which declaration is recorded in the office of the clerk of the chancery court of the county where he lives. The proceeds of a life insurance policy, to an amount not exceeding ten thousand dollars upon any one life, is exempt to the beneficiaries named therein against the debts of the insured, and the proceeds of a policy not exceeding five thousand dollars, payable to the executor or administrator, inures to the heirs or legatees free from liability for debts; but if life is insured for the benefit of heirs or legatees otherwise, and they collect the same, the sum collected can be deducted from the five thousand dollars, and the excess of the latter only is exempt. No property is exempt as against the purchase money, or for labor performed on it or material furnished therefor.

### MISSOURI.

**EXEMPTIONS.**—Resident married men and heads of families are allowed a homestead of one hundred and sixty acres of land to the value of \$1,500. In cities of forty thousand inhabitants or over, homestead shall not include more than eighteen square rods of ground nor exceed in value \$3,000. In cities of less than forty thousand and over ten thousand, homestead shall not include over thirty square rods nor exceed \$1,500 in value. In cities and towns less than ten thousand, not more than five acres not exceeding \$1,500 in value. Personal property or real estate to the amount of not less than \$300, in addition to wearing apparel, beds, bedding, household and kitchen furniture of the value of \$100, and other specific articles are allowed to the heads of families. Wages for last thirty days' service are exempt to heads of families. When judgment is obtained for the purchase money of personal property, that specific property is not exempt, if property is found in hands of debtor. A debtor who is a married woman may invoke all exemption and homestead laws for the protection of the head of a



family except where the husband has claimed such exemption and homestead rights for the protection of his own property. Those not the head of a family are entitled to hold as exempt all wearing apparel and the necessary tools and implements of his trade, if a mechanic.

#### MONTANA.

EXEMPTIONS.—All clothing of the debtor and family, and chairs, tables, desks and books, to the value of two hundred dollars; also all necessary household, table and kitchen furniture, and provisions and fuel actually provided for individual or family use, sufficient for three months; also one horse, two cows and their calves, four swine, and fifty domestic fowls. In addition to the above there is exempt to the farmer his farming utensils, not exceeding six hundred dollars in value, two oxen, or two horses or mules, and their harness, one cart or wagon, and food for such stock for three months; two hundred dollars' worth of seed, grain, or vegetables actually provided for the purpose of sowing or planting. The proper tools, books or instruments, of any mechanic, physician, lawyer, dentist, or clergyman. To a miner, his dwelling, and all his tools and machinery necessary for carrying on his avocation, not to exceed in value one thousand dollars, and one horse, mule, or two oxen, vehicle and harness, by which the debtor habitually earns his living. One horse, with vehicle or harness, of physician or clergyman, used in making his professional visits, with food for such stock for three months. All arms, uniforms, etc., required by law to be kept by any person. All property generally held by the county or town for the benefit of the county or the public, except as against a vendor's lien or a mortgage. The wages of a debtor earned at any time within thirty days next preceding the levy, provided they are necessary for the use of his family residing in the state, supported wholly or in part by his labor. None but *bona fide* residents can claim the benefits of this law. A homestead not to exceed in value twenty-five hundred dollars; if agricultural land, it is not to exceed one hundred and sixty acres of land; if within the limits of a town plat, city or village, not to exceed one-fourth of an acre. The debtor has his option of the two and may select either, with all improvements thereon, which are included in the valuation. Such exemptions does not affect the lien of any mechanic or laborer, or extend to any mortgage lawfully obtained. The exemptions above specified apply only to married men or the head of a family, and none of the personal property is exempt from attachment or execution for the wages of any clerk, mechanic, laborer, or servant. In order to secure the homestead the claimant must execute and record in the county clerk's office a declaration of homestead. Failure to do this renders the property subject to execution.

#### NEBRASKA.

EXEMPTIONS.—A homestead consisting of any quantity of land, not exceeding one hundred and sixty acres, and the dwelling house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated city or village; or, instead thereof, at the option of the owner, a quantity of contiguous land, not exceeding one-half an acre with buildings thereon and appurtenances, all not over \$2,000 in value, being within an incorporated town, city or village or, in lieu of the above, a lot or parcel of contiguous land, not exceeding twenty acres, being within the limits of an incorporated town, city or village, the said parcel or lot of land not being laid off into streets, blocks and lots, owned and occupied by any resident of the state, being the head of a family, shall not be subject to attachment, levy or sale, upon execution or other process issuing out of any court in this state, so

long as the same shall be occupied by the debtor as a homestead, provided, however, that such farm lands, lots, etc., do not exceed in value \$2,000. All heads of families who have neither lands, town lots, nor houses subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of \$500 in personal property. No property hereinafter mentioned shall be liable to attachment, execution or sale, or any final process issued from any court of this state, against any person being a resident of this state and the head of a family: The family bible; family pictures, school books and library for use of the family; all necessary wearing apparel of the debtor and his family; all beds, bedsteads and bedding necessary for the use of such family; all stoves and appendages put up or kept for the use of debtor's family, not to exceed four; all cooking utensils and all other household furniture not herein enumerated, to be selected by the debtor, not exceeding in value \$100; one cow, three hogs, and all pigs under six months old; and if the debtor be at the time actually engaged in the business of agriculture, in addition to the above, one yoke of oxen, or a pair of horses in lieu thereof, ten sheep, and the wool therefrom, either in the raw material or manufactured into yarn or cloth; the necessary food for the stock mentioned in this section for the period of three months; one wagon, cart or dray, two plows and one drag; the necessary gearing for the team herein exempted, and other farming implements not exceeding \$50 in value; the provisions for the debtor and his family necessary for six months' support either provided or growing, or both, and fuel necessary for six months; the tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business; the library and implements of any professional man. Unmarried child residing on homestead, is allowed it exempt if parents both dead. The widow or widower, together or either one without the other, and with or without a child living with them, or if all children are dead, are entitled to homestead, provided the person claiming homestead has some relative living with him or her, dependent upon him or her for support. A conveyance or encumbrance of homestead by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument. The homestead is subject to execution on forced sale in satisfaction of judgments obtained: First, on debts secured by mechanics', laborers' or vendors' liens upon premises. Second, on debts secured by mortgage upon the premises, executed and acknowledged by both husband and wife, or an unmarried claimant. Homestead descends discharged from debts.

#### NEVADA.

**EXEMPTIONS.**—The following property of the judgment debtor is exempt from execution. Chairs, tables, desks, and books to the value of \$100. Necessary household furniture, wearing apparel, beds, bedding, provisions, and firewood sufficient for one month. Farming utensils; also two oxen or two horses, or two mules and their harness; two cows, and one cart or wagon; and food for such oxen, horses, cows or mules, for one month; also all seed grain or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing, at any time within the ensuing six months, not exceeding in value \$400. The tools and implements of a mechanic or artisan necessary to carry on his trade; the instruments and chests of a surgeon, physician, surveyor, and dentist, necessary to the exercise of their profession, with their scientific and professional libraries, and the libraries of an attorney or counselor, and the libraries of ministers of the gospel. The cabin or dwelling of a miner, not exceeding in

value \$500; also all tools and implements necessary for carrying on any mining operation not exceeding in value \$500; and two horses, mules, or oxen, with their harness, and food for the same for one month, when necessary to be used in such mining operations. Two oxen, two horses, or two mules, and their harness, and one cart or wagon, by the use of which a cartman, huckster, peddler, teamster, or other laborer, habitually earns his living; and one horse, with vehicle and harness, or other equipments, used by a physician or surgeon or minister of the gospel in making his professional visits, and food for such oxen, mules, or horses, for one month. One sewing machine, not exceeding in value \$150, in actual use by the debtor or his family. All fire engines, hooks and ladders, and all apparatus and furniture belonging to any fire company or department. All arms, uniforms, and accoutrements required by law to be kept by any person. All court houses, jails, public offices and buildings, lots, grounds, and personal property; the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the court house, jail, and public offices belonging to any county in this state, and all cemeteries, public squares, parks and places, public buildings, town halls, public markets, buildings for the use of the fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use, or for the use of any fire or military company organized under the laws of this state. None of the above articles or species of property are exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon. The earnings of a judgment debtor arising from his personal services for the calendar month during which process has been issued (in supplemental proceedings), not exceeding fifty dollars, are exempt, when it shall be made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of a family supported wholly or partially by his labor. Homestead not exceeding \$5,000 in value, to be selected by husband or wife, or other head of a family.

#### NEW HAMPSHIRE.

EXEMPTIONS.—Homestead to the value of \$500; necessary apparel and bedding, and household furniture to the value of \$100; bibles and school books in use in the family library to the value of \$200; one cow, one hog, and one pig, and pork of same when slaughtered; tools of occupation to the value of \$100; six sheep and their fleeces, one cooking stove and its furniture; provisions and fuel to the value of \$50, and one sewing machine; beasts of the plow not exceeding one yoke of oxen, or a horse, when required for farming or teaming purposes or other actual use, hay not exceeding four tons, and domestic fowl to value of \$50.

#### NEW JERSEY.

EXEMPTIONS.—Every resident head of a family has or is entitled to an exemption of property (exclusive of wearing apparel) of the value of \$200 as against creditors in all cases where such property has not been pledged or mortgaged to secure indebtedness. The family of a decedent may claim the same exemption and have set apart for their use property of the decedent of said appraised value. Household goods and furniture of every kind, not exceeding in value \$200, of any absconding debtor having a family residing in this state, are reserved for the use of the family, and are not liable to seizure under any writ of attachment or other civil process, unless the debt or demand sued on be one for which such property was sold and delivered.

**NEW YORK.**

**EXEMPTIONS AND HOMESTEAD.**—If the judgment debtor is a householder, or has a family for which he provides, necessary household furniture, working tools or team, professional instruments, furniture and library, not exceeding \$250 in value, and food for the team for ninety days, are exempt, except in actions for the purchase price thereof, or the purchase price of various household exempt articles specified in the statute. Even in supplementary proceedings the judgment debtor cannot be ordered to apply upon the judgment his earnings for his personal services within sixty days preceding the order if such earnings are necessary for the support of a family wholly or partly supported by his labor. The lot and buildings not exceeding in value \$1,000, owned and occupied as a residence by a householder, having a family, and recorded as homestead property, are exempt as against all debts but debts for purchase price thereof, and those contracted before the property was recorded as exempt.

**NORTH CAROLINA.**

**EXEMPTIONS.**—Every homestead, and dwelling and buildings used therewith, not exceeding in value \$1,000, to be selected by the owner thereof; or in lieu thereof, at the option of the owner, any lot in any city, town or village, with the dwellings used thereon, owned and occupied by any resident of the state, and not exceeding the value of \$1,000. Personal property of the value of \$500.

**NORTH DAKOTA.**

**EXEMPTIONS.**—The following property is absolutely exempt to a head of family as defined in homestead from attachment on mesne process and from levy and sale on execution: All family pictures, a pew or any other sitting in any house of worship; a lot or lots in any burial ground; the family bible and all school books used by the family and all other books not exceeding in value one hundred dollars; all wearing apparel and clothing of the debtor and his family; provisions for the debtor and his family necessary for one year's supply, and also fuel necessary for one year, and the homestead as created, defined and limited by law. Aside from these absolute exemptions, the debtor may select from all other of his personal property, goods, chattels, merchandise, or money not to exceed in the aggregate fifteen hundred dollars; or in lieu thereof he may select books and musical instruments of the value of five hundred dollars; kitchen and household furniture and bedding of the value of five hundred dollars; three cows, ten swine, one yoke of cattle, two horses or mules, one hundred sheep and their lambs under six months old, and all wool therefrom, and all cloth or yarn manufactured from such wool and the food necessary to keep such animals for one year; also one wagon, one sleigh, two plows, one harrow and farming utensils, including tackle for teams, not exceeding three hundred dollars in value, the tools of any mechanic used and kept for the purpose of carrying on his trade, and, in addition thereto, stock in trade of the value of two hundred dollars; the library and instruments of any professional person not exceeding six hundred dollars in value. None but the absolute exemptions above specified are allowed to either a corporation for profit, a non-resident, a debtor who is in the act of removing from the state with his family, a debtor who has absconded, taking his family with him, or any person against whom an execution or other process issues upon a debt incurred for property obtained under false pretenses, or as against an execution issued for the recovery of laborers' or mechanics' wages or physicians' bills. No exemption exists as against execution issued for

the purchase money of property, real or personal. A partnership firm can claim but one exemption of fifteen hundred dollars, or the alternative property, and not a several exemption for each partner.

#### OHIO.

**EXEMPTIONS.**—The family homestead of each head of a family is exempt from sale on execution on any decree or judgment rendered in any cause of action, provided that such homestead does not exceed one thousand dollars in value. When the homestead consists of a house and lot of land that will not bear a division, the plaintiff in execution shall receive, in lieu of the proceeds of a sale of the homestead, the amount over and above \$100 annually, which shall be adjudged by appraisers as a fair and reasonable rent for the same, until the debt, interest, and costs are paid, the same being payable quarterly. In default of rent being paid quarterly, or within ten days after each payment shall become due, it is the duty of the sheriff to proceed and sell said homestead. It cannot be sold for less than its appraised value. The wearing apparel of such family, beds, bedsteads, bedding necessary for the use of the family; one stove and pipe, fuel sufficient for sixty days, tools necessary for carrying on his or her trade or business, not exceeding \$100 in value; the personal earnings of the debtor and his or her minor child or children for three months when necessary to the support of debtor. In case the debtor is not the owner of a homestead, he is entitled to hold exempt from levy and sale personal property not exceeding \$500 in addition to the amount of chattel property aforesaid. The defendant may hold exempt from execution ninety per cent. only of his personal earnings as provided above, when the debt, demand or claim is for necessaries furnished to the defendant, his wife or family after April 26th, 1898.

#### OKLAHOMA.

**EXEMPTIONS.**—To head of a family, outside of city or town, not to exceed one hundred and sixty acres, which must be in one tract, with the improvements thereon, and in a city or town, not more than one acre; all household and kitchen furniture; lot in cemetery; all implements of husbandry, tools, apparatus and books used in trade or profession; family library, portraits and wearing apparel; five milch cows and their calves, one yoke of oxen, with yokes and chains; two horses or mules, and wagon, or cart, or dray, carriage or buggy; gun; ten hogs, twenty sheep; saddles, bridles and harness for use of family; provisions, forage on hand or growing for home consumption and for the use of exempt stock for one year; current wages and earnings for personal and professional services within last ninety days. These exemptions do not apply to corporation for profit; to a non-resident; to a debtor who is in the act of removing his family from the Territory, or who has absconded, taking with him his family. To a single person: lot or lots in cemetery held for sepulchre; all wearing apparel; tools, apparatus, and books belonging to any trade or profession; one horse, bridle and saddle or one yoke of oxen; current wages for personal services. Exemption of homestead shall not apply where debt is due for purchase money, or part of same; taxes due thereon; work and material used in constructing improvements thereon; lien given by the owner. Exemption of personal property shall not apply when debt is due for rents and advances of landlord to tenant, or to debts secured by lien. No personal property is exempt from execution or attachment for wages of clerk, mechanic, laborer or servant. All pension money is exempt, and judgment debtor has right to select \$600 worth of property, exempt from any levy.

**OREGON.**

**EXEMPTIONS.**—Books, pictures, and musical instruments, to the value of \$75; wearing apparel to the value of \$100, and if a householder, to the value of \$50 for each member of the family; tools, implements, apparatus, team, vehicle, harness, or library, when necessary in the occupation or profession of a judgment debtor, amount of \$400; also sufficient quantity of food to support such team, if any, for sixty days; if the judgment debtor be a householder, ten sheep with one year's fleece, two cows, five swine, household goods, furniture, and utensils, to the value of \$300. No article of property is exempt from execution issued upon a judgment for the purchase price. Earnings of judgment debtor for personal services for the thirty days next preceding garnishment or attachment cannot be included in the judgment.

**PENNSYLVANIA.**

**EXEMPTIONS.**—In executions issued on judgments "obtained upon contract and distress for rent," property, real or personal, to the value of \$300. The exemption may be waived in note or contract. Under assignments for the benefit of creditors, household furniture and things of domestic use to the amount of \$300. The widow or children of a deceased resident of the state can retain as against creditors \$300 in money, lands or personalty.

**RHODE ISLAND.**

**EXEMPTIONS.**—The following property is exempt from attachment: The necessary wearing apparel of a debtor or his family, if he have a family; the working tools of a debtor necessary to his or her usual occupation, not exceeding in value the sum of \$200, and the professional library of any professional man in actual practice; the household furniture and family stores of a housekeeper, not exceeding in value the sum of \$300; one cow and one and a half tons of hay of a housekeeper; one hog, and one pig of a housekeeper, and pork of such hog and pig when slaughtered; debts secured by bills of exchange or negotiable promissory notes; the salary or wages due or payable to any debtor, not exceeding the sum of \$10, except when the cause of action is for necessities furnished the defendant. For certain other exemptions see Chapter 255 of the General Laws of 1896. There is no homestead exemption.

**SOUTH DAKOTA.**

**EXEMPTIONS.**—Absolute exemptions are: All family pictures; a pew or other sitting in any house of worship; lot or lots in burial ground; family bible and all school books used by family, all other books used as part of family library, not exceeding \$200; all wearing apparel and clothing of debtor and family, provisions and fuel necessary for one year's supply for himself and family; and the homestead. In addition, debtor, if head of family, may select \$750 worth of other personal property; and, if single person, \$300. Any debtor wishing to avail himself of this last exemption must prepare a verified schedule of all his personal property and deliver it to the officer having the execution or other writ within three days from the date of the levy. Any property owned by the debtor and not included in this schedule shall not be exempt. The appraisement of the personal property must be at the actual value of the articles at the place where situated. The appraisement is made by three disinterested persons, one chosen by each of the parties, and they selecting the third. If they cannot agree

upon the third, the sheriff or officer having the writ selects him. Instead of the \$750 exemption the debtor may select property as follows: books and musical instruments for use of family, not exceeding \$200 in value; household and kitchen furniture, not exceeding \$200; two cows, five swine, two yoke of oxen or one span of horses or mules, twenty-five sheep and their lambs under six months old, all wool of the same, and all cloth or yarn manufactured therefrom, necessary food for the animals mentioned for one year; also one wagon, one sleigh, two ploughs, one harrow, and farming utensils, including tackle for teams, not exceeding \$1,250 in value; the necessary tools and implements of a mechanic, and in addition stock in trade not exceeding \$200 in value; the library and instruments of a professional man, not exceeding \$300 in value. But no exemptions except the absolute ones are allowed against an execution or other process issued upon a debt incurred for property obtained under false pretenses. The same is true as to a judgment for laborers' or mechanics' wages; and also for physicians' bills, with certain restrictions; and no exemptions are allowed against an execution levied on property for the purchase money of such property. A corporation for profit, a non-resident, a debtor who is in the act of removing with his family from the state, or who has absconded, taking with him his family, cannot claim any but absolute exemptions. A partnership firm can claim but one exemption of \$750, and not several exemptions for each partner.

### TENNESSEE.

**EXEMPTIONS.**—A homestead to the value of \$1,000 is exempt. Debtor has the right to elect what property shall be set apart for the purpose. It is not necessary that he should reside upon it. Also two beds, bedsteads and necessary clothing for each, and for each three children an additional bed, bedstead, and clothing, such bedstead not exceeding \$25 in value; one cow and calf, and if family consists of six persons, two cows and calves; one dozen knives and forks, one dozen plates, half dozen dishes, one set tablespoons, one set teaspoons, one bread tray, two pitchers, one waiter, one coffeepot, one teapot, one canister, one cream jug, one dozen cups and saucers, one dining table and two table cloths, one dozen chairs, one bureau not exceeding \$40 in value, one safe or press, one wash basin, one bowl and pitcher, one washing kettle, two washing tubs, one churn, one looking glass, one chopping axe, one spinning wheel, one loom and gear, one pair cotton cards, one pair wool cards, one cooking stove and utensils not exceeding \$25 in value, one cradle, one bible and hymn book, all school books, two horses or mules, or one of each, or one yoke of oxen, one ox cart, ring, staple, and log chain, one two-horse or one-horse wagon not exceeding \$75 in value, and harness, one man's saddle, one woman's saddle, two riding bridles, twenty-five barrels of corn, twenty bushels of wheat, five hundred bundles of oats, five hundred bundles of fodder, one stack of hay not exceeding \$20 in value, and in family of less than six persons one thousand pounds of pork, slaughtered or on foot, or six hundred pounds of bacon, and if the family consists of more than six persons, twelve hundred pounds of pork or nine hundred pounds of bacon, all the poultry on land and fowls up to \$25, a home-made carpet, and six cords of wood or one hundred bushel of coal, and if the head of the family be engaged in agriculture, two plows, two hoes, one grubbing hoe, one cutting knife, one harvest cradle, one set plow gears, one pitchfork, one rake, one iron wedge, five head of sheep, and ten head of stock hogs; also, in hands of a mechanic, one set of mechanics' tools, such as are usual and necessary in pursuit of his trade; also, in hands of every male citizen, or female if head of family, one gun; also, in hands of head of family, or single female using in

earning a livelihood, one sewing machine; and in hands of families, fifty pounds of picked cotton, twenty-five pounds of wool, and enough upper and sole leather to provide shoes for family; one hundred gallons of sorghum molasses, five bee hives and the products of the same, one hundred pounds of soap, fifty pounds of lard, one hundred pounds of flour, fifty pounds of salt, one hundred pounds of beef or mutton, one pound of black pepper, one pound of spice, one pound of ginger, twenty pounds of coffee, fifty pounds of sugar, three bushels of meal, one bushel of dried beans, one bushel of dried peas, fifty bushels of Irish potatoes, fifty bushels of sweet potatoes (provided they be kept for family use, and not for sale or merchandise), ten bushels of turnips, one pair of andirons, one clock, all the canned fruits put up for the use of the family, not to exceed twenty dollars in value, and twenty bushels of peanuts, three strings of red pepper, and two gourds, two punger gourds, a carpet in actual use by the family, not exceeding in value twenty-five dollars; fifty head of sheep and the fleece that may be shorn from the same, twenty-five stand of bees and the product of the same. In the hands of each mechanic who is the head of a family, two hundred dollars' worth of lumber, or material or products of his labor, in a finished or unfinished state.

#### TEXAS.

EXEMPTIONS.—The homestead of a family is exempted and protected from forced sale for the payment of all debts, except the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; nor shall the owner, if a married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements thereon, as herein before provided, whether such mortgage or trust deed or other lien shall have been created by the husband alone, or together with his wife, and all pretended sales of the homestead involving any conditions of defeasance shall be void. The homestead not in a town or city shall consist of not more than two hundred acres of land, with the improvements thereon. The homestead in a city, town or village shall consist of lot or lots not exceeding in value \$5,000 at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family. There is also exempt to every family all household and kitchen furniture; all implements of husbandry; any lot or lots in a cemetery; all tools, apparatus and books belonging to any trade or profession; the family library and all family portraits and pictures; five milch cows and their calves; two yoke of work oxen, with necessary yokes and chains; two horses and one wagon; one carriage or buggy; one gun; twenty hogs; twenty head of sheep; all saddles, bridles and harness necessary for the use of family; all provisions and forage on hand for home consumption, and all current wages for personal services. The following property shall be exempt to persons who are not constituents of a family: A lot or lots in a cemetery; all wearing apparel; all tools, apparatus and books belonging to any trade or profession; one horse, saddle and bridle, and current wages for personal services.

#### UTAH.

EXEMPTIONS.—Chairs, tables, desks, and books amounting to \$200; necessary household and kitchen furniture amounting to \$300, also one sewing machine and family pictures, provisions and fuel for three months. Farming implements



not exceeding \$300 of a farmer: also two oxen, two mules or two horses and their harness, two cows with sucking calves, two hogs and all sucking pigs, all wearing apparel, also all beds and bedding, cart or wagon, food for such horses, mules, oxen, and cow for sixty days, also seeds, etc., for planting amounting to \$200, and crops of same amount. Tools of mechanics not exceeding \$500, instruments of physicians, surgeons or dentists with professional library, law library of attorney, cabin of miner not exceeding \$500, tools, derricks etc., \$200, two oxen, horses or mules, carts and harness by which drayman, etc., habitually earns his living, a horse, harness and vehicle, etc., used by physician, surgeon or minister in making professional calls, with hay and grain sufficient for three months, all earnings of the debtor if he be a married man or with a family dependent upon him for support, within sixty days next preceding the levy. If the debtor is head of family there is exempt homestead valued \$1,000, \$500 additional valuation allowed for wife and \$250 for each other member of family. Court houses, public buildings, property of fire companies, cemeteries, parks and churches. No property is exempt owned by non-residents or for purchase price of the thing sold. *Redemption*—Leasehold estate, less than two years unexpired, sale shall be absolute. In all other cases real property shall be subject to redemption: First, the judgment debtor, or his successor in interest in the whole or any part of the property; second, a creditor having a lien by judgment or mortgage on the property sold, or on some part thereof, subsequent to that on which the property was sold, within six months after sale of the property, by paying the purchase money in kind as specified in the judgment (gold or currency) with six per cent. thereon added, together with any assessment or tax which the purchaser may have paid since the purchase, and if the purchaser be also a creditor, having a lien prior to that of a redemption other than the judgment under which the purchase was made the amount of such lien with interest. If the property be so redeemed by a redeptioner, either the judgment debtor or another redemptioner may, within sixty days of the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with three per cent. thereon in addition, and the amount of any assessment or tax which the last redemptioner may have paid thereon after the redemption made by him, with interest on such amount, and in addition, the amount of any liens held by said last redemptioner prior to his own with interest, provided that the judgment under which the property was sold need not be paid as a lien. The property may be again redeemed as often as a debtor or redemptioner is so disposed, from any previous redemptioner, within sixty days after the last redemption, with three per cent. thereon in addition, and amount of any assessment or tax which the last redemptioner paid after the redemption by him, with interest thereon and the amount of any liens other than the judgment under which the property was sold, held by the said last redemptioner previous to his own with interest. Sale under deed of trust of real property may be redeemed by the grantor or assigns, or any legal redemptioner within six months after sale on payment of debt and interest and legal charges and costs.

#### VERMONT.

*EXEMPTIONS.*—Homestead to the value of \$500, and products, such suitable apparel, bedding, tools, arms, and articles of furniture as may be necessary for upholding life; one sewing machine kept for use, one cow, not exceeding \$100 in value, the best swine, or the meat of one swine, ten sheep, not exceeding \$100 in value for the ten, and one year's product of said sheep in wool, yarn, or cloth; forage sufficient for keeping not exceeding ten sheep and one cow through

one winter; ten cords of firewood, twenty bushels of potatoes, such military arms and accoutrements as the debtor is required by law to furnish; all growing crops, ten bushels of grain, one barrel of flour, three swarms of bees and hives, together with their produce in honey; two hundred pounds of sugar, and all lettered gravestones; the bibles and other books used in a family; one pew or slip in a meeting house or place of religious worship; live poultry not exceeding in amount or value the sum of \$10; the professional books and instruments of physicians, and the professional books of clergymen and attorneys at law, to the value of \$200, and also one yoke of oxen or steers as the debtor may select, or two horses kept in use for team work, and such as the debtor may select, in lieu of oxen or steers, but not exceeding in value the sum of \$200, with sufficient forage for the keeping of the same through the winter; also one two-horse wagon with whiffletrees, and one neckyoke, or one ox-cart as the debtor may choose, one sled or one set of tram-sleds, either for horses or oxen, as the debtor may select, two harnesses, two halters, two chains, one plow and one ox-yoke, which with the oxen, or steers, or horses, which the debtor may select for team work, shall not exceed in value \$250; provided that the exemption of said one two-horse wagon with whiffletrees and one neckyoke, or one ox-cart as the debtor may choose, one sled or set of tramsleds, harnesses, halters, plow and ox-yoke are not to extend to or affect any attachment in any suit founded on any contract made on or before the 1st day of December, A. D. 1878, or to any execution issued on a judgment founded on any such contract; provided, however, the exemption, as to one yoke of oxen or steers and the forage therefor, is not to extend to any attachment issued on any contract made on or before the twenty-first day of November, 1859, or the exemption as to two horses and the forage therefor, on or before the 1st day of December, 1866, or any execution issued on a judgment founded on any such contract. But property is not exempt in a suit brought for the purchase price thereof.

#### VIRGINIA.

EXEMPTIONS.—Every householder or head of a family shall be entitled, in addition to the articles mentioned below, to hold exempt from levy his real and personal property, or either, including money or debts due him, to a value not exceeding \$2,000, to be selected by him. In case of husband, parent, or other person, who is a housekeeper and head of a family, there are also exempt, family bible, family pictures, books, etc., not exceeding \$100 in value; a pew in a church, lot in a burial ground, necessary wearing apparel of debtor and family, necessary beds, bedding, etc., stoves for necessary use of family, not exceeding three; one cow, one horse, six chairs, one table, six knives, six forks, six plates, one dozen spoons, two dishes, two basins, one pot, one oven, six pieces of wood or earthenware, one loom, one safe or press, spinning-wheel, pair of cards, one axe, two hoes, five barrels of corn, five bushels of wheat or one barrel of flour, two hundred pounds of bacon, three hogs, \$10 worth of forage; one cooking stove and utensils for cooking; one sewing machine; and in case of a mechanic, the tools of his trade to the value of \$100; if debtor at the time is actually engaged in agricultural pursuits, there are exempt, whilst so engaged, one yoke of oxen, or a pair of horses or mules in lieu thereof, one wagon, two plows, one drag, one harvest cradle, one pitchfork, one rake, two iron wedges. The foregoing list of exemptions, except the item of \$2,000, applies to debts contracted since February 20, 1867; the exemption, affecting debts contracted before that time, embraces but a small proportion of the above described articles. The benefit of a homestead (\$2,000) can only be secured by deed duly recorded in

the county where the property, or the greater part thereof, is situated, declaring an intention to claim such homestead, with a description of the property so claimed as such homestead. The homestead continues after death of the householder or head of a family for the benefit of the widow and children of the deceased until her death or marriage, and after her death or marriage for the exclusive benefit of the minor children until the youngest child becomes twenty-one years of age; after which period it shall pass, according to the law of descent, as other real estate, or as may be devised by said householder, not being subject to dower, yet subject to all the debts of the said householder or head of a family. The Court of Appeals of Virginia has decided that the provision of the State Constitution and the act of the General Assembly passed in pursuance thereof, known as the "Homestead Exemption Laws," so far as they apply to contracts entered into or debts contracted before their adoption, are in violation of the Constitution of the United States, and therefore void.

#### WASHINGTON.

**EXEMPTIONS.**—The homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as provided by law. The homestead is exempt from execution or forced sale, except on debts secured by mechanic's lien, labor liens, vendors' liens, debts secured by mortgage on the premises, executed and acknowledged by the husband and wife, or by an unmarried claimant. The homestead of a married person cannot be conveyed or incumbered, except by instrument signed by both husband and wife. A homestead can be abandoned only by a declaration of abandonment, or a grant therefor executed and acknowledged by the husband and wife, if claimant is married, or by claimant if unmarried, and a declaration of abandonment is effectual only from the date it is filed for record. Whenever property, which is exempt by the laws of the state, is destroyed by fire, then the insurance money coming to or belonging to the person thus insured to an amount equal to the property thus destroyed shall be exempt from execution and attachment. The following property shall be exempt from execution and attachment (1) all wearing apparel of every person and family; (2) all private libraries, not to exceed \$500 in value, and all family pictures and keepsakes; (3) to each householder one bed and bedding, and one additional bed and bedding for each additional member of the family, and other household goods and utensils and furniture, not exceeding \$500 coin in value; (4) to each householder two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such household and family for six months, also feed for such animals for six months (provided that in case such householder shall not possess, or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed \$250 coin in value); (5) to a farmer, one span of horses or mules with harness, or two yoke of oxen with yokes and chains, and one wagon; also farming utensils actually used about the farm, not exceeding in value \$500 in coin; also one hundred and fifty bushels of wheat, one hundred and fifty bushels of oats or barley, fifty bushels of potatoes, ten bushels of corn, ten bushels of peas, and ten bushels of onions for seeding purposes; (6) to a mechanic, the tools and instruments used to carry on his trade for the support of himself and family, also material used in his trade not exceeding in value \$500 in coin; (7) to a physician, his library, not to exceed in value \$500 in coin, also one horse with harness and buggy, the instruments used in his practice, and medicines not exceeding in value \$200 in coin; (8) to attorneys, clergymen and other profes-

sional men, their libraries, not exceeding \$1,000 in coin value, also office furniture, fuel and stationery, not exceeding in value \$200 in coin; (9) all firearms kept for the use of any person or family; (10) to any person, a canoe, skiff, or small boat, with its oars, sails and rigging, not exceeding in value \$250; (11) to a person engaged in lightering for his support or that of his family, one or more lighters barges or scows, and a small boat with oars sails and rigging, not exceeding in the aggregate \$250 in coin value; (12) to a teamster or drayman engaged in that business, for the support of himself or his family, his team, consisting of one span of horses or mules, or two yoke of oxen, or a horse and mule with harness, yokes, one wagon, truck, cart or dray; (13) to a person engaged in the business of logging for his support or that of his family, three yoke of work cattle and their yokes, and axes, chains, implements for the business, and camp equipments, not exceeding \$300 coin in value; (14) a sufficient quantity of hay, grain, or feed to keep the animals mentioned in the several subdivisions of this chapter, for six weeks. But no property shall be exempt from an execution issued upon a judgment for the price thereof, or any part of the price thereof, or for any tax levied thereon or for clerk's laborer's or mechanic's wages earned within this state, nor shall any property be exempt from execution issued upon a judgment against an attorney on account of any liability incurred by such attorney to his client on account of any moneys, or other property coming into his hands, from or belonging to his client. Each person shall be entitled to select the property which he is entitled to claim as exempt. Any money received by any citizen of the state as a pension from the Government of the United States, whether the same be in the actual possession of such person or be deposited or loaned by him, shall be exempt from execution, attachment or seizure by or under any legal process whatever. When any debtor dies or absconds, and leaves his family any money exempted by this act, the same shall be exempt to his family. The proceeds or avails of all life insurance is exempt from all liability for debt. In addition to the above exemption, the law of 1897 exempts to every householder in the state, personal property to the amount and value of \$1,000, and defines a householder as designated in all statutes relating to exemptions to be: (1) the husband and wife, or either; (2) every person who has residing with him or her, and under his or her care and maintenance, either: (a) his or her minor child, or the minor child of his or her deceased wife or husband; (b) a minor brother or sister, or the minor child of a deceased brother or sister; (c) a father, mother, grandfather or grandmother; (d) the father, mother, grandfather, or grandmother of deceased husband or wife; (e) an unmarried sister, or any other of the relatives mentioned in this section who have attained the age of majority, and are unable to take care of or support themselves.

#### WEST VIRGINIA.

EXEMPTIONS.—Homestead to the value of \$1,000 is exempt, where the debtor, being a husband or parent, and resident in the state, previously to contracting the debt or liability, has placed a declaration of his intention to keep the property as a homestead on the land records of the county in which the real estate is situate. Personal property to the value of \$200 is also exempted, provided debtor is a resident, and husband or parent, or a married woman. Also \$50 worth of tools of a mechanic, artisan or laborer, whether he is a husband or parent or not.

#### WISCONSIN.

EXEMPTIONS.—A homestead consisting of any quantity of land not exceeding forty acres, used for agricultural purposes, and the dwelling house thereon and

its appurtenances, to be selected by the owner thereof, and not included in any city or village; or instead thereof, at the option of the owner, a quantity of land not exceeding in amount one-fourth of an acre, being within a city or village, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of the state, shall not be subject to forced sale on execution, or any other final process from a court, for any debt or liability except mechanics' liens, mortgages and taxes; but if testator leave no widow or minor children the homestead is liable for expense of last sickness, funeral and administration, and if he leave no widow, children, or grandchildren, it is liable for all debts after other property is exhausted. Family bible, family pictures and school books, library of debtor, and every part thereof, but not circulating libraries, wearing apparel of debtor and family, all beds, bedsteads and beddings kept and used for the debtor and his family, all stoves put up and kept for use, all cooking utensils, and all other household furniture not herein enumerated, not exceeding \$200 in value; two cows, ten swine, one yoke of oxen and one horse or mule, or instead of oxen two horses or two mules; ten sheep and the wool from same, either raw or manufactured; the necessary food for above stock for a year's support; one wagon, cart, or dray, one sleigh, one plow, one drag, and other farming utensils, including tackle for teams, not exceeding \$200 in value, provisions and fuel for one year; tools and implements or stock in trade of a mechanic, miner, merchant, trader, or other person, not exceeding \$200 in value, all moneys from insurance of exempt property; all sewing machines kept for use; any swords, plate, books, or other articles presented by Congress or any legislature; printing materials and press, or presses, used in the business of any printer or publisher, not exceeding \$1,500 in value; but not more than \$400 shall be exempt as against employees; fire engines and equipments, and everything connected with fire departments, including houses and lots, etc.; abstract books, and patents. All private property shall be exempt from seizure and sale upon any execution, issued to enforce any judgment or decree of any court, which shall have been rendered against any county, town, village, city, or school district. The earnings of any person and persons having a family to support, for three months prior to issue of process, to the amount of \$60 per month, are also exempt. Said earnings shall not exceed \$180 for the three months, including such parts or share thereof paid the debtor during said time.

#### WYOMING.

**EXEMPTIONS.**—The necessary wearing apparel of every person not exceeding in value \$150. Household property when owned by any person being the head of a family to the amount of \$500. Tools, teams, implements, or stock in trade of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding in value \$300, and homestead occupied by the owner or his or her family not exceeding in value \$1,500, and the earnings of a debtor for his personal services not exceeding \$50, when it is shown that the earnings are needed for the support of a family supported wholly or partly by his labor. No article of personal property is exempt from attachment or sale on execution for the purchase money of said article. Persons claiming exemption must be *bona fide* residents of this state. No property of any person about to remove or abscond from the state is exempt.



**List of Judges of Circuit, District and Territorial Courts and Circuit Courts of Appeals of the United States and of the Clerks of the Circuit and District Courts with their Official Addresses; of the times and places of holding Courts, and the Geographical limits of Districts and Circuits, compiled from Official Sources and Corrected to October 1, 1900.**

Circuit.	Districts.	District Judges.	Circuit Judges.	Justices.
1	Maine. .... New Hampshire.. Massachusetts.... Rhode Island ...	Nathan Webb ..... Edgar Aldrich..... Francis C. Lowell.. Arthur L. Brown ..	Le Baron B. Colt. Wm. L. Putnam.	Horace Gray.
	Vermont..... Connecticut.... New York, N'th'n New York, S'th'n. New York, East'n New York, West'n	Hoyt H. Wheeler... Wm. K. Townsend. A. C. Coxe..... Addison Brown .... Edward B. Thomas John R. Hazel.....	W. J. Wallace E. Henry Lacombe. Nath'n'l Shipman.	
3	New Jersey ..... Pennsylvania, East'n .. Pennsylvania, West'n..... Delaware.....	And'w Kirkpatrick. John B. McPherson Joseph Buffington.. Edw'd G. Bradford.	M. W. Acheson. G. M. Dallas. George Gray.	Geo. Shiras, Jr.
	North Carolina, East'n. .... North Carolina, West'n..... South Carolina... Maryland ..... Virginia, East'n.. Virginia, West'n.. West Virginia....	Thomas R. Purnell. Jas. Edmund Boyd. Wm. H. Brawley .. Thomas J. Morris.. Edm'd Waddill, Jr.. John Paul ..... John J. Jackson....	Nathan Goff. Chas. H. Simonton.	
5	Georgia, North'n Georgia, South'n. Florida, North'n.. Florida, South'n.. Alabama, North'n and Middle ... Alabama, South'n Mississippi, N'th'n and South'n ... Louisiana, East'n Louisiana, W'st'n Texas, North'n... Texas, East'n ... Texas, West'n ..	Wm. T. Newman.. Emory Speer ..... Charles Swayne ... James W. Locke.... John Bruce..... Henry T. Toulmin. Henry C. Niles.... Charles Parlange... Aleck Boarman... Edward R. Meek... David E. Bryant... Thomas S Maxey..	D. A. Pardee. And'w P. McCormick. D. D. Shelby.	E. D. White.

Circuit.	Districts.	District Judges.	Circuit Judges.	Justices.
6	Ohio, North'n . . .	Augustus J. Ricks..	H. H. Lurton. Wm. R. Day. Henry F. Sev- erens.	John M. Harlan
	Ohio, South'n....	Albert C. Thompson		
	Michigan, East'n	Henry H. Swan....		
	Michigan, West'n	George P. Wanty...		
	Kentucky. ....	Walter Evans.....		
	Tennessee, East'n and Middle.....	Charles D. Clark...		
Tennessee, West'n	Eli S. Hammond...			
7	Indiana.....	John H. Baker.....	W. A. Woods. James G. Jen- kins. Peter S. Gross- cup.	H. B. Brown.
	Illinois, North'n..	Christian C. Kohl- saat.		
	Illinois, South'n..	William J. Allen...		
	Wisconsin, East'n	William H. Seaman		
	Wisconsin, West'n	Romanzo Bunn ...		
8	Minnesota . . . . .	William Lochren...	Henry C. Cald- well. Walter H. San- born. A. M. Thayer.	D. J. Brewer.
	Iowa, North'n....	Oliver P. Shiras...		
	Iowa, South'n....	Smith McPherson..		
	Missouri, East'n..	Elmer B. Adams...		
	Missouri, West'n..	John F. Philips....		
	Arkansas, East'n..	Jacob Trieber....		
	Arkansas, West'n..	John H. Rogers....		
	Nebraska.....	William H. Munger		
	Colorado.....	Moses Hallett ...		
	Kansas.....	William C. Hook..		
	Wyoming.....	John A. Riner ...		
	North Dakota....	Charles F. Amidon.		
	South Dakota....	John E. Carland..		
	Utah.....	John A. Marshall..		
	<i>New Mexico</i> .....	.....		
<i>Oklahoma</i> .....	.....			
<i>Indian Territory, North'n</i> .....	Joseph A. Gill....			
<i>Indian Territory, Central</i> .....	Wm. H. H. Clayton			
<i>Indian Territory, South'n</i> .....	Hosea Townsend..			
9	California, N'th'n.	John J. De Haven..	William W. Morrow. William B. Gil- bert. E. M. Ross.	J. McKenna.
	California, S'th'n.	Olin Wellborn....		
	Oregon.....	Charles B. Bellinger		
	Nevada.....	Thomas P. Hawley.		
	Washintgon.....	Cornelius H. Han- ford.		
	Idaho.....	James H. Beatty...		
	Montana.....	Hiram Knowles...		
	Alaska.....	Melville C. Brown, Div. No. 1.		
	<i>Alaska</i> .....	Arthur H. Noyes, Div. No. 2.		
	<i>Alaska</i> .....	James Wickersham, Div. No. 3.		
<i>Arizona</i> .....	.....			



## Clerks, United States Circuit Courts of Appeals.

Name and office.	Official address.	Name and office.	Official address.
<b>First Circuit.</b> <i>Clerk.</i> John G. Stetson . . .	Boston, Mass.	<b>Sixth Circuit.</b> <i>Clerk.</i> Frank O. Love- land . . . . .	Cincinnati, Ohio.
<b>Second Circuit.</b> <i>Clerk.</i> William Parkins . .	New York, N. Y.	<b>Seventh Circuit.</b> <i>Clerk.</i> Edward M. Hol- loway . . . . .	Chicago, Ill.
<b>Third Circuit.</b> <i>Clerk.</i> Wm. V. Williamson.	Philadelphia, Pa.	<b>Eighth Circuit.</b> <i>Clerk.</i> John D. Jordan . .	St. Louis, Mo
<b>Fourth Circuit.</b> <i>Clerk.</i> Henry T. Meloney .	Richmond, Va.	<b>Ninth Circuit.</b> <i>Clerk.</i> F. D. Monckton . .	San Francisco, Cal.
<b>Fifth Circuit.</b> <i>Clerk.</i> James M. McKee . .	New Orleans, La.		

**ALABAMA (5th Circuit).****NORTHERN DISTRICT.**

*Counties in the district.*—Northern division: Colbert, Cullman, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Marion, Marshall, Morgan, and Winston.

Southern division: Bibb, Blount, Calhoun, Cherokee, Cleburne, DeKalb, Etowah, Fayette, Greene, Hale, Jefferson, Lamar, Pickens, St. Clair, Shelby, Sumter, Talladega, Tuscaloosa, and Walker.

*Time and place of holding courts.*—Circuit and district courts for northern division: First Monday in April and second Monday in October, at Huntsville.

Circuit and district courts for southern division: First Mondays in March and September, at Birmingham.

*District Judge*, John Bruce.

*Clerk Circuit and District Courts*, Charles J. Allison, Birmingham.

**MIDDLE DISTRICT.**

*Counties in the district.*—Autauga, Barbour, Bullock, Butler, Chilton, Chambers, Clay, Coffee, Coosa, Covington, Crenshaw, Dale, Dallas, Elmore, Geneva, Henry, Lee, Lowndes, Macon, Montgomery, Perry, Pike, Randolph, Russell, and Tallapoosa.

*Time and place of holding courts.*—Circuit court: First Mondays in May and November, at Montgomery.

District court: First Mondays in May and November, at Montgomery. A session of this court is also held on the first Monday of each month, under rules adopted.

*District Judge*, John Bruce.

*Clerk Circuit and District Courts*, Joseph W. Dimmick, Montgomery.

**SOUTHERN DISTRICT.**

*Counties in the district.*—Baldwin, Choctaw, Clarke, Conecuh, Escambia, Marengo, Mobile, Monroe, Washington, and Wilcox.

*Time and place of holding courts.*—Circuit and district courts: Fourth Monday in November and first Monday in May, at Mobile.

*District Judge*, Harry T. Toulmin.

*Clerk Circuit and District Courts.*—Richard Jones, Mobile.

**ALASKA (9th Circuit).****DIVISION No. 1.**

*Time and place of holding courts.*—At least four terms of court in the district each year—two at Juneau and two at Skagway—and the judge shall, as near January 1 as practicable, designate the time of holding the terms during the current year.

Recording districts: Wrangel, No. 1; Juneau, No. 2; Skagway, No. 3; Sitka, No. 4; Kodiak, No. 5; Valdes, No. 6.

*District Judge*, Melville C. Brown.

*Clerk District Court*, Joseph J. Rogers, Juneau.

#### DIVISION No. 2.

*Time and place of holding court*.—At least one term of court each year at St. Michaels, in the district, beginning the third Monday in June.

*District Judge*, Arthur H. Noyes.

*Clerk District Court*, Geo. V. Borchsenius, St. Michaels.

#### DIVISION No. 3.

*Time and place of holding court*.—At least one term of court each year at Eagle City, in the district, beginning on the first Monday in July. Special terms at times and places as the Judge or Attorney-General may direct. Recording districts: Eagle City, Circle City, and Rampart City.

*District Judge*, James Wickersham.

*Clerk District Court*, Albert Heilig, Eagle City.

#### ARIZONA (9th Circuit).

*Counties in the different judicial districts*.—First judicial district: Cochise, Pima, and Santa Cruz.

Second judicial district: Gila, Graham, and Pinal.

Third judicial district: Maricopa and Yuma.

Fourth judicial district: Apache, Coconino, Mohave, Navajo, and Yavapai.

*Time and place of holding courts*.—Supreme court Second Monday in January each year, at Phoenix.

First judicial district: First Mondays in April and October, at Tucson.

Second judicial district: First Mondays in May and November, at Florence.

Third judicial district: Second Mondays in April and October, at Phoenix.

Fourth judicial district: First Mondays in June and November, at Prescott.

*Chief Justice*, Webster Street, third district.

*Associate Justices*, George R. Davis, first district; Fletcher M. Doan, second district; Richard E. Sloan, fourth district.

*Clerk Supreme Court*, Thomas Grindell, Phoenix.

*Clerks District Courts*, Clinton D. Hoover, first district, Tucson; Daniel C. Stevens, second district, Florence; W. C. Foster, third district, Phoenix; J. M. Watts, fourth district, Prescott.

#### ARKANSAS (8th Circuit).

##### EASTERN DISTRICT.

*Counties in the district*.—Eastern division (returnable to Helena): Mississippi, Crittenden, Lee, Phillips, Clay, Craighead, Pointsett, Greene, Cross, St. Francis, and Monroe.

Northern division (returnable to Batesville) : Independence, Cleburne, Stone, Izard, Baxter, Searcy, Marion, Sharp, Fulton, Randolph, Lawrence, and Jackson.

Western division (returnable to Little Rock) : Arkansas, Ashley, Bradley, Chicot, Clark, Cleveland, Conway, Dallas, Desha, Drew, Faulkner, Garland, Grant, Hot Spring, Jefferson, Lincoln, Lonoke, Montgomery, Perry, Pope, Prairie, Pulaski, Saline, Van Buren, White, and Woodruff.

*Time and place of holding courts.*—Circuit and district courts : Fourth Monday in May and second Monday in December, at Batesville. Second Mondays in March and October, at Helena.

District court : First Mondays in April and October, at Little Rock.

Circuit court : Second Monday in April and fourth Monday in October, at Little Rock.

*District Judge*, Jacob Trieber.

*Clerks Circuit Court*, W. P. Field, Little Rock ; Joseph W. Parse, Batesville ; Emerson R. Crum, Helena.

*Clerks District Court*, O. M. Spelman, Little Rock ; Joseph W. Parse, Batesville ; Emerson R. Crum, Helena.

#### WESTERN DISTRICT.

*Counties in the district.*—Fort Smith division : Polk, Scott, Yell, Logan, Sebastian, Franklin, Crawford, Washington, Benton, Madison, Carroll, Newton, Johnson, and Boone.

Texarkana division : Sevier, Howard, Little River, Pike, Hempstead, Miller, Lafayette, Columbia, Nevada, Ouachita, Union, and Calhoun.

*Time and place of holding courts.*—Fort Smith division, Fort Smith : Second Mondays in January and June. Texarkana division, Texarkana : Second Mondays in November and May.

*District Judge*, John H. Rogers.

*Clerks Circuit Court*, Thomas Boles, Fort Smith ; John M. Somervell, Texarkana.

*Clerks District Court*, H. B. Armistead, Fort Smith ; John M. Somervell, Texarkana.

#### CALIFORNIA (9th Circuit).

##### NORTHERN DISTRICT.

*Counties in the district.*—Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra, Costa, Del Norte, Eldorado, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Toulumne, Yolo, and Yuba.

*Time and place of holding courts.*—Circuit court, San Francisco : First Monday in March, second Monday in July, and first Monday in November. District court, San Francisco : First Monday in March, second Monday in July, and first Monday in November.

*District Judge*, John J. De Haven.

*Clerk Circuit Court*, Southard Hoffman, San Francisco.

*Clerk District Court*, George E. Morse, San Francisco.

#### SOUTHERN DISTRICT.

*Counties in the district*.—Northern division: Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, and Tulare.

Southern division: Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura.

*Time and place of holding courts*.—Circuit and district courts: Northern division: First Monday in May and second Monday in November, at Fresno.

Southern division: Second Mondays in January and July, at Los Angeles.

*District Judge*, Olin Wellborn.

*Clerk Circuit Court*, William M. Van Dyke, Los Angeles.

*Clerk District Court*, Edward H. Owen, Los Angeles.

#### COLORADO (8th Circuit).

*Time and place of holding courts*.—Circuit and district courts: At Denver, first Tuesdays in May and November; at Pueblo, first Tuesday in April; at Del Norte, first Tuesday in August.

District comprises the entire State.

*District Judge*, Moses Hallett.

*Clerk Circuit Court*, Robert Bailey, Denver.

*Clerk District Court*, Charles W. Bishop, Denver.

#### CONNECTICUT (2nd Circuit).

*Time and place of holding courts*.—Circuit court: Fourth Tuesday in April, at New Haven; second Tuesday in October, at Hartford.

District court: At New Haven, fourth Tuesdays in February and August; at Hartford, fourth Tuesday in May, first Tuesday in December.

District comprises the entire State.

*Circuit Judges*, William J. Wallace, Emile Henry Lacombe, Nathaniel Shipman.

*District Judge*, William K. Townsend.

*Clerk Circuit and District Courts*, Elwin E. Marvin, Hartford.

#### DELAWARE (3rd Circuit).

*Time and place of holding courts*.—Circuit court: Third Tuesdays in June and October, at Wilmington.

District court: Second Tuesdays in January, April, June, and September, at Wilmington.

District comprises the entire State.

*District Judge*, Edward G. Bradford.

*Clerk Circuit and District Courts*, S. Rodman Smith, Wilmington.

**DISTRICT OF COLUMBIA.**

*Time and place of holding courts.*—Court of Appeals: First Monday in January, April, and October.

Supreme court, general term: First Mondays in January, April, and October.

Circuit and criminal courts: First Tuesdays in January, April, and October.

Equity courts: First Tuesday in every month.

District court: First Mondays in January and July.

District comprises all the District of Columbia.

**COURT OF APPEALS.**

*Chief Justice*, Richard H. Alvey.

*Associate Justices*, Martin F. Morris, Seth Shepard.

*Clerk Court of Appeals*, Robert Willett, Washington.

**SUPREME COURT.**

*Chief Justice*, Edward F. Bingham.

*Associate Justices*, Alexander B. Hagner, Andrew C. Bradley, Charles C. Cole, Harry M. Clabaugh, Job Barnard.

*Clerk Supreme Court*, John R. Young, Washington.

**FLORIDA (5th Circuit).****NORTHERN DISTRICT.**

*Counties in the district.*—Calhoun, Escambia, Franklin, Gadsden, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Santa Rosa, Taylor, Wakulla, Walton, and Washington.

*Time and place of holding courts.*—Circuit and district courts: First Monday in February at Tallahassee; first Monday in March, at Pensacola.

*District Judge*, Charles Swayne.

*Clerk Circuit and District Courts*, Frederick W. Marsh, Pensacola.

**SOUTHERN DISTRICT.**

*Counties in the district.*—Alachua, Baker, Bradford, Brevard, Citrus, Clay, Columbia, Dado, De Soto, Duval, Hamilton, Hernando, Hillsboro, Lake, Lee, Madison, Manatee, Marion, Monroe, Nassau, Orange, Osceola, Pasco, Polk, Putnam, St. Johns, Sumter, Suwanee, and Volusia.

*Time and place of holding courts.*—Circuit and district courts: Second Monday in February, at Tampa; first Mondays in May and November, at Key West; first Monday in December, at Jacksonville; third Monday in January, at Ocala.

District court open at all times in admiralty.

*District Judge*, James W. Locke.

*Clerk Circuit and District Courts*, Eugene O. Locke, Jacksonville.

## GEORGIA (5th Circuit).

## NORTHERN DISTRICT.

*Counties in the district.*—Eastern division: Coweta, Spalding, Henry, Newton, Morgan, Greene, Oglethorpe, Elbert, Oconee, Walton, Rockdale, Fayette, Campbell, Clayton, DeKalb, Fulton, Gwinnett, Milton, Forsyth, Cobb, Cherokee, Pickens, Gilmer, Fannin, Union, Lumpkin, Dawson, Jackson, Clarke, Madison, Hart, Franklin, Hall, Banks, Habersham, White, Towns, Rabun, Douglas.

Western division: Heard, Troup, Meriwether, Harris, Talbot, Taylor, Muscogee, Marion, Schley, Webster, Stewart, Terrel, Randolph, Quitman, Clay, Early, Miller.

Northwestern division: Carroll, Haralson, Paulding, Polk, Bartow, Floyd, Chattooga, Gordon, Walker, Dade, Catoosa, Whitfield, Murray.

*Time and place of holding courts.*—Eastern division, circuit and district courts: At Atlanta, first Mondays in October and second Mondays in March.

Western division, circuit and district courts: At Columbus, first Mondays in May and December.

Northwestern division circuit and district courts: At Rome, third Mondays in May and November.

*District Judge*, William T. Newman.

*Clerk Circuit Court*, Olin C. Fuller, Atlanta.

*Clerk District Court*, Walter Colquitt Carter, Atlanta.

## SOUTHERN DISTRICT.

*Counties in the district.*—Eastern division, Savannah: Appling, Bullock, Berrien, Bryan, Brooks, Clinch, Camden, Coffee, Charlton, Colquitt, Chatham, Decatur, Echol Emanuel, Effingham, Glynn, Irwin, Lowndes, Liberty, Montgomery, McIntosh, Pierce, Screven, Tatnall, Thomas, Ware, Wayne, and Worth.

Western division, Macon: Baker, Baldwin, Bibb, Butts, Calhoun, Crawford, Dodge, Dooly, Dougherty, Hancock, Houston, Jasper, Jones, Laurens, Lee, Macon, Mitchell, Monroe, Pike, Pulaski, Putnam, Sumter, Telfair, Twiggs, Upson, Webster, Wilcox, and Wilkinson.

Northeastern division, Augusta: Burke, Columbia, Glascock, Jefferson, Johnson, Lincoln, McDuffie, Richmond, Taliaferro, Washington, Wilkes, and Warren.

*Time and place of holding courts.*—Circuit court: First Mondays in May and October, at Macon; second Monday in April and Thursday after first Monday in November, at Savannah; first Monday in April and third Monday in November, at Augusta.

District court: First Mondays in May and October, at Macon; second Tuesdays in February, May, August, and November, at Savannah; first Monday in April and third Monday in November, at Augusta.

*District Judge*, Emory Speer.

*Clerks Circuit Court*, H. H. King, Savannah; Cecil Morgan (deputy), Macon.

*Clerks District Court*, H. H. King, Savannah; Lenoir M. Erwin (deputy), Macon; S. F. B. Gillespie (deputy), Savannah; George K. Calvin (deputy), Augusta.

### HAWAII.

#### SUPREME COURT.

*Chief Justice*, W. F. Frear.

*Associate Justices*, Clinton A. Galbraith, Antonio Perry.

*Clerk of the Supreme Court*, Henry Smith, Honolulu.

### IDAHO (9th Circuit).

*Counties in the district*.—Northern division: Idaho, Kootenai, Latah, Nez Perces, and Shoshone.

Central division: Ada, Boise, Blaine, Canyon, Cassia, Lincoln, Elmore, Owyhee, and Washington.

Southern division: Bannock, Bear Lake, Bingham, Custer, Fremont, Lemhi, and Oneida.

*Time and place of holding courts*.—Circuit and district courts: Northern division—At Moscow, second Monday in May and fourth Monday in October.

Central division: At Boise, second Mondays in March and September.

Southern division: At Pocatello, second Monday in April and first Monday in October.

*District Judge*, James H. Beatty.

*Clerk Circuit and District Courts*, Alonzo L. Richardson, Boise.

### ILLINOIS (7th Circuit).

#### NORTHERN DISTRICT.

*Counties in the district*.—Northern division: Boone, Bureau, Carroll, Cook, Dekalb, Dupage, Grundy, Jo Davies, Kane, Kendall, Kankakee, Lasalle, Lee, Lake, McHenry, Ogle, Stephenson, Will, Whiteside, and Winnebago.

Southern division: Fulton, Henderson, Henry, Iroquois, Knox, Livingston, Marshall, McDonough, Mercer, Peoria, Putnam, Rock Island, Stark, Tazewell, Warren, and Woodford.

*Time and place of holding courts*.—Statutory terms: Chicago, first Monday in July, third Monday in December; Peoria, third Monday in April, third Monday in October. "Adjourned terms" (created by rule of court): Chicago, first Monday in March, first Monday in May, first Monday in October.

*District Judge*, Christian C. Kohlsaet.

*Clerk Circuit Court*, S. W. Burnham, Chicago.

*Clerk District Court*, Thomas C. MacMillan, Chicago.

#### SOUTHERN DISTRICT.

*Counties in the district*.—Adams, Alexander, Bond, Brown, Calhoun, Cass, Campaign, Christian, Clark, Clay, Clinton, Coles, Crawford, Cumberland,



Dewitt, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Gallatin, Greene, Hamilton, Hancock, Hardin, Jackson, Jasper, Jefferson, Jersey, Johnson, Lawrence, Logan, Moultrie, Macon, Macoupin, Madison, Marion, Mason, Massac, McLean, Menard, Monroe, Montgomery, Morgan, Perry, Piatt, Pike, Pope, Pulaski, Randolph, Richland, St. Clair, Saline, Sangamon, Schuyler, Scott, Shelby, Union, Vermilion, Wabash, Washington, Wayne, White, and Williamson.

*Time and place of holding courts.*—Circuit and district courts: First Mondays in January and June, at Springfield; first Monday in May, at Danville, and first Monday in September, at Quincy.

District court First Mondays in March and October, at Cairo.

*District Judge*, William J. Allen.

*Clerk Circuit Court*, James T. Jones, Springfield.

*Clerk District Court*, Mervin B. Converse, Springfield.

### INDIANA (7th Circuit).

*Time and place of holding courts.*—Circuit and District courts: First Tuesdays in May and November, at Indianapolis; first Mondays in January and July, at New Albany; first Mondays in April and October, at Evansville; second Tuesdays in June and December, at Fort Wayne; third Tuesdays in April and October, at Hammond.

District comprises the entire State.

*Circuit Judges*, William A. Woods, James G. Jenkins, Peter S. Grosscup.

*District Judge*, John H. Baker.

*Clerk Circuit and District Courts*, Noble C. Butler, Indianapolis.

### INDIAN TERRITORY (8th Circuit).

#### NORTHERN DISTRICT.

*Counties in the district.*—The northern district is composed of the Cherokee, Creek, and Seminole nations and the Quapaw Agency, being all of the Indian Territory north of the South Canadian and the Arkansas rivers.

*Time and place of holding courts.*—At Muscogee: First Monday in September, fourth Monday in January. At Miami: First Monday after the first Tuesday in October; third Monday in January. At Talequah: First Monday after the second Tuesday in October, fourth Monday in April. At Wewoka: First Monday in November, first Monday after the first Tuesday in April. At Wagoner: Second Monday in November, first Monday in March. At Vinita: First Monday in December, second Monday in May.

Judge Gill and the judges for the central and southern districts compose the court of appeals, which meets the first Mondays in January and June.

*Judges*, Joseph A. Gill, John R. Thomas<sup>1</sup>.

*Clerk District Court*, Charles A. Davidson, Muscogee.

*Deputy Clerks District Court*, Robert C. Hunter, Wagoner; Herbert C. Smith, Tahlequah.

*Clerk of the Court of Appeals*, W. P. Freeman, South McAlester.

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<sup>1</sup> Appointment comprises whole Territory.

## CENTRAL DISTRICT.

*Time and place of holding courts.*—South McAlester: First Mondays in December and May. Atoka: First Mondays in September and February. Poteau: First Mondays in October and March. Antlers: First Mondays in November and April.

Judge Clayton and the judges of the northern and southern districts compose the court of appeals, which meets the first Mondays in January and June.

District comprises the Choctaw Nation.

*Judges* H. H. Clayton, John R. Thomas<sup>1</sup>.

*Clerk District Court*, E. J. Fannin, South McAlester.

*Deputy Clerks District Court*, D. J. Folsom, Atoka; T. B. Latham, Antlers; T. T. Varnar, Cameron; J. M. Dodge, South McAlester.

*Clerk Court of Appeals*, W. P. Freeman, South McAlester.

## SOUTHERN DISTRICT.

*Time and place of holding courts.*—At Chickasha: Beginning on Monday, October 15, 1900, and on Monday, February 18, and on Monday, October 14, 1901. At Ryan: Beginning on Monday, October 29, 1900, and on Monday, March 4, and Monday, October 28, 1901. At Purcell: Beginning on Monday, November 12, 1900, and on Monday, March 18, and Monday, November 11, 1901. At Pauls Valley: Beginning on Monday, November 26, 1900, and on Monday, April 15, and Monday, November 25, 1901. At Ardmore: Beginning on Monday, December 17, 1900, and on Monday, May 6, and on Monday December 16, 1901.

Judge Townsend and the judges for the northern and central districts compose the court of appeals, which meets the first Mondays in January and June.

District comprises all of the Chickasaw Nation.

*Judges*, Hosea Townsend, John R. Thomas<sup>1</sup>.

*Clerk District Court*, C. M. Campbell, Ardmore.

*Deputy Clerks District Court*, N. H. McCoy, Ardmore; J. F. Fleming, Pauls Valley; T. G. Green, Purcell; J. W. Speake, Chickasha; S. H. Wootton, Ryan,

*Clerk of the Court of Appeals*, W. P. Freeman, South McAlester.

## IOWA (8th Circuit).

## NORTHERN DISTRICT.

*Counties in the district.*—Eastern division: Allamakee, Dubuque, Buchanan, Clayton, Jackson, Delaware, Fayette, Winneshiek, Howard, Chickasaw, Bremer, Black Hawk, Floyd, and Mitchell

Cedar Rapids division: Jones, Cedar, Linn, Johnson, Iowa, Benton, Tama, Grundy, Hardin, and Clinton.

Central division: Emmet, Palo Alto, Pochahontas, Calhoun, Kosuth, Humboldt, Webster, Winnebago, Hancock, Wright, Hamilton, Worth, Cerro Gordo, Franklin, and Butler.

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<sup>1</sup> Appointment comprises entire Territory.

Western division: Dickinson, Clay, Buena Vista, Sac, Osceola, O'Brien, Cherokee, Ida, Lyon, Sioux, Plymouth, Woodbury, and Monona.

*Time and place of holding courts.*—Circuit and district courts, Cedar Rapids division, Cedar Rapids: First Tuesday in April and second Tuesday in September.

Eastern division, Dubuque: Fourth Tuesday in April and first Tuesday in December.

Western division, Sioux City: Fourth Tuesday in May and first Tuesday in October.

Central division, Fort Dodge: Second Tuesdays in June and November.

*District Judge*, Oliver P. Shiras.

*Clerk Circuit and District Courts*, Alonzo J. Van Duzee, Dubuque.

### SOUTHERN DISTRICT.

*Counties in the district.*—Western division: Carroll, Crawford, Harrison, Shelby, Audubon, Cass, Pottawattamie, Mills, Montgomery.

Eastern division: Scott, Muscatine, Louisa, Washington, Keokuk, Wapello, Jefferson, Henry, Des Moines, Lee, Van Buren, Davis.

Central division: Marshall, Story, Boone, Greene, Guthrie, Dallas, Polk, Jasper, Poweshiek, Mahaska, Marion, Warren, Madison.

Southern division: Lucas, Clarke, Union, Adair, Adams, Fremont, Paige, Taylor, Ringgold, Decatur, Wayne, Appanoose.

*Time and place of holding courts.*—Circuit and district courts, western division: At Council Bluffs, second Tuesday in March and third Tuesday in September.

Eastern division: At Keokuk, second Tuesday in April and third Tuesday in October.

Central division: At Des Moines, second Tuesday in May and third Tuesday in November.

Southern division: At Creston, third Monday in May and fourth Monday in September.

*District Judge*, Smith McPherson.

*Clerk Circuit Court*, Edward R. Mason, Des Moines.

*Clerk District Court*, John J. Steadman, Council Bluffs.

### KANSAS (8th Circuit).

*Counties in the district.*—First division: Entire State except counties in second and third divisions.

Second division: Barber, Barton, Butler, Clark, Comanche, Cowles, Edwards, Ellsworth, Finney, Ford, Garfield, Grant, Gray, Greeley, Hamilton, Harper, Harvey, Hodgeman, Haskell, Kingman, Kiowa, Kearney, Lane, McPherson, Morton, Meade, Ness, Pratt, Pawnee, Reno, Rice, Rush, Scott, Sedgwick, Stafford, Stevens, Seward, Sumner, Stanton, and Wichita.

Third division: Allen Anderson, Bourbon, Cherokee, Coffey, Chautauqua, Crawford, Elk, Greenwood, Labette, Linn, Miami, Montgomery, Neosho, Wilson, and Woodson.

*Time and place of holding courts.*—First division, circuit court: First Monday in June, at Leavenworth; fourth Monday in November, at Topeka.

District court: Second Monday in April, at Topeka; second Monday in October, at Leavenworth; second Monday in May, at Salina.

Second division, circuit and district courts: Second Mondays in March and September, at Wichita.

Third division, circuit and district courts: First Monday in May and second Monday in November, at Fort Scott.

*District Judge*, William C. Hook.

*Clerk Circuit Court*, George F. Sharitt, Topeka.

*Clerk District Court*, Frank L. Brown, Topeka.

### KENTUCKY (6th Circuit).

*Time and place of holding courts.*—Circuit and district courts: Frankfort, first Monday in January and second Monday in June; Louisville, third Monday in February and first Monday in October; Paducah, first Monday in April and third Monday in November; Covington, second Monday in May and first Monday in December; Owensboro, first Monday in June and fourth Monday in January.

District comprises the entire State.

*District Judge*, Walter Evans.

*Clerks Circuit and District Courts*, Thomas Speed, Louisville; Joseph C. Finnell, Covington; Walter G. Chapman, Frankfort; John R. Puryear, Paducah.

### LOUISIANA (5th Circuit).

#### EASTERN DISTRICT.

*Parishes in the district.*—New Orleans division: Assumption, Iberia, Jefferson, Lafourche, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Mary, St. Tammany, Tangipahoa, Terrebonne, and Washington.

Baton Rouge division: Ascension, East Baton Rouge, East Feliciana, Iberville, Livingston, Pointe Coupee, St. Helena, West Baton Rouge, and West Feliciana.

*Time and place of holding courts.*—Circuit court: At New Orleans, fourth Monday in April and first Monday in November. At Baton Rouge, second Mondays in April and November.

District court: At New Orleans, third Mondays in February, May, and November. At Baton Rouge, second Mondays in April and November.

*District Judge*, Charles Parlange.

*Clerk Circuit Court of Appeals*, J. M. McKee, New Orleans.

*Clerk Circuit Court*, E. R. Hunt, New Orleans.

*Deputy Clerk Circuit Court*, H. J. Carter, New Orleans.

*Clerk District Court*, Frank H. Mortimer, New Orleans.

*Deputy Clerk District Court*, R. H. Carter, New Orleans.

## WESTERN DISTRICT.

*Parishes in the district.*—Avoyelles, Acadia, Bienville, Bossier, Caddo, Calcasieu, Caldwell, Cameron, Catahoula, Claiborne, Concordia, De Soto, East Carroll, Franklin, Grant, Jackson, Lafayette, Lincoln, Madison, Morehouse, Natchitoches, Ouachita, Rapids, Red River, Richland, Sabine, St. Landry, St. Martin, Tensas, Union, Vermilion, Vernon, Webster, West Carroll, and Winn.

*Time and place of holding courts.*—Circuit and district courts: First Mondays in January and June, at Opelousas; fourth Mondays in January and June, at Alexandria; third Mondays in February and October, at Shreveport; first Mondays in April and October, at Monroe.

*District Judge.* Aleck Boarman.

*Clerk Circuit and District Courts,* John B. Beattie, Shreveport.

## MAINE (1st Circuit).

*Time and place of holding courts.*—Circuit court: 23d of April and September, or if 23rd falls on Sunday, the 24th, at Portland.

District court: First Tuesdays in February and December, at Portland; first Tuesday in June, at Bangor; first Tuesday in September, at Bath.

District comprises the entire State.

*District Judge,* Nathan Webb.

*Clerk Circuit and District Courts,* A. H. Davis, Portland.

## MARYLAND (4th Circuit).

*Time and place of holding courts.*—Circuit court: First Mondays in April and November, at Baltimore.

District court: First Tuesdays in March, June, September, and December, at Baltimore.

District comprises the entire State.

*District Judge,* Thomas J. Morris.

*Clerk Circuit and District Courts,* James W. Chew, Baltimore.

## MASSACHUSETTS (1st Circuit).

*Time and place of holding courts.*—Circuit court: May 15 and October 15, at Boston.

District court: Third Tuesday in March, fourth Tuesday in June, second Tuesday in September, and first Tuesday in December, at Boston.

District comprises the entire State.

*District Judge,* Francis C. Lowell.

*Clerk Circuit Court,* Alexander H. Trowbridge, Boston.

*Clerk District Court,* Frank H. Mason, Boston.

## MICHIGAN (6th Circuit).

## EASTERN DISTRICT.

*Counties in the district.*—Northern division: Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella,  
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Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Ile, Roscommon, Saginaw, Shiawassee, and Tuscola.

Southern division: Branch, Calhoun, Clinton, Hillsdale, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw, and Wayne.

*Time and place of holding courts.*—Circuit and district courts: Southern division, at Detroit, first Tuesdays in March, June, and November.

Northern division, at Bay City, first Tuesdays in May and October.

Terms of court at Port Huron in the discretion of the judge.

*District Judge*, Henry H. Swan.

*Clerk Circuit Court*, Walter S. Harsha, Detroit.

*Clerk District Court*, Darius J. Davison, Detroit.

#### WESTERN DISTRICT.

*Counties in the district.*—Northern division: Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft.

Southern division: Allegan, Antrim, Barry, Benzie, Berrien, Cass, Charlevoix, Eaton, Emmet, Grand, Traverse, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Me-waygo, Oceana, Osceola, Ottawa, St. Joseph, Van Buren, and Wexford.

*Time and place of holding courts.*—Circuit and district courts: Grand Rapids (southern division), first Tuesdays in March and October; Marquette (northern division), first Tuesdays in May and September.

*District Judge*, George P. Wanty.

*Clerk Circuit Court*, Charles L. Fitch, Grand Rapids.

*Clerk District Court*, John McQuewan, Grand Rapids.

#### MINNESOTA (8th Circuit).

*Counties in the district.*—First division: Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore, and Houston.

Second division: Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Leuseur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley, and Lac qui Parle.

Third division: Chicago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott.

Fourth division: Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne, and Isanti.

Fifth division: Cook, Lake, St. Louis, Itasca, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Millelacs, Morrison, and Benton.

Sixth division: Stearns, Pope, Stevens, Big Stone, Traverse, Grant, Douglas, Todd, Ottertail, Wilkins, Clay, Becker, Wadena, Norman, Polk, Marshall, Kittson, Beltrami, and Hubbard.

*Time and place of holding courts.*—Circuit and district courts, first division: First Tuesdays in June and December, at Winona.

Second division: Third Tuesday in April, first Tuesday in November, at Mankato.

Third division: Fourth Tuesday in June, second Tuesday in January, at St. Paul.

Fourth division: First Tuesdays in March and September, at Minneapolis.

Fifth division: Second Tuesdays in May and October, at Duluth.

Sixth division: Fourth Tuesdays in March and September, at Fergus Falls.

*District Judge*, William Lochren.

*Clerk Circuit Court*, Henry D. Lang, St. Paul.

*Clerk District Court*, Charles L. Spencer, St. Paul.

### MISSISSIPPI (5th Circuit).

#### NORTHERN DISTRICT.

*Counties in the district*.—Alcorn, Pontotoc, Chickasaw, Choctaw, Attala, Tishomingo, Lee, Monroe, Oktibbeha, Winston, Prentiss, Itawamba, Clay, Lowndes, De Soto, Yalobusha, Carroll, Union, Tippah, Coahoma, Lafayette, Calhoun, Montgomery, Marshall, Tunica, Quitman, Tallahatchie, Grenada, Webster, Benton, Tate, and Panola.

*Time and place of holding courts*.—Circuit and district courts: At Oxford, first Mondays in June and December; at Aberdeen, first Mondays in October and April.

*District Judge*, Henry C. Niles.

*Clerk Circuit Court*, G. R. Hill, Oxford.

*Clerk District Court*, J. S. Burton, Oxford.

#### SOUTHERN DISTRICT.

*Counties in the district*.—Jackson division: Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Lawrence, Lincoln, Leflore, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson and Yazoo,

Vicksburg division: Bolivar, Claiborne, Issaquena, Sharkey, Sunflower, Warren, and Washington.

Meridian division: Clarke, Jones, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Noxubee, and Wayne.

Mississippi City division: Greene, Hancock, Harrison, Jackson, Marion, Perry, and Pearl River.

*Time and place of holding courts*.—Circuit and district courts: At Jackson, first Mondays in May and November; at Vicksburg, first Mondays in July and January; at Biloxi, third Mondays in February and August; at Meridian, second Mondays in March and September.

*District Judge*, Henry C. Niles.

*Clerk Circuit and District Courts*, L. B. Moseley, Jackson.

### MISSOURI (8th Circuit).

#### EASTERN DISTRICT.

*Counties in the district*.—Eastern division. Audrain, Bollinger, Butler, Cape Girardeau, Carter, Crawford, Dent, Dunklin, Franklin, Gasconade, Iron, Jef-

ferson, Lincoln, Madison, Mississippi, Montgomery, New Madrid, Oregon, Pemiscot, Perry, Reynolds, Ripley, St. Charles, St. François, Ste. Genevieve, St. Louis, Scott, Shannon, Stoddard, Warren, Washington, Wayne, and St. Louis City.

Northern division: Macon, Marion, Monroe, Randolph, Lewis, Adair, Scotland, Schuyler, Pike, Ralls, Knox, Clark, and Shelby.

*Time and place of holding courts.*—Eastern division: Circuit court, at St. Louis, third Mondays in March and September. District court, at St. Louis, first Mondays in May and November.

Northern division: Circuit and district courts, at Hannibal, fourth Monday in May and first Monday in December.

*District Judge*, Elmer B. Adams.

*Clerks Circuit Court*, Thomas Lester Crawford, St. Louis; George C. Moore, Hannibal.

*Clerks District Court*, William Morgan, St. Louis; George C. Moore, Hannibal.

#### WESTERN DISTRICT.

*Counties in the district.*—Western division: Barton, Bates, Caldwell, Carroll, Cass, Chariton, Clay, Grundy, Henry, Jackson, Jasper, Johnson, Lafayette, Linn, Livingston, Mercer, Putnam, Ray, St. Clair, Saline, Sullivan, and Vernon.

St. Joseph division: Andrew, Atchison, Buchanan, Clinton, Daviess, Dekalb, Gentry, Holt, Harrison, Nodaway, Platte, and Worth.

Central division: Benton, Boone, Callaway, Cooper, Camden, Cole, Hickory, Howard, Maries, Miller, Moniteau, Morgan, Osage, Pettis, and Phelps.

Southern division: Barry, Christian, Cedar, Dade, Dallas, Douglas, Greene, Howell, Laclede, Lawrence, McDonald, Newton, Ozark, Polk, Pulaski, Stone, Taney, Texas, Webster, and Wright.

*Time and place of holding courts.*—Kansas City, fourth Monday in April, first Monday in November; St. Joseph, first Monday in March, third Monday in September; Springfield, first Mondays in April and October; Jefferson City, third Mondays in March and October.

*District Judge*, John F. Philips.

*Clerks Circuit Court*, Adelaide Utter (Miss), Kansas City; Charles A. Pollock, St. Joseph; Henry C. Geisberg, Jefferson City; Sarah A. Lathim (Miss), Springfield.

*Clerks District Court*, John M. Nuckols, Kansas City; Charles A. Pollock, St. Joseph; Henry C. Geisberg, Jefferson City; Sarah A. Lathim (Miss), Springfield.

#### MONTANA (9th Circuit).

*Counties in the district.*—Broadwater, Cascade, Choteau, Carbon, Custer, Dawson, Deerlodge, Flathead, Fergus, Granite, Gallatin, Jefferson, Lewis and Clarke, Meagher, Missoula, Park, Ravalli, Sweet Grass, Teton, Yellowstone, and Valley.

Southern division: Beaverhead, Madison, and Silverbow.



*Time and place of holding courts.*—First Mondays in April and November, at Helena; first Tuesdays in February and September, at Butte.

*District Judge*, Hiram Knowles.

*Clerk Circuit and District Courts*, George W. Sproule, Helena.

#### NEBRASKA (8th Circuit).

*Time and place of holding courts.*—Omaha, first Monday in May and second Monday in November; Lincoln, third Monday in January and first Monday in October; Hastings, third Monday in April; Norfolk, fourth Monday in April.

District comprises the entire State.

*District Judge*, William H. Munger.

*Clerk Circuit Court*, George H. Thummel, Omaha.

*Clerk District Court*, R. C. Hoyt, Omaha.

#### NEVADA (9th Circuit).

*Time and place of holding courts.*—Circuit court: At Carson City, third Monday in March and first Monday in November.

District court: At Carson City, first Mondays in February, May, and October.

District comprises the entire State.

*District Judge*, Thomas P. Hawley.

*Clerk Circuit and District Courts*, T. J. Edwards, Carson City.

#### NEW HAMPSHIRE (1st Circuit).

*Time and place of holding courts.*—Circuit court: Portsmouth, May 8; Littleton, last Tuesday of August; Concord, October 8.

District court: Portsmouth, third Tuesdays in March and September; Concord, third Tuesdays in June and December; Littleton, last Tuesday in August.

District comprises the entire State.

*District Judge*, Edgar Aldrich.

*Clerk Circuit and District Courts*, Fremont E. Shurtleff, Concord.

#### NEW JERSEY (3rd Circuit).

*Time and place of holding courts.*—Circuit court: Fourth Tuesdays in March and September, at Trenton.

District court: Third Tuesdays in January, April, June, and September, at Trenton.

District comprises the entire State.

*District Judge*, Andrew Kirkpatrick.

*Clerk Circuit Court*, S. D. Oliphant, Trenton.

*Deputy Clerk Circuit Court*, H. D. Oliphant, Trenton.

*Clerk District Court*, George T. Cranmer, Trenton.

*Deputy Clerk District Court*, Frank R. Brandt, Trenton.

**NEW MEXICO (8th Circuit).**

*Counties in the district.*—First district: Santa Fe, San Juan, Rio Arriba, and Taos.

Second district: Bernalillo and Valencia.

Third district: Grant, Donna Ana, and Sierra.

Fourth district: San Miguel, Colfax, Mora, Union, and Guadalupe.

Fifth district: Socorro, Lincoln, Chaves, and Eddy.

*Time and place of holding courts.*—First district: First Mondays in March and September, at Santa Fe.

Second district: Third Mondays in March and September, at Albuquerque.

Third district: First Mondays in April and October, at Las Cruces.

Fourth district: Second Mondays in May and November, at Las Vegas.

Fifth district: Last Monday in April and second Monday in May, at Socorro.

*Chief Justice*, William J. Mills, fourth district.

*Associate Justices*, John R. McFie, first district; Jonathan W. Crumpacker, second district; Frank W. Parker, third district; Charles A. Leland, fifth district.

*Clerks District Court*, Alfred M. Bergere, first district, Santa Fe; Harry P. Owen, second district, Albuquerque; James P. Mitchell, third district, Las Cruces; Secundino Romero, fourth district, Las Vegas; John E. Griffith, fifth district, Socorro.

**NEW YORK (2nd Circuit).****NORTHERN DISTRICT.**

*Counties in the district.*—Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren, and Washington, with the waters thereof.

*Time and place of holding courts.*—Circuit court: First Tuesday in April, at Syracuse; second Tuesday in February, at Albany; first Tuesday in December, at Utica. District court: Second Tuesday in February, at Albany; first Tuesday in December, at Utica; second Tuesday in June, at Binghamton; first Tuesday in October, at Auburn; first Tuesday in April, at Syracuse; and, in the discretion of the judge of the court, one term annually at such time and place within the counties of Saratoga, Onondaga, St. Lawrence, Clinton, Jefferson, Oswego, and Franklin as he may from time to time appoint.

*District Judge*, Alfred C. Coxe.

*Clerk Circuit and District Courts*, William S. Doolittle, Utica.

**SOUTHERN DISTRICT.**

*Counties in the district.*—Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester.

*Time and place of holding courts.*—Circuit court: Last Monday in February, first Monday in April, and third Monday in October; and (criminal only)

second Wednesdays in January, March, May, October, and December, and third Wednesday in June, at New York City.

District court: First Tuesday in each month, at New York City.

*District Judge*, Addison Brown.

*Clerk Circuit Court*, John A. Shields, New York.

*Clerk District Court*, Samuel H. Lyman, New York.

#### EASTERN DISTRICT.

*Counties in the district*.—Kings, Queens, Richmond, Suffolk, and Nassau, with the waters thereof.

*Time and place of holding courts*.—Circuit and district courts: First Wednesday in every month, at Brooklyn.

*District Judge*, Edward B. Thomas.

*Clerk Circuit Court*, Benjamin Lincoln Benedict, Brooklyn.

*Clerk District Court*, Richard P. Morle, Brooklyn.

#### WESTERN DISTRICT.

*Counties in the district*.—Alleghany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates, with the waters thereof.

*Time and place of holding courts*.—Circuit court: Second Tuesday in May, at Rochester; second Tuesday in September, at Canandaigua; second Tuesday in November, at Buffalo.

District court: Second Tuesday in January, at Elmira; second Tuesdays in March and November, at Buffalo; second Tuesday in July, at Jamestown; second Tuesday in October, at Lockport.

*District Judge*, John R. Hazel.

*Clerk Circuit Court*, Harris S. Williams, Buffalo.

*Clerk District Court*, George P. Keating, Buffalo.

#### NORTH CAROLINA (4th Circuit).

##### EASTERN DISTRICT.

*Counties in the district*.—Beaufort, Bertie, Bladen, Brunswick, Camden, Chatham, Cumberland, Currituck, Craven, Columbus, Chowan, Carteret, Dare, Duplin, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hartnett, Hertford, Hyde, Johnston, Jones, Lenoir, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Robeson, Richmond, Sampson, Tyrrell, Vance, Wake, Warren, Washington, Wayne, and Wilson.

*Time and place of holding courts*.—Circuit courts at Wilmington same dates as district court; circuit courts at Raleigh same dates as district court; circuit courts at Newbern same dates as district court; circuit courts at Elizabeth City same dates as district court.

District courts Raleigh, fourth Monday in May and first Monday in December; Elizabeth City, third Mondays in April and October; Newbern, fourth

Mondays in April and October; Wilmington, first Monday after the fourth Monday in April and October.

*District Judge*, Thomas R. Purnell.

*Clerks Circuit Court*, N. J. Riddick, Raleigh; William H. Shaw, deputy, Wilmington; George Greene, deputy, Newbern; J. P. Overman, deputy, Elizabeth City.

*Clerks District Court*, Hiram L. Grant, Raleigh; Geo. L. Tonnofski, deputy, Raleigh; William H. Shaw, deputy, Wilmington; George Greene, deputy, Newbern; J. P. Overman, deputy, Elizabeth City.

#### WESTERN DISTRICT.

*Counties in the district*.—Alamance, Alexander, Ashe, Alleghany, Anson, Buncombe, Burke, Caswell, Cabarrus, Catawba, Cleveland, Caldwell, Clay, Cherokee, Davidson, Davie, Forsyth, Guilford, Gaston, Graham, Henderson, Haywood, Iredell, Jackson, Lincoln, Montgomery, Mecklenburg, Mitchell, McDowell, Madison, Macon, Orange, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanley, Stokes, Surry, Swain, Transylvania, Union, Wilkes, Watauga, Yadkin, and Yancey.

*Time and place of holding courts*.—Greensboro, first Mondays in April and October; Statesville, third Mondays in April and October; Asheville, first Mondays in May and November; Charlotte, first Mondays in June and December.

*District Judge*, James Edmund Boyd, recess appointment.

*Clerks Circuit and District Courts*, Henry C. Cowles, Statesville; Cary B. Moore, Asheville; Samuel L. Trogdon, Greensboro.

#### NORTH DAKOTA (8th Circuit).

*Time and place of holding courts*.—Circuit and district courts: First Tuesday in July, at Devils Lake; first Tuesday in March, at Bismarck; third Tuesday in May, at Fargo; second Tuesday in November, at Grand Forks.

District comprises the entire State.

*District Judge*, Charles F. Amidon.

*Clerk Circuit and District Courts*, J. A. Montgomery, Fargo.

#### OHIO (6th Circuit).

#### NORTHERN DISTRICT.

*Counties in the district*.—Eastern district: Ashland, Ashtabula, Cuyahoga, Carroll, Columbiana, Crawford, Geauga, Holmes, Lake, Lorain, Medina, Mahoning, Portage, Richland, Summit, Stark, Tuscarawas, Trumbull, and Wayne.

Western division: Auglaize, Allen, Defiance, Erie, Fulton, Henry, Hancock, Hardin, Huron, Lucas, Mercer, Marion, Ottawa, Paulding, Putnam, Seneca, Sandusky, Van Wert, Williams, Wood, and Wyandot.

*Time and place of holding courts*.—Circuit and district courts: On the first Tuesdays in February, April, and October, at Cleveland, for the eastern division,

and the first Tuesdays in June and December, at Toledo, for the western division of the district.

*District Judge*, Augustus J. Ricks.

*Clerk Circuit Court*, Irvin Belford, Cleveland.

*Clerk District Court*, H. F. Carleton, Cleveland.

### SOUTHERN DISTRICT.

*Counties in the district*.—Western division: Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby, and Warren.

Eastern division: Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, and Washington.

*Time and place of holding courts*.—Circuit and district courts: Western division, first Tuesdays in February, April and October, at Cincinnati.

Eastern division, first Tuesdays in June and December, at Columbus.

*District Judge*, Albert C. Thompson.

*Clerk Circuit and District Courts*, Benjamin Rush Cowen, Cincinnati.

### OKLAHOMA (8th Circuit).

*Counties in the district*.—First district: Logan, Lincoln, Payne, and Woodward.

Second district: Canadian, Blaine, "D," Day, Roger Mills, Custer, and Washita.

Third district: Oklahoma, Pottawatomie, Cleveland, and Greer.

Fourth district: Beaver, "P," Noble, and Osage Nation.

Fifth district: Garfield, Kingfisher, Grant, and Woods.

*Time and place of holding courts* (between July 1, 1900, and January 1, 1901, subject to change upon order of supreme court of Oklahoma).—First judicial district: September 10, at Stillwater, in Payne County; October 1, at Chandler, in Lincoln County; October 23, at Woodward, in Woodward County; November 8, at Guthrie, in Logan County.

Second judicial district: September 19, at Cloud Chief, Washita County; October 3, at Arapahoe, in Custer County; October 15, at Norman, in Cleveland County; November 5, at Kingfisher, in Kingfisher County; November 26, at El Reno, in Canadian County.

Third judicial district: July 7, at Oklahoma City, in Oklahoma County; September 11, at Mangum, in Greer County; October 9, at Tecumseh, in Pottawatomie County.

Fourth judicial district: September 11, at Beaver, in Beaver County; September 24, at Newkirk, in Kay County; October 29, at Pawhuska, in Osage Nation; November 7, at Pawnee, in Pawnee County; December 3, at Perry, in Noble County.

Fifth judicial district: November 19, at Enid, in Garfield County; September 10, at Pond Creek, in Grant County; September 19, at Taloga, in Dewey

County; October 22, at Grand, in Day County; October 4, at Watonga, in Blaine County; November 1, at Alva, in Woods County.

*Chief Justice*, John H. Burford, first district.

*Associate Justices*, Clinton F. Irwin, second district, El Reno; B. F. Burwell, third district, Oklahoma City; Bayard T. Hainer, fourth district, Perry; John L. McAtee, fifth district, Kingfisher.

*Clerks Circuit and District Courts*, M. C. Hart, first district, Guthrie; E. M. Hegler, second district, El Reno; D. B. Shear, third district, Oklahoma City; Jay E. Pickard, fourth district, Perry; J. P. Renshaw, fifth district, Enid.

### OREGON (9th Circuit).

*Time and place of holding courts*.—United States circuit court: At Portland, second Monday in April and first Monday in October.

United States district court: At Portland, first Mondays in March, July, and November.

District comprises the entire State.

*District Judge*, Charles B. Bellinger.

*Clerks Circuit Court*, Joseph A. Sladen, Portland; G. H. Marsh, deputy, Portland.

*Clerks District Court*, Edward D. McKee, Portland; G. H. Marsh, deputy, Portland.

### PENNSYLVANIA (3rd Circuit).

#### EASTERN DISTRICT.

*Counties in the district*.—Adams, Berks, Bucks, Carbon, Chester, Cumberland, Dauphin, Delaware, Franklin, Lancaster, Lebanon, Lehigh, Monroe, Montgomery, Northampton, Perry, Philadelphia, Pike, Schuylkill, Wayne, and York.

*Time and place of holding courts*.—Circuit court: First Mondays in April and October, at Philadelphia.

District court: Third Mondays in February, May, August, and November, at Philadelphia.

*District Judge*, John B. McPherson.

*Clerk Circuit Court*, Samuel Bell, Philadelphia.

*Clerk District Court*, Charles S. Lincoln, Philadelphia.

#### WESTERN DISTRICT.

*Counties in the district*.—Alleghany, Armstrong, Beaver, Bedford, Blair, Bradford, Butler, Cambria, Cameron, Center, Clarion, Clearfield, Clinton, Columbia, Crawford, Elk, Erie, Fayette, Forest, Fulton, Greene, Huntingdon, Indiana, Jefferson, Juanita, Lackawanna, Lawrence, Luzerne, Lycoming, McKean, Mercer, Mifflin, Montour, Northumberland, Potter, Snyder, Somerset, Sullivan, Susquehanna, Tioga, Union, Venango, Warren, Washington, Westmoreland, and Wyoming.

*Time and place of holding courts.*—Pittsburg: District court, first Monday of May and third Monday of October. Circuit court, second Mondays of May and November.

Williamsport: District court, third Monday of June and first Monday of October. Circuit court, third Mondays of June and September.

Scranton: District court, first Mondays of March and September. Circuit court, first Mondays of March and September.

Erie: District court, third Monday of July and second Monday of January. Circuit court, third Monday of July and second Monday of January.

*District Judge*, Joseph Buffington.

*Clerks Circuit Court*, H. D. Gamble, Pittsburg; Max Mitchell, Williamsport.

*Clerks District Court*, William T. Lindsley, Pittsburg; F. C. Graham, deputy, Pittsburg; W. A. Sherwood, deputy, Pittsburg; Frank W. Grant, deputy, Erie; A. J. Colburn, deputy, Scranton.

## PORTO RICO.

### SUPREME COURT.

*Chief Justice*, José Severo Quinones.

*Associate Justices*, Louis Sulzbacher; José C. Hernandez; José M. Figueras; Rafael Nieto y Abeillé.

*Secretary of the Supreme Court*, Eugenio de Jesus Lopez Gaztambide, San Juan.

## RHODE ISLAND (1st Circuit).

*Time and place of holding courts.*—Circuit court: At Providence, June 15 and November 15.

District court: At Providence, first Tuesdays in February and August; at Newport, second Tuesday in May and third Tuesday in October.

District comprises the entire State.

*District Judge*, Arthur L. Brown.

*Clerks Circuit and District Courts*, William P. Cross, Providence.

## SOUTH CAROLINA (4th Circuit).

*Time and place of holding courts.*—Circuit court: First Tuesday in April, at Charleston; third Tuesdays in April and October, at Greenville, fourth Tuesday in November, at Columbia; first Tuesday in March, at Florence.

District court: First Tuesdays in June and December, at Charleston; third Tuesdays in April and October, at Greenville; fourth Tuesday in November, at Columbia; first Tuesday in March, at Florence.

District comprises the entire State.

*District Judge*, William H. Brawley.

*Clerk Circuit Court*, James E. Hagood, Charleston.

*Clerk District Court*, Charles J. C. Hutson, Charleston.

## SOUTH DAKOTA (8th Circuit).

*Counties in the district.*—Northern division (court at Aberdeen): Brookings, Hamlin, Deuel, Grant, Roberts, Codington, Clark, Day, Marshall, Spink,

Brown, McPherson, Edmunds, Campbell, Walworth, and Sisseton and Wahpeton Indian reservations.

Central division (court at Pierre): Potter, Sully, Faulk, Hand, Hyde, Hughes, Buffalo, Jerauld, Stanley, Nowlin, part of Pratt, Jackson, and Sterling, and Standing Rock and Cheyenne Indian reservations.

Southern division (court at Sioux Falls): Clay, Union, Yankton, Turner, Lincoln, Bonhomme, Charles Mix, Douglas, Hutchinson, Brule, Aurora, Davidson, Hanson, McCook, Minnehaha, Moody, Lake, Sanborn, Lyman, Miner, Gregory, Todd, Beadle, Kingsbury Crow Creek, and Lower Brule, and Yankton Indian reservations.

Western division (court at Deadwood): Butte, Custer, Fall River, Lawrence, Meade, Pennington, and all the remaining portion of the State of South Dakota lying west of the central and southern divisions, including the Rosebud and Pine Ridge Indian reservations.

*Time and place of holding courts.*—Circuit and district courts: At Deadwood, first Tuesdays in February and September, at Pierre, first Tuesdays in March and October, at Sioux Falls, first Tuesday in April and third Tuesday in October, at Aberdeen, first Tuesday in May and third Tuesday in November.

*District Judge*, John E. Carland.

*Clerk Circuit and District Courts*, Oliver S. Pendar, Sioux Falls.

## TENNESSEE (6th Circuit).

### EASTERN DISTRICT.

*Counties in the district.*—Eastern division: Anderson, Bradley, Bledsoe, Blount, Campbell, Claiborne, Cumberland, Fentress, Grainger, Hamilton, James, Jefferson, Knox, Loudon, Marion, McMinn, Meigs, Monroe, Morgan, Polk, Rhea, Roane, Sevier, Scott, Sequatchie, and Union. North-eastern division; Johnson, Carter, Unicoi, Sullivan, Washington, Greene, Hawkins, Hancock, Cocke, and Hamblen.

*Time and place of holding courts.*—Circuit and district courts: Second Mondays in March and September, at Knoxville; first Mondays in April and October, at Chattanooga; fourth Mondays in February and August, at Greeneville.

*District Judge*, Charles D. Clark.

*Clerks Circuit and District Courts*, Henry O. Ewing, Chattanooga; James T. Carter, deputy, Knoxville; Richard M. Watkins, deputy, Chattanooga.

### MIDDLE DISTRICT.

*Counties in the district.*—Bedford, Cannon, Cheatham, Clay, Coffee, Davidson, Dekalb, Davison, Franklin, Giles, Grundy, Hickman, Humphreys, Houston, Jackson, Lawrence, Lewis, Lincoln, Macon, Marshall, Maury, Montgomery, Moore, Overton, Pickett, Putnam, Robertson, Rutherford, Smith, Stewart, Sumner, Trousdale, Van Buren, Warren, Wayne, White, Williamson, and Wilson.



*Time and place of holding courts.*—Circuit and district courts at Nashville third Mondays in April and October.

*District Judge*, Charles D. Clark.

*Clerk Circuit and District Courts*, Henry M. Doak, Nashville.

#### WESTERN DISTRICT.

*Counties in the district.*—Eastern division: Henry, Benton, Perry, Decatur, Hardin, McNairy, Henderson, Madison, Carroll, Chester, Weakley, Lake, Gibson, Crockett, Obion, and Hardeman.

Western division: Dyer, Lauderdale, Tipton, Shelby, Fayette, and Haywood.

*Time and place of holding courts.*—Circuit and district courts: At Jackson, fourth Mondays in April and October; at Memphis, fourth Mondays in May and November.

*District Judge*, Eli S. Hammond.

*Clerk Circuit and District Courts.*—John B. Clough, Memphis.

#### TEXAS (5th Circuit).

##### NORTHERN DISTRICT.

*Counties in the district.*—Returnable to Dallas: Navarro, Johnson, Ellis, Kaufman, Dallas, Rockwell, Hunt, Collin, Denton, Cooke, and Montague.

Returnable to Fort Worth: Comanche, Hood, Erath, Tarrant, Parker, Palo Pinto, Wise, Clay, Jack, Young, Archer, Wichita, Wilbarger, Baylor, Hardeman, Cottle, Motley, Briscoe, Hall, Childress, Hollingsworth, Donley, Armstrong, Randall, Deaf Smith, Oldham, Potter, Carson, Gray, Wheeler, Hemphill, Lipscomb, Ochiltree, Roberts, Hutchinson, Hansford, Sherman, Moore, Hartley, Dallam, and Foard.

Returnable to Waco: Brazos, Robertson, Leon, Limestone, Freestone, McLennan, Falls, Bell, Coryell, Hamilton, Bosque, Somervell, and Hill.

Returnable to Abilene: Eastland, Stephens, Throckmorton, Shackelford, Callahan, Taylor, Jones, Haskell, Knox, Noland, Fisher, Stonewall, Kent, Dickens, King, Crosby, Garza, Lubbock, Gaines, Andrews, Mitchell, Scurry, Borden, Howard, Martin, and Midland.

Returnable to San Angelo: Glasscock, Sterling, Coke, Tom Green, Crockett, Schleicher, Sutton, Irion, Mills, Runnels, Coleman, Brown, Menard, and Concho.

*Time and place of holding courts.*—Circuit and district courts: At Dallas, third Monday in January and fourth Monday in May; at Waco, fourth Monday in April and second Monday in October; at Fort Worth, first Monday in March and fourth Monday in November; at Abilene, first Monday in April and fourth Monday in September; at San Angelo, third Monday in April and third Monday in November.

*District Judge*, Edward R. Meek.

*Clerk Circuit and District Courts*, J. H. Finks, Waco.

##### EASTERN DISTRICT.

*Counties in the district.*—Returnable to Tyler: Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, Nacogdoches, Panola, Rains, Rusk, Shelby, Smith, Trinity, Van Zandt, and Wood.

Returnable to Jefferson; Bowie, Camp, Cass, Franklin, Harrison, Hopkins, Marion, Morris, Titus, and Upshur.

Returnable to Galveston: Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Madison, Matagorda, Montgomery, Walker, Waller, Wharton, and Jackson.

Returnable to Paris: Delta, Fannin, Grayson, Lamar, and Red River.

Returnable to Beaumont: Hardin, Jasper, Jefferson, Liberty, Newton, Orange, Polk, San Jacinto, Sabine, San Augustine, and Tyler.

*Time and place of holding courts.*—Circuit and district courts: Tyler, first Mondays in January and September; Jefferson, fourth Mondays in January and September; Galveston, third Mondays in February and October; Paris, first Monday in April and third Monday in November; Beaumont, first Mondays in June and December.

*District Judge*, David E. Bryant.

*Clerk Circuit Court*, C. Dart, Galveston.

*Clerks District Court*, C. Dart, Galveston; D. W. Parish, Tyler; W. E. Singleton, Jefferson; C. Dart, Jr., Beaumont; John B. Dailey, Paris.

#### WESTERN DISTRICT.

*Counties in the district.*—Returnable to San Antonio: Aransas, Atacosa, Bandera, Bevar, Bee, Comal, Calhoun, Dewitt, Dimmit, Edwards, Frio, Guadalupe, Gonzales, Goliad, Kerr, Kendall, Kinney, Karnes, Lavaca, Live Oak, Medina, Maverick, Nueces, Refugio, San Patricio, Uvalde, Valverde, Victoria, Wilson and Zavalla.

Returnable to El Paso: Brewster, Buchel, Bailey, Castro, Cochran, Crane, Dawson, El Paso, Ector, Foley, Floyd, Hale, Hockley, Jeff Davis, Lamb, Lynn, Loving, Presidio, Pecos, Farmer, Reeves, Swisher, Terry, Upton, Winkler, Yoakum, and Ward.

Returnable to Brownsville: Cameron, Hidalgo, and Starr.

Returnable to Austin: Blanco, Bastrop, Burleson, Burnet, Caldwell, Fayette Gillespie, Hays, Kimble, Lee, Llano, Lampassas, Mason, McCullough, Milam, San Saba, Travis, Washington, and Williamson.

Returnable to Laredo: Duval, Encinal, Lasalla, McMullen, Webb, and Zapata.

*Time and place of holding courts.*—Circuit and district courts: At San Antonio, first Mondays in May and November; at Austin, first Mondays in February and July; at Brownsville, first Monday in January and second Monday in June; at El Paso, first Mondays in April and October; at Laredo third Monday in March and first Monday in December.

*District Judge*, Thomas S. Maxey.

*Clerks Circuit Court*, D. H. Hart, Austin; J. W. Hancock, deputy, Austin.

*Clerks District Court*, D. H. Hart, Austin; A. Grosenbacher, deputy, San Antonio; Chas. F. Tilghman, deputy, Brownsville; J. T. Hodgson, deputy, El Paso; Geo. B. Hufford, deputy, Laredo.

#### UTAH (8th Circuit).

*Time and place of holding courts.*—Circuit and district courts: First Mondays in December and May, at Salt Lake; first Mondays in March and September, at Ogden.

District comprises the entire State.

*District Judge*, John A. Marshall.

*Clerks Circuit and District Courts*, Jerrold R. Letcher, Salt Lake City; John W. Christy, deputy, Salt Lake City.

#### VERMONT (2nd Circuit).

*Time and place of holding courts*.—Fourth Tuesday of February, at Burlington; third Tuesday in May, at Windsor; first Tuesday in October, at Rutland.

District comprises the entire State.

*District Judge*, Hoyt H. Wheeler.

*Clerk Circuit and District Courts*, George E. Johnson, Burlington.

#### VIRGINIA (4th Circuit).

##### EASTERN DISTRICT.

*Counties in the district*.—Accomac, Albemarle, Alexandria, Amelia, Brunswick, Caroline, Charles City, Chesterfield, Culpeper, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greensville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenburg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spottsylvania, Stafford, Surry, Sussex, Warwick, Westmoreland, and York.

*Time and place of holding courts*.—Circuit court of appeals: fourth circuit: First Tuesdays in February, May, and November, at Richmond.

Circuit and district courts: First Mondays in April and October, at Richmond; first Mondays in May and November, at Norfolk; first Mondays in January and July, at Alexandria.

*District Judge*, Edmund Waddill, Jr.

*Clerk Circuit Court*, Matthew F. Pleasants, Richmond.

*Clerks District Court*, Henry Flegenheimer, Richmond; H. S. Ackiss, Norfolk; John S. Fowler, Alexandria; George E. Bowden, Norfolk.

##### WESTERN DISTRICT.

*Counties in the district*.—Alleghany, Albemarle, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Dickenson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Page, Patrick, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise, and Wythe.

*Time and place of holding courts*.—Circuit and district courts: At Lynchburg, Tuesdays after the second Mondays in March and September; at Danville, Tuesdays after the second Mondays in April and November; at Abing-

don, Tuesdays after the first Mondays in May and October; at Harrisonburg, Tuesdays after the first Mondays in June and December. District court: Second Monday in January, at Charlottesville.

*District Judge*, John Paul.

*Clerks Circuit and District Courts*, A. K. Fletcher, Harrisonburg; William McCauley, Lynchburg; Stanley W. Martin, Danville; Isaac C. Fowler, Abingdon.

#### WASHINGTON (9th Circuit).

*Counties in the district*.—Northern division, King, Kitsap, Island, Whatcom, Jefferson, Skagit, Clallam, San Juan, and Snohomish.

Southern division: Wallawalla, Columbia, Garfield, Asotin, Whitman, Franklin, Yakima, and Klickitat.

Eastern division: Spokane, Stevens, Douglas, Okanogan, Kittitas, Lincoln, Adams, Ferry, and Chelan.

Western division: Pierce, Thurston, Mason, Chehalis, Lewis, Pacific, Wahkiakum, Cowlitz, Clarke, and Skamania.

*Time and place of holding courts*.—Circuit and district courts: Northern division, at Seattle, first Tuesdays in June and December; southern division, at Walla Walla, first Tuesdays in May and November; eastern division, at Spokane, first Tuesdays in April and September; western division, at Tacoma, first Tuesdays in February and July.

*District Judge*, Cornelius H. Hanford.

*Clerk Circuit Court*, A. Reeves Ayres, Tacoma.

*Clerk District Court*, Robert M. Hopkins, Seattle.

#### WEST VIRGINIA (4th Circuit).

*Time and place of holding courts*.—Circuit court: Charleston, May 1 and November 10; Parkersburg, January 10 and June 10; Wheeling, April 1 and September 20; Clarksburg, April 15 and October 15; Martinsburg, October 15.

District court: Charleston, May 1 and November 10; Wheeling, April 1 and September 20; Clarksburg, April 15 and October 1; Martinsburg, October 15.

District comprises the entire State.

*District Judge*, John J. Jackson.

*Clerk Circuit Court*, Lyman B. Dellicker Parkersburg.

*Clerk District Court*, Jasper Y. Moore, Clarksburg.

#### WISCONSIN (7th Circuit).

##### EASTERN DISTRICT.

*Counties in the district*.—Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, (except townships 31, 32, 33, and 34 of ranges 9 and 10 east) Manitowoc, Marinette, Marquette, Milwaukee, Oconto, Oneida (towns 35, 36, 37, 38, and 39 of range 11 east), Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Vilas (towns 40, 41, and 42 of range 11 east), Walworth, Washington, Waukesha, Waupaca, Waushara, and Winnebago.

*Time and place of holding courts.*—Circuit and district courts: First Mondays in January and October, at Milwaukee; second Tuesday in June, at Oshkosh.

*District Judge*, William H. Seaman.

*Clerk Circuit and District Courts.*—Edward Kurtz, Milwaukee.

#### WESTERN DISTRICT.

*Counties in the district.*—Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Douglas, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, St. Croix, Sauk, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn, and Wood.

*Time and place of holding courts.*—Circuit and district courts: First Tuesday in December, at Madison; first Tuesday in June, at Eau Claire; third Tuesday in September, at La Crosse; third Tuesday in June, at Superior.

Special term: At Madison, third Tuesday in June and first Tuesday in October. The clerk residing at Madison shall attend all terms of said courts at Eau Claire, as clerk thereof.

*District Judge*, Romanzo Bunn.

*Clerks Circuit and District Courts*, Franklin W. Oakley, Madison; Alfred Harrison, La Crosse.

#### WYOMING (8th Circuit).

*Time and place of holding court.*—Circuit and district courts: At Cheyenne, second Mondays in May and November; at Evanston, first Monday in July, and at Sheridan or in National Park, at such dates as the courts may order.

The district comprises the entire State; also Yellowstone National Park.

*District Judge*, John A. Riner.

*Clerk Circuit and District Courts*, Louis Kirk, Cheyenne.



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